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Narrowed Constellations in a Supranational Climate Change Regime Complex: The “Magic Number” Is Four

Myanna Dellinger*

*University of Oregon School of Law

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ARTICLE

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*Myanna Dellinger**

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INTRODUCTION

Just as the world community had almost given up hope for a timely solution to climate change, new events have created reason for cautious optimism that an effective solution may, after all, be found at the supranational scale. In 2012, the 195 parties to the United Nations Framework Convention on Climate Change (“UNFCCC”) agreed that a legal instrument with binding force is to be adopted by 2015 and implemented by 2020.¹ In President Barack Obama’s 2013 Climate Action Plan,

* Professor Dellinger graduated from the University of Oregon School of Law at the top of her class, Order of the Coif. While in law school, she interned for the United Nations Framework Convention for Climate Change. After law school, she clerked for the late Hon. Francis J. D’Eramo of the Superior Court of the United States Virgin Islands and for the Hon. Procter Hug, Jr., of the United States Court of Appeals for the Ninth Circuit. She is currently an Associate Professor of Law with Western State College of Law where she teaches Contracts and Sales and writes on international law with a particular focus on climate change. Professor Dellinger thanks Western State College of Law for the summer 2013 research funds for this project and the American Society of International Law for the chance to present it at its 2013 Midyear Meeting. She is also grateful to Western State College of Law librarian Scott Frey for his research assistance on this project. The main research for this project concluded in the late summer of 2013.

1. See United Nations Framework Convention on Climate Change, Durban, S. Afr., Nov. 28–Dec. 11, 2011, *Rep. of the Conference of the Parties*, U.N. Doc. FCCC/CP/2011/9/Add.1; see also Durban: *Towards Full Implementation of the UN Climate*

the President finally promised that the United States will take international action and lead global climate change efforts.² In the spring and summer of 2013, the United States and China—arguably the two most important parties to a potential supranational climate change solution—reignited their mutual climate discussions and reached an important bilateral agreement to jointly phase down hydroflouorocarbons (“HFCs”), one of the most impactful gases in climate change. This and other related rhetoric is indicative of the two nations’ potential willingness to accede to an internationally binding climate change agreement, which in turn may cause a watershed in negotiations and spur further action.

This would be in the nick of time. Science demonstrating the onset of climate change is increasingly grim: global temperatures reached their highest levels in the history of modern records during the 2001–2010 time period and continue to rise.³ The decade included a more than 2000% increase in the loss of human life from heat waves,⁴ not to mention the threatened loss of animal species. New facts about the diverse problems of climate change continue to surface. In August 2013, for example, the journal *Science* reported that shifts in climate are strongly linked to human violence around the world, such as spikes in domestic violence in India and Australia, increased assaults and murders in the United States, ethnic violence in Europe, land invasions in Brazil, police violence in Holland, and civil conflicts throughout the tropics.⁵ The Fifth Assessment Report by the Intergovernmental Panel on Climate

Change Convention, U.N. FRAMEWORK CONV. ON CLIMATE CHANGE, http://unfccc.int/key_steps/durban_outcomes/iatems/6825.php (last visited Oct. 27, 2013).

2. EXEC. OFFICE OF THE PRESIDENT, THE PRESIDENT’S CLIMATE ACTION PLAN 17–21 (2013) [hereinafter CLIMATE ACTION PLAN], *available at* <http://www.whitehouse.gov/sites/default/files/image/president27climateactionplan.pdf>.

3. WORLD METEOROLOGICAL ORG., THE GLOBAL CLIMATE 2001–2010: A DECADE OF CLIMATE EXTREMES 3 (2013), *available at* http://library.wmo.int/pmb_ged/wmo_1119_en.pdf.

4. Andrea Vittorio, *Last Decade Sees ‘Unprecedented’ Extremes, Highest Temperatures on Record*, U.N. SAYS, INT’L ENV’T REP. (BNA) No. 15, at 1008 (July 3, 2013). For example, the 2003 heat wave in Europe caused more than 66,000 deaths and the 2010 one in Russia more than 55,000. WORLD METEOROLOGICAL ORG., *supra* note 3, at 7–8.

5. Kathleen Maclay, *Warmer Climate Strongly Affects Human Conflict and Violence Worldwide*, SAYS STUDY, BERKELEY NEWS CTR. (Aug. 1, 2013), <http://newscenter.berkeley.edu/2013/08/01/climate-strongly-affects-human-conflict-and-violence-worldwide-says-study/>.

Change (“IPCC”) recently concluded that it is “extremely likely” (i.e., at 95%–100% certainty) that human activity is the principal cause of climate change. Thus, there can no longer be reasonable discussions about whether or not this problem is man-made and, accordingly, about whether or not human action is necessary to solve the problem.⁶

According to the International Energy Agency, carbon dioxide (“CO₂”) levels must be held to 450 parts per million (“ppm”) in this century in order for us to have a chance to keep global warming to the internationally agreed-upon goal of a temperature increase of no more than 2°C.⁷ But in 2013, CO₂ levels exceeded 400 ppm for the first time in human history,⁸ demonstrating the uphill and urgent battle to be fought on this front. By putting climate change efforts on hold because of the recent global financial crisis and a lack of political will to agree on effective climate change goals, nations have managed to put the world on track towards a 5.3°C temperature increase with recognized and “potentially disastrous implications in terms of extreme weather events, rising sea levels, and huge [related] economic and social costs.”⁹ In fact, global temperatures have already risen 0.85°C since 1880.¹⁰

Because the best predictor of future behavior is often past behavior, it is doubtful that a large number of nations with widely divergent interests in the climate context, such as all or

6. Intergovernmental Panel on Climate Change, Working Group I Contribution to the IPCC Fifth Assessment Report, *Climate Change 2013: The Physical Science Basis*, Approved Summary for Policymakers SPM-12 (2013) [hereinafter IPCC, *Climate Change*], available at http://www.climatechange2013.org/images/uploads/WGIAR5-SPM_Approved27Sep2013.pdf. “Extremely likely” denotes a 95-100% level of certainty. *Id.* at SPM-2 n.2.

7. See Rick Mitchell, *IEA Urges Policy Action on Global Warming, Worries U.S. Shift to Natural Gas May Slow*, INT’L ENV’T REP. (BNA) No. 13, at 844 (June 10, 2013); see also *UN Climate Change Official Applauds US Climate Change Strategy*, UN NEWS CTR. (June 25, 2013), <http://www.un.org/apps/news/story.asp?NewsID=45270#.Um0tb5SicV0>. The IPCC operates with different figures that nonetheless show the clear gap to be closed: Global emissions cannot exceed 850 gigatons of carbon emissions, but the world has already emitted 530 gigatons, thus leaving only 350 gigatons to support the economic development that developing economies need. See Martha Kessler, *Top UN Official Says Agreement Must Be Able to Accommodate Changes*, ENERGY & CLIMATE REP. (BNA) No. 189, at 5 (Sept. 30, 2013).

8. See Mitchell, *supra* note 7.

9. See *id.*

10. See IPCC, *Climate Change*, *supra* note 6, at SPM-3.

most of the 195 members of the UNFCCC, will be able to reach the required consensus on a new treaty within the next year, as they have, over the past two decades since the adoption of the UNFCCC, not been able to agree on significant substantive progress in the area. The good news is that they do not all have to. Without a doubt, most nations have neither played any significant role in the production of the problem nor do they have much real relevance to its solution.¹¹ This Article thus argues that effective climate change action can be instigated by a much lower number of emitters than scholarly and policy-based discussions have promoted thus far, and that this is the only realistic solution in the timeframe at hand. The “magic number”¹² or “critical mass” needed to give new impetus to climate action may be as little as just three nations, and is certainly less than “all the major emitters,” as most legal scholars have so persistently promoted, at least until recently. Precious time is ticking away. It is now necessary for international lawmakers and scholars to embrace less ideological, but more legally realistic, solutions to this issue, even though such solutions may not represent cosmopolitan ideals of democratic inclusiveness.¹³ The world urgently needs a solution that, in and of itself, can help alleviate at least some of the substantive problem, but that can also secondarily act as a catalyst for further treaty membership or replication. Some may argue that we do not have time to wait for such a stepped approach. The response to that is that we have no time to continue promoting and hoping for solutions that have *already* proved ineffective. If we wait for everyone to do something, nothing will happen.

But, which are the most crucial nations to a new climate change leadership constellation? Should a new, narrowed

11. Eduardo Viola, *Brazilian Climate Policy since 2005: Continuity, Change and Perspective*, CEPS Working Document, February 2013, at 2.

12. Moisés Naim, *Minilateralism; The Magic Number to Get Real International Action*, FOREIGN POLICY, July/August 2009, at 136. The “magic number” is defined as “the smallest possible number of countries needed to have the largest possible impact on solving a particular problem.” *Id.* at 135.

13. “Cosmopolitan democracy posits not only the furthering of government by democratic popular election at a domestic level, but also the extension of democratic process to governance between states at a regional and global level.” Jeffrey Scott McGee, *Exclusive Minilateralism: An Emerging Discourse within International Climate Change Governance*, 8 PORTAL JOURNAL OF MULTIDISCIPLINARY INT’L STUDIES (2011), <http://epress.lib.uts.edu.au/journals/index.php/portal/article/view/1873>.

regime complex only include the historical and present major emitters? If so, is it realistic to hope that all of these major emitters will join? Would it be wiser to attempt other compositions such as the inclusion of nations that stand to bear the worst consequences of climate change and nations that seek the most far-reaching solutions, or would this present even worse gridlock? Is it even possible to assess the scientific, political, and symbolic dimensions of the “relevance” of nations in this context?

This Article provides answers to the above questions. In doing so, it breaks with scholarly notions that have, by now, proved false. The Article challenges the viewpoint that all major emitters are needed to form part of a new climate treaty from the beginning. Even just a small handful of nations agreeing on action could cause a shift in the currently stalled talks. The Article also points out that whereas less-democratic negotiation methods may not be ideal, they serve important pragmatic functions in urgent contexts. In short, the Article promotes and applies a legal realism methodology.

The Article first analyzes factors that have proved crucial to treaty success in recent and more historical contexts. Much current scholarship examines the same, relatively new, but of course highly relevant, treaties. It provides additional insight from a few of the world’s most successful treaties. These treaties happen to be of slightly older origins and have thus unfortunately become largely forgotten in today’s apparent rush to reinvent the treaty wheel. The findings of this Article can inform today’s treaty decision-making processes, in which parties and scholars often fail to think “outside the box” and learn from what has actually worked in the past instead of continually promoting solutions that currently do not. Resting on this foundation, the Article proposes a range of narrower constellations for a new regime-complex at the supranational scale that are more likely to be adopted than what has previously been envisioned by scholars and policy-makers. The Article also demonstrates that, in spite of some recent disappointment with the UNFCCC, this is still the most likely and best climate action governance architecture. Finally, the Article identifies nexuses to other international agreements and describes how these may work well as complements to, but not yet substitutes for, a

solution under the auspices of the UNFCCC. As the focus of the Article is on treaty development, treaty stipulations, compliance, and review, procedures are not addressed.

Much excellent climate change scholarship has been produced in recent years. However, and respectfully, some of it no longer matches reality in international legal proceedings. The Article takes a legal realism approach and posits that enough theory has been written about who "should" join a new climate change treaty and why; the time has come to look at what can realistically be expected within the near future in this arena. As has so correctly been said, a small club of key emitters "could transform the credibility of climate actions and provide an effective alternative to over-ambitious global negotiations prone to [only] yield legal zombies."¹⁴ The time has come to look at climate treaties in new ways. This Article does so.

I. FACTORS DEFINING SUCCESS IN TREATY-MAKING; THE "HOW"

This Section will analyze common denominators for success in the treaty negotiation context. In contrast to many other bodies of work, the focus here is not exclusively on multilateral environmental agreements ("MEAs"), although some highly illustrative ones are included. Rather, its focus is on select treaties aimed at improved international cooperation within economic and territorial issues, as well as science and technology-related treaties. The climate change discourse has so far focused extensively on environmental agreements, but much can be gained from broadening our views and learn lessons from, in particular, the financial context. This is so because, in contrast to popular belief, environmental agreements are not about the "morality" or "correctness" of being good stewards of our natural planetary environment; rather, they are, at bottom, mainly about money. If the considerations below—proven to work—are taken into account when negotiating a new climate treaty, success can once again be reached at the supranational level, even in relation to this almost hopelessly difficult problem. There is no need to reinvent the wheel in treaty drafting processes.

14. David Victor, *Plan B for Copenhagen*, 461 NATURE 342, 344 (2009).

As a threshold matter, “success” in the international environmental treaty context can be defined as the written instrument being a “focal point[] for building consensus and driving . . . change in policy, at the institutional, state and domestic levels.”¹⁵ Some of the most significant shared characteristics are as follows.

A. *Contextual Factors*

Treaties are not made in a vacuum. Rather, they aim to solve significant on-the-ground problems and address general global developments. The “exogenous shock theory” holds that external events increase the probability of treaty adoption success when a window of opportunity exists that can be used productively even if all other factors do not converge.¹⁶

The World Trade Organization (“WTO”) was established in 1995 to regulate international trade in an unstoppably globalizing world. Thus, world trends helped pave the way towards the treaty negotiation and eventual adoption. In the case of the Antarctic Treaty System, analyzed in further detail below, general fears of war spilled over into the treaty negotiations, but with a positive result that led to a host of nations ultimately adopting a treaty to, primarily, avoid territorial conflicts and war. In the case of the North Atlantic Fur Seal Treaty, also examined below, the extinction of an entire species of animals and the resulting collapse of significant industrial sectors in several nations were at issue, but did not always feature highly on the agenda of the involved nations.¹⁷

In the final stages of treaty adoptions, a favorable domestic political climate is, of course, important, but the theory that success in regime formation can only occur when the specific issue enjoys a very high-priority status on the domestic agenda of

15. EMILY O'BRIEN & RICHARD GOWAN, N.Y. UNIV. CTR. ON INT'L COOPERATION, WHAT MAKES ENVIRONMENTAL AGREEMENTS WORK: DEFINING FACTORS FOR SUCCESS 6 (2012), *available at* http://cic.es.its.nyu.edu/sites/default/files/gowan_obrien_factors_success.pdf.

16. See Natalia Mirovitskaya et al., *North Pacific Fur Seals: Regime Formation as a Means of Resolving Conflict*, in POLAR POLITICS 22, 43 (Oran R. Young & Gail Osherenko eds., 1993).

17. See *id.* at 44–45, 55.

each of the participants is simply false.¹⁸ In fact, the opposite of the oft-repeated hypothesis seems to apply. For example, "it was only after the issue [of seal extinction] had lost its priority on the domestic policy agendas of the parties and ceased to be considered an issue of high politics that it became possible to settle it rationally and coolly."¹⁹ Of course, although a treaty-related problem does not need to rank highest on a national agenda for eventual success, a favorable domestic political climate, including the will to act swiftly, is for good reason frequently considered crucial to the adoption of treaties.²⁰

In climate negotiations, recent weather events, along with the amount of sound science persistently presented by such reputable organizations as the IPCC and the Union of Concerned Scientists, present an opportune window of time and contextual background for adopting a new international agreement. However, attempts to give climate change an extremely high priority on the national agenda of a very large number of nations or even for the nations that are considered key in this context is a waste of precious time. It is simply a myth that climate change must feature higher on the political agenda for a treaty to be adopted. The good news is thus that even if climate change and closely related environmental issues do not rank as high as other issues among lawmakers (as is unfortunately the case in the United States and some other highly developed nations),²¹ it is sufficient if the leaders of a crucial amount of key nations can agree on a treaty.²²

18. See *id.* at 44–45, 55.

19. See *id.* at 45.

20. See Camilla Bausch & Michael Mehling, *Alternative Venues of Climate Cooperation: An Institutional Perspective*, in CLIMATE CHANGE AND THE LAW 111, 132 (Erkki J. Hollo et al. eds., 2013).

21. See TIMOTHY DEVINNEY ET AL., ANATOMY OF CIVIL SOCIETIES RESEARCH PROJECT, WHAT MATTERS TO AMERICANS: SOCIAL, POLITICAL AND ECONOMIC VALUES 38, 39, 46 (2012) (showing that "environmental sustainability" including climate change does not rank among the highest twenty-five out of 113 of the most importance to Americans, although it is not ranked among the bottom twenty-five either—the top three priorities for Americans are clean water and sanitation, the cost of daily living, and economic growth. The bottom three priorities are the right of commercial domain, protection against over-hunting/fishing, and intellectual property rights).

22. In the case of the United States, the executive negotiates and signs treaties whereas the Senate approves or rejects the resolution of ratification. See Treaties, U.S. SENATE, <http://www.senate.gov/artandhistory/history/common/briefing/Treaties.htm> (last visited Mar. 11, 2014).

B. *Incentivizing Participation*

Most important to the adoption and success of a treaty, both positive incentives for participation and negative disincentives for non-participation must be present. Much current discourse speaks to what nations “should” do and what our “moral obligations” are. Although it cannot be ignored that some nations may respond to moral arguments, it is clear that at least in the American reality, calculations regarding climate mitigation strategies are primarily a matter of cost-benefit analysis. This includes the attitude taken by the United States in connection with the failure to ratify the Kyoto Protocol “because the benefits of doing so were perceived to be outweighed by the potential costs to the US economy.”²³ Previous efforts have amply shown that rhetoric describing the risks involved in climate change does not suffice; economic incentives are indispensable.²⁴ This is particularly true in relation to the United States and China, two perceived key players for whom unilateral emissions reductions are insufficient drivers due to the negative outcome of cost-benefit analyses.²⁵ Simply put, major polluters have so far had too little to gain and too much to lose from Greenhouse Gas (“GHG”) emissions reductions.²⁶ Thus, simply discussing “risks” and moral obligations is not enough; monetary benefits must form part of the rhetoric.

1. The Money

The Montreal and Kyoto Protocols demonstrate the economic considerations involved when some nations, particularly the United States, decide whether or not to join a treaty regime.

In the case of the Montreal Protocol, US officials were aware that the nation’s own citizens were at grave risk from depletion of the ozone layer and that even purely unilateral

23. Jody Freeman & Andrew Guzman, *Climate Change and U.S. Interests*, 109 COLUM. L. REV. 1531, 1537–38 (2009).

24. Cass Sunstein, *The World vs. The United States and China? The Complex Climate Change Incentives of the Leading Greenhouse Gas Emitters*, 55 UCLA L. REV. 1675, 1676 (2008).

25. *Id.* at 1677.

