

An hourglass-shaped graphic with a globe inside. The top bulb is dark blue, and the bottom bulb is light blue. The globe is a darker shade of blue. The hourglass is centered on the page.

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*Global Climate Change: Selected Legal Questions About the
Kyoto Protocol*

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Abstract. On November 12, 1998, the United States signed the Kyoto Protocol to the United Nations Framework Convention on Climate Change. This report addresses several legal questions about the Protocol and its possible implementation, namely, 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.

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Global Climate Change: Selected Legal Questions About the Kyoto Protocol

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Summary

On November 12, 1998, the United States signed the Kyoto Protocol to the United Nations Framework Convention on Climate Change. The Protocol had been concluded a year earlier (on December 10, 1997) by delegates from 161 nations and sets binding targets for reduction of emissions of greenhouse gases by developed nations. It cannot be legally binding on the U.S. until it enters into effect internationally and the Senate gives its advice and consent. Nonetheless, signature of a treaty does impose an obligation under international law to refrain from actions that would undermine the Protocol's object and purpose. That obligation continues to apply until such time as the signatory ratifies the Protocol or makes clear its intent not to do so. Signature alone does not implement the Protocol, nor does it provide a legal basis for the provisional implementation of the Protocol by the U.S.. Congress can, however, pursuant to its own constitutional authority, adopt measures which parallel or support the obligations of the Protocol. This report addresses each of these legal issues and will be updated as events warrant.

(1) Is the United States now legally bound by the Kyoto Protocol? No. The Kyoto Protocol was negotiated as a means of implementing the United Nations Framework Convention on Climate Change,¹ to which the Senate gave its advice and consent on October 7, 1992,² and by which the U.S. is legally bound. The Framework Convention set a general objective of stabilizing greenhouse gas concentrations in the atmosphere at levels that would prevent global warming and anticipated that the Parties would adopt protocols to the Convention in order to achieve that objective. But such protocols must themselves be ratified by the participating states and meet their own standards for going into effect internationally before they can become legally binding. In this instance the Kyoto Protocol has been negotiated; and the Clinton Administration signed it on October 12, 1998, and indicated its intent eventually to seek its ratification.

¹ TIAS ____ (1994).

² 138 CONG. REC. 33521-27 (Oct. 7, 1992).

But the Protocol has not been submitted to the Senate for its advice and consent, nor will it enter into force internationally until it has been ratified by at least 55 states that accounted for at least 55% of the total carbon dioxide emissions in 1990.³ Moreover, the Bush Administration has indicated that it does not intend to pursue ratification of the Protocol. 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 is the legal effect of the United States signing the Kyoto Protocol? The Kyoto Protocol provided that it was open for signature from March 16, 1998, to March 15, 1999, and states that it is subject to ratification, acceptance, or approval.⁴ The United States initially delayed signing as a means of encouraging fuller participation in emissions reductions by developing states. But on November 12, 1998, it became the 58th nation (and the last major industrialized nation) to sign.

Signature in itself does not make the Protocol legally binding on the United States. But it does have at least three consequences. First, signature authenticates the text of an agreement, *i.e.*, it represents “the assent of the negotiating states that a given text expresses the agreement they have reached.”⁵ Secondly, it initiates 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.”⁶ Signature of the Protocol, thus, is a public declaration of the intent of the U.S. to make it legally binding. That is only the first step in the process, however. As noted above, the Protocol cannot become legally binding on the U.S. 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.

Finally, signature of a treaty or protocol obligates a state “to refrain from acts that would defeat the object and purpose of the agreement.”⁷ 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:

³ Kyoto Protocol, Art. 24. As of September 27, 2002, the Protocol had been signed by 84 states and ratified by 95, including Japan, France, Germany, China, India, and the United Kingdom. The ratifying states produced only 37.1 percent of the carbon dioxide emitted in 1990, however. For a list of the signatures and ratifications, *see* the official website for the Framework Convention: [<http://www.unfccc.int/resource/kpstats.pdf>].

⁴ *Id.* Art. 23(1).

⁵ Department of State (Whiteman, Marjorie, ed.), DIGEST OF INTERNATIONAL LAW, Vol. 14 (1968), at 40.

⁶ American Law Institute, RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, Vol. 1 (1987), § 312, Comment d, at 173 (hereinafter RESTATEMENT).

⁷ *Id.* § 312(3).

(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.⁸

The United States has not ratified the Vienna Convention but recognizes most of the Convention as representing customary international law. As a practical matter, however, it is often difficult to determine what this obligation entails, *i.e.*, “[i]t is often unclear what actions would have [the] effect” of defeating a treaty’s object and purpose.⁹ The *Restatement* suggests that one criterion may be whether a particular action has a negative and irreversible effect on what would be a state’s obligations under a treaty.¹⁰

(3) Can the United States remove its signature from the Kyoto Protocol? International law does not provide any procedure for a nation to remove its signature from a treaty. However, a signatory state can eliminate the legal consequences of signature by making clear its intent not to ratify the treaty. Article 18 of the Vienna Convention, quoted above, states 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.” The Convention does not prescribe any particular means by which such an intention must be expressed. However, a letter from the Secretary of State to the treaty depositary (in this case the United Nations) likely would suffice to do so. (The United States used that method on May 6, 2002, to state that it did not intend to become a party to the Rome Statute of the International Criminal Court and, therefore, “has no legal obligations arising from its signature on December 31, 2000.”)

