

**MODERN DEVELOPMENTS IN THE
TREATY PROCESS:**
Recent Developments Regarding Advice and Consent,
Withdrawal,
and the Growing Role of Nongovernmental Organizations
in International Agreements
With Particular Examination of the 1997 Kyoto Protocol

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MODERN DEVELOPMENTS IN THE TREATY PROCESS

INTRODUCTION TO THE TREATY PROCESS¹

Treaties are agreements between nations, or states. They range from bilateral agreements to multilateral pacts including each of the 189 member states of the United Nations. Throughout history treaties have addressed all manner of international discourse, from rules of military engagement to mutual defense and termination of hostilities, creating a UN and a European Union, international border delineation, liability in international transportation, establishing trade terms and intellectual property protections.²

As such treaties, or “conventions” with amendments thereto called “rounds”, protocols, *etc.* which are typically discrete treaty agreements requiring independent ratification, are the manner by which states formalize codes for their relationships, both civil and criminal.³ Depending on their nature treaties are therefore properly viewed either as contracts, in that they establish civil procedures, or as establishing the equivalent of laws applicable to the parties.⁴

¹ This paper attempts to clarify common misunderstandings about the treaty process, particularly as involve the United States and ambiguities arising from inconsistent treatment of various treaty commitments. Certain assertions made herein, for example regarding the history of Kyoto and specifically certain negotiating developments, are not formally documented but based upon the author’s observations attending these negotiations, both as an attorney representing a nongovernmental organization, and writing on the proceedings for various publications.

² See various definitions, FN 53, *infra*. Treaty topics even range to taxation of foreign motor vehicles and unification of road signals. For the compendium of “[e]very treaty and every international agreement entered into by any Member of the United Nations”, see <http://untreaty.un.org/>. For a selection of treaties signed, though not necessarily ratified by the United States, see <http://usinfo.state.gov/usa/infousa/laws/tradeagr.htm>.

³ The latter actually involves sanction by a supranational body of private entities and individuals acting on behalf of a state. For such matters agreements have created *ad hoc* bodies, for example the International Criminal Tribunal for the former Yugoslavia (see <http://www.un.org/icty/index.html>), and the International Criminal Tribunal for Rwanda (see <http://www.ictt.org/>), both under auspices of the UN Security Council.

⁴ For a compendium of treaties addressing “Penal Matters,” see <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/chapterXVIII.asp>.

In modern practice states have increasingly turned to treaties to address matters not clearly involving international discourse such as trade or conduct on the high seas but establishing norms of purely domestic behavior. States, which under the Constitution have no treaty power,⁵ have nonetheless waded into areas which are the subject of modern treaties, negotiating international agreements addressing topics such as the theory of “man-made global warming”.⁶

The 1997 Kyoto Protocol, also addressing that theory of man-made global warming is exemplar of efforts addressing (principally) domestic activities.⁷ It does claim a purported global phenomenon as its basis and the bulk of the world’s recognized states as parties, but selectively commits certain developed nations to reduce domestic energy use emissions. Given current technology, for the foreseeable future Kyoto thereby effectively rations and redistributes particular domestic economic activity by instituting this selective cap, in perpetuity and not indexed for economic or population growth. As such, Kyoto is arguably in truth an economic instrument by which foreign competitors hope to mitigate U.S. competitive advantages.⁸

Cornell University Professor of Law Jeremy Rabkin writes:

“In 1929 Chief Justice Hughes of the U.S. Supreme Court – who had already served as a justice on the Permanent Court of International Justice -- reaffirmed

⁵ U.S. Constitution, Article 1, Section 10: "No State shall enter into any Treaty, Alliance or Confederation... No State shall, without the Consent of Congress...enter into any Agreement or Compact with another State, or with a foreign Power..."

⁶ For discussion of a recent example, see “New England Governors Pledge to Implement Kyoto, Violate Constitution”, Jon Reisman, Downeast, Coastal Press, July 16, 2002. Reisman is an associate professor of economics and public policy at the University of Maine at Machias.

⁷ Kyoto also imputes emissions to covered states from activities in international airspace and waters, even national security and international peacekeeping missions despite an initial U.S. effort to exclude the latter.

⁸ “This is about international relations, this is about economy about trying to create a level playing field for big businesses throughout the world. You have to understand what is at stake and that is why it is serious.” European Union Commissioner for the Environment Margot Wallstrom, quoted by The Independent (London), March 19, 2002, p. 14.

the doctrine that the treaty power cannot be invoked as a mere pretext for altering domestic policies:

‘[T]he treaty making power was intended for the purpose of having treaties made relating to foreign affairs and not to make laws for the people of the United States in their internal concerns through the exercise of the asserted treaty-making power.’⁹

Nonetheless, agreements such as Kyoto now proliferate. In this context, it seems fair to paraphrase Clausewitz on war: treaties are the extension of politics by organized state lobbying.

Treaties purporting to involve binding commitments are enforceable against parties to the agreement.¹⁰ Disputes over compliance or implementation of the bulk of treaties, best characterized as civil agreements, are heard before the International Court of Justice¹¹. “The Court has two functions: to render judgments on disputes submitted to it by States and to furnish advisory opinions on questions referred to it by authorized bodies.”¹²

⁹ Rabkin, “Why Sovereignty Matters,” (1998 AEI Press), p. 22, citing Proceedings of the American Society of International Law, vol. 23 (1929), pp. 194-6.

¹⁰ Not all treaties purport binding commitments. The parent agreement of the principal case study cited herein (Kyoto), is the United Nations Framework Convention on Climate Change (UNFCCC). The UNFCCC was typical of treaties merely expressing mutual goals, or “promises” of voluntary undertakings (in this case, voluntary commitments to attempt to reduce man-made “greenhouse gases”, or GHGs).

¹¹ “The Court, in existence since 1946, serves as the successor to the Permanent Court of International Justice established by the League of Nations and derives its mandate from a [Statute](#) which forms an integral part of the [Charter of the United Nations](#).” <http://www.un.org/Depts/dhl/resguide/specil.htm#icj>. For text, see <http://www.un.org/Overview/Charter/contents.html>.

¹² Id. The Permanent International Court of Justice was established with the chartering of the United Nations (<http://www.un.org/aboutun/charter/>). The United States withdrew its August 1946 accession to this court in October 1985 in response to an unfavorable verdict in an action brought against it by Nicaragua. For the text of the declaration see United Nations, *Treaty Series*, vol. I, p. 9. That does not resolve the matter but actually leaves the U.S. status regarding this treaty as rather ambiguous, also. The implications of this move, regarding proper venue for pursuit of actions by (or against) the United States is a topic more appropriate for a separate paper.

Recently, sufficient signatory nations submitted ratification instruments of the Rome Treaty to bring into effect a permanent International Criminal Court (ICC)(<http://www.un.org/law/icc/statute/romefra.htm>), and questions persist over the potential application of its terms not merely against ratifying nations but others – specifically the U.S. – whose, e.g., troops assigned to UN peacekeeping duty may be

Originally, the Framers conceived of treaties not as the creation of laws, but more contracts between states bearing the force of law.¹³ Time and intervening “criminal” agreements, of course, have further clouded this assessment.

A body of international common or “customary” law evolved to assist in treaty interpretation. This body of law was purportedly codified by the 1969 Vienna Convention on the Law of Treaties.¹⁴ In the pursuit of enforcing such agreements, canons of statutory and contractual construction recognized domestically by an individual state may offer insight and even guidance as to what a party intended, but do not strictly apply.¹⁵

Individual agreements obtain their popular name, typically, from the site of some meaningful level of agreement, *e.g.*, Ghent, Vienna, Rome, Kyoto.¹⁶ Occasionally a treaty is popularly characterized by its formal name, *e.g.*, the General Agreement on Tariffs and Trade (or GATT, agreed to in 1947, subsequently the subject of further rounds, *e.g.*, its eight-year “Uruguay Round,” *etc.*).

The agreed-to language emerging from organic treaty negotiations can, though does not universally, rise to the level of an enforceable treaty. That is, it can but does not always include sufficient detail to make it a “meeting of the minds”. Even treaties open for ratification are not necessarily completed to the point of offering sufficient detail for

deemed by parties to Rome to have transgressed to the detriment of ratifying nations. The United States signed the Rome Treaty, but rescinded its signature, as detailed, *infra*.

See the panoply of international legal bodies at <http://www.un.org/Depts/dhl/resguide/specil.htm>.

¹³ Still, this apparent view of a discipline not properly in the exclusive realm of the executive or legislature was a factor in bifurcating the roles in treaty accession. See esp. Hamilton in Federalist No. 75.

¹⁴ “The United States views most of the Vienna Convention as codifying customary international law.” “Global Climate Change: Selected Legal Questions about the Kyoto Protocol”, p. 3, FN 9. CRS Report for Congress (March 29, 2001). See also, *e.g.*, <http://www.law.cornell.edu/topics/international.html>. For text, see United Nations, *Treaty Series*, vol. 1155, p. 331. See FN 75 *infra* for a discussion regarding who accedes to Vienna’s terms. See also <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXXIII/treaty1.asp>, for signatories and ratifications, reservations, and related details.

¹⁵ Vienna Articles 31 and 32 open the door for such considerations.

¹⁶ For a listing of such popular names, see <http://untreaty.un.org/English/sample/SimpleSample.asp>.

coherent, uniform understanding and compliance. Indeed, states have ratified treaties including Kyoto despite numerous negotiations remaining to define what was actually agreed. The obvious problems associated with this phenomenon are discussed briefly, in “Ratification”, *infra*. Regardless of whether the treaty terms declare the document open for ratification, such language is occasionally merely a starting point, or near thereto.¹⁷

The initial level of agreement is typically manifested by publication of the terms agreed, and listing the agreeing parties.¹⁸ This is at best a symbolic practice. That is, a state not “agreeing” to a document at its inception does not impede it from subsequently following the treaty’s terms toward accession. Indeed, numerous countries not even

¹⁷ For a roadmap of how the UN Office of Legal Affairs, Treaty Section, views the various stages of the treaty process, see <http://untreaty.un.org/English/TreatyHandbook/hbframeset.htm>. Specifically, see Kyoto, <http://usinfo.state.gov/usa/infousa/laws/treaties/107a01.pdf>, the basic treaty structure agreed to at the “Third Conference of the Parties” to the UNFCCC, or COP-3, the details of which were to be worked out at subsequent COPs. Since Kyoto, five COPs have taken place with another scheduled for October 2002, narrowing the treaty’s broad assertions each time (with one exception; see discussion November 2000 Hague discussions in “Ratification”, *infra*). The treaty was open for signature between March 1998 and March 1999. Kyoto has been open for ratification since March 1999. It goes into effect when ratification instruments are submitted by covered, or “Annex I” countries (of which there are 36), representing 55% of 1990 GHG emissions.

By the end of July 2002, 75 countries had submitted ratification instruments representing 35.8% of the covered 1990 GHG emissions, despite the necessity of negotiations to craft a document with sufficient detail to be enforceable. 55 of the 75 ratifying states are among the 125-plus states bearing no emission reduction obligations (whose ranks include large industrial players China, Mexico, Brazil, India, South Korea, Indonesia). This does leave Kyoto 19.2% shy of the 55% threshold to come into force, leaving solely Russia (17.4%) or the United States (36.1%) as determinative of Kyoto’s fate.

It is logical that countries with actual obligations proceed more deliberately given the undefined terms threaten real impact on them. Further, with treaty effectiveness at hand, recent COP negotiations indicate that remaining covered, non-ratifying signatories are driving hard bargains to minimize the initial economic harm – or maximize initial economic gain, as the case may be. For example, due to its unique circumstances Russia stands to make quite a large sum from Kyoto. Upon becoming indispensable to Kyoto’s fate, Russia secured larger allowances for sale of valuable “sinks” (see FN110, *infra*), and recently added debt forgiveness to their list of requirements in return for their determinative ratification.

¹⁸ See Decision1/CP.3 of the Conference of the State Parties to the Convention at its third session (UNEP, UNFCCC). The U.S. State Department asserts that it agreed to Kyoto (“Treaty Actions” page). “**Environment--Climate Change** Amendments to Annex I of the Framework Convention on Climate Change of May 9, 1992. Adopted at Kyoto Dec. 11, 1997. Entered into force Aug. 13, 1998. (http://www.state.gov/www/global/legal_affairs/treaty_actions.html).

The Vienna Convention speaks to the process issue in Article 9, “Adoption of the text”:
“1. The adoption of the text of a treaty takes place by the consent of all the States participating in its drawing up except as provided in paragraph 2.
2. The adoption of the text of a treaty at an international conference takes place by the vote of two-thirds of the States present and voting, unless by the same majority they shall decide to apply a different rule.”

signing, for example the Kyoto Protocol, ratified it nonetheless.¹⁹ It is theoretically possible, though not in the case of the United States, for a treaty to impose legally enforceable obligations at the “agreement” stage, given that some states’ constitution permits such commitment by executive signature alone.²⁰

The U.S. Constitution is more typical in that it requires a level of legislative concurrence with an executive treaty commitment for the treaty to be binding.²¹ The U.S. Constitution requires Senate “advice and consent” to any treaty prior to it coming into effect against the U.S., both the language and application of which having created tensions between our Constitution and international law. Treaty commitments inherently cede some level of sovereignty by transferring accountability to a supranational authority without the safeguards of our system, developing binding policy without the U.S. Constitution’s checks and balances.²² Therefore these agreements, the permissibility of

¹⁹ “Parties that have not yet signed the Kyoto Protocol may accede to it at any time.” <http://unfccc.int/resource/convkp.html#kp>. For examples of non-signatory ratifications, see <http://untreaty.un.org/>. Curiously, however, in response to a June 2002 inquiry by the author as to the U.S. status under Kyoto given the ambiguity between President Bush’s verbal “rejection” and the absence of a withdrawal, the Secretary General of the UNFCCC asserted the following: “Simple signature does not affect entry into force which depends entirely on ratifications/accessions. Signature qualifies the signatory State to proceed to ratification, acceptance or approval.” This belies that several nations ratified Kyoto without signing the document. Further, the author’s follow-up request as to whether this indicates the UNFCCC does not recognize the Vienna Convention has gone unanswered to date.

