PARIS AGREEMENT TO ENTER INTO FORCE: IMPLICATIONS FOR ENFORCEMENT IN THE UNITED STATES AND INTERNATIONALLY

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Global policy on climate change and greenhouse gas regulation is poised to take a significant step forward as the Paris Agreement ("Agreement") enters into force just before international climate negotiations resume in Morocco next month. The 22nd Conference of the Parties ("COP-22") will be held in Marrakech, Morocco, November 7 through 18, 2016, and will be the first time that parties to the Agreement gather after its ratification. Signatories to the Agreement include 191 countries and represent 95 percent of global greenhouse gas emissions. Now the hard work of implementing the Agreement begins. Parties are expected to start reducing emissions under the Agreement in 2020, with a long-term goal of holding global temperature increase well-below 2 degrees Celsius. Meeting this goal requires steep reductions in carbon—for the United States, this will impact sectors of the economy that have not yet seen significant carbon regulation, such as oil refineries, cement makers, paper processers, chemical companies, and other manufacturers and will require continued reductions via the deployment of renewable energy, energy efficiency, decreasing use of hydrofluorocarbons and methane, and motor vehicle emissions regulations.

The accelerated ratification of the Agreement is significant because it means that during COP-22 in Marrakech, the first official Meeting of the Parties to the Paris Agreement ("CMA1") will take place. As described in more detail below, decisions made by CMA1 will operationalize the Agreement, putting compliance procedures into place.

The details to be hammered out during CMA1 will have important implications for each signatory. In the United States, stakeholders will be watching closely to determine how the enforcement mechanisms of the Agreement will take shape, how they will interact with the current uncertainty in U.S. climate policy, and whether the Agreement itself is even enforceable in the United States given questions regarding its ratification and the pending presidential election.

OVERVIEW OF THE AGREEMENT

The Agreement was adopted on December 12, 2015, but did not take force until 55 parties accounting for at least 55 percent of total global greenhouse gas emissions joined the Agreement. On October 3, 2016, the European Union became the 63rd party to join the Agreement, putting the total global greenhouse gas emissions over the 55 percent threshold and triggering the Agreement to take force.[1]

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The Agreement reflects a new global commitment to cutting carbon. The legally binding aspects of the Agreement require countries to set goals to reduce carbon emissions, meet every five years beginning in 2023, and monitor and report on their emissions levels and reductions. Parties to the Agreement committed to holding the increase in global average temperature to "well below" 2 degrees Celsius, but the Agreement also includes an aspirational goal of "pursuing efforts" to limit the temperature increase to 1.5 degrees Celsius.

According to several sources, reaching this 1.5 degree Celsius target by 2100 would require that at some point in this century, carbon emissions would have to become negative on a global scale.[2] Forecasters anticipate a need to reduce emissions by 70–95 percent relative to 2010 levels by 2050, which is significantly more than the 40–70 percent by 2050 for 2 degrees Celsius.[3] This amounts to a reduction of about 29 gigatonnes of total CO2 by 2100 to remain below 2 degrees Celsius, and about 54 gigatonnes of total CO2 to remain below 1.5 degrees Celsius.[4] The United States emitted 6.87 gigatonnes in 2014 alone.[5] Estimates on the impact to global wealth land at about a 2.3 percent reduction in economic growth per year.[6]

The Agreement also created a system to meet the long-term emission reduction goals. A "global stocktake" will be held every five years starting in 2018 to evaluate where the world is in relation to its long-term goal and to inform new commitments. The stocktake will consider mitigation, adaptation, the means of implementing the Agreement, and the best available science, such as the latest Intergovernmental Panel on Climate Change reports. In 2020, countries must submit new pledges or resubmit or revise pledges to cover the years 2020 through 2030. Revised emission pledges, informed by the stocktake, are due every five years thereafter with the expectation that they would become more ambitious.

Emission reductions under the Agreement will begin in 2020. Read more about the details of the Agreement here.

