

THE PERILS OF “SOFT” AND UNRATIFIED TREATY COMMITMENTS:

THE EMERGING CAMPAIGN TO “ENFORCE” U.S. ACKNOWLEDGEMENTS

MADE IN AND UNDER THE RIO TREATY AND KYOTO PROTOCOL

USING CUSTOMARY LAW, WTO, ALIEN TORT CLAIMS ACT, AND NEPA

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July 2003**

I. Introduction and Summary¹

On 31 December 2000, at the last permissible hour and as he prepared to leave office, President Clinton committed the U.S. to the Rome Statute of the International Criminal Court.² In so doing, he publicly asserted that he didn't agree with its contents.³ Such behavior was not well received among particular circles⁴ viewing it as the nadir in a long-growing diminution of the solemnity that the United States affords treaty commitments. At present, at least one authority inventories 400 discrete agreements bearing the U.S. signature but no ratification, stretching to the early days of the republic.⁵

Recognizing the consequences of so frivolously wielding the U.S.'s signature, President George W. Bush's Department of State consummated the President's claim that the U.S. had no intention of being bound by its signature, submitting the simple but

¹ This paper expands upon the discussion of Vienna and customary law as they apply to the U.S.'s Kyoto signature, in "Modern Developments in the Treaty Process", Christopher C. Horner (Federalist Society) (<http://www.fed-soc.org/Intllaw&%20AmerSov/Treatypaper.pdf>).

² See Treaty at http://www1.umn.edu/humanrts/instree/Rome_Statute_ICC/Rome_ICC_toc.html. U.S. Ambassador-at-Large for War Crimes Issues David Scheffer signed the agreement on the last day a country could sign, per its terms, without at the same time depositing an instrument of ratification.

³ "Clinton stated that he approved the signing of the Rome Treaty to 'reaffirm [the United States]' strong support for international accountability.'...Clinton did acknowledge that the Rome Treaty has 'significant flaws'. In particular, Clinton said his administration was 'concerned that when the Court comes into existence, it will not only exercise authority over personnel of states that have ratified the Treaty, but also claim jurisdiction over personnel of states that have not.' Due to these concerns, Clinton said, 'I will not, and do not recommend that my successor submit the Treaty to the Senate for advice and consent until our fundamental concerns are satisfied.' He stated that the U.S. 'should have the chance to observe and assess the functioning of the Court, over time, before choosing to become subject to its jurisdiction.' However, he stressed that by signing the treaty, the United States 'will be in a position to influence the evolution of the court. Without signature, [it] will not.'" See "U.S. Signs Rome Treaty Establishing ICC", <http://www.unausa.org/newindex.asp?place=http://www.unausa.org/policy/NewsActionAlerts/info/dc010301.asp>.

⁴ Sen. Jesse Helms (R-NC), then-Chairman of the Foreign Relations Committee, called "Clinton's decision to sign the Rome Treaty...in his final days in office...as outrageous as it is inexplicable.' Commenting on the Court's jurisdiction over non-parties to the treaty, Helms said, 'By signing, the President has effectively given his approval to this unprecedented assault on American sovereignty.' He described the Clinton signature as 'a blatant attempt by a lame-duck President to tie the hands of his successor.'" Id.

⁵ See Witkor, Christian L. *Unperfected Treaties of the United States of America, 1776-1976*, Dobbs Ferry, N.Y.: Oceana, 1976-1994. This nine-volume set contains over 400 treaties that the United States signed but never entered into force.

requisite communication to the United Nations.⁶ By this letter, however, the U.S. reaffirmed not only that treaty signatures do in fact carry obligations but arguably the method by which the U.S. Executive expresses its intention to not be bound by a treaty's object and purpose. This underscored the potential that the U.S. is obligated under other unratified agreements bearing its signature. That reality appears close to bearing consequences.

In 2002, the Friends of the Earth-Europe (FoE-E) petitioned the European Union (EU) to penalize the U.S. for asserting it will not pursue the Kyoto Protocol as the (for now) culmination of its commitments under "climate change" treaties.⁷ That is, FoE-E in effect seeks to enforce the objective of the Rio and Kyoto climate treaties, through the EU exercising \$4bn in retaliatory authority recently granted it by the World Trade Organization (WTO) in the form of tariffs on energy intensive products from the U.S.⁸ Another environmental pressure group, Greenpeace, and its co-plaintiffs employed similar logic (and the island nation of Tuvalu threatened to), citing that Man is dangerously interfering with the earth's climate in a lawsuit seeking damages for

⁶ The specific language selected was: "This is to inform you, in connection with the Rome Statute of the International Criminal Court adopted on July 17, 1998, that the United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000. The United States requests that its intention not to become a party, as expressed in this letter, be reflected in the depositary's status lists relating to this treaty." Letter to UN Secretary General Kofi Annan, <http://www.state.gov/r/pa/prs/ps/2002/9968.htm>. Also, see detailed discussion of Vienna, *infra*. Cabinet officers made several public statements – revealing as to their motivations and anxiety – about the President's decision: Secretary of State Colin Powell – "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 Defense Donald Rumsfeld noted that "even without ratification, the president's signature conveys standing and a U.S. obligation to support and not undermine the Treaty."

⁷ See http://www.foeeurope.org/press/AW_16_09_02_GMOsynergy.htm.

⁸ These include the Rio Treaty, formally styled as United Nations Framework Convention on Climate Change (UNFCCC), a "non-binding" or voluntary, but unanimously ratified agreement committed parties to "voluntarily" reduce or limit identified "greenhouse gas" (GHG) emissions to 1990 levels. The Kyoto Protocol sought to amend Rio through a "binding", though to date unratified (by the U.S.) commitment including most among the 187 parties ratifying Rio but binding only 38 particular industrialized nations to more aggressively reduce or otherwise limit GHG emissions to levels particular to each party.

evolving and future climate change.⁹ Subsequently, the International Center for Technology Assessment (ICTA), a group dedicated to questioning “the development and commercialization of transportation technologies,”¹⁰ filed suit to force the United States Environmental Protection Agency (EPA) to act on ICTA’s petition seeking control of GHG emissions from vehicles.¹¹

It is important to note that none among the FoE-E, ICTA or Greenpeace, *et al.*, actions expressly seek as a matter of law to enforce either climate treaty, which at present is not feasible.¹² Still, as legal if not scientific propositions and for different reasons these pressure groups’ efforts hold mighty potential. Shakespeare’s lesson does not apply, that that without remedy should be without regard. The current unenforceability of either Rio or Kyoto does not mean they cannot be employed to the same or at least similar ends, through other means.

Predecessor, like-minded actions have overlooked the obvious, and to an extent these filings repeat the mistake when asserting, *e.g.*, “scientists now predict that average world temperatures will increase up to 6 degrees F over the next century. This rise in global temperature is caused by human activities creating a build up of greenhouse gases

⁹ See Greenpeace press release, found at http://www.greenpeace.org/news/details?news_id=24022&campaign_id=3937. See also coverage of the claims, “U.S. faces legal battles as climate bogeyman,” Reuters August 29, 2002, at http://www.enn.com/news/wire-stories/2002/08/08292002/reu_48290.asp.

Though merely political rhetoric, even British Prime Minister Tony Blair has gotten in on the act, citing the U.S.’s acknowledgment of Kyoto’s alarmism as why the world continues to expect Kyoto compliance. (<http://www.guardian.co.uk/international/story/0,3604,784705,00.html>). Blair speech found at http://www.ukun.org/xq/asp/SarticleType.17/Article_ID.489/qx/articles_show.htm. EU officials have threatened such consequences for some time, as discussed in “World Trade Organization”, *infra*.

¹⁰ See ICTA Complaint, para. 6. Found at <http://www.icta.org/co2suit/complaint.html>.

¹¹ Co-plaintiffs include green pressure groups Greenpeace and Sierra Club. *ICTA et al. v. Whitman* (CV-02-02376) alleges merely a violation of the Administrative Procedure Act. “This is an action for declaratory judgment and mandamus relief challenging defendant’s, and others acting under her authority, failure to provide a substantive response to plaintiff [ICTA’s] petition for rulemaking concerning the emission of greenhouse gases from motor vehicles (Greenhouse Gas Petition).” See Complaint.

¹² Rio, despite its mandatory language, offers no enforcement potential in and of itself and to date the U.S. has not ratified Kyoto, a condition precedent to seeking *de jure* “enforcement”.

- primarily carbon dioxide, methane and nitrous oxide - in the atmosphere.”¹³ They fail, however, to plead on the basis of glaring “statements against interest”: Defendant “admits” this, too.¹⁴

U.S. legal and policy missteps, recent lawsuits by state attorneys general politically antagonistic to President Bush and the religiosity of climate change theory indicate that this spate of overtures will by no means be the last of their kind. Ultimately the light will go on for policymakers that the U.S. government must be called to reconcile the inexplicable and growing conflict between its international promises regarding “climate change” and its policies, and that the former have become potentially costly contrary to the administration’s apparent wishful thinking.

The plaintiffs bar appear primed to seize upon the State Department having exercised delegated powers¹⁵ to “unsign” Rome consistent with the President’s assertions

¹³ See ICTA Complaint, para. 17.

¹⁴ The exceptions of note include the FoE lawsuit citing in support of its claims that the U.S. government has formally acknowledged climate alarmism. see complaint, esp. paras. 45-54, at http://www.climatelawsuit.org/2002-08-26_Complaint.pdf.) Further, recently the Attorneys General of Connecticut, Maine and Massachusetts filed a the “Notice of Intent to Sue Under Clean Air Act § 7604” with the Environmental Protection Agency making in large part the arguments presented herein, regarding the U.S. having produced, in addition to its Rio and Kyoto commitments, a “National Assessment on Climate Change” [<http://www.usgcrp.gov/usgcrp/nacc/default.htm>] and submitted a “Climate Action Report 2002” to the UN pursuant to Rio [<http://yosemite.epa.gov/oar/globalwarming.nsf/content/ResourceCenterPublicationsUSClimateActionReport.html>]. Then, on the same basis, on February 20, 2003, these three AGs, joined by those from New Jersey, New York, Rhode Island, and Washington, filed a separate notice of intent to sue Administrator Whitman unless she agrees to promulgate New Source Performance Standards (NSPS) for CO2 emissions from power plants, pursuant to Section 111 of the CAA. Both climate products, as discussed in detail, *infra*, in effect further “admit” anthropogenic culpability in environmental damage via climate change. See also NRDC press release in “NEPA” discussion and discussion of “Other Acknowledgements,” *infra*.

The U.S. Senate nearly compounded matters even further when it recently passed – and a “lame duck” session concluding the 107th Congress nearly enacted – a statutory “admission” to accompany the myriad Executive Branch missteps. The Senate obtained 88 votes on final passage for H.R. 4, the “Energy Policy Act of 2002”, which would have, *inter alia*, formalized in the U.S. Code a policy conclusion recognizing a distinction between “climate variability” – what the Earth does -- and climate change, the latter implicitly anthropogenic and with an inherent environmental impact: From Title XIII of H.R.4, amending the Global Change Research Act, as amended, 15 U.S.C. 2901 *et seq.*: “SEC. 1342. CHANGES IN FINDINGS. Section 2 (15 U.S.C. 2901) is amended -- (1) by striking ‘Weather and climate change affect’ in paragraph (1) and inserting ‘Weather, climate change, and climate variability affect public safety, environmental security, human health.’” (emphasis added)

of rejection, as that act is reasonably interpreted as affirming U.S. adherence to two concepts of international “customary” law also codified in the Vienna Convention on the Law of Treaties.¹⁶ These tenets of relations between nations are that 1) a treaty signature binds a state to at minimum to do nothing that would defeat a signed pact’s object or purpose, even where a state’s domestic system requires ratification for the agreement to go into full and specific effect; and 2) this commitment remains viable until a state specifically communicates its intention to not be bound by the signed agreement.¹⁷ The first tenet also arguably means a signatory acknowledges, as appropriate to the particular agreement, the treaty’s underlying basis represents a “law of nations” or customary law.

By so reaffirming these tenets, even if by only renouncing its commitment to one such agreement – Rome -- the U.S. also buttressed claims that its signatures on the host of other signed-but-not-ratified agreements carry specific obligations and acknowledgements. More specifically, pressure groups have support to claim that the U.S. rhetorically disparaging, but never renouncing, its Kyoto signature acknowledges the theory of and an apparent law of nations regarding catastrophic anthropogenic “climate change,” doubtless including specific duties of industrialized countries. This is

¹⁵ Pursuant to 22 U.S.C. § 2656, “Management of Foreign Affairs”. The argument for such a writ is that State has failed to act in pursuit of President Bush’s “rejection” of Kyoto, or declaration that the U.S. had no intention of being bound by its signature on Kyoto or otherwise proceeding with the treaty, This is potentially important as State arguably established grounds for a *mandamus* action to compel it to so communicate to the United Nations regarding Kyoto or any other treaty that the President asserts the U.S. “rejects”. See, e.g., *U.S. ex Rel Boynton v. Blaine*, 11 S.Ct. 607, 612 (1891); see also discussion in “Obligations of Treaty Signature”, *infra*. Such a petition may be defeated upon an assertion on behalf of the President that Executive expressions of “rejecting” Kyoto were merely rhetorical expressions of disagreement with his predecessor having signed the treaty, intended to be of no legal effect.

¹⁶ For implications of the U.S.’s Vienna signature, see “Are Rio and Kyoto Acknowledgements Enforceable -- Vienna and Customary Law”, *infra*.

¹⁷ “[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). 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, Horner, discussion of “Withdrawal.”

compounded by the U.S.'s Rio ratification and subsequent acknowledgement in formal documents of climate alarmism. Such a confused quilt of climate assertions seemingly creates, or more reasonably enhances, the U.S.'s and its citizens' exposure pursuant to various regimes. Particularly, this inconsistent handling of treaty commitments creates or at minimum heightens exposure for "climate change" levies under the World Trade Organization, regulatory assessment and consideration obligations under the National Environmental Policy Act, and/or private liability under the Alien Tort Claims Act particularly for domestic operations.¹⁸

The pro-Kyoto community will hone its arguments which to date have not been overly artful and bring worse to bear in future efforts to invoke, or directly seek to hold the U.S. or American operations accountable under, the U.S.'s various express and tacit acknowledgements regarding the theory of catastrophic anthropogenic "climate change".¹⁹ For instance, it appears that the defenses employed with success against

¹⁸ A 1789 law providing aliens original jurisdiction in U.S. courts for violation of "the law of nations", dormant for over a century until given life by human rights actions and now being explored by foreign "environmental" plaintiffs. See discussion, *infra*.

¹⁹ A forerunner may be found in *Flores, et al. v. Southern Peru Copper Corporation* ((SDNY CV-00-9812), recently dismissed on jurisdictional grounds. See Alien Tort discussion, *infra*. Defendant in this ATCA action is a Delaware corporation with an office in New York City, which owns and operates copper mining and smelting operations near the city of Ilo, Peru. Plaintiffs, eight Ilo residents, asserted that their claim was not for environmental damage but health effects as a result of environmental pollution caused by defendant's operations. Nonetheless, they offer a likely parallel to future climate claims, arguing that the defendant has violated plaintiffs' rights to sustainable development under international law, on the basis that its operations systematically sicken and kill people in a manner contemptuous of human life (defendant's decision not to install particular pollution control devices).

Most illuminating is the even more recent *Sarei et al. v. Rio Tinto*, 221 F.Supp.2d 1116 (CD CA 9 July 2002), in which plaintiffs, residents of the Papua New Guinea island of Bougainville, alleged that defendant's mining operations caused crop damage in part due to its pollution changing the particular island's climate (and, in an inherently interconnected global climate system, implicitly altered the world's climate negatively – as discussed, *infra*, any anthropogenic change is presumptively "damage" in the public and policy debates). This was an element of defendants' alleged violation of plaintiffs' "international environmental rights". The trial court granted defendant's motion – "[a]s respects defendants' nonjusticiability arguments, the court concludes that plaintiffs' environmental tort and racial discrimination claims must be dismissed on act of state and international comity grounds. It concludes that all claims must

recent environmental Alien Tort Claims Act claims comity, *forum non conveniens* and the political question and act of state doctrines, offer no comfort for putative domestic ATCA “climate change” defendants. This is because these defenses’ success to date relies on actions complaining of overseas behavior and its environmental impacts both restricted to the borders of a particular foreign sovereign. The preponderance of inquiry in a complaint addressing instead domestic activities and their alleged global environmental implications will not involve the proper forum or impacts on international relations, but whether the alleged tort of contributing to climate change violates the “law of nations”. On this score, clumsy U.S. management of the climate change issue has placed its citizens at a decided disadvantage. At least as inviting is NEPA, which in its current state offers no defense to a claim that “climate change” is a necessary consideration that may be employed toward “paralysis by analysis” for major federal projects with a significant energy component.

The Bush Administration is cultivating already fertile ground to aid potential plaintiffs circumvent the unenforceability of Rio and Kyoto, in international *fora* and even domestic courts, through continuing to formally dignify and even “acknowledge” the unestablished theory of catastrophic anthropogenic climate change, in addition to maintaining its Kyoto signature unmolested. Gestures such as these were generally long-thought and specifically intended as mere cheap virtue in that they paid obeisance without incurring actual commitments.²⁰ This paper examines America’s specific

be dismissed on the basis of the political question doctrine.” *Id.* at 133. The matter now stands on appeal before the 9th Circuit. No such dismissals are likely to issue involving domestic ATCA “climate” claims.

²⁰ See, e.g., Statement of Senator McConnell, a staunch opponent of binding commitments, during Senate floor consideration of Rio. “I was concerned that it could be interpreted unilaterally by the executive branch to bind the United States to targets and timetables for greenhouse gas emissions. However, I am

obligations under both of these “climate” treaties, and how these commitments create legal risk for U.S. interests given “customary” international law and the Vienna Convention on the Law of Treaties purporting to codify it, the WTO, and the U.S.’s NEPA and Alien Tort Claims Act.²¹

In sum, little reasonable argument remains that the U.S. has not accepted the relevant customary requirements also found in the Vienna Convention on the Law of Treaties Article 18 and Restatement of the Law of Foreign Relations Section 312, and these combined with various U.S. submissions indicate the U.S. accepts the theory underlying Kyoto and related developed country obligations. Similarly, as this indicates that Kyoto’s basis and prescription rise to the level of “the law of nations” – the Alien Tort Claims Act’s moniker for customary law – U.S. operators are exposed to claims of “climate change” liability for domestic operations leading to purported global impacts, such claims being uniquely invulnerable to the defenses employed with success against environmental ATCA claims.

Both dynamics are compounded by the U.S. having successfully argued elevation of hortatory WTO preamble language advocating “sustainable development” to an enforceable principle in the regrettable “Shrimp-Turtle” decision. That is, as the U.S.

satisfied that we have clarified this issue in the Foreign Relations Committee...Because of these concerns, I felt compelled to discuss the possibility of a unilateral interpretation with the chairman of the Foreign Relations Committee who has given me his public assurances that if this treaty is amended or interpreted by the executive branch to commit the United States to stabilize greenhouse gas emissions, that it would be subject to ratification by the Senate. The Foreign Relations Committee has included language to this effect in the committee report accompanying this treaty to make the record on this point absolutely clear. The executive branch is precluded from interpreting this convention as a binding commitment to targets and timetables unless ratified by the Senate. Interpreting the aim of this convention in binding terms would amount to a material change in the treaty requiring the Senate's advice and consent. With the chairman's assurances, I am pleased to support this fine agreement.” **SI7151* 1992 WL 308108 (Cong.Rec.) October 7, 1992; see also page 12, § 2.4 (Evolution of the Global Climate Regime) of <http://www.ksg.harvard.edu/cbg/research/rpp/RPP-2002-08.pdf>.

²¹ Pressure groups also claim recourse under other U.S. laws, including the Endangered Species Act (16 U.S.C. § 1532), but such claims’ reliance on climate science as opposed to U.S. acknowledgements or commitments bodes little chance of success.

acknowledges the theory behind catastrophic man-made climate change, and an enforceable right to “sustainable development”, it seemingly recognizes obligations arising therefrom as equivalent to customary law or the law of nations. This leaves the U.S. or its citizens with a weak hand when Shrimp-Turtle is employed against them for America’s refusal to ratify (or actually renounce its commitment to) Kyoto. Finally, the totality of all three analyses indicates that the administration is without reasonable arguments against requiring climate change as a consideration under NEPA, and all of the obstructive consequences flowing there from.

This paper concludes that it is therefore past time to reevaluate the potential consequences of specific U.S. “climate” treaty commitments, and other looming risks encouraged through treaties -- ratified and otherwise – and related assertions. Such review militates for the Bush Administration to undertake a specific campaign to aggressively reassert U.S. sovereignty by clarifying for policy purposes what the U.S. does in fact acknowledge in particular agreements and filings, that to which the U.S. actually commits, and the scope of particular domestic statutory regimes. As also discussed, barring Executive leadership Congress maintains the ability and it also seems the responsibility to affect each of these goals.

II. The U.S. Treaty Process – Backdrop for Conflicting Climate Policies

Treaties in force range from bilateral agreements to multilateral pacts involving each of the nearly 200 member states of the United Nations. U.S. treaties have addressed all manner of international discourse, from rules of military engagement to mutual defense and termination of hostilities, creating a UN and special trade zones, international border delineation, and liability in international transportation.²²

As such, treaties, “conventions” -- or protocols and rounds offering amendments thereto which also are typically discrete agreements requiring independent ratification²³ -- are the manner by which states formalize codes for their relationships, both civil and criminal.²⁴ 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.²⁵

In modern practice the U.S. and its allies 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. The 50 States, who

²² The U.S. 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.” As discussed, herein, while technically accurate strict acceptance of this posture as reality requires a degree of self-delusion.

Treaty topics range even to 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/info usa/laws/tradeagr.htm](http://usinfo.state.gov/usa/info%20usa/laws/tradeagr.htm).

²³ See UN definitions, at <http://untreaty.un.org/ola-internet/Assistance/Guide.htm#treaties>.

²⁴ 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.

²⁵ For a compendium of treaties addressing “Penal Matters,” see <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/chapterXVIII.asp>.

under the Constitution have no treaty power,²⁶ 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”.²⁷

The 1997 Kyoto Protocol, also addressing that theory of man-made global warming, is exemplar of efforts addressing principally domestic activities.²⁸ It does claim a purported global phenomenon as its basis and the bulk of the world’s recognized states as parties, but selectively commits only certain nations to reduce their own domestic energy use emissions in relation to 1990 emissions to levels unique to each state.²⁹ If Kyoto becomes effective against the U.S., given current technology and for the foreseeable future, Kyoto thereby effectively rations and redistributes particular domestic economic activity by instituting a selectively applied 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 might hope to mitigate U.S. competitive advantages, if under the auspices of an agenda that simpatico domestic U.S. advocates have failed to achieve.³⁰

Consider past admonitions against such endeavors, cited by Cornell University Professor of Government and Constitutional Law Jeremy Rabkin:

²⁶ 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..."

²⁷ 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.

²⁸ 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.

²⁹ CITE to text and Annex I...For example, Australia committed to limit emissions to 8% above 1990 levels, while the United States pledged to reduce its emissions to 7% below 1990 levels (which is approximately 17% below 2000 (DOE cite)).

³⁰ “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), 19 March 2002, p. 14.

“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 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.’”³¹

Nonetheless, international agreements now proliferate such as Kyoto addressing domestic activities domestic efforts to regulate which having failed, and in the name of a global cause.³² French writer Maurice Borquin is quoted as saying, “International law is a legal crystallization of international politics.” Or, in this context, it seems fair to paraphrase Clausewitz on war: treaties are the extension of politics by organized state lobbying.³³ Inconsistent and even irresponsible treaty behavior, as discussed herein, is therefore highly inadvisable.

³¹ Rabkin, “Why Sovereignty Matters,” (1998 AEI Press), p. 22, citing Proceedings of the American Society of International Law, vol. 23 (1929), pp. 194-6.

³² The Montreal Protocol, calling for a phase out of domestic use of chlorofluorocarbons (CFCs), and the Stockholm Convention on Persistent Organic Pollutants, calling for a phase out of some chemicals, closely resemble Kyoto in that they address domestic activities with a purported global impact.

³³ 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. 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.*, subjectively selective) version of the pre-1995 U.S. congressional practice of issuing special passes allowing special access. 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.”

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 Horner, “Modern Developments in the Treaty Process”, n. 34. For a detailed discussion, see David Davenport, “The New Diplomacy”, Policy Review Vol. 116 found at www.policyreview.org/dec02/davenport_print.html.

Treaties purporting to involve binding commitments are enforceable against parties to the agreement.³⁴ Disputes over compliance or implementation of the bulk of treaties, those best characterized as civil agreements, may be heard before the International Court of Justice³⁵. “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.”³⁶

Originally, the U.S. Constitution’s Framers conceived of treaties not as the creation of laws, but more as contracts between states bearing the force of law.³⁷ Time and intervening “criminal” agreements, of course, have further clouded this assessment.³⁸

³⁴ 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) also styled as the “Rio Treaty”. 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). As discussed, it uses mandatory language but, citing no date by which its promises are to be met, is widely considered as “voluntary.”

³⁵ “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>.

³⁶ *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 deemed by parties to Rome to have transgressed to the detriment of ratifying nations. Certain groups style Rome as an “environmental” treaty, one of 44 documents bearing a U.S. signature without ratification (Rome is the only one “unsigned”). See <http://www.ecolex.org/TR/state/comply/adopt/EN/USAM.htm>.

See the panoply of international legal bodies at <http://www.un.org/Depts/dhl/resguide/specil.htm>. Individual agreements obtain their popular name, typically, from the site of some meaningful level of agreement, *e.g.*, Ghent, Vienna, Rome, Kyoto. For a listing of such popular names, see <http://untreaty.un.org/English/sample/SimpleSample.asp>. 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.*, and also spawning the World Trade Organization (WTO); see http://www.sice.oas.org/agreements/wto_e.asp#WTO|GATT. See discussion, *infra*.

³⁷ 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.

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 coherent, uniform understanding and compliance. Indeed, states have ratified treaties including Kyoto despite numerous negotiations remaining to define what was actually agreed.³⁹ Regardless of whether the treaty terms declare the document open for ratification, such language is occasionally merely a starting point, or near thereto.⁴⁰

The initial level of agreement is typically manifested by publication of the terms agreed, and listing the agreeing parties, which is called “adoption”.⁴¹ As the Kyoto

³⁸ See discussion of Vienna Convention and Customary International Law, *infra*, for discussion of the body of international law developed to assist with interpreting treaties.

³⁹ See Horner for discussion of the obvious problems associated with this phenomenon, under “Ratification.”

⁴⁰ 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, six COPs have taken place, the most recent in October 2002, narrowing the treaty’s broad assertions each time (with one exception; see discussion November 2000 Hague discussions in Horner, at “Ratification”). 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”, and recently added debt forgiveness to their list of requirements in return for their determinative ratification.

⁴¹ See Decision I/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”, found at http://www.state.gov/www/global/legal_affairs/treaty_actions_1998.html.

Protocol has proved, this is at best a symbolic practice. That is, a state not being among the adopting parties does not impede it from subsequently following the treaty's prescription toward accession. Indeed, the UN accepted numerous countries not even *signing* the Kyoto Protocol as having ratified it nonetheless.⁴² 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.⁴³

The U.S. Constitution is more typical in that it requires express legislative concurrence with an executive treaty commitment for the treaty to be fully and specifically binding.⁴⁴ The requirement of Senate "advice and consent" has, both in its

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."

⁴² As of 1 February 2003 update, the UNFCCC website listed 104 countries as having submitted instruments of ratification, though only 84 countries actually signed the treaty (among the and 121 states listed as agreeing in Kyoto)(see <http://unfccc.int/resource/kpstats.pdf>). "Parties that have not yet signed the Kyoto Protocol may accede to it at any time." <http://unfccc.int/resource/convkp.html#kp>. For other 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.

⁴³ This is called "definitive signature"; see UN discussion, "9. Definitive Signature -- When the treaty is not subject to ratification, acceptance or approval, "definitive signature" establishes the consent of the state to be bound by the treaty. Most bilateral treaties dealing with more routine and less politicized matters are brought into force by definitive signature, without recourse to the procedure of ratification [Art.12, Vienna Convention on the Law of Treaties 1969], found at <http://untreaty.un.org/ola-internet/Assistance/Guide.htm#definitive>. 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."

⁴⁴ 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

language and application, created tensions between our Constitution and international law.⁴⁵ 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.⁴⁶ Therefore these agreements, the permissibility of which was authorized by the Constitution, also inherently create tensions with its framework.⁴⁷

two thirds of the Senators present 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. 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:6692.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.

Vienna acknowledges such requirements as the U.S.'s two-thirds condition, recognizing exchange of instruments, ratification (also called acceptance or approval), accession, and deposit of instruments. See Vienna Articles 13, 14, 15 and 16 respectively.

⁴⁵ See Horner, "Modern Developments in the Treaty Process," for a discussion of Senate consideration of the advice and consent requirements in the Kyoto context; see also discussion of impact of Senate reservations to Rio, and the "Byrd-Hagel" resolution, *infra*.

⁴⁶ 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, 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.

⁴⁷ 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

There are four stages in the development of a treaty prior to a pact taking binding effect against the United States. These stages are, in this order: agreement – typically occurring at a negotiating session but in no measure binding; signature – a discrete window for which is provided by each treaty; ratification – timing for which is also provided for in each treaty;⁴⁸ and submission of a ratification instrument.

This multi-stage process of treaty maturation also raises certain other questions, including post-ratification requirements -- is a treaty self-implementing, or does it require implementing legislation?⁴⁹ -- and withdrawal -- at what point is a commitment real

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.

⁴⁸ 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.

⁴⁹ A self-executing treaty is one that, without implementing legislation, can be cited as the equivalent of domestic law for purposes of, *e.g.*, litigation. See § 111 of the Restatement of the Law - The Foreign Relations Law of the United States (3rd):

“(4) An international agreement of the United States is ‘non-self-executing’

(a) if the agreement manifests an intention that it shall not become effective as domestic law without the enactment of implementing legislation,

(b) if the Senate in giving consent to a treaty, or Congress by resolution, requires implementing legislation, or

(c) if implementing legislation is constitutionally required.”

See also, “*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

enough that withdrawal is required, and how is it effected at various relevant stages? Of these this paper only addresses in depth the latter, particularly the question of obligations coming at and/or with the assistance of mere treaty signature, with a minor discussion of various methods of extracting the U.S. from these obligations.

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?”

III. The Climate Change Case Studies

A. Specific U.S. “Climate Change” Commitments, In Brief

Professor Rabkin asserts that “[l]egal scholars no longer take the constitutional strictures of earlier times so seriously.”⁵⁰ Now, “in the view of some legal scholars, anything might be the proper subject of a treaty,”⁵¹ in an undeniable spiral of cheapening the seriousness of “permanent alliances” against which President Washington warned in his Farewell Address.⁵² In the context of “climate change” treaties, this paper examines potential implications of one particular, pre-ratification stage of the treaty process – signature – in addition to the implications of ratifying “soft” treaty commitments. The following analysis concludes that it is increasingly likely that a U.S. Court will face the question, and could just as likely determine, that the U.S. has sufficiently acknowledged a customary law of industrialized nation obligations pursuant to the theory of catastrophic anthropogenic climate change. This is critical in its own right but, in turn, would yield that behavior contrary to these obligations is an actionable offense against the “law of nations”, affording Alien Tort Claims Act subject matter jurisdiction.

1. Rio Treaty (or UNFCCC)

The 1992 UN Framework Convention on Climate Change, or Rio Treaty, committed the U.S. to reduce its greenhouse gas emissions to 1990 levels by the end of that decade.⁵³ Often described as “voluntary”, Rio bears that word only once in any

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>.

⁵³ For Rio text, see <http://unfccc.int/resource/conv/conv.html>.

form.⁵⁴ “Shall” appears 118 times. This mandatory language is, of course, not exclusively found in the critical Article 4, “Commitments”. Still, the treaty is considered “voluntary” per its terms principally because its specific target and timetable are nonetheless otherwise couched in loose terms – and that the U.S. Senate was then as now in no mood for binding GHG commitments -- as discussed, *infra*.

The Bush Administration and U.S. Senate embarrassingly rushed headlong to ratify Rio, 1992 being not merely an election year but a presidential election year in which one party’s apparent nominee for Vice President had recently released a best selling book in large part on related themes.⁵⁵ In Rio, there were questions as to whether the U.S. would even accept the agreement until White House Chief of Staff John Sununu reportedly stressed the cost-free nature and political upside of a voluntary “commitment”. The treaty was agreed 9 May 1992, signed 12 June and transmitted to the Senate on 8 September 1992. The Senate unanimously ratified it on 7 October 1992, creating a remarkable gestation period from agreement to ratification of merely 150 days.⁵⁶ In fact, among the ultimately 187-plus parties to Rio only the Seychelles and Mauritius acted faster.⁵⁷ There are no obvious indicators that a significant bloc within the Senate actually sought Presidential transmittal, which rarely occurs so speedily (and often not at all). A truncated debate, if robust on the matter of Rio being “binding”, did occur,

⁵⁴ “4...Developing country Parties may, on a voluntary basis, propose projects for financing, including specific technologies, materials, equipment, techniques or practices that would be needed to implement such projects, along with, if possible, an estimate of all incremental costs, of the reductions of emissions and increments of removals of greenhouse gases, as well as an estimate of the consequent benefits.” Article 12, Communication of Information Related to Implementation.

⁵⁵ “Earth in the Balance: Ecology and the Human Spirit,” Al Gore.

⁵⁶ The U.N. Framework Convention on Climate Change was ratified by the U.S. Senate on 10/7/1992, at page 17149-17151 of the Congressional Record.

⁵⁷ For list of signatory and ratifying countries see <http://unfccc.int/resource/conv/ratlist.pdf>.

with both the Senate Foreign Relations Committee and the full body developing a substantive record.

Included in this record was the Foreign Relations Committee's report of the treaty to the floor. As ably characterized in pertinent part by the Committee's authoritative "Treaties and Other International Agreements":

"The committee repeated [its caution against an Executive negotiating 'no-reservation' clauses in treaties] in its report on the UNFCCC, which had a similar no-reservations article. [Exec. Rept. 102-55, October 1, 1992. p. 15.] This convention had the objective of stabilizing greenhouse gas concentrations in the atmosphere at the level that would prevent dangerous interference with the climate system, and established a framework for addressing relevant issues with different obligations for developed and developing countries. [Treaty Doc. 102-38. Adopted May 9, 1992, and signed June 12, 1992. Submitted to the Senate September 8, 1992. Approved by the Senate October 7, 1992.]

