

IS THE PARIS AGREEMENT ALREADY POISED FOR FAILURE?—  
DISCERNING HOW IMPACTFUL THE CLEAN POWER PLAN’S  
FATE IS ON THE LATEST GLOBAL CLIMATE INITIATIVE

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## I. INTRODUCTION

In the last year, the United States has joined global efforts to combat climate change by joining an international treaty, the 2015 Paris Agreement (Paris Agreement or Agreement), and instituting the Clean Power Plan (CPP), a domestic regulation introduced to comply with the international treaty. The purpose of this Note is to ascertain the international implications stemming from the possibility of the U.S. Supreme Court potentially striking down the CPP. More specifically, it will determine how this action could impact other signatories to the Paris Agreement and their contributions towards combatting global climate change. And while the United States has recently renounced its involvement in the Agreement, the CPP's fate will still play a major role in the United States' carbon emission policies and lead other signatories to take note and react accordingly while developing their own climate policies. This Note will not speculate whether the issues presented may be remedied by future global climate deals.

## II. A SYNOPSIS OF THE 2015 PARIS AGREEMENT

In order to understand the role that the United States will play in the implementation of the 2015 Paris Agreement, it is imperative that one understands what the Agreement is and what it purports to do. Between November and December of 2015, the Twenty-first Session of the Conference of the Parties (COP 21) was held in Paris with the aim of formulating an effective global climate change initiative.<sup>1</sup> By the end of the COP 21, the parties reached what has been called an “ambitious effort[ ] to combat climate change”: the 2015 Paris Agreement.<sup>2</sup> Of the 197 parties attending COP 21, the Paris Agreement currently has 195 signatories, 175 of which joined on April 22, 2016, during its signature ceremony.<sup>3</sup> However, the significance of the Paris Agreement lies not simply in the quantity of signatories it has accumulated, but rather the fact that these signatories consented to the Agreement's exceptionally ambitious goals and stringent methods outlined to meet those goals.

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<sup>1</sup> *Paris Climate Change Conference – November 2015*, UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE [UNFCCC], [http://unfccc.int/meetings/paris\\_nov\\_2015/meeting/8926.php](http://unfccc.int/meetings/paris_nov_2015/meeting/8926.php) (last visited Oct. 23, 2017).

<sup>2</sup> *The Paris Agreement*, UNFCCC, [http://unfccc.int/paris\\_agreement/items/9485.php](http://unfccc.int/paris_agreement/items/9485.php) (last visited Oct. 23, 2017).

<sup>3</sup> *Paris Agreement – Status of Ratification*, UNFCCC, [http://unfccc.int/paris\\_agreement/items/9444.php](http://unfccc.int/paris_agreement/items/9444.php) (last visited Oct. 23, 2017).

The combination of several key features make this international agreement unique. Most notable of the Agreement's features are mitigation and adaptation efforts, the collective intent of developed countries to support developing countries in their endeavors to fight global climate change, and the accountability and transparency measures imposed on party members to ensure compliance.<sup>4</sup> In regard to mitigation, the Paris Agreement establishes a formidable goal of keeping the global average temperature within 2 degrees Celsius above pre-industrial levels with the hopes that the Parties' efforts might even be able to stay below the 1.5 degrees mark.<sup>5</sup> In order to meet this objective, the Agreement demands that each Party "shall prepare, communicate and maintain successive nationally determined contributions (NDCs) that it intends to achieve."<sup>6</sup> Each Party's NDC should exemplify a strong effort to mitigate their contribution to greenhouse gases and, over time, prove to the rest of the Agreement's Parties that they are meeting their commitments.<sup>7</sup> Further, due to the nature of NDCs, the Paris Agreement grants each member the right to tailor their own goals and the procedures they prefer to employ based on its "respective capabilities, in light of different national circumstances."<sup>8</sup> It should come as no surprise that retaining this amount of flexibility is comforting to many states when binding themselves to international agreements.<sup>9</sup>

As a supplement to the Parties' mitigatory plans, the Paris Agreement also calls for Parties to engage in adaptation efforts.<sup>10</sup> The global aim for adaptation is to "enhanc[e] adaptive capacity, strengthen[ ] resilience and reduc[e] vulnerability to climate change."<sup>11</sup> To achieve this, the Agreement encourages Parties to share information, strengthen any institutional arrangements they may have, further scientific research, and assist developing countries.<sup>12</sup> In addition, parties are mandated to "engage in

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<sup>4</sup> *Paris Agreement*, EUR. COMM'N, [http://ec.europa.eu/clima/policies/international/negotiated/conns/paris/index\\_en.htm](http://ec.europa.eu/clima/policies/international/negotiated/conns/paris/index_en.htm) (last updated Sept. 23, 2017).

<sup>5</sup> Paris Agreement, art. 2, Dec. 12, 2015, UNFCCC, [https://unfccc.int/files/essential\\_background/convention/application/pdf/english\\_paris\\_agreement.pdf](https://unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf).

<sup>6</sup> *Id.* art. 4.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> See Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CALIF. L. REV. 1823, 1870–71 (2002) (noting that "[b]y adjusting their level of commitment, states are able to signal their willingness to honor their promises and can control the amount of reputational capital they stake as collateral. This flexibility allows states that enjoy a high level of mutual trust to enter into agreements that come with only low levels of commitment.").

