

Climate Change Law and Policy: EU and US Perspectives

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A Brief History of Climate Politics and the Roles of the US and EU Therein

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Abstract and Keywords

This chapter briefly reviews the history of the international climate change negotiations leading up to and culminating in the drafting of the United Nations Framework Convention on Climate Change and, subsequently, the Kyoto Protocol. The discussion examines the role of the US and the EU in the negotiating process; focusing on how the US and the EU influenced the substantive content of the Kyoto Protocol. It then explores the importance of the EU and the US as political actors in global climate politics, as past and present contributors to anthropogenic greenhouse gas emissions, and as symbolic and substantive 'role models' in the international climate regime.

Keywords: UNFCCC, Kyoto Protocol, European Union, United States, policymaking, negotiation

As the twentieth anniversary of the United Nations Framework Convention on Climate Change (UNFCCC) and the end of the first compliance period for the Kyoto Protocol to the UNFCCC nears, the scientific and political atmosphere surrounding climate change reflects a sense of urgency unparalleled in the history of international environmental law. Discussions over the future of the international climate regime pervade environmental, economic, and security forums and rank high on political agendas worldwide. News on climate change science, climate change politics, and climate change consequences and solutions appear with increasing frequency in local, regional, and global media outlets. While once a fringe issue primarily confined to scientific deliberation and heralded largely by environmentalists, global climate

change now dominates mainstream debate and has become part of popular culture in much of the world. From science, to religion, to economics, to medicine, to politics, to development studies, to law, there is virtually no academic or political forum devoid of discussions on climate change.

The proliferation of 'climate discourse' reflects a widespread and growing recognition of the threats posed by climate change. Containing the causes of climate change requires much more than mere awareness, however; it demands the modification of primary economic, social, and legal structures, while containing and adapting to the consequences of climate change requires global cooperation to a degree never before witnessed in international environmental law. The extent of mitigation and adaptation efforts needed to maintain adequate standards of living is still being debated and the complexities of this debate are only marginally reflected in conventional thought and discourse. Complicating this process is disciplinary and jurisdictional fragmentation.

There is a growing body of academic literature exploring questions of climate change at the margins between the physical and social sciences. A smaller body of literature analyzes and compares approaches to climate change mitigation and adaptation worldwide. However, there is a dearth of literature dealing with the intersection between socio-legal studies and comparative law analysis. Thus, our understanding of how and why localities, States, and regional entities are **(p.4)** converging and diverging in response to climate change remains patchy. For this reason, this book focuses primarily on examining climate change law and policymaking at multiple levels in the European Union and the United States to shed light on the processes by which state and federal entities endeavor to address climate change and the consequences of these endeavors for larger global efforts to structure an effective global climate regime.

With these points in mind, this introductory chapter sets the scene by briefly reviewing the history of climate change regime building before laying the foundations for the ensuing comparative analysis of United States (US) and European Union (EU) climate change law and policymaking.

Concise History of the International Climate Regime

The evolution of climate change from a peripheral topic to one of the most highly contentious themes of political debate can be traced through the development of the international climate change legal regime, as embodied by the UNFCCC¹ and the Kyoto Protocol² to the UNFCCC.

The UNFCCC and the Kyoto Protocol represent international efforts to address the causes and consequences of global climate change. Both the UNFCCC and the Kyoto Protocol promote the goal of 'stabilizing atmospheric concentrations of greenhouse gas at a level that would prevent dangerous anthropogenic interference in the climate system'.³ Together, the UNFCCC and the Kyoto Protocol create the backbone of the international climate change regime.

The breadth and objectives of the UNFCCC and, especially, the Kyoto Protocol, represent a new era in international environmental law—one that reflects the dual realities that environmental change can no longer be regarded as tangential to social and economic well-being and that efforts to prevent and adapt to environmental change will require concerted international cooperation and transformations in how we think about and interact with the natural environment. The Kyoto Protocol, more than any existing multilateral environmental agreement, impacts local and national economies, lifestyle choices, political beliefs, and ethical perspectives.

Early concern for the health of the global atmosphere dates back to the beginning of the global environmental era in the late-1960s. In 1965, the US President's Science Advisory Committee identified the process of global climate change and suggested the possibility that climate change might be partially (p.5) attributed to human activities and could have important consequences.⁴ Following this early warning on the problem of global atmospheric warming, in the 1970s, Drs Sherwood Rowland and Mario Molina highlighted the threat that chlorofluorocarbons (CFCs) posed to the Earth's ozone layer.⁵ This revelation initiated a period of intense research, culminating in the enactment of the 1985 Vienna Convention for the Protection of the Ozone Layer⁶ and the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer.⁷

Ozone depletion highlighted the global scale of many emerging environmental problems and represented the first time that scientists and policymakers worldwide worked cooperatively to identify and address a problem of atmospheric pollution. The international regime for curbing ozone depletion is largely heralded as a success with the Montreal Protocol being 'recognized as a landmark accord in the most effective international environmental regime to date'.⁸ The time-span between when scientists first identified the risks that CFCs pose to the ozone layer and the time that the Vienna Convention and the Montreal Protocol were implemented was remarkably short. Ozone depletion was quickly identified as a global

problem and, despite contentious negotiations, the international community was able to devise and implement an effective legal regime. The epistemic communities formed to analyze ozone depletion, the model of international negotiations pursued to formulate the legal regime, and the resulting international ozone regime offered promising models for subsequent problems of managing the global environmental commons. In the wake of international ozone negotiations, there was great hope that the international community could follow a similar path to develop an international climate change regime.

