IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR BIOLOGICAL DIVERSITY, Plaintiff, v. UNITED STATES DEPARTMENT OF STATE, *et al.*, Defendants.	)	Civil Action No. 1:18-cv-00563 (JEB)

REPLY MEMORANDUM IN SUPPORT OF FEDERAL DEFENDANTS' MOTION TO PARTIALLY DISMISS AMENDED COMPLAINT

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INTRODUCTION

Plaintiff's Opposition to the Federal Defendants' Partial Motion to Dismiss ("Opposition" or "Opp.", ECF No. 25) provides this Court no reason why it should not dismiss the Amended Complaint. The Opposition has many failings, but three predominate. First, as to standing, it fails to address the inadequacy of the allegations of injury in the Amended Complaint identified in the Federal Defendants' Motion to Partially Dismiss ("U.S. Memorandum" or "U.S. Mem."). Instead, Plaintiff Center for Biological Diversity ("CBD") re-packages the same inadequate allegations and attempts to push off consideration of its standing problems to summary judgment. Second, Plaintiff ignores, or betrays a thorough misunderstanding of, the fundamental differences between a non-self-executing international treaty obligation (enforceable only on the international plane absent implementing legislation) and a self-executing treaty obligation that is enforceable in domestic courts. Plaintiff goes to lengths to establish that under the United Nations Framework Convention on Climate Change ("UNFCCC" or "Convention"), the United States has certain reporting obligations and that the United States and other parties have a "practice" of meeting those obligations. Those points are undisputed (*see* U.S. Mem. at 2, 4-5, 15-16), but ultimately irrelevant here. The pertinent question is whether those UNFCCC obligations are self-executing, and Plaintiff has failed to present the requisite evidence to show that they are, let alone to overcome the "presum[ption] that treaties do not create privately enforceable rights in the absence of *express language* to the contrary." *Medellin v. Texas*, 552 U.S. 491, 506 n.3 (2008) (citation omitted) (emphasis added). Critically, Plaintiff concedes that, even if the UNFCCC reporting provisions were self-executing, the UNFCCC does not confer the private cause of action that Plaintiff requires to proceed in U.S. courts. And, as with the standing issue, Plaintiff urges the Court to defer consideration of these threshold legal issues to summary judgment without justification.

Finally, Plaintiff strains too far in trying to find an enforceable duty in a statute, the Global Climate Protection Act, that neither directly nor implicitly creates a statutory requirement for the Federal Defendants to implement the UNFCCC reporting provisions at issue here. Indeed, the Act is so bereft of specific directives that one court has observed it "consists almost entirely of mere platitudes." *Connecticut v. Am. Elec. Power Co.*, 582 F.3d 309, 382–83 (2d Cir. 2009), rev'd on other grounds, 564 U.S. 410 (2011). The Global Climate Protection Act is neither directly enforceable with respect to any duty at issue here, nor does it contain a duty enforceable under the Administrative Procedure Act ("APA") or through a writ of mandamus.

All of the issues presented in the U.S. Motion and Memorandum are matters of law that this Court can address at this stage of the proceedings, without an administrative record or further factual development. Plaintiff identifies no cause to defer consideration of these issues to briefing on the merits. The Court should dismiss the First and Second Claims for Relief of the First Amended Complaint.[1]

ARGUMENT

I. Plaintiff's Assertions of Informational and Organizational Standing for its Treaty-Based Claims Fail to Satisfy the Applicable Standards

The Amended Complaint contains just a handful of factual allegations relevant to Plaintiff's claims of Article III standing. *See* Amend. Compl. ¶ 13, 14. As explained in the U.S. Memorandum, none of the allegations establish the requirement of injury-in-fact. The alleged injuries are not sufficiently concrete and particularized such that they "must affect the plaintiff in a personal and individual way." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016).

[1] Plaintiff requests oral argument on the instant Motion. Opp. at 1 n.1. As set forth below, the Federal Defendants respectfully believe that the Motion presents legal issues that can be resolved without oral argument on the basis of the parties' written submissions.

The Opposition clarifies that Plaintiff asserts standing on its own behalf as an organization and not on behalf of its members, referring to "the Center's" standing while never expressly asserting injury to CBD members. This accords with the fact that the Amended Complaint fails to identify a single CBD member who allegedly will be harmed by the unavailability of the UNFCCC Reports. Thus, CBD rightly does not assert associational standing. *See, e.g., Chamber of Commerce v. EPA,* 642 F.3d 192, 200 (D.C. Cir. 2011) (if plaintiffs have "not identified a single member who was or would be injured by [a Government action]," associational standing is lacking).

As described below, CBD's claims to informational and organizational standing (Opp. at 13) are no more viable.

A. Plaintiff Has Neither Alleged Violation of a Public Disclosure Requirement nor Established Informational Injury-in-Fact

In the Opposition, Plaintiff alleges informational injury and contends that "the State Department has an *enforceable* legal obligation to complete and publicly release" the UNFCCC Reports. Opp. at 14. To establish informational standing, CBD must allege that it "is injured-in-fact ... because [it] did not get what the statute entitled [it] to receive." *Am. Soc. for Prevention of Cruelty to Animals v. Feld Entm't, Inc.*, 659 F.3d 13, 23 (D.C. Cir. 2011) (citation omitted). But more specifically, establishing such an injury requires CBD to "espouse a view of the law under which the defendant (or an entity it regulates) is obligated to disclose certain information that the plaintiff has a *right* to obtain." *Id.* (emphasis added). And while for purposes of the informational standing analysis a court is to credit a plaintiff's "view of the law," *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 21 (1998), that does not mean that "a court's informational-standing analysis is constrained by a plaintiff's assertion that a particular disclosure provision requires the disclosure of information on the terms the plaintiff dictates." *New England Anti-Vivisection Soc'y v. United States Fish & Wildlife Serv.*, 208 F.Supp.3d 142, 161–62 (D.D.C. 2016) (citing *Friends of Animals v. Jewell*, 828 F.3d 989, 993 (D.C. Cir.

