IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR BIOLOGICAL DIVERSITY, Plaintiff, v. U.S. DEPARTMENT OF STATE, and MICHAEL R. POMPEO, Secretary of State, Defendants.	Case No.: 1:18-cv-00563-JEB

PLAINTIFF'S OPPOSITION TO DEFENDANTS' PARTIAL MOTION TO DISMISS

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INTRODUCTION[1]

This case concerns the Department of State's ("State" or "State Department") failure to carry out a crucial task: publicly reporting the United States' plans to address its greenhouse gas emissions and the consequences of those plans. Under the United Nations Framework Convention on Climate Change ("UNFCCC" or "Convention")—signed by President George H. W. Bush and ratified by the U.S. Congress in 1992—the United States agreed that it "shall communicate . . . detailed information on its policies and [mitigation] measures" to the UNFCCC Secretariat on a mandatory schedule, as one vital component of its commitment toward the "stabilization of greenhouse gas concentrations in the atmosphere." United Nations Framework Convention on Climate Change, May 9, 1992, 1771 U.N.T.S. 107 (hereinafter, "UNFCCC"), Art. 2, 4.2(b). Moreover, pursuant to the UNFCCC's provision determining that "the frequency of" these communications shall be determined "by the Conference of the Parties,"[2] UNFCCC, Art. 12.5, there is no dispute in this case that the most recent iteration of these reports—called the "Seventh Climate Action Report" (or "Report"), which consists of both the U.S.'s seventh "national communication" and third "biennial report"—were due January 1, 2018. *See* Defendants' Motion To Dismiss ("Def. Mem."), ECF No. 20, at 4 ("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*") (emphasis added).

There is also no dispute that the United States has neither completed the Seventh Climate Action Report, nor even issued a draft report for public comment. Plaintiff's Amended

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[1] Plaintiff Center for Biological Diversity ("the Center") respectfully requests that the Court hear oral argument on Defendants' motion.

[2] For reference, the "Conference of the Parties" is the "supreme body of the Convention" that regularly reviews the Convention's implementation. UNFCCC, Art. 7.1-7.2.

Complaint, ECF No. 8 ("Am. Comp."), ¶ 3. Accordingly, after the State Department refused to act on the Center's demand that the State Department complete and issue the mandated Report, *id.* ¶ 23, the Center filed this suit.[3]

As the State Department has explained, after the suit was filed, the parties "explore[d] the possibility of resolving the treaty-related claims without resort to further litigation." ECF No. 17, ¶¶ 2-3. However, rather than resolving the UNFCCC Reporting Claims, the State Department filed a motion to dismiss on August 29, 2018. Def. Mem.

The State Department concurs that "the UNFCCC imposes a *binding international obligation*" to complete and submit the Seventh Climate Action Report. *Id*. at 2 (emphasis partially added). However, Defendants argue that the Center has failed to adequately allege Article III standing for its UNFCCC Reporting Claims, and that the State's Department's obligation to complete the Report required under the UNFCCC is not legally enforceable. *Id.* at 6-22.

Defendants' arguments have no merit. As to Article III standing, it is well-established that in considering standing the Court assumes that Plaintiff's legal theory is correct on the merits. *Defenders of Wildlife v. Gutierrez*, 532 F.3d 913, 924 (D.C. Cir. 2008) (citing *City of Waukesha v. EPA*, 320 F.3d 228, 235 (D.C. Cir. 2003)); *Chaplaincy of Full Gospel Churches v. U.S. Navy*, 697 F.3d 1171 (D.C. Cir. 2012) (same). In this case, the Center's legal theory is that Defendants have a legal duty to provide the information required under the UNFCCC, which will be made publicly available. Am. Comp., ¶¶ 18-24. The Center therefore has Article III standing to

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[3] While not at issue here, this case also concerns the State Department's failure to timely provide records, pursuant to the Freedom of Information Act, 5 U.S.C. § 552, *as amended*, concerning the *reasons* the Seventh Climate Action Report is overdue. *See* Am. Comp. ¶¶ 46-84 (Claims Three through Eight). We will refer to the claims at issue here—Claims One and Two, regarding the delay of the Report itself —as the "UNFCCC Reporting Claims."

pursue its right to information to which it is legally entitled. *Federal Election Comm'n v. Akins*, 524 U.S. 11, 21 (1998); *Public Citizen v. U.S. Dep't of Justice,* 491 U.S. 440, 449 (1989); *Shays v. Federal Election Comm'n*, 528 F.3d 914, 923 (D.C. Cir. 2008). Moreover, having alleged that the information is "necessary to allow the Center to carry out its mission," Am. Comp. ¶ 14, which includes "educat[ing] its members and the public," the Center has also adequately alleged organizational injury sufficient to support its standing. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982); *People for the Ethical Treatment of Animals v. U.S. Dep't of Agric.*, 797 F.3d 1087, 1094 (D.C. Cir. 2015) ("*PETA*").[4]

As to the merits, the Center has adequately demonstrated that it may be entitled to relief for the UNFCCC Reporting Claims. Contrary to Defendants' arguments, Def. Mem. at 13-21, the UNFCCC reporting requirements at issue here have all the hallmarks of a self-executing mandate enforceable by this Court: (i) Articles 4 and 12 of the UNFCCC are discrete and specific obligations; (ii) the State Department's and other Parties' post-ratification practices demonstrate the understanding that the Reporting Requirements are mandatory; and (iii) the Congressional history and context of the Convention's ratification evince this understanding as well. *See, e.g., Medellin v. Texas*, 552 U.S. 491, 506-07, 513 (2008) ("*Medellin*") (listing factors

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[4] Defendants argue that the Center lacks standing because there is a "mere delay" in completing the Seventh Climate Action Report, Def. Mem. at 10, and asks the Court to rely on a newspaper article in which a State Department spokesperson is quoted as saying the report is "under development." Def. Mem. at 5. As Plaintiff will explain, however, Defendants cannot have it both ways—seeking dismissal of these claims at the outset, while asking that the Court take into account the agency's public statement of what it is doing. Indeed, even putting aside Defendants' studious failure to provide the Court itself with any representation as to the schedule for completing the Report, for Defendants' motion to dismiss the Court must limit itself to Plaintiff's Amended Complaint; Defendants' extrinsic "evidence" simply highlights the need for the full Administrative Record—or even jurisdictional discovery—before the UNFCCC Reporting Claims can be resolved. *See, e.g., Natural Resources Defense Council v. Pena*, 147 F.3d 1012, 1024 (D.C. Cir. 1998) (allowing discovery for plaintiffs to obtain information addressing defendants' standing arguments).

in ascertaining whether a treaty provision is self-executing). Moreover, because the Global Climate Protection Act of 1987, Title XI of Pub. L. 100-204, 101 Stat. 1407 (1987), note following 15 U.S.C. § 2901 (hereinafter, "GCPA"), requires that the State Department fulfill the United States' international climate obligations, *id.* § 1103(c), these requirements are enforceable irrespective of whether the UNFCCC reporting provisions alone would be deemed self-executing. *See, e.g.*, *Sluss v. U.S. Dept. of Justice*, 2018 U.S. App. LEXIS 21111, at *14-15 (D.C. Cir. July 31, 2018) ("*Sluss*") (holding that domestic legislation enacted *prior* to a treaty obligation's ratification showed that the treaty obligation could be enforced in U.S. courts); *see also Massachusetts v. Envtl. Protection Agency*, 549 U.S. 497, 508 (2007) (explaining that in the Global Climate Protection Act, Congress "*ordered* the Secretary of State" to take the necessary steps to "coordinate diplomatic efforts to combat global warming" (emphasis added)).

Accordingly, assuming, as the Court must on a motion to dismiss, "the veracity" of Plaintiff's factual allegations, and construing all "reasonable inferences drawn from those factual allegations in the plaintiff's favor," *Doe v. Rumsfeld*, 800 F. Supp. 2d 94, 103 (D.D.C. 2011), the Court cannot find that Defendants have met their burden to demonstrate that the Center will necessarily *not* be entitled to relief at summary judgment. *Ramirez v. U.S. Immigration & Customs Enforcement*, 2018 U.S. Dist. LEXIS 147895, at *30 (D.D.C. Aug. 30, 2018) (same). Indeed, contrary to Defendants' suggestion that this case can be resolved *without* an Administrative Record, Def. Mem. at 1 n.1, the Court will need to assess the record in order to ultimately determine whether relief is appropriate to address Defendants' failure to timely complete the Seventh Climate Action Report. *See Biodiversity Legal Found. v. Norton*, 180 F. Supp. 2d 7, 10 (D.D.C. 2001); *Boswell Memorial Hosp. v. Heckler*, 749 F.2d 788, 792 (D.C. Cir. 1984). There is no basis to short-circuit that process and determine, at this early stage in the litigation, that Defendants' failure to comply with this mandatory duty warrants no relief

whatsoever. Rather, after reviewing the Record, the Court may conclude, in light of the combination of international and domestic obligations under which the State Department must act, the importance of the deadline at issue, and other factors, that the State Department should be compelled to complete the Seventh Climate Action Report on a reasonable timetable. *See Telecommunications Research & Action Ctr. v. Federal Communications Comm'n,* 750 F.2d 70 (D.C. Cir. 1984) ("*TRAC*"); *see also Defenders of Wildlife v. Endangered Species Scientific Authority*, 659 F.2d 168 (D.C. Cir. 1981) (enforcing international obligation that Congress had delegated to a federal agency).

LEGAL AND FACTUAL BACKGROUND

A. The Reporting Requirements In The UNFCCC

In 1992, President George H.W. Bush, after receiving consent from Congress, ratified the UNFCCC,[5] the founding framework treaty of the international climate change regime, which aims to "stabiliz[e] greenhouse gas concentrations at a level that would prevent dangerous anthropogenic interference with the climate system." UNFCCC, Art. 2. The Convention entered into force on March 21, 1994.[6]

In order to achieve the Convention's landmark objectives, the U.S. agreed with other Parties to critical substantive commitments as outlined in Article 4—the most fundamental being periodic reporting requirements, as further specified in Article 12 (collectively, the "Reporting Requirements").[7] For example, in these reports, the United States must include the "steps taken or

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[5] Resolution of Advice and Consent to Ratification: Senate Consideration of Treaty Document 102-38 (Oct. 7, 1992).

[6] United Nations Treaty Collection, Chapter XXVII.7, United Nations Framework Convention on Climate Change (Mar. 21, 1994).