STEPS FOR THE AGREEMENT TO TAKE FORCE

The Agreement had to go through three stages to become legally enforceable: adoption, signing, and joining. It was adopted on December 12, 2015, at the 21st Conference of the Parties. The Agreement was then open for parties to sign starting on April 22, 2016, at the United Nations headquarters in New York. Currently, there are 191 signatories to the Agreement.[7] Next, signatories to the Agreement could formally join by depositing an instrument of ratification, acceptance, or approval with the Secretary-General of the United Nations.

Currently, 63 parties have joined the Agreement representing more than 55 percent of global greenhouse gas emissions.[8] Per Article 21 of the Agreement, which triggers its effect "on the thirtieth day after the date on which at least 55 Parties to the Convention accounting in total for at least an estimated 55 percent of the total global greenhouse gas emissions have deposited their instruments of ratification, acceptance, approval, or accession," it will now officially take effect on November 4, 2016.

UNITED STATES JOINS THE AGREEMENT ON SEPTEMBER 3

The United States joined the Agreement on September 3, 2016, in a joint ceremony with Chinese President Xi Jingping.[9] India, the world's third largest greenhouse gas emitter joined the Agreement on October 2, 2016, [10] and Canada ratified the Agreement on October 5, having recently announced a carbon tax to meet the Agreement's targets.[11]

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The U.S.' Intended Nationally Determined Contributions ("INDCs") commit the United States to reduce emissions by 26 to 28 percent below 2005 levels by 2025, which is on a straight line reduction pathway to deeper emission reductions of 80 percent or more by 2050. The Obama Administration ("Administration") plans to achieve the Agreement targets in part via the Clean Power Plan ("CPP"), which reduces emissions from the U.S.' power sector by setting state-by-state targets to achieve reductions by 32 percent by 2030. For additional analysis on the CPP, click here. As noted in detail below, the CPP alone will not achieve the U.S.' INDCs and the next administration will need to act to make further reductions.

However, the CPP is being challenged by a consortium of states led by West Virginia. Oral argument on the CPP took place before the D.C. Circuit on September 27, and while the litigation plays out the Supreme Court stayed implementing the CPP. Observers expect that any decision by the D.C. Circuit will be appealed to the Supreme Court. Consequently, whether the reductions intended under the CPP will be obtainable under the timeline set by the Agreement is unclear, though the Agreement will almost certainly be considered by the Supreme Court given that the CPP is the one of the main pillars of the U.S.' commitments to reduce greenhouse gases.

But even if it does withstand judicial scrutiny, the CPP alone is only expected to account for a quarter of the U.S. goal pledged to in the Agreement, which will require substantial acceleration of the 2005–2020 annual pace of reduction, approximating doubling that rate.[12] As a consequence, meeting the U.S.' INDCs will likely require carbon reduction in sectors of the economy, such as oil refineries, cement makers, paper processers, chemical companies, and other manufacturers who have not yet seen significant carbon regulation. It will also require continued reductions via the deployment of renewable energy, energy efficiency, the reduction of hydrofluorocarbons and methane, and motor vehicle emissions reductions. Whether these additional reductions will be achieved through rulemaking, congressional action, or executive action remains unclear.

ENFORCEMENT OF THE AGREEMENT IN THE UNITED STATES

The Administration characterizes the Agreement as an executive agreement, not a legally binding treaty that requires Senate ratification.[13] Executive agreements are not submitted to the Senate but are considered binding in international law as long as they have legal support in the form of one or more of the following: (1) congressional legislation; (2) an article II, section 2 treaty; or (3) the president's own constitutional powers.[14] The Administration believes that laws such as the Clean Air Act and the United Nations Framework in Climate Change signed by President George H.W. Bush give it the authority to join and enforce the Agreement without Senate approval. [15]

In fact, some aspects of the Agreement were intentionally crafted to avoid the need for Senate approval. For instance, the preamble of the Agreement pledges $100 billion per year from developed countries for climate financing for developing countries, but a monetary pledge was left out of the operative portion of the Agreement, so as to avoid Senate approval. Additionally, the United States pushed to exclude absolute emissions reductions targets from the legally binding portions of the overall Agreement at the eleventh hour so that the Agreement would not need Senate approval.[16]

