CLIMATE CHANGE UNDER CUSTOMARY INTERNATIONAL LAW: MUST THE UNITED STATES PROTECT THE CLIMATE SYSTEM?

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On July 23, 2025, the International Court of Justice (ICJ) issued its "Advisory Opinion on Obligations of States in Respect of Climate Change," concluding that "the full gamut of international law applies to climate change." Beyond treaty-based duties, the ICJ recognized that customary international law imposes obligations on all states to protect the climate. The advisory opinion emerged from unprecedented participation by states and international organizations, reflecting a growing consensus that addressing climate change is a legal obligation. This Note explores the legal implications of recognizing a customary international law duty to protect the climate system. It posits that these customary obligations bind the United States as a matter of both international and domestic law. Therefore, recent regulatory and scientific rollbacks under President Donald J. Trump's administration place the United States in breach of its duties to prevent significant environmental harm and to cooperate in good faith with other states.

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INTRODUCTION

During deliberations for the International Court of Justice's (ICJ) "Advisory Opinion on Obligations of States in Respect of Climate Change"[1] ("ICJ Advisory Opinion"), Judge Peter Tomka observed that "[c]limate change presents a global challenge to the international community . . . [that]

1. Obligations of States in Respect of Climate Change, Advisory Opinion (July 23, 2025), https://www.icj-cij.org/sites/default/files/case-related/187/187-20250723-adv-01-00-en.pdf (on file with the *Fordham Law Review*) [hereinafter ICJ Advisory Opinion]. Open to all member states of the United Nations (UN), the ICJ was established by the UN Charter in 1945 and has been operational since 1946 at the Peace Palace in The Hague. *See* INT'L CT. OF JUST., THE INTERNATIONAL COURT OF JUSTICE: HANDBOOK 5–6 (6th ed. 2014). It is the principal judicial organ of the UN that adjudicates legal disputes between states and provides advisory opinions on legal questions referred by authorized UN organs and specialized agencies. *See id.*

can be addressed only through co-operation."[2] This observation captures the essence of the proceedings, in which an unprecedented ninety-six states and eleven international organizations delivered oral arguments before the ICJ, marking the "largest legal proceedings ever in human history."[3]

For states like Vanuatu, a small nation of islands in Oceania, the stakes could not be higher.[4] "Rising sea levels are projected to submerge the entire territory of certain small island States—possibly within decades."[5] In 2019, that sense of urgency reached a group of law students at the University of the South Pacific, a school serving the island states of Vanuatu, Fiji, Tonga, and the Solomon Islands.[6] These students were witnessing the effects of climate change every day, as rising seas erased beaches, graveyards washed into the ocean, and increasingly severe tropical cyclones destroyed homes and displaced families.[7] In response, they founded the grassroots campaign Pacific Island Students Fighting Climate Change with the mission to "tak[e] the world's biggest problem to the world's highest court."[8] Their plan: urge their governments to seek an advisory opinion from the ICJ on states' legal obligations to address climate change.[9] Their strategy was to frame the issue as a simple question affecting everyone: "If the I.C.J. ruled that all of international law [applied] . . . then climate change wouldn't be about some esoteric negotiations by bigwigs a world away but about the simple right to keep living in your own home."[10] Following a direct appeal from the

2. Obligations of States in Respect of Climate Change, Advisory Opinion, ¶ 1 (July 23, 2025) (declaration by Tomka, J.), https://www.icj-cij.org/sites/default/files/case-related/187/187-20250723-adv-01-02-en.pdf (on file with the *Fordham Law Review*).

3. Brooke Jarvis, *How a Group of Students in the Pacific Islands Reshaped Global Climate Law*, N.Y. TIMES MAG. (Sep. 12, 2025), https://www.nytimes.com/2025/09/10/magazine/global-climate-law-students.html (on file with the *Fordham Law Review*); *see also* Julia Foxen, *Landmark Climate Change Hearings Represent Largest Ever Case Before UN World Court*, UN NEWS (Dec. 2, 2024), https://news.un.org/en/story/2024/12/1157671 [https://perma.cc/W39C-HCXX]; Press Release, Int'l Ct. of Just., Obligations of States in Respect of Climate Change (Request for Advisory Opinion): Conclusion of the Public Hearings Held From 2 to 13 December 2024, I.C.J. Press Release No. 2024/81 (Dec. 13, 2024); Alaa Hajyahia, *ICJ Delivers Unanimous Advisory Opinion on States' Climate Change Obligations*, AM. SOC'Y OF INT'L L. (July 24, 2025), https://asil.org/ilib/icj-delivers-unanimous-advisory-opinion-on-states-climate-change-obligations [https://perma.cc/9G24-FSVZ].

4. *See* Obligations of States in Respect of Climate Change, Verbatim Record, 104–05 (Dec. 2, 2024, at 10:00 CET), https://www.icj-cij.org/sites/default/files/case-related/187/187-20241202-ora-01-00-bi.pdf (on file with the *Fordham Law Review*) [hereinafter Dec. 2 Verbatim Record]. Vanuatu is a country comprising thirteen major islands and many other smaller volcanic and coral islands in the southwestern Pacific Ocean. *See Vanuatu*, ENCYC. BRITANNICA, https://www.britannica.com/place/Vanuatu (on file with the *Fordham Law Review*) (last visited Aug. 6, 2026).

5. Dec. 2 Verbatim Record, *supra* note 4, at 105.

6. *See* Jarvis, *supra* note 3.

7. *See id.*

8. *Id.*

9. *See id.*

10. *Id.*

students, Vanuatu's government agreed to champion the proposal.[11] What began as a few students soon grew into a global coalition of 134 states.[12]

In March 2023, with Vanuatu at the helm, the United Nations (UN) General Assembly adopted a resolution requesting the ICJ Advisory Opinion.[13] The resolution asked the ICJ to address two questions.[14] First, "[w]hat are the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases[?]"[15] Second, "[w]hat are the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment[?]"[16]

Oral arguments commenced in December 2024.[17] The United States and other developed states[18] urged the ICJ to adopt a narrow interpretation.[19] They argued that existing treaties constituted "the only international legal régime" and these alone "provide the best hope for protecting the climate system."[20] Vanuatu and other island states argued for a broader approach, encompassing the corpus of international climate treaties, customary international law, and international human rights law.[21] In their view, the duty to protect the climate system was no different than the existing duty to prevent transboundary pollution.[22] "[I]f an isolated incident of transboundary pollution is unlawful, it is unthinkable that the ultimate form of pollution is not."[23] Thus, "[a]cts, such as issuing licenses for fossil fuel exploration and extraction or granting massive fossil fuel subsidies, as well

11. *See id.*
12. *See id.*
13. G.A. Res. 77/276 (Mar. 29, 2023).
14. *Id.* at 3.
15. *Id.* Anthropogenic refers to "of, relating to, or resulting from the influence of human beings on nature." *Anthropogenic*, MERRIAM-WEBSTER'S DICTIONARY, https://www.merriam-webster.com/dictionary/anthropogenic (on file with the *Fordham Law Review*) (last visited July 16, 2026).
16. G.A. Res. 77/276, *supra* note 13, at 3 ("[W]ith respect to: (i) States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change?; [and] (ii) Peoples and individuals of the present and future generations affected by the adverse effects of climate change?").
17. Press Release, Int'l Ct. of Just., Obligations of States in Respect of Climate Change (Request for Advisory Opinion): Revised Schedule for the Public Hearings, I.C.J. Press Release No. 2024/76 (Dec. 2, 2024).
18. "Developed" and "developing" are classifications used by the United Nations and other international organizations to categorize states according to measures of economic and human development. *See* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2023: SYNTHESIS REPORT 123 (Hoesung Lee et al. eds., 2023).
19. *See* Obligations of States in Respect of Climate Change, Verbatim Record, 44–46 (Dec. 4, 2024, at 15:00 CET), https://www.icj-cij.org/sites/default/files/case-related/187/187-20241204-ora-02-00-bi.pdf (on file with the *Fordham Law Review*).
20. *Id.* at 44.
21. *See* Dec. 2 Verbatim Record, *supra* note 4, at 106–10.
22. *See id.* at 110.
23. *Id.*

as omissions, such as the failure to regulate emissions," should amount to an internationally wrongful act.[24]

After months of deliberations, on July 23, 2025, the ICJ delivered its opinion.[25] Unanimously, the ICJ adopted the broad approach advanced by Vanuatu and other island states.[26] In addition to the existing obligations of ratified parties to climate treaties, the ICJ concluded that customary international law imposes binding obligations on *all* states, regardless of their treaty posture.[27] First, the ICJ held that the customary duty to prevent significant environmental harm applies to the climate system and is "intrinsically linked" to a customary duty of cooperation.[28] Next, the ICJ affirmed that the international human right to a clean, healthy, and sustainable environment also applies to climate change.[29] In sum, "the full gamut of international law applies to climate change," just as the students at the University of the South Pacific had originally advocated.[30]

Six days later, U.S. Environmental Protection Agency (EPA) Administrator Lee Zeldin announced efforts to repeal the 2009 Endangerment and Cause or Contribute Findings for Greenhouse Gases under section 202(a) of the Clean Air Act ("Endangerment Finding"),[31] which had served as the scientific foundation for regulating carbon dioxide (CO2) and other greenhouse gases (GHGs) under the Clean Air Act[32] (CAA). According to the EPA, "[t]here is insufficient reliable information to retain the conclusion that GHG emissions . . . in the United States cause or contribute to endangerment to public health and welfare," because the EPA found there were "too many analytical gaps, uncertainties, and speculative predictions" to justify the original finding.[33] In Zeldin's own words, this marked "the largest deregulatory announcement in U.S. history . . . driving a dagger straight into the heart of the climate change religion."[34] This

24. *Id.* at 111.
25. ICJ Advisory Opinion, *supra* note 1.
26. *See id.* ¶ 457.
27. *See id.* ¶¶ 131–145.
28. *Id.*
29. *Id.* ¶¶ 369–404.
30. Jarvis, *supra* note 3.
31. *See* Maxine Joselow & Lisa Friedman, *In Game-Changing Climate Rollback, E.P.A. Aims to Kill a Bedrock Scientific Finding*, N.Y. TIMES (Mar. 29, 2025), https://www.nytimes.com/2025/07/29/climate/epa-endangerment-finding-repeal-proposal.html (on file with the *Fordham Law Review*); Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66496 (Dec. 15, 2009).
32. 42 U.S.C. §§ 7401–7671q.
33. Reconsideration of 2009 Endangerment Finding and Greenhouse Gas Vehicle Standards, 90 Fed. Reg. 36288, 36307–11 (proposed Aug. 1, 2025) (to be codified at 40 C.F.R. pts. 85–86, 600, 1036–1037, 1039) [hereinafter Reconsideration of 2009 Endangerment Finding]. In February 2026, the EPA issued a final rule rescinding the 2009 Endangerment Finding. *See* Rescission of the Endangerment Finding, 91 Fed. Reg. 7686 (Feb. 18, 2026); *see also infra* Part I.A.3.c.
34. U.S. ENVIRONMENTAL PROTECTION AGENCY, *EPA Administrator Lee Zeldin Launches the Greatest Day of Deregulation in American History*, at 00:01–00:05 (YouTube, Mar. 12, 2025), https://www.youtube.com/watch?v=qae9bhymH50 (on file with the *Fordham Law*

announcement came as no surprise: In January 2025, President Donald J. Trump issued Executive Order (EO) 14154, "Unleashing American Energy,"[35] which outlined plans to "encourage energy exploration and production."[36] In addition to directing the EPA to address "the legality and continuing applicability" of the Endangerment Finding, the EO directed federal agencies to fast-track permit applications for fossil fuel projects.[37] That same day, the Trump administration issued EO 14156, "Declaring a National Energy Emergency,"[38] directing federal agencies to expedite such projects using emergency procedures.[39]

In May 2025, the Trump administration took aim at scientific agencies with EO 14303, "Restoring Gold Standard Science,"[40] which "replace[d] the scientific experts who lead U.S. governmental scientific organizations with non-scientific political appointees who would have the power to decide what science could and could not be published."[41] One month later, the website climate.gov, operated by the National Oceanic and Atmospheric Administration (NOAA),[42] which was "one of the most trusted sources of climate-related information in the U.S.," was taken offline.[43] This removal

Review); Press Release, U.S. Env't Prot. Agency, EPA Launches Biggest Deregulatory Action in U.S. History (Mar. 12, 2025), https://www.epa.gov/newsreleases/epa-launches-biggest-deregulatory-action-us-history [https://perma.cc/W95L-AAXQ].

