CLIMATE COMMONS LAW: THE TRANSFORMATIVE FORCE OF THE PARIS AGREEMENT

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Can international law continue to bind the United States to reduce carbon emissions after it terminates the Paris Climate Agreement? President Trump's recent statement that the United States will immediately halt implementation of the Paris Agreement lends urgency to this question: meeting global carbon emission reduction goals in accordance with the Paris Agreement would be close to impossible without U.S. participation. Global leaders have expressed outrage at the U.S. announcement, insisting that the United States continue to make efforts to meet its Paris goals. Despite the practical importance of the question, the scant scholarship on the topic so far has failed to provide a realistic path to hold the United States legally accountable for a defection from its Paris Agreement commitments. Part of the literature highlights the lack of substantive U.S. legal constraint under the law of treaties. The remainder proposes purely political processes to entice the United States to cooperate with global climate efforts.

This Article for the first time theorizes that the question can be answered by focusing on the legal significance of global reliance on the United States' Paris Agreement commitments. It submits that the Paris Agreement was built to encourage strong reliance interests. The United States acted to foster reliance upon its commitment to the Paris Agreement goals. Other states in turn relied upon representations by the United States. By inducing other states to rely upon its commitments, the United States has now become bound under the international law of unilateral declarations to meet these commitments. The Article further submits that continued and ambitious state practice to reduce carbon emissions in reliance upon global Paris Agreement commitments will give rise to a new rule of customary international law. This rule of customary international law will obligate each state, including the United States, equitably and proportionately to contribute to global carbon emission reduction efforts.

The Article shows that (1) the United States has bound itself by an international law unilateral declaration to continue to reduce carbon emissions

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notwithstanding President Trump's recent statement of intent to the contrary; (2) sufficiently many states have relied upon U.S. action to deny the United States the ability to terminate its unilateral commitment for at least four years; and (3) if a sufficient number of states have met or exceeded their own commitments by that time, the United States will become bound permanently by a carbon custom to continue to fulfill its initial commitments and to match the trajectory set by customary international development. The Article thus demonstrates that, consistent with the initial reaction to the U.S. withdrawal from the Paris Agreement, existing commitments by the United States to reduce carbon emissions in the implementation of the Paris Agreement have more than political force at international law.

How does a ragtag volunteer army in need of a shower
Somehow defeat a global superpower?
How do we emerge victorious from the quagmire?
Leave the battlefield waving Betsy Ross' flag higher?
— Guns and Ships, Hamilton: An American Musical[1]

I. INTRODUCTION

Fluid, ubiquitous, and irreverent in its disregard for national borders, climate change is an international legal quag-

1. LIN-MANUEL MIRANDA, *Guns and Ships*, *on* HAMILTON: AN AMERICAN MUSICAL (Atl. Records 2015). Teams of lawyers so far have joined in order to challenge executive action by the Trump administration as unlawful and unconstitutional. These efforts have had a significant amount of success in forcing reversals by the administration. *See, e.g.*, Michael Shear, *Supreme Court Takes Up Travel Ban Case, and Allows Parts to Go Ahead*, N.Y. TIMES (June 26, 2017), https://www.nytimes.com/2017/06/26/us/politics/supreme-court-trump-travel-ban-case.html; Michael Shear et al., *Judge Blocks Trump Order on Refugees amid Chaos and Outcry Worldwide*, N.Y. TIMES (Jan. 28, 2017), https://www.nytimes.com/2017/01/28/us/refugees-detained-at-us-airports-prompting-legal-challenges-to-trumps-immigration-order.html?_r=0. These successes by "ragtag" teams of lawyers against overbearing executive action are a testament to the power of law to maintain constitutional government. This Article is the first of two intended to provide a path for further legal arguments to achieve similar ends in the context of the Paris Agreement. This Article sets out the first part of this legal argument, submitting that the United States has committed itself as a matter of international law to play a leading role in the reduction of carbon emissions and atmospheric greenhouse gases. The next Article will submit that the U.S. assumption of a global leadership role was constitutional as a matter U.S. law. *See* Frédéric G. Sourgens, *The Paris Paradigm*, 2019 U. ILL. L. REV. __ (forthcoming 2019).

mire.[2] The global scale of climate change means that it can only be contained by collective action.[3] Thus, the need for international law seems vindicated.[4] And yet, the global nature of climate change also undercuts the state-to-state paradigm of international law.[5] The conclusion of a single bilateral treaty for the prevention of climate change should appear manifestly absurd or quixotic. International environmental law thus faces a collective action problem.

For a short while, it appeared that international lawyers had successfully overcome this problem. Following multiple efforts, the international community in 2015 negotiated the Paris Agreement.[6] The Paris Agreement provides a framework for the reduction of greenhouse gas emissions,[7] with the explicit goal of keeping the rise of global temperature levels to well below two degrees Celsius pre-industrial levels.[8] The Agreement seeks to achieve this goal by requiring countries to make Nationally Determined Contributions (NDCs) concerning their respective reductions in greenhouse gas emissions.[9] These commitments are registered with and published by a U.N. body.[10] The Agreement further sets out that states should communicate regularly about their nationally determined

2. *See* Nico Krisch, *The Decay of Consent: International Law in an Age of Global Public Goods*, 108 AM. J. INT'L L. 1, 5 (2014) (discussing the collective action problem climate changes poses for international law).

3. For example, a Chinese governments spokeswoman recently noted that climate change is a "global problem" which requires coordinated response by the international community. *See* Alison Smale, *Angela Merkel and Emmanuel Macron Unite Behind Paris Accord*, N.Y. TIMES (June 2, 2017), https://www.nytimes.com/2017/06/02/world/europe/paris-agreement-merkel-trump-macron.html.

4. *See* Harold Hongju Koh, *Triptych's End: A Better Framework to Evaluate 21st Century International Lawmaking*, 126 YALE L.J. F. 338, 363–64 (2014) (noting the importance of "soft law" tools, such as the Paris Agreement, in fostering substantive legal change and international cooperation).

5. *See* Krisch, *supra* note 2, at 15–20 (noting that classic models of consensual multilateralism have failed to produce substantive solutions to tackling climate change).

6. Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 13, 2015, *in* Rep. of the Conference of the Parties on the Twenty-First Session, U.N. Doc. FCCC/CP/2015/10/Add.1, annex (2016) [hereinafter Paris Agreement].

7. *Id.* pmbl.

8. *Id.* art. 2(1)(a).

9. *Id.* art. 3.

10. *Id.* art. 4(12).

commitments and must update their NDCs at least every five years.[11] These NDC commitments should become progressively more ambitious to meet the Agreement's climate change mitigation goals.[12] Further, the Agreement provides for market and finance mechanisms to assist developing countries and high emission countries to make ambitious contributions to reducing greenhouse gas emissions.[13] Demonstrating their commitment to the new path, the Paris parties agreed to make withdrawal from the Paris Agreement time-consuming and cumbersome.[14]

While the Agreement has found near universal support in the international community,[15] this near universal support has come at a cost. At the urging of the United States, the parties at the last minute agreed to remove wording that would have made NDC commitments binding under the treaty.[16] The quick implementation of the Agreement promised to overcome this flaw. The commitment of the world community to communicate and coordinate its actions to combat climate change provided the means by which a lawyer could navigate safely to the desired ends of the accord even without making NDC commitments formally binding under the treaty. Once in effect, the Agreement would provide the framework for the administration of global carbon emission reduction and the means to create robust markets to further accelerate climate action.

But, on June 1, 2017, President Trump returned international lawyers to the quagmire by expressing the intention of the U.S. government to withdraw from the Paris Agreement

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11. *Id.* art. 4(9).

12. *Id.* art. 4(3).

13. *Id.* arts. 6, 9.

14. *See* Lavanja Rajamani, *Reflections on the U.S. Withdrawal from the Paris Climate Change Agreement*, EJILTALK! (June 5, 2017), https://www.ejiltalk.org/reflections-on-the-us-withdrawal-from-the-paris-climate-change-agreement/#more-15311 (discussing the Paris Agreement's withdrawal process).

15. *See Paris Agreement- Status of Ratification*, UNITED NATIONS CLIMATE CHANGE, http://unfccc.int/paris_agreement/items/9444.php (last visited Apr. 3, 2018) [hereinafter *Paris Agreement Status*] (showing that 175 of 197 parties to the convention have ratified the Paris Agreement).

16. Koh, *supra* note 4, at 351.

and halt its implementation immediately.[17] To justify his decision, President Trump invoked national interest.[18] International collective action on climate change thus stands at an inflection point: besieged by President Trump's "America First" economic nationalism, it is in limbo between global perseverance and collective collapse.[19]

The U.S. exit from the Paris Agreement places the world at a familiar loggerheads. Europe insists that the United States must meet its Paris commitments and that the progress of the Paris Agreement is irreversible.[20] Specifically, European leaders specifically have looked to U.S. states, cities, and industry to meet the commitments made by the United States pursuant to the Paris framework irrespective of the Trump administration's withdrawal.[21]

Yet, as a legal matter, President Trump could still prove correct: the United States could refuse to participate in Paris Agreement processes as announced[22] without legal consequence, as the current administration could point out that the United States has not made any substantive, binding commit-

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17. *See* 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.

18. *See id.* (explaining that President Trump views the Paris accord as an "attack on the sovereignty of the United States" and an agreement that is to the detriment of American workers).

19. Remarks Announcing United States Withdrawal from the United Nations Framework Convention on Climate Change Paris Agreement, 2017 DAILY COMP. PRES. DOC. 373 (June 1, 2017) [hereinafter Trump Withdrawal Remarks] ("The Paris Agreement handicaps the United States economy in order to win praise from the very foreign capitals and global activists that have long sought to gain wealth at our country's expense. They don't put America first. I do, and I always will.").

20. Mythili Sampathkumar, *Paris Agreement Cannot Be Renegotiated Despite Trump's Claims, Says France, Germany and Italy in Joint Statement*, INDEPENDENT (June 1, 2017), http://www.independent.co.uk/news/world/americas/us-politics/paris-agreement-trump-renegotiated-cannot-be-france-germany-italy-joint-statement-latest-a7768266.html.

21. Smale, *supra* note 3 ("Thirty mayors, three governors, more than 80 university presidents and more than 100 businesses in the United States are preparing to submit a plan to the United Nations pledging to meet the country's greenhouse gas emissions targets under the Paris Agreement.").

22. *See* Trump Withdrawal Remarks, *supra* note 19 ("[A]s of today, the United States will cease all implementation of the non-binding Paris Accord . . . .").

ments.[23] The U.S. exit then would threaten to undercut the Paris Agreement by revealing that it is "an agreement that can visibly do nothing to constrain a climate laggard."[24]

In this context, it is deeply problematic that current scholarship fails to provide an analytic framework for how international law *would* "constrain a climate laggard" pursuant to the Paris Agreement. As discussed in Part II, much of the literature seeks to combat this problem by introducing non-consensual means of global governance. This literature points to political mechanisms that might be utilized in order to secure a robust response to climate change. The literature, however, does not provide a means to cement such governance processes within a binding legal framework. Without such a legal framework, the literature submits that current governance processes operate outside of international law because it implicitly assumes that international law is not sufficiently flexible to entice cooperation or sufficiently robust to contain occasional defectors. International law would then become irrelevant to issues that the international community views as some of its most pressing problems.[25]

Perhaps more worryingly, the current state of the literature might prove the seed of the Paris framework's undoing. The literature frames the Paris Agreement as a procedural treaty intended to secure political pathways for future cooperation.[26] In doing so, the literature yields primacy to politics. It

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23. *Id.* (relying upon the allegedly "non-binding" nature of the Paris Agreement as a justification to cease implementation immediately).

24. Luke Kemp, *Why the Paris Climate Agreement Might Be Better Off Without the US*, WORLD ECON. F. (June 2, 2017), https://www.weforum.org/agenda/2017/06/why-the-us-withdrawal-from-the-paris-climate-agreement-might-be-just-what-we-need.

25. *See* Paris Agreement, *supra* note 6, pmbl ("*Recognizing* the need for an effective and progressive response to the urgent threat of climate change on the basis of the best available scientific knowledge" and "*Recognizing* the fundamental priority of safeguarding food security and ending hunger, and the particular vulnerabilities of food production systems to the adverse impacts of climate change").

26. *See, e.g.*, Koh, *supra* note 4, at 363–64 (characterizing the Paris Agreement as an example of "soft law" which helps gradually create legal "regime change"); Daniel Bodansky, *The Paris Climate Agreement: A New Hope?*, 110 AM. J. INT'L L. 288, 297 (2016) (providing a first thorough analysis of the agreement in the context of international environmental law and noting its substantively non-binding nature); Daniel Bodansky & Peter Spiro, *Executive*

thus unwittingly suggests that a purely political exit is feasible—and that there are no hurdles standing in a state's way given the overall non-binding nature of the substantive Paris Agreement provisions. President Trump exploited this narrative when he called the Paris Agreement the "non-binding Paris Accord" in his withdrawal announcement.[27]

The dominant academic response to President Trump's statement has been quick to point out that the treaty contains binding procedural obligations.[28] On closer scrutiny, this academic response misses the mark of the public outcry following President Trump's announcement. That reaction was driven by global outrage concerning the United States' *substantive* exit from the Paris framework.[29] The procedural obligations at issue in the current academic response, by definition, cannot answer that concern. More problematically, the procedures to which the literature refers are hollow and potentially moot:[30] it can hardly be the point of the Paris Agreement to force the Trump administration to submit President Trump's speeches on a regular basis to the U.N. body charged with the implementation of the Paris Agreement.[31] The dominant strand in the literature thus does not provide a satisfactory answer concerning what currently constrains the United States from im-

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Agreements+, 49 VAND. J. TRANSNAT'L L. 885, 885 (2016) (discussing the Paris Agreement under U.S. foreign relations law to a similar effect).

27. Trump Withdrawal Remarks, *supra* note 19.

28. *See, e.g.*, Daniel Bodansky, *Sound and Fury on the Paris Agreement—But Does It Signify Anything?*, OPINIO JURIS (June 2, 2017, 12:39 PM), http://opiniojuris.org/2017/06/02/33147 (discussing the importance of the procedural provisions in question); Tess Bridgeman, *Paris Is a Binding Agreement: Here's Why That Matters*, JUST SECURITY (June 4, 2017, 8:44 AM), https://www.justsecurity.org/41705/paris-binding-agreement-matters (discussing the same); Rajamani, *supra* note 14 (discussing the same).

29. Harold Hongju Koh et al., *Trump's So-Called Withdrawal from Paris: Far From Over*, JUST SECURITY (June 2, 2017 8:44 AM), https://www.justsecurity.org/41612/trumps-so-called-withdrawal-paris ("If the United States were actually to exit the Agreement, it would not only jeopardize humanity's best chance at preventing global climate disaster, but also disadvantage the United States' status in the international economic order.").

30. Bodansky, *supra* note 28 (relying upon purely procedural obstacles to U.S. withdrawal); Bridgeman, *supra* note 28 (same); Koh, *supra* note 29 (same).

31. *See* CHITTHARANJAN F. AMERASINGHE, JURISDICTION OF INTERNATIONAL TRIBUNALS 227–30 (2003) (defining mootness in international law as the absence of purpose of a judgment on the merits).

mediately halting implementation of the substance of the Paris Agreement.

This Article therefore proposes a paradigm shift. The dominant understanding of the Paris Agreement submits that NDCs are not binding because the Paris Agreement does not give them obligatory force. This understanding is wrong and overly simplistic. It misses that NDCs *can* have an obligatory force by virtue of a source of international law other than the law of treaties; in other words, the Paris Agreement may not *require* parties to make binding commitments in their NDCs, but it certainly does not prohibit them from doing so either.[32] It is therefore necessary to analyze the legal nature and international legal effect of the NDCs in their own right. As discussed in the remainder of this Article, this legal effect is twofold: first, the NDCs themselves can be binding under international law as unilateral declarations when other states reasonably relied upon the NDC commitments to their detriment. This is the case with regard to the United States' NDC, which was relied upon by other members of the international community in setting their own mitigation strategies and commitments.[33] Second, the implementation by states of their respective NDCs constitutes state practice. As will be developed in Part V, This state practice is the core element of a new customary rule of international law that can bind the United States, whether or not it remains a party to the Paris Agreement. If such a practice, and consequently such a custom, formed, the United States would then irreversibly be bound to the goals set out in the U.S. NDC as a matter of international law.

To permit analysis of the United States' NDC in its own right, Part III lays out the international law of unilateral declarations, particularly the law of unilateral declarations made

32. *See* Paris Agreement, *supra* note 6, art. 4(3) ("Each Party's successive nationally determined contribution will represent a progression beyond the Party's then current nationally determined contribution and reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.").

33. *See* Matthew Kotchen, *A View from the United States, in* TOWARDS A WORKABLE AND EFFECTIVE CLIMATE REGIME 31, 36, 38 (S. Barrett et al. eds., 2015) (discussing the importance of the United States as an early mover on NDCs to create momentum towards climate action).

pursuant to treaties.[34] A unilateral declaration gives rise to an obligation if made by the head of state.[35] Further, the declaration must manifest an intention by the state which made it to be bound by it.[36] "Intent" is a term of art and can be established on the basis of reasonable reliance; international courts and tribunals have found reasonable reliance—and thus "intent"—when (i) it is objectively reasonable to assume that a state sought to induce reliance of third parties by making the declaration, or (ii) when there is actual reliance on the declaration by third parties.[37] The resulting obligation is substantively grounded in the state's unilateral action rather than the treaty pursuant to which the declaration is made.[38]

Part III will apply the law of unilateral declarations to the United States' implementation of the Paris Agreement, viewed together with public pronouncements made by President Obama and his Cabinet. It will conclude that, viewed together, these pronouncements give rise to a binding unilateral act because the United States sought to induce and actually induced reliance by the world community in participating in the Paris framework. Pursuant to this unilateral act, the United States is bound as a matter of international law *not to increase* greenhouse gas emissions after the entry into force of the Paris

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34. The rules governing a sovereign's unilateral acts in international law are unsettled and disputed. *See, e.g.*, Mobil Corp., Venez. Holdings, B.V. v. Bolivarian Republic of Venez., ICSID Case No. ARB/07/27, Decision on Jurisdiction, ¶ 87 (June 10, 2010), https://www.italaw.com/documents/MobilvVenezuelaJurisdiction.pdf; Int'l Law Comm'n, Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations, with Commentaries Thereto, U.N. Doc. A/61/10, cmts. 1, 3 (2006) [hereinafter ILC Guiding Principles] (recognizing that the "concept of unilateral act is not uniform").

35. ILC Guiding Principles, *supra* note 34, princ. 4.

36. ILC Guiding Principles, *supra* note 34, princ. 1 (noting that a reasonably relying state is "entitled to require that such obligations be respected").

37. *Id.* princ. 10(ii) (citing Nuclear Tests Case (Austl. v. Fr.), Judgment, 1974 I.C.J. Rep. 253, ¶ 51 (Dec. 20) and Nuclear Tests Case (N.Z. v. Fr.), Judgment, 1974 I.C.J. Rep. 457, ¶ 53 (Dec. 20) for proposition that states may induce reliance by other parties; and Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Jurisdiction of the Court and Admissibility of the Application, 1984 I.C.J. Rep. 392, ¶ 51 (Nov. 26) for proposition to support assertion of actual reliance by states).

38. *See id.* cmt. 7(3) (discussing the relationship between the Vienna Convention on the Law of Treaties and unilateral acts on interpretive questions).

Agreement in November 2016, to continue to *decrease* carbon emissions consistent with U.S. projections of reductions to be achieved by 2020 made prior to final Paris Agreement negotiations, and to *further reduce* carbon emissions consistent with the implementation of the Obama administration's Clean Power Plan and methane emission reduction commitments made pursuant to the Paris Agreement itself.[39]

Part IV proceeds to discuss why the unilateral declarations cannot be immediately undone by the Trump administration. The international law of unilateral declarations provides that such declarations may not arbitrarily be withdrawn.[40] Part IV will establish that the Paris Agreement provides a minimum period of time within which U.S. obligations made pursuant to it cannot be withdrawn, namely until November 5, 2020.[41] Part IV concludes that the United States has made binding commitments that it cannot undo immediately without incurring international legal liability, meaning that the Paris Agreement in fact has provided a means to "constrain a climate laggard."[42]

Part V then proposes that future reliance upon the Paris framework by means of implementation of its goals can lead to a new customary rule of international law. Such implementation would reflect widespread and representative state practice consistent with a sense of legal obligation of implementing states to combat climate change expressed in the Paris Agreement, and thus create a rule of customary international law.[43] The resulting carbon custom will obligate the international community equitably to apportion the carbon emission reductions needed to meet the Paris goal of holding the global aver-

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39. *NDC Registry: United States of America- First NDC*, UNITED NATIONS CLIMATE CHANGE (Sept. 3, 2016), http://www4.unfccc.int/ndcregistry/Pages/Party.aspx?party=USA [hereinafter *USNDC*].

40. ILC Guiding Principles, *supra* note 34, princ. 10 (specifying the factors that should be considered in determining whether revocation is arbitrary)

41. *See infra* Part IV.B.

42. Kemp, *supra* note 24.

43. *See* Paris Agreement, *supra* note 6, pmbl. (discussing the purpose of the Paris Agreement in light of existing legal obligations); North Sea Continental Shelf Cases (Fed. Rep. Ger./Den; Fed. Rep. Ger./Neth.), Judgment, 1969 I.C.J. Rep. 3, ¶¶ 73–78 (Feb. 20); *see also* Mathias Forteau, *Comparative International Law Within, Not Against, International Law: Lessons from the International Law Commission*, 109 AM. J. INT'L L. 498, 506 (2015) (discussing how state practice is to be derived).

age temperature increase to well below two degrees Celsius pre-industrial levels among the global community of states.[44] The United States would remain bound by such a rule of customary international law even if it is no longer a party to the Paris Agreement.

Part VI explains why the United States will not be able to escape the application of a carbon custom. In order to escape the application of a new customary international law rule, a state must prove that it was a persistent objector to the rule in question.[45] The unilateral declarations and early implementation of these declarations by the United States formed one of the constituent parts of the customary rule in question. Consequently, the United States could not be a persistent objector to the rule and thus could not escape its grasp as a matter of international law.[46]

The most likely objection to the argument developed in this Article is that the United States insisted, in the final minutes of negotiations, that the Paris Agreement be reworded to avoid having NDC commitments become binding. According to this objection, the United States did not intend to make a binding commitment by means of its NDC and could have done so by treaty had it in fact harbored such an intent.[47] This objection does not take into account the relevant context. In context, the United States could not have obligated itself to emissions reductions "by the normal method: a formal agreement on the basis of reciprocity" for obvious domestic political

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44. Paris Agreement, *supra* note 6, art. 2(1)(a).

45. Curtis Bradley & Mitu Gulati, *Withdrawing from International Custom*, 120 YALE L.J. 202, 204 (2010) ("According to most international law scholars, a nation may have some ability to opt out of a CIL rule by persistent objection to the rule before the time of its formation (although even that proposition is contested), but once the rule becomes established, nations that are subject to it never have the right to withdraw unilaterally from it.").

46. *Id.*

47. *See* Case Concerning the Frontier Dispute (Burk. Faso v. Mali), Judgment, 1986 I.C.J. Rep. 554, ¶ 40 (Dec. 22) ("Here, there was nothing to hinder the Parties from manifesting an intention to accept the binding character of the conclusions of the Organization of African Unity Mediation Commission by the normal method: a formal agreement on the basis of reciprocity. Since no agreement of this kind was concluded between the Parties, the Chamber finds that there are no grounds to interpret the declaration made by Mali's head of State on 11 April 1975 as a unilateral act with legal implications in regard to the present case.").

reasons cited as the sole reason for the drafting change.[48] U.S. policymakers, including President Obama, nevertheless were explicit that the Paris Agreement was intended as a substantive turning point in global efforts to curb climate change.[49] President Obama *acknowledged* that the United States used its NDC to induce reliance by others to participate in the Paris Agreement.[50] The world community accepted the U.S. drafting change in the Paris Agreement upon which the objection rests as a "glitch"[51]—and with the contemporaneous understanding that the United States had "committed" to its emissions reductions target in substance.[52] The jubilant reception of the final accord by its drafters testified to this global understanding of

48. *Id.*; *see also* Suzanne Goldberg, *How U.S. Negotiators Ensured Landmark Paris Climate Deal Was Republican-Proof*, GUARDIAN (Dec. 13, 2015), https://www.theguardian.com/us-news/2015/dec/13/climate-change-paris-deal-cop21-obama-administration-congress-republicans-environment (explaining how the Obama administration took extraordinary steps to make sure the climate deal could not be undercut by Congressional Republicans).

49. Remarks on the Paris Agreement on Climate Change, 2016 DAILY COMP. PRES. DOC. 666 (Oct. 5, 2016).

50. *Id.* ("We continued to lead by example with our historic joint announcement with China two years ago, where we put forward even more ambitious climate targets. And that achievement encouraged dozens of other countries to set more ambitious climate targets of their own. And that, in turn, paved the way for our success in Paris: the idea that no nation, not even one as powerful as ours, can solve this challenge alone. All of us have to solve it together.").

51. *Compare* Goldberg, *supra* note 48 ("When final approval was held up for an hour over typos and a dispute over a single verb—shall or should—Hollande telephoned Narendra Modi, India's prime minister, to assure him the last-minute glitches would be fixed.") *with* Koh, *supra* note 4, at 352 (noting that the drafting change in question was made at the urging of U.S. lawyers). The discussion with Prime Minister Modi evidences that the "shall" or "should" discussion was not considered to have a substantive effect by the world community as it was described as a "last-minute glitch" and not a substantive change to the agreement (a change, one may infer, which would have led to the withdrawal of India).

