



International Agreements on Climate Change: Selected Legal Questions

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Summary

The United Nations Framework Convention on Climate Change (UNFCCC) opened for signature in 1992 and soon thereafter was ratified by the United States. The UNFCCC does not set greenhouse gas (GHG) emissions reduction targets, and during ratification hearings, the George H.W. Bush Administration represented that any protocol or amendment to the UNFCCC creating binding GHG emissions targets would be submitted to the Senate for its advice and consent.

The Kyoto Protocol (the Protocol) to the UNFCCC was intended as a first step towards implementing the UNFCCC. To that end, it sets quantitative emission reduction targets for the high income countries listed in its Annex B. The Protocol's goal is to reduce each parties' overall emissions by at least 5% below 1990 levels by 2012. Although the United States signed the Protocol in 1998, it did not submit the Protocol to the Senate. The George W. Bush Administration announced in 2001 that it would not pursue U.S. accession to the Protocol. The Obama Administration has followed this policy.

In 2007, the UN Climate Change Conference in Bali adopted a framework for negotiations over the post-2012 climate regime. It established two tracks for negotiation: (1) a track by which Kyoto Protocol parties would pursue an amendment to the Protocol for a "second round" of emission targets for its Annex B parties, and (2) a track by which UNFCCC parties would set GHG mitigation targets or actions for all parties. However, consensus under either track proved difficult to achieve at the 2009 Copenhagen Conference of the Parties. The outcome, the Copenhagen Accord (the Accord), is consequently considered a non-binding political agreement. The Accord allows each high income party listed in Annex I of the UNFCCC to define its own GHG emissions target level. "Non-Annex I" parties wishing to associate with the Accord must identify and commit to undertaking "nationally appropriate mitigation actions," which may receive international support subject to certain international reporting requirements.

The labels "convention," "protocol," and "accord" are not clear indicators of whether these three climate change agreements are binding internationally and/or domestically. Under international law, an agreement is considered binding only if it conveys the intention of its parties to create legally binding relationships and has entered into force. However, some have suggested that enforceability, rather than intentions, should govern whether an agreement is "legally binding."

Under U.S. law, a legally binding international agreement may take the form of a treaty or an executive agreement. In order for the United States to enter a treaty, the agreement must be approved by a two-thirds majority of the Senate and subsequently be ratified by the President. An executive agreement does not require the Senate's advice and consent in order to be legally binding. Historically, executive agreements have arisen in a limited set of circumstances, and certain subjects, including significant global environmental issues, have traditionally been handled as treaties that require the Senate's approval.

Of the three agreements discussed, only the UNFCCC and the Kyoto Protocol are considered legally binding agreements under international law, and the United States is bound only by the former. The United States has, however, indicated its intent to associate with the Copenhagen Accord. In doing so, it voluntarily committed to reduce U.S. emissions by 17% below 2005 levels by 2020. The Accord does not implicate the treaty power of Congress, which will likely shape the domestic effect of the Copenhagen Accord through appropriations and lawmaking. The Accord does not appear to empower the Executive to implement it solely by agency actions.

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Background on Global Climate Change Negotiations

Formal international negotiations to address human-driven climate change were launched in December 1990. These negotiations yielded the United Nations Framework Convention on Climate Change (UNFCCC) in 1992. The U.S. Senate gave its advice and consent to ratification of the agreement that same year. The UNFCCC entered into force on March 21, 1994. The UNFCCC provides a structure for international consideration of climate change. In particular, it divided countries into “Annex I countries,” which are the high income countries listed in Annex I of the UNFCCC, and “non-Annex I parties,” which are considered to be relatively low income countries as well as emerging markets.¹ The UNFCCC does not set binding targets for greenhouse gas (“GHG”) emissions.

The Kyoto Protocol to the UNFCCC (the Protocol) was negotiated as the first step towards implementing the UNFCCC. It establishes quantitative emission reduction targets for the high income countries listed in the Protocol’s Annex B² and market-based mechanisms, including emissions trading, for achieving those targets. The Protocol and decisions adopted under it also establish an elaborate compliance system. Prior to the conclusion of the Protocol on December 10, 1997, the Senate adopted a resolution expressing the view that the United States should not sign any agreement at Kyoto that would either commit developed, but not developing, nations to reduce or limit GHG emissions by a certain date or do “serious harm” to the U.S. economy.³ Nevertheless, the United States signed the Kyoto Protocol on November 12, 1998. Although, in 2001, President George W. Bush announced that the United States would not become a party to the Protocol, most other countries approved it, and it entered into force for its parties on February 16, 2005. The Protocol has not been submitted to the U.S. Senate for its advice and consent to ratification.

Recognizing that the emissions reductions for the Kyoto Protocol were set for a period that would end in 2012, the 2007 UN Climate Change Conference in Bali adopted the “Bali Road Map” as a framework for negotiations over the post-2012 climate regime. In doing so, the parties established two tracks for negotiation: (1) a track by which Kyoto Protocol parties would pursue an amendment to the Protocol for a “second round” of emission targets for Annex I parties, and (2) a track by which UNFCCC parties would seek agreement on GHG mitigation targets or actions for *all* parties. This second “track” was called the Bali Action Plan, and the deadline for the conclusion of its negotiations was the December 2009 meeting in Copenhagen, Denmark.

The two-track structure of the negotiating process created uncertainty and disagreement over whether the goal at Copenhagen was to reach a single agreement under the UNFCCC that could

¹ Among the countries listed in Annex I of the UNFCCC are: Australia, Japan, New Zealand, Russia, the United States, the United Kingdom, and most European countries. Countries that are, therefore, considered non-Annex I parties include Brazil, China, India, South Africa, and all least-developed countries. Annex I can be found at the end of the UNFCCC, which is available online at <http://unfccc.int/resource/docs/convkp/conveng.pdf> (last visited Apr. 5, 2010).

² Among the countries listed in Annex B of the Kyoto Protocol are: Australia, Japan, New Zealand, Russia, the United Kingdom, and most European countries. Annex B can be found at the end of the Kyoto Protocol, which is available online at <http://unfccc.int/resource/docs/convkp/kpeng.pdf> (last visited Apr. 5, 2010). Note that Annex I of the UNFCCC and Annex B of the Kyoto Protocol have substantially similar, but not identical, lists of countries.

³ S.Res. 98, 105th Cong., 1st Sess., 143 CONG. REC. 8138 (daily ed. July 25, 1997).

replace the Kyoto Protocol, or, rather, two agreements, one under the Kyoto Protocol and the other under the UNFCCC.⁴ Perhaps because of this uncertainty, there were high expectations about what the outcome of the Copenhagen Conference might be, even though, in the months before the Conference, it became clear that a legally binding agreement was highly unlikely. At the Conference, the 193 delegations were unable to reach a consensus. Consequently, the Copenhagen Accord (the Accord) is the product of negotiations among a much smaller group of countries, including the United States, China, India, Brazil, and South Africa.

The Copenhagen Accord is the first U.N. document to explicitly set a goal for capping the rise of global temperatures. It establishes a process that allows each Annex I party to define its own GHG emissions target level. However, delivery of these reductions is subject to measurement, reporting, and verification in accordance with set guidelines. Non-Annex I parties wishing to associate with the Copenhagen Accord should identify and commit to undertaking “nationally appropriate” GHG “mitigation actions” (NAPAs). Those NAPAs for which international support is provided are subject to international measurement, reporting, and verification requirements.

Most UNFCCC parties appeared willing to adopt the Accord, but adoption was blocked by Bolivia, Cuba, Sudan, and Venezuela. Consequently, the Conference of the Parties of the UNFCCC (COP) “took note” of the text but did not adopt it. Willing countries are invited to “associate” with the Copenhagen Accord, but the Accord is not subject to signature. To indicate their intent to associate with the Accord, countries need only submit a letter or a note verbale (an unsigned diplomatic communication prepared in the third person) to the UNFCCC Secretariat. The United States submitted its note verbale to the Executive Secretary of the UNFCCC on January 28, 2010 with a voluntary GHG emissions reduction target of 17% below 2005 levels by 2020.⁵ Seventy-six of the 193 countries represented at the Copenhagen Conference, including China, India, Brazil, Indonesia, and South Africa, have submitted GHG emissions targets or, as appropriate, NAPAs to the Executive Secretary of the UNFCCC.⁶ More countries are expected to follow suit despite missing the “soft” deadline for submissions of January 31, 2010.⁷

⁴ See Daniel Bodansky, *The Copenhagen Climate Change Accord*, ASIL INSIGHTS (Feb. 2010), available at <http://www.asil.org/files/insight100212pdf.pdf> (last visited Apr. 5, 2010).