35. Exec. Order No. 14154, 90 Fed. Reg. 8353 (Jan. 20, 2025).

36. *Id.*

37. *Id.* at 8357.

38. Exec. Order No. 14156, 90 Fed. Reg. 8433 (Jan. 20, 2025).

39. *See id.*

40. Exec. Order No. 14303, 90 Fed. Reg. 22601 (May 23, 2025).

41. Michael E. Wysession et al., *The Executive Order "Restoring Gold Standard Science" Is Dangerous for America*, AGU ADVANCES, Aug. 2025, at 1.

42. NOAA is the "principal federal agency tasked with understanding and predicting changes in climate, weather, ocean and coasts; sharing that knowledge and information with others; and conserving and managing coastal and marine ecosystems and resources." EVA LIPIEC, CONG. RSCH. SERV., R47636, NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION (NOAA): ORGANIZATION OVERVIEW AND ISSUES FOR CONGRESS 2 (2025). Its mission includes climate monitoring, weather forecasting, and the dissemination of environmental data. *See* 15 U.S.C. §§ 8501–8563.

43. Rebecca Hersher, *A Popular Climate Website Will Be Hobbled, After Trump Administration Eliminates Entire Staff*, NPR (June 12, 2025, at 16:47 ET), https://www.npr.org/2025/06/12/nx-s1-5431660/climate-us-government-website-changes [https://perma.cc/4KPP-HA3G]. As of July 16, 2026, users visiting climate.gov are redirected to NOAA's climate webpage, which displays the following notice:

> In compliance with Executive Order 14303 ('Restoring Gold Standard Science'), the White House Office of Science and Technology Policy's June 23, 2025 Memorandum ('Agency Guidance for Implementing Gold Standard Science in the Conduct & Management of Scientific Activities'), 15 USC § 2904 ('National Climate Program'), 15 USC § 2934 ('National Global Change Research Plan'), and 33 USC § 893a ('NOAA Ocean and Atmospheric Science Education Programs'), you have been redirected to NOAA.gov. Future research products previously housed under Climate.gov will be available at NOAA.gov/climate and its affiliate websites.

Climate, NAT'L OCEANIC & ATMOSPHERIC ADMIN., https://www.noaa.gov/climate [https://perma.cc/WX8X-S27E] (last visited July 16, 2026).

followed mass firings, contract terminations, and 2026 and 2027 budget cut proposals at NOAA.[44]

In September 2025, President Trump defended his agenda on the world stage at the eightieth session of the UN General Assembly, calling climate change "the greatest con job ever perpetrated on the world" and the concept of a carbon footprint a "hoax."[45] This was a far cry from the language in the ICJ Advisory Opinion, which described climate change as "an existential problem of planetary proportions that imperils all forms of life and the very health of our planet."[46]

In light of the ICJ Advisory Opinion, this Note argues that such acts and omissions by the Trump administration constitute violations of customary international law enacted to protect the climate system. Part I provides the necessary background by outlining the science, international and domestic legal frameworks, and principles of customary international law around climate change.[47] Part II examines whether climate change obligations have crystallized into customary international law. It then analyzes whether those obligations bind the United States by contrasting the modernist and revisionist views on the domestic status of customary international law.[48] Part III argues that climate change is indeed now part of customary international law and that the United States is in breach of its obligations.[49]

I. THE FOUNDATIONS OF CUSTOMARY CLIMATE OBLIGATIONS

The customary obligations articulated in the ICJ Advisory Opinion implicate scientific, legal, and policy considerations. To situate these obligations, this Note first lays the necessary foundation. Part I.A introduces the scientific background and details both the international and domestic responses to climate change, with particular focus on recent climate rollbacks by the Trump administration. Part I.B turns to how custom is identified and describes the customary duties to protect the environment.

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44. *See* Seth Borenstein, *Hundreds of Weather Forecasters Fired in Latest Wave of DOGE Cuts*, ASSOCIATED PRESS (Feb. 27, 2025), https://apnews.com/article/national-weather-service-layoffs-trump-doge-a65360a1eb2500b7d47c9c966e383f4a [https://perma.cc/DH27-RUBP]; *see also* OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, FISCAL YEAR 2026 DISCRETIONARY BUDGET REQUEST, at 24–25 (2025); OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, FISCAL YEAR 2027 DISCRETIONARY BUDGET REQUEST, at 8–9 (2026).

45. President Donald J. Trump, Address at the 80th Session of the UN General Assembly, at 40:34–40:38, 42:14–42:18 (Sep. 23, 2025), https://gadebate.un.org/en/80/united-states-america (on file with the *Fordham Law Review*).

46. ICJ Advisory Opinion, *supra* note 1, ¶ 456.

47. *See infra* Part I.

48. *See infra* Part II.

49. *See infra* Part III.

A. Climate Science, Treaties, and the U.S. Response to Climate Change

To provide context before discussing whether states have a legal obligation to protect the climate system, this Note will first examine the science behind climate change,[50] the international legal regime built to address it,[51] and the United States' evolving engagement with this regime.[52]

1. Scientific Background

Climate change is the "change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere."[53] Climate change causes rising global surface temperatures, primarily driven by anthropogenic GHG emissions.[54] GHGs trap heat within the atmosphere, creating the "greenhouse effect."[55] The rapid increase in anthropogenic GHG emissions since the Industrial Revolution has intensified the greenhouse effect, further increasing global surface temperatures.[56] Rising global surface temperatures pose a series of interrelated risks, including sea level rise; increased frequency and intensity of heat waves and droughts; frequent and severe hurricanes; and ocean acidification, which threatens marine ecosystems.[57]

CO2 is considered the main driver of climate change and is emitted primarily through the combustion of fossil fuels for energy.[58] Climate scientists rely on sophisticated models to forecast the impacts of global CO2 emissions.[59] The Intergovernmental Panel on Climate Change (IPCC)[60] synthesizes this research into periodic consensus reports.[61] The IPCC's Representative Concentration Pathways illustrate potential futures under

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50. *See infra* Part I.A.1.

51. *See infra* Part I.A.2.

52. *See infra* Part I.A.3.

53. United Nations Framework Convention on Climate Change art. 1, May 9, 1992, 1771 U.N.T.S. 107 (entered into force Mar. 21, 1994) [hereinafter UNFCCC].

54. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *supra* note 18, at 42–47; John Cook et al., *Consensus on Consensus: A Synthesis of Consensus Estimates on Human-Caused Global Warming*, ENV'T RSCH. LETTERS, Apr. 2016, at 6 ("[T]he scientific consensus on [anthropogenic global warming] is robust, with a range of 90%–100%.").

55. *See* KERRY A. EMANUEL, CLIMATE SCIENCE AND CLIMATE RISK: A PRIMER 2–3 (2016).

56. *See id.* at 1.

57. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *supra* note 18, at 84.

58. *See id.* Even if emissions ceased today, a substantial portion of CO2 would remain in the atmosphere for centuries. *Id.*

59. *Id.* at 4–5, 10.

60. The Intergovernmental Panel on Climate Change (IPCC) is a UN-affiliated body that provides governments with authoritative assessments of the scientific basis of climate change, its impacts and risks, and options for mitigation and adaptation. Comprising 195 UN member states, the IPCC does not conduct original research; rather, it synthesizes and evaluates the existing scientific literature through assessment reports prepared by volunteer experts and subjected to extensive, transparent review by both scientific experts and governments to reflect a broad range of perspectives and levels of confidence. *About the IPCC*, IPCC, https://www.ipcc.ch/about/ [https://perma.cc/2P4L-3BJE] (last visited July 13, 2026).

61. INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *supra* note 18, at 4–5, 10.

varying emissions and mitigation scenarios.[62] Under current emissions trends, global average surface temperatures are expected to rise to approximately 1.5 degrees Celsius above preindustrial levels by 2040.[63] Each additional fraction of a degree Celsius compounds existing climate risks.[64] IPCC assessments emphasize that even 1.5 degrees Celsius of warming poses serious and widespread dangers for most societies, ecosystems, and economic sectors.[65] Although models present multiple emission scenarios, all conclude that only swift, substantial, and sustained reductions in CO2 emissions can meaningfully slow the warming trend within a time frame required to produce detectable improvements in atmospheric conditions.[66] In the face of such harrowing consequences, the international community has organized collectively to address climate change.

2. The International Response: Climate Change Treaties

The international climate change regime developed through a series of multilateral agreements, beginning with the UN Framework Convention on Climate Change (UNFCCC).[67] Ratified by 197 states, the UNFCCC's objective is the "stabilization of [GHG] concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system."[68] To accomplish this, developed states are expected to "take the lead in combating climate change" by adopting national policies to mitigate climate change with the aim of returning to the CO2 emissions levels of 1990.[69] The UNFCCC also established the Conference of the Parties (COP), charged with reviewing implementation, assessing progress, and adopting decisions to promote effective compliance.[70] The COP meets annually and has the power to adopt protocols to the UNFCCC.[71] Because the UNFCCC itself did not establish binding GHG emissions reduction targets, the COP convened in 1997 to negotiate mitigation commitments, resulting in the Kyoto Protocol.[72]

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62. *See id.* at 9.
63. *See id.* at 12. "[T]he near term is defined as the period until 2040." *Id.* at 3 n.3.
64. *See id.* at 99.
65. *See id.* at 97–101.
66. *See id.*
67. UNFCCC, *supra* note 53, art. 1.
68. *Id.* art. 2.
69. *Id.* arts. 3(1), 4(2)(a)–(b). Party classification under the UNFCCC divides states into Annex I (industrialized and transition-economy states), Annex II (wealthier members with funding and technology-transfer duties), and non-Annex I (developing states, including least-developed countries given special consideration). *See id.* art. 4(2), Annex I–II; *see also Parties & Observers*, UNITED NATIONS CLIMATE CHANGE, https://unfccc.int/parties-observers [https://perma.cc/8SKZ-7QLX] (last visited July 31, 2026).
70. UNFCCC, *supra* note 53, art. 7.
71. *Id.* art. 17.
72. *See* Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, 2303 U.N.T.S. 162 (entered into force Feb. 16, 2005) [hereinafter Kyoto Protocol].

Ratified by 191 states, the Kyoto Protocol established legally binding GHG emissions reduction targets for developed states to meet within determined commitment periods.[73] During the first commitment period, from 2008 to 2012, developed states were required to reduce GHG emissions by an average of 5 percent below 1990 levels.[74] A second commitment period followed from 2013 to 2020, after which no subsequent period was established.[75] Finally, the Paris Agreement,[76] adopted in 2015, shifted the international climate change regime away from fixed targets toward a more flexible system of nationally determined contributions (NDCs).[77]

Signed by 194 parties, the Paris Agreement sought to hold the increase in global surface temperature to well below 2 degrees Celsius, while pursuing efforts to limit warming to 1.5 degrees Celsius.[78] Its central mechanism for mitigation is the system of NDCs, which requires each state to prepare, register, and maintain successive climate pledges, which must be updated every five years.[79] States must also pursue domestic mitigation measures to achieve their NDCs.[80] Beyond mitigation, the Paris Agreement requires that states cooperate on adaptation, education, training, and public awareness.[81] Within this context of international cooperation, the United States' role in combating climate change remains capricious at best.

