Client Update
The Outlook for International Law Under President Trump

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The election of Donald J. Trump as President of the United States raises significant questions for the future of international law and policy in the United States. While the President-elect has not detailed concrete policy proposals in the arena of international diplomacy and foreign affairs, he has made broad statements on international trade agreements, international arrangements to combat global climate change and the Iran Nuclear Deal (officially known as the Joint Comprehensive Plan of Action or "JCPOA"). In particular, Mr. Trump has vowed to renegotiate existing trade agreements such as the North American Free Trade Agreement ("NAFTA") and pull out of nascent deals such as the Trans-Pacific Partnership ("TPP"), a trade deal among twelve Pacific Rim countries. His public commentary has been contradictory, but Mr. Trump has stated at varying times that he will cancel the Paris Agreement, stop payments by the United States to the United Nations Climate Fund and either dismantle or renegotiate the JCPOA.

Of course, once in office and faced with the realities of governance, Mr. Trump may reconsider. If he does not, a key question is the power of Mr. Trump as President to carry out promises of wholesale U.S. withdrawal. Under the U.S. Constitution, Mr. Trump will be vested as President with broad power to act in the sphere of foreign affairs. But that Executive power is not absolute. As President, he will not be able to act unilaterally on all matters affecting treaties or international arrangements, particularly with respect to ratified treaties that received the Senate's advice and consent and where Congress has passed implementing legislation.

At times, therefore, Mr. Trump will need to work with Congress, with all of the compromise that usually entails. Although the President-elect will have Republican majorities in both the House of Representatives and the Senate, not all Congressional Republicans share Mr. Trump's views on international law and

foreign policy, particularly the hostility to international trade agreements like NAFTA.

Whether the U.S. can withdraw from, denounce or terminate an international treaty is not just a domestic issue. It is also a question governed by international law, which requires either compliance with a specific withdrawal procedure set out in that treaty or satisfaction of a limited set of exceptions.

Looking forward, many questions remain unanswered as to the outlook for international law. But the approach to international law and international arrangements likely will shift under the Trump Administration. It remains to be seen whether that shift will be of seismic proportions, and what the consequences will be, including for companies operating internationally.

UNILATERAL EXECUTIVE WITHDRAWAL IS A QUESTION OF BOTH U.S. DOMESTIC LAW AND INTERNATIONAL LAW

Not all international arrangements are created equal, including with respect to the steps required to withdraw. Under U.S. law, international agreements fall into three basic categories: treaties, congressional executive agreements and sole executive agreements.

- **Treaties** are international agreements whose entry into force, as laid out by the Constitution, requires the advice and consent of two-thirds of the Senate.
- **Congressional executive agreements** are approved and implemented into U.S. law by an act of Congress, requiring a simple majority of both the House and Senate.
- **Executive agreements** can be entered solely by the President under certain circumstances by relying on existing Congressional legislation, a pre-existing Senate advice-and-consent treaty, or the President's own Constitutional powers.

In most circumstances, the President can withdraw unilaterally from sole executive agreements or political arrangements. However, the U.S. Supreme Court has not settled the question of whether the President can unilaterally withdraw from treaties or congressional executive agreements.

This is not a new question, but the answer is still unsettled. In 1979, President Jimmy Carter unilaterally withdrew from the Sino-American Mutual Defense Treaty with Taiwan upon recognizing the Beijing government as the sole government of China. The U.S. Supreme Court addressed that act in *Goldwater v. Carter*. More recently, President George W. Bush withdrew from the Anti-

Ballistic Missile Treaty ("ABM") in 2002, which reached the District Court for the District of Columbia in *Kucinich v. Bush*. Both courts held that the question of Executive power to unilaterally withdraw from a treaty was a non-justiciable "political question," meaning the courts do not have the competence to answer that question.

But the view of Congress towards any Presidential withdrawal is key. The U.S. Supreme Court made clear in *Goldwater* that if Congress had formally opposed President Carter's actions, the legislative and executive branches would have been at a constitutional impasse, and the question would have been justiciable; that is, could have been decided by the Court.

