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The Paris Climate Agreement and Bederman's Six Myths About International Law and International Legal Practice

MARKUS G. PUDER, PH.D.*

“Let us face it: there is no planet B.” Emmanuel Macron**

In his seminal work, *International Law Frameworks*, the late Professor David J. Bederman of Emory Law School confronts and debunks several myths that have persistently clouded international law and international legal practice. In homage to Professor Bederman's insightful and creative work, my article harnesses his myths to elucidate recent developments in the evolving field of international climate law.

I. Introduction***

The international scientific, legal, and political conversation about our climate barely covers four decades.¹ As the spectrum of opinions in the climate debate has continued to range from cataclysmic doomsday scenarios of life, or the absence thereof, on a hotter planet² to conspiracy theories

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** July Hirschfield Davis, *Macron Critiques Trump's Policies in Speech to Congress*, N.Y. TIMES (Apr. 25, 2018), <https://www.nytimes.com/2018/04/25/us/politics/macron-congress-speech-trump.html>.

*** This article develops themes broached in my keynote address at the 23rd International Petroleum Environmental Conference (IPEC-23) in New Orleans, Louisiana. I would like to thank John A. Veil of Veil Environmental LL.C. and the organizers of IPEC-23. The views advanced in this article are strictly mine.

1. John W. Zillman, *A History of Climate Activities*, 58 (3) Bulletin of the World Meteorological Org. [WMO] 141 (2009) (referring to the First World Climate Conference convened under the auspices of the World Meteorological Organization in 1979), https://ane4bf-datap1.s3-eu-west-1.amazonaws.com/wmocms/s3fs-public/article_bulletin/related_docs/58_3_zillman_en.pdf?I_nHSQzd.63T9FloxaG7rtIV8pQCUW4F.

2. See generally MARK LYNAS, SIX DEGREES: OUR FUTURE ON A HOTTER PLANET (Nat'l Geographic 2008).

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labeling climate change a Chinese hoax,³ international climate law has moved quite slowly.⁴

Lawmaking efforts to protect the global climate did not gain steam until the 1990s. Prior to the arrival of the Paris Agreement in late 2015,⁵ they resulted in the UN Framework Convention on Climate Change of 1992 (UNFCCC),⁶ the Kyoto Protocol of 1997,⁷ and the Copenhagen Accord of 2009.⁸

The UNFCCC pursues the long-term objective to stabilize “greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.”⁹ Commitments under the UNFCCC, which are generally prefaced by “shall,” differ by degrees of development.¹⁰ In addition to inventorying and reporting information related to the implementation of the UNFCCC, all parties shall mitigate climate change by reducing or avoiding greenhouse gas emissions.¹¹ But only developed countries shall deploy policies and measures (PAMs) to abate and mitigate climate change.¹² Yet, the PAMs are not linked up with a legally binding target beyond the aim to return to 1990 levels.¹³ Finally, a subset of developed countries shall collectively mobilize financial resources for developing countries.¹⁴ Especially through the Conference of the Parties (COP), which serves as supreme decision-making body and mechanism to regularly review and progressively tighten international

3. Edward Wong, *Trump Has Called Climate Change a Chinese Hoax. Beijing Says It Is Anything But.*, N.Y. TIMES (Nov. 18, 2018), <https://www.nytimes.com/2016/11/19/world/asia/china-trump-climate-change.html>.

4. See, e.g., Daniel Bodansky, et al., Int’l Relations and Global Climate Change, *The History and Legal Structure of the Global Climate Change Regime* at 24, Potsdam Institute for Climate Impact Research (2001).

5. See generally Paris Agreement in United Nations Framework Convention on Climate Change [UNFCCC], Report of the Conference of the Parties on its Twenty-First Session, Addendum, at 21, U.N. Doc. FCCC/CP/2015/10/Add.1 (Jan. 29, 2016) [hereinafter PA]. For Decision 1/CP.21 of the Conference of the Parties to which the Paris Agreement is attached, see Adoption of the Paris Agreement, Decision 1/CP.21, in COP Report No. 21, Addendum, at 2, U.N. Doc. FCCC/CP/2015/10/Add/1 (Jan. 29, 2016) [hereinafter PD].

6. See generally United Nations Conference on Environment and Development: Framework Convention on Climate Change, U.N. Doc. A/AC/23/7/18 (Part II)/Add.1, 31 I.L.M. 849 (May, 9, 1992) [hereinafter UNFCCC].

7. See generally Conference of the Parties to the Framework Convention on Climate Change: Kyoto Protocol, U.N. Doc. FCCC/CP/1997/7/Add.1, 37 I.L.M. 22 (Dec. 10, 1997) [hereinafter Kyoto Protocol].

8. See generally Conference of the Parties, *Rep. of the Conf. of the Parties on its Fifteenth Session*, U.N. Doc. FCCC/CP/2009/11/Add.1, Decision 2/CP.15, at 4 (Mar. 30, 2010) [hereinafter Copenhagen Accord].

9. UNFCCC, *supra* note 6, art. 2.

10. See generally *id.*

11. *Id.* arts. 4.1, 12.

12. *Id.* art. 4.2(a).

13. *Id.* art. 4.2(b).

14. *Id.* art. 4.3.

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climate law,¹⁵ the UNFCCC is alive and well.¹⁶ But this cannot be said about the Kyoto Protocol and the Copenhagen Accord.

The Kyoto Protocol grew out of the UNFCCC.¹⁷ Sparing developing countries, it imposed on developed countries ambitious targets and timetables.¹⁸ These were mollified by flexibility-and-market mechanisms to internationally transfer mitigation outcomes.¹⁹ Ultimately, however, the Kyoto Protocol failed to deliver. After the first commitment period expired, a second commitment period under the Doha Amendment to the Kyoto Protocol, with tightened obligations for even fewer countries and the European Union,²⁰ never entered into force.²¹

While the international community debated whether the Kyoto Protocol should be extended or replaced by a new global climate treaty, the Copenhagen Accord emerged in a political intermezzo.²² Independent of the uncertainties surrounding its status,²³ the Copenhagen Accord, as incorporated into the UNFCCC's ambit,²⁴ offered a new paradigm for achieving mitigation goals: self-declared national emission limitation pledges submitted by all countries.²⁵ But the horizon of the Copenhagen Accord did not extend beyond 2020.²⁶

The package that emerged in Paris comprises several components. Foremost, the Paris Decision, which was taken by the conference of the parties, provided the vehicle for formally adopting the Paris Agreement—a new international instrument with legal force, defining how countries will implement their UNFCCC commitments after 2020.²⁷ Ahead of the

15. *Id.* art. 7.

16. See generally Annalisa Savaresi, *The Paris Agreement: Reflections on an International Law Odyssey*, 13 EUR. SOC'Y OF INT'L L. 1 (2016).

17. UNFCCC, *supra* note 6, at 869.

18. Kyoto Protocol, *supra* note 7, at 34, 42; UNFCCC, *supra* note 6, at 872.

19. Kyoto Protocol, *supra* note 7, at 34–35, 38, 40.

20. Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol, *Rep. of the Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol on its Eighth Session*, FCCC/KP/CMP/2012/13/Add.1, annex I (Feb. 28, 2013).

21. See Press Release, UNFCCC, Doha Amendment (Sept. 28, 2018) (reporting that (1) 144 instruments of acceptance are required for the entry into force of the amendment; and (2) as of March 15, 2018, 111 parties have deposited their instruments of acceptance).

22. See generally Lavanya Rajamani, *The Making and Unmaking of the Copenhagen Accord*, 59 INT'L & COMP. L. Q. 824 (2010).

23. *Id.* at 828–31 (discussing that neither a decision of the Conference of the Parties nor an independent plurilateral agreement, but a political rather than a legal instrument).

24. Daniel Bodansky, *The Paris Climate Change Agreement: A New Hope?*, 110 AM. J. INT'L L. 288, 292 (2016) (referring to the 2010 Cancún Agreements).

25. Copenhagen Accord, *supra* note 8, ¶ 4, app. I (developed countries identify their quantified economy-wide emission targets), app. II (developing countries describe their nationally appropriate mitigation actions).

26. See Bodansky, *supra* note 24, at 292.

27. Center for Climate and Energy Solutions, Paris Climate Agreement Q&A, at 1 (June 2017), <https://www.c2es.org/site/assets/uploads/2017/06/paris-climate-agreement-qa.pdf> [hereinafter Paris Climate Agreement Q&A].

conference, more than 180 countries had already submitted their intended emission reduction pledges.²⁸ Finally, a host of non-state actors were invited to offer their contributions.²⁹

The Paris Agreement entered into force on November 4, 2016.³⁰ Despite its relative youth, it spawned reams of insightful commentary. Most reviewers have either discussed its provisions or peeled out singular features of interest. My article offers a fresh look at the Paris Agreement in homage to the late Professor David J. Bederman of Emory Law School and his unique pedagogical mastery in unpacking and repackaging the highly abstract and somewhat mercurial legal themes so characteristic of international law and practice. In his chef-d'oeuvre, *International Law Frameworks*,³¹ Professor Bederman poses three overarching questions with regard to the existence and essence of international law. Why do so many people believe it does not exist?³² Why does international law still seem to be the stepchild of legal studies?³³ Why do international lawyers appear to “have a perpetual chip on their shoulder?”³⁴ Exploring these questions, Professor Bederman confronts and debunks six myths about international law and international legal practice.³⁵ His six myths lend themselves superbly to elucidate recent developments in the evolving field of international climate law, especially in the light of recent efforts in the United States to sideline the Paris Agreement in the public eye.

II. The Six Myths

The myths identified by Professor Bederman revolve around the following six assertions: first, international law is its own, separate, and distinct legal system; second, international law is all theory and no practice; third, international law is not real law; fourth, no one obeys international law; fifth, international law is what the United States says it is; and sixth, international lawyers are not real lawyers.³⁶ The following sections discuss and refute each myth for international climate law under the Paris Agreement.

28. *Id.* at 1–2.

29. *Id.* at 3.

30. *Id.* at 1.

31. See generally DAVID J. BEDERMAN, *INTERNATIONAL LAW FRAMEWORKS* (Foundation Press 2001).

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 6–12.

