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)

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

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INTRODUCTION/SUMMARY OF THE ARGUMENT

In the First and Second Claims for Relief of the Amended Complaint for Declaratory and Injunctive Relief ("Amended Complaint"), Plaintiff Center for Biological Diversity ("CBD" or "Plaintiff") seeks an order compelling Defendants the United States Department of State ("the State Department") and Michael R. Pompeo, in his official capacity as the Secretary of State ("Secretary Pompeo"[1]) (collectively, "State Department" or "Federal Defendants"), to complete and submit two reports to an international body pursuant to an international treaty, the United Nations Framework Convention on Climate Change ("UNFCCC" or "Convention"). Plaintiff seeks to compel this agency action under the authority of the Administrative Procedure Act ("APA") and the federal mandamus statute.

As set forth below, the First and Second Claims for Relief pertaining to these treaty-based reports should be dismissed. First, Plaintiff has suffered no injury-in-fact to support standing under Article III of the United States Constitution. Second, Plaintiff seeks to enforce the timetable for implementing an international obligation of the United States through a private action in domestic court. But Plaintiff has failed to state a claim. It has failed to identify any enforceable legal requirement. The UNFCCC reporting provisions at issue are not self-executing. In the absence of implementing legislation, they are unenforceable in a United States court. Third, even if the

[1] Pursuant to Fed. R. Civ. P. 25(d), Secretary Pompeo is automatically substituted as a party. Additionally, Local Rule 7(n) appears to contemplate that Federal Defendants will produce a certified administrative record after filing an answer or upon filing a dispositive motion focused on the merits of Plaintiffs' claim, "whichever occurs first." L. Civ. R. 7(n). The apparent logic of the rule, however, presupposes that the motion implicates the contents of the administrative record (*see id.,* counsel not to "burden the appendix with excess material from the administrative record that does not relate to the issues raised in the motion or opposition."). Federal Defendants' motion raises only jurisdictional and other threshold defenses and does not depend upon the contents of any documents that would comprise the administrative record. *See Carroll v. Office of Fed. Contract Compliance Programs, U.S. Dep't of Labor*, 235 F. Supp. 3d 79, 81 n.1 (D.D.C. 2017) (concluding that the "certified list" of administrative record contents was "'immaterial' to [the] resolution" of a motion to dismiss).

reporting provisions were self-executing, the UNFCCC does not furnish Plaintiff a private right of action to compel action by the Federal Defendants. Fourth, because Plaintiff's alleged rights under the UNFCCC are not enforceable as a matter of law, Plaintiff's claim under the APA and for mandamus must fail.

The Federal Defendants do not dispute that the UNFCCC imposes a binding *international* obligation for its Parties to submit certain information through periodic communications to the UNFCCC Conference of the Parties. But the UNFCCC affords Plaintiff no rights with respect to such communications that are enforceable in this Court. A treaty is "primarily a compact between nations," and any issue with respect to the United States' completion and submission of these communications to the UNFCCC is a "subject of international negotiations and reclamations," not one for a domestic court. *Medellin v. Texas*, 552 U.S. 491, 505 (2008) (quoting *Head Money Cases*, 112 U.S. 580, 598 (1884)). Accordingly, Plaintiff's First and Second Claims for Relief premised on the UNFCCC must be dismissed.

STATEMENT OF THE CASE

I. Legal Background – the United Nations Framework Convention on Climate Change

In 1992, President George H.W. Bush signed the UNFCCC. This multilateral agreement stated the objective of "stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system." 13 S. Treaty Doc. No. 102–38, Art. 2, p. 5, 1771 U.N.T.S. 107 (1992); *see* Amend. Compl. ¶ 18. The Senate subsequently provided its advice and consent on October 7, 1992, and the United States then ratified the Convention, which entered into force for the United States in 1994. Resolution of Advice and Consent to Ratification: Senate Consideration of Treaty Document 102-38 (Oct. 7, 1992); United Nations Treaty Collection, Chapter XXVII.7, United Nations Framework Convention on Climate Change, available here.

The UNFCCC establishes a secretariat that supports the operation of the treaty. UNFCCC, Art. 8. The Convention also establishes a Conference of the Parties that has met annually since 1995 and through which Parties review the implementation of the Convention and take decisions to promote its implementation. *Id.*, Art. 7.1, 7.2 ("Conference of the Parties may adopt, and shall make, within its mandate, the decisions necessary to promote the effective implementation of the Convention"). The Convention includes many provisions related to the exchange of information among the Parties, including the reporting requirements under Articles 4 and 12.

Article 12.1 provides that each UNFCCC party shall communicate to the Conference of the Parties (through the secretariat) certain information. This includes a "national inventory" of covered emissions, "[a] general description of steps taken or envisaged by the Party to implement the Convention," and other information the Party considers "relevant to the achievement of the objective of the Convention and suitable for inclusion in the communication." *Id.*, Art. 12.1(a)-(c). For Parties included in Annex I and Annex II of the Convention, such as the United States, communications must also include certain additional elements, such as a description of policies and measures to address climate change and measures taken to provide support to developing countries to address climate change. *Id.*, Art. 12.2-.3.

Other than the deadline for the first communication, the UNFCCC does not itself establish the specific timing of communications. *See id.*, Art. 12.5 (first communication due "within six months of the entry into force of the Convention for that Party"). Rather, the schedule for submitting subsequent communications is subject to a decision made by the Conference of Parties. *Id.* ("the frequency of subsequent communications by all Parties shall be determined by the Conference of the Parties.").

