

## **The Status of UNFCCC COP and other Treaty Body Decisions under US Law**

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### **Introduction**

1. As negotiations continue on the post-2012 climate change regime, numerous uncertainties remain over the legal form of the agreement that may be ultimately adopted by the Parties. The US, in particular, constrained by its domestic political situation, has indicated that it will not sign a new legal agreement without the large developing countries taking on similar legal obligations.
2. Amongst the various options currently being considered is one where US obligations are created by way of a decision of the Conference of the Parties (COP) only, with the intent of thereby avoiding the need for a Senate vote, or other US legislative action. This has therefore raised the questions whether the COP of the United Nations Framework Convention on Climate Change (UNFCCC) can create obligations for the US which would be binding under US domestic law, and, if so, could those obligations include such substantive obligations as financial commitments and commitments to cut carbon emissions.
3. This paper begins by introducing treaty bodies in general and COPs in particular. It briefly discusses the authority of treaty body decisions under international law. It then outlines the key issue under the US Constitution: whether any decisions of treaty bodies are ever binding under US law, and, if so, which kinds of decisions. Turning to the COP of the UNFCCC, the paper notes statements by congressional and executive leaders confirming that neither the US Executive nor the Senate considered that, in ratifying the UNFCCC, the US was agreeing to consider COP decisions to be binding, and discusses two domestic cases reinforcing this view. Finally, the paper briefly notes the ability of the US Executive to implement some limited kinds of non-binding COP decisions without legislative endorsement.
4. It should be noted that this briefing paper is intended to analyse the *legal* position only. The likely political willingness of the Executive or Congress to take or resist particular actions is beyond the scope of this paper.

### **Executive Summary**

5. Decisions made by treaty bodies under some limited circumstances can be “binding” under US law, in the sense of being enforceable without the need for legislation. However, COP decisions under the UNFCCC COP are almost certain to be found not to be binding under US law.

6. Many international treaties, in addition to directly creating obligations for states parties, also create what are in effect governing or implementing bodies – bodies tasked with implementing obligations, resolving disputes and even, in some cases, proposing new or expanded obligations over time. The primary treaty body created by the UNFCCC is the COP.
7. The terms of a treaty determine whether any body created by the treaty can make decisions binding on parties to the treaty as a matter of international law. However, the laws of each individual state party to a treaty dictate whether any international law obligation, including an obligation imposed by decision of a treaty body, can be enforced as a domestic law matter without separate legislation.
8. In the US, for a decision of a treaty body such as the COP to be binding in the sense of being enforceable under US law without further legislation, the decision would have to be clearly within the mandate of the treaty body and the treaty would have to be considered “self-executing” under US law. Most treaties that regulate economic matters, and decisions made by bodies created by those treaties are not considered self-executing.
9. Leaving aside the question of the scope of the mandate of the COP under the UNFCCC to impose obligations that are internationally binding on Parties, it is clear as a matter of US law that such decisions, whether or not binding, would not be considered self-executing, and therefore could not be enforced without separate legislative authority. At the time of the ratification of the UNFCCC in 1992, both the Legislature and the Executive agreed that, in adhering to the Treaty, the US was not agreeing to be legally bound by COP decisions. Recently, US courts – including the Supreme Court in the 2008 case of *Medellin v. Texas* – have declared that decisions made by COP-like bodies are not self-executing and therefore do not override inconsistent domestic law absent separate legislative action.
10. Although COP decisions are not binding in US law, the US Executive could choose to comply with COP decisions to the extent it has authority under existing environmental statutes. However the scope of executive authority under these statutes is limited, and its exercise is subject to judicial challenge. Environmental Protection Agency (EPA) actions regulating greenhouse gases (GHGs) are already subject to numerous pending lawsuits brought by industrial interests and certain states. Financial commitments require legislation.