2016)). Moreover, "[o]nly if the statute grants a plaintiff a concrete interest in the information sought will he be able to assert an injury in fact." *Nader v. FEC,* 725 F.3d 226, 229 (D.C. Cir. 2013). Put another way, accepting a plaintiff's legal theory, for instance that a purported public disclosure requirement applies to the defendant, does not mean that "a court is required to accept a plaintiff's threshold legal argument about whether and to what extent a statute requires disclosure at all." *New England Anti-Vivisection Soc'y*, 208 F.Supp.3d at 163. Indeed, courts assessing informational standing will examine the underlying statute to determine if the alleged disclosure obligation exists. *See id.* (rejecting plaintiff's argument for standing purposes that the disclosure requirements of Section 10(c) of the Endangered Species Act at issue were "actually broader than the plain text provides").

There are two insuperable problems with the Plaintiff's alleged informational injury. First, despite CBD's attempt to re-frame its treaty-based claims in this case, the First and Second Claims for Relief in the Amended Complaint that this Motion seeks to dismiss do not allege *at all* a State Department failure to release, disclose, or otherwise make information publicly available. Rather, CBD's treaty-based claims expressly call for the "completion and submission of the Seventh Climate Action Report" to the UNFCCC. Amend. Compl. ¶¶ 42, 45. The First and Second Claims for Relief are, thus, properly considered a deadline suit seeking to compel the State Department to prepare the UNFCCC Reports; the separate and bifurcated Freedom of Information Act ("FOIA") claims in this case rightly comprise the public disclosure aspects of the case. While the Federal Defendants do not dispute Plaintiff's standing for purposes of FOIA, as to its treaty-based claims the D.C. Circuit has held that a plaintiff cannot rely on informational standing as the basis to "enforce a . . . deadline provision that *by its terms* does not require the public disclosure of information." *Friends of Animals v. Jewell*, 828 F.3d 989, 992 (D.C. Cir. 2016) (emphasis added); *see also New England Anti-Vivisection Soc'y*, 208 F. Supp. 3d at 158 (describing *Friend of Animals* as holding that "the plaintiff would not be permitted to assert that it had suffered an informational injury (*i.e.*, that

its right to information had been violated) based on the agency's failure to satisfy the deadline for making findings").

That is precisely what CBD attempts to do here. The operative UNFCCC provision that Plaintiff seeks to enforce, Article 12, contains *no language* directing the State Department or the United States to publicly release the UNFCCC Reports. Nor has Plaintiff identified a federal implementing statute mandating the public release of the UNFCCC Reports. Plaintiff has alleged and posited a legal theory only to support its request for the State Department to complete and submit the report to the UNFCCC. It has identified *no legal basis* under which this Court could order the State Department to *publicly release* the UNFCCC Reports, which is the only type of claim that informational standing can support.

Thus, Plaintiff's informational standing claim fails at the first step because the First Amended Complaint does not on its face seek to enforce an express information disclosure requirement. Even if the Amended Complaint were read to assert such a claim, Plaintiff still has a second informational standing problem. Plaintiff points to no potentially applicable legal requirement that plausibly could be read to impose a public disclosure requirement on the State Department "or an entity it regulates." *Feld*, 659 F.3d at 23. Plaintiff offers *no explanation or legal theory* for how the reporting deadline it seeks to enforce also includes a requirement for *the State Department* to publicly disclose the reports in issue. This shortcoming is similar to what the D.C. Circuit considered in *Feld*. There, plaintiffs asserted that certain elephant-training methods were prohibited by Section 9 of the Endangered Species Act. They claimed informational standing because, in their view, the defendant circus organization would need a permit under Section 10 of the Act, and information submitted as part of the permit application necessarily would become public under Section 10(c) of the Act. *Id.* at 17, 22. The court held that the plaintiff lacked informational standing. As with the UNFCCC provisions CBD seeks to enforce here, "nothing in

[S]ection 9, even under [plaintiffs'] view, would entitle [them] to any information." *Id.* at 23. The DC Circuit, thus, rejected that plaintiff's attempt to bootstrap a subsequent, not-yet-effective informational disclosure requirement that might show injury and standing.

The cases relied upon by Plaintiff (Opp. at 14-15) only highlight the weaknesses in Plaintiff's theory. While public disclosure requirements are at the very heart of the statutes considered in *FEC v. Akins*, 524 U.S. 11 (1998), and *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440 (1989), that is not the case for the UNFCCC reporting provisions at issue here. Plaintiff can point to no similar statutory or treaty language to support its public disclosure claim here. In *Akins,* for example, the plaintiffs challenged the Federal Election Commission's determination that the American Israel Public Affairs Committee ("AIPAC") was not a "political committee" as defined by the Federal Election Campaign Act ("FECA") and therefore not subject to FECA's express disclosure requirements. *Akins,* 524 U.S. at 13. Plaintiffs' legal theory in that case (*i.e.*, that AIPAC was a "political committee") would have required AIPAC to disclose information pursuant to FECA. This was information to which plaintiffs would have been entitled given FECA's own "extensive recordkeeping and disclosure requirements." *See id.* at 14. As a result, the plaintiffs in *Akins* were found to have informational standing.