On the Climate Change Convention, the Foreign Relations Committee also noted that decisions by the parties to adopt targets and timetables for limiting emissions would have [to be] submitted to the Senate for advice and consent. It noted further: that a decision by the executive branch to reinterpret the Convention to apply legally binding targets and timetables for reducing emissions of greenhouse gases to the United States would alter the "shared understanding" of the Convention between the Senate and the executive branch and would therefore require the Senate's advice and consent. [Exec. Rept. 102-55, p. 14]."⁵⁸

Regardless, Clinton Administration officials later admitted to beginning work on a binding agreement, or what became Kyoto, within one year after Rio went into effect.⁵⁹

⁵⁸ Senate Foreign Relations Committee, "Treaties and Other International Agreements: The Role of the United States Senate", S.Rpt. 106-71, p. 289; see http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_cong_senate_print&docid=f:66922.pdf.

⁵⁹ 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. In fact, Senate admonitions notwithstanding:

"In 1995 'parties to the Rio Framework met in Germany (the First Conference of the Parties)' and negotiated the Berlin Mandate. Under the Mandate, the Parties agreed (i) that they would continue to pursue the Rio Framework's goals, (ii) that the developed nations should negotiate a follow-on agreement, which would cover the post-2000 period, and (iii) there would be no new commitments for developing nations, though developing nations would be required to advance implementation of commitments they made in Rio." (untitled Clinton Administration document

Indications that the U.S. participation in Rio was driven almost completely by political considerations were no impediment to the treaty going into force against the U.S. in March 1994. For the rest of his term and despite basing the purported need for binding commitments on the fact that the voluntary effort failed, President Clinton did not request nor did Congress enact independent legislation implementing Rio, which was not an inherently self-executing treaty.⁶⁰ Authority and precedent make clear that responsibility for proposing such programs lies with the White House.⁶¹ If the U.S.'s "non-binding" Rio obligations in fact "bound" the U.S. to achieve specific reductions --

obtained by author under Freedom of Information Act request to the Department of Commerce, #02-00338)

Rio was thus clearly intended as a mere first step. The Senate recognized this possibility when ratifying Rio, requiring only that any modifications to Rio require independent ratification. However, this step was specifically cited by the unanimous Senate in S.Res. 98 warning against a Kyoto-style treaty. See discussion, *infra*.

⁶⁰ As the party charged with "making" treaties the Executive is responsible for meeting, or at minimum proposing legislation to affect, treaty commitments. President Clinton proposed a Btu tax, though not expressly in pursuit of Rio. It failed once and did not emerge again. He instituted his Climate Action Plan, which with minor recent modifications continues to this day with more than 50 voluntary programs, though a quick search of Thomas revealed no implementing legislation. Congress did appropriate money in response to proposals by the Executive. See, e.g., "Treaties and Other International Agreements: The Role of the United States Senate", S.Rpt. 106-71, p.4.

⁶¹ "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", 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. 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?"

contrary to contemporary Senate⁶² and Executive assertions⁶³ of U.S. intent -- then the Executive interpretation of Rio (Article 4) throughout the 1990s was actually incorrect, and is responsible for the cited failure.

Regardless, binding or not and 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 Rio targets.⁶⁴

Whether those targets are “voluntary” is a legitimate topic of discussion. For example, that which is deemed the “meat” of Rio’s commitments states in pertinent part:

⁶² “The [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 the pre-Kyoto 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.

⁶³ “In the 1992, nations participating in the Earth Summit met in Rio de Janeiro and agreed to limit global greenhouse emissions by the year 2000 to 1990 levels (however the agreement was not binding and shortfalls would carry no formal sanctions).” USGCRP, http://sciencepolicy.colorado.edu/homepages/roger_pielke/hp_roger/pdf/ams.6.2001.pdf, p. 19.

The Clinton Administration, originally charged with implementing Rio, offered only voluntary programs in such pursuit though it did “strongly advocate[] a domestic cap-and-trade program for greenhouse gases as a part of its strategy of compliance with the Kyoto targets (Yellen 1998), although it never provided details about the strategy and made clear that it did not intend to submit the Protocol to the Senate for ratification.” See page 12, § 2.4 (Evolution of the Global Climate Regime) found at <http://www.ksg.harvard.edu/cbg/research/rpp/RPP-2002-08.pdf>.

⁶⁴ 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.

Regardless, in the build-up to the August 2002 World Summit on Sustainable Development in Johannesburg, Senator James Jeffords (I-VT) chaired a joint hearing by the Senate Committees on Foreign Relations on Environment and Public Works to address the issue of U.S. failure to meet its commitments under MEAs,. The author testified at this hearing (much of which prepared testimony is presented herein and which may be found at http://www.cei.org/gencon/027_03136.cfm) was asked to testify on the basis that Jeffords’ argument was that the U.S. failure to meet Rio’s commitment made its Kyoto commitments the necessary and logical next step.

“2....The developed country Parties and other Parties included in Annex I commit themselves specifically as provided for in the following:

(a)...Each of these Parties shall adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases and protecting and enhancing its greenhouse gas sinks and reservoirs. These policies and measures will demonstrate that developed countries are taking the lead in modifying longer-term trends in anthropogenic emissions consistent with the objective of the Convention, recognizing that the return **by the end of the present decade to earlier levels of anthropogenic emissions of carbon dioxide and other greenhouse gases** not controlled by the Montreal Protocol would contribute to such modification, and taking into account the differences in these Parties' starting points and approaches, economic structures and resource bases, the need to maintain strong and sustainable economic growth, available technologies and other individual circumstances, as well as the need for equitable and appropriate contributions by each of these Parties to the global effort regarding that objective. These Parties may implement such policies and measures jointly with other Parties and may assist other Parties in contributing to the achievement of the objective of the Convention and, in particular, that of this subparagraph;

(b)...In order to promote progress to this end, each of these Parties shall communicate, within six months of the entry into force of the Convention for it and periodically thereafter, and in accordance with Article 12, detailed information on its policies and measures referred to in subparagraph (a) above, as well as on its resulting projected anthropogenic emissions by sources and removals by sinks of greenhouse gases not controlled by the Montreal Protocol for the period referred to in subparagraph (a), with the aim of returning individually or jointly to their 1990 levels these anthropogenic emissions of carbon dioxide and other greenhouse gases not controlled by the Montreal Protocol.” UNFCCC Article 4 (emphasis added).

Certainly, this language is sufficiently specific to otherwise allow enforcement.

Yet this is clearly interpreted by the U.S. Executive Branch as a non-binding promise, or presumably a mere promise of a good faith effort, to reduce covered emissions to 1990 levels, as the panoply of subsequent programs of the Clinton Administration to control GHG emissions were all voluntary.⁶⁵ Again, this is no doubt largely because the U.S.

⁶⁵ That Administration’s Climate Action Plan, which with minor recent modifications continues to this day, was comprised of more than 50 voluntary programs; see report "Taking Action on Climate Change," at [http://yosemite.epa.gov/oar/globalwarming.nsf/uniqueKeyLookup/SHSU5BWHST/\\$file/usaction_99.pdf?OpenElement](http://yosemite.epa.gov/oar/globalwarming.nsf/uniqueKeyLookup/SHSU5BWHST/$file/usaction_99.pdf?OpenElement); see also description of CCAP, at <http://www.epa.gov/region01/eco/cchange/action.html>.

Senate when ratifying Rio acted on the express understanding – if not “reservation”⁶⁶ -- that its commitment was predicated on the absence of binding commitments.⁶⁷

Still, the United States does appear to have complied with the bulk of Rio’s commitments, including developing and publishing programs designed to limit GHG emissions,⁶⁸ calculating emissions by sources and removals by sinks of greenhouse gases⁶⁹ (4)(2)(c), providing wealth and⁷⁰ technology transfer⁷¹ to other countries, *etc.*

The key and indeed seemingly sole factor of relevance, however, according to those asserting the U.S. has not complied with Rio is that the U.S. failed to reduce its GHG emissions to 1990 levels by the end of the decade. This begs the question as to whether Rio’s commitments were merely of a “good faith effort.” Pro-suppression advocates likely would contest this assessment, given their calamitous rhetoric. Yet blame, if it exists, as a matter of law and policy clearly lies with the Clinton Administration’s implementation, and that administration was rhetorically and at least to some extent formally pro-Kyoto.⁷²

If not *per se* enforceable, however, does Rio still not offer support for a putative “climate change” plaintiff under, *e.g.*, Alien Tort Claims Act, to argue that the U.S. government has “acknowledged” the basis for their claims? After all, courts have

⁶⁶ Rio Article 24 reads, *in toto*, “No reservations may be made to the Convention.”

⁶⁷ See CRS Report, Sen. McConnell statements, *supra*.

⁶⁸ Article 4 Para. 1.

⁶⁹ Article 4 Para. 2(c).

⁷⁰ Article 4 Para. 3: “...provide new and additional financial resources to meet the agreed full costs incurred by developing country Parties in complying with their obligations under Article 12, paragraph 1. They shall also provide such financial resources, including for the transfer of technology, needed by the developing country Parties to meet the agreed full incremental costs of implementing measures that are covered by paragraph 1 of this Article and that are agreed between a developing country Party and the international entity or entities referred to in Article 11, in accordance with that Article.”

⁷¹ Article 4 Para. 5.

⁷² Although that administration negotiated and ensured the U.S. signature upon Kyoto, in the subsequent three years it never transmitted the treaty to the Senate for ratification.

employed even non-self-executing treaties in interpreting domestic legal regimes,⁷³ and Rio does “acknowledge” anthropogenic climate change and a duty among industrialized nations. Consider Rio Article 1:

“For the purposes of this Convention:

“1.... ‘Adverse effects of climate change’ means changes in the physical environment or biota resulting from climate change which have significant deleterious effects on the composition, resilience or productivity of natural and managed ecosystems or on the operation of socio-economic systems or on human health and welfare.

2.... ‘Climate change’ means a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods.” UNFCCC (Article 1)

Admittedly, this is potentially tempered somewhat by the Preamble language, doubtless the subject of intense negotiating and which is distinct from its predecessor item leading with “Acknowledging”, merely expresses:

“The Parties to this Convention, . . . **Concerned** that human activities have been substantially increasing the atmospheric concentrations of greenhouse gases, that these increases enhance the natural greenhouse effect, and that this will result on average in an additional warming of the Earth's surface and atmosphere and may adversely affect natural ecosystems and humankind.” (emphasis in original)

⁷³ “Other court decisions assume that provisions of non-self-executing treaties may have domestic effect. The court of appeals for the Second Circuit has allowed provisions from some non-self-executing treaties to influence its decision in at least two cases. See *United States v. Toscanino*, 500 F.2d 267, 276–77 (2d Cir. 1974)(reversing a lower court ruling that allegations of government kidnaping [sic] and torture of a defendant would not require dismissal of the case if proved, and distinguishing prior inconsistent cases on the grounds that they did not involve ‘violation of international treaties’ even though the two treaties in question, the United Nations Charter and the Organization of American States charter, were non-self-executing); *Filartiga v. Pena*, 630 F.2d 876, 882 & n.9 (2d Cir. 1980) (noting that while a treaty may be non-self-executing, “this observation alone does not end our inquiry’ and pointing out that the earlier *Toscanino* court gave legal effect to a non-self-executing treaty ‘as evidence of binding principles of international law’). See also Louis Henkin, ‘Evolving Concepts of International Human Rights and the Current Consensus,’ 170 F.R.D. 275, 281–84 (1997) (paper presented at the International Human Rights Session, Judicial Conference—Second Circuit, June 15, 1996) (non-formally-binding treaties may be an important tool in statutory construction).” *Beharry*, 183 F. Supp.2d at 594-95.

Nonetheless, the entirety of the ratified language serves if not as the lead argument then as another arrow in a putative ATCA plaintiff's quiver, because according to the Article VI of the U.S. Constitution: "The Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land ..."

§ 111 of the Restatement of the Law - The Foreign Relations Law of the United States

(3rd), adds:

“(1) International law and international agreements of the United States are law of the United States and supreme over the law of the several States.

(2) Cases arising under international law or international agreements of the United States are within the Judicial Power of the United States and, subject to Constitutional and statutory limitations and requirements of justiciability, are within the jurisdiction of the federal courts.

(3) Courts in the United States are bound to give effect to international law and to international agreements of the United States, except that a "non-self-executing" agreement will not be given effect as law in the absence of necessary implementation.”⁷⁴

Further, consider that, at the U.S.'s urging, the World Trade Organization Appellate Body elevated Preamble “sustainable development” language, far less demanding than that of Rio cited, *supra*, in the “Shrimp-Turtle” decision as establishing an enforceable right to sustainability (see discussion, *infra*).

Still, subsequent to ratifying Rio but prior to the U.S. Executive agreeing to terms in Kyoto, the Senate unanimously spoke to what it recognized was an unacceptable drift away from the U.S. Rio stance adamantly opposed to binding commitments, asserting its “Advice” pursuant to Article II, Section 2 of the U.S. Constitution.⁷⁵ Regardless, U.S.

⁷⁴ See discussion of self-implementing treaties, n. 49, *supra*.

⁷⁵ “In mid-1997, as these negotiations were underway, the Senate passed S. Res. 98 [“Byrd-Hagel,” S.Res. 98 105th Congress (105-54 July 21, 1997)], 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

negotiators clearly disregarded both major Senate recommendations and committed the U.S. to Kyoto despite a likely tremendous economic impact, and no requirement for developing countries to share our commitments.⁷⁶ This begs the question, does the rejection or, more appropriately, failure to ratify, binding commitments negate an apparent acknowledgement of a peril and duty?

2. Kyoto Protocol

Kyoto, like Rio, was clearly intended to be a step in a “treaty hopping” campaign: even the models on which it is based predict an undetectable climatic impact⁷⁷ -- at a cost to the U.S. of up to \$400 billion annually⁷⁸ -- yet may represent as little as 1/30th of what its proponents seek and, arguably, what acknowledging its basis demands.⁷⁹ Rio and Kyoto offer differing commitments but purport “the same ultimate objective”:

“stabilization of greenhouse gas concentrations in the atmosphere at a level that would

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.” “Treaties and Other International Agreements”, p. 276. The operative language is as follows: “*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”.

⁷⁶ “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.” *USA Today*, 12 June 2001.

⁷⁷ 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>.

⁷⁸ U.S. Department of Energy, Energy Information Administration, Office of Integrated Analysis and Forecasting. “Impacts of the Kyoto Protocol on U.S. Energy markets and Economic Activity.” Washington, D.C. October 1998 (found at <http://www.eia.doe.gov/emeu/plugs/plkyoto.html>).

⁷⁹ “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.

prevent dangerous anthropogenic interference with the climate system.”⁸⁰ The UN Intergovernmental Panel on Climate Change (IPCC) has said this means reducing GHG emissions by as much as 60-80%, which wildly exceeds Kyoto’s specified ambitions.⁸¹

As noted, *supra*, post-Rio the U.S. immediately began participating in international efforts to develop binding GHG commitments. The Senate Foreign Relations Committee describes Kyoto’s evolution:

“In 1997 the parties to the UNFCCC agreed at their third Conference of the Parties to adopt the Kyoto Protocol to the UNFCCC, which outlined legally binding reductions in greenhouse gas emissions for all annex I parties (developed/industrialized countries), to cumulatively total a 5-percent reduction of greenhouse gas emissions below 1990 levels by these parties averaged over the period 2008–2012. 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.”⁸²

Kyoto’s terms compel parties to reduce or otherwise limit their GHG emissions at a level particular to each of the 38 “Annex I”, or covered countries (now 41 states, due to realignment among Central European countries). Such nations include, in addition to the U.S., fellow industrial titans Liechtenstein, Iceland, Monaco, Latvia, Slovenia and Slovakia, but not China, Mexico, South Korea, India, Indonesia, Brazil, and other players

⁸⁰ See, e.g., Rio Article 2, Kyoto Preamble.

⁸¹ 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. This reality contributes to the author’s conclusion that the U.S. should require, prior to and as part of ratifying any further agreements, express acknowledgement not only of the actual “ultimate objective”, but that it is committed to its practical requirements, in this case up to “30 Kyotos”. See “Treaties and Other International Agreements,” at 274.

⁸² Senate Foreign Relations Committee, “Treaties and Other International Agreements: The Role of the United States Senate”, S.Rpt. 106-71, p. 289; see http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?db name=106_cong_senate_print& docid=f:66922.pdf.

in the global economy.⁸³ Covered countries are permitted to meet their obligations using various “flexible mechanisms”, including “joint implementation,”⁸⁴ a “clean development mechanism,”⁸⁵ GHG “sinks”⁸⁶ and emission credit trading.⁸⁷

As is typical of such agreements the more general language can mean nothing or everything, and what it ultimately means is the subject of each subsequent conference of the parties (COPs), disputes over which led to the U.S. ultimately “rejecting” Kyoto, rhetorically at least.⁸⁸ As of this writing, though detail continued to be added at the 2001 Bonn and Marrakech COPs, critical specifics regarding implementation and noncompliance remain open questions.⁸⁹

Kyoto’s requirements go into effect against covered countries upon submission of instruments of ratification by at least 55 countries (from among all parties), representing at least 55% of Annex I countries’ 1990 GHG emissions. Canada’s 16 December 2002 ratification brought the total to 100 ratifying countries, representing 43.7% of relevant

⁸³ See <http://unfccc.int/resource/conv/annex1.html>.

⁸⁴ See <http://unfccc.int/resource/guideconvkp-p.pdf>, at p. 28.

⁸⁵ See *Id.* at p. 29.

⁸⁶ See *Id.* at p. 25; what constitutes an acceptable sink and European efforts to severely limit how much a country may rely upon sinks led to the U.S. stalling its participation in Kyoto at the November 2000 COP-6 negotiations in The Hague, during the Clinton Administration contrary to conventional wisdom.

⁸⁷ See *Id.* at p. 30.

⁸⁸ See Horner, discussion of COP-6 in The Hague.

⁸⁹ In Bonn, parties agreed in principle to certain penalties for the “first compliance period”, that is, Kyoto’s requirements as they stand at present. These arguably designed the Protocol to fail. This is because a covered country failing to meet its “target” despite the availability of all of the “flex mex”, are penalized including by being banned from international emissions trading and other flexibility mechanisms, and reducing the emissions limit in the second compliance period (beginning in 2013) by 1.3 tons for every ton of emissions above a nation’s target in the first compliance period (2008-2012). This latter penalty is problematic because no targets have been agreed to for the second compliance period. It seems likely that nations failing to meet their initial targets will simply demand easier targets in the second period. What is meant by “legally-binding commitments” therefore remains a major question. Further, this will likely provide non-covered countries an excuse to delay their entry into the presumptive “second compliance period.” Marrakech further narrowed the terms, though negotiations continued in New Delhi in October-November 2002 and are expected to recommence in the near future; these meetings remain COPS until Kyoto goes into effect, at that point they become MOPs – meetings of the Parties. For a discussion of the impact of the post-Kyoto agreements, see “Kyoto Protocol: The First Commitment Period and Beyond”, Jakeman, Hester, Woffendon, Fisher, *Australian Commodities* vol. 9 no. 1, March quarter 2002, found at <http://www.abare.gov.au/htdocs/pages/freepubs/Kyoto.pdf>.

1990 emissions (as determined in 1997 when the Protocol was adopted).⁹⁰ That left the U.S. (36.1% of Annex I emissions) and Russia (17.4%) as the sole states that can put Kyoto over the top of its 55% threshold and bring it into effect, regardless of what other covered countries do.⁹¹ Russia serially wavers over its ratification plans in a running public split between its economic minister (“anti”) and environment chief (“pro”), and at this writing asserts an intention to do so if not in late 2003 then by mid-2004. The U.S. and Australia indicate they will forego ratification though neither has voted Kyoto down or renounced their signature, the implications of which are a key topic of this paper.

3. Other “Acknowledgements”

The November 2000 first National Assessment on Climate Change (NACC, formally *Climate Change Impacts on the United States: The Potential Consequences of Climate Variability and Change*) struck a schizophrenic balance of conclusive-sounding statements as to man’s impact on the earth’s climate and the necessity of a response, combined with often randomly placed expressions of uncertainty, principally limited to how great might be the impact. For example:

“This Assessment has identified many remaining uncertainties that limit our ability to fully understand the spectrum of potential consequences of climate change for our nation. To address these uncertainties, additional research is needed to improve understanding of ecological and social processes that are sensitive to climate, application of climate scenarios and reconstructions of past climates to impacts studies, and assessment strategies and methods. Results from these research efforts will inform future assessments that will continue the process of building our understanding of humanity's impacts on climate, and climate's impacts on us.”⁹²

⁹⁰ See <http://unfccc.int/press/prel2002/pressrel181202.pdf>; as of 1 July 2003 ratifications stood at 110 nations constituting 43.9% of Annex I 1990 emissions (www.unfccc.int).

⁹¹ See <http://unfccc.int/resource/guideconvkp-p.pdf>, at p. 40.

⁹² NACC Overview, p. 13 found at <http://www.usgcrp.gov/usgcrp/Library/nationalassessment/1IntroA.pdf>.

That is ambiguous enough but, after citing some beneficial impacts of anthropogenic (man-made or -influenced) climate change as “possible,” the U.S. government’s first formal assessment on the matter and in fact statutorily designated policy guidance document for the Congress and Executive continues with a myriad of negative “*likelihoods*,” concluding with a “certainty” of dramatic climate change due to increased GHG concentrations⁹³, which the Assessment – and President Bush⁹⁴ – expressly attribute to Man:

“Climate variability and change will interact with other environmental stresses and socioeconomic changes. Air and water pollution, habitat fragmentation, wetland loss, coastal erosion, and reductions in fisheries are likely to be compounded by climate-related stresses. An aging populace nationally, and rapidly growing populations in cities, coastal areas, and across the South and West are social factors that interact with and alter sensitivity to climate variability and change.

There are also very likely to be unanticipated impacts of climate change during the next century. Such ‘surprises’ may stem from unforeseen changes in the physical climate system, such as major alterations in ocean circulation, cloud distribution, or storms; and unpredicted biological consequences of these physical climate changes, such as massive dislocations of species or pest outbreaks. In addition, unexpected social or economic change, including major shifts in wealth, technology, or political priorities, could affect our ability to respond to climate change.

Greenhouse gas emissions lower than those assumed in this Assessment would result in reduced impacts....

⁹³ Even where probabilities are not obviously weighted from “possible” to likely”, their impact is clearly cited as net-negative. Consider the following, from NACC Overview: “For example, forest productivity is likely to increase in the short term, while over the longer term, changes in processes such as fire, insects, drought, and disease will possibly decrease forest productivity”, p. 13. See also the gloom-and-doom pages 14-15 concluding the Overview. Again, these assessments are summaries of consistent, more detailed projections, or scenarios”, throughout the National Assessment.

⁹⁴ “Concentration of greenhouse gases, especially CO₂, have increased substantially since the beginning of the industrial revolution. And the National Academy of Sciences indicate that the increase is due in large part to human activity”, found at <http://www.whitehouse.gov/news/releases/2001/06/20010611-2.html>.

Though nature produces well over 95% of global GHGs naturally, its annual contribution, like Man’s and indeed like the natural consumption of GHGs (CO₂, for example, is required by plants for photosynthesis, is absorbed by oceans and other natural processes, *etc.*), is not static; logic dictates that Man is to some, unknowable, extent responsible for increasing concentrations, but this is an irrelevant inquiry barring a greater understanding of climate sensitivity to increased (esp. CO₂) concentrations.

Even with such reductions, however, the planet and the nation are certain to experience more than a century of climate change, due to the long lifetimes of greenhouse gases already in the atmosphere and the momentum of the climate system. Adapting to a changed climate is consequently a necessary component of our response strategy.”⁹⁵

This schizophrenia, as well as the dominant theme of scientific certainty of negative anthropogenic climate change, is consistent throughout the document. It is compounded by using the NACC as the basis for Chapter 6, “Impacts and Adaptation”, of the “*Climate Action Report 2002*”⁹⁶ submitted to the UN, despite the White House having indicated disavowal of NACC as a formal expression of the government in settlement of a lawsuit brought by CEI, Senator Inhofe and Representatives Emerson and Knollenberg.⁹⁷

The *Climate Action Report 2002* (CAR) was another among Rio’s obligations; its submission, that is, not its alarmist content.⁹⁸ The CAR bases its Chapter 6,⁹⁹ and therefore a significant part of its substantive content expressly on NACC. Regardless that both documents can likely be pulled down under the Federal Data Quality Act,¹⁰⁰ they

⁹⁵ NACC Overview at p. 12 found at <http://www.usgcrp.gov/usgcrp/Library/nationalassessment/1IntroA.pdf> (see also the rather alarmist “likelihood” scale, at 9).

⁹⁶ <http://yosemite.epa.gov/oar/globalwarming.nsf/content/ResourceCenterPublicationsUSClimateActionReport.html>.

⁹⁷ “The national assessment [overview and foundation documents] are not policy positions or official statements of the U.S. government. Rather, they were produced by the scientific community and offered to the government for its consideration.” 6 September 2001 letter to author from Acting Director of White House Office of Science and Technology Policy Rosina Bierbaum, produced as a condition of plaintiffs withdrawing the above-described complaint, *CEI, et al., v. Bush* (DCDC C.A. No. 00-02383). The letter stated an obvious legal fiction, given, *e.g.*, the purely government funding and “.gov” address of the entire USGCRP production, but a fiction that nonetheless was intended to represent that the government effectively disavowed the deeply politicized and otherwise flawed effort. Its subsequent submission to the UN by EPA and the State Department, intentionally or not, represented an abrogation of the agreement.

⁹⁸ Rio Articles 4 and 12 require Parties submit a series of National Communications explaining their efforts to implement the treaty’s (voluntary) commitments, including providing inventories, programs to mitigate climate change by limiting GHG emissions, *etc.*

⁹⁹ [http://yosemite.epa.gov/oar/globalwarming.nsf/UniqueKeyLookup/SHSU5BNQ7Z/\\$File/ch6.pdf](http://yosemite.epa.gov/oar/globalwarming.nsf/UniqueKeyLookup/SHSU5BNQ7Z/$File/ch6.pdf).

¹⁰⁰ Enacted as Section 515(a) of the FY ’01 Treasury and General Government Appropriations Act (P.L. 106-554; H.R. 5658), FDQA requires any information *disseminated* by the federal government satisfy the requirements of “objectivity” (whether the disseminated information is presented in an *accurate, clear, complete* and *unbiased* manner and is as a matter of substance *accurate, reliable* and *unbiased*), and

continue to serve as the U.S. government's most prominent, certainly most formal, assessments of the theory of anthropogenic climate change.

Certain public officials in addition to a growing number of green pressure groups have now formally asserted that the Administration has "admitted" anthropogenic climate change. Consider the "Notice of Intent to Sue Under Clean Air Act § 7604" sent by the Attorneys General of Connecticut, Massachusetts and Maine (30 January 2002), fairly comprehensively making the case as described herein:

"The *Climate Action Report* describes serious consequences of global climate change and repeatedly states the conclusion that emission of carbon dioxide from the burning of fossil fuels is the dominant source contributing to human caused climate change. As explained in the Attorneys General's letter, we believe that the conclusions set forth in the *Climate Action Report* compel prompt implementation of mandatory reductions of carbon dioxide emissions...

The findings and conclusions set forth in the *Climate Action Report* undeniably establish that carbon dioxide emissions cause or contribute to climate change. The *Climate Action Report* devotes an entire chapter to a discussion of "potential impacts of climate change" and "response options that are designed to increase resilience to climate variations and reduce vulnerability to climate change." *Climate Action Report* at 83; see *Chapter 6: Impacts and Adaptations*.

Specifically, the *Climate Action Report* concludes that the dominant source of human-caused climate change is carbon dioxide emissions and that the "the long lifetimes of greenhouse gases [such as carbon dioxide] in the atmosphere and the momentum of the climate system are projected to *cause climate to continue to change* for more than a century." *Climate Action Report* at 82 (emphasis added). In addition to this general concession that carbon dioxide is causing climate change, the *Climate Action Report* details many specific examples of adverse impacts to weather and public health that are occurring, or are likely to occur, such as: increases in temperature, heat index, intense rainfall events, frequency of

"utility" (the *usefulness* of the information to the *intended users* (per the US Global Change Act of 1990, the intended users of NACC are Congress and the Executive Branch). "Influential scientific or statistical information" must also meet a "reproducibility" standard, setting forth transparency regarding data and methods of analysis, "as a quality standard above and beyond some peer review quality standards." See the White House Office of Management and Budget's (OMB) "government-wide" Interim Final Guidelines for agency compliance with FDQA requirements (66 FR 49718), finalized by OMB's January 3, 2002 Final Guidance (67 FR 369).

These standards are patently violated by FDQA, as explained in CEI "Petition under Federal Data Quality Act to Prohibit Further Dissemination of Climate Action Report 2002" found at <http://www.cei.org/gencon/027.03040.cfm>.

heat waves, water shortages, drought, sea level, heat stress, diseases from insects, ticks, rodents and water-borne vectors, and health effects due to air pollution and extreme weather events.

Unsurprisingly, the *Climate Action Report* acknowledges the difficulty of predicting what the precise impacts of climate change will be at any given place or time. Such acknowledgments do not undercut the *Climate Action Report's* pervasive conclusions that: climate change is occurring; it is caused by carbon dioxide emissions from human activities; and it poses harm to public health and welfare. Thus, the *Climate Action Report* determines that carbon dioxide emissions “cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare” within the meaning of the Act. As explained below, the *Climate Action Report* itself has triggered your duty to regulate carbon dioxide pollution under the Clean Air Act.

The *Climate Action Report* was the culmination of an extensive and deliberative effort, conducted by EPA and involving numerous federal agencies, to review and analyze existing scientific data and assessments related to climate change. It was prepared to satisfy reporting obligations of the United States that arise under the United Nations Framework Convention on Climate Change (UNFCCC or Rio Treaty), and it was submitted to the United Nations as the official *Climate Action Report* of the United States. In this context, it states the official position of the United States. Under the Supremacy Clause of the Constitution, U.S. Const., art. VI, paragraph 2, a treaty shares equal footing with federal statutes. Conclusions reported to the United Nations as the formal position of the United States, in satisfaction of treaty obligations, therefore, are of equal import in the context of construing federal statutes. *See generally, Murray v. The Schooner Charming Betsy*, 6 U.S. 64 (1804) (holding that an act of Congress should be construed consistently with international laws).

We note, as well, that EPA played the lead role in preparation and publication of the *Climate Action Report*, even conducting formal “notice and comment” proceedings on the *Climate Action Report* not once, but twice. 66 Fed. Reg. 15470-71 (Mar. 19, 2001); 66 Fed. Reg. 57456-57 (Nov. 15, 2001). EPA fully reviewed and officially adopted the findings and conclusions of Chapter 6, discussed above, as its own. Moreover, the fact that, after notice and review of comments, EPA reached the conclusions it did, set them out in the *Climate Action Report*, and adopted them as its own, demonstrates that EPA deemed the data and comments it reviewed during that process to be sufficient to support such conclusions. No further notice and comment is necessary to trigger EPA’s Clean Air Act obligations. Consistent with the conclusions of the *Climate Action Report*, both you and President Bush have made numerous statements recognizing that carbon dioxide emissions are endangering public health and welfare and must be reduced. For example, the President has stated that climate change has the “potential to impact every corner of the world,” that “the United States is the world’s largest emitter of manmade greenhouse gases,” and that “[b]y increasing

conservation and energy efficiency and aggressively using these clean energy technologies, we can reduce our greenhouse gas emissions by significant amounts in the coming years.” Remarks by the President (June 11, 2001). Similarly, you have stated: “If we fail to take the steps necessary to address the very real concern of global climate change, we put our people, our economies, and our way of life at risk.” G8 Environmental Ministerial Meeting, Working Session on Climate Change, Trieste, Italy (March 3, 2001).

The National Assessment and its offspring the *Climate Action Report* obviously offer “acknowledgement” of climate alarmism on behalf of the United States, or at minimum a potentially sufficient basis for various climate change litigation, be it under NEPA, ATCA or other regime. According to U.S. documents, negative impacts are near-certain or certain, benefits anthropogenic climate change, however, are downplayed and indeed the bulk of alarmist claims are accepted and/or acknowledged with the open question of “how catastrophic?” This effectively takes the science of climate change from the table in all but the rarest action seeking to impose Kyoto-like strictures on the U.S. economy (that instance being efforts to impose “climate” as a mandatory consideration of NEPA where the strength of government “admissions” are susceptible to balance against and the potential for invoking the “speculative” defense, see discussion, *infra*).

IV. Are Rio and Kyoto Acknowledgements “Enforceable”?

A. Obligations from Treaty Signature: Customary Law and the Vienna Convention

A body of international “customary” law evolved – indeed, is still evolving -- to assist in managing relations between nations generally, and treaty interpretation specifically.¹⁰¹ This body of law is curiously both dynamic yet purportedly codified in large part by the 1969 Vienna Convention on the Law of Treaties.¹⁰² The same dynamism yields peril, of course, by subjecting the U.S. or its citizens or operators to a body of law malleable under the sympathies of some undefined critical mass of global authorities and/or experts. This is explored *infra* in the discussion of what constitutes the “law of nations”, the Alien Tort Claims Act’s moniker for “customary law”.¹⁰³

¹⁰¹ See, e.g., Restatement 3d of the Law of Foreign Relations, §101, “International Law Defined” and §102, “Sources of International Law” (latter at n. 186, *infra*).

“Customary international law is not static. It is subject to change as customs change. Customs are not always well-defined. ‘Evidence of customary international law is found in (1) the general usage and practice among nations, (2) the works of jurists and writers, and (3) judicial decisions recognizing and enforcing that law.’ Maria, 68 F.Supp.2d at 233. See, e.g., Black’s Law Dictionary, “Customary Law” (7th ed. 1999) (‘practices and beliefs that are so vital and intrinsic a part of a social and economic system that they are treated as if they are laws’); Merriam-Webster’s Collegiate Dictionary, ‘Custom’ (10th ed. 1999) (‘1(a): a usage or practice common to many’); The Compact Edition of the Oxford English Dictionary, ‘Customary’ 631–32 (1971) (‘A written collection of customs’). International law based upon custom can be said to be influenced by breadth and period of acceptance, as well as by opinions of scholars, judges and others. It is conceivable that a standard could become customary international law with just one of these factors if it is strong enough.... The Supreme Court has long recognized the principle that in admiralty United States courts are ‘bound by the law of nations, which is part of the law of the land.’ The Neriede, 13 U.S. at 423 (1815). See also The Paquete Habana, 175 U.S. at 700 (federal courts are to apply the law of nations as federal law). In general, customary international law has the same status as domestic legislation. Restatement (Third) of Foreign Relations Law § 701 cmt.e (‘The United States is bound by the international customary law of human rights.’)” *Beharry v. Reno et al.*, 183 F.Supp.2d 584, 596-97 (E.D.N.Y. 2002).

