

**"The Precautionary Principle:  
U.S. International Treaties Threaten Private Property Rights"**

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## **Introduction**

International law governs the conduct of states, of international organizations, and of persons (whether natural or juridical).

International law and international agreements of the United States are law of the United States and supreme over the law of the several States. [Restatement \(Third\) of Foreign Relations Law of the United States \(1987\), \(para. 111\(1\)\)](#).

The United States primarily assumes binding international law obligations by executing agreements with other nations or international bodies. These legal agreements assume the form of treaties or executive agreements. The United States also assumes binding international law obligations to the extent they have risen to the level of custom – international customary law.

## **Treaties**

Subject to [Article II, 2, cl. 2](#) of the United States Constitution

Provides President “with Power, by and with the Advice and Consent of the Senate to Make Treaties, provided two-thirds of the Senators present concur.”

This means that a 2/3 majority of the Senate must provide its advice and consent to a treaty first brought to them by the President, and then the President must ratify it.

President cannot ratify treaty unless accepts Senate’s conditions.

*United States v. Stuart*, 489 U.S. 353, 374–75 (1989) (Scalia, J., concurring) (“[The Senate] may, in the form of a resolution, give its consent on the basis of conditions (reservations). If these are agreed to by the President and accepted by the other contracting parties, they become part of the treaty and of the law of the United States...”).

Senate treaty conditions accepted by President can modify or define US rights/obligations under treaty

## **Examples of International Environmental Treaties**

[UN Law of the Sea Convention](#) – (UN General Secretariat) (U.S. has not ratified)

Sets out the legal framework within which all activities in the oceans and seas must be carried out. Chapter 17 of Agenda 21, adopted in 1992 at the United Nations Conference on Environment and Development, remains the fundamental programme of action for achieving sustainable development in respect of oceans and seas.

There is a Complex Interrelationship Between the UNCLOS Framework and International Environmental Law, Including Europe's *Precautionary Principle* ([L. Kogan 2009, p. 48](#))

[United Nations General Assembly Resolution 62/215](#) (March 14, 2008)

Reaffirmed "the universal and unified character" of the UNCLOS, as well as its "strategic importance as the legal framework within which all oceans and seas activities must be carried out" and as "the basis for national regional and global action and cooperation in the marine sector."

Reemphasized the need for all nations "to harmonize ...their national legislation with the provisions of the Convention... and to ensure... that any declarations or statements... made..., when signing, ratifying or acceding to the Convention do not purport to exclude or to modify the legal effect of its provisions...in their application to the State concerned..."

The provisions of UNCLOS Part XII arguably reflect environmental policy objectives that were in common with numerous other regional and multilateral environmental agreements (MEAs) developed during an earlier era. From 1972-1992, the world had witnessed the negotiation of many multilateral treaties calling for the increased regulation of the environment. In fact, as many as 302 separate but overlapping MEAs were drawn up during this era, many of which ("197, or nearly 70%") are regional rather than global in scope.

Biodiversity-related conventions –

Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) – species conservation (U.S. has ratified)

[Convention on Biological Diversity](#) – ecosystem protection (UN Environment Programme) (U.S. signed ([6-4-93](#)), but did not ratify) (Art. 8(g) – in-situ conservation)

[Biosafety Protocol](#) (U.S. has not signed, therefore not subject to (L. Kogan, 2006) (*Precautionary Principle*, Preamble, Arts. 1, 10(6), implementing Convention Art. 8(g))

[Ramsar Convention](#) – wetlands ecosystem protection (U.S. ratified ([12-18-86](#)))

Atmosphere conventions –

Vienna Convention on the [Protection of the Ozone Layer](#) (UN Environment Programme) (U.S. ratified ([8-27-86](#)))

Montreal Protocol on Substances that Deplete the Ozone Layer (U.S. ratified ([4-21-88](#))) (*Precautionary Principle*, Preamble)

United Nations Framework Convention on Climate Change (UN Environment Programme) (U.S. ratified) (*Precautionary Principle*, Art. 3.3) (L. Kogan, [2004](#))

Kyoto Protocol (U.S. repudiated ([3-28-01](#))) (*Precautionary Principle*, Preamble)

[Paris Agreement](#) (U.S. executed ([9-3-16](#)), announced withdrawal ([6-1-17](#)), withdrawal symbolically blocked by [Climate Action Now Act](#) Passed by Democratic House ([5-2-19](#)))

#### Chemicals and Hazardous Waste Conventions –

The Stockholm Convention on Persistent Organic Pollutants (POPs) ([rev. 2017](#)) (U.S. signed (5-23-01), not ratified) (*Precautionary Principle*, Preamble, Arts. 1, 8(9), Annex C, Part V.B)

[Rotterdam Convention](#) on Prior Informed Consent (“PIC”) Procedure (hazardous chemicals and pesticides in trade) (U.S. signed ([9-11-98](#)), but not ratified) (*Precautionary Principle*, Art. 5, Annex V(1)(c))

[Basel Convention](#) on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (U.S., no signature, no ratification - President Bush (41) signed the Basel Convention in 1989, but the Convention has since not been ratified by the Senate