Public Citizen is similar. In that case, Public Citizen had sued the Department of Justice asserting that the Department's use of an American Bar Association committee to evaluate nominees for federal judgeships was subject to the various public disclosure requirements of the Federal Advisory Committee Act (FACA), 5 U.S.C. § 1, *et seq.* The Supreme Court explained that a purpose of FACA is to "ensure... that Congress and the public remain apprised of [advisory committees'] existence, activities, and cost." 491 U.S. at 446. It summarized FACA's many public disclosure requirements (such as, subject to enumerated exceptions, providing notice of meetings; opening meetings to the public; and requiring that meeting minutes, records, and reports be publicly

disclosed). *Id.* at 446-47. Comparing the situation to a request for agency information under FOIA, the Supreme Court found that denial of a request for information under FACA's analogously express disclosure provisions was sufficient to constitute informational injury. *See id.* at 449-50.

The situation at bar bears no resemblance to these cases. Here, Plaintiff points to no provision in the UNFCCC that grants Plaintiff a right to the information. Articles 4 and 12 are the only provisions of the UNFCCC cited by Plaintiff. Article 4 contains no express directive to Parties, let alone a self-executing one, to publicly disclose the UNFCCC Reports called for in Article 12. *See generally* UNFCCC, Art. 4. Article 12 similarly does not contain an express directive to Parties to publicly disclose the UNFCCC Reports. Article 12 provides only that parties are to submit the required elements of information "to the Conference of the Parties, through the secretariat." *Id.* Art. 12.1. In fact, parties are permitted to designate information submitted to the secretariat as "confidential," subject to certain criteria. *Id.* Art. 12.9. While Article 12 does provide that the secretariat of the UNFCCC will make "communications by Parties under this Article [12] publicly available," *id.* Art. 12.10, that requirement is subject to the aforementioned confidentiality measure and applies only to the secretariat of the UNFCCC, not to a Party such as the United States. The secretariat is not an "entity" that the Federal Defendants "regulate," *Feld*, 659 F.3d at 23, nor is it a party before this Court.

The 2012 "decision" document of the UNFCCC Conference of the Parties that CBD cites as the source of the applicable deadline for the UNFCCC Reports, Decision 2/CP.17, is similarly bereft of a public disclosure requirement applicable to the Federal Defendants. *See* Amend. Compl. ¶¶ 19, 42. The absence of such a requirement is unsurprising. The information in the UNFCCC Reports is for the primary benefit of the Parties, the secretariat, and various multilateral subsidiary bodies under the Convention to achieve the Convention's objectives, not for the benefit of domestic

individuals or organizations. *See* U.S. Mem. at 18-19.[2] Finally, as addressed in more detail *infra*, the Global Climate Protection Act, provides no support for Plaintiff's informational injury claim as it does not even address reporting pursuant to the UNFCCC, let alone the public disclosure thereof.

In sum, even on Plaintiff's own theory and examining the plain text of the authorities upon which Plaintiff relies, Plaintiff has failed to establish informational injury-in-fact and, thus, informational standing.[3]

B. The Opposition Fails to Address the Deficiencies of Plaintiff's Allegations of Organizational Injury

The analysis for organizational injury is straightforward and consists of a "two-part inquiry." A court will ask "first, whether the agency's action or omission to act injured the [organization's] interest and, second, whether the organization used its resources to counteract that harm." *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 919 (D.C. Cir. 2015) (quoting *People for the Ethical Treatment*

[2] Plaintiff observes, but rightly does not cite as a basis for standing, that the State Department in the past has published in the Federal Register or otherwise draft versions of reports submitted to the UNFCCC. Opp. at 9-10. Such practice is immaterial to the standing analysis because, to the extent the State Department has followed this practice, it has done so only in its own discretion and not pursuant to any statutory or other legal requirement. And contrary to Plaintiff's claim (Opp. at 9-10), the State Department has not issued for public comment a draft of every UNFCCC report like those at issue here, including the most recent report submitted to the UNFCCC secretariat (the second biennial report submitted on December 15, 2015).

[3] The Federal Defendants' challenge to Plaintiff's informational standing is manifestly a strictly legal issue resolvable through reference to Plaintiff's allegations and the relevant treaty-related documents. As such, Plaintiff's half-hearted "request" for "jurisdictional discovery" (Opp. at 16) is unsustainable. First, it is improperly raised. *See generally* L. Civ. R. 7; s*ee also Banner Health v. Sebelius*, 797 F.Supp.2d 97, 116 (D.D.C. 2011) ("Plaintiffs have never actually filed a motion for jurisdictional discovery; a passing argument made in opposition to a motion to dismiss simply will not suffice.…The Court will not exercise its discretion to authorize Plaintiffs to go on a fishing expedition, particularly one that can bear no fish."")). Second, no additional facts *from the Federal Defendants* could conceivably shed light on Plaintiff's alleged injury due to the unavailability of the UNFCCC Reports. Finally, the information Plaintiff seeks overlaps with the information at issue under its FOIA claims in this case, as to which discovery generally is not available (*see* L.Civ. R. 16.3(b)(10)), creating a potentially problematic end run around the ongoing FOIA litigation. If the Court nonetheless entertains Plaintiff's "request," the United States respectfully requests the opportunity to respond fully.

of Animals v. USDA, 797 F.3d 1087, 1093 (D.C. Cir. 2015)) (brackets in original) ("*PETA*"). An "organization must allege that the defendant's conduct perceptibly impaired the organization's ability to provide services," specifically through "'inhibition of [the organization's] daily operations' in order to establish injury in fact." *Food & Water Watch, Inc.*, 808 F.3d at 919-20 (citation omitted). In its Memorandum, the Federal Defendants asserted that Plaintiff's allegations were too vague and abstract, or otherwise entirely absent, to satisfy either prong.