A. FIRST MYTH

1. *Assertion: The Paris Agreement Is Its Own, Separate, and Distinct Legal System*

The myth that international law is distinct and separate from the domestic legal systems³⁷ evokes a dualist worldview according to which the Paris Agreement and domestic law subsist in walled off silos. In the literature, dualism and monism have been used as didactic tools in two different contexts.³⁸

Some scholars have understood monism and dualism to elucidate the relationship between international law and domestic law.³⁹ Under this view, dualism advances that domestic law and international law differ in their subject, sources, and contents.⁴⁰ Along these lines it could be said, for example, that international law is made by treaties, whereas domestic law is created through statutes. Radical dualism allows both legal orders to co-exist albeit in strict separation.⁴¹ Moderate dualism recognizes a certain degree of overlap between international law and domestic law when norms of one legal order refer to the other or when norms are transferred from one order to the other.⁴² In contrast to dualism, monism views international law and domestic law joined with and part of the internal order of a state.⁴³ Monism then has to resolve ensuing questions of rank in favor of giving primacy to one or the other legal order.⁴⁴

Pursuant to an alternative scholarly understanding, monism and dualism describe different types of legal systems.⁴⁵ Dualist states accord no special force to treaties absent incorporating legislation.⁴⁶ For monist states, duly concluded treaties become automatically part of the internal legal orders.⁴⁷ In practice though, many legal systems exhibit dualist and monist elements.⁴⁸

At first sight, the creation of the Paris Agreement by states and for states as well as its inability to impose substantive domestic legal obligations on the executive and judicial branches appear to exude the dualist flavor of

37. BEDERMAN, *supra* note 31, at 6.

38. See DAVID SLOSS, DOMESTIC APPLICATION OF TREATIES IN THE OXFORD GUIDE TO TREATIES 368 (Duncan B. Hollis, ed., Oxford Univ. Press 2012).

39. *Id.*

40. *Id.*

41. MICHAEL SCHWEITZER, STAATSRECHT III: STAATSRECHT, VÖLKERRECHT, EUROPA-RECHT, 12 ¶ 32 (10th ed., 2010).

42. *Id.* at 12, ¶ 33.

43. SLOSS, *supra* note 38, at 368–69.

44. Georg Dahm, Jost Delbrück & Rüdiger Wolfrum, *Völkerrecht / Die Grundlagen. Die Völkerrechtssubjekte* (De Gruyter 1988).

45. SLOSS, *supra* note 38, at 368.

46. *Id.* at 369.

47. *Id.*

48. *Id.*; see also D. A. Jeremy Telman, *A Monist Supremacy Clause and a Dualistic Supreme Court: The Status of Treaty Law as U.S. Law*. (Marko Novakovic ed., 2013), available at SSRN: <https://ssrn.com/abstract=2265880>.

separation suggested by the first myth. But a closer look reveals “extensive contemporary interaction”⁴⁹ between the Paris Agreement and the domestic realms of its parties.

2. *Rebuttal: Interactions Between the Paris Agreement and the Domestic Realms*

A first set of interactions stems from the unique domestic processes that had to play out within the system of each prospective party before it could give its consent to being bound by and join the Paris Agreement. A different set of interactions is worked into the design of the nationally determined contributions (NDCs) under the Paris Agreement.

a. Domestic Approvals

In 2016, the World Resources Institute published a valuable survey covering the domestic approval of the Paris Agreement by the top 100 greenhouse gas emitters.⁵⁰ The study found that emitters fell into one of five broad categories of domestic approval: first, by the executive alone; second, by the executive coupled with additional requirements or practices such as legislative notification; third, by the executive and the majority consent of the legislature or one legislative body; fourth, by the executive and a super majority of the legislature or one legislative body; and fifth, by multiple executive and legislative bodies.⁵¹ Within this classification grid, the United States joined the Paris Agreement under the first category.⁵² The European Union (EU) fell into the fifth category.⁵³

i. *United States*

For the United States, President Obama opted to join the Paris Agreement by way of a sole executive agreement,⁵⁴ as opposed to seeking approval from the Senate under the treaty clause of the Constitution⁵⁵ or from both houses of Congress through a federal statute under the Foreign Commerce Clause.⁵⁶ The precise sources of authority for proceeding by

49. GILLIAN D. TRIGGS, *INTERNATIONAL LAW: CONTEMPORARY PRINCIPLES AND PRACTICES* 154 (Butterworths Law 2006).

50. See Eliza C. Northrop & Chad Smith, *Domestic Processes for Joining the Paris Agreement*, WORD RESOURCES INSTITUTE at 2 (Sept. 2016), <https://www.wri.org/publication/domestic-processes-joining-paris-agreement>.

51. *Id.* at 3.

52. *Id.* at 4.

53. *Id.*

54. See Daniel Bodansky, *Legal Options for U.S. Acceptance of a New Climate Change Agreement*, Center for Climate and Energy Solutions at 14 (May 2015), <https://www.c2es.org/document/legal-options-for-u-s-acceptance-of-a-new-climate-change-agreement/> [hereinafter *U.S. Acceptance*]; Gwynne Taraska & Ben Bovarnick, *The Authority for U.S. Participation in the Paris Climate Agreement* (July 2015), <https://cdn.americanprogress.org/wp-content/uploads/2015/07/InternationalExecutiveAgreements-report1.pdf>.

55. *U.S. Acceptance*, *supra* note 54, at 5, 14.

56. *Id.* at 5–6, 13–14.

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executive agreement were never publicly articulated by the Obama administration.⁵⁷ Supporters of this approval route could invoke the president's core constitutional power to communicate with foreign governments.⁵⁸ Another argument could be that the Senate had already given its advice and consent for the UNFCCC through which, after all, the Paris Agreement was adopted.⁵⁹ Moreover, it could be said that the president relied on extant domestic statutory and regulatory authorities, such as those under the Clean Air Act and the Energy Policy Act.⁶⁰ Finally, one could argue that binding greenhouse gas reduction promises and new binding financial commitments, which may have called for the involvement of the legislative power, are conspicuously absent from the Paris Agreement itself.⁶¹

Critics of President Obama's approval by sole executive agreement have spoken of an unconstitutional move by a Democrat administration to bypass a Republican Congress.⁶² Others have posited that the United States never really joined the Paris Agreement because the Paris Agreement could not be conceptualized as an executive agreement in light of the unusually long delay associated with a withdrawal.⁶³

Yet, the president's choice for approving the Paris Agreement domestically was never challenged in court. This may be due to the gatekeeper doctrines of "standing" and "political questions" which patrol the doors to the federal courtroom in the United States.⁶⁴

57. STEPHEN P. MULLIGAN, CONG. RESEARCH SERV., R44761, WITHDRAWAL FROM INTERNATIONAL AGREEMENTS: LEGAL FRAMEWORK, THE PARIS AGREEMENT, AND THE IRAN NUCLEAR AGREEMENT, (2017), at 16.

58. *Id.* at 16–17.

59. *Id.*

60. *Id.*

61. Daniel Bodansky & Peter Spiro, *Executive Agreements*, 49 VAND. J. TRANSNAT'L L. 885, 918 (2016). See also *U.S. Acceptance*, *supra* note 54, at 15–17.

62. For specific references to newspaper editorials and a congressional resolution that was introduced but never enacted, see Bodansky & Spiro, *supra* note 61, at 886 n.3.

63. Eugene Kontorovich, *The U.S. Can't Quit the Paris Climate Agreement Because It Never Actually Joined*, WASH. POST (June 1, 2017), https://www.washington.com/news/volokh-conspiracy/wp/2017/06/01/the-u-s-cant-quit-the-paris-climate-agreement-because-it-never-actually-joined/?noredirect=on&utm_term=.d77d79e59440. But see Vienna Convention on the Law of Treaties arts. 46.1, 46.2, May 23, 1969, 1155 U.N.T.S. 331 (offering that: (1) "[a] State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and concerned a rule of its internal law of fundamental importance;" and (2) "[a] violation is manifest if it would be objectively evident to any State conducting itself in the matter in accordance with normal practice and in good faith"). While the United States is not a party, it "considers many of the provisions of the Vienna Convention on the law of Treaties to constitute customary international law on the law of treaties." See U.S. Dep't of State, Vienna Convention on the Law of Treaties, <https://www.state.gov/s/l/treaty/faqs/70139.htm>.

64. MARTIJN WILDER AM ET AL., BAKER MCKENZIE, THE PARIS AGREEMENT: PUTTING THE FIRST UNIVERSAL CLIMATE CHANGE TREATY IN CONTEXT 15 (2016).

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Under the traditional test for standing to sue, potential plaintiffs would have been required to show a particularized injury that could fairly be traced to the president's approval of the Paris Agreement by executive agreement and that could be redressed by a favorable court decision.⁶⁵ Individual litigants would be hard pressed to show a personal stake accruing from President Obama's approval choice.⁶⁶ Any direct injury to individual parties could only come from domestic regulations spurred by the Paris Agreement as opposed to the Paris Agreement itself.⁶⁷ Even Senators claiming that their prerogative to give advice and consent was infringed by the president's approval by sole executive agreement would have found themselves confronted with the U.S. Supreme Court's narrow view of a personal stake in the context of "legislative standing."⁶⁸ They would have needed to advance arguments that were difficult to make: that President Obama's choice completely nullified their votes and that they were left without any legislative remedy whatsoever.⁶⁹

A conceptually different, but likewise real litigation risk for challenging a president's approval choice is associated with the operations of the political question doctrine, which is triggered when a court, in the process of querying whether it is seized of a matter, looks to the system of political accountability as the best mechanism to resolve a matter.⁷⁰ This gatekeeper may likewise have deterred potential challengers from going to court, as the issues surrounding President Obama's choice for approving the Paris Agreement could be deemed so politically charged that federal courts would not hear the controversy for lack of justiciability.⁷¹

ii. European Union

In light of the internal allocation of powers between the EU and its Member States, there are actually two domestic approval dimensions with regard to the Paris Agreement. One exists in the relationship between the EU and the Paris Agreement. The other touches the separate internal acceptances of the Paris Agreement by each individual EU Member State.

Internationally, the UNFCCC and the Paris Agreement allow for the membership of regional economic integration organizations.⁷² The EU was thus able to join the Paris Agreement alongside its Member States.

65. *U.S. Acceptance*, *supra* note 54, at 19.

66. *Id.*

67. *Id.* at 20.

68. *Id.*

69. Wells Bennett, *Homeland Security: About That Legislative Standing Doctrine*, LAWFAREBLOG.COM (June 16, 2012), <https://www.lawfareblog.com/about-legislative-standing-doctrine>.

70. See *Baker v. Carr*, 369 U.S. 186, 217 (1962).

71. *U.S. Acceptance*, *supra* note 54, at 19 (referring to Supreme Court's *Goldwater v. Carter*, 444 U.S. 996 [1979], decision and the Eleventh Circuit's *Made in USA Foundation v. United States*, 242 F.3d 1300 [11th Cir. 2001], decision, but noting that "the Supreme Court has shown a greater willingness to adjudicate separation of powers disputes relating to foreign affairs").

72. UNFCCC, *supra* note 6, at art. 22; PA, *supra* note 5, art. 20.

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Within the integration system of the EU, powers in the environment sphere are shared between the EU and its Member States.⁷³ In consequence, the EU, proceeding under EU law, and the Member States, proceeding under their own domestic laws, had to pool their respective powers in a “mixed agreement” for purposes of joining the Paris Agreement.⁷⁴ On behalf of the EU and in pursuance of EU law,⁷⁵ the EU’s Council of Ministers, acting by qualified majority and having regard to the proposal by the European Commission and the consent of the European Parliament, passed its decision on the conclusion of the Paris Agreement.⁷⁶ This decision by the EU legislature embodies the EU’s regional approval of the Paris Agreement.

