

2015

The Internationalization of Agency Actions

Jason Marisam

Hamline University School of Law

Follow this and additional works at: <https://ir.lawnet.fordham.edu/flr>



Part of the [Administrative Law Commons](#), and the [International Law Commons](#)

Recommended Citation

Jason Marisam, *The Internationalization of Agency Actions*, 83 Fordham L. Rev. 1909 (2015).

Available at: <https://ir.lawnet.fordham.edu/flr/vol83/iss4/10>

This Article is brought to you for free and open access by FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in Fordham Law Review by an authorized editor of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

THE INTERNATIONALIZATION OF AGENCY ACTIONS

Jason Marisam*

U.S. agencies routinely base their domestic regulations on international considerations, such as the benefits of coordinating American and foreign standards or the foreign policy advantages of a particular policy. I refer to this phenomenon as the internationalization of agency actions. This Article examines what the internationalization of agency actions means for agency decision-making processes, institutional design, and legal doctrine. It creates a stylized model of how agencies determine whether to coordinate their standards with foreign regulations. Among other institutional design findings, it shows that court opinions that reduce the stringency of judicial review when agencies implement internationally coordinated standards make such coordination more likely to occur, but they simultaneously deprive the executive of bargaining power because U.S. agencies cannot credibly threaten that any coordinated agreement must align more closely with U.S. values or risk being overturned in U.S. courts. This Article also develops a taxonomy of international factors relied on by agencies and applies that taxonomy to help clarify the doctrinal issue of whether and when agencies can use international factors to justify their actions in court. This taxonomical approach shows how the Supreme Court's opinion in Massachusetts v. EPA can reasonably be read to allow agencies to invoke a far broader range of foreign policy rationales than some prevailing views suggest.

INTRODUCTION.....	1911
I. A TAXONOMY OF AGENCIES' INTERNATIONAL CONSIDERATIONS....	1914
A. <i>International Network Effects</i>	1915
1. Network Effects and Gains from International Trade.....	1915
2. Network Effects and Compliance and Reporting Costs..	1916
3. Network Effects and Information and Enforcement Costs.....	1917
B. <i>International Regulatory Spillover Effects</i>	1917
1. How Spillover Effects Occur	1918
2. Independently Assessing U.S.-Based Spillover Effects..	1919

* Assistant Professor, Hamline University School of Law.

3. Protecting the United States from Other Nations' Spillover Effects.....	1920
C. <i>International Epistemic Factors</i>	1921
1. Foreign Regulation As Guidance for U.S. Regulation....	1922
2. Foreign Regulations As Replacements for State Regulations.....	1922
D. <i>Foreign Affairs Factors</i>	1924
1. Binding International Law	1924
2. International Reputation and Relationships	1925
3. Foreign Responses to Agency Actions	1926
4. Effects on International Negotiations	1927
II. AGENCY DECISION MAKING AND THE INTERNATIONAL COORDINATION DILEMMA	1929
A. <i>An Ideal Point Model of Agency Decision Making and the International Coordination Dilemma</i>	1929
1. The Model.....	1930
2. Applying the Model to Facts.....	1931
a. <i>The Packing Materials Regulation</i>	1932
b. <i>The Automobile Side Collision Regulation</i>	1933
B. <i>Domestic Institutions and International Interagency Coordination</i>	1934
1. The Cooperation-Bargaining Advantage Trade-Off	1935
2. Judicial Review As a Domestic Constraint on International Interagency Coordination	1936
3. Presidential Oversight As a Domestic Constraint on International Interagency Coordination	1939
III. LEGAL DOCTRINE AND THE INTERNATIONALIZATION OF AGENCY ACTIONS	1940
A. <i>Hard Look Review: Permissible and Impermissible Factors</i>	1941
B. <i>D.C. Circuit Precedent on International Considerations</i>	1942
1. <i>Natural Resources Defense Council, Inc. v. Nuclear Regulatory Commission</i>	1942
2. <i>Center for Auto Safety v. Peck</i>	1944
3. <i>AMSC Subsidiary Corp. v. FCC</i>	1944
4. <i>National Ass'n of Clean Air Agencies v. EPA</i>	1945
5. <i>International Union, United Mine Workers of America v. Mine Safety Health Administration</i>	1946
C. <i>International Considerations and Massachusetts v. EPA</i>	1947
1. <i>Massachusetts v. EPA</i>	1947
2. Several Possible Interpretations of <i>Massachusetts v. EPA</i>	1948
a. <i>The Broad Interpretation of Massachusetts v. EPA</i> ..	1948
b. <i>A Narrow Interpretation of Massachusetts v. EPA</i> ...	1949
c. <i>The Narrowest Interpretation of Massachusetts v. EPA</i>	1950

3. The Effects of the Narrowest Interpretation of
Massachusetts v. EPA 1951
 CONCLUSION 1953

INTRODUCTION

In nearly every area of domestic regulatory law, agencies today base their regulations in part on international considerations, such as the benefits of harmonizing U.S. and foreign standards or the foreign policy advantages of a particular policy. I refer to this phenomenon as the internationalization of agency actions. For a smattering of examples from the Obama Administration, consider the following proposed or final rulemakings:

The Environmental Protection Agency (EPA) recently proposed strict limits on greenhouse gas emissions from new coal plants in part because doing so would “demonstrate global leadership” on climate change and signal to China a U.S. commitment to the collaborative development of carbon capture technology.¹

The Department of the Treasury and the Federal Reserve Board established capital ratio standards for banks that were “measured in a manner consistent with the international leverage ratio” set by a group of international regulators known as the Basel Committee.²

The Food and Drug Administration (FDA) has proposed “requiring that dates on medical device labels conform to a standard format consistent with international standards and international practice” in order to streamline U.S. and international medical device labels.³

The Nuclear Regulatory Commission (NRC) has adopted safety standards that “provide consistency between domestic and international efforts for security of radioactive materials that are deemed to be attractive targets for malevolent use.”⁴

The Department of Labor has proposed that the labeling of hazardous chemicals in workplaces must “conform with” a recommended classification system set by the United Nations.⁵

The internationalization of agency actions is due, in large part, to the growing number of regulatory issues that demand international cooperation and coordination in our globalized age.⁶ In 2012, international cooperation received a boost from President Obama’s landmark Executive Order

1. EPA, REGULATORY IMPACT ANALYSIS FOR THE PROPOSED STANDARDS OF PERFORMANCE FOR GREENHOUSE GAS EMISSIONS FOR NEW STATIONARY SOURCES: ELECTRIC UTILITY GENERATING UNITS (2013), <http://www2.epa.gov/sites/production/files/2013-09/documents/20130920proposalria.pdf>.

2. Regulatory Capital Rules, 78 Fed. Reg. 62,018, 62,022 (Oct. 11, 2013).

3. Unique Device Identification System, 78 Fed. Reg. 58,786, 58,787 (Sept. 24, 2013).

4. Physical Protection of Byproduct Material, 78 Fed. Reg. 16,922, 16,926 (Mar. 19, 2013).

5. Hazard Communication, 74 Fed. Reg. 50,280 (Sept. 30, 2009).

6. See David Zaring, *Sovereignty Mismatch and the New Administrative Law*, 91 WASH. U. L. REV. 59, 69 (2013).

13,609, which tasks agencies with considering the “international impacts” of significant rulemakings and pursuing “international regulatory cooperation” when addressing shared regulatory issues.⁷ As a result, we can expect this internationalization trend to continue and gain in prominence.

This Article examines what the internationalization of agency actions means for agency decision-making processes, institutional design, and legal doctrine. In doing so, this Article makes several descriptive and normative claims that contribute to several strands and fields of legal scholarship.

First, the Article contributes to traditional administrative law doctrine by offering a clearer understanding of when agencies can rely on international considerations to justify their actions in court. This Article develops a taxonomy of international factors relied on by agencies and scours the case law to determine which factors courts presumptively allow agencies to consider in the absence of express congressional authorization.⁸ I then apply these findings to offer a fresh interpretation of the U.S. Supreme Court opinion in *Massachusetts v. EPA*.⁹ While some have read this case as prohibiting agencies from invoking foreign policy considerations to justify their actions,¹⁰ I suggest a narrower reading that only prohibits agencies from relying on one type of foreign policy consideration identified in the taxonomy—namely, agencies cannot base their actions on the effects they have on international negotiations.¹¹ Even here, though, I suggest that such effects may be considered if the regulatory agency consults with the Department of State or other diplomatic experts.¹² Not only would this reading of *Massachusetts v. EPA* allow agencies to invoke a broader range of foreign policy rationales generally, it would have the immediate and specific effect of making it more likely that a court will accept as legitimate the foreign policy considerations underlying the EPA’s recent action on climate change.

Second, this Article contributes significantly to the global administrative law literature. Global administrative law focuses on the processes, procedures, and substantive outcomes of international regulatory regimes.¹³

7. Exec. Order No. 13,609, 77 Fed. Reg. 26,413, 26,414 (May 1, 2012). This Executive Order is the first presidential executive order that tasks agencies with international regulatory cooperation, a recommendation first made in 1991, *see* Recommendations of the Administrative Conference Regarding Administrative Practice and Procedure, 56 Fed. Reg. 33,841 (July 24, 1991), but not effected until nearly twenty-one years later, *see* Press Release, Executive Order Signed Based on Administrative Conference Recommendation (May 9, 2012), *available at* <http://www.acus.gov/newsroom/news/executive-order-signed-based-administrative-conference-recommendation>.

8. *See infra* Parts I, III.

9. 549 U.S. 497 (2007).

10. *See infra* Part III.C.

11. *See infra* Part III.C.

12. *See infra* Part III.C.

13. *See, e.g.*, Daniel C. Esty, *Good Governance at the Supranational Scale: Globalizing Administrative Law*, 115 YALE L.J. 1490 (2006); David Zaring, *Best Practices*, 81 N.Y.U. L. REV. 294, 318–320 (2006); David Zaring, *Informal Procedure, Hard and Soft*, in *International Administration*, 5 CHI. J. INT’L L. 547 (2005) [hereinafter Zaring, *Informal*].

The subfield was launched because traditional administrative law paradigms were formed with domestic law in mind and could not account for international developments.¹⁴ To the extent that the subfield has focused on the domestic level, it has typically been either to assess how U.S. administrative law can inform international administrative practices¹⁵ or to show how international regulatory regimes affect substantive decision making by domestic agencies.¹⁶

This Article engages in an institutional analysis that shows how the causal chain runs in the other direction too—that is, domestic administrative law can affect substantive decision making at the international level.¹⁷ For example, in several opinions, courts have refused to exercise jurisdiction over some agency decisions that involve the negotiation and implementation of international agreements coordinating foreign and U.S. regulations.¹⁸ One effect of these opinions is to give the executive branch a freer hand to bargain with other nations and not worry that courts will veto the international arrangements. But at the same time these judicial decisions undermine the executive’s bargaining power because they make it harder for the executive to credibly claim that any agreement must align more closely with U.S. values and preferences or risk being overturned in U.S. courts.

Third, this Article contributes to the international law and international affairs literature on costly signaling theory.¹⁹ This theory explains how, in the midst of international negotiations, state actors behave in ways that send signals of their foreign policy intentions to other nations, which observe the signals and adjust their negotiating positions accordingly.²⁰ The literature has focused on signals sent through actions by Congress and the President. This Article shows how such signals are now being sent through agency actions. The most recent example comes from the EPA’s proposal to regulate climate change in part because of the “leadership” that it would demonstrate globally.²¹

14. See Benedict Kingsbury et al., *The Emergence of Global Administrative Law*, 68 LAW & CONTEMP. PROBS. 15 (2005).

15. See, e.g., Richard B. Stewart, *U.S. Administrative Law: A Model for Global Administrative Law?*, 68 LAW & CONTEMP. PROBS. 63 (2005).

16. See, e.g., Richard B. Stewart, *The Global Regulatory Challenge to U.S. Administrative Law*, 37 N.Y.U. J. INT’L L. & POL. 695 (2005); Joel P. Trachtman, *International Legal Control of Domestic Administrative Action* (Feb. 19, 2014), http://works.bepress.com/cgi/viewcontent.cgi?article=1003&context=joel_trachtman.

17. See *infra* Part II.B.

18. See *infra* Part II.B.

19. See, e.g., JACK L. GOLDSMITH & ERIC A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005); ANDREW T. GUZMAN, *HOW INTERNATIONAL LAW WORKS: A RATIONAL CHOICE THEORY* (2008); Tom Ginsburg & Richard H. McAdams, *Adjudicating in Anarchy: An Expressive Theory of International Dispute Resolution*, 45 WM. & MARY L. REV. 1229 (2004); Jack L. Goldsmith & Eric A. Posner, *A Theory of Customary International Law*, 66 U. CHI. L. REV. 1113 (1999); Oona A. Hathaway, *Between Power and Principle: An Integrated Theory of International Law*, 72 U. CHI. L. REV. 469 (2005); Kal Raustiala, *Form and Substance in International Agreements*, 99 AM. J. INT’L L. 581 (2005).

20. See *infra* Part I.D.

21. See EPA, *supra* note 1.

Finally, this Article contributes incidentally to the federalism literature. Some scholars have argued against the federal preemption of state law on the grounds that preemption blocks policymaking at the state level and thus deprives federal policymakers of a valuable source of information about which policies work best.²² Without state policy experiments, the argument goes, federal policymakers such as agencies will have a harder time identifying the optimal policy.²³ This Article shows that this argument against preemption has far less purchase in today's globalized world. U.S. agencies and their foreign counterparts often face similar problems.²⁴ As a result, when state-level regulations are preempted or otherwise nonexistent, U.S. agencies can still learn by looking to policies enacted overseas.

This Article proceeds as follows. Part I provides a taxonomy of the international factors that agencies consider when taking regulatory action. Part II examines a common dilemma faced by agencies: whether to coordinate their standards with international or foreign regulators. This part creates a stylized model of agency decision making under this dilemma. It then discusses how domestic institutions can be designed to make it more likely that agencies will engage in beneficial coordination with foreign regulators or that such coordination will align with U.S. preferences. This part shows that there is a trade-off between international coordination and the U.S. agency's bargaining advantage. Domestic institutional designs that make coordination more likely simultaneously reduce U.S. agencies' bargaining power over their foreign counterparts. Part III discusses the current doctrine on whether agencies can rely on international factors to support their actions in court. It suggests narrow readings of *Massachusetts v. EPA* that keep intact a presumption developed by the D.C. Circuit that agencies can rely on such factors, even in the absence of express congressional authorization.