### **Treaty Bodies Generally**

11. Many treaties, especially complex multilateral treaties, create associated treaty bodies. For example, the UN Charter outlines basic party obligations for ensuring peaceful international relations and then creates the UN Security Council, entrusting it with powers for executing “primary responsibility for the maintenance of international peace and security.”<sup>1</sup>
12. The powers of treaty bodies are determined by the treaty that creates them. In theory, states may be willing to yield substantial sovereign powers by treaty to treaty bodies, as was done, for example, in the creation of the European Union. By consenting to the treaty that gives a body such power, a state party consents to the exercise of the power delegated to that body, even if it in some senses intrudes on sovereignty. However, almost all countries are wary of delegating open-ended authority to bodies that they cannot necessarily control. Certainly the US is among the countries that is most reluctant to yield such authority to a treaty body that it does not control.

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<sup>1</sup> United Nations Charter, art. 24.

## The COP Model and the UNFCCC

13. Since the early 1970s, multilateral environmental agreements (MEAs) have by and large adopted the COP as a standard model for treaty administration. Each COP has a distinct set of powers defined by its originating treaty, but there are significant similarities across treaties. COPs are not tied to a pre-existing international organisation such as the United Nations Environment Programme (UNEP), and generally have annual meetings without a set meeting location.<sup>2</sup> Notably, the COP model has generally not been extended outside of the environmental field, although there are some similarities to the organisations created by the World Trade Organization and some modern arms control treaties.<sup>3</sup>
14. The UNFCCC follows the COP model. Article 7 of the UNFCCC creates a COP and declares that it “shall make, within its mandate, the decisions necessary to promote the effective implementation of the Convention.”<sup>4</sup> More specifically, Article 4.2 entrusts the COP with periodically reviewing and improving key operative paragraphs requiring developed country parties to both report on and actually mitigate their greenhouse gas emissions until the overall goals of the Convention are achieved.<sup>5</sup> However, nothing in Article 4 suggests that the COP could create new enforceable obligations against particular parties.
15. The Parties’ primary effort to refine their GHG reduction commitments under UNFCCC Article 4 was not made by a decision of the COP but, rather, via the adoption of specific emissions targets under the Kyoto Protocol. While protocols and amendments to the UNFCCC are adopted by the COP,<sup>6</sup> they are subject to added procedural requirements (the UNFCCC sets out these requirements for amendments and provides for protocols defining their own procedures) and have a more formal nature. Notably, the UNFCCC specifies that amendments and protocols “enter into force” (whereas the Convention is silent on how and whether decisions acquire force.<sup>7</sup> Yet despite the past practice of adopting targets through a Protocol, the text of the UNFCCC suggests that the COP has at least some power to add specificity to party obligations under the UNFCCC. Further, as is normal in international law and practice, the Protocols do not appear to bind those who do not accept the Protocol.

## Treaty Body Decisions Under International Law

16. Decisions made by treaty bodies decidedly can create international obligations.<sup>8</sup> However, most commentators agree that COP decisions are not by their nature binding under international law.<sup>9</sup> The legal character of any given COP decision depends on the specific powers granted in the underlying treaty. Some MEAs, most notably the Montreal Protocol, explicitly grant COP decisions binding power to alter particular elements of the underlying treaty.<sup>10</sup> The UNFCCC lacks such an explicit authorisation.
17. The UNFCCC, however, does implicitly grant the COP authority to use decisions to establish rules for the implementation of various rules, processes, and standards included in the text

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<sup>2</sup> For a thorough dissection of the COP model, see Robin Churchill & Geir Ulfstein, ‘Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law’, (2000) 94 *Am. J. Int’l L.* 623.

<sup>3</sup> *Id.* at 656.

<sup>4</sup> UNFCCC, art. 7.2.

<sup>5</sup> *Id.* art. 4.2(d).

<sup>6</sup> *Id.* art. 15-17.

<sup>7</sup> See UNFCCC, arts. 15(5), 16(3) and 23 and Kyoto Protocol, arts. 20(4) and (5), 21(5)-(7) and 25.

<sup>8</sup> See *Medellin v. Texas*, 552 U.S. 491, 520 (2008) (emphasising in an opinion denying domestic effect to the decisions of international tribunals that these decisions create “international obligations”).

<sup>9</sup> Churchill & Ulfstein, *supra* note 2 at 639; Brunnée, ‘COPing with Consent: Law-Making Under Multilateral Environmental Agreements’, 15 *Leiden Journal of International Law* 21 (2002), note 4 at 32.

