

The Paris Agreement and the Trump administration: Road to nowhere?

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Abstract. The unexpected election of the Republican Donald J. Trump for the US presidency generated serious concerns as to the future of the multilateral negotiations on climate change. Indeed, the President Trump is a climate skeptic who is challenging the linkage between human activity and global warming. With the long-awaited Statement of 1st June 2017 on the US withdrawal from the Paris Agreement, he claimed the prevalence of domestic economic interests over common concerns, like climate. In fact, President Trump's declaration – although void of any sort of rational, coherent explanation – constitutes the proclamation of the primacy of State sovereignty when it comes to environmental issues. In this regard, the words of President Trump are eloquent: “the withdrawal from the Paris Agreement represents a reassertion of America's sovereignty”. In the present paper, the free-riding strategy that the Trump administration took regarding international climate commitments will be reviewed, focusing on the consequences of Trump's declaration, whose twofold content will be highlighted (it lies not only in the expression of the will to exit the Agreement, but also in the immediate ceasing of its implementation). Finally, the potential countermeasures to steer the US action (tit-for-tat strategy) or other incentives for and implications of the US withdrawal will be analyzed, as well as some reflections on the next steps for the US in the climate change regime, claiming that Trump's pursuit of short-term benefits would come at the risk of longer-term damages.

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1. INTRODUCTION

Paul Crutzen and Eugene Stoermer coined in 2000 the term ‘Anthropocene’, in order to highlight a new geological era which is substituting the Holocene and is characterized by a deep ‘footprint’ of human activities (Crutzen & Stoermer, 2000). The anthropogenic emissions of carbon dioxide of the current geological period, resulting from the exponential growth in fossil fuels’ use (coal, oil, natural gas), are responsible of interrelated environmental problems, including desertification, deforestation, destruction of habitats, lower biodiversity, extinction of wild species in both fauna and flora, especially in the polar regions¹. Human impacts are predicted to be the greatest in the Sub-Saharan Africa, and perhaps the largest non-human impacts are expected to be from the loss of coral reefs.²

Despite multilateral efforts already taken to reduce the emissions of the main greenhouse gases – GHGs (carbon dioxide, methane and nitrous oxide, but also fluorinated gases, HFCs, PFCs, SF₆), which led to a sequence of international conferences and negotiations, progress towards a low-carbon economy has not been made and CO₂ emissions continue to rise steadily. According to the World Meteorological Organization (WMO), 2016 was the hottest year on record (2016’s global temperatures are approximately 1.2° Celsius above the pre-industrial levels), with the growth of extreme climate events such as the Hurricanes Maria and Irma that hit the Caribbean and Florida in 2017, and environmental degradation (rapid melting of the Greenland ice sheet and decline of sea ice, coral reef bleaching).³

In spite of these alarming data on global warming, the entry into force of the Paris Agreement on Climate Change on 4 November 2016 was hailed as an historical landmark and a success of multilateralism (it is the first major multilateral deal of the twenty-first century), which allowed the crossing of the ‘global warming gridlock’ determined by the failure of the Copenhagen Conference in 2009 (Victor, 2011, p. 17).

Indeed, for the first time in history 195 UN Member States (including the European Union) agreed to take concrete steps towards climate change adaptation and mitigation, pledging to limit global temperature increase to well below 2°C from the pre-industrial levels (Art. 2, Para. 1, *a*).

It also marked a renowned role of the United States in the multilateral climate regime, since the Obama administration was actively engaged in the negotiation process. Just a few days later, the election of the Republican Donald J. Trump as US President created discomfort amongst environmentalists. Indeed, the US President (as well as the head of the Environmental Protection Agency – EPA, Scott Pruitt) are climate change skeptics and adhere to the position of the Climate Change Counter Movement, that denies the linkage between global warming and human activities, opposing the dominant Anthropogenic Global Warming position (Farrell, 2016).

Trump’s attitude towards climate change is already quite clear: it is not a priority of the US foreign policy, and domestic environmental policy must not burden the US economy and domestic jobs in an undue manner (for instance, through higher electricity prices and higher taxes). Actually, he considers the environmental regulations adopted by the former administration as being excessive and also being the main cause of the job losses in the coal mining and oil & gas industries (this view is clearly expressed in the Executive Order n. 13783 of 28 March 2017).⁴

¹ The Arctic is facing the most serious environmental consequences of global warming; the habitats of many species of flora and fauna, such as arctic fox, polar bear and some species of arctic whales are seriously threatened by the melting of the polar ice caps http://www.biologicaldiversity.org/programs/climate_law_institute/the_arctic_meltdown/pdfs/ArcticExtinctionReport_Final.pdf.

² http://coral.unep.ch/Coral_Reefs.html.

³ Provisional WMO Statement on the Status of the Global Climate in 2016, November 4, 2016. Available at <http://public.wmo.int/en/media/press-release/provisional-wmo-statement-status-of-global-climate-2016>.

⁴ Remarks by President Trump at Signing of Executive Order to Create Energy Independence, 28 March 2017, <https://www.whitehouse.gov/the-press-office/2017/03/28/remarks-president-trump-signing-executive-order-create-energy>.

