IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR BIOLOGICAL DIVERSITY, Plaintiff, v. UNITED STATES DEPARTMENT OF STATE, *et al.*, Defendants.	Civil Action No. 1:18-cv-00563 (JEB)

FEDERAL DEFENDANTS' MOTION TO
PARTIALLY DISMISS SECOND AMENDED COMPLAINT

Pursuant to Federal Rules of Civil Procedure 8, 12(b)(1), and 12(b)(6) and Local Civil Rule 7, Federal Defendants the United States Department of State and Michael R. Pompeo, in his official capacity as the Secretary of State, hereby move to dismiss the First and Second Claims for Relief of Plaintiff's Second Amended Complaint, ECF 31. The Second Amended Complaint purports to compel the Federal Defendants to complete, submit, and publicly release two reports to an international body pursuant to a treaty, the United Nations Framework Convention on Climate Change ("UNFCCC"), under the authority of the Administrative Procedure Act ("APA") and the federal mandamus statute.

Plaintiff lacks standing under Article III of the Constitution because it has failed to sufficiently allege injury-in-fact to its members or itself that has been caused by the Federal Defendants. Further, Plaintiff seeks to enforce a timetable for implementing an international obligation of the United States through a private action in domestic court, but has failed to identify any enforceable legal requirement. The UNFCCC reporting provisions at issue are non-self-executing and unenforceable in domestic courts in the absence of implementing legislation. Even if the reporting provisions were self-executing, the UNFCCC does not furnish Plaintiff a private right

of action to compel action by the Federal Defendants. Absent operative, enforceable domestic law, Plaintiff's claims under the APA (First Claim for Relief) and for mandamus (Second Claim for Relief) also must fail.

WHEREFORE, for the foregoing reasons, Federal Defendants respectfully request that the Court grant this motion to dismiss the First and Second Claims for Relief of the Second Amended Complaint. This motion is supported by the accompanying memorandum and a proposed Order consistent with this request is attached herewith.

Dated: December 21, 2018

Respectfully submitted,

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

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INTRODUCTION/SUMMARY OF THE ARGUMENT

In the First and Second Claims for Relief of the Second Amended Complaint ("Second Amended Complaint" or "SAC"), ECF No. 31, Plaintiff Center for Biological Diversity ("CBD" or "Plaintiff") seeks an order compelling the United States Department of State ("the State Department") to submit two reports to an international body pursuant to an international treaty, the United Nations Framework Convention on Climate Change ("UNFCCC" or "Convention"). Plaintiff seeks to compel this agency action under the authority of the Administrative Procedure Act ("APA") and the federal mandamus statute.

This is a Second Amended Complaint. The Federal Defendants previously moved to partially dismiss the treaty-based claims in the Amended Complaint for lack of standing and for failure to state a claim. ECF No. 22. In a Memorandum and Opinion of November 8, 2018 ("Decision" or "Dec."), ECF No. 29, this Court granted the Federal Defendants' motion, finding that Plaintiff had failed to establish injury-in-fact to support its standing under Article III but granting Plaintiff leave to file an amended pleading by December 10, 2018. Dec. at 7. Plaintiff filed the Second Amended Complaint on December 7, 2018. ECF No. 31.

In the interests of completeness, this memorandum re-states the Federal Defendants' arguments for dismissing the First and Second Claims for Relief both for lack of jurisdiction (standing) and for the failure to identify a self-executing treaty obligation that could sustain Plaintiff's claims. However, we note at the outset that the Second Amended Complaint is plagued by the same glaring defects on standing that the Court identified in its Decision and should be dismissed accordingly, without the need to address the remaining issues. Specifically, this Court plainly alerted Plaintiff of the need to identify as a prerequisite for "informational injury" a legally-enforceable provision mandating the public disclosure of the UNFCCC reports at issue here. Dec. at 4-5. However, Plaintiff again directs the Court to legal texts that *on their face* contain no such

requirement and reveal that no plausible legal theory could support Plaintiff's claims. For reasons that doomed the Amended Complaint, Plaintiff again fails to establish informational injury. This Court also alerted Plaintiff to its failure even to allege a prerequisite under circuit law for organizational standing, *viz.*, that the organization has expended resources to counteract whatever harm to its interests have been alleged. Dec. at 6-7. Absent this threshold allegation (if well-pleaded), an organization lacks standing to proceed on its own behalf in this Court. *Id.* Nonetheless, the Second Amended Complaint is identical to the Amended Complaint in this regard and again lacks this indispensable allegation. This failing alone warrants dismissal of the treaty-based claims.

Beyond Plaintiff's reprise of its failings on standing in the Amended Complaint, the Second Amended Complaint seeks to enforce the timetable for implementing an international obligation of the United States through a private action in domestic court. But Plaintiff has failed to state a claim. It has failed to identify any enforceable legal requirement. The UNFCCC reporting provisions at issue are not self-executing. In the absence of implementing legislation imposing such obligations, the UNFCCC provisions cited by Plaintiff are unenforceable in a United States court. Even if the reporting provisions were self-executing, the UNFCCC does not furnish Plaintiff a private right of action to compel action by the Federal Defendants (a point Plaintiff conceded in earlier briefing before this Court). And because Plaintiff's alleged rights under the UNFCCC are not enforceable as a matter of law, Plaintiff's claims under the APA and for mandamus must fail.

The Federal Defendants do not dispute that the UNFCCC imposes a binding *international* obligation for its Parties to submit certain information through periodic communications to the UNFCCC Conference of the Parties. But the UNFCCC affords Plaintiff no rights with respect to such communications that are enforceable in this Court. A treaty is "primarily a compact between nations," and any issue with respect to the United States' completion and submission of these

communications to the UNFCCC is a "subject of international negotiations and reclamations," not one for a domestic court. *Medellin v. Texas*, 552 U.S. 491, 505 (2008) (quoting *Head Money Cases*, 112 U.S. 580, 598 (1884)). Accordingly, Plaintiff's First and Second Claims for Relief premised on the UNFCCC must be dismissed.

STATEMENT OF THE CASE

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

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

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

Article 4 of the Convention describes a series of "commitments" by Parties. These include a series of general commitments for all Parties and some specific additional commitments for Parties

included in Annex I and Annex II to the Convention. In a few instances, Article 4 refers to communication of information to the Conference of the Parties; however, in these instances Article 4 further provides that such information is to be communicated "in accordance with Article 12." *Id.* Art. 4.1(a), 4.1(j), 4.2(b). Thus, the specific provisions governing the communication of information to the Conference of the Parties are found in Article 12, which is entitled "Communication of Information Related to Implementation."

