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Global Climate Change: Selected Legal Questions About the Kyoto Protocol

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Summary

On December 10, 1997, delegates from 161 nations concluded the Kyoto Protocol to the United Nations Framework Convention on Climate Change setting binding targets for reduction of emissions of greenhouse gases by developed nations. The Clinton Administration is generally supportive of the Protocol but will not sign it and submit it to the Senate for its advice and consent until further negotiations on the Protocol are held later this year. Nonetheless, a number of legal questions about the Protocol and its possible implementation have already arisen. This report adresses whether the United States is now legally bound by the Protocol, the legal implications of signing it, whether it could be implemented as an executive agreement without submission to the Senate, and whether the Protocol could be used as the legal basis for regulation of emissions even prior to ratification.

(1) Is the United States now legally bound by the Kyoto Protocol?

No. The Protocol has been negotiated, and the Administration has indicated its intent eventually to seek its ratification. But the Protocol has not as yet been signed by the U.S. or submitted to the Senate for its advice and consent, nor has it entered into force internationally. Both steps — ratification by the U.S. and entry into force internationally — are necessary for the Protocol to be legally binding on the U.S.

(2) What would be the legal effect of the United States signing the Kyoto Protocol?

The Kyoto Protocol provides that it is open for signature from March 16, 1998, to March 15, 1999, and is subject to ratification, acceptance, or approval.[1] As noted, the United States has not as yet signed the Protocol but Under Secretary of State Eisenstadt has stated that the Administration intends to do so sometime during this one year period.

[1] Kyoto Protocol, Art. 23(1).

Signature in itself would not make the Protocol legally binding on the United States. But it would have at least two consequences. First, it would initiate the process by which the U.S. could become legally bound. That is, signature of a treaty is essentially a political statement of approval and represents "at least a moral obligation to seek (its) ratification."[2] Signature of the Protocol, thus, would be a public declaration of the Administration's intent to make it legally binding. That is only the first step in the process, however. The Protocol could not become legally binding until it is submitted to the Senate, the Senate gives its advice and consent, the President signs and deposits the appropriate instruments of ratification with the United Nations, and the Protocol gains sufficient ratifications to enter into force internationally.

Secondly, signature of a treaty or protocol obligates a state "to refrain from acts that would defeat the object and purpose of the agreement."[3] The Vienna Convention on the Law of Treaties, Art. 18, states the matter as follows:

> A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:
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> (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
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> (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.[4]

The United States has not ratified the Vienna Convention but this portion likely represents customary international law on the subject.

As a practical matter, "[i]t is often unclear what actions would have such effect."[5] The *Restatement* suggests, however, that the irreversibility of an action may be an important criterion.[6]

(3) Could the Kyoto Protocol be treated as an executive agreement for which Senate or Congressional consent is not required?

Executive agreements are not mentioned as such in the Constitution, but their existence has been validated by historical practice and judicial decision.[7] Such agreements can generally be categorized as (1) congressional-executive agreements sanctioned by the joint authority of the President and the Congress, (2) agreements

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[2] American Law Institute, *Restatement of the Foreign Relations Law of the United States Third*, Vol. 1 (1987), § 312, Comment d, at 173 (hereinafter *Restatement*).

[3] *Id.*, § 312(3).

[4] Vienna Convention on the Law of Treaties, Exec. L, 92d Cong., 1st Sess. (1971), Art. XVIII, *reprinted in* Congressional Research Service, *Treaties and Other International Agreements: The Role of the United States Senate*, 103d Cong., 1st Sess. (Comm. Print 1993), at 318, 334.

[5] *Restatement, supra*, Comment i, at 174.

[6] *Id.*

[7] *See Treaties and Other International Agreements, supra*, at 52-68.

concluded pursuant to existing treaties, and (3) Presidential or "sole" executive agreements made by on the basis of the President's independent constitutional authority.