Plaintiff's Opposition explicitly concedes that organizational standing is subject to this two-part test. Opp. at 17. Citing *PETA*, Plaintiff concedes that it must "demonstrate" that the Federal Defendants have "injured the organization's interest" and that the "organization used its resources to counteract that harm." Opp. at 17. As to the first prong, Plaintiff merely repeats the allegations in the Amended Complaint and proclaims them sufficient for standing. *Id.* at 17-18. As such, the Federal Defendants simply re-assert the many deficiencies of Plaintiff's vague and abstract alleged injuries to its organizational interests. U.S. Opp. at 9-12. However, as to the second prong, Plaintiff makes no argument whatsoever. Thus, even though the Federal Defendants had pointed out that the Amended Complaint fails even to allege that CBD "used its resources to counteract that harm," *Food & Water Watch, Inc.,* 808 F.3d at 919, as the law requires, the Opposition does not even attempt to fill this fatal gap.[4]

The Opposition concedes that CBD has not alleged in the Amended Complaint that it has used resources to counteract any alleged injury to its education or advocacy interests. Instead, CBD again urges that it not be required to address the deficiencies in its standing allegations now, but rather at summary judgment. Opp. at 18 n.19. But CBD concedes that in *PETA* the plaintiff's *much*

[4] In a footnote, CBD cryptically asserts that the "injury to its resources" is not self-inflicted. Opp. at 17 n.18. However, CBD nowhere specifies what these "resources" are or otherwise identifies any resource impact of the Federal Defendants' alleged inaction. In any event, the Amended Complaint alleges no impact to CBD resources.

more detailed and substantial allegations of standing were evaluated at the motion to dismiss stage. Opp. at 17. Resolution at the motion to dismiss stage is also appropriate here. *See* U.S. Mem. at 12 (discussing extent of allegations in *PETA*).[5]

Because CBD failed to make allegations necessary to address one of two legally-required elements for organizational standing, its claim to organizational standing also fails. And CBD proffers no legal basis for deferring consideration of its standing problems to the summary judgment (*i.e.*, merits briefing) stage. Thus, the treaty-based claims in the First Amended Complaint should be dismissed. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) ("Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.") (Citation and internal quotation marks omitted).

II. The Amended Complaint Fails to State a Claim Because the UNFCCC Reporting Obligations are Non-Self-Executing and Unenforceable in U.S. Courts

Plaintiff concedes that it cannot enforce the UNFCCC reporting obligations in this Court unless the treaty provisions are "self-executing." Opp. at 20. Unfortunately, Plaintiff's correct

[5] Plaintiff repeatedly suggests that the Court should defer the issues raised in the Federal Defendants' motion to dismiss to the summary judgment stage (or, more accurately stated, the merits stage, *see* Comment to L. Civ. R. 7 (n)). *See* Opp. at 12, 19, 24. However, Plaintiff cites no authority for the proposition that this Court cannot evaluate the legal issues of the sufficiency of the Plaintiff's standing allegations or the justiciability of the Plaintiff's treaty-based APA and mandamus claims. Plaintiff's standing clearly is subject to challenge in a motion to dismiss, and the United States challenges only the sufficiency of the allegations in the Amended Complaint. *See, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). The Court needn't consider any material beyond the Amended Complaint, materials referenced therein, or other judicially-noticeable material. That applies to what Plaintiff exaggerates as the Federal Defendants' "mere delay" argument (Opp. at 15-16), which in reality is a citation to a newspaper article to provide context for *Plaintiff's* allegation that the State Department "stated publicly to news outlets that it is preparing the Report." Amend. Compl. ¶ 24. The allegations of injury in the Amended Complaint are deficient, vague and abstract whether the release of the UNFCCC Reports is delayed or never occurs at all. U.S. Mem. at 9-13. Federal Defendants make no separate standing argument based on delayed issuance of the report, and the details of the status of the UNFCCC Reports within the State Department are legally irrelevant to the motion to dismiss.

treatment of this decisive legal issue ends there. Much like its handling of its standing problems, Plaintiff fails to address one of the threshold legal requirements necessary to pursue its treaty-based claims. CBD thus effectively concedes that it has failed to adequately state a claim.[6]

In *Medellin v. Texas*, the Supreme Court identified two steps for ascertaining whether a treaty is directly enforceable in domestic courts by a private party. The first step is to determine whether a treaty obligation is "self-executing." In other words, whether the treaty provision in question "constitutes binding federal law enforceable in United States courts." 552 U.S. at 504. If the provision is not self-executing, it "can only be enforced pursuant to legislation to carry [it] into effect." *Id.* at 505 (quoting *Whitney* v. *Robinson*, 124 U.S. 190, 194 (1888)). Where, as is the case here, a treaty provision is neither self-executing nor separately made enforceable by a statute, that is the end of the matter. *Id.* at 504.