I. A TAXONOMY OF AGENCIES' INTERNATIONAL CONSIDERATIONS

This part provides a taxonomy of the international considerations relied on by agencies. I divide these considerations into four main types: (A) international network effects, (B) international regulatory spillover effects, (C) international epistemic factors, and (D) foreign affairs factors. Each type is discussed in a section below. The taxonomy is designed to improve the understanding of agency decision making regarding international concerns generally. Identifying different types of international considerations also produces a couple of interesting specific findings. It shows that regulatory agencies are now engaging in the sort of costly signals of foreign policy intent that have typically been ascribed to the President and Congress, and it shows that agencies look to foreign

22. See, e.g., Yair Listokin, *Learning Through Policy Variation*, 118 YALE L.J. 480 (2008).

23. See *id.*

24. See *supra* Part I.C.

regulations as potential models in ways that complement how agencies sometimes look to state-level regulations for guidance.

A. *International Network Effects*

When U.S. regulators and their foreign counterparts adopt the same standard, this consistency produces efficiencies known as network effects.²⁵ The potential to generate network effects often leads agencies to consider whether they should coordinate their regulations with foreign standards.

This section discusses several types of benefits from network effects—gains in international trade, reduced compliance and reporting costs for firms, and reduced information and enforcement costs for agencies—and illustrates how agencies consider these benefits.

1. Network Effects and Gains from International Trade

Gains from international trade are probably the most common network effect considered by agencies.²⁶ When U.S. and foreign regulations are harmonized, it makes it easier to import and export goods among the nations because manufacturers can make one product that satisfies the multiple nations' regulations. U.S. agencies often invoke this kind of improved trading opportunity as a benefit of their policy choice.²⁷ For example, when the Department of Transportation promulgated a rule for hydraulic brakes, it noted that its standards were the same as European specifications and explained: "This will enable manufacturers to build vehicles with standardized brake systems acceptable throughout the world, thereby providing significant cost savings to vehicle buyers . . . and thereby dismantl[ing] one of the most significant non-tariff barriers to international motor vehicle trade."²⁸

Network effects leading to gains from trade are also generated when a U.S. agency makes a finding that a foreign standard is of equivalent or compatible stringency and thus compliance with the foreign standard will be deemed sufficient to satisfy the U.S. standard. Equivalency determinations are often made as part of mutual recognition agreements in which the U.S. and another nation agree that if a product or service meets regulatory requirements in one jurisdiction, it then satisfies the requirements of the other jurisdiction.²⁹ For example, the FDA has

25. See George Norman & Joel P. Trachtman, *The Customary International Law Game*, 99 AM. J. INT'L L. 541, 567 n.117 (2005) (explaining that network effects "arise simply from efficiencies due to consistency of arrangements").

26. I have no strong empirical support for this proposition. It is merely my sense from having read and searched through dozens of proposed and final rulemakings that purport to rely on some international or foreign factor.

27. See, e.g., Pesticide Tolerance Grouping Program II, 75 Fed. Reg. 76,284, 76,288 (Dec. 8, 2010).

28. Federal Motor Safety Standards, 60 Fed. Reg. 6411, 6413 (Feb. 2, 1995).

29. See Kalypso Nicolaidis & Gregory Shaffer, *Transnational Mutual Recognition Regimes: Governance Without Global Government*, 68 LAW & CONTEMP. PROBS. 263, 274–75, 290 (2005).

agreements with regulators in Canada that require each nation to accept the other's results from inspections for compliance with good manufacturing practices.³⁰ In effect, each nation's regulators have agreed to deputize the other nation's regulators to act on their behalf. The outcome is that firms with operations in each country can comply with their home nation's standards and at the same time satisfy regulators in the other nation.

Equivalency determinations can also occur on an ad hoc basis as regulated entities push U.S. agencies to find that compliance with another nation's regulations will satisfy the agency's own standards.³¹ For example, car manufacturers often ask the Department of Transportation to determine that various European standards are "functionally equivalent" with U.S. standards.³² The carmakers lobby the agency for this finding because they want to be able to sell cars in both American and European markets without having to change safety specifications.

2. Network Effects and Compliance and Reporting Costs

Adopting consistent standards can also produce regulatory benefits by reducing the resources that regulated firms must devote to compliance and reporting. Firms operating in multiple jurisdictions are often subject to conflicting requirements that require compiling unique sets of information for each jurisdiction.³³ However, if these jurisdictions coordinate their requirements, the firms can avoid this burdensome work.³⁴

The FDA used this logic to support its proposal to adopt safety reporting requirements recommended by an international regulatory body, noting: "Savings to the affected industry would accrue from more efficient allocation of resources resulting from international harmonization of the safety reporting requirements."³⁵ Similarly, to reduce reporting costs through uniform standards, the Securities and Exchange Commission (SEC) developed a "multijurisdictional disclosure system" that allows Canadian issuers of securities to meet U.S. disclosure requirements "by providing

30. See Linda Horton, *Mutual Recognition Agreements and Harmonization*, 29 SETON HALL L. REV. 692, 722 n.139 (1998).

31. See Nicolaidis & Shaffer, *supra* note 29, at 283 (noting that equivalency findings are often the product of pressure from business interests).

32. See, e.g., Federal Motor Vehicle Safety Standards, 65 Fed. Reg. 33,508 (May 24, 2000).

33. See Philip J. McConaughay, *Reviving the "Public Law Taboo" in International Conflict of Laws*, 35 STAN. J. INT'L L. 255, 289 (1999) (noting that conflicting oversight of businesses by different nations can produce "multiple, concurrent regulation of any given international transaction").

34. The same basic issue arises when firms are subject to oversight by multiple federal agencies with overlapping jurisdiction. If these agencies adopt conflicting rules, it increases reporting requirements for firms. Interagency coordination among the federal agencies can help reduce these costs. See Jason Marisam, *Duplicative Delegations*, 63 ADMIN. L. REV. 181, 200-01, 223 (2011) (discussing the "burdens on regulated entities that must comply with two agencies' regulations").

35. Safety Reporting Requirements for Human Drug and Biological Products, 67 Fed. Reg. 74,112 (Dec. 9, 2002).

disclosure documents prepared in accordance with the requirements of Canadian regulatory authorities.”³⁶

3. Network Effects and Information and Enforcement Costs

Coordination with foreign regulations can also generate network effects that save resources for the agencies themselves. As more nations adhere to a similar regulatory standard, it becomes increasingly valuable for U.S. agencies to adopt the same standard because they can reap the benefits of information-sharing and joint enforcement among the similarly situated foreign regulators.³⁷ As Kal Raustiala has explained: “[N]etwork effects boost the existing incentives to standardize.”³⁸ Thus, if SEC and Federal Reserve Bank regulators are interested in creating a common standard with other jurisdictions, these organizations can serve as the fora in which such a standard is hammered out.³⁹ Whatever standard is chosen has a good chance of developing an adoptive momentum by virtue of the advantages regulators see in being a part of the “network” of regulators applying the same schema to their regulated industry.⁴⁰

Capitalizing on this kind of network effect was one reason why the EPA aligned its crop classification system with European standards.⁴¹ As the EPA explained, harmonizing classifications “increased potential for resource sharing between EPA and pesticide regulatory agencies in other countries.”⁴² These resource savings can indirectly benefit the public because less money must be drawn from the U.S. Treasury for the agency to do its job, but the benefit first and foremost redounds to the agency, which immediately has more resources to devote to its other regulatory tasks.⁴³

B. International Regulatory Spillover Effects

Regulatory spillover effects exist whenever one nation’s regulations substantially affect the well-being of another nation’s population.⁴⁴ This section first explains how spillover effects occur. It then illustrates how

36. Multijurisdictional Disclosure and Modifications to the Current Registration and Reporting System for Canadian Issuers, 55 Fed. Reg. 46,288 (Nov. 2, 1990).

37. See Zaring, *Informal*, *supra* note 13, at 591–92; see also Mariano-Florentino Cuellar, *The Mismatch Between State Power and State Capacity in Transnational Law Enforcement*, 22 BERKELEY J. INT’L L. 15, 28–29 (2004) (describing how information and enforcement costs lead to problems in international coordination among law enforcement agencies).

38. Kal Raustiala, *The Architecture of International Cooperation: Transgovernmental Networks and the Future of International Law*, 43 VA. J. INT’L L. 1, 65 (2002).

39. *Id.*

40. *Id.*

41. Pesticide Tolerance Crop Grouping Program II, 75 Fed. Reg. 76,284, 76,288 (Dec. 8, 2010).

42. *Id.*

43. See Jason Marisam, *The Interagency Marketplace*, 96 MINN. L. REV. 886, 941–42 (2012) (explaining how, when an agency saves resources from one task, “the agency has extra money to spend on something else”).

44. Cf. Joel P. Trachtman, *Trade and . . . Problems, Cost-Benefit Analysis and Subsidiarity*, 9 EURO. J. INT’L L. 32, 34 (1998) (“[T]here are horizontal spillovers that cause one group to be affected by the legal rules and policy decisions of another group.”).

U.S. agencies take these effects into account by independently assessing how their actions affect other nations and also how their actions could protect the United States from spillover effects originating in other nations.

1. How Spillover Effects Occur

Many spillover effects occur because one nation's regulations are set at levels that do not adequately protect global public and common goods, such as clean air, fisheries populations, and stable banking systems.⁴⁵ If one nation has lax pollution standards, people breathing in other nations can suffer. If one nation allows voluminous fishing off its shores, the fish stocks available for other nations will also be depleted. If one nation allows its banks to take on excessive risk without adequate capital reserves, the banks' weaknesses can cause a chain of bad consequences that reaches other nations' banking systems.⁴⁶ The problem from a governance perspective is that nations have incentives to maintain inadequate regulations that produce these kinds of risks because nations must absorb the cost of enacting and enforcing their own stringent regulations, but they only capture a fraction of the benefits, which are spread among all the nations that enjoy the global public and common goods.⁴⁷

Spillover effects are also generated by regulatory arbitrage. Professor Victor Fleisher has recently defined regulatory arbitrage as "the manipulation of the structure of a deal to take advantage of a gap between the economic substance of a transaction and its regulatory treatment."⁴⁸ One key type of regulatory arbitrage arises when regulators in different jurisdictions address the same subject matter differently. This inconsistency can give regulated actors the ability to choose which regulatory regime they prefer and then locate or relocate their actions in that jurisdiction. The outcome of this gamesmanship can be inefficient because firms are likely to choose a jurisdiction with insufficiently stringent regulations. Again, though, there is a governance problem because individual nations have incentives to weaken their regulations to attract individual businesses to their jurisdictions. These nations then reap much of the wealth-generating benefits of having such businesses, while much of the risk spills over to other nations.

45. See Gregory Shaffer, *International Law and Global Public Goods in a Legal Pluralist World*, 23 EUR. J. INT'L L. 669 (2012).

46. Steven L. Schwarcz, *Systemic Risk*, 97 GEO. L.J. 193, 198–200 (2008).

47. Cf. Bradley C. Karkkainen, *Biodiversity and Land*, 83 CORNELL L. REV. 1, 93–94 (1997) ("Because producers of biodiversity—that is, owners of land producing biodiversity—capture at best only a small fraction of its benefits, no one has an adequate incentive to produce that good in socially optimal quantities.").

48. Victor Fleischer, *Regulatory Arbitrage*, 89 TEX. L. REV. 227, 230 (2001); see also Frank Partnoy, *Financial Derivatives and the Costs of Regulatory Arbitrage*, 22 J. CORP. L. 211, 211 n.1 (1997) ("Regulatory arbitrage" refers to financial transactions designed to reduce costs or capture profit opportunities created by differential regulations or laws.").

2. Independently Assessing U.S.-Based Spillover Effects

U.S. agencies sometimes take into account spillover effects by independently assessing how their regulations affect other nations. They often do so for political reasons. By considering how their regulations affect others, the U.S. agencies signal that they are not selfish actors but are willing to cooperate in the protection of some global good. For example, when the Federal Trade Commission was considering whether to license the sale of nuclear material to another nation, it assessed the impact on the “global commons”—that is, it considered how radiation leaks from the nuclear material would affect global public health and the environment.⁴⁹ The agency seemed to make the assessment because it was in the United States’ interests to be seen as cooperating with international efforts to responsibly manage the proliferation of nuclear material.⁵⁰

Other times, these assessments are made because the agency has a legal obligation to consider transnational harms. For example, the National Environmental Policy Act (NEPA) requires a federal agency “to the fullest extent possible” to prepare “a detailed statement on . . . the environmental impact” of “major Federal actions significantly affecting the quality of the human environment.”⁵¹ A federal court has interpreted these provisions to require the Department of Transportation to consider how its domestic regulation of fuel efficiency standards for automobiles affects climate change.⁵² The agency had argued to the court that it should not have to assess climate change impacts precisely because “climate change is largely a global phenomenon that includes actions that are outside of [the agency’s] control.”⁵³ However, the court held that the global nature “does not release the agency from the duty of assessing the effects of *its* actions on global warming within the context of other actions that also affect global warming.”⁵⁴ That is, to the extent that the agency’s regulatory standards affected a global public good like the climate, the agency had to assess that impact per Congress’s instruction in NEPA.

49. *See* Natural Res. Def. Council, Inc. v. Nuclear Regulatory Comm’n, 647 F.2d 1345, 1365–66 (D.C. Cir. 1981).

50. *See infra* Part III.B.1.

51. 42 U.S.C. § 4332(2)(C)(i) (2012).

52. *See* Ctr. for Biological Diversity v. Nat’l Highway Traffic and Safety Admin., 538 F.3d 1172 (9th Cir. 2008).

53. *Id.* at 1217. Professor Kevin Stack refers to this kind of argument as the “one percent problem” because it involves actors deflecting responsibility for a problem by arguing that they are only contributing a small amount to the problem. Kevin Stack & Michael P. Vadenbergh, *The One Percent Problem*, 111 COLUM. L. REV. 1385 (2011).

54. *Ctr. for Biological Diversity*, 538 F.3d at 1217. Agencies may be expressly forbidden from considering such effects, too. For example, a federal court held that the Department of the Interior must consider the local environmental impacts of its regulations on offshore oil operations but that it was barred from considering the international or global impacts because, when Congress passed the agency’s enabling statute, it was only concerned with local effects. *Ctr. for Biological Diversity v. Dep’t of the Interior*, 563 F.3d 466, 484–85 (D.C. Cir. 2009).

