REVISITING THE LEGAL NATURE OF "UN-SIGNING" AN UNRATIFIED TREATY: BROADER IMPLICATIONS OF THE U.S.' WITHDRAWAL FROM THE TPP

Tomohiko Kobayashi*

ABSTRACT

This article focuses on the legal issues arising from treaty withdrawal after signing but before ratification, as is the case in the United States (hereinafter "U.S.") withdrawal from the Trans-Pacific Partnership Agreement (hereinafter "TPP"). This article attempts to shed light on the definition of "withdrawal" (or "un-signing") because it can make a practical difference to the fate of the TPP.

More specifically, we consider the legal nature of the U.S. withdrawal and its broader implications for the other signatories. First, is the U.S. still acting within the framework of the TPP or is it already out? Second, what impact does this U.S. action have on the legal status of the other original signatories of the TPP? Third, is the U.S. liable for violating its obligation to not frustrate the object and purpose of the treaty at hand? Finally, what can the 11 original signatories learn from the exit of the U.S. to revive the TPP without U.S. involvement?

Our major arguments are that the U.S. still remains an original signatory to the TPP, despite its notorious notification of withdrawal in January 2017. On the other hand, other original signatories that have already ratified are not exempt from the interim obligation of not frustrating the object and purpose based

* Associate Professor at Otaru University of Commerce (Japan). Office: 3-5-21 Midori Otaru, Hokkaido 047-8501, Japan. The author can be reached at: kobayashi@otaru-uc.ac.jp.

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solely on "undue delay" caused by the U.S.'s unilateral notification of withdrawal. In addition, other original signatories are not eligible to claim damages against the U.S. due to their acquiescence, and the U.S. cannot claim damages for the subsequent actions of other original signatories because the current situation was created by the U.S. itself. Finally, the other original signatories have several options to avoid a similar incident in the future.

KEYWORDS: *signature, withdrawal, ratification, provisional application, TPP (Trans-Pacific Partnership)*

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> *It is not the practice of an enlightened Government to sign a treaty unless, subject to new circumstances intervening, it means to ratify it in due course. To withhold ratification lightly and without adequate reason, or in the hope of obtaining some new concession in the same or another subject of negotiation, is a breach of courtesy and "bad business".*
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> LORD MCNAIR, THE LAW OF TREATIES 135 (1961).

I. INTRODUCTION: WHY DOES WITHDRAWING A SIGNATURE MATTER?

The January 2017 announcement by U.S. President Donald Trump, in which the U.S. would "withdraw" from the TPP, was another example of tension between international agreements and the national executive power.[1] Did he do so "in the hope of obtaining some new concession in the same or another subject of negotiation,"[2] as illustrated in Lord McNair's masterpiece on the law of treaties quoted above, which was published more than 50 years ago? Pursuing the relevant legal regulations that address capricious retreat from international rulemaking processes is the principal objective of this article.

It is true that there is a long list of treaties that involve controversial exits of the U.S., including the Paris Agreement of 2015 on climate change[3] and the Optional Protocol to the Vienna Convention on Consular Relations.[4] However, on these occasions, the U.S. withdrew from treaties that were ratified and had entered into force in the U.S.[5] Thus, each withdrawal was carried out in accordance with each treaty's specific provisions addressing withdrawal or termination,[6] which highly depend on

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[1] Curtis A. Bradley, *Unratified Treaties, Domestic Politics, and the U.S. Constitution*, 48(2) HARV. INT'L L.J. 307, 307 (2007).

[2] Note that this phrase does not appear in the 1938 edition. *See* ARNOLD DUNCAN MCNAIR, THE LAW OF TREATIES: BRITISH PRACTICE AND OPINIONS 88 (1938).

[3] Stéphane Dujarric, *Note to Correspondents on the Paris Climate Agreement*, U.N. SECURITY-GENERAL (Aug. 4, 2017), https://www.un.org/sg/en/content/sg/note-correspondents/2017-08-04/note-correspondents-paris-climate-agreement. *See* Office of the Press Secretary, *Statement by President Trump at the Paris Climate Accord*, WHITE HOUSE (June 1, 2017, 3:32 PM), https://www.whitehouse.gov/the-press-office/2017/06/01/statement-president-trump-paris-climate-accord (U.S. President Donald Trump announced the U.S.'s intention to withdraw from the Paris Agreement on June 1, 2017, pending formal notification to the Depositary.).

[4] U.N. Secretary-General, *Optional Protocol to the Vienna Convention on Consular Relations Concerning the Compulsory Settlement of Disputes, United States of America: Notice of Withdrawal*, U.N. Doc. CN/186/2005.TREATIES-1 (Mar. 11, 2005).

[5] In this article, the word "ratification" is used interchangeably with "acceptance", "approval" and "accession", as long as it brings a treaty applicable to a state as a party to it.

[6] For example, the Paris Agreement has Article 28 that allows contracting parties to withdraw after

the arrangement of the treaty agreed upon by the negotiating parties.[7]

In contrast, this article focuses on the legal issues arising from the withdrawal from a treaty after signing but before ratification, as is the case of the U.S.' withdrawal from the TPP. This article attempts to shed light on the definition of the concept of "withdrawal" (or "un-signing") because it can make a practical difference to the fate of the TPP. More specifically, we must consider the legal nature of the U.S. withdrawal and its broader implications for other signatories to the TPP.

