

LEGAL ISSUES RELATED TO THE PARIS AGREEMENT



In the debate over continued U.S. participation in the Paris Agreement on climate change, questions have arisen as to the agreement's potential legal implications for U.S. policymaking. Attention has focused on two issues in particular:

- Whether a party legally has discretion to weaken the nationally determined contribution (NDC) it has submitted under the agreement; and
- Whether the agreement legally precludes a party from altering domestic policies related to the achievement of its NDC – such as, in the case of the United States, withdrawing the Environmental Protection Agency's Clean Power Plan.

This brief explains why, in both cases, the provisions of the Paris framework preserve national discretion over both a Party's international target and its domestic policymaking.

ADJUSTING A PARTY'S NATIONALLY DETERMINED CONTRIBUTION (NDC)

The Paris Agreement requires each party to “prepare, communicate and maintain” successive nationally determined contributions. The United States' current NDC is to reduce U.S. greenhouse gas emissions by 26 to 28 percent below 2005 levels in 2025.

Article 4.11 of the agreement provides that a party “may at any time adjust its existing [NDC] with a view to enhancing its level of ambition....” This provision makes clear that, if a party chooses to revise its existing target, it is encouraged to do so in a more ambitious direction. However, higher ambition is not a legal requirement, and Article 4.11 does not legally prohibit a party from adjusting its NDC in another direction.

Likewise, the requirement in Article 4.2 that a party “maintain” successive NDCs does not preclude a downward adjustment. Like the sentence it appears in, the term “maintain” applies to NDCs in general, not to a particular NDC. In other words, a party must always have an NDC in place; removing an existing NDC without replacing it would violate this requirement. However, a party is not required to maintain each particular NDC once it has been submitted.

When the question arose during the negotiation of the Paris Agreement whether a party could revise its NDC once submitted, many negotiators believed it went without saying that parties could, given that NDCs are “nationally determined.” Others, however, believed it was desirable to make this point explicit – thus the inclusion of Article 4.11. The option of legally prohibiting a “downward” revision was discussed and supported by some, but rejected. Some negotiators were concerned that, if downward adjustments were prohibited, Parties might offer less ambitious contributions in the first instance. Some believed the agreement would be more resilient over the long term if it enabled parties to make adjustments, rather than withdraw completely.

In sum, while a downward revision is liable to draw criticism, it is a legally available option under the Paris Agreement.

A PARTY'S DISCRETION TO ALTER DOMESTIC CLIMATE POLICIES

The Paris Agreement says that a party “shall pursue domestic mitigation measures, with the aim of achieving the objectives of [its NDC].” This provision, however, neither mandates any particular domestic measures

nor precludes a party from subsequently withdrawing, modifying or replacing measures it has put in place. Thus, there would be no violation of international law were a Party to change its domestic measures. If a domestic stakeholder sought to invoke the Paris Agreement in a domestic challenge to withdrawing the Clean Power Plan, courts would almost certainly find that the agreement does not constrain executive branch action.

First, the Paris Agreement would likely be held non-self-executing. A self-executing agreement is considered the law of the land, like a statute; conversely, a non-self-executing treaty has no domestic force of law, and therefore imposes no domestic legal obligations on either the executive or judicial branches. In assessing whether the Paris Agreement is self-executing, courts would look to whether there was an intent to make the agreement part of U.S. domestic law directly, without any implementing legislation, or whether it was directed at the political branches only. A number of circuit courts of appeal have adopted a presumption against self-execution,¹ and as a general matter, “treaties on subjects that Congress has regulated extensively are more likely to be interpreted as

non-self-executing.”² The few cases to consider the question in the context of multilateral environmental agreements have found them to be non-self-executing.³ Nothing either in the Paris Agreement itself or in its adoption by the United States suggests that it was intended to be self-executing.

Second, even if the Paris Agreement were found by a court to be self-executing, the agreement does not require that a party achieve its NDC, or put in place any particular implementing measures. So withdrawal of the Clean Power Plan, adoption of an alternative domestic strategy or failure to achieve the U.S. emissions reduction target would not violate the agreement.

Finally, the Paris Agreement has no bearing on whether domestic law allows the President to scrap the Clean Power Plan. Under the Charming Betsy doctrine, courts are supposed to interpret domestic law, wherever possible, to be consistent with international law.⁴ But since neither downward revision of the U.S. NDC nor withdrawal of the Clean Power Plan would violate international law, the Charming Betsy doctrine would be inapplicable.

This brief was prepared with contributions from former U.S. State Department Deputy Legal Adviser Susan Biniaz and Daniel Bodansky, Foundation Professor Law, Arizona State University.

ENDNOTES

- 1 Curtis Bradley, *International Law in the U.S. Legal System*, pp. 43-44 (Oxford University Press, 2015).
- 2 Restatement (Third) of the Foreign Relations Law of the United States, §111, reporters’ note 5.
- 3 Daniel Bodansky, “International Environmental Law in U.S. Courts,” *Review of European Community and International Environmental Law*, vol. 7, issue 1, p. 58 (1998).
- 4 *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64 (1802).



The Center for Climate and Energy Solutions (C2ES) is an independent, nonpartisan, nonprofit organization working to forge practical solutions to climate change. Our mission is to advance strong policy and action to reduce greenhouse gas emissions, promote clean energy, and strengthen resilience to climate impacts.