UNDENIABLE OBLIGATIONS TO GAIA: U.S. REMAINING INVESTMENT OBLIGATIONS AFTER ITS WITHDRAWAL FROM THE PARIS AGREEMENT

Ching-Wen Hsueh*

ABSTRACT

The hostility of the United States (hereinafter "U.S.") toward the Paris agreement comes mainly from the fear that it will somehow lose its competitiveness and be taken advantage of by the rest of the world. The environmental concerns that make the Paris agreement necessary are recognized on the condition that the U.S. can take the lead and renegotiate a new deal. Otherwise, the U.S. will seek to be "the cleanest and most environment friendly country on Earth" solely by itself. Two messages from the U.S. withdrawal are clear: The U.S. policy will favor the conventional energy sector over green energies and prefers a unilateral approach to environmental protection. A policy change in environmental protection, featuring a more economic-oriented and "America First" outlook, will follow. The U.S. withdrawal echoes the presidential executive order to reverse or review climate change policies adopted by the Obama administration. This policy change will have legal consequences under both domestic and international legal frameworks. This essay explores whether or to what extent the withdrawal alleviates U.S. obligations concerning global warming.

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* Assistant professor, Department of International Business, National Chengchi University. The author can be reached at: cwh@nccu.edu.tw.

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I. INTRODUCTION

In early November 2016, when the world celebrated the entry into force of the Paris Agreement[1], very few people could have foreseen the promising results of the battle against global warming diminished due to the withdrawal of the U.S., which is the second largest CO2-emitting country, from the agreement it had hitherto supported. During his presidential campaign, Donald Trump was well known as a skeptic of human involvement in climate change. Once President Trump began to reverse former President Barack Obama's environmental policies,[2] the official announcement he made on June 1, 2017 that the U.S. would withdraw from the agreement was unsurprising. World leaders responded with disagreement to his decision. French President Emmanuel Macron asked the private sector in the U.S. to join France's efforts to fight climate change with the phrase "Make our planet great again," which is an ironic contrast to President Trump's campaign slogan, "Make America great again."[3] In addition to tweets and unofficial statements, President Trump's perceptions about the Paris agreement and global warming were clearly conveyed in his speech on the withdrawal of the U.S., which also implies U.S. environmental policy for at least 4 years.

President Trump criticized the Paris agreement from several perspectives. First, compliance with the Paris agreement will impose restrictions on U.S. industries and cause loss of millions of jobs, especially in the iron, steel, and conventional energy sectors. Second, other leading polluters of the world do not equally bear meaningful obligations under the Paris agreement. China will have more flexibility in terms of emission reduction goals, which is perceived as unfair by the U.S. Third, the Paris agreement is attacked as "less about the climate and more about other countries gaining a financial advantage over the United States."[4] It has also been accused of redistributing U.S. wealth to other countries. Fourth, the Paris agreement *per se* is not cost efficient. Even if the agreement is fully implemented with compliance from all parties, the reduction in temperature would still be insignificant. Thus, the investment of considerable resources is unreasonable, or even pointless. Fifth, the Green Climate Fund, the

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[1] Paris Agreement, Dec. 12, 2015, U.N. Doc. FCCC/CP/2015/L.9/Rev.1 (entered into force Nov. 4, 2016) [hereinafter Paris Agreement].

[2] *See Obama's Environmental Legacy: How Much Can Trump Undo?*, YALE ENV'T 360 (Nov. 14, 2016), http://e360.yale.edu/feature/obama_environmental_legacy_donald_trump_undo/3054/.

[3] Carla Herreria, *French President to U.S. Scientists: Come Work with Us on Climate Change*, HUFFINGTON POST (June 1, 2017, 9:16 PM), http://www.huffingtonpost.com/entry/french-president-macron-invit es-us-scientists-to-france-climate-change_us_5930983de4b0c242ca2279a2.

[4] Clark Mindock, *Donald Trump's Speech Pulling US Out of Paris Agreement on Climate Change: Read It in Full*, INDEP. (June 1, 2017, 9:44 PM), http://www.independent.co.uk/news/world/americas/us-politics/trump-paris-agreement-speech-read-in-full-climate-change-deal-withdrawal-a7768291.html.

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scheme under the Paris agreement for assisting developing countries to handle global warming issues, is not trustworthy because it lacks transparency in operations and money use. Last, but not the least, the Paris agreement prevents the president from unlocking restrictions on U.S. energy resources. An ambitious agreement, such as the Paris agreement, might lead to massive legal liability for nonfulfillment and intrude on the sovereignty of the U.S.[5]

The hostility against the Paris agreement mainly derives from the fear that the U.S. would somehow lose its competitiveness and be taken advantage of by the rest of the world. The environmental concerns of the Paris agreement will be recognized on the condition that the U.S. can take the lead and renegotiate a new deal. Otherwise, the U.S. will seek to be "the cleanest and most environment friendly country on Earth" solely by itself.[6] In short, two messages from the U.S. withdrawal are clear: the U.S. policy will favor the conventional energy sector over the green industries, and a unilateral approach to environmental protection is preferable. A policy change in the favor of environmental protection will occur, with a more economy-oriented and "America First" outlook. The U.S. withdrawal echoes the presidential executive order to reverse or review climate change policies adopted by the Obama administration.[7] This policy change will have legal consequences under both domestic and international legal frameworks. This essay explores whether the withdrawal can alleviate U.S. obligations on global warming, in terms of the Paris agreement *per se*, and of international investment laws. In Part II, the obligations under the Paris agreement are securitized to examine whether and to what extent they are inconsistent with the policy envisaged by President Trump. In addition, the withdrawal does not take effect immediately, and this raises the question of what the rights and obligations of the U.S. during this waiting period are. In part III, the author argues that even without the Paris agreement, the U.S. still has obligations to not favor less environment friendly industries, *inter alia* the conventional energy sector. Because the withdrawal is driven by economic and investment concerns, an analysis from the perspective of the international investment law seems suitable. In the last part, a brief observation on the legal implications of the withdrawal is provided.

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[5] *Id.*

[6] *Id*.

