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# The Un-Exceptionalism of U.S. Exceptionalism

Sabrina Safrin \*

## ABSTRACT

*This Article challenges the prevailing view that the United States acts exceptionally by examining the insufficiently considered legal exceptionalism of other countries. It puts U.S. exceptionalism in perspective by identifying European exceptionalism as well as noting developing country exceptionalism, pointing to the exceptional rules sought by the European Union and by developing countries in numerous international agreements and institutions. It argues that most nations seek different international rules for themselves when they perceive themselves to have an exceptional need. Indeed, in cases of exceptional need, numerous countries believe themselves entitled to exceptional legal accommodation and may even perceive other countries' unwillingness to accommodate their needs as unfair. Requests for special treatment even exhibit a pattern.*

*This Article concludes by suggesting that the present emphasis on U.S. legal exceptionalism is overstated at best, misguided and even dangerous at worst. Furthermore, having shown that most nations seek exceptional legal accommodation, or double standards, in certain situations, it identifies some parameters for future work on the proper place for exceptionalism in international law.*

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## I. INTRODUCTION

Nations, like children, are each exceptional in their own way. This Article challenges the prevailing view that the United States acts exceptionally by examining the insufficiently considered legal exceptionalism of other countries. A nation that is “exceptional” seeks to apply a legal rule for itself that differs from an existing or emerging international norm as reflected in a multilateral treaty—behavior that might be called, in the words of Harold Koh, pursuit of a double standard.<sup>1</sup> This definition of legal exceptionalism differs

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1. Koh identifies the pursuit of double standards as the most problematic side of American exceptionalism. Harold Hongju Koh, *On American Exceptionalism*, 55 STAN. L. REV. 1479, 1485–87 (2003). Here, the United States seeks a norm for itself that differs from the international norm. *Id.*

This Article focuses exclusively on legal exceptionalism in the context of multilateral agreements. I do not consider exceptionalism in the context of customary international law, as indicated, for example, by whether a country objects to a customary international norm. Jonathan Charney notes that the persistent objector rule that enables a country to avoid the application of a customary international norm by persistently objecting to it is rarely used. Jonathan Charney, *Universal International Law*, 87 AM. J. INT’L L. 529, 538–42 (1993); see also Oona Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469, 474–75 (2005) [hereinafter *Integrated Theory*] (similarly restricting her analysis of states’ commitment to international law to treaties). The vast number of international multilateral agreements presents a broader spectrum of norms against which to analyze exceptionalism. Moreover, multilateral agreements arise from international negotiations that more readily reveal a country’s exceptional positions. Finally, most of the criticism against the United States stems from its failure to join multilateral enterprises rather than from its having excepted itself from customary international law.

from the historical understanding of American exceptionalism, credited to Alexis de Tocqueville, which refers to the United States' perception that it differs qualitatively from other nations due to its unique history, origins, and special political institutions, and that it serves as a beacon to other nations.<sup>2</sup> The attitude and policies of the George W. Bush Administration have increased and amplified allegations of the United States' legal exceptionalism.<sup>3</sup> However, concern over U.S. legal exceptionalism and unilateralism predates the Bush Administration and will likely persist after it.<sup>4</sup>

The collapse of the Soviet Union left the United States as the world's sole superpower and unleashed a growing torrent of international and academic concern over U.S. legal exceptionalism. A search of English-language law review articles published between 1990 and 2006 identified 732 articles referencing "American exceptionalism" and 45 discussing "U.S." or "United States" "exceptionalism."<sup>5</sup> An additional 294 articles referred to "American unilateralism," "U.S. unilateralism," or "United States unilateralism."<sup>6</sup> Law schools, law journals, and prestigious legal academic societies have devoted entire symposia and panels to the

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2. See Koh, *supra* note 1, at 1481–82 n.4 (describing historic understanding of American exceptionalism). Most of the recent literature focuses on legal exceptionalism, sometimes in the U.S. domestic context but generally with an international or comparative component.

3. See *id.* at 1499–1501 (discussing the Bush Doctrine and its impact on American exceptionalism); see, e.g., Nicholas J. Wheeler, *The Bush Doctrine: The Dangers of American Exceptionalism in a Revolutionary Age*, 27 ASIAN PERSP. 183, 184–85, 205, 212–15 (2003) (discussing Bush's policies as related to American exceptionalism).

4. See Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971, 1973–74 (2004) (noting the "history of unilateralism in this country and the strange two-facedness of America's approach to internationalism since the Second World War"); see also John H. Jackson, *International Law Status of WTO Dispute Settlement Reports: Obligation to Comply or Option to "Buy Out"?*, 98 AM. J. INT'L L. 109, 118 n.39 (2004) (noting that one of the major desires underlying the 1994 Uruguay Round was the desire to "reign in' United States unilateralism. This was a fairly explicit goal of the European Community . . ."). Most of the treaties said to reflect U.S. unilateralism and exceptionalism, such as those mentioned below, as well as the Convention on Biological Diversity, predate the George W. Bush Administration. *Id.*; Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 142 [hereinafter CBD].

5. The search was conducted on Westlaw in the JLR database and updated as of July 12, 2007.

6. These results are particularly striking given that the Westlaw JLR database identified only twelve articles in total containing the terms "U.S.," "United States," or "American" with "Exceptionalism" or "Unilateralism" between 1950 and 1989. (Search updated as of August 9, 2007). Several of these articles concerned U.S. exceptionalism in the context of labor rights. See, e.g., William E. Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109, 1118–25 (1989); Karl E. Klare, *Workplace Democracy and Market Reconstruction: An Agenda for Legal Reform*, 38 CATH. U. L. REV. 1, 3–9 (1988).

topic of U.S. exceptionalism and unilateralism in international law.<sup>7</sup> The articles and panels generally decry the alleged tendency of the United States to refrain from a series of international legal norms and certain international institutions. Often-cited examples include the refusal of the United States to join the International Criminal Court, the Kyoto Protocol on Climate Change, the Ottawa Convention Banning Landmines, the United Nations Convention on the Rights of the Child, and other international human rights agreements—actions that pre-date the current Bush administration.<sup>8</sup>

In sharp contrast, between 1990 and 2006, the term “European exceptionalism” appears in just three English-language law review articles and only three more refer to “European unilateralism.”<sup>9</sup> Only nine articles in total mention French, British, English or German exceptionalism.<sup>10</sup> Only one article references “French unilateralism” and not one mentions English, British, or German unilateralism. Russia seems rarely to exempt itself from international norms. The term “Russian exceptionalism” appears in one article and “Russian unilateralism” appears in but two. Four articles refer to “Japanese exceptionalism” and one to “Japanese unilateralism.” The term “African exceptionalism” appears in four articles. No articles mention Chinese, Indian, or developing country exceptionalism or unilateralism.

Books and articles with titles like *American Exceptionalism and Human Rights*, *Rogue Nation: American Unilateralism and the Failure of Good Intentions*, and *American Exceptionalism and U.S. Foreign Policy: Public Diplomacy at the End of the Cold War*

7. See, e.g., Symposium, *The New American Hegemony?*, 19 CONN. J. INT'L L. 359 (2004); Symposium, *Treaties, Enforcement and U.S. Sovereignty*, 55 STAN. L. REV. 1479 (2003); Symposium, *Unilateralism in International Law: A United States-European Symposium*, 11 EUR. J. INT'L L. 1 (2000) (addressing U.S. unilateralism in international law and not that of Europe); 99th Meeting of the American Society of International Law, Panel, *American Exceptionalism in Treaty Behavior*, 99 AM. SOC'Y INT'L L. PROC. 429, 441 (2005); Podcast, *Who Me? American Exceptionalism and International Law*, Association of American Law Schools Annual Meeting (Jan. 6, 2006), available at <http://www.aals.org/am2006/program/friday.html>.

8. E.g., Michael Ignatieff, *Introduction: American Exceptionalism and Human Rights*, in AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 1, 4–5 (Michael Ignatieff ed., 2005); Koh, *supra* note 1, at 1485–86; see *infra* Part II and accompanying notes (discussing landmines).

9. The search of terms in this paragraph was conducted on the Westlaw JLR database and updated as of July 12, 2007. Europe's leading international law journal, the *European Journal of International Law*, similarly manifests an obsession with U.S. legal exceptionalism and unilateralism and does not self-reflect on whether Europe suffers from any similar characteristic. Between January 1, 1990, and May 30, 2007, that journal published thirteen articles containing *U.S.*, *United States*, or *American* and *exceptionalism* and fifty-one articles referencing *American*, *United States* or *U.S. unilateralism*. No articles appeared with the terms *European exceptionalism* or *European unilateralism*.

10. Two articles contain *French exceptionalism*, six articles reference *British* or *English exceptionalism*, and one mentions *German exceptionalism*.

abound.<sup>11</sup> The countries of Europe, to take one example, are perceived to differ dramatically from the United States, as evidenced by works entitled *The Better Peoples of the United Nations*,<sup>12</sup> *The Limits of Unilateralism from a European Perspective*,<sup>13</sup> and *The United Nations and Europe: An Even Stronger Partnership*.<sup>14</sup> From the perspective of scholarly concern, other nations appear to join an international community of norms and institutions, while the United States goes its own way.<sup>15</sup>

A rich body of scholarship exists as to when nations assume international obligations or when they comply with existing ones. The debate tends to the theoretical, with scholars congregating into doctrinal camps. These include the realist,<sup>16</sup> constructivist,<sup>17</sup>

11. AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS, *supra* note 8; SIOBHAN MCEVOY-LEVY, AMERICAN EXCEPTIONALISM AND U.S. FOREIGN POLICY: PUBLIC DIPLOMACY AT THE END OF THE COLD WAR (2001); CLYDE PRESTOWITZ, ROGUE NATION: AMERICAN UNILATERALISM AND THE FAILURE OF GOOD INTENTIONS (2004).

12. Bardo Fassbender, *The Better Peoples of the United Nations? Europe's Practice and the United Nations*, 15 EUR. J. INT'L L. 857, 857 (2004) (noting the widespread belief of European peoples and governments that Europeans are "the better peoples of the United Nations" and their absolute conviction of their "UN virtuousness," but questioning some of this self-assessment).

13. Bernhard Jensen, *The Limits of Unilateralism from a European Perspective*, 11 EUR. J. INT'L L. 309, 309 (2000) ("The European approach to unilateralism is characterized by extreme prudence and limited flexibility with regard to attempts by individual states to usurp the role of 'world policeman.'").

14. THE UNITED NATIONS AND THE EUROPEAN UNION: AN EVEN STRONGER PARTNERSHIP (Jan Wouters et al. eds., 2006); *see also* SERGIO FABBRINI, THE UNITED STATES CONTESTED: AMERICAN UNILATERALISM AND EUROPEAN DISCONTENT 97 (2006) (noting a "creeping alienation that has affected public opinion and public discourse on both sides of the Atlantic"). A search conducted on Amazon.com on July 12, 2007, revealed thirty-six books and manuscripts with *American exceptionalism* in the title and another six with *American unilateralism* in the title. In sharp contrast, Amazon.com did not list a single book or manuscript with *European exceptionalism* or *European unilateralism* in its title.

15. Even in the realm of sports, the United States faces criticism for its exceptional behavior as it proves unwilling to join the international community's greatest passion—soccer. *See generally* ANDREI S. MARKOVITZ & STEVEN L. HELLERMAN, OFFSIDE: SOCCER AND AMERICAN EXCEPTIONALISM (2001) (discussing American exceptionalism as manifested in the United States' lack of interest in soccer).

16. The realists view states as rational, singular actors with the sole intention of maximizing their self-interest and power. HANS MORGANTHAU, POLITICS AMONG NATIONS 4–5 (6th ed. 1985). According to E.H. Carr, realists "deduce what should be from what was and what is." OONA A. HATHAWAY & HAROLD HONGJU KOH, FOUNDATIONS OF INTERNATIONAL LAW AND POLITICS 27 (2005) (citing EDWARD HALLETT CARR, THE TWENTY YEARS' CRISIS 12 (Palgrave 2001) (1939)). The neorealists acknowledge that states may pursue a wider scope of self-interest and may strategically choose to cooperate internationally. *Id.* at 29. *See generally*, KENNETH N. WALTZ, THEORY OF INTERNATIONAL POLITICS (1979) (discussing various political structures and the respective management of international affairs).

17. Like the realists, the constructivists believe that states are interest-based actors; however, unlike the realists, constructivists do not see states as rigidly seeking the same goals of power, security, and wealth. Instead, international surroundings influence or "construct" states and their interests. HATHAWAY & KOH, *supra* note 16, at

institutionalist,<sup>18</sup> and liberal theorist camps.<sup>19</sup> More recently, scholars like Oona Hathaway and Beth Simmons have injected some empirical analysis into the question of when nations assume or comply with international norms.<sup>20</sup>

This Article uses case studies to examine the concept of legal exceptionalism. In doing so, it paints a more nuanced and useful picture of exceptionalism in international law than that prevalent in current international scholarship, seeking to add to the theoretical and numbers-based empirical approaches of existing scholarship. The Article argues that most countries seek different international rules for themselves when they perceive themselves to have an

112; see, e.g., MARTHA FINNEMORE, NATIONAL INTERESTS IN INTERNATIONAL SOCIETY 6–13 (1996) (noting that international law does not only constrain state actions but can also change their preferences); Alexander Wendt, *Anarchy Is What States Make of It: The Social Construction of Power Politics*, 46 INT'L ORG. 391, 394 (1992) (finding self-help and power politics as not an inevitable outcome of an anarchic system).

18. The institutionalist theory builds on the realist theory to account for the rise of influential international institutions. The institutionalists share the realists' view that self-interest motivates states, and their quest to maximize power drives international politics. The institutionalists theorize that states join and comply with international institutions as "rational, negotiated responses to the problems international actors face." HATHAWAY & KOH, *supra* note 16, at 50 (quoting Barbara Koremenos et al., *The Rational Design of International Institutions*, 55 INT'L ORG. 761, 768 (2001) (emphasis omitted)); see also Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823, 1825 (2002) (arguing that power and self-interest, not concerns about ideology or legitimacy, drive state actions in the international realm); Robert O. Keohane, Jr., *Institutional Theory and the Realist Challenge After the Cold War*, in NEOREALISM & NEOLIBERALISM 269, 271, 275 (David A. Baldwin ed., 1993) (arguing that states participate in international institutions and treaty regimes as a way to curtail short-term power goals in favor of maximizing long-term power).

19. The liberal theorists adopt a more nuanced view of international relations. While they believe that self-interest motivates states, they do not view states as unitary actors. Instead, they believe that domestic politics greatly influence state actions in the international realm. HATHAWAY & KOH, *supra* note 16, at 78; see also Andrew Moravcsik, *Taking Preferences Seriously: A Liberal Theory of International Politics*, 51 INT'L ORG. 513, 513 (1997) (reasoning that one cannot fully understand interstate politics without first understanding the domestic forces that shape states' preferences in the international realm); Anne-Marie Slaughter, *A Liberal Theory of International Law*, 94 AM. SOC'Y OF INT'L L. PROC., 240, 240 (2000) (observing that liberal theorists focus on the interaction between individuals and government institutions).

20. See Oona A. Hathaway, *Do Human Rights Treaties Make a Difference?*, 111 YALE L.J. 1935, 1941–42 (2002) [hereinafter *Human Rights*]; Beth Simmons & Zachary Elkins, *Globalization and Policy Diffusion: Explaining Three Decades of Liberalization, in GOVERNANCE IN A GLOBAL ECONOMY: POLITICAL AUTHORITY IN TRANSITION* (Miles Kahler & David A. Lake eds., 2003) (studying the conditions that either facilitate or retard the harmonization between domestic and international norms or regimes); Beth A. Simmons, *The International Politics of Harmonization: The Case of Capital Market Regulation*, 55 INT'L ORG. 589, 591 (2001); see also Joseph Leggold & Timothy McKeown, *Is American Foreign Policy Exceptional? An Empirical Analysis*, 110 POL. SCI. Q. 369, 377 (1995) (analyzing U.S. military policy from 1870 to 1914 and finding it unexceptional).

exceptional need. Indeed, in cases of exceptional need, numerous countries believe themselves entitled to exceptional legal accommodation and may even perceive other countries' unwillingness to accommodate their need as unfair.