¹⁰² Critical to the Alien Tort Claims Act discussion, *infra*, customary law is another term for a “law of nations”. In that vein, consider, “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 n. 109, *infra* for discussion as to 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.

¹⁰³ Vienna Articles 31 and 32 open the door for considering canons of statutory and contractual construction recognized domestically by an individual state for insight as to what a party intended when

Individual agreements provide a window of time during which that document may be signed. For example, the Kyoto Protocol, agreed to or “adopted” in December 1997, was open for signature for a finite period of one year.¹⁰⁴ As discussed, *supra*, that window and/or failure to sign the document proved meaningless, as the UN acquiesced to even *non-signatories* subsequently ratifying the Protocol. Whether treaty signature is meaningless, however, is an entirely different matter, and not likely one that a document would expressly address.¹⁰⁵ The U.S. signed Kyoto on 12 November 1998.

As regards the U.S. treaty-making power, it is clear from the Article II, Section 2 “advice and consent” requirement that the Executive has the power to negotiate agreements. Kyoto proved that the unilateral power to draft content exists *de facto*, if arguably not *de jure*. This power to negotiate treaties doubtless includes in fact the

interpreting international agreements. See *e.g.*, NAFTA Chapter 11 Arbitral Tribunal: *Ethyl Corporation v. The Government of Canada*, at n. 122, *infra*.

Along these lines and as also discussed, whether the U.S. has signed a treaty contributes to whether it rises to the level of customary law, or the law of nations, though the lack of a signed agreement does not doom such an argument. Neither is that an agreement is merely a “RUD” – resolution, understanding or declaration – fatal to a claim that it represents or is at least illustrative of customary law or the law of nations. Further, signed-but-not-ratified agreements are even used by the courts to aid in interpreting the domestic laws of the U.S. See n. 101 re: *Beharry, supra*.

¹⁰⁴ Kyoto Article 24 states, in pertinent part: “1. This Protocol shall be open for signature and subject to ratification, acceptance or approval by States and regional economic integration organizations which are Parties to the Convention. It shall be open for signature at United Nations Headquarters in New York from 16 March 1998 to 15 March 1999. 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...” This Article illustrates the UN has joined, or possibly fosters, the devolution to frivolity of erstwhile solemn commitments such as treaty signatures. A precise window exists for signature, after the formal closing of which accession may occur in perpetuity. Yet signature is not a condition precedent to ratification/accession. What is the sense in this exercise?

¹⁰⁵ As discussed at length, *infra*, however, it is difficult to imagine government officials so typically proceed so casually as if signature was in fact meaningless. See, *e.g.*, the relevant introductory UN explanations, “23. Signature Subject to Ratification, Acceptance or Approval -- Where the signature is subject to ratification, acceptance or approval, the signature does not establish the consent to be bound. However, it is a means of authentication and expresses the willingness of the signatory state to continue the treaty-making process. The signature qualifies the signatory state to proceed to ratification, acceptance or approval. It also creates an obligation to refrain, in good faith, from acts that would defeat the object and the purpose of the treaty. [Arts.10 and 18, Vienna Convention on the Law of Treaties 1969]”, found at <http://untreaty.un.org/ola-internet/Assistance/Guide.htm#signaturesubject>.

unilateral ability to make various, sub-ratification commitments such as agreement and signature, so long as the agreement makes no pretense of abrogating the ratification requirement.¹⁰⁶ The Executive typically internally delegates its constitutional authority to “make” treaties, such authority which Congress formally made delegable by in the State Department’s authorizing statute.¹⁰⁷ In practice this delegation includes signing, unsigned and withdrawing from treaties.¹⁰⁸

The constitutional “advice” limitation on this negotiating power is nonetheless occasionally ignored – Kyoto is a prime example – such failure to seek advice being subject to Senate forgiveness nonetheless via providing consent.

As discussed, most treaties provide for a discrete signing function as a condition precedent to being eligible to accede via ratification – meaningless though this purported condition has proven. Signatures may be challenged but barring such challenge are presumed valid.¹⁰⁹ Questions of other implications of signature arise, certainly in the

¹⁰⁶ See Rabkin pp. 12-16.

¹⁰⁷ 22 U.S.C. § 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)).

¹⁰⁸ The difference between unsigned and withdrawal of course is that the latter is only available for ratified agreements. Regarding signature, 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; Rome was signed by Ambassador-at-Large for War Crimes Issues David Scheffer and unsigned by Under Secretary of State for Arms Control and International Security John R. Bolton.

¹⁰⁹ The Vienna Convention on the Law of Treaties 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).

recent contexts of the Rome Treaty and Kyoto Protocol. Like individual treaty documents, customary law and its “codification” the Vienna Convention on the Law of Treaties recognize the common requirement of legislative approval as a condition of a signed agreement’s specific terms becoming binding. Regardless, in return for recognizing that executive commitment may not be ultimately binding, these regimes expect signatures represent only sincere commitments and consider them binding to at least the treaty’s “object and purpose”.¹¹⁰

This principle that a signature cannot be without meaning, developed likely for purposes of ensuring sincere negotiations, is formalized in Vienna Article 18, asserting international agreement that a pre-ratification commitment, *e.g.*, signature, nonetheless

¹¹⁰ “Article 18 Obligation not to defeat the object and purpose of a treaty prior to its entry into force A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.” Vienna Convention, found at <http://www.tufts.edu/departments/fletcher/multi/texts/BH538.txt>.

This requirement is also found in § 312(3) of the Restatement (3d) of The Foreign Relations Law of the United States. True, the Restatement also asserts in its comments to § 312, “Entry into Force of International Agreements”, “[a] state can be bound upon signature, but that has now become unusual as regards important formal agreements. For such agreements, signature is normally *ad referendum*, *i.e.*, subject to later ratification, and has no binding effect but is deemed to represent political approval and at least a moral obligation to seek ratification. Subsection (3) and Comment I set forth an obligation not to defeat the object and purpose of a treaty after signature.” § 312 Comment *d*. It continues, “[a] treaty can be brought into force against the United States only after the Senate has given consent to it, and only subject to any conditions imposed by the Senate. See § 303, Comment *d*.” § 312, Comment *j*. This, however, is not only repetitive of other provisions in Vienna, but also does nothing to undercut the requirement that signatures do in fact carry particular obligations.

Clearly, the obligation’s incurred upon treaty signature survive other provisions of Vienna and customary law and, as exposed, *infra*, the U.S. courts have actually granted this requirement great deference. Consider also the Reporter’s Notes to the Restatement, “[t]he principle that a signatory state may not take steps that would defeat the object and purposes of an international agreement, even prior to its entry into force, Subsection (3) and Comment *i*, is less familiar to common law writers than to their civil law counterparts. See Kessler and Fine, “*Culpa in Contrahendo*, Bargaining in good faith and Freedom of Contract: A Comparative Study,” 77 Harv.L.Rev. 401 (1964). The International Law Commission in its Report to the General Assembly, [1966] 2 Y.B.Int’l L.Comm’n 169, 202, found that the obligation to refrain from acts calculated to frustrate the object of treaty ‘appears to be generally accepted.’ 9(further citation omitted)...Under the Convention, therefore, the obligation commences at signature. Kearney and Dalton, “The Treaty on Treaties,” 64 Am.J.Int’l L. 495, 509 (1970).” § 312, n. 6.

binds a state to certain degree.¹¹¹ Yet how seriously do states take this testament to the issue of a non-ratifying signatory state? It is either ironic or proof positive of the failure represented by this effort that the U.S. bears an enormous inventory of signed-but-not-ratified instruments including many never even “transmitted” to the Senate.¹¹²

The courts leave no doubt that the U.S. is held to the Vienna and customary law principle that signature is not entirely bereft of commitment or obligation, particularly when accompanied by behavior consistent with the obligations the document purports. Consider *Sarei et al. v. Rio Tinto*, 221 F.Supp.2d 1116 (CD CA 9 July 2002), plaintiffs there complaining of numerous violations of the law of nations – or, customary law – including environmental abuses as discussed below in more detail under “Alien Tort Claims Act”. There, the court held that plaintiffs articulated rights rising to the level of customary international law on the basis of their recognition in the UN Convention on the Law of the Sea signed, but not ratified, by the United States:

“Although the United States has not ratified UNCLOS, it has signed the treaty. Moreover, the document has been ratified by 166 nations and thus appears to represent the law of nations. See *United States v. State of Alaska*, 503 U.S. 569 (1992)[parallel citations omitted] (“The United States has not ratified [UNCLOS],

¹¹¹ Vienna manifests throughout, *e.g.*, Articles 11, 12, 18, 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?

¹¹² See n. 5, *supra*.

but has recognized that its baseline provisions reflect customary international law”¹¹³); *Mayaguezanos por la Salud y el Ambiente v. United States*, 198 F.3d 297, 305, n. 14 (1st Cir. 1999)(“Mayaguezanos refers to [UNCLOS]. The Convention has been signed by the President, but it has not yet been ratified by the Senate. Consequently, we refer to UNCLOS only to the extent that it incorporates customary international law, though we also note that the United States 'is obliged to refrain from acts which would defeat the object and purpose of the agreement'”, quoting [Vienna Article 18 and RESTATEMENT § 312(3), omitted]; *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 965, n. 3 (4th Cir. 1999)(quotation omitted; *Mayaguezanos por la Salud y el Ambiente v. United States*, 38 F.Supp.2d 168, 175, n. 3 (D.P.R. 1999)(“The Senate has yet to ratify UNCLOS III. However, pending ratification or rejection by the Senate, ‘the United States is bound to uphold the purpose and principles of the agreement to which the executive branch has tentatively made the United States a party’ ... (further quotation omitted) citing *United States of America v. Royal Caribbean Cruises, Ltd.*, 24 F.Supp.2d 155, 159 (D.P.R. 1997) and Carol Elizabeth Remy, *Note: U.S. Territorial Sea Extensions: Jurisdiction and International Environmental Protection*, 16 FORDHAM INT’L L.J. 1208, 1211-12 (1993)), *aff’d on other grounds*, 198 F.3d 297 (1st Cir. 1999).” 221 F.Supp.2d at 1161-62.

That is, that the U.S. merely signed a treaty ratified by many other nations, particularly when the U.S. exhibits behavior that can be identified as consistent with having accepted the treaty’s terms, either independently or due to the combination of these factors can elevate the principles embodied in that document to the law of nations, or customary law. Be it UNCLOS or Kyoto, therefore, the U.S. legal system acknowledges that signature on a treaty may indeed trigger obligations. Subsequent U.S. actions dignifying Kyoto’s underlying premises only compound matters, discussed, *infra*.

Further, an international agreement in place even without U.S. participation can signify to a court the existence of a customary law/law of nations suitable to trigger subject matter jurisdiction under Alien Tort Claims Act. In addition to the UNCLOS

¹¹³ Consider the numerous instances in which the U.S. acknowledges that the unratified Vienna Convention equally offers “baselines” that it has accepted, and how this pattern translates to determining whether it also accepts Kyoto “baselines”. Does the lack of express acceptance of Kyoto, or even making disparaging remarks, doom a claim that Kyoto represents customary law, negating the numerous acknowledgements of the theory of catastrophic anthropogenic climate change underlying Kyoto? Of, are these considerations inherently less meaningful than the U.S. refusing, post-Rome Statute, to rescind its Kyoto signature?

example where the U.S. is a non-ratifying signatory, courts have even accepted – as well as rejected – that level of commitment as instructive where only “soft” agreement(s) including resolutions, understandings, and declarations (“RUDs”) are in question. The key is less whether written, expressly binding commitments have entered into force against the U.S. but whether a norm has been suitably recognized “that is specific, universal, and obligatory”.

However, even those terms hold ambiguities and clearly bear discretion and flexibility in their application in the absence of a ratified, binding agreement. Relevant precedent, explored in detail in *Rio Tinto*, manifests that an ATCA court seeks to discern whether a standard articulable to the point of being obeyed can be attached to the U.S. through its actions (thus yielding the deceptively styled “universal” acceptance); if so, the “obligatory” element follows in course, in that it is deemed to have risen to the level of customary law by virtue of the first two elements being satisfied. See 221 F.Supp.2d at 1161-63. This makes for rather a circular argument and illustrates that, because courts bear discretion in this ultimate determination, peril exists in the U.S. continuing to pay obeisance to certain principles in its soft or unratified agreements, and submissions.¹¹⁴

¹¹⁴ Indeed, the courts have affirmed that U.S. signature on a treaty, even though it remains unratified, carries sufficient acknowledgement of that which underlies the agreement that it may even be used as an aid in interpreting domestic law. See the Eastern District of New York’s opinion in *Beharry v. Reno et al.*, 183 F.Supp.2d 584 (E.D.N.Y. 2002) addressing the impact of treaty signature, specifically on the interpretation of domestic legislation in the context of a petitioner seeking relief from deportation under the Immigration and Naturalization Act or other principles of international law. Regarding the impact of certain human rights treaties upon domestic law, the court stated:

“A treaty has been sometimes said to have force of law only if ratified. Courts, however, often use non-ratified treaties as aids in statutory construction. A number of these cases have been catalogued by professor Steinhardt, who lists:

Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1388 (10th Cir. 1981)(citing the American Convention on Human Rights and the Universal Declaration of Human Rights as support for customary principle prohibiting prolonged arbitrary detention); *Filartiga v. Pena-Irala*, 630 F.2d 876, 883-85 (2d Cir. 1980)(consulting the American Convention on Human Rights and the

This also needlessly complicates the issue, as the U.S. has acknowledged the Vienna Convention as controlling in that it represents customary international law at least as regards treaty signature, and Vienna dictates that the U.S. recognizes Kyoto's underlying theory, developed country obligations, and requirements for the U.S. to extricate itself from same. Therefore, it seems perilous to casually presume that Kyoto-style obligations do not rise to the level of "law of nations" for industrialized countries, including a non-ratifying U.S., if Kyoto goes into effect.

Though Kyoto bears the U.S.'s signature,¹¹⁵ the Bush Administration assures Americans that by the President expressing disagreement with that signature the U.S. has "rejected" Kyoto even as the signature remains unmolested.¹¹⁶ This is fanciful, as is demonstrated in detail, *infra*. A Senate majority seems to have recently manifested their concurrence with the international law requirement of an affirmative act to undo a treaty signature even in the absence of ratification, when they maneuvered to ensure a Senate

International Covenant on Civil and Political Rights, inter alia, to determine the customary prohibition on torture); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1542 (N.D. Cal. 1987) (recognizing the Universal Declaration, American Convention, and the Civil and Political Covenant as evidence of a customary norm against summary execution), reh'g granted in part and denied in part, 694 F. Supp. 707 (N.D. Cal. 1988); *Lareau v. Manson*, 507 F. Supp. 1177, 1187-89 n.9 (D. Conn. 1980)(discussing the United Nations Minimum Standard Rules Governing the Treatment of Prisoners), modified, 651 F. 2d 96 (2d Cir. 1981), aff'd in part and modified in part, 651 F. 2d 96 (2d Cir. 1981).

Ralph G. Steinhardt, *The Role of International Law as a Canon of Domestic Statutory Construction*, 43 Vand. L. Rev 1103, 1182 n. 332 (1990). See also *Id.* at 1180-82." (discussing the weight courts attach to non-ratified treaties)." 183 F.Supp.2d at 593.

The court concluded it would consider this signed treaty as a tool in interpreting domestic law, on the basis that, "[t]he United States signed the [Convention on the Rights of the Child] on February 16, 1995; it has never been sent to the Senate for ratification... The CRC does not have the force of domestic law under the treaty clause of the Constitution. Non-ratification does not, however, eliminate its impact on American law." 183 F. Supp.2d at 596.

¹¹⁵ 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.

¹¹⁶ See statements by Bush Administration officials, n. 125, *infra*.

vote on the Comprehensive Test Ban Treaty in October 1999.¹¹⁷ Consider Senator James Inhofe's (R-OK) remarks during the 1999 Senate floor debate prior to the unsuccessful ratification vote on the Comprehensive Test Ban Treaty (CTBT):

"I have been asked the question by a number of people as to why I am so adamant about objecting to the unanimous consent request--and I do not care who makes it--to take this from the calendar and put it back into the Foreign Relations Committee.

I do so because there is something that has not even been discussed on this floor yet; and that is, unless we kill it and actually reject this treaty by a formal action, the provisions of this treaty are going to remain somewhat in effect. In other words, we are going to have to comply with this treaty that has been signed--

¹¹⁷ Publicly, experts disputed that the U.S. signature on, *e.g.*, CTBT, carried any commitments under international law. "The Roundtable next turned to a discussion of 'The Status of the CTBT Following its Rejection by the Senate' led by Douglas J. Feith, Esq., former Deputy Assistant Secretary of Defense and internationally recognized expert on multilateral and other arms control agreements, and Robert F. Turner, a specialist in constitutional law who is currently a professor of the University of Virginia School of Law and a former acting Assistant Secretary of State. They eviscerated President Clinton's assertion that the U.S. is still legally bound by the provisions of the CTBT -- despite its rejection by a majority of the Senate -- 'unless I erase our name,' noting that such a stance is not supported by either international or U.S. domestic law." [referring to remarks by President Clinton on October 14, 1999, "I signed to [sic] that treaty. It still binds us unless I go, in effect, and erase our name. Unless the President does that and takes our name off, we are bound by it"] Center for Security Policy, press release "Center Roundtable Shows Why C.T.B.T. Cannot be Fixed," 4 February 2000, found at http://www.centerforsecuritypolicy.org/index.jsp?section=papers&code=00-P_11; Roundtable proceedings are found at http://www.centerforsecuritypolicy.org/index.jsp?section=papers&code=00-P_19.

These experts, the Roundtable proceedings reflect, went to great effort arguing a strict interpretation of the Constitution's two-thirds ratification requirement as the sole determinant of assuming treaty obligations, in a vacuum excluding customary law and the Vienna Convention. This runs contrary even to their host's earlier call for the Senate to vote on CTBT on the basis that Vienna Article 18 binds us by our signature (see CSP press release "Vote -- and Defeat -- the C.T.B.T. Today", 13 October 1999, found at http://www.centerforsecuritypolicy.org/index.jsp?section=papers&code=99-D_115) Further, press reports are that in private at least one of these experts advised key Senators, particularly John Kyl (R-AZ), that Clinton's position was indeed at least to some extent correct, prompting treaty opponents to ensure it received a vote, confident that it would not receive the two-thirds majority required for ratification and thus in effect nullifying any obligations borne of treaty signature. "Kyl began circulating information he'd been given by Doug Feith, a Washington lawyer and senior Reagan Pentagon official. The gist of the matter was that signatories of the CTBT are obligated not to conduct nuclear tests undercutting the object of the treaty even if they have not ratified it (Article 18 of the Vienna Convention) on the Law of Treaties). This suggested that postponing the vote was a backdoor way of implementing the treaty. Kyl also circulated a brief written in 1996 by John Hollum, a senior arms control official in the Clinton administration, affirming the point." Matthew Rees, "'The Right Thing For Our Country:' How Jon Kyl and a Handful of His Republican Colleagues in the Senate Engineered the Defeat of the Comprehensive Test Ban Treaty," *The Weekly Standard*, October 25, 1999, p. 25). Feith was subsequently appointed by President Bush to serve as Under Secretary of Defense, the highest ranking civilian at the Pentagon, so the Administration is, at some level, aware of continuing perils of maintaining treaty signatures on documents with which the U.S. disagrees. See also discussion in "Remedies to U.S. Kyoto Signature", *infra*.

going back to a document of the Vienna Convention that was actually signed on May 23, 1969, but it did not become a part of the international law until January of 1980.

Article 18--and this is in effect today--says:

Obligation not to defeat the object and purpose of a treaty prior to its entry into force.

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

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

... This is from the Vienna Convention. This is something that we are a party to. It says--I will take out some of the other language--[repeats Article 18, subpart “a”]

How do you make your intentions clear? Under the Vienna Convention language, not to be a party to this treaty you have to vote it down. You have to bring this up for ratification and reject it formally on the floor of this Senate. To do anything other than that is to leave it alive and to force us to comply with this flawed treaty, which is a great threat to our safety in this country.”¹¹⁸

Senator Inhofe concluded:

“A State is obliged to refrain from arguments which would defeat the object and purpose of a treaty when it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intentions clear not to become a party to the treaty. That is what this is all about. We are the Senate that is going to reject this treaty.”¹¹⁹

Even were the Bush Administration’s reasoning sound, that mere public disparagement of our Kyoto signature is sufficient to “reject” the treaty commitment or actually effect some change in treaty status, then such change is undone equally simply by an executive reversing the rhetoric. In truth, as is explored, *infra*, such dismissive language carries no *de facto* or *de jure* impact. Compounding this approach is that the

¹¹⁸ Cong’l. Rec. pp. S12465-66, 13 October 1999 found at <http://www.clw.org/pub/clw/coalition/inhofe101399.htm>.

¹¹⁹ *Id.* at p. S12511.

Bush State Department actually rejected a request that it submit an instrument to the UN renouncing its Kyoto signature consistent with the President's assurances of having rejected the treaty and also consistent with his having disparaged, then renounced, the U.S. signature on Rome.¹²⁰ This further emphasizes the distinction between the U.S.'s handling of its Kyoto obligation and its rhetorical "rejection" of Rome, the latter consummated with a formal expression of this position to the UN expressly in accordance with applicable international law and practice.¹²¹

Defending a claim that the U.S. violates Vienna Article 18 via, *e.g.*, Kyoto (or vice versa), the U.S. would likely posit the argument that it never ratified Vienna and is thereby not bound to its terms. Particularly as regards Article 18 this argument is sophisticated but hopeless, if for no other reason than it is belied by the longstanding deference the U.S. has granted Vienna in relations when dealing with a nation that is party to Vienna¹²² and particularly regarding Article 18 as made clear during the Rome

¹²⁰ In May 2002, the author formally petitioned the State Department on behalf of the Competitive Enterprise Institute to clarify its inconsistent rhetorical and legal Kyoto positions through, *inter alia*, replicating the withdrawal from Rome. State responded in June 2002, electing to not assert which of the two ambiguous U.S. Kyoto positions is operative. Its response was mildly incoherent in attempting to avoid addressing the merits presented in the request, merely rejecting this request for resolving 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 sum, the State Department has no doubt about what the position is – though what that position is they would not assert -- so it requires no clarification through, *e.g.*, consummating the purported "rejection".

¹²¹ See letter to UN Secretary General Kofi Annan, <http://www.state.gov/r/pa/prs/ps/2002/9968.htm>. Also, see detailed discussion of Vienna, *infra*.

¹²² U.S. officials have cited or otherwise acknowledged in practice for some time that Vienna provisions are authoritative. See, *e.g.*, <http://www.state.gov/documents/organization/6552.doc>, see also the NAFTA Chapter 11 Arbitral Tribunal: *Ethyl Corporation v. The Government of Canada* (Award on Jurisdiction) June 24, 1998, "51. The applicable rules of international law include the Vienna Convention on the Law of Treaties ("Vienna Convention"), done at Vienna, May 23, 1969, entered into force, January 27, 1980, 1155 U.N.T.S. 331, reprinted in 8 I.L.M. 679 (1969), in particular Articles 31 and 32" and "52. Canada is a party to the Vienna Convention, having acceded to it on 14 October 1970, and the United States accepts it as a correct statement of customary international law. [FN18] Moreover, given that 84 States are parties to the Vienna Convention (as of 15 April 1998), and that Articles 31 and 32 "were adopted without a dissenting vote," these Articles clearly "may be considered as declaratory of existing law." [FN19] found at <http://www.state.gov/s/l/3827.htm>.

“unsigning.” As to the rest of the treaty, it is possible if, again, rather sophisticated, for the U.S. to assert that it is not bound by its signature upon a treaty purporting to govern the interpretation of treaties, the very terms of which establish that signing a treaty in the absence of ratification still binds the signatory to the treaty’s goals and objectives.¹²³

Even more recently, the U.S. further complicated this putative defense against application of Vienna in the Kyoto (or any other) context during the process of obtaining UN Security Council Resolution 1441, regarding Iraqi weapons inspections, disarmament of weapons of mass destruction and enforcing compliance with prior UNSC resolutions. See text at <http://ods-dds-ny.un.org/doc/UNDOC/GEN/N02/682/26/PDF/N0268226.pdf?OpenElement>. On 8 November 2002, the U.S. successfully steered that resolution through the UNSC, violation of which it claimed would constitute “material breach” of 1441 [and its predecessor resolutions dating to the 1991 Gulf War cease-fire] obviating any need for the U.S. returning to the Security Council for still another resolution authorizing force. See, e.g., “The Administration’s Position with Regard to Iraq”, found at <http://www.state.gov/secretary/rm/2002/13765.htm>. UN officials also made clear, to no protest from the U.S., its perspective that the basis for this understanding -- the term of art “material breach,” not found in the relevant resolution -- derived from the Vienna Convention. See, e.g., “Mr Blix, the chief inspector for chemical and biological weapons as well as ballistic missiles, has privately reassured the ten non- permanent Security Council members that he will not operate on a hair trigger. Although he insists that he will merely report the facts, the question remains: which facts? In answer, Mr Blix has been citing the 1969 Vienna Convention on the Law of Treaties, which defines a ‘material breach’ as ‘the violation of a provision essential to the accomplishment of the object or purpose of the treaty.’” “We Don’t Want to be Trigger Happy, Blix Tells Bush”, The Times (London) 15 November 2002. On 19 December 2002, the U.S. declared continued/renewed “material breach” and, thus, grounds to attack Iraq.

¹²³ Like a prospective automobile customer taking a vehicle off the lot then parking it in his garage for 30 days, the U.S. signed Vienna and, while never formalizing the deal also acted for over 30 years now as if it had, through various and sundry diplomatic and administrative actions. It is likely that such a doctrine of constructive acceptance exists in the law of international agreements, customary and otherwise. 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” is persuasive if not perfectly on point: “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 at least contemplated withdrawing from Vienna concurrent with, though following, his Rome withdrawal, although this did not occur. Such a move, after having satisfied Vienna’s Article 18 test for “withdrawal” of the unratified ICC, would therefore be intended to impact the status of *other* signed-but-not-ratified agreements. In that case, 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

The U.S. further complicated its ability to claim it bears no obligations under Vienna or the host of customary law codified therein when it *expressly* satisfied Article 18 in renouncing its Rome Treaty signature -- not merely customary law.¹²⁴ Again, the U.S. is so rhetorically and practically steeped in acknowledging its acceptance of this among other Vienna requirements that it cannot reasonably maintain it carries no signature obligations pursuant to Vienna or certainly its equivalent.

It was presumably in recognition of the perils of “feel-good” treaty signature – of a “soft” commitment or where there are no realistic prospects of ratification, even when an Executive has no intention of transmitting a treaty to the Senate -- 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

behind treaties. Private conversations with active proponents of the Rome renunciation reveal a fear that renouncing on more than one treaty would hobble future administrations as well as implicate the U.S. in the host of other signed treaties, by establishing that particular act as the singular avenue by which the U.S. signals its intention to not become a party. This fear, for reasons largely set forth herein, seems overblown.¹²⁴ See, e.g., announcement of the Rome withdrawal, which reads in pertinent part: “President Bush has come to the conclusion that the United States can no longer be a party to this process. In order to make our objections clear, both in principle and philosophy, and so as not to create unwarranted expectations of U.S. involvement in the Court, the President believes that he has no choice but to inform the United Nations, as depository of the treaty, of our intention not to become a party to the Rome Statute of the International Criminal Court. This morning, at the instruction of the President, our mission to the United Nations notified the UN Secretary General in his capacity as the depository for the Rome Statute of the President’s decision. **These actions are consistent with the Vienna Convention on the Law of Treaties.** The decision to take this rare but not unprecedented act was not arrived at lightly. But after years of working to fix this flawed statute, and having our constructive proposals rebuffed, it is our only alternative.” (emphasis added) Marc Grossman, Under Secretary for Political Affairs, Remarks to the Center for Strategic and International Studies, Washington, DC, May 6, 2002, found at <http://www.state.gov/p/9949.htm>.

See also statements made in the context of “unsigning” the Rome Treaty, found at <http://fpc.state.gov/9965.htm>. “Q My name is Katia Galinski (sp). I’m with the German newspaper, Frankfurter Allgemeine. And my question is that there were some reports that there is also the intention not to ratify the Vienna Convention on the Law of Treaties, and I was wondering whether you could confirm these reports. AMB. PROSPER: No, those reports are erroneous. We did not have any plans to take any actions on the Vienna Convention. In fact, **today our action is consistent with the convention and out of respect for the convention, in that we filed the document with the United Nations notifying the depository of our intent toward the treaty.**” (emphasis added)

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, 2001¹²⁵

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

B. Conclusion re: the Binding Nature of Signatures

Murky arena or not, there remains little room to contest that the U.S. recognizes as controlling the principles underlying Vienna’s treaty signature provision, and that those principles trigger “climate change” obligations unless and until the U.S., at minimum, renounces its Kyoto signature (or the Senate rejects the pact). These obligations may merely be negative – restraint of violating the treaty’s theme of reducing greenhouse gas reductions – or more affirmatively require GHG reduction efforts.

Given that the courts, universal legal authorities and even U.S. admissions and practice make it clear enough that the U.S. has some commitments under signed-but-not-

¹²⁵ 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, 28 March 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, 5 June 2002
- Vice-President Cheney - "We do not support the approach of the Kyoto treaty." MSNBC 17 March 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, 17 June 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. 17 March 2001
- Environmental Protection Agency Administrator Christie Todd Whitman - "We have no interest in implementing that treaty." Washington Post, 28 March 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, 29 March 2001

ratified treaties particularly when signature combines with other acts, and the myriad other climate traps looming on this basis, climate agreements offer an excellent example of the distorted and perilous modern application of the Treaty Power. This paper details the impropriety of how the U.S. has handled its agreement to amend the UN Framework Convention on Climate Change (UNFCCC, or Rio Treaty) through the Kyoto Protocol.

It is true that after Rio went into force in March 1994, the U.S. enacted no implementing legislation but instead sought to implement the treaty by Executive action.¹²⁶ This does not mean the U.S.'s Rio or Kyoto commitments are meaningless, however, as the above illustrates how it is beyond reasonable dispute that achieving the

¹²⁶ While they can have an impact on the interpretation of domestic and international law, as detailed, *infra*, neither Rio nor Kyoto can be directly enforced through the U.S. courts. First, treaties are "supreme law of the land" but only "self-executing" treaties can be enforced or invoked by U.S. courts and the Senate ratification record made certain that it did not ratify UNFCCC with the understanding or intent that it was a self-executing treaty (that is, a treaty that can be treated as equivalent to a statute for purposes of litigation). The "modern position" regarding "customary" law, however, is that its tenets are in fact "self-executing. For a discussion, see *Customary International Law as Federal Common Law: A Critique of the Modern Position*, by Curtis Bradley, University of Colorado at Boulder School of Law & Jack Goldsmith, University of Virginia School of Law, 110 *Harv. L. Rev.* (1997); *Is International Law Really State Law?* by Harold Koh, Yale Law School, 111 *Harv. L. Rev.* 815 (1997) [*a Response to: Bradley & Goldsmith, Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 *Harv. L. Rev.* (1997)]; and *Federal Courts and the Incorporation of International Law* by Bradley & Goldsmith, 111 *Harv. L. Rev.* 815 (1997) [*a Response to: Harold Koh, Is International Law Really State Law?*, 111 *Harv. L. Rev.* (1998)].

It is the above consideration, not its soft terms, ensuring that Rio could not be enforced even through, *e.g.*, the International Court of Justice at The Hague. Kyoto, however, clearly provides targets and timetables, as well as promises enforcement mechanisms. These, of course, like most of the implementation requirements that could possibly cause alarm among international voters prior to their government ratify, await formulation. Still, patent refusal to abide by commitments does expose one to complaint internationally.

This paper does not explore in great depth the implications of whether a treaty is self-executing as it is premature. See, however, § 111 of the Restatement (3d) - The Foreign Relations Law of the United States:

- (1) International law and international agreements of the United States are law of the United States and supreme over the law of the several States...
- (3) Courts in the United States are bound to give effect to international law and to international agreements of the United States, except that a "non-self-executing" agreement will not be given effect as law in the absence of necessary implementation.
- (4) An international agreement of the United States is "non-self-executing"
 - (a) if the agreement manifests an intention that it shall not become effective as domestic law without the enactment of implementing legislation,
 - (b) if the Senate in giving consent to a treaty, or Congress by resolution, requires implementing legislation, or
 - (c) if implementing legislation is constitutionally required.

signature stage enters a state into an ambiguous level of commitment: some affirmative act noticing your intent not to become a party is required to establish that a nation carries no obligations under a particular agreement. It is for the individual state to assert, not for other signatories to glean from rhetoric, whether or not it intends any commitment at all from written agreement.¹²⁷

Now, the Bush Administration faces the unavoidable conflict between its refusal to disavow the U.S. signature on Kyoto while concurrently publicly insisting the President has rejected it, all while further dignifying Kyoto's underlying premise by other actions. Skeptics see this approach as no more than an attempt to finesse keeping an unpopular treaty commitment in place for a successor – or a second Bush Administration – to deepen the commitment. In fact, President Bush's management of U.S. climate commitment appears identical to the Clinton-Gore Administration's decision to rhetorically assure its political base but leave actual resolution to the successor administration. Both administrations have otherwise behaved as if signaling U.S. acceptance of the underlying theory and prescription, if both refusing to foster the Senate's opportunity to vote on the treaty itself.

Regardless, the Bush Administration's management of the issue courts a proliferation of NEPA and ATCA challenges, and having, *e.g.*, its proposed "Climate Action Plan" or pro-fossil fuel energy policies and proposed Clean Air Act amendments with voluntary GHG provisions challenged as violative of Kyoto, via Vienna and/or its customary signature equivalent.

¹²⁷ For a discussion of the impact upon a country's treaty signature of Executive transmittal, and whether that act is necessary for Senate consideration, see Horner, pp. 27-35.