[7] *See* Office of the Press Secretary, *Presidential Executive Order on Promoting Energy Independence and Economic Growth*, WHITE HOUSE (Mar. 28, 2017), https://www.whitehouse.gov/the-press-office/2017/03/28/presidential-executive-order-promoting-energy-independence-and-economi-1.

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II. OBLIGATIONS UNDER THE PARIS AGREEMENT: UNDERSTANDINGS AND MISUNDERSTANDINGS

The Paris agreement was drafted within the United Nations Framework Convention on Climate Change (hereinafter "UNFCCC").[8] At the 21st UNFCCC Conference of the Parties (COP 21), the parties finally compromised on their political concerns, including even the U.S., which is usually cautious about joining international agreements on climate change. However, the U.S. later dramatically turned against the Paris agreement for its "unfair" obligations. If this was the case, some misunderstanding must have occurred, either for the U.S. to sign or withdraw from the Paris agreement. This discussion begins by describing the core elements of the agreement and then the effects of U.S. withdrawal.

A. Core Elements of the Paris Agreement

The Paris agreement can be divided roughly into two parts: substantive rules and institutional and procedural designs for implementation. The substantive rules consist of specific commitments for greenhouse gas (hereinafter "GHG") reduction, adaptation to climate change, support for loss and damage, and cooperation between parties. In contrast to the Kyoto protocol[9], the Paris agreement neither prescribes static GHG reduction nor mandates adverse effects for failing to comply. A bottom-up approach is adopted in which each state sets its own reduction goal, and the legal framework serves mainly as a "notary" that confirms the compliance of states.[10] The institutional and procedural designs for implementation are as vital as, or might be more vital than, the substantive rules to the goals.[11]

1. Objectives — The objectives of the Paris agreement are diverse, although limiting the temperature increase is the principal theme. The long-term goal is to limit the increase in the global average temperature to less than 2℃ above preindustrial levels. Additionally, a more ambitious target is to limit the temperature increase to 1.5℃ higher than preindustrial levels. To this end, the global peak in emissions will be set "as soon as possible".[12] In addition, the abilities of the states to adapt to the adverse impact of climate change should be increased, and finance resources should

[8] Framework Convention on Climate Change, June 2, 1992, 1771 U.N.T.S. 107 (entered into force Mar. 21, 1994) [hereinafter Convention on Climate Change].
[9] Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, (entered into force Feb. 16, 2005) [hereinafter Kyoto Protocol].
[10] Annalisa Savaresi, *The Paris Agreement: A New Beginning?* 34(1) J. ENERGY & NAT. RES. L. 16, 21 (2016).
[11] Sandrine Maljean-Dubois et al., *The Legal Form of the Paris Climate Change Agreement: A Comprehensive Assessment of Options*, 2015(1) CARBON & CLIMATE L. REV. 68, 83 (2016).
[12] Paris Agreement, *supra* note 1, art. 4.1.

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be distributed to low GHG emission developments and climate resilience.[13] Climate change issues are intertwined with the concerns of food security, sustainable development, and fulfillment of human rights, all of which are recognized in the Preamble as values that guide implementation.

2. Mitigation and Adaptation — In the face of the challenges of climate change, countries must attempt to halt the process of global warming by reducing GHG or adapting to extreme weather. The Paris agreement provides more flexibility for reduction target setting and implementation than does the Kyoto protocol.[14] Each party submits the amount of GHG reduction that it can contribute to temperature reduction; that is, the nationally determined contributions (hereinafter "NDCs"). Only submitting the NDCs is mandatory; the exact amount of the NDCs and the timeframe for achieving them is self-defined, which can be in accordance with each party's resources, capacity, and development phase. Additional guidance regarding the NDCs is entrusted to the Ad Hoc Working Group on the Paris Agreement (APA);[15] however, no result has yet been reached.[16] The Paris agreement provides a "ratchet-up mechanism," urging the parties to progress over time, by submitting new NDCs every 5 years. Succeeding NDCs are not necessarily superior to previous ones in the amount but should indicate progress and the greatest possible ambition depending on parties' national circumstances.[17] Developed country parties are expected, but not obliged, to adopt absolute reduction targets to take the lead as emphasized by the UNFCCC[18] and the Paris agreement. To make compliance assessment possible, parties must provide necessary information, and they must account for their emissions and removal of GHGs.[19] NDC operations are based on the principles of self-determination and self-implementation, which would require guidance to establish common methodologies and standards for accounting purposes.[20] Additional instructions are currently unavailable because the guidance is under preparation.[21] This flexibility was also provided so that parties can adjust their existing NDCs at any time, subject to the guidance yet to be

[13] *Id.* art. 2.1.

[14] Joint Implementation, Clean Development Mechanism, Emission Trading, see Kyoto Protocol, *supra* note 9, arts. 6, 12, 17.

[15] G.A. Dec. 1/CP.21, U.N. Doc. FCCC/CP/2015/10/Add.1 (Jan. 29, 2016) [hereinafter Decision of COP 21].

[16] U.N. Framework Convention on Climate Change, *Report of the Ad Hoc Working Group on the Paris Agreement on the Third Part of Its First Session, Held in Bonn from 8 to 18 May 2017*, U.N. Doc. FCCC/APA/2017/2, at 5 (June 30, 2017).

[17] Paris Agreement, *supra* note 1, art. 4.3.

[18] Convention on Climate Change, *supra* note 8, art. 3.

[19] Paris Agreement, *supra* note 1, arts. 4.8, 4.13.

[20] *Id.* arts. 4.10, 4.13.

[21] Climate Change Secretariat, *Progress Tracker: Work Programme Resulting from the Relevant Requests Contained in Decision 1/CP.21*, U.N. (June 20, 2017), http://unfccc.int/files/paris_agreement/application/pdf/pa_progress_tracker_200617.pdf.