The present paper advances from providing some background on the Paris Agreement to the backdrop of the US ratification. Then it explores on this basis the extent of President's Trump Statement as of 1st June 2017, that simultaneously announced the intention to withdraw from the Paris Agreement and the immediate ceasing of its implementation, in order to skip the obligations established by the climate change legal regime.

This paper will underline that the environmental policy of the President Trump is not far from that of his Republican predecessors, but rather is in line with the historical Byrd-Hagel Resolution. Secondly, it will explain that what matters is not the announcement of the US intention to withdraw, which will be effective only by 2020, but the hostility of President Trump towards the multilateral climate regime highlighted by his previous moves to dismantle Obama's climate legacy.

Therefore, the problem does not lie in the formal compliance with the Paris Agreement (a text without precise commitment, target or timetable), but in the open disengagement with the process based on voluntary domestic targets and paths of action (through the self-proclaimed nationally determined contributions). In this framework, potential retaliations that could be used to deter US defection (rather than simply allowing the Paris Agreement to collapse altogether due to the US desertion) will be discussed.

2. THE PARIS AGREEMENT

The Paris Agreement is the first multilateral treaty of the XXI Century addressing a common concern, whose adoption entails the crossing of the stagnation in the international lawmaking process reported by some scholars (Pauwelyn, Wessel, & Wouters, 2014, p. 733). The number of countries involved has considerably risen with respect to the previous Kyoto Protocol, since the Paris Agreement has a potential universal participation (Bodansky, Brunnée, & Rajamani, 2017, p. 25).⁵

The turning point which determined the inclusion of emerging economies in the new Agreement was represented by the deal between former President Obama and the General Secretary of the Communist Party of China Xi Jinping during the APEC Summit (Joint Statement on Climate Change of 11 November 2014)⁶. China, for the first time, recognized its interest in contrasting climate change, given its unsustainable impact on the health of the Chinese population. The axis between USA and China is the geopolitical foundation of the Paris Agreement. Undeniably, the involvement of fast-growing emerging economies, such as China and India, is the novelty of the Paris Agreement.

Indeed, the Obama administration, particularly sensitive towards environmental issues, was the engine of the multilateral process which led to the adoption of the Paris Agreement. It announced in 2015 its Intended Nationally Determined Contribution and pledged to reduce CO₂ emissions by 26 percent to 28 percent below 2005 levels, by strictly limiting access to carbon dioxide-emitting resources (the US contribution to CO₂ emissions is 17.90%).

Countries have pledged to mitigate their greenhouse gas emissions to maintain the rise of global temperature well below 2 degrees Celsius with respect to pre-industrial era. The *ambitious* estimate of 2°C has undoubtedly become the symbol of climate negotiations. However, it is easy to say that the Intended Nationally Determined Contribution (INDCs) in the Paris Agreement are not expected to be sufficient for realizing the 2 degrees Celsius target, despite language in the deal requiring this (so while *ambitious*, it was also immediately seen as out of reach). The Agreement also contains a long-term emissions goal at Article 4, where it states that: "Parties aim to reach global peaking of greenhouse gas emissions as soon as

⁵ 197 States signed the Paris Agreement and 160 ratified it, http://unfccc.int/paris_agreement/items/9444.php.

⁶ <https://www.whitehouse.gov/the-press-office/2014/11/11/us-china-joint-announcement-climate-change>.

possible” and to achieve “a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century”.

The Paris Agreement recognizes that both developed countries and emerging economies cannot be requested drastic emissions reductions. It abandoned, therefore, the bottom-up logic behind Kyoto (Falkner, 2016, p. 1107), which resulted in the divide between Annex I and non-Annex I countries (which was any way in the UNFCCC), and was the major reason of the failure of the Kyoto scheme. Now both developed and developing countries are committed to reducing their GHGs (the Paris Agreement strives towards net-0 emissions by second half of 21st Century), even if only on a voluntary basis. Article 2, Para. 4, affirms that “Developed country Parties should continue taking the lead by undertaking economy-wide absolute emission reduction targets. Developing country Parties should continue enhancing their mitigation efforts, and are encouraged to move over time towards economy-wide emission reduction or limitation targets in the light of *different national circumstances*”. As highlighted by Aldy (2016), the negotiators opted for a ‘pledge and review’ model for the negotiations on climate change, based on reduction commitments established at national level but reviewed on the international stage (process of ‘naming’ and ‘shaming’). This model acknowledges the primacy of domestic policies on climate change and relies on the ambition that States will comply voluntarily with self-established limitations to CO₂ emissions.

The instrument of the voluntary and nationally determined targets, that substitutes the compulsory emission targets of Kyoto, is one of the most relevant and controversial aspects of the Paris Agreement (Biniiaz, 2016). The shift from a top down approach, setting standards and targets for States internationally established to be implemented, to a bottom-up structure, founded on INDCs, was officially endorsed at COPs 19 and 20 (2013 and 2014) held respectively in Warsaw and Lima (Grubb, 2015, p. 299). Article 4, Para. 2, of the Paris Agreement establishes that “Each Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions”.⁷

Some additional elements of the Paris Agreement need to be mentioned, such as the pledge to review and increase ambition level over time, development of low carbon roadmaps, support for developing countries and global stocktaking (Streck, Keenlyside, & von Unger, 2016, p. 3).