[7] The United States has particular reporting requirements as one of the "Annex I" parties

envisaged" to "implement the Convention," including "detailed information on [ ] policies and measures" for "limiting its anthropogenic emissions of greenhouse gases"[8]; the "resulting projected anthropogenic emissions" from the implementation of the proposed policies[9]; and "any other information that the Party considers relevant to the achievement of the objective of the Convention."[10]

In addition to these substantive Reporting Requirements, the UNFCCC mandates the *timing* for Reporting Requirements as well. Thus, pursuant to Article 12.5 of the Convention, providing that after Annex I Parties provide an inaugural report, "[t]he frequency of subsequent communications . . . shall be determined by the Conference of the Parties,"[11] the Conference of the Parties decided that National Communications must be submitted every four years[12] —making the most recent binding deadline January 1, 2018. *See also 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 in response to Questions Asked by the Foreign Relations Committee) ("Senate Convention Hearing"), at 92-93 (*see attached*) (testimony of EPA Administrator William Reilly, on behalf of the Bush Administration, that, while the Convention did not create "legally binding targets and timetables with *respect to greenhouse gas*

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under the Convention. UNFCCC, Art.4.2, Art. 12.2, Annex I.

8 *Id*., Art. 4, 2(a)-(b).

9 *Id*., Art. 4.2(b).

10 *Id*., Art. 12.1(c).

11 *Id*., Art. 12.5.

12 *See, e.g*., Decision 2/CP.17 of the Conference of the Parties, United Nations Framework Convention on Climate Change, Conference of the Parties 17, FCCC/CP/20119/Add.1 (Dec. 11, 2011) (hereinafter "Decision 2/CP.17"), available at: https://unfccc.int/resource/docs/2011/cop17/eng/09a01.pdf.

emissions," it *did* create "commitments" for all parties to "implement appropriate national and regional strategies to mitigate and adapt to climate change, [and] to *report on these actions* . . . .") (emphasis added).

B. The Global Climate Protection Act

In the decade leading up to the ratification of the UNFCCC, Congress and the Executive Branch took several milestone actions to begin to understand and address climate change. *See, e.g.*, *California v. GMC*, 2007 U.S. Dist. LEXIS 68547 at *12 (N.D. Cal. Sep. 17, 2007) (describing the enactment of the National Climate Program Act, which established a "national climate program" to improve understanding of global climate change, as the first federal action to address the climate crisis); *see generally Massachusetts v. Envt'l Protection Agency*, 549 U.S. at 507 (summarizing federal climate change legislation). In 1987, Congress enacted the landmark Global Climate Protection Act, in which Congress found, *inter alia*, that addressing climate change "will require vigorous efforts to achieve international cooperation," which "will be greatly enhanced by United States leadership." GCPA, §1102(5). To achieve those objectives, in that statute Congress expressly provided, under the heading "Coordination of United States Policy in the International Arena":

> *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*. In the formulation of these elements of United States policy, the Secretary of State shall, under the direction of the President, work jointly with the Administrator of the Environmental Protection Agency and other United States agencies concerned with environmental protection, consistent with applicable Federal law.

Id., § 1102(c) (emphasis added). Importantly, the Global Climate Protection Act serves as omnibus legislation, charging the Secretary of State with "coordinat[ing] those aspects of U.S. policy requiring action through the channels of multilateral diplomacy," and recognizing that

requirements mandating action would arise *in the future*, in light of the fact that "the global nature of this problem will require vigorous efforts to achieve international cooperation aimed at minimizing and responding to adverse climate change." *Id*., §1102; §1103(c).

As the Supreme Court has explained, by this language in section 1103(c) of the Act, Congress "*ordered* the Secretary of State" to take the necessary steps to "coordinate diplomatic efforts to combat global warming." *Massachusetts*, 549 U.S. at 508 (emphasis in original). In practice, the Global Climate Protection Act "authorized" the State Department to engage in "the negotiations" that resulted in the UNFCCC ratification, *California v. GMC*, 2007 U.S. Dist. LEXIS 68547 at *12, and continues to place the responsibility for *carrying out* the United States' international obligations regarding climate change with the Secretary of State.

C. The State Department's Prior Compliance With UNFCCC Reporting Requirements, The Center's Efforts To Convince The State Department To Comply With The Current Reporting Deadline, And The Current Litigation

Since its entry into force in 1994, the UNFCCC has required the United States to submit the full Climate Action Report to the Secretariat approximately every four years.[13] Until this year, 2018, the State Department has always fulfilled this Reporting Requirements—having completed and submitted six prior national communications.[14] Past reports have included both summaries of

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[13] UNFCCC, Art. 4, 12; *see also* Decision 2/CP.17.

[14] *See* U.S. Department of State, UNITED STATES CLIMATE ACTION REPORT 2014: FIRST BIENNIAL REPORT OF THE UNITED STATES OF AMERICA AND SIXTH NATIONAL COMMUNICATION OF THE UNITED STATES OF AMERICA UNDER THE UNFCCC (2014), https://unfccc.int/files/national_reports/annex_i_natcom/submitted_natcom/application/pdf/2014_u.s._climate_action_report[1]rev.pdf; U.S. Department of State, UNITED STATES CLIMATE ACTION REPORT 2010: FIFTH NATIONAL COMMUNICATION OF THE UNITED STATES OF AMERICA UNDER THE UNFCCC (2010), https://unfccc.int/resource/docs/natc/usa_nc5.pdf; U.S. Department of State, UNITED STATES CLIMATE ACTION REPORT 2006: FOURTH NATIONAL COMMUNICATION OF THE UNITED STATES OF AMERICA UNDER THE UNFCCC (2007), https://unfccc.int/resource/docs/natc/usnc4.pdf; U.S. Department of State, UNITED STATES

actions the federal government is currently taking and future plans to address United States' greenhouse gas emissions, as well as details on state and local actions being taken to further these efforts, in order to advance the Convention's objective to lower and mitigate GHG emissions.[15]

In light of the January 1, 2018 reporting deadline, 93 percent of the 43 Annex I countries have submitted their required Seventh Climate Action Reports.[16] This leaves the United States as one of only four Annex I Parties—along with Belarus, Turkey, and Ukraine—that have failed to yet submit their Seventh Climate Action Report. *Id.*

Before completing each Climate Action Report, the State Department has also consistently issued multiple draft forms of the report for public comment, often several months in advance of the report's submission deadline, to allow for public input and ultimately improve the quality of the report. *See*, *e.g.*, 66 Fed. Reg. 15470 (Mar. 19, 2001) (notice issued eight months prior to global deadline for third Climate Action Report); 74 Fed. Reg. 38078 (Jul. 30, 2009) (notice for the report's first of two drafts issued seven months prior to global deadline for fifth Climate Action Report). Thus, while some of the prior final Climate Action Reports were submitted some months after the deadline, the State Department has never before failed to even issue a *draft* of the

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CLIMATE ACTION REPORT 2002: THIRD NATIONAL COMMUNICATION OF THE UNITED STATES OF AMERICA UNDER THE UNFCCC (2002), https://unfccc.int/resource/docs/natc/usnc3.pdf; U.S. Department of State, CLIMATE ACTION REPORT: 1997 SUBMISSION OF THE UNITED STATES OF AMERICA UNDER THE UNFCCC (1997), https://unfccc.int/resource/docs/natc/usnc2.pdf; U.S. Department of State, CLIMATE ACTION REPORT, SEPTEMBER 1994: SUBMISSION OF THE UNITED STATES OF AMERICA UNDER THE UNFCCC (1994).

[15] *See*, *e.g.*, *See* U.S. Department of State, UNITED STATES CLIMATE ACTION REPORT 2014: FIRST BIENNIAL REPORT OF THE UNITED STATES OF AMERICA AND SIXTH NATIONAL COMMUNICATION OF THE UNITED STATES OF AMERICA UNDER THE UNFCCC (2014), https://unfccc.int/files/national_reports/annex_i_natcom/submitted_natcom/application/pdf/2014_u.s._climate_action_report[1]rev.pdf, 96-130.

[16] UNFCCC, Seventh National Communications – Annex I, https://unfccc.int/process-and-meetings/transparency-and-reporting/reporting-and-review-under-the-convention/national-communications-and-biennial-reports-annex-i-parties/seventh-national-communications-annex-i (last visited Sep. 29, 2018).

report for public comment long *after* the submission deadline has passed. Yet, more than 10 months into 2018, the State Department has yet to issue a single draft of the Seventh Climate Action Report for public comment.

Concerned with Defendants' failure to complete this vital obligation, on February 1, 2018. the Center submitted a FOIA request to the State Department to better understand the reasons for the delay. Am. Comp. ¶ 33. A few days later, the Center also wrote the State Department a letter demanding timely completion of the Climate Action Report. *Id.* ¶ 23. When State failed to respond to either the FOIA or the Center's demand, the Center filed suit.

Since that time, the Center has continued to seek resolution of these issues without Court intervention, including agreeing to a schedule for the State Department to provide FOIA records, *see* Status Report, ECF No. 23, and discussing "the possibility of resolving the treaty-related claims." *Defendants' Consent Motion, ECF No. 17, ¶¶ 2-3.* However, Defendants have chosen to seek dismissal rather than simply provide the Center, the public, and the Court with a concrete and reasonable timeline pursuant to which the State Department will finally complete the Seventh Climate Action Report.

STANDARD OF REVIEW

"In passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974); *see also Walker v. Jones*, 733 F.2d 923, 925-26 (D.C. Cir. 1984) (same). Thus, "a court should only dismiss a complaint for lack of subject matter jurisdiction if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Richardson v. United States*, 193 F.3d 545, 549 (D.C. Cir. 1999) (internal quotation marks omitted); *see also Blumenthal v. Trump*, 2018 U.S. Dist. LEXIS 167411 at *8 (D.D.C. 2018) ("the

court must accept as true all of the factual allegations in the complaint and draw all reasonable inferences in favor of plaintiffs").

Similarly, to survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a complaint need only "contain sufficient factual matter, [if] accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("*Iqbal*") (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *see also Sissel v. Dep't of Health & Human Servs.*, 760 F.3d 1, 4 (D.C. Cir. 2014) ("A court must assume the truth of all well-pleaded factual allegations and construe reasonable inferences from those allegations in favor of the plaintiff."). Thus, it is well-established that the Federal Rules of Civil Procedure "do not require 'detailed factual allegations' for a claim to survive a motion to dismiss," *Banneker Ventures, LLC v. Graham*, 798 F.3d 1119, 1129 (D.C. Cir. 2015) (quoting *Iqbal*, 556 U.S. at 678), but rather "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2); *Doe v. Rumsfeld*, 800 F. Supp. 2d 94, 103 (D.C.C. 2011) (citing *Iqbal*, 556 U.S. 662 (2009)).