Earlier warnings notwithstanding, the climate change debate emerged in the midst of international efforts to address ozone depletion. During the early 1970s, scientists became increasingly concerned about the impact of anthropogenic releases of greenhouse gases on the Earth's atmosphere. By the late 1970s, scientists had identified links between CO₂ emissions and suspected global temperature increases, spurring a new era in global climate research. It was not until the late 1980s, however, with the establishment of the Intergovernmental Panel on Climate Change (IPCC) in 1988, that international cooperation on global climate change began in earnest. By the mid-1980s, it was apparent that climate change—although similar in many ways to the problem of ozone (p.6) depletion—posed vastly more complex questions in terms of scientific understanding, economic implications, cultural change, and political solutions.

Due to this complexity, international negotiations on climate change were divisive almost from the very beginning. Leading up to the negotiations for the UNFCCC, State perspectives ranged from small island States calling for dramatic, immediate, and binding emissions reduction obligations, to developing country members of the G77/China warning against the imposition of any obligations that would hinder economic growth, to the US and the EU wavering between the relative priorities of environmental protection and economic supremacy.⁹

Despite contentious international relations, at the United Nations Conferences on Environment and Development in Rio de Janeiro in 1992, following intense negotiations, the global community adopted the UNFCCC. The UNFCCC is a framework convention that sets out the broad, overarching goals of the international community in relation to climate change. The Convention requires Annex I countries¹⁰ to adopt national policies that would limit their greenhouse gas emissions to 1990 levels and to 'adopt national policies and take corresponding measures on the mitigation of

climate change, by limiting ... anthropogenic emissions of greenhouse gases and protecting and enhancing its greenhouse gas sinks and reservoirs'.¹¹ The UNFCCC did not, however, create a system of detailed and legally binding obligations for its member states. The final form of the UNFCCC reflected the global community's ability to agree upon the need to 'stabiliz[e] atmospheric concentrations of greenhouse gas at a level that would prevent dangerous anthropogenic interference in the climate system',¹² but is also revealed a continuing inability to agree upon what that level would be or how to best achieve the requisite emissions reductions.

UNFCCC negotiations were fraught with problems from beginning to end. Developed countries disagreed about levels and types of obligations; developed and developing countries argued over proper roles and responsibilities; developing countries quarrelled amongst themselves over the proper level of participation and response; and overhanging the entire debate were continuing questions of whether human-induced climate change was, in fact, even a scientifically verifiable reality.

Both the US and the EU played key roles in the negotiations for the UNFCCC. The climate negotiations, however, saw the US and the EU reversing roles from those they had adopted only a few years before during the ozone negotiations. In the negotiations for the Vienna Convention, the US led negotiations for a **(p.7)** strong international regime whereas the EU initially opposed stringent legal limitations. In contrast, with the onset of climate negotiations, the US expressed tempered skepticism over the science and politics behind the treaty negotiations while the EU emerged as an international leader in promoting aggressive action to address climate change. Thus, while the EU delegation affirmed the threats posed by climate change and the wisdom of early action, the US delegation questioned the validity of the science on human-induced global warming and the wisdom behind adopting legally binding greenhouse gas reductions that would result in economic strain and social upheaval. The positions that the US and the EU adopted during UNFCCC negotiations signaled their shifting roles in global environmental politics and foreshadowed the difficulties to come in the negotiation of the Kyoto Protocol.

Negotiations for a Protocol to supplement the Convention with more robust emission reduction commitments began in 1995 at the first meeting of the Conference of the Parties to the UNFCCC (COP-1). The primary outcome of COP-1 was the drafting of the Berlin Mandate, which specified that, by 1997, the Parties to the Convention would draft a Protocol that included

additional commitments for industrialized countries for the post-2000 period but imposed no new commitments on developing countries.¹³ The Berlin Mandate reflected widespread support for supplementing the UNFCCC with a more detailed, binding framework for achieving requisite levels of greenhouse gas emission reductions. The stipulation in the Berlin Mandate that the Protocol limit legally binding emissions reductions obligations to developed countries established the parameters for the debate, both past and present.

The decision to exclude developing countries from binding greenhouse gas reduction commitments created a permanent rift in global climate change negotiations. In particular, the inclusion of this condition in the Kyoto Protocol divided the US and the EU and underscored the US decision not to participate in the Protocol.

