Summary and Analysis of the Paris Agreement

This memorandum summarizes and provides an initial analysis of the draft Paris Agreement (“Agreement”).

I. Summary

a. Purposes

The Agreement’s purpose is to “enhance[] the implementation of the [United Nations Framework Convention on Climate Change (“UNFCCC”)].” It does so by establishing three broad objectives:

✓ “Holding the increase in the global average temperature to well below 2 °C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5 °C above pre-industrial levels”;

✓ “Increasing” society’s ability to adapt and to become more resilient; and

✓ “Making finance flows consistent with a pathway towards low greenhouse gas [“GHG”] emissions and climate-resilient development.”

b. How the Parties Are to Achieve the Purposes

Parties are to achieve the Agreement’s purposes by “undertak[ing] and communicat[ing] [the following six categories of] “ambitious efforts”": (1) mitigation (article 4); (2) adaptation (article 7); (3) climate finance (article 9); (4) technology – i.e., the Technology Mechanism (article 10); (5) capacity-building (article 11); and (6) transparency and reporting (article 13). It is understood that these “ambitious efforts” will get more stringent over time. Each of these six categories is discussed separately below.

1 For purposes of this memorandum, the term “Party” means a Party to the Agreement without regard to economic or other classification – e.g., developed, developing. Sub-classification of Parties will be noted where relevant.
2 Agreement, art. 2(1) (2015). The Agreement has no separate definition section but instead adopts and uses the terminology of the UNFCCC. Id., art. 1.
3 Id., art. 2(1).
4 This is separately identified as the “long-term temperature goal.” Id., art. 4(1).
5 Of note, the UNFCCC defines “GHGs” to include both “natural and anthropogenic” GHGs. UNFCCC, art. 1.
6 Agreement, art. 3.
7 Id. (“The efforts of all Parties will represent a progression over time”).
1. **Mitigation (article 4).** The long-term temperature goal stated as one of the Agreement’s purposes is to be achieved, on a Party-by-Party basis measured collectively, by:

   1. “reach[ing] global peaking of GHG emissions as soon as possible”; and
   2. “undertak[ing] rapid reductions thereafter.”

   These two sequential emission reduction efforts, in turn, are intended to “achieve a balance between anthropogenic emissions by sources and removals of sinks of [GHGs] in the second half of this century.”

   Each Party is to identify and communicate the domestic mitigation actions it intends to implement through so-called “nationally determined contributions” (“NDC”). NDC’s are to be submitted every five years, with each subsequent submission being more stringent than the prior and reflecting each Party’s “highest possible ambition.” A Party may adjust its NDC “at any time … with a view of enhancing its level of ambition.” The UNFCCC secretariat shall maintain a public registry of NDCs.

   Within this bottom-up NDC framework, developed and developing country Parties are to pursue different domestic targets, however. Developed country Parties such as the United States “shall … undertak[e] economy-wide absolute emission reduction targets.” Developing country Parties such as China and India “should continue enhancing their mitigation efforts, and are encouraged to move over time towards economy-wide emission reduction or limitation targets …” It is envisioned that developed country Parties will provide “[s]upport” to developing country Parties in this regard.

   Each Party “shall account” for its NDC through future guidance to be provided.

   Parties may act jointly in their pursuit of NDCs – e.g., under the EU Emissions Trading System.

2. **Adaptation (article 7).** Parties are encouraged to undertake actions related to adaptation, but reporting on the same is not required.

3. **Climate Finance (article 9).** Developed country Parties “shall provide financial resources to assist developing country Parties with respect to both mitigation and adaptation …” The

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8 Id., art. 4(1).
9 Id. The described post-2015 situation is effectively a net-carbon or carbon negative scenario. The UNFCCC defines “sink” as “any process, activity or mechanism which removes a [GHG], an aerosol or a precursor of a [GHG] from the atmosphere.” UNFCCC, art. 1.
10 Agreement, art. 4(2).
11 Id., art. 4(2), (3), (9).
12 Id., art. 4(11).
13 Id., art. 4(12).
14 Id., art. 4(4) (emphasis added). This sentence may trigger the Treaty Clause of the United States Constitution.
15 Id. (emphasis added).
16 Id., art. 4(5).
17 Id., art. 4(13).
18 Id., art. 4(16).
19 Id., art. 7(10).
20 Id., art. 9(1) (emphasis added). This sentence may trigger the Treaty Clause of the United States Constitution. Additionally, only the U.S. Congress may appropriate such funds.
existing Green Climate Fund mechanism under the UNFCCC – along with the Global Environmental Facility – are to be used, with mandatory, biennial reporting required by developed country Parties.21

4. **Technology (article 10).** The existing Technology Mechanism of the UNFCCC is carried forward.22

5. **Capacity-Building (article 11).** Existing capacity-building efforts under the UNFCCC are continued and enhanced.23