52. *See Live Blog: The World Awaits the Final Paris Agreement*, ECO-BUSINESS (Dec. 12, 2015), http://www.eco-business.com/news/live-blog-the-world-awaits-the-final-paris-agreement (quoting speech of French President Francois Hollande that "[h]istory is written by those who commit and not those who calculate. And today you committed, you did not engage in calculations.").

continued U.S. commitment.[53] To borrow a popular metaphor, this reception would have been unlikely if the objection were to be credited: the United States would have acted like one Lucy van Pelt pulling the proverbial football of actionable climate change commitments from an onrushing global community bearing an uncanny resemblance to Charlie Brown at the very last moment.[54] Were this the case, the world community is far more likely to have responded with an "aaugh!" of surprise than fanfare and jubilation. This Article therefore reconstructs why the global reaction to both the conclusion of the Paris Agreement and to the recent U.S. announcement of withdrawal from it was correct—the Agreement had and continues to have a sound basis in international law, if not exclusively in the law of treaties.[55]

The core contribution of this Article is to demonstrate the weighty accomplishment of the Paris Agreement. The Paris Agreement provided a framework for mutual trust building and reliance by means of its procedural mechanisms. By acting pursuant to the framework established by the Paris Agreement, world society has breathed legal force into the aspirations of the Paris parties. This legal force is sufficiently robust to prevent state parties from abandoning their commitments prior to the withdrawal period of the Paris Agreement. If a critical mass of states acts pursuant to the Paris Agreement, withdrawal from the principles laid down in the Paris Agreement for any one state swimming against the tide of this critical mass would no longer be practically feasible. It provides a blueprint for international cooperation with regard to the thorniest of policy issues at a time when self-interest and naked identity politics more than ever threaten to weaken the fabric of international law. If successfully implemented and replicated, this structure of international cooperation could be

53. *Climate Conference Reaches Agreement*, REUTERS (Dec. 12, 2015), https://www.nytimes.com/video/world/europe/100000004090455/climate-conference-reaches-agreement.html.

54. *See Charlie Brown's Greatest Misses: Every 'Peanuts' Football Gag Comic*, GO COMICS (Feb. 3, 2017), http://www.gocomics.com/news/laugh-tracks/3688/charlie-brown-s-greatest-misses-every-peanuts-football-gag-comic.

55. *See* Cass Sunstein, *Of Montreal and Kyoto: A Tale of Two Protocols*, 31 HARV. ENVTL. L. REV. 1, 4 (2007) (discussing both broad adoption of and significant failures of compliance with the Kyoto Protocol).

used in order to resolve other, similarly weighty problems in the future.

II. The Paris Paradox

This part briefly appraises the current state of the literature on the Paris Agreement.[56] It submits that the literature focuses its discussion of the Paris Agreement on its nature as a political treaty. It argues that this focus leads to a paradox: the salient substantive provisions of the treaty were drafted using non-binding language with only procedural obligations imposed upon treaty parties.[57] In doing so, the drafters intended to make the treaty more flexible, durable, and resilient to challenge or abandonment by a conservative U.S. administration.[58] And yet, the very non-binding nature of the treaty also risks

56. *See, e.g.*, Daniel Bodansky, *The Paris Climate Agreement: A New Hope?*, 110 Am. J. Int'l L. 288, 297 (2016) (providing a first thorough analysis of the agreement in the context of international environmental law); Daniel Bodansky & Peter Spiro, *Executive Agreements+*, 49 Vand. J. Transnat'l L. 885, 885 (2016) (discussing the Paris Agreement under U.S. foreign relations law); Charles E. Di Leva & Xiaoxin Shi, *The Paris Agreement and the International Trade Regime: Considerations for Harmonizations*, 17 Sustainable Dev. L. & Pol'y 20 (2016) (discussing the inter-relationship between the Paris Agreement and international trade law); Bryan H. Druzin, *The Parched Earth of Cooperation: How to Solve the Tragedy of the Commons in International Environmental Governance*, 27 Duke J. Comp. & Int'l L. 73, 73 (2016) (discussing the Paris Agreement from the perspective of the tragedy of the commons); Koh, *supra* note 4, at 350–52, 362–65 (discussing the Paris Agreement from the perspective of U.S. foreign relations law); Jonas J. Monast et al., *On Morals, Markets, and Climate Change: Exploring Pope Francis' Challenge*, 89 L. & Contemp. Probs. 135, 135–38 (2017) (discussing the Paris Agreement through the lens of Catholic theology); Arden Rowell & Josephine van Zeben, *A New Status Quo? The Psychological Impact of the Paris Agreement on Climate Change*, 7 Eur. J. Risk Reg. 49, 51–52 (2016) (discussing the psychological impact of the Paris Agreement); Scott J. Shackelford, *On Climate Change and Cyber Attacks: Leveraging Policycentric Governance to Mitigate Global Collective Action Problems*, 18 Vand. J. Ent. & Tech. L. 653, 677–79 (2016) (discussing the governance benefits derived from the structure of the Paris Agreement); Abby Stemler et al., *Paris, Panels, and Protectionism: Matching US Rhetoric with Reality to Save the Planet*, 19 Vand. J. Ent. & Tech. L. 545, 545 (2017) (providing a U.S. based analysis of the Paris Agreement).

57. Koh, *supra* note 4, at 350–52 (discussing the procedural nature of the obligations incurred by the parties to the Paris Agreement as an asset of the agreement); *see* sources cited *supra* notes 29–30.

58. Koh, *supra* note 4, at 350-52, 362-65; *see also* Rowell & van Zeben, *supra* note 56, at 51–52 (analyzing the Paris Agreement through loss aversion created by new treaty baselines); Shackelford, *supra* note 56, at 677–79 (dis-

revealing that it is "an agreement that can visibly do nothing to constrain a climate laggard."[59] The non-binding nature of the core provisions of the treaty thus render the treaty less durable and ultimately easier to abandon with immediate effect by the United States. In other words, there is no non-compliance that could do another treaty party harm—rendering any potential dispute with regard to the binding procedural provisions in the Paris Agreement moot.[60]

This part thus concludes that interpreting the Paris Agreement as a political treaty does not adequately capture the Paris mechanism. The Paris Agreement sought to engender global action by mutual reliance.[61] The intricate procedural mechanisms set up to support, channel, and engender mutual reliance show that the goals of the Paris Agreement are more than a political aspiration. The true legal significance of the Paris Agreement—and thus the legal significance of any exit by the United States—must be found beyond the treaty framework.

A. *The Road to Paris—A Political Treaty*

The literature on the Paris Agreement focuses on the nature of the accord as a political agreement or as an executive agreement.[62] Much of this debate in the United States is driven by constitutional concerns regarding whether President Obama had the authority to enter into the Paris Agreement without Senate ratification or other additional Congressional action as an executive agreement or Congressional executive

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cussing the governance benefits derived from the structure of the Paris Agreement); Stemler et al., *supra* note 56, at 558–60 (discussing the same).

59. Kemp, *supra* note 24; *see also* Druzin, *supra* note 56, at 74 ("Yet governments face no consequences if they fall short of their commitments under the agreement. The agreement thus stands enfeebled upon the shaky edifice of verbal commitments and good will. Consensus of this kind is extremely fragile.").

60. *See* AMERASINGHE, *supra* note 31, at 227-30 (defining mootness in international law as the absence of purpose of a judgment on the merits).

61. Remarks on the Paris Agreement on Climate Change, 2016 DAILY COMP. PRES. DOC. 666 (Oct. 5, 2016) (acknowledging the force of Paris NDC commitments to induce reliance in other states).

62. *See, e.g.*, Bodansky & Spiro, *supra* note 56, at 885 (focusing on U.S. foreign relations law paradigm of executive agreements); Koh, *supra* note 4, at 350–52, 355–62 (same).

agreement.[63] The debate therefore focuses on the nature and force of the Paris Agreement as a treaty in counter-distinction to an executive agreement or Congressional executive agreement (a distinction which has no bearing on the international legal force of the obligations in the Paris Agreement).[64]

This focus has practical effects on the international discourse.[65] The U.S. delegation, aware of the impending scrutiny, sought to draft the Paris Agreement so as to avoid the constitutional problem identified in the literature.[66] As outlined in this section, this focus of the ongoing discourse opens the first prong of the Paris paradox: the Paris Agreement is permitted to have legal force because it fails to impose substantive legal obligations.[67]

1. *The Drafting History*

The Paris Agreement is the latest in a series of climate agreements going back to the 1992 U.N. Framework Convention on Climate Change (UNFCCC).[68] As the literature on the Paris Agreement is quick to point out, the accord can only be understood in light of this longer history.[69] This longer history begins with the adoption of a U.N. Framework Convention pursuant to which future action is taken by the member states.[70] Currently, the UNFCCC has 197 parties.[71] The

63. *See, e.g.*, Koh, *supra* note 4, at 364–65.

64. *Id.*

65. Di Leva & Shi, *supra* note 56, at 20 (focusing on impact of the Paris Agreement on international trade); Stemler, *supra* note 56, at 558–60 (discussing the same).

66. Koh, *supra* note 4, at 350–52 (discussing motivations of U.S. negotiators).

67. Bodansky & Spiro, *supra* note 56, at 917–19 (Paris Agreement does not impose substantive obligations); Koh, *supra* note 4, at 350–52, 355–62 (Paris Agreement does not impose substantive obligations).

68. United Nations Framework Convention on Climate Change (UNFCCC), May 9, 1992, 1771 U.N.T.S. 107 (entered into force Mar. 19, 1994) [hereinafter UNFCCC].

69. *See* Bodansky, *supra* note 56, at 291–94 (placing the Paris Agreement in the context of the UNFCCC and UNFCCC conference of parties' protocols and initiatives); Bodansky & Spiro, *supra* note 56, at 917 (same); Koh, *supra* note 4, at 350–52 (same).

70. Bodansky & Spiro, *supra* note 56, at 917 (explaining UNFCCC mechanism); Koh, supra note 4, at 350 –52 (same).

71. *Paris Agreement Status*, *supra* note 15.

UNFCCC already contains binding, if very vague, legal commitments to limit greenhouse gas emissions.[72]

The first, now somewhat infamous, attempt at climate action under the UNFCCC was the Kyoto Protocol of 1997.[73] The Protocol sought to set binding emission targets.[74] The protocol failed to live up to its potential as the U.S. Senate overwhelmingly voted against the treaty.[75] A core complaint by the U.S. Senate was the lack of climate commitments by the developing world to match U.S. commitments.[76] Following his election to the U.S. presidency, President George W. Bush attempted to withdraw the United States' signature from the treaty.[77]

The structure of the Paris Agreement further develops a different, and far more flexible, approach adopted at a later meeting convened pursuant to the UNFCCC at Copenhagen, which adopted a purely political and non-binding agreement

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72. Michael G. Faure & André Nollkaemper, *International Liability as an Instrument to Prevent and Compensate for Climate Change*, 43A STAN. J. INT'L L. 123, 143-145 (2007) ("If the defendant state were a signatory to the UNFCCC, but not the Kyoto Protocol (a hypothesis which was examined in the literature with respect to Canada before the entry into force of the Kyoto Protocol), a question would arise as to whether the state violated its commitments under Article 4 of the UNFCCC, and whether that breach could be the basis of a liability claim. The latter may not be obvious, as the requirements of Article 4(1) are rather vague. For instance, it refers to the obligation to promote and cooperate in the development and transfer of technologies that control, reduce or prevent anthropogenic emissions, as well as the obligation to promote sustainable management of sinks and reservoirs of all greenhouse gases. These obligations are so vague that it is doubtful that violating these obligations would constitute a sufficient basis for state liability.").

73. *See* Sunstein, *supra* note 55, at 4 (discussing both broad adoption of and significant failures of compliance with the Kyoto Protocol).

74. *See* Tyler McNish, *Carbon Offsets Are a Bridge Too Far in the Tradable Property Rights Revolution*, 36 HARV. ENVTL. L. REV. 387, 400 (2012) (describing how the binding provisions of the Kyoto Protocol were intended to function).

75. Sunstein, *supra* note 55, at 4 (outlining the U.S. Senate votes regarding negotiations positions by the U.S. in the run up to the Kyoto Protocol in the U.S. Senate).

76. Jonathan Wiener, *On the Political Economy of Global Environmental Regulation*, 87 GEO. L.J. 749, 772 (1999) (outlining arguments raised by U.S. Senators objecting to the Kyoto Protocol).

77. Koh, *supra* note 4, at 350–52 (outlining Copenhagen negotiations and the ultimate political-agreement compromise).

to break gridlock.[78] Following the Kyoto Protocol, actors on the international climate change mitigation stage became increasingly aware of the vicissitudes of U.S. foreign relations law and climate politics. U.S. politics was particularly damaging to climate discussion as it exacerbated an already wide gulf between the climate change priorities of the developing and developed world.[79] This significantly hampered the negotiation of further treaties to facilitate climate action.[80] This deadlock was broken and the path set for Paris when the United States negotiated towards a flexible, non-binding approach at Copenhagen that would permit executive action without the need for Senate approval and further give states significant flexibility in implementing any climate action domestically.[81] The result was a fully non-binding political accord paving the road to the Paris negotiations.[82]

The Paris Agreement sought to navigate the thin line between concrete climate action and the flexibility first adopted at Copenhagen. Thus, it was intended to be and became a legal agreement.[83] Further, it required a brokering of concrete targets to assure that action would be meaningful.[84] Nevertheless, these pledges would need to remain flexible and non-binding in order to assuage U.S. domestic concerns.[85] Further, this flexibility permitted coalition building at Paris to build towards larger consensus.[86]

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78. *Id.* (outlining the factors complicating the U.S. negotiations of the Paris Agreement).

79. *See* Daniel Bodansky, *The Copenhagen Climate Conference: A Postmortem*, 104 AM. J. INT'L L. 230, 232 (2010).

80. *Id.*

81. *Id.*

82. *Id.*

83. *See* Bodansky & Spiro, *supra* note 56, at 917 (discussing status of the Paris Agreement as a legal as opposed to purely political agreement).

84. *See* Carol Davenport, *Nations Approve Landmark Climate Accord in Paris*, N.Y. TIMES (Dec. 12, 2015), https://www.nytimes.com/2015/12/13/world/europe/climate-change-accord-paris.html (explaining the changes made during negotiations which allowed the deal to become a reality).

85. *See supra* note 67 and accompanying text (discussing the lack of substantive obligations in the Paris Agreement itself and the negotiation history leading up to this textual choice).

86. *See* Todd Stern, *Mr. Trump's Climate Decision*, PLANETPOLICY (Mar. 6, 2017), https://www.brookings.edu/blog/planetpolicy/2017/03/06/mr-trumps-climate-decision (explaining that the United States negotiated the Paris Agreement specifically so that each country could nationally determine

This flexible approach ultimately led to the broad adoption of the Paris Agreement.[87] The Paris Agreement, prior to the U.S. exit, enjoyed the support of most of the UNFCCC member states.[88] Importantly, it included pledges by China, as well as the United States, thus providing significant political momentum towards concerted climate action.[89]

2. *Core Provisions*

The Paris Agreement sets as its overall goal to hold "the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels."[90] This formulation of a target temperature represents the Copenhagen compromise between island nations and developed economies.[91] Particularly, the language of "well below" the two degrees Celsius target was a victory for particularly affected small island nations, which had lobbied for the more ambitious target to reduce temperature increases to below 1.5 degrees Celsius.[92]

The Paris Agreement further provides that parties "are to undertake and communicate ambitious efforts" to set their re-

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its own climate program, which then helped build both domestic and international support).

87. *See* Davenport, *supra* note 84 (discussing what negotiation strategies ultimately bore fruit at Paris).

88. *Paris Agreement Status, supra* note 15.

89. *See, e.g.*, Simon Evans, *Climate Pledge Puts China on Course to Peak Emissions as Early as 2027*, CarbonBrief (July 1, 2015), https://www.carbonbrief.org/climate-pledge-puts-china-on-course-to-peak-emissions-as-early-as-2027 (discussing the impact of Chinese climate pledges pursuant to the Paris framework); Simon Evans, *U.S. Climate Pledge Promises to Push for Maximum Ambition*, CarbonBrief (Mar. 31, 2015), https://www.carbonbrief.org/us-climate-pledge-promises-to-push-for-maximum-ambition (discussing the impact of U.S. climate pledges pursuant to the Paris framework).

90. Paris Agreement, *supra* note 6, art. 2(1)(a).

91. *See* Bodansky, *supra* note 79, at 231 (discussing the history behind the Paris compromise); John Vidal, *Vulnerable Nations at Copenhagen Summit Reject 2C Target*, Guardian (Dec. 10, 2009), https://www.theguardian.com/environment/2009/dec/10/copenhagen-climate-change (discussing the position of island nations at Copenhagen).

92. Eric Reguly, *Small Island States Make Waves at Paris Climate Conference*, Globe & Mail (Dec. 14, 2015), https://www.theglobeandmail.com/news/world/small-island-states-make-waves-at-paris-climate-conference/article27742043.

spective Nationally Determined Contributions (NDCs) to combat climate change.[93] These contributions consist of emissions reduction and limitation targets set by each state.[94] This is one of the central pieces of the Paris Agreement and the means by which its party states must ultimately seek to implement its temperature increase goals.[95]

The Paris Agreement envisions the creation of a marketplace mechanism.[96] This market place mechanism takes the form of "internationally transferred mitigation outcomes towards nationally determined contributions."[97] The Agreement provides for a broad structure through which such market transactions can be accounted for and prohibits double-counting of market-based emission reductions.[98]

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93. Paris Agreement, *supra* note 6, art. 3.

94. Paris Agreement, *supra* note 6, art. 4(4).

95. *See* Hari Osofsky & Jacqueline Peel, *Energy Partisanship*, 65 EMORY L.J. 695, 718–19 (2016) (noting the need for a polycentric solution given the insufficiency of INDCs to alone meet the climate goals); Shackelford, *supra* note 56, at 708 ("As Professor Robert Stavins predicted: '[I]t appears that the 2015 agreement will reflect a hybrid climate policy architecture—one that combines top-down elements, such as for monitoring, reporting, and verification, with bottom-up elements, including 'Intended Nationally Determined Contributions' (INDCs), describing what a country intends to do to reduce emissions, based on domestic political feasibility and other factors.' This is, in essence, describing a polycentric approach to Paris and beyond, and one that was realized in the final 2015 Paris Agreement.") (citations omitted).

96. Paris Agreement, *supra* note 6, art. 6.

97. *Id.* art. 6(2) ("Parties shall, where engaging on a voluntary basis in cooperative approaches that involve the use of internationally transferred mitigation outcomes towards nationally determined contributions, promote sustainable development and ensure environmental integrity and transparency, including in governance, and shall apply robust accounting to ensure, inter alia, the avoidance of double counting, consistent with guidance adopted by the Conference of the Parties serving as the meeting of the Parties to this Agreement.").

98. *Id.* art. 6(4)-(5) ("4. A mechanism to contribute to the mitigation of greenhouse gas emissions and support sustainable development is hereby established under the authority and guidance of the Conference of the Parties serving as the meeting of the Parties to this Agreement for use by Parties on a voluntary basis. It shall be supervised by a body designated by the Conference of the Parties serving as the meeting of the Parties to this Agreement, and shall aim: (a) To promote the mitigation of greenhouse gas emissions while fostering sustainable development; (b) To incentivize and facilitate participation in the mitigation of greenhouse gas emissions by public and private entities authorized by a Party; (c) To contribute to the reduction

Further, the Paris Agreement significantly provides for assistance to developing nations in implementing the climate goals.[99] In particular, it foresees that "developed country Parties should continue to take the lead in mobilizing climate finance from a wide variety of sources, instruments and channels, noting the significant role of public funds, through a variety of actions, including supporting country-driven strategies."[100]

Finally, the Agreement sets up procedures for its own implementation.[101] It thus requires that parties communicate with each other to set NDCs;[102] it sets out how such communication must occur;[103] it requires exchanges of scientific and technical information;[104] and it importantly establishes the fa-

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of emission levels in the host Party, which will benefit from mitigation activities resulting in emission reductions that can also be used by another Party to fulfil its nationally determined contribution; and (d) To deliver an overall mitigation in global emissions. 5. Emission reductions resulting from the mechanism referred to in paragraph 4 of this Article shall not be used to demonstrate achievement of the host Party's nationally determined contribution if used by another Party to demonstrate achievement of its nationally determined contribution.").

99. *Id.* art. 9(1) ("Developed country Parties shall provide financial resources to assist developing country Parties with respect to both mitigation and adaptation in continuation of their existing obligations under the Convention.").

100. *Id.* art. 9(2) ("Other Parties are encouraged to provide or continue to provide such support voluntarily.").

101. *Id.* arts. 4, 7, 9, 11, 13.

102. *Id.* art. 4(2), (8), (9), (12) ("2. Each Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions. . . . 8. In communicating their nationally determined contributions, all Parties shall provide the information necessary for clarity, transparency and understanding in accordance with decision 1/CP.21 and any relevant decisions of the Conference of the Parties serving as the meeting of the Parties to this Agreement. 9. Each Party shall communicate a nationally determined contribution every five years in accordance with decision 1/CP21 and any relevant decisions of the Conference of the Parties serving as the meeting of the Parties to this Agreement and be informed by the outcomes of the global stocktake referred to in Article 14. . . . Nationally determined contributions communicated by Parties shall be recorded in a public registry maintained by the secretariat.")

103. *Id.*

104. *Id.* art. 7(7)(a) ("Parties should strengthen their cooperation on enhancing action on adaptation, taking into account the Cancun Adaptation

cilities through which the accord's implementation can be supervised.[105]

3. *Paris as Politics and Procedure*

From a treaty law perspective, most of the Paris Agreement provisions do not impose binding obligations. Rather, they express broad goals and aspirations of the treaty parties. Grammatically, this feature of the treaty is highlighted by the use of "should," "aim," or "will" as opposed to "shall" in most of its principal provisions.[106] This aspirational nature centrally deprives the agreement to keep global temperature increases well below two degrees Celsius of binding force.[107] Similarly, the Paris Agreement contemplates that NDCs communicated pursuant to the Paris Agreement are not binding but rather constitute non-binding targets.[108]

The literature highlights that the treaty parties intentionally removed binding language from other core parts of the Paris Agreement. As both Harold Koh as well as Daniel Bodansky and Peter Spiro note in two separate articles, the U.S. delegation in particular did so in order to avoid the constitutional question: whether the Paris Agreement would require Senate approval.[109] These core substantive provisions of the Paris Agreement were therefore intentionally kept as political commitments rather than legally binding ones.[110]

Framework, including with regard to: (a) Sharing information, good practices, experiences and lessons learned, including, as appropriate, as these relate to science, planning, policies and implementation in relation to adaptation actions.").

105. *Id.* arts. 16–18.

106. *See id.* arts. 2, 3, 4, 5, 7, 9, 11; s*ee also* DANIEL BODANSKY ET AL., INTERNATIONAL CLIMATE CHANGE LAW 20 (2017) (explaining that mandatory treaty language typically uses the mood 'shall').

107. *See, e.g.*, Paris Agreement, *supra* note 6, art. 2 (introducing the temperature increase maximum with the verb "aims").

108. *See id.* art. 4(2) (defining NDCs as emission targets "it intends to achieve").

109. *See* Bodansky & Spiro, *supra* note 56, at 918 (noting that the Paris Agreement did not impose NDC obligations and as such could fit within the scope of executive agreements); Koh, *supra* note 4, at 350–52; ("Indeed, the most dramatic moment of the Conference came on the final day, when the United States hastened to "correc[t] an error in the text, which had converted a provision intended to be non-binding into a binding obligation, by using the verb 'shall' rather than 'should.'").

110. *See supra* note 109 and accompanying text.

As Harold Koh notes in particular, this political nature of the Paris commitments is sufficient to trigger a process of internalized compliance.[111] Thus, as Koh explains, the "Paris Agreement created a framework within which transnational actors repeatedly interact at an international level in a way that continually spurs the development of emission reduction norms and policies at the domestic level."[112] As Arden Rowell and Josephine van Zeben explain, this creates a psychological loss-aversion pull towards setting a new normative bar and thus sets a new normal for compliance purposes.[113]

Centrally, the literature highlights that the *procedural* parts of the Paris Agreement are binding. This procedural component of the Paris Agreement, the literature explains, provides no impediment to U.S. executive action under U.S. domestic law.[114] Thus, the provisions did not create problems from a U.S. perspective.[115] These procedural provisions require continuous engagement and communication by treaty parties with regard to NDCs, scientific data, and financing facilities for developing countries.[116] Each of the substantive core provisions of the Paris Agreement are therefore covered by the procedural obligations to continue to communicate and engage.[117]

Finally, the literature further highlights that the termination provisions require prolonged participation in the Paris process before exit is permitted. The withdrawal provision states, "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 to the Depositary."[118] Withdrawal by operation of the Paris Agreement then takes effect "upon expiry of one year from the date of receipt by the Depositary of the notification

111. *See* Koh, *supra* note 4, at 361 (discussing the stickiness of the Paris Agreement).

112. *Id.*

113. *See* Rowell & van Zeben, *supra* note 56, at 51–52 (analyzing Paris through loss aversion created by new treaty baselines).

114. *See, e.g.*, Bodansky & Spiro, *supra* note 56, at 918 (discussing the scope of executive authority under U.S. constitutional law).

115. *Id.*

116. Paris Agreement, *supra* note 6, arts. 4, 7, 9, 11, 13; *see* Bridgeman, *supra* note 28 (discussing the procedural provisions in question).

117. Bridgeman, *supra* note 28 (discussing the impact of the procedural provisions).

118. Paris Agreement, *supra* note 6, art. 28(1).

of withdrawal."[119] These withdrawal provisions are similarly mandatory.[120]

In short, the literature argues that a political commitment is a sufficient incentive to secure future compliance.[121] It submits that the political commitment can constrain even a defecting government because its civil society actors would continue to meet the political commitments of the Paris Agreement anyway due to the new expectation set by the Paris Agreement.[122] All that is needed are two elements: first, a procedure by which engagement with the new standard becomes mandatory to achieve this psychological result; second, there must be forced engagement with that process for a sufficient time to habituate civil society to the new status quo.[123] The Paris Agreement makes precisely these two procedural mechanisms a mandatory part of the accord.[124]

B. *The Fragility of Politics*

The case made by the bulk of the literature on the virtues of the structure of the Paris Agreement does not stand uncontested. The flexibility praised by many of the Paris proponents harbors a significant threat: political commitments are highly fragile.[125] The political nature of the core substantive provi-

119. *See id.* art. 28(2).

120. Bridgeman, *supra* note 28.

121. *See, e.g.*, Koh, *supra* note 4, at 361 (discussing political compliance incentives); Rowell & van Zeben, *supra* note 56, at 51–52 (same).