ARGUMENT

I. The Center Has Sufficiently Pled Article III Standing.

Complaining that the Center's allegations are not sufficiently detailed, Defendants argue that the Center's UNFCCC Reporting Claims must be dismissed because the Center has not demonstrated Article III standing. Def. Mem. at 6-13. Defendants are mistaken.

At the outset, it is critical to set the record straight as to a plaintiff's burden in setting forth allegations in a Complaint sufficient to withstand a motion to dismiss. While Defendants complain that the Amended Complaint fails to, *e.g.*, "describe with any specificity how CBD previously used reports like the UNFCCC Reports for the benefit of its members," *id.* at 10, Defendants ignore the well-established principle that, "[a]t the pleading stage, general factual

allegations of injury resulting from the defendant's conduct" *are all that is required*, "for on a motion to dismiss [a court] presum[es] that general allegations embrace those specific facts that are necessary to support the claim.'" *Wultz v. Islamic Republic of Iran*, 755 F. Supp. 2d 1, 21 (D.D.C. 2010) (quoting *Lujuan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)) (emphasis added)). Thus, while the Center certainly must demonstrate its standing when the case reaches summary judgment, under the lenient standard applicable at this early stage of the litigation, the Center has more than adequately alleged standing. *See also Attias v. CareFirst, Inc.*, 865 F.3d 620, 625-26 (D.C. Cir. 2017) (reversing district court that had "dismissed this action at the pleading stage, where plaintiffs are required only to 'state a *plausible* claim' that each of the standing elements is present") (emphasis in original); *see also, e.g.*, *Lujan*, 504 U.S. at 561 ("[E]ach element [of standing] must be supported . . . with the manner and degree of evidence required at the successive stages of the litigation [and thus] [a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice . . . .").

As clearly stated in the Amended Complaint—which the Court must liberally construe for purposes of the motion to dismiss— the Center alleges:

> - Plaintiff Center for Biological Diversity is a national, non-profit conservation organization with offices throughout the United States. The Center has more than 1.5 million members and online activists who care about protecting the natural environment from the ravages of climate change and other environmental degradation. Am. Comp., ¶ 11.
>
> - The Center's Climate Law Institute engages in national and international advocacy to advance the fight against climate change by, *inter alia*, pursuing strategies to limit greenhouse gas emissions. This includes public education and international engagement concerning the United States' commitments to greenhouse gas emission reductions through the Convention and other international commitments. *Id.*, ¶ 12.
>
> - Among the vital instruments for these efforts is the United States' Climate Action Report, which discloses the nation's greenhouse gas emission inventories and contains detailed mitigation and adaptation plans consistent with the Convention's objectives. 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 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. The Department's completion and submission of the Seventh Climate Action Report will redress these injuries. *Id.*, ¶ 14.

Thus, as more than sufficiently alleged in the Amended Complaint, the Center is suffering cognizable informational and organizational injuries by virtue of the State Department's failure to complete and issue the Seventh Climate Action Report, and that injury will be redressed once the Report is complete.

In arguing otherwise, Defendants ignore the Center's *actual* claims of injury, and instead principally rely on cases concerning a different kind of injury altogether. In particular, many of the cases Defendants cite concern plaintiffs seeking to establish that an agency action (or inaction) will concretely impair the organization or its members' underlying aesthetic, economic, or other interests. *See* Def. Mem. at 8-9.

That is not the type of injury at issue here. Rather, as the Am. Comp. makes clear, the Center is principally alleging *informational injury* by virtue of the State Department's failure to produce the Climate Action Report. *See, e.g.*, *Public Citizen,* 491 U.S. at 449. In addition, the Center alleges organizational injury. *See, e.g.*, *PETA*, 797 F.3d at 1094. Accordingly, Defendants fail to meet their burden to demonstrate that the Center will be unable to demonstrate it has standing at summary judgment.

A. The Center Has Adequately Alleged Informational Injury.

As a threshold matter, as noted, for purposes of considering Article III standing, the Court assumes that plaintiff's legal theory is correct. *Defenders of Wildlife v. Gutierrez*, 532 F.3d 913, 924 (D.C. Cir. 2008); *Chaplaincy of Full Gospel Churches v. United States Navy*, 697 F.3d 1171 (D.C. Cir. 2012) (same). In this case, that means the Court assumes the State Department has an *enforceable* legal obligation to complete and publicly release the overdue Seventh Climate Action Report.

For purposes of informational standing, that is all that is required. As the Supreme Court explained in *Federal Elections Commission v. Akins*, 524 U.S. 11 (1998):

> The 'injury in fact' that respondents have suffered consists of their inability to obtain information—lists of AIPAC donors (who are, according to AIPAC, its members), and campaign-related contributions and expenditures—that, *on respondents' view of the law*, the statute requires that AIPAC make public. There is no reason to doubt their claim that the information would help them (and others to whom they would communicate it) . . . . Respondents' injury consequently seems concrete and particular. Indeed, this Court has previously held that a plaintiff suffers an 'injury in fact' when the plaintiff fails to obtain information which must be publicly disclosed . . . .

Id., 524 U.S. at 21 (emphasis added). Applying those principles here, having alleged that the State Department is legally obligated to publicly provide the Seventh Climate Action Report, the Center has sufficiently alleged informational injury.

The Supreme Court's analysis in *Public Citizen* reinforces that result. In that case, which sought the public disclosure of information related to judicial nominees, defendants argued plaintiffs lacked standing because they "have advanced a general grievance shared in substantially equal measure by all or a large class of citizens." *Public Citizen*, 491 U.S. at 449. In rejecting that argument, the Court explained that since the defendant had not complied with plaintiff's pre-litigation request for the information, plaintiffs had suffered a "sufficiently distinct injury to provide standing to sue." *Id.* at 449.

Similarly, here, the State Department failed to comply with the Center's *specific request* for the Seventh Climate Action Report. *See* Am. Comp., ¶ 23. Accordingly, the Center has standing, for as the Court further explained in *Public Citizen*, "[a]s when an agency denies requests for information under" FOIA, the refusal to provide the requested information "constitutes a sufficiently distinct injury to provide standing," *Id.* at 449 ("[o]ur decisions interpreting [FOIA] have never suggested that those requesting information under it need show more than that they sought and were denied specific agency records."); *see also Shays*, 528 F.3d at 923 ("Shays's injury in fact is the denial of information he believes the law entitles him to"); *Citizens for Responsibility & Ethics v. Federal Election Comm'n*, 243 F. Supp. 3d 91, 101 (D.D.C. 2017).[17]

Finally, Defendants cannot undermine the Center's informational injury based on the bald assertion that the State Department "is in the process of preparing the Report." Def. Mem. at 10. Defendants' assertion the Center is not entitled to relief from "a mere delay" in issuing the Climate Action Report, *id.*, is an issue for the merits, and irrelevant to Article III standing. *See American Rivers & Alabama Rivers Alliance v. FERC*, 895 F.3d 32, 15 (D.C. Cir. 2018) (rejecting defendant's challenge as to whether the agency action in fact leads to plaintiff's injury because "[w]hether the evidence of harm ultimately supports the allegation is a question for a later day");

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[17] For this reason, it is of no moment that the UNFCCC does not itself confer a specific right on Plaintiff. In *Public Citizen*, the Federal Advisory Committee Act conferred no specific rights either; rather it was the fact that the Plaintiffs had requested the information from the agency that conferred the requisite injury. 491 U.S. at 449. Similarly, courts have had no difficulty finding informational injury due to the failure to provide information that, under plaintiff's legal theory, should be made publicly available under the Endangered Species Act ("ESA"), 16 U.S.C. § 1531, *et seq.*, just as, under the Center's legal theory here, the State Department must release the Seventh Climate Action Report. *See, e.g., Friends of Animals v. Jewell*, 82 F. Supp. 3d 265, 272-73 (D.D.C. 2015) (where the legal obligation under the ESA, "(on the claimants' reading) requires that the information" be released, an agency's failure to provide "access to information can work an 'injury in fact' for standing purposes") (citations omitted).

see also Wellborn v. IRS, 218 F. Supp. 3d 64, 79 (D.D.C. 2016) (citing *Sissel v. U.S. Dep't of Health & Human Servs.*, 760 F.3d at 4)) ("At the point of a motion to dismiss, a court credits all well-pled facts and gives a plaintiff the benefit of all reasonable inferences that might be drawn from such facts."). Thus, for purposes of evaluating the Center's standing, this Court should assume the State Department has *no intention of completing the Report*; the State Department's failure to comply with the UNFCCC obligations therefore adequately satisfies Plaintiff's showing of informational injury.

In any event, in support of their "mere delay" argument Defendants only cite to a single newspaper article where a State Department spokesperson—in direct response to a journalist asking about Plaintiff's demand for the Seventh Climate Action Report—stated that it "is under development." Def. Mem. at 5. Tellingly, Defendants' brief *itself* is devoid of any representations regarding the Report's production status. Accordingly, while the Court certainly should not credit Defendants' argument that the Center lacks Article III standing due to a purported "mere delay" in the Report, Def. Mem. at 10, if the Court found the Report's progress at all relevant, the Center respectfully requests a brief period of discovery to ascertain the *actual status of the Report*—particularly since the documents the State Department has thus far provided in response to the Center's FOIA request have shed no light on the situation. *See, e.g., Natural Resources Defense Council v. Pena*, 147 F.3d at 1024 (discussing a plaintiff's entitlement to jurisdictional discovery to respond to an agency's standing arguments that rely on contested facts within the agency's control).