In addition, failure to comply with international law renders a purported U.S. withdrawal without legal effect in the international community. Under customary international law (i.e., universally binding international law) embodied in the 1969 Vienna Convention on the Law of Treaties, a country may only withdraw from, or terminate, a treaty if the treaty itself provides for it or if all parties to the treaty agree to it. Absent an express or implied withdrawal or termination clause, the treaty is presumed to continue indefinitely. Withdrawal clauses vary widely from treaty to treaty, with many specifying a fixed term of years and/or notice period.

NORTH AMERICAN FREE TRADE AGREEMENT

Mr. Trump has placed much of the blame for the decline of U.S. manufacturing and the loss of American jobs on what he has called unbalanced trade relationships and faulty international trade agreements. He has alternatingly called NAFTA the "worst trade deal in history" and the TPP the "death blow for American manufacturing." Mr. Trump's "Seven Point Plan to Rebuild the American Economy by Fighting for Free Trade" involves three key action items:

- To "withdraw from the Trans-Pacific Partnership, which has not yet been ratified";
- To "direct the Secretary of Commerce to identify every violation of trade agreements a foreign country is currently using to harm our workers, and also direct all appropriate agencies to use every tool under American and international law to end these abuses"; and
- To "tell NAFTA partners that we intend to immediately renegotiate the terms of that agreement to get a better deal for our workers. If they don't agree to a renegotiation, we will submit notice that the U.S. intends to withdraw from the deal."

It is unclear from his statements what the precise scope of any "renegotiation" would be, including whether it would encompass the investor-state arbitration provisions in Chapter 11 that have led to numerous cases over the past two decades.

As a matter of international law, Article 2205 of NAFTA explicitly allows the United States to withdraw from the agreement, provided that it gives a six-month advance and written notice of withdrawal to the other parties. Under U.S. law, however, it is unclear whether Mr. Trump could withdraw from NAFTA without the support of Congress. Unlike the Taiwan or ABM treaties, NAFTA is a congressional-executive agreement and was implemented by Congress through the NAFTA Implementation Act, which is silent on termination. Mr. Trump's withdrawal from NAFTA would not automatically terminate the NAFTA Implementation Act. As the Supreme Court held in *INS v. Chadha*, proposals to amend or repeal statutes must be presented to and considered by both the House and Senate. And of course, again unlike the Taiwan or ABM treaty contexts, Congress could formally oppose withdrawal from NAFTA. Such a response would likely leave it to the Supreme Court to decide the question over the course of the next few years.

While less of a focus, Mr. Trump has also suggested that he would withdraw from the World Trade Organization ("WTO"). The WTO regime comprises a number of separate multilateral trade agreements, including the General Agreement on Tariffs and Trade ("GATT") and the General Agreement on Trade in Services ("GATS"). Like NAFTA, the Agreement establishing the WTO provides that countries who are party may withdraw from the WTO (and all other WTO trade agreements) six months after notifying the Director-General in writing. The WTO treaties were congressional-executive agreements approved and implemented by Congress through the Uruguay Round Agreements Act of 1994, such that unilateral attempts to withdraw would be subject to the same Constitutional challenge described above.

Constitutional concerns aside, withdrawal from NAFTA or the WTO, as well as other trade or investment agreements, would significantly affect U.S. companies' ability to access foreign markets by impacting customs, duties, tariffs and recognition of regulatory standards. Companies' ability to challenge expropriatory or other unfair actions taken by foreign sovereigns against U.S. companies before impartial international tribunals would also be impacted. Moreover, withdrawal without an alternative regime in place, which inevitably would be time-intensive and politically costly, could expose U.S. businesses to a legal vacuum and ensuing commercial uncertainty.