⁵ Letter from Todd Stern, U.S. Special Envoy for Climate Change, to Yvo de Boer, Executive Sec’y of the UNFCCC (Jan. 28, 2010), available at http://unfccc.int/files/meetings/application/pdf/unitedstatesphaccord_app.1.pdf (last visited Mar. 3, 2010). For more on the history of international climate change negotiations, read CRS Report R40001, *A U.S.-centric Chronology of the International Climate Change Negotiations*, by Jane A. Leggett.

⁶ Press Release, UNFCCC, UNFCCC Publishes Reports Summing Up Results of 2009 UN Climate Change Conference in Copenhagen (Mar. 31, 2010), available at http://unfccc.int/files/press/news_room/press_releases_and_advisories/application/pdf/20100331_pr_cop_report_v2.pdf (last visited Apr. 5, 2010). For links to the submissions of Annex I parties relating to the Copenhagen Accord, visit <http://unfccc.int/home/items/5264.php> (last visited Mar. 5, 2010). For links to the submissions of non-Annex I parties relating to the Copenhagen Accord, visit <http://unfccc.int/home/items/5265.php> (last visited Mar. 5, 2010). Another 44 countries have provided “additional information” relating to the Copenhagen Accord. See Additional Information Provided by Parties to the Convention Relating to the Copenhagen Accord, <http://unfccc.int/meetings/items/5276.php> (last visited Mar. 30, 2010). *E.g.* Letter from Fatima Fetibegovic (Minister of Physical Planning, Civil Engineering, and Ecology of the Republic of Srpska-Bosnia and Herzegovina) to Mr. Yvo De Boer (Executive Secretary of the UNFCCC) (Jan. 29, 2010) (expressing Bosnia and Herzegovina’s intent to associate with the Accord).

⁷ Thai Phi Stone, *Global Warming: Where Do We Go From Copenhagen?* WASHINGTON LAWYER, Mar. 2010, (D.C. Bar Assoc., Wash. D.C.) Mar. 2010, at 37.

What Is the Difference Between a “Convention,” a “Protocol,” and an “Accord”?

A variety of terms are used in the titles of international agreements, including treaty, convention, protocol, declaration, agreement, act, covenant, statute, concordat, and exchange of notes. Despite their air of formality, these terms are not dispositive of the agreement’s legal status.⁸ Indeed, some writers suggest that names are assigned to treaties by chance or at the whim of their drafters.⁹ However, others have cataloged recurring titles of international agreements in an effort to identify patterns in their usage.¹⁰ These studies suggest that, while an agreement’s title is not determinative of that agreement’s substance or legal effect, it can help contextualize the agreement in light of historical practices.¹¹

These studies suggest, for example, that the word “convention” typically refers to an agreement that defines or expands upon an area of international relations that is not necessarily fundamental to inter-state relations.¹² In general, the distinguishing characteristic of conventions is their narrow scope.¹³ A convention typically addresses a single clearly determined object, although it may also complement other existing rights and obligations.¹⁴ The bulk of major multi-state agreements coordinated by an international organization like the United Nations are called “conventions.”¹⁵ In addition *framework* conventions, like the UNFCCC, are generally understood in international environmental law as setting guidelines by which parties are expected to address an issue and the details for implementation which will be developed by subsequent, more specific, agreements.

Unlike conventions, protocols are rarely foundational agreements in a field of inter-state relations.¹⁶ Instead, a protocol typically supplements, clarifies, interprets, or modifies the provisions of a primary instrument (most often a convention).¹⁷

Relative to “convention” and “protocol,” the word “accord” has been used infrequently in the titles of international agreements and, consequently, does relatively little to suggest what the agreement it describes might have in common with previous international agreements.¹⁸

⁸ CONGRESSIONAL RESEARCH SERVICE, TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE; A STUDY PREPARED FOR THE SENATE COMMITTEE ON FOREIGN RELATIONS 48 (1984).

⁹ See Denys P. Myers, *The Names and Scope of Treaties*, 51 AM. J. INT’L L. 574, 574 n.1 (1957) (mentioning examples where writers have argued that the choice of nomenclature used when drafting international agreements is often arbitrary).

¹⁰ See e.g. John King Gamble Jr., *Multilateral Treaties: The Significance of the Name of the Instrument*, 10 CAL. W. INT’L L. J. 1 (1980); Myers, *supra* note 9.

¹¹ See e.g. Gamble, *supra* note 10; Myers, *supra* note 9.

¹² Myers, *supra* note 9, at 583.

¹³ See *id.* at 583.

¹⁴ *Id.* at 583, n. 44-45 (1957).

¹⁵ Gamble, *supra* note 10, at 6; Myers, *supra* note 9, at 583.

¹⁶ See Gamble, *supra* note 10, at 6; Myers, *supra* note 9, at 587.

¹⁷ Gamble, *supra* note 10, at 6; Myers, *supra* note 9, at 587.

¹⁸ See Gamble, *supra* note 10, at 5 (identifying the five most commonly used titles as “treaty, convention, agreement, protocol, and exchange of notes”); Myers, *supra* note 9, at 587 (charting the use of certain words in the titles of international agreements and finding that, between 1920 and 1945, the word “convention” was used in 353 multilateral (continued...))

Nevertheless, when it is used, the word “accord” appears to indicate that the agreement is reciprocal, restricted in subject matter, and less formal than other types of agreements.¹⁹

What Makes Some International Agreements “Legally Binding” but Not Others?

Binding and non-binding agreements go by many names, but an agreement is considered binding only if it (1) conveys the intention of its parties to create legally binding relationships under international law and (2) has gone into force.²⁰ Frequently, the intention of the parties to create legally binding relationships is expressed by the use of mandatory, rather than hortatory, language²¹ and the inclusion of “final clauses” relating to ratification, entry into force, and other legal formalities.²² Moreover, statements by the parties that an agreement is *not* legally binding, or that it invokes only *political* obligations, are generally evidence that the instrument is not a legally binding agreement.²³

While some might wish there was a provision or turn of phrase that positively identified an international agreement as “binding,” international law’s emphasis on the parties’ intent has roots in contract law, to which the law of treaties is sometimes compared.²⁴ Accordingly, the Department of State adopts and expands upon this approach, deeming an agreement legally binding if it (1) is between parties that are states, state agencies, or intergovernmental organizations and who intend their undertaking to be both legally binding and governed by international law; (2) constitutes a significant undertaking or arrangement; (3) includes objective criteria for determining enforceability; and (4) necessarily entails two or more parties so that it is not unilateral in nature.²⁵ Despite the apparent obliqueness of relying on the parties’ intent at all, in most cases, the parties’ intent, and therefore the legal nature of the agreement, is clear.²⁶

Although legally binding agreements are often touted for being stronger than non-legal agreements, the latter have certain advantages. For example, agreements that are not legally

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agreements, the term “protocol” in 290, and the term “accord” in only one).

¹⁹ Myers, *supra* note 9, at 583.

²⁰ Congressional Research Service, *supra* note 8, at 55.

²¹ DANIEL BODANSKY, *THE ART AND CRAFT OF INTERNATIONAL ENVIRONMENTAL LAW* 156 (2010). For example, substituting the word “will” for “shall” in an international agreement is generally understood to deprive the agreement of any legally binding effect. *See id.* at n.6.

²² *Id.* at 156.

²³ *Id.*; Congressional Research Service, *supra* note 8, at 46. While these statements are occasionally included in the instrument itself, they may also be made verbally. Bodansky, *supra* note 21, at 156. For example, President Gerald Ford reportedly made an explicit statement when adopting the 1975 Helsinki Accords that the Accords were not legally binding. *Id.* at n.6.