B. The Center Has Also Adequately Alleged Organizational Injury.

The Court need go no farther than informational injury to resolve Defendants' standing arguments. However, in addition, the Center has also adequately alleged *organizational* injury due to Defendants' failure to timely complete the Seventh Climate Action Report. *See, e.g.,*

Havens Realty Corp., 455 U.S. at 378-79; *PETA*, 797 F.3d 1087. As the Court of Appeals explained in *PETA*, organizational standing simply requires a plaintiff to demonstrate that the agency's inaction "injured the organization's interest," and that "the organization used its resources to counteract that harm." *PETA*, 797 F.3d at 1094. Thus, for example, in that case—which was similarly resolved on a motion to dismiss—PETA had standing in light of the Complaint's allegations regarding its mission, and the fact that the lack of the information it sought "deprived PETA of key information that it relies on to educate the public." *Id.* [18]

Similarly, here, the Center has more than adequately alleged that that Defendants' failure to timely complete the Seventh Climate Action Report interferes with its advocacy and public education activities, explaining that it "engages in national and international advocacy to advance the fight against climate change," including "public education and international engagement concerning the United States' commitments to greenhouse gas emission reductions," and that the U.S. Climate Action Reports generally, and the Seventh Climate Action Report specifically, are "vital instruments for these efforts." Am. Comp., ¶¶ 12-13. As the Center further explains, it "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

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[18] The Court in that case also rejected Defendants' argument that the injury was not cognizable because it was self-inflicted. *Id.* at 1096-97. Explaining that, "PETA has expended—and must continue to expend—resources due to the" defendants' failure to act, the court found the allegations "fit comfortably within our organizational-standing jurisprudence." *Id.* Here, where the Center alleges that the Seventh Climate Action Report is "necessary to allow the Center to carry out its mission and advocacy efforts," the injury to its resources is likewise not self-inflicted, but instead arises from Defendants' failure to timely complete the Seventh Climate Action Report.

adaptation." *Id.* ¶ 13.[19]

In short, as in *PETA*, having sufficiently alleged that the Seventh Climate Action Report will provide the Center with critical information it relies on to educate the public, engage in administrative proceedings, and perform its watchdog duties of ensuring U.S. accountability regarding its articulated climate action plans and Convention obligations, and that the State Department's failure to provide the Report impairs these efforts, the Center has also adequately alleged organizational standing. *See also, e.g. Attias v. CareFirst, Inc.*, 865 F.3d 620, 629 (D.C. Cir. 2017) ("Article III standing does not require that the defendant be the most immediate cause, or even a proximate cause, of the plaintiffs' injuries; it requires only that those injuries be "fairly traceable' to the defendant").[20]

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[19] The Center recognizes that this form of organizational standing cannot be predicated only on resources expended for litigation or lobbying. *See PETA*, 797 F.3d at 1093 (explaining, *e.g.*, that plaintiff cannot demonstrate standing "when the *only* injury arises from the effect of the regulations on the organization's lobbying activities") (citations omitted; emphasis added). Thus, while the Center included in the Amended Complaint *all* of the activities for which it relies on the Climate Action Report, in proving its standing at summary judgment it will limit its evidence to those activities cognizable for Article III injury, which include, as the Center also alleges, its educational and other advocacy activities. *Id.* at 1095 (explaining how the data at issue would provide "key information that" PETA would "rel[y] on to educate the public").

[20] It also strains all credulity for Defendants to assert that the Center lacks standing because "there may be other sources of information regarding U.S. climate activities." Def. Mem. at 12. Plaintiffs have alleged that the information in the Climate Action Report "is necessary to allow the Center to carry out its mission and advocacy efforts." Am. Comp. ¶ 14. Defendants point to no authority for the proposition that in addition to making such allegations, a plaintiff—at the pleading stage, no less—must also prove a negative by somehow establishing all of the sources of federal, state, and local efforts to address greenhouse gas emissions, and show why they do not serve as an adequate substitute for the Seventh Climate Action Report. Surely, the fact that the United States committed, in the UNFCCC, to providing the Climate Action Report is alone sufficient—even at summary judgment—to demonstrate its independent utility, and certainly nothing more is required at this stage of the litigation, Defendants' protestations to the contrary notwithstanding.

II. Defendants Have Failed To Establish That The Center Will Not Be Able To Prevail On The Merits Of Their UNFCCC Reporting Claims.

Regarding the merits, Defendants ask the Court to conclude that under no circumstances may the Court ultimately provide judicial relief for the State Department's failure to timely complete the Seventh Climate Action Report. Def. Mem. at 13-24. To the contrary, the Amended Complaint sufficiently states a "claim to relief that is plausible on its face." *Iqbal*, 556 U.S. at 678. In short, the Center has more than sufficiently alleged that, by failing to fulfill its enforceable obligations under the Convention to complete and publicly submit the Seventh Climate Action Report, the State Department is violating the Administrative Procedure Act's ("APA") proscription against unlawfully withheld and unreasonably delayed agency action. Am. Comp. ¶ 42 (citing 5 U.S.C. 706(1)); *see also id.* ¶ 45 (seeking the same relief pursuant the Mandamus Act, 28 U.S.C. § 1361).

Accordingly, the issue of whether the Court should enforce the State Department's legal obligation to complete the Seventh Climate Action Report cannot be resolved until summary judgment. *See Telecommunications Research & Action Center v. FCC (*"*TRAC*"*)*, 750 F.2d 70, 80 (D.C. Cir. 1984) (setting forth factors governing relief for agency delay); *In re Barr Laboratories, Inc.*, 930 F.2d 72, 74-75 (D.C. Cir. 1991) (applying *TRAC* factors to missed deadline). Put another way, as another court in this Circuit has explained, when merits arguments "go to the question of whether [an] agency has adhered to the standards of decision-making required by the [Administrative Procedure Act], the United States Court of Appeals for the District of Columbia Circuit has advised that the 'better practice' is to test the parties' arguments in the context of a motion for summary judgment and with reference to the full administrative record." *Banner Health v. Sebelius*, 797 F. Supp. 2d 97, 113-14 (D.D.C. 2011) (citing *Marshall Cnty. Health Care Auth. v. Shalala*, 988 F.2d 1221,1226 n.5. (D.C. Cir. 1993)).

A. The Center Has Adequately Alleged That Defendants Have Legally Enforceable Obligations Under the UNFCCC.

As Defendants correctly concede, the fact that the UNFCCC is an international agreement rather than a domestic statute does not dictate whether its requirements are judicially enforceable in United States courts. Def. Mem. at 13 (acknowledging that "certain treaty obligations may be directly enforceable in U.S. courts"). The Constitution's Supremacy Clause declares that international treaties, like the Constitution and federal statutes, are the "supreme Law of the Land," U.S. Const., art. VI, cl. 2, and are "to be regarded in courts of justice as equivalent to an act of the legislature." *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 314 (1829); *see also* 28 U.S.C. § 1331 ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, *or treaties of the United States*.") (emphasis added).

Whether a treaty is judicially enforceable in domestic courts generally depends on whether it is "self-executing"—*i.e.* whether the treaty provisions at issue "operate[] of [themselves] without the aid of any legislative provision" and thus have "domestic effect as federal law upon ratification." *Medellin*, 552 U.S. at 504-05, n.2. Resolving whether a treaty is self-executing, in turn, requires examining several factors, including (i) whether the obligation is "absolute and mandatory," *Republic of the Marsh. Is. v. United States*, 865 F.3d 1187, 1195 n.5 (9th Cir. 2017); (ii) the post-ratification conduct of the parties in implementing the treaty, *Day v. Trans World Airlines, Inc.*, 528 F.2d 31, 35-36 (2d Cir. 1975); and (iii) whether the treaty's "negotiation and drafting history" evince an understanding that the obligations would be enforceable. *Medellin*, 522 U.S. at 506-07, 513. In this case, each of these factors weighs in favor of finding that the specific Reporting Requirements of the Convention at issue are self-executing, and thus may be enforced in domestic courts. Def. Mem. at 15 (acknowledging that "[t]he proper scope of a court's self-execution analysis is the provision at issue"); *see also* Restatement (Fourth) of the

Foreign Relations Law of the United States: Treaties § 110, ch.2.2 (Am. Law Inst., Tentative Draft No. 2, 2017) (approved at 2017 Annual Meeting) ("Restatement Fourth") (additional considerations in determining whether a treaty provision is self-executing include "(a) whether the treaty provision is sufficiently precise or obligatory to be suitable for direct application by the judiciary, and (b) whether the provision was designed to have immediate effect, as opposed to contemplating additional measures by the political branches."). [21]

1. The Convention Itself Demonstrates That The Reporting Requirements At Issue Are Self-Executing.

Defendants entirely ignore that the treaty provision at issue meets the most important factor for determining whether it is self-executing: whether the text embodies a discrete, specific, and mandatory obligation that is suitable for direct application by the judiciary. Restatement Fourth, § 110, rptr. n.5; *Republic of the Marsh. Islands v. United States*, 865 F.3d 1187, 1195 n.5 (9th Cir. 2017) (internal citations omitted) ("A provision that is 'absolute and mandatory' is more likely self-executing because there is no need for precise and obligatory treaty language 'to be supplemented by legislative or executive action'"). Thus, while courts have failed to find treaty provisions self-executing where they contain "indeterminate, vague, or aspirational language," or fail to compel any action with words like "shall," *id.* at 1194, obligations like the ones at issue here—all of which arise from treaty language commanding that the United States "shall" complete the Reporting Requirements—are typically deemed to be self-executing, and therefore enforceable. *See also Sluss*, 2018 U.S. App. LEXIS 21111 at *19 (treaty provision

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[21] This version of the Restatement "represents the most current statement of [the American Law Institute's] position on the subject and may be cited in opinions or briefs." *See* American Law Institute, Frequently Asked Questions, https://www.ali.org/publications/frequently-asked-questions/#cite-drafts (last visited Oct. 1, 2018); *see also, e.g.*, *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649, 1659 (2017) (Thomas, J., dissenting) (citing Restatement (Fourth) in opinion).

including "shall" considered a "compulsory directive" that "courts routinely enforce"); *Asakura v. City of Seattle*, 265 U.S. 332, 340-41 (1924) (self-executing treaty providing that citizens of the other state "shall have" and "shall receive" certain rights); c*f. U.S. v. Bahel*, 662 F.3d 610, 629-30 (2d Cir. 2011) (citation omitted) ("the absence of mandatory language (*i.e.*, 'must' or 'shall') indicates that a particular provision is not a self-executing directive.").

In particular, the Convention's plain text in Articles 4 and 12 conveys a discrete and mandatory obligation for the United States to submit to the Secretariat the Climate Action Report through the use of the term "shall," coupled with discrete Reporting Requirements regarding the substance and timing of reports. For example, Article 4—which bears the title "Commitments" to emphasize the mandatory and binding nature of the actions set forth—establishes that each Annex I Party "shall" regularly submit "communications" containing certain required information, including, *inter alia*, "[a] detailed description of the policies and measures that it has adopted to implement its commitment" under the Convention, and "[a] specific estimate of the effects that the[se] policies and measures . . . will have on anthropogenic emissions . . . ." UNFCCC, Art. 4.2(b).

