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International Climate Change Negotiations: What to Expect in Paris, December 2015

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Summary

The Conference of the Parties (COP) to the *United Nations Framework Convention on Climate Change* (UNFCCC) convenes for the 21st time (COP21) in Paris, France, from November 29 to December 11, 2015. The United States ratified the UNFCCC in 1992. Accordingly, the United States and the other 195 UNFCCC Parties already have legally binding but qualitative obligations under the treaty. COP21 intends to finalize an agreement under the UNFCCC to address climate change from 2020 on. A major focus is to lay out a path toward stabilizing greenhouse gas (GHG) concentrations in the atmosphere to avoid a 2° Celsius (3.6°F) increase in global temperature. The expected agreement would replace the Kyoto Protocol, to which the United States is *not* a Party. The Kyoto Protocol contains obligations for a limited set of the highest income countries to the year 2020.

This report identifies critical issues regarding (1) the expected Paris Agreement and (2) a Decision that would give effect to the Agreement. The Congressional Research Service (CRS) draws on the draft negotiating texts, publicly available reports, and commentaries to suggest likely outcomes. These are not predictions. While many stakeholders are optimistic that agreement will be reached, the conclusions are far from certain.

There are many issues under negotiation. The main issues include (with key terms italicized) the following:

- Which provisions will be *legally binding*, and on which Parties?
- Will responsibilities be *differentiated* among Parties with different circumstances and capacities? Will all Parties agree to modify the existing bifurcation into Annex I and developing country Parties? Is resolution possible if the Agreement does not ensure differentiated but efficacious participation of all Parties?
- Will a *durable* Agreement, intended to provide a multi-decade framework, include binding processes for all Parties to ensure *progression* toward the long-term UNFCCC objective?
- Might greater priority be given to *adaptation to climate change*, particularly with regard to financing and capacity-building?
- Will Parties find common ground on *Means of Implementation* (MOI), including assistance in financing, capacity building, and access to technologies?
- Will all Parties accept a common *transparency* framework with international *reviews* of national performance and *consultations* to address noncompliance?
- Would Parties with historically high contributions to current GHG concentrations agree to address *loss and damage* from climate change, or would Parties that feel most vulnerable to climate change accept an agreement without it?
- Will an agreement set long-term goals to avoid future temperature increases of 2° Celsius (3.6°F) or lower, or to impose deadlines to achieve *decarbonization* of economies?

Legal form and force: A new agreement could be internationally legally binding but not *add* legally binding obligations for the United States. If it does not, a new agreement may constitute an executive agreement that may not require the advice and consent of the Senate under the Constitution. Some in Congress, however, suggest that an executive agreement could be an "end run" or violate the treaty clause of the Constitution.

Financing: Financing beyond 2020 remains a crucial issue for the Paris deal. Some Parties seek to make financing pledges legally binding; scale up amounts on a timetable; restrict contributors to public funds from developed country Parties, and pay for *loss and damage* in developing countries. The United States and many current donor countries oppose proposals to pay for loss and damage.

Worldwide Participation: Very broad participation has already been achieved by the negotiating process. While only a few Annex I Parties of the 1992 UNFCCC took on specific obligations to produce national plans to mitigate their GHG emissions, 174 Parties to the UNFCCC—almost 90%—voluntarily submitted *Intended Nationally Determined Contributions* (INDCs) prior to the Paris conference, almost all containing pledges to limit or reduce their GHG emissions.

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National delegations from more than 190 countries and the European Union will gather in Paris, France, on November 29,[1] 2015, to try to negotiate an agreement to address climate change. They have set for themselves a deadline of December 11 to adopt "an agreed outcome with legal force under the Convention applicable to all Parties." While many are optimistic about reaching an accord, strong disagreements over the legal form and content of the outcome remain. A climate change deal in Paris is not assured.

This report identifies the critical issues and major provisions under consideration for the Paris negotiations. The Congressional Research Service (CRS) has drawn on the draft texts of an agreement and a decision under negotiation, and publicly available reports and views to provide a current sense of what may be likely outcomes. These are not predictions. While many stakeholders are optimistic that an agreement will be reached, the nature of the expected agreement and the provisions within it are far from certain. Several delegations hold strenuously to opposing positions that may not be bridged through negotiations. Particularly contentious are issues regarding whether pledges to reduce greenhouse gas (GHG) emissions should be quantified and legally binding, whether financial assistance should be quantified and legally binding, and whether any obligations regarding loss and damage should be included in the accord. These issues are substantive and have complicated international climate negotiations for over two decades. The prospects for reaching agreement on them are discussed later in this report. Further, in light of current events, a brief section on security issues in France appears at the end of the report.