Plaintiff's claims concern two reports submitted by the Parties through the secretariat on a regular basis: the "national communication" and the "biennial report" (collectively, the "UNFCCC

Reports"). Amend. Compl. ¶ 2. Through a series of decisions in the years following the initial submissions (most of which occurred in 1994), the Conference of the Parties adopted guidance for the content of national communications. It also set dates for the submission of the reports, which generally had been called for every four years. *See, e.g,* Dec. 10/CP.13, ¶ 2 ("Requests Annex I Parties to submit to the secretariat a fifth national communication by 1 January 2010 in accordance with Article 12, paragraphs 1 and 2 of the Convention, with a view to submitting the sixth national communication four years after this date."), available here. Pursuant to a decision adopted by the Conference of the Parties in 2012, beginning with the national communication to be submitted by January 1, 2014, the "Parties shall submit a full national communication every four years." Dec. 2/CP.17, ¶ 14, available here.

The same decision also provided that Annex I parties such as the United States are to submit biennial reports. These reports cover, among other subjects, information on the progress made by Annex I Parties in achieving their emission reduction targets, projected emissions, and the provision of financial, technological and capacity-building support to non-Annex I Parties. *Id.*, Annex I, at 31. Pursuant to Decision 2/CP.17, the first biennial report was to be submitted by January 1, 2014, and every two years thereafter. *Id.* ¶ 13. In years when both a national communication and biennial report are to be submitted (such as 2014, 2018, etc.), Annex I Parties could submit the biennial report as an annex to the national communication or as a separate report. *Id.* ¶ 15. Under this schedule, Annex I parties such as the United States were to submit both a national communication and a biennial report to the secretariat by January 1, 2018. Amend. Compl. ¶¶ 2, 42, 45.

No federal statute implements the UNFCCC reporting provisions at issue here.

II. Factual and Procedural Background

Beginning with the first national communication submitted by the United States to the secretariat in September 1994, *see generally* Climate Action Report: Submission of the United States of

America Under the United Nations Framework Convention on Climate Change (September 1994), the United States has to this date submitted to the secretariat six national communications and two biennial reports. As is the case for many Parties submitting these reports under the UNFCCC, the United States has an uneven record of submitting the reports by the dates stated by the UNFCCC Conference of the Parties. The majority of submissions by the United States have occurred after those dates, ranging from three months late (for the second national communication) to 18 months late (for the fourth national communication[2]).

On February 5, 2018, CBD submitted to the State Department a letter noting that the United States had not submitted the UNFCCC Reports to the secretariat by January 1, 2018. The letter stated CBD's intent to file suit unless the State Department agreed to a schedule to complete and submit the UNFCCC Reports. *See* Amend. Compl. ¶ 23. In February 2018, the State Department stated publicly that it was in the process of preparing the report. *See id.* ¶ 24; *see also* J. Chemnick, *Trump Admin Vows to Send Overdue Report*, Climatewire, Feb. 6, 2018 (""The State Department intends to submit a National Communication to the UNFCCC,' a spokesman for the department said yesterday. 'The report is under development.'"). This lawsuit followed.

STANDARD OF REVIEW

Federal Defendants move to dismiss the Amended Complaint for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). Plaintiff bears the burden of demonstrating jurisdiction. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). It is "presume[d] that federal courts lack jurisdiction unless the contrary appears affirmatively from the record." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 n.3 (2006) (citation omitted). Because the

[2] The secretariat publishes on its website the deadlines and dates of submission by UNFCCC parties, including the United States, for national communications and biennial reports. *See* UNFCCC website here. For example, the fourth national communication was due by January 1, 2006, and was submitted by the United States on July 27, 2007. *See* UNFCCC website here.

Court has "an affirmative obligation … to ensure that it is acting within the scope of its jurisdictional authority," the Court may "consider matters outside the pleadings" in addressing Defendants' motion to dismiss under Rule 12(b)(1) without converting it to a motion for summary judgment. *Forrester v. U.S. Parole Comm'n*, 310 F. Supp. 2d 162, 167 (D.D.C. 2004) (citation omitted).

Federal Defendants alternatively move to dismiss the Amended Complaint under Federal Rule of Civil Procedure 12(b)(6). Under this rule, the Court may consider well-pleaded factual allegations, as well as "documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). Although the Court must accept all well-pleaded factual allegations as true, it need not accept "a legal conclusion couched as a factual allegation." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citation omitted). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Finally, insofar as Plaintiff's claims relate to obligations of the United States under an international treaty (*i.e.,* the UNFCCC), "[i]t is …well settled that the United States' interpretation of a treaty is entitled to great weight," including as to whether a treaty's provisions are domestically enforceable. *Medillin,* 552 U.S. at 513 (internal quotation omitted).

ARGUMENT

I. Plaintiff Has Failed to Establish Injury-in-Fact Sufficient to Support Standing for Itself or its Members for its Treaty-Based Claims

To establish Article III standing, a plaintiff must demonstrate: (1) an "actual or imminent," "concrete and particularized" injury-in-fact, (2) a "causal connection between the injury" and the challenged action, and (3) a likelihood that the "injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 560-61. When an association such as CBD seeks to invoke federal jurisdiction, it can establish standing either through "associational standing," by suing on behalf of its members, or

through "organizational standing" by suing on its own behalf. *See Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977) (associational standing); *People for the Ethical Treatment of Animals v. USDA*, 797 F.3d 1087, 1093 (D.C. Cir. 2015) (organizational standing). While the Amended Complaint is far from clear on this point, as an organization, Plaintiff CBD appears to assert standing on its own behalf and on behalf of its members. *See* Amend. Compl. ¶ 14.