3. Protecting the United States from Other Nations' Spillover Effects

When regulatory agencies independently assess their own spillover effects, such considerations help protect other nations from U.S. regulatory behavior, but they do not necessarily help protect U.S. citizens from other nations' spillover effects. To limit these harms, agencies must convince other nations to address their spillover effects. How can they do that? A common approach is to reinforce or help form an international arrangement whereby multiple nations adhere to common minimum standards that reduce the spillover effects created by lax regulation.⁵⁵ As Professor Ilan Benshalom puts it, "Given their inability to satisfactorily govern complex global issues by themselves, states have an incentive to better manage these issues by coordinating their actions."⁵⁶ A recent example of this is the agreement between China and the United States regarding climate change. Announced by President Obama and President Xi Jinping on November 11, 2014, the two nations outlined a joint plan to curb carbon emissions, which includes new carbon emissions reductions by the United States and a "first-ever commitment by China to stop its emissions from growing by 2030."⁵⁷ Not only does the agreement allow the United States to limit the spillover effects from China, but the coordinated effort between the two nations acts to encourage other countries to make their own cuts in carbon emissions.⁵⁸

The United States can help maintain such spillover-minimizing arrangements by adhering to existing international arrangements and thus encouraging others to do the same. When the United States agrees to enter into an internationally coordinated agreement, other nations are likely to follow for a couple of reasons. First, when increasing numbers of nations agree to a common international standard, other nations may fear that they will be punished or their reputation may suffer if they do not join.⁵⁹ This risk is particularly great when dominant nations such as the United States are the ones pushing for international coordination. Second, the comparative costs of joining a coordinated arrangement decrease as more nations adhere to that standard. If we assume that there is some resource cost to joining an international arrangement because it entails maintaining stricter regulations, some nations may balk at absorbing these costs because they do not want to expend resources that other nations are saving by not joining the arrangement. This concern about comparative resource savings

55. See Raustiala, *supra* note 38, at 27 ("[I]n the area of environmental protection, the public goods nature of many environmental problems prompts states to negotiate collective, often universal treaties that fit the liberal internationalist model well.")

56. Ilan Benshalom, *Rethinking International Distributive Justice: Fairness As Insurance*, 31 B.U. INT'L L.J. 267, 275 (2013).

57. Mark Landler, *U.S. and China Reach Climate Accord After Months of Talks*, N.Y. TIMES, Nov. 12, 2014, at A1; *see also* Press Release, Office of the Press Secretary, The White House, Fact Sheet: U.S.-China Joint Announcement on Climate Change and Clean Energy Cooperation (Nov. 11, 2014), *available at* <http://www.whitehouse.gov/the-press-office/2014/11/11/fact-sheet-us-china-joint-announcement-climate-change-and-clean-energy-c>.

58. Landler, *supra* note 57.

59. See Benshalom, *supra* note 56, at 292 n.142.

diminishes as more nations expend the resources needed to abide by the international arrangement.⁶⁰

This logic helps explain why U.S. agencies often abide by recommended international standards governing spillover effects that they are under no legal obligation to adopt. For example, spillover effects are generated when individual nations do not adequately secure their nuclear material, creating a risk that the material may be captured by terrorists and used in attacks around the world. To minimize this risk, the United Nations has established a voluntary framework that sets minimum security standards for different types of radioactive material.⁶¹ The United States Nuclear Regulatory Commission has opted to adhere to this standard, thus creating support for the norm and potentially making it more likely that other nations will do the same.⁶² As more nations abide by the norm, the United States itself is increasingly protected from the risk of misused, stolen radioactive material.

When no spillover-minimizing arrangement exists, U.S. agencies can play a role in the formation of one. Consider the SEC's recent attempts to regulate security-based swaps, which are complex financial transactions that involve two parties agreeing to exchange payments contingent on events such as changes in stock prices or interest rates.⁶³ Such swaps, if not properly regulated, can cause great harm to the global financial system.⁶⁴ Yet, only a few nations have enacted regulations for the swaps. The lack of regulation in other nations could produce problems for the United States if poorly constructed swap deals made in those nations generate risks that spill into U.S. markets. To reduce this risk, the SEC "is in discussions with its foreign counterparts to explore steps toward harmonizing standards for such regulation in the future."⁶⁵

C. *International Epistemic Factors*

Agencies also look to foreign regulations for epistemic benefits—that is, for what the agencies can learn about the workability of different regulatory standards. This section first illustrates how agencies look to foreign regulations for guidance. It then examines how United States reliance on foreign policies complements federal reliance on state-level policies. One implication of this discussion is that arguments against the federal

60. *See id.*

61. U.S. Nuclear Regulatory Comm'n, *International Safeguards*, NRC.GOV (Nov. 3, 2014), <http://www.nrc.gov/about-nrc/ip/intl-safeguards.html>.

62. Physical Protection of Byproduct Material, 78 Fed. Reg. 16,922, 16,925 (Mar. 19, 2013).

63. Cross-Border Security-Based Swap Activities, 78 Fed. Reg. 30,968 (Mar. 19, 2013).

64. *See, e.g.,* Yesha Yadav, *The Problematic Case of Clearinghouses in Complex Markets*, 101 GEO. L.J. 387, 444 (2013).

65. Cross-Border Security-Based Swap Activities, 78 Fed. Reg. at 31,056; *see also* Eric C. Chaffee, *The Internationalization of Securities Regulation: The United States Government's Role in Regulating the Global Capital Markets*, 5 J. BUS. & TECH. L. 187, 191 (2010) ("Unless harmonization and centralization of international securities law occurs, this race to the bottom will continue, and more financial crises will ensue.").

preemption of state law have less force when foreign policies are available as models.

1. Foreign Regulation As Guidance for U.S. Regulation

If foreign regulations have worked well to solve a regulatory problem, this success can spur U.S. agencies to consider whether similar approaches are desirable here.⁶⁶ For example, in 2009, the European Union adopted regulations governing the transparency of retail roaming charges incurred by European wireless customers. Its immediate success in Europe led the Federal Communications Commission (FCC) “to gather information on the feasibility of instituting usage alerts and cut-off mechanisms similar to those required under the European Union (EU) regulations.”⁶⁷ Without the European experience, the FCC probably would not have pursued this regulatory effort.

Aside from looking to other nations for evidence of what they should be doing, U.S. agencies also look to those nations to see what they need not enact. The logic seems to be that the absence of a particular regulatory feature in other comparably developed nations can serve as evidence that such a feature is not a necessary part of a modern, legitimate regulatory scheme that adequately protects the public from risks. For example, the Department of Transportation justified its decision “not to require head restraints in rear outboard designated seating positions” in part by pointing out that European regulations were likewise lacking these head restraint standards.⁶⁸ The lack of regulations in a rich, comparatively consumer-friendly jurisdiction like Europe made it easier for the agency to argue that it was not shirking its public duties by not having such regulations either.

2. Foreign Regulations As Replacements for State Regulations

The federalism literature has long recognized that policy variation among states is valuable because the federal government can observe the various policies, determine which ones work best, and adapt them at the federal level.⁶⁹ But states are often unlikely to experiment with different policies.⁷⁰ In these instances, foreign regulations can fill the gap.

66. Looking to foreign decisions can be problematic if the U.S. agency free rides off of the foreign agency’s efforts and simply mimics its decision without doing any individual assessment of the options. *See, e.g.*, Mark Seidenfeld, *Cognitive Loafing, Social Conformity, and Judicial Review of Agency Rulemaking*, 87 CORNELL L. REV. 486, 486 (2002). But if the agencies avoid the temptation to engage in pure epistemic free riding, they can benefit by looking to the foreign experience of selecting and implementing a standard as evidence of that standard’s plausibility and practicability.

67. Measures Designed to Assist U.S. Wireless Consumers to Avoid “Bill Shock,” 75 Fed. Reg. 28,249 (May 20, 2010).

68. Federal Motor Vehicle Safety Standards, 69 Fed. Reg. 74,848 (Dec. 14, 2004).

69. *See New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”). For a discussion of this rationale in legal scholarship, see Ann Althouse, *Vanguard States, Laggard States: Federalism and*

Consider that states often fail to regulate risks that have significant global impacts because the harms from such risks reach far beyond one state's borders and thus each individual state has little incentive to absorb the cost of regulating the risk on its own.⁷¹ When this problem occurs, federal agencies can still look to foreign and international regulators for guidance. For example, states have little incentive to invest resources in developing robust methodologies for measuring how emissions impact climate change because climate change is a global problem. As a result, when the EPA searched for such a methodology, it did not look to the states but to the United Nations.⁷²

States are also sometimes unable to regulate because state action is preempted by federal law.⁷³ Federal preemption is most often justified by the benefits of having a uniform national standard instead of a patchwork of different states' standards that can increase the costs of doing business nationwide. When preemption occurs, though, the states have no law that can serve as guidance for U.S. agencies. But U.S. agencies can still look overseas. Consider the example of automobile regulation. In order to ensure a national market for cars, many state-level automobile safety standards are preempted by federal law.⁷⁴ As a result, the Department of Transportation cannot look to state policies for guidance when crafting automobile safety standards, but the agency routinely looks to foreign regulations and has recently implemented European safety standards.⁷⁵

This last point has significant normative implications. Some have argued against federal preemption because it deprives federal policymakers of the ability to learn by observing policy variation at the state level.⁷⁶ But this

Constitutional Rights, 152 U. PA. L. REV. 1745, 1750–76 (2004); Roberta Romano, *The States As a Laboratory: Legal Innovation and State Competition for Corporate Charters*, 23 YALE J. ON REG. 209, 246 (2005).

70. See Susan Rose-Ackerman, *Risk Taking and Reelection: Does Federalism Promote Innovation?*, 9 J. LEGAL STUD. 593, 615 (1980) (stating that federalism produces only “weak effects” in promoting innovation); Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 UCLA L. REV. 903, 925 (1994) (“[I]ndividual states will have no incentive to invest in experiments that involve any substantive or political risk.”).

71. Cf. Michael Abramowicz et al., *Randomizing Law*, 159 U. PA. L. REV. 929, 977 (2011) (“When a policy targets individual incentives and has no ‘externalities’—effects that extend beyond an individual—then the treatment should be randomly assigned at the individual level.”).

72. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009).

73. For a discussion of the arguments for and against regulatory preemption law and policy, see generally THOMAS O. MCGARITY, *THE PREEMPTION WAR: WHEN FEDERAL BUREAUCRACIES TRUMP LOCAL JURIES* (2008); Catherine M. Sharkey, *Products Liability Preemption: An Institutional Approach*, 76 GEO. WASH. L. REV. 449 (2008). For recent Supreme Court decisions, see *Brueswitz v. Wyeth*, 131 S. Ct. 1068 (2011); *Wyeth v. Levine*, 555 U.S. 555 (2009); *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2008).

74. *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 881 (2000).

75. See, e.g., *Anthropomorphic Test Devices*, 71 Fed. Reg. 75,304, 75,305 (Dec. 14, 2006).

76. See Listokin, *supra* note 22, at 551 (arguing that preemption “comes at a significant cost—the elimination of information-producing policy variance that improves long-run policy outcomes”); Nim Razoock, *A Contract-Enhancing Norm Limiting Federal Preemption of Presumptively State Domains*, 11 BYU J. PUB. L. 163 (1997) (arguing that state

argument has less force when international policies can generate similar information. In these instances, federal lawmakers and regulators can capture the benefits of preemption—namely national uniformity—while still being able to learn through policy variation. Of course, sometimes foreign regulations will provide imperfect models because of cultural differences among the nations.⁷⁷ But while such differences can be problematic, it should not be assumed that it is more difficult for agencies to borrow from their foreign counterparts than their state-level counterparts. Indeed, federal agencies may have an easier time adapting a foreign regulation from a large nation facing a similar problem than scaling up a state-level regulation that was originally designed to meet local needs.

In sum, foreign regulations often provide useful information about what kinds of regulations may work to solve regulatory problems in the United States. Foreign regulations are particularly valuable models for federal agencies when state-level regulations are unavailable or inapplicable.

D. Foreign Affairs Factors

Regulatory agencies also consider the kinds of foreign affairs factors that have traditionally been the bailiwick of diplomats and international lawyers. This section discusses how regulatory agencies consider a host of foreign affairs factors including: binding international law, international reputation and relationships, the response of foreign nations to agency actions, and the affect on international negotiations.

1. Binding International Law

Binding international law is perhaps the most straightforward of these factors.⁷⁸ Under various conventions and treaties, the United States is obligated to take certain actions or suffer some punishment.⁷⁹ The United States' treaty obligations may either be self-executing, that is to say they may be immediately enforced,⁸⁰ or non-self-executing, which would require

experimentation is usually preferable to federal preemption for traditionally state-governed areas such as product liability law in part because of the value of experimentation).

77. One concern with looking to policies made in foreign nations instead of American states is that “differences between nations are so great that one cannot infer the effects of a variation in Country X will be similar to the effects of the same variation in Country Y.” Listokin, *supra* note 22, at 549 n.184.

78. See Gregory C. Shaffer & Mark A. Pollack, *Hard vs. Soft Law: Alternatives, Complements, and Antagonists in International Governance*, 94 MINN. L. REV. 706, 707–08 (2010) (explaining the difference between hard international law—that may entail binding legal obligations—and soft international law—which does not produce litigation or direct legal sanction but may still affect state behavior through its effect on norms and state identities).

79. Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1115 U.N.T.S. 331; *Edye v. Robertson*, 112 U.S. 580, 598 (1884) (providing that if a nation fails to enforce its treaty obligations, “its infraction becomes the subject of international negotiations and reclamations, so far as the injured party chooses to seek redress, which may in the end be enforced by actual war”).

80. See *Edye*, 112 U.S. at 598–99.

Congress to pass an implementing statute to enforce the treaty.⁸¹ The desire to meet these obligations drives many regulatory actions. For example, under the Chicago Convention on International Civil Aviation, a U.N. Convention, the United States must match certain emission standards for aircrafts or else other nations can sanction the United States by banning its airplanes from traveling through their airspace.⁸² In part to avoid this sanction, the EPA updates its emissions standards to meet the international standard.⁸³

International law can also affect the procedures through which agencies act. For example, the United States is party to World Trade Organization (WTO) agreements that require nations to employ certain procedures when setting trade standards.⁸⁴ When the United States Trade Representative enacts rules, it must ensure it follows these procedures.⁸⁵

2. International Reputation and Relationships

Softer foreign affairs factors such as international reputation and international relationships also enter into regulatory agencies' decision-making calculus. Reputation is particularly important for agencies that are part of informal intergovernmental networks of regulators that deal with similar regulatory problems in their respective jurisdictions. These networks lack the formal binding structure of a treaty. Instead, the members are bound through relationships and trust.⁸⁶ If an agency wants to maintain its membership in an informal network and reap the cooperative benefits from such membership, it must demonstrate its trustworthiness.⁸⁷ For example, the Federal Reserve is a member of the Basel Committee, an informal network of international regulators that recommends banking standards.⁸⁸ If the U.S. banking agency were to ignore the Committee's

81. See *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829), *overruled on other grounds* by *United States v. Percheman*, 32 U.S. (7 Pet.) 51 (1833).