Most scholarship on legal exceptionalism takes a fairly binary approach: Has a country acceded to a convention, or, in the alternative, has it refused to join or joined but excepted itself from some of the treaty's norms by using reservations?<sup>21</sup> Compliance scholarship also assesses compliance in terms of whether a country fulfills its obligations as enumerated under a treaty.<sup>22</sup> Most of the criticism leveled against the United States stems from its refusal to join agreements, and, particularly in the human rights context, making its accession contingent on a series of reservations.<sup>23</sup>

This Article broadens the analysis of legal exceptionalism to include situations where a country or a group of countries seek a special or different legal norm for themselves during the process of negotiating a treaty and *succeed* in obtaining this legal accommodation. Having obtained this built-in accommodation, they can join the treaty; they need not file a reservation because the treaty already addresses their special interests; and, having had their special interests expressly accommodated, they can better comply with the norms that they have accepted. Politically, the situation of a country that joins a treaty and enjoys both the benefit of built-in exceptions and the international acclaim of participating in the treaty differs dramatically from a country that does not join and faces the possibility of international criticism.<sup>24</sup> However, with respect to double-standards, no compelling legal normative reason exists to distinguish, as a matter of course, between built-in exceptionalism and the exceptionalism of abstaining from a treaty or joining one subject to a reservation. In each case, a country excepts itself from a uniform international rule. Admittedly, in the case of built-in exceptionalism, the international community has sanctioned the differential treatment. However, in assessing, let alone excoriating, legal exceptionalism, we should not automatically distinguish between the two situations. International law permits countries to abstain from treaties or to join with reservations just as much as it permits built-in exceptions. The difference between countries that obtain built-in exceptions and those that do not often simply reflects discrepancies in their respective bargaining power in multilateral

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21. *E.g.*, Ignatieff, *supra* note 8, at 3–7.

22. *E.g.*, *Human Rights*, *supra* note 20, at 1956–57.

23. *E.g.*, Ignatieff, *supra* note 8, at 3–7; Philippe Sands, *American Unilateralism*, 96 AM. SOC'Y. INT'L L. PROC. 85, 90 (2002).

24. Joining treaties enhances a country's reputation. George W. Downs & Michael A. Jones, *Reputation, Compliance and International Law*, 31 J. LEGAL STUD. 95, 95 (2002); Guzman, *supra* note 18, at 1825.



negotiations rather than discrepancies in the merits of their underlying claims for differential treatment.

Part II explores U.S. exceptionalism in the context of the 1997 Ottawa Convention Banning Landmines (the Landmines Convention). Part III points to the exceptional position taken by the European Union in various international agreements and international organizations to accommodate its unique and evolving status. Part IV considers developing country exceptionalism in seeking common but differentiated responsibilities in international environmental agreements and in trade agreements.

This analysis reveals that, while not exclusively the case, U.S. exceptionalism often flows from its perceived military needs and unique global security responsibilities. Overall, we can expect the United States to expect accommodation when an agreement raises significant military issues for it. European exceptionalism grows out of Europe's unique status as a quasi-state or quasi-multi-state negotiating bloc. Europe will often seek special international rules for itself when issues involving the European Union and its relationship with its member states arise. Developing country exceptionalism flows from developing countries' special economic needs. We can expect developing countries often to demand international norm accommodation when an agreement involves economic obligations or has an impact upon development.

Harold Koh levels his strongest criticism against the United States in situations where the United States seeks a rule for itself that differs from the rule that applies to the rest of the world.<sup>25</sup> In this zenith of exceptional behavior, he considers the United States to appear as an international hypocrite.<sup>26</sup> The United States, however, hardly stands alone in this objectionable conduct. As shown below, there is nothing exceptional about hypocrisy in international norm formation.

This Article does not defend U.S. exceptionalism *per se*. Rather, it puts U.S. exceptionalism in perspective by analyzing the exceptionalism of other countries. If most countries seek international double standards in certain situations, exceptionalism in international law is unexceptional. The question moving forward thus becomes what, if anything, to do about exceptionalism in international law. This Article thus concludes by briefly identifying some parameters for future work on the proper place for exceptionalism in international law. The Article suggests that certain situations call for exceptional legal accommodation, and the community of nations should continue to fashion double standards to meet *bona fide* special needs. Nations, however, should avoid

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25. Koh, *supra* note 1, at 1485–87; *accord* Sands, *supra* note 23, at 90.

26. Koh, *supra* note 1, at 1487.

according special treatment to a country or a group of countries as a matter of course based on their inherent status or position with little regard to identified special needs in a particular treaty. They also should refuse to extend special legal accommodation beyond that necessary to address the special need at hand. They should eschew according special treatment to countries that participate in negotiations to develop norms for others while simultaneously seeking to exempt themselves from most of a treaty's obligations or core requirements. Indeed, a country's or group of countries' use of international law to bind other nations but not themselves represents the most problematic form of legal exceptionalism.

The Article further argues that the present lopsided focus on U.S. exceptionalism is dangerous. Such a focus particularly benefits European nations, which at times use international law to isolate the United States in order to compete with it economically and politically rather than using international law to address global problems meaningfully. The characterization of the United States as a persistent objector to international law not only discourages meaningful discourse with the United States and leads to less effective agreements without its support, but it also causes the United States actively to oppose certain international agreements. Overall, the unbalanced criticism of the United States, coupled with the international and scholarly emphasis on headcounts of state accession to treaties, threatens the bedrock of peaceful international norm evolution—that is, negotiated consensus between states that addresses the bona fide interests and concerns of the negotiating parties. Over the long run, treaties that obtain high levels of accession by small and medium states but leave important powers like the United States outside of the treaty regime fall short of addressing international problems and achieving comity between nations.

## II. A CLOSER LOOK AT U.S. EXCEPTIONALISM

This Part begins where current scholarship on U.S. exceptionalism generally leaves off.<sup>27</sup> It asks what situations will

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27. Recent scholarship has analyzed the roots of U.S. legal exceptionalism. Jed Rubenfeld explains the differences between U.S. and European attitudes toward international law in terms of their respective histories. He argues that the United States is less likely to join international norms because it understood World War II to vindicate its way of life, values, and popular democracy. Europe, in contrast, viewed World War II as a powerful condemnation of popular sovereignty, with international law serving as a much-needed constraint on popular democracy. Rubenfeld, *supra* note 4, at 1985–87. Delahunty disagrees with Rubenfeld, finding the roots of difference in self-interest. Robert J. Delahunty, *The Battle of Mars and Venus: Why Do American*

likely cause the United States to act exceptionally by either refusing to accede to an emerging or existing international legal norm or by seeking a special accommodation for itself that may amount to a double standard in the problematic way identified by Koh. This Part argues that U.S. exceptionalism will often arise in situations where the international norm significantly impinges upon the United States' perceived special international security responsibilities. When faced with an international regime that presents significant military hardship, the United States will not only seek exceptional legal treatment and refuse to join an agreement that fails to address its needs, but it will also consider its unique global military obligations and exposure to justify its posture. Although not the focus of this Part, another situation that will regularly trigger an exceptional response by the United States is a treaty or an emerging international norm that implicates constitutional rights or the constitutional relationship between the federal government and the Several States. The United States will usually abstain from international agreements, such as those in the area of human rights, that raise constitutional or federalism issues or, in the alternative, will only join the accords with reservations.<sup>28</sup> Even if lawyers and

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*and European Attitudes toward International Law Differ?*, 4 LOY. UNIV. CHI. INT'L L. REV. 11, 38 (2006).

Both Michael Ignatieff and Harold Koh have broken U.S. exceptionalism into categories that help in understanding its facets. Ignatieff identifies three aspects: (1) human-rights narcissism, where the United States embraces its own First Amendment political rights but not economic rights accepted by the rest of the world; (2) judicial exceptionalism, where courts consider the sentiments of other foreign courts and jurisdictions irrelevant to U.S. constitutional interpretation; and (3) U.S. exemptionalism, where the United States exempts itself from international rules by not joining agreements, by not complying with agreements, or by joining with reservations and understandings. Ignatieff, *supra* note 8, at 3–11. Koh teases out four facets of U.S. exceptionalism, “in order of ascending opprobrium”: (1) distinctive rights, where the United States protects certain rights such as speech more than other countries; (2) the “use of different labels to describe synonymous” international legal concepts; (3) the “flying buttress mentality,” where the United States complies with treaties, particularly human rights agreements, which it does not join; and (4) double standards, where the United States advocates a different rule for itself than that applicable to the rest of the world. Koh, *supra* note 1, at 1483–86. Others argue that there is nothing wrong with aspects of U.S. legal exceptionalism, and it may even be helpful. *See, e.g.*, Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 457–59 (2000) (defending U.S. practice of ratifying treaties subject to reservations and understandings).

28. Thus, for example, First Amendment free speech considerations have prevented the United States from joining the International Hate Speech Convention. *See* Bradley & Goldsmith, *supra* note 27, at 417. Second Amendment concerns involving the right to bear arms make the United States unwilling to join a global ban on the illicit transfer of small arms and weapons. *See* John R. Bolton, U.S. Ambassador to the U.N., U.S. Statement at Plenary Session Under Sec'y of State for Arms Control & Security Affairs U.N. Conference on the Illicit Trade in Small Arms & Light Weapons in All Its Aspects (July 9, 2001), available at <http://disarmament.un.org/cab/>

scholars make a strong argument that the treaty or emerging international norm does not violate the Constitution, the mere fact that it raises serious constitutional issues—which, in the case of a treaty, will likely emerge during the ratification process—will make the United States much less likely to agree to the norm or more likely to seek an exception to address the constitutional concerns.<sup>29</sup>

The 1997 Ottawa Landmines Convention provides a good case study of U.S. legal exceptionalism. Many international law scholars and practitioners regard the Landmines Convention as one of the two

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smallarms/statements/usE.html (“The United States will not join consensus on a final document that contains measures abrogating the Constitutional right to bear arms.”).

If an international norm requires the federal government to impinge upon responsibilities generally reserved to the states, the United States will be less likely to join or to comply with the international norm. See Peter J. Spiro, *The State and International Human Rights*, 66 *FORDHAM L. REV.* 567, 572–78 (1997) (pointing out how human rights conventions have stalled in the Senate due in key part to federalism concerns, how the U.S. practice of attaching reservations to those human rights agreements that it has joined largely stems from federalism issues, and how most U.S. violations of international human rights occur at the state and local level); see also Judith Resnick, *Categorical Federalism: Jurisdiction, Gender, and the Globe*, 111 *YALE L.J.* 619, 665–66 (2001) (noting “practices of the Senate that consistently limit the application of international laws by reference to federalism”). The United States’ refusal to prevent Arizona from executing two German nationals who had not been informed of their rights under the Vienna Convention on Consular Relations exemplifies this. The International Court of Justice (ICJ), in the *LaGrand* case had provisionally enjoined the executions. *LaGrand Case (F.R.G. v. U.S.)*, 2001 *I.C.J.* 466 (June 27). The Author believes that the United States would have respected the ICJ’s order had the *LaGrand* brothers been convicted of federal as opposed to state crimes. In the *Breard* case, the Clinton Administration maintained that, even if the ICJ decision bound the United States, the Constitution does not give the federal government the right to issue directives in state criminal proceedings. *Case Concerning the Vienna Convention on Consular Relations (Breard)* (Para. v. U.S.), 1998 *I.C.J.* 248 (Apr. 9); Carlos Manuel Vazquez, *Breard and the Federal Power to Require Compliance with ICJ Orders of Provisional Measures*, 92 *AM. J. INT’L L.* 683, 684 (1998) (citing Brief for the United States as Amicus Curiae at 51, *Breard v. Greene*, 523 U.S. 371 (1998)). A spokesperson for Senator Jesse Helms, then-chairman of the U.S. Senate Committee on Foreign Relations, called the ICJ’s decision “an appalling intrusion by the United Nations into the affairs of the State of Virginia.” Joel R. Paul, *The Rule of Law is Not for Everyone*, 24 *BERKELEY J. INT’L L.* 1046, 1057 (2006) (book review).

The much-criticized U.S. refusal to join the Convention on the Rights of the Child, Nov. 20, 1989, 1577 *U.N.T.S.* 3, also finds explanation in the Convention’s foray into numerous issues usually left to the states. These include many aspects of family law and juvenile justice, such as family separation and reunification, child custody, and child abuse and neglect. Lainie Rutkow & Joshua T. Lozman, *Suffer the Children?: A Call for United States Ratification of the United Nations Convention on the Rights of the Child*, 19 *HARV. HUM. RTS. J.* 161, 175–77 (2006).

29. See, e.g., Harold Hongju Koh, *A World Drowning in Guns*, 71 *FORDHAM L. REV.* 2333, 2348–49, 2359–61 (2003) (arguing that a ban on the illicit transfer of light weapons and small arms would not violate the Second Amendment). Koh’s argument proved insufficient to persuade the United States to join the international ban.

most important international legal developments of the 1990s.<sup>30</sup> As of October 2008, 156 nations had joined the Convention; thirty-nine nations, including the United States, had not joined.<sup>31</sup> Parties to the Landmines Convention undertake four key obligations. First, they agree not to produce, import, or export anti-personnel landmines.<sup>32</sup> Second, they commit to clear anti-personnel landmines from territory under their jurisdiction or control within ten years of joining.<sup>33</sup> Third, they commit to destroy their stockpiles of anti-personnel landmines within four years of joining.<sup>34</sup> Finally, they undertake not to use anti-personnel landmines.<sup>35</sup>

The United States faces routine criticism for not acceding to the Landmines Convention. The Convention appears on most lists as a classic example of problematic U.S. exceptionalism. The United States' failure to join the Landmines Convention has been cited as a typical example of the United States refraining from treaties that nearly all other nations, from Andorra and Monaco to Spain and France, find acceptable.<sup>36</sup> Failure to join the Landmines Convention, critics allege, reflects U.S. refusal to subscribe to "multilateralism of any kind that either defines or enforces basic values,"<sup>37</sup> and evidences U.S. hostility to "the development of international law and institutions."<sup>38</sup> In a nutshell, the United States, in sharp contrast to other countries, allegedly has acted exceptionally by not joining the new international norm of an anti-personnel landmines ban.

This claim of inherent U.S. exceptionality toward international law is incorrect. U.S. failure to join the Landmines Convention flows from its perceived special security needs in light of its exceptional

30. Kenneth Anderson, *The Ottawa Convention Banning Landmines, the Role of International Non-governmental Organizations and the Idea of International Civil Society*, 11 EUR. J. INT'L L. 91, 92 (2000).

31. International Campaign to Ban Landmines, States Parties, <http://www.icbl.org/treaty/members> (last visited Oct. 21, 2008). As of October 21, 2008, the following states have not joined the Convention: Armenia, Azerbaijan, Bahrain, Burma, China, Cuba, Egypt, Finland, Georgia, India, Iran, Israel, Kazakhstan, North Korea, South Korea, Kyrgyzstan, Lao PDR, Lebanon, Libya, Marshall Islands, Micronesia, Mongolia, Morocco, Nepal, Oman, Pakistan, Poland, Russian Federation, Saudi Arabia, Singapore, Somalia, Sri Lanka, Syria, Tonga, Tuvalu, United Arab Emirates, United States, Uzbekistan, and Vietnam. *Id.*

32. Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines and on their Destruction art. 1(1)(b), Sept. 18, 1997, 36 I.L.M. 1507, available at <http://www.icbl.org/treaty/text/English> [hereinafter Landmines Convention].

33. *Id.* art. 5(1).

34. *Id.* art. 4.

35. *Id.* art. 1(1)(a).

36. International Campaign to Ban Landmines, *supra* note 31.

37. James C. Hathaway, *America, Defender of Democratic Legitimacy?*, 11 EUR. J. INT'L L. 121, 134 (2000).

38. Carl Bruch & John Pendergrass, *Type II Partnerships, International Law, and the Commons*, 15 GEO. INT'L ENVTL. L. REV. 855, 879–80 (2003).

international security obligations. As Phillip Bobbit noted, the United States, unlike other countries, has given its allies security guarantees, which both promote international stability and enable countries to use their resources for nonmilitary purposes.<sup>39</sup> The United States' primary difficulty with the Landmines Convention stems from its commitment to protect South Korea from North Korea.<sup>40</sup> The United States has implemented this commitment by planting mines along the 151-mile thirty-eighth parallel that separates the two Koreas (the Demilitarized Zone or DMZ).<sup>41</sup> In the absence of such landmines, North Korea's more than one million troops<sup>42</sup> could reach Seoul within hours,<sup>43</sup> inflicting an estimated civilian casualty rate in the hundreds of thousands.<sup>44</sup> Preventing a land invasion by North Korea without landmines appears virtually impossible.<sup>45</sup>

During the negotiation of the Landmines Convention, U.S. diplomats attempted to secure a provision that would have excluded the DMZ from the treaty's mine-clearing obligation.<sup>46</sup> Highly influential nongovernmental organizations and other countries rejected this proposal out of hand.<sup>47</sup> The United States then sought an additional nine years, beyond the ten years allocated in the treaty,

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39. Phillip Bobbit, *American Exceptionalism: The Exception Proves the Rule*, 3 U. ST. THOMAS L.J. 328, 329 (2005).

40. Mutual Defense Assistance Agreement, U.S.-Korea, Jan. 26, 1950, 1 U.S.T. 137, 80 U.N.T.S. 205; Mutual Defense Treaty, U.S.-Korea, Oct. 1, 1953, 5 U.S.T. 2368, 238 U.N.T.S. 199.