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determined by Conference of the Parties serving as the meeting of the Parties to the Paris Agreement (CMA).[22]

Because adaptation measures are recognized as the second line of defense to climate change, each party is required, as appropriate, to engage in adaptation plans, including formulating and implementing their own national action plans.[23] The parties should submit periodic reports about their support needs in adaptation, action taken, and policy priorities.[24]

3. Market-Based Mechanisms and International Cooperation — Market-based mechanisms enable parties to make up the deficit in GHG reduction with emission reduction units (hereinafter "ERUs") acquired from other parties. Through market-based mechanisms, parties have an incentive to cooperate with each other. Furthermore, these mechanisms are necessary for the parties of the Kyoto protocol because they need flexibility in case they fail to reach the binding reduction target. By contrast, the parties of the Paris agreement might not have the same need because the NDCs are self-determined and not mandatory. Nonetheless, cooperation among parties is desirable at all times. The Paris agreement recognizes that parties may use "international transferred mitigation outcomes" to implement their NDCs.[25] The market-based mechanisms for the Paris agreement are under construction with the objectives of promoting overall GHG mitigation, sustainable development, and the participation of public and private entities.[26]

The Paris agreement also calls for nonmarket-based approaches that assist other parties without receiving ERUs in return, such as technology transfer, capacity building, and financial support.[27] Financial resources should be provided to developing countries to reduce GHGs and adapt to climate change. Prior to 2025, developed countries are urged to collectively provide at least US$100 billion per year.[28] No new mechanisms for financial resources and transfer of technology were established under the Paris agreement. Those established under the UNFCCC will continue to serve their present purpose and the financial resources for the Paris agreement.[29]

4. Climate Justice and "Loss and Damage" — The Paris agreement is the first international agreement that explicitly incorporates, in moderate wordings, the concept of climate justice in its preamble. Although the definition of the concept varies, all involve the inherent unfairness that

[22] Paris Agreement, *supra* note 1, art. 4.11.
[23] *Id.* art. 7.9.
[24] *Id.* art. 7.10.
[25] *Id.* art. 6.2.
[26] *Id.* art. 6.4.
[27] *Id.* art. 6.8.
[28] Decision of COP 21, *supra* note 15, ¶ 53.
[29] Paris Agreement, *supra* note 1, arts. 9.8, 10.3.

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people who suffer the most from climate change are those who have the smallest impact on its cause.[30] In line with climate justice, the fair and just solution to climate change must include equality, human rights, collective rights, and historical responsibility.[31] That would also imply compensation for "loss and damage," which refers to the negative effects of climate change that people cannot cope with or adapt to.[32] Whether to address loss and damage was controversial in negotiations, but it was ultimately included in the Paris agreement. Developed countries, including the U.S., have concerns that liability and compensation for loss and damage would become a "blank check" leading to unexpected financial burden[33] and even litigation. The Paris agreement adopted a conciliatory approach to provide support for loss and damage but not to include liability and compensation.[34] The Warsaw International Mechanism for Loss and Damage associated with Climate Change Impacts is entrusted with topics concerning irreversible and permanent damage, slow-onset events, resilience, insurance, and early warning systems.[35]

5. Implementation and Supervision — The substantive rules for measures countering climate change are more of a voluntary than mandatory nature. The key to fulfilling the substantive rules lies in increasing parties' willingness to comply. The Paris agreement resorts to peer pressure and public condemnation.[36] Therefore, the requirements of transparency, which are preconditions for implementation and supervision,[37] are ultimately relatively rigid obligations. The parties are obliged to regularly provide a national inventory report of resources and GHG removal. Additionally, they must provide the necessary information for tracking progress related to NDC implementation and information, as appropriate, related to adaptation to climate change. Developed country parties are imposed with an extra obligation to submit information on financial support, technology transfers, and capacity building, whereas developing country parties are suggested to provide information on the

[30] KEELY BOOM ET AL., CLIMATE JUSTICE: THE INTERNATIONAL MOMENTUM TOWARDS CLIMATE LITIGATION 7 (2016), https://www.boell.de/sites/default/files/report-climate-justice-2016.pdf.
[31] *Id.*
[32] KOKO WARNER ET AL., EVIDENCE FROM THE FRONTLINES OF CLIMATE CHANGE: LOSS AND DAMAGE TO COMMUNITIES DESPITE COPING AND ADAPTATION 20 (2012), https://collections.unu.edu/eserv/UNU:1847/pdf10584.pdf.
[33] KEELY BOOM ET AL., *supra* note 30, at 10.
[34] Decision of COP 21, *supra* note 15, ¶ 51.
[35] Paris Agreement, *supra* note 1, art. 8.4.
[36] Kristina Daugirdas & Julian Davis Mortenson, *United States Joins Consensus on Paris Climate Change Agreement*, 110(2) AM. J. INT'L L. 374, 378 (2016).
[37] Paris Agreement, *supra* note 1, arts. 13.5-13.6.

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support required and received.[38] The common modalities, procedures, and guidelines for the requirement of transparency are yet to be determined.[39]

Although the Paris agreement does not provide mechanisms for enforcement, this does not mean that no mechanism exists to ensure compliance. Supervision is performed by expert assessment of parties' implementation. All the information submitted must undergo a technical expert review, which can be seen as an evaluation of parties' performances. The review not only checks the consistency of the information with transparency requirements but also discloses the achievements made and identifies areas for improvement.[40] Moreover, parties must participate in considering adaptation progress and NDC implementation. A formal assessment on the collective progress and achievement of long-term goals, referred to as the "global stocktake," shall be conducted regularly.[41] The global stocktake will first be conducted in 2023 and every 5 years thereafter.[42] In addition to the expert review and global stocktake, the Paris agreement entrusts an expert-based committee, which is a compliance mechanism yet to be established, with the task of facilitating and promoting compliance.[43]

In summary, the substantive rules under the Paris agreement might not appear to be strongly binding on parties. The agreement has established obligations on parties to submit commitments determined by themselves and provided the codes of conduct, which are not legally binding. The Paris agreement was designed to introduce a forum where parties must specify the actions and contributions that they propose to make. The substantive rules reflect the latest available science and equity concerns.[44] The implementation of the substantive rules can be enhanced through peer pressure and supervision procedures. The actual effect of the Paris agreement remains to be seen. One certainty exists: peer pressure will decrease if any parties start to challenge or breach the rules commonly agreed upon. Despite all the efforts to include the U.S.,[45] the Paris agreement might be more successful, in terms of compliance, without the U.S. that has already decided not to cooperate in substance.