²⁰ See Vienna Article 12, “Consent to be bound by a treaty expressed by signature”:
“1. The consent of a State to be bound by a treaty is expressed by the signature of its representative when:
(a) the treaty provides that signature shall have that effect;
(b) it is otherwise established that the negotiating States were agreed that signature should have that effect;
or
(c) the intention of the State to give that effect to the signature appears from the full powers of its representative or was expressed during the negotiation.”

²¹ U.S. Constitution, Article II, Section 2. Vienna acknowledges such requirements, recognizing exchange of instruments, ratification (also called acceptance or approval), accession, and deposit of instruments. See Vienna Articles 13, 14, 15 and 16 respectively.

²² For example, “the current version of [the North American Free Trade Agreement (NAFTA)] allows private litigants to challenge certain U.S. trade measures before a supranational panel, the decisions of which cannot be reviewed but must still be enforced by U.S. domestic courts.” Rabkin at 4, citing NAFTA reprinted in 32 I.L.M. 289 (1993) Art. 1904. Further, “the U.S.-Canada Free Trade Agreement and its successor, NAFTA, already provide for appeals by private parties from U.S. administrative proceedings to supranational tribunals”. Rabkin at 18. This latter reality clearly conflicts with Article III, Section 2,

which was authorized by the Constitution, also inherently create tensions with its framework.²³

Treaty negotiations formally involve only participant states, although in multilateral negotiations a (not quite) quasi-formal role exists for interested -- and UN approved -- third parties. These nongovernmental organizations, or NGOs, if approved obtain credentials and participate in the summits in an informal capacity.²⁴ They are provided access to negotiators, attendance in plenary and subsidiary body sessions, and briefings denied the public but have no voting or formal negotiating role. NGOs are, in short, lobbying organizations. The UN's system is akin to a more controlled (*i.e.*,

Clause 1: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority".

Modern legal scholarship on the treaty power is thus reasonably analogized to the shift of authority away from states to the federal government that began with the New Deal in the 1930s. See Rabkin for a discussion of the comparison of diminution of constitutional limits on federal power, and the treaty power.

²³ For example, the Constitution not only recognized "a law of nations" (in granting Congress the power to remedy offenses against same, Article I Section 8). The Framers provided treaties parity with the "supreme law of the land" (Article VI), or federal statutes, despite that treaty bodies to which the U.S. accedes clearly may assume authorities and create rules in conflict with domestic law (not to mention the Constitution)(see Jay in Federalist No. 64).

Vienna Article 27 offers the provocative assertion: "Internal law and observance of treaties: A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty. This rule is without prejudice to article 46." The latter provision tempers the friction somewhat, enabling a U.S. constitutional defense: "Invalidity of Treaties, Article 46, Provisions of internal law regarding competence to conclude treaties:

1. A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance.
2. A violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith."

This paper does not explore such tensions and what areas treaties may permissibly seek to resolve, instead restricting its discussion to the treaty process. For a detailed discussion on this and limitations on the treaty power, see Rabkin.

²⁴ Controversy has arisen in recent years over the reluctance of particular UN bodies to accommodate or even recognize groups less inclined to support particular treaty efforts. Such groups are typically fairly characterized as "conservative" advocacy groups. See FN 34, *infra*.

subjectively selective) version of the pre-1995 U.S. congressional practice of issuing special passes allowing special access.²⁵

There are four necessary stages prior to a treaty taking binding effect against the United States. This is typical of most systems, with minor exceptions. These stages are, in this order: agreement; signature – a discrete window for which is provided by each treaty; ratification -- also provided for in each treaty;²⁶ and submission of ratification instruments.

Also relevant are post-ratification requirements -- is a treaty self-implementing, or does it require implementing legislation? -- and withdrawal -- at what point is a commitment real enough that withdrawal is required, and how is it effected at various relevant stages?

This paper examines this process and certain implications arising from the stages of treaty agreement. It particularly explores unsettled questions regarding modern application of “advice and consent”, including the scenario where an executive eschews “advice”, what requirements exist of the U.S. post-signature but prior to Senate “consent”, must a president transmit a treaty to the Senate before the Senate may attempt “consent”, and which branch of government may withdraw us at what stage, and how? It also examines the burgeoning role of NGOs in the treaty process.

²⁵ See <http://www.ngo.org/>. The UN-sponsored NGO interface is the NGO Network, which happens to be sponsored by the UN. It asserts the goal of NGOs is to “more effectively partner with the United Nations and each other to create a more peaceful, just, equitable and sustainable world for this and future generations.”

²⁶ International law and individual treaties recognize differential requirements, from unilateral power of binding commitment in an executive to some version of legislative approval. See Vienna, *e.g.*, Article 14.

This discussion occurs principally in the context of the Kyoto Protocol. That unique agreement is signed, but not ratified.²⁷ President Bush assures Americans that by his being unhappy with the U.S. signature on the document the U.S. has “rejected” it, yet the signature remains unmolested. Compare this with the Rome Treaty, the Administration’s rhetorical “rejection” of which was identical yet followed by formal expression of this position to the UN consistent with Vienna Article 18.²⁸ Also, the Bush State Department has in fact actually rejected a request to submit an instrument to the same effect. Kyoto’s highly charged politics, and the treaty-status limbo those political pressures have yielded begs so many questions that it provides an excellent vehicle to study the relative commitments accompanying each step.

ROLE OF NONGOVERNMENTAL NGOs IN THE TREATY PROCESS²⁹

Treaty negotiations occur at formal summits, as well as intervening subsidiary body and preparatory sessions, all of which when conducted under the auspices of the United Nations do not limit participation to potential signatory states. Nongovernmental organizations, representing any conceivable interest group so long as approved by the UN, are permitted a quasi-formal role.³⁰ According to the UN Department of Public Information (DPI), NGO Section:

²⁷ One need not look beyond the “environmental” context to find numerous such agreements, *e.g.*, various individual Protocols to the 1979 Convention on Long-Range Transboundary Air Pollution, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, the Convention on Environmental Impact Assessment in a Transboundary Context, and so on. The relevant inquiry, as discussed herein in the Kyoto and Rome contexts, is what risk does an ambiguous status regarding a particular instrument pose.

²⁸ See letter to UN Secretary General Kofi Annan, <http://www.state.gov/r/pa/prs/ps/2002/9968.htm>.

²⁹ For a comprehensive assessment of NGO participation, see Sheehan, “Global Greens” (Capital Research Center, 1998).

³⁰ Generally, and the DPI disclaimer, *supra*, notwithstanding, members of accredited NGOs are accorded preferred access and privileges not available to the public, to facilitate interaction with UN operations,

“A non-governmental organization is any non-profit, voluntary citizens' group which is organized on a local, national or international level. Task-oriented and driven by people with a common interest, NGOs perform a variety of services and humanitarian functions, bring citizens' concerns to Governments, monitor policies and encourage political participation at the community level. They provide analysis and expertise, serve as early warning mechanisms and help monitor and implement international agreements. Some are organized around specific issues, such as human rights, the environment or health. Their relationship with offices and agencies of the United Nations System differs depending on their goals, their venue and their mandate.

Over 1,500 NGOs with strong information programmes on issues of concern to the United Nations are associated with the Department of Public Information (DPI), giving the United Nations valuable links to people around the world. DPI helps those NGOs gain access to and disseminate information about the range of issues in which the United Nations is involved, to enable the public to understand better the aims and objectives of the world Organization.”³¹

The process for becoming an accredited NGO is subjective, offering the United Nations discretion in who or what group it allows for what purpose(s). Recently, on an

which interaction can vary based on the subject matter discipline involved. See <http://www.ngo.org/index2.htm>, link to “NGO Access to UNHQ”. Indeed, UNDPI/NGO asserts: “The Department of Public Information and NGOs cooperate regularly. NGOs associated with DPI disseminate information about the UN to their membership, thereby building knowledge of and support for the Organization at the grassroots level. This dissemination includes: Publicizing UN activities around the world on such issues as peace and security, economic and social development, human rights, humanitarian affairs and international law; Promoting UN observances and international years established by the General Assembly to focus world attention on important issues facing humanity.” See <http://www.ngo.org/index2.htm>, link to “applications for associative status with DPI”. The general public is not permitted access to functions. A state’s delegation, however, may include parties who do not have negotiating authority and who need not even hold some governmental post, though they are afforded full access, and limited participation. Senator Al Gore was a member of the United States delegation to Rio, from which perch he vocally criticized the delegation. Also, NGO participation is feasible in, for example, bilateral negotiations, if the parties agree.

³¹ See <http://www.ngo.org/index2.htm>, link to “applications for associative status with DPI”. This dynamic began, according to UNDPI, “The importance of working with and through NGOs as an integral part of United Nations information activities was recognized when the Department of Public Information was first established in 1946. The General Assembly, in its resolution 13 (I), instructed DPI and its branch offices to “...actively assist and encourage national information services, educational institutions and other governmental and non-governmental organizations of all kinds interested in spreading information about the United Nations. For this and other purposes, it should operate a fully equipped reference service, brief or supply lecturers, and make available its publications, documentary films, film strips, posters and other exhibits for use by these agencies and organizations.” In 1968, the Economic and Social Council, by Resolution 1297 (XLIV) of 27 May, called on DPI to associate NGOs, bearing in mind the letter and spirit of its Resolution 1296 (XLIV) of 23 May 1968, which stated that an NGO “...shall undertake to support the work of the United Nations and to promote knowledge of its principles and activities, in accordance with its own aims and purposes and the nature and scope of its competence and activities””. Id.

ad hoc basis, the relevant accrediting body has requested information on financial donors and required proof of an international presence as conditions precedent of selective (and, to the author's knowledge, exclusively "conservative") NGOs.

UNDPI criteria for NGOs to become associated with DPI are as follow:

"Organizations eligible for association with DPI are those which:

- Share the ideals of the UN Charter;
- Operate solely on a not-for-profit basis;
- Have a demonstrated interest in United Nations issues and proven ability to reach large or specialized audiences, such as educators, media representatives, policy makers and the business community;
- Have the commitment and means to conduct effective information programmes about UN activities by publishing newsletters, bulletins, and pamphlets; organizing conferences, seminars and round tables; and enlisting the cooperation of the media."³²

UNDPI describes the procedure to become an associated NGO as follows:

"An NGO that meets the established criteria should send an official letter from its headquarters to the Chief of the NGO Section, Department of Public Information, expressing interest in association with DPI. The letter should state the reasons why the organization seeks such association and should briefly describe its information programmes. This letter should be accompanied by at least six samples of recent information materials produced by the applying organization. Letters of reference from UN Departments, UN Programmes and Specialized Agencies, and/or UN Information Centres and Services (UNICs and UNISs) will greatly enhance consideration of the application.

Once the application process is completed, the DPI Committee on Non-Governmental Organizations will review applications at its scheduled sessions. Applicants are notified immediately of the results of the Committee's deliberations. Associated NGOs are then invited to designate their main and alternate representatives to the Department of Public Information.

Please note: Association of NGOs with DPI does not constitute their incorporation into the United Nations system, nor does it entitle associated organizations or their staff to any kind of privileges, immunities or special status."³³

³² See <http://www.ngo.org/index2.htm>, "applications for associative status with DPI".

³³ Id. See FN 30, *supra*, re: disclaimer/privileges.

Clearly, the application process is subjective and, arguably, institutionally biased toward participation by a preponderance of groups considered sympathetic to the relevant summit's cause (that is, against dissent).³⁴

For an example of NGO participation, consider the 1992 the UN Conference on Environment and Development (UNCED or "Earth Summit") in Rio de Janeiro, likely the largest treaty summit in recent memory, though soon to be eclipsed by "Rio-plus-10" the World Summit on Sustainable Development in Johannesburg, August 2002. Rio is commonly recognized as ushering in the boom era of mass NGO participation. Rio has the added relevance for these purposes as being the session that produced, *inter alia*, the UNFCCC,³⁵ that the Kyoto Protocol amends by making its universal voluntary "commitments" mandatory for certain among the world's economic powers.

In the summer of 1992, as the United States presidential and general elections prepared to launch, nations of the world convened in Rio for the UNCED under the guise of the United Nations Environment Programme (UNEP), which is under the direction of the UN General Assembly.³⁶ Numerous non-binding, in effect, position papers were generated with great effort, though disagreement tended to be more fairly characterized as disputes over whose priority was granted highest esteem.³⁷ Several other documents

³⁴ See <http://www.ngo.org/index2.htm>, link to "applications for associative status with DPI". The UN's NGO home page offers a feel for the type of organizations it seeks to include, the description of which rings of the UN endorsement of its typical endeavors, with which the NGOs are to have input: "Its aim is to help promote collaborations between NGOs throughout the world, so that together we can more effectively partner with the United Nations and each other to create a more peaceful, just, equitable and sustainable world for this and future generations." That is, organizations whose application reference materials demonstrate opposition to UN-sponsored initiatives face an adversarial review of their application. For a report on bias in the selection process, see, e.g., <http://www.washtimes.com/national/20020511-32784532.htm>, in the context of the 2002 U.N child Summit (UNICEF).

³⁵ See <http://usinfo.state.gov/usa/infousa/laws/treaties/conv.htm>.

³⁶ See <http://www.un.org/aboutun/chart.html>.

³⁷ Among the international "agreements" being developed were the Rio Declaration, and the similar if much more exhaustive (600 pages) Agenda 21. These were enormous if non-binding documents containing a lot of "shoulds", but as accurately characterized by the Cato Institute's P.J. O'Rourke, each "having the

emerged from the fortnight-long diplomacy, the binding nature of which are arguable given a great degree of voluntariness but which nonetheless rose to the level of “treaty”.³⁸

Participants at Rio included delegations from all recognized national governments including scores of heads of state. 95 NGOs plus numerous among their subsidiaries were accredited representing national, regional and international common interests or agendas. These interests ranged from scientific and even architectural and various other professional societies, industry and laborers, gender and environmentalist pressure groups and/or their legal arms, spiritual to indigenous peoples.³⁹ These were condensed in practice at the summit under the “Global Forum,” to centralize their presence, and voice. The latter act presumes NGO support for the summit undertakings.