Existing Obligations under the UNFCCC

All Parties to the 1992 United Nations Framework Convention on Climate Change (UNFCCC),[2] including the United States,[3] have a host of common obligations under the treaty. These include to

- inventory, report, and control their human-related GHG emissions, including from land use;
- cooperate in preparing to adapt to climate change;
- seek to mobilize financial resources; and,
- through the Conference of the Parties (COP), assess and review the effective implementation of the Convention, including the commitments therein.

As a framework convention, this treaty provides the structure for collaboration and evolution of efforts over decades, as well as the first qualitative step in that collaboration. The UNFCCC does not, however, include quantitative and enforceable objectives and commitments.[4]

[1] The Secretariat announced that the negotiations will begin a day earlier than scheduled, now beginning on November 29, to provide more time to address the numerous unresolved issues.

[2] United Nations Framework Convention on Climate Change (UNFCCC), March 21, 1994, 1771 U.N.T.S. 107; United Nations, *Treaty Series*, vol. 1771, p. 107; and depositary notifications C.N.148.1993. As of November 1, 2015, there were 196 Parties to the UNFCCC.

[3] President George H.W. Bush transmitted the signed treaty to the Senate for its advice and consent in President George H.W. Bush, Letter to the Senate of the United States, 138 *Congressional Record* 23902 (September 8, 1992). The U.S. Senate gave its advice and consent to ratification in Framework Convention on Climate Change, 138 *Congressional Record* 33527 (October 7, 1992). See also S. Treaty Doc. 102-38 (1992); S. Exec. Rept. 102-55. President Bush signed the instrument of ratification and submitted it to the United Nations on October 13, 1992. Depositary notification C.N.148.1993.

[4] The commitment by industrialized Parties to prepare national action plans aiming to reduce GHG emissions to 1990

The overall objective of the UNFCCC (as stated in Article 2 of the treaty) is to stabilize GHG concentrations in the atmosphere at a level that would prevent dangerous human-induced interference with the Earth's climate system. While further articulation of the purpose of an agreement is expected in the negotiations at the 21st meeting of the Conference of the Parties (COP21) in Paris, most Parties understand the work of the COP to be identifying next steps to bring their GHG emission trajectories more closely in line with meeting the Article 2 objective of the UNFCCC.

A Key Challenge: Differentiation Among Parties

Two principles in the UNFCCC are that (1) Parties should act "on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities" (CBD) and (2) that developed country Parties should take the lead in combating climate change.

Thus, the treaty bifurcated Parties into two broad categories: (1) the 35 highest-income countries, which were listed in Annex I (Annex I Parties) and accepted more specific commitments regarding national plans, reporting, and assisting low-income countries; and (2) all other Parties—the "developing countries" or non-Annex I Parties. Because emissions come from all countries, only limitations—then reductions—by all major emitters can stabilize the rising GHG concentrations in the atmosphere. The UNFCCC anticipated that the Annex I Parties would take the first, marked steps in abating GHG emissions and that the non-Annex I Parties would follow soon thereafter. By 1995, however, a position of "no new commitments for developing countries" from some leading non-Annex I Parties effectively blocked participation in quantitative mitigation commitments even by willing emerging economies. Many stakeholders believe that this bifurcation of commitments strongly limits the potential effectiveness of any agreement in tackling global emissions.

A turning point occurred in the 2009 Copenhagen COP, when the non-binding Copenhagen Accord invited GHG mitigation pledges from all Parties, albeit differently described. The broad participation of more than 174 Parties (as of November 15, 2015) in submitting nationally determined pledges of action to contribute to the Paris agreement(s) demonstrates this change in trajectory. How the Paris negotiations embody this broad continuum of pledges in legal forms remains one of the more important—albeit controversial—questions regarding the outcomes.

The Mandate for a December 2015 Agreement

At COP17 in December 2011, Parties to the UNFCCC adopted the Durban Platform for Enhanced Action, which launched a new round of negotiations aimed at developing

> a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties … no later than 2015 in order to adopt this protocol, another legal instrument or an agreed outcome with legal force at the twenty-first session of the Conference of the Parties and for it to come into effect and be implemented from 2020.[5]

Since that time, the negotiations have proceeded under what is called Workstream 2 of the Ad Hoc Working Group on the Durban Platform for Enhanced Action (ADP). Their efforts to date have produced the draft text of an agreement and a decision by the Conference of the Parties intended for adoption at COP21.[6]

levels is measurable, but no effective penalties or mechanisms were established to address any noncompliance with obligations.