[Ban Amendment](#) (New Annex VII to Basel) (L. Kogan [2004](#))

#### Regional Seas and Related Agreements –

Convention for the Protection and Development of the Marine Environment of the Wider Caribbean Region ([Cartagena Convention](#)) (UN Environment Programme)

[Protocol](#) Concerning Pollution from Land-Based Sources and Activities (U.S. signed/ratified ([2-13-09](#)))

Treaty Between the United States and Great Britain Relating to Boundary Waters, and Questions Arising Between the United States and Canada” ([Boundary Waters Treaty](#)) (Jan. 11, 1909)

(Covers water quantity and water quality issues in shared waterways and related watersheds along entire Canada-U.S. border)

Established [International Joint Commission](#) to advise treaty parties on treaty implementation

### **Executive Agreements**

Agreements entered into by executive branch that are not submitted to the Senate for its advice and consent

The Case-Zablocki Act of 1972, [P.L. No. 92-403, 86 Stat. 619](#) – Requires that all “international agreements” other than treaties be transmitted to Congress w/in 60 days of their entry into force for the United States. [1 U.S.C. § 112b](#).

The U.S. Supreme Court has recognized Executive Agreements as legally valid international compacts. See, e.g. [Am. Ins. Ass’n v. Garamendi](#), 539 U.S. 396, 415 (2003) (“[O]ur cases have recognized that the President has authority to make ‘executive agreements’ with other countries, requiring no ratification by the Senate . . . this power having been exercised since the early years of the Republic.”)

It is estimated that more than 90% of international legal agreements concluded by the United States have assumed the form of an executive agreement.

Congressional-Executive Agreements –

Both houses of Congress are involved in the authorizing process which takes the form of a statute which must pass both houses of Congress – i.e., domestic authority is derived from existing or subsequently enacted statute –

Bilateral Trade Agreements, North American Free Trade Agreement (“NAFTA”), General Agreement on Tariffs and Trade (“GATT”)

CLOUD Act, P.L. No. 115-141, div. V, § 105 (codified at 18 U.S.C. § 2523)  
(authorizing data-sharing executive agreements with certain foreign nations)

Foreign Assistance Act of 1961, P.L. No. 87-195 (codified at 22 U.S.C. §§ 2151-2431k)  
(authorizing the President to furnish assistance to foreign nations “on such terms and conditions as he may determine, to any friendly country”).

[Executive Agreements Made Pursuant to a Treaty](#) Based on Authority Created in Prior Senate-Approved, Ratified Treaties –

Great Lakes Water Quality Agreement (“GLWQA”) –

Executive Agreement signed by heads of state but not submitted to legislature for approval

Implements Art. IV of the Boundary Waters Treaty of 1909

Is one of the United States’ oldest and most durable international environmental agreements

Supplemented prior aspirational Great Lakes Basin Compact (1955), to which Congress granted consent (1968), subject to reservations - [P.L. 90-419](#), 82 Stat. 414-419, 90th Cong. 2d Sess. (July 24, 1968)

#### GLWQA ([4-15-72](#))

(Nixon and Congress enact into law Federal Water Pollution Control Act (10-18-72) - [P.L. 92-500](#), Federal Water Pollution Control Act, 86 Stat. 816 (Oct. 18, 1972)) (predecessor to Clean Water Act of 1977)

#### GLWQA ([1978, 1987 Amended](#))

1978 agreement introduced ecosystem approach to management, a multi-faceted ecological restoration goal

#### GLWQA (2012 Protocol Amend ([9-7-12](#))) (entered into force 2-12-13)

The new 2012 GLWQA was intended to facilitate “United States and Canadian action on threats to Great Lakes water quality and include[d] strengthened measures *to anticipate and prevent* ecological harm.”

“[A] framework for identifying binational priorities and implementing actions that improve water quality. [EPA coordinates U.S. activities under the Agreement.](#)” [USEPA coordinates U.S. activities](#) from the Chicago, Illinois-based Great Lakes National Program Office ([GLNPO](#)). The GLNPO is located at the USEPA Region 5 offices. USEPA Region 5 covers six of the Great Lakes States: Minnesota, Wisconsin, Illinois, Indiana, Michigan, and Ohio.

Articles 2 and 4, and Annexes 2.B and 10 (incorporate *Precautionary Principle*)

Art. 4.1 - requires the Government of the State of Michigan, along with the other Great Lakes State governments, to cooperate with the Federal Governments of Canada and the United States to develop and implement programs and other measures to fulfill the purpose of said Agreement, “*in accordance with the Principles and Approaches set forth in Article 2.*”

Art. 4.2 - said programs and other measures shall include but are not limited to: 1) pollution abatement, control, and prevention programs; 2) conservation programs; and 3) *enforcement actions and other measures to ensure the effectiveness of the programs described above.*

Art. 4.3 – U.S. committed itself to seek enactment of any legislation necessary to implement the programs and other measures

developed under Article 4, with cooperation, input, and advice from downstream jurisdictions.