122. *See* Bridgeman, *supra* note 28 (discussing the interplay between the procedural mechanisms of the Paris Agreement and the political motivation to comply with Paris commitments); Bodansky, *supra* note 56, at 316 (same); Bodansky & Spiro, *supra* note 56, at 918 (same); Koh, *supra* note 4, at 351, 361 (same); Rowell & van Zeben, *supra* note 56, at 51–52 (same).

123. Koh, *supra* note 4, at 361.

124. *See* Bridgeman, *supra* note 28 (discussing the interplay between the procedural mechanisms of the Paris Agreement and the political motivation to comply with Paris commitments); Bodansky, *supra* note 56, at 316 (same); Bodansky & Spiro, *supra* note 56, at 918 (same); Koh, *supra* note 4, at 351, 361 (same); Rowell & van Zeben, *supra* note 56, at 51–52 (same).

125. *See* Druzin, *supra* note 56, at 74 ("Yet governments face no consequences if they fall short of their commitments under the agreement. The agreement thus stands enfeebled upon the shaky edifice of verbal commitments and good will. Consensus of this kind is extremely fragile."); Jean Galbraith, *From Treaties to International Commitments: The Changing Landscape of Foreign Relations Law*, 84 U. CHI. L. REV. 1675, 1734 (2017) ("In actuality, the Obama administration was so hemmed in on every front that the Paris

sions therefore renders the Paris Agreement less robust.[126] Paradoxically, the means chosen to overcome the collective action problem in climate change action—flexibility—threatens to undercut the impetus towards collective action.

The fragility of politics poses both a political and a legal risk. From the political perspective, it is far from clear that the procedural mechanisms in the Paris Agreement will in fact have the effect of internalizing emission reduction. This internalization by its terms would occur once parties have participated in positive steps towards reduction and thus would have been habituated to continue the same process in the future.[127] An early exit by a participant in whom others have placed trust has a tendency to undermine this result as the less than stellar early track record under the Kyoto Protocol has amply shown.[128] The political case advocated by Paris champions such as Harold Koh therefore may depend upon the willingness of civil actors other than the federal government to meet U.S. emission targets and thus send the requisite signal of continued compliance to other Paris participants.[129] Such a scenario is not implausible given current state, municipal, and market efforts in the United States.[130] But, it is far from guaranteed.

Agreement amounted to an improbable and brilliant success. The acts of the Trump administration to date suggest that this success may prove to be a fleeting one."); Kemp, *supra* note 24 (discussing ability of the Trump administration to exit the Paris Agreement).

126. *See* Druzin, *supra* note 56, at 74 ("Yet governments face no consequences if they fall short of their commitments under the agreement. The agreement thus stands enfeebled upon the shaky edifice of verbal commitments and good will. Consensus of this kind is extremely fragile."). Kemp, *supra* note 24 (cautioning against a "domino effect" as a result of the U.S. departure from the Paris Agreement).

127. *See* Koh, *supra* note 4, at 363–64 (describing the internalization of international norms).

128. Sunstein, *supra* note 55, at 41 (discussing international Kyoto Protocol compliance after it became clear that the U.S. would not become a member to the Protocol).

129. *See* Koh, *supra* note 4, at 360 (outlining a case for Paris compliance by state and municipal actors).

130. *See* Hiroko Tabuchi & Henry Fountain, *Bucking Trump, These Cities, States and Companies Commit to Paris Accord*, N.Y. TIMES (June 1, 2017), https://www.nytimes.com/2017/06/01/climate/american-cities-climate-standards.html?_r=0.

From the legal perspective, the asserted political nature of the core commitments under the Paris Agreement raises the question: what is the legal harm done to other treaty parties by U.S. non-compliance? The answer suggested by scholars such as Tess Bridgeman would be that the legal harm caused by a U.S. refusal to implement the Paris Agreement, at all, would be the failure to follow the procedural mechanisms outlined in the Paris Agreement and, potentially, failure to abide by the Paris withdrawal mechanism.[131] This answer, however, raises a further question: had it been possible for the United States simply to revise its NDC to nothing, as some of the critics of President Trump's Paris withdrawal argue, what is the harm of not following the Paris Agreement process to do so?[132]

If it is not feasible to formulate a meaningful remedy, it is possible that the question of an early withdrawal becomes moot. Although mootness at international law is a fuzzy concept, it typically denotes that the obligation invoked does not provide the party invoking it with a meaningful remedy.[133] Requesting that the United States sincerely participate in the Paris processes consistent with its current unwillingness to contribute to the goals of the Paris Agreement is metaphysical or pragmatically impossible. It demands a state of mind, sincerity, rather than concrete action; in any event, it would seem impossible to find a more sincere form of rejection of the Paris Agreement than the disdain displayed by President Trump in his June 1, 2017, announcement.[134] In other words, process and politics alone may not be able legally to constrain a state that made the political decision to pursue a carbon-emission intensive economic policy.

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131. *See* Bridgeman, *supra* note 28 (outlining the binding elements of the Paris Agreement in response to President Trump's withdrawal statement).

132. *See id.* (submitting that the U.S. could have complied with the Paris Agreement by lowering its NDC).

133. AMERASINGHE, *supra* note 31, at 227–30 (discussing the concept of mootness in international law).

134. *See* Trump Withdrawal Remarks, *supra* note 19 ("The Paris Agreement handicaps the United States economy in order to win praise from the very foreign capitals and global activists that have long sought to gain wealth at our country's expense. They don't put America first. I do, and I always will. . . . As of today, the United States will cease all implementation of the non-binding Paris Accord.").

C. *From Politics to Reliance*

The emphasis on the politics of the Paris Agreement obscures the core purpose of its adoption. The core intent behind the Paris Agreement was to escape from a tragedy of the commons.[135] A tragedy of the commons classically arises when multiple parties rely upon a limited shared resource, known as a "commons." This commons benefits the use of all parties relying upon it. But, each member will seek to increase their own use and thus risk the collapse of the commons in the process. Garrett Hardin, the author credited with the concept, uses the commons of a grazing pasture as an example.[136] Multiple herdsmen will use the grazing pasture, and each animal they can add to the commons adds to their individual utility. Each will therefore seek to increase their own herd by as many animals as they can afford. This, however, will inevitably lead to the collapse of the pasture through overgrazing, leaving all herdsman worse off.[137]

Many authors describe climate change as a tragedy of the commons.[138] Each country benefits from further industrialization.[139] But, each country's increased industrialization will lead to an increase in greenhouse gas emissions as industriali-

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135. Druzin, *supra* note 56, at 75 (discussing the Paris Agreement from the perspective of the tragedy of the commons).

136. Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1243-4 (1968).

137. *Id.*

138. *See, e.g.*, Devani G. Adams, *Why We Cannot Wait: Transnational Networks As a Viable Solution to Climate Change Policy*, 13 SANTA CLARA J. INT'L L. 307, 324–25 (2015) (describing climate change as a tragedy of the commons); Michele Fink & Sofia Ranchordas, *Sharing and the City*, 49 VAND. J. TRANSNAT'L L. 1299, 1330, n.160 (2016) (same); Blake Hudson & Jonathan Rosenbloom, *Uncommon Approaches to Common Problems: Nested Governance Commons and Climate Change*, 64 HASTINGS L.J. 1273, 1336 (2013) (same); Sarah E. Light, *Precautionary Federalism and the Sharing Economy*, 66 EMORY L.J. 333, 348 (2017) (same); Surabhi Ranganathan, *Global Commons*, 27 EUR. J. INT'L L. 693, 693 (2016) (same); Katharine Trisolini, *All Hands on Deck: Local Governments and the Potential for Bidirectional Climate Change Regulation*, 62 STAN. L. REV. 669, 674 (2010) (same).

139. *See* J. Peter Byrne, *The Cathedral Engulfed: Sea-Level Rise, Property Rights, and Time*, 73 LA. L. REV. 69, 74 (2012) ("Consistent with the hypothesis of anthropogenic climate change, i.e., that human activity significantly contributes to it, the spread of industrialization and increasing emissions of greenhouse gases correlates with an accelerating increase in sea-level rise since this metric was first recorded. A recent study, for example, found an increas-

zation requires energy, and the cheapest way to generate energy is the burning of fossil fuels on a large scale.[140] As each country rationally increases its own productivity, it "overgrazes" the climate by emitting climate-changing gases into the atmosphere. Each country thus risks environmental disaster—and therefore economic hardship—but cannot rationally do anything about it short of collaborative action to increase global utility while reducing the impact of climate change.[141] Thus, climate action requires full global cooperation.[142] Yet, until the core stakeholders, including the United States and China, agree to cooperate, it is in the national interest of all countries to defect from cooperation.[143]

The key goal of the Paris Agreement was to build towards binding commitments through building trust.[144] The reason that the flexible nature of the NDCs was crucial to the building of a broad coalition—as the chief U.S. negotiator of the treaty confirmed—was that this flexibility in effect made all Paris participants second movers.[145] It allowed states to see what commitments others were willing to make before being irrevocably committed themselves. Everybody could thus test the sincerity of all participants to holding the increase of global tempera-

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ing rate of sea-level rise in recent years: from 1950 to 1993 it averaged 1.7 mm/year, while in the period from 1993 to 2009 it averaged 3.3 mm/year.")

140. *See* Hudson & Rosenbloom, *supra* note 138, at 1290 ("Ultimately, commons resources like forests, wetlands, and agricultural lands are subject to traditional commons management mechanisms such as private property and government regulation, yet remain in a tragic plight—with stark implications for climate change")

141. *Id.*

142. Druzin, *supra* note 56, at 7 (discussing the need for cooperation in the climate change to escape the tragedy of the commons).

143. *See* Krisch, *supra* note 2, at 15–16 (explaining that climate change regulation is difficult because of financial, technological, and collective action problems).

144. Paris Agreement, *supra* note 6, art. 13(1) ("In order to build mutual trust and confidence and to promote effective implementation, an enhanced transparency framework for action and support, with built-in flexibility which takes into account Parties' different capacities and builds upon collective experience is hereby established."); William Mauldin & Gabriele Steinhauser, *Trust Poses Challenge for Reaching Paris Climate Accord*, WALL ST. J. (Dec. 6, 2015), https://www.wsj.com/articles/trust-poses-challenge-for-reaching-paris-climate-accord-1449425961 (discussing the importance of trust for the Paris climate negotiations).

145. Stern, *supra* note 86.

ture averages well below two degrees Celsius above pre-industrial levels.[146]

In terms of the well-known game theory problem of the prisoner's dilemma, the negotiation dynamic required all participants to reveal themselves ahead of time.[147] The Paris Agreement allows parties to coordinate by allowing a cooperating party to withdraw in the face of a defecting counter-party.

For this gambit to work, the Paris Agreement crucially must protect reliance. Revealing a provisional choice would be counterproductive if one could merely feign cooperation. Since an indication of cooperation could be feigned and is therefore meaningless, it would still be rational to defect. In other words, the prisoner's dilemma would re-present itself at this later stage of performance of the feigned commitment, as when cooperation is feigned, all parties would defect, a result that would be plainly predictable given the incentive structure. It would thus lead to a breakdown of negotiation dynamics from the outset.[148]

To build trust, the Paris Agreement therefore must protect reasonable reliance interests. It could then create the kind of internalized compliance discussed by Harold Koh from the outset without needing a prior track record of compliance.[149] If parties pledge to cooperate towards the stated global temperature goal, the agreement must be able to make these pledges stick. This "stickiness" originates in the treaty—the treaty provides the mechanism for mutual engagement.[150] Further, treaty law requires performance in good faith, thus

146. *See* Paris Agreement, *supra* note 6, art. 2(1).

147. In a prisoner's dilemma, two suspects are arrested together. One is then separated for interrogation. If both suspects keep silent, they will each receive a prison sentence of one year. If both suspects confess, they will each receive a prison sentence of two years. If one suspect confesses and the other stays silent, the confessing suspect goes free, and the silent suspect will receive a six-year prison sentence. The overall most efficient strategy is cooperation—except that one does not know how the other suspect will act, prompting a rational but inefficient choice to confess to avoid the harshest sentence. Avinash Dixit & Barry Nalebuff, *Prisoner's Dilemma*, *in* CONCISE ENCYCLOPEDIA OF ECONOMICS (David R. Henderson ed., 2d ed. 2008), http://www.econlib.org/library/Enc/PrisonersDilemma.html.

148. *See id.* (outlining the prisoners' dilemma).

149. Koh, *supra* note 4, at 360.

150. *Id.* (discussing the concept of "bureaucratic stickiness" in the context of the Paris Agreement).

prohibiting insincerity in performance or action that would undermine the object of the treaty.[151] The ultimate glue holding together the Paris edifice, however, is not the Paris Agreement; it is the action taken by each state pursuant to the Paris Agreement in reliance upon the action of other states.[152]

In other words, the Paris Agreement creates a transnational network in which national regulators can cooperate and coordinate with each other. This coordination—and thus the real work of the Paris structure—occurs in the context of the action of states undertaken pursuant to the Paris Agreement, rather than the Paris Agreement itself.[153] To fully appreciate the transformative power of the Paris Agreement to constitute a "turning point" for global climate cooperation, one must thus look to the legal significance of these actions.[154]

III. Treaty Actions, Reliance, and Obligation

Appreciation of the "turning point" that is the Paris Agreement structure requires elucidation of one the most under-theorized areas of international law: the law of unilateral declarations made pursuant to a treaty.[155] The canonical statement of sources of international obligation establishes that states have international obligations pursuant to treaties, customary international law, and general principles of law.[156]

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151. Jean Salmon, *Article 26, Pacta Sunt Servanda*, *in* The Vienna Convention on the Law of Treaties: A Commentary 659, 680 (Oliver Corten & Pierre Klein eds., 2011) (discussing the concepts of honesty-in-fact and fidelity of purpose as constitutive components of good faith in the context of the good faith performance of treaty obligations).

152. *See* Stern, *supra* note 86 (discussing the reason for flexible NDCs in the Paris architecture).

153. *See* Rebecca Dowd & Jane McAdam, *International Cooperation and Responsibility Sharing to Combat Climate Change: Lessons for International Refugee Law*, 18 Melb. J. Int'l L. 180, 184–87 (2017) (noting the importance of this coordination for the Paris Agreement framework).

154. *See* Oliver Milman, *Paris Climate Deal a "Turning Point" in Global Warming Fight, Obama Says*, Guardian (Oct. 5, 2016), https://www.theguardian.com/environment/2016/oct/05/obama-paris-climate-deal-ratification.

155. *See id.* (reporting President Obama's description of the the Paris Agreement as a turning point in the fight against climate change).

156. *See* Duncan Hollis, *Why State Consent Still Matters—Non-State Actors, Treaties, and the Changing Sources of International Law*, 23 Berkeley J. Int'l L. 137, 141 (2005) ("Most international lawyers, however, rely on the articulation of sources in Article 38 of the Statute of the International Court of

Consistent with the under-appreciation of the international law of unilateral declarations, this list all but ignores the potential binding force of unilateral actions at international law. This under-appreciation is not warranted by the jurisprudence of the International Court of Justice, which, for example, relied upon unilateral acts in order to find a legal obligation to halt atmospheric nuclear weapons testing in the *Nuclear Tests* cases.[157]

The law of unilateral declarations is uniquely significant for the current phase of Paris implementation: it protects reasonable reliance interests.[158] Premised on the principle of good faith, it is applied particularly when treaties call for voluntary compliance by member states.[159] In this context, it requires a full factual analysis of the circumstances leading up to treaty action taken by a state.[160] It asks whether other treaty parties could or did reasonably rely upon the unilateral action.[161] If faced with such reasonable reliance, the law of unilateral declarations will imply an intent on the part of the declaring state to be bound and give binding force at international law to its unilateral commitment.[162]

Justice—treaties, custom, and recognized general principles—to identify what legal rules to apply in a particular case.").

157. Nuclear Tests Case (Austl. v. Fr.), Judgment, 1974 I.C.J. 253, ¶ 43-46 (Dec. 20) (outlining the obligation of France to halt atmospheric nuclear tests on the premise of a French unilateral act); Nuclear Tests Case (N.Z. v. Fr.), Judgment, 1974 I.C.J. 457, ¶ 46-49 (Dec. 20) (same).

158. *See* David D. Caron, *The Interpretation of National Foreign Investment Laws as Unilateral Acts Under International Law*, *in* LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN 649, 649-674 (Mahnoush H. Arsanjani et al. eds., 2010) (discussing the link between good faith and unilateral acts).

159. *See id.* (discussing jurisdictional undertakings pursuant to consent to jurisdiction of tribunals constituted pursuant to a multilateral treaty).

160. ILC Guiding Principles, *supra* note 34, princ. 3, cmt. 2 (discussing the contextual analysis of needed to determine the binding nature and scope of unilateral acts). The ILC Guiding Principles are the authoritative statement of the customary international law of unilateral acts.

161. *Id.* pmbl. ("*Noting that* behaviours capable of legally binding States may take the form of formal declarations or mere informal conduct including, in certain situations, silence, on which other States may reasonably rely.")

162. *Id.* princ. 1. ("Declarations publicly made and manifesting the will to be bound may have the effect of creating legal obligations. When the conditions for this are met, the binding character of such declarations is based on good faith; States concerned may then take them into consideration AND

The law of unilateral action can best explain how and when action pursuant to the Paris Agreement becomes, to use Harold Koh's terminology, "sticky."[163] As this part will submit, the actions taken by the United States pursuant to the Paris Agreement purposefully invited reliance by other Paris parties. Other states then did in fact rely upon that action in making their own climate pledges. Because of this reliance, the United States is now bound in good faith to follow through on its core commitments as a matter of the international law of unilateral acts. Mapping international law over the prisoner's dilemma introduced as a tool to analyze the Paris structure at the end of the last section, the international legal principle of good faith requires that, once the United States reliably communicated its intent to cooperate with the Paris Agreement goals, it is precluded from defecting once reliance has occurred. As the next part will explain, this preclusion operates for the term of the withdrawal period stipulated in the Paris Agreement.

A. *The Law of Unilateral Declarations Pursuant to a Treaty*

There are three relevant components to the law of unilateral declarations for the purpose of understanding the legal significance of U.S. action pursuant to the Paris Agreement.

RELY ON THEM; SUCH STATES ARE ENTITLED TO REQUIRE THAT SUCH OBLIGATIONS BE RESPECTED.") (emphasis added). *See also id.* princ. 10(ii) (considering "the extent to which those to whom the obligations are owed have relied on such obligations" in determining whether a unilateral act may be withdrawn).

163. Koh, *supra* note 4, at 360-1 ("The Paris Agreement created a framework within which transnational actors repeatedly interact at an international level in a way that continually spurs the development of emission reduction norms and policies at the domestic level. These norms operate not just in federal, but also in mutually reinforcing state, local and private initiatives. I long ago described a pervasive phenomenon in international affairs that I call 'transnational legal process,' which holds that international law is primarily enforced not by coercion, but by a process *of internalized compliance*. Nations tend to obey international law because their government bureaucracies adopt standard operating procedures and other internal mechanisms that foster default patterns of habitual compliance with agreed upon norms. That 'bureaucratic stickiness' will create default resistance to disruption that the new Administration will have to negotiate in every policy area, mindful of its weak coalition, minority electoral support, and limited political capital. If the President-Elect tries to change course too sharply, he will encounter deep resistance and may be forced to moderate his positions in order to preserve scarce political capital.").

First, there are common principles governing all unilateral declarations. Part III.A.1 briefly outlines the international law of general unilateral acts, paying attention to the key features that make unilateral acts binding at international law and how such acts should then be construed. Second, unilateral acts made pursuant to treaties are given favorable treatment at international law. Part III.A.2 addresses how the making of a unilateral act pursuant to a treaty differs from general unilateral acts. Finally, these treaty declarations must be placed in the context of the obligation to perform the treaty pursuant to which the declarations were made in good faith. Part III.A.3 explains the relationship between good faith in the law of treaties and the law of unilateral declarations.

1. *Unilateral Declarations in General*

International diplomacy is driven by unilateral statements made in order to achieve foreign policy goals. The vast majority of these diplomatic statements do not impose any obligations on the state engaging in the diplomatic exchanges. This is true even in the context of statements made by heads of state—otherwise, every press conference during a state visit would be filled to the rafters with lawyers. Consequently, *binding* unilateral declarations are the rare exception.

Some statements are, on their face, different. These statements do not engage in the give and take of diplomatic negotiations. They evidence an intention by the state to bind itself. For instance, in a televised address, the King of Jordan on July 31, 1988, "declared that Jordan was dismantling its 'legal and administrative' links with the West Bank."[164] Similarly, in an official declaration, Egypt on April 24, 1957, "promised to respect the terms and spirit of the 1888 Convention respecting the Free Navigation of the Suez Maritime Canal and the rights and obligations arising therefrom."[165] These statements, on their face, are qualitatively different from ordinary diplomatic exchanges and are examples cited by the International Law Commission (ILC) as binding unilateral acts by Jordan ceding

164. Víctor Rodríguez Cedeño (Special Rapporteur), *Eighth Rep. on Unilateral Acts of States*, ¶ 44, U.N. Doc. A/CN.4/557 (May 26, 2005).

165. *Id.* ¶ 56; *see also id.* ¶¶ 57–62 (describing further the declaration and its context).

the West Bank and by Egypt permitting navigation of the then recently nationalized Suez Canal.[166]

As a general rule, only certain state officials can make binding unilateral declarations. The ILC notes that the head of state can bind the state.[167] Similarly, the head of government and minister of foreign affairs is empowered to do so.[168] Importantly, for contemporary diplomatic exchanges, cabinet ministers in principle are also able to bind the state within the purview of the portfolio.[169] This is particularly the case when the minister has technical expertise with regard to the portfolio in question, thus suggesting that the head of an environmental ministry, such as the administrator of the U.S. Environmental Protection Agency (EPA), may have the ability to make a binding unilateral declaration under some circumstances.[170] The ILC is express that statements by a head of state or foreign minister that otherwise meet the criteria of a binding unilateral declaration do not lose their binding character because he or she lacked constitutional authority to make the promise in question.[171]

Whether a statement constitutes a binding unilateral declaration is determined after a full appreciation of the circumstances in which it was made.[172] The ILC's Guiding Principle 3 states, "To determine the legal effects of such declarations, it is necessary to take account of their content, of all the factual circumstances in which they were made, and of the reactions to which they gave rise."[173] While the text of the declaration is still significant, a premium is placed on broader contextual factors that would not be taken into account in the context of treaty interpretation.[174] The ILC noted, for instance, that Swiss

166. ILC Guiding Principles, *supra* note 34, princ. 1, cmt. 2.
167. *Id.* princ. 4, cmt. 1.
168. *Id.*
169. *Id.* princ. 4, cmt. 3.
170. *See* Case Concerning Armed Activities on the Territory of the Congo (New Application) (Dem. Rep. Congo v. Rwanda), Judgment, 2006 I.C.J. Rep. 6, ¶¶ 45–49 (Feb. 3) (discussing statements made by a minister of justice with regard to human rights protections).
171. Rodríguez Cedeño, *supra* note 164, ¶ 53 (discussing the distinction between the question of constitutionality in domestic law and the binding nature of an act at international law in capacity as ILC Special Rapporteur).
172. ILC Guiding Principles, *supra* note 34, princ. 3.
173. *Id.*
174. *Id.* princ. 3, cmt. 3.

statements made in the context of seeking out the United Nations as a potential organization to open offices in Switzerland had to be read in the context of earlier Swiss statements made to attract international organizations to open headquarters in Switzerland.[175]

State conduct must be viewed cumulatively, meaning that a binding obligation can arise even if no single statement on its own would lead to that conclusion.[176] The ICJ's analysis of statements made by France in diplomatic communiqués and on television in order to establish that France had committed itself to halting atmospheric testing of nuclear weapons is one such illustrative example of a cumulative assessment in jurisprudence.[177] The ILC also pointed to continued Swiss statements relating to privileges to be granted to U.N. workers as another example.[178] Special Rapporteur Victor Rodríguez concluded that the Swiss example was a further instance of "a series of acts or statements that formed a single unilateral act."[179]

The fundamental question in establishing whether a declaration is binding is whether there has been reasonable reliance on that declaration. Reasonable reliance can be established subjectively.[180] The ILC, in its commentary, noted the "importance of the reactions of other States concerned in evaluating the legal scope of the unilateral acts in question, whether those States take cognizance of commitments undertaken (or, in some cases, rights asserted), or, on the contrary, object to or challenge the binding nature of the 'commitments' at issue."[181]

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175. Rodríguez Cedeño, *supra* note 164, ¶¶ 150–56.

176. *See* ILC Guiding Principles, *supra* note 34, princ. 3 ("To determine the legal effects of such declarations, it is necessary to take account of their content, of all the factual circumstances in which they were made, and of the reactions to which they gave rise.").

177. Nuclear Tests Case (N.Z. v. Fr.), 1974 I.C.J. Rep. 457, ¶¶ 37–47 (Dec. 20).

178. Rodríguez Cedeño, *supra* note 164, at ¶¶ 144–50.

179. *Id.* ¶ 151.

180. ILC Guiding Principles, *supra* note 34, princ. 3 ("To determine the legal effects of such declarations, it is necessary to take account of their content, of all the factual circumstances in which they were made, AND OF THE REACTIONS TO WHICH THEY GAVE RISE.") (emphasis added).

181. *Id.* princ. 3, cmt. 2.

ILC Special Rapporteur Victor Rodríguez cited the continued use of the Suez Canal by members of the Suez Canal Users Association as relevant evidence of reliance, indicating the existence of a binding unilateral declaration by Egypt with regard to rights to navigation in the Canal discussed above.[182] Similarly, the recognition of Palestinian sovereignty over the West Bank, following Jordan's declaration purporting to sever ties, was significant reliance on Jordan's declaration, giving it legal force even over the objection of two permanent U.N. Security Council members, the United States and France, that issues of sovereignty could not be resolved by means of unilateral declaration.[183] In another example, diplomatic correspondence by Venezuela, accepting an acknowledgment of sovereignty received by way of diplomatic exchange from Colombia, was reliance by Venezuela relevant to establish the binding nature of Colombia's actions.[184]

Reasonable reliance can also be established objectively in the absence of actual subjective reliance.[185] This is evidenced in the *Nuclear Tests* cases.[186] In *Nuclear Tests*, France did not submit that it had made a unilateral declaration.[187] Similarly, neither New Zealand nor Australia relied upon the statements made by France.[188] There was thus no subjective reliance.[189] Instead, the Court noted that a finding of objective reliance was appropriate in light of the French conduct because a reasonable state in New Zealand or Australia's position would have relied upon the declaration.[190] This objective reliance

182. Rodríguez Cedeño, *supra* note 164, ¶ 63.

183. *Id.* ¶¶ 50–51.