82. See *Nat'l Ass'n of Clean Air Agencies v. EPA*, 489 F.3d 1221, 1224–25 (D.C. Cir. 2007).

83. *Id.*

84. See, e.g., Trade Agreements Act of 1979 § 2(a), 19 U.S.C. § 2503(a) (2012).

85. Submission of Representations Concerning Standards-Related Activity, 47 Fed. Reg. 50,207 (Nov. 5, 1982) (enacting regulations that “provide for the proper submission of representations by certain foreign countries concerning standards-related activities viewed by such countries as barriers to trade” as required by WTO agreements).

86. See Evan J. Criddle, *Fiduciary Foundations of Administrative Law*, 54 UCLA L. REV. 117, 161–62 (2007) (“Foreign regulators and nongovernmental organizations also play influential roles as evangelists and watchdogs of agency professionalism, diligence, and fidelity.”).

87. As Anne-Marie Slaughter has observed, these kinds of networks give agencies “an incentive ‘to maintain their reputation in the eyes of other members of the network.’” ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* 55 (2004) (quoting Giandomenico Majone, *The New European Agencies: Regulation by Information*, 4 J. ENVTL. PUB. POL'Y 262, 272 (1997)).

88. See Charles K. Whitehead, *What's Your Sign? International Norms, Signals, and Compliance*, 27 MICH. J. INT'L L. 695, 710 (2006) (describing the Board as a “driving force” on the Basel Committee).

core recommendations, it would jeopardize its standing in the group.⁸⁹ As a result, the agency tends to enact the core recommendations domestically.⁹⁰

3. Foreign Responses to Agency Actions

Another foreign policy consideration concerns whether and how foreign nations will respond to an agency action. A regulation seen as cooperative may be reciprocated with a cooperative regulation that has benefits for the United States. The clearest example of this consideration comes from a 2006 Department of Transportation proposal to allow foreign investors in U.S. airlines to engage in commercial decision making at the airlines if the United States has an agreement with the foreign investor's home country that permits reciprocal investment opportunities in its national air carriers for U.S. investors.⁹¹ In proposing the rule, the agency observed that "European Union negotiators have made it clear that the European Union will consider the outcome of this proceeding in determining whether it will" allow U.S. investment in European airlines.⁹² In other words, if the Department of Transportation made it easier for Europeans to invest in and control U.S. airlines, the Europeans would likely do the same for Americans.⁹³

By contrast, a regulation that is seen as uncooperative could be met with an antagonistic response by foreign regulators. For example, it has been suggested that the Federal Reserve's proposed rule to heighten capital requirements for foreign banks could trigger a tit-for-tat response by foreign regulators who would ratchet up their regulation of American banks operating on their turf.⁹⁴ As the *New York Times* hinted: "One looming question is whether the Europeans will retaliate against the new rules once they go into effect—and force American banks to lock up capital at their

89. This would entail significant costs, as some of the most important banking rules are crafted by the Basel Committee. See Brett McDonnell, *Don't Panic! Defending Cowardly Interventions During and After a Financial Crisis*, 116 PENN ST. L. REV. 1, 53–54 (2011) ("In the area of capital requirements, the most important rulemaking is occurring at the international level, as the Basel Committee on Banking Supervision moves to finalize the Basel III Accords.").

90. See Maximilian L. Feldman, Note, *The Domestic Implementation of International Regulations*, 88 N.Y.U. L. REV. 401, 410 (2013) (observing that the Federal Reserve Board was, for certain provisions of the Accord, "so strongly committed to an international regulation that it disregards contrary public comments and implements the international regulation domestically").

91. Airworthiness Directives, 71 Fed. Reg. 26,425 (May 5, 2006).

92. *Id.* However, the agency insisted that it was not proposing the rule in order to secure agreements with the European Union. *Id.*

93. Interestingly, state policymakers are not allowed to make similar calculations concerning whether other states would reciprocate cooperative behavior. See *Great A&P Tea Co. v. Cottrell*, 424 U.S. 366 (1976) (invalidating a Mississippi law that required that milk could be shipped into Mississippi from other states only if the other state would reciprocate by accepting milk from Mississippi).

94. Enhanced Prudential Standards and Early Remediation Requirements for Foreign Banking Organizations and Foreign Nonbank Financial Companies, 77 Fed. Reg. 76,628 (Dec. 28, 2012).

operations overseas.”⁹⁵ The agency is likely aware of this possibility and has considered it as part of the decision-making process.

4. Effects on International Negotiations

The last type of foreign affairs factor concerns the signal that the agency action sends to other nations about the United States’ negotiating position on an international matter. Presidents and Congress have long been understood to use their powers to signal U.S. foreign policy intentions to other nations, a dynamic captured by what is known as costly signaling theory.⁹⁶ One insight from this Article is that these signals now are being sent through agency actions. In this section, I briefly provide some background on costly signaling theory in international relations and then show how administrative actions have become vehicles for such signals.

The basic logic of signaling theory in international affairs is that when one nation’s government takes an action at some expense, other nations observe that action, find it credible because it was costly to take, and then adjust their negotiating behavior accordingly. For example, Professor Jide Nzelibe has shown that when Presidents decide not to authorize acts of force unilaterally, but instead take the costly step of seeking congressional authorization, “the President sends a more credible signal of the United States’ resolve to prosecute the conflict.”⁹⁷ Presumably, the adversary nations respond by ratcheting up their war preparations or capitulating to U.S. demands. Similarly, Professor Rachel Brewster has observed that, if Congress were to enact significant climate change legislation, it would serve as a costly signal to other nations about the United States’ willingness to engage in treaty talks on climate change and contribute significantly to combating the global problem.⁹⁸ Other nations may respond by reciprocating U.S. efforts to fight climate change. As Brewster explains, “[t]his unselfishness on the part of the United States raises the possibility that other states will act similarly.”⁹⁹

Just as the President and Congress can send costly signals of negotiating positions, so too can agencies. Indeed, under both Presidents George W. Bush and Barack Obama, the EPA has used its decisions to send different signals about the terms on which the United States is willing to engage in negotiations on climate change.

The signal under Bush became part of the Supreme Court case *Massachusetts v. EPA*.¹⁰⁰ In that case, multiple groups petitioned the EPA

95. Peter Eavis, *Exporting U.S. Rules for Foreign Banks*, N.Y. TIMES, Jan. 23, 2014, at B1.

96. See *supra* note 19.

97. Jide Nzelibe, *A Positive Theory of the War Powers Constitution*, 91 IOWA L. REV. 993, 1022 (2006).

98. See Rachel Brewster, *Stepping Stone or Stumbling Block: Incrementalism and National Climate Change Legislation*, 28 YALE L. & POL’Y REV. 245 (2010).

99. *Id.* at 259.

100. 549 U.S. 497 (2007).

to regulate greenhouse gas emissions from automobiles.¹⁰¹ The EPA rejected the petition in part because of foreign policy concerns. In particular, the EPA was concerned that “unilateral EPA regulation of motor-vehicle greenhouse gas emissions might also hamper the President’s ability to persuade key developing countries to reduce greenhouse gas emissions.”¹⁰² The EPA’s logic was that other nations will only cut their emissions as a part of a quid pro quo deal with the United States. If the United States unilaterally cuts greenhouse gas emissions, other nations will free ride off of the United States’ efforts.

The signal contained in the EPA’s decision not to regulate greenhouse gas emissions was that the United States was not willing to take any climate change action or agree to any treaty that did not also wring emissions concessions from developing nations. In game theory terms, the United States did not want to invest in a public good while other players were free riders.

The EPA under the Obama Administration has recently sent a very different, more encouraging signal. The signal first came through the EPA’s proposed rule capping greenhouse gas emissions from new coal plants.¹⁰³ Current market conditions make the construction of new coal plants unattractive.¹⁰⁴ The proposed rule would make such construction even less likely because the plants would have to develop and employ expensive technology to limit emissions.¹⁰⁵

The proposed rule also offers foreign policy benefits. As the EPA explained, the proposed rule “demonstrate[s] global leadership” in advance of international talks on climate change.¹⁰⁶ By taking the costly step of challenging the coal industry, the Obama Administration was signaling its willingness to contribute to the global fight on climate change. As mentioned earlier, this American willingness—the world’s number two carbon polluter—helped to bring about a cooperative agreement between the United States and China, the world’s number one carbon polluter.¹⁰⁷ Other nations may respond to this signal by reciprocating and increasing their efforts or willingness to sign and implement an international treaty or multilateral agreement on the matter.

This signaling rationale is not entirely inconsistent with the logic that the EPA used under the George W. Bush presidency. Bush’s EPA was concerned that U.S. action would lead to free riding, and Obama’s EPA is assuming that U.S. action can spur reciprocal action from other nations. Both free riding and reciprocity can occur at the same time because

101. *Id.* at 505.

102. *Id.* at 513–14.

103. Standards of Performance for Greenhouse Gas Emissions from New Statutory Sources, 79 Fed. Reg. 1430 (Jan. 8, 2014).

104. *See* EPA, *supra* note 1.

105. Standards of Performance for Greenhouse Gas Emissions from New Statutory Sources, 79 Fed. Reg. at 1430 (explaining that the proposed rule would force new coal plants to implement carbon capture technologies).

106. *See* EPA, *supra* note 1.

107. *See supra* note 57 and accompanying text.

different nations will respond differently to U.S. signals depending on their own circumstances and decision making. The question is whether the good achieved through the sum of other nations' reciprocal efforts to fight climate change outweighs the costs created when other nations decide to free ride off of U.S. efforts. I will leave answering this question to the foreign policy experts. My primary point is that the EPA, under two different administrations, has used the same issue—the regulation of climate change—to send different costly signals to foreign nations about the United States' willingness to contribute to the global fight against climate change.

In sum, agencies routinely consider foreign affairs factors before they act. They take into account hard obligations under international law, how a particular action might affect the agency's reputation and relationships overseas, how foreign nations might respond to the content of a regulation, and what international negotiating position is signaled by the agency action.

II. AGENCY DECISION MAKING AND THE INTERNATIONAL COORDINATION DILEMMA

The paradigmatic case of an agency considering international factors involves an agency deciding whether to adopt a standard that is coordinated with other nations or whether to maintain its own domestically crafted regulation. I will refer to this as the international coordination dilemma.

This part examines the dilemma from two different angles. Part II.A models agency decision making with regard to the dilemma using a stylized ideal point model from political science and applies this model to real world facts.¹⁰⁸ This model shows how agencies must consider not only whether to coordinate, but also whether such coordination can take place on terms more favorable to the United States. Part II.B views the dilemma from an institutional design perspective. It examines whether domestic institutions can be designed to make it more likely that agencies will engage in beneficial coordination with foreign regulators and whether these institutions can push the outcomes of such coordination closer to American preferences. Drawing from the international affairs literature on domestic constraints, this section shows that there is a trade-off between these two goals. Institutional designs that make coordination more likely will also tend to reduce the United States' bargaining power to dictate the terms of such coordination. This section concludes by discussing how this finding has implications for judicial review and presidential oversight of agencies.

A. *An Ideal Point Model of Agency Decision Making and the International Coordination Dilemma*

This section introduces a stylized ideal point model of how agencies face the international coordination dilemma and applies the model to a couple of

108. See Daniel E. Ho & Kevin M. Quinn, *How Not to Lie with Judicial Votes: Misconceptions, Measurement, and Models*, 98 CAL. L. REV. 813, 820 (2010) (explaining how ideal point models are often used to explain roll call votes in Congress).

real world cases. The model assumes that agencies make a good faith effort to identify and consider the full range of significant factors that determine whether a regulatory action improves public welfare in the United States.¹⁰⁹ The model ignores oversight from Congress and White House offices, and it assumes that only one agency is making the decision without input or influence from other agencies.¹¹⁰ I make these simplifying assumptions in order to isolate as best as possible the influence international coordination benefits have over agency decision making, irrespective of other influences such as industry capture, political oversight, and competition among federal agencies. The following section on institutional design will take a closer look at how some of these influences impact agency decisions involving international coordination.

1. The Model

Imagine a line that represents the range of policy outcomes an agency could choose for a particular regulatory problem.¹¹¹ One point on the line is the “domestic ideal point,” which represents the policy outcome that would maximize utility if the agency were to focus exclusively on considerations internal to the United States and ignore the content of foreign and international policies on the same matter.¹¹² Some utility is lost if U.S. regulators enact policies that depart from this ideal point, and the size of the utility loss increases as regulators move farther away from the ideal point.¹¹³ For shorthand, I will refer to these losses and gains as “domestic utility.”

Another point on the line represents the policy outcome that aligns with an international norm or standard. I will refer to this point as the “international point.” The international point is unlikely to be the same as the domestic ideal point because it was either formed by a foreign nation

109. This assumes that agencies are relatively free to enact the optimal policy without constraints from domestic interest groups. See Pierre-Hugues Verdier, *Transnational Regulatory Networks and Their Limits*, 34 YALE J. INT'L L. 113, 115 (2009) (noting that, in the real world, agencies “are not free to pursue optimal global public policy for its own sake” and “one should expect that their positions will be shaped by the preferences of domestic constituencies”).

110. See generally Neomi Rao, *Public Choice and International Law Compliance: The Executive Branch Is a “They,” Not an “It,”* 96 MINN. L. REV. 194, 200 (2011) (showing how U.S. international policy can be affected by competition among agencies with divergent interests).

111. See Matthew C. Stephenson, *Optimal Political Control of the Bureaucracy*, 107 MICH. L. REV. 53, 65 (2008) (modeling the preferences of the median voter as an ideal point on a policy space).

112. One can also imagine this point as the policy that the United States should enact if it were the only nation that existed. See David Epstein & Sharyn O'Halloran, *Sovereignty and Delegation in International Organizations*, 71 LAW & CONTEMP. PROBS. 77, 84 (2008) (referring to the “stand-alone” ideal point as the policy that a nation would enact if it were the only country that existed).