26. *Id.* at 1680.

action was still very much in the nation's interest.²⁷ The costs of unilateral action to the United States without the Protocol were calculated to be US\$21 billion, the same as *with* the Protocol.²⁸ However, the benefits to the nation of an international agreement were almost triple: US\$3575 billion with a concord compared to US\$1373 billion without one.²⁹ These figures were derived by, among other things, calculating the costs of the projected five million skin cancer deaths and twenty-five million cataract cases without global treaty action, compared to 200,000 and two million, respectively, with global action.³⁰ Presented with these facts, President Ronald Reagan—not otherwise an environmentally inclined president—pushed hard for the adoption of the Protocol.³¹ Because of these persuasive economic considerations and, of course, other motivators as well, other nations became willing to adopt the treaty.

In the case of the Kyoto Protocol, the United States would, in contrast, have to spend more than US\$300 billion to gain monetized benefits of only 4% of that amount.³² A 2.5°C increase has been calculated to lead to damages as a percentage of the gross domestic product ("GDP") of key nations as follows: India, 4.93% (with an expected loss of 3,600,000 years of human life); Africa 3.93% (with the loss of 26,677,000 years of life in Sub-Saharan Africa); Europe, 2.83%; United States, 0.45%; and China, 0.22% (with a loss of 603,000 years of human life).³³ Russia, however, stands to *benefit* by a 0.65% GDP increase by some calculations.³⁴ As will be shown below, Russia's official attitude towards climate change is hesitant because of the perceived benefits to it of climate change and its self-proclaimed "better" ability to deal with climate change than other nations. Accordingly, Russia is seen as the "most difficult country"³⁵ in climate negotiations. Russia must, then, have reasons for both

27. *Id.* at 1679.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 1680.

33. *Id.* at 1683–84.

34. *See id.*; *see also* Viola, *supra* note 11, at 2.

35. *See* Viola, *supra* note 11.

joining and observing the treaty beyond a concern for the climate itself.

The United States stands to lose 0.45% to 1.2% of GDP with a 3°C temperature increase.³⁶ For the United States, however, “only” 13,080 additional deaths are to be expected from climate change, which could be seen as not “so bad” given the fact that car accidents result in over 40,000 deaths per year.³⁷ Further economic factors may be more persuasive: the average annual agricultural productivity is expected to decrease by 39% due to climate change just as water costs have been projected to increase by 31.3%.³⁸ The above figures reflect what has become the accepted norm of a temperature increase of “only” 2.5–3°C. Catastrophic warming would be more expensive and the prevention of that could thus function as a better driver: The loss to the US GDP because of more extreme warming would be 22.1%, the same as for Africa and China, whereas Russia would suffer a loss of 33.2% of GDP and Europe and India 44.2% each.³⁹

Thus, if one believes that the projected temperature increase can indeed be limited to 2.5–3°C, major GHG contributors face the cost problem that by some calculations, they have “little” to gain from emissions reductions and much to lose.⁴⁰ This goes for the United States as well—recall that the benefits to the United States from tackling ozone depletion was roughly sixty-five times the costs, whereas with climate change, benefits to be gained are only three times the costs.⁴¹ Narrowly perceived, key nations have so far not seen themselves as potential victims of climate change. Hopefully, this perception can be changed via economic and other motivators; otherwise

36. See Sunstein, *supra* note 24, at 1683–84.

37. *Id.* at 1693.

38. *Id.*

39. *Id.* at 1692.

40. *Id.* at 1680. In contrast, a recent UN report warns of “vast” economic damage and “severe” economic disruptions caused by climate change. Justin Gillis, *U.N. Says Lag in Confronting Climate Woes Will Be Costly*, N.Y. TIMES, Jan. 16, 2014, http://www.nytimes.com/2014/01/17/science/earth/un-says-lag-in-confronting-climate-woes-will-be-costly.html?_r=0

41. See Frances Cairncross, *What Makes Environmental Treaties Work?*, CONVERSATION (July 29, 2008), <http://conservationmagazine.org/2008/07/what-makes-environmental-treaties-work/>.

we may well find ourselves in the dire straits predicted by much research so far.

It is clear that economic factors are important incentives for both the developed and the developing world, but they are also important deterrents. It is beyond the scope of this Article to identify the most effective “sticks” in this context, but frequently mentioned factors include trade restrictions and sanctions, carbon markets, and carbon taxes. As an example, the Montreal Protocol used both economic rewards for poorer countries that complied with the agreement as well as trade restrictions and other “punishments” such as trade restrictions for countries that did not.⁴² Such threats contributed to changes in state behavior, which demonstrates the crucial importance of economic considerations to MEAs. It may, frankly, be necessary to give treaty participants that otherwise would lose out on economic side payments (“bribes”)⁴³ to offset some of their costs of participation.⁴⁴ If this helped secure an agreement, everyone would ultimately be a winner as there can no longer be any doubt that continuing the current status quo would ultimately be a loss to all.

The North Pacific Fur Seal Convention of 1911 (“Seal Treaty”) and the United States-Japan telecommunications agreement similarly came to life based on commercial interests. Hailed as “one of the most successful treaties ever negotiated,”⁴⁵ the Seal Treaty was the first international treaty to address the issue of wildlife conservation and still represents “a major victory for the conservation of natural resources, a signal triumph of diplomacy . . . , and a landmark in the history of international cooperation.”⁴⁶ The Seal Treaty protected North Pacific Fur Seals from pelagic hunting, which had almost driven the species to extinction, and inspired subsequent national legislation such as the Marine Mammal Protection Act of 1972 in the United States.⁴⁷ Fur seals were a major source of income for the four key

42. *See id.*; *see also* McGee, *supra* note 13, at 14.

43. *See* Cairncross, *supra* note 41.

44. *See id.*

45. *See id.*

46. *North Pacific Fur Seal Treaty of 1911*, NOAA CELEBRATES 200 YEARS SCL, SERVICE, & STEWARDSHIP, <http://celebrating200years.noaa.gov/events/fursealtreaty/welcome.html#treaty> (last visited March 13, 2014).

47. *See id.*

treaty actors at the time: the United States, Russia, Great Britain (on behalf of Canada), and Japan. The prosperous branches of the economy in these nations were, at least in large part, based on the same resource, the seal, and their wealth had been diminished by the nations' collective, but unregulated efforts.⁴⁸ Economic, not environmental, concerns were the primary motivators behind the Seal Treaty negotiations.⁴⁹ Once experts agreed that the overall health of the seal population was at risk, consensus on developing a treaty was reached in spite of the existence of some minor scientific uncertainties.⁵⁰ This brings hope to the current climate context, where a few scientific uncertainties are still cited in some circles. As the Seal Treaty shows, this can be overcome. In fact, climate arguments are currently even more scientifically sound than the seal discussions of a century ago were, as it can no longer reasonably be argued that whatever few uncertainties still exist justify non-action in the climate arena. But whereas modern economies rely to a large extent on fossil fuels just as nations at the time depended on sealing, our wealth has not yet been diminished by our fossil fuel dependency, which contrasts with the Seal Treaty background and may make it harder for nations to reach consensus on a climate treaty. There is still very much money to gain by using fossil fuels unless such use becomes regulated in much more far-reaching ways than is currently the case.⁵¹ Carbon prices may have to be raised via taxes; undoubtedly a sound step from a scientific point of view although not politically popular in the United States. That finances played a large role in the development of the Seal Treaty is further demonstrated by the fact that the Japanese and British/Canadian delegations outright demanded and obtained proper compensation before consenting to the treaty.⁵² In other words, the bargaining at the time was financially integrative and interest-based. Parties to a new climate deal can learn from this and take legal formative action on the realization that without

48. See Mirovitskaya, *supra* note 16, at 54.

49. See *id.* at 40, 53–54.

50. See *id.* at 39, 44, 52–53.

51. See generally Bill McKibben, *Global Warming's Terrifying New Math*, ROLLING STONE, Aug. 2, 2012, at 52, 53–60.

52. See Mirovitskaya, *supra* note 16, at 32, 39.

economic support to poorer nations and an overall working out of economic interests among participants, a treaty may not come about. Nothing new in that; a hundred years of international diplomacy has shown the “pragmatic soundness” of that approach.

However, when comparing the climate experiment to the Seal Treaty, a consideration to be taken into account is that seals were an international common property. Entry to the sealing scheme by non-sealing nations was deterred in order to limit the use of this common resource.⁵³ In contrast, a stable climate is, in similarity with ozone protection under the Montreal Protocol, a public good requiring the effective management of national resources for the good of all nations. Entry to the carbon market by some nations cannot be deterred, unless a major paradigm shift occurs under which climate rights also come to be seen as property rights. This could stem from a clearer understanding that fossil fuels are, at bottom, also a property resource that, although individually owned by sovereign nations and their corporations, is also, at a greater scale, a resource shared by the relatively few number of nations who possess the resource. *These* are arguably the nations that must come together in creating a new treaty.

The Seal Treaty also shows the potential interplay between equity and efficiency concerns: in the short term, it would have been more efficient for the relevant nations to continue hunting, but eventually, doing so would have turned inefficient because of the likely extinction of the entire resource. Equity prevailed. Under the “salient solution theory,” parties can, as with the Seal Treaty, be made to realize that they have to cooperatively accept legal restrictions or, ultimately, stand to lose significantly at an individual as well as a collective basis. Similar efficiency concerns will have to be utilized in climate change: efforts to persuade hesitant parties must continue to rely on the ultimate inefficiency at a national level in continuing efforts that will lead to economic inefficiencies. The problem, of course, is to convince such parties that their individual action

53. SCOTT BARRETT, ENVIRONMENT AND STATECRAFT: THE STRATEGY OF ENVIRONMENTAL TREATY-MAKING 39 (2003).

will help and to find ways to effectively address the leakage problem.⁵⁴

The so-called United States/Japan telecommunications agreement (“telecom agreement”) similarly took off on a nationally motivated economic platform.⁵⁵ At bottom, the United States demanded increased market access to the Japanese market to rectify a large trade deficit between the two nations in the telecommunications sector.⁵⁶ This move found support in a global ideological shift away from national monopolies and toward international competition, although deep domestic policy change was not initially forthcoming.⁵⁷ After years of extended negotiations that were often highly coercive towards Japan, both parties eventually came to an agreement when Japan’s trade ministry and political elite saw the United States’ demands as being in the interest of Japan too.⁵⁸ Telecommunications networks, providers of vital infrastructure for other economic activity, were seen as stimuli for economic growth. For the first time, policy issues were framed strictly using economic criteria in the international rhetoric.⁵⁹ Today, carbon is similarly seen as a backbone for current economic growth. Economic rhetoric must thus be embraced in the discussions pertaining to a new treaty to an even larger extent than before.

54. In the climate context, “leakage” denotes the risk that if some nations curb excessive Greenhouse Gas (“GHG”) emissions from their territories, GHG-producing entities may simply move to other nations with fewer restrictions, thus simply moving the problem geographically without solving it substantively.

55. Not a treaty per se, the name refers to an agreement reached after numerous bilateral negotiations between the United States and Japan subsequent to the Tokyo Round under General Agreement on Tariffs and Trade (“GATT”) auspices in the 1970s and the WTO “Basic Telecommunications Talks” in the 1980s and 1990s. The agreement produced a Reference Paper; a framework of pro-competitive regulatory policies that are not legally binding, but that become so with additional commitments by the parties. *See, e.g.*, TORU NAKAKITA ET AL., JAPAN INST. OF INT’L AFFAIRS, JAPAN-US TELECOMMUNICATIONS NEGOTIATIONS IN A NEW PHASE: STATES AND MARKETS 3–4 (2012). Now, competition, and not monopoly, is considered the norm in most nations and has been internationally accepted to benefit consumers and companies alike.

56. *See* Paula Murphy Ives, *Negotiating Global Change: Progressive Multilateralism in Trade in Telecommunication Talks*, 8 INT’L NEGOTIATION 43, 49, 51 (2003).

57. *Id.* at 59.

58. *See id.* at 52, 54, 67.

59. *See id.* at 55.

In short, economic motivators are key to treaty formation. The Montreal Protocol, Seal Treaty, and telecom agreement demonstrate this point, yet also show that even though finances are one of, or even, the primary motivators behind an agreement, much substantive success can be created. This holds for the environmental agenda as well. As scholars, we ought to stop what has turned into a somewhat naïve rhetoric that keeps discussing what nations “should” do for “moral” reasons. Let us become more realistic: money simply appears to matter more than the environment per se in climate discussions, both nationally and internationally. Softer arguments such as moral obligations, animal extinction, the future displacement of millions of people (which all of course also have economic implications), and even military arguments, are not currently the most persuasive “talking points” in the climate discourse. Key policy makers have demonstrated this. For example, President Obama’s June 2013 Climate Action Plan describes the motivating factors for the nation adopting such a plan.⁶⁰ This Plan makes no less than sixteen references to the economy, jobs, technology, oil independence, and health (for the purpose of this Article considered an economic motivator), but only four references to “moral obligation” itself or factors such as “future generations,” “national treasure[s],” and “snow-capped peaks.”⁶¹ Similarly, whereas a speech by Secretary of State John Kerry to the Asia-Pacific Economic Cooperation CEO Summit in Bali in October 2013 called action on climate change an “international moral responsibility,” it also described it as “a practical business responsibility.” The speech further emphasized that failure to act on climate change would create uncertainty in the business community, but that finding solutions to the problem will create a US\$6 trillion industry over the following decades, dwarfing the technology industry revolution of the 1990s.⁶²

60. See generally CLIMATE ACTION PLAN, *supra* note 2.

61. See *id.* at 4.

62. Anthony Adragna, *Kerry Says Countries Have Responsibility to Work Together on Climate Change Issues*, INT’L ENV’T REP. (BNA) No. 22, at 1497 (Oct. 7, 2013). Incidentally, private economy cost concerns are also the most important factor affecting public opinion of climate agreements, although “people are also swayed by treaty features that make cooperation more effective, distribute costs more fairly, involve a higher number of participating countries, penalize countries that fail to met

It is evident that work on a new climate treaty must take the business and economic interests of key parties into account and make sure that these are addressed satisfactorily to these parties. The political awareness of the economy behind climate change cannot be ignored. Incidentally, economic aspects are also crucial to garner the politically required public support for a new climate agreement: a new scientific study reveals that costs are the most important factor affecting public opinion of climate agreements and that people are more willing to support such agreements if they involve lower household costs. For example, an increase in average household costs to support climate mitigation from 0.5% to 1% of the GDP decreases public support by ten percentage points.⁶³

2. “Rights-based” Rhetoric

In the climate treaty negotiation context, the United States is often lamenting the fact that China, India, and other emerging economies are sticking to their “rights to develop” and are thus not willing to undertake total emissions reductions targets. But, such rights-based arguments are also not new in international treaty law and thus need not stand in the way now either. The Antarctic Treaty System of 1961 (“ATS”) shows as much. “One of the successes of twentieth century international law,”⁶⁴ the ATS was negotiated by twelve original signatories, seven of which claimed rights to Antarctica as territorial sovereigns.⁶⁵ Although all parties eventually came to share the ultimate goals of promoting science and using the region for peaceful purposes, national territorial interests were the true impetus for the treaty—not science, as myth otherwise has it.⁶⁶ Granted, science was used as a tool of diplomacy, but it was

emission reduction targets and include monitoring by an independent third party.” Rob Jordan, *A New Approach to Making Climate Treaties Work, from Research at Stanford and in Switzerland*, STANFORD NEWS (August 20, 2013), <http://news.stanford.edu/news/2013/august/climate-treaty-politics-082013.html>

63. Jordan, *supra* note 62.

64. Gillian Triggs, *The Antarctic Treaty System: A Model of Legal Creativity and Cooperation*, in SCIENCE DIPLOMACY: ANTARCTICA, SCIENCE, AND THE GOVERNANCE OF INTERNATIONAL SPACES 39 (Paul Arthur Berkman et al. eds., 2009).

65. *Id.* at 40.

66. See generally Rip Bulkeley, *The Political Origins of the Antarctic Treaty*, 46 POLAR REC., no. 1, Jan. 2010, at 9.

mainly for the added advantage of preventing unnecessary and undesirable political rivalries in the region, as well as the recurrence of international misunderstandings.⁶⁷ Similar to climate change, a practical legal solution was not forthcoming at the international level: the treaty had to be created first. The timing of the treaty was remarkable: it was adopted during the Cold War with the participation of then-arch enemies the Soviet Union ("USSR") and the United States, along with such competitors for rights to explore the region as Argentina, Chile, Australia, Japan, and the United Kingdom, none of which were willing to give up their asserted rights. Seemingly irreconcilable differences existed, but nonetheless, a workable strategy was developed around common objectives. A "pooled sovereignty" model had first been suggested, but as individual territorial claims were too difficult to overcome, Chile instead proposed the current "status quo" solution under which territorial claims should be "frozen" through a moratorium on new claims.⁶⁸ The treaty now has forty-six members, only five of whom mutually recognize the territorial claims of the others.⁶⁹

Modernly, potential treaty parties—most noticeably the United States—similarly must come to terms with the fact that some nations will not give up their national rights arguments pertaining to development. No one can seriously dispute the right of poorer nations to do so. Instead, a "status quo" solution might be found in relation to climate change as well, but by reframing the problem. For instance, status quo in climate change could and must encompass the right to retain increasing levels of development. But, instead of asking whether or not nations are "entitled" to develop—of course they are—the correct question is whether nations are necessarily entitled to base such development on GHG emissions, or whether—with crucial economic and other assistance—they can reach the desired levels of development based on non-GHG sources. A difficult question indeed, but if arch enemies could agree on a

67. S. TREATY DOC. NO. 86 (1960) (Exec. B).

68. Article IV of the Antarctic Treaty denied countries the right to assert, support, or deny "a claim to territorial sovereignty in Antarctica or create any rights of sovereignty in Antarctica." *See* Antarctic Treaty art. IV, Dec. 1, 1959, 12 U.S.T. 794, 402 U.N.T.S. 71; *see also* Bulkeley, *supra* note 66; Triggs, *supra* note 64, at 41.

69. *See* Triggs, *supra* note 64, at 40–41.

treaty during the Cold War, one would hope that key negotiating parties could not only come to the table, but could also reach an agreement in these more peaceful times. The ATS shows that irreconcilable supranational differences can be overcome with persistence and innovative diplomacy. As with the ATS, operational *and* scientific cooperation is also currently needed in order for all nations to be able to share the natural “resource” in the future. At the time of the ATS, the “resource” was a region with potentially fruitful scientific development. Now, a healthy environment must be seen as a precious resource with a proven effect of economic development. In the ATS context, widely divergent political interests existed within the realm of both the problem itself (use of the resource) as well as outside the problem (broader economic concerns), in the same way as they do now in the current ongoing global financial crisis.