The low level of obligations of the Paris Agreement, was strongly boosted by the former US administration in order to be able to participate in the new climate change regime (skipping, therefore, the vote of the Senate). Now these efforts, that are the legacy of the Obama administration, have been undermined by the Trump Administration. As a result, what remains of Obama’s environmental policy is a ‘soft’ treaty without the formal participation of the second world polluter and also former promoter of the multilateral negotiations on climate change.

3. THE RATIFICATION IN THE UNITED STATES

The US delegation engaged in the negotiations on the climate change deal was challenged by the problem of how to bypass the deadlock within the Senate, with a Republican majority (Savaresi, 2016). Indeed, the two-thirds threshold requested by the US Constitution would have crippled the efforts of the administration, rendering highly improbable a ratification of the treaty through the Senate, which would have got stuck in what has been labelled as ‘ratification straitjacket’ (Kemp, 2015). The most well-known

⁷ The list of States that have submitted their NCDs is available at <http://www4.unfccc.int/submissions/indc/Submission%20Pages/submissions.aspx>.

case is probably that of the non-ratification of the Covenant of the League of the Nations, promoted by the former President Wilson, but then rejected by the Senate.

Now, the US legal system considers three routes in order to ratify a treaty and envisages a loophole for a President with a hostile Senate (Bodansky, 2015).

The classical procedure established by Article II, section 2, of the US Constitution ('Treaty-clause') requires consent and advice by two-thirds of the Senate (the President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur"). The super-majority voting requirement enshrined in the 'Treaty-clause' – unlike most countries – is only envisaged in other five countries in the world (Hathaway, 2008, p. 1236). This mechanism is a hindrance to the ratification of several treaties, since Senate members are traditionally exposed to the pressure of lobbies and interest groups, being elected at local level and being bearers of the interests of the State that designated them (De Sombre, 2014, p. 224).

Alternatively, treaties can also be ratified by the President acting alone in the case of presidential-executive agreements or by the majority of both houses of the Congress (congressional-executive agreements) (Bradley, 2013, p. 73). However, under a narrow view, the word ratification should only apply to treaties that go through process of Senate approval, whereas it could be more common to say that the President has the power to enter into an executive agreement (Borchard, 1944). Indeed, executive agreements are not treaties (this is an important legal distinction in US law), and the simple majority approval by both houses of executive agreements is not considered to be ratification (which as a legal term applies to treaties only). The distinction between a treaty/agreement and executive agreements is however only valid at the domestic level, since the Vienna Convention on the Law of Treaties (VCLT) does not make any distinction between categories of treaties.

The authority of the US President to ratify treaties alone relies on the independent powers of the executive power in the field of foreign affairs. In the practice, the vast majority of treaties are ratified by the President without previous authorization of the Senate (Hathaway, 2009, p. 140). The practice of US Presidents provides several precedents of executive agreements in the field of environment, such as the Air Quality Agreement with Canada (1991) and the Minamata Convention on Mercury (2013).

Certainly, a treaty providing emission reduction targets and concrete financial commitments could not have been classified as an executive agreement; it is the reason why, the Paris agreement was not labelled as 'protocol', in order to avoid the same situation of stalemate of the Kyoto Protocol, signed by a Democrat and never ratified by a Republican.

Since it is the content of a treaty which determines the ratification route, the US delegation opted for the adoption of a 'bottom-up pledge and review' approach that, not implying specific reduction targets and financial commitments, could have classified the new deal under US law as an executive agreement rather than a treaty (Taraska, & Bovarnick, 2015). Indeed, provisions that would have fallen under the Senate's authority have been carefully excluded. Now, the Agreement simply requests the Parties to "pursue domestic mitigation measures", with the goal of achieving their INDCs, not to implement their INDCs (Bodansky, 2015 b).

The Republicans have strongly criticized the route followed by the former President in order to ratify the Agreement. It is not a case that President Trump labelled the Paris Agreement as 'non-binding' in the Statement of 1st June 2017, which means that he implicitly did not recognize any legal soundness to the US ratification. In fact, one of the main reasons of the US decision to withdraw from the Paris Agreement lies precisely in the will of President Trump to dismantle Obama climate policies (indeed, he already reversed Obama-era climate regulations).

4. THE FREE-RIDING STRATEGY OF PRESIDENT TRUMP

The US policy on climate change is characterized by a historical divide between Democrats and Republicans. While Democrats are traditionally more sensitive towards environmental issues, Republicans believe that the economic interests of US companies shall prevail over the collective interest to the protection of the environment.

The traditional reluctance of the Republican Party towards the UN multilateral process and environmental negotiations implicated the non-ratification of several environmental treaties (Montego Bay Convention on the Law of the Sea, Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Convention on Biological Diversity – CBD, Kyoto Protocol), or the non-signature (Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters).

In the case of the CBD, for instance, President Clinton signed the treaty – after the refusal of President George H. W. Bush – and committed himself to obtain the authorization to ratify by the Senate. However, despite the support to ratification by the Senate Foreign Relations Committee, the Senate process ultimately came to a halt and the CBD was never ratified (the USA is in company of Andorra, Iraq and Somalia) (Blomquist, 2002, p. 483).

However, it is worth recalling that Republicans were supporting some environmental measures in the 1970s (the EPA was created under Nixon's administration that supported also the Stockholm global summit in 1972), while a majority of Republican congressmen became more critical of environmental legislation under Ronald Reagan.

