

Environment Alert

June 13, 2017

The Paris Agreement: Where We Were, Where We Are, Where We Are Going

On June 1, 2017, President Donald Trump announced that the United States would withdraw from the Paris Agreement (the “Agreement”), describing it as “disadvantaging the United States” and indicating that the United States will “cease implementation” thereof, unless the United States can renegotiate its terms. While purporting to be a definitive statement of U.S. policy, the President’s announcement raised more questions than it answered.

1. Where We Were

The Agreement was the culmination of a four-year negotiation among the 197 nations that are parties to the United Nations Framework Convention on Climate Change (UNFCCC). The parties reached agreement on December 12, 2015, and the United States formally joined the Agreement on September 3, 2016. Former President Barack Obama did not send the Agreement to the Senate for ratification (as would be required for a treaty), but rather relied on existing authorities to support the United States’ participation, including his authority under Article II of the U.S. Constitution, federal statutes (including the Clean Air Act) and the UNFCCC. Central to the conclusion that the Agreement did not require ratification by the Senate: its terms are aspirational rather than obligatory.

Before leaving office, President Obama took a number of steps to implement the pledges made in the Agreement. Under Article 9.1 of the Agreement, the United States must provide financial resources to assist developing countries with their obligations under the UNFCCC. Although the Agreement does not specify how the financial resources are to be provided, or in what form, the United States promised to contribute \$3 billion to the Green Climate Fund (GCF)—an initiative designed to help developing countries meet their “mitigation and adaptation needs.” During President Obama’s term, the United States contributed the first \$1 billion to the GCF.¹ In addition, pursuant to Article 4.9 of the Agreement, the United States offered its first Nationally Determined Contribution (NDC), pledging “to achieve an economy-wide target of reducing *** greenhouse gas emissions by 26%-28% below *** 2005 level[s] in 2025 and to make best efforts to reduce *** emissions by 28%.”

2. Where We Are

President Trump’s decision to withdraw from the Agreement leaves these and other commitments in doubt. Although President Trump did not specify how he intends to remove the United States from the Agreement, reports suggest that the President will follow the terms of the Agreement providing for withdrawal. Under Article 28, the United States can withdraw from the Agreement no earlier than November 4, 2020—the day after the 2020 election.²

As such, the United States will remain a party to the Agreement for the next three and a half years, with a continuing duty to abide by commitments made thereunder. The extent to which those commitments require concrete action, however, is unclear.

During his speech announcing withdrawal from the Agreement, President Trump stated that the United States would make no further contributions to the GCF. However, this refusal is not necessarily a violation of the Agreement. Article 9.1 does not mandate that contributions to developing countries take a specific form or reach a minimum amount. Accordingly, it could be argued that the \$1 billion contributed to the GCF during the Obama administration is sufficient to satisfy the United States' obligations under Article 9.1, even if falls short of the United States' pledge.

Similarly, under Article 13.7 of the Agreement, the United States must "regularly" provide information, including national inventory reports of anthropogenic emissions within the country and "information necessary" to track the United States' progress toward achieving its NDC. Like other provisions of the Agreement, however, these reporting requirements are open to interpretation. Specifically, the Agreement fails to identify a particular time for such "regular" communications, or a date by which at least one communication must be made. The UNFCCC, on the other hand, obligates parties to publish by April 15 of each year national inventories of anthropogenic greenhouse gas emissions, and to communicate climate change mitigation and adaptation measures. To avoid violating the UNFCCC treaty, the United States must therefore continue to submit reports for the next three and a half years and beyond.

In addition to fulfilling its UNFCCC reporting requirements, the United States would be expected (as a member of the Agreement) to send a delegation to the 23rd Conference of Parties (COP23), to be held in Bonn, Germany, in November 2017. Given its decision to withdraw from the Agreement, it is unclear whether the United States will participate in COP23. Notably, EPA Administrator Scott Pruitt participated in only a few hours of the recent two-day G-7 environmental summit held in Bologna, Italy.