However, the Republican-controlled Congress has questioned the Administration's legal right to ratify the Agreement.[17] Instead, they argue that it should be characterized as a treaty, noting that the Constitution grants the Senate a role of "advice and consent" in making treaties and that it requires a two-thirds vote of approval from

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the Senate.[18] Opponents to the Agreement have called on Congress to block funding for the Agreement and the Administration's Global Climate Change Initiative, defund U.S. participation in the United Nations Framework Convention on Climate Change, and conduct oversight hearings on the U.S.' Agreement negotiations.[19] Because the Agreement did not adopt legally binding emission targets, the Agreement does not legally bind federal agencies such as the U.S. Environmental Protection Agency. The few legally binding aspects of the Agreement are procedural rather than substantive, committing parties to regularly report on their progress implementing voluntary emission targets.[20] As a result, at this juncture, Congress does not need to take action to enforce the Agreement because the Agreement does not require Senate ratification, and the Administration plans to achieve its emission reductions via existing law, such as the CPP under the Clean Air Act. However, if the CPP is struck down by the Supreme Court, the next administration will likely need Congress to authorize legislation to help the United States meet its emission targets.

To further complicate the situation, according to the terms of the Agreement, once it takes effect, parties cannot withdraw for at least three years. If a party chooses to withdraw at the end of the three-year period, the withdrawal does not take effect until a year after the notice of withdrawal is received.[21] Whether the Agreement will be deemed binding on the United States may be contested by the U.S. Senate and in the courts. In addressing the treaty versus executive agreement question, decision-makers will have to grapple with whether the withdrawal clause applies or whether the next U.S. president can simply unwind the U.S. commitment to the Agreement.

The 2016 presidential candidates have very different views on the Agreement. In an energy policy speech last May, Republican candidate Donald Trump told supporters, "We're going to cancel the Paris climate agreement."[22] Mr. Trump also pledged to rescind the Administration's Climate Action Plan and "stop all payments of U.S. tax dollars to [United Nations] global warming programs."[23] Furthermore, Mr. Trump has called climate change a hoax invented by the Chinese government[24] and does not believe that climate change is caused by humans.[25] Democratic candidate Hillary Clinton, on the other hand, praised the Agreement when it was ratified last December[26] and has pledged to continue to reduce greenhouse gas emissions.[27]

If Mr. Trump were elected president, he could not simply "cancel" the Agreement. As explained above, the United States cannot withdraw from the Agreement for at least three years since its effective date, and a withdrawal does not take effect until at least a year after the notice of withdrawal is received. This means that the United States cannot fully withdraw from the Agreement until at the very earliest, November 2020—just in time for the 2020 presidential election. However, a withdrawal from the Agreement is not the only concern. The next president will dictate the success or failure of the Agreement in the United States. It will be nearly impossible for the United States to meet its INDCs if the next president rescinds the Administration's climate efforts (as Mr. Trump has promised). The lack of sanctions or legally binding emission targets in the Agreement also means that the next president will not be bound to meet its pledged INDCs. Therefore, the success (or failure) of the Agreement and the U.S.' ability to meet its INDCs depends in part on the outcome of the 2016 presidential election, the outcome of the CPP litigation, and Congress.

THE AGREEMENT'S NEXT STEPS—MARRAKECH

While the Agreement provided clearer pathways for action on climate change, many of the details still need to be

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resolved. This will occur in Marrakech during CMA1. CMA1 is significant because it is the Agreement's governing body with authority over all substantive, procedural, administrative, and operational matters.[28] Decisions made by CMA1 will operationalize the Agreement, determining procedures and guidelines for the transparency regime, the information required in communicating INDCs, and the processes to take stock and raise ambition, facilitate implementation, and promote compliance. The CMA1 must also make decisions on procedural, institutional, and administrative matters. A key question hovering over CMA1 is that of inclusivity, i.e., how will CMA1 consider the input of countries that have not yet joined the Agreement but have considerable interests at stake?