NGO activities ranged from the informal – media availabilities, pamphlet and newsletter distribution – to quasi-formal – presentation of the product of petition drives before the plenary and subsidiary body sessions.⁴⁰

Though NGOs have no formal vote or role at negotiations, efforts have been underway for some time to find paying roles for NGOs in implementing and monitoring compliance with treaty agreements. Specifically, for example, environmentalist advocates seek a formal paying role as an independent auditing and verification monitors

same approximate force in law as a note passed in study hall.” (*All the Troubles in the World*, p. 214, 1994).

³⁸ See, e.g., Convention on Biological Diversity, actually finalized in Rio. United Nations, *Treaty Series*, vol. 1760, p. 79; and depositary notification C.N.329.1996.TREATIES-2 of 18 March 1996.

³⁹ See UNFCCC NGO roster, at <http://unfccc.int/sessions/97feb/ngo.htm>.

⁴⁰ For the schedule of Johannesburg NGO events, see <http://www.worldsummit.org.za/>.

of company and country GHG emissions/reductions.⁴¹ Indeed, domestically, NGOs have already received literally millions of taxpayer dollars to advocate Kyoto.⁴²

Many agreements, be they addressing environment or human rights, offer the potential for such business opportunities. That is one way the NGOs elevate their “negotiating” presence. They do have potential interests at stake to pursue, just as they possess an impressive media presence and potentially valuable approval to grant to or withhold from parties.

Representatives of groups directly impacted by potential commitments -- industry and labor -- were fairly limited in Rio (approximately 20% of the accredited NGOs) and fairly split between those standing to lose economic activity – anti-energy-suppression interests such as the coal industry, energy users, mine workers – and those seeking “rents” through GHG restrictions with mechanisms such as credit-trading schemes.⁴³

By the time of the July 2002 “COP 6.5” in Bonn, Germany, sufficient “industry” NGOs, falsely presumed as a matter of practice to be “anti-Kyoto”, attended that the U.S. State Department had informally begun addressing two discrete constituencies in separate, restricted briefings. This did not accurately bifurcate the ideological or substantive positions of the groups, but rather manifest a common predisposition – that

⁴¹ Under Kyoto this would be pursuant to Article 17: “The Conference of the Parties shall define the relevant principles, modalities, rules and guidelines, in particular for verification, reporting and accountability for emissions trading.”

⁴² See, e.g., “Cashing in on Global Warming”, http://www.cei.org/gencon/005_01248.cfm.

⁴³ For example, an immediate post-negotiation internal Enron memo, dated December 12 1997 and written by the Enron Corp. ‘s representative attending Kyoto, excitedly described Kyoto as “precisely what [Enron has] been lobbying for,” cited numerous “wins”, and concluded: “This agreement will be good for Enron stock!!” The reasons for Enron’s advocacy are numerous, and similar to various other business NGO participants’. Enron held positions as owner of the world’s largest wind turbine manufacturer and half owner of the world’s largest solar energy venture, both of which would have faced tremendously increased markets under Kyoto’s effective requirement of dramatically lowered fossil fuel use (particularly coal) among developed countries. For similar reasons, Enron faced tremendous earnings prospects from its large natural gas holdings and its gas pipeline network, the world’s largest outside of Gazprom. For disclosure, the author briefly worked for Enron, during which time this effort was a source of disagreement.

State representatives simply had to know was false -- that Kyoto, and environmental agreements generally, created a clash of “industry vs. environmentalists.” In fact, industry groups are among the most aggressive “direct” pro-treaty lobbying forces at treaty negotiations and elsewhere, and aggressive in their indirect advocacy (funding green and business advocacy groups).⁴⁴

Therefore, while State deemed a separation of ideologies as appropriate it did so such that pro-Kyoto NGOs constituted one group, while the other advocacy section supposedly competing for State’s ear consisted of a deeply split “Industry” cadre, despite pro-Kyoto industry being at least equally represented as Kyoto opponents. This skews the NGO input at least so far as concerns the U.S. delegation, offering pro-Kyoto NGO advocates a *de facto* greater advocacy role.⁴⁵ This matters because, as discussed, *infra*, the U.S. has not withdrawn from Kyoto but retains its signature and continues to send a full delegation to negotiations, even if they curiously assume a reduced role.⁴⁶

In conclusion, treaty negotiations take place among delegates, though NGOs serve as welcome pressure groups, with a limited formal role but a select membership chosen by proponents of the agreement on the table.

THE TREATY POWER UNDER THE UNITED STATES CONSTITUTION

In the United States, treaty power is governed by Article II Section 2 of the Constitution, stating “[The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present

⁴⁴ Re: the letter, see, *e.g.*, Alexander Cockburn, “An Enron Tale of Strange Bedfellows,” Los Angeles Times (December 28, 2001). This also is manifested by the “Business Council for a Sustainable Energy Future” and its European counterpart, constituted by (at the time) Enron and like-minded interests.

⁴⁵ For NGO claims of influence see “Greens’ Success at Kyoto”, http://www.cei.org/gencon/014_02873.cfm

⁴⁶ See FN 121, *infra*.

concur”. Therefore, the Executive may negotiate agreements, the terms of which do not, pursuant to our own Constitution, become effective against the U.S. until and unless the Senate ratifies the agreement by two-thirds of those voting.⁴⁷

It does not seem there was any doubt during its formulation that the Constitution would permit treaties, which, to the extent they transfer any authority outside of the system the Constitution established, potentially threaten the very document authorizing such agreements. Discussion of the treaty power among the Framers appears principally confined to the necessity to concentrate it at the federal level, so as to not be “liable to the infractions of thirteen different legislatures, and as many different courts of final jurisdiction, acting under the authority of those legislatures”, and thus “protect the faith, the reputation, the peace of the whole union.”⁴⁸

In Federalist No. 64 Jay addressed an apparent, similar multiple actor problem but through vesting the treaty power in a dynamic, impressionable “popular assembly”, advocating instead housing principal authority in the executive. In Federalist No. 69 Hamilton weighed the merits of vesting the power solely in the executive, musing over what he later described as “the trite topic of the intermixture of powers,” albeit one addressed amongst the Framers “with no small degree of vehemence.”⁴⁹

⁴⁷ This clearly does not require 67 votes as is often asserted. “Although the number of Senators who must be present is not specified, the Senate’s practice with respect to major treaties is to conduct the final treaty vote at a time when most Senators are available.” See, “Treaties and Other International Agreements: The Role of the United States Senate”, p. 11, at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_cong_senate_print&docid=f:66922.pdf. Compare this “present” requirement with other “two thirds” (*in toto*) requirements in the Constitution, Article I, Section 5, regarding House impeachments; Article I Section 7 re: veto override; and Article V re: proposing amendments to the Constitution.

Hamilton addressed the deliberation over two-thirds of those “present”, vs. of the body as constituted, in Federalist No. 75. There, he identified the fear about “as constituted”, that a minority of Senators could impede ratification through simple, convenient absences. See “Consent”, *infra*, for further discussion as to how this did not end potential gamesmanship.

⁴⁸ See Hamilton, Federalist No. 22, sentiments repeated by Madison in Federalist No. 44.

⁴⁹ Federalist No. 75.

Arguably, modern conflicts arising from signed-but-not ratified treaties are a problem easily avoided, or at least mitigated, with the treaty power fixed solely within one branch (certainly, if with the Executive). Still, the practical, political problems discussed herein, borne of the simple bifurcation of authority, do not seem to have registered discussion by the Framers. One can safely presume this is because the Framers did not envision “permanent alliances” becoming so profuse that hundreds of modern instruments would emerge to the extent even of addressing unification of road signals.

Pertinent to this discussion, the Framers likely also could not envision commission to a treaty such as Kyoto: international agreements to curb domestic behavior to retard what is inarguably a marginal contribution to a hypothetical risk -- man-made catastrophic climate change -- even in advance of science having advanced the hypothesis some appreciable degree toward knowledge. Similarly, it is difficult to fathom the Framers envisioning administration of their creation such that scores of treaties would receive an executive signature yet never face Senate consideration. Times change, and with them perspectives. As Rabkin plainly asserts “[l]egal scholars no longer take the constitutional strictures of earlier times so seriously.”⁵⁰ Now, “in the view of legal scholars, anything might be the proper subject of a treaty.”⁵¹ This, in an undeniable spiral of cheapening the seriousness of “permanent alliances” against which President Washington warned in his Farewell Address.⁵²

⁵⁰ “Sovereignty” at 18. The same can be said for policymakers, be they elected, appointed or career. See Chief Justice Hughes’ admonition, *supra*.

⁵¹ *Id.* at 22.

⁵² Farewell Address, delivered on September 17, 1796. Washington similarly urged that the US must “Act for ourselves and not for others,” by forming an “American character wholly free of foreign attachments.” See <http://www.house.gov/paul/tst/tst2002/tst041502.htm>.

One constitutional ambiguity arises in the question of which agreements rise to the level of a “treaty” requiring Senate ratification?⁵³ Further, notwithstanding the ratification requirement, the treaty process inherently requires executive commitment of a sort. What are the other implications of such a commitment, now that we have seen that this practice does not in fact even serve the protocol function of a qualifying a state for ratification?⁵⁴ Can an Executive validly agree to treaty language circumventing constitutional requirements?⁵⁵ These questions and their answers, to the extent they exist,

⁵³ This issue arises from other powers found in Article II of the Constitution, specifically the Executive Power Clause (Section 1), the Commander-in-Chief Clause (Section 2) and, most interesting, the duty to take Care that the laws are “faithfully executed”, which concludes Section 3. “Where the powers of the President are exclusive -- as the Commander in Chief power – the President may make an international agreement solely on his own. Such agreements are often called sole executive agreements.” National Treaty Law and Practice (Austria, Chile, Columbia, Netherlands, U.S.) eds. Monroe Leigh, Merritt R. Blakeslee, and L. Benjamin Ederington. Washington, DC, American Society of International Law 1999, Chapter 6, National Treaty Law and Practice: United States (Robert E. Dalton), “Section G, Legal Bases for Agreements Not Formally Approved By the Legislature”. See <http://www.asil.org/dalton.pdf>. This document offers an extensive discussion of this issue, including a discussion of *United States v. Belmont* (301 U.S. 324 (1937)), involving an intermingling in one document of assignment of funds and U.S. recognition of the Soviet Union. There, the Court asserted as regards the particular agreement at issue, “[A]n international compact, as this was, is not always a treaty that requires the participation of the Senate,” but in this case an exercise of the President’s power to enter executive agreement pursuant to his independent authority. *Id.* at 330.

The Court asserted limits to the reach of this duty to “take Care”, in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). The Court determined that President Truman usurped the lawmaking power of Congress by his claim of independent constitutional authority to take control of and operate the nation’s steel mills during the Korean War on the basis of on an “inherent” power to protect the well-being and safety of the nation as well as his Article II exclusive powers as Commander-in-Chief and executive.

Finally, see also “Treaties and Other International Agreements: The Role of the United States Senate”, pp. 25-26, at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_cong_senate_print&docid=f:66922.pdf.

The State Department defines “treaty” as follows: “International agreements (regardless of their title, designation, or form) whose entry into force with respect to the United States takes place only after the Senate has given its advice and consent”. See “Department of State Circular 175, Procedures on Treaties”, Foreign Affairs Manual, 11 FAM 700, Treaties and Other International Agreements, TL:POL—36, Revised February 25, 1985, Sec. 11 FAM 721.2 “Constitutional Requirements”.

The Vienna Convention, Article 2, defines “treaty” for its purposes as: “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation”.

⁵⁴ See “Signature” discussion, *infra*.

⁵⁵ A simple answer might seem to be that the Constitution cannot be read to permit commitments in violation of its terms, which terms may only be amended by the prescribed amendment process. Things are not that simple, however, such that this question is beyond the scope of this paper. See Rabkin, pp. 10-22. Commitments raising this tension are nonetheless made. Consider the Vienna Convention, a document that claims to bind parties to such documents, to some degree, by mere signature. Does that signature in fact

are exemplar of the murky nature of this field of law, driven in practice less by established legal rules than protocol. This curiosity extends to U.S. practice, whereby both the Executive Branch and Senate operate on the presumption that the Senate may not consider a treaty until a President transmits it to the Senate, though such requirement is found neither in the Constitution nor U.S. laws.⁵⁶

Congress has formalized this delegation power, for certain presidential authorities regarding the conduct of foreign affairs, in the State Department's authorizing statute.⁵⁷ In practice this delegation includes signing (and withdrawing from) treaties.⁵⁸

The requirement of Senate "Advice" is not as straightforward as a plain reading of Article II intimates. Here, Kyoto also offers an interesting case study, as a treaty entered in spite of formal if non-binding (and unsolicited) Senate advice.⁵⁹ An Executive

violate the Constitution? Can a signatory state plausibly claim they are not bound to any degree by a treaty that acknowledges signature as imputing a level of pre-ratification commitment?

⁵⁶ See discussion of "Submission," *infra*. Senate rules indicate it has indirectly established "transmission" as a condition precedent. These rules do not, however, make clear that the Foreign Relations Committee can refuse to consider a treaty on the basis that it was never transmitted -- an unlikely controversy. A more likely battle would pit a White House opposed to ratification objecting to FRC consideration of a treaty on the basis that there was never a transmittal. The prospect of such a conflict, though facially bizarre prospect given a president apparently retains the right to effectively withdraw the U.S. signature until some point in the pre-ratification stage (pre-transmittal, or pre-vote, or post-defeat but returned to Committee as pending matter). See, e.g., <http://www.state.gov/r/pa/prs/ps/2002/9968.htm>.

These prospects further warrant consideration not merely because the signature by an executive poses some level of commitment to a treaty's objectives, if not its specific terms. Consider also a Senate and White House deeply divided, rhetorically at least, over a signed-but-not-ratified treaty as they appear to be over Kyoto, and the potential showdown over "advice and consent" which that conflict poses.

