SAVING INSTITUTIONAL BENEFITS: PATH DEPENDENCE IN INTERNATIONAL LAW

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Dissertation submitted in partial fulfillment of the requirements for the degree of Doctor of Philosophy in the Department of Political Science in the Graduate School of Duke University

2008
ABSTRACT

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Abstract

This project considers the pace of change in international law, focusing on sources of evolution and stagnation. I attempt to determine why negotiators defer to existing law in some situations and not others. To that end, this study explores country preferences towards the status quo in international negotiations.

I hypothesize that deference to existing international law is more likely under four conditions. First, countries that have experienced a decline in relative power should promote deference to existing international law. Second, declining powers that have allowed private access by their citizens to existing international institutions should have greater domestic political pressure to protect those arrangements. Third, this relationship should be particularly strong if interested citizens are able to participate (perhaps through the ratification process) in subsequent negotiations. Finally, more complex negotiations (i.e., those including more participants) should result in greater deference to existing international law.

The project tests these hypotheses with statistical analysis on a random sample of multilateral treaties, as well as case studies of negotiation practices in the United States, India, and the European Union. The analysis supports all four conjectures, and notes interactions between them.
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1. Introduction and Theoretical Underpinnings

Can institutions survive changing power alignments? Or are they – as some have suggested – mere representations of participants’ capabilities at a point in time, and unable to affect state behavior thereafter? On the contrary, this paper argues that institutions are used by some countries to entrench existing power relationships. The overarching question of change and continuity has implications for the answers to these questions about the staying power of international institutions.

Recent research notes that existing domestic law constrains the possible configuration of later rules. Influential parties consolidate power by introducing rules that benefit them, and they can often block change even if they are no longer the strongest participants (Pierson 2000; Pierson 2004). Political science literature on institutional change has generally focused on modes of change in particular situations (Streeck and Thelen 2005). Obviously, participants retain legal institutions in some situations and attempt to overturn them in others. Despite the extensive literature on path dependence, we still have a poor understanding of the conditions under which change or continuity is likely to prevail, nor has this analysis extended to the context of international institutions.

Theories of power transition abound in international relations research (DiCicco and Levy 1999; Gilpin 1981; Organski 1958), but they seldom arise in the study of
international political economy and international law. With the ongoing rise of major developing countries such as Brazil, India, and China, scholars must address the impacts of those participants on the shape of international legal institutions, and the effectiveness of existing frameworks for resisting a new power arrangement. If anything, changing power dynamics have been used to explain the weakness of international institutions, which are viewed as “epiphenomenal” and subject to change in light of their participants’ altered capabilities (Downs, Rocke, and Barsoom 1996; Krasner 1991). This project looks at the ability of declining countries to hold on to past institutional successes, while new powers attempt to alter the status quo.

A similar story of influence by powerful beneficiaries in domestic politics can push some countries to support the status quo when those private parties are involved in foreign policy. In making foreign policy decisions, domestic political considerations abound. Negotiating positions reflect not only a country’s position in the world, but also the incentives faced by domestic actors who wish to gain, or fear losses, from a new agreement.

This study will consider the pace of change in international law, focusing on the sources of evolution and stagnation. Institutional change, of course, is also related to shifting power dynamics. While international relations theory has addressed power transition at length, previous studies have not considered the legal tools used to gain or
retain power. Existing research also addresses the costs of legal compliance, but it rarely considers the beneficiaries of international law and how they protect their advantageous position. However, this preference for the status quo also is not evident across the board in international institutions. This project attempts to determine why negotiators defer to existing law in some situations and not others. To that end, I explore a random sample of international agreements and three case studies of government preferences, attempting to determine who supports the status quo, and why.

This chapter will proceed by situating the project in existing literatures on institutional change, institutional linkages, and power transition theory. It subsequently identifies four hypotheses about the conditions under which countries support the status quo or institutional change. The final section of the chapter outlines the remainder of this study.

1.1 Positioning the Study in Existing Literature

1.1.1 Path Dependence and Institutional Change

As discussed above, there is extensive variation in the degree of deference to existing international law. The act of preserving benefits appears to be an explicit indication of parties’ desires to protect past gains from international cooperation, while
replacement of existing institutions seems to represent a conscious decision to override less advantageous rules.

The Vienna Convention on the Law of Treaties, although not applicable in all situations, provides that more recent treaties should prevail when a conflict arises, so we might expect that later negotiations trump previous results (Article 30). It generally serves as the default decision rule in the case of conflicting obligations among two or more international legal provisions. This strictly legal orientation accommodates shifting power relationships so that newly strengthened countries can renegotiate and replace old agreements on which they had little influence. The Vienna Convention rules, therefore, mirror the realist notion that more recent negotiations can easily overrule past agreements (Krasner 1991). If past agreements are actually overruled every time power shifts, then they can have very little influence on the behavior of states. As such, constant change would indicate that international institutions are exceedingly weak.

However, rather than always accepting the Vienna Convention’s status quo, parties to international law have taken pains to protect their previous winnings across issue areas in some agreements.¹ In fact, negotiators often explicitly require that treaties defer to existing international law. When the parties want to preserve their gains from a

¹ Throughout the dissertation, I refer to support for the status quo, in general, as “legal deference” or “deference to existing international law.”
previous negotiation, “they may specify that some or all of the provisions of the [current] treaty shall not prevail (United Nations 2003:87).” Some of these “savings clauses” require deference to all previous agreements. Others may only subordinate the current accord to some subset of treaties in the same, or another, issue area, or may preserve only those treaties that enshrine broader rights to individuals (Id: 88).\textsuperscript{2} While these clauses are the most explicit form of deference to existing law, protection of the status quo may take other shapes as well. Parties may instead narrow the scope of a new agreement’s application, refuse to allow certain types of changes to the institution, or reject a new agreement altogether. As Gruber notes, the status quo is not always a possible outcome when powerful players are involved (Gruber 2000). However, even in that situation, some parties will attempt to stay as close as possible to the existing arrangement. This project addresses all these aspects of deference to the status quo.

As Pierson notes, existing institutions exert constraints on the possible configuration of later rules (Pierson 2000; Pierson 2004). Institutional path dependence does not merely happen as a result of existing institutions. Rather, it requires positive action by groups that wish to block change from taking place. Earlier research shows that influential parties are able to consolidate power by introducing institutions that

\textsuperscript{2} For instance, the Constitution of the International Labour Organization (1919) subordinates itself to existing law only if the preexisting provision “ensures more favourable conditions to the workers concerned...”
benefit them (Moe 1990; Pierson 2000). Viewed in this way, some groups are able to add institutional provisions to their portfolio of negotiating advantages. Countries – and individuals within them – who benefit from the institutions can be expected to protect those arrangements against legal change.

At the interstate level, we should expect that the earlier institution was created by the most powerful countries in the particular issue of interest at the time of its negotiation. If power dynamics were altered by the time of subsequent negotiations on the same or another issue, the participant in question should oppose change and preserve existing institutional benefits. A similar process follows on the domestic political stage in beneficiary countries. Within those nations, those who influenced the government’s original position – and therefore stood to gain most from their government’s bargaining success – should be the most adamant opponents of institutional change.

Existing literature shows a number of circumstances in which path dependence prevails, as well as a series of examples in which power changes result in institutional overhauls. However, we still have little understanding of the conditions under which each of these outcomes emerges. That analysis is critical for answering ongoing questions about the strength of international institutions. In contrast with most neoliberal institutionalist approaches, the power of countries plays an important role in
this study. Their capabilities – but more importantly their changing abilities over time –
are a key independent variable in this dissertation. As Mattli and Büthe have shown,
power is often a predictor of institutional outcomes. However, unlike most realist
studies of international institutions, they also note that power itself derives from existing
domestic and international institutions (Mattli and Büthe 2003). Following in that
tradition, this dissertation recognizes that many international regimes do exert
continuing influence, even in the face of power shifts. Drawing on psychological
prospect theory (Kahneman and Tversky 1979), it also examines whether potential losers
(those who benefit most from existing institutions) have a stronger preference for the
status quo than potential winners do for change.

1.1.2 Institutional Linkages

Another topic of recent interest in international law and international relations is
the relationship between international institutions. Raustiala and Victor, for example,
examine “regime complexes,” rather than individual agreements because they recognize
that negotiations take place in the shadow of existing law (Raustiala and Victor 2004).
Of course, interaction is not merely taking place between formal institutions. Rather,
this interaction results from the relationship between different issue areas in
international politics. For instance, the notion of sustainable development inherently
touches upon trade, agriculture, environmental protection, and human rights, among
other concerns. In a world of overlapping issues, the traditionally separate legal approaches to these concerns cannot help but overlap as well. Oberthür and Gehring describe interactions between “source” and “target” institutions (Oberthür and Gehring 2006a). Building on their framework, this dissertation explores the influence of existing “source” institutions on any subsequent “target” regimes.

Most of this research, however, focuses on interaction among two or more existing agreements. With the recent proliferation of international agreements among states, there is an increasing probability that these accords impose conflicting obligations on member states. Legally speaking, an analysis of treaty interaction should be controlled by “secondary rules” (Hart 1961) that define the relationship between existing laws. As we will see later, hierarchical relationships are important in the effort to increase legal certainty. Uncertainty increases the degree of risk one faces in carrying out any action (D’Amato 1983:5). In an economic sense, this risk raises expected costs and makes the transaction less likely (Coase 1988; Williamson 1985). When it is unclear which laws take precedence, the legal system is compromised. Its impact declines because people shy away from using the law to accomplish their goals.

As such, we are talking about two levels of legalization. At the basic level are the laws or treaties that cover each subject area in international relations. Though each set of rules may clearly indicate which actions are legal within that institution, states must
consider whether their actions are legal under all other commitments as well. Even though institutions are fragmented, their requirements are still simultaneous. At the second, or systemic, level, therefore, there must be some mechanism that establishes a hierarchy among international treaties in order to determine which rule takes precedence in a given situation. Behavior cannot be guided by law unless people are clear on what to expect from a legal system. Without knowing which law applies, they have no chance of acting appropriately or bargaining in the shadow of the law (Mnookin and Kornhauser 1979).

This loss of certainty is unwelcome because one of international law’s primary benefits is the establishment of concrete incentives, decreasing transaction costs by allowing actors to expect certain actions from other players (Keohane 1984). Recent legal and institutionalist research counsels us to expect many conflicting rules in international law as the number of treaties continues to rise and negotiations are not formally linked to each other (Davis 2004; Kingsbury 1999; Young 2002). There is little evidence, however, to demonstrate this proliferation of legal conflicts.³ Pauwelyn suggests that conflicts should be avoided by legal posturing rather than at the negotiation stage

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³ Two exceptions come to mind. The EU and Chile had a legal dispute about swordfish fisheries simultaneously in the WTO and Law of the Sea tribunals (WT/DS193/3 (6 April 2001)). Also, recent decisions by NAFTA and WTO tribunals have provided conflicting solutions for the US-Canada softwood lumber dispute (WT/DS277/RW (15 November 2005). It should be noted, however, that “nested” or “overlapping” commitments can still affect legal implementation, even if they do not lead to a formal legal conflict (Alter and Meunier 2006).
(Pauwelyn 2003). One might expect, therefore, that negotiators would make an effort to avoid conflict before legal battles (i.e., “transaction costs” in institutionalist terminology) are necessary.

Abbott and Snidal, in a paper for the recent Princeton University conference on nested and overlapping regimes, suggest a typology of institutional interactions on the basis of whether they relate to the same or different issue areas, and whether the two regimes have a hierarchical legal relationship (Abbott and Snidal 2006). When a hierarchy is present, it is clear which of the conflicting obligations must be followed. Without a clearly defined hierarchy, legal uncertainty remains in the case of inconsistencies. Building on Abbott and Snidal’s three-part typology (see Table 1-1 below), I suggest that savings clauses and the Vienna Convention represent a fourth type of relationship that combines characteristics of the nested and overlapping types. In particular, the coordination mechanisms discussed in this project establish a hierarchical relationship between two international legal agreements, even though they may not address the same issue area.

Non-hierarchical relationships lead to legal uncertainty, and its affiliated problems. Hierarchy – as in nesting – establishes a means for conflict resolution and legal certainty. As discussed above, the Vienna default entails a secondary rule that gives priority to later agreements, while negotiators often reverse that hierarchy with
savings clauses (see Section 1.1.1). Either way, the reliance on secondary rules is important for further understanding institutional interactions.

Table 1-1: Typology of regime relationships

<table>
<thead>
<tr>
<th>Single Issue Area</th>
<th>Non-Hierarchical</th>
<th>Hierarchical</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Example: Softwood lumber dispute (NAFTA/WTO)</td>
<td>Example: Bananas dispute (EU/ACP/WTO)</td>
</tr>
<tr>
<td>Multiple Issue Areas</td>
<td>Overlap (Alter/Meunier 2006; Abbott/Snidal 2006)</td>
<td>Vienna Convention and savings clauses</td>
</tr>
<tr>
<td></td>
<td>Example: Swordfish dispute (Law of the Sea/WTO)</td>
<td>Example: Genetically modified organisms case?? (Biosafety Protocol/WTO)</td>
</tr>
</tbody>
</table>

Ongoing efforts to study regime linkages address important questions about institutional effectiveness. However, we have only a vague understanding of how and when overlapping rules emerge in the first place. This side of the research program has been limited mostly to scholars of international environmental politics. They have suggested, in particular, that there is a propensity for trade treaties to trump environmental agreements (Eckersley 2004; Stilwell and Tuerk 1999). While these authors do present a number of examples of this relationship, none have attempted a
systematic analysis of the conditions under which such deference occurs, nor have existing studies compared deference between environmental and other agreements. This dissertation, while controlling for issue area characteristics, attempts to determine whether protection of the status quo – and hence the relationship between international institutions – varies by the number and type of countries involved in the negotiation.

1.1.3 Power Transitions

Any discussion of institutional change must also consider the changing power relationships between the groups who create those institutions. One well-known strand of international relations research focuses on the impacts of shifting power relations. These transitions have been suggested as one cause of war between states in the international system. The changing ability of countries to exert themselves against enemies is said to create an unstable system in which declining powers seek to fight off rising competitors by force if necessary (Houweling and Siccama 1988; Organski and Kugler 1980). However, even in Organski and Kugler's famous *War Ledger*, power shifts do not always result in conflict. Of course, there are other impacts of changing power relationships as well. This study examines another, less violent, site of contestation, namely the negotiation of international legal regimes on a variety of topics. Building on power transition theory, I suggest that declining powers – even if they are not completely overtaken – jealously guard the benefits they have accrued from past
negotiations. As they are no longer in a position to dominate the outcome to the same degree, they should be inclined to at least insist upon maintenance of the status quo situation. Because status quo institutions are a powerful tool, and potential losers have more to lose than rising powers have to gain, declining powers should still be able to slow power shifts by retaining their institutional advantages.

1.2 Hypotheses

I have developed four sets of hypotheses regarding the situations in which we should expect countries to prefer the status quo rather than institutional change. They relate to each country’s capabilities and political institutions, as well as the complexity of the negotiating environment. Each hypothesis is described in relation to country preferences, as well as the expected institutional outcomes that would result from those preferences.

1.2.1 Power transitions and the status quo

First, countries that have experienced a decline in relative power should promote deference to existing international law. If we expect powerful countries, in the absence of other frictions, to get the best deal in international negotiations, then we should also expect them – particularly after experiencing a decline relative to other countries – to be most concerned with saving those benefits later. Those countries who previously had a
strong negotiating position, but currently face more constraints, will want to protect their previous gains because they may not be able to achieve an equally favorable outcome after their power has declined. Assuming that power, more often than not, helps a country to achieve its goals in international negotiations, one might expect that countries who have experienced a decline in relative power are the ones who later have something to lose in a changed environment. Extensive experience with existing regimes should also serve to harden their resolve in favor of the status quo.

Therefore, we might expect that traditional superpowers are more likely to support the status quo than “rising powers” that did not have much say in earlier institutional design. Countries that have gained power, on the other hand, should be interested in overriding past agreements. Faced with a more advantageous negotiating position, they should be eager to override any undesirable provisions that resulted from earlier weakness.

These countries – while preferring change – should not have as strong a preference for change as the declining states do for the status quo. One might expect that potential winners should be able to guide later policy-making just as successfully. However, psychological prospect theory tells us that previous beneficiaries are likely to put forth extra effort to avoid potential loss (Kahneman and Tversky 1979). As Fernandez and Rodrik show, policy change should be quite deliberate when potential
winners are uncertain of their likely success (Fernandez and Rodrik 1991). Therefore, while rising powers may oppose the status quo, they are likely to exhibit a weaker preference than declining powers.

Figure 1-1: Expected Preferences for Institutional Change as a Function of a Country’s Shifting Power

As Figure 1-1 shows, I expect declining powers to have more intense preferences for the status quo than rising powers do for change. However, that does not mean it would be impossible for a heavily rising power to have a stronger preference than a mildly declining power. Obviously, it is impossible to know the slope of either line segment in this Figure (or indeed whether these relationships are linear), but the
hypothesis holds as long as the first segment remains steeper than the second one. For instance, consider two countries, A and B. In the first instance, country A has declined by one unit, and country B has increased its capabilities by the same amount. Based on the graph above, country A’s one unit decline would translate into one unit of opposition to change, whereas country B’s similar rise translates into only 1/4 unit of support for change.

Now consider two more countries, C and D. Suppose that country C had declined by half of a unit, but that D recently rose four units. If that were the case, C’s modest decline would result in only a slight concern (1/2 unit) for protecting the status quo. D, however, with its huge rise, exerts a full unit towards overriding those same existing institutions. In this second case, therefore, the rising power is more concerned with change than the decliner is with maintaining the status quo. As such, I am not claiming that rising powers will always be weaker proponents for their position, only that it takes a much greater rise to elicit the same level of concern as the preference resulting from a fairly modest decline. If two countries’ levels of rise and decline are equivalent, however, the declining power should demonstrate a more intense preference for the status quo than the rising power will express for institutional change.

However, the story does not end there, because this discussion has only considered the countries’ desire for change or continuity. In order to predict negotiation
outcomes, we also need a measure of each participant’s ability to achieve those preferences. From this discussion, the following mathematical representation emerges for two countries, one experiencing a decline (player 1) and the other a rising power (player 2):

\[ \text{Equation 1.1.} \]

\[
\text{Likelihood of legal deference resulting from negotiations} = \left[ c_1 \times k_1 \times (-p_1) \right] - \left[ c_2 \times k_2 \times p_2 \right]
\]

between players 1 and 2

where:
- \( c_1 \) and \( c_2 \) = current capabilities of players 1 and 2 respectively. Both must be greater than zero.
- \( k_1 \) and \( k_2 \) = constants representing the preference for institutional change per unit of capabilities change (i.e., the slope of the line in Figure 1-1) for players 1 and 2 respectively; we assume \( k_1 > k_2 \)
- \( p_1 \) and \( p_2 \) = capabilities change experienced by declining and rising powers respectively. Therefore, \( p_1 < 0 \) and \( p_2 > 0 \), and the expectation is that those values will map onto each player’s preference for institutional change. Since \( p_1 \) should indicate the declining power’s preference for change, then \( (-p_1) \) should represent that player’s level of support for the status quo.

Therefore, a player’s influence on the negotiation is a product of her preferences (based on the magnitude of rise or decline in capabilities) and current capabilities. The negotiated outcome leans towards the status quo when the declining power (player 1) shows a greater product of preference and power. It shifts towards institutional change when the rising power (player 2) has a larger product. In order to determine when new
institutions will exhibit deference to the status quo, therefore, the following inequality should provide an answer:

\[
[c_1 \times k_1 \times (-p_1)] > [c_2 \times k_2 \times p_2]
\]

\[
c_1 > \frac{[c_2 \times k_2 \times p_2]}{[k_1 \times (-p_1)]}
\]

The status quo, then, should be protected when the current capabilities of the declining power \(c_1\) are greater than the rising power’s capabilities, multiplied by the ratio of the rising power’s desire for change to the declining power’s desire to maintain the status quo.

In the first example above, country A has declined one unit, and country B has grown by one unit. Therefore, plugging in the slopes used in that example, we should see deference to the status quo if player A’s capabilities \(c_A\) are greater than player B’s capabilities \(c_B\) multiplied by the ratio of their preferences \([k_B \times p_B]/(k_A \times p_A)\], or \([\frac{1}{4} \times 1]/(1 \times 1)\]. In other words, player A must demonstrate only 25 percent of player B’s current capabilities in order to retain its preferred institution.

In the second example, keeping the slopes the same, player C declines by half of one unit, and player D rises by four units. In this case, we should observe deference if C’s capabilities are greater than \(c_D\times[(\frac{1}{4} \times 4)/(1 \times \frac{1}{2})]\], or 2 times \(c_D\). In this case, that is, \(\frac{1}{4} \times 4\),

\[\text{Note that } p_1 \text{ is always negative. Therefore, } (-p_1) \text{ is always positive, meaning that the inequality need not shift directions when dividing through.}\]
the declining power (player C) must be twice as strong as its negotiating counterpart (player D) in order to successfully defend the existing institution.

The combination of power transitions and prospect theory, therefore, leads to my first set of hypotheses about national preferences for or against the status quo.

**Hypothesis 1a:** If a country has become less influential – relative to its negotiating partners – since the original institution was formed, then its government should support the status quo. Rising powers, on the other hand, should support institutional change, but not as vigorously as others oppose it.

**Hypothesis 1b:** Therefore, treaties are more likely to enshrine deference to existing law when the average participant remains strong despite a relative decline in power.

### 1.2.2 Private Gains from Existing Institutions

Second, a country’s support for the status quo should be enhanced when private parties within that state have access to the existing institutions that benefit them. This section discusses when private parties will be most eager to have their country support the status quo. The most obvious condition under which individuals and industries support existing arrangements is when the rules are written in a way that is favorable to

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5 In each set of hypotheses, part (a) indicates which countries should be most likely to support the status quo, while part (b) discusses the conditions under which those countries should be most likely to succeed in that endeavor.
them. This outcome should be the case when their country was successful in gaining institutional benefits from earlier negotiations. Therefore, this condition should be indistinguishable from those outlined above in hypothesis 1. This set of hypotheses, therefore, is only relevant in assessing the level of preference among countries that already wish to support the status quo on the basis of the hypothesis 1a.

Nonetheless, there are other conditions that can differentiate private parties’ goals and abilities from those of their governments. In order for helpful rules to have any value, they must also be enforceable. While the other hypotheses focus on the situations in which negotiators defer to existing arrangements, this hypothesis also addresses which existing institutions are deemed to be worth saving. Beneficial rules should only trigger political action if the beneficiaries have access to institutions that enforce them. Scholars of international law and politics have described three characteristics of legalization – obligation, precision, and delegation (Abbott et al. 2000).

Obligation refers to the degree to which parties agree to comply. For example, the treaties creating the European Union contain a series of rules that member states agree to uphold under penalty of dismissal or ostracism. In contrast, most “general principles” of international law – while still representing a source of law – operate more as suggestions than as requirements (Birnie and Boyle 2002:18-20). Even within the category of formal treaty rules, commitments can range from shallow agreements about
meeting attendance and scientific cooperation to much deeper accords requiring major behavior changes. In this case, I suggest that parties will be more eager to protect existing arrangements that mandate a higher and deeper level of obligation from their members. These types of commitments from countries are worth much more to their partners abroad, therefore garnering further protection.

*Precision* refers to the exact nature of a legal commitment. Some agreements – such as the UN Framework Convention on Climate Change, for example – simply require parties to report on their activities and make an effort to change behavior. Others – such as that Convention’s Kyoto Protocol – actually outline the steps that parties are expected to take in order to meet those goals. The latter commitments are much more precise in nature, meaning that enforcement is more feasible for the reasons outlined above in the discussion of legal certainty. When parties know their precise commitments, and others can easily observe violations of those commitments, the rules are more likely to be implemented. Under that condition of enforceability, private parties are likely to care much more about existing rules. Within countries that achieved their preferred outcomes in earlier negotiations, certain private parties will have influenced the government negotiating position in the first instance. Assuming these groups continue to be influential, they should push the government to maintain similar benefits in subsequent negotiations.
The third characteristic – *delegation* – refers to the degree to which rules can be enforced by a third party. I suggest that international institutions with high levels of delegation (Keohane, Moravcsik, and Slaughter 2000) lead to the emergence, and/or enhanced impact, of domestic political groups that benefit from those international agreements. Alter (citing Raustiala) points out that international institutions often create enforcers and monitors (Alter 2006), and Kahler refers to these groups – who have an interest in upholding institutional benefits – as “compliance constituencies.” These groups, usually beneficiaries of the institution in question, “will often increase the probability of government compliance and encourage imposition of sanctions on other governments that violate legal commitments.” Kahler posits that governments may be worried about retaliation when they pursue enforcement action against another country. Private groups, on the other hand, can push for legal compliance without directly suffering reprisal (Kahler 2000).

This compliance activity should put certain industries in a position to wield greater influence later on. By virtue of their reliance on past international agreements, these groups may develop expertise in foreign policy – particularly the details of beneficial institutional mechanisms – and a relationship with the foreign policy bureaucracy. Their opponents may not be as experienced in international law and politics, placing them at a disadvantage. Furthermore, industry associations, rather than
individual firms, often serve as the relevant enforcement actors (Hathaway 1998). In this case, the “winners” have already managed to solve their collective action problem, as evidenced by their participation in the enforcement process together as an industry. Cichowski further notes the potentially “powerful mobilizing effects of litigation (Cichowski 2006).” As discussed above, prospect theory suggests that these groups will be more adamant about protecting the status quo than others will be in their efforts to change institutions. Therefore, in addition to the stronger preference held by those with something to lose (see section 1.2.1), previous domestic winners should also occupy an advantageous bargaining position later on. On the whole, private parties should be most concerned about protecting the most legalized existing institutions, those demonstrating high levels of obligation, precision, and delegation. This relationship leads to the following expectation.

**Hypothesis 2.1:** When existing institutions exhibit higher levels of obligation, precision, and delegation, countries will try harder to protect them.

In addition to the institutional variation described in Hypothesis 2.1, delegation also varies by country because individuals do not usually have standing to bring cases under international law. As a result, private beneficiaries must involve their government in the process. Without access, even the most highly legalized institutions
are useless to a private party. Therefore, domestic rules play a role in the intensity of preferences for the status quo as well. Governments that have allowed private access by their citizens to existing international institutions are more likely to face domestic pressure to protect those existing rules. For example, unlike most other countries, the United States and European Community have formal procedures through which industries can request the government to bring a case in the WTO Dispute Settlement process. As I will discuss in more depth later, the European Commission provides even greater opportunities to private parties in this area than the US does (Shaffer 2003). As a result, assuming that the rules favor US and European industries equally (which they rarely do), private parties in Europe stand to gain more from existing WTO provisions. The involvement of domestic political players can act as a constraint on any government considering new agreements that alter its constituents’ benefits from existing international law. In addition to the influence those actors have gained, they may also provide important information to a government official who may be unaware of a new arrangement’s potential pitfalls (Shaffer 2003; Shaffer, Ratton Sanchez, and Rosenberg 2006). Therefore, another set of hypotheses emerges to address private parties’ interest in the status quo.

**Hypothesis 2.2a:** When groups that benefit from existing arrangements are granted greater access to those institutions, they should be more likely to support
deference in later agreements. Therefore, when countries allow greater private access to existing international institutions, they should face more pressure from their constituents to incorporate legal deference in subsequent treaties.

**Hypothesis 2.2b:** When the average participant allows more private access to existing international institutions, subsequent agreements are more likely to protect the status quo.

### 1.2.3 Private Participation in the Negotiating Process

Third, this relationship should be particularly strong when interested citizens are able to play a role in subsequent negotiations. When there are more points at which these private actors can gain influence over eventual outcomes, their desire to support the status quo should have greater impact. This participation emerges primarily through legislative ratification processes and executive branch calls for private input.

The desire for deference, brought on by institutional benefits – and access to those benefits – should only translate into national negotiating positions if private actors can influence the officials who are negotiating later agreements.⁶ Without the ability to participate in foreign policy decisions, private actors will not be able to translate their preferences into national negotiating positions. I expect, therefore, that countries

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⁶ Access to the home government’s foreign policy decision-making apparatus should not be confused with the aforementioned access granted to these same parties for utilization of existing international institutions.
granting private parties a role in the foreign policy process will be more likely to support legal deference in response to wishes of their constituents.

In particular, in the classic two-level game, when the legislature plays a role in treaty ratification (Putnam 1988), private actors should be able to exert constraints on the eventual outcome because they have more access to, and electoral control over, the many local representatives involved than they would to an individual executive branch negotiator. Furthermore, supermajoritarian ratification requirements provide even more support for those who wish to block change. In the United States, for instance, the two-thirds Senate ratification rule means that supporters of the status quo need to convince only 34 Senators of their position, while proponents of change must garner 67 votes.

In addition to working through the legislature, private parties often have an opportunity to influence negotiators directly through pre-negotiation hearings and other intragovernmental preparations. As Vogel notes, private parties are better able to influence their government’s position when more entry points are available for their participation (Vogel 2003: 575). Those who wish to protect the status quo have the added advantage of needing to convince only one veto player to take that position (Tsebelis 2002). When the agency representing a group’s interests is included, bureaucratic politics can lead to successful protection of its interests. Since the identity of participating agencies plays an important role in which perspectives are promoted by
the delegation (Allison 1969), the inclusion of additional government agencies should provide additional potential outlets for private parties who wish to avoid institutional change.

Although domestic supporters of change may participate also, they often face a more difficult path to success, even if their preference is equally strong. Domestic institutional differences, therefore, lead to a third set of hypotheses.

Hypothesis 3a: Among countries that provide their citizens the same benefits from, and access to, existing international institutions, those that allow greater private participation in the negotiation process should be more likely to support the status quo in subsequent negotiations.

Hypothesis 3b: When the average participant – controlling for private benefits from, and access to, existing international institutions – allows more private participation in its foreign policy process, subsequent international agreements are more likely to protect the status quo.

1.2.4 Complexity of the Negotiating Process

Finally, one might suggest that legal deference is used simply to reduce treaty impacts. More complex negotiations (i.e., those including more participants) should result in greater deference to existing international law. As more parties become involved, participants become more concerned about delegating power. Wishing to
slow the speed of change in this situation, one tactic for “putting on the brakes” is
deferece to existing law, thereby limiting the scope of the new institution.

The involvement of more countries should also mean a greater possibility of affecting a group that fears change. If bargaining constraints originate in domestic politics, additional participants should make negotiations more difficult and their results more uncertain (Koremenos 2005). We should therefore expect more savings clauses, or other opposition to change, as more countries are involved. Similarly, a veto points model (Tsebelis 2002) would expect that more parties should make cooperation more difficult due to further constraints on bargaining space, as well as the sheer difficulty of coordinating large groups of people (Olson 1965).

Of course, only parties who benefit from the status quo should be interested in using this strategy to slow change. Influential rising powers who played a limited role in previous negotiations should not want to “put on the brakes” because the status quo may still be more detrimental for them. Together, these strands lead to a fourth hypothesis.

**Hypothesis 4**: When more parties are involved in the negotiation, new institutions should be less likely to alter the status quo. However, this

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7 Like Hypothesis 2.1, Hypothesis 4 does not rely on variation among countries, meaning that it does not require a separate phrasing for country-level analysis.
relationship should only hold among participants whose power has not increased over time.

1.2.5 Relationship between the Hypotheses

As I have noted, these four hypotheses are related to each other. Connections between the first three can be seen graphically in the decision tree presented in Figure 2. Any government can be located on this decision tree to assess its likely position on protecting the status quo. Examples are noted where applicable in the diagram, and the cases addressed in this dissertation are underlined and italicized.

The first hypothesis remains central to the decision process for each country because it relates to the potential for getting a better deal in subsequent negotiations. Rising powers, of course, are likely to gain by negotiating from their new position of greater strength. The other hypotheses concerning domestic institutions and complexity of the negotiating environment should not be relevant to the status quo unless the country is in a diminished position relative to the other participants. As described in hypothesis 2, that beneficial position is more likely to activate private preferences – and therefore active support – for the status quo when the country allows its constituents more access to existing international legal institutions. Finally, as outlined in the third

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8 I do not discuss Hypothesis 4 at length here because it is related to a characteristic of the negotiations rather than to the position in which each participant finds itself.
set of hypotheses, these private preferences can only translate into government negotiating positions when domestic institutions allow private participation in the country’s foreign policy decision making. Together, these hypotheses demonstrate the conditions under which a country is most likely to support the status quo.

1.2.6 Alternative Explanations

Throughout the dissertation, I also identify and assess a series of hypotheses drawn from existing literature in international negotiations. This section highlights a few of those potential explanations for bargaining outcomes.

1.2.6.1 Hegemonic Stability Theory

Hegemonic Stability Theory (HST) predicts that the existence of powerful hegemons is a necessary condition for the existence of robust international institutions (Krasner 1976). HST addresses power at a point in time rather than changing power balances. In contrast with the power change hypothesis presented above, HST suggests that a declining former hegemon will back away from international institutions. My expectation, instead, is that declining powers – even when they are no longer the
Figure 1-2: Decision Tree Linking Hypotheses
strongest players in the game – can successfully push for the maintenance of earlier provisions.

1.2.6.2 Baptists and Bootleggers

In a different vein, DeSombre (2000) points to the importance of the domestic political economy in setting countries’ negotiating positions. In her story, when an industry faces high levels of regulation at home, it should join with pro-regulation groups to support strict international regulations as well. A desire for strict international rules should indicate opposition to savings clauses and other techniques for limiting an institution’s scope. However, this explanation is of limited use in situations where the domestic industry faces weak rules at home, meaning that it is unlikely to act in concert with pro-regulation groups.

1.2.6.3 Environmental Chilling Effect

In addition to existing theories that address power structures and domestic politics, I also consider expectations that vary by issue area. One recent line of inquiry suggests that countries – fearing any change in trade benefits – now limit the scope of environmental treaties to avoid contradicting WTO rules. However, as subsequent chapters will show, this approach varies by country, leading me to question its overall theoretical value.
1.3 Plan of the Book

The remainder of the dissertation will test these hypotheses with a combination of statistical and case study analyses.

Chapter 2 applies logistic regression techniques to determine the conditions under which multilateral treaties protect the status quo situation with a “savings clause,” by which they defer to existing international law. It draws on a new dataset that was created by randomly sampling 10% of the multilateral agreements included in the United Nations Treaty Series. Each treaty is coded on the basis of its deference to earlier agreements. This analysis, including explanatory variables that test hypotheses one and four above, demonstrates that savings clauses are, in fact, more likely when there is a complex negotiating environment, as measured by a large number of parties. However, as expected, this relationship only holds when the average participant has experienced a decline in power relative to the rest of the world. Rising powers, in contrast, do not seek to “put on the brakes” in complex negotiating situations. Instead, they are more likely to accept the Vienna Convention’s default rules that give precedence to the more recent agreement. The declining countries show a significant propensity to protect the status quo. However, as expected by prospect theory, the rising powers are less concerned about overriding existing arrangements, leading to an insignificant coefficient on this variable.
While the statistical analysis controls for a number of factors, it is unable to properly examine the domestic political variables described in hypotheses 2 and 3. It also cannot demonstrate causality, meaning that further support for all hypotheses require more in-depth comparative analysis. Therefore, I have also conducted a series of case studies that explore how governments form their preferences for or against the status quo condition. These case studies shift the unit of analysis from a completed treaty to a party’s negotiating position. Chapter 3 describes the methods used in the subsequent case studies, and outlines the case selection process. Each of the following three chapters addresses the preferences of one government – the United States, India, and the European Community. These countries vary widely in terms of their capabilities and domestic institutions, as well as their approach to institutional change. Most importantly, the US and India represent cases of relatively declining and rising power respectively, while the EC is an intermediate case. As discussed in chapter 3, I have compared each of these governments’ preferences for the status quo on the topics of United Nations Security Council expansion, bilateral investment treaties (BITs), the WTO Agreement on Sanitary and Phytosanitary Standards (SPS), and the Cartagena Protocol on Biosafety (Biosafety Protocol, or BSP). These four areas were chosen because of their importance for international law and regulatory practice. They also provide a high degree of variation in preferences between the governments in question. Each of
these negotiating areas has provided controversy on the issue of deference to existing international law, and they are therefore critical cases for understanding why certain parties protect the status quo while others attempt to override it. I have traced the process by which each government arrived at its negotiating positions by interviewing a wide range of officials in each government and examining relevant documentary evidence. These case studies allow for further assessment of the hypotheses described above.

Chapter 4 addresses positions taken by the United States Government in international negotiations. Unlike India and the European Communities, the United States has adamantly defended the status quo legal situation. Having demonstrated a steep decline over time in its capabilities relative to the rest of the world, it is unsurprising that the United States would want to protect its earlier gains. This chapter also examines the process by which the US reaches these decisions, and finds that extensive support for the status quo comes from private parties who have gained access to existing international institutions. While the US does allow parties to bring WTO violations to its attention, it is not as open about encouraging such action as the European Commission has been. Therefore, not as many “compliance constituencies” have pushed the US Government for change. Nonetheless, the Government’s extensive reliance on public participation – through Congressional ratification rules and the
inclusive interagency process used to develop US negotiating positions – means that any involved private parties are able to participate extensively in subsequent negotiations. As a result, the US case also provides support for the hypotheses described above.

Chapter 5 discusses India’s negotiating position. As expected, it is largely opposed to the status quo condition. As a rising power, India is in a position to benefit from new agreements rather than relying on institutions that were established when it had less bargaining strength. However, while this result would seem to confirm Krasner’s story of changing institutions, in keeping with prospect theory, the Indian government is much less concerned about change than others are about maintaining the status quo. The domestic institutional hypotheses are less important in this case because decisions do not make it past the first branch of the tree shown in figure 2. Nonetheless, it is important to note that domestic interests play a less significant role in Indian foreign policy due to the lack of any requirement for legislative ratification. As a result, even parties who might benefit from the existing arrangements would have very little opportunity to protect the status quo.

Chapter 6 explores the European Communities’ position when negotiating with external actors. The preference for the status quo is more mixed in this case, with the EC sometimes supporting change and other times trying to maintain the status quo. This variation turns out to be related in part to the EU Council voting rules for each
negotiating position, but more importantly to the EU’s changed power position in relation to the particular negotiating partner. While most trade topics encounter majoritarian decision-making, other negotiations – including agricultural trade – require unanimous agreement of EC members.

The decision to support or oppose the status quo appears to mirror this divide, although this dissertation contains few examples of complete delegation through majoritarian voting. Nonetheless, majoritarian decisions seem supportive of change in most trade negotiations, while unanimous decision-making is more likely to defend existing agreements. This relationship finds support from the first three hypotheses above. First, majoritarian voting means that the Commission has responsibility for related decisions. The Commission, as a representative of the whole Union, can be seen as a rising power both because of the increasing authority granted to it over time and the growing number of countries (and therefore bargaining power) it represents. Unanimity decisions, in contrast, allow for greater input from a number of European powers – namely the UK and France – who are no longer as strong individually as they were when many international institutions were formed in the aftermath of World War II. Second, majoritarian decisions – in keeping with hypothesis 3 – do not involve as much private participation because they do not require the assent of every EU member country. Consensus decisions, on the other hand, do allow for participatory processes
and potential vetoes from each of the now 27 members. Finally, as discussed in hypothesis 2, the European Communities are more open than other governments to industry and other private access to WTO dispute settlement processes. Of course, as noted earlier, this access is only relevant to the extent that private parties feel the existing rules are more beneficial than those that have been proposed. In this case, therefore, the question of access to existing institutions is most pertinent on those topics – such as agriculture – for which each country retains a veto, and then only for those countries – such as the UK and France – in which power has declined over time relative to others. The evidence shows that, as hypothesized, the EC is most likely to prefer deference when those countries are able to make their voices heard. Furthermore, this desire to protect the status quo is generally evident only when negotiating with other rising powers. In contrast, when bargaining primarily with the United States, the European Commission tends to see itself as a rising power, desiring institutional change as a result of its newly strengthened position.

Chapter 7 concludes by comparing the three case study chapters and exploring other implications of the research conducted in this dissertation. It shows strong support for the hypotheses discussed in this chapter, particularly the likelihood of declining countries to hold on to existing arrangements, while rising powers promote change with somewhat less enthusiasm. Overall, these findings suggest that institutions
can, in fact, survive changing power alignments under certain conditions, and that private parties play an important role in this effort to protect the status quo.
2. Statistical Analysis of Change and Deference in International Law

The previous chapter set forth a theory of change and continuity in international law, describing the factors that influence countries’ decisions to protect existing international treaties. This chapter, and the four that follow it, will test hypotheses by examining variation in treaty outcomes, as well as the process by which countries decide to support or oppose major changes in new treaties. As expected, the combination of a complex negotiating environment and parties who have declined in power leads to few efforts to override the status quo. Following a brief review of the hypotheses, this chapter tests their validity with statistical analysis of more than 200 randomly sampled multilateral treaties.

2.1 Review of Hypotheses

Four primary hypotheses were described earlier. They relate to the benefits accrued from existing treaties, private access to existing international law, private participation in subsequent negotiations, and complexity of the negotiating environment.

First, countries that have experienced a decline in relative power should promote deference to existing international law. Those countries who previously had a strong
negotiating position, but currently face more constraints, will want to protect their previous gains because they may not be able to achieve an equally favorable outcome after their power has declined. Assuming that power, more often than not, helps a county to achieve its goals in international negotiations, one might expect that countries who have experienced a decline in relative power are the ones who later have something to lose in a changed environment.

Countries that have gained power, on the other hand, should be interested in overriding past agreements. Faced with a more advantageous negotiating position, they should be eager to override any undesirable provisions that resulted from earlier weakness. As discussed in the previous chapter, these countries – while preferring change – should not have as strong a preference for change as the declining states do for the status quo (Kahneman and Tversky 1979). In addition to the impacts of risk aversion, private actors in beneficiary countries have also gained expertise in the issues at hand,¹ allowing them to understand the process and remain involved as changes are proposed.

Second, among countries that benefit from earlier institutions, efforts to protect the existing rules are more likely when private citizens are granted access to those

¹ For example, a handful of countries have shown the greatest abilities to use WTO litigation procedures to their benefit. Busch, Marc L., and Eric Reinhardt. 2003. Developing Countries and General Agreement on Tariffs and Trade/World Trade Organization Dispute Settlement. *Journal of World Trade* 37 (4):719-35.
existing international institutions through legal channels. When the beneficiaries are private actors, flexibility in using the institution has important implications for their overall benefit from it. In addition to the influence those actors have gained, they may also provide important information to a government official who may be unaware of a new arrangement’s potential pitfalls (Shaffer 2003; Shaffer, Ratton Sanchez, and Rosenberg 2006).

Third, private support for the status quo is only relevant for treaty outcomes if interested citizens are able to participate (perhaps through the ratification process) in subsequent negotiations. When the legislature is involved in treaty negotiation or approval, there are more points at which private actors can gain influence over eventual outcomes. In other situations, private parties may have some other defined role that allows them to push for protection of the status quo.

Finally, more complex negotiations (i.e., those including more participants) should result in greater deference to existing international law. As more parties become involved, participants become more concerned about delegating power, and more uncertain about the impact of a new agreement. Wishing to slow the speed of change in this situation, one tactic for “putting on the brakes” is deference to existing law, therefore limiting the scope of the new institution. Of course, only parties who benefit from the status quo should be interested in using this strategy.
This chapter will present a statistical test of these hypotheses. It uses individual treaty outcomes as the unit of analysis, looking to see when and how previous treaties are protected in current negotiations. As the theory outlined in chapter 1 suggests, some combination of complex negotiating environments and declining power lead to deference in international law. Contrary to realist expectations, institutions do not always change when power changes. However, in contrast with theories of path dependence, many treaties do override existing international law. The analysis in this chapter finds that change is less common when declining powers are involved in the negotiation. In later chapters, I will examine individual country preferences, but I start here by exploring the outcomes of group decision-making. First, I outline a dependent variable that allows me to measure legal deference across issue areas and treaties. Following a discussion of the varying levels of deference to the status quo, I detail the set of possible explanatory and control variables. After displaying the resulting data, the chapter concludes with a discussion of the results and their limitations.

2.2 Dependent Variable – Savings Clauses

I am asking in which circumstances negotiators are most likely to exhibit
deference to existing law, and who is supporting that deference? One way in which deference is clearly noted is through a “savings clause.” “Savings clauses” are defined by the United Nations (2003) as clauses “specify[ing] that some or all of the provisions of the [current] treaty shall not prevail” when they conflict with existing international law.

The Vienna Convention on the Law of Treaties, although not applicable in all situations, provides that more recent treaties should prevail when a conflict arises (Article 30). There is always a potential for a conflict between two international treaties. Based on the Vienna rules, the expected result of a clash would be a decline in the influence of existing agreements, even when dealing with different issue areas. Savings clauses, instead, replace the Vienna default and allow existing rules to persist in case of a conflict.

The preservation of institutional capital need not lead to savings clauses. Instead, some parties may oppose new rules entirely, or they may only consent to sign on to a weaker form of the new agreement. The introduction of savings clauses is a very direct way for countries, and the beneficiary groups within them, to retain their institutional capital, even in the face of changing power relationships. This chapter, therefore, endeavors to explain the use of savings clauses in multilateral treaties.

2 See discussion in chapter 1 regarding the increasing potential for conflict across issue areas.
For this project, I have read a random sample of treaties and coded each on the basis of its relationship to existing international law. I examine a variety of factors predicting their occurrence. Following Koremenos (2005), I have selected a random sample from the 4631 multilateral agreements listed in the United Nations Treaty Series (UNTS). UNTS only publishes treaties that have been registered by member countries. As many less developed countries are slower to report (Kohona 2002:402), their treaties may be underrepresented. However, the skew towards developed countries should not bias my results because I control for relevant country characteristics.

Unlike Koremenos, I focus only on multilateral treaties (i.e., those open to participation by more than two country parties). While selecting on values of the explanatory variable should not bias results (King, Keohane, and Verba 1994), I recognize that this truncation may reduce generalizability. However, as bilateral treaties account for more than 90 percent of the total (Koremenos 2005), their inclusion in a uniform random sample would reduce variation on this independent variable. Additionally, although bilateral treaties represent 90 percent of all treaties, they do not account for 90 percent of all international cooperation. Rather, a multilateral treaty with eight parties should actually count as a much greater coordination event than a bilateral accord. As such, to test theories of cooperation, a true random sample should weight each treaty based on the number of participants.
with unavailable text or less than three country participants. Neither of these restrictions should bias the results because they simply exclude irrelevant accords in which negotiation between sovereign states is not present or testable.

Two shortcomings of the data should be noted before continuing. First, as I mention above, legal deference may be underrepresented because there are different ways of diluting agreements, not all of which require language directly addressing existing treaties. Second, the fact that I rely on existing treaties in force means that I cannot account for negotiations that failed completely on these grounds. Nonetheless, on both accounts, there is no reason to believe that this type of dilution should be found in particular types of treaties.

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4 UNTS multilateral agreements include treaties, such as loan agreements, that are negotiated between one country and international organizations (e.g., World Bank). Because these international organizations do not respond directly to political interest groups, I cannot consider them to be governments for the sake of testing this theory.

The dataset contains 203 randomly selected UNTS multilateral agreements. I have coded each treaty’s relationship to other international law/treaties, creating an ordered dependent variable according to the following rules:

1 = no mention of past agreements (legal default)

2 = use existing international law to interpret certain provisions, or reiterate commitment to previously agreed international law (e.g., “States situated between the sea and a State having no sea-coast shall … in conformity with existing international convention accord (Convention on the High Seas 1958)…”)

3 = defer to past treaties IF in same spirit (“In no case shall the adoption of any Convention or Recommendation by the Conference, or the ratification of any Convention by any Member, be deemed to affect any law, award, custom or agreement which ensures more favourable conditions to the workers concerned than those provided for in the Convention or Recommendation (International Labour Organization Constitution 1919).”). Although deference is involved in this statement, it cannot be considered a savings clause in the same way as subsequent categories. Rather, countries frequently use this phrasing to clarify their desire to prioritize rights with the present agreement.

4 = defer to particular past treaties in the same issue area (e.g., “Nothing in this Convention shall be interpreted as in any way limiting or detracting from the obligations assumed by any State under the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (Chemical Weapons Convention 1993).”)

5 = defer to particular past treaties in different issue area (e.g., “The provisions of the preceding articles shall be without prejudice to: 1. the right to mail documents direct to interested parties who are abroad; … In each of the above cases the right in question shall be deemed to exist only if it is recognised in Conventions between the States concerned… (Convention Relating to Civil Procedure 1954).”)

47
Each treaty was coded at the highest number achieved in its text to represent the overall degree of deference in a given negotiation. Table 1 shows the distribution of this variable in treaties with data sufficient for the regression analyses later in this chapter. 35 observations are dropped due to insufficient data on independent variables. Most of these 35 agreements were negotiated within institutions – such as ILO and UNESCO – that do not operate on consensus. As a result, their agreements have signatures only from organizational leadership rather than participating countries.

<table>
<thead>
<tr>
<th>Code</th>
<th>Frequency of this level in the dataset</th>
<th>Percent of treaties at this level</th>
<th>Percent of treaties at or below this level</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. No mention</td>
<td>40</td>
<td>23.81</td>
<td>23.81</td>
</tr>
<tr>
<td>2. Maintain existing</td>
<td>62</td>
<td>36.90</td>
<td>60.71</td>
</tr>
<tr>
<td>3. Defer if same goals</td>
<td>4</td>
<td>2.38</td>
<td>63.10</td>
</tr>
<tr>
<td>4. Defer – same issue</td>
<td>34</td>
<td>20.24</td>
<td>83.33</td>
</tr>
<tr>
<td>5. Defer – other issue</td>
<td>6</td>
<td>3.57</td>
<td>86.90</td>
</tr>
<tr>
<td>6. Defer – all</td>
<td>22</td>
<td>13.10</td>
<td>100.00</td>
</tr>
<tr>
<td>Total</td>
<td>168</td>
<td>100.00</td>
<td></td>
</tr>
</tbody>
</table>
I have constructed other specifications of the dependent variable as well. My dataset includes dichotomous variables for each value on the above scale, as well as variables that lump together deference above each value on that scale. In this chapter, I employ a dichotomous measure that separates treaties with savings clauses (i.e., categories 4-6 above) from treaties that override existing international law.

As one can gather by looking at Table 1 above, more than one-third of randomly selected treaties contain some form of a savings clause. That is a fairly high proportion considering that the legal default is the opposite. By itself, this variation calls existing theories into question. Realists seem to suggest that parties will always overturn existing arrangements in the face of changing power (Krasner 1991). Institutional theorists, on the other hand, have often suggested that international institutions persist despite changing power dynamics (Keohane 1984:100-03). In contrast with these theoretical approaches, the variation demonstrated in Table 1 suggests that institutional change is supported under some conditions but not others. In the next section, I explore potential explanations for these different outcomes.

2.3 Explanatory Variables

2.3.1 Power Change

Countries that benefit from existing institutions should promote savings clauses
in new institutions. Those states who have experienced a decline in power – relative to other countries – should want to lock in the deals they made from their former position of relative strength. Facing a less favorable negotiating environment, relative decliners therefore should support deference to earlier international law, while relative risers should look to override existing international law.

Power is a notoriously difficult concept to measure. However, the Composite Index of National Capability (CINC) (Singer 1987; Singer, Bremer, and Stuckey 1972) is one major effort to accomplish such an ambitious goal. The CINC index is comprised of six measures for each country in each year: total population, urban population, iron and steel production, energy consumption, military personnel, and military expenditure. Although the index does not capture all possible measures of national capabilities, its inclusion of military, as well as economic, power makes it a good way of comparing many countries. To get an idea of changes in relative power, and their effects on negotiating strategies, consider two important countries: the United States and India. Both are currently strong enough to hold up treaty negotiations, but they have followed different trajectories to reach their present positions.