²⁴ *See* Bodansky, *supra* note 21, at 157 (stating that treaties have “traditionally” been understood as “contracts between states” and explaining the reasons for this comparison). *E.g.* RESTATEMENT (SECOND) OF CONTRACTS (1981), § 21 (stating that a manifestation of a party’s intent that a promise *does not* affect legal relations may prevent the formation of a contract).

²⁵ 22 C.F.R. 181.2(a).

²⁶ Bodansky, *supra* note 21, at 156 (“[I]n most cases the parties’ intent is clear from the agreement’s context and language.”)

binding can generally be negotiated, adopted, and changed more quickly (largely because they do not require ratification), and they enable states to test and perfect an approach to an international problem that they are unsure how to best address.²⁷

How Does the United States Become a Party to an International Agreement by Way of Treaty?

In order for the United States to become bound by an international agreement, it must first complete the steps necessary to become a party. When the United States seeks to enter an agreement by way of treaty,²⁸ a three-step process must occur before the agreement can become the “Law of the Land.”²⁹ First, the United States must sign the treaty; second, the agreement must be submitted by the Executive to the U.S. Senate for its advice and consent to treaty ratification and two-thirds of the Senators present must give their approval (sometimes inaccurately referred to as “ratification by the Senate”³⁰); and third, the President must ratify the agreement by following the terms of the agreement for ratification or accession.³¹ International agreements generally require parties to exchange or deposit instruments of ratification in order for them to enter into force.³²

In some instances, the United States may enter legally binding international agreements by means other than treaty. Historically, however, the United States has generally entered significant legally binding environmental agreements by way of treaty.³³

Some agreements, however, take slightly different routes to becoming U.S. law. One such category of agreements, “executive” agreements, can become U.S. law without receiving the U.S. Senate’s advice and consent.³⁴ Another category, non-self-executing agreements, require

²⁷ Bodansky, *supra* note 21, at 156.

²⁸ The term “treaty” has a different meaning in the context of international law and domestic U.S. practice. For purposes of international law, the term “treaty” may be used to refer to any legally binding international agreement. For purposes of U.S. domestic law, however, “treaty” more narrowly refers to those binding international agreements that are contemplated under Article II, § 2 of the Constitution.

²⁹ U.S. CONST. art. VI, § 2.

³⁰ To say the Senate *ratified* a treaty is a commonly used but technically imprecise way of conveying that the United States became a party to a treaty after the Senate gave its advice and consent to its ratification and the Executive thereafter completed the ratification process. LORI F. DAMROSCH ET. AL., *INTERNATIONAL LAW: CASES AND MATERIALS* 679 (5th ed. 2009).

³¹ Generally, this process entails depositing the requisite instrument of ratification or accession with the treaty depository. The President is, however, under no duty to proceed with ratification of, or accession to, a treaty after the Senate has given its approval, and consequently may decide to oppose the treaty after obtaining the Senate’s advice and consent or decline to file the papers necessary to give effect to the Senate’s consent. *Id.*; Oona A. Hathaway, *Treaties’ End: The Past, Present, and Future of International Lawmaking in the United States*, 117 *YALE L. J.* 1236, 1323-24 (2002).

³² *See infra* at “Can the Kyoto Protocol Be Treated as an Executive Agreement Rather Than as a Treaty?”

³³ *See* John C. Yoo, *Laws as Treaties? The Constitutionality of Congressional-Executive Agreements*, 99 *MICH. L. REV.* 757, 799-813 (2001) (discussing historical U.S. practice of treating international agreements concerning certain matters, including the environment, as treaties).

³⁴ *RESTATEMENT (THIRD) OF FOREIGN RELATIONS*, § 303 n.8 (1987); LOUIS HENKIN, *FOREIGN AFFAIRS AND THE U.S. CONSTITUTION* 217 (2d ed. 1996). There are two kinds of executive agreements: (1) *sole* executive agreements; and (2) *congressional-executive* agreements. The former can become U.S. law without Congress taking action to either (continued...)

Congress to enact implementing legislation to transform the provisions of the agreement, even if it is an executive agreement, into U.S. law.³⁵

What Effect Does an Agreement Have Domestically Once the United States Becomes a Party to It?

Once the United States binds itself to the terms of either an executive agreement or a treaty, the domestic legal effect of that agreement's provisions depends largely on whether the obligations imposed by those provisions are self-executing, i.e. whether they have the force of law without need for further congressional action. In cases where treaty provisions are "non-self-executing," however, implementing legislation may be required to provide U.S. agencies with the domestic legal authority necessary to carry out duties and functions contemplated by the agreement or to make the agreement's obligations enforceable by private parties in U.S. court.³⁶ While agreements, particularly those providing that certain acts shall *not* be done, are generally presumed to be self-executing, agreements have been found to be non-self-executing for at least three reasons: (1) the agreement manifests an intention that it shall not become effective as domestic law without the enactment of implementing legislation; (2) the Senate in giving consent to a treaty, or Congress by resolution, requires implementing legislation; or (3) implementing legislation is constitutionally required.³⁷

Self-executing provisions (i.e., provisions that can be carried out or implemented without subsequent congressional action) generally carry the same legal weight as a federal statute: they

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approve or adopt the obligations contained in the agreement. The latter becomes U.S. law following approval from a majority of *Congress*, rather than simply the Senate. For more on these two categories of agreements, see CRS Report RL32528, *International Law and Agreements: Their Effect Upon U.S. Law*, by Michael John Garcia. A discussion of congressional-executive agreements in the context of trade is also available in CRS Report 97-896, *Why Certain Trade Agreements Are Approved as Congressional-Executive Agreements Rather Than as Treaties*, by Jeanne J. Grimmett.

³⁵ See Restatement, *supra* note 34, at § 111(4). Non-self-executing agreements should be contrasted with self-executing agreements, which can also be classified as either a treaty or an executive agreement, but which, unlike non-self-executing agreements, can become U.S. law only after Congress enacts implementing legislation. See *id.* at § 111cmt. h. However, as discussed in the next section of this report, some international agreements defy classification as self-executing or non-self-executing because they contain both self-executing and non-self-executing provisions. *Id.*

³⁶ *E.g.* *Medellin v. Texas*, 552 U.S. 491, 505 (2008) ("In sum, while treaties may comprise international commitments ... they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be 'self-executing' and is ratified on these terms.") (internal citations and quotations omitted); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) ("When the [treaty] stipulations are not self-executing, they can only be enforced pursuant to legislation to carry them into effect, and such legislation is as much subject to modification and repeal by congress as legislation upon any other subject."). There is some scholarly debate concerning both the differences between self-executing and non-self-executing agreements and the ability of U.S. courts to enforce their provisions. See, e.g., Jordan J. Paust, *Self-Executing Treaties*, 82 AM. J. INT'L L. 760 (1988); Carlos Manuel Vázquez, *Treaties as Law of the Land: The Supremacy Clause and the Judicial Enforcement of Treaties*, 122 HARV. L. REV. 599 (2008); John C. Yoo, *Globalism and the Constitution: Treaties, Non-Self-Execution, and the Original Understanding*, 99 COLUM. L. REV. 1955 (1999).

³⁷ See Restatement, *supra* note 34, at § 111(4), §111 reporters note 5. In general, provisions in treaties of friendship, commerce, and navigation have been given effect as self-executing agreements. *Id.* For more detail on self-executing and non-self-executing agreements, read CRS Report RL32528, *International Law and Agreements: Their Effect Upon U.S. Law*, by Michael John Garcia.

are superior to state laws but inferior to constitutional requirements.³⁸ For their part, non-self-executing provisions are considered to have limited legal status domestically because it is the implementing legislation or regulations that transform these provisions into U.S. law.³⁹

The United Nations Framework Convention on Climate Change (UNFCCC)

The UNFCCC was the first formal international agreement addressing human-driven climate change. The U.S. Senate provided its advice and consent to the UNFCCC's ratification in 1992, the same year that it was concluded. The UNFCCC entered into force for the United States in 1994. As a framework convention, the UNFCCC provides a structure for international consideration of climate change but does not contain detailed obligations for achieving particular climate-related objectives in each party's territory. It recognizes that climate change is a "common concern to humankind," and, accordingly, requires parties to: (1) gather and share information on GHG emissions, national policies, and best practices; (2) launch national strategies for addressing GHG emissions and adapting to expected impacts; and (3) cooperate in preparing for the impacts of climate change. The UNFCCC does not set binding targets for GHG emissions.