⁵⁷ "22 U.S.C. Sec. 2656. - Management of foreign affairs. The Secretary of State shall perform such duties as shall from time to time be enjoined on or intrusted to him by the President relative to correspondences, commissions, or instructions to or with public ministers or consuls from the United States, or to negotiations with public ministers from foreign states or princes, or to memorials or other applications from foreign public ministers or other foreigners, or to such other matters respecting foreign affairs as the President of the United States shall assign to the Department, and he shall conduct the business of the Department in such manner as the President shall direct." It is certainly this general authority that State exercised in notifying the UN that the US has no intention to be bound by the Rome Treaty (its 6 May 2002 letter to UN Secretary General Annan (see text at www.state.gov/r/pa/prs/ps/2002/9968.htm)).

⁵⁸ See e.g. Kyoto, signed by USA's functioning UN Ambassador, Peter Burleigh. See http://www.bellona.no/en/b3/air/climate/buenos_aires/10952.html.

⁵⁹ "Byrd-Hagel," S.Res. 98 105th Congress (105-54, 1997). The operative language is as follows: "Resolved, That it is the sense of the Senate that--

eschewing Senate advice does not as a matter of law doom a treaty as failing to meet constitutional muster. An Executive subsequently nullifying the U.S. signature, or a Senate vote on ratification, should be the final word on that though, again matters in practice have not developed quite so simply.⁶⁰

The concerns raised by an Executive “freelancing” treaty commitments without seeking or heeding Senate advice can be further compounded by a treaty barring the standard ability of a party to set forth objections and/or reservations.⁶¹ It is through such objections and reservations, asserted by the Senate as a condition of ratification, that

(1) the United States should not be a signatory to any protocol to, or other agreement regarding, the United Nations Framework Convention on Climate Change of 1992, at negotiations in Kyoto in December 1997, or thereafter, which would--

(A) mandate new commitments to limit or reduce greenhouse gas emissions for the Annex I Parties, unless the protocol or other agreement also mandates new specific scheduled commitments to limit or reduce greenhouse gas emissions for Developing Country Parties within the same compliance period, or
(B) would result in serious harm to the economy of the United States”.

Kyoto nonetheless emerged, clearly not satisfying Byrd-Hagel condition (1)(A), by differentiating not only between 36 “covered” countries, but by differentiating the commitments among those countries. Regarding condition (1)(B), among prominent economic analysts only the Clinton White House’s Council of Economic Advisors, contended that no “serious economic harm”. President Clinton never submitted the treaty to the Senate over the course of the remaining 27 months of his presidency. Upon leaving office the relevant CEA professionals publicly amended their assertions regarding Kyoto’s economic impact. (See *USA Today*, June 12, 2001). See discussion of “Advice, *infra*.”

A fair question is: which is the more constitutionally offensive practice? 1) Eschewing advice and committing to a treaty yet not offering the Senate its opportunity to consent or disapprove; or 2) rescinding the U.S. signature from one “rejected”, signed-but-never-submitted treaty, on the express basis that “even without ratification, the president's signature conveys standing and a U.S. obligation to support and not undermine the Treaty” (see Rumsfeld comments, p. 27, *infra*), yet not similarly treating other rhetorically “rejected” agreements.

⁶⁰ “(6) Treaties Reported by the [Foreign Relations] Committee but neither approved nor formally returned to the President by the Senate are automatically returned to the Committee calendar at the end of a Congress; the Committee must report them out again for the Senate to consider them.” Therefore, a “defeated” treaty is not necessarily rejected until it is returned to the President. See “Treaties and Other International Agreements: The Role of the United States Senate”, p. 12; see http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_cong_senate_print&docid=f:66922.pdf. The Senate may also keep a “defeated” treaty alive by adopting or entering a motion to reconsider. *Id.* at 3.

⁶¹ “The conditions included by the Senate in its resolutions of advice and consent to ratification fall into four general categories: reservations, understandings, declarations, and provisos.” National Treaty Law and Practice (Austria, Chile, Columbia, Netherlands, U.S.) eds. Monroe Leigh, Merritt R. Blakeslee, and L. Benjamin Ederington. Washington, DC, American Society of International Law 1999, Chapter 6, National Treaty Law and Practice: United States (Robert E. Dalton), p. 6.

Vienna Article 2 defines “reservation” as: “a unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State”. Part Two of Vienna, Articles 19-23, address reservations exclusively.

policy development by supranational bodies are deemed constitutionally tolerable given their lack of checks and balances, and limited accountability.⁶² Yet the U.S. agreed to and then signed the Kyoto Protocol despite it having exacerbated the sin of omission of seeking Senate advice with the rare, express prohibition of reservations.⁶³

The Senate Foreign Relations Committee Report serving as the Senate's most formal statement on these matters, outside of Standing Senate Rules, states the following regarding nearly this precise circumstance, except for the compounding factor of eschewing advice prior to the "no reservation" constraint:

"Some multilateral treaties have contained an article prohibiting reservations. The Senate Foreign Relations Committee has taken the position that the executive branch negotiators should not agree to this prohibition. The Senate has given its advice and consent to a few treaties containing the prohibition, but the committee has stated that approval of these treaties should not be construed as a precedent for such clauses in future treaties. It has further stated that the President's agreement to such a clause could not constrain the Senate's right and obligation to attach reservations to its advice and consent."⁶⁴

Specifically addressing the UNFCCC, which the Senate nonetheless quickly ratified despite its own "no reservations" clause, the same Report cautions "The Foreign Relations Committee has cautioned the administration that Senate consent in these cases should not be construed as a precedent."⁶⁵ The Report went on to caution against any attempt to alter the UNFCCC's voluntary scheme by committing to mandatory reductions, asserting any such commitment would require ratification.⁶⁶ The Report then recites Senate intervention when the negotiations appeared to be headed toward not

⁶² See, e.g., Rabkin, p.ix.

⁶³ Kyoto Article 26 asserts, *in toto*: "No reservations may be made to this Protocol."

⁶⁴ "Treaties and Other International Agreements: The Role of the United States Senate", p.274.

⁶⁵ *Id.*

⁶⁶ *Id.* at 276.

merely binding commitments requiring subsequent ratification, but differential commitments among parties with likely serious U.S. economic impacts.⁶⁷

Kyoto nonetheless emerged as such a “take it or leave it” document but with no advance authorization or abdication as is offered by, *e.g.*, “fast track” legislation. Indeed, it is fair to say the opposite vote was registered, though non-binding by necessity given the nature and timing of such a preemptive strike. NAFTA can therefore hardly be analogized to Kyoto as both having been similarly foisted upon the Senate, though it is noteworthy that the composition of Congress can certainly change measurably in the interim between fast-track approval (or Byrd-Hagel) and the opportunity to offer consent.

This combination found in Kyoto of not obtaining (ignoring) Senate advice and restricting permissible consent is constitutionally indefensible in theory, though it does not impede Senate ratification. Indeed, it is now accepted practice for Congress to offer advance approval of suspending the Senate ability to provide objections and/or reservations when voting on ratification of specific agreements.⁶⁸ “Some scholars have pointed out the constitutional difficulties of this scheme, but it did not raise any great controversy.”⁶⁹

⁶⁷ “In mid-1997, as these negotiations were underway, the Senate passed S. Res. 98, which stated that the Senate would not approve any agreement on binding reductions in greenhouse gases that did not include commitments by developing countries as well as developed/industrialized countries, or that would result in harm to the U.S. economy. The administration has not transmitted the Kyoto Protocol to the Senate because, among other reasons, developing countries have to date not been willing to consider making binding commitments regarding their greenhouse gas emissions.” *Id.*

⁶⁸ See, *e.g.*, S. 2062 (107th Congress), “The Comprehensive Trade Negotiating Authority Act of 2002”. The express logic behind providing this authority is to provide the President’s negotiators the ability to strike deals not subject to subsequent modification as a condition of ratification, and their counterparts confidence in U.S. promises. It is arguable that congressional approval of such authority constitutes advice, if uninformed advice, still conditioned upon Senate ratification of the deal itself.

⁶⁹ Rabkin at 18.

Signature

Individual agreements provide a window during which the document may be signed. For example, the Kyoto Protocol, agreed to in December of 1997, was open for Party signature for a finite period of one year. As discussed, *supra*, that window and/or failure to sign the document were meaningless, as non-signatories subsequently ratified the Protocol. Whether signing the document is meaningless, however, is discussed, *infra*. The U.S. signed Kyoto on 12 November 1998.

It is clear from Article II, Section 2 that the Executive has the power to negotiate agreements if not *de jure* unilateral power to craft their content. This power to negotiate treaties doubtless includes the ability to make various, sub-ratification levels of commitment such as agreement and signature, so long as the agreement makes no pretense of abrogating the ratification requirement.⁷⁰ The “advice” limitation on this negotiating power is subject to Senate forgiveness (for the failure to seek advice), via providing consent nonetheless.

Most treaties provide for a discrete signing function as a condition precedent to being eligible to accede via ratification.⁷¹ Signatures may be challenged but barring such

⁷⁰ See Rabkin pp. 12-16.

⁷¹ See FN 19, *supra*. Kyoto Article 24 states: “1)... This Protocol shall be open for accession from the day after the date on which it is closed for signature. Instruments of ratification, acceptance, approval or accession shall be deposited with the Depositary. 2. Any regional economic integration organization which becomes a Party to this Protocol without any of its member States being a Party shall be bound by all the obligations under this Protocol. In the case of such organizations, one or more of whose member States is a Party to this Protocol, the organization and its member States shall decide on their respective responsibilities for the performance of their obligations under this Protocol. In such cases, the organization and the member States shall not be entitled to exercise rights under this Protocol concurrently. 3. In their instruments of ratification, acceptance, approval or accession, regional economic integration organizations shall declare the extent of their competence with respect to the matters governed by this Protocol. These organizations shall also inform the Depositary, who shall in turn inform the Parties, of any substantial modification in the extent of their competence.”

challenge are presumed valid.⁷² Questions arise, certainly in the recent contexts of the Rome Treaty and Kyoto Protocol, of other signature implications. Like most individual treaty documents “customary law” and its “codification” the Vienna Convention on the Law of Treaties recognize the requirement of many systems of legislative approval for an agreement’s specific terms to be binding.

The principle that a signature cannot be truly meaningless, developed likely for purposes of ensuring sincere negotiations, nonetheless was formalized as Vienna Article 18. That provision asserts international agreement that a pre-ratification commitment, *e.g.*, signature, is nonetheless binding a state to certain degree.⁷³ Yet how seriously do states take this testament to the issue of a non-ratifying signatory state: "a State is obliged to refrain from acts which would defeat the object and purpose of a treaty," until and unless "it shall have made its intention clear not to become a party to the treaty, or it

⁷² Vienna sets forth generally, followed by an illustrative roster of, who may commit a state: “Article 7, Full powers: 1. A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty if: (a) he produces appropriate full powers; or (b) it appears from the practice of the States concerned or from other circumstances that their intention was to consider that person as representing the State for such purposes and to dispense with full powers.” A state may subsequently confirm an unauthorized signature (Article 8).

⁷³ Vienna manifests throughout, *e.g.*, Articles 11, 12, 18, manifest that states operate on the presumption that a signature is the promise of a binding relationship, presumably through ratification. “A paramount principle of international law is *pacta sunt servanda*—that treaties must be kept.” Senate Foreign Relations Committee, “Treaties and Other International Agreements: The Role of the United States Senate”, S.Rpt. 106-71, p. 7; see http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_cong_senate_print&docid=f:66922.pdf. What of the documents that a country signs, but does not ratify? That question and the ambiguous answers, to the extent they exist, prompted President Bush to withdraw from the unratified Rome Treaty. Specifically, the U.S. sought to avert legitimate concerns that its signature would impute some form of acquiescence with Rome.

However, many treaties are signed but not ratified, particularly by the US. The same ambiguities underlie the concerns over Kyoto discussed, herein. As with Rome, the President voiced his disagreement with his predecessor’s signature. As regards Kyoto, however, he has not manifested this rhetoric with action. Consider that the President then offers and formally proceeds with a proposal clearly running counter to Kyoto’s goals and objectives, as he did with his pending proposal to address U.S. GHG emissions. This proposal envisions emissions increasing, clearly in violation of Kyoto’s objective of massive reductions. Certainly, mere proposals likely do not run hard afoul of Vienna. But what if the proposal is enacted?

has expressed its consent to be bound by the treaty"?⁷⁴ It is either ironic, or proof positive that this effort failed, that the U.S. bears an enormous inventory of signed-but-not-ratified instruments including many never even "transmitted" to the Senate.

Defending a claim that the U.S. somehow violates Vienna Article 18 via, *e.g.*, Kyoto (or vice versa), the U.S. would likely posit the argument that it never ratified Vienna. Particularly as regards Article 18, this argument is sophisticated. It requires a state to argue that it is not bound by signing a treaty that purports to govern the interpretation of treaties, the terms of which establish that signing a treaty in the absence of ratification still binds the signatory to the treaty's goals and objectives.⁷⁵

⁷⁴ See "Withdrawal", *infra*.

⁷⁵ Consider a prospective automobile purchaser talking terms then taking the car off the lot for a spin, though without finalizing any deal. He parks it in his garage, and otherwise treats the offer of sale as a deal he accepted, for some period of time. Now consider the U.S. signing a treaty, though never formalizing the deal, yet also acting as if it had "bought" the agreement for 30 years through various and sundry diplomatic and administrative actions, or merely on the basis that it waited three decades before testing its strictures?

It is likely that such a doctrine of constructive acceptance exists in the law of international agreements. Vienna Article 11, "Means of expressing consent to be bound by a treaty," does not offer much guidance, asserting "The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed." However, Part 5, "Invalidity, Termination and Suspension of the Operation of Treaties" makes the case more plainly: "Article 45 Loss of a right to invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty: A State may no longer invoke a ground for invalidating, terminating, withdrawing from or suspending the operation of a treaty under articles 46 to 50 or articles 60 and 62 if, after becoming aware of the facts:

(a) it shall have expressly agreed that the treaty is valid or remains in force or continues in operation, as the case may be; or

(b) it must by reason of its conduct be considered as having acquiesced in the validity of the treaty or in its maintenance in force or in operation, as the case may be."