3. The U.S. Response to Climate Change

Anthropogenic climate change began receiving federal attention in the United States during the 1960s, particularly after scientific advisors warned President Lyndon B. Johnson in 1965 about the effects of rising CO2 emissions.[82] More than two decades later, then–Vice President George

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73. *See id.* art. 3(1).

74. *Id.*

75. JANE A. LEGGETT, CONG. RSCH. SERV., R40001, A U.S.-CENTRIC CHRONOLOGY OF THE UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE 2 (2013).

76. Paris Agreement to the United Nations Framework Convention on Climate Change, Apr. 22, 2016, T.I.A.S. No. 16-1104 (entered into force Nov. 4, 2016) [hereinafter Paris Agreement].

77. *See id.*; *see also* Jonathan B. Wiener & Tyler Felgenhauer, *The Evolving International Climate Change Regime: Mitigation, Adaptation, Reflection*, 11 TEX. A&M L. REV. 451, 462 (2024).

78. Paris Agreement, *supra* note 76, art. 2(1)(a).

79. *See id.* arts. 4(2), 4(9), 4(12), 4(13).

80. *See id.* art. 4(2).

81. *See id.* arts. 7(6), 7(7), 8(4), 12. "States are free to select the means of co-operating, as long as such means are consistent with the obligations of good faith and due diligence." ICJ Advisory Opinion, *supra* note 1, ¶ 262.

82. *See* The Knowable Podcast, *Scientists Warned About Climate Change in 1965. Nothing Was Done.*, KNOWABLE MAG., at 01:35–02:05, 02:21–03:12 (May 30, 2023), https://knowablemagazine.org/content/article/food-environment/2023/scientists-warned-climate-change-1965-podcast (on file with the *Fordham Law Review*). "Carbon dioxide is being added to the earth's atmosphere by the burning of coal, oil, and natural gas . . . . This will modify the heat balance of the atmosphere to such an extent that marked changes in climate, not controllable though [sic] local or even national efforts, could occur." PRESIDENT'S SCI. ADVISORY COMM. ENV'T POLLUTION PANEL, RESTORING THE QUALITY OF OUR ENVIRONMENT 9 (1965).

H. W. Bush declared climate change "not a liberal or conservative" issue but rather the "common agenda of the future."[83] In the decades that followed, however, climate change became increasingly politically polarized, producing significant shifts in the United States' climate posture.[84]

Understanding the United States' position on climate change is essential to assessing whether it has acted consistently with, or in opposition to, emerging customary obligations. This section surveys U.S. treaty practice and domestic climate policies to assess whether the United States has acted as a persistent objector or has instead contributed to the crystallization of customary obligations.[85]

a. International Engagement and Treaty Practice

During the UNFCCC negotiations, the United States opposed binding emissions reduction targets, prompting negotiators to exclude enforceable obligations from the final treaty text.[86] While the United States ultimately signed the UNFCCC, it did so only after ensuring it imposed no mandatory limits on GHG emissions.[87]

However, leading up to negotiations for the Kyoto Protocol, President William J. Clinton publicly supported binding GHG emissions reduction targets.[88] This prompted the U.S. Senate to unanimously adopt the Byrd-Hagel Resolution, opposing any "commitments to limit or reduce [GHG] emissions for the [United States], unless the protocol . . . also mandates . . . [GHG] emissions [reductions] for Developing Country Parties."[89] As a result, while the United States signed the Kyoto Protocol, it was not submitted to the Senate for ratification.[90] In March 2001, President George W. Bush formally withdrew U.S. support, calling the Kyoto Protocol unfair and economically damaging.[91]

In preparation for a post–Kyoto Protocol framework, President Barack Obama negotiated an agreement that would include both developed and

83. George H. W. Bush, U.S. Vice President, Environmental Policy Speech, at 11:42–11:58 (Aug. 31, 1988), https://www.c-span.org/program/campaign-1988/bush-campaign-speech/2100 (on file with the *Fordham Law Review*).

84. *See* Riley E. Dunlap, Aaron M. McCright & Jerrod H. Yarosh, *The Political Divide on Climate Change: Partisan Polarization Widens in the U.S.*, ENV'T: SCI. & POL'Y FOR SUSTAINABLE DEV., Sep.–Oct. 2016, at 4–5.

85. *See infra* Parts I.A.3.a–c, I.B.1.

86. *See* CHRIS WOLD, MELISSA POWERS & DAVID HUNTER, CLIMATE CHANGE AND THE LAW 145–47 (2013).

87. *See id.*

88. *See id.* at 191.

89. S. Res. 98, 105th Cong. (1997) (enacted).

90. *See* LEGGETT, *supra* note 75, at 4.

91. Presidential Letter to Members of the Senate on the Kyoto Protocol on Climate Change, 37 WEEKLY COMP. PRES. DOC. 444 (Mar. 13, 2001) ("As you know, I oppose the Kyoto Protocol because it exempts 80 percent of the world, including major population centers such as China and India, from compliance, and would cause serious harm to the U.S. economy.").

developing states, resulting in the Paris Agreement's system of NDCs.[92] The United States joined the Paris Agreement in 2016 but withdrew less than a year later during President Trump's first administration, citing economic burdens.[93] In January 2021, President Joseph R. Biden Jr. rejoined the Paris Agreement, reaffirming U.S. participation in international climate cooperation.[94] At the beginning of his second administration, however, President Trump again withdrew the United States from the agreement.[95] Within the context of domestic policy, support for actions addressing climate change has similarly waxed and waned.

b. Domestic Actions

In 1978, Congress enacted the National Climate Program Act[96] (NCPA), which established a research and planning framework within the U.S. Department of Commerce. The NCPA further directed federal agencies to operate through a National Climate Program Office administered by NOAA to "assist the Nation and the world to understand and respond to natural and man-induced climate processes and their implications."[97] To that end, the National Climate Program Office conducts "global data collection, and monitoring and analysis activities to provide reliable, useful and readily available information on a continuing basis."[98] The NCPA also requires the secretary of commerce to "cooperate and participate with . . . foreign, international, and domestic organizations and agencies involved in international or domestic climate-related programs," which includes "providing representation at climate-related international meetings and conferences in which the United States participates."[99]

Twelve years later, Congress enacted the Global Change Research Act of 1990[100] (GCRA), which established the U.S. Global Change Research

92. *See* JANE A. LEGGETT & RICHARD K. LATTANZIO, CONG. RSCH. SERV., R44609, CLIMATE CHANGE: FREQUENTLY ASKED QUESTIONS ABOUT THE 2015 PARIS AGREEMENT 1–2, 14 (2017); Joint Statement—United States-China Climate Change Cooperation Outcomes, 2 PUB. PAPERS 1125 (Sep. 3, 2016).

93. *See* Press Release, Secretary-General Remarks at Ceremony for the Deposit of Instruments by China and the United States to Join the Paris Agreement, U.N. Press Release SG/SM/18027 (Sep. 3, 2016), https://www.un.org/sg/en/content/former-secretary-general/statements/2016-09-03/secretary-generals-remarks-ceremony-for-the-deposit-of-instruments-china-and-the-united-states-join-the-paris-agreement-delivered [https://perma.cc/UQM6-9R5F]; President Donald J. Trump, Statement by President Trump on the Paris Climate Accord (June 1, 2017), https://trumpwhitehouse.archives.gov/briefings-statements/statement-president-trump-paris-climate-accord/ [https://perma.cc/3A9P-RNJJ]; Press Statement, U.S. Dep't of State, On the U.S. Withdrawal from the Paris Agreement (Nov. 4, 2019), https://2017-2021.state.gov/on-the-u-s-withdrawal-from-the-paris-agreement/ [https://perma.cc/75VU-LH4M].

94. *See* Exec. Order No. 13990, 86 Fed. Reg. 7037 (Jan. 20, 2021).

95. *See* Exec. Order No. 14162, 90 Fed. Reg. 8455 (Jan. 20, 2025).

96. 15 U.S.C. §§ 2901–2908.

97. *Id.* §§ 2902, 2904(c).

98. *Id.* § 2904(d)(4).

99. *Id.* § 2904(f).

100. 15 U.S.C. §§ 2921–2961.

Program[101] (USGCRP) and mandated the release of a National Climate Assessment (NCA) every four years.[102] The NCA must (1) synthesize and evaluate program findings and related scientific uncertainties; (2) assess the impacts of global change on the environment, economy, and society; and (3) analyze current and projected trends in human-induced and natural climate change over the next 25 to 100 years.[103] In the decades that followed, the task of addressing climate change shifted from Congress to the executive and judicial branches.[104]

Because Congress largely refrained from enacting further climate change legislation, the federal government's authority to regulate GHG emissions largely developed through a series of U.S. Supreme Court decisions interpreting the CAA.[105] In *Massachusetts v. EPA*,[106] the Court held that section 202(a)(1) of the CAA grants the EPA authority to regulate GHGs emitted from new motor vehicles if they "endanger public health or welfare."[107] The Court reasoned that the CAA's broad definition of "air pollutant" encompassed GHGs and that Congress structured the statute to allow regulatory flexibility in response to emerging environmental threats.[108] Thus, the CAA requires the EPA to determine whether GHG emissions pose a threat to public health or welfare and, if so, regulate them accordingly.[109]

In response to *Massachusetts v. EPA*, the EPA issued its Endangerment Finding.[110] Relying on scientific assessments from the IPCC and USGCRP, the EPA determined that GHGs from new motor vehicles "contribute to the air pollution that may reasonably be anticipated to endanger public health and welfare."[111] This finding triggered the EPA's obligation under section 202(a)(1) of the CAA to regulate such emissions, leading to tailpipe standards for light-duty vehicles, light-duty trucks, and medium-duty passenger vehicles.[112]

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101. Much like the IPCC, the USGCRP is an interagency scientific coordination body composed of fifteen federal agencies that develops and synthesizes research on global environmental change and its impacts, providing the scientific foundation for informing domestic and international responses to climate-related risks. *See* U.S. GLOB. CHANGE RSCH. PROGRAM, OUR CHANGING PLANET: THE U.S. GLOBAL CHANGE RESEARCH PROGRAM FOR FISCAL YEAR 2025, at 1 (2024).

102. *See* 15 U.S.C. § 2936. Much like IPCC assessment reports, the NCA is an interagency assessment of climate change impacts, risks, and response options, and provides the scientific foundation to support informed decision-making across the United States. *See* U.S. GLOB. CHANGE RSCH. PROGRAM, FIFTH NATIONAL CLIMATE ASSESSMENT, at iv (2023).

103. *See* 15 U.S.C. § 2936.

104. *See* Jody Freeman & David B. Spence, *Old Statutes, New Problems*, 163 U. PA. L. REV. 1, 28 (2014).

105. *See id.* at 24, 28.

106. 549 U.S. 497 (2007).

107. *Id.* at 528.

108. *See id.* at 528–30.

109. *See id.* at 533.

110. *See* Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66496, 66499 (Dec. 15, 2009).

111. *Id.* at 66537.

112. *See* 40 C.F.R. § 86.1818-12 (2011).