184. *Id.* ¶ 17.

185. *See* Daniel Davison-Vecchione, *Beyond the Forms of Faith: Pacta Sunt Servanda and Loyalty*, 16 GER. L.J. 1163, 1167–68 (2015) (discussing that unilateral acts do not require actual reliance and are anchored in good faith).

186. Nuclear Tests Case (Austl. v. Fr.), Judgment 1974 I.C.J. Rep. 253 (Dec. 20); Nuclear Tests Case (N.Z. v. Fr.), Judgment, 1974 I.C.J. Rep. 457 (Dec. 20).

187. *See* Brigitte Bollecker-Stern, *L'Affaire des Essais Nucléaires Francäis Devant la Cour Internationale de Justice* [*The French Nuclear Test Case Before the International Court of Justice*], 20 ANN. FR. DR. INT'L 299 (1974) (discussing the French reception of the case).

188. MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA 350–54 (2005).

189. *Id.*

190. *See* THOMAS M. FRANCK, FAIRNESS IN THE INTERNATIONAL LEGAL AND INSTITUTIONAL SYSTEM: GENERAL COURSE ON PUBLIC INTERNATIONAL LAW 67 (1993) (discussing the *Nuclear Tests Cases*).

sufficed for the Court to establish that France was bound by its declaration not to conduct further atmospheric nuclear tests.[191]

2. *The Special Nature of Treaty Declarations*

The law of unilateral declarations distinguishes between free-standing declarations and declarations made pursuant to treaties.[192] This distinction originates in case law.[193] It was not included in the ILC Guiding Principles, though the distinction has been confirmed in jurisprudence since the release of the ILC Guiding Principles.[194]

Consistent with the exceptional nature of binding unilateral declarations, the ILC Guiding Principles provide for the restrictive interpretation of free-standing acts.[195] This view is consistent with the presumption that states intend to incur only the narrowest of constraints when assuming new obligations (i.e., *in dubio mitius*).[196] This presumption is at its most intuitive when states incur obligations unilaterally without re-

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191. Nuclear Tests Case (N.Z. v. Fr.), Judgment, 1974 I.C.J. Rep. 457, ¶¶ 37–44 (Dec. 20).

192. *See* PATRICK DAILLIER & ALAIN PELLET, DROIT INTERNATIONAL PUBLIC 361–64 (7th ed. 2002) (outlining the law of unilateral acts as falling into both categories).

193. *Anglo-Iranian Oil Co.* (U.K. v. Iran), Preliminary Objection, 1952 I.C.J. 93 (July 2) *Fisheries Jurisdiction Case* (Spain v. Can.), 1998 I.C.J. 432 (Dec. 4). For a discussion of this jurisprudence, see Michael D. Nolan & Frederic G. Sourgens, *Limits of Consent, Arbitration Without Privity and Beyond*, *in* LIBER AMICORUM BERNARDO CREMADES 873, 873-911 (M. Á. Fernández-Ballesteros & David Arias eds., 2010).

194. *See* CEMEX Caracas Invs. B.V. v. Bolivarian Republic of Venez., ICSID Case No. ARB/08/15, Decision on Jurisdiction, ¶¶ 90–139 (Dec. 30, 2010), https://www.italaw.com/sites/default/files/case-documents/ita0142.pdf (distinguishing between unilateral acts made pursuant to treaties and free-standing unilateral acts); Mobil Corp., Venez. Holdings, B.V. v. Bolivarian Republic of Venez., ICSID Case No. ARB/07/27, Decision on Jurisdiction, ¶¶ 87, 90 (June 10, 2010), https://www.italaw.com/documents/MobilvVenezuelaJurisdiction.pdf (distinguishing between unilateral acts made pursuant to treaties and freestanding unilateral acts). Judge Gilbert Guillaume, a former President of the International Court of Justice, sat as arbitrator in both proceedings.

195. ILC Guiding Principles, *supra* note 34, princ. 7.

196. Hans Peter Kunz-Hallstein, *The United States Proposal for a GATT Agreement on Intellectual Property and the Paris Convention*, 22 VAND. J. TRANSNAT'L L. 265, 275–77 (1989) (discussing the canon of *in dubio mitius*).

ceipt of bargained-for benefits and under no other legal constraint.[197]

In the treaty context, unilateral declarations operate differently.[198] They are an extension of the underlying treaty bargain struck by the declaring state. The obligation incurred in this way is not properly free-standing. Rather, it forms part of the larger web of treaty action by the treaty parties, though each action on its own is not independently bargained-for. Consequently, restrictive interpretation of unilateral declarations made in the treaty context is far less appropriate. A rich jurisprudence by both the ICJ and arbitral tribunals therefore have rejected a restrictive approach when interpreting unilateral declarations made in this context.[199]

3. *The Relationship Between Treaty Declarations and* Pacta Sunt Servanda

Unilateral declarations made pursuant to a treaty naturally interact with treaty obligations proper. On the one hand, it is necessary to determine whether good faith requires that a unilateral declaration made pursuant to a treaty has independent binding force.[200] On the other hand, it must be ascertained whether new unilateral conduct is consistent with the obligation to perform the treaty pursuant to which it is made in good faith.[201]

Centrally, the requirement that treaties be performed in good faith demands that treaty parties must act with honesty-

197. ILC Guiding Principles, *supra* note 34, princ. 7, cmt. 2.

198. *See* CEMEX Caracas Invs. B.V. v. Bolivarian Republic of Venez., ICSID Case No. ARB/08/15, Decision on Jurisdiction, ¶¶ 90–139 (Dec. 30, 2010), https://www.italaw.com/sites/default/files/case-documents/ita0142.pdf (outlining how unilateral acts made pursuant to treaty are to be interpreted); Mobil Corp., Venez. Holdings, B.V. v. Bolivarian Republic of Venez., ICSID Case No. ARB/07/27, Decision on Jurisdiction, ¶¶ 87, 90 (June 10, 2010), https://www.italaw.com/documents/MobilvVenezuelaJurisdiction.pdf (same).

199. *See* Michael D. Nolan & Frédéric G. Sourgens, *Limits of Consent, Arbitration Without Privity and Beyond*, *in* LIBER AMICORUM BERNARDO CREMADES 873, 879-890 (Miguel A. Fernández-Ballesteros & David Arias eds., 2010) (discussing the jurisprudence of the International Court of Justice).

200. *See* Part III.A.2 (discussing this process).

201. *See* Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 [hereinafter VCLT] (codifying the obligation to perform treaties in good faith).

in-fact.[202] Treaty parties further are constrained by good faith not to act in a manner that complies only with the letter of the treaty if their conduct is inconsistent with the treaty's intent.[203] Finally, treaty parties must at all times avoid acting in a manner that would undermine the treaty's object and purpose.[204]

Thus, treaty compliance may further limit unilateral conduct. New action pursuant to a treaty must be consistent with the overall obligations to act in good faith.[205] This may well limit the scope of permissible treaty action, as future action must be honest in fact, consistent with the spirit of the treaty, and broadly consistent with the treaty's purpose.[206] It causes particular constraints if a party has already begun to perform. In that instance, earlier conduct presents state practice consistent with a specific understanding of facts and legal obligation. The justification for later departure from continued performance in a certain manner will need to overcome this course of performance. At the very least, a state will have to refrain from acting in a manner that is facially contradictory to its prior actions under the treaty.[207] This obligation under the treaty may thus bolster the reliance interests of treaty parties even if the underlying action by another treaty state is not a binding unilateral act.

In that case, it is important to note that the obligation is a negative one. The state may not act in a manner that would undermine the treaty or radically depart from past conduct without a valid reason.[208] This leaves significant margin for action to treaty parties. It does not, however, provide unlimited discretion that would undermine reliance interests entirely.

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202. *See* Andrew Mitchell, *Good Faith in WTO Dispute Settlement*, 7 MELBOURNE J. INT'L L. 339, 339 (2006) (defining good faith by reference to honesty of purpose).

203. Salmon, *supra* note 151, at 679 (discussing the concepts of honesty-in-fact and fidelity of purpose as constitutive components of good faith in the context of the good faith performance of treaty obligations).

204. VCLT, *supra* note 201, art. 26; Salmon, *supra* note 151, at 680.

205. VCLT, *supra* note 201, art. 26.

206. *See* VCLT, *supra* note 201, art. 26; Mitchell, *supra* note 202, at 339; Salmon, *supra* note 151, at 679–80.

207. Salmon, *supra* note 151, at 674 (discussing the links between good faith and prior treaty conduct).

208. VCLT, *supra* note 201, art. 26 (codifying good faith obligations under treaty law); Mitchell, *supra* note 202, at 339 (commenting on Article 26 of the VCLT); Salmon, *supra* note 151, at 679-80 (same).

B. *Politics vs. Reliance*

The discussion so far highlights the danger posed by the current literature on the Paris Agreement. The current literature casts many of the substantive portions of the accord as political in nature.[209] This characterization would suggest that the intent behind the substantive portions of the Paris Agreement, the NDCs, was the attainment of some foreign policy end.[210] The Agreement would, in the end, not overcome the fragility of politics until all parties agreed that climate change mitigation made for good policy *and* good domestic politics.[211] President Trump's disagreement would be an annoyance to the rest of the world but little more than "politics as usual."[212] The reaction to the Trump administration's announcement has shown that this is not the case—and thus highlighted an intuitive flaw in the predominant discussion of the Paris Agreement.[213]

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209. *See* Bodansky & Spiro, *supra* note 56, at 918 ("Moreover, this objection to presidential acceptance of the Paris Agreement is particularly inapposite, since the agreement expressly allows parties to withdraw by giving one year's notice, thereby allowing future presidents to withdraw from obligations that they do not wish to fulfill"); Koh, *supra* note 4, at 351 ("These steps led to the 2015 Paris Conference, where the parties achieved an historic accord not by entering a binding legal agreement but, rather, by doing the opposite.").

210. *See* Bodansky & Spiro, *supra* note 56, at 918 ("Since submitting reports and participating in international review are within the president's core foreign affairs power to communicate with other governments, it is a comparatively small step to say that the president may enter into international agreements providing for such communications.").

211. *Id.* at 291 ("States will have an incentive to carry out their NDCs because, if they don't, everyone will know, subjecting them to peer and public pressure.").

212. *Id.* ("Whether the Paris Agreement reflects true political convergence or a papering over of differences should become apparent in the course of these negotiations. As always, the devil is in the details. But what kind of devil will it prove to be? Will the next phase of the negotiations be a comparatively technical process, elaborating the political deal in Paris, or will it be as political and contentious as ever?")

213. *France, Italy, Germany Defend Paris Accord and Say It Cannot Be Renegotiated*, REUTERS (June 1, 2017) [hereinafter *European Response*], http://www.telegraph.co.uk/news/2017/06/01/france-italy-germany-defend-paris-accord-say-cannot-renegotiated/ ("We deem the momentum generated in Paris in December 2015 irreversible and we firmly believe that the Paris Agreement cannot be renegotiated since it is a vital instrument for our planet, societies and economies.").

The discussion so far has highlighted that an alternative conception is possible. A treaty framework may invite future unilateral action in order to foster reliance interests. Such unilateral action taken pursuant to the treaty may then create and legally protect different levels of reliance. Some actions may truly invite little to no reliance on the part of third parties, for instance, by merely reporting factual information. But unilateral action can create some reliance interests under the framework treaty itself by providing a guidepost constraining future action under the treaty if the unilateral action gives rise to an estoppel.[214] Finally, unilateral action can create robust reliance interests in the form of a legally binding unilateral declaration made pursuant to the treaty.[215]

The object and purpose of the Paris Agreement is to set up a framework to foster future reliance through treaty action by the Paris parties. Treaty interpretation looks to the preamble of a treaty in order to determine the object and purpose of a treaty.[216] The first two preambles define the place of the Paris Agreement in the context of earlier climate change treaties.[217] The third preamble—the first to address the object and purpose of the Paris Agreement outright—"[r]ecogniz[es] the need for an effective and progressive response to the urgent threat of climate change on the basis of the best available scientific knowledge."[218] Later preambles "[a]cknowledg[e] that climate change is a common concern of humankind."[219]

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214. Salmon, *supra* note 151, at 674 (discussing the principle of non-contradiction).

215. *See* DAILLIER & PELLET, *supra* note 192, at 361–64 (discussing the distinction between autonomous and treaty based unilateral acts).

216. *See* Laurence Boisson de Chazournes et al., *Treaty Interpretation*, *in* THE VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY, *supra* note 151, at 388 (explaining the canons of treaty interpretation). The Paris Agreement for international law purposes is a "treaty" even if its status as a matter of foreign relations law remains contested (e.g., is it a treaty, sole executive agreement, Congressional executive agreement etc.). *See* Bodansky, *supra* note 56, at 296 ("[T]here appears to be no disagreement among states that the Paris Agreement is a treaty within the meaning of international law."). The current discussion focuses on the international legal implications of the Paris Agreement, not the domestic law implications of the Paris Agreement for the United States. I outline these U.S. implications, as well as their constitutionality in Sourgens, *supra* note 1.

217. Paris Agreement, *supra* note 6, pmbl.

218. *Id.*

219. *Id.*

Treaty interpretation then confirms the object and purpose of the treaty with the operative provisions of the treaty.[220] Relevantly, Article 4(4) states, "Each Party's successive nationally determined contribution will represent A PROGRESSION beyond the Party's then current nationally determined contribution and reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances."[221] The language in Article 4(4) expressly references the first substantive preamble on joint, effective, and progressive action.[222] Both preamble and treaty structure thus confirm that the object and purpose of the Paris Agreement is to build towards effective action through mutually reinforcing reliance by the Paris parties, not political communication or information exchange.

This framework flies in the face of the characterization in the literature that future action pursuant to the treaty would be predominantly political or substantively non-binding.[223] The reason for this disconnect is the foreign relations law of the United States, which would require that the Paris Agreement not impose new substantive obligations in order to permit the President to enter into it without Senate approval.[224] This focus on the foreign relations law has tended to obscure the international legal obligations flowing from action under the Paris Agreement. As a matter of domestic U.S. law, the exercise of foreign relations powers by the President is of course

220. Boisson de Chazournes, *supra* note 216, at 388 (explaining the role of object and purpose in treaty interpretation).

221. Paris Agreement, *supra* note 6, art. 4(4); *see* Bodansky, *supra* note 56, at 306 ("The Paris Agreement also establishes a comparatively strong ratchet-up mechanism, to promote progressively stronger NDCs over time. This was viewed as crucial by many states, since the NDCs submitted in the run-up to Paris were acknowledged to be insufficient.").

222. Paris Agreement, *supra* note 6, pmbl.

223. *See* Bodansky & Spiro, *supra* note 56, at 918 (noting ability of executive to exit the Paris Agreement within one year as evidence of political commitment); Bodansky, *supra* note 56, at 291 (discussing political pressure to implement NDCs); Koh, *supra* note 4, at 350-51 (noting the intentionally non-binding nature of core NDC-related provisions).

224. *See* Bodansky & Spiro, *supra* note 56, at 918 (discussing the Paris Agreement in the context of U.S. foreign relations law); Koh, *supra* note 4, at 350–51 (discussing the same).

political.[225] The effects of its exercise on the international plane, in this case, plainly are and were intended to be legal in nature.

C. *Significance of U.S. Action Pursuant to the Paris Agreement*

As discussed in this part, the United States' past actions pursuant to the Paris Agreement impose substantive international obligations upon the United States. For purposes of analysis, this part will address three topics of U.S. action separately: (1) the NDC submitted by the United States together with its ratification of the Paris Agreement on September 3, 2016; (2) additional conduct by the United States regarding the Clean Power Plan; and (3) additional conduct by the United States regarding methane emission reduction. As discussed at the end of this part, these actions must be viewed together as a single unilateral declaration akin to the conduct of France in the *Nuclear Tests* case or of Switzerland in the context of its statements to the United Nations discussed in Part III.A.1 above. This section concludes by noting that any action taken by the United States pursuant to the Paris Agreement at a minimum requires it: (a) to meet or exceed its projected emissions reductions that would be achieved under the Clean Power Plan; (b) to attain reasonable methane emission reductions measured against the commitment to reduce oil and gas production-related methane emissions by at least forty percent; and (c) to continue participation in the NDC process not arbitrarily inconsistent with the path already taken by the United States.

1. *The Paris Contribution Pledge*

The United States submitted its Intended National Determined Commitment on March 9, 2016, which became the first NDC (USNDC) upon acceptance of the Paris Agreement by the United States.[226] The USNDC states, "The United States intends to achieve an economy-wide target of reducing its greenhouse gas emissions by 26%-28% below its 2005 level in 2025 and to make best efforts to reduce its emissions by

225. David H. Moore, *Beyond One Voice*, 98 MINN. L. REV. 953, 977 (2014) (noting the political components of executive foreign policy powers).

226. *USNDC, supra* note 39.

28%."[227] It further lists regulatory measures already undertaken by the United States, which are taken into account in the calculation of the emissions targets, including vehicle emissions and power plant emissions rules.[228]

The USNDC notes that existing action "place us on a path to achieve the 2020 target of reducing emissions in the range of 17 percent below the 2005 level in 2020."[229] However, the USNDC makes clear that "[a]dditional action to achieve the 2025 target represents a substantial acceleration of the current pace of greenhouse gas emission reductions."[230] The USNDC treats as "completed" the following regulatory actions for purposes of calculating the 2020 targets:

> - . . . fuel economy standards for light-duty vehicles for model years 2012-2025 and for heavy-duty vehicles for model years 2014-2018.
>
> - . . . multiple measures addressing buildings sector emissions including energy conservation standards for 29 categories of appliances and equipment as well as a building code determination for commercial buildings.
>
> - . . . the use of specific alternatives to high-GWP HFCs in certain applications through the Significant New Alternatives Policy program.[231]

The USNDC further lists "proposed regulations" as part of its contemplated means for achieving the NDC target.[232] One "proposed regulation" is the Clean Power Plan discussed below.[233] Other proposed regulations listed in the USNDC include "fuel economy standards for heavy-duty vehicles," "standards to address methane emissions from landfills and the oil and gas sector," "[reduction of] the use and emissions of high-GWP HFCs through the Significant New Alternatives Policy program," and "[reduction of] buildings sector emissions including by promulgating energy conservation standards for a

227. *Id.* at 3.
228. *Id.* at 4-5.
229. *Id.* at 1.
230. *Id.*
231. *Id.* at 4–5.
232. *Id.*
233. *Id.* at 5.

broad range of appliances and equipment, as well as a building code determination for residential buildings."[234]

2. *The Clean Power Plan*

The Clean Power Plan is a core component of the United States' plan to meet its NDC goals not included as a "completed" regulation in its first NDC.[235] The Clean Power Plan is a regulation adopted by the EPA pursuant to the Clean Air Act after notice and comment rulemaking in August 2015.[236] It has three components: "(1) increasing the operational efficiency of coal-fired power plants; (2) shifting electricity generation from higher emitting fossil fuel-fired power plants (usually coal-fired plants) to lower-emitting, natural gas-fired plants; and (3) increasing electricity generation from renewable sources of energy like wind and solar."[237]

Although the Clean Power Plan was not included as a "completed" regulation in the USNDC, the initial U.S. report submitted pursuant to the Paris Agreement updates the USNDC in this regard.[238] The update explains that "[t]he Current Measures scenario" communicated in the report "incorporates policies and measures that were finalized by mid-2015, including the Clean Power Plan, light-duty vehicle fuel efficiency standards, and consumer appliance efficiency standards."[239] Commentary considers the Clean Power Plan vital

234. *Id.*

235. *Id.*

236. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015) ("*Clean Power Plan*") (to be codified at 40 C.F.R. pt. 60); Daniel Selmi, *Federal Implementation Plans and the Path to Clean Power*, 28 GEO. ENVTL. L. REV. 637, 646 (2016) (discussing promulgation of same). For a full discussion of the Clean Power Plan and its relationship to the Paris Agreement under U.S. law, see Frédéric G. Sourgens, *The Paris Paradigm*, 2019 U. ILL. L. REV. ___ (forthcoming 2019).

237. Selmi, supra note 236, at 646 (discussing the key features of the Clean Power Plan).

238. WHITE HOUSE, UNITED STATES MID-CENTURY STRATEGY FOR DEEP DECARBONIZATION 27 (2016) [hereinafter U.S. MID-CENTURY STRATEGY], https://unfccc.int/files/focus/long-term_strategies/application/pdf/mid_century_strategy_report-final_red.pdf.

239. *Id* (footnote omitted). In a footnote, the document adds that "Implementation of the Clean Power Plan has been stayed by the U.S. Supreme Court during the pendency of a set of legal challenges. The Obama Adminis-

for the United States to achieve its targeted emissions reductions in the USNDC.[240]

The centrality of the Clean Power Plan in the USNDC suggests a review of additional remarks by the U.S. President to ascertain whether the United States intended to commit itself to the international community. Then-President Obama expressly referenced international climate change commitments when he announced the final regulation.[241] He further noted that he "committed the United States" to its regulatory goals.[242]

The Clean Power Plan immediately became part of U.S. diplomatic exchanges. Highlighting the global nature of the Clean Power Plan, Secretary of State, John Kerry, issued a statement that the plan was means to "meet[ ] our international pledges by taking action to cut down on greenhouse gas pollution from the largest sources and delivering on our responsibility to ensure a safer, healthier planet for future generations."[243] Secretary Kerry described the Clean Power Plan as "final."[244] The Clean Power Plan was a core part of U.S. State Department statements concerning U.S. efforts to address climate change.[245] U.S. Paris Agreement negotiators continued

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tration is confident that the Plan will be upheld by the courts as it is based on a strong legal and technical foundation." *Id.* n.5.

240. *See* Press Release, Grantham Research Inst. on Climate Change and the Env't, London Sch. of Econ, Killing Clean Power Plan Will Make It 'Virtually Impossible' for US to Meet Paris Agreement Pledges (Mar. 28, 2017), http://www.lse.ac.uk/GranthamInstitute/news/killing-clean-power-plan-will-make-it-virtually-impossible-for-us-to-meet-paris-agreement-pledges/ ("[W]ithout the Clean Power Plan annual emissions of greenhouse gases from the United States will not decline any further."); *see also* Chris Mooney, *The U.S. Is on Course to Miss Its Emission Goals*, WASH. POST (Sept. 26, 2016), https://www.washingtonpost.com/news/energy-environment/wp/2016/09/26/the-u-s-is-on-course-to-miss-its-emissions-goals-and-one-reason-is-methane/?utm_term=.6]ef004989c0.

241. Remarks Announcing the Environmental Protection Agency's Clean Power Plan, 2015 DAILY COMP. PRES. DOC. 546 (Aug. 3, 2015).

242. *Id.*

243. Press Release, John Kerry, U.S. Sec'y of State, Remarks Regarding the Clean Power Plan (Aug. 3, 2015), https://2009-2017.state.gov/secretary/remarks/2015/08/245629.htm.

244. *Id.*

245. Press Release, Robert Dunningham, U.S. Dept. of State, Remarks at the Inter-American Dialogue (Mar. 15, 2016), https://2009-2017.state.gov/e/enr/rls/255390.htm.

this line of argument into the Paris negotiations by expressing to other states that "[t]he President's not going to accept" any Congressional interference with the Clean Power Plan, highlighting that "Clean Power Plan rule is going to go forward."[246]

President Trump has since announced his intention to dismantle the Clean Power Plan and the EPA has taken action to that effect.[247] The EPA has announced the commencement of the process for revision of the Clean Power Plan and would then in all likelihood seek to abandon it after proper administrative procedures.[248] Further, the current budget does not include funding for the Clean Power Plan.[249]

3. *Methane Emissions*

Action with regard to methane emissions is a further core component of the United States' plan to meet its NDC goals not included as a "completed" regulation in the USNDC.[250] Again, the methane emission plan is taken up in the first U.S. report pursuant to the Paris Agreement. It states:

> President Obama announced in March 2016 that the United States would complete a mid-century low greenhouse gas emissions strategy and submit it to the UNFCCC secretariat before the end of the year. Following that announcement, the President directed an interagency group led by the White House to assist with the development of the U.S. MCS [Mid-Century Strategy].[251]

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246. Press Availability, Todd Stern, U.S. Dept. of State, COP21 Press Availability with Special Envoy Todd Stern (Dec. 2, 2015), https://2009-2017.state.gov/s/climate/releases/2015/250305.htm.

247. Philip A. Wallach, *The Clean Power Plan 2014-2017*, PLANETPOLICY (Mar. 30, 2017), https://www.brookings.edu/blog/planetpolicy/2017/03/30/the-clean-power-plan-2014-2017-2/; 82 F.R. 16329 (Apr. 4, 2017) (publication of notice of review by EPA to revise or repeal the Clean Power Plan).

248. *Id.*

249. Chris Mooney, *Trump's Budget Would Torpedo Obama's Investment in Climate Change and Clean Energy,* WASH. POST (Mar. 16, 2017), https://www.washingtonpost.com/news/energy-environment/wp/2017/03/16/trumps-budget-would-torpedo-obamas-investments-in-climate-change-and-clean-energy/?utm_term=.0b10e3132462.

250. *USNDC*, *supra* note 39, at 5.

251. U.S. MID-CENTURY STRATEGY, *supra* note 238, at 23.

The March 2016 efforts by the United States included a joint effort and statement between the United States and Canada.[252] That statement expressly notes that the effort announced in the statement constitutes joint implementation of the Paris Agreement by both governments. The statement was released by the White House on behalf of then-President Obama.[253] It provided that the United States "commit[s] to work together to support robust implementation of the carbon markets-related provisions of the Paris Agreement," "commit[s] to take action to reduce methane emissions from the oil and gas sector," and "commit[s] to reduce methane emissions by 40-45 percent below 2012 levels by 2025 from the oil and gas sector."[254]

Shortly after issuance of the joint statement, the EPA issued standards to reduce methane emissions from the oil and gas sector.[255] In addition, the U.S. Department of the Interior, in November 2016, finalized regulations aimed at reducing methane emissions from hydrocarbon wells.[256] These regulatory actions are broadly consistent with the commitment made by the United States in its joint statement with Canada.[257]

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252. Joint Statement by President Obama and Prime Minister Justin P.J. Trudeau of Canada on Climate, Energy, and Arctic Leadership, 2016 DAILY COMP. PRES. DOC. 136 (Mar. 10, 2016) [hereinafter Obama-Trudeau Joint Statement].