In contrast to U.S. law, primary EU law explicitly provides for a judicial review component prior to the EU’s entering into an external agreement with third countries. Any Member State, as well as the European Parliament, the Council of Ministers, and the European Commission, may seek an opinion from the European Court of Justice as to whether the envisaged agreement would be compatible with the EU treaties.⁷⁷ If the court’s opinion is adverse, the EU could only enter the external agreement once the EU treaties were amended accordingly.⁷⁸ As existing authorities for the EU’s entering the Paris Agreement had never been in dispute, the European Court of Justice was not asked to assess the compatibility of the Paris Agreement with the EU treaties.

b. Nationally Determined Contributions (NDCs)

The NDCs under the Paris Agreement⁷⁹ constitute the centerpiece of the new international climate regime. They embody a bottom-up approach⁸⁰ towards stabilizing greenhouse gas concentrations as contemplated by the UNFCCC.⁸¹ NDCs are self-defined and unilaterally declared by each party.⁸² This means that the substantive plans communicated by each party are not part of the Paris Agreement itself. Rather, each party decides domestically what the exact contents of the international obligation will be

73. Consolidated Version of the Treaty on the Functioning of the European Union art. 192, Oct. 26, 2012, 2012 O.J. (C 326) 47 [hereinafter TFEU].

74. VAUGHNE MILLER, HOUSE OF COMMONS LIBR., EU EXTERNAL AGREEMENTS: EU AND UK PROCEDURES, at 10–12 (Mar. 28, 2016), <http://researchbriefings.files.parliament.uk/documents/CBP-7192/CBP-7192.pdf>.

75. TFEU, *supra* note 73, art. 218.

76. Council Decision (EU) 2016/1841, of 5 Oct. 2016 on the conclusion, on behalf of the European Union, of the Paris Agreement adopted under the United Nations Framework Convention on Climate Change, 2016 O.J. (L 282) 1, 2.

77. MILLER, *supra* note 74, at 16.

78. *Id.*

79. PA, *supra* note 5, art. 3.

80. Bodansky, *supra* note 24, at 289, 300–01, 316–17.

81. UNFCCC, *supra* note 6, art. 2.

82. Bodansky, *supra* note 24, at 300.

for it individually.⁸³ Finally, the Paris Agreement invites parties to adjust their NDCs at any time “with a view to enhancing its level of ambition.”⁸⁴ While geared towards the tightening of NDCs in-between submission intervals, the language may have created an open flank for parties endeavoring to eventually walk back their NDCs.⁸⁵

The first set of final NDCs prepared by each party to the Paris Agreement and recorded in the UNFCCC’s NDC registry⁸⁶ exhibit notable differences among the individual submissions. It also reveals a deep interconnectivity between international goal attainment and domestic action.

i. Discrepancy Among Individual Submissions

Individual NDCs submitted by the various countries differ widely in format, scope, contents, detail, and length. The great variance among NDCs makes it quite challenging to understand and compare them.⁸⁷ Yet, transparency and comparability are essential for assessing how the NDCs fare in terms of global mean warming by 2100 and what this means for scaling up national climate efforts.

A built-in differentiation among individual NDCs results of course from the remnants of the firewall between developed and developing countries. Under the Paris Agreement, developed countries “should take the lead by undertaking economy-wide absolute reduction targets.”⁸⁸ Developing countries “should continue enhancing their mitigation efforts, and are encouraged to move towards economy-wide emission reduction or limitation targets in the light of their particular circumstances.”⁸⁹

While the NDCs submitted by developed countries aim for economy-wide absolute emission reduction targets, individual pledges vary significantly in the targets and reference years that were put forward. For example, the United States has communicated its plan to reduce its economy-wide greenhouse gas emissions by 26-28 percent below its 2005 level in 2025 and to make best efforts to reduce its emissions by 28 percent.⁹⁰ The EU and its Member States have identified a target of at least 40 percent

83. *See id.*

84. PA, *supra* note 5, art. 4.11.

85. CENTER FOR CLIMATE AND ENERGY SOLUTIONS, LEGAL ISSUES RELATED TO THE PARIS AGREEMENT 1 (May 2017), <https://www.c2es.org/site/assets/uploads/2017/05/legal-issues-related-paris-agreement.pdf>.

86. PA, *supra* note 5, art. 4(12); *see generally* NDC Registry (Interim), <http://www4.unfccc.int/ndcregistry/Pages/All.aspx> (showing the first set of NDCs submitted).

87. *See, e.g.*, ANKE HEROLD ET. AL, ÖKO-INSTITUT E.V., IS IT POSSIBLE TO TRACK PROGRESS OF THE SUBMITTED NATIONALLY DETERMINED CONTRIBUTIONS UNDER THE PARIS AGREEMENT?, (Mar. 1, 2018), <https://www.oeko.de/fileadmin/oekodoc/Tracking-progress-of-INDCs.pdf>.

88. PA, *supra* note 5, art. 4.4.

89. *Id.*

90. NDC Registry (Interim), *United States of America First NDC*, at 1, 3, <https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/United%20States%20of%20America%20First/U.S.A.%20First%20NDC%20Submission.pdf> [hereinafter *United States NDC*].

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domestic reduction in greenhouse gas emissions by 2030 compared to 1990.⁹¹ Japan's pledge towards post-2020 greenhouse gas emission reductions contemplates a reduction of 26.0 percent by fiscal year 2030, compared to 2013, and a reduction of 25.4 percent, compared to 2005.⁹²

Due to their being even less internationally contoured, the NDCs submitted by developing countries reflect an even wider range in approaches. These include absolute economy-wide targets, reductions in emissions intensity per unit of gross domestic product, reductions from projected business-as-usual emissions, and reductions in per-capita emissions.⁹³ Brazil's submission, for example, declares that it will reduce greenhouse gas emissions by 37 percent below 2005 levels in 2015 and by 43 percent below 2005 levels in 2030.⁹⁴ China has endeavored to achieve its emissions peak around 2030 or earlier and lower its carbon dioxide emissions per unit of the gross domestic product by 60-65 percent from 2025 levels.⁹⁵ India's quite elaborate narrative pledges to reduce the emissions intensity of its gross domestic product by 33-35 percent by 2030 from 2005 levels.⁹⁶

If NDCs are to become the long-term instrument for achieving and ratcheting up ambitions to tackle global climate change, national and international policy makers must be able to understand and compare the way in which NDCs are aligned with domestic action. Despite the great variance among NDCs, tracking studies conducted in the wake of the first wave of submissions⁹⁷ have found that implementing the aggregate of all NDCs could hold the median warming by 2100 to 2.7 to 3.7 degrees Celsius above pre-industrial levels.⁹⁸ Although this would be a significant improvement

91. *NDC Registry (Interim), European Union First NDC*, at 1, at <http://www4.unfccc.int/ndcregistry/PublishedDocuments/Europe%20Union%20First/LV-03-06-EU%20INDC.pdf>.

92. *NDC Registry (Interim), Japan First NDC*, at 1, 3, http://www4.unfccc.int/ndcregistry/PublishedDocuments/Japan%20First/20150717_Japan%27s%20INDC.pdf.

93. HEROLD ET. AL, *supra* note 87, at 9.

94. *NDC Registry (Interim), Brazil First NDC*, at 1–2, <http://www4.unfccc.int/ndcregistry/PublishedDocuments/Brazil%20First/BRAZIL%20iNDC%20english%20FINAL.pdf> [hereinafter *Brazil NDC*].

95. *NDC Registry (Interim), China First NDC*, at 5, <http://www4.unfccc.int/ndcregistry/PublishedDocuments/China%20First/China%27s%20First%20NDC%20Submission.pdf> [hereinafter *China NDC*].

96. *NDC Registry (Interim), India First NDC*, at 29, <http://www4.unfccc.int/ndcregistry/PublishedDocuments/India%20First/INDIA%20INDC%20TO%20UNFCCC.pdf> [hereinafter *India NDC*].

97. See *Intended Nationally Determined Contributions (INDCs)*, DAG HAMMARSKJÖLD LIBRARY: RESEARCH GUIDES, <http://research.un.org/c.php?g=127572&p=5362958> (last visited Jan. 19, 2019).

98. For a synopsis of various tracking estimates, see Kelly Lavin & Taryn Fransen, *Insider: Why are INDC Studies Reaching Different Temperature Estimates*, WORLD RESOURCES INSTITUTE (Nov. 9, 2015), <http://www.wri.org/blog/2015/11/insider-why-are-indc-studies-reaching-different-temperature-estimates>. See also CLIMATE TRANSPARENCY, BROWN TO GREEN – THE G20 TRANSITION TO A LOW CARBON ECONOMY (2018), https://www.climate-transparency.org/wp-content/uploads/2018/11/Brown-to-Green-Report-2018_rev.pdf (estimating that the

over the 4 to 5 degrees Celsius achieved under current policies,⁹⁹ the predicted outcome falls far short of keeping the temperature rise to a maximum of 2 degrees Celsius, if not lower, under the Paris Agreement.¹⁰⁰

ii. Interconnectivity Between International Goal Attainment and Domestic Action

By design, mitigation goals announced in the various NDCs hinge on domestic laws, regulations, policies, measures, and programs. For example, the United States offers in its submission a list of domestic initiatives in progress that undergird and carry its mitigation goal.¹⁰¹ They include cutting carbon pollution from new and existing power plants, tightening fuel economy standards for heavy-duty vehicles, reducing emissions of methane and hydro fluorocarbons with a high global warming potential, and decreasing building sector emissions.¹⁰² In comparison, Brazil plans to achieve 18 percent of biofuels and 45 percent of renewables in its energy-mix by 2030, in addition to restoring 12 million hectares of forest.¹⁰³ India is planning to roll out 100 gigawatts of solar.¹⁰⁴ China has endeavored to boost non-fossil fuels in primary energy consumption to roughly 20 percent, to increase the volume of forest stock, and to install a national “cap-and-trade” system.¹⁰⁵

As the undoing of the Obama administration’s Clean Power Plan (CPP) in the United States illustrates, domestic politics could very well jeopardize a country’s NDC. The CPP establishes guidelines for states to follow when it comes to limiting carbon dioxide emissions from existing power plants.¹⁰⁶ In the wake of challenges by the several states and various companies and business groups, the U.S. Supreme Court stayed the implementation of the CPP.¹⁰⁷ Meanwhile, the U.S. Environmental Protection Agency of the Trump administration has proposed to repeal and replace the CPP.¹⁰⁸

G20 pledges, even if kept, would in the aggregate still lead to a temperature rise of 3.2 degrees Celsius, with 2.5 degrees Celsius attributable to the EU and the United States, 3 to 4 degrees Celsius to China and more than 4 degrees Celsius to Russia, Turkey and Saudi Arabia).

99. *Id.*

100. PD, *supra* note 5, ¶17. For more background and context, see Bodansky, *supra* note 24, at 302–03 (explaining that, in addition to confirming the goals of 2 degrees and 1.5 degrees envisaged in Copenhagen and Cancún, the Paris agreement set two other long-term, albeit somewhat vaguely formulated, mitigation goals: (1) a peaking of emissions as soon as possible; and (2) net greenhouse gas neutrality in the second half of the century).