Media reports indicated that President Bush intended to withdraw from Vienna concurrent with his Rome withdrawal, though this did not occur. This would (or will) occur after having satisfied Vienna's Article 18 test for "withdrawal" of the unratified ICC. Clearly, therefore, such a move would be intended to impact the status of other signed-but-not-ratified agreements. Presuming this was successful (see FN 75, *supra*), particular implications of such a move as regards Kyoto include that the U.S. would be free of the Vienna Article 18 argument of commitment to Kyoto's object and purpose (if not residual "customary" doctrine, if any exists). The U.S. position would be that it is "out" of Kyoto solely on the basis that one executive verbally claimed that to be the case, with no formalization of that position. That is, the signed document remains available for "re-entry" by a subsequent executive solely on the basis that he verbally asserts that this is the U.S. position. To pursue or even enable such a dynamic is shortsighted and flies in the face of the bulk of the rationale behind treaties.

It was presumably in recognition of the perils of feel-good treaty signature with state has no intention of ratifying which led the Bush Administration to formally disavow its signature on the Rome Treaty. Consider the following statements by Cabinet officers:

“Since we have no intention of ratifying it, it is appropriate for us, because we have such serious problems with the ICC, to notify the...secretary-general that we do not intend to ratify it and therefore we are no longer bound in any way to its purpose and objective.” Secretary of State Colin Powell, CNN.com, May 5, 2002

“Even without ratification, the president's signature conveys standing and a U.S. obligation to support and not undermine the Treaty.” Secretary of Defense Donald Rumsfeld, State Department Info, Jan. 11, 2001

Now, of course, the Administration faces the unavoidable question of why does it refuse to disavow the U.S. signature on Kyoto? That is, should it desire to avoid having, *e.g.*, its proposed “Climate Action Plan” challenged as violative of Vienna, via Kyoto.⁷⁶

These implications of treaty signature and the related quagmire of “how much sovereignty does (the U.S.) cede at what step?” is exemplar of the murky nature of this field of law, driven in practice less by established legal rules than protocol.

⁷⁶ Compare Administration statements on Kyoto remarkably similar to its rhetoric establishing why Rome must be “unsigned”:

President Bush - "I'll tell you one thing I'm not going to do...I'm not going to let the United States carry the burden for cleaning up the world's air, like the Kyoto treaty would have done." ABCNews.com, March 28, 2001

President Bush - "I do not support the Kyoto Treaty...The Kyoto treaty would severely damage the United States economy and I don't accept that." Washington Times, June 5, 2002

Vice-President Cheney - "We do not support the approach of the Kyoto treaty." MSNBC March 17, 2001
Secretary of State Colin Powell - "The Kyoto Protocol, as far as the United States is concerned, is a dead letter." Interview with Fox News' Tony Snow, June 17, 2001

National Security Advisor Condoleezza Rice - to European diplomats, the "protocol is totally unacceptable and already dead at the arrival of the Bush administration"; also quoted at the same meeting asserting Kyoto was "dead on arrival" in the United States. March 17th, 2001

National Security Advisor Condoleezza Rice - "It might have been better to let people know in advance, including our allies, that we were not going to support the protocol." USATODAY.com June 7, 2001

Environmental Protection Agency Administrator Christie Todd Whitman - "We have no interest in implementing that treaty." Washington Post, March 28, 2001

White House Spokesman Ari Fleischer - "The president has been unequivocal. He does not support the Kyoto treaty. It is not in the United States' economic interest." CNN.com, March 29, 2001

In sum, achieving the signature stage enters a state into an ambiguous level of commitment; obligations begin to emerge, such that a notification of intent not to become a party action is required to clearly establish a nation's status.

Executive Transmittal of a Treaty

Is there a reverse equivalent to the Constitution's "presentment" clause, for treaties?⁷⁷ A plain reading of Article II, Section 2 indicates an Executive's treaty-making function is complete upon treaty signature, or at least that the signature reasonably triggers the Senate's ability to attempt consent, though the Executive is not be stripped of authority to continue relevant treaty functions. Certainly, if a president transmits a treaty to the Senate with its concomitant request for a vote, there is no doubt that the Senate may vote upon it. But what about a treaty signed but not submitted to the Senate?

An authoritative Foreign Relations Committee report asserts the Senate's most formal position on the matter, outside of its standing rules which are largely silent or ambiguous:

"Consideration by the Senate

A second phase begins when the President transmits a concluded treaty to the Senate and the responsibility moves to the Senate.

Following are the main steps during the Senate phase.

(1) Presidential submission.—The Secretary of State formally submits treaties to the President for transmittal to the Senate. A considerable time may elapse between signature and submission to the Senate, and on rare occasions a treaty signed on behalf of the United States may never be submitted to the Senate at all and thus never enter into force for the United States. When transmitted to the Senate, treaties are accompanied by a Presidential message consisting of the text of the treaty, a letter of transmittal requesting the advice and consent of the

⁷⁷ U.S. Constitution, Article I, Section 7: "Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States".

Senate, and the earlier letter of submittal of the Secretary of State which usually contains a detailed description and analysis of the treaty.”⁷⁸

This describes what happens next. It does not, however, establish a requirement. Instead, it manifests that the Senate is historically conditioned to wait for executive transmittal prior to considering an agreement and its rules now recognize this practice, having in effect manufactured a “presentment” equivalent. The FRC Report offers in fact an explanation of protocol, and nothing more, serving as the principal impediment to the Senate considering a treaty absent the Executive transmitting it to them. There is no constitutional bar. Though the Senate has the constitutional right to set its own rules of operation,⁷⁹ there exists no express prohibition in the rules, either.⁸⁰ It is a matter of interpretation. These rules are binding of course only on the Senate but are a matter of interpretation, and that is largely irrelevant.

These Senate rules do not make clear that the Foreign Relations Committee can refuse an Executive request to consider a treaty on the basis that it was never transmitted. Such a battle is of course unlikely: if an Executive desired a treaty vote he would in all likelihood “transmit” a treaty with such a request.⁸¹ A conflict is more likely to involve a White House opposed to ratification, objecting to FRC consideration on the basis that there was never a transmittal. The prospect of such a conflict is also, however, facially

⁷⁸ “Treaties and Other International Agreements: The Role of the United States Senate”, S.Rpt.106-71, p. 7.

⁷⁹ “Each House may determine the Rules of its Proceedings...” Article I, Section 5.

⁸⁰ With or without transmittal it would be fair for a Member (or private litigant who can establish standing) to call on the Senate to vote on the entire spate of modern treaties signed-but-not-ratified treaties. It seems particularly disrespectful of the Constitution, however, for the Senate not to at minimum vote on aberrations such as Kyoto, qualifying for immediate rejection because of the unacceptable combination of the Executive breaching specific Senate instruction, then accepting the disavowed terms also with a prohibition on reservations.

⁸¹ Such a request does not necessarily accompany a transmittal recommendation. See discussion of President Reagan’s transmittal of the Protocols to the Geneva Convention, *infra*.

bizarre given a president apparently retains the right to effectively withdraw the U.S. signature until some point in the pre-ratification stage (see “Withdrawal”, *infra*).

As also discussed, in Kyoto we see a Senate and White House deeply divided, rhetorically at least, over a particular signed-but-not-ratified treaty. This merits consideration of the potential showdown over authority to ultimately commit the U.S. In this instance, we face a president asserting a position (“rejects” the treaty) but unwilling to formalize it. Indeed, this administration actually has rejected the idea of withdrawal.⁸²

Whether an executive must “transmit” a treaty, or whether the Senate may vote on signed agreements of its own accord, is a question that has yet to be adjudicated. It has yet to even be legislated other than Senate internal rules of operation, which are ambiguous. Congress addressed transmittal of international agreements *other than treaties* in the Case-Zablocki Act.⁸³ This Act did not, however, indirectly establish Executive discretion regarding transmittal of treaties to Congress, as its clear import was to inform Congress of agreements in which Congress had had no consultative or approval role.

The Senate Foreign Relations Committee possesses exclusive congressional jurisdiction over treaties (though as was seen regarding Kyoto, other committees, both

⁸² In May 2002, the author formally petitioned the State Department on behalf of the Competitive Enterprise Institute, to replicate the withdrawal from Rome, re: Kyoto. State responded in June 2002. It elected to not assert which of the two ambiguous U.S. Kyoto positions – rhetorical vs. submitted – is operative. Its response was mildly incoherent in attempting to avoid addressing the merits presented in the request, merely rejecting this request for clarification of the ambiguity on the simple basis that “[w]e have gone to considerable lengths, internationally, over the past year to make our position with respect to the Kyoto Protocol clear and unambiguous.” In short, they’re not confused about the position – whatever it is – so it requires no clarification.

⁸³ 1 U.S.C Sections 112a and 112b; as added by act of September 23, 1950, 64 Stat. 980; and added by Public Law 92–403 [Case-Zablocki Act, S. 596], 86 Stat. 619, approved August 22, 1972.

House and Senate, may weigh in on various aspects of the agreement). That is, FRC is the gatekeeper determining which treaties may be reported for floor consideration:

“ rule 1--jurisdiction

(a) Substantive. --In accordance with Senate Rule XXV.1(j), the jurisdiction of the Committee shall extend to all proposed legislation, messages, petitions, memorials, and other matters relating to the following subjects:...

17. Treaties and executive agreements, except reciprocal trade agreements....

(b) Oversight. --The Committee also has a responsibility under Senate Rule XXVI.8, which provides that ‘...each standing Committee . . . shall review and study, on a continuing basis, the application, administration, and execution of those laws or parts of laws, the subject matter of which is within the jurisdiction of the Committee.’

(c) ‘Advice and Consent’ Clauses. --The Committee has a special responsibility to assist the Senate in its constitutional function of providing ‘advice and consent’ to all treaties entered into by the United States and all nominations to the principal executive branch positions in the field of foreign policy and diplomacy...

rule 9--treaties

(a) The Committee is the only Committee of the Senate with jurisdiction to review and report to the Senate on treaties submitted by the President for Senate advice and consent. Because the House of Representatives has no role in the approval of treaties, the Committee is therefore the only congressional committee with responsibility for treaties.”

This indicates the presumption that the Committee would move only those transmitted. FRC Rule 9 then seemingly creates a transmittal condition precedent to considering a treaty:

“(b) Once submitted by the President for advice and consent, each treaty is referred to the Committee and remains on its calendar from Congress to Congress until the Committee takes action to report it to the Senate or recommend its return to the President, or until the Committee is discharged of the treaty by the Senate.”

It does appear a Member is not able to move a treaty toward a floor vote in the absence of at least FRC consideration, though the relevant Standing Rule does not seem

to resolve the question of whether the Senate can vote absent transmission (that is, take matters into its own hands to, *e.g.*, clarify an ambiguous U.S. position):

“RULE XXX EXECUTIVE SESSION - PROCEEDINGS ON TREATIES

1. (a) When a treaty *shall be laid before the Senate for ratification*, it shall be read a first time; and *no motion in respect to it shall be in order, except* to refer it to a committee, to print it in confidence for the use of the Senate, or to remove the injunction of secrecy...

2. *Treaties transmitted by the President to the Senate for ratification* shall be resumed at the second or any subsequent session of the same Congress at the stage in which they were left at the final adjournment of the session at which they were transmitted; but all proceedings on treaties shall terminate with the Congress, and they shall be resumed at the commencement of the next Congress as if no proceedings had previously been had thereon.⁸⁴

So, the Senate seemingly manufactures a “requirement” of presentment. This does not make that requirement law but likely demonstrates that a court might well defer a legal challenge to an ambiguous U.S. treaty posture under the “political question” doctrine. Such a challenge, for example, could seek formal withdrawal from Kyoto as a necessary step given the Executive’s avowed rejection of a signed treaty. Presumably, the State Department manifested the position, in the context of its communication to the UN regarding Rome, that withdrawal from such a document requires this transmission pursuant to the delegation of certain “Management of foreign affairs” in 22 U.S.C. Sec. 2656.⁸⁵ This because by that act the Bush Administration formally recognized the legal implications to signing a treaty, seemingly giving merit to such an effort to compel other withdrawals to resolve similar ambiguities and potential risks.

Still, this language raises an interesting debating point as to whether there is the equivalent of a “presentment” requirement. That is, the Senate arguably hereby distinguishes between “Treaties transmitted by the President to the Senate for

⁸⁴ Found at <http://rules.senate.gov/senaterules/rule30.htm> (emphasis added).

⁸⁵ See FN 57, *supra*.

ratification”, and, “When a treaty shall be laid before the Senate for ratification”, that could be, of the accord of one of its Members.

There clearly is no constitutional prohibition to the Senate taking a signed treaty upon itself to consider, only a Senate committee rule and a Standing Rule possibly indicating they have decided otherwise. The Senate has the right to establish its rules of operation under Article I, Section 5, but those offer no prohibition and indeed are ambiguous at best as regards this matter. Certainly given the rhetoric of potential natural catastrophe surrounding Kyoto, if President Bush insists on continuing the U.S.’ ambiguous role in Kyoto the Senate should take matters into its own hands, and decide the fate of this agreement.

Regarding the transmittal itself, by practice, this communication is considered formally as part of the Senate Treaty Document sent by the White House.⁸⁶ Clearly, a transmittal message need not request ratification, but an Executive certainly may ask the Senate to reject a treaty. Similarly, though not identical, is that in practice a transmittal letter does not require “transmission” of the particular treaty language for a vote, but can include a mere request that the Senate express its sense that the treaty is not acceptable. This likely satisfies the Vienna test for manifesting a state’s intention to not be bound by a treaty, if it does not equate with rejection. President Reagan’s transmittal of the 1977 Protocols to the Geneva Convention offers an example of what may be considered “risk-free transmittal”, that is, asking for disapproval while not risking present or future ratification of the actual agreement.