[5] UNFCCC, *Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action*, UNFCCC Decision 1/CP.17, December 11, 2011, paragraphs 2 and 4. UN Doc. FCCC/CP/2011/9/Add.1.

[6] An advance, unedited version of the negotiating text, as of October 23, 2015, is available at https://unfccc.int/files/bodies/application/pdf/ws1and2@2330.pdf.

In addition, more than 174 Parties to the UNFCCC—almost 90%—voluntarily submitted *Intended Nationally Determined Contributions* (INDCs) prior to the Paris conference, with almost all containing pledges to limit or reduce their GHG emissions.[7] Many specify policies and measures already enacted or planned to achieve their INDCs.[8] Many also include intentions to adapt to expected climate change, and many seek assistance in the way of financing, technology cooperation, or support to build technical and governance capacities to meet their pledges.

What Is Likely in an Expected Agreement and Decision

If the Paris negotiations succeed in resolving the major disputes, they are likely to yield at least two agreements: an Agreement (hereinafter capitalized)—which many expect to be legally binding; and a Decision (hereinafter capitalized) by the COP that would adopt the Agreement under the UNFCCC and include provisions intended to "give effect to the Agreement." The Decision would lay out follow-up processes for the Parties, tasks for the Secretariat, and possibly include related provisions that could be legally binding under the Convention.[9] The Decision may also identify issues not resolved at COP21 that should be decided by the Parties in 2016 and beyond.

Most Parties have indicated an intention to negotiate a legally binding Agreement; however, their willingness to include specific provisions that legally bind them to substantive obligations is less clear. For example, the UNFCCC already contains many legally binding obligations for all Parties;[10] however, the United States delegation may oppose an Agreement that would establish new substantive obligations on the United States, such as making the GHG emission reduction in the U.S. INDC legally binding. Likewise, there are a number of Parties currently treated as developing countries (because they are not listed in Annex I of the Convention) that have submitted INDCs conditional on receiving financial assistance to achieve their pledges. These countries oppose any provisions that would make such contributions legally binding under the Agreement without these conditions. Thus, even a legally binding Agreement is likely to include provisions that are exhortatory ("should"), not binding ("shall").

Very broad participation has already been achieved by the negotiating process. For example, while only a few Annex I Parties of the 1992 UNFCCC took on specific obligations to produce national plans to mitigate their GHG emissions (e.g., under the Kyoto Protocol), already a large majority of Parties to the UNFCCC have submitted INDCs in preparation for the COP21. Many, if not most, Parties may abide by their pledges even if they are not legally enforceable. China's chief negotiator stated on November 19 that "China will ensure that the INDC targets will be accomplished in whatever circumstances. The Chinese government and the Chinese people will

[7] See CRS In Focus IF10239, *President Obama Pledges Greenhouse Gas Reduction Targets as Contribution to 2015 Global Climate Change Deal*, by Jane A. Leggett; CRS Report R41919, *China's Greenhouse Gas Emissions and Mitigation Policies*, by Jane A. Leggett; CRS In Focus IF10296, *New Climate Change Joint Announcement by China and the United States*, by Jane A. Leggett; and CRS Report R44092, *Greenhouse Gas Pledges by Parties to the United Nations Framework Convention on Climate Change*, by Jane A. Leggett.

[8] See CRS Report R44092, *Greenhouse Gas Pledges by Parties to the United Nations Framework Convention on Climate Change*, by Jane A. Leggett

[9] COP21 will almost certainly adopt additional decisions in Paris pertaining to other business under the Convention.

[10] See CRS Report R40001, *A U.S.-Centric Chronology of the United Nations Framework Convention on Climate Change*, by Jane A. Leggett.

abide by our promises."[11] Others, such as Mexico, the European Union, and the United States have already enacted much of their programs into law—though the United States faces uncertainty while the Clean Power Plan, a major regulation to reduce emissions from power plants, is being challenged in litigation.[12]

While pledges to provide financial assistance to low-income countries had heretofore been restricted to the highest-income "developed country" Parties, the recent negotiations have sparked countries across the economic spectrum to announce their intentions to contribute to global climate finance. For example, China recently announced a pledge to provide $3.1 billion in new financing to developing countries. Further, countries such as Chile, Colombia, Indonesia, Mexico, Mongolia, and Peru have pledged financial contributions to the Green Climate Fund.[13] Nonetheless, as discussed below, resolving how to embody "differentiation" in a new Agreement may be one of the most challenging issues in Paris. (See text box above.)