First, is the U.S. still acting within the framework of the TPP or is it already out? This is the first question that will be addressed below (Question 1). Second, what impact does this action of U.S. have on the legal status of the other original signatories of the TPP, that is, Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, and Vietnam? Are the 11 original signatories still obliged not to frustrate the object and purpose of the treaty in accordance with Article 18 of the Vienna Convention on the Law of Treaties (hereinafter "VCLT") of 1969, or are they freed from that obligation? Particularly Japan, Malaysia and New Zealand, who have already ratified the TPP, are they freed from this obligation due to an "undue delay" caused by the U.S. withdrawal (Question 2)? Third, is the U.S. liable for violating the obligation to not frustrate the object and purpose of the treaty at hand (Question 3)? Finally, what can the 11 original signatories learn from the exit of the U.S. to revive the TPP without the U.S.' involvement (Question 4)?

Section II identifies a variety of legal implications of the U.S. exit from the TPP and compares them to previous withdrawals from different treaties. Section III analyses those implications on the basis of international law. Section IV concludes and provides suggestions for further research.

II. PROBLEM IDENTIFICATION AND COMPARISON WITH PREVIOUS INCIDENTS

A. The Legal Nature of the U.S. Withdrawal from the TPP

Under the U.S. Constitution, the president shares treaty-making power with the Senate, in the sense that the president can sign and ratify treaties with the advice and consent of the Senate, provided that two-thirds of the senators present concur. The president can also unilaterally decide to withdraw from the agreement that has entered into force in the U.S. However, in modern practice, most treaties of general application require

three years have passed after its entry into force, plus a one-year waiting period to be effective.

[7] Laurence R. Helfer, *Exiting Treaties*, 91 VIRG. L. REV. 1579, 1596 (2005).

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consent from the legislative branch prior to ratification.[8]

In practice, there are certain procedural rules to withdraw from a signed treaty that has been submitted to the Senate:

> The President may request the return of a treaty, or the Foreign Relations Committee may report and the Senate adopt a simple resolution directing the Secretary of the Senate to return a treaty to the President. Otherwise, treaties that do not receive the advice and consent of the Senate remain pending on the committee calendar indefinitely (emphases added).[9]

Then, additionally:

> The President does not have the formal authority to withdraw a treaty from Senate consideration without the Senate's concurrence. In practice, however, a President can render any pending treaty effectively moot, at least for the duration of his time in office, simply by declaring his unwillingness to ratify it, regardless of whatever action the Senate might take (emphases added).[10]

Here, because the TPP was not submitted to the Senate asking for approval, the Senate does not have power to intervene in the president's action. Against this background, the second and third paragraphs of the presidential memorandum directed to the U.S. Trade Representative (hereinafter "USTR") dated Jan. 23, 2017, read as follows:

> Based on these principles, and by the authority vested in me as President by the Constitution and the laws of the United States of America, I hereby direct you to withdraw the United States as a signatory to the Trans-Pacific Partnership (TPP), to permanently withdraw the United States from TPP negotiations, and to begin pursuing, wherever possible, bilateral trade negotiations to promote American industry, protect American workers, and raise American wages.
>
> You are directed to provide written notification to the Parties and to the Depository of the TPP, as appropriate, that the

[8] In this article, the word "treaty" is used in the sense of international law, regardless of its treatment in the U.S. legal system as a treaty, executive agreement or congressional-executive agreement.

[9] STAFF OF CONG. RESEARCH SERV. LIBR. CONG., 106TH CONG., TREATIES AND OTHER INTERNATIONAL AGREEMENTS: THE ROLE OF THE UNITED STATES SENATE 12 (Comm. Print 2001).

[10] *Id*. at 145.

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> United States withdraws as a signatory of the TPP and withdraws from the TPP negotiating process (emphases added).[11]

Clearly, President Trump intended to leave the entire TPP scheme by asking to "permanently withdraw" from the TPP and to "begin pursuing . . . bilateral trade negotiations." This indicates he wanted to undo or cancel the U.S. signature or to withdraw the signature itself.

In contrast, a week later, on Jan. 30, 2017, the USTR sent a two-paragraph letter to the TPP depositary, namely the Government of New Zealand, which reads as follows:

> This letter is to inform you that the United States does not intend to become a party to the Trans-Pacific Partnership Agreement. Accordingly, the United States has no legal obligations arising from its signature on February 4, 2016. The United States requests that New Zealand notify the other signatories.
>
> The United States remains committed to taking measures designed to promote more efficient markets and higher levels of economic growth, both in our country and around the world. We look forward to further discussions as to how to achieve these goals (emphases added).[12]

Strangely, the USTR did not follow the president's instructions to cancel the act of signing from February 2016. Rather, through the notification, the USTR stated that the U.S. no longer owed legal obligations "arising from its signature." Although the USTR could have cancelled the U.S. signature to the TPP, as it was indicated in the third paragraph of the Presidential Memorandum issued on Jan. 23, 2017, it did not do so in the letter of January 30th. Is this notification format specific to this case or is this a consistent policy of the U.S. Government? Let us now compare this notification with previous texts.

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[11] *See* Office of the Press Secretary, *Presidential Memorandum Regarding Withdrawal of the United States from the Trans-Pacific Partnership Negotiations and Agreement*, WHITE HOUSE (Jan. 23, 2017), https://www.whitehouse.gov/the-press-office/2017/01/23/presidential-memorandum-regarding-withdrawal-united-states-trans-pacific.

[12] *See* TRANS-PACIFIC PARTNERSHIP AGREEMENT (TPP), https://mfat.govt.nz/en/about-us/who-we-are/treaties/trans-pacific-partnership-agreement-tpp/ (last visited July 25, 2017); *see also* U.S. OFFICIALLY WITHDRAWS FROM THE TRANS-PACIFIC PARTNERSHIP, https://ustr.gov/about-us/policy-offices/press-office/press-releases/2017/january/US-Withdraws-From-TPP (last visited July 25, 2017).