253. *Id.*

254. *Id.*

255. Press Release, Envtl Prot. Agency, EPA Releases First-Ever Standards to Cut Methane Emissions from the Oil and Gas Sector (May 12, 2016), https://archive.epa.gov/epa/newsreleases/epa-releases-first-ever-standards-cut-methane-emissions-oil-and-gas-sector.html.

256. Chris Mooney, *Obama's Government Just Released a New Oil and Gas Rule,* WASH. POST (Nov. 15, 2016), https://www.washingtonpost.com/news/energy-environment/wp/2016/11/15/obama-administration-releases-new-oil-and-gas-rule-in-the-face-of-an-incoming-trump-administration/?utm_term=.9ab264651d5e; Waste Prevention, Production Subject to Royalties, and Resource Conservation: Final Rule, 81 Fed. Reg. 83,008 (Nov. 18, 2016).

257. *Compare* Obama-Trudeau Joint Statement, *supra* note 252 (laying out the joint goals to reduce methane emissions) *with* Waste Prevention, Production Subject to Royalties, and Resource Conservation: Final Rule, 81 Fed. Reg. 83,008 (Nov. 18, 2016) (outlining U.S. regulatory action to reduce methane emissions from oil and gas developments).

The Trump administration has since taken action to undo the EPA rule in question.[258] The EPA administrator on May 31, 2017, has put a portion of the rule on a stay.[259] The rule will now undergo further comment.[260] It is highly likely that further action with regard to the rule—such as an attempted repeal—will follow after the comment period.[261] The rules promulgated by the Department of the Interior under President Obama are currently challenged in court and similarly subject to repeal efforts.[262]

4. *International Reliance upon U.S. Statements*

There is a significant record of reliance upon U.S. leadership towards and in the Paris framework. The pivotal role played by the United States, and its commitments, to achieving

258. *EPA Halts Obama Era Methane Emissions Rule for Oil and Gas Industry*, THINKPROGRESS (May 31, 2017), https://thinkprogress.org/epa-delays-methane-emissions-rule-489fe284d405.

259. *See* Jack Beerman, *The Deregulatory Moment and the Clean Power Plant Repeal*, HARV. L. REV. BLOG (Nov. 30, 2017), https://blog.harvardlawreview.org/the-deregulatory-moment-and-the-clean-power-plan-repeal/.

260. *EPA Halts, supra* note 258.

261. *Id.*; Beerman, *supra* note 259 (outlining the regulatory strategy of the Pruitt EPA).

262. *See* State v. Bureau of Land Mgmt., 286 F. Supp. 3d 1054 (N.D. Cal. 2018) ("On March 28, 2017, President Trump issued an Executive Order requiring the Secretary of the Interior to review the Waste Prevention Rule. Exec. Order No. 13,783, 82 Fed. Reg. 16,093, § 7(b) (Mar. 28, 2017). BLM reviewed the rule and drafted a proposed Revision Rule rescinding certain provisions of the Waste Prevention Rule and substantially revising others. BLM published the proposed rule in the Federal Register today, after conclusion of its review by the Office of Information and Regulatory Affairs. *See* 'Waste Prevention, Production Subject to Royalties, and Resource Conservation: Rescission or Revision of Certain Requirements,' 83 Fed. Reg. 7924 (proposed Feb. 22, 2018). In the interim, BLM developed a rule to delay for one year the effective date of the provisions of the Waste Prevention Rule that had not yet become operative and suspend for one year the effectiveness of certain provisions already in effect ('Suspension Rule'). 82 Fed. Reg. 58,050, 58,051 (Dec. 8, 2017). BLM published the proposed Suspension Rule on October 5, 2017, and on December 8, 2017, published the final Suspension Rule. *See* 82 Fed. Reg. 46,458, 58,050. It took effect on January 8, 2018. The rule temporarily suspended or delayed certain requirements at the heart of the pending *Wyoming* litigation. Plaintiffs in this action filed suit challenging the Suspension Rule on December 18, 2017, and moving for a preliminary injunction.") (footnotes omitted)

final agreement at Paris has been widely reported.[263] This reliance by other states was based centrally on the willingness of the United States to make meaningful commitments: Paris negotiations tracked substantive emission target pledges, intended NDCs (INDCs), made by states including the United States alongside the negotiations of the Paris Agreement text proper.[264] The United States consequently submitted its INDC early.[265] As one commentator noted the effect and purpose was to invite reliance: "[T]he best way for other countries to allay concerns about whether U.S. climate commitments will withstand domestic political pressures is to submit and maintain equally ambitious INDCs."[266]

The People's Republic of China in particular coordinated its Paris approach with the approach taken by the United States. This collaboration began in earnest in November 2014 when both countries "committed to reaching an ambitious 2015 agreement that reflects the principle of common but differentiated responsibilities and respective capabilities, in light of different national circumstances."[267] Significantly, in a 2015 joint presidential statement prior to the final stages of Paris negotiations, both states made express reference to reliance upon their respective INDCs: "The United States and China welcome the enhanced actions reflected in the intended nationally determined contributions communicated by each

263. *See* Suzanne Goldberg, *How U.S. Negotiators Ensured Landmark Paris Climate Deal Was Republican-Proof*, GUARDIAN (Dec. 13, 2015), https://www.theguardian.com/us-news/2015/dec/13/climate-change-paris-deal-cop21-obama-administration-congress-republicans-environment ("Even until the final moments, Obama and the French president, François Hollande, were spending that capital to get to a deal, telephoning world leaders for support. When final approval was held up for an hour over typos and a dispute over a single verb—shall or should—Hollande telephoned Narendra Modi, India's prime minister, to assure him the last-minute glitches would be fixed.").

264. Kotchen, *supra* note 33, at 36.

265. *Id.*

266. *Id.* at 38.

267. Obama-Trudeau Joint Statement, *supra* note 252.

other and by other Parties."[268] Symbolically, both states jointly submitted their ratification to the Paris Agreement.[269]

This pattern of reliance must be viewed in historical context. Historically, U.S. leadership has influenced other states to make or meet emission reduction pledges. As noted by Cass Sunstein with regard to the experience under the Kyoto agreement, "the behavior of nations is interdependent, and whether nations are willing to make significant reductions in greenhouse gas emissions might be endogenous to the behavior of the United States in particular. If the world's leading emitter is unwilling to make reductions, other nations might be reluctant to do so."[270]

It is finally significant that the U.S. withdrawal from the Paris Agreement met with significant protest. In a joint statement, France, Germany, and Italy deemed "the momentum generated in Paris in December 2015 irreversible and [they] firmly believe[d] that the Paris Agreement [could not] be renegotiated since it [was] a vital instrument for our planet, societies and economies."[271] Significantly, the statement that renegotiation is impossible would appear to refer to President Trump's offer to renegotiate substantive climate change commitments.[272] The same characterization that the Paris Agreement is "irreversible" is also shared by China.[273] Both the Presidents of China and France have since almost immediately taken public meetings with representatives from U.S. states

268. Joint Statement by President Obama and President Xi Jinping of China on Climate Change, 2015 DAILY COMP. PRES. DOC. 649 (Sept. 25, 2015) [hereinafter Obama-Xi Joint Statement].

269. Jean Chemnick, *U.S. and China Formally Commit to Paris Climate Accord,* SCI. AM. (Sept. 6, 2016), https://www.scientificamerican.com/article/u-s-and-china-formally-commit-to-paris-climate-accord/.

270. Sunstein, *supra* note 55, at 41.

271. *European Response*, *supra* note 213.

272. *See* Trump Withdrawal Remarks, *supra* note 19 (suggesting renegotiation because "[t]he Paris Climate Accord is simply the latest example of Washington entering into an agreement that disadvantages the United States to the exclusive benefit of other countries, leaving American workers—who I love—and taxpayers to absorb the cost in terms of lost jobs, lower wages, shuttered factories, and vastly diminished economic production").

273. *See* Daniel Boffey & Arthur Neslen, *China and EU Strengthen Promise to Paris Deal with US Poised to Step Away,* GUARDIAN (June 1, 2017) [hereinafter *Chinese Response*], https://www.theguardian.com/environment/2017/may/31/china-eu-climate-lead-paris-agreement.

and municipalities to discuss continued compliance with U.S. Paris Agreement commitments.[274]

It is noteworthy that U.S. states and municipalities sent a significant delegation to the first Conference of the Parties (COP) of the UNFCCC in Bonn following the announcement of U.S. withdrawal from the Paris Agreement.[275] These states and municipalities highlighted their efforts to mitigate greenhouse gas emissions at the meeting,[276] and diplomats in fact engaged with this shadow delegation.[277] However, this engagement has not translated to a linking of the COP process formally reserved for the official U.S. delegation and the commitments made by U.S. states and municipalities to shore up the implementation of the USNDC.[278]

5. *Legal Significance of U.S. Conduct in Light of Global Reliance*

The conduct by the United States pursuant to the Paris Agreement imposes substantive obligations on it beyond participating in the procedural mechanisms set out in the treaty. The Paris Agreement is a treaty rather than a political joint statement. It thus imposes the same kind of obligations to perform the Paris Agreement in good faith as any other treaty obligation.

As already discussed, Article 4 of the Paris Agreement does not make the commitments included in NDCs submitted

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274. *See* Jessica Meyers, *China is Now Looking to California—Not Trump—to Help Lead the Fight Against Climate Change*, L.A. TIMES (June 6, 2017), http://www.latimes.com/world/asia/la-fg-china-global-climate-20170606-story.html; *NYC's Bloomberg Tells Macron U.S. Cities Will Meet Paris Climate Agreement*, REUTERS (June 1, 2017), https://www.washingtonpost.com/video/world/nycs-bloomberg-tells-macron-us-cities-will-meet-paris-climate-agreement/2017/06/02/2b72471e-47e5-11e7-8de1-cec59a9bf4b1_video.html.

275. On the structural role of the COP for UNFCCC implementation, see Daniel Bodansky, *The United Nations Framework Convention on Climate Change: A Commentary*, 18 YALE INT'L L. J. 451, 533–34 (1993).

276. Michael R. Bloomberg & Jerry Brown, *The U.S. Is Tackling Global Warming, Even If Trump Isn't*, N.Y. TIMES (Nov. 14, 2017), https://www.nytimes.com/2017/11/14/opinion/global-warming-paris-climate-agreement.html.

277. Lisa Friedman, *A Shadow Delegation Stalks the Official U.S. Team at Climate Talks*, N.Y. TIMES (Nov. 11, 2017), https://www.nytimes.com/2017/11/11/climate/un-climate-talks-bonn.html.

278. *Id.* (outlining the (lack of) access given to U.S. state and municipal representatives to formal Bonn talks).

by states parties binding as a matter of Paris Agreement.[279] The structure of the Paris Agreement does, however, give rise to independent substantive obligations as a matter of the law treaties, or more precisely the obligation to perform treaties in good faith.[280] These obligations become the more pronounced once a state has made an NDC for the reasons set out below.

First, good faith performance of the Paris Agreement itself requires that the United States not act so as to undermine the object and purpose of the Paris Agreement.[281] This imposes a substantive obligation on the United States beyond the procedural provisions of the Paris Agreement, which are the only facially binding provisions contained in the treaty. Thus, the purpose of the treaty, as discussed above, is the reduction of carbon emissions.[282] A significant increase of carbon emissions by the United States would thwart the purpose of the treaty as well as the efforts of the other Paris Agreement parties to bring about the goals of the Agreement. The participation by the United States in the Paris Agreement entails a good faith, substantive obligation not to undermine this goal.[283] This obligation is stronger when it is considered together with the United States' submission of an ambitious INDC during the Paris negotiations.[284] This submission created reliance interests in other Paris parties, inducing them to participate.[285] This entails an obligation, as a matter of good faith performance of the Paris Agreement, to keep carbon emissions at a level reasonably consistent with November 2016 levels, the time that the Paris Agreement entered into force.[286]

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279. *Paris Agreement*, *supra* note 6, at art. 4(4).

280. VCLT, *supra* note 201, art. 26 ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith.").

281. MARK VILLIGER, COMMENTARY ON THE 1969 CONVENTION ON THE LAW OF TREATIES 367 (2009) ("Good faith furthermore covers the narrower doctrine of abuse of rights according to which parties must abstain from acts calculated to frustrate the object and purpose and thus impede the proper execution of the treaty.").

282. Paris Agreement, *supra* note 6, pmbl., art. 4(4).

283. *See* VCLT, *supra* note 201, art. 26 (codifying customary international law duty to perform treaties in good faith).

284. Kotchen, *supra* note 33, at 36 (discussing the incentive structures of early action in climate negotiations by the United States).

285. *Id.*

286. *Paris Agreement Status*, *supra* note 15.

Second, good faith performance of the Paris Agreement requires future conduct by the United States with honesty-in-fact.[287] The United States is committed in principle, under the Paris Agreement, to respond to the "urgent threat of climate change on the basis of the best available scientific knowledge."[288] It is trite to observe that having agreed to this statement in a treaty, the United States is no longer at liberty to deny that such an urgent threat exists without contradicting an earlier commitment. U.S. conduct under the Paris Agreement thus cannot be merely compliance with the procedural mechanisms set out in the Paris Agreement while substantively committing to a climate policy premised in the belief that "[t]he concept of global warming was created by and for the Chinese in order to make U.S. manufacturing non-competitive."[289]

Third, good faith performance of the Paris Agreement requires a rational basis for a downward adjustment of the USNDC. Good faith includes the principle of non-contradiction.[290] This principle of non-contradiction forms part of the obligation of treaty performance in good faith.[291] Consequently, any adjustment of the USNDC weakening it would require a justification regarding changed circumstances or other reasons why the USNDC reasonably cannot be fulfilled. This justification must be provided with honesty-in-fact.[292]

The conduct of the parties entails the same obligations imposed under the law of unilateral declarations made pursuant to a treaty. This overlap is not surprising. As discussed above, the law of unilateral declarations is an extension of the international legal principle of good faith.[293] It should thus

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287. *See* Mitchell, *supra* note 202, at 339–49 (describing good faith as a general principle of law and a principle of customary international law).

288. Paris Agreement, *supra* note 6, pmbl.

289. Donald J. Trump (@realdonaldtrump), Twitter (Nov. 6, 2012, 11:15 AM), https://twitter.com/realdonaldtrump/status/265895292191248385?lang=EN.

290. *See* Bin Cheng, General Principles of Law as Recognized by International Courts and Tribunals 147 (1953) (discussing the good faith canon of *venire contra factum proprium*).

291. Salmon, *supra* note 151, at 674 (discussing the role of the principle of non-contradiction in the good faith performance of treaties).

292. *See* Mitchell, *supra* note 202, at 339–49 (defining good faith by reference to honesty of purpose).

293. *See* Part III.A.1.

overlap with the obligation to perform the treaty pursuant to which the declarations were made in good faith.

The law of unilateral declarations imposes further obligations on the United States. Thus, the United States represented that it "has already undertaken . . . the necessary steps to place us on a path to achieve the 2020 target of reducing emissions in the range of 17 percent below the 2005 level in 2020."[294] The statement is not couched in the ordinary mandatory language of "shall." Nevertheless, the statement grammatically uses the present perfect tense "has . . . undertaken,"[295] indicating "a situation that began in the past and leads up to the present time," and, depending upon context, continues into the future.[296] The present perfect thus implies that no further action is needed to remain on the path, that is, that it would continue to take affirmative steps to achieve the stated emissions reduction range. The statement therefore implies the commitment not to change course with regard to existing efforts. The context of the statement confirms this implication. The statement was reasonably calculated to induce action in other countries, that is, the formulation of ambitious INDCs.[297] The reaction of other states, such as China, confirms that the statement did in fact induce such action.[298] The vehement protest with regard to U.S. withdrawal is additional confirmation that this obligation, at the very least, should be "irreversible."[299]

The commitments made by the United States with regard to the Clean Power Plan also have likely matured into a binding obligation.[300] Then-President Obama stated, with regard to the Clean Power Plan, that he "committed the United States" to the policy purpose of the plan.[301] The formulation is

294. *USNDC, supra* note 39, at 1.

295. *Id.*

296. BAS AARTS, OXFORD MODERN ENGLISH GRAMMAR 258 (2011).

297. *See* Kotchen, *supra* note 33, at 36 (discussing potential effect of early action by the United States in climate negotiations).

298. *See* Obama-Xi Joint Statement, *supra* note 268 (explaining that major domestic policy measures had been announced in order to combat climate change).

299. *European Response*, *supra* note 213.

300. *See supra* Part III.C.2 (outlining U.S. conduct regarding the Clean Power Plan).

301. Remarks Announcing the Environmental Protection Agency's Clean Power Plan, 2015 DAILY COMP. PRES. DOC. 546 (Aug. 3, 2015).

significantly stronger than the factual observation that could have been made instead—and likely would have been used in carefully crafted language had a different diplomatic been intended—that the Obama administration/the United States is committed to the Clean Power Plan. The latter example uses "committed" as an adjective and relays a fact denoting attachment.[302] President Obama, however, uses "committed" as a verb. The Merriam-Webster Dictionary defines the verb "commit" as "obligate, bind a contract committing the company to complete the project on time."[303] President Obama's statement thus, on its face, denotes a command binding someone to an obligation.

The statements with regard to the Clean Power Plan were intended for global consumption. Secretary of State Kerry relayed the message as such when he noted the finality of the plan and prominently introduced it into the Paris process by U.S. negotiators.[304] The reception of these statements echoes that of the INDC commitment regarding 2020 emissions targets.[305] The making of the statements in a diplomatic context is evidence of an intent to induce reliance by the world community on emission reduction by the United States consistent with the Clean Power Plan, and the reception of these statement is evidence of actual reliance. It is therefore likely that the United States is obligated to continue on the trajectory of carbon emission reductions consistent with the implementation of the Clean Power Plan so long as the unilateral declaration is effective as a matter of international law.

Finally, the commitments made by the United States with regard to methane reduction also matured into an obligation. The statements in question again used "commit" as a verb and did so repeatedly.[306] The commitment was an important part

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302. *Committed*, *in* CAMBRIDGE BUSINESS ENGLISH DICTIONARY ONLINE (2018), https://dictionary.cambridge.org/us/dictionary/english/committed ("loyal and willing to give your time and energy to something that you believe in").

303. *Commit*, *in* MERRIAM-WEBSTER DICTIONARY ONLINE (2018), https://www.merriam-webster.com/dictionary/commit.

304. *See supra* Part III.C.2 (outlining U.S. conduct regarding the Clean Power Plan).

305. *See supra* Part III.C.4 (outlining reliance upon U.S. conduct).

306. Obama-Trudeau Joint Statement, *supra* note 252.

of the Paris process.[307] The reception of these statements, too, echoes that of the INDC commitment.[308] It is therefore likely that the United States is obligated to continue on the trajectory of methane emission reductions consistent with the implementation of the goal of forty percent from oil and gas project developments so long as the unilateral declaration is effective.

The central counter-argument against the creation of obligation by means of a unilateral declaration is that President Obama, Secretary Kerry, and the USNDC merely made policy statements.[309] Had the United States intended to make a unilateral declaration with regard to its emission pledges, it knew how to do so: the United States edited such binding language out of the Paris Agreement in the final rounds of edits and failed to repeat such language in later communications made pursuant to the Paris Agreement.[310] Such a comparison of treaty practice to the language actually used in governmental communications has been dispositive in other instances in which international adjudicators determined that a state's unilateral statement did not create a legal obligation.[311]

This counter-argument draws too narrow a scope of inquiry. As discussed above, the core question is one of intent, as established by the circumstances surrounding the declaration,

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307. *See supra* Part III.C.3 (outlining U.S. conduct regarding methane emissions).

308. *See supra* Part III.C.4 (outlining reliance upon U.S. conduct).

309. *See* David Koplow, *Nuclear Arms Control by a Pen and a Phone: Effectuating the Comprehensive Test Ban Treaty Without Ratification*, 46 GEO. J. INT'L L. 475, 514–15 (2014) ("States today are likely to characterize their existing respective testing moratoria as revocable 'policy choices,' rather than as voluntary assumptions of legal commitments, and the ILC principles 'do not apply to policy statements or even formal declarations that were not specifically intended to create legal results, even if other states might have relied upon them or asserted that they were legally binding.'") (quoting Michael J. Mattheson, *The Fifty-Eighth Session of the International Law Commission*, 101 AM. J. INT'L L. 407, 421–22 (2007)).

310. *See* Koh, *supra* note 4, at 350–52 (discussing removal of binding language from the Paris Agreement).

311. Case Concerning the Frontier Dispute (Burk. Faso v. Mali), Judgment, 1986 I.C.J. Rep. 554, ¶¶ 40–41 (Dec. 22) (concluding that there was no intent to create a binding obligation in a unilateral act by comparing the act in question to the state's treaty practice); Mobil Corp., Venez. Holdings, B.V. v. Bolivarian Republic of Venez., ICSID Case No. ARB/07/27, Decision on Jurisdiction, ¶ 139 (June 10, 2010), https://www.italaw.com/documents/MobilvVenezuelaJurisdiction.pdf (same).

and its reception, not just its text.[312] The counter-argument focuses exclusively on text.[313] Here, the circumstances leading to the declaration are highly relevant: the Paris Agreement sought to provide a medium by which states could bind themselves to the extent that there was a path towards collective climate action without binding states if such an effort did not materialize.[314] The intent thus was one of encouraging reliance, not one of making a promise that would bind regardless of reliance.[315]

Further, the reception of the statements as well as the later U.S. withdrawal from the Paris Agreement do not suggest that the U.S. commitments were understood by the international community as mere policy statements.[316] To the contrary, they were understood as "irreversible" if subject to modification in keeping with the general structure of the Paris framework.[317] This again lends credence to the creation of an obligation by way of unilateral declaration.

Finally, even if successful, this counter-argument would ultimately have to contend with the need to perform the Paris Agreement in good faith.[318] As a leading commentator on good faith in international law has pointed out, the factual circumstances of any statement are highly probative to understanding the scope of the obligation of non-contradiction.[319] The fact of reliance, and the object and purpose of the Paris Agreement would both weigh heavily in favor of a stronger

312. ILC Guiding Principles, *supra* note 34, princ. 3.

313. Mobil Corp., Venez. Holdings, B.V. v. Bolivarian Republic of Venez., ICSID Case No. ARB/07/27, Decision on Jurisdiction, ¶ 139 (June 10, 2010), https://www.italaw.com/documents/MobilvVenezuelaJurisdiction.pdf (ruling that a unilateral declaration did not give rise to binding commitments on the basis of purely textual comparison).

314. *See* Stern, *supra* note 86 ("Of course, the Agreement is built to encourage ambition—otherwise, there would be no point—but it does this in a non-intrusive way that allows countries to set their own path.").

315. Kotchen, *supra* note 33, at 36 (discussing the intent of the United States in moving early in climate negotiations).

316. *See supra* Part III.C.4 (outlining reliance on U.S. conduct).

317. *See European Response*, *supra* note 213 (treating progress at Paris as irreversible); *Chinese Response, supra* note 273 (same).

318. VCLT, *supra* note 201, art. 26.

319. CHENG, *supra* note 290, at 147.

view of this good faith obligation.[320] Thus, even if the counter-argument were to succeed that the United States did not make a binding unilateral declaration pursuant to the Paris Agreement in the strictest of senses, the conduct of the United States under the treaty would significantly limit the permissible margin of conduct by future administrations.

In conclusion, the conduct of the United States pursuant to the Paris Agreement has imposed significant substantive obligations upon it. These obligations cannot be withdrawn by declaring that the United States is terminating its participation in the Paris Agreement. As discussed above, many of the policies adopted by the Trump administration place the United States on the path of violating its international legal commitments. The question that remains is how durable these commitments are in the face of the expressed intent to escape from them. The remainder of the Article will now turn to this question.

IV. The Long Paris Sunset

The remainder of the Article will establish whether and how U.S. commitments made pursuant to the Paris Agreement can indeed become "irreversible." This part will address the issue from the perspective of the treaty obligations and unilateral declaration obligations incurred by the United States. It will begin with an outline of the law of treaty termination. It will continue with an explanation of the law of terminating unilateral acts. It will then apply that law to the actions taken by the United States pursuant to the Paris Agreement. It will conclude that the earliest sunset for U.S. obligations is November 2020, the time at which the United States would have withdrawn from Paris.[321]

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320. *See* Steven Reinhold, *Good Faith in International Law*, 2 UCL J. L. & Jurisp. 40, 54 (2013) ("Even though municipal law, particularly contract law, has many different formulations of this behaviour (such as the notion of *venire contra factum proprium*), in international law the remit is broader. The legitimate reliance of one State (State A) on the conduct of another (State B) precludes this State from acting contrary to its representations.").

321. For a discussion of the substantive obligations in this period, see Part III.C.

A. *Terminating Obligations Incurred by Action Pursuant to a Treaty*

The legal framework governing the termination of obligations incurred pursuant to a treaty again combines both the law of treaties and the law of unilateral declarations. The law of treaties plays a dominant role in this context. This dominant role is not surprising given that the unilateral declarations at issue are expressly tied to the treaty pursuant to which they have been made.

1. *The Law of Treaty Termination*

Termination obligations are governed by the law of treaties. The Vienna Convention on the Law of Treaties (VCLT) provides that treaty obligations can be terminated by terminating or withdrawing from the treaty in question.[322] A state wishing to terminate or withdraw from a treaty must notify the other treaty parties,[323] and this notification must be communicated in writing.[324]

The law of treaties defers to treaty parties to provide for the mechanics and effects of their termination decisions within the treaty. Article 70 thus provides that its default rules operate "[u]nless the treaty otherwise provides or the parties otherwise agree."[325] This means that the treaty to be terminated can displace the default rules set out by the law of treaties with regard to the consequences of termination. The key default rule affected is the time from which termination takes effect.[326] The VCLT states notification of termination "[r]eleases the parties from any obligation further to perform the treaty."[327] Thus, as a default rule, termination has immediate effect.[328] Treaty parties habitually alter this default rule by including sunset provisions in their treaties.[329]

322. VCLT, *supra* note 201, art. 65.
323. *Id.*
324. *Id.* art. 67.
325. *Id.* art. 70(1).
326. *Id.* art. 70(1)(a).
327. *Id.*
328. *See* MARK VILLIGER, COMMENTARY ON THE 1969 CONVENTION ON THE LAW OF TREATIES 871–72 (2009) (explaining that termination operates *ex nunc*).
329. SEAN MURPHY, PRINCIPLES OF INTERNATIONAL LAW 174 (2d ed. 2012).