The expected Agreement is likely to require all Parties to communicate *Nationally Determined Contributions* (or Commitments) (NDCs) that include self-differentiated pledges to mitigate their GHG emissions according to guidelines clearly defined by the *COP meeting as the Parties to the Agreement* (the CMA). Flexibility in the schedule and content of these communications may be extended to countries with the lowest capacity. A requirement to submit communications is not a foregone conclusion, however, as some developing country Parties continue to oppose such an obligation for themselves.

Many observers expect the Agreement to include some exhortations or requirements for Parties to include *progression*, or at least not allow "backsliding," on the GHG mitigation in their NDCs. There may be exceptions, particularly for developing countries, in the event of natural disasters or other catastrophes that interrupt their efforts.

Adaptation is very likely to take a higher profile in the Paris Agreement in comparison to past accords, and possibly will be a required component of NDCs. The most likely adaptation options are processes that enhance cooperation, including sharing of information and building of technical and governance capacities. The final texts may raise the priority of adaptation for available funds. Specification of amounts of financing, or *scaling up* levels of financing, seems unlikely, as it is likely to be particularly contentious within the overall financing debate (discussed below).

The Agreement seems likely, at a minimum, to reiterate existing obligations (under the UNFCCC) for financing, technology cooperation, and capacity-building. It may recall the existing collective pledge to aim to mobilize $100 billion annually by 2020 to assist developing country Parties.[14] Less likely options would set that amount as a floor for the post-2020 period, with other options implying mandatory increases in perpetuity from 2020.

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[11] Xinhua. "China Expects 'Ambitious, Legal-Binding Deal' at Paris Climate confernece|Politics|chinadaily.com.cn." *China Daily USA*, November 19, 2015, online edition. http://usa.chinadaily.com.cn/china/2015-11/19/content_22485839.htm.

[12] See CRS Report R44145, *EPA's Clean Power Plan: Highlights of the Final Rule*, by Jonathan L. Ramseur and James E. McCarthy.

[13] See Green Climate Fund, "Pledge Tracker," at http://news.gcfund.org/wp-content/uploads/2015/04/GCF_contributions_2015_apr_30.pdf.

[14] See CRS Report R41889, *International Climate Change Financing: The Green Climate Fund (GCF)*, by Richard K. Lattanzio.

Calls for guidelines for (transparent) reporting and review of financing and other means to assist Parties to meet their obligations could make it into a final Agreement. Alternatively, they could be included in the Decision. Parties seeking to strengthen existing guidelines under the Convention to improve transparency of non-Annex I Parties' GHG mitigation policies and performance may need to trade them off with accepting greater transparency for financing. Any new guidelines for financial arrangements are likely, however, to include balance between reporting from donors and recipients.

An Agreement would likely include review and resubmittal of NDCs through the life of the Agreement to provide *durability* over time.[15] It is less certain that accord would be reached on a periodicity of every five years. Greater flexibility and assistance would likely be given to the Least Developed Country Parties (LDCs).

A *Global Stocktake* would periodically—possibly every five years—review the performance of Parties in aggregate against the objective of the UNFCCC or a long-term goal (e.g., avoiding an increase of global mean temperature of 2ºC or 1.5ºC above the pre-industrial level) if set in the Agreement. It would presumably review the NDCs as well as the aggregate performance in terms of GHG emissions, adaptation, and assistance given or received (the "means of implementation" or MOI).

Key Challenges to Adoption of an Agreement

Parties to Watch

There remain many strongly held differences in "must-have" positions among negotiating Parties. Some positions may be so critical to a Party that the Party would be willing to block a consensus to adopt an Agreement or Decision.[16] Countries to watch in this regard include (but are not limited to) the United States, India, Saudi Arabia, South Africa, the African Group of countries, and/or the Group of 77 and China.[17] Many views remain strenuously argued and diametrically opposed, as described below.

France, as host of the talks, is determined to conclude a legally binding Agreement in Paris. Its determination may influence the European Union as well, potentially inducing compromise on their highest-priority positions.

[15] The Kyoto Protocol included quantified targets for an initial commitment period from 2008-2012. Targets or reductions beyond 2012 could only be extended by negotiating new commitment periods. Moreover, there were no automatic mechanisms for Parties to "graduate" into commitments as their capacities increased. Durability in the context of the Paris agreement would likely create automatic procedures for commitments to be sustained and possibly strengthened without renegotiating the entire deal. Many developing countries seek such durability in provision of financial and other assistance, without provisions for countries to graduate from being recipients of assistance as their capacities develop.

[16] Because the COP has never reached consensus on voting rules, all decisions must be made by consensus. This means any single Party can block an agreement. For more information, see CRS Report R40001, *A U.S.-Centric Chronology of the United Nations Framework Convention on Climate Change*, by Jane A. Leggett. A Party, rather than preventing adoption of an agreement, could abstain and then not accede to the agreement.