The same hesitancy is registered in the field of human rights. For example, the Statute of the International Criminal Court (ICC) was signed under the Clinton administration, but then unsigned by the Bush administration (McLaurin, 2006). The Convention on the Rights of Persons with Disabilities was considered for ratification by the US Senate on 4 December 2012, but it missed for 5 votes the supermajority requested⁸. Other cases of unratified human rights treaties are the Convention on the Elimination of All Forms of Discrimination against Women, the Convention on the Right of the Child, the Mine Ban Treaty, the Convention on Cluster Munitions.

In the light of the traditional Republican policy of hostility towards the climate change multilateral regime, it is not difficult to interpret the current US policy trend towards climate. It appears that President Trump is more in the norm than suggested by his aggressive rhetoric: his current position echoes, in fact, Georges Herbert W. Bush's statement "the American way of life is not negotiable" in 1992, Georges Walker Bush's withdrawal from the Kyoto protocol, and the constant narrow-minded and climate revisionist attitude of the Senate since de mid-1990s (Mooney 2011, 147). The Al Gore-led US team in Kyoto and former president Obama are exceptions but Congress effectively hindered their efforts.

President Trump affirmed on several occasion that global warming is a 'hoax' perpetrated by China in order to damage the US industry.⁹ His position on climate change is not dissimilar from that of Bush Jr. and echoes his words in his 'Letter to Members of the Senate on the Kyoto Protocol on Climate Change'.¹⁰ Indeed, he wants to eliminate what he considers 'unnecessary restrictions' on the main sources of energy, such as coal and onshore and offshore oil and gas, because the reduction of CO2 emissions must not take place at detriment of the domestic industry. His environmental plan is against a calendar of

⁸ <http://uscd.org/template/page.cfm?id=221>.

⁹ <https://twitter.com/realdonaldtrump/status/265895292191248385>.

¹⁰ The text of the letter is available at <http://www.presidency.ucsb.edu/ws/?pid=45811>.

reductions imposed by the United Nations, but is instead favorable to a mechanism of self-regulation by domestic companies under the supervision of the central government.

His policy was displayed during the G7 Rome Energy Ministerial Meeting held in Rome on 9 and 10 April 2017, as the negotiators did not manage to find a convergence on climate change statement following US strong opposition.¹¹

The Trump administration had several strategies that could have followed with regard to the Paris Agreement, which can be summarized as compliance (which would have implied a clamorous reversal of its climate policy) or rejection (not-openly or openly) of the climate change international legal framework (breach or withdrawal).¹² The basic difference between breach and withdrawal is that in the first case, the intent of the State not to comply with treaty's obligations is hidden, while in the latter, the State explicitly and openly displays its will to exit treaty's obligations. Therefore, the State concerned – making public its choice – declares its will 'to play' following the rules.

With his statement of 1st June 2017, the Trump administration opted for two options simultaneously (withdrawal and breach), announcing publicly and shameless that the United States won't implement the Paris Agreement. It is a novelty in international relations, since States usually do not officially declare that they won't no longer follow the 'rules of the game'. The content of his statement violates international law, considering that a State Party to a treaty is obliged to respect its international obligations, even if it decides to withdraw, until completion of the exit process.

The United States could have easily complied (although it did not happen) with the few procedural duties of the Paris Agreement, at least until 2019 (Voigt, 2016 b, 17).¹³ In fact, the trend of carbon emissions in the atmosphere is already lowering due to the recent technology of fracking or hydraulic fracturing and horizontal drilling, that provided access to large volumes of affordable natural gas.¹⁴ The emissions generated by the combustion of natural gas are much lower than those produced by the other fossil fuels, such as coal or oil.

Indeed, natural gas became the main source of electricity at detriment of coal, contributing to a significant reduction of emissions in the atmosphere in 2015 (12% lower than the level of 2005),¹⁵ and this surprisingly happened despite the fact that the United States never ratified the Kyoto Protocol.

This sort of 'low cost' compliance would have simply requested to continue along the way of fracking. The reputation of the United States on the international level would have enjoyed of this policy, more profitable than a free-riding behavior. It might have entailed minor consequences under the side of the fear of retaliations meted out by the other Parties and the United States would have continued to be considered as a trustworthy State which respects its international duties. Reputation is central in the international system because of the absence of a compulsory mechanism of compliance. In fact, States generally tend to comply with their international duties precisely why they fear a damage to their reputation or retaliation measures against non-compliance (Guzman, 2005, p. 376). Indeed, according to the rational choice theory, they make coherent decisions and act rationally to protect their interests (Goldsmith & Posner, 2005). Therefore, States decide to comply or not with a treaty not on the basis of a concept of 'justice', but maximizing their personal interests. In the case of the climate change legal

¹¹<http://www.france24.com/en/20170410-g7-energy-ministers-fail-agree-statement-climate-change>.

¹² The terms 'exit', 'denunciation' and 'withdrawal' are used in this paper as synonyms. See U.N. Office of Legal Affairs, Final Clauses of Multilateral Treaties Handbook, at 109, U.N. Sales No. E.04.V.3 (2003).

¹³ For instance, States shall prepare, communicate and maintain their NDCs (Article 4,2) and shall provide information necessary for clarity, transparency and understanding (Article 4,8).