Irrespective of the theory, the Amended Complaint's cursory allegations of injury are insufficient to support standing. Plaintiff asserts that, as an organization, CBD "engages in national and international advocacy to advance the fight against climate change by, *inter alia*, pursuing strategies to limit greenhouse gas emissions," including through "public education and international engagement" addressing the "United States' commitments to greenhouse gas emission reductions through the [UNFCCC]." *Id.* ¶ 12. The purported harms to these interests caused by the alleged untimely completion and submission of the UNFCCC Reports in the Amended Complaint are so brief and unsubstantiated that they can be reproduced in their entirety here:

- "The Center relies on the information in the Climate Action Report both to educate its members and the public about United States activities—and deficiencies—in meeting its commitments to reduce GHG emissions, as well as to productively engage in domestic and international advocacy—including policy campaigns, public comment letters, scientific articles, and legal proceedings—to advance the country's GHG emission reductions and other facets of climate change mitigation and adaptation." *Id.* ¶ 13.

- "By failing to timely complete and submit the Seventh Climate Action Report, the [State] Department is harming the Center and its members by withholding information to which the Center is legally entitled and which is necessary to allow the Center to carry out its mission and advocacy efforts." *Id.* ¶ 14.[3]

[3] The Amended Complaint also alleges harm from the Federal Defendants' alleged failure to comply with FOIA, Amend. Compl. ¶ 15, which is not germane to the instant motion to dismiss the treaty-based claims only.

A. Plaintiff Has Failed to Identify a Member Who Has Been Harmed

Establishing associational standing requires an organization to demonstrate that "(1) at least one of its members would have standing to sue in his own right, (2) the interests the association seeks to protect are germane to its purpose, and (3) neither the claim asserted nor the relief requested requires that an individual member of the association participate in the lawsuit." *Sierra Club v. EPA,* 292 F.3d 895, 898 (D.C. Cir. 2002). CBD fails to identify a single CBD member allegedly harmed by the unavailability of the UNFCCC Reports. It falls at the first hurdle.

"When a petitioner claims associational standing, it is not enough to aver that unidentified members have been injured. Rather, the petitioner must specifically 'identify members who have suffered the requisite harm.'" *Chamber of Commerce v. EPA*, 642 F.3d 192, 199–200 (D.C. Cir. 2011) (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009)). At the very least, the identity of the party suffering an injury-in-fact "must be firmly established." *Pub. Citizen, Inc. v. Trump*, 297 F. Supp. 3d 6, 19 (D.D.C. 2018) (quoting *Am. Chemistry Council v. Dep't of Transp.*, 468 F.3d 810, 820 (D.C. Cir. 2006)). Where plaintiffs have "not identified a single member who was or would be injured by [a Government action]," associational standing is lacking. *Chamber of Commerce v. EPA,* 642 F.3d at 200; *see also Nat'l Ass'n of Home Builders v. EPA*, 667 F.3d 6, 15 (D.C. Cir. 2011) (affirming dismissal where declarations "fall short of establishing certainly impending dangers for any particular member of the petitioners' associations").

The Amended Complaint fails to identify a single CBD member who allegedly will be harmed by the Federal Defendants' alleged failure to timely submit reports to an international secretariat. Rather, the Amended Complaint asserts only generally that this alleged failure "is harming the Center and its members." *See, e.g.,* Amend. Compl. ¶ 14. This deficiency is fatal to a claim of associational standing. Without identifying any actual member supposedly harmed or threatened by the alleged failure to timely submit the UNFCCC Reports, this Court is unable to

determine whether Plaintiff, as an organization, has standing to sue on behalf of their members. *See Summers*, 555 U.S. at 499.

Moreover, even if Plaintiff had identified a specific member, the purported injury is insufficient. It appears to be nothing more than the same type of abstract, speculative injury claimed by CBD as an organization – *i.e.*, impairment to education or advocacy efforts. Thus, for the reasons discussed further below, CBD's claim of associational standing would also fail. Even if a specific CBD member had been identified, that individual's claim of injury is too abstract to provide the individual "standing to sue in his own right[.]" *Sierra Club*, 292 F.3d at 898.

B. Plaintiff's Organizational Allegations of Injury Are Too Vague and Abstract to Establish Standing

The Amended Complaint's vague allegations of injury also fail to satisfy the well-defined standard for injury-in-fact. To establish injury-in-fact, "[t]he complainant must allege an injury to himself that is 'distinct and palpable,' as opposed to merely '[a]bstract,' and the alleged harm must be actual or imminent, not 'conjectural' or 'hypothetical.'" *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (citations omitted). The alleged injury must also be particularized such that it "must affect the plaintiff in a personal and individual way." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (citations and internal quotation marks omitted). Where an organization is concerned, it must, "like an individual plaintiff," show "actual or threatened injury in fact that is fairly traceable to the alleged illegal action and likely to be redressed by a favorable court decision." *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 919 (D.C. Cir. 2015).