[17] The Group of 77 (G77) was established in 1964 as a group of developing countries as a "the means for the countries of the South to articulate and promote their collective economic interests and enhance their joint negotiating capacity on all major international economic issues within the United Nations system, and promote South-South cooperation for development." (http://www.G77.org) Membership is now at 134. China is not a member of the G77 but frequently allies itself with G77 positions in negotiations.

Issues on Which Resolution May Not Be Reached

Divisions are so great and positions so strongly held on some issues that resolution may be elusive into the final hours of the Paris sessions, or beyond. The most difficult issues include

- whether the agreement perpetuates the UNFCCC's principle of *differentiation* among Parties as a bifurcation into "developed country Parties" and "developing country Parties," or permits a self-determined continuum that evolves through the Agreement. Placeholders to define "developed country Parties" and "developing country Parties" appear in the Definitions article of the draft as well;
- whether quantified pledges for GHG emission mitigation and/or financing are legally binding for all Parties, only developed country Parties, or no Parties;
- whether to further characterize, in the Agreement, the UNFCCC's objective as avoidance of a temperature goal (2ºC, 1.5ºC, or well below either), or to "decarbonize" economies, and whether the responsibilities to achieve any long-term goal might be allocated to Parties individually;
- whether financing heretofore pledged collectively by most of the highest-income Parties, to aim to mobilize $100 billion annually by 2020, should be included in the Agreement, quantified, required to continually increase over time, be prescribed by formula, or be limited to "developed country Parties" rather than all Parties "in a position to do so." Some propose a major break from the UNFCCC's commitment to support "agreed incremental costs" to help developing countries meet their substantive obligations, by adding options to meet all the country-specified needs of all developing countries. Some proposals would alter the terms of pledged financing to require it to come entirely, or in large part, from public funds (i.e., as opposed to private sector or alternative methods of financing);
- whether a transparency framework would apply only to developed country Parties or to all Parties, based on a criterion (e.g., regarding a Party's capacity), immediately or at a designated time in the future. Some Parties assert that international reviews violate national sovereignty, while others point out that those countries have already acceded to more rigorous reviews (for example, by the International Trade Organization or the International Monetary Fund);
- whether the Agreement will contain principles or provisions to address "loss and damage" beyond the existing processes of the Warsaw Mechanism.[18] Parties that perceive themselves as vulnerable to climate change seek provisions to provide them with funds for "loss and damage" that they may suffer even with adaptation efforts. Some Parties may hold out for commitments to providing funds, such as a portion of the Green Climate Fund, and means to relocate populations displaced by climate change. More likely options would explore and support cooperation on risk management and risk transfer (i.e., through insurance);
- additional challenges including the provision for technology cooperation and transfer; support for sustainable development policies; methods to facilitate compliance; strategies to control international emissions (e.g., from international

[18] The Warsaw International Mechanism on Loss and Damage ("Warsaw Mechanism") was agreed in 2013 at COP19, in Decision 3/CP.19. It is procedural in nature.

aviation and shipping); and the role that market-based mechanisms and the private sector would play in Parties meeting their NDCs.

Challenging Issues Less Likely to Impede Agreement

- Technology cooperation or transfer: Existing processes to encourage technology development and diffusion are likely to continue, though some Parties have proposed options for developing countries to receive finances for research and development, or intellectual property rights, at no cost. Others oppose such proposals.
- Facilitating compliance with the Agreement: The Kyoto Protocol included stronger mechanisms to assess and encourage compliance with its binding GHG targets; the Agreement may include provisions that build on those hard-negotiated provisions. The most likely options in the draft include advice and assistance to Parties that need it, or preparations of "statements of concern," to less likely processes that could result in a "declaration of non-compliance" to requirements that a Party prepare a "compliance action plan."
- GHG emissions from international transport: The European Union and others requested reinsertion in the draft a proposal to address GHG emissions from international aviation and shipping. The proposal calls for a process, mandatory or exhortatory, to pursue "concrete measures" to limit or reduce these emissions. Currently, Parties are required to inventory and report these emissions, but the emissions were not included in the mitigation targets in the Kyoto Protocol. Rather, the International Civil Aviation Organization and the International Maritime Organization were tasked with addressing those emissions.
- Market- and non-market mechanisms: Most of the Annex I Parties seek to permit market-based mechanisms (emissions trading or pricing) as a means to help meet their GHG mitigation pledges. Other Parties oppose market-based mechanisms, but propose non-market approaches, the mechanism for sustainable development mentioned above, or other cooperative approaches. Some Parties expressed concern about some or all of these approaches because of concerns about reliable accounting and accountability for emission reductions.

