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The Paris Agreement: Its Role in International Law and American Jurisprudence

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The Paris Agreement: Its Role in International Law and American Jurisprudence

Cover Page Footnote

Kayla Clark, Notre Dame Law School, Class of 2018. I would like to thank Notre Dame Law Professor Mary Ellen O'Connell

**THE PARIS AGREEMENT: ITS ROLE IN INTERNATIONAL LAW
AND AMERICAN JURISPRUDENCE**

KAYLA CLARK*

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INTRODUCTION

On December 12, 2015, the international community created the first major climate change agreement since 1997: The Paris Agreement.¹ The goals of the treaty are unprecedented, and the document features an innovative oversight strategy to enforce its ambitious scope. The historical nature of the Agreement is clear not only from the sheer participation in the treaty—with over 196 participating countries²—but also because the content of this agreement has radically advanced the use of international law to combat climate change.³

When the United States joined China and India in ratifying the Paris Agreement, the treaty became the first international climate change agreement to have all three of the world's greatest polluters actively involved.⁴ After nearly two decades under the unsupported Kyoto Protocol regime, China, India, and the United States' support for the Paris Agreement signaled a shift in global consciousness about climate change and a substantial development in

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¹ See generally Robert Falkner, *The Paris Agreement and the New Logic of International Climate Politics*, 92 INT'L AFF. 1107 (2016).

² *Paris Agreement - Status of Ratification*, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE, http://unfccc.int/paris_agreement/items/9444.php (last visited Feb. 2, 2017).

³ Falkner, *supra* note 1, at 1112–13.

⁴ Participation by the world's greatest polluters is widely thought to be necessary to the success of the Paris Agreement. See President Barack Obama, Remarks by the President on the Paris Agreement (Oct. 5, 2016) (transcript available at <https://obamawhitehouse.archives.gov/the-press-office/2016/10/05/remarks-president-paris-agreement>); see also DANIEL BODANSKY, CTR. CLIMATE & ENERGY SOLS., LEGAL OPTIONS FOR U.S. ACCEPTANCE OF A NEW CLIMATE CHANGE AGREEMENT SOLUTIONS 1 (2015), <https://www.c2es.org/site/assets/uploads/2015/05/legal-options-us-acceptance-new-climate-change-agreement.pdf> (“Unless the Paris outcome applies to the world's biggest emitters, it cannot significantly advance the international climate effort.”).

international commitment to combat greenhouse gas emissions.⁵ Shortly after the United States' ratification, the Paris Agreement met the requirements necessary for it to become legally binding and viable—ratification from fifty-five countries, accounting for fifty-five percent of global emissions.⁶ Law, for the first time since the Kyoto negotiations, seemed to be the best possible mechanism to achieve change, and for the first time in decades, hope seemed to replace stalemate as the dominant culture of international climate change effort. However, this hope was short lived. On November 9, 2016, Republican nominee Donald Trump, a candidate committed to renege on any U.S. participation in the recently enacted Paris Agreement,⁷ won the American presidency.

On June 1, 2017, President Donald Trump announced that the United States would withdraw from the Paris Agreement.⁸ In the wake of his announcement, we unavoidably find ourselves in a most critical moment for the future of international and environmental law—and their role in American jurisprudence. The world is now pulled between Paris' new legal framework and the movement that supports it, and the uncooperative leadership in one of the Agreement's key parties. Despite the Paris Agreement's significant support, domestic politics in one of the most influential countries in the world has the potential to uproot and gut any meaningful impact of the pact. Recent evidence, namely the Kyoto Protocol, warns of the United States' power to subvert global environmental efforts. Moreover, the United States' diplomatic status and relationship to international law hangs in the balance.

In such a determinative moment, this note seeks to answer two questions. First, after reflecting on prior climate change treaties, what promise does the Paris Agreement, as a tool of international law, offer for the future of international climate change efforts? In the wake of the expired Kyoto Protocol regime, the international community had the opportunity to learn many lessons; of critical importance is whether the Paris Agreement's goals and structure seem to have contemplated prior treaty failures. In other words, this note first asks whether the Paris Agreement as a treaty will be an effective expression of international law. Second, despite the ambition and structure of the Paris Agreement, and its potential to be an effective treaty regime, how does the Trump administration's announcement to withdrawal affect the treaty and the legal obligations of involved countries? Specifically, is it possible for the Paris Agreement to be successful without the support of, or potentially despite active antagonism by, the United States? Additionally, now that the Paris Agreement has entered into force, what are the legal consequences for the United States now that President Trump has reneged the United States' commitment to the treaty? In analyzing the structure and enforcement mechanisms of the Paris Agreement,

⁵ Rebecca Hersher, *India Ratifies Paris Climate Change Agreement*, NPR (Oct. 2, 2016), <http://www.npr.org/sections/thetwo-way/2016/10/02/496305658/india-ratifies-paris-climate-change-agreement>.

⁶ Coral Davenport, *U.N. Signals That Climate Deal Has Backing Needed to Enter Force*, N.Y. TIMES (Sept. 20, 2016), <https://nyti.ms/2pnJ379> (explaining that in reaching the treaties requirements for both number of ratifying parties and percentage of emissions accounted for, the climate deal will become legally enforceable against all signing parties).

⁷ See Matt McGrath, *Donald Trump Would 'Cancel' Paris Climate Deal*, BBC (May 27, 2016), <http://www.bbc.com/news/election-us-2016-36401174>.

⁸ Michael D. Shear, *Trump Will Withdraw U.S. From Paris Climate Agreement*, N.Y. TIMES (June 1, 2017), <https://www.nytimes.com/2017/06/01/climate/trump-paris-climate-agreement.html>.

this note determines what legal obligations the United States incurred through President Barack Obama's lawful ratification, examining whether the United States will have liability if the Trump Administration chooses not to comply with the terms of the treaty, and what legal impact may be caused by rescinding the treaty—both for the Paris Agreement and future U.S. involvement in international law.

I. LOOKING TO THE PAST, PRESENT, AND FUTURE FOR SUCCESS

A. HISTORY

The Paris Agreement, as the most recent major international environmental treaty, presents a unique vantage point from which to view past efforts to address climate change. The successes, failures, and permutations of climate change policies over time illuminate the strengths and potential areas of concern for the Paris Agreement. In this section, I discuss the legal forces that lead to the development of climate change treaty regimes, and how the evolution of these forces has made the Paris Agreement a promising new approach to climate change and international law.

Prior to the Kyoto Protocol's adoption in 1997, international environmental agreements focused on reactionary approaches to issues such as ozone depletion, water pollution, and waste disposal.⁹ However, in the lead-up to the Protocol, policymakers and the scientific community attempted to create the first ambitious international legal effort to proactively address greenhouse gas emissions. Unfortunately, the reality of the Protocol—both as a substantive and structural solution to the scientific evidence—has been well recognized as a failure.¹⁰

Several specific design flaws of the Protocol help explain why international law's first true attempt at climate change policy failed, and assist policymakers form accurate expectations about the viability of the Paris Agreement.¹¹ The Kyoto Protocol's failure has been problematized by author Amanda Rosen, using her systematic framework for policy analysis. The three-part framework evaluates a policy's effectiveness, efficiency, and compliance.¹² Application of the framework shows that the Kyoto Protocol failed all three benchmarks.¹³ The design flaws of the treaty led to a lack of participation by certain states whose emissions were critical to any meaningful improvement in the climate.¹⁴ The

⁹ See generally Guus J. M. Velders et al., *The Importance of the Montreal Protocol in Protecting Climate*, 104 PNAS 4814 (2007) (discussing how the Montreal Protocol, an international response to the issue of ozone depletion, was a wide-reaching and formidable international environmental treaty prior to the Kyoto Protocol). In addition to successful ozone rehabilitation efforts, the Montreal Protocol's scope also included climate change protections and laid groundwork for the Kyoto Protocol.

¹⁰ Alexandre Durand, *Common Responsibility: The Failure of Kyoto*, 34 HARV. INT'L REV. 8, 8–9 (2012).

¹¹ Amanda M. Rosen, *The Wrong Solution at the Right Time: The Failure of the Kyoto Protocol on Climate Change*, 43 POL. & POL'Y 30, 44 (2015).

¹² *Id.* at 34 (citing Jennifer Wallner, *Legitimacy and Public Policy: Seeing Beyond Effectiveness, Efficiency, and Performance*, 36 POL'Y STUD. J. 421 (2008)).

¹³ *Id.* at 35–40.