According to the CINC index, the United States controlled over one-third of global power in 1946. One might therefore expect that the US was able to achieve its most preferred outcome in a variety of international institutions that were created
shortly after World War II. In 1994, with the re-emergence of Japan and a reunited Germany, as well as the rise of large developing countries, the same index suggests that the United States controlled just over 15% of world power. In other words, despite its continued strong position in 1994, the United States was no longer in a position to get quite as good a bargain in international negotiations. At that stage, assuming the US retained the same substantive preferences as in the late 1940s, we might expect that US negotiators would be concerned about any threats to their original status quo. This preference for the status quo, of course, will not translate directly into a savings clause because the treaty text results from compromise between a broad range of positions. As discussed in the previous chapter, however, there are reasons to believe that preferences for the status quo will be more forceful than the same level of support for overriding past deals.

In contrast, India was not even a country in 1946, and scored just over 5% on the CINC scale when it became independent in late 1947. However, with rapid population growth, industrial success, and economic growth, India has experienced an upward trend, scoring over 6% by 1994. In addition to these measurements, we now have many accounts of India’s role as a rising power (Mohan 2006; Nayar and Paul 2003; Tellis 2005), and one whose acquiescence is often necessary for the completion of international

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7 Case study chapters will discuss preferences for legal deference within individual countries, while this chapter will address only the aggregate outcomes produced by a group of negotiating countries.
negotiations (DeSombre 2000; Narlikar 2003). Recent efforts to restart WTO Doha round negotiations have included India and Brazil in addition to the traditional powers of the United States and European Union (Dougherty 2007). In this situation, one might expect that India would want to exert its ability to change the status quo that was established when its capabilities were significantly lower. Hence, rising powers like India should oppose savings clauses.

![Figure 2-1: Capabilities Measures for China, India, Japan, Russia/USSR, USA, and combined European Community, 1945-2001](image-url)
I have, therefore, developed a series of measures to compare the average power change among parties to a given treaty. These measures take, as their starting point, the CINC index mentioned above (Singer 1987; Singer, Bremer, and Stuckey 1972), as well as measures of Gross Domestic Product (GDP) (Gleditsch 2004) for each country in each available year after 1945. These data are certainly not foolproof, but both allow for some comparison of relative power among countries involved in each particular treaty.

As I point out above, the CINC index allows for some degree of overall comparison between countries. GDP has also been proposed as a measure of bargaining strength among countries, although it is limited to a country’s economic abilities. In order to provide a similar measure, I compare each country’s national GDP as a proportion of global GDP, in the same way that CINC is measured as a proportion of world capabilities. The CINC and GDP measures for each country-year are correlated at a level of .905.

In order to understand the degree to which countries’ power has changed over time, a starting point is required. Following a number of scholars, I note that there was a major upheaval of international institutions in the aftermath of World War II (Ikenberry 2001), and take the postwar period as a starting point from which to measure gains and

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8 One might of course note that GDP should also be related to military capabilities.
9 The Gleditsch data includes GDP per capita for each independent country in each year since 1950. I multiply each entry by the country’s population (available from the same dataset), and divide it by the total world GDP for the year in question.
losses of relative power. For the CINC index, I use 1948 as a base year because it comes immediately after GATT negotiations were completed. GATT was the last of the major postwar global institutions, and one that many parties should have an interest in protecting. Furthermore, it is a useful base year because most of the major players of the late 20th Century (with the exception of Germany and Japan) were operating independently by then.\textsuperscript{10} Reliable GDP data is not available prior to 1950, so 1950 is used as a base year for GDP-related variables.

Although I am interested in individual countries’ negotiating behavior, it is not possible to identify each of their preferred outcomes on every treaty in the dataset. Even if every country’s official position were known, it would still not be clear that the official position (their negotiating strategy) matched the desired outcome (their preference) (Frieden 1999). Case studies in subsequent chapters will identify individual country preferences and strategies. This statistical analysis instead examines outcomes produced by a group of countries. As a result, explanatory variables must also capture group, rather than individual country, characteristics.\textsuperscript{11} Negotiated outcomes rely on countries’ preferences, as well as the ability of each country to achieve these preferences. I have

\textsuperscript{10} It should, however, be noted that capabilities change very little in any given year. Therefore, the choice of 1948 – rather than 1947 or 1950 – should not have a great effect on the outcomes.

\textsuperscript{11} I discuss concerns related to the ecological fallacy in the conclusion to this chapter.
aggregated participants’ preferences by constructing a set of variables that account for the change in power experienced by signatories to the treaty in question.

These variables look at the average or median change in each participant’s capabilities from 1948 (or 1950 for GDP) to the time of the new negotiation. By accounting for relative changes, these measurements allow us to see whether savings clauses are related to declining power among later treaty participants. Figure 2 illustrates the change in CINC scores since 1948 for Security Council members and some other important participants in international negotiations.

\[\text{Note, of course, that many contemporary states were non-existent, or at least not yet independent, in 1948. For the purposes of this analysis, their subsequent emergence represents a rise in power relative to 1948, meaning that they should wish to overturn the results of postwar negotiations that took place without their influence.}\]


<table>
<thead>
<tr>
<th>Year</th>
<th>Change in CINC score since 1948</th>
</tr>
</thead>
<tbody>
<tr>
<td>1940</td>
<td>-2.00E-01</td>
</tr>
<tr>
<td>1950</td>
<td>-1.50E-01</td>
</tr>
<tr>
<td>1960</td>
<td>-1.00E-01</td>
</tr>
<tr>
<td>1970</td>
<td>-5.00E-02</td>
</tr>
<tr>
<td>1980</td>
<td>0.00E+00</td>
</tr>
<tr>
<td>1990</td>
<td>5.00E-02</td>
</tr>
<tr>
<td>2000</td>
<td>1.00E-01</td>
</tr>
<tr>
<td>2010</td>
<td>1.50E-01</td>
</tr>
</tbody>
</table>

Figure 2-2: Capabilities Change for Key Countries since 1948

For each treaty in the dataset, I have aggregated the participants’ CINC and GDP changes to produce a set of variables that demonstrate the average or median change in participants’ capabilities since the era of postwar institution-building. These variables attain negative values when the average party has declined in power over time. They attain positive values when the average participant has become more powerful relative to the rest of the world. The expectation is that there will be a negative correlation.
between the average (or median) party’s change in capabilities and the inclusion of a savings clause in the resulting treaty. I have specified a number of variables in an effort to capture this relationship. The most relevant of these measures is described below, and others are outlined in Appendix 2.1. Table 10 presents a comparison of these measures.

2.3.1.1 Capabilities Change x Current Abilities

The most basic measure of changing capabilities among participants is the average change of capabilities within the group. This measure should indicate the group’s combined preference for or against savings clauses, allowing for parties with sharp relative losses (gains) to have a stronger preference for deference to (overriding of) existing law. Average change may be able to approximate parties’ preferences, but it does not account for their ability to achieve those preferences. Therefore, each country’s CINC or GDP change must be multiplied by its current capabilities in order to account for their likelihood of achieving their preferences at the time of subsequent negotiations. The formula for this measure is:
Equation 2.1.

\[
\text{Average CINC Change Weighted by Current Abilities} = \frac{\sum_{i=1}^{p} [(\text{CINC}_{it} - \text{CINC}_{1948i}) \times \frac{\text{CINC}_{it}}{\sum_{i=1}^{p} \text{CINC}_{it}}]}{p}
\]

where:

- \( p \) = number of parties to the current treaty
- \( i \) = the set of countries that are party to this treaty
- \( t \) = the year of negotiation
- \( \text{CINC}_{it} \) = country i’s CINC score in year t
- \( \text{CINC}_{1948i} \) = country i’s CINC score in 1948
- \( \sum_{i=1}^{p} \text{CINC}_{it} \) = total proportion of global capabilities represented in this negotiation

The same calculation is conducted using GDP data with 1950 as the base year. In addition to these measurements, I have also created dichotomous variables that indicate whether the average participant (weighted by current power) has increased or decreased its capabilities since 1948 (1950 for GDP). Therefore, four measurements based on CINC/GDP change are included for each treaty. Summary statistics appear in table 3.

In order to give a better idea of what these variations mean in practice, Table 2 shows the values of these variables for all 1992 treaties in the random sample. In the Agreement establishing the Fund for the Development of the Indigenous Peoples of

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13 I assign a value of 1 to each treaty in which the weighted average of the parties’ change was greater than zero, and a value of 0 to each treaty in which the average party’s power has declined since 1948/1950.

14 1992 and 1950 were the only two years in which all observations had either no reliance upon existing law (ordered dependent variable coded 1), or deference to all existing law (coded 6). 1992 is used here for illustration because GDP measures have a baseline of 1950, meaning that no change in GDP would be observed in that year.
Latin America and the Caribbean, the average participant – whether measured by CINC or GDP, and whether or not it is weighted by current capabilities – has gained power since the postwar period. This relationship is even clearer when we note that the most powerful participant – Brazil – is also the biggest power gainer over that time period. As a result, this is a negotiation in which I expect to see very little concern for the status quo. And, in fact, this agreement turns out to be one of the 40 observations in which there is no reliance upon existing international law.

In contrast, the other two treaties signed in 1992 demonstrate average participants with a declining position in international politics. The most powerful participants in each of these negotiations – Russia and the United States – are also the largest decliners amongst the parties to their respective treaties. I expect, therefore, to see a high degree of deference to existing law, and my expectations are confirmed because both treaties contain savings clauses that defer to all previous agreements.

Obviously, three observations are insufficient to support or reject the hypothesis, but these three agreements demonstrate how the relationships may play out.
Table 2-2: Independent Variables for 1992 Treaties

<table>
<thead>
<tr>
<th></th>
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<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Agreement establishing the Fund for the Development of the Indigenous Peoples of Latin America and the Caribbean (no)</td>
<td>1992</td>
<td>Brazil</td>
<td>Costa Rica (CINC) Nicaragua (GDP)</td>
<td>Brazil</td>
<td>Spain (CINC) Argentina (GDP)</td>
<td>21</td>
<td>.0011529</td>
<td>.0002292</td>
<td>.0002886</td>
</tr>
<tr>
<td>Convention on the protection of the Black Sea against pollution (yes)</td>
<td>1992</td>
<td>Russia</td>
<td>Georgia</td>
<td>Ukraine</td>
<td>Russia</td>
<td>6</td>
<td>-.0123073</td>
<td>-.0089664</td>
<td>-.0001948</td>
</tr>
<tr>
<td>Constitution and Convention of the International Telecommunication Union (yes)</td>
<td>1992</td>
<td>USA</td>
<td>Liechtenstein (CINC) San Marino (GDP)</td>
<td>Japan</td>
<td>USA</td>
<td>127</td>
<td>-.0004127</td>
<td>-.0000721</td>
<td>.0004109</td>
</tr>
</tbody>
</table>
2.3.1.1 Qualifications on the Power Change Variable

I have developed a number of measures in order to best grasp the impact of power rise and decline, as well as countries’ current abilities to achieve their preferences, upon the likelihood of savings clause inclusion. However, before proceeding it is worthwhile to note some of the shortcomings inherent in the underlying CINC and GDP data.

First of all, the CINC index is not a perfect proxy of national capabilities across issue areas. Even the Correlates of War documentation warns that “the quality and quantity of the data vary greatly from state to state and year to year (Correlates of War).” It also suggests that users should be careful when using cross-time comparisons, particularly for the component measures. However, in this case, because the index computes each country’s capabilities as a proportion of world power, the changes over time should still represent their changing place in global negotiating fora. In addition, the extremely high correlation with GDP data would seem to confirm the usefulness of both data sources.

The CINC index is only one measure of power, and does not include all possible aspects of a country’s capabilities in international negotiations. Scholars have long debated whether power is fungible across issue areas (Art 1996; Keohane 1980).
However, in order to compare the wide range of agreements included in UNTS, the CINC index provides the broadest proxy of capabilities across issues. It is the most useful alternative because it does account for military and economic abilities, both of which should be important for countries who wish to assert themselves internationally.

The GDP measure is more straightforward, but also faces a number of concerns, especially in negotiations that address issues other than economic cooperation (approximately one-half of the sample). Once again, however, the size of a country’s market must play a role in its ability to achieve certain goals when negotiating with other countries. GDP is included as a robustness check. The underlying GDP and CINC data are highly correlated at .905. The weighted average change measures used here correlate at .85.15

In addition to these concerns about the underlying data, the use of 1948/1950 as a start point is also open to some questions. While that timing picks up any concerns about protection of the United Nations structure, Bretton Woods institutions, and GATT, it is of limited use if a country is attempting to use a savings clause for protection of some other institution. Nonetheless, if the postwar period really does represent a clean slate for institution building as Ikenberry (2001) suggests, then those years are a good start point for analyzing the impact of power changes. While countries’ specific

15 The constructed variables discussed in Appendix 2.1 are not as closely related, with some of the dichotomous measures correlating at less than .5
preferences may well change over time, they are unlikely to shift from their desire to
play a prominent role in global institutions. For instance, post-Communist Russia may
not share the USSR’s 1948 desire to prioritize economic, social, and cultural rights.

However, it is unlikely that the Putin or Medvedev government would have any wish to
overturn the voting rules, particularly the Security Council veto, that was awarded to
the USSR in its most powerful position, and passed down to contemporary Russia. The
institutions created between 1945 and 1948 not only put particular rules in place; they
also entrenched a particular power structure within the resulting institutions.

Regardless of their desire to maintain or change any specific measure created by
international institutions, powers experiencing decline should unquestionably want to
maintain the institutional arrangements that they established from a position of greatest
power. These desires will be more apparent at the case study stage, in which
participants were able to note what institutions they wished to protect, either through
comments in my interviews with them, or through their official statements during the
negotiating process.

Finally, as noted earlier, some of these measures may be influenced by outliers
such as the impact of US power. However, those outliers do represent an important
measure of the degree to which countries should care about the altered negotiating
environment. Median and proportional measures can also be employed to account for
this concern, as can a control variable for US participation. All of these measures have been tested, but none exert the same degree of influence as the weighted average power change variables discussed here. These alternative measures are detailed in Appendix 2.1.
2.3.2 Ratification Procedures

2.3.2.1 Average Ratification Procedure Variable

As discussed earlier, countries should also be more likely to protect existing international institutions when private parties within the country benefit from those existing rules. In order to translate these private benefits into government negotiating positions, there must be some mechanism for domestic beneficiaries to influence their country’s foreign policy process. Along with private access to existing international institutions,\textsuperscript{16} therefore, countries should be more likely to support legal deference when they allow more private participation in the negotiation process for new institutions. Therefore, I expect that institutions should be more likely to contain savings clauses when the average participant state allows a greater role for private actors. In particular, when negotiators are constrained by legislative ratification rules, they will have to account more closely for citizen preferences.

The more involved the legislature is, the more likely it is that groups have access to the treaty-making process. In addition to providing a more fine-grained understanding of the institutions that guide foreign policy decision making, this

\textsuperscript{16} Access to existing international institutions is important for the preferences of private parties. However, the access granted by each country to its citizens does not vary enough to provide an interesting aggregate measure here. Nonetheless, case study chapters will demonstrate the impacts of this difference in a few particular countries.
measure of access to the foreign policy process should also be positively correlated with savings clause inclusion. As with the average change variable above, this aspect of preference formation can only be considered in conjunction with each country’s ability to achieve its preferences. I have, therefore, constructed a variable to measure the proportion of participating governments who face legislative constraints on their negotiating abilities.

Data on legislative ratification comes from the University of Illinois Comparative Constitutions Project (Elkins, Ginsburg, and Melton 2007). Constitutions requiring approval from at least one house of the legislature are coded as ratifiers. However, many of these countries, while requiring legislative input, do not necessarily allow private parties to participate. China, for instance, has a formal requirement for the legislature to ratify. However, it is clear that this requirement falls short of ensuring private participation in foreign affairs. I therefore multiply the ratification score by Przeworski et al.’s dichotomous coding of democracy in order to get a better sense of the countries in which there is likely to be meaningful private participation (Alvarez et al.; Przeworski 2000). As with the power change variables above, these preferences are

---

17 I thank these scholars for providing me with this data prior to its public release.
18 The Comparative Constitutions Project does not include the United Kingdom because it has no written constitution. However, it is clear that the UK does not require legislative ratification, so I have coded it 0.
19 The Alvarez et al. dataset codes the regime variable as “1” for autocracies “0” for democracies; I invert that coding so that the product of ratification and democracy is “1” for democracies with legislative ratification.
multiplied by the country’s current capabilities to gain a more complete picture of expected outcomes. The average score for legislative involvement is calculated as follows for the group of parties in question:

Equation 2.2.

\[
\text{Weighted Proportion of Participants requiring Legislative Ratification} = \frac{\sum_{i=1}^{p} [(\text{LegisRatif}_{it} \times \text{Democracy}_{it}) \times \text{CINC}_{it}] / \sum_{i=1}^{p} \text{CINC}_{it}}{p}
\]

where:
- \( p \) = number of parties to the current treaty
- \( i \) = the set of countries that are party to this treaty
- \( t \) = the year of negotiation
- \( \text{LegisRatif}_{it} = (1) \) if country \( i \) required its legislature to ratify international treaties in year \( t \), and (0) otherwise.
- \( \text{Democracy}_{it} = (1) \) if country \( i \) is a democracy in year \( t \), and (0) otherwise.
- \( \text{CINC}_{it} = \) country \( i \)'s CINC score in year \( t \)
- \( \sum_{i=1}^{p} \text{CINC}_{it} = \) total proportion of global capabilities represented in this negotiation

Summary statistics are reported in table 3.

If a country is not included in the Przeworski et al (2002) dataset (East Timor 2002, Libya 1951, Oman 1946-50, North and South Vietnam 1954-75, North Yemen 1946-67, South Yemen 1990), they are coded as democracy in years when their Polity IV aggregate score (Jaggers and Gurr 1995; Marshall and Jaggers 2001) is +6 or above (see, e.g., Henisz and Mansfield 2006, for rationale on this cut point). Observations are dropped if the country has no value in the Przeworski et al. dataset and is not included in the Correlates of War state system for that year. If the country-year has a ratification value but no democracy score in either dataset (East Germany 1990, Monaco 1993-2002, Tuvalu 2000-02, Zanzibar 1963-64), it is coded as missing data.
2.3.2.1 Qualifications on the Ratification Procedure Variable

Although this new dataset provides an excellent source of information on domestic institutions, some concerns remain. The most important limitation of this measure as a proxy for public participation is its lack of attention to other routes – such as public hearings – through which governments solicit private opinion. The Government of India, for instance, has no legislative involvement in treaty negotiations (see Chapter 5). However, its Ministries have nonetheless begun to solicit stakeholder preferences before important international bargaining sessions (Priyadarshi 2005; Sinha 2005; UNCTAD India Programme 2005).

In addition to that concern, this variable may be open to other sources of measurement bias as well. First off, it should be noted that the underlying data used here is taken from more than one source, and democracy measures are notoriously inconsistent. Second, ratification rules are not employed uniformly within each country. In many countries, for instance, legislative ratification is required only for some subset of agreements (International Centre for Parliamentary Documentation 1986). The US Senate’s ratification procedure is only used in approximately 5% of international agreements to which the United States is a party (Dalton 1999:10). This dataset is not nuanced enough to allow for each country’s variation by issue area and agreement type. Third, the proportion of participants with legislative involvement may not be a
worthwhile measure if only some threshold of ratifiers is necessary to support the status quo. Despite these concerns, I am using the best ratification data currently available, and the average ratification score does provide a helpful comparison of private access for the group of participating countries.

2.3.3 Number of Participants

2.3.3.1 Log of the Number of Parties

As discussed in the previous chapter, treaties that involve more participants should also be more likely to contain savings clauses. This relationship is likely because of the complexity of negotiations, as well as the greater opportunity for any country to raise that concern. If bargaining constraints originate in domestic politics, additional participants should make negotiations more difficult (Koremenos 2005). We should therefore expect more savings clauses to appear as more countries are involved. Similarly, a veto points model (Tsebelis 2002) would expect that more parties should make cooperation more difficult.\(^\text{20}\)

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\(^{20}\) In essence, all of the treaties analyzed here involve consensus decision-making. Signatures do not reach the treaty unless each of the countries is satisfied (though not necessarily pleased) with the outcome. In that sense, every participant has a veto to the extent that their participation is valued by the other parties. Of course, unlike the process in domestic politics, participants often decide to exclude some weaker parties if their demands are not acceptable to the rest of the group.
I have included the number of parties in each regression. Table 3 contains summary statistics for the number of parties in each negotiation, as well as the natural log of that value. The statistical models only use the natural log of the number of parties because I expect the changing number to make more difference at lower levels. That is, I expect that the shift from three to four parties should complicate bargaining much more than the addition of a 101st participant, because there is less likelihood that any two out of four parties will take the same position, whereas it seems quite plausible that some subset of the larger group will take a similar position, and possibly form a negotiating bloc, when 100 parties are involved.

The number of parties is determined by counting the parties who have signed each treaty. Their signatures are included in the official version of each agreement, as published in the United Nations Treaty Series.²¹

²¹ This measure encounters a bit of confusion in determining whether to count regional integration organizations or their member states in treaties to which both are signatories. I have counted the regional organization when it is the sole representative of the group, and the individual member states otherwise.
2.3.3.2 Interaction between number of parties and the average/median preference

Building on the logic I have just outlined, I expect that the number of participants (as an indicator of the complexity of the negotiating environment) plays an important role in the decision to include savings clauses. However, that strategy of slowing the rate of change should only be employed by a group of participants who actually are comfortable with the status quo. Among treaties in which the average party has gained power, there should not be such a desire to avoid change.

Also, note the importance of prospect theory (Kahneman and Tversky 1979) here. That is, those who stand to lose should have much more interest in protecting their existing benefits than potential winners have in pursuing new achievements. Therefore, I expect that the effect of a complex negotiating environment will be much stronger (in both magnitude and significance) when the average party has declined. I expect that the number of parties will also have a positive, but less important, effect when the average participant is a rising power. Parties who have gained power are likely to have less desire for change than declining powers do for maintaining the status quo.

Therefore, it is worthwhile to examine the interaction between the number of parties (logged for the reasons discussed above) and a measure indicating whether the average participant has increased or reduced its share of global power.

When using interaction effects, note that the lower order coefficients can only be
interpreted as relevant when other lower order coefficients are held to 0 (Braumoeller 2004). In these models, therefore, the value of the parties (logged) coefficient is only meaningful for the subset of observations in which the average CINC or GDP change variable is set to 0 (i.e., when the average participant has the same share of power as it did in 1948 or 1950). The interaction coefficient, on the other hand, indicates the combined effect of the number of parties and the average power change. The CINC or GDP average change variable is only relevant when the number of parties (logged) is held at 0.22

I have also produced an alternative set of two regressions, partitioning the data into models in which the average party has risen, and those in which the average party has declined, in relative power.23 While the process is quite similar, this comparison also allows me to examine the changing effects of other variables under these two different circumstances.24

22 Of course, there are no observations in which the treaty has zero signatories, so the dichotomous variable is somewhat meaningless. However, it must be included so that the interaction term can be tested, while controlling for any value of the parties variable. Braumoeller, Bear F. 2004. Hypothesis Testing and Multiplicative Interaction Terms. International Organization 58 (4):807-820.
23 See Braumoeller 2004, footnote 22 for a series of strategies that may be used to avoid problems with the interaction effects discussed above.
24 This effort is reflected in Table 8, models 3a and 3b.
2.3.3.3 Qualifications on the Parties Measurement

Although the number of parties (and therefore its natural log) is a fairly straightforward measure, some clarification is in order. First, the question of counting regional economic integration organizations (REIOs) remains a difficult one for the sake of accurate analysis. However, for the sake of counting parties, it seems quite reasonable to count REIOs as single participants when their member states have deputized them to negotiate on behalf of the entire group. While their influence may be greater than a typical state party, in light of their mandate to take a single position, they should not complicate the negotiating environment any more than any other single state party.

Second, one may be concerned that additional parties were involved in the negotiation, but declined to sign the actual agreement. Certainly, this occurrence is common in international negotiations. However, it should not raise concerns here because the variable is designed to grasp the group of countries who actually did agree on the eventual document, not merely those that considered it to be an important issue.

Finally, it should be noted that some parties sign after the time of agreement but are still included in this count because they sign before the agreement enters into force.

25 See footnote 21 above.
These countries should, nonetheless, be included because they are often participants in the original negotiation, and they have explicitly agreed with the outcome.

Table 3 shows summary statistics for each of the explanatory variables described above.

<table>
<thead>
<tr>
<th>Variable</th>
<th>Observations</th>
<th>Mean</th>
<th>Standard Deviation</th>
<th>Minimum</th>
<th>Maximum</th>
</tr>
</thead>
<tbody>
<tr>
<td>Weighted Average CINC Change</td>
<td>166</td>
<td>-.00119</td>
<td>.00464</td>
<td>-.0317</td>
<td>.00563</td>
</tr>
<tr>
<td>Weighted Average GDP Change</td>
<td>159</td>
<td>-.000379</td>
<td>.00306</td>
<td>-.0196</td>
<td>.0106</td>
</tr>
<tr>
<td>Weighted Average CINC Change &gt;0</td>
<td>166</td>
<td>.380</td>
<td>.487</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Weighted Average GDP Change &gt;0</td>
<td>166</td>
<td>.410</td>
<td>.493</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Weighted Proportion of Parties with Legislative Ratification</td>
<td>178</td>
<td>.0752</td>
<td>.110</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Number of Parties</td>
<td>166</td>
<td>18.5</td>
<td>25.7</td>
<td>2²⁶</td>
<td>133</td>
</tr>
<tr>
<td>Number of Parties (natural log)</td>
<td>166</td>
<td>2.35</td>
<td>.992</td>
<td>.693</td>
<td>4.89</td>
</tr>
<tr>
<td>Interact – parties (logged) x Weighted Average CINC Change</td>
<td>164</td>
<td>-.00202</td>
<td>.00676</td>
<td>-.0428</td>
<td>.00727</td>
</tr>
<tr>
<td>Interact – parties (logged) x Weighted Average GDP Change</td>
<td>159</td>
<td>-.000563</td>
<td>.00470</td>
<td>-.0272</td>
<td>.0147</td>
</tr>
</tbody>
</table>

²⁶ One treaty in the dataset is a multilateral scientific research agreement between the European Economic Community and Norway. However, because the EEC Member States delegated authority to the Commission in this instance, they are not counted individually (see footnote 21). As a result, this multilateral treaty appears to have only 2 signatories.
2.4 Control Variables

2.4.1 Existing Commitments

Because legal deference is focused on past agreements, we should expect to see more savings clauses when there are more agreements that countries may want to protect. We should not expect to see savings clauses unless those provisions can refer to some pre-existing agreements. Therefore, I include a measure of the participants’ existing commitments at the time of negotiation. The Correlates of War project includes an “International Governmental Organizations Data Set” (Pevehouse and Nordstrom 2003), which codes each country’s memberships in each of approximately 500 treaties in any given year.

I have used this data to construct a measure of existing commitments among the parties to a given later negotiation. As with the CINC and GDP measures above, this variable identifies the average number of existing commitments for parties to a given negotiation in a given year. It can be written as:
Equation 3.

\[ \text{Average Commitments} = \frac{1}{p} \sum_{i=1}^{P} \text{[Membership}_{it}] \]

where:

- \( p \) = number of parties to the current treaty
- \( i \) = the set of countries that are party to this treaty
- \( t \) = the year of negotiation
- \( \text{Membership}_{it} \) = country i’s existing IO memberships in year t

I would expect to see a positive correlation between the average number of existing commitments and the likelihood of savings clause inclusion. This variable is also likely to pick up the impact of an increase in treaties over time, since countries are more likely to have more commitments over time, as treaties become more prevalent.

2.4.2 Commodity Agreements

The likelihood of deference should also increase as more private actors are affected by the rules proposed in any new negotiation. Agreements that cover a broad range of economic sectors should be more likely to contain savings clauses. Therefore, I have included a dichotomous variable that identifies commodity (or other single sector) agreements in order to control for the effects of agreements that impact only one sector in each country. The commodity variable is coded as (1) if the agreement addresses only one sector, such as the International Coffee Agreements or the International Tropical
Timber Agreement. It is coded as (0) if the agreement addresses multiple economic sectors, as is the case with the Marrakesh Agreement Establishing the World Trade Organization. I expect to see a negative coefficient for this variable.

### 2.4.3 Regional Agreements

I also control for regional agreements, though conflicting logic may be at work here. On the one hand, participants may be more willing to give up sovereignty at the regional level because of shared goals and a tradition of cooperation. However, that tradition of cooperation actually might spark additional concerns about preserving a greater pool of existing agreements. I have coded agreements as regional if they are limited to participation from parties within a particular region. If there is no geographical qualification for membership mentioned in the treaty itself, then it is coded as non-regional.

Summary statistics for these control variables are included in the following table:

<table>
<thead>
<tr>
<th>Variable</th>
<th>Observations</th>
<th>Mean</th>
<th>Standard Deviation</th>
<th>Minimum</th>
<th>Maximum</th>
</tr>
</thead>
<tbody>
<tr>
<td>Average # of Commitments</td>
<td>168</td>
<td>56.5</td>
<td>15.4</td>
<td>2.33</td>
<td>89</td>
</tr>
<tr>
<td>Commodity</td>
<td>168</td>
<td>.101</td>
<td>.302</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Regional</td>
<td>168</td>
<td>.464</td>
<td>.500</td>
<td>0</td>
<td>1</td>
</tr>
</tbody>
</table>
2.4.4 Issue Areas

The likelihood of savings clauses may also vary by issue area. In particular, I expect that countries will be overly cautious in introducing new constraints regarding treatment of their own citizens at home. Issues of domestic law and human rights are tightly connected to traditional notions of sovereignty, and countries may look for any excuse to slow down their commitments in these areas. Even the European Union, which has made tremendous progress on regional integration has set aside criminal law as one issue on which cooperation may have to wait. Therefore, I expect to see a higher prevalence of savings clauses in agreements that address human rights or domestic legal processes. I have no particular expectations regarding the likelihood of savings clauses in other issue areas, but will control for these differences to be sure they are not influential.

I have developed a full coding of issue categories by combining standard codes that are included in the United Nations Treaty Series. Some agreements have more than one issue coding. In that case, I have decided which category is most appropriate. I have also developed a few composite categories that will allow me to control for certain groups of agreements. The most important of these composites is the domestic legal category, which combines human rights and other domestic legal commitments. All else being equal, I expect that countries will go slowly in this realm of international law,
leading to more savings clauses. If this relationship holds true, it will be important to control for the domestic legal issue area when analyzing the effects of other independent variables. Issue area coding rules can be seen in Table 5, and summary statistics are located in Table 5a.
### Table 2-5: Issue Area Coding

<table>
<thead>
<tr>
<th>If any of the following words are listed in the UNTS under “subject”:</th>
<th>They are coded as “1” for:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Trade; Customs; Commodity; Commodities; (Name of a particular commodity); Market (or “Marketing”, as in the Mercosur case)</td>
<td>Trade</td>
</tr>
<tr>
<td>Insurance (though one might argue that some should be “Labour”)</td>
<td>Insurance</td>
</tr>
<tr>
<td>Patent; Trademark; Copyright; Intellectual Property;</td>
<td>Intellectual Property</td>
</tr>
<tr>
<td>Finance; Financial; Exchange Rate</td>
<td>Financial</td>
</tr>
<tr>
<td>(other economic indication) (includes “Monetary”, “Investment” and “Taxation”)</td>
<td>Other Economic Issues</td>
</tr>
<tr>
<td>(Any of the above categories)</td>
<td>Economic Cluster</td>
</tr>
<tr>
<td>Pollution; Resource(s); Natural; (Name of a particular resource)</td>
<td>Environment &amp; Resources</td>
</tr>
<tr>
<td>(Any of the above categories)</td>
<td>Environment + Economics</td>
</tr>
<tr>
<td>Labour</td>
<td>Labour</td>
</tr>
<tr>
<td>Transport; Transit; Vehicles; Motor Vehicles; Navigation; Vessels</td>
<td>Transport</td>
</tr>
<tr>
<td>Communications; Telecommunications; Post; Postal</td>
<td>Communications &amp; Postal</td>
</tr>
<tr>
<td>(Any of the above categories except EnvtRes)</td>
<td>All Economic Issues</td>
</tr>
<tr>
<td>Legal (when paired with civil or criminal); Civil; Criminal</td>
<td>Domestic Law</td>
</tr>
<tr>
<td>Human rights</td>
<td>Human Rights</td>
</tr>
<tr>
<td>(either of the above categories)</td>
<td>Domestic Legal</td>
</tr>
<tr>
<td>Research; Inspection; Food; Science; Scientific; Cooperation (if paired with a title that makes it obviously scientific); (Name of a particular scientific field)</td>
<td>Science and Research</td>
</tr>
<tr>
<td>Peace; War; Reparations; Military</td>
<td>Security</td>
</tr>
<tr>
<td>(all others…mostly regional unity agreements, Education, Health, Passport/Visa issues)</td>
<td>Other Issues</td>
</tr>
</tbody>
</table>
Table 2-5a: Summary Statistics for Issue Area Dichotomous Variables

**a) Economic subset** (note the different possibilities for the composite category)

<table>
<thead>
<tr>
<th>Variable</th>
<th>Obs</th>
<th>Mean</th>
<th>Std. Dev.</th>
<th>Occurrences</th>
</tr>
</thead>
<tbody>
<tr>
<td>Trade</td>
<td>168</td>
<td>.172619</td>
<td>.3790474</td>
<td>29</td>
</tr>
<tr>
<td>Insurance</td>
<td>168</td>
<td>.017857</td>
<td>.132828</td>
<td>3</td>
</tr>
<tr>
<td>Intellectual Ppty</td>
<td>168</td>
<td>.029762</td>
<td>.170438</td>
<td>5</td>
</tr>
<tr>
<td>Finance</td>
<td>168</td>
<td>.017857</td>
<td>.132828</td>
<td>3</td>
</tr>
<tr>
<td>Other Econ Issues</td>
<td>168</td>
<td>.041667</td>
<td>.200424</td>
<td>7</td>
</tr>
<tr>
<td>Economic Cluster</td>
<td>168</td>
<td>.279762</td>
<td>.450224</td>
<td>47</td>
</tr>
</tbody>
</table>

[NOTE: Economic Cluster is a composite of trade, insurance, intellectual property, finance, and other economic issues.]

<table>
<thead>
<tr>
<th>Variable</th>
<th>Obs</th>
<th>Mean</th>
<th>Std. Dev.</th>
<th>Occurrences</th>
</tr>
</thead>
<tbody>
<tr>
<td>Environment&amp;Resources</td>
<td>168</td>
<td>.071429</td>
<td>.258309</td>
<td>12</td>
</tr>
<tr>
<td>Environment+Economics</td>
<td>168</td>
<td>.351191</td>
<td>.478769</td>
<td>59</td>
</tr>
</tbody>
</table>

[NOTE: Environment+Economics combines the economic cluster with the environment & resources category to establish a category that should have private sector impacts, and in which negotiations should resemble a prisoners’ dilemma.]

<table>
<thead>
<tr>
<th>Variable</th>
<th>Obs</th>
<th>Mean</th>
<th>Std. Dev.</th>
<th>Occurrences</th>
</tr>
</thead>
<tbody>
<tr>
<td>Labour</td>
<td>168</td>
<td>.005952</td>
<td>.077152</td>
<td>1</td>
</tr>
<tr>
<td>Transport</td>
<td>168</td>
<td>.101191</td>
<td>.302482</td>
<td>17</td>
</tr>
<tr>
<td>Communications&amp;Postal</td>
<td>168</td>
<td>.083333</td>
<td>.277211</td>
<td>14</td>
</tr>
<tr>
<td>All Economic Issues</td>
<td>168</td>
<td>.458333</td>
<td>.499750</td>
<td>77</td>
</tr>
</tbody>
</table>

[NOTE: All Economic Issues combines the economic cluster above with other economic issues (labour, transport, and communications) that do not necessarily follow a prisoners dilemma logic.]

**b) Law subset**

<table>
<thead>
<tr>
<th>Variable</th>
<th>Obs</th>
<th>Mean</th>
<th>Std. Dev.</th>
<th>Occurrences</th>
</tr>
</thead>
<tbody>
<tr>
<td>Domestic Law</td>
<td>168</td>
<td>.113095</td>
<td>.317656</td>
<td>19</td>
</tr>
<tr>
<td>Human Rights</td>
<td>168</td>
<td>.065476</td>
<td>.225843</td>
<td>9</td>
</tr>
<tr>
<td>Domestic Legal</td>
<td>168</td>
<td>.178571</td>
<td>.384138</td>
<td>30</td>
</tr>
</tbody>
</table>

[Note: The Domestic Legal category includes all treaties coded as domestic law or human rights. Treaties in these issue areas constrain domestic activity (vis a vis domestic citizens) in member states.]

**c) Other Issue Areas**

<table>
<thead>
<tr>
<th>Variable</th>
<th>Obs</th>
<th>Mean</th>
<th>Std. Dev.</th>
<th>Occurrences</th>
</tr>
</thead>
<tbody>
<tr>
<td>Science/Research</td>
<td>168</td>
<td>.077381</td>
<td>.267994</td>
<td>13</td>
</tr>
<tr>
<td>Security</td>
<td>168</td>
<td>.053571</td>
<td>.225843</td>
<td>9</td>
</tr>
<tr>
<td>Other Issues</td>
<td>168</td>
<td>.160714</td>
<td>.368365</td>
<td>27</td>
</tr>
</tbody>
</table>
### 2.5 Results

A quick look at the distribution of outcomes on the basis of average rising and falling powers should provide an initial test of the relationship between power change and the use of savings clauses to avoid legal change. Tables 6 and 7 present this bivariate relationship without controlling for other factors. They also demonstrate the difference between average and median values.

**Table 2-6: Tabulation of dependent variable values, based on whether the average participant experienced a rise or decline in power**

<table>
<thead>
<tr>
<th>Parties’ Average CINC Change</th>
<th>Value on Categorical Dependent Variable</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Average Rise</td>
<td>15 28 3 10 5 5</td>
<td></td>
</tr>
<tr>
<td>Average Decline</td>
<td>24 34 1 23 1 17</td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>39 62 4 33 6 22</td>
<td></td>
</tr>
</tbody>
</table>

**Table 2-6b: Tabulation of dependent variable values, based on whether the median participant experienced a rise or decline in power**

<table>
<thead>
<tr>
<th>Parties’ Median CINC Change</th>
<th>Value on Categorical Dependent Variable</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Median Rise</td>
<td>10 28 0 14 4 10</td>
<td></td>
</tr>
<tr>
<td>Median Decline</td>
<td>30 34 4 20 2 12</td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>40 62 4 34 6 22</td>
<td></td>
</tr>
</tbody>
</table>

82
Table 2-7: Tabulation of dichotomous dependent variable with average participant’s power rising or falling

<table>
<thead>
<tr>
<th>Savings Clause</th>
<th>No</th>
<th>Yes</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Parties’ Average Rise</td>
<td>46</td>
<td>20</td>
<td>66</td>
</tr>
<tr>
<td>Average Decline</td>
<td>59</td>
<td>41</td>
<td>100</td>
</tr>
<tr>
<td>Total</td>
<td>105</td>
<td>61</td>
<td>166</td>
</tr>
</tbody>
</table>

Table 2-7b: Tabulation of dichotomous dependent variable with median participant’s power rising or falling

<table>
<thead>
<tr>
<th>Savings Clause</th>
<th>No</th>
<th>Yes</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Parties’ Median Rise</td>
<td>38</td>
<td>28</td>
<td>66</td>
</tr>
<tr>
<td>Median Decline</td>
<td>68</td>
<td>34</td>
<td>102</td>
</tr>
<tr>
<td>Total</td>
<td>106</td>
<td>62</td>
<td>168</td>
</tr>
</tbody>
</table>

These tables indicate that savings clauses are more likely (percentage-wise) when the average participant has declined in power since 1948. Furthermore, the correlation between the two dichotomous variables in Table 7(a) is -0.1086, suggesting an inverse relationship between power gains and the use of a savings clause. However, the median value does not produce the same correlation (+0.0894), probably because the median value ignores the intensity of preference held by the parties in either direction. In the following section, I introduce multivariate regression techniques to determine whether
this correlation remains strong after introducing other potential factors that should affect legal deference.

Due to the categorical nature of the dependent variable(s), linear regression is an inappropriate statistical technique for this analysis. Instead, logistic regression is the preferred method (Long and Freese 2006). All models in this chapter employ the probit function in Stata software. I have no particular reason to believe that probit is a better tool than logit in this instance. Nonetheless, all data reported here were verified using both types of logistic regression.

Collinearity makes it impossible to test all of the change variables simultaneously. Instead, I tested each one separately, starting by constructing four models for each potential measure of capabilities change. Only the preferred weighted average change measures are reported in Tables 8 and 9. Each of these analyses includes the change measure, the natural log of the number of participants, ratification score and a dummy variable for the criminal law and human rights issue area.27 Model 1 in each set simply looks at the effect of each variable on the likelihood of savings clause inclusion. Model 2 in each group analyzes the interaction between the change variable

\footnote{With few exceptions, the results remain the same without controlling for this issue area. One difference is that the GDP interaction variable (along with the related GDP change variable) loses significance in model 2. However, even in that model, the joint significance of variables involved in the interaction remains strong. In GDP model 3a, the legislative ratification variable gains significance by a small margin.}
and the number of parties, in addition to the criminal and human rights issue dummy and legislative ratification variables. Models 3a and 3b compare the impact of these variables separately for rising and declining powers by restricting the set of observations to those treaties in which the average participant has experienced a rise or decline in power, respectively. These restrictions allow me to see whether there is a different data-generating process for groups where the average participant (weighted by current capabilities) faces a rise or fall in relative power. Models 4-6 follow the same process, while adding a set of control variables to the analysis.

In this chapter, I report the results for weighted average capabilities change, as discussed above. As I suggested in the earlier discussion, this is a good measure of power change because it accounts for the intensity of preferences, as well as the ability of countries to turn those preferences into group outcomes. Results are similar for the CINC and GDP versions of this variable, and they can be seen in Tables 8 and 9.

In models 1 and 4, both the GDP and CINC weighted change variables have the expected negative coefficients, suggesting that savings clauses are less likely when the average party has experienced a greater increase in power over time. However, the

28 Weighted average power change is the most relevant measure of power change. However, I have conducted the same analyses using other measurements of power change. These other specifications returned similar results, although the weighted average power change variable performed closest to my expectations. I compare results using these other measures with the full interaction model in tables 10a and 10b.
Table 2-8: Probit Models with DV as dichotomous indicator of savings clause presence

<table>
<thead>
<tr>
<th>Variable</th>
<th>CINC1</th>
<th>CINC2</th>
<th>CINC3a</th>
<th>CINC3b</th>
<th>GDP1</th>
<th>GDP2</th>
<th>GDP3a</th>
<th>GDP3b</th>
</tr>
</thead>
<tbody>
<tr>
<td>CINC change weighted</td>
<td>-19.236</td>
<td>213.355*</td>
<td>213.355*</td>
<td>213.355*</td>
<td>213.355*</td>
<td>213.355*</td>
<td>213.355*</td>
<td>213.355*</td>
</tr>
<tr>
<td>Interact - parties(log) x CINC Change weighted</td>
<td>-156.656*</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>GDP change weighted</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>-13.566</td>
<td>269.763*</td>
<td>156.81</td>
</tr>
<tr>
<td>Interact - parties(log) x GDP Change weighted</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>-185.585*</td>
<td></td>
<td></td>
</tr>
<tr>
<td># of parties (logged)</td>
<td>0.339**</td>
<td>0.286**</td>
<td>0.477***</td>
<td>0.326**</td>
<td>0.316**</td>
<td>0.316**</td>
<td>0.316**</td>
<td>0.316**</td>
</tr>
<tr>
<td>% with Legislative Ratification (weighted by current CINC)</td>
<td>-1.481</td>
<td>-1.397</td>
<td>-1.345</td>
<td>-2.112</td>
<td>-1.224</td>
<td>-1.017</td>
<td>-5.381</td>
<td>-0.582</td>
</tr>
<tr>
<td>Criminal or Human Rights Issue</td>
<td>0.576**</td>
<td>0.618**</td>
<td>0.549**</td>
<td>0.651**</td>
<td>1.271**</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Constant</td>
<td>-1.200***</td>
<td>-1.140***</td>
<td>-1.411**</td>
<td>-1.139***</td>
<td>-1.154***</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Interaction Joint Significance (Prob &gt; chi2)</td>
<td>0.0078</td>
<td>0.0260</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>N</td>
<td>164</td>
<td>164</td>
<td>64</td>
<td>101</td>
<td>159</td>
<td>159</td>
<td>74</td>
<td>91</td>
</tr>
<tr>
<td>Chi-Squared</td>
<td>19.702</td>
<td>25.737</td>
<td>0.673</td>
<td>27.159</td>
<td>17.263</td>
<td>20.878</td>
<td>3.925</td>
<td>21.886</td>
</tr>
<tr>
<td>Pseudo R-squared</td>
<td>0.091</td>
<td>0.119</td>
<td>0.008</td>
<td>0.200</td>
<td>0.082</td>
<td>0.099</td>
<td>0.040</td>
<td>0.185</td>
</tr>
</tbody>
</table>

Note: Standard errors in parentheses

p<.1 **p<.05 ***p<.01
### Table 2-9: Probit Models with DV as dichotomous indicator of savings clause presence, including controls

<table>
<thead>
<tr>
<th>Variable</th>
<th>CINC4</th>
<th>CINC5</th>
<th>CINC6a</th>
<th>CINC6b</th>
<th>GDP4</th>
<th>GDP5</th>
<th>GDP6a</th>
<th>GDP6b</th>
</tr>
</thead>
<tbody>
<tr>
<td>CINC change weighted</td>
<td>-37.000</td>
<td>183.712</td>
<td>(113.63)</td>
<td>(26.58)</td>
<td>-149.599</td>
<td>(71.53)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>GDP change weighted</td>
<td>-35.855</td>
<td>241.153</td>
<td>(40.49)</td>
<td>(165.08)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td># of parties (logged)</td>
<td>0.440**</td>
<td>0.399**</td>
<td>(0.17)</td>
<td>(0.18)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>% with Legislative Ratification (weighted by current CINC)</td>
<td>-1.751</td>
<td>-1.553</td>
<td>(2.06)</td>
<td>(2.02)</td>
<td>-1.646</td>
<td>(3.00)</td>
<td>-2.056</td>
<td>(2.64)</td>
</tr>
<tr>
<td>Criminal or Human Rights Issue</td>
<td>0.737**</td>
<td>0.751**</td>
<td>(0.34)</td>
<td>(0.35)</td>
<td>0.363</td>
<td>(0.55)</td>
<td>1.154**</td>
<td>(0.48)</td>
</tr>
<tr>
<td>Environment and Economics</td>
<td>0.494</td>
<td>0.416</td>
<td>(0.31)</td>
<td>(0.31)</td>
<td>0.531</td>
<td>(0.50)</td>
<td>0.278</td>
<td>(0.40)</td>
</tr>
<tr>
<td>Transport</td>
<td>0.683*</td>
<td>0.724*</td>
<td>(0.39)</td>
<td>(0.39)</td>
<td>1.008*</td>
<td>(0.56)</td>
<td>0.268</td>
<td>(0.59)</td>
</tr>
<tr>
<td>Communications/Post</td>
<td>-0.057</td>
<td>0.000</td>
<td>(0.49)</td>
<td>(0.49)</td>
<td>0.159</td>
<td>(0.85)</td>
<td>-0.298</td>
<td>(0.64)</td>
</tr>
<tr>
<td>Military/Security/War</td>
<td>-0.109</td>
<td>0.000</td>
<td>(0.67)</td>
<td>(0.68)</td>
<td>0.392</td>
<td>(0.96)</td>
<td>0.036</td>
<td>(0.75)</td>
</tr>
<tr>
<td>Commodity</td>
<td>-0.362</td>
<td>-0.300</td>
<td>(0.40)</td>
<td>(0.40)</td>
<td>0.061</td>
<td>(0.72)</td>
<td>-0.425</td>
<td>(0.53)</td>
</tr>
<tr>
<td>Regional (1=yes)</td>
<td>0.154</td>
<td>0.229</td>
<td>(0.25)</td>
<td>(0.26)</td>
<td>0.252</td>
<td>(0.46)</td>
<td>0.214</td>
<td>(0.34)</td>
</tr>
<tr>
<td>Parties' Existing Commitments</td>
<td>0.009</td>
<td>0.008</td>
<td>(0.01)</td>
<td>(0.01)</td>
<td>0.014</td>
<td>(0.01)</td>
<td>-0.003</td>
<td>(0.01)</td>
</tr>
<tr>
<td>Constant</td>
<td>-2.264***</td>
<td>-2.206***</td>
<td>(0.77)</td>
<td>(0.77)</td>
<td>-2.064</td>
<td>(1.30)</td>
<td>-1.570</td>
<td>(1.02)</td>
</tr>
</tbody>
</table>

**Interaction Joint Significance (Prob > chi**2**)**

<table>
<thead>
<tr>
<th>N</th>
<th>164</th>
<th>164</th>
<th>64</th>
<th>101</th>
<th>159</th>
<th>159</th>
<th>74</th>
<th>91</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pseudo R-squared</td>
<td>0.125</td>
<td>0.149</td>
<td>0.078</td>
<td>0.216</td>
<td>0.112</td>
<td>0.127</td>
<td>0.156</td>
<td>0.224</td>
</tr>
</tbody>
</table>

Note: Standard errors in parentheses

*p<.1   **p<.05   ***p<.01
Table 2-10a: Comparing Performance of Different Capabilities Change Measures with 1948 CINC Baseline