The EPA subsequently relied on the Endangerment Finding to extend regulation of GHG emissions to stationary sources under sections 111(b) and 111(d) of the CAA.[113] In 2015, the EPA promulgated the Clean Power Plan[114] to limit CO2 emissions from existing fossil-fuel-fired power plants pursuant to section 111(d).[115] In *West Virginia v. EPA*,[116] however, the Supreme Court held that section 111(d) did not authorize the EPA to transform the nation's energy sector through generation-shifting measures absent "clear congressional authorization."[117] The Court held that when an agency claims authority over matters of "vast economic and political significance," it must point to a "clear congressional authorization."[118] While *West Virginia v. EPA* narrowed the scope of the EPA's regulatory authority, subsequent executive action under the second Trump administration would target the broader federal framework for addressing climate change.

c. U.S. Climate Rollbacks

Upon returning to office in January 2025, President Trump reversed or suspended a range of domestic and international climate measures adopted under prior administrations—Democratic and Republican alike.[119] On the first day of his second term, President Trump issued EO 14154, "Unleashing American Energy,"[120] directing federal agencies to expedite fossil fuel development.[121] The EO also instructed agency heads to identify regulations that "impose an undue burden on the identification, development, or use of domestic energy resources," including oil, natural gas, coal, hydropower, biofuels, critical minerals, and nuclear energy.[122] The same day, President Trump issued EO 14162, "Putting America First in International Environmental Agreements,"[123] directing the withdrawal of the United States from the Paris Agreement.[124] The EO further suspended U.S. participation in cooperative climate mechanisms and "revoke[d] any purported financial commitment made by the United States under the [UNFCCC]."[125]

113. 42 U.S.C. § 7411(a)(1), (b), (d).
114. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64662 (Oct. 23, 2015) (codified at 40 C.F.R. pt. 60).
115. *See id.* at 64663–64.
116. 142 S. Ct. 2587 (2022).
117. *Id.* at 2605, 2609 (quoting Util. Air Regul. Grp. v. EPA, 573 U.S. 302, 324 (2014)).
118. *Id.* (quoting *Util. Air Regul. Grp.*, 573 U.S. at 324).
119. *See* Clare Zhang, *Trump Reverses Climate Policies on First Day in Office*, AM. INST. OF PHYSICS (Jan. 23, 2025), https://www.aip.org/fyi/trump-reverses-climate-policies-on-first-day-in-office [https://perma.cc/QWH8-X87H].
120. Exec. Order No. 14154, 90 Fed. Reg. 8353 (Jan. 20, 2025).
121. *See id.*
122. *Id.* at 8354.
123. Exec. Order No. 14162, 90 Fed. Reg. 8455 (Jan. 20, 2025).
124. *See id.*
125. *Id.*

In May 2025, President Trump issued EO 14303, "Restoring Gold Standard Science,"[126] which restructured federal science oversight by vesting final approval of agency research in political appointees.[127] Pursuant to the EO, the Trump administration's fiscal year 2027 budget proposed eliminating NOAA's Office of Oceanic and Atmospheric Research (OAR) and the National Climate Program Office.[128] The Trump administration also canceled contracts supporting interagency coordination under USGCRP and halted work on the sixth NCA.[129] That same month, NOAA discontinued updates to its Billion-Dollar Weather and Climate Disasters database, and in June 2025, archived climate.gov, suspending public access to climate-data products.[130] Taken together, these actions effectively paused the National Climate Program's statutory functions of continuous monitoring, assessment, and public dissemination.[131]

In July 2025, the U.S. Department of Energy (DOE) released *A Critical Review of Impacts of Greenhouse Gas Emissions on the U.S. Climate* (the "DOE Report"), directly challenging the IPCC's assessment of both the magnitude and risks of anthropogenic climate change.[132] The DOE Report asserted that IPCC climate models "generally run 'hot'" and "tended to exceed observed trends."[133] It further argued that the IPCC's use of high-emission scenarios is misleading and an exaggeration.[134] Emphasizing what it characterized as the beneficial effects of CO2, the DOE Report concluded that "[CO2] differs in many ways from the so-called Criteria Air Pollutants" under the CAA.[135] These "Criteria Air Pollutants," the DOE Report argued, "cause local problems depending on concentrations that include nuisances (odor, visibility), damage to plants, and, at high enough

126. Exec. Order No. 14303, 90 Fed. Reg. 22601 (May 23, 2025).

127. *See id.*

128. NAT'L OCEANIC & ATMOSPHERIC ADMIN., U.S. DEP'T OF COM., BUDGET ESTIMATES FISCAL YEAR 2027 CONGRESSIONAL JUSTIFICATION, at OAR-1 to -35 (2026).

129. Zack Colman, *Trump Moves to Hobble Major U.S. Climate Change Study*, POLITICO (Apr. 9, 2025, at 11:57 ET), https://www.politico.com/news/2025/04/09/trump-moves-to-hobble-major-climate-study-00280405 (on file with the *Fordham Law Review*); Dharna Noor & Gabrielle Canon, *White House Ends Funding for Key U.S. Climate Body: "No Coming Back from This*," GUARDIAN (Apr. 9, 2025, at 16:11 ET), https://www.theguardian.com/us-news/2025/apr/09/trump-national-climate-assessment-usgcrf [https://perma.cc/C9BV-FU7T].

130. *See Billion Dollar Weather and Climate Disasters*, NAT'L ENV'T SATELLITE, DATA, & INFO. SERV. (May 8, 2025), https://www.nesdis.noaa.gov/about/documents-reports/notice-of-changes/2025-notice-of-changes/billion-dollar-weather-and-climate-disasters [https://perma.cc/3T55-XDBU]; Hersher, *supra* note 43. The Billion-Dollar Weather and Climate Disasters database tracks U.S. weather and climate disasters where damages reached or exceeded $1 billion. *See U.S. Billion-Dollar Weather and Climate Disasters,* CLIMATE CENT., https://www.climatecentral.org/climate-services/billion-dollar-disasters [https://perma.cc/A2YP-2GVP] (last visited July 17, 2026).

131. *See* Hersher, *supra* note 43.

132. *See* U.S. DEP'T OF ENERGY, A CRITICAL REVIEW OF IMPACTS OF GREENHOUSE GAS EMISSIONS ON THE U.S. CLIMATE, at ix–x (2025).

133. *Id.* at ix, 11.

134. *Id.* at 11.

135. *Id.* at 2.

exposure levels, toxicological effects in humans."[136] In contrast, the DOE Report argued that CO2 "is odorless, does not affect visibility and has no toxicological effects at ambient levels," that it is "naturally occurring . . . and a key component of human and plant respiration," and that "CO2 is essential for plant photosynthesis and higher levels are beneficial for vegetation."[137] On that basis, the DOE Report concluded that "U.S. policy actions are expected to have undetectably small direct impacts on the global climate."[138] The EPA subsequently proposed rescinding the Endangerment Finding, asserting that new data and uncertainty justified reconsideration of whether anthropogenic GHG emissions "cause or contribute to" endangerment under section 202(a) of the CAA.[139]

Then, in January 2026, President Trump announced the United States' withdrawal from several international climate agreements and organizations, including the UNFCCC and the IPCC.[140] That same month, the United States' withdrawal from the Paris Agreement became effective.[141] In February 2026, the United States formally notified the UN secretary-general of its withdrawal from the UNFCCC.[142] The withdrawal takes effect in February 2027, making the United States the first—and only—country to withdraw from the UNFCCC.[143]

While President Trump announced the U.S. withdrawal from the UNFCCC, the EPA finalized its rescission of the 2009 Endangerment Finding.[144] In the final rule, the EPA stated that it "did not rely" on the DOE Report in issuing the rule.[145] Rather, the agency concluded that "regulating GHG emissions from new motor vehicles and engines under CAA section 202(a)(1) has no material impact on global climate change concerns."[146] The

136. *Id.*
137. *Id.*
138. *Id.* at ix.
139. Reconsideration of 2009 Endangerment Finding, *supra* note 33, at 36307–11 (citing U.S. DEP'T OF ENERGY, *supra* note 132) ("[T]he 2025 [Critical Review of Impacts of GHG emissions on the U.S. Climate] Draft Report was provided to the EPA on May 27, 2025, and was reviewed and relied upon in formulating this proposal.").
140. Memorandum on Withdrawing the United States from International Organizations, Conventions, and Treaties That Are Contrary to the Interests of the United States, 91 Fed. Reg. 2281, 2282–83 (Jan. 16, 2026).
141. U.N. Secretary-General, Paris Agreement: United States of America: Withdrawal (Jan. 27, 2025), https://treaties.un.org/doc/Publication/CN/2025/CN.71.2025-Eng.pdf [https://perma.cc/TK4Y-PHAS].
142. U.N. Secretary-General, United Nations Framework Convention on Climate Change: United States of America: Withdrawal (Feb. 27, 2026), https://treaties.un.org/doc/Publication/CN/2026/CN.102.2026-Eng.pdf [https://perma.cc/N362-3TER].
143. *Id.*; Andrew Freedman, Ella Nilsen & Samantha Waldenberg, *Trump Moves to Pull US Out of Bedrock Global Climate Treaty, Becoming First Country to Do So*, CNN (Jan. 7, 2026, at 22:33 ET), https://www.cnn.com/2026/01/07/climate/trump-withdrawal-climate-treaty-international-agreements [https://perma.cc/U37G-4ZXU].
144. Rescission of the Greenhouse Gas Endangerment Finding and Motor Vehicle Greenhouse Gas Emission Standards Under the Clean Air Act, 91 Fed. Reg. 7686 (Feb. 18, 2026) (to be codified at 40 C.F.R. pts. 85, 86, 600, 1036, 1037, 1039).
145. *Id.* at 7691 n.8.
146. *Id.* at 7688.

rule nevertheless drew criticism.[147] One commentator argued that the "[EPA]'s own projections show that U.S. motor vehicles account for a substantial share of global emissions, and the scientific literature makes clear that even small incremental increases in global temperature translate to significant impacts on people and ecosystems."[148] Against this scientific, international, and domestic backdrop, the question is whether, and to what extent, obligations to address climate change arise under customary international law.

B. Identifying Customary Climate Obligations

With the scientific and legal foundations of climate change in place, this Note turns to customary international law. Part I.B.1 explains how custom is identified, crystallized, and opted out of,[149] and Part I.B.2 examines the two core customary duties implicated by climate change: the duty to prevent significant harm to the environment and the duty to cooperate to protect it.[150]

1. Identifying Custom

Customary international law may be identified where two elements meet: (1) general practice of states and (2) acceptance of that state practice as law, known as *opinio juris*.[151] This section first examines these two elements. It then considers the role of treaties in crystallizing customary rules before examining the ICJ's interpretive role. Finally, this section discusses how a state may avoid applying a customary rule under the persistent objector doctrine.

General practice. General practice, also known as the "objective" element, refers to patterns of conduct that give rise to or reflect customary international law.[152] Distinct requirements govern whether such conduct qualifies as "general" and whether it constitutes a state "practice."[153]

"Generality" refers to the overall pattern of state conduct in relation to an alleged rule of customary international law.[154] There are two requirements for generality.[155] First, the practice must be "sufficiently widespread and

147. *See* Jessica Wentz, *Responding to EPA's Claim That U.S. Motor Vehicle Emissions Have a "De Minimis" Impact on Climate-Related Harms*, CLIMATE L. BLOG (Feb. 20, 2026), https://blogs.law.columbia.edu/climatechange/2026/02/20/responding-to-epas-claim-that-u-s-motor-vehicle-emissions-have-a-de-minimis-impact-on-climate-related-harms/ [https://perma.cc/QJ7D-9JE3].

148. *Id.*

149. *See infra* Part I.B.1.

150. *See infra* Part I.B.2.

151. *See generally Identification of Customary International Law*, [2018] 2 Y.B. Int'l L. Comm'n 92, U.N. Doc. A/CN.4/SER.A/2018/Add.1.

152. *See Identification of Customary International Law*, *supra* note 151, at 96.

153. *See id.* at 96–102.

154. *See id.* at 100.