Relatively Uncontroversial Provisions

Notwithstanding the disagreements above, a number of items appear agreed upon in the draft texts, including most of the legal and institutional arrangements. For example, the Agreement would establish the Conference of the Parties of the UNFCCC as its "supreme body." It will likely be referred to as the CMA when it is the *Conference of the Parties meeting as the meeting of the Parties to the Agreement*. The Secretariat, existing subsidiary bodies of the Convention, and additional legal and institutional provisions are largely resolved in the draft, though some are yet to be agreed upon—particularly whether there will be constraints placed on becoming a party to the Agreement or on voting rights, based on compliance with its provisions.

Much of the information that must be provided by Parties in their NDCs is already agreed upon, with few exceptions, either in an existing decision of the COP or in unbracketed text in the Decision. Its placement in the Agreement or the Decision remains under discussion.

There remains a placeholder in the draft regarding whether a Party may place reservations on its accession to the Agreement. This placeholder is conceivably a flexibility that could aid reaching accord on issues that may not be resolvable in the December timeframe. Withdrawal would be allowed, though the terms remain under discussion.

Is Time Running Out?

Many observers have noted the limited number of days until the official deadline for reaching agreement. Despite efforts to slim down the draft texts in the October 2015 negotiating COP21 session, the draft Agreement text grew from about 20 to more than 50 pages. Many textual options are unlikely to be resolved until late in the scheduled session, if at all. Even a number of provisions in the draft Agreement and Decision that may not be as controversial would still depend on resolution of more difficult disagreements. Assuming many controversies remain until late in the session, this leaves a few options for the Parties: (1) to slim down what is in the Agreement and possibly the Decision, (2) to extend the Paris sessions, and/or (3) to postpone many provisions to later meetings. If the objective is to stabilize GHG concentrations in the atmosphere, one may conclude that it will take much longer than December 2015 to judge the degree to which the Paris negotiations may lead to "success."

Measuring Success; and If an Agreement Isn't Reached….

Many people's expectations before the 2009 COP in Copenhagen were raised to unrealistic heights. When the COP was unable to adopt a legally binding decision, many concluded that the Copenhagen meeting was a failure. Others who opposed international efforts to address climate change viewed Copenhagen's outcome as fortuitous. Others note advances arguably achieved in the Copenhagen Accord and its follow-up actions.[19]

Once again, the expectations of many to adopt a legally binding decision during the upcoming Paris talks have been raised. What may be the consequences if Parties are unable to adopt an Agreement at COP21?

On the one hand, most of the largest emitters do not appear likely to roll back their GHG reduction intentions if there were no legally binding outcome in Paris. As noted earlier, China's chief negotiator stated in November 2015 that "China will, under any circumstances, fulfill its INDC pledge… Once we make a promise and set a target, we will carry it through no matter what challenges we face."[20] Mexico and South Korea have set their programs into law for the most part, as have a number of other emerging economies.

The absence of an agreement may not have an effect on other Parties' pledges, as observers have noted that some pledges do not go beyond business-as-usual trajectories. Russia's INDC is consistent with its economy-oriented efforts to improve energy and industrial efficiency and with its growing forests. Some analysts conclude that China may peak its emissions earlier than its

[19] See a summary in the Copenhagen section in CRS Report R40001, *A U.S.-Centric Chronology of the United Nations Framework Convention on Climate Change*, by Jane A. Leggett, as well as Fiona Harvey, "What Has Changed Since Climate Talks in Copenhagen?" Climate Central, August 1, 2015, http://www.climatecentral.org/news/what-has-changed-since-copenhagen-19292, and others.

[20] Xinhua, "China Expects 'Ambitious, Legal-Binding Deal' at Paris Climate confernece|Politics|chinadaily.com.cn." *China Daily USA*, November 19, 2015, online edition, http://usa.chinadaily.com.cn/china/2015-11/19/content_22485839.htm.

target of 2030 because of its efforts to reform the economy; ensure energy security; and reduce pollution, traffic, and water demand. Others suggest a similar situation for India.

On the other hand, some Parties, including the United States, have yet to put policies in place that will fully achieve their INDCs. Further, some Parties have indicated that they would condition achieving their INDCs on adequate international financing; the financing they anticipate may not be forthcoming without an Agreement, though an Agreement may not include all the financing they anticipate, either.

Finances reportedly available to assist low-income Parties were $62 billion in 2014 under the non-binding 2010 Cancun pledge, though not (yet) the $100 billion pledged by 2020.[21] Most of those funds are coming from philanthropic and other private sources, not dependent on public funds. The funds are well below what some say are needed and some Parties are proposing in the Paris negotiations. It is unclear whether reaching a binding agreement—or not—in Paris would substantially affect financial flows over time. Market-based and cooperative mechanisms may emerge in the context of quantified pledges made that further increase available financing.