Article 12.1 provides that each UNFCCC party shall communicate *to the Conference of the Parties (through the secretariat)* certain information. This includes a "national inventory" of covered emissions, "[a] general description of steps taken or envisaged by the Party to implement the Convention," and other information the Party considers "relevant to the achievement of the objective of the Convention and suitable for inclusion in the communication." *Id.*, Art. 12.1(a)-(c); *see also* Art. 4.1(j) (Parties to communicate to the Conference of the Parties implementation information in accordance with Article 12). For Parties included in Annex I and Annex II of the Convention, such as the United States, communications must also include certain additional elements, such as a description of policies and measures to address climate change and measures taken to provide support to developing countries to address climate change. *Id.*, Art. 12.2-.3.

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

Parties communicate information to fulfill the obligations under Articles 4 and 12 by submitting certain periodic reports. Guidance for the content and timing of these submissions is

contained in a series of decisions of the Conference of the Parties over the years. Three reporting vehicles are currently in place for Parties in Annex I to the Convention, such as the United States, to communicate information called for in Articles 4 and 12: (1) national inventories of greenhouse gas emissions; (2) national communications; and (3) biennial reports.

Plaintiff's claims concern only two of the reports submitted by the Parties through the secretariat on a regular basis: the "national communication" and the "biennial report" (collectively, the "UNFCCC Reports"). SAC ¶ 2.[1] Through a series of decisions in the years following the initial submissions (most of which occurred in 1994), the Conference of the Parties adopted guidance for the content of national communications. It also set dates for the submission of the reports, which generally had been called for every four years.[2] Pursuant to a decision adopted by the Conference of the Parties in 2012, beginning with the national communication to be submitted by January 1, 2014, the "Parties shall submit a full national communication every four years." Dec. 2/CP.17, ¶ 14, available here.

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

[1] Parties submit national inventory reports separately on an annual basis. These reports are not at issue in this lawsuit. The United States submitted its most recent national inventory report on April 12, 2018, available here.

[2] *See, e.g,* Dec. 10/CP.13, ¶ 2 ("Requests Annex I Parties to submit to the secretariat a fifth national communication by 1 January 2010 in accordance with Article 12, paragraphs 1 and 2 of the Convention, with a view to submitting the sixth national communication four years after this date."), available here.

report are to be submitted (such as 2014, 2018, etc.), Annex I Parties could submit the biennial report as an annex to the national communication or as a separate report. *Id.* ¶ 15. Under this schedule, Annex I parties such as the United States were to submit both a national communication and a biennial report to the secretariat by January 1, 2018. *See* SAC ¶¶ 2, 21.

Authority for complying with these reporting provisions lies within general foreign affairs authorities. No federal statute specifically implements the UNFCCC reporting provisions at issue here, including as to the timeframe for submitting specific reports.

II. Factual and Procedural Background

Beginning with the first national communication submitted by the United States to the secretariat in September 1994, *see generally* Climate Action Report: Submission of the United States of America Under the United Nations Framework Convention on Climate Change (September 1994), the United States has to this date submitted to the secretariat six national communications and two biennial reports. As is the case for many Parties submitting these reports under the UNFCCC, the United States has an uneven record of submitting the reports by the dates stated by the UNFCCC Conference of the Parties. The majority of submissions by the United States have occurred after those dates, ranging from three months late (for the second national communication) to 18 months late (for the fourth national communication[3]).

On February 5, 2018, CBD submitted to the State Department a letter noting that the United States had not submitted the UNFCCC Reports to the secretariat by January 1, 2018. The letter stated CBD's intent to file suit unless the State Department agreed to a schedule to complete and submit the UNFCCC Reports. *See* SAC ¶ 25. This lawsuit followed.

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

STANDARD OF REVIEW

Federal Defendants move to dismiss the Second Amended Complaint for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). Plaintiff bears the burden of demonstrating jurisdiction. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). It is "presume[d] that federal courts lack jurisdiction unless the contrary appears affirmatively from the record." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 n.3 (2006) (citation omitted). Because the Court has "an affirmative obligation … to ensure that it is acting within the scope of its jurisdictional authority," the Court may "consider matters outside the pleadings" in addressing Defendants' motion to dismiss under Rule 12(b)(1) without converting it to a motion for summary judgment. *Forrester v. U.S. Parole Comm'n*, 310 F. Supp. 2d 162, 167 (D.D.C. 2004) (citation omitted).

Federal Defendants alternatively move to dismiss the Second Amended Complaint under Federal Rule of Civil Procedure 12(b)(6). Under this rule, the Court may consider well-pleaded factual allegations, as well as "documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). Although the Court must accept all well-pleaded factual allegations as true, it need not accept "a legal conclusion couched as a factual allegation." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citation omitted). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Nor is the Court required to adopt inferences unsupported by the facts alleged in the Complaint. *Trudeau v. Fed. Trade Comm'n*, 456 F.3d 179, 193 (D.C. Cir. 2006).

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

ARGUMENT

I. Plaintiff Has Failed to Establish Injury-in-Fact Sufficient to Support Standing for Its Treaty-Based Claims

To establish Article III standing, a plaintiff must demonstrate: (1) an "actual or imminent," "concrete and particularized" injury-in-fact, (2) a "causal connection between the injury" and the challenged action, and (3) a likelihood that the "injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 560-61. When an association such as CBD seeks to invoke federal jurisdiction, it can establish standing either through "associational standing," by suing on behalf of its members, or through "organizational standing" by suing on its own behalf. *See Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977) (associational standing); *People for the Ethical Treatment of Animals v. USDA*, 797 F.3d 1087, 1093 (D.C. Cir. 2015) (organizational standing).

This court's decision granting partial dismissal for lack of standing determined that Plaintiff asserted only one specific category of injury, "informational injury." Dec. at 4. There is no difference between the Amended Complaint and Second Amended Complaint in this regard. The Second Amended Complaint does not introduce any new theories of injury-in-fact. It thus is clear that Plaintiff still asserts informational injury as its only injury-in-fact. We address below Plaintiff's continuing failure to establish that injury.

The Court's Decision also determined that Plaintiff had alleged only "injury to itself as an organization," Dec. at 5, i.e., organizational standing. With respect to this point, once again there is no difference between the Amended Complaint and the Second Amended Complaint and it is clear that, despite a passing reference to CBD members (*see* SAC ¶ 14), Plaintiff asserts only organizational injury. To establish associational standing, CBD would have needed to demonstrate that "(1) at least one of its members would have standing to sue in his own right, (2) the interests the association seeks to protect are germane to its purpose, and (3) neither the claim asserted nor the

relief requested requires that an individual member of the association participate in the lawsuit." *Sierra Club v. EPA,* 292 F.3d 895, 898 (D.C. Cir. 2002). However, by still failing to identify a single CBD member allegedly harmed by the unavailability of the UNFCCC Reports, Plaintiff does not, "as it must," identify individual "members who have suffered the requisite harm" to support associational standing. Dec. at 5 (internal quotation marks and citation omitted); *see also Chamber of Commerce v. EPA*, 642 F.3d 192, 200 (D.C. Cir. 2011) (where plaintiffs have "not identified a single member who was or would be injured by [a Government action]," associational standing is lacking). We address below Plaintiff's failure to establish organizational injury.