6. **Transparency and Reporting (article 13).** Reporting is required under transparency provisions. Of note, each Party –

   a. “[S]hall regularly” provide the following information: (i) a national inventory report; and (ii) “[i]nformation necessary to track progress made in implementing and achieving its [NDC under article 4]”; and

   b. “[S]hould also provide information related to climate change impacts and adaptation.”24

   c. **International Carbon Trading**

   An international carbon trading mechanism is created under rules that are to be developed in the future.25

   d. **“Loss and Damage”**

   The Warsaw International Mechanism for Loss and Damage Associated with Climate Change Impacts is made subject to the authority of the Parties to the Paris Agreement. No formal mechanism is provided for payment of damages, however.26

   e. **REDD**

   Parties are encouraged to use the existing framework to reduce emissions from deforestation and forest degradation (“REDD”).27

   f. **Administration, Enforcement, Entry into Force, Related Matters**

21 Id., art. 9(5). The Draft Decision states that a “new collective quantified goal from a floor of USD 100 billion per year” shall be set. Draft Decision, ¶ 54.
22 Agreement, art. 10.
23 Id., art. 11.
24 Id., art. 13(7), (8).
25 Id., art. 6(4). We interpret this effectively to be a continuation of the Clean Development Mechanism under the Kyoto Protocol, as modified to reflect the fact that the Paris Agreement, unlike the Kyoto Protocol, does not so explicitly differentiate between developed and developing countries. Draft Decision, ¶ 38. The U.S. INDC indicated that the United States did not intend to pursue international carbon trading “at this time.” http://www4.unfccc.int/submissions/INDC/Published%20Documents/United%20States%20of%20Americ a/1/U.S.%20Cover%20Note%20INDC%20and%20Accompanying%20Information.pdf.
26 Agreement, art. 8.
27 Id., art. 5.
“The Agreement shall be open for signature and subject to ratification, acceptance or approval by States and regional economic integration organizations that are Parties to the UNFCCC.”28 It enters into force on the 30th day after the date on which at least 55 Parties to the UNFCCC accounting in total for at least an estimated 55% of total global GHG emissions have ratified it.29

The Conference of the Parties meeting as the Parties to the Paris Agreement “shall periodically take stock” of the Agreement’s implementation, with the first such check to take place in 2023.30 An interim progress check of the Agreement will be made in 2018, too, according to the Draft Decision.31

There is no penalty for non-compliance. Instead, compliance is to be “promote[d].”32 A Party may withdraw subject to time limits.33

References to “human rights” now appear in the Draft Decision, not the text of the Agreement itself.34

II. Initial Analysis

a. Putting The Paris Agreement In Context: What It Means

Regardless of one’s view of climate science and policy, the Agreement is a striking political statement that portends continued low-carbon policy headwinds for the foreseeable future. The incorporation of a 1.5 °C goal – as reflected in Agreement and Draft Decision text – effectively invokes “deep carbon” reduction scenarios that envision peaking of GHG emissions by circa 2030 and net-carbon or carbon negative energy systems by 2050, with the latter understood to require carbon capture & storage (“CCS”) with the use of bioenergy.

It could be fairly asked if these goals are realistic given – as the Draft Decision itself notes – country commitments filed to date (in the form of so-called INDCs) do not fall within the 2.0 °C scenarios.35 Reflecting perhaps the disconnect between ambition and reality, the Draft Decision pleads for countries to continue to implement the struggling Second Commitment of the Kyoto Protocol (through 2020).36

The natural gas bridge also appears to grow short under the Agreement. Indeed, the Draft Decision invites Parties to communicate by 2020 “long-term low [GHG] development strategies” consistent with article 4 of the Agreement.37 With coal-fired generation already being displaced, we interpret this language to mean GHG emissions from oil & gas are next

28 Id., art. 20(a).
29 Id., art. 21(1).
30 Id., art. 14.
31 Draft Decision, ¶ 20.
32 Agreement, art. 15(1).
33 Id., art. 28.
34 Draft Decision, preamble.
35 Id., ¶ 17.
36 Id., Art. IV.
37 Agreement, art. 4(19); Draft Decision, ¶ 36.
up. Through new metrics such as the Social Cost of Methane, various oil & gas climate initiatives already in play, and the dialing-down of natural gas generation under the Clean Power Plan, the U.S. Environmental Protection Agency is already moving in that direction.

The inclusion of international carbon trading is helpful but significant work needs to be done administratively to sort the transition from the Kyoto Protocol’s comparable mechanisms, such as CDM and JI. It is unfortunate that the United States does not intend to take advantage of international carbon trading.38

There is much in the Agreement for renewable energy sources to like. Next week, we expect the U.S. Congress to extend both the wind (PTC) and solar (ITC) tax incentives, too.

b. Is It Binding?/Status Under U.S. Law

Unlike the top-down approach of the Kyoto Protocol, which the United States never ratified, this bottom-up Agreement is not binding per se. Instead, each Party – such as the United States – merely has to implement its own actions and report on them.

That said, the Agreement uses the term “shall” in several places, as noted above. Further, the mitigation provisions appear to differentiate between developed and developing countries, thereby carrying forward elements of the Kyoto Protocol that the Congress opposed years ago. We thus anticipate that the U.S. Senate will seek to exercise its powers under the Treaty Clause of the U.S. Constitution to review the Agreement. Litigation can be expected.

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38 http://www4.unfccc.int/submissions/INDC/Published%20Documents/United%20States%20of%20America/1/U.S.%20Cover%20Note%20INDC%20and%20Accompanying%20Information.pdf.