41. Andrew C.S. Efav, *The United States Refusal to Ban Landmines: The Intersection Between Tactics, Strategy, Policy, and International Law*, 159 MIL. L. REV. 87, 101 (1999); Jonathan Kandell, *Korea: A House Divided*, SMITHSONIAN, July 2003, at 38, available at <http://www.smithsonianmag.com/travel/korea.html>.

42. Kathleen T. Rhem, *DefenseLink News Article: North Korean Military "Very Credible Conventional Force,"* AM. FORCES PRESS SERV., Nov. 18, 2003, <http://www.defenselink.mil/news/newsarticle.aspx?id=27769>. Only twenty-five miles separate South Korea's capital from the North Korean border. Kandell, *supra* note 41.

43. Philip Shenon, *Clinton Still Firmly Against Land-Mine Treaty*, N.Y. TIMES, Oct. 11, 1997, at A6.

44. Efav, *supra* note 41, at 101.

45. *Posture Statement: Hearing on Fiscal Year 1999 Defense Authorization Before the H. Comm. on National Security Fiscal Year 1999 Defense Authorization*, 105th Cong. (1998) (statement of General Henry H. Shelton, Chairman, Joint Chiefs of Staff), available at [http://www.globalsecurity.org/military/library/congress/1998\\_hr/2-5-98shelton.htm](http://www.globalsecurity.org/military/library/congress/1998_hr/2-5-98shelton.htm) [hereinafter *Shelton Hearing*] (testifying that "[i]n Korea . . . where we stand face-to-face with one of the largest hostile armies in the world, we rely upon anti-personnel landmines to protect our troops."); Bobbit, *supra* note 39, at 330 (concluding that "[n]o realistic conventional force could be protected from such a huge North Korean force without mines . . ."); G.E. Willis, *Leaders Fight Ban to Protect Defenses*, ARMY TIMES, June 15, 1998, at 14 (explaining that only anti-personnel mines that do not self-destruct could stop a surprise attack because other mines could not be planted in time).

46. David E. Sanger, *U.S., In Shift, Says It May Sign Treaty to Ban Land Mines*, N.Y. TIMES, Sept. 15, 1997, at A1.

47. *Id.*

to remove the mines along the North Korea–South Korea border.<sup>48</sup> NGOs and other nations rejected this proposal as well.<sup>49</sup> The United States also unsuccessfully sought an exclusion for its system of preventing the dismantling of anti-tank mines comparable to the exclusion secured by other nations.<sup>50</sup>

The United States refrained from joining the Landmines Convention not because of its exceptional approach to international law, but because the Convention failed to address the United States' perceived special military needs. As President Clinton lamented:

One of the biggest disappointments I've had as President, a bitter disappointment for me, is that I could not sign in good conscience the treaty banning land mines, because we have done more since I've been President to get rid of land mines than any country in the world by far. We spend half of the money the world spends on de-mining. We have destroyed over a million of our own mines.

I couldn't do it because the way the treaty was worded was unfair to the United States and to our Korean allies in meeting our responsibilities along the DMZ in South Korea, and because it outlawed our anti-tank mines while leaving every other country [sic] intact. And I thought it was unfair.<sup>51</sup>

Moreover, a close look at the Landmines Convention reveals that many nations who, like the United States, could identify a specific security threat that they believed necessitated the use of landmines did not join the Convention. U.S. refusal to join thus remains unexceptional even when assessed within the confines of the Convention itself. Of the thirty-nine countries that have not joined the Convention, most could identify a particular border which they

48. Shenon, *supra* note 43. The United States may have hoped that the North Korean leadership would change by the end of the requested extension period.

49. *Id.*; Peter Malanczuk, *The International Criminal Court and Landmines: What are the Consequences of Leaving the US Behind?*, 11 EUR. J. INT'L L., 77, 85 (2000) (stating that Article 3 of the Landmines Convention provides for exceptions, but nations did not allow an exception to address the United States' "Korean problem" through a transitional period or other formulation). On the general rejection of any kind of accommodation, see Shawn Roberts, *No Exceptions, No Reservations, No Loopholes: The Campaign for the 1997 Convention on the Prohibition of the Development, Production, Stockpiling, Transfer, and Use of Anti-Personnel Mines and on Their Destruction*, 9 COLO. J. INT'L ENVTL. L. & POL'Y 371, 386 (1998).

50. See Press Release, The White House, Office of the Press Secretary, Clinton Remarks on Comprehensive Test Ban Treaty (Oct. 6, 1999), available at <http://www.fas.org/nuke/control/ctbt/news/991006-ctbt-usia1.htm> [hereinafter White House Press Release]; *infra* notes 128–35 and accompanying text.

51. White House Press Release, *supra* note 50. The much-maligned refusal by the United States to join the International Criminal Court (ICC) also flows in part from her sensitivity to the exceptional exposure that her troops face given their presence in numerous theaters from Kosovo to Haiti to Somalia to Korea and the potential that the Court could be used as a political weapon against her. Delahunty, *supra* note 27, at 44. As with the Landmines Convention, before the U.S. refused to join the ICC, it sought built-in exceptions to address her perceived special needs, including, for example, an exception for U.S. military forces in the UN peacekeeping mission in Bosnia. *Id.* For a summary of U.S. objections to the ICC, see Malanczuk, *supra* note 49, at 78–84.

believed necessitated the use of landmines. These include Russia,<sup>52</sup> India and Pakistan,<sup>53</sup> Israel,<sup>54</sup> Egypt,<sup>55</sup> Syria and Lebanon,<sup>56</sup> the Koreas,<sup>57</sup> Finland,<sup>58</sup> and Iran.<sup>59</sup>

Like the U.S., a large number of countries facing a comparatively large sacrifice refused to join the Convention. For example, India and Pakistan, who would have to destroy their stockpiles, stop the production of new landmines, and de-mine the Kashmir border, have remained outside of the Convention.<sup>60</sup> China, with the world's largest stockpile of landmines—110 million—has not joined the Convention.<sup>61</sup> To put China's extensive compliance burden with respect to landmine destruction in context, between the adoption of the Convention in 1997 and 2006, all parties combined have destroyed a total of 80 million landmines.<sup>62</sup>

Most of the 156 parties could join the Convention without incurring a military cost of the kind identified by the United States and other nonparties. The Convention bans stockpiling, yet sixty-four of the parties never had such stockpiles.<sup>63</sup> When one adds to this number the number of nonparties, the majority of nations—103, to be

52. See Landmine Monitor, *Russian Federation*, in LANDMINE MONITOR REPORT 2006 (2006), available at <http://www.icbl.org/lm/2006> (describing Russia's use of landmines in Chechnya).

53. See Landmine Monitor, *India*, in LANDMINE MONITOR REPORT 2006, *supra* note 52; Landmine Monitor, *Pakistan*, in LANDMINE MONITOR REPORT 2006, *supra* note 52 (detailing India's use of landmines on the border of Pakistan).

54. See Landmine Monitor, *Israel*, in LANDMINE MONITOR REPORT 2006, *supra* note 52 (detailing Israel's use of landmines on the border of Lebanon).

55. See Landmine Monitor, *Egypt*, in LANDMINE MONITOR REPORT 2006, *supra* note 52 (detailing Egypt's use of landmines on the border of the Gaza Strip).

56. See Landmine Monitor, *Syria*, in LANDMINE MONITOR REPORT 2006, *supra* note 52 (detailing Syria's use of landmines on the borders of Turkey and Jordan); Landmine Monitor, *Lebanon*, in LANDMINE MONITOR REPORT 2006, *supra* note 52 (noting that Lebanon's border with Israel continued to be a potential flashpoint).

57. See Landmine Monitor, *Republic of Korea*, in LANDMINE MONITOR REPORT 2006, *supra* note 52 (detailing South Korea's use of landmines along the border of the Korean demilitarized zone); Landmine Monitor, *Democratic People's Republic of Korea*, in LANDMINE MONITOR REPORT 2006, *supra* note 52 (detailing North Korea's use of landmines along the border of the Korean demilitarized zone).

58. See Landmine Monitor, *Finland*, in LANDMINE MONITOR REPORT 2006, *supra* note 52 (noting that the Ministry of Defense will not reveal any details regarding Finland's stockpile of antipersonnel mines).

59. Landmine Monitor, *Iran*, in LANDMINE MONITOR REPORT 2006, *supra* note 52 (detailing Iran's use of landmines along the borders of Iraq, Afghanistan, and Pakistan).

60. Landmine Monitor, *India*, *supra* note 53; Landmine Monitor, *Pakistan*, *supra* note 53.

61. Landmine Monitor, *China*, in LANDMINE MONITOR REPORT 2006, *supra* note 52.

62. Landmine Monitor, *Major Findings*, in LANDMINE MONITOR REPORT 2006, *supra* note 52 (reporting that worldwide stockpiles of landmines have declined from 260 million before the Convention to 180 million).

63. *Id.*



exact—either did not agree to eliminate stockpiles or agreed to eliminate them but had none to destroy.

With respect to clearing existing landmines, the overwhelming majority of parties had none to clear.<sup>64</sup> Of the eighty-eight countries that had landmines to clear,<sup>65</sup> approximately thirty-four, or 39%, refused to join the Convention.<sup>66</sup> Of the fifty-one countries with landmines that did join the Convention,<sup>67</sup> many—such as Bosnia, Colombia, and many African countries—did not perceive an existing need to use the landmines.<sup>68</sup> Clearing the landmines reflected a much-needed, historic cleanup for which these countries would seek, and receive, financial and material assistance, including from the United States.<sup>69</sup> As for the production of landmines, most countries that produce landmines did not join the Convention and most that joined do not produce.<sup>70</sup> With respect to Andorra, Monaco, France, and Spain, Andorra and Monaco did not have to do anything to comply with the Convention.<sup>71</sup> The Convention requires France to

64. Landmine Monitor, *Key Findings*, in LANDMINE MONITOR REPORT 2006, *supra* note 52 (reporting that, in 1999, the number of nations with landmines to clear was eighty-eight).

65. Landmine Monitor, *Landmine Problem in the World*, in LANDMINE MONITOR REPORT 2006, *supra* note 52.

66. Landmine Monitor, *Key Developments*, in LANDMINE MONITOR REPORT 2006, *supra* note 52; International Campaign to Ban Landmines, *States Parties*, *supra* note 31.

67. Landmine Monitor, *Key Developments*, in LANDMINE MONITOR REPORT 2006, *supra* note 52.

68. Soliman M Santos, Jr., *War Crimes, Landmine Ban, and Rebel Groups* (Jan. 20, 1999), <http://www.icbl.org/resources/warcrime.rtf>.

69. See Landmines Convention, *supra* note 32, art. 6 (providing for international assistance for de-mining operations); U.S. Dep't of State, *Fact Sheet*, in NEW UNITED STATES POLICY ON LANDMINES: REDUCING HUMANITARIAN RISK AND SAVING LIVES OF UNITED STATES SOLDIERS (2004), available at <http://www.state.gov/t/pm/rls/fs/30044.htm> (reporting that the United States has provided nearly \$800 million to 46 countries since 1993 to clear mines and help civilians). In 1998, General Henry Shelton testified before Congress that the United States engaged in more de-mining activity than any other country. *Shelton Hearing*, *supra* note 45; see also Landmine Monitor, *Bosnia and Herzegovina Report*, in LANDMINE MONITOR REPORT 2006, *supra* note 52 (reporting that while it does not use, stockpile, or produce anti-personnel landmines, the extensive presence of landmines in the country presents a "significant problem" for which it depends extensively on international financial support).

70. Landmine Monitor, *Global Production of Antipersonnel Mines*, in LANDMINE MONITOR REPORT 2006, *supra* note 52.

71. Landmine Monitor, *Andorra*, in LANDMINE MONITOR REPORT 2006, *supra* note 52; Landmine Monitor, *Monaco*, in LANDMINE MONITOR REPORT 2006, *supra* note 52.

remove mines from Djibouti, which, as of May 2007, it has yet to do.<sup>72</sup> Spain destroyed its stockpile of 853,286 landmines.<sup>73</sup>

Overall, countries that could identify a threat to security for which they considered the use of landmines necessary did not join the Landmines Convention. The refusal by the United States to join the Convention, while exceptional as to Andorra, Monaco, France and Spain, hardly proves exceptional when compared to many, if not most, countries in positions similar to that of the United States.<sup>74</sup> More importantly, U.S. insistence on an exception to accommodate its special obligations in Korea is not exceptional when compared, as in Part III below, with the demands by other countries to address their perceived special circumstances.

### III. EUROPEAN EXCEPTIONALISM

Much of the disproportionate focus on U.S. legal exceptionalism stems from concern and fear of a sole superpower unbridled by international legal constraints.<sup>75</sup> The Soviet Union's collapse, however, heralded not only an increase in U.S. global power but also the dramatic ascendancy of a united, larger, and more powerful European Union (the Union or EU). Since 1989, at least three major treaties—the 1992 Treaty of Maastricht, the 1997 Treaty of Amsterdam, and the 2001 Treaty of Nice—have vastly increased the power of the European Union, with member states ceding a wide

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72. See Landmine Monitor, *France*, in LANDMINE MONITOR REPORT 2006, *supra* note 52.

Although there are no recorded mined areas in mainland France, it has treaty obligations in respect of any mined areas under its jurisdiction or control elsewhere. France announced that it planned to initiate clearance of anti-personnel mines around its ammunition depot in Djibouti in October 2006, more than seven years after becoming a State Party to the Mine Ban Treaty.

*Id.*

73. See Landmine Monitor, *Spain*, in LANDMINE MONITOR REPORT 2006, *supra* note 52 (reporting that Spain had 853,286 anti-personnel mines when joining the Convention, and that it had completed its destruction of its stockpiles on October 3, 2000).

74. If anything, rather than reflecting exceptional conduct, the refusal by the United States to join the Landmines Convention appears consistent with Oona Hathaway's general observation that "the more likely a state is to change its behavior to comply with a treaty, the more reluctant it will be to commit to it in the first place." *Integrated Theory*, *supra* note 1, at 492.

75. See EDWARD C. LUCK, *American Exceptionalism and International Organizations: Lessons from the 1990s*, in US HEGEMONY AND INTERNATIONAL ORGANIZATIONS: THE UNITED STATES AND MULTILATERAL INSTITUTIONS (Rosemary Foot et al. eds., 2003).

range of sovereign functions to it.<sup>76</sup> The Union has ballooned from twelve members in 1989 to twenty-seven members today.<sup>77</sup> International law scholars and lawyers have viewed this ascension with little alarm.<sup>78</sup> They see the European Union and its members as multilateralist and internationalist.<sup>79</sup> Underlying academic conferences and scholarship objecting to American exceptionalism often seems to lie the lament: If only the United States would behave more like Europe.

Although the nations of the European Union may join treaties and international regimes more readily than the United States, they are just as likely to seek exceptional treatment within those treaties and regimes as their transatlantic peer. The member states of the European Union, as well as the Union itself, have repeatedly sought and received exceptional accommodation in international organizations, at multilateral treaty negotiations, and in treaty text to address the ever-changing status of the European Union and its

76. Treaty of Nice Amending the Treaty on European Union, The Treaties Establishing the European Communities and Certain Related Acts, Feb. 26, 2001, 2001 O.J. (C 80); Treaty of Amsterdam, Oct. 2, 1997, 1997 O.J. (C 340); Maastricht Treaty on European Union, Feb. 7, 1992, 1992 O.J. (C 191). The Treaty of Nice amended the Treaty on the European Union to authorize the EU to conclude agreements in the areas of foreign affairs and justice. Duncan B. Hollis, *Why State Consent Still Matters—Non-State Actors, Treaties, and the Changing Sources of International Law*, 23 BERKELEY J. INT'L L. 137, 158 (2005).

77. Members of the European Union in 1989 were France, Belgium, the United Kingdom, the Netherlands, Denmark, Luxembourg, Germany, Italy, Spain, Ireland, Greece, and Portugal. Europa, *Key Dates in the History of European Integration*, [http://ec.europa.eu/abc/12lessons/key\\_dates/index\\_en.htm](http://ec.europa.eu/abc/12lessons/key_dates/index_en.htm) (last visited Oct. 21, 2008). In 1995, three new members joined: Austria, Finland, and Sweden. *Id.* In 2004, ten more states joined the Union: Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia, and Slovenia. *Id.* In January of 2007, Bulgaria and Romania joined. *Id.* As of June 2007, the European Union was conducting accession negotiations with two more states, Turkey and Croatia. Europa, *European Commission Enlargement*, [http://ec.europa.eu/enlargement/countries/index\\_en.htm](http://ec.europa.eu/enlargement/countries/index_en.htm) (last visited Oct. 21, 2008). Additionally, the former Yugoslav Republic of Macedonia, Albania, Bosnia and Herzegovina, Montenegro, and Serbia are all potential candidate countries. *Id.*

78. The few articles or papers expressing some concern about the European Union include Evan Bloom, *The European Union's New Ambitions*, 99 AM. SOC'Y INT'L L. PROC. 361 (2005); Delahunty, *supra* note 27; Howard Mann, *NAFTA and the GATT: The Impact of International Treaties on Environmental Law and Practice*, 35 SANTA CLARA L. REV. 1187, 1197 (1995) (arguing that international harmonization of standards within NAFTA and the WTO "will likely be seen as the best defense to United States and European unilateralism in Canada").