Moreover, as referenced in Article 4, Article 12—which is entitled "Communication of Information Related to Implementation"—provides additional mandatory reporting requirements for communication reports:

> (1) In accordance with Article 4, paragraph 1, *each Party shall communicate* to the Conference of the Parties, through the secretariat, the following elements of information: (a) A national inventory of anthropogenic emissions by sources and removals by sinks of all greenhouse gases . . . ; (b) A general description of steps taken or envisaged by the Party to implement the Convention; and (c) Any other information that the Party considers relevant to the achievement of the objective of the Convention and suitable for inclusion in its communication . . .
>
> (2) *Each developed country Party and each other Party included in Annex I shall incorporate in its communication* the following elements of information: (a) A detailed description of the policies and measures that it has adopted to

> implement its commitment under Article 4, paragraphs 2 (a) and 2 (b); and (b) A specific estimate of the effects that the policies and measures referred to in subparagraph (a) immediately above will have on anthropogenic emissions by its sources and removals by its sinks of greenhouse gases during the period referred to in Article 4, paragraph 2 (a).

Id., Art. 12.1-12.2 (emphasis added).

Further, as regards to the *timing* of the submission of the Reports, the Convention similarly mandates the following as applied to Annex I Parties like the United States:

> *Each developed country Party and each other Party included in Annex I* <u>*shall*</u> make its initial communication *within six months of the entry into force of the Convention* for that Party. . . . The frequency of subsequent communications by all Parties *shall be determined by the Conference of the Parties*, taking into account the differentiated timetable set by this paragraph.

Id., Art. 12.5 (emphasis added).[22] Finally, the Convention in Article 22 emphasizes the legally binding nature of these "shall" commitments for all Parties, stating that even regional economic integration organizations seeking to become a party to the treaty "*shall be bound* by all the obligations under the Convention." *Id*., Art. 22.2 (emphasis added).

Taken together, Articles 4 and 12—and the inclusion of the term "shall" in each section coupled with the specific reporting standards—establish the discrete and mandatory obligations for the United States (and other Annex I Parties) to regularly submit the Climate Action Report. Accordingly, because the precise obligations at issue here are discrete and mandatory, at

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[22] The parties have determined that the frequency of the reporting "*shall*" be every four years, which gives rise to the undisputed January 1, 2018 deadline. Decision 2/CP.17, Add.1 ¶¶ 13-15. As noted, this deadline is directly incorporated into the UNFCCC's mandatory obligations because Article 4.2(b) explicitly states that Annex I Parties "<u>*shall*</u> *communicate*, within six months of the entry into force of the Convention for it and *periodically thereafter*, and in *accordance with Article 12*" the Climate Action Report, while Article 12.5 states that the "frequency of communications by all Parties <u>*shall*</u> be determined by the Conference of the Parties." UNFCCC, Art. 4.2(b), Art. 12.5. Moreover, contrary to Defendants' assertion that "[n]othing in these provisions suggests that they were designed to have 'immediate effect,'" Def. Mem. at 16, the Convention *required* that the United States' first national communication be submitted six months after the Convention's entry into force. UNFCCC, Art. 12.5.

summary judgment the Court should find the reporting provisions self-executing, and therefore enforceable. *See McKesson HBOC, Inc. v. Islamic Republic of Iran*, 271 F.3d 1101, 1107-08 (D.C. Cir. 2001) (finding "shall" terms indicative of a treaty's status as self-executing); *Olympic Airways v. Husain*, 540 U.S. 644, 649 (2004) (assuming as self-executing the "shall" provision of Warsaw Convention regarding liability of civil air carriers); *Medellin*, 552 U.S. at 545 (J. Breyer, dissenting) (listing, as examples, 29 Supreme Court cases holding or assuming particular treaty provisions as self-executing, as most of those provisions at issue contained the obligatory term "shall" and explicit commitments).

2. The U.S. And Other Parties' Post-Ratification Practice Of Fulfilling Reporting Obligations Further Demonstrates That They are Self-Executing Provisions.

Defendants also entirely disregard a second vital factor governing whether a provision is self-executing: the persistent post-ratification practice of the U.S. and other Annex I Parties in complying timely submission of the Climate Action Reports in compliance with the Reporting Requirements. As the Supreme Court in *Medellin* recognized, the "post-ratification understanding of signatory nations" are critical to assessing a treaty provision's self-executing nature. *Medellin*, 552 U.S. at 507; *see also Day v. Trans World Airlines, Inc*., 528 F.2d at 35-36 (the conduct of Parties subsequent to a treaty's ratification is also "relevant in ascertaining the proper construction to accord the treaty's various provisions.").

As a threshold matter, since ascertaining the parties' past practice itself involves the consideration of facts that go well beyond the four corners of the Amended Complaint, there is no basis for the Court to definitively resolve the self-execution question at this early stage of the litigation, contrary to Defendants' arguments. Def. Mem. at 15. However, even a few examples of the Parties' post-ratification conduct indicate that, in fact, the Convention's Parties have always understood the treaty's reporting obligations to be binding.

First, past State Department practice demonstrates that, until 2018, the U.S. itself has consistently complied with the Convention's reporting commitments, signaling the U.S.'s understanding that the requirements are discrete, mandatory, and thus self-executing. Specifically, the U.S. has submitted all prior six mandated national communications.[23]

Importantly, the State Department—both in the text of the prior Climate Action Reports, and in the Federal Register notices for public comment on the Report drafts—has also consistently articulated that the treaty provisions at issue are binding legal commitments in fulfillment of the Convention. For example, the U.S.'s first National Communication states: "This document, the Climate Action Report, represents the first formal U.S. communication under the Framework Convention on Climate Change, *as required under Articles 4.2 and 12*" and "meet[s] the reporting requirements in the Climate Convention."[24]

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[23] See n. 14, *supra*. Separately, in addition to the Climate Action Report, the State Department has also, without fail, submitted the annual national inventory of GHG emissions required by Article 2 of the Convention. This consistent compliance further emphasizes the U.S.'s understanding that the Convention's Reporting Requirements are self-executing. *See, e.g.*, UNFCCC, National Inventory Submissions 2018, https://unfccc.int/process-and-meetings/transparency-and-reporting/reporting-and-review-under-the-convention/greenhouse-gas-inventories-annex-i-parties/national-inventory-submissions-2018 (last visited Sep. 29, 2018).

[24] U.S. Department of State, CLIMATE ACTION REPORT, SEPTEMBER 1994: SUBMISSION OF THE UNITED STATES OF AMERICA UNDER THE UNFCCC (1994). *See also, e.g.*, U.S. Department of State, CLIMATE ACTION REPORT: 1997 SUBMISSION OF THE UNITED STATES OF AMERICA UNDER THE UNFCCC (1997), https://unfccc.int/resource/docs/natc/usnc2.pdf (the report "represents the second formal U.S. communication under the [Convention], *as required under Articles 4.2 and 12*.") (emphasis added); U.S. Department of State, UNITED STATES CLIMATE ACTION REPORT 2010: FIFTH NATIONAL COMMUNICATION OF THE UNITED STATES OF AMERICA UNDER THE UNFCCC (2010), https://unfccc.int/resource/docs/natc/usa_nc5.pdf (report is "in accordance with the Articles 4 and 12 of the UNFCCC"); 62 Fed. Reg. 25988 (May 12, 1997) ("Pursuant to the *reporting requirements under Articles 4.2 and 12* of the Convention . . . , the United States submitted the U.S. Climate Action Report [] to the UNFCCC Secretariat" and is to submit "*in accordance with Articles 12.1 and 12.2 of the Convention*, a second national communication by April 15, 1997") (emphasis added); 78 Fed. Reg. 59412 (Sep. 26, 2013) (emphasis added) (The sixth Climate Action Report "respond[s] to *reporting requirements* under the [UNFCCC]" and is

Second, the vast majority of Annex I Parties have also consistently complied with the Reporting Requirements.[25] Of the 43 current Annex I Parties to the Convention, all but four countries— the United States, Belarus, Turkey, and Ukraine—have failed to submit the Seventh Climate Action Report.[26] Otherwise, all Annex I Parties have consistently complied with these reporting requirements; for example, 100% of all Annex I Parties submitted the First and Sixth National Communications, while only a handful of countries—not including the United States—did not submit their communications during the second through fifth iterations.[27]

Overall, these consistent patterns of compliance with the Convention's reporting requirements demonstrate a post-ratification understanding that the requirements are mandatory and legally binding. *See Humane Society of the United States v. Glickman*, 217 F.3d 882, 887-88

"provided in accordance with Articles 4.2 and 12 of the UNFCCC").

[25] For reference to the U.S. State Department's and other Annex I Parties' prior submissions of the Climate Action Reports, *see* UNFCCC, Sixth National Communications – Annex I, https://unfccc.int/process/transparency-and-reporting/reporting-and-review-under-the-convention/national-communications-and-biennial-reports-annex-i-parties/submitted-national-communications-from-annex-i-parties/sixth-national-communications-annex-i (last visited Oct. 4, 2018); UNFCCC, Fifth National Communications – Annex I, https://unfccc.int/process/transparency-and-reporting/reporting-and-review-under-the-convention/national-communications-and-biennial-reports-annex-i-parties/national-communication-submissions/fifth-national-communications-annex-i (last visited Oct. 4, 2018); UNFCCC, Fourth National Communications and Reports Demonstrating Progress Under the Kyoto Protocol – Annex I, https://unfccc.int/process/transparency-and-reporting/reporting-and-review-under-the-convention/national-communications-and-biennial-reports-annex-i-parties/national-communication-submissions/fourth-national-communications-and-reports-demonstrating-progress-under-the-kyoto (last visited Oct. 4, 2018); UNFCCC, First, Second, Third National Communications – Annex I, https://unfccc.int/process/transparency-and-reporting/reporting-and-review-under-the-convention/national-communications-and-biennial-reports-annex-i-parties/national-communication-submissions/first-second-third-national-communications-annex-i (last visited Oct. 4, 2018).

[26] *See* UNFCCC, Seventh National Communications – Annex I, https://unfccc.int/process/transparency-and-reporting/reporting-and-review-under-the-convention/national-communications-and-biennial-reports-annex-i-parties/submitted-national-communications-from-annex-i-parties (last visited Oct. 4, 2018).