In some ways, the ATS may be seen as factually and contextually different from current climate change, but in other ways, there are strong resemblances that justify the comparison. Just as the ATS member nations were motivated by national territorial concerns, so too does the climate rhetoric have significant national security implications. Both regimes implicate the development and use of science for peaceful, yet nationally advantageous, reasons. Even the physical surroundings are somewhat similar: the Antarctic is a very remote and ethereal region, as is the atmosphere, but both areas came to require a supranational solution. The ATS thus sets valuable precedent for how nations may come to give up old arguments and start over using new, shared goals as a platform for success—even during times with a highly volatile international political climate and seemingly insurmountable legal obstacles. Perhaps most noticeably, the ATS used an ecosystem approach at a time when arms races and military prowess were otherwise higher on the international agenda. If the mutual goals of peace, science, and “even” the environment had the power to supersede political, economic, and military interests, then surely they do now as well.

3. The Science

As shown above, the fact that “the science” behind treaty developments is difficult, and even controversial at times, is not a hindrance to eventual treaty success. The telecom agreement,

the ATS, the Seal Treaty and, in particular, the Montreal Protocol all involved complex scientific and technical issues, but still found a common platform on which to stand. In fact, as the ATS and Montreal Protocol show, scientific motivators often function as crucial drivers in treaty negotiations and drafting.

C. Negotiation "Champions"

More unknown than the role of national actors, but perhaps equally important in the treaty drafting process, is the role played by *individual* "champions."⁷⁰ This oft-forgotten aspect of treaty-making could beneficially be re-applied in upcoming climate negotiations. Strong leadership not only by nations, but also by individuals, is needed in treaty work.⁷¹

In the case of the ATS, the work performed by prominent individuals helped spur action and paved some of the way for the eventual treaty adoption. Informal talks began when President Eisenhower issued a letter to the US ambassadors to all governments taking part in the International Geophysical Year ("IGY").⁷² This letter outlined mutual goals and asserted that a treaty could be created "without requiring any participating nation to renounce whatever basic historic rights it may have" in the region.⁷³ A subsequent gathering at the private residence of Dr. James Van Allen—a prominent scientist who played a large role in planning the IGY—prompted the suggestion of a coordinated international science effort and thus helped shift focus from contested national claims between intensely rivaling nations to peaceful international cooperation for scientific purposes.⁷⁴ Without the impetus by leaders in both the scientific and political communities, the treaty may not have been adopted.

70. See, e.g., Steven Blumenfield, *For Science and Peace: The Creation and Evolution of the Antarctic Treaty System*, YALE ECON. REV., Winter/Spring 2010, at 28.

71. See O'BRIEN & GOWAN, *supra* note 15, at 8, 13.

72. See Bulkeley, *supra* note 66.

73. See U.S. Antarctic Policy=Historical Perspective, NAT'L SCI. FOUND., <http://www.nsf.gov/geo/plr/antarct/usaphist.jsp> (last visited October 30, 2013) (providing an excerpt from a 1958 statement by US Secretary of State John Foster Dulles); see also Triggs, *supra* note 64, at 41.

74. Blumenfield, *supra* note 70.

When Japan wanted more than the 25% share of the seal harvest offered to it in connection with the negotiations leading up to the Seal Treaty, President Taft sent a direct, personal appeal to the Emperor of Japan calling for “friendly relations between the Japanese and American nations” as the preservation of the seals was “of importance to all the nations of the world,” which helped ensure Japanese participation.⁷⁵ At the time, direct involvement by national leaders in treaty negotiations was rare, but these examples demonstrate that personal relations and the structural leadership provided by world leaders can help move agendas forward. Two entrepreneurial leaders were key to the Seal Treaty as well, demonstrating the importance of involving businesses and other non-governmental organizations (“NGOs”) in treaty developments, controversial as that may sound to environmentalists. In the telecom agreement, the US Secretary of State intervened at an early stage, which similarly shows the importance of high-level political pressure by well-known actors.⁷⁶

In the Montreal process, United Nations Environment Programme (“UNEP”) executive director Mostafa Tolba was an impartial, but important, negotiator.⁷⁷ In the climate context, Lord Stern and former British Prime Minister David Cameron have been mentioned as potential future political champions in driving the intergovernmental processes forward.⁷⁸ Lord Stern has already contributed much to the discourse. Several other candidates come to mind: Kofi Annan, Al Gore, and Connie Hedegaard, for example. It does not appear to matter exactly *who* is chosen to play this crucial role as long as *somebody* is chosen, and as long as that somebody has sufficient clout and diplomatic skills to influence even very “stubborn” parties.

Non-state actors should also be included, potentially in a two-step process that starts with an inclusive multi-stakeholder

75. Barrett, *supra* note 53, at 35.

76. See Ives, *supra* note 56, at 50.

77. See O'BRIEN & GOWAN, *supra* note 15, at 13.

78. See U.N. FOUND., *ROUNDTABLE DISCUSSION SUMMARY: SUCCESSFUL INTERNATIONAL AGREEMENTS AND LESSONS FOR POST-2015* (2013) [hereinafter *ROUNDTABLE DISCUSSION SUMMARY*], available at <http://www.unfoundation.org/assets/pdf/post-2015-july.pdf>

conversation, but ends with an intergovernmental agreement.⁷⁹ Involvement by civil society, including a coalescence of public interest NGOs and businesses, is understood to be key, especially in treaty compliance contexts.⁸⁰

D. *Coercion, Secrecy and Other Undemocratic Traits*

Perhaps one of the most prevailing aspects of international legal scholarship is the notion that a new climate treaty should be negotiated in transparent, fully democratic, and collaborative ways. Less appealing negotiation techniques are often ignored. This Section shows how reality often varies from academic ideals pertaining to treaty developments.

1. Unilaterality and Coercion as Steps Towards Broader Agreements

Mahatma Gandhi famously said, “Be the change that you wish to see in the world.” That is, for sure, laudable in the private context, but unilateral action does not work in the international context unless also supplemented by at least bilateral and, most likely, multilateral steps.

The background to the Seal Treaty shows how resources shared among several nations are prone to overuse when countries pursue unilateral policies and goals.⁸¹ The United States initially attempted various unilateral technical fixes to solve the problem. For example, the nation exerted some “moral leadership” in the area, appealed to international law, sought diplomatic interventions, petitioned for arbitrations, attempted unilateral trade restrictions, and even threatened unilateral military action—all to no avail.⁸² The United States even considered moving the threatened seal population from the ocean to inland lakes to protect it, which presented the problem that no food was available for the ocean-feeding seals

79. *See id.*

80. *See id.*

81. *See* BARRETT, *supra* note 53, at 33. However, civil society involvement in multilateral environmental agreement (“MEA”) negotiation processes can also be logistically very difficult, as was seen at the Copenhagen COP 15, where this almost got out of hand.

82. *See id.* at 33.

in lakes.⁸³ At one point, the United States even went so far as to suggest exterminating a certain herd completely out of spite if Britain refused to cooperate.⁸⁴ Only a subsequent four-party agreement solved the problem; not these other attempted types of statecraft.⁸⁵ Below, the telecom agreement will show how unilateral pressures can work, but only in conjunction with other techniques. In other words, unilateral action and threats can be instrumental in multilateral contexts, but are not the determinant factor.⁸⁶ Information exchange and cooperative interaction during the negotiation stages are more important.⁸⁷

If self-motivation at the national level does not occur and unilateral action does not suffice, can some international “stick” be applied to drive recalcitrant parties towards agreement? As shown by the telecom agreement, perhaps such a “stick” would suffice, although coercion is more likely to work in tandem with multilateral track diplomacy.

Before the telecom agreement, the United States threatened Japan with bilateral trade sanctions in direct contrast to multilateral policies against limited reciprocity.⁸⁸ The US Trade Representative (“USTR”) exerted pressure on Japan.⁸⁹ Section 301 petitions under the Trade Act of 1974⁹⁰ were used as a negotiation weapon.⁹¹ As an additional threat, a draft telecommunications access bill was proposed that would have used Federal Communications Commission (“FCC”)

83. *See id.*

84. *See id.*

85. *See id.*

86. *See Ives, supra* note 56, at 60.

87. *See id.* at 60.

88. *See id.* at 50.

89. *See id.* at 49.

90. Trade Act of 1974 Pub. L. No. 93-619 § 301, 88 Stat. 1978-2, 19 U.S.C. § 2411 (2012) (authorizing the President to take all appropriate action, including retaliation, to obtain the removal of any act, policy, or practice of a foreign government that violates an international trade agreement or is unjustified, unreasonable, or discriminatory, and that burdens or restricts U.S. commerce). Section 301 cases can be self-initiated by the United States Trade Representative (“USTR”) or as the result of a petition filed by a firm or industry group. If the USTR initiates a Section 301 investigation, it must seek to negotiate a settlement with the foreign country in the form of compensation or elimination of the trade barrier. For cases involving trade agreements, the USTR is required to request formal dispute proceedings as provided by the trade agreements. *See id.*

91. *Ives, supra* note 56, at 51.

certification procedures to slow or prohibit imports from foreign countries that did not open their markets to US telecommunications products or services.⁹² The FCC proposed to introduce legislation calling for minimum pricing benchmarks based on narrow reciprocity.⁹³ In other words, the United States openly sought to punish “unfair traders” within the telecommunications sector.⁹⁴ The discourse was often adversarial as opposed to collaborative.⁹⁵ The ultimate agreement reached was thus not negotiated through inclusive, democratic and politically correct means. Arguably, the United States more or less “bullied” Japan into compliance. Japan correctly perceived the process as coercive, which seriously damaged the US-Japanese relationship.⁹⁶ Japan further lamented that it alone had to compromise, not the United States.⁹⁷ However, the mix of coercion with some positive interaction and persuasion in relation to the monetary benefits that Japan stood to gain through an agreement eventually led Japan away from only trying to avoid possible losses by being named under Section 301, and towards the ultimate agreement.⁹⁸ More collaboratively, in 1995 the G7 dedicated a meeting to the topic which helped share the core consensus and ensure support from the broader WTO process, albeit again with warnings from the USTR. A crucial “*interest redefinition*” happened when Japan came to see trade liberalization as being in its own national economic interest.⁹⁹ Thus, coercion may have only worked in conjunction with the broader positive incentives. The final WTO agreements were reached in more democratically appealing ways, but, even so, the talks under that framework were, first and foremost, designed to satisfy the underlying needs and interests of the *dominant* players, not all the players.¹⁰⁰ There was an “inner circle” that harmonized its members’ policies while countries on the outskirts of the circle

92. See S. 492, 86th Cong.; see also Ives, *supra* note 56, at 51.

93. See Ives, *supra* note 56, at 63.

94. See *id.* at 52.

95. See *id.* at 54.

96. See *id.* at 52.

97. See *id.* at 54.

98. See *id.* at 52.

99. See *id.* at 61.

100. See *id.*

spent time catching up.¹⁰¹ This not only shows a degree of undemocratic egotism or nationalist economic interests at play, but it also the possibility of narrower agreements broadening when secondary actors are coaxed into moving along with other nations. Thus, in the telecom agreement, a double strategy was used wherein coercive threats were used in conjunction with multilateral track diplomacy.¹⁰² This interplay between cooperative processes and coercive pressure was paramount in inducing change at that time,¹⁰³ and it may be with climate change now.

Coercion was particularly effective because of the highly technical nature of the telecommunications problem.¹⁰⁴ Because climate change is just as technically complex, if not more, less democracy and more “old-fashioned” diplomatic coercion may thus also be fruitful in egging some parties along.

In contrast, pure coercion appears unlikely to function well as an exclusive negotiation tactic. There is a demonstrated link between use of coercive tactics and instability of outcomes.¹⁰⁵ Over time, coercion leads to a breakdown in relationships.¹⁰⁶ Coercion is more likely to be tolerated if the underlying relationship is strong *or* if state behavior demonstrates willingness to improve the relationship.¹⁰⁷ Currently, the US-Sino relationship, for example, is very likely not strong enough to support any attempted “coercion” in the climate context no matter the degree of such pressure. The relationship seems to rest on a very delicate platform. Just as cautious optimism for a climate agreement between the two parties seems warranted, the ebb and flow of this relationship changes, thus making any US attempts to convince China to adopt binding agreements seem futile. Other national actors may be more open towards diplomatic pressure than China.

At bottom, the success of coercive tactics is contingent upon channeling negotiations into broader, more collaborative

101. *See id.*

102. *See id.* at 63.

103. *See id.* at 64.

104. *See id.* at 71.

105. *See id.* at 69.

106. *See id.*

107. *See id.*

contexts. To be successful, difficult international talks should be progressively multilateralized.

2. Secrecy and Early Examples of Exclusion

In the case of the ATS, the US Department of State initially issued a secret policy paper seeking to eliminate international disputes over the territory, preserve the continent for science, and protect US interests.¹⁰⁸ Initially, the United States was predominantly interested in denying access to the area to potential enemies—such as the USSR—and to prevent Soviet influence over it.¹⁰⁹ The State Department's review of US policy led to bilateral talks with Great Britain about options for the desirable level of "internationalization" of the continent.¹¹⁰ These talks were only later widened to include six other governments with territorial claims in Antarctica and, subsequently, other governments with IGY committees running stations on the continent.¹¹¹ Initially, the USSR was thus *not* a party to the talks, but was included in a cartel outside the UN architecture.¹¹² India, Brazil, Uruguay, and Peru were also excluded from initial negotiations.¹¹³ The USSR conducted itself in a positive, open-minded manner throughout the international discussions, as the nation wanted inclusion into, not exclusion from, the ATS.¹¹⁴ Later, when the USSR was included in plans for a possible international solution, the United States and the USSR conducted no less than sixty secret meetings in preparation for the treaty.¹¹⁵ At one stage of the negotiations, the parties reached a "gentlemen's agreement" under which the negotiating governments agreed not to "engage in legal or political argumentation" over Antarctic sovereignty issues during the IGY.¹¹⁶ Although a seemingly small aspect of the overall agreement, it at least shows how parties may agree on a period of "truce" in otherwise deadlocked political

108. See Triggs, *supra* note 64, at 41.

109. See Bulkeley, *supra* note 66.

110. See *id.*

111. See *id.*

112. See *id.*

113. See Triggs, *supra* note 64, at 41.

114. See Bulkeley, *supra* note 66.

115. See *id.*

116. See Triggs, *supra* note 64, at 42.

discussions when something else is perceived to be a higher priority on the international agenda. This is arguably the current case with the climate change crisis, where scientific reality must, or, for the lack of a better word, should, be seen to override political and economic difficulties.

The above shows how undemocratic treaty negotiations can be and probably often are. For example, secret papers are circulated among key participants. Exclusive clubs are formed. Such club formation is not unknown at the supranational scene either—some nations reach behind-the-scenes agreements in phases and with a limited range of participants, at least to begin with. To a very large extent, these shape the ultimate agreement whether or not all nations “like” this process and the resulting outcomes. In fact, true broad consensus is rare. Nations do not deal with each other exclusively, but rather seek to promote their own interests by negotiating faceted agreements into place with others before reaching an ultimate supranational agreement. Yet despite such seemingly undemocratic facets of international law-making, nations eventually do find reasons to join the adopted schemes and coalitions. This also goes for organizations such as the Organisation for Economic Co-operation and Development (“OECD”) and the groups of major economies such as the Group of Twenty Finance Ministers and Central Bank Governors (“G20”). Even as regards to the otherwise quite inclusion-seeking (and “politically correct”) European Union, it has become known that Turkey simply is not a desirable member, and likely will not be for a long time to come. Shameful, perhaps, but the reality is that from kindergartens to international forums, political coalitions arise and agreements are made in ways that are not necessarily democratic. The crucial matter, however, is that substantively desirable goals can be reached even through procedurally questionable actions. Perhaps the end justifies the means, at least when it comes to climate change. The world has become so used to the UNFCCC and the Kyoto Protocol resting on solid “cosmopolitan democratic”¹¹⁷ principles and near-universal participation that it might, at first glance, be difficult to imagine alternatives. But they do exist, even under the United Nations

117. McGee, *supra* note 13, at 7.

auspices. For example, the UN Security Council also does not employ a broadly democratic process: only the five permanent members have veto power over substantive resolutions. The ten additional rotating non-permanent members do not. In all, fifteen Security Council members vote on matters that could affect no less than 193 nations; the total membership of the United Nations. True democracy is, of course, the ideal, but in the climate context, it is arguably less important over the next few months and years than reaching a substantively effective solution. Procedural fairness could then be improved.

E. Bilateralism and Progressive Multilateralism

The call for the participation of "all major emitters" in a new climate treaty still permeates the international climate discourse. This Article posits that as few as two parties can kick start a new international agreement. International law precedent supports this argument as follows.

During the initial stages of the development of the United States-Japan telecommunications agreement, "key states . . . migrate[d] away from the multilateralism of the [International Telecommunication Union] towards 'more effective' and 'less time consuming' bilateral and plurilateral channels."¹¹⁸ After several high-level bilateral meetings and much pressure, Japan responded affirmatively to all points demanded of it.¹¹⁹ The United States also worked with Canada, several European nations, Brazil, and India to eventually reach a broader international impact in the telecommunications industry, but at first sought to achieve this in a bilateral manner.¹²⁰ When nations were egged along by the general trend of internationalization in telecommunications and, further, came to realize that what had first been seen as problems actually represented inherent gains for national industry players, the agreements that started out as sets of bilateral agreements between the United States and the above parties became topics for further expansion under the auspices of the OECD.¹²¹ At

118. Ives, *supra* note 56, at 47.

119. *Id.* at 51.

120. *Id.*

121. *Id.* at 55, 57.

first, four difficult impasse points were discussed at length within the relatively small OECD forum until virtual consensus had been achieved.¹²² Only then were negotiations displaced by the broader, binding, General Agreement on Tariffs and Trade (“GATT”)/WTO forum.¹²³ Multilateral talks at the WTO level only arose after a core consensus had been developed via, first, unilateral action in the form of the United States coercing Japan to agree or face sanctions, then tough bilateral negotiations and information exchanges, and further broadened international negotiations at the OECD level.¹²⁴ Under the WTO auspices, the “Reference Paper” was eventually developed.¹²⁵ This is a framework of pro-competitive regulatory policies that is not legally binding in and of itself, but becomes binding with additional commitments by the parties.¹²⁶

The above procedures show how high-level national interest in the United States can lead other key actors into adopting an integral and crucial bilateral agreement which, crucially in the climate context, can lead to much broader and deeper binding multilateral action under an already existing architecture. When the United States has both the economic interest and the political will, it can be the instigator of action at the international level. Bilaterality is still common in the trade context. For example, in the GATT/WTO context, legal frameworks are often translated into binding commitments via breakout bilateral treaties among individual states.¹²⁷

Another example of how broader international agreements can be reached from a very narrow starting point is the WTO schedules. The WTO operates with a set of general rules that apply to all members, but also specific commitments (“schedules”) initially made by individual member governments.¹²⁸ All WTO members have a schedule of

122. *Id.* at 58.

123. *Id.*

124. *Id.* at 47.

125. See Nakatika, *supra* note 55, at 3.

126. *Id.* at 4.

127. See Gabriella Blum, *Bilateralism, Multilateralism, and the Architecture of International Law*, 49 *HARV. INT’L L.J.* 323, 370 (2008).