Plaintiff alleges, essentially, that due to the unavailability of the UNFCCC Reports, CBD will be hindered in its ability to "educate its members" on U.S. climate activities as well as its ability to "productively engage in domestic and international advocacy" on the issue of climate change, Amend. Compl. ¶¶ 13-14, what CBD calls its "mission and advocacy efforts." *Id.* ¶ 14. This

threadbare and conclusory allegation is too generalized to support standing. The Amended Complaint provides no information about *how* CBD uses such information to educate its members. Nor does the Amended Complaint provide a single example of CBD's past use of reports submitted by the United States under the UNFCCC for this purpose. No allegation in the Amended Complaint addresses the particular manner in which the education of CBD members (let alone a specific CBD member) will be affected by the timing of the UNFCCC Reports. Nor does it describe with any specificity how CBD previously used reports like the UNFCCC Reports for the benefit of its members. Notably, Plaintiff has not alleged a single specific educational or advocacy activity that it has eliminated or curtailed, or imminently will eliminate or curtail, as a consequence of the unavailability of the UNFCCC Reports.

At most, the Amended Complaint raises the theoretical prospect of impacts on such activities. But such conjectural injury cannot support Article III standing. While the UNFCCC Reports concededly were not completed and submitted by January 2018, the State Department has publicly stated that it is in the process of preparing the report. *See* Amend. Compl. ¶ 24; J. Chemnick, *Trump Admin Vows to Send Overdue Report*, Climatewire, Feb. 6, 2018 ("'The State Department intends to submit a National Communication to the UNFCCC,' a spokesman for the department said yesterday. 'The report is under development.'"). Plaintiff has failed to allege with any specificity that it presently, or even imminently, is prejudiced in its ability to educate its members due to a mere delay in submitting the UNFCCC Reports. As noted, Plaintiff has not identified a single missed, or soon-to-be-missed, educational opportunity for CBD members. That harm may never come to pass, or may be averted due to the completion and submission of the UNFCCC Reports.

The D.C. Circuit consistently has rejected organizational standing based on the types of issue-advocacy injuries alleged by Plaintiff. The court has emphasized that no organizational

standing exists where the claimed injury is "frustration of an organization's objective" or where the "service impaired is pure issue-advocacy." *Ctr. for Law & Educ. v. Dep't of Educ.*, 396 F.3d 1152, 1161-62 (D.C. Cir. 2005). The alleged injury to a plaintiff's activities must be "concrete and demonstrable," and "a mere setback to [plaintiff's] abstract social interests is not sufficient." *People for the Ethical Treatment of Animals,* 797 F.3d at 1093 (citations omitted); *see also Pub. Citizen, Inc. v. Trump*, 297 F. Supp. 3d at 21(same).

Yet this is precisely what CBD relies on for standing. It alleges that the State Department's failure to complete and submit the UNFCCC Reports is "harming" CBD's ability to "carry out its mission and advocacy efforts." Amend. Compl. ¶ 14. CBD proffers no allegation that it uses the UNFCCC Reports for purposes other than for issue advocacy. CBD also fails to allege any specific facts about the impact on the organization resulting from the unavailability of the UNFCCC reports.

This is fatal to CBD's claim. 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); *Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1434 (D.C. Cir. 1995) (in challenge to federal tax provision, court found that plaintiff's "self-serving observation that it has expended resources to educate its members and others regarding Section 13208 does not present an injury in fact" and noted lack of evidence that the tax provision "subjected [plaintiff] to operational costs beyond those normally expended to review, challenge, and educate the public about revenue-related legislation."). For organizational standing as apparently claimed by Plaintiff here, circuit law further requires that the plaintiff show a (1) a direct conflict between the defendant's conduct and the organization's mission; and (2) that the plaintiff has used its resources to counteract the asserted harm. *Pub. Citizen, Inc. v. Trump*, 297 F. Supp. 3d at 21 (citing,

respectively, *Nat'l Treasury Emps. Union v. United States*, 101 F.3d 1423, 1430 (D.C. Cir. 1996) and *People for the Ethical Treatment of Animals*, 797 F.3d at 1093).

Here, Plaintiff's sparse allegations are insufficient. If does not identify the type of "conflict" that could support standing or specifically *how* its daily operations have been impaired by the Federal Defendants' conduct. Rather, Plaintiff has only vaguely and generally asserted purported impairment of its educational and issue advocacy activities (and in the absence of any details or description of CBD's activities, "education" can easily be read as a form of, and indistinct from, "advocacy"). These generalized purported effects on CBD's issue advocacy cannot constitute injury-in-fact. *See, e.g., Turlock Irrigation Dist. v. FERC*, 786 F.3d 18, 24 (D.C. Cir. 2015); *cf. People for the Ethical Treatment of Animals,* 797 F.3d at 231-33 (in finding injury, at least in part, from denial of information in government reports, citing multiple, detailed allegations of impaired PETA activities in the complaint and a declaration; 240 (Millett, J., dubitante op.) (expressing concern that accepting even these allegations for standing purposes "presses the concept of informational standing far beyond anything the Supreme Court has recognized").