During the negotiations for the UNFCCC and the early stages of the negotiations towards the drafting of the Kyoto Protocol, the atmosphere in the US towards climate change was one of scepticism, but it was not one of open hostility. President George H.W. Bush signed the UNFCCC on behalf of the US and the US was one of the first countries to ratify the UNFCCC.¹⁴ In 1995, however, the tide took a dramatic turn towards open hostility when the Republicans assumed control of Congress. Although the executive branch was now controlled by a Democrat—President Bill Clinton—the general tide had turned against **(p.8)** adopting new environmental obligations at either the domestic or the international level.

Tensions between the US executive and legislative branches ran high during the mid-1990s. With tensions simmering at home, Vice-President Al Gore arrived in Berlin to represent the US at COP-1. During the COP-1 negotiations, Al Gore's perceived failure to represent the interests of the US on the issue of developing country participation in a legally binding regime created a political rift between Congress and the Clinton Administration—so much so that one commentator has described Al Gore's decision to sign the Berlin Mandate as 'haunt[ing] [the Democrats] since 1995'.¹⁵ This gulf was deepened even further when, at the COP-2 in Geneva, the Clinton Administration supported legally binding obligations applicable only to industrialized countries.

In response to the US executive branch's apparent disregard for Congressional priorities, on 25 July 1997, the US Senate passed the Byrd-Hagel Resolution by a margin of 95–0.¹⁶ As will be explored further in [Chapter 8](#), this Resolution expressed the view of the Senate that the

US should not be a signatory to *any* protocol that exempted developing countries from legally binding obligations. The passage of the Byrd-Hagel Resolution virtually precluded the possibility that the US would ratify the subsequently drafted Kyoto Protocol.

Despite clear Congressional opposition to almost any possible outcome, during the final negotiations for the Kyoto Protocol in 1997, Al Gore continued to pursue an aggressive climate change agenda on behalf of the US. In fact, while the US negotiation team went to the Kyoto negotiations with the idea of agreeing to a 1-2% reduction obligation, Al Gore ultimately committed the US to a 7% reduction of greenhouse gas emissions below 1990 levels by 2008-2012. The Vice President's actions were greeted by Congressional claims that he had 'caved in'¹⁷ and that he had 'destroyed the last bit of confidence that the Senate and climate change opposition had in the administration'.¹⁸

Entrenched political tensions within the US made it unfeasible that Congress would ratify the Kyoto Protocol, regardless of its final form. Nevertheless, international negotiations continued, led by an aggressive EU delegation. While the US bickered and stalled, the EU took advantage of the growing gap in leadership to craft a reputation as the global leader on climate change policy and to push ahead with Protocol negotiations. Despite US inconsistency and European efforts to lead, the US had a heavy hand in shaping the final version of the Kyoto Protocol, as adopted in 1997. **(p.9)**

The US profoundly influenced the substantive content of the Kyoto Protocol. Its subsequent decision not to ratify the Treaty, however, left the international community holding a potentially lifeless Treaty. The Kyoto Protocol required 55 ratifications, accounting for at least 55% of total CO₂ emissions emanating from industrialized States in 1990, to come into effect. This provision made US participation critical. The US was responsible for 36.1% of the 1990 CO₂ emissions of industrialized countries. In 2001, President George W. Bush clarified that the US had no intention of ratifying the Kyoto Protocol. President Bush's decision pushed the Protocol to the brink of collapse, but it also created an opening for the EU to more effectively exercise its role as global climate change leader. Once it became clear that the US had truly abandoned the Treaty, the global community's outrage allowed the EU to move out from the shadow of US influence to take on a more meaningful role in regime-building efforts.

The EU only accounted for 24.2% of CO₂ emissions in 1990, meaning that even with EU ratification the Kyoto Protocol would still fall short of achieving

the requisite 55% of 1990 emissions by 30.8%. In order to salvage the Protocol, the EU would have to take a leap of faith and ratify the Protocol absent participation by its leading economic competitors and then try to convince Japan (accounting for 8.5% of 1990 emissions) and Russia (accounting for 17.4% of 1990 emissions) to ratify the Treaty, as well.¹⁹ The EU's decision to ratify the Protocol on 31 May 2002 represented a critical turning point in the history of the Kyoto Protocol and in the dynamics of international environmental leadership. The EU's subsequent success in convincing Japan (4 June 2002), Russia (18 November 2004)²⁰—and, eventually, Australia (12 December 2007)—to ratify the Protocol enabled the Kyoto Protocol to come into force on 16 February 2005, ensuring the continuing viability of the international climate regime.

Due in large part to EU efforts, the Kyoto Protocol supplemented the UNFCCC to create the regulatory backbone of the still-evolving international climate change regime. The Kyoto Protocol augments the UNFCCC by establishing legally binding obligations that require industrialized countries to incrementally reduce human-induced greenhouse gas emissions to an average of 5.2% below 1990 emission levels by 2012.²¹

The legally binding obligations that it creates for industrialized countries, ie, Annex I countries,²² are the hallmark of the Kyoto Protocol. Kyoto commitments are expressed in terms of emissions allowances, or Assigned Amount Units, that are equal to a nation's allowable greenhouse gas emissions. In order to facilitate (p.10) compliance with Treaty obligations and reduce the cost of emission reductions, the Kyoto Protocol embodies three key economic flexibility mechanisms. These flexibility mechanisms —(1) Joint Implementation (JI),²³ (2) the Clean Development Mechanism (CDM),²⁴ and (3) Emissions Trading (ET)²⁵—enable parties to trade and transact Emission Reduction Units and Certified Emission Reductions in order to more efficiently meet their Assigned Amount Units. As discussed in more detail in [Chapter 7](#), while the US played a key role in negotiating the inclusion of economic flexibility mechanisms in the Kyoto Protocol, they are now widely employed by Annex I parties and, in particular, the EU and its member states.