[27] *See* n. 25, *supra*.

(D.C. Cir. 2000) (enforcing Migratory Bird Treaty obligations on federal agency, over agency's objection that it could not be forced to comply with the treaty provisions, by ascertaining the U.S. and Canada's past consistent practice and enforcement of treaty provision, despite agency's new interpretation).

3. The Convention's Ratification History Also Demonstrates That The Reporting Requirements Are Self-Executing.

"The circumstances surrounding [the] execution" of a treaty is also highly relevant to whether it is self-executing. *Diggs v. Richardson*, 555 F.2d 848, 851 (D.C. Cir. 1976). In considering this factor, courts look to the views expressed by the President and Senate during the advice and consent process. *See, e.g.*, *Brzak v. United Nations*, 597 F.3d 107, 111-12 (2d Cir. 2010) (citing testimony by State Department's Legal Adviser before the Senate Foreign Relations Committee, and Committee report, as supporting conclusion that certain provisions were self-executing); *cf. United States v. Postal*, 589 F.2d 862, 881-82, 884 (5th Cir. 1979) (citing Senate Foreign Relations Committee testimony by State Department and negotiating delegation representatives concerning the effect of the Convention on the High Seas on U.S. law as supporting inference that the U.S. intended relevant provisions to be non-self-executing). For the UNFCCC, consideration of this factor also supports the result that the Reporting Requirements are self-executing.

Thus, as noted, in discussing the Convention at the Senate Foreign Relations Committee hearing, then-EPA Administrator William Reilly explained that, although the Convention contained no "legally binding targets and timetables with *respect to greenhouse gas emissions*," it *did* create "commitments" for "all parties to prepare," *e.g.*, "national inventories of human induced emissions, to implement appropriate national and regional strategies to mitigate and adapt to climate change, [and] to *report on these actions* . . . ." Senate Convention Hearing, at 93, 112

(*see attached*) (emphasis added). Further, when explicitly asked whether the Convention required any implementing legislation with respect to Article 4, Administrator Reilly stated, "the [C]onvention will *not require* any new implementing legislation," *id*. at 93 (emphasis added)—thus indicating that domestic enforcement of Article 4 requirements does not turn on subsequent implementing legislation. *See also* Restatement (Third) of The Foreign Relations Law of the United States § 111 rptr. n. 5 (Am. Law Inst., 1987) (noting there is a strong presumption in favor of self-execution if the executive branch has not requested implementing legislation, "especially so if some time has lapsed").

Similarly, at that same Senate Committee hearing, the State Department itself emphasized the importance of the Reporting Requirements at issue here as fundamental to global cooperation on climate change:

> The United States supported *extensive reporting requirements* for all Parties, including with respect both to emissions inventories and *implementation of Convention obligations*. In the U.S. view, such an approach would ensure the exchange of critical information with respect to climate change, as well as provide for *transparency*. *** While the U.S. recognized the need for appropriate differentiation between developed and developing countries, it considered that developing countries *had to have sufficient obligations to bring them effectively into the process; otherwise, the Convention's goal of achieving widespread participation would be thwarted*.

Senate Convention Hearing at 121(*see attached*) (emphasis added) .[28] Accordingly, this factor

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[28] Defendants erroneously suggest that the absence of language about self-execution in the U.S. ratification record automatically "suggests no intent that the UNFCCC [is] to be enforced in domestic courts." Def. Mem. at 20. To the contrary, where they intend a treaty to *not be* self-executing, the Executive Branch and Congress have regularly declared expressly, as a condition of treaty approval, that a treaty provision is *non-self-executing*, as pronounced with respect to several treaties. *See*, *e.g*., U.S. reservations, declarations, and understandings, International Convention on the Elimination of All Forms Of Racial Discrimination, 140 Cong. Rec. S7634-02 (daily ed. June 24, 1994), § III ("The Senate's advice and consent is subject to the following declaration: That the United States declares that the provisions of the Convention are not self-executing."); U.S. reservations, declarations, and understandings, International Covenant on Civil and Political Rights, 138 Cong. Rec. S4781-01 (daily ed. April 2, 1992) § III ("The Senate's advice and

also weighs in favor of concluding that the operative provisions of the UNFCCC at issue here should be found self-executing, and thus enforceable.

* * *

For all these reasons, at summary judgment the Court may find the Convention self-executing, and thus it may remedy the State Department's failure to comply with its binding reporting obligation under the Convention.

B. The Global Climate Protection Act Further Reinforces The State Department's Enforceable Obligation To Complete The Seventh Climate Action Report.

While the Center has sufficiently demonstrated that the Court may ultimately find the Convention itself self-executing *irrespective* of domestic legislation, in fact—and again, contrary to Defendants' cursory claim, *see* Def Mem. at 14 n.5—Congress has also passed domestic legislation that reinforces the State Department's legal obligation to timely complete the Climate Action Report.

In particular, the Global Climate Protection Act mandates that the State Department must fulfill the obligations of the United States through international climate protection agreements such as the UNFCCC. Thus, Congress directed, under the heading "Coordination of United States Policy in the International Arena," that "*the Secretary of State shall be responsible* to coordinate those aspects of United States policy requiring action through the channels of multilateral diplomacy . . . ." GPCA at §1103(c) (emphasis added). Indeed, as noted, interpreting this very language, the Supreme Court has explained that in these terms, Congress "*ordered* the Secretary of State" to take the necessary steps to "coordinate diplomatic efforts to combat global warming."

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consent is subject to the following declarations: (1) That the United States declares that the provisions of Articles 1 through 27 of the Covenant are not self-executing."). Thus, the absence of express language regarding self-execution in fact suggests the Convention is, in fact, self-executing.

Massachusetts v. Envtl. Protection Agency, 549 U.S. at 508 (emphasis in original). Similarly, as another federal court has explained, the State Department was in fact "authorized by the Global Climate Protection Act" to negotiate the terms of the UNFCCC, which in turn contains the binding Reporting Requirements at issue here. *California v. GMC*, 2007 U.S. Dist. LEXIS 68547 at *12.

Accordingly, the reporting duties imposed by the Convention on the United States plainly lie with the State Department—which is why the State Department has issued the prior Climate Action Reports,[29] and why, in this case, rather than arguing that it has no obligation to complete the Seventh Climate Action Report, the State Department is narrowly arguing that the Center may not enforce that obligation—while also studiously avoiding making any representations regarding its progress in the Report's production.

Indeed, while, in a footnote, Defendants argue that the Global Climate Protection Act does not itself contain binding duties, Def. Mem. at 14 n.5, Defendants do not argue, or even suggest, that the State Department is not the agency responsible for completing the Seventh Climate Action Report. Accordingly, the duties that the Global Climate Protection Act confers on the State Department further reinforce both that the discrete Convention Reporting Requirements at issue here are enforceable, and that the Court has jurisdiction to ultimately enforce those obligations. For all these reasons as well, the motion to dismiss should be denied. *See Alaska v. Kerry*, 972 F. Supp. 2d 1111, 1125 (D. Al. 2013) ("A court may review agency actions, undertaken pursuant to implementing legislation that specifically mandates the agency's compliance with an international agreement, to ensure that those actions are consistent with the implementing law that incorporates the international agreement") (citing *Defenders of Wildlife v. Endangered Species Scientific*

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[29] *See* n. 14, *supra*.

Authority, 659 F.2d 168 (D.C. Cir. 1981)).[30]

Moreover, given the close relationship between the UNFCCC and the Global Climate Protection Act, the Court may conclude that it need not even determine whether the UNFCCC is self-executing in order to afford relief here. *See, e.g.*, *Sluss*, 2018 U.S. App. LEXIS 21111 at *14. In this regard, this case is in line—and in fact parallels—the D.C. Circuit's recent decision in *Sluss*, where the court held that international commitments are enforceable in U.S. courts as a result of *prior* legislation that vests the agency defendant with the responsibility to carry out such commitments. *Id.* In particular, the Court determined that the implementing legislation at issue there— called the Transfer of Offenders to or from Foreign Countries Act ("Transfer Act"), 18 U.S.C. §1400 *et seq.* –served as an "omnibus" law which provides "procedures to [not only] implement" the particular treaty at issue in that case, "but also "a prisoner-transfer treaty with Mexico, *as well as future prisoner-transfer agreements with other countries*." *Id.* at *14 (emphasis added).

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[30] Defendants rely on *Natural Resources Defense Council v. Envtl. Protection Agency*, 464 F.3d 1, 9-10 (D.C. Cir. 2006) ("*NRDC*"), Def. Mem. at 17, but, in fact, that case supports the Center here. Thus, while in that case, the court concluded that plaintiff could not challenge EPA's actions in purported conflict with the treaty at issue because plaintiff's argument rested on separate commitments made subsequent to the treaty, the Court expressly distinguished another case—*Day v. TWA*, 528 F.2d 31 (2d Cir. 1975) —where the Second Circuit *had* enforced the terms of a treaty based on the parties' subsequent *understanding* of what those terms meant. 464 F.3d at 13 ("The conduct of the parties subsequent to ratification of a treaty may, thus, be relevant in ascertaining the proper construction to accord the treaty's various provisions") (quoting *Day*, 528 F.2d at 35-36).

Here, the operative terms of the Convention concern the "frequency" of the reporting requirements under Article 12.5, and, as in *Day*—and in contrast to *NRDC*—the United States' and other Annex I Parties' consistent practice of compliance demonstrates an understanding that, under this language, the Climate Action Reports are due every four years, with the most recent deadline being January 1, 2018. Indeed, since Defendants themselves acknowledge that "the UNFCCC imposes a *binding international obligation*" to timely complete the Seventh Climate Action Report, Def. Mem. at 2 (emphasis added), it could not be more clear that the "proper construction" of the Convention, *NRDC*, 464 F.3d at 13 (quoting *Day*, 528 F.2d at 35-36), is that the Report is overdue, and thus that the obligation may be enforced here.