<sup>10</sup> Paris Agreement, *supra* note 5, art. 7.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

adaptation planning processes and the implementation of actions.”<sup>13</sup> This shows that the Agreement provides flexibility, albeit limited, for its members in effectuating these policies.

While these zealous efforts are inspiring for most climate-concerned individuals, none will get off the ground without reliable and sufficient sources of funding. Fortunately, the Paris Agreement takes this concern into account and establishes three areas where developed countries will provide support: financial assistance, technology development and transfer, and capacity-building efforts.<sup>14</sup>

The most crucial area of support, financial assistance, already has a goal in place for the near future. By 2020, developed countries are seeking to provide \$100 billion USD annually to developing countries to assist their climate change efforts.<sup>15</sup> This contribution is to remain fixed until 2025 after which it is expected that developed countries will agree upon a new and even greater contribution.<sup>16</sup> While it is evident that developed countries will lead the way in raising these funds, the Paris Agreement also urges developing countries to contribute financially if they are able.<sup>17</sup> It is the Agreement’s objective that these “scaled-up financial resources . . . achieve a balance between adaptation and mitigation, [while] taking into account country-driven strategies, and the priorities and needs of developing country Parties.”<sup>18</sup> It even places a special emphasis on assisting particularly vulnerable parties, such as the least developed countries and developing small islands.<sup>19</sup>

In addition to financial assistance, developed countries are also expected to assist developing countries with technology development and transfer.<sup>20</sup> The Paris Agreement expressly states that the Parties recognize how critical the innovation and sharing of technology is towards meeting its long-term aims “to improve resilience to climate change and to reduce greenhouse gas

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<sup>13</sup> *Id.*

<sup>14</sup> Paris Agreement, *supra* note 5, arts. 9–11.

<sup>15</sup> Paris Agreement, *supra* note 4. See also Camila Domonoske, *2 Degrees, \$100 Billion: The World Climate Agreement, By the Numbers*, NAT’L PUB. RADIO (Dec. 12, 2015, 5:33 PM), <http://www.npr.org/sections/thetwo-way/2015/12/12/459502597/2-degrees-100-billion-the-world-climate-agreement-by-the-numbers> (reporting on the current financial obligations of developed countries).

<sup>16</sup> Paris Agreement, *supra* note 4.

<sup>17</sup> Paris Agreement, *supra* note 5, art. 9.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* art. 10.

emissions.”<sup>21</sup> Ideally, this collaborative approach would substantially reduce the use of dated technology that emits large amounts of greenhouse gases.

The last support area the Paris Agreement prescribes is capacity-building.<sup>22</sup> This area is meant to improve developing countries’ capacity and ability to implement effective climate action measures.<sup>23</sup> More specifically, the Agreement defines these measures as “including, inter alia, to implement adaptation and mitigation actions, and should facilitate technology development, dissemination and deployment, access to climate finance, relevant aspects of education, training and public awareness, and the transparent, timely and accurate communication of information.”<sup>24</sup> Over time, these actions should render developing countries less dependent on other countries in combatting climate change, a benefit to all parties involved.

The last major components of the Paris Agreement are the accountability and transparency measures meant to promote compliance among the Parties. First and foremost, it is the “first-ever universal legally binding global climate deal.”<sup>25</sup> However, this proclamation does not tell the entire story. To explain, it helps to know that the legal nature of the Paris Agreement was written to appease both the European Union and small island nations—who insisted upon giving NDCs the legal effect of requiring a Party to achieve its goals—and Parties such as the United States, who opposed affording NDCs such strict legal authority.<sup>26</sup> The Agreement’s language was the ultimate compromise between the two. In Article 4.2, the Agreement states, “Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions.”<sup>27</sup> As written, Parties are required to undertake methods to pursue their own NDCs, but there is no outstanding legal obligation for Parties to successfully meet their NDC goals. Essentially, this is “an obligation of conduct rather than an obligation of result.”<sup>28</sup>

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<sup>21</sup> *Id.* See also Stephen Minas, *Keeping the Paris Agreement’s Climate Technology Promise*, ECO-BUS. (Apr. 22, 2016), <http://www.eco-business.com/opinion/keeping-the-paris-agreements-climate-technology-promise/> (acknowledging the Paris Agreement’s focus on technological innovation as an important measure for fighting climate change).

<sup>22</sup> Paris Agreement, *supra* note 5, art. 11.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Paris Agreement*, *supra* note 4; *id.* art. 13.

<sup>26</sup> Daniel Bodansky, *The Paris Climate Change Agreement: A New Hope?*, 110 AM. J. INT’L L. 288, 297 (2016) (discussing the arguments over granting NDCs legal effect).

<sup>27</sup> Paris Agreement, *supra* note 5, art. 4.2.

<sup>28</sup> Bodansky, *supra* note 26, at 304.

In addition to the quasi-legal status of certain provisions, the Agreement has another powerful tool in its arsenal to assure the parties comply: transparency. The Agreement outlines a transparency framework meant “to build mutual trust and confidence and promote effective implementation.”<sup>29</sup> The framework will track each Party’s progress towards reaching its NDC, provide an assessment of the financial support provided by Parties, and submit the information to a technical expert review.<sup>30</sup> Finally, a “global stocktake” will occur periodically which will “take stock of the implementation of this Agreement to assess the collective progress towards achieving the purpose of this Agreement and its long-term goals.”<sup>31</sup> Throughout this process, Party members will be made aware of other members’ inadequacies. The idea is that a stern transparency system will incentivize parties to reach their commitments when they would otherwise face scrutiny from their peers and the public.<sup>32</sup> In sum, it is the weak legally-binding effect of the Agreement that pushes a Party to arrange its climate goals and submit their progress, but it is the pressure from other Parties and the public that assures that a Party will make honest attempts to follow through with these goals.