79. Rubinfeld, *supra* note 4, at 2009–10 (noting that U.S. exceptionalism would not be that exceptional were it not for Europe's internationalism). The dearth of scholarship on European unilateralism reflects the perception of Europe's multilateralism. *See supra* note 10 and accompanying text. Not only did the search conducted on Amazon.com on July 12, 2007 reveal, as mentioned earlier, not a single book with "European unilateralism" in its title, it identified only seven works addressing the topic at all. By contrast, the search unearthed 356 books and papers containing as a key term "American unilateralism."

relationship with its members. These exceptional accommodations, on which this Part elaborates below, include: (1) regional economic integration organization provisions that enable the EU to join multilateral agreements and to participate in international institutions, as well as structural accommodations that give the EU and its members disproportionate influence at international negotiations and institutions; (2) built-in exceptions in multilateral treaties that accommodate EU interests; and (3) “mixed-agreements” that leave it ambiguous whether the EU or its member states bear responsibility for the implementation of and compliance with the treaties.

As a whole, these accommodations have received little attention in legal scholarship. Yet, they represent one of the most important, dramatic, and consistent exceptional treatments accorded by the international community to any nation or group of nations.<sup>80</sup> The exceptions granted to the European Union and its members enable them to act as one entity or as many states, whatever suits them best. *E pluribus unum; ex uno plures*. Enjoying both the advantages of a unified, state-like entity and the votes of many states, the European Union and its members have come to dominate multilateral treaty negotiations and, hence, emerging international legal norms.<sup>81</sup>

#### A. Regional Economic Integration Organization Provisions and Participation in International Bodies

Treaties and international bodies have long been the province of states. While some exceptions exist, ordinarily only states negotiate and join international agreements.<sup>82</sup> International organizations,

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80. The status and power accorded to the permanent five members of the Security Council—China, France, Russia, the United Kingdom, and the United States—stands as the most exceptional treatment enjoyed by any group of nations. See Fassbender, *supra* note 12, at 871–72 (discussing the treatment and privileges afforded to the permanent members of the Security Council).

81. Even the Soviet Union only enjoyed three votes. See Russia Takes over the Soviet Union's Seat at the United Nations, <http://74.125.95.104/search?q=cache:RqBJJmmUzsQJ:www.ejil.org/journal/Vol3/No2/art8.html+USSR+three+UN+votes&hl=en&ct=clnk&cd=1&gl=us> (last visited Oct. 21, 2008) (stating that the Soviet Union consisted of fifteen republics, of which two—the Ukraine and Belarus—were original members of the United Nations).

82. See JOSE ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 272–79 (2007) (describing the persistent obstacles that international organizations have faced in trying to negotiate treaties); Hollis, *supra* note 76, at 164 (explaining how a series of limitations effectively preclude international organizations “from joining multilateral treaties that either create rules of general application or establish other international actors”). International organizations will negotiate and be parties to treaties that establish their headquarters and their privileges and immunities. See, e.g., United States Headquarters Agreement, S.J. Res. 144, 80th Cong. (1947), available at [http://www.usunnewyork.usmission.gov/hc\\_docs/hc\\_law\\_80\\_357.html](http://www.usunnewyork.usmission.gov/hc_docs/hc_law_80_357.html). The Multilateral Fund of the Montreal Protocol and the Conference of the Parties to the

emerging states, and regional organizations typically participate in international negotiations and in treaty regimes as observers, if they participate at all.<sup>83</sup> They sit in the back of the negotiating room. They speak only after states have spoken. They do not formally propose treaty text and they certainly do not actively negotiate its content.<sup>84</sup> They do not participate in the sensitive, high-level endgame negotiations that occur in the early morning hours of many, if not most, multilateral treaty negotiations.<sup>85</sup>

The European Union stands as the most common and increasingly persistent exception. The European Union and its member states have sought, and continue to seek, unique accommodations that enable the Union to join treaties as a party and to participate fully in treaty negotiations. Although the EU may enter into some treaties directly, usually the EU's component communities, particularly the European Community (EC), negotiate and join treaties for the EU.<sup>86</sup> The EU's central bureaucracy, the European Commission, coordinates and supervises the European

Climate Change Convention have entered into agreements with their host states. Hollis, *supra* note 76, at 162.

83. The United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107, available at <http://unfccc.int/resource/docs/convkp/conveng.pdf> [hereinafter Climate Change Convention]. For example, contains a fairly standard provision for international organizations. Article 7(6) states:

The United Nations, its specialized agencies and the International Atomic Energy Agency, as well as any State member thereof or observers thereto not Party to the Convention, may be represented at session of the Conference of the Parties as observers. Any body or agency, whether national or international, governmental or non-governmental, which is qualified in matters covered by the Convention, and which has informed the secretariat of its wish to be represented at a session of the Conference of the Parties as an observer, may be so admitted unless at least one-third of the Parties present object. The admission and participation of observers shall be subject to the rules of procedure adopted by the Conference of the Parties.

*Id.* art. 7(6).

84. The Rome Convention on the International Criminal Court and the Landmines Convention constitute two exceptions. Anderson, *supra* note 30, at 92-94. Nongovernmental organizations played an unprecedented active and influential role in the negotiations of these two treaties. *Id.*

85. Various UN bodies have their own rules and procedures, including those covering non-voting observers. See, e.g., United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, June 15, 1998, *Rules of Procedure for the United Nations Diplomatic Conference on the Establishment of an International Criminal Court*, ch. XI, U.N. Doc. A/CONF.183/6 (June 23, 1998), available at <http://www.un.org/icc/ruleproc.htm#chapt11> (governing observers to the conference establishing the ICC); Climate Change Convention, *supra* note 83, art. 7(6) (governing admission of NGOs and other observers to the Convention Conference).

86. Hollis, *supra* note 76, at 156. EU members gave the EU treaty-making power in 2001. *Id.* Before 1993, the EC was called the European Economic Community. *Id.* The European Atomic Energy Community (Euratom) and the European Coal and Steel Community (ECSC) constitute the other two EU Communities. *Id.* at 156 n.89.

Union position during treaty negotiations.<sup>87</sup> As of July 2007, the EU had joined over one hundred multilateral agreements.<sup>88</sup> The 1994 Agreement Establishing the World Trade Organization (WTO Agreement), for example, expressly provides that the European Community may join the Agreement and the agreements contained in its annex on the same footing as original members of the General Agreement on Tariffs and Trade of 1947.<sup>89</sup> As a member of the World Trade Organization (the WTO), the EC enjoys all the rights of member nations, including the right to propose amendments to the WTO Agreement and to the trade agreements annexed to it.<sup>90</sup>

Today, multilateral agreements routinely contain “regional economic integration organization” (REIO) clauses. These clauses are proposed by and designed specifically for the EU.<sup>91</sup> Indeed, as of June 2007, not a single entity other than the EU appeared to have joined a multilateral agreement pursuant to a REIO clause. REIO clauses typically define a REIO as “an organization constituted by sovereign States of a given region, to which its member States have transferred competence in respect of matters governed by [the agreement] and which has been duly authorized, in accordance with its internal procedures, to sign, ratify, accept, approve or accede to it.”<sup>92</sup> A REIO

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87. The EU vs. EC distinction is confusing. The European Union was created in 1993 and includes as one of its key components the previously existing European Community. The European Union refers, *inter alia*, to the overall confederation of the twenty-seven member states and to the Communities of the Union to which all member states also belong. The European Community constitutes the principal of these communities. Thus, the term European Community still exists but now refers to one of the communities of the European Union. Although the European Community continues to join and negotiate most treaties on behalf of the EU, for simplicity's sake this Article will use “EU” when discussing EU or EC participation in international bodies and its negotiation and accession to treaties. For a guide to EU nomenclature and jargon, see Europa, Eurojargon, [http://europa.eu/abc/eurojargon/index\\_en.htm](http://europa.eu/abc/eurojargon/index_en.htm) (last visited October 21, 2008).

88. See Europa, Treaties Office Database List of Multilateral [hereinafter EC Agreements], available at <http://ec.europa.eu/world/agreements/searchByType.do?id=2> (last visited Oct. 21, 2008) (listing over 136 agreements to which the EU is a party, approximately 106 of which are general agreements open to all members of the relevant international organization, such as the United Nations, the Food and Agriculture Organization, and the WTO).

89. Agreement Establishing the World Trade Organization arts. XI, XIV, Apr. 15, 1994, 33 I.L.M. 1125 [hereinafter WTO Agreement]. Agreements contained in the annexes to the WTO Agreement, which members join when they join the WTO Agreement, include the Sanitary and Phytosanitary Agreement, the Technical Barriers to Trade Agreement, and the Agreement on the Trade-Related Aspects of Intellectual Property Rights.

90. *Id.* art. X.

91. Hollis, *supra* note 76, at 161 (reporting that REIO clauses are generally understood to refer only to the European Union).

92. *E.g.*, Secretariat of the Convention on Biological Diversity, Cartagena Protocol on Biosafety to the Convention on Biological Diversity art. 3(j), Jan. 29, 2000, 39 I.L.M. 1027, available at <http://www.cbd.int/doc/legal/cartagena-protocol-en.pdf> [hereinafter Biosafety Protocol]; Convention on Biodiversity art. 2, June 5, 1992, 31

provision allows the EU to join the treaty,<sup>93</sup> to vote on treaty matters falling within its competence,<sup>94</sup> to participate in the meetings of the parties to the treaty and in subsidiary bodies of the treaty, such as expert groups,<sup>95</sup> to interpret treaty text, and otherwise to partake fully in the treaty regime. The EU finds its participation and influence typically bounded only by restrictions on the EU casting a vote in addition to those cast by its members—for matters within its competence, the EU often casts the votes of its member states, who may not then cast individual votes<sup>96</sup>—and by limitations on its legal authority under EU law.<sup>97</sup>

Having entered a treaty regime or an international organization or body as a full participant, and even in the case of United Nations bodies in which the EU participates as an observer only,<sup>98</sup> the EU and its members enjoy disproportionate influence due to exceptional accommodations that preserve their benefits as a group of individual states, notwithstanding their legally-mandated, unified foreign policy on a range of matters. To appreciate fully the extensive power enjoyed by the EU and its members, one must understand the organizational structure of international negotiations and bodies. At most international negotiations and organizations, the allocation of committee chairmanships, representation on the bureau that directs

I.L.M. 818, available at <http://www.cbd.int/doc/legal/cbd-un-en.pdf>; Climate Change Convention, *supra* note 83, art. 1(6).

93. *E.g.*, Biosafety Protocol, *supra* note 92, art. 37 (allowing for REIO to join as a Party to the Protocol); Kyoto Protocol to the United Nations Framework Convention on Climate Change art. 24(1), Dec. 11, 1998, 37 I.L.M. 32, available at <http://unfccc.int/resource/docs/convkp/kpeng.pdf> [hereinafter Kyoto Protocol] (providing that the Protocol shall be open for signature and subject to ratification by regional economic integration organizations). Kyoto Protocol, *supra*, art. 25(4) (providing that an instrument of ratification deposited by a REIO will not count in addition to those deposited by its member States for purposes of bringing the treaty into force).

94. *E.g.*, Kyoto Protocol, *supra* note 93, art. 22 (expressly allowing REIOs the right, “in matters within their competence,” to “exercise their right to vote with a number of votes equal to the number of their member States that are Parties” to the Protocol).

95. *E.g.*, Climate Change Convention, *supra* note 83, arts. 8–10 (establishing a Conference of the Parties; a subsidiary body for scientific and technological advice; and, a subsidiary body for implementation, each open to all Parties). The EU would not enjoy a right to vote in these bodies in addition to the right to vote of its members. *Id.*

96. *E.g.*, Kyoto Protocol, *supra* note 93, art. 22 (prohibiting a REIO from exercising its right to vote if any of its member States exercises its right to vote and vice versa so as to preclude double-voting). In a few rare cases, such as the Madrid Agreement Concerning the International Registration of Marks, the EU has secured a vote in addition to that of its members. Rafael Leal-Arcas, *The European Community and Mixed Agreements*, 6 EUR. FOREIGN AFF. REV. 483, 489 (2001) [hereinafter *Mixed Agreements*]. In other rare cases, the EU has one vote and its members no votes. Hollis, *supra* note 76, at 157. This situation rarely occurs because the EU rarely has sole competence to the exclusion of its members. *Id.*

97. See discussion *infra* Part III.A.

98. The UN Charter limits membership to the UN and its bodies, such as the ECOSOC, to sovereign states. U.N. Charter art. 4, ¶ 1.

a treaty negotiation, and seats on important bodies such as the International Court of Justice and the International Law Commission, are based on representation by regional group. These groups, set forth by the UN General Assembly in 1963, are: (1) the Group of African States, (2) the Group of Latin American and Caribbean States, (3) the Group of Asian States, (4) the Group of Eastern European States, and (5) the Group of Western European and Other States (WEOG).<sup>99</sup> WEOG has twenty-nine members, of which seventeen belong to the European Union.<sup>100</sup> The Group of Eastern European States has twenty-one members, of which nine belong to the EU and six are potential candidates for accession.<sup>101</sup> At negotiations or bodies where more than five groups are represented, such as the Conference of the Parties to the Convention on Biological Diversity, WEOG often divides into the EU and JUSCANZ.<sup>102</sup> JUSCANZ consists of Japan, the United States, Canada, New Zealand, Australia, Norway, and Switzerland, joined at times by South Korea and Mexico.<sup>103</sup> This division owes primarily to the EU's emergence as a unified foreign policy entity.<sup>104</sup> Each group selects its own representatives.<sup>105</sup>

No country, regardless of its power, consistently has its own delegate on a bureau or consistently holds numerous committee chairmanships. With the important exception of the Security Council and bodies established by the Council, where the permanent five members of the Council usually hold seats, nations ordinarily must

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99. Fassbender, *supra* note 12, at 877.

100. EU members of the WEOG are Austria, Belgium, Denmark, Estonia, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, Malta, the Netherlands, Portugal, Spain, Sweden, and the United Kingdom. *Id.* Andorra, Liechtenstein, Monaco and San Marino are not formally part of the EU. These small states have so many ties to the EU that they tend to vote in concert with the EU. *Id.* Turkey has applied for membership in the EU and therefore has sensitivity to EU interests. *Id.* Only seven members of the WEOG truly enjoy independence from the EU: Australia, Canada, Iceland, New Zealand, Norway, Switzerland, and the United States. Israel has temporary and restricted membership in WEOG. *Id.* For a list of WEOG members as of February 2003, see Fassbender, *supra* note 12, at 877 n.83.

101. EU members of the Group of Eastern European States are: Bulgaria, the Czech Republic, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia, and Slovenia. Fassbender, *supra* note 12, at 877 n.84. Potential candidates for EU accession are: Croatia, the former Yugoslav Republic of Macedonia, Albania, Bosnia and Herzegovina, Montenegro, and Serbia. *Id.* The other members of the Group of Eastern European nations are: Albania, Armenia, Azerbaijan, Belarus, Georgia, Moldova, the Russian Federation, and Ukraine. *Id.* For a list of members of the Group of Eastern European States, see *id.*

102. Eye on the UN, Political Alliances in the UN, <http://www.eyeontheun.org/view.asp?l=11&p=55> (last visited Oct. 21, 2008).

103. *Id.*

104. John Vogler & Hannes R. Stephan, *The European Union in Global Environmental Governance: Leadership in the Making?*, 7 INT'L ENVTL. AGREEMENTS 389, 408 (2007).

105. Fassbender, *supra* note 12, at 877.



content themselves with representation by other nations in their group, even though they may hold different substantive positions on the issues under consideration. By virtue of its tremendous number of votes and the accommodations accorded to it at many international treaty negotiations that allow the EU and its members to deliberate and enjoy representation as a distinct group, the EU and its member states never risk exclusion from any important body.<sup>106</sup> Moreover, the EU or one of its members speaking on behalf of the EU *always* represents the EU position at, for example, bureau meetings. Its ubiquitous presence enables the EU to consistently influence important procedural matters, to affect the order in which negotiating fora address treaty issues, and to generally ensure that matters that it considers important do not somehow become omitted from, for example, any chairman's proposed treaty text.<sup>107</sup> Negotiations frequently grind to a halt to enable the EU and its member states to coordinate a common position—an occurrence so common that it has its own name: "EU coordination."<sup>108</sup> Enjoying the votes of many but the voice of one, the EU and its members can adroitly advance their positions and, at a minimum, can prevent anything to which they really object from entering a treaty text.<sup>109</sup>

Legally joined together in an economic and political union, EU members vote for each other for seats on international bodies. They thus secure disproportionate representation in a host of international institutions as measured by virtually any standard—population, gross domestic product, or military power. For example, as of July 2007, EU nations comprised nine of the thirty-four members of the International Law Commission.<sup>110</sup> The United States, in comparison, presently holds no seat on the Commission. The UN General Assembly elects the Commission members. EU nations hold four of the fifteen seats on the International Court of Justice.<sup>111</sup> In addition to the two permanent seats on the Security Council held by the

106. Bloom, *supra* note 78, at 361.

107. *Id.* at 361–62.