Article 70 also provides that "the termination of a treaty" must occur "under its provisions."[330] This means that a treaty can itself provide (a) the time when a party can first terminate the treaty and (b) the means it must use to terminate the treaty.[331] Prior to the compliance by a state with both the timing and means of termination foreseen in the treaty, the treaty remains in full force. Once a state has complied with these requirements, treaties can additionally require a sunset provision that would extend the substantive obligations of the treaty for an additional period of time post-termination. In other words, a premature or formally non-compliant notice purporting to terminate the treaty does not terminate the treaty, nor can it trigger the sunset mechanism.[332] Such a notice, if it has effect at all, could only have legal force at the time stipulated in the treaty mechanism as the earliest moment of termination.

Article 70 of the VCLT further states that termination has no retroactive effect with regard to prior obligations incurred as part of a treaty.[333] It states that termination "[d]oes not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination."[334] As one commentator relevantly explained, "[T]he termination does not affect the validity of the *acts of the parties* performed during the treaty's existence prior to its termination."[335]

Although the United States is not a party to the VCLT,[336] it is bound by the parts of the VCLT that form part of custom-

330. VCLT, *supra* note 201, art. 70(1).

331. MURPHY *supra* note 329, at 174.

332. *See* VCLT, *supra* note 201, art. 70(1) (setting out the right of the treaty parties to set out the manner in which a treaty may be terminated).

333. *Id.* art. 70(1)(b).

334. *Id.*

335. VILLIGER, *supra* note 328, at 872 (emphasis added).

336. *Status- Vienna Convention on the Law of Treaties*, UNITED NATIONS TREATY COLLECTION, https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXIII-1&chapter=23&Temp=mtdsg3&clang=_En (last updated Apr. 4, 2018, 2:07 AM EDT).

ary international law.[337] The provisions regarding termination discussed above form part of customary international law.[338]

2. *Revocation of Unilateral Declarations*

The revocation of unilateral acts is governed by the law of unilateral declarations. The ILC Guiding Principles lay out that "[a] unilateral declaration that has created legal obligations for the State making the declaration cannot be revoked arbitrarily."[339] This principle is consistent with the principle of good faith from which the law of unilateral declarations is derived.[340] It gives effect to obligations of non-contradiction central to international law of good faith.[341]

The non-arbitrary nature of a permissible revocation is established principally according to three factors.[342] First, it is relevant whether the unilateral declaration itself states "specific terms . . . relating to its revocation."[343] As discussed above, unilateral declarations must be read in the context of the circumstances of their promulgation.[344] A unilateral declaration made pursuant to a treaty thus should be viewed as incorporating the termination provisions of the treaty pursuant to which the declaration is made.[345]

This is generally consistent with the second factor: determining whether revocation of a unilateral declaration was arbitrary. An appraisal of the arbitrariness of revocation must take

337. *See* Georges v. United Nations, 834 F.3d 88, 96 (2d Cir. 2016) (quoting Mora v. New York, 524 F.3d 183, 196, n.19 (2d Cir. 2008) ("Although the United States has not ratified the Vienna Convention on the Law of Treaties, our Court relies upon it as an authoritative guide to the customary international law of treaties, insofar as it reflects actual state practices.")).

338. *See* Herve Ascencio, *Article 70 of the Convention of 1969*, *in* THE VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY 1585, 1590–91 (Oliver Corten & Pierre Klein eds., 2011) (explaining that Article 70 reached customary international law status at least for treaties concluded after 1969).

339. ILC Guiding Principles, *supra* note 34, princ. 10.

340. *See* Thomas Franck & Dennis Sughrue, *The International Role of Equity as Fairness*, 81 GEO. L.J. 563, 568 (1993) (explaining the relationship between good faith, unilateral declarations, and estoppel).

341. *See id.* (discussing estoppel); *see also* CHENG, *supra* note 290, at 147 (discussing venire contra factum proprium); Reinhold, *supra* note 320, at 54 (discussing the same).

342. ILC Guiding Principles, *supra* note 34, princ. 10.

343. *Id.* princ. 10(a).

344. *Id.* princ. 3.

345. *Id.*

into account "[t]he extent to which those to whom the obligations are owed have relied on such obligations."[346] As commentary makes clear, this element of reliance is premised in jurisprudence.[347] This jurisprudence requires that reliance be plausible and reasonable.[348] The presence in a treaty of a withdrawal mechanism thus affects such a reasonableness analysis.

Finally, a unilateral declaration can be revoked in the context of changed circumstances.[349] This provision applies the law of treaties by analogy.[350] As stated by the ILC's commentary, "[a] unilateral declaration may also be rescinded following a fundamental change of circumstances within the meaning and within the strict limits of the customary rule enshrined in article 62 of the 1969 Vienna Convention on the Law of Treaties."[351]

B. *Application to the Paris Context*

The legal regime applicable to the termination of obligations made pursuant to a treaty must begin with the provisions governing termination. These provisions govern when the treaty can be terminated and how long treaty obligations survive. They further provide a yardstick to measure the arbitrariness of revocation of unilateral acts made pursuant to the treaty.[352]

The Paris Agreement states as follows with regard to the manner and timing within which withdrawal is permissible: "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 to the

346. *Id.* princ. 10(b).

347. *Id.* princ. 10, cmt. 2.

348. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Jurisdiction of the Court and Admissibility of the Application, 1984 I.C.J. Rep. 392, ¶ 50–51(rejecting a reliance submission by the United States as unreasonable).

349. ILC Guiding Principles, *supra* note 34, princ. 10(c).

350. *See id.* princ. 10, cmt. 2.

351. *Id.*

352. *Id.* princ. 10(a) ("A unilateral declaration that has created legal obligations for the State making the declaration cannot be revoked arbitrarily. In assessing whether a revocation would be arbitrary, consideration should be given to [a]ny specific terms of the declaration relating to revocation.").

Depositary."[353] The date on which the Paris Agreement entered into force is November 4, 2016.[354] Consequently, the United States may give written notification of its withdrawal from the Paris Agreement on or after November 5, 2019.

The press conference held by President Trump is not a timely withdrawal from the Paris Agreement. It further does not comply with the notice form required for withdrawal. At the time of this writing, it is unclear whether the correct notification has been dispatched. It is further unclear whether the notification has been accepted, to be held by the Depositary until such time as it becomes timely, or whether it will have to be re-submitted once timely in November 2019.

The Paris Agreement further contains a sunset period in which a party that has properly withdrawn must still abide by its treaty obligations under the Paris Agreement. It states that "[a]ny such withdrawal shall take effect upon expiry of one year from the date of receipt by the Depositary of the notification of withdrawal, or on such later date as may be specified in the notification of withdrawal."[355] Consequently, the United States' withdrawal would be effective at the earliest on November 5, 2020.

The literature on the Paris Agreement confirms that the provisions are binding upon the United States.[356] Initial reactions to the announced withdrawal by the United States have pointed out that, as of yet, it is impossible for the United States to withdraw from the Paris Agreement.[357]

All obligations incurred by the United States under the Paris Agreement, as a matter of the law of treaties, therefore continue to be in full force until November 5, 2020, at the

353. Paris Agreement, *supra* note 6, art. 28(1).

354. *Paris Agreement Status*, *supra* note 15.

355. Paris Agreement, *supra* note 6, art. 28(2).

356. Koh, *supra* note 4, at 360 (President Trump "[can]not formally withdraw the United States from its Paris obligations until the start of the next four-year presidential term, when a new president less hostile to the Paris Agreement might be taking office"). *But see* Bodansky & Spiro, *supra* note 56, at 918 ("[T]he agreement expressly allows parties to withdraw by giving one year's notice, thereby allowing future presidents to withdraw from obligations that they do not wish to fulfill.").

357. Bridgeman, *supra* note 28 (discussing earliest possible timing of withdrawal by the United States from the Paris Agreement); Rajamani, *supra* note 14 (same); Daniel Bodansky, *supra* note 28 (same).

earliest. These obligations include the obligations outlined in Part III above: not to increase carbon emissions as against the levels in November 2016, when the Paris Agreement went into force; to communicate with honesty in fact as part of the Paris process; and to meet 2020 emission targets that could reasonably have been achieved had the initiatives outlined in the USNDC remained in effect, unless reasons can be provided as to why this is no longer feasible.

The notice of intent to terminate also does not affect acts already undertaken by the United States pursuant to the treaty.[358] Thus, the unilateral declarations of the United States have not been appropriately withdrawn by President Trump's June 1, 2017, announcement. Given the significant reliance upon U.S. leadership outlined above, immediate withdrawal at this stage is arbitrary. The reasons provided for a withdrawal by President Trump further confirm the arbitrary nature of U.S. conduct as it did not provide a single reason for withdrawal consistent with prior U.S. conduct pursuant to the Paris Agreement.[359]

Nevertheless, the termination mechanism set forth in the Paris Agreement, and its conjunction with the next U.S. presidential elections, suggests that reliance by treaty parties on U.S. commitments after November 2020 would fast become increasingly less reasonable, all else being equal.[360] Should President Trump or a like-minded politician win the White House in 2020, reliance on U.S. climate leadership would no longer

358. VILLIGER, *supra* note 328, at 872 ("[T]he termination of a treaty does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination.").

359. Trump Withdrawal Remarks, *supra* note 19 ("[A]s of today, the United States will cease all implementation of the non-binding Paris Accord. . . .").

360. ILC Guiding Principles, *supra* note 34, princ. 10. It should be noted that the issue may well be one of U.S. domestic process. The Trump administration currently is attempting to repeal the Clean Power Plan. *See* Beerman, *supra* note 259. This process may well fail because it is untimely in that it seeks to undo the Clean Power Plan without replacing it with similar emissions reductions at a time that the United States remains substantively obligated as a matter of international law. This may require a renewed notice and comment effort to undo the rule and thus further extend the period in which the Trump administration—or another likeminded administration—could not move away from the USNDC commitments. *See* Sourgens, *supra* note 1.

be plausible. The exit mechanism in the treaty expressly contemplated this potential political reality.[361]

In practice, this means that the United States is committed to seeing through emissions reductions that would have been achieved had the Clean Power Plan and methane emission reduction initiatives—to which the United States obligated itself by unilateral declaration as analyzed in the previous section—been permitted to run their course through 2020. Given the four-year window, this obligation may well need to be met from other sources, as the ramp-up time and delay due to litigation risk facing these programs in the short term would have to be taken into account.[362]

Although this obligation to reduce greenhouse gas emissions may appear less ambitious than climate advocates might have preferred, it has significant signal value. It confirms, for the near term, the signal sent by the global political community to the business world and financial markets.[363] The unilateral declaration further provides a legal foothold to states, cities, and municipalities, as well as business leaders, to press on with efforts to meet the targets set out in the USNDC without federal action.[364] It thus continues, even for the United States, the global momentum generated in Paris.

The obligations further provide a signal to the community of Paris Agreement states. The reliance placed upon the efforts of the United States was not entirely in vain in that it imposes substantive legal obligations on the United States. The Paris framework, even in its infancy, is politics-proof for the short term.[365] Yet, even the long Paris sunset may not suffice to impose an international legal obligation upon the United States to meet its 2025 goals set out in the USNDC.

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361. Koh, *supra* note 4, at 360.

362. *See USNDC*, *supra* note 39, at 1. The USNDC appears to suggest that most benefits of the new initiatives would be achieved *after* 2020. The graphic representation does not mirror the text of the USNDC, which speaks of a per annum NDC change. It is nevertheless indicative of the run-up time issues in implementing new regulations.

363. *See* Larry Light, *Why U.S. Businesses Said "Stay in the Paris Accord*," CBS NEWS (June 2, 2017), http://www.cbsnews.com/news/paris-climate-agreement-us-corporate-support/ (discussing the value of market stability).

364. *See* Tabuchi & Fountain, *supra* note 130 (describing these efforts).

365. *See* Goldberg, *supra* note 263 (discussing goal to make the Paris Agreement "Republican proof").

In order to make these 2025 goals irreversible as a matter of international law, more is required. As will be discussed in the next part, the "more" is further reliance—and, more importantly still, action—by the world community upon the commitments made at Paris. Once such reliance by the world community turns into tangible, significant, and widespread emissions reductions, the global community will then have established a new customary rule of international law holding states to permanent greenhouse gas emissions mitigation. If the world community continues on this path, the (prudential) observation made by Matthew Kotchen would then be borne out by the law: perseverance by the world community in the Paris commitments will bind the United States to its initial commitment in the long term.[366] It will do so even in the face of the political tornado that is President Trump's "America first" foreign policy.[367]

V. Creating Carbon Custom

In order to bind the United States and others permanently to the goals established at Paris, more is needed than good faith obligations of non-contradiction and unilateral declarations. Good faith in the context of the Paris Agreement provides sufficient stopgap to prevent states, such as the United States, to defect from Paris commitments at the first opportunity. It does not provide a sufficient basis for more.

Under current political conditions, the only means to achieve a more permanent commitment to the Paris goals is the development of a customary international law on greenhouse gas emission reductions, or a "carbon custom." This carbon custom would provide for the equitable apportionment of greenhouse gas emission reductions among the world community to achieve the Paris goal of keeping global average temperature increases to well below two degrees Celsius below preindustrial levels.[368]

As the remainder of this Article will set out, the Paris Agreement has set in motion the ingredients for the quick for-

366. Kotchen, *supra* note 33, at 36.

367. W. James Antle III, *Trump Tornado Hits Washington*, Wash. Examiner (Jan. 25, 2017), http://www.washingtonexaminer.com/trump-tornado-hits-washington/article/2612896.

368. *See* Paris Agreement, *supra* note 6, art. 2(1)(a).

mation of such a customary international law rule. Such a customary rule forms when there is widespread and representative state practice adopted by states out of a sense of legal obligation.[369] Reliance by treaty parties upon the NDCs provided by other state parties can lead to contemporaneous implementations of ambitious emission reductions.[370] This provides a wealth of concordant state practices. The Paris Agreement itself gives credence to the sense of legal obligation undergirding the global emission reduction effort. Together, this state practice, built upon mutual reliance and communication premised in a charged moral vision for the world's future, will further internalize the new international climate norms.[371]

A. *Creating Custom*

Customary international law is one of the principal sources of international law. Canonically, proof of a rule of customary international law requires evidence of widespread and representative state practice.[372] It further requires proof that the state adopted its practice out of a sense of legal obligation.[373] Treaty practice is frequently used in one form or another to prove one or both elements.[374]

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369. North Sea Continental Shelf Cases (F.R.G./Den.; F.R.G./Neth.), Judgment, 1969 I.C.J. Rep. 3, ¶¶ 72–73 (Feb. 20) (noting the need for widespread and representative state practice together with a sense of legal obligation to give rise to a rule of customary international law).

370. *See* Stern, *supra* note 86 (discussing this as an ambition of the Paris Agreement).

371. *See* Koh, *supra* note 4, at 361 (describing the internalization of international norms in the context of the Paris Agreement).

372. North Sea Continental Shelf Cases (Fed. Rep. Ger./Den; Fed. Rep. Ger./Neth.), Judgment, 1969 I.C.J. Rep. 3, ¶¶ 72–73 (Feb. 20) ("a very widespread and representative participation in the convention might suffice of itself" to create custom).

373. *See id.* at ¶ 77 ("Not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. The need for such a belief, Le., the existence of a subjective element, is implicit in the very notion of the *opinio juris sive necessitatis*.")

374. *See* Jose Alvarez, *A BIT About Custom*, 42 N.Y.U. J. INT'L L. & POL. 17, 49 (2009) (discussing the role of concordant bilateral treaty practice in the formation of customary international law). The North Sea Continental Shelf case also notes the need to take into consideration the position of specially affected states. North Sea Continental Shelf Cases (Fed. Rep. Ger./Den; Fed.

The formation of a new customary international law rule can be reasonably quick. Historically, customary international law was thought to crystalize at a slower pace.[375] Yet, from at least the mid-twentieth century onwards, the expanding need for state-to-state interaction in the industrial, and now post-industrial, world has led to a recognition that customary rules can form in very short periods of time.[376] The literature has adopted the moniker of "instant custom" for such rules.[377]

Customary international law is a reasonably controversial source of international law. There is significant debate about whether customary international law requires a minimum floor of state practice, or whether an overwhelming sense of

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Rep. Ger./Neth.), Judgment, 1969 I.C.J. Rep. 3, ¶ 73 (Feb. 20) ("[I]t might be that, even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected. In the present case however, the Court notes that, even if allowance is made for the existence of a number of States to whom participation in the Geneva Convention is not open, or which, by reason for instance of being land-locked States, would have no interest in becoming parties to it, the number of ratifications and accessions so far secured is, though respectable, hardly sufficient. That non-ratification may sometimes be due to factors other than active disapproval of the convention concerned can hardly constitute a basis on which positive acceptance of its principles can be implied: the reasons are speculative, but the facts remain.") This discussion of "specially affected" states might imply that state practice by non-parties to a multilateral convention must be given particular heed. On a fair reading, the point is one of discovering whether non-parties to the convention might satisfy either a persistent objector rule—or would be so numerous in objecting as to obviate the ability of the proposed rule to become custom. North Sea Continental Shelf Cases (Fed. Rep. Ger./Den; Fed. Rep. Ger./Neth.), Judgment, 1969 I.C.J. Rep. 3, ¶ 73 (Feb. 20) ("That non-ratification may sometimes be due to factors OTHER THAN ACTIVE DISAPPROVAL OF THE CONVENTION concerned can hardly constitute a basis on which positive acceptance of its principles can be implied.") (emphasis added). This concern therefore is treated in the context of persistent objector status below. For further discussion of specially affected states in the formation of custom, see Michael P. Scharf, *Accelerated Formation of Custom in International Law*, 20 ILSA J. INT'L & COMP. L. 305, 316 (2014).

375. The Paquete Habana, 175 U.S. 677, 686 (1900) (discussing the long-standing nature of customary rules).

376. North Sea Continental Shelf Cases (Fed. Rep. Ger./Den; Fed. Rep. Ger./Neth.), Judgment, 1969 I.C.J. Rep. 3, ¶¶ 72–73 (Feb. 20) (discussing the speed with which customary international law rules can form).

377. *See* Andrew Guzman, *Saving Customary International Law*, 27 MICH. J. INT'L L. 115, 157 (2005) (discussing instant custom).

legal obligation can lower the state practice requirement and vice versa.[378] Further, customary international law has been accused of being a Trojan horse for lawyers wishing to impose rules based on their own moral predilections rather than proving that those rules are grounded in state consent.[379] As a rule of thumb, this part will conclude that the stronger the argument for actual state practice, the less controversial the proposed rule of customary international law will be.

1. *State Practice*

Proof of custom requires proof of state practice.[380] This state practice must be widespread and representative.[381] It is not necessary to prove universal state practice supporting a rule.[382] Rather, only a critical mass of state practice is required.[383] In determining whether critical mass has been reached, the literature and jurisprudence pay close attention to particularly affected states.[384]

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378. *See* Frederic Kirgis, *Custom on a Sliding Scale*, 81 AM. J. INT'L L. 146, passim (1987) (proposing a sliding scale model in which stronger evidence of state practice can stand in for weaker evidence of opinio juris and vice versa); Pierre-Hugue Verdier & Erik Voeten, *Precedent, Compliance, and Change in Customary International Law: An Explanatory Theory*, 108 AM. J. INT'L L. 389, 417 (2014) (discussing the literature on the formation of customary international law including the sliding scale theory).

379. Hilary Charlesworth, *The Unbearable Lightness of Customary International Law*, 92 AM. SOC'Y INT'L L. PROC. 44, 44 (1998).

380. North Sea Continental Shelf Cases (F.R.G./Den.; F.R.G./Neth.), Judgment, 1969 I.C.J. Rep. 3, ¶¶ 72–73 (Feb. 20) (custom requires proof of widespread and representative state practice).

381. *Id.*

382. MARK VILLIGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES 13 (1985).

383. William T. Worster, *The Transformation of Quantity into Quality: Critical Mass in the Formation of Customary International Law*, 31 B.U. INT'L L.J. 1, 32, 42 (2013) ("One way in which a situation of potential customary international law might have self-organized criticality is when there is a complex, dynamic network of connecting states. In these networks, the dialogue is particularly intense with frequent speculation and commentary. It is here that the dynamics of the change in the behavior of individual state actors, again to some degree in isolation and also in relation to others, changes international social relations and customs sufficiently to create a new norm of international law.").

384. VILLIGER, *supra* note 328, at 14–15 (discussing particularly affected states with a particular emphasis on identifying them); Worster, *supra* note

The discussion of state practice distinguishes three kinds of conduct. First, there is purely domestic conduct of state. Second, states act verbally by entering into treaties, making unilateral declarations or statements in diplomatic correspondence, as well as international legal pleadings.[385] Third, states literally act through their deeds in foreign affairs, for instance, by implementing their verbal commitments.[386]

Classically, state practice predominantly refers to the third kind of conduct, that is, international acts of state.[387] Some support exists for including conventional acts of states, such as entering into a treaty or voting in the U.N. General Assembly, as state practice.[388] Technically, crediting such conventional acts could blur the line between state aspirations and day-to-day reality. Blurring this line can negatively affect the implication of consent to the rule to be proved.[389] By way of an everyday analogy, to establish whether any group believes that a vigorous exercise routine is a necessary component of a good life, one should not look to the new year's resolutions of its members. One should consult the daily data from their digital pedometers. For this reason, a customary international law rule would similarly tend to have a stronger foundation if it were proved exclusively with non-conventional conduct.

To arrive at custom, state practice does not need to lead to the formulation of a rigid and technical rule. It is tempting to think of customary rules of international law as definite rules, such as the definition of a State's territorial sea extending twelve nautical miles from its shoreline.[390] Modern customary rules do not require such rigidity. In fact, customary

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383, at 58–71 (discussing the importance of particularly affected states in the formation of critical mass).

385. Philip M. Moremem, *National Court Decisions as State Practice: A Transnational Judicial Dialogue?*, 32 N.C. J. INT'L L. & COM. REG. 259, 285–87 (2006).

386. *Id.*

387. *Id.*

388. Alvarez, *supra* note 374, at 49 (discussing use of conventional acts to establish state practice).

389. KOSKENNIEMI, *supra* note 188, at 49 (deconstructing consent and deontological bases of international legal rules).

390. *See* Kevin Aquilina, *Territorial Sea and the Contiguous Zone, in* 1 THE IMLI MANUAL ON INTERNATIONAL MARITIME LAW 26, 27 (David Attard et al. eds., 2014) (submitting that twelve nautical mile territorial sea has matured into custom in the twenty years since conclusion of UNCLOS).

rules dealing with resource allocation reflect fairness, proportionality, and equitable use principles.[391] State practice reflecting such a sense of fairness, proportionality, and equity will suffice for the formation of a customary rule, so long as the criteria for weighing equities can be readily discerned.[392]

2. *Sense of Legal Obligation*

Proof of custom further requires proof that states acted out of a sense of legal obligation. It is not sufficient that states frequently or habitually act consistently with a proposed rule.[393] Rather, it must be ascertained that the state in question believed itself to be bound to act as it did.[394] This frequently presents difficult problems of proof—how to ascertain whether a state acted out of a sense of legal obligation as opposed to prudential reasons?

The clearest evidence of legal obligation is a declaration to that effect accompanying the state conduct. As one classic study noted, "[T]he express statement of a State that a given rule is obligatory (or customary, or codificatory) furnishes the clearest evidence as to a State's legal conviction."[395] When such statements accompanying state conduct are available, they are likely dispositive of the question.

Alternatively, statements made by states in the context of the U.N. framework can also supply evidence of a sense of legal obligation.[396] U.N. resolutions can provide a forum for

391. *See* Peter Tomka, *The Contribution of the International Court of Justice to the Law of the Sea*, *in* 1 THE IMLI MANUAL ON INTERNATIONAL MARITIME LAW, *supra* note 390, at 618, 627 (discussing the equity considerations in continental shelf delimitations); *see also* TAKELE SOBOKA BULTO, THE EXTRATERRITORIAL APPLICATION OF THE HUMAN RIGHT TO WATER IN AFRICA 196 (2014) (discussing the customary status of equitable use of transboundary water resources).

392. *See* BULTO, *supra* note 391, at 196 (customary international law on use of transboundary water resources); Tomka, *supra* note 391, at 627 (customary international law on continental shelf limitations).

393. VILLIGER, *supra* note 328, at 28 (highlighting the importance of *opinio juris* for the formation of customary international law rules).

394. North Sea Continental Shelf Cases (Fed. Rep. Ger./Den; Fed. Rep. Ger./Neth.), Judgment, 1969 I.C.J. Rep. 3, ¶¶ 77–80 (Feb. 20) (providing the *locus classicus* of defining *opinio juris* in jurisprudence).

395. VILLIGER, *supra* note 328, at 28.

396. *Id.* (discussing statements made in the U.N. framework as fulfilling the requirements of *opinio juris*).

states to express their views with reasonable specificity.[397] State interactions with more specialized U.N. bodies set up by multilateral treaties logically can provide similar opportunities.[398] Finally, the treaty practice of states can provide further evidence of a sense of legal obligation, particularly when the treaty in question is intended to lend precision to rules that states agree in principle to be binding upon them.[399]

Determining whether a state acted out of a sense of legal obligation in the context of a customary rule is reasonably similar to the unilateral declaration analysis—whether a state intended to incur a legal obligation through its acts. In both instances, the state conduct must be viewed in the totality of the circumstances.[400] The circumstances leading up to the conduct in question provide evidence for the rationale or motivation of the state conduct.[401] Similarly, the reception of state conduct by the international community is a meaningful gauge of the reasonable intent behind state conduct.[402] The analysis therefore is reasonably familiar in the current setting.

The key difference between establishing a binding unilateral declaration and state conduct supporting a customary rule is the nature of the conduct at issue. In the context of a unilateral declaration, there ultimately must be a verbal act, or series of verbal acts or declarations, upon which an obligation would

397. *Id.* (discussing the relationship between U.N. resolutions and customary international law).