V. National Environmental Policy Act

The most glaring exposure created by the U.S.'s inconsistent, presumably “no cost” statements on climate change ranging from international commitments to acknowledgements may likely be a positive reception in domestic courts, of claims turning on the legitimacy of the theory of severe anthropogenic warming, under a major environmental “infrastructure” administrative law. Specifically, plaintiffs have already emerged seeking to further expand one of the greatest examples of “statutory sprawl” in history, the National Environmental Policy Act of 1969,¹²⁸ to include “climate change” as a mandatory “environmental impact” consideration. These efforts to date have been relatively feeble compared to that which the opportunity presents.

NEPA was enacted “[t]o declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.”¹²⁹

This mission sounds potentially benign, but the malignancy was soon found to be in the lack of statutory detail. By merely forcing regulators to make particular assessments and share them with the public, the statute is not facially a tool for blocking

¹²⁸ 42 USC §§ 4320 *et seq.* (Pub. L. 91-190, 42 U.S.C. 4321-4347, January 1, 1970, as amended by Pub. L. 94-52, July 3, 1975, Pub. L. 94-83, August 9, 1975, and Pub. L. 97-258, § 4(b), Sept. 13, 1982).

¹²⁹ 42 U.S.C. § 4321. For the Council on Environmental Quality’s NEPANet website, including implementing regulations, see <http://ceq.eh.doe.gov/nepa/nepanet.htm>.

projects on the basis of alleged environmental harm.¹³⁰ Still, implementing this statute turned out to be a powerful weapon for those seeking to obstruct development through “paralysis by analysis.” This occurred routinely by defining the statute through the courts aided by loose implementing regulations. Further, environmental groups have successfully used the NEPA-mandated environmental impact statements in conjunction with the other environmental laws, such as the Endangered Species Act or the Clean Air Act, to persuade courts to stop or significantly modify scores of projects.¹³¹

Under NEPA all government agencies – from agricultural to military -- must study and provide an assessment of the environmental implications of major projects before undertaking them. Private companies that receive federal funds or use federal lands also fall under NEPA's umbrella.¹³² Capitalizing on this requirement, environmental pressure groups filed thousands of essentially nuisance lawsuits arising from a bias against development or resource exploitation to block construction of office buildings to projects to drill for oil on federal land.¹³³

Ground rules established by President Carter's Council on Environmental Quality

¹³⁰ However, see, *e.g.*, “is NEPA only a procedural requirement imposing paperwork on agencies, or does it also impose substantive limits on agency decisions? The majority view is apparently that NEPA does impose substantive limits on agencies and that agency action is subject to judicial review if it transgresses these limits. However, except for the Second Circuit’s decision reversed by the Supreme Court in *Stryker’s Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223 (1980), no court of appeals has actually overturned an agency for violating NEPA’s substantive limits”. Roger W. Findley and Daniel A. Farber, *Environmental Law*, 1988, pp. 50-51.

This paper focuses more, however, on the likelihood that anthropogenic “climate change” will be successfully cited as a necessary. That potential outcome is the topic of a separate discussion.

¹³¹ An illustrative example is found in *Akers v. Resor*, 339 F.Supp. 1375 (D.C. Tenn 1972), addressing the NEPA requirement that the 1958 Fish and Wildlife Coordination Act be administered and interpreted in light of NEPA’s environmental objectives.

¹³² See, *e.g.*, *Ely v. Velde*, 497 F.2d 252 (4th Cir. 1974), involving federal construction financing.

¹³³ Contradicting NEPA’s language, John Echeverria, executive director of the Georgetown Environmental Policy Project says “The whole purpose of the law was to slow down the government juggernaut and to make public officials think long and hard before they take any action that could be harmful to the environment... There's no question that environmentalists have used NEPA to block projects that they thought were ill-advised and particularly harmful.” Quoted in “Bush’s Quiet Plan,” *National Journal*, Vol. 34, Nos. 47-48, November 23 2002 p. 3475.

outlined a regulatory strategy for systematically complying with NEPA’s mandates, though despite this it is the courts more often than Executive officers ultimately determining what a NEPA requirement means in a given situation.¹³⁴

NEPA’s dominant component in practice is § 102(2)(c), requiring an environmental impact statement (EIS) for all “major federal actions significantly affecting the quality of the human environment”.¹³⁵ Such criteria for governmental consideration of environmental concerns, interpreted over time as breathtakingly malleable, were in pursuit of NEPA instituting a governmental policy to use all practical means to administer federal programs in harmony with the human environment.¹³⁶ This was manifested, in pertinent part, as follows:

The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this Act, and (2) all agencies of the Federal Government shall – ...

(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on --

(i) the environmental impact of the proposed action,

¹³⁴ “‘Court decisions were pouring out,’ recalls James Gustave Speth, who headed the Council on Environmental Quality under President Carter and now is dean of the Yale School of Forestry and Environmental Studies. ‘It was the first major federal environmental legislation. And it became extraordinarily powerful, primarily because of the courts.’” *Id.*

¹³⁵ 42 U.S.C. 4332(2)(C). CEQ defines “human environment” in its regulations implementing NEPA as “‘Human environment’ shall be interpreted comprehensively to include the natural and physical environment and the relationship of people with that environment. (See the definition of “effects” (§ 1508.8).) This means that economic or social effects are not intended by themselves to require preparation of an environmental impact statement. When an environmental impact statement is prepared and economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss all of these effects on the human environment.” In practice, this requirement has led to EIS being conducted for all major federal actions, in order to determine whether it entails possible significant impact on the quality of the human environment. CFR Part § 1508.14

¹³⁶ This policy is to be consistent with, if not supreme to, other national policies. See, e.g., *Stryker’s Bay Neighborhood Council, Inc. v. Karlen*, 444 U.S. 223, 228 n. 2 (1980).

- (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
- (iii) alternatives to the proposed action,
- (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
- (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.¹³⁷

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of title 5, United States Code, and shall accompany the proposal through the existing agency review processes;...¹³⁸

There is no shortage of examples of these NEPA requirements imposing tremendous consequences, from mere frustrating delays to significant economic impacts. With “climate change” incorporated as a necessary consideration for an EIS, this would without doubt become exponentially worse.¹³⁹ Already one court has determined that indeed climate change must be considered prior to the government proceeding with, in this case, a permit application to construct and operate electrical transmission lines from

¹³⁷ The prefacing language set the context, with the mandate that agency decisions include environmental factors: “(2)(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment; (B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations”.

¹³⁸ NEPA § 102, 42 U.S.C. 4332.

¹³⁹ As the Bush Administration pursues NEPA reforms (see, *e.g.*, <http://www.humaneventsonline.com/articles/12-23-02/staff.htm>), a favorite rhetorical example of dilatory campaigns to which NEPA is employed involves the town of Stillwater, MN, attempting for 30 years to build a four-lane bridge over the St. Croix River. The project would replace and diverting traffic, including semi-trucks away from an historic district and a 70-year old bridge on National Register of Historic Places, presumably increasing development in communities on both sides of the bridge. Environmentalists claim, in addition to wetlands and “wild and scenic river” concerns, the bridge would accelerate urban sprawl.

Mexico to California, for the reason that these lines would facilitate the emissions of a facility thereby making the plant's operation an effect of the federal permitting decision despite, as the court presumed, the plant's operations being outside of NEPA's reach due to being located outside the U.S. borders.¹⁴⁰ This opinion is both bizarre and alarming. The court did not explain or even seek to justify this portion of its opinion addressing carbon dioxide with any analysis of impacts or even that the U.S. has arguably acknowledged them. Instead, it merely took notice as fact of the allegation that anthropogenic emissions of carbon dioxide contribute to climate change, reasoning that because the federal defendants did not disprove that claim they had completed an EIS that is inadequate as a matter of law.¹⁴¹

For this reason, the instant analysis does not dedicate discussion to the impacts of *Border Power* but merely cites it as a warning of things to come. The breathtaking implications of a court merely taking notice of the theory of anthropogenic climate change as a basis for its opinion, without inquiry and as fact, are potentially staggering.

In addition to the EIS requirement NEPA's regulatory evolution includes other such innovations as "An Ecosystem-based Approach Can Integrate NEPA into Strategic

¹⁴⁰ *Border Power Plant Working Group v. U.S. Department of Energy* (SD CA (CV-02-513) 2 May 2003 Order Partially Granting Plaintiffs' Motion for Summary Judgment. The court considered the GHG emissions from the perspective of indirect and cumulative impacts, discussed, *infra*.

¹⁴¹ "Second, plaintiff argues that the [EIS] fails to consider the emissions of carbon dioxide and ammonia. Because carbon dioxide contributes to global warming...plaintiff contends that the failure to assess and disclose the impact makes the [EIS] inadequate. Defendants respond that nothing in the record provides a basis for the assertion that the agencies should have considered [CO2] emissions. Although federal defendants cite authority for the proposition that they need not evaluate "questionable effects" or "imaginary horrors," these cases are inapposite to the question posed by the emissions described here. Defendants do not dispute that the [turbines] will emit ammonia and carbon dioxide. These effects are neither questionable nor imaginary...Although the agencies state that plaintiff has provided no authority for the proposition that it must consider the impacts of [CO2], neither do the agencies cite reasoning or legal authority for their proposition that they need not disclose and analyze these emissions merely because the EPA has not designated them as 'criteria pollutants'". *Id* (pleadings references omitted). The court then referred to Merriam-Webster for the proposition that CO2 is a greenhouse gas, and therefore a "pollutant" despite not being listed as such under any regime, the alleged though not debated impacts of the emissions of which must therefore be considered in any EIS. Opinion at 34.

Planning”, asserting that “[m]any other agencies are using the ecosystem approach to develop regional planning EISs. Strategic use of NEPA is proving to be a useful mechanism for attaining the sustainable development goals of communities. ...An ecosystem, or place-based, approach to strategic planning through NEPA can provide a framework for evaluating the environmental status quo and the combined cumulative impacts of individual projects.”¹⁴²

It is in this context that environmental advocacy groups have initiated a campaign to have climate change added to the list of environmental considerations necessary in any acceptable EIS, while also seeking to have the EIS requirement attach to even Small Business Administration loans and overseas loan guarantees. It does in fact appear that inept, or at minimum inconsistent, issue management has created sufficient grounds for U.S. courts to positively receive claims that NEPA requires consideration of a project’s contribution to the now-“acknowledged” anthropogenic climate change as a condition of approving any major federal endeavor.

Thus it is important that, in addition to its EIS requirement, NEPA also creates opportunity for plaintiffs on two specific counts, these being that reasonable alternatives exist, and consideration not merely of the discrete project’s impact but its possible contribution to global environmental concerns, specifically, that agencies:

“...(E) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

¹⁴² “The National Environmental Policy Act: A Study of its Effectiveness After 25 Years”, CEQ, at 15 (<http://ceq.eh.doe.gov/nepa/nepa25fn.pdf>), January 1997.

(F) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment.”¹⁴³

These provisions offer plaintiffs possible avenues to judicial review that the EIS might not.¹⁴⁴ Additionally, however, the language found in NEPA subsections 102(2)(B) and (F) clearly augur well for plaintiffs seeking to ensure a project’s “climate change” potential is considered when determining possible impact on the human environment. Additionally, in fact, NEPA possesses broad “sustainable development” language offering significant authority should global, less tangible concerns such as climate change become accepted as required considerations.¹⁴⁵ Already, potential contribution to the

¹⁴³ 42 U.S.C. § 4332.

¹⁴⁴ In fact, the EIS makes no mention of judicial enforcement, a concept which only arose upon the D.C. Circuit asserting in *Calvert Cliffs’ Coordinating Committee, Inc. v. U.S. Atomic Energy Comm’n*, 449 F.2d 1109 (D.C. Cir. 1971), that NEPA establishes a strict standard of compliance in pursuit of a “particular sort of careful and informed decisionmaking process and creates judicially enforceable duties.” *Id.* at 115. If the agency fails to “balanc[e] environmental factors... it is the responsibility of the courts to reverse.” *Id.*

¹⁴⁵ § 101 (42 U.S.C. 4331), NEPA’s “sustainable development,” and indeed “right to a sustainable environment” clause, likely to be invoked as such in a putative ATCA climate action as such claims have already proliferated in the typical ATCA complaint (see WTO Shrimp-Turtle discussion, *infra*):

“(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

(b) In order to carry out the policy set forth in this Act, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may

1. fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
2. assure for all Americans safe, healthful, productive, and aesthetically and culturally pleasing surroundings;
3. attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

amorphous “sprawl” is an accepted, required consideration.¹⁴⁶ What, then, is the logic to not extending NEPA to examining potential contribution to “climate change”?

Consider Reporter’s Note 9 to § 601, “The Law of the Environment,” in the Restatement (3d) of The Law of International Relations”:

“Impact abroad or upon the ‘global commons.’ ... While [NEPA]... is principally directed toward assuring a healthful environment for the people of the United States, it recognizes ‘the worldwide and long-range character of environmental problems’ and supports the initiation of ‘programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind’s world environment.’ 42 U.S.C. §§ 4321, 4332(2)(F). Whether this policy declaration indicates that the legal obligation to prepare an environmental impact statement extends to impacts outside the United States is not clear. (citations omitted) The Executive Order on Environmental Effects Abroad of Major Federal Actions (Reporter’s Note 2) requires federal agencies to take into consideration environmental impact statements and relevant international environmental studies when approving ‘major Federal actions significantly affecting the environment of the global commons outside the jurisdiction of any nation (e.g., the oceans or Antarctica).’ Section 2-3(a) [Ed Note: or the atmosphere] See also Pincus, ‘The “NEPA-Abroad” Controversy: Unresolved by an Executive Order,’ 30 Buffalo L.Rev. 611 (1981.)”

“Climate change” being a global phenomenon regardless of its cause, and whether or not this analysis contemplates foreign impacts it doubtless further affirms the likelihood that NEPA as currently applied by the courts is reasonably required to consider a project’s potential contribution to “climate change” as part of any acceptable EIS.

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4. preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity, and variety of individual choice;
 5. achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and
 6. enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.”

¹⁴⁶ “Court decisions construing NEPA have recognized that federally-assisted projects which contribute to urban sprawl are required to evaluate the growth inducing effect of additional development. See e.g., *City of Davis v. Coleman*, 521 F.2d 661 (9th Cir. 1995) (highway construction); *Carmel-by-the-Sea v. U.S. Dept. of Transportation*, 123 F.3d 1142 (9th Cir. 1997) (highway construction); *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569 (9th Cir. 1998) (airport expansion).” <http://www.foe.org/site1/act/sbaltr.html>.

It is instructive to note that courts have already proven amenable to extending the regulatory consideration of “human environment”, ruling that NEPA is not limited to undisturbed natural areas or even to the natural environment.¹⁴⁷

Now, it is beyond serious debate that, even assuming climate alarmism and notwithstanding contemporary rhetoric that, *e.g.*, Iraq setting fire to scores of oil wells might dramatically accelerate “global warming,” few if any discrete projects could be alleged as having an individual ability to impact climate. The individual project under review is neither necessarily the relevant nor certainly the exclusive consideration under NEPA, however. First, “effect” or the synonymous “impact” is defined exceedingly broadly.¹⁴⁸ Further, a project’s incremental contribution to the cumulative effect of some activity or family of activities is of consequence.¹⁴⁹

¹⁴⁷ See, *e.g.*, *Hanly v. Mitchell*, 460 F.2d 640 (2d Cir. 1972), cert. denied 409 U.S. 990 (1972), in which the Second Circuit asserted the potential significant environmental impact involved the possibility of increased crime in the area, esthetic impacts of the jail in question, and other socio-economic effects. Further, the Supreme Court addressed the question in *Metropolitan Edison Co. v. People for the Ethical Treatment of Animals*, 460 U.S. 766 (1983). There, in the matter of the necessity of an EIS prior to restarting a nuclear reactor at Three Mile Island, the Court found anxiety, tension fear and/or a sense of helplessness “too removed from the physical environment to justify their consideration under NEPA” *Id.* at 774. The Court stated that “Congress was talking about the physical environment – the world around us, so to speak.” *Id.* at 772. Post-*Hanly* opinions further demonstrating NEPA’s reach include *Nucleus of Chicago Homeowners Ass’n v. Lynn*, (7th Cir. 1975), 524 F.2d 225, certiorari denied 424 U.S. 967, stating that the environmental policy embodied in NEPA is as broad as the mind can conceive, thus including the quality of urban life the problems of which extend beyond clean air and water. Other courts determined that NEPA requires federal agencies preserve important historic and cultural aspects of the nation’s heritage. See, *e.g.*, *Preservation Coalition, Inc. v. Pierce* (9th Cir. 1982), 67 F.2d 851.

Therefore, though the *Hanly* expansion of “environmental impact” may not be limitless, the Court left no doubt that “environmental” contemplates a “reasonably close causal relationship” to a change in the physical environment, including possible effects should future risks materialize. 460 U.S. at 774.

Though debate also may be had over whether the environmental impact of anthropogenic climate change – discretely or cumulatively -- is significant, and whether warming would be beneficial, this paper does not discuss that debate as it seems overly tenuous: the operative presumption of the courts will doubtless be that anthropogenic influence on a global scale is “significant” and a net negative. Still, see the two-part test adopted by the Second Circuit in *Hanly v. Kleindienst*, 471 F.2d 823 (2d Cir. 1972), cert. denied 412 U.S. 908 (1973). The court prescribed an examination of the degree of change from current land use and the absolute quality of the impact.

¹⁴⁸ “‘Effects’ include: (a) Direct effects, which are caused by the action and occur at the same time and place. (b) Indirect effects, which are caused by the action and are later in time or farther removed in distance, but are still reasonably foreseeable. Indirect effects may include growth inducing effects and other

The Council on Environmental Quality regulations implementing these NEPA procedural provisions define cumulative effects in a way quite hospitable to “climate” proponents, as:

“the impact of the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time.”¹⁵⁰

The following CEQ chart illustrates the potential far-reaching nature of “cumulative impact” analysis particularly as relates to putative “climate change” claims against, *e.g.*, an EIA for an energy or transportation project:

effects related to induced changes in the pattern of land use, population density or growth rate, and related effects on air and water and other natural systems, including ecosystems.

Effects and impacts as used in these regulations are synonymous. Effects includes ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic, social, or health, whether direct, indirect, or cumulative. Effects may also include those resulting from actions which may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.” 40 CFR §1508.8

¹⁴⁹ See, *e.g.*, *City of Tenakee Springs v. Clough* (9th Cir. 1990), 915 F.2d 1308; *Northern Crawfish Frog v. Federal Highway Administration* (D.Kan. 1994), 858 F.Supp. 1503 (also addressing the requirement of considering secondary effects). However, also see *NRDC v. Callaway* (D.Conn. 1974), 389 F.Supp. 1263, *rv’d* in part on other grounds 524 F.2d 79.

¹⁵⁰ 40 CFR § 1508.7. For a detailed discussion of this matter, see “Considering Cumulative Effects Under the National Environmental Policy Act”, CEQ (<http://ceq.eh.doe.gov/nepa/ccenepa/exec.pdf>) January 1997.

Table E-1. Incorporating principles of cumulative effects analysis (CEA) into the components of environmental impact assessment (EIA)	
EIA Components	CEA Principles
Scoping	<ul style="list-style-type: none"> ● Include past, present, and future actions. ● Include all federal, nonfederal, and private actions. ● Focus on each affected resource, ecosystem, and human community. ● Focus on truly meaningful effects.
Describing the Affected Environment	<ul style="list-style-type: none"> ● Focus on each affected resource, ecosystem, and human community. ● Use natural boundaries.
Determining the Environmental Consequences	<ul style="list-style-type: none"> ● Address additive, countervailing, and synergistic effects. ● Look beyond the life of the action. ● Address the sustainability of resources, ecosystems, and human communities.

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Clearly, given the operative definitions of “human environment”, “effects”, and “cumulative impact” there is no limitation of required “environmental impacts” that may be easily gleaned from CEQ’s implementing regulations. The final relevant consideration from these regulations, the definition of “significantly,”¹⁵² offers no refuge. The text of this extensive provision can be considered almost entirely relevant to a claim that “climate change” is what NEPA contemplated as a required consideration for an EIS particularly for an energy or energy-dependent project. Those most relevant include as follows:

¹⁵¹ “Considering Cumulative Effects Under the National Environmental Policy Act”, at 5. Matters actually used to be (slightly) worse, as a now-rescinded Carter-era CEQ regulation, agencies were required to deal with the issue of which environmental impacts must be considered by including a “worst case scenario” in the EIS. Under this regulation, a supertanker port’s EIS was deemed invalid by the court in *Sierra Club v. Sigler*, 695 F.2d 957 (5th Cir. 1983), because it failed to discuss the “worst case” of a total cargo loss by a tanker in Galveston Bay. Now, though “the Act itself does not mandate that uncertainty in predicting environmental harms be addressed exclusively” by worst-case scenarios, they may substitute for holes in an EIS due to significant information gaps that yield scientific uncertainty over the possible effects.

Robertson v. Methow Valley Citizens’ Council, 490 U.S. 332, 354 (1989). Clearly, this has potential “climate change” ramifications, as the government in defense might plead it did not intend certainty by its “acknowledgements,” which does not appear to offer promise as an acceptable excuse.

¹⁵² 40 CFR § 1508.27.

“‘Significantly’ as used in NEPA requires considerations of both context and intensity:

(a) Context. This means that the significance of an action must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality. Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the world as a whole. Both short- and long-term effects are relevant.

An alleged non-site-specific action naturally therefore calls for considerations helpful to a “climate” complainant. The subsequent, multi-part “Intensity” analysis is equally unhelpful, including many potentially damning considerations, given the allegations about purported anthropogenic climate change, but none more so than:

“7. Whether the action is related to other actions with individually insignificant but cumulatively significant impacts. Significance exists if it is reasonable to anticipate a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.” CFR Part 1508 § 1508.27(b)

The potential, though not likely, saving grace might be found in the considerations under “Intensity,” stating:

“[T]he following should be considered in evaluating intensity:

4. The degree to which the effects on the quality of the human environment are likely to be highly controversial.
5. The degree to which the possible effects on the human environment are highly uncertain or involve unique or unknown risks.”

Certainly, the totality of NEPA’s statutory EIS requirement and CEQ’s implementing regulations pose conflict with the increasing record of the U.S. government “admitting” anthropogenic climate change and the necessity of mitigating further

contribution to existing atmospheric GHG concentrations.¹⁵³ The *Hanly* court's assessment of the meaning of NEPA's "significant" standard is also troubling in this context:

"[T]he absolute quantitative adverse environmental effects of the action itself, including the cumulative harm that results from its contribution to existing adverse uses or conditions in the affected area." 471 F.2d at 830-31 (emphasis added)

Consider a recent, admittedly "interested" yet still illustrative press release by the pressure group Natural Resources Defense Council (NRDC):

"A new report by the Bush administration finally acknowledges that global warming is a real problem for the U.S., one that will have dramatic and costly effects on our health, economy and environment. The document also concedes that man-made emissions are to blame. Despite the sudden reversal -- which confirms what most scientists have been saying for years -- the White House continues to oppose efforts to reduce the pollution responsible for the problem.

"This scientific epiphany places the Bush administration squarely at odds with its own lackluster global warming policy. Having admitted the extent of the problem and identified the cause, a policy of inaction becomes impossible to defend," said David G. Hawkins, director of the Climate Center at NRDC (Natural Resources Defense Council). "America has the technology to start cleaning up the problem. These findings are a warning that it's time to get moving."

The new assessment, "[U.S. Climate Action Report 2002](#)," was quietly posted last Friday on the Environmental Protection Agency website. It represents a sharp break from the administration's global warming rhetoric, which downplayed scientific certainty. The new report echoes conclusions by the National Academy of Sciences, the Intergovernmental Panel on Climate Change and many others."¹⁵⁴

With each acknowledgement", the U.S. government removes "climate change" further from being an effect that is safely characterized as "remote and (or)

¹⁵³ See e.g., <http://yosemite.epa.gov/oar/globalwarming.nsf/content/VisitorCenterOutdoorEnthusiasts.html>. Further, agencies' responsibilities are to develop "continuously" as the record regarding environmental impacts develops. See, e.g., *Environmental Defense Fund v. Tennessee Valley Authority* (6th Cir. 1972), 468 F.2d 1164. The U.S. government therefore digs its hole ever deeper with each "acknowledgement."

¹⁵⁴ <http://www.nrdc.org/media/pressreleases/020603b.asp>.

speculative,”¹⁵⁵ or “unknown or uncertain”¹⁵⁶, which can make a consideration unnecessary.

The likely applicable threshold of whether the impact is “reasonably foreseeable”¹⁵⁷ appears triggered by myriad U.S. governmental “admissions.” Other groups recognize this, taking their insight all the way to the courthouse though possibly not as artfully as they might. In August 2002, pressure groups Friends of the Earth and Greenpeace, joined by the city of Boulder, Colorado and several individual plaintiffs filed suit under NEPA Section 102 demanding that U.S. government finance agencies bankrolling fossil fuel projects overseas undertake a NEPA EIS, with their potential climate change impact a necessary consideration.¹⁵⁸ Their specific complaint was that the Export-Import Bank of the United States and the Overseas Private Investment Corporation violated NEPA when, without conducting an EIS, they gave developing countries more than \$32 billion to develop oil fields, pipelines, and coal-fired plants without first assessing the projects' contribution to global warming. Their underlying support for subject matter jurisdiction is a 1983 ruling that so long as an environmental impact on the United States can be demonstrated, the fact that the activities occur overseas is not a barrier to NEPA application. (*Environmental Defense Fund, Inc. v. Massey*, 986 F.2d 528 (D.C. Cir. 1993).

¹⁵⁵ See, e.g., *Trout Unlimited v. Morton* (9th Cir. 1974), 509 F.2d 1276, *Columbia Basin Land Projection Ass'n v. Kleppe* (D.Wash. 1976), 417 F.Supp. 46.

¹⁵⁶ See, e.g., *EDF v. Costle* (D.N.Y. 1977), 439 F.Supp. 980.

¹⁵⁷ See, e.g., *Carolina Environmental Study Group v. U.S.* (D.D.C. 1975), 510 F.2d 796.

¹⁵⁸ *FoE et al. v Overseas Private Investment Corporation, Export-Import Bank of the United States* (C-02-4106 NDCA 2002 (JSW)). See Complaint at http://www.climatelawsuit.org/2002-08-26_Complaint.pdf See also the background paper asserting how such financing causes climate change, at http://www.seen.org/pages/reports/exim_opic_summary.pdf, and Greenpeace press release, http://www.greenpeace.org/news/details?news_id=24022&campaign_id=3937.

This complaint is further unique in that it does in fact cite the National Assessment as representing U.S. concurrence with the UN's alarmist IPCC Third Assessment Report (see esp. paras. 45-54). Although the legal overtures to date have not been pled as artfully as is possible and are seemingly small scale, the precedent they threaten is enormous. This is why environmentalists cite pending actions as a mere taste of things to come, when hypothetical victims of future rising sea levels and increased droughts and floods go after those they see as responsible - the main GHG "polluters".¹⁵⁹ NEPA as presently applied by the courts should give these pressure groups great hope.

¹⁵⁹ Even more parties have noted this conflict, though given their standing are more likely to be limited to arguing the science of global warming in seeking to prove damages, unless they file under Alien Tort Claims Act. Consider: "U.S. faces legal battles as climate bogeyman", Reuters, August 29, 2002, Johannesburg, South Africa - The United States faces new challenges in the courts over its climate policies despite its denials [ed: As NRDC more accurately notes, the Administration's submissions indicate it hardly "denies" this] that as the world's biggest polluter it is responsible for global warming. Wednesday the government of tiny Pacific island state Tuvalu said it planned to launch lawsuits within a year against the United States and Australia. Both have rejected the Kyoto climate pact. The country, which is only 13 feet above sea level at its highest point, faces oblivion if scientists' gloomy scenarios prove right and global warming causes the sea to rise. Tuvalu is blaming the polluters." http://www.enn.com/news/wire-stories/2002/08/08292002/reu_48290.asp.

VI. Alien Tort Claims Act

A. Modern ATCA Development

Should the underlying premises of Rio and Kyoto – an acknowledged anthropogenic threat and particular responses incumbent upon industrialized states – in fact rise to the level of customary law or its equivalent “the law of nations”, it seems inescapable that plaintiffs in the emerging campaign to enforce U.S. climate treaty commitments will aggressively invoke the Alien Tort Statute, or Alien Tort Claims Act (ATCA).¹⁶⁰ Enacted in 1789,¹⁶¹ that law provides original jurisdiction to federal courts over “any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”

Though its modern usage initiated in the human rights context, as more traditionally defined – anti-torture -- green pressure groups have recently begun exploring its potential to expand recognition of human rights for these purposes to include the right to sustainable development. To date the spate of environmental torts alleged under ATCA merely assail U.S. companies for direct or vicarious liability arising from activities in *developing* countries. That will not last.

Environmental pleadings under Alien Tort have so far been inartful and/or have not made those arguments likely to succeed in a putative “climate change”-based action. Regardless of this particular shortcoming and the plaintiffs’ general lack of success in ultimately obtaining a domestic hearing, ATCA revival generally has raised alarms that this law “presents a danger that the US judicial system will become the world’s civil

¹⁶⁰ It may be instructive to note that plaintiffs in the major ATCA case recently decided at the trial level, *Sarei et al. v. Rio Tinto*, 221 F.Supp.2d 1116 (CD CA 9 July 2002), was filed by “tobacco attorney” and active anti-corporate plaintiffs’ lawyer Steve W. Berman. See <http://www.hagens-berman.com>, or <http://www.hagens-berman.com/frontend?command=Lawsuit&task=viewLawsuitDetail&iLawsuitId=213>.

¹⁶¹ 28 U.S.C. 1350.

court of first resort.”¹⁶² This also creates concern over the threat it poses to direct foreign investment by U.S.-based entities and those with a reasonable expectation of being subject to U.S. jurisdiction.¹⁶³

As this paper discusses, the untapped ATCA threat is that it will be applied against U.S. companies for their domestic operations in compliance with U.S. law for purported international environmental consequences.¹⁶⁴

Enacted in as part of the First Judiciary Act,¹⁶⁵ ATCA was largely dormant until invoked in 1980.¹⁶⁶ Since then, activist groups of various stripes have actively and fairly openly pondered opportunities to exercise its tremendous potential.¹⁶⁷

¹⁶² “The Very Long Arm of American Law,” Thomas Niles, *Financial Times* 6 November 2002.

¹⁶³ See, generally, business advocacy group websites www.USAEngage.org, and www.USCIB.org.

¹⁶⁴ See, e.g., “Bizarre Weather Ravages Africans’ Crops: Some See Link to Worldwide Warming Trend,” *The Washington Post*, 7 January 2003, p. A1, found at <http://www.washingtonpost.com/wp-dyn/articles/A19765-2003Jan6.html>.

Green pressure groups are not oblivious to this. Consider the article “Rising Seas and Disappearing Islands: Can Island Inhabitants Seek Redress Under the Alien Tort Claims Act?,” Reed, *Pacific Rim Policy Journal*, March 2002 (published by a Tuvaluan university -- University of the South Pacific)(available through <http://www.vanuatu.usp.ac.fj/>). “Greenhouse gas concentrations in the atmosphere are rising, resulting in a number of environmental consequences. One of the more pressing consequences is rising sea levels, which threaten to destroy and submerge small island states in the Pacific Ocean. The approximately 300,000 inhabitants of these islands could at the end of the century find their homes under water, but there is still time to find a solution to the problem. One option is to bring an action, in United States district courts, under the Alien Tort Claims Act (“ATCA”), seeking damages for violations of their environmental human rights and threatened genocide. The ATCA allows aliens to use United States district courts for tort actions claiming violations of international norms.” P. 2.

¹⁶⁵ Enacted as Sec. 9; excerpted at <http://exchanges.state.gov/education/engteaching/pubs/AmLnC/br8.htm>.

¹⁶⁶ *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980). There, the court held that two Paraguayans could bring an ATCA claim against a former Paraguayan police inspector for the torture and death of one of their family. The court in *Sarei et al. v. Rio Tinto*, 221 F.Supp.2d 1116 (CD CA July 9, 2002) asserted “prior to the Second Circuit’s 1980 decision in *Filartiga*, there were only twenty-one reported decisions under the ATCA. See Kenneth C. Randall, *Federal Jurisdiction over International Law Claims: Inquiries Into the Alien Tort Claims Statute*, 18 N.Y.U. J. INT’L. L. & POL. 1, 4-5, n. 15 (1985). *Filartiga* was thus the seminal case interpreting the Act.” 221 F.Supp.2d at 1132 (n. 96).

¹⁶⁷ Already academic pieces are appearing exploring ATCA’s environmental potential. See, e.g., Richard L. Herz, *VA JNL of Int’l.L.*, “Litigating Environmental Abuses Under the Alien Tort Claims Act: A Practical Assessment”, Vol. 40: 545.

Announcing their victory at the trial level for defendants in *Flores v. SPCC*, the law firm Covington & Burling issued a press release noting that, “Observers such as the *Harvard Law Review* and the U.S. Council for International Business have commented on the increasing frequency with which such lawsuits have been brought against multinational corporations. Those lawsuits often are supported by activist political or environmental organizations and academics who advocate expansive definitions of the

As recently recounted by the 2d Circuit in *Flores v. Southern Peru Copper*:

“The Second Circuit’s decision in *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), marked the beginning of this recent increase in litigation brought under the ATCA. In that case, the court held that contemporary international law does not just govern the relations among states and the relations between a state and citizens of another state, but also governs certain acts, such as torture, committed by a state against its own citizens. *Id.* at 884-85. Then in *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995), the Second Circuit went a step further to hold that, under modern international law, ‘certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals.’ *Id.* at 239.” (2d Circuit CV-00-982) Memorandum Opinion and Order, Dismissing for Lack of Subject Matter Jurisdiction, pp. 2-3 (16 July 2002).

Since *Kadic*, plaintiffs have petitioned courts to apply ATCA to hold private entities either directly or vicariously accountable for the acts of a state in which they operate, as well as for environmental consequences of their own actions. Those complaints, as described herein, have been dismissed from U.S. courts nearly uniformly on the analysis that U.S. courts simply ought steer clear, pursuant to *forum non conveniens*, comity and/or the political question and act of state doctrines.