⁸⁶ See, e.g., “The President’s Transmittal Message”, H.Doc. 107-20; http://frwebgate.access.gpo.gov/cgi-bin/useftp.cgi?IPaddress=162.140.64.21&filename=td007.pdf&directory=/diskb/wais/data/107_cong_documents.

After transmitting and asking for ratification of Protocol II, additional to the 1949 Geneva Conventions of 1949 concluded on June 10, 1977, President Reagan requested the Senate express its sense of disapproval of Protocol I, which he did not transmit. Addressing in part a topic very timely to a current debate, specifically the status of certain combatants, President Reagan wrote:

“While I recommend that the Senate grant advice and consent to this agreement [Protocol II], I have at the same time concluded that the United States cannot ratify a second agreement on the law of armed conflict negotiated during the same period. I am referring to Protocol I additional to the 1949 Geneva Conventions, which would revise the rules applicable to international armed conflicts. Like all other efforts associated with the International Committee of the Red Cross, this agreement has certain meritorious elements.”⁸⁷

Calling Protocol I “fundamentally and irreconcilably flawed”, Reagan described its flaws in principle and with some specific examples, then shifted the burden to the Senate without actually transmitting the Protocol with a recommendation to reject, stating in relevant part:

“These problems are so fundamental in character that they cannot be remedied through reservations, and I therefore have decided not to submit the Protocol to the Senate in any form, and I would invite an expression of the sense of the Senate that it shares this view.”⁸⁸

Yet requesting disapproval of non-transmitted language was not the real deviation so much as was actually seeking disapproval. Historically, it appears that “requesting” disapproval took the passive form of presidents simply not seeking a vote on certain treaties. President Reagan’s request did not betray its groundbreaking nature:

“It is unfortunate that Protocol I must be rejected. We would have preferred to ratify such a convention, which as I said contains certain sound elements. But we cannot allow other nations of the world, however numerous, to impose upon us

⁸⁷ United States: Message From the President Transmitting Protocol II Additional to the 1949 Geneva Conventions, Relating to the Protection of Victims of Noninternational Armed Conflicts, January 29, 1987 (<http://www.fed-soc.org/pdf/ABAResID.pdf>).

⁸⁸ Id.

and our allies and friends an unacceptable and thoroughly distasteful price for joining a convention drawn to advance the laws of war... The *repudiation* of Protocol I is one additional step, at the ideological level so important to terrorist organizations, to deny these groups legitimacy as international actors. Therefore, I request that the Senate act promptly to give advice and consent to the ratification of the agreement I am transmitting today, subject to the understandings and reservations that are described more fully in the attached report. I would also invite an expression of the sense of the Senate that it shares the view that the United States should not ratify Protocol I, thereby reaffirming its support for traditional humanitarian law, and its opposition to the politicization of that law by groups that employ terrorist practices.”⁸⁹

This quasi-transmittal offers a model for Executive request of the Senate regarding other commitments through which the U.S. presents an ambiguous posture. It does not, however, guarantee clarification: The Senate elected to vote on neither Protocol, adding them to the heap of literally dozens of treaties signed but not ratified, not to mention those of which never were the subject of a “transmittal” to the Senate.⁹⁰

This does offer authority for the proposition that the Senate need wait for neither a Presidential transmission of language, nor a request *to ratify a treaty* in order to speak to the issue of whether it accepts the commitment. In the case of Kyoto, Byrd-Hagel has no relevant “consent” impact -- though potentially great influence as “advice” eschewed -- Kyoto not having been agreed at the time this (inherently) non-binding resolution passed.

Another question involves the implications of “transmitting” a treaty to Senate. Upon such communication, has the President ceded his ability to withdraw, as President Bush withdrew from Rome? If so, is it for a reasonable period for the Senate to act, say, the term of one Congress, which ability is revived by the absence of Senate action over another reasonable period of time?

⁸⁹ Id. (emphasis added).

⁹⁰ See http://www.icrc.org/eng/party_gc.

Such resolution seems unnecessarily complex and, presuming no presentment requirement exists for treaties, two outcomes appear equally possible. The courts could determine some form of “mutual jurisdiction” during a post-transmittal, pre-vote stage, during which either branch may decide or at least advance the fate of an agreement. Alternatively, the courts could determine that such an Executive function should not be undertaken lightly. In such instance, they might reason, given that even post-transmission – whatever the request -- the President retains the ability to formally request Senate rejection, decide that upon transmission the Senate obtains sole jurisdiction.

Finally, the courts may determine that there is indeed a presentment requirement for treaties. Of course, even President Bush’s recent withdrawal from Rome appears unprecedented, if precisely what longstanding international policy held to be appropriate behavior. Thus, despite that all of this remains conjecture, the increased possibility of challenge to these questionable modern practices merits inquiry.

ROLE OF CONGRESS IN THE TREATY PROCESS – ADVICE AND CONSENT

What obligations and impediments arise from the constitutional requirement of “advice and consent”, particularly in the unique circumstances offered by development of Kyoto? Further, what role does the Senate play in possible withdrawal in such unique circumstances? Finally, if a ratified agreement is amended, is it subject to further advice and consent?

Advice: Kyoto Example

We have already examined the nontraditional role the Senate played in offering advice to the Executive regarding the Kyoto Protocol, development of which began soon

after – and, arguably, partially as a consequence of -- the inauguration of a new U.S. administration. As discussed, this process toward binding international commitments regarding domestic energy use emissions not declared, for the most part, “pollutants” by any nation in the world, came almost immediately on the heels of agreeing in Rio to the UNFCCC’s voluntary campaign.⁹¹ This, certain domestic efforts,⁹² and a lack of administration solicitation of advice alarmed many within the Senate. As negotiations advanced, Senators took it upon themselves to register advice.

The Senate, seeing what was developing, unanimously passed a non-binding, “Sense of the Senate Resolution”:

“*Resolved*, That it is the sense of the Senate that--
(1) the United States should not be a signatory to any protocol to, or other agreement regarding, the United Nations Framework Convention on Climate Change of 1992, at negotiations in Kyoto in December 1997, or thereafter, which would--
(A) mandate new commitments to limit or reduce greenhouse gas emissions for the Annex I Parties, unless the protocol or other agreement also mandates new specific scheduled commitments to limit or reduce greenhouse gas emissions for Developing Country Parties within the same compliance period, or
(B) would result in serious harm to the economy of the United States.”⁹³

⁹¹ Per Kyoto’s Preamble, it developed, *de jure*, “Being guided by Article 3 of the Convention,” (Principles), which was the omnibus “protect the planet” provision. This rationalization emerged, *de facto*, however directly pursuant to the new U.S. administration’s assertion of “changed circumstances”. The next step, of actually drafting a binding document, came “Pursuant to the Berlin Mandate adopted by decision 1/CP.1 of the Conference of the Parties to the Convention at its first session,” as also set forth in Kyoto’s preamble. In 1996, Deputy Assistant Secretary of State Rafe Pomerance asserted that “the administration has been working on this policy for more than a year”, quoted in Nature, 25 July 1996.

⁹² Specifically, in 1993, the new Clinton-Gore Administration created a State Department slot for former Senator Tim Wirth, Undersecretary of State of Global Affairs, including in its portfolio “environment”. Wirth was famous for his statement in 1990 as a Democratic Senator from Colorado, “We’ve got to ride the global warming issue. Even if the theory of global warming is wrong, we will be doing the right thing in terms of economic and environmental policy.” Cited in “Global Warming: Just a Lot of Hot Air?”, The Actuarial Review, August 1998 (Fred Kilbourne) (see <http://www.casact.org/pubs/actrev/aug98/gwfredk.htm>). Rio, in hindsight, soon began to look like an agreement whose authors had no sincere intent of determining its effectiveness when it was almost immediately used as a springboard to obtain mandatory, reduction commitments.

⁹³ “Byrd-Hagel,” S.Res. 98 105th Congress (105-54 July 21, 1997).

Subsequent to this advice, and upon other nations of the world resisting U.S. positions, Vice President Al Gore arranged to fly to Kyoto, where he encouraged U.S. negotiators to show “increased negotiating flexibility.” Kyoto emerged, clearly not satisfying Byrd-Hagel condition (1)(A) by differentiating between 36 “covered” countries. Opponents were also angry over the agreement to differentiate various commitments among those countries.⁹⁴

Regarding condition (1)(B), among prominent economic analysts only the Clinton White House’s Council of Economic Advisors, contended that no “serious economic harm” would result.⁹⁵ President Clinton never submitted the treaty to the Senate over the course of the remaining 25 months of his presidency. Upon leaving office the relevant CEA professionals publicly amended their assertions regarding Kyoto’s economic impact.⁹⁶

Administration disregard for Senate advice was exacerbated when the White House soon adopted a mantra of seeking “*meaningful* participation by *key* developing countries,” a rhetorical sleight of hand to facilitate ratification. Still, this received no widespread condemnation, despite the administration’s ploy being an apparent, significant diminution of the Senate’s most prominent “Advice”.

⁹⁴ Specifically, parties committed to varying percentages of reduction from 1990 levels of GHG emissions. Some were permitted to increase emissions (*e.g.*, Australia, by 8%), others permitted to pool their emission increases/reductions under a bubble (the EU), while the U.S. committed to reduce GHG emissions by 7% below 1990, or 19% below today’s emission levels according to the Department of Energy’s Energy Information Administration (EIA).

⁹⁵ EIA, *e.g.*, estimated Kyoto’s economic impact upon the U.S. economy at \$400 billion annually. U.S. Department of Energy, Energy Information Admin., Office of Integrated Analysis and Forecasting. *Impacts of the Kyoto Protocol on U.S. Energy markets and Economic Activity*. Washington, D.C. October 1998.

⁹⁶ “Economists from the Clinton White House now concede that complying with Kyoto’s mandatory reductions in greenhouse gases would be difficult - and more expensive to American consumers than they thought when they were in charge.” See *USA Today*, June 12, 2001.

The composition of the Senate can change appreciably over a short time and, so long as the U.S. remains a signatory, it may feasibly ratify Kyoto.⁹⁷ All past sins of omission, and commission regarding the Article II “Advice” requirement are absolvable through a ratification vote.

“Consent”, or Ratification

As noted, it is clear from Article II Section 2 that the executive power to “make” treaties affords him the principal negotiating role therein. This typically involves at minimum one signature stage, at minimum as a protocol, “formalizing” the signatory’s eligibility for ratification. However, it is also clear pursuant to Article II the terms of any agreement negotiated by the executive do not become effective against the U.S. until and unless the Senate ratifies the agreement by two-thirds of those voting.⁹⁸ This presumably intimates a limitation on the treaty power of an executive not being able to validly enter agreements circumventing the constitutional ratification requirement.⁹⁹ Further, this raises the possible issue of what rises to the level of a treaty requiring Senate ratification?¹⁰⁰

Treaties typically recognize that a significant number of countries do not permit the “Executive” to formally bind his nation through a signature, but that it is a fairly common requirement that one or more legislative bodies approve of the document. To the extent a particular document does not address this issue, the Vienna Convention codifies the “customary” recognition of this practice. Treaties also typically provide a

⁹⁷ True, as described, *supra*, several non-signatory nations ratified Kyoto nonetheless. These nations share neither our Constitution, nor our adherence to protocol, and it seems implausible that the U.S. Senate should ever reverse an Executive having rejected a signed, unratified treaty that the Senate has made no move to consider. It seems an open question whether Article II prohibits such an act.

⁹⁸ See FN 47, *supra*.

⁹⁹ See FN 55, *supra*.

¹⁰⁰ See FN 53, *supra*.

window for ratification. We have already seen, *supra*, the ambiguities surrounding whether the Senate may of its own accord consider a treaty for ratification.

The “Consent” function offers the Senate a second bite as the “Advice” apple. That is, with the rare exception found in Kyoto, treaties typically allow reservations and/or objections to particular provisions.¹⁰¹ The executive may make suggestions regarding such objections, as it at issue in the current debate regarding Senate ratification of the Stockholm Convention on Persistent Organic Pollutants (POPs Treaty).¹⁰² Domestic U.S. parties whose products or businesses would be covered by this agreement’s restrictions seek ratification, but conditional upon one of two options in the treaty language over the addition of new chemicals to the list of covered substances.

Specifically, these parties seek a reservation to the effect that each addition to the list of covered chemicals requires discrete ratification by countries recognizing this addition. This raises another relevant “Consent” issue: whether treaty amendments require individual ratification. The treaty itself typically addresses this matter.¹⁰³ To the extent an agreement does not address this matter, Vienna offers ambiguous guidance as to what rule governs.¹⁰⁴ This contributes to the reality in practice that Senate ratification clearly can be made contingent upon any modifications to the particular treaty being subject to ratification prior to being binding on the U.S.¹⁰⁵

¹⁰¹ See the UN’s Model Instrument of Reservation at <http://untreaty.un.org/English/TreatyHandbook/annex6.htm>.

¹⁰² See EPA statement on POPs Treaty at http://www.epa.gov/oppfead1/cb/csb_page/updates/popsleg.htm.

¹⁰³ See, e.g., Kyoto Article 20 which, like the similar POPs and Rio language, does not expressly call for ratification to “Accept” the change, though that is how the Senate has treated the latter two provisions.

¹⁰⁴ See Articles 41, 42.

¹⁰⁵ In consenting to the Genocide Convention, the Senate added a reservation that the U.S. must first specifically consent to IJC jurisdiction before submitting any dispute to which the United States was a party. “Treaties and other International Agreements”, p. 21.

