Paris Treaty Is Best Even with USA as a non-Party: But the USA Has No Ratification Dilemma

Kyle Ash
Greenpeace USA
10 December 2014
The US Senate does not need to ratify a Paris climate treaty, contrary to popular understanding. This argument, however, provides the foundation for President Obama administration’s claim that making mitigation commitments legally binding in the 2015 Paris climate agreement is not just unnecessary but harmful to the outcome. They claim that legal bindingness undermines ambition.

This paper provides an alternative to the US delegation perspective as they describe it. A treaty – new obligations contained in a legally-binding agreement – is better for the United States and the international community as a whole. Furthermore, a new climate treaty in Paris can include US participation even if President Obama refuses to sign.

Contents:

• Why Legally Binding Is Better
  ○ Competing Policies and Political Priorities
  ○ From Treaty to Domestic Policy
  ○ Legitimacy in Domestic and International Law
• No US Legal Obstacle to Signature and Ratification
• US Could Participate in Paris Treaty as a non-Party

1. Why Legally Binding Is Better

Legally binding terms, more than voluntary pledges, will compel national leaders to act on climate. But also, the act of agreeing to legally binding commitments will itself be a positive, internationally reinforcing signal that they already feel so compelled. Leaders unwilling to give climate policy the weight of law, in very simple terms, *do not want to commit.*

There are several reasons why it will be better to have a comprehensive treaty that includes mitigation targets, but the first and foremost is that legal commitments will make governments feel more compelled to act than they do now – *legally binding obligations will induce ambition over time.*

**Competing Policies and Political Priorities**

It is illustrative that the US administration does not advocate for voluntary commitments in trade negotiations. Rather, it is typical today for the President to ask Congress to pre-approve ('fast track') trade treaties without knowing the final details.¹

Climate policy must be able to hold its own when coming up against shorter term political whims, and certainly when resulting from the influence of private actors whose short term preferences may at times contrast with public health needs and sustainable economic policy. This cannot happen if the legal status of climate 'pledges' is *a priori* subordinate to trade and other policies.

National leaders have a record of proposing terms for new free trade laws which seek not just to preempt but suppress existing policies.² Transnational corporations also seek to achieve judicial

---

¹ [https://www.stopfasttrack.com/](https://www.stopfasttrack.com/)
methods of recourse that would usurp those of national citizens, such as in the Trans-Pacific Partnership negotiations.\(^3\) National leaders should make sure climate policy is on level ground, and anything less means our leaders are not focused on the economic security of their countries. Global climate disruption is a threat to economic prosperity that will sabotage the free market far more than insular trade policies.\(^4\)

**From Treaty to Domestic Policy**

It's a common claim, and one which begs the question, that internationally legally binding obligations are meaningless without domestic policy. Rather, the origin of domestic law often is international law. How national legal systems integrate new international agreements in part depends on where those legal systems are on the spectrum of so-called dualist or monist legal systems. Dualist legal systems must translate international law into domestic law, whereas monist systems regard ratified treaties as the law of the land. The US is considered to have a monist legal system. But it's obviously more complicated than this.\(^5\)

Some leaders will be able to commit their country to legal obligations in Paris without approval from a national legislature. For some States, there must be domestic legislation for implementation of new international obligations. For others, where legislation was already approved or the national leader has pre-existing authority otherwise, State leaders could provide a “definitive signature” to a Paris treaty rather than a “simple signature”. A “definitive signature” is simultaneously the act of ratification.\(^6\)

For dozens of countries international treaties are *automatically incorporated* into domestic law upon ratification. Ratification in international law is simply an official communication by the State government that it consents to the legal obligations provided by the treaty. Again, a “definitive signature” by definition is also ratification. For the UK, ratification comes not from the Parliament but from the Queen. For other countries, such as the United States, ratification of treaties even with “simple signatures” may come from the head of state when new legislation is not required. Although certainly not expected at this point, President Obama can provide a definitive signature to a Paris treaty (as below discusses).

---


Legitimacy in Domestic and International Law
Voluntary agreements, be they UN General Assembly resolutions or the Copenhagen Accord, have little bearing on the decisions of domestic and international courts.\(^7\) The same cannot be said of treaties. For many countries, especially those with monist legal systems, a Paris treaty would have the weight of law upon ratification whether or not there is domestic legislation to implement it. And, as an international legal instrument, the Paris Treaty would become pertinent to the decisions of international courts. Therefore, even with countries without automatic incorporation or countries which have not ratified a Paris Treaty, if they have accepted the jurisdiction of international courts (e.g., International Court of Justice), they will be directly affected by legal obligations created in the Treaty.

Sources of international law include treaties and decisions of courts. Another source is customary international law, which is essentially developing consensus among international legal scholars of what has become the legally enforceable expectations of States' behavior. If it is clear that a State is acting as if it is obligated by a treaty, whether a signatory or not, increasingly over time it becomes difficult to argue that the State is not a subject to the obligations of Parties spelled out by that treaty. This legal principle is referred to as *opinio juris*.

An internationally binding agreement is symbolically, politically, and legally better than a collection of voluntary pledges. A treaty increases legitimacy of the negotiated agreement. A treaty creates a regime with a legal identity that affects markets and incentivizes participation. The closer to an international legal instrument the Paris agreement is, the more likely its content will become customary international law. In effect, non-Parties to Paris Treaty will much more likely choose to become Parties in the future. And non-Parties who do not choose to officially join may become obligated nonetheless as aspects of the Paris treaty become customary international law.