The legal obligations that the Kyoto Protocol creates and the implementation measures that it embodies represent an unheralded international commitment to protecting the global commons. The Kyoto Protocol is unlike any existing multilateral environmental agreement in the scale of commitment that it requires from member states. The Kyoto Protocol

represents the first time that developed nations have jointly agreed to reduce emissions from such a wide range of gases and across such a cross-section of the economy, and the first time that a multilateral environmental agreement has created the framework for an elaborate global market in emissions trading.²⁶ The Kyoto Protocol defies traditional understandings of the parameters of environmental problems and requires parties to modify primary social, political, and economic structures, including transformations within domestic consumption, energy, transportation, manufacturing, agricultural, and investment sectors. The impacts of emission reduction commitments under the Kyoto Protocol resonate through all levels of the public and private sectors.

In sum, the Kyoto Protocol challenges the global community to create a sustainable and equitable²⁷ international regulatory framework for combating global climate change over the long term. The Kyoto Protocol requires States to balance scientific, social, and economic considerations to develop laws and policies that ensure the long-term survivability of a common resource—the Earth's **(p.11)** atmosphere—without jeopardizing the short- or long-term welfare of the global citizenry. Yet, for all of its complexity and ambition, the Kyoto Protocol is incomplete and insufficiently aggressive. Even if Annex I parties meet their Kyoto Protocol obligations, the global community will have won only one small victory in a steep, uphill battle to address global climate change. The UNFCCC and the Kyoto Protocol create the foundations for a successful global climate change regime, but they require major modification and expansion to create an effective and sustainable legal regime. This goal cannot be achieved without truly global cooperation—global cooperation, which at a minimum, includes meaningful participation on the part of the largest global emitters regardless of economic status and takes into consideration the needs of the most vulnerable States.

Global regime building must be led by powerful industrialized countries, such as the US and EU member states, who have the historic responsibility and the social and economic capacity to respond to threats posed by global climate change, but must also include the rapidly developing economies who increasingly account for high percentages of total global greenhouse gas emissions. The persistent refusal of the US federal government to be a full and active player in international efforts to halt climate change impairs efforts to form a global consensus and to incentivize participation and cooperation on the part of the rapidly developing economies. Only in February 2007, when global leaders negotiated a non-binding agreement

that commits both developed and developing countries alike to legally binding emission reduction obligations, did the US show even a glimmer of willingness to re-engage with global climate change regime building efforts. Translating this non-binding agreement into a post-Kyoto legally binding Convention or Protocol will test the authenticity and strength of EU climate leadership and US commitment to global cooperation and re-engaging in global climate change regime building.

The Role of the US and the EU in International Climate Change Politics

Since no single nation can efficiently and effectively deal with global challenges such as climate change, counterterrorism, non-proliferation, pandemics and natural disasters on its own, we commit ourselves to strengthening our cooperation to address these challenges.

EU-US Summit Declaration, Vienna, July 2006.

The dynamics of global politics are changing. Superpowers are no longer so super and power is no longer so centralized. Yet, power imbalances remain and global climate change regime-building continues to be disproportionately affected by a small handful of countries, both developed and developing. The role of developing States is becoming increasingly important as a consequence of shifts in **(p.12)** economic prowess and carbon footprints. China and India, in particular, emerge as influential and essential components of the international climate regime.²⁸ The financial crisis of 2008 offered a daunting geopolitical setback to US and EU economic primacy that revealed the extent to which China and India have made gains in amassing global political influence, as further demonstrated by the political dynamics that emerged at the Copenhagen Climate Change Conference in December 2009.²⁹ Despite economic and environmental shifts, however, the US and the EU continue to exert a high level of influence in international climate negotiations. As two of the most politically and economically powerful entities in global politics, the actions and omissions of the EU and the US profoundly influence the contours and effectiveness of the international climate change regime. Political and environmental leadership on the part of the EU and the US continues to be central to ongoing efforts to develop an effective and equitable international climate change regime.

The US and the EU are the two largest economies in the world, together accounting for almost half of the entire world economy.³⁰ The EU and the US also share the world's largest bilateral trading and investment partnership³¹ with transatlantic flows of trade and investment amounting to approximately US\$1 billion a day and combined US-EU global trade accounting for almost 40% of world trade.³² Independently, both the US and the EU possess great global economic and political power. When working together on issues of global governance their combined authority is unparalleled.