398. *Id.* at 29.

399. *See* North Sea Continental Shelf Cases (Fed. Rep. Ger./Den; Fed. Rep. Ger./Neth.), Judgment, 1969 I.C.J. Rep. 3, ¶¶ 63–65 (Feb. 20) (discussing the possibility of reliance upon a multilateral convention in an area in which "State practice [previously] lacked uniformity"); John G. Sprankling, *The Global Right to Property*, 52 COLUM. J. TRANSNAT'L L. 464, 496 (2014) (discussing the case in greater detail).

400. *Compare* VILLIGER, *supra* note 328, at 29–30 (discussing evidence of formation of a customary rule) *with* ILC Guiding Principles, *supra* note 34, princ. 3 (discussing the same in the context of a unilateral declaration).

401. VILLIGER, *supra* note 328, at 29–30 (discussing the importance of context of state acts to establish customary international law); ILC Guiding Principles, *supra* note 34, princ. 3 (discussing the importance of context of state acts to establish binding unilateral acts).

402. VILLIGER, *supra* note 328, at 29–30 (discussing the importance of reception as part of context to be taken into account in the context of customary international law); ILC Guiding Principles, supra note 34, princ. 3 (discussing the importance of reception as part of context to be taken into account in the context of binding unilateral acts).

be premised.[403] In the context of customary international law, the focus is predominantly upon the non-verbal conduct of states.[404] Custom, in this sense, embodies the old adage that actions speak louder than words because talk is cheap.

3. *Custom and Reliance*

This Article's discussion of the Paris Agreement has focused on the transformative role of reliance upon international legal obligation.[405] Reliance—objective and subjective—is a core element of the law of unilateral declarations. As discussed above, the law of unilateral declarations imposes binding obligations upon states on the basis of statements that, in isolation, would not appear to evidence this intent.[406] The law of unilateral declarations does so because such statements must be interpreted in context.[407] Reliance is a key component of that context for the law of unilateral declarations.[408]

The law of custom gives a similar pride of place to reliance. In Harold Koh's terminology, reliance is the glue that makes customary obligations "sticky."[409] Custom forms because state conduct does not occur in isolation.[410] Thus:

> States react with further conduct, claims and counterclaims, and thereby uphold the practice, for instance, in the expectation that other States will again accord reciprocity. Other States may come to rely on the conduct of a State, and the latter will then be bound by the expectations its conduct has raised in other States.[411]

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403. ILC Guiding Principles, supra note 34, princ. 1.

404. Moremem, *supra* note 385, at 285–87 (discussing the importance of non-verbal conduct as the basis for state practice).

405. *See* Milman, *supra* note 154 (discussing perception that the Paris Agreement is a "turning point").

406. Rodríguez Cedeño, *supra* note 164, ¶ 151.

407. ILC Guiding Principles, *supra* note 34, princ. 3.

408. *Id.* princ. 3, cmt. 3 ("Several of these examples show the importance of the reactions of other States concerned in evaluating the legal scope of the unilateral acts in question, whether those States take cognizance of commitments undertaken (or, in some cases, rights asserted), or, on the contrary, object to or challenge the binding nature of the 'commitments' at issue.") (citations omitted).

409. Koh, *supra* note 4, at 360.

410. VILLIGER, *supra* note 328, at 30.

411. *Id.*

Custom formation is premised upon the same reliance logic that undergirds the mechanics of the Paris Agreement.[412] It is the repetitive interaction and integration of conduct through trust that hardens into legal obligation.[413] This interaction is a transnational legal process.[414] It operates according to and reacts to reliance interests explicitly and implicitly communicated between states and within world society.[415]

For the reasons set out in the next section, custom is the most robust form of reliance-based obligation in international law. The logic, however, is already apparent. Unilateral acts are fragile because they are not premised upon any kind of reciprocity.[416] This fragility is confirmed by the recognition that unilateral acts are in principle revocable.[417] Customary rules of international law, on the other hand, are premised upon the reciprocation of reliance.[418] Custom thus recognizes mutual reliance interests as legally binding.[419] Intuitively, the ties of such mutual reliance interests are far harder to break than the tethers of unilateral reliance. The goal of any framework premised in a hope to engender reliance therefore must be the creation of the trust and shared global mission that provides the predicate for customary international law.

B. *Projecting Paris Practice*

It is possible that the Paris Agreement will lead to a marked change in state practice regarding greenhouse gas emissions. Review of the NDCs submitted with the Paris Agreement registry so far suggests that the world's major advanced

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412. Stern, *supra* note 86 (discussing the reliance logic of the Paris Agreement).

413. VILLIGER, *supra* note 328, at 30 (discussing the importance of trust in hardening into legal obligation in customary international law).

414. Harold Hongju Koh, *Transnational Legal Process*, 75 NEB. L. REV. 181, 184 (1996).

415. *Id.* at 203–06.

416. *See Brian Havel, An International Institution in Crisis: Rethinking Permanent Neutrality*, 61 OHIO ST. L.J. 167, 196 n.95 (2000) ("Lacking any marks of reciprocity or mutuality, a unilateral declaration standing alone can serve only to impose duties upon, and accord no rights to, the declarant state.").

417. ILC Guiding Principles, *supra* note 34, princ. 10 (codifying the rules governing revocation of binding unilateral acts).

418. VILLIGER, *supra* note 328, at 30.

419. *Id.*

economies have made significant commitments to reducing their carbon emissions by 2025 or 2030.[420] The picture is less clear with regard to emerging and developing economies, though a trend there is visible, as well.[421] Particularly, as will be discussed below, emerging and developing economies continue to favor policies of industrialization. This legitimate goal of further economic development needs to be taken into account as more progress is made towards apportioning emission reduction responsibilities among the international community.

Advanced economies took a definite leadership role, which is exemplified in their climate commitments. Western European NDCs consistently project a reduction of forty percent, using 1990 as a base year. The European Union submitted an NDC stating, "The EU and its Member States are committed to a binding target of an at least 40% domestic reduction in greenhouse gas emissions by 2030 compared to 1990."[422] The NDC doubles the European Union's existing 2020 reduction commitment of twenty percent compared to 1990.[423] Norway submitted an NDC stating that it "is committed to a target of an at least 40% reduction of greenhouse gas emissions by 2030 compared to 1990 levels."[424] Norway's prior commitment under the Kyoto Protocol was for a thirty percent reduction compared to 1990.[425] Iceland similarly followed the E.U. goal of a forty percent reduction compared to 1990.[426] Iceland took this action despite the fact that, prior to 1990,

420. *See Country-Composition of WEO Groups*, INT'L MONETARY FUND (Apr. 2017), https://www.imf.org/external/pubs/ft/weo/2017/01/weodata/groups.htm#ae (categorizing advanced economies).

421. *See id.* (categorizing emerging and developing economies).

422. *See NDC Registry: European Union- First NDC*, UNITED NATIONS CLIMATE CHANGE 1 (Oct. 5, 2016) [hereinafter *EUNDC*], http://www4.unfccc.int/ndcregistry/Pages/Party.aspx?party=EUU.

423. *Id.*

424. *NDC Registry: Norway- First NDC*, UNITED NATIONS CLIMATE CHANGE 1 (June 20, 2016) [hereinafter *Norway NDC*], http://www4.unfccc.int/ndcregistry/Pages/Party.aspx?party=NOR.

425. *Id.* at 6.

426. *NDC Registry: Iceland- First NDC*, UNITED NATIONS CLIMATE CHANGE 1 (Sept. 21, 2016), http://www4.unfccc.int/ndcregistry/Pages/Party.aspx?party=ISL.

"Iceland's electricity production and heating [came] almost 100% from renewable energy."[427]

The remaining G7 countries—Canada and Japan—have also made significant commitments. Canada's revised NDC states, "To contribute to the achievement of the Paris Agreement, Canada is committed to reduce greenhouse gas emissions by 30 percent below 2005 levels by 2030."[428] Japan's NDC has projected a 25.4% reduction compared to 2005 levels.[429] The Japanese commitment in particular has been rated as below the level of E.U. commitments but still remains around the same reduction level as the USNDC—even if at a cheaper cost for Japan to achieve.[430]

Eastern European NDCs project at least a twenty-five percent reduction of greenhouse gas emissions measured against 1990 as a base year. Russia has not yet submitted its first NDC. Russia's INDC projects a commitment of a reduction of greenhouse gases by twenty-five percent compared to 1990.[431] Ukraine, on the other hand, has submitted an NDC following the E.U. example.[432]

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427. *Id.* at 2.

428. *NDC Registry: Canada- First NDC (Revised Submission)*, UNITED NATIONS CLIMATE CHANGE 1 (May 11, 2017), http://www4.unfccc.int/ndcregistry/Pages/Party.aspx?party=CAN.

429. *NDC Registry: Japan- First NDC*, UNITED NATIONS CLIMATE CHANGE 1 (Nov. 8, 2016), http://www4.unfccc.int/ndcregistry/Pages/Party.aspx?party=JPN.

430. *Compare Japan*, CLIMATE ACTION TRACKER (Nov. 6, 2017), http://climateactiontracker.org/countries/japan.html (rating Japan's NDC "inadequate" given Paris goals) *with EU*, CLIMATE ACTION TRACKER (Nov. 6, 2017), http://climateactiontracker.org/countries/eu.html (rating the European Union's commitment as "medium" given Paris goals) *and* Andries F. Hoff et al., *Global and Regional Abatement Costs of Nationally Determined Contributions (NDCs) and of Enhanced Action to Levels Well below 2 C and 1.5 C*, 71 ENV'T SCI. & POL'Y 30, 30 (2017) ("Of the ten major emitting economies, Brazil, Canada and the USA are projected to have the highest cots as share of GDP to implement the conditional NDCs, while the costs for Japan, China, Russia, and India are relatively low.").

431. *NDC Registry: Russia Submission INDC*, UNITED NATIONS CLIMATE CHANGE 1 (Apr. 1, 2015), http://www4.unfccc.int/submissions/indc/Submission%20Pages/submissions.aspx.

432. *NDC Registry: Ukraine- First NDC*, UNITED NATIONS CLIMATE CHANGE 2 (Sept. 19, 2016), http://www4.unfccc.int/ndcregistry/Pages/Party.aspx?party=UKR.

Asian NDCs similarly reflect a broader range of emission reduction commitments. Of the advanced economies, China has submitted an NDC projecting a carbon dioxide emissions reduction of sixty percent from 2005 levels.[433] The NDC reports that China had already achieved carbon dioxide emissions reduction of 33.8% per unit of GDP as against 2005 levels, thus committing China to almost double past efforts.[434] The Republic of Korea, on the other hand, "plans to reduce its greenhouse gas emissions by 37% from the business-as-usual (BAU, 850.6 MtCO2eq) level by 2030 across all economic sector."[435] This target, Korea submits, would permit it to "reduce global greenhouse gas emissions by 40-70% from 2010 levels by 2050."[436]

Of the leading emerging and developing economies in Asia, India projected a thirty-three percent emissions reduction compared to 2005 as a base year.[437] India's NDC states, by way of comparison, that as a result of existing policies, "the emission intensity of our GDP has decreased by 12% between 2005 and 2010."[438] Pakistan's NDC estimates that, should financing be available to assist government efforts, it would be able be reduce its currently projected 2030 greenhouse gas emissions by twenty percent.[439] Both NDCs make compelling cases for the fairness of their respective contributions.[440]

Latin American NDCs also reflect a sizeable commitment to long-term greenhouse gas emission reductions. Brazil's

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433. *NDC Registry: China- First NDC*, UNITED NATIONS CLIMATE CHANGE 5 (Sept. 3, 2016) [hereinafter *China NDC*], http://www4.unfccc.int/ndcregistry/Pages/Party.aspx?party=CHN.

434. *Id.* at 3.

435. *NDC Registry: Republic of Korea- First NDC*, UNITED NATIONS CLIMATE CHANGE 1 (Nov. 3, 2016), http://www4.unfccc.int/ndcregistry/Pages/Party.aspx?party=KOR.

436. *Id.* at 4.

437. *NDC Registry: India- First NDC*, UNITED NATIONS CLIMATE CHANGE 29 (Oct. 2, 2016) [hereinafter *India NDC*], http://www4.unfccc.int/ndcregistry/Pages/Party.aspx?party=IND.

438. *Id.* at 8.

439. *NDC Registry: Pakistan- First NDC*, UNITED NATIONS CLIMATE CHANGE 28 (Nov. 10, 2016) [hereinafter *Pakistan NDC*], http://www4.unfccc.int/ndcregistry/Pages/Party.aspx?party=PAK.

440. *Compare India NDC*, *supra* note 437, at 33–34 (outlining fairness concerns and promising further revisions as needed) *with Pakistan NDC*, *supra* note 439, at 6–8 (outlining the same for Pakistan).

NDC states that Brazil "intends to commit to reduce greenhouse gas emissions by 37% below 2005 levels in 2025."[441] This, Brazil submits, "represents an additional gross reduction of approximately 19% in 2025."[442] The recent economic downturn in Brazil combined with successful efforts to fight deforestation and previous efforts to reduce emissions would, however, permit Brazil to meet this goal with modest emission increases.[443] Argentina's commitments, though overall less strong, suggest an approximately forty metric ton of carbon dioxide equivalent emission reduction by 2030 compared to 2005 levels.[444] Argentina further has committed itself to absolute emissions caps in its NDC.[445]

Some African NDCs finally put front and center the development costs of the climate accord. South Africa, for instance, projects that it will be able to reduce its emission *increase* only—as opposed to reducing emissions as a whole.[446] South Africa's NDC explains that this pledge is made in light of pressing developmental concerns.[447] Uganda's NDC reflects similar challenges.[448] Notably, Ethiopia's NDC breaks with this

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441. *NDC Registry: Brazil- First NDC*, UNITED NATIONS CLIMATE CHANGE 1 (Sept. 21, 2016), http://www4.unfccc.int/ndcregistry/Pages/Party.aspx?party=BRA.

442. *Id.* at 2.

443. *Id.* at 5; *see also Brazil*, CLIMATE ACTION TRACKER (Nov. 6, 2017), http://climateactiontracker.org/countries/brazil.html (discussing the impact of climate action proposed by Brazil in its NDC).

444. *NDC Registry: Argentina- First NDC*, UNITED NATIONS CLIMATE CHANGE 3 (Nov. 17, 2016) [hereinafter *Argentina NDC*], http://www4.unfccc.int/ndcregistry/Pages/Party.aspx?party=ARG.

445. *Id.* at 1.

446. *NDC Registry: South Africa- First NDC*, UNITED NATIONS CLIMATE CHANGE 5–6 (Nov. 1, 2016) [hereinafter *SANDC*], http://www4.unfccc.int/ndcregistry/Pages/Party.aspx?party=ZAF; *see also South Africa*, CLIMATE ACTION TRACKER (Nov. 6, 2017), http://climateactiontracker.org/countries/southafrica.html (discussing the impact of climate action proposed by South Africa in its NDC).

447. *SANDC*, *supra* note 446, at 2 ("Therefore, in the short-term (up to 2025), South Africa faces significant rigidity in its economy and any policy-driven transition to a low carbon and climate resilient society must take into account and emphasize its overriding priority to address poverty and inequality. South Africa's INDC should be understood in the context of these and other national circumstances.").

448. *NDC Registry: Uganda- First NDC*, UNITED NATIONS CLIMATE CHANGE 17 (Sept. 21, 2016), http://www4.unfccc.int/ndcregistry/Pages/Party.aspx?party=UGA.

trend, promising to reduce projected 2030 emissions by sixty-four percent, with projections against a business-as-usual baseline, or "level of emissions that would result if future development trends follow those of the past and no changes in policies take place."[449] Climate activists have praised Ethiopia's efforts.[450]

The Paris Agreement framework, together with the NDCs submitted so far, aspires to create an equitable allocation of carbon reduction commitments consistent with other resource-based customs.[451] NDCs so far do not permit the conclusion that a single emission reduction trajectory will fit all states. This, in any event, would not have been the goal of the Paris Agreement, which strives to take developmental needs into account.[452] NDCs promise to give substance to the fairness concerns set out in the Paris Agreement.[453] As NDCs are implemented and begin to foster debate among states, fairness factors will further be refined.

But, the commitments in the NDCs, on their own, are unlikely to give rise to a customary international law obligation.

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449. *NDC Registry: Ethiopia- First NDC*, UNITED NATIONS CLIMATE CHANGE 1 (Mar. 9, 2017), http://www4.unfccc.int/ndcregistry/Pages/Party.aspx?party=ETH; *see also* Nilmini Silva-Send, *What is Business-As-Usual? Projecting Greenhouse Gas Emissions at the Regional Level*, EPIC ENERGY BLOG (July 24, 2015), https://epicenergyblog.com/2015/07/24/what-is-business-as-usual-projecting-greenhouse-gas-emissions-at-the-regional-level-2/#_ftn1 (discussing the implications of business as usual baselines in the context of Ethiopia's NDC commitment).

450. *Ethiopia*, CLIMATE ACTION TRACKER (Nov. 6, 2017), http://climateactiontracker.org/countries/ethiopia ("Ethiopia's National Determined Contribution (NDC) is one of the few the Climate Action Tracker rates as '2°C compatible.' The '2°C compatible' rating indicates that Ethiopia's climate plans are within the range of what is considered to be a fair share of global effort but is not consistent with the Paris Agreement.").

451. *See* Paris Agreement, *supra* note 6, pmbl. ("Emphasizing the intrinsic relationship that climate change actions, responses and impacts have with equitable access to sustainable development and eradication of poverty"); *id.* art. 2(1) ("This Agreement, in enhancing the implementation of the Convention, including its objective, aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty.").

452. *See supra* note 451 and accompanying text.

453. *See* sources cited *supra* footnotes 422, 424, 426, 428, 429, 431, 432, 433, 435, 437, 439, 441, 444, 446, 448, and 449. All NDCs reviewed in this Article expressly addressed fairness and ambition. The less ambitious the NDC on its face, the longer the fairness explanation typically ran.

The NDCs, at most, are commitments to reduce carbon emissions.[454] They are thus verbal acts.[455] As such, they are not a strong foundation for customary international law, classically conceived.[456] Further, they are a first commitment, subject to further revision and strengthening under the Paris Agreement.[457]

It is also unclear whether practices meeting current NDC goals would be sufficiently ambitious to represent widespread and representative state practice of an equitable allocation of carbon emission reduction commitments. Participation in the Paris Agreement is certainly sufficiently broad to give rise to custom.[458] But, as the survey above has shown, some states presently are making less ambitious commitments in terms of both real reductions and cost. This may well prevent the formation of custom. The development of custom will therefore crucially depend upon further implementation of the Paris Agreement. Particularly, it will depend upon the trust and reliance that currently reluctant states place on the emission and financing commitments made by leading advanced and emerging economies, such as the European Union and Ethiopia, at opposite ends of the development spectrum.

Centrally, the issue is not one of increased E.U. commitments. Some commentators have suggested that the European Union take on a greater role in emission reduction following

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454. *See* sources cited *supra* footnotes 422, 424, 426, 428, 429, 431, 432, 433, 435, 437, 439, 441, 444, 446, 448, and 449.

455. Moremem, *supra* note 385, at 285–87 (defining verbal acts in the context of sources of international law).

456. *Id.* (discussing the preference for non-verbal acts in generating customary international law).

457. Paris Agreement, *supra* note 6, art 4 (setting out mechanisms for further improvement in NDCs to become more ambitious over time).

458. *Compare Paris Agreement Status*, *supra* note 15 (stating current participation) *with* North Sea Continental Shelf Cases (Fed. Rep. Ger./Den; Fed. Rep. Ger./Neth.), Judgment, 1969 I.C.J. Rep. 3, ¶¶ 77–78 (Feb. 20) (defining widespread and representative practice). As of the time this article goes to print, there are 197 Parties to the Paris Agreement. Of these, 175 have ratified the Paris Agreement. There are currently 193 UN Member States. *Growth in United Nations Membership, 1945-Present*, http://www.un.org/en/sections/member-states/growth-united-nations-membership-1945-present/index.html#2000-Present (last visited April 11, 2018). Membership in the Paris Agreement, in other words, is so widespread and representative as to border on the universal.

the United States' statement of intent to withdraw.[459] However, the European Union, at present, is not willing to make further commitments.[460] Such E.U. commitments would, in any event, have been of limited legal importance: the European Union already has made significant carbon emission pledges that, if followed by others, would support the formation of a strong customary international law rule on carbon emission reductions.

The issue instead is whether other states will be willing to follow the European Union's example and enact reasonably ambitious emission reduction programs. The immediate bellwether states for such an effort are China, Japan, Russia, and India.[461] Initial reactions from Japan suggest that greater commitments might well be feasible with the backing of civil society and business.[462] India has already indicated its willingness to exceed its Paris Agreement pledge after a meeting between Prime Minister Modi of India and President Macron of France.[463] China is currently negotiating with the European Union on joint commitments to the Paris goals and has indicated willingness to take on a greater leadership role.[464] There is thus some potential for the Paris Agreement mechanism to work as initially intended, even without active participation by the U.S. federal government.[465]

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459. *See, e.g.*, Daniel Boffey, *EU Says No Extra Emission Cuts to Fill Gap Left by U.S. After Paris Withdrawal*, GUARDIAN (June 6, 2017), https://www.theguardian.com/environment/2017/jun/06/european-leaders-scale-up-climate-change-efforts-trump-paris-deal.

460. *Id.*

461. Hoff et al., *supra* note 430, at 30 ("Of the ten major emitting economies, Brazil, Canada and the USA are projected to have the highest cots as share of GDP to implement the conditional NDCs, while the costs for Japan, China, Russia, and India are relatively low.").

462. Eric Johnston, *Japan Disappointed by Trump's Decision to Quit Paris Agreement*, JAPAN TIMES (June 2, 2017), http://www.japantimes.co.jp/news/2017/06/02/national/japan-disappointed-trumps-decision-quit-paris-agreement/#.WT9L4LGZMfM.

463. Clare Byrne & Laurence Benhamou, *India Vows to "Go Beyond" Paris Accord, Adding Pressure on Trump*, YAHOO NEWS (June 3, 2017), https://www.yahoo.com/news/india-vows-beyond-paris-accord-adding-pressure-trump-153933377.html.

464. Chinese Response, *supra* note 273 (outlining leadership claims by China); *see also* Boffey, *supra* note 459 (same).

465. *See* Byrne & Benhamou, *supra* note 463 (discussing Indian willingness to exceed Paris commitments following U.S. statement of intent to with-

The most recent Bonn COP meeting gives rise to cautious optimism that state practice will continue to develop towards a customary rule of greenhouse gas emission mitigation. The United Nations' chief climate official noted that, following U.S. withdrawal, there evolved "an unparalleled wave of support for the treaty."[466] This diplomatic enthusiasm has not led to immediate tangible results in terms of implementation of NDCs. As the *New York Times* reports, "[N]ot one of the major industrialized nations is on course to hit those goals."[467] This lack of tangible results so far may well improve following the Bonn meeting, as states continue to establish rules on implementing NDCs and to confirm compliance with the NDCs.[468] These rules and means to assess compliance will likely go a long way to strengthen Paris commitments.

C. *Parisian* Je Ne Sais Droit

State practice with regard to greenhouse gas emissions follows from a sense of legal obligation. As set out above, the sense of legal obligation can be proved by treaty conduct. Here, the sense of legal obligation, pursuant to which states act, is supplied by U.N. climate treaties.

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draw); *Chinese Response, supra* note 273 (discussing Chinese willingness to take on leadership role in climate action under the Paris umbrella following U.S. statement of intent to withdraw); *European Response, supra* note 213 (discussing E.U. commitment to Paris Agreement following U.S. statement of intent to withdraw).

466. Damian Carrington, *The COP23 Climate Change Summit in Bonn and Why It Matters*, GUARDIAN (Nov. 5, 2017), https://www.theguardian.com/environment/2017/nov/05/the-cop23-climate-change-summit-in-bonn-and-why-it-matters.

467. Jonathan Ellis, *The Bonn Climate Conference: All Our Coverage in One Place*, N.Y. TIMES (Nov. 13, 2017), https://www.nytimes.com/2017/11/13/climate/bonn-climate-change-conference.html?_r=0.

468. Lisa Friedman & Brad Plumer, *What Happened (And Didn't Happen) at the Bonn Climate Talks*, N.Y. TIMES (Nov. 18, 2017), https://www.nytimes.com/2017/11/18/climate/bonn-climate-cop23.html ("Negotiators said they had made some progress expanding the fine print of that agreement, particularly in refining rules that will help verify whether countries are actually reducing emissions as promised. But countries still have to finalize a rule book that will govern a much larger climate discussion in 2018, when countries will formally gauge how much progress they have made in reducing emissions to date. That rule book will have to be completed by next year's climate conference in Katowice, Poland.").

Centrally, the very NDC process shows that states will act to reduce greenhouse gas emissions pursuant to the Paris Agreement.[469] The Paris Agreement makes submission of the NDCs a legal obligation, meaning that they are submitted out of a sense of legal obligation.[470] This legal obligation is more than procedural as the Paris Agreement foresees a further increase in climate action or increasingly ambitious NDCs.[471] Any follow-through on past climate promises and the making of future commitments must be viewed against this background.

States' sense of legal obligation can further be established through the framework convention on the basis of which the Paris Agreement itself was negotiated—the UNFCCC. The final preamble to the UNFCCC states that the convention was concluded because the parties had "determined to protect the climate system for present and future generations."[472] The same commitment is included in Article 3(1).[473] Commentary suggests that the UNFCCC was sufficiently robust to give rise to a sense of legal obligation in the right circumstances.[474] It failed to give rise to custom on its own simply because there was insufficient, or insufficiently concrete, state action prior to the Paris Agreement to permit the derivation of customary rule.[475]

The language of the NDCs reviewed above support this conclusion. The European NDCs throughout speak of com-

469. Paris Agreement, *supra* note 6, art. 4.

470. *Id.*

471. *Id.* art. 4(4).

472. UNFCCC, *supra* note 68, pmbl.

473. *Id.* art. 3(1); *see also* Rowena Maguire, *Foundations of International Climate Law: Objectives, Principles, and Methods*, *in* 21 IUS GENTIUM: COMPARATIVE PERSPECTIVES ON LAW AND JUSTICE 83, 96 (2013) (discussing the article in the context of the preamble).