A. The Second Amended Complaint Fails to Cure Plaintiff's Failure to Establish Informational Injury

Plaintiff asserts that, as an organization, CBD "engages in national and international advocacy to advance the fight against climate change by, *inter alia*, pursuing strategies to limit greenhouse gas emissions," including through "public education" and "engaging in national and international policymaking" on the "United States' commitments to greenhouse gas emission reductions through the [UNFCCC]." SAC ¶ 12. The purported harms to these educational and advocacy interests caused by the alleged untimely completion and submission of the UNFCCC Reports in the Second Amended Complaint are captured in just two paragraphs, which are reproduced in full here for convenience:

- "The Center relies on the information in the Climate Action Report [i.e., the UNFCCC Reports] both to educate its members and the public about United States activities—and deficiencies—in meeting its commitments to reduce GHG emissions. In addition, the Center also depends on the Report's information to productively engage in domestic and international advocacy that both seeks to hold the government accountable to the Convention's objectives and advance progressive measures and policies in the government's climate action plans, with the ultimate goal of progressing the country's greenhouse gas emission reductions and other facets of climate change mitigation and adaptation in ways that are consistent with the Convention. *Id.* ¶ 13.

- "By failing to timely complete, publicly release, and submit the Seventh Climate Action Report, the Department is harming the Center and its members by withholding information to which the Center is legally entitled, and which is necessary to allow the Center to carry out its mission and advocacy efforts. For example, in the absence of the Report, information regarding the government's climate action plans, measures, and policies to reduce greenhouse gas emissions in fulfillment of the Convention's emissions targets and objectives is not generally available. As a result, the absence of the Seventh Climate Action Report hinders the Center's ability to educate and advocate for government accountability and transparency with respect to meeting the Convention obligations. The public release of the Seventh Climate Action Report will redress these injuries." *Id.* ¶ 14.[4]

To establish informational standing, CBD must allege that it "is injured-in-fact ... because [it] did not get what the statute entitled [it] to receive." *Am. Soc. for Prevention of Cruelty to Animals v. Feld Entm't, Inc.*, 659 F.3d 13, 23 (D.C. Cir. 2011) (citation omitted). But more specifically, establishing such an injury requires CBD to "espouse a view of the law under which the defendant (or an entity it regulates) is obligated to disclose certain information that the plaintiff has a *right* to obtain." *Id.* (emphasis added).

For purposes of evaluating informational standing, a court is to credit a plaintiff's "view of the law." *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 21 (1998). However, that does not mean that "a court's informational-standing analysis is constrained by a plaintiff's assertion that a particular disclosure provision requires the disclosure of information on the terms the plaintiff dictates." *New England Anti-Vivisection Soc'y v. United States Fish & Wildlife Serv.*, 208 F.Supp.3d 142, 161–62 (D.D.C. 2016) (citing *Friends of Animals v. Jewell*, 828 F.3d 989, 993 (D.C. Cir. 2016)). "Only if the statute grants a plaintiff a concrete interest in the information sought will he be able to assert an injury in fact." *Nader v. FEC,* 725 F.3d 226, 229 (D.C. Cir. 2013). Put another way, accepting a plaintiff's legal theory, for instance that a purported public disclosure requirement applies to the defendant,

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

does not mean that "a court is required to accept a plaintiff's threshold legal argument about whether and to what extent a statute requires disclosure at all." *New England Anti-Vivisection Soc'y*, 208 F.Supp.3d at 163. Indeed, courts assessing informational standing will examine the underlying statute (or other legal text) to determine if the alleged disclosure obligation exists. *See id.* (rejecting plaintiff's argument for standing purposes that the disclosure requirements of Section 10(c) of the Endangered Species Act at issue were "actually broader than the plain text provides"). Moreover, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). This Court simply is not required to adopt inferences unsupported by the facts alleged in the complaint. *Trudeau*, 456 F.3d at 193.

1. Revising the Second Amended Complaint to Baldly Allege that the State Department Is Legally Required to "Publicly Release" the UNFCCC Reports Does Not Cure the Standing Defects Identified in this Court's Decision

In its Decision granting partial dismissal of the Amended Complaint, this Court observed that the Amended Complaint lacked any allegation that "the Government is required to make the UNFCCC Reports publicly available" and that Plaintiff had failed to "seek public disclosure" as a remedy. Dec. at 4. As such, CBD had not "facially satisfied" the test for informational standing. In an effort to address these deficiencies, Plaintiff has amended the complaint at numerous points to allege that CBD is "legally entitled" to the UNFCC Reports (SAC ¶ 14) and that various provisions in Articles 4 and 12 of the UNFCCC require Parties (such as the United States) to "publicly disclose," "publish," or "publicly release" information in the UNFCCC Reports. *See id.* ¶¶ 19-20. CBD also asserts that the Global Climate Protection Act of 1987 requires the State Department to "release[]" the UNFCCC Reports, implicitly to the public. *Id.* ¶ 22. Plaintiff also amended the claims for relief to allege a failure to "publicly release" the UNFCCC Reports. *Id.* ¶¶ 39, 42.

Sprinkling these references to public release and disclosure throughout the Second Amended Complaint does nothing to resolve the fundamental problem in Plaintiff's claims, which this Court identified in its Decision. These new allegations still lack the "*sine qua non* of informational injury" because, at bottom, CBD "is seeking to enforce a . . . deadline provision that by its terms does not require the public disclosure of information." Dec. at 5 (quoting *Friends of Animals v. Jewell*, 828 F.3d 989, 992 (D.C. Cir. 2016)). *None* of the legal texts cited by Plaintiff–the UNFCCC, Decision 2/CP.17, and the Global Climate Protection Act–impose a public disclosure requirement on the Federal Defendants applicable to the UNFCCC Reports at issue here. Nor has Plaintiff identified a federal implementing statute mandating the public release of such reports. Thus, Plaintiff again has identified *no legal basis* under which this Court could order the State Department to *publicly release* the UNFCCC Reports, which is the only type of claim that informational standing can support.

Plaintiff seeks the completion and, now, public release of two specific reports submitted by Parties to implement reporting provisions of the UNFCCC: the "national communication" and the "biennial report." SAC ¶ 2. As explained *supra* (at 4-5), to facilitate the implementation of reporting provisions in Article 12, the Conference of the Parties has adopted a series of decisions providing guidance on the content and timing of these reports. And as further described above, although Articles 4 and 12 both call for Parties to communicate information on implementing the Convention, Article 4 expressly conditions communication of information on the requirements of Article 12. *See* Art. 4.2(b) (Annex I Parties' national communications shall be "in accordance with Article 12"); Art. 4.1(j) (implementation information to be communicated to the "Conference of the Parties . . . in accordance with Article 12").

