

**Subcommittee on Environment and Climate Change
Hearing on
“We’ll Always Have Paris:
Filling the Leadership Void Caused by Federal Inaction on Climate
Change”
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Mr. Andrew Light, Distinguished Senior Fellow, World Resources
Institute and University Professor, George Mason University

The Honorable Frank Pallone, Jr. (D-NJ)

1. How should national security, energy and economic security, and other geopolitical and common defense interests factor into U.S. national decisions relating to climate change policy?

RESPONSE:

We’ve had over a decade now of official U.S. government reports and testimony from senior Department of Defense and intelligence officials from Republican and Democratic administrations confirming that climate change is an increasingly critical national security threat. This message was perfectly clear in the last *Worldwide Threat Assessment of the U.S. National Intelligence Community* released by National Intelligence Director Coats on January 29, 2019, stating, “Climate hazards such as extreme weather, higher temperatures, droughts, floods, wildfires, storms, sea level rise, soil degradation, and acidifying oceans are intensifying, threatening infrastructure, health, and water and food security. Irreversible damage to ecosystems and habitats will undermine the economic benefits they provide, worsened by air, soil, water, and marine pollution” (p. 23). In other words,

our collective, official, authoritative, and non-biased intelligence community agrees that climate change should factor into our security and defense interests. In broader geopolitical terms, consider only the economic opportunity that has emerged as a result of the creation of the Paris Agreement on climate change in 2015. According to a study from the International Finance Corporation – a member of the World Bank Group – just the commitments for greenhouse gas mitigation under Paris from 21 of the largest emerging economies has created a \$23 trillion investment opportunity, primarily in clean energy markets. The countries that step up to support those markets will not only form stronger economic and security ties with those parties but will also grow their own economies. However, I believe that at present, the U.S. administration risks harming our ability to compete in these markets, and thus risks damaging the credibility of U.S. businesses abroad by standing alone in the world in our intention to withdraw from the Paris Agreement. This is a potential enormous loss to the U.S. economy, and our strategic relationship with these other countries who are uniformly concerned about the threat of climate change and understand that they can sustainably grow their economies.

The Honorable John Shimkus (R-IL)

1. When I asked if the Paris Agreement was a treaty, you responded that it was not because it was under the UNFCCC [[link to exchange](#)]. The “Kyoto Protocol to the Convention on Climate Change” was also, as its formal title implies, under the UNFCCC. In your opinion, even though the Kyoto Protocol was under the rubric of the UNFCCC, would U.S. participation in the Kyoto Protocol have required Article 2 advice and consent?

RESPONSE:

I am not a lawyer, so I can only give you my best understanding. Both Kyoto and Paris were agreements adopted under the UNFCCC. But they are very different in content, including, most significantly, that Kyoto included legally binding emissions targets which went beyond the UNFCCC. Although I do not know whether, as a constitutional matter, Kyoto would have required Senate advice and consent, it was the expectation that an agreement of Kyoto's nature and content warranted Senate approval. This was the expectation, at least in part, because the ratification history of the UNFCCC reflected an interest on the part of the Senate in getting to approve a future climate change agreement if, unlike the UNFCCC, it included legally binding targets. (It also reflected a corresponding assurance from the Executive Branch that it expected this would be the case.) To my mind the 1997 Byrd-Hagel Resolution also anticipated what could have emerged as a possible ratification discussion for what would become the Kyoto Protocol. The point I was trying to make during our exchange was that Paris did not include legally binding targets and so did not have the same profile as Kyoto. So, to make the point clearer, it is not only the fact that Paris was adopted under the UNFCCC, but the nature and content of its provisions, including its non-binding nationally determined contributions, that made it amenable to conclusion by the Executive Branch.