Similarly, here, the Court may conclude that the Global Climate Protection Act serves as omnibus legislation directing the State Department to fulfill the prospective international commitments made in the UNFCCC, and that therefore the State Department's failure to comply with the UNFCCC's reporting requirements is a violation of the Global Climate Protection Act itself. *See* GPCA §1102; §1103(c) (requiring the State Department to "coordinate those aspects of U.S. policy requiring action through the channels of multilateral diplomacy," and recognizing that such action will occur in the future in light of the fact that "the global nature of this problem will require vigorous efforts to achieve international cooperation aimed at minimizing and responding to adverse climate change.").[31]

C. Plaintiff May Enforce These Legal Obligations Through The APA And Mandamus Act.

Once again conflating this Court's jurisdiction with the ultimate merits of the Center's claim, Defendants also argue that the Center may not enforce the State Department's obligation to complete the Seventh Climate Action Report under the APA or the Mandamus Act because "Plaintiff has failed to identify a source of substantive law applicable to agency action" to support these causes of action. Def. Mem. at 23. Once again, Defendants are mistaken. The Reporting Requirements under Articles 4 and 12 of the UNFCCC, particularly as coupled with the Global Climate Protection Act, which delegate responsibility to the State Department to carry out the Reporting Requirements, form the substantive law applicable to Plaintiff's APA and federal Mandamus causes of action. [32]

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[31] Accordingly, Defendants' complaint about the fact that the Global Climate Protection Act *preceded* the UNFCCC is of no moment. Def. Mem. at 14 n.5. As in *Sluss* with regards to the domestic law implicated there, the Global Climate Protection Act committed the State Department to carrying out the *prospective* international commitments entered into by the United States.

[32] Defendants incorrectly assert that the existence of Article 13 and 14 of the Convention—

Indeed, as noted, the D.C. Circuit recently resolved an APA claim concerning a federal agency's compliance with treaty obligations, rejecting defendants' arguments that the court lacked jurisdiction to hear the case. *Sluss*, 2018 U.S. App. LEXIS 21111 at *11-12. Thus, in *Sluss*, the D.C. Circuit held that a provision of the Treaty on the Execution of Penal Sentences between the U.S. and Canada ("Transfer Treaty")—which provided that the United States, "in deciding upon the transfer of an Offender [from the U.S. to Canada] . . . *shall* bear in mind all factors bearing upon the probability that transfer will be in the best interests of the Offender"—sufficiently "provide[d] 'law to apply'" and a "'judicially manageable standard'" to resolve an APA cause of action. 2018 U.S. App. LEXIS at *16, *22.

To be sure, the Court in that case also relied on a separate piece of domestic legislation, the Transfer Act, which "authorized" the Attorney General to act on behalf of the U.S.to carry out the Transfer Treaty. *id*. at *4, in concluding that the Attorney General's decision to transfer the plaintiff was subject to APA judicial review of whether it comported with the "concrete standards" articulated in the Transfer Treaty's "shall" provision at issue. *Id*. at *19. However, as with the Global Climate Protection Act, the Transfer Act provided overall direction for the Attorney General to carry out not only the Transfer Treaty's provisions but also prospective

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which concern implementation and dispute resolution between Parties—"confirm[s] that issues of treaty implementation and compliance are to be addressed on the international plane" to the exclusion of domestic enforcement. Def. Mem. at 18. To the contrary, as also stated in the Restatement Fourth:

> [A] treaty's provision for international enforcement mechanisms *does not necessarily preclude domestic enforcement through direct judicial application*. International law frequently affords mechanisms for the enforcement of treaties, but that is compatible with the doctrine of self-execution, as each from of proceeding may obviate any need to resort to the other.

§ 110, n.7 (emphasis added); *see also Head Money Cases*, 112 U.S. 580, 598-99 (1884) (discussing the co-existence of self-execution and international recourse mechanisms to ensure compliance).

international agreements involving transnational prisoner transfers. *Id.* at *14. Accordingly, while the plaintiff in *Sluss* did not ultimately prevail on the merits of his APA claim, the fact that the Court had no trouble finding that it had jurisdiction to resolve that claim demonstrates that the State Department's arguments against this Court's jurisdiction to resolve the Center's APA and Mandamus claims in this case have no merit.

Indeed, if anything, the international commitment at issue here—discretely requiring that the State Department "*shall*" provide certain information—is considerably more confined than the language the Court found enforceable in *Sluss*, which, as noted, simply required the Attorney General to "bear in mind all factors bearing upon the probability that transfer will be in the best interests of the Offender." *Id.* at *4. Thus, if the Court could resolve the merits of whether the agency had complied with that amorphous obligation in *Sluss*, this Court can certainly resolve whether the State Department is in compliance with the discrete and specific Reporting Requirements under the UNFCCC, which contain specific "shall" requirements. *See, e.g.*, *See, e.g., Vietnam Veterans of Am. v. CIA*, 811 F.3d 1068, 1078 (9th Cir. 2016) (enforcing a "specific, unequivocal command" for an agency "to take discrete agency action") (citations omitted*); Liu v. Novak*, 509 F. Supp. 2d 1 (D.D.C. 2007) (finding delay unreasonable); *Sandoz, Inc. v. Leavitt*, 427 F. Supp. 2d 29 (D.D.C. 2006) (same).

In short, the applicable provisions of the Convention consistently provide that the Annex I Parties "shall" produce the Climate Action Report, and also include a specific deadline—the most recent of which the vast majority of other Annex I countries around the world have now met. Def. Mem.at 5 n.2 (citing submission report). Under these circumstances, the Court may find that it can provide relief for the Center's UNFCCC Reporting Claims. *Fund for Animals v. Norton*, 294 F. Supp. 2d 92, 114 (D.D.C. 2003) (affording relief for missed deadline); *see also Am. Acad. of Pediatrics v. United States FDA*, 2018 U.S. Dist. LEXIS 150595 (D. Mass. 2018) (granting relief

for agency's failure to comply with deadline).

To be clear, however, the Court is not at this time resolving whether, in fact, to afford relief for the State Department's failure to complete the Seventh Climate Action Report, or to even issue a draft for public comment. At this time the only question before the Court is whether the Center will be permitted to pursue those arguments. Accordingly, because the Court may ultimately conclude that Articles 4 and 12 of the UNFCCC, which outline the Reporting Requirements, are self-executing, or that these provisions may be enforced in light of the State Department's obligations under the Global Climate Protection Act, the Court should deny the motion to dismiss, and direct Defendants to produce the Administrative Record. *See Biodiversity Legal Found. v. Norton*, 180 F. Supp. 2d 7 (D.D.C. 2001). Then, and only then, will the Court be in a position to resolve whether to afford relief, based on the well-established *TRAC* factors governing relied for missed deadlines in this Circuit:

> (1) the time agencies take to make decisions must be governed by a rule of reason; (2) where Congress has provided a timetable or other indication of the speed with which it expects the agency to proceed in the enabling statute, that statutory scheme may supply content for this rule of reason; (3) delays that might be reasonable in the sphere of economic regulation are less tolerable when human health and welfare are at stake; (4) the court should consider the effect of expediting delayed action on agency activities of a higher or competing priority; (5) the court should also take into account the nature and extent of the interests prejudiced by delay; and (6) the court need not find any impropriety lurking behind agency lassitude in order to hold that agency action is unreasonably delayed.

AHA v. Burwell, 812 F.3d 183, 189 (D.C. Cir. 2016) (quoting *TRAC*, 750 F.2d at 80). However, Defendants' argument that under no circumstances may the Center prevail on its claims under the APA or Mandamus Act must be rejected.

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CONCLUSION

For the foregoing reasons, the Center respectfully urges the Court to deny Defendants' motion to dismiss.

A proposed Order is attached.

October 5, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 5, 2018, I electronically filed the foregoing brief with the Clerk of the Court for the United States 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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S. HRG. 102-970

U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE (TREATY DOC. 102-38)

HEARING

BEFORE THE

COMMITTEE ON FOREIGN RELATIONS UNITED STATES SENATE

ONE HUNDRED SECOND CONGRESS

SECOND SESSION

SEPTEMBER 18, 1992

Printed for the use of the Committee on Foreign Relations

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(inventories of emissions and sinks, assessments of climate change impacts and of responses).

- To develop a treaty calling for national plans—a treaty that required a nationwide program to limit emissions and protect sinks, but a treaty that left to individual states decisions on what to include in the plan.

These objectives remained the administration's objectives throughout the negotiations and were accepted as elements of the convention.

U.S. OBLIGATIONS

Question. Please enumerate U.S. obligations under the convention and the statutory or regulatory authority under which these obligations can be executed. (U.S. obligations under section 4.2 (a) and (b) are discussed later.)

Answer. The transmittal package from the President to the Senate enumerates prospective U.S. obligations under the convention and the authorities under which these obligations would be executed. In summary, there will be commitments with respect to: greenhouse gas emissions, reporting, cooperation in science and education, provision of financial resources, technology cooperation, and participation in the convention's various institutions.

Question. Does the Climate Convention require any implementing legislation or regulatory action for these provisions of the convention?

Answer. The convention will not require any new implementing legislation, or any added regulatory programs. However, enactment of pending comprehensive energy legislation would aid in meeting certain convention obligations. Moreover, periodic appropriations will be necessary to meet U.S. financial obligations under the convention.

Question. Which agency will be the lead agency in implementing the convention? How will the expertise of other agencies be integrated to implement the convention effectively?

Answer. We expect to distribute responsibility for implementing the convention as follows:

- Reports: joint action coordinated by NSC policy coordinating committee working group on climate change under leadership of DOS with input and technical support from DOE, EPA and others.
- Meeting participation: U.S. delegations to be headed by DOS with advisors from other agencies (as in negotiating sessions to date). Policy coordination by PCC working group and by the White House policy coordinating group.

All decisions will have White House oversight, including those involving financial issues (e.g., contributions to the GEF, funding for country studies, etc.)

OTHER COUNTRIES' OBLIGATIONS

Question. Please describe obligations assumed by the so-called countries in transition and developing countries under the convention.

Answer. Obligations of countries with economies in transition (listed in annex I to the convention) and developing countries differ in certain respects from those of developed (i.e., OECD) countries:

- Countries with economies in transition are bound by the enhanced greenhouse gas emissions and reporting obligations applicable to developed countries; however, with respect to the obligations to adopt national policies and take corresponding measures on the mitigation of climate change by limiting anthropogenic emissions of greenhouse gases and protecting and enhancing greenhouse gas sinks and reservoirs, these countries are to be granted a certain degree of flexibility in its implementation. These countries are not bound by the financial and technology obligations otherwise applicable to developed countries.
- Developing countries are not bound by the enhanced greenhouse gas emissions and reporting obligations applicable to developed countries; they are also not bound by the financial and technology obligations, which are indeed designed to benefit such countries. Further, several provisions in the convention call for special consideration to be given to developing countries in terms of implementation.