101. *United States NDC*, *supra* note 90, at 5.

102. *Id.*

103. *Brazil NDC*, *supra* note 94, at 3.

104. *India NDC*, *supra* note 96, at 9.

105. *China NDC*, *supra* note 95, at 5, 14.

106. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60).

107. See *West Virginia v. EPA*, 136 S. Ct. 1000, 1 (2016).

108. Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 82. Fed. Reg. 48,035 (Oct. 16, 2017) (to be codified at 40 C.F.R. pt. 60).

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Beyond the fate of the CPP, President Trump announced that the country would immediately cease implementation of its current NDC.¹⁰⁹ Independent and apart from executive action, the U.S. Congress could at any point decide not to fund expenditures for activities pertaining to the Paris Agreement.¹¹⁰ However this scenario seems very unlikely in the new era of divided government installed by the American voter in the mid-term elections of 2018.

The domestic shaping and the envisioned scaling-up of NDCs under the Paris Agreement have the potential to affect corporate actors and their bottom line as well as individual parties in their lifestyle choices. For example, Chevron and Exxon have found themselves under pressure from their shareholders to stress test their portfolio's resilience in a low carbon economy as greenhouse gas intensive assets and projects will receive greater scrutiny.¹¹¹ At Royal Dutch Shell and Beyond Petroleum, shareholders have filed resolutions urging greater transparency and disclosure with regard to climate risks and impacts.¹¹²

Not only corporations but also individuals could be directly affected by domestic action designed to ensure successful NDCs. For example, Tradable Energy Quotas (TEQs), which were proposed two decades ago and studied but never implemented in the United Kingdom, stand for a domestic economic rationing instrument, which targets individuals as consumers of energy.¹¹³ TEQs offer a national electronic scheme of quantity-based personal tradable carbon allowances for all users of energy destined to enable nations to keep commitments "within whatever international framework applies at the time."¹¹⁴ Specifically, each "adult would receive an

109. President Donald J. Trump, Statement by President Trump on the Paris Climate Accord (June 1, 2017), (transcript available at <https://www.whitehouse.gov/briefings-statements/statement-president-trump-paris-climate-accord/>).

110. For a recent review of funding for federal climate change activities, see U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-18-223, CLIMATE CHANGE – ANALYSIS OF REPORTED FEDERAL FUNDING (2018).

111. Bradley Olson & Nicole Friedmann, *Exxon, Chevron shareholders narrowly reject climate change stress tests*, WALL STREET J. (May 25, 2016), <https://www.wsj.com/articles/exxon-chevron-shareholders-narrowly-reject-climate-change-stress-tests-1464206192>.

112. See Juliet Phillips & Michael Chaitow, SHAREACTION, TWO YEARS AFTER AIMING FOR 'A': WHERE ARE WE NOW? (Oct. 2017), <https://shareaction.org/wp-content/uploads/2017/10/InvestorReport-AimingForA-BP.pdf>.

113. See, e.g., Shaun Chamberlain, Larch Maxey, & Victoria Hurth, *Reconciling Scientific Reality with Realpolitik: Moving beyond Carbon Pricing to TEQs – An Integrated, Economy-Wide Emissions Cap*, 5 CARBON MANAGEMENT 411, 411–412 (2015); DAVID FLEMING AND SHAUN CHAMBERLAIN, HOUSE OF COMMONS ALL PARLIAMENTARY GROUP ON PEAK OIL & THE LEAN ECON. CONNECTION, *TEQs: Tradable Energy Quotas – A Policy Framework for Peak Oil and Climate Change*, at 12 (2011); DAVID FLEMING, THE LEAN ECON. CONNECTION, *Energy and the Common Purpose – Descending Staircase with Tradable Energy Quotas (TEQs)*, 2 (2007); David Fleming, *Tradable Quotas: Using Information Technology to Cap National Carbon Emissions*, 7 EUR. ENV'T 139, 139 (1997).

114. DAVID FLEMING, THE LEAN ECON. CONNECTION, *Energy and the Common Purpose – Descending Staircase with Tradable Energy Quotas (TEQs)*, at 1 (2007).

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equal free entitlement of TEQs units each week.”¹¹⁵ Other energy users from industry to government would bid for their units at a weekly tender or auction.¹¹⁶ Whenever a user buys fuel or energy, units corresponding to the amount and “carbon rating” of the fuel or energy purchased would be deducted from the user’s individual TEQs account.¹¹⁷ Transactions would generally be automatic using credit card or direct debit technology.¹¹⁸ In similarity to a cap-and-trade system, users would be able to purchase additional units or sell surplus units, and the total number of units would be ratcheted down year-by-year.¹¹⁹ A variant of TEQs called personal carbon allowances would cover only household emissions.¹²⁰ To help individuals understand their contributions to and stakes in climate pollution, a range of private consumer products have been analyzed for their carbon footprint. A cup of coffee, for example, has been estimated to emit roughly 60 grams of carbon dioxide.¹²¹ One gallon of gasoline is assumed to produce 8.8 kilograms of carbon dioxide.¹²² Carbon offset programs offered by airlines provide customers with the opportunity to reduce the carbon footprint associated with their trip through the purchase of carbon offsets.¹²³ Passengers first calculate the carbon footprint for their itineraries, then choose among offset project portfolios, and finally purchase the contribution amount needed to offset their travel.¹²⁴ For example, the carbon offset program offered by United Airlines calculates a one-way ticket between Washington DC and New Orleans with carbon dioxide emissions of 0.1744 metric tons and a contribution amount of roughly two dollars.¹²⁵

In recognition of the infra-national dimension of domestic action to protect the climate, the non-state actor zone for climate action (NAZCA) was launched to track the visibility and diversity of climate action and to mobilize broader engagement to help countries achieve and exceed their national commitments.¹²⁶ By the time of Paris, the NAZCA’s portal listed roughly 11,000 commitments from 2,250 cities, 22,025 companies, and hundreds of states and regions, investors, and civil society organizations.¹²⁷

115. Chamberlain, Maxey & Hurth, *supra* note 113, at 415.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. Tchibo GmbH, *Case Study Tchibo Privat Kaffee Rarity Machare*, PCF Pilot Project Germany, 26 (Nov. 28, 2008), http://www.pcf-projekt.de/files/1232962944/pcf_tchibo_coffee.pdf.

122. U.S. ENVTL PROTECTION AGENCY, EPA 420-F-05-004, OFFICE OF TRANSPORTATION AND AIR QUALITY, EMISSION FACTS: GREENHOUSE GAS EMISSIONS FROM A TYPICAL PASSENGER VEHICLE, at 4 (Feb. 2005).

123. United Eco-Skies, United’s Carbon Offset Program, <http://co2offsets.sustainabletravelinternational.org/ua/offsets/trip> (last visited Jan. 19, 2019).

124. *Id.*

125. *Id.*

126. Paris Climate Agreement Q&A, *supra* note 27, at 3.

127. *Id.*

This showing of support from all corners of society has been widely credited as a key dynamic facilitating the rise of the Paris Agreement.¹²⁸

c. Adaptation

In the climate arena, adaptation, which offers another example for international and domestic interactions, may be described as the art of learning how to cope and live with a changing climate. Adaptation unfolds locally, though not necessarily according to political lines. As developing countries are more vulnerable and less resilient to the impacts of climate change, they have pushed for a more vigorous international conversation about adaptation.

In comparison to the UNFCCC, the Kyoto Protocol, and the Copenhagen Accord, the Paris Agreement places a greater emphasis on adaptation.¹²⁹ It thus acknowledges the reality and significance of adaptation independent of the collective action issues surrounding mitigation.¹³⁰ Just as parties will submit mitigation contributions, the Paris Agreement calls on all parties to plan for and implement adaptation efforts.¹³¹ It further encourages all parties to communicate their efforts and needs.¹³² Finally, adaptation will be a component of the global stocktake cycles and scaled-up financial resources.¹³³

Parties to the Paris Agreement have already submitted adaptation language identifying priorities and needs as part of their NDCs.¹³⁴ Emphasizing the social dimension of adaptation, Brazil identifies housing and basic infrastructure for health, sanitation, and transportation as core risk areas.¹³⁵ In addition to announcing the acceleration of its own national strategy for climate adaptation, China calls for the institutional recognition of adaptation in the international climate framework by creating a new subsidiary body with an adaptation portfolio.¹³⁶

B. SECOND MYTH

1. *Assertion: The Paris Agreement Is All Theory and No Practice*

This myth suggests that international climate law under the Paris Agreement simply lacks practical relevance. It leverages a presentiment among many that climate change, in the way it works and affects everyday life, proves too abstract and too temporally distant.

128. *Id.*

129. PA, *supra* note 5, arts. 3, 7, 9.4, 14.

130. Bodansky, *supra* note 24, at 308.

131. *Id.*

132. *Id.*

133. *Id.* at 309.

134. See *Brazil NDC*, *supra* note 94, at 2; *China NDC*, *supra* note 95, at 33–34.

135. *Brazil NDC*, *supra* note 94, at 3.

136. *China NDC*, *supra* note 95, at 20, 34.

The assertion advanced by the myth exhibits a “kernel of truth”¹³⁷ in the climate arena, as broad principles have served as guideposts along the trajectory towards achieving the objectives of international climate law. In this tradition, the Paris Agreement recalls not only the principles earlier espoused by the UNFCCC, but also underlines “the principle of equity and common but differentiated responsibilities and respective capabilities, in the light of different national circumstances[.]”¹³⁸ Equity involves resolving questions of how to address imbalances between capacities to cope with climate change and questions of how to temper climate change impacts on vulnerable population segments.¹³⁹ Common but differentiated responsibilities, which is the operationalization of equity, constitutes the core distributive paradigm behind the distinction between developed countries and developing countries under the Paris Agreement.¹⁴⁰

In addition to the level of abstraction enveloping the guiding principles of the Paris Agreement, it may be hard to comprehend that, in the context of a global carbon cycle with tens of thousands of gigatons, an anthropogenic contribution in the single digits should be the culprit behind climate change.¹⁴¹ Moreover, future damages and injuries resulting from climate change may seem too far away and removed from possible causal events.¹⁴² Climate change, which works over longer-term horizons, is different from the here and now of the weather. This may very well be why, in a shrewd effort to fudge the conceptual difference between both terms and rally support from the broader population for binding global targets to restrict greenhouse gases in the 1990s, President Clinton assembled weather forecasters in the White House to bring home that climate change was real.¹⁴³

2. *Rebuttal: Practical Relevance of the Paris Agreement*

The myth of too much theory and no practice relies on basic truisms. Obviously, there is nothing unusual about the deployment of theory and meta-norms when identifying, explaining, applying, and enforcing the law.

137. BEDERMAN, *supra* note 31, at 8.

138. PA, *supra* note 5, pmb1.

139. See, e.g., Ellen Wiegandt, *Climate Change, Equity and International Negotiations*, INT’L REL. AND GLOBAL CLIMATE CHANGE 127 (Urs Luterbacher & Detlef F. Sprinz eds., The MIT Press, Cambridge, MA & London 2001); Bert Metz, *International Equity in Climate Change Policy*, 1 INTEGRATED ASSESSMENT 111 (2000).

