

# ClientEarth Briefing

## Can President Trump legally pull out of the Paris Agreement on climate change?

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### 1 Key Messages

- President-elect Trump cannot unilaterally 'cancel' the Paris Agreement.
- He cannot withdraw the United States (US) from the Paris Agreement before 4 November 2019, with withdrawal on that date taking effect one year later 4 November 2020.
- To avoid this requirement, President-elect Trump could entirely withdraw the US from the United Nations Framework Convention on Climate Change (UNFCCC) In this scenario, the US could be out of the UNFCCC by January 2018. Such a move would be unprecedented and would have flow-on ramifications for international climate change law as a whole.
- Alternatively, as enforcement mechanisms in the Paris Agreement and the UNFCCC are weak, Trump could simply refuse to comply with the terms of the PA. Any deliberate breach of an international treaty and arguably international customary law would be contrary to the US's foreign policy to date. It would have implications for the international order and could lead to diplomatic condemnation at the UN General Assembly.

### 2 Background

Prior to his election, Donald Trump was consistently clear about his views on climate change and his opposition to the Paris Climate Change Agreement (Paris Agreement).

The US president-elect has previously called climate change a hoax, 'created by and for the Chinese in order to make US manufacturing non-competitive'.<sup>1</sup> He has said that he wants to get

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<sup>1</sup> <http://www.vox.com/policy-and-politics/2016/9/26/13067910/presidential-debate-clinton-trump-global-warming-hoax>

rid of the US Environmental Protection Agency entirely,<sup>2</sup> and that he wants to repeal all federal spending on clean energy.<sup>3</sup> In his first major speech on energy policy in the presidential campaign he also said he would ‘cancel’ the Paris climate deal.<sup>4</sup>

This briefing considers what President Trump would need to do to ‘cancel’ the Agreement, which we presume means trigger the withdrawal of the US as a party to the Agreement.

## 3 Analysis

### 3.1 The Paris Agreement

The Paris Agreement was agreed in December 2015 at the 22nd Conference of the Parties to the UNFCCC, the treaty establishing the international framework for state co-operation on climate change mitigation and adaptation. The Agreement entered into force on Friday, 4 November 2016.<sup>5</sup> This means that the agreement is now operational and has legal force under international law. The Paris Agreement commits countries to the submission and implementation<sup>6</sup> of nationally determined emissions reduction targets, known as NDCs, in order to achieve the overall objective of limiting temperature rise to well below 2 degrees below pre-industrial levels. It also contains a number of binding procedural obligations including a global stock-take of NDCs every 5 years and a requirement of greatest possible and upwards only ambition. The Paris Agreement is a novel hybrid of bottom up and top down governance approaches that provides the framework for maintaining momentum towards effective international co-operation.

As required under article 21 of the Agreement, entry into force occurred 30 days after the ratification threshold was met. Currently, 103 parties, accounting for over 70% of estimated global greenhouse gas emissions, have ratified the Agreement including the world’s largest economies, the EU, Brazil, China and India.<sup>7</sup>

Under US law, President Obama was able to sign and ratify the agreement on 3 September 2016<sup>8</sup> on behalf of the US without the approval of Congress because of its status as an agreement, and not a treaty. This method of ratification applies where the treaty lies within the scope of the president’s foreign affairs mandate and existing legislation.<sup>9</sup> The Paris Agreement was carefully crafted to allow ratification through this method.

The Paris Agreement is an international treaty and now that it has entered into force it cannot simply be ‘cancelled’ unilaterally by the US. However, there are a number of actions that President Trump could take to effect the withdrawal of the US from the PA. This would have significant ramifications for the effectiveness of the agreement, particularly if other countries also decided to withdraw. The refusal of the Bush administration to ratify the Kyoto Protocol caused other countries to follow, and saw a decade of stalled action on emissions reductions.

<sup>2</sup> <https://www.theguardian.com/environment/2016/feb/26/republican-candidates-donald-trump-eliminate-epa-law-experts>

<sup>3</sup> <http://www.bna.com/trump-says-plan-n57982082131/>

<sup>4</sup> <http://www.bbc.co.uk/news/election-us-2016-36401174>

<sup>5</sup> UNFCCC, The Paris Agreement, [http://unfccc.int/paris\\_agreement/items/9485.php](http://unfccc.int/paris_agreement/items/9485.php)

<sup>6</sup> Arguably implied under Article 4(2).

<sup>7</sup> UNFCCC, The Paris Agreement, [http://unfccc.int/paris\\_agreement/items/9485.php](http://unfccc.int/paris_agreement/items/9485.php)

<sup>8</sup> <https://www.whitehouse.gov/blog/2016/09/03/president-obama-united-states-formally-enters-paris-agreement>

<sup>9</sup> Daniel Bodansky, ‘Legal Options for US Acceptance of a New Climate Change Agreement’, *Arlington, Virginia: Centre for Climate Change and Energy Solutions* (2015).

We set out below the three main options President Trump could take to avoid US compliance with the PA:

- withdrawal from the Paris Agreement itself (after three years, effective after four),
- withdrawal from the underlying agreement under the UNFCCC, (effective after one year) or
- non-compliance with the Paris Agreement.

