The withdrawal by Japan from the International Whaling Convention and its related Commission in December 2018 and the on-off threat by the new leader of Brazil to withdraw from the Paris Agreement on Climate Change are the latest signals that International Environmental Law ("IEL") is under siege. The move by Japan and the possible withdrawal by Brazil follow on the heels of President Trump's decision to withdraw the United States from the Paris Agreement and the earlier "unsigning" by President G.W. Bush of the Kyoto Protocol to the Climate Change Convention.

It goes without saying that if the international process is functioning well, a transnational environmental problem should be addressed by most if not all of the nations that are contributing materially to the problem. Although the responsibilities of the nations may be differentiated, the nations share a common responsibility. If nations begin to peel off the membership rolls of multilateral treaties, and focus solely on their domestic priorities, IEL could face a serious, perhaps existential, threat. The rapid rise of nationalism in recent years has exacerbated this threat. When major nations forsake an international agreement, the knock-on effect upon participation by the remaining nations frays the fabric of the agreement.

As nations retreat from an internationalist approach to solving transnational environmental problems, some of the slack is being taken up by efforts from the private and non-governmental sectors. This article will examine how private environmental governance ("PEG") can help fill in the gap left by defections from IEL treaties.

To understand IEL's vulnerability to the recent trend towards nationalism, we start with a quick look at the architecture of international law. Obviously, international law differs from domestic law. Unlike domestic law, international law lacks a supranational governing body, a legislature, a court system with muscle, and an enforcement arm. International law is said to be based on the positivist approach, meaning in the case of treaties that nations are only subject to treaties to which they give their consent, through signature and ratification. Furthermore, all treaties contain provisions for withdrawal from the treaty upon proper notice; thus, the consent once given may be withdrawn.

In addition to the hard law of treaties, there exists a category of international agreements and other instruments known as soft law that is expressed in many forms, including among others non-binding agreements, declarations, codes of conduct, action plans, and statements of goals. Consent by participating nations is inherent in these instruments, but the consent is given with the understanding that the provisions are not binding. Soft law serves important purposes in providing strategic direction and non-binding commitment to solutions for transnational environmental issues. And any withdrawal of support for soft law

has much the same unraveling effect as withdrawal from a treaty. The refusal by President Trump's administration to support parts of declarations by various international bodies that mention the dangers of human-induced climate change is an example.

The requirement of consent is the child of the concept of national sovereignty. Sovereignty means that nations have exclusive authority with respect to their territory, peoples, and actions, and are not subject to the authority of another nation or a supranational institution – unless they consent. Joining a treaty and adhering to its rules are in effect exercises of national sovereignty, and as such require an explicit act of consent. As well, opting out of a treaty is an exercise of sovereignty.

Given the importance of consent, there are diverse views as to whether international law is truly "law." Proponents note that treaties are considered binding and by that feature are instruments of law. Some would contend that an essential feature of law is constraint, and that in reality a treaty does not constrain because a nation may opt out and because there is no effective mechanism for enforcing the treaty restrictions. Others accept that international law exists but maintain that it is subject to limitations as noted above, and its importance lies in setting standards and marshaling the treaty members around a program to deal with the subject issue covered by the treaty—more of an action plan than a truly binding set of obligations.

The recent trend towards nationalism puts additional strain on IEL. Mutual cooperation is required to solve global environmental problems, and near-universal participation in environmental treaties is needed not only to address the problems but also to prevent the insidious effects of free-riding by non-members. When nations withdraw from a treaty the critical mass of member nations is diminished, and the withdrawal results in a blow to maintaining the commitments of the remaining members. This is especially the case when leading nations like the United States withdraw, and most especially when the withdrawing nations have contributed significantly to the problem at hand.

With the rise of populist nationalism in a number of nations, including our own, the trend toward withdrawal from multilateral environmental treaties may accelerate. Perhaps this will be a temporary phenomenon, but in the meantime what forcing mechanism can be used to prod nations into participation in pacts to solve global environmental issues? Certainly, public pressure and media attention can help to move recalcitrant nations, but years could be lost in the effort.

Fortunately, a supplement to governmental and intergovernmental action has emerged during the past twenty-some years: the phenomenon termed "private environmental

governance" or PEG, which Vandenbergh analyzed in detail in a 2013 article. At its core, PEG occurs when actions by organizations in the private and non-governmental sectors perform the roles typically thought to be the province of national and subnational governments, and international governmental organizations. Examples include reducing negative externalities that harm the environment or managing common pool resources threatened by unsustainable practices.

PEG takes many forms, including private standard setting, certification of sustainable behavior, industry codes, supply chain contracting requirements, NGO-business partnerships, and even green investment screens. PEG utilizes many of the same regulatory instruments as the public regulatory regime, from prescriptive rules, to the creation of property rights, to market leveraging and informational regulation tools, as examined in a recent article by Light and Orts. PEG also addresses many of the same topics as the public regulatory regime, from fisheries and forest management to climate mitigation and toxics regulation, as explored in a recent book chapter by Light and Vandenbergh. The ability of civil society to address inadequacies in the international regulatory regime regarding labor, human rights, sustainability and other issues has been examined by international law scholars writing on transnational governance, as discussed in an article by Abbott and Snidal.

Research on PEG has explored the role that private actors play not only at the global level, but also at the domestic level, and has recognized that although much of the activity in this area is not required by positive law, it is hardly voluntary. The drivers of corporate behavior, for instance, include brand reputation concerns, supply chain contracting requirements, retail customer preferences, pressure from investors, lenders, and insurers, employee morale, and manager norms, as Vandenbergh and Gilligan examine in a recent book.

In many cases, PEG initiatives are motivated by the desire of business enterprises to demonstrate their good behavior to the public, often as a brand-building exercise that will help financial bottom lines while contributing to the common good. Walmart's recent commitment to reduce supply chain emissions by a billion tons (an amount roughly equal to the total annual emissions of Germany or Japan) by 2030 is an example, as is Maersk's recent commitment to achieve carbon neutrality by 2050. These efforts combine advocacy group pressure and firm management decisions to reduce emissions even absent requirements enforced by national or international governmental bodies. The efforts also create networks of international contracts with environmental requirements that cross international boundaries even absent international environmental agreements. Walmart has more than 10,000 suppliers in China alone, so pressure to reduce carbon emissions from its supply chain has the potential not only to affect China's emissions, but also China's

motivations in international negotiations.

Similarly, when the Trump Administration announced its intention to withdraw from the Paris Agreement, hundreds of companies joined with other private sector organizations and subnational governments to participate in the "We Are Still In" initiative—signaling to other nations that many in the United States would continue to pursue the goals of the Paris Agreement and reducing the motivation by other nations to defect.

Much remains to be understood about the efficacy and spillover effects of PEG initiatives, and they cannot, and should not, pretend to displace treaty law and governmental action, but with governmental failure to solve enduring international environmental problems, we should be thankful for the contribution made by these alternative approaches.

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