


The Paris Agreement

Putting the first universal climate change treaty in context

On December 12, 2015, 196 Parties¹ agreed to the terms of a Paris Agreement, a historic document aimed at limiting global warming to "well below 2°C". The Paris Agreement was negotiated under the 1992 United Nations Framework Convention on Climate Change (UNFCCC), and is expected to come into force from 2020, replacing the existing Kyoto Protocol under which developed countries have binding emission reduction targets. The Paris Agreement is all encompassing – with legal obligations on all countries – to report and account for their mitigation actions. While implementation of the Agreement will take some time, the Paris COP showcased the range of other climate change initiatives already occurring at a sub-national government level (states, provinces and cities), and non-government action, some of which have substantial implications for companies and other organizations within those jurisdictions. A copy of the Paris Decision (containing the Paris Agreement) is [available here](#), the terms of which we analyze in detail in this alert. Please contact a member of our Environmental Markets team for further information.

Baker & McKenzie has been a part of nearly all of the prior twenty UNFCCC Conferences of the Parties (COPs), but even before our team arrived in Paris for COP 21, we knew this would be a different COP – and not a repeat of the Copenhagen conference, at which the Parties failed to agree to a new climate treaty. Throughout the course of 2015 the French Government worked tirelessly to prepare for COP 21. French diplomats and politicians led efforts around the world with governments, business, non-government organizations and media to prepare the groundwork for a successful outcome. This included engaging many stakeholders who traditionally had not been involved in climate change issues through the Lima-Paris Action Agenda (discussed further below). Other governments also helped to build momentum prior to the COP through major bilateral announcements such as the [U.S.-China Joint Presidential Statement on Climate Change](#) and the [UK-China Joint Climate Change Statement](#).

¹ Comprising 195 countries and the European Union.



This preparatory work was further bolstered by the arrival of over 100 heads of state at the beginning of the COP – the largest single presence of such senior leadership at a COP – to kick-start the discussions. The mood in the hallways of the conference center at Le Bourget was energized, focused and upbeat at the start of the COP. The substantial involvement by civil society, non-governmental entities, state, provincial and city governments, and of private sector representatives was also unprecedented. This breadth of involvement - which is reflected in multiple provisions of the Agreement - meant that the two weeks of the COP was replete with significant governmental and business announcements coinciding with, but outside of, the formal negotiation process.

With respect to the negotiation of the Paris Agreement itself, the French Government masterfully steered the process. Interestingly, the negotiations utilized the high-level "indaba" negotiating approach whereby Parties stated their "red lines" or boundaries upfront, in an attempt to minimize disagreements over the final Paris Agreement and avoid any last minute "surprises". Given the historical divide between developed and developing countries, this approach - led by Foreign Minister Laurent Fabius – helped achieve compromise over several issues in the final days of negotiation. Ultimately, the Paris Agreement provides the framework for future global action on climate change in terms of both mitigation and adaptation across and sets out a strong pathway for future low carbon economic growth, finance and investment. In much the same way as the UNFCCC and the Kyoto Protocol laid the foundations for government reform, private sector investment and market activity on climate change, we think that the Paris Agreement will do the same but at a more transformative level. In this alert we put the Paris Agreement in context, both among previous international climate agreements and other non negotiated outcomes from the COP.

1 Overview of the Paris Agreement

The Paris Agreement is housed within the [Paris Decision](#), the formal decision of the COP adopting the Paris Agreement and mapping out a process towards the Agreement's formal entry into force. This Decision and the Paris Agreement contained within it are the culmination of over five years of negotiations within the UNFCCC process to develop a new agreement to endure beyond the Kyoto Protocol that scales up ambition by placing mitigation and adaptation obligations on all Parties. The Agreement follows on from the Kyoto Protocol and the political Copenhagen Accord and is a further evolution of international climate change law. As we discuss below, the Paris Agreement includes elements of, but also differs from, each previous international agreements. We cover the negotiating history of these agreements in section 19 of this alert.