Finally, the Amended Complaint's threadbare and conclusory allegations make it impossible to determine to what extent CBD's purported curtailment of educational/advocacy activities may be a self-inflicted harm. CBD does not suffer a cognizable injury by curtailing its educational/advocacy activities simply because it expresses a subjective fear or assumption that the UNFCCC Reports that have been delayed will not be forthcoming. *See Clapper v. Amnesty International*, 568 U.S. 398, 416 (2013) ("[R]espondents cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending."). Rather, in the so-far temporary absence of the UNFCCC Reports, there may be other sources of information regarding U.S. climate activities. Plaintiffs could use those to sustain their educational or advocacy objectives, or those activities could proceed in the temporary absence of the UNFCCC Reports. In other

words, Plaintiff has proffered insufficient factual allegations about the particular impacts to its activities for this Court to evaluate whether Plaintiff has chosen to curtail its own activities and, relatedly, whether the unavailability of the UNFCCC Reports is the cause of Plaintiff's purported harm at all.[4] If so, Plaintiff may have generated a self-inflicted injury that fails to establish standing. *See Nat'l Family Planning & Reprod. Health Ass'n v. Gonzales*, 468 F.3d 826, 831 (D.C. Cir. 2006) ("We have consistently held that self-inflicted harm doesn't satisfy the basic requirements for standing.").

II. The Amended Complaint Fails to State a Claim Because the UNFCCC Reporting Obligations are Non-Self-Executing and Are Not Enforceable in U.S. Courts

"In addition to constitutional standing, a plaintiff must have a valid cause of action for the court to proceed to the merits of its claim." *Gunpowder Riverkeeper v. FERC*, 807 F.3d 267, 273 (D.C. Cir. 2015). Even if Plaintiff has standing to sue, its claim is fatally flawed. Plaintiff seeks to directly enforce the timetable for a reporting obligation that derives from an international treaty that is not by itself enforceable in U.S. courts. As the Supreme Court has explained, "a treaty is, of course, "primarily a compact between independent nations" . . . that ordinarily "depends for the enforcement of its provisions on the interest and the honor of the governments which are parties to it." *Medellin*, 552 U.S. at 505 (quoting *Head Money Cases*, 112 U.S. at 598). While certain treaty obligations may be directly enforceable in U.S. courts, "not all international law obligations automatically constitute binding federal law enforceable in United States courts." *Id.* at 504. Courts determine whether a treaty obligation is directly judicially enforceable by determining whether it is "self-executing," in other words, whether the treaty provision in question "can be applied directly as law." *Id.* at 498.

[4] This lack of allegations renders Plaintiff equally unable to demonstrate that its injuries were caused by the Federal Defendants, which Plaintiff also must demonstrate to establish standing. *See, e.g., Lujan*, 504 U.S. at 560-61

A. Factors for Identifying Self-Executing Treaty Obligations

A treaty is not considered to be enforceable in domestic courts "*unless* Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be 'self-executing' and is ratified on these terms." *Id.* at 505 (emphasis added); *see also, e.g., Igartua-De La Rosa v. United States*, 417 F.3d 145, 150 (1st Cir. 2005) (though treaties may impose an "international commitment[]" . . . "they are not domestic law unless Congress has either enacted implementing statutes or the treaty itself conveys an intention that it be 'self-executing' and is ratified on these terms.") (citations omitted).

As the UNFCCC lacks any implementing legislation on the reporting provisions,[5] the treaty itself must convey the intention to be self-executing. *Republic of Marshall Islands v. United States*, 865 F.3d 1187, 1193 (9th Cir. 2017) ("Only if the provision serves as a 'directive to domestic courts' may the judiciary enter the fray to enforce it.") (quoting *Medellín*, 552 U.S. at 508). "[W]here a treaty does not provide a particular remedy, either expressly or implicitly, it is not for the federal courts to impose one . . . through lawmaking of their own." *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 347 (2006). To do otherwise would be "entirely inconsistent with the judicial function." *Id.*; *see also The Amiable Isabella*, 6 Wheat. 1 (1821) (Story, J.) ("[T]o alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty").

[5] The Amended Complaint refers to the Global Climate Protection Act of 1987, 15 U.S.C. § 2901. *See* Amend. Compl. ¶¶ 20, 42, 45. That statute pre-dates the UNFCCC by 5 years. It does not refer to the UNFCCC. Nor does it implement the UNFCCC or specifically address any reporting responsibility of the Secretary of State in the climate arena. Rather, it provides only that: "The 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 Environment Program and other international organizations." 15 U.S.C. § 2901 note, Pub. L. 100-204, § 1103(c). Thus, the Global Climate Protection Act establishes no basis for judicial enforcement of the treaty provisions on which Plaintiff relies.

The proper scope of a court's self-execution analysis is the provision at issue, rather than the treaty as a whole. *See Republic of Marshall Islands,* 865 F.3d at 1194 (defining "the ultimate self-execution question" as "whether the treaty *provision* is directly enforceable in domestic courts") (emphasis added); *see also* Restatement (Third) of Foreign Relations Law § 111, comment h (1987) ("Some provisions of an international agreement may be self-executing and others non-self-executing."). There are no bright-line tests in this analysis. But courts have been more likely to find a treaty provision to be self-executing when it speaks to matters of individual or private rights, *see Head Money Cases*, 112 U.S. at 598, or is part of a bilateral, as opposed to multilateral, agreement. *Al-Bihani v. Obama*, 619 F.3d 1, 16 (D.C. Cir. 2010) ("Courts have been somewhat more reluctant to find multilateral treaties self-executing.")

Interpreting a treaty to determine if it is self-executing "must . . . begin with the language of the Treaty itself," 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). Aids to interpreting a treaty may also include the negotiation and drafting history of the treaty, as well as the post-ratification understanding of signatory nations. *Id.* at 507. Finally, "[i]t is …well settled that the United States' interpretation of a treaty is entitled to great weight." *Id.* at 513 (internal quotation marks omitted).