140. See Harald Winkler & Lavanya Rajamani, *Common but Differentiated Responsibility and Respective Capabilities in a Regime Applicable to All*, 14 CLIMATE POL. 102, 103 (2014), <http://gdrights.org/wp-content/uploads/2013/06/Winkler-Rajamani-2013-CBDRRC.pdf>.

141. J.S. Bhatti, M.J. Apps & R. Lal, *Anthropogenic Changes and the Global Carbon Cycle*, CLIMATE CHANGE AND MANAGED ECOSYSTEMS 72–76 (J.S. Bhatti, R. Lal, M.J. Apps & M.A. Price eds.) (CRC Taylor & Francis Group, Boca Raton, FL 2006).

142. See Richard J. Lazarus, *Restoring What’s Environmental About Environmental Law in the Supreme Court*, 47 UCLA L. REV. 703, 745–48 (2000).

143. Martha Joynt Kumar, *MANAGING THE PRESIDENT’S MESSAGE: THE WHITE HOUSE COMMUNICATIONS OPERATION* 39–40 (The Johns Hopkins Univ. Press, Baltimore 2007).

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Legal methodology and legal operations in any specialty field have traditionally been informed by history, philosophy, sociology, economics, and anthropology. International climate law adds a healthy dose of science to the mix. Moreover, climate litigation has become a practice area increasingly occupying the courts.

a. Climate Science

The central role of science in the climate arena raises a host of serious questions requiring real answers. What is the best, if not settled science, in a milieu of uncertainty? Who are the scientists? How robust and reliable are their data, methodologies, and models? If one thinks of science as the facts, policy as the decisions, and politics as the act of selling the facts and decisions, how do and how should they interact?

In light of these questions the presence of a trusted and trustworthy repository of scientific information and knowledge is of utmost practical relevance. Despite the Climategate kerfuffle of the past,¹⁴⁴ the International Panel on Climate Change (IPCC)—a creature of the World Meteorological Organization and United Nations Environment Programme—is still widely considered to be that storehouse and authoritative source of the latest scientific consensus in the climate arena.¹⁴⁵ Even courts rely on the work conducted by the IPCC. Dutch courts have sounded a particularly robust signal in this regard. When ordering the Dutch government to reduce carbon emissions by at least twenty-five percent by the end of 2020, the Hague District Court invoked the IPCC's reports as the scientific basis undergirding its determination precisely because it considered them the most authoritative crystallization of a rigorous process and consensus among

144. For a detailed account, see Axel Bojanowski, *Forscherskandal: Heißer Krieg ums Klima*, SPIEGEL ONLINE (May 3, 2010), at <http://www.spiegel.de/wissenschaft/natur/climategate-alles-ueber-den-skandal-in-der-klimaforschung-a-688175.html>.

145. See IPCC Factsheet: *What is the IPCC?* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (Aug. 30, 2013), http://www.ipcc.ch/news_and_events/docs/factsheets/FS_what_ipcc.pdf. For the IPCC's latest special report, a massive survey on the state of global warming, spanning three years of work by more than 130 authors, who relied on over 6,000 scientific references and fielded over 42,000 expert and government review comments, see International Panel on Climate Change, *Global Warming of 1.5°C – An IPCC special report on the impacts of global warming of 1.5°C above-pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty* (2018), at <http://www.ipcc.ch/report/sr15/> (warning that the 1.5 degrees Celsius tipping point, with catastrophic consequences, could already be reached in 2040 or even earlier, which means that carbon emission reductions must start immediately to achieve a halving by 2030 and carbon neutrality by 2050).

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all government participants.¹⁴⁶ The judgment has meanwhile been upheld by the Hague Court of Appeal.¹⁴⁷

b. Climate Litigation

Litigation in the climate arena is serious business. Not surprisingly, lawsuits have been on the rise.¹⁴⁸ The advent of the Paris Agreement will reinforce this trend at all levels: international, regional, and domestic.¹⁴⁹

i. *International*

On the international plane, climate law could conceivably come before the International Court of Justice (ICJ) in two ways—either through a contentious proceeding between states¹⁵⁰ or through a request from within the UN-system for an advisory opinion.¹⁵¹ The odds for contentious cases appear rather dim because the Paris Agreement purposely does not boast a compromissory clause or any other dispute settlement mechanism involving international tribunals. It is also unlikely that states will give their consent to climate litigation before the ICJ outside the Paris Agreement. But climate themes could indirectly reach the ICJ in the context of its own charge to protect and preserve rights of litigants,¹⁵² for example, when it comes to environmental study and planning. In this vein, the ICJ has already decided that it is now considered a requirement under general international law to conduct an environmental impact statement when a proposed industrial activity may have significant adverse transboundary effects, especially in the context of shared resources.¹⁵³ At the same time, the ICJ held that the scope and the contents of environmental impact assessments have not yet been defined.¹⁵⁴

More promising than a contentious case would be a request for an advisory opinion. But this route requires convincing the United Nations General Assembly (UNGA) or the United Nations Security Council

146. *Urgenda Foundation v. The State of the Netherlands*, C/09/456689/HA ZA 13-1396, ¶¶ 2.8–2.21 (June 24, 2015), noted in Johannes Saurer & Kai Purnhagen, *Klimawandel vor Gericht – Der Rechtsstreit der Nichtregierungsorganisation Urgenda gegen die Niederlande und seine Bedeutung für Deutschland*, 27 ZEITSCHRIFT FÜR UMWELTRECHT (ZUR) 16 (2016).

147. *Urgenda Foundation v. The State of the Netherlands*, C/09/456689/HA ZA 13-1396 (Oct. 9, 2018).

148. See Michael Burger & Justin Gundlach, *The Status of Climate Change Litigation – A Global Review*, UNITED NATIONS ENVIRONMENT PROGRAMME & SAHIN CENTER FOR CLIMATE CHANGE AT COLUMBIA, (May 2017) (reporting 900 cases in 24 countries as of March 2017).

149. For searchable databases of climate change law for U.S. and non-U.S. litigation, see The Sabin Center for Climate Change Law, Climate Change Litigation Databases, at <http://climatecasechart.com>.

150. Statute of the International Court of Justice, June 26, 1945, arts. 36, 34 [hereinafter ICJ Statute].

151. U.N. Charter art. 96; ICJ Statute, art. 65.

152. ICJ Statute, *supra* note 150, art. 65.

153. *Pulp Mills on the River Uruguay* (Arg. v. Uru.), 2010 I.C.J. Rep. 135, ¶ 204 (Apr. 20).

154. *Id.* ¶ 205.

(UNSC) to make the request.¹⁵⁵ To this end the Ambassadors for Responsibility on Climate Change have been lobbying the UNGA to submit a request covering the obligations of states to prevent the harmful consequences of anthropogenic climate change.¹⁵⁶ This campaign is still in progress.

ii. Regional

On the regional plane, EU climate litigation has in great measure concerned the national allocation plans (NAPs) under the EU's Emissions Trade System (ETS).¹⁵⁷ NAPs reflect the decisions by each EU country as to the allocation of their emission allowances; and their sum initially set the overall cap under the EU's ETS.¹⁵⁸ Several decisions by the European Commission with regard to the NAPs were challenged before the ECJ.¹⁵⁹ Avoiding the legal uncertainties typically associated with litigation constituted one of the factors informing the EU's switch to an EU-wide cap set at the EU level for the phase covering 2013 to 2020.¹⁶⁰

For the EU, the recent "People's Climate Case" could break new grounds. Eight petitioners from Europe, joined by a family from Kenya and one from the Fiji Islands, have sued the EU's legislature before the General Court, which serves as a court of first instance for actions brought by natural persons against the institutions.¹⁶¹ The petitioners do not seek damages, but allege a failure by the EU to strengthen its climate target for 2030 from the current 40% less carbon dioxide to a minimum of 50-60% over 1990 levels, which they consider technically and economically feasible.¹⁶² As a basis for

155. See U.N. Charter art. 96.

156. See, e.g., Doug Kysar, *Climate Change & the International Court of Justice*, Yale Law School, Public Law Research Paper No. 315 (Aug. 15, 2013), at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2309943; Philippe Sands QC, *Climate Change and the Rule of Law: Adjudicating the Future in International Law*, 28 J. ENVTL. L. 19 (2016).

157. See generally, Jon Birger Skjærseth and Jørgen Wettstad, *EU EMISSIONS TRADING: INITIATION, DECISION-MAKING AND IMPLEMENTATION* (Routledge, Oxon & New York 2016).

158. Karoline Rogge, Joachim Schleich & Regina Betz, *An Early Assessment of National Allocation Plans for Phase 2 of EU Emission Trading*, (Sustainability and Innovation Nr. 5, Working Paper, 2006), https://www.isi.fraunhofer.de/content/dam/isi/dokumente/sustainability-innovation/2006/WP1-2006_An%20Early%20Assessment%20of%20National%20Allocation%20Plans%20for%20Phase%20of%20EU%20Emission.pdf.

159. Singh Ghaleigh, *Emissions Trading before the European Court of Justice: Market Making in Luxembourg*, LEGAL ASPECTS OF CARBON TRADING KYOTO, COPENHAGEN AND BEYOND 12 (David Freestone & Charlotte Steck eds., Oxford Univ. Press 2009).

160. *National Allocation Plans*, European Commission, https://ec.europa.eu/clima/policies/ets/cap_en.

161. *Familien klagen gegen zu schwache EU-Klimapolitik* [Families Complain About too Weak EU Policy], PEOPLE'S CLIMATE CASE (May 24, 2018), <https://peoplesclimatecase.caneurope.org/de/2018/05/familien-klagen-gegen-zu-schwache-eu-klimapolitik/>.

162. Susanne Ehlerding, *Familien Verklagen EU auf Mehr Klimaschutz*, DER TAGESSPIEGEL (May 25, 2018), <https://www.tagesspiegel.de/politik/umweltschutz-familien-verklagen-eu-auf-mehr-klimaschutz/22601620.html>.