¹⁴ http://www.eia.gov/energy_in_brief/article/shale_in_the_united_states.cfm.

¹⁵ <https://www.eia.gov/todayinenergy/detail.php?id=26152>.

framework, the interest of the United States would have consisted in gaining collateral benefits related to the trade of US products in the world, allegedly damaged, for instance, by a carbon tax on American products.

President Trump's unpredictable decision to openly breach the Paris Agreement is in contradiction with the 'rational choice theory (but President Trump is not a very rational actor). In sum, the Trump administration seems to be more worried by the internal consent, than by its level of reputation abroad ('America First Foreign Policy').¹⁶ To this aim, he opted for a unilateral foreign policy in several occasions (examples are the air strikes against Syria, the decisions not to join the Trans-Pacific Partnership, to pull out of UNESCO to recognize Jerusalem as Israel's capital and to impose import restrictions.).

5. THE TWOFOLD CONTENT OF THE STATEMENT BY PRESIDENT TRUMP ON THE PARIS CLIMATE ACCORD

The long-awaited Statement by President Trump on the Paris Climate Accord of 1st June 2017 is clear about the US choice: "the United States will withdraw from the Paris Climate Accord" and "the United States will *cease all implementation* of the non-binding Paris Accord and the draconian financial and economic burdens the agreement imposes on our country". He added that his decision includes ending the implementation of the nationally determined contribution and the Green Climate Fund "which is costing the United States a vast fortune."

He justified his double decision by saying "the bottom line is that the Paris Accord is very unfair, at the highest level, to the United States". Indeed, he made reference to the potential detriment of US economy if choosing to remain in the Agreement and the "serious obstacles" it would have created "as we begin the process of unlocking the restrictions on America's abundant energy reserves". He also made reference to the "lack of binding obligations" on other States, particularly China and India, and the impact of the Agreement on the US economy, showing "a fundamentally flawed understanding of the Paris Agreement" (Rajamani, 2017).

However, he left the door open to a possible renegotiation of the Agreement on more favorable terms ("so we are getting out, but we will start to negotiate, and we'll see if we can make a deal that's fair"). In response to US announced exit, the EU officially rebuked this option in the European Council conclusions on the Paris Agreement on climate change of 22 June 2017, stating that "the Agreement remains a cornerstone of global efforts to effectively tackle climate change, and *cannot be renegotiated*."

The reactions of the world community have been unanimous in condemning the US decision to exit the Agreement. According to the UN Secretary-General, Trump's decision is "a major disappointment for global efforts to reduce greenhouse gas emissions and promote global security".¹⁷ The French President Macron labelled the US decision as a "mistake both for the U.S and for our planet",¹⁸ while German Chancellor Merkel "deplored" US leaving the Paris Agreement.¹⁹

In addition, internal consent to the exit from the Paris Agreement was not unanimous. There is a lot of posturing in Trump's announcement when the federal government is not the only player: much of the efforts to reduce US emissions will arguably come from single US States, cities and private actors as they have done since Bush's 2001 decision. Indeed, many voices counselled against US exit: for instance, a

¹⁶ <https://www.whitehouse.gov/america-first-foreign-policy>

¹⁷ Statement attributable to the Spokesman for the Secretary-General on the US decision to withdraw from the Paris Agreement, <https://www.un.org/sg/en/content/sg/statement/2017-06-01/statement-attributable-spokesman-secretary-general-us-decision>.

¹⁸ <http://www.pbs.org/newshour/rundown/watch-macron-calls-u-s-exit-paris-climate-agreement-mistake-u-s-planet/>.

¹⁹ <https://www.cbsnews.com/news/angela-merkel-donald-trump-paris-agreement-i-deplore-this/>.

coalition of 17 US States ('United States Climate Alliance'), led by California and by the State of New York, has announced that it will not comply with the policy of disengagement of the White House, but rather it will push with more decision towards energy efficiency and renewable sources ("Alliance members are committed to supporting the international agreement, and are pursuing aggressive climate action to make progress toward its goals").²⁰ Also many corporations like Apple, Google, Microsoft, that recently started a strong policy of investment in renewable energies, with advertisements publicized in several newspapers (The New York Times, The Wall Street Journal, and New York Post) "urged President Trump to keep the United States in the Paris Agreement".²¹

5.1. Withdrawal

The first announcement of President Trump relates to the US withdrawal from the Paris Agreement (although it is not an automatic process and in 2018 he said in several occasions that he could decide to rejoin the Paris Agreement).

The different circumstances which allow a State to denounce or to withdraw from a treaty are specified in the VCLT. Denunciation usually refers to bilateral treaties, and withdrawal to multilateral treaties. Denunciation implies the termination of the treaty, while withdrawal entails the exit of a State by a treaty, but it does not affect the efficacy of the treaty in itself, which continues to be into force at the international level (Daillier, Forteau, Pellet, 2009, p. 192).

In some cases, it is the treaty itself to establish in its clauses the conditions to withdraw; in other words, all the signatories agreed during the negotiation process to include an exit (the intention may be either explicit or implicit in the agreement). Article 54 of the VCLT, entitled "Termination of or withdrawal from a treaty under its provisions or by consent of the parties," reiterates the importance of mutuality; the parties may agree, either during the treaty's drafting or subsequently, upon the conditions for termination or withdrawal. It states: "The termination of a treaty or the withdrawal of a party may take place: a) in conformity with the provisions of the treaty; b) at any time by consent of all the parties after consultation with the other contracting States".