B. The UNFCCC Provisions and Related UNFCCC Decisions on Reporting are Non-Self-Executing and, Thus, Not Directly Enforceable in This Court

1. The Relevant UNFCCC Provisions and Related "Decision" Documents Lack any Indication that They Are Enforceable in Domestic Courts

In the absence of implementing legislation, the provisions of the UNFCCC addressed to reporting by Parties must themselves constitute a "directive to domestic courts" to enforce them. *Id.* at 508. While the United States fully recognizes and does not dispute that Articles 4 and 12 of

the Convention include certain international obligations, those provisions (and indeed the entire UNFCCC) are non-self-executing as a matter of U.S. law. Nothing in these provisions suggests that they were "designed to have immediate effect" in domestic courts, *Republic of Marshall Islands*, 865 F.3d at 1195 (citation omitted), even with the benefit of suitable interpretive aids. Rather, the UNFCCC and its reporting provisions amount to "a compact between independent nations." *Medellin,* 552 U.S. at 505 (citations and internal quotation marks omitted). They are enforceable only as between the "governments which are parties to it." *Id.* Any alleged breach of the obligation, then, "becomes the subject of international negotiations and reclamations … [and] … the judicial courts have nothing to do and can give no redress." *Id.* (citations and internal quotation marks omitted).

The Amended Complaint points to only two articles in the UNFCCC to support its claims: Articles 4 and 12. Amend. Compl. ¶ 18. Article 4 of the Convention requires Annex I parties to "[c]ommunicate to the Conference of the Parties information related to implementation, in accordance with Article 12." UNFCCC, Art. 4.1(j). Article 12 elaborates on this requirement and specifies that Annex I parties "shall communicate *to the Conference of the Parties*, *through the Secretariat*" the various categories of information comprising the national communication. *See generally* UNFCCC, Art. 12.1-.3 (emphasis added). With respect to timing, Article 12 provides that the first national communication was to be submitted "within six months of the entry into force" of the UNFCCC for that party. *Id.* Art. 12.5. Thereafter, "[t]he frequency of subsequent communications by all Parties shall be determined by the Conference of the Parties." *Id.*

Plaintiff claims a single deadline for submitting the UNFCCC Reports that the Federal Defendants allegedly missed: January 1, 2018. *See, e.g.,* Amend. Compl. ¶¶ 2, 23, 42. Plaintiff does not identify a UNFCCC provision that creates this deadline. Rather, Plaintiff alleges that this purported deadline is established from a 2012 "decision" document of the UNFCCC Conference of

the Parties, *i.e.,* Decision 2/CP.17. *Id.* ¶¶ 19, 42. The Federal Defendants agree that the UNFCCC itself does not establish the January 1, 2018, date at issue in this case. Nor does the UNFCCC establish the particular form of report described in the Amended Complaint (*i.e.*, the "national communication" and "biennial report"). Rather, the decision by the Conference of the Parties for Parties to submit these particular reports by this particular date was established in Decision 2/CP.17 (well after the UNFCCC itself was ratified in 1992). *See supra* at 4.

Plaintiff points to nothing in the relevant UNFCCC provisions suggesting that any aspect of the Convention's reporting obligations are self-executing and therefore enforceable in domestic courts, let alone a "directive to domestic courts" to enforce them. *Medellín*, 552 U.S. at 508. Neither article contains an indication of domestic enforcement. Rather, both are "silent as to any enforcement mechanism" in the event of a delay in submitting the reports. *Id.* In particular, Article 12, the *only* provision addressing the timing of submissions by Parties, "is not a directive to domestic courts" at all but, instead, only "call[s] upon governments to take certain action.'" *Id.* (quoting *Comm. of U.S. Citizens Living in Nicaragua v. Reagan*, 859 F.2d 929, 938 (D.C. Cir. 1988)).

Here, Plaintiff seeks to directly enforce a date (*i.e.*, January 1, 2018) that was not established in the Convention itself or implementing legislation, but instead in a post-ratification UNFCCC decision document. Amend. Compl. ¶¶ 42, 45. In similar circumstances, the D.C. Circuit has found that, "[w]ithout congressional action," conditions in certain post-ratification decisions under the Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, S. TREATY DOC. NO. 100–10, "are not the law of land" and are "enforceable not through the federal courts, but through international negotiations." *See NRDC v. EPA*, 464 F.3d 1, 9-10 (D.C. Cir. 2006) (holding that particular conditions contained in Montreal Protocol "decisions" by the parties concerning exemptions for critical uses of methyl bromide are not enforceable under the Montreal Protocol or under the Clean Air Act). While *NRDC* was confined to "the facts of this case," *see id.* at 13

(Edwards, J. concurring), and does not categorically hold that all "decision" documents under international agreements are unenforceable in U.S. courts, there are several key similarities between *NRDC* and this case. They include, *inter alia*: both involve non-self-executing treaty provisions lacking any indication of intent of direct enforcement in domestic courts, *see id.* at 9 ("Nowhere does the Protocol suggest that the Parties' post-ratification consensus agreements about how to implement the critical-use exemption are binding in domestic courts."); both involve post-ratification consensus decisions that "set rules for implementing" the provisions in issue, *see id.* at 8; and both involve conditions or rules included in such decisions for which there is no applicable implementing legislation. *Id.* The foregoing considerations also lend additional weight to the conclusion that the Convention's provisions on reporting are non-self-executing and unenforceable in this Court.