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[38] *Id.* art. 13.7.
[39] *Id.* art. 13.13.
[40] *Id.* art. 13.12.
[41] *Id.* art. 14.1.
[42] *Id.* art. 14.2.
[43] *Id.* art. 15.
[44] Hari Osofsky et al., *The 2015 Paris Agreement on Climate Change: Significance and Implications for the Future*, 46 ENVTL. L. REP.: NEWS & ANALYSIS 10267, 10272 (2016).
[45] *See id*. at 10273.

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B. Problems with the Withdrawal

The U.S. withdrew from the Paris agreement because the Trump administration plans to make a policy change in favor of conventional energy sectors, which they believe to be stalled by the Paris agreement. In addition, President Trump labeled the agreement "unfair" for its differential treatment to developing countries, *inter alia* China.[46] However, such perceptions might be misleading, and the withdrawal might result in problems that are worth contemplating.

1. Withdrawal Based on Misperceptions — The decision to withdraw is problematic because none of President Trump's criticisms about the Paris agreement are valid. In terms of policy choices, the U.S. is not obliged to adopt the policy against the conventional energy sector under the Paris agreement. Parties are given sufficient flexibility to adopt policies in accordance with their domestic circumstances, including economic development. The Paris agreement is a hybrid of legal forms that blends binding rules with soft laws. NDC submission is mandatory, whereas NDC content is fully discretionary, and the nonfulfillment of the NDCs does not lead to adverse legal consequences. Instead of a strict obligation to implement the NDCs, parties are required to pursue domestic mitigation measures in good faith.[47] Developed country parties must provide information on financial support, technology transfer, and capacity building, although they are not obliged to assist developing countries in this regard. In other words, the U.S. bears only commitments in quantity and quality, which it unilaterally decided for itself. The United States intended to attain a GHG reduction of 26%-28% below its 2005 level by 2025. The year 2025 is the only deadline without any interim checkpoint, but an interim target provides for a 17% reduction by 2020. An even more ambitious target is an 80% reduction by 2050. Additionally, the U.S. intended not to utilize international market measures to implement its 2025 target.[48]

The policy change in favor of conventional energy makes it difficult, if not impossible, to achieve the NDCs. However, the commitment to achieve the NDCs does not entail mandatory implementation of the NDCs in any case, because many parties clearly opposed the inclusion of an obligation to achieve the NDCs.[49] Furthermore, the NDCs could be downgraded to include new policy changes. Despite the constructive reasons for not

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[46] *See* Mindock, *supra* note 4.

[47] Daniel Bodansky, *Paris Climate Change Agreement: A New Hope?*, 110(2) AM. J. INT'L L. 288, 304 (2016).

[48] U.S. COVER NOTE INDC AND ACCOMPANYING INFORMATION 4 (2015), http://www4.unfccc.int/Submissions/INDC/Published%20Documents/United%20States%20of%20America/1/U.S.%20Cover%20Note%20INDC%20and%20Accompanying%20Information.pdf.

[49] Bodansky, *supra* note 47, at 301.

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downgrading the NDCs,[50] the flexibility embodied in the Paris agreement allowed for downgrades to some extent. First, the NDCs cannot be considered unilaterally binding acts that qualify as an obligation to implement. The prescriptive color of the NDCs; that is, "shall . . . maintain" in the first sentence of Article 4.2, is negated by the term "shall pursue" in the second sentence of the same provision. An obligation to "pursue"[51] only indicates an effort to attempt and does not guarantee the achievement of the goal. In fact, partial fulfillment, or even worse, nonfulfillment of the NDCs, is no better than complete fulfillment of the downgraded NDCs. If partial fulfillment or nonfulfillment is legally acceptable, then so should complete fulfillment of the downgraded NDCs. Second, Article 4.11 does not prohibit downgrading the NDCs but simply indicates a preference for more ambitious NDCs. The permissive wording "may" in Article 4.11 allows parties to level up their ambition "at any time" instead of waiting for the 5-year route. This provision remains silent on whether downgrading the NDCs is prohibited, a matter that was discussed in negotiations; however, no agreement was reached.[52] Again, parties have the right to decide on the content of the NDCs, except as otherwise provided for, given that all limitations on the NDCs use the prescriptive "shall".[53] The restrictive interpretation is recognized as applying in cases regulating the rights of the state,[54] which is the case here. Furthermore, an interpretation that would deny the possibility of downgrade does not fully respect the self-determining nature of the NDCs. This could further drive parties that have justifications for modifications away from continuing participation in the Paris agreement. Despite its policy change, the U.S. can still remain a party to the Paris agreement if it has any intention of contributing to GHG reduction.

The argument of the "unfair" features of the Paris agreement is weak, even absurd. First, the Paris agreement has moved beyond the two-track model that differentiates between developed and developing country parties. Learning from the unpleasant experiences of the Kyoto agreement, the Paris agreement signifies a "U-turn" in international climate change governance on differentiation.[55] The developing and developed country parties bear the same obligations to submit the NDCs and to follow the

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[50] *E.g.*, Lavanya Rajamani, *The US and the Paris Agreement: In or Out and at What Cost?*, BLOG EUR. J. INT'L L. (May 10, 2017), https://www.ejiltalk.org/the-us-and-the-paris-agreement-in-or-out-and-at-what-cost/.

[51] "Follow or chase (someone or something)", "Seek to attain or accomplish (a goal) over a long period," SHORTER OXFORD ENGLISH DICTIONARY (William Little ed., 6th ed. 2007).

[52] U.N. Framework Convention on Climate Change, *Negotiating Text*, U.N. Doc. FCCC/ADP/2015/1, ¶¶ 180-81 (Feb. 25, 2015).

[53] *E.g.*, Paris Agreement, *supra* note 1, arts. 4.12-4.13, 4.15.