If, however, a provision is determined to be self-executing, as Plaintiff contends here, *Medellin* instructs a court to engage in a second step. Before enforcing the provision, a court must determine whether the provision creates a "private cause of action in domestic courts." *Id.* at 506 n.3 (citing cases); *see also Canadian Transp. Co. v. United States*, 663 F.2d 1081, 1092 (D.C. Cir. 1980) ("In the absence of *specific language in the treaty* waiving the sovereign immunity of the United States,

[6] Plaintiff's procedural contentions are equally wide of the mark. Plaintiff offers no reason why the Court must await the merits phase to determine whether the UNFCCC provisions are self-executing or if the Global Climate Protection Act contains enforceable duties and, thus, are capable of supporting Plaintiff's APA and mandamus claims. Making this threshold, legal determination does not go the merits of the case as Plaintiff contends (Opp. at 19), but rather is necessary to determine if Plaintiff has stated a claim at all. Finally, as the administrative record is unnecessary to the Court's consideration of the Federal Defendants' motion, which raises strictly legal issues, Plaintiff's reliance on *Banner Health* to yet again urge deferral until summary judgment is misplaced. Unlike this case, in *Banner,* the defendant *had* presented "merits-based" arguments as to its compliance with the Administrative Procedure Act in its motion to dismiss. 797 F.Supp.2d 97 at 117. Here, the Federal Defendants ask the Court to evaluate only whether Plaintiff has identified applicable, operative law that could trigger application of the APA and make no arguments whatsoever regarding the merits of Plaintiff's APA unreasonable delay claim.

the treaty must be interpreted in accord with the rule that treaty violations are normally to be redressed outside the courtroom.") (emphasis added)); *McKesson Corp.* v. *Islamic Republic of Iran*, 539 F.3d 485, 491 (D.C. Cir. 2008) ("In the absence of a textual invitation to judicial participation, we conclude the President and the Senate intended to enforce the Treaty of Amity through bilateral interaction between its signatories"). If a plaintiff fails to meet either criterion, its claim to enforce a treaty obligation in domestic court must fail.[7]

A. Plaintiff Concedes that, Even if the UNFCCC Provisions at Issue Were Self-Executing, the UNFCCC Does not Furnish a Private Cause of Action

The U.S. Memorandum explicitly explained that even if the treaty provisions at issue were self-executing, Plaintiff was required to identify a private cause of action in the UNFCCC and failed to do so. U.S. Mem. at 21-22. Indeed, Plaintiff carries the heavy burden, and has failed, to overcome the presumption that "[i]nternational agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts." *Medellin*, 552 U.S. 506, n.3 (citing Restatement (Third) of Foreign Relations Law § 907, cmt. a (1987); *see also McKesson*, 539 F.3d at 489 (same); *Diggs v. Richardson,* 555 F.2d 848, 851 (D.C. Cir. 1976) (after finding Security Council resolution provisions at issue to be non-self-executing, observing that the provisions "do not by their terms confer rights upon individual citizens; they call upon governments to take certain action. The provisions deal with the conduct of our foreign

[7] Before addressing the many reasons why Plaintiff has failed to state a claim, we must correct Plaintiff's erroneous assertion that the Federal Defendants claim that this *case* can be resolved without an administrative record. (Opp. at 4). Rather, we have explained that the instant *motion to dismiss* can be resolved without an administrative record because the motion raises strictly legal issues. U.S. Mem. at 1 n.1. Plaintiff's treaty-based APA and mandamus claims clearly "involv[e] the judicial review of administrative agency actions" within the meaning of L. Civ. R. 7(n), and the Federal Defendants will file a certified administrative record in accordance with the local rules if the case progresses to the merits phase. *See* U.S. Mem. at 1 n.1.

relations, an area traditionally left to executive discretion."). In fact, Plaintiff concedes that "the UNFCCC does not itself confer a specific right on Plaintiff." Opp. at 15 n.17.

Notwithstanding two pages of argument and a separate argument heading for this threshold legal issue in the U.S. Memorandum (at 21-22), the Opposition all but ignores this requirement. Rather than point the Court to treaty text that would purport to buttress its claim, Plaintiff only notes in defense of its *standing* that the absence of a private cause of action in the UNFCCC is "of no moment." Opp. at 15 n.17. Assuming *arguendo* that this has minimal relevance to the standing issue, the absence of a private cause of action in the treaty is decisive on the issue of whether Plaintiff has stated a claim. Yet Plaintiff concedes that the UNFCCC contains no such language. Its failure even to address it as a necessary element of its claim is definitive. On this factor alone, the treaty-based claims for relief should be dismissed.

B. Plaintiff Misapplies the Considerations for Determining Whether a Treaty Provision is Self-Executing

Though it will be unnecessary for the Court even to address this issue in light of Plaintiff's concession, Plaintiff also commits several errors in attempting to establish that the UNFCCC reporting provisions are self-executing. It thus fails to counter the explanation in the U.S. Memorandum that the treaty is not self-executing. U.S. Mem. at 13-21.

"Whether an international agreement of the United States is self-executing is a matter of interpretation to be determined by the courts." *Diggs*, 555 F.2d at 851. Determining whether a treaty provision is self-executing requires a court to answer a fundamental query: does "the treaty itself convey[] an intention that it be 'self-executing' and is [it] ratified on these terms." *Medellin*, 552 U.S. at 505 (citation omitted); *see also Diggs*, 555 F.2d at 851 ("In determining whether a treaty is self-executing courts look to the intent of the signatory parties as manifested by the language of the instrument, and, if the instrument is uncertain, recourse must be had to the circumstances

surrounding its execution."). Of course, "[i]t is …well settled that the United States' interpretation of a treaty is entitled to great weight." *Medellin*, 552 U.S. at 513 (internal quotation marks omitted).