The success and extent to which the Agreement is enforced after the Administration depends on the outcome of the 2016 presidential election as well as proceedings in Marrakech. We will continue to monitor and report on legal, policy, and industry developments driven by the enforcement of the Agreement.

NOTES:

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[12] Doug Vine, Achieving the United States' Intended Nationally Determined Contribution, Center for Climate and Energy Solutions (July 2016), http://www.c2es.org/docUploads/achieving-us-indc.pdf; *see also* U.S. Cover Note INDC and Accompanying Information.

[13] Carole E. Lee & William Mauldin, U.S., China Agree on Implementing Paris Climate-Change Pact, Wall St. J. (Sept. 3, 2016), http://www.wsj.com/articles/u-s-china-agree-on-implementing-paris-climate-change-pact-1472896645.

[14] The Senate's Role in Treaties, United States Senate,http://www.senate.gov/artandhistory/history/common/briefing/Treaties.htm (last visited Oct. 12, 2016); *see also* Treaty vs. Executive Agreement, U.S. Department of State,http://www.state.gov/s/l/treaty/faqs/70133.htm (last visited Oct. 12, 2016).

[15] Karoun Demirjian & Steven Mufson, Trick or Treat? The legal question hanging over the Paris climate change conference, The Washington Post (Nov. 30, 2016), https://www.washingtonpost.com/news/powerpost/wp/2015/11/30/trick-or-treaty-the-legal-question-hanging-over-the-paris-climate-change-conference/.

[16] The near final draft of the agreement included a phrase that read "developed country Parties shall continue taking the lead by undertaking economy-wide absolute emissions targets." "Shall" was changed to "should" for the final draft. *See* http://www.eenews.net/climatewire/2015/12/14/stories/1060029452.

[17] *See* S.Res.290, 114th Cong. (2015), A resolution expressing the sense of the Senate that any protocol to, or other agreement regarding, the United Nations Framework Convention on Climate Change of 1992 negotiated at the 2015 United Nations Climate Change Conference in Paris will be considered a treaty requiring the advice and consent of the Senate, https://www.congress.gov/bill/114th-congress/senate-resolution/290/actions.

[18] The Constitution provides that 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." U.S. Const. art. II, § 2.

[19] Steven Groves, The Paris Agreement Is a Treaty and Should Be Submitted to the Senate, The Heritage Foundation (Mar. 15, 2016), http://www.heritage.org/research/reports/2016/03/the-paris-agreement-is-a-treaty-and-should-be-submitted-to-the-senate#_ftn40.

[20] *See, e.g.*, Paris Agreement, Article 4, ¶ 2, Dec. 12, 2015 ("Each Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve.").

[21] *See* Paris Agreement, Article 28, Dec. 12, 2015.

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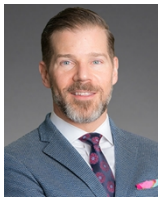
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[26] Hillary Clinton 2016 Press Release, Hillary Clinton Statement on the Paris Climate Change Agreement (Dec. 12, 2015), https://www.hillaryclinton.com/briefing/statements/2015/12/12/paris-climate-change-agreement/.

[27] Chris Mooney & Brady Dennis, The Paris climate agreement is entering into force. Now comes the hard part., The Washington Post (Oct. 4, 2016), https://www.washingtonpost.com/news/energy-environment/wp/2016/10/04/the-paris-climate-agreement-is-entering-into-force-now-comes-the-hard-part/?utm_term=.463227359aa1.

[28] Eliza Northrop et. al., Insider: CMA1, the first meeting under the Paris Agreement -- Why it's significant and how it could happen at COP 22, World Resources Institute (Oct. 3, 2016), http://www.wri.org/blog/2016/10/insider-cma1-first-meeting-under-paris-agreement-why-its-significant-and-how-it-could.

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