[54] *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 635 (7th ed. 2008).

[55] Savaresi, *supra* note 10, at 22.

requirements of transparency, whereas none of them are obligated to undertake absolute GHG reduction targets.[56] Second, favors provided to developing country parties level the gap between developing and developed country parties,[57] which embodies substantive equality, rather than discrimination against developed country parties. Developed country parties are not obliged to provide new financial support that has not been envisaged under the UNFCCC, transfer of technology, or compensation for loss and damage.[58] Moreover, the fulfillment of developing country parties' obligations is not contingent on the favors.[59] Instead, the support and favors serve as incentives for a higher ambition in developing country parties' actions.[60] That is, developing country parties are not paid to do what is within their capacity: they are paid to do what might be beyond their original abilities.

2. Suspended Status of the United States Under the Paris Agreement — The misperceptions concerning the Paris agreement led to the decision on whether to withdraw, which is doubtful and unreasonable. However, this is not the only problem with the U.S. withdrawal. According to Article 28 of the Paris agreement, parties can withdraw from the agreement 3 years after the date of entry into force, which will be Nov. 4, 2019. The withdrawal will take effect one year after the receipt of the notice of withdrawal, and the earliest date will be Nov. 4, 2020. Unless a dramatic change occurs in the U.S. administration—either President Trump withdrawing the withdrawal or losing reelection—for at least 3 years more, the U.S. and the other parties are trapped in a suspended relationship that benefits no one. The U.S. is obliged to remain in an agreement that it is about to leave. The problem is that the U.S. may not fully disregard its commitments or obligations during this period. Although the U.S. NDCs are not mandatory obligations, the U.S. is required to pursue domestic mitigation measures in good faith.[61] If the United States does not even attempt to implement its commitments and obligations or change its policy of favoring the conventional energy sector to some extent, it will be in breach of the Paris agreement. In addition, the U.S. might encounter problems with transparency requirements. The transparency criteria require parties to submit detailed information necessary for supervising implementation. On one hand, the U.S. might feel uneasy in providing information indicating its noncontribution to fighting climate change. On the other hand, the technical expert review will experience similar unease at turning a blind eye to the

[56] Paris Agreement, *supra* note 1, arts. 4.2, 4.4, 4.8.
[57] *E.g.*, *id.* art. 13.2.
[58] Paris Agreement, *supra* note 1, arts. 9.1, 10; Decision of COP 21, *supra* note 15, ¶ 51.
[59] E.g., Paris Agreement art. 13.2 requires flexibility for developing countries.
[60] Paris Agreement, *supra* note 1, art. 4.5.
[61] Bodansky, *supra* note 47, at 312.

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U.S. submissions. Furthermore, other parties must consider the actual status of the U.S. at follow-up meetings, which are entrusted with the task of providing guidelines and mechanisms for the implementation of obligations and commitments. The U.S., as a current party to the agreement, is legally eligible to participate in decision-making procedures and to submit opinions. However, whether a departing party can vote on a framework that it will not be governed by is questionable; it could instead be downgraded to an observer in these follow-up meetings. In any event, the U.S. is likely to be politically marginalized in shaping the "rule book" of the Paris agreement.[62] The suspended status will last for at least 3 years, unless the U.S. withdraws from the UNFCCC, in which case the period of uncertainty could be shortened to 1 year.[63]

III. INTERNATIONAL INVESTMENT AGREEMENT AS A LEVERAGE AGAINST THE LESS ENVIRONMENT FRIENDLY POLICY CHANGE

After withdrawing from the Paris agreement, the U.S., as a party to the UNFCCC, must still contribute to GHG reductions. The U.S. refused to utilize the flexibility provided in the Paris agreement because it misinterpreted the Paris agreement as inflexible or because a policy change in the favor of less environment friendly sectors might require ratcheting down or at least not ratcheting up GHG reductions.[64] As elaborated in the previous section, the Paris agreement *per se* is not a legal obstacle to the policy change, because enforcement and compliance with the Paris agreement rely on peer pressure and self-implementation. However, the policy change in the favor of a specific sector, environment friendly or not, causes concerns under international economic laws, including trade and investment law, which value noninterference of the state in the market. In cases where parties of the Paris agreement intend to adopt measures in the favor of environment friendly sectors, concerns will be raised regarding whether international economic laws can be harmonized with environmental concerns.[65] In such cases, international economic laws are deemed as an adverse factor for environmental protection. Notably, the relationship is reversed when states intend to adopt measures in favor of less environment friendly sectors, such as the conventional energy sector in the present case. In this section, the discussion is narrowed to issues concerning the international investment law. The U.S. might have

[62] Lavanya Rajamani, *Reflections on the US Withdrawal from the Paris Climate Change Agreement*, BLOG EUR. J. INT'L L. (June 5, 2017), https://www.ejiltalk.org/reflections-on-the-us-withdrawal-from-the-paris-climate-change-agreement/.

[63] Convention on Climate Change, *supra* note 8, art. 25.

[64] *See* Mindock, *supra* note 4.

[65] *See* Charles E. Di Leva & Xiaoxin Shi, *The Paris Agreement and International Trade Regime: Considerations for Harmonization*, 17(1) SUSTAINABLE DEV. L. & POL'Y 20, 22-28 (2016).

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obligations to not favor the conventional energy sector under the international investment law after its withdrawal from the Paris agreement. The manner in which the U.S. government grants advantages to the conventional energy sector plays a major role in this regard. Different types of measures favoring the conventional energy sector will not have the same implications under international investment agreements. For instance, the lowering standards for the conventional energy sector might be unacceptable, although financial support to them might be consistent with international investment agreements.