2. The UNFCCC's Other Provisions and Structure and the Practice of the Parties Confirm that Issues of Treaty Implementation and Compliance Disputes Are to be Addressed on the International Plane

Notably, the UNFCCC separately addresses questions of implementation with its terms (and resulting disputes) as matters of international or bilateral negotiation and collaboration. This structure further reflects that Articles 4 and 12 are not self-executing. Article 13 refers to the establishment of a "multilateral consultative process" to resolve "questions regarding the implementation of the Convention." UNFCCC, Art. 13. And Article 14 establishes procedures for resolving disputes between any two or more Parties. Thereby "the Parties concerned shall seek a settlement of the dispute through negotiation or any other peaceful means of their own choice." *Id.* Art. 14.1. Article 14 further describes a series of dispute resolution mechanisms that may be initiated under certain circumstances, including arbitration and conciliation. *Id.* Art. 14.2(b), 14.5. Tellingly, the mechanisms provided in Articles 13 and 14 all operate on the international plane and amongst Parties to the Convention. No provision of the UNFCCC creates or suggests a mechanism

for private entities to domestically enforce the treaty's requirements against a Party. Nor is there any indication of an intent that post-ratification decisions of the Conference of the Parties setting dates for the submission of reports are self-executing.

There is further confirmation that the UNFCCC Reports are intended to be addressed on the international plane and that the reporting requirements are inappropriate for enforcement in domestic courts. These include the stated purposes and uses of the reports and information submitted pursuant to Article 12, and the international review process to which they are subject.[6] The treaty provides that information required under Article 12 is to be submitted through the secretariat in order to be distributed to the "Conference of the Parties and to any subsidiary bodies" of the treaty. UNFCCC, Art. 12.6. In other words, the information 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.

And Plaintiff's attempt to domestically compel the report is novel. In practice, Parties have worked within the context of multilateral negotiations under the UNFCCC to encourage timely submissions and address late submissions. For example, the UNFCCC posts information on its website regarding the submission dates and actual dates of submission by Parties. *See* fn. 2 *supra*. The secretariat also publicly lists the Parties that have not submitted by a deadline.[7] And Parties regularly include the status of report submissions on the agenda for sessions of the subsidiary bodies of Conference of the Parties. Indeed, a recent meeting of the Subsidiary Body for Implementation

[6] *See generally* UNFCCC website, Review Reports of National Communications and Biennial Reports ("The in-depth reviews of national communications (NCs) are conducted by an international team of experts, coordinated by the UNFCCC secretariat."), available here.

[7] *See, e.g.,* Note by the Secretariat: Status of submission and review of seventh national communications and third biennial reports, Document FCCC/SBI/2018/INF.7 (Apr. 6, 2018), available here.

included an agenda item on the status of the seventh national communications and third biennial reports.[8] Finally, the Conference of the Parties regularly adopts decisions urging Parties to submit their reports.[9] These processes and mechanisms reflect the Parties' intent and practice that issues pertaining to reporting be addressed on the international plane among the Parties under the framework of the UNFCCC.

3. The U.S. Ratification Record Suggests No Intent that the UNFCCC Be Enforced in Domestic Courts

The intent of the Senate in ratifying the UNFCCC confirms that the reporting provision is not enforceable in domestic courts. The issue of judicial enforcement of the UNFCCC was not a subject of the ratification debate. Questions were raised by Senators in the confirmation process regarding the mechanisms established in Articles 13 and 14 for addressing implementation questions and disputes among Parties, but there was no indication of any consideration of domestic judicial enforcement of UNFCCC obligations. To the contrary, in responding to a Foreign Relations Committee question about Article 13's method for addressing implementation issues, the Administration responded that: "In the case of a global issue such as climate change, multilateral mechanisms for the resolution of implementation questions will likely be more appropriate and useful than more traditional bilateral dispute settlement procedures. Further, consultative mechanisms may be ultimately more conducive to problem solving than adversarial processes." *U.N. Framework Convention on Climate Change (Treaty Doc. 102-38) Hearing Before the S. Comm. On Foreign Relations*, 102nd Cong. 97 (1992) (responses of the Administration to Questions Asked by the

[8] Subsidiary Body for Implementation, Forty-eighth session, Bonn, 30 April to 10 May 2018, Agenda as adopted, item 3(a) ("Status and review of seventh national communications and third biennial reports from Parties included in Annex I to the Convention"), available here.

[9] *See, e.g.,* Decision 10/CP.13, paragraph 2 ("Urges Parties included in Annex I to the Convention … that have not submitted their national communications … to do so as a matter of priority"), available here.

Foreign Relations Committee). Nothing "indicate[s] that the President and Senate intended for the agreement to have domestic effect," *Medellin*, 552 U.S. at 519 (citations omitted), as is required to determine that the reporting obligations at issue are self-executing.

In sum, the Convention's text, structure, implementation practice, and ratification history all confirm that the UNFCCC and its reporting obligations are non-self-executing and cannot support Plaintiff's claims in this case.