<sup>10</sup> Legal Response Initiative, ‘COP Decisions: Substance and Mandates’, 3 (2010).

of the Convention.<sup>11</sup> Decisions within this authority may constitute or reflect general principles of international law.<sup>12</sup> For the particularly critical step of adding binding emission targets to the UNFCCC, the past practice of States Party to the Kyoto Protocol suggests that such a significant step may require a formal protocol or amendment of the treaty and the specific consent of the state (which could be granted by ratifying a Protocol or amendment), rather than a mere decision of the COP.<sup>13</sup>

18. Perhaps more importantly in practical terms, the operative text of the Convention, unlike the Kyoto Protocol does not provide for a compliance mechanism or a process to create a compliance mechanism.<sup>14</sup> Therefore, even if purportedly binding mitigation targets were to be adopted by way of COP decision, it is questionable whether the Parties would be entitled to create a non-compliance system to address the issue of compliance with such targets, especially if it were a question of compliance with a decision by a Party to the UNFCCC who had not agreed with the decision.

### **UNFCCC COP Decisions are not binding under US Law: Evidence from the Political Branches and the Courts**

19. In general, US courts find few US treaties are self-executing, and they certainly would not find the UNFCCC, or decisions thereunder by the COP, to be self-executing. In the first place, the terms of the UNFCCC, including the mandate of the COP under Articles 4 and 7 are not precise, with many qualitative terms and obligations that lack benchmarks or particular state accountability. These obligations are of a kind whose compliance depends in many cases on international cooperation, and implementation could take many forms. This is the kind of obligation that is routinely considered not self-executing.
20. For COP decisions to be binding domestic law, the UNFCCC itself must qualify as binding domestic law. Although the US Constitution declares all ratified treaties “the supreme law of the land,”<sup>15</sup> only so-called “self-executing” treaties take domestic effect without separate legislation.<sup>16</sup> In *Medellin v. Texas*, the Supreme Court narrowed the universe of self-executing treaties. *Medellin* concerned the domestic effect of a decision of the International Court of Justice (ICJ) finding that the US had violated the Vienna Convention on Consular Relations (VCCR) by failing to inform imprisoned Mexican nationals of their right under the convention to request their consulate be informed of their arrest.<sup>17</sup> While acknowledging that the ICJ decision was binding international law, the Supreme Court determined that the VCCR was not self-executing and that ICJ holdings in particular, without legislative implementation, did not override the domestic law at issue.
21. *Medellin* held that only explicitly self-executing treaties are binding as a matter of US law. The Statute of the ICJ (which is annexed to, and forms an integral part of, the UN Charter) was not explicit enough for the Supreme Court. Although the UN Charter provides that “[e]ach ... Member ... undertakes to comply with the [ICJ’s] decision,” the Court held that the phrase “undertakes to comply” is a commitment by UN Member states to take future action

<sup>11</sup> Id. at 2. UNFCCC decisions may be used to establish rules relating to Articles 4(1)(a), 4(2)(c) and (d), 4(8), 7(2), 7(3), 8(2)(g), 9(3), 11(1), 11(3), 11(4), 12(5), 12(6), 12(8), 12(9), 13, 14(2)(b) and 14(7) of the convention.

<sup>12</sup> Farhana Yamin & Joanna Depledge, *The International Climate Change Regime: A Guide to Rules, Institutions and Procedures*, 406 (2004).

<sup>13</sup> See Legal Response Initiative, supra note 10 at 4.

<sup>14</sup> Id. at 4-5.

<sup>15</sup> US Const. art VI.

<sup>16</sup> For a thorough analysis and typology of self-executing treaties, see Carlos Manuel Vasquez, ‘The Four Doctrines of Self-Executing Treaties’, (1995) 89 *Am. J. Int’l L.* 695.

<sup>17</sup> Vienna Convention on Consular Relations, Apr. 24, 1963, [1970] 21 U.S.T. 77, T.I.A.S. No. 6820, art. 36(1)(b).