<table>
<thead>
<tr>
<th>Variable</th>
<th>CINC7a</th>
<th>CINC7b</th>
<th>CINC7c</th>
<th>CINC7d</th>
<th>CINC7e</th>
</tr>
</thead>
<tbody>
<tr>
<td>CINC change weighted</td>
<td>183.712</td>
<td>183.712</td>
<td>183.712</td>
<td>183.712</td>
<td>183.712</td>
</tr>
<tr>
<td>Interact - parties(log) x CINC Change Weighted</td>
<td>-149.599**</td>
<td>(113.63)</td>
<td>-149.599**</td>
<td>(71.53)</td>
<td>-149.599**</td>
</tr>
<tr>
<td>Average CINC Change</td>
<td>76.359</td>
<td>(66.16)</td>
<td>76.359</td>
<td>(66.16)</td>
<td>76.359</td>
</tr>
<tr>
<td>Interact - parties(log) x Average CINC Change</td>
<td>-60.039*</td>
<td>(36.18)</td>
<td>-60.039*</td>
<td>(36.18)</td>
<td>-60.039*</td>
</tr>
<tr>
<td>Median CINC Change</td>
<td>-77.835</td>
<td>(283.21)</td>
<td>-77.835</td>
<td>(283.21)</td>
<td>-77.835</td>
</tr>
<tr>
<td>Interact - parties(log) x Median CINC Change</td>
<td>104.340</td>
<td>(177.87)</td>
<td>104.340</td>
<td>(177.87)</td>
<td>104.340</td>
</tr>
<tr>
<td>Proportion of Participants with Rising CINC Score</td>
<td>-0.142</td>
<td>(1.10)</td>
<td>-0.142</td>
<td>(1.10)</td>
<td>-0.142</td>
</tr>
<tr>
<td>Interact - parties(log) x % of Parties with Rising CINC Score</td>
<td>0.174</td>
<td>(0.45)</td>
<td>0.174</td>
<td>(0.45)</td>
<td>0.174</td>
</tr>
<tr>
<td>Weighted Proportion of Parties with Rising CINC Score</td>
<td>68.331</td>
<td>(151.15)</td>
<td>68.331</td>
<td>(151.15)</td>
<td>68.331</td>
</tr>
<tr>
<td>Interact - parties(log) x Wted % Parties with Rising CINC Score</td>
<td>-55.994</td>
<td>(123.27)</td>
<td>-55.994</td>
<td>(123.27)</td>
<td>-55.994</td>
</tr>
<tr>
<td># of parties (logged)</td>
<td>0.399**</td>
<td>(0.18)</td>
<td>0.412**</td>
<td>(0.17)</td>
<td>0.372**</td>
</tr>
<tr>
<td>% with Legislative Ratification (weighted by current CINC)</td>
<td>-1.553 (2.02)</td>
<td>-0.977 (1.86)</td>
<td>-1.616 (1.99)</td>
<td>-1.360 (1.94)</td>
<td>-1.121 (1.85)</td>
</tr>
<tr>
<td>Criminal or Human Rights Issue</td>
<td>0.751**</td>
<td>(0.35)</td>
<td>0.798**</td>
<td>(0.35)</td>
<td>0.775**</td>
</tr>
<tr>
<td>Environment and Economics</td>
<td>0.416 (0.31)</td>
<td>0.406 (0.31)</td>
<td>0.494 (0.31)</td>
<td>0.490 (0.31)</td>
<td>0.478 (0.31)</td>
</tr>
<tr>
<td>Transport</td>
<td>0.724*</td>
<td>(0.39)</td>
<td>0.689*</td>
<td>(0.39)</td>
<td>0.613 (0.39)</td>
</tr>
<tr>
<td>Communications/Post</td>
<td>0.406 (0.49)</td>
<td>0.069 (0.51)</td>
<td>0.110 (0.49)</td>
<td>0.040 (0.51)</td>
<td>0.012 (0.50)</td>
</tr>
<tr>
<td>Military/Security/War</td>
<td>0.000 (0.68)</td>
<td>0.387 (0.58)</td>
<td>0.028 (0.66)</td>
<td>-0.030 (0.66)</td>
<td>0.356 (0.57)</td>
</tr>
<tr>
<td>Commodity</td>
<td>-0.300 (0.40)</td>
<td>-0.255 (0.41)</td>
<td>-0.377 (0.40)</td>
<td>-0.316 (0.41)</td>
<td>-0.292 (0.41)</td>
</tr>
<tr>
<td>Regional (1=yes)</td>
<td>0.229 (0.26)</td>
<td>0.244 (0.27)</td>
<td>0.025 (0.25)</td>
<td>0.039 (0.26)</td>
<td>0.126 (0.26)</td>
</tr>
<tr>
<td>Parties' Existing Commitments</td>
<td>0.008 (0.01)</td>
<td>0.003 (0.01)</td>
<td>0.010 (0.01)</td>
<td>0.007 (0.01)</td>
<td>0.005 (0.01)</td>
</tr>
<tr>
<td>Constant</td>
<td>-2.206***</td>
<td>(0.77)</td>
<td>-1.983***</td>
<td>(0.76)</td>
<td>-2.020***</td>
</tr>
<tr>
<td>Interaction Joint Signif. (Prob &gt; Chi²)</td>
<td>0.0062</td>
<td>0.0163</td>
<td>0.0774</td>
<td>0.1113</td>
<td>0.0982</td>
</tr>
<tr>
<td>N</td>
<td>164.000</td>
<td>162.000</td>
<td>164.000</td>
<td>161.000</td>
<td>162.000</td>
</tr>
<tr>
<td>Log Likelihood</td>
<td>-91.643</td>
<td>-93.477</td>
<td>-94.738</td>
<td>-94.170</td>
<td>-95.653</td>
</tr>
<tr>
<td>Chi-squared</td>
<td>32.116</td>
<td>27.647</td>
<td>25.925</td>
<td>24.297</td>
<td>23.295</td>
</tr>
<tr>
<td>Pseudo R-squared</td>
<td>0.149</td>
<td>0.129</td>
<td>0.120</td>
<td>0.114</td>
<td>0.109</td>
</tr>
</tbody>
</table>
Table 2-10b: Comparing Performance of Different Capabilities Change Measures with 1950 GDP Baseline

<table>
<thead>
<tr>
<th>Variable</th>
<th>GDP7a</th>
<th>GDP7b</th>
<th>GDP7c</th>
<th>GDP7d</th>
<th>GDP7e</th>
</tr>
</thead>
<tbody>
<tr>
<td>GDP change weighted</td>
<td>241.153</td>
<td>22.029</td>
<td>-23.689</td>
<td>48.566</td>
<td>-37.838</td>
</tr>
<tr>
<td>Interact - parties(log) x GDP Change Weighted</td>
<td>-183.029*</td>
<td>-183.029*</td>
<td>-23.689</td>
<td>48.566</td>
<td>0.239</td>
</tr>
<tr>
<td>Average GDP Change</td>
<td>22.029</td>
<td>(99.63)</td>
<td>52.72</td>
<td>(263.14)</td>
<td></td>
</tr>
<tr>
<td>Interact - parties(log) x Average GDP Change</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Median GDP Change</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Interact - parties(log) x Median GDP Change</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Proportion of Participants with Rising GDP Score</td>
<td>0.239</td>
<td></td>
<td>0.191</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Interact - parties(log) x % of Parties with Rising GDP Score</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Weighted Proportion of Parties with Rising GDP Score</td>
<td>59.653</td>
<td>(174.83)</td>
<td>-40.643</td>
<td>(133.13)</td>
<td></td>
</tr>
<tr>
<td># of parties (logged)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>% with Legislative Ratification (weighted by current GDP)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Criminal or Human Rights Issue</td>
<td>0.399**</td>
<td>0.381**</td>
<td>0.382**</td>
<td>0.382**</td>
<td>0.368**</td>
</tr>
<tr>
<td>Environment and Economics</td>
<td>0.797**</td>
<td>0.703**</td>
<td>0.748**</td>
<td>0.657**</td>
<td>0.694**</td>
</tr>
<tr>
<td>Transport</td>
<td>0.672**</td>
<td>0.635</td>
<td>0.674*</td>
<td>0.512*</td>
<td>0.474</td>
</tr>
<tr>
<td>Communications/Post</td>
<td>0.084</td>
<td>0.064</td>
<td>-0.006</td>
<td>-0.012</td>
<td>0.040</td>
</tr>
<tr>
<td>Military/Security/War</td>
<td>0.070</td>
<td>-0.008</td>
<td>0.020</td>
<td>-0.060</td>
<td>-0.047</td>
</tr>
<tr>
<td>Commodity</td>
<td>-0.229</td>
<td>-0.273</td>
<td>-0.323</td>
<td>-0.355</td>
<td>-0.315</td>
</tr>
<tr>
<td>Regional (1=yes)</td>
<td>0.155</td>
<td>0.089</td>
<td>0.078</td>
<td>0.033</td>
<td>0.076</td>
</tr>
<tr>
<td>Parties' Existing Commitments</td>
<td>0.011</td>
<td>0.009</td>
<td>0.006</td>
<td>0.009</td>
<td>0.007</td>
</tr>
<tr>
<td>Constant</td>
<td>-2.274***</td>
<td>-2.065***</td>
<td>-1.919**</td>
<td>-2.015*</td>
<td>-1.926**</td>
</tr>
<tr>
<td>Interaction Joint Signif. (Prob &gt; chi^2)</td>
<td>0.0294</td>
<td>0.1409</td>
<td>0.1278</td>
<td>0.1084</td>
<td>0.1796</td>
</tr>
<tr>
<td>N</td>
<td>159</td>
<td>156</td>
<td>159</td>
<td>156</td>
<td>156</td>
</tr>
<tr>
<td>Pseudo R-squared</td>
<td>0.127</td>
<td>0.105</td>
<td>0.110</td>
<td>0.109</td>
<td>0.103</td>
</tr>
</tbody>
</table>
variable does not approach any conventional level of significance in any of the four models. The number of parties (logged) and the legal issue area dummy variable are both positive and significant, as expected, in all of these analyses.

Models 2 and 5 demonstrate the added impact of including the interaction between number of parties and weighted power change. The interaction term consistently has a negative and significant coefficient, as expected. In addition, the joint significance of the term and its components is strong in all models. The weighted change variable also gains significance under most specifications. However, keeping the interaction effect in mind, that coefficient is only relevant when the number of parties (logged) is set to zero, a condition that cannot be present in this dataset. In addition, the parties variable stays positive and significant for all models, suggesting the importance of a complex negotiating environment for situations in which there is no change in power (i.e., the change variable is set to 0).

Models 3 and 6 allow for a better understanding of the relationship between negotiating environment and the parties’ power changes over time. In each instance, when shifting from treaties in which the average party (weighted for current abilities) has risen to those in which the weighted average has decreased, the magnitude and significance of the parties variable increases. The domestic law and human rights variable experiences a similar shift in each model. A large portion of the savings clause
variation in Models 1 and 4, therefore, is captured only among relatively declining powers. Using SPost software to predict outcomes while holding other variables at their mean (Long and Freese 2006), Figure 3 graphically demonstrates the relationship between complex negotiating environments and savings clauses. It is clear from that graph that this relationship is much more robust for treaties in which the average party, accounting for negotiating strength, has declined than when rising powers are in control.

![Figure 2-3: Predicted Probability of Savings Clauses based on Natural log of the number of parties](image-url)
Together, these changes lend support to the theory that a complex negotiating environment, and issues that directly affect sovereignty, are important predictors of savings clause inclusion when the average participant (weighted for current abilities) has declined in power. That is, a complex negotiating environment may lead to efforts at “putting on the brakes” with new agreements, but only in situations where the parties have earlier gains to protect. This finding supports the prospect theory expectation that potential losers will be much more vigilant than those who stand to gain from change.

I should also note that the transportation issue area shows the opposite result, leading to more deference only when the weighted average party has gained a greater share of power than it once controlled. This result was not expected, but may suggest something about the type of negotiation encountered in that issue area.

### 2.6 Discussion and Conclusions

The three major schools of thought in international relations would seem to predict different outcomes for this study. As I discussed earlier, an oversimplified version of realist theory would be surprised by the one-third of agreements that contain a savings clause, while institutionalists may be surprised there were not more. A constructivist epistemic communities approach might see savings clauses as a legal tool
that has developed over time, perhaps through lawyers teaching each other the
technique or a basic dissemination of the idea around the world. Such a cascade effect
should result in some correlation between time and the use of savings clauses. The
existing commitments variable is closely related to time because of the increasing
number of treaties that have been signed in recent years. However, neither the existing
commitments variable nor measures of time have significant effects on the likelihood of
including savings clauses. This outcome leads me to question the epistemic
communities approach, although it would be better tested within issue areas since those
are usually the level at which negotiators actually interact.

I began this chapter by laying out four hypotheses regarding deference to
existing international law. I will now assess their validity in the face of the evidence
accumulated to this point.

First, I suggested that countries will be cautious about institutional change when
they have experienced a reduction in their share of global power. The statistical
analyses support that theory to some extent, finding that legal deference is a tactic used
to slow legal change in complex situations, but only when the parties are looking to
protect existing institutional benefits. In fact, there is a significant difference between
the protection of status quo rules by rising and declining countries.
Second, I brought up the impact of private access to international institutions, and private participation in the negotiating process at home. There is not enough cross-country variation among private access to existing international arrangements to test those effects in a statistical model. Furthermore, unlike governments who want to protect their decision-making power in international institutions, private actors may gear their concerns towards a very specific existing treaty. While the “national interest” may involve protection or replacement of major postwar institutions, and their allocation of voting rights, private parties should be more focused on specific provisions that they wish to protect. Because the dependent variable here involves later negotiations – rather than the rules they wish to protect – it would be difficult to select an appropriate base year for comparison. However, I will revisit this hypothesis in the upcoming case studies because interview subjects will be able to tell me why they support or oppose deference, and to which existing law.

The question of private access to foreign policy decision makers at home is a different story. In an effort to test that hypothesis, I have established a proxy measure by looking at ratification rules that allow for political action before treaties enter into force. If Putnam is correct about two-level games, then threat of nonratification should have important effects on the outcome of treaty negotiations (Putnam 1988). The statistical analyses in this chapter do not provide support for this hypothesis, most likely
because a dichotomous ratification variable is unable to capture the extensive options that some countries provide for private participation in foreign affairs. Once again, subsequent chapters will be able to better address the impacts of private preferences on government negotiating positions.

Finally, as expected, the complexity of the negotiating environment is a very significant predictor of deference to existing international law. However, interestingly, this correlation is only significant within the subset of treaties where the power of the average participant has declined over time. Figure 3 shows the substantive effects of additional parties and power change on likelihood of an agreement including a savings clause. This difference between samples suggests that savings clauses are used as a tool to rein in change in the confusing multiparty environment, but only when the countries involved would want to protect the existing institutional setup.

This project attempts to understand decision-making by individual countries (or negotiators). However, their preferences are not revealed, making it very difficult to identify individual characteristics that lead to certain decisions. Instead, I have employed a second best approach that aggregates country positions into a group measure used for predicting treaty negotiation outcomes.
On the whole, the data on savings clauses has supported my expectations about the influence of declining power and complex negotiating environments. However, my use of aggregate data for inferences about unit-level behavior raises concerns about the ecological fallacy (King 1997). That is, by trying to understand individual behavior from group characteristics, I must assume that all countries think about these issues in the same manner, and make their decisions based on this narrow understanding of national interests. It could be that I am overlooking important individual country (or negotiator) characteristics as a result. The subsequent chapters attempt to remedy this concern by looking in depth at three polities and how they approach the issue of existing international law. Interviews and official documents allow me to shed light on the actual process by which countries establish and carry out a negotiating strategy.
3. Case Study Methods

The previous chapter constructed and tested a statistical model with a dataset of over 200 treaties. It demonstrated that countries often defer to the status quo when many parties are involved in a negotiation, but this result only holds when the average participant has experienced a decline in power relative to the rest of the world since 1948. This finding gives support to Hypothesis 1, suggesting that declining powers should be more likely to hang on to existing institutions while rising powers – though they may favor change – are less likely to take a strong position on this issue. While the quantitative analysis provides strong support for hypothesis 1, further evidence is necessary to test this and other hypotheses more thoroughly.

As outlined in the first hypothesis, chapter 2 demonstrated a strong correlation between power change and support for the status quo, but it is not able to demonstrate the mechanism by which that relationship emerges. Hypothesis 1 would be further supported by case studies demonstrating how particular countries make decisions, with particular emphasis on acknowledgement of their power trajectory as a determinant of negotiating positions.

In addition to providing a more robust test of the first hypothesis, country-level case studies (as opposed to the treaty-level analysis in chapter 2) allow me to assess
national preferences rather than only exploring outcomes that emerge from the pooled preferences of all participants. This nuance allows for additional confirmation of the first hypothesis and allows me to consider the influence of various issue area and country-level factors in comparing positions taken by different governments in different situations. This focus on preferences allows me to assess micro-incentives for government behavior rather than only addressing the outcomes of global or regional processes.

Finally, case studies permit me to better address hypotheses 2 and 3, each of which consider the role of private parties in the negotiating process. While there is not a wide range of variation between countries on access to existing international institutions, I am able to select cases that do demonstrate different values for that characteristic. Even with a greater degree of variation, the treaty-level analysis in chapter 2 is only able to consider which treaties defer to existing international law. It is, however, unable to address which existing rules are of sufficient value to merit such protection, as described in Hypothesis 2.1. By tracing the process governments follow to decide whether they will support change or the status quo, country-level case studies can uncover which existing rules are valued and who values them.

A better test of hypothesis 3 also requires a more fine-grained case study investigation. While there is some level of variation in private participation across
countries, a government-level analysis allows me to gain a better understanding of how those private parties translate their preferences into government negotiating stances. The case study approach in this and the following three chapters allows me to look more deeply into the process by which private actors wish to, and have the ability to, influence their governments’ negotiating positions.

3.1 Case Selection – United States, India and European Communities

In order to further test the hypotheses established in chapter 1, I have therefore conducted a series of government case studies that cross-cut the treaty-level analysis used in chapter 2. This chapter outlines the process by which I carried out these analyses, and the next three chapters each provide evidence drawn from one of three cases. Three governments were selected on the basis of variation in my proposed explanatory variables. At the outset, as is the case for most researchers, I did not know each country’s position in regards to the status quo for most of the negotiations addressed here (King, Keohane, and Verba 1994:140). Therefore, building on John Stuart Mill’s method of difference (Bennett 2004:31-32), I selected cases that varied greatly in terms of the key independent variables (King, Keohane, and Verba 1994:137-138). As the next three chapters will make clear, the chosen cases also demonstrated variation on the dependent variable – level of government support for the status quo – in the manner
expected by the first three hypotheses elucidated earlier. Figure 1 positions each case on the decision tree shown earlier, and Table 1 lists each governments’ values for key explanatory variables as well as expected observations for the dependent variable.

As discussed in chapter 4, the United States exhibited a completely dominant position after World War II and played a correspondingly influential role in the establishment of the United Nations, GATT, and other postwar institutions. It should, therefore, continue to protect those institutional benefits against proposed changes. In particular, its relative decline in comparison to an expanding and increasingly unified European Community should lead the US to be especially protective when dealing with the EC as a negotiating partner in recent years. These potential benefits should be magnified by US domestic rules that allow private parties to gain access to WTO Dispute Settlement and other international institutions, although this factor should not bring private preferences of the same magnitude as in Europe. Those private benefits are further enforced by the great ability of US private actors to influence subsequent negotiations through the pre-negotiation interagency process and Senate ratification requirements.

1 The country-case approach does not provide much leverage for testing Hypothesis 4 because that proposition supposes variation on the basis of particular negotiations rather than country characteristics. Nonetheless, I gain some additional insights on the impact of negotiating complexity by drawing on variation in the approach taken by each country.
Table 3-1: Anticipated Explanatory and Dependent Variables for 3 Case Studies

<table>
<thead>
<tr>
<th></th>
<th>Power Change Relative to the rest of the World</th>
<th>Private Access to Existing International Institutions (especially WTO)</th>
<th>Private Participation in Foreign Policy Decision Making</th>
<th>Expected Support for Deference</th>
</tr>
</thead>
<tbody>
<tr>
<td>United States</td>
<td>Decline since 1948 relative to others</td>
<td>US private parties have access to dispute settlement processes such as the WTO DSB, though they must seek it out themselves.</td>
<td>Executive Branch hearings; Ratification by 2/3 of Senate</td>
<td>Strong support for status quo</td>
</tr>
<tr>
<td>India</td>
<td>Rise since independence in 1947</td>
<td>No formal procedure</td>
<td>No formal mechanism; No legislative ratification</td>
<td>Weak support for change</td>
</tr>
<tr>
<td>European Commission</td>
<td>Mixed (some countries rise, while others decline); Rise as a unified organization</td>
<td>European Commission actively solicits WTO trade complaints. Most other access varies by member country.</td>
<td>The Commission remains open to private comments, but the Council provides greater opportunities for participation because each country has a veto in that institution.</td>
<td>Mixed response</td>
</tr>
</tbody>
</table>
Figure 3-1: Location of Cases on the Decision Tree
At the other end of the spectrum, Chapter 5 discusses negotiating preferences exhibited by the Government of India. Since independence in 1947, India has gradually gained influence in world politics. Its growing population, rising economy, and nuclear capabilities place it in a very different position than it encountered as a newly independent country shortly after World War II. As such, its government should support change in the major international institutions that were created without much Indian input at that time. Despite strong democratic processes, India does not have a formal mechanism for private access to existing international institutions such as WTO Dispute Settlement. There is also no legislative ratification process, or any official role for private actors in foreign policy decision making. Therefore, even if India were a major beneficiary of existing institutions, I would expect those benefits to be tempered by the lack of private influence.

Finally, the European Community – studied in chapter 6 – represents an intermediate case. This influential agglomeration of European countries has taken over some foreign policy activities for its member states while leaving other functions to the member state governments. For responsibilities delegated to the European Commission – the EC’s bureaucracy, I expect to see extensive opposition to the status quo because of the Commission’s opportunity to gain additional powers as a new international actor. Furthermore, the rising influence of the Community more broadly – with the addition of more countries and greater overall influence in world politics – should also lead the
Commission to act as a rising power. In addition, because the Commission only requires support from a majority of member states and does not employ any legislative ratification process, there are fewer opportunities to encounter opposition to change from private parties. Other issues, in contrast, require unanimous assent of the member states and are handled by the EC Council. The Council, therefore, provides greater leverage for relatively declining member states such as the UK and France, as well as private parties who wish to protect existing institutions. Despite this mixed expectation regarding European preferences, private parties in Europe clearly have a great deal of access to WTO Dispute Settlement and other intergovernmental tribunals such as the European Court of Justice (ECJ) and European Court of Human Rights (ECHR). The extensive use of these institutions would suggest that private parties, when given the opportunity to influence later negotiations should be somewhat opposed to change.

These three cases, therefore, can be expected to demonstrate extensive variation on the dependent variable, with India looking primarily for institutional change, the US supporting the status quo, and Europe exhibiting mixed tendencies.

3.2 Selected Negotiations – United Nations, Bilateral Investment, Sanitary and Phytosanitary Standards, and Biosafety

Within each case, it is important to expand the number of observations (George and Bennett 2005:178-179; King, Keohane, and Verba 1994:217-228) by looking at a variety of different negotiations in which that government has participated. By focusing
on multiple negotiating positions, I was able to determine whether the preference for or against the status quo was driven by government-level characteristics or some other factor.

For each case, I examined four negotiating positions in detail, and also drew on a great deal of other anecdotal evidence provided by interview subjects and additional documents. The four primary negotiations were chosen to maximize variation and address prominent political debates in international law.

First, I consider the ongoing efforts to reform the United Nations Security Council (UNSC). Although these negotiations do not take place in the traditional treaty bargaining context described in chapter 2, they demonstrate the important concerns that countries have in regard to existing institutional frameworks. UNSC was part of the UN Charter institutions founded in the aftermath of World War II. It is more powerful than other UN institutions because of its ability to institute sanctions or even the introduction of troops to address conflict situations. As such, the stakes for participation are enormous. On top of the important role of the institution itself, five permanent members – representing those countries who emerged victorious from World War II – wield a veto in the Council. That permanent membership, along with the corresponding veto power, is jealously guarded by its holders and eagerly sought by other countries around the world. Although the permanent members – China, France, Russia, United Kingdom, and United States – remain among the world’s strongest countries, other
challengers have recently proposed an expanded permanent membership to reflect a changed world. Their efforts have led to extensive discussions, culminating in a set of proposals leading up to the 2005 World Summit. However, the status quo remains entrenched and little progress has been made in the years following that World Summit.

UNSC reform is clearly an important case with implications for global security and human rights. It also has important implications for the question of the conditions under which international institutions change. The topic has been fiercely debated, with countries taking positions on the basis of their changed status since the 1940s. To this point, the status quo has demonstrated powerful influence, allowing the five relative decliners (as defined in chapter 2) to defend their valued positions as permanent Security Council members, while a series of rising powers aim for as much change as possible. This variation in negotiating positions allows me to test the hypotheses outlined in chapter 1. The difference between the three governments analyzed here makes it a good issue on which to compare their approaches to protecting the status quo. The following chapters demonstrate that rising powers and relative decliners, while controlling for a variety of other factors, take different positions on the basis of their changing power. This result provides support for Hypothesis 1, and allows me to demonstrate the value attached to such a privileged institutional position. In contrast with the other three negotiations, there is very little private party influence in UNSC, allowing me to compare the impact of relevant variables across issues.
Next, I address negotiations over bilateral investment treaties (BITs). These agreements, used to promote and protect investments between two sovereign countries, have proliferated in recent years, growing from 385 BITs at the end of 1989 to 1,857 at the beginning of the 21st Century (United Nations Conference on Trade and Development 2000:1). Over that time, there has been a particularly large growth in North-South BITs, frequently leading to asymmetrical preferences rather than similarity between the participants. BITs provide a good case for studying the actors who promote legal change and stagnation because they inherently address issues of importance to private actors. More importantly for research design purposes, multiple observations within each country allow me to hold country and issue area characteristics constant to see whether additional factors influence each country’s preference for the status quo. While the United States and India – as independent sovereign countries – have entered into a wide range of BITs, the European Community has taken a different approach. EC investment efforts mainly operate at the level of the Community’s Council – which requires unanimous agreement from all member states. They have expanded in recent years from investment promotion agreements to also include stricter rules about investment protection. Most EC investment agreements are not signed with one other country, but rather with other regional groupings. In any event, the Council unanimity arrangement means that additional pathways are available for private influence on the European negotiating position. As a result, I am also better able to assess the role of
increased private participation by comparing investment treaties with other bargaining positions taken by the European Commission.

Negotiations leading to the WTO Agreement on Sanitary and Phytosanitary Standards (SPS) present a third area for comparison. The SPS Agreement regulates the permissible use of standards to restrict import of agricultural goods. The question of reliance on existing standard-setting institutions was an important issue during negotiations over the SPS Agreement. The three governments addressed in this dissertation took different stances on reference to the existing institutional framework. The United States was highly supportive of efforts to follow three existing global standards organizations. The European Community was supportive in a more limited way, while India opposed that provision but was not vocal in its opposition. This variation among government positions allows me to examine the reasons for those different preferences. In the end, the US position succeeded, with some European support.

Finally, I examine government positions on the Cartagena Biosafety Protocol (BSP), which was negotiated under the auspices of the Convention on Biological Diversity (CBD) and signed in 2000. This agreement establishes procedures for the acceptable export of genetically modified organisms (GMOs). It addresses risk

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1 The SPS Agreement is included in Annex 1A of the Marrakesh Agreement Establishing the World Trade Organization, signed 15 June 1994.
assessment procedures and provides for advanced informed agreement so that importing countries must be aware of – and willing to accept – any GMOs brought across their borders. Because BSP deals with standards for imported goods, there are potential implications for its relationship to the SPS Agreement. In fact, the question of the Biosafety-SPS relationship was debated at length and was one of the final clauses holding up agreement on BSP (Gupta 2000). While India once again took a rather weak stance on this issue, the US was the chief proponent of protecting the status quo, and the EC was the most adamant promoter of allowing the new Protocol to take precedence over existing SPS rules. Once again, variation on the dependent variable (preference for the status quo) allows for a robust study that can determine the causes of those different government positions. The resulting compromise “emphasiz[es] that this Protocol shall not be interpreted as implying a change in the rights and obligations of a Party under any existing international agreements,” while simultaneously ensuring that the aforementioned clause does not “subordinate this Protocol to other international agreements.”

3.3 Research Methods

Having selected three case studies, and four primary negotiations within each of them, I now turn to the data gathering process. I focused in particular on documentary evidence in the form of each government’s formal submissions to these negotiations. Unfortunately, most documents addressing internal government decision-making
processes remain classified, so I have also relied on interviews with the officials who were responsible for representing each government abroad. This section describes the available data in further detail.

3.3.1 Documentary evidence

Formal submissions are the most important measure of a government’s preferences because they demonstrate official requests, made after accounting for expectations of the other parties’ positions. While official positions may not represent precise preferences due to strategic concerns, they nonetheless address the country’s public position on the matter.

Public statements and formal proposals on Security Council reform, as well as extensive scrutiny by news outlets, have been analyzed for the degree to which they support the current UNSC alignment. Most are fairly straightforward representations of each country’s position. In addition to formal submissions and news reports, I looked at Congressional testimony on this topic from US State Department officials, as well as Indian Government answers to Parliamentary Questions. I have also examined statements made by heads of government at the 2005 World Summit.

The bilateral investment negotiating process generally does not involve as many public statements. Instead, it operates on a more contractual offer-acceptance basis. Countries involved in a wide range of BITs maintain a Model BIT that is presented to negotiating partners. This Model represents the country’s preferences for negotiation,
even if the final agreement eventually diverges from that proposal. The United States and India each have a Model text that serves as a starting point for negotiations, and I have drawn on both of these documents for evidence of each country’s support for the status quo in the investment arena (Government of India 1994; United States Trade Representative 2004). As mentioned in the discussion of selected negotiations above, the European Community does not engage in typical BIT negotiations and therefore does not maintain a model agreement. However, EC investment proposals are available through the Community’s website and have been analyzed as part of this research.

SPS and BSP negotiating materials are all available online. In order to make sure that I have encountered all submissions from each government, I collected and read all Uruguay Round submissions by India, the EC, or the US on Agriculture or SPS. I similarly assembled a complete set of official submissions in the Biosafety negotiating process, as well as comments from negotiators included in a recent volume on the negotiations. I noted any reference to the status quo in all of the aforementioned documents.

3.3.2 Interview Sampling Methods

In order to triangulate the evidence and also gain a broader sense of country positions, I conducted a series of interviews with officials who have participated in

2 SPS materials from the Uruguay Round negotiations are available at gatt.stanford.edu and BSP documents are available from www.biodiv.org
international negotiations on behalf of their governments. For each of the four negotiating areas, I contacted officials who had been noted as official representatives of their government (based upon their signature on the document, inclusion in a list of participants, or referral by some other government official). In addition, in an effort to gain a broader perspective, I also visited each of the three capitals and contacted all people responsible for international negotiations in each substantive government agency, as well as lawyers responsible for the treaty portfolio in each external affairs ministry (i.e., India’s Ministry of External Affairs Legal and Treaties Division, the European Commission’s Legal Service, and the US Department of State’s Office of the Legal Adviser). These three foreign affairs agencies themselves are too large to contact every official, but the aforementioned departments within each are responsible for vetting all agreements before signature. They are, therefore, the most relevant people within their agencies.

From these starting points, I engaged in “snowball”, or “chain-referral” sampling (Weiss 1994:25), asking each official for recommendations of other important people to contact. In each case, I eventually reached a point where these referrals began to overlap with previous contacts, suggesting that I had gained the perspectives of a significant proportion of relevant individuals.

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3 I also conducted an initial round of interviews with government and international organization representatives in Geneva, Switzerland.
4 Most initial contacts led to some response, though a number of officials in each capital declined to speak with me due to their lack of knowledge on the subject or availability.
Other than the initial phase of contacting substantive agency representatives, the process produced a non-random sample of relevant officials. In many process tracing exercises, this is the most appropriate technique because random sampling may inadvertently exclude the most relevant subjects (Tansey 2007). While not all contacts responded, there is no reason to believe that the sample should be biased towards any particular point of view because this issue does not seem to be controversial within countries. The initial contacts and subsequent snowball approach led to interviews with 27 current and former government officials in Delhi, 11 from the European Commission, and 23 US negotiators. In addition, the referral chain led me to 3 representatives of Indian business organizations. The sample covers a broad range of issue areas, and largely confirms the views expressed in official documents. It is, however, necessarily biased towards recent negotiations due to the availability of current government officials and a decreasing ability to locate those who participated in negotiations prior to the early 1990s. While this constraint limits the generalizability of interview findings, it also allows me to control for broader global concerns, since almost all discussions centered around post-Cold War negotiations.

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5 As an aside, I find it quite interesting that government officials were so quick to recommend outsiders in the government that is, at least in terms of formal procedures, least open to private participation.

6 These interviews, with few exceptions, were not for attribution. A confidential list of all interviews has been provided to my dissertation advisor – Professor Joseph Grieco at Duke University – who can therefore confirm the sources included in this dissertation.
3.3.3 Interview Process

Each official who agreed to be interviewed was asked a similar set of questions regarding their training, experience working for their government, and particular involvement with international negotiations. After establishing that background matter, I asked them to discuss how they approached the status quo in a particular negotiation (if they were selected as part of the four subcases) or negotiations more generally (if they were selected because of their position as an international negotiator for a government agency). In addition to understanding their approach to status quo and change, I asked a series of questions to determine why they had taken that stance, when it emerged in the negotiating process, how their government reaches a negotiating position in general, and which domestic inputs supported or opposed the status quo of existing international law. The respondents recalled these answers to varying degrees, but were generally cooperative.7

After conducting these interviews and document reviews, I analyzed the material through a structured, focused comparison of the three cases (George and Bennett 2005). They are designed to test the hypotheses elaborated in chapter 1. As such, I began with the expectation that the United States would adamantly favor existing institutions after six decades of benefiting from its favored international legal provisions. The US position should be further enhanced by private participants’

7 The script used for semi-structured interviews is available from the author.
support for the status quo, driven by the moderately high level of access to existing international institutions provided by the US government to private parties. In contrast, India – with a sharp rise in power and no formal access or participation for private parties – should be opposed to the preservation of existing law. Drawing on prospect theory, however, I expected that India’s support for change would be fairly soft as opposed to the intensity of the US preference for the status quo. Bridging the gap between well-defined Indian and US positions, the European Community should have a mixed approach to the status quo due to the tension between EC positions and the divergent preferences of its member states. The European Commission – operating with the support of a member state majority and representing the rising power of the EU as a cohesive unit – can be expected to prefer change in international institutions. On issues for which the EC Council – operating only under unanimous member state permission and representing a wide range of countries – is in control, it should take the opposite approach. Furthermore, as the European level of capabilities (and its relative change in capabilities), are between that of India and the US, I expect that EC support for the status quo will change depending on the other countries with which it is negotiating. The next three chapters address the US, India, and EC cases respectively.
4. Case Study 1: United States Negotiating Positions – Protecting Status Quo Institutions

The United States is, of course, one of the world’s preeminent powers, and has been for quite some time. According to the National Material Capabilites (CINC) dataset, the US has controlled the world’s greatest proportion of capabilities in each of the last hundred years except the 1971-1988 period, during which the US was a close second to the Soviet Union (Singer 1987). In economic terms, the US became a global hegemon shortly after World War I, though it faced a decline through the late 1960s and early 1970s relative to other countries (Krasner 1976). As the party with the greatest influence under most circumstances, the US is an essential topic of study in any discussion of international negotiations. In order to understand how negotiations unfold, one must be able to grasp the goals and preferences of the US government.

Despite its persistently strong position, US capabilities to influence negotiated outcomes have waxed and waned over time relative to other countries. While it is still the strongest country following the Cold War, the US controls a considerably smaller share of power than it did following World War II. US preferences, therefore, also should have changed over time. I would expect to see the US support legal change when occupying a position of almost absolute strength – along with the USSR – following World War II. However, I expect a desire to maintain those earlier institutions
in the years following the Cold War, as the European Union and major developing countries emerged as important players in world politics.

In addition, the US provides an interesting case for this study because of its unique approach to the participation of private parties. US foreign policy undergoes a much more democratic vetting process than that of most countries. As a result, citizens and industry, working through US political institutions, should play an important role in the position taken by the federal government, and therefore the ultimate outcome of negotiations in which the US has a major influence.

The following sections describe US behavior in regards to the protection of existing agreements. Robert Kagan has famously claimed that the US has little concern for international law due to it predominance as a military power (Kagan 2002; Kagan 2003). On the contrary, in keeping with my expectations, this chapter shows that the United States is a staunch supporter of the status quo in international negotiations. The chapter concludes with a discussion of the reasons for that behavior.

4.1 Anecdotal Evidence of US Support for Savings Clauses

This section reviews US support for deference or change as discussed by interview subjects who were chosen from US government officials responsible for international negotiations (see chapter 3 for a discussion of interview methodology). I
then compiled further information on the issues they discussed.

4.1.1 General Support for the Status Quo

4.1.1.1 Protecting Institutional Benefits

Contrary to Kagan’s claim about US indifference towards international law, anecdotal evidence in this section shows that the US is quite likely to protect existing agreements to which it is a party. One oceans negotiator notes that this approach stems partly from the US role as a strong advocate for the rule of law after the World Wars. Internationally, the rule of law is a core US interest, and is a basic underlying aspect of US foreign policy. As that oceans official points out, “We designed the system,…and therefore it benefits us to uphold it.” When faced with an international realignment, if other powers (like the US) have not receded, then legal change could be quite destabilizing (US Department of Commerce 2007b). These comments are in line with the power change hypothesis discussed throughout this dissertation, suggesting that US support for the status quo stems from a desire to hold on to benefits gained when the country had greater bargaining power.

One US Government official noted, If we have “agreed in the past [to a particular provision], then [we want to] stick with it (US Government 2007a).” As long as a proposed rule is in line with US law and provisions that the US has already agreed to
uphold, then the US generally supports that rule (US Government 2007a). The US does not usually pursue the route of a second treaty to overturn existing agreements because it has an “allergy to treaties” and does not want to deal with new ones if it does not have to. This concern arises because the US is not sure it could control the outcome to keep regulation in the same place it has been (US Department of Education 2007).

These existing agreements may be used in a defensive mode to maintain the status quo and avoid new, unnecessary agreements. For example, Europe has been pushing for a mercury treaty, but the US does not want one. One strategy is to demonstrate that existing international law is already sufficient. Mercury is currently addressed by the Rotterdam PIC (Prior Informed Consent) Convention, the LRTAP (Long-Range Transboundary Air Pollution) Heavy Metals Protocol, and UNEP partnerships. The Stockholm Treaty on POPs (Persistent Organic Pollutants) could potentially be used to cover some additional aspects of the problem, but is not directly applicable. So, they first ask whether the POPs Treaty could provide an appropriate framework, and if so, then whether it needs tweaking. Only if all else fails do we need something new altogether (US Department of State 2007d).

Another example of this approach is the debate over a funding mechanism in the Convention on Biological Diversity (CBD). The Convention’s financial support for developing country implementation was related to efforts by the Global Environment
Facility (GEF), which is run by the World Bank. Developing countries were concerned that one pot of money would not be sufficient, and they did not like the World Bank’s involvement because it leaves the donors in charge. The US, however, wanted any such funding to run through the Bank, in part so that the process would be surrounded by bankers. More importantly for this study, US negotiators wanted this process to be controlled by an institution such as the Bank that was created and controlled by the US and other developed countries. In the end, Article 2.1 leaves open the question of whether funding would go through the existing GEF, which the US would have supported. A new structure was employed instead, and this change was one of the reasons that the US eventually declined to ratify CBD (US Department of State 2007c).

The rest of this section notes other rationales for protecting the status quo. Subsequent parts point to slight variations in the degree of US support for existing international law, as well as a few instances in which the US actually pushed for institutional change.

4.1.1.2 Legal and Policy Concerns

Other officials point to legal reasons for sticking with the status quo. The aforementioned oceans negotiator, for instance, notes that the US is more serious about implementing its international commitments than any other country. We are, therefore,
more careful about what treaties we are willing to enter (US Department of Commerce 2007b). As I discuss in Chapter 1, deference to existing law limits the scope of new agreements, thereby decreasing the level of commitments that countries make. Careful approaches to new international law, as suggested by this Commerce Department official, are often manifested by efforts to limit the amount of institutional change undertaken. However, the US is not merely “putting on the brakes” or avoiding international law altogether as Kagan might suggest. Instead, this official’s statement indicates that the US is slow to accept new rules because it really does want to implement any agreement of which it is a part.

The desire to prevent change may also result from a normative or efficiency-based policy rationale. According to one official from the Foreign Agricultural Service, the issue of past agreements arises constantly in agriculture negotiations. US negotiators also focus on legal precedent from Dispute Settlement cases. This concern for the past arises from a desire to maintain the integrity of the international legal system. The attention to legal coherence is evidenced by efforts to frame changes as clarification of ambiguities rather than replacement of earlier rules (US Department of Agriculture 2007a).

4.1.1.3 Pragmatic Reasons for Supporting the Status Quo
In addition to the strategic and legal rationales described above, there are some plainly pragmatic reasons for slowing the rate of change in international institutions. First, negotiating parties are likely to fall back on existing agreements when negotiations become most contentious. Encountering difficult negotiating circumstances, parties are sometimes faced with a decision to bring in more parties at the expense of deeper cooperation (Gilligan 2004). Reliance on a previously agreed formula is sometimes the only way to get an agreement and complete the negotiations (US Department of Commerce 2007b). For example, a recent G8 labor proposal was built on the OECD Jobs Strategy which countries already support. In contrast, the International Labour Organization (ILO)’s majoritarian voting model provides a different atmosphere than the consensus approach used elsewhere. The ILO, therefore, is not as often forced into relying on prior rules because the majority vote makes negotiations easier to complete with new provisions (US Government 2007b).¹

¹ Due to this majoritarian model and the resulting lack of signatures, ILO Conventions were dropped from the dataset analyzed in chapter 2. However, all agreements were coded prior to their removal. Of 17 ILO agreements, only 3 contained any form of savings clause, well below the 34% of agreements with a savings clause in the full dataset. One, the 1946 Convention (No. 24) Concerning Sickness Insurance for Workers in Industry and Commerce and Domestic Servants, preserves the earlier ILO Convention Concerning the Employment of Women Before and After Childbirth. Another 1946 agreement, the Convention (No. 48) Concerning the Establishment of an International Scheme for the Maintenance of Rights under Invalidity, Old-age and Widows’ and Orphans’ Insurance allows a five-year grace period to honor “supplementary agreements” on pension payments. Finally, the 1949 Convention (No. 91) Concerning Vacation Holidays with Pay for Seafarers allows that “collective agreements may
Finally, the US attempts to rely on existing agreements to avoid duplication of effort. One instance of this rationale was the US insistence upon considering the value of CITES (Convention on International Trade in Endangered Species) and the Ramsar Convention on Wetlands in the subsequent discussions on forming a Convention on Biological Diversity (CBD). The goal was to make sure the new institution was not simply replicating other efforts (US Department of State 2007c).

**4.1.2 Variation in the Degree of Deference**

While this support for the status quo seems to arise in just about all negotiations, the US preference for protecting existing agreements is stronger in some circumstances than in others.

**4.1.2.1 Legalization of Proposed Agreement**

For instance, US efforts to protect the status quo are more prominent when the new agreement is slated to have concrete legal impacts. Because of the concerns about implementation mentioned above, more legalized institutions are taken more seriously by the US due to the enforceability of those potential commitments. For instance, although the domestic vetting process is essentially the same (US Government 2007a),

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provide for the exemption from the provisions of this Convention of vessels of less than 200 gross register tons.” It is unclear whether such “collective agreements” are of the interstate or collective bargaining variety.
one official notes that the bindingness of ILO Conventions makes debates there more heated than those regarding the language of G8 communiqués, since the parties actually stand to lose something in the more formal ILO process (US Government 2007b). Once again, this degree of concern should lead to more reliance on existing agreements.

4.1.2.2 Legalization of Existing Agreements

In addition to this variation in situations where the previous agreement is called upon, there is some variation among which existing rules the US prefers to retain. Generally speaking, in line with Hypothesis 2A described earlier, the US is more apt to call upon earlier agreements when they are more precise and more enforceable. They want to make progress, but ground it in existing law. If no hard law is available, then negotiators sometimes turn to guidelines and principles that have also already been agreed upon (US Department of Commerce 2007b).

When there is no formal agreement to call upon, the conservative approach to international law also results in the US relying upon existing soft principles and guidelines. In the Antarctic Treaty Environment Protocol, there was discussion of an Environmental Impact Assessment provision. Some parties, including the US, wished to tie that provision to the non-binding UNEP guidelines on assessment. Application of this existing set of standards was intended to make the provision more rigorous.
Furthermore, the US was then able to point out that the others had already agreed to the guidelines and it would be strange to oppose those provisions now. Although developing countries remained concerned about the proposal, its precedential nature made it easier to push through (US Department of Commerce 2007b).

In the 2007 G8 Chairs Conclusions, some parties pushed for the section on Corporate Social Responsibility to refer to existing OECD and ILO guidelines for Corporate Social Responsibility, as well as the UN Global Compact on that topic (US Government 2007a). While reaffirming the voluntary nature of those guidelines, the US did support their inclusion (US Government 2007b).

Existing customary international law does not get a huge amount of consideration in most environmental treaty negotiations because it is so vague and cannot really solve most problems. It may inform the debate, but is not useful for problem solving. Instead, negotiations focus more on existing concrete international law and agreements. This reliance on existing law is even less useful to the US when the earlier provisions are less concrete, as in the case of the “precaution.” In that instance, the meaning and application of the concept is so heavily contested that protecting it would create confusion rather than clarity (US Department of State 2007d).

As expected, the United States is more eager to protect existing rules when they are highly legalized, providing some assurance to private (and government) parties of
their usefulness.\footnote{As discussed in chapter 6, the same is true of European negotiators.}

4.1.2.3 Variation by Issue Area

Finally, US negotiators have been more resolute about protecting existing rules in particular issue areas. It is important to note here that treaties are considered across issue areas, not just within one regime. The US desire to rely on existing bargains extends across issue areas as well. Scholars of international environmental politics have claimed, for instance, that existing trade law exerts a “chilling effect” on the scope of multilateral environmental agreements (Eckersley 2004; Stilwell and Tuerk 1999).

This concern has indeed arisen during discussions about trade measures in environmental negotiations. The US prefers to maintain strong multilateral trade rules without creating conflicts in the new environmental provisions. In those situations, USTR acts as the “keepers of policy,” explaining what is and is not WTO compliant. Commerce Department officials also flag issues about global trade rules in proposed environmental agreements, and there is broad agreement across the US Government on efforts to avoid legal inconsistency. WTO is the biggest concern, but there are also discussions about making sure not to conflict with existing bilateral and regional trade agreements (US Department of State 2007a).
These actions, coupled with US efforts to include a savings clause in the Biosafety Protocol (see Section 4.5), support the “chilling effect” hypothesis. However, that explanation remains insufficient because other countries have taken the opposite stance, and because US negotiators also prefer subordination of other issue areas to trade rules. In addition to environmental treaties, bilateral agreements on scientific cooperation always include a provision that addresses intellectual property rights for inventions that result from the partnership. These rules are negotiated on the basis of models prepared by USTR, and they often rely on the WTO’s Agreement on Trade-Related Intellectual Property Rights (TRIPS) or other international intellectual property rules (US Department of State 2007e).

In the energy negotiations for the US-Canada Free Trade Agreement and NAFTA, participants started from GATT Article XX and the national security exemption, and wanted to apply discipline by outlining what qualified for the exceptions. In all these negotiations, GATT rules were the baseline for subsequent discussion. The parties, particularly the US delegation, were not willing to accept any rules that would run contrary to the benefits gained from GATT (Center for Strategic and International Studies 2007).

After the US-Canada rules had been agreed, both countries were insistent upon using those as a baseline in NAFTA. Mexico was unwilling to go that far because of its
restrictions on private investment in the oil and gas sector, so the US and Canada allowed Mexico to derogate. However, they made sure to include language in NAFTA that required the other two countries to maintain their earlier rules rather than slipping back to Mexico’s level of protection in that industry. At least one participant suggested that they probably would not have ended up with the same formula in NAFTA if they did not have the earlier US-Canada Agreement to build upon. Allowing Mexico to derogate from the energy rules was one of the more contentious issues in NAFTA and was not resolved until very late in the process. Mexico was very clear on its unwillingness to follow those existing rules, and it was a potential deal breaker for them. However, the US and Canada were similarly unwilling to give up their existing benefits (Center for Strategic and International Studies 2007).

Even though the focus in NAFTA was protection of Canada-US rules, GATT was still viewed as the basic instrument for a baseline of acceptability. Any agreement had to be no worse than that outcome in order to gain US support. The US, therefore, required subsequent energy provisions in trade and investment agreements to open markets further than the NAFTA text (Center for Strategic and International Studies 2007).

This gradation of support for existing treaties across issue areas also points to some variation on the basis of private benefits for the status quo, although there is no
evidence to verify a causal link between private concerns and deference at this point. This concern will be discussed further in subsequent sections.

4.1.3 Occasional Efforts to Produce Institutional Change

Despite the general preference for protecting earlier rules, there are also instances in which the US has advocated replacement of old agreements that no longer serve its interests. The US is sometimes looking to overturn existing provisions if it suits the greater US policy goals, although there are not as many bold examples of this approach. It would usually be a creative interpretation rather than explicit replacement of existing rules, although there are certainly examples of the US trying to move past earlier bargains (US Department of State 2007d).

The US has tried to override existing rules when it is not a member of the earlier treaty. Presumably, the US would have joined the earlier agreement if it had liked those rules. Having rejected them once, it is eager to not be locked into them by other countries who are trying to force change upon the US. For example, the US is willing to mention the ILO in later agreements because the US is a member and follows the ILO minimum standards. However, it could be an issue to mention specific ILO Conventions since the US does not participate in all of them (US Government 2007a).

In the International Coffee Organization (ICO), the US actually looked for change
after having been outside the organization for quite some time. During a periodic review of the International Coffee Agreement (ICA), which establishes the ICO, the US sought revisions in the voting structure to ensure that the votes of members of regional economic organizations such as the EU were counted equally with votes of other members. The also US sought and gained members’ agreement to streamline ICO’s governance structure, eliminating the Executive Board, whose meetings and procedures the US viewed as duplicating activities of the Governing Council. Previously, when rejoining the ICO, the US requested and received an understanding that the ICA’s provisions did not override WTO provisions or limit the power of members to regulate for environmental, health and other public purposes (US Government 2007c).

Similarly, unlike its concern for CITES and Ramsar, the US had very little concern during CBD negotiations about the Convention on Migratory Species (CMS) since it is not a party to that agreement (US Department of State 2007c). Subsequently, the US has been opposed to protecting the CBD (US Department of Agriculture 2007b) or the Convention on Civil Liability for Oil Pollution Damage (US Department of Commerce 2007b) in later negotiations since it is not a member of those institutions.

As I note in the next subsection, the United States has also been a proponent of institutional change when power has shifted in its favor. In that case, the US pushed for renegotiation of the Albacore Treaty after migration patterns shifted more of the fish
into US waters.

4.1.4 Complexity of US Activity in Fisheries Agreements

The US has been a particularly active participant in bilateral, regional, and global fisheries negotiations. It is a major fishing power, representing more than 5% of global catch in 2005 (3rd in the world behind China and Peru), and over 6% of apparent global fish consumption over the 2001-03 period.\(^3\) Owing to its expansive coast lines, the United States also has the largest exclusive economic zone (EEZ) of any country in the world (US Department of State 2007b).\(^4\)

In most situations, the US is more conservation-minded than others in the fisheries realm for two main reasons. As a general matter, US domestic law on fisheries tends to be stricter than the laws of other nations, so the US fishing industry sees strict international regulation as a means of leveling the playing field. Of course, environmentalists want the same, meaning that there is some degree of consensus on this issue (DeSombre 2000; US Department of State 2007b). Secondly, because the US has the world’s largest EEZ, most US vessels operate within the US zone. As a result, most US vessels gain a competitive advantage when there are greater constraints on high seas fishing (US Department of State 2007b).


\(^4\) See also http://www.nmfs.noaa.gov/fishwatch/management.htm
Fisheries negotiations tend to be extremely precedent conscious on the whole. In general, the US wants to rely on existing agreements, but is not always the first to bring them up. That issue has never caused the US delegation to back away from an agreement, in part because strong tactics have been unnecessary. Proposals to rely on earlier agreements have tended to be uncontroversial in this area, and accepted by other parties as well (US Department of State 2007b). This lack of opposition to the status quo would seem to raise questions for the power change hypothesis since it cannot be the case that all participants have experienced the same decline over time. However, this weaker support for change actually fits well with prospect theory and other explanations for varied intensity of preference.

One of the primary reasons why the State Department feels that the United Nations Convention on the Law of the Sea (UNCLOS) is good for the US, and should be ratified, is because it is generally built upon a set of US-influenced 1958 treaties (Negroponte 27 September 2007). As a former Assistant Secretary of State dealing with environmental issues noted, “The Convention’s provisions on fisheries are entirely consistent with U.S. domestic fisheries laws as well as our international fisheries agreements and understandings (Turner 21 October 2003).” Part of the former Legal Adviser’s pitch to the Senate on UNCLOS ratification also had to do with the Convention’s deference to other existing international rules. In particular, he focused on
the revised Seabed Agreement’s requirement that subsidies cannot be inconsistent with GATT/WTO rules (Taft 21 October 2003).