128. See *Goods Schedules*, WORLD TRADE ORG., http://www.wto.org/english/tratop_e/schedules_e/goods_schedules_e.htm (last visited Nov. 5, 2013) [hereinafter *WTO Goods Schedules*].

concessions that reflect specific tariff concessions and other commitments that nations have agreed to in the context of trade negotiations such as the Uruguay Round.¹²⁹ The schedules record commitments to progressively remove barriers to the international trade in goods and services, and serve as a starting point for future trade negotiations.¹³⁰ The content of the schedules change over time to take account of different modifications, such as GATT Article XXVIII negotiations or rectification procedures.¹³¹ Each individual WTO member schedule is an agreement among all members, and no changes can be introduced without the approval of all members.¹³²

In contrast, the Seal Treaty development process shows how bilateral agreements may *not* work well when there is a risk of "leakage," as there is with climate change. In an arbitration agreement between the United States and Great Britain on behalf of Canada, the WTO tribunal had held for Britain and limited the United States jurisdiction to hunt seals to only three miles from shore.¹³³ This ruling was observed, but circumvented by sealers moving to other areas of the ocean, by United States (and Great Britain) sealers flying the flag of other nations in order to continue sealing, and by other entrants on the sealing scene, such as Japan, who were not affected by the arbitration ruling.¹³⁴ It became clear then, as it might be with climate change now, that a comprehensive agreement covering all the major powers in the area was needed.¹³⁵ Nonetheless, the Seal Treaty still shows that even though major powers may be needed for eventual successful treaty developments, bilateral talks can lead to broader legal regimes. The Seal Treaty process quickly grew from two to five nations in the closing treaty stages; enough to secure a substantive success (the affected seal herd, almost

129. *See id.*

130. ARUNABHA GHOSH, CENTER. FOR POLICY RESEARCH, MAKING CLIMATE LOOK LIKE TRADE? QUESTIONS ON INCENTIVES, FLEXIBILITY AND CREDIBILITY (2010), *available at* http://www.cprindia.org/sites/default/files/CPR%20Climate%20Brief_March%202010_1.pdf.

131. *See WTO Goods Schedules, supra* note 128.

132. *See* GHOSH, *supra* note 130.

133. *See* BARRETT, *supra* note 53, at 28.

134. *Id.* at 29–30.

135. *Id.* at 29.

extinguished, grew to two million not many years later).¹³⁶ The Seal Treaty also shows that a very large number of nations need not be involved in a treaty for it to be successful. The crux is typically whether the parties with a major economic interest at stake come to an agreement.

In short, bilaterality may well prove conducive, at least initially, in the climate change context. Two parties will probably not have the sufficient substantive effect on an eventual resolution of the underlying climate change problem, but as has been demonstrated, two key players can pave the way for a subsequent sufficiently broad treaty participation. “[B]ilateral teeth and multilateral intellect” are key in international law formation.¹³⁷ Such progressive multilateralism was also seen in the case of the ATS, which started with twelve parties but increased to forty-six. Similarly, economic/political organizations such as the G20, and even the European Union also started relatively small. For example, the European Union began with narrow agreements on steel and coal among six nations. It is now arguably one of the most successful international governance examples in the world with twenty-eight member nations in Europe and much influence on international affairs such as, in particular, climate change. Treaty development is all about the “process, not just a piece of paper.”¹³⁸

As has been seen in the climate change context, attempting to bring everyone to the table too early and incorporating too many and too diverse interests destroys whatever negotiating momentum may otherwise have been built up, especially when addressing highly technical problems. Instead, taking a step back, starting with key bilateral agreements and gradually building up momentum is more effective. Together, bi- and multilaterality make up a “single negotiation space,” but one approach may not work without the other. To be sure, time has almost run out for very limited approaches, but, on the other hand, there may also not be time *not* to try this approach. They

136. *See id.* at 32.

137. Ives, *supra* note 56, at 71.

138. *See* Triggs, *supra* note 64, at 48.

may well prove effective in the climate context as they have in other areas the past.

F. Club Formation

One of the perhaps most prevalent premises promoted in climate discourse is the notion that a new treaty must be highly inclusive for reasons of procedural fairness and general democracy. This premise is proving dated or even outright false. While many legal scholars still refer to “all” major emitters, this notion denotes the ideal of international inclusiveness that has proved unrealistic so far. Respectfully, this Article argues that these notions have proved so unpragmatic that they now more closely align with idealistic academic myths than on-the-ground reality in the climate treaty formulation contexts. This Section will analyze the advantages and criticisms pertaining to what has become known as “minilateralism” and set forth some examples of successful narrow national negotiation constellations work to show that minilateralism works in reality.

As a threshold matter, “multilateralism” denotes the creation of international bodies, agreements, and rules through negotiation by the states that will be also subject to the arrangements in question and who agree to be bound by the arrangements.¹³⁹ “Inclusive” multilateralism happens when NGOs are also involved in the discourse¹⁴⁰ or simply when an extensive number of nations form part of the debate. In contrast, “minilateralism” denotes seeking a “magic number” of key states with enough influence upon an issue to craft smaller, responsive international institutions.¹⁴¹ “Exclusive” minilateralism takes place when excluding irrelevant parties and all NGO involvement.¹⁴² In the climate context, for example, exclusive minilateralism would come about by excluding the 175 or so nations with the least GHG emissions.¹⁴³

In general, typical criticisms of exclusive minilateralism include the arguments that such processes are self-serving, break

139. See McGee, *supra* note 13, at 8.

140. See *id.* at 11.

141. See *id.* at 11–12; Naim, *supra* note 12.

142. See McGee, *supra* note 13, at 12.

143. See *id.*

ethical principles of due process, directly contest the cosmopolitan democratic version of liberal multilateralism and “all inclusiveness,” and thus lack legitimacy within the international society.¹⁴⁴ Openly excluding NGOs from processes is contra to the democratic ideal that promotes the voice of non-state actors for accountability and aggregation of interest purposes.¹⁴⁵ With climate change in particular, due process concerns arise when the most vulnerable nations are excluded from the democratic process that would greatly affect them.¹⁴⁶ The stand-off between top emitters would allegedly be the same in small forums as in big ones,¹⁴⁷ so the argument is that negotiators may just as well continue with large-scale multilateral negotiations even though they stopped yielding effective results about two *decades* ago,¹⁴⁸ incidentally with the creation of the UNFCCC and the WTO. Further, smaller groupings are thought to bring with them the risk that economically powerful states acting more or less alone will redefine the problem and accept lower levels of ambition than what is actually needed.¹⁴⁹

Parades of horrors such as these are far from unknown in the legal field, and thankfully often prove unwarranted. As reality shows, a continued stalemate is more likely to happen with the continued use of the same broad constellation. The “stand-off” between some emitters could be avoided by smaller cooperative forums that, quite simply, excluded disinterested nations to begin with. As treaty history shows, this step may in itself provide sufficient international “jealousy” to motivate them to join the regime in secondary steps. Alternatively, if sufficient economic motivators were developed and made available to a certain range of parties, this too could break the stalemate in small and large forums. The broader concerns regarding due process and ethics are, of course, very valid, but it is not the first time in history that they have been brought up and initially set aside in order to reach agreements on crucial

144. *See id.* at 12–13, 22.

145. *See id.* at 22.

146. *See id.* at 12.

147. Robyn Eckersley, *Moving Forward in the Climate Negotiations: Multilateralism or Minilateralism?*, 12 *GLOBAL ENVTL. POL.*, May 2012, at 35.

148. *See* Naim, *supra* note 12.

149. *See* McGee, *supra* note 13, at 23.

matters, as shown above. In regards to climate change, procedural problems are better than substantive stalemate. We need a quite different perspective than ever before. "An approach based on agreements or partnerships between individual nations, groups of countries and regions makes more sense—and could eventually strengthen more universal measures."¹⁵⁰

In fact, minilateral forums are *already* used in UNFCCC contexts, as was most recently demonstrated in connection with the Copenhagen Conference of Parties 15 ("COP 15"). In an attempt to take advantage of its Presidency and become an agenda-setting leader, Denmark broke ranks with the traditional negotiating parties and, instead, focused its efforts on a group of nations known as "the circle of commitment," which was understood to include the United Kingdom, United States, and Denmark.¹⁵¹ Discussions were held among these parties outside the UNFCCC preparatory meetings in order to garner support for the "Danish text."¹⁵² This proposed text would have abandoned the Kyoto Protocol, weakened the United Nation's role in handling climate finance by handing effective control of climate change finance to the World Bank, made any money to help poor countries adapt to climate change dependent on them taking a range of actions, forced developing countries to agree to specific emission cuts and measures that were not part of the original UN agreement, and divided poor countries further by creating a new official category of developing countries called "the most vulnerable."¹⁵³ In addition, Denmark also organized bilateral meetings with, among others, the European Union, Australia, Canada, Mexico, Brazil, China, and India, and a multilateral, confidential meeting between twenty to thirty countries to advocate for its position prior to the COP 15.¹⁵⁴ However, the Danish text was ultimately leaked to the

150. McGee, *supra* note 13, at 12 (citing to prominent UK sociologist Anthony Giddens).

151. John Vidal, *Copenhagen Climate Summit in Disarray After 'Danish Text' Leak*, GUARDIAN (U.K.) (Dec. 8, 2009), <http://www.theguardian.com/environment/2009/dec/08/copenhagen-climate-summit-disarray-danish-text>.

152. *See id.*; *see also* McGee, *supra* note 13, at 20.

153. *See* Vidal, *supra* note 151.

154. *See* McGee, *supra* note 13, at 20.

Guardian,¹⁵⁵ which alienated the vast majority of the states that had been unaware of the existence of the text.¹⁵⁶ The Group of 77 (“G77”) plus China denounced it as “undemocratic, unfair and . . . lack[ing] . . . transparency.”¹⁵⁷ No agreement was ever reached on the text. Instead, on the Friday before the closure of the COP, the leaders of five nations (the United States, China, India, South Africa, and Brazil) met in private to draft the modest three-page Copenhagen Accord.¹⁵⁸ The text of this proposed agreement was presented to a group of twenty-six countries that had also tried to create an agreement for consensus during the last few days of the COP.¹⁵⁹ Consensus on support for the Accord was reached by these twenty-six nations. However, the Copenhagen Accord was ultimately rejected by Bolivia, Nicaragua, Venezuela, Sudan, and Tuvalu, a rejection that was possible because UNFCCC agreements require full consensus.¹⁶⁰ The Accord was thus only “noted” rather than “adopted,”¹⁶¹ although, importantly, subsequent consensus on the main aspects of the Accord was reached only one year later at the COP 16 in Cancun.¹⁶²

The Copenhagen process shows that breakouts are on the way within the UNFCCC. Although the Accord cannot be said to have had a huge ultimate effect, it was at least a beginning and was an indicator of the potential for climate clubs. Noticeably, the Accord took its start in confidential agreements among just five nations, became further empowered by a group of twenty-six, and was adopted a year later by approximately 142

155. See Vidal, *supra* note 151.

156. McGee, *supra* note 13, at 20.

157. *Id.* (quoting Per Meilstrup, *The Runway Summit: The Background Story of the Danish Presidency of COP 15*, in DANISH FOREIGN POLICY YEARBOOK 128 (2010), available at http://subweb.diiis.dk/graphics/Publications/Books2010/YB2010/YB2010-Runaway-summit_WEB.pdf).

158. *Id.*

159. *Id.*

160. *Id.* at 21.

161. See Framework Convention on Climate Change, Copenhagen, Den. Dec. 7-19, 2009, *Decisions Adopted by the Conference of the Parties*, U.N. Doc. FCCC/CP/2009/11/Add.1.

162. Compare *id.*, with Framework Convention on Climate Change, Cancun, Nov. 29-Dec. 10, 2010, *Decisions Adopted by the Conference of the Parties*, U.N. Doc. FCCC/CP/2010/7/Add.1.

nations.¹⁶³ There is thus strong evidence of the willingness of key states to marginalize the open development of texts through the UNFCCC meetings and instead employ unilateral discourse forums.¹⁶⁴

Outside the UNFCCC context, but within MEAs, club formation is common too. For example, the Asia-Pacific Partnership ("APP"), intended to complement, but not replace, the Kyoto Protocol work, commenced with six original nations (China, India, Japan, Australia, South Korea, and the United States) and has since added two (New Zealand and Canada).¹⁶⁵ The United States Major Emitters and Energy Consumers Process ("MEP") was established to build on US relations within the APP and initially consisted of the world's top fifteen GHG economies and polluters.¹⁶⁶ These nations were to develop long-term global goals "based on national circumstances" with the goals to be determined by each state individually.¹⁶⁷ Thus, clubs exist even *within* clubs. The forum, re-badged by the Obama Administration as the Major Economies Forum on Energy and Climate ("MEF") in 2009, comprises seventeen nations. Perhaps most promising is the fact that the Montreal Protocol was led by three major coalitions: one led by the United States that favored a deep agreement, a group comprised of the then-European Community and Japan, and a coalition of developing countries that shared concerns about potential economic impacts.¹⁶⁸

Outside the MEA context, clubs have been formed for a long time as well, and with much success. An example is what is now the European Union. The current twenty-eight members grouped and integrated at different rates. Even currently, the European Union allows for agreements among only some members. For example, not all members use the euro; Denmark

163. McGee, *supra* note 13, at 21; *Copenhagen Accord*, FRAMEWORK CONVENTION ON CLIMATE CHANGE, https://unfccc.int/meetings/copenhagen_dec_2009/items/5262.php.

164. *Id.*

165. *Id.* at 15–16.

166. *Id.* at 17.

167. *Id.* at 17–18 (citing Press Release, The Whitehouse, Fact Sheet: A New International Climate Change Framework (May 31, 2007) available at <http://georgewbush-whitehouse.archives.gov/news/releases/2007/05/20070531-13.html>).

168. See O'BRIEN & GOWEN, *supra* note 15, at 13.

and the United Kingdom have opted out. Denmark also opted out of the common EU defense policy.¹⁶⁹ Under the Schengen Agreement (which initially was adopted independently of the European Union), most EU members and a few non-EU members have abolished border controls.

In international financial law, club formation takes precedent in both legally binding and non-binding agreements. For example, the WTO has provisions for plurilateral agreements that allow small groups of countries to proceed with a more limited agreement than others.¹⁷⁰ But the WTO also employs non-exclusive principles; discussions leading up to these agreements may involve *non*-members as well as members, just as membership is open to non-members.¹⁷¹ Likewise, the WTO's "Most Favored Nation" principle started as an agreement among a relatively exclusive club, but now extends to all members.¹⁷² Accordingly, the WTO is, on the one hand, a very broadly democratic organization, but on the other hand, also features intrinsic club-formation, or at least narrower regime constellations in relation to some issues when needed. Much could be learned from that in the climate regime.

On the non-binding end of the spectrum, initial multilateral talks within the OECD may also not have been as integrative as some prevailing existing theories may suggest.¹⁷³ There too were the issues defined and influenced by dominant players.¹⁷⁴ And the various groups of major economies, such as the G8, G8+5, and currently the G20, are also by definition exclusive clubs, although they are not driven by internal coalitions, but rather reach agreement by all members through flexibility, which is key to these groups' work.

In short, a small club of key emitters could transform the credibility of climate actions and provide a new effective alternative to what has been seen as the problem of treaty law,

169. EUROPEAN PARLIAMENT, http://www.europarl.europa.eu/ftu/pdf/en/FTU_6.1.3.pdf (last visited Aug. 4, 2013).

170. GHOSH, *supra* note 130, at 3.

171. *Id.*

172. *Understanding the WTO: The Basics—Principles of the Trading System*, WORLD TRADE ORG, http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm (last visited Aug. 4, 2013).

173. Ives, *supra* note 56, at 59.

174. *Id.*

namely that treaties become the “law of the least ambitious program . . . ’ and codify the interests of laggards.”¹⁷⁵

In contrast, the development of the Seal Treaty demonstrates the benefits that derive from inclusive and, to perhaps a smaller extent, symmetrical bargaining. Each of the four major sealing parties to the negotiations was recognized as a Great Power, which created some symmetry in the distribution of power.¹⁷⁶ Unilateral attempts by each state to take advantage of the situation (and, for example, exterminate entire herds of seals out of spite just to prevent other nations from benefiting from the resource) were met with strong responses. In other words, the inclusivity meant that the parties were able to keep each other in check, although doing so created a very tense situation that persisted for decades,¹⁷⁷ not unlike the current climate change situation. However, the symmetric bargaining cannot fully account for the success, as the *military* powers had also begun to shift at the time.¹⁷⁸ Perhaps the somewhat equal economic status among the parties was more important. But with the shift of military status came the resolution of the seal issue,¹⁷⁹ which may bode well for the development of a new climate regime complex as China is rising in both economic and thus also military power. Shifts in the balance of power at negotiation tables can allow for decisions and outcomes that might otherwise have been impossible.¹⁸⁰ Similarly, changing specific parties in international negotiations either by expansion or reduction of the pool of negotiating parties can cause shifts in the balance of power¹⁸¹ that may help pave the way towards a new agreement. Thus, a *reduction* of the number of participants in the climate change negotiations in clubs or via “tracks” or

175. See David Victor, *Toward Effective International Cooperation on Climate Change: Numbers, Interests and Institutions*, 6 GLOBAL ENVTL. POL., Aug. 2006, at 90 (quoting ARILD UNDERDAL, *THE POLITICS OF INTERNATIONAL FISHERIES MANAGEMENT: THE CASE OF THE NORTHEAST ATLANTIC 36* (1980)).

176. See Mirovitskaya, *supra* note 16, at 36–37.

177. *Id.*

178. Mirovitskaya, *supra* note 16 at 37.

179. *Id.*

180. *Id.* at 37–38.

181. *Id.*

“tiers” may well help break the hopeless stalemate of recent years.¹⁸² This will be further developed in the next Section.

G. *Tiers, Tracks, and Other Fairness Concerns*

Instead of one major agreement with limited differentiation of party obligations among a few tracks of parties, such as the design of the first Kyoto Protocol architecture, recent climate discourse points to the possibility that a new agreement may well have to feature several more layers of obligations. This Section will highlight the existing regime and possibilities for its future development

1. CBDR

Treaties considered successful by experts reflect notions of fairness such as the principle of “common but differentiated responsibilities” (“CBDR”) in MEA contexts.¹⁸³ This principle has been promoted in environmental contexts since its inception as part of Principle 7 of the 1992 Rio Declaration on Environment and Development. The Montreal Protocol featured exact but differentiated plans for compliance.¹⁸⁴ Developing nations faced looser restrictions and received economic assistance.¹⁸⁵ The principle was most recently invoked by the 2009 Copenhagen UNFCCC COP. But the amount of differentiation spelled out in the two related instruments (“Annex I” and “Annex II” countries under the UNFCCC umbrella as well as “Annex B” and “non-Annex I” countries together with the resulting legal and financial obligations under the Kyoto Protocol) is no longer considered to give sufficient guidance to inform the parties of exactly *what* is required of them.¹⁸⁶ More obligation divergence is needed to secure a new, fair treaty. The largest emitters must accept that they will likely have to show sincere efforts to reduce their emissions to what may be seen as a disproportionately greater extent than

182. For a discussion of how the Seal Treaty succeeded by changing the rules of the game by restructuring the relationships among the countries, see BARRETT, *supra* note 53, at 33–39.

