

# THE ELEPHANT IN THE ROOM

## LISA DEMARCO AND JONATHAN MCGILLIVRAY OFFER A FOREIGN PERSPECTIVE ON POTENTIAL TRUMP ADMINISTRATION APPROACHES TO US INTERNATIONAL CLIMATE COMMITMENTS

To say that President Donald Trump, Steve Bannon, Scott Pruitt and Rex Tillerson (Team Trump) are not advocates of progressive climate policy is trite. Trump's 28 March energy and environment executive order, which eviscerates virtually all of the Obama administration's domestic climate policy and regulations<sup>1</sup> under the guise of ending the war on coal and protecting jobs, provides a clear view of the new US climate policy direction.

The more pressing question is what Team Trump will do with its international legal commitments under the UN Framework Convention on Climate Change (UNFCCC) and the Paris Agreement. This question and its potential answers are much more nuanced and strategic. Inquiring minds (and governments) want to know... (i) what are the legal options and processes available to Team Trump if it intends to back away from the Paris Agreement, and (ii) what are the implications of those options?

We see four main options for Team Trump to avoid the US's international climate commitments: (i) the obvious: withdraw from the Agreement; (ii) the impatient: withdraw from the UNFCCC; (iii) the expedient: repudiate the Obama executive agreement; and (iv) the fake: continue as a party to the Paris Agreement but undermine it through domestic policy.

### THE OBVIOUS

In the unlikely event that Team Trump views the US to be legally bound by the Agreement,<sup>2</sup> it may simply withdraw from it. But the process and timing is not likely to

do the trick. The Agreement came into force on 4 November 2016, and any party can withdraw from it after 4 November 2019 by providing written notice that, at the earliest, will be effective one year after it is received (4 November 2020).<sup>3</sup> The next US election is scheduled for 3 November 2020, leaving the door open for a Trump defeat to upset any plan to withdraw from the Agreement on the earliest possible date. Consequently, the Obvious is more likely to be a possibility than a pragmatic reality.

### THE IMPATIENT

If Team Trump does not want to risk the vagaries of the 2020 election, it also has the option of withdrawing from the Paris Agreement by withdrawing from the UNFCCC.<sup>4</sup> This would take effect one year after written notice of withdrawal from the UNFCCC is made and, at present,<sup>5</sup> written notice can be given at any time.

The internal process for withdrawing from a treaty that the Senate passed a resolution to ratify is not, however, a slam dunk for Team Trump. US constitutional law allows the President to terminate a treaty through executive action with any of prior or subsequent authorisation or direction of Congress (collectively) or the Senate (alone). However, the US Supreme Court considered, but refrained from deciding,

whether a Senate-authorized treaty could be legally terminated by executive action of the President without the prior or subsequent authorisation of Congress or the Senate. And US experience on this point has been mixed: President Reagan unilaterally terminated a treaty with Nicaragua without challenge in 1985; however, President Carter's attempt to terminate a mutual defence treaty with Taiwan in 1979 was challenged. With divided lower courts, the plurality of the Supreme Court intentionally avoided deciding the issue on the basis that it was a political question.<sup>6</sup>

In addition, if Senate direction is sought by Team Trump, it is unclear whether the authorisation will need to be by a super or simple majority of the Senate, which currently has a 52-seat Republican majority.

### THE EXPEDIENT

Former President Obama accepted the Paris Agreement (notionally as an agreement made pursuant to the UNFCCC treaty, which expressly authorises subsequent agreements) by way of an executive agreement on 3 September 2016. That action, without Senate advice and consent, was well within his constitutional authority under Article II, § 2, cl. 1 as long as the agreement can be implemented relying on existing statutory or Article II treaty authority. In fact, the Paris Agreement was long structured and negotiated to

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avoid any requisite US Senate ratification and still create a legally binding agreement.