Articles 12 and 4 are the only UNFCCC provisions cited by Plaintiff. Neither contains an express directive to Parties, let alone a self-executing one, to publicly disclose the UNFCCC Reports called for by Article 12. *See generally* UNFCCC, Arts. 4, 12. Article 12 provides only that parties are

to submit the required elements of information "to the Conference of the Parties, through the secretariat." *Id.* Art. 12.1. Nothing in Article 12 even suggests that Parties must release information communicated under Article 12 directly to the general public, and Plaintiff points to nothing that would establish such a requirement.

Plaintiff rests its claim to a public disclosure obligation on Article 4.1(a), which provides that Parties must "publish and make available to the Conference of the Parties, in accordance with Article 12, national inventories of anthropogenic emissions." SAC ¶ 20. On its face, this provision is no help to Plaintiff, as it simply is not relevant to Plaintiff's claims. Article 4.1(a) applies only to national inventories of greenhouse gases, which are submitted as standalone annual reports[5] and are not at issue in this lawsuit. Notably, Article 4.1(a) refers only to national inventories of emissions, and not to other information communicated by Parties under Article 12. And the other provisions in Article 4 that refer to communication of information under Article 12—namely, Article 4.1(j) and 4.2(b)—do not include similar language. Moreover, even as it relates to national inventories, Article 4.1(a) provides that Parties shall "publish and make available *to the Conference of the Parties, in accordance with Article 12,*" SAC ¶ 20 (emphasis added)—which reinforces the requirement to provide the information to the Conference of the Parties, with any publication then to be done according to Article 12 itself.

The other provision explicitly cited by the Second Amended Complaint, Article 4.1(b), is even less helpful. Though it admittedly contains the word "publish," it pertains to the formulation

[5] The Conference of the Parties has adopted a series of decisions with specific guidance and due dates for submission of national inventory reports. Most recently, in decision 24/CP.19 (adopted in 2014), the Conference of the Parties adopted updated guidelines for greenhouse gas inventories for Parties included in Annex I, which provides that such inventories are "due by 15 April each year." The inventory reports are posted separately on the UNFCCC website from the quadrennial national communications. The most recent inventory submissions, including by the United States on April 12, 2018, are available here.

and implementation of national and regional programs to mitigate climate change, and not to the communication of information to the Conference of the Parties under Article 12 at issue here. UNFCCC, Art. 4.1(b). This represents a general commitment to formulate, publish, and update plans containing measures to address climate change, not a specific reporting commitment, and on its face it does not apply to information communicated under Article 12. There is no timeframe established either under the Convention or decisions of the Conference of the Parties to formulate or publish such plans (and, indeed, Plaintiff identifies none). Parties have considerable discretion in implementing Article 4.1(b), both in terms of content and timing. Although Parties may include in their national communications or biennial reports information about such national and regional programs, any communication of such information to the Conference of the Parties must accord with Article 12—which does not establish any requirement for Parties to publish communications submitted under Article 12.

The Second Amended Complaint vaguely alleges that the Conference of the Parties eventually "makes this information publicly available." SAC ¶ 20. However, that allegation is both demonstrably incorrect and legally insufficient in any event. In fact, Parties are permitted to designate information submitted to the secretariat as "confidential," subject to certain criteria, and the secretariat will "protect its confidentiality." UNFCCC, Art. 12.9. While Article 12 does provide that the secretariat of the UNFCCC will make "communications by Parties under this Article [12] publicly available," *id.* Art. 12.10, that requirement is subject to the aforementioned confidentiality measure and applies only to the secretariat of the UNFCCC, not to a Party such as the United States. Moreover, to establish informational standing, Plaintiff must identify a public disclosure obligation that applies directly to the Federal Defendants or an "entity it regulates." *Feld*, 659 F.3d at 23. We have already established Plaintiff's failure to establish a direct obligation on the Federal

Defendants, and the secretariat is not an "entity" that the Federal Defendants "regulate." *Id.* at 23. Nor is the UNFCCC secretariat a party before this Court.

The 2012 "decision" document of the UNFCCC Conference of the Parties that CBD cites as the source of the applicable deadline for the UNFCCC Reports, Decision 2/CP.17, is similarly bereft of a public disclosure requirement applicable to the Federal Defendants. *See* SAC ¶ 21. The absence of such a requirement is unsurprising. The information in the UNFCCC Reports is for the primary benefit of the Parties, the secretariat, and various multilateral subsidiary bodies under the Convention to achieve the Convention's objectives, not for the benefit of domestic individuals or organizations. *See infra* at 25-26. Finally, as addressed in more detail *infra*, the Global Climate Protection Act, provides no support for Plaintiff's informational injury claim (*see* SAC ¶ 22) as it does not even address reporting pursuant to the UNFCCC, let alone the public disclosure thereof.

In sum, even on Plaintiff's own theory and examining the plain text of the authorities upon which Plaintiff relies, Plaintiff has failed to establish informational injury-in-fact and, thus, informational standing.

B. Plaintiff Has Failed to Establish Organizational Injury

The analysis for organizational injury is straightforward and consists of a "two-part test." Dec. at 5. A court will ask "first, whether the agency's action or omission to act injured the [organization's] interest and, second, whether the organization used its resources to counteract that harm." *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 919 (D.C. Cir. 2015) (quoting *People for the Ethical Treatment of Animals v. USDA*, 797 F.3d 1087, 1093 (D.C. Cir. 2015)) (brackets in original). An "organization must allege that the defendant's conduct perceptibly impaired the organization's ability to provide services," specifically through "'inhibition of [the organization's] daily operations' in order to establish injury in fact." *Food & Water Watch, Inc.*, 808 F.3d at 919-20 (citation omitted).

1. The Second Amended Complaint Still Fails to Allege the Expenditure of Resources Necessary to Establish Organizational Injury

In its Decision, the Court applied this test and by-passed analysis of the first prong (whether CBD adequately alleged injury to its organizational interests) and moved directly to the second prong "because any allegation that would support the second is plainly absent." Dec. at 6. The Second Amended Complaint similarly fails to address this defect. While we nonetheless explain below why CBD has failed to satisfy the first prong for the sake of completeness, we, too, jump to the second prong because the Second Amended Complaint contains no revisions or new allegations that address this Court's earlier finding. Once again, "at no point does [CBD] give any hint that it has 'used its resources to counteract that harm.'" *Id.* (quoting *Food & Water Watch,* 808 F.3d at 919). (D.C. Cir. 2015). As before, CBD alleges *only with respect to its FOIA claims for relief* that it has "been required to expend resources to prosecute this action." SAC ¶ 37. This Court explained in its Decision that litigation-related expenditures cannot establish injury. Dec. at 5 (citing cases).