The history of US-EU relations is one of prickly camaraderie. In international relations, the US and the EU are both über-allies and über-competitors. Since World War II, the US and the countries that now form the EU have regularly acted together as a formidable force on international security issues—eg, during the Cold War, the first Gulf War, the war in Afghanistan, and other UN-sanctioned actions. This relationship has strained in recent years due to perceptions of US unilateralism,³³ but it persists. In the all-important realm of economics and international trade, the US and the EU have worked jointly to liberalize international trade and further global development while simultaneously **(p.13)** competing ruthlessly for economic primacy. Disputes between the US and the EU, for example, have dominated the General Agreement on Tariffs and Trade (GATT) and World Trade Organization (WTO) dispute settlement forums.³⁴ Competition and conflict pervade US-EU economic affairs and international trade relations and yet the US and the EU continue to maintain an unprecedented global trade and investment partnership.

Transatlantic environmental relations are similarly characterized by a tumultuous partnership. The EU and the US share common environmental challenges, many of which are by-products of industrialization and many of which are global in scale.³⁵ They also share common goals of erecting systems of environmental law and policy that protect human health and well-being, with varying capacity to incorporate non-human concerns. In the realm of domestic and international environmental lawmaking, the US and the EU have taken turns bearing the mantle of environmental leader. In recent years, however, the US and the EU have frequently diverged on questions of science, regulation, and priority-setting on environmental issues with the effect of undermining transatlantic environmental cooperation that dates back to the early days of the environmental movement.³⁶

As early as 1974, for example, the US and the EU established a bilateral framework for cooperating on environmental issues and for holding annual

environmental consultations between high level governmental officials. Early bilateral consultations offered a convenient forum for sharing information and facilitating transatlantic cooperation on a wide range of environmental issues. The last consultation, however, took place almost ten years ago in May 2000. The bilateral consultation process was superseded, in part, by the 1995 New Transatlantic Agenda which expanded cooperative efforts to a wider variety of political and economic matters, including:

- 1) promoting peace and stability, democracy, and development around the world;
- 2) responding to global challenges (including preservation of the environment);
- 3) contributing to the expansion of world trade and fostering closer ties;
- and 4) building bridges across the Atlantic.³⁷

The cessation of bilateral consultations, however also reflected shifting priorities. Transatlantic economic relations increasingly overshadowed environmental cooperation during the late 1990s and 2000s as the US and the EU worked to minimize barriers to bilateral trade and investment and solidify global economic (p.14) supremacy following the end of the Cold War. During this period, environmental relations were further strained by diverging perspectives on climate change, global biodiversity protection, food safety, and general notions of risk and precaution.

Following the 2001 EU-US Summit in Göteborg, Sweden, the US and the EU took steps to renew transatlantic environmental cooperation by initiating a process for bilateral dialogue on climate change. In so doing, the US and the EU prefaced their dialogue on points of agreement and disagreement. The US and the EU joined in agreeing that climate change poses a pressing global problem requiring intensified bilateral and global cooperation, but articulated patent disagreement over the appropriateness of the Kyoto Protocol as a vehicle for addressing climate change. The US and the EU framed their new dialogue around a mutually agreed goal of promoting 'sustainable development for present and future generations.'³⁸

The first summit of the EU-US High-Level Representatives on Climate Change took place in Washington, DC in April 2002. The meeting revealed embedded differences in approach to addressing climate change, with particular reference to the Kyoto Protocol, but suggested potential areas for cooperating on research and development. In summarizing the meeting, then EU Environment Commissioner Margot Wallström stated:

We need to revitalize cooperation between the EU and the US on certain environmental issues. This visit has been a useful

launch pad to move our cooperation forward. Obviously, we do not agree on everything and we have different approaches to tackling environmental problems. The Kyoto Protocol is one notable example. But we do need to work together on climate change and we have now identified some areas for joint co-operation.³⁹

Following the modest success of this initial meeting, formal bilateral climate consultations collapsed and were not revived until 2005. High level meetings between EU and US leaders in April 2005 and June 2006 initiated a new series of transatlantic meetings, this time more broadly focused on the 'serious and linked challenges in tackling climate change, promoting clean energy and achieving sustainable development globally'.⁴⁰

The first meeting of the new EU-US High Level Dialogue on Climate Change, Clean Energy and Sustainable Development was held in Helsinki, Finland, on (p.15) 24-25 October 2006 while the second meeting was held in Washington on 7 March 2008. The meetings brought together high level officials from the US and the EU to review domestic climate and energy policy developments, emissions technologies, areas for bilateral climate and clean energy cooperation as well as measures to stem biodiversity loss and illegal logging.⁴¹ The onset of these meetings in the latter half of President George W. Bush's presidency reflects an easing in US posture towards multilateral cooperation on climate change. Yet, the substance of the meetings reflects continuing hesitancy on the part of the US to engage in negotiations leading to binding emissions reduction commitments. The meetings focused primarily on market-based responses to climate change, energy efficiency, and clean technology development leaving substantive debate on regulatory responses and international commitments for other forums. The low profile and modest scale of these meetings reflected enduring tensions between the EU and the US on the question of how to respond to climate change.