113. In economic terms, utility is negatively correlated with the distance between the domestic ideal point and the actual enacted policy. See Stephenson, *supra* note 111, at 65 (“The voter’s utility is a decreasing function of the distance between the policy outcome and the voters ideal point.”).

that has different preferences than the United States or it reflects a compromise among various nations. Thus, when a U.S. agency adopts a policy that aligns with the international point, it is setting a policy that creates costs from the loss of domestic utility.

To flesh out the model further, assume that an agency is tasked with formulating a policy for a particular regulatory problem X . The domestic ideal point is policy outcome $X_{1.0}$. However, a group of foreign nations have already addressed the same problem and compromised by agreeing to policy outcome $X_{2.0}$. The United States cannot negotiate with the nations and cannot convince them to change their standard to $X_{1.0}$. The agency has only two discrete policy choices: $X_{1.0}$ or $X_{2.0}$. A choice of $X_{2.0}$ would produce coordination benefits, perhaps by creating network effects that improve gains from trade, but would at the same time incur costs, perhaps through the internal costs to U.S. regulators and the regulated parties. Conversely, a choice of $X_{1.0}$ would create the benefits of adhering to the United States' ideal range and the concomitant domestic utility of that choice, whereas the costs of that same decision could include harm to the U.S. foreign relations position or a reduction in trade with those foreign nations. The question for the agency is simply whether the benefits of the international point outweigh the costs of departing from a domestic ideal. If $X_{2.0}$ is too far away from the domestic ideal, the United States would be better off sticking to its own ideal standard and not joining the international arrangement.¹¹⁴

If we relax the assumption that $X_{2.0}$ is fixed and allow for the possibility that it could be renegotiated or otherwise altered, the decision making becomes slightly more complicated. Imagine once again that $X_{1.0}$ represents the domestic ideal point and $X_{2.0}$ the foreign standard, but now there is a range of policy options in between, represented by the points $X_{1.1}$, $X_{1.2}$. . . $X_{1.9}$. The U.S. agency can stick to its domestic ideal point, adopt the foreign standard, or try to arrange a compromise at any of these points. Now, the agency must determine whether it can convince the foreign nations to adopt a coordinated standard closer to $X_{1.0}$ and, if so, at what cost. Even if the benefits of international consistency outweigh the costs of diverging from the domestic ideal point, the agency has to consider whether the United States can extract a deal that captures the benefits of international coordination but on terms more favorable to the United States.

2. Applying the Model to Facts

This section applies the ideal point model to two regulatory cases. The first, taken from the Second Circuit case *Natural Resources Defense Council, Inc. v. Department of Agriculture*,¹¹⁵ concerns the Department of

114. In buyer-seller deals, this analysis is similar to the seller's "walk-away point," the point at which he will abandon the sale because the offered price is too far below the asking price. See Russell Korobkin, *A Positive Theory of Legal Negotiation*, 88 GEO. L.J. 1789, 1791-92 (2000).

115. 613 F.3d 76 (2d Cir. 2010).

Agriculture's regulation of packing materials. The second case involves the Department of Transportation's National Highway Traffic and Safety Administration (NHTSA) and its regulation of automobile side impact safety.¹¹⁶

a. The Packing Materials Regulation

The Department of Agriculture regulates packing materials used in international trade.¹¹⁷ A few years ago, the agency had to decide whether to enact a stricter standard backed by U.S. environmentalists or to adhere to an international standard that was formed pursuant to a multinational convention signed by the United States.¹¹⁸ The international standard was voluntary but multi-nation adherence to the standard would generate trade benefits by standardizing trade requirements for packing materials.¹¹⁹ However, the international standard was far from ideal for domestic purposes because it allowed shippers to use wood packing material susceptible to wood-boring insects, which can bury themselves into the wood in foreign countries and then emerge in the United States, where the invasive insects pose a threat to the ecosystem.¹²⁰ The environmentalists urged the department to require substitute packing materials that do not contain these wood-boring pests. The department conceded that this approach "was likely the most effective means of eliminating pest risk associated with the importation of goods."¹²¹

In terms of the model, assume that the environmentalists' recommendation represented the domestic ideal point because it minimized domestic risk at low domestic costs, and assume that the international standard departed significantly from this ideal. The first question for the Department of Agriculture was whether the benefits from international consistency outweighed the losses to domestic utility from the increased risk of invasive insects. The agency seemed to believe that it did because it favored the "the harmonization and facilitation of global trade" over "competing considerations of pest control and environmental concerns."¹²²

But a second, more complicated question was whether international coordination was possible on terms more favorable to the United States. The environmental group argued that it was, observing that the "international market for substitute packing materials might expand over time if a phased-in substitute-materials-only requirement were promulgated

116. See Federal Motor Vehicle Safety Standards; Side Impact Protection; Grant in Part, Denial in Part of Petition for Rulemaking, 65 Fed. Reg. 33,508 (May 24, 2000) (rejecting the European standard); cf. Anthropomorphic Test Devices, 71 Fed. Reg. 75,304 (Dec. 14, 2006) (adopting the ES-2re test dummy standard, a modification of the European standard that it had rejected earlier).

117. See Importation of Unmanufactured Wood Articles; Solid Wood Packing Material, 64 Fed. Reg. 3049 (Jan. 20, 2009).

118. *Natural Res. Def. Council*, 613 F.3d at 79–85.

119. *Id.* at 80 n.2.

120. *Id.* at 79.

121. *Id.* at 81.

122. *Id.* at 86.

by the United States.”¹²³ In other words, if the United States adopted its ideal standard, it would lower the cost for other nations to do the same, thus making the standard more attractive to foreign nations.

But, on the other hand, there were a couple of significant barriers to convincing foreign nations to reconsider the international standard. First, there was a massive collective action problem. A convention consisting of 173 nations established the recommended international standard.¹²⁴ While the United States is a powerful nation and pressure from the United States can go a long way, it would be quite an ordeal to reopen the drafting process for the international standard and produce something acceptable to so many nations. Moreover, there were procedural costs. The standard was promulgated pursuant to a formal convention, under which any standard would have to be set or amended in accordance with a 151-page procedural manual, thus increasing the cost of revisiting the issue.¹²⁵

After taking these factors into consideration, the agency decided that the gains from international coordination were great and that such coordination was unlikely to occur on terms more favorable to the United States because, in the agency’s words, “the [international] negotiations would be time-consuming, and their outcome would depend upon a variety of factors, including developing nations’ technical capacities and anticipated economic growth.”¹²⁶

b. The Automobile Side Collision Regulation

The calculus looked quite different for the Department of Transportation when it considered a petition, filed by an international trade association representing carmakers’ interests, that asked the agency to replace its automobile side impact standard with the European standard.¹²⁷ If the agency made this change, then United States and European carmakers would be able to sell their cars in each other’s markets without changing specifications to meet each jurisdiction’s requirements.

Assume that the United States’ status quo represented the United States ideal, a realistic assumption given that the agency determined that the U.S. standard was better than the European standard because it was safer.¹²⁸ The question for the agency was whether the benefits of coordination outweighed the costs of departing from this ideal. The agency ultimately concluded that they did not and decided to stick with the U.S. standard.¹²⁹

123. *Id.*

124. *Id.*

125. See generally FOOD AND AGRIC. ORG. OF THE U.N., INTERNATIONAL PLANT PROTECTION CONVENTION, 2012 PROCEDURE MANUAL: STANDARD SETTING (Nov. 16, 2012), available at https://www.ippc.int/sites/default/files/documents//1356016213_IPPCProcedureManual_Part3_StSet_.pdf.

126. *Natural Res. Def. Council*, 613 F.3d at 85–86.

127. Federal Motor Vehicle Safety Standards; Side Impact Protection; Grant in Part, Denial in Part of Petition for Rulemaking, 65 Fed. Reg. 33,508, 33,508 (May 24, 2000).

128. *Natural Res. Def. Council*, 613 F.3d at 81–85.

129. *Id.*

Again, though, the agency considered whether coordination was possible but on terms closer to the United States' ideal of a safer standard. The agency, after rejecting the proposal to adopt the European standard, observed that "our first steps will be to work with the Europeans to cure [their standard's] problems."¹³⁰ The agency's decision to achieve coordination on better terms proved fruitful. Six years later, the Europeans had improved their standard, and NHTSA announced that it planned to adopt the European standard "in an upgraded Federal Motor Vehicle Safety Standard on side impact protection."¹³¹

What explains NHTSA's willingness to hold out until European regulators moved closer to the United States' preferred safety standard while the Department of Agriculture would not try to convince other nations to budge on the packing material regulation? At least one major factor was the cost of negotiating due to the number of parties involved. NHTSA could work closely with its European counterparts to address its concerns with the European standard, and the two sets of regulators could negotiate among themselves. By contrast, the Department of Agriculture would have had to win approval from officials representing many more countries with different and disparate regulatory preferences. Also, because NHTSA and its European counterparts were negotiating informally, they were not hampered by the same formality that would have met the Department of Agriculture had it tried to update the international standard pursuant to the lengthy international convention.

B. Domestic Institutions and International Interagency Coordination

The model developed in Part II.A shows that agencies (1) often want to coordinate with international and foreign regulators because coordination brings benefits, and (2) would prefer that coordination occur on terms as close to the United States' ideal policy as feasible. Given these two goals, the institutional design question becomes whether domestic institutions can be set up to either increase the likelihood of beneficial international coordination or to make it more likely that such coordination favors the United States.

This section shows that there is a trade-off between these two goals.¹³² I first explain this trade-off in more detail. I then discuss implications of this trade-off for judicial review of agency decisions involving the negotiation

130. Federal Motor Vehicle Safety Standards; Side Impact Protection; Grant in Part, Denial in Part of Petition for Rulemaking, 65 Fed. Reg. at 33,512.

131. Anthropomorphic Test Devices, 71 Fed. Reg. 75,304, 75,305 (Dec. 14, 2006) (adopting the ES-2re test dummy standard, a modification of the European standard that it had rejected earlier).

132. As Robert Schmidt has explained: "[D]omestic political constraints may help a divided party claim greater value in the external bargain[, but i]f the constraints are severe . . . they may reduce the efficiency of the external bargain, perhaps reducing it to the no agreement outcome." Robert J. Schmidt, *International Negotiations Paralyzed by Domestic Politics: Two-Level Game Theory and the Problem of the Pacific Salmon Commission*, 26 ENVTL. L. 95, 117 (1996).

and implementation of international coordination agreements. I also discuss implications for presidential oversight of these agency decisions.

1. The Cooperation-Bargaining Advantage Trade-Off

When agencies bargain with their foreign counterparts over the terms of a regulatory standard, they face constraints at home that limit the range of policies that they can successfully implement domestically. These constraints come from actors, such as the President, Congress, the courts, and powerful interest groups, who have the power to block agency implementation of a standard.¹³³ As a matter of institutional design, the strength of these domestic constraints can be adjusted. For example, courts can be stripped of jurisdiction over a set of agency decisions, thus removing this constraint on the agency. Adjusting the level of domestic constraints on agencies has effects on both the likelihood of coordination and the substantive bargaining outcomes.

Consider first the effect on the likelihood of coordination. Reducing the strength of domestic constraints on agencies makes it more likely that an agency will be able to coordinate with its foreign counterparts, while increasing the strength of the constraints makes coordination less likely. When domestic constraints are weak or nonexistent, there is a greater range of standards that an agency can successfully implement at home. To borrow the terminology used in the literature on international affairs, there is a larger “win set.”¹³⁴ This larger win set makes coordination more likely to occur because there are simply more policy options that can feasibly satisfy the negotiating parties and their respective domestic constraints. For example, imagine that the Department of Transportation is trying to coordinate an automobile safety standard with European regulators, and there are ten possible safety standards on the table. If the President has said that five of the options are unacceptable to him, then half of the options are no longer viable and an agreement is less likely. But, if the President has said that he will support any coordinated agreement that the Department of Transportation reaches, then presumably all ten options are still on the table—at least for the United States—and this large win set makes a coordinated agreement more likely.

Now consider the second, and less intuitive, effect involving bargaining power. The greater the domestic constraint, the more bargaining power the agency has over its foreign counterparts.¹³⁵ The reason is that, when several policy options are on the table, the U.S. agency’s bargaining

133. See Verdier, *supra* note 109, at 126 (observing that agencies negotiating with their foreign counterparts “are instead politically and legally accountable to numerous domestic constituencies, including not only their superiors in the executive branch but also the legislature, the courts, the media, and the public”).

134. See Robert D. Putnam, *Diplomacy and Domestic Politics: The Logic of Two-Level Games*, 42 INT’L ORG. 427, 437 (1988).

135. See *id.*; see also Brewster, *supra* note 98, at 253 (noting that “a government’s bargaining position is strengthened when it can credibly commit to accepting only its preferred treaty draft (or one that is very close)”).

position is strengthened if it can credibly threaten that only its preferred option, or some option close to it, would satisfy U.S. domestic constraints. Thus, if the U.S. agency and its foreign counterparts want to achieve a coordinated outcome, coordination can only take place with a policy more favorable to the United States.

To illustrate this effect, consider again the example of the Department of Transportation negotiating over a coordinated standard with European regulators. The negotiations start with ten possible options on the table. But the Department of Transportation says that the President will only support the United States' three preferred options and thus coordination can only occur with one of these three standards. With so few options on the table, coordination is less likely. However, if Europe stands to benefit sufficiently from coordination with the United States and it believes the domestic constraint is real, it will likely capitulate and agree to an option that is more favorable to the United States.

Taken together, these findings show that there is a cooperation-bargaining advantage trade-off when designing domestic institutions that oversee agency decisions involving international coordination. High domestic constraints produce less cooperation but give the United States a greater bargaining advantage. Weak domestic constraints lead to greater international coordination but sacrifice American bargaining leverage.¹³⁶

2. Judicial Review As a Domestic Constraint on International Interagency Coordination

This trade-off has significant implications for how we consider the role of courts in reviewing agency decisions on international coordination. Consider that courts have several times declined to exercise jurisdiction over agencies' negotiation and implementation of international coordination agreements because of concerns that judicial oversight would constrain the executive.¹³⁷ As Richard Stewart has observed, some courts worry that they will "impair the ability of the executive to conclude and promptly and efficiently implement international agreements."¹³⁸ What these courts may have overlooked, though, is that, by refusing to exercise jurisdiction, they were removing a domestic constraint that could benefit the executive by giving the executive a bargaining chip.