Because Plaintiff has not cured in the Second Amended Complaint the legal deficiencies that led the Court to determine that Plaintiff failed to establish organizational injury, the Court should reach the same conclusion and dismiss the treaty-based claims for lack of standing. Of course, regardless of the type of harm alleged (be it informational injury or injury or harm education or advocacy interests), Plaintiff has failed to satisfy the D.C. Circuit's standing test for organizations to proceed in court on their own behalf, as Plaintiff does here. By amending its complaint in an attempt to address its standing problems for informational injury but not its problems for organizational standing, Plaintiff appears to have failed to appreciate that it must satisfy the requirements for organizational standing *no matter what form of injury it alleges*. Having failed to meet the standing requirements to proceed in court on its own behalf *at all*, Plaintiff would not be helped even if it had made out the requirements for informational injury (which it has not). The same is

true for Plaintiff's alleged injury to educational and advocacy interest, addressed in the next section. This repeated failing warrants dismissal of the treaty-based claims.

2. Plaintiff Has Not Adequately Alleged an Injury to a Cognizable Interest

While there is no need for the Court to reach this issue, the Second Amended Complaint's vague allegations of injury also fail to satisfy the well-defined standard for injury-in-fact. To establish injury-in-fact, "[t]he complainant must allege an injury to himself that is 'distinct and palpable,' as opposed to merely '[a]bstract,' and the alleged harm must be actual or imminent, not 'conjectural' or 'hypothetical.'" *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (citations omitted). The alleged injury must also be particularized such that it "must affect the plaintiff in a personal and individual way." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (citations and internal quotation marks omitted). Where an organization is concerned, it must, "like an individual plaintiff," show "actual or threatened injury in fact that is fairly traceable to the alleged illegal action and likely to be redressed by a favorable court decision." *Food & Water Watch*, 808 F.3d at 919.

Plaintiff alleges that the unavailability of the UNFCCC Reports will hinder its ability to educate its members and the public about U.S. climate activities as well as its ability to "productively engage in domestic and international advocacy" on the issue of climate change. SAC ¶ 13. CBD calls this its "mission and advocacy efforts." *Id.* ¶ 14. Where such issue advocacy interests are at stake, the alleged injury to a plaintiff's activities must be "concrete and demonstrable," and "a mere setback to [plaintiff's] abstract social interests is not sufficient." *People for the Ethical Treatment of Animals,* 797 F.3d at 1093 (citations omitted); *see also Pub. Citizen, Inc. v. Trump*, 297 F. Supp. 3d 6, 21 (D.D.C. 2018) (same).

As to these interests, CBD alleges only vaguely that it "relies on the information" in the UNFCCC Reports and that their unavailability "hinders" its ability to educate and advocate. SAC ¶¶

13, 14. This threadbare and conclusory allegation is too generalized to support standing. The Second Amended Complaint provides no information about *how* CBD uses such information to educate its members. Nor does Plaintiff give an example of its past use of the UNFCCC Reports or the particular manner in which the education of CBD members or the public will be affected by the delayed timing of the UNFCCC Reports. One new allegation apparently meant to provide an example asserts, quite circularly, that the "absence of the Report" means that certain information "is not generally available." *Id.* ¶ 14. While this must be accepted as true, it says nothing about how it affects a particularized interest of CBD's. These generalized, purported effects on CBD's issue advocacy as alleged in the Second Amend Complaint cannot constitute injury-in-fact. *See, e.g., Turlock Irrigation Dist. v. FERC*, 786 F.3d 18, 24 (D.C. Cir. 2015).

Notably, Plaintiff has not alleged an educational or advocacy activity that it has eliminated or curtailed, or imminently will eliminate or curtail, as a consequence of the unavailability of the UNFCCC Reports. Nor has Plaintiff alleged facts to support the notion that its interests are harmed by the delay to date in issuing the UNFCCC Reports, versus harm to its interests that would result from the reports never issuing. Any harm from the latter situation is conjectural and may never come to pass, or may be averted due to the completion and submission of the UNFCCC Reports.

Finally, the Second Amended Complaint's threadbare and conclusory allegations make it impossible to determine to what extent CBD's purported curtailment of educational/advocacy activities may be a self-inflicted harm. CBD does not suffer a cognizable injury by curtailing its educational/advocacy activities simply because it expresses a subjective fear or assumption that the UNFCCC Reports will never issue. *See Clapper v. Amnesty International*, 568 U.S. 398, 416 (2013) ("[R]espondents cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending."). Rather, in the so-far temporary absence of the UNFCCC Reports, there may be other sources of information regarding

U.S. climate activities. Plaintiffs could use those to sustain their educational or advocacy objectives, or those activities could proceed in the temporary absence of the UNFCCC Reports. In other words, Plaintiff has proffered insufficient factual allegations about the particular impacts to its activities for this Court to evaluate whether Plaintiff has chosen to curtail its own activities and, relatedly, whether the unavailability of the UNFCCC Reports is the cause of Plaintiff's purported harm at all.[6] If so, Plaintiff may have generated a self-inflicted injury that fails to establish standing. *See Nat'l Family Planning & Reprod. Health Ass'n v. Gonzales*, 468 F.3d 826, 831 (D.C. Cir. 2006) ("We have consistently held that self-inflicted harm doesn't satisfy the basic requirements for standing.").

In sum, Plaintiff has again failed to establish standing for its treaty-based claims and they should be dismissed. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) ("Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.") (citation and internal quotation marks omitted).

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

"In addition to constitutional standing, a plaintiff must have a valid cause of action for the court to proceed to the merits of its claim." *Gunpowder Riverkeeper v. FERC*, 807 F.3d 267, 273 (D.C. Cir. 2015). Even if Plaintiff has standing to sue, its claim is fatally flawed. Plaintiff seeks to directly enforce the timetable for a reporting obligation that derives from a treaty that is not by itself enforceable in U.S. courts. As the Supreme Court has explained, "a treaty is, of course, "primarily a compact between independent nations" that ordinarily "depends for the enforcement of its

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

provisions on the interest and the honor of the governments which are parties to it." *Medellin*, 552 U.S. at 505 (quoting *Head Money Cases*, 112 U.S. at 598). While certain treaty obligations may be directly enforceable in U.S. courts, "not all international law obligations automatically constitute binding federal law enforceable in United States courts." *Id.* at 504. Courts determine whether a treaty obligation is directly judicially enforceable by determining whether it is "self-executing," in other words, whether the treaty provision in question "can be applied directly as law." *Id.* at 498.

A. Factors for Identifying Self-Executing Treaty Obligations

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

As the UNFCCC lacks any implementing legislation requiring the United States to comply with the reporting provisions, in order for a court to enforce the reporting provisions, the treaty itself would need to convey the intention to be self-executing. *Republic of Marshall Islands v. United States*, 865 F.3d 1187, 1193 (9th Cir. 2017) ("Only if the provision serves as a 'directive to domestic courts' may the judiciary enter the fray to enforce it.") (quoting *Medellín*, 552 U.S. at 508). "[W]here a treaty does not provide a particular remedy, either expressly or implicitly, it is not for the federal courts to impose one . . . through lawmaking of their own." *Sanchez-Llamas v. Oregon*, 548 U.S. 331, 347 (2006). To do otherwise would be "entirely inconsistent with the judicial function." *Id.* at 346; *see also The Amiable Isabella*, 6 Wheat. 1, 71 (1821) (Story, J.) ("[T]o alter, amend, or add to any treaty, by inserting any clause, whether small or great, important or trivial, would be on our part an

usurpation of power, and not an exercise of judicial functions. It would be to make, and not to construe a treaty").