155. *See id.*

representative."[156] Universal participation is not required; however, the practice should include states that have the opportunity or capacity to apply the alleged rule.[157] Second, the practice must display a degree of consistency, reflecting a discernible pattern of behavior among states.[158] Absolute uniformity is not required, and "some inconsistencies and contradictions" may exist among states.[159] Rather, "instances of State conduct inconsistent with a given rule should generally [be] treated as breaches of that rule, not as indications of the recognition of a new rule."[160] Particular weight is given to the practice of states most directly affected by the subject matter of the alleged rule, known as "specially affected States."[161]

"Practice" encompasses a wide range of state conduct, including physical and verbal acts; diplomatic exchanges and communications; participation in international organizations, such as negotiating, adopting, and implementing resolutions or decisions, whether or not they are legally binding; treaty-related acts, including negotiation, ratification, and implementation; executive acts, including executive orders and decrees; legislative and administrative acts; and domestic court decisions at all levels, with greater weight afforded to higher courts.[162] No single form of state practice is inherently superior, although the relative weight of particular acts may vary depending on the context.[163] A state's practice is evaluated "as a whole," across all relevant organs and over time.[164]

Finally, customary international law can develop over a relatively short period, if state practice satisfies the requirements of generality and consistency.[165] However, some passage of time is necessary for a general practice to coalesce into a discernible pattern of behavior.[166]

Opinio juris. *Opinio juris*, also known as the "subjective" element, refers to whether an established general practice is "undertaken with a sense of legal . . . obligation."[167] This sense of obligation is distinct from conduct motivated by comity, political convenience, or expediency.[168] Likewise, actions taken solely to comply with treaty obligations do not, on their own,

156. *Id.*
157. *See id.* at 100–01.
158. *See id.* at 101.
159. *Id.*
160. *Id.* (quoting Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶¶ 174–179 (June 27)).
161. *See id.* For example, coastal states are especially relevant for rules on maritime navigation, and both capital exporting and host states are key for rules on foreign investment. The term "specially affected" refers to a state's connection to the issue, not its political or economic power. *See id.*
162. *Id.* at 99.
163. *Id.*
164. *Id.* at 100.
165. *See* North Sea Continental Shelf (Ger./Den.; Ger./Neth.), Judgment, 1969 I.C.J. 3, ¶ 74 (Feb. 20).
166. *See id.*; *Identification of Customary International Law*, *supra* note 151, at 102.
167. *Identification of Customary International Law*, *supra* note 151, at 102.
168. *Id.*

establish *opinio juris*.[169] If a state, however, applies a treaty's provisions despite not being legally bound by it, that may indicate acceptance of the underlying norm as law.[170] States may further indicate recognition or rejection of a customary rule through statements, actions, or inaction.[171] Evidence of *opinio juris* may appear in official publications issued in a state's name, opinions of government legal advisers, diplomatic correspondence, legislation, and judicial decisions.[172]

Treaties. Although treaties bind only their parties, they "may have an important role to play in recording and defining rules deriving from custom, or indeed in developing them."[173] Treaties may affect customary international law in three ways.[174] First, a treaty provision may codify a rule of customary international law that predated the treaty.[175] Second, a treaty provision may crystallize an emerging customary rule by defining and consolidating it at the time of the treaty's adoption.[176] Third, a treaty provision may generate a new rule of customary international law if followed by general practice and *opinio juris*, independent of the treaty obligation itself.[177] While the repetition of similar provisions across multiple treaties or widespread ratification may support a claim of customary status, neither is dispositive.[178] Thus, whether a treaty provision reflects customary international law must be assessed by reference to general practice and *opinio juris* among parties and nonparties to the treaty.[179]

The ICJ. As the UN's principal judicial organ and the only permanent international court with general jurisdiction, the ICJ plays a central role in identifying customary international law.[180] ICJ advisory opinions are considered "subsidiary means" for determining rules of international law, in that they "elucidate[] the law, rather than being themselves a source of international law."[181] Thus, they provide persuasive authority and are widely considered "important for the identification of customary international law."[182] The weight accorded to a particular advisory opinion depends on factors such as the size of the majority, the extent to which it examines

169. *Id.*
170. *Id.*
171. *Id.* at 103.
172. *Id.* at 103–04.
173. *Id.* at 105 (quoting Continental Shelf (Libyan Arab Jamahiriya/Malta), Judgment, 1985 I.C.J. 13, ¶ 27 (June 3)).
174. *Id.*
175. *Id.* at 109.
176. *Id.*
177. *Id.*
178. *See id.*
179. *See id.*
180. *See id.*
181. *Id.*
182. *Id.*

evidence of general practice and *opinio juris*, and its subsequent reception by states and other tribunals.[183]

The Persistent Objector Doctrine. The persistent objector doctrine is a narrow exception in customary international law that permits a state to avoid being bound by an emerging customary rule.[184] To qualify, a state must satisfy stringent conditions.[185] First, the state's objection, by arguing against the customary rule or engaging in an alternative practice, must be made while the rule is still forming, rather than after it has crystallized.[186] Second, the objection must be clearly and publicly communicated to other states.[187] Third, the state must maintain its objection consistently over time, reiterating it as appropriate and refraining from conduct that would imply acceptance of the rule.[188] Should the state later abandon its objection, explicitly or through conduct, it becomes bound by the customary rule.[189]

2. Customary Climate Obligations

The ICJ Advisory Opinion interprets how established principles of customary international law apply to the climate system.[190] This section first examines the ICJ's application of the duty to prevent significant harm to the environment in the climate change context in Part I.B.2.a.[191] Part I.B.2.b then details the ICJ's treatment of the duty to cooperate.[192] Finally, Part I.B.2.c describes the ICJ's interpretation of the relationship between obligations under the climate change treaties and customary international law.[193]

a. The Duty to Prevent Significant Harm to the Environment

The duty to prevent significant harm to the environment derives from the no-harm principle, which obligates states not to "knowingly [allow their] territory to be used for acts contrary to the rights of other States."[194] In the environmental context, this principle is commonly known as the duty to prevent transboundary harm.[195] Historically, the duty was applied to forms

183. *See id.*
184. *Id.* at 111.
185. *Id.*
186. *Id.*
187. *Id.* at 112.
188. *Id.*
189. *Id.* at 111.
190. ICJ Advisory Opinion, *supra* note 1, ¶¶ 271–315.
191. *See infra* Part I.B.2.a.
192. *See infra* Part I.B.2.b.
193. *See infra* Part I.B.2.c.
194. ICJ Advisory Opinion, *supra* note 1, ¶ 272 (quoting Corfu Channel (U.K. v. Alb.), Merits, Judgment, 1949 I.C.J. 4, 22 (Apr. 9)).
195. *Id.* ¶ 272.

of direct cross-border pollution, such as factory fumes in one state affecting a neighboring state.[196] Over time, however, it has evolved to include activities with global environmental consequences, such as the use of nuclear weapons.[197]

In attempting to prevent harm, a state must act with due diligence by "us[ing] all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State."[198] Due diligence is therefore an obligation of conduct rather than result, meaning a state need not succeed in preventing harm so long as it "employ[s] all means reasonably available" to do so.[199] The level of due diligence required is context dependent, taking into account a state's economic status and available resources, such that more developed states are generally expected to undertake more extensive preventive measures than less developed states.[200]

Due diligence requires that states assess and manage activities that pose a risk of significant environmental harm, both where harm has not yet occurred and where harm has already occurred but further adverse effects remain foreseeable.[201] Whether an activity presents such a risk depends on the likelihood and magnitude of the potential harm.[202] The obligation also extends to cumulative effects, where environmental harm may result from the aggregate conduct of multiple states or private actors.[203] A state breaches its duty of due diligence if it disregards plausible indications of risk.[204] To avoid this, states are required to conduct environmental impact assessments (EIAs) for proposed activities that may cause significant transboundary harm.[205] While states must conduct EIAs prior to authorizing activities with potential transboundary environmental effects, the scope and content of the

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> [N]o State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.

Id. (quoting Trail Smelter (U.S. v. Can.), Arbitral Award, 3 R.I.A.A. 1905, 1965 (Apr. 16, 1938 & Mar. 11, 1941)).

196. *See Trail Smelter*, 3 R.I.A.A. at 1907.

197. *See* Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, ¶ 29 (July 8).

198. Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, 2010 I.C.J. 14, ¶ 101 (Apr. 20).

199. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43, ¶ 430 (Feb. 26). For an obligation of result, "a State acts wrongfully if it fails to bring about the result required under the obligation." ICJ Advisory Opinion, *supra* note 1, ¶ 208.

200. Thus, "employ[s] all means reasonably available to them" is an articulation of the principle of "common but differentiated responsibilit[y]." *See* UNFCCC, *supra* note 53, art. 4(1); *see also* ICJ Advisory Opinion, *supra* note 1, ¶ 135.

201. ICJ Advisory Opinion, *supra* note 1, ¶¶ 274–279.

202. *Id.*

203. *Id.*

204. *See* Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, 2010 I.C.J. 14, ¶ 204 (Apr. 20).

205. *Id.*

assessments are left to domestic determination, constrained by the due diligence standard rather than fixed substantive requirements.[206]

The ICJ Advisory Opinion concluded that the general duty to prevent significant harm to the environment applies to the protection of the climate system.[207] Recognizing the climate as "an integral and vitally important part of the environment," the ICJ extended the no-harm principle to encompass the cumulative and diffuse effects of GHG emissions.[208] Thus, the ICJ framed environmental harm as collective, stating that "the sum of all activities" contributes to a general risk of significant harm to the atmosphere and related ecosystems.[209] The diffuse and cumulative nature of GHG emissions, however, does not absolve individual states of responsibility.[210] Rather, the ICJ found that the risk of significant harm arises from "activities undertaken within [each state's] jurisdiction or control."[211] The ICJ emphasized that a risk of "significant harm" exists where the accumulation of GHG emissions causes "rising temperature[s], sea level rise, negative effects on ecosystems and biological diversity, and extreme weather events."[212] The assessment of such risk must consider the "best available science," as reflected in the assessments of the IPCC.[213]

In addition to employing "all the means at its disposal"[214] to prevent harm, states must adopt legislative, administrative, and enforcement mechanisms designed to achieve "deep, rapid, and sustained reductions" in GHG emissions.[215] Due diligence further requires states to obtain and act upon the best available scientific information.[216] Where "generally recognized scientific evidence [shows] that it is highly probable that significant harm will occur," the standard of due diligence becomes more demanding for all states.[217] Thus, states must "actively pursue the scientific information necessary . . . to assess the probability and seriousness of harm."[218] In this regard, the ICJ recognized that IPCC assessment reports "constitute comprehensive and authoritative restatements of the best available science about climate change at the time of their publication."[219]

206. *Id.* ¶ 205.
207. *See* ICJ Advisory Opinion, *supra* note 1, ¶ 273.
208. *Id.* ¶¶ 273; *id.* ¶¶ 274–279. Cumulative effects are impacts that build up over time due to repeated or ongoing activities, while diffuse effects are impacts that are spread out geographically, rather than traceable to a single source. *See id.*
209. *Id.* ¶ 272.
210. *Id.* ¶ 279.
211. *Id.* ¶ 277.
212. *Id.* ¶ 278.
213. *Id.*
214. *Id.* ¶ 281 (quoting Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, 2010 I.C.J. 14, ¶ 204 (Apr. 20)).
215. *Id.* ¶¶ 281–282.
216. *See id.* ¶¶ 280–286.
217. *Id.* ¶ 283.
218. *Id.*
219. *Id.* ¶ 284; *see supra* Parts I.A.1–3.