EU and US disagreement over the appropriate political responses to human-induced climate change dates back to the commencement of UNFCCC negotiations. Since that time, at the federal level, the EU has adopted a leadership role in pushing forward international and regional climate change regime-building while the US has challenged the legitimacy and viability of the international climate change regime and failed to implement domestic climate-based legislation. The nuances of EU and US approaches to climate change will be closely examined in the remainder of the book. Brief mention

of the contours of EU and US climate programs is made here, however, to lay the foundations for later analyses.

Climate change regimes in both the US and the EU contain complex mixtures of regulatory, market, voluntary, and research-based strategies. The EU, however, has adopted an approach to climate change that is based on mandatory greenhouse gas emission reductions; it is based upon an enforceable regulatory framework and accompanied by numerous policies and 'soft' law measures at the regional and member state level. The EU approach supports the internationalization of climate change measures and the adoption of an increasingly stringent, emission reduction-based international law regime.

The US federal approach to climate change, in contrast, has carefully avoided mandatory emission reduction obligations and focused instead on using a variety of 'soft' measures to encourage—rather than mandate—greenhouse gas emission reductions in an economically sound, market-driven manner. Unlike the EU, which has embraced the legitimacy of binding emission reduction commitments under the Kyoto Protocol, the US has questioned the legitimacy of the Kyoto Protocol and disregarded fundamental tenants of the international climate regime. **(p.16)**

Fundamental differences aside, both EU and US climate change regimes have fallen short on substantive and procedural grounds. Neither the EU nor the US has developed a comprehensive system of implementable climate policies conducive to the long-term decoupling of fossil fuels and social and economic stability. As a result, neither of the most powerful and affluent members of the global community offer a comprehensive or easily replicable policy roadmap for achieving equitable and efficient emissions reductions. Despite obvious short-comings, a critical examination of US and EU approaches to climate change reveals important lessons.

Primary among these lessons are the relevance of US and EU actions and omissions to global climate change regime building efforts and the necessity of a regulatory framework to achieving sustainable emissions reductions. First, variations in the language, substance, and goals of EU and US climate programs transcend bilateral relations to impact the greater process of global climate governance. Second, while the US approach to climate change lacks credibility and offers little in the way of transferrable policy frameworks, the EU approach creates the regulatory foundations for building an effective climate change regime and offers the beginnings of a roadmap in climate policy successes and failures.

Drawing upon these two observations, the remainder of this book examines US and EU climate change law and policymaking at multiple levels of governance to reveal key convergences and divergences and underlying socio-legal drivers and to suggest how transatlantic policy choices impact the viability of the larger international climate regime. The theoretical framework for this book is based on a conventional convergence and divergence approach to comparative law, but it seeks to broaden upon traditional comparative law methodologies by more closely examining the relationship between law, society, and culture in the climate change law and policymaking process.⁴²

Comparative analysis of US and EU environmental policy is still an emerging area of legal inquiry,⁴³ and much of the existing literature focuses on trends in environmental policymaking and governance, generally, and on trade and sustainable development policies, specifically. Comparative environmental analysis of US and EU climate change policies remains limited despite a growing need for this type of study.⁴⁴ Further, many of the climate change policy analyses that exist focus on the policies of the US, the EU, and their sub-federal entities in isolation, leaving critical gaps in our understanding of transatlantic law and **(p.17)** policymaking. Throughout, and in particular in [Chapter 7](#), this book seeks to begin filling these gaps and instigating continuing dialogue in this regard.

Recognizing, however, that climate change policies reflect a profound interplay among legal and regulatory institutions and social, cultural, and political processes, the book expands upon classical comparative law approaches by situating the legal analysis of climate change in its cultural setting and by engaging with climate change research coming out of other social sciences disciplines. By engaging with interdisciplinary materials and incorporating a socio-legal perspective,⁴⁵ in [Chapter 8](#), this study looks beyond the composition of US and EU climate change laws and policies to explore how and why they are formulated and implemented at different levels of government, and to suggest what this can teach us about domestic and international climate change policymaking moving forward post-2012.

As the end of the first Kyoto Protocol compliance period nears, global climate change regime building stands at a critical crossroads. The ability of the global community to create an enduring international climate change regime hinges in no small part on US and EU participation. The US and the EU hold themselves out to be global, political, economic, and environmental leaders and the policy positions they adopt affect policy opportunities and

preferences worldwide. This is particularly true in the climate context where industrialized countries bear great responsibility for past harms and possess greater present capacity to support mitigation and adaptation measures. Even as the US and the EU increasingly express a shared recognition that climate change is a global political priority, the extent to which Europe and America accept global leadership roles continues to differ. At a 2006 US-EU summit, for example, European and American leaders identified four priority areas for transatlantic cooperation, including: promoting peace, human rights, and democracy worldwide; confronting global challenges, including security and non-proliferation; fostering prosperity and opportunity; and advancing strategic cooperation on energy security, climate change, and sustainable development.⁴⁶ The inclusion of climate change as one of four priority areas for bilateral cooperation suggests that climate change has risen to the top of political agendas worldwide, even in the most resistant of political contexts. Yet, despite this rhetorical agreement, a careful analysis of policy preferences and legal frameworks reveals that EU policies and programs far exceed anything proposed or adopted by the US federal government.