Though Plaintiff wrongly suggests that there is a definitive three-factor test, Opp. at 20, it nonetheless discusses some factors that are relevant to identifying a self-executing treaty provision: the treaty's text, the post-ratification practice of treaty parties, and evidence in the record of U.S. ratification. However, Plaintiff consistently fails to appreciate that the relevant inquiry with respect to all of these considerations is quite limited. That analysis focuses exclusively on whether those considerations evince an intention that the provision in question be enforceable in domestic courts. There is not a dispute here over the existence of reporting obligations in the UNFCCC. The parties agree that the UNFCCC imposes an obligation on the United States to prepare and submit certain communications to the UNFCCC. The only dispute between the parties is whether that obligation is exclusively an international one, between the parties to the UNFCCC and addressed on the international plane, or an obligation that the signatory nations agreed reaches to private parties like Plaintiff and is enforceable in domestic court. The U.S. Memorandum establishes it is the former.

1. Plaintiff Identifies No Text in the UNFCCC or Applicable UNFCCC Decision Documents Indicating that the UNFCCC Reporting Provisions Are Enforceable in Domestic Courts.

Plaintiff's examination of the text of the UNFCCC and related decision document amounts to a very long walk only to reach an immaterial conclusion: the UNFCCC reporting provisions use mandatory language such as "shall." Opp. at 21-24. While Plaintiff goes to lengths to demonstrate that there is *an* obligation, the text it relies upon does not undercut the Federal Defendants' position that the obligation is a non-self-executing, international one. U.S. Mem. at 15-16. Plaintiff's burden was to identify "*textual provisions* indicat[ing] that the President and Senate intended for the agreement to have *domestic* effect," *Medellin*, 552 U.S. at 519 (emphasis added and citations omitted), and, additionally, that function as a "directive to domestic courts" to enforce U.S. compliance. *Id.* at

508. Neither the UNFCCC nor any applicable decision documents contain such language, and Plaintiff does not even argue as much. Furthermore, Plaintiff seeks to enforce a deadline that derives entirely from a UNFCCC decision document, Decision 2/CP.17. *See* U.S. Mem. at 16-17. Yet Plaintiff has not seriously contested the applicability here of the D.C. Circuit's decision in *NRDC v. EPA*, 464 F.3d 1 (D.C. Cir. 2006). *See* Opp. at 31 n.30.[8] *NRDC* holds that "[w]ithout congressional action," conditions in certain post-ratification decisions "are not the law of land" and are "enforceable not through the federal courts, but through international negotiations." 464 F.3d at 9-10; *see also* U.S. Mem. at 17-18.

Plaintiff appears to (wrongly) believe that the UNFCCC only needs to use words that might establish a mandatory, enforceable duty in a U.S. statute (either directly or under the APA) to show that a treaty is enforceable in federal court. As such, Plaintiff appears to have settled on the proposition that the use of terms like "shall" in the UNFCCC raise a presumption of self-execution. Opp. at 21 (suggesting that treaties with mandatory terms are "typically deemed to be self-executing"). However, there is no such presumption in the law (indeed, Plaintiff cites none).[9] Many

[8] Plaintiff cites (Opp. at 31 n.30) *NRDC*'s discussion of a Second Circuit case, *Day v. TWA*, 528 F.2d 31 (2d Cir. 1975). However, *Day* is inapposite because the treaty it involved–the Warsaw Convention for the Unification of Certain Rules Relating to International Transportation by Air–is both self-executing and provides a private right of action. *See TWA v. Franklin Mint Corp.*, 466 U.S. 243, 252 (1984); *McKesson*, 539 F.3d 485, 489. However, neither is true for the UNFCCC. Further, in *NRDC,* Judge Edwards observed that *Day* "offers no solace" for the proposition that the post-ratification document at issue in *NRDC* provided enforceable law. *NRDC*, 464 F.3d at 12-13 (Edwards, J. concurring). The court in *Day* was asked to apply a subsequent, post-ratification agreement to interpret Article 17 of the Warsaw Convention. *Id.* Here, by contrast, Decision 2/CP.17 does not interpret language in the UFCCC at all, but rather establishes requirements (including deadlines) not present in the Convention. *See* U.S. Mem. at 16-18.

[9] Restatement (Fourth) of Foreign Relations Law: Jurisdiction Treaties § 106 DD (2015) ("The case law has not established a presumption for or against self-execution, in the sense of a clear statement or default rule that dictates a result in the absence of contrary evidence."). Cases cited by Plaintiff (Opp. at 21-22) provide no further support for such a presumption. For instance, in *Sluss v. United States Dep't of Justice*, 898 F.3d 1242, 1249 (D.C. Cir. 2018), the court deemed the self-executing issue

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counter-examples of treaty obligations expressed in mandatory language that courts have found to be non-self-executing refute the argument. For example, in *Cameron Septic Tank Co. v. Knoxville*, 227 U.S. 39, 43-44 (1913), the Supreme Court held an international treaty regulating patents to be non-self-executing despite multiple detailed provisions concerning the handling of patents that used mandatory terms such as "shall" and the observation that "the text of the treaty is without ambiguity." Also, in considering Article 34 of the United Nations Convention Relating to the Status of Refugees, the Supreme Court similarly indicated, without deciding, that a provision requiring that "[t]he Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees" was "not self-executing." *I.N.S. v. Stevic*, 467 U.S. 407, 417 & 429 n.22 (1984). And in *United States v. Postal*, 589 F.2d 862, 877 (5th Cir. 1979), the Fifth Circuit considered a provision of the Convention on the High Seas that used compulsory language in requiring that "[s]hips shall sail under the flag of one State only" and "shall be subject to its exclusive jurisdiction on the high seas." *Id.* at 877. Notwithstanding such language, the court found several factors associated with the treaty to suggest it was not self-executing. These included that it "is a multilateral treaty which has been ratified by over fifty nations," making it "difficult therefore to ascribe to the language of the treaty any common intent that the treaty should of its own force operate as the domestic law of the ratifying nations." *Id.* at 878.