To illustrate this trade-off with more concrete detail, consider the D.C. Circuit case *Public Citizen v. United States Trade Representative*.¹³⁹ The United States Trade Representative (USTR) was negotiating the North

136. These findings are an extension of a leading international affairs article by Robert Putnam, who showed that a domestic constraint, such as the need for legislative approval on the executive, could be a bargaining advantage for the executive. See Putnam, *supra* note 134, at 434. Putnam showed that a nation's bargaining advantage is increased if it can credibly show to other parties that it faces a domestic constraint that limits the range of options it can accept and implement at home. *Id.*

137. See Stewart, *supra* note 16, at 726.

138. *Id.*

139. 970 F.2d 916 (D.C. Cir. 1992).

America Free Trade Agreement with Canada and Mexico.¹⁴⁰ U.S. environmental groups were worried that the agreements would override existing domestic environmental protections, and they sued to compel the USTR to assess the agreement's adverse environmental effects.¹⁴¹ The court held that it had no jurisdiction because the USTR had not yet taken a final agency action.¹⁴² Such finality would not occur until the USTR submitted the agreements for presidential and congressional approval, a decision that the court also lacked power to review.¹⁴³ The result was that the court would not have jurisdiction at any point in the negotiations.

The court may have been reluctant to assert jurisdiction because it would affect the executive's ability to conduct foreign affairs.¹⁴⁴ However, by refusing to exercise jurisdiction, the court made it harder for the USTR to credibly threaten that it could not agree to any deal that did not have strong environmental protections because otherwise the deal could be bogged down in U.S. courts over claims that it did not meet statutory obligations relating to the environment. Ultimately, the lack of jurisdiction made it more likely that a deal would be implemented but less likely that the terms would reflect U.S. environmental values.

A similar effect can be seen in the case *Jensen v. National Marine Fisheries Service*.¹⁴⁵ That case involved the U.S.-Canadian coordination of Pacific Ocean fishing rules. The nations set up a regulatory scheme in which an international agency—the International Pacific Halibut Commission—recommended fishing rules subject to approval by the American and Canadian heads of state.¹⁴⁶ These rules were then implemented domestically.¹⁴⁷ The *Jensen* case concerned a rule that fishing vessels must throw back halibut that was incidentally caught in nets set to catch other fish.¹⁴⁸ U.S. owners of fishing vessels challenged the enforcement of the rule by the domestic acting agency, the National Marine Fisheries Service (NMFS), and argued instead for a rule that allowed them

140. *Id.* at 917–19.

141. The groups were worried about “the agreements’ possible preemptive effect on various federal and state environmental regulations,” and they wanted the USTR to prepare an environmental impact statement under NEPA. *Id.* at 918–19.

142. *Id.* at 923 (“As plaintiffs have failed to identify any final agency action upon which our jurisdiction under the APA could be grounded, we affirm the district court’s dismissal of their claims.”).

143. *Id.* at 919.

144. See Stewart, *supra* note 15, at 727 (“Deference to executive flexibility is also reflected in *Public Citizen v. United States Trade Representative*.”).

145. 512 F.2d 1189 (9th Cir. 1975).

146. Convention for the Preservation of the Halibut Fishery of the Northern Pacific Ocean and Bering Sea, U.S.-Can., March 2, 1953, 5 U.S.T. 5, 8–9.

147. This kind of scheme is quite common. See, e.g., Bradley C. Karkkainen, *The Great Lakes and International Environmental Law: Time for Something Completely Different?*, 54 WAYNE L. REV. 1571, 1586–89 (2008).

148. *Jensen*, 512 F.2d at 1190 (“They complain of a regulation enacted by the Commission which prohibits them from keeping halibut which they catch in their nets incidentally to other fish upon which they concentrate their efforts.”).

to keep some percentage of halibut caught in certain areas.¹⁴⁹ The court, instead of viewing the matter as a NMFS action subject to judicial review, categorized the matter as a presidential action that was not subject to review because “presidential action in the field of foreign affairs is committed to presidential discretion by law.”¹⁵⁰

By declining to exercise jurisdiction, the court freed the executive to implement an internationally coordinated standard without worrying about judicial vetoes. But the court also hampered the executive’s ability to negotiate future rules more favorable to U.S. interests because the holding made it impossible for the U.S. executive to credibly argue to the international agency and the Canadians that a particular standard was unacceptable because it would likely be blocked in U.S. court.

If a general pattern emerges of courts declining to exercise jurisdiction in these kinds of cases, it could result in a more widespread decrease in U.S. bargaining power. In particular, foreign officials would learn that the U.S. judiciary is not a constraint on agencies implementing international agreements and would adjust their negotiating posture by refusing to view the U.S. judiciary as a relevant actor that can take certain policy options off the negotiating table.

My point here is descriptive and not normative.¹⁵¹ I am not urging courts to exercise jurisdiction and reject the domestic implementation of international agreements more often. But the findings of the coordination-bargaining advantage trade-off can have normative implications. One potential extrapolation of these findings is that judicial deference regimes should be sensitive to the executive’s goals in particular cases.¹⁵² In any given case, it could be that bargaining advantage is more important to the executive than increasing the likelihood of coordination. In these cases, if the judiciary truly wants to aid the executive, it would do better to exercise jurisdiction and potentially halt the implementation of an international agreement on coordinated regulatory standards. If a court were to block implementation, the nations’ agencies could return to the negotiating table and credibly claim that certain options were off the table because of domestic opposition from the judiciary. This claim could give the United States a significant bargaining advantage.

149. *Id.* Presumably they wanted to keep halibut caught in areas where halibut overfishing was less of a problem.

150. *Id.* at 1191.

151. My descriptive finding is consistent with Professor Daniel Abebe’s recent article showing that, for foreign affairs cases, “determining the appropriate level of deference to the [executive] requires consideration of both internal, domestic constraints and external, international constraints.” Daniel Abebe, *The Global Determinants of U.S. Foreign Affairs Law*, 49 STAN. J. INT’L L. 1, 53 (2013).

152. *Cf. id.* at 52 (“[D]eference regimes should also be responsive to structural changes in international politics.”).

3. Presidential Oversight As a Domestic Constraint on International Interagency Coordination

A similar trade-off can be seen in how Presidents choose to oversee agency decisions about whether to coordinate their standards with foreign regulations.

Consider the potential effects of President Obama's 2012 executive order promoting international regulatory cooperation.¹⁵³ Among other provisions, the order tasks agencies with considering "regulatory approaches by a foreign government" with the purpose of eliminating "differences between the regulatory approaches of U.S. agencies and those of their foreign counterparts [that] might not be necessary and might impair the ability of American businesses to export and compete internationally."¹⁵⁴ This order increases the likelihood that U.S. agencies will adopt standards coordinated with foreign regulations.¹⁵⁵ At the same time, though, the order lessens domestic constraints on agencies seeking to coordinate regulations and thus may make it more likely that any such coordination occurs with regulatory details that come from foreign and not U.S. agencies.

The lessening of domestic constraints comes from the publicly observable fact that the President is unlikely to veto a domestic agency's adoption of a foreign regulatory standard that is of roughly similar stringency as the existing U.S. standard. This presidential position could make it more likely that any differences between the two standards are reconciled in favor of the foreign nation. To illustrate, imagine that a U.S. agency and a foreign government agency have each adopted different regulatory standards for the same regulatory problem. Both agencies agree that coordination is preferable. The U.S. agency asks the foreign agency to switch to the U.S. standard. However, the foreign agency demurs, arguing that its head of state does not want the agency to copy U.S. regulatory standards for a variety of political reasons. The foreign agency then asks whether, in the interest of international coordination, the U.S. agency would adopt its standard. The U.S. agency cannot turn around and argue that the President is averse to having U.S. agencies adopt foreign-made standards because the President has publicly declared the exact opposite position. As a result, under this highly stylized example, the gap between United States and foreign regulations is more likely to be bridged with the U.S. agency agreeing to move closer to the foreign agency's position instead of vice versa.

153. Exec. Order No. 13,609, 77 Fed. Reg. 26,413, 26,413 (May 1, 2012).

154. *Id.* at 26,413–14.

155. *See, e.g.*, Harmonization of Airworthiness Standards—Fire Extinguishers and Class B and F Cargo Compartments, 79 Fed. Reg. 38,266 (July 7, 2014) (to be codified at 14 C.F.R. pt. 25) (stating that the proposed rulemaking "would eliminate differences between U.S. aviation standards and those of other civil aviation authorities by creating a single set of certification requirements for transport category airplanes that would be acceptable in both the United States and Europe").

President Obama's executive order may have the effect of exacerbating an existing trend that favors European over U.S. standards. Professor Gregory Shaffer has observed that, when coordinating with European regulations, "the United States has made most of the changes" and adopted "international standards that mirror [European] ones."¹⁵⁶ Shaffer hypothesizes that this trend is due in part to the size of the European market, which is larger than the U.S. market and thus gives Europe a bargaining advantage because U.S. businesses are eager for access to this market.¹⁵⁷ If this finding is right, then President Obama's executive order may reinforce U.S. tendencies to adopt European standards.

I do not mean to suggest that President Obama's executive order is ill-conceived. On net, it is likely that the order produces benefits from newly coordinated standards that outweigh the costs from the possibility that the details of these standards come more from foreign regulators than from U.S. regulators. Nevertheless, the basic descriptive point remains that President Obama has enacted an order that could reduce the U.S. agencies' bargaining advantages in order to increase gains from international cooperation. If we are to properly calibrate domestic institutions that affect international interagency coordination, we must take into account these kinds of impacts.

III. LEGAL DOCTRINE AND THE INTERNATIONALIZATION OF AGENCY ACTIONS

Doctrinally, the most pressing question involving the internationalization of agency actions is whether agencies can rely on international factors to support their actions under judicial review and, if so, which ones. This part suggests that the current law establishes a presumption that agencies can rely on international factors, even when Congress has not expressly authorized such considerations.

This part proceeds as follows. It begins by providing background on hard look review, the process through which courts review agency actions to determine in part whether the agency has relied on permissible factors to support its actions. It then shows how, over the past thirty years, the D.C. Circuit has developed a body of case law creating a presumption that agencies can consider international considerations, even when the enabling statutes are silent on the matter. The final section discusses *Massachusetts v. EPA*, which held that the EPA's consideration of an international factor was invalid, and asks whether that holding should change our understanding of the presumption developed by the D.C. Circuit.¹⁵⁸ Applying the taxonomy developed in Part I of this Article, I suggest a narrow reading of *Massachusetts v. EPA* that would keep intact the D.C. Circuit's presumption in favor of international factors.

156. See Gregory Shaffer, *Reconciling Trade and Regulatory Goals: The Prospects and Limits of New Approaches to Transatlantic Governance Through Mutual Recognition and Safe Harbor Agreements*, 9 COLUM. J. EUR. L. 29, 73–74 (2002).

157. *Id.*

158. *Massachusetts*, 549 U.S. 497 (2007).

A. *Hard Look Review: Permissible and Impermissible Factors*

Hard look review is the process through which courts ensure that agency decisions are based on a “consideration of the relevant factors.”¹⁵⁹ If Congress has expressly authorized the consideration of a factor, then agencies clearly can rely on that factor. The problem occurs when the agency’s enabling statute is silent or ambiguous as to a factor. In these instances, courts have adopted two sometimes competing presumptions, which I will refer to as the logical relevance and impermissible politics presumptions.

The logical relevance presumption simply holds that, when Congress is silent as to a factor, courts will presume that an agency can consider that factor if it is “logically relevant” to its decision.¹⁶⁰ Furthermore, if a factor is logically relevant, agencies can rely on that factor absent a clear congressional intent to the contrary.¹⁶¹ These presumptions have been affirmed in a line of cases in the D.C. Circuit, the most important circuit for administrative law purposes because of the volume of administrative law cases it hears and its reputation for handling those cases well.¹⁶²

Meanwhile, the impermissible politics presumption holds that agencies cannot rely on crude political factors to justify their decisions. This approach is rooted in a strand of case law suggesting that judicial review of agency action is “a means of cabining political discretion.”¹⁶³ The most relevant case in this line of jurisprudence is the Supreme Court’s 1983 decision *Motor Vehicle Manufacturers Ass’n v. State Farm Mutual Auto Insurance Co.*,¹⁶⁴ which is now seen as establishing that agencies must

159. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971); *see also* Kristin E. Hickman & Matthew D. Krueger, *In Search of the Modern Skidmore Standard*, 107 COLUM. L. REV. 1235, 1307–09 (2007) (explaining how hard look review relates to other administrative law doctrines such as *Chevron* and *Skidmore*); Gillian E. Metzger, *Ordinary Administrative Law As Constitutional Common Law*, 110 COLUM. L. REV. 479, 490–505 (2010); Mark Seidenfeld, *Demystifying Deossification: Rethinking Recent Proposals to Modify Judicial Review of Notice and Comment Rulemaking*, 75 TEX. L. REV. 483, 490–99 (1997) (describing how hard look review creates uncertainty about how courts will treat agency decisions and how this uncertainty can discourage agencies from adopting rules); Matthew C. Stephenson, *A Costly Signaling Theory of “Hard Look” Judicial Review*, 58 ADMIN. L. REV. 753 (2006) (showing how agencies can increase their chances of surviving hard look review by investing more resources in compiling a record for judicial review); David Zaring, *Reasonable Agencies*, 96 VA. L. REV. 2317 (2010) (arguing that there is no difference between hard look review and any other standard of review because courts invariably look to the basic “reasonableness” of the agency decision).

160. Richard J. Pierce, Jr., *What Factors Can an Agency Consider in Making a Decision?*, 2009 MICH. ST. L. REV. 67, 73.

161. *See, e.g., Michigan v. EPA*, 213 F.3d 663, 678 (D.C. Cir. 2000).

162. *See* CHRISTOPHER P. BANKS, *JUDICIAL POLITICS IN THE D.C. CIRCUIT COURT* 23–46 (1999); *see also* Nicholas R. Parrillo, *Leviathan and Interpretive Revolution: The Administrative State, the Judiciary, and the Rise of Legislative History, 1890–1950*, 123 YALE L.J. 266, 389 (2013) (“In about 1970, the D.C. Circuit rapidly transformed into a de facto specialized court for agency litigation.”).

163. CHRISTOPHER F. EDLEY, JR., *ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY* 193 (1990).

164. 463 U.S. 29 (1983).

“explain their decisions in technocratic, statutory, or scientifically driven terms, *not* political terms.”¹⁶⁵

Taken together, these two approaches suggest that, under hard look review, agencies generally can base their actions on any logically relevant factor except political factors.