2 The "Well Below 2°C" Mitigation Target and Nationally Determined Contributions (NDCs)

Perhaps one of the more surprising outcomes of the Paris Agreement is its level of ambition. The Paris Agreement sets an unambiguous goal to hold global warming to "well below 2°C" and to pursue efforts to limit the temperature increase to 1.5°C above preindustrial levels. While we were aware of calls by several low-lying states to include a 1.5°C target, we did not expect such a figure to be included in the text. Its inclusion speaks to the increased importance state Parties are now placing on climate change mitigation. To achieve this ambitious target, countries are to "peak"² and then reduce emissions "as soon as possible" to "achieve a balance between anthropogenic emissions by sources and removals by sinks" which absorb greenhouse gases in the second half of the century. Put differently, from as soon as possible after 2050, countries are to have net-zero emissions, using carbon sinks, such as forests, to offset any emissions they then produce.


The focus of the Agreement is on a process for achieving the well below 2°C target. Key to that process is the bottom-up submission by Parties of "nationally determined contributions" (NDCs). NDCs are high-level policy plans setting out what approach each country will take to reduce emissions and contribute to the global well-below 2°C goal. In the lead up to COP 21, Parties were called upon to submit their *intended* nationally determined contributions (INDCs) - interim NDCs, in effect, intended to help create momentum for the Agreement by showcasing how emission reductions would be possible.

Prior to COP 21 160 INDC submissions, covering 187 Parties (some Parties submitted joint INDCs), were made to the UNFCCC.³ The basis of setting and the actual emission reduction targets covered in these INDCs were all slightly different in approach, and so one of the key aspects of the Paris Agreement is some guidelines on what information the longer term NDCs are to include. Namely, information about: the reference point from which country's set their goals, time frames and/or periods for implementation of their target, the scope and coverage of their emission reduction plans, as well as assumptions and methodological approaches they will use in their NDCs.

This "bottom up" approach to mitigation through NDCs differs from the Kyoto Protocol's top down approach. Where Kyoto required an annexed list of developed countries to achieve emission reduction targets and was prescriptive at the international level in the approach that those countries could take to achieve that target, the Paris Agreement asks all countries (both developed and developing) to justify how they propose to contribute to the broader global

² Meaning, reaching their maximum emissions output.

³ The Paris Decision calls for those countries that did not submit INDCs prior to COP 21 to do so prior to the Paris Agreement coming into force in 2020.



emission reduction goal. With all countries defining their own measures through INDCs/NDCs, the Paris Agreement has created greater "buy-in" into the process.⁴

A potential challenge of the Agreement's "bottom up" structure is that countries could simply elect not to make sufficient domestic policy reform to achieve the global emissions reduction goal. Indeed the Paris Decision acknowledges that the INDCs submitted by Parties in the lead up to the Paris COP, "do not fall within least-cost 2°C scenarios". Thus the Paris Agreement requires that when countries submit their longer-term NDCs they ensure that the revised commitments reflect the "highest possible ambition". Each NDC is also to be revised every five years "with a view to enhancing its level of ambition".

The NDCs will also be made publically available, enabling civil society to review, analyze and hold country governments to account for those pledges. In addition, there will be a process of global stocktaking on progress towards the well-below 2°C goal every five years from 2023; a process designed to drive countries to increase the ambition of their NDCs. To set an ambitious tone to the start of the Agreement, the Paris Decision calls on Parties to participate in a "facilitative dialogue" in 2018, prior to the Agreement coming into force, in which all NDCs will be assessed against the well-below 2°C goal. See the timeline below.

⁴ While much of the commentary credits the Paris COP for this concept, it was actually developed following the Copenhagen COP.