III. Even if the Reporting Obligations Were Self-Executing, the UNFCCC Does Not Provide Plaintiff a Private Right of Action

As the Supreme Court has explained, "[e]ven when treaties are self-executing in the sense that they create federal law, the background presumption is 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.'" *Id.* at 506 n.3 (quoting 2 Restatement (Third) of Foreign Relations Law of the United States § 907, cmt. a (1987)). The D.C. Circuit "presume[s] that treaties do not create privately enforceable rights in the absence of *express language* to the contrary." *Id.* (citing *Canadian Transp. Co. v. United States*, 663 F.2d 1081, 1092 (D.C. Cir. 1980)) (emphasis added). As the D.C. Circuit has observed, treaties that only set forth substantive rules of conduct, and do not explicitly call upon the courts for enforcement of such rules, do not create private rights of action. *McKesson Corp. v. Islamic Republic of Iran*, 539 F.3d 485, 488-89 (D.C. Cir. 2008). Therefore, even if the reporting obligations under the UNFCCC were self-executing—and thus "ha[d] the force and effect of a legislative enactment," *Medellín,* 552 U.S. at 505-6 (citation omitted)—Plaintiff could not seek relief pursuant to those provisions in this Court unless the treaty explicitly provided a cause of action to do so.

Plaintiff has failed to point to anything in the Convention, or anything in its drafting or negotiating history, to support the existence of a private right of action under the UNFCCC. This is

unsurprising. As discussed in Section II.B.2 *supra,* the provisions that Plaintiff relies upon evince an intention to operate on the international plane. They involve only the UNFCCC Conference of the Parties, the secretariat, and the various UNFCCC subsidiary bodies charged with implementing elements of the treaty. Indeed, the text of the reporting provisions makes clear that the reports are for submission to, and the primary benefit of, the secretariat, not private parties like Plaintiff. *Cf.* Art. 12.1 (specifying that Annex I parties "shall communicate to the Conference of the Parties, through the Secretariat" the various categories of information comprising the national communication). As such, if the UNFCCC provisions at issue establish a substantive rule, they do not provide for that rule to be enforced in national courts. *See McKesson*, 539 F.3d at 488-89; *cf. Comm. of U.S. Citizens Living in Nicaragua*, 859 F.2d at 938 ("We find in these clauses no intent to vest citizens who reside in a U.N. member nation with authority to enforce an ICJ decision against their own government. The words of Article 94 do not by their terms confer rights upon individual citizens; they call upon governments to take certain action."). Moreover, courts are to "give 'great weight'" to the views of the United States with regard to whether a treaty provides a private right of action. *See McKesson*, 539 F.3d at 474.

Plaintiff simply has failed to identify a right stemming from the UNFCCC that is enforceable in this Court or a cause of action to enforce that alleged right. Nor is there a federal implementing statute that could supply Plaintiff a private right of action. *See* discussion *supra* at 14. Consequently, Plaintiff's claims premised on the UNFCCC should be dismissed for this additional reason.

IV. The Administrative Procedure Act and Federal Mandamus Statute Do Not Furnish Plaintiff a Cause of Action.

As the foregoing has shown, Plaintiff has failed to identify any private right under the UNFCCC that is enforceable in this Court. Nonetheless, Plaintiff seeks to overcome this limitation

by alleging a violation of the Administrative Procedure Act to enforce a wholly international obligation in domestic court. But the APA lacks the power to cure this defect in Plaintiff's claim. Plaintiff has failed to identify a source of substantive law applicable to agency action to support an APA cause of action. Specifically, the APA does not provide a cause of action for enforcing the United States' compliance with its UNFCCC reporting obligations. While the APA may provide "a limited cause of action for parties adversely affected by agency action," *Trudeau v. FTC*, 456 F.3d 178, 185 (D.C. Cir. 2006), "the APA does not grant judicial review of agencies' compliance with a legal norm that is not otherwise an operative part of domestic law." *Committee of U.S. Citizens Living in Nicaragua*, 859 F.2d at 943; *see* 5 K. Davis, Administrative Law Treatise § 28.1, at 256 (2d ed. 1984) ("The APA provision on reviewability is *always* dependent on other law, the law of reviewability is essentially the same as it would be without any APA provision."); *see also id.* at § 29.1. Neither the UNFCCC nor any other source of law cited in the Amended Complaint is operative for the purposes of alleging a cause of action for Plaintiff's treaty-based claims. *See* Amend. Compl. ¶ 7 (citing the federal question statute, the Declaratory Judgment Act, and the federal Mandamus Act).

Plaintiff's reliance on the federal mandamus statute, 28 U.S.C. § 1361, is equally unavailing. Indeed, Plaintiff's Second Claim for Relief under the mandamus statute is functionally identical to its "unlawfully withheld" APA claim under 5 U.S.C. § 706(1). *See Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 63 (2004) (noting that limitation that "only agency action that can be compelled under the APA [as unlawfully withheld] is action legally *required* . . . carried forward the traditional practice prior to [APA's] passage, when judicial review was achieved through use of the so-called prerogative writs-principally writs of mandamus"). "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). It only applies when the defendant owes the plaintiff a clear, nondiscretionary, ministerial duty. *Heckler v. Ringer*, 466 U.S. 602, 616 (1984). Even if such a

duty were identified, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances. *See Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367, 381 (2004). But Plaintiff has failed to identify an operable, domestically enforceable legal duty that applies to the Federal Defendants. The submission of the UNFCCC Reports to an international body, under the auspices of a multilateral treaty, is not a clear nondiscretionary duty. Plaintiff cannot sustain its mandamus claim on this ground.

CONCLUSION

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

Dated: August 29, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2018, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court District Court for the District of Columbia by using the CM/ECF system.

The participants in the case are registered CM/ECF users and service will be accomplished by the CM/ECF system.

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