II. No US Legal Obstacle to Signature and Ratification
The US position of a ratification obstacle for a Paris Treaty results from lack of Presidential leadership not from a legal impediment. President Obama can sign a treaty in Paris, and he can ratify it with executive authority. He could have made this choice in Copenhagen.\(^8\) As President Bush's 'unsigning' of Kyoto was illegitimate, President Obama even could have chosen to use his executive authority to ratify Kyoto upon taking over from his climate denier predecessor.\(^9\)

One common point of confusion is the definition of 'treaty,' which in international has a much broader definition than in US domestic law. This fact may be conveniently overlooked by Parties not wanting to feel completely obligated by 'pledges' made during the climate negotiations.

In the US a treaty is only one type of international executive agreement, and one which does need the consent of two-thirds of the Senate. Senate consent is also not technically 'ratification':

- the Senate does not ratify treaties; the President does. Treaties, in the U. S. sense, are not the

---

only type of binding international agreement. Congressional-Executive agreements and Sole Executive agreements may also be binding...\textsuperscript{10}

What President Obama can do is sign a Paris Treaty which in US law would be considered either a 'sole executive agreement' or 'congressional executive agreement,' although it may be safer legally and politically to do the latter. The President could ratify either by providing a definitive signature in Paris or by relaying a formal communication later.

Although the use of Presidential powers in the form of congressional executive or sole executive agreements is well established, this is not the case obviously when it comes to international climate mitigation. Some scholars have argued that this lack of precedent results in serious limitations, such as precluding the President from signing onto a treaty that includes a mitigation target. It is unjustified to be bound by such a cautious legal analysis when the issue is as dire as the climate threat to global security. Such conservative legal arguments may also not consider particular acts of Congress undergirding the President's ability to use congressional executive authority.\textsuperscript{11}

The thrust of the legal argument that President Obama can sign and ratify the Paris Treaty is that he already has the authority to implement it, which was provided by Congress. The strongest evidence he has that authority is in regulations his administration has already proposed, finalized, and even promulgated. EPA was obligated to use its authority under the Clean Air Act (CAA) to address the climate problem, and it has been doing that already.\textsuperscript{12} The problem is that these regulations do not go far enough, the reason being the same as why Obama's administration would have the world believe he has no power to sign the US onto a treaty that includes a mitigation target.

The US President's ability, and actually obligation,\textsuperscript{13} to use the CAA should make his legal authority clear enough, especially as the CAA contains explicit authority regarding international air pollutants (CAA, Section 115). But it is even clearer. Congress expressly gave the President the authority to negotiate international obligations on climate when it passed the Global Climate Protection Act, signed by Republican President Reagan in 1987.\textsuperscript{14} The President can also point to the fact that the Senate ratified the UN Framework Convention on Climate Change (UNFCCC), which states that the US (as an Annex I Party) “shall adopt national policies and take corresponding measures on the mitigation of climate change...”\textsuperscript{15}

Legally and politically the President is responsible for foreign policy. This authority is established in Article II of the US Constitution. There is no need to ask the US Senate's consent to an international

\textsuperscript{11} That a US President has not relied on congressional executive authority to enter into binding international obligations on a particular issue is not a sufficient argument to say that Presidential power does not exist with respect to that issue, particularly if there is no legislation directly opposing that authority. In this case, furthermore, there is legislation promoting that authority. Chang admits that the argument of a constraint to use congressional executive authority for mitigation targets is a 'legally prudent' view. With such a dire and unprecedented issue as global climate change, the chief executive may consider something other than the most legally prudent approach. Chang, Hannah. “International Executive Agreements on Climate Change”, Columbia Journal of Environmental Law (2010) 35(2).
\textsuperscript{13} Ibid.
\textsuperscript{15} Article II(a). http://unfccc.int/essential_background/convention/background/items/1349.php.
agreement on climate mitigation unless that agreement is in conflict with existing domestic law.

The Obama administration has energetically laid claim to the ability to use executive authority even with sharp disagreement from the contemporary Congress. His administration argued for both congressional and sole executive authority to sign the US onto a treaty on ‘intellectual property’ rights. The US president should be so bold when it comes to mitigating global climate catastrophe.

III. The US Could Participate in a Paris Treaty as a non-Party

Prior to the Warsaw climate talk, Nepal submitted a proposal on behalf the Least Developed Countries (LDCs) to consider provisions to allow participation by non-Parties. In Warsaw, UNFCCC Parties convened a workshop to consult with Secretariats of other Multilateral Environmental Agreements (MEAs). One of the topics of discussion was how other MEAs deal with non-Party participation. The Secretariats of the Stockholm Convention on Persistent Organic Pollutants, Montreal Protocol, and Convention on International Trade of Endangered Species (CITES) were present, and all of their respective regimes allow non-Party participation in one way or another.

Important lessons can be drawn from these and other international regimes. For instance, there is a strong case that US participation as a non-Party to a Paris treaty, including for ensuring compliance, could be achieved via US formal participation in trade-related environmental treaties such as CITES, Montreal, and the Basel Convention. The United States has acted for decades as if it is an official Party to the UN Convention on the Law of the Sea (UNCLOS) including for details as specific as the 200-mile economic exclusion zone. Arguably, the US is obligated to certain UNCLOS provisions in customary international law due to opinio juris.

In the case that the US remains committed to not committing legally to specific obligations in Paris, this ongoing discussion of non-Party participation needs to become a priority. The US may balk at this discussion if it is clearly aimed at them, but they should not favor attempts to appear a leader over other negotiators sincere efforts to create an effective climate agreement.

UNFCCC negotiators and State leaders must try to avoid being trapped by misconceptions and sometimes intentional mis-portrayals of political and legal constraints. The US delegation has been clear about the US goal, that legally binding obligations would not be a part of the Paris agreement when it comes to the actual mitigation pledges. This need not happen even if the Obama administration does not change its cowardly political calculus on climate policy.