### III. THE UNITED STATES: A TEAM PLAYER?

In order for the Paris Agreement to make any substantive progress, it is critical that the world’s largest economies partake. Moreover, skating by on half-hearted efforts at truly reducing greenhouse gas emissions will not suffice either. States with the most to contribute, like the United States, must make honest attempts to do their part.

At the Paris Agreement’s signature ceremony on April 22, 2016, the United States was among the 174 signatories to express their dedication to the global climate deal.<sup>33</sup> However, despite this outstanding initial support, more is required of the signatories to effectuate the Agreement. Namely, the Agreement requires that “at least 55 parties to the Convention accounting in total for at least an estimated 55 % of the total global greenhouse gas emissions [to] have deposited their instruments of ratification, acceptance, approval or accession.”<sup>34</sup> On September 3, 2016, the United States, in

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<sup>29</sup> Paris Agreement, *supra* note 5, art. 13.1.

<sup>30</sup> *Id.* arts. 13.5, 13.6, 13.11.

<sup>31</sup> *Id.* art. 14.1.

<sup>32</sup> Bodansky, *supra* note 26, at 291.

<sup>33</sup> Pamela Falk, *U.S. Joins 174 Nations to Sign Hard-Won Climate Pact*, CBS NEWS (Apr. 22, 2016), <http://www.cbsnews.com/news/us-climate-pact-un-signing-ceremony-paris-agreement-co-p21/>.

<sup>34</sup> Paris Agreement, *supra* note 5, art. 21.1.

conjunction with China, formally joined the Agreement.<sup>35</sup> As recent data shows that these two countries collectively contribute to over 40% of the world's CO<sub>2</sub> emissions,<sup>36</sup> the Paris Agreement likely would not have gone into effect without their formal commitment. Clearly, the United States' future efforts to comply with this Agreement are very pronounced and cannot be undervalued.

Acknowledging its responsibility in this global effort, the United States took several steps at the COP 21 to demonstrate its resolve to play an active part.<sup>37</sup> Specifically, the United States stated it would be a part of Mission Innovation—a collection of twenty countries committing to doubling their funding towards global clean energy research and development—as well as double its grant-based, public financing for climate adaptation by 2020.<sup>38</sup> Furthermore, the United States is encouraging contributions from subnational governments, the private sector, and its citizens. For example, the Compact of Mayors is a pledge comprised of 117 United States mayors that will uniformly measure and report their respective cities' impact and action against climate change.<sup>39</sup> The United States has also had 154 companies sign onto the White House's American Business Act on Climate Pledge.<sup>40</sup> These companies have pledged their support to the Paris Agreement and have promised “to reduce their emissions, increase low-carbon investments, deploy more clean energy and take other actions to build more sustainable businesses and tackle climate change.”<sup>41</sup> To increase citizen awareness and knowledge about global climate change, the White House has introduced another pledge, the American Campuses Act on Climate, under which higher education communities promise to “transition to low-carbon energy while

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<sup>35</sup> Tanya Somanader, *President Obama: The United States Formally Enters the Paris Agreement*, WHITE HOUSE (Sept. 3, 2016, 10:41 AM), <https://obamawhitehouse.archives.gov/blog/2016/09/03/president-obama-united-states-formally-enters-paris-agreement>.

<sup>36</sup> See *Global Greenhouse Gas Emissions Data*, U.S. ENVTL. PROTECTION AGENCY [EPA], <https://www.epa.gov/ghgemissions/global-greenhouse-gas-emissions-data#Country> (last updated Apr. 13, 2017), for a graphic indicating the global CO<sub>2</sub> emissions by country. See also *Each Country's Share of CO<sub>2</sub> Emissions*, UNION OF CONCERNED SCIENTISTS, [http://www.ucsusa.org/global\\_warming/science\\_and\\_impacts/science/each-countrys-share-of-co2.html#.WduskGiPLIV](http://www.ucsusa.org/global_warming/science_and_impacts/science/each-countrys-share-of-co2.html#.WduskGiPLIV) (last updated Nov. 18, 2014) (showing the top CO<sub>2</sub> emitting countries' rank and proportion of global emissions).

<sup>37</sup> *U.S. Leadership and the Historic Paris Agreement to Combat Climate Change*, WHITE HOUSE (Dec. 12, 2015), <https://www.obamawhitehouse.archives.gov/the-press-office/2015/12/12/us-leadership-and-historic-paris-agreement-combat-climate-change>.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

enhancing sustainable and resilient practices.”<sup>42</sup> Over 300 colleges and universities representing more than 4 million students have joined this pledge thus far.<sup>43</sup>

However, despite these initiatives to encourage everyone to do their part to combat climate change, there is still a lack of force ensuring that actual, substantive reductions of greenhouse emissions will occur. To remedy this deficiency, the United States has relied on its regulatory agencies; the most notable of which is the Environmental Protection Agency (EPA). The United States has already taken some steps to help meet its future greenhouse emission reduction commitments. For example, it has implemented stringent fuel economy standards for passenger and commercial vehicles.<sup>44</sup> Not to be exempted from its own policies, in 2009, the Obama Administration directed the federal government to reduce their greenhouse gas emissions by 28% by 2020 as well as significantly improve their reliance on renewable sources of energy.<sup>45</sup> Lastly, the United States has also introduced standards to promote energy efficiency, “including developing energy conservation standards for appliances and equipment . . . mak[ing] energy efficiency accessible to rural America, completing home efficiency upgrades,” and others.<sup>46</sup>