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their lawsuit, the petitions invoke protections pertaining to the exercise of their profession and their property rights under the Charter of Fundamental Rights of the European Union.¹⁶³ Their action for failure to act, as the proceeding is known in EU vernacular, will however face significant hurdles in its admissibility stage.¹⁶⁴ Arguably, the concern of the petitioners in this case is not sufficiently individualized, as climate change touches everybody.¹⁶⁵ If the General Court decides not to admit the case or deny its merits, plaintiffs could still petition the European Court of Justice on appeal.¹⁶⁶

In the Americas, petitions proceeding within the Inter-American System of Human Rights under the auspices of the Organization of American States have traditionally linked climate change to fundamental rights. For example, a petition filed with the Inter-American Commission on Human Rights (IACHR) by Earthjustice on behalf of the Arctic Athabaskan Council alleges that Canada's failure to regulate climate-forcing black carbon emissions marks the beginning of a causal chain resulting in severe adverse impacts on the Athabaskan people's culture, property, health, and means of subsistence in contravention of the American Declaration of the Rights and Duties of Man (American Declaration).¹⁶⁷ According to the petition, failure to properly regulate black carbon also results in violations of Canada's duties to avoid transboundary harm and to protect the environment consistent with the precautionary principle.¹⁶⁸ For relief, the petitioners request an onsite reconnaissance visit, a hearing and a report by the IACHR declaring that Canada's failure to regulate domestic black carbon emissions violates the American Declaration, along with recommendations for measures to limit black carbon emissions and a plan to protect Arctic Athabaskan culture and resources from the effects of accelerated Arctic warming and melting.¹⁶⁹ Whether or not this petition will be more successful than the Inuit petition in 2005, which the IACHR ultimately declined to process, remains to be seen.¹⁷⁰ But since then, the law has developed. In a recent case involving the construction and operations of large-scale infrastructure projects in the Greater Caribbean region, the Inter-American Court of Human Rights rendered a historic advisory opinion declaring that states must take measures to prevent significant harm to individuals inside and outside their

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *See generally* Petition to the Inter-American Commission On Human Rights Seeking Relief from Violations Of the Rights of Arctic Athabaskan Peoples Resulting from Rapid Arctic Warming and Melting Caused by Emissions of Black Carbon by Canada (Apr. 23, 2013), https://earthjustice.org/sites/default/files/AAC_PETITION_13-04-23a.pdf.

168. *Id.* at 52–53.

169. *Id.* at 86–87.

170. Don McCrimmon, *The Athabaskan Petition to the Inter-American Human Rights Commission: Using Human Rights to Respond to Climate Change*, 6 *THE POLAR J.* 398 (2016).

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territory.¹⁷¹ According to the court, the progressive realization of economic, social and cultural rights guaranteed by the American Convention on Human Rights (American Convention) leads to the existence of an autonomous right to a healthful environment.¹⁷² In its opinion, the court made several significant pronouncements that may sustain transboundary climate litigation, including its recognition of the adverse impact of climate change on human rights and its new “effective control” test for the extraterritorial reach of the American Convention.¹⁷³

iii. Domestic

Climate change litigation in domestic courts has faced significant hurdles in terms of jurisdiction, evidence, and remedies. A case with enormous potential ramifications comes from Germany. It is so unique because it advances the proposition that private corporate emitters could be exposed to liability for interference with the property of others anywhere in the world even when engaging in lawful activities.

In late 2015, Peruvian farmer Saúl Luciano Lliuya filed suit in Germany against Rheinisch-Westfälische Elektrizitätswerke (RWE), Germany's largest energy producer, for its contributions to global warming based on its total emissions between 1751 and 2010.¹⁷⁴ Alleging that global warming is increasing the threat of glacier lake outburst floods from Lake Palcacocha that endanger his home in Huaraz, in the foothills of the Andes, the claimant asked the court to order RWE to reimburse him for roughly half a percent of the costs he and the local authorities had incurred to establish flood protections.¹⁷⁵ That percentage, according to Mr. Lliuya, was concomitant with RWE's contribution to global greenhouse gas emissions.¹⁷⁶ Mr. Lliuya based his claim on liability for interference under section 1004 of the German Civil Code.¹⁷⁷

171. Advisory Opinion OC-23/18, Inter-Am. Ct. H.R., (ser. A) No. 23 (Nov. 15, 2017), http://www.corteidh.or.cr/docs/opiniones/seriea_23_esp.pdf; discussed in Maria L. Banda, *Inter-American Court of Human Rights' Advisory Opinion on the Environment and Human Rights*, ASIL INSIGHTS 22 (May 10, 2018), https://www.asil.org/insights/volume/22/issue/6/inter-american-court-human-rights-advisory-opinion-environment-and-human#_edn20.

172. Advisory Opinion OC-23/18, *supra* note 170, ¶¶ 62–63 (“el derecho a un medio ambiente sano como derecho autónomo”).

173. *Id.* ¶ 102 (“control efectivo”).

174. Dan Collins, *Peruvian Farmer Demands Climate Compensation from German Company*, THE GUARDIAN (Mar. 16, 2015), <https://www.theguardian.com/environment/2015/mar/16/peruvian-farmer-demands-climate-compensation-from-german-company>.

175. *Lliuya v. RWE AG*, 2 O 285/15 Essen Regional Court, on appeal, (2015), http://blogs2.law.columbia.edu/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2016/20161215_Case-No.-2-O-28515-Essen-Regional-Court_decision.pdf.

176. *Id.*

177. Elisa Chiaro, *Corporate Responsibility for Climate Change: Litigation and Other grievance Mechanisms*, DOING BUSINESS RIGHT BLOG (Jan. 2018), <http://www.asser.nl/DoingBusinessRight/Blog/post/corporate-responsibility-for-climate-change-litigation-and-other-grievance-mechanisms-by-elisa-chiaro>.

RWE asserted that the claim could not be addressed through individual civil liability in the absence of a causal link between its emissions and supposed flood risks from the glacial lake.¹⁷⁸ According to RWE, there was no legal basis in German law giving rise to liability of a single emitter for general, ubiquitous environmental pollution.¹⁷⁹

Reasoning that no effective redress was available and that no linear causal chain between particular greenhouse gas emissions and particular climate change effects was discernible, the District Court in Essen agreed with RWE and dismissed Mr. Lliuya's claims for declaratory and injunctive relief as well as damages.¹⁸⁰

On appeal the Upper Regional Court in Hamm recognized the complaint as well-pled and admissible, allowing the case to move into the evidentiary phase.¹⁸¹ In addition to determining whether glacier lake flooding, mudslides, or both have seriously threatened Mr. Lliuya's home, the evidentiary phase is set to explore the following questions.¹⁸² Do RWE's carbon dioxide emissions rise into the atmosphere and contribute to increased concentrations of greenhouse gases in the earth's atmosphere?¹⁸³ Does the concentration of greenhouse gas molecules lead to increased heat-trapping and rising global temperatures?¹⁸⁴ Does the increase in average temperatures accelerate the melting of the Palcaraju glacier and prevent the moraine from holding the surging water volumes of the Palcacocha lagoon?¹⁸⁵ Is RWE's share of contribution in the context of the preceding questions measurable and calculable?¹⁸⁶ Do RWE's historical greenhouse gas emissions amount to roughly half a percent of global emissions since the beginning of the era of industrialization?¹⁸⁷

While the evidentiary phase must still be seen through to completion and the case will in all likelihood be appealed, the court's recognition that it is theoretically possible to trace liability for harms arising from climate change to a particular corporate defendant at the other end of the world writes legal history in the climate arena.¹⁸⁸ This holds especially true when considering that a legal basis comparable to the one used by Mr. Lliuya in Germany may exist in more than fifty jurisdictions worldwide.¹⁸⁹ Private law, whether in

178. *Lliuya*, 2 O 285/15 Essen Regional Court (2015).

179. *Id.*

180. *Id.*

181. *Lliuya v. RWE*, LSE, at ¶ I.1 (2017) (OLG Hamm), <http://cisgw3.law.pace.edu/cases/800626g1.html>.

182. *Id.* ¶ III.1.

183. *Id.* ¶ III.2(a).

184. *Id.* ¶ III.2(b).

185. *Id.* ¶ III.2(c).

186. *Id.* ¶ III.2(d)[1].

187. *Id.* ¶ III.2(d).

188. *See id.*

189. Laura Schäfer et al., *The Significance of Climate Litigation for the Political Debate on Loss & Damage* GERMANWATCH 10 (2018), <https://germanwatch.org/sites/germanwatch.org/files/publication/21699.pdf>.

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property or tort, could therefore become a powerful arrow in the quiver of climate change litigants wishing to sue emitters rather than governments.¹⁹⁰ Unlike the U.S. Supreme Court, which has declined to open the door to public nuisance lawsuits in federal common law because the Clean Air Act vests the power to regulate greenhouse gas emissions in the U.S. Environmental Protection Agency,¹⁹¹ the OLG Hamm explicitly declares that operating under a lawful permit pursuant to Germany's Federal Immission Control Law does not foreclose a claim for interference under Germany's Civil Code.¹⁹²

The case beautifully illustrates how plaintiffs may shift their visors from governments to individual corporate defendants. Mr. Lliuya notably did not go after the government of Peru although he could conceivably have filed a petition with the IACHR alleging breaches of his human rights in the wake of Peru's failure to take precautionary measures against the risk of flooding¹⁹³—for example, by not deploying, at a minimum, what the Paris Agreement calls “effective early warning systems.”¹⁹⁴

C. THIRD MYTH

1. *Assertion: The Paris Agreement Is Not Real Law*

The myth of the non-legal nature of international law in general and the Paris Agreement in particular pairs up the core elements of the myths assigning to international law the features of separation and the lack of practical relevance.¹⁹⁵ More specifically, the myth feeds off the diagnosis that international law does not have the robust government institutions, compliance mechanisms and enforcement machineries typically present in the municipal legal orders.¹⁹⁶ Due to this *carence institutionelle*, international law tends to rely more heavily on reciprocity of conduct or name-and-shame approaches to nudge its subjects, primarily the nation-states, into its fold.¹⁹⁷ Outside topically focused treaty frameworks, international environmental law and international climate law have also relied on soft law instruments. Soft law, which embodies a somewhat oxymoronic term, stands for commitments and expressions for preferences that could lead to hard law,

190. *Id.* at 8–10.

191. *American Electric Power v. Connecticut*, 564 U.S. 410, 424 (2011); *see also* *Kivalina v. ExxonMobil*, 696 F.3d 849, 855–56 (9th Cir. 2012), *writ denied*, 569 U.S. 1000 (2013); Karen Sokol, *Seeking Climate Justice in the Courts*, CPRBLOG (May 21, 2018), <http://www.progressivereform.org/CPRBlog.cfm?idBlog=21F2FEAD-CB8A-E6AC-769F43D28CA7C36B>.

192. Lliuya, LSE ¶ III.2 (2017).

193. *Petition and Case System: Informational Brochure*, INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 5 (2010), <https://www.oas.org/en/iachr/docs/pdf/howto.pdf>.

194. PA, *supra* note 5, art. 8.4(a).

195. BEDERMAN, *supra* note 31, at 9.

196. *Id.*

197. *Id.*

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but not necessarily so.¹⁹⁸ Examples of soft law in the climate arena include the Oslo Principles on Global Climate Change¹⁹⁹ and the Principles on Climate Obligations of Enterprises.²⁰⁰

Applied to the latest installment of international climate law under the Paris Agreement, adherents of the third myth may point to the designation of the nationally determined pledges as “contributions” rather than “commitments,” the non-bindingness of the NDCs, the non-adversarial, non-punitive transparency framework to review and foster progress, and the failure to link climate loss and damage to the law of state responsibility for international wrongs.²⁰¹

2. Rebuttal: International Climate Law through the Paris Agreement

International law has existed for thousands of years—in harder and softer variants depending on the context. In terms of its legal nature and its legal substance, the Paris Agreement is a source of international law and it also makes international law.

a. Legal Nature

In contrast to what the third myth suggests, the Paris Agreement is first and foremost a treaty under international law. Whether characterized as an ancillary treaty to the UNFCCC²⁰² or a protocol in anything but name,²⁰³ the Paris Agreement embodies the consent of the parties memorialized in written form and governed by international law.²⁰⁴

Several considerations support that the Paris Agreement is a treaty by its legal nature. First, the Paris Agreement is structured in articles as opposed to paragraphs or recitals.²⁰⁵ Moreover, it includes standard treaty provisions such as those covering its entry into force and deposit.²⁰⁶ Also, the parties to

198. For a comprehensive discussion of the definitions of soft law, its interactions with treaties and custom, the reasons for adopting soft law, compliance issues associated with soft law, *see* Dinah L. Shelton, *Soft Law*, in *ROUTLEDGE HANDBOOK OF INTERNATIONAL LAW* 68 (David Armstrong ed.) (2009).