Those defenses will be of no avail against “climate” complaints citing in whole or significant part domestic U.S. operations and international environmental impacts: Given that to date allegations of environmental torts under ATCA have exclusively involved overseas operations’ allegedly tortious local implications, it makes sense that important

meaning and applicability of ‘international law’.” <http://www.cov.com/new/pressreleases/191.html>. The Harvard Law Review reference likely is to *Customary International Law as Federal Common Law: A Critique of the Modern Position*, Curtis Bradley, University of Colorado at Boulder School of Law & Jack Goldsmith, University of Virginia School of Law, *110 Harv. L. Rev. (1997)*; *Is International Law Really State Law?* Harold Koh, Yale Law School, *111 Harv. L. Rev. 815 (1997)* [*a Response to: Bradley & Goldsmith, Customary International Law as Federal Common Law: A Critique of the Modern Position, 110 Harv. L. Rev. (1997)*]; Harvard Law Review, May, 2001 Developments in the Law, International Criminal Law, *2025 V. Corporate Liability for Violations of International Human Rights Law, Copyright © 2001 Harvard Law Review Association; and/or *Federal Courts and the Incorporation of International Law* Curtis Bradley, University of Colorado at Boulder School of Law & Jack Goldsmith, University of Virginia School of Law, *111 Harv. L. Rev. 815 (1997)* [*a Response to: Harold Koh, Is International Law Really State Law?, 111 Harv. L. Rev. (1998)*]. For USCIB comments, see <http://www.uscib.org/index.asp?DocumentID=2175>.

considerations of the propriety of U.S. courts, given the location of witnesses and evidence and political considerations or even the potential that U.S. courts would risk effectively imposing U.S. environmental standards on poorer nations, has led to a bias against domestic judicial intervention and in favor of local adjudication. It is less logical that these defenses offer domestic ATCA defendants refuge when the behavior in question by American entities occurred in the U.S. with alleged global consequences.

Though this paper discusses in specific detail the minimal utility each of those defenses will offer putative domestic ATCA “climate change” defendants, it appears inevitable that ATCA environmental litigation will outgrow these obstacles. Future litigation complaining of *domestic* activities with alleged *global* – or, at minimum, particularly damaging regional -- environmental implications will focus nearly entirely on whether an alleged tort of contributing to climate change violates the “law of nations”. On this score, clumsy U.S. treaty/issue management has given plaintiffs a leg up.

The relevant inquiry is also expressed as whether the tort alleged is in violation of customary law.¹⁶⁸ The U.S. has given every appearance of respecting Vienna’s signature requirement and/or its customary equivalent as controlling. This to some extent obligates the U.S. pursuant to its Kyoto signature. That and accumulated U.S. actions lend themselves to an argument that the U.S. acknowledges a universal right to “sustainable development” and even Kyoto-style obligations as rising to the level of customary law. This will become relevant, environmental ATCA claims to date having been based purely on “soft” resolutions, declarations and understandings. Therefore, potential defendants

¹⁶⁸ See, e.g., “[b]ecause UNCLOS reflects customary international law, plaintiffs may base an ATCA claim upon it.” *Rio Tinto*, 221 F.Supp.2d at 1162.

should in fact be concerned that a tort will be found to exist in carbon-intensive activities of violating some norm against contributing to “climate change”.

B. ATCA’s Scope

Though one aberrant opinion continues to offer hope for future application of ATCA, courts addressing the issue routinely maintain that ATCA confers not only jurisdiction but a cause of action.¹⁶⁹ The argument by some scholars that this issue is not entirely closed has been given new life by a recent opinion in the D.C. Circuit.¹⁷⁰

¹⁶⁹ See, e.g., *Sarei et al. v. Rio Tinto*, 221 F.Supp.2d 1116 (CD CA 9 July 2002). “The Ninth Circuit has stated that the ATCA both confers federal subject matter jurisdiction and creates an independent cause of action for violations of treaties or the law of nations. See *In re Estate of Ferdinand Marcos, Human Rights Litigation* (‘*Hilao II*’), 25 F.3d 1467, 1475-76 (9th Cir. 1994). See also *Kadic, supra*, 70 F.3d at 238; *Filartiga, supra*, 630 F.2d at 887; *Alomang v. Freeport-McMoran, Inc.*, Civ. A. No. 96-2139, 1996 WL 601431, * 4 (E.D. La. Oct. 17, 1996) (‘Freeport correctly points out that the Alien Tort Statute provides an independent basis of federal question jurisdiction to redress human rights violations’) ... (‘[W]e have previously held that the ATCA has a substantive as well as a jurisdictional component’); *National Coalition Gov’t of the Union of Burma v. Unocal, Inc.* (‘*Unocal II*’), 176 F.R.D. 329, 344 (C.D. Cal. 1997).” 221 F.Supp.2d at 1130-31.

See also Harvard Law Review May, 2001 Developments in the Law: International Criminal Law, *2025 V. “Corporate Liability for Violations of International Human Rights Law” (Westlaw citations omitted). “The commentators and jurists writing on the purpose and scope of the ATCA may be divided into two broad camps: those who take issue with *Filartiga* and argue for a narrow interpretation of the ATCA, and those who support *Filartiga* and argue for a broad interpretation. Compare *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 798-823 (D.C. Cir. 1984)(Bork, J., concurring) (arguing that the ATCA provides only a grant of jurisdiction, not a cause of action, and that the statute was intended to cover only the rights of ambassadors), and Joseph Modeste Sweeney, “A Tort Only in Violation of the Law of Nations”, 18 Hastings Int’l & Comp. L. Rev. 445, 447, 477-83 (1995)(arguing that the ATCA was intended to apply only to a narrow subset of cases under the law of prize), with *Tel-Oren*, 726 F.2d at 775-98 (Edwards, J., concurring) (supporting the *Filartiga* interpretation of the ATCA), Anne-Marie Burley, “The Alien Tort Statute and the Judiciary Act of 1789: A Badge of Honor”, 83 Am. J. Int’l L. 461, 475 (1989)(arguing that the ATCA was “a direct response to what the Founders understood to be the nation’s duty to propagate and enforce those international law rules that directly regulated individual conduct”), William R. Casto, The Federal Courts’ Protective Jurisdiction over Torts Committed in Violation of the Law of Nations, 18 Conn. L. Rev. 467, 501 (1986) (arguing that “[t]he absence of a jurisdictional amount limitation, the language of the Act, the legislative precedents, and the general historical background all support a broad and liberal construction of section 1350”, William S. Dodge, “The Historical Origins of the Alien Tort Statute: A Response to the ‘Originalists’”, 19 Hastings Int’l & Comp. L. Rev. 221, 237-56 (1996)(responding to the arguments put forth by Judge Bork and Professor Sweeney and arguing that the *Filartiga* interpretation of the ATCA is the correct one), and Randall, *supra* note 58, at 11 (arguing that the ATCA was part ‘of an overall endeavor to establish authority in the federal judiciary over actions involving aliens’).”

¹⁷⁰ See Judge Randolph’s 11 March 2003 concurrence in *Al Odah et al v. U.S.* (a Guantanamo Bay “illegal combatant”/detainee case, found at <http://pacer.cadc.uscourts.gov/docs/common/opinions/200303/02-5251a.pdf>), indicating his belief (subtly addressed also at the close of the majority opinion) that the *Filartiga* generation of ATCA jurisprudence is misguided, never accepted by the DC Circuit and that he sides with Judge Bork’s concurrence that ATCA does not provide subject matter jurisdiction. If future

Notwithstanding this more limited interpretation offered by Judge Bork in his concurrence in *Tel-Oren* ATCA as commonly applied permits foreign plaintiffs to sue for damages or injunctive relief in U.S. district court for behavior or damages occurring anywhere subject to standard jurisdictional considerations.¹⁷¹ Though most modern ATCA complaints against corporate entities arise from allegedly exercising quasi-governmental authority and/or claims of vicarious liability,¹⁷² the *Kadic* court allowed claims to also proceed for direct liability arising from the entity's own operations.¹⁷³

ATCA complaints presenting at least an environmental component include *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999)(citing in part defendant's mining operations as resulting in myriad "environmental abuses") and the

ATCA plaintiffs, "climate" or otherwise, seek to access the DC Circuit this opinion may in hindsight be viewed as having revived Bork/Robb, undercutting *Filartiga* and stemming the tide of its progeny.

¹⁷¹ See *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

¹⁷² Typical of these claims are *Rio Tinto*, described, *supra*, and, e.g., *Doe v. Unocal Corp.*, (C.D.CA 1997), 963 F.Supp. 880. Plaintiffs in the latter alleged that employees of the state oil and gas enterprise were agents of an American oil company providing significant financing for its partner, another (European) entity's construction of a gas pipeline, that these Burmese defendants were joint venturers with the American company, who conspired to commit human rights violations. The court found this allegation sufficient to confer subject matter jurisdiction under ATCA. Ultimately, Plaintiffs' claims that Unocal be held liable for the government's use of forced labor were deemed insufficient to invoke ATCA jurisdiction though evidence suggested that defendant, knew of the use of forced labor because it did not seek to employ forced or slave labor. *Doe v. Unocal Corp.*, 110 F.Supp.2d 1294 (C.D. CA 2000). In September 2002, the 9th U.S. Circuit Court of Appeals reinstated the federal suit stating that Aiding and abetting liability can be imposed under international law as it pertains to Alien Tort Claims Act for knowing practical assistance or encouragement that has substantial effect on perpetration of crime. Order of 18 September 2002. Plaintiffs also refiled in a state court, and in mid-2002 California Superior Court Judge Victoria Chaney ruled that Unocal could face vicarious liability. That case is set for summer 2003 trial.

Consider the arguments in *Rio Tinto*, as described by the court excerpting plaintiffs' complaint: "Plaintiffs allege that Rio Tinto needed the cooperation and assistance of PNG's government to [construct a desired mine]do so, because constructing the mine necessitated displacing villages and destroying massive portions of the rain forest. To obtain the required assistance, Rio Tinto allegedly offered the government 19.1% of the mine's profits. [Papua New Guinea (PNG)] accepted, and plaintiffs allege that thereafter, the mine became 'a major source of income for PNG and provided [an] incentive for the PNG government to overlook any environmental damage or other atrocities Rio committed.' They also assert that '[t]he financial stake of the PNG government effectively turned the copper mine into a joint venture between PNG and Rio [Tinto] and allowed Rio [Tinto] to operate under color of state law.'" 221 F.Supp.2d at 1121. The court found these allegations, that foreign actors served as agents of an "American" operator raised the specter of willful or active participation in recognized violations of the law of nations – war crimes – and therefore sufficient to invoke ATCA jurisdiction.

¹⁷³ See *Flores* (Order pp. 2-3), *supra*.

recent *Sarei v. Rio Tinto*, 221 F.Supp.2d 1116 (CD CA 9 July 2002)(alleging environmental – and other – torts including, *inter alia*, altering the climate of the Papua New Guinean island of Bougainville and violating plaintiffs’ right to a sustainable environment). Given the trend of green pressure group litigation, it is inevitable that we will see better-pled ATCA claims for international environmental damage arising at least in part from U.S. operations in the very near future. The example considered herein is a complaint against an entity with extensive U.S. energy-producing or energy-intensive operations for alleged contribution to climate change, with Kyoto having gone into effect though without U.S. ratification or renunciation of its signature, as appears the most likely near-term scenario.¹⁷⁴

The court in *Rio Tinto* explained the principal Alien Tort Claims Act jurisdictional inquiry:

“[F]or jurisdiction to lie under § 1350, plaintiffs must allege facts sufficient to establish that (1) they are aliens (2) suing for a tort (3) that was committed in violation of the law of nations or a treaty of the United States. See *Kadic, supra*, 70 F.3d at 238 (‘ . . . it is not a sufficient basis for jurisdiction to plead merely a colorable violation of the law of nations. There is no federal subject-matter jurisdiction under the Alien Tort Act unless the complaint adequately pleads a violation of the law of nations (or treaty of the United States)’); *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 164-65 (5th Cir. 1999) (‘Section 1350 confers subject matter jurisdiction when the following conditions are met; (1) an alien sues, (2) for a tort, (3) that was committed in violation of the “law of nations” or a treaty of the United States. . . .’); *Alvarez-Machain v. United States*, 107 F.3d 696, 703 (9th Cir. 1996).” 221 F.Supp.2d at 1131.

ATCA’s language – “law of nations or treaties” – left no doubt that the standard or norm at issue by no means must be the topic of an international pact but can be some “universally” accepted norm of conduct, one that, by virtue of the suit being under ATCA

¹⁷⁴ This paper does not discuss the concept of Federal Tort Claim Act liability for the U.S. acknowledging a threat and a duty yet refusing to responsibly act upon it, including through forcing modifications among its domestic operators.

and not the U.S. Code, has likely yet to be codified domestically.¹⁷⁵ The realm of principles deemed constituting a “law of nations” does look to be expanding. Addressing two 1996 opinions seemingly further opening the door to expansive acceptance of “laws of nations”, Donald J. Kochan asserts that “[w]hile the use of international law in judicial decision-making is not new, these cases illustrate that the law of nations is gaining an increasing presence in the jurisprudence of American courts through the ATCA. In other words, the ATCA is the vehicle by which the use of international law is receiving a constitutionally illegitimate mutation.”¹⁷⁶

C. The Next Generation of ATCA: “Climate” Claims

Because those to-date successful defenses such as *forum non conveniens* and political question actually have little to no applicability in the circumstance contemplated herein, a U.S. operator facing ATCA “climate” claims will rely almost entirely on its hamstrung ability to convince the court that contributing to climate change, or otherwise violating a “right” to “sustainable development”, does not rise to the level of violating some “law of nations” in tort.¹⁷⁷ This makes the Kyoto question all the more compelling: if, presumably by its persistent signature, the U.S. is deemed to have agreed to at minimum

¹⁷⁵ This raises obvious questions, of both conflicts and separation of powers. See, generally, Donald J. Kochan, *Constitutional Structure as a Limitation on the Scope of the “Law of Nations” in the Alien Tort Claims Act*, 31 Cornell Int’l L.J. 153 (1998). “Granting the judiciary a general power to ascertain the ‘law of nations’ not only creates a vague standard, it allows a tremendous amount of judicial discretion to pick and choose from the multitude of international ‘principles’ floating around in the world--regardless of whether they have been accepted or defined as law by Congress, yet effectively binding Congress all the same. A restriction on action or an obligation to act, declared by the courts as applicable to all nations, must presumably bind the United States as well. [FN 184] One court has expressed this concern as follows: ‘Not all conduct which may be harmful to the environment, and not all violations of environmental laws, constitute violations of the law of nations.... Otherwise more detailed statutes and regulations would be effectively superseded, contrary to the intention of the legislatures involved.’ Aguinda v. Texaco, Inc., 1994 WL 142006, *7 (S.D.N.Y. 1994).” Kochan, at 187.

¹⁷⁶ Kochan, 31 Cornell Int’l L.J. at 168.

¹⁷⁷ Clearly, potential factors include whether plaintiffs seek injunctive relief or damages, impacting a defendant’s potential for pleading into an action a broad universe of codefendants as necessary parties, and the concomitant ability to plead difficulty of assigning liabilities.

not violate Kyoto's object and purpose, it presumably agrees with that which underlies the treaty. This makes it even more troubling that, should a plaintiff file a "climate change" lawsuit under ATCA, the relevant inquiry is not whether the science behind purported climate change is legitimate, but the legitimacy of the international recognition of the scientific claims of likely catastrophic warming. The U.S. has further removed this issue by its subsequent *National Assessment and Climate Action Report*. U.S. acknowledgements have for all intents and purposes taken climate science from the table: what purpose is served by debating the science when even the U.S. government has legitimized an "international consensus"?

1. **Is there a Climate Change "Law of Nations"?**

Professor Kochan describes "the oft-quoted method for ascertaining the law of nations" from *United States v. Smith*, 18 U.S. (5 Wheat) 153 (1820), that, "[c]ourts may ascertain the law of nations 'by consulting the work of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.'" Kochan at 159, citing *Smith* at 160-61. On the basis of this landmark opinion and the assessment offered in *The Paquette Habana*, 175 U.S. 677, 700 (1900), Kochan identifies three relevant rules. First, the proposition that international law is part of the law of the United States; second, the court may apply an international "law" as controlling authority, regardless whether the law has previously been recognized in a U.S. treaty, legislative act, executive act, or prior court decision, and third, Kochan cites the *Smith* court's reliance on jurists or commentators, though only those purporting to report the law rather than those advocating acceptance of a particular principle. *Id.* at 159.

The court in *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999), addressed claims typical of recent ATCA actions -- alleged violations of international law (environmental and human rights violations and cultural genocide), arising from multinational corporate mining activities in the Pacific Rim. It enumerated considerations for determining “the law of nations”:

“[T]he standards by which nations regulate their dealings with one another *inter se* constitutes the ‘law of nations’. These standards include the rules of conduct which govern the affairs of this nation, acting in its national capacity, in relationships with any other nation...[d]efined by customary usage and clearly articulated principles of the international community. One of the means of ascertaining the law of nations is ‘by consulting the work of jurists writing professedly on public law or by the general usage and practice of nations...’ ...Courts ‘must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today.’ [citations omitted]¹⁷⁸

In 1998 the *Beanal* District Court dismissed plaintiffs’ complaint over “environmental harms” for failure to state a valid international tort claim upon which relief could be granted. Dismissal of the alleged environmental torts of environmental degradation, termed “environmental abuses”, arising from its mine tailing dumping practices, was not based upon the claims by their nature being insatiable under ATCA but that plaintiffs failed to establish that defendant’s mining practices violated any accepted international standard such that they could be accepted in tort.¹⁷⁹ The 5th Circuit Court of Appeals affirmed, in what at first appears to be a contradictory fashion, even after affirming the potentially broad *Smith* outreach to jurists writing professedly:

¹⁷⁸ 197 F.3d 161, 165. The penultimate comment is potentially alarming as some jurist could determine it encompasses even, *e.g.*, the product of gatherings of “jurists of the world” such as those coalescing at the “World Summit on Sustainable Development” in Johannesburg for the very purpose of opining on the imperative of enforcing appropriate “climate” behavior. See United Nations Environment Programme’s (UNEP) “Global Judges Symposium on Sustainable development and the Role of Law”, found at <http://www.unep.org/dpdl/symposium/>; particularly note the principles adopted, available at <http://www.unep.org/dpdl/symposium/Principles.htm>. Critically, one of the Symposium’s 13 sponsors was the U.S. Environmental Protection Agency. Followup steps are already underway to implement the agenda, see links available at <http://www.unep.org/dpdl/symposium/>.

¹⁷⁹ 197 F. 3d at 167.

“Nevertheless, ‘[i]t is only where the nations of the world have demonstrated that the wrong is of mutual and not merely several, concern, by means of express international accords, that a wrong generally recognized becomes an international law violation in the meaning of the [ATS].’ *Filartiga*, 680 F.2d at 888. Thus, the ATS ‘applies only to shockingly egregious violations of universally recognized principles of international law’” (citing *Zapata v. Quinn*, 707 F.2d 691, 692 (2d Cir. 1983)(*per curiam*).” 197 F. 3d at 167

This stringent, apparent test was explained in *Flores v. Southern Peru Copper*,¹⁸⁰ as far more favorable to plaintiffs than it appears on its face:

“*Zapata* and *Beanal* did not establish ‘shockingly egregious’ as an independent standard for determining what constitutes a violation of international law. Rather, both cases affirmed that the appropriate standard is whether the rule is universally accepted as international law. The courts in *Zapata* and *Beanal* recognized that because universal acceptance is a prerequisite to a rule becoming binding as customary international law, only rules prohibiting acts that are ‘shockingly egregious’ are likely to attain that status.” Memorandum Opinion and Order at 21.

It appears inarguable that, should it be “universally accepted” that altering the earth’s climate is impermissible, no ATCA defense exists on the basis that precipitating severe weather events to the detriment of poor nations is not “shockingly egregious.” Still, *Beanal* addressed the key test of whether a standard “enjoy[s] universal acceptance in the international community”, reasoning that plaintiffs only established that defendant violated international standards rising to the level of “soft” or RUD commitments such as the Rio Declaration on Environment and Development,¹⁸¹ which the court here found insufficient as “the law of nations.”¹⁸² As the court stated:

¹⁸⁰ SDNY CV-00-9812, opinion not published.

¹⁸¹ “Chiefly among these are the Principles of International Environmental Law I: Frameworks, Standards and Implementation 183-18 (Phillip Sands ed., 1995) (‘Sands’), (5) and the Rio Declaration on Environment and Development, June 13, 1992, U.N. Doc. A/CONF. 151/5 rev.1 (1992) (the ‘Rio Declaration’).” 197 F.3d at 167. The Rio Declaration is not to be confused with the UNFCCC or Rio Treaty. See text at <http://fletcher.tufts.edu/multi/texts/RIO-DECL.txt>.

¹⁸² Kochan styles RUDs as “CILOs, or Customary International Law Outputs. As demonstrated, supra, RUDs (or CILOs) can serve as compelling evidence to a court of the existence of customary law or the law of nations. However, the *Beanal* court criticized plaintiffs reliance on RUDs, specifically “three environmental law principles: (1) the Polluter Pays Principle; (2) the Precautionary Principle; and (3) the Proximity Principle.” 197 F.3d at 167, n. 5. “Although *Beanal* cites the Rio Declaration to support his

“[t]he sources of international law cited by Beanal and the *amici* merely refer to a general sense of environmental responsibility and state abstract rights and liberties devoid of articulable or discernable standards and regulations to identify practices that constitute international environmental abuses or torts.”¹⁸³

claims of environmental torts and abuses under international law, nonetheless, the express language of the declaration appears to cut against Beanal's claims. Principle 2 on the first page of the Rio Declaration asserts that states have the ‘sovereign right to exploit their own resources pursuant to their own environmental and developmental policies,’ but also have ‘the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment or other States or areas beyond the limits of national jurisdiction.’ Beanal does not allege in his pleadings that Freeport's mining activities in Indonesia have affected environmental conditions in other countries.” *Id.* at 167, n. 6. That latter consideration will certainly not be present in an ATCA climate change complaint.

Another ATCA authority asserts that “[r]elying on proclamations of international assemblies creates problems because the text of these documents [is] liberally drafted and embody general goals or aspirations as opposed to legally binding principles.... One court in a case where plaintiffs sought jurisdiction under the ATCA, for example, granted a Fed. R. Civ. P. 12(b) (1) motion on the basis that the international principles relied upon, the Stockholm Principles on the Human Environment, do not set forth any specific proscriptions, but rather refer only in a general sense to the responsibility of nations to insure that activities within their jurisdiction do not cause damage to the environment beyond their borders. Nor does the Restatement of Foreign Relations law constitute a statement of universally recognized principles of international law. *Amlon Metals, Inc. v. FMC Corp.*, 775 F. Supp. 668 (S.D.N.Y. 1991). This type of approach recognizes the limited ‘legal’ nature of international declarations, proclamations, and the like.” Donald J. Kochan, *Constitutional Structure as a Limitation on the Scope of the “Law of Nations” in the Alien Tort Claims Act*, 31 *Cornell Int’l L.J.* 153 (1998), p. 14.

However, consider again *Beharry v. Reno*, as excerpted, *supra*, citing various “soft” agreements as “evidence of a customary norm”.

¹⁸³ The court explained its reticence to accept plaintiffs’ “authorities” as offering a binding norm. “Beanal fails to show that these treaties and agreements enjoy universal acceptance in the international community. The sources of international law cited by Beanal and the amici merely refer to a general sense of environmental responsibility and state abstract rights and liberties devoid of articulable or discernable standards and regulations to identify practices that constitute international environmental abuses or torts. Although the United States has articulable standards embodied in federal statutory law to address environmental violations domestically, see The National Environmental Policy Act (42 U.S.C. § 4321 et seq.) and The Endangered Species Act (16 U.S.C. § 1532), nonetheless, federal courts should exercise extreme caution when adjudicating environmental claims under international law to insure that environmental policies of the United States do not displace environmental policies of other governments. Furthermore, the argument to abstain from interfering in a sovereign's environmental practices carries persuasive force especially when the alleged environmental torts and abuses occur within the sovereign's borders and do not affect neighboring countries. (6) Therefore, the district court did not err when it concluded that Beanal failed to show in his pleadings that Freeport's mining activities constitute environmental torts or abuses under international law.” 197 F.3d at 167.

Yet, consider § 102 of the Restatement (Third) of Foreign Relations Law, “Sources of International Law”, also instructive in the inquiry into whether U.S. acknowledgements and commitments have abetted creation of a cognizable “law of nations” regarding “climate change” or “sustainable development”. The Restatement describes the creation of rules of international law as follows:

“(1) A rule of international law is one that has been accepted as such by the international community of states

- (a) in the form of customary law;
- (b) by international agreement; or
- (c) by derivation from general principles common to the major legal systems of the world.

(2) Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation.

That is, ideals may be addressed and even embraced in certain international agreements, though not “enforceable” or “rights” pursuant to the law of nations. Further, Beanal’s complaints of mining practices offered no reasonable attempt to claim violation of a specific standard or right, let alone an impact beyond the sovereign’s borders.¹⁸⁴

This opinion by no means, however, asserts that an alleged tort be in violate an expressly binding agreement. In the context of expatriating a former concentration camp guard, a federal court intimated that courts may consider even signed-but-not-ratified RUDs as evidence of customary international law. *U.S. v. Schiffer*, 836 F.Supp. 1164, 1171 (E.D.PA 1993). Further, and subsequent to *Beanal* as judicial consideration of environmental ATCA claims began to mount, the *Rio Tinto* court asserted that:

“To ascertain the content of the law of nations, courts consult the works of jurists on public law, consider the general practice of nations, and refer to court decisions that discuss and enforce international law (citing to *Beanal* 197 F.3d at 165; *Kadic* 70 F.3d at 238 and) *Siderman de Blake v. Republic of Argentina*, 965

(3) International agreements create law for the states parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted.

(4) General principles common to the major legal systems, even if not incorporated or reflected in customary law or international agreement, may be invoked as supplementary rules of international law where appropriate.”¹⁸³

The Restatement § 103 similarly identifies the various sources that may be consulted in ascertaining the scope of international law:

- “(1) Whether a rule has become international law is determined by evidence appropriate to the particular source from which that rule is alleged to derive (§ 102).
(2) In determining whether a rule has become international law, substantial weight is accorded to
(a) judgments and opinions of international judicial and arbitral tribunals;
(b) judgments and opinions of national judicial tribunals;
(c) the writings of scholars;
(d) pronouncements by states that undertake to state a rule of international law, when such pronouncements are not seriously challenged by other states.”

As we have seen, it is essentially the same inquiry whether the U.S. is bound by Vienna Article 18 and/or the customary tenet that that provision purports to codify, and whether the U.S. acknowledges a law of nations regarding obligations on the basis of “climate change”. The consideration articulated in §103(2)(d) militates answering the latter in the affirmative. As revealed in the Rio, Kyoto and Vienna discussions, *supra*, there is little room for dispute that the U.S. acknowledges catastrophic anthropogenic climate change pursuant to this analysis, and likely particular, concomitant duties of developed countries.
¹⁸⁴ 197 F.3d at 167, esp. n. 6.

F.2d 699, 714 (9th Cir. 1992). ...In evaluating plaintiffs' ATCA claims, therefore, the court must consider: (1) whether they identify a specific, universal, and obligatory norm of international law; (2) *whether that norm is recognized by the United States*; and (3) whether they adequately allege its violation (citing to *National Coalition Gov't of the Union of Burma v. Unocal, Inc.* ("Unocal II"), 176 F.R.D. at 345". (emphasis added) 221 F.Supp.2d at 1132.

The *Rio Tinto* court dismissed plaintiffs' claims of localized "environmental harm" in violation of soft international commitments or expressions of intent, for lack of ATCA subject matter jurisdiction. The court cited to other opinions finding that plaintiffs complaining of local impacts, in compliance with local law or not, also failing to articulate how the practices at issue rose to the level of violating any law of nations. 221 F.Supp.2d at 1159-60. Regardless, reading *Rio Tinto*, and the *Beanal* and *Schiffer* opinions, it appears that the more the U.S. joins in formal recognition of particular environmental dogmas, even hortatory standards in RUDs, the greater the chance that it will confirm an environmental "law of nations" enforceable at least against U.S. operators. These claims of "environmental harm", like those made by plaintiffs in *Rio Tinto*, and the cases cited by the court, are easily distinguishable from the ATCA "climate" claims contemplated herein. Further, these tests needlessly complicate the relevant assessment in the face of the U.S.'s clumsy handling of the climate change issue.

Note the critical test for a law of nations, as articulated by the *Rio Tinto* court, of being "recognized" by the United States. As argued in "Vienna and Customary Law", *supra*, this is ultimately determinative, so long as the alleged standard is reasonably articulable so as to be considered subject to compliance. A purported right to sustainable development and supposed impediments to this right are likely to be continued subjects of litigation, the goal being to establish this principle for all peoples if subject to the interpretation of the U.S. judiciary. It is true that the court in *Rio Tinto* dismissed

plaintiffs' arguments of sustainable development as a right too vague for defendants to have violated.¹⁸⁵ It is noteworthy, however, that it does not seem that *Rio Tinto's* Plaintiffs presented the court with the WTO's "Shrimp-Turtle" decision, in which the Appellate Body elevated this ideal to enforceable principle – *at the U.S.'s insistence* – from the basis of its mere assertion in that organization's Preamble.¹⁸⁶

Now consider the *Beanal* panel's ultimate concern, that the suit might be used to establish the precedent of effectively imposing U.S. environmental standards on other countries, or eco-imperialism.¹⁸⁷ This concern, also cited in *Rio Tinto*,¹⁸⁸ represents another critical distinction between typical ATCA claims and a putative ATCA "climate" action against U.S. domestic operators, as the latter in fact offers no traction for the "eco-imperialism" concerns. Instead of fearing imposition of wealthy nations' standards on the poor, the issue would be whether U.S. operators should be held to a standard or duty, variously acknowledged in serial instruments by the U.S. government on the also

¹⁸⁵ The court recognized a fairly indisputable assessment, that "the principle of sustainable development 'is generally understood to mean "development that meets the needs of the present without compromising the ability of the future generations to meet their own needs.'" 221 F.Supp.2d at 1160, citing a declaration by plaintiff expert Professor Gunther Handl. "Sustainable development" is the basis for the Rio and Kyoto treaties, but also the basis for the Shrimp-Turtle opinion by the WTO Appellate Body, *infra*.

The court continued, "[h]e asserts that it 'implies specific substantive duties, such as the obligation to avoid "serious and irreversible" environmental or human health effects from development activities and the obligation to manages...wastes in an "environmentally sound" manner.'...Handl concedes that the principle may be 'too broad a concept to be legally meaningful. Because the court cannot identify the parameters of the right created by the principle of sustainable development, it concludes that it cannot form the basis for a claim under the ATCA.'" Id. at 1161, citing, *inter alia*, *Beanal*, 969 F.Supp. at 370 ("To be recognized as an international tort under § 1350, the alleged violation must be definable, obligatory (rather than hortatory), and universally condemned").

¹⁸⁶ See WTO discussion, *infra*.

¹⁸⁷ Further, *Beanal's* complaints of mining practices offered no reasonable attempt to claim violation of a specific standard or right, let alone an impact beyond the sovereign's borders. 197 F.3d at 167, esp. n. 6. Ironically, an ATCA plaintiff successfully complaining of domestic activities would impose an environmental standard "other" than domestic U.S. requirements, though arguably agreed to by the U.S., superceding U.S. regimes. Again, compare the *Beanal* logic with the WTO ruling in "Shrimp-Turtle" decision in which the U.S. successfully argued that "sustainable development", interpreted by the U.S. as necessitating turtle excluder devices, represents an enforceable commitment their reading of which is in fact acceptably imposed on others.

¹⁸⁸ This concern was expressed on the basis of the comity doctrine. See discussion, 221 F.Supp.2d beginning at 1201.

acknowledged basis that failure to act likely yields particular damages (falling most heavily on the poor). It seems inescapable that pressure groups could successfully import the U.S.-endorsed Shrimp-Turtle logic to, *inter alia*, Alien Tort environmental litigation in U.S. courts (and, of course, before the WTO Appellate Body potentially joined by European competitors and/or bureaucrats).

Other tools beyond climate treaties and RUDs exist for divining a possible law of nations for ATCA climate claims. Consider other “law of the environment”, particularly as articulated in the Restatement (3d) of The Law of Foreign Relations, offering rules for state conduct which may be employed in conjunction with U.S. acknowledgements and commitments to assign liability to the U.S. government for its failure to enact Kyoto-style restraints. These include the illuminating § 601, “State Obligations with Respect to Environment of Other States and the Common Environment”:

- (1) A state is obligated to take such measures as may be necessary, to the extent practicable under the circumstances, to ensure that activities within its jurisdiction or control
 - (a) conform generally to accepted international rules and standards for the prevention, reduction, and control of injury to the environment of another state or of areas beyond limits of national jurisdiction; and
 - (b) are conducted so as to not cause significant injury to the environment of another state or of areas beyond the limits of national jurisdiction.
- (2) A state is responsible to all other states
 - (a) for any violation of its obligations under Subsection (1)(a), and
 - (b) for any significant injury resulting from such violation, to the environment of areas beyond the limits of national jurisdiction.
- (3) A state is responsible for any significant injury, resulting from a violation of its obligations under Subsection (1), to the environment of another state or to its property within that state’s territory or under its jurisdiction or control.

Relevant Comments to this Section include that:

“The state may be responsible, for instance, for not enacting necessary legislation...[A] state is responsible only if it has not taken such measures as may be necessary’ to comply with international standards and avoid causing injury outside its territory, as required by Subsection (1)...See also the principles applicable to weather modification, Comment *f*. A state is not responsible for injury due to a natural disaster such as an eruption of a volcano, unless such disaster was triggered or aggravated by a human act...

...Determination of responsibility raises special difficulties in cases of long-range pollution where the link between multiple activities in some distant states and the pollution in the injured states might be difficult to prove. [Note: this concern is mitigated somewhat by U.S. governmental “admissions”] Where more than one state contributes to the pollution causing significant injury, the liability will be apportioned among the states, taking into account, where appropriate, the contribution to the injury of the injured state itself.