Exit clauses are often included amongst the 'final clauses' of bilateral or multilateral treaties (in the first case, the most correct wording is denunciation, in the latter, withdrawal). In State practice, withdrawal or exit from treaties is far from being an occasional event. Indeed, States rely quite often on withdrawal clauses or invoke other causes of extinction of treaties (Helfer, 2005, p. 1579).

As to the legal consequences of unilateral withdrawal from a treaty, Article 70 of the VCLT establishes that "the termination of a treaty under its provisions....releases the parties from any obligation further to perform the treaty". Nonetheless, termination (Art. 70, Para. 1 (a), (b)) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to the date that the termination takes effect.

In general terms, the decision by a State to withdraw from a treaty – instead of simply breaching – has more serious institutional consequences. In fact, the State is no longer entitled to send its delegates at the Conference of Parties and to vote on key decisions concerning the treaty, having therefore no more say on the matter.

The US government, in order to legally defect from the climate change regime, officially invoked on 4 August 2017 the withdrawal clause pursuant to Article 28, Para. 1, of the Paris Agreement, which

²⁰ <https://www.usclimatealliance.org/>.

²¹ <https://www.c2es.org/international/business-support-paris-agreement>.

concedes a huge discretionary power upon States.²² Accordingly, a Party may unilaterally notify to the Depositary its will to withdraw from the treaty, without the necessity to invoke any cause of termination of a treaty, such as the *rebus sic stantibus* clause, or supervening impossibility of performance. However, withdrawal from the Paris Agreement can be requested only three years after the date of entry into force for a Party, and the withdrawal shall take effect upon expiry of one year from the date of receipt by the Depositary of the notification of the withdrawal. For this reason, for the very first time in international relations, a State simply notified its intention (instead of its decision) to exit from an agreement.

Therefore, the US unilateral notification (“the United States submitted a communication regarding the U.S. intent to withdraw from the Paris Agreement *as soon as it is eligible to do so*, consistent with the terms of the Agreement”) is void of any legal effect until 2019, but it has a symbolic value in terms of internal consent. It practically means for the United States to retire from the Paris Agreement by at least 2020, when new Presidential elections are scheduled. In this case, the US President could notify his decision even without the Congress approval. He has the full power to decide to withdraw from a treaty ratified with an Executive Order, with the only limit established by the Constitution “to take care that the laws be faithfully executed”.

A similar precedent is represented by the withdrawal of Canada from the Kyoto Protocol, pursuant to Art. 27, Para. 1, (“At any time after three years from the date on which this Protocol has entered into force for a Party, that Party may withdraw from this Protocol by giving written notification to the Depositary”). On 15 December 2011 Canada, led by the Conservative Party, notified the Depositary its will to abandon the Protocol; the withdrawal took effect on 15 December 2012.

President Trump could have simply pulled out in just one year if he had taken the more extreme step of withdrawing directly from the UNFCCC, pursuant to Art. 25, Para. 1, which allows unilateral exit within one year from the eventual notification to the Depositary (Bodansky, & O’ Connor, 2016). The Paris Agreement affirms that if a State withdraws from UNFCCC, it is not bound by the Convention anymore (Art. 28, Para. 3).

5.2. Breach

The US decision to cease the implementation of the Paris Agreement before the withdrawal is a clear violation of the customary principle of international law *pacta sunt servanda* – which provides that a treaty is “binding upon the parties to it and must be performed by them in good faith” (Article 26 VCLT) – (although not every provision in the Agreement creates a legal obligation for States parties).

Trump’s announcement to openly breach the Agreement in the absence of a formal withdrawal raises some issues under the lens of international law, since he clearly made reference to ending the implementation of the nationally determined contribution and of the Green Climate Fund.

First, the Paris Agreement does not impose upon States Parties a duty to achieve a specified goal, but a simple duty of due diligence (Voigt, 2016). What matters is not the formal respect of the national goals of reduction, but the engagement in good faith with the process of stocktaking and raising ambition every 5 years. Therefore, even if the US administration would have not respected the 26-28% reduction target established under the Obama administration, but it would have showed good faith in at least trying to reach their goal, they would have not been in violation of the Agreement. In addition, Art. 4, Para. 11, of

²²Communication Regarding Intent to Withdraw From Paris Agreement’, <https://www.state.gov/r/pa/prs/ps/2017/08/273050.htm><https://www.state.gov/r/pa/prs/ps/2017/08/273050.htm>.

the Paris Agreement provides that a Party “may at any time adjust its existing [NDC] with a view to enhancing its level of ambition”, which does not impede a Party to downgrade its NDC (Bodansky, 2017).

Furthermore, as observed by Gervasi, the Green Climate Fund (GCF) was not established by the Paris Agreement, but it was set up in 2010 during the COP 16 held in Cancun (Decision 1/CP.16, Para. 102) as an operating entity of the Financial Mechanism of the UNFCCC set up under its Article 11 (Financial Mechanism) (Gervasi, 2017).²³

Following the path of openly breaching the Paris Agreement, the new administration rolled back the environmental regulations enacted under the former administration (included the Climate Action Plan). For instance, the US Clean Power Plan fixed State-specific targets of reduction of CO₂ emissions that regarded principally coal-fired power plants (Nagle, 2017, p. 109). President Trump, with the Executive Order of 28 March 2017, decided to dismantle the structure of the Clean Power Plan, pushing on the growth of US economy through coal and oil industry (Davenport, Rubin, 2017). The adoption of this Executive Order means that the US will not respect what the Obama administration pledged in its INDCs submitted in 2015, where it promised “to lower emissions by at least 26% below 2005 levels by 2025”.