Applied to international considerations, the doctrinal question becomes: Which international considerations are logically relevant factors that agencies can use and which are impermissible political factors? Below I scour the case law to help answer this question.

B. D.C. Circuit Precedent on International Considerations

Over the past few decades, the D.C. Circuit has decided a string of cases in which it held or suggested that an agency could rely on a variety of international factors, even in the absence of express authorization by Congress. These cases establish a presumption in favor of allowing agencies to rely on international factors. This section briefly discusses each of these D.C. Circuit cases to show how, collectively, they create this presumption.

1. *Natural Resources Defense Council, Inc.* *v. Nuclear Regulatory Commission*

*Natural Resources Defense Council, Inc. v. Nuclear Regulatory Commission*¹⁶⁶ is the first D.C. Circuit opinion I could find on the matter of international considerations by agencies. The 1981 case involved a challenge to a Nuclear Regulatory Commission (NRC) decision to allow the export of nuclear materials to the Philippines.¹⁶⁷ In its decision-making process, the agency relied on international factors to help decide several questions, among them, the agency’s consideration of foreign impact on American interests and the impact on the global commons, and the court upheld the agency’s consideration of each factor.¹⁶⁸

First, the agency had to determine whether it had authority to assess risks to the “global commons” under NEPA, which requires agencies to issue environmental impact statements regarding all significant actions affecting the environment but is vague about whether and how agencies should consider international or global risks.¹⁶⁹ The agency decided that it had such authority in part out of respect for the spirit of the Treaty on the Non-Proliferation of Nuclear Weapons, which the United States had signed.¹⁷⁰ Although the treaty does not expressly require nations to consider global

165. Kathryn A. Watts, *Proposing a Place for Politics in Arbitrary and Capricious Review*, 119 YALE L.J. 2, 5 (2009).

166. 647 F.2d 1345 (D.C. Cir. 1981).

167. *Id.* at 1348.

168. *Id.* at 1365–66.

169. *Id.* at 1353 (“The Commission interpreted NEPA to require consideration of environmental impacts on the United States, and to permit consideration of impacts on the global commons.”).

170. *Id.* at 1360 n.68.

environmental impacts, the agreement was designed to minimize environmental dangers from the spread and use of nuclear material.¹⁷¹ The NRC's decision to assess how the exportation of nuclear material to the Philippines would affect the global commons was consistent with this purpose of the treaty. By acting in concert with this international goal, the NRC helped the United States maintain its standing as a nation properly concerned with the effects of nuclear proliferation.

Second, the agency had to consider whether the export of the nuclear material would in fact harm the global commons.¹⁷² It concluded that the risk to the global commons was insignificant because "American abstention from international nuclear trade risks leaving the field to less responsible suppliers and encouraging uncontrolled proliferation."¹⁷³ By approving the deal and working with the Philippines, the United States could better "prevent deterioration of the worldwide environment" than other nations.¹⁷⁴

Third, the agency had to consider whether to assess the environmental impacts specific to the Philippines and its population.¹⁷⁵ Here, the agency concluded that it did not have the requisite legal authority under NEPA. The agency's primary rationale was that such site-specific evaluations would require the agency to demand that the Philippines give it access to local sites, which would push against "principles of national sovereignty" and impact U.S.-Filipino relations.¹⁷⁶

In terms of the taxonomy developed in this Article, the agency relied on factors involving international law and international reputation, the minimization of global spillover effects, and the United States' relationship with a foreign nation. The D.C. Circuit upheld the agency's use of each factor in its broader ruling affirming the issuance of the license. More specifically, characterizing the case as one "of agency jurisdiction and legal obligation,"¹⁷⁷ the D.C. Circuit held that an environmental impact statement was not required for the issuance of a license to the Philippines when the extraterritorial effect of the agency action is limited to the recipient country, here the Philippines. Highlighting international cooperation, the court found that the NRC's actions were consistent with U.S. foreign policy;¹⁷⁸ to the court, it was Congress's intent under NEPA that bilateral or multilateral

171. During the Cold War, states adopted numerous treaty-based agreements targeting nuclear testing in response to environmental consequences that this testing posed. The cross border pollution, dangers to human health, and the perception of threat to global security created the political will to attack the problem of testing nuclear weapons. See Winston P. Nagan & Erin K. Slemmens, *National Security Policy and Ratification of the Comprehensive Test Ban Treaty*, 32 HOUS. J. INT'L L. 1, 12–13 (2009).

172. *Natural Res. Def. Council, Inc.*, 647 F.2d at 1383 ("NRC has concluded that risk to the global commons, if existent at all, is bound to be negligible.").

173. *Id.* at 1347.

174. *Id.* at 1353.

175. *Id.*

176. *Id.*

177. *Id.* at 1359.

178. *Id.* at 1366.

cooperation between nations take precedence over unilateral American action, here the environmental impact statement.¹⁷⁹

2. *Center for Auto Safety v. Peck*

A few years later, the D.C. Circuit addressed a case that concerned a straightforward issue of international trade benefits. In *Center for Auto Safety v. Peck*,¹⁸⁰ the Department of Transportation amended a bumper safety standard to make it less stringent.¹⁸¹ One reason the agency gave for the change was that the new standard aligned with European standards and thus made it cheaper for American and European auto companies to manufacture cars for both markets.¹⁸² Challengers to the regulation jumped on this reasoning, arguing that it was impermissible for the agency to consider international factors.¹⁸³ The D.C. Circuit, with then-Circuit Judge Scalia writing for the court, disagreed. It held that the NHTSA was relying on the Trade Agreements Act of 1979, “which instructs each federal agency that is developing standards to ‘take into consideration international standards and . . . if appropriate, base the standards on international standards’” when it noted the increased “international harmonization.”¹⁸⁴ The court went further, though, stating that, even if the statute had not mentioned international factors—and even though the NHTSA itself noted that the Trade Agreements Act did not require selecting “the standard that best promoted [international] harmonization”—the attack on the agency’s consideration of international trade “seems to us questionable, since harmonization produces public benefits by promoting international commerce.”¹⁸⁵

While the court’s statement was dicta, it nevertheless suggests that the judges were favorably predisposed to allowing agencies to consider gains from international trade as a factor when their enabling statutes were silent on the matter.

3. *AMSC Subsidiary Corp. v. FCC*

In a 2000 case, the D.C. Circuit upheld the FCC’s decision to license mobile satellite systems based in part on international considerations.¹⁸⁶ For decades before the case, many nations had regulatory schemes that afforded monopoly power over the satellite systems in their jurisdictions.¹⁸⁷

179. *Id.* at 1348.

180. 751 F.2d 1336 (D.C. Cir. 1985).

181. *Id.* at 1342.

182. *Id.* at 1367 (“Finally, NHTSA noted that the less restrictive standard would increase international harmonization.”).

183. *Id.* at 1367–68 (“Petitioners assert that this is irrelevant to the requirements of the Cost Savings Act.”).

184. *Id.* at 1368.

185. *Id.*

186. *AMSC Subsidiary Corp. v. FCC*, 216 F.3d 1154 (D.C. Cir. 2000).

187. In the Matter of Amendment of the Commission’s Regulatory Policies to Allow Non-U.S. Licensed Space Stations to Provide Domestic and International Satellite Service in the United States, Report and Order, 12 FCC Rcd. 24,094, 24,097 (Nov. 26, 1997).

In 1997, the United States joined a WTO agreement requiring nations to abandon their monopolies and authorize foreign firms to serve customers if there was adequate spectrum for local and foreign firms to operate.¹⁸⁸ The agreement was designed to produce positive global spillover effects from innovation in the field. Pursuant to the agreement, the FCC amended its procedures to establish that it will grant licenses to foreign satellite operators if such a license is in the public interest, which includes a consideration of “foreign policy[] and trade issues.”¹⁸⁹ Notably, these international factors were not expressly authorized in the agency’s enabling statute.¹⁹⁰

When a foreign satellite system applied for a license, the FCC granted the license over the objections of AMSC Subsidiary Corp., a U.S. operator. In particular, AMSC’s objections were that the FCC, through its foreign licensing, harmed its ability to meet its future spectrum needs.¹⁹¹ The agency concluded that denying the license “would be inconsistent with U.S. market access commitments in the WTO Agreement” and that granting “these applications will serve the public interest by facilitating increased competition in the mobile satellite services market.”¹⁹²

In terms of the taxonomy, the agency relied on international law and concerns over international spillover effects in its licensing decision. The D.C. Circuit upheld the agency’s consideration of international factors as part of an “adequate explanation” necessary to support the agency’s action.¹⁹³

4. *National Ass’n of Clean Air Agencies v. EPA*

In 2007, the D.C. Circuit upheld the EPA’s consideration of an international agreement. In *National Ass’n of Clean Air Agencies v. EPA*,¹⁹⁴ the EPA had set standards for airplane emissions in order to match international standards.¹⁹⁵ If the EPA had not updated its standards, the United States would have been out of compliance with an international convention that it had signed.¹⁹⁶ An advocacy group wanted the EPA to enact standards that were more stringent than the international standards,

188. *AMSC*, 216 F.3d at 1157 (“The adoption by the United States in 1997 of the WTO Agreement on Basic Telecommunications Services, however, obligated the United States to open its satellite markets to foreign systems licensed by other WTO member countries.”).

189. *Id.*

190. 47 U.S.C. §§ 308(b), 309 (2012).

191. *AMSC*, 216 F.3d at 1159.

192. 14 FCC Rcd. 20,798, 20,799, 20,813 (Nov. 30, 1999).

193. *AMSC*, 216 F.3d at 1160.

194. 489 F.3d 1221 (D.C. Cir. 2007).

195. *Id.* at 1223–24 (noting that the EPA “issued a final rule increasing the stringency of the oxides of nitrogen . . . emission standards applicable to newly certified commercial aircraft gas turbine engines under § 231 of the Clean Air Act.”).

196. *Id.* at 1225 (stating that “by virtue of being a party to’ the Chicago Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295, the United States is a member of the United Nations International Civil Aviation Organization,” which is an organization under the United Nations comprised of 189 member countries, tasked with adopting harmonized security standards).

but the EPA protested that studying those standards would have taken too much time and pushed the EPA far past the deadline for compliance with the international standards.¹⁹⁷ The group responded that the EPA's enabling statute, which was silent as to international considerations, did not allow the EPA to rely on factors such as international compliance.¹⁹⁸

The D.C. Circuit sided with the EPA, stating that it "refused 'to infer from congressional silence an intention to preclude the agency from considering factors other than those listed in a statute'"¹⁹⁹ and holding that the EPA could consider "international standards."²⁰⁰ The court found that Congress had "delegated expansive authority to EPA to enact appropriate regulations applicable to the emission of air pollutants from aircraft engines," and because the EPA's rule was not "manifestly contrary to the statute," the court deferred to the EPA's reasoning and standards.²⁰¹ In terms of the taxonomy of international considerations, the court upheld the agency's consideration of an international agreement designed to control regulatory spillover effects.

5. *International Union, United Mine Workers of America
v. Mine Safety Health Administration*

Most recently, an international factor was raised in a case about the regulatory standard governing the volume of mine refuge chambers.²⁰² In *International Union, United Mine Workers of America v. Mine Safety Health Administration*, the acting agency, the Mine Safety and Health Administration (MSHA), had promulgated a safety standard regarding rescue chambers for miners that was laxer than the mine workers union wanted.²⁰³ However, the standard was in line with international standards. In upholding MSHA's standard, the court cited the consistency with international standards as one valid reason in support of the rule.²⁰⁴ The court seemed to invoke international consistency as evidence of the

197. *Id.* at 1225–26 ("But [the EPA] reasons that 'assess[ing] the costs (and emission benefits) of more stringent standards' would have required additional time that EPA did not then have 'since [it had] already gone past the implementation date of the [international] standards.'" (quoting Control of Air Pollution From Aircraft and Aircraft Engines, 70 Fed. Reg. 69,664, 69,675, 69,677–78 (Nov. 17, 2005)).

198. *Id.* at 1229 (stating that the group argued that the Clean Air Act "is intended to promote the 'public health [and] welfare,' not to 'establish[] consistency with international standards'" (quoting 42 U.S.C. § 7571(a)(2)(A) (1996))).

199. *Id.* at 1230 (quoting *George E. Warren Corp. v. EPA*, 159 F.3d 616, 623–24 (D.C. Cir. 1998)).

200. *Id.*

201. *Id.*

202. *Int'l Union, United Mine Workers of Am. v. Mine Safety Health Admin.*, 626 F.3d 84 (D.C. Cir. 2010).

203. *Id.* at 89–90.

204. *Id.* at 97 (noting that the "15 cubic feet [standard] was consistent with international standards"). Interestingly, the agency had not based its standard on international consistency. Instead, international consistency was listed as a benefit in comments submitted to the agency. *Id.* at 97 n.6. Nevertheless, the fact that the court noticed these comments and cited the international consistency as a benefit suggests that it viewed international consistency as a legitimate factor that supported the agency action.

practicability and potential reasonableness of MSHA's standards—that is, the court treated consistency with the international standard as a valid epistemic factor.

* * *

In sum, in several cases dating back to 1981, the D.C. Circuit has issued opinions in which the court has presumed or suggested that agencies can justify their decisions based on various kinds of international network effects, spillover effects, epistemic factors, and foreign affairs factors. Taken together, these cases strongly suggest that agencies can presumptively consider international factors, at least in the most important circuit for administrative law purposes.

C. *International Considerations and Massachusetts v. EPA*

In 2007, the Supreme Court decided *Massachusetts v. EPA*. Some have offered broad readings of the case that would seem to upend the presumption in favor of international factors established by the D.C. Circuit. I suggest narrower readings, based in part on the taxonomy developed in Part I of this Article, that largely maintain this presumption. I do not claim that these narrower readings are superior under some theory of legal interpretation, but rather that they are reasonable and plausible interpretations of *Massachusetts v. EPA*'s holding that attorneys and courts must take seriously.

This section first recounts the relevant aspects of *Massachusetts v. EPA*. While I have referred to the case earlier in the Article, the discussion here draws on the facts directly relevant to the doctrinal discussion. This section then discusses several possible interpretations of the case. It concludes by discussing the important normative consequences if courts were to accept the narrowest reading of the case suggested here.