¹⁴ BODANSKY, *supra* note 4, at 1 (explaining that “[a] major weakness of the Kyoto Protocol has been its limited coverage, due both to the unwillingness of the United States to become a party and to the

absence of key players—such as China, India, and the United States—compounded with the failure of signatory states to adhere to the pact, made it an ineffective and inefficient treaty regime.¹⁵ Finally, because of the flawed differentiation between states, compliance by ratifying parties was weak.¹⁶

Most devastating to its effectiveness, efficiency, and compliance was the Kyoto Protocol's top-down approach to coerce states with mandatory greenhouse gas emission reduction targets. These mandatory targets created a legal liability, and were ineffective both as a mechanism for participating countries and nonparticipating countries.¹⁷ The main design feature of the targets was a differentiation between what were determined to be "Annex I" and "Non-Annex I" states.¹⁸ This distinction created two classes of nations: those that were developed and capable of immediately reducing greenhouse gas emissions ("Annex I"), and those that were categorized as developing and thus deemed unable to immediately begin emissions reduction ("Non-Annex I").¹⁹ The identification of two classes of states was influenced by the international law principle of common but differentiated responsibilities, in which developed states were seen as more capable of reducing emissions and more responsible for the emissions given their historically industrial role.²⁰ Additionally, developing states were believed to lack the necessary capacity to reduce their emissions, and perhaps were even justified in desiring to continue industrializing in an environmentally unsustainable way (i.e. industrialize "as they see fit") because ecological standards were not enforced on countries that had industrialized over the last two centuries.²¹

Because of the Annex design, the emissions targets created a participation deficit by some of the nations with highest emission rates, such as China and India.²² This was because Non-Annex I status, and thus freedom from emissions targets, was determined by each state's level of development.²³ Correspondingly, it dramatically reduced the Protocol's effectiveness by narrowing the scope of potential greenhouse gas emissions available to target.²⁴

protocol's lack of new mitigation commitments for developing countries, which now account for the majority of global greenhouse gas (GHG) emissions," which can alternatively be described as a fundamental lack of coverage).

¹⁵ Rosen, *supra* note 11, at 31.

¹⁶ *Id.* at 35–36.

¹⁷ *Id.* at 35 ("Experts have pointed out that even full participation and compliance with Kyoto would not have prevented wide spread climate change . . . [H]owever, the 2007 report by the IPCC asserts, 'the numerous mitigation measures that have been undertaken by many Parties to the UNFCCC . . . are inadequate for reversing overall GHG emission trends.'") (citations omitted).

¹⁸ Falkner, *supra* note 1, at 1111.

¹⁹ *See id.*

²⁰ Durand, *supra* note 10, at 9; Falkner, *supra* note 1, at 1116.

²¹ Durand, *supra* note 10, at 9 ("The concerned non-Annex I nations have replied that ecological standards set by the international community were not applied to countries that industrialized over the course of the last two centuries, and that they also have the right to industrialize as they see fit.")

²² *Id.*

²³ *See Parties & Observers*, U.N. FRAMEWORK CONVENTION FOR CLIMATE CHANGE, http://unfccc.int/parties_and_observers/items/2704.php (last visited Mar. 30, 2018) (explaining the difference between Annex I, Annex II, and Non-Annex I parties).

²⁴ Jorge Vinales, *The Paris Climate Agreement: An Initial Examination (Part I of III)*, EJIL TALK! (Feb. 7, 2016), <https://www.ejiltalk.org/the-paris-climate-agreement-an-initial-examination-part-i-of-ii/> (noting that the total "commitments [made] under the Kyoto Protocol cover[ed] not more than 14% of global annual emissions.").

Failing to assign emission reduction obligations to heavy polluters like China and India prevented the Protocol from capturing or reducing a large amount of global greenhouse gas emissions.

This reality made joining the Protocol unattractive to developed countries that believed adhering to the Protocol would restrict domestic industry.²⁵ One of the largest global polluters, the United States, choose not to join the Protocol because the targets were seen as both economically restrictive on domestic industry, and ineffective given the large amount of pollution left untouched in Non-Annex I countries.²⁶ Without China and India, and later the United States, the treaty only accounted for thirty percent of global emissions.²⁷ Thus, the cumulative effect of the Protocol's Annex design made the treaty unambitious in both spirit and execution.

Even for the countries that were not dissuaded by the Annex problems described above, the structural design of the treaty did not favor success for participating nations. Rosen writes that even once implemented, there were four design flaws that made the Kyoto Protocol work particularly poorly. Of the four design flaws, the two were particularly important: the short commitment period and the non-progressive emissions targets.²⁸ The emissions targets that were assigned to participating Annex I countries were both unambitious and easily achieved within the short commitment period.²⁹ This created a system in which the participating countries had very little incentive to make long-term investments in reductions targets because they could all too easily meet their obligations. The design of the Protocol's emissions targets created a near-sighted vision for climate change, when ultimately long-term solutions were needed.³⁰ Similarly, Robert Falkner writes that the static emissions reduction target failed to create dynamic incentives to decarbonize economies. And, importantly, by anticipating renegotiation of emissions targets in a future treaty, the assignment of targets became "a distributional conflict over respective shares of the mitigation burden" of emissions reduction, instead of a vehicle for meaningful efforts against climate change.³¹

Kyoto's failure of inspiration includes an additional insidious effect on the attitude of environmentalists.³² Though the Kyoto Protocol may have been recognized as unsatisfactory and limited, environmentalists were still compelled to back it as it was the only international legal regime in existence and had not run its statutory course.³³ Backing by those most concerned with environmental issues seems to have wasted many critical years, political capital, and a huge volume of potentially preventable emissions. This latent effect cautions future treaty-crafters against making self-defeating policy regimes that act as their own barrier to improvement.

²⁵ Falkner, *supra* note 1, at 1122 ("Time and again, major emitters have shown themselves willing to accept a loss in international reputation when domestic economic priorities have been at stake.").

²⁶ See Durand, *supra* note 10, at 9.

²⁷ *Id.*; see also Vinuales, *supra* note 24.

²⁸ Rosen, *supra* note 11, at 40.

²⁹ *Id.* at 36, 40 (Rosen writes that the five-year commitment periods of the Kyoto Protocol "promoted policies that focused on picking the low-hanging fruit rather than engaging in the fundamental economic and social changes necessary for a sincere effort at halting global climate change.").

³⁰ *Id.* at 40–41.

³¹ Falkner, *supra* note 1, at 1111.

³² See Durand, *supra* note 10.

³³ *Id.*

In turning our attention to the Paris Agreement, there are many lessons from Kyoto to apply—primarily from the ineffective crafting of the past treaty. Luckily, the Paris Agreement shows that, despite the failure to renew the Kyoto Protocol, environmental issues have not permanently taken a back seat in the international law arena. Instead, the Paris Agreement may show that the international community legitimately rebuked the shortcomings of the Kyoto Protocol's top-down, differentiation approach, and have instead put a concerted effort into using international law with a fundamentally different strategy to address climate change.

B. TRANSITION FROM KYOTO TO PARIS

After the crumbling of the Kyoto Protocol, the international community went without another major environmental treaty until the Paris Agreement. In the short time since the treaty's completion, over 197 parties have joined the pact. Most strikingly, there are also 127 ratified parties to the Agreement.³⁴ In total, it took less than a year from the Agreement's adoption date (December 12, 2015) for it to reach the ratification threshold needed to enter into force. The Kyoto Protocol, by comparison, only yielded eighty-three ratifying parties, and it took eight years for it to enter into force.³⁵ Looking beyond environmental treaties, the Rome Statute of the International Criminal Court garnered 124 ratifying parties, and entered into force in July of 2002, nearly four years after initial adoption.³⁶ Thus, it is not hyperbolic to describe the support behind the Paris Agreement as “overwhelming,” and a historic use of international law.

Upon reflection of the outpouring of support for the Paris Agreement, a fundamental question must be asked: how was the necessary momentum gained to support an ambitious new climate agreement? Several important factors seem to have led to the attitudinal shift, but most importantly, global leaders from countries not previously unified under the Kyoto Protocol began working together, and domestic investment in renewable energy has grown substantially.³⁷

In 1995, the Conference of the Parties (COP)³⁸—an organization created by the same statute that established the United Nations Framework on Climate Change (UNFCCC), which organized and created the Kyoto Protocol³⁹—began

³⁴ *Paris Agreement - Status of Ratification*, *supra* note 2.

³⁵ *Status of Ratification of the Kyoto Protocol*, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE, http://unfccc.int/kyoto_protocol/status_of_ratification/items/2613.php (last visited Jan. 21, 2017).

³⁶ Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90.

³⁷ Falkner, *supra* note 1, at 1111–13.

³⁸ *Background on the UNFCCC: The International Response to Climate Change*, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE, http://unfccc.int/essential_background/items/6031.php (last visited Feb. 28, 2018).