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B. Comparison with Past Practice: Nothing New Under the Sun?

Here, it is necessary to compare the past state practices. How is this withdrawal different from the previous events such as the withdrawal from the Kyoto Protocol to the United Nations Framework Convention on the Climate Change (NFCCC) [13] and from the Rome Statute to the International Criminal Court (hereinafter "ICC Statute").[14]

Among others, the ICC Statute is a victim of government change. It was President William Clinton himself who signed the ICC Statute on December 31, 2000, only a few weeks before his term ended. He never submitted it to the Senate for advice and consent, possibly because of the unlikelihood of it being approved. On May 6, 2002, under the administration of President George W. Bush, Under Secretary of State for Arms Control and International Security John R. Bolton sent a one-paragraph letter to U.N. Secretary-General Kofi Annan, which read as follows:

> This is to inform you, in connection with the Rome Statute of the International Criminal Court adopted on July 17, 1998, that the United States does not intend to become a party to the treaty. Accordingly, the United States has no legal obligations arising from its signature on December 31, 2000. The United States requests that its intention not to become a party, as expressed in this letter, be reflected in the depositary's status lists relating to this treaty.[15]

This was a new format that did not exist in 2001, when the same Bush Administration attempted to withdraw the U.S. signature from the Kyoto Protocol.[16] In 2001, President Bush also attempted to undo the 1997 signature of former President Clinton. However, there was never any international notification. In fact, President Bush announced his intention not to pursue ratification of the Kyoto Protocol via a letter to several Senators,[17] with no subsequent and formal international notification to the depositary.

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[13] U.S. President George W. Bush sent a letter to several Senators on Mar. 15, 2001, expressing his intention not to pursue Senate approval.

[14] The U.S. government sent a notification to the U.N. Secretary-General on May 6, 2002.

[15] Richard Boucher, *International Criminal Court: Letter to UN Secretary General Kofi Annan*, U.S. DEP'T ST. (May 6, 2002), https://2001-2009.state.gov/r/pa/prs/ps/2002/9968.htm.

[16] Bradley, *supra* note 1, at 312.

[17] Office of the Press Secretary, *Text of a Letter from the President to Senators Hagel, Helms, Craig and Roberts*, WHITE HOUSE (Mar. 13, 2001), https://georgewbush-whitehouse.archives.gov/news/releases/2001/03/20010314.html.

Apparently, the notification of 2002 was the prototype notification the U.S. sent to the TPP depositary in January 2017. Additionally, it presumably established a default format for signatories wishing to withdraw their signatures before ratifying a treaty. Signatories that used similar phrasing include Israel in August 2002 and Sudan in August 2008, both of which used almost identical wording to notify their intent not to ratify the ICC Statute.[18] In November 2016, the Russian Federation followed a similar style as well.[19]

What is interesting here is that the notification of 2002 did not take the U.S. out of the ICC Statute system. The United Nations (hereinafter "U.N.") has continued to keep the U.S. on the list of signatories for 15 years, with an explanatory note on the notification of 2002.[20] More importantly, the U.S. itself maintains its position to act as a part of the ICC Statute. For example, on Jan. 15, 2015, the U.S. Government sent a communication to the U.N. Secretary-General as the depositary of the ICC Statute that it "believes that the 'State of Palestine' is not qualified to accede to the Rome Statute."[21] When the U.S. behaves as if it is part of the ICC Statute, it can only be as a signatory, if not a party, based on its signature in 2000.[22]

Therefore, the U.S. remains an original signatory to the TPP the same way it remains as a signatory in the ICC treaty system. Presumably, President Trump thought it sufficient to recover the nation's freedom of action with the notification in January 2017, without the need to get out of the TPP framework entirely. Surprisingly, other original signatories to the TPP seem to share this understanding,[23] though they have been impacted

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[18] *Rome Statute of the International Criminal Court*, U.N. (2002), https://treaties.un.org/doc/Publication/MTDSG/Volume%20II/Chapter%20XVIII/XVIII-10.en.pdf.

[19] *Id*. The Russian notification reads as follows:

> I have the honour to inform you about the intention of the Russian Federation not to become a party to the Rome Statute of the International Criminal Court, which was adopted in Rome on 17 July 1998 and signed on behalf of the Russian Federation on 13 September 2000. I would kindly ask you, Mr. Secretary-General, to consider this instrument as an official notification of the Russian Federation in accordance with paragraph (a) of Art. 18 of the Vienna Convention on the Law of Treaties of 1969.

Although the wording is slightly different, it has the same effect on the Russia. The only difference is that Russia, as a party to the VCLT, invoked art. 18(a) thereof.

[20] *See* 10. ROME STATUTE INT'L CRIM. CT., https://treaties.un.org/Pages/ShowMTDSGDetails.aspx?src=UNTSONLINE&tabid=2&mtdsg_no=XVIII-10&chapter=18&lang=en (last visited July 25, 2017).

[21] U.N. Secretary-General, *Rome Statute of the International Criminal Court, United States of America: Communication*, U.N. Doc. CN/64/2015.TREATIES-XVIII.10 (Jan. 23, 2015).

[22] While the U.S. has undertaken this kind of communication of objection to the Depositary on dozens of treaties, all of them, except for the ICC Statute, are treaties that the U.S. has ratified and that have entered into force in the U.S.

[23] See *infra* Section III.B.2. for details.

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more broadly.