1. *Massachusetts v. EPA*

In *Massachusetts v. EPA*,²⁰⁵ a group of states, local governments, and private organizations filed a rulemaking petition to the EPA to regulate the emissions of four greenhouse gases from new motor vehicles, including carbon dioxide, pursuant to the EPA's responsibility under the Clean Air Act.²⁰⁶ Under section 202(a)(1) of the Clean Air Act, the EPA shall prescribe and revise "standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare."²⁰⁷

The EPA denied the rulemaking petition, citing two reasons for its denial: first, the EPA stated that the Clean Air Act did not authorize the

205. 549 U.S. 497 (2007).

206. *Id.* at 505.

207. *Id.* at 506 (quoting 42 U.S.C. § 7521(a)(1)).

agency to issue mandatory regulations to address global climate change, and second, even if the EPA had the authority, it would be unwise to do so.²⁰⁸ The EPA cited a handful of reasons why it would be unwise to promulgate regulations regarding greenhouse emissions, but one was “that regulating greenhouse gases might impair the President’s ability to negotiate with ‘key developing nations.’”²⁰⁹

Although the Supreme Court noted that it had “neither the expertise nor the authority to evaluate these policy judgments,” the Court nonetheless rejected the foreign policy rationale, as well as the EPA’s argument that it lacked authority to promulgate rulemaking; the Court held that the EPA’s enabling statute required the agency to act pursuant to the petition and to base its decision on “scientific judgment,” which made the foreign policy considerations impermissible rationales.²¹⁰ However, in the same paragraph, the Court implied that the lack of statutory authority could have been remedied if the EPA’s foreign policy judgments were based on consultations with the Department of State.²¹¹ In the Court’s words: “Congress authorized the State Department—not EPA—to formulate United States foreign policy with reference to environmental matters relating to climate . . . [and] EPA has made no showing that it issued the ruling in question here after consultation with the State Department.”²¹²

2. Several Possible Interpretations of *Massachusetts v. EPA*

There are several possible interpretations of *Massachusetts v. EPA* with regard to its impact on which international considerations are presumptively permissible for an agency to consider.

a. *The Broad Interpretation of Massachusetts v. EPA*

A prevailing broad reading of the case is that it prohibits agencies from considering seemingly all foreign policy rationales, such as how agency actions impact U.S. foreign relationships, reputation, and negotiations.

Justice Scalia, writing in dissent, read the majority opinion in this way and castigated the Court for going against established practice: “The reasons EPA gave are surely considerations executive agencies *regularly* take into account (and *ought* to take into account) when deciding whether to consider entering a new field: the impact such entry would have on other Executive Branch programs and on foreign policy.”²¹³

208. *Id.* at 511.

209. *Id.* at 533–34 (quoting 68 Fed. Reg. 52,922, 52,931 (Sept. 8, 2003)). For a discussion of how the case had broad supranational implications, see Hari M. Osofsky, *The Intersection of Scale, Science, and Law in Massachusetts v. EPA*, 9 OR. REV. INT’L L. 233 (2007).

210. *Massachusetts*, 549 U.S. at 533–34.

211. *Id.* at 534.

212. *Id.*

213. *Id.* at 552 (Scalia, J., dissenting).

Similarly, Professor Kathryn Watts has suggested that *Massachusetts v. EPA* extends *State Farm*'s rejection of impermissible political factors to foreign policy rationales.²¹⁴ Watts argues against the normative desirability of such a holding, but as a descriptive matter writes that “*Massachusetts* loudly reiterates the message that *State Farm* has been read to have established more than twenty years earlier: agencies must justify their decisions in expert-driven, *not* political, terms if they wish to convince courts that reasoned decisionmaking has occurred.”²¹⁵ Professor Mark Seidenfeld disagrees with Watts normatively but concedes that descriptively “she is correct that [*Massachusetts v. EPA* and other] cases do not invite agencies to proffer political influence as a factor in arbitrary and capricious [or hard look] review.”²¹⁶ Professors Adrian Vermeule and Jody Freeman have similarly described how the holding lends itself to this kind of interpretation. They read the Court as establishing that the EPA, and presumably acting agencies in similar cases, “may not consider extraneous non-statutory factors such as foreign policy.”²¹⁷

Under these readings, the Court is viewed as establishing that foreign policy considerations are presumptively not allowed unless Congress clearly signals otherwise in the statute—contrary to the presumption the D.C. Circuit has established over the past several decades.

b. A Narrow Interpretation of Massachusetts v. EPA

Massachusetts v. EPA easily lends itself to narrower interpretations, though. If we apply the taxonomy developed in this Article, we see that the EPA was using one particular subtype of foreign policy consideration—that is, the effect on the United States’ international negotiating position. The Court could be seen as prohibiting only this subtype of foreign policy consideration and not foreign policy rationales generally.

As a policy matter, there are reasons to draw a line between this subtype and other foreign policy rationales. When agencies consider other foreign policy factors, they typically do so because their actions directly impact the well-being of other nations. For example, in the first D.C. Circuit case discussed above, the NRC considered U.S.-Filipino relations because its decision to license the sale of nuclear material to the Philippines directly impacted welfare in that nation.²¹⁸ By contrast, when an agency considers what its action signals to foreign nations about the United States’ negotiating position, it is considering a far more speculative and amorphous effect. There are several steps from the signal to concrete international outcome. The agency must first consider what other nations currently assume about the United States’ negotiating position. It must then consider

214. See generally Watts, *supra* note 165.

215. *Id.* at 22.

216. Mark Seidenfeld, *The Irrelevance of Politics for Arbitrary and Capricious Review*, 90 WASH. U.L. REV. 141, 161 (2012).

217. Jody Freeman & Adrian Vermeule, *Massachusetts v. EPA: From Politics to Expertise*, 2007 SUP. CT. REV. 51, 97.

218. *Natural Res. Def. Council, Inc. v. NRC*, 647 F.2d 1345 (D.C. Cir. 1981).

how its action changes those assumptions and how other nations will react to those changes. Then, the agency must determine whether those nations' reactions will have a significant effect on international talks or global regulatory efforts, a ridiculously complicated calculation given the complex nature of multinational talks.

This distinction leads to two problems. First, because the effect on international negotiation is speculative, agencies are more likely to miscalculate and make the wrong decision. Second, if agencies can consider how their actions affect international negotiations, they can inject foreign policy considerations into a range of domestic regulatory decisions that are only tenuously connected to foreign nations and foreign affairs. In today's world, a host of regulatory problems are subject to ongoing, future, or potential international talks. It would be problematic if agencies could look to any of these talks and then make significant adjustments to domestic regulatory actions that are not a direct product of agreements reached in these talks. An amicus brief filed by former Secretary of State Madeleine Albright gives voice to these two concerns.²¹⁹ Albright characterized the EPA's international negotiations rationale as "a speculative foreign policy concern," and she observed that, "[g]iven the number of domestic issues that are now the subject of international negotiation, the opportunities for executive invocation of such a foreign policy trump are substantial."²²⁰

c. The Narrowest Interpretation of Massachusetts v. EPA

Massachusetts v. EPA is reasonably subject to an even narrower reading as well. Under this reading, agencies can consider how their actions affect U.S. negotiating positions if and only if the claimed impact is based on the expertise of a diplomatic agency like the State Department. This reading finds support from the fact that the Court itself seemed bothered that the "EPA has made no showing that it issued the ruling in question here after consultation with the State Department."²²¹ Like the Court, Albright too suggested that her concerns about agencies abusing foreign policy rationales to justify arbitrary decisions would have been ameliorated had the EPA consulted with other expert agencies. She noted that

the agency came up with its policy rationale entirely on its own, even though it lacked the relevant expertise[, and] [n]othing in the record suggests that the EPA consulted with the Department of State, the National Security Council, or any other relevant agency with foreign policy expertise, on whether its foreign policy position was appropriate.²²²

219. Brief for Madeleine K. Albright As Amicus Curiae Supporting Petitioners at 16–19, *Massachusetts v. EPA*, 549 U.S. 497 (2007) (No. 05-1120), 2006 WL 2570988 [hereinafter Albright Brief].

220. *Id.* at 4.

221. *Massachusetts*, 549 U.S. at 534.

222. Albright Brief, *supra* note 219, at 10.

Further support for this reading comes from a federal district court in California, which observed that the “decision in *Massachusetts* teaches that when the court seeks to determine what United States foreign policy is, it must look to sources other than EPA because EPA’s pronouncements of what is United States foreign policy, and what constitutes interference with that policy, are not authoritative.”²²³

As a practical matter, requiring agencies to consult with the Department of State before invoking a rationale based on international negotiation effects would help ameliorate the concerns that such rationales are too speculative and can lead to agency abuse. If the Department of State has been significantly involved in an agency’s decision-making process, the foreign affairs implications of that decision are likely to have been vetted by foreign policy experts who are less likely to miscalculate the influence of the agency action on international negotiations. Moreover, requiring consultation with another agency introduces procedural and substantive costs that will deter agencies from invoking this rationale too often. Procedurally, holding significant consultations with another agency consumes resources. Substantively, when an acting agency gives another agency a chance to offer significant and early input on its decisions, the agency sacrifices some degree of decision-making autonomy because the consulted agency can now also shape the regulatory action.²²⁴ Agencies will want to avoid these procedural and substantive costs, thus reducing the concern that international negotiation effects will find their way into many run-of-the-mill domestic regulatory actions.

3. The Effects of the Narrowest Interpretation of *Massachusetts v. EPA*

If courts accept the narrowest interpretation suggested here, there are clear normative consequences. Generally, such an interpretation keeps in place the presumption that agencies can rely on international factors even when their enabling statutes are silent on the matter. The agency will need to consult with foreign policy experts when taking into account certain foreign policy considerations, but otherwise the presumption remains intact.

More specifically, this reading provides a way for courts to distinguish the EPA’s reasoning in *Massachusetts v. EPA* and the EPA’s reasoning in its recent climate change action under President Obama. Recall that the EPA has recently proposed a rule limiting greenhouse gas emissions from new power plants, particularly coal plants, based in part on the signal it would send about American willingness to join international efforts to fight

223. *Cent. Valley Chrysler-Jeep, Inc. v. Goldstene*, 529 F. Supp. 2d 1151, 1181 (E.D. Cal. 2007).

224. See Jason Marisam, *Interagency Administration*, 45 ARIZ. ST. L.J. 183, 186 (2013) (explaining how, when agencies are consulted about other agencies’ actions, the “agencies then gain the power to influence agency actions made outside their departments”); see also Jason Marisam, *The President’s Agency Selection Powers*, 65 ADMIN. L. REV. 821, 835–38 (2013) (explaining how the President can mandate interagency consultation that in effect creates a hierarchy in which the consulted agency exerts power over the acting agency).

global climate change.²²⁵ At first glance, this reasoning appears similar to the invalid foreign policy rationale used in *Massachusetts v. EPA*. But unlike the EPA's decision-making process in that case, the EPA this time has consulted with foreign policy experts. The EPA based its foreign policy rationales on recommendations developed by Obama's Interagency Task Force on Carbon Capture and Storage, a group that included the Department of State.²²⁶

Under the reading that I have offered of the Court's holding in *Massachusetts v. EPA*, this distinction is enough for a court to hold that the EPA's consideration of how its cap on emissions from coal plants would impact international negotiations is a permissible factor that contributes to a satisfactory explanation supporting the action.

I am not claiming here that this narrowest reading and the holdings it would produce are the best based on some normative metric. Rather, my claim is that this interpretation is a reasonable and plausible reading of *Massachusetts v. EPA* that courts and agencies should take seriously. Narrowness is often a virtue in legal interpretation.²²⁷ Narrowness is especially valuable when broader readings would upend longstanding legal understandings, as they would here. The Supreme Court has remarked that "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes."²²⁸ The same could be said of the Supreme Court—that is, the Court should not be presumed to make fundamental changes to legal practice and doctrine in vague terms. The narrowest interpretation of *Massachusetts v. EPA* honors this maxim by reading the case's vague holding to make the smallest possible change to established D.C. Circuit precedent.

225. See EPA, *supra* note 1.

226. See REPORT OF THE INTERAGENCY TASK FORCE ON CARBON CAPTURE STORAGE (2010), available at <http://www.epa.gov/climatechange/Downloads/ccs/CCS-Task-Force-Report-2010.pdf>. The task force concluded that taking regulatory actions and other steps domestically that demonstrate leadership on issues of carbon capture and sequestration would help "engag[e] large, coal-dependent emerging economies with rapidly expanding power sectors to avoid locking in inefficient, high [greenhouse gas] emission power generation assets for decades." *Id.* at 91.

227. See, e.g., David S. Han, *Autobiographical Lies and the First Amendment's Protection of Self-Defining Speech*, 87 N.Y.U. L. REV. 70, 86 (2012); Paul W. Kahn, *Interpretation and Authority in State Constitutionalism*, 106 HARV. L. REV. 1147, 1154 (1993) ("When a non-textual constitutional right is of such longstanding recognition that it cannot be abandoned, the Court must base its interpretation on the narrowest possible reading of the relevant tradition."); Michael J. Perry, *Correspondence*, 33 STAN. L. REV. 1190, 1191 (1981) ("Instead, my argument is based on the narrowest possible *coherent* reading of the Court's opinion in *Roe*.").

228. *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). See generally Jacob Loshin & Aaron Nielson, *Hiding Nondelegation in Mouseholes*, 62 ADMIN. L. REV. 19 (2010).

CONCLUSION

The internationalization of agency actions has become a mainstream phenomenon. The Federal Register is replete with agency actions based in part on international considerations. This trend will only become more important as the world becomes increasingly globalized and regulators in different nations have greater incentives to coordinate their regulations.²²⁹ This Article has contributed to our understanding of the internationalization of agency actions in several ways. First, it developed a comprehensive taxonomy of international factors relied on by agencies. Second, it developed a stylized model of agency decision making to better understand how agencies consider whether and when to coordinate their standards with foreign and international regulatory standards. Third, from an institutional design perspective, it showed that there is a trade-off between coordination and bargaining advantage. Domestic institutions can be designed to promote international coordination by agencies or to afford U.S. agencies bargaining power over their foreign counterparts but not both at the same time. Fourth, it clarified the legal doctrine on when agencies can rely on international factors to justify their actions under judicial review. In particular, it suggested a new interpretation of *Massachusetts v. EPA* that keeps in place a presumption in favor of allowing agencies to rely on international factors, even in the absence of express congressional authorization.

229. See, e.g., Hari M. Osofsky & Hannah J. Wiseman, *Dynamic Energy Federalism*, 72 MD. L. REV. 773, 792 (2013) (“Governance of energy is slowly becoming formally international, however, as more electricity flows within transnational regions.”).