TRANS-PACIFIC PARTNERSHIP

The Trans-Pacific Partnership ("TPP"), the largest regional trade accord in history, is a multinational agreement between the United States, Japan, Australia, Peru, Malaysia, Vietnam, New Zealand, Chile, Singapore, Canada, Mexico and Brunei Darussalam, representing roughly one-third of world trade. Proponents point out that the TPP would substantially cut tariffs for U.S. exports to member states and have welcomed the TPP's coverage of issues such as environmental protection, workers' rights, intellectual property and reduction of non-tariff barriers to trade. Detractors point to the lack of transparency in the negotiations process, fear of reductions in U.S. tariffs leading to a flood of cheap imports into the U.S. market and the failure of any growth in exports under the deal to offset the new imports, amplifying the U.S. trade deficit. Mr. Trump has proclaimed his intention to "withdraw" from the TPP on Day One of his administration, labeling it a "job-killing" trade policy. He has been especially critical of the TPP's lack of provisions dealing with currency manipulation, particularly by China, which is not a member of the TPP at present, but may join in the future.

The TPP was signed on February 4, 2016 by President Obama and the other country signatories, but has not entered into force. The TPP requires Congressional approval, but the Senate majority leader (Sen. McConnell, R-Ky.) recently stated that the TPP would not be taken up in the lame-duck Congress, leaving the trade pact essentially dead.

Mr. Trump can "un-sign" the TPP as a matter of unilateral Executive power. This would be the death knell for the trade pact not only in the United States, but also for the other signatories. The TPP can only enter into force if at least six of the original signatories comprising 85% or more of the gross GDP ratify the treaty. Due to the size of the U.S. economy, the failure of the United States to ratify the agreement would effectively block its entry into force for all countries involved.

PARIS AGREEMENT

The conclusion of the Paris Agreement in December 2015 was heralded as a landmark moment in the fight against climate change. The Paris Agreement was adopted under the auspices of the United Nations Framework Convention on Climate Change ("UNFCCC"), a 1992 treaty ratified by the United States with the advice and consent of the Senate. That treaty requires the United States to "stabilize greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system." The Paris Agreement defines how countries will implement their UNFCCC commitments after 2020.

U.S. Secretary of State John Kerry signed the Paris Agreement on Earth Day, April 22, 2016. It sets goals for countries around the world to cap and reduce emissions, with the central aim to combat climate change by keeping the increase in the global average temperature to "well below 2 degrees Celsius above pre-industrial levels and to pursue efforts to limit the temperature increase even further to 1.5 degrees Celsius." The President, deriving authority from the UNFCCC treaty, the Clean Air Act and his own Constitutional powers, signed the Paris Agreement as a sole executive agreement. However, since it was signed without the approval of Congress, it could not establish binding emission targets and new binding financial commitments. Nevertheless, the Paris Agreement does establish a set of binding procedural commitments, including the requirement to prepare and maintain successive nationally determined contributions ("NDC") where each successive NDC needs to "represent a progression beyond the Party's then current [NDC]," and the obligation to "pursue domestic mitigation measures." The Paris Agreement has been formally joined by 110 of the 193 signatory countries, including the United States, China and India.

Despite the overwhelming scientific consensus on the evidence, Mr. Trump has been skeptical that the world's climate is changing, going so far as to state that "the concept of global warming was created by and for the Chinese in order to make U.S. manufacturing non-competitive." In May 2016, he released an "America First Energy Plan" on his campaign website, which stated: "We're going to cancel the Paris Climate Agreement and stop all payments of U.S. tax dollars to U.N. global warming programs." Most recently, in an interview with the New York Times yesterday, Mr. Trump stated that he would keep an "open mind" with respect to climate change more generally.

The Paris Agreement already has enough signatories to take effect, and it entered into force on November 4, 2016. It precludes countries from withdrawing within the first three years of its entry into force. Once three years have elapsed, a country may give notice of its intention to withdraw, but withdrawal will not take effect until one year after receipt of the notification. This means that any attempt by Mr. Trump to withdraw from the Paris Agreement should have no effect until November 2020—the time of the next U.S. Presidential election—at the earliest. While there has been some conjecture that Mr. Trump would try to circumvent the four-year moratorium on withdrawal by withdrawing from the underlying UNFCCC treaty, such a move would be subject to the same Constitutional obstacles described above.