A. Policy Change in Favor of Conventional Energy Sectors and the Linkage to Protections for Foreign Investors

The U.S. policy on climate change can be changed to such an extent that disputes under international investment laws might arise. The Obama administration took measures to mitigate GHG emissions and the adverse effects of global warming, among which the Clean Power Plan (hereinafter "CPP") was the most controversial.[66] The CPP was authorized by Section 111 of the Clean Air Act[67] to limit GHG emissions and mandate other performance requirements for fossil fuel-fired power plants. The CPP forced states to reconfigure their electricity generating portfolios to favor renewable sources.[68] In March 2017, the Trump administration started to undo or review Obama's policy on climate change. All existing regulations will be reviewed to lift the burden on the development of domestically produced energy, "with particular attention to oil, natural gas, coal, and nuclear energy resources."[69] Presidential memorandums and executive orders were revoked, which indicated major changes in the U.S. policy.[70] First, support for investment to increase resilience against climate change would be reduced and so would the support for private investment in natural resource restoration. Second, carbon pollution standards for power plants would be rescinded or reviewed. Third, climate change is no longer a matter of national security. The administrative branch will no longer invest as many resources into fighting climate change at it does for

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[66] 27 federal state and a number of private parties resort to United States Court of Appeals for the District of Columbia Circuit, State of West Virginia v. EPA, No. 15-1363 (D.C. Cir. Oct. 23, 2015). The Supreme Court granted the application for stay on CPP until the judgements coming out. *See* Review of the Clean Power Plan, 83 Fed. Reg. 16329-30 (Apr. 4, 2017) (to be codified at 40 C.F.R. pt. 60), https://www.federalregister.gov/documents/2017/04/04/2017-06522/review-of-the-clean-power-plan.

[67] Clean Air Act, 42 U.S.C. §7411 (1970).

[68] Ethan G. Shenkman & Jonathan S. Martel, *Trump Issues Sweeping Executive Order on Energy, Environment and Climate Change*, ARNOLD & PORTER KAYE SCHOLER LLP (Mar. 29, 2017), https://www.apks.com/en/perspectives/publications/2017/03/trump-issues-sweeping-executive-order.

[69] Office of the Press Secretary, *supra* note 7.

[70] *Id.*

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national security. Rather than worrying about climate change and the GHG emissions of the conventional energy sector, the U.S. will prioritize the independence of domestic energy supply, with focus on conventional energy resources. The "social cost of carbon" is no longer recognized, and federal lands are reopened for coal mining.[71] In addition, the CPP is under review. The extent to which the conventional energy sector will benefit from this policy change remains to be seen.

In summary, the conventional energy sector will face fewer GHG emission limits, and financial support for energy sources that compete with the conventional energy sector will be withdrawn. Both these measures can have implications for international investment agreements (hereinafter "IIAs"). IIAs are involved whenever the interests of foreign investors are involved. Because IIAs signed by the U.S. tend to cover stock shares,[72] U.S. companies in the renewable energy sector that have foreign shareholders are eligible for protection under IIAs. In such cases, the withdrawal of support for the renewable energy sector and lowering standards for the conventional energy sector might hurt the interests of the renewable energy sector and can therefore constitute an infringement of protection for foreign investors. In the following sections, the author uses cases involving the U.S. and U.S. investors as examples to elaborate how IIAs might affect the current less environment friendly policy. However, investment arbitrations are not legal precedents and are sometimes even inconsistent. Nonetheless, rulings on these cases are instructive and inspiring.

B. Substantive Protection for Foreign Investors of the Renewable Energy Sector

In theory, and maybe even in reality, the U.S. can face investment arbitration against the policy change against the renewable energy sector from foreign individuals or nongovernmental organizations that either care about the profits of the renewable energy sector or global warming. The investor-state dispute settlement[73] enables these people or organizations to claim their rights under IIAs and, to some extent, provides leverage to fight against the withdrawal of the support for the renewable energy sector in the U.S. To use this leverage, they should acquire shares, not necessarily the majority. The tribunal in *CMS v. Argentina*, which is a case brought under the Argentina–United States Bilateral Investment Treaties, stated no

[71] *See* Shenkman & Martel, *supra* note 68.

[72] *E.g.*, 2012 U.S. Model Bilateral Investment Treaty, art. 1, https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf [hereinafter 2012 U.S. Model BIT].

[73] The concept of ISDS, see RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 235-36 (2d ed. 2012).

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requirements under the international law bar claims raised by minority shareholders.[74] Furthermore, the protection of minority shareholders is not limited to the ownership of shares. It extends to the assets of a company.[75] That is, each and every shareholder, regardless of the amount of shares, can represent the company. The U.S. may be more exposed to investment arbitration for environmental protection than expected if the shares of companies in the renewable energy sector are traded in an open market.[76]

1. Sudden Withdrawal of Support for the Renewable Energy Sector as an Infringement of Fair and Equitable Treatment — The exact measures applied to withdraw support for companies in the renewable energy sector remain to be seen. However, the withdrawal of support will likely fail the requirements of fair and equitable treatment (hereinafter "FET"), or indirect expropriation. In terms of FET, the withdrawal of support *per se* might infringe investors' legitimate expectations and is therefore inconsistent with FET.[77] Investors' legitimate expectation derives from the legal framework, acts, or assurances of the host state. A reversal of the assurance of the host state would violate the principle of FET.[78] Support for the renewable energy sector is provided by a presidential executive order, which is not only a part of the U.S. legal framework but also represents the U.S. policy at the highest level. Investors have a clear expectation that the U.S. is determined to fight climate change, which is a long-term task, and thus the support should continue for a certain period at least. Furthermore, the requirement for transparency plays a key role in FET, particularly in cases where the government of a host state acts inconsistently. For instance, in *Metalclad v. Mexico*, the central government granted permission to investors, but the municipality refused to grant a construction permit. The tribunal held that the central government has a duty to avoid misunderstandings and confusion about legal requirements, so that investors can proceed with confidence that they are acting in accordance

[74] CMS Gas Transmission Company v. The Argentine Republic, ICSID Case No. ARB/01/8, Decision on Jurisdiction, ¶ 48 (July 17, 2003).

[75] DOLZER & SCHREUER, *supra* note 73, at 58.