Snapshot of INDCs Submitted Prior to COP 21

Total number of INDCs submitted	160 (covering 187 countries)
Percentage of global emissions covered	98.6 %
Key countries	Summary

USA

The United States intends to achieve an economy-wide target of reducing its greenhouse gas emissions by 26%-28% below its 2005 level in 2025 and to make best efforts to reduce its emissions by 28%.

Action already underway is expected to place the U.S. on the path to reduce emissions by 17% below 2005 levels by 2020. Actions to reduce emissions that are in process include the following: 1) Clean Power Plan addressing carbon from existing power plants and carbon pollution standards for new fossil fuel-fired power plants; 2) additional fuel economy standards; 3) addressing methane emissions from landfills and the oil and gas sector; 4) further reduction in High Global Warming Potential Hydro-fluorocarbons; and 5) additional appliance and building efficiency standards, including residential standards. The U.S. notes that, at the time of its INDC submission, it does not intend to rely on international markets to implement its 2025 target, although the states implementing the Clean Power Plan are expected to rely heavily on emissions trading to achieve the domestic reduction targets.

EU

The EU and its Member States are committed to a binding target of an at least 40% domestic reduction in greenhouse gas emissions by 2030 compared to 1990, to be fulfilled jointly, as set out in the conclusions by the European Council of October 2014.

CHINA

China's INDC mentions that its mitigation actions by 2030 will to:

- achieve the peaking of carbon dioxide emissions around 2030 and making best efforts to peak early;
- lower carbon dioxide emissions per unit of GDP by 60% to 65% from 2005 levels;
- increase the share of non-fossil fuels in primary energy consumption to around 20%; and
- increase the forest stock volume by around 4.5 billion cubic meters on the 2005 level.

AUSTRALIA

Australia's INDC says that it will implement an economy-wide target to reduce greenhouse gas emissions by 26 to 28 % below 2005 levels by 2030. The INDC mentions the Emissions Reduction Fund, a government financed fund which purchases emission reductions credits, and the Renewable Energy Target of 23% renewables by 2020.

JAPAN

Japan's INDC aims for a reduction of 26% by fiscal year 2030 compared to FY 2013 (25.4% reduction compared to FY 2005). These reductions are detailed as coming from the following sectors: industry, transportation, residential, commercial sectors, LULUCF and energy. The Japan INDC also contemplates the purchase of offsets through its Joint Crediting Mechanism.

INDIA

India's INDC is for the period 2021-2030, including to:

- reduce the emissions intensity of its GDP by 33 to 35% by 2030 from 2005 levels;
- achieve about 40% cumulative electric power installed capacity from non-fossil fuel based energy resources by 2030 with the help of transfer of technology and low cost international finance including from Green Climate Fund;
- create an additional carbon sink of 2.5 to 3 billion tones of CO₂ equivalent through additional forest and tree cover by 2030;
- better adapt to climate change by enhancing investments in development programs in sectors vulnerable to climate change, particularly agriculture, water resources, Himalayan region, coastal regions, health and disaster management;
- mobilize domestic and new and additional funds from developed countries to implement the above mitigation and adaptation actions in view of the resource required and the resource gap; and
- build capacities, create domestic framework and international architecture for quick diffusion of cutting edge climate technology in India and for joint collaborative R&D for such future technologies.

BRAZIL

Brazil intends to commit to reduce greenhouse gas emissions by 37% below 2005 levels by 2025 and 43% by 2030. The INDC proposes to achieve this through, among other things, achieving a 45 percent share of renewables in the energy mix by 2030. The INDC also indicates that Brazil aims to restore 12 million hectares of forest.

Link to all INDCs

<http://www4.unfccc.int/submissions/indc/Submission%20Pages/submissions.aspx>

3. Ensuring Transparency of Parties' NDCs

An important issue negotiated in the COP was the ability for Parties to compare progress to achieve NDCs in a consistent and transparent manner. To that end, the Paris Agreement includes a transparency framework that will be established by a future COP serving as the meeting of the Parties to the Paris Agreement (to be known as the CMA), which allows the Parties the ability to track progress towards the well-below 2°C target, drawing on some of the existing UNFCCC mechanisms (e.g. international assessments). Future CMA guidance will be developed to ensure measurement promotes environmental integrity, transparency, accuracy, completeness, comparability, and consistency and avoids double counting. The framework should include Parties providing a national inventory report on emissions and sources using IPCC-accepted methodology and information necessary to track progress on NDCs.