UNCLOS also provides the framework for subsequent fisheries agreements. According to one US negotiator, the last 30 years of fisheries agreements are “consistent with (or elaborate on) UNCLOS because it carefully – if in general terms – sets down the rights and obligations geographically as well as by species group.” Subsequent negotiations are designed to fill gaps on high seas and shared (not straddling) stocks, not to alter UNCLOS rules (US Department of Commerce 2007a). Another US official agrees, claiming that the only concern in subsequent negotiations is that everyone agrees to follow the Law of the Sea, but there are of course different interpretations of it, so the new agreements can be used to elaborate details in specific areas (US Department of State 2007b).

In addition to accepting UNCLOS due to the deference it enshrines,⁵ the US has made efforts to establish subsequent rules that defer to UNCLOS as well. In 1995, countries met to fill in some of the gaps created by the 1982 Law of the Sea. They ended up with the 1995 Straddling Stocks Agreement, the principles of which are applied in

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⁵ The US has not ratified UNCLOS, but President Reagan issued an Executive Order accepting all of UNCLOS except the deep seabed provisions US Department of Commerce. 2007a. Interview, National Oceanic and Atmospheric Administration, National Marine Fisheries Service. 6 November. Silver Spring, Maryland. While the Executive Order does bind the US to comply, it would appear NOT to require other countries to provide reciprocal benefits. As such the benefits to the United States remain questionable in this area.
subsequent fisheries negotiations (US Department of Commerce 2007a). Every agreement since 1995 has been negotiated “against” (ie, in the shadow of) both UNCLOS/Straddling Stocks Agreement and the FAO Code of Conduct (US Department of Commerce 2007a).

The State Department has tried to convince Congress that other fisheries agreements were worthwhile because they are geared towards protecting UNCLOS and the 1995 Agreement as well. For instance, in trying to demonstrate the value of ratifying the Convention Strengthening the Inter-American Tropical Tuna Commission, the State Department noted that “The Antigua Convention faithfully incorporates valuable provisions of other recent fisheries treaties, particularly the 1995 United Nations Fish Stocks Agreement, to which the United States is already a party (Balton 29 September 2005).” This raises the question of why a “strengthening” was necessary for an institution that had already been influenced by the US. However, it is clear that the US was careful in this instance to protect the earlier institutions that it valued most. The State Department has also noted that “The revised Inter-American Tropical Tuna Convention...seeks to incorporate the new international legal regime as reflected in the 1982 Law of the Sea Convention, 1995 United Nations Fish Stocks Agreement and other important legal instruments governing the conservation and management of fishery resources (US Department of State 18 November 2003).” While it necessarily alters the
previous IATTC regime, it is designed specifically to protect other, broader conventions to which the US adheres, particularly two that contain more detailed enforcement procedures.

Similarly, the State Department notes that the Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Central and Western Pacific Ocean (WCPFC)

builds upon the 1982 United Nations Convention on the Law of the Sea (the LOS Convention) and the 1995 United Nations Agreement on the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (the Fish Stocks Agreement). The WCPF Convention gives effect to the provisions of the LOS Convention and Fish Stocks Agreement that recognize as essential, and require, cooperation to conserve highly migratory fish stocks through regional fishery management organizations, by those with direct interests in them - coastal States with authority to manage fishing in waters under their jurisdiction and those nations whose vessels fish for these stocks. (Balton 29 September 2005).

These constant reminders to Congress suggest that the concern for the status quo is driven, at least in part, by legislative concerns.

One State Department official noted similarities between the influence of UNCLOS on subsequent fisheries negotiations, and his previous experiences dealing with human rights negotiations on behalf of the United States. For instance, when pursuing the Convention on the Rights of the Child (CRC), the Universal Declaration on Human Rights and the International Covenants played a role similar to UNCLOS in
regional fisheries negotiations. Subsequent negotiations are aimed to develop more specific rules, but they build on the existing frameworks. In that instance, references to existing international law provided a background for the negotiation. One of the most contentious issues for the United States in the CRC process was the discussion of children in armed conflict. The US, in that setting, wanted to maintain existing Geneva Convention rules on the topic, primarily because the US felt that such issues should remain under the purview of the Geneva Convention and not be negotiated separately in other fora devoted exclusively to human rights issues (US Department of State 2007b). It seems, therefore, that this is not merely a story about fishing treaties, but rather a more general approach pursued by the United States in international negotiations.

The 1984 Pacific salmon agreement with Canada provides a good example of the domestic politics involved in protecting an existing agreement. It was negotiated to supersede a treaty from the 1930s. The earlier pact only addressed Puget Sound and the Columbia River at a time when the fishery really only focused on the river. Rules from the old agreement, however, were absorbed into the new one because Puget Sound fishermen did not want to replace the earlier rules on which they had relied for 50 years. Their acquiescence was politically necessary for the new agreement to succeed, and they were opposed to any arrangement that could reduce existing benefits (US Department of
In addition to the relationship with existing fisheries agreements, there is a great potential for interaction with trade rules since fisheries negotiations are conducted in a commodity framework. Despite concerns about protecting liberal trade rules, the US is still interested in using trade restrictions (particularly import restrictions) to promote compliance with fisheries rules. There is a sense that multilateral trade restrictions have a better chance of withstanding WTO scrutiny. In that respect, consistent with the “chilling effect” hypothesis, the WTO is a constraint on future negotiations but certainly does not negate the possibility of new agreements (US Department of State 2007b).

Sometimes USTR is not happy with results of fishing negotiations, but NMFS and the State Department are the ones authorized to handle this area. NMFS works with International Trade Administration (ITA) lawyers and others to make sure new rules are consistent with trade agreements to which the US is a party (US Department of Commerce 2007a).

Although the US is quite consistent in protecting earlier agreements, it occasionally takes the opposite approach. In 2004, the US renegotiated the 1981 Albacore Treaty with Canada. This is one of very few instances in which the US was interested in overturning its previous agreements. However, it makes sense in this instance because the migration pattern of these fish shifted towards US waters,
providing additional bargaining power for US regulators who then wished to control the fishery more tightly (Balton 29 April 2004).

4.2 US Views on Reforming the United Nations Security Council

The United Nations Security Council (UNSC) is the UN’s most powerful arm, charged with enacting sanctions, and even calling for troop deployments, in response to gross violations of international law. Rather than consider the potential for a savings clause in this case, the UNSC presents an interesting case for institutional change in high politics. It does not address specific legal rules, but rather deals with the potential for change on the basis of altered power alignments in the post-Cold War world. Unlike the governments discussed in the next two chapters, the United States – by virtue of its success in World War II – is a veto-wielding permanent member of the UNSC. Therefore, in addition to the dominant role usually played by the US in global negotiations, its support is a legal necessity for any major change within this particular institution.

The United States has generally pushed the goal of management reform in the United Nations without supporting a change in the institutions underlying the organization. In particular, one of the most controversial proposed reforms is the change of Security Council membership to reflect current international power
alignments. As the United States has acknowledged, it played a leading role as a founder of the institution in 1945 (Burns 16 June 2005), and it is not eager to dilute the power that it gained through its permanent Security Council position and the veto linked to that seat.

The United States claims to support the idea of Security Council expansion (US Department of State 17 June 2005), but believes that it must take a secondary role behind the other proposed management reforms that have been stalled for years. As Under Secretary of State Nicholas Burns has noted, “The United States recognizes that the Security Council needs to look more like the world of 2005 than the world of 1945...[a]nd we’re very much open to the debate about whether or not the Council should be expanded. But we see this debate as only one of the issues that has to be put forward. And we’d like to see progress on all the other issues before we turn our full attention to the UN Security Council debate itself (Burns 16 June 2005).”

Faced with a variety of proposals that would have expanded the Council from 15 to 24 members, some of which would be new permanent members, the United States claimed to support reform but only in a limited way.

We have to be concerned, as one of the custodians of the Security Council, as a member of the Permanent Five. We have to be concerned about the effectiveness of a Security Council. And so we believe that an intake of nine or ten countries is not easily digestible by the United Nations Security Council. We wouldn’t be able to be assured that the Council’s effectiveness could be continued. And that has to be the standard...by which we judged
[sic] this debate (Burns 16 June 2005).

Although the US is willing to address the possibility of Security Council expansion, that is not among the country’s 6 priorities for United Nations reform (Burns 21 July 2005). In fact, the topic of Security Council expansion did not even arise in many official US statements in the year following the UN Summit (Bolton 5 April 2006; Bolton 25 January 2006; Schweich 4 October 2005). The State Department’s primary website on UN reform also makes no mention of proposals to expand the Security Council.

Ambassador John Bolton has noted that, while the US was “prepared to engage fully” in discussions about Security Council expansion, “too large an expansion would risk making [the Council] unable to quickly address challenges to international peace and security (Bolton 10 November 2005).” The US claimed, in June 2005, that it would accept the addition of Japan as a permanent member, and perhaps one or two others, and also to accept the idea of adding 2 or 3 new temporary slots to the Council (Burns 21 July 2005). Although it was willing to accept some sort of a modest expansion, the US has maintained a “very strong view that the veto should remain with the Permanent 5 and the veto should not be extended to any new permanent members of the Council (Burns 16 June 2005).” Despite the public support for Japanese accession, and Ambassador John Bolton’s claim regarding “a specific proposal for a modest expansion
(Bolton 10 November 2005),” the US does not appear to have ever submitted a formal proposal for expansion, and has managed to find fault with all those put forth by others.

Furthermore, as Under Secretary Burns noted in testimony before the US Senate, “we do not think any proposal to expand the Security Council – including one based on our own ideas – should be voted upon at this stage. If the G-4 puts its resolution for a vote, we will vote against it and are urging others to do the same (Burns 21 July 2005).”

The next month, during the lead up to the 2005 World Summit, at which UN Reform was to be debated, Ambassador Anne Patterson expressed further concerns about the process, calling “for the G-4, AU, and Uniting for Consensus groups to defer the tabling of Security Council expansion resolutions, to stop pushing for votes, and to focus first on more urgently needed reforms. The Security Council debate has indeed siphoned extensive resources away from more critical UN reforms (Patterson 2 August 2005).”

Secretary Rice, in her comments at the World Summit, continued to claim openness to expansion in the guise of a seat for Japan and better developing country representation, but also suggested that such a discussion had to be preceded by “real progress on these fundamental [mostly management and budget] reforms” thus proving “that the United Nations can address greater issues of change (Rice 17 September 2005).” Secretary Rice

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was particularly adamant that there was weak rationale for giving Germany a seat because the European Union was already well represented with the UK and France occupying permanent Security Council seats (Blum 2005:647).

The level of US interest in such changes is thrown further into question when one reads the words of Ambassador John Bolton who claims that “We all recognize that the Council created in 1945 represents a world very different from today, which is why we will continue to actively support permanent membership for Japan (Bolton 28 September 2005).” One must wonder why Japan should be the only new member if the Council is being adapted to represent the world of 2005. To put it mildly, the United States was clearly not working towards any expansion of the Security Council, despite previous rhetoric to the contrary. As such, one might well presume that the US is not particularly interested in overhauling the institution as it already exists.

**4.3 Negotiating Bilateral Trade and Investment Treaties**

The United States has negotiated investment agreements with a series of partner countries. These agreements sometimes take the form of standalone Bilateral Investment Treaties (BITs), but at other times represent one chapter of a larger Free Trade Agreement (FTA) (US Trade Representative 2007a). Since FTA investment chapters are basically the same as BITs without some of the procedural material, this
section addresses both types of negotiation.

In the investment context as a whole, the US finds it critical to stick with previous agreements. Like other countries, the US maintains a publicly available Model BIT which is the starting point for all negotiations (United States Trade Representative 2004). This Model provides extensive insight into the US position on investment agreements, whether they are separate BITs or FTA investment chapters.

The 2002 Trade Act laid out what future agreements should contain, and served as a guide to the Executive Branch in preparing the 2004 Model (US Trade Representative 2007a). The model is, therefore, quite important because it reflects a domestic bargain already reached by Congress, and of course Congressional support is necessary for passage of an agreement. Negotiators can deviate from the model, but only if the changes will not undermine the objectives laid out by Congress in the 2002 Trade Act. As a result, in the investment area, negotiators have very little flexibility with new proposals since there is already a long standing domestic agreement on the model. Changes are generally made at the request of the other country, and then very sparingly (US Trade Representative 2007a).  

7 See chapter 5 for a discussion of India’s Model BIT.  
8 Small changes occasionally emerge from the US side as well if it appears that some aspect of the model has an unexpected interpretation or effect in one of the previous agreements (US Government 2007e).
In BIT negotiations, as demonstrated by the Model, the US position often supports maintenance of existing agreements by reference because the earlier agreements were done properly and were already vetted by important domestic and international actors. Nonetheless, if any change – however small – is desired, it is done with new language rather than a qualified reference to the earlier agreement (US Government 2007e). Other agreements are referenced just for the sake of clarity (US Trade Representative 2007a). The US is generally willing to accept such references, although it pushed back against deference to the IMF balance of payments rules since “we consider the BITs to have higher standards (US Government 2007e).”

The Model does rely upon a number of existing provisions, though the lack of a clear savings clause across issue areas may come as a surprise considering officials’ statements about existing treaties and the US experience in other areas. They do, however, take these references seriously. One official claims that the reference to existing agreements potentially could be important enough to derail the agreement if the other side insists upon their removal. However, because the US generally has a large bargaining advantage, hard bargaining on these references is off the equilibrium path (US Trade Representative 2007a) and should not, therefore, be evident from negotiation histories.

The most direct reference to other existing treaties comes in Article 21.3, where
the Model specifies that existing tax agreements must maintain precedence: “Nothing in this Treaty shall affect the rights and obligations of either Party under any tax convention. In the event of any inconsistency between this Treaty and any such convention, that convention shall prevail to the extent of the inconsistency (United States Trade Representative 2004).”

A few officials involved in preparing the Model BIT told me that tax treaties are protected because the Department of Treasury officials working on tax did not want existing agreements to be interpreted in a new way. They are less involved in BIT negotiations and wanted to make sure that treaty provisions were not interpreted incorrectly in a realm where they were not in charge (US Government 2007e).

All “applicable rules of international law” are also maintained by allowing the tribunal to rely upon them as important sources of law that must be followed (United States Trade Representative 2004:Article 30.1). “Such rules of international law as may be applicable” are to be consulted “if the rules of law have not been specified or otherwise agreed (United States Trade Representative 2004) (Article 30.2(b)).” Of course, these provisions do not specify whether the old rules should replace the new ones, but it does suggest that they should continue to be upheld. On the scale introduced in chapter 3, this Article would be scored as a level 2. It is not, in that sense, a savings clause, but still relies upon earlier agreements. Existing law, here, is used to
interpret the new rules. On the whole, that is a much weaker form of reliance on existing agreements than one might expect from the United States.

Existing labor agreements are also cited as an important body of existing international law. The Preamble positions labor as a necessarily related issue: “Desiring to achieve these objectives in a manner consistent with…the promotion of internationally recognized labor rights (United States Trade Representative 2004:Preamble).” Article 13 of the Model goes on to explain that investment should not be promoted through the weakening of domestic labor laws insofar as they are “directly related” to a core set of “internationally recognized labor rights (United States Trade Representative 2004).” As one official notes, this provision in the Model BIT was a political move. It was better to rely on those existing principles rather than laying that issue out for discussion again (US Government 2007e).

Customary international investment law is also protected with fairly weak language. Article 5 provides that “Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security (Article 5.1)...‘full protection and security’ requires each Party to provide the level of police protection required under customary international law (United States Trade Representative 2004:Article 5.2(b)).”

However, “A determination that there has been a breach of another provision of
this Treaty, or of a separate international agreement, does not establish that there has
been a breach of this Article (United States Trade Representative 2004:Article 5.3).”

Similarly, the WTO Agreement on Trade-Related Intellectual Property Rights
(TRIPS) is referenced as one way of doing things that would be presumptively
acceptable, shifting the burden to another party who wishes to show that the follower of
TRIPS could possibly be out of compliance with the BIT. “This Article does not apply to
the issuance of compulsory licenses granted in relation to intellectual property rights in
accordance with the TRIPS Agreement, or to the revocation, limitation, or creation of
intellectual property rights, to the extent that such issuance, revocation, limitation, or
creation is consistent with the TRIPS Agreement (United States Trade Representative
2004:Article 6.5).”

Other restrictions also do “not apply…when a Party authorizes use of an
intellectual property right in accordance with Article 31 of the TRIPS Agreement, or to
measures requiring the disclosure of proprietary information that fall within the scope
of, and are consistent with, Article 39 of the TRIPS Agreement (United States Trade
Representative 2004:Article 8.3(b)(i)).” That is to say that following TRIPS is
presumptively acceptable. The US, it seems, has decided to continue relying on the
TRIPS rules that have served it well, and in which it played a major role at the
negotiation stage.
The presumptive acceptability from following TRIPS comes up more in the intellectual property chapter (see especially the Thailand FTA). It is common that the US has to explain the need for this provision in the investment context, but the other side generally agrees after that (US Trade Representative 2007a). TRIPs was referenced in the model because USTR felt it was a good way to build on rules that they liked already (US Government 2007e).

The BIT dispute settlement provisions also rely on existing agreements, but that appears to be simply a matter of convenience since such institutions have already been formed. Section B of the Model BIT lays out rules for dispute settlement, requiring that the parties approach the process consistent with their agreement under the ICSID Convention and UNCITRAL Arbitration Rules (United States Trade Representative 2004). Although those two agreements do not contain substantive provisions about investment between the parties, they do contain procedures that must be of some value to the United States, which has depended upon them previously and played an important role in creating them. Furthermore, to the extent that other agreements provide for different remedies, the BIT is not to override those benefits (United States Trade Representative 2004:Article 34.8).

The Model BIT does not attempt to protect the WTO General Agreement on Trade in Services (GATS), an agreement that covers many aspects of investment activity.
In order to ensure that the new agreement would not constrain the scope of benefits to less than was previously available, Article 20.7 makes sure that “financial services” is defined in the same way as it was in the GATS Agreement (United States Trade Representative 2004).” This provision was not heavily debated but was meant simply to serve as a baseline for which services are covered. Earlier post-NAFTA BITs extend substantive NAFTA national treatment and most favored nation standards to this sector, but later agreements rely instead on the substance of GATS since it came later and provided deeper access (US Government 2007e). The broader lack of concern for GATS may be related to the weakness of investment rules within that Agreement. As Sornarajah notes, GATS “does not contain binding commitments other than those individually negotiated ad hoc by the different states as to sectors of the industry (Sornarajah 2004:88).” Unlike GATT, GATS does not mandate non-discrimination or national treatment approaches to the trade in services (Sornarajah 2004; WTO 7 October 2002:300). It is beyond the scope of this discussion to consider whether the US wanted those provisions in the 1994 GATS, and if so why it failed to get them.

Existing environmental agreements are also noticeably missing from the Model BIT. After NAFTA, interagency debates addressed how to change the model to cover defensive interests, not just market openings. While there is no formal Model FTA environment chapter, this section remains fairly consistent across recent FTAs. It does
address existing agreements (US Government 2007c), but is not directly related to the investment provisions (US Government 2007e).

Nonetheless, in BITs and FTAs, the US does raise concerns about the relationship between new trade and investment rules, and Multilateral Environmental Agreements (MEAs) with trade obligations (i.e., Convention on International Trade in Endangered Species (CITES), Montreal Protocol on Substances that Deplete the Ozone Layer), but many other agreements do not arise. According to one Environmental Protection Agency (EPA) official, “If we are parties and have obligations under a treaty, there is an understanding not to have inconsistencies between new and existing provisions (US Environmental Protection Agency 2007).

In addition to provisions included in the Model BIT, recent domestic political shifts have resulted in a greater focus on some other existing agreements. The recently approved Free Trade Agreement with Peru raises the importance of complying with CITES rules, at the request of Congressman Rangel and the new Democratic majority in Congress. It is trying to use a trade agreement to reinforce MEAs (US Government 2007c). The new Annex on Forest Sector Governance protects CITES rules in case of conflict, as long as the measure relying on CITES does not have the primary purpose of imposing a disguised restriction on trade (United States Trade Representative 2008: Annex 18.3.4). This willingness to prioritize an environmental agreement points again
to the insufficiency of the “chilling effect” hypothesis.

### 4.4 US and the SPS Agreement

The WTO Agreement on Sanitary and Phytosanitary Standards (SPS) – with support from the US – became an integral part of the Uruguay Round final agreement. As I discuss in chapter 3, the SPS Agreement is an important case for this project because it contains a number of provisions that rely on existing international standards organizations, and these references had varying levels of support among negotiating parties.

The United States has been the world’s largest agricultural exporter since at least 1990, representing over 10% of the world total in each year from 1990-2005. The US has been a net exporter throughout that period (Food and Agriculture Organization of the United Nations 2008a; Food and Agriculture Organization of the United Nations 2008b). As a result, the US was looking to open foreign markets that used non-tariff barriers, such as SPS measures, to limit the level of imports. The US was the primary demander of an SPS Agreement. The main fights in this process related to how precautionary measures should be included and whether animal welfare was a basis for trade.

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* Combined European Community exports dwarf the US level, although a large portion of the combined EU level is intra-EU trade (See Section 6.4).
restrictions. Although related, the question of existing standards was not the primary focus of the negotiations (US Trade Representative (former official) 2007).

Early in the negotiations, the parties realized that it would be important to reach some agreement on the types of SPS measures that would be deemed acceptable to all countries rather than being targeted as potential trade barriers. From the beginning, the US wanted to rely on existing international standards, or at least delegate power to the institutions that had created those standards (Büthe forthcoming (2008):24 in original). The US proposed inclusion of its favored standards institutions early in the process, as part of a paper about the agriculture negotiations more generally (GATT 22 February 1988). The placement of this proposal suggests that it was an important piece of the overall US strategy on agriculture in the Uruguay Round. The US saw “standards that have been established by relevant international standards organizations” as an important part of the harmonization process even though it did not require “identical laws or uniform measures” in all countries (GATT 22 February 1988:11).

Drezner claims that farmers and the biotech industry had invested in following existing regulations, which led the US to support the status quo to a great extent (Drezner 2007:160). Drezner’s explanation cannot capture the whole story because the SPS Agreement – and the US position on it – leaves open the possibility of changing standards within the existing standards institutions. Rather than merely trying to
maintain existing standards, the US goal in this negotiation was to retain the existing decision making process employed by those organizations. To the extent these processes favored US interests, the US hoped to keep that structure in place. Had it tried to create a new institution at this point, other countries (especially those in the developing world, such as India – see chapter 5) may have been able to wield more influence in the process.

Not only did the United States hope to rely on international standards in general, the aforementioned US paper of February 1988 also proposed three specific standards-setting bodies (Codex Alimentarius Commission – CAC; International Organization for Epizootics – OIE; International Plant Protection Convention – IPPC) on which it hoped to gain early agreement, although the precise role of those groups was left for further discussion (GATT 22 February 1988:12-13). The US Department of Agriculture drove the idea of relying on Codex and IPPC/OIE as well, although the Europeans and other US agencies basically just agreed (US Trade Representative (former official) 2007). To the extent that the US and EU agree on substantive questions of sanitary and phytosanitary standards, they are essentially able to control all three of these institutions (Büthe forthcoming (2008)). Neither had strong opposition to OIE, IPPC, or Codex as a result (Büthe forthcoming (2008):35 in original). To that point, they had agreed on most standards, but the process became more difficult as contentious issues (ie, beef
hormones) arose later (Büthe forthcoming (2008):30 in original).

The developing countries also liked the idea at the time because it would allow them to take a standard “off the rack” without having to develop their own complicated risk assessment procedures. They also were not quite so adamant about anything in SPS because it was not their major concern among Uruguay Round negotiating groups (US Trade Representative (former official) 2007)(also see Section 5.4).

The early US proposal demonstrates a desire to stick with existing institutions, and also represents a strategy to bring in those organizations early on in order to strengthen links throughout subsequent negotiations on the topic. In essence, it appears that the US was trying to establish a first mover advantage for those organizations by making them immediately accessible to the Uruguay Round negotiators.

The Codex Alimentarius Commission (CAC) was particularly dominated by the developed countries because the chair of each committee is responsible for the committee’s operating costs, leading to a situation in which very few developing countries can control the organization’s agenda (Büthe forthcoming (2008):31 in original). The US was even more effective than the EC in the Codex context because CAC has a bias towards agricultural exporters (Drezner 2007:162-63; Sikes 1998: 328). The US agriculture industry was aware of US dominance in Codex, so it knew the standards should continue to support them if the new SPS Agreement continued to rely
on the CAC for future decisions (US Trade Representative (former official) 2007).

Once international standards, and these three bodies in particular, were written into the Midterm Agreement, their dominance was more or less assured for the final agreement. The US subsequently pushed to have “these organizations immediately begin working toward fulfilling their role in the improved GATT approach to sanitary and phytosanitary regulations (GATT 10 July 1989).” This subsequent action still allowed for “the possible designation of other scientific bodies” but it sought to give an advantage to the first three by creating relationships between them and the GATT, and to get them started working on the relevant material within their own institutions (GATT 10 July 1989). In particular, the US attempted to build early coordination with the OIE (GATT 4 May 1990; GATT 16 February 1990). Presumably, this agreement on standards within those organizations would also result in the burden of scientific proof being directed at those who felt the standards were inadequate. This presumption of acceptability from the work of those groups could then serve as a powerful lever against those who might wish to establish some alternate standard.

The US did recognize, even early on, that “There are other international and regional bodies which influence world trade of agricultural products.” However, the US paper expresses concern that none of these other groups “have the capacity nor the international scientific reputation and credibility of these three organizations (GATT 22
February 1988:14).” One wonders, of course, what is the source of that capacity and reputation. It certainly may be the case that these organizations’ reputation for scientific expertise was related to US support for them. If that is the case, of course, then it simply reinforces the US goal of protecting those institutions that it likes best. In order to support its claim of expertise for these organizations, the US notes the longevity of these bodies as well as their membership. The rationale, however, does not refer to the institutional structures themselves, which are the primary concern of developing countries later on. There is, notably, no discussion of why other standard-setting bodies do not have sufficient capacity, reputation or credibility to play that role.

Unsurprisingly, the US was opposed to inclusion of the United Nations Economic Commission for Europe (UNECE) (Büthe 2007:35). Even though the US had been granted full voting membership, EC members represent a vast majority in this ostensibly European institution. The US was also somewhat opposed to other standards organizations such as OECD and IAEA. In OECD unanimity voting, the US – like other countries – essentially has veto power, but it is politically costly to use that tool when the majority takes a different stance. A unified European position, in contrast, would not require EC members to use such drastic measures in the face of US opposition (Büthe 2007:47-48). As a result, the OECD procedure is not seen as favorable to US interests.
The US later proposed that SPS standards could be brought in through GATT, with rules in line with CAC, OIE, and IPPC standards presumed to be important enough to merit the use of GATT Article XX exceptions. If no international standard existed, then the country could still put a regulation in place. However, such import barriers would be open to challenge through the Dispute Settlement process rather than presumptively acceptable for being “based on sound scientific evidence (GATT 25 October 1989).”\textsuperscript{10} For issues “not covered by the aforementioned standards or guidelines…the appropriate standards or guidelines of other scientific organizations open to full participation by all Contracting Parties” could gain the same level of acceptability (GATT 25 October 1989:14). The final SPS agreement largely adopts that proposal, identifying these other acceptable standards as those “promulgated by other relevant international organizations open for membership to all Members, as identified by the Committee.” Regional standards were later brought up by the US as well, although they would only be viewed as “a useful first step” without the legal role of existing international standards (GATT 6 December 1989).

Aside from the standards issue, the US was not terribly focused on protecting other international agreements through the SPS negotiations. The interagency process

\textsuperscript{10} Of course, the mere fact that these standard setting bodies have intergovernmental procedures demonstrates that they are not simply scientific agreements. They each entail some coordination between countries when there is a disagreement about the appropriate scientific standard to use.
did not include EPA and FDA originally, so concerns about environmental treaties were not brought forth at an early stage, until the general trade and environment issue became more contentious. On the whole though, everyone was at the table within the US government and USTR did not have to ask for renegotiation because there were few interagency disagreements (US Trade Representative (former official) 2007).

Finally, demonstrating US satisfaction with the SPS Agreement, the US rebuffed efforts to alter SPS provisions during subsequent negotiations in 1998 (Drezner 2007:163; Kerr 1999:245). As I will show in the next section, the US also went to great lengths to protect its SPS success when negotiating the Biosafety Protocol in later years.

4.5 Biosafety Protocol and the United States – Pushing for a Savings Clause

The Cartagena Protocol on Biological Safety (Biosafety Protocol, or BSP) is another important negotiation for assessing hypotheses about legal change because each country took a different stand regarding the importance of existing international agreements. In particular, proponents of a savings clause – particularly the United States and other biotech exporters – seem to have focused their efforts on protecting the limitations on import barriers that were developed in the SPS Agreement discussed above.

The United States has taken the clear lead in introducing biotech crops, leading
the world in planting these varieties in every year since 1996 (Brookes and Barfoot 2006:6; James 2006:6; James 2007:5). As such, the US industry would like to see weak regulations at home and abroad in order that it might export its products without further hindrance. It had succeeded in this endeavor within the US (Prakash and Kollman 2003:626; Vogel 2003:578), and was eager to make sure its success at home would not be replaced by strict international rules.

4.5.1 Early Opposition to Change

In the runup to the 1999 WTO Ministerial meeting in Seattle, the US, among others, had proposed to regulate the biotechnology trade under the auspices of the WTO (Oberthür and Gehring 2006:13), an institution in which the US had a fair amount of clout and could control the outcome of negotiations, as seen above. Developing countries, in particular, managed to prevent that effort by pushing the discussion towards the Biosafety process that was taking place under the Convention on Biological Diversity (CBD) (Oberthür and Gehring 2006:13).

On the whole, the United States was opposed to a Biosafety Protocol. US scientists felt that biotech products did not have risks warranting a Protocol (US Government 2007d). More generally, the US felt that “no deal is better than a bad one (Drezner 2007:163),” suggesting a high level of satisfaction with the status quo.
It appears, however, that the primary reasons for US displeasure were not merely related to the substance of proposed agreements. The US was also concerned about negotiating from a very weak position in the CBD context because it had not ratified the original CBD agreement (Drezner 2007:163). The fact that the US was not a member meant it could not sign any new Protocol, and also could not serve as a voting member in the Protocol negotiations (Gupta 2000:226). The delegation hoped that the US would ratify the parent Convention because that would provide more leverage for them, but they realized it was unlikely. Without the ability to vote and speak, US influence was somewhat limited (US Government 2007d).

4.5.2 Coalition Building with the Miami Group

However, once the US aligned with the Miami Group of agricultural exporters, the delegation gained more leverage. The US could not speak because it was a non-party, but it could influence the negotiations by coordinating with other Miami Group members on a common message. Within the group, the countries generally agreed on the desired outcome, although they debated tactics and strategy occasionally (US Government 2007d; US Trade Representative 2007b).

Others expressed concern that the rest of the Miami Group would not join without having their primary export competitor bound by the new rules. However, US
exporters will still have to play by many of these rules in order to participate fully in export markets (Gupta 2000:226), a fact that seems to have placated other Miami Group countries. Nonetheless, at least one former official believes that the issue should actually take on less legal meaning for the United States since it is not a member of CBD. As long as that situation remains, relations between the US and other countries can only be governed by treaties to which both are parties (Safrin 2002b:613,fn68). Even from that perspective, however, it was important to the US to protect existing agreements in case it should become a party to CBD and the Protocol at some point in the future.

As I noted above, agricultural exporters from the US benefited the most from WTO rules, and therefore should have been most interested in protecting their institutional capital. This notion plays out in the Biosafety negotiations as the US and other “Miami Group” exporters pushed hard for a savings clause that would protect their WTO-SPS rights.

The Miami Group wanted to include a savings clause “to ensure that WTO obligations would not be superseded by the new Protocol (Gupta 2000:215).” Such a provision would state that “nothing in the protocol should affect a country’s obligations under other international agreements (Gupta 2000:215).”

The US, in particular, was eager to avoid any “unnecessary impediments to trade (US Department of Agriculture 2007c),” but US and Miami Group concerns were not
merely a matter of substantively blocking progress on this issue or maintaining open trade. The negotiating position was directly related to how a new agreement would fit with the existing WTO provisions, although not all people involved cared about the WTO per se (US Trade Representative 2007b). One member of the US delegation notes that the US was worried about the impact on trading rights enshrined in the WTO because of the Vienna Convention’s “last in time” provision (US Government 2007d). In the end, the preamble paragraph that provides precedence for existing rules was essential to the Miami Group’s decision allowing the agreement to move forward (Gupta 2000:223-224).

4.5.3 Developing the Savings Clause Approach

Very early in the process, the United States expressed concerns about overriding other international agreements, proposing at the second meeting of the Biosafety Working Group that “The protocol should specify that nothing in it shall affect the rights and obligations of countries under agreements that have entered into force prior to the adoption of the protocol (United Nations Environment Program 6 May 1997).” In addition to that broad request for consistency, the US also proposed that any Advanced Informed Agreement mechanism must be “implemented in a manner that is fully consistent with the provisions of the WTO (United Nations Environment Program 6
May 1997).” In fact, one member of the US delegation claims that the whole point of the Biosafety Protocol, from the US perspective, was to avoid conflict since the US was comfortable with SPS rules and did not want to change them (US Department of Agriculture 2007a).

According to one State Department lawyer, the US supported a savings clause for three primary reasons. First, existing agreements—not just those comprising the WTO—represented a delicate balance that had been difficult to achieve. It would, therefore, be unwise to take any risk that those bargains may be overturned by the new Biosafety agreement (Safrin 2002a:439). The US, having been in a better bargaining position during the Uruguay Round, benefited from the SPS framework, and did not want to upend it at this point. Even from the standpoint of a Government lawyer, the shifting power dynamics were apparently key for decisionmaking.

Second, the US was concerned that other parties would try to implement the Protocol without regard for WTO rules. Even though the US believed that the substantive rules in the Protocol were completely consistent with global trade rules, US negotiators felt it was important to point out to other parties that WTO agreements should be taken into account when implementing the Biosafety procedures (Safrin 2002a:439-40; Safrin 2002b:611-12). In fact, “behind the scenes…a few countries unofficially admitted that they hoped the protocol would give them room potentially to
avoid certain WTO obligations (Safrin 2002a:440).” Beyond merely cautioning other countries about that practice, the US hoped that a savings clause would clarify international obligations and therefore reduce the likelihood of disputes (Safrin 2002a:451).

This second rationale was picked up by commentators and other US officials as well, noting in particular the importance of legal clarity. The Miami Group may have been afraid “that, without a clarification, the customary lex-posterior rule might have suggested that the later Cartagena Protocol takes precedence over earlier WTO rules (Oberthür and Gehring 2006:17).” One member of the US delegation agreed that there was a lot of concern to make sure that biosafety disciplines fit with the WTO. According to this official, “We believe that trade and environment do not necessarily conflict, and we want to make sure that continues to be the case. As a result, we want to ensure clarity to the extent possible.” This official notes that the US Government had developed an understanding of the need to avoid conflicts. There was a recognition of the need to achieve goals without conflict that could hurt both agreements. By the later stages of negotiation, his agency (USTR) did not have to convince the others of the importance of WTO rules (US Trade Representative 2007b).

Third, the US wanted to be sure all parties recognized that trade disputes involving biosafety concerns could continue to be handled by the WTO’s Dispute
Settlement Body rather than any newly established institution (Safrin 2002a:440).

Together, the last two reasons for the savings clause provide support for my institutional access hypothesis. While the second rationale suggests a neutral support for legal certainty, the desire to solve any uncertainty in the particular direction of WTO processes suggests a greater focus on the protection of existing legal benefits that accrue to the biotech industry.

In addition to these three State Department rationales, another reason for the desire to include a savings clause was the position of the US agriculture industry. This goal of maintaining the status quo was pushed in particular by US private actors who wanted to keep the original regulatory standards (Drezner 2007:166). In fact, one member of the US delegation notes that industry, though paying little attention initially, later pushed to prevent any agreement at all.\(^\text{11}\) Environmental NGOs, of course, wanted a much stronger agreement, but their influence was more limited in this negotiation (US Government 2007d).

Finally, there were also bureaucratic politics reasons for limiting the reach of this agreement. In contrast with the environmental offices negotiating on behalf of other countries, the US Department of Agriculture (USDA) is the lead agency on biotechnology in the United States. It is known for having strong connections to the

\(^{11}\) Prakash and Kollman claim that final agreement was actually possible only because Monsanto softened its opposition (2003: 652-53)
private sector, as its mission includes “the promotion of agricultural exports (Prakash and Kollman 2003:624).” As such, USDA did not want to have an agreement of this nature because it was concerned about cutting into the Department’s mandate to deal with SPS issues. The Department felt CBD should not affect trade rules (US Department of Agriculture 2007a). Similarly, the Food and Drug Administration (FDA) was concerned that the agreement should not cover drugs for which it was responsible because it was not the right forum in which to address them. It was not a matter of particular international agreements, but just a desire to limit the scope of agreement so it would not infringe upon FDA jurisdiction. The EPA also expressed concerns about the relationship between environmental and trade treaties, with a concern that trade should not trump the environment. The USTR view, in contrast, was that there was really no need for an agreement of this type at all, and the EPA eventually came around to share that position. The introduction of a savings clause was aimed at limiting the scope of this agreement more generally (US Government 2007d).

In addition to the WTO/SPS rules themselves, US success in the WTO Dispute Settlement process led to even greater support for the existing provisions over the course of the negotiations (Safrin 2002a:441-42; Safrin 2002b:616). The legal backing provided by WTO Dispute Settlement Body (DSB) decisions allowed US actors to gain very concrete benefits from the existing institution. The DSB was an important part of
US strategy due to the realization that this legitimate tool could serve as a fall back (Drezner 2007:167). US wariness about the use of precautionary measures stemmed in part from its recent successful experience in the beef hormone dispute under the auspices of the DSB, and the ability to rely on that decision as something of a precedent as well (Gupta 2000:216).

One US delegate suggests that the Hormones case was not, by itself, the driving force behind the concern about trading rights. However, he had also worked on the US team for the DSB Hormones case and was quite well aware of the new Protocol’s potential ramifications for Dispute Settlement (US Government 2007d). Others have also noted that, among US and other Miami Group delegations, the desire for a savings clause grew over the course of negotiations. In particular, it increased after the August 1997 release of the DSB’s “beef hormone” case decision. In that case, the DSB supported the US complaint that the European Community’s ban on meat from hormone-treated cattle was not based on sound science and therefore violated the SPS Agreement. The US became concerned that European negotiators were trying to use the new Protocol as a way to avoid those responsibilities in the future (Safrin 2002a:441-42; Safrin 2002b:616). The US now realized that the WTO provided not only supportive rules, but also a legal environment in which to enforce those rules. The desire to protect highly legalized SPS rules and implementing decisions only increased the US preference for protecting the
In the end, the Miami Group position on a savings clause was strengthened in the Cartagena negotiations because even the EU and developing countries did not want to create a broader conflict with the WTO (Oberthür and Gehring 2006:15).

In addition to the discussion of a potential savings clause, it was important to make sure that the substantive obligations themselves were not in conflict with WTO disciplines. In particular, the US was not eager to support the precautionary principle in this context, in part because it was not yet well-established as a principle in international law. As I noted in section 4.1, US negotiators are wary of relying on legal concepts that remain contested. This lack of clarity made the US concerned that relying on it would simply provide further confusion (Gupta 2000:221-222).

This general US position on precaution, however, was not as consistent as the desire to insert a savings clause. FDA and EPA were not as opposed to the mention of precaution because they do, at times, follow a precautionary approach. They were concerned that the trade agencies would be too narrow in allowing them to take action without more information. In particular, the FDA drug approval process assumes danger until an item is proven safe. The Department of Agriculture and USTR, on the other hand, were interested in a very high threshold for precaution, while the Europeans were willing to allow blocked imports even without any evidence at all. However, US
Government scientists reasoned that they actually knew a lot about genetically modified corn, and all the evidence suggested that the product was safe, meaning that even precaution should not prohibit its entry. Therefore, from this point of view, market access for biotech products could be maintained without eliminating precautionary actions altogether. The State Department Oceans and Environment Bureau was sympathetic to that position, and the USTR was reasonably so, but the State Department Economic Bureau was not at all sympathetic (US Government 2007d). The end result is not really very different from existing SPS rules in terms of the scientific basis for risk assessment (US Trade Representative 2007b).

In addition to the relationship with WTO agreements, it should be noted that the US more generally wished to avoid change. The first US proposal in the Biosafety Working Group also notes support for the existing CBD infrastructure and reliance on standards from the UNEP International Technical Guidelines on Safety in Biotechnology (United Nations Environment Program 6 May 1997). Those guidelines received continued support in the US submission for the Working Group’s third meeting later in 1997 (United Nations Environment Program 18 August 1997), although they do not seem to be a major US priority in subsequent bargaining sessions. According to one member of the delegation, the Guidelines proved to be useful during Biosafety negotiations, but they were not relied upon as a legal matter. Even those aspects that
were invoked were fought over again word by word during the Cartagena process (US Department of Agriculture 2007c).

Perhaps the appropriate counterfactual with which to examine US behavior in BSP negotiations is by exploring what would have happened in the absence of the SPS Agreement. If, in this situation, the US would have been supportive of a Biosafety Protocol, then we might impute that their primary goal in the BSP negotiations was to protect existing legal mechanisms for the sake of clarity, or a preference for existing rules. If, on the other hand, the US would have still been inclined to oppose strong biosafety rules without the existence of WTO strictures, then we might think that the WTO provisions are being used as an excuse to avoid new rules that the US did not like from a substantive point of view.

Some US officials seem to suggest that the latter situation would be a better representation of the US preference formation process. Many of the people with whom I spoke were clear that the substantive provisions of the Biosafety Protocol were unwelcome to the United States. Since the agreement was a bad idea from a science perspective, there was no reason to give in on anything. It was easy to oppose a lot of provisions here because the US opposed all efforts at an agreement, which provided some leverage. Furthermore, they reasoned that they should make sure the agreement could not provide ammunition for European claims on something so unnecessary (US
However, other US officials noted that this support for the status quo was tied up with overall positive feelings towards the WTO and its highly legalized structure. Furthermore, the fact that US opposition to a wide-reaching Protocol grew over time – along with growing evidence for the value of the SPS Agreement – seems to indicate that the rules themselves were worth protecting. On the whole then, while the US may have opposed a Biosafety Protocol anyhow, its opposition was greatly enhanced by a desire to protect existing rules which it had successfully put in place through the SPS Agreement.

4.6 Positioning the US

This section addresses a series of independent variables described earlier in the dissertation, in an effort to test whether my hypotheses successfully predict US preferences. It also considers the validity of causal mechanisms I have proposed. The US consistently supports the status quo in international negotiations. Figure 1 shows that this result is in line with those expectations, as will be explained throughout the remainder of this chapter.

Table 1 summarizes the US position in the negotiations discussed above, along with the value of each independent variable for that negotiation. US support for existing rules is particularly strong in the fisheries, SPS and Biosafety negotiations. Although US
officials claim a willingness to contemplate Security Council expansion, the US is clearly not eager for change in that arena either. Finally, the US does not take quite as strong a position on deference to existing institutions in the bilateral investment context, but US officials still remain clear on their desire to complete bilateral agreements only if they will provide benefits equal to, or better than, existing treaties. There is obviously not much variation on the dependent variable within the US case, so this chapter by itself is insufficient for hypothesis testing. Chapter 7 will bring together results from each of the case studies, allowing for comparison between US, EU, and Indian preferences.
Figure 4-1: US Position on the Decision Tree
Table 4-1: US Approach to the Status Quo in Selected Negotiations

<table>
<thead>
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</thead>
<tbody>
<tr>
<td>Fisheries</td>
<td>Many</td>
<td>N/A</td>
<td>Generally, US private parties have access to dispute settlement processes such as the WTO DSB, though they must seek it out themselves.</td>
<td>Fisheries Councils; 2/3 Senate advice/consent</td>
<td>State/NOAA</td>
<td>Maintain UNCLOS rules; make RFOs compatible with each other</td>
</tr>
<tr>
<td>UNSC Expansion</td>
<td>Through 2005</td>
<td>Decline since WW2</td>
<td></td>
<td>2/3 Senate advice/consent on UNSC change</td>
<td>State</td>
<td>Support Japan as UNSC member, but opposed to further expansion</td>
</tr>
<tr>
<td>Bilateral Investment</td>
<td>Many</td>
<td>N/A</td>
<td></td>
<td>Advisory Committees; 2/3 Senate advice/consent on BITs; 50% Congress on FTAs</td>
<td>USTR/State</td>
<td>Protect tax treaties; presumptive acceptability for compliance with other international rules</td>
</tr>
<tr>
<td>WTO SPS</td>
<td>1988-1994</td>
<td>Decline</td>
<td></td>
<td>2/3 Senate advice/consent</td>
<td>USTR</td>
<td>Rely on, and adhere to, existing standards bodies, especially Codex/IPPC/OIE</td>
</tr>
<tr>
<td>Biosafety</td>
<td>1997-2000</td>
<td>Steady since SPS, but EC rose; Weak here because not a member</td>
<td>Industry comments but US could not join</td>
<td>State</td>
<td>Admant opposition to anything that would alter trade rules</td>
<td></td>
</tr>
<tr>
<td>Overall</td>
<td>Various</td>
<td>Decline since WWII</td>
<td>More access than all but EC</td>
<td>Open to private opinion through Congressional approval</td>
<td>Various</td>
<td>Overall Support for the Status Quo in International Negotiations</td>
</tr>
</tbody>
</table>
4.6.1 Power change and Interest in maintaining the status quo

The first hypothesis outlined in this dissertation deals with the effects of shifting power alignments. It suggests that rising powers will prefer institutional change, while the status quo will be defended even more aggressively by countries who have experienced a decline in capabilities relative to other participants. The United States fits in this latter category because of its tremendous dominance in the late 1940s, and the subsequent rise of other major powers. The US remains in a powerful position, but its current relative capabilities do not give it the same preponderance of power as it had immediately following World War II. As one US Government official noted, as designers of those institutions, the United States has an interest in upholding the benefits gained from those arrangements (US Department of Commerce 2007b) (see discussion in section 4.1). Other countries’ recent influence cannot be overlooked in this context.

Following the Cold War, some commentators suggested that the US had become a world hegemon, capable of even greater leverage in international negotiations. However, others have noted that the collapse of the Soviet Union instead unleashed the influence of European Union and other forces together to balance against the United States, at least in the economic realm where most treaty negotiations take place. As a
result, the US position was weakened somewhat once the other western powers no longer relied upon its protection against the USSR (Wiarda and Wylie 2002:34).

By most measures, the US has experienced a decline in power over the past 60 years, relative to the rest of world. This trend is clearly demonstrated by looking at US scores on the CINC index, as shown in Figure 4-2. This index still places the United States as the world’s strongest leader, maintaining just under 15% of global capabilities in 2001. However, that is only about half of the dominant 29-30% level achieved by the US in 1947 and 1948 when major international institutions were formed. This decline leveled off from the mid-1970s through the early 1990s. Nonetheless, the rise of the European Union as the USA’s primary economic competitor continued through the 1990s, meaning that the US also may have been concerned in recent years about maintaining its Uruguay Round success of the early 1990s.

On the whole, then, the US desire to protect the status quo seems unsurprising. In keeping with Hypothesis 1 proposed earlier in the dissertation, as US power has declined relative to the rest of the world, the US should be more inclined to support existing institutions. The United States is no longer in control to the same extent as 60 years ago, meaning that it no longer has the same degree of control over institutional

\[12\] US GDP follows a similar pattern, though the decline is not as steep.
designs. Nonetheless, its continuing power still allows it to exert significant influence on a wide range of issues.

Figure 4-2: United States Capabilities (CINC) since 1945

In addition to the overall change in power, there are particular institutions in which the US starts with less bargaining power due to its membership status or a changed environment. It can then gain power in those contexts relatively easily. Not so coincidentally, these are also the same few negotiations in which the United States actually promotes institutional change. The albacore agreement with Canada is one
instance in which the US delegation insisted upon an altered institution, in large part
due to a changed fish migration pattern that left a greater portion of the stock in US
waters. The resulting increase in bargaining advantage, coupled with the already high
level of capabilities, led to a high level of legal change in the albacore regime.

The power change hypothesis would also expect the US to protect only those
institutions of which it is a member, while trying to override others in which it did not
previously participate. A number of US officials directly noted this effort. For instance,
in CBD negotiations, the US was very careful not to alter CITES or the Ramsar
Convention on Wetlands. However, it was quite willing to push past the Convention on
Migratory Species (CMS), in which it was not a member (US Department of State 2007c).
Without having the desired influence in the latter context, the US apparently preferred
to create a new institution that could replace CMS rules. This membership question also
plays out in the degree to which the US has leverage in subsequent Biodiversity
negotiations since the US never ratified CBD. I now consider how this hypothesis
applies to each of the negotiations detailed above.

4.6.1.1 Security Council Reform

Despite some rhetoric to the contrary, the United States has generally set out to
block change in the configuration of the United Nations Security Council. US comments
suggest a desire to go slowly with any change that will be made to this important
institution. Concerns about diluting the value of a Security Council veto indicate that this cautious stance has a great deal to do with the changed position in which the US now finds itself. Although US power has declined relative to the countries on the other side of this debate – The G-4 grouping of Brazil, Germany, India, and Japan – it has maintained a high level of capacity through continued economic and military power and its institutional veto power. The US is able to wield that strength to block change, although it may be less successful at securing such benefits if it were to try forming a similar organization from scratch in today’s world.

4.6.1.2 Bilateral Investment Treaties

The United States is not quite so adamant about protecting existing agreements in the course of bilateral investment negotiations. The US Model BIT does include a savings clause for tax treaties, although that provision seems to be a result of competition between agencies within the US Government rather than relative power distributions between countries. It also relies on “internationally recognized labor rights” in an effort to avoid further negotiation on that issue. The implication in that case, again, is the desire to avoid domestic political problems related to renegotiations.

The Model also allows for the presumptive acceptability of other international provisions, though it declines to have those rules prevail in case of a conflict with the BIT. The degree of relative power change is difficult to observe when dealing with so
many different potential negotiating partners. Under these conditions, it seems that the US retains a fairly high degree of bargaining power since it is only negotiating with one partner, meaning there is no possibility of coalitions forming to combat the US position. The lack of focus on existing arrangements in this bilateral situation also suggests that the impacts of complex negotiating environments raised earlier (see hypothesis 4 in chapter 1 and results in chapter 2) do not arise, leading to less concern about going slow to protect the status quo.

4.6.1.3 WTO SPS Agreement

In the SPS negotiations, on the other hand, the United States pushed hard to retain the benefits it had gained from global standards-setting organizations. In this context, the US had clearly faced a decline relative to the European Community and developing countries since the founding of those institutions. There is no direct evidence that this decline was the proximate cause of the US preference, but the correlation here is strong. Despite the relative decline, the United States still retained a high degree of power at the time of Uruguay Round negotiations. As a result, it was successful in its goal of maintaining the status quo institutions.
4.6.1.4 Biosafety Protocol

Despite coming only a few years after the SPS Agreement was signed, Biosafety negotiations provided a much weaker bargaining environment for the United States. Its status as a nonmember of the parent CBD meant that the US had no vote and few channels of influence. Because of its lack of influence, it is not surprising that the US had a particularly strong preference for a Biosafety Protocol that would not affect existing institutions in which the US did play an important role. The US clearly recognized the benefits it had achieved earlier and wanted to make sure they were retained. As one member of the US delegation has noted, the United States was particularly careful not to overturn the results of beneficial earlier agreements because it was unclear whether they could achieve the same delicate bargain again (Safrin 2002a:439).