Is the United States Legally Bound by the UNFCCC?

The UNFCCC is a legally binding international agreement because its parties intended it as such and it has entered into force. It was signed by President George H. W. Bush and received the advice and consent of the U.S. Senate in 1992. On March 21, 1994, the ninetieth day following the date of deposit of the fiftieth instrument of ratification or acceptance, the UNFCCC entered force for the United States and the other fifty-one countries who ratified the treaty by that time.⁴⁰ Since that date, the terms of the UNFCCC have been binding on the United States under both international and domestic law. The United States implemented the UNFCCC under existing statutes without passing new implementing legislation.⁴¹

Although the United States is legally bound by the UNFCCC, the UNFCCC does not provide the Executive with an independent source of authority for imposing quantitative emissions restrictions on industry. When a treaty is ratified, any self-executing provisions it contains are the "Law of the Land." Accordingly, the Executive may promulgate regulations to implement these

³⁸ For more detail on self-executing and non-self-executing agreements, read CRS Report RL32528, *International Law and Agreements: Their Effect Upon U.S. Law*, by Michael John Garcia.

³⁹ See Restatement, *supra* note 34, at § 115 cmt. c.

⁴⁰ UNFCCC, United Nations Framework Convention on Climate Change: Status of Ratification (Aug. 22, 2007), available at http://unfccc.int/files/essential_background/convention/status_of_ratification/application/pdf/unfccc_conv_rat.pdf (last visited Mar. 29, 2010). See also UNFCCC, Art. 23 (stating the prerequisites for the UNFCCC's entry into force).

⁴¹ Letter of Submittal to the President (Aug. 28, 1992), S. TREATY DOC. NO. 102-28, , at VII ("The United States will implement this obligation through a variety of measures, including the Clean Air Act and its 1990 Amendments, the National Energy Strategy, and the Intermodal Surface Transportation Act of 1991."); Nigel Purvis, Essay, *The Case for Climate Protection Authority*, 49 VA. J. INT'L L. 1007, 1047 (2009).

provisions' requirements just as it could in the case of an authorizing federal statute.⁴² However, neither the Senate nor the Executive appears to view the UNFCCC as an agreement that, once ratified, provides a legal basis for new regulations restricting GHG emissions by U.S. industries.⁴³

Evidence from the ratification history of an agreement may illustrate the Senate's understanding of the agreement when it gave its approval.⁴⁴ During the Senate Foreign Relations Committee hearing on UNFCCC ratification, the George H.W. Bush Administration stated that Article 4.2 of the UNFCCC, which commits the parties to, *inter alia*, adopt national policies and, accordingly, mitigate climate change by limiting GHG emissions did "not require any new implementing legislation *nor added regulatory programs*."⁴⁵ Perhaps most importantly, it stated that an amendment or future agreement under the UNFCCC to adopt targets and timetables for emissions reductions would be submitted to the Senate for its advice and consent.⁴⁶ In the subsequent report, the Senate Committee on Foreign Relations wrote:

... [A] decision by the Conference of the Parties to adopt targets and timetables would have to be submitted to the Senate for its advice and consent before the United States could deposit its instruments of ratification for such an agreement. The Committee notes further that a decision by the executive branch to reinterpret the Convention to apply legally binding targets and timetables for reducing emissions of greenhouse gases to the United States would alter the "shared understanding" of the Convention between the Senate and the executive branch and would therefore require the Senate's advice and consent.⁴⁷

The George H.W. Bush Administration's commitment to submit any agreed upon timetables or GHG targets to the Senate was later cited during the Senate debate on advice and consent to ratification as an important element of the Senate's consent.⁴⁸ Accordingly, should an executive agency claim that the UNFCCC authorizes it to adopt and implement quantitative emissions restrictions, and, subsequently, face a legal challenge from an affected industry for the imposition of those restrictions, the court hearing the case would most likely deem the Executive's action an unconstitutional usurpation of congressional power because of the UNFCCC's ratification history.⁴⁹

⁴² See *Whitney*, 124 U.S. at 194 (1888) ("By the constitution, a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other.").

⁴³ See generally Letter of Submittal to the President (Aug. 28, 1992), S. TREATY DOC. NO. 102-28.

⁴⁴ See Restatement, *supra* note 34, at § 314, cmts. b, d; Damrosch, *supra* note 30, at 722 ("The Senate may express its understanding of a treaty provision that is arguably ambiguous. If the Senate indicates its interpretation of such a provision, the President must honor it: the treaty as so understood is the treaty to which the Senate consents."). See also *Rainbow Navigation v. Dep't of Navy*, 699 F. Supp. 339, 343 (D.D.C. 1988) (stating that the Executive Branch must stand behind its representations to the Senate regarding a treaty and comply with any formal, or informal, conditions that the Senate attaches as part of ratification so as not to "undermine the authority of the Senate under Article 2 section 2 of the Constitution to concur or to fail to concur in treaties made by the Chief Executive.").

⁴⁵ *Hearing Before the Senate Committee on Foreign Relations on the U.N. Framework Convention on Climate Change*, 102d Cong., 2d Sess. (1992), at 93 (emphasis added).

⁴⁶ *Id.* at 106.

⁴⁷ S. Exec. Rept. 102-55, 102d Cong., 2d Sess. (1992), at 14.

⁴⁸ E.g. 138 CONG. REC. 33521 (Oct. 7, 1992) (statement of Sen. McConnell). Senator McConnell stated that amending or interpreting the treaty to commit the United States to stabilize greenhouse gas emissions or as a binding commitment to targets and timetables would be subject to ratification by the Senate and "the record on this point is absolutely clear." *Id.*

⁴⁹ See *Medellin v. Texas*, 553 U.S. 491, 518, 530 (2008) (stating that provisions of treaties are held to be self-executing (continued...))

When Is an Agreement Formally Adopted Under the UNFCCC?

Articles 15, 16, and 17 of the United Nations Framework Convention on Climate Change govern the adoption of amendments, annexes, and protocols to the UNFCCC. Amendments, annexes and protocols are to be adopted at ordinary sessions of the Conference of the Parties.⁵⁰ The text of an amendment, annex, or protocol must be communicated to the parties at least six months before the meeting at which it is proposed for adoption.⁵¹ The parties must make every effort to reach an agreement on a proposed amendment or annex, but, if all efforts at consensus are exhausted, the amendment or annex can be adopted by a three-fourths majority vote of the parties present and voting at the meeting.⁵² In the absence of adoption by at least a three-fourths majority vote, the amendment or annex is not considered legally binding under the UNFCCC.⁵³ Some view these consensus procedures as blocking progress under the UNFCCC, a position which could draw support from the Conference of the Parties' failure to reach an agreement under the UNFCCC process at Copenhagen compared to the relatively quick progress made on initiatives launched outside of that process.⁵⁴

Unlike the adoption of amendments and annexes, the UNFCCC does not provide a rule for the adoption of protocols.⁵⁵ The parties have, moreover, failed to reach an agreement on a voting rule in this context despite years of trying.⁵⁶ In the absence of an agreed upon rule for the number of votes necessary to adopt a protocol, protocols are adopted by consensus.⁵⁷

The UNFCCC provides that, once adopted, an amendment enters into force under international law for the parties that have accepted it.⁵⁸ An adopted annex enters into force under international law for all parties to the Convention that have *not* notified the Depository of instruments of their

(...continued)

when there is indication that the President and Senate intended them to have domestic effect and the Executive cannot unilaterally execute a non-self-executing treaty). In *Medellin*, the case was brought by a Mexican national who had been convicted and sentenced in a Texas state court for murder. *Id.* at 497-98. In a case brought by Mexico before the International Court of Justice (ICJ), the ICJ found that Medellin was entitled to reconsideration of his conviction because of U.S. violations of the Vienna Convention on Consular Relations. *Id.* at 498. Accordingly, Medellin filed an application for a writ of habeas corpus in state court. *Id.* The Texas Court of Criminal Appeals dismissed Medellin's application. *Id.* Medellin then applied to the Supreme Court for review of the Texas Court of Criminal Appeal's dismissal. *Id.* For a complete overview of the Supreme Court's decision in *Medellin*, read CRS Report RL34450, *Can the President Compel Domestic Enforcement of an International Tribunal's Judgment? Overview of Supreme Court Decision in Medellin v. Texas*, by Michael John Garcia.