Perhaps the most consequential question related to compliance with the Agreement over the next three and a half years is whether the United States will submit a new NDC. Article 4.9 of the Agreement provides that each party must create and communicate an NDC to the UNFCCC every five years. Although the United States submitted an NDC in 2016, that NDC was developed prior to the Paris Conference as an "Intended Nationally Determined Contribution" and was converted into an NDC when the United States formally joined the Agreement in September 2016. At the time the Agreement was adopted, the parties requested that nations like the United States, "whose intended nationally determined contribution *** contains a time frame up to 2025 *** communicate by 2020 a new [NDC] and *** do so every five years thereafter." Hence, the United States is expected to produce a new NDC prior to the date on which withdrawal from the Agreement could be effectuated. Failure to do so would flout that expectation.³

3. Where We Are Going

Further complicating this already thorny thicket, President Trump appeared to leave the door to future U.S. efforts to combat climate change open by indicating a willingness to "renegotiate" the Agreement. If

he is serious about that intention, President Trump would have several options: for example, he could attempt to negotiate an entirely independent agreement, revise the existing Agreement or simply modify the commitments the United States made thereunder.

If President Trump attempted to negotiate a new accord or revise the existing Agreement, the path of least resistance would be to work within the UNFCCC treaty. That treaty provides an underlying framework designed to encourage international cooperation in combating climate change and has an established schedule of annual COP meetings during which negotiations could take place. However, even proceeding through the UNFCCC, any effort to negotiate a new or revised agreement would face significant hurdles. Several prominent European nations—including France, Germany and Italy—have indicated that they will not entertain discussions toward a new agreement on climate change. Furthermore, Chinese Premier Li Keqiang stated last week at the 12th China-EU business summit that “The Paris Agreement represents the broadest consensus of the international community.” “All parties,” he added, “need to jointly safeguard this hard-won outcome and work for its effective implementation.” Given the public embrace of the Agreement and apparent commitment to its implementation even without the United States’ participation, world leaders are unlikely to engage with the Trump administration on efforts to arrive at an entirely new agreement, or even to revise the existing Agreement.

By contrast, redefining U.S. obligations within the Agreement would be an easier task. To start, President Trump could modify the United States’ NDC and establish less aggressive goals for reducing emissions. (As just noted, the United States is expected to submit a new NDC before 2020). Although Article 4.11 suggests that NDCs should be altered to ratchet emissions-reduction goals upward rather than downward, allowing parties to “adjust *** existing nationally determined contribution[s] with a view to *enhancing* [their] level[s] of ambition,” downward adjustments are not expressly prohibited. The President might also redefine commitments by eliminating, or reducing, U.S. financial obligations, such as the country’s \$3 billion pledge to the GCF. Given the flexibility of the Agreement—as well as the fact that it was undertaken unilaterally by President Obama without approval by Congress—President Trump would have substantial latitude to make these changes.

If President Trump opted to modify U.S. commitments during the three and a half years prior to withdrawal and/or successfully propose amendments to the Agreement to make it more favorable to the United States, he could decide ultimately to remain in the Agreement, notwithstanding his recent commitment to withdraw. Indeed, this approach could have a significant political upside: by announcing a U.S. withdrawal from the Agreement, but later remaining within it, the President would be able to claim both that he kept his promises to leave the Agreement because it was a bad deal for America **and** that he successfully negotiated a “better deal,” potentially appeasing some who have steadfastly disagreed with his initial announcement to withdraw. Arguably, that course of action offers greater potential political gains than withdrawing entirely from the Agreement and making no effort to replace it.

The President’s stated intention to renegotiate the Agreement, the political benefits he might derive from doing so and the significant time lapse before withdrawal from the Agreement can be completed together

present an opportunity for advocacy for stakeholders on all sides of the issue. Notwithstanding the administration's current stance on the Agreement—and on the fight against climate change more generally—advocates may find success in persuading the administration that remaining within the Agreement is in the country's (and the President's) interest.

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¹ The United States has contributed two \$500 million payments, one in March 2016 and the other in January 2017.

² Parties to the Agreement can submit notifications of withdrawal three years after the date on which the Agreement became effective, which, for the United States, was November 4, 2016. After submitting notification of withdrawal, the Agreement permits withdrawal after one year.

³ Of course, the Trump administration's effort to dismantle the regulatory programs that support compliance with the existing NDC—the Clean Power Plan and the Methane Initiative, for example—could also be seen as contravening the spirit of the Agreement (if not its plain terms) in the years before withdrawal.