³⁹ U.N. Framework Convention on Climate Change Conference of Parties, Twenty-First Session, *Adoption of the Paris Agreement*, U.N. Doc. FCCC/CP/2015/L.9/Rev.1 (Dec. 12, 2015) [hereinafter Paris Agreement] (noting that the Conference of the Parties was created through the 1992 statute that established the United Nations Framework Convention on Climate Change). *See generally* United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107 [hereinafter UNFCCC].

holding annual meetings to address the actions of global leaders.⁴⁰ Since Kyoto, however, these meetings have not produced much new international law. This did not change until the December 2015 meeting in Paris (COP 21). Perhaps the most notable of the intermediary COPs was the 2009 meeting in Copenhagen, Denmark (COP 15).⁴¹ The build-up to Copenhagen led many to believe that this was the COP to reinvigorate the Kyoto era.⁴² And though Copenhagen did not produce a new treaty or protocol, it should not be seen as a total disappointment. After the fruitless official negotiating at COP 15, certain global leaders, including President Obama and officials from both India and China, separately met and reached an understanding now known as the Copenhagen Accord.⁴³ This conversation seemed to be the earliest indication of an official intention to strike mandatory target emissions from future international climate change solutions. From the Copenhagen Accord, the bottom-up, voluntary emission reduction strategy that we now see reflected in the Paris Agreement gained popularity.⁴⁴ This change in dialogue seemed to be far more appealing to those states that were put off by the Kyoto Protocol's coercive character, and it promised a new shift in framework for climate treaties to come. Most critically, the Copenhagen Accord finally did away with the distinction between Annex 1 and non-Annex 1 countries.⁴⁵ The Accord brought some of the largest polluters to the table, and encouraged previously uninterested countries to participate in climate change talks. The Copenhagen Accord also motivated developed countries to contribute to adaption and mitigation infrastructure in developing countries that needed it most.⁴⁶ Though no legally binding treaties came out of these talks, the groundwork for Paris's "bottom-up" voluntary participation strategy was laid by the Copenhagen Accord.⁴⁷

However, the rhetoric of relevant world leaders was not the only change that occurred between Kyoto and Paris; domestic customs also began to shift. The new global interest in voluntary commitments seemed to reflect the way sustainable development was organically impacting domestic industries. In the United States, a significant transition occurred between 1997 and 2015 in the way corporations, private citizens, and government agencies approached the environment.⁴⁸ As climate change has continued to have global impacts,

⁴⁰ *Conference Essentials*, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE, http://unfccc.int/essential_background/bare_essentials/items/6145.php (last visited Feb. 28, 2018).

⁴¹ *COP – COP 15*, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE, http://unfccc.int/meetings/copenhagen_dec_2009/session/6262.php (last visited Feb. 28, 2018).

⁴² Vinuales, *supra* note 24 (“A first attempt to address this issue [the Kyoto Protocol’s ability to only bind a small amount of total global emissions] was made in 2007 at the Bali COP, which launched a negotiation process that was supposed to lead to the adoption of a new instrument in Copenhagen, at COP 15 (2009). This process was . . . unsuccessful in its end result . . .”).

⁴³ Falkner, *supra* note 1, at 1111 (describing the nature and relevance of the Copenhagen Accord). The Copenhagen Accord and the subsequent actions by participating countries might support the principle of progression discussed later in this note. For discussion of the principle of progression, see Jorge Vinuales, *The Paris Climate Agreement: An Initial Examination (Part II of III)*, EJIL: TALK! (Feb. 8, 2016), <https://www.ejiltalk.org/the-paris-climate-agreement-an-initial-examination-part-ii-of-iii/>.

⁴⁴ Falkner, *supra* note 1, at 1111.

⁴⁵ *Id.*

⁴⁶ *Id.* (explaining that, for example, after Copenhagen, the Green Climate Fund was created and was promised up to \$100 billion a year by 2020 for mitigation and adaption projects in developing countries).

⁴⁷ *Id.*

⁴⁸ *Id.* at 1112.

institutional investors have demanded transparency about climate risks on the business operations of the corporation.⁴⁹ Local municipalities, often following state law initiatives began to prioritize sustainable development and reduction of greenhouse gas emissions at local and regional levels.⁵⁰ Moreover, federal regulations under the Obama administration have limited the amount of carbon pollution from power plants, cars, and trucks.⁵¹ By targeting renewable energy development and transportation, the United States (without participation in the Kyoto Protocol or any other mandated climate change obligation) reduced carbon emissions by fifteen percent from 2005-2012.⁵² Additionally, domestic investment in renewable energies has led the prices of renewable energy to fall considerably—widening the market for American businesses to realistically participate in sustainable development.⁵³ In addition to the development of renewable energy in the United States, with help from the federal government domestic production of coal has decreased in favor of natural gas extraction and renewable energy.⁵⁴ Though not a renewable energy source, natural gas has replaced many other dirtier forms of fossil fuels in American transportation and industry.⁵⁵

China, another country that was never bound by the Kyoto Protocol, and currently the world's greatest emitter of greenhouse gas, has also made considerable improvements in its renewable energy efforts. In 2006, China became the world's greatest emitter of carbon dioxide, but following the 2009 Copenhagen Accord, China has made dramatic improvements in their energy sector as part of their twelfth and thirteenth Five Year Plans. Some of these improvements included unprecedented domestic investment in renewable energy and reduction of coal use.⁵⁶ As in the United States, proliferation of

⁴⁹ *Id.*

⁵⁰ Though AB 32 and the CAP method may be reminiscent of the coercive emission targets of the Kyoto Protocol, the regional application allowed California counties to choose their level of ambition and develop their own programs to lower their greenhouse gas emissions at the local level. These programs demonstrated the differences between of a “bottom-up” approach to climate change, compared to Kyoto’s “top-down” method. *See, e.g., Local Government Actions for Climate Change*, CALIFORNIA AIR RESOURCES BOARD, <https://www.arb.ca.gov/cc/localgovernment/localgovernment.htm> (last reviewed Apr. 13, 2016) (describing the Climate Action Plans (CAPs) implemented in counties across California. After state law Assembly Bill 32 (AB 32) was passed, requiring each county construct plans to reduce their greenhouse gas emissions by fifteen percent, municipalities became legally obligated to find the best way to meet their goals locally).

⁵¹ *See* Obama, *supra* note 4.

⁵² Elizabeth Kolbert, *Has Obama Fulfilled His Promise on Carbon Emissions?*, NEW YORKER (June 2, 2014), <http://www.newyorker.com/tech/elements/has-obama-fulfilled-his-promise-on-carbon-emissions>.

⁵³ Falkner, *supra* note 1, at 1112–13 (indicating that in 2014 alone the United States invested \$38.3 million in renewable energy; “as more and more emission-reducing and energy-saving policies have been put in place, gradual technological improvements, market competition and greater economies of scale have pushed down the costs of low-carbon technologies. Solar photovoltaic energy, for example, has become a cost-effective energy source. . . the cost of photovoltaic modules has fallen by an average rate of about 10 percent per year since 1980.”).

⁵⁴ *Id.* at 1113.

⁵⁵ *See* Tyler Hodge, *Natural Gas Expected to Surpass Goal in Mix of Fuel Used for U.S. Power Generation in 2016*, U.S. ENERGY INFO. ADMIN. (Mar. 16, 2016), <https://www.eia.gov/todayinenergy/detail.php?id=25392>; Dana Nuccitelli, *The War on Coal is Over. Coal Lost.*, GUARDIAN (Oct. 16, 2017), https://www.theguardian.com/environment/climate-consensus-97-per-cent/2017/oct/16/the-war-on-coal-is-over-coal-lost?CMP=share_btn_fb.

⁵⁶ Falkner, *supra* note 1, at 1112 (noting that China invested an estimated \$83.3 billion in renewable energy in 2014, more than double that of the United States).

renewable energies and carbon reductions resulted in a dramatic shift in China's climate change culture between the Kyoto Protocol and the Paris Agreement.

Broadly speaking, domestic shifts in energy use and environmental policy are extremely relevant for international law as it can provide support for the emergence of customary international law, legitimize treaty regimes that are based upon consensual and voluntary participation, and rebut claims that argue the practice was not custom. The cultural development and domestic investment that has supplemented international law in the realm of climate change and sustainable development provides insight into why the Paris Agreement received such fast and enthusiastic support upon adoption. Additionally, domestic sustainable growth should signal the viability of the Paris Agreement's voluntary character, as well as provide credibility for the Agreement's enforcement mechanisms of naming and shaming.⁵⁷

C. THE PARIS AGREEMENT'S POTENTIAL FOR SUCCESS

The consensus after the completion of the Paris Agreement was highly optimistic, especially because of three key features of the treaty: its aspirational goals, nuanced form of differentiation, and rigorous oversight.⁵⁸ These key features contrast sharply with the Kyoto Protocol, hopefully reflecting what has been learned from the Kyoto Protocol's regime—including its failure. In this section, this note conducts a closer examination of the Paris Agreement's components, as well as the potential consequences for those who wish to withdraw.⁵⁹

First, the primary aspirational goal of the Paris Agreement is to halt the increase in global average temperature.⁶⁰ The Paris Agreement states that parties must peak their greenhouse gas emissions as soon as possible and then make rapid reductions thereafter, “[s]o as to achieve a balance between anthropogenic emissions by sources and removals by sinks of GHGs [greenhouse gasses] in the second half of the century.”⁶¹ This goal is long term in nature, and formal evaluations of each nation's progress do not begin until 2023, with check-in periods every five years after that.⁶² Because the evaluation periods are only every five years, beginning in 2023, the treaty has created a long-term statutory period. Paris' approach thus differs sharply from the emission targets of the Kyoto Protocol, which were short-term in nature.⁶³ Comparatively, the Paris Agreement's longevity and ambitious goals show a long-term commitment by states to the direction of international law, and has the additional benefit of sending a clear signal to global markets of long-term visions for the global

⁵⁷ See Paris Agreement, *supra* note 39, art. 13–14 (explaining the transparency framework that requires parties to report their progress towards their goals and how the annual Conference of Parties will be the meeting in which the collective goals of the parties will be evaluated).

