

institutions and that they share the international community's strong commitment to genuine multilateral decision making and ever-improving lending standards and safeguards. The standards and safeguards are designed to foster sustainable development by curbing corruption, preventing environmental damage, and ensuring protection of both laborers and affected communities.⁴⁷

When Congress did finally approve the IMF reforms, Lew attributed Congress's action, in part, to the rise of the AIIB, "which was poised to fill a vacuum left by the United States" had Congress delayed any further.⁴⁸

INTERNATIONAL OCEANS, ENVIRONMENT, HEALTH, AND AVIATION LAW

United States Joins Consensus on Paris Climate Agreement

On December 12, 2015, 196 nations agreed to the terms of the Paris Agreement, a treaty that aims to limit increases in global average temperature to "well below 2° Celsius above pre-industrial levels."¹ The agreement adopts a "bottom-up" framework, meaning that all parties independently determine how much they will reduce their greenhouse gas emissions. While the commitments themselves are not legally binding, the Agreement does impose a legal obligation on parties to report their commitments and steps taken towards implementation; these reports are subject to monitoring and verification.² The agreement also creates a framework for evaluating progress towards meeting the treaty's goal and for revising parties' commitments every five years. U.S. Secretary of State John Kerry praised the agreement for its ambition, flexibility (because it "allow[s] different countries to do what they're able to do, reflecting their national capacity and their economies, [and] their capabilities"), and "unprecedented level of transparency."³ UN Secretary-General Ban Ki-moon described the Agreement as "a triumph for people, the planet, and for multilateralism."⁴

The negotiations that led to the Paris Agreement took place at the 21st Conference of the Parties (COP) to the 1992 UN Framework Convention on Climate Change (UNFCCC).⁵ Until the Paris Agreement, the parties to the UNFCCC failed to reach a universal, binding agreement to reduce quantified greenhouse gas emissions. The 1997 Kyoto Protocol bound

⁴⁷ U.S. Dep't of Treasury Press Release, Remarks of Secretary Lew at the Asia Society Northern California on the International Economic Architecture and the Importance of Aiming High (Mar. 31, 2015), at <https://www.treasury.gov/press-center/press-releases/Pages/jl10014.aspx>.

⁴⁸ Calmes, *supra* note 2.

¹ Paris Agreement, *in* United Nations Framework Convention on Climate Change [UNFCCC], Conference of the Parties, Rep. on its Twenty-First Sess. [hereinafter COP Report No. 21], Annex, Art. 2, UN Doc. FCCC/CP/2015/L.9/Rev.1 (Dec. 12, 2015) (advance version) [hereinafter Paris Agreement].

² *Id.* Arts. 4, 13.

³ U.S. Dep't of State Press Release, John Kerry, U.S. Secretary of State, Press Availability, (Dec. 12, 2015), at <http://www.state.gov/secretary/remarks/2015/12/250590.htm>.

⁴ United Nations Press Release, Paris Climate Change Agreement "A Triumph for People, Planet" Secretary-General Tells General Assembly (Dec. 15, 2015), at <http://www.un.org/press/en/2015/sgsm17417.doc.htm>.

⁵ United Nations Framework Convention on Climate Change, May 9, 1992, S. TREATY DOC. NO. 102-38 (1992), 1771 UNTS 107 [hereinafter the UNFCCC]. The Convention does not impose legally binding limits on parties' emissions, but establishes the ultimate objective of achieving "stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system." *Id.* Art. 2. For a more detailed account of the developments leading to the Paris Agreement, see Daniel Bodansky, *The Paris Climate Change Agreement: A New Hope?*, 110 AJIL 288 (2016).

developed-state parties to compulsory targets and timetables for reducing emissions,⁶ but notably, the United States did not ratify it.⁷ A major reason for the United States' nonparticipation was the dichotomous way the Protocol treated developing and developed states; it imposed binding, quantified obligations to reduce greenhouse gas emissions only on the latter. Some U.S. government officials specifically objected to the lack of obligations on China to justify rejecting the Kyoto Protocol.⁸ Given this history, the likelihood of a universal agreement in Paris greatly increased following a November 2014 joint announcement in which the United States and China indicated their respective emission reduction targets in anticipation of the Paris negotiations.⁹ These emission targets would constitute the two states' "Intended Nationally Determined Contributions" (INDCs), discussed in detail below.

In December 2014, the parties to the UNFCCC met for the 20th COP in Lima, Peru, where they elaborated the elements of the anticipated universal climate change agreement.¹⁰ Over the next year, 187 parties submitted INDCs outlining the steps they would take to combat climate change,¹¹ indicating significant support from the global community leading up to the Paris negotiations.¹²

By the time 150 heads of state gathered in Paris on November 30, 2015, the areas of agreement and contention had become evident. The submission of INDCs by a substantial majority of the parties illustrated the widespread buy-in of the "bottom up" approach under the new regime. There was disagreement, however, as to whether the INDCs would be incorporated into the Agreement as legally binding obligations. The United States insisted that domestic targets not carry the force of law (for reasons discussed below), while the European Union and many small island nations pushed for binding INDCs.¹³ One thing was clear: by inviting countries to define their own mitigation measures, the Paris Agreement eschewed the strict binary

⁶ Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 2303 UNTS 162] [hereinafter Kyoto Protocol].