The weaker bargaining position did, in the end, lead to a less desirable outcome for the United States. In this case, the resulting savings clause was actually the third choice of the US delegation. Its preference was to address the issue through the WTO or avoid a new Protocol altogether, or at least to have a savings clause preventing the diminution of any existing rights under international law. The outcome – a savings clause balanced by an “Understanding that [the savings clause] is not intended to subordinate this Protocol to other international agreements” – falls short of US goals,
although it does generally serve to protect the SPS rules of most importance. One
member of the US delegation claims that even this savings clause would have been
difficult to achieve, but for the rhetorical brilliance of a Canadian negotiator in
Cartagena (US Government 2007d).

It appears then that a decline in power is an important condition for a desire to
protect existing agreements. However, power change by itself does not provide a
sufficient explanation for the degree to which the United States supports the status quo.
Instead, it is essential to look at the domestic actors who exert influence on the
Government’s negotiating position in order to understand the conditions under which
the United States is pushed to take stronger or weaker positions as a result of rising or
declining power in a particular issue area.

4.6.2 Private Access to Existing Institutions

As suggested by the second hypothesis, existing institutions are more useful if
they contain enforceable rules to which private groups have access. As such, the US
position should vary along with the degree to which its citizens have access to existing
international institutions. This characteristic varies across countries and across
institutions. Therefore, we should expect to see a general effect within the US, but some
variation among the institutions it is most adamant about protecting.
The WTO is the institution that likely provides the greatest potential for benefits to industry and other private parties within the US and other developed countries. However, because only states can file cases in the WTO Dispute Settlement Body (DSB), private actors who wish to collect on those institutional benefits must convince their governments to bring the case forward on their behalf in the DSB.

The US has been particularly successful in using the WTO’s Dispute Settlement process to enforce those rights on behalf of US companies. As for beneficiaries in any country, in order to get one’s case heard in the DSB, a US firm or industry must convince the US Government that its case has merit and will have broader impacts for the US economy. The US Section 301 process allows companies or whole industries to complain about foreign barriers to market entry. While this process privileges entrenched firms, the US also pursues claims from other groups if they have particularly strong legal arguments (Shaffer 2003). As a result, the US grants its citizens more access to the DSB than a country like India that has no formal process for selecting cases to file. However, it does not provide as much access as the European Commission, which actually solicits cases from its industries. In this respect, private parties in the US should be more adamant about protecting WTO rules than similar groups in India, but less so than comparable groups in the European Community. As the discussion of Biosafety most clearly demonstrates, US industry was quite adamant about protecting WTO disciplines.
in subsequent negotiations. In addition, there is a clear link between the value of institutional access and the desire to protect institutions in this case. The intensification of US support for a Biosafety savings clause following the WTO Beef Hormones decision (Gupta 2000:216; Safrin 2002a:441-42; Safrin 2002b:616) demonstrates the importance of success in that setting, and the subsequent impact on private parties’ negotiating objectives.

In addition, we should generally see more concern for protecting the most legalized existing institutions. In fact, this is the pattern observed in this chapter. As a number of officials noted, WTO rules elicit more private support than other existing institutions like the UNEP Biotechnology Guidelines. This lower level of support for less legalized existing agreements is consistent with hypothesis 2.1.

Although the UN Security Council provides many benefits to the United States as a country, it is not directed towards private citizens or industry, and does not provide any means for an individual to file a grievance about a supposed wrong done to her or him by another country. Even if UNSC did address issues of that nature, Security Council expansion should not have affected any such provisions. The US did, nonetheless, display an aversion to change in UNSC membership, so private legal access is clearly not a necessary condition for a preference against institutional change. It does seem to alter the intensity of the status quo preference though, and this lack of private
concern may explain the occasional willingness of State Department officials to publicly support Japanese membership. This hypothesis also finds support in the idea repeated by quite a few government officials that the US needed to rely first on existing enforceable international law, followed by less concrete provisions, international standards, and finally soft law principles or guidelines.

4.6.3 Private Participation in the Negotiating Process

Of course, as described earlier, this interest from private parties is only important to the extent those groups are able to participate later in the formulation of US negotiating positions.

U.S. foreign policy is highly democratized, involving many societal actors to a much higher degree than that of other countries (Wiarda and Wylie 2002:33). Business and labor interest groups, working through media publicity, have gained an important role in the US through their ability to mobilize large numbers of citizens and their resulting influence on electoral politics (Wiarda and Wylie 2002:36-37). In particular, one recent study finds that United States foreign policy is often influenced by the opinions of business and industry leadership, meaning that any account of US decision making must take their preferences into consideration (Jacobs and Page 2005).

One reason for this level of private participation is the role of Congress. The Legislative Branch plays a greater role in foreign policy than the legislatures of most
countries. In particular, the need for advice and consent from two-thirds of the Senate makes treaty ratification an inherently open process, although only about 5% of agreements actually follow this step for approval (Dalton 1999). However, less formal “agreements” often require support from a majority in both houses of Congress. The Senate’s up-or-down vote on treaties is particularly useful for actors who wish to prevent change and are quite comfortable with the status quo situation. While supporters of a formal treaty need to muster 67 votes for ratification, opponents of change are able to prevent US membership by convincing a mere 34 Senators of a treaty’s shortcomings. As a result, the Executive Branch must consult with Congress at the negotiating stage to make sure it will produce a treaty that can be ratified. This legislative influence leads to a route for access to political parties and their constituents (Wiarda and Wylie 2002:39). Political actors who want a new agreement, therefore, must confront concerns about the status quo at an early stage.

Because these issues are publicly debated by elected officials representing every state, constituents have much greater access to treaty ratification debates than they would in a system where this decision is made by the executive cabinet, as in India or Australia. In the US, private actors who wish to influence negotiated outcomes also have the potential to be heard by lobbying Members of Congress. These officials have an incentive to listen to their constituents, and other powerful lobbies, for electoral
reasons. They present an additional outlet for those who wish to block change. As Vogel notes, it is easier for private parties to influence the political process when multiple entry points are available (Vogel 2003:575). To the extent that these actors wish to maintain the status quo, this fragmentation provides multiple veto points at which to prevent change from occurring. Blocking change only requires attention from one of those veto players (Tsebelis 2002).

Of course, private participation need not be directed solely through the Senate ratification process. The interagency process often retains a place for public input at the prenegotiation stage as well, and the involved agencies vary across issue area. In addition to consulting with Congress, the Executive Branch also follows a formal interagency process when preparing its negotiating position. This activity – known as the Circular 175, or C175, process – requires that the State Department sign off on any proposed treaty language, or delegate that right to another agency. All other relevant agencies must also signal their support for the position taken by the US Government. Most discussions take place at the staff level, but interagency disagreements are pushed up the chain to higher levels within each Executive Branch Department, leading to discussions at the Deputy Secretary, or even Cabinet, level if necessary (US Department of State; US Department of State 2006).
The C175 process leads to intragovernmental negotiations on a wide range of issues. Different agencies take the lead on each issue up for negotiation. In global trade negotiations, the lead agency varies by subtopic, with USTR controlling most of the negotiations, but sharing much of that responsibility – for example – with the Department of Agriculture for negotiations on the WTO Agreement on Agriculture. When cross-issue linkages or tradeoffs are proposed within WTO negotiations, those decisions then must reach the level of Cabinet Secretaries or their Deputies (US Department of Agriculture 2007a). As one former negotiator notes, the interagency process often takes as long as the negotiations with other countries (Center for Strategic and International Studies 2007).

As a result of this need for broad approval, each agency’s constituents are indirectly involved in developing a US negotiating stance. The more agencies that are involved, the more opportunity there is for private parties to play a role. Again, this broad range of entry points provides many opportunities for private parties who wish to participate in negotiations, particularly if they are looking to block change.

Another important factor in U.S. foreign policy is the relationship between different branches of the bureaucracy, as described by Graham Allison (1969). To the extent that private actors have well-developed relationships with the agencies that regulate them, the importance of bureaucratic politics lies in the additional opportunities
provided for private participation in foreign affairs. The difference in each agency’s perspective, and the private parties who influence them, often leads to different preferences for foreign policy outcomes. Agencies are, in this case, one of the interests who benefit from existing agreements because of their responsibility for upholding them. They are themselves, in that sense, a compliance constituency that must be considered when creating new agreements. More importantly, Executive Branch agencies have well-established relationships with relevant private constituencies, each of which may also have a stake in protecting existing benefits. As a result, the formal mechanisms for power within the bureaucracy are important predictors of the eventual position taken by the US government.

Most respondents suggested that the interagency process was quite open to input from a variety of agencies, suggesting an opportunity for participation by many private groups. However, a few US Government officials who deal with environmental issues noted that they are not invited to some meetings, and have to fight for input occasionally, especially on bilateral Free Trade Agreement negotiations. (US Department of Agriculture 2007b; US Government 2007c)

It is worthwhile, therefore, to examine the variation among pre-negotiation processes to see if these differences have affected the US position on protecting the
status quo. The process varies only slightly among treaties in which the US has participated, but these differences have important impacts.

In ILO negotiations, at one extreme, there is more nongovernmental participation because of the Organization’s tripartite structure which requires input from labor and business representatives (US Government 2007b). This arrangement does not exist in other negotiations though.

In environmental negotiations, which follow a more typical bargaining process, the US delegation must consult with officials at home, and inform them of progress regularly during the negotiating round. However, negotiators remain “very agile,” especially since the other principal government actors tend to have a similar view of the situation. In contrast, the Japanese delegation must often consult with officials in Tokyo, and the EU can do nothing without consulting the Member States, so European negotiators often react more slowly to new proposals. Nonetheless, US Government agencies that are not at the table retain input throughout the actual negotiations, through frequent and ongoing consultations, as well as the eventual need for broad interagency acceptance (US Department of State 2007a).

According to one official from the EPA, cross-agency coordination is designed to make sure there is complementarity between the new agreement and existing ones. By calling on experts with a variety of issue area specialties, the delegation can make sure it
is aware of potentially conflicting provisions on a wide range of topics. This arrangement is especially important in any environmental agreement with trade obligations. The text must be cleared to make sure there are no inconsistencies. The agencies do not want to negotiate something that conflicts with existing commitments (US Environmental Protection Agency 2007). The broad agency participation presumably allows negotiators to learn about possible conflicts on a wide variety of issues.

The Executive Branch also briefs Congress on the issues, although there is not always a high level of interest from Congress (US Department of State 2007a). One official reports, however, that Congress has become more and more involved in fisheries negotiations over time. The reality is that the Senate is necessary for ratification of fisheries treaties, and both Houses are necessary to get implementing legislation in place. When Members of Congress are given “ownership” early in the process, then they tend to care more about the particular issues and end up helping to carry it through Congress (US Department of State 2007b). As I discussed earlier, the US is very supportive of UNCLOS and other fisheries agreements when negotiating new regional or bilateral treaties. This desire to protect existing agreements has been particularly noticeable in the testimony of State Department officials before Congress, supporting the
notion that Congressional input has indeed played a role in maintaining the status quo on fisheries.

Before and after environmental negotiations, the government holds meetings with “green NGOs” and the private sector (US Department of State 2007a). Before fisheries negotiations take place, officials collect input from others in government and also conduct meetings and conference calls with stakeholders around the country. It is not a legally prescribed process, but it is not entirely ad hoc either. Those groups often bring up existing agreements that they wish to uphold. In those cases, reliance on existing agreements does seem to be a strategy used to avoid new, undesirable regulations (US Department of State 2007b), thus demonstrating one mechanism by which private participation often leads to protection of the status quo.

4.6.3.1 Security Council Reform

Although many UN decisions do not require Congressional participation, Security Council expansion would require amendment of the UN Charter, which in turn would necessitate ratification by the US Senate (Burns 21 July 2005). Charter amendments require adoption and ratification by two-thirds majority of the full UN membership, including all five permanent members of the Security Council (Blum 2005:648). There would, therefore, be a need for the decision to go through a political process open to private citizen participation. However, unlike trade treaties discussed
above, the Security Council structure does not have the same potential for direct impact on private parties in the US, nor do individuals or businesses have access to any legal enforcement mechanism through the existing Security Council. Nonetheless, while paying lip service to “modest” expansion of the Security Council, the US has generally opposed major changes in the structure of that institution. Despite the lack of a private stake in this issue, Congress has been supportive of that effort, often serving as the driving force for the US desire to block any changes prior to management and budget reform. While private interests support the status quo in many cases, therefore, their experience does not appear to be absolutely necessary for US opposition to change. The public acceptance of permanent membership for Japan (and possibly India) does, however, seem to indicate a lower level of opposition to change than the power change hypothesis by itself would otherwise predict in this area. Although evidence is scant, this mild support may be linked to the aforementioned lack of private concern in this issue area.

4.6.3.2 Bilateral Investment Treaties

As noted above, two-thirds of the Senate must provide advice and consent before ratification of BITs, while 50% of both Houses must support accession to a broader Free Trade Agreement. These processes both allow for a high level of private participation, and the recent renegotiation of the Peru FTA to require a reference to CITES and other
agreements demonstrates the importance of existing agreements in the mind of the
Congressional leadership, as well as Congress’ power to bring about these provisions.

BIT negotiations are co-led by USTR and the State Department, while USTR is
the sole lead agency for FTA negotiations. In both instances, these core agencies develop
the US position through extensive consultation with other Government agencies.
Disagreements at the staff level can be elevated, with the deputies (or indeed the
Cabinet) eventually in charge (US Trade Representative 2007a). The Trade Policy Staff
Committee (TPSC) is the interagency process on these issues. If TPSC members cannot
agree, then they appeal to the Trade Policy Review Group (TPRG, composed of
Assistant Secretaries), then to the Deputy Secretary level, which is convened by the
National Security Council. However, this stage limits involvement because some
agencies with environmental or natural resource mandates are not members of the NSC,
so they can participate in these high level meetings by invitation only (US Government
2007c).

BIT negotiators have some flexibility when there is a hard deadline approaching,
but they otherwise consult with cleared advisors and Congress regularly. These cleared
advisors bring up existing agreements occasionally but mostly make sure that the
negotiators are following the objectives they think most important, many of which are
identified in the 2002 Trade Act legislation (US Government 2007e). Their lack of
concern may be tied to the general low level of legalization in existing investment institutions, although that does not explain why a more general savings clause would not have been included.

The 2004 Model BIT was built upon those Congressional objectives. That Model does protect a series of existing agreements, though not as broadly as one might expect from a Congressional mandate. The most direct deference in that Model (the tax clause discussed above) apparently resulted from the broad interagency process and the desire of some agencies – rather than private actors – to retain earlier bargains. Drawing directly on legislation, bilateral trade and investment negotiations appear to be highly responsive to Congressional goals. However, the Trade Promotion Authority granted to the Executive Branch in that Act limited further Congressional participation at the negotiating stage. Nonetheless, in 2007, the new Democrat-controlled Congress asked for changes in FTAs that had already been negotiated (but not ratified). Its requests started with the addition of clauses to protect existing labor and environmental agreements. This shift demonstrates the power retained by Congress and the potential for existing agreements to gain traction when Congress is able to review the details of an agreement.
4.6.3.3 WTO SPS Agreement

The SPS Agreement, as part of the broader Uruguay Round negotiations, drew on a wide range of private and Congressional input over a long period of time. USTR was the lead on most issues in the Uruguay Round, but the Department of Agriculture (USDA) took the lead on SPS negotiations with input from USTR (US Trade Representative (former official) 2007).

Within the US, the agriculture industry played a very important role because USDA – with promotion of agricultural exports as part of its mission (Prakash and Kollman 2003:624) – is heavily reliant upon industry input more generally. As a result, the National Cattlemen’s Association and the Meat Packers Association were a driving force and were intimately involved at a very early stage in SPS discussions. Their relation to USDA even included power over who would be chosen at the Assistant Secretary level, and many USDA officials previously represented major parts of the industry (US Trade Representative (former official) 2007). It is clear that the agriculture industry was supportive of the SPS Agreement’s reliance on existing standard-setting organizations, particularly the Codex Commission in which the US representative is also likely to be a sympathetic US Government official.\(^{13}\) While this industry support

\(^{13}\) With two exceptions, all current US Delegates and Alternates to the 24 Codex committees and task forces come from the industry-friendly Food and Drug Administration (FDA) or USDA. The only exceptions are
remains consistent with the public participation hypothesis, there is insufficient
evidence to demonstrate that industry support was a necessary condition for the US
proposal to include these organizational linkages. The role of Congress also remains
unclear in this negotiation.

4.6.3.4 Biosafety Protocol

In contrast with Security Council expansion and bilateral investment treaties,
Congress showed very little interest in the Biosafety negotiations early on. There were
some delegates from a Congressional Committee at a late stage, but there was not much
“left to chance” at that point (US Government 2007d). As a result, it would appear that
Congressional interest is not a necessary condition for the US to support existing
institutions. Even without direct involvement early on, however, negotiators knew that
they would have to gain Senate support if they ever sought to ratify the Convention on
Biological Diversity (CBD) or its Biosafety Protocol. As a result, there was still
recognition of the preferences held by Congress and private parties.

BSP followed a pattern similar to most other interagency processes, but the threat
of unknown effects and the scope of the issue magnified some of the contestation on the

the EPA official serving as Delegate to the Pesticide Residues Committee, and the NOAA (National Oceanic
and Atmospheric Administration) official who is an Alternate on the Fish and Fishery Products Committee.
issue. There was also a deeper need for interagency coordination than in other areas because of the complex nature of this subject (US Department of Agriculture 2007a). At this point, the issue of the perceived linkage between trade and multilateral environmental agreements had already been sufficiently well developed, so others knew to consult USTR for its substantive expertise in this area (United States Trade Representative 2007b).

US regulation on Biosafety is quite weak (Prakash and Kollman 2003:626; Vogel 2003:578). As a result, the US biotech industry is not eager to introduce regulation through international agreements while it maintains a relatively free operational environment at home. This result is in keeping with Desombre’s expectation that industry will only support international regulatory efforts when it is faced with a stringent regulatory environment at home (DeSombre 2000). However, her explanation is insufficient here because it only explains state behavior in the situation where industries facing strict regulation build coalitions with pro-regulation civil society groups, and it also fails to contemplate why there was such weak regulation in the first place. This approach falls short of explaining how an anti-regulatory preference can be translated into government opposition to regulation when, as in this case, environmental and other groups support legal strictures.
In this case, industry is able to promote its anti-regulation message by using its connections within the US Government and building on existing international institutions. Unlike in other countries, where environmental agencies were in charge, the agriculture industry-friendly US Department of Agriculture takes the lead on biotechnology regulation in the United States (Prakash and Kollman 2003:626). As a result, “[b]usiness pressures played a critical role in shaping American opposition” to the Biosafety Protocol (Vogel 2003:578), with biotech giant Monsanto apparently leading that opposition early on (Prakash and Kollman 2003:632). If, as Prakash and Kollman suggest, it was Monsanto’s eventual acquiescence that allowed the Protocol to go forward, we can infer that the biotech industry had a high level of access to the negotiations and was influential in accepting the third best outcome (behind no agreement or WTO control, and an unbalanced savings clause) that eventually emerged from this process.

Private participation in the US, therefore, does not vary much between issue areas. It is generally quite high, providing a variety of access points for interested private actors. As expected, this access to the negotiation process correlates with a high level of support for the status quo in US negotiating positions. As shown in this section, private (especially industry) preferences are translated into US negotiating positions
through the variety of access points available to them in the Legislative and Executive Branches.

### 4.7 Assessing the Hypotheses

The previous section brought together the proposed explanatory variables with US preferences across a range of negotiations. In this concluding section, I assess the ability of a series of hypotheses to explain the US negotiating position in these cases. I begin with some potential alternatives, and conclude with an assessment of the hypotheses presented in chapter 1.

#### 4.7.1 Alternative Hypotheses

##### 4.7.1.1 US Opposition to International Law

I begin with Kagan’s claim that the United States – in light of its powerful military – is uninterested in international law. His assessment finds no support in the research I have done. On the contrary, the US frequently tries to protect existing international law, and seems to place a high value on existing institutions that it played a role in creating.
4.7.1.2 Hegemonic Stability Theory

Hegemonic Stability Theory (HST) suggests that international institutions are only enacted when a powerful hegemon provides them for its own benefit (Krasner 1976). In that framework, one should expect the institutions to find less support after a powerful country faces a decline in power. However, while this theory is supported by US efforts to avoid new institutions in the face of a changed environment, HST is not supported by the evidence here either. Rather than allowing institutions to whither away, it appears that a relative decline in power actually leads to greater protection of existing laws. Furthermore, although the post-Cold War status of the United States as a global hegemon is open for debate, I have taken the position that it is at best a weakened world leader. While HST would expect the lack of a hegemonic force to result in a lack of new global institutions, that is clearly not the case in the late 1990s and early years of this century.

4.7.1.3 Baptists and Bootleggers

DeSombre has noted that the United States is one of the foremost promoters of stringent fishing regulations because of the high level of domestic regulation, and the resulting coalition between environmentalists and the fishing industry (DeSombre 2000). This explanation is particularly helpful in understanding the case of fisheries negotiations. However, it is insufficient for the other cases in this chapter because the
UNSC is not a regulatory environment and the industry prefers weak regulation – in opposition to environmentalists – in the other cases. This approach also does not consider the sources of domestic regulation in the first place, leading to the potential for omitted variable bias.

4.7.1.4 The Chilling Effect

Finally, I consider the “chilling effect” hypothesis discussed earlier in this chapter (Eckersley 2004; Stilwell and Tuerk 1999). That explanation fits well with US opposition to the Biosafety Protocol and the prominence given to trade agreements in other environmental negotiations. However, it is insufficient for explaining why other existing rules – including environmental agreements such as CITES in the recent US-Peru Free Trade Agreement – are also protected, nor does it account for other countries’ efforts to move past WTO rules in the Biosafety context.

4.7.2 Assessing the Hypotheses Presented in This Dissertation

4.7.2.1 Power Change Hypothesis

I have proposed instead that the preference against institutional change is related to a country’s desire to preserve institutions that were made at a time when the country was relatively more powerful. Although I would have expected US Government officials to avoid statements that could be construed as confirming the US decline in
relative power over time, many were forthcoming in noting that they support the status quo because of concerns about what would result from a renegotiation. This reliance on power-based decisionmaking by some Government lawyers (Safrin 2002a:439), who are supposed to see existing law as normatively attractive, provides further support for the power change hypothesis.

While it does provide a powerful explanation for institutional change and continuity, the power change hypothesis remains insufficient to explain the variation of intensity within US preferences for the status quo. Therefore, I examine further hypotheses below that help to address this slight within-case variation.

4.7.2.2 Institutional Access Hypothesis

The institutional access hypothesis suggests that states will be more likely to support the status quo when private parties within them have enjoyed access to highly legalized international institutions. This chapter provides a great deal of support for the notion that negotiators are more concerned about protecting highly legalized, rather than soft law, institutions. In addition, the Biosafety case, in particular, demonstrates the power of private access to the WTO Dispute Settlement process. Having succeeded in acquiring additional access to European markets through the Beef Hormones case, agricultural exporters in the US intensified their efforts to retain the SPS rules on which that case had been decided.
4.7.2.3 Private Participation Hypothesis

Of course, that preference for protecting existing rules remains irrelevant unless those private parties also have the opportunity to participate in subsequent negotiations. In the United States, the status quo has been bolstered by extensive private participation in foreign affairs. Unlike the process used in other countries, industry and other private parties are able to impact treaty negotiations through the Senate ratification process as well as the extensive involvement of bureaucratic agencies. With many veto points to choose from, they are in a particularly strong position when they wish to prevent institutional change from occurring. Looking again to the Biosafety case, it is clear that private parties’ connections to the process played an important role in the eventual US support for a savings clause. Again, the officials with whom I spoke would have had an incentive to avoid explanations related to influential special interest lobbying. However, all were very clear on the importance of making decisions that were acceptable to private stakeholders and Congress.

4.7.2.4 Complexity of the Negotiating Environment

The complexity of the negotiating environment proved to be very important in the statistical sample. However, there is considerably less variation on this variable among the cases studied here. The United Nations, SPS, and Biosafety involve similarly large numbers of participants, and these issues have not been addressed at regional or
bilateral levels in the same way, so it is difficult to gain leverage through that type of comparison. However, it is notable that BITs, in which the US inherently deals with only one other negotiating partner, do exhibit somewhat less US support for the status quo. This correlation certainly should not be taken as proof of this relationship, but it is consistent with my expectations.

As this chapter demonstrates, all four hypotheses find support in the US case. With declining power relative to the rest of the world, private concern for the status quo, and private participation in subsequent negotiations, the US is more likely than other countries to ensure that existing treaties are not replaced by new rules.

This assessment of support for institutional change has provided an understanding of events in the recent past. The power change hypothesis, in particular though, has important implications for the future as the US continues to deal with the rise of the European Union on the economic front, as well as India and China more broadly. A rising power may eventually attempt to override existing US-supported institutions if the US stays at its current position. However, as I have demonstrated here, the status quo holds an important position due to the intensity of preferences held by declining powers in favor of the institutions that they created and from which they have benefited. Furthermore, at such time as those countries reach their zenith of
relative power and begin to decline, their democratic processes will be important predictors of their approach to institutional change and continuity. If, as is presently the case, China’s government continues to block private participation, it should face less pressure than today’s United States to retain status quo institutions. As subsequent chapters will demonstrate, the rise of India and the European Union has brought about such preferences, but they have not been successful in overriding the international legal system to date. Chapter 7 will compare the US experience with those of India and the EU in an effort to further test these hypotheses.
5. Case Study 2: Indian Government Negotiating Positions – Pushing for Legal Change

As discussed in chapter 3, India is an important case for the study of international negotiations because of its recent rise and considerable influence for a developing country. In addition, unlike the United States and European Community—studied in chapters 4 and 6, Indian law provides less institutionalized access for private parties to reach the WTO and other existing international institutions. Private parties also do not have a formal legal role, through legislative ratification or otherwise, in developing subsequent negotiating positions.

In addition to the value of showing variation between India and the entrenched powers, India is in its own right an important subject of study in international negotiations. Along with Brazil and some other large developing countries, India plays a major role in international negotiations across many issue areas. It has been one of the leaders among developing nations, particularly on trade issues, and was also one of the primary conveners of the Non-Aligned Movement during the Cold War. By the late 1990s and early years of this decade, India’s CINC score suggests a greater share of global capabilities than every country except the United States and China (see Figures 2-
A number of studies have explored India’s negotiating position in regards to nuclear weapons (Paranjpe 1997), or special and differential treatment for developing countries in trade and environmental agreements (Narlikar 2003; Rajan 1997). However, we still have little understanding of the changing role and preferences of India and other major developing countries as their power has risen over the last two decades. India is, therefore, an important case for this study, as well as a crucial case for understanding international negotiations more generally. Existing scholarship has only a weak notion of how rising powers attempt to continue their ascent through negotiating strategies in international institutions. This chapter will examine India’s approach – as a rising power – to international legal change.

### 5.1 Anecdotal Evidence of Indian interest in Legal Change

Discussions with Indian negotiators and examination of various negotiating documents demonstrates that India is, as expected, less interested than other countries in preserving the status quo. However, it also shows, in line with the prospect theory model, that India was not nearly as adamant about overturning the status quo as its opponents were about preserving it. On the whole, there seems to be a fair bit of

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1 The combined score of all European Union Member States falls between China and India, suggesting greater European capabilities on issues for which EU Members have delegated authority to the Commission.
indifference towards savings clauses, but there is often regret about them later, as will be
evident in the case of SPS (Section 5.5).

Furthermore, within India, there is still some variation regarding support for the
status quo in international law. This response varies along the lines of the individual
negotiator’s background. In this section, I develop a general picture of Indian
negotiators’ approaches to existing international law. Subsequent sections go into
further depth regarding Security Council reform, bilateral trade and investment treaties
(BITs), the WTO Agreement on Sanitary and Phytosanitary Standards (SPS), and the

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Figure 5-1: India’s CINC Score Since 1945
My interview subjects used a variety of methods to approach the issue of legal change and deference. As a group, they could – as expected – be described as fairly indifferent to the relationship between the treaties they have negotiated and previously existing international law. Other issues are clearly much more important to these neogotiators. As I will show in the SPS case, however, there is often a fair bit of regret later on.

This indifference is often expressed as a willingness to accept savings clauses if they are proposed by other countries, despite a simultaneous avoidance of introducing the idea (Government of India 2006k). Former Foreign Secretary Muchkund Dubey notes that “Reference to existing agreements in the text for concluding new treaties has not generally been a major factor affecting India’s position on the new text (Dubey 2007).” One civil servant trained as a lawyer pointed out that India generally supports existing law (Government of India 2006m). Another lawyer currently working in the Foreign Ministry’s Legal and Treaties Division explained that deference to existing WTO rules is important because that institution serves as a focal point for so many countries and provides a cohesive legal instrument that India would not want to override (Government of India 2006l).

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2 India’s Foreign Ministry is formally known as the Ministry of External Affairs (MEA). I alternate between that title and the more colloquial “Foreign Ministry” throughout this chapter.
Many of the people I interviewed – both lawyers and other bureaucrats – referred to savings clauses as a form of precaution that would help to avoid problems of confusion and legal incoherence from conflicting rules. The current head of the Legal and Treaties Division (also a member of the United Nations’ International Law Commission) observed that savings clauses are generally not contentious matters, as they are considered at the end of the negotiation process while lawyers and the Cabinet are vetting the final text. As a result, discussion about savings clauses is not generally tied up in the scope of the agreement itself. Because these clauses are not contentious, they are often included for the sake of “abundant caution” even when a conflict between treaties is unlikely (Government of India 2006k). One of the legal officers serving under him also referred to savings clauses as “precautionary,” noting the example of Agricultural Cooperation agreements that must stay in line with UPOV (International Union for the Protection of New Varieties of Plants) rules to avoid legal problems (Government of India 2006l). A scientist in the Ministry of Environment and Forests used similar language, claiming that in his experience a savings clause is always included as a “safety valve” to make sure that the new agreement does not cause problems, even though it would seem to be unnecessary in many situations (Government of India 2006g).

As noted above, consideration of a savings clause usually takes place towards
the end of just about every negotiation, after substantive Ministries have negotiated the political aspects of the agreement (Government of India 2006g). Despite this willingness of MEA lawyers to review the treaty and consider a savings clause, active input on this issue is rarely necessary in multilateral negotiations. In those contexts, the potential concern is basically “taken care of by itself” because there is so much legal review by other countries’ lawyers and the treaty secretariat (Government of India 2006k). Although such a clause is often part of the standard draft, the Legal and Treaties Division only suggests specific language when there is a policy preference from the line ministry (Government of India 2006). Once again, it appears that Indian negotiators are not adamantly opposed to the use of clauses protecting existing law, but they are also not eager to introduce such deference themselves.

A number of other negotiators – none of whom was a lawyer – suggested that it was necessary, for normative reasons, to avoid overriding earlier obligations (Government of India 2006d; Government of India 2006g; Government of India 2006q). However, even one of these negotiators, who had experience dealing with the 2001 Stockholm Convention on Persistent Organic Pollutants, noted that savings clauses were not an important issue for the Indian delegation. While this normative concern is consistently stated, inconsistency can already be avoided through application of the Vienna Convention default discussed in chapter 1. The Vienna rule yields the opposite
result, however, subordinating earlier rules to the most recent agreement. Support for savings clauses, therefore, must have a purpose beyond mere consistency. These efforts should only be evident when the negotiator desires to protect status quo institutions.\(^3\)

In at least one situation, a negotiator noted that India supported a WTO savings clause because it genuinely preferred to retain the benefits provided by that institution. The case in question was the Convention on Cultural Diversity, and India’s negotiating team was resolute that it should not surrender the flexibility provided by WTO rules, especially since it felt that India would benefit from open markets in this context. Because Indian cultural goods have tremendous export opportunities and face little competition at home, India would do well to promote further liberalization in this sector (Government of India 2006f).

Private actors do not seem terribly concerned about this aspect of negotiations, preferring to focus on the potential for conflict with existing domestic rules (Confederation of Indian Industry (CII) 2006a; Federation of Indian Chambers of Commerce and Industry (FICCI) 2006). However, they would prefer to avoid overlapping commitments for the sake of efficient legal compliance. According to the Director of FICCI’s Foreign Trade Division, business would prefer a consistent legal framework. In fact, he claims the concern is so obvious that FICCI does not even need

\(^3\) It is, of course, also possible that a negotiator erred in supporting a savings clause.
permission from the membership to raise concerns about this type of issue, suggesting that more private participation in foreign policy might yield greater national concern for the relationship between international law provisions (Federation of Indian Chambers of Commerce and Industry (FICCI) 2006). Once again, though, if legal consistency were the only issue here, that goal could also be achieved by clear replacement of existing rules, as in the Vienna default. Nonetheless, it is reasonable to think that industry would prefer existing rules to which it has already adapted. The Head of CII’s International Trade Policy Division noted that the first reaction to potential new agreements is a study about what international agreements already exist in that area. In response, CII recommends that the Government try to avoid conflicting obligations, but it also notes where seemingly new concessions are simple to accommodate because of any similar rules that industry is already following (Confederation of Indian Industry (CII) 2006b).

While private parties are eager to see consistency in international law, many Indian negotiators may actually prefer to achieve that regularity through a clear replacement of existing law rather than savings clauses. Even one of the Government lawyers noted that sometimes, when existing law seems problematic, negotiators try to work around it in the mandate and note implementation concerns (Government of India 2006m). Former Foreign Secretary Muchkund Dubey was more resolute, noting that
reference to existing agreements is a marginal issue for India. Nonetheless, the Indian delegation does occasionally try to revise or override the Non-Proliferation Treaty through other negotiations because the agreement binds India to a second tier power status, even though India has never signed it (Dubey 2007). There is also a consistent effort to keep existing environment and labor standards away from new trade rules (Dubey 1996; Government of India 2006c). By not referring to these existing rules, a new treaty would follow the Vienna Convention default of overriding them, even if that was not the conscious goal of the negotiator.

Problematic rules are exacerbated by heavily legalized processes such as the WTO Dispute Settlement Body. Because DSB decisions are binding, the government must be very careful about which complaints it puts before the DSB, remaining cognizant of the potential effects on other sectors of the Indian economy (Anonymous 2006). Whereas before, India had the potential to escape punishment in some trade disputes, the Dispute Settlement process has shown India how powerful the WTO rules can be, leading to extreme care in subsequent negotiations and an occasional desire to overturn rules that negatively affect the Indian economy (Anonymous 2006).

Nonetheless, the decision to override rather than save existing law remains less important than other negotiating issues. Despite some opposition based on adjustment costs, industry has willingly accepted existing international standards because they are
difficult to fight and probably good for industry in the long term (Federation of Indian Chambers of Commerce and Industry (FICCI) 2006).

On the whole, India appears to show a wide range of approaches to change and deference, depending on the particular negotiator and issue involved. The following sections focus in more detail on the country’s involvement in a specific set of negotiations.

5.2 India at the United Nations: Seeking Systemic Change

5.2.1 Unilateral Support for Security Council Reform

Since 1994, India has been seeking to reform the United Nations Security Council through the inclusion of developing country permanent members. It has offered itself as a candidate since that time (2000), and has reiterated the goal of reform consistently in subsequent General Assembly meetings and UN Summit events (Singh 2005b). The Government’s official position continues to focus on additional representation for developing countries as permanent and non-permanent members (Permanent Mission of India to the United Nations). Despite a failure to convince others to move forward with the proposal at the 2005 World Summit, the Indian Government continues to push for Security Council change during UN meetings and bilateral discussions (2007).

The Government’s rationale for Security Council expansion seems to fall under
two categories. First, India claims that the Council’s current alignment is not sufficiently representative, nor are the current veto holders the most democratic states in the world (Sen 2005a). This “democracy deficit” is said to hinder the institution’s functioning (Singh 2005b). India’s official statements, therefore, often focus on bringing democracy and the rule of law to the international sphere through a more representative UNSC that has permanent members at all levels of economic development (Sen 2005c). A former Minister of External Affairs has claimed that the Security Council would benefit by recognizing diversity among nations as “a source of strength and effectiveness (Singh 2005a).” In this argument, legitimacy and democracy go hand in hand with a strong institution, and efficiency requires “acceptability of decisions perceived to be fair and just (Sen 2005b).” Security Council expansion, therefore, is not mere democratic rhetoric, nor is it to be viewed simply as an effort for rising powers to claim some degree of decision making power. Rather, it is deemed to be essential for the ongoing influence of the institution itself.

In contrast, India has simultaneously pushed a second rationale for UNSC reform. That is, in addition to the notion of representativeness, Indian officials have noted that the Council should account for changed power dynamics. As the Prime Minister has noted, in language echoing US statements, the current “structure and decision-making process reflect[s] the world of 1945, not of 2005 (Singh 2005b).” In the
words of another Government representative, “The world of Yalta and Potsdam has crumbled outside but is artificially being kept alive through the UN (Sen 2005d).” The expanded Security Council should not only be “broadly representative of the international community as a whole,” but also “of the geopolitical realities in today’s world (Gopinathan 2005).” The changed power relationships, therefore, should be reflected in a new Security Council alignment with rapid effect. India’s Permanent Representative has, therefore, ominously warned other countries opposed to change: “Do not prolong the death agony of the Yalta-Potsdam system of dominance.”

India, clearly a rising power in its own right, has been one of the most adamant supporters of UN Security Council expansion, from which it obviously stands to benefit. Despite the rhetoric of representative democracy, there remains a clear focus on expansion that would allow newly powerful participants to play an important role in any new arrangement.

5.2.2 Multilateral Efforts to Promote Reform

Despite India’s growing strength, its desire to overturn the status quo in the Security Council has been met with opposition by many UN members. Fourteen years after India formally proposed expansion, the Security Council has the same membership structure it has maintained since 1965. As a result of this institutional design, the
permanent members are in a powerful position to block reforms. While India has gained capabilities since 1945, it is still not the world’s strongest power by any measure. India has therefore attempted to build coalitions with other countries that have gained strength since 1945. The G-4 grouping of Brazil, Germany, India, and Japan represents a much larger power base than any one of those countries alone. These four Security Council aspirants have tabled a series of proposals that has achieved a “high level of endorsement (Government of India 2006o).” Nonetheless, despite the potential for increased bargaining power, the coalition exercise has also turned at least one potential supporter against the bid for Security Council reform. In particular, while China seems to support Indian membership, it is adamantly opposed to the inclusion of Japan, rendering the package deal approach insufficient to bring about meaningful change (Saran 2006).

In addition to the formal proposals tabled by the G-4, India has also joined with Brazil and South Africa, two other rising powers, in an effort to push for UNSC reform. Brazil and South Africa are situated similarly to India, and the three countries have recently established the IBSA (India-Brazil-South Africa) Dialogue Forum to fund development projects in less developed countries, promote better relations between the three members, and work together on common global positions (Government of India 2004:114). The coalition is not a formal political alliance, but it does serve as a forum for
coordinating negotiating positions in other multilateral institutions.

One of the primary goals of this new partnership is to overhaul existing international institutions, particularly the United Nations Security Council, “so as to reflect contemporary realities (IBSA Dialogue Forum (India-Brazil-South Africa) 13 September 2006).” That is, the members of IBSA would like global institutions to recognize their enhanced capabilities by granting them positions of greater influence within those institutions. These countries were weaker when the United Nations Charter was finalized in 1948. Based on the CINC index used in chapter 3, Brazil and India have experienced significant rises. South Africa has also increased its capabilities, but not nearly to the same degree. All three joined the UN by the end of 1948, but none have been granted permanent seats on the Security Council. Now that they have gained strength, the three countries together would like to see institutional structures recognize their new position and the relative decline of other powers. This goal originated with the group’s founding Brasilia Declaration (2003):

They agreed on the need to reform the United Nations, in particular the Security Council. In this regard, they stressed the necessity of expanding the Security Council in both permanent and non-permanent member categories, with the participation of developing countries in both categories. They agreed to combine efforts in order to enhance the effectiveness of the General Assembly and the Economic and Social Council of the United Nations. (IBSA Dialogue Forum (India-Brazil-South Africa) 6 June 2003:paragraph 4)
Security Council reform continues to be a major goal of the group, and an overarching goal for all three countries (Research and Information System for Developing Countries 2006). At the most recent summit, the three heads of state: reiterated that the international system cannot be reordered meaningfully without a comprehensive reform of the United Nations. The leaders emphasized that the reform of the Security Council is central to this process to ensure that the UN system reflects contemporary realities. They expressed their full support for a genuine reform and expansion of the Security Council, in permanent and non permanent categories of membership, with greater representation for developing countries in both. They reiterated that inter-governmental negotiations on the issue of Security Council reform must commence forthwith. They agreed to further strengthen cooperation amongst their countries and with other member states interested in a genuine reform of the Security Council (IBSA Dialogue Forum (India-Brazil-South Africa) 17 October 2007).

Their statements to that effect have been clear and direct, demonstrating that this is one of IBSA’s primary foreign policy goals. Nonetheless, it should be noted that, outside of the United Nations Charter, IBSA has pushed for the enhanced implementation of some existing rules. In particular, the group is adamant in its support of the decisions reached at the 2002 Johannesburg World Summit on Sustainable Development, as well as the full implementation of the Kyoto Protocol that deals with global climate change (IBSA Dialogue Forum (India-Brazil-South Africa) 13 September 2006). Of course, the institutions that IBSA has chosen to support are much more recent creations, and they do reflect enhanced bargaining power on the part of these three
It should be obvious, therefore, that the IBSA countries are eager to maintain and enhance their institutional capital with rules that allow them the greatest influence in the future. Of course, it should also be noted that Security Council reform has not yet succeeded, indicating that India’s changed role in world politics (along with the rise of its partners) has still not allowed it to overturn the power of countries who have been entrenched in powerful institutional roles for quite some time.

5.3 **Bilateral Trade and Investment Treaties**

As discussed in chapter 3, one important issue area is the realm of bilateral investment treaties (BITs). BITs provide an interesting case for comparison because all major economic players have engaged in agreements of this nature, and they provide a means for comparison within each country in regards to interactions with different negotiating partners. This discussion also allows me to hold the number of parties constant at two, thus ensuring that the number of parties to a negotiation is not the only relevant predictor of savings clauses, while simultaneously allowing for some analysis – though not well controlled – regarding the influence of different levels of complexity in the negotiating environment.

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4 BITs are also referred to by Indian Government officials as Bilateral Investment Protection Agreements (BIPAs).
Foreign investment has become an important part of India’s economy in recent years. Recent statistics show almost US$240 Billion in Indian investments abroad, and almost US$290 Billion of foreign investments in India for the year ending March 2007. Those numbers represent more than a 25% increase in each category over the previous year (Reserve Bank of India 2008).

With the increasing importance of foreign investment, India has become quite active in international negotiations that deal with transboundary investments. As of June 2007, India had signed 60 BITs, 47 of which had already entered into force. They have been reached with a wide range of developing and developed countries (United Nations Conference on Trade and Development 2007). More than 30 negotiations are still underway (Government of India 2007c).

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6 Recent reports also suggest ongoing efforts to establish an EU-India “bilateral trade and investment agreement” (European Commission 2006), as well as discussions to produce a similar agreement with the United States that would replace the existing “Investment Incentive Agreement” (Sen and Sikarwar 2008). Neither of these endeavors are included in the list of 30 negotiations formally in progress.
5.3.1 Model BIT Provisions

Bilateral investment negotiations begin with the two governments exchanging “model treaties” that detail their ideal framework for agreement (Government of India 2006l; Government of India 2006n). India’s 1994 Model BIT includes reference to other agreements in a few different places. First, it relies upon the 1982 UN Convention on the Law of the Sea (UNCLOS) to interpret the meaning of “territory” for this agreement (Article 1(f)(i)). It also allows the participants, or investors who are nationals of either participant, to employ existing dispute settlement procedures such as those established by the 1965 Convention on the Settlement of Investment Disputes between States and Nationals of other States (Article 9(3)(a)). Article 4(3) also mentions existing treaties, but only in order to clarify that the participants do not have to extend these benefits to third parties who are members of a customs union. As in the GATT Agreement, this Article simply allows for members of regional agreements to be more preferential to each other than they are towards third parties (Government of India 2006n). This clause has never been contested, and is included in all of India’s BIPAs (Government of India 2006p).

None of these provisions should be considered to constitute deference to existing

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7 India’s oldest BIT was signed in 1994 around the time that this model was approved (UNCTAD 2006). A new model text is currently under development. Government of India, Ministry of External Affairs. 2006n. Interview, Senior Legal Officer, Ministry of External Affairs, Legal and Treaties Division. 27 November. New Delhi.

8 This official also noted that the taxation clause in the same paragraph plays a similar role, ensuring that countries do not try to claim third party benefits from India’s taxation treaties.
international law. In the coding scheme I used in chapter 2, these clauses would have been coded “2” because they rely on existing law for interpretation. They do not suggest that earlier treaties should prevail over the current agreement.

Article 13 of the model text is a bit more confusing, suggesting:

“If...obligations under international law existing at present or established hereafter between the Contracting Parties in addition to the present Agreement contain rules, whether general or specific, entitling investments by investors of the other Contracting Party to a treatment more favourable than is provided for by the present Agreement, such rules shall to the extent that they are more favourable prevail over the present Agreement [sic]. (Government of India 1994)

This is a common phrasing, used in the ILO Constitution and other treaties to explain the intention of the contracting parties. It would have been coded as category 3 in the statistical analysis I presented in chapter 3 because it does invoke existing law, but only when that law is more protective than the current convention. Rather than serving as a savings clause with deference to other treaties, this formulation is used by Indian negotiators to indicate that nobody should interpret this agreement as limiting the right of investors any more than necessary. To that end, investors – when this clause is included in the final text – should be assured that India and its partner will use this treaty only to provide more rights than otherwise exist, and never to take rights away from them. As such, model Article 13 is not intended as a savings clause, nor is any
other provision in the Model text.

5.3.2 Opposing Savings Clauses

After the exchange of model texts, governments return to the table with a list of agreed provisions, and a list of outstanding issues. Most of the outstanding issues become acceptable with small modifications, and are then removed from subsequent bargaining. However, the countries usually deadlock on a small number of clauses that are not mutually acceptable. Occasionally, as in the case of India’s ongoing negotiations with Canada, that impasse is related to the other country’s insistence upon a savings clause of some sort. India, in that case, would prefer not to weaken the treaty’s substance in anticipation of a procedural dispute that could emerge at the implementation phase. It is unwilling to include savings clause language in the agreement (Government of India 2006l).

At this point in the process, the Ministry of Finance consults with the Ministry of External Affairs (which examines the potential agreement from the WTO perspective), the Law Ministry (which makes sure that there are no implementation concerns), and other relevant government officials (Government of India 2006l; Government of India 2006n). There is no defined route for participation from private actors. Nonetheless, groups like FICCI have found that industry is somewhat interested in commenting on
these bilateral agreements. Their concerns, however, are focused more on domestic issues than on existing international commitments (Federation of Indian Chambers of Commerce and Industry (FICCI) 2006).

As with the general impression noted above in section 5.1, India prefers to override or ignore past agreements when there is a potential conflict of laws. In the case of ongoing negotiations with the EU, for example, the status of India’s existing BITs with individual EU Member States has been a point of contention (see section 6.3). However, Indian negotiators do occasionally consent to savings clauses when the negotiating partner is adamant about their inclusion (Government of India 2006p). Although India supports legal change in this setting, it is not always able to achieve that goal when negotiating with more powerful partners.

5.4 India and the SPS Agreement – looking for a new standard-setting process

The WTO Agreement on Sanitary and Phytosanitary Standards (SPS) was an integral part of the Uruguay Round final agreement. As I discuss in chapter 3, the SPS Agreement is an important case for this project because of its provisions that rely on existing international standards. In particular, Article 3 provides for a presumption of acceptability when “sanitary or phytosanitary measures…conform to international standards, guidelines, or recommendations (Article 3.2)” such as those created in the
“Codex Alimentarius Commission, the International Office of Epizootics, and the international and regional organizations operating within the framework of the International Plant Protection Convention (Article 3.4).” This framing means that countries are allowed to restrict imports along the lines suggested in those fora, but must defend any measures more restrictive than those levels of preventive action. India, with its large agriculture base and a desire to increase exports, wanted to play a greater role in forming those acceptable international standards. The structure of existing organizations, as this section will demonstrate, was not particularly conducive to Indian participation.

India has viewed the opening of markets for agricultural goods as one of its primary goals in ongoing trade negotiations. As early as 1987, one of India’s chief Uruguay Round negotiators noted that a reduction in developed country SPS measures, including US phytosanitary restrictions on mango imports, would be beneficial for developing countries (Hoda 1987:193,201).

5.4.1 Lack of Indian Concern during the Uruguay Round

India’s role in the SPS negotiations has received very little attention from academics and other observers. However, many critics of the Uruguay Round within India have focused on this agreement as one in which their country lost some important
flexibility for setting appropriate import standards and avoiding undesirable export limitations. In particular, scholars and former government officials have noted that the Agreement’s reliance on existing institutions puts developing countries at a disadvantage because those existing institutions were not designed to their liking.

It is clear that the use of international standards, and discussions about which ones were most appropriate, were contentious aspects of the SPS negotiations. Although this question was eventually resolved, early discussions encountered dissent regarding the use of existing standards (GATT 28 October 1988). While this provision for international standards may not be a traditional savings clause, and the details of existing standards are not at issue here, it does represent a concern about deference to the existing rules of standard-making organizations. This represents one way in which deference is pursued by developed countries who played a role in creating earlier institutions. Subsequent efforts by newly powerful countries are often unsuccessful in their efforts to fight off the status quo.

There was some general opposition on the part of developing countries, but India was not particularly involved in those statements and did not aggressively try to oppose the inclusion of international standards during the Uruguay Round negotiations. An early statement on behalf of a few developing countries noted that “the immediate application of international standards may serve as unintended barriers to trade among
developing countries (GATT 13 September 1988:part II(c)).” Shortly thereafter, it was pointed out during the first negotiating session that “not all participants were involved to the same extent in the work of the different international standards organizations operating in this field (GATT 28 October 1988:para.9).” A couple years later, opposition had softened, though some participants continued to note that “it was not always appropriate for developing countries to use international standards (GATT 4 May 1990:para.6).”

Despite this public opposition to international standards among some developing countries, India was not adamant in resisting such standards. Indian negotiators did prefer not to include these standards, having played an insignificant role in their formation (Government of India 2006e). Indian industry, despite a low level of awareness, is also generally opposed to bringing in international standards (Confederation of Indian Industry (CII) 2006a). However, not many domestic actors took part in SPS discussions because – despite its potential – India was not yet considered to be a large scale agriculture exporter at the time (Government of India 2006e). As a result, even if India generally liked the existing standards process, there would have been no domestic constituents pushing for the status quo. This lack of private participation seems to have further limited potential support for existing institutions.
The reliance on international standards seemed fairly innocuous at the time since those standards had already undergone an international vetting process (Government of India 2006b). Furthermore, negotiators felt the need to focus on other issues that they deemed to be much more important. In contrast to its minimal role in the SPS working group, India was quite involved in negotiations over intellectual property at the time, particularly in an effort to prevent developed countries from making existing WIPO standards into legally enforceable WTO rules (Government of India 2006b; Government of India 2006e). SPS concerns were of much lower concern to Indian negotiators.