- through their political branches. Such language did not indicate that the Senate intended to vest ICJ decisions with immediate legal effect in domestic courts.<sup>18</sup>
22. The UNFCCC permits the COP to take appropriate action, including the adoption of new commitments needed to achieve the objective of the Convention,<sup>19</sup> but it is significantly less explicit about the binding power of these commitments on members than is the Statute of the ICJ. Under the current *Medellin* framework, it seems highly unlikely that a US court would hold that UNFCCC COP decisions impose binding domestic obligations.
  23. The other relevant case, *NRDC v. EPA*, is no more promising than *Medellin*. *NRDC* concerned two decisions by the treaty body for the Montreal Protocol on Substances that Deplete the Ozone Layer (a protocol to the 1985 Vienna Convention for the Protection of the Ozone Layer). The EPA adopted a domestic rule that *NRDC* claimed violated these COP decisions, relating to production of methyl bromide.<sup>20</sup> A federal appellate court found that the decisions were not binding domestic law; the court cited the non-delegation doctrine, and read the treaty and its authorising legislation to avoid a potential constitutional conflict.<sup>21</sup> The court did so despite implementing legislation which stated that US law “shall not be construed, interpreted, or applied to abrogate the responsibilities or obligations of the United States to implement fully the provisions of the Montreal Protocol. In the case of conflict between [the implementing legislation] and any provision of the Montreal Protocol, the more stringent provision shall govern.” The court nevertheless found it “far more plausible to interpret the Clean Air Act and Montreal Protocol as creating an ongoing international political commitment rather than a delegation of lawmaking authority to annual meetings of the Parties.”<sup>22</sup> There is no such implementing legislation for the UNFCCC, and thus even less reason to find that UNFCCC COP decisions have binding force under US law.
  24. The legislative history of the process in which the Senate gave its advice and consent to ratification supports this analysis.
  25. While the actual ratification text is silent on the matter, contemporaneous documentation shows that the Senate understood, in voting to give its consent to US ratification of the UNFCCC, that the US would not be bound by any new obligations beyond the terms of the UNFCCC unless such new obligations had been ratified with the advice and consent of the Senate.<sup>23</sup>
  26. During Senate hearings on the UNFCCC, US administration officials claimed that UNFCCC commitments would not require any new regulatory programs, and emphasised that any binding emissions commitments associated with the Treaty would require Senate approval.<sup>24</sup> The Senate Committee Report adopts this view wholeheartedly: it describes the Convention as “a flexible, voluntary response” that contains “no legally binding commitments to reduce greenhouse gas emissions.”<sup>25</sup> It further notes that “a Decision by the Conference of the Parties to adopt targets and timetables” would have to be submitted to the Senate, and that any reinterpretation of the Treaty by the US Executive to impose legally binding targets

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<sup>18</sup> 552 U.S. 491 at 517.

<sup>19</sup> UNFCCC, Arts. 4, 11.

<sup>20</sup> 464 F.3d 1, 5 (D.C. Cir. 2006).

<sup>21</sup> *Id.* at 9.

<sup>22</sup> *Id.*

<sup>23</sup> The most blunt statements to this effect come from the Senate debate found at 138 Cong. Rec. 33522-27.

<sup>24</sup> See Emily Barbour, ‘Congressional Research Service, International Agreements on Climate Change: Selected Legal Questions’, 8 (2008).

<sup>25</sup> S. Exec. Rep. 102-55, 102d Cong., 2d Sess. at 12 (1992).

would also require Senate approval.<sup>26</sup> Speaking before the ratification vote, a number of Senators explained that their votes for the Convention were dependent on this limitation.<sup>27</sup>

27. The weight of the legislative history indicates that the Senate must approve any domestically binding change to US obligations under the UNFCCC. A 2010 study by the US Congressional Research Service, the non-partisan research arm of the US Congress, reaffirms this analysis,<sup>28</sup> and we are not aware of any reputable contrary analysis.

