

A Two-Step Climate Plan for Trump to Address U.S. Obligations



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Is the United States in violation of its obligations under the 1992 U.N. Framework Convention on Climate Change (UNFCCC) or the 2015 Paris Agreement on Climate Change? Does it matter? And if it does, what options are available to the Trump administration, without relying on the Obama Clean Power Plan that Trump pledged to rescind, to help the United States comply with its commitments to reduce domestic greenhouse gas (GHG) emissions? Equally important, how could the Trump administration comply with our UNFCCC and Paris commitments to help developing countries adapt to the inevitable impacts of climate change when Trump has already proposed to slash foreign aid to those very countries?

This column briefly reviews the legal and "moral" obligations of the United States under the UNFCCC and the Paris Agreement and summarizes the multiple reasons why the United States must not simply walk away from those obligations. It then proposes a two-part climate plan that the Trump administration could undertake to meet those commitments (1) without relying on the Clean Power Plan to reduce domestic U.S. GHG emissions and (2) without asking for continuing Congressional appropriations to help developing countries adapt to climate change. If properly implemented, this two-part plan could, I believe, significantly reduce U.S. emissions faster and more certainly than the Clean Power Plan and enable the United States to reassert its leadership in climate adaptation in a way that significantly helps tens of millions of people in the developing world.

U.S. Climate Change Obligations

Although successive U.S. administrations (include Clinton, Bush II and the first part of Obama) have conveyed the impression that the UNFCCC is not a legally binding agreement (and creates, at best, only "moral" obligations relating to climate), that is not the case. The UNFCCC was signed by President George H. W. Bush, ratified by the Senate and remains in full force and effect today as a binding U.S. treaty commitment. The UNFCCC does not require the United States or any other country to reduce GHG emission by a specific numerical amount. However, Article 4(2)(a) of the treaty requires the United States and other "Annex I" (i.e., developed) countries to, among other things, "adopt national policies and take corresponding measures on the mitigation of climate change by limiting its [GHG

emissions]." Article 4(2)(b) then requires such countries to furnish "detailed information on its policies and measures referred to in subparagraph (a) ... with the aim of returning individually or jointly their 1990 levels of [GHG] emissions." Articles 4, 5 and 8 of the UNFCCC also require developed countries to "assist the developing countries Parties that are particularly vulnerable to the adverse effects of climate change in meeting costs of adaptation to those adverse effects" by providing a broad range of both financial and technical assistance. These twin UNFCCC obligations—GHG reductions at home and adaptation assistance to vulnerable developing countries—are not quantified, but they are nevertheless real, and every bit as specific as many U.S. domestic securities, consumer protection and antitrust laws.

Unlike the UNFCCC, the Paris Agreement is not a legally binding treaty, at least in the U.S. view. Instead, it is an Executive Agreement accompanied by a lengthy multilateral resolution that promises little other than that the nearly 200 signatory parties (including the United States) will each take, and report to each other on, unspecified actions with the collective goals of (1) holding the average global temperature increase to "well below" 2 degrees Celsius when compared to pre-industrial levels and (2) providing an aggregate of at least \$100 billion annually in climate assistance to developing countries by 2020 (an unspecified portion of which is expected to be devoted to adaptation projects). While some of the procedural and reporting requirements of the Paris Agreement undoubtedly are within the authority of Presidential executive agreements, the principal substantive obligations of that Agreement are neither binding treaty commitments nor even commitments of individual states. Unlike the UNFCCC, the Paris Agreement has never been submitted to the Senate for ratification.

U.S. Compliance

There seems little doubt that the Trump administration was prepared at the outset simply to repudiate the nation's Paris commitments, both with respect to reduction of U.S. GHG emissions and adaptation assistance to developing countries. However, as noted above, these were not intended to be legally binding commitments in the first place, despite their importance for the global community. The UNFCCC, though, presents different issues. Notwithstanding the generality of the UNFCCC's obligations and the absence of an enforceable remedy under the treaty, there is a compelling case that the United States has long been in violation of those obligations. There has been no significant federal climate change legislation in the 25 years since the 1992 UNFCCC and only limited executive branch action in the 10 years since the Supreme Court held in *Massachusetts v. EPA* that the EPA had a duty to regulate carbon dioxide. In fact, there has been only a single significant executive branch action involving GHG reductions (a negotiated voluntary increase in auto fuel efficiency), and the auto industry is now trying to repudiate even that. The most important late-term effort of the Obama administration to remedy this failure, the Clean Power Plan, was itself only a half-step toward the required GHG reductions and has been held up by complex litigation that, even if unsuccessful, will make timely achievement of the plan's emission reductions dubious. In view of this track record and the Trump administration's repeated questioning of climate change, one or more other parties to the UNFCCC might well seek ways to hold the U.S. accountable for those violations.