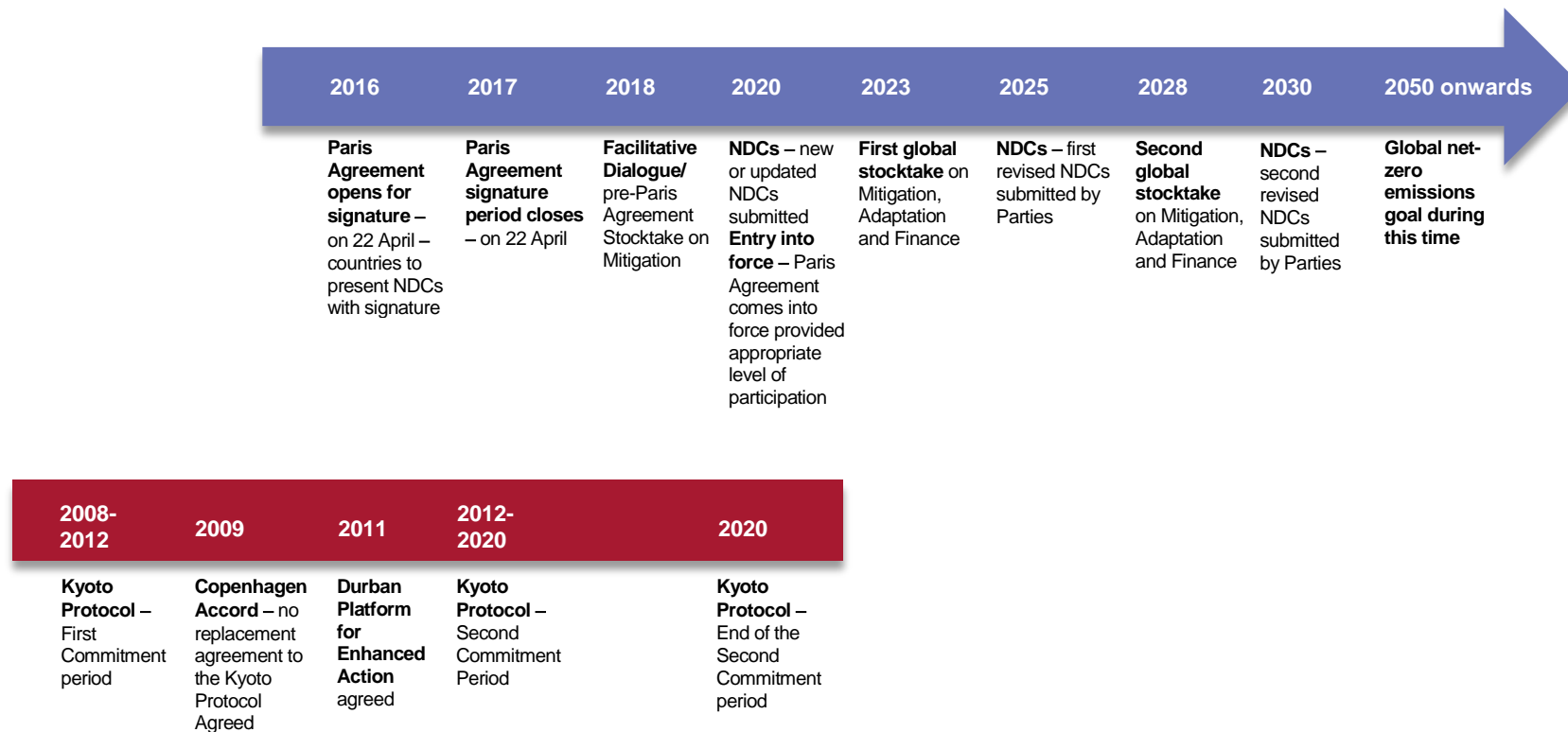
4 Differentiation Between Developed and Developing Parties

Although the Paris Agreement calls for **all** countries to make ambitious emission reduction pledges and a transparency framework to monitor such pledges, the Agreement differentiates between the obligations of developed and developing country governments with respect to achieving such pledges.