As a result, Mr. Trump will have a hard time extricating the United States from the deal, at least immediately. And the deal itself is likely to continue,

particularly where other countries—including China and India—have said they intend to go ahead with the plan on their own. There is also good reason to believe that the 29 states, District of Columbia and three U.S. territories that have adopted carbon reduction goals or renewable energy investments will continue to lead efforts that can meet the overarching goal of the Agreement. Since President Obama took office, the United States has added more than 35,000 MW of wind power and solar generation has increased more than thirtyfold, while coal production has dropped by 36 percent. As a result, while much remains to be seen, including whether the Trump Administration will try to unravel the state rules through contrary federal regulation, the United States may have already passed a critical point of investment in renewables that can set the stage for further progress towards climate change goals.

JOINT COMPREHENSIVE PLAN OF ACTION

On July 14, 2015, the United States, the United Kingdom, Germany, France, Russia, China, the European Union and Iran agreed on the JCPOA to ensure that Iran could not proceed towards building a nuclear weapon in exchange for sanctions relief. The arrangement came into effect in October 2015 and was implemented on January 16, 2016. The International Atomic Energy Agency verified Iran's compliance with strict restrictions on enriched uranium and centrifuges, abandonment of plutonium and intensive international monitoring of nuclear facilities. In return, the United States and EU lifted nuclear-related sanctions as agreed. If Iran at any time fails to fulfill its commitments, these sanctions will snap back into place.

Mr. Trump's statements on Iran and the JCPOA have been contradictory, ranging from promising U.S. business access to the Iran market to suggestions that he will tear up the deal as "the worst deal ever negotiated," where ending it would be his "number one priority," or renegotiate its terms.

The JCPOA is, as indicated by its name and confirmed by the State Department, a "political commitment," not a legally binding agreement. The State Department has stated that the success of the JCPOA does not depend on whether it is legally binding or signed, but on the verification measures put in place and the capacity of the U.S. government to reinstate or ramp up sanctions if Iran does not meet its commitments. President Obama met U.S. obligations under the JCPOA through a series of waivers and Executive Orders granted under existing legislation, such as the Iran Sanctions Act of 1996. As such, Mr. Trump as President can unilaterally and immediately withdraw Washington's commitments under the deal.

While governments may agree on joint statements of policy or intention that do not establish legal obligations, the distinction between an agreement that results in a binding commitment under international law and one that does not is not always clear. Much of the language of the JCPOA is precatory, but there are elements that appear to assert binding obligations, such as the dispute resolution mechanism contained in the agreement and UN Security Council obligations.

Most recently, Iran has stated that if Washington decides to renew sanctions, they will regard that "as grounds to cease performing [Iran's] obligations under the JCPOA." But a U.S. withdrawal would not automatically unravel the deal, as the other countries and the EU could keep the JCPOA in force if they can use their own threat of sanctions to pressure Iran to reconsider. Notably, under the JCPOA, the EU and other countries lifted nearly all significant sanctions, but the United States lifted only a narrower subset of secondary, "nuclear-related" sanctions directed at non-U.S. companies, leaving in place other sanctions, including what are called "primary" sanctions on U.S. companies doing business with Iran. So while Mr. Trump could decide to unilaterally or in conjunction with Congress impose (or reimpose) sanctions, lifting of these U.S. sanctions was only part of the JCPOA deal. Sanctions targeting U.S. companies (and their foreign subsidiaries) would not directly affect foreign companies, and attempting to penalize those companies could risk major disputes with China and France as they have deepened economic ties with Iran. In short, there would still be significant economic incentives for Iran to stay in.

The ultimate fate of the JCPOA remains unclear, though the likelihood of passage of some U.S. package of sanctions is material. The risk of disruption for non-U.S. companies and non-U.S. subsidiaries of U.S. companies that may have re-initiated trade is high.

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As more information comes to light about the Trump Administration's international law agenda and key appointments, the outlook will become clearer. Please do not hesitate to contact any member of the Public International Law Group at Debevoise at any time with questions that you may have about how changes to international arrangements may affect you.