(4) Can 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.¹¹ While the full scope of the President’s authority to conclude and implement executive agreements remains a subject of scholarly and political debate, the Senate appears to have anticipated the question when it gave its advice and consent to the Framework Convention on Climate Change in 1992. 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 first Bush Administration responded as follows:

⁸ Vienna Convention on the Law of Treaties, Exec. L, 92d Cong., 1st Sess. (1971), Art. XVIII.

⁹ RESTATEMENT, *supra*, Comment i, at 174.

¹⁰ *Id.*

¹¹ See CRS, TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE (S. Prt. 106-71, 2001), at 76-96. Three categories of executive agreements are generally recognized: (1) congressionally-authorized executive agreements, (2) executive agreements concluded pursuant to existing treaties, and (3) Presidential or “sole” executive agreements made on the basis of the President’s independent constitutional authority.

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.¹²

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

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.¹³

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.¹⁴

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 first 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.¹⁵ 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.

(5) Can the Kyoto Protocol, prior to ratification, be used as a basis for regulations imposing emissions restrictions on industry? As noted, treaties generally are not legally effective until they have been ratified and have gone into effect internationally. But 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

¹² *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).

¹³ *Id.* at 106.

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

¹⁵ See 138 CONG. REC. 33521 (Oct. 7, 1992) (statement of Sen. McConnell).

even though they have not yet been ratified by the U.S. 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:
 - a. the treaty itself so provides; or
 - b. the negotiating States have in some other manner so agreed.¹⁶

A few treaties that the U.S. has signed have been given provisional application prior to ratification — the Maritime Boundary Agreement between the United States and Cuba,¹⁷ the Maritime Boundaries Agreement between the U.S. and Mexico,¹⁸ and, arguably, the 1979 SALT II Treaty on the Limitation of Strategic Offensive Arms.¹⁹ Most recently, the U.S. agreed to the provisional application of a revised deep seabed regime under the Law of the Sea (LOS) Convention.²⁰ Nonetheless, the provisional application of a treaty prior to ratification 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.”²¹ According to the *Restatement*, such an executive agreement “normally must rest on the

¹⁶ Vienna Convention, *supra*, Art. 25.

¹⁷ 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.

¹⁸ 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).

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 The LOS Convention was put forward by the United Nations General Assembly as a multilateral treaty in 1982. The U.S. supported much of the Convention but chose not to sign it or to pursue ratification because of objections to the deep seabed regime set forth in Part XI. To accommodate the U.S., Part XI was renegotiated in the early 1990s. 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 (GA Res. 48/263 (July 28, 1994)); subsequently signed the Agreement; submitted the LOS Convention as amended by the Agreement to the Senate for its advice and consent (Treaty Doc. 103-39 (Oct. 7, 1994)); and began participating in the Council of the International Sea-Bed Authority. The Senate, however, has not as yet given its advice and consent; and the provisional application of the Agreement, by its terms, terminated in November, 1998.

²¹ CRS, TREATIES AND OTHER INTERNATIONAL AGREEMENTS, *supra*, at 113.

President's own constitutional authority"²²; but it also appears possible that authority can be buttressed by Congressional or Senate authorization or approval, express or implied.²³

However, there does not appear to be any clear legal authority that could be invoked to sustain the provisional application of the Kyoto Protocol. The Protocol itself does not so provide, and the parties that negotiated the Protocol did not otherwise agree to do so. Nor has Congress assented to, or otherwise authorized, the provisional implementation of the Protocol either expressly or by implication. Indeed, the actions of the Senate and Congress have been decidedly to the contrary. On July 25, 1997, for instance, 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.²⁴ Congress, moreover, has repeatedly barred any expenditure of appropriations to implement the Protocol.²⁵ Finally, it appears doubtful that the President could implement the Protocol on the basis of his independent constitutional authority.²⁶

(6) Can Congress enact measures concerning global climate change absent ratification of the Kyoto Protocol? Nothing inhibits Congress from enacting laws with provisions that might parallel or support those in the Kyoto Protocol. But the legal authority for those initiatives is Congress' constitutional authority under Article I, § 8, of the Constitution. Such initiatives do not require the ratification of the Protocol.

²² RESTATEMENT, *supra*, Comment 1, at 175.

²³ *Id.* See also Charney, Jonathan, "U.S. Provisional Application of the 1994 Deep Seabed 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 supported the provisional application of the Agreement).

²⁴ S. Res. 98, 105th Cong., 1st Sess., adopted at 143 CONG. REC. S 8138 (daily ed. July 25, 1997). 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

²⁵ See, *e.g.*, § 517 of the Treasury Department Appropriations Act for Fiscal 2001, enacted as part of the omnibus Consolidated Appropriations Act, P.L. 106-654 (Dec. 21, 2000).

²⁶ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). In that case 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. 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. But the Court rejected his claims individually and in the aggregate, finding his actions to be a usurpation of the lawmaking power of Congress.