The full scope of the President's authority to conclude and implement executive agreements remains a subject of scholarly debate, and the guidelines issued by the Department of State to direct whether a particular agreement should be in the form of a treaty or an executive agreement are suggestive but indeterminate.[8] But with respect to the Kyoto Protocol the issue appears to have been anticipated when the Senate gave its advice and consent to the Framework Convention on Climate Change in 1992.[9] 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. The 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.[10]

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

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[8] In Circular 175, "Procedure on Treaties," the Department sets forth the following considerations to guide the decision whether a particular agreement is to be concluded as a treaty or an executive agreement:

a. The extent to which the agreement involves commitments or risks affecting the nation as a whole;

b. Whether the agreement is intended to affect State laws;

c. Whether the agreement can be given effect without the enactment of subsequent legislation by the Congress;

d. Past U.S. practice as to similar agreements;

e. The preference of the Congress as to a particular type of agreement;

f. The degree of formality desired for an agreement;

g. The proposed duration of the agreement, the need for prompt conclusion of an agreement, and the desirability of concluding a routine or short-term agreement; and

h. The general international practice as to similar agreements.

The Circular further provides that "[i]n determining whether any international agreement should be brought into force as a treaty or as an international agreement other than a treaty, the utmost care is to be exercised to avoid any invasion or compromise of the constitutional powers of the Senate, the Congress as a whole, or the President." *See Treaties and Other International Agreements, supra,* Appendix IV, at 301, 304.

[9] 138 CONG. REC. S 17156 (daily ed., Oct. 7, 1992).

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

> 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.[11]

The Senate did not attach any formal conditions to its resolution of ratification for the Convention. But the report of the Senate Foreign Relations Committee on the resolution stated as follows:

> The Committee notes that 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.[12]

The committee made clear, in other words, its view that "[t]he final framework convention contains no legally binding commitments to reduce greenhouse gas emissions" and its intent that any future agreement containing legally binding targets and timetables for reducing such emissions would have to be submitted to the Senate. The Bush Administration concurred with that view and agreed to submit any such agreement. That commitment was cited during Senate debate on the resolution of ratification as an important element of the Senate's consent.[13] While these statements may not be as legally binding as a formal condition to the Senate's resolution of ratification for the 1992 Convention, it is doubtful that any administration could ignore them.

The Clinton Administration, it might be noted, has repeatedly stated that it intends to submit the Kyoto Protocol to the Senate for its advice and consent.

(4) Could the Kyoto Protocol, prior to ratification, be used as a basis for regulations imposing emissions restrictions on industry?

On rare occasion in the past treaties have been given provisional application prior to their ratification, *i.e.*, measures have been taken to carry them out even though they have not completed the ratification process. The Vienna Convention on the Law of Treaties states:

> 1. A treaty or a part of a treaty is applied provisionally pending its entry into force if:
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> a. the treaty itself so provides; or
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> b. the negotiating States have in some other manner so agreed.[14]

Most recently, for instance, the U.S. agreed to the provisional application of a revised deep seabed regime under the Law of the Sea (LOS) Convention. That Convention was

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[11] *Id.*, at 106.

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

[13] *See* 138 CONG. REC. S 17150 (daily ed. Oct. 7, 1992) (statement of Sen. McConnell).

[14] Vienna Convention, *supra*, Art. 25.

put forward by the United Nations General Assembly as a multilateral treaty in 1982, but the U.S. chose not to sign it or to pursue ratification because of objections to the deep seabed regime set forth in Part XI. Part XI was subsequently renegotiated in the early part of this decade; and in order to allow the participation of industrial nations such as the U.S. which had not yet ratified the Convention in the policy making body for the deep seabed (the Council of the International Sea-Bed Authority), the agreement provided that it could be provisionally applied even before ratification. The U.S. voted in favor of the General Assembly resolution endorsing the Agreement revising Part XI,[15] subsequently signed the Agreement, submitted the LOS Convention as amended by the Agreement to the Senate for its advice and consent, and began participating in the initial implementation of the Agreement. However, the provisional application of the Agreement will, by its terms, terminate in November, 1998.

A few other treaties have similarly been given provisional application — the Maritime Boundary Agreement between the United States and Cuba,[16] the Maritime Boundaries Agreement between the U.S. and Mexico,[17] the 1971 International Wheat Agreement,[18] and, arguably, the 1979 SALT II Treaty on the Limitation of Strategic Offensive Arms.[19] Nonetheless, the provisional application of a treaty remains an unusual occurrence.