6. WHICH CONSEQUENCES UNDER INTERNATIONAL LAW?

Now that the scenario implying a breach of the Paris Agreement became a reality, it is important to assess which could be the consequences under international law. Simple withdrawal might have shielded the United States from the legal and political consequences arising from an open breach of the Agreement.

Failure to comply (or at least to try to comply in good faith) with the pledges contained in an INCD, or failure to submit an INDC, would imply a State responsibility (Voigt, 2016c), given their legally binding nature (Viñuales, 2016). Breach of treaty is a wrongful act under international law, which determines a State responsibility and entitles the injured State or the States parties to the treaty to retaliate by taking for instance countermeasures (Dominicé, 1999, p. 359).²⁴

Since global warming is a ‘common concern’ that does not affect a single State, and therefore falls under the legal regime of *erga omnes* obligations owed by each State to the whole international community (Fitzmaurice, 2010), a breach of such an obligation could be invoked by any other Party to the agreement (Hamilton, 2007, p. 83). The qualification of *erga omnes* obligations related to climate change is highly relevant, because it is very difficult to envisage a small-island State directly affected by the adverse consequences of global warming to adopt a countermeasure against a ‘geopolitical giant’ such as the United States. Therefore, also non-injured States could lawfully respond to a violation of the Paris Agreement through countermeasures, whose ultimate goal would be of forcing the US to comply with its international obligations to tackle global warming, in line with Article 30 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts (International Law Commission – ILC): “the State responsible for the internationally wrongful act is under an obligation to cease that act”.

According to Article 49 of the Draft Articles, the injured State(s) can adopt countermeasures in response to a wrongful act in order to induce the breaching party to comply with its obligations (Crawford, 2013, p. 45). Therefore, some argued that the EU, for instance, could lawfully impose – as a trade-countermeasure – a carbon tax on imports of industrial products of US companies (Britt, 2017). The

²³ <http://unfccc.int/resource/docs/2010/cop16/eng/07a01.pdf#page=17>.

²⁴ Article 12 of the Draft Articles on States Responsibility establishes that “there is a breach of an international obligation by a State when an act of that State is not in conformity with what is required of it by that obligation, regardless of its origin or character”.

idea of a carbon tax was first advanced by former French President Nicholas Sarkozy during French Presidential campaign.²⁵ This kind of reprisal should be based on the 'unfair trade advantage' that US companies enjoy, because they have to carry minor burden than EU companies that have strong emissions cuts obligations according to the Roadmap for moving to a competitive low carbon economy in 2050.²⁶ However, it must be pointed out that a carbon tax would be in contrast with WTO law (McLure, 2010), and it is not available readily for countermeasures in violation of the Paris Protocol.

Therefore, a more practical option would imply blocking or frustrating US demands in other international negotiations or international organizations (e.g. NATO, WTO), following a 'tit for tat strategy' also in the light of Trump decision to impose big tariffs on US steel and aluminum imports. According to the model to foster cooperation amongst different actors developed by Axelrod (1984), if a State as a first move fails to comply with a duty, the other States can react exactly as the other player did (in this case defection) on their last move. In this case, the 'punishment' lasts until when the player that has violated the pact continues, and only when it decides to comply, even the others start again to cooperate. In the present case, the other States would adopt a mere reprisal and not a countermeasure or a retaliation, aimed, however, to punish the non-cooperative behavior of the United States and to force it to comply with its INCD.

However, according to Art. 52, Para. 1 (b), of the Draft Articles, the injured State must first try to settle peacefully the dispute and "offer to negotiate with that State". In this regard, the Paris agreement established "a *non-compliance mechanism* managed by a Committee" (Art. 15, Paras. 1 and 2) (Viñuales, 2016 b).²⁷ It is a typical diplomatic mechanism of dispute resolution of environmental regimes based on a managerial rather than on an enforcement model or in other words, on diplomatic rather than judicial methods (Birnie, Boyle, & Redgwell, 2009). This mechanism does not intend to replace, but simply to supplement judicial remedies for dispute settlement (Voigt, 2016). A similar structure was established under the Kyoto Protocol (Hovi et al., 2012, p. 742).²⁸

In case of violation of the Paris Agreement, the compliance Committee has the power to start a quasi-judicial procedure, with the aim of declaring the State in breach of the Agreement "non-compliant". This is a procedure of 'naming and shaming', that has therefore only a symbolic value, since the Committee has not judicial powers, and it cannot therefore to issue a compulsory judgment against the breaching State. This procedure ends with the adoption of a recommendation by the Committee addressed to the breaching State, which suggests the measures to adopt in order to comply with the treaty's obligations.

Since the Paris Agreement does not contain any judicial clause which would allow a Party to bring a legal action before an international tribunal (i.e. arbitrate or International Court of Justice), States should first rely on the diplomatic mechanism established by the Agreement, and only if it should fail, adopt countermeasures or reprisals such as a 'tip-tap strategy'.