The resulting Indian indifference towards international SPS standards is also evident from India’s lack of concern in public negotiating documents. I have examined all Indian submissions from the Uruguay Round Negotiating Group on Agriculture, of which the SPS negotiations were one part. As I note above, India was not a major player in this negotiating group, as it was concentrating more on TRIPS and other issues. Even within Agriculture, India was not terribly focused on SPS, preferring to promote special and differential treatment for developing countries more generally (GATT 6 August 1990; GATT 21 December 1987). In the one instance that an Indian proposal did address SPS, it did not touch on the issue of existing international standards and organizations (GATT 14 November 1988).
5.4.2 Subsequent Concerns about the Uruguay Round Outcome

Despite the lack of concern during the Uruguay Round, Indian negotiators were later among the forefront of those claiming that this aspect of the SPS Agreement placed India and other developing countries at a serious disadvantage (Dubey 1996:79). As one former official notes, the problem lies in who participates with setting the international standards. Although this concern does not relate to any one standard in particular, it is still a concern because developing countries continue to have trouble participating in the standards organizations to the same degree as other governments (Government of India 2006b).

Other observers have also noted this concern about developing countries being forced to rely on existing standards when they did not get to play as important a role in creating them (South Centre 2006). B.L. Das, a former Indian Ambassador to Geneva, claims, “International technical standards and rules of origin are being formulated which will have important implications for the market access of goods, but the developing countries have hardly got the resources and capacity to participate in the process (Das 2002).” This weak role in standards organizations results, to some extent, from a lack of resources for participation. However, institutional structure also plays a role. Developing countries are at a voting disadvantage in the chosen institutions

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9 Dubey has served as India’s Ambassador to Geneva and Foreign Secretary.
because new standards often require support from only a majority of those present, rather than a majority of the organization’s membership (WTO 24 September 1998; Zarrilli 2000:321-24,335). Therefore, when the least developed countries are unable to attend a meeting, less votes are required for acceptance of a new standard. With this reduced obstacle to new standards, a coalition of the remaining developing countries may not have the votes to block new provisions supported only by the OECD.

Perhaps developing countries would have opposed this linkage to existing standards organizations during the Uruguay Round if they had been aware of the ramifications at that time. India has since raised these concerns in WTO negotiations, particularly in the lead up to the 1999 Seattle Ministerial meeting, as its negotiating capacity had risen by that time (Government of India 2006b; WTO 24 September 1998).

India shares the aforementioned concern in this context that standards may be adopted by a majority present in the standards organization meeting, even though those assemblies do not represent the full group of countries that are bound as WTO members to view the resulting standard as a legal ceiling. As India’s 1998 submission to the Committee on Sanitary and Phytosanitary Standards states:

…various committees or expert groups, based on a majority decision of the countries attending the meetings of these bodies, adopt international standards. In the absence of most developing countries, these meetings are naturally steered by developed countries and very often the safety limits which are decided by these bodies are those which are felt to be appropriate by the developed countries, without necessarily taking into
consideration the conditions prevailing in the developing countries. (WTO 24 September 1998:para.5)

India proposed instead that “for the purpose of the SPS Agreement, a standard, guideline or recommendation shall be considered mandatory only if an agreed minimum number of countries from different regions have participated in its formulation, i.e., in the entire process relating to its adoption, and that it has been adopted by consensus (WTO 24 September 1998:para.10).”

Overall, India has expressed opposition to the SPS Agreement’s reliance on earlier standard-setting organizations. Although this opposition was fairly weak during the Uruguay Round, it began to emerge shortly thereafter. Such inattention might be explained, at least in part, by a lack of awareness regarding the Agreement’s ramifications. However, that lack of concern also demonstrates the lower level of interest paid by those who have little to lose and are therefore less attuned to potential gains from institutional change. The growing expression of concern also varies with important changes in Indian negotiating capacity from the late 1980s through the late 1990s. During the Uruguay Round, India failed to appreciate the value of change as much as those who were worried about maintaining the status quo. Following the Uruguay Round, however, as the problem became more clear, and India gained bargaining power, it set forth more energy to change the SPS and the cited standard-
setting organizations.

5.5 Biosafety Protocol and India

The Cartagena Protocol on Biological Safety (Biosafety Protocol, or BSP) is another important negotiation for assessing hypotheses about legal change because each country took a different stand regarding the importance of existing international agreements. In particular, proponents of a savings clause – particularly the United States and other biotech exporters – seem to have focused their efforts on protecting the limitations on import barriers that were developed in the SPS Agreement discussed above.

India has become an important biotech power over the last decade. In 2006, India was the world’s fifth largest producer of genetically modified (GM) crops, with 3.8 million hectares (9.4 million acres) of Bt cotton under cultivation. This represents almost a three-fold increase over the previous year (James 2006). The Indian biotech industry faces a wide range of domestic regulations (Newell 2007:185-86). As a result, the Biosafety Protocol is a major concern to Indian producers, even though their current efforts are focused entirely on cotton, much of which is used for domestic production. Although the industry was not yet well established during the Cartagena negotiations, India’s high tech sector was already beginning to develop interests in this area.
India, which has long claimed that its lack of power in the Uruguay Round led to a poor outcome in the SPS rules (see section 5.4 above), could therefore be expected to use a new negotiation to overturn those rules. Having already tried to change SPS once, one would naturally expect Indian efforts to override SPS rules again in this context. As it happens, India did oppose the US savings clause idea during BSP negotiations. However, it also did not actively block efforts to include a savings clause, in part because it did not want to affect other existing international institutions and the international legal system more generally. Once again, a similar pattern emerges, with India looking to overturn the status quo but not taking a strong stand in that direction.

India only made one submission on the topic of relationships with existing international agreements.10 As in the 1994 Model BIPA described above (Section 5.4), the Indian proposal suggests that the new agreement should not affect sovereign and navigational rights established by UNCLOS (United Nations Environment Program 10 December 1997:7, para.5). The Indian position also seeks, as in Article 13 of India’s Model BIPA discussed earlier, to clarify that any agreement reached would not be designed to remove existing environmental protection. Whichever rule “better

10 India’s two earlier formal submissions to the Biosafety Working Group do not mention the relationship to existing international agreements at all, despite the fact that the United States was already proposing a savings clause at this point in the process. United Nations Environment Program. 6 May 1997. INDIVIDUAL GOVERNMENT SUBMISSIONS ON THE CONTENTS OF THE FUTURE PROTOCOL: UNEP/CBD/BSWG/2/Inf.2, United Nations Environment Program. 18 August 1997. GOVERNMENT SUBMISSIONS: UNEP/CBD/BSWG/3/5.
protect[s] biological diversity, human health and the environment” would take precedence in this formulation. Once again, this Indian stance is not designed as deference to existing law, but rather to clarify the Protocol’s intent (United Nations Environment Program 10 December 1997: 7, para.4). And to the extent that the proposal addresses existing law, it is distinctly not concerned with protecting WTO or other trade rules as the United States was pushing at the time. Furthermore, even that narrow focus on promoting stronger environmental provisions seems to have dropped from India’s major goals, with no formal submissions in later negotiating rounds. India once again did not push for deference to existing international agreements, even though it was obviously an option, with the relationship between WTO standards and the new agreement clearly on the table early in the Biosafety negotiations.

In this case, the WTO savings clause was raised by others, in particular the United States (see chapter 4). At the time, the Indian delegation – along with other developing countries – was more interested in the containment procedures being proposed in the Protocol (Government of India 2006j), and was therefore less concerned with the savings clause question. Once the relationship to trade rules was on the table, the Indian delegation decided to add a representative from the Commerce Ministry in order to address that issue (Government of India 2006m). This ability to adapt served Indian negotiators well, while allowing for the engagement of private actors who
consult with the Commerce Ministry instead of the Ministry of Environment and Forests.

While the Indian delegation did not wholeheartedly support a savings clause, they were willing to accept it, especially since they preferred not to create any contradiction between different international treaties (Government of India 2006m). This latter position was clearly pushed by Ministry of Commerce representatives.

On the whole, India was not in favor of a savings clause, but this issue was not a major stumbling block for Indian negotiators either. Again, the inattention to questions of legal change speaks to the lower level of effort expected from those who would benefit from change.

5.6 Positioning India and Testing Hypotheses

Figure 5-2 shows India’s position on the institutional change decision tree introduced in Chapter 1. Based on these expectations, rising powers should oppose the status quo, no matter what domestic political influences would suggest. India is fairly consistent in its weak opposition to savings clauses (see Table 5-1 for outcomes on each of the four primary case studies), as the model anticipates. While this correlation between power increase and support for institutional change appear strong, the remainder of the chapter will attempt to show causal linkages between these two.
variables, while also assessing the impact of the other hypotheses discussed in chapter 1.

This endeavor requires me to show not only a lack of support for existing law, but also some intention behind that lack of support. There could be many reasons – including negligence, lack of attention, and lack of resources – why a government may neglect to raise a particular issue or fail to adamantly push for its preferences in a negotiation. However, to support any or all of the hypotheses outlined earlier, I will need to demonstrate India’s actual preference for that outcome, even if it was not pursued with gusto.

The remainder of this section looks at the institutional change hypotheses, and discusses how they fare in the case of India. Although I introduce these concepts as explanatory variables, the mere correlation between them and the expected lack of enthusiasm for savings clauses would be quite insufficient to test any of the hypotheses suggested earlier. For one, all three of the primary hypotheses point to the same result in the case of India. Assuming we do observe that result, it would be impossible to determine which hypotheses were most helpful because such an outcome would be overdetermined. Therefore, in this section I will assess the role that each of these characteristics actually played in decision making. By tracing the decision process through documents and interview responses, I hope to understand the rationale for Indian negotiators’ stance on the influence of existing international law.
Figure 5-2: India’s Position on the Decision Tree
Table 5-1: India’s Approach to the Status Quo in Selected Negotiations

<table>
<thead>
<tr>
<th>Negotiation</th>
<th>Year</th>
<th>Power Change</th>
<th>Private Access to Existing International Institutions</th>
<th>Formal Private Participation in the Negotiation Process</th>
<th>India’s Support for Status Quo</th>
</tr>
</thead>
<tbody>
<tr>
<td>UNSC Expansion</td>
<td>1994 - present</td>
<td>Risen greatly since 1945</td>
<td>Access is provided to WTO Dispute Settlement, although it tends to be limited to well connected groups and state-owned industries</td>
<td>Very little private participation, other than Parliament Questions</td>
<td>Complete opposition to the current structure; Looking for change, including a permanent Security Council seat for itself</td>
</tr>
<tr>
<td>Bilateral Investment</td>
<td>Many</td>
<td>Varies, but generally a steady rise</td>
<td>No formal role for private groups, but their opinions are often solicited</td>
<td>General opposition to status quo rules, except by Government lawyers; opposition has grown over time</td>
<td></td>
</tr>
<tr>
<td>WTO SPS</td>
<td>1988-1994</td>
<td>Generally rising, though still in transition at this time</td>
<td>Almost no private participation</td>
<td>Quiet opposition to existing standards; later efforts to overturn these results</td>
<td></td>
</tr>
<tr>
<td>Biosafety</td>
<td>1997-2000</td>
<td>Rising since SPS negotiations</td>
<td>Participation through interministerial Working Group process</td>
<td>General lack of support for savings clause, but weak efforts to accomplish that goal</td>
<td></td>
</tr>
<tr>
<td>Overall</td>
<td>Many</td>
<td>Ongoing rise since World War II</td>
<td>Very little access unless parties are already well-connected</td>
<td>No formal role for private parties, but increasing efforts to include their opinions</td>
<td>General opposition to the Status Quo, though often quiet on that account</td>
</tr>
</tbody>
</table>
5.6.1 Power change and dissatisfaction with the status quo

First, on the matter of shifting power, I have suggested that established and declining powers should support the legal status quo, while rising powers should be eager to change the existing legal order. To that end, a country like India – seen by most as a state on the rise – should be expected to promote change. India’s current position should allow it to succeed in those efforts to some degree. In the realm of trade, for instance, India’s large size makes it a desirable market and an important trading partner for many other countries. As its market has opened over the last two decades, it has become even more influential in the global economy. While it may not be able to shape every aspect of multilateral trade negotiations, India has the potential to veto anything deemed truly onerous because the other countries will not want to enact a major global trade agreement without India’s participation. The country has experienced similar growth in other areas as well. I expect that India will, therefore, be interested in overturning any rules that were put into place earlier when it occupied a much weaker position.

Many recent studies point out that India plays a constantly growing role in world politics for a variety of reasons. By just about any measure of global capabilities, India is more powerful now than it was at the time most major international institutions were established. As I noted in chapter 2, India’s share of the world’s capabilities (measured by the CINC index) has grown from under 5% at independence in 1947 to 242
nearly 7% in 2001 (see Figure 5-1). India’s share of global GDP rose from approximately
4.5% in 1950 to 6% in 2000. Importantly, the bulk of each rise has come since 1990,
meaning that India occupies an even stronger bargaining position now than it did
during the Uruguay Round negotiations that created the World Trade Organization
(WTO) in the late 1980s and early 1990s. The rise is expected to continue into the
foreseeable future. By 2015, India is projected to possess the fourth greatest
concentration of power in the world (Tellis 2005:30)\textsuperscript{11}, and by most accounts will soon be
among the top five economies in the world (Johnson 2007; Tellis 2005). A rise in power,
of course, suggests the ability to achieve more now on the international scene than the
country could during the previous period.

This rise is evident in a number of different areas. For starters, India has the
third largest military in the world (Nayar and Paul 2003:43), although that measure
should not come as a surprise with India’s enormous population. The major change
over time, however, is the increasingly high tech equipment in use by the Indian
military (Nayar and Paul 2003:49-52) and its growing nuclear capabilities. In addition to
the GDP measures described earlier, India’s economic power can be viewed in a few
different ways. Much has been said about the rise of high tech industries in India and
the strength of the services sector (Nayar and Paul 2003:54-56). In order to demonstrate

\textsuperscript{11} The United States, European Union, and China are projected to remain ahead of India, as they currently
are in the CINC index.
a country’s strength, the level of imports is also an important characteristic because it provides a measure of other countries’ dependence upon India (Virmani 2006:4609-10). In this realm, too, India’s large and growing population provides a huge market for products from potential trading partners (Nayar and Paul 2003:56-67), and one that should grow as the economy continues to liberalize and more people move out of poverty to become potential consumers. The large population also provides advantages due to the resulting surplus of labor that can be employed in a globalizing economy.

A country’s position is also determined by the perception of other actors in world politics. In recent years, the United States has begun to recognize India as an important player on the international stage (Rice April 14, 2005; Tellis 2005). The US has gone so far as to recognize the new hierarchy by granting India and others a more prominent status in some international institutions – such as IMF voting rules – as a result (Drezner 2007:38-39). However, this action seems to be a matter of accommodation only in situations of lower priority to the US (Drezner 2007:39). Developing countries also seem to respect India’s position, from its status as founder of the Non-Aligned Movement to recent leadership in the G-20 and G-77 groupings (Nayar and Paul 2003; Singh 2006:59;45). The success of those coalitions has increased in recent years, making the leadership role more important than it was previously (Research and Information System for Developing Countries 2006).
Of course, India’s newfound strength also points to earlier weaknesses. As a result, it is clear that India does not like many of the existing international institutions and feels that it generally received a bad deal under most previous international rules. In general, Prime Minister Indira Gandhi and others have expressed concern that the advanced industrial countries “reached their present affluence by their domination over other races and countries…They got a headstart through sheer ruthlessness, undisturbed by feelings of compassion or by abstract theories of freedom, equality or justice (Rajan 1997:p26 quoting Gandhi)”. This perspective shows India’s broader interest in overturning the existing world order.

Although the country clearly benefits from some existing provisions, it has expressed concerns about unfair results from a series of negotiations. For instance, despite good arguments for permanent membership on the United Nations Security Council, India was not considered for such a position when the UN was founded in 1948, nor has it succeeded in reforming that institution since (Nayar and Paul 2003:66-67) (see Section 5.2). India’s biggest grievance, however, is what has been referred to as the “nuclear apartheid structure” of the 1968 Non-Proliferation Treaty (NPT) regime (Nayar and Paul 2003:7-8; Singh 1998; Virmani 2006:4601). The system is viewed as discriminatory because it allows existing powers to keep nuclear weapons but does not allow others to acquire them (Nayar and Paul 2003:14-15; Thomas 2002:181). In a Cold War world where a country acquired great power status by having the right to nuclear
weapons, NPT was viewed in India as an institutional means to deny the legitimacy of future Indian gains (Nayar and Paul 2003:76-79).

More recently, Indian commentators have suggested that the Uruguay Round negotiations were highly discriminatory against developing countries in general, and India in particular. Muchkund Dubey, who served as Foreign Secretary during part of the Round has declared that the resulting treaty represents a disservice to developing countries and an unequal advantage to the powerful industrialized nations (Dubey 1996). B.L. Das, also a participant on behalf of India early in the Uruguay Round when he was India’s Ambassador to the GATT, has expressed similar concerns about the eventual outcome (Das 1998). The Indian public was also angered by the Uruguay Round results when the nearly complete agreement became freely available in late 1992 (Dubey 1996:10). Interestingly, the primary successes for India, according to Dubey, were the blocking of western efforts to incorporate existing environmental and labor standards from other international agreements (Dubey 1996:127-28), as well as the replacement of the Multi-Fiber Agreement (MFA) (137), all of which were negotiated earlier when India would have been in an even weaker position. While the overall displeasure with the Uruguay Round should have very little effect on most of the treaties in the dataset analyzed earlier,\(^\text{12}\) it was quite relevant for the current Indian negotiators who I have interviewed. In contrast with these earlier failures, India is now

\(^{12}\) Only 9 treaties from the random sample were negotiated after 1994, none of which involved India.
in a position to at least prevent undesirable outcomes, if not to participate in agenda setting.

On the whole, then, India’s formerly weak position has resulted in disappointment with a large portion of existing international law, leading me to expect that India should not be among those countries pushing for deference to existing agreements. This expectation finds support from the cases described in this chapter. They demonstrate a correlation between India’s rising power status and also present evidence that the desire for change is caused by those shifting power dynamics.

5.6.1.1 Security Council Reform

On the matter of Security Council reform, India has supported major systemic changes, as the power change hypothesis would predict. In addition to this correlation, there are clear signs that its efforts to promote change were linked to the greater bargaining leverage accrued since 1945. This linkage comes out in Foreign Ministry statements regarding the need for a Security Council that mirrors current geopolitical realities.

In addition to the rhetoric about a changed world in the new millennium, India’s tactics suggest a degree of confidence in its new position. In fact, most of its proposals have been geared towards renegotiation generally, without setting Indian membership as a precondition. The country’s official position is that candidature should be “based on agreed criteria, rather than be a pre-determined selection (Permanent Mission of
India to the United Nations).” It is, of course, assumed that restructuring would result in a permanent Indian seat on the Security Council, meaning that it does not have to lobby for itself once reform becomes feasible. Other than in response to Parliamentary Questions, the Foreign Ministry rarely focuses on India’s own candidature in public statements and negotiating documents. Rather, the Ministry has portrayed India – because of its power and democracy – as clearly deserving a permanent seat (2000), if only reform could be accomplished. In this context, it is interesting to note that – although India felt aggrieved by its subordinate position for many years – its intensive efforts to bring about change did not emerge until the country’s sharp upward trend in the mid 1990s. Furthermore, the willingness to campaign for change generally – rather than only for an Indian seat – demonstrates that India is not merely making a farfetched plea for inclusion. Instead, its rising influence is linked directly to preference for institutional change. The power change hypothesis, therefore, is bolstered by the timing and substance of the Indian campaign for Security Council reform.

Moreover, India has been careful to oppose compromise solutions that would result only in more nonpermanent Security Council members. It initially expressed a willingness to consider that proposal – put forth by the Non-Aligned Movement – only if other efforts fell through completely (2001). As Indian influence has continued to grow, however, officials have been more explicit about the inadequacy of adding more nonpermanent members (Gopinathan 2005). India’s Permanent Representative to the
UN has claimed that “Non-permanent membership for more than half a century has not been able to address…the vulnerability of the vast majority, precisely because it lacks the continuity and institutional memory of permanent membership (Sen 2005d).” He has gone on to suggest that new permanent members must also have veto power in order to balance the weight of existing Security Council members (Sen 2005c).

Clearly, the Government’s support for Security Council expansion is linked to the expected results of any institutional reforms. India’s enhanced position in world affairs has quite evidently resulted in a desire to overturn the existing Security Council structure.

Of course, despite India’s increased bargaining power and willingness to join coalitions with other rising powers, it still has not been able to replace the existing institution. Its rise has been met by institutional resistance from those powers who stand to lose influence in a reconfigured Security Council.

5.6.1.2 Bilateral Investment Treaties

India’s experience with bilateral investment treaties demonstrates a desire to avoid legal deference but a fair bit of indifference towards savings clauses overall. The impasse with Canada suggests that countries who have declined over time may be more excited than India about the protection of existing international law. Although the pattern is consistent with my hypotheses, there is no firm evidence to show that India’s aversion to savings clauses in new BITs is rooted in its status as a rising power. Again, it
must also be noted that this preference has not always been achieved when negotiating with more powerful partners.

5.6.1.3 WTO SPS Agreement

The SPS case provides support for the power change hypothesis on two levels. First, developing countries – and India in particular – feel that they got a bad deal in the original SPS negotiations, primarily because they are now forced to comply with earlier international rules and standards that they participated in forming to an even lesser degree than the SPS itself. They believe that this reliance on existing institutions puts them at a disadvantage, even relative to their current power situation. Although not fully apparent at the time of the Uruguay Round, the shortcomings of existing standards organizations have become clear to rising powers like India. Former negotiators have been very clear on the link between India’s rise and the desire to change existing international law.

Second, once India recognized this concern and developed the negotiating capacity to address it, it attempted to alter that decision made in the late 1980s before liberalized India became an important player in the international economy. Again, in this situation, the rising power demonstrates a desire to alter the status quo. Despite these repeated preferences for change, India has not pushed as hard on this issue as the developed countries have, demonstrating once again that relatively declining powers tend to push harder for the status quo than rising powers do for change. The more
entrenched one’s institutional success becomes, the more likely they are to defend that position.

Prospect theory suggests that when two negotiators face an equal gain and loss, the potential loser will be more adamant about protecting the status quo than the other party will be in support of change. In negotiations over Security Council reform and SPS, it appears that India’s potential gains eventually rose to a level that was sufficient to trigger active opposition to the status quo. It is clear that a better understanding of SPS rules emerged after the Uruguay Round, leading India to shift away from its inattention to the impacts of existing standards institutions. As in the Security Council efforts, India still has not achieved its desired changes to the SPS Agreement, but it is no longer for lack of trying.

5.6.1.4 Biosafety Protocol

The Biosafety case also provides support for the power change hypothesis. Despite having a large biotech industry that might gain from further liberalization, India did not support a WTO savings clause during the Cartagena negotiations. Indian negotiators eventually consented to some protection of SPS rules for a couple of reasons. First, there were concerns among Commerce Ministry officials that a lack of protection for SPS might also weaken the WTO system more generally, leading to the removal of the trade benefits that had been achieved. Second, India’s level of bargaining power allowed some influence in the negotiations, but the desire to complete some sort of
agreement on this topic meant that Indian positions had to accept compromises necessary for other major players to remain on board. This lack of fortitude suggests that India’s weak opposition may also relate to its incomplete rise in power status. It still cannot hope to outbargain an economy like the United States.

India’s recent and continuing rise has put it in a position to gain a much better bargain in international negotiations than it was able to achieve sixty, or even twenty, years ago. Indian negotiators have, therefore, been at the forefront of those pushing for institutional change in the international system. Assuming this rise continues, we should expect to see an intensification of India’s preference for change. At the same time, a continuing rise should allow it greater success in having those preferences incorporated into the resulting institutions.

5.6.2 Private Access to Existing Institutions

Of course, in order to take advantage of legal institutions that do benefit a country, it must also be able to use the relevant implementing mechanisms. Since only Member States can actually file cases in the Dispute Settlement Body (DSB), private industry can only gain from WTO rules if it can get the government to take up its cause. Even if India were thrilled with the results of past negotiations, there would be no constituency for supporting legal deference unless some actors were able to make use of existing international institutional procedures. Of course, if it is true that India has failed in earlier negotiations, there should be little demand for such access anyhow.
Unlike US and European rules discussed in other chapters (Shaffer 2003), India has no formal process by which an industry can ask the government to file a dispute on its behalf. Nor does anybody seem to be pushing for such a process at present (Advisory Centre on WTO Law 2006). India, as discussed above, is in a much stronger position than it was twenty years ago during the negotiations that created the WTO. It would seem, therefore, that well connected private parties are likely to be dissatisfied with the original outcome and ready to gain greater benefits than they were previously able to achieve. Without a formal process for bringing complaints, one might expect that the only parties who have access to the benefits provided by WTO rules are the well-connected companies and industries who are dissatisfied by the institution anyhow. Other, less connected private parties may be more excited by the legal benefits, but have little ability to get them implemented. As a result of the limited access provided, those other private parties are also unlikely to be excited by existing rules – however beneficial on paper – that they cannot use. Without access to these benefits, there are likely to be very few private parties pushing for legal deference (at least in the form of savings clauses that protect WTO rules) in future agreements.

Most potential users of processes like the WTO DSB, therefore, would likely be private actors that did not influence earlier government positions since earlier

\[13\] This line of reasoning suggests that the same private parties remain influential within the country. Although such shifts are rare, the section 5.6.3 calls that assumption into question.
negotiations generally failed to produce the rules desired by well-connected groups in India at the time. Alternatively, some private industry may have invested in changes that respond to the new institutional setting, leading to a changed set of preferences.

Developing countries in general do not gain the same benefits as wealthy countries from existing institutions because their lawyers have less experience, they cannot take advantage of economies of scale with the small number of legal actions, and they are concerned about the potential losses from alienating major powers (Shaffer, Ratton Sanchez, and Rosenberg 2006:23-25). Some large developing countries are adapting to the process, and starting to involve private parties more, even if not within a formal process, to raise concerns (Shaffer, Ratton Sanchez, and Rosenberg 2006). India seems to be less successful than Brazil, however, in its attempts to support private sector involvement in bringing cases before the WTO Dispute Settlement Body (DSB). Nonetheless, some legal capacity has begun to develop at home (Advisory Centre on WTO Law 2006; Venugopal 2006).

India has been one of the most active developing country participants in WTO disputes, reaching the panel stage in 17 complaints and 19 cases as a defendant (WTO 2007). Benefits from the existing institution usually come from cases where a country has acted as plaintiff, bringing about change in access to some other country’s markets. The lack of a formal mechanism for private involvement seems to limit participation to
those parties who already would have had influence and benefited from the rules to the extent possible.

However, when a dispute is initiated by the other country, the lack of previous benefits and lack of access may be irrelevant. The Dispute Settlement process, in that respect, can be valuable to parties on the defense as well. A defendant also stands to gain when a complainant loses and sanctions are avoided. In the absence of the dispute settlement process, a stronger adversary could simply apply sanctions at will. To that extent, some private parties may appreciate the Dispute Settlement process even without gaining formal access as a plaintiff.

In general, government relations with the private sector are not very good, although businesses can be heard informally (Advisory Centre on WTO Law 2006). As a result, companies try to bring their concerns to the government through the established chambers of commerce, the Confederation of Indian Industry (CII), the Federation of Indian Chambers of Commerce and Industry (FICCI), and the Associated Chambers of Commerce and Industry of India (ASSOCHAM). According to CII’s Head of International Trade Policy, when CII is approached, the first step is to examine the viability of the case, demonstrating the importance of a legalized process. Second, before approaching the government, CII surveys all other members to make sure that support for the case at hand would not be detrimental to another member industry. CII only takes the case to government if the membership at large would benefit from the
case (Confederation of Indian Industry (CII) 2006b). Otherwise, the industry will have to approach the government by itself without any institutional backing, and without being able to move past the original status quo that CII participated in forming (Sinha 2005). Although CII and FICCI have been able to play this role as a gateway to the government in the past, both have now closed their Geneva offices, leading to even less access (Advisory Centre on WTO Law 2006).

In one instance, the shrimp industry has managed to make its concerns known when faced with an anti-dumping case in the US International Trade Commission (ITC). In this situation, market access was going to be curtailed, but the well-connected Seafoods Exporters Association of India (SEAI) prevailed upon the Government to contest the decision through WTO Dispute Settlement proceedings. This effort, while demonstrating one potential advantage of WTO rules, also shows the importance of existing connections in order to use international institutions successfully. Without SEAI’s participation in the Government’s Marine Products Export Development Authority (MPEDA), the industry would have faced a much more difficult road to DSB participation (Bhattarcharyya).

Without a formal process in place for business to approach the government, many of the DSB cases filed by India involve public sector industries (Advisory Centre on WTO Law 2006) or systemic issues that affect all industry. As in Brazil, the challenge

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14 The Dispute Settlement Body decided in favor of India in March 2008.
is to bring in “smaller and less organized sectors to help to identify…foreign trade barriers that they face (Shaffer, Ratton Sanchez, and Rosenberg 2006:64).” With this lack of access to the existing institutions, it would seem that there should be very little private support for protection of even the most advantageous rules. In fact, that link is supported by evidence from the negotiations discussed in this chapter.

I would expect more enthusiasm for savings clauses in BITs because of the private access inherent in these agreements. That enhanced private access to existing institutions may explain the inclusion of language in Model text Article 13 to maximize investor rights, although it falls short of major support for the status quo.

In keeping with hypothesis 2 described in earlier chapters, it is important to examine whether the lack of access to WTO benefits weakened savings clause support from newly important industries during the subsequent Biosafety negotiations. In this case, institutional access is a weak explanation because the growing biotech industry coordinated its political activities through CII (Newell 2007:192-94), an organization that is already quite well connected to key decision makers. As a result, the biotech industry already would have been in a position to have the government file DSB complaints if necessary. However, there is no complaint to be filed against other countries if the original rules do not benefit India’s industry anyhow.
5.6.3 Private Participation in the Negotiating Process

Third, even if the prior two conditions are fulfilled (i.e., private parties benefit from, and have access to, existing international rules), private party opinions are not terribly relevant unless those groups can participate later in the foreign policy decision making process. As discussed in chapter 2, one likely route for such participation is through a legislative ratification process. When a country’s legislature has to ratify treaties before their entry into force, there exist additional points at which private parties can enter the process and influence decision making.

In India, the legislature is not involved at all in the ratification process. Instead, the Cabinet – the same branch responsible for negotiating – is in charge of ratification of, and accession to, all agreements with other countries (Thakore 1995). As a result, there are fewer outlets for private parties to gain attention on foreign policy issues. If they do not have access to executive branch officials, they will not be able to achieve any of their policy goals. Here again, it seems that the lack of a private push to protect benefits may result in reduced concern about savings clauses.

As in many other countries, foreign affairs are handled almost exclusively by the Executive branch of government. There is no legal need for parliamentary ratification or accession to treaties, although the Parliament does have power over implementing legislation because most international law is non-self-executing in India (Thakore 1995:85). In fact, there is not even much discussion of foreign policy in the Parliament at
all, due to the notion that such activities should be left to experts in the Ministry of External Affairs (Dubey 2007; Rajan 1997:22).

Lack of Parliamentary participation results in less incentive for Government negotiators to consider localized private concerns. However, an extensive interagency process is followed before most international treaty negotiations. This process involves representatives of relevant Ministries, with a Committee of Secretaries available to handle any conflicts (Dubey 2007; Rajan 1997:24). These prenegotiation discussions often involve other ministries, affected industries, organizations like CII or FICCI, and private experts on the topic (Confederation of Indian Industry (CII) 2006a; Government of India 2006h). As a result, well-connected businesses are able to gain involvement through CII or FICCI participation. Nonetheless, one FICCI official claims that he only gets a response from approximately 5% of the membership when soliciting opinions on most trade negotiations. Members who respond are concerned primarily with existing domestic rules, with a particular focus on the applied tariff levels discussed in bilateral negotiations (Federation of Indian Chambers of Commerce and Industry (FICCI) 2006).

It should be noted as well that there is also a new trend, pushed by UNCTAD, towards broader public involvement in developing Indian trade negotiating positions (UNCTAD India Programme 2005; United Nations Conference on Trade and Development 2006). As a result, the private sector has increased its involvement in foreign policy in recent years.
5.6.3.1 Security Council Reform

As in the United States, Security Council reform does not particularly lend itself to private concerns in India. Even if it did, however, there is even less opportunity for private actors to play a role on this issue than there is in economic negotiations. On the latter issues, the Government at least holds events to gather stakeholder input. Even that is not the case for UN reform. Nonetheless, the public spotlight on the issue leads to some Legislative oversight of the negotiators (2000; 2001; 2007). As expected, this nudging leads to more support for change in this instance because of the perceived injustices of the past. Additional public scrutiny (though falling short of participation by most definitions) only leads toward the status quo when the existing institution is deemed to have value.

5.6.3.2 Bilateral Investment Treaties

The lack of private participation in BIT negotiations does fit with the notion that legal change should be more easily accepted when nongovernmental actors are not involved. However, there is no evidence that this lack of participation has anything to do with India’s position in this particular situation. In fact, I expect that participation should have little impact on savings clause inclusion for a rising power like India, even in the heavily legalized investment area. Again, if private parties do not perceive major benefits from existing international legal rights, then increased participation will not be directed at saving earlier outcomes.
5.6.3.3 WTO SPS Agreement

In the SPS case, private parties again seem to have had even less direct concern about the issue because they were not able to benefit from the existing standards. Even if they had been in favor of those existing standards, there was very little private involvement in developing national negotiating positions during the Uruguay Round (Priyadarshi 2005). Since the 1999 WTO Seattle negotiations, the Government of India has made efforts to bring industry on board (Priyadarshi 2005; Sinha 2005). Despite enhanced participation, India continued to look for change in the standard-setting process. The ongoing displeasure with existing arrangements in this area demonstrates that increased private engagement does not lead a government to support the status quo when the country is a rising power that supports change more generally.

5.6.3.4 Biosafety Protocol

Later, in the case of Biosafety negotiations, the Indian Government – particularly the Ministry of Commerce – appears to be more accepting of WTO rules in general, and careful not to decrease its benefits altogether. Although causality cannot be proven here, the shift of position after Commerce joined the negotiating team points to the potential impact of private parties when they do see benefits from an existing institution and have some access through a concerned actor on the negotiating team. Even though India continues to prefer a change in the standard-setting process, private participants have
come to appreciate some other benefits of the WTO, and limit their proposals for change to reflect that position.

In section 5.6.1, I suggested that India’s opposition to a WTO savings clause in the Biosafety Protocol was puzzling because of the potential benefits of trade liberalization for the country’s growing biotech industry. A new industry would seemingly be able to overcome the aforementioned concerns about the lack of potential beneficiaries from an earlier agreement that seemed to have poor results for India.

While the biotech industry truly took off in India around 2005 (James 2006), its potential was rapidly recognized during the time between the Uruguay Round and the Cartagena Protocol (Barwale et al. 2004:24). Despite the industry’s growth, India took a mild stance against protecting liberal WTO rules during the latter set of negotiations. Three possible explanations relate private participation to that outcome.

First, the biotech industry was heavily regulated at home (Newell 2007:185-86,191). As a result, it may have wanted other countries’ biotech industries to face similar barriers to production (DeSombre 2000). However, there is no evidence that additional regulation abroad was the industry’s goal, particularly as the industry continued to gain strength and leverage in India. A more plausible industry approach would have been efforts at global liberalization that would have decreased regulatory influence worldwide.
Second, as I have repeated throughout this chapter, even the additional private influence should not lead to support for the status quo when the actors in question see an opportunity to get a better deal under new global circumstances. In that case, they should not want to rely on the institution already in place. To some extent, this rationale appears to be at work in this case, with India looking to gain more in later negotiations. However, the unwillingness to oppose a WTO savings clause altogether suggests there were at least some players interested – at least passively – in the status quo.

Finally, it may be the case that growing private influence is limited to domestic politics due to the Indian Government’s institutional freedom to ignore all outside forces – including Parliament – on most international issues. However, this explanation is not satisfactory either since most biotech industry lobbying is coordinated through CII (Newell 2007:192-94). This organization is known for its influence in international negotiations since the Seattle WTO meetings (Priyadarshi 2005; Sinha 2005), and participates often in pre-negotiation discussions with the Ministry of Commerce (Confederation of Indian Industry (CII) 2006a; Government of India 2006d). It would seem, therefore, that if the industry was deeply interested in a savings clause – or any other provision – it would at least have been considered by Indian negotiators. To some extent, the delegation did consider that approach when the Commerce Ministry became involved and acquiesced to – though certainly did not promote – a savings clause.
In conjunction, these last two explanations seem to be plausible understandings of the process that led to India’s position on a WTO savings clause. That is, general opposition to the status quo spread to private players who stood to benefit from the country’s enhanced negotiating position. However, industry retained an interest in avoiding language that would constrain the liberalizing impact of the WTO more generally. The Government’s compromise position, therefore, seems to result from a combination of India’s status as a rising power, as well as the emergence of a new industry modeled around prevailing international rules.

5.7 Assessing Hypotheses

Other independent and control variables discussed in chapters 2 and 3 do not remain constant within each country. Although it would be an interesting test of the power change theory, my reliance on interviews with present and former negotiators makes it difficult to show variation in Indian negotiating positions over a large period of time. The other variables of primary interest – private access to existing institutions and private participation in foreign policy – have not varied much over India’s history. There are signs of greater access and participation in the future, but not much difference over the past 60 years to provide contrast, even if the full range of interview subjects were available.

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15 I spoke primarily with current government officials, as well as a few who served in the late 1980s and early 1990s.
5.7.1 Alternative Hypotheses

In this section, I consider alternative explanations for the outcomes seen in this case study. Some of the alternative hypotheses discussed in the US chapter are ignored because they focus only on actions taken by the very strongest player in the international system. Despite India’s rise, it certainly has no claim at all to that position.

5.7.1.1 Professional Legal Training and the Status Quo

It would seem likely that there will be some variation among individual negotiators on the basis of their professional backgrounds. In particular, lawyers – who are engaged with existing laws and invested in a system that privileges those texts – should be more likely to support legal deference. They are often consulted only late in the process, usually after the basic agreement has been reached. Participants from the Law Ministry are assigned to play a role that mirrors their review of domestic legislation. Since their normal professional responsibility is to make sure that Parliament has not created internal legal conflicts, Law Ministry representatives are likely to approach a draft international agreement with a view to making sure that it will not result in conflicting commitments (Government of India 2006a).

Legalism apparently has had an impact on Indian positions. The efforts of some lawyers to avoid contradiction show that experience with international law has a lot to do with efforts to protect it. I spoke with one Government official who has served as a Commerce Ministry negotiator, but is also one of the few lawyers serving in a general
negotiating position (as an officer in the Indian Administrative Service rather than the Law Ministry or Legal and Treaties Division). His experiences suggest that efforts against contradictory treaties are a matter of professional training, rather than merely an issue related to the culture of a particular government department. That understanding of existing law is important for a delegation. As a former Joint Secretary of the Legal and Treaties Division notes, a negotiator is “well placed when he feels international law is on his side of the argument and burden of proof will then be on the other party seeking to change the status quo.” Power and other policy concerns of course continue to “outweigh any role international law itself could and does play” but knowledge of the legal status quo provides a very important starting point for understanding the context in which negotiations are taking place (Government of India 2006i).

In the case of BIT negotiations, Foreign Ministry lawyers were not more careful about existing law than were Finance Ministry officials. They work together closely in this area, and both seem to feel that savings clauses are unnecessary.

Interestingly though, it does appear that professional training played a role in individual negotiators’ support for deference to existing international law in the Biosafety case. Involved lawyers were more willing to accept the savings clause (Government of India 2006m) despite its potential to entrench unwanted SPS rules in the Biosafety area. Other representatives from the Ministry of Commerce were more
accepting of a savings clause that would protect WTO rules than were Ministry of Environment officials.

5.7.1.2 Normative Approaches to the Status Quo

As discussed earlier, there are some negotiators who take a normative approach to existing law, suggesting that deference is necessary in order that India does not appear to be avoiding its responsibilities to the world community. This final rationale may be the most surprising of all, but its repeated acknowledgement indicates that it must be taken seriously.

5.7.1.3 Baptists and Bootleggers

DeSombre’s “Baptists and Bootleggers” theory also has some use in the case of India’s approach to Biosafety. The growing domestic industry faced high levels of regulation at home and may have hoped to impose similar costs on biotech industries in other places. Furthermore, the coalition with environmental opposition to biotech may have been an important aspect of the case as well. However, this model has very little to say about the other negotiations addressed in this chapter.

5.7.1.4 Environmental Chilling Effect

One might expect that Indian positions on existing law vary across issue areas. As I have discussed in previous chapters, scholars of international environmental politics have suggested that environmental agreements are most likely to be narrowed
by concerns about trade law. As has been noted by many observers, India consistently
cares more about development issues than about environmental protection (Rajan
1997:31). As a result, we might expect to see India supporting deference in
environmental agreements towards existing trade rules, but not the reverse. As it turns
out, India’s opposition to the Biosafety savings clause is in opposition to this
expectation. Despite the desire for development, India was careful to support existing
environmental agreements, but only acquiesced to protecting WTO rules in this context.
Furthermore, in IBSA statements, India and its partners have been explicit about their
support for environmental and sustainable development institutions, in contrast with
the chilling effect hypothesis.

5.7.2 Hypotheses Addressed earlier in this Dissertation

India is a very interesting case for assessing the explanations developed in
chapter 1. In this section, I examine how the evidence fits with those hypotheses.

5.7.2.1 Power Change Hypothesis

First, Indian negotiating positions largely support the expectation that rising
powers would oppose deference to the status quo when they have the opportunity. A
number of Indian negotiators noted that they certainly would not propose the idea of a
savings clause in negotiations, though it has never been an issue of primary concern to
their delegations. In bilateral investment treaties, India has occasionally allowed legal
deference to appear, but it is generally opposed to such provisions on the grounds that they curtail the scope of new agreements, reached in a position of greater power than the original rules. As regards the SPS negotiation, India largely ignored discussions about the application of earlier international standards. Participants later regretted their avoidance of that issue once it became clear that those existing standards were not ones in which the country had participated. The Indian position on the Biosafety Protocol once again represents weak opposition to savings clauses, but an overall lack of concern with the particular issue. In keeping with the expectations of prospect theory, India’s opposition to legal deference is much less forceful than the support coming from those countries that fear the loss of institutional benefits without a savings clause.

Of course, this relationship between power change and legal change is also conditioned on other aspects of the situation. In order for the country – and its citizens – to truly benefit from existing rules, there must be a mechanism for approaching international institutions. Even if India was completely satisfied with earlier outcomes, its lack of formal private access to international institutions mitigates the potential benefits that could be achieved. Despite the low level of private access to WTO, one might expect private support for protecting BITs, which often provide explicit legal rights to foreign investors. However, India’s relatively recent growth as an investor abroad means that there are few relevant beneficiaries of those rules. More generally, as
expected, private access to international institutions does not affect status quo preferences when the country had such negligible influence on earlier institutions.

Once a private actor has gained benefits from, and access to, existing international law, its support for the status quo can be relevant only if it is also allowed to participate in the subsequent negotiation process. India’s sole reliance on the executive branch means that very few private actors are involved in developing foreign policy. However, the lack of participation does not appear to be the major impasse here because private parties have not really expressed much support for the status quo anyhow.

This chapter has attempted to increase our knowledge of the role that India and other rising powers play in international negotiations. In particular, I have demonstrated how India approaches legal change or continuity, and why its Government seems to prioritize new structures rather than path dependent processes. Results from this chapter are compared with the other two case studies in chapter 7.
6. Case Study 3: European Community Negotiating Positions

Over the past twenty years, European integration has proceeded at a rapid pace, bringing new institutions as well as new members to the enhanced European Union (EU). The Union now represents approximately 460 million people, a greater share of the world population than any single country other than India and China.\(^1\) Taken together, it is also the biggest exporter of goods, sending €969.3 Billion in goods abroad in 2005, and the second largest importer behind the United States, with over €1 Trillion in imports that year.\(^2\) On the environment front, the EU occupies nearly 4 million square kilometers,\(^3\) with a wide range of ecosystems, and it accounts for approximately 16 percent of global energy consumption (Energy Information Administration 2007: derived from Table E.1). When negotiating as a bloc, there is little question that the EU is one of the preeminent actors in contemporary international negotiations on a wide range of topics.

Although the Union – in the form of its bureaucracy, the European Commission – does not have legal competence in all issue areas, its mandate is broad and growing.

\(^1\) As of 1 January 2005 (http://europa.eu/abc/keyfigures/sizeandpopulation/howmany/index_en.htm). This amounts to about 7% of world population.
\(^2\) http://europa.eu/abc/keyfigures/tradeandeconomy/tradingpower/index_en.htm
\(^3\) http://europa.eu/abc/keyfigures/sizeandpopulation/howbig/index_en.htm
The assent of the European Communities (EC)\textsuperscript{4} is necessary for agreement on any new multilateral trade rules, and its influence is felt in many other issue areas – from the environment to global finance – as well.

If for no other reason than the influence of the EU on world politics, it would be an important case for any study of international negotiations. However, it also presents an interesting set of questions for this dissertation because the notion of rising or declining power is somewhat confused when considering the European Union. Some EU members – most notably a reunified Germany – have clearly gained strength since the creation of postwar institutions, while others – in particular the United Kingdom – have experienced considerable declines relative to the rest of the world. However, as members of the Union have drawn their negotiating efforts together, the Union’s bargaining power has changed considerably. The EU did not exist at all in 1948 when many important global institutions were formed. And, with the addition of 21 new members over time, its capabilities have grown massively since the original European Coal and Steel Community of 1951 (see Figure 6-1).

Many recent studies explore how the EC – through the executive power of the Commission – has gained the ability to accomplish certain goals in negotiations with

\textsuperscript{4} Although they refer to slightly different aspects of the European integration project, for the purpose of describing the organization as an international actor, I will use the terms European Community(ies) (EC) and European Economic Community (EEC) interchangeably throughout this chapter. I also use “European Union (EU)” to refer to the group of countries as a whole following the 1993 [Single European Act].
other countries (Bretherton and Vogler 1999; Meunier 2005). However, existing research has not systematically addressed the evolution of EC preferences, how they contrast with those of other parties, and the sources of those preferences on the international stage. This chapter will begin to address these questions by examining positions taken by the Community on issues of institutional change and continuity.

I begin by displaying EC preferences for institutional change in a variety of negotiations. Unlike the cases studied in previous chapters, the EU does not maintain a consistent approach to protecting the status quo. The within-case variation exhibited here bears explaining, and the final sections of this chapter attempt to do so. The chapter concludes by using this additional information to test the hypotheses outlined in chapter 1.
6.1 Anecdotal Evidence of European Support for Savings Clauses

This section reviews EU support for deference or change as discussed by interview subjects who were chosen from the European Commission representatives with responsibility for international negotiations (see chapter 3 for a discussion of interview methodology). I then compiled further information on the issues discussed by each of them.
6.1.1 Protecting European Community Institutions

One primary goal of EC negotiators is the preservation of the European legal framework itself, particularly when faced with charges that the Union functions as a form of trade discrimination by its members towards non-member countries. In the trade context, intra-Union preferential treatment goes against the most favored nation (MFN) rules that require WTO Members to provide the same trade access for all other members. The EU strives to maintain the common market without its Members being forced to extend those advantages to all other GATT members. The WTO’s General Agreement on Tariffs and Trade (GATT), for example, contains a clause allowing such customs unions to maintain preferential treatment internally (GATT Article XXIV).

European negotiators are constantly aware of the need to protect EC law against claims that new treaties could trump it. As the Commission has noted, “...a primary consideration in on-going (sic) negotiations on international Conventions is to safeguard as between Member States the application of Community rules on recognition and enforcement by means of a disconnection clause (European Commission 2001:fn8).” The Commission’s Legal Service has also pushed for such clauses in a number of other situations as well. The rationale for this position has been redacted from most documents (e.g.,(Council of the European Union 2005a)). However, the Legal Service has been resolute about the need for disconnection clauses, noting that the inclusion of
such a clause in 1999 amendments to the Convention concerning International Carriage by Rail (COTIF) was an important condition for accession to that agreement (Council of the European Union 2005b:para.16).

This reliance on EC law raises a number of questions about the nature of European institutions and whether they should be treated as international agreements or some sort of domestic federal structure. If EU regulations, or at least EU integration treaties, are considered to be international agreements, then the focus on protecting agreements between EU members provides support for my second hypothesis – private access to existing institutions results in greater protection of them. The status of Community legislation as international law is important in this context because the EU represents the most legalized of all international regimes, and one that clearly provides an opportunity for private parties to benefit – through ECJ enforcement – from the existing agreement (Abbott et al. 2000; Alter 2000). This support for the European status quo may be explained by private efforts to protect legalized institutions, or by the EU’s own interest in preserving the organization and the rules its negotiators have been hired to implement. No further evidence is available to distinguish between these alternative explanations. However, the focus on disconnection clauses is, at the very least, not inconsistent with my expectation about protecting the most highly legalized institutions.

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5 It would be difficult to argue against the latter as examples of international treaties from a legal standpoint, though EC legislation has been considered as supranational or federal by different commentators.
From the perspective of European Community negotiators, EC law can also be treated as domestic legislation. The remainder of this section, therefore, focuses only on efforts to protect or alter the Union’s *external* agreements.

### 6.1.2 Protecting the EU’s External Rights and Obligations

EU participation in deference debates is not limited to protecting European institutions. It is also active in discussing the place of the status quo in many other agreements. In most respects, when the Commission represents the EU in international negotiations, it operates like any other participant.

By virtue of its short existence as a unified entity, the EU has less international agreements to protect than countries who have a long history of negotiating as independent nations. As chapter 2 showed, however, the number of international commitments held by the parties has very little impact on the likelihood of savings clauses. EC positions further call that explanation into question for two reasons. First, the Community has also accepted many of its members’ commitments, particularly in

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6 There is also an extensive framework in the Treaty on European Union (Article 307) that addresses how to handle new members’ existing agreements with non-EU countries. They do not lose any rights from existing agreements, but are expected to eventually phase out any commitments that are incompatible with EC law. Member Countries have received exemptions that permit them to avoid phasing out these agreements, especially when it would entail further concessions to a third party in renegotiation. When negotiating new agreements, in areas of Member State competence, the states are encouraged by the Commission to include a clause ensuring that the new agreement is interpreted in line with EC law, especially in the contentious area of investment (Commission Legal Service 2006). This chapter is concerned instead with Community – rather than Member State – commitments.
the realm of trade. To that extent, the EC does not have a portfolio of agreements considerably smaller than other countries. Second, the EC has a mixed record of support for existing law. If the number of existing commitments were influential, then the preference for change should decline over time. Instead, as this chapter demonstrates, the Commission in particular has grown even more weary of the status quo in recent years.

When faced with the potential for conflicting obligations, the Commission Legal Service generally pushes for coherence through the protection of existing treaties, especially the WTO Agreements (Commission Legal Service 2006). DG Trade\(^7\) is also particularly adamant that all new agreements should be “WTO-legal,” often leading to disputes with other Directorates who are looking for new agreements to have a broader scope (Bretherton and Vogler 1999:82). As I discuss in section 6.5, however, “WTO-legal” does not always mean a full fledged effort to protect existing WTO strictures.

The Commission bureaucracy has developed strategies for avoiding legal conflict when possible. DG Environment, for example, is often asked for its opinion on other issue area negotiations to make sure that environmental issues are properly covered. The Directorate is not always asked to step in, but sometimes notices an important negotiation and takes the initiative to participate for the sake of legal coherence. For

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\(^7\) Each department of the European Commission bureaucracy is referred to in this chapter as a Directorate-General (DG).
example, DG Environment has commented on the EU position in fishery subsidies trade
discussions, as well as WTO negotiations on Non-Agricultural Market Access (NAMA, which includes forest products), to make sure that the parties are considering existing
environmental agreements as well. The process works in reverse also, as there is a
similar official in DG Trade responsible for impacts of environmental negotiations on
trade agreements (DG Environment 2006b).