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

Interpreting a treaty to determine if it is self-executing "must . . . begin with the language of the Treaty itself," to identify "*textual provisions* indicat[ing] that the President and Senate intended for the agreement to have domestic effect." *Medellin*, 552 U.S. at 519 (emphasis added and citations omitted). "Whether an international agreement of the United States is self-executing is a matter of interpretation to be determined by the courts," which will "look to the intent of the signatory parties as manifested by the language of the instrument, and, if the instrument is uncertain, recourse must be had to the circumstances surrounding its execution." *Diggs v. Richardson,* 555 F.2d 848, 851 (D.C. Cir. 1976). Aids to interpreting a treaty may include the negotiation and drafting history of the treaty, as well as the post-ratification understanding of signatory nations. *Medellin,* 552 U.S. at 507. Finally, "[i]t is …well settled that the United States' interpretation of a treaty is entitled to great weight." *Id.* at 513 (internal quotation marks omitted).

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

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

In the absence of legislation requiring the United States to comply with the UNFCCC reporting provisions, such provisions must themselves constitute a "directive to domestic courts" to enforce them. *Id.* at 508. While the United States fully recognizes and does not dispute that Articles 4 and 12 of the Convention include certain international obligations, those provisions (and indeed the entire UNFCCC) are non-self-executing as a matter of U.S. law. Nothing in these provisions suggests that they were "designed to have immediate effect" in domestic courts, *Republic of Marshall Islands*, 865 F.3d at 1195 (citation omitted), even with the benefit of suitable interpretive aids. Rather, the UNFCCC and its reporting provisions amount to "a compact between independent nations." *Medellin,* 552 U.S. at 505 (citations and internal quotation marks omitted). They are enforceable only as between the "governments which are parties to it." *Id.* Any alleged breach of the obligation, then, "becomes the subject of international negotiations and reclamations … [and] … the judicial courts have nothing to do and can give no redress." *Id.* (citations and internal quotation marks omitted).

The Second Amended Complaint points to only two articles in the UNFCCC to support its claims: Articles 4 and 12. Article 4 requires Annex I parties to "[c]ommunicate to the Conference of the Parties information related to implementation, in accordance with Article 12." UNFCCC, Art. 4.1(j). Article 12 elaborates on this requirement and specifies that Annex I parties "shall communicate *to the Conference of the Parties*, *through the Secretariat*" various categories of information. *See generally id.*, Art. 12.1-.3 (emphasis added). With respect to timing, Article 12 provides that the first communication was to be submitted "within six months of the entry into force" of the UNFCCC

for that Party. *Id.* Art. 12.5. Thereafter, "[t]he frequency of subsequent communications by all Parties shall be determined by the Conference of the Parties." *Id.*

Plaintiff claims a single deadline for submitting the UNFCCC Reports that the Federal Defendants allegedly missed: January 1, 2018. *See, e.g.,* SAC ¶¶ 2, 21, 25. Plaintiff does not identify a UNFCCC provision that creates this deadline. Rather, Plaintiff alleges that this purported deadline is established from a 2012 "decision" document of the UNFCCC Conference of the Parties, *i.e.,* Decision 2/CP.17. *Id.* ¶ 21. The Federal Defendants agree that the UNFCCC itself does not establish the January 1, 2018, date at issue in this case. Nor does the UNFCCC establish the particular form of reports described in the Second Amended Complaint (*i.e.*, the "national communication" and "biennial report"). Rather, the decision by the Conference of the Parties for Parties to submit these particular reports by this particular date was established in Decision 2/CP.17 (well after the UNFCCC itself was ratified in 1992). *See supra* at 5-6.

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

Here, Plaintiff seeks to compel submission and the public release of the UNFCCC Reports pursuant to a deadline (*i.e.*, January 1, 2018) that was not established in the Convention itself or implementing legislation, but instead in a post-ratification UNFCCC decision document. SAC ¶¶

39, 42. In similar circumstances, the D.C. Circuit has found that, "[w]ithout congressional action," conditions in certain post-ratification decisions under the Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, S. TREATY DOC. NO. 100–10, "are not the law of land" and are "enforceable not through the federal courts, but through international negotiations." *See NRDC v. EPA*, 464 F.3d 1, 9-10 (D.C. Cir. 2006) (holding that particular conditions contained in Montreal Protocol "decisions" by the parties concerning exemptions for critical uses of methyl bromide are not enforceable under the Montreal Protocol or under the Clean Air Act). While *NRDC* was confined to "the facts of this case," *see id.* at 13 (Edwards, J. concurring), and does not categorically hold that all "decision" documents under international agreements are unenforceable in U.S. courts, there are several key similarities between *NRDC* and this case. They include, *inter alia*: both involve non-self-executing treaty provisions lacking any indication of intent of direct enforcement in domestic courts, *see id.* at 9 ("Nowhere does the Protocol suggest that the Parties' post-ratification consensus agreements about how to implement the critical-use exemption are binding in domestic courts."); both involve post-ratification consensus decisions that "set rules for implementing" the provisions in issue, *see id.* at 8; and both involve conditions or rules included in such decisions for which there is no applicable implementing legislation. *Id.* The foregoing considerations also lend additional weight to the conclusion that the Convention's provisions on reporting are non-self-executing and unenforceable in this Court.

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

Notably, the UNFCCC separately addresses questions of implementation with its terms (and resulting disputes) as matters of international or bilateral negotiation and collaboration. This structure further reflects that Articles 4 and 12 are not self-executing. Article 13 refers to the establishment of a "multilateral consultative process" to resolve "questions regarding the

implementation of the Convention." UNFCCC, Art. 13. And Article 14 establishes procedures for resolving disputes between any two or more Parties. Thereby "the Parties concerned shall seek a settlement of the dispute through negotiation or any other peaceful means of their own choice." *Id.* Art. 14.1. Article 14 further describes a series of dispute resolution mechanisms that may be initiated under certain circumstances, including arbitration and conciliation. *Id.* Art. 14.2(b), 14.5. Tellingly, the mechanisms provided in Articles 13 and 14 all operate on the international plane and amongst Parties to the Convention. No provision of the UNFCCC creates or suggests a mechanism for private entities to domestically enforce the treaty's requirements against a Party. Nor is there any indication of an intent that post-ratification decisions of the Conference of the Parties setting dates for the submission of reports are self-executing.