²⁵<http://www.independent.co.uk/news/world/europe/donald-trump-us-carbon-tax-nicolas-sarkozy-global-warming-paris-climate-deal-a7418301.html>.

²⁶ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Roadmap for moving to a competitive low carbon economy in 2050, Brussels, 8.3.2011 COM(2011) 112 final.

²⁷ Article 15, Para. 2 of the Agreement states that: "The mechanism referred to in paragraph 1 of this Article shall consist of a committee that shall be expert-based and facilitative in nature and function in a manner that is transparent, non-adversarial and non-punitive. The committee shall pay particular attention to the respective national capabilities and circumstances of Parties."

²⁸ States parties established in 2006 a Compliance Committee and its rules of procedure Report of the Conference of the Parties serving as the meeting of the Parties to the Kyoto, UNFCCC/COR, 2006, UN Doc. FCCC/KP/CMP/2006/10/Add.1 at 17.

Under a practical point of view, countermeasures against the US government appear, however, unrealistic for several reasons. Firstly, the Paris Agreement itself does not envisage any punitive measure in case of non-compliance or breach. Secondly, the aim of a countermeasure would imply a request to the United States to reduce their emissions within the parameters of Paris Agreement, which would mean to reduce the use of fossil fuels to produce energy. It is highly improbable that President Trump could reverse its environmental policy against the coal and oil lobby that supports him. Thirdly, it appears hard to prove the *causal link* between the *activity* – CO₂ emissions below the levels envisaged in the Paris Agreement – which is supposed to have caused the *damage* (i.e. sea-level rise of Small Islands Developing States).

Other avenues, such as the securitization of climate change within the Security Council, which would pave the way to economic sanctions, are doomed to failure, because the United States would probably exercise its veto power.

7. CONCLUSIONS

The COP23 President's speech at the 72nd Session of the United Nations General Assembly of 21 September 2017²⁹ clearly affirmed that the unstoppable global momentum on climate change is a fact that cannot be underestimated: the number of ratification of the Paris Agreement is growing towards the goal of being the most ever ratified environmental treaty. The largest emitters of greenhouse gases, notably Brazil, China, EU, India, are States Parties.

Despite the large acceptance of the Paris Agreement, the Trump administration opted for a free riding strategy in two steps: immediate breach of the Paris Agreement (step 1) waiting for withdrawal (step 2), which will be effective only by 2020 (unless a new US President won't reverse this process). Due to this policy, the United States risk to become a 'pariah' State in the global scenario on environmental protection and their reputation – already harmed by the 'trade war' began by President Trump in March 2018 – will be therefore highly damaged on the international level.

In view of the facts, President Trump does not intend to comply with the dispositions of the Paris Agreement, not fearing that defection or non-compliance could result in damages to reputation and/or retaliation measures.

On the other hand, the decision to remain a Party to the UNFCCC (although the withdrawal process would have taken only one year) will allow USA to continue to be part of the climate change multilateral process, but on the other hand will expose it to countermeasures and or retaliations.

The free-ride US policy on the environment and on trade – claiming the primacy of US domestic policies on the environment over international law – is rooted in the short-term benefits for the US economy. These advantages come from the idea that the US “can free-ride on the climate commitments of others, while minimizing its own financial contributions and retaining wide flexibility on how it promotes and uses its energy resources” (El-Erian, 2017). Over the longer term, however, the absence of the US would severely undermine the beneficial impact of the Paris Agreement. And since the US cannot insulate itself from the effects of global climate change, it would also face an array of environmental and environment-related threats.

Regardless of any retaliation measure from the EU or some emerging powers, the we-go-alone strategy will prove difficult to maintain for the Trump administration as time goes: many coal mines

²⁹ 'Global Warming Changes Our Very Understanding of What National Interests Are', Speech of Fiji's Prime Minister Frank Bainimarama at the UN General Assembly, <https://cop23.com.fj/global-warming-changes-understanding-national-interests/>.

closed under Obama will not reopen because they are not competitive; US oil majors are also global corporations and are not convinced that is the right thing to do given the reputational damages outside the US; finally, US partners in global negotiations practice issue-linkage and the Chinese, in particular, will not make any concession on trade or currency if Trump is arrogant on climate issues (now assessed as part of China's national interest). The worst part of this story perhaps is that Trump is a daydreamer who cannot tell the difference between reality and his own fantasies.

In looking toward the future, the new unilateralism pursued by the Trump administration (witnessed by the strike against the Al Assad regime of 6 April 2017 the new protectionism in trade) might have a strong impact on multilateral efforts against global warming. History seems to repeat itself. The same stalemate happened with the League of the Nations, which was heavily weakened by the defection of the United States, one of its pillars and founder Members. The failure of the League of the Nations is one of international law's darkest episodes with a huge impact on international relations.

In general terms, to have a reasonable chance of staying below the 2°C limit, the world needs to achieve a drastic reversal in current GHG emission trends and the entire industrial system should be re-designed in order to reach the ultimate goal of a low-carbon world economy. This ambitious target cannot be reached if all the countries do not commit themselves in the direction of a green economy. The defection of the United States from this process might have serious consequences on the whole environmental multilateral process and undermine decades of negotiation efforts.

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