

President Trump and International Law

Implications for the Treaties of the United States

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I have been asked to discuss the relationship between President Trump and the treaty obligations of the United States. In particular I want to address the question of whether the election of President Trump will herald a Brexit-style rush to withdraw from particular existing treaty obligations of the United States, and if so, what treaties might be most exposed to a real risk of withdrawal or denunciation.

One of the features of the international legal system that provides stability and security is the understanding among nations that a change in government does not affect existing treaty obligations. In other words, a treaty, once signed and ratified by a state, binds that state in accordance with the rules of international law whether or not the government of that state changes in the future. The only recognised exception to the rule is a change of government consequent upon the formation of a new state – the most recent example being the creation of the State of East Timor.

The alternative model, by which states are free to renegotiate international terms on every change of government, is plainly unworkable and would destroy the fabric of the rules based system of international law – a rules based system that small and middle powers such as Australia rely upon for security and prosperity.

President Trump chose to give prominence during his election campaign to several treaty obligations of the United States. He suggested that he may, upon taking office, conduct a review of all multilateral treaties entered into by the United

States. He indicated his hostility to the rules-based system of international law when, after the Brussels terror attacks in 2016 he was reported to have said:

‘I would say,’ he responded, ‘that the eggheads who came up with this international law should turn on their television and watch CNN.’

It must be accepted that President Trump’s statements during the campaign, and now more recent statements made following his inauguration, reveal a serious possibility of withdrawal from, or termination of, a number of very significant international treaties.

It is beyond the scope of this short paper to consider the security and strategic implications in the event that the United States did choose to terminate particular treaty relationships. Let it just be said that they are obviously significant and withdrawal would be likely to fracture security and trade relationships which have served the world well for several decades.

A small number of treaties seem more exposed to risk than others. Looking at the words of President Trump, during the election campaign, President Trump announced his intention to withdraw from the Paris Climate Change Agreement. He indicated he would withdraw from the Iran Nuclear Agreement. Other agreements that President Trump raised as deserving of criticism and scrutiny included the NAFTA, the US-Japan Defence Treaty and, surprisingly, NATO. In an interview in June 2016 he suggested that he would consider withdrawing the United States from the World Trade Organisation.

It is useful to look at what President Trump has actually said about the various treaties before considering whether or not he actually has the power and ability to cause the USA to withdraw from those treaties.

NAFTA is a treaty between the US, Mexico, and Canada. It came into force in 1994 under the presidency of Bill Clinton, although it was negotiated by President George Bush. NAFTA essentially eliminates tariffs between the three states.

During the election campaign President Trump described NAFTA as
“the worst trade deal in the history of the country.”

The White House website today carries the following statement:

“President Trump is committed to renegotiating NAFTA. If our partners refuse a renegotiation that gives American workers a fair deal, then the President will give notice of the United States’ intent to withdraw from NAFTA.”

On Thursday last week President Trump said: "NAFTA has been a catastrophe for our country; it's been a catastrophe for our workers and our jobs and our companies,"

The Paris Climate Change Agreement builds upon the United Nations Framework Convention on Climate Change, adopted in New York on 9 May 1992. The primary goal of the Paris Agreement is to mitigate the effect of climate change by holding the increase in the global average temperature to well below 2 °C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5 °C above pre-industrial levels.

The Paris Agreement has now been ratified by 129 parties. It entered into force on 4 November 2016.

It seems clear that President Trump intends to withdraw the United States from the Paris Agreement. Mr Myron Ebell, who advised President Trump on climate change, said last week that an Executive Order in relation to the Paris Agreement was expected “within days”. During the election President Trump also suggested that he wished to withdraw all funding from the U.N. Framework Convention on Climate Change and redirect climate programming funds to infrastructure projects.

There have been numerous media reports suggesting that President Trump may wish to withdraw the United States from the NATO alliance. Such a step would of course have serious security implications for Europe which are beyond the scope of this short paper to address.

On March 23 in an interview with Bloomberg Politics, President Trump said: *“I think NATO may be obsolete. NATO was set up a long time ago — many, many years ago when things were different. Things are different now. We were a rich nation then. We had nothing but money. We had nothing but power. And you know, far more than we have today, in a true sense. And I think NATO — you have to really examine NATO. And it doesn’t really help us, it’s helping other countries. And I don’t think those other countries appreciate what we’re doing.”*

More recently, there are some suggestions that President Trump is backing away from his earlier rhetoric surrounding NATO. On Sunday of this week it is reported that President Trump spoke with the NATO Secretary General and referred to the United States' "strong support for NATO" according to the White House press office.

It seems that President Trump's main concern with NATO may be to achieve what he considers to be a more equitable cost sharing structure, rather than a full withdrawal.

The nuclear deal with Iran is also heavily exposed to risk of termination. In July 2015, Iran agreed to the Joint Comprehensive Plan of Action (the "Iran Deal"). Iran agreed to serious limitations on its stockpiles of enriched uranium and agreed to decommission a number of centrifuges. In return, the most severe sanctions against Iran were lifted.

Throughout the campaign President Trump repeatedly criticized the Iran deal and stated that he would terminate it upon election. Last week in an interview with Fox News he said:

"I think it was the worst deal I've ever seen negotiated. I think it was a deal that never should have been negotiated. I think it's a shame that we've had a deal like that and that we had to sign a deal like that and there was no reason to do it and if you're going to do it, have a good deal."

So, can President Trump follow through on these pledges, or are they simply campaign rhetoric?

The starting point is that there are two separate questions. The first question is whether it can withdraw from a treaty at the international level in a manner consistent with international law. The second is whether the United States can cease participating in, or complying with, treaty regimes as a matter of US domestic law.