The analysis does not end there, however. Looking beyond the federal level in the EU and the US, a more complex picture of political pushes and pulls emerges. The pushes and pulls of climate change politics in the US and the EU are **(p.18)** characteristic of modern environmental law and policymaking. Tensions between environmental protection and economic development and between national sovereignty, international law, and the plethora of governmental and civil society views that define environmental politics challenge efforts to develop domestic consensus on climate change. Patterns of interaction between federal, state, and local climate change law and policymaking in the EU and the US reflect larger trends in international climate change policy, whereby intense dialogue over the appropriate legal and political responses to climate change take place at multiple levels of governance. The interplay between governmental institutions at multiple levels and among social, political; and economic factors shapes climate change law and policymaking in the US and the EU and provides insight into the nuances of climate policy formulation, implementation, and effectiveness.

US and EU climate policymaking processes offer critical lessons in success and failure to state and global efforts to formulate effective climate policies in the post-2012 period. The remainder of this book examines US and EU climate change law and policymaking in order to further understanding of

how and why transatlantic policy approaches vary and to suggest how these variations affect efforts to build an equitable and effective global climate change regime.

Notes:

(1) United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 31 ILM 849 (UNFCCC) art 2.

(2) Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 11 December 1997, entered into force 16 February 2005) 37 ILM 32 (Kyoto Protocol).

(3) UNFCCC (n 1) preamble.

(4) Shardul Agrawala, 'Context and Early Origins of the Intergovernmental Panel on Climate Change' (1998) 39 *Climactic Change* 605, 606.

(5) Richard Elliot Benedick, *Ozone Diplomacy* (2nd edn, Harvard University Press, Cambridge, 1998) 11.

(6) Vienna Convention for the Protection of the Ozone Layer (adopted 22 March 1985, entered into force 22 September 1988) 1513 UNTS 293.

(7) The Montreal Protocol on Substances That Deplete the Ozone Layer (adopted 16 September 1987, entered into force 1 January 1989) 1522 UNTS 293.

(8) Laura Thoms, 'A Comparative Analysis of International Regimes on Ozone and Climate Change with Implications for Regime Design' (2003) 41 *Colum J Transnatl L* 795, 797.

(9) Dana R Fisher, *National Governance and the Global Climate Change Regime* (Rowman & Littlefield Publishers Inc, Lanham, 2004).

(10) The Annex I Countries include the 40 industrialized countries that bear primary responsibility for both creating and addressing the problem of global climate change.

(11) UNFCCC (n 1) art 4.2.

(12) UNFCCC (n 1) preamble.

(13) S Agrawala and S Andresen, 'US Climate Policy: Evolution and Future Prospects' (2001) 12[2-3] *Energy and Environment* 117.

(14) President Bush brought the UNFCCC to the US Senate for ratification on 8 September 1992. The Senate ratified the treaty less than one month later on 7 October 1992, with the requisite two-thirds majority vote. President Bush then signed the instrument of ratification one week later on 13 October 1992. Thus, it took less than two months for the US to ratify the UNFCCC.

(15) Fisher (n 9) 124.

(16) Eg John Vogler and Charlotte Bretherton, 'The European Union as a Protagonist to the United States on Climate Change' (2006) 7[1] *Intl Studies Perspectives* 17, emphasizing that 'the question of the future commitments of the developing economies remains at the heart of debates about the climate regime.'

(17) Fisher (n 9) 129.

(18) *Ibid* 131. Congress responded to the executive branch's perceived failures by passing a rider known as the Knollenberg rider, which 'made it illegal for government agencies and federally funded organizations to spend their time working on Kyoto Protocol-related work'. *Ibid* 132.

(19) Miranda Schreurs and Yves Tiberghien, 'Multi-Level Reinforcement: Explaining European Union Leadership in Climate Change Mitigation' (2007) 7[4] *Global Environmental Politics* 19.

(20) UNFCCC Secretariat, Press Release, 'Russian Decision on Ratification—Major Step in Entry into Force of Kyoto Protocol' (7 October 2004) #<http://unfccc.int/files/press/releases/application/pdf/pr040930.pdf># accessed 28 September 2009.

(21) Kyoto Protocol (n 2) arts 4.1, 10, 12.

(22) Annex I parties must return to 1990 levels by 2012. *Ibid*.

(23) Enabling Annex I parties to jointly implement GHG reduction projects and to trade in emission reduction units (ERUs) arising from such projects. *Ibid* art 3.

(24) Allowing Annex I parties to fund emission reduction projects in the territories of non-Annex I parties, thus enabling developed States to meet

article 3 commitments and developing State Parties to be involved in the emission reduction process without suffering the costs associated with emission caps. [Ibid art 12](#).

(25) Allowing Annex I parties to trade in emissions or ERUs. [Ibid art 17](#).