108. *Id.*

109. *Id.*

110. EU members on the ILC are the United Kingdom, Portugal, Italy, Poland, Sweden, Romania, Germany, France, and Slovenia. International Law Commission, Membership, <http://www.un.org/law/ilc/> (last visited Oct. 21, 2008). Non-EU members are Qatar, Switzerland, Argentina, Mozambique, South Africa, Mali, Egypt, Jordan, Cameroon, Tunisia, Russian Federation, Canada, Costa Rica, Nigeria, Sri Lanka, Brazil, India, Columbia, Chile, Jamaica, Ecuador, Kenya, Indonesia, China, and Japan. *Id.*

111. The following EU members hold seats on the International Court of Justice: the United Kingdom, Germany, Slovakia and France. International Court of Justice, The Court, <http://www.icj-cij.org/court/index.php?p1=1&p2=2&p3=1> (last visited Oct. 21, 2008). Non-EU judges come from Jordan, Madagascar, China, Sierra Leone, Venezuela, the United States, Japan, New Zealand, Mexico, Morocco, and the Russian Federation. *Id.*

United Kingdom and France, members of the EU hold two of the ten nonpermanent seats.<sup>112</sup> EU member countries thus form one-third of the Security Council. EU member states comprise 25% of the parties to the Rome Statute on the International Criminal Court.<sup>113</sup> EU countries will enjoy ample representation on that court once it forms. It should come as no surprise that the EU and its members readily join international institutions—they can dominate them.

One can argue that the nations of the EU deserve the representation and influence described above. After all, they *are* a group of nations as opposed to a single state. However, the nations of the EU differ materially from all other blocs of nations. EU members shoulder a legal obligation to form and advocate a unified foreign policy position on a broad range of international matters. The Treaty on the European Union (the Maastricht Treaty) provides that “the Union shall define and implement a common foreign and security policy covering all areas of foreign and security policies.”<sup>114</sup> It further requires member states to “coordinate their action in international organizations and at international conferences” and to “uphold the common positions in such forums.”<sup>115</sup>

While other countries can and often do take positions that differ from those of their regional groups, the nations of the EU often cannot and usually do not. In the UN General Assembly, to take one example, the current EU President routinely delivers joint declarations on behalf of the EU member states, and EU members almost always vote together.<sup>116</sup> Evan Bloom explains that diplomats negotiating with EU member states

often find that . . . we are either too early or too late. We are too early in that when we approach the European Union to discuss particular positions, we are told that the Commission and members states are not ready to talk with the United States in substance because EU coordination has not been carried out. Then, once the coordination has

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112. Italy and Belgium currently hold seats on the Security Council. UN Security Council, Membership of the Security Council, <http://www.un.org/sc/members.asp> (last visited Oct. 21, 2008). EU member countries traditionally hold two of the nonpermanent seats. Fassbender, *supra* note 12, at 876.

113. International Criminal Court, Assembly of State Parties, <http://www.icc-cpi.int/statesparties.html> (last visited Oct. 21, 2008).

114. Maastricht Treaty on European Union, *supra* note 76, art. 11(1).

115. *Id.* art. 19(1). Article 19(2) provides that joint actions adopted by the EU Council shall bind the member states. *Id.* art. 19(2). Article 19(2) further requires France and the United Kingdom, in exercising their functions as permanent members of the Security Council, to “ensure the defense of the positions and the interests of the Union.” *Id.* The EU also has the power to force member states to take certain actions. *Id.*

116. Fassbender, *supra* note 12, at 874–75.

occurred, we are told that the European Union now has a formal position which cannot be changed.<sup>117</sup>

In contrast to other states, each of which suggests its own version of treaty text, the EU offers a single version. For example, during the negotiation of the Biosafety Protocol, the chairman instructed all nations to submit their proposed text for the Protocol's articles. Numerous nations, including Brazil, Canada, Cameroon, Columbia, Cuba, Ethiopia, Mexico, Japan, Russia, South Africa, Switzerland, and the United States, proposed draft texts.<sup>118</sup> At no time in the four-year negotiations did a single member of the EU submit its own treaty text. Rather, the EU submitted one text for all of its members.<sup>119</sup> The members of the EU thus act like, and in numerous foreign policy respects, legally *are* more like a single state than a group of independent sovereign states. Yet they exercise twenty-seven national votes.

### B. *Built-in Exceptions*

Exceptional accommodation extends beyond allowing the EU to join agreements and international institutions and to continue to enjoy the benefits of a group of independent states. The EU and its members have vigorously insisted upon and received built-in exceptions whereby the multilateral agreement or international institution treats the EU and its members as a single state for purposes of treaty obligations but as many states for voting on treaty issues and for counting towards the number of states required to render an agreement effective.

For example, during the negotiation of the Biosafety Protocol, the EU and its member states insisted that the Protocol's regulations on the transboundary movement of genetically modified organisms not apply to movements within the EU.<sup>120</sup> While the EU and its members served as principal *demandeurs* of the Protocol and took a lead role in defining the rules that would govern the trade in

117. Bloom, *supra* note 78, at 361; accord Fassbender, *supra* note 12, at 874 (pointing out that, once the EU has adopted a common position, "it can hardly be changed in the course of subsequent negotiations with other UN Member States, especially the other members of WEOG.").

118. *E.g.*, Convention on Biological Diversity, Open-Ended Ad Hoc Working Group on Biosafety, *Compilation of Government Submissions of Draft Text on Selected Items*, U.N. Doc. UNEP/CBD/BSWG/3/3 (Aug. 15, 1997), available at <http://www.cbd.int/doc/meetings/bs/bswg-03/official/bswg-03-03-en.pdf> [hereinafter *Compilation*].

119. *Id.*

120. See Convention on Biological Diversity, Open-Ended Ad Hoc Working Group on Biosafety, *Compilation of the Views of Governments on the Contents of the Future Protocol*, U.N. Doc. UNEP/CBD/BSWG/2/2 (Mar. 18, 1997), available at <http://www.cbd.int/doc/meetings/bs/bswg-02/official/bswg-02-02-en.pdf>.

genetically modified goods,<sup>121</sup> they promptly sought to exclude themselves from these rules with respect to much of their trade. They argued that EU rules, not those of the Protocol, should govern all trade in genetically modified goods between EU member countries.<sup>122</sup> They proposed that the Protocol include the following exception: "A regional economic integration organization, which itself is a Contracting Party to the Protocol and has a specific legal framework for biosafety, may declare that the Protocol shall not apply to movements within its territory."<sup>123</sup> While proffering a complete exception for itself, the EU proposed that trade undertaken pursuant to non-REIO bilateral and multilateral arrangements meet certain minimum standards.<sup>124</sup> Some Latin American and Caribbean countries objected to the EU's REIO provision.<sup>125</sup> "After intense internal discussion," the EU withdrew its REIO-specific exception and agreed to an exception applicable to all parties for trade undertaken pursuant to bilateral and multilateral agreements and arrangements.<sup>126</sup>

In a similar vein, during the negotiation of the Kyoto Protocol, the EU and its members insisted on the creation of an "EU

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121. Mark Rhinard & Michael Kaeding, *The International Bargaining Power of the European Union in "Mixed" Competence Negotiations: The Case of the 2000 Cartagena Protocol on Biosafety*, 44 J. COMMON MKT. STUD. 1023, 1033 (2006).

122. Early in the negotiations, the EU laid down a marker that the EU regulatory scheme should govern all trade within the EU. See Convention on Biological Diversity, Open-Ended Ad Hoc Working Group on Biosafety, *Individual Government Submissions on the Contents of the Future Protocol*, U.N. Doc. UNEP/CBD/BSWG/Inf.2 (May 6, 1997), available at <http://www.cbd.int/doc/meetings/bs/bswg-02/information/bswg-02-inf-02-en.pdf> ("Within regional economic integration organizations, principles of an internal market and regional legislation on biotechnology can provide a sufficient framework for the aspects of the internal movement of LMOs [living modified organisms] and such a framework can therefore fulfil [sic] the objectives of the Protocol.").

123. Convention on Biological Diversity, Open-Ended Ad Hoc Working Group on Biosafety, *Overview and Annotated Draft Negotiating Text of the Protocol on Biosafety*, U.N. Doc. UNEP/CBD/BSWG/6/8 (Dec. 9, 1998).

124. *Compilation*, *supra* note 118, at 33. The European Union submitted text on bilateral and regional agreements that could operate in lieu of the procedures set forth in the Protocol, but only if such agreements and arrangements "do not result in a lower level of protection than the one provided for by the Protocol." *Id.* However, under the EU proposal, this limitation would not apply to multilateral agreements and arrangements that had been entered into prior to the entry into force of the Protocol, such as the existing agreements and arrangements that governed the movement of genetically modified goods within the EU. *Id.* at 33–34.

125. Eric Schoonejans, *Advanced Informed Agreement Procedures*, in THE CARTAGENA PROTOCOL ON BIOSAFETY 299, 316 (Cristoph Bail et al. eds., 2002).

126. Schoonejans, *supra* note 125, at 316. Article 14 of the Biosafety Protocol provides that "[p]arties may enter into bilateral, regional and multilateral agreements and arrangements regarding international transboundary movements of living modified organisms, consistent with the objective of this Protocol and provided that such agreements and arrangements do not result in a lower level of protection than that provided for by the Protocol." Biosafety Protocol, *supra* note 92, art. 14.

bubble.”<sup>127</sup> Under the bubble concept, reductions in greenhouse gas emissions would be calculated for the EU as a whole.<sup>128</sup> The treaty would thus effectively treat the European Union as a single state for purposes of compliance with the treaty’s greenhouse gas reduction requirements. The EU “called for a uniform target for all industrialized-country parties,” with the exception of its own industrialized member states, for whom different targets would be allowed under the EU bubble.<sup>129</sup> The EU bubble would enable certain EU members, such as Portugal, Spain, Greece, and Ireland, actually to increase their greenhouse gas emissions to facilitate their economic development.<sup>130</sup> The bubble would also help the EU countries meet their emissions reduction targets by taking advantage of Germany’s large emissions reductions due to eastern Germany’s economic restructuring.<sup>131</sup>

While the EU and its members insisted upon the ability to effectively trade emissions within the EU, they vigorously opposed emissions trading between other developed nations. The EU and its members maintained that the Kyoto Protocol should freely enable EU countries to swap emissions with each other, with reductions from some countries offsetting increases in emissions in others, but should preclude countries like the United States and New Zealand from enjoying similar flexibility.<sup>132</sup> Breidenich, Magraw, Rowley, and Rubin describe the EU’s position at the Kyoto negotiations:

The United States, New Zealand and other non-EC Annex I countries proposed a broad system to allow Annex I countries to trade portions of their assigned [reduction] amounts. The proposed ‘emissions trading’ system would require countries . . . to track and report country-to-country emissions transfers, which would be recorded by the FCCC [Framework Convention on Climate Change] Secretariat. . . . The Community opposed this formulation. . . . Under the EC proposal, Annex I countries could trade credit only for emissions reductions that are generated for specific projects. The proposed system would require international certification and tracking of each project and the resulting trade, *with one exception: trade within the EC bubble*. Many

127. Clare Breidenich et al., *The Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 92 AM. J. INT’L L. 315, 321 (1998).

128. *Id.*; Cinnamon Carlarne, *Climate Change Policies an Ocean Apart: EU & US Climate Change Policies Compared*, 14 PENN ST. ENVTL. L. REV. 435, 459–60 (2006) (describing how the EU bubble works); Chad Damro & Pilar Luaces-Méndez, *The Kyoto Protocol’s Emissions Trading System: An EU-US Environmental Flip-Flop* 5 n.7 (U. Pittsburg Center for Int’l Stud., Eur. Union Center, Working Paper No. 5, 2003), available at <http://aei.pitt.edu/874/01/Kyoto.pdf>. See generally Daniel Bodansky, *The United Nations Framework Convention on Climate Change*, 18 YALE J. INT’L L. 451, 520–21 (1993) [hereinafter *Climate Change*] (describing joint implementation approaches including the regional bubble approach suggested by the EU for itself).

129. Breidenich et al., *supra* note 127, at 320.

130. Damro & Luaces-Méndez, *supra* note 128, at 7 tbl.1.

131. DAVID HUNTER ET AL., INTERNATIONAL ENVIRONMENTAL LAW AND POLICY 688 (3d ed. 2007).

132. *Id.* at 665, 680.

non-EC parties argued that the Community's internal burden-sharing arrangement is, in fact, a form of internal EC target-based emissions trading, and that all Annex I countries should be provided with the same opportunity. The Community countered that the burden sharing is *necessary owing to, and is strictly a product of, the EC member states' unique economic cooperation.*<sup>133</sup>

The EU and its members succeeded in obtaining their bubble.<sup>134</sup> Ultimately, they had to allow emissions trading for other nations, too.<sup>135</sup>

The Landmines Convention presents another example of a built-in exclusion to accommodate EU interests. During the negotiation of the Landmines Convention, the EU and its member states pressed to exclude from the scope of the Convention anti-personnel devices used to protect anti-vehicle mines from enemy personnel who would attempt to disarm them.<sup>136</sup> The militaries of EU member states use anti-personnel devices to protect their anti-vehicle mines.<sup>137</sup> The United States military also protects its anti-tank mines with anti-personnel devices through a functionally equivalent, but technically different method.<sup>138</sup> While pressing for its own exclusion, the EU simultaneously opposed a comparable exclusion for the United States.<sup>139</sup> Under the banner of "no loopholes, no exceptions, no

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133. Breidenich et al., *supra* note 127, at 324 (emphasis added). Annex I countries are industrialized countries. HUNTER ET AL., *supra* note 131, at 680. The Kyoto Protocol imposes targets and timetables for these countries to reduce their net emissions of greenhouse gases. *Id.* The EU and its members initially opposed all emissions trading between non-EU Annex I countries. *Id.* at 688. Even when they eventually agreed to emissions trading between non-EU Annex I countries, they insisted on capping the amount of trading that these countries could do. *Id.* at 665.

134. See Kyoto Protocol, *supra* note 93, art. 4 (providing for EU bubble). This provision allows nations other than those of the EU "to bubble" with each other. *Id.* As with REIO provisions, while facially neutral, this provision was designed specifically for and has been utilized exclusively by the EU. *Id.*

135. See *id.* art. 17 (providing for emissions trading); see also HUNTER ET AL., *supra* note 131, at 688 (describing how the EU ultimately agreed to full emissions trading between Annex I countries).

136. Christian M. Capece, *The Ottawa Treaty and Its Impact on U.S. Military Policy and Planning*, 25 BROOK. J. INT'L L. 183, 194-96 (1999); see also Leo Rennert, *Clinton Acts Unilaterally on Land Mines: Other Nations Draft Treaty, Overriding U.S. Objections*, FRESNO BEE, Sept. 18, 1997, at A6 ("Before Washington joined the Oslo talks, the Europeans had fashioned an exemption for booby traps attached to their anti-tank mines. U.S. negotiators proposed a two-word amendment that would have broadened the wording to include explosives attached to 'or near' anti-tank mines but were rebuffed.").

137. Capece, *supra* note 136, at 194-96.

138. Sanger, *supra* note 46 ("European nations have similar combination mines, but in their version, the antipersonnel explosives to defend the anti-tank mines are integrated into the rest of the weapon."). The United States protects its anti-vehicle mines with anti-personnel mines that self-destruct after a few weeks so as not to linger and cause casualties after a battle. *Id.*

139. Telephone Interview with former State Dep't Officer (July 11, 2007) (discussing the negotiation of the Landmines Convention, with which he was familiar).

exclusions," NGOs objected to both the EU and the U.S. exclusions.<sup>140</sup> With its bloc of then-fifteen votes coordinated under a single entity, the EU could easily prevent the adoption of the Convention.<sup>141</sup> The EU's voting power enabled it to secure a built-in exception for its anti-handling devices,<sup>142</sup> which permitted its members to join the Convention.<sup>143</sup>

### C. *Mixed Agreements*

In addition to securing built-in exemptions for itself in multilateral agreements, the EU and its members have insisted upon and repeatedly obtained an exceptional mode of treaty to accommodate the unique and evolving status of the European Union—mixed agreements. These extraordinary and largely unprecedented agreements create an ambiguity as to which party bears responsibility for fulfilling obligations under the treaty. Mixed agreements are treaties that both the EU and some or all of its members can join.<sup>144</sup> In negotiating mixed agreements, other nations may face a confusing gaggle of "one or more of the Communities, one or more of the Communities together with one or more of the . . . Member States, the Member States acting jointly, for instance, under the Common Foreign and Security Policy (CFSP) . . . and the Member States acting in a more individual capacity."<sup>145</sup>

In addition, not a single EU state supported any attempt by the United States to address the DMZ situation in Korea. Malanczuk, *supra* note 49, at 85.