199. Expert Group on Global Climate Obligations, *Oslo Principles on Global Climate Obligations*, 3 *Legal Perspectives for Global Challenges* (Eleven Int'l Pub'g, The Hague 2015) (chiefly addressing its principles to states).

200. Expert Group on Global Climate Obligations, *Principles on Climate Obligations of Enterprises*, 5 *Legal Perspectives for Global Challenges* (Eleven Int'l Pub'g, The Hague 2015) (complementing the Oslo Principles with principles tailored to enterprises as well as financiers and investors).

201. *See generally* PA, *supra* note 5.

202. Annalisa Savaresi, *The Paris Agreement: Reflections on an International Law Odyssey* 6, *EUR. SOC'Y OF INT'L L.* (2017), <https://ssrn.com/abstract=2912001>.

203. Annalisa Savaresi, *The Paris Agreement: A New Beginning?*, 34 *J. EN. & NAT. RES. L.* 16, 20 (2016).

204. *See* Vienna Convention on the Law of Treaties art. 2.1(a), May 23, 1969, 1155 U.N.T.S. 331.

205. *See generally* PA, *supra* note 5.

206. *Id.* art. 21.3.

the Paris Agreement have considered it to be a treaty under international law. Finally, there is nothing unusual about an international law treaty that deploys in one single instrument aspirational, enabling, and non-categorical language as well as categorical obligations. This technique does not push a hard source of international law into the non-legal or soft law realm.

b. Legal Substance

Alongside the exhortative language “should” and “are encouraged” and the absence of obligations of result invoked by the proponents of the third myth with regard to the pledges submitted by each party, the Paris Agreement imposes significant categorical legal obligations of conduct, which are generally introduced by “shall.” Under the Paris Agreement, each party shall “prepare, communicate and maintain” successive NDCs at five-year intervals,²⁰⁷ pursue domestic mitigation measures,²⁰⁸ and regularly report on emissions and removals as well and progress.²⁰⁹ Developed country parties shall provide financial resources to assist developing country parties and report on financing every two years.²¹⁰ Finally, although the NDCs are unilaterally declared by each country and filter up, the Paris Agreement legally requires a review mechanism at the international level through the COP.²¹¹ This “global stocktake” is designed to assess the collective progress towards achieving the objective of the Paris Agreement and its long-term goals.²¹² It will provide valuable feedback to the parties with regard to updating and enhancing their actions. The first global stocktake is slated for 2023 and every five years thereafter.²¹³

D. FOURTH MYTH

1. *Assertion: No One Obeys the Paris Agreement*

The myth that ascribes a voluntary and relativist nature to the Paris Agreement misappropriates a realist world of international law and international relations, a world that is purely driven by national self-interest.²¹⁴ This myth is harder to debunk because nation-states tend to obey more seamlessly when international community norms happen to coincide with the individual self-interest of a country.²¹⁵

207. *Id.* arts. 4.2, 4.9.

208. *Id.* art. 4.2.

209. *Id.* art. 13.7(a)–(b).

210. *Id.* arts. 9.1, 9.5,

211. PA, *supra* note 5, art. 16.4.

212. *Id.* arts. 14.1, 14.3.

213. *Id.* art. 14.2.

214. BEDERMAN, *supra* note 31, at 11.

215. *Id.*

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2. *Rebuttal: The Paris Agreement and Its Performance Record*

a. Early Successes

Climate governance under the Paris Agreement, which leverages the domestic and the international planes, does not comport with traditional notions of compliance and enforcement as hallmarks of legality or illegality.²¹⁶ While the Paris Agreement requires submission of NDCs, the parties define and shape the contents and objectives of their individual NDCs in reflection of what they are willing and able to accomplish domestically. This hybridization of international process and domestic contents has thus far proven successful as the NDCs in the UNFCCC registry now represent a stunning 95% of global greenhouse gas emissions.²¹⁷

b. Enhanced Transparency Framework

Under the Paris Agreement, each party will have the opportunity to study the pledges and adaptation progress made by the other parties, the challenges they have confronted, and the kind of support that could help avoid failure and foster success.²¹⁸ In this sense, the “enhanced transparency framework” of the Paris Agreement, under which the inventories of emissions and removals and the progress reports submitted by each country will be subjected not only to independent reviews by technical experts and but also to a “facilitative, multilateral consideration of progress” by fellow parties,²¹⁹ may be described as compliance assistance—a tool not unknown to even the sternest among enforcement agencies in domestic contexts.²²⁰ The friendly solidarity dynamics built into this non-punitive and non-adversarial framework, as well as the involvement of non-state actors, may even lead to a race to the top in a spirit of collectively supported competition.

c. Orderly Exit

International law binds states to observe and fulfill the commitments they have undertaken in international law treaties.²²¹ This fundamental norm,

216. Ann-Marie Slaughter, *The Paris Approach to Global Governance* 1, PROJECT SYNDICATE (Dec. 28, 2015), <https://scholar.princeton.edu/sites/default/files/slaughter/files/projectsyndicate12.28.2015.pdf>.

217. Thomas Day et al., *Conditionality of Intended Nationally Determined Contributions (INDCs)*, INT’L PARTNERSHIP ON MITIGATION AND MRV 2 (Feb. 2016), https://www.transparency-partnership.net/sites/default/files/indc-conditionality_0.pdf.

218. PA, *supra* note 5, arts. 4.8, 7.5.

219. *Id.* art.13.11.

220. *See, e.g.*, Resources and Guidance Documents for Compliance Assistance, EPA, <https://www.epa.gov/compliance/resources-and-guidance-documents-compliance-assistance> (“The compliance assistance program provides businesses, federal facilities, local governments and tribes with tools to help meet environmental regulatory requirements. Compliance assistance tools and methods include one-to-one counseling, online resource centers, fact sheets, guides and training.”).

221. Laurence R. Helfer, *Exiting Treaties*, 91 VIRGINIA L. REV. 1579, 1580 (2005).

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which is known as *pacta sunt servanda*,²²² undergirds the voluntary and consensual system of treaty-based relations between states.²²³ Denunciation or withdrawal clauses permit a state to end these relations through a lawful, formal and public exit mechanism.²²⁴ If a state unilaterally invokes a withdrawal clause, it is not breaching its commitments.²²⁵ Withdrawal in accordance with the process provided under the treaty is lawful; however, unjustified disobedience is not.²²⁶

In this light, President Trump's announcement to withdraw the United States from the Paris Agreement may be characterized as political theatre to placate his electoral base and create political pressure for renegotiating disfavored provisions.²²⁷ President Trump did not proclaim an immediately effective renunciation of U.S. membership but declared that he would withdraw the United States from the Paris Agreement.²²⁸ According to the process provided by the Paris Agreement, which was not put into question in President Trump's announcement, a withdrawal from the Paris Agreement could only be effective around the time of the next presidential election at the earliest.²²⁹ Notably, President Trump decided not to exit the Paris Agreement through a withdrawal of the United States from the UNFCCC, which would take effect well within his first term.²³⁰ This may be due to a legal diagnosis that a presidential executive agreement, such as the Paris

222. *See id.*

223. *See id.*

224. *Id.* at 1589.

225. *See id.* at 1613–29 (identifying and analyzing the distinct features of exit and breach).

226. *See id.* at 1581.

227. *See id.* at 1588.

228. Statement by President Trump on the Paris Climate Accord, *supra* note 109, at 2; *see also* Nikki R. Haley, U.S. Permanent Representative to the U.N., Diplomatic Note (Aug. 4, 2017) (“[T]he United States will submit to the Secretary-General, in accordance with Article 28, paragraph 1 of the Agreement, formal written notification of withdrawal as soon as it is eligible to do so.”); *see* Karl Mathieson, *Trump to submit notice of Paris withdrawal to UN*, CLIMATE HOME NEWS (Apr. 8, 2017, 9:26 PM), <http://www.climatechangenews.com/2017/08/04/trump-submit-notice-paris-withdrawal-un-reports/>.

229. PA, *supra* note 5, arts.28.1, 28.2; Stephen P. Mulligan, *Withdrawal from International Agreements: Legal framework, The Paris Agreement, and the Iran Nuclear Agreement* 19, FED’N OF AM. SCIENTISTS (May 4, 2018), <https://fas.org/sgp/crs/row/R44761.pdf>. *See also* Deutscher Bundestag, Wissenschaftliche Dienste, *Rechtliche Modalitäten und Folgen des Austritts der USA aus dem Pariser Klimaschutz-Übereinkommen vom 12. Dezember 2015*, WD – 3000 – 055/17 (2017) [hereinafter *Wissenschaftliche Dienste*], at 4, [at https://www.bundestag.de/blob/513892/fc32a476c5962458a4645a691244c/wd-2-055-17-pdf-data.pdf](https://www.bundestag.de/blob/513892/fc32a476c5962458a4645a691244c/wd-2-055-17-pdf-data.pdf) (explaining that: (1) for the United States, which had deposited its instrument of acceptance on September 3, 2016, the Paris Agreement entered into force on November 4, 2016; (2) the United States can therefore withdraw on November 4, 2019, by submitting its notification of withdrawal to the United Nations Secretary-General; and (3) the withdrawal will then be effective with the receipt of the withdrawal notification and therefore, on November 5, 2019, at the earliest).