A. Broader Implications for Other Original Signatories to the TPP

The real impact of the U.S. withdrawal notification is that regardless of its notification to withdraw as a party to the TPP, the continued presence of the U.S. in the TPP as an original signatory prevents the TPP's entry into force across the board. Even for signatories that have ratified it, the TPP can never take effect. Is this different from previous incidents where the effectiveness of the relevant treaties was not affected, as in the ICC and the Kyoto Protocol?

In accordance with Article 30.5, the TPP can take effect if six or more "original signatories" ratify the agreement and if they collectively account for 85% or more of the combined gross domestic product (hereinafter "GDP") of the original signatories as of 2013. At the signing ceremony held in Auckland, New Zealand, on Feb. 4, 2016, 12 states signed the TPP. Among them, the U.S. makes up 60% of the total GDP, as is shown in Table 1.

TABLE 1: GDP Data of the 12 Original Signatories to the TPP

Country	Total GDP (Billion USD)	GDP ratio among original signatories (%)	Per capita GDP (USD)
United States	16,663.15	**60.25**	52,607.92
Japan	4,919.59	**17.79**	38,633.16
Canada	1,838.96	**6.65**	52,392.73
Australia	1,497.22	**5.41**	64,271.09
Mexico	1,261.86	**4.56**	10,657.85
Malaysia	323.34	**1.17**	10,796.94
Singapore	302.25	**1.09**	55,979.76
Chile	276.66	**1.00**	15,691.13
Peru	201.88	**0.73**	6,523.65
New Zealand	184.76	**0.67**	41,280.08
Vietnam	170.57	**0.62**	1,901.70
Brunei Darussalam	18.09	**0.07**	44,540.15
Total	27,658.32	100.00	

Because there is no provision in the TPP that permits partial application or provisional application among the original signatories, the TPP is not designed to be effective even for parties that have ratified it,

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unless the criteria abovementioned have been met. Thus, although Japan, Malaysia, and New Zealand have already ratified the TPP, it can go nowhere without US ratification.[24]

However, the situation would be completely different if the U.S. loses its position as an original signatory. Without objection, the U.S. signed the TPP in February 2016. However, because the TPP does not contain a specific list of "original signatories," the class of original signatories was not fixed at the time of the signing ceremony. What happens if the U.S. exits the TPP regime by revoking its signature, as if it never took part in the signing ceremony held in February 2016? The requirement that effectuates the TPP could have changed had the U.S. retroactively cancelled or revoked its physical act of signing the agreement in February 2016. Excluding the U.S., the allocation of the combined GDP would be as illustrated in Table 2 below.

TABLE 2: GDP Data of the 11 Original Signatories, Excluding the U.S.

Country	Total GDP (Billion USD)	GDP ratio among original signatories (%)	Per capita GDP (USD)
Japan	4,919.59	**44.74**	38,633.16
Canada	1,838.96	**16.73**	52,392.73
Australia	1,497.22	**13.62**	64,271.09
Mexico	1,261.86	**11.48**	10,657.85
Malaysia	323.34	**2.94**	10,796.94
Singapore	302.25	**2.75**	55,979.76
Chile	276.66	**2.52**	15,691.13
Peru	201.88	**1.84**	6,523.65
New Zealand	184.76	**1.68**	41,280.08
Vietnam	170.57	**1.55**	1,901.70
Brunei Darussalam	18.09	**0.16**	44,540.15
Total	10,995.17	100.00	

In this case, against the background that Japan, Malaysia, and New Zealand have already ratified it, the "mini-TPP" can take effect with a few more ratifications, including Canada.[25] Needless to say, this does not mean

[24] See Tomohiko Kobayashi, *Memento Mori: Membership Issues Surrounding Entry into, Modification of, and Withdrawal from the TPP*, *in* PARADIGM SHIFT IN THE RULE MAKING OF INTERNATIONAL ECONOMIC LAW: TPP AS A NEW MODEL FOR TRADE AGREEMENTS?, sec. II.1 (Julien Chaisse et al. eds.) (forthcoming 2017) for earlier discussions.

[25] In other words, Canada, which accounts for 16.73% of the combined GDP, has veto powers for

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the mini-TPP will be easily acceptable, politically. Though the 11 original signatories are hesitant to implement provisions and conditions that were inserted for the benefit of the US since their first follow-up meeting in March 2017, commencing the pick-and-choose process might open a Pandora's box that will ruin fragile balances within the original TPP. In addition, excluding the U.S., the combined GDP of the 11 original signatories was reduced to 10,995 billion US dollars, almost one-third the original GDP, which will significantly decrease the economic and political significance of the mini-TPP. However, at least the option to revive the original TPP as intended, without US participation remains.

Nevertheless, none of the remaining original signatories seem to be arguing for the latter case. Although public information on the contents of the meetings regarding the future of the TPP is limited, it seems that the 11 original signatories assume that the original TPP cannot take effect unless the U.S. changes its mind to ratify it, assuming that the U.S. is still an original signatory. Is that a legally true assumption? If so, what status do the 11 original signatories retain? Can they argue that the U.S. is liable for the trouble it has caused already?

III. THE SCOPE AND DEGREE OF INTERIM OBLIGATIONS OF THE SIGNATORIES

A. Definition of "Withdrawal"

The word "withdraw" has different meanings, such as to "draw back or remove (a thing) from its place or position"; "take (one's eyes etc.) off something"; "take back or retract (one's words, a statement, or expression)"; formerly, rescind [a judgment]; to "refrain from proceeding with a course of action, a proposal, etc.)"; "cease to support (a candidate, for example)," and so on.[26] Similarly, "un-sign" has more than one technical meaning, such as revoking a prior signature itself[27] or reversing the effects of a prior signature.[28]

Although the VCLT provides detailed and extensive treaty laws that

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the hypothetical mini TPP to be effective, because without Canada, the threshold of 85% cannot be met and the TPP remains in stalemate.