[76] This is not a hypothetical scenario. In 2017, the Singaporean investor, who bought the share shares of the Taiwanese financial holding company in the open market, filed a case against Taiwan Ministry of Finance. The issues concern with the acquisition and merger of the financial holding company and a bank, which were usually solved at domestic level. *See* SURFEIT HARVEST INVESTMENT HOLDING PTE LTD V. REPUBLIC OF CHINA (TAIWAN), https://www.italaw.com/cases/5929 (last visited Aug. 24, 2017).

[77] The concept of FET is not clearly defined. There are investment tribunals recognizing legitimate expectation embodies the FET. *See, e.g.*, Glamis Gold, Ltd. v. The United States of America, UNCITRAL Arbitration Rules, Award, ¶ 321 (June 8, 2009); Methanex Corp. v. United States of America, UNCITRAL Arbitration Rules, Final Award of the Tribunal on Jurisdiction and Merits, pt. IV, ch. D, ¶ 9 (Aug. 3, 2005) [hereinafter Methanex v. United States].

[78] DOLZER & SCHREUER, *supra* note 73, at 134; Thomas W. Wälde, *Energy Charter Treaty-based Investment Arbitration: Controversial Issues*, 5(3) J. WORLD INV. & TRADE 373, 387 (2004).

with the law.[79] Additionally, the tribunal held that an investor was fully entitled to rely on the representations of the central government in the case of inconsistency.[80] In the U.S. case, inconsistency is present at the presidential level; however, the U.S. government did not pay any attention to investors' conceptions, which were based on the previous executive order. Investors never had an opportunity to be involved in the decision-making procedure before the withdrawal of support was announced.

2. Withdrawal of Support for the Renewable Energy Sector as Indirect Expropriation — To avoid uncertainty, the U.S. tends to publish clear instructions for the determination of indirect expropriation.[81] Whether the action or series of actions of the host state constitutes an indirect expropriation is determined on a case-by-case and fact-based inquiry. Among other things, three factors should be taken into consideration: (1) the economic impact of the government action, although not the sole factor for determination; (2) the extent to which the government action interferes with investors' reasonable expectations; and (3) the characteristics of government actions, including its objectives and context.[82] Furthermore, the government actions in principle do not constitute indirect expropriation in cases of nondiscriminatory regulatory actions that are designed to protect legitimate public welfare objectives, such as public health, safety, and environment.[83]

According to these instructions, the withdrawal of support can constitute an indirect expropriation. First, the withdrawal of support can have an adverse effect on companies in the renewable energy sector. The economic impact is not limited to the actual loss of investors but covers the benefits reasonably-to-be expected[84] and market share.[85] The values of companies in the renewable energy sector can decrease, either because of the loss of support *per se* or because the market share in the energy sector that could have increased would no longer increase. If the adverse impact is sufficiently substantial, indirect expropriation can occur. Second, the legitimate expectations of investors are infringed. The withdrawal of

[79] Metalclad Corp. v. The United Mexican States, ICSID Case No. ARB(AF)/97/1, Award, ¶ 76 (Aug. 30, 2000) [hereinafter Metalclad v. Mexico].
[80] *Id.* at ¶ 89.
[81] *See, e.g.*, 2012 U.S. Model BIT, *supra* note 72, art. 4, annex B; Letter from Robert B. Zoellick, U.S. Trade Representative, to George Yeo, Minister for Trade & Industry (May 6, 2003) (on file with the United States–Singapore Free Trade Agreement); Free Trade Agreement Between the United States of America and the Republic of Korea, U.S.–S. Kor., annex 11-B, June 30, 2007 [hereinafter KORUS FTA]; United States–Australia Free Trade Agreement, U.S.–Austl., annex 11-B, May 18, 2004.
[82] KORUS FTA, *supra* note 81.
[83] *Id.*
[84] Metalclad v. Mexico, *supra* note 79, at ¶ 103.
[85] Methanex v. United States, *supra* note 77, at ¶ 17.

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support is unexpected and unforeseeable, even to a prudential investor. Indeed, investors should have foreseen that laws would not always be the same. However, changes in the legal system of a host state should not be beyond a prudential investor's expectations. In *Methanex v. USA*, the tribunal described the United States as "a political economy in which it is widely known, if not notorious, that governmental environmental and health protection institutions . . . restrict the use of those compounds for environmental and/or health reason."[86] That the U.S. would simply abandon the fight against climate change and choose a less environment friendly policy was regarded as unlikely. As elaborated in the previous section, the executive order signed by former President Obama is the basis for investors' expectations, and the failure of a host state to respect those expectations caused investors to suffer damage.[87] Third, the objective of the withdrawal of support might not be legitimate or even consistent with public welfare. Notably, public welfare objectives require some genuine public interests.[88] Whether the objective is legitimate is not at the discretion of a host state. The withdrawal of support is regarded as a part of the program to assist energy independence, economic growth, and job creation,[89] none of which are explicitly recognized in the U.S. BIAs in determining indirect expropriation.[90] Moreover, these objectives favor a specific group of companies, particularly those in the conventional energy sector, rather than the general public. Even if these objectives correspond with the public interest, whether the withdrawal of the support can assist these goals to any extent is questionable. Additionally, the withdrawal of support clearly provides nothing to the fight against climate change, which involves the genuine interest of all mankind.

3. Lowering Standards for the Conventional Energy Sector as an Infringement of National Treatment — In addition to the withdrawal of support, the lowering of standards for conventional energy may be inconsistent with investment agreements. The CPP and carbon pollution standards are all under review, and the results are yet to be reached. Nonetheless, the presidential executive order signed by President Trump indicated that GHG restrictions on the domestic conventional energy sector would be lowered or revoked. If requirements on the domestic conventional energy sector are all, or to a great extent, repealed, national treatment (hereinafter "NT") may become a concern. NT requires equal treatment for

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[86] *See id.* at ¶ 9; Int'l Thunderbird Gaming Corp. v. The United Mexican States, UNCITRAL Arbitration Rules, Arbitral Award, ¶ 147 (Jan. 26, 2006) [hereinafter Thunderbird v. Mexico].

[87] Thunderbird v. Mexico, *supra* note 86, at ¶ 147.