(26) A Petsonk, 'The Kyoto Protocol and the WTO: Integrating Greenhouse Gas Emissions Allowance Trading Into the Global Marketplace' (1999) 10 *Duke Envtl L & Policy Forum* 185.

(27) At the 2001 meeting of Kyoto's Conference of the Parties, the Parties drafted the Marrakesh Accord, which outlines the present context of the climate change regime. The Accord emphasizes that 'economic and social development and poverty eradication are the first and overriding priorities of the developing countries' and that efforts to combat climate change must take place against this economic backdrop. 'The Marrakesh Accords & the Marrakesh Declaration' UNFCCC Conference of the Parties (Marrakesh 29 October 2001–10 November 2001) UN Doc FCCC/CP/2001/13/Add.1 [Vol. I (D), (H)].

(28) Eg Roger C Altman, 'The Great Crash, 2008: A Geopolitical Setback for the West' (2009) 88[1] *Foreign Affairs* 2; Daniel W Drezner, 'The New World Order' (2007) 86[2] *Foreign Affairs* 34.

(29) As further discussed in Ch 9.

(30) EU Delegation to the US, 'EU-US Facts & Figures' (2009) #http://www.eurunion.org/eu/index.php?option=com_content&task=view&id=1746&Itemid=9# accessed 28 September 2009.

(31) Ernst-Ulrich Petersmann and Mark A Pollack (eds), *Transatlantic Economic Disputes The EU, the US, and the WTO* (OUP, Oxford, 2004) 66.

(32) EU-US Facts & Figures (n 30); 'EU-USA Summit: An EU27 surplus in trade in goods with the USA of 63 bn euro in 2008, Surplus of 11 bn in trade in services in 2007' (Eurostat News Release, STAT/09/47 2009) #<http://europa.eu/rapid/pressReleasesAction.do?reference=STAT/09/47&format=HTML&aged=0&language=EN&guiLanguage=en># accessed 3 April 2010.

(33) Eg Robert Kagan, 'Power and Weakness: Why the United States and Europe see the world differently' (2002) 113 *Policy Rev* 1; 'Conclusions on

Iraq' (Council of Ministers' Conclusions, 2003) #http://www.eu-un.europa.eu/articles/fr/article_3013_fr.htm# accessed 3 April 2010.

(34) André Sapir, 'Old and New Issues in EC-US Trade Disputes' (Conference on Transatlantic Perspectives on US-EU Economic Relations: Convergence, Conflict & Cooperation, 2002).

(35) Eg point source water pollution, hazardous waste, toxic air pollution, food and agricultural safety.

(36) Miranda A Schreurs, Henrik Selin, and Stacy D VanDeveer (eds), *Transatlantic Environment and Energy Politics* (Ashgate, 2009).

(37) European Commission, 'Bilateral relations—USA: Basis for Co-operation' (Statement on International Issues 2007) #http://ec.europa.eu/environment/international_issues/relations_usa_en.htm# accessed 28 September 2009.

(38) Delegation of the European Commission to the USA, 'EU-US Summit: A Guide: Göteborg, Sweden, June 14, 2001' (Conclusions from EU-US Summit 2001) #<http://www.eurunion.org/partner/summit/Summit0106/Statement.htm># accessed 28 September 2009.

(39) European Commission, 'Commissioner Wallström comments on transatlantic environment cooperation' (Summary of press conference 2002) #http://www.eu-un.europa.eu/articles/en/article_1329_en.htm# accessed 28 September 2009.

(40) The US Mission to the EU, 'EU, US to Continue Climate, Energy and Sustainable Development Dialogue (Joint EU-US press release 2006) #http://useu.usmission.gov/energy/oct2506_high_level_dialogue.html# accessed 3 April 2010.

(41) The US Mission to the EU, 'EU, US Advance Climate Change, Clean Energy and Sustainable Development Dialogue' (Joint EU-US press release, 2008) #http://useu.usmission.gov/dossiers/climate_change/mar0708_us_euadvanceclimatechange.html# accessed 3 April 2010.

(42) Mathias Reimann, 'The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century' (2002) 50 *Am J Comp L* 671, 685.

(43) Eg Norman J Vig and Michael G Faure (eds), *Green Giants: Environmental Policies of the United States and the European Union* (MIT Press, Cambridge, 2004).

(44) Eg Miranda A Schreurs, 'The Climate Change Divide: The European Union, the United States, and the Future of the Kyoto Protocol' in Norman J Vig and Michael G Faure (eds), *Green Giants: Environmental Policies of the United States and the European Union* (MIT Press, Cambridge, 2004).

(45) Although there is no generally accepted definition of 'socio-legal studies', the term is used here to refer to inter-disciplinary analysis of law within its wider social context.

(46) President George W. Bush, 'US–EU Summit Declaration: Promoting Peace, Human Rights and Democracy Worldwide' (Press Release 2006) #<http://georgewbush-whitehouse.archives.gov/news/releases/2006/06/20060621-2.html># accessed 3 April 2010.