⁷ E.g., Kristina Daugirdas & Julian Davis Mortenson, *Contemporary Practice of the United States*, 109 AJIL 195, 197 (2015); Sean D. Murphy, *Contemporary Practice of the United States*, 95 AJIL 647 (2001).

⁸ Daugirdas & Mortenson, *supra* note 7, at 197.

⁹ In this joint announcement, President Barack Obama announced a new target to cut net greenhouse gas emissions 26–28% below 2005 levels by 2025, and Chinese President Xi Jinping announced targets to peak CO₂ emissions around 2030 and to increase the non-fossil fuel share of all energy to around 20% by 2030. The White House Press Release, U.S.-China Joint Announcement on Climate Change (Nov. 11, 2014), at <http://www.whitehouse.gov/the-press-office/2014/11/11/us-china-joint-announcement-climate-change>; see also UN Press Release, Commending Joint Announcement by China, United States for Post-2020 Action on Climate Change, Secretary-General Urges All Countries to Follow Lead (Nov. 11, 2014), at <http://www.un.org/press/en/2014/sgsm16333.doc.htm> (statement by UN Secretary-General Ban Ki-moon that with the joint announcement by China and the United States and other international commitments, "a strong foundation has been laid and momentum is building towards a meaningful climate agreement in 2015").

¹⁰ UNFCCC Press Release, Lima Call for Climate Action Puts World on Track to Paris 2015 (Dec. 14, 2014), at <http://newsroom.unfccc.int/lima/lima-call-for-climate-action-puts-world-on-track-to-paris-2015/>.

¹¹ As of December 15, 2015, 160 INDCs had been submitted, reflecting 187 countries (including the European Union member states). *Comparison of INDCs*, CTR. FOR CLIMATE & ENERGY SOLUTIONS, at <http://www.c2es.org/indc-comparison> (last updated Dec. 21, 2015); *INDCs as Communicated by Parties*, UNFCCC, <http://www4.unfccc.int/submissions/INDC/Submission%20Pages/submissions.aspx> (last visited Mar. 1, 2016).

¹² See *Live at State with Special Envoy for Climate Change Todd Stern on COP21 in Paris*, U.S. DEP'T OF STATE (Nov. 24, 2015), at <http://www.state.gov/r/pa/ime/249970.htm> [hereinafter *Todd Stern*] ("Nobody would go through the blood, sweat, and tears that it takes to put together one of these targets if they didn't think the agreement was going to happen and if they weren't fundamentally bought in to an agreement happening.")

¹³ See *id.* (stating that "[t]he thing that would not be legally binding . . . is the targets themselves"); Fiona Harvey, *Paris Climate Change Agreement: The World's Greatest Diplomatic Success*, THE GUARDIAN (Dec. 14, 2015), at

differentiation between developing and developed countries that characterized the Kyoto Protocol.¹⁴ Nevertheless, many developing countries, including China, favored preserving some version of the dichotomy so as to accord different climate-protection responsibilities to different countries based their level of development.¹⁵

Transparency also proved to be a controversial issue. The United States pressed for requirements that governments monitor, verify, and report their emissions reductions to an international body of experts.¹⁶ Some commentators have suggested that the U.S. firm stance on transparency was due in part to a November 2015 report that China had been underreporting aggregate emissions from its coal-fired power plants.¹⁷ Some developing nations resisted these transparency proposals, reportedly considering them “intrusive and a potential violation of sovereignty.”¹⁸

The parties also disputed the appropriate level of ambition for reducing global warming and the appropriate means for meeting this worldwide goal. The Copenhagen Accord of 2009 first “recogniz[ed] the scientific view that the increase in global temperature should be below two degrees Celsius.”¹⁹ According to a UN report, the first 119 INDCs submitted (which represented 75 percent of the parties and 86 percent of global greenhouse gas emissions) would not be sufficient to meet this goal.²⁰ Nevertheless, China, the European Union, the United States, and numerous island countries supported a more ambitious goal of limiting global temperature increases to 1.5 degrees.²¹ Saudi Arabia and some other oil-producing countries in the Middle East opposed this target as impractical.²² Moreover, the parties disagreed about how to reach

<http://www.theguardian.com/environment/2015/dec/13/paris-climate-deal-cop-diplomacy-developing-united-nations>; see also *infra* note 71 and accompanying text.

¹⁴ See Daugirdas & Mortenson, *supra* note 7, at 197; Todd Stern, *supra* note 12 (“[W]e need to move this agreement from the old-style, backward-looking bifurcation between two distinct categories into a world which is forward-looking, where there is differentiation across the range of countries.”).