⁵⁸ Lavanya Rajamani, *Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics*, 65 INT'L & COMP. L.Q. 493, 493–96 (2016).

⁵⁹ See *infra* text accompanying notes 112–57 (discussing the consequences of withdrawing from the Paris Agreement).

⁶⁰ Paris Agreement, *supra* note 39, art. 2.

⁶¹ Rajamani, *supra* note 58, at 496; see also *id.* art. 4(1).

⁶² Paris Agreement, *supra* note 39, art. 4(9), 14.

⁶³ Rosen, *supra* note 11, at 40.

economy. Providing stability and confidence for the global economy about investments in green growth will hopefully aid treaty implementation and insulate the new legal regime.⁶⁴

Moreover, the long-term nature of the Paris Agreement has the additional benefit of potentially creating customary international law regarding international environmental norms and development. Customary international law, recognized to be legally binding on participating nations,⁶⁵ can be shaped when a custom, such as a commitment to consistently reduce greenhouse gas emissions, becomes regarded as law. Evidence of customary international law can include: general acceptance by the participants; adherence for a sufficient duration; consistent understanding of the terms and stable enforcement; and a finding of *opinio juris*—evidence that the terms are seen as law.⁶⁶ If it can be shown throughout the Paris Agreement's implementation that the terms, including participants' commitments and implementation of goals, transitioned from mere statutory obligations to customary international law, then the Paris Agreement stands a credible chance at recognition beyond the limits of the treaty's text. The architecture of the Agreement, with an aspirational goals of temperature reduction and evaluation periods every five years beginning in 2023, leaves ample time for the already binding international treaty to take on another stable and well-recognized form—customary international law.⁶⁷

In addition to the aspirational goals of the Paris Agreement, the nuanced form of differentiation between nations is a feature that positions the pact for success. The differentiation is meant to be both inclusive and empowering to all participants.⁶⁸ Beginning with the preamble of the Agreement, “one finds in a condensed manner carefully crafted expressions of the main tensions underpinning the entire text, between developed and developing countries, between more vulnerable countries and the rest, between countries that expect to suffer from measures that ‘respond’ to climate change and the rest . . .”⁶⁹ The Agreement is facilitated by each state voluntarily committing to reduce its emissions reductions. All states are asked to commit to some amount of emissions reduction, but no states are assigned a mandatory reductions target, as they were in Kyoto. Under Paris, “[s]tates thus choose their level of ambition subject to two requirements, namely the regular updating—at least every five years . . . and an obligation of non-regression . . .”⁷⁰ The Paris Agreement's voluntary contribution scheme seeks to diffuse the sharply divisive Annex 1 and

⁶⁴ Obama, *supra* note 4 (“[B]y sending a signal that [the Agreement] is going to be our future—a clean energy future—it opens up the floodgates for businesses, and scientists, and engineers to unleash high-tech, low-carbon investment and innovation at a scale we’ve never seen before.”).

⁶⁵ MICHAEL J. GARCIA, CONG. RESEARCH SERV., RL32528, INTERNATIONAL LAW AND AGREEMENTS: THEIR EFFECT UPON U.S. LAW 1, 16 (2015).

⁶⁶ North Sea Continental Shelf Cases (Ger. v. Den.; Ger. v. Neth.), Judgment, 1969 I.C.J. Rep. 3 (Feb. 20) [hereinafter North Sea Continental Shelf Cases] (establishing ways to evince creation of customary international law).

⁶⁷ *Id.*; see also GARCIA *supra* note 65, at 16.

⁶⁸ Vinales, *supra* note 24 (“Behind this discussion [of differentiation in the Paris Agreement] lies a tension between science and equity.”) The tension is addressed, or was attempted to be addressed, by including the aspirational goals alongside a discussion of differentiation.

⁶⁹ *Id.*

⁷⁰ See *infra* text accompanying notes 133–136; see also Vinales, *supra* note 43 (citing Paris Agreement, *supra* note 39, art. 4(3)).

non-Annex 1 strategy of the Kyoto Protocol, as well as reduce the coercive effect of mandatorily assigned targets. The Annex strategy not only excluded many developing countries, chief of which included high carbon emitters like China and India, but also disheartened developed countries that felt that even a good faith attempt at meeting their target emissions would make only a marginal impact on overall climate change efforts.⁷¹ Additionally, the distinction between Annex 1 and non-Annex 1 under the Kyoto Protocol restricted the ability or motivation of developing countries to reduce their greenhouse gas emissions, as they were not required to participate.⁷²

Now, developing countries like China or India cannot shirk participation merely because of their developing status.⁷³ The Paris Agreement reflects the principle of common but differentiated responsibilities, but implements this international law doctrine more effectively. Though all participating nations must voluntarily assume and be accountable for their emission reduction goals, accommodations for developing countries are also included. To offset the cost on now-included developing countries, the Paris Agreement incorporates adaptation by developing countries as a goal, and urges developed countries to provide developing states with financial and logistical support. Including mechanisms to support adaptation is a new way to address climate change, responsive to the reality that, as Vinales writes, “[i]t may be that climate change is no longer a matter of precaution but one of prevention – preventing acknowledged risk.”⁷⁴ Creating infrastructure and advancing technology in developing nations, via funding from developed nations, recognizes the different capacities of different countries, reflects the common but differentiated responsibilities doctrine, and focuses on adaptation. However, the Agreement still expects developing nations to contribute throughout the adaptation process.

The third promising feature of the Paris Agreement is the innovative approach to oversight and enforcement. Compared to the Kyoto Protocol’s mandatory and legally-binding emissions reductions, the Paris Agreement takes a less coercive, information-based approach.⁷⁵ Through the construction of international law, the Paris Agreement hopes to use both official and unofficial sources of pressure in its information-based enforcement. As Falkner writes, the Paris Agreement relies on a “two-level game” logic that unites domestic climate politics with strategic international interaction.⁷⁶ Though the Paris Agreement does not impute a legal obligation for states to actually reduce their emissions per their commitments, it does require periodic reports to be disclosed to the participants of the Agreement. These reports will occur every five years, beginning in 2023, and will provide the international community with a transparent look into the efforts of other states to combat climate change.⁷⁷ The information garnered from these periodic reports, and their subsequent review,

⁷¹ Durand, *supra* note 10, at 8–9.

⁷² Falkner, *supra* note 1, at 1116.

⁷³ *Id.*

⁷⁴ Vinales, *supra* note 24.

⁷⁵ Jorge Vinales, *The Paris Climate Agreement: An Initial Examination (Part III of III)* EJIL: TALK! (Feb. 8, 2016), <https://www.ejiltalk.org/the-paris-climate-agreement-an-initial-examination-part-iii-of-iii/>.

⁷⁶ Falkner, *supra* note 1, at 1120.

⁷⁷ Paris Agreement, *supra* note 39, art. 4(9), 14(2).

may facilitate the “naming and shaming” of states that have not succeeded in meeting their goals.⁷⁸ The peer pressure function should work effectively between nations, as they may easily identify and call out those that have failed to make a good faith effort to meet their voluntary contributions. The mandatory reporting serves to make the Agreement transparent and legitimate to the international community.⁷⁹

The naming and shaming also anticipates pressure on the contributing parties from civil society, as governments of underperforming countries may experience naming and shaming by environmental groups, the media, and other interested parties.⁸⁰ Domestically, after nations choose their emission reduction contribution, they will likely face some pressure from groups in their country regarding their performance under the contribution. Internationally, the Agreement is also designed to create peer pressure among states, which could be exerted on states that are failing to meet their commitments. The naming and shaming function between states delivers the brunt of the Agreement’s enforcement mechanism. Though the enforcement tools of the Paris Agreement do not create actual legal liability for states that neglect their commitments, the enforcement strategies should not be seen as toothless.⁸¹ By operating with multiple kinds of enforcement, and engaging with both domestic and international paradigms over a long period of time, the Paris Agreement consciously increases the likelihood of immediate enforcement and of transitioning from mere statute to binding customary international law.⁸²

II. LEGALITY OF THE UNITED STATES’ COMMITMENT TO AND POTENTIAL WITHDRAWAL FROM THE PARIS AGREEMENT

A. PRESIDENT OBAMA’S 2016 COMMITMENT TO THE TREATY

When President Obama ratified the Paris Agreement in September 2016, he did not have the support of the Senate. Under Article II of the Constitution, the President of the United States must secure the advice and consent of two-thirds of the Senate before entering into treaties.⁸³ However, in part due to the limited

⁷⁸ Vinales, *supra* note 75.