2. It was widely reported that, during completion of negotiations on the Paris Agreement, then-Secretary of State John Kerry insisted on a subtle [last-minute word change](#) (of “shall” to “should”) intended to “Senate proof” the Agreement and help the Obama Administration avoid having to send it to the Senate for its Article 2 advice and consent. According to the UNFCCC, however, all but a handful of countries (the United States among them) have formally ratified the Agreement. Moreover, the UN itself often refers to the Paris Agreement as a treaty, both in [formal documents](#)

and in press statements. For example, in response to President Trump's announcement regarding U.S. participation in Paris, the UN [stated](#) that "The Paris Agreement remains a historic [treaty](#) signed by 195 Parties and ratified by 146 countries plus the European Union."

- a. Does President Obama's signing of an acceptance document—which states "[I, Barack Obama, President of the United States of America, having seen and considered the Paris Agreement, done at Paris on December 12, 2015, and signed on behalf of the United States of America on April 22, 2016, do hereby accept the said Agreement and every article and clause thereof on behalf of the United States of America. Done at Washington this 29th day of August, 2016](#)"— make the Paris Agreement binding on the United States?

RESPONSE:

As a preliminary matter, it is my understanding that the word "treaty" routinely causes confusion, because it has two different meanings – one under international law and the other under U.S. law. Under international law, it refers to an agreement concluded between or among States that is intended to be governed by international law. In the international sense, the Paris Agreement can be considered a treaty even though its formal title does not include the word "treaty." But that does not mean it is a "treaty" under U.S. law that requires Senate ratification. In fact, most "treaties" under international law are not concluded as "treaties" under U.S. law, i.e., they are not approved by the Senate (see the Appendix to [this report](#)). So, while I find it imprecise, I understand why some parties, including the UN refer to the Paris Agreement as a "treaty" insofar as they may be

commenting on its status under international law, not on how it is approved under U.S. law in particular.

The United States validly joined the Paris Agreement by “accepting” it. Consistent with Article 20 of the Agreement, each Party decides for itself whether it “accepts,” “ratifies,” etc. Therefore, the United States is a Party to the Agreement and has commitments in accordance with its terms. However, emissions targets under the Agreement (as included in the nationally determined contributions), are not binding.

b. And if not, please explain why not.

RESPONSE:

Please see my answer in (a) for my explanations as to this question.

c. Would U.S. Senate ratification of the Paris Agreement make the Paris Agreement binding on the United States?

RESPONSE:

My understanding is that the legal character of the Agreement’s provisions does not depend upon the manner in which it is joined by the United States. For example, the emissions targets are not legally binding, and that would not change, even if the Senate had approved the Agreement.

3. A number of legal scholars have argued that U.S. participation in the Paris Agreement may authorize EPA to pursue a broad range of greenhouse gas regulations under section 115 of the Clean Air Act (CAA). According to a forthcoming Columbia University [report](#)

entitled *Legal Pathways to Deep Decarbonization in the United States*, these regulations could address industrial carbon emissions, agriculture, and even an economy-wide cap and trade system.

- a. Do you believe the President’s formal “acceptance” of the Paris Agreement provides legal justification for regulation under CAA Section 115?

RESPONSE:

I am not a lawyer and have no view at this time on whether Section 115 can be used to regulate greenhouse gases. In any event, the Paris Agreement is distinct from U.S. law, so any availability of 115 would not be “under” the Paris Agreement.

- b. Does the World Resources Institute support use of CAA Section 115, under the Paris Agreement, as a means to address greenhouse gas emissions?

RESPONSE:

WRI does not yet have a position on the use of Section 115 to regulate greenhouse gases.

- c. If formal “acceptance” of the Paris Agreement does not provide legal justification for CAA section 115, do you believe Senate “ratification” of the Paris Agreement would constitute legal justification for regulation under this section of the Clean Air Act?

RESPONSE:

Again, it is my understanding that any use of Section 115 to regulate greenhouse gases (which I do not have a view

on at this time) would not be “under” the Paris Agreement, whether the Agreement were “accepted” or “ratified” by the United States.