⁵⁰ UNFCCC, Arts. 15.2, 16.2, 17.1.

⁵¹ *Id.* at Arts. 15.2, 16.2, 17.2.

⁵² *Id.* at Arts. 15.3, 16.2.

⁵³ *See id.*

⁵⁴ *See e.g.* Richard Ingham, *Progress Seen on Forest Scheme, Germany to Join*, AFP (Mar. 11, 2010) (writing that a plan to stem deforestation was launched "on the sidelines" of Copenhagen and has made laudable progress outside of the UNFCCC's consensus rules, which have "bedevilled efforts to build a worldwide treaty on climate change after 2012.").

⁵⁵ CLIMATE CHANGE SECRETARIAT, A GUIDE TO THE CLIMATE CHANGE CONVENTION PROCESS 33 (2002), available at <http://unfccc.int/resource/process/guideprocess-p.pdf>.

⁵⁶ *See id.* ("As there is no agreed voting rule, almost all decisions must be adopted by consensus."). Moreover, the failure to adopt a voting rule has also prevented the Conference of the Parties' from adopting general rules of procedure. *Id.*

⁵⁷ UNFCCC, Art. 17.3; Climate Change Secretariat, *supra* note 55, at 33.

⁵⁸ UNFCCC, Art. 16.3

non-acceptance.⁵⁹ Protocols must define their own entry into force procedures.⁶⁰ These rules regarding how agreements relating to the UNFCCC enter into force solely govern the process by which they enter into force for the purposes of establishing parties' obligations under *international law*. Depending on the circumstances, a party might need to modify its domestic statutes through, for example, implementing legislation, to provide its agencies with the necessary legal authority to regulate relevant matters or to make the agreement's obligations enforceable by private parties in a domestic court.

The Kyoto Protocol

The Kyoto Protocol was negotiated as a first step towards implementing the UNFCCC, largely by establishing quantitative emission reduction targets for the high income countries listed in its Annex B. The Protocol's goal is to reduce the overall emissions of those parties by at least 5% below 1990 levels by 2012. The Kyoto Protocol was concluded on December 10, 1997 and signed by the United States a year later (on November 12, 1998). The Kyoto Protocol entered into force for parties on February 16, 2005, four years after the detailed rules for its implementation, the "Marrakesh Accords," were adopted.

In addition to emission reduction targets, the Kyoto Protocol establishes market-based mechanisms, including emissions trading among the parties, for achieving those targets. The Protocol and decisions adopted under it also create a compliance system that requires parties to gather GHG emissions data, communicate that information to the UNFCCC Secretariat, and then subject that information to international review by expert review teams. If a party does not meet its obligations under the Protocol, two penalties are available (1) an increase in the country's emissions reduction target required during the period following the one in which the country failed to comply, and (2) exclusion of that country from the emission trading scheme.⁶¹

In 2001, President George W. Bush announced that the United States would not become a party to the Protocol. Among the reasons given for U.S. non-participation in the Protocol were that it did not include GHG commitments by all large emitting countries and would cause serious harm to the U.S. economy. The Kyoto Protocol has not been submitted to the Senate for its approval.

Is the United States Legally Bound by the Kyoto Protocol?

The United States is not legally bound by the Kyoto Protocol. While the Kyoto Protocol is a binding international agreement, the United States is not currently a party. The United States signed the Kyoto Protocol on October 12, 1998, but the Protocol has not been submitted to the Senate for its advice and consent. Ratification of the Protocol by the United States would be necessary before the United States may become legally bound by the agreement.

⁵⁹ *Id.*

⁶⁰ *Id.* at Art. 17.3; Climate Change Secretariat, *supra* note 55, at 33.

⁶¹ UNFCCC, *An Introduction to the Kyoto Protocol Compliance Mechanism*, http://unfccc.int/kyoto_protocol/compliance/introduction/items/3024.php (last visited Mar. 12, 2010); Sean Cumberlidge, *Multilateral Environmental Agreements: From Montreal to Kyoto—A Theoretical Approach to an Improved Climate Change Regime*, Dev. J. 37 INT'L L. & POL'Y 303, 326 (2009).

What Obligations Did the United States Incur by Signing the Kyoto Protocol and to What Extent Does It Remain Bound by Those Obligations?

As discussed, the United States generally is not bound by the terms of an international agreement simply on the basis of its signature unless the agreement constitutes an executive agreement that does not require subsequent congressional action. However, signing does create new obligations. First, it authenticates the text of an agreement, confirming that the text expresses the agreement reached by the negotiating states. Second, it represents a “moral obligation” by the United States to pursue accession to the Protocol, in this case, by seeking the Senate’s advice and consent.⁶² Third, the signature ostensibly obligates the United States to “refrain from acts which would defeat the object and purpose” of the agreement.⁶³ Article 18 of the Vienna Convention on the Law of Treaties states the matter more completely as follows:

A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

(a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or

(b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.⁶⁴

International law does not provide a procedure by which a nation can remove its signature from a treaty. Nevertheless, a signatory state may eliminate the legal consequences of signature by making clear its intent not to ratify the treaty.⁶⁵ The Vienna Convention on the Law of Treaties (VCLT) does not prescribe a method by which such an intention must be expressed. However, it is generally accepted that a letter from the Secretary of State to the treaty depositary (in this case, the United Nations) would suffice. For example, the George W. Bush Administration sent such a letter in 2002 to extinguish any legal obligations arising from its signature of the “Rome Statute,” which established the International Criminal Court. The United States has not sent a similar notice of its disavowal of the Kyoto Protocol to the Secretary-General of the United Nations.⁶⁶ Instead, the Bush Administration merely stated, albeit on multiple occasions, that the United

⁶² Restatement, *supra* note 34, at § 312(3), § 312 cmt. d. (stating that a country’s signature to an agreement is normally “deemed to represent political approval and at least a moral obligation to seek ratification”). Note that by describing the obligation as “moral,” the Vienna Convention on the Law of Treaties (VCLT) suggests that it is not a legally enforceable obligation.

⁶³ Vienna Convention on the Law of Treaties, Art. 18. The United States signed the VCLT but has not ratified it. Nevertheless, the U.S. considers most of the VCLT to constitute customary international law on the law of treaties. Customary international law is a set of practices that all, or nearly all, states consistently follow because they consider themselves legally bound to do so. CRS Report RL32528, *International Law and Agreements: Their Effect Upon U.S. Law*, by Michael John Garcia.

⁶⁴ VCLT, Art. 18. *See* Restatement, *supra* note 34, at § 312(3), § 312 cmt. i.

⁶⁵ VCLT, Art. 18 (stating that the obligation to refrain from acts that would “defeat the object and purpose of a treaty” applies only until such time as a signatory “shall have made its intention clear not to become a party to the treaty.”).

⁶⁶ Curtis A. Bradley, *Unratified Treaties, Domestic Politics, and the U.S. Constitution*, 48 HARV. INT’L L. J. 307, 312 (2007).

States would not participate in the Protocol.⁶⁷ What, if any, legal effect these statements have is debatable, but the fact that the George W. Bush Administration followed the most formal procedure with the Rome Statute and a less formal procedure with the Kyoto Protocol could suggest that the United States saw a meaningful distinction between the results achieved by the two procedures and chose which process to follow in each instance accordingly.⁶⁸ However, in the absence of an institutional mechanism for enforcing the obligations that arise from a nation's signature, it appears that it is largely up to the United States to determine (1) whether it is still a signatory to the Kyoto Protocol under customary international law and (2) what acts would be inconsistent with those obligations.⁶⁹

Can the Kyoto Protocol Be Treated as an Executive Agreement Rather Than as a Treaty?