183. O'BRIEN & GOWAN, *supra* note 15, at 11

184. *Id.* at 14–15.

185. Sunstein, *supra* note 24, at 1690–91.

186. O'BRIEN & GOWAN, *supra* note 15, at 14.

developing countries and to share technologies to help the latter.¹⁸⁷

Of course, notions of what is “fair” differ widely and depend on the point of view from which one approaches this topic. For example, the United States has so far rejected a climate agreement because, at bottom, American negotiators have not considered it “fair” that developing nations such as China and India have not also had to take on legally binding targets. In turn, China and India have taken the stance that because their per capita emissions are much lower than those in North America, they should not have to be bound to *total* emissions targets. The elephant in the room is that the Sino-Indian notion may not be so “unfair” after all.¹⁸⁸ To reach a supranational agreement in a timely fashion, the United States may just have to swallow its diplomatic pride, set aside its own previous hard stance on this topic, and instead reconsider whether it would make more overall sense to display a more flexible attitude towards the attempts of China and other rapidly emerging countries in reaching overall reductions as well as per capita goals. Principles from the Asia-Pacific Partnership context demonstrate that much trust may be gained among negotiators if members of a group of large emitters showed sincere efforts to reduce emissions unilaterally first, especially if some nations showed a greater willingness to share technologies and provide economic support for the adoption of new technologies in poorer member nations.¹⁸⁹ It is well established that economic, technical, and information-sharing mechanisms to facilitate compliance in developing countries are a trademark of good international agreements.¹⁹⁰ On the other hand, a common fear in this context is that less economically able nations simply seek to increase their technological prowess “for free” without actually reducing their carbon footprints. Further, China’s economic growth is, for example, more than double the world’s average¹⁹¹ and as China stands to become the largest economy in

187. *See id.* at 3–4.

188. *Id.* at 11.

189. GHOSH, *supra* note 130 at 2.

190. O’BRIEN & GOWAN, *supra* note 15 at 13.

191. Sunstein, *supra* note 24 at 1687.

the world within this decade,¹⁹² the question becomes if China is or will remain a country that should receive help and how much. That question, however, is outside the scope of this Article.

It may be that the creation of a single, relatively uniform treaty text for negotiation reduces the degree of complexity and, thus, at least in theory, makes it more likely that a greater number of nations will become willing to adopt the text compared to treaties that feature a greater amount of flexible arrangements. However, single texts are known to result in the least common denominator being chosen and reducing the opportunities for creativity in shaping the central problem.¹⁹³ In a worst-case scenario, a single uniform text does not reflect the central problem at all or the desires of the majority of potential participants.¹⁹⁴ This became reality with the Kyoto Protocol, the first version of which was valid until late 2012, but only called for approximately 5% emissions reductions even towards the end of the first commitment period when it had become known that much deeper cuts were needed. Accordingly, more multi-faceted agreements are more likely to result in substantively better results, especially if nations can form clubs in negotiating such tiered agreements.

2. Tiers and Tracks

Tiered solutions have proven effective in both environmental and non-environmental contexts. The ATS, for example, was initially developed as one overall treaty governing the territorial and general usage claims, with separate treaties for seals, krill, and other living resources adopted afterwards in a step-by-step approach featuring separate tracks for the involved nations.¹⁹⁵ In the creation of the WTO, talks often deadlocked, but when the trade-in-services discussions were moved to a separate negotiation track, the deadlock was resolved¹⁹⁶ and, as the saying goes, the rest is history. In the US-Japanese telecom agreement, the United States wanted a “critical mass” of options, from either a quantity or a quality point of view, to

192. AL GORE, *THE FUTURE: SIX DRIVERS OF GLOBAL CHANGE* 93 (2013).

193. Ives, *supra* note 56, at 60.

194. *Id.* at 60.

195. Triggs, *supra* note 64, at 44.

196. See Ives, *supra* note 56, at 62.

choose from.¹⁹⁷ The result was a tiered agreement. "Tier One" nations were required to fulfill 100% of their respective market opening commitments (the United States, European Union, Canada, and Japan "quad," plus Switzerland, Singapore, Hong Kong, Brazil, India, and Korea).¹⁹⁸ "Tier Two" consisted of advanced developing countries (ASEAN, the "Big Latins," and South Africa), who would have to satisfy existing regimes and commit to future market opening within reasonable timeframes.¹⁹⁹ "Tier Three" comprised all remaining countries, who would be asked to bind their current regimes.²⁰⁰ In this way, the desired critical mass was achieved, although less than seventy states were signatories to the resulting agreement.²⁰¹ Ninety percent of the telecommunications market was covered by the agreement, which led the United States to commit to open *its* market on a most favored nation basis.²⁰² This shows that substantively successful agreements can be reached without the extremely broad consensus sought so far under the UNFCCC auspices, as long as a certain *minimum* number of key nations form a part.

The tiered approach already applies to some MEAs such as the United States-Canada Quality Agreement and the Long-range Transboundary Air Pollution Regime.²⁰³ The latter has separate protocols on separate substances such as sulfur dioxide, mono-nitrogen oxides, and heavy metals.²⁰⁴ Track solutions might be possible in a renewed climate change regime. In fact, the UNFCCC and Kyoto Protocol already feature both *de jure* and *de facto* tracks²⁰⁵: *de jure*, these frameworks already reference Annex I, non-Annex I, and Annex II solutions; *de facto*, parties have taken technology-based initiatives, made subnational commitments and initiated much other cooperation outside the UNFCCC/Kyoto context. Future tracks or tiers

197. *Id.* at 65.

198. *Id.* at 65–66.

199. *Id.*

200. *Id.* at 66.

201. *Id.*

202. *Id.*

203. DANIEL BODANSKY & ELLIOT DIRINGER, PEW CTR. ON GLOBAL CLIMATE CHANGE, TOWARDS AN INTEGRATED MULTI-TRACK CLIMATE FRAMEWORK 8, 11 (2007).

204. *Id.* at 8.

205. *Id.* at 6.

could consist of a host of different commitments such as completely individualized commitments, integrated commitments with a limited number of tracks *and* requirements as to which nations could negotiate within which tracks, a variable approach including both legally binding and non-legally binding targets, or economy-wide vs. sector-wide commitments.²⁰⁶ A “menu” approach has also been suggested, under which nations are limited to a choice of options from a collectively agreed-upon menu.²⁰⁷ Finally, a “mixed approach” would define some commitments collectively via a top-down supranational approach, but letting nations define others by themselves in a bottom-up fashion.²⁰⁸ At bottom, it is clear that the major economies are more apt to engage in an international effort if given latitude to pursue different policy tracks.²⁰⁹ For example, “Todd Stern, U.S. special envoy for climate change, said the U.S. position of having nations offer up their own ‘nationally determined mitigation commitments’ – one that was greeted with some skepticism at the 2009 Copenhagen summit – has now become accepted wisdom among key blocs from China to the European Union.”²¹⁰

The view that a new climate treaty must be able to accommodate a greater degree of changes without having to renegotiate the treaty in a few years is supported by Christiana Figueres, executive secretary of the UNFCCC: “there is no appetite to renegotiate yet another agreement in two [to] five years What the governments want is something they can add on to, in sort of a modular fashion, as time moves on.”²¹¹

Whether the diversity of obligation required is called club formation, tiers, tracks, or something else, it is clear that the time has come to utilize negotiation techniques that allow for much greater diversity and flexibility than what has been used under the UNFCCC so far. And whatever obligations are adopted, they must be legally binding in order to be successful;

206. *Id.* at 13, 17, 20.

207. *Id.* at 12.

208. *Id.* at 13.

209. *Id.* at 1.

210. Dean Scott, *U.S. Envoy Touts Evolution in Climate Talks to Broad Acceptance of Pledge-based Accord*, INT’L ENV’T. REP. (BNA) (November 18, 2013).

211. Kessler, *supra* note 7.

merely drafting treaties means little on-the-ground improvement without binding effect and enforcement options.²¹² Although a legally binding solution is arguably key to climate change in order to be able to provide sufficiently serious deterrents to this increasingly severe factual problem, non-binding agreements can similarly play an important *complementary* role in the initial stages of treaty drafting.²¹³ Such agreement would not work as much as leaders of action but as codifiers²¹⁴: "International cooperation emerges through ambitious commitments, efforts and experiments that are undertaken more readily when agreements are nonbinding. Through these experiments, governments gain confidence . . . and then become more willing to embrace binding commitments."²¹⁵ For example, the European acid rain regime was adopted *alongside* a binding convention.²¹⁶ The US-Japanese telecom agreement process also shows that alternative forums are valuable to eventual binding results. Human rights treaties demonstrate this: numerous nations around the world have adopted a wide range of such instruments, yet continue their flagrant violations thereof. It may be advantageous for nations to accede to various treaties from a publicity standpoint, but without legal "teeth," a treaty does not guarantee any actual action. And in order to avoid a race to the bottom in the MEA context, a climate treaty must require that *more* be done to protect the environment than states would otherwise be inclined to do.²¹⁷

Creating a treaty is a difficult art and science. The above demonstrates some of the most important factors that come into play when nations attempt to do so. The next Section will analyze *who* should do so.

II. MINILATERAL CONSTELLATIONS IN THE CLIMATE CHANGE REGIME COMPLEX; THE "WHO"

Recent scholarship proposes that a new climate change agreement is likely to be created by a much narrower

212. Cairncross, *supra* note 41; O'BRIEN & GOWAN, *supra* note 15, at 14.

213. Victor, *supra* note 175, at 98.

214. *Id.* at 100.

215. *Id.*

216. *Id.* at 98.

217. Cairncross, *supra* note 41.

constellation of parties than previously envisioned, although most writers continue to promote the inclusion of “all” major emitters. Typical suggestions range from twelve to twenty parties. Why do many scholars and policymakers now seem to agree that not all or even most nations around the world are needed for a successful new climate treaty when the UNFCCC and the Kyoto Protocol comprised almost two hundred nations? The answer is that because most emissions are created by a relatively low number of nations, only a minority of nations is needed for *substantive* success. As one leading analyst said, “it is better to focus on [the twenty largest] emitters, the other 150 countries only get in the way.”²¹⁸

This Section first examines recent proposals for action-taking clubs. The Article analyzes *who* that is and what these nations *themselves* indicate about their possible intent to take action (or the lack thereof). The Section then critically examines which nations are the most realistic candidates for a renewed climate change regime complex constellation.

A. *Frequently Proposed Constellations*

The smallest number proposed for a renewed climate regime is three: the United States, the European Union, and China.²¹⁹ Each of these is responsible for a high proportion of global carbon emissions (at least 12%) and of global GDP.²²⁰ Together, they represent half of the global GDP and 49% of global carbon emissions.²²¹ Because they also possess important technological and human capital for decarbonizing the economy, in addition to relatively solid finances, these nations are seen as particularly important players.²²² In fact, they are arguably so important to the climate context that they could constitute a successful constellation by themselves—if not substantively, then at least to spur further nations to join the club or emulate its action.

218. McGee, *supra* note 13, at 12.

219. Viola, *supra* note 11, at 2.

220. *Id.*

221. *Id.*

222. *Id.*

India, Russia, Japan, South Korea, and Brazil are also considered to be potentially important to the formulation of a new climate treaty.²²³ India's share of total emissions is growing rapidly and, in this decade, will likely surpass the emissions of the European Union and the United States.²²⁴ Brazil has the least carbon-intensive energy matrix²²⁵ of these nations and is thus of much recent scholarly and political interest. Japan has one of the less-intensive carbon economies of the world, and in addition has strong human and technological capacity for the transition to a low-carbon economy.²²⁶ South Korea is similarly highly resource-capable and is very reform-minded.²²⁷ Russia is among the most difficult nations in the climate debate as it has very high per capita emissions and actually stands to benefit economically from climate change.²²⁸ This is so because warmer temperatures in Russia would mean an increased grain output and savings on heating costs, further explained below. But, as shown above, Russia has historically played a large role on the international scene. It could be that a solution that excludes Russia is not internationally acceptable.

The so-called "k group"—the minimum number of countries necessary to make collective action rational within climate change—is often said to be "about a dozen," namely the top ten emitters from fossil fuel usage plus Brazil and Indonesia; two of the top emitters from changes in land use.²²⁹ Twelve—incidentally also the size of most juries—is a number that many "deliberative democrats argue is the optimal size for meaningful deliberation."²³⁰ Who would these be? The group should, according to one theory, be comprised of "the most capable, the most responsible and the most vulnerable."²³¹

The most capable are the leading developed economies (using GDP as a proxy for capacity), which have the greatest capacity to reduce emissions through technological innovation,

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. Victor, *supra* note 175, at 95.

230. Eckersley, *supra* note 147, at 17.

231. *Id.* at 15.

and the greatest capacity to assist developing countries with mitigation and adaptation. The most responsible are the parties with the biggest historical, aggregate, and forecasted emissions, and therefore the biggest scope to reduce emissions, with appropriate acknowledgement of differences in per capita emissions and development need. The most vulnerable are the parties that are expected to suffer the harshest impacts of climate change, and have the least capacity to adapt. The most vulnerable are represented by three key negotiating blocs: the Alliance of Small Island States (“AOSIS”), the African Group (“AG”), and the Least Developed Countries (“LDC”).²³²

A group consisting of the United States, the European Union, the AG, the Russian Federation, Japan, China, India, Brazil, Korea, Mexico, AOSIS, and the LDCs has thus been suggested because this would precisely capture the most responsible, the most capable, and the most vulnerable by including approximately 70% of total emissions as well as 70% of the world population.²³³ Others have even gone further. Most still promote “all major emitters,”²³⁴ which by most accounts would amount to as many as approximately fifteen to twenty parties.²³⁵

A few years ago, a highly influential article proclaimed that the “magic number” that can break the world’s untenable gridlock is “about twenty;” namely, the world’s twenty most polluting nations.²³⁶ Yet others suggest action within already existing architectures such as the MEF, G20, APP, OECD, the WTO, and even the United Nations Security Council. The number of parties of a climate agreement under the auspices of these groups would supposedly be coterminous with their general membership. The relevance of these architectures to the climate change discourse is analyzed below.

Some experts list *criteria* for membership, not actual numbers. For example, one source promotes a club consisting

232. *Id.* at 15–16.

233. *Id.* at 17.

234. See generally Obold et al., *Impressions from Durban: COP-17 and Current Climate Change Policies*, 23 *COLO. J. INT’L ENVTL. L. & POL’Y* 389 (2012); Bausch & Mehling, *supra* note 20; Eckersley, *supra* note 147, at 16 (“Whatever criteria is employed to judge capacity and responsibility, the major emitters tend to emerge at the top of the list.”).

235. See, e.g., Bausch & Mehling, *supra* note 20, at 132; Naim, *supra* note 12.

236. Naim, *supra* note 12.

of “all [the] major current and future emitters and participants who have the firm political will to act swiftly to achieve the 2°C goal and a common vision on how to achieve this,”²³⁷ but recognizes that no venue or group of nations currently fulfills all these criteria. Precisely for that reason we must stop the rhetoric that perpetually and almost stubbornly promotes ideas that are academically appealing, but practically unrealistic. Whatever the exact number, this much is clear: much could be accomplished by focusing more on the true climate change culprits rather than making everyone pay the price for a problem predominantly caused by only a few handfuls of states. Further, only a limited number of states have the actual capability to pioneer the technological innovation relevant to climate change.²³⁸ A pragmatic solution with many fewer participants than what is currently promoted in academic circles is warranted.

Exactly who are the “major emitters” so frequently referred to in the climate discourse? This will be examined next.

B. *The World’s Current Top Twenty Emitters*

The following were the world’s top twenty emitters in 2010 measured in million metric tons of carbon dioxide equivalent (“MtCO₂e”).²³⁹ The total global amount of MtCO₂e was 44,542.²⁴⁰

237. Bausch & Mehling, *supra* note 20, at 132.

238. McGee, *supra* note 13, at 11–12.

239. WORLD RESOURCES INST., <http://cait2.wri.org/wri/Country%20GHG%20Emissions?indicator=Total%20GHG%20Emissions%20Excluding%20LUCF&indicator=Total%20GHG%20Emissions%20Including%20LUCF&year=2010&sortIdx=0&sortDir=desc&chartType=> (last visited Aug. 4, 2013).

240. *Id.*

Rank	Country	Total GHG emissions excluding land-use change and forest activities (“LUCFs”) (in MtCO₂e)	Total GHG emissions including LUCFs (in MtCO₂e)	Percent of world total (without LCUFs)
1	China	10,385	10,081	23%
2	USA	6,866	6,775	15%
3	EU (27)	4,918	4,823	11%
4	India	2,326	2,304	5%
5	Russia	2,326	2,317	5%
6	Brazil	1,162	2,136	3%
7	Germany	926	926	2%
8	Indonesia	823	1,170	2%
9	Iran	727	727	2%
10	Canada	726	726	2%
11	Mexico	688	706	2%
12	South Korea	678	679	2%
13	United Kingdom	627	626	1%
14	Australia	587	736	1%
15	South Africa	560	560	1%
16	France	545	532	1%
17	Saudi Arabia	542	542	1%
18	Italy	515	497	1%
19	Spain	408	393	1%
20	Ukraine	390	383	1%
	<i>Top ten total</i>			70%
	<i>Top twenty total</i>			82%

Developing nations account for 60% of total global GHG emissions.²⁴¹

C. National Standpoints on International Climate Change Action

One thing is what we as scholars think “should” be done at the supranational level. Quite another is what nations are actually willing to do. Thankfully, a turning point in the rhetoric among some key parties in relation to their national and international commitments gives reason for optimism that some parties will finally agree on effective action against climate change. So what do some of the most relevant nations *themselves* have to say about their stance on this issue? In the following, the stance of, for brevity, the five currently largest emitters is analyzed.

1. The United States

So far, the United States has never ratified any internationally legally binding climate change agreement.²⁴² In 2009, President Obama “pledged” to reduce the total US emissions by 17% below 2005 levels by 2020.²⁴³ The target was not ratified by the Senate.²⁴⁴ The country is, however, approximately halfway to meeting this target.²⁴⁵

In the summer of 2013, President Obama announced his domestic Climate Action Plan (“Action Plan”), which also gave several indications of what may be expected from the United States in relation to *international* climate change efforts. Among other things, the President called for “multilateral engagement” on climate change and promised to “lead international efforts” to combat the threat of climate change.²⁴⁶ The United States

241. Mitchell, *supra* note 7.

242. JAPAN TODAY, <http://www.japantoday.com/category/world/view/obama-wins-praise-abroad-for-climate-change-goals> (last visited Aug. 4, 2013).