As to the first issue, public international law permits a state to withdraw from a treaty in two main circumstances. The first is where the treaty itself provides for termination upon particular terms. That is the most common scenario. It is the subject of Article 54 of the Vienna Convention on the Law of Treaties which provides that:

The termination of a treaty or the withdrawal of a party may take place:

- (a) in conformity with the provisions of the treaty; or
- (b) at any time by consent of all the parties after consultation with the other contracting States.

Where the treaty does not expressly make provision for termination or withdrawal, the position is more complex. There, Article 56 of the Vienna Convention on the Law of Treaties provides that:

1. A treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:

- (a) it is established that the parties intended to admit the possibility of denunciation or withdrawal; or
- (b) a right of denunciation or withdrawal may be implied by the nature of the treaty.

2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1.

It may well be that President Trump is capable of issuing executive orders to terminate particular treaties within the US domestic legal system. Others may require the involvement of Congress. However, unless international law also recognises the withdrawal, such domestic acts would merely place the United States

in breach of its international obligations.

So what of the various agreements now under consideration?

NAFTA

NAFTA provides expressly for termination. Article 2205 provides that

A Party may withdraw from this Agreement six months after it provides written notice of withdrawal to the other Parties. If a Party withdraws, the Agreement shall remain in force for the remaining Parties.

It follows that for the purposes of international law it would be possible to withdraw from NAFTA upon the provision of six months' notice.

However in practice, that notice may be difficult to trigger in light of the requirements of US domestic law. The starting point is that by Article VI of the US Constitution any treaty ratified by Congress is a part of US domestic law as well as international law.

NAFTA has been implemented within the United States by domestic law. Those laws would remain in force in the United States even if President Trump notified an intention to withdraw from NAFTA. Whether or not the President even has the power to withdraw from a treaty without the involvement of Congress is an open point within the United States. The question seems not to have been addressed by the United States Supreme Court and may provide another obstacle to executive withdrawal from NAFTA.

Because of the existence of US domestic law implementing NAFTA, it is simply not possible for President Trump to re-impose tariffs and other trade barriers without legislative amendment. It may not be as simple as President Trump suggests to withdraw from NAFTA.

The Paris Agreement was entered into by President Obama as an executive act. It follows under the domestic law of the United States that President Trump is entirely capable of reversing that executive act and indicating, without the involvement of Congress, the intention of the United States to withdraw from the Paris Agreement.

However at international law the withdrawal would not be immediately effective. The Paris Agreement is an example of a treaty that makes express provision for withdrawal. Article 28 provides:

At any time after three years from the date on which this Agreement has entered into force for a Party, that Party may withdraw from this Agreement by giving written notification to the Depositary.

Any such withdrawal shall take effect upon expiry of one year from the date of receipt by the Depositary of the notification of withdrawal, or on such later date as may be specified in the notification of withdrawal.

Any Party that withdraws from the [Framework] Convention shall be considered as also having withdrawn from this Agreement.

It follows that written notification of intention to withdraw would not be effective for a period of four years from 4 November 2016.

Article 28(3) raises a different possibility. The Framework Convention has parallel provisions (Article 25) on termination requiring twelve month's notice of termination of that treaty. Because Article 28(3) of the Paris Agreement provides that withdrawal from the Framework Convention amounts to withdrawal from the Paris Agreement, it is possible that President Trump may attempt to withdraw from the Framework Convention itself, thereby reducing the time to withdraw from the Paris Agreement, from four years, to one.

However that may not be such a simple matter. Because the Framework Convention was ratified by the United States in accordance with its own constitutional requirements, it seems arguable that any attempt to withdraw from the Framework Convention may require the approval of Congress – an approval which may not be forthcoming.

Because President Trump seems now to have softened his rhetoric surrounding NATO I will merely note that any party to NATO may now withdraw upon twelve month's notice as a result of Article 13 of the NATO Treaty which provides:

“After the Treaty has been in force for twenty years, any Party may cease to be a Party one year after its notice of denunciation has been given to the Government of the United States of America, which will inform the Governments of the other Parties of the deposit of each notice of denunciation.”

Finally, there is the position of the Iran Deal. That is the most susceptible to immediate withdrawal. The Iran Deal was a treaty, signature of which was an executive act of President Obama binding the United States. As such it is susceptible to withdrawal by another executive act. The fact that the deal was arguably implemented for the purposes of United States domestic law by the Iran Nuclear Agreement Review Act of 2015 raises domestic complications within US law which are beyond the scope of this paper.

There is no doubt at all that the Iran Deal is a treaty for the purposes of international law. It was embodied in a written document and was intended to be legally binding. The treaty is silent as to withdrawal, and it is not easy to find an implication that withdrawal is permitted within the meaning of the Vienna Convention on the Law of Treaties.

However it appears that both under Section C of the Iran Nuclear Agreement Review Act and under the terms of the treaty itself, there is some scope for the United States to force the re-imposition of sanctions on Iran. To the extent that some sanctions were lifted by President Obama using Executive Orders, they may be re-imposed relatively easily by President Trump. My colleagues at the International Bar Association who have looked at this issue suggest that:

“Technically, the Iran nuclear deal is only a political commitment, so Trump surely has the power to reinstate US sanctions.”

Even within the terms of the agreement and the implementing Security Council Resolutions, there remain the possibility of re-imposing sanctions against Iran in the event of a finding of significant non-compliance by Iran.

The attitude of the Trump White House to treaties is a matter that must be of international interest and concern. President Trump displays overt hostility to international law as a system, suggests the making of an executive order reviewing all existing multilateral treaty commitments and exhibits strong rhetoric about existing treaties upon which middle powers like Australia found their prosperity. The election of an individual with protectionist and isolationist tendency to the Presidency of a superpower is a shock to the international legal system and one which will provide a severe test to the resilience of international law.