⁷⁹ *Id.*

⁸⁰ It should be noted, however, that any civil society pressure is, logically, completely dependent on the domestic media or other monitoring groups being interested in the national climate change policies. The political systems, prevalence of environmental groups, and level of partisan politics can all substantially contribute to the level of “naming and shaming” experienced domestically. *See* Falkner, *supra* note 1, at 1122–23.

⁸¹ *Id.* at 1123. For additional enforcement potential beyond domestic and international oversight mechanisms, Falkner notes that global economic forces will also be an effective mechanism to judge and enforce decarbonization progress under the Paris Agreement. The effect of the Agreement, and reduction of greenhouse gas emissions, on the global economy, if done at such a scale to trigger a shift in resource use globally, may motivate and exert pressure upon participating countries to legitimately meet their emissions reductions goals.

⁸² Vinales, *supra* note 75.

⁸³ U.S. CONST. art. II, § 2; *see also* GARCIA, *supra* note 65, at 2 (“Under U.S. law, a treaty is an agreement negotiated and signed by the Executive that enters into force if it is approved by a two-thirds majority of the Senate and is subsequently ratified by the President.”).

constitutional guidance on treaties, Supreme Court case law and domestic practice have developed to recognize the executive's ability to conduct foreign affairs through executive agreements.⁸⁴ Entering into executive agreements is an alternative to forming treaties, allowing the executive to make international commitments without ever submitting the proposal to the Senate for its advice and consent.⁸⁵ The Supreme Court held in *American Insurance Association v. Garamendi* that "the president has the authority to make 'executive agreements' with other countries, requiring no ratification by the Senate or approval by Congress, this power having been exercised since the early years of the Republic."⁸⁶ This form of international law-making has been far more heavily used than formal treaties—likely because of the difficulty of reaching the required two-third's consent in the Senate.⁸⁷ Executive agreements in the context of international legal agreements, made by the President, are authorized if they are based on existing legal authority, including prior grants of power from Congress to the executive or the President's inherent constitutional control over foreign affairs.⁸⁸ Assuming the executive agreement is supported by the Constitution and falls within the scope of the President's foreign affairs power, Congress's approval or disapproval does not impact the agreement's validity.⁸⁹ In choosing to join the Paris Agreement, President Obama faced the "recurring concern . . . whether an international commitment should be entered into as a treaty or an executive agreement."⁹⁰ Logically, legislative bodies tend to prefer the forms of international agreements that maximize their participation. It then follows that "[t]he Senate may prefer that significant international commitments be entered as treaties . . . [due to] fear that reliance on executive agreements will lead to an erosion of the treaty power."⁹¹ The House of Representatives may

⁸⁴ There certainly is opposition, or at least concern, about the role the federal government has in foreign affairs. See, e.g., Ted Cruz, *Limits on the Treaty Power*, 127 HARV. L. REV. F. 93, 96 (2014) ("[C]ourts should enforce constitutional limits on the President's power to make treaties and Congress's power to implement treaties by preventing either from infringing on the sovereignty reserved to the states. Whether one couches this as a Tenth Amendment or a structural argument, the basic point is the people, acting in their sovereign capacity, delegated only limited powers to the federal government while reserving the remaining sovereign powers to the states or individuals. If the federal government could evade the limits on its powers by making or implementing treaties, then our system of dual sovereignty would be grievously undermined.").

⁸⁵ GARCIA, *supra* note 65, at 4 (explaining that, although executive agreements have been used since the Founding, they "have been employed much more frequently since the World War II era.").

⁸⁶ *Am. Ins. Ass'n v. Garamendi*, 539 U.S. 396, 415 (2003) (citations omitted). For further discussion, see BODANSKY, *supra* note 4, at 5 (indicating that the constitutional basis for executive agreements is discussed and distilled to three main sources of support. "First, Article I, Section 10, implies that not all international agreements constitute 'treaties,' since states are precluded from entering into 'treaties' with other countries, but are allowed to enter into 'agreements' . . . Second, Article II does not state that its treaty-making procedure is exclusive. Third, the extensive powers granted by the Constitution to Congress and the president provide bases for agreement-making.").

⁸⁷ GARCIA, *supra* note 65, at 5 ("[O]ver 18,500 executive agreements have been concluded by the United States since 1789. . . compared to roughly 1,100 treaties that have been ratified by the United States.").

⁸⁸ *Id.* at 6. "[N]o one denies that the president has the power to make some agreements on his own authority." BODANSKY, *supra* note 4, at 7 (citing LOUIS HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 215 (1996)).

⁸⁹ GARCIA, *supra* note 65, at 6 (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS, § 303(4) (1987)).

⁹⁰ *Id.* at 7.

⁹¹ *Id.*

instead prefer congressional-executive actions, which would involve the president entering an agreement with the direction or consent of both houses of Congress.⁹²

In the case of a constitutional challenge to a President's use of a unilateral executive agreement, the Court may need to examine the legitimacy of the President's actions within the structurally defined foreign affairs power of the executive.⁹³ The Court's analysis in the famous case *Youngstown Sheet & Tube Co. v. Sawyer* offers a potential check on the President's ability to make executive agreements without any support or authority from Congress. The Court held that "when the president takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb"⁹⁴ Instead of joining the Paris Agreement by obtaining Senate's approval or through an act of Congress, President Obama ratified the Paris Agreement with an executive agreement—a vulnerable method for the United States to join the treaty, thus making it easier for a subsequent president to withdraw from it.⁹⁵

However, there was much precedent for a United States President to join an environmental agreement through an executive action, without the support or inclusion of Congress.⁹⁶ As a report from the Center for Climate and Energy Solutions explained, "the United States entered into the 1991 Air Quality Agreement (AQA) with Canada, without any action by the Senate or Congress Similarly, the United States entered into several protocols under the 1979 Long-Range Transboundary Air Pollution Convention (LRTAP) as presidential-executive agreements, including the 1999 Gothenburg Protocol to Abate Acidification."⁹⁷ The Center's report further described three constitutional bases that could support President Obama's ratification of the Paris Agreement as either a unilaterally executive action, congressional-executive agreement, or a treaty-executive agreement:

First, the president's core foreign affairs powers include communicating with foreign governments. To the extent that the Paris agreement . . . relat[es] to reporting and review, then it would arguably fall within the president's independent constitutional authority.

⁹² *Id.* For further discussion of congressional-executive agreements, see BODANSKY, *supra* note 4, at 5–6.

⁹³ GARCIA, *supra* note 65, at 6

⁹⁴ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 647 (1952).

⁹⁵ Though, as will be discussed later in more detail, if President Trump decides to withdraw from the UNFCCC entirely, and not just the Paris Agreement, the inquiry will be slightly different because the UNFCCC was created by a Senate-approved treaty. See U.S. SENATE COMMITTEE ON ENERGY & NATURAL RESOURCES (Dec. 6, 2005), <https://www.energy.senate.gov/public/index.cfm/democratic-news?ID=E5CEC797-F583-4FAC-9F80-27CECB779718> (providing a copy of a bipartisan letter was sent to President Bush urging his administration to engage conversations on climate change and reminding him that the United States has entered into the treaty that created the UNFCCC).

⁹⁶ However, environmental treaties with mandatory provisions joined without Congress' participation may again raise constitutional questions for those who believe that the President's treaty power is structurally limited. See Cruz, *supra* note 84, at 105.

⁹⁷ BODANSKY, *supra* note 4, at 14 (footnote omitted) (explaining that the 1991 Air Quality Agreement was joined by the President "on the basis that the commitments contained in the agreement tracked the requirements of the 1990 Clean Air Amendments. Similarly, the United States entered into several [other] protocols . . . as presidential-executive agreements.").

Second, an international agreement addressing climate change would complement existing law. . . .

Finally, an agreement that solely implemented or elaborated the UNFCCC's existing commitments would arguably be within the scope of the Senate's original advice and consent to the convention, and therefore would constitute a treaty-executive agreement.⁹⁸

The report goes on to write that the legal basis for President Obama's signing of the Paris Agreement is further bolstered by the inclusion of a withdrawal clause, "which would expressly permit a future president to terminate the United States' international obligations under the agreement."⁹⁹ A withdrawal clause would limit the binding nature of the Paris Agreement, and would be less offensive to those concerned that unilateral executive agreements verged on unconstitutionality.¹⁰⁰ Moreover, the less legally binding language is in the Paris Agreement, the more legitimate the participation of the United States becomes. As we know, the ultimate strategy of Paris was not to require substantive emissions reductions, but to require procedural participation of domestic efforts through periodic reporting and review. In conclusion, though President Obama signed the Paris Agreement without going through either legislative body, his ratification met constitutional muster. And, as the United States is a full participatory member in the treaty, the ratification included the whole text of the Paris Agreement.