According to one representative of DG Environment, deference arises
particularly in discussions of new nonbinding arrangements (e.g., recent discussion on
chemicals management), in which the Commission puts forth an effort to protect other
more legalized agreements that might possibly interact (DG Environment 2006b). This
approach contrasts with that of US negotiators who express more concern for existing
agreements when the new regime will be more legally binding. This EC effort suggests
that deference to existing law is not just a means of “putting on the brakes” for EC
officials as it sometimes has been for US negotiators. Again, we see an effort to protect
highly legalized institutions from which concrete benefits are derived.

In another context, developing countries have pushed to override existing
environmental funding arrangements in favor of new funding processes in which they
would have more say. However, the EU (along with the US) wants to protect earlier
frameworks such as the Global Environment Facility (GEF) for use in other
environmental areas. In large part, the Commission has succeeded in making that happen, as all post-GEF environmental agreements have adopted the Facility as their financial mechanism (DG Environment 2006a). This relationship is in line with my expectations, as the EU attempts to protect existing provisions when negotiating with developing countries who have gained influence over the last two decades.

When dealing with other major powers, however, the EU sees itself as a rising power, particularly in an area like finance where the Euro zone has created a much stronger negotiating position internationally than previously existed. As a result, the Commission often expresses concern about the representativeness of finance and monetary rules that date to 1945. Instead, the EU feels that institutions need to be adapted to recognize a new world that includes an integrated Europe. One DG Finance official, responsible for negotiations with the G-8 grouping, said that he could not recall a single issue on which his office had raised concerns about conflict with existing international rules (DG Economic and Financial Affairs 2006). Following the Vienna Convention rules discussed in chapter 1, when no savings clause is included in a treaty, the default is replacement of existing provisions in case of a conflict. Therefore, raising no concerns about existing rules is functionally equivalent to promoting legal change.

In the ongoing competition for control between the Commission and Member States, deference to existing provisions may also be a useful tool for those Members who
wish to reduce the Commission’s powers. According to one Commission official, Member States often point out existing international commitments in order to decrease the scope of new agreements, and therefore protect their own control over more issue areas (DG Economic and Financial Affairs 2006). On the other side of this struggle, the Commission should favor change in order to continue exerting itself as the focal point for negotiations with Western Europe. The Commission’s capacity to achieve change would indicate that it is, indeed, a rising power – not only in relation to external actors but also in contrast with the Member States who continue to cede power (sometimes unwittingly) to the EU institutions. An alternative explanation would relate to principal-agent theory more generally, with the Commission constantly trying to usurp more power than its principals (Member State governments) would desire, and those principals attempting to put constraints on the delegation. In that case, I would expect to see the Member States attempting to rein in Commission foreign policy efforts. These two explanations can operate together to demonstrate that the Commission’s rising power actually provides principals with a reason to delegate bargaining efforts, therefore achieving a better bargain with external actors, while still placing constraints on the Commission. In that sense, efforts to take the delegation fight outside the EU provide support for the power change hypothesis as well as alternative models that deal

8 See Alter (1998) regarding the growing influence of the European Court of Justice.
with delegation more broadly. It is also consistent with the idea that much of the EU’s effort to protect the status quo is driven by political activity at the Member State level, where private parties may have more institutionalized access. However, this correlation does not provide further support for the underlying causal linkage.

One negotiator noted that the Commission also spends little time addressing existing rules during services negotiations because trade in services has not been liberalized, so there is very little existing law that negotiators would want to use to their advantage (DG Trade 2006a). Nonetheless, the same negotiator, a lawyer working in the Trade Directorate, claimed that he cannot see a situation where they would want to override the existing situation due to fears of what bargain would result (DG Trade 2006a). Again, this example points to the lack of efforts to retain the status quo in trade negotiations. While Commission officials do not explicitly seek institutional change, the Vienna Convention default allows them to passively prioritize new rules over the status quo. In situations such as this one, it is difficult to demonstrate causal pathways leading to passive efforts to promote change. The Vienna default, therefore, complicates the analysis unless some party has exhibited significant opposition to institutional change. The remainder of this chapter addresses a series of situations in which change and continuity have been contested, meaning that passive support for institutional change is not an option.
6.1.3 EC Activity in Fisheries Agreements

As in the trade area, the EC has exclusive competence for fisheries policy, and negotiates agreements with third parties to access fishing waters of those countries (DG Fisheries 2006; European Commission 2007). They are negotiated in the context of the framework laid out by Article 62 of the United Nations Convention on the Law of the Sea (UNCLOS). This provision requires that “Where the coastal State does not have the capacity to harvest the entire allowable catch, it shall, through agreements or other arrangements and pursuant to the terms, conditions, laws and regulations referred to in paragraph 4, give other States access to the surplus of the allowable catch…” The resulting bilateral agreements ensure that the UNCLOS agreement – which took many years to negotiate, and has a legally binding dispute settlement process – remains supreme. Bilateral fisheries agreements contain savings clauses directed at the broader UNCLOS agreement (DG Fisheries 2006), and the overall Commission strategy in this area notes the importance of relying on “sound scientific and technical advice as defined in article 62 of UNCLOS (European Commission 2002:7).”

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9 For example, the 1989 bilateral agreement with Mauritius provides that “Nothing in this Agreement shall affect or prejudice any manner the view of either Party with respect to any matter relating to the Law of the Sea (Article 9).” The 1980 agreement with Norway – agreed during the reign of the earlier Second Law of the Sea Convention – similarly states, “Nothing contained in this Agreement shall affect or prejudice in any manner the views of either Party with respect to any questions relating to the law of the sea (Article 10).”
In communications with the Council, the European Commission has noted that new agreements “…must respect the various commitments entered into by the European Community under its external policy (Council of the European Union 2004:para.3)…” The Commission, it seems, is trying to protect earlier bilateral fisheries agreements in addition to UNCLOS rules. Once again, they are making efforts to protect treaties that provide benefits to private parties within the EU. The maintenance of UNCLOS and the earlier bilaterals is of great importance to the European fishing industry in light of its need to continue fishing abroad, particularly as recent reports suggest that “many kinds of fish, like tuna, swordfish and cod, are not readily available from European Union waters anymore (Rosenthal 2008).” As a result, the industry has sought to exploit other fisheries, particularly those off the coast of West Africa (LaFraniere 2008). While the fishing industry clearly benefits from existing agreements, and participates in the negotiation of new ones, I have no further evidence to demonstrate that the industry was the cause of Commission efforts to protect the status quo.

In addition to the reliance on UNCLOS savings clauses in bilateral fisheries treaties, the Commission is careful to make sure that its activities are compatible with WTO rules (DG Fisheries 2006). Fisheries are also an important part of the Economic Partnership Agreements now being negotiated with African, Caribbean and Pacific
(ACP) countries. It is expected that these new agreements may “have an impact on the [Fisheries Protection Agreements] between the EU and certain ACP States,” although the EU hopes not to replace those arrangements in which it has gained important advantages (Directorate-General for Fisheries and Maritime Affairs -- European Commission 2007). It should also be noted that these negotiations are under way for the sole purpose of ensuring that the current ACP arrangement does not conflict with WTO law. This phase out of broad preferences was part of the Uruguay Round agreements allowing for preferential treatment only in the short term. Renegotiation is not the EU’s preferred choice, but is necessary for compliance with WTO MFN rules.

When there is a possibility of contradictory rules, the Fisheries Directorate is careful to consult with DG Trade to ensure they do not override or confuse compliance with important trade rules (DG Fisheries 2006). This high level of deference in the fisheries realm may have to do with the desire to maintain existing law, not only because of the benefits provided by UNCLOS but also because of the extreme difficulty that was required in negotiating that Convention in the first place. The difficulty of UNCLOS negotiations suggests an alternative explanation for savings clauses. That is, one might suggest that countries are eager to maintain the status quo rather than renegotiating when the original agreement had high transaction costs. One source of increasing returns is the investment that parties have made in designing the original regime.
(Koremenos, Lipson, and Snidal 2001). Having created an institution that reduces transaction costs of their activities (Keohane 1984:89-92,100-103), any other model will necessarily be more expensive. Authors cite a number of reasons for these high transaction costs, but the most important here is the complexity of negotiations, clearly an issue in the massive multidecade UNCLOS bargaining process (Sebenius 1983). Obviously, no country would wish to overturn the results of that process or go through it again. While I do not doubt that the European Commission is uninterested in renegotiating UNCLOS, this explanation remains insufficient for two reasons. First, the Commission has expressed a great degree of willingness to alter the UNCLOS enforcement mechanism, thus reopening the negotiation process. Second, complexity has not deterred the EU from attempting to block the preservation of SPS rules that emerged from a similarly complex Uruguay Round final agreement.

Even more revealing is the Commission’s own recognition in recent years that Europe’s distant water fleet – the world’s fourth-ranked fishing power (European Commission 1999) – is now losing ground to “the fleets of new emerging fishing nations which are operating at lower costs (European Commission 2002) (4).” This statement is supported by data showing a decline in the EU’s annual catches as percent of total world catches, despite the addition of new Member States (Eurostat/FAO 2008). EU fisheries negotiators are therefore in a position to hold on to their past success in an area of
declining – though still great – power.

Because the Commission has exclusive competence for negotiating fisheries agreements, only a qualified majority of Council members is required for approval, meaning that there is less public involvement. Furthermore, the European Parliament is allowed to give an opinion on the matter but does not have the right to block any fisheries agreement. This lack of public involvement, however, does not seem to have limited the Commission’s desire to protect other existing treaties, particularly in negotiations with developing countries.

Despite these efforts to preserve the UNCLOS framework and territory rules in other regimes, the EU is still trying to revise UNCLOS itself, mostly by expanding its mandate for enforcement over illegal fishing and promotion of more regional agreements (Directorate-General for Fisheries and Maritime Affairs -- European Commission 2007). It promotes “coherence between the measures adopted by” regional fisheries organizations and UNCLOS, presumably in an attempt to consolidate the EU’s advantageous position in global fisheries law.

6.2 Reforming the United Nations Security Council

UN reform is an important case for this dissertation because it provides an opportunity to go beyond legal provisions and gain an understanding of rising and
declining powers, and their approach to institutional change more generally. Rather than focusing only on detailed regulatory frameworks, it allows for an assessment of the institutional configurations that define who has the power to guide those frameworks. The case of UN Security Council reform allows for an assessment as to whether power change and institutional change go hand in hand, or whether they can be addressed separately, with the existing institution remaining intact despite changing power dynamics. The previous chapters showed the stark difference between Indian efforts to alter the Security Council’s longstanding structure, and US attempts to block institutional change. In this chapter, I address the intermediate case of the European Union.

The EU position on reforming the United Nations, particularly the Security Council vote allocation, reflects the confused preference that emerges from a “rising power” composed of some countries who face a rise to glory and others experiencing a fall from previous grace. The issue of UN institutional reforms – being a traditional foreign policy concern – falls under mixed, or member state, competence. As a result, the Commission must follow only a unanimous acceptance by Community members if it wishes to push for a change from the status quo situation. In this instance, some Member States – presumably Germany and Italy – were pushing to change the architecture of UN institutions that had been built to exclude their influence. At the
same time, others – presumably the UK and France – were less than supportive of changes that might dilute their postwar institutional gains. As a result, the Commission was not able to establish a common position on UN reform (DG External Relations 2006), although most EU Member States do seem to support the addition of Germany to the Security Council. It must be this set of irreconcilable differences that led the EU representative at the 2005 UN World Summit to focus only on management – rather than political – reforms in her speech (Ferrero-Waldner 16 September 2005). The Commission, as part of its effort to participate as the European representative in more multilateral institutions, has taken on the goal of being more active at the United Nations, and to willingly push for “comprehensive reform of the UN Security Council in all its aspects,” although no details are provided in regards to what reforms would be preferred (European Commission 2003:6). In fact, the Commission later pushed for a “broadly representative and more transparent” Security Council, but only insofar as that shift would not upset progress on other reforms within the UN (European Commission 2005a).

6.3 Bilateral Trade and Investment Treaties

As I discuss further in Section 6.6, negotiating responsibility is delegated to the Community or the Member States, depending upon the subject matter. Investment
issues have generally been left to the Member States in line with the European Court of Justice (ECJ) Opinion 1/94. This decision, handed down during the final stages of the Uruguay Round negotiations, clarified that the Community is responsible for trade in goods, while investment and other services remain Member State responsibilities (1994). As a result, the EU does not have any traditional bilateral investment treaties (BITs) (United Nations Conference on Trade and Development 2006). However, there is a trend towards more central EU involvement here too (DG Trade 2006a), as a number of EU bilateral or interregional trade agreements contain significant investment provisions. For the most part, those agreements focus on investment promotion rather than the investment protection rules traditionally addressed by BITs (Szepesi 2004). The slightly more comprehensive agreements with Mexico and Chile include provisions for protecting investment through the parties’ WTO GATS (General Agreement on Trade in Services) commitments (Szepesi 2004).

6.3.1 Investment Provisions in Interregional Trade Agreements

The EU’s proposed Association Agreements with Latin American country groupings are slated to include investment protection provisions. Building on an “informal business sector consultation,” the Commission finds a need “to guarantee the predictability and security of these investments (European Commission 2005b:11).” The
Commission has promoted the use of GATS and other international rules in this process. Draft negotiating mandates for Association Agreements with both the Central American and Andean Communities refer repeatedly to the need to keep the new agreements consistent with WTO rules and obligations. Both draft negotiating mandates also contain the following clause:

[A]dherence to and effective implementation of international agreed standards in the social, core labour and environmental domain is a necessary condition for sustainable development. In particular, the Agreement will aim to maintain the level of good governance, social, labour and environmental standards achieved through ratification and effective implementation of relevant international Conventions subscribed by and applicable to the Parties at the time of entry into force of the Agreement (European Commission 2006c; European Commission 2006d:12 in both).

The next sentence in each draft notes that the agreement is to replace the relevant Political Dialogue and Cooperation Agreement, each of which were signed in 2003. In sum, therefore, we see that the Commission is keen to put in place some form of a savings clause for WTO agreements when negotiating with emerging market areas. However, it merely “aims to maintain” standards in other areas, and is quite willing to overturn other existing agreements that are not enforceable and therefore provide little benefit to private parties. The EU Member States also managed to push for the protection of their preferred arrangements, with a clause requiring that any safeguard
mechanisms are “in line with ...previous bilateral agreements [between EU Member States and members of the Central American or Andean Communities] (European Commission 2006c; European Commission 2006d:17).” Again, we see that Member States, when they open the process to their nationals, have the potential to push for deference that will protect highly legalized existing agreements.

These provisions allow the EU to retain the strategic advantage it achieved vis à vis developing countries in the Uruguay Round services negotiations, supporting the hypothesis that the EU will try to protect existing agreements when negotiating with developing countries that have begun to gain a greater share of world capabilities. Furthermore, as expected, in a sector that requires more private participation through the unanimous agreement of Member States, there is more opportunity to push for the status quo. The Member States have managed to convince the Commission to include provisions protecting WTO rules and Member State BITs with the third party negotiating partners (Maes 2007:9). These provisions demonstrate, once again, the correlation between savings clauses and processes open to Member State private

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10 New EU members and the United States also insisted on protecting old BITs during a recent phase of EU enlargement. United States Department of State. 2003. Understanding Concerning Certain U.S. Bilateral Investment Treaties, signed by the U.S., the European Commission, and acceding and candidate countries for accession to the European Union (September 22, 2003).
participation, as well as the strong support for existing agreements that allow private parties to enforce their rights through dispute settlement proceedings.

6.3.2 Ongoing Bilateral Negotiations

In addition to the traditionally weak investment provisions in trade agreements, the EU has recently begun to negotiate agreements with Canada and India that would focus more on investment as a primary goal, reflected in the proposed title of these ongoing negotiations (European Commission 2006a; Foreign Affairs and International Trade Canada 2005).

The EU has begun negotiations with Canada on a proposed Trade and Investment Enhancement Agreement (TIEA), although it would focus primarily on investment promotion rather than investment protection in the vein of a typical BIT. Nonetheless, the TIEA Framework mentions existing agreements, particularly the WTO, a number of times. For instance, in the realm of regulatory co-operation, the Framework notes the need to respect “both Parties’ rights and obligations under the WTO Agreements or any other international agreements to which each may be a Party…(Foreign Affairs and International Trade Canada 2005).” Overall, the Framework pushes for WTO supremacy in any final agreement, pointing out that “TIEA should support and contribute to multilateral trade negotiations, to which the EU and
Canada remain highly committed. Therefore, for those issues covered by the World Trade Organization (WTO) Doha Ministerial Declaration, bilateral co-operation under the TIEA will take place without prejudice to on-going WTO negotiations (Foreign Affairs and International Trade Canada 2005).” This latter statement, of course, points to a relationship with a forthcoming – rather than existing – agreement, but it is focused on protecting the WTO framework in which the EC occupies an advantageous position, rather than the specific rules to be established in the Doha Round. However, Canada’s seemingly equal backing for this measure does not provide support for the power change hypothesis unless both parties have experienced similar capabilities change in the investment arena. This condition is difficult to confirm due to the early stage of EC’s participation in this field.

India and the EU have commenced negotiations on an agreement that also would explicitly cover trade and investment issues. The agreement does not yet have a formal title but is consistently referred to as the EU-India “bilateral trade and investment agreement” (European Commission 2006a). Preparatory documents suggest that agreement on trade in goods “should be WTO compatible” and that “any agreement [on trade in services] should be compatible with GATS.” The EU is also open to Indian proposals for including investment protection – rather than merely promotion – rules, but only on condition that “any such provision would have to be complementary to
bilateral investment treaties between India and EU Member States (EU-India High Level Trade Group 2006:5,6,7).” Once again, we see the desire of the EU and its Members to hang on to existing rules, particularly those that provide legal access for private parties within the Member States. In fact, many of the concerns addressed in responses to European Parliament and public questions demonstrate a commitment to protecting extant WTO rules in any new agreement with India (European Commission 2006a; Mandelson 2006).

On the whole, the EU experience with investment agreements supports the hypotheses described earlier. Not surprisingly, support for the status quo comes in an area where Member States play an important role, since any declining Member could veto an agreement that seeks to overturn beneficial past agreements. In addition, due to the lack of Commission competence and resulting unanimous Council voting on investment issues, there is more room for private input in this issue area.11 As a result, there is more European support for the status quo than in other policy fields. As expected, that preference is particularly strong when it comes to protecting enforceable rights such as WTO and Member country BIT rules.

11 See Section 6.6 for a more detailed explanation of Commission and Council negotiating roles.
6.4 EC and the SPS Agreement

As I discuss in chapter 3, the WTO Agreement on Sanitary and Phytosanitary Standards (SPS) was an integral part of the Uruguay Round final agreement. It sets limits for acceptable levels of non-tariff trade barriers (NTBs) to protect human, plant and animal health. As part of the negotiations, the countries agreed to accept international standards – as set by the Codex Alimentarius Commission, International Office of Epizootics, and International Plant Protection Commission – as presumptively acceptable levels for import restrictions. As with the case of Security Council reform, the parties were not arguing about specific regulatory requirements. Rather they were debating the structure of institutions with the ability to set acceptable standards past, present and future. Again, in contrast with the US and Indian cases, the European Community represents an intermediate example for this case because it agreed with the US idea of relying upon existing international standards institutions, but would also have been happier to maintain existing Community standards. The EC has attempted subsequently to alter the resulting SPS Agreement of the early 1990s.

The EU is one of the world’s largest agricultural exporters, accounting for approximately 10% of global exports in recent years (European Commission 2008; Food
and Agriculture Organization of the United Nations 2008). However, it remained a net importer of agricultural goods from 1990-2005 (European Commission 2008).

The EC was committed to an SPS agreement early on because it was concerned with the potential for other countries to use health standards as disguised trade barriers. As a net importer, however, it still wished to enforce its own health standards. The Community, therefore, was adamant that some process be introduced whereby some standards could be automatically deemed acceptable (GATT 20 April 1988). This concern extended beyond standards for finished goods to also address production and process methods (GATT 20 December 1989). According to one observer, the Community’s actual goal was the protection of existing European arrangements such as the Common Agriculture Policy (CAP) rather than other international standards (Drezner 2007:155). The same study claims that the focus on existing rules was clearly also an effort to maintain strict EC regulatory standards, including a desire to have some ground for the exclusion of products made with genetically modified organisms (GMOs) (Drezner 2007:160). However, maintenance of these import restrictions would have

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12 The proportion of global exports is derived from FAO export statistics. However, this data does not differentiate between intra-EU exports and those that left the Union. Therefore, I have also calculated, from European Commission data, the proportion of agricultural exports that are sent outside of the EU in order to compare EU with other countries. Unfortunately, this proportion is only available for the 25 Member EU, so it covers a small time period.
13 It should also be noted that this gap has narrowed significantly in recent years.
been better served by some sort of proposal – though unlikely to succeed – for reliance on extant regional or customs union standards.

In order to achieve these goals, the EU was fairly adamant that SPS should push all countries toward a common set of import standards, including some way to “make differing national provisions compatible (GATT 20 April 1988).” The EC recognized that one way to accomplish such harmonization was reliance on existing standards in some form. It originally pushed for a list of existing standards that could be used, with an onus on any objector to say why that particular standard should not be recognized (GATT 19 March 1990; GATT 20 December 1989). However, there was no consensus on this approach through November 1990 (Büthe forthcoming (2008):24 in original draft).

European negotiators eventually moved from that position, accepting delegation to existing institutions rather than specific standards. This delegation approach allowed for the introduction of new standards in the future as well (Büthe forthcoming (2008):23 in original). While the specific standards might change, the structure of the existing institutions entrenched the power dynamics inherent in them. Such an arrangement would help replace the lack of expertise within the GATT institutions, and would allow outside experts to address emerging technologies (Büthe forthcoming (2008):25 in original). However, it also meant that the existing standards could be altered by institutions that were not altogether friendly to the EC position. To the extent that
Europe and the US had agreed on most previous standards in those organizations, they were able to control the outcome together. However, subsequent contentious issues have pointed to the Community’s institutional deficit in some of these situations (Büthe forthcoming (2008):30 in original).

In either format, the idea was for some set of existing rules – either specific standards or the institutions that created them – to be privileged as compliant with GATT Article XX exceptions for standards necessary to protect human, animal, or plant life. The EU wanted to grant a “full legal guarantee of legitimacy” to countries relying on these existing international standards (GATT 20 April 1988). However, the EC did not give up on its proposal that parties should retain the possibility of having higher standards when they were already in place (GATT 20 December 1989). Although the Commission was willing to accept existing rules, it hoped that the new institution would still provide flexibility for the higher levels of regulation supported by the Community in some areas. This mild preference for the status quo makes sense in light of protection against developing countries, and ongoing competition as a rising power in relation to the United States. While the EC was willing to accept some existing institutions, it wanted flexibility to take a new position with diminished influence from the United States.

The question then arises as to which existing institutions the EC would support.
The “3 sisters” of the International Office of Epizooties (OIE), Codex Alimentarius Commission (CAC), and International Plant Protection Commission (IPPC) seemed like obvious choices. They were already in place, and it made a good deal of sense to build on them rather than constructing new standards (DG Health 2006). Of course, the question remains as to why the EC should have supported those three instead of others. One should note then that the developed countries controlled those three institutions. As a result, neither the US nor Europe had strong opposition to OIE, IPPC or CAC (Büthe forthcoming (2008):35 in original). Europeans felt that OIE was “responsive” to European concerns (Büthe 2007:28) and was most familiar to them historically (Büthe 2007:36). IPPC lacked an organization at the time, but there was no strong worldwide alternative for addressing plant health standards (Büthe 2007:37). Codex, on the other hand, was slightly more controversial for the EC. As with OIE, the institution favored developed countries – especially since committee chairs pay the committee’s operating costs, meaning that few developing countries have the ability to control committee agendas (Büthe forthcoming (2008):31 in orig). Furthermore, the “one country, one vote” rule means that the Community has a lot of votes in the CAC (Büthe 2007:31). Nonetheless, the EC was somewhat divided regarding the value of Codex in SPS (Büthe 2007:52), and it was later realized that European success in CAC was often a result of its alignment with other developed countries. When more contentious issues came along,
and the EC and US positions diverged, the lack of transparency and a bias towards open markets hurt Community positions in the voting process (Büthe 2007:36-37; Sikes 1998:328). In the end, the Commission did support the use of Codex standards, but not as wholeheartedly as it supported OIE and IPPC.

In addition to its stance on “the three sisters”, the EC actually proposed early on the incorporation of standards from other organizations – particularly the UN Economic Commission for Europe (UNECE) and the Organization for Economic Cooperation and Development (OECD) (GATT 20 April 1988) – as well. European countries played a greater role in these organizations, but they did not succeed in having them incorporated due to US insistence on keeping only the three sisters in place. The EC, however, continued to push for consideration of standards “organizations open to full participation by all contracting parties” such as the World Health Organization (GATT 20 December 1989). More importantly, European negotiators pushed for the inclusion of regional standards, with one delegate questioning “whether these three should be the only ones retained, since standards developed under other regional organizations might also be pertinent (GATT 14 November 1988).”14 Later, the Community continued to push for regional standards as a first step towards international harmonization (GATT

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14 This delegate is not clearly identified as a representative of the Community. However, the same individual took care to answer a number of followup questions regarding the EU institutions, leading me to believe that the delegate was representing the Commission.
19 March 1990). Eventually, the EC tied its support for the entire agriculture process, among other things, to such recognition (GATT 6 August 1990), although this may have been a bargaining tactic aimed at gaining further concessions on other agriculture issues. Obviously, reliance on regional standards would have served the EC well as a heavily institutionalized regional organization itself. In addition to its power in that realm, the maintenance of regional standards should have been supported by private groups within Europe.

Despite its best efforts, the Community failed to get regional standards included in the SPS Agreement. Nonetheless, its support for them demonstrates the strength of existing institutions that provide benefits to private and governmental parties. Like India, in its role as a rising power that hoped to achieve greater success later, the EC also grew tired of the WTO influence on Codex and other standards-setting organizations (WTO 17 August 1998:para.62), and proposed revisiting these SPS rules in subsequent negotiations (Drezner 2007:163; Kerr 1999:245). However, the Community is no longer interested in reopening that process (DG Trade 2006c).

6.5 Biosafety Protocol and the European Union

The Cartagena Protocol on Biological Safety (Biosafety Protocol, or BSP) is another important negotiation for assessing hypotheses about legal change because each
country took a different stand regarding the importance of existing international agreements. In particular, proponents of a savings clause – especially the United States and other biotech exporters – seem to have focused their efforts on protecting the limitations on import barriers that were developed in the SPS Agreement discussed above. The EU, having benefited less from, and grown more powerful since, the SPS negotiations was not quite as eager to protect those rules. Nonetheless, the Community did hope to protect certain other existing agreements. As a policy matter, the EC wanted to limit imports of genetically modified (GM) goods due to its minimal biotech industry (Brookes and Barfoot 2006) and public opposition to GM crops (Vogel 2003). It was concerned that SPS rules did not allow the necessary latitude for preferred import restrictions. The Community had sought this flexibility in SPS early on, but had not succeeded in achieving that position during the Uruguay Round. As opposition to GM foods grew in Europe, the EU’s preference on this issue intensified (Vogel 2003).

Although Biosafety was framed as an agricultural issue in the US, it was handled by environment authorities in Europe (Prakash and Kollman 2003:626), mirroring its origin in the Convention on Biological Diversity (CBD). In contrast with trade policy, the Community does not enjoy exclusive authority on environment issues. In practice, the Commission does just about all the negotiating in this area, relying on Article 175 of the Treaty establishing the European Community (TEC), which allows for qualified
majority voting (QMV) in environmental policy-making (Rhinhard and Kaeding 2006:1037). At the same time, unanimous Council approval is required on some negotiating issues. Because the Council has a representative from each Member State, there are many opportunities for private access through this process. In this case, the Council reigned in the Commission early in the process, only later establishing a mixed negotiating plan whereby the Commission handled trade-related matters and the Council presidency took care of all other issues in the negotiation (Rhinhard and Kaeding 2006:1035).

Importantly, under mixed competence negotiations, national parliaments also must ratify the agreement, meaning there is even more opportunity for public involvement (Rhinhard and Kaeding 2006:1044) through the additional EU institutional veto players (Vogel 2003). Of course, this public involvement is only supportive of the status quo insofar as the public feels that it has benefited from the status quo. In this case, the EU had faced concerns with the SPS rules and feared major losses in WTO Dispute Settlement proceedings (Drezner 2007:167).

In particular, the EU was concerned about SPS rules that place the burden of proof on countries who believe there is a potential for harm from a particular import, rather than on exporters to demonstrate the safety of their product. This concern played

15 See Section 6.6 for more discussion of unanimity and QMV voting in the Council.
out in the EU’s desire to apply the precautionary principle in the realm of food imports, suggesting a lower level of risk acceptance than most exporters would probably support (Gupta 2000:215). This was not mere legal posturing since the EU was truly concerned about the recent WTO Dispute Settlement decision on importation of hormone-treated beef. In fact, many of the EU’s appearances as a defendant in the WTO have been related to violation of SPS disciplines. As it turns out, the EU was not quite as successful in the SPS negotiation as it had originally thought. The three sisters used to determine international standards were no longer mere unbiased scientific organizations in its view (WTO 17 August 1998:para. 62). As a result, there was a need to limit the influence of these rules – particularly reliance on the Codex Commission – that were more damaging than the EU had imagined. The Union’s disdain for these standards institutions was further intensified when the US and others attempted to insert a Biotech Agreement into the WTO at the 1999 Seattle meetings (Drezner 2007:164; European Commission 2006b).

Nonetheless, EU officials suggested that they were unwilling to overturn trade rules completely. The head of DG Environment at the time, Margot Wallström, explained, “The EU would not accept any subordination. This would have announced to the world that globalization and trade prevails over environment and health. Neither, however, did the EU want to legitimize discriminatory or protectionist
measures under the guise of safeguarding environment or health (Wallström 2002:249).” This indicates that the Union at least claims not to be trying to override existing rules, but rather just trying to create predictability. Another negotiator has also suggested that the EC viewed the US savings clause proposal as a means of blocking progress by exporters who did not want an agreement at all. He claims that the European position, in contrast, was that the treaties should remain compatible. He further maintains that no explicit savings clause was necessary, and that the resulting Preamble neutralized itself, returning the law to the default Vienna rules in any event (European Commission 2006b). The EU was eventually opposed to the status quo once more Commission Directorates became involved (Drezner 2007:164). As some commentators have noted, “The EU in particular was opposed to such a subordination and favored a balance that would tend more towards the Cartagena Protocol (while paying due respect to their obligations under the WTO). It would have been content with not addressing the relationship with other international organizations at all (Oberthür and Gehring 2006:17).” However, the obvious implication is that, according to the Vienna Convention, this more recent agreement would prevail over existing SPS rules.¹⁶

This claim about balancing the two areas of international law, rather than merely overriding existing rules, suggests that the EU was not quite so adamantly opposed to

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¹⁶ See footnote 17 below, however, describing a possible legal argument in favor of the Oberthür and Gehring formulation.
existing rules in general. As we will see shortly, EU Biosafety negotiators were perfectly happy including similar clauses to protect other international legal rules. Early on, prior to the Seattle WTO Ministerial, the EU also had been less opposed to efforts at protecting WTO rules. EU Trade Commissioner Pascal Lamy, in particular, originally supported the savings clause. This position is evidenced by the Community’s first submission in the Biosafety negotiations:

The general article on this matter shall reflect that the substantive provisions of the protocol take into account the existence of other international agreements. Furthermore, it should be noted that measures taken by Parties to the Protocol are likely to have an impact, inter alia, on international trade and might thus be covered by WTO Agreements and underline the importance of consistency between the protocol and the Agreements under the WTO. More generally, the provisions of the protocol shall be consistent with the relevant international obligations of the Parties (United Nations Environment Program 18 March 1997).

Later, after other Commission Directorates became involved, however, the Union was more resolute in its opposition (Drezner 2007:169). This simultaneous shift of participants and the negotiating position seems to indicate that bureaucratic politics and the addition of veto-wielding private access points may have been influential, despite my expectation that private participation is only relevant when dealing with a declining power. This piece of evidence suggests instead that private parties may intensify the government’s position in either direction, at least in the European Union. At this point,
Wallström notes, “We could not accept a savings clause subordinating the protocol to the WTO agreements (Wallström 2002:248).” Eventually, there were “no differences of opinion” within the EU at the Ministerial level (European Commission 2006b). The Council shared that position as well. Its directive to Commission negotiators during the final round requires reaffirmation “that trade and environment agreements and policies should be mutually supportive, and stresses the importance of the Protocol having an equal legal status with other international agreements and not being subordinate to such agreements (European Union 1999; European Union 2000).” This odd phrasing is intended to mean that no savings clause should be included because it would subordinate the results of this negotiation to other, previously agreed treaties in other issue areas. The EU was concerned that a savings clause “would negate the purpose of negotiating the protocol (Gupta 2000:215).”

At least one EU negotiator has noted that his delegation was “wary of US attempts to carve up international law more generally (European Commission 2006b)” by limiting the influence of new agreements. In that respect, it is interesting to note that the EU did propose a series of clauses that would protect other, non-WTO legal provisions. From the very beginning, the EC also proposed that “The issue of the relationship with other international agreements should, as far as possible, be referred to in the context of Article 22 of the [parent] Convention [on Biological Diversity] (United
In other words, they felt that there was already a precedent for addressing the relationship to existing commitments, and it had been developed within the Biodiversity regime, to which this Protocol was addressed in any event. The US had not ratified the parent Convention, meaning that Article 22 primarily represented the EC bargain with developing countries. The existence here of two opposing precedents – the WTO rule and the CBD rule – may have created the opening whereby deference had to be addressed more specifically. This legal uncertainty approach mentioned in chapter 1, however, only suggests the need for second order legal institutions. It fails to address the question of whether the existing or new rules will take precedence, nor does it provide leverage regarding which parties are likely to support the status quo. In this case, of course, the EU hoped to follow the Biodiversity agreement it had already joined with developing countries, and not the WTO bargain that it had struck with the United States. This decision suggests a nuanced view of deference towards the Union’s best prior achievement that was reached from a position of greater strength in relation to the developing countries. While the EC

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17 Article 22 reads, “1. The provisions of this Convention shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity. 2. Contracting Parties shall implement this Convention with respect to the marine environment consistently with the rights and obligations of States under the law of the sea.” Interestingly, if the Protocol was slated to follow the Convention’s rules, this phrasing may suggest from a legal standpoint that no savings clause was needed unless the Parties wished to override the exception for “serious damage or threat to biological diversity.”
wanted to alter the results of its existing agreements with the United States, it was not eager to see other rising powers cut into its other successes.

The EU’s first preamble proposal also noted the possibility of relying on other international guidelines. In particular, like the US early on, it hoped to draw from experience with the nonbinding UNEP International Technical Guidelines for Safety in Biotechnology and the UN Recommendations on Transport of Dangerous Goods. The UNEP Guidelines are proposed also as “valuable guidance and information for risk assessment and risk management” in the Operational Provisions, and as a model for the Advanced Informed Agreement procedure (United Nations Environment Program 6 May 1997). Neither of these references were included in the final Protocol text, or were even mentioned again by the EC. Nonetheless, the willingness to rely on earlier standards suggests an overall support for those existing institutions in which the Community achieved its preferred outcomes.

Later the same year, the European Community proposed the protection of UNCLOS and other rules related to sovereign territorial rights:

Nothing in this Protocol shall affect in any way the sovereignty of States over their territorial sea established in accordance with international law, and the sovereign rights and the jurisdiction which States have in their exclusive economic zones and their continental shelves in accordance with international law, and the exercise by ships and aircraft of all States of navigational rights and freedoms as provided for in international law and as reflected in relevant international instruments (United Nations Environment Program 18 August 1997).
Clearly, the EC was willing to accept existing international law in the guise of sovereignty rules and the Law of the Sea. However, it stops short of wishing to protect all existing international law. The same proposal went on to express concern about international trade implications as well: “Each Party shall ensure that the measures taken by it to implement this protocol do not create unnecessary obstacles to and do not constitute a means of arbitrary or unjustifiable discrimination or disguised restrictions on international trade (United Nations Environment Program 18 August 1997).”

Apparently, the EC was willing to move forward and make sure that the new Protocol would not affect international trade. It was, however, explicitly unwilling to accept that trade in the context of existing WTO rules that, it felt, had harmed European interests. In this August 1997 submission, the Commission suggested again that the relationship to other international law should be handled under the rules in CBD Article 22.

In response to questions about transboundary movement of Living Modified Organisms (LMOs) to areas outside of national jurisdiction, later EU proposals again pushed for the protection of the existing Law of the Sea and other rules:

We note that the international community has developed and adopted several legally binding instruments specifically to protect the environment of areas outside national jurisdiction, such as the Antarctic Treaty and its Protocol on Environmental Protection, the Convention on the conservation of Antarctic marine living resources(1) and the UN Convention on the Law of the Sea....
We note further that these instruments already include provisions on co-operation between Parties and provisions on the introduction of alien or new species.

Although Article 1 bis on general obligations should certainly apply we conclude that for transboundary movements taking place from an area under national jurisdiction to an area outside national jurisdiction it will be more effective to rely on provisions under the previously mentioned instruments than to elaborate provisions under the protocol on biosafety. However, to make it quite clear to the Parties to these instruments that measures should be taken to ensure an adequate level of protection in the field of biosafety when moving an LMO into these areas, a preambular paragraph to that effect could be inserted in the biosafety protocol (United Nations Environment Program 3 July 1998).

On the whole, the EU’s lack of enthusiasm for existing WTO rules was evident throughout the Biosafety negotiations. Despite that opposition, the Miami Group – composed of agricultural exporters led by the United States – was strengthened in the negotiations because even the EU and developing countries did not want outright conflict with WTO rules (Oberthür and Gehring 2006:15).

This EC opposition to a savings clause is in line with the general opposition to GM goods in Europe at the time (Prakash and Kollman 2003; Vogel 2003). The negotiating position, however, does not appear to be merely a policy preference. If this was simple opposition to GM goods, even accounting for the desire to have flexibility in blocking their entry to the European market, I would expect to see more activity in the post-Uruguay Round SPS negotiations themselves. As it was, the EU had briefly tried to
change the rules in that context as well, but could not make progress on that front. Instead, it sought a new institution in which there would be less US influence. The idea was that it could change the rules once it had even more power (Helfer 2004). Furthermore, if this was simply an effort to change SPS, it was quite a limited one because the Biosafety Protocol does not include issues other than GMOs. The Beef Hormones issue, for instance, would not have come under the purview of BSP because it dealt with food imports rather than the LMOs contemplated by the Cartagena Protocol. Therefore, as a policy solution, use of the BSP seems like a fairly limited approach.

Another potential explanation relates to the EU’s existing high levels of biotech regulation within the Community. This situation often translates into efforts to introduce similarly stringent international regulations, especially with the potential for coalition building with environmentalists who were also opposed to the biotech trade (DeSombre 2000). DeSombre’s theory, while quite useful, also leaves aside the question of why high regulations were put in place within the Union in the first place, leaving it open to concerns of omitted variable bias. This explanation remains weak for the EU in Biosafety because the European biotech industry is so weak (Brookes and Barfoot 2006) as to have almost no political influence. Rather than a strong, highly regulated industry, it was basically nonexistent in Europe. As a result, the only players within the EU were environmental groups and potential competitors such as conventional agriculture
producers. Furthermore, while this coalition may be feasible in the EU, it fails to explain the US position on BSP because US industry and environmental groups were on opposite sides of this issue.

On the other hand, the power change hypothesis goes a long way towards explaining the Community’s position on Biosafety. In fitting with the hypotheses suggested earlier, it is evident here that the EU was quite uninterested in protecting existing law that involved US interests such as the WTO. It was, however, willing to maintain CBD rules and other provisions that related more to developing countries with which it now faced greater competition.

### 6.6 Explaining the EU’s Mixed Result

EC negotiating positions are clearly less consistent than those of India or the United States in terms of the approach to institutional change and the status quo. This section attempts to determine why the Community sometimes supports and sometimes opposes the status quo. I discuss the hypotheses outlined in chapter 1 by considering how each explanatory variable is coded for the EC and analyzing other causal evidence linking those variables to EC negotiating preferences. A graphic representation of the European Union’s location on these variables can be found in Figure 6-2, and those values are coupled with EC negotiating positions in Table 6-1.
Figure 6-2: The EU’s Positions on the Decision Tree
<table>
<thead>
<tr>
<th>Negotiation</th>
<th>Year</th>
<th>Power Change</th>
<th>Private Access to Existing International Institutions</th>
<th>Formal Private Participation in the Negotiation Process</th>
<th>Council voting rule</th>
<th>EC Support for Status Quo</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fisheries</td>
<td>Many</td>
<td>Decline vis-à-vis developing country partners</td>
<td>European Commission actively solicits WTO trade complaints, meaning that private parties are able to utilize the Dispute Settlement process. Most other access varies by member country.</td>
<td>Low</td>
<td>QMV</td>
<td>Maintain UNCLOS rules, esp. in negotiations with “emerging fishing nations”</td>
</tr>
<tr>
<td>UNSC Expansion</td>
<td>~2000-2005</td>
<td>Union and some members have risen, but others have declined</td>
<td>N/A – no formal EC decision-making</td>
<td>Member States decide independently</td>
<td>N/A</td>
<td>Left to the member countries. EC does not take an official position</td>
</tr>
<tr>
<td>Bilateral Investment</td>
<td>Many</td>
<td>N/A</td>
<td>High</td>
<td>Unanimity required</td>
<td>N/A</td>
<td>Generally tries to ensure new agreements do not overturn existing treaties</td>
</tr>
<tr>
<td>WTO SPS</td>
<td>1988-1994</td>
<td>Union and some members have risen, but others have declined</td>
<td>High</td>
<td>Unanimity required because agriculture</td>
<td>N/A</td>
<td>Willing to rely on existing standards organizations, but wanted to broaden the group to include regional standards bodies</td>
</tr>
<tr>
<td>Biosafety</td>
<td>1997-2000</td>
<td>Stronger than 1994 relative to US</td>
<td>Somewhat high (mixed competence)</td>
<td>Commission lead, but unanimity required</td>
<td>N/A</td>
<td>Adamantly opposed to preservation of WTO SPS rules</td>
</tr>
<tr>
<td>Overall</td>
<td>Many</td>
<td>Union and some members have grown, but others have declined</td>
<td>Most access to WTO; other institutions vary by country</td>
<td>More private participation in Council; less in Commission</td>
<td>Various</td>
<td>Mixed record of support for the status quo</td>
</tr>
</tbody>
</table>
6.6.1 Power change and dissatisfaction with the status quo

First, because the Union – as a whole – can be seen as a rising power, I expect to see less deference on issues where the Commission has full negotiating authority, particularly when bargaining with the United States or other longtime non-EU powers. Nonetheless, I still anticipate a preference for the status quo when unanimous approval is required through the Council, and in EU dealings with developing countries that have gained more in recent years than the average EU member.

As noted in the introduction to this chapter, the question of power change in the EU is different when considering the Union as a whole rather than the situation of individual Member States. However, as the Commission has gained competence in a variety of issue areas, the overall position of the Union resembles that of a rising power, particularly in the economic realm. In addition to the changes in capabilities and economic prowess outlined above, the EU has undergone significant representational and institutional changes that affect its negotiating capacity.

Prior to 1951, all current members of the EU negotiated separately in all international fora. In fact, their ability to commit to a unified position abroad only began with the introduction of the Common Commercial Policy (CCP) in 1957 and was fully in place only with the completion of the customs union in 1968. Since that time, the Union – in the guise of the Commission – has gradually gained more responsibilities for representing its Members in negotiations with third parties (Bretherton and Vogler
1999:89-91). In particular, the end of the Cold War brought more opportunity for the Community to develop external economic relations without focusing solely on independent national security concerns (Bretherton and Vogler 1999:8). The EC was granted “full participant status” in the United Nations for the first time in 1992, although this grant was limited to its role in the 1992 UN Rio Conference on Environment and Development (Bretherton and Vogler 1999:91). The Commission President was finally recognized by Japan as a pseudo-Head of State in the mid-1990s (Bretherton and Vogler 1999:69) and the New Transatlantic Agenda of 1995 was the first time that the US dealt with the EU as a unified political force outside the trade realm (Bretherton and Vogler 1999:72). Most non-EU countries have recently shifted their primary missions in Europe from national capitals to Brussels (Bretherton and Vogler 1999:72), and Brussels has also become a focal point for a variety of organizations wishing to lobby EU policy makers (Bilefsky 2005; Buck and Kirchgaessner 2005).

This process of increasing Commission capabilities, however, has led to a great deal of confusion in relations with external negotiating partners. Indeed, the level of Commission involvement continues to vary by issue area, with full competence on commercial negotiations, and “mixed competence” in most other areas. Some commentators have suggested that this lack of broad issue area responsibility, coupled with the lack of domestic legitimacy, may hurt external credibility (Bretherton and Vogler 1999:42). “Economic presence,” they note, “…has not been entirely matched by
the development of a capacity to behave as a single purposive actor in the world system (Bretherton and Vogler 1999:46).” The Member States have difficulty agreeing on a coherent negotiating mandate, and the Commission often finds itself with little ability to deal with new offers because of the need for Members to renegotiate any response to third parties (Bretherton and Vogler 1999:41). These difficulties played out in the Uruguay Round WTO negotiations (Bretherton and Vogler 1999:76), and may have hurt the EC’s ability to achieve its most preferred outcomes. However, the flip side is the strength provided by the need for Member State approval, resulting in a 2-level game advantage similar to that provided by US Senate ratification rules (Bretherton and Vogler 1999:77). At least one commentator has noted that the power to achieve EU goals is often strengthened by this unanimity requirement, especially when Member States are trying to retain the status quo situation (Meunier 2000).

On the whole, it would appear that the EU – as a unified player in international negotiations – has gained influence over time, even if some of its members have experienced significant declines. As a rising power, the EU – when represented by the Commission, in particular – should oppose the status quo. Despite this increasing leverage, however, the ongoing ability of individual states to block change may lead to support for the status quo, especially when unanimous approval is required through Council participation (see section 6.6.3 below).
In addition to the variation in perceived power change depending on which EU institution is competent to handle the particular issue area, the EC faces a different measure of relative power change depending on the negotiating partner. Previous chapters addressed more clear cut cases in regard to power changes over time. The United States has clearly declined relative to just about every other country in the world, while India has clearly experienced a relative increase in bargaining power. The EC, however, has increased its capacity in relation to the US, but faces a relative decline in regards to developing countries whose influence has grown even more than that of the EC. The remainder of this section outlines EC activity on investment, SPS, and Biosafety negotiations. I do not elaborate here on the Security Council case because of the Community’s lack of participation in that debate.

6.6.1.1 Bilateral Investment Treaties

The EU does not have competence for most investment provisions. However, in those situations where it does participate, the Commission has been quite supportive of the status quo on investment issues. In large part, this stance seems to be related to the countries with which it is negotiating. Certainly, India could be seen to have risen more steeply than the EC over the past few decades. As a result, in the early stages of negotiations with India, the Community has been quite explicit about its need for a savings clause if the agreement is to be expanded beyond mere efforts at investment
promotion. These negotiations are still underway, so it is impossible to confirm whether the EC will be successful in these efforts to protect existing legal provisions.

It is also notable that investment is an area requiring unanimous Member State support through the Council voting process. Some EC Members may have actually experienced a relative decline in power, providing rationale for the Member States to block any agreement that does not protect existing arrangements. However, there is no clear evidence to show that the Community would not have pushed for a savings clause in the absence of these unanimity rules.

6.6.1.2 WTO SPS Agreement

In the SPS negotiations, EC negotiators willingly supported the status quo, but also pushed for reliance on regional standards bodies in which the Community had played a greater role. In comparison with developing countries, it is clear as mentioned above that the Community had not risen as much. Therefore, its support for the status quo – particularly in institutions that European countries had founded and controlled along with the United States – seems quite plausible. The desire to expand the reference institutions to those in which the EU could reduce US influence provides even better support for the power change hypothesis. Essentially, because referenced international standards have equal influence in the SPS Agreement, any additional referenced institutions would have had important effects. Any mentioned standard becomes a presumptively acceptable measure for blocking imports, meaning preservation of
greater regulatory flexibility with any additional standard, particularly one over which European countries held a great deal of sway. Again, there is no concrete evidence that the EC took this action specifically because of the power alignments, but it remains a plausible explanation. Unfortunately for the Community, it was not powerful enough to overcome US opposition to regional agreements at that time, resulting in a reliance only on the Codex, OIE, and IPPC standards-setting rules.

6.6.1.3 Biosafety Protocol

By the time of Biosafety negotiations during the late 1990s, the European Community had further increased its position as a major player in international institutions. In addition to its ongoing economic integration, the EU was on course to add additional members, further increasing the size of its economic clout. Based on the CINC index, the EU rose from 12.8% to 13.6% of global capabilities from 1994-1999, while the United States stayed at nearly the same level throughout the period. As such, the EU should have expected to attain a better bargain with the United States at the end of that five year period. The US was also hampered in Biosafety negotiations by its lack of membership in the parent Convention on Biological Diversity (CBD), meaning that the Europeans had greater control over the negotiations than otherwise expected. Nonetheless, the Community was simultaneously concerned with the rise of major developing countries such as India and China, each of which experienced a major rise over that time. As expected by the power change hypothesis, the EU’s rise in regards to
the United States was rewarded with efforts to remove past rules that seem to have favored the US a great deal more. When addressing the existing CBD, of which the United States was not a member, EU negotiators instead moved to maintain the existing institution from the early 1990s.

Again, EU negotiators have not indicated directly that power change was the cause of their opposition to a savings clause in this negotiation. However, their frequent expressions of displeasure in the WTO setting with politicization of the Codex process points to a specific concern with continuing to rely on certain limited international standards bodies. Had the EU succeeded in its efforts to add regional bodies during the Uruguay Round, it would not have needed to fight about it again during Biosafety negotiations. The EU’s increased abilities in the Biosafety context are confirmed by its success in avoiding a full WTO savings clause. Whereas it failed to incorporate regional standards in SPS due to US influence, it did manage to avoid the top two US options in Biosafety – no agreement at all, or an unmodified savings clause. Instead, the Europeans succeeded in getting a Protocol that placed the savings clause in the Preamble and softened it with conditions in the subsequent paragraph. Although it was not a complete victory, the EU achieved a compromise more to its liking than it had earlier. The adamant support for institutional change in this case seems, at first glance, to go against prospect theory and other explanations that emphasize lower intensity of support for positions opposed to the status quo. However, as I discuss in chapter 1,
while rising powers should have a lower level of concern for institutional change per unit of power change, the level of concern is never zero, and may – as in this case – be extremely high due to the large capability increase that a country has experienced. In the Biosafety negotiations, the EU’s power appeared to increase much more than any aggregate measure would suggest because of the United States’ non-membership in the parent CBD.

Overall, EU support for the status quo seems to vary with its position as a relatively rising power in relation to bargaining partners. However, causal evidence is lacking, in part because negotiators are loath to admit any efforts to overturn existing law, preferring instead to claim that they wanted to put environmental issues on a par with international trade law.

6.6.2 Private Access to Existing Institutions

Second, as with other parties, the EU should not treat all existing law equally. After succeeding in a negotiation, it should be most interested in protecting the results when there are legally binding arrangements providing enforceable rights to private parties. These individuals and industries should therefore be “compliance constituencies” who support status quo rules.