### Complying with COP Decisions in the US without Legislative Authorisation

28. If a US President or executive agency wants to comply with a non-binding COP decision, they may be able to do so without direct congressional authorisation, depending on existing US law and the precise contours of the obligation created by the COP decision. COP decisions imposing new monitoring and reporting requirements could very likely be implemented in this fashion, while certain emission reduction requirements would be more difficult to fit into the existing regulatory scheme. COP decisions requiring a binding financial commitment could not be implemented without separate legislation.
29. Existing legislative authority, especially under the Clean Air Act (CAA), gives the executive branch, specifically the EPA, extensive authority to regulate greenhouse gases. This authority was recognised by the Supreme Court in *Massachusetts v. EPA*<sup>29</sup> and more recently in *AEP v. Connecticut*.<sup>30</sup> This authority would allow for the execution of some COP decisions. Not only can executive agencies receive broad grants of power from Congress without violating the non-delegation doctrine, but under the so-called Chevron doctrine US courts will defer to reasonable agency interpretations of ambiguous statutory commands.<sup>31</sup> The executive branch could re-examine its authority under existing environmental statutes in light of a UNFCCC COP decision to meet at least some non-binding international commitments.
30. However, such executive action could be overruled by either legislative action, future executive branch reversal, or a court challenge to a specific exercise of CAA authority. Affected industries are already challenging every action taken by the EPA with respect to greenhouse gases,<sup>32</sup> and the EPA has no ability to stray beyond the authorities granted under the CAA. The CAA does give the EPA extensive monitoring authority,<sup>33</sup> so the EPA should be able to implement most new Measurement, Reporting and Verification (MRV) requirements, but emission reduction requirements would need to be fit into one of the existing CAA mechanisms, such as new source performance standards.<sup>34</sup> Neither the CAA nor any other law gives the EPA the ability to make binding financial commitments; those must come from Congress. A full discussion of the contours of CAA authority to regulate GHGs is beyond the scope of this paper.
31. Indeed, the US implemented some of its initial obligations under the UNFCCC itself without passing new legislation. The monitoring and reporting obligations created by the treaty were

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<sup>26</sup> Id. at 14.

<sup>27</sup> 138 Cong. Rec. 33522-27.

<sup>28</sup> See Barbour, *supra* note 21.

<sup>29</sup> *Massachusetts v. EPA*, 549 U.S. 497 (2007).

<sup>30</sup> *American Electric Power Co. v. Connecticut*, 564 U.S. \_\_\_\_ (2011).

<sup>31</sup> See *Chevron v. NRC*, 467 U.S. 837 (1984).

<sup>32</sup> See Michael Gerrard & J. Cullen Howe, 'Climate Change Litigation in the US Chart', at <http://climatecasechart.com/> (last updated July 22, 2011).

<sup>33</sup> 42 U.S.C. §§ 7414, 7542 (2006).

<sup>34</sup> § 4211.

implemented in part by reinterpreting the executive branch's existing authority under the CAA and other statutes to meet UNFCCC standards.<sup>35</sup>

32. It should be noted that under US law, the later law in time overrides inconsistent provisions of an earlier law or of an earlier treaty. One practical reason that the US Executive is reluctant to take on even obligations that it supports without some proper form of Congressional approval is that Congress is normally much more reluctant to take actions inconsistent with international obligations that Congress has in effect endorsed, than it is to override a similar commitment that the US Executive accepted without Congressional approval. That is especially true if the mandate of the COP seems doubtful or if the executive theory as to its domestic capacity to comply seems flimsy. If a COP decision sufficiently antagonises US political actors, the Congress could effectively compel the US to withdraw from the UNFCCC by passing laws that prevent the US from complying with its obligations.

### Conclusion

33. Decisions of the UNFCCC COP, especially if the COP tried to impose specific obligations on the US without going through the protocol or amendment process, almost certainly would not be binding and enforceable under US domestic law, without obtaining specific implementing legislation. The executive branch may be able to comply with some kinds of COP decisions using authority under existing US environmental legislation, but the US risks provoking veto-proof legislative reaction if the Executive tries to stretch its interpretation of existing law too far.

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<sup>35</sup> UNFCCC, Presidential Letter of Transmittal, Sen. Treaty Doc. 102-38 at VII-VIII.