Amendments and agreements entered into pursuant to an existing treaty can be a source of binding international obligations.⁷⁰ In general, all contracting states to the original agreement must have an opportunity to (1) take part in the negotiations regarding an amendment; and (2) become parties to the agreement as amended.⁷¹ Under international law, an amendment to a multilateral agreement, like the UNFCCC, only has legal effect for those countries that become parties to the amending agreement.⁷²

Under U.S. law, amendments are subject to the same requirements as treaties and other binding international agreements.⁷³ U.S. law, however, permits some kinds of legally binding international agreements, namely some forms of executive agreements, to avoid taking the form of a treaty. These agreements can, therefore, avoid the constitutional requirements imposed on the United States' participation in treaties.

Executive agreements, which may or may not be authorized by Congress, are binding agreements entered into by the executive branch that are not submitted to the Senate for its advice and consent.⁷⁴ Generally, executive agreements arise in three situations: (1) when Congress has previously or retroactively authorized the international agreement, in which case the agreement is called a congressional-executive agreement; (2) when the agreement is authorized by a ratified treaty; and (3) when the President had independent constitutional authority to enter the agreement so that further congressional action is not necessary (in which case the agreement is called a *sole* executive agreement).⁷⁵ Although not explicitly mentioned in the Constitution, the use of

⁶⁷ *Id.*

⁶⁸ See Edward T. Swaine, *Unsigning*, 55 STAN. L. REV. 2061, 2079 (2003).

⁶⁹ See *id.*

⁷⁰ See Restatement, *supra* note 34, at § 334.

⁷¹ See *id.*

⁷² See *id.*

⁷³ See *id.* at § 334 cmt. a.

⁷⁴ CONGRESSIONAL RESEARCH SERVICE, TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE, A STUDY PREPARED FOR THE SENATE COMM. ON FOREIGN RELATIONS 5 (2001 S. Prt. 106-71), available at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_cong_senate_print&docid=f:66922.pdf (last visited Mar. 29, 2010).

⁷⁵ *Id.*

executive agreements has been validated by historical practice and judicial decision.⁷⁶ Nevertheless, the full scope of the President's authority to conclude and implement executive agreements, particularly sole executive agreements, remains a subject of scholarly and political debate.

When asked to give its advice and consent to the UNFCCC, the Senate expressed concern that, if ratified, the UNFCCC might be interpreted as authorizing the treatment of subsequent protocols and amendments as executive agreements. During the hearing on the Convention, the Senate Foreign Relations Committee propounded to the Administration the general question of whether protocols and amendments to the Convention and to the Convention's Annexes would be submitted to the Senate for its advice and consent. As discussed, the George H.W. Bush Administration responded as follows:

Amendments to the convention will be submitted to the Senate for its advice and consent. Amendments to the convention's annex (i.e., changes in the lists of countries contained in annex I and annex II) would not be submitted to the Senate for its advice and consent. With respect to protocols, given that a protocol could be adopted on any number of subjects, treatment of any given protocol would depend on its subject matter. However, we would expect that any protocol would be submitted to the Senate for its advice and consent.⁷⁷

The committee also asked more specifically whether a protocol containing targets and timetables for emissions reductions would be submitted. The Administration responded in the affirmative:

If such a protocol were negotiated and adopted, and the United States wished to become a party, we would expect such a protocol to be submitted to the Senate.⁷⁸

In light of these statements, the Senate Committee on Foreign Relations stated in its report on the resolution that a decision by *either* the UNFCCC parties *or* the Executive to implement the UNFCCC by adopting targets and timetables would need to be treated as a new treaty and therefore submitted to the Senate for its advice and consent.⁷⁹ In doing so, the Committee provided a clear statement of its view that any future agreement containing legally binding targets and timetables would have to be submitted to the Senate. These statements lack the strength of a formal condition to the Senate's resolution of ratification for the UNFCCC, but they carry both legal and political significance and, consequently, would be potentially dangerous for any administration to disregard.

While it should be noted that no executive agreement appears to have been invalidated by a court on the grounds that it was not submitted to the Senate as a treaty,⁸⁰ history also shows that the

⁷⁶ *E.g.* *Am. Ins. Assoc. v. Garamendi*, 539 U.S. 396, 415 (2002) (“[O]ur cases have recognized that the President has authority to make ‘executive agreements’ with other countries, requiring no ratification by the Senate ... this power having been exercised since the early years of the Republic”); *U.S. v. Belmont*, 301 U.S. 324, 330 (1937) (“[A]n international compact ... is not always a treaty which requires the participation of the Senate”). *See also* Congressional Research Service, *supra* note 8, at 70.

⁷⁷ *Hearing Before the Senate Committee on Foreign Relations on the U.N. Framework Convention on Climate Change*, 102d Cong., 2d Sess. (1992), at 105.

⁷⁸ *Id.* at 106.

⁷⁹ S. Exec. Rept. 102-55, 102d Cong., 2d Sess. (1992), at 14. Additionally, the H.W. Bush Administration's commitment was again cited during the Senate debate on the resolution of ratification as an important element of the Senate's consent. *See* 138 CONG. REC. 33521 (Oct. 7, 1992) (statement of Sen. McConnell).

⁸⁰ For example, in the late nineties, the Fifth Circuit Court of Appeals was asked to determine whether an executive (continued...)

United States consistently enters multilateral agreements concerning significant environmental issues by way of treaty.⁸¹ Given the nature of the Protocol and the Senate's statements on the ratification of the UNFCCC, it is unlikely that an Administration would opt to deviate from the usual U.S. approach to environmental agreements by adopting the Kyoto Protocol without Senate approval. Moreover, the failure of the parties to reach an agreement on post-2012 emissions targets at Copenhagen may detract from the future significance of the Kyoto Protocol and give the Executive yet another reason not to desire the Protocol's adoption as an executive agreement.

Because the United States has not completed the legal prerequisites by which the Kyoto Protocol would become binding domestic law,⁸² the Kyoto Protocol cannot serve as independent legal authority for imposing quantitative emissions restrictions on U.S. industry. There have, however, been rare occasions when treaties have been given provisional application (temporary implementation) prior to their receipt of the Senate's advice and consent.⁸³ Nevertheless, the Protocol appears to lack the legal authority to sustain its provisional application because, unlike other agreements that have received provisional application, neither the Protocol's text nor statements by its parties suggest that the Kyoto Protocol was negotiated with an expectation of its provisional application.

In general, the provisional application of a treaty requires that the President have independent constitutional authority, or, potentially, some form of approval from the legislative branch, to enter into a binding executive agreement that would undertake what provisional application of the treaty entails.⁸⁴ However, the President presumably lacks the authority to enter into an executive agreement that would temporarily implement the Protocol.⁸⁵ Finally, rather than expressly or implicitly authorizing the provisional application of the Protocol, in 1997 the Senate adopted a resolution on a vote of 95-0 expressing the view that the United States should not sign any

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agreement between the United States and the International Criminal Tribunal for Rwanda (ICTR) and its implementing statute created valid authority for U.S. extradition of a prisoner to the ICTR. *Ntakirutimana v. Reno*, 184 F.3d 419 (5th Cir. 1999), *cert. denied* 528 U.S. 1135 (2000). Ultimately, the court ruled that it did and emphasized that a treaty, i.e. an agreement ratified by the President and approved by two-thirds of the Senate, is not the only method by which the United States can enter a binding international agreement. *Id.* at 426. Several years later, the Eleventh Circuit Court of Appeals ruled that the issue of whether an agreement, in that case the North American Free Trade Agreement, which was treated as a congressional-executive agreement, should have been approved as a formal treaty was a nonjusticiable political question. *Made in the USA Found. v. United States*, 242 F.3d 1300 (11th Cir. 2001) *cert. denied sub nom* *United Steelworkers of America et. al. v. U.S.*, 534 U.S. 1039 (2001).

⁸¹ *E.g.* Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), Mar. 3, 1973, T.I.A.S. No. 8249; Convention for the Protection of the Ozone Layer, Mar. 22, 1985, T.I.A.S. No. 11097; Montreal Protocol on Substances That Deplete the Ozone Layer, Sept. 16, 1987, 26 I.L.M. 1541. *See also* Yoo, *supra* note 33, at 822 (“[T]he President and Senate have reserved the treaty form for significant international obligations in several areas, such as political/military agreements, arms control, extradition, the environment, and human rights.”).