[26] *Withdraw*, THE NEW SHORTER OXFORD ENGLISH DICTIONARY: ON HISTORICAL PRINCIPLE 3704 (Lesley Brown ed., 1993).

[27] ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 108 (3d ed. 2013) ("[A] diplomatic note to the depositary that the signature of the state 'shall be considered as having been withdrawn' has the same legal effect as the withdrawal of an instrument of ratification before entry into force."). Note that in the case of the withdrawal of an instrument of ratification, the instrument becomes void and the state can submit another instrument of ratification with new reservations as a separate unilateral action. *See also* Bradley, *supra* note 1, at 312.

[28] Luke A. McLaurin, *Can the President "Unsign" a Treaty?: A Constitutional Inquiry*, 84(7) WASH. U. L. REV. 1941, 1941 n.1 (2006).

have, more or less, codified customary international law, significant uncertainties remain with regard to a state's withdrawal from a treaty before ratification.[29] In this sense, the rights and obligations of a signatory to a treaty before ratification is a twilight zone in the field of the law of treaties.

Under the VCLT, the word "withdraw" appears in two different contexts.[30] First, the withdrawal from a treaty (e.g., Article 65 of the VCLT) means *walking away* from the entire treaty system. Second, the withdrawal of a reservation means *taking back* a specific reservation (Article 22 thereof). Using the same word, however, the former implies an ultimate impact on the treaty relationship for a state, while the latter implies a non-critical modification of the treaty obligations.[31]

However, this word is not used for the stages prior to the treaty entering into force. Why is this the case? It is because before a state expresses its intention to be bound by the treaty, followed by its entry into force, it is not bound by the treaty provisions. Thus, states have no need to, or cannot, withdraw from the treaty. In other words, treaty provisions that address withdrawing from the treaty abovementioned are inapplicable to withdrawing from that treaty before the treaty enters into force.[32] Does this mean that signatories who have not yet ratified a treaty cannot withdraw from it?

B. Nature of the Interim Obligations on the Signatories

1. A Party's Right to Withdraw from the Treaty — The rights and obligations of signatories to a treaty are quite unclear comparing to those of actual parties. Under Article 2(g) of the VCLT, a state becomes a "party" to a treaty once that state expresses its "consent to be bound by a treaty."[33] In addition, the means of expressing consent to be bound by a treaty can be in

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[29] To what extent does Article 18 reflect customary international law has long been subject to discussions? Technically speaking, the US is not a party to the VCLT, making it inapplicable as a treaty. However, the US has long acknowledged the provisions of the VCLT that are relevant to this article as reflecting customary international law. Laurence Boisson de Chazournes et al., *Article 18: Obligation Not to Defeat the Object and Purpose of a Treaty Prior to Its Entry into Force*, *in* VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY 369, 372-83 (Olivier Corten & Pierre Klein eds., 2011); Bradley, *supra* note 1, at 314-15; Evan Criddle, *The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation*, 44 VA. J. INT'L L. 431, 435 (2004); Maria Frankowska, *The Vienna Convention on the Law of Treaties Before United States Courts*, 28(2) VA. J. INT'L L. 281, 286 (1988).

[30] Needless to say, most of modern treaties contain provisions on withdrawal (or termination) and they may also address withdrawal of the signature before ratification as the drafters may agree.

[31] Lawful reservations are not supposed to be "incompatible with the object and purpose of the treaty" in the first place. *See* Vienna Convention on the Law of Treaties art. 19(c), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

[32] PAUL REUTER, INTRODUCTION TO THE LAW OF TREATIES 52 (1989).

[33] VCLT, *supra* note 31, art. 2(g).

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the form of a signature, an exchange of instruments, ratification, acceptance, approval or accession, or by any other means if so agreed (Article 11). If a treaty requires ratification, acceptance, or approval for a state to express its consent to be bound by a treaty (Article 14), which happens to be the case more often nowadays, a state's signature to that treaty does not constitute a concrete expression to be bound by it; rather, it is subject to ratification. In this case, a signatory is not yet a party to the treaty and the treaty does not apply to that state.

Once a signatory expresses consent to be bound by a treaty and meets procedural conditions, the treaty takes effect with regard to that state and *pacta sunt servanda* applies to the parties (Article 26). Notably, the VCLT sets forth an extensive set of procedural options for a party, including options to cancel or revoke the actions of parties (not signatories) to a treaty from the treaty regime. For example, a state can withdraw prior reservations to the treaty or object to the reservations (Article 22); can invalidate, terminate, withdraw from, or suspend the operation of the treaty (Article 65); and can also revoke the process to invalidate, terminate, withdraw from, or suspend the treaty (Article 68). Article 68 of the VCLT sets forth the following:

> A notification or instrument provided for in article 65 [Procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty] or 67 [Instruments for declaring invalid, terminating, withdrawing from or suspending the operation of a treaty] may be revoked at any time before it takes effect.

Notably, the provisions only apply to the actions of parties, and not to those of signatories. Compared to these detailed provisions, there are only a few articles that address the rights and obligations of signatories. In parallel, can a signatory revoke its signature at any time before a treaty takes effect?

2. The Nature of the Signatory's Status in the Case of "Withdrawal" — For signatories to a treaty, there is an implicit obligation not to frustrate the object and purpose of the treaty, assuming that the signatory is at least interested in ratifying the treaty in the future. Article 18 of the VCLT, entitled "Obligation not to defeat the object and purpose of a treaty prior to its entry into force" reads as follows:

> A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:
> (1) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or

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> approval, until it shall have made its intention clear not to become a party to the treaty; or
>
> (2) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed (emphases added).