140. Roberts, *supra* note 49, at 385.

141. International conventions are usually adopted by consensus. While technically the opposition of one nation can bloc consensus, as a practical matter this rarely happens. Rather, consensus is only blocked when a number of countries object. Given its large number of states, the European Union can always block consensus. Indeed, at the time of the adoption of the Landmines Convention, the fifteen members of European Union comprised over one-third of the forty countries needed to bring the Convention into force. See Landmines Convention, *supra* note 32, art. 17(1).

142. Article 2(1) expressly excludes anti-vehicle mines with anti-handling devices in the definition of anti-personnel landmines. *Id.* art. 2(1). Article 2(3) defines an anti-handling device as a device intended to protect a mine. *Id.* art. 2(3).

143. See Jodi Preusser Mustoe, *The 1997 Treaty to Ban the Use of Landmines: Was President Clinton's Refusal to Become a Signatory Warranted?*, 27 GA. J. INT'L & COMP. L. 541, 565 (1999) ("Ironically, the United States' European allies that use a similar explosive device that attaches to an anti-tank mine for the same purpose [keeping enemy soldiers from disarming it], received an exemption for their weapons in the Ottawa agreement."); Stephen Chapman, *Who's Blocking Progress on Land Mines?*, CHI. TRIB., Dec. 7, 1997, at 23 ("Our European allies use similar explosive devices attached to anti-tank mines for the same reason—but they got an exemption for their weapons in the Ottawa accord.")

144. Hollis, *supra* note 76, at 157; *Mixed Agreements*, *supra* note 96, at 485.

145. Allan Rosas, *Mixed Union-Mixed Agreements*, in INTERNATIONAL LAW ASPECTS OF THE EUROPEAN UNION 125, 126 (Martti Koskenniemi ed., 1998).

In mixed agreements, the EU and its members share competence.<sup>146</sup> “Competence” refers to the legal authority to undertake the obligations and exercise the rights set forth in the treaty.<sup>147</sup> Today, most multilateral agreements implicate shared competences between the EU and its member states. The EU Treaty Office’s list of agreements joined by the EU indicates that, with a few exceptions, the treaties involve mixed competences between the EU and its members.<sup>148</sup> Most of these agreements cannot be divided into distinct blocks where competences are clearly allocated between the member states and the EU. Rather, the EU and its members “both have competences over parts of the whole.”<sup>149</sup> Even if the EU could exercise exclusive competence in a given area, EU members generally resist ceding all treaty power to the EU in a given area, preferring instead to monitor the EU, participate, and preserve their vote in treaty negotiations.<sup>150</sup>

Other nations negotiating and entering treaties with the EU and its members usually remain unaware of who bears responsibility for what under the treaty.<sup>151</sup> For example, during the negotiation of the Kyoto Protocol, nations persistently and largely unsuccessfully asked

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146. *Mixed Agreements*, *supra* note 96, at 485.

147. JONI HELISKOSKI, MIXED AGREEMENTS AS A TECHNIQUE FOR ORGANIZING THE INTERNATIONAL RELATIONS OF THE EUROPEAN COMMUNITY AND ITS MEMBER STATES 6 n.21 (2001).

148. See EC Agreements, *supra* note 88. For example, the EU is a signatory to thirty-one multilateral environmental agreements, all of which involve mixed competences. Rhinard & Kaeding, *supra* note 121, at 1031–32. Fisheries represent a rare example where the members have transferred all of their competence to the EU such that the EU now joins fisheries agreements in lieu of its members. Hollis, *supra* note 76, at 157.

149. Eva Steinberger, *The WTO Treaty as a Mixed Agreement: Problems with the EC's and the EC Member States' Membership of the WTO*, 17 EUR. J. INT'L L. 837, 847 (2006).

150. See, e.g., Rafael Leal-Arcas, *The EU Institutions and Their Modus Operandi in the World Trading System*, 12 COLUM. J. EUR. L. 125, 127 (2005) (noting the unwillingness of EU member states to cede all power to the EU, even in the area of trade).

151. See Rafael Leal-Arcas, *Exclusive or Shared Competence in the Common Commercial Policy: From Amsterdam to Nice*, 30 LEGAL ISSUES OF ECON. INTEGRATION 3, 5–6 (2003) (describing the lack of clarity as to the allocation of competences between the EU and its member states); Steinberger, *supra* note 149, at 848 (noting that, for other countries, apportionment of competences between the EU and the member states “is very unpredictable and largely inscrutable. For all WTO Agreements other than GATT, the EC competences are . . . not clearly separated or even divisible from the competences of its Member States.”). For a general description of the constantly changing and often confusing allocation of competences between the EU and its member states, see Nanette A. Neuwahl, *Shared Powers or Combined Incompetence? More on Mixity*, 33 COMMON MKT. L. REV. 667 (1996); Marise Cremona, *External Relations of the EU and the Member States: Competence, Mixed Agreements, International Responsibility, and Effects of International Law* (Eur. U. Inst., Working Paper No. LAW 2006/22, 2006), available at <http://cadmus.eui.eu/dspace/bitstream/1814/6249/1/LAW-2006-22.pdf>.



whether the EU or its members bore responsibility for the important obligations under consideration.<sup>152</sup> Even the EU and its members appeared uncertain during negotiations of their respective competences.<sup>153</sup> These competences can change during the course of a negotiation, as occurred during the negotiation of the FAO Fisheries Agreement.<sup>154</sup> EU competence remains in constant flux because much of the power of the EU remains latent until the EU decides to exercise it by issuing directives.<sup>155</sup> In addition, decisions of the European Court of Justice apportion competences between the Community and its member states.<sup>156</sup> Even where a treaty requires the EU to declare where its competences lie,<sup>157</sup> the EU declaration provides other nations with little comfort. It normally states that the "scope and the exercise of Community competence are, by their nature, subject to continuous development."<sup>158</sup>

Few have written on the problems that EU mixed agreements present for other nations.<sup>159</sup> With mixed agreements, other nations often do not know who bears responsibility or liability for a breach. Does responsibility lie with the EU? Does the member state where the violation occurred bear liability? The EU and its members maintain that, ordinarily, the question of which among them bears responsibility constitutes an internal EU matter.<sup>160</sup> The EU and its

152. Damro & Luaces-Méndez, *supra* note 128, at 4 (describing how legal uncertainties as to the relationship between the EU and member states led "to numerous questions on the part of third parties about which actor—the EU or each member state" bore responsibility for implementing the issues under consideration during the negotiation of the Kyoto Protocol).

153. *Id.* at 5.

154. *Mixed Agreements*, *supra* note 96, at 487–88.

155. See generally Cremona, *supra* note 151 (discussing international responsibility under mixed agreements).

156. See, e.g., Hollis, *supra* note 76, at 158 (noting that member states successfully challenged the authority of the EC to enter into human rights agreements before the European Court of Justice).

157. In an effort to alleviate some of the confusion, some treaties now provide that the REIO should declare what powers it exercises for purposes of that treaty. Cremona, *supra* note 151, at 21. Article 24(3) of the Kyoto Protocol, for example, requires REIOs to declare at the time that they join the Protocol "the extent of their competence with respect to the matters governed by" the Protocol and to inform the Depository of "any substantial modification in the extent of their competence." Kyoto Protocol, *supra* note 93, art. 24(3).

158. HELISKOSKI, *supra* note 147, at 161–66.

159. Steinberger, *supra* note 149, at 838. While much has been written about the internal problems that mixed agreements present for the EU and its members, few scholars seem to worry about the problems that these agreements present for everyone else. *Id.* Steinberger discusses some of these problems in the context of the WTO. *Id.*

160. See Cremona, *supra* note 151, at 16 ("Whether the Community or the Member State actually implements the agreement will depend on 'the state of Community Law for the time being in the areas affected by the provisions of the agreement.'" (quoting Case 104/81, Hauptzollamt Mainz v. Kupferberg, 1982 E.C.R. 3641, issue 2, ¶ 12)). Furthermore, the European Court of Justice has opined that, in

members expect other nations to exercise patience as Brussels goes through time-consuming internal gyrations, legal analysis, and negotiations with EU members with respect both to implementing treaty obligations and to addressing breaches. These delays, however, can impose significant costs on other countries. In the case of some agreements, such as those in the areas of trade and aviation, the aggrieved country can suffer millions of dollars in damages for every day that a violation occurs.<sup>161</sup> Some have argued that in the event of a breach of an obligation contained in a mixed agreement, the EU and its members bear joint and several liability.<sup>162</sup> The aggrieved party could then initiate compliance measures against each, and each would shoulder liability. The EU resists this suggestion.<sup>163</sup>

The issue of liability arose in the recent Air Transport Agreement between the EU and its members and the United States (the Open Skies Plus Agreement).<sup>164</sup> Disputes over the Open Skies Plus Agreement illustrate the liability issues that arise in mixed agreements. The Agreement treats the airlines of all European Union member countries as “Community airlines.”<sup>165</sup> For most purposes, the Agreement treats the EU member countries as one territorial entity, just like the United States.<sup>166</sup> Should an entity within the United States, such as an airport or state, violate a provision of the Open Skies Plus Agreement, then the EU and its members could conceivably retaliate—i.e., impose countermeasures—

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mixed agreements, the apportionment of competences between member states and the EU constitutes “an internal question.” *Id.* at 20.

161. See *infra* pp. 1344–47.

162. See, e.g., Steinberger, *supra* note 149, at 859–62 (concluding that the EU and its members should bear joint and several liability for breaches of the WTO Agreements).

163. See, e.g., Cremona, *supra* note 151, at 21–25.

The Commission likes to see the EC as the first port of call, in order to minimize the risk that a Member State and a third state might enter into bilateral negotiations or even proceedings which might have the effect of deciding issues relating to the interpretation of the agreement and to the scope of EC competence.

*Id.* In multilateral agreements where the EU has filed a declaration of competences, joint and several liability does not apply. *Id.* at 21–22. However, in the absence of a declaration or its inconclusiveness, “the authorities differ as to whether international responsibility should be apportioned between the Community and its member States according to their respective competences, or whether the Community and Member States could be regarded as jointly and severally responsible in international law for the whole agreement.” *Id.*

164. Air Transport Agreement, Apr. 30, 2007, 46 I.L.M. 470, 2007 O.J. (L 134) 4, available at [http://ec.europa.eu/transport/air\\_portal/international/pillars/global\\_partners/doc/us/agreement\\_oj\\_%201134\\_2007.pdf](http://ec.europa.eu/transport/air_portal/international/pillars/global_partners/doc/us/agreement_oj_%201134_2007.pdf).

165. *Id.* art. 3, ¶ 1(c)(ii).

166. See, e.g., *id.* art. 1, ¶ 9 (defining territory in terms of the United States and the European Community).

against any entity or state of its choosing within the United States. For example, if Phoenix Sky Harbor International Airport violated the Open Skies Plus Agreement by imposing fees in excess of services provided on Community aircraft arriving from any EU country,<sup>167</sup> the EU and its members could retaliate by imposing similar charges on U.S. flights to the EU originating from John F. Kennedy International Airport in New York. What if Athens International Airport imposed unreasonable fees against U.S. flights? Given that the EU member states now form one entity, should the United States have the flexibility to retaliate against Frankfurt am Main International Airport, or are its options restricted to airports in Greece? A position favorable to the United States would hold that the United States should have the flexibility to retaliate anywhere in the EU. A position favorable to the EU would hold that it should not.

Overall, responsibility for violations of agreements with the EU member countries remains unclear. While the EU and its members always know what countries they can hold responsible for implementation and breaches of international agreements, other countries do not enjoy similar comfort in their treaty relations with the EU. This situation is unlikely to correct itself over time. The EU and its members have both legal and political incentive to maintain the ambiguity manifest in mixed agreements, and the number of mixed agreements will continue to mushroom.

The EU and its members take pride in their historic union. They expect other nations to accommodate their exciting experiment and its attendant legal irregularities. As Alan Rosas, former Principal Legal Adviser for the European Commission, matter-of-factly said: "The European Union being a hybrid conglomerate situated somewhere between a State and an intergovernmental organisation, it is only *natural* that its external relations in general and treaty practice in particular should not be straightforward."<sup>168</sup> Other countries simply must accept as facts of life mixed agreements, representation at international conferences by both the EU and its member states, and the maintenance of embassies by the EU in addition to those of the member states.<sup>169</sup>

Its command of a tremendous number of votes enables the EU and its members to obtain both the structural and substantive accommodations that they desire in a treaty. While they might

167. See *id.* art. 12.

168. Rosas, *supra* note 145, at 125 (emphasis added).

169. See, e.g., Per Lachmann, *Remarks: The European Union's New Ambitions*, 99 AM. SOC'Y INT'L L. PROC. 370, 372 (2005) ("My colleagues in third states' legal departments . . . will continue to have to live with mixed agreements."). Furthermore, had the Constitutional Treaty been ratified, "the creation of diplomatic EU missions abroad instead of just Commission missions [would] be a new fact of life influencing the daily routines of the international community." *Id.*

ultimately have to abandon their hypocritical positions and extend similar substantive accommodation to other nations, as they did in the Kyoto Protocol and in the Biosafety Protocol, the EU and its members always obtain their “must haves.”<sup>170</sup> In contrast, the United States—with its single vote— finds itself unable to secure legal accommodation in a multilateral agreement even if its proffered accommodation would apply to other nations in a similar situation. The U.S.-proposed exclusion for the DMZ obviously applied solely to the DMZ, but this tailored exclusion arose out of the restrictive dynamic of the Ottawa process.<sup>171</sup> The United States would have accepted an exclusion that encompassed other countries.<sup>172</sup> In fact, the 1996 UN Protocol on Landmines to which the United States is party has a general exclusion for mines in controlled fields.<sup>173</sup> This exclusion covers the DMZ as well as the China-Russia border and the India-Pakistan border. In the case of the International Criminal Court, the United States sought to preserve the International Law Commission’s original concept of the Court as subject to the control of the Security Council.<sup>174</sup> The United States sits on the Council, but so do other nations—the United States’ desired accommodation would have applied to those similarly situated nations with seats on the Security Council.

Roughly to analogize the position of the United States to that of the European Union, imagine if the United States could, for purposes of international negotiations, become a group of fifty states. Like the European Union, the United States, when speaking at international negotiations, could intervene along the following lines: “The United States, on behalf of its fifty member states, proposes that the Landmines Convention include a nine-year grace period for the demining of the DMZ and, in addition to excluding anti-handling devices, exclude self-destructing anti-personnel mines when used with anti-vehicle mines. Without such provisions, our fifty member states will not join the Convention.”

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170. See, e.g., Rhinard & Kaeding, *supra* note 121, at 1033, 1042–43 (noting that the EU achieved almost all of its aims in Biosafety Protocol).

171. See *supra* notes 40–51 and accompanying text.

172. See *supra* notes 40–51 and accompanying text.

173. Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Protocol II, May 3, 1996, 1342 U.N.T.S. 163, available at <http://treaties.un.org/untc/Pages/doc/Publication/UNTS/Volume%201342/volume-1342-I-22495-English.pdf>.

174. William A. Schabas, *United States Hostility to the International Criminal Court: It's All About the Security Council*, 15 EUR. J. INT'L L. 701, 712–16 (2004).

#### IV. DEVELOPING COUNTRY EXCEPTIONALISM: COMMON BUT DIFFERENTIATED RESPONSIBILITIES

Just as the United States sought an exception in the Landmines Convention to address its historical obligations and special needs in the DMZ, developing countries routinely and increasingly seek to except themselves from uniform international norms in environmental agreements and in trade agreements, arguing that they need such exceptions in order to address their special needs and history. Developing countries argue that they have overwhelming socio-economic concerns, including the pressing need to alleviate abject poverty in their societies, that take precedence over environmental protection and that require differentiated environmental standards and trading rules.<sup>175</sup> They further emphasize that they lack the resources and the technical capabilities to implement environmental protection standards to the same degree as developed countries.<sup>176</sup> Some note that developed countries freely exploited their resources and natural habitats on their road to development, and believe that it is unfair for international rules now to constrain the freedom of poor countries to use their environments to advance economically.<sup>177</sup> Finally, developing countries argue that developed countries should shoulder a higher share of the costs of environmental protection as they created a disproportionate amount of the world's environmental problems.<sup>178</sup> Overall, as Christopher Stone notes, "[t]he environment is emerging as the most fertile field for nonuniform obligations."<sup>179</sup> The concept that developing countries should enjoy a lesser legal burden has acquired two names: "common

175. LAVANYA RAJAMANI, DIFFERENTIAL TREATMENT IN INTERNATIONAL ENVIRONMENTAL LAW 152 (2006).

176. *Id.*

177. See HUNTER ET AL., *supra* note 131, at 496 ("Some economists argue that developing countries should be allowing to continue polluting as they develop their economies, and that this a legitimate 'comparative' advantage they should be able to exploit in international trade.")