243. Karl Ritter, *UN Climate Boss: No Support for Tough Climate Deal*, ASSOCIATED PRESS (Nov. 30, 2012), available at <http://news.yahoo.com/un-climate-boss-no-support-tough-climate-deal-123816100.html>.

244. JAPAN TODAY, *supra* note 242.

245. Michael Casey, *US Defends 'Enormous' Climate Efforts at UN Talks*, ASSOCIATED PRESS (Nov. 26, 2012, 3:19 PM), <http://finance.yahoo.com/news/us-defends-enormous-climate-efforts-un-talks-141052070—finance.html>.

246. CLIMATE ACTION PLAN, *supra* note 2; Press Release, White House, Office of the Press Sec’y, Fact Sheet: President Obama’s Plan to Cut Carbon Pollution (Jun. 25,

“commit[ed] to expanding major new and existing international initiatives including bilateral initiatives with China, India and other major emitting countries.”²⁴⁷ The United States’ promise to push for a global climate treaty in negotiations under the UNFCCC.²⁴⁸ Accordingly, in a speech announcing the publication of the Climate Action Plan, President Obama stated that:

Four years ago, in Copenhagen, every major country agreed, for the first time, to limit carbon pollution by 2020. Two years ago, we decided to forge *a new agreement beyond 2020* that would apply to all countries, *not just developed countries*. What we need is an agreement that’s ambitious—because that’s what the scale of the challenge demands. We need an *inclusive agreement*—because every country has to play its part. And we need an agreement that’s *flexible*—because different nations have different needs.²⁴⁹

Of course, the US Senate would have to advise and consent to American participation in an international climate change treaty. With the persistent Congressional gridlock in relation to a wide range of issues, it may be that the President’s above statements are simply an expression of hope in an attempt to give direction of what truly should happen rather than what is actually likely to happen. This is especially troublesome given the fact that the new treaty has been slated to take effect in 2015, mere months away. Further, the President also disappointed some environmentalists with his January 2014 State of the Union address in which he touted his “all-of-the-above” energy strategy, which includes “oil and natural gas production.”²⁵⁰ As has been said, “[i]t is time to implement a different strategy focused on

2013), <http://www.whitehouse.gov/the-press-office/2013/06/25/fact-sheet-president-obama-s-climate-action-plan>.

247. *Id.*

248. CLIMATE ACTION PLAN; Avery Fellow, *President’s Climate Plan Said to Signal U.S. Action on Ambitious 2015 Agreement*, ENERGY & CLIMATE REP. (BNA), at 1 (June 25, 2013).

249. President Barack Obama, Remarks by the President on Climate Change, Office of the Press Sec’y (Jun. 25, 2013), <http://www.whitehouse.gov/the-press-office/2013/06/25/remarks-president-climate-change>.

250. President Barack Obama, State of the Union 2014 Address, *available at* <http://www.politico.com/story/2014/01/state-of-the-union-2014-speech-transcript-text-video-102763.html>.

developing the ‘*best of the above:*’ solar, wind, renewables.”²⁵¹ On the other hand, although federal climate legislation collapsed in the Senate in 2010 and although the Senate currently also appears unwilling to adopt a climate treaty, one can hope that the string of severe weather events of recent months in combination with the amount of sound economic and scientific information calling for climate change action could cause a watershed either under the current administration or shortly thereafter. A tipping-point effect could happen among US lawmakers, even though political interests unfortunately still seem too solidly entrenched to facilitate Senate treaty ratification in the near future.

As for *who* the United States sees as crucial members of a possible new agreement and how inclusive a new agreement may have to be, President Obama has previously refused to agree to any solution that does not include China and India.²⁵² The Action Plan laments the fact that these two parties, as well as “Brazil and other emerging economies,” did not have binding obligations under the Kyoto Protocol.²⁵³ The Plan also cites the fact that at the 2009 Copenhagen COP 15, “President Obama and other world leaders agreed for the first time that all major countries, whether developing or not, would implement targets or actions to limit greenhouse emissions.”²⁵⁴ This is a positive. Emerging economies are considered unlikely to join a new climate regime if they do not believe that the historically largest polluters will shoulder the majority of the burden.²⁵⁵ As for the American call for what appears to be a very broad agreement (“every country has to play its part”), time will have to tell whether the United States will be unwilling to accept a less inclusive agreement or whether the above is a rhetorical starting position for the upcoming international negotiations, which sophisticated negotiators know will have to include a certain amount of compromise.

251. Email from Trip Van Noppen, Earthjustice, to members, (January 29, 2014, 4:27 PM) (emphasis in original) (on file with author).

252. See, e.g., Obbold et al., *supra* note 234, at 394.

253. CLIMATE ACTION PLAN, *supra* note 2, at 21.

254. *Id.*

255. O'BRIEN & GOWAN, *supra* note 15, at 14–15.

In early part of 2013, the United States reached what is seen by the President and others as a crucial agreement with China to jointly phase down the nations' production and consumption of hydrofluorocarbons ("HFCs").²⁵⁶ The reduction of HFCs is crucial to climate change mitigation and thus potentially a good sign for future mutual agreement between these two nations. As noted by King:

This is not a historic climate deal that will prevent the world from smashing 2°C warming, nor will it lay the foundations for long-term low carbon growth. [But the] agreement does allow both countries to say they are taking dynamic and firm action to address the causes of climate change—which isn't strictly accurate—and leverage control at UN talks crying out for national leadership.²⁵⁷

Although not a groundbreaking agreement from a substantive point of view, the US–China HFC deal does indicate that these nations' current negotiators are able to reach consensus and close an important deal, which is at least somewhat promising from a procedural point of view and an improvement on the previous complete inaction in bilateral MEAs between these two nations. But of course, more than mere rhetoric is needed, and time will have to tell if this can be obtained. The “on-again, off-again” nature of climate change talks between the United States and China is cause for some concern as to the true intent of these two nations. Nonetheless, hope must be maintained that they can, soon, come to an agreement in this area.

2. China

The Twelfth Chinese Five-Year Plan of 2011 sets binding targets to reduce energy consumption per unit of GDP by 16%, cut CO₂ emissions per unit of GDP by 17%, and raise the

256. Amena Saiyid & Daniel Pruzin, *U.S. China Agree to Collaborate to Phase Down Hydrofluorocarbons*, ENERGY & CLIMATE REP. (BNA) (June 10, 2013); see also President Barack Obama, Remarks by the President on Climate Change, Office of the Press Sec'y (Jun. 25, 2013), <http://www.whitehouse.gov/the-press-office/2013/06/25/remarks-president-climate-change>; Ed King, *US and China HFC Deal Needs Climate Health Warning*, RTTC.ORG, <http://www.rtcc.org/us-and-china-hfc-deal-needs-health-warning/>.

257. King, *supra* note 256.

proportion of non-fossil fuels in the overall primary energy mix to 11.4%.²⁵⁸ Although China was the biggest CO₂ polluter in 2012, the nation “still posted one of its lowest increases in a decade, thanks to efforts on renewables deployment and efficiency gains.”²⁵⁹ China is planning emissions caps for existing and new industrial facilities in forty-seven major cities in nineteen provinces,²⁶⁰ and has made progress toward reducing its overall emissions.²⁶¹

Internationally, China officially maintains its position of not undertaking any *total* emissions reductions, but rather only GDP-bound commitments. As for the Chinese position on international obligations, China maintains that “rich nations” “should become part[ies] to an extended Kyoto Protocol—an emissions deal for some industrialized countries that the Americans long ago rejected—or at least make ‘comparable mitigation commitments.’”²⁶² Not surprisingly, China promotes the principle of CBDR.²⁶³

According to Lord Stern, “[l]eadership from US and China is absolutely fundamental.”²⁶⁴ This is so because together, the two nations account for a very large share of the global CO₂ emissions (close to or, in one estimate, more than 40% of CO₂ emissions).²⁶⁵ In April 2013, China and the USA increased cooperation significantly in a Climate Change Working Group aimed at taking “forceful” action against climate change.²⁶⁶ In a joint statement, the nations agreed that they realize that climate change “threatens our economic livelihoods and our security” and that they have thus “elevated this issue in our bilateral

258. NAT'L DEV. & REFORM COMM'N, CHINA'S POLICIES AND ACTIONS FOR ADDRESSING CLIMATE CHANGE 2 (2012), available at <http://qhs.ndrc.gov.cn/zcfg/W020121122588539459161.pdf>.

259. Mitchell, *supra* note 7.

260. Michael Standaert, *China's Environment Ministry Plans Emissions Caps for Industrial Facilities*, DAILY ENV'T REP. (BNA) (Mar. 12, 2013).

261. Obold et al., *supra* note 234, at 393–94.

262. Casey, *supra* note 245.

263. Obold et al., *supra* note 234, at 393.

264. Anthony Adragna, *2013 Offers World's Best Opportunity for Broad Climate Action, British Economist Says*, INT'L ENV'T REP. (BNA) (Apr. 10, 2013).

265. Andrea Vittorio, *U.S.-China Discussions Could "Reenergize" Cooperation on Climate, Energy, Analysts Say*, INT'L ENV'T REP. (BNA) (July 8, 2013).

266. Adragna, *supra* note 264.

relationship.”²⁶⁷ Because China has previously been very recalcitrant towards binding climate change action, this marks a “big initial step” forward on climate action.²⁶⁸ During COP 19 UNFCCC negotiations, China and India sought use of the phrase “actions” which suggests less binding action than “commitments,” which the United States and European Union preferred.²⁶⁹ The parties reached a compromise agreement using the term “contributions.” Although not overly promising, it is at least an improvement over previous Chinese unwillingness to adopt any language indicating any type of legally binding requirements. This move in the right direction may have a desirable ripple effect as India has also indicated its willingness to be flexible, while Brazil has taken the cue from China.²⁷⁰ Crucially, experts predict that “[o]ther holdouts will jump on” and that an eventual international agreement can be reached.²⁷¹

Although executive agencies do not speak for the international intent of their national governments, both the State Environmental Protection Agency of China and the United States Environmental Protection Agency have also indicated the potential for what may come as follows:

The goal of [a 2012] joint United States (U.S.) and China strategy is to enhance the effectiveness of *collaborative efforts* to reduce the emissions intensity (air pollution and greenhouse gases) of China’s rapidly growing economy. Implementation of the *joint strategy* is intended to address China’s severe local and regional air pollution problems and reduce emissions that contribute to transboundary air pollution, as well as regional and *global climate impacts*.²⁷²

267. *Id.*

268. Amena H. Sayid et. al., *supra* note 256.

269. Reed Landberg & Alex Morales, *China, India Split with Other Developing Countries over Wording in UN Summit Text*, INT’L ENV’T REP. (BNA) (Nov. 25, 2013).

270. *Id.*

271. *Id.*

272. U.S. Envtl. Prot. Agency, Strategy for Clean Air and Energy Cooperation Between the Environmental Protection Agency of the United State of American and the State Environmental Protection Administration of the People’s Republic of China (2004) (emphasis added), *available at* http://www.epa.gov/oia/regions/Asia/china/2004_sca_eng.pdf.

Of course, the concern remains whether sufficient and legally binding action is likely to be forthcoming from China or whether the nation is, in fact, continuing to stall progress with empty rhetoric. The same could, however, be said for the United States. But hopefully these two parties will, in the nick of time, realize the advantages of and necessity for mutually binding action on climate change.

3. The European Union

The European Union's current legally binding goal is for the region to reach 20% GHG reductions from 1990 levels by 2020, a 20% share of total energy for renewable energy, and voluntary target to increase energy efficiency by 20% by 2020—the so-called “20 by 20”.²⁷³ The European Union has additionally offered to increase its emissions reduction to thirty percent by 2020 if other major emitting countries in the developed and developing worlds commit to undertake their “fair share” of a global emissions reduction effort.²⁷⁴ For the long term, EU leaders have endorsed the “objective” of reducing Europe's greenhouse gas emissions by 80–95% compared to 1990 levels by 2050 as part of efforts by developed countries as a group to reduce their emissions.²⁷⁵ A potential new goal of 40% reduction by 2030 has been announced, which would be consistent with an aim for the bloc to cut emissions 80–95% by 2050.²⁷⁶ However, this goal is an overall regional goal that does not impose national targets. Some consider this “likely to be much harder to enforce.”²⁷⁷ The European Parliament is likely to proceed on this issue after elections in May 2014.²⁷⁸ The European Union is on track towards meeting its targets for

273. *The EU Climate and Energy Package*, European Comm'n, http://ec.europa.eu/clima/policies/package/index_en.htm (last visited Aug. 4, 2013).

274. *Id.*

275. *What is the EU Doing About Climate Change?*, EUROPEAN COMMISSION, http://ec.europa.eu/clima/policies/brief/eu/index_en.htm (last visited Aug. 4, 2013).

276. Stephen Gardner, *European Union to Aim for “Understanding” on Bloc's 2030 Climate Goal by Mid-2014*, INT'L ENV'T. REP. (BNA) (July 17, 2013); Stephen Gardner, *European Commission Proposes Binding EU 40 Percent Greenhouse Gas Cut by 2030*, INT'L ENV'T. REP. (BNA) (January 22, 2014).

277. Stephen Castle, *European Union Proposes Easing of Climate Rules*, N.Y. TIMES, January 23, 2014.

278. *Id.*

2020.²⁷⁹ EU emissions recently fell partly due to contracting economies, but also due to extensive renewable energy usage.²⁸⁰

Supranationally and regionally, the European Union is pressing for an agreement that is “ambitious, comprehensive and legally binding.”²⁸¹ According to Climate Action Commissioner Connie Hedegaard: “The direction for Europe has been set. If all other regions were equally ambitious about tackling climate change, the world would be in significantly better shape.”²⁸² The European Union is *not* asking developing nations to commit to absolute emission reductions, but makes it known that they would be expected to begin reducing their growth of emissions, and to commit to emissions reductions after 2020.²⁸³ According to the Union, all major developing countries should commit to reductions of 50% over 1990 levels by 2050.²⁸⁴ Emerging economies must form part of a new agreement and are unlikely to buy into a new set of targets if left out of the conversation.²⁸⁵ But this does not mean that the heaviest part of the burden will not have to be pulled by the developed world.

4. India

India’s stance on both national and international climate change efforts is outdated and unimpressive, although the nation has made some progress toward reducing national emissions.²⁸⁶ In 2008, Prime Minister Manmohan Singh released India’s first National Action Plan on Climate Change outlining existing and future policies and programs addressing climate

279. *EU Greenhouse Gas Emissions and Targets*, EUROPEAN COMMISSION, http://ec.europa.eu/clima/policies/g-gas/index_en.htm (last visited Aug. 4, 2013).

280. Mitchell, *supra* note 7.

281. *The EU Climate and Energy Package*, *supra* note 273.

282. Press Release, European Commission, 2030 Climate and Energy Goals for a Competitive, Secure and Low-carbon EU Economy (Jan. 22, 2014), *available at* http://europa.eu/rapid/press-release_IP-14-54_en.htm; Gardner, *supra* note 276.

283. Jutta Brunnee, *Europe, the United States, and the Global Climate Regime: All Together Now?*, 24 J. LAND USE & ENVTL LAW 1, 19 (2008).

284. *Id.* at 19–20.

285. UN FOUNDATION, *supra* note 78.

286. Obold et al., *supra* note 234, at 394.

mitigation and adaptation.²⁸⁷ The plan identifies eight core “national missions” running through 2017.²⁸⁸ Only the eighth addresses international action involving India, but still only references a “knowledge group” working with the global community in research and technology development by collaboration through “different mechanisms.” India has stated that it “[w]ill meet our obligations under the UNFCCC,”²⁸⁹ which, however, included no exact or legally binding commitments on the nation. India continually invokes the CBDR principle and has issued no promising international action indicators recently.

5. Russia

The Climate Doctrine of the Russian Federation (the “Doctrine”) represents Russia’s public policy on climate change both within national borders and the international arena.²⁹⁰ Russia recognizes climate change as a security threat and “focuses its efforts on lowering [] anthropogenic GHG emissions,”²⁹¹ but mentions no hard numbers. Instead, the Doctrine vaguely cites to the “necessity to take climate change into consideration as one of the major long-term elements of the security of the Russian Federation and to put the problem of global climate change, both in its national and international dimensions, among the Russian Federation’s policy

287. CTR. FOR CLIMATE & ENERGY SOLUTIONS, SUMMARY: INDIA’S NATIONAL ACTION PLAN ON CLIMATE CHANGE, (2008), <http://www.c2es.org/international/key-country-policies/india/climate-plan-summary>.

288. *Id.* These are (1) increasing solar energy’s share of total energy mix, implementation of energy, (2) implementation of energy efficiency measures, (3) sustainable urban planning and renewal, (4) optimization of water use efficiency, (5) 33% afforestation goal, (6) enhancing India’s ecosystem services, (7) making agriculture more resilient to climate change, (8) establishing a National Mission on Strategic Knowledge of Climate Change whose aim is to work with the global community in research and technology development by collaboration through different mechanisms.

289. *National Mission on Strategic Knowledge for Climate Change*, GOV’T OF INDIA, DEP’T OF SCI. AND TECH., MINISTRY OF SCI. & TECH., 5 (August 2009) <http://www.environmentportal.in/files/Strategic%20knowledgeMission-09.pdf>.

290. *Climate Doctrine of the Russian Federation*, President of Russia, Official Web Portal (Dec. 19, 2009), <http://archive.kremlin.ru/eng/text/docs/2009/12/223509.shtml>

291. *Id.* §§ 9, 23.

priorities.”²⁹² As for international action, the Doctrine only recognizes the need for “international equal partnership actions of the Russian Federation in the framework of international . . . projects concerning climate change.”²⁹³

In December 2012, a presidential order called for the creation of an “interdepartmental taskforce on issues of climate change and sustainable development.”²⁹⁴ At its first meeting in 2013, the task force “looked into issues of interdepartmental cooperation in implementing the decisions of the [COP 18 in Doha in 2012] as well as possible measures for stimulating the reduction of man-made greenhouse gas emissions in the Russian Federation.”²⁹⁵ The COP 18 extended the Kyoto Protocol until 2020, but limited it to only the European Union and eight other industrialized nations that signed up for binding emissions cuts by 2020.²⁹⁶ These represent about 15% of global emissions.²⁹⁷ The temporary agreement suffers from the lack of participation of key industrialized nations and emerging nations such as, among others, Russia. During the negotiations, Russia also appeared to attempt to stall progress by calling into question the voting rules. Russia insists on the continuation of consensus voting, which is not a good sign for climate action under the UNFCCC umbrella, at least until smaller, yet procedurally effective, clubs are formed. That would make it easier to reach the consensus insisted upon by Russia, unless by “consensus” Russia means by all current UNFCCC parties. Unfortunately, this may be the case.