Finally, the ICJ affirmed that EIAs remain a component of the due diligence obligation in the context of climate change.[220] While the ICJ recognized the challenges posed by the diffuse nature of GHG emissions, it nevertheless explained that states must conduct EIAs "on the basis of the best available science" for activities that contribute significantly to such emissions.[221]

b. The Duty to Cooperate for the Protection of the Environment

The duty to cooperate derives from the UN Charter, whose purpose is "[t]o achieve international cooperation in solving international problems."[222] In the environmental context, this duty arises where states share common resources and reflects the principle that environmental conservation is grounded in shared interests and governed by good faith.[223]

The principle of good faith requires states to approach cooperation with sincerity, transparency, and a genuine commitment to preventing harm, rather than merely satisfying procedural formalities.[224] Acting in good faith means engaging constructively, sharing relevant information, consulting meaningfully, and refraining from concealing or distorting facts that could influence joint preventive efforts.[225] It also prohibits the abusive exercise of rights, including the exploitation of legal or technical loopholes to evade responsibility.[226] In practice, good faith requires each state to take reasonable steps to ensure that its preventive measures are effective, responsive to legitimate concerns raised by others, and consistent with the shared objective of minimizing transboundary harm.[227] Thus, the duty to cooperate requires substantive, candid, and genuine engagement focused on environmental protection.[228]

The ICJ concluded that the general duty to cooperate for the protection of the environment applies equally to climate change.[229] Since the duty to cooperate arises where states share a common resource, the ICJ reasoned that

220. *See* ICJ Advisory Opinion, *supra* note 1, ¶ 297.
221. *Id.* ¶ 298.
222. U.N. Charter art. 1, ¶ 3; *see also* ICJ Advisory Opinion, *supra* note 1, ¶ 140; Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 191 (June 27).
223. *See* ICJ Advisory Opinion, *supra* note 1, ¶ 141; Nuclear Tests (Austl. v. Fr.), Judgment, 1974 I.C.J. 253, ¶ 46 (Dec. 20); Dispute over the Status and Use of the Waters of the Silala (Chile v. Bol.), Judgment, 2022 I.C.J. 613, ¶ 101 (Dec. 1).
224. *See International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law (Prevention of Transboundary Harm from Hazardous Activities)*, [2001] 2 Y.B. Int'l L. Comm'n 155–56, U.N. Doc. A/CN.4/SER.A/2001/Add.1.
225. *See id.*
226. *See id.*
227. *See id.*
228. *See id.*
229. *See* ICJ Advisory Opinion, *supra* note 1, ¶¶ 301–308.

it is "all the more vital" when the resource at issue is shared by all states.[230] Given the cumulative and diffuse nature of GHG emissions, the duty to cooperate complements the duty to prevent significant harm.[231] Therefore, while each state remains responsible for regulating activities within its jurisdiction, domestic measures must be adopted with regard to the interests and capacities of other states.[232] Cooperation, therefore, constitutes an essential component of due diligence, requiring "sustained and continuous" collective efforts to mitigate and adapt to climate change.[233]

The ICJ further clarified that the duty to cooperate requires more than formal participation in multilateral agreements.[234] While instruments such as the Paris Agreement constitute expressions of cooperative action, states remain bound by a broader customary obligation "to make good faith efforts to arrive at appropriate forms of collective action."[235] The ICJ also situated the duty to cooperate within the collective aim of achieving a global temperature goal.[236] States must work jointly to determine and realize GHG emissions reduction targets.[237] Although the specific means of cooperation remain within each state's discretion, that discretion is constrained by the obligation of due diligence and the requirement that domestic efforts contribute meaningfully to global mitigation efforts.[238]

c. The Relationship Between Climate Treaties and Customary Obligations

While the ICJ observed that treaty obligations and customary rules "retain a separate existence" as distinct sources of international law, it emphasized that they should "be interpreted so as to give rise to a single set of compatible obligations."[239] Accordingly, treaties must be interpreted in light of "any relevant rules of international law that are applicable in the relations between the parties."[240] At the same time, the ICJ recognized that treaties may "shed light on the content of customary international law" and may contribute to its development.[241] Customary rules may also develop "under the influence of

230. *See id.* ¶ 301 (quoting Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, 2010 I.C.J. 13, ¶ 81 (Apr. 20)).
231. *See id.* ¶¶ 301–308; *supra* Part I.B.2.a.
232. *See* ICJ Advisory Opinion, *supra* note 1, ¶¶ 301–308.
233. *Id.* ¶ 304.
234. *See id.* ¶¶ 301–308; *supra* Part I.B.1.
235. ICJ Advisory Opinion, *supra* note 1, ¶ 304.
236. *See id.* ¶ 305.
237. *See id.*
238. *See id.* ¶ 306.
239. *Id.* ¶ 310 (citing Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14, ¶ 178 (June 27)).
240. *Id.* ¶ 311 (citing Vienna Convention on the Law of Treaties art. 31(3)(c), May 23, 1969, 1155 U.N.T.S. 331).
241. *Id.* ¶ 312 (quoting Jurisdictional Immunities of the State (Ger. v. It.; Greece intervening), Judgment, 2012 I.C.J. 98, ¶ 66 (Feb. 3)).

[a treaty], to such an extent that a number of rules contained in the [treaty] . . . acquire[] a status independent of it."[242]

Applying this framework to the climate change treaties, the ICJ concluded that such instruments "establish standards that may enable or facilitate the identification and application of the diligence that is due in specific instances."[243] Climate change treaty obligations thus help specify the operational content of states' general customary duties to prevent significant environmental harm and to cooperate in good faith.[244] While full and good faith compliance with climate change treaty obligations ordinarily implies conformity with corresponding customary duties, it does not automatically discharge them, as customary obligations exist independently of any specific treaty framework.[245] However, the ICJ acknowledged that nonparty states may fulfill their customary obligations "through practice that comports with the required conduct of States under the climate change treaties."[246] A nonparty that fails to do so, however, bears the burden of demonstrating that its conduct independently satisfies the customary standards of prevention and cooperation.[247]

II. THE STATUS AND DOMESTIC EFFECT OF CUSTOMARY CLIMATE OBLIGATIONS

To establish the existence of a legal obligation, customary international law must bind states through recognized and legitimate claims of authority.[248] Part II.A considers arguments against recognizing climate change obligations beyond those reflected in the international climate change treaty regime.[249] Part II.B then analyzes how customary international law operates within the U.S. legal system.[250]

A. The Argument Against Customary Climate Obligations

In their written submissions to the ICJ, several states and international organizations argued that existing climate treaties constitute the sole framework governing states' legal obligations with respect to climate change.[251] The United States, the United Kingdom, and the Organization of

242. *Id.* (quoting *Military and Paramilitary Activities in and Against Nicaragua*, 1986 I.C.J. ¶ 181).
243. *Id.* ¶ 313.
244. *See id.* ¶¶ 313–315.
245. *See id.*
246. *See id.* ¶ 315.
247. *See id.*
248. Mortimer N. S. Sellers, *Why States Are Bound by Customary International Law*, 4 INT'L LEGAL THEORY 22, 22 (1998).
249. *See infra* Part II.A.
250. *See infra* Part II.B.
251. *See* Obligations of States in Respect of Climate Change, Written Statement of the United States of America, ¶¶ 4.5–4.29 (Mar. 22, 2024), https://www.icj-cij.org/sites/default/files/case-related/187/187-20240322-wri-06-00-en.pdf (on file with the *Fordham Law Review*) [hereinafter United States Written Statement]; Obligations of States in Respect of

the Petroleum Exporting Countries (OPEC) each advanced variations of this position, urging the ICJ to limit its analysis to the *lex specialis* of the international climate change regime.[252]

The United States initially argued that, because the impacts of GHG emissions were cumulative and diffuse, attribution to any one state was impracticable.[253] Even assuming that a customary duty to prevent significant environmental harm applied to climate change, the United States maintained that the UNFCCC and Paris Agreement supply the controlling standard of due diligence.[254] On that view, participation in and the implementation of the Paris Agreement should be regarded as fulfilling any parallel customary obligation.[255]

The United Kingdom advanced a similar position, emphasizing that the obligations set out in the Paris Agreement represent the most recent and dynamic expression of states' understandings of their commitments and responsibilities.[256] It argued that the ICJ's analysis should be grounded in the climate change treaty framework, which already provides the authoritative modalities for mitigation and cooperation.[257]

OPEC likewise argued against creating new obligations by interpreting customary rules outside the climate change treaty framework.[258] Citing judicial restraint and state sovereignty, OPEC argued that states were the "supreme" architects of international law.[259] Thus, the ICJ should avoid expansive readings and refrain from "find[ing]" obligations in customary international law absent clear evidence of general practice and *opinio juris*.[260] In OPEC's view, the international community had chosen to regulate GHG emissions exclusively within the climate change treaty framework, and that consensus should govern the ICJ's analysis.[261]

Climate Change, Written Comments: The United Kingdom of Great Britain and Northern Ireland, ¶ 10 (Aug. 12, 2024), https://www.icj-cij.org/sites/default/files/case-related/187/187-20240812-wri-02-00-en.pdf (on file with the *Fordham Law Review*) [hereinafter United Kingdom Written Comments]; Obligations of States in Respect of Climate Change, Written Statement of the Organization of the Petroleum Exporting Countries (OPEC), ¶ 19 (Mar. 19, 2024), https://www.icj-cij.org/sites/default/files/case-related/187/187-20240319-wri-03-00-en.pdf (on file with the *Fordham Law Review*) [hereinafter OPEC Written Statement].

252. *See* United States Written Statement, *supra* note 251, ¶¶ 4.5–4.29; United Kingdom Written Comments, *supra* note 251, ¶ 10; OPEC Written Statement, *supra* note 251, ¶ 19. *Lex specialis derogat legi generali* is the legal principle that a more specific law governs over a more general one when both apply to the same issue. *See* Int'l L. Comm'n, Rep. on the Fragmentation of International Law, at 8–11, U.N. Doc. A/CN.4/L.682 (2006) (discussing the *lex specialis* principle).

253. *See* United States Written Statement, *supra* note 251, ¶¶ 4.5–4.28.

254. *See id.*

255. *See id.*

256. *See* United Kingdom Written Comments, *supra* note 251, ¶ 10.

257. *See id.* ¶¶ 10–11.

258. OPEC Written Statement, *supra* note 251, ¶¶ 18–19.

259. *Id.*

260. *See id.* ¶¶ 19, 21.

261. *See id.* ¶ 19.

B. Does Custom Bind the United States?

Whether climate change obligations have crystallized into customary international law is distinct from the question of whether such custom has domestic legal effect in the United States. In *The Paquete Habana*,[262] the Supreme Court declared that "[i]nternational law is part of our law."[263] Since that decision, courts and commentators have disagreed over how customary international law operates within the U.S. legal system.[264] This part analyzes two schools of thought. First, Part II.B.1 outlines the modernist view, under which customary international law is automatically incorporated into federal law.[265] Then, Part II.B.2 examines the revisionist perspective, which treats custom as nonfederal common law subject to constraints and to legislative control.[266]

1. The Modernist Theory

Although modernist accounts differ as to *how* customary international law entered U.S. law, they agree that it has historically bound courts without requiring legislative incorporation.[267] Modernists point to the Restatement (Third) of Foreign Relations Law, which explains that customary international law, since the United States' founding, "was considered to be incorporated into the law of the United States without the need for any action by Congress or the President."[268] On this view, customary international law "is a kind of federal law," and is "accorded supremacy over State law by Article VI of the Constitution."[269] Therefore, any rule of customary international law that has solidified since the founding "arise[s] under 'the laws' of the United States."[270]

Modernists also invoke *The Paquete Habana* in support of the view that customary international law functions as federal law.[271] There, the Supreme Court stated that customary international law "must be ascertained and administered by the courts . . . where there is no treaty and no controlling executive or legislative act or judicial decision."[272] Because no treaty,