The Agreement states that developed countries should have absolute economy-wide targets; whereas developing countries should "move over time" towards economy-wide reductions or limitation targets. In other words, the Agreement compels developed countries to include whole of economy targets, whereas developing countries can scale up to such targets. Despite this, the Paris Agreement takes a softer approach to differentiation between developing and developed countries to reflect changes in some countries' economic situation since the adoption of the UNFCCC and Kyoto Protocol. The Agreement takes a self-differentiation approach. Unlike the Kyoto Protocol and the UNFCCC, where countries are annexed in developed/developing categories, the Paris Agreement does not cross reference these previous annexes nor does it define the terms "developed" and "developing", allowing countries to self assess where they fit on the developed/developing spectrum and thus intending that the agreement have greater longevity than previous climate agreements.

In addition, the Agreement allows countries in a regional bloc (such as the EU) or through mitigation partnerships to collaborate with other countries in the development of NDCs. This would allow greater collaboration between developed and developing countries in meeting mitigation targets. Where countries submit joint NDCs they must communicate the emission level allocated to each party to the UNFCCC.

Timeline: Kyoto Protocol and Paris Agreement



5 Mitigation and Sustainable Development Mechanism (International Carbon Markets)

Of particular note is the resurgence of the role of international markets in the Paris Agreement. Though a critical part of the Kyoto Protocol, markets have had a rocky path over the past 10 years and were not a guaranteed part of the Paris Agreement and at times during negotiations there were in fact calls to keep markets out all together. The NDC structure gives countries autonomy to develop their own domestic approaches to mitigation, and would thus allow them to use domestic emissions trading or other market mechanisms to achieve their goals. However, a key issue for debate in developing the Paris Agreement was the role that markets would play in allowing countries to collaborate with each other internationally and the role for project-based emission reductions.

Some hoped that the best case scenario at the Paris COP would be an absence of a prohibition on the use of markets coupled with the understanding that markets could be used at the discretion of the Parties. Instead, there was convergence among the Parties that markets were critical to providing flexibility to Parties and to allowing for more ambitious NDCs. While progress was made during the Paris COP to incorporate markets into the negotiating text, as late as the Friday evening before the final draft was released, the provisions on markets were still bracketed, meaning that they were not agreed by the negotiating Parties. There was real concern in the hallways because although it appeared that the vast majority of states realized the benefits of allowing the use of markets, a small minority of Parties that have consistently opposed markets were creating obstacles.

In the end, while not using the language of markets per se, the Paris Agreement explicitly authorizes markets. Under Article 6(2), the Paris Agreement allows for countries to voluntarily cooperate in meeting their NDCs, through the use of "internationally transferred mitigation outcomes" (ITMOs). The Agreement allows for these emission reductions derived from a number of different sources from one country to be used by another country in fulfilment of its NDC commitments, provided that the host country does not also count the emission reductions towards its NDC commitments. This has very similar parallels to the transfer of Allowable Amounts under the Kyoto Protocol. The CMA will provide further guidance on what sources can contribute towards ITMOs and the approach to avoid double counting of such mitigation outcomes.

Separately, the Agreement creates a mechanism to "support emission reductions and sustainable development", through which private and public entities can support mitigation through projects and programs that reduce emissions. Many commentators have referred to this as a new "Sustainable Development Mechanism" or the "ITMO Mechanism", but at this stage have intentionally not

adopted such a description given the Agreement currently lacks sufficient detail of how such a mechanism will operate.