There is further confirmation that the UNFCCC Reports are intended to be addressed on the international plane and that the reporting requirements are inappropriate for enforcement in domestic courts. These include the stated purposes and uses of the reports and information submitted pursuant to Article 12, and the international review process to which they are subject.[7] The treaty provides that information required under Article 12 is to be submitted through the secretariat in order to be distributed to the "Conference of the Parties and to any subsidiary bodies" of the treaty. *Id.* Art. 12.6. In other words, the information is for the primary benefit of the Parties, the secretariat, and various multilateral subsidiary bodies under the Convention to achieve the Convention's objectives, not for the benefit of domestic individuals or organizations.

And Plaintiff's attempt to domestically compel submission and release of these reports is novel. In practice, Parties have worked within the context of multilateral negotiations under the

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

UNFCCC to encourage timely submissions and address late submissions. For example, the UNFCCC posts information on its website regarding the submission dates and actual dates of submission by Parties. *See* fn. 3 *supra*. The secretariat also publicly lists the Parties that have not submitted by a deadline.[8] And Parties regularly include the status of report submissions on the agenda for sessions of the subsidiary bodies of Conference of the Parties. Indeed, a recent meeting of the Subsidiary Body for Implementation included an agenda item on the status of the seventh national communications and third biennial reports.[9] Finally, the Conference of the Parties regularly adopts decisions urging Parties to submit their reports.[10] These processes and mechanisms reflect the Parties' intent and practice that issues pertaining to reporting be addressed on the international plane among the Parties under the framework of the UNFCCC.

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

The intent of the Senate in providing its advice and consent for ratification of the UNFCCC confirms that the reporting provision is not enforceable in domestic courts. The issue of judicial enforcement of the UNFCCC was not a subject of the ratification debate. Questions were raised by Senators in the confirmation process regarding the mechanisms established in Articles 13 and 14 for addressing implementation questions and disputes among Parties, but there was no indication of any consideration of domestic judicial enforcement of UNFCCC obligations. To the contrary, in

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

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

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

responding to a Foreign Relations Committee question about Article 13's method for addressing implementation issues, the Administration responded that: "In the case of a global issue such as climate change, multilateral mechanisms for the resolution of implementation questions will likely be more appropriate and useful than more traditional bilateral dispute settlement procedures. Further, consultative mechanisms may be ultimately more conducive to problem solving than adversarial processes." *U.N. Framework Convention on Climate Change (Treaty Doc. 102-38) Hearing Before the S. Comm. On Foreign Relations*, 102nd Cong. 97 (1992) (responses of the Administration to Questions Asked by the Foreign Relations Committee). Nothing "indicate[s] that the President and Senate intended for the agreement to have domestic effect," *Medellin*, 552 U.S. at 519 (citations omitted), as is required to determine that the reporting obligations at issue are self-executing.

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

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

As the Supreme Court has explained, "[e]ven when treaties are self-executing in the sense that they create federal law, the background presumption is that '[i]nternational agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts.'" *Id.* at 506 n.3 (quoting 2 Restatement (Third) of Foreign Relations Law of the United States § 907, cmt. a (1987)). The D.C. Circuit "presume[s] that treaties do not create privately enforceable rights in the absence of *express language* to the contrary." *Id.* (citing *Canadian Transp. Co. v. United States*, 663 F.2d 1081, 1092 (D.C. Cir. 1980)) (emphasis added). As the D.C. Circuit has observed, treaties that only set forth substantive rules of conduct, and do not explicitly call upon the courts for enforcement of such rules, do not create private rights of action.

McKesson Corp. v. Islamic Republic of Iran, 539 F.3d 485, 488-89, 491 (D.C. Cir. 2008) ("In the absence of a textual invitation to judicial participation, we conclude the President and the Senate intended to enforce the Treaty of Amity through bilateral interaction between its signatories"); *see also Diggs,* 555 F.2d at 851 (after finding Security Council resolution provisions at issue to be non-self-executing, observing that the provisions "do not by their terms confer rights upon individual citizens; they call upon governments to take certain action. The provisions deal with the conduct of our foreign relations, an area traditionally left to executive discretion."). Therefore, even if the UNFCCC reporting obligations were self-executing—and thus "ha[d] the force and effect of a legislative enactment," *Medellín,* 552 U.S. at 505-6 (citation omitted)—Plaintiff could not seek relief pursuant to those provisions in this Court unless the treaty explicitly provided a cause of action to do so.

Importantly, on this definitive point warranting dismissal in its own right, Plaintiff has conceded in prior briefing that that the UNFCCC *does not* confer a private right of action. Plaintiff's Opposition to Defendants' Partial Motion to Dismiss, ECF No. 25, at 15 n.17 ("the UNFCCC does not itself confer a specific right on Plaintiff"). In any case, and even though nothing in the interim would affect that concession, in the Second Amended Complaint and its previous briefing, Plaintiff points to nothing in the Convention, or anything in its drafting or negotiating history, to support the existence of a private right of action under the UNFCCC. This is unsurprising. As discussed in Section II.B.2 *supra,* the provisions that Plaintiff relies upon evince an intention to operate on the international plane. They involve only the UNFCCC Conference of the Parties, the secretariat, and the various UNFCCC subsidiary bodies charged with implementing elements of the treaty. Indeed, the text of the reporting provisions makes clear that the reports are for submission to, and the primary benefit of, Parties, the secretariat, and various multilateral subsidiary bodies under the Convention, not private parties like Plaintiff. *Cf.* Art. 12.1 (specifying that Annex I parties "shall communicate to the Conference of the Parties, through the Secretariat" the various categories of

information comprising the national communication). As such, if the UNFCCC provisions at issue establish a substantive rule, they do not provide for that rule to be enforced in national courts. *See McKesson*, 539 F.3d at 488-89; *cf. Comm. of U.S. Citizens Living in Nicaragua*, 859 F.2d at 938 ("We find in these clauses no intent to vest citizens who reside in a U.N. member nation with authority to enforce an ICJ decision against their own government. The words of Article 94 do not by their terms confer rights upon individual citizens; they call upon governments to take certain action."). Moreover, courts are to "give 'great weight'" to the views of the United States with regard to whether a treaty provides a private right of action. *See McKesson*, 539 F.3d at 474.

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

IV. The Global Climate Protection Act Does Not Direct Implementation of the UNFCCC Reporting Provisions and is Not a Basis for Jurisdiction

As with the Amended Complaint, the Second Amended Complaint obliquely references the Global Climate Protection Act of 1987, 15 U.S.C. § 2901 note, Pub. L. 100-204, as a supposed source of unspecified obligations for the Federal Defendants with respect to the UNFCCC Reports. SAC ¶¶ 22, 39, 42. Notably, Plaintiff does not cite the Global Climate Protection Act as a basis for this Court's jurisdiction. *See id.* ¶¶ 6-9. In any event, that statute contains no provisions that are directly enforceable in this Court, does not expressly or implicitly contemplate the UNFCCC, nor does it refer to reporting under an international agreement of any kind. As such, the Global Climate Protection Act has no relevance to the UNFCCC-based claims in the Second Amended Complaint.