Art. 2.4(i) - imposes upon all treaty parties the directive to employ a “*precautionary approach* [...] . . . as set forth in the Rio Declaration on Environment and Development [...] . . . in order to achieve the purpose of this Agreement.”

Despite the use of precautionary approach documentation language, the actual practice on the ground has been to resort to the “strong” European Precautionary Principle for compliance and enforcement purposes.

Art. 3.1(a)(v) - subject to these Principles, imposes the general obligation to “support healthy and productive wetlands and other habitats to sustain resilient populations of native species.”

Art. 1(j) - imposes the directive to employ “tributary management” (emphasis added) focused on restoration of surface waters flowing into the “Waters of the Great Lakes, namely, tributaries with a substantial nexus to “waters of the United States”, including wetlands.

Annex 2.B -

Requires parties, in consultation with state, provincial, local and tribal governments to undertake various lakewide management actions, including scientific evaluations of the state of the waters of each Great Lake, the reporting of such evaluations’ findings, and the development and implementation of specific binational strategies to address Annex 4 nutrient threats to water quality. Lakewide management actions shall “include consideration of non-point source runoff, shoreline hardening, climate change impacts, habitat loss, invasive species, dredging and contaminated sediment issues, bacterial contamination, contaminated groundwater, and other factors where they are identified as a source of stress to the nearshore environment.”

In addition, such actions also should also include scientific evaluations of the nearshore Waters of each of the Great Lakes and the development of an integrated nearshore framework.

Requires identification of high ecological value nearshore areas, nearshore areas and the determination of chemical, physical or biological integrity of which are subject to high stress individual or cumulative impacts.

Requires establishment of priorities for nearshore and whole lake prevention, restoration and protection.

Annex 2.C – Requires Parties to “document and coordinate these lakewide management actions through development of Lakewide Action Management Plans (LAMP) for each Great Lake,” which shall be issued every five years, with annual updates. (Lake Huron LAMP – Michigan) (Lake Erie LAMP – Ohio) (Lake Erie LAMP – Ohio, Pennsylvania, New York)

Annex 4 - Focus On Nutrient Loads Nonpoint Source Runoff Pollutants – (phosphorous, nitrogen concentrations in lower Lake Erie, Lake Huron)

Requires Parties to assess and, where necessary, develop and implement regulatory and non-regulatory programs to reduce phosphorous loading from agricultural and rural non-farm point and non-point sources.

Requires Parties to “identify watersheds that are a priority for nutrient control,” and to “develop and implement management plans, including phosphorous load reduction targets and controls for these watersheds, as appropriate.”

Annex 10 – Science –

Directly obligates the United States (and indirectly obligates the State of Michigan (and the other seven Great Lakes States) to use adaptative (ecosystem-based) science management techniques to review available scientific information to inform management actions and policy development, and, to consider IJC/Great Lakes Science Advisory Board advice.

Canada and the U.S. also must , and to establish and maintain comprehensive (*precautionary*) science-based ecosystem indicators to assess the state of the Great Lakes and to anticipate emerging threats, thereby reinforcing the role of the IJC in such decision-making.

[1994 IJC Report](#) recommending application of the “weight-of-evidence” (WOE) approach of establishing scientific support for proposed regulatory actions had significantly influenced the drafting of the new 2012 GLWQA *Precautionary Principle* provisions.

GLWQA employs *Precautionary Principle* consistent with CEPA 1999

[Canadian Environmental Protection Act of 1999](#) –

Preambular paragraph 6 of CEPA 1999 states that “the Government of Canada is committed to implementing the *precautionary principle* that, where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.”

CEPA 1999 Article 2(1)(a) states that the Government of Canada shall “apply the *precautionary principle*” in exercise of its powers “to protect the environment and public health.”

CEPA 1999 Part 3, Article 54(1)(b) provides that “[f]or purposes of carrying out the Minister’s mandate related to preserving the quality of the environment, the Minister shall issue environmental quality guidelines specifying recommendations in quantitative or qualitative terms to support and maintain particular uses of the environment.”

[Chapter 3](#) of the Government of Canada’s “Guide to Understanding the Canadian Environmental Protection Act, 1999” includes “*sustainable development*” and the “*precautionary principle*” as among the “key” guiding principles informing the Canadian Government’s implementation of that statute.

Among the “key” guidelines is the “[Framework](#) for the Application of Precaution in Science-based Decision Making about Risk.”

See: [The Europeanization of the Great Lakes States' Wetlands Laws and Regulations](#)

Michigan State Law Review 2019-3 (forthcoming 2019)

See: [What Goes Around Comes Around: How UNCLOS Ratification Will Herald Europe's Precautionary Principle as U.S. Law](#)

Santa Clara Journal of International Law (Vol. 7, 2009)

See: [The Precautionary Principle and WTO Law: Divergent Views Toward the Role of Science in Assessing and Managing Risk](#)

Seton Hall Journal of Diplomacy and International Relations (Spring 2004)

See: [‘Enlightened’ Environmentalism or Disguised Protectionism? : Assessing the Impact of EU Precaution-Based Standards on Developing Countries](#)

National Foreign Trade Council, Inc. Working Paper (April 2004)