One impact, if no binding agreement were reached in Paris, might be on advocates of international accords as a vehicle to promote cooperative climate change policies and of treaties under the United Nations more generally. Disillusionment with the UNFCCC process may increase. This could shift efforts to other venues, including sub-national governments, bilateral agreements, and pressure on private companies. Such shifts may yield faster results, and likely more diverse and fragmented ones.

Any assessment that Paris may "fail" is significantly premised on the idea that outcomes are driven by the international process, rather than by nations themselves determining their own policies and actions; or that the United Nations negotiations can drive governments to go beyond what domestic impetus and support provide. Numerous analyses, however, have argued that this is not the case.[22] For example, the Kyoto Protocol may have extracted binding commitments from several countries that were beyond what could be achieved in domestic policies and politics. But those commitments were not accompanied in all cases with GHG emission reduction outcomes.

A significant component of the arrangements in Paris is inclusion of civil society and non-state entities in the events. Associated events will highlight efforts of indigenous communities, youth, women, local governments, states, and provinces to address their GHG emissions and to adapt to climate change. Programs centered on private sector initiatives are also scheduled, and the French government is striving to compile and sustain a focal point for sharing information on their performance. The Agreement itself, for the first time, contains draft text explicitly acknowledging and inviting broad participation in achieving the objective of the UNFCCC. Many observers have noted the greater inclusiveness of the process.

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[21] OECD, "Climate Finance in 2013-14 and the USD 100 Billion Goal – OECD," Paris: Organisation for Economic Cooperation and Development (OECD) in collaboration with the Climate Policy Initiative, October 2015. http://www.oecd.org/env/cc/oecd-cpi-climate-finance-report.htm.

[22] See, for example, Emily O'Brien and Richard Gowan, "What Makes International Agreements Work: Defining Factors for Success," (London: Overseas Development Institute (ODI), October 2012), http://www.odi.org/publications/6442-makes-international-agreements-work-defining-factors-success; Espen Bratberg, Sigve Tjøtta, and Torgeir Øines, "Do Voluntary International Environmental Agreements Work?" *Journal of Environmental Economics and Management* 50, no. 3 (November 2005): 583–97. doi:10.1016/j.jeem.2005.03.002, and Robert D. Putnam, "Diplomacy and Domestic Politics: The Logic of Two-Level Games," *International Organization* 42, no. 3 (Summer 1988): 427–60.

The Role of Congress in Approving a New Climate Agreement[23]

The UNFCCC is legally binding on the United States—the United States ratified the agreement and it entered into force in 1994. Although the UNFCCC does not require the United States to meet any specific GHG emission reduction targets, the subsidiary agreement, currently being negotiated, potentially could impose binding quantitative emission reductions on parties to that agreement. On the other hand, it is also possible that the new subsidiary agreement would not impose any new legal obligations on the United States, but merely provide for political support or aspirational goals.

Whether the new subsidiary agreement would require congressional action depends on the nature and content of the agreement. If the agreement were to impose new legal obligations on the United States concerning emission reduction targets, then congressional action would likely be required for that agreement to have legal force in the United States.[24] During Senate deliberations on the UNFCCC in 1992, George H.W. Bush Administration officials testified that, in the view of the Administration, the degree of congressional involvement in U.S. adoption of any future protocols to the UNFCCC would depend on the nature of those agreements.[25] The Administration also declared that any future agreement containing specific GHG emission targets likely would need to take the form of a treaty and be submitted to the Senate for advice and consent to ratification, stating:

> [T]reatment of any given protocol would depend on its subject matter.... If a protocol [containing targets and timetables] were negotiated and adopted, and the United States wished to become a party, we would expect such a protocol to be submitted to the Senate.... We would expect amendments [to the Convention] to be submitted to the Senate [for its advice and consent]. However, should there be an amendment which we did not believe would require Senate advice and consent, we would consult with the Senate prior to such a determination.[26]

The George H.W. Bush Administration noted, as an example, that changes to the lists of parties included in Annex I and Annex II of the UNFCCC would likely not be submitted to the Senate: "Normally the Senate does not approve changes to the parties in the agreement."[27]

Correspondingly, the Senate Committee on Foreign Relations wrote in its report on the treaty:

> [A] decision by the Conference of the Parties to adopt targets and timetables would have to be submitted to the Senate for its advice and consent before the United States could deposit its instruments of ratification for such an agreement. The Committee notes further that a decision by the executive branch to reinterpret the Convention to apply legally

[23] This section was co-authored by CRS legislative attorneys Daniel T. Shedd and Michael John Garcia.