The mechanism would be supervised by a body nominated by the CMA. The concept of a mechanism to facilitate emission reduction transfers is reminiscent of the CDM under the Kyoto Protocol, which allowed projects to be established in developing countries, the emission offsets of which could be sold into carbon markets. The mechanism in the Paris Agreement differs to the CDM in that it does not explicitly state that such projects or programs must occur in developing countries. However, the Agreement does require that a share of the proceeds from this mechanism are provided cover administrative expenses in managing the program and to assist developing countries particularly vulnerable to climate change to meet adaptation costs.

Although the Paris Agreement includes the basic principles for a new market-based mechanism further details are to be developed by the CMA. The Paris Decision calls on the CMA to be guided by the following principles in the development of the new mechanism:

- Voluntary participation authorized by each Party involved;
- Real, measurable, and long-term benefits related to the mitigation of climate change;
- Specific scopes of activities;
- Reductions in emissions that are additional to any that would otherwise occur;
- Verification and certification of emission reductions resulting from mitigation activities by designated operational entities; and
- Experience gained with and lessons learned from existing mechanisms and approaches.

6 Avoided Deforestation (or REDD+)

Owing to permanence issues and concerns over monitoring, verification and safeguards, provisions related to forestry, especially avoided deforestation, have been controversial in the UN climate change policy arena. The CDM excluded avoided deforestation projects, for instance. To fill that void, over the last ten years, civil society groups developed now widely-accepted protocols and methodologies. At the same time, through numerous COP decisions, the UNFCCC created a more robust framework governing these aspects of REDD+ (called the Warsaw Framework for REDD+⁵), the final details of which were agreed earlier in 2015.

⁵ Our overview and commentary of the Warsaw Framework for REDD+ can be found at: www.bakermckenzie.com/reddrulebook



In Paris, with greater comfort over the monitoring, verification and safeguards issues, the international community tackled REDD+ head-on and included an explicit provision on REDD+ in the Paris Agreement, representing a breakthrough.


Specifically, Article 5 of the Paris Agreement says:

Parties are encouraged to take action to implement and support, including through results-based payments, the existing framework as set out in related guidance and decisions already agreed under the Convention for: policy approaches and positive incentives for activities relating to reducing emissions from deforestation and forest degradation, and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries; and alternative policy approaches, such as joint mitigation and adaptation approaches for the integral and sustainable management of forests, while reaffirming the importance of incentivizing, as appropriate, non carbon benefits associated with such approaches.

In addition, the Paris Decision continues previous calls for ongoing "adequate and predictable" climate finance to support REDD+ from both the public and the private sectors. Additionally, 54% of countries prioritized the land use sector within their INDCs, and several ministers from developing countries specifically called out forests in their public announcements during the first week of the COP.

With REDD+ in the Paris text and the seemingly strong political support for the mechanism, we think it is likely that the Paris Agreement will facilitate greater financial support for REDD+ and potentially a REDD+ market with a focus in part on results based payments (still to be defined). There are many reasons for this. For many countries, forests are the primary means by which such countries can contribute to the collective action to address climate change. Thus, reducing deforestation is and will continue to be a prominent feature of many NDCs. Those NDCs will result in mitigation outcomes and it is clear that countries may choose to internationally transfer their respective mitigation outcomes. Additionally, the explicit reference to carbon sinks in the Agreement, such as forests, to achieve the net-zero emissions goal is also encouraging.