#### IV. INTRODUCING THE CLEAN POWER PLAN

Among these regulatory measures is the Clean Power Plan (CPP). It is an EPA directive to establish “emission guidelines for states to follow in developing plans to [reduce] GHG emissions from existing fossil fuel-fired electric generating units.”<sup>47</sup> In other words, the CPP requires states to place limitations on their power plants to reduce their carbon output by an EPA-specified amount.

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<sup>42</sup> *American Campuses Act on Climate*, WHITE HOUSE (Dec. 11, 2015), <https://www.obama.whitehouse.archives.gov/the-press-office/2015/12/11/american-campuses-act-climate>.

<sup>43</sup> *Id.*

<sup>44</sup> *Climate Change*, WHITE HOUSE, <https://obamawhitehouse.archives.gov/energy/climate-change> (last visited Sept. 25, 2017). See also *Carbon Pollution from Transportation*, EPA, <https://www.epa.gov/air-pollution-transportation/carbon-pollution-transportation> (last updated July 17, 2017) (outlining the new regulatory aims to reduce greenhouse gas emissions and improve the fuel efficiency of motor vehicles).

<sup>45</sup> *Climate Change*, *supra* note 44.

<sup>46</sup> *Id.*

<sup>47</sup> Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662, 64,703 (Dec. 22, 2015) (to be codified at 40 C.F.R. Pt. 60) [hereinafter Carbon Pollution Emission Guidelines]. *What EPA Is Doing about Climate Change*, EPA, <https://archive.epa.gov/epa/climatechange/what-epa-doing-about-climate-change.html> (last updated May 9, 2017).

To effectuate this regulation, the EPA drafted the CPP in a manner that consists of three primary components which are to be implemented over the course of an eight-year period beginning in 2022.<sup>48</sup> First, it designates emission performance rates for electric steam generating units and natural gas combined cycle generating units that must be followed.<sup>49</sup> These rates will be based off the EPA's "best system of emission reduction" standard.<sup>50</sup> Second, are state-specific reduction goals, expressed as both emission rates and total mass, which are to be "based on the above performance rates and that state's mix of [electric generating units]."<sup>51</sup> Lastly, the CPP will supply compliance guidelines to assist states with the development and implementation of their respective plans.<sup>52</sup>

So how does the CPP play into the United States' global commitments regarding carbon emissions? It is expected that the CPP will reduce CO<sub>2</sub> levels from the utility power sector by 32% of the sector's 2005 level.<sup>53</sup> Considering that these power plants accounted for approximately one-third of the United States' greenhouse gas emissions in 2012, successfully implementing a plan as ambitious as the CPP will go a long way toward satisfying the United States' obligations under the Paris Agreement.<sup>54</sup>

In addition to keeping the country honest to the rest of the world, the United States can expect these reductions to yield other benefits. For example, it is predicted that by 2030 the CPP will have reduced emissions of nitrogen oxides and sulfur dioxide by an estimated 72% and 90% of their 2005 levels, respectively.<sup>55</sup> Further, the EPA anticipates that the United States will accrue \$26–\$45 billion due to increased health and climate benefits.<sup>56</sup> Some annual health benefits include 1,700 fewer heart attacks, 3,600 fewer premature deaths, 90,000 fewer people suffering asthma attacks,

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<sup>48</sup> Benjamin Harris, *What the Supreme Court's Stay of the Clean Power Plan Means for the EPA's Greenhouse Gas Regulation Moving Forward*, STAN. ENVTL. L.J. (Feb. 15, 2016), <https://journals.law.stanford.edu/stanford-environmental-law-journal-elj/blog/what-supreme-courts-stay-clean-power-plan-means-epas-greenhouse-gas-regulation-moving-forward>.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> Carbon Pollution Emission Guidelines, *supra* note 47, at 64,665.

<sup>54</sup> *Learn about Carbon Pollution from Power Plants*, EPA, [https://19january2017snapshot.epa.gov/cleanpowerplan/learn-about-carbon-pollution-power-plants\\_.html](https://19january2017snapshot.epa.gov/cleanpowerplan/learn-about-carbon-pollution-power-plants_.html) (last updated July 27, 2016).

<sup>55</sup> *Overview of the Clean Power Plan: Cutting Carbon Pollution from Power Plants*, EPA, <https://archive.epa.gov/epa/cleanpowerplan/fact-sheet-overview-clean-power-plan.html> (last updated May 9, 2017).

<sup>56</sup> *Id.*

300,000 fewer missed days of school and work, and more.<sup>57</sup> Climate benefits entail a shift towards a clean energy economy that, by 2030, should render a 300% increase in wind power and a 2,000% increase in solar power relative, to the United States' 2008 levels.<sup>58</sup> One would imagine that the savings caused by this directive will allow the United States to more easily contribute its share of financial assistance to sources such as Mission Innovation or developing countries of the Paris Agreement.