For the U.S. the provisional application of a treaty "is in essence an executive agreement to undertake temporarily what the treaty may call for permanently."[20] According to the *Restatement*, such an executive agreement "normally must rest on the President's own constitutional authority"[21] but it also appears possible that that authority can be buttressed by Congressional or Senate authorization or approval, express or implied.[22]

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[15] GA Res. 48/263 (July 28, 1994).

[16] Exec. G, 96th Cong., 1st Sess. (1979). *See* Senate Exec. Rept. 96-49 (to accompany Execs. F, G, and H, 96-1) (1979). The treaty itself contained a provision providing that the maritime boundaries would be applied provisionally for up to two years pending ratification, and that provision has been renewed by a periodic exchanges of notes from the time of its signing in 1977 to the present.

[17] Exec. F, 96th Cong., 1st Sess. (1979). The maritime boundaries set forth in the treaty were identical to those in an executive agreement concluded in 1976, and the executive agreement provided that it would remain provisionally in effect "pending final determination by treaty of the Maritime Boundaries between the two countries. The Senate gave its consent to the treaty in October, 1997, and final ratification occurred in November. *See* 143 CONG. REC. S 11165 (daily ed. Oct. 23, 1997).

[18] *See Treaties and Other International Agreements*, *supra*, at 85.

[19] *Id.* Ratification of the treaty was forestalled by the Soviet invasion of Afghanistan, but both parties stated independently that they would observe the restraints of the treaty so long as the other party did so.

[20] *Id.*, at 84.

[21] *Restatement, supra*, Comment l, at 175.

[22] *Id. See also* Charney, Jonathan, "U.S. Provisional Application of the 1994 Deep Seabed

(continued...)

There does not appear to be any clear legal authority that might be invoked to sustain the provisional application of the Kyoto Protocol. Congress, for instance, has not assented to, or otherwise authorized, the provisional implementation of the Protocol either expressly or by implication. Indeed, Senate action in the summer of 1997 was expressly to the contrary. On July 25, 1997, the Senate unanimously adopted (95-0) a resolution expressing the view that the U.S. should not sign any agreement at Kyoto that would commit developed nations, but not developing ones, to reduce or limit greenhouse emissions by a certain date or that would do "serious harm" to the U.S. economy. The resolution further stated the view that any agreement which would require Senate advice and consent should be accompanied by a detailed analysis of its economic impact and of any legislation and regulations necessary to implement the agreement.[23] Moreover, the President's independent constitutional authority to impose such restrictions appears dubious. In *Youngstown Sheet & Tube Co. v. Sawyer*,[24] it might be noted, President Truman'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 was rejected by the Supreme Court. In that instance the President claimed his action to be legally justified not only on the basis of an "inherent" power to protect the well-being and safety of the nation but also on the basis of the Commander-in-Chief and executive power clauses of Article II of the Constitution.[25] But the Court rejected his claims individually and in the aggregate, finding his actions to be a usurpation of the lawmaking power of Congress.

In sum, then, legal authority for the provisional application of a treaty must exist either in the independent constitutional powers of the President or in Congressional (or Senate) assent or authorization. In the present situation there does not appear to be any clear legal basis for the provisional implementation of the Kyoto Protocol prior to ratification and its entry into force.

This does not, however, mean that the United States is unable to adopt and implement measures that might parallel or support the obligations of the Kyoto Protocol. The Administration, for instance, has proposed a $6.3 billion climate change initiative as part of its budget for fiscal 1999, and Congress may choose to authorize and fund its implementation. But the legal authority for that initiative's implementation will be Congress' authorization, not the Kyoto Protocol.

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[22](...continued)
Agreement," 88 *Amer. J. Int. Law* 705 (1994) (arguing that Congressional participation in, and support for, the LOS Convention negotiations, the compatibility of the Agreement with the "Deep Seabed Hard Mineral Resources Act" adopted by Congress in 1988, and the authority given in the "State Department Basic Authorities Act" for temporary participation in international institutions support the provisional application of the Agreement).

[23] S.Res. 98, 105th Cong., 1st Sess., adopted at 143 CONG. REC. S 8138 (daily ed. July 25, 1997).

[24] 343 U.S. 579 (1952).

[25] Article II provides that "The executive Power shall be vested in a President" and that he "shall be Commander in Chief of the Army and Navy of the United States."