As the methods by which the United States' ratification of the Paris Agreement appear to be constitutionally valid, the terms of the Paris Agreement should fully apply to the United States. However, there may have been further legal obligations incurred by joining the treaty due to customary international law. Customary international law, as briefly discussed above,¹⁰¹ is a significant way that international law grows and evolves. Participation for a critical duration in an international custom, and widespread recognition that the custom has gained the status of law (otherwise described as *opinio juris*), is sufficient to establish that the custom has become legally binding and enforceable international law.¹⁰² Though customary international law is certainly recognized in foreign courts,¹⁰³ the full effects of customary international law upon the United States' jurisprudence is unclear.¹⁰⁴

⁹⁸ *Id.* (first citing *Massachusetts v. EPA*, 549 U.S. 497, 528–33 (2007) (“[T]he Supreme Court held that the Clean Air Act authorizes the Environmental Protection Agency . . . to find that carbon dioxide is a pollutant and to regulate it as such. Since the threat posed by carbon dioxide emissions requires international action, the president could argue that the authority to negotiate an international agreement is a necessary adjunct to the regulation of domestic emissions.”); then citing UNFCCC, *supra* note 39, art. 16).

⁹⁹ *Id.*

¹⁰⁰ *See id.*

¹⁰¹ *See supra* text accompanying notes 65–67.

¹⁰² *See* Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention]; North Sea Continental Shelf Cases, *supra* note 66.

¹⁰³ North Sea Continental Shelf Cases, *supra* note 66.

¹⁰⁴ GARCIA, *supra* note 65, at 16–20.

B. *PRESIDENT TRUMP WITHDRAWS*

On June 1, 2017, President Trump announced that he would withdraw the United States from the Paris Agreement. In the official statement he said,

[W]e're getting out. . . .

. . . .

. . . the United States will cease all implementation of the non-binding Paris Accord and the draconian financial and economic burdens the agreement imposes on our country. This includes ending the implementation of the nationally determined contribution and, very importantly, the Green Climate Fund which is costing the United States a vast fortune.¹⁰⁵

Then, on August 4, 2017, the Trump Administration provided further detail on the current state of U.S. involvement in the Paris Agreement.¹⁰⁶ The administration reiterated intent for the United States to withdraw from the Paris Agreement—joining Syria and Nicaragua as the only nations not party to the Agreement.¹⁰⁷ Additionally, the administration shared that they had formally sent in paperwork to the United Nations to withdraw, but that they intended to maintain a “seat at the table” in UNFCCC and climate change developments going forward.¹⁰⁸

Perhaps affirming the United States' intention to stay involved mitigates the frustration that the United States is technically bound by the withdrawal terms of the Paris Agreement. Procedurally, under Article 28 of the Agreement, the earliest that the United States could officially withdraw would be three years after the Agreement went into force. As the Agreement went into force November 4, 2016, the earliest the United States could officially withdraw would be November 4, 2019,¹⁰⁹ and the withdrawal would not go into effect for another year, November 4, 2020.¹¹⁰ Conveniently, November 4, 2020 is just one day after the next U.S. presidential election. The schedule of withdrawal and date of the next presidential election creates, should President Trump fail to be re-elected, the possibility that the United States may never leave the Paris Agreement. However, under the current trajectory of American leadership,

¹⁰⁵ President Donald Trump, Statement by President Trump on the Paris Climate Accord (June 1, 2017) (transcript available at <https://www.whitehouse.gov/the-press-office/2017/06/01/statement-president-trump-paris-climate-accord>).

¹⁰⁶ Robinson Meyer, *Trump and the Paris Agreement: What Just Happened?*, ATLANTIC (Aug. 4, 2017), <https://www.theatlantic.com/science/archive/2017/08/trump-and-the-paris-agreement-what-just-happened/536040/>.

¹⁰⁷ Laura Koran, *US Notifies UN of Intent to Pull Out of Climate Deal*, CNN (Aug. 4, 2017), <http://cnn.it/2hvSGOQ>.

¹⁰⁸ *Id.*

¹⁰⁹ Paris Agreement, *supra* note 39, art. 28(1).

¹¹⁰ *Id.* art. 28(2).

President Trump's announcement raises questions about the legal limitations and ramifications of U.S. withdrawal from the Paris Agreement.

C. LEGALITY OF WITHDRAWAL

Though the United States' joining of the agreement appears to be fully valid, the true question is what a Trump withdrawal means—both for the Paris Agreement and the United States. What commitments is the United States backing out of? What enforcement mechanisms in the Paris Agreement, if any, apply? The constitutionally granted foreign affairs power of the executive branch almost conclusively gives President Trump the power to withdraw from a treaty under U.S. law.¹¹¹ However, in analyzing the legality of withdrawing from the Paris Agreement, there is the primary concern of whether to analyze the events under international law or only U.S. domestic law.¹¹² These two regimes appear to conflict with one another regarding withdrawal from the Paris Agreement, and as such, analysis under each may lead to a different result.

Under U.S. domestic law, the nature of the treaty will affect its legal status and protection. As a congressional report on the role of international law in American jurisprudence states:

The status of an international agreement within the United States depends on a variety of factors. Self-executing treaties have a status equal to federal statute, superior to U.S. state law, and inferior to the Constitution. Depending upon the nature of executive agreements, they may or may not have a status equal to federal statute. In any case, self-executing executive agreements have a status that is superior to U.S. state law and inferior to the Constitution. Treaties or executive agreements that are not self-executing generally have been understood by the courts to have limited status domestically; rather, the legislation or regulations implementing these agreements are controlling.¹¹³

As the Paris Agreement is recognized to be a non-self-executing treaty,¹¹⁴ proponents of the treaty seem to have an even further diminished capacity to argue against a Trump repeal. Thus, the Paris Agreement constitutes a non-self-executing *statute* because it requires domestic legislation to achieve any true

¹¹¹ *Can the President Withdraw from the Paris Agreement?*, FED'N OF AM. SCIENTISTS: CRS LEGAL SIDEBAR (Dec. 5, 2016), <https://fas.org/sgp/crs/misc/withdraw.pdf>.

¹¹² *Id.*

¹¹³ GARCIA, *supra* note 65.

¹¹⁴ *See Can the President Withdraw from the Paris Agreement?*, *supra* note 111 (“No legislation implementing the UNFCCC or the Paris Agreement into domestic law has been enacted, nor has the executive branch asserted that the provisions in either are self-executing, a term used to describe international obligations that have the force of domestic law without subsequent congressional action.”).

effect, and does not stretch the executive's foreign affairs power to the same degree as a self-executing treaty might.¹¹⁵

However, under international law, treaties are primarily governed, or at the very least guided, by the Vienna Convention on Treaties, and customary international law.¹¹⁶ The Vienna Convention creates a set of default rules for the navigation of treaties, including what constitutes full participation and performance under treaties, what constitutes a failure to perform or breach, and how, if at all, a party may lawfully withdraw from a treaty. These rules may be amended or narrowed by the specific text of a new treaty, but the Vienna Convention provides a default procedure in the case that the treaty neglected to specify their own terms.¹¹⁷ It is a principle of treaty interpretation under the Vienna Convention to first defer to a plain reading of the treaty's text when analyzing a particular section, and the Paris Agreement is no exception.¹¹⁸ This is the approach to take when analyzing the carefully worded withdrawal clause of the Paris Agreement, the clause President Trump is expected to invoke without much delay.

Article 28 of the Paris Agreement provides that

1. At any time after three years from the date on which this Agreement has entered into force for a Party, that Party may withdraw from this Agreement by giving written notification

....

2. Any such withdrawal shall take effect upon expiry of one year from the date of receipt . . . of the notification of withdrawal, or on such later date as may be specified in the notification of withdrawal.¹¹⁹

Importantly, however, Article 28(3), states that “[a]ny Party that withdraws from the Convention shall be considered as also having withdrawn from this

¹¹⁵ A self-executing treaty would effectively create domestic law, as, for example, the Kyoto Protocol made emissions reductions legally binding on the participating countries without the need for additional domestic law to establish that legal liability. If the executive signs on to a self-executing treaty without following Article II's treaty process, then the executive has essentially legislated in lieu of the legislature. Under a structural argument or Tenth Amendment argument, this would be objectionable. *See Cruz, supra* note 84, at 93 (“[T]reaties ‘constitute international law commitments,’ but they ‘do not by themselves function as binding federal law’—these are called non-self-executing treaties.” (quoting *Medellín v. Texas*, 552 U.S. 491, 504 (2008))); *Cruz, supra* note 84, at 94–95 (“[Medellín] recognized critical limits on the federal government’s power to use a non-self-executing treaty to supersede state law. . . . The court held that state procedural default rules could not be displaced by the non-self-executing Vienna Convention And it then clarified that the President cannot use a non-self-executing treaty ‘to unilaterally make treaty obligations binding on domestic courts.’ . . . But Medellín involved an unusual fact pattern and many questions remain about the scope of the federal government’s treaty power.” (quoting *Medellín*, 552 U.S. at 527)).