## V. THE CLEAN POWER PLAN'S PROFOUND CONTROVERSY

Unfortunately for proponents of clean energy initiatives, the CPP has been stalled by litigation. Twenty-four states have brought suit challenging the CPP on the basis that "it's an illegal attempt to 'reorganize the nation's energy grid' and an attack on the coal industry that will lead to higher electricity costs."<sup>59</sup> Additionally, several companies with coal-related interests have intervened in the suit and allege that the EPA is exceeding its "lawfully delegated authority."<sup>60</sup>

In response, the EPA contends that their authority to impose the CPP is vested in the Clean Air Act.<sup>61</sup> The EPA argues that the power to limit carbon pollution from power plants in this situation is no different from the decades-worth of instances where they regulated other forms of air pollutants from power plants.<sup>62</sup> The EPA has two responses to the allegations that the CPP is an attack on the coal industry and that it will result in higher prices. First, it professes the urgent need to address carbon emissions from coal-fired power plants.<sup>63</sup> It even goes so far as to call these emissions a "monumental threat to Americans' health and welfare" because they are such a prominent source of climate change.<sup>64</sup> At the very least, this is a compelling public policy argument. Second, the EPA simply refutes the notion that the CPP will

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<sup>57</sup> *Id.* See also *The Clean Power Plan Protects Our Environment, Health & Economy*, EPA, <https://archive.epa.gov/epa/cleanpowerplan/clean-power-plan-protects-our-environment-health-economy.html> (last updated May 9, 2017), for an extended list of the benefits that the Clean Power Plan will cause.

<sup>58</sup> *The Clean Power Plan Protects Our Environment, Health & Economy*, *supra* note 57.

<sup>59</sup> Bobby Magill, *The Suit Against the Clean Power Plan, Explained*, CLIMATE CENT. (Apr. 12, 2016), <http://www.climatecentral.org/news/the-suit-against-the-clean-power-plan-explained-20234>.

<sup>60</sup> Alex Horowitz, *Clean Power Plan is Lawmaking, Not Rulemaking, Intervenor Says*, 36 NO. 17 WESTLAW J. ENVTL. 5, Mar. 2016, at 2.

<sup>61</sup> Magill, *supra* note 59.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

result in higher energy prices.<sup>65</sup> As a matter of fact, the EPA declares the CPP will result in the exact opposite outcome.<sup>66</sup>

In front of the D.C. Circuit, the plaintiffs brought their case requesting a stay on the implementation of the CPP.<sup>67</sup> In January, “the D.C. Circuit denied the motion to stay the CPP until litigation concludes on the substantive challenges to the CPP” brought by the plaintiffs.<sup>68</sup> The D.C. Circuit did this on the basis that the plaintiffs failed to satisfy the stringent requirements for a stay pending court review.<sup>69</sup>

Surprisingly, however, the Supreme Court overruled the D.C. Circuit and granted a stay on the CPP.<sup>70</sup> This effectively halted the EPA’s efforts to roll out the CPP, and instead, the parties to the suit had to wait until they could present their oral arguments in front of the D.C. Circuit in June of 2016.<sup>71</sup> Yet the June hearing did not occur. Instead, a few weeks prior to the hearing date, the D.C. Circuit announced that it would conduct an en banc review of the case, thus postponing the case until late September.<sup>72</sup> Now, having heard both parties’ oral arguments, it is expected that the D.C. Circuit will take a few months before issuing their decision.<sup>73</sup> However, regardless of whether their decision is in favor of the CPP or against it, the EPA will not be able to immediately begin implementing the CPP. The Supreme Court’s stay will remain in effect “until the Supreme Court either denies a writ of certiorari . . . or enters its own judgment.”<sup>74</sup> Considering the prominence of this case and the fact that the Supreme Court is already involved, it is

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* See also *FACT SHEET: Clean Power Plan Benefits of a Cleaner, More Efficient Power Sector*, EPA, [https://19january2017snapshot.epa.gov/cleanpowerplan/fact-sheet-clean-power-plan-benefits-cleaner-more-efficient-power-sector\\_.html](https://19january2017snapshot.epa.gov/cleanpowerplan/fact-sheet-clean-power-plan-benefits-cleaner-more-efficient-power-sector_.html) (last updated July 14, 2016), for the EPA’s explanation as to why consumers may expect to see a decrease in their electricity bills by the time the CPP is fully implemented in 2030.

<sup>67</sup> Harris, *supra* note 48.

<sup>68</sup> *Id.* Accord Order, *West Virginia v. Env’tl. Prot. Agency*, No. 15-1363 (D.C. Cir. filed Jan. 21, 2016) (order denying preliminary injunction).

<sup>69</sup> *West Virginia v. Env’tl. Prot. Agency*, *supra* note 68, at 2.

<sup>70</sup> Harris, *supra* note 48.

<sup>71</sup> Bobby Magill, *Obama Confident in Climate Plan Despite Court Setback*, CLIMATE CENT. (Feb. 10, 2016), <http://www.climatecentral.org/news/obama-confident-climate-plan-court-set-back-20014>.

<sup>72</sup> Tim Profeta, *Clean Power Plan Court Hearing Delayed to September*, NAT’L GEOGRAPHIC (May 19, 2016), <http://voices.nationalgeographic.com/2016/05/19/clean-power-plan-court-hearing-delayed-to-september/>.

<sup>73</sup> Jonathan H. Adler, *The En Banc D.C. Circuit Meets the Clean Power Plan*, WASH. POST (Sept. 28, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/09/28/the-en-banc-d-c-circuit-meets-the-clean-power-plan/?utmterm=.5f70ee6aefa9>.