Like those treaties, nothing in the UNFCCC's text itself constitutes a "directive to domestic courts" in the United States or any other signatory nations to enforce them. *Medellin*, 552 U.S. at 508. Furthermore, the UNFCCC establishes a "multilateral consultative process" for resolving questions of implementation and disputes, *see* UNFCC, Arts. 13-14, which further suggests that it is

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forfeited on appeal and expressly stated that it "need not decide whether the Treaty is self-executing." And in *Asakura v. City of Seattle*, 265 U.S. 332, 342 (1924), the Supreme Court did not examine or remark upon the relevance of mandatory language such as "shall" to a self-execution analysis.

not intended to be self-executing. U.S. Mem. at 18-19. As does the fact that the UNFCCC's underlying purpose as to reporting is principally to share information among and between, and for the benefit of, treaty parties, the Conference of the Parties and the secretariat. *Id.*

2. Nothing in the Post-Ratification Practice of the Parties Suggests an Intent to Make the UNFCCC Reporting Provisions Enforceable in Domestic Courts.

The complete absence of evidence of an intent that the UNFCCC would be enforceable in domestic courts in the UNFCCC's text and structure resolves the self-execution issue. But even if the Court were to consider post-ratification practice, that would only further confirm that the UNFCCC reporting provisions are not self-executing.

Plaintiff again misses the mark with its lengthy discussion of the UNFCCC parties' post-ratification practice. It establishes only the unremarkable fact that most parties (including the United States) have complied with the treaty's reporting requirements most of the time. Opp. at 24-27. But this observation adds nothing to the self-execution analysis. UNFCCC parties also would be expected to comply with mandatory, *non-self-executing* treaty obligations. Rather, pertinent evidence would be a "postratification understanding" of UNFCCC parties that the United States or any other UNFCCC party "treats [the UNFCCC reporting provisions] as binding in domestic courts." *Medellin*, 552 U.S. at 516. But Plaintiff has adduced none, and the Federal Defendants are unaware of pertinent examples. To the contrary, there are indications that the UNFCCC (secretariat and Conference of the Parties) and Parties address concerns related to the reporting requirements on the international plane under mechanisms established under the Convention. *See* U.S. Mem. at 19-20. Thus, as the Supreme Court found for International Court of Justice judgments in *Medellin*, "the lack of any basis for supposing that any other country would treat [the UNFCCC reporting provisions] as directly enforceable as a matter of their domestic law strongly suggests that the treaty should not be so viewed in our courts." 552 U.S. at 517.

3. Nothing in the Ratification Record Indicates that the President or the Senate Understood that the UNFCCC Would be Enforced in U.S. Courts.

Plaintiff's reliance on the ratification hearing transcript is just as unavailing as evidence that the provisions at issue are self-executing. Nothing Plaintiff cites gives any indication "that the President and Senate intended for the agreement to have domestic effect," *Id.* at 519 (citations omitted). First, Plaintiff selectively quotes and appends to its Opposition an excerpt including language from written responses by the Executive Branch to questions submitted by the Senate Foreign Relations Committee in the context of its consideration of advice and consent for the UNFCCC. This includes language that obligations under Article 4.2 (a) and (b) of the UNFCCC "do not require any new implementing legislation." Opp. at 28 (citing attached hearing transcript at 93). However, Plaintiff omitted the very next sentence, which goes on to explain that "the United States will implement this obligation through a variety of measures" including through the Clean Air Act and other enumerated statutes. *Id.* Thus, far from stating that the obligations under Article 4.2 (a) and (b) would not require implementing legislation, the response from the Executive Branch identified some of the existing authorities that would be sufficient to implement obligations under Article 4.2 (a) and (b), while explaining that no "*new*" implementing legislation was needed.

Plaintiff's other reference to the ratification record (Opp. at 28-29) again manifests Plaintiff's confusion between international, non-self-executing obligations and domestically enforceable self-executing ones. The quoted passage addresses the purposes and anticipated benefits of the UNFCCC reporting provisions according to State Department testimony. There is absolutely no dispute about the substance of that passage and the State Department stands by it completely–the UNFCCC reporting provisions are a binding *international obligation* with important objectives and benefits. That said, nothing in the ratification record expressly supports the notion that the President or Senate understood the UNFCCC to create obligations enforceable in domestic courts.

Rather, other aspects of the record indicate an expectation, and preference, that the Convention's multilateral mechanisms would be used for implementation disputes. U.S. Mem. at 20-21.

III. The Global Climate Protection Act Does Not Direct Implementation of the UNFCCC Reporting Provisions and is Not a Basis for Jurisdiction

Though only obliquely referenced in the First Amended Complaint (*see* Amend. Compl. ¶¶ 20, 42, 45), Plaintiff now contends expressly that the UNFCCC reporting provisions are directly enforceable in this Court through the Global Climate Protection Act of 1987, 15 U.S.C. § 2901 note, Pub. L. 100-204. Opp. at 29. But that Act pre-dates the UNFCCC by five years, does not expressly or implicitly contemplate the UNFCCC, and does not refer to reporting under an international agreement of any kind. The Global Climate Protection Act does not support the weight that Plaintiff places on it.