262. 175 U.S. 677 (1900).
263. *Id.* at 700.
264. *See* Louis Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1556–57 (1984).
265. *See infra* Part II.B.1.
266. *See infra* Part II.B.2.
267. *See* Henkin, *supra* note 264, at 1557. One view holds that customary international law was incorporated into U.S. law as part of the English common law applied in the colonies and continued to be part of U.S. law after independence. Another view holds that customary international law became part of U.S. law "by virtue of international statehood," because, as an independent state, the U.S. is ipso facto subject to it. *See id.* at 1555–56.
268. *See* RESTATEMENT (THIRD) OF THE FOREIGN RELS. L. OF THE U.S., pt. I, ch. 2, intro. note (A.L.I. 1987).
269. *See id.*
270. *See id.*
271. Louis Henkin, *The Constitution and United States Sovereignty: A Century of* Chinese Exclusion *and Its Progeny*, 100 HARV. L. REV. 853, 867–78 (1987).
272. The Paquete Habana, 175 U.S. 677, 700 (1900).

executive action, or statute conflicted with the customary rule at issue, the Court's holding rested on the premise that customary international law itself constituted the "law of the land."[273] Modernists argue that some have misread this dictum to mean that customary law is subordinate to federal law, often relying on characterizations of customary international law as "common law."[274] Some modernists reject that framing, arguing that customary international law merely "resembles" or "is like" federal common law, while others accept the framing outright.[275] Even so, modernists agree that customary international law, like treaty law, stands on equal footing to an act of Congress, with the later-in-time rule determining which governs in the event of a conflict.[276]

2. The Revisionist Theory

The revisionist view of customary international law rejects the notion that custom automatically forms part of the federal common law of the United States.[277] Revisionists contend that the modernist position, which treats custom as self-executing federal law, lacks historical, constitutional, and doctrinal support.[278] Historically, they argue, customary international law was understood as part of the federal general common law under *Swift v. Tyson*,[279] rather than as "laws of the United States" within the meaning of Articles III or VI of the Constitution.[280] Because *Erie Railroad Co. v. Tompkins*[281] abolished the federal general common law, federal courts after *Erie* lost authority to apply any body of unwritten law not traceable to a sovereign source.[282] Thus, absent constitutional or federal statutory authorization, customary international law cannot operate as domestic federal law.[283] On this view, modernists improperly resurrect pre-*Erie* reasoning by allowing courts to apply customary international law "in the

273. Henkin, *supra* note 271, at 873.

274. *Id.*

275. Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815, 843–44 (1997) (first quoting Henkin, *supra* note 271, at 876; then quoting Henkin, *supra* note 264, at 1561).

276. *See* Henkin, *supra* note 271, at 871 ("By the Constitution a Treaty is placed on the same footing, and made of like obligation, with an Act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other . . . . [I]f the two are inconsistent, the one last in date will control the other, provided always the stipulation of the Treaty on the subject is self executing." (alteration in original) (quoting Whitney v. Robertson, 124 U.S. 190, 194 (1888))).

277. *See* Bradley & Goldsmith, *supra* note 275, at 816–21.

278. *See id.*

279. 41 U.S. (16 Pet.) 1 (1842).

280. *See* Bradley & Goldsmith, *supra* note 275, at 822–24.

281. 304 U.S. 64 (1938).

282. *See* Bradley & Goldsmith, *supra* note 275, at 852–53.

283. *See id.* at 856–57 ("It is precisely the grounding of federal common lawmaking in a *federal* sovereign source that makes the new federal common law, unlike the pre-*Erie* general common law, binding on the states.").

absence of any domestic authorization," a practice revisionists maintain "cannot survive *Erie*."[284]

Revisionists further caution that treating customary international law as federal law threatens the principles of representative democracy, separation of powers, and federalism.[285] Because customary norms derive from international practice rather than domestic lawmaking processes, their automatic incorporation would permit unelected judges to apply rules generated by the world community without democratic accountability.[286] On this view, customary international law binds the United States only on the international plane, and "the federal political branches, rather than the federal courts, . . . have the primary role in deciding when and how the United States carrie[s] out its international obligations and when and how these norms created enforceable rights in U.S. courts."[287]

III. THE UNITED STATES' BREACH OF CUSTOMARY CLIMATE OBLIGATIONS

The United States is violating binding customary international law by dismantling the legal and scientific infrastructure necessary to protect the climate system. To demonstrate this, Part III.A posits that the duty to protect the climate system has crystallized into a rule of customary international law, binding on all states.[288] Part III.B shows that the United States is bound by this custom under both international and domestic legal principles.[289] Part III.C concludes that the Trump administration's systematic rollback of environmental safeguards constitutes a breach of these obligations.[290]

A. Climate Obligations Have Crystallized into Customary International Law

A rule of customary international law emerges from a general practice of states, undertaken out of a sense of legal obligation.[291] When both elements are satisfied, the resulting rule binds all states, regardless of treaty participation.[292] The ICJ Advisory Opinion affirms that this has occurred with respect to the duty to protect the climate system.[293] Over decades of treaty practice, national legislation, multilateral cooperation, and official statements, states have fulfilled both requirements for crystallization.[294]

284. *Id.* at 857.
285. *See id.* at 857, 861–62.
286. *See id.* at 868.
287. *Id.* at 871.
288. *See infra* Part III.A.
289. *See infra* Part III.B.
290. *See infra* Part III.C.
291. *See supra* Part I.B.1.
292. *See supra* Part I.B.1.
293. *See supra* Part I.B.2.
294. *See supra* Parts I.A.2–3, I.B.2.

Treaties may contribute to the formation of customary international law where they are followed by general practice and *opinio juris*.[295] Widespread state behavior demonstrates a settled expectation that anthropogenic climate change must be mitigated through coordinated international action.[296] Every UN member state is party to the UNFCCC, whose objective is the "stabilization of [GHG] concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system."[297] To that end, states have undertaken extensive mitigation, adaptation, and cooperation commitments, including participation in the annual COP and submission of NDCs.[298]

Although the UNFCCC itself did not impose binding GHG emissions-reduction targets, the Kyoto Protocol bound nearly 100 percent of UN member states to GHG emissions-reduction targets.[299] The Paris Agreement further established mitigation goals and cooperation mechanisms for all UN member states, many of which have since enacted domestic legislation implementing mitigation and adaptation measures.[300] Absolute uniformity is not required.[301] Taken together, these treaty commitments, domestic measures, and sustained engagement through COP participation establish a sufficiently widespread and consistent pattern of state practice to satisfy the general practice requirement.[302]

Finally, particular weight must be given to the practice of specially affected states.[303] In the climate change context, this category includes small island and low-lying coastal states, for which "rising sea levels are projected to submerge the[ir] entire territory . . . within decades."[304] In their submissions to the ICJ, these states consistently affirmed that obligations to prevent and mitigate climate change already exist under customary international law and are binding on all states.[305]

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295. *See supra* notes 173–82 and accompanying text.

296. *See supra* Part I.B.

297. UNFCCC, *supra* note 53, art. 2.

298. *See supra* notes 67–81 and accompanying text.

299. *See supra* notes 72–73 and accompanying text.

300. *See* CLIMATE CHANGE LAWS OF THE WORLD, https://climate-laws.org/faq [https://perma.cc/9C6M-CXVX] (maintaining a database of more than 8,000 climate laws, policies, and UNFCCC submissions from parties to the UNFCCC); *supra* notes 78–81 and accompanying text.

301. *See supra* note 159 and accompanying text.

302. *See supra* Part I.B.2.

303. *See supra* note 161 and accompanying text.

304. *See* Dec. 2 Verbatim Record, *supra* note 4, at 105.

305. *See* Obligations of States in Respect of Climate Change, Written Statement of Antigua and Barbuda, ¶ 298 (Mar. 22, 2024), https://www.icj-cij.org/sites/default/files/case-related/187/187-20240322-wri-08-00-en.pdf (on file with the *Fordham Law Review*); Obligations of States in Respect of Climate Change, Written Statement of the Commonwealth of the Bahamas, ¶¶ 98, 105 (Mar. 22, 2024), https://www.icj-cij.org/sites/default/files/case-related/187/187-20240322-wri-04-00-en.pdf (on file with the *Fordham Law Review*); Obligations of States in Respect of Climate Change, Written Statement of Barbados, ¶ 134 (Mar. 22, 2024), https://www.icj-cij.org/sites/default/files/case-related/187/187-20240322-wri-11-00-en.pdf (on file with the *Fordham Law Review*); Obligations of States in Respect of Climate Change, Written Statement of Belize, ¶ 31 (Mar. 21, 2024), https://www.icj-

Alongside general practice, *opinio juris* is demonstrated by widespread expressions of legal obligation.[306] The near-unanimous adoption of the 2023 UN General Assembly resolution requesting an ICJ opinion demonstrates collective recognition.[307] Of the ninety-one written statements submitted to the ICJ, over seventy states invoked these obligations.[308] In addition,

cij.org/sites/default/files/case-related/187/187-20240321-wri-09-00-en.pdf (on file with the *Fordham Law Review*); Obligations of States in Respect of Climate Change, Written Statement of the Cook Islands, ¶¶ 135–136 (Mar. 20, 2024), https://www.icj-cij.org/sites/default/files/case-related/187/187-20240320-wri-01-00-en.pdf (on file with the *Fordham Law Review*); Obligations of States in Respect of Climate Change, Written Statement of Grenada, ¶¶ 41–46 (Mar. 21, 2024), https://www.icj-cij.org/sites/default/files/case-related/187/187-20240321-wri-02-00-en.pdf (on file with the *Fordham Law Review*); Obligations of States in Respect of Climate Change, Written Statement of the Republic of Kiribati, ¶¶ 125–127 (Mar. 22, 2024), https://www.icj-cij.org/sites/default/files/case-related/187/187-20240322-wri-13-00-en.pdf (on file with the *Fordham Law Review*); Obligations of States in Respect of Climate Change, Written Statement of the Republic of the Marshall Islands, ¶¶ 22–23 (Mar. 22, 2024), https://www.icj-cij.org/sites/default/files/case-related/187/187-20240322-wri-17-00-ene.pdf (on file with the *Fordham Law Review*); Obligations of States in Respect of Climate Change, Responses of the Federated States of Micronesia to the Questions Put by Judges Aurecu and Charlesworth, ¶ 20 (Dec. 20, 2024), https://www.icj-cij.org/sites/default/files/case-related/187/187-20241220-oth-40-00-en.pdf (on file with the *Fordham Law Review*); Obligations of States in Respect of Climate Change, Written Statement of the Republic of Nauru, ¶¶ 26–33 (Mar. 22, 2024), https://www.icj-cij.org/sites/default/files/case-related/187/187-20240322-wri-36-00-en.pdf (on file with the *Fordham Law Review*); Obligations of States in Respect of Climate Change, Written Statement of the Republic of Palau, ¶¶ 2–4 (Mar. 19, 2024), https://www.icj-cij.org/sites/default/files/case-related/187/187-20240319-wri-04-00-en.pdf (on file with the *Fordham Law Review*); Obligations of States in Respect of Climate Change, Written Statement of the Independent State of Samoa, ¶¶ 103–108, 129–130 (Mar. 22, 2024), https://www.icj-cij.org/sites/default/files/case-related/187/187-20240322-wri-40-00-en.pdf (on file with the *Fordham Law Review*); Obligations of States in Respect of Climate Change, Written Statement of the Republic of Seychelles, ¶ 66 (Mar. 22, 2024), https://www.icj-cij.org/sites/default/files/case-related/187/187-20240322-wri-41-00-en.pdf (on file with the *Fordham Law Review*); Obligations of States in Respect of Climate Change, Written Statement of Solomon Islands, ¶ 154 (Mar. 22, 2024), https://www.icj-cij.org/sites/default/files/case-related/187/187-20240322-wri-30-00-en.pdf (on file with the *Fordham Law Review*); Obligations of States in Respect of Climate Change, Saint Lucia's Response to Questions by the Court, ¶ 2 (Dec. 20, 2024), https://www.icj-cij.org/sites/default/files/case-related/187/187-20241220-oth-52-00-en.pdf (on file with the *Fordham Law Review*); Obligations of States in Respect of Climate Change, Saint Vincent and the Grenadines' Replies to Questions, ¶ 4 (Dec. 20, 2024), https://www.icj-cij.org/sites/default/files/case-related/187/187-20241220-oth-53-00-en.pdf (on file with the *Fordham Law Review*); Obligations of States in Respect of Climate Change, Written Statement of the Kingdom of Tonga, ¶ 285 (Mar. 15, 2024), https://www.icj-cij.org/sites/default/files/case-related/187/187-20240315-wri-01-00-en.pdf (on file with the *Fordham Law Review*); Obligations of States in Respect of Climate Change, Written Statement of Tuvalu, ¶ 91 (Mar. 22, 2024), https://www.icj-cij.org/sites/default/files/case-related/187/187-20240322-wri-05-00-en.pdf (on file with the *Fordham Law Review*); Obligations of States in Respect of Climate Change, Written Statement Submitted by the Republic of Vanuatu, ¶¶ 235–248, 268 (Mar. 21, 2024), https://www.icj-cij.org/sites/default/files/case-related/187/187-20240321-wri-06-00-en.pdf (on file with the *Fordham Law Review*).