<sup>74</sup> Harris, *supra* note 48. See also Magill, *supra* note 59 (indicating the stay will remain in effect until the Supreme Court decides the case on appeal or instead, allows the D.C. Circuit’s judgment to stand).

expected that the Supreme Court will grant a writ of certiorari.<sup>75</sup> Therefore, it is unlikely that the fate of the CPP, a directive that is key to meeting the United States' global climate commitments for the Paris Agreement, will be known "until the second quarter of 2017."<sup>76</sup> Fortunately for the proponents of the Paris Agreement, the CPP's entanglement in litigation throughout most of 2016 deterred neither the United States nor other states from formally committing, as indicated above.

## VI. EARLIER GLOBAL EFFORTS TO COMBAT CLIMATE CHANGE

In order to fully understand the significance of the United States' substantial involvement in the Paris Agreement, one must analyze previous global agreements to combat climate change and compare their efficacy to the United States' involvement. Because climate change has only been taken seriously by the global community in recent decades, it is useful to remember that the United States consistently held a role as a world leader throughout all of these matters. Therefore, whether or not a world leader plays an active part in global agreements is quite apparent to the rest of the international community.

In 1987, twenty-four states and the Commission of European Communities signed the Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol).<sup>77</sup> This international treaty recognizes the severity of the globe's depleting ozone layer and aims to reduce the world's emissions of ozone-depleting substances.<sup>78</sup> It is worth beginning with the Montreal Protocol for two reasons. First, it is widely regarded as the world's most successful international environmental agreement.<sup>79</sup> Second, the

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<sup>75</sup> See Harris, *supra* note 48.

<sup>76</sup> *Id.*

<sup>77</sup> Laura Thoms, *A Comparative Analysis of International Regimes on Ozone and Climate Change with Implications for Regime Design*, 41 COLUM. J. TRANSNAT'L L. 795, 797 (2003).

<sup>78</sup> *Studying a World Avoided: The Effects of the Montreal Protocol*, NAT'L CTR. FOR ATMOSPHERIC RES., <https://ncar.ucar.edu/press/studying-a-world-avoided-the-effects-of-the-montreal-protocol> (last visited Sept. 27, 2017).

<sup>79</sup> *Montreal Protocol on Substances that Deplete the Ozone Layer*, AUSTL. GOV'T: DEP'T OF THE ENVTL. & ENERGY, <https://www.environment.gov.au/protection/ozone/montreal-protocol> (last visited Nov. 3, 2016). *Accord The Montreal Protocol on Substances that Deplete the Ozone Layer*, U.S. DEP'T OF STATE, <https://2009-2017.state.gov/e/oes/eqt/chemicalpollution/83007.htm> (last visited Nov. 3, 2016) (quoting former Secretary General of the United Nations, Kofi Annan, who remarked "[The Montreal Protocol is] [p]erhaps the single most successful international agreement to date").

Protocol continues to be relevant today to both the United States and the international community.<sup>80</sup>

The reasoning for the Montreal Protocol's near-universal praise is two-fold. It attained both mass international participation and exceptional results. Back in September of 2009, the Montreal Protocol made history as East Timor ratified the treaty, which made "it the first international environmental treaty to achieve complete ratification."<sup>81</sup> With the complete support of the world's nations, the Montreal Protocol produced remarkable results. Only a year after garnering universal ratification, nearly every party reported that they were in compliance with their "phase-out" obligations.<sup>82</sup> As a result, the globe's ozone-depleting substances have been reduced by 98% from their historic highs.<sup>83</sup> Barring any unexpected setbacks, the Parties' continued adherence to the Montreal Protocol have led experts to believe the ozone layer will be fully recovered by the middle of the twenty-first century.<sup>84</sup> This outcome would unquestionably render the Montreal Protocol a success.

From the outset, the United States played a dominant role in the Montreal Protocol's development. With tremendous pressure from both the public and Congress, the United States was motivated to instigate discussions about ozone-related treaties.<sup>85</sup> Since signing the Montreal Protocol in 1987 and ratifying it in 1988,<sup>86</sup> the United States has continued to play an active role and has even voluntarily elected to join the treaty's four subsequent amendments.<sup>87</sup> Even more recently, the United States has demonstrated its

<sup>80</sup> See U.S. DEP'T OF STATE, *supra* note 79 (recognizing the United States, Canada, and Mexico jointly tendered an amendment proposal for the Montreal Protocol).

<sup>81</sup> AUSTL. GOV'T: DEP'T OF THE ENVTL. & ENERGY, *supra* note 79.

<sup>82</sup> *Montreal Protocol – Achievements to Date and Challenges Ahead*, OZONE SECRETARIAT, <http://ozone.unep.org/en/focus/montreal-protocol-achievements-date-and-challenges-ahead> (last visited Nov. 3, 2016).

<sup>83</sup> *Id.*

<sup>84</sup> *Stratospheric Ozone Layer Depletion and Recovery*, NAT'L OCEANIC & ATMOSPHERIC ADMIN., <http://www.esrl.noaa.gov/research/themes/o3/> (last visited Sept. 27, 2017). See also U.S. DEP'T OF STATE, *supra* note 79 (estimating the ozone layer will return to its pre-industrial levels by 2060–2075).