The most significant problem in relation to Russia’s interest in taking action *against* climate change is probably that the nation does not see climate change as purely a negative, in fact, quite the opposite: Russia’s Climate Change Doctrine—only four years old—lists seven negative effects of climate change, but

292. *Id.* prmb.

293. *Id.* § 7.

294. *Meeting of Interdepartmental Taskforce on Issues of Climate Change and Sustainable Development*, President of Russia, Executive Office, March 13, 2013 <http://eng.state.kremlin.ru/administration/5111>.

295. *Id.*

296. Louise Gray, *Climate Change Deal Agreed at Doha Talks*, TELEGRAPH (U.K.) (December 8, 2012), <http://www.telegraph.co.uk/earth/environment/climatechange/9731933/Climate-change-deal-agreed-at-Doha-talks.html>.

297. Gray, *supra* note 256.

also four positives.²⁹⁸ Additionally, Russia relies on its better ability to adapt to climate change “compared with many other countries and regions of the world” because of its vast territory, substantial water resources, and relatively low population in areas particularly vulnerable to climate change.²⁹⁹

The above unfortunately indicates that Russia is unwilling to take imminent and internationally binding action against climate change. The advantage of a narrowed regime complex is that other nations can still forge a viable new agreement even without Russia. After all, the nation only accounts for 5% of global emissions. For sure, the democratically best solution would be for Russia to form part of a new climate agreement, but there is no need *not* to go ahead just because of Russia’s persistent and egotistical “bad boy” behavior towards climate mitigation.

D. *New Constellation Options*

Who, then, are the actors that are the most likely to agree on joint action that would be at least somewhat effectual from a scientific point of view, but more importantly, likely to spur even further international agreement?

1. The Magic Number is Three

Parties that are considered key to the substantive issue at hand are also widely considered procedurally necessary to its solution.³⁰⁰ The United States is very widely considered one of the major parties—if not *the* key party—in the climate change context. The United States is the world’s historically largest emitter, the world’s largest economy and, quite simply, a key player in a great variety of international contexts. The United States played key roles in the development of the Atlantic Treaty System, the North Atlantic Fur Seal Treaty, the Montreal Protocol, and, of course, in the US-Japan telecom agreement. It

298. The negative effects cited to include higher mortality rates, increased health risks and ecological balance upsets, see Climate Doctrine of the Russian Federation, *supra* note 290, § 27. The positives listed are decreased energy consumption, improved Arctic freight hauling conditions, increased “cattle breeding efficiency” and increased forestry efficiencies, *see id.* § 28.

299. *Id.* § 29.

300. O’BRIEN & GOWAN, *supra* note 15, at 14.

was among the founding members of the WTO, OECD, and the G6, which morphed into the G7, G8, G8+5, and now the G20. It is indeed unthinkable that a new climate treaty would exclude the United States and still be considered supranationally successful. Fortunately, the US President has finally indicated an interest in joining an international regime complex, as shown above.

In international discussions, China is approaching the same level of importance as the United States in the development of a new climate agreement or even surpassing it. As shown, the United States continually refers to China in its rhetoric pertaining to the parties necessary for the adoption of an agreement. As demonstrated, Sino-American relations in climate change contexts, specifically the important new HFC agreement, have been improving. There are grounds for cautious optimism that these two key nations will be able to agree on some climate change action in the not too distant future, although US-Sino relationships outside the climate context still appear to be volatile and unpredictable. Treaty-making precedent clearly shows that once bilateral action is taken, this typically spreads progressively to multilateral action. This is exactly what is needed in the current climate context.

As for India, not much, if anything, indicates that India is capable of or willing to join any kind of international treaty regime any time soon. This is unfortunate, but is India a crucial party? The United States often refers to the nation in statements regarding the new climate regime complex, but does that necessarily mean that the United States would not adopt a new agreement just because India was not a party if, for example, the European Union, China, Brazil, or other important parties joined a new regime? That question must be answered elsewhere or by history, but this much is sure: the United States is currently still bargaining from a position that includes India. However, as a sophisticated and highly experienced party to international negotiations and compromises, the United States may well agree to leave India out of a future agreement if other key emerging economies joined.

One such party could be Brazil. In the energy and climate contexts, this country presents several unique conundrums: more than 45% of Brazil's energy comes from renewable

sources, compared to only 6.7% for OECD countries.³⁰¹ Between 2005 and 2009, Brazil was able to reduce its GHG emissions by approximately 25%; the largest reduction ever recorded and mainly due to a remarkable fall in Amazonian deforestation.³⁰² Brazil is ranked one of the five countries with the largest potential to reduce emissions by 2030.³⁰³ But Brazil is becoming increasingly carbonized and is the only important economy in the world in which there has been a recent *increase* in carbon intensity if deforestation is not taken into account.³⁰⁴

Brazil has so far considered climate change to be primarily an international relations and not a domestic issue.³⁰⁵ This helped divert attention from other pressing issues such as local land distribution and use issues.³⁰⁶ But climate change has gained much political ground and is now central to the modern Brazilian political context.³⁰⁷ Most notably, law number 12.187 from 2010 adopts Brazil's voluntary national greenhouse gas reduction target of between 36.1% and 38.9% of projected emissions by 2020 with a baseline of 2005.³⁰⁸ Another aim is to reduce the rate of de-forestation by 70% by 2017, which would decrease greenhouse gas emissions by 4.8 billion tons.³⁰⁹ In the international context, Brazil endorses the 2°C goal, supports CBDR, and has traditionally opposed binding reductions targets for non-Annex I countries including major emerging economies, at least until 2020.³¹⁰ Instead, Brazil has suggested that only industrialized countries agree to reduce emissions by 40% by 2020.³¹¹ However, Brazil has recently been pushing in

301. Mikael Román & Marcus Carson, *Shifting Ground: Brazil Tackles Climate Change and Deforestation, but Rapid Growth, Energy Needs Undermine Process*, STOCKHOLM ENVIRONMENT INSTITUTE (2010) 1, 1 available at <http://www.sei-international.org/mediamanager/documents/Publications/SEI-PolicyBrief-ShiftingGroundBrazil-2010.pdf>.

302. Viola, *supra* note 11, at 3.g

303. Román & Carson, *supra* note 301, at 1

304. Viola, *supra* note 11, at 4.g

305. Román & Carson, *supra* note 301, at 1

306. *Id.* at 2.

307. *Id.* at 1–2.

308. CLIMATE POLICY WATCHER, <http://www.climate-policy-watcher.org/?q=Brazil>; WORLD RES. INST., <http://www.wri.org/stories/2010/03/brazils-global-warming-agenda>; Viola, *supra* note 11, at 5.

309. CLIMATE POLICY WATCHER, *supra* note 308.

310. See Román & Carson, *supra* note 301, at 3; see also Viola, *supra* note 11, at 6.

311. Román & Carson, *supra* note 301, at 3.

favor of some kind of commitments from non-Annex 1 countries starting in 2020.³¹² In the UN context, Brazil has so far negotiated in an alliance with emerging countries with an energy matrix heavily dependent on fossil fuels (South Africa, India, and China, the so-called “BASIC” alliance).³¹³ But importantly, “Brazil . . . [is] trying to diminish the distance between the position of the European Union and the other BASIC countries, particularly trying to persuade China and India of the need to be more flexible and trying to make the American position more flexible.”³¹⁴ The real issue is thus,

for how long [] Brazil [will] maintain the recently created imbalance between the domestic climate change policy with reduction targets and the alliance with the more conservative emerging powers like China, Russia and India. Given the interests and relative power of different economic sectors and the dynamics of the public opinion, it is probable that this imbalance will not last long, and the Brazilian position will tend to converge with the more advanced EU, Japan and South Korea.³¹⁵

The European Union consistently positions itself as in favor of multilateralism, international law, and binding international obligations.³¹⁶ Accordingly, it heavily promotes far-reaching, international measures to combat climate change and has consistently done so for some time. There exists a marked EU “desire [for] . . . the creation of an ‘elite-driven, treaty-based, legal order,’ a supranational political entity dedicated to respect for human rights and the rule of law.”³¹⁷ Modernly, human rights are considered to comprise environmental law and rights as well.³¹⁸ It is, in short, clear that the European Union remains

312. Viola, *supra* note 11, at 6.

313. *Id.* at 5–6.

314. *Id.* at 6.

315. *Id.* at 9.

316. Brunnee, *supra* note 283, at 30.

317. *Id.* at 30. Brunnee also cites to other potential reasons behind the European Union’s strong motivation for a continuation of the Kyoto Protocol and the adoption of a future treaty such as the desire to cast the European Union as not only an “anonymous” bureaucracy, but a purposive and influential international player.

318. See, e.g., Myanna Dellinger, *An Unstoppable Tide: Creating Environmental and Human Rights Law from the Bottom Up*, 15 *OR. REV. INT’L L.* 63 (2013).

a strong advocate of a treaty-based solution to climate change.³¹⁹ For these and other reasons, the European Union is arguably the most serious and also one of the world's most crucial parties to the adoption of a legally binding international solution. All indicators point towards the European Union's willingness to be flexible in the upcoming work to be done and to adopt, if not just "any" international solution, then certainly one with a range of different constellation options, as long as these included substantively effective goals.

Although the United States and the European Union still have some differences regarding the size of the GHG emissions reductions goals required for an effective solution, who should undertake these, which of the emerging economies should form part of a possibly renewed agreement, and what funding should be provided to these, there can be no serious dispute that if a breakthrough happened in relation to, most crucially, the Chinese position on climate change, the European Union and the United States would most likely be able to come together on these issues. Both parties have serious international clout. Examples abound of their mutual cooperation in many other financial, scientific, technical, and territorial contexts. They would, in all likelihood, be able to agree on climate change as well.

Thus, a minilateral constellation for a new climate change regime could look like this: the United States is a necessary key player. But even without the United States, the European Union will very likely join a new treaty. Both the United States and the European Union call for the inclusion of at least some players from the Global South that are willing and able to undertake at least some legally binding action. China seems to be the party that the United States and European Union most frequently have in mind, and has indeed very recently indicated some willingness to proceed with an agreement with at least the United States, albeit the extent of these intentions still remains unclear at this late stage. However, a trilateral union may not be sufficiently broad for the United States and European Union;

319. As recently as in January of 2014, EU Climate Action Commissioner Connie Hedegaard stated that "the direction for Europe has been set" and encouraging other nations to follow suit. Gardner, *supra* note 276.

the world's de facto drivers of action. Historical treaty contexts and climate negotiations show that at least one more major emerging economy may be required. This could be India *or* Russia, but they both appear unwilling to take any legally binding and substantively effective action anytime soon. Thus, “new kid on the block” Brazil could soon overtake the previous relevance of these two nations in this context. Indeed, Brazil itself now promotes commitments by developing nations and is shifting its negotiation position towards a closer alliance with the European Union and the United States, which is highly promising. With Brazil and hopefully other parties, a landslide could finally occur in supranational negotiations.

Accordingly, the “magic number”—to recall, “the smallest possible number of countries needed to have the largest possible impact on solving a particular problem” or at least instigating crucial action towards a resolution—is, in the climate change context, three: the United States, the European Union, and China. This constellation would account for 49% of the world's total GHG emissions. And with Brazil as an increasingly likely fourth player, 52% of global GHGs would be accounted for. Scientifically, this is arguably not a high enough percentage to solve the ultimate problem, but as the above analyses show, broader multilateral action can be derived progressively from narrower beginnings, so even a coalition of “just” three or four initial parties may be enough. For example, in the case of the Seal Treaty, four major economic and population powerhouses who used and financially benefitted from the disputed resource were enough for a successful resolution. Of course, differences between the two situations exist, but this much is clear: international agreements start somewhere. So far, the international community has gained literally nothing from attempting the broadest possible solution; near-global treaty participation. It may well be that Denmark, after all, had a good point in its 2009 Copenhagen “Danish Solution” to narrow the constellation of participating countries very significantly and to seek entirely new commitment and financing solutions. But where that solution went wrong was that it did *not* include the truly key parties, but rather only included the United States, the European Union, and Denmark itself. Such a constellation will not work. The above one will.

Some have mentioned the possibility of the five permanent members of the UN Security Council forming a climate coalition. Advantageously, this would include the major climate powerhouses of Russia, the United States, and China. Such a coalition could also advantageously include some developing nations. But France and the United Kingdom—the other Security Council members—would likely negotiate not individually, but from an EU platform. Thus, a solution taking its starting point in a Security Council membership is more likely to include the United States, Russia, China, and the European Union; in other words, again a narrow solution of a small handful of parties. However, a Security Council background is of mainly academic interest, as will be analyzed below.

2. Jury-sized Options

Recall that twelve is a number that is thought to be ideal for meaningful democratic discussion. Recall also that climate rhetoric frequently mentions “the major emitters” by referring to, typically, the ten to twelve nations with the highest GHG emissions. Would a twelve-party solution work? The top twelve nations would include parties currently very willing to take decisive action (the European Union), but also some who are very likely not (India, perhaps Russia). Additionally, it would include parties among whom some current geopolitical friction exists (the United States, Russia, and Iran). But as the ATS demonstrated, agreements on even highly contested issues among rivaling powerhouses can be reached, even in volatile times. The ATS also started with just twelve parties and grew from there. By applying the tactics and theories analyzed above, it could happen again. The top twelve GHG emitters account for a total of 74% of the world’s emissions. It is tempting to think “the more, the better,” but such rhetoric brings with it the problems described above.

Incidentally, the Organization of Petroleum Exporting Countries (“OPEC”) also consists of twelve members. What about calling for them to reach an agreement? After all, oil and gas are major physical sources of the problem itself, so maybe it would not be too much to trace a solution to the actual source in a sort of “strict liability”-based solution. But the organization

consists of nations that are neither committed to climate action nor among the major emitters from a current or historical perspective, which makes this idea unviable.

In some jurisdictions, juries consist of just six members. The top six nations in the climate context—China, United States, European Union, India, Russia, Brazil, and Germany—account for 62% of the problem. However, it is arguably better to base rhetoric on who is the most likely to join an agreement that will have at least some scientific substance to it from the beginning, and, more importantly, that will kick start a situation of broader unilateral constellations or progressive multilateralism rather than simply pick a random number from the top down.

3. Tracks

At bottom, “track” or “tier” solutions simply denote clubs of nations agreeing on certain issues. As mentioned, excellent scholarship already explores such tracks. In this context, it is important to apply a pragmatic approach and examine which options are the most likely to be adopted and lead to further steps or emulation by others, not to discuss who “should” do what. A possible constellation could include the European Union, AOSIS, the LDC, and the African Group as one whose members are the most capable, the most vulnerable, *and*, as a new very important consideration, the most willing to take action (the European Union). Another could cover the United States, European Union, Canada, and Australia as the most capable and most responsible. However, that constellation would comprise no developing nations and is thus problematic. A group consisting of the European Union, China, India, Brazil, and the LDC would include what are currently the most responsible and the most vulnerable, but that constellation does not include the United States and is thus unlikely to make a deep enough impact substantively and, in particular, procedurally.

In theory, constellation options abound. At the end of the day, the crux of the matter is to find workable solutions among *just enough* nations that will pave the way for others to join for a variety of pragmatic, not scholarly, reasons.

III. IS THE UNFCCC STILL "THE ONLY GAME IN TOWN"?; THE "WHERE"

After the lackluster Copenhagen COP 15 outcome, and even before, a wide range of different negotiating platforms and governance architectures have been proposed for future climate change efforts. In addition to the UNFCCC, these typically include the G20, WTO, OECD, the UN Security Council, and even the UN General Assembly. The most relevant of these is arguably still the UNFCCC, occasionally referred to as the "only game in town."³²⁰ This Section will briefly demonstrate the advantages of using this architecture and the supranational consensus that supports doing so before proceeding to an analysis of the relevance of some other forums that may complement the UNFCCC.

A. *The UNFCCC; Back to the Future*

The many advantages of using the UNFCCC umbrella cannot be denied. First, there is arguably no reason to waste precious resources in creating new content from scratch when an existing global framework for action already exists.³²¹ The UNFCCC already has a staff of five hundred and much expertise to address the problem.³²² A new architecture would create the risk of forum shopping. Climate governance would become even more fragmented than it already is. Activities and mandates would overlap, which might create unnecessary redundancies. Tensions would arise as would inconsistencies and potential undermining of one framework by the other; not desirable in periods of already scarce resources and time. A certain amount of competition is healthy in most contexts, but not when there is a risk that attention will focus on the institutional players and processes instead of the underlying problem, as could happen if another climate platform were created. In reality, attempts to

320. J. Jack Ewing, *2015 the New Copenhagen? The UNFCCC Process Risks Falling into Faulty Patterns*, (Jan. 19, 2013), http://www.academia.edu/2479375/2015_the_New_Copenhagen_The_UNFCCC_Process_Risks_Falling_into_Faulty_Patterns; J. Jack Ewing & Gianna Gayle Amul, *2015 the New Copenhagen? The UNFCCC Process Risks Falling into Faulty Patterns* (Jan 2013), <http://www.rsis.edu.sg/nts/HTML-Newsletter/Bulletin/pdf/NTS-Bulletin-jan-2013.pdf>.

321. UN FOUNDATION, *supra* note 78.

322. Bausch & Mehling, *supra* note 20, at 137.

steer action away from the UNFCCC have not succeeded in gaining sufficient political weight to shape the climate agenda.³²³ There is consensus among most, if not all, governments that the appropriate venue for developing the post-2012 climate framework is the UNFCCC.³²⁴ Governments are willing to invest political capital and resources to defend the UNFCCC climate regime against attempts to sideline it.³²⁵ After Copenhagen, this willingness probably decreased somewhat, but it has gained momentum again. Quite simply, the “UNFCCC is the only body that can deliver a comprehensive, legally binding international treaty.”³²⁶ Much indicates that the UNFCCC is, again, if not the only, then certainly the most relevant game in town.

B. *Complementary Forums*

Diverse negotiating platforms within an overall architecture are beneficial to treaty drafting processes in general. In connection with the Montreal Protocol, for example, the parties took advantage of differing forums and working groups as a complement to, but not a replacement of, the main forums.³²⁷ “The use of small, private negotiating platforms in the beginning stages of negotiations was conducive to negotiations on issues that sharply divided coalitions.”³²⁸

Alternative negotiation settings *outside* the UNFCCC umbrella can, as a complement to the UNFCCC, also help move issues to a higher political level and allows parties to explore contentious issues without the pressure of needing to advocate rigid diplomatic positions.³²⁹ Further, they provide an arena for less formal interaction between large emitters that often have diametrically opposed positions.³³⁰ “Fortunately, it no longer appears that any of the major international forums addressing climate mitigation are directly counteracting each other.”³³¹ For

323. *Id.* at 134.