Kyoto's amendment mechanism is set forth through various Articles. First, specifically discussing "non-compliance" and consequences," Article 18 reads, in pertinent part, "Any procedures and mechanisms under this Article entailing binding consequences shall be adopted by means of an amendment to this Protocol." Such amendment occurs as set forth in Article 20:

- "1. Any Party may propose amendments to this Protocol.
2. Amendments to this Protocol shall be adopted at an ordinary session of the Conference of the Parties serving as the meeting of the Parties to this Protocol.
3. The Parties shall make every effort to reach agreement on any proposed amendment to this Protocol by consensus. If all efforts at consensus have been exhausted, and no agreement reached, **the amendment shall as a last resort be adopted by a three-fourths majority vote of the Parties present and voting** at the meeting. The adopted amendment shall be communicated by the secretariat to the Depositary, who shall circulate it to all Parties for their acceptance."
(emphasis added)

Kyoto then proceeds to indicate, but does not state, that Senate ratification of Kyoto even in its current, incomplete form and without a specific reservation to this effect, nonetheless permits the U.S. to claim it is not bound by any subsequent narrowing of Kyoto's terms without separate ratification:

- "4. Instruments of acceptance in respect of an amendment shall be deposited with the Depositary. An amendment adopted in accordance with paragraph 3 above shall enter into force for those Parties having accepted it on the ninetieth day after the date of receipt by the Depositary of an instrument of acceptance by at least three fourths of the Parties to this Protocol."

This is reassuring to some degree given that Kyoto permits all nations to vote on binding consequences applicable only to those 36 countries actually covered by Kyoto's restrictions. Reassuring as this "out" may be, it remains foreseeable that the requisite three-fourths of, *e.g.*, 150 or so parties to Kyoto should they ultimately ratify, can occur simply by coalescence of that large universe of countries facing all benefit, no pain under

Kyoto. The incentive to “stick it” to particular countries, for example the U.S., is enormous, given the amounts of money involved under a fully implemented rationing structure that is Kyoto. Given international pressures to proceed “with the flow” should the U.S. actually ratify Kyoto, this presents alarming opportunities for other nations to extract even more benefits out of the U.S. in this context than Kyoto’s generous “capacity building” and “development” funds already envision.¹⁰⁶

The Executive cannot constitutionally abrogate Senate consent,¹⁰⁷ though as we have seen Congress can anticipatorily abdicate the Senate’s ability to modify an agreement’s language, and thus its ability to offer substantive objections or reservations (though not to reject a treaty).¹⁰⁸

Consideration of treaties must begin in the Senate Foreign Relations Committee. Again, and contrary to the reality that scores of treaties formally transmitted to the Senate lie dormant, Senate FRC Rule 9 calls for swift initiation of the consideration process:

d) Insofar as possible, the Committee should conduct a public hearing on each treaty as soon as possible after its submission by the President. Except in extraordinary circumstances, treaties reported to the Senate shall be accompanied by a written report.

As also discussed in “Transmittal”, Senate Standing Rule XXX governs the full Senate’s treaty procedure.

The Constitution requires two-thirds of those “present,” or voting. As mentioned, Alexander Hamilton foresaw possible political gamesmanship in the ratification process,

¹⁰⁶ In response to this very practice of treaties moving far along in the development stage that it takes political capital, often not spent, to extricate from even that level of agreement, the Bush Administration has initiated an informal policy group to look down the road at potential such entanglements particularly in the environmental context. This would seem to be a lesson learned from Rio and Kyoto. Participants are drawn, *inter alia*, from the State Department, Council on Environmental Quality, and National Security Council.

¹⁰⁷ See Rabkin, pp. 12-16.

¹⁰⁸ See discussion of NAFTA, *supra*.

detailed in Federalist No. 75. Hamilton argued that requiring two-thirds of those “present” would mitigate these opportunities. Hamilton’s fears were prescient, though the resolved language suffers a similar soft underbelly for political hijinks.

Imagine one party seeing great political gain in voting for a politically charged treaty so long as it failed, and great peril – political and otherwise – if enacted. This describes the dynamic between many Senators and Kyoto. Extensive polling data show, for example, that the concept of “doing something” about “global warming” enjoys popular support so long as it remains a proposal potentially warding off future catastrophe. The actual requirements of massive energy use reductions, and how to attain them, are not quite so popular.

Consider a height of media and trade competitor outrage about a U.S. President having informally “rejected” a treaty, say after one World or Kyoto summit. The savvy Majority Leader might schedule a treaty vote (see debate over “Transmittal,” *supra*). The intent would be the near-certain, near-unanimous support of one party and a nicely contrasting party bloc voting nearly unanimously against. Two-thirds would not be achieved. Whispers to (certain among) the Majority party’s supporters in industry could issue that the treaty stands no chance, so do not become alarmed. This display would provide one party an opportunity to declare their concern and support for a document that is politically advantageous among certain constituencies, while casting its opposition as heartlessly standing in the way. That party would carry a powerful rhetorical weapon into the next elections.

This scenario collapses should most, *e.g.*, Republicans simply not be “present” come vote time. In such case, it seems highly likely the attempted ploy would severely

backfire, to great fanfare and political heat from the other party's own "green" base. Members would rush to the well to change their vote, and/or the treaty would ultimately be pulled from consideration, naturally amid claims of the opposition's irresponsibility. The alternative to this retreat would be a party single-handedly responsible for the U.S. committing itself to a treaty wildly unpopular even in theory among most labor and energy consuming interests. For this reason, the required Senate vote remains subject to gamesmanship.

Further, and as referenced, *supra*, in theory problems can arise with agreements open for ratification though they are subject to further negotiations, and indeed may require significant narrowing of the meaning of its various provisions before offering sufficient detail to be enforceable or even considered a meeting of the minds. Kyoto is a sterling example of such problems.

Kyoto's express window for ratification was already open by, *e.g.*, the November 2000 COP-6 in The Hague, and numerous countries had already ratified the agreement such that it could go into effect against them should it gain sufficient ratifications.¹⁰⁹ The Hague negotiations collapsed with no alteration or narrowing of the terms after the EU and U.S. avowed wildly divergent opinions on the meaning of several terms key to the agreement's financial impact on the U.S.¹¹⁰ The parties immediately called "COP-6.5",

¹⁰⁹ Of course, these ratifying nations were not those facing actual emission reduction obligations under Kyoto, but among the 140 "exempt" nations, who were principally made eligible to receive wealth transfers under the treaty's auspices.

¹¹⁰ These negotiations occurred after the U.S. presidential election but prior to its resolution. There, the EU negotiators, likely sensing desperation on the part of Clinton Administration negotiators aware an administration opposed to Kyoto might well be inaugurated soon, refused to take "yes" for an answer on key issues on the table. Specifically, they held to a unique assertion regarding the significant limitation upon sinks (credits for land use practices which actually remove GHGs from the atmosphere), simply not visible to the naked eye when reading the relevant Kyoto title (Article 3). The EU implausibly insisted that parties intended the language that sinks "shall be used to meet the commitments under this article" really only intended allowance for insignificant sink credits. Given the U.S. intended to meet a major portion of

held in Marrakech in September 2001, to resume negotiations. By that time, President Bush had taken office and repeated his campaign opposition to Kyoto, solidifying the rhetorical, if not *de facto*, “rejection” by the U.S. initiated at The Hague collapse.

Therefore, Kyoto actually collapsed, so far as U.S. participation is concerned, under the prior administration. The more relevant lesson is that treaties open for ratification can, and often do, present little in the way of an actual meeting of the minds permitting implementation and compliance. Ratification should always be undertaken warily, but, as this shows, should not even be considered when the treaty remains subject to determining what it is that parties actually agreed.

Deposit of Ratification Instrument

Despite the Clinton Administration negotiating Kyoto, for example, over the course of 25 months it never “communicated” the treaty to the Senate for a ratification vote.¹¹¹

Still, though a vote sufficient for ratification vote would create a stronger argument of commitment, under Vienna Article 18, than would mere signature, it does not formalize “consent to be bound by the treaty”, pursuant to the terms of most pacts. Even after agreement, signature, and a country is not formally bound to the terms of a treaty until it submits its instrument of ratification.¹¹²

its Kyoto commitment through sinks, this initiated the beginning of the (temporary?) “end” of full-fledged U.S. participation in Kyoto talks.

¹¹¹ See “Submission”, *supra*, for discussion of the necessity of communicating a treaty to the Senate, or whether the Executive’s signature is sufficient justification for the Court to assert the Senate’s ability to ratify the document

¹¹² See the UN’s “Model Instrument for Ratification”, at <http://untreaty.un.org/English/TreatyHandbook/annex4.htm>.

Post-Ratification

Treaties can either require parties to enact implementing legislation, or be “self-implementing”, that is, needing no new authority to implement its terms.¹¹³ Clearly, of course, as authorities vary by state, a self-implementing treaty to one party may require implementing legislation by another. Typically, however, treaties that are self-implementing to the U.S. provide reporting and accounting functions generally available to any relevant regulatory or administrative body under existing authority and require no specific appropriation.

¹¹³ *Implementation* The executive branch has the primary responsibility for carrying out treaties and ascertaining that other parties fulfill their obligations after treaties and other international agreements enter into force, but the Senate or the entire Congress share in the following phases.” “Treaties and Other International Agreements: The Role of the United States Senate”, p. 12. “A question that may be raised under U.S. law is whether or not Congress has a duty to implement a treaty which is in force internationally, but which requires additional legislation or implementation or an appropriation of funds to give effect to obligations assumed internationally by the United States. When implementation of a treaty requires domestic legislation or an appropriation of funds, only the Congress can provide them.” *Id.* at pp. 166-67. Despite no specific implementing legislation, however, the Senate has indeed appropriated funds in pursuit of administrative programs seeking to advance Rio’s objectives.

The FRC Report continues, “The extent of congressional obligation to implement a treaty under U.S. law has not been resolved in principle. FN 61 According to an often-cited authority, Congress has generally responded ‘to a sense of duty to carry out what the treaty-makers promised, to a reluctance to defy and confront the President (especially after he can no longer retreat), to an unwillingness to make the U.S. system appear undependable, even ludicrous...’” *Id.* at 167, quoting Henkin, *Louis. Foreign Affairs and the United States Constitution*. 2d ed. 1996, pp. 205-206. The referenced FN 61 says in pertinent part, “[F]ailure to implement an internationally perfected treaty would constitute a violation of obligations assumed by the United States under international law. See Memorandum of April 12, 1976, by Monroe Leigh, Legal Adviser, Department of State, as quoted in U.S. Department of State. *Digest of U.S. Practice in International Law* 1976. 1977, p. 221.” This begs the question: “to precisely what extent was the “non-binding” Rio binding?”

Addressing this question prior to ratification, “[t]he [Senate Foreign Relations] Committee made clear, in other words, its view that ‘[t]he final framework convention contains no legally binding commitments to reduce greenhouse gas emissions’... While these statements may not be as legally binding as a formal condition to the Senate’s ratification of the 1992 Convention [ed: reservations were prohibited by Rio’s terms], it is doubtful that any administration could ignore them.” “Global Climate Change: Selected Legal Questions about the Kyoto Protocol”, p. 4. CRS Report for Congress (March 29, 2001), citing in part 138 CONG. REC. 33521 (Oct. 7, 1992)(statement of Sen. McConnell).

To avoid future such uncertainty, in S.Res. 98 the Senate “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.” See CRS Report at p. 6, FN 25.

An example of a self-ratifying treaty is the Rasmussen Convention, or Convention on Wetlands of International Importance Especially as Waterfowl Habitats.¹¹⁴

The Convention requires no implementing legislation as it merely requires maintenance of a list of wetlands of international importance and encourages “wise use” of wetlands in order to preserve the ecological characteristics from which wetland values derive. The required function(s) can be effected under existing regulatory and/or administrative authority, in this case the task is merely the U.S. Fish and Wildlife Service serving as an administrative authority, in consultation with the Department of State.¹¹⁵

The Kyoto Protocol, however, is an entirely different story. Even in theory it is highly suspect that Kyoto could possibly proceed without implementing legislation. This because for the U.S. to achieve its obligations realistically requires significant reduction in emissions from energy use. The former, emissions, are for the most part not considered “pollutants” and therefore not regulated; the latter, actual energy use, is not regulated in any governmental sense but by market forces. Kyoto reductions would in fact require a massive series of initiatives to implement its regime, from emissions limitations and myriad tax provisions to internal versions of, *inter alia*, the international verification and trading infrastructures. That maze is illustrative of a treaty that is decidedly not self-implementing.

¹¹⁴ I.L.M. 11:963-976; September 1972. This Convention entered force on December 21, 1975, after the required signatures of seven countries. The United States Senate consented to ratification of the Convention on October 9, 1986, and the President signed instruments of ratification on November 10, 1986.

¹¹⁵ See <http://laws.fws.gov/lawsdigest/treaty.html#list>.

Withdrawal

The U.S. Constitution is silent as to the process for treaty withdrawal. Treaties provide their own provisions for withdrawal from their commitments. Kyoto's procedure, for example, is set forth in Article 27, as follows:

- “1. At any time after three years from the date on which this Protocol has entered into force for a Party, that Party may withdraw from this Protocol by giving written notification to the Depositary.
2. Any such withdrawal shall take effect upon expiry of one year from the date of receipt by the Depositary of the notification of withdrawal, or on such later date as may be specified in the notification of withdrawal.
3. Any Party that withdraws from the [UNFCCC] shall be considered as also having withdrawn from this Protocol.”

Clearly, Senate ratification of a treaty that includes a withdrawal mechanism should resolve the question of the legitimacy of an executive acting pursuant to such mechanism. Though withdrawal can be politically contentious, little controversy appears likely over the actual *process* of withdrawal from treaties in-effect.¹¹⁶

That focused upon in this paper, however, is the curious, topical matter of withdrawing from agreements not ratified, because of the possibility of obligations arising from pre-ratification commitments.¹¹⁷ The treaty may merely be signed, and not

¹¹⁶ Yet this is not the case, be the treaty in effect or otherwise. “Domestically, the Constitution does not prescribe a process for the United States to terminate a treaty, and the process remains controversial. Treaties have been terminated in a variety of ways, including by the President following a joint resolution of Congress, by the President following action by the Senate, by the President and with subsequent congressional or Senate approval, and by the President alone.” “Treaties and Other International Agreements,” at 14.