¹⁵ See, e.g., Zhang Chun, *What is China's Position at Paris Climate Talks?*, CHINA DIALOGUE (Nov. 30, 2015), at [https://www.chinadialogue.net/article/show/single/en/8356-What-is-China-s-position-at-Paris-climate-talks-\(interview-with-Chinese-climate-envoy-Xie-Zhenhua\)](https://www.chinadialogue.net/article/show/single/en/8356-What-is-China-s-position-at-Paris-climate-talks-(interview-with-Chinese-climate-envoy-Xie-Zhenhua)).

¹⁶ See Todd Stern, *supra* note 12 (explaining the monitoring, reporting, and verification procedures endorsed by the United States).

¹⁷ See Chris Buckley, *China Burns Much More Coal Than Reported, Complicating Climate Talks*, N.Y. TIMES, Nov. 3, 2015, at A1.

¹⁸ Coral Davenport, *Trust and Money at Core of Crucial Paris Talks on Climate Change*, N.Y. TIMES, Dec. 6, 2015, at A7.

¹⁹ Copenhagen Accord, (Dec. 18, 2009), in UNFCCC, Conference of the Parties, Rep. on its Fifteenth Sess., Addendum, at 5, UN Doc. FCCC/CP/2009/11/Add.1 (Mar. 30, 2010).

²⁰ Synthesis Report on the Aggregate Effect of the Intended Nationally Determined Contributions, in COP Report No. 21, UN Doc. FCCC/CP/2015/7, para. 8, 204 (Oct. 30, 2015) (finding that aggregate emissions resulting from implementation of INDCs communicated by October 1, 2015 “do not fall within the range of least-cost 2° C scenarios”); see also *Climate Scoreboard*, CLIMATE INTERACTIVE, at <https://www.climateinteractive.org/tools/scoreboard/> (last visited Mar. 1, 2016) (estimating a global temperature increase of 3.5 degrees Celsius above pre-industrial levels if all INDCs communicated before the conclusion of the Paris Agreement are implemented without further action).

²¹ Robinson Meyer, *A Reader's Guide to the Paris Agreement*, ATLANTIC (Dec. 16, 2015), at <http://www.theatlantic.com/science/archive/2015/12/a-readers-guide-to-the-paris-agreement/420345/>; John Vidal & Fiona Harvey, *Paris Climate Talks: Vulnerable Countries Demand 1.5C Warming Limit*, GUARDIAN (Nov. 30, 2015), at <http://www.theguardian.com/global-development/2015/nov/30/paris-climate-talks-vulnerable-countries-demand-15c-warming-limit>.

²² See, e.g., Suzanne Goldenberg, *Saudi Arabia Accused of Trying to Wreck Paris Climate Deal*, GUARDIAN (Dec. 8, 2015), at <http://www.theguardian.com/environment/2015/dec/08/saudi-arabia-accused-of-trying-to-wreck-the-paris-climate-deal>.

any numerical target. Vulnerable island nations called for “decarbonization”—or the complete elimination of greenhouse gas emissions—in the second half of the century, but Saudi Arabia resisted.²³

Clear divides between developed and developing nations also emerged around financial aspects of the anticipated agreement. Prior to the Paris negotiations, Christina Figueres, the executive secretary of the UN Framework Convention on Climate Change, described climate finance—the issue of who will pay to combat and adapt to climate change—as the “most crucial component” needing greater clarity.²⁴ She identified mutual “lack of trust” as the root of the disagreement: developing countries questioned whether developed countries would deliver on commitments to provide climate financing to developing states, while developed countries questioned the ways that the recipients would spend such funds.²⁵ According to reports, proposals from the developing country negotiating block (comprised of the G77 and China) sharply differed from those presented by developed countries, specifically with regard to the source, amount, and progression of climate finance.²⁶

In addition to climate finance, developed and developing countries disagreed on the issue of “loss and damage.” Loss and damage refers to the long-term adverse effects of climate change, including those that cannot be adequately addressed through adaptation or risk management strategies.²⁷ Developing countries, especially vulnerable island nations, wanted to hold developed countries liable for the loss and damage the former sustained as a result of climate change, the logic being that developed countries, like the United States, are responsible for the bulk of emissions to date.²⁸ From the U.S. perspective, providing compensation for loss and damage opened the door to ongoing liability for climate change reparations—liability the United States was not willing to accept.²⁹

Despite these disagreements, all 196 nations consented to the final text of the Agreement on December 12, 2015. To balance competing demands for binding and non-binding commitments, the final Agreement included both mandatory and non-mandatory provisions.³⁰ As explained in greater detail below, the United States sought to limit the legal obligations in the Paris Agreement in part to avoid the need for ex post approval by the

²³ Meyer, *supra* note 21.

²⁴ “Lack of Trust” on Climate Finance, Figueres Warns Before Paris Negotiations, BLOOMBERG NEWS (July 1, 2015), at <http://www.bna.com/lack-trust-climate-n17179928952/> (interview with Christina Figueres at the UN High Level Event on Climate Change in July 2015).