...Under this section, a state is obliged to take all necessary precautionary measures where an activity is contemplated that poses a substantial risk of a significant transfrontier environmental injury; if the activity has already taken place, the state is obligated to take all necessary measures to prevent or reduce pollution beyond its borders. Similarly, where a violation of international environmental standards has already occurred, the violating state is obligated to take promptly all necessary preventative or remedial measures, even if no injury has yet taken place.” (§ 601 Comment *d*).¹⁸⁹

Also relevant is the law of “weather modification”, alluded to in § 601 Comment *d*, and raised in Comment *f*, as follows, “[u]nder international law, a state engaged in weather modification activities is responsible for any significant injuries if causation can be proved.” Again, the theory of catastrophic anthropogenic climate change is that Man’s use of fossil fuels is producing significant environmental and human harm by influencing the weather. The U.S. government has to a great degree admitted this, if

¹⁸⁹ As was true in *Rio Tinto*, the *Flores* court asserted that “I find no prohibition under international law dealing with environmental conduct within a nation’s borders...” Memorandum Opinion and Order at 24. This represents a critical distinction between ATCA environmental actions to date, and those far more threatening claims contemplated herein.

differing mostly over the level of certainty over the catastrophic nature of the impact.¹⁹⁰
That should provide little comfort to putative domestic ATCA “climate” defendants.

This Comment, like related language and the underlying agreement it addresses, clearly intends but is not limited to activities undertaken with the *intent* to modify the weather, be it for hostile reasons or otherwise. This approach does not, however, appear to exclude consideration of, *e.g.*, failure to impose Kyoto-style restrictions on fossil-fuel use with the understanding that such failure also leads to weather modification.

The U.S. is in fact party to an international agreement addressing the phenomenon of anthropogenic weather modification but in the context of intentional, or hostile, activities to influence climate for the purpose of inflicting injury on another state.¹⁹¹

From the Restatement (3d) of The Law of Foreign Relations:

“See also the Draft Principles prepared by the World Meteorological Organization’s and United Nations Environment Program’s (WMO/UNEP) Informal Meeting on Legal Aspects of Weather Modification, April 1978, [1978] Digest of U.S. Practice in Int’l L. 1204-1205 (including, *inter alia*, the principle that ‘[s]tates shall take all reasonable steps to ensure that weather modification activities under their jurisdiction or control do not cause adverse environmental effects in areas outside their national jurisdiction’); and the 1975 United States-Canada Agreement relating to the Exchange of Weather Modification Activities [also addressing intentional acts], 26 U.S.T. 540, T.I.A.S. No. 8056; Weiss, “International Liability for Weather Modification,’ 1 Climatic Change 267 (1978).”¹⁹²

¹⁹⁰ The U.S. has produced a “National Assessment on Climate Change” [<http://www.usgcrp.gov/usgcrp/nacc/default.htm>] and submitted a “Climate Action Report 2002” to the UN pursuant to Rio [<http://yosemite.epa.gov/oar/globalwarming.nsf/content/ResourceCenterPublicationsUSClimateActionReport.html>], both of which in effect further “admitting” anthropogenic culpability in environmental damage via climate change. See also, *e.g.*, <http://yosemite.epa.gov/oar/globalwarming.nsf/content/VisitorCenterOutdoorEnthusiasts.html>.

¹⁹¹ The 1977 Military Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, 31 U.S.T. 333, T.I.A.S. No. 9614.

¹⁹² Restatement 3d, § 601 “The Law of the Environment”, Reporter’s Note 7. See also Reporter’s Notes, 1, for myriad RUDs asserting obligations regarding avoidance of pollution that might increase the possibility of global environmental damage.

That these agreements were made at the time of breathless allegations of anthropogenic-induced *ice age* is likely not relevant as a legal matter, though certainly worth bearing in mind for context when addressing allegations of human-induced weather modification. In the same analysis this Note acknowledges an absence of international rules to deal with, not cooling but, *inter alia*, “the melting of Arctic ice causing inundation of coastal areas all over the world,”¹⁹³ though this proposition has not (yet) been put to a reasoned test. The Note does assert that “[w]hile these principles are widely accepted, scientists have found it difficult to agree whether an incident was caused by a weather modification activity, and it may be difficult to prove causation in a particular case.” *Id.* This is true, and quite possibly that issue to which a court will direct the parties to focus their arguments. That would not be a welcome circumstance for an ATCA climate defendant.

Without considering this matter or the U.S.’s confusing record of international positions taken on climate change, the *Beanal* court’s opinion, as described *supra*, does indicate that a climate claim against U.S. operations would likely fare better, in terms of establishing a “law of nations,” than the particular failed claims applying loose green vows to local mining activities in *Beanal*. *Beanal*’s plaintiffs offered nothing comparable to that which a “climate change” plaintiff might present. Consider the U.S. and most of the rest of the world having ratified the Rio Treaty with its specific target agreed in tandem with its goals of “sustainability”, as well as its attempted amendment via the Kyoto Protocol. Consider further that the U.S. has fairly recklessly steeped itself in acknowledging the necessity of industrial nations reducing their CO₂ and other GHG

¹⁹³ *Id.* See also discussion of Note 9, “Impact abroad or upon the ‘global commons,’” in NEPA section, *supra*. This adds to U.S. recognition of the “worldwide and long-range character of environmental problems”, sustainable development, and obligations arising thereunder.

emissions as a universally accepted standard or norm, to the point of acknowledging all sorts of climate/energy/environment related activities (or failures to act) as ultimately intolerable, under the apparent comfort that these acknowledgements were not binding.¹⁹⁴

That is, the U.S. has ratified one agreement agreeing to specific reductions and general goals (if on the express condition that it be “nonbinding”, found nowhere in the agreement the text of which disallowed conditions of ratification), and signed another target and timetable to amend the first. It therefore seems feasible that a court can conclude that continued U.S. obeisance to these “principles” through its formal agreements in fact contributes to establishing at minimum the principle of Kyoto-style GHG restrictions as a universally accepted international norm. Further, the U.S. has established two methods by which it negates such a commitment as the Kyoto signature (renunciation and a Senate vote against), but has not acted in such manner, which omission is compounded by these serial, subsequent “acknowledgements”. A question might remain whether the standard is a good faith *effort* toward the goals per at least Rio’s language (as EU nations might ultimately claim given their own mixed success in curbing emissions), or whether it means actually *achieving* one’s Rio/Kyoto goals.¹⁹⁵

Further, of what impact on Kyoto’s purported “universality” is the existence of strikingly differing commitments such that 140 nations are in agreement with the purported law of nations on the apparent condition that no obligations flow to them? Is it not possible for “universal agreement” to recognize different standards among nations, with the fact of agreement and not its substance the crucial point?

¹⁹⁴ See, e.g., discussion of NACC and CAR, *supra*.

¹⁹⁵ Though a slightly different issue, the Restatement does address the matter of good faith in treaty compliance, noting that some agreements expressly include that requirement. Restatement 3d, Law of Foreign Relations, § 321 “Binding Force of Agreement”, Reporter’s Note 1. Of what import, if any, is the absence of that requirement in Rio?

All of this returns us to the potential importance of Kyoto and the binding nature of the U.S. signature under Vienna/customary law. The U.S. or its citizens do appear vulnerable to be held to recognize or account for failing to satisfy Kyoto-style restrictions as the law of nations, certainly upon that particular agreement going into effect when (if) Russia ratifies. The Kyoto signature clearly is binding to some effect, and provides a subsequent reaffirmation of the problem and solution articulated and agreed in Rio, with an even more dramatic and “more binding” specific target and timetable. This combination ought negate the argument of that a standard of “good faith effort” exists that the U.S. might potentially advance on the basis that Rio was “voluntary” and the U.S. never ratified Kyoto. It is further arguable that by agreeing to and then signing Kyoto the U.S. indicated its understanding that Rio’s “voluntarism” failed, that its standard is to *actually achieve the identified reductions*, and agreed that the next step was a mandatory (even more stringent) program. That is, the U.S. affirmed that at least industrialized nations achieving Rio’s goal is the law of nations.

Still, such arguments appear greatly diminished given that the U.S. seemingly has little room to viably argue that it does not recognize Vienna Article 18 or at minimum the customary law tenet it purports to codify. Given this, the U.S. insistence upon maintaining its Kyoto signature particularly in combination with its subsequent “National Assessment” and “Climate Action Report 2002”, seemingly establish a *prima facie* case of acknowledging a climate change “law of nations.”

Until such a claim is adjudicated, of course, a U.S. operator’s exposure to climate actions under Alien Tort Claims Act remains an open question. The U.S. will likely not ratify Kyoto but Russia may ratify nonetheless to bring Kyoto into effect against the bulk

of the developed world in the near future. This will prompt such disputes, if they have not yet been already initiated by pressure groups as appears likely.

2. **Successful Modern ATCA Defenses Offer Little Comfort**

Given the near-total, nearly universally successful,¹⁹⁶ reliance of modern ATCA defendants upon comity, the political question doctrine, *forum non conveniens* and act of state doctrine in order to avert application of ATCA particularly to environmental claims, it is worthwhile to examine how and why they are inapt to the putative ATCA “climate change” complaint against domestic activities.

Act of State Doctrine

The act of state doctrine is simply of little applicability to the claims considered herein. As asserted by the court in *Rio Tinto*, “[t]he act of state doctrine precludes a United States court from adjudicating claims if doing so would require that the court invalidate a foreign sovereign’s official acts within its own territory.” 221 F.Supp.2d at 1183. “[C]ourts can find that a claim is barred by the act of state doctrine only if it involves (a) an official act of a foreign sovereign, (2) performed within its own territory, and (3) seeks relief that would require the court to declare the foreign sovereign’s act is invalid.” *Id.* at 1184 (citations omitted). Though act of state has received tremendous discussions by courts facing ATCA environmental complaints, and the *Rio Tinto* court dedicated great discussion to the topic (*Id.* at pp. 1183-93), this was warranted as it invoked (and questioned) another sovereign’s laws to address disputes involving actions not merely occurring exclusively within that sovereign’s borders but, like other ATCA environmental claims to date – and in stark contrast to allegations of climate change torts – the alleged impact was contained to that sovereign’s borders (see, e.g., *Flores*, at 24.).

¹⁹⁶ See status of Unocal litigation, n. 172, *supra*.

This is hardly the case in the climate change ATCA claim contemplated herein, and for this reason act of state doctrine does not warrant significant discussion.

Comity

The recently *Rio Tinto* opinion addressed all of these defenses, comity included:

“International comity has been defined as ‘the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation.’ *Hilton v. Guyot*, 159 U.S. 113, 164 (1895). Under this doctrine, courts sometimes defer to the laws or interests of a foreign country and decline to exercise the jurisdiction they otherwise have. See *Societe Nationale Industrielle Aerospatiale v. United States District Court for the Southern Dist. of Iowa*, 482 U.S. 522, 544, n. 27 (1987)(“Comity refers to the spirit of cooperation in which a domestic tribunal approaches the resolution of cases touching the laws and interests of other sovereign states”).¹⁹⁷

For reasons similar to those involving the act of state doctrine, comity is inapplicable to an ATCA action alleging climate change torts arising from domestic U.S. operations. Certainly, no laws of other states are at issue in an ATCA “climate” action for domestic activities. The interest of another sovereign state is, if anything, to allow their citizens access to U.S. courts in more convenient proximity to the facts, witnesses and *loci* of the behavior allegedly impacting the global commons (and/or that state).

The *Rio Tinto* court continued, turning to the Restatement for guidance:

“In deciding whether to invoke international comity, courts frequently look to the standard set forth in section 403 of the Restatement, which provides that ‘a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.’ RESTATEMENT, § 403(1). See also *Marsoner v. United States*, 40 F.3d 959, 965 (9th Cir. 1994) (‘Under the revised Restatement, reasonableness is “an essential element in determining whether, as a matter of international law, the state may exercise jurisdiction to prescribe”’); *Sequihua, supra*, 847 F.Supp. at 63. The Restatement identifies a number of factors that courts should consider in assessing whether the exercise of jurisdiction would be unreasonable: ‘(a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory; (b) the connections, such as nationality,

¹⁹⁷ 221 F.Supp.2d at 1199.

residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect; (c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted; (d) the existence of justified expectations that might be protected or hurt by the regulation; (e) the importance of the regulation to the international political, legal, or economic system; (f) the extent to which the regulation is consistent with the traditions of the international system; (g) the extent to which another state may have an interest in regulating the activity; and (h) the likelihood of conflict with regulation by another state.’ RESTATEMENT, § 403(2).” *Id.* at 1199-1200.

The court’s most enlightening comment as to a putative domestic ATCA climate action was its invocation of Justice Blackmun’s concurrence and dissent in *Societe Nationale Industrielle Aerospatiale*, 482 U.S. 522, 555, stating, “[a]s in the choice-of-law analysis, which from the very beginning has been linked to international comity, *the threshold question in a comity analysis is whether there is in fact a true conflict between domestic and foreign law.*” *Id.* at 1200 (emphasis added, internal citations omitted).

“The entire point of the comity doctrine is to afford consideration and respect to the laws and interests of foreign nations.” *Rio Tinto*, 221 F.Supp.2d at 1204. The putative, alleged conflict between laws might exist in an ATCA climate change complaint against domestic operations, but if so it is between U.S. law and international law, maintaining U.S. courts as the more appropriate forum for hearing such claims. It seems the doctrine of comity, if it applies at all, militates in favor of a U.S. court hearing such an ATCA complaint. Adding to those factors mounting against a domestic ATCA “climate” defendant, therefore, it seems fair to conclude that dismissal on the grounds of comity would also likely fall on the basis of the same considerations dooming the “eco-imperialism” argument as described, *supra*.

Political Question Doctrine

ATCA defendants, including those facing allegations of environmental torts, have enjoyed great success obtaining dismissal through the “political question” doctrine, which “employs separation of power principles to restrict justiciability of certain issues.”¹⁹⁸ “Most often, the doctrine is invoked in matters involving the foreign relations of the United States...Not every case implicating United States foreign relations involves a non-justiciable political question, however.”¹⁹⁹ The *Rio Tinto* court, addressing claims of, *inter alia*, environmental abuses in violation of the law of nations, articulated the six-part “*Baker* inquiry” understood to govern application of the political question doctrine:

“To determine whether plaintiffs’ claims raise a political question, the court must consider the following factors: ‘(1) the existence of any textually demonstrable commitment of the issue to a coordinate political department;... (2) a lack of judicially discoverable and manageable standards for resolving the claims;... (3) the impossibility of deciding without an initial, non-judicial policy determination; ... (4) the impossibility of a court’s undertaking independent resolution without expressing lack of respect for the coordinate branches of government;... (5) an unusual need for unquestioning adherence to a political decision already made; [and] (6) the potentiality of embarrassment from multi-farious pronouncements by various departments on one question.’ If any one of these factors is ‘inextricabl[y]’ involved in the case, the political question applies, and the court should dismiss the claims.”²⁰⁰

¹⁹⁸ 221 F.Supp.2d at 1193, citing *Custer County Action Association v. Garvey*, 256 F.3d 1024, 1031 (10th Cir. 2001). This may or may not be accurate, as there exists a dispute over “political question” as a jurisdictional or prudential limitation, acknowledged by the *Rio Tinto* court (see esp. 221 F.Supp.2d at 1193, n. 273); this paper limits discussion to the constitutional restraints as applied in ATCA opinions to date, presuming that no considerations of prudence trigger typical “political question” considerations.

¹⁹⁹ 221 F.Supp.2d at 1193-94 (citations omitted).

²⁰⁰ 221 F.Supp.2d at 1194-95, citing the test developed in *Baker v. Carr*, 369 U.S. 186, at 217 (1962). Ultimately, the *Rio Tinto* court determined that “continued adjudication of this lawsuit implicates the fourth and sixth Baker factors, which factors warrant invocation of the political question doctrine.” 221 F.Supp.2d. at 1198 (citations omitted). The court foresaw the potential result of at minimum indirectly implicating a foreign government of violating international human rights law in the face of the Department of State asserting its support for that government and the ongoing efforts at reform and peace negotiation. It found unacceptable the potential for expressing lack of respect for the coordinate branches of government and the potentiality for embarrassment from multi-farious pronouncements by various departments on one question. *Id.* No such considerations are likely to arise in the ATCA “climate” actions of the sort contemplated herein.

That the defendants in an ATCA or other complaint are private entities is not sufficient to dismiss the defense of “political question.”²⁰¹ Nor does the fact that Congress enacted the Alien Tort Claims Act, providing federal courts jurisdiction over particular alleged torts and therefore subject matter jurisdiction, ensure that all that within that subject matter is justiciable.²⁰² However, an ATCA action being by nature a suit in tort, the second *Baker* factor is not pertinent in these inquiries.²⁰³

In *Rio Tinto*, the court found plaintiffs’ arguments unpersuasive against a political question argument, accepting instead the defendants’ plea – buttressed by State Department assurances that it was working with the government in question toward improving the conditions complained of -- of potential interference in “matters of war and peace and the legitimacy of foreign governments [which] are quintessential political questions.”²⁰⁴

More recently, in the treaty context, the U.S. District Court for the District of Columbia rejected a lawsuit by thirty-two U.S. Representatives challenging President Bush’s unilateral withdrawal from the 1972 Anti-Ballistic Missile Treaty (“ABM”) without the approval of Congress.²⁰⁵ The court dismissed the action, finding that

²⁰¹ See *Id.* at 113, citing to *Frumkin v. JA Jones, Inc.*, 129 F.Supp.2d 370, 375 (D.N.J. 2001).

²⁰² *Id.* at 113-14, citations omitted.

²⁰³ See 221 F.Supp.2d at 1194, citing *Kadic*, 70 F.3d at 249, “...[B]ecause the common law of tort provides clear and well-settled rules on which the district court can easily rely, this case does not require the court to render a decision in the absence of “judicially discoverable and manageable standards.””

²⁰⁴ Though the document did “not directly indicate whether [State] believes and of the act of state, political question, or international comity doctrines appl[y],” 221 F.Supp.2d at 1190, the court was impressed by the State Department’s assertion (solicited by the court), in a Statement of Interest of the United States pursuant to 28 U.S.C. §§ 516 and 517, in which Mr. Howard Taft IV, Legal Advisor to the Department of State, stated that continued adjudication of this lawsuit “would risk a potentially serious adverse impact on the [Bougainville] peace process, and hence on the conduct of [United States] foreign relations.” 221 F.Supp.2d at 1181. This further distinguishes several environmental ATCA claims dismissed on political question and/or comity grounds, *e.g.*, *Kadic* and *Unocal*.

²⁰⁵ *Kucinich et al. v. Bush et al.*, (D.D.C. CV-02-1137)(30 December 2002)(Memorandum Opinion found at <http://www.dcd.uscourts.gov/02-1137.pdf>). ABM was a ratified agreement with a state no longer in existence, the former Soviet Union, and which provided in its text a mechanism for withdrawal, followed

“pursuant to *Goldwater v. Carter*, 444 U.S. 996 (1979)...the treaty termination issue is a nonjusticiable ‘political question’ that cannot be resolved by the courts.”²⁰⁶

That court made clear the nature of its inquiry as quite distinct from the instant hypothetical: that it viewed treaty or other foreign relations disputes between the legislature and executive as particularly “largely immune from judicial inquiry or interference”, Memorandum Opinion at 25, citing *Haig v. Agee*, 453 U.S. 280, 292 (1981)(quoting *Harisiades v. Shaughnessy*, 342 U.S. 580, 589 (1952), and that the *Goldwater* court was persuaded by “the issue [being] a nonjusticiable political question ‘because it involves the authority of the President in the conduct of our country’s foreign relations and the extent to which the Senate or the Congress is authorized to negate the action of the President.’” *Kucinich* Memorandum Opinion at 25, quoting 444 U.S. at 1002. Yet the more appropriate analysis given the instant hypothetical involves not treaty termination or conduct of foreign affairs, but accepting the repercussions of our government’s handling of relations with other states. “[I]t would be ‘error to suppose

by President Bush despite the dissolution of one of the parties to the agreement in all likelihood effectively nullifying the agreement (despite arguments that Russia was the presumptive successor to such treaties). Plaintiffs unsuccessfully sought to prohibit such practice under the Supremacy Clause.

²⁰⁶ Memorandum Opinion, p. 2. More specifically, the President’s decision regarding treaty termination is a nonjusticiable political question; a potential lawsuit seeking a writ of mandamus compelling the State Department execute the President’s determination to, e.g., unsign Kyoto, presents a starkly different question. Critically, the court in *Kucinich* stated “[f]oreign governments must be able to rely upon the pronouncements of the United States regarding its treaties.... With treaties, in particular, a single voice is needed.” *Id.* at 26. The President asserting one position – rejection – with State refusing to execute that decision clearly runs afoul of that dictum. This raises the “unusual need for unquestioning adherence to a political decision already made.” *Baker*, 369 U.S. at 217.

The court also based its dismissal on the grounds that individual legislative plaintiffs lack standing to sue for Executive decisions made without seeking congressional approval, on the principle of *Raines v. Byrd*, 521 U.S. 811 (1997), which “teaches that generalized injuries that affect all members of Congress in the same broad and undifferentiated manner are not sufficiently ‘personal’ or particularized,” but rather are *institutional*, and too widely dispersed to confer standing.” *Id.* at p. 10 (emphasis supplied by court).

Finally, as this article was being edited, the Department of Justice filed a brief in favor of Unocal, arguing that the statute had been “commandeered” for cases that had “no connection whatsoever with the United States.” See brief at http://www.uscib.org/docs/unocal_us_amicus.pdf. Prior to this action, in 2002, the State Department asked a court to dismiss a suit against ExxonMobil in Indonesia, saying it could hurt the fight against terrorism.

that every case or controversy which touches foreign relations lies beyond judicial cognizance’.” *Kucinich* Memorandum Opinion, quoting *Baker*, 369 U.S. at 211.

Which of the “*Baker* factors”, *supra*, are inextricably linked to an ATCA complaint that domestic activities of U.S. operators contribute to “climate change” under the theory as posed? A defendant might assert that, though standards exist for judging the merits of environmental damage, “climate change” complaints are uniquely speculative. This defense is not aided by the U.S. government having supported the theory on numerous occasions. The “embarrassment” factor appears to be self-inflicted and derived solely from U.S. governmental inconsistency, not litigious allegations consistent with U.S. proclamations that private entities are harming the environment; as such, it does not appear an overly viable consideration in this context. Similarly, the need for unquestioning adherence to a political decision already made does not cut in favor of dismissal, but adjudication over the consequences of the decision to sign the treaty and maintain the signature.

Indeed, it appears that the best hope for successful invocation of the political question defense in an ATCA climate action is that political departments are indeed addressing the issue of climate change, including in ongoing treaty negotiations and the extent to which (U.S.) operations are impacting it. Yet, were the existence of anthropogenic climate change an open question in the mind of the U.S. government, resolution of which would upset some diplomatic endeavor or embarrass the government, its agencies presumably would not have formally expressed the conclusions they have. Further, some “textually demonstrable commitment of the issue to a coordinate political department” can be asserted regarding the preponderance of underlying substantive bases

for complaints. The court clearly did not intend, for example, literal application of that factor which would be as potentially sweeping as were the court to rule that because an entity is private, or that Congress granting federal courts jurisdiction over the subject matter, the political question doctrine cannot apply. Instead, the *Baker* Court's discussion makes clear it did indeed intend whether the issue had been committed to branches other than the judiciary for resolution,²⁰⁷ whether the court faces a question decided or to be decided by another branch of government.²⁰⁸ Clearly this factor does not disqualify the contemplated ATCA climate claim from adjudication by U.S. courts.

As the *Rio Tinto* court stated, "the court must first ascertain the relevant foreign policy of the executive branch, and then assess whether adjudication of the claims before it will unduly interfere with that policy. In conducting this analysis, the court must accept the statement of foreign policy provided by the executive branch as conclusive of its view of that subject; it may not assess whether the policy articulated is wise or unwise, or whether it is based on misinformation or faulty reasoning." 221 F.Supp.2d at 1181-2 (citations omitted).

The relevant foreign policy of the executive in the instant matter, if we may rely on the Secretary of State's rhetoric, is that that while "The Kyoto Protocol, as far as the United States is concerned, is a dead letter," (interview with Fox News' Tony Snow, 17 June 2001), the U.S. has subsequently, expressly acknowledged the underlying claims of extreme consequences. An ATCA "climate" claim, however, does not address the U.S. decision to pursue Kyoto, or not, in any fashion, but instead seeks to hold U.S. companies accountable for damage the likelihood of which the U.S., including its State Department,

²⁰⁷ See discussion, 369 U.S.186, 222.

²⁰⁸ *Id.* at 226.

has acknowledged. Would adjudicating a plaintiff's claim of contribution to climate change interfere with the relevant U.S. foreign policy, unduly or otherwise, except to possibly further it? To answer that question in the affirmative seems a stretch.

Even if State argued in an ATCA climate action for application of comity, *forum non conveniens*, or political question -- as was done by letter in *e.g.*, *Rio Tinto*, *Kadic* and *Unocal*, though not argued in the government's amicus *Unocal* brief seeking to rein in the statute's use, generally -- it seems unlikely that this would be at all relevant toward dismissing such claims against domestic operations. Nothing is similar to considerations in those cases, such as ongoing peace processes or other similar or even delicate negotiations, is foreseeable that might possibly be impacted by allowing a U.S. court to adjudicate the propriety of the U.S. continuing certain policies despite international commitments, or its domestic operators' actions given same. Kyoto negotiations continue, with the U.S. a party if in some bizarre status of self-exile,²⁰⁹ but for this to be relevant the administration would be forced to assert in federal court its intention to keep the U.S. involved in Kyoto despite its (misleading) political rhetoric to the contrary. Still, the potential for that move to give the judiciary pause before adjudicating an alleged environmental tort is questionable.

Alternatively, defendants, with or without the aid of the State Department, might assert that WTO/MEA "harmonization" talks might be impacted (see *infra*), but upon scrutiny this, too, seems less than convincing. Again, these future ATCA complaints will turn on clearly articulated U.S. statements, and whether the U.S. and its domestic operators can be held to them, not the slim likelihood that U.S. adjudication of alleged torts would disrupt some diplomatic endeavors.

²⁰⁹ See discussion in "Unsigning Kyoto," *infra*.

Forum Non Conveniens

Depending on the facts of the particular case, the comity and political question arguments might be of a family with the defenses enjoying success in environmental ATCA litigation, *forum non conveniens* and act of state doctrines, in that they address the propriety of U.S. courts adjudicating a claim which, but for the defendant's susceptibility to U.S. jurisdiction, entirely implicates the interests of another state.²¹⁰ The nature of an ATCA complaint addressing alleged "climate change" torts occurring in the U.S. is such that *forum non conveniens*, however, like act of state doctrine, is not applicable. Still, given, that the alleged damage would likely manifest itself at least in part in a plaintiffs' homeland, discussion of its potential applicability in the circumstance contemplated follows.

Again consider the most recent ATCA opinion *Rio Tinto*, which articulated the FNC test in the context of an ATCA complaint.

"[T]he standard to be applied [to a motion for dismissal on the ground of *forum non conveniens*] is whether...defendants have made a clear showing of facts which...establish such oppression and vexation of a defendant as to be out of proportion to plaintiff's convenience, which may be shown to be slight or nonexistent..." *Cheng v. Boeing Co.*, 708 F.2d 1406, 1410 (9th cir. 1983)... To obtain dismissal on *forum non conveniens* grounds, defendants must demonstrate that an adequate alternative forum exists, and that private and public interests favor trial in the alternative forum. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 (parallel citations omitted)(1982)." (add'l citations omitted) 221 F.Supp. at 1164.

Barring unusual circumstances, it is difficult to imagine a U.S. court accepting an argument that a foreign forum is more appropriate, in the interests of the needs of

²¹⁰ For example the *Rio Tinto* court, asserted agreement with defendants that: "[t]he same strong sovereign interests that support dismissal on grounds of comity and act of state also compel the conclusion that Papua New Guinea is the appropriate forum for this dispute. Its residents compose the putative class of plaintiffs. Its sovereign choices regarding economic development of natural resources, and actions necessary to maintain territorial integrity and prevent secession of Bougainville Island, are at the center of the dispute." 221 F.Supp.2d at 1174.

defendant and justice, to adjudicate a matter when the defendants, the bulk of their witnesses, and the loci of the behavior allegedly causing the harm are located in the U.S. Even should the “vexation” element not be immediately dismissed, however, and the court proceeds to the “public interest/private interest” analyses, these considerations do not militate toward defendants achieving dismissal.

Applying the longstanding “private factor/public factor” test from *Gulf Oil Corp. v. Gilbert*,²¹¹ it seems that only one of six “private interest” factors weighs in favor of a U.S. court concluding a foreign forum is preferable to hear to such a complaint. That is the fourth factor, the possibility of a view of any of the affected premises if view would be appropriate to the action.²¹² However, practical factors such as the availability of technology not overly helpful or extant in 1947, to assist the assessment of alleged climate-related damage, makes this reasoning appear tepid at best to consider dismissal.

In contrast, three of five *Gulf Oil* “public interest” factors do arguably favor a putative ATCA “climate” defendant gaining dismissal, though in practice the weaknesses of an overburdened U.S. judicial system hardly seem graver than the weaknesses of developing countries’ judiciaries.²¹³ A European plaintiff, however, might pose an

²¹¹ 330 U.S. 501 (1947).

²¹² *Id.* at 508.

²¹³ See 221 F.Supp.2d at 1164. The four “public interest factors” for determining the wisdom of removing an action are local interest in the controversy, avoidance of imposing jury duty on residents of a jurisdiction having little relationship to the controversy, court congestion and application of foreign law. The court also cited that the relevant tribunal would interpret not PNG law, but international law, was a factor in its determining that “[o]n balance...the public interests at issue do not tip sharply in favor of the alternate forum.” *Id.* at 83-84. “The court believes such a result is particularly appropriate given that the case is brought under the ATCA and alleges violations of international law.” *Id.* at 1175. The sole tempering factor here is that the court faced an added consideration that a domestic U.S. law, the Torture Victims Protection Act, was passed “favoring adjudication of claims in violation of international prohibitions on torture” (citing *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 108 (2d Cir. 2000)) weigh[ing] against dismissing the action on *forum on conveniens* grounds.”

Despite this, the court ultimately did assert the following conditional dismissal, indicating we should not read too much into its granting defendants’ motions (see also, discussion of State Department intervention (*infra*): “As respects defendants’ nonjusticiability arguments, the court concludes that

interesting question; in fact, should matters come to this, given the widespread acceptance of climate alarmism in Europe a U.S. defendant might prefer a U.S. forum. All this considered, however, and notwithstanding the possible European example, despite the success of this defense to date in ATCA cases it seems unlikely that a U.S. court would determine that these amount to “exceptional circumstances” warranting dismissal of the claims contemplated herein.²¹⁴

Finally, consider that the “state law” to be applied in such instance is really whether a customary international law exists,²¹⁵ the principal factor in such analysis being whether U.S. acknowledgements elevate a putative obligation of developed countries to undertake Kyoto-style energy use/GHG emission reductions. This further militates toward a U.S. court as more appropriate.

plaintiffs’ environmental tort and racial discrimination claims must be dismissed on act of state and international comity grounds. It concludes that all claims must be dismissed on the basis of the political question doctrine. These dismissals are contingent on the court’s receipt, within thirty days of the date of this order, of defendants’ written consent to have the action proceed in the Papua New Guinea courts despite the provisions of the Compensation Act or any other potential legal bar to adjudication in that forum that may exist. Such consent must expressly state that the Compensation Act and any other potential legal bar will not be raised as a defense to any action filed in the Papua New Guinea courts by any plaintiff to this action.” *Id.* at 1209

Flores v. SPCC, was also dismissed for lack of subject matter jurisdiction, though the court similarly asserted: “If I had not decided, as I did in Part I of this Opinion, that the Court lacked subject matter jurisdiction of the case at bar, I would for the reasons stated in Part II dismiss the action on the grounds of *forum non conveniens*. I would condition that dismissal upon the defendant filing in this Court a stipulation with respect to the claims plaintiffs plead in their complaint agreeing to (1) defend those claims on the merits in any action plaintiffs may bring in a Peruvian court and (2) waive any statute or period of limitations that would otherwise apply under Peruvian law to any action brought by plaintiffs in a Peruvian court within two years after the date of this Court’s order of dismissal or the resolution of any and all appeals from that order, whichever occurs later.” Memorandum Opinion and Order Dismissing Complaint, at p. 59)(16 July 2002)).

Still, it remains clear that an ATCA climate action against U.S. operators presents an even less compelling case to move jurisdiction to the home nation of the plaintiffs claiming damage and/or violation of their international environmental rights.

²¹⁴ See 221 F.Supp.2d at 1164-65. Other factors are necessary to whether an adequate forum exists in the plaintiff’s homeland (the condition precedent to the public/private factor analysis, see *BCCI v. State Bank of Pakistan*, 273 F.3d 241, 246 (2d Cir. 2001), and whether the great deference granted a plaintiff’s choice of forum are outweighed by the possibility that “plaintiff chose a particular forum for genuine convenience or for tactical advantage.” *Flores* Memorandum Opinion and Order at p. 28. These factors do not figure to be negatively determinative for a “domestic” ATCA action and are not discussed herein.

²¹⁵ See *Gilbert*, 330 U.S. at 508-09.

In the context of a domestic ATCA complaint against U.S. operators for a climate change-related tort, there simply appears no question that these do not dictate removal, or even that they apply. Again, a putative ATCA climate suit against U.S. operators for their domestic operations does not seek to impose U.S. standards on other nations, but asks U.S. courts to judge U.S. operations in light of U.S. acknowledgements and possibly even an international obligation agreed by the U.S. Such suit merely seeks to hold the U.S. and/or its citizens to account for such commitments.

It thus appears that domestic ATCA plaintiffs will face none of the frustrations their counterparts have encountered in obtaining adjudication in U.S. courts, on this simple distinction that they do not complain of overseas operators with U.S. ties inflicting environmental impacts limited to the territory of a particular foreign sovereign in violation of RUDs or their purported, U.S.-acknowledged right to a “sustainable existence”. Evidence and witnesses relating to the principal matters at issue are found in the U.S. – a governmental acknowledgement(s) and seemingly contradictory policies, policymaker and other experts, and details of particular defendant U.S. operations (GHG emissions and so forth) and, finally, contribution to a purported global phenomenon though likely for yielding particular localized damages. Quite simply, not only are there no arguments why the U.S. is inconvenient, but there exists no good argument for removal to an alien’s homeland.