### 3.1.1 Withdrawal from the Paris Agreement

Article 28 of the Paris Agreement directly establishes the right for a country to withdraw from the agreement itself. Under article 28, a country is permitted to withdraw from the agreement three years' after the agreement has entered into force, by giving notice to the UNFCCC secretariat.<sup>10</sup> The withdrawal itself then takes effect one year after that notice has been given.<sup>11</sup>

Because the US ratified the Paris Agreement by a presidential-executive agreement, this means that it could withdraw from the agreement by the same means, without senate approval. Based on the date that the Paris Agreement entered into force, the new US President could give notification of withdrawal from the Paris Agreement on 4 November 2019. This would then take effect on 4 November 2020. Until that withdrawal takes effect, the US is bound by international law to comply with the terms of the Paris Agreement and to pursue measures to implement its NDC.

It should be noted that the withdrawal of the US would not affect the continued operation of the Paris Agreement, which would continue to apply to other state parties.<sup>12</sup>

### 3.1.2 Withdrawal from the UNFCCC

Article 28 of the Paris Agreement also provides that a country will be considered to have withdrawn from the Paris Agreement, if it withdraws from the underlying UNFCCC.<sup>13</sup> Withdrawing from the entire UNFCCC would be a more dramatic step. However it would only take one year to have effect. Under article 25 of the UNFCCC, a party may now withdraw from the UNFCCC by giving notice to the UNFCCC secretariat<sup>14</sup> and the withdrawal takes effect one year from that date.<sup>15</sup>

Although the UNFCCC was ratified by the senate, past practice suggests that the senate approval is not required for withdrawal from a treaty, although there is some legal uncertainty.<sup>16</sup> Consequently, if a new US President Trump gave notification of withdrawal from the UNFCCC on the first day of office, the US could be effectively withdrawn from the UNFCCC and the Paris Agreement as soon as 20 January 2018.

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<sup>10</sup> Paris Agreement (2015), article 28(1).

<sup>11</sup> Paris Agreement (2015), article 28(2).

<sup>12</sup> Vienna Convention on the Law of Treaties, Article 55.

<sup>13</sup> Paris Agreement (2015), article 28(3).

<sup>14</sup> United Nations Framework Convention on Climate Change (1992), article 25(1).

<sup>15</sup> United Nations Framework Convention on Climate Change (1992), article 25(2).

<sup>16</sup> <http://www.climatecentral.org/news/trump-could-abandon-paris-climate-agreement-20711>

This option would have significant implications for the UNFCCC and all future international cooperation on climate change. It would also be a marked departure from US foreign policy to date, as the US is a party to most international treaties governing the environment, as well as other subjects. US withdrawal from this treaty could raise legitimate questions among other states about its intention to withdraw from other longstanding international instruments, and have serious diplomatic consequences.

Trump could also challenge President Obama's legal authority to ratify the PA, arguing that the US's adoption is invalid, which would arguably run contrary to accepted legal principles and interpretation of those requirements to date.

### 3.1.3 Non-Compliance with Paris Agreement

Alternatively, President Trump may choose to simply disregard the PA, and breach international law. This could be done explicitly through a unilateral declaration, or implicitly by simply abandoning the policies and programs introduced by the Obama administration to reduce greenhouse gas (GHG) emissions in the US.

The majority of these programs at the national level, such as the Clean Power Plan, are not enshrined in legislation and have been introduced by President Obama by way of executive actions. They could be equally easily done away with by a new President Trump.

While such actions would mean the US would fail to meet the GHG emission reduction targets it brought to Paris, the Paris Agreement was specifically designed as an instrument for building consensus and ratcheting up ambitious action. It contains little in the way of binding or coercive mechanisms to ensure compliance. Simple non-compliance could be just as impactful in disrupting its effectiveness as any withdrawal.

Any blatant or explicit breach of international law would run contrary to the US's foreign policy to date, and risk violating a range of international norms and customs. In that event arguably the UN General Assembly could take action, possibly by passing a resolution recommending referral to the International Court of Justice (ICJ) for an advisory legal opinion (although the US would not be compelled to submit to the court's jurisdiction). The likelihood of such action would depend highly on other geo-political events and sensitivities.

In summary, withdrawal by President Trump from the Paris Agreement before 4 November 2019 would be a violation of international law, as would a refusal to comply with the procedural aspects of the agreement, or to pursue measures to implement the US's agreed emissions reduction targets.

## 4 ClientEarth Comment

The international and investor community must strongly condemn any violation of international law by President Trump, as well as a decision to step away from a hard-won international consensus on the greatest environmental threat facing mankind.

Despite the above, it is important to remember that the transition to a low-carbon economy is underway and is inevitable. Above and separate to national politics, the international financial and business community will continue to direct capital away from carbon intensive industries and

towards clean, low carbon investments. They will do this because they must; company directors and investors are obliged under the law to manage and mitigate financial risks to their businesses. Climate change poses business risks to a range of sectors and the financial system as a whole. In fact, US withdrawal from the Paris Agreement or the UNFCCC arguably increases climate related financial risk for companies and the financial sector, which would in turn elevate the duties of company directors and investors to mitigate those risks.

ClientEarth's briefing on the risks of a Trump presidency for business and investors is available at: <http://www.documents.clientearth.org/library/download-info/trump-presidency-may-significantly-increase-climate-related-financial-risks-to-business-and-investors/>

Karla Hill  
020 7749 5975  
khill@clientearth.org  
www.clientearth.org

ClientEarth is a non-profit environmental law organisation based in London, Brussels and Warsaw. We are activist lawyers working at the interface of law, science and policy. Using the power of the law, we develop legal strategies and tools to address major environmental issues.

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**Brussels**  
Rue du Trône 60  
5ème étage  
1050 Bruxelles  
Belgique

**London**  
274 Richmond Road  
London  
E8 3QW  
UK

**Warsaw**  
ul. Żurawia 45  
00-680 Warszawa  
Polska