230. PA, *supra* note 5, art. 28.3. Mulligan, *supra* note 229, at 20. *See also* *Wissenschaftliche Dienste, supra* note 229, at 4-5 (offering that: (1) a withdrawal from the UNFCCC would automatically be a withdrawal from the Paris Agreement; (2) the UNFCCC entered into force for the United States on March 21, 1994; and (3) therefore, a withdrawal would be possible at

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Agreement, is much easier to undo domestically than an Article II treaty, such as the UNFCCC.²³¹ This means that until its withdrawal takes effect in late 2020, the United States remains a full member of the Paris Agreement with all its obligations and margins of opportunity. Even after withdrawal, the United States, unlike its several states, could rejoin the Paris Agreement should domestic political realities change.²³²

Even when President Trump declared that the United States would cease the implementation of its NDC and its contribution to the Green Climate Fund, he did not technically disobey the Paris Agreement for three reasons. The United States has already submitted its NDC.²³³ Moreover, the substance of the NDCs is legally non-binding.²³⁴ Finally, the mobilization of climate funds under the Paris Agreement has remained shrouded in legal vagueness.²³⁵ The fact that infra-national actors have already declared to chip in is of great political symbolism in this regard.²³⁶

If President Trump goes ahead with the withdrawal of the United States from the Paris Agreement in late 2019, this would not be the first time that a party withdraws from a climate treaty. A domestic judicial challenge of a withdrawal by the United States seems highly unlikely because U.S. law offers even fewer anchoring arguments than those that were present in a Canadian precedent involving an unsuccessful challenge by a member of parliament of that government's withdrawal from the Kyoto Protocol.²³⁷ In its decision, the Canadian court first determined that the government's discretion was not curtailed by domestic legislation, which incidentally was repealed between the filing of the petition and the issuance of the court's opinion.²³⁸ According to the court, the statute in question had urged the government to operate under the Kyoto Protocol, and the government

any point in time and become effective with the expiry of one year from the submission of a withdrawal notification).

231. Mulligan, *supra* note 229, at 8-15.

232. PA, *supra* note 5, art. 20. See Wissenschaftliche Dienste, *supra* note 229, at 5-6.

233. US Submits its Climate Action Plan Ahead of 2015 Paris Agreement, UNITED NATIONS CLIMATE CHANGE (March 31, 2015), <https://unfccc.int/index.php/news/united-states-submits-its-climate-action-plan-ahead-of-2015-paris-agreement>.

234. PA, *supra* note 5, arts. 4.2, 7.9.

235. See Bodansky, *supra* note 24, at 310 ("The United States and other developed countries succeeded in excluding a reference to the Copenhagen one-hundred billion dollar per year mobilization goal in the Paris Agreement itself. Instead, the only quantitative finance goal appears in paragraph fifty-four of the Paris COP decision, which extends developed countries' existing one-hundred-billion-dollar mobilization goal through 2025 and provides that the parties shall set a new collective quantified goal prior to 2025 (not necessarily limited to developed countries), using the one-hundred billion per year figure as a floor.").

236. Paris Climate Agreement Q&A, *supra* note 27, at 3 (observing that (1) in Paris the developed countries pledged \$19 billion to assist developing countries; and (2) due to broadened donor base under the Paris Agreement, not only China and Vietnam, but also the cities of Paris and Québec made funding pledges).

237. Turp v. Canada (Att'y Gen.), [2012] 1 F.C. 893 (Can.).

238. *Id.* ¶¶ 18-26.

complied by proceeding under that treaty's express withdrawal provision.²³⁹ Moreover, the court held that the democratic principle protecting the rights of the legislature did not prohibit Canada's withdrawal.²⁴⁰ According to the court, the House of Commons only ever passed a motion encouraging the ratification of the Kyoto Protocol. This was a far cry from drawing a red line that a withdrawal could cross.²⁴¹

E. FIFTH MYTH

1. *Assertion: The Paris Agreement Is What the United States Says It Is*

This myth invokes the special status of the United States as a superpower and heavy weight in international relations, politics, and law.²⁴² In addition to being able to wield the dominance of the dollar, the United States is a permanent member of the United Nations Security Council.²⁴³ This position allows the United States, acting alone, to block peace-coercion law²⁴⁴ and enforcement of ICJ judgments.²⁴⁵

Obviously, the United States played a crucial role in all installments of the international climate arc. Prior to subscribing to the Paris Agreement, the United States had joined the UNFCCC, signed but not ratified the original Kyoto Protocol, and supported the Copenhagen Accord.²⁴⁶ In the process culminating in the Paris Agreement, the United States was successful in ensuring that the language covering loss and damage in the Paris Agreement steered clear of notions of liability and compensation under the law of state responsibility for internationally wrongful acts.²⁴⁷ Similarly, the United States successfully prevented the inclusion in the Paris Agreement of a dollar amount for purposes of climate finance.²⁴⁸

2. *Rebuttal: The Rest of the World and the Paris Agreement*

While the United States was a key actor in the Paris process, the Paris Agreement is by no means a U.S. dictate. On the contrary, the Paris Agreement equally reflects the inputs from others, especially the countries of the Global South.²⁴⁹ They play a strong hand in international climate law because a robust protection of the global atmosphere is simply elusive without their buy-in.

239. *Id.* ¶ 25.

240. *Id.* ¶¶ 29–32.

241. *Id.* ¶ 31.

242. BEDERMAN, *supra* note 31, at 12.

243. UN Charter art. 23, ¶ 1.

244. *Id.* arts. 24, 27, ¶ 3, 39, 41–42.

245. *Id.* arts. 27, ¶ 3, 94 ¶ 2.

246. Bodansky & Spiro, *supra* note 61, at 917.

247. *See* Bodansky, *supra* note 24, at 309.

248. *See id.* at 310.

249. *See generally* PA, *supra* note 5.

For example, when the United States pushed for replacing the harder “shall,” which had slipped into the text for the developed country NDCs, with the softer “should” to harmonize the language of international mitigation obligations for developed and developing countries alike, the switch could not have been accomplished without the acceptance by the EU and the G77.²⁵⁰ Similarly, the United States found allies in Saudi Arabia, Venezuela, and China to stave off concrete long-term decarbonization language.²⁵¹

The give-and-take throughout the Paris process was in no small measure owed to “indabas”—a consensus-building technique borrowed from the Zulu and Xhosa peoples²⁵² and “aimed at establishing a ‘common mind’ or story that all participants can take with them.”²⁵³ Indabas are successful when “participants come with open minds motivated by the spirit of the common good and listen to each other to find compromises that will benefit the community as a whole.”²⁵⁴

When President Trump announced his intent to withdraw the United States from the Paris Agreement coupled with the perspective of a renegotiation or the conclusion of a new treaty, other parties publicly closed ranks in their strong support for the Paris Agreement and declared they were not open to a new negotiation.²⁵⁵ Even if the United States were to scale down or were to walk away from its already submitted NDC, this would then be considered a violation of the spirit of the Paris Agreement, but would not lead to its demise.

F. SIXTH MYTH

1. *Assertion: Paris Agreement Lawyers Are Not Real Lawyers*

This myth levels the ultimate insult against legal professionals with exposure to the climate arena. From the perspective of myth adherents, it embodies the logical culmination of the previous five myths. If international climate law is out there, if it has no practical relevance, if it is not law, if it

250. Radoslav S. Dimitrov, *The Paris Agreement on Climate Change: Behind Closed Doors*, 16 GLOBAL ENVTL. POL. 1, 3 (2016), available at: http://politicalscience.uwo.ca/people/faculty/full-time_faculty/GEP%20Paris%20Agreement.pdf.

251. See *id.* at 4; see also Ed King, *Trillions Hang on Two Sentences as Paris Climate Talks Near Climax*, CLIMATE HOME NEWS (Dec. 8, 2015), <http://www.climatechangenews.com/2015/12/08/trillions-hang-on-two-sentences-as-paris-climate-talks-near-climax/>.

252. Ben Zimmer, *The African Discussion Style ‘Indaba’ Thrived at Climate Talks*, WALL STREET J. (Dec. 18, 2015), <https://www.wsj.com/articles/the-african-discussion-style-indaba-thrived-at-climate-talks-1450456996>.

253. *Ask an Ethicist What can I do to address our changing planet in an ethical way?*, PENN ST. NEWS (May 4, 2016), <https://news.psu.edu/story/408598/2016/05/04/impact/ask-ethicist-what-can-i-do-address-our-changing-planet-ethical-way>.

254. Zimmer, *supra* note 252.

255. Johnathan Watts & Kate Connolly, *World Leaders React after Trump Rejects Climate Deal*, THE GUARDIAN (June 2, 2017), <https://www.theguardian.com/environment/2017/jun/01/trump-withdraw-paris-climate-deal-world-leaders-react>.

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subsists at the whim of its legal subjects, if it bows to the dictates of the United States, then those who come into contact with it could be at most dreamers in a spacey and fleeting world of ideas and ideals instead of real lawyers.

2. *Rebuttal: Legal Opportunities Abound in the Orbit of the Paris Agreement*

Having debunked those other myths, I come to the opposite conclusion. If international climate law is connected with the domestic realms, if it is relevant, if it is real law, if it commands compliance, if all actors are equal and autonomous, then real lawyers will be required for its creation, interpretation, application, and enforcement.

Moreover, zooming out of the locution “Paris Agreement lawyers” reveals the absurdity of the sixth myth. “International climate lawyer” may still sound ephemeral. But “environmental lawyers,” “energy lawyers,” and “land use lawyers” engage in relevant, recognized and robust practice areas. Finally, because international climate law touches so many other disciplines, it requires an even wider array of expertise and services. As we speak, opportunities as well as challenges for international climate lawyers are “growing by leaps-and-bounds.”²⁵⁶

III. Final Thoughts

International climate law has not burst onto the scene in one big bang. Rather, in consonance with the approach initiated by the UNFCCC, international climate law has evolved over time. This evolution has seen incremental progress and episodic setbacks.

The Paris Agreement offers a fresh start while considering prior experiences in international climate law, policy, and politics. Borrowing from the UNFCCC’s successful COP template, it likewise creates a command bridge in the conference of the parties serving as the meeting of the parties to the Paris Agreement (CMA). In addition to reviewing the overall performance of the Paris Agreement, the CMA will fine-tune the details necessarily omitted from several shell provisions of the Paris Agreement. Thus, the rulebooks for the implementation of the Paris Agreement, including accounting rules and accountability procedures, will be written under the auspices of the CMA. This effort will dominate the international climate agenda for the next few years.²⁵⁷

256. BEDERMAN, *supra* note 31, at 12.

257. For the decisions adopted at the Climate Change Conference in Katowice, Poland, see Katowice Climate Change Conference (Dec. 2018), *available at* <https://unfccc.int/katowice>. See also Proposal by the President – Informal Compilation of L-Documents (“Paris Rulebook”), *available at* https://unfccc.int/sites/default/files/resource/Informal%20Compilation_proposal%20by%20the%20President_rev.pdf. For a concise summary, see Center for Climate and Energy Solutions, Essential Elements of the Paris ‘Rulebook’ (Nov. 2018), *available at* <https://www.c2es.org/site/assets/uploads/2018/11/essential-elements-paris-rulebook.pdf>.

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In light of what our discussion of Professor Bederman's six myths has revealed, the Paris Agreement may not be your typical multilateral international law treaty. But it could very well be "a model for effective global governance in the twenty-first century"²⁵⁸ in the way that it serves a special constituency and a special value. The Paris Agreement serves all inhabitants of the planet; and it equally fosters the rule of law in achieving maximum protection of the global climate. It is thus the perfect illustration of how untrue the myths are. As Professor Bederman so astutely and graciously observes for all of us: "[P]racticing international law is not just about a secure professional future. It is also about doing well by doing good and being involved in a practice area that promotes the global rule of law, peace, and justice."²⁵⁹ *Sis felix!*

258. Slaughter, *supra* note 216, at 1.

259. BEDERMAN, *supra* note 31, at 13.