Regarding ABM, controversy exists in that numerous Members of Congress have filed suit against President Bush's invocation of the withdrawal provision in the anti-ballistic missile (ABM) treaty, signed with the now-defunct Soviet Union. See also S. 1565 (107th), proposed Senate resolution of disapproval.¹¹⁷ There is also little room to dispute that an “agreed to” treaty as yet unsigned requires no withdrawal, given that even the “troublemaking” provision Vienna 18, is triggered by the signature, not some even less formal level of “commitment”. Specifically: “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...” The canon *expressio unius est exclusio alterius* would indicate that “commitments” begin with the signature. Also, the pre-signature,

transmitted to the Senate. The document may have been transmitted but not yet taken up. As discussed in “Submission”, *supra*, that transmittal may or may not matter. Finally, a treaty may have been taken up for Senate consideration, but failed to achieve the requisite two-thirds vote.¹¹⁸

Kyoto’s sole relevant provision addresses only a treaty having entered into force and offers no guidance as to how a state extracts itself from whatever commitments are incurred through signature.¹¹⁹ This is seemingly true with the Vienna Convention’s numerous relevant Articles (54 - 72), though those seem arguably susceptible to claims that they also translate at minimum in spirit to state efforts to “[make] its intention clear not to become a party to the [unratified] treaty”.

The official offices of the UNFCCC ought to serve as an authority on this issue, but, curiously, the same UNFCCC correspondence to the author regarding the U.S. status re: Kyoto, cited in FN 19, *supra*, also asserted: “There is no procedure for the withdrawal of a signature in the [UNFCCC or Kyoto].” A follow-up request as to whether this indicates the UNFCCC does not recognize the Vienna Convention has gone unanswered to date.

“agreement” stage as in the 1997 Kyoto “agreement” likely does not rise to the level of “exchanging documents.” See the canons *noscitur a sociis* and *eiusdem generis*.

¹¹⁸ Does the latter circumstance satisfy the Vienna test of making “its intention clear not to become a party to the treaty”? This is a fascinating question given that “(6) Treaties Reported by the [Foreign Relations] Committee but neither approved nor formally returned to the President by the Senate are automatically returned to the Committee calendar at the end of a Congress; the Committee must report them out again for the Senate to consider them.” Therefore, a “defeated” treaty is not rejected unless returned to the President. See “Treaties and Other International Agreements: The Role of the United States Senate”, p. 12.

¹¹⁹ For an example of withdrawal from a treaty in effect, see U.S. termination of recognition of compulsory jurisdiction of the International Court of Justice *Treaty Series*, vol. 1, p. 9.

We can be confident that, at least in the case of the U.S., the Vienna Article 18 requirement is not satisfied by senior officers merely speaking ill of a treaty.¹²⁰

As regards the never ratified, never transmitted Kyoto (or Rome), President Bush's badmouthing of the treaty, though he may clearly still reject it, would not be considered to constitute rejection by "denunciation." The U.S. continues to send delegations to the relevant negotiations, though in a strange, voluntarily mitigated role that is a matter of some controversy.¹²¹ Kyoto provides for "observers" in Article 15: "2. Parties to the Convention that are not Parties to this Protocol may participate as observers in the proceedings of any session of the subsidiary bodies. When the subsidiary bodies serve as the subsidiary bodies of this Protocol, decisions under this Protocol shall be taken only by those that are Parties to this Protocol." It is this provision the Administration seems to believe it is accessing by attending negotiations in full force, but in a somewhat "backbench" role.¹²²

¹²⁰ Vienna does permit rejection or withdrawal, if not elsewhere provided otherwise and only under certain conditions, by "denunciation." See, *e.g.*, Articles 42-44, 56, *etc.* However, that appears to be a term of art applicable only to executives with unilateral power to effect a treaty. Clearly, given the discussion above, that does not by itself seem to exclude the U.S. and its own system's peculiarities, when a treaty has yet to be ratified. Still, President Bush's precedent regarding Rome has established how the U.S. expresses its rejection. Mere badmouthing can reasonably be viewed as a negotiating ploy for a better offer.

¹²¹ One reason provided by the Bush Administration, publicly if informally for the U.S. not having submitted any communication to the UNFCCC indicating its intent to not be bound by Kyoto is that the U.S. must remain a part of "the Kyoto process". There is no "Kyoto process," however, until the treaty achieves sufficient ratification to go into effect. Until that time, these negotiations remain part of the Rio Process (*e.g.*, Kyoto emerged not from COP-1, or a Kyoto process, but COP-3, of the Rio Process pursuant to Rio Article 7). The U.S. delegation now assumes a second-class citizen posture, communicating desires through a proxy nation (typically Canada, one of the "umbrella group" nations; other such groups are the EU, the G-77 and China, *etc.*). This seems a wasted exercise as until Kyoto goes into effect, as a ratifying party to Rio the U.S. has every right to actively participate in the current round of COPs. This is another example of how protocol, or the desire to not upset other parties, dominates treaty process more than legal requirements.

¹²² The Administration are likely incorrect. Specifically, the U.S. is informally spreading the word that because it has not ratified Kyoto it is not a "Party", but thereby eligible for Article 15 "observer" status. Yet it is clear that "Party" status originated with the agreement to Kyoto's terms at the close of COP-3. Specifically, Kyoto's own language belies a claim that until Kyoto is made effective by sufficient ratifications there are no "Parties" to the agreement.

Instead, withdrawal from a treaty (in effect) sufficient to satisfy Vienna is accomplished by communicating this intent to the other parties to the treaty.¹²³ As regards the unratified Rome Treaty, President Bush doubtless satisfied the relevant requirement by submitting an instrument rescinding the signature to the same body to which the signature was communicated. Regarding such treaties, however, until such communication, any nation is free to pursue an action seeking to have, for example, either the Bush energy plan calling for the construction of more coal-fired power plants, or its "Climate Action" proposal allowing increased greenhouse gas emissions, for they clearly violate Kyoto's "object and purpose".¹²⁴

Finally, reconsider the Geneva Convention Protocol I. President Reagan transmitted a statement to the Senate whereby he did not send the language and ask for an unsuccessful vote on ratification, but asked for an "expression of the sense of the Senate" that it shared his disapproving view of the agreement. This appears to be a mere semantic distinction, but by so doing President Reagan performed a burden shift, establishing by precedent a position on which very few hard and fast rules govern. This transmittal intimated that the treaty was purely in the Senate's realm upon Executive

The relevant provisions include, but are in no way limited to, the following: a) Kyoto's preamble prior to its articles states "The Parties to this Protocol...Have agreed as follows: [Articles]...", dated December 1997 and setting forth articles clearly reading in the present tense, and not as if relevant solely upon ratification; b) Articles 6.2, 7.4, 16, 18 and 20, among others, all reference activities which to the extent they have been addressed in the days since COP-3 manifest that it is "Parties" -- to the Protocol, not the UNFCCC -- who have been deliberating since; c) Article 13.2 makes clear that any decisions made regarding further narrowing of the Kyoto language, subsequent to COP-3, were made by Parties to the Protocol; and d) Article 13.7 appears to set forth the mechanism by which COP-6.5 (Bonn) was called and particularly timed, at the request of a Party to Kyoto.

In sum, it takes remarkable creativity to contend under the language of Kyoto that no Parties to Kyoto exist until sufficient ratifications to bring Kyoto into effect have been submitted to the Directorate.

¹²³ See Vienna Article 67.

¹²⁴ Further, would the U.S. extending, or even permitting the continued application of, oil and gas depletion allowances (tax breaks facilitating lower-priced energy) also constitute a violation of Vienna via Kyoto? If so, how about recently extended state subsidies for the German coal industry, a nation which subsequently ratified Kyoto?

signature, when in fact it is likely in the province of either the Executive or the Senate at this point to act.

CONCLUSION

The Kyoto Protocol, and its predecessor the Rio Treaty, offer an excellent joint-example of the distorted modern application of the Treaty Power. This article intends to detail the impropriety of the U.S. agreeing to amend the UN Framework Convention on Climate Change (UNFCCC, or Rio Treaty), by ratifying the Kyoto Protocol.

For whatever specific reasons (economic growth, failure to foresee the energy requirements of the “new economy”, or other), the U.S., like many nations, failed to meet its voluntary Rio targets.¹²⁵

Now some advocates assert, “Because the U.S. has not met its Rio goal, we must commit to even greater mandatory reductions (Kyoto)”. Attempting instead to comply with the initial treaty seems the more appropriate response, for several reasons.

Rio went into force in March 1994. President Clinton did not request, nor did Congress enact, independent legislation implementing Rio, which was not an inherently self-executing treaty.s Authority and precedent make clear that responsibility for proposing such programs lies with the White House. If our “non-binding” Rio obligations in fact “bound” the U.S. to achieve specific reductions -- contrary to contemporary Senate and Executive assertions of U.S. intent -- then the Executive interpretation of Rio Article 4 throughout the 1990s was actually incorrect, and is

¹²⁵ See, e.g., <http://unfccc.int/resource/docs/natc/eunc3.pdf>. The EU, which under Kyoto has negotiated a “bubble” such that it could pool its increases and “reductions”, announced in May that it met its Rio target. It said it had reduced greenhouse gases by 3.5 percent below 1990 levels in 2000. This is commonly attributed to the ending of coal subsidies in Great Britain in their push to replace coal with gas, shutting down East German industry and that Europe did not match the U.S.’ decade-long economic expansion. Russia, e.g., met its target by regressing economically.

responsible. The pending question is apparently: does the U.S. respond by attempting to meet such Rio promises, or by making further, even deeper, binding promises?

Skipping specific pursuit of the U.S.' Rio promises, in favor of Kyoto's binding commitments even greater than those we've failed to attain, seems highly illogical. Compounding this of course is that, precisely five years ago tomorrow, the Senate unanimously spoke to what it recognized was an unacceptable drift away from the U.S. Rio stance adamantly opposed to binding commitments. The Senate, seeing what was developing, asserted its "Advice" pursuant to Article II, Section 2 of the U.S. Constitution, passing S. Res. 98.

Subsequent to and despite this Advice, U.S. negotiators clearly disregarded both major Byrd-Hagel recommendations: Kyoto did not require developing countries to share our commitments, and even the Clinton White House economic advisors have recanted their refutations of the Kyoto cost estimates.

Since then, nothing has emerged to indicate that Kyoto does not still violate both key Byrd-Hagel conditions, and it is likely that very few Senators have amended their position against a treaty causing "serious economic harm." However, Clinton Administration officials did admit that they began working on the plan for binding commitments within one year after Rio went into effect.

Kyoto, too, is clearly intended to be a similar step in a "treaty hopping" campaign: even the models on which it is based predict an undetectable climatic impact¹²⁶ -- at a cost to the U.S. of up to \$400 billion annually -- yet may be 1/30th of what its proponents

¹²⁶ See, Testimony of Dr. Sallie Baliunas to the Senate Committee on Environment and Public Works, at <http://www.techcentralstation.com/1051/envirowrapper.jsp?PID=1051-450&CID=1051-031302C>.

seek.¹²⁷ Rio and Kyoto offer differing commitments but purport “the same ultimate objective.”¹²⁸ The UN IPCC has said this means reducing GHG emissions by as much as 60-80%, which wildly exceeds Kyoto’s specified ambitions.

As such the U.S. should require, prior to and as part of ratifying any further agreements, express acknowledgement not only of the actual “ultimate goal”, but that it is committed to its practical requirements, in this case up to “30 Kyotos”.

Such “treaty hopping” agendas illustrate the importance of Senate treaty “reservations”, or the Senate’s second bite at the “Advice” apple. This comes of course during the “Consent” function, which function the U.S. negotiators unfortunately eviscerated. After agreeing to terms incompatible with Byrd-Hagel, the Administration also accepted Kyoto’s prohibition on reservations, or the Senate’s ability to specify the specific understandings or conditions of the U.S. commitment. This despite the Senate also having forewarned the administration about this in advance of Kyoto.¹²⁹

In summation, President Bush ought to match his assertions of having “rejected” Kyoto with the requisite submission to the UN to that effect, as was done regarding the International Criminal Court.¹³⁰ In the absence of that act, the White House must at

¹²⁷ “Yet the climate simulations lead to the conclusion that the Kyoto reductions will have little effect in the twenty-first century (15), and ‘30 Kyotos’ may be needed to reduce warming to an acceptable level.” James Hansen, Makiko Sato, Reto Ruedy, Andrew Lacis, and Valdar Oinas, “Global warming in the twenty-first century: An alternative scenario,” *Proceeding of the National Academy of Sciences*, August 29, 2000. Hansen was citing Malakoff, D. (1997) *Science* 278, 2048.

¹²⁸ “[S]tabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.” See, *e.g.*, Rio Article 2.

¹²⁹ See “Treaties and Other International Agreements,” at 274, citing .

¹³⁰ The President manifested that this is how the United States makes “its intention clear to not become a party to the treaty,” as required by “customary” law and the Vienna Convention Article 18. “[S]ignature by the U.S. does impose an obligation on the U.S. 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 U.S. ratifies the Protocol or makes clear its intent not to do so.” “Global Climate Change: Selected Legal Questions about the Kyoto Protocol”, CRS Report for Congress (March 29, 2001).

minimum assist resolution of the ambiguous U.S. role in Kyoto by requesting the Senate disapprove of the treaty. In the absence of that, the Senate should recognize that there is no reverse equivalent of the “presentment” clause¹³¹, regarding treaties. Only protocol, not any constitutional prohibition, impedes Senate consideration of a signed treaty. Certainly given the imperative rhetoric surrounding Kyoto, if President Bush insists on continuing the U.S.’ ambiguous role the Senate should take matters into its own hands, and decide the fate of this agreement.

That resolution should by definition be rejection of Kyoto. Otherwise, by accepting this double indignity of ignoring advice and prohibiting reservations, this body would condone Executive circumvention of the Senate’s constitutional treaty role.

Though it has not yet done so, precedent indicates the Senate can also effect this outcome by passing a Sense of the Senate expressing disapproval of a signed, not ratified treaty. See, “Withdrawal,” in attached article.

¹³¹ U.S. Constitution, Article I, Section 7: “Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States”.