VII. World Trade Organization and “Climate” Commitments

Other international engagements also pose obvious peril from the opportunity they provide those seeking to enforce the climate agenda upon the U.S. The Kyoto Protocol was not formally on the agenda at the Johannesburg World Summit on Sustainable Development (WSSD).²¹⁶ Yet, in the midst of the WSSD, Russia – one of only two countries now able to dictate Kyoto’s fate – nonetheless made Kyoto news by declaring an intention to soon ratify the Protocol,²¹⁷ a serial assertion it has since reiterated yet again but which remains non-consummated. This announcement, combined with certain European Union threats, threatens peril for the global trading system and was further evidenced by the recent petition to the EU Trade Commissioner by Friends of the Earth-Europe (FoE-E). Upon scrutiny there is no avoiding that the World Trade Organization (WTO) and Kyoto, among other multi-lateral environmental agreements (MEAs), are in conflict.

As discussed, *supra*, if Russia ratifies Kyoto the treaty will attain the requisite numbers to go into effect against adopting nations, triggering formal implementation.²¹⁸

²¹⁶ Still, the spirit of Kyoto loomed, and was manifested in the final WSSD “Plan of Implementation”, alluding to the pending conflict between multilateral environmental agreements (MEAs) and the WTO: “91. Continue to enhance the mutual supportiveness of trade, environment and development with a view to achieving sustainable development through actions at all levels to:

(a) Encourage the WTO Committee on Trade and Environment and the WTO Committee on Trade and Development, within their respective mandates, to each act as a forum to identify and debate developmental and environmental aspects of the negotiations, in order to help achieve an outcome which benefits sustainable development in accordance with the commitments made under the Doha Ministerial Declaration;...

92. Promote mutual supportiveness between the multilateral trading system and the multilateral environmental agreements, consistent with sustainable development goals, in support of the work programme agreed through WTO, while recognizing the importance of maintaining the integrity of both sets of instruments.” Found at http://www.johannesburgsummit.org/html/documents/summit_docs/2309_planfinal.htm. See also para. 93, *Id.*

²¹⁷ This announcement came on the heels of Russian delegates having roiled conferees by declaring it was not certain it had an “economic interest” in ratifying Kyoto. See, e.g., “Russia Close to Kyoto Signing [sic]”, found at <http://www.cnn.com/2002/WORLD/africa/09/03/kyoto.russia.glb/index.html>.

²¹⁸ Numerous ratifying states have already undertaken steps toward implementation, expediting discussion of ways to mitigate the resulting competitive disadvantages. This discussion contemplates an in-effect

No other country or collection of countries has this ability given Kyoto's own formula. Implementation entails not only suppression of domestic energy emissions through energy and/or carbon taxes or caps, but also using the international "flexible mechanisms" provided for in the Protocol. At least one study claims that instituting mitigating border adjustments will trigger questions of inconsistency with the WTO's rules against discriminating between domestic and foreign producers.²¹⁹ However, coherent arguments exist that, while "the relationship between WTO law and multilateral environmental agreements remains disputed and is in need of further clarification",²²⁰ "...if Europe embarked on a carefully designed strategy of energy tax adjustments at the border vis-à-vis non-European industrialized countries, there is a fair chance that European governments would prevail if these tax adjustments were challenged by other WTO members before the WTO dispute settlement system."²²¹

Why are the WTO and Kyoto inherently in conflict? The WTO claims its "overriding purpose is to help trade flow as freely as possible", by eliminating economic

Kyoto precipitating a WTO showdown. It remains possible, however, that the EU could attempt climate tariffs against, e.g., the U.S. and/or seek sanction against U.S. failure to undertake Kyoto-style levies both in the absence of Kyoto going into effect.

²¹⁹ See, e.g., "WTO Rules and Procedures and Their Implication for the Kyoto Protocol," U.S. Council on International Business, November 2002 citing "Domestic Climate Policies and the WTO", Zhong Xiang Zhang and Lucas Assunção, Fondazione Eni Enrico Mattei [ZhongXiang Zhang and Lucas Assunção, *Domestic Climate Policies and the WTO*, Fondazione Eni Enrico Mattei, Milan, Italy, December 2001, p. 3], found at <http://www.uscib.org/index.asp?documentID=2323>. See also, Increasing Participation and Compliance in International Climate Change Agreements, Harvard University John F. Kennedy School of Government, RPP-2002-08p. 12. (<http://www.ksg.harvard.edu/cbg/research/rpp/RPP-2002-08.pdf>). "This situation of some countries moving down one track, and the United States moving down another, is not sustainable. The United States is too important a player as the world's largest emitter of greenhouse gases, a major trading partner of the Kyoto signatories, the world's largest economy, and its only superpower. If Kyoto enters into force and requires substantial abatement by its parties, industry in those countries will face higher costs than in the United States. This may shift comparative advantage in the greenhouse gas-intensive industries toward the United States, undermining the environmental effectiveness of the Kyoto agreement and causing industry in signatory countries to plead for protection."

²²⁰ Bierman, Frank and Rainer Brohm. 2003. *Implementing the Kyoto Protocol Without the United States: The Strategic Role of Energy Tax Adjustments at the Border*. Global Governance Working Paper No. 5. Postdam, Berlin, Oldenberg: The Global Governance Project, at p. 25.

²²¹ *Id.* at 26.

barriers to increased productivity, trade and global economy.²²² Kyoto, on the other hand, restricts energy-use emissions, penalizing parties who refuse to abide by energy use edicts. Energy use is a solid measure of -- that is, necessary for -- economic activity. Despite its “green” wrapper, therefore, Kyoto is in reality an economic instrument. Kyoto's advocates expressly deny the connection between quality of or satisfaction with life and increasing Gross National Product.²²³ That philosophy represents the antithesis of the theory of a globalized trading system, and the WTO's structure in pursuit thereof. “The WTO does not permit any member to impose its own policies extraterritorially under the threat of trade bans (the MEAs²²⁴ say we will not trade with you unless you apply our policies and standards) and it does not permit members of the WTO to discriminate amongst each other in trade policies.”²²⁵ Those MEAs with, and without trade provisions (Kyoto for example), are the focus of “harmonization” efforts.

²²² http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact1_e.htm. This statement is then qualified with the amorphous “so long as there are no undesirable side effects.” Still, the sentiment is repeated throughout, see, e.g., the unqualified “The WTO's overriding objective is to help trade flow smoothly, freely, fairly and predictably,” at http://www.wto.org/english/thewto_e/whatis_e/inbrief_e/inbr02_e.htm.

²²³ Consider a statement typical of much found in the UN's Intergovernmental Panel on Climate change (IPCC) Third Assessment Report, discussing its efforts to “focus on alternative pathways to pursue global sustainability and address issues like decoupling growth from resource flows, for example through eco-intelligent production systems, resource light infrastructure and appropriate technologies, **and decoupling wellbeing from production**, for example through intermediate performance levels, regionalization of production systems, and changing lifestyles. 1.2 “Broadening the Context of Climate Change Mitigation,” found at <http://www.ipcc.ch/pub/taroldest/wg3/012.htm> (emphasis added).

The “trade-off” between economy and environment “is central to the new IPCC scenarios, where a choice between the economy and the environment is one of two main dimensions, IPCC 2000:28.” Bjorn Lomborg, “The Skeptical Environmentalist”, pp. 32-33, n. 359. Lomborg, whose work has become highly controversial for his questioning the apparent anti-wealth motivation of the climate change lobby, also assails the IPCC for abetting the use of climate policy “as a tool and a justification for charting an alternative course of development” (*Id.* at 319-20), and for trumpeting of scarcity in its advocacy of eco-efficiency, industrial ecology, eco-efficient consumption. “Basically, the IPCC conclude that it will be necessary to decouple wellbeing from production. Indeed, it will be necessary to make people understand that the performance of things cannot keep improving, for the sake of the environment.” *Id.* at 320.

²²⁴ That is, the three MEAs which oblige parties to use trade bans to enforce the treaties' environmental objectives, those being the Basel Convention, Montreal Protocol and Convention on International Trade in Endangered Species.

²²⁵ Oxley at p. 7.

With varying degrees of directness the EU have made clear their intention to exact Kyoto-style economic sacrifice from the U.S., either through direct U.S. participation in Kyoto or otherwise. Consider the EU website, revealing possible intentions of claiming that U.S. goods are impermissibly subsidized by America's refusal to adopt Kyoto-style energy taxes while hinting at "harmonizing" the agreements to avoid, *e.g.*, the U.S. claiming Kyoto-centric retaliation as running afoul of WTO:²²⁶

"The EU also wants to clarify that measures taken to tackle environmental problems under Multilateral Environmental Agreements (MEAs), such as the Kyoto Protocol on Climate change, are not contrary to WTO rules. For example, problems could arise if a country imposed a trade measure for environmental purposes on another WTO Member that had not signed the MEA. Could the country affected use WTO rules to overrule the trade measures? The EU wants WTO Members to agree that this should not be allowed to happen."²²⁷

Further, at his press conference prior to Kyoto's COP-6.5 in Bonn in July 2001, then-chair of the UN-sponsored climate negotiations and Minister of Housing, Spatial Planning, and the Environment of The Netherlands, Jan Pronk offered one of several hints he has made of trade implications for the U.S. in the event it does not follow the EU's wishes regarding (and its signed commitment to) Kyoto.²²⁸ This followed earlier remarks before the Pew Center on Global Climate Change Equity and Global Climate Change Conference that hinted at barriers, if not sanctions:

²²⁶ "Neither environmental nor food safety issues are new to the WTO. The original GATT Agreement of 1947 (Article XX) allowed trade restrictions when they were 'necessary to protect human, animal or plant life or health.' The 1994 Agreements that set up the WTO included a detailed 'Agreement on the Application of Sanitary and Phytosanitary Measures' (the SPS Agreement), which applies to all measures intended to protect human, animal or plant life or health which may affect international trade. At the same time, a Committee on Trade and Environment was created in the W T O." Stuart Eizenstat, "On the Agenda: Food Safety and the World Trade Organization," Washington Legal Foundation, Critical Legal Issues Working Paper Series No. 106 November 2001, p. 2, found at <http://www.cov.com/publications/259.PDF>.

²²⁷ European Union policy statement, *Trade and the Environment: Support Sustainable Development*, http://europa.eu.int/comm/trade/index_en.htm, p.2.

²²⁸ The author cites this from memory as there is no locatable transcript of his speech. However, in addition to the comments cited, *infra*, Pronk also has written that some countries are considering trade sanctions to force the U.S. to return to Kyoto, while also expressing opposition to it. <http://www.chinadaily.com.cn/star/2001/0524/cn8-1.html>.

“Non-participation by, for instance, the United States, would have negative consequences, also in broad political terms, beyond climate, because it would be a blow to confidence, confidence in multilateral diplomacy and in multilateral decision making. Non-participation would also be harmful to the United States itself, for instance, to U.S. business interests, because of the resulting climate-friendly guidelines from products to get access to markets abroad. Non-participation would have major negative consequences for future negotiations on such and other global issues.”²²⁹

It may well be that the EU has competitive motives, not merely environmental protection, in its apparent spoiling for a fight over this matter, intentions consistent with Commissioner Wallstrom’s revealing “leveling the playing field” remark.²³⁰ According to former U.S. Ambassador to the EU, Stuart Eizenstat:

“There is substantial suspicion that the EU’s intention may be to create a loophole in the WTO Agreements by creating an exception for trade measures allegedly undertaken pursuant to an MEA. The fear among Washington trade policymakers is that a country might then be free to violate its WTO obligations if it can argue that its actions are consistent with the objectives of any MEA.”²³¹

“The apprehension of the Green groups is that one day a member of the WTO, not a party to an MEA, might secure a ruling from the WTO that another member of the WTO has acted illegally under WTO rules by restricting trade in accordance with the terms of the MEA. Greenpeace and the WWF have been pressing for a decade for an amendment to the WTO rules which would remove the right of any WTO member to take such a case. This is the result the EU is seeking...[This] would legitimize discriminatory trade provisions and undermine the core values which have made the GATT-WTO an outstanding success.”²³²

As a result of the obvious schism between the WTO and Kyoto goals, according to Yale University economist William D. Nordhaus, the U.S. not ratifying Kyoto “is

²²⁹ Found at <http://www.pewclimate.org/events/pronk.cfm>, 17 April 2001.

²³⁰ “This is about international relations, this is about economy about trying to create a level playing field for big businesses throughout the world.” To the EU, it appears, Kyoto is about the U.S.’s “unfair tax competition”, American governments’ consistently refusing to match the Europeans’ zeal for taxing energy use to modify behavior, particularly repressing automobile use and population.

²³¹ Stuart Eizenstat, “On the Agenda: Food Safety and the World Trade Organization,” Washington Legal Foundation, Critical Legal Issues Working Paper Series No. 106 November 2001, p. 4, found at <http://www.cov.com/publications/259.PDF>; see Brittan speech, cited *infra*, seemingly granting legitimacy to such suspicions.

²³² Oxley at pp. 7-8.

likely to engender trade disputes because it widens the already large disparities in energy prices between Europe and the United States.”²³³ Any treaty threatening the economic health of nations will ultimately collapse of its own potential harm, though not without first wreaking havoc. As one industry study group gloomily portrays the coming debate:

"The business community cannot count on any challenge in the WTO against trade measures [such as EU-imposed border tax adjustment if the EU goes to a carbon tax on its own industries] designed to promote compliance with Kyoto being upheld by a Dispute Panel or the Appellate Body. The Shrimp-Turtle decision and the revised treatment of inputs in the Uruguay Round's agreement on subsidies have opened the door to such measures. And it is clear that there are some groups and governments seemingly prepared to test the system at some future point. Such a challenge would be significant not only for business, but also for the functioning and international standing of the WTO.”²³⁴

State of the WTO/Kyoto Conflict

This conflict nears maturation. “The EU has been the main proponent of including environmental issues on the WTO agenda, and has had substantial difficulty obtaining support from other WTO Members.”²³⁵ Nonetheless, in November 2001 Ministerial discussions concluded in Doha, Qatar, to chart the WTO’s future path. There, WTO members ordered negotiations on trade and the environment.²³⁶ The members:

“instruct[ed] the Committee on Trade and Environment, in pursuing work on all items on its agenda within its current terms of reference, to give particular attention to: (i) the effect of environmental measures on market access, especially in relation to developing countries, in particular the least-developed among them, and those situations in which the elimination or reduction of trade restrictions and

²³³ “Global Warming Economics”, *Science*, Vol. 294, 1283, 9 November 2001, at 1284, found at http://www.econ.yale.edu/~nordhaus/homepage/nordhaus_science_110901.pdf.

²³⁴ United States Council for International Business, Background Paper “WTO Rules and Procedures and Their Implication for the Kyoto Protocol”, November 2002, at <http://www.ucsib.org/index.asp?DocumentID=2356>. This assessment confuses the UNFCCC and Kyoto and the respective level of U.S. acceptance, in another passage relating to the conflict and possible remedies, but is otherwise substantively sound despite seemingly preferring U.S. acquiescence in Kyoto as a means of avoiding this conflict.

²³⁵ Eizenstat, “On the Agenda: Food Safety and the World Trade Organization,” p. 1.

²³⁶ See the Doha Declaration, 14 November 2001, found at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm#organization.

distortions would benefit trade, the environment and development...(toward)
“identify[ing] any need to clarify relevant WTO rules”²³⁷

“The [Doha Round] deal is that the environment issue of immediate interest to the EU – ‘clarifying conflict between the provisions of the WTO and MEAs’ – would in the first instance be studied and then, at their meeting in 2003, WTO Ministers would decide whether or not to negotiate changes to WTO rules,”²³⁸ seemingly at least in part to preempt a (potentially losing) battle over sanctions. Anticipatory “harmonization” of WTO provisions by including deference to the spate of subsequent MEAs with or without trade provision would acknowledge the legitimacy of climate-based retaliation or competition. EU officials had cautioned that talks on the environment were a potential “deal breaker” such that the failure to address trade and environment issues could prevent the launch of a new round.²³⁹ The EU presented a demand for consensus to a special negotiating session of the WTO's committee on trade and the environment to address the following: WTO agreement on principles governing the relationship between WTO rules and MEAs; the extent to which MEA “specific trade obligations” are considered in automatic conformity with WTO rules; and that WTO members considering only the applicability of WTO rules to parties of MEAs does not mean that MEAs “should not be an important element of interpretation of WTO law” in disputes involving non-parties.²⁴⁰

²³⁷ Doha Declaration, para. 32.

²³⁸ Alan Oxley, “Environmental Protection and the WTO” in Morris, “Sustainable Development: Promoting Progress or Perpetuating Poverty” at 123-24, citing the Doha Declaration.

²³⁹ “EU Proposal on Trade, Environment Receives Cool Reception at WTO Meeting”, found at <http://subscript.bna.com/SAMPLES/wto.nsf/125731d8816a84d385256297005f336a/0102099e4ad425ff85256b8800145611?OpenDocument> March 26, 2002. Approximately 200 MEAs have trade components, including the Basel Convention on the Transboundary Movements of Hazardous Waste and their Disposal, the Convention to Regulate International Trade in Endangered Species of Wild Flora and Fauna, and the Cartagena Protocol on Biosafety. http://www.wto.org/english/tratop_e/dda_e/dohaexplained_e.htm. Kyoto does not have a trade component, however one should anticipate *e.g.*, EU arguments that implementation measures seeking to avoid competitive advantages constitute such a “trade component.”

²⁴⁰ “EU Proposal on Trade, Environment Receives Cool Reception at WTO Meeting,” *Ibid.*

The last element appears directed at U.S. claims that the Doha ministerial mandate would prohibit any eventual use of trade measures to enforce Kyoto against the United States, since the mandate specifically states that the WTO negotiations “shall be limited in scope to the applicability of such existing WTO rules as among parties to the MEA in question.”²⁴¹

Given this context, the fears cited by former Ambassador Eizenstat certainly gained credence, and are further enhanced by a speech by European Commission Vice President Leon Brittan to the Bellerive GLOBE International Conference in Geneva. The portion of his talk addressing “Multilateral Environmental Agreements: Problems of Overlap” included the following illuminating remarks:

"My view is that the EU should press hard to resolve the potential difficulties caused by the overlap between WTO rules and trade provisions in [MEAs]. Of course, we should not overstate the problem: there are already a large number of MEAs which coexist with the WTO and this has not, to date, produced major difficulties. But there is nevertheless a potential conflict. A WTO member who does not belong to a particular MEA may nevertheless face trade restrictions when exporting into countries which are members of that MEA.

Where there is an MEA which commands wide support among WTO members, we need to be more confident than at present that WTO trade rules do accommodate the aims of the parties to the MEA, and therefore allow trade measures to be taken under such an MEA. WTO rules should not be capable of being used to frustrate the objectives of an MEA. To the extent that they could be so used at present, they need to be reinterpreted or even textually amended.

²⁴¹*Id.* See a provision hinting at the bias toward measures with an economically protective result though styled as environmental, in item 10 of Doha’s “Implementation-related Issues and Concerns”, “Agreement on Subsidies and Countervailing Measures”, though expressly targeted to developing countries: “10.2 [The Ministerial Conference Decides as Follows: Takes note of the proposal to treat measures implemented by developing countries with a view to achieving legitimate development goals, such as regional growth, technology research and development funding, production diversification and development and implementation of environmentally sound methods of production as non-actionable subsidies, and agrees that this issue be addressed in accordance with paragraph 13 below. During the course of the negotiations, members are urged to exercise due restraint with respect to challenging such measures.” Found at http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_implementation_e.htm.

...I would also like to mention the key example of Kyoto. It is vitally important that trade aspects of Kyoto, including emissions-trading and other trade-related elements, are not frustrated by the same governments which signed up to Kyoto wearing their WTO hat, or by non-members of Kyoto. The Commission is examining these questions urgently with a view to avoiding conflicts before they flare up.²⁴²

Will Talks Resolve WTO/Kyoto Conflict?

The WTO took up the EU trade and environment proposal in Geneva in 2002, acceptance of which in Doha mainstreamed “environment” as an agenda item in the upcoming Cancun 2003 trade round. As is typical, however, the outcome was little more than an agreement to agree at a later date.

According to Alan Oxley the MEA-WTO clash, while destined to occur, is most likely to do so at talks such as Cancun in September 2003 than before a tribunal.²⁴³ At the table it seems certain that the EU will hold firm to the concessions it won, in the post-9/11 climate in which the U.S. actively cajoled its allies through endless avenues toward harmonizing the obvious WTO-MEA conflicts and thereby reduce tensions and facilitate cooperation on other fronts. Events in the interim have demonstrated, if anything, degraded relations including on related matters such as EU agricultural subsidies and resistance to crop imports (the “GMO” issue).

Recall the lesson the Irish and others have learned in the OECD’s EU-driven pursuit of “harmonizing” what has come to be characterized as “unfair tax competition”

²⁴² *Solving the Trade and Environment Conundrum*, found at <http://www.eurunion.org/news/press/1998-1/pr21-98.htm> March 23 1998. For a discussion of possible avenues for the aggrieved Kyoto parties to take, see also *Open Trade with the U.S. without Compromising Canada’s Ability to Comply with its Kyoto Target*, Zhong Xiang Zhang, East-West Center Working Paper 2003, www.EastWestCenter.org.

²⁴³ See, e.g., Oxley, “The WTO Doha Development Round: The Threat to International Business of the Spread of Environmental Trade Sanctions”, The Australian Study Centre (2002).

as to what the EU means by harmonizing:²⁴⁴ some competitor's costs are too low or regulatory structure too forgiving, and whatever barrier is the least beneficial to EU goals and/or its dominant member states must be made (typically) more stringent. The very consideration that a longstanding agreement must be "harmonized" with MEAs which offer stark philosophical conflict, agreed subsequent to WTO in full knowledge of the existing trade framework manifests a consistent EU perspective: the WTO is secondary, requiring substantive modification or a grant of primacy to MEAs over WTO trade rules.

In practice, reconciling the WTO and Kyoto documents through negotiations, as opposed to litigating the conflict, requires involving economic and trade ministers as well as their environmental counterparts. The former individuals tend to possess an awareness and acceptance of the role that economic wealth plays in improving environmental and living conditions far different than most environment ministers, who often buy into the "people are pollution" ideology and objectives.²⁴⁵ Further, at that ministerial level Lesser Developed Countries (LDCs) overwhelmingly prefer the WTO's pro-growth goals to the Kyoto agenda, despite the latter's wealth transfers and its selective hobbling of economic growth in developed states.²⁴⁶ They know that a prosperous West is necessary to their own escape from poverty and dependence. Now, their conviction is penetrating into the chambers of even some European governments long supportive of Kyoto. Germany's

²⁴⁴ See, e.g., "An OECD Proposal To Eliminate Tax Competition Would Mean Higher Taxes and Less Privacy", Daniel J. Mitchell, Ph.D. Backgrounder #1395 September 18, 2000, found at <http://www.heritage.org/Research/Taxes/BG1395.cfm>.

²⁴⁵ See green advocate quotes at <http://www-formal.stanford.edu/jmc/progress/quotes.html>.

²⁴⁶ See, e.g., "[b]ut developing countries were opposed (to EU "harmonization" proposals), arguing that such talks could open the door to "green protectionism." BNA, "EU Trade-Environment Proposal Receives Cool Reception at WTO." This was best exemplified during the Johannesburg World Summit, when the G-77 teamed with the U.S. to reject the EU's "eco-imperialist" demands that LDC growth must come, if at all, through the most land-intensive, least efficient, ergo expensive energy technologies ("renewables"). See, e.g., "An Energetic Victory," James K. Glassman 3 September 2002, found at <http://www.techcentralstation.com/1051/envirowrapper.jsp?PID=1051-450&CID=1051-090302A>. Cf. WSSD Resolution, found at <http://ods-dds-ny.un.org/doc/UNDOC/GEN/N02/731/88/PDF/N0273188.pdf?OpenElement>.

economic minister has spoken out against mindless carbon dioxide suppression.²⁴⁷ Still, at present the collision course appears set.

Instead of EU dominance in the upcoming negotiations to resolve this tension, it does seem at least feasible that the nascent LDC-U.S. bloc could hold firm, given the cohesiveness displayed in Johannesburg and subsequently at Kyoto's COP-8 in New Delhi.²⁴⁸ Throughout these 2002 negotiations, however, the EU exhibited intense anxiety over the fate of its heavily subsidized agricultural sector, and while it has given ground on that and the GMO issue indications are that the EU will not give further ground lightly, but will fight to secure primacy of MEA environmental restrictions over WTO prohibitions on trade barriers.

The U.S. will face an EU which maintains great leverage over LDCs. As Oxley points out, “[t]he issues on which [the EU] have historically been most reluctant to move – agriculture and garments and textiles – are issues of the greatest importance to developing countries, it is easy to see the EU holding progress in those areas hostage at the 2003 meeting to commitments to negotiate rule changes on environmental issues.”²⁴⁹ As was seen in Johannesburg, the EU persuaded even famine-stricken African nations to reject genetically modified food relief under threat of closing EU markets to their own

²⁴⁷ See, e.g., “German Minister Says Green Goals May Harm Economy”, Planet Ark 28 November 2001, found at <http://www.planetark.org/dailynewsstory.cfm/newsid/13468/story.htm>.

²⁴⁸ After contentious debate but a cohesive U.S./G-77 bloc, development was given equal billing with the issue of “climate change”. A key example was not only including hydroelectric power as “renewable” (taboo in the U.S. under pressure from green groups), but recognizing that reliance on “renewable” energy will not lift poor countries out of their poverty (Resolution “(L)”, “Delhi Ministerial Declaration on Climate Change and Sustainable Development”, found at http://unfccc.int/cop8/latest/1_cpl6rev1.pdf.)

²⁴⁹ Oxley at p. 5.

crops in return – clear agricultural protectionism on a purely hypothetical claim of potential human health and/or environmental harm.²⁵⁰

Tribunal Outcome Likely Unfavorable to U.S.

Consider instead the increasing chances that this dispute will face resolution not at the table but before a tribunal. “The WTO allows members to restrict imports to protect human health, and animal plant and safety, but it obliges members, when challenged, to demonstrate that such restrictions are based on science.”²⁵¹ Further, the WTO Appellate Body had clearly cited the impermissibility of trade measures based on process standards, *e.g.*, how a state regulates how a product is obtained or manufactured as opposed to its taxation.²⁵² The “environmental” allowance was wildly expanded and the “process” restriction significantly loosened, at the urging of the U.S. no less, by the WTO Appellate Body’s “Shrimp-Turtle” decision, as discussed, *infra*. That decision has clear implications for potential climate-based trade barriers

In September 2002 FoE-E fired the first shot to expedite resolution of the WTO-Kyoto conflict by recommending the EU apply penalties against energy intensive U.S. products in retaliation for the U.S. not going along with Kyoto.²⁵³ This followed earlier

²⁵⁰ See, *e.g.*, “Michael Dorsey, a member of the board of directors of the Sierra Club...conceded political pressure might have led Zambia to reject the GM food. “[Zambia] made that choice in the face of potential trade retribution from the European Union because of the contamination of the export crops of these GM organisms.” “Green Activist Accused of Promoting Famine Wins Time Magazine Honor” CNSNews.com, 09/17/2002, found at <http://www.cnsnews.com/ForeignBureaus/Archive/200209/FOR20020917a.html>.

²⁵¹ Oxley at p. 9.

²⁵² GATT Report of the Panel *United States -- Restrictions on Imports of Tuna* 1991 and GATT Report of the Panel *United States -- Restrictions on Imports of Tuna* 1994 (“Tuna-Dolphin” cases).

²⁵³ “Friends of the Earth Europe today called on EU Trade Commissioner Lamy and EU governments to target US exported genetically modified (GM) foods and energy intensive products in retaliation for the US violation of World Trade Organisation (WTO) rules on Foreign Sales Corporations [Following an EC request, the WTO has found that the US tax treatment of Foreign Sales Corporations constitutes a prohibited export subsidy. On 30 August, the WTO has authorised the EU to take countermeasures on US products worth US \$ 4,043 million. The EU must formally notify the WTO of the relevant detailed list of products until November 2002. Countermeasures may be taken anytime after final WTO authorisation has been granted.]. This call follows the European Commission's decision to publish...an initial list of US

rumblings by activist group Greenpeace international, prior to the Doha WTO ministerial negotiations, that countries should use trade talks to coerce the U.S. into ratifying Kyoto, or pursue sanctions in response.²⁵⁴ When the EU published the initial list of products against which it proposed exercising this authority, energy intensive products accounted for roughly one-quarter of the dollar amount, if without specific reference as such.²⁵⁵

Erecting such border adjustments in retaliation expressly on the basis of “unfair energy (or carbon) tax competition” penalty,²⁵⁶ or alternatively an “eco-dumping”

products that will be targeted for countermeasures. Following the WTO's authorisation to the EU to impose countermeasures on US imported goods, worth US\$ 4,043, the Commission's brand-new list includes a wide range of products, including agricultural goods, textiles, iron and steel. The European Commission has asked European business to send their comments and views on which products 100% additional duties should be raised.

Commenting Alexandra Wandel of Friends of the Earth said: “We call on Commissioner Lamy and European governments to consider European consumer concerns and the protection of our global environment when targeting US products. Genetically modified food and animal feed products as well as energy intensive products seems to be the obvious choice to make a move towards fairer and more sustainable transatlantic trade. . .EU governments should also consider targeting specifically high energy intensive products. The U.S. rejection of the Kyoto Protocol is unfair and puts European business at a disadvantage. With Bush’s increasing rejection of international agreements that are essential to protect our environment, Europe should have every right to penalize U.S. goods for the pollution they cause.” FoE-E stopped short of threatening legal action under WTO rules as they did in the same release regarding European legislation addressing genetically modified food identification. Friends of the Earth Europe, Press Release dated September 16, 2002, available at http://www.foeeurope.org/press/AW_16_09_02_GMOsynergy.htm.

²⁵⁴ “WTO Member States should say before arriving in Doha that they will not discuss the possibility of a new round of trade liberalization if the US does not agree to ratify the Kyoto Protocol. If the US continues to refuse to ratify the Kyoto Protocol, WTO Members States who support Kyoto should also consider bringing that country before a WTO Dispute Panel, because the US position is providing the equivalent to a hidden subsidy for their domestic industry, inconsistent with WTO rules.” Greenpeace International, *Greenpeace Recommendations to the Conference*, a paper prepared for the Doha Ministerial and available at <http://www.greenpeace.org/politics/wto/Doha/html/greeningD.html>, p.1.

²⁵⁵ See list submitted by EC to WTO, WTO document WT/DS108/26.

²⁵⁶ It seems likely that border adjustments offer less promise for being upheld than a determination that the U.S.’s failure to institute Kyoto-style policies constitutes a discriminatory unfair trade barrier. This, if for no other reason than the EU, and most of its member countries, will fail to meet their various Kyoto commitments, according to yet another report, most recently from the European Environment Agency. The report lays out the case for stabilizing greenhouse gas emissions. "Achieving 'sustainable' atmospheric greenhouse gas concentrations, avoiding dangerous interference with the climate system but allowing economic development, would require substantial (50 to 70 percent) global reductions in total greenhouse gas emissions." The first step to that goal is the ratification and compliance with the Kyoto Protocol.

The EU's Kyoto target is a reduction of emissions to 8 percent below 1990 levels. The EU experienced a decrease in greenhouse gas emissions in the early 1990s, which stabilized during the second half of the 1990s and then began increasing again in 1999 and 2000. About half of the decrease in emissions during the early 1990s, according to the report, was due to German reunification and economic restructuring that shut down inefficient East German industry and energy market liberalization and fuel

complaint by a WTO member state, would force the pro-growth WTO to address anti-growth MEAs such as Kyoto. It is not clear whether WTO, confronted with this conflict, would remain true to its mission of expanding economic growth, despite that its provisions predate such agreements. Such a complaint would also trigger a landmark battle over the freedom of states to refuse to adopt or pay for the economic policies of others, without incurring penalty for discriminatory trade.

The WTO in the past has ruled against measures imposed by member states on environmental or public health bases – most notably, the EU's ban on hormone-treated beef – absent a risk assessment-based, scientific justification for the measure.²⁵⁷ That is, the WTO affirmed that its member states may not merely restrict imports absent a credible non-economic basis, but created a potential loophole particularly given that the WTO will not likely put science on trial. As a result of this ruling the EU has argued, beginning with the Doha Round, that the relationship between WTO rules and MEAs should be based on several principles, notably that multilateral environment policy “should be made within multilateral environmental *fora* and not in the WTO” and that MEAs and the WTO should be considered “equal bodies of international law.”²⁵⁸ It additionally argues that WTO rules “should not be interpreted in ‘clinical isolation’ from

switching in the United Kingdom.

In 2000, six EU countries (Finland, France, Germany, Luxembourg, Sweden and the United Kingdom) were on track to meet their differential burden-sharing targets. The remaining members, (Austria, Belgium, Denmark, Greece, Ireland, Italy, the Netherlands, Portugal and Spain) are not likely to meet their targets. If current trends continue, to the EU emissions will be at 4.7 percent below 1990 levels by 2010. The report is available at <http://reports.eea.eu.int>.

²⁵⁷ See beef-hormone disputes, DS26, DS389, DS48, rulings thereon found at http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm#1996.

²⁵⁸ “EU Proposal on Trade, Environment Receives Cool Reception at WTO Meeting”, found at <http://subscript.bna.com/SAMPLES/wto.nsf/125731d8816a84d385256297005f336a/0102099e4ad425ff85256b8800145611?OpenDocument> March 26, 2002.

other bodies of international law and without considering other complementary bodies of international law, including MEAs.”²⁵⁹

The necessity, from the EU perspective, of deferring to MEAs – or any fear EU nations might have about imposed climate-based barriers in the absence of a trade mechanism in Kyoto -- should nonetheless be greatly tempered by the signal the WTO sent when its Appellate Body came down in favor of trade restrictions based on environmental protection, in the 1996 “shrimp-turtle” actions, DS58 (brought by India, Pakistan, Malaysia and Thailand), and DS61 (brought by Philippines).²⁶⁰ The AB’s report affirming such protections even stated that the panel originally hearing the matter, having interpreted the WTO so as to find the measures inconsistent with WTO’s open-trade rules “renders most, if not all, of the specific exceptions of Article XX inutile, a result abhorrent to the principles of interpretation we are bound to apply.”²⁶¹

The United States Trade Representative summarizes the issue and years of deliberation as follows:

“For more than a decade, the United States has required that U.S. shrimp fishermen employ (Turtle Excluder Devices, or TEDs). Over a dozen countries around the globe also require that their shrimp trawlers employ TEDs. Experience has shown that the use of TEDs, combined with other elements of an integrated sea turtle conservation program, can stop the decline in sea turtle populations and will, over time, lead to their recovery.