The Global Climate Protection Act was among the earliest statutes addressing the issue of climate change. It stated numerous Congressional findings, expressed multiple goals of the United

States, described a process for the formulation of U.S. policy, described an approach for coordinating U.S. policy in the international arena, and directed the Secretary of State and the Administrator of the Environmental Protection Agency to jointly prepare and submit a report to Congress on certain scientific, diplomatic and strategic considerations of global climate change. *See generally* 15 U.S.C. § 2901 note. Plaintiff identifies only one provision of even potential relevance here, to wit that "[t]he Secretary of State shall be responsible to coordinate those aspects of United States policy requiring action through the channels of multilateral diplomacy, including the United Nations Environment Program and other international organizations." *Id.* § 1103(c); *see* SAC ¶ 19.

Neither this provision, nor any other, in the Global Climate Protection Act establishes the State Department's legal responsibility for "compiling, releasing, and submitting" the UNFCCC Reports as Plaintiff alleges. SAC ¶ 19. Plaintiff also fails to identify a *self-executing* obligation for the Federal Defendants to directly and publicly release the UNFCCC Reports to Plaintiff as implied in the Second Amended Complaint. This provision only requires that the State Department "coordinate" action through "multilateral diplomacy." It is not even remotely the type of clear, nondiscretionary, and ministerial duty that can support the mandamus relief that Plaintiff seeks. *See, e.g., Heckler v. Ringer*, 466 U.S. 602, 616 (1984). "Mandamus is an extraordinary remedial process which is awarded, not as a matter of right, but in the exercise of a sound judicial discretion." *Duncan Townsite Co. v. Lane*, 245 U.S. 308, 311-312 (1917).

The text of this provision is markedly indistinct. The vague verb "coordinate" is the only operative term. The statute describes no discrete action the State Department must take, nor does it contain any deadlines or other parameters for a court to enforce. Though perhaps a bit of overstatement, one court has captured the dilemma of Plaintiff's reliance on the Global Climate Protection Act by observing that the Act "consists almost entirely of mere platitudes." *Connecticut v. Am. Elec. Power Co.,* 582 F.3d 309, 382–83 (2d Cir. 2009)*, rev'd on other grounds,* 564 U.S. 410 (2011).

This Act does not even refer, in any fashion, to the implementation of obligations under international agreements. If it could be applied to enforce the reporting deadline of a treaty that was ratified five years after the Act's enactment and is not even within the contemplation of the statute sought to be enforced, there would be no logical limit to the theory behind the Second Amended Complaint. The State Department is given responsibility and authority to do *something* with respect to "coordination" under § 1103(c) of the Global Climate Protection Act. But there is no basis to find that the statute imposes a non-discretionary duty on the State Department to submit a report to the UNFCCC by January 1, 2018, and publicly release it.

In sum, there is no judicially enforceable connection between the Global Climate Protection Act and the UNFCCC reporting provisions that Plaintiff seeks to enforce.

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

As the foregoing has shown, Plaintiff has failed to identify any private right under the UNFCCC that is enforceable in this Court. Nonetheless, Plaintiff seeks to overcome this limitation by alleging a violation of the Administrative Procedure Act to enforce a wholly international obligation in domestic court. But the APA lacks the power to cure this defect in Plaintiff's claim. Plaintiff has failed to identify a source of substantive law applicable to agency action to support an APA cause of action. Specifically, the APA does not provide a cause of action for enforcing the United States' compliance with its UNFCCC reporting obligations. While the APA may provide "a limited cause of action for parties adversely affected by agency action," *Trudeau*, 456 F.3d at 185, "the APA does not grant judicial review of agencies' compliance with a legal norm that is not otherwise an operative part of domestic law." *Comm. of U.S. Citizens Living in Nicaragua*, 859 F.2d at 943; *see* 5 K. Davis, Administrative Law Treatise § 28.1, at 256 (2d ed. 1984) ("The APA provision on reviewability is *always* dependent on other law, the law of reviewability is essentially the same as it

would be without any APA provision."); *see also id.* at § 29.1. Neither the UNFCCC nor any other source of law cited in the Second Amended Complaint is operative for the purposes of alleging a cause of action for Plaintiff's treaty-based claims. *See* SAC ¶ 6 (citing the federal question statute, the Declaratory Judgment Act, and the federal Mandamus Act).

Plaintiff's reliance on the federal mandamus statute, 28 U.S.C. § 1361, is equally unavailing. Indeed, Plaintiff's Second Claim for Relief under the mandamus statute is functionally identical to its "unlawfully withheld" APA claim under 5 U.S.C. § 706(1).[11] *See Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 63 (2004) (noting that limitation that "only agency action that can be compelled under the APA [as unlawfully withheld] is action legally *required* . . . carried forward the traditional practice prior to [APA's] passage, when judicial review was achieved through use of the so-called prerogative writs-principally writs of mandamus"). Mandamus is an extraordinary remedy and applies only when the defendant owes the plaintiff a clear, nondiscretionary, ministerial duty. *Heckler,* 466 U.S. at 616; *Duncan Townsite Co.*, 245 U.S. at 311-312 (1917). Even if such a duty were identified, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances. *See Cheney v. U.S. Dist. Court for Dist. of Columbia*, 542 U.S. 367, 381 (2004). But Plaintiff has failed to identify an operable, domestically enforceable legal duty that applies to the Federal Defendants. The submission of the UNFCCC Reports to an international body, under the auspices of a multilateral treaty, is not a clear nondiscretionary duty. Plaintiff cannot sustain its mandamus claim on this ground.

CONCLUSION

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

[11] Plaintiff conceded this point in earlier briefing on the Federal Defendants' motion for partial dismissal. Opp., ECF No. 25, at 19.

Dated: December 21, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2018, I electronically filed with the Clerk of the Court for the United States Court District Court for the District of Columbia the foregoing Memorandum in Support, as well as the related Motion to Dismiss the Second Amended Complaint and Proposed Order, by using the CM/ECF system.

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

s/ David S. Gualtieri
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CENTER FOR BIOLOGICAL DIVERSITY, Plaintiff, v. UNITED STATES DEPARTMENT OF STATE, *et al.*, Defendants.	Civil Action No. 1:18-cv-00563 (JEB)

[PROPOSED] ORDER

Before the Court is Federal Defendants' Motion to Partially Dismiss Second Amended Complaint, ECF 31. Having considered the motion and all briefing in support and opposition, it is hereby

ORDERED that Federal Defendants' Motion is **GRANTED**.

FURTHER ORDERED that the First and Second Claims for Relief in the Second Amended Complaint are **HEREBY DISMISSED**.

It is **SO ORDERED** this_____day of_____, 2018.

_____
HON. JAMES E. BOASBERG
UNITED STATES DISTRICT COURT JUDGE