⁸² Recall that the Protocol has not been submitted to the Senate for its advice and consent on ratification, and, accordingly, the United States has not deposited an instrument of ratification with the Secretary-General of the United Nations.

⁸³ *E.g.* Maritime Boundary Agreement between the United States and Cuba, Exec. G, 96th Cong., 1st Sess. (1979); Maritime Boundaries Agreement between the United States and Mexico, Exec. F, 96th Cong., 1st Sess. (1979).

⁸⁴ Restatement, *supra* note 34, at § 312 cmt. 1.

⁸⁵ *See generally* *Medellin*, 552 U.S. at 530-32 (holding that presidential memorandum ordering state court to give effect to non-self-executing- treaty requirement did not constitute federal law preempting the state's procedural default rules); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (rejecting President's claim of independent constitutional authority to take control of and operate the nation's steel mills to ensure continued production during the Korean War).

agreement at Kyoto that would commit developed, but not developing, nations to reduce or limit GHG emissions by a certain date or that would do “serious harm” to the U.S. economy.⁸⁶

The Copenhagen Accord

The Copenhagen Accord is the first U.N. document to explicitly state the goal of limiting global temperature rise to 2 degrees Celsius (3.6 degrees Fahrenheit) compared to pre-industrial levels. It establishes a process that allows each Annex I party to define its own GHG emissions target level. However, delivery of these reductions is subject to measurement, reporting, and verification in accordance with set guidelines. It asks non-Annex I parties wishing to associate with the Copenhagen Accord to identify and commit to undertaking “nationally appropriate” GHG “mitigation actions” (“NAPAs”). All NAPAs, regardless of whether their receipt of international support, are subject to provisions for “international consultations and analysis” and domestic measurement, reporting, and verification. Those NAPAs for which international support is provided, however, are also subject to international measurement, reporting, and verification requirements. The Accord calls for \$30 billion in funding between 2010-2012 to help poorer countries adapt to the impacts of climate change.

The Accord could not be adopted under the UNFCCC because it failed to garner sufficient support to meet the UNFCCC’s consensus rules. Consequently, the Conference of the Parties only “took note” of the text. Willing countries are invited to join the Copenhagen Accord, but the Accord is not subject to signature.

The United States submitted a note verbale to the Executive Secretary of the UNFCCC on January 28, 2010, declaring U.S. intent to associate with the Copenhagen Accord.⁸⁷ Pursuant to the terms of the Accord, the United States attached a voluntary GHG emissions reduction target of 17% below 2005 levels by 2020.⁸⁸ Seventy-six of the 193 countries represented at the Copenhagen Conference, including China, India, Brazil, Indonesia, and South Africa, have submitted GHG emissions targets or, when appropriate, NAPAs to the Executive Secretary of the UNFCCC.⁸⁹ More countries are expected to follow suit despite missing the “soft” deadline for submissions of January 31, 2010.⁹⁰

⁸⁶ S.Res. 98, 105th Cong., 1st Sess., 143 CONG. REC. 8138 (daily ed. July 25, 1997).

⁸⁷ For more on the history of international climate change negotiations, read CRS Report R40001, *A U.S.-centric Chronology of the International Climate Change Negotiations*, by Jane A. Leggett.

⁸⁸ Letter from Todd Stern, U.S. Special Envoy for Climate Change, to Yvo de Boer, Executive Sec’y of the UNFCCC (Jan. 28, 2010), available at http://unfccc.int/files/meetings/application/pdf/unitedstatescphaccord_app.1.pdf (last visited Mar. 3, 2010).

⁸⁹ Press Release, UNFCCC, UNFCCC Publishes Reports Summing Up Results of 2009 UN Climate Change Conference in Copenhagen (Mar. 31, 2010), available at http://unfccc.int/files/press/news_room/press_releases_and_advisories/application/pdf/20100331_pr_cop_report_v2.pdf (last visited Apr. 5, 2010). For links to the submissions of Annex I parties relating to the Copenhagen Accord, visit <http://unfccc.int/home/items/5264.php> (last visited Mar. 5, 2010). For links to the submissions of non-Annex I parties relating to the Copenhagen Accord, visit <http://unfccc.int/home/items/5265.php> (last visited Mar. 5, 2010). Another 44 countries have provided “additional information” relating to the Copenhagen Accord. See Additional Information Provided by Parties to the Convention Relating to the Copenhagen Accord, <http://unfccc.int/meetings/items/5276.php> (last visited Mar. 30, 2010). *E.g.* Letter from Fatima Fetibegovic (Minister of Physical Planning, Civil Engineering, and Ecology of the Republic of Srpska-Bosnia and Herzegovina) to Mr. Yvo De Boer (Executive Secretary of the UNFCCC) (Jan. 29, 2010) (expressing Bosnia and Herzegovina’s intent to associate with the Accord).

⁹⁰ Stone, *supra* note 7, at 37.

Is the United States Legally Bound by the Copenhagen Accord?

The United States is not legally bound by the Copenhagen Accord. Statements of the parties to the Copenhagen Accord show that the parties understood the Accord as *political* agreement, rather than a legally binding one. This understanding has since been reflected in statements by both the UN Secretary General and the Executive Secretary of the UNFCCC.⁹¹ Consequently, the Accord is not a legally binding international agreement.

In light of the voluntary nature of the Accord, countries may “associate with,” rather than sign, the Copenhagen Accord.⁹² To communicate their intention to associate with the Accord, countries were asked to submit a note verbale, an unsigned diplomatic communication prepared in the third person, to the Executive Secretary of the UNFCCC.⁹³ The United States has submitted a letter to the Executive Secretary indicating its intention to be associated with the Accord,⁹⁴ however, because the agreement is not legally binding, this association does not necessarily require U.S. adherence with the Accord’s provisions.

The Conference of the Parties’ failure to formally adopt the Copenhagen Accord means that, in addition to being voluntary, the Accord lacks legal standing under the UNFCCC.⁹⁵ As noted above, because a small group of countries objected to the Accord, the COP could not achieve the consensus required by the UNFCCC for formal adoption. Accordingly, the COP agreed only to “take note of” the Copenhagen Accord. The Executive Secretary of the UNFCCC explained that this decision means the provisions of the Accord “do not have any legal standing with the UNFCCC process even if some Parties decide to associate themselves with it.”⁹⁶

⁹¹ E.g. China’s Submission of Views on the AWG-LCA and AWG-KP ¶4 (Feb. 15, 2010), *available at* http://unfccc.int/files/meetings/ad_hoc_working_groups/application/pdf/chinawp2010.pdf (describing the Copenhagen Accord as a “political agreement”); India’s Submission on the Work of AWG-LCA and AWG-KP, *available at* http://unfccc.int/files/meetings/ad_hoc_working_groups/application/pdf/indiawp2010.pdf (stating that the Copenhagen Accord reflects a “political understanding”); Ban Ki-moon, Secretary-General, United Nations, Remarks to the General Assembly on the outcome of the United Nations Climate Change Conference (Dec. 21, 2009) (stating that the commitments enshrined in the Copenhagen Accord *should be* converted into a legally binding climate change treaty); Notification to Parties from Yvo de Boer, Executive Sec’y of the UNFCCC, to the Conference of the Parties on a Clarification Relating to the Notification of 18 January 2010 (Jan. 25, 2010), *available at* http://unfccc.int/files/parties_and_observers/notifications/application/pdf/100125_noti_clarification.pdf (describing the legal nature of the Accord as “a political agreement, rather than a treaty instrument ...”).

⁹² See Notification to Parties from Yvo de Boer, Executive Sec’y of the UNFCCC, to the Conference of the Parties on Information Relating to the Copenhagen Accord (Jan. 18, 2010) *available at* http://unfccc.int/files/parties_and_observers/notifications/application/pdf/notification_to_parties_20100118.pdf.