¹¹⁶ BODANSKY, *supra* note 4, at 3 (“The international law is codified in the Vienna Convention on the Law of Treaties, which generally reflects customary international law.”); *see* Vienna Convention, *supra* note 102; *see also* GARCIA, *supra* note 65 (“International law is derived from two primary sources—international agreements and customary practice.”).

¹¹⁷ *See* Vienna Convention, *supra* note 102.

¹¹⁸ Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, ¶114, WTO Doc. WT/DS58/AB/R (Oct. 12, 1998).

¹¹⁹ Paris Agreement, *supra* note 39, art. 28(1)–2.

Agreement.”¹²⁰ The “Convention” referred to in this final section is the United Nations Framework Convention on Climate Change, the international body spearheading all major global environmental efforts. The United States is a member to the Convention, and has been since joining the Framework treaty in 1992.¹²¹

President Trump thus has two lawful options to withdraw from the Paris Agreement, under international law. First, he can withdraw the United States just from the Paris Agreement, a process which will take four years to become official due to the wait period built into the treaty.¹²² The earliest any party could lawfully withdraw from the Agreement, is November 4, 2020. However, that would assume the party had submitted their intention to withdraw on the very day the treaty was ratified. Secondly, he could withdraw from the UNFCCC, and remove the United States’ “seat at the table” for all current and future international environmental developments.¹²³

Domestic law over treaties and foreign affairs, which tends to be less restrictive on executive action by the United States, is sourced from Article II of the Constitution and respective case law.¹²⁴ The United States, however, also has a long tradition of holding international law, or “the law of nations,” as binding on domestic affairs.¹²⁵ Thus, while President Trump may have the domestic legal means to withdraw from global climate change agreements, pillars of international law may potentially bind him. As previously discussed, international law is primarily made of treaties and customary international law. The United States does recognize customary international law, in addition to treaties, as part of the national jurisprudence. In *The Paquete Habana*, the Supreme Court held that “[i]nternational law is part of our law,” meaning that the law of nations was also part of the laws of the United States.¹²⁶ Constitutionally, the laws of the United States are the supreme law of the land.¹²⁷ Additionally, according to the United States Department of State’s website, the Department recognizes that the United States is not party to the Vienna Convention, and stated that “[t]he United States considers many of the provisions of the Vienna Convention on the Law of Treaties to constitute customary international law on the law of treaties.”¹²⁸ Though the Department policy is not dispositive that all customary international law is incorporated

¹²⁰ *Id.* art. 28(3).

¹²¹ UNFCCC, *supra* note 39, at annex II.

¹²² Under Article 28 of the Paris Agreement, the United States may submit notification of withdrawal three years after the Paris Agreement goes in to force. The treaty went into force on November 4, 2016. Then, the withdrawal will take an additional year to become official. *See* Paris Agreement, *supra* note 39, art. 28(1)–(2).

¹²³ *Id.* art. 28(3).

¹²⁴ U.S. CONST. art. II.

¹²⁵ GARCIA, *supra* note 65, at 1 n.3, (first citing *Ware v. Hylton*, 3 U.S. 199, 281 (1796); then quoting *Chisholm v. Georgia*, 2 U.S. 419, 474 (1793) (“the United States had, by taking a place among the nations of the earth, become amenable to the law of nations.”)).

¹²⁶ *The Paquete Habana*, 175 U.S. 677, 700 (1900).

¹²⁷ U.S. CONST. art. IV, § 2. *See generally* Saikrishna Prakash, *The Constitutional Status of Customary International Law*, 29 HARV. J.L. & PUB. POL’Y 66, 67 (2010) (arguing a more skeptical approach to integrating customary international law as the supreme law of the land).

¹²⁸ Vienna Convention on the Law of Treaties, *supra* note 102; *Frequently Asked Questions: The Vienna Convention on the Law of Treaties*, U.S. DEP’T OF STATE, <https://www.state.gov/s/l/treaty/faqs/70139.htm> (last visited Jan. 21, 2018).

under the U.S. Constitution's Supremacy Clause, it supports the theory that customary international law, when appropriately established through U.S. participation and practice, can become the supreme, legally binding law of the land. "The effects of . . . customary international practice, upon the United States are more ambiguous and controversial. While there is some Supreme Court jurisprudence finding that customary international law is part of U.S. law, U.S. statutes that conflict with customary rules remain controlling."¹²⁹ Commitments made under the Paris Agreement, if found to be enforceable under emerging customary international law, may be incorporated into law in the United States under the "law of nations." However, the doctrine of last in time—which states that when statutes (including treaties) conflict and are irreconcilable, American courts must find the most recent law controlling—weakens the role of customary international law.¹³⁰ Applying the last in time doctrine, any customary international law that may support the Paris Agreement is vulnerable if a new law is passed that irreconcilably contradicts it.

Under international law, if there is customary international law enforcing the provisions of the Paris Agreement, as well as those under the UNFCCC, then there may be some reason to believe that the United States has an obligation to remain a party to them. The most fully articulated concept of the customary law regime regarding environmental treaties is known as the principle of progression. This concept holds that once a nation has made a commitment to improve their response to climate change, they cannot later return to the prior, lesser, levels of commitment. This doctrine, as a relatively new development in customary international law, finds its source in the Paris Agreement's obligation of non-regression.¹³¹ In Article 4, the Paris Agreement reads, "Each Party's successive nationally determined contribution will represent a progression beyond the Party's then current nationally determined contribution . . ."¹³² The inclusion of a Party's obligation to commit more than they have in the past is "new and signals what perhaps will become a major new principle of international environmental law."¹³³ As European Commissioner for Climate Change Miguel Arias Canete stated, "The fight against climate change cannot depend on the result of elections in one country of [sic] another. When a country signs an international agreement it has to fulfil its commitments."¹³⁴ Thus, while domestic law may freely empower the President to withdraw from treaties at will, under international law the President may be legally obligated to remain part of international environmental agreements. Herein exists the conflict between the ability of the United States to withdraw from the Paris Agreement or UNFCCC under domestic versus international law.

¹²⁹ GARCIA, *supra* note 65, at 1 n.3 (referring to the jurisprudence of the Paquete Habana).

¹³⁰ *Id.* at 16 ("When . . . [a statute and treaty] relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but, if the two are inconsistent, the one last in date will control the other: provided, always, the stipulation of the treaty on the subject is self-executing.") (citing *Whitney v. Robertson*, 124 U.S. 190, 194 (1888)).

¹³¹ Paris Agreement, *supra* note 39, art. 4(3).

¹³² *Id.*

¹³³ Vinales, *supra* note 43.

¹³⁴ Daniel Boffey et al., *EU to Bypass Trump Administration After Paris Climate Agreement Pullout*, *GUARDIAN* (June 2, 2017), <https://www.theguardian.com/environment/2017/jun/02/european-leaders-vow-to-keep-fighting-global-warming-despite-us-withdrawal>.

Aside from domestic and international law principles, the Paris treaty itself creates some repercussions for a noncompliant or exiting party. The chief enforcement mechanism of the Paris Agreement, and one of its main innovations is the “‘enhanced transparency framework for action and support’ established by Article 13” of the Agreement.¹³⁵ The transparency mandated by the statute allows the global community to fully understand the level of progress other countries are making toward their committed contributions. With this information, states may “name and shame,” as a form of public pressure, when their peers are neglecting to take action.¹³⁶ Though it is aimed at enforcing the terms of the treaty for participating countries—not punishing those who leave—the kind of consequences one would expect from a negligent participant will likely be felt many times over by a nation who leaves.

The naming and shaming pressure formalized by the Paris Agreement has already been utilized since President Trump announced he will withdraw the United States from the treaty. Even before he was inaugurated, world leaders expressed concern about Trump’s intention to withdraw at the 2016 COP in Morocco.¹³⁷ But that was just the beginning of the explicit naming and shaming Trump has received for his position of climate change and Paris. Since his official withdrawal, President Trump has been named and shamed both internationally and domestically.

Internationally, a chorus of world leaders immediately condemned President Trump’s decision to leave Paris in June 2017. French President, Emmanuel Macron, responded to Trump’s withdrawal saying that Trump’s decision not to honor the Agreement was a mistake, and “made a plea for entrepreneurs, scientists, and engineers who want to work on climate issues to leave the United States and move to France.”¹³⁸ Macron was not the only leader shaming Trump to “make our planet great again.”¹³⁹ Canadian Prime Minister, Justin Trudeau, stated that, “[Canadians] are deeply disappointed that the United States federal government has decided to withdraw from the Paris Agreement.”¹⁴⁰ Miguel Arias Cañete, European Union Climate Action and Energy Commissioner, stated:

Today is a sad day for the global community, as a key partner turns its back on the fight against climate change. The EU deeply regrets the unilateral decision by the Trump administration to withdraw the US from the Paris Agreement.