The legal basis for this interim obligation is the principle of good faith. Because the mere act of adding a signature does not amount to consent to be bound by the treaty, *pacta sunt servanda* is not applicable at this stage.

It is true that the scope and degree of this provision has long been subject to academic discussions, such as the criteria for "defeat," the definitions of "object and purpose," the procedure for a signatory to express "its clear intention not to become a party to the treaty," and the critical date on which the treaty's entry into force is "unduly delayed."[34] Commentators seem to agree that the provisions are, at best, uncertain and difficult to apply to specific circumstances.[35] However, in principle, signatories are only bound not to frustrate the object and purpose, absent any obligations to positively take action.[36]

In this article, the major question is the legal effects of a notification by a signatory of its intention not to become a party to the treaty under Article 18, Paragraph (a) of the VCLT.[37] Apparently, a signatory can take away the effect of its signature by effectively announcing its intent not to ratify the treaty. However, it is not entirely clear if it can also remove its status as a signatory. Can a signatory revoke the signature *itself* and exit from the entire treaty framework, as if it never signed it?

Here, we need to distinguish between the withdrawal of a *signature* in terms of Paragraph (a) of Article 18 and the withdrawal of *ratification* in terms of Paragraph (b) thereof, assuming in both situations that it was submitted to the depositary before the treaty's entry into force for that state. With regard to the latter situation, a number of withdrawals of the instrument of ratification have not generated objections from other states.[38]

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[34] De Chazournes et al., *supra* note 29, at 396.

[35] ROBERT KOLB, THE LAW OF TREATIES: AN INTRODUCTION 44 (2016); Philippe Cahier, *L'obligation de Ne Pas Priver Un Traité de Son Objet et de Son But Avant Son Entrée en Vigueur*, *in* MELANGES FERNAND DEHOUSSE, LES PROGRES DU DROIT DES GENS 31, 36-37 (Fernand Nathan ed., 1979); SIR IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES 43 (1984); Reuter, *supra* note 32, at 52; AUST, *supra* note 27, at 107-08.

[36] Arguably, signatories are supposed to take positive steps in favor of the treaty objectives, in case the treaty in question aims at maintaining status quo or preventing irreversible events such as the extinction of natural species. However, the application of this provision depends largely on the specific circumstances of the case at hand. De Chazournes et al., *supra* note 29, at 400-01.

[37] In the drafting history, the phrase "not to become a party" was used interchangeably with "not to ratify."

[38] Oliver Dörr, *Obligation Not to Defeat the Object and Purpose of a Treaty Prior to Its Entry Into*

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As Anthony Aust opined on the withdrawal of consent to be bound by a treaty before the treaty enters into force, "in principle, there would seem to be no reason it cannot be done given certain circumstances" because the "consent is to be bound once the treaty has entered into force, not before."[39]

Assuming that the instrument of ratification has greater legal impact than the signature and that a signatory can withdraw the instrument of ratification before it enters into force, then there would also be no reason a signatory cannot withdraw its signature to a treaty that was obviously made before the treaty entered into force and will not affect its future entry into force. Although the VCLT is not clear on this point, comments in the drafting history fit this understanding.[40] It is true that signing a treaty is a solemn act and withdrawing the signature itself from a treaty is very rare, if not unprecedented.[41] Still, there is no reason a signatory cannot do so. Thus, there is a compelling case for the interpretation that the signatory maintains its status as a signatory even if it has submitted a notification of its intention to not ratify the treaty. Notably, state practice in the case of the ICC Statute and the TPP, discussed in Section II.2, fits this interpretation.

3. Consistent Interpretation of the "Termination" of Provisional Application — In addition, this interpretation applies to another provision of the VCLT that mentions a signatory's intention "not to become a party to the treaty." This phrase is used to address the situation to terminate the provisional application of a treaty, pending its formal entry into force.[42] Paragraph 2 of Article 25 of the VCLT sets forth the following:

> Unless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or

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Force, *in* VIENNA CONVENTION OF THE LAW OF TREATIES: A COMMENTARY 219, 230 (Oliver Dörr & Kristen Schmalenbach eds., 2012); AUST, *supra* note 27, at 109-10.

[39] AUST, *supra* note 27, at 109.

[40] See, for example, statements by Mr. Yasseen (Iraq), U.N. Conference on the Law of Treaties, *Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole*, U.N. Doc. A/CONF.39/11, at 103, ¶ 14 (Apr. 10, 1968) ("In any case, a State would recover its freedom of action in the matter upon expressing its intention not to become a party to the treaty.") [hereinafter *Summary Records*].

[41] Open Letter from Kenneth Roth, Exec. Director, Human Rights Watch, to George W. Bush, President (May 3, 2002), https://www.hrw.org/news/2002/05/03/dont-unsign-icc-treaty.

[42] In the course of drafting the VCLT, Mr. Denis (Belgium) stated that in case of terminating the provisional application:

> There was no question in that case of applying the provisions of article 53 of the draft [that finally became Article 54] relating to denunciation of treaties, because a State could not denounce a treaty to which it was not yet party. It should therefore suffice to terminate provisional application if the State concerned manifested its wish not to become a party to the treaty.

U.N. Conference on the Law of Treaties, *26th Meeting of the Committee of the Whole*, U.N. Doc. A/CONF.39/C.1/SR.26, 142 (Apr. 17, 1968) [hereinafter *26th Meeting*].

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> a part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty (emphases added).