⁹³ Notification to Parties from Yvo de Boer, Executive Sec’y of the UNFCCC, to the Conference of the Parties on a Clarification Relating to the Notification of 18 January 2010 (Jan. 25, 2010), *available at* http://unfccc.int/files/parties_and_observers/notifications/application/pdf/100125_noti_clarification.pdf (last visited Mar. 3, 2010).

⁹⁴ Letter from Todd Stern, *supra* note 88.

⁹⁵ See *supra* notes 50- 60 and accompanying text.

⁹⁶ Notification to Parties from Yvo de Boer, *supra* note 93. Cf. Daniel Bodansky, *supra* note 4 (stating that the decision to “take note of” the Copenhagen Accord gives the Accord “some status in the UNFCCC process but not as much as approval by the COP.” (emphasis added)).

Does the U.S. Constitution Require the President to Submit the Copenhagen Accord to the Senate for Its Advice and Consent?

The Constitution does not appear to require the President to submit the Copenhagen Accord to the Senate for its advice and consent. The Senate's advice and consent is only required if the executive branch is considering action to legally bind the United States to an international agreement.⁹⁷ As is, the Copenhagen Accord is a voluntary agreement: no party has a *legal* responsibility to fulfill the commitments therein,⁹⁸ but states might use political actions to discourage a party's noncooperation.⁹⁹ From the international law perspective then, the Copenhagen Accord is not a treaty.¹⁰⁰

From a constitutional perspective, the practice of the Executive adopting voluntary, or political, commitments has largely evaded a serious examination of its constitutional foundations.¹⁰¹ However, the Constitution explicitly affords treaties a unique domestic legal status as part of the "supreme Law of the Land," a position that voluntary agreements, which go unmentioned in the Constitution, necessarily lack.¹⁰² This presence of constitutional language regarding treaties and its corresponding absence regarding voluntary agreements strongly suggests that the Copenhagen Accord, as a voluntary agreement, does not require the Senate's approval.¹⁰³

Nevertheless, some commentators have recently suggested that voluntary agreements and other international political commitments have evolved over time to become functionally akin to

⁹⁷ Congressional Research Service, *supra* note 8, at 4. The drafters of the Constitution may have intended the Senate's advice and consent to begin earlier in the treaty-making process than it does today. *Id.* According to this view, the Senate would help formulate instructions to negotiators and act as a council of advisers to the President *in addition to* approving each treaty entered into the United States. *Id.* Presumably, this larger level of participation seemed feasible because the United States was not expected to enter very many treaties and the original Senate contained only twenty-six Members. *Id.* This enhanced role of the Senate quickly became problematic and the current practice was developed in which not all agreements require the Senate's approval, and, for those agreements that do, the Senate is usually asked for its approval only as the final step before ratification. *Id.*

⁹⁸ See Oscar Schachter, Editorial Comment, *The Twilight Existence of Nonbinding International Agreements*, 71 AM. J. INT'L L. 296, 300 (1977). There is general agreement that a nonbinding agreements means that noncompliance by a party is not a ground for a claim of reparation, sanctions, or some form of judicial remedy. *Id.* In addition, nonbinding agreements are not governed by the obligations of customary international law that are included in the Vienna Convention on the Law of Treaties, such as a signatory's obligation to refrain from undermining the object and purpose of the signed agreement. *Id.* Nevertheless, Schachter suggests that the doctrine of estoppel might apply to nonbinding agreements, so that a signatory of a nonbinding agreement must not deny that another signatory's course of action that was necessitated by, or perhaps simply pursuant to, the agreement is lawful. *Id.* at 301.

⁹⁹ Duncan B. Hollis and Joshua J. Newcomer, *Political Commitments and the Constitution*, 49 VA. J. INT'L L. 507, 512, 540 (2009). Hollis and Newcomer go on to suggest that this distinction is not always so meaningful, as countries may opt to respond politically to breaches of *both* treaty and voluntary commitments. *Id.* at 540.

¹⁰⁰ Damrosch, *supra* note 31, at 122. In international law, the term "treaty" refers only to binding agreements between subjects of international law that are governed by international law. *Id.* In the case of the Copenhagen Accord, it would not be considered a treaty in either sense because it is nonbinding. *See id.* Note that in U.S. usage, the term "treaty" signifies an agreement that has been approved by the Senate. *Id.*

¹⁰¹ Hollis and Newcomer, *supra* note 99, at 540.

¹⁰² U.S. CONST. art. VI, § 2.

¹⁰³ *See id.*; Damrosch, *supra* note 31, at 122. In U.S. usage, the term "treaty" signifies an agreement that has been approved by the Senate. *Id.* In international law, the term "treaty" is used more generally to cover binding agreements between subjects of international law that are governed by international law. *Id.* In the case of the Copenhagen Accord, it would not be considered a treaty in either sense because it is nonbinding. *See id.*

treaties, and, therefore, should require some level of Senate approval prior to their adoption.¹⁰⁴ Regardless of the merits of this argument, the Senate will presumably influence the domestic effect of the Copenhagen Accord through its role in appropriations, oversight, and the enactment of domestic legislation. It may be difficult for the United States to achieve its voluntary commitment to reduce its overall greenhouse gas emissions by 17% below 2005 levels by 2020 without congressional support.

Can the Copenhagen Accord Be Used as a Basis for Regulations Imposing Emissions Restrictions on Industry?

The Copenhagen Accord cannot be used as an independent basis for agency regulations imposing emissions restrictions on industry. When a treaty is ratified, any self-executing provisions it contains are the “Law of the Land.” Accordingly, the Executive could promulgate regulations to implement these provisions’ requirements just as it could to implement a federal statutory regime that authorizes agency rulemaking.¹⁰⁵ As the Copenhagen Accord is neither the “Law of the Land” nor self-executing,¹⁰⁶ the Copenhagen Accord is an unlikely basis for regulations imposing emissions restrictions on industry.

Although the Executive branch may not rely on the Copenhagen Accord as a basis for regulations, it may be able to rely on authority under the Clean Air Act (42 U.S.C. § 7521 *et. seq.*) to implement some GHG emission reducing measures.¹⁰⁷ Domestic climate change *legislation* would not require Senate approval of the Accord or any other international climate change agreements. Congress may enact laws that support provisions of the Copenhagen Accord under one or more of its enumerated powers in Article I, § 8 of the Constitution.

¹⁰⁴ *E.g.* Hollis and Newcomer, *supra* note 99, at 547 (“Why should we constitutionalize political commitments? Even as differences remain, political commitments and treaties have come to overlap significantly in terms of the international functions they perform.”).

¹⁰⁵ *See Whitney*, 124 U.S. at 194 (1888) (“By the constitution, a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other.”).

¹⁰⁶ *See infra* notes 83-86 (explaining why the Kyoto Protocol can’t be used as a basis for regulations).

¹⁰⁷ *Mass. v. Envtl Prot. Agency*, 549 U.S. 497 (2007). For a summary of the case, read CRS Report RS22665, *The Supreme Court’s Climate Change Decision: Massachusetts v. EPA*, by Robert Meltz. In that context, there is some debate over the President’s authority to initiate an agency rulemaking process that would result in GHG emissions regulations. *E.g.* Michel Estrin Gilman, *President as Scientist-in-Chief*, 45 WILAMETTE L. REV. 565 (2009); Joshua Westmoreland, Note, *Global Warming and Originalism: The Role of the EPA in the Obama Administration*, 37 B.C. ENVT’L AFF. L. REV. 225 (2010). This discussion is part of a longstanding conversation among legal scholars about presidential control of the agency rulemaking process. *E.g.* Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749 (2007); Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2006); Kevin M. Stack, *The President’s Statutory Powers to Administer the Laws*, 106 COLUM. L. REV. 263 (2006). However, discussion of the relationship of domestic law to agency rulemaking is outside of the scope of this report, which is focused only on the relationship of international agreements to domestic law. For a review of the issues involved in regulating GHG-emitting sources under the Clean Air Act, read CRS Report R40585, *Climate Change: Potential Regulation of Stationary Greenhouse Gas Sources Under the Clean Air Act*, by Larry Parker and James E. McCarthy, and CRS Report R40506, *Cars and Climate: What Can EPA Do to Control Greenhouse Gases from Mobile Sources?*, by James E. McCarthy.

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