²⁵ *Id.*

²⁶ See Ed King, *Life or Death: G77 Demands Climate Finance Guarantee*, CLIMATE HOME (Oct. 22, 2015), at <http://www.climatechangenews.com/2015/10/22/life-or-death-g77-demands-climate-finance-guarantee/>.

²⁷ Decision 2/CP.19 (Nov. 11–23, 2015), in COP Report No. 19, UN Doc. FCCC/CP/2013/10/Add.1 (Jan. 31, 2014).

²⁸ See Chris Mooney, *The Key, Tricky Details That Will Determine Whether the Paris Climate Meeting Succeeds*, WASH. POST (Dec. 1, 2015), at <https://www.washingtonpost.com/news/energy-environment/wp/2015/12/01/these-are-the-key-tricky-details-that-will-determine-whether-the-paris-climate-meeting-succeeds/>.

²⁹ U.S. Dep’t of State Press Release, COP21 Press Availability with Special Envoy Todd Stern (Dec. 2, 2015), at <http://go.usa.gov/cBmFd> (“We’ve also made it clear that we are not at all supportive of and would not accept the notion of liability and compensation being part of that.”).

³⁰ For a more detailed analysis of these provisions, see Bodansky, *supra* note 5.

Senate or Congress as a whole. Separately, the parties to the UNFCCC also adopted a non-binding decision (Paris Decision) that addresses some key contested issues.³¹

Article 3 of the Paris Agreement addresses each party's nationally determined contribution (NDC):³² "all Parties are to undertake and communicate ambitious efforts . . . with the view to achieving the purpose of this Agreement as set out in Article 2."³³ Article 2 states that the Agreement is meant to enhance the implementation and objective of the UNFCCC, including by "[h]olding 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, recognizing that this would significantly reduce the risks and impacts of climate change."³⁴

Article 4 establishes uniform procedures that govern the NDCs; it also preserves some degree of differentiation, as follows:

2. Each Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. . . .
3. Each Party's successive nationally determined contribution will represent a progression beyond the Party's then current nationally determined contribution and reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.
4. 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.³⁵

This framework evidently satisfied China's desire for differentiation as well as the United States' desire for a forward-looking approach that does not rigidly classify countries as developed or developing.³⁶

The Agreement also reflects a balancing of preferences with respect to transparency. Article 4 requires that NDCs be recorded in a public registry,³⁷ which some commentators see as a mechanism for public shaming to motivate compliance.³⁸ Article 13 sets out further reporting requirements; it reads in part:

³¹ Decision 1/CP.21 (Nov. 30–Dec. 11, 2015), in COP Report No. 21, UN Doc. FCCC/CP/2015/L.9/Rev.1 (Dec. 12, 2015) [hereinafter Paris Decision].

³² The Paris Decision provides that INDCs communicated before joining the Paris Agreement will be treated as NDCs for purposes of the Paris Agreement unless the party submitting the INDC decides otherwise. *Id.*, para. 22.

³³ Paris Agreement, *supra* note 1, Art. 3.

³⁴ *Id.* Art. 2(1)(a).

³⁵ *Id.* Art. 4.

³⁶ Although the Agreement does use the terms "developed country" and "developing country" to establish different obligations for parties based on their differing levels of development, it does not define either phrase or classify countries accordingly, like in the Kyoto Protocol. Compare Paris Agreement, *supra* note 1, with Kyoto Protocol, *supra* note 6.

³⁷ Paris Agreement, *supra* note 1, Art. 4(12).

³⁸ See, e.g., Jessica F. Green, *Wondering What's Different About the Paris Climate Change Negotiations? Here's What You Need to Know*, WASH. POST (Dec. 1, 2015), at <https://www.washingtonpost.com/news/monkey-cage/wp/2015/12/01/wondering-whats-different-about-the-paris-climate-change-negotiations-heres-what-you-need-to-know/>.

7. Each Party shall regularly provide the following information:

- (a) A national inventory report of anthropogenic emissions by sources and removals by sinks of greenhouse gases, prepared using good practice methodologies . . . ;
- (b) Information necessary to track progress made in implementing and achieving its nationally determined contribution.³⁹

This transparency framework is required to “be implemented in a facilitative, non-intrusive, non-punitive manner, respectful of national sovereignty . . . ”⁴⁰ Article 15 further establishes a verification mechanism to “facilitate implementation of and promote compliance with” the Agreement.⁴¹ It requires that the mechanism “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. [And it] shall pay particular attention to the respective national capabilities and circumstances of the Parties.”⁴²

The Agreement also includes provisions for reviewing and revising NDCs over time. Under Article 4, each party is required to communicate its nationally determined contribution every five years.⁴³ Furthermore, Article 14 establishes “global stocktakes,” where the parties “take stock of the implementation of the Agreement to assess the collective progress towards achieving the purpose of th[e] Agreement and its long-term goals.”⁴⁴ These stocktakes are scheduled to begin in 2023 and continue every five years thereafter unless otherwise decided by the COP.⁴⁵

The Agreement builds in flexibility with respect to how the parties reach their individual emissions-reduction targets. Article 4(1) sets forth emission reduction objectives that apply to all parties. It states in relevant part:

Parties aim to reach global peaking of greenhouse gas emissions as soon as possible, recognizing that peaking will take longer for developing country Parties, and to undertake rapid reductions thereafter in accordance with best available science, so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century.⁴⁶

This provision indicates that parties are expected to begin to reduce domestic emissions (i.e., peak), but it does not mandate “decarbonization,” or greenhouse gas emissions neutrality. Rather, it allows parties to balance emissions and removals by carbon sinks, such as new forests, which draw carbon dioxide from the atmosphere. While the Agreement does not mention carbon pricing, it leaves room for the development of carbon markets. Article 6(4) establishes a mechanism similar to the Kyoto Protocol’s Clean Development Mechanism, which generates tradable emission offsets.⁴⁷ And Article 6(2) allows parties to voluntarily cooperate in meeting

³⁹ Paris Agreement, *supra* note 1, Art. 13(7).

⁴⁰ *Id.* Art. 13(3).

⁴¹ *Id.* Art. 15(1).

⁴² *Id.* Art. 15(2).

⁴³ *Id.* Art. 4(9).

⁴⁴ *Id.* Art. 14(1).

⁴⁵ *Id.* Art. 14(2).

⁴⁶ *Id.* Art. 4(1).

⁴⁷ *Compare id.* Art. 6(4), with Kyoto Protocol, *supra* note 6, Art. 12.

their targets through the use of “internationally transferred mitigation outcomes” so long as they avoid “double counting.”⁴⁸

The Agreement does not provide any specific figures regarding climate finance, due in part to the United States’ need to avoid the inclusion of new binding financial commitments.⁴⁹ Instead, Article 9 states that “[d]eveloped country Parties shall provide financial resources to assist developing country Parties with respect to both mitigation and adaptation in continuation of their existing obligations under the [UNFCCC].”⁵⁰ It encourages other parties—presumably, wealthier developing countries—“to provide such support voluntarily.”⁵¹ Developed countries are also called upon to “take the lead in mobilizing climate finance from a wide variety of sources” in a way that “progress[es] beyond previous efforts.”⁵² The climate finance provisions invite funding from a “wide variety of sources, instruments and channels”; require biennial communications of developed countries’ projected levels of future financing; encourage financial resources that “aim to achieve a balance between adaptation and mitigation”; and preserve existing financial mechanisms that allow for effective technology transfer.⁵³

Despite the relatively few binding provisions on climate finance, there was a surge of financial activity by public and private actors during COP 21. In the first days of the conference, the U.S. government announced a contribution of over \$51 million to the Least Developed Countries Fund and \$30 million to regional climate risk insurance initiatives in the Pacific, Central America, and Africa.⁵⁴ President Barack Obama also helped launch Mission Innovation, an initiative under which “twenty countries, representing around 80 percent of global clean energy research and development (R&D) funding,” committed to double their R&D budgets over five years.⁵⁵ Bill Gates led a coalition of twenty-eight private investors in a pledge to support early-stage energy technologies in countries that joined Mission Innovation.⁵⁶ A number of U.S. states, mayors, businesses, and universities made additional commitments to help combat climate change in their respective domains.⁵⁷ Obama predicted that this combined commitment “has the potential to unleash investment and innovation in clean energy at a scale we have never seen before.”⁵⁸

⁴⁸ Paris Agreement, *supra* note 1, Art. 6(2).

⁴⁹ See Press Release, *supra* note 3 (noting that “having binding agreements with respect to . . . finance” would “trigger[] a different kind of agreement”); Nitin Sethi, *US Threatens to Walk Out of Paris Pact Over Financial Obligations*, BUS. STANDARD (India) (Dec. 11, 2015), at http://www.business-standard.com/article/current-affairs/us-threatens-to-walk-out-of-paris-pact-over-financial-obligations-115121100913_1.html (quoting Kerry as saying that “legally binding with respect to finance is a killer for the agreement” and describing this statement as a “veiled threat that the agreement could fail if the US was pushed for financial obligations”).

⁵⁰ Paris Agreement, *supra* note 1, Art. 9(1).

⁵¹ *Id.* Art. 9(2).

⁵² *Id.* Art. 9(3).

⁵³ *Id.* Arts. 9(3)–9(5).

⁵⁴ U.S. Dep’t of State Press Release, Joint Statement on Donors’ Pledge of \$248M USD to Least Developed Countries Fund to Support Climate Change Adaptation (Nov. 30, 2015), at <http://go.usa.gov/cKVE2>; U.S. Dep’t of State Press Release, U.S. Climate Risk Insurance Announcement (Dec. 1, 2015), at <http://go.usa.gov/cZQ4B>.

⁵⁵ See The White House Press Release, U.S. Leadership and the Historic Paris Agreement to Combat Climate Change (Dec. 12, 2015), at <https://www.whitehouse.gov/the-press-office/2015/12/12/us-leadership-and-historic-paris-agreement-combat-climate-change>.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ The White House Press Release, Statement by the President on the Paris Climate Agreement (Dec. 12, 2015), at <https://www.whitehouse.gov/the-press-office/2015/12/12/statement-president-paris-climate-agreement>.