As Humphrey Waldock (expert consultant) mentioned to the drafting committee of the VCLT, a typical situation for a signatory to terminate the provisional application is "if a treaty was brought before parliament and it became apparent that parliamentary approval was not likely to be forthcoming, the government could change its decision and terminate the [provisional application of the] treaty."[43] As shown in Section II.1 above, the rejection of a signed treaty by the legislative branch does not automatically nullify the state's status as a signatory.[44] The state can always try again.

In this context, U.S. actions regarding the Comprehensive Nuclear-Test-Ban Treaty (hereinafter "CTBT") support this interpretation, although this does not directly involve provisional application. Although the U.S. government signed the CTBT on Sept. 25, 1996, the Senate rejected it on Oct. 13, 1999, both events occurring under the Clinton Administration. However, the Senate refused the president's call to return the treaty. Since then, the U.S. remains a signatory to the CTBT, while in reality there is little chance of ratification.[45] A minority view argues that the president can withdraw a treaty from the Senate even when the Senate has refused to return the disfavored treaty to the president.[46] However, this disregards the fact that the U.S. President can, in a sufficiently public manner, express his/her intent not to ratify the treaty, regardless of the conclusions of the Senate. Thus, despite the Senate's rejection that blocked the ratification of the CTBT, the status of the US as a signatory has not been affected.

Here, it is worth mentioning that the wording used in paragraph 2 of

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[43] Statement by Mr. Humphrey Waldock, U.N. Conference on the Law of Treaties, *Eleventh Plenary Meeting*, U.N. Doc. A/CONF.39/SR.11, at 43, ¶¶ 89-90 (Apr. 30, 1969); *see also* Denise Mathy, *Article 25: Provisional Application*, *in* VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY, *supra* note 29, at 653.

[44] Statement by Mr. Eustathiades (Greece), U.N. Conference on the Law of Treaties, *Eleventh Plenary Meeting*, U.N. Doc. A/CONF.39/SR.11, at 41, ¶ 75 (Apr. 30, 1969).

[45] Another example of provisional application is that of the Environmental Protocol of 1991 to the Antarctic Treaty. In the Final Act, there was a provision that it is "desirable" for signatories to apply the Protocol "in accordance with their legal systems and to the extent practicable." AUST, *supra* note 27, at 155. However, this is rather informal and courteous pledge by the signatories without legally binding force. This might work for issues that each signatories can contribute to pursue the object and purpose by their own unilateral measures, which is quite alien to free trade agreements like the TPP.

[46] David C. Scott, *Presidential Power to "Un-Sign" Treaties*, 69 U. CHI. L. REV. 1447, 1477 (2002).

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Article 25 has been borrowed from Article 18(a).[47] Thus, there is the case of a signatory maintaining its status as a signatory even if it has expressed its intention not to become a party to a treaty.

Finally, with regard to Question 1 posited in the introduction, the U.S. maintains its status as an original signatory to the TPP, despite its notification to not ratify the treaty. First, this interpretation is consistent with the customary international law of treaties embodied in Article 18(a) of the VCLT.[48] Secondly, the U.S. itself did not declare that it has cancelled the signature to the TPP.[49] Last but not least, the remaining original signatories recognize this as true.[50]

C. Are Other Original Signatories Still Bound by the Interim Obligations?

1. The Status of the Other Original Signatories to the TPP (Question 2) — Based on the above analysis, let us address the remaining questions. First, with regard to the status of the other 11 signatories, what impact did the U.S. notification to withdraw have on the interim obligations of the other original signatories? Are they still bound by the Article 18 obligations, despite the sudden withdrawal of the U.S.? It is evident from Article 18 of the VCLT that the three states that ratified the TPP—Japan, Malaysia, and New Zealand—fall within the scope of Article 18, Paragraph (b), and that the other states—Australia, Brunei, Canada, Chile, Mexico, Peru, Singapore, and Vietnam—fall within the scope of Paragraph (a) thereof. For the latter group of signatories, each remains in the same position as before the U.S. notification to withdraw and they may submit notifications of their intention not to become a party to the TPP. The U.S. withdrawal does not affect the status of these states.[51]

The former group, which showed a stronger commitment to the TPP, also owe the same obligations, under Article 18(b). However, they can claim that their obligation not to defeat the object and purpose of the TPP is lifted because the TPP's entry into force is "unduly delayed"[52] due to the U.S. withdrawal notification, which blocked the satisfaction of the 85% GDP threshold.[53] It is true that the U.S. can delay the entry into force of

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[47] In the course of drafting the VCLT, Mr. Denis (Belgium) pointed out "the wording used in the amendment [to add a prototype of current Article 25(2)] was based on terms employed in draft article 15 [that finally became Article 18 on the interim obligations of signatories], which had already been approved by the Committee in principle." *26th Meeting*, *supra* note 42.

[48] *Supra* Section III.B.

[49] *Supra* Sections II.A. & II.B.

[50] *Supra* Section II.C.

[51] *Supra* Section III.B.

[52] *Id.*

[53] *Supra* Section II.C.

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the TPP just by halting its ratification. Nevertheless, this is what the negotiating parties intended. It was their rational choice to set a relatively high threshold for the TPP to take effect, giving larger economies greater leverage. Thus, it would be difficult for the three signatories who ratified the treaty to claim freedom from the Article 18 obligation based solely on the U.S.'s unilateral notification of withdrawal.