[88] ADC Afflicate Ltd. and ADC & AMDC Mgmt. Ltd. v. Republic of Hungary, ICSID Case No. ARB/03/16, Award, ¶ 433 (Oct. 2, 2006), https://www.italaw.com/sites/default/files/case-documents/ita0006.pdf.

[89] Office of the Press Secretary, *Supra* note 7.

[90] *See* sources sited *supra* note 81.

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foreign and domestic investors in companies in the energy sector. NT can be infringed, if a basis for comparison, differentiation between foreign and domestic investors, and no justification for this differentiation are observed.[91]

Companies in renewable and conventional energy sectors are in the same business. Even in the narrow sense of "like circumstances,"[92] they have a basis for comparison. The question is whether lowering standards for the conventional energy sector constitute differentiation. The effects of the measures on competitive situations between the conventional and renewable energy sectors would be highly relevant in this regard. In *Thunderbird v. Mexico*, the tribunal held that NT does not require proving that the differentiation is because of nationality, and the fact of differentiation suffices.[93] In *SD Myers v. Canada*, whether the practical effect of the measure is to create a disproportionate benefit for nationals is essential for assessing NT.[94] In *ADF v. USA*, the tribunal examined how competitive situations are affected.[95] For environmental protection purposes, GHG emission standards should have been identical for conventional and renewable energy sectors. Companies in the renewable energy sector can adapt to standards more easily compared with those in the conventional energy sector, which give them competitive advantages. Less restrictive GHG emission limitations than the current ones, or the removal of all such limitations, might deprive the renewable energy sector of its advantages and create benefits for the conventional energy sector. The benefits could be substantial because the conventional energy sector can externalize the social costs of carbon emissions, which were once recognized in the U.S. executive orders. If that is the case here, the next question is whether any justification for differentiation can be determined. In practice, justifications are not confined to the common welfare of the general public. In *SD Myers v. Canada*, the tribunal considered ensuring "the economic strength" of an industry, in part, as a legitimate goal.[96] However, no clear description of the content of justifications is available.

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[91] *See, e.g.*, Pope & Talbot Inc. v. The Government of Canada, UNCITRAL Arbitration Rules, Award on the Merits of Phase 2 (Apr. 10, 2001); S.D. Myers, Inc. v. Government of Canada, UNCITRAL Arbitration Rules, Partial Award (Nov. 13, 2000) [hereinafter S.D. Myers v. Canada]; ADF Grp. Inc. v. United States of America, ICSID Case No. ARB(AF)/00/1, Award (Jan. 9, 2003) [hereinafter ADF v. USA]; Marvin Roy Feldman Karpa v. United Mexican States, ICSID Case No. ARB(AF)/99/1, Award (Dec. 16, 2002), 18 ICSID Review-FILJ (2003); Occidental Exploration & Production Co. v. The Republic of Ecuador, LCIA Case No. UN3467, Final Award (July 1, 2004).

[92] Marvin Roy Feldman Karpa v. United Mexican States, ICSID Case No. ARB(AF)/99/1, Award, ¶ 171 (Dec. 16, 2002).

[93] Thunderbird v. Mexico, *supra* note 86, ¶ 177.

[94] *See* S.D. Myers v. Canada, *supra* note 91, ¶ 252.

[95] ADF v. USA, *supra* note 91, ¶ 157.

[96] *See* S.D. Myers, Inc. v. Canada, *supra* note 91, ¶ 255.

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Consistency with the relevant rules of the international law can be the reference point for determining policy goals that should be respected under NT.[97] The U.S. policy in favor of the convectional energy sector, which benefits only domestic industries and the U.S. economy, should not be a legitimate ground for differentiation. The UNFCCC, Kyoto protocol, and the Paris agreement clearly outline the goal of GHG reduction. The policy in favor of the conventional energy sector, a sector which is responsible for substantial U.S. GHG emissions,[98] contravenes the international law on climate change. Even if the benefits of supporting the conventional energy sector can be interpreted as in the domestic public interest as the grounds for differentiation, the U.S. should seek alternative measures rather than a discriminatory one. In *SD Myers v. Canada*, the tribunal required that the measures for attaining an objective should also be legitimate; a purely discriminatory measure is not acceptable.[99] Lowering standards for GHG limits deprives the competitive advantages of renewable energy companies and thus is discriminatory. For the purpose of economic growth and energy independence, the U.S. should seek to adopt alternative measures that can support the conventional energy sector in meeting GHG reduction requirements.

IV. CONCLUSION

The withdrawal of the U.S. from the Paris agreement results from the U.S. environmental policy change, which is economy focused and exhibits the "America First" ideology. The Paris agreement is not a legal obstacle to such a policy change because it is a hybrid legal form that blends binding rules with soft laws. NDC submission is mandatory, but NDC content is fully discretionary. Parties are under no strict obligation to implement the NDCs but are required only to pursue domestic mitigation measures in good faith. In fact, the U.S. has sufficient flexibility to pursue other policy goals. Furthermore, the withdrawal will not be effective for at least another 3 years. The U.S. and other parties are trapped in a suspended relationship that benefits no one during this period. The policy space caused by the U.S. withdrawal should not be overestimated, because the U.S., as a party to the UNFCCC, must still contribute to GHG reduction. The U.S. refused to utilize the flexibility provided in the Paris agreement because it misinterpreted the Paris agreement as inflexible or because a policy change in the favor of less environment friendly sectors might require ratcheting down, or at least not ratcheting up, GHG reduction. The policy change in the favor of a less environment friendly sector led to concerns under

[97] DOLZER & SCHREUER, *supra* note 73, at 203.
[98] Rajamani, *supra* note 50.
[99] *See* SD Myers v. Canada, *supra* note 95, ¶ 255.

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international investment laws, which value the noninterference of the state in the market. The policy in the favor of the conventional energy sector might disadvantage the renewable energy sector. Foreign investors who suffer from the policy change have sufficient motive and grounds to resort to IIAs. To an extent, IIAs may be an unexpected safeguard for fighting climate change. Ultimately, the United States can withdraw from the Paris agreement, but it cannot fully deny obligations under IIAs that might have implications for climate change.

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