. . .

¹³⁵ Vinuales, *supra* note 75.

¹³⁶ *Id.*

¹³⁷ Coral Davenport, *Diplomats Confront New Threat to Paris Climate Pact: Donald Trump*, N.Y. TIMES (Nov. 18, 2016), <https://nyti.ms/2spa4Fk>.

¹³⁸ Alex Ward, *French President Emmanuel Macron Responds to Trump: “Make Our Planet Great Again,”* VOX (June 1, 2017), <https://www.vox.com/world/2017/6/1/15727140/emmanuel-macron-trump-paris-agreement-make-our-planet-great-again>.

¹³⁹ *Id.*

¹⁴⁰ Prime Minister Justin Trudeau, Statement by the Prime Minister of Canada in Response to the United States’ Decision to Withdraw from the Paris Agreement (June 1, 2017) (transcript available at <http://pm.gc.ca/eng/news/2017/06/01/statement-prime-minister-canada-response-united-states-decision-withdraw-paris>).

. . . .

. . . Europe and its strong partners all around the world are ready to lead the way. . . .

. . . We are on the right side of history.¹⁴¹

Further, world leaders from France, Canada, and Mexico have warned they are open to imposing a carbon tax on the United States, should the United States withdraw from the treaty.¹⁴² Other leaders warn that withdrawing from the Paris Agreement could have serious diplomatic implications for the United States.¹⁴³ The heat President Trump has felt, and will continue to feel, for leaving the Agreement will be intense, given the outcry he has already received in his short time as President. The global temperament surrounding President Trump seems to be increasingly unforgiving. Specifically, world leaders reacted to President Trump's executive order that bans immigrants and refugees from seven predominantly Muslim countries, by calling it illegal, divisive, insulting, and discriminatory.¹⁴⁴ In this political environment, it seems that withdrawing from a celebrated and nearly-unanimously supported environmental treaty (or entire treaty framework, if he were to withdraw from the UNFCCC) will not be taken lightly by the international community.

Instead, it likely will continue to be met with harsh criticism, diplomatic repercussions, and even potential economic sanctions. Already, diplomatic relations have soured. "The [July 2017] G20 meeting saw a number of tense encounters between Trump and other world leaders, with a particular clash between him and the French delegation over climate change"¹⁴⁵ While every other member of the G20 signed a declaration that the Paris Agreement was irreversible, President Trump stood alone in opposition.¹⁴⁶ Exclusion from international relationships and cooperation seems to be a very a functional consequence of withdrawing. Already, the European Council is strengthening its partnership with China to combat climate change and build a EU-China bond.¹⁴⁷ The Paris Agreement's overwhelming support seems to have created a diplomatic divide between the United States (and Nicaragua and Syria) and the rest of the world that remains committed to the treaty.

Domestically, Trump's announcement to withdraw from the Paris Agreement has sparked outrage. Industry leaders such as Facebook, General Electric, Apple, Ford, and Microsoft have all doubled down on their support of

¹⁴¹ Miguel Arias Cañete, Statement by the EU Climate Action and Energy Commissioner Miguel Arias Cañete on the US Announcement to Withdraw from the Paris Agreement (June 1, 2017) (transcript available at https://ec.europa.eu/clima/news/statement-eu-climate-action-and-energy-commissioner-miguel-arias-ca%C3%B1ete-us-announcement_en).

¹⁴² Davenport, *supra* note 137.

¹⁴³ *Id.*

¹⁴⁴ Azadeh Ansari, Nic Robertson, & Angela Dewan, *World Leaders React to Trump's Travel Ban*, CNN (Jan. 30, 2017), <http://www.cnn.com/2017/01/30/politics/trump-travel-ban-world-reaction/>.

¹⁴⁵ Anushka Asthana & Patrick Wintour, *Trump Left in Cold Over Paris Climate Agreement at End of G20 Summit*, GUARDIAN (July 8, 2017), <https://www.theguardian.com/world/2017/jul/08/donald-trump-paris-climate-agreement-g20-summit-us-theresa-may>.

¹⁴⁶ *Id.*

¹⁴⁷ Boffey, Connolly & Asthana, *supra* note 134.

the Agreement and pledged their private sector commitment to follow the goals of the Treaty.¹⁴⁸ Cities and counties across the United States have declared they too will “remain” in the Paris Agreement.¹⁴⁹ Notably, after President Trump’s withdrawal speech in June 2017 where he declared that he was leaving the treaty because he was elected to represent the people of Pittsburgh not Paris, Pittsburgh mayor Bill Peduto responded that “Pittsburgh stands with the world and will follow Paris agreement. As the mayor of Pittsburgh, I can assure you that we will follow the guidelines of the Paris agreement for our people, our economy and future.”¹⁵⁰ Moreover, individual states, Native American tribes, and universities have also joined the movement against the President’s withdrawal.¹⁵¹

None of this naming and shaming would matter, however, if the Trump administration did not plan on building diplomatic relationships, conducting friendly foreign affairs, working with American industry, and counting on state and local agency cooperation at home. But it appears the administration does plan to pursue international deals as part of its foreign policy and economic agenda. Common sense dictates international political capital should be a priority, but withdrawing from Paris does not reflect such prudence.¹⁵² After withdrawing from the Trans Pacific Partnership, which Trump stated was a bad deal for the United States, the President has also stated he is interested in forming bilateral trade agreements with countries such as Japan.¹⁵³ Though these bilateral trade deals seem to be a priority for President Trump, if he creates a reputation for the United States as a fair-weather diplomatic partner who will leave treaties and devastate the purposes of international conventions, it may be challenging to build trust during future agreements. Thus, the consequences for the United States of leaving the Paris Agreement may range from naming and shaming pressure to loss of diplomatic goodwill, or even to economic sanctions that could provoke a trade war.¹⁵⁴ At home, Trump explicitly has expressed interest in working with American businesses.¹⁵⁵ Also, he has specifically designed policy that requires support, cooperation, and communication with state, regional, and local agencies.¹⁵⁶ But backlash over his decision to withdraw from Paris may

¹⁴⁸ *Id.*; Daniel Victor, ‘Climate Change Is Real’: Many U.S. Companies Lament Paris Accord Exit, N.Y. TIMES (June 1, 2017), <https://nyti.ms/2stUI7V>; see WE ARE STILL IN, <https://www.wearstillin.com/> (last visited Jan. 21, 2018).

¹⁴⁹ WE ARE STILL IN, *supra* note 148.

¹⁵⁰ Boffey, Connolly, Asthana, *supra* note 134.

¹⁵¹ WE ARE STILL IN, *supra* note 148.

¹⁵² See generally Zeeshan Aleem, *Trump Just Pulled Out of the TPP Free Trade Deal*, VOX (Jan. 23, 2017), <http://www.vox.com/policy-and-politics/2017/1/23/14356398/trump-pull-out-tpa-nafta>.

¹⁵³ *Id.*; Shawn Donnan, *US Plans Fresh Push for Talks on Bilateral Trade Deal with Japan*, FIN. TIMES (Feb. 2, 2017), <https://www.ft.com/content/052cf600-e95b-11e6-893c-082c54a7f539>. See generally *Trade Deals that Work for All Americans*, WHITE HOUSE, <https://www.whitehouse.gov/trade-deals-working-all-americans> (last visited Sept. 24, 2017).

¹⁵⁴ See Davenport, *supra* note 137.

¹⁵⁵ See generally ASSOCIATED PRESS, *Layoffs Begin at Carrier Plant Where Trump Promised to Save Jobs*, CHI. TRIB. (July 20, 2017), <http://www.chicagotribune.com/business/ct-carrier-plant-layoffs-20170720-story.html>.

¹⁵⁶ See, e.g., Exec. Ord. No. 13,767, 82 Fed. Reg. 8, 793 (Jan. 25, 2017); Exec. Ord. No. 13,768, 82 Fed. Reg. 8,799 (Jan. 25, 2017).

deplete the political capital he needs to work effectively with domestic government agencies.¹⁵⁷

CONCLUSION

The Paris Agreement, regardless of continued U.S. involvement, is a revolutionary document. It represents not only a new way of using international law to address global environmental challenges but showed just how united the world can be in addressing them. The trajectory of the Paris Agreement was undeniably changed by President Trump's withdrawal of U.S. involvement, but as an achievement of international law, it remains unshaken.

¹⁵⁷ Already, President Trump's domestic policies have angered American cities like Chicago to the point of declaring their city a "Trump Free Zone." Pursuing the withdrawal from Paris Agreement seems likely to only aggravate these tensions. *See, e.g.,* Melissa Etehad, *Mayor Rahm Emanuel Declares Chicago a 'Trump Free Zone' after DACA Decision*, L.A. TIMES (Sept. 5, 2017), <http://www.latimes.com/politics/la-dreamers-decision-live-updates-mayor-rahm-emanuel-declares-chicago-1504638077-htmlstory.html>.