474. Faure & Nollkaemper, *supra* note 72, at 143–45 (discussing that the UNFCCC could give rise to liability in its own right but that the main obstacle to such liability under the UNFCCC is the lack of precision in the underlying commitment).

475. *Id.* Following Faure & Nollkaemper's logic, if the UNFCCC could give rise to legal liability for failing to endeavor to reduce greenhouse gas emissions, any future action that is intended to give greater precision to these admittedly vague commitments would be taken out of a sense of legal obligation.

mitments to be borne as a matter of treaty obligation.[476] The same is true with regard to China's NDC, as well as NDCs submitted by others.[477] This is further confirmation that the overall Paris Agreement process is one of legal obligation rather than political expediency.

D. *Conclusion*

World society has the ability to bind the United States for the long-term to Paris Agreement goals. The Paris framework was the first step. It provided the conduit through which reliance interests could mature and rules could be established, as the literature correctly recognized.[478] Further, it put beyond doubt that states acting to reduce greenhouse gas emissions do so out of a sense of legal obligation.[479]

The hard part is that, now, world society must act—and trust that others will act, too. As explained above, on their face, the first NDCs submitted pursuant to the Paris Agreement are likely too different from each other and, in some cases, not sufficiently ambitious to lead to the formation of a customary rule. To form a customary rule, states therefore will need to respond to the leading ambitious NDCs, rely upon the intentions stated by these leading jurisdictions to further reduce their own emissions, and reduce emissions proportionately themselves.[480] This, of course, was the intended result of the Paris framework.[481]

The unilateral declaration analysis above gives some comfort to world society: until the expiration of the cumulative termination and sunset periods of the Paris Agreement, the U.S. commitments will remain in place. Reliance on these commitments so far has not been in vain.

The customary international law analysis shows, additionally, that it is possible to bind the United States beyond No-

476. *See, e.g.*, *EUNDC, supra* note 422, at 1; *Norway NDC, supra* note 424, at 6.

477. *See, e.g.*, *China NDC, supra* note 433, at 1; *Argentina NDC, supra* note 444, at 1.

478. KOH, *supra* note 4, at 360.

479. *See* Paris Agreement, *supra* note 6, arts. 2–4.

480. VILLIGER, *supra* note 328, at 30 (discussing the process of emergence of customary international law rules).

481. STERN, *supra* note 86 (discussing the process and intent of Paris negotiations).

vember 2020, when the unilateral declarations would first become revocable. Paradoxically, to bind the United States past November 2020 requires further trust and reliance by the international community, despite the attempted U.S. defection from the Paris Agreement. In other words, it requires the world to take the USNDC at face value and continue with emissions reductions elsewhere as if President Trump had not declared his intention to withdraw from the Paris Agreement. And if nevertheless the international community persisted, its mutual reliance interests would mature into a rule of customary international law by which the United States also would be bound.[482] As discussed in the next section, such reliance is reasonable as the United States could not lawfully opt out of such a customary rule having originally signed on to the Paris Agreement. The world community can therefore look to the formation of an international legal rule on the back of their own actions as a way to constrain the United States to participate in joint greenhouse gas mitigation efforts. Moreover, this international legal rule, as discussed in a forthcoming Article, would further be actionable in the U.S. environmental rulemaking process.[483]

The specific level of U.S. reductions required by the customary rule would need to be established in light of the specific state conduct upon which custom would be predicated. That being said, a reduction consistent with the USNDC target of twenty-six to twenty-eight percent, measured against 2005 emissions, appears largely consistent with the projected trajectory of other Paris Agreement parties.[484] And if the world acts decisively, the United States will likely be obligated to make

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482. *See European Response, supra* note 213 (European leaders confirming in the face of a stated U.S. intent to withdraw from the Paris Agreement that "We deem the momentum generated in Paris in December 2015 irreversible and we firmly believe that the Paris Agreement cannot be renegotiated since it is a vital instrument for our planet, societies and economies.").

483. *See* Frédéric G. Sourgens, *The Paris Paradigm*, 2019 U. ILL. L. REV. ___ (forthcoming 2019).

484. *Compare e.g., NDC Registry: Canada- First NDC (Revised Submission)*, UNITED NATIONS CLIMATE CHANGE 1 (May 11, 2017), http://www4.unfccc.int/ndcregistry/Pages/Party.aspx?party=CAN (30% reduction against 2005 emissions) *and EUNDC, supra* note 422, at 1 (40% reduction against 1990 emissions) *and China NDC, supra* note 433, at 1 (60% reduction by a developing economy against 2005 emissions) *with USNDC, supra* note 39, at 1 (26%-28% reduction against 2005 emissions).

much steeper emissions cuts consistent with its new customary international law obligations.[485]

The Paris Agreement is not the only multilateral instrument suggesting that a customary norm of international law on emission reduction is in its final stages of development. On February 7, 2018, the Inter-American Court of Human Rights issued an advisory opinion on the human right to a clean environment—and particularly on the cross-boundary harm done by polluting states in violation of this human right.[486] The opinion was premised upon Articles 4 and 5 of the Inter-American Convention on Human Rights, which provide in relevant part that "[e]very person has the right to have his life respected" and "[e]very person has the right to have his physical, mental, and moral integrity respected."[487] These are common provision found in other human rights instruments such as the International Covenant on Civil and Political Rights.[488]

As Giovanny Vega-Barbosa and Lorraine Aboagye explain, in interpreting these common provisions in the Inter-American Convention on Human Rights, "[t]he Court declared the customary nature of the obligation to prevent transboundary environmental damage (para. 129). The Court then clarified that this principle imposes obligations that are similar to the general obligation to prevent violations of human rights and is not restricted to inter-State relations (para. 133)."[489] As

485. *See USA*, CLIMATE ACTION TRACKER (Nov. 6, 2017), http://climateactiontracker.org/countries/usa.html ("[The United States' climate plans are] at the least ambitious end of what would be a fair contribution.").

486. *See* "Environment and Human Rights," Inter-American Court of Human Rights, Advisory Opinion OC-23/17. For an English summary of the decision, see Monica Feria-Tinta & Simon Milnes, *The Rise of Environmental Law in International Dispute Resolution: Inter-American Court of Human Rights issues Landmark Advisory Opinion on Environment and Human Rights*, EJILTALK! (Feb. 26, 2018), https://www.ejiltalk.org/the-rise-of-environmental-law-in-international-dispute-resolution-inter-american-court-of-human-rights-issues-landmark-advisory-opinion-on-environment-and-human-rights/.

487. Feria-Tinta & Milnes, *supra* note 486; Inter-American Convention on Human Rights arts. 4(1), 5(1), Nov. 22, 1969, 1144 U.N.T.S. 123.

488. International Covenant on Civil and Political Rights art. 6(1), Dec. 19, 1966, 999 U.N.T.S. 171 ("Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.").

489. Giovanny Vega-Barbosa & Lorraine Aboagye, *Human Rights and the Protection of the Environment: The Advisory Opinion of the Inter-American Court of Human Rights*, EJILTALK! (Feb. 26, 2018), https://www.ejiltalk.org/human-

Monica Feria-Tinta and Simon Milnes note further, "it is the first ruling ever by an international human rights court that truly examines environmental law as a systemic whole, as distinct from isolated examples of environmental harm analogous to private law nuisance claims."[490] As they note further,

> The [Advisory Opinion] does not address climate change, but some of the Court's observations on States' duties (see especially § 242) are clearly pertinent to this ultimate example of transboundary pollution. Moreover, the Court's reasoning on the "jurisdiction" issue could be used to support an argument that a State's contribution to the accumulation of greenhouse gases in the atmosphere should result in State responsibility and accountability under the [Inter-American Convention on Human Rights] to victims living in other States, e.g. persons whose lands have become submerged or uncultivable due to rising sea levels.[491]

The development is significant in that it tracks a similar and accelerating movement towards a customary international law rule of emissions reduction in two converging regimes—human rights and international climate law. This convergence strengthens the human rights norm—Giovanny Vega-Barbosa and Lorraine Aboagye observed that the Inter-American Court's advisory opinion "did not however, provide any reasoning on a state practice and *opinio juris* basis."[492] The Paris Agreement—and action taken pursuant to it—provide such specific state practice and additional *opinio juris* from a different regime for the reasons outlined in this Article. This convergence further strengthens international climate law. It showcases that the preambular purpose in the Paris Agreement, that the Paris Agreement was concluded by the state parties to "promote and consider their respective obligations on human rights," was not fanciful rhetoric.[493] The Paris Agreement truly does interlock with human rights law and

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rights-and-the-protection-of-the-environment-the-advisory-opinion-of-the-inter-american-court-of-human-rights/.

490. Feria-Tinta & Milnes, *supra* note 486.

491. *Id.*

492. Vega-Barbosa & Aboagye, *supra* note 489.

493. Paris Agreement, *supra* note 6, pmbl. 11.

thus receives the benefit of its additional customary international law status of the right to life and dignity by extension. The notion, in other words, that a duty to mitigate climate change will mature quickly into a customary rule has already found a foothold. The Paris Agreement is simply accelerating such an existing trend and provides it with the needed definition to become practically enforceable.

VI. Irreversible momentum

Italy, Germany, and France responded to the proposed U.S. withdrawal from the Paris Agreement by stating that "the momentum generated in Paris in December 2015 [is] irreversible."[494] The statement is not political window-dressing. As the previous section pointed out, there remains a clear path for the international community to bind the United States, even if it leaves the Paris Agreement, by means of a customary rule of international law.

The crystallization of a customary rule would in fact be irreversible for the United States, as the United States would lack any clear means to escape the new customary legal obligations. As discussed below, the only means to escape a customary rule is to be a persistent objector to the rule from the moment of its formation. The United States cannot claim such a persistent objector status given its leadership role in the Paris negotiations. Particularly if the customary rule crystallizes prior to November 2020, the United States would have been bound by its own consent to the Paris structure from its very inception. It therefore could not claim persistent objector status.

A. *The Persistent Objector Rule*

The only means by which a state can escape legal obligation under an otherwise applicable rule of customary international law is to prove that it was a persistent objector to the rule. To obtain the status of a persistent objector, a state must have objected at the time the customary rule began to form.[495]

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494. *European Response, supra* note 213.

495. *See* James Green, The Persistent Objector Rule in International Law 7 (2016) (quoting the following ILC definition as authoritative: "[w]here a state has objected to a customary rule of international law while that rule was in the process of formation, the rule is not opposable to the

Jurisprudence confirms that objecting only after a new rule has become binding is untimely.[496] This means that timing of both the beginning of the formation of a customary international law rule and its eventual acceptance are dispositive to establishing persistent objector status.[497]

As the term persistent objector indicates, the objection must be raised consistently from the beginning of the process of formation of a customary rule through to invocation of persistent objector status.[498] Thus, the acceptance of the rule at any point after its formation will waive persistent objector status.[499] Once waived, the persistent objector status typically cannot be reclaimed.[500] This is the case particularly if other states have relied, in some form, upon the relinquishment of persistent objector status.[501]

Persistent objections must be clearly raised,[502] and the state must express that it objects to the rule as such.[503] It logically would therefore not suffice that the state objects to a par-

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State concerned for so long as it maintains the objection."); VILLIGER, *supra* note 328, at 39 (discussing the persistent objector rule).

496. *See* Asylum Case (Col./Peru), Judgment, 1950 I.C.J. 266, 277–78 (Nov. 20) (finding persistent objector status when a state refused to become a member of conventions leading to the formation of the customary rule in question); Fisheries Case (U.K. v. Nor.), Judgment, 1951 I.C.J. 116, 131 (Dec. 18) (finding the same rule not applicable to Norway because "it has always opposed any attempt to apply it to the Norwegian coast").

497. *See* GREEN, *supra* note 495, at 146 ("Although a subsequent objector rule would not necessarily negate the entire legal content of customary international law, it is nonetheless fairly clear that subsequent objection would decrease the reliability of state compliance with customary norms: something that is, of course, already imperfect.").

498. Fisheries Case (U.K. v. Nor.), Judgment, 1951 I.C.J. 116, 131 (Dec. 18) (discussing the timing when a state may become a persistent objector to a customary international law rule); GREEN, *supra* note 495, at 7 (same).

499. *See* Eugene Kontorovich, *Inefficient Custom in International Law*, 48 WM. & MARY L. REV. 859, 875 (2006) ("The 'persistence' required of the objector is quite substantial, and there is a tendency to aggressively construe a failure to raise objections at a particular moment as a waiver, despite previous and subsequent objections.").

500. *Id.*

501. *Id.*; *see also* CHENG, *supra* note 290, at 147 (discussing the principle of *venire contra factum proprium nemini licet*).

502. Kontorovich, *supra* note 499, at 910 ("States must make their objections known openly and clearly during the norm's creation.")

503. *See* GREEN, *supra* note 495, at 245 (discussing clarity and persistence as alternate requirements for objector status).

ticular application of the rule, for instance, because the rule is allegedly not applicable to certain conduct. It should therefore not be sufficient to claim that a rule is "non-binding" or that a state has acted lawfully without further elaboration.

B. *U.S. Paris Participation as Bar to Objector Status*

The United States cannot currently be a persistent objector to customary international law rules arising out of the Paris Agreement. The United States was central to its negotiation,[504] as noted throughout, the United States is currently a party to the Paris Agreement.[505] Both of these facts distinguish the *Asylum* case recognizing a persistent objector status in the context of treaty commitments, reflecting an asserted customary rule of international law.[506] Moreover, the United States remains a member of the UNFCCC.[507] The UNFCCC has a similar object and purpose to the Paris Agreement.[508]

Unlike the *Fisheries* case, the United States did not always object to the underlying obligations a customary rule would impose upon the United States.[509] Quite to the contrary, the United States is bound by good faith to perform a significant part of the USNDC commitments through at least November 2020.[510] These commitments are consistent with the forming

504. *See, e.g.*, Goldberg, *supra* note 263 (discussing the role of the United States in driving Paris negotiations towards a successful conclusion).

505. *Paris Agreement Status, supra* note 15.

506. Asylum Case (Col./Peru), Judgment, 1950 I.C.J. 266, 277–78 (Nov. 20).

507. *Parties & Observer Status: United States of America*, UNITED NATIONS CLIMATE CHANGE, http://unfccc.int/tools_xml/country_US.html (last visited Mar. 19, 2018).

508. *Compare* UNFCCC, *supra* note 68, pmbl ("*Acknowledging* that the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response, in accordance with their common but differentiated responsibilities and respective capabilities and their social and economic condition") *with* Paris Agreement, supra note 6, pmbl. ("Recognizing the need for an effective and progressive response to the urgent threat of climate change on the basis of the best available scientific knowledge").

509. Fisheries Case (U.K. v. Nor.), Judgment, 1951 I.C.J. 116, 131 (Dec. 18) ("In any event the ten-mile rule would appear to be inapplicable as against Norway inasmuch as she *has always opposed* any attempt to apply it to the Norwegian coast.") (emphasis added).

510. *See supra* Part III (discussing the basis for U.S. international legal obligations in the law of unilateral declarations and the law of treaties).

state practice under the Paris Agreement as discussed in Part IV.B above. The *Fisheries* logic compels the conclusion that the United States cannot both be obligated under international law to act consistent with the predicate for a forming customary international law rule and be a persistent objector to the same rule.[511]

An issue could arise if the customary rule formed after a U.S. withdrawal from the Paris Agreement could first become effective in November 2020. In that case, the United States may wish to argue that President Trump's June 1, 2017, statement constituted an objection to any rule forming after November 2020.[512] As the custom in this scenario had not yet formed, this objection would not be a subsequent objection following the formation of a new customary rule and would thus be permissible.[513]

This scenario would crucially depend on the link between the customary rule and the Paris Agreement. The stronger the link between the Paris Agreement and the new customary rule, both in terms of timing and in terms of the NDC process, the more convincing the argument that the United States is precluded from objecting to the customary rule due to its earlier party status in the Paris Agreement. Should the link prove too attenuated, the United States will have a stronger factual basis for its objection.

Consequently, the international community would do well to act decisively in its Paris implementation. A U.S. withdrawal from the Paris Agreement does not undo the United States' initial participation in the formation of the customary rule—as discussed above, the United States was instrumental in negotiating the Paris Agreement and acting upon it. Decisive action by others on the Paris Agreement would deprive the United States to claim that it was a persistent objector to the newly forming rule. Swift action would deprive the United States of the most promising defense against a customary international law rule on carbon emission reductions: as intended by the Paris drafters, the greater the reliance, the greater the legal

511. Fisheries Case (U.K. v. Nor.), Judgment, 1951 I.C.J. 116, 131 (Dec. 18) (quoted above in footnote 509).

512. Trump Withdrawal Remarks, *supra* note 19.

513. GREEN, *supra* note 495, at 146 (discussing the dangers of a subsequent objector rule).

protection from U.S. defection.[514] Such action therefore would make good on the recent promise that the Paris momentum has become "irreversible."[515]

C. *The Wisdom of Constraining Exit from Custom*

Some recent academic literature has suggested a means to exit custom subsequent to its formation. In an article central to this effort, Curtis Bradley and Mitu Gulati submit that it is, on the whole, undesirable not to permit parties to terminate customary obligations when international law permits parties to terminate treaty obligations.[516] Central to their argument, they view customary rules as cumbersome and unresponsive to policy concerns.[517] Further, due to this lack of responsiveness to dialogue and constituent needs, they suggest that custom lacks democratic legitimacy.[518]

Important for current purposes, Bradley and Gulati make an exception when a customary rule addresses a potential tragedy of the commons:

> To be sure, there are situations in which reliance interests might provide an argument for restricting withdrawal rights. The contracts literature concerning holdup problems tells us that an easy ability to withdraw from a relationship can lead to underinvestment. Particularly in situations in which parties make sequential investments, the party making the first investment will be concerned that, once it has made its

514. *See* Goldberg, *supra* note 263 (discussing goal to make the Paris Agreement "Republican proof").

515. *See European Response, supra* note 213.

516. Bradley & Gulati, *supra* note 45, at 254 ("We conclude from this literature that it is unlikely that the Mandatory View makes sense as a matter of institutional design for all of CIL, although restricted withdrawal rights might be justified for certain types of issues.").

517. *Id.* at 244 ("These conditions make it less likely that the aggregation of state practice, which is the basis for traditional CIL formation, will generate efficient rules.").

518. *Id.* at 244-45 ("The problem for CIL is that, unlike in the common law litigation model, the number of disputes that are heard by international tribunals is small, and most international disputes are instead addressed through diplomatic channels. That means that judges deciding international law matters have neither the opportunity to evaluate the analysis of the same issue by a variety of tribunals nor the incentive to reduce the numbers of disputes by shaping efficient rules.").

> investment, it will be subject to the risk of holdup by the counterparty who can threaten to withhold its investment unless it is given something extra. Ex ante, if this risk of holdup is significant, parties will refrain from investing—hence, the underinvestment problem.[519]

Bradley and Gulati nonetheless doubt the effectiveness of custom when "there is reliance and a strong incentive to cheat."[520] They argue that, in such instances, "nations typically turn to treaties instead of relying on CIL."[521] Treaties, Bradley and Gulati contend, provide "mechanisms for communication, monitoring, and collective sanctions, [and] can attempt to address the incentives that nations might have to behave opportunistically in an uncoordinated system."[522] Of course, such treaty structures also permit a right to exit.[523]

The Paris Agreement provides a strong counter argument to their position. Treaty structures binding states ex ante to emissions reductions have a less than stellar track record.[524] Treaties expressing only commitments in principle are unduly fragile.[525] Even long termination and sunset periods fail to constrain for the necessary ten-year timeframe to see through even initial commitments.[526]

The treaty structure in this context provides only part of the answer. It provides the means to coordinate action to solve the collective action problem. It is not the answer to the collective action problem itself.

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519. *Id.* at 255.

520. *Id.*

521. *Id.*

522. *Id.*

523. *Id.* at 254.

524. Sunstein, *supra* note 55, at 41 (discussing the Kyoto Protocol and the mass defection from the goals it set out following U.S. withdrawal).

525. Druzin, *supra* note 56, at 74 (discussing the risk of non-compliance for aspirational treaties).

526. *Compare* Paris Agreement, *supra* note 6, art. 28 (termination and sunset provisions permitting 2020 exit) *with USNDC, supra* note 39 (expressing goals for 2025 reduction efforts in excess of 2020 commitments). Climate action is frequently hard fought in domestic courts. A stay by a court of a particular regulatory climate action may frustrate the sunset period. This is currently playing out in the context of the Clean Power Plan. For a full discussion, *see* Sourgens, *supra* note 1.

The global lawyer's toolkit therefore needs the strong reliance protection provided by customary international law. Customary international law as it stands today permits a gradual growth of reliance interests into a customary rule. Treaty structures can assist in creating a framework for communication in which this can occur, as Bradley and Gulati point out.[527] But treaties cannot assist in creating instant trust and reliance. Trust and reliance arise out of positive experiences in the performance of the treaty, as the treaty logically predates its own performance.

Positive performance feedback matures reliance interests into custom.[528] In order to mature to this point, however, states must have legal confidence that their trust or reliance in others cannot easily be undone to avoid the tragedy of the commons. Custom therefore holds states to their commitment to cooperate in a normative enterprise if it ends up being successful, no matter if there is a subsequent change of heart.[529] Because of this guarantee, it becomes rational for states to rely and cooperate at the early stages, when formation of a customary rule is still uncertain.[530] Far from being a weakness of custom, this "stickiness" of custom is its ultimate selling point.[531]

The "glue" of custom thus completes the plan behind the Paris framework. It is now possible to explain how the transnational legal process of climate norm internationalization and habituation not only changes minds but also reflects lasting binding legal obligations.[532] When reliance interests have fully matured to a customary rule, they cannot legally be undone by executive fiat or defection.[533] They can only be replaced by

527. BRADLEY & GULATI, *supra* note 45, at 255.

528. VILLIGER, *supra* note 328, at 29-30 (discussing the link between reliance and custom).

529. GREEN, *supra* note 495, at 146 (discussing the reasons against recognizing a subsequent objector rule in customary international law).

530. *Id.*

531. *See* Bradley & Gulati, *supra* note 45, at 245–49 (raising stickiness as a concern for customary international law).

532. Koh, *supra* note 4, at 360 (positing the "stickiness" of the Paris Agreement).

533. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Merits, 1986 I.C.J. Rep. 14, 98 (June 27) ("In order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of States should, in general, be consistent with such rules, and that instances of State conduct inconsistent with a given rule should generally have been

similar processes of internationalization and habituation of competing norms.[534] It is needless to say that naked self-interest can never become the predicate of a new international norm; it would be categorically impossible to prove that a state acts in naked self-interest out of a sense of legal obligation.[535] This should give comfort to states as they contemplate their future action pursuant to the Paris framework.

VII. Conclusion

The Paris Agreement gives rise to international legal prescriptions that can be applied to U.S. environmental policy today. The United States has bound itself to perform the Paris Agreement at least through November 2020.[536] During this time, the United States is bound to follow through on its 2020 projected carbon emission reduction goals, as described in the USNDC, as a matter of the law of unilateral declarations and the law of treaties. An immediate withdrawal, as announced by President Trump, is therefore impossible as a matter of international law. The United States must therefore perform its procedural and substantive obligations until November 2020.

The Paris Agreement holds the promise of giving rise to an irreversible shift in international environmental law. If the Paris parties follow their initial commitments expressed in their respective NDCs and further increase their contributions promised in these NDCs to match the most ambitious goals already pledged as part of the Paris framework, then they will give rise to a carbon custom. This carbon custom would bind

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treated as breaches of that rule, not as indications of the recognition of a new rule. If a State acts in a way prima facie incompatible with a recognized rule but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule."); Green, *supra* note 495, at 146.

534. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Merits, 1986 I.C.J. Rep. 14, 98 (June 27); Villiger, *supra* note 328, at 29–30.

535. *See* North Sea Continental Shelf Cases (Fed. Rep. Ger./Den; Fed. Rep. Ger./Neth.), Judgment, 1969 I.C.J. Rep. 3, ¶¶ 77–80 (Feb. 20) (discussing the *opinio juris* requirement). *See also* Edward T. Swaine, *Rational Custom*, 52 Duke L.J. 559, 589 (2002) ("But customary international law is of course special. *Opinio juris* arguably requires that a state act with reference to legal obligation, not out of 'mere' self-interest.")

536. *See supra* Part IV.B.

all states equitably to apportion the greenhouse gas emission reduction commitments in order to meet the goal to keep average global temperature increases well below two degrees Celsius.

If the world community acts with reasonable haste in altering its emissions trajectory, the United States, too, will be bound by the currently emerging carbon custom even after a potential November 2020 exit from the Paris Agreement. International law is clear that the United States cannot become a subsequent objector to the Paris framework. U.S. participation in the Paris Agreement precludes it from claiming persistent objector status. The international community therefore has the power to ensure that President Trump's decision to pull the United States out of the Paris Agreement has no effect.

Given the current state of international environmental law, a carbon custom is greatly needed. International efforts regarding climate change are a classic collective action problem. Previous attempts to solve the collective action problem by means of binding treaty obligations have failed. The path has now been cleared by the Paris Agreement for the formation of a lasting and globally binding carbon custom.

This is not to say that the formation of a carbon custom should not be responsive to the policy concerns and developmental needs of the international community. Rather, the Paris Agreement provides for clearly identifiable and justifiable pathways to arrive at a robust consensus of developmental concerns in the greenhouse gas emission context. These pathways help narrow the debate about equity and proportionality that would otherwise plague the formation of a carbon custom. A carbon custom thus provides a means to act prudently and with the input of all affected members of the world community. The emergence of a carbon custom from the Paris Agreement is one instance in which legal decision-making processes devise sensible policy in the face of severe uncertainty and distrust.[537] It instead stabilizes and renders effective transnational networks created by the Paris NDC process. In so

537. *See* Siegfried Wiessner, *Michael Reisman, Human Dignity, and the Law*, *in* LOOKING TO THE FUTURE: ESSAYS ON INTERNATIONAL LAW IN HONOR OF W. MICHAEL REISMAN, *supra* note 158, at 21 (submitting that the task of legal scholars is to design lawful decisions that are contextually meaningful and realistic).

doing, it proves that, after the Paris Agreement, the international community can indeed constrain a climate laggard even if that laggard is the United States—all it must do is act with the courage of its convictions.