[24] For further discussion regarding situations when congressional or Senate action is required to give an international agreement domestic legal effect, see generally CRS Report RL32528, *International Law and Agreements: Their Effect upon U.S. Law*, by Michael John Garcia.

[25] Hearing on the U.N. Framework Convention on Climate Change Before the Senate Committee on Foreign Relations, 102d Cong., S. Hrg. 102-970, at 105 (1992).

[26] Ibid. at 105-106.

[27] Ibid. State Department regulations concerning the coordination and approval of international legal agreements, commonly referred to as the Circular 175 procedure, identify congressional preference and historical practice as important factors in determining whether an agreement should be submitted to the Senate for consideration as a treaty. 11 Foreign Affairs Manual chapter 720.

> binding targets and timetables for reducing emissions of greenhouse gases to the United States would alter the "shared understanding" of the Convention between the Senate and the executive branch and would therefore require the Senate's advice and consent.[28]

Currently, the UNFCCC does not require any specific (i.e., quantified and binding) reductions in GHG emissions. Therefore, it would appear that a new agreement that contains specific targets for GHG emission reduction would impose new obligations on the United States. The understanding of the Senate and the executive branch at the time of U.S. ratification of the UNFCCC, along with U.S. historical practice concerning the entering of major environmental agreements, supports the view that any new legally binding agreement requiring a *quantified* obligation of the United States to reduce GHG emissions would need to take the form of a treaty, ratified by the President with the advice and consent of the Senate.[29]

Parties to the UNFCCC could negotiate a subsidiary agreement that may not be legally binding. The United States regularly makes agreements with foreign entities that are not intended to be legally binding, either as a matter of international or domestic law. The executive branch has often entered into these agreements without seeking approval from Congress.[30] While adherence to such arrangements might carry significant moral or political weight with their participants, these non-legal arrangements do not have the effect of modifying participants' existing legal obligations under domestic statutes and international legal agreements. The primary means Congress uses to exercise oversight authority over the making of non-legally binding agreements is through its appropriations power or via other statutory enactments, by which it may limit or condition actions the United States may take in furtherance of the arrangement.

The United States' 2009 pledge to reduce GHG emissions to 17% below 2005 levels by 2020 as follow up to accordance with the Copenhagen Accord is not legally binding on the United States. The Obama Administration averred that it did not require congressional approval to make this non-legal pledge.

Security at the Paris Venues

A set of terrorist attacks in Paris on November 13, 2015, raised questions about the security of the planned Paris COP-related events. The government of France announced the negotiations will be held but, in a "difficult decision," it added

> The "Generations" venue will host throughout the Conference more than 300 events, discussions, and meetings. Public gatherings, in numerous events, are also anticipated

[28] S. Exec. Rept. 102-55, 102nd Cong., 2d Sess. (1992), at 14.

[29] Although it appears unlikely at this stage, should the Parties to the UNFCCC decide to amend the UNFCCC, instead of negotiating a new subsidiary agreement, such amendment would enter into force only for those Parties that deposit an instrument of acceptance and only after the amendment has been accepted by at least three-quarters of the Parties to the UNFCCC. UNFCCC art. 15.4. As a matter of historical practice, the Senate has considered amendments to ratified treaties to be subject to the same requirements as the original treaties, unless the treaty provides for modification in some other way. See Treaties and Other International Agreements: The Role of the United States Senate, A Study Prepared for the Senate Comm. on Foreign Relations 13-14 (Comm. Print 2001).

[30] See generally Robert E. Dalton, Asst. Legal Adviser for Treaty Affairs, *International Documents of a Non-Legally Binding Character*, State Department, Memorandum, March 18, 1994, http://www.state.gov/documents/organization/65728.pdf (discussing U.S. and international practice with respect to nonlegal, political agreements); Duncan B. Hollis and Joshua J. Newcomer, *"Political" Commitments and the Constitution*, 49 Va. J. Int'l L. 507 (2009) (discussing U.S. political commitments made to foreign States and the constitutional implications of the practice).

> throughout France. All the events will proceed, except school trips, at the conference site at Bourget.[31]

Officials stated that all programs in closed and secure spaces would continue. However, security measures will be strengthened.

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[31] Unofficial CRS translation of Communique de la Presidence de la COP21: Les evenenment de la societe civile au Bourget sont maintenus," http://www.cop21.gouv.fr/tous-les-evenements-de-la-societe-civile-sur-le-site-de-la-cop21-au-bourget-sont-maintenus/.

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