The U.S. law at issue -- Section 609 of Public Law 101-162 -- restricts imports of shrimp harvested with fishing equipment, such as shrimp trawl nets not equipped

²⁵⁹ *Id.*

²⁶⁰ WTO Appellate Body Report *United States – Import Prohibition of Certain Shrimp and Shrimp Products* 1998.

²⁶¹ Opinion found at http://docsonline.wto.org/GEN_viewerwindow.asp?D:/DDFDOCUMENTS/T/WT/DS/58ABRW.DOC.HTM, Doc. 01-5166.

with TEDs, that results in incidental sea turtle mortality. It thereby avoids further endangerment of sea turtles.

In October 1996, India, Malaysia, Thailand and Pakistan challenged the U.S. law under WTO dispute settlement procedures, claiming that it was inappropriate for the United States to prescribe their national conservation policies. In April 1998, a panel found that the U.S. measure was inconsistent with Article XI of the General Agreement on Tariffs and Trade (GATT), which provides that WTO Members shall not maintain import restrictions. The United States had maintained that Section 609 fell within the exception under Article XX(g) of the GATT that permits import restrictions relating to the conservation of an exhaustible natural resource. The United States appealed the panel findings to the WTO Appellate Body.

In October 1998, the Appellate Body reversed the findings of the dispute settlement panel. It agreed with the United States that the U.S. law is covered by the GATT exception for measures relating to the conservation of exhaustible natural resources, but found that the United States had implemented the law in a way that resulted in unfair discrimination between exporting nations.²⁶² **The Appellate Body also agreed with the United States that the GATT and all other WTO agreements must be read in light of the preamble to the WTO Agreement²⁶³, which endorses sustainable development and environmental protection.** The Appellate Body confirmed that WTO members may adopt environmental conservation measures such as the U.S. law so long as they are administered in an even-handed manner and do not amount to disguised protectionism.” (emphasis added)²⁶⁴

Again according to WTO expert Oxley, who also served as a panelist on the related GATT tuna/dolphin case, this opinion represents AB acceptance that “the measures were legitimate and important environmental objectives which were justified

²⁶² This alludes to the finding that the US restriction forced fishermen in the exporting countries to use a specific technology (a process-based regulation) to achieve that goal and would have precluded all imports from those countries even if only some fishermen were found not to be using the devices.

²⁶³ The Marrakech Agreement Establishing the WTO states in pertinent part, “The *Parties* to this Agreement, Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development,” found at http://www.wto.org/english/docs_e/legal_e/04-wto_e.htm.

²⁶⁴ “USTR on WTO Decision Supporting Shrimp-Turtle Law”, 22 October 2001, found at <http://usinfo.state.gov/topical/econ/wto/01102201.htm>; pleadings, further background and opinions available at www.ustr.gov.

because they related to national measures to conserve exhaustible natural resources.”²⁶⁵

Though the AB avoided addressing whether the U.S. was entitled to assert extra-territorial reach when invoking the WTO’s terms:

“[t]he US was clear about this. It was banning shrimp imports in order to force other countries...[to act] in accordance with the requirements that the US imposed on American shrimp boats...[Therefore], the AB has opened the possibility that WTO members may impose production and processing methods in the jurisdiction of other countries. This has far reaching implications. Until this point, the vast majority of WTO members would have refused to accept there was any right to assert jurisdiction under Article XX in the territory of another member.”²⁶⁶

The U.S. did modify its implementation of Section 609 to remove any discriminatory application pursuant to the Appellate Body’s June 2001 report. The AB’s qualification notwithstanding, consider the magnitude of elevating “preamble” language to the level of such controlling authority, regarding no less than such a malleable concept as “sustainable development”. Also, simply substitute “climate change” and related responses for this ideal, and it is not difficult to imagine the EU successfully seeking effective imposition of Kyoto on the U.S. Couple the Shrimp-Turtle precedent with serial U.S. “admissions” of anthropogenic climate change and it is not hard to imagine the case ushering in a generation of disputes over protectionism under the guise of measures designed to combat “climate change”.²⁶⁷

Oxley offers the following prediction:

“If the EU secured the principle that the trade provisions of MEAs were legitimate instruments which the WTO should sanctify, it could then set about

²⁶⁵ Oxley at 13.

²⁶⁶ *Id.*

²⁶⁷ See Bierman, Frank and Rainer Brohm for an exploration of the broader relevant legal precedent arguing in favor of the defensibility under world trade law of European carbon-based trade barriers.

creating new MEAs to lay down its preferred environmental standards. It could argue that actions taken by countries to protect the environment warranted trade restrictions to enforce them and that, as a matter of principle, the WTO should respect such restrictions. There is already a major new multilateral environment agreement which one should expect the EU to seek to legitimize in this way. It is the Kyoto Protocol...It is hard to believe that the EU, disadvantaged by self-imposed carbon taxes, would not invoke a right to restrict trade on environmental grounds to protect itself against the competitive advantage of industries in the United States, and other countries, not so burdened by high energy costs. There will be very strong pressure from European business on the EU to invoke a right to restrict trade on environmental grounds to protect itself against the competitive advantage of business in the United States and other countries which are free of the cost burden of higher energy charges, but which are imposed in Europe to reduce emissions of carbon dioxide...The acceptance, therefore, by the trade ministers at Doha of the EU's demand to include the Environment in the negotiating round is a significant breakthrough, by the EU, in a long term campaign to secure new rights to use trade sanctions to secure environmental objectives. The EU might argue its motive is to protect the environment, but the other side of the same coin is that it is an instrument which would facilitate the protection of industry and agriculture from international competition."²⁶⁸

Regarding such possible future EU actions to capitalize on the Shrimp-Turtle decision and impose its climate agenda on the U.S., recent arguments made in trade negotiations are also noteworthy. The EU posits that, even barring some formal recognition of MEA primacy over WTO rules, if conflicts arise between parties regarding specific trade obligations set out under an MEA the parties involved should make every effort to solve the issue through the MEA dispute settlement,²⁶⁹ which Kyoto does not possess. If such resolution does not occur and a dispute is brought to the WTO – as would be necessary in a dispute relating to GHG emissions -- the EU urges that the WTO panel “should take due account of the MEA when addressing the case, as has been consistently confirmed by successive panels.”²⁷⁰ That is, though the forum is the (more

²⁶⁸ Oxley at 11-12.

²⁶⁹ See Oxley, pp. 7-9.

²⁷⁰ “EU Proposal on Trade, Environment Receives Cool Reception at WTO Meeting”, found at <http://subscript.bna.com/SAMPLES/wto.nsf/125731d8816a84d385256297005f336a/0102099e4ad425ff85256b8800145611?OpenDocument> March 26, 2002.

longstanding) WTO and pursuant to its terms, a conflicting MEA should be granted at minimum equivalence with the open-trade pact.

When the seemingly inevitable carbon- or climate-centric border adjustment, claim for sanction or other retaliatory action arises, it will doubtless be accompanied by claims of scientific certainty, *etc.*, likely premised upon the U.S. refusal to follow the EU's greenhouse gas (Kyoto) path constituting impermissible protectionism and/or "eco-dumping", paraphrased as "If we choose to adopt certain 'responsible' policies, [the U.S.] can't fairly not follow suit."²⁷¹ As stated, it is not likely that the WTO will assume competence to try differing assessments of the threat of anthropogenic climate change, but will adopt some *de jure* or *de facto* "precautionary" approach, assuming validity to the theory with the open question of "how catastrophic?", consistent with U.S. proclamations. Already, through its U.S.-advocated "Shrimp-Turtle" decision the WTO is on record accepting such an argument, which is also advocated by some as one path to "harmonize" the otherwise incompatible pro-trade and anti-energy pacts.²⁷²

Naturally, the exposure that would arise by this challenge would raise sharp questions about the Bush Administration's curious scientific "acknowledgements" and refusal to rescind its Kyoto signature, *a la Rome's*, given that this inconsistency as a matter of law hobbles the U.S. ability to defend itself in addition to the other perils detailed herein. As the Bush administration seeks to reshape U.S. foreign policy, one important step would be to abandon once and for all Kyoto, with its built-in appeasement

²⁷¹ This action has numerous opportunities to rear its head. Consider, *e.g.*, Rio's language: "Parties have a right to, and should promote sustainable development" (Art. 3.4).

²⁷² See, *e.g.*, "After Doha and Johannesburg: Dispute over Multilateral Environmental Agreements (MEAs) and Trade Rules: What Next? FoEE commentary on the EC position, November 2002", http://www.foeeurope.org/publications/MEA_paper_Nov_2002.doc.

of ideological extremists seeking to impede global prosperity. To date, however, their Kyoto abandonment has been purely rhetorical. Even actual signature renunciation would, however, merely facilitate a fair fight in the looming battle over Kyoto, *et al.*, before the WTO.

Considering all of the above, the inherent conflict between WTO and Kyoto must sound alarms, particularly should the U.S. remain a non-ratifying signatory while maintaining its “admissions” regarding anthropogenic climate change. Further, as Kyoto has no trade mechanism, this direction of the WTO bodes further ill for U.S. efforts to remain free of the energy-reduction path the EU has set for the U.S. economy. At present, the U.S. can offer only a deeply flawed defense having admitted, *ab initio*, and as described herein, far too much to offer a coherent rebuttal that the EU is acting on unacceptable economic, and not the U.S.-sanctified environmental, principles.

VIII. Synopsis of “Climate” Exposure and Remedies

A. State of Play

The United States has incurred obligations and/or exposures under the Vienna Convention on the Law of Treaties and/or its customary law premises by, *inter alia*, signing the Kyoto Protocol. These are as follows, with recommended remedial steps:

* Obligations to not defeat the object and purpose of the Kyoto Protocol –
REMEDIAL STEP: renounce Kyoto signature or vote the treaty down.²⁷³

* Obligations to consider and act accordingly upon “climate change” as a required consideration for a NEPA EIS due to Rio and Kyoto commitments, the CAR and NACC –
REMEDIAL STEPS: renounce Kyoto; correct or cease “dissemination” of the National Assessment on Climate Change (NACC) and Climate Action Report 2002 voluntarily or by order pursuant to the Federal Data Quality Act (FDQA),²⁷⁴ reform NEPA by narrowing to what level of acceptance or certainty a concept must arise to be a requisite consideration as an “environmental impact”.

* Exposure under Alien Tort Claims Act, due to Rio, Kyoto, CAR and NACC –
REMEDIAL STEPS: renounce Kyoto; correct or withdraw NACC and CAR; reform ATCA to specify or otherwise limit a universe of torts covered (or repeal ATCA).

* Exposure under the WTO to energy intensity or climate change-related penalties or adjustments, due to Rio compounded by Kyoto – REMEDIAL STEP: renounce Kyoto.

²⁷³ This paper does not discuss the efficacy of withdrawing from the ratified UNFCCC (Rio), provided for in Rio Article 25. Though this would not only remove our acquiescence from Rio’s goals and, per Rio’s own terms also remove any Kyoto obligation, it is not politically feasible. It is unclear whether the U.S.’s hypothetical abandonment of these acknowledgements, barring some express substantive basis (e.g., scientific breakthrough proving the negative that Man does not appreciably impact climate) would impact the determination as to whether a relevant law(s) of nations exists.

²⁷⁴ See n. 100, *supra*.

B. Remedies to U.S. Kyoto Signature, to Clarify U.S. Obligations

The utilitarian remedy of renouncing the U.S. Kyoto signature would not in and of itself in fact resolve that the U.S. has acknowledged either catastrophic anthropogenic climate change or Kyoto-style obligations of developing countries. Clearly, given poor management of the “climate” issue by various governmental agencies, renunciation would merely alleviate, not solve, the obligations or exposures identified herein. Absent that step, however, other recommended acts such as withdrawing the NACC and CAR are far less useful overtures. Removing the “acceptance” argument by at minimum renouncing the signature, however, would at least credential the defense that the U.S. has modified its prior position such that it now rejects the theory/obligations. Putative “climate” plaintiffs would face a less gilded path.

This paper has detailed how the U.S. signature on Kyoto yields inescapable if ill-defined obligations should the U.S. face efforts to enforce them as appear likely. Rescind the signature, and the relevant inquiries shift from what impact the U.S. signature carries in terms of accepting the commitment to reduce CO₂ and citizen liability, to whether the U.S. successfully disavowed its long docket of accepting climate alarmism and all that it portends, has it established there is no “universally accepted” norm,? It also seems that the U.S. ratifying Kyoto would still open the door for plaintiff demands, as the U.S. cannot possibly meet its obligation absent a crushing economic recession. Barring action on the signature and “acknowledgements” the U.S.’s best defense is to cite the refusal by approximately 140 countries to accept obligations consistent with those of Rio (Kyoto) Annex I countries, though as discussed this is a tepid argument.

Numerous private operators have awakened to the potential threats from this “climate” issue mismanagement. At some point, preferably before better-articulated complaints mount in the courts, they will educate the U.S. government sufficient to act to stem the looming perils by at minimum clarifying what the US does and does not acknowledge, and therefore that to which the US does and does not agree.

Can a citizen advance or somehow force the Administration’s hand on this matter? The Competitive Enterprise Institute filed a series of correspondence amounting to a petition for the State Department to execute the President’s political decision to reject Kyoto. In a reply which was actually non-responsive in that it refused to articulate which U.S. position – legal signature or rhetorical rejection – is operative, State rejected that request to clarify the U.S. commitment or obligation. It does appear that State is vulnerable to a petition for a writ of mandamus to force it to execute this decision.²⁷⁵

Barring Executive or even Senate leadership, however, it is increasingly likely that we will see in the very near future either Rio or Kyoto triggering various liability, regulatory or penalty regimes. Statutory reforms can take several forms, but their necessity is manifest from the discussion, *supra*. Discussions the author has had with numerous lawmakers and executive officers makes clear that the current state of the U.S.’s Kyoto commitment creates confusion amongst policymakers as to its status, impact and the potential remedies. The potential remedial steps possibly available to the Executive and Senate are further explored, below.

²⁷⁵ The author has prepared such a petition but further discussion is beyond the scope of this paper.

C. Kyoto: Alternatives for the Necessary Withdrawal

The U.S. Constitution is silent as to the process for treaty termination.²⁷⁶ 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.”

This provision governs Kyoto for a ratifying party when the treaty has achieved sufficient acceptance to go into effect. While that is not the present case, Senate ratification of a treaty that includes a withdrawal mechanism would presumably 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.²⁷⁷ As established, *supra*, there is also little room to claim that an “agreed to” treaty as yet unsigned requires no withdrawal or formal rejection.²⁷⁸ Alternately, the treaty may merely be signed, and not transmitted

²⁷⁶ See, *Coleman v. Miller*, 307 U.S. 433, 450 (1939), *Goldwater v. Carter*, 444 U.S. at 1005 (Rehnquist, J. concurring), *Made in the USA Foundation v. United States*, 242 F.3d 1300, 1315 (11th Cir. 2001).

²⁷⁷ 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.

²⁷⁸ Vienna's troublesome provision Article 18 is triggered by signature, not some even less formal level of “commitment”. Specifically: “A State is obliged to refrain from acts which would defeat the object and

to the Senate, as with Kyoto. The document may have been transmitted but not yet taken up, though transmittal may or may not matter.²⁷⁹ Finally, a treaty may have been taken up for Senate consideration, but failed to achieve the requisite two-thirds vote, or even received a majority “nay” vote (as with CTBT).²⁸⁰

Kyoto’s sole relevant provision which addresses only the treaty having entered into force offers no guidance as to how a state extracts itself from whatever commitments are incurred through signature.²⁸¹ This is seemingly also true as to the Vienna Convention’s relevant Articles (54 - 72), though those seem arguably susceptible to claims that they also equate to the requirement that a state “[make] its intention clear not to become a party to the [unratified] treaty”. Relevant customary law is elusive.

The official offices of the UNFCCC ought to serve as an authority on this issue, but, curiously, the same UNFCCC correspondence to this author regarding the U.S.’s Kyoto status, cited in Note 42, *supra*, also asserted, “There is no procedure for the withdrawal of a signature in the [UNFCCC or Kyoto].” A follow-up request made in June 2002 as to whether this indicates the UNFCCC does not recognize the Vienna Convention has gone unanswered to date.

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, “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 *ejusdem generis*.

²⁷⁹ See Horner, “Executive Transmittal of a Treaty”, discussion, pp. 27 - 35.

²⁸⁰ 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.

²⁸¹ 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.

1. “Unsigning” Kyoto

The State Department’s renunciation of the U.S. Rome signature, however, put to bed both the issues of whether the U.S. recognizes that such act is necessary to extract from a signed treaty, and the Executive mechanism which the U.S. recognizes.²⁸² Therefore, despite UNFCCC officials’ silence in the face of this conflict we can be confident in agreement with the Bush Administration’s actions if not rhetoric that the customary requirement found also in Vienna Article 18 is not satisfied by senior U.S. officers merely speaking ill of a treaty or expressing disagreement with a predecessor’s signature.²⁸³

As regards the never-ratified, never-transmitted Kyoto, President Bush’s purely rhetorical rejection of the treaty does not find support in the relevant law that it constitutes rejection, by “denunciation” or otherwise. Further, and distinct from the (actually rejected) Rome, the U.S. continues to send delegations to the relevant negotiations, albeit in a strange, voluntarily mitigated role that is a matter of some controversy.²⁸⁴ Kyoto provides for “observers” in Article 15: “2. Parties to the

²⁸² Informally, Bush Administration officials state that Rome was distinct from, *e.g.*, Kyoto, because of the threat by Parties to invoke the treaty against non-parties. Was that not an illusory distinction, it would remain a red herring as the relevant issue continues to be that the signature imparts obligations. Ultimately, discussions with the Bush Administration and its allies are distilled to reveal a fear of establishing cognizable precedent as to how the U.S. extracts from signed treaties, and of also signaling acceptance of those the signature upon which it has not renounced. This argument rests on the presumption that one renunciation occurs in a vacuum but two are precedent.

²⁸³ 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.

²⁸⁴ 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 in Kyoto, the Third Conference of the Parties to the Rio Process, pursuant to Rio Article 7). The U.S. delegation now assumes

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. Yet, until Kyoto goes into effect, though it asserts otherwise the U.S. remains a party as much as any other nation.²⁸⁵

Instead, withdrawal from a signed-but-not-ratified treaty compliant with Vienna Article 18 or its customary law equivalent is accomplished by communicating this intent to the other parties to the treaty.²⁸⁶ 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, the UN serving as the clearing house for all parties to treaties under its auspices. The Administration certainly seems to believe this is the case, given it quite specifically stated as much.

a second-class citizen posture, communicating desires through a proxy nation (typically Canada or Australia, among the “umbrella group” nations; other such groupings are the EU, the G-77 and China, *etc.*). This seems a wasted exercise as until Kyoto goes into effect, the U.S. as a ratifying party to Rio 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.

²⁸⁵ 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.

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.

²⁸⁶ See Vienna Article 67.

Regarding such treaties, however, in the absence of such communication any nation is free to pursue, for example, action against the Bush initiatives to construct more coal-fired power plants, or its “Clear Skies” proposal that assumes increased greenhouse gas emissions, for they clearly violate Kyoto’s “object and purpose”.²⁸⁷

As with Senate rejection, Executive renunciation would principally benefit the ability to defend claims arising under “customary” law and/or Vienna, though would doubtless be of utility in defending claims based on U.S. statutes and the argument the U.S. acknowledges a particular environmental damage and/or obligation. As discussed, however, things may have progressed too far for such action to mitigate potential exposure before a WTO tribunal.

2. Senate Rejection of Kyoto²⁸⁸

A Senate vote failing to achieve the required favorable two-thirds of those voting, and more certainly a vote garnering a majority against a treaty, would be compelling if not determinative to an inquiry over whether the U.S. remained bound by its treaty signature. But, what impact upon the meaning of a country’s signature, or an Executive’s ability to rescind that signature, is created by Executive transmittal of a signed document to the Senate for purposes of a ratification vote?²⁸⁹ Further, is such transmittal necessary for the Senate to vote or may it take matters into its own hands upon

²⁸⁷ Further, would the U.S. extending, or even permitting the continued coal subsidies, or 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 well past the date Kyoto is scheduled to take effect, even though that nation subsequently ratified Kyoto?

²⁸⁸ This paper does not address withdrawal from the UNFCCC, which is not politically realistic at present, though by the terms of Rio and Kyoto that act would also constitute withdrawal from any Kyoto commitments.

²⁸⁹ For a detailed discussion of whether there exists a reverse equivalent, for treaties, of the Constitution’s “presentment” clause (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”), see discussion of “Executive Transmittal of a Treaty,” Horner, “Modern Developments in the Treaty Process,” pp. 27-35

recognizing the perils detailed herein, and in the face of an Executive that clearly seeks to avoid formalizing its rhetorical “rejection”?

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 such as continuing participation in the perpetual negotiations. Certainly, if a president transmits a treaty to the Senate with a request the Senate vote, there is no doubt that the Senate may act upon it subject to its own rules of operation (which it may amend or suspend at any time). But what about a treaty signed but not transmitted to the Senate?

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.²⁹⁰ The Senate has the right to establish its rules of operation under Article I, Section 5 of the Constitution, but those rules offer no such prohibition and indeed are ambiguous at best as regards this matter. Certainly given the rhetoric of potential natural catastrophe surrounding “climate change” and the perils of maintaining our signature on a “rejected” treaty, 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. That an easily circuited rule stands in the way is a less than flimsy excuse for inaction by those proclaiming impending catastrophe.

As a matter of protocol, however, and now manifested in Senate rules, that body does wait on the Executive to transmit a treaty prior to taking it up for consideration. Therefore, it is likely not fruitful to expect Senate “withdrawal” from Kyoto. Should the

²⁹⁰ See Horner, pp. 27-35.

Executive seek to otherwise claim “rejection” without a Rome-like letter, alternative prospects exist.

The Senate did recently “vote down” a treaty, the Comprehensive Test Ban Treaty (CTBT). Senator John Kyl (R-AZ) gave a post-mortem of that process in a June 2000 speech:

“The whole notion that the process used to consider the treaty was unfair is silly. As many of you know, the business of the Senate is usually established by unanimous consent, as was the case for the CTBT. After badgering by Democrats, the Majority Leader [Trent Lott] finally offered a unanimous consent proposal for consideration of the treaty. Democrats objected, demanding more debate time. It was added. All 100 Senators then had an opportunity to object to the second unanimous consent request and, thus, block that agreement from entering into force - none did. It was only after treaty supporters realized they didn’t have the votes that they reversed their position and called for the Senate to rescind its scheduled vote.

In the two weeks before the full Senate debated the treaty, three Senate Committees held five hearings and heard from over 30 witnesses, including General Shalikashvili, the four appropriate administration Cabinet secretaries, the chairman of the Joint Chiefs of Staff, and the lab directors. Finally, the Senate spent more hours debating the CTBT on the floor than similar treaties like the Chemical Weapons Convention. In fact, the Senate spent more time debating the CTBT than the START I, START II, and CFE treaties combined. What proponents cannot admit is that this treaty was rejected on the merits - and soundly at that.”²⁹¹

Senator Kyl made his case for Senate action, in lieu of merely allowing the signature to stand, in a floor speech during debate (with corresponding Congressional Record pages):

“If we proceed today to reject the CTBT, future U.S. negotiators will be more inclined to seek the Senate's advice before the deal is finalized and the administration demands our consent. This will serve the U.S. national interests in various ways.

²⁹¹ Disarmament Diplomacy, Issue No. 47 ‘*Why the Senate Rejected the CTBT and the Implications of its Demise,*’ Carnegie Endowment for International Peace, June 5, 2000, found at <http://www.acronym.org.uk/47kyl.htm>.

First, the Senate was never intended to be a rubber stamp, approving any ill-advised treaty negotiated by an administration. Our constitutional duty in treaty-making is to perform the equivalent of quality control. Under the Constitution, the Senate's role is of equal stature with the President's. We in the Senate are entitled--indeed, we are obliged--to second guess the President's national interest calculations regarding treaties.

There would inevitably be complaints from abroad, including from friends, if we upset the CTBT apple cart. But that unpleasantness would be minor and transitory, especially in light of the permanent harm the CTBT would do to our national security. The embarrassment of the President for buying into such a flawed treaty in the first place is not desirable, but the Senate cannot avert it at any price....(S12338)

The Senate now has a chance to demonstrate strength and the good sense worthy of Ronald Reagan. If we do it, we will be flouting much conventional thinking, but we will, in fact, enhance our Nation's diplomatic strength, protecting our national security and vindicating the wisdom of America's founding fathers who assigned to the Senate the duty to protect the country from ill-conceived international obligations...(S12338)

Mr. President, the Senate has a solemn obligation under our Constitution to be a backstop. We are not supposed to be a rubber stamp to treaties. If we were simply to rubber stamp whatever the President sent to us, our founding fathers wouldn't have provided a separate advice and consent responsibility for the Senate. As a matter of fact, we would be doing the Office of the Presidency a big favor by exercising that responsibility in a responsible way, saying that when we find treaties that lack even minimal standards, then we need to say no, so that our negotiators in the future will be able to negotiate stronger provisions--provisions that we seek because we understand their importance and necessity for sensible arms control..."(S12369)²⁹²

There is no question that a Senate vote failing to achieve the necessary two-thirds majority does not bar the Senate from voting again on the treaty in the future. However, a floor vote on CTBT, particularly a majority vote against ratification as was achieved against CTBT, in a rational world should suffice as an equivalent of a state making its intention known to not become a party to a treaty, and at minimum serves as persuasive

²⁹² Congressional Record, 12 October 1999, found at <http://www.clw.org/pub/clw/coalition/ky1101299.htm>.

evidence should the matter become subject to challenge, as the purpose of this custom is to place some marker superceding the signature as an expression to other parties.²⁹³

Again, consider Senator Inhofe's remarks in the CTBT debate:

“How do you make your intentions clear? Under the Vienna Convention language, not to be a party to this treaty you have to vote it down. You have to bring this up for ratification and reject it formally on the floor of this Senate. To do anything other than that is to leave it alive and to force us to comply with this flawed treaty, which is a great threat to our safety in this country.”²⁹⁴

This characterization is in fact slightly inaccurate in that the universe of manifestations of the required expression of intent is by no means limited to Senate disapproval, but that intent is certainly effectuated by an Executive renunciation of the signature. This is particularly true given the Rome Statute precedent. It is also true, however, that the way for the Senate to make its intentions clear is in fact limited to such an act.²⁹⁵ Still, despite a majority of the Senate voting against CTBT, some still maintain the opinion that the U.S. signature, having not been undone by the Executive, continues to carry obligations. For example:

“In addition, some anti-CTBT factions in the Bush administration are pressing for full repudiation of the CTBT. Even though President Bush does not have the authority to unilaterally withdraw the treaty from the Senate's calendar, he does have the power under U.S. law to formally notify the secretary-general of the

²⁹³ See comments of Messrs. Watson and Feith at n. 117, *supra*.

²⁹⁴ (S12465-66).

²⁹⁵ CTBT was transmitted to the Senate for ratification. In the absence of transmittal, and possible Senate reluctance to proclaim its ability to consider a treaty absent transmittal – a very real consideration given deference to protocol and institutional prerogatives – a “Sense of the Senate,” though non-binding, may in fact serve as a persuasive expression of U.S. intention to not become party to a treaty: see discussion of President Reagan's “transmittal” of the Geneva Protocol I, *infra*. It might prompt an Executive to actually unsign a controversial treaty, however. S.Res. 98, “Byrd-Hagel”, unanimously passed against the concept of what emerged as Kyoto, was obtained in advance of the Protocol's existence, so cannot actually serve that function; though it was actually cited by President Bush as the reason he was rejecting it, as manifesting that it was politically nonviable, at present. See, e.g., “Text of a Letter from President Bush to Senators Hagel, Helms, Craig and Roberts”, 13 March 2001, found at <http://www.whitehouse.gov/news/releases/2001/03/20010314.html>.

United Nations that the United States does not intend to ratify the treaty, which would free the United States of its obligations as a signatory under Article 18 of the Vienna Convention on Treaties.”²⁹⁶

Lacking any substantiating authority, however, these expressions appear to be no more than mere advocacy, similar to the “signatures are meaningless” position articulated, as described, *supra*, by Messrs. Feith and Watson in public despite at least one of them successfully urging in private that the Senate vote to remove the signature’s potentially burdensome obligations.

What if the Executive does not transmit a signed treaty to the Senate, yet the lawmakers note the imperative of clarifying U.S. obligations? By practice the Executive treaty transmittal and its communication is considered formally as part of the Senate Treaty Document sent by the White House.²⁹⁷ Clearly, a transmittal message need not request ratification but an Executive may instead ask the Senate to reject a treaty. Similar 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. Prior to President Bush’s precedent-setting letter “rescinding” the U.S. signature from the Rome Treaty, this arguably satisfied the Vienna/ customary standard 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

²⁹⁶ Maintaining U.S. Support for the CTBT Verification System, Presentation for the VERTIC Seminar *CTBT Verification: Achievements and Opportunities* 18 March 2002, Vienna International Center, Austria Daryl Kimball, Executive Director, Arms Control Association, found at <http://www.armscontrol.org/aca/ctbtver.asp>.

²⁹⁷ 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.

of the actual agreement (while also apparently recognizing that the Executive loses some and possibly all control over the treaty's future upon transmittal).

After transmitting and asking for ratification of Protocol II, additional to the Geneva Conventions of 1949 concluded on 10 June 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 the post-“September 11” debate over 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.”²⁹⁸

Calling Protocol I “fundamentally and irreconcilably flawed” – language remarkably similar to Bush Administration characterization of Kyoto -- 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.”²⁹⁹

Yet requesting disapproval of non-transmitted language was not the real deviation so much as was actually seeking disapproval. Historically, it appears that “requesting”

²⁹⁸ 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, 29 January 1987. (<http://www.fed-soc.org/pdf/ABAResID.pdf>).

²⁹⁹ *Id.*

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 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.”³⁰⁰

President Reagan transmitting a statement to the Senate without sending the language and/or asking for ratification, but for an “expression of the sense of the Senate” that it shared his disapproving view of the agreement, appears to be a mere semantic distinction. But by this act 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 signature, when in fact it is likely in the province of either the Executive or the Senate at this point to act. 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 never having been the subject of a “transmittal” to the Senate.³⁰¹

³⁰⁰ *Id.* (emphasis added).

³⁰¹ See http://www.icrc.org/eng/party_gc.

IX. Conclusion

It appears unavoidable under the current dynamic that lawsuits seeking to impose the “climate change” agenda found in at least two international agreements are in the near-term future of the U.S. and that of U.S. companies. Operators of domestic facilities, and the U.S. government itself, appear to be at increased risk due to inconsistent U.S. management of the “climate change” issue including its handling of the signed Kyoto Protocol and submission of documents accepting conclusions of climate alarmism. Specifically, pressure groups have already convinced one U.S. court that the National Environmental Policy Act requires climate change among the environmental impacts to be considered when conducting the mandated EIS.

Further, it appears unavoidable that these groups will discern the vulnerability of U.S. operators to claims that the latter are damaging the earth’s climate by their *domestic* operations, consistent with U.S. law though they may be, the purported negative global consequences may well prove with actionable regardless of the merit of such claims. Here, too, U.S. mismanagement of “climate” contributes to the plaintiffs’ case, but under the Alien Tort Claims Act. Finally, as the march continues to “harmonize” the World Trade Organization’s provisions with MEAs, it appears equally unavoidable that the WTO will serve as the Europeans’ forum for leveling the economic playing field as was sought via the Kyoto Protocol. All of these are ultimately abetted by the U.S. refusing to renounce its signature as required by at minimum the customary law equivalent of the Vienna Convention on the Law of Treaties, and other wise “acknowledging” climate alarmism.

The EU plans are premised upon the U.S. continuing its diplomatic slide of go-along-to-get-along in climate dealings, if not yet pursuing Kyoto ratification the prospect of which momentarily appeared defeated by the Bush Administration's rhetorical "abandonment" of Kyoto. In fact of course mere rhetoric carries no legal meaning whatsoever and President Bush's successor is free to enter any Kyoto deal for which he can obtain consent. Of course, this incentivizes the EU and others to find a way to tweak Kyoto (or pressure the U.S.) until it is accepted. Actual U.S. rejection would doubtless prove politically painful unless handled properly, also not a fair presumption given recent endeavors and that Republicans generally are comfortable with neither the specifics nor the rhetoric of green issues. Yet the issue of political cost should be minimized by the reality that few people have not already incorporated in their judgment a presumption that President Bush already has rejected Kyoto, therefore having taken whatever beating exists to be doled out for such an act.

The EU are aware of the power of green issues and the desire among at least one major U.S. political party to pursue at least this component of the EU's agenda for the U.S. The EU therefore – now, more than ever, clearly -- feel a stake in the outcome of U.S. political elections. 2003 and the early initiation of U.S. presidential politicking brought forth numerous political opponents of President Bush invoking European disapproval of Bush's foreign policy as a sign of U.S. moral inferiority under current leadership. Given this, that many Americans tend to forget that the EU has an agenda for America, and continued timidity in the face of attempts by green pressure groups, the campaign by EU bureaucrats and distressed European industry careening unstoppably down the GHG-suppression highway could prove devastating to the U.S. economy.

In summation, therefore, to initiate a campaign to reclaim sovereignty and mitigate U.S. citizens' exposure to "climate" sanctions of one form or another, President Bush ought to match his assertions of having "rejected" Kyoto with the requisite submission to the UN to that effect as he did regarding the International Criminal Court, or at minimum assist resolution of the ambiguous U.S. role in Kyoto by requesting the Senate disapprove of the treaty. The Administration should also correct presumably cost-free "acknowledgements" of catastrophic anthropogenic climate change. Barring either renunciation or Executive transmittal of the treaty to the Senate, that body should recognize that there is no reverse equivalent of the "presentment" clause³⁰² regarding treaties and vote Kyoto down on its own initiative. 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 can claim justification in taking matters into its own hands. For the Senate to not reject Kyoto is for the Senate to accept the triple indignity of an Executive ignoring advice, prohibiting reservations and disregarding consent, thereby abdicating its constitutional treaty role.

The step of removing inane "admissions" requires private entities suing under the Federal Data Quality Act to cease "dissemination" of the National Assessment on Climate Change and "Climate Action Report 2002".

Without such leadership, it is a matter of months and not years before U.S. industry begins paying the price of this feckless management of an issue the seriousness of which remains to this date unrecognized by Washington bureaucrats.

³⁰² 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".