178. These arguments are well-known. See generally *id.* at 495–97 (noting the controversial nature of differentiated responsibilities); Duncan French, *Developing States and International Environmental Law: The Importance of Differentiated Responsibilities*, 49 INT'L & COMP. L.Q. 35, 46–59 (2000) (discussing the justifications for differentiated responsibilities in international environmental law); Howard Latin, *Saving Nature Despite Fools, Felons and Experts: Why the Environmental Groups Are Failing* (manuscript ch. Common but Differentiated Responsibilities, at 1-2, on file with author) (summarizing some of the arguments for differential treatment).

179. Christopher D. Stone, *Common but Differentiated Responsibilities in International Law*, 98 AM. J. INT'L L. 276, 279 (2004). For an overview of common but differentiated responsibility, see RAJAMANI, *supra* note 175, at 129–62.

but differentiated responsibilities” (CDR) in the environmental arena and “special and differential treatment” (SDT) in the trade context.<sup>180</sup>

In environmental agreements, “differentiated” means that legal obligations to address common environmental threats should differ among nations, with developing nations ordinarily assuming lower burdens than developed ones.<sup>181</sup> Agenda 21, adopted by nations at the 1992 Rio Earth Summit, calls upon states to “take into account the different situations and capabilities of countries” when designing international standards.<sup>182</sup> The lesser burden imposed upon developing nations, or the special accommodation afforded them, manifests itself in treaties in a number of ways. A treaty might specify a lower level of obligation for developing countries. For example, the Kyoto Protocol completely exempts developing countries from any obligation to reduce or to cap future emissions of greenhouse gases.<sup>183</sup> The 1994 Desertification Convention imposes obligations on developed countries that it does not impose upon developing countries.<sup>184</sup> The United Nations Convention on the Law of the Sea contains at least ten provisions that accord preferential treatment to developing nations.<sup>185</sup> For example, Article 61, which addresses the conservation of the living resources of the sea, qualifies the obligation of coastal states “to maintain or restore populations of harvested species” based on “the special requirements of developing

180. Compare Michael Hart & Bill Dymond, *Special and Differential Treatment and the Doha “Development” Round*, 37 J. WORLD TRADE 395 (2003) (discussing SDT), with Stone, *supra* note 179, at 276 (discussing CDR).

181. Stone, *supra* note 179, at 277.

182. United Nations Conference on Environmental and Development [UNCED], Rio de Janeiro, Braz., June 3–14, 1992, *Agenda 21*, ¶ 39.3(d) available at <http://www.un.org/esa/sustdev/documents/agenda21/english/agenda21chapter39.htm>.

183. Kyoto Protocol, *supra* note 93, art. 3. The Protocol divides countries into four groups. *Id.* Only Annex I countries (OECD countries plus some countries in central and eastern Europe and the newly independent states from the Soviet breakup) must reduce greenhouse gas emissions, by at least 5% below 1990 levels by 2008–2012. *Id.* See generally Paul G. Harris, *Common but Differentiated Responsibility: The Kyoto Protocol and United States Policy*, 7 N.Y.U. ENVTL. L.J. 27 (1999) (discussing the requirements imposed by the Kyoto Protocol); Lavanya Rajamani, *The Principle of Common but Differentiated Responsibility and the Balance of Commitments under the Climate Regime*, 9 REV. EUR. COMMUNITY & INT’L ENVTL. L. 120 (2000) (discussing differentiated responsibility as shown in the Kyoto Protocol).

184. United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa art. 4, 6, Oct. 14, 1994, 33 I.L.M. 1328. The 1994 International Tropical Timber Agreement (ITTA) also provides for differential treatment. International Tropical Timber Agreement art. 34, ¶ 1, Jan. 26, 1994, 33 I.L.M. 1014. It stipulates that “[d]eveloping importing members whose interests are adversely affected by measures taken under this Agreement may apply to the Council for appropriate differential and remedial measures.” *Id.*

185. Stone, *supra* note 179, at 279 n.21 (citing the United Nations Convention on the Law of the Sea, arts. 61(3), 62(3), 69(4), 70(5), 82, 140, 144, 148, 150, 152, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter LOS Convention]).

States.”<sup>186</sup> Article 62 exhorts coastal states to take special account of “the requirements of developing States” when allocating access to fishing rights in their Exclusive Economic Zones.<sup>187</sup> While the Convention obligates nations that exploit minerals and gas beyond their continental shelf to contribute to an international fund, it exempts certain developing countries from the payment obligation.<sup>188</sup>

In the alternative, a treaty that imposes identical obligations on all parties might offer certain countries a more favorable time frame for implementation.<sup>189</sup> The Montreal Protocol on Substances That Deplete the Ozone Layer, for example, grants certain developing countries ten years to begin reduction of their use of ozone-depleting substances.<sup>190</sup> It further allows them to increase their use of these substances during the ten-year grace period.<sup>191</sup> Differentiation often involves funding obligations, with numerous environmental agreements imposing funding obligations on developed countries alone.<sup>192</sup> Examples include the Montreal Protocol and its 1991 amendments,<sup>193</sup> the Convention on Biological Diversity,<sup>194</sup> and the Biosafety Protocol.<sup>195</sup> Developing countries have even gone so far as to assert that the common but differentiated responsibility concept exempts them from any payment obligation to multilateral environmental organizations or projects, such as the UN Environment Programme.<sup>196</sup>

One of the more widespread and subtle methods of norm differentiation that favors developing countries involves linking a country’s obligation to comply to its capacity to comply. In these

186. LOS Convention, *supra* note 185, art. 61.

187. *Id.* art. 62(3).

188. *Id.* art. 82(3).

189. Susan Biniaz, *Common but Differentiated Responsibilities*, 96 AM. SOC’Y INT’L L. PROC. 358, 359 (2002).

190. Montreal Protocol on Substances that Deplete the Ozone Layer art. 5, Sept. 16, 1987, 26 I.L.M. 1550 [hereinafter Montreal Protocol].

191. *See id.* Article 5 provides:

Any Party that is a developing country and whose annual calculated level of consumption of the controlled substances is less than 0.3 kilograms per capita on the date of the entry into force of the Protocol for it, or anytime thereafter within ten years of the date of entry into force of the Protocol shall, in order to meet its basic domestic needs, be entitled to delay its compliance with the control . . . by ten years after that specified in those paragraphs.

*Id.*; *see also* HUNTER ET AL., *supra* note 131, at 585 (explaining special accommodations for developing countries in the Montreal Protocol).

192. French, *supra* note 178, at 50–53.

193. Montreal Protocol, *supra* note 190, art. 10; Adjustments and Amendments to the Montreal Protocol on Substances that Deplete the Ozone Layer § T, June 29, 1990, 30 I.L.M. 537.

194. CBD, *supra* note 4, art. 21.

195. Biosafety Protocol, *supra* note 92, art. 28; *see also* French, *supra* note 178, at 42 (describing funding requirements of multilateral environmental agreements).

196. Biniaz, *supra* note 189, at 363.

cases, the treaty makes the commitment contingent upon "the capacity of countries," "the different capabilities of countries," or to the extent possible.<sup>197</sup> The World Heritage Convention, for example, obligates states to identify, protect, and conserve natural and cultural heritage "in so far as possible, and as appropriate for each country."<sup>198</sup> The 1979 Convention on Long-Range Transboundary Air Pollution contains numerous obligations that take into account economic development.<sup>199</sup> Article 2 of the treaty, for example, provides that parties "shall endeavor to limit and, as far as possible, gradually reduce and prevent air pollution."<sup>200</sup> The Convention on Biological Diversity recognizes "that economic and social development and poverty eradication are the first and overriding priorities of developing countries."<sup>201</sup> Consequently, caveats like "as far as possible and as appropriate" limit many of the Convention on Biological Diversity's requirements.<sup>202</sup> Article 8 on in situ conservation, for example, obligates parties to establish protected areas and to "regulate or manage biological resources important for the conservation of biological diversity" only "as far as possible and as appropriate."<sup>203</sup>

Even if a treaty does not expressly differentiate between parties, Susan Biniaz explains that "countries will later assert that the principle of common but differentiated responsibilities dictates that compliance regimes distinguish between developed and developing countries."<sup>204</sup> This amounts to "a kind of *ex post facto* effort to change commitments that were *not* differentiated when they were negotiated into differentiated commitments by virtue of saying that it is permissible for developing countries not to implement these commitments, because of the principle."<sup>205</sup>

So widespread has CDR become that some suggest that this differentiation in legal obligation, or what could be called developing

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197. *Id.* at 359–60; see also Daniel Barstow Magraw, *Legal Treatment of Developing Countries: Differential, Contextual, and Absolute Norms*, 1 COLO. J. INT'L ENVTL. L. POL'Y 69, 74–75, 82 (1990) (describing "contextual norms," whereby obligations contain caveats like "reasonable" or "equitable").

198. Convention for the Protection of the World Cultural and Natural Heritage art. 5, Nov. 23, 1972, 27 U.S.T. 37, 1037 U.N.T.S. 151.

199. Magraw, *supra* note 197, at 93.

200. Convention on Long-range Transboundary Air Pollution art. 2, Nov. 13, 1979, 18 I.L.M. 1442.

201. CBD, *supra* note 4, pmbl.

202. French, *supra* note 178, at 39; Latin, *supra* note 178, at 3.

203. CBD, *supra* note 4, art. 8.

204. Biniaz, *supra* note 189, at 363.

205. *Id.* (emphasis added); see also Latin, *supra* note 178, at 1–2 ("[U]nder the justification of 'common but differentiated responsibilities,' the governments of developing states can rationalize their inability to implement or enforce international conservation treaty terms by contending that they have inadequate resources and more pressing national concerns, such as poverty alleviation.").



country exceptionalism, may constitute an emerging principle of customary international law.<sup>206</sup> Several developing countries have even argued that CDR constitutes a principle of international law that selectively relieves them from WTO standards.<sup>207</sup> Most scholars and international lawyers do not believe that CDR has risen to a principle of customary international law.<sup>208</sup> Nonetheless, it has “significantly affected international legal discourse.”<sup>209</sup>

In the trade realm, “differential and more favourable treatment for developing countries” is “deeply embedded” in both the negotiation and the implementation of multilateral trade agreements.<sup>210</sup> In 1955, parties to the General Agreement on Tariffs and Trade (GATT) revised the Agreement to allow developing countries to impose trade restrictions to support infant industries and to avoid the GATT’s prohibition against quantitative restrictions.<sup>211</sup> In 1971, the parties established a waiver that allowed members to promulgate preferential tariff rates that favored developing countries.<sup>212</sup> By the 1970s, according to the GATT’s chief economist, Jan Tumlir, “practice under the General Agreement [had] become so lenient that hardly a substantive obligation could be said to exist . . . which could not be waived or substantially attenuated in favour of a developing country.”<sup>213</sup> In 1979, the parties adopted a declaration that enunciated and endorsed the concept of special and differential treatment for developing countries in the multilateral system.<sup>214</sup>

The 1994 WTO Agreements contain more than one hundred provisions that extend special and differential treatment to developing countries.<sup>215</sup> Since its birth in 1995, the WTO has issued scores of declarations that provide for special and differential

206. See Christopher C. Joyner, *Common but Differentiated Responsibility*, 96 AM. SOC’Y INT’L L. PROC. 358–59 (2002) (asking whether CDR reflects a nonbinding norm or whether “it has already emerged as a robust, acknowledged principle of international environmental law”); Stone, *supra* note 179, at 281.

207. Stone, *supra* note 179, at 281.

208. See, e.g., *Climate Change*, *supra* note 128, at 501–02 (noting how industrialized countries expressly disavowed that they accepted CDR as a principle of customary international law); Philippe Cullet, *Differential Treatment in International Law: Towards a New Paradigm of Inter-State Relations*, 10 EUR. J. INT’L L. 549, 570 (1999) (doubting that CDR has become a customary principle); Stone, *supra* note 179, at 281.

209. Edith Brown Weiss, *Common but Differentiated Responsibilities in Perspective*, 96 AM. SOC’Y. INT’L. L. PROC. 366, 366 (2002); accord Magraw, *supra*, note 197, at 69 (“[T]he treatment of developing countries arises in virtually every discussion of international environmental protection and resource management.”).

210. Hart & Dymond, *supra* note 180, at 398–99.

211. *Id.* at 400.

212. *Id.* at 401.

213. *Id.* at 402.

214. Weiss, *supra* note 209, at 367.

215. Hart & Dymond, *supra* note 180, at 403.

treatment.<sup>216</sup> Developing countries continue to press for differential and more favorable treatment in the trade regime.<sup>217</sup> They do so not because they disdain international norms but because, as they stated in a 2002 joint communiqué to the WTO Committee on Trade and Development, they believe that they “experience peculiar problems, which constrain their beneficial participation in the multilateral trading system. Fundamental to these are structural imbalances in their economies as well as distortions arising from historical trading relations . . . [which] undermine productive and trade capacity of these countries.”<sup>218</sup> As they further explained: “It follows that developing countries cannot address their development challenges and participate meaningfully in the international trade system, if they assume the same types and levels of obligations as envisaged in the Uruguay Round Agreements . . . . On the contrary, they must be accorded S&D treatment.”<sup>219</sup>

Many will likely object to the comparison of CDR and SDT to the vilified legal exceptionalism of the United States. The need of developing countries to improve their standards of living and their proportionately lower level of contribution to global environmental degradation may be seen as having greater moral purchase than U.S. perceptions of special security obligations, and constitutional and federalism issues.<sup>220</sup> Furthermore, other countries find it politically expedient to accommodate developing countries’ demands in environmental agreements to obtain these countries’ accession to multilateral environmental treaties.<sup>221</sup> Other countries have not found it similarly expedient to accommodate U.S. needs. This reticence stems in key part from the United States’ exercise of only one vote at most multilateral treaty negotiations. However, it may also owe to the United States’ compliance with agreements that it does not join, such as human rights treaties and environmental

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216. Weiss, *supra* note 209, at 367.

217. See, e.g., Michael Friis Jensen, *African Demands for Special and Differential Treatment in the Doha Round: An Assessment and Analysis*, 25 DEV. POL’Y REV. 91, 91 (2007) (“Interest in Special and Differential Treatment is experiencing a revival and Africa has made it a WTO priority.”).

218. Hart & Dymond, *supra* note 180, at 412.

219. *Id.*

220. At times the United States’ exercise of its military power is generally perceived as contributing to a better world, as in the cases of Gulf War I in Iraq, Somalia, and Kosovo. Other times, as in the present intervention in Iraq, it appears internationally destabilizing and objectionable to most nations. See Keith A. Parrella, *America’s Splendid Little Wars*, 187 MIL. L. REV. 184, 187 (2006) (book review) (noting how media reports of starving children in Somalia and genocide in Bosnia swayed public opinion and led the United States to enter those conflicts).

221. French, *supra* note 178, at 46. “Now the problem is to persuade developing states to participate in treaty regimes that they may perceive as offering little benefit or as hindering their ‘freedom to develop.’” *Id.* at 57 n.81 (quoting A. Boyle, *Comment on D. Pone-Nava’s Paper on Capacity-Building*, SUST. DEV. & INT’L L. 138 (1995)).

agreements like the Convention on Biological Diversity.<sup>222</sup> Moreover, the United States' difficult treaty ratification process, which requires the approval of two-thirds of the Senate, leads countries to believe that the United States will not join multilateral agreements even when other nations have met most of its demands. This contributes to nations' unwillingness to accommodate U.S. needs. For example, while participating in international negotiations as a U.S. Department of State lawyer, representatives of several nations told the Author on a number of occasions that they lacked motivation to accommodate some U.S. requests because they believed that the United States would not join the agreement regardless.

Compelling reasons do underlay CDR and SDT. They do not, however, justify non-uniform standards for all developing countries in all situations, when routine developing country exceptionalism in the form of CDR has a corrupting influence on international norm formation. CDR enables developing countries to negotiate strenuous international norms for other countries while excepting themselves from the same burdens. Daniel Bodansky has called this "representation without taxation."<sup>223</sup> This can produce unrealistic and unfair norms. For example, the Kyoto Protocol only binds Annex I countries.<sup>224</sup> However, it requires fifty-five nations to join for it to enter into force.<sup>225</sup> Since the number of Annex I countries amounts to less than fifty-five,<sup>226</sup> the Protocol needed the support of developing countries to bring it into force. This gave developing countries a significant say in determining rules that would not apply to them.<sup>227</sup> Middle Eastern oil producing countries, for example, even those that emit extensive greenhouse gases,<sup>228</sup> not only enjoy exemption from

222. See Koh, *supra* note 1, at 1484 (describing the United States' widespread compliance with human rights treaties that it has not joined).