However, a number of legal scholars including Julian Ku of Hofstra University believe that if the President unilaterally entered an international agreement, the President is also able to unilaterally exit it. In fact, on 3 November 2016, a number of Republican members of the Senate Committee on Environment and Public Works issued a letter to the then-Secretary of State espousing the view that President Obama's acceptance of the Paris Agreement through a sole executive agreement resulted in nothing more than a non-legally binding, political commitment, leaving the door open for any future administration to alter its course.

It is possible that Team Trump may do just that by way of either: (a) an executive order or act repudiating the original acceptance by President Obama without Senate approval; or (b) a call for Senate advice and consent on the Paris Agreement on the grounds that it needs more than the UNFCCC powers for implementation, is not empowered by a statutory authority, and should have been subject to the advice and consent of the Senate in the first instance. Either of these options are plausible for Team Trump, if they view any political, policy, or economic gain from exiting the Paris Agreement.

If the US repudiates the executive acceptance of the Paris Agreement and otherwise withdraws from it, the conditions that allowed it to enter into force are still likely to exist; it entered into force when 55 parties representing 55% of global GHG emission ratified it. Currently, 141 parties representing 82.55% of global emissions have ratified the Agreement, with the US

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representing 17.89% of global emissions. If Russia (7.53%) also withdraws, its status may become much more tenuous.

US repudiation is likely to cause further challenges for the US-China memorandum of understanding on climate-related actions, which predates US acceptance of the PA. Similarly, it is likely to result in added complexities and potential border carbon adjustments (BCAs) in the context of the NAFTA renegotiations. Canada and Mexico may also bilaterally agree to a preferred PA compliance-based approach to accounting for and governing low carbon exports to the US, which they may attempt to use for compliance under Article 6 of the PA. Other parties to the PA may also consider imposing a BCA on GHG emission intensive US goods. Further, US repudiation may subject US emission intensive companies to increased risk of tort claims, given that the US previously acknowledged the foreseeability of the potential harm and nonetheless took actions or inaction to increase its likelihood.

### THE FAKE

If all politics is local, Team Trump may bet on the fact that his supporters have little interest in what the US does internationally as long as the domestic actions and rhetoric are consistent with traditional energy and jobs. This may lead Team Trump to focus its changing climate change mandate on domestic actions that

undermine the Paris Agreement, without the US actually taking steps to withdraw from or repudiate it.

In many ways, this insidious fake approach is the most difficult for the other parties to the Agreement to navigate. It is likely to change the UNFCCC negotiating dynamics dramatically, and provide China, India and Brazil with considerable leverage.

A fake approach by the US may also seriously decrease the level of ambition of other parties in future years. However, it may make it more challenging for other parties to impose border carbon adjustments on emission intensive US goods while the US remains a party to the Agreement. Similarly, Canada and Mexico may face enhanced stakeholder pressure to slow their climate mitigation actions and harmonise with US inaction on climate change. Finally, the fake approach may contribute to more "fake news" about serious US action to address climate change, one of the most serious global challenges of our time.

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(1) The Executive Order (i) directs federal agencies to review actions that burden domestic energy production; (ii) directs the EPA to rewrite the Clean Power Plan; (iii) directs the EPA to review oil and natural gas sector emissions standards; (iv) directs federal agencies to stop considering the 'social cost of carbon' in policymaking; (v) directs the Bureau of Land Management to lift the moratorium on federal coal leasing and review oil and gas guidance documents; and (vi) repeals many of President Obama's climate-related executive orders and actions. (2) Team Trump has regularly referenced the Paris Agreement as being illegal and nothing more than a political statement, and on 28 March 2017, in an interview with ABC's George Stephanopoulos, Pruitt indicated that "...Paris, was not just that it was – you know, failed to be treated as a treaty, but China and India got away, the largest producers of CO2 internationally [author's note: this is not factually accurate], got away scot-free. ... So Paris was just a bad deal, in my estimation." (3) Paris Agreement, Article 28(1-2). (4) Paris Agreement, Article 28(3); UNFCCC Article 25. (5) No party could withdraw within the first three years that the UNFCCC was in force. (6) *Goldwater v. Carter*, 444 U.S. 996 (1979)