The European Commission, unlike most bureaucracies, is still at the stage of trying to establish a constituency among citizens of the Union. As a result, it has created a set of rules that make it particularly easy for private actors in the EU to utilize the
WTO Dispute Settlement process. Rather than waiting for industry to bring up concerns
with access to foreign markets, the Commission actually solicits complaints through the
Trade Barriers Regulation (TBR), which was designed to mobilize new participants
(Shaffer 2003). This process provides extensive openings for industry to have the
Commission file DSB complaints on its behalf, and the agreement of all Member States is
only required when addressing issues of joint competence such as the services sector.
Otherwise, a slightly less demanding qualified majority can support the initiation of
dispute settlement proceedings. The concentration of this process in Brussels has also
made it easier for industries to present a unified European voice, particularly now that
their interests are linked through the complete internal market. For example, one repeat
client on WTO issues has been the spirits industry. As a result, a DG Trade official notes
that this industry has gained access to the Commission at the negotiating phase as well
(DG Trade 2006b).

Nonetheless, new players are rare, as small and medium enterprises do not tend
to approach the Commission through these extensive openings (DG Trade 2006b). In the
case of WTO market entry rules, assuming that they stand to benefit equally, I expect
European industry to be more adamant supporters than their US counterparts because
of the access they have been granted to the dispute settlement process.

This expectation may be true, but it receives limited support in this chapter. In
the case of recent investment negotiations, the Community has sought savings clauses
directed at the WTO. However, there is little evidence to demonstrate that this effort would have been any less substantial without the high level of access granted to European private parties in the Dispute Settlement process. This factor is irrelevant for the SPS case since it was negotiated before TBR was put in place. In the Biosafety case, in fitting with the relationship I have described between hypotheses, TBR had little impact on the EC negotiating position. Due to the rise in relative power, Europe felt that it could benefit more from new rules that would replace the existing SPS arrangement. As a result, there were not private parties pushing for the protection of SPS rules in the Biosafety area.

More importantly for this chapter, as described in hypothesis 2.1, I expect the EC to focus on protecting enforceable EU, WTO and BIT rules rather than other agreements that do not create legal rights. To the extent it feels that it has benefited from those existing arrangements, EC negotiators show the most concern for upholding highly legalized international provisions. The ongoing effort to include “disconnection clauses” shows a desire to protect EC law itself, although this effort could just as easily derive from a goal of organizational maintenance as it does from a desire to protect highly legalized institutions. In a number of settings, however, the EU demonstrates a clear focus on protecting existing regimes with enforceable rights. The consistent focus on saving UNCLOS rules – both in later fishing agreements as well as Biosafety proposals – points to that level of concern with legalized agreements, but only when the
power change hypothesis finds the country generally on that side of the issue. Again, when EU actors have not benefited from the existing rules – as in the case of SPS – the degree of legalization makes little difference in regards to efforts at protecting the status quo. In negotiations with other rising powers, the EC has focused on the protection of WTO – rather than other – rules negotiated from a position of strength and implemented with a high level of private access.

6.6.3 Private Participation in the Negotiating Process

As I have noted, the institutional framework for negotiations varies with issue area. As a result, so too does the amount of private participation in developing the Union’s negotiating position.

The general process for preparing an EU negotiating position involves proposals by the Commission (the Union’s bureaucracy), followed by approval from the Council (which contains a representative from each Member State) by unanimity or qualified majority depending on the issue area. Under Article 300 of the EC Treaty, the Commission – upon deciding to participate in a negotiation – proposes a framework within which to do so. The proposal is then reviewed by expert committees (for example, the “133 Committee” – named for the Treaty article that establishes it) in the

case of trade negotiations). Before reaching the Council, it is also examined by the Committee of Permanent Representatives of the Member States (COREPER) (Meunier 2000:107). The Council then must authorize the Commission to approach other countries on the basis of a specific negotiating mandate. These Council instructions remain classified, though leaked examples show a significant degree of latitude left to the Commission (Eeckhout 2004:171). Having received permission to proceed, the Commission conducts negotiations “in consultation with special committees appointed by the Council to assist it in this task and within the framework of such directives as the Council may issue to it (Article 300(1) EC Treaty).” Article 111 provides a separate basis for negotiating authority on monetary arrangements. The process is similar, although the Commission must also coordinate with the European Central Bank (ECB) on these matters (Eeckhout 2004:174).

Once the Commission has reached agreement with other countries, it must approach the Council again for permission to sign and/or conclude the agreement. The Council then makes a “decision” to conclude the international agreement, which includes a statement of the legal basis for Community participation, as well as note of approval, and a brief mention regarding who is responsible for communicating this acceptance to the world (Eeckhout 2004:176).

The Council’s power to control Commission activity varies depending upon the issue area, and follows different voting rules on that basis. Because the Council includes
a member from each EU state, it can be used as a tool to constrain the amount of authority delegated by Member States to the Union. When Council unanimity is required, EU negotiators cannot move as far from the position that would have been taken by the Member States individually. In theory, with unanimous approval from the Member States, the EC – as represented by the Commission – could undertake negotiations on just about any issue.

On issues delegated to the Union, however, only a qualified majority vote (QMV) is necessary to proceed (Article 300(1) EC Treaty). For instance, the Common Commercial Policy (CCP), established by Article 113 of the Treaty of Rome [133 in the revised treaty], grants “exclusive competence” to the Community for trade negotiations with non-EU countries (Bretherton and Vogler 1999:49). For goods falling under the CCP, the Commission can initiate policy and propose negotiations, while the Council has a right to approve or disapprove by QMV, meaning that not all Member States have to agree in order for a proposal to move forward. However, on the most contentious issues, consensus is often required so that all Members have the opportunity to block any major concerns (Bretherton and Vogler 1999:50).

Similarly, Article 300(2) gives the Council a right to decide by QMV on proposals for signature (and sometimes conclusion/ratification for those agreements that are concluded upon signature). However, it must act unanimously “when the agreement
covers a field for which unanimity is required for the adoption of internal rules and for the [Association Agreements] referred to in Article 310 (Article 300(2) EC Treaty).”

These “mixed” agreements “need to be concluded and ratified by each Member State” subject to each state’s ratification rules (Eeckhout 2004:218). The European Court of Justice (ECJ) can be called upon to decide which issues require unanimous Council approval. In its Opinion 1/94, ECJ clarified that the CCP covers only trade in goods, while services, investment and other non-trade sectors are subject to a Council consensus (1994).

As Meunier has demonstrated, the distinction between QMV and unanimity has important implications for negotiating outcomes. She employs the notion of 2-level games to show that the Council’s constraints on the Commission negotiating mandate can make the EC’s position stronger due to a credible commitment of veto by any opposed EU member. This strength is particularly evident when the EU wishes to maintain the status quo. When the Community prefers a change, then QMV may provide more bargaining space even though it does not provide the same credible commitment (Meunier 2000).

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19 Although ratification votes come after agreement has been reached, negotiators must consider the preferences of those who will attempt later to ratify the resulting treaty.

Furthermore, the Commission is more liberal, favoring more change than the Member States, which is another reason to expect more support for change when the Commission has greater flexibility in international negotiations (Meunier 2000:112). The Commission, as a relatively new player on the international scene, also likes to push for new institutions that require private parties to go through it rather than through Member State governments (Shaffer 2003).

This institutional explanation also plays into my third hypothesis regarding private participation. The mechanism for translating that institutional difference into greater support for the status quo runs through the aggregation of private preferences. The greater the degree of unanimity and control by the Council over the Commission, the more points there are at which private parties can participate. Each country gets a representative and some are more open to private concerns than others. Regardless of individual country rules though, fragmented decision making provides additional opportunities for private participants, particularly when private actors want to prevent change (Tsebelis 2002; Vogel 2003). As a result, the more countries that are required to sign off, the greater opportunity there is for private parties to raise deference concerns. A veto points model does not provide the same support regarding agents of change.
because a qualified majority still represents a significant level of support and it remains
difficult to convince that many players to adopt a position in favor of a new proposal.21

Private participation is evident outside the Council-Commission interaction as well. The European Parliament (EP) provides an important route for private participation because its members are directly elected and therefore held accountable to European citizens. However, EP involvement is minimal at every stage of most international negotiations. Consultation is required, but there is no need for the EP’s consent, and the Commission can generally move forward without any EP approval. The Parliament’s opinion is, however, required for agreements with “important budgetary implications” or those “entailing amendment of an act adopted under the procedure referred to in Article 251 (Article 300(3) EC Treaty),” as well as Association Agreements, and agreements “organizing cooperation procedures” (Eeckhout 2004:178). Therefore, I would expect to see greater support for the status quo in these types of agreements due to the opportunity for private influence on directly-elected EP members. In fact, the EC’s preference for existing institutions has been noted in the two Latin American Association Agreements discussed in section 6.3.1.

Although there is no legal mandate for private participation, the so-called 133 Committee also brings together interested parties almost every week. The Commission

21 Vogel (2003) claims that the additional access points are valuable for change constituencies as well, but theoretical justification is lacking.
makes its views known to the Member States through this Committee regularly (DG Health 2006). The Member States also have their own processes for involving private parties, all of which are different. These processes are beyond the scope of this discussion, but the relevant concern is that they each have some means of learning private preferences, which can then be translated into the country’s position in Council votes.

Each Directorate has a different process for direct public interaction. DG Health, for example generally communicates with Member State civil servants and scientific authorities rather than NGOs (DG Health 2006). DG Finance also rarely encounters private involvement, except indirectly through Member State opinions and the European Parliament (DG Economic and Financial Affairs 2006). At the other extreme, DG Trade actually seeks out industry involvement in setting its negotiating positions (DG Trade 2006a). Environmental negotiations occupy a middle ground, with DG Environment serving as an entry point and dealing often with environmental and industry groups (DG Environment 2006b). These groups approach the Environment Directorate, rather than the ongoing solicitation of views that takes place in the trade realm. Despite these different approaches, the lack of legal requirement for direct participation should limit the impacts of different rules.

I expect to see a high level of support for deference when private parties benefiting from existing institutions actually have a role in developing the Union’s
negotiating position. Although the Commission often solicits public comment on its positions, private influence is more likely to emerge through the Council approval process. As such, there should be more private participation, and therefore greater support for the status quo, when the Council must approve negotiating directives and concluding decisions unanimously rather than by qualified majority. In those issue areas, as Meunier notes, supporters of the status quo have more influence.

Again, this hypothesis should only be relevant when the EU has experienced a relative decline in power compared with negotiating partners. Unanimity is required in all cases here except fisheries negotiations which operate by QMV. Nonetheless, despite support for changing some UNCLOS enforcement mechanisms, the Commission largely desires to maintain UNCLOS and other provisions. Although contrary to my expectation, this outcome is not shocking since QMV still provides a fairly high barrier to approval.

In investment negotiations, unanimity voting and preference for the status quo are both present, though there is no further evidence to link these two pieces of data. The EC acted as a rising power in both the SPS and Biosafety negotiations, making it unlikely that private participation should affect the preference for institutional change. Without a constituency pushing for the status quo in each of these situations, private participation should be somewhat meaningless. Nonetheless, it should be noted that there was a slight shift in EC’s Biosafety position from acceptance of savings clause early
on with the involvement of the Trade Commissioner Lamy to adamant efforts against
the status quo after the inclusion of officials representing other issue areas. This shift,
which also came shortly after the Community lost its WTO beef hormones case, may
suggest the importance of additional veto players, or it may indicate the role of
bureaucratic politics when officials also wish to protect institutions for which they are
responsible. In this case, private participation seems to be an insufficient explanation
since there really was no European biotech industry to speak of.

### 6.7 Assessing the Hypotheses

#### 6.7.1 Alternative Hypotheses

This section outlines a series of other possible explanations that have been
considered throughout the chapter.

#### 6.7.1.1 Normative Support for Existing International Institutions

First, unlike other parties to international negotiations, the EU was itself created
through negotiation of a multilateral treaty (Bretherton and Vogler 1999:46). After more
than fifty years of European integration, the resulting institutions provide a wealth of
enforceable rights to Member States and their citizens. As a result, both private actors,
and the Commission itself, have incentives to protect EC law. Therefore, the EU can be
expected – all else equal – to push harder than its negotiating partners for the protection
of existing international rules, particularly those related to regional economic integration organizations.

Kagan has also suggested that Europeans are simply more interested in international law because they believe that integration has saved them from the dreads of war (Kagan 2003). Kagan's approach is not supported by the evidence in this chapter. Although the EU may enforce existing international law, they are actually more interested in overriding it later on rather than sticking with what was earlier agreed upon.

6.7.1.2 Hegemonic Stability Theory

A second important theory is Hegemonic Stability Theory, as described in chapter 4. This theory also cannot explain the outcomes seen here because it seems that the EU has actually succeeded in establishing new institutions even without US support.

6.7.1.3 Savings Clauses as Ad hoc Policy Preferences

Next, one might suggest that EU negotiating positions were merely linked policy preferences at a point in time. While this may also be the case, particularly in the case of efforts to restrict GM crops during the Biosafety negotiations, the EU was fighting against a current institutional framework that was clearly a result of its diminished position in earlier years. The opportunity to change institutional structures would not have arisen without the concerns about power change that have been discussed
throughout this dissertation. In addition, policy approaches alone cannot explain the shifting positions within the course of a negotiation. The EC’s original support of WTO law seems to have been related to the people involved in the negotiation. The eventual switch to harsh opposition for a savings clause may correlate with increased opposition to GMOs (Vogel 2003) but that switch was not as rapid as the changed position. Additional preference intensity seems to have resulted from EC concerns about the extent of its problems in the WTO after the beef hormones decision was handed down. Clearly, the EU had background policy concerns, but those are insufficient for explaining the course of the Biosafety negotiations.

6.7.1.4 Baptists and Bootleggers

A fourth approach is the Baptists and Bootleggers model mentioned in previous chapters. While there is a strong correlation between high regulation in Europe and a high level of European support for global regulation, this approach is insufficient in this case because there was no strong biotech industry to push for the internationalization of local rules. Furthermore, this theory does not examine the origins of domestic regulation, suggesting the potential for omitted variable bias, linked in this case to general biotech opposition in the EU. It also does not account for other questions of change such as market access concerns in investment treaties.
6.7.1.5 Environmental Chilling Effect

Next I consider the “chilling effect” approach discussed previously. While this hypothesis might give us some leverage on understanding the supposed watering down of the Biosafety Protocol, it fails to explain European efforts to balance against economic law in that case.

6.7.1.6 Transaction Costs

Finally, institutionalists have often suggested a transactions costs approach. While this theory might explain the desire not to renegotiate the highly complex and very lengthy UNCLOS, it is unclear why governments should not also agree on setting aside the highly contentious WTO/SPS. To some extent, the eventual influence of other WTO provisions may provide support for this theory. However, it remains insufficient for explaining all the variation demonstrated in the Biosafety case.
6.7.2 Assessing the Hypotheses Presented in This Dissertation

Overall, the behavior of European Community negotiators supports the hypotheses established earlier.

6.7.2.1 Power Change Hypothesis

The Community and its Members have experienced different levels of rising and declining power. As expected, the newly powerful Commission tends to support change more often than the Council, which operates with more Member State input. More importantly, the EU consistently displays a preference for the status quo when addressing previous agreements with developing countries that may now be in a position to gain more concessions. However, in negotiations with the United States, the Commission seems to push for a greater degree of change in international institutions. This finding suggests an ongoing strategy – though not always successful – to exploit new power dynamics and gain new institutional benefits, while constantly protecting against other rising powers.

My suggestions about weak opposition to the status quo would seem to be washed away by the Biosafety case in which EU takes a firm stand for institutional change. However, this difference might be explained by the degree to which the EU has risen in this case. In particular, the weak position of the US as a nonmember provided the EU with a much greater bargaining advantage than it would otherwise have had in that time period.
6.7.2.2 Institutional Access Hypothesis

Second, the EU does not always aim to protect existing WTO rules on behalf of an industry that has access to that institution. However, this lack of concern for the WTO seems to occur only in situations where the EU felt aggrieved by existing rules, as in the realization that SPS had become a significant burden to the EU’s regulatory freedom. In other situations, particularly when negotiating with developing countries, the EU does try to protect enforceable EU, WTO and BIT rights for its industry that has used these provisions in the past. As expected in Hypothesis 2.1, the EU is much more active in efforts to maintain enforceable rules than it is in protecting other existing treaties such as Association Agreements.

Hypothesis 2.2 is not well tested by this case, other than the demonstration of increased European support for change after losing the beef hormones case. Again, however, there is not much to report regarding claims about the impact of WTO access because this hypothesis depends on a country being in a less advantageous negotiating position than before. The investment negotiations come after the Uruguay Round and protect WTO rules. The correlation between institutional access and a preference for the status quo is evident, but no causal evidence is available. The SPS case came before the introduction of TBR and so could not possibly have been influenced by access to Dispute Settlement through the TBR arrangement. The Biosafety case does come after TBR was
in place, but the EU was a rising not declining power in that context, so it would have had no incentive to protect anything in that negotiation.

6.7.2.3 Private Participation Hypothesis

Finally, this case also does not provide a great deal of leverage regarding the influence of private participation on status quo maintenance. As shown in Figure 6-2, I would expect that private influence on later negotiations should breed more support for existing rules, but only when the other two conditions are in place. That is, when negotiating with other rising powers, the Commission should be more likely to support deference if the issue area in question requires a unanimous – rather than qualified majority – decision from the Council. Unfortunately, the cases explored here do not hold the first two conditions constant while varying the Council decision rule. The Biosafety case shows the opposite of my expectation regarding high private access to existing WTO rules and private participation through Council unanimity. However, this decision does not reach those branches of the tree in Figure 6-2 because of the EU’s position as a rising power in regards to the United States during the interim years. Instead, it involves the rejection of an existing rule that the Community did not support, so it is difficult to compare it with other issue areas in which the EC faces greater competition from other rising powers.

Despite the increase in power, there does appear to be a correlation between veto points and the position against the status quo in Biosafety. Perhaps it is the case that
private participation intensifies a country’s position in either direction, or perhaps the position shift happened for other reasons, as no evidence is available to support any causal linkage in this situation either. Reliance on the status quo in investment cases is similarly correlated with a high level of participation. However, there is once again no causal evidence of this relationship, especially since SPS and Biosafety also had unanimity requirements based on their status as agriculture issues.

The complexity hypothesis is not really addressed in this chapter for two reasons. First, there is very little variation on this issue within the cases here since bilaterals are primarily just investment promotion in this case. Second, as with the other hypotheses considered above, this linkage only kicks in for declining powers (as shown in chapter 2), so it is not quite as relevant in the EC case.

In the end, there is not enough variation on private participation within the EU to test the third hypothesis without comparison to other countries’ preferences. In fact, the argument could be made that just about all contentious EU negotiating positions actually require unanimous approval due to the potential for any aggrieved Member State to hold up the process and make threats in other areas. Even Meunier’s primary example of QMV – the early phase of Uruguay Round agriculture negotiations – was eventually overturned (Meunier 2005:72). The second and third hypotheses gain support from the EC case, but they can only be fully assessed through a comparison between US, EU, and Indian negotiating practices.
The European Union represents an important new player in international negotiations, with growing competence over the last half century. Its approach to protecting the status quo reflects a careful balance between its increasing role and a hesitation on the part of some Member states to accept change. Chapter 7 compares this case to the US and India studies, drawing conclusions about the value of my hypotheses.
7. Conclusion

This dissertation has tested a series of hypotheses regarding the influence of existing international law on subsequent negotiations. It addresses the conditions under which countries support or oppose the legal status quo. This chapter summarizes the project’s findings, and discusses its implications for the study of international institutions.

7.1 Results of Case Study Research

Chapter 2 presented a statistical analysis of the conditions under which participants protected or replaced the status quo in more than 200 randomly selected multilateral treaty negotiations. Chapters 4 through 6 used a cross-cutting case study approach to better understand why certain governments express preferences for change or the status quo. This section brings together those four chapters worth of empirical evidence to assess the value of four hypotheses outlined in Chapter 1. All four hypotheses are supported, to varying degrees, by the statistical model and case studies. Table 7-1 shows each government’s preference for the status quo in each of the four subcases studied in this dissertation. Table 7-2 displays those outcomes together with the values of independent variables for each case.
### Table 7-1: Case Study Outcomes – Support for Deference on 4 issue areas in three governments

<table>
<thead>
<tr>
<th></th>
<th>Security Council Expansion</th>
<th>Bilateral Investment Treaties</th>
<th>SPS</th>
<th>Biosafety</th>
<th>Overall</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>United States</strong></td>
<td>Supportive of very limited change; Efforts to prevent any major changes.</td>
<td>All agreements include a savings clause for tax agreements and limited references to other existing international law</td>
<td>Adamant about relying on existing standards organizations, especially the global ones in which it had the most control</td>
<td>Adamantly opposed to replacement of WTO SPS rules</td>
<td>Support for the status quo</td>
</tr>
<tr>
<td><strong>India</strong></td>
<td>Member of G-4 seeking expansion, including a seat for itself</td>
<td>Refuses to participate if other country demands a savings clause</td>
<td>Did not want to rely on existing rules, but did not take a strong stand on this issue</td>
<td>Somewhat indifferent about the relationship with WTO rules</td>
<td>Support for change, though not always active</td>
</tr>
<tr>
<td><strong>European Communities</strong></td>
<td>This issue is left to the member countries. EC does not take an official position.</td>
<td>Generally tries to make sure that new agreements do not overturn existing agreements</td>
<td>Willing to rely on existing standards organizations, but wanted those to include regional organizations</td>
<td>Adamantly opposed to preservation of WTO SPS rules</td>
<td>Mixed</td>
</tr>
</tbody>
</table>
Table 7-2: Explanatory and Dependent Variables for 3 Case Studies

<table>
<thead>
<tr>
<th>Case</th>
<th>Power Change Relative to the rest of the World</th>
<th>Private Access to Existing International Institutions (especially WTO)</th>
<th>Private Participation in Foreign Policy Decision Making</th>
<th>Overall Support for Deference</th>
</tr>
</thead>
<tbody>
<tr>
<td>United States</td>
<td>Has declined since 1948 relative to others</td>
<td>Generally, US private parties have access to dispute settlement processes such as the WTO DSB, though they must seek it out themselves.</td>
<td>Open to private opinion through Congressional approval, as well as Executive Branch hearings. When more Executive agencies are involved, there are more openings for private participation.</td>
<td>Overall support for the status quo in international negotiations</td>
</tr>
<tr>
<td>India</td>
<td>Has risen since independence in 1947</td>
<td>There is no formal procedure for businesses to have the Government bring their case to the WTO.</td>
<td>Businesses and citizens are often invited to comment on negotiating positions, but there is no formal mechanism and no need for legislative ratification.</td>
<td>Support for new international institutions to override existing rules, though not always actively promoting that change.</td>
</tr>
<tr>
<td>European Union</td>
<td>Individual countries are mixed (UK sharp decline since 1948; Germany huge rise since 1948); European Union (as represented by the Commission) has gained strength and importance; some major developing countries have risen more steeply however</td>
<td>European Commission actively solicits WTO trade complaints, meaning that private parties are able to utilize the Dispute Settlement process. Most other access varies by member country.</td>
<td>The Commission remains open to private comments, but the Council provides greater opportunities for participation because each country has a veto in that institution.</td>
<td>Mixed response – Support the status quo when dealing with developing countries, but look for institutional change when negotiating with the US; Commission tends to push for new institutions, while the member states often want to move more slowly</td>
</tr>
</tbody>
</table>
7.1.1 Hypothesis 1: Institutional Benefits and Power Change

The first hypothesis suggested that countries would be more likely to protect existing international law if they had experienced a decline in power relative to the rest of the world. Furthermore, drawing on prospect theory, that support for the status quo should be much more intense than the preference for change expressed by rising powers. In fact, the evidence throughout the dissertation supports this hypothesis.

Chapter 2 demonstrates that agreements are more likely to contain “savings clauses” that explicitly protect status quo rules when the negotiation involves more participants. However, that relationship is statistically significant only in cases where the average participant has experienced a decline in relative power since 1948. As expected by prospect theory, rising powers seem less concerned about change than their counterparts. This expectation is supported by the lack of a significant relationship in either direction among rising powers.

In order to further test this hypothesis, chapters 4-6 examined government preferences for the United States, India, and the European Community. Though it remains the world’s greatest superpower, the United States has experienced a decline in power relative to the rest of the world. As expected, therefore, it is a strong supporter of

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1 As discussed in Section 7.1.4, more participants lead to a more complex negotiating environment, which in turn raises uncertainty and provides additional points at which parties can express opposition to change. Both of these conditions push participants towards a narrower scope of agreement, which is one purpose of a savings clause.

2 This base year comes just after the establishment of the major postwar institutions.
existing international rules. The United States has invested a great deal of energy in protecting its advantageous institutional position. As one government official noted, “We designed the system,…and therefore it benefits us to uphold it (US Department of Commerce 2007b).”

In contrast, Indian officials are less sanguine in their support for change, but most do prefer the creation of new institutions that represent the country’s greater position in world politics. Negotiating documents, and comments from current and former government officials, confirm that India would prefer to replace or change some of the institutions that were formed without its input. As representatives of a rising power, Indian officials would prefer to see new institutions that account for their newly advantageous bargaining position. Nonetheless, in negotiations such as those surrounding the SPS Agreement and the Biosafety Protocol, India was willing to move forward with reliance on existing standards institutions and the use of a savings clause respectively, despite its preference for change. This issue did not stand in the way of India’s broader support for agreements in those areas.

The European Community (EC), in contrast, presents a mixed record in its support for the status quo condition. The European Commission – representing the increasingly powerful Community as a whole, and occupying a new position in world politics itself – tends to prefer institutional change. However, there are very few issue areas – none of which are studied at length in this dissertation – in which the
Commission has been granted full negotiating authority, needing support from only a qualified majority of Member States. Of the four negotiations upon which this dissertation focuses, the Commission was granted the most authority in the Biosafety case. That is also the issue on which the EC was most adamant about moving past the status quo. However, despite that correlation, there is little evidence linking the Commission’s role in Biosafety to the EC’s adamant savings clause opposition in this case. It appears equally likely that individual EC Members would have reached the same position. As the Community continued to expand in size and influence throughout the 1990s, it tended to take stronger positions against the status quo. Surprisingly, in contrast with the Indian case, this support for change often appears as strong as other countries’ position in favor of the status quo. Nonetheless, even in the Biosafety case, while the EC tried to override certain SPS rules, the Community’s effort to avoid a savings clause was moderated by its overall desire to maintain WTO rules more broadly (Oberthür and Gehring 2006).

However, on issues requiring unanimous approval from all Member States through the EC Council (such as SPS and agricultural trade negotiations), there tends to be stronger support for the status quo because each Member State has veto power over the Community’s negotiating position. Relatively declining powers – such as the UK and France – are therefore able to block any agreement that would eliminate institutional benefits gained in previous negotiations.
Furthermore, the mixed EC record relates to the perceived opponent in negotiations. When dealing with the United States, European negotiators tend to support change because of their increasingly advantageous positions. In contrast, when negotiating primarily with developing countries – as in investment deals for India and the Andean Community – the EC is careful to protect its citizens’ existing rights under international law.

On the whole, therefore, both treaty-level statistical observations and government-level case studies confirm the desire of declining powers to protect existing institutions. Rising powers, on the other hand, generally prefer change. However, their preference tends to be softer than the status quo support exhibited by declining countries.

### 7.1.2 Hypothesis 2: Private Benefits Require Access to Existing Institutions

The second hypothesis suggests that, if a country has experienced a relative decline, it should further value existing institutional benefits when private parties have more access to use them. Highly legalized international regimes, therefore, provide more institutional capital to private parties within countries. This expectation of concrete legal results should lead to private parties placing a higher value on those institutions. In addition to different levels of legalization, private access also varies by country, as each government employs a different mechanism by which private actors
may utilize existing international institutions.

I was unable to test this hypothesis statistically because treaty-level observations can only provide information about whether a given agreement protects existing arrangements. That level of analysis, however, cannot provide systematic insights into the characteristics of institutions that are most likely to be protected by a savings clause. The case studies are crucial for testing this hypothesis, and they provide support for it.

In particular, across all three cases, it was clear that negotiators took pains to protect the most legalized existing institutions. As expected by Hypothesis 2.1, less formal legal devices – such as UN Guidelines – generally received less consideration in later negotiations than highly legalized institutions like the World Trade Organization.

In most international dispute settlement processes, only governments – rather than individuals or private industries – can initiate disputes. Therefore, governments act as gatekeepers, deciding which cases are important enough to bring before an international tribunal. Private parties wishing to use the institution must convince their governments to complain on their behalf. As a result, in addition to the institutional variation driving Hypothesis 2.1, there is also some degree of variation across countries regarding the level of private access to international institutions.

India does not provide extensive access for private parties. It has no formal process by which citizens or industry can request that a case be brought to the WTO

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3 Human rights agreements provide notable exceptions to this rule.
Dispute Settlement Body (DSB). As a result, most Indian DSB complaints are intended to help state-owned industries or other well-connected businesses. These are the same groups who were able to influence the government position earlier at the negotiation stage, meaning that their additional benefits from the existing institution should not bring any further support for the status quo. Of course, because India’s power has increased over time, these constituents may be inclined to believe that their government can achieve a better outcome on their behalf in subsequent negotiations, rather than sticking with the status quo situation. India does not make it past the power change condition described in Hypothesis 1, so this lack of private access seems fairly inconsequential in this case. On the whole, despite some involvement from well-connected industries, India’s relatively narrow channels for private access to existing institutions seem to prevent widespread support for the institutional status quo.

The European Community, in contrast, provides exceptionally broad access for private parties who wish to have their case brought before the DSB, and the European Court of Justice (ECJ) also allows extensive private participation. For potential DSB complaints, the European Commission actually solicits grievances from affected industries, broadening the scope of actors who can benefit from the international status quo. After involvement in a DSB case, these parties often become important constituents for subsequent treaty negotiations (DG Trade 2006b). In addition, the EC case study demonstrates a particular interest in protecting the most highly legalized of existing
international agreements – especially the Community’s own multilateral institutions – from potential changes.

The United States takes an intermediate approach to institutional access, with the well-known Section 301 process allowing any private actor an opportunity to convince the US Government that its case should appear before the DSB. However, the US does not solicit cases as the European Commission does. As a result, most – though not all – US complaints in the DSB come from well-connected industries. This increasing reliance on formal legal institutions has led US negotiators to protect institutions perceived as helping US private parties. In particular, following the DSB’s Beef Hormones decision, US negotiators became even more adamant about the need to protect SPS rules in the emerging Biosafety Protocol. Private benefits, enhanced by their access to – and resulting success in – the DSB, led to intensified US support for the status quo.

In each case, there is a clear relationship between private access to existing institutions and government support for the status quo in subsequent negotiations. Private parties, and their government representatives, support highly legalized institutions, and that relationship is strengthened when those parties have been granted the ability to use established dispute settlement processes. Therefore, when countries have institutional benefits to defend, their preference for the status quo is strengthened by a push from private parties who have access to those existing institutions.
7.1.3 Hypothesis 3: Private Benefits are Only Relevant with Private Participation in Subsequent Negotiations

The third hypothesis stipulates that the private benefits from, and access to, existing institutions only influence subsequent agreements when the beneficiaries have a role to play in later negotiations. Again, this hypothesis is not fully addressed in Chapter 2 because it requires a more fine-grained understanding of political institutions at the domestic level. The statistical analysis does test the impact of legislative ratification requirements, finding no influence on savings clauses. However, as I noted earlier, the legislative ratification measure is of limited use because it does not account for other means of increasing public participation. This measure is also unable to distinguish among the cases in which a country actually enacts its formal ratification procedure and those in which less formal agreements are approved without the legislature. The case studies, however, were able to further uncover the impact of private participation in foreign policy.

The United States is known as one of the few countries in which private parties can play an important role in foreign policy decisions. This participation has a concrete manifestation in the requirement that formal treaties be ratified by two-thirds of the US Senate. This procedure means that private actors can influence negotiations by having their legislator set clear conditions for a ratification vote. Because only 34 Senators are required to block treaty ratification, they each wield a great deal of control over the
Executive Branch negotiating position. As a result, a number of US Government officials note that they are particularly careful early on to account for opinions held by Congress and private parties. US negotiators often look for private input, and official negotiating delegations often include industry or NGO representatives in an effort to make sure that these groups will not have an incentive to block the results at the ratification stage. Although these groups are not always the first to bring up status quo conditions, they often serve as the country’s most adamant defenders of existing agreements. In SPS and Biosafety negotiations, in particular, private parties pushed US negotiators to protect international standards organizations and SPS rules, respectively. This opposition to change carried a lot of weight in negotiations because other countries knew that private support would be necessary to achieve US ratification of any resulting agreement.

In addition to Congressional participation, the US Government’s interagency vetting process provides many openings for private input. To the extent that private groups have rapport with particular agencies, they are more likely to have an access point when more agencies are involved. The broadly inclusive US interagency process provides many such entry points for supporters of the status quo.

India, unlike the US, has no formal process for private participation in foreign policy. Furthermore, neither house of the Indian Parliament is involved in treaty ratification, meaning that there are few channels by which private parties can hope to influence a negotiating position. Only those groups with connections to the Cabinet
have any means of making their position known for a particular agreement. The Government does hold hearings to gauge support for major international treaties, but there is no legal reason why the Cabinet must take these opinions into account when negotiating with other countries. Of course, I already expect weak Indian support for the status quo because of its position as a rising power and the limited access it grants private parties to existing institutions. Therefore, it would be surprising to see support for the status quo in India, even if private parties did have extensive involvement in subsequent negotiations.

The European Community, once again, represents a mixed case for this analysis. The Commission does allow – and often solicits – private input for negotiations, but it has no formal process by which it must take those opinions into account. Ratification of Commission-driven agreements, such as those in the trade area, requires support from a qualified majority of member states. Significant flexibility remains for Commission negotiators in this situation. Nonetheless, many Commission officials insist that private preferences are accounted for through public hearings. It was not clear from the available evidence whether private support for (or against) the status quo was able to change the Commission’s negotiating position.

Other issue areas require unanimous support in the EC Council, meaning that national governments must also ratify any resulting agreement. This rule provides more opportunity for private parties to influence the final result through their governments.
There is scant evidence to link the added private participation directly to support for the status quo. However, the requirement for unanimity does seem to have played a role in EC positions for investment negotiations, and it also seems to have moderated the Commission’s willingness to avoid WTO rules completely during the Biosafety negotiations.

It should be noted that there are complications in adjudicating between the strength of hypotheses 2 and 3. The governments that require private access to international institutions tend to be the same governments that require private participation at the negotiation phase. Perhaps that is because the other countries – largely Parliamentary democracies like Australia and India – do not have a great deal of private input to legislation generally. As a result, private parties were not able to earn institutional access in the first place. However, that relationship is beyond the scope of this dissertation. For present purposes, it is important to recognize the correlation between private participation and support for status quo institutions, and to focus carefully on the process that led to support for the status quo in each government.

**7.1.4 Hypothesis 4: Complexity and the Number of Participants**

The fourth hypothesis builds on existing research in international relations (Koremenos 2005) to suggest that governments will “put on the brakes,” showing a great deal of caution, when negotiating with a large number of other countries. The
uncertainty introduced by complex situations, it seems, make governments nervous, and therefore likely to limit the scope of negotiated arrangements. In this case, efforts to protect the status quo can be seen as a form of caution because they reduce the scope of individual agreements, and slow the rate of change in international law as a whole.

Chapter 2 presents extensive support for this hypothesis, as the statistical analysis demonstrates a significant relationship between the number of parties (logged) and the likelihood of a savings clause in the treaty. However, building on Hypothesis 1, this relationship only holds when the average participant has experienced a decline in relative power since 1948, suggesting that caution is only a preferred mode of operation when the parties have some affinity for existing international arrangements. When they prefer change more generally, the number of parties does not exert a significant influence on the likelihood of savings clauses.

The case studies do not address this hypothesis in detail. However, it is notable that even the United States does not take as strong a stand for the status quo in its Model BIT as it does in other areas. Even though the US tends to take the strongest position against change, it seems less concerned about the potential for rule changes when it enters a negotiation with only one other party. In addition to the increased certainty in bilateral negotiations, this position also points to the reduced potential for sweeping systemic rule changes when only two parties are involved.
7.2 Need for Future Research

This dissertation has brought together a variety of research approaches and a wide range of cases to better understand when countries support or oppose existing international rules during subsequent negotiations. However, additional research would be useful in an effort to further test the hypotheses presented here.

First, preferences for the status quo need not appear as savings clauses in subsequent international agreements. There are many other mechanisms – including complete avoidance of new regimes – that can be used to blunt the impact of new institutions. Recent studies of “non-regimes” have explored the conditions under which international institutions fail to emerge (Dimitrov et al. 2007). Future research would do well to account for “non-regimes” as well as other legal tactics that slow the process of institutional change. By supplying further variation on the dependent variable, such an approach would allow one to better understand the lengths to which opponents of institutional change have gone in an effort to retain beneficial status quo rules.4

Second, in addition to new “non-regime” observations, additional government case studies would be useful for expanding variation on independent variables. The decision tree presented in chapters 1 and 3 contains five end nodes. However, the three case studies in this dissertation are insufficient for a complete examination of each node.

4 The truncated variation presented here limits the potential of this study to find evidence of the hypothesized relationship. The fact that such a correlation is still evident – despite this challenge – speaks to the strength of the underlying relationship.
This study is therefore unable to fully consider the relative importance of private access to existing institutions and private participation in the negotiation process, since those factors covary within the sample studied here. Future research should identify and study governments – if any – that provide a high level of private access to existing international institutions and minimal private participation in foreign policy decisions, as well as those presenting the inverse situation.

Finally, future efforts could be strengthened by uncovering deeper linkages between private party involvement and government negotiating positions. Such a study would need to involve a greater understanding as to whether private parties are satisfied with their governments’ negotiating positions and institutional outcomes. A survey of industry representatives would allow me to see whether past beneficiaries are indeed the most ardent supporters of the status quo. This approach would also help to analyze which domestic groups are actually the most influential in bringing about government support for or against the institutional status quo.

7.3 Broader Implications of the Results

As discussed in chapter 1, this dissertation contributes to literature on path dependence and institutional change by analyzing the conditions under which each of those outcomes emerges. Unlike many studies of path dependence, it views the status quo as one possible result, comparing situations in which countries change international
institutions or keep them intact. It brings this question of institutional change to the international arena, and has implications for major strands of international law and international relations research. The remainder of this section expands on some of those linkages.

7.3.1 Conflict and Fragmentation in International Law

Existing research suggests that the recent proliferation of international agreements should also lead to an increase in conflicts between the rules established by different treaties. However, as this dissertation confirms, rational negotiators are aware of this concern and take action to avoid it. In some cases, they consciously support legal change, acknowledging the Vienna Convention default that would allow new treaties to supplant earlier agreements in case of overlap. In other treaties – including approximately one-third of those in my random sample – negotiators include a savings clause, with which they explicitly allow the new agreement to defer to existing rules. Rather than a world of legal conflict, the Vienna Convention and savings clauses serve as a second tier of rules that increase the certainty provided by the international legal system.

Furthermore, these undertakings are not merely haphazard efforts to support or overturn the status quo. Instead, they follow a concrete pattern, becoming more likely in negotiations with more participants, and supported overwhelmingly by countries that
have benefited from existing international institutions. These countries, having experienced a decline in relative power since the emergence of major postwar international institutions, seem to be concerned that they have a less advantageous negotiating position than they once did. As a result, these relative decliners prefer to hold on to the status quo. Relatively rising powers support change, but their preference is less intense than that exhibited by the decliners. In other words, the second order legal institutions – the Vienna default, and savings clauses – are not mere lucky occurrences, but rather calculated outcomes representing countries’ changing capabilities and domestic institutional arrangements.

7.3.2 Implications for Power Transition Theories

Scholars have long discussed the difficult times of transition that result from power shifts in the international arena. These periods often encounter violent interactions between rising powers and the countries they wish to unseat (Houweling and Siccama 1988). This dissertation demonstrates another realm in which settled and rising powers compete: the arena of international law. In this context, parties who face a challenge to their leadership have successfully retained the status quo in international negotiations. Status quo powers have managed to use international institutions as part of their power portfolio, preventing massive change by protecting the rules that have benefited them. Although it is far beyond the scope of this study, evidence of this
institutional strategy lends credence to suggestions that international institutions can moderate systemic threats, although it also points to the possibility of intense confrontation over these issues. Further research should examine whether institutions do, in fact, create a less violent arena in which to contest global power positions. At the very least, this dissertation shows that sticky institutions limit the ability of rising powers to quickly alter the shape of world politics.

7.3.3 The Power of International Law

This dissertation also demonstrates that, far from being “epiphenomenal (Strange 1983),” international law can constrain future bargains. Rather than merely representing power relationships at a given point in time, the structure of international institutions often resembles earlier relationships, with the institutions themselves restricting potential changes. I find that countries jealously guard their institutional capital in an effort to retain the benefits that they previously gained. Because relatively declining powers have a more intense preference for the status quo than rising powers do for change, they are often successful in efforts to reduce the scope of subsequent agreements.

Previous research suggests that compliance with international law is shallow cooperation because countries only sign up to undertake what they would have done anyhow (Downs, Rocke, and Barsoom 1996; Hathaway 2002). The staying power of
international regimes, however, suggests that adherence to international rules does not simply represent the situation that would have emerged without legal structures. Instead, the evidence presented here implies that existing agreements are not quite so malleable. If law is quite difficult to change, then later compliance should represent a deeper form of coordination. To the extent that countries follow international legal rules, it is not merely a representation of their interest in making those rules. Instead, it is clear from this analysis that institutions are slow to change, meaning that countries cannot simply override undesirable regimes as power shifts take place. Rules that do emerge, therefore, exhibit long-term benefits for the countries who favored them, making international treaty negotiations a higher stakes game than some authors have suggested.

7.3.4 Private influence on International Negotiations

In addition to the implications for international law and power transitions, this research shows the importance of examining international relations through Waltz’s second and third images – the influence of domestic political institutions, as well as global power structures, on international outcomes (Waltz 1954). While I show that relative power declines trigger a country’s support for the status quo, this dissertation also demonstrates that power changes are insufficient to explain why countries prefer different degrees of institutional change. In order to gain a more complete picture of
national preference formation, it is also essential to consider the domestic political actors who benefit from existing institutions. Domestic rules allowing private access to international institutions, and private participation in subsequent negotiations, are important determinants of support for the status quo.

Institutional benefits are sometimes accrued at the country level, as in the case of the UN Security Council veto power. However, in other situations, institutional benefits are more directly geared towards individuals or industries within the country. Those benefits can only drive private party preferences if those groups are allowed access to international legal institutions. Because most international law is directed at countries rather than individuals, only governments usually have standing to submit complaints against other countries that have violated the rules in question. Governments therefore act as gatekeepers, deciding which cases are worth the effort to bring before international tribunals. The benefits of reduced tariffs, for instance, are valued by export industries. However, WTO Dispute Settlement rules only allow governments – not aggrieved parties within countries – to bring claims against other Members who violate their commitments. Therefore, in order for a private party to be concerned with the status quo, it must encounter beneficial international rules, and also gain access to the implementing institutions through its own government.

5 Bilateral investment treaties and human rights agreements often allow non-governmental entities to activate the dispute settlement process. However, these examples are the exception in international law.
In order to affect national preferences for the status quo, there must also be some channel through which the private party can translate its preference into the government’s negotiating position. As I have shown throughout the dissertation, governments tend to show greater concern for existing institutions when they have formal mechanisms for private participation in foreign policy. Private input – most notably through inclusive interagency vetting processes and legislative ratification requirements – strengthens a government’s resolve to protect the status quo when that country has benefited from existing institutions.

On the whole, then, it is clear that global power shifts (Waltz’s third image) may help to account for negotiation outcomes. However, they are insufficient for explaining the complete range of variation. For a more nuanced understanding of support for the institutional status quo, it is essential to apply Waltz’s second image view of domestic political variables as well.
Appendix 2.1 Other Possible Measures of Capabilities Change

Section 2.3 presented one way to measure the parties’ preferences for change or continuity in multilateral treaties, as well as their ability to achieve those preferences. In this Appendix, I outline alternative measurements and demonstrate how they perform in the regressions discussed in this chapter.

1. Average Capabilities Change

As discussed earlier, the most basic measure would simply look at the average party’s preference without consideration for its current ability to achieve those goals. That preference is drawn from the average of participants’ CINC or GDP change. As before, this measure allows for parties with sharp relative losses (gains) to have a stronger preference for deference to (overriding of) existing law. This measure can be defined as follows:

Equation A1.

\[
Average \ CINC \ Change = \frac{\sum_{i=1}^{P} [CINC_{it} - CINC_{1948}]}{P}
\]

where:
- \( p \) = number of parties to the current treaty
- \( i \) = the set of countries that are party to this treaty
- \( t \) = the year of negotiation
- \( CINC_{it} \) = country i’s CINC score in year t
- \( CINC_{1948} \) = country i’s CINC score in 1948

As before, the same calculation is conducted using GDP data, and dichotomous variables are created for treaties in which the average participant has experienced a rise
or decline in relative power since the base year in question. Summary statistics are reported in Table A1.

2. Median Capabilities Change

For both CINC-based and GDP-based variables, the average measures allow me to grasp the group’s overall preference, while giving additional weight to those countries who are likely to have the strongest preference in either direction. However, these measures give a large weight to the countries who have risen or fallen the most in the world. For instance, the United States CINC score declined by more than .2 from 1948 to 1994. This tremendous change, in contrast with the next largest decliner – Russia’s decline of almost .1 – and the largest rise – Japan’s gain of .05 – makes it clear that the inclusion of the United States in a recent agreement will drastically change the average decline for any group of participants. While it is important to account for the intensity of each participant’s preference, one might suggest that the median value among participants is a more useful measure because it dulls the impact of outliers like the United States.

In addition to the mean value of the change variable among participants, I have attempted to address the aforementioned outlier concern by looking at the median power change among countries involved in the negotiation. This set of variables follows the same logic as those calculating the average party, whereby I expect to see a negative correlation between the median party’s CINC change and the prevalence of savings
In this situation, a weighted measure would not make much sense, since I am looking at the median party rather than the average of a group of parties. However, there are still four median change measures, enabling the inclusion of CINC and GDP data, as well as dichotomous variables for medians above and below zero. Summary statistics for all four variables are included in table A1.

3. Proportion of Participants experiencing a rise in power

Another possible solution to the outlier problem is the transformation of change measurements to a dichotomous indicator of each country’s rise or decline. This format removes the intensity of preferences from the equation entirely. However, it allows for the possibility that there is a non-linear relationship between power change and the preference for savings clauses. The mean and median measures assume that each country has a preference for the status quo that is linearly correlated with the degree of its change in power since the postwar period. Since we do not know whether there is such a linear relationship, it seems reasonable to count each party as a declining (or rising) power in terms of their relative capabilities, thus attributing a preference for (or against) deference to existing international law. Having established this preference for each party, I then simply look at the proportion of participants who have risen in terms of their proportion of world capabilities or GDP. This variable can be calculated as follows:

\[ \text{Proportion of Participants rising} = \frac{\text{Number of participants rising}}{\text{Total number of participants}} \]

\[ \text{Proportion of Participants declining} = \frac{\text{Number of participants declining}}{\text{Total number of participants}} \]

Note that the use of the median party does not imply a causal process similar to the median voter theorem, where the median party is the most important decision-maker. The causal logic is the same as that outlined above for the mean party, but I employ the median party instead in order to address the concern about outliers.
Equation A2.

\[ \text{Proportion of CINC Risers} = \frac{\sum_{i=1}^{P} \text{[CINCΔpos}^t_i\text{]}}{P} \]

where:
- \( p \) = number of parties to the current treaty
- \( i \) = the set of countries that are party to this treaty
- \( t \) = the year of negotiation
- \( \text{CINCΔpos}^t_i = (1) \) if country \( i \)'s share of power (CINC score or GDP) has increased since 1948, and (0) otherwise.\(^2\)

Once again, I expect that a higher proportion of rising powers should be correlated with a preference against savings clauses. Table A1 includes summary statistics for measures constructed from CINC and GDP data. As with the median measures, these variables dull the outlier problem and avoid the assumption of linear relationships, but they simultaneously remove the impact of preference intensity.

4. Weighted Proportion of Participants experiencing a rise in power

As I noted above, the rise or decline in CINC or GDP only measures participants' preferences for or against the status quo. However, in order to account for their ability to achieve those goals, I also need to include their current level of capabilities. As such, this additional variable multiplies current CINC or GDP scores by 1 for rising powers, and -1 for declining or status quo powers.

\(^2\) A complete lack of power change is very rare. The only instance in this dataset, other than measurements for the base year itself, is Iceland in 1964. Over time, Iceland’s CINC score has fluctuated extensively, and happened to return to the 1948 level in 1964.
Equation A3.

\[
\text{Weighted Proportion of CINC Risers} = \frac{\sum_{i=1}^{p} [(\text{CINC} \Delta \text{posneg})_{it} \times \text{CINC}_{it}]}{\sum_{i=1}^{p} \text{CINC}_{it}}
\]

where:

- \(p\) = number of parties to the current treaty
- \(i\) = the set of countries that are party to this treaty
- \(t\) = the year of negotiation
- \(\text{CINC} \Delta \text{posneg}_{it}\) = (1) if country i’s share of power (CINC score or GDP) has increased since 1948, and (-1) otherwise.
- \(\text{CINC}_{it}\) = country i’s CINC score in year \(t\)
- \(\sum_{i=1}^{p} \text{CINC}_{it}\) = total proportion of global capabilities represented in this negotiation

As with the non-weighted proportion above, I expect that a higher proportion of rising powers should be correlated with a preference against savings clauses, particularly when their preferences are weighted by their ability to achieve those goals.

Table A1 includes summary statistics for measures constructed from CINC and GDP data.
### Table 2-A1: Summary statistics for Alternative CINC and GDP Change Variables

<table>
<thead>
<tr>
<th>Variable</th>
<th>Observations</th>
<th>Mean</th>
<th>Standard Deviation</th>
<th>Minimum</th>
<th>Maximum</th>
</tr>
</thead>
<tbody>
<tr>
<td>Average CINC Change</td>
<td>165</td>
<td>-.00194</td>
<td>.00597</td>
<td>-.0312</td>
<td>.00976</td>
</tr>
<tr>
<td>Average GDP Change</td>
<td>156</td>
<td>.000200</td>
<td>.00414</td>
<td>-.0173</td>
<td>.0111</td>
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<tr>
<td>Average Party has CINC Gain</td>
<td>166</td>
<td>.398</td>
<td>.491</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Average Party has GDP Gain</td>
<td>159</td>
<td>.522</td>
<td>.501</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Median CINC Change</td>
<td>166</td>
<td>-.000416</td>
<td>.00135</td>
<td>-.0093</td>
<td>.00619</td>
</tr>
<tr>
<td>Median GDP Change</td>
<td>159</td>
<td>-.000236</td>
<td>.00145</td>
<td>-.00530</td>
<td>.0123</td>
</tr>
<tr>
<td>Median Party has CINC Gain</td>
<td>168</td>
<td>.393</td>
<td>.490</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Median Party has GDP Gain</td>
<td>168</td>
<td>.506</td>
<td>.501</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Proportion of CINC Gainers</td>
<td>163</td>
<td>.436</td>
<td>.292</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Proportion of GDP Gainers</td>
<td>156</td>
<td>.467</td>
<td>.223</td>
<td>0</td>
<td>1</td>
</tr>
<tr>
<td>Weighted Proportion of CINC Gainers</td>
<td>165</td>
<td>-.000378</td>
<td>.00424</td>
<td>-.0343</td>
<td>.0327</td>
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<tr>
<td>Weighted Proportion of GDP Gainers</td>
<td>156</td>
<td>-.000144</td>
<td>.00324</td>
<td>-.0148</td>
<td>.0303</td>
</tr>
</tbody>
</table>
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Biography

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