<sup>85</sup> See Thoms, *supra* note 77, at 828–29, for an analysis of how both the public and Congress supported an international treaty, with Congress going so far as "pass[ing] a resolution in 1987, by an overwhelming majority of 80–2, urging the President to 'strongly endorse the U.S. position' [opposing continued production of ozone-depleting substances]."

<sup>86</sup> *International Actions – The Montreal Protocol on Substances that Deplete the Ozone Layer*, EPA, <https://www.epa.gov/ozone-layer-protection/international-actions-montreal-protocol-substances-deplete-ozone-layer> (last updated July 20, 2016); U.S. DEP'T OF STATE, *supra* note 79.

<sup>87</sup> U.S. DEP'T OF STATE, *supra* note 79. See generally *The Montreal Protocol on Substances that Deplete the Ozone Layer*, OZONE SECRETARIAT, <http://ozone.unep.org/en/treaties-and-decisions/montreal-protocol-substances-deplete-ozone-layer> (last visited Nov. 4, 2016) (listing

dedication to the cause. As previously noted,<sup>88</sup> the United States was a part of a North American effort to further amend the Montreal Protocol. This amendment “includes provisions to phase down the production and consumption, and eliminate byproduct emissions of hydrofluorocarbons [which are] potent greenhouse gases with global warming potential . . . thousands of times that of carbon dioxide.”<sup>89</sup> To amass support for the amendment, the United States hosted a gathering of countries in New York.<sup>90</sup> Less than a month later, all 197 members of the Montreal Protocol agreed to adopt the amendment.<sup>91</sup> Thus, the Montreal Protocol evinces that the United States’ involvement has the capacity to perpetuate global environmental action.

Despite the United States occasionally taking the lead in furtherance of the Montreal Protocol, it is difficult to truly grasp how impactful the United States’ role is without comparing it to other global environmental initiatives. It just so happens that there exists a sharp contrast to the Montreal Protocol in regard to the United States’ participation: the Kyoto Protocol.

The Kyoto Protocol was created by the United Nations Framework Convention on Climate Change,<sup>92</sup> the same international organization under which the Paris Agreement was made at the COP 21.<sup>93</sup> Adopted in Kyoto, Japan in 1997, the Kyoto Protocol entered into force in 2005.<sup>94</sup> Since its inception, the Kyoto Protocol has acquired a substantial amount of support from the international community.<sup>95</sup> Noticeably, absent from this group is the United States.<sup>96</sup>

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the Montreal Protocol’s four amendments: London Amendment (1990), Copenhagen Amendment (1992), Montreal Amendment (1997), and Beijing Amendment (1999)).

<sup>88</sup> U.S. DEP’T OF STATE, *supra* note 79.

<sup>89</sup> *Id.*

<sup>90</sup> *Leaders from 100+ Countries Call for Ambitious Amendment to the Montreal Protocol to Phase Down HFCs and Donors Announce Intent to Provide \$80 Million of Support*, WHITE HOUSE (Sept. 22, 2016), <https://www.obamawhitehouse.archives.gov/the-press-office/2016/09/22/leaders-100-countries-call-ambitious-amendment-montreal-protocol-phase>.

<sup>91</sup> *Recent International Developments Under the Montreal Protocol*, EPA, <https://www.epa.gov/ozone-layer-protection/recent-international-developments-under-montreal-protocol> (last updated Dec. 30, 2016).

<sup>92</sup> Robert Henson, *What is the Kyoto Protocol and Has it Made Any Difference?*, THE GUARDIAN (Mar. 11, 2011), <https://www.theguardian.com/environment/2011/mar/11/kyoto-protocol>.

<sup>93</sup> *The Paris Agreement*, *supra* note 2.

<sup>94</sup> *Kyoto Protocol*, UNFCCC, [http://unfccc.int/kyoto\\_protocol/items/2830.php](http://unfccc.int/kyoto_protocol/items/2830.php) (last visited Oct. 23, 2017).

<sup>95</sup> See *Status of Ratification of the Kyoto Protocol*, UNFCCC, [http://unfccc.int/Kyoto\\_protocol/status\\_of\\_ratification/items/2613.php](http://unfccc.int/Kyoto_protocol/status_of_ratification/items/2613.php) (last visited Oct. 23, 2017), for a current list of the 192 parties to the Kyoto Protocol.

<sup>96</sup> *Id.*

The Kyoto Protocol “required participating nations to collectively reduce [greenhouse gas] emissions by 5 percent below 1990 levels by 2012.”<sup>97</sup> More specifically, the treaty “mandated that 37 industrialized nations plus the European Community cut their greenhouse gas emissions.”<sup>98</sup> However, other Parties were deemed “developing countries” and, therefore, not under any mandate to comply.<sup>99</sup> Rather, the Kyoto Protocol suggests this group voluntarily reduce their greenhouse gas emissions.<sup>100</sup>

“The United States did not ratify the Kyoto Protocol treaty and did not otherwise commit to reducing [greenhouse gas] emissions in large measure because the [Kyoto] Protocol exempted many developing nations, such as China and India, from adopting emission limits of their own.”<sup>101</sup> Considering China was on pace, and now is,<sup>102</sup> the world’s leader in greenhouse gas emissions, and that both China’s and India’s economies have grown drastically since the Kyoto Protocol was written,<sup>103</sup> the fact that they get to enjoy the Kyoto Protocol’s exemption can be seen as an unfair advantage in the world market.