The Global Climate Protection Act was among the earliest statutes addressing the issue of climate change. It stated numerous Congressional findings, expressed multiple goals of the United States, described a process for the formulation of U.S. policy, described an approach for coordinating U.S. policy in the international arena, and directed the Secretary of State and the Administrator of the Environmental Protection Agency to jointly prepare and submit a report to Congress on certain scientific, diplomatic and strategic considerations of global climate change. *See generally* 15 U.S.C. § 2901 note.[10] Plaintiff identifies only one provision of significance here, to wit that "[t]he Secretary of State shall be responsible to coordinate those aspects of United States policy requiring action through the channels of multilateral diplomacy, including the United Nations

[10] Contrary to Plaintiff's assertion, the Federal Defendants have not asserted that the Act "does not itself contain binding duties." Opp. at 30. Rather, the Federal Defendants asserted, and maintain, that the Act "establishes no basis for judicial enforcement of the treaty provisions" at issue. U.S. Mem. at 14 n.5.

Environment Program and other international organizations." 15 U.S.C. § 2901 note, Pub. L. 100-204, § 1103(c).

Plaintiff contends that this language establishes the State Department's legal responsibility for completing the UNFCCC Reports and that the Federal Defendants could be compelled to complete and submit the UNFCCC Reports based on this provision alone, and without having to establish that the UNFCCC reporting provisions are self-executing. Opp. at 30-31. However, this provision only requires that the State Department "coordinate" action through "multilateral diplomacy." It is not even remotely the type of clear, nondiscretionary, and ministerial duty that can support the mandamus relief that Plaintiff seeks. *See, e.g., Heckler v. Ringer*, 466 U.S. 602, 616 (1984).[11] "Mandamus is an extraordinary remedial process which is awarded, not as a matter of right, but in the exercise of a sound judicial discretion." *Duncan Townsite Co. v. Lane*, 245 U.S. 308, 311-312 (1917).

The language upon which Plaintiff relies is markedly indistinct. The vague verb "coordinate" is the only operative term. The statute describes no discrete action the State Department must take, nor does it contain any deadlines or other parameters for a court to enforce. Though perhaps a bit of overstatement, one court has captured the dilemma of Plaintiff's contention by observing that the Act "consists almost entirely of mere platitudes." *Connecticut v. Am. Elec. Power Co.*, 582 F.3d at 382–83. If the Act could be applied to enforce the reporting deadline of an international treaty that was ratified five years hence and is not even within the contemplation of the statute being enforced, there would be no logical limit to Plaintiff's theory. The State Department is given responsibility and authority to do *something* with respect to "coordination" under § 1103(c) of

[11] As the Federal Defendants had asserted (U.S. Mem. at 23), Plaintiff concedes that its APA "unlawfully withheld" claim and its mandamus claim are functionally identical. Opp. at 19. Plaintiff merely re-treads its earlier arguments in asserting this Court's APA and mandamus jurisdiction to enforce the UNFCCC reporting provisions. Opp. at 32-35. But in the final analysis, CBD fails to identify an "operative part of domestic law" to support those claims. *See Comm. of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 943 (D.C. Cir. 1988); U.S. Mem. at 22-24.

the Global Climate Protection Act. But there is no basis to find that the statute imposes a non-discretionary duty on the State Department to submit a report to the UNFCCC by January 1, 2018, as Plaintiff contends.

Finally, Plaintiff's reliance on *Sluss v. Dep't of Justice* is misplaced. Opp. at 31-32. There simply is no comparison in the relationship between the implementing legislation and prisoner transfer treaty at issue in *Sluss*, on the one hand, and the Global Climate Protection Act and the UNFCCC reporting provisions, on the other. Plaintiff offers no evidence that when Congress enacted the Global Climate Protection Act in 1987 it had in mind the domestic enforcement of treaties like the UNFCCC—ratified five years later—let alone the domestic enforcement of the UNFCCC reporting provisions in particular.

In *Sluss,* by contrast, the Senate established—as an express condition of ratification—that implementing legislation for the treaty at issue be in place *before* the United States deposited its instrument of ratification (thus bringing the treaty into force). *Sluss*, 898 F.3d at 1250. So Congress enacted the Transfer of Offenders to or from Foreign Countries Act ("Transfer Act"), 18 U.S.C. § 4100 *et seq.*, in 1977, just prior to the United States bringing the treaty into force. The Transfer Act expressly implemented, and indeed incorporated certain provisions of, the U.S.-Canada Treaty on the Execution of Penal Sentences. *Sluss*, 898 F.3d at 1250. The Transfer Act took an "omnibus approach to prisoner transfers, providing procedures to implement this [U.S.-Canada] Treaty and a similar prisoner-transfer treaty with Mexico, as well as future prisoner-transfer agreements with other countries." *Id.* Thus, completely unlike the Global Climate Protection Act, the statute in *Sluss* was a *bona fide* and dedicated implementing statute enacted just in advance of treaty ratification. The D.C. Circuit thus found, without deciding the issue of self-execution of the treaty itself, that the court could enforce certain provisions of the treaty that had been expressly incorporated in the Transfer Act. *Id.* ("The Transfer Act is not in derogation of the Treaty; to the contrary, it

implements and incorporates the Treaty, making its provisions (including the one on which Sluss relies) part of domestic law.").

Plaintiff invites this Court to do something different altogether. Here, there is no direct connection between the Global Climate Protection Act and the UNFCCC reporting provisions that Plaintiff seeks to enforce. The Court should decline to imagine one.

CONCLUSION

For the foregoing reasons, the Court should dismiss Plaintiff's First and Second Claims for Relief premised on U.S. treaty obligations.

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Respectfully submitted,

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