U.S. IMPLEMENTATION OF ARTICLE 4.2 (a) AND (b)

Question. Please explain U.S. obligations under Article 4.2 (a) and (b) of the convention along with the statutory and regulatory authority under which these obligations will be executed.

Answer. During the negotiations, much attention focused on article 4.2 (a) and (b), which addresses the obligation of developed countries with respect to greenhouse

gas emissions. Subparagraph 2(a) calls upon each of these parties to adopt policies and take corresponding measures to address climate change through both limitation of emissions and enhancement of sinks. The subparagraph contains a series of factual recognitions, including that the return by the end of the present decade to earlier levels of anthropogenic emissions of greenhouse gases not controlled by the Montreal protocol on substances that deplete the ozone layer would contribute to a modification of longer-term trends in anthropogenic emissions consistent with the objective of the convention. It also provides that parties may implement policies and measures jointly.

The United States will implement this obligation through a variety of measures, including the Clean Air Act and its 1990 amendments, the National Energy Strategy, and the Intermodal Surface Transportation Act of 1991. In this regard, it should be noted that implementation of some elements of the national energy strategy depend on legislation presently being considered by Congress.

Subparagraph 2(b) contains an enhanced reporting requirement for developed countries, namely to provide detailed information on their policies and measures, including the projected effect on their net emissions of such policies and measures for the period referred to in subparagraph (a) (i.e., the period up to the end of the present decade), "with the aim of returning individually or jointly to their 1990 levels these anthropogenic emissions of carbon dioxide and other greenhouse gases not controlled by the Montreal protocol."

Neither subparagraph 2(a) nor subparagraph 2(b), whether taken individually or jointly, creates a legally binding target and timetable for limiting greenhouse gas emissions.

Question. Does the Climate Convention require any implementing legislation or regulatory action for these provisions of the convention?

Answer. These provisions do not require any new implementing legislation nor added regulatory programs. The United States will implement this obligation through a variety of measures, including the Clean Air Act and its amendments, the National Energy Strategy, and the Intermodal Surface Transportation Act of 1991. In this regard, it should be noted that implementation of some elements of the national energy strategy depend on legislation presently being considered by Congress.

Question. A June 1, 1992 "fact sheet" issued by the White House at the Earth Summit in Rio states that "the aim of these [national action] plans and emissions projections is to return by the year 2000 greenhouse gas emissions to 1990 levels." Is the goal of this commitment to return greenhouse gas emissions in the year 2000 to 1990 levels as was stated in the aforementioned fact sheet? Will the aim of the U.S. national plan be to return greenhouse gas emissions in the year 2000 to 1990 levels? If so, what measures will the U.S. action plan contain to ensure that the U.S. meets this target?

Answer. The U.S. envisions that national action plans will include:

- A statement of national circumstances (factors affecting greenhouse gas emissions)
- A greenhouse gas inventory, including a statement of the methodologies and assumptions used in their derivation
- A list of national mitigation actions (including statement on assumptions used for calculating emissions limitations, e.g. savings per measure, penetration rate of measures) and adaptation actions
- A description of international cooperative activities related to climate change;
- A description of ongoing research programs; and
- A description of education, training, and public awareness programs.

The process of preparing and reviewing national plans provides opportunity for all countries to review activities that lead to net emissions of greenhouse gases (i.e. all gases in all sectors, including sinks and reservoirs). The U.S. set of actions already proposed, as discussed in the paper "U.S. Views on Global Climate Change," are expected to reduce annual U.S. net emissions of greenhouse gases between 7 and 11 percent from levels otherwise projected for the year 2000.

Question. In light of the objective of the convention, what does article 4 require for emissions after the year 2000?

Answer. The obligation in article 4.2(a) to adopt national policies and take corresponding measures on the mitigation of climate change, as well as the obligation in article 4.2(b) to report detailed information on such policies and measures, continue to apply regardless of the time period in question. Article 4.2(d) provides for review by the COP of the adequacy of 4.2 (a) and (b) at its first session and again by the end of 1998 and thereafter at regular intervals until the objective of the convention is met.

the timeframe for developing that plan? what person will be in charge of writing the plan and what federal agency will take the lead?

Answer. The specific contents of the national plan are still under discussion. However, it is expected that the United States will include the following elements in its plan:

- Statement of national circumstances (including geography and natural resources, climate, current pressing environmental problems, demographics and population, economic factors, energy issues, institutional systems, relevant policies, laws, administrative measures, and international obligations)
- Vulnerability to climate change and variability greenhouse gas inventory (including a statement of methodologies and assumptions used)
- Adaptation actions (including costs, benefits, effectiveness, economic efficiency, and opportunity costs for each action)
- Mitigation actions (including statement on assumptions used for calculating emissions reductions and on costs, benefits, effectiveness and opportunity costs of actions, and on jointly implemented mitigation actions)
- Emission trends with mitigation
- International cooperation (assistance with mitigation and adaptation)
- Research efforts.

The United States expects to have a draft of this plan completed by January 1993. The plan is being developed in an interagency process coordinated by the State Department. Agencies with the relevant technical expertise, including the Environmental Protection Agency, and the Department of Energy, will draft specific elements of the plan for interagency review and concurrence.

Question. Mr. Reilly, as you know from our discussions during the Clean Air Bill debate, Kentucky is home to many industries which, I suppose, would be considered emitters of greenhouse gases. Coal production and auto manufacturing are two. These constituents generally support this framework convention, but are concerned that it might at some point be interpreted as committing the U.S. to setting targets and timetables for the stabilization of greenhouse gases. I might also add that nationally, many experts are concerned about how such a commitment would impact economic growth and jobs in this country.

I was somewhat relieved by a May 8 letter from then domestic counselor Clayton Yeutter to John Dingell in which Mr. Yeutter said his interpretation of the document was that it does bind the U.S. to commitments of any kind.

You were intimately involved in drafting of this document. In your view, does the framework convention contain binding targets and timetables? What does it bind the U.S. to do? Is that also the view of the administration?

Answer. The convention does not contain legally binding targets and timetables with respect to greenhouse gas emissions.

With respect to commitments under the convention, the transmittal package from the President to the Senate enumerates these in detail. In summary, the convention calls upon all parties to prepare national inventories of human induced emissions, to implement appropriate national and regional strategies to mitigate and adapt to climate change, to report on these actions, to promote technology cooperation, to promote scientific research and to promote and cooperate in the full and open exchange of information and in education, training and public awareness. Industrialized countries are to provide technical and financial support to developing countries to enable them to meet certain costs of implementing the convention.

This is both my view and the view of the administration.

LETTER TO SENATOR HELMS FROM D. ALLAN BROMLEY

EXECUTIVE OFFICE OF THE PRESIDENT,
WASHINGTON, DC,
September 18, 1992.

SENATOR JESSE HELMS,
Foreign Relations Committee, Washington, DC

DEAR SENATOR HELMS: I would like to take this opportunity to set the record straight on a matter which was originally discussed during the confirmation hearing of Dr. Karl A. Erb to be an Associate Director of the Office of Science and Technology before the Committee on Commerce, Science and Transportation on May 21, 1992.

During this hearing, Senator Al Gore repeatedly asked me if I had ever given the President a scientific briefing on global climate change or if such a briefing had ever been attended by the President. The answer to those two questions is no; however,

countries in meeting their reporting commitments; in terms of other climate change measures taken by developing countries, developed countries are to meet the agreed incremental costs of measures that are agreed by the international entity designated as the financial mechanism. The Global Environment Facility of the World Bank, UNDP, and UNEP is to function as the financial mechanism on an interim basis.

C. Review Mechanisms

One of the major issues in the negotiations was what could be called the Convention's "review mechanism". First, this issue involved the extent to which Parties would be required to report on various aspects of their policies/activities relevant to climate change (e.g., their emissions inventories, how they were implementing their Convention obligations). Second, it involved the extent to which institutions would be established under the Convention to review such information; subsidiary questions concerned whether such review would be of a technical or policy nature or both, and whether the review would be conducted by government representatives or independent experts. Also at issue was whether there should be a differentiation between developed and developing countries with respect to both reporting and review. Options were propose along the entire spectrum of possibilities. In considering these options, much concern was expressed, particularly by developing countries, over potential "intrusion" on national sovereignty.

The United States supported extensive reporting requirements for all Parties, including with respect both to emissions inventories and implementation of Convention obligations. In the U.S. view, such an approach would ensure the exchange of critical information with respect to climate change, as well as provide for transparency. In terms of review, the U.S. supported a two-tiered review process, with a technical review of national reports being conducted by a subsidiary technical body composed of government representatives, and a policy review conducted by the Conference of the Parties. While the U.S. recognized the need for appropriate differentiation between developed and developing countries, it considered that developing countries had to have sufficient obligations to bring them effectively into the process; otherwise, the Convention's goal of achieving widespread participation would be thwarted.

SECTION 5. FRAMEWORK CONVENTION ON CLIMATE CHANGE

The Framework Convention on Climate Change, signed by President Bush on June 13, 1992 in Rio de Janeiro, is action-oriented and seeks to achieve a wide variety of goals, including:

- providing for all Parties to design and implement national strategies to mitigate climate change by addressing anthropogenic emissions by sources and removals by sinks of greenhouse gases;
- accommodating a wide variety of national political and economic circumstances and specifically avoiding the imposition of uniform, rigidly specified requirements (in favor of a more flexible approach enabling countries to develop strategies that best meet their individual situations, needs and capabilities).
- encouraging Parties to take account of climate change in their economic, social and environmental policies and to take account of economic, social and other concerns in their climate policies;
- assisting developing countries in collecting data on their net greenhouse gas emissions and in limiting the rate of growth in those emissions;
- defining a financial mechanism to provide funding for agreed incremental costs of projects in developing countries that produce global environmental benefits.
- increasing awareness of the causes and implications of potential climate change and response measures (requiring Parties to promote and cooperate in public education and training programs); and,
- improving countries' capacities to observe, model, and understand the global climate system (including requiring Parties to report detailed information on their greenhouse gas emissions regularly), and promoting the continued development of globally coordinated climate change research.

The Convention takes a comprehensive approach to addressing climate change embracing all sources and sinks of greenhouse gases (other than those controlled by the Montreal Protocol). It allows for economically efficient mitigation and adaptation responses. To oversee the achievement of these goals, the Convention establishes various institutions: a Conference of the Parties, a secretariat, a subsidiary body for science and technology, and a subsidiary body for implementation; and designates a financial mechanism.