223. Daniel Bodansky, *Bonn Voyage: Kyoto's Uncertain Revival*, NAT'L INT'L, Fall 2001, at 45, 50; see also Daniel Vice, Note, *Implementation of Biodiversity Treaties: Monitoring, Fact Finding, and Dispute Resolution*, 29 N.Y.U. J. INT'L L. & POL. 577, 631 (1997) (pointing out that countries may feel that they can join environmental agreements "without fulfilling all of the treaty obligations, presenting the public image of an environmental commitment without having to dedicate resources to implementation").

224. Kyoto Protocol, *supra* note 93, arts. 2–3; see also Bodansky, *supra* note 223, at 50 (discussing the large amount of countries that negotiated a treaty that binds only a limited group of countries).

225. Kyoto Protocol, *supra* note 93, art. 25.

226. Climate Change Convention, *supra* note 83, annex I.

227. Bodansky, *supra* note 223, at 50.

228. For example, in 2005, Qatar, Kuwait, the UAE, and Saudi Arabia had the first, second, third, and thirteenth highest per capita fossil-fuel carbon dioxide emissions levels in the world, respectively. GREGG MARLAND ET AL., CARBON DIOXIDE INFORMATION ANALYSIS CENTER, RANKING OF THE WORLD'S COUNTRIES BY PER CAPITA FOSSIL-FUEL CO<sub>2</sub> EMISSION RATES (2005), <http://cdiac.ornl.gov/trends/emis/top2005.cap>. Iran and Saudi Arabia ranked among the top 20 fossil fuel carbon dioxide-emitting countries in the world based on total emissions for 2004. CARBON DIOXIDE

the burdens of the Kyoto Protocol but also asked for subsidies to compensate them for financial losses that they might incur due to the Protocol.<sup>229</sup>

CDR also results in international standards that deter developed countries from joining. For example, the exemption for developing countries, including major polluters like China, from any obligation to limit future greenhouse gas emissions meant that other countries had to shoulder an even greater greenhouse gas reduction burden than if all polluters played a role in limiting emissions.<sup>230</sup> Stone has shown that, as of 2002, the United States emitted 23.81% of the world's carbon dioxide emissions.<sup>231</sup> However, with countries like China and India exempted from Kyoto, the United States' share jumps to 51.60% of the emissions of countries subject to the 2002 Kyoto greenhouse gas targets.<sup>232</sup> This increased burden deterred the United States from joining.<sup>233</sup>

Developing country exceptionalism further has a corruptive influence when the widespread practice in environmental agreements of tying developing countries' compliance to the receipt of funds from developed countries<sup>234</sup> turns international standards into a fundraising source. For example, both the 1992 Framework on Climate Change and the Convention on Biological Diversity provide that the successful implementation by developing country parties of their treaty obligations will depend on the effective implementation by developed country parties of their financial resources and technology commitments.<sup>235</sup> Developing countries have an economic incentive to raise standards with the expectation that others will pay them to implement these standards. Furthermore, the expectation that others will pay for the implementation of environmental regulations causes developing countries to propose and support unrealistic standards that countries who shoulder the responsibility for the costs of their implementation cannot afford. For example,

INFORMATION ANALYSIS CENTER, TOP 20 EMITTING COUNTRIES BY TOTAL FOSSIL-FUEL EMISSIONS (2005), [http://cdiac.ornl.gov/trends/emis/tre\\_tp20.html](http://cdiac.ornl.gov/trends/emis/tre_tp20.html).

229. HUNTER ET AL., *supra* note 131, at 665; Greg Kahn, *The Fate of the Kyoto Protocol Under the Bush Administration*, 12 BERKLEY J. INT'L L. 548, 558 (2003).

230. Stone, *supra* note 179, at 280, 298; *see also* Harris, *supra* note 183, at 42 (referring to then-President Clinton's declaration that key developing states, including China, must participate in emission controls).

231. Stone, *supra* note 179, at 297.

232. *Id.* The U.S. percentage has decreased now that Russia has joined Kyoto. *Id.* at 297–98.

233. *Id.* at 296–98.

234. *See* Mark A. Drumbl, *Northern Economic Obligation, Southern Moral Entitlement, and International Environmental Governance*, 27 COLUM. J. ENVTL. L. 363, 367 (2002) (pointing to developing countries' widespread demands for financial and technological support as a condition of joining multilateral environmental agreements).

235. Climate Change Convention, *supra* note 83, art. 4(7); CBD, *supra* note 4, art. 20(4).

during the negotiation of the Biosafety Protocol, developing countries consistently argued for a high and costly level of protection that exceeded that which even a rich country like the United States had in place domestically. Developing countries argued that the Protocol should require importing countries to review every shipment of a genetically modified organism, such as a strain of genetically modified corn, even if that genetically modified strain had already been approved in their countries. These countries then maintained that developed countries should pay developing countries for the cost of implementing the Protocol's regulatory regime.<sup>236</sup>

China's posture on climate change perhaps best illustrates the problematic side of developing country exceptionalism. The International Energy Agency expects China to surpass the United States as the world's largest emitter of carbon dioxide by 2009.<sup>237</sup> As a developing country, China enjoys exemption from the Kyoto Protocol's requirements. When the Kyoto Protocol entered into force in 2005, China praised it and called on all "developed countries" which had not done so "to sign the protocol as soon as possible so as to fulfill the measures taken by the international community to cope with climate change."<sup>238</sup> Ten months later, the Chinese Ministry of Foreign Affairs reiterated China's support for the Protocol: "China supports the earnest implementation of the Kyoto Protocol in light of the fundamental principle of the Pact. . . . [The] Kyoto Protocol sets the principle of common and differentiated responsibilities. China upholds the principle."<sup>239</sup> Despite China's imminent emergence as the world's greatest emitter of greenhouse gases and the expectation that developing countries will be responsible for most of the increase in global carbon dioxide levels over the coming years, China consistently resists any limits on its emissions and those of developing countries.<sup>240</sup> Instead, China repeatedly calls for even tighter limits on developed countries' emissions.<sup>241</sup>

236. The Author participated in the Biosafety Protocol negotiations as legal counsel to the U.S. delegation and personally heard these arguments.

237. Keith Bradsher, *China to Pass U.S. in 2009 in Emissions*, N.Y. TIMES, Nov. 7, 2006, at C1.

238. Hu Quian, *Chinese Practice in Public International Law: 2005(II)*, 5 CHINESE J. INT'L L. 761, 776-77 (2006) (quoting Kong Quan, Foreign Ministry Spokesman, Comment on the Entry into Force of the Kyoto Protocol (Feb. 18, 2005), available at <http://www.fmprc.gov.cn/eng/xwfw/s2510/2535/t183889.htm>).

239. Quian, *supra* note 238, at 777 (quoting Qin Gang, Foreign Ministry Spokesman, Press Conference (Dec. 8, 2005), available at <http://www.fmprc.gov.cn/eng/xwfw/s2510/2511/t225529.htm>).

240. Bradsher, *supra* note 237.

241. *Id.*

## V. CONCLUSION

The present rhetoric and emphasis on U.S. exceptionalism is overstated at best and misguided and even dangerous at worst. First, it provides cover for European nations that, at times, misuse international law to isolate the United States in order to compete economically and politically rather than to address substantive global problems.<sup>242</sup> Second, the characterization of the United States as an inherent objector to international law discourages meaningful discourse with the United States and leads to weaker international agreements. Rather than negotiating with the United States to see if they can accommodate its needs, nations—prompted at times by influential NGOs—often formulate international norms that obtain high levels of accession by small and medium states or by states with minimal de jure or de facto compliance burdens.<sup>243</sup> These nations

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242. Important voices within the EU have the ambition of competing with the United States. Romano Prodi, the former head of the European Commission, has stated that the EU has as a chief goal the creation of “a superpower on the European continent that stands equal to the United States.” Delahunty, *supra* note 27, at 38. In the words of Josef Joffe, the publisher of the weekly German newspaper *Die Zeit*, if the states of Western Europe have any “common identity, it defines itself in opposition to the United States—both its culture and its clout.” *Id.* at 38–39. In this context, these nations use international law to accomplish their geopolitical goals at the expense of effectively addressing substantive global problems. See Kahn, *supra* note 229, at 561–62 (noting that a number of commentators have hypothesized that “Europe is taking a contrary position to the United States . . . as a matter of policy” and that there exists a trend in European politics to frustrate and shame the United States on numerous international issues of which Kyoto represents one example). For example, several European ministers “made it clear that they wanted Americans to feel some economic pain more than they wanted a workable” Kyoto Protocol. *Id.* The European nations have not met their Kyoto targets, and the emissions of Canada and Western European countries have in fact risen since 1990. Bradsher, *supra* note 237.

I note that joining an international agreement without complying with it presents far greater legal problems than not joining at all. Scholars who argue that Europe uses international law to restrain the United States include STEPHEN M. WALT, *TAMING AMERICAN POWER: THE GLOBAL RESPONSE TO U.S. PRIMACY* 144–52 (2005); Delahunty, *supra* note 27, at 43–44; and G. John Ikenberry, *Strategic Reactions to American Preeminence: Great Power Politics in the Age of Unipolarity* (July 28, 2003), available at [http://www.dni.gov/nic/PDF\\_GIF\\_2020\\_Support/2003\\_11\\_24\\_papers/ikenberry\\_StrategicReactions.pdf](http://www.dni.gov/nic/PDF_GIF_2020_Support/2003_11_24_papers/ikenberry_StrategicReactions.pdf). As Josef Joffe points out, many of the international law disputes between the United States and other nations are “not about principle, but power.” Josef Joffe, *Gulliver Unbound: Can America Rule the World?*, SYDNEY MORNING HERALD, Aug. 6, 2003, <http://www.smh.com.au/articles/2003/08/05/1060064182993.html>.

243. NGOs adopted this approach in the Landmines Convention and intend to use it in future campaigns. As Kenneth Roth, Director of Human Rights Watch, said: “The landmines campaign . . . can be seen as a model of what is to come . . . already the focus has shifted forward, with NGOs looking to build similar partnerships with small and medium-sized governments on other causes.” Richard John Galvin, *The ICC Prosecutor, Collateral Damage, and NGOs: Evaluating the Risk of a Politicized Prosecution*, 13 U. MIAMI INT’L & COMP. L. REV. 1, 41 (2005) (quoting Kenneth Roth,

then hope to pressure the United States into treaties to which the United States objects by decrying the United States as exceptionalist.<sup>244</sup> This approach has not worked, as the United States continues to resist bad bargains. But leaving a powerful country outside of a treaty regime can weaken the treaty as a practical matter, notwithstanding the large number of treaty members.

Third, the present dynamic that ostracizes a country that does not join international agreements leads a country that objects to certain treaties to work against them. Prominent scholars have criticized the United States not only for refusing to join international agreements such as the Kyoto Protocol and the International Criminal Court, but also for actively working to undermine these treaties by encouraging other nations not to join.<sup>245</sup> Yet no longer can a nation adopt a live-and-let-live approach to certain multilateral treaties. Even if a country does not join, the treaty can hurt it by generating international ostracism. This potential harm gives the threatened nation a strong incentive to undermine the treaty. The rhetoric of U.S. exceptionalism thus presents a double danger to international law: it isolates the United States and can lead to less effective agreements without U.S. support, and it also causes the United States to actively oppose certain international agreements.

This Article, in showing that most nations seek exceptional legal accommodation in certain situations, lays a foundation for future work on the proper place for exceptionalism in international law. Legal exceptionalism may not always be bad. Situations exist where countries have exceptional needs for which the international community should consider special accommodation. The United States' quest for a solution for the Korean Peninsula in the Landmines Convention falls into this category. Europe's need for at least some international accommodation for its historic union also deserves a sympathetic ear. The pursuit by developing countries, particularly the least developed ones, for lower levels of obligation in environmental and trade agreements has traction in many, though not all, situations.

In contrast, status-based exceptionalism—in which a country or a group of countries obtains special accommodation or, conversely, faces special opprobrium based on inherent status or position—represents an unacceptable form of exceptionalism. The United States does not deserve legal exceptions simply because of its superpower status. Similarly, the rest of the world cannot be expected to consistently diminish the strength of human rights agreements—such as the Convention on the Rights of the Child's

*New Minefields for NGOs: After the War on Landmines, These Organizations Start New Campaigns*, NATION, Apr. 13, 1998, at 22).

244. *Id.* at 37–38.

245. *See, e.g.*, Sands, *supra* note 23, at 90.

prohibition on the execution of minors—to oblige the U.S. federal system, which leaves many powers to her several states. Nations should not persistently accommodate the European Union and its members just because they constitute an evolving union. Developing countries should not enjoy an across-the-board presumption of lesser legal obligation in environmental and trade agreements. An indicator of this type of status-based exceptionalism can be found when a country seeks an accommodation for itself but opposes that accommodation for other similarly situated countries. The conduct of the European Union and its members in the Biosafety Protocol and the Kyoto Protocol exemplify this type of exceptionality.

A country's leveraging of a bona fide special circumstance to obtain unfair advantage or benefit that exceeds what it needs to address the circumstance at hand also represents an unacceptable form of exceptionalism. The complete exemption from climate change disciplines sought and obtained by countries like Brazil, China, India, and Saudi Arabia that allows them to freely emit greenhouse gases to their economic advantage exemplifies this type of unacceptable exceptionalism. In these cases the exceptions sought go well beyond special needs and yield an unfair advantage that degrades the environment and undermines the likelihood that other polluters will join the agreement. The European Union and its members' legal fusion of their foreign policy while maintaining a commanding number of votes at international negotiations extends beyond the reasonable accommodation necessary to enable the Union to function as part of the international community. Rather, it gives one international entity an unfair advantage and disproportionate influence in setting international norms. Also suspect is the European Union's practice of hiding the ball on the division of competences that enables it to create uncertain compliance obligations in multilateral agreements. This practice often exceeds the actual needs of the Union and its members and instead works to their legal, political, and economic advantage.

A country's or a group of countries' use of international law to bind other nations while excluding themselves represents the most problematic form of legal exceptionalism. Here, a country or a group of countries uses international law not to bridge gaps between nations or to address global problems but as a sword against other countries. Little tolerance should be afforded to countries that participate in negotiations to develop norms for others while simultaneously seeking to exempt themselves from most of a treaty's obligations or core requirements by using exemptions or reservations—or by having no intent to comply with a treaty's requirements in the first place. Countries that ratchet up international norms and then demand funding for their implementation similarly engage in a negotiation of obligations for others.



The present focus on U.S. exceptionalism forms part of an overall emphasis on the generation of treaties, with over 5,400 multilateral agreements in place today,<sup>246</sup> and an obsession with countries' accession to them, sometimes at the expense of meaningful solutions to substantive global problems. International law has come to be viewed as a global good in and of itself<sup>247</sup>: the more, the better. This orientation allows countries to gain international esteem by joining agreements, even if they do not comply with them.<sup>248</sup> It allows nations like the United States to avoid seriously tackling global issues through concrete action by diverting attention to why it has not joined a treaty.<sup>249</sup> If the United States' climate change posture is shameful, it is not because of its refusal to join the Kyoto Protocol, a fundamentally flawed agreement, but because of its refusal to take steps to abate its emission of greenhouse gases. As the world moves further into the twenty-first century, the time has come to take a more mature look at the place of exceptionalism in international law.

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246. Laurence Helfer, *Exiting Treaties*, 91 VA. L. REV. 1579, 1606 (2005) (noting that nations have adopted 5,416 multilateral agreements from 1945 to 2004 for which the United Nations serves as the depository). The actual number of multilateral agreements in place exceeds this number because entities other than the United Nations, such as the FAO or countries, serve as depositories for multilateral agreements. According to Oona Hathaway, some 50,000 bilateral and multilateral treaties exist today. *Integrated Theory*, *supra* note 1, at 469.

247. See Jose Alvarez, *Multilateralism and its Discontents*, 11 EUR. J. INT'L L. 393, 394 (2000) (observing that for most international lawyers "[m]ultilateralism is our shared secular religion. Despite all of our disappointments with its functioning, we still worship at the shrine of global institutions like the UN."). Most international lawyers and scholars take offense at any "suggestion that we need to re-examine the idea that multilateral approaches, preferably accompanied by institutionalized dispute settlement, are the most enlightened responses to modern dilemmas." *Id.*

248. See, e.g., *Human Rights*, *supra* note 20, at 1940 (finding that countries with the worst human rights records are among the most likely to join human rights agreements); Vice, *supra* note 223, at 631 (pointing out that countries join multilateral environmental agreements that they have little intention of complying with in order to enhance their global esteem).

249. See, e.g., *Exclusive: Cheney on Global Warming*, ABC NEWS, Feb. 23, 2007, <http://abcnews.go.com/print?id=2898539> (focusing on the Kyoto Protocol's deficiencies when asked about global warming, rather than on steps to reduce greenhouse gas emissions); President George Bush, Remarks on Global Climate Change (June 11, 2001), available at <http://www.state.gov/oes/rls/rm/4149.htm> (stressing the defects of the Kyoto Protocol, while outlining few concrete measures for the United States to reduce its greenhouse gas emissions).