324. Bodansky, *supra* note 203, at 2.

325. Bausch & Mehling, *supra* note 20, at 134.

326. Eckersley, *supra* note 147, at 40.

327. O'BRIEN & GOWAN, *supra* note 15, at 13.

328. *Id.*

329. Bausch & Mehling, *supra* note 20, at 134.

330. *Id.*

331. *Id.* at 133.

completeness, the rest of this Article thus examines the major international forums that could supply alternative climate negotiation opportunities.

1. The UN Security Council and the UN General Assembly

Climate change has long been recognized to have serious security implications. There is a clear nexus to the work of the UN Security Council. A solution by the Security Council itself or even the creation of a new "Climate Council"³³² as a subsidiary organ have been suggested, as has bringing climate change action into the authority sphere of the UN General Assembly.

The above discussion of the general advantages and disadvantages of climate change work in non-UNFCCC forums is relevant here as well, but in particular, climate work negotiations and other action under the UN Security Council in particular might be taken more seriously by the world's nations and thus help break the stalemate that has persisted in this area for more than twenty years. The Security Council has been trialed in regulating non-state actors already. It has more authority—real and perceived—than the UNFCCC. Some of this is obviously coercive by nature, but some recent progressive action under Chapter VII of the UN Charter³³³ resembles law *making* rather than mere enforcement. For example, Resolution 1373, a post 9/11 counterterrorism measure, called on all states to "adjust their national laws" so that they can ratify all existing international conventions on terrorism. Resolution 1540 covers the non-proliferation of weapons of mass destruction ("WMDs"). It requires all member states to "develop and

332. See, e.g., Eckersley, *supra* note 147, at 19. Article 7 of the United Nations Charter allows for this: "Such subsidiary organs as may be found necessary may be established in accordance with the present Charter." U.N. Charter art. 7.

333. Chapter VII of the Charter of the United Nations governs "Action with respect to threats to the peace, breaches of the peace, and acts of aggression." U.N. Charter ch. VII. Article 39 stipulates that "[t]he Security Council shall determine the existence of any *threat to the peace*, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security" U.N. Charter art. 39 (emphasis added). Climate change has been recognized to carry with it an inherent threat to the peace in cases where, for example, large population segments seek to emigrate to unwilling host nations as water resources become more and more scarce or as land in the emigrants' original host nations becomes unlivable or submerged.

enforce appropriate legal and regulatory measures” against the proliferation of chemical, biological, radiological, nuclear, and other WMDs, as well as their spread to non-state actors. Resolution 1308 relates to the impact of AIDS on peace and security. All three of these resolutions are binding on all members without their signature and backed by the possibility of coercive sanctions. In other words, they are examples of veritable international institutional law-making without necessarily having to reach global consensus on a given issue. But all three govern existing, on-the-ground effects with current military implications, which is not yet perceived to be the case with climate change. Although “a small minority of writers believe that there are any legal limits to the discretion of the Security Council in identifying a threat to the peace . . . [most] share the view that the Council’s determination under [Article 39 of Chapter VII] is essentially political”³³⁴ and unlikely to be immediately forthcoming in relation to climate change. In fact, the Council has “not to date shown any great alacrity in identifying environmental threats to the peace.”³³⁵

Expecting the Security Council to act legislatively against climate change involves a “securitization issue,” in other words, “referring to an issue that has hitherto been conceptualized only in political, economic, environmental or other terms as a security threat so as to heighten awareness of the issue and the urgency of taking effective action.”³³⁶ For now, the Council is more likely to react in response to the consequences of climate change rather than addressing the substantive problem itself.³³⁷ Thus, imminent “legislative” action by the Security Council is only a theoretical opportunity. And although, strictly seen, there are no legal limits to the Council’s mandates as long as they revolve around security implications, there are practical limits at issue. In this context, those are the political obstacles presented by members with veto powers potentially having to vote against

334. Shirley Scott, *Climate Change and Peak Oil as Threats to International Peace and Security: Is It Time for the Security Council to Legislate?*, 9 MELB. J. INT’L L. 495, 502 (2008).

335. *Id.* at 503.

336. Shirley Scott, *The Securitization of Climate Change in World Politics: How Close Have We Come and Would Full Securitization Enhance the Efficacy of Global Climate Change Policy?*, 21 RECIEL 221 (2012) (emphasis added).

337. *Id.* at 228.

their own self-interest. As long as they have no interest in taking action against climate change, they are equally unlikely to do so under the Security Council as under the UNFCCC architectures.

What has the Council itself said about climate change? In 2007, the Council had its first debate on the issue. Focus was as much on the appropriate international forum within which to address the problem as on the substantive part of the problem itself.³³⁸ Discussions echoed the general North/South divide, and the G77 and China took a stance against the Security Council being the appropriate forum for climate change action.³³⁹ In a 2011 debate, the Council did not take a position on climate change, but did express concern that security issues would be implicated "in the long run."³⁴⁰ The G77 and the non-aligned movement remained averse to the idea.³⁴¹

Just as the imminently needed action is unlikely to come from the Security Council, it is equally unlikely to stem from the General Assembly. In its first debate on climate change security in 2009, the General Assembly reaffirmed the UNFCCC as the key instrument for addressing climate change.³⁴²

2. The WTO

The nexus between climate change and the WTO is both contextual and financial in nature. As with the WTO, climate change involves issues of increasing international trade and development, both of which lead to rapidly increasing levels of GHG. Climate change has significant global trade and other cross-border economic implications such as national subsidies, border tax instruments, obligations to purchase emission permits, and other measures that may intersect with legally binding WTO rules.³⁴³ Both areas have come to need a supranational regulatory regime for orderliness and, in the case of climate change, even implications involving life and death. The trade regime creates welfare benefits to individual nations.

338. *Id.* at 225.

339. *Id.*

340. *Id.* at 226.

341. *Id.*

342. *Id.* at 225.

343. Recall the "schedules" analysis above and the fact that nations record commitments to the progressive removal of barriers to goods and services.

In contrast, the climate regime governs the global commons and increased *global* welfare, but individual nations taking unilateral action may suffer welfare *losses*.³⁴⁴ These must either be compensated for, or, alternatively, economic “welfare” benefits to acting nations should be established³⁴⁵ in order for sufficiently incentivize these nations. Thus, in climate negotiations, the short-term goals for acting nations are to maintain national welfare and mercantile interests whereas the end goal is to increase global welfare.³⁴⁶

The legal authority of the WTO would be an advantage to the organization also addressing climate change, but significant hurdles present themselves in this context. First, the WTO currently has 159 members and is, as the UNFCCC, consensus-based. Reducing the number of voting parties from 195 (in the case of the UNFCCC) to 159 is unlikely to make the necessary difference in reaching a substantively effective international agreement.

Most importantly, the WTO’s main focus is *trade* issues, not climate change. This situation could, however, change. The rules that enable divergence from the WTO agreement rules (governing trade) are known as “exceptions.” Article XX of the GATT provides that “nothing in this Agreement shall be construed to prevent the adoption or enforcement of measures . . . necessary to protect *human, animal or plant life or health*, and . . . relating to the conservation of *exhaustible natural resources*.”³⁴⁷ There is thus apparent and “squarely applicable” authority for exceptions from the existing trade-focused rules. Nonetheless, Article XX authority has not led to any results of any relevance to climate action so far, and it is unlikely to do so within the next months and years before a new agreement simply has to be adopted to avoid catastrophic effects of climate change.

Alternatively, GATT Article XXI provides that:

Nothing in the Agreement shall be construed to . . . prevent any member from taking any action which it considers

344. Ghosh, *supra* note 130, at 2.

345. *See id.*

346. *See id.*

347. General Agreement on Tariffs and Trade art. XX, April 15, 1994, 1867 U.N.T.S. 187 (emphasis added).

necessary for the protection of its essential security interests . . . (iii) taken in time of war *or other emergency in international relations*; or . . . (c) to prevent any contracting party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.³⁴⁸

Even though Article XXI appears alluringly relevant to climate change seen from an environmental advocacy point of view, application of the Article has been interpreted to require the specific purpose of preserving national security.³⁴⁹ Application of Article XXI to climate change solutions is thus currently a stretch as climate change has not yet actually and demonstrably resulted in any national security implications. There have been no ultimate panel or Appellate Body decisions addressing this exception since the WTO was established in 1995.³⁵⁰ In *US-Imports of Sugar from Nicaragua*, the Panel simply concluded that it was not authorized to examine the reasons for justification under Article XXI and thus unable to determine if the measures in question were defensible.³⁵¹ In other words, even though it could, the WTO is, in reality, disinclined to use its authority to address matters implicating the security of a nation state. The United States would likely also continue to resist this. For example, US officials declined participating in a WTO dispute with the European Union regarding the Cuban Liberty and Democratic Solidarity Act because the “panel lacked competence to adjudicate on a national security issue.”³⁵² Thus, Article XXI is also unlikely to be applied presently, and presently is what is needed in the climate change arena.

3. The G20 and OECD

Scholarship also frequently raises the issue of whether climate change could more advantageously be addressed in smaller economic settings such as the G20 or the OECD.

348. *Id.* art. XXI(b).

349. Felicity Deane, *The WTO, the National Security Exception and Climate Change*, 2 CARBON & CLIMATE L. REV. 149, 155 (2012).

350. *Id.*

351. *Id.* at 155–56; Report of the Panel, *United States–Imports of Sugar from Nicaragua*, L/5492 (Mar. 16, 1983).

352. Deane, *supra* note 349, at 156.

Similar to the climate change problem, the 2008 financial crisis revealed the numerous and severe shortcomings of an existing regulatory system—in that case financial regulations. The crisis spurred international cooperation over these regulatory issues.³⁵³ The G20 stepped in and leaders provided much needed short-term crisis management,³⁵⁴ which is what is needed with climate change as well. Of course, regulations had to be implemented at the national level as the G20 cannot create any legally binding protocols and has few monitoring and enforcement tools.³⁵⁵ But the world became aware that rules had to be created, scrapped, or changed via G20 and other international attention. The need for similarly swift action by “champions,” as with the G20 leaders, is needed in the climate context too.

The advantages of climate action spurred by the G20 platform is that it is more flexible and able to act more swiftly than bigger architectures precisely because it creates no legally binding protocols. If the G20 could instigate action against climate change among its own members, this would be significant, as the G20 nations account for more than 80% of global GHG emissions.³⁵⁶

But significant obstacles exist that make the G20 an unrealistic actor for change. Perhaps most importantly, precisely because the Group is not able to take legally binding action, it is unlikely to be much more than yet another forum for discussions. Legal action is needed, not more discussion forums. Further, strong opposition within the G20 to the Group addressing climate change comes from such formidable and numerous parties as China, India, Russia, Brazil, South Africa, Argentina, Indonesia, and Saudi Arabia.³⁵⁷ This may simply be insurmountable to action within the G20. Apart from the impetus for financial regulatory change after the 2008 crisis, the Group has displayed an unfortunate stagnation in the development of both climate change and economic policies.³⁵⁸

353. O'BRIEN & GOWAN, *supra* note 15, at 16.

354. *Id.* at 19.

355. *Id.* at 18.

356. Viola, *supra* note 11, at 1.

357. *Id.*

358. *Id.*

The G20 has come to suffer from a severe image problem. It is simply not considered significantly important by the international community³⁵⁹ and lacks ultimate, decisive leadership. In the words of Al Gore:

Meetings of the G20 have become little more than a series of annual opportunities for the leaders of its component nations to issue joint press releases [wearing matching outfits] . . . [This resembles] the parable of the child who notices that the emperor has no clothes. Except in this case, the clothes have no emperor.³⁶⁰

If perception is reality, action is unlikely to come from the G20. Thus, efforts would arguably be better spent on addressing climate change within the UNFCCC, which is, as described above, seen globally to be a more appropriate forum for this.

As for the OECD (which problematically does not include China and India among its members), the organization does recognize climate change as a key policy concern for the 21st century, but refers and defers to the UNFCCC for action³⁶¹: “The objective of the work on long-term issues is to investigate how possible policy decisions, including future commitments, may progressively ensure the long term success of the UN Framework Convention on Climate Change.”³⁶²

CONCLUSION

Much climate change discourse centers on misconceptions of almost mythical proportions. This could prove detrimental in treaty negotiation contexts. As scholars, we must stop promoting rhetoric that has proved to lead to literally no substantive results in the climate change context.

For example, one myth is that a solution to climate change is virtually impossible to reach at the supranational level because of the complex science involved and the contested political background among nations. In reality, nations have—as in the

359. *Id.*

360. GORE, *supra* note 192, at 94.

361. *Climate Change*, OECD, <http://www.oecd.org/env/cc/> (last visited March 8, 2014).

362. *Post 2012 Framework and Other Issues*, OECD, <http://www.oecd.org/env/cc/post-2012frameworkotherissues.htm>.

case of the Antarctic Treaty System—been willing to give up positions that were thought to present insurmountable obstacles to an international legal solution at the time in question, even in times of a much more volatile political climate than now (such as the Cold War). As international environmental scholars, we often lament the fact that climate change is not ranked as highly on national agenda as arguably should be the case and worry that this means that no national and thus supranational solution can be found. It does not. Treaty history demonstrates that it is simply not a must that a given problem is ranked very highly on any national political agenda for a solution to still be found. Very frequently, scholars and policy-makers alike cite to national “moral obligations” and what nations “should” do, but sometimes largely ignore the perhaps ugly fact that *money* is typically the main concern, even in the climate negotiation context. Discussing risks and morality has led to virtually nothing so far. Monetary benefits must form a greater part of the rhetoric *and* solution. The Montreal Protocol, for example, presented a difficult technical and scientific background just like climate change does, but a solution was found because, among other factors, nations such as the United States realized the economic benefits to be reaped at the national level from an international solution.

Another major line of thought holds that broadly accepted democratic methods have to be used in the climate negotiation context. This would, of course, be ideal, but reality shows that this too is not a must: some degree of coercion, secrecy, backroom deals, noninclusive voting processes, and small, exclusive clubs have been used—with success—in treaty contexts ranging from the Antarctic Treaty and Fur Seal Treaty processes decades ago to the Copenhagen COP 15 just a few years ago. Granted, it of course took more than just such methods, and some time, to create the needed breakthroughs, but these might very well not have been secured had parties not taken action that might, from an academic point of view, be frowned upon. Realism is different than idealism. Both play important roles in the development of the law, but with climate change, whatever may be able to break the current stalemate situation must be considered seriously because of the urgent nature of the underlying problem.

To be considered successful, a new climate treaty must likely be legally binding and include both developed *and* developing nations. All indicators show that the United States and China are crucial to a new solution. On the one hand, this appears troublesome because of the recalcitrant stance historically taken by both of these parties towards legally binding action at the national and international levels. However, the good news is that both have recently indicated at least some interest in both national and supranational-level action against climate change. Granted, a watershed may have to happen for these parties to ratify a new climate treaty, but with much recent focus on severe weather events, extreme pollution levels and the costs of climate change, one can hope that the United States and China will be willing to join a new treaty if the other considerations outlined above are also taken into account.

One of the most prevalent myths is perhaps that all 195 parties to the UNFCCC or at least "all" major emitters must form part of a new regime complex. Reality shows that focusing on smaller clubs in the beginning phases of treaty development—even just bilateral solutions to start with—can lead to much broader results. For example, even the European Union and WTO started with constellations much narrower than their current ones. What is needed is individual negotiation "champions" and nations that can promote the formation of such clubs in the newly restarted climate change treaty development context. These clubs could and likely would, as part of more progressive multilateralism, lead to the broader international solutions that so many call for. Currently, it makes little sense to continue hoping for very broad solutions, especially those that call for "all" major emitters, as these include highly recalcitrant nations such as India and Russia who still appear unlikely to adopt international solutions, especially in just another year or two. Whether democratically ideal or not, club formation is already well underway under the UNFCCC umbrella as shown by the Copenhagen COP 15 development. Even though not initially successful—in fact quite the opposite—the history of the Copenhagen Accord nonetheless shows how a related base agreement among just five initial nations can develop into a document adopted by more than 140 nations just one year later. This additionally speaks to the

concern that there is no time for narrow solutions now: there is, in fact, no time *not* to take some action even if it is initially not as broad as should have been. The Montreal Protocol, European Union, Antarctic Treaty System, and Seal Treaty contexts analyzed above also broadened fairly rapidly. Legal pragmatism is, in this context, better than legal idealism.

What, then, is the crucial number of nations that is likely to set action in motion that could, finally, have both a substantive and procedural effect? Although successful treaties have in some cases started with mere bilateral agreements, a climate deal is likely to require broader membership. As shown, the European Union is likely to join an agreement between the United States and China or other major developing nations. Recently, Brazil has appeared on the world stage as a potential and highly relevant candidate for a new treaty. Experts predict that if an agreement is reached between the United States, China, or another developing nation, other “holdouts” will join. Thus, the answer to how many nations currently constitute the “critical mass” needed in the climate negotiation arena is three. Such an agreement is most likely to be reached under UNFCCC auspices. However, the UNFCCC framework currently calls for consensus by almost 200 member states, a virtually impossibly large platform for agreement on the issue as long as it remains as narrowly formulated as it has so far. Accordingly, the consensus to be reached by the parties under that regime must, instead, be focused on a solution that allows for a much more tiered and club-based approach as described above. Or perhaps ranks will have to be so completely broken that a separate Protocol for a handful of some nations with a separate Protocol for others is the only legally realistic solution in the very limited amount of time remaining before 2015. Although the UNFCCC remains the most competent architecture for addressing climate change in general, other complementary forums could take steps to egg along the process or, most realistically, provide additional forums for related technical, trade-related, or national security issues.

The last successes of large-scale, international governance date back two decades to the adoption of the WTO and, incidentally, the UNFCCC itself. Since then, not much has been accomplished at a level including literally hundreds of nations.

Solutions that may not be seen as “perfect” may have to suffice when it comes to climate change to get at least some action underway as soon as possible. In other contexts of extreme moral and other importance, compromises have also been reached for the sake of obviously necessary progress. For example, in the words of Thaddeus Stevens, a fierce opponent of slavery and discrimination against African Americans, on the alteration of his original proposal for the 14th Amendment:

Do you inquire why, holding these views and possessing some will of my own, I accept so imperfect a proposition? I answer, because I live among men and not among angels; among men as intelligent, as determined, and as independent as myself, who not agreeing with me, do not choose to yield their opinions to mine. Mutual concession, therefore, is our only resort, or mutual hostilities.³⁶³

Let us hope that nations will avoid mutual hostilities in their upcoming climate change negotiations and instead reach workable solutions before it is too late to avoid truly catastrophic climate change.

363. THADDEUS STEVENS SOCIETY, <http://www.thaddeusstevenssociety.com/Quotes.html> (last visited March 8, 2014).