There are multiple reasons why the United States should avoid being in that posture. First, international law is itself an important value for the United States, one that our nation has championed for more than a century (more accurately, since its founding) and a cornerstone of our demands on other nations to comply with applicable international norms. Second, while the UNFCCC has no sanctions for its violation, other developed nations that do comply (the European Union or Japan, for example) might consider imposing special carbon-based border taxes on U.S. imports that are not subject to the same carbon restrictions as those nations' domestic products, a trade restriction that could well be legitimate under Article XX of the General Agreement on Tariffs and Trade. Third, many of the nations most badly

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in need of the climate adaptation assistance contemplated by Paris and UNFCCC are countries that the United States looks to for support of its other foreign policy initiatives, either in the U.N. or in bilateral dealings. Fourth, the substantive problems that climate adaptation funds are intended to address are the very conditions giving rise to the migration, conflict and political instability that the Trump administration (like its predecessors) seeks to avoid. Even for an administration given to non-linear thinking that separates actions from consequences, the role of climate change in accelerating famine, conflict and migration must at some point become evident.

A Two-Step U.S. Program

Because it is important, for the multiple reasons cited above, for the United States to meet its obligations under the UNFCCC and to at least try to meet the goals of the Paris Agreement, there are two steps that the Trump administration could take to address both of these challenges.

Buy and Close Coal Mines: First, rather than using EPA to slowly regulate the nation's approximately 350 existing coal plants out of existence, Trump should propose that the federal government simply buy and close them down over a fixed period of say, five or 10 years. Instead of the bankruptcy that a growing number of coal plants are facing (leaving both shareholders and miners high and dry), federal acquisition through a new Coal Decommissioning Authority (akin to the Tennessee Valley Authority that Roosevelt created) would pay fair market value for the existing plants and close them down safely and responsibly on a predetermined schedule. This plan would also provide generous severance payments, job retraining, college loans (or grants) and mortgage relief for affected miners—as well as priority in filling the decommission jobs that would likely take an additional 10 years.

All this could likely be done for about the same cost (between \$25 billion and \$45 billion) as the economic benefits that EPA has estimated would result from closing the plants through regulation, without taking into account ancillary health benefits not included in the EPA estimate. Not only would this plan provide much fairer compensation to coal miners (and a better payday for shareholders), but it would achieve more certain greenhouse gas reductions more quickly than the Obama Clean Power Plan, which I believe is lawful but too limited and too gradual in its implementation. By this single step, Trump could do more to reduce U.S. coal emissions than his predecessors while simultaneously providing a pilot infrastructure plan to help displaced miners and other coal industry workers. While I have no sympathy for coal plant operators who have long abused their workers and sought—and still seek—to undermine environmental regulations, it is essential that we rid our nation once and for all of our largest source of GHG emissions and move forward toward a renewable energy future without the political and economic drag of a dying coal industry.

An International Financial Transaction Microtax: Second, rather than turning his back on climate adaptation funding for the developing world (or asking Congress to commit to appropriating tens of billions of dollars annually for the foreseeable future), Trump could take up the proposal by the New York City Bar Association to impose a small Financial Transaction Microtax (FTM) on all international financial transactions as a condition of revived trade agreements with Europe, Asia and Latin America. Such an FTM could over time provide the \$100 billion in annual climate adaptation funds that the Paris Agreement promised but which no nation has thus far committed to provide in the absence of U.S. leadership.

This approach, which Trump could fairly claim provides a basis for restarting trade negotiations under new rules, would require the international financial system and its institutional users to pay most of the cost of helping developing nations survive the impacts of climate change, impacts that the global

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financial system has itself exacerbated. No federal funds would be appropriated for this approach, which once established would operate like a trust fund by providing automatic annual payments into the dedicated Climate Adaptation or Green Climate Funds contemplated by the Paris Agreement. Here too, Trump could in a single step transform global climate adaptation programs and help save the homes and livelihoods of hundreds of millions of people facing floods, famine and forced migration from climate change.

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