With respect to “loss and damage,” the Agreement again reflects a balancing of developed and developing countries’ interests. Article 8 acknowledges the “importance of averting, minimizing and addressing loss and damage associated with the adverse effects of climate change” and establishes new oversight for the existing Warsaw International Mechanism for Loss and Damage.⁵⁹ However, the Paris Decision explicitly states that “Article 8 of the Agreement does not involve or provide a basis for any liability or compensation.”

For the Obama administration, a key goal in the negotiations was to ensure that the president would be able to bind the United States without seeking approval from the Senate. In other words, as a matter of U.S. law, the administration sought an executive agreement rather than an Article II treaty given the near-certainty that Senate approval would not be forthcoming.⁶⁰

Aware of the administration’s plan to avoid triggering congressional advice and consent requirements, members of Congress preemptively objected to the Agreement and challenged the President’s authority to ratify it singlehandedly. In November 2015, some Senators introduced “Sense of the Senate” and “Sense of Congress” resolutions, insisting that the president obtain the Senate’s advice and consent with respect to any agreement coming out of COP 21 and warning that Congress would refuse climate-change related funding otherwise.⁶¹ The House of Representatives and Senate also approved two resolutions to block domestic climate change regulations that were promulgated by the Environmental Protection Agency (EPA) under the Clean Air Act.⁶² The House passed the measures on the second day of COP 21, ostensibly to undermine the President’s bargaining position.⁶³ However, the administration continued to negotiate the Agreement under the assumption that Obama would veto any legislation undermining the Clean Air Act.⁶⁴ (He did so on December 18, 2015.⁶⁵)

As the Paris negotiations were just about to conclude, the United States objected to language in the final draft that stated: “Developed country Parties *shall* continue taking the lead by undertaking economy-wide absolute emission reduction targets. Developing country Parties

⁵⁹ Paris Agreement, *supra* note 1, Arts. 8(1)–8(2).

⁶⁰ Karoun Demirjian & Steven Mufson, *Trick or Treaty? The Legal Question Hanging Over the Paris Climate Change Conference*, WASH. POST (Nov. 30, 2015), at <https://www.washingtonpost.com/news/powerpost/wp/2015/11/30/trick-or-treaty-the-legal-question-hanging-over-the-paris-climate-change-conference/>.

⁶¹ S. Res. 329, 114th Cong. (2015); S. Con. Res. 25, 114th Cong. (2015).

⁶² S.J. Res. 23, 114th Cong. (2015); S.J. Res. 24, 114th Cong. (2015).

⁶³ In a statement, Senator James M. Inhofe (R-Okla.) said: “The message could not be more clear that Republicans and Democrats in both the U.S. Senate and U.S. House do not support the president’s climate agenda, and the international community should take note.” Valerie Richardson, *Republicans Move to Undermine Obama on Paris Climate Deal*, WASH. TIMES (Dec. 7, 2015), at <http://www.washingtontimes.com/news/2015/dec/7/republicans-move-to-undermine-obama-on-paris-clima/>.

⁶⁴ See OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATIVE POLICY: S.J. RES. 23 – DISAPPROVING EPA RULE ON GREENHOUSE GAS EMISSIONS FROM NEW, MODIFIED, AND RECONSTRUCTED ELECTRIC UTILITY GENERATING UNITS (Nov. 17, 2015), available at https://www.whitehouse.gov/sites/default/files/omb/legislative/sap/114/sapsjr24s_20151117.pdf; OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATIVE POLICY: S.J. RES. 23 – DISAPPROVING EPA RULE ON CARBON POLLUTION EMISSION GUIDELINES FOR EXISTING ELECTRIC UTILITY GENERATING UNITS (Nov. 17, 2015), available at https://www.whitehouse.gov/sites/default/files/omb/legislative/sap/114/sapsjr23s_20151117.pdf.

⁶⁵ The White House Press Release, Memorandum of Disapproval on S.J. Res. 23 (Dec. 19, 2015), at <http://www.whitehouse.gov/the-press-office/2015/12/19/memorandum-disapproval-sj-res-23>; The White House Press Release, Memorandum of Disapproval on S.J. Res. 24 (Dec. 18, 2015), at <https://www.whitehouse.gov/the-press-office/2015/12/19/memorandum-disapproval-sj-res-24>.