2. Potential Liabilities Generated by Subsequent Acts (Question 3) — According to President Trump's memorandum and the subsequent notification by the USTR, the major reason the U.S. withdrew its signature from the TPP is that it wanted to alter policy priorities with regard to the benefits of joining the TPP,[54] thus abusing its power as the largest economy, and that it wanted to pursue bilateral negotiations "in the hope of obtaining some new concession in the same or another subject of negotiation."[55]

Does this action enable the other signatories to bring legal claims against the US for defeating the object and purpose of the TPP? It is plausible that with its unilateral notification of withdrawal, the U.S. frustrated or "defeated" the object and purpose of the TPP to the detriment of the governments as well as the private sectors of the other original signatories. It is true that signed but unratified agreements may constitute an accurate expression of the state-to-state understanding of the parties at the time of signature,[56] but Article 18 of the VCLT is too vague to be seen as authorizing compensation for damages caused by the action of the U.S.[57] In addition, those other original signatories have not raised legal accusations against the U.S. regarding its withdrawal from the TPP in January 2017. Thus, in the case of the TPP, they are not eligible to invoke this provision.[58]

However, under Article 18(a) of the VCLT, the eight original signatories to the TPP are subject to the same interim obligation not to defeat the object and purpose of the TPP as they were previously. Then, can the recent project to create a mini-TPP or neo-TPP to replace the original TPP be considered an act that "defeats" the object and purpose of the original TPP? Seeing from this perspective, the ongoing efforts of the remaining original TPP signatories aim to salvage the basic concepts of the TPP, not jeopardize them. Furthermore, the U.S. has bene deprived of the opportunity to raise a claim against the original signatories because "no one

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[54] *Supra* Section II.A.
[55] *Supra* Section I.
[56] Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v. Bahrain), Judgment, 2001 I.C.J. Rep. 40, ¶¶ 66-68, 80-91 (Mar. 16, 2001).
[57] *Supra* Section III.B.
[58] MARK E. VILLIGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 248 (2009).

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may invoke his own turpitude."[59]

3. Possible Legislative Options (Question 4) — From a policy perspective, it is sometimes beneficial for signatories to refrain from ratifying a treaty in order to maintain flexibility.[60] Thus, failing to ratify the signed treaty or withdrawing consent to avoid being bound by that treaty before it enters into force does not in and of itself constitute "defeat" of the object and purpose of the treaty at hand, as long as both are discretionary but permitted actions.[61]

Nevertheless, this discretion has caused problems in a growing number of treaties. Even if some commentators attempt to justify that expressing intention to not ratify a treaty is better than inertia,[62] it does not always increase the policy options for other signatories, as was the case with the TPP.[63] To prevent these unforeseen discrepancies, negotiating parties might want to stabilize the status of the signed treaty.

Needless to say, from a policy standpoint, imposing stronger interim obligations on signatories would disincentivize negotiating parties from signing the treaty.[64] Therefore, proponents of a new TPP may well consider institutional improvements in the new treaty, such as (i) creating a waiting period in the case of the withdrawal of a signature or ratification; (ii) creating substantial benefits for signatories as well as ratified signatories;[65] or (iii) imposing a statute of limitations on the legal effects of a signature.[66] They may also consider inserting provisions for provisional application to address unforeseen changes in circumstances such as future political turmoil, which actually occurred after the optimistic signing ceremony for the TPP.

IV. CONCLUSIONS: HOW FAR CAN WE GO?

Our findings are summarized in the previous section. Our major arguments are that the U.S. remains an original signatory to the TPP, despite its notorious notification of withdrawal in January 2017.[67] On the

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[59] De Chazourne et al., *supra* note 29, at 393.

[60] W. Michael Reisman, *Unratified Treaties and Other Unperfected Acts in International Law: Constitutional Functions*, 35(3) VAND. J. TRANSNAT'L L. 729, 740-43 (2002).

[61] Dörr, *supra* note 38, at 234.

[62] Bradley, *supra* note 1, at 335.

[63] *Supra* Section II.C.

[64] Martin A. Rogoff, *The International Legal Obligations of Signatories to an Unratified Treaty*, 32 MAINE L. REV. 263, 299 (1980); De Chazournes et al., *supra* note 29, at 391.

[65] For example, under the ICC Statute, only signatories can participate in the preparatory committee for the establishment of the ICC, which may create incentives for signatories to maintain their status. De Chazourne et al., *supra* note 29, at 391-92.

[66] Curtis A. Bradley, *Treaty Signature*, *in* THE OXFORD GUIDE TO TREATIES 17 (Duncan Hollis ed., 2012), http://scholarship.law.duke.edu/faculty_scholarship/2463.

[67] *Supra* Section III.B.

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other hand, other original signatories that have already ratified the TPP are not exempt from the interim obligation of not frustrating its object and purpose based solely on "undue delay" caused by the U.S.'s unilateral notification of withdrawal. In addition, the other original signatories are not eligible to claim damages against the U.S. due to their acquiescence and the U.S. cannot claim damages for the subsequent actions of the other original signatories because the U.S. created the current situation. Finally, the other original signatories have several options to avoid a similar incident in the future.

Not surprisingly, this interpretation may raise the issue of abuse, as it was correctly pointed out during the drafting process of the VCLT,[68] that is, one may worry that the Article 18 obligation is meaningless if signatories can freely opt out by announcing their withdrawal. Issues that remain to be addressed in a separate investigation are as follows: whether and in what manner a signatory can withdraw its status as a signatory and whether and in what manner other signatories can compel the withdrawing signatory to revoke the signature itself or expel that signatory from the treaty framework without undue interference in the decision making of a sovereign state. Ultimately, doing good business is the best policy.

[68] For example, Mr. Yasseen pointed out that "Sub-paragraph (b) [that finally became Article 18(a)] raised the problem of abuses. A State could decline to ratify a treaty but, in so doing, it should not act in such a way as to cause international difficulties or tension between the signatory States of the treaty." *Summary Records*, *supra* note 40.

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