Given the level of ambition in the Paris Agreement, it is difficult to imagine achieving such goal without a robust approach to reducing global deforestation. Investment into REDD+ is one of a number of tools towards that end. However, against this is the fact that specific language on creating a REDD+ market mechanism, which would support a direct means of valuing carbon and potential non-carbon and results based payments, formerly included in draft versions of the Paris text, was negotiated out of the Agreement. Thus, while there are positive signs of REDD+ being included in the broader market mechanisms of the Agreement including as part of a new mechanism or ITMOs,



the degree to which this happens will ultimately depend on the detailed rules for such mechanisms developed by the CMA and individual countries' appetites for engaging in such market activity. In this regard, many working in the REDD+ area will be looking closely at the extent to which countries like Australia, emissions trading schemes like California and market based measures being pursued by the international aviation sector will create demand and hence finance for REDD+ carbon and non-carbon results.

7 Climate Finance

As with prior COPs, climate finance was a contentious issue in Paris. Poorer countries sought strong assurances from the developed world that pledges for finance would be scaled up. Developed countries also argued that wealthier developing countries should also make contributions to finance. These various negotiating positions are reflected in the Agreement. The final Paris Agreement calls for developed countries to provide developing countries finance, which "should represent a progression beyond previous efforts". Other Parties - which most likely refers to wealthier developing countries - are called upon to provide financial support on a "voluntary" basis.

In practice this means that the previously agreed USD 100 billion per annum financial commitment which UNFCCC Parties made in Durban continues until 2025. The Paris Decision sets a floor of USD 100 billion per year to be mobilized each year after 2025. However, the Paris Agreement itself does not include any new or specific figures (driven largely by U.S. need to keep any firm financial commitments out of the agreement, which would have triggered the Agreement to go through the Senate for ratification - discussed further below). This reflects one of the major issues of contention during the negotiations, particularly in respect of the amount and source of funding. As with previous COP decisions, the Paris Decision encourages the greater coordination of support from, *inter alia*, public and private, bilateral and multilateral sources, such as the Green Climate Fund.

There are also mechanisms in place to try and ratchet up climate finance commitments. In addition to reporting the level of financial commitments they have made or received at the five yearly global stocktakes, developed country Parties are also required to submit, every two years, information on future projected levels of finance available.

8 Adaptation and loss and damage

A critical issue for developing countries in COP negotiations has been the responsibility of developed countries for loss and damage from climate change suffered by developing countries; this remained a significant issue in Paris. Wealthier countries resisted the inclusion of loss and damage without clear boundaries on the issue, for fear of creating legal liability. Vulnerable countries, particularly small island states, pushed for developing a process to deal with climate change consequences.

The compromise position reached under the Agreement was for a reference to be made to loss and damage in article 8, but with a clear statement in the Paris Decision that the inclusion of loss and damage would not create any legal liability or rights to compensation. Specifically, the Agreement says that discussion on loss and damage will be facilitated by the Warsaw International Mechanism for Loss and Damage, originally established by the 2013 COP. The CMA will preside over this mechanism, and should cooperate with respect to early warning systems, emergency preparedness, slow onset events, events that involve irreversible loss, risk assessment and insurance, non-economic losses and climate resilience.

In addition to loss and damage, the Agreement also covers adaptation. Under the Agreement all parties have agreed to enhance "adaptive capacity" and many countries have already set out adaptation priorities in their INDCs. Countries are called upon to carry out national adaptation planning processes, which includes assessing climate change vulnerabilities and impacts to inform prioritization of actions, implementing actions to adapt and build resilience, and monitoring, evaluating, and learning from adaptation plans, policies, programs, and actions. Adaptation efforts are also to be included in the five yearly global stocktaking process. Thus each country is required to submit and periodically update an adaptation communication, which summarizes adaptation priorities, efforts, and support needs

Adaptation efforts at the COP fit within a significant year for international adaptation discussions. In March 2015, the United Nations World Conference on Disaster Risk Reduction adopted the [Sendai Framework for Disaster Risk Reduction](#) which is a framework for countries to carry out long term plans for disaster reduction. Presumably countries could use elements of this Framework in complying with their adaptation plans under the Paris Agreement.

9 Technology Transfer, Capacity Building and Implementation

Ultimately, to achieve the overall objective of