To the dismay of many, the Kyoto Protocol has not enjoyed the same success as the Montreal Protocol. Instead, it appears to have had mixed results: On the one hand, the Kyoto Protocol’s original Parties collectively reduced carbon dioxide greenhouse emissions by 12.5% by 2012 which exceeded their 4.7% goal;<sup>104</sup> on the other hand, by 2014 the world’s carbon dioxide emissions had increased overall by 51% compared to 1990 levels.<sup>105</sup>

The question now becomes: can the Kyoto Protocol’s lack of results be attributed to the United States’ non-participation? At the very least, there is enough evidence to confidently suggest that the United States’ absence from the treaty significantly hampered its effectiveness. First, it is difficult to implement an effective plan to reduce greenhouse gases without constraining

<sup>97</sup> D. Bart Turner & Chris J. Williams, *Law in a Changing Climate*, 70 ALA. LAW. 358, 360 (2009).

<sup>98</sup> *Kyoto Protocol Fast Facts*, CNN, <http://www.cnn.com/2013/07/26/world/kyoto-protocol-fast-facts> (last updated Mar. 24, 2017).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> Turner & Williams, *supra* note 97.

<sup>102</sup> See *Global Greenhouse Gas Emissions Data*, *supra* note 36.

<sup>103</sup> See Cass R. Sunstein, *Of Montreal and Kyoto: A Tale of Two Protocols*, 31 HARV. ENVTL. L. REV. 1, 4–5 (2007) (discussing the profound growth of India’s and China’s economies and greenhouse gas emissions).

<sup>104</sup> Craig Jones, *The Kyoto Protocol: Climate Change Success or Global Warming Failure?*, CIRCULAR ECOLOGY (Apr. 2, 2015), <http://www.circular ecology.com/news/the-kyoto-protocol-climate-change-success-or-global-warming-failure#.Wc1SJBNSw1g>.

<sup>105</sup> *Id.*

the two largest emitters of greenhouse gases: the United States and China.<sup>106</sup> In addition, there is direct evidence that the United States' non-involvement reduced motivation to comply with the Kyoto Protocol. Canada formally withdrew from the Kyoto Protocol in 2011, a year before the first term was set to expire.<sup>107</sup> Among Canada's reasons for leaving was the ineffectiveness of the Kyoto Protocol without the United States.<sup>108</sup>

## VII. HOW THE CPP'S FATE WILL IMPACT THE PARIS AGREEMENT

In the event the Supreme Court decides to strike down the CPP, the question becomes: How will this affect other Parties' resolve to meet their commitments under the Paris Agreement? While these Parties surely recognize how impactful the United States' greenhouse emissions are on climate change, collectively, they are not exceedingly dependent on the United States' participation. The remaining Parties to the Agreement can still have a profound global impact and satisfy many of its goals. This is because the United States only contributes 16% of the world's greenhouse carbon dioxide emissions from fossil fuels which leaves the rest of the world the opportunity to reduce the remaining 84%.<sup>109</sup> Further, despite Canada's withdrawal from the Kyoto Protocol because of the United States' non-involvement, the remaining members of the agreement stayed committed, including some of the world's largest greenhouse gas emitters. This continuity suggests that the United States' involvement in global climate agreements has a noticeable effect, but even without its participation, the agreements can still achieve their goals.

However, this conjecture has a pronounced flaw. It presumes that without the CPP, the United States' contribution towards its global commitments will become nil, and that it will continue along the same greenhouse emission trajectory that it is currently on. Yet, regardless of the passage of the EPA's CPP, the United States has already made commitments to limit its emissions in other ways. For example, its commitment to Mission Innovation and the pursuit of clean energy research and development will not be impacted by the CPP's fate. Also, other Parties can still rely on the

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<sup>106</sup> *Global Greenhouse Gas Emissions Data*, *supra* note 36.

<sup>107</sup> *Kyoto Protocol Fast Facts*, *supra* note 98.

<sup>108</sup> *Id.*; see also *Canada Pulls out of Kyoto Protocol*, CBC NEWS, <http://www.cbc.ca/news/politics/canada-pulls-out-of-kyoto-protocol-1.999072> (last updated Dec. 13, 2011) (reporting the Canadian government's preference for a "new international agreement that includes commitments from all major emitters, including those in the developing world").

<sup>109</sup> *Global Greenhouse Gas Emissions Data*, *supra* note 36.

pledges made via the Compact of Mayors because the mayors' commitments are similarly independent of the CPP.

In addition to these commitments, the United States can also abide by other articles of the Paris Agreement without the passage of the CPP. Most notably, the United States may still provide its portion of the \$100 billion of financial assistance to developing countries to aid their efforts to curb their environmental impact. Second, the United States may also continue to share updated technology with developing countries. Third, developing countries may seek aid from the United States for their capacity-building efforts so that they can adapt to climate change and mitigate any harmful environmental effects. These measures are among the most important keys to the success of the Paris Agreement, and the Supreme Court's decision on the CPP will not affect the United States' role in these regards.

#### VIII. CONCLUSION

In sum, if litigation kills the CPP, the effects should not be damning to the Paris Agreement. The United States has other commitments that exemplify its resolve to contribute to this global dilemma. Considering the United States' absence from the Kyoto Protocol did not deter most other countries from participating, the fact that the United States is showing any willingness to contribute bodes well for the success of the Paris Agreement. Hopefully, however, the CPP will survive its day in court and any concern for potentially negative consequences will become moot.