306. *See supra* notes 152–66 and accompanying text.

307. *See supra* note 12 and accompanying text.

308. *See* Press Release, Int'l Ct. of Just., Obligations of States in Respect of Climate Change (Request for Advisory Opinion): Filing of Written Statements, I.C.J. Press Release No. 2024/31 (Apr. 12, 2024).

sustained participation in and implementation of COP decisions further demonstrates that states act out of a sense of legal obligation.[309]

As the principal judicial organ of the UN, the ICJ "offer[s] valuable guidance" and plays a central role in identifying customary international law.[310] Advisory opinions therefore carry significant persuasive weight, particularly where they reflect a broad judicial consensus and engage with evidence of general practice and *opinio juris*.[311] The ICJ Advisory Opinion was adopted unanimously by a panel of judges that canvassed written statements from ninety-one states, heard oral arguments from ninety-six states, and analyzed decades of treaty conduct in what was described as the "largest legal proceedings ever in human history."[312] Its interpretation thus constitutes strong persuasive evidence that a customary obligation to protect the climate system has crystallized. Although a small number of states urged the ICJ to confine its analysis to the *lex specialis* of the climate change treaty regime, the ICJ's conclusion that treaties and customary obligations must be interpreted harmoniously aligns with the established rule that treaties may record, define, or contribute to the development of custom.[313]

Considered together, the evidence of general practice and *opinio juris* demonstrates that duties to prevent significant environmental harm and to cooperate in addressing climate change have crystallized into customary international law.

B. Customary Climate Obligations Bind the United States Under International and Domestic Law

To opt out of a customary rule under the persistent objector doctrine, a state must clearly and consistently object to the emerging norm while it is forming and maintain that objection over time.[314] The United States has done neither. From the 1978 NCPA to the 1990 GCRA, Congress expressly acknowledged the need for scientific cooperation and international engagement to address climate change.[315] The United States also negotiated, helped draft, and signed the UNFCCC; participated in negotiating the Kyoto Protocol; and played a central role in the adoption of the Paris Agreement.[316] It has since implemented multiple domestic regulatory regimes under the CAA that align with the objectives of the UNFCCC and the Paris Agreement.[317] Although recent successive presidential administrations have varied in their political commitment to the Paris Agreement, intermittent withdrawal from cooperative frameworks does not constitute a persistent

309. *See* ICJ Advisory Opinion, *supra* note 1, ¶ 288.
310. *Identification of Customary International Law*, *supra* note 151, at 109.
311. *See supra* note 183 and accompanying text.
312. Jarvis, *supra* note 3; *see also supra* notes 1, 17, 251–64 and accompanying text.
313. *See supra* notes 239–50 and accompanying text.
314. *See supra* Part I.B.1.
315. *See supra* Part I.A.3.b.
316. *See supra* Part I.A.2.
317. *See supra* Parts I.A.3.a–b.

objection.[318] To the contrary, the United States' earlier sustained pattern of conduct reflects an acknowledgment of a duty to protect the climate system.

A state's judicial decisions can support both general practice and *opinio juris*.[319] The Supreme Court's climate change decisions reflect principles consistent with the ICJ's articulation of customary duties to protect the climate system. In *Massachusetts v. EPA*, the Court held that the EPA possesses a nondiscretionary duty under the CAA to regulate GHGs that "endanger public health or welfare."[320] That holding demonstrates that the United States has internalized, through its domestic legal system, the principle identified by the ICJ that states are obliged to prevent significant harm to the environment.

In *The Paquete Habana*, the Supreme Court held that customary international law must be "ascertained and administered by the courts . . . where there is no treaty and no controlling executive or legislative act."[321] Subsequent commentators have debated whether this dictum implies that customary international law is subordinate to federal statutes.[322] However, no such conflict is present here. Congress has enacted no legislation repudiating the obligations to prevent environmental harm or to cooperate internationally.[323] To the contrary, the NCPA and GCRA expressly mandate international collaboration and continuous scientific assessment.[324] The Supreme Court's climate change jurisprudence affirms that GHGs must be regulated if found to pose a danger to public health and welfare.[325]

Revisionist scholars contend that *Erie* extinguished any judicial authority to apply customary international law as federal common law.[326] Although *Erie* addressed the scope of federal courts' diversity jurisdiction and the abolition of general federal common law, it did not address customary international law or the federal judiciary's role in foreign relations.[327] In the decades since *Erie*, the Supreme Court has continued to apply customary international law as part of federal common law in cases implicating foreign relations.[328] Indeed, the Court has expressly linked climate regulation to foreign affairs, noting that "the President has broad authority in foreign affairs" and that Congress authorized the U.S. Department of State "to

318. *See supra* notes 92–95 and accompanying text.
319. *See supra* notes 162, 172 and accompanying text.
320. Massachusetts v. EPA, 549 U.S. 497, 533 (2007).
321. The Paquete Habana, 175 U.S. 677, 700 (1900).
322. *See supra* note 273 and accompanying text.
323. *See supra* Part I.A.3.b.
324. *See supra* Part I.A.3.b.
325. *See supra* Part I.A.3.b.
326. *See supra* Part II.B.2.
327. *See* Carlos M. Vázquez, *Customary International Law as U.S. Law: A Critique of the Revisionist and Intermediate Positions and a Defense of the Modern Position*, 86 NOTRE DAME L. REV. 1495, 1515–38 (2011). *See generally* Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).
328. *See* Vázquez, *supra* note 327, at 1515–38.

formulate United States foreign policy with reference to environmental matters relating to climate."[329]

C. The Trump Administration's Climate Rollbacks Breach Customary Climate Obligations

Customary international law imposes on all states a duty to prevent significant transboundary environmental harm and a duty to cooperate in addressing climate change.[330] These obligations require states to exercise due diligence by employing "all means" at their disposal, guided by the best available science, and by engaging in sustained, good faith cooperation with other states.[331] The Trump administration's dismantling of climate institutions, science programs, and regulatory frameworks constitutes a direct breach of both duties. Part III.C.1 addresses the Trump administration's breach of the duty to prevent significant harm to the environment.[332] Part III.C.2 turns to the Trump administration's breach of the duty to cooperate.[333]

1. Breach of the Duty to Prevent Significant Harm to the Environment

The duty to prevent significant environmental harm is an obligation of due diligence, not a result-based obligation.[334] It requires states to employ their full regulatory, scientific, and institutional capacities to avoid foreseeable transboundary harm arising from GHG emissions.[335] This obligation extends to maintaining domestic regulatory mechanisms and EIA procedures consistent with the best available scientific evidence.[336] In the United States, those mechanisms are embodied in the CAA.[337]

The Trump administration's effort to rescind the Endangerment Finding constitutes a breach of the due diligence obligation.[338] Once the EPA determined that GHG emissions pose a threat to public health and welfare, the EPA had a nondiscretionary duty to regulate them under section 202(a)(1) of the CAA.[339] Proposing to vacate that finding by substituting the DOE Report, which questions the validity of established climate science, undermines the statutory and scientific foundation for GHG regulation.[340] A state that deliberately weakens its regulatory capacity to control emissions

329. *See* Massachusetts v. EPA, 549 U.S. 497, 534 (2007).
330. *See supra* Part III.A.
331. *See supra* notes 199–204 and accompanying text.
332. *See infra* Part III.C.1.
333. *See infra* Part III.C.2.
334. *See supra* note 199 and accompanying text.
335. *See supra* notes 216–22 and accompanying text.
336. *See supra* note 205 and accompanying text.
337. *See supra* Part I.A.3.b.
338. *See supra* notes 31–36, 132–38 and accompanying text.
339. *See supra* Part I.A.3.b.
340. *See supra* notes 31–36, 132–36 and accompanying text.

fails to "employ all means reasonably available" to it and breaches its preventive obligation.[341]

Furthermore, the Trump administration's politicization of and attempts at defunding climate science, including efforts to eliminate NOAA's OAR, violate the obligation to act on the "best available science."[342] The GCRA mandates the coordination of federal research and the periodic performance of NCAs.[343] Halting those climate assessments, archiving climate.gov, and discontinuing the Billion-Dollar Weather and Climate Disasters database deprive policymakers and the public of essential information for evaluating climate risks.[344] Due diligence requires both collecting and disseminating scientific knowledge relevant to harm prevention.[345] By dismantling the institutions responsible for producing and sharing such information, the United States fails to maintain the scientific infrastructure required to prevent significant environmental harm.

2. Breach of the Duty to Cooperate for the Protection of the Environment

"Intrinsically linked" to the duty to prevent significant environmental harm is the duty to cooperate, which is governed by the principle of good faith.[346] Because the atmosphere is shared by all states, cooperation is "all the more vital" and requires sustained participation in collective mitigation efforts and the exchange of scientific information.[347]

The Trump administration's suppression of climate data and public assessments undermines these cooperative obligations. Suspending work on the sixth NCA and archiving NOAA's Billion-Dollar Disasters database disrupts the international exchange of scientific information.[348] Transparency and data sharing are recognized components of the duty to cooperate.[349] By halting the dissemination of its own climate data, the United States withdrew from the channels of collective learning and assistance that define good faith cooperation.

The substitution of politically driven reports disputing IPCC findings for established, peer-reviewed assessments further breaches this duty. The IPCC is widely regarded as the authoritative source of the best available climate science.[350] Issuing reports that dismiss this consensus and using them to justify deregulation erodes the factual foundation on which cooperation is based.[351] For a global problem defined by scientific interdependence, the

341. *See supra* note 199 and accompanying text.
342. *See supra* notes 128, 132–39 and accompanying text.
343. *See supra* notes 101–04 and accompanying text.
344. *See supra* notes 127–31 and accompanying text.
345. *See supra* notes 215–22 and accompanying text.
346. *See supra* notes 28, 223–31 and accompanying text.
347. *See supra* note 230 and accompanying text.
348. *See supra* notes 129–30 and accompanying text.
349. *See supra* note 225 and accompanying text.
350. *See supra* note 213 and accompanying text.
351. *See supra* notes 31–36, 132–39 and accompanying text.

unjustified rejection of a common evidentiary baseline is itself a breach of cooperation.

CONCLUSION

At the eightieth session of the UN General Assembly, President Trump argued that Europe's emissions-reduction efforts had been "wiped out" by offsetting increases from other states,[352] thereby seemingly conceding the position articulated by Judge Tomka that climate change "can be addressed only through co-operation."[353] Yet, the Trump administration's climate rollbacks are antithetical to that very principle. The obligations affirmed by the ICJ to combat climate change require due diligence and good faith cooperation. Recognizing these obligations as part of U.S. law is essential to protecting both present and future generations. For states like Vanuatu, the question is no longer whether these obligations exist, but whether they will be honored in time.

352. *See* President Donald J. Trump, *supra* note 45, at 43:07–44:00.
353. *See supra* note 2 and accompanying text.