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.”⁶⁶ The problem for the United States was the “shall” in the first sentence. The “shall” in this provision would create an international legal obligation on developed country parties to adopt economy-wide emission reduction targets and would introduce a distinction between the obligations of developed- and developing-country obligations—something the United States had strived to avoid.⁶⁷ Eventually the inclusion of “shall” instead of “should” was explained as a typographical error—and the revised version of the agreement was adopted.⁶⁸ When asked about the apparent error, Kerry confirmed that the “shall” posed a serious problem for the United States:

Laurent Fabius [then the French foreign minister] said point-blank that it was a mistake. And he doesn't know where it took place, but the bottom line is that when I looked at that, I said, “We cannot do this and we will not do this. And either it changes or President Obama and the United States will not be able to support this agreement.” And we made it crystal clear that every text up until this particular one had a different wording. So it wasn't hard for them to realize that somebody had made a mistake, and they accepted responsibility for it.⁶⁹

In response to a separate press question about whether “the emissions were not made legally binding because that would have made this a treaty and it wouldn't have gotten through the Senate,” a senior administration official first explained that the United States wasn't alone in preferring nonbinding language:

I don't remember exactly when the proposal that we started to follow was first announced. But New Zealand had the idea of what is, in effect, a hybrid kind of legal form where a number of elements would be legally binding, including essentially the whole accountability system, the requirement to put in targets or ratchet them to be—to report on them and be reviewed on them, and various rules for counting emissions and so forth would be legally binding, but the targets themselves would not be. So that was the basic structure of the—of what I'm referring to as the hybrid that New Zealand put forward.

And we thought that that made sense for reasons of broad participation in this agreement, certainly including the United States but by no means only the United States. There are many countries—the most vocal outside of us probably India—but the reality is there would be many developing countries who would balk at having to do legally binding targets for themselves. They might be perfectly happy to ask for legally binding targets from developed countries, but we were not going to go back into a Kyoto structure of binding target commitments for developed countries but not for developing. We're past that.

⁶⁶ Adoption of the Paris Agreement, Proposal of the President, Draft Decision /CP.21, Annex, Art. 4, UN Doc. FCCC/CP/2015/L.9 (Dec. 12, 2015) (emphasis added). See Marty Lederman, *The Constitutionally Critical, Last-Minute Correction to the Paris Climate Change Accord*, BALKANIZATION (Dec. 13, 2015), at <http://balkin.blogspot.com/2015/12/the-last-minute-correction-to-paris.html>; Daniel Bodansky, *Reflections on the Paris Conference*, OPINIO JURIS (Dec. 15, 2015), at <http://opiniojuris.org/2015/12/15/reflections-on-the-paris-conference>.

⁶⁷ One of the United States' top priorities was eliminating binary distinctions between the obligations of developed and developing states. See Bodansky, *supra* note 5.

⁶⁸ Nitin Sethi, *How the Pact Was Won with a “Typo” Tweak*, BUSINESS STANDARD (Dec. 14, 2015), at http://www.business-standard.com/article/current-affairs/when-a-typo-saved-the-climate-change-summit-from-the-brink-of-collapse-115121300690_1.html.

⁶⁹ U.S. Dep't of State Press Release, Press Availability, John Kerry, Secretary of State (Dec. 12, 2015), at <http://www.state.gov/secretary/remarks/2015/12/250590.htm>.

That's the backwards-looking world. It didn't work. That's not where we were going. So the notion of the targets not being binding was really a fundamental part of our approach from early on, and obviously something quite useful for us as well.

In terms of congressional approval, this agreement does not require submission to the Senate because of the way it is structured. The targets are not binding; the elements that are binding are consistent with already approved previous agreements. So it would not be—I mean, I don't want to speak in a definitive way, but it's certainly not—I would just say that it's not required. What actions are taken or not taken is a separate question, but it's not required.⁷⁰

In response to a follow-up question, another senior administration official explained:

[T]his agreement does not require ratification by the Senate. And the reason for that is the hybrid structure that [Senior Administration Official One] mentioned. And so the structure is really one of an executive agreement. And we have numerous executive agreements across—in the climate and energy area, but frankly, across all areas of multilateral engagement, and those agreements include binding provisions for reporting and review and otherwise. We have a long history of that and it's part of the executive authority that the U.S. exercises in foreign policy. And so we will implement this agreement in a manner that's consistent with that. And the hybrid structure is very important and very useful.⁷¹

In closing, this administration official said: “Congress plays an important role in executive agreements in terms of receiving information and being briefed, and I assume that—and expect that we will engage in a lot of that going forward. But we feel very confident that, as with the range of executive agreements that exist and have been effectively in place for years and years, that we can move forward with this agreement within existing legal authority.”⁷²

The Paris Agreement opened for signature on April 22, 2016.⁷³ It will enter into force thirty days after the date on which at least fifty-five parties to the UNFCCC, accounting in the aggregate for at least 55 percent of total greenhouse gas emissions, deposit instruments of ratification, acceptance, approval, or accession.⁷⁴ On March 31, 2016, Obama and Chinese President Xi Jinping announced that “the United States and China will sign the Paris Agreement on April 22nd and take their respective domestic steps in order to join the Agreement as early as possible this year.”⁷⁵ In a subsequent briefing, a State Department official elaborated that, for the United States, that the process involves “a standard State Department exercise . . . for authorizing an executive agreement.”⁷⁶ As of April 29, 2016, there are 177 signatories to the Paris Agreement, including the United States and China.⁷⁷ Sixteen states, together accounting for

⁷⁰ U.S. Dep't of State Press Release, Background Briefing on the Paris Climate Agreement (Dec. 12, 2015), at <http://www.state.gov/r/pa/prs/ps/2015/12/250592.htm>.

⁷¹ *Id.*

⁷² *Id.*

⁷³ Paris Agreement, *supra* note 1, Art. 20.

⁷⁴ *Id.* Art. 21.

⁷⁵ The White House Press Release, Office of the Press Secretary, U.S.-China Joint Presidential Statement on Climate Change (Mar. 31, 2016), at <https://www.whitehouse.gov/the-press-office/2016/03/31/us-china-joint-presidential-statement-climate-change>.

⁷⁶ U.S. Dep't of State Press Release, Senior State Department Official on the Paris Agreement Signing Ceremony (Apr. 20, 2016), at <http://www.state.gov/r/pa/prs/ps/2016/04/256415.htm>.

⁷⁷ Paris Agreement, Status of Ratification, UN FRAMEWORK CONVENTION ON CLIMATE CHANGE, at http://unfccc.int/paris_agreement/items/9444.php (last visited May 9, 2016).

0.03% of total global greenhouse gas emissions, have already deposited their instruments of ratification, acceptance, or approval.⁷⁸

Once the Paris Agreement enters into force, it will be up to the parties to implement their legal and political commitments. As Ban Ki-moon recently said, “our task is not over. In fact, it has just begun. In 2016, we must go from words to deeds.”⁷⁹ Obama was hopeful about the implementation of the Agreement. Immediately following the adoption of the Paris Agreement, he declared that “this moment can be a turning point for the world.”⁸⁰

Roadblocks have already materialized in the United States, however. In early February, the Supreme Court halted the implementation of the Environmental Protection Agency’s Clean Power Plan, pending the judicial resolution of legal challenges regarding the scope of the EPA’s authority.⁸¹ The EPA has described the Clean Power Plan as one of its most ambitious and achievable regulatory efforts to curb greenhouse gas emissions under the Clean Air Act.⁸² In response to the stay, the White House released a statement affirming the “strong legal and technical foundation” on which the Clean Power Plan is based and asserting that “the Administration will continue to take aggressive steps to make forward progress to reduce carbon emissions.”⁸³

INTERNATIONAL ECONOMIC LAW

United States and Eleven Other Nations Conclude Trans-Pacific Partnership

On October 5, 2015, trade officials from the United States and eleven other nations¹ concluded negotiations on the Trans-Pacific Partnership (TPP),² six years after President Barack Obama first announced his intention to begin working towards such a trade Agreement.³ The parties to the Agreement represent 800 million people⁴ and nearly 40 percent of global GDP.⁵

⁷⁸ *Id.*

⁷⁹ UN Press Release, No Time to Delay Implementation of Paris Climate Agreement, Secretary-General Says at Briefing to Member States on Upcoming Signing Ceremony (Feb. 16, 2015), at <http://www.un.org/press/en/2016/sgsm17547.doc.htm>.

⁸⁰ The White House Press Release, Statement by the President on the Paris Climate Agreement (Dec. 12, 2015), at <https://www.whitehouse.gov/the-press-office/2015/12/12/statement-president-paris-climate-agreement>.

⁸¹ *Basin Electric Power Cooperative v. U.S. Environmental Protection Agency*, No. 15A776, *stay granted*, 2016 WL 502654 (U.S. Feb. 10, 2016).

⁸² Janet McCabe, *The Final Clean Power Plan: More Ambitious, More Achievable for States*, EPA CONNECT (Aug. 3, 2015), at <https://blog.epa.gov/blog/2015/08/the-final-clean-power-plan-more-ambitious-more-achievable-for-states/>.

⁸³ The White House Press Release, Press Secretary Josh Earnest on the Supreme Court’s Decision to Stay the Clean Power Plan (Feb. 9, 2016), at <https://www.whitehouse.gov/the-press-office/2016/02/09/press-secretary-josh-earnest-supreme-courts-decision-stay-clean-power>.

¹ The twelve nations that negotiated the Trans-Pacific Partnership include Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States, and Vietnam. *Overview of the Trans-Pacific Partnership*, OFF. U.S. TRADE REPRESENTATIVE, <https://ustr.gov/tpp/overview-of-the-TPP> (last visited Nov. 29, 2015) [hereinafter *Overview of the TPP*].

² Statement on the Trans-Pacific Partnership, 2015 DAILY COMP. PRES. DOC. 696 (Oct. 5, 2015) [hereinafter TPP Statement].

³ *Overview of the TPP*, *supra* note 1.

⁴ Joint Statement—Trans-Pacific Partnership Leaders Statement, 2015 DAILY COMP. PRES. DOC. 818 (Nov. 18, 2015).

⁵ U.S. Dep’t of State Press Release, Successful Conclusion of Trans-Pacific Partnership Negotiations (Oct. 5, 2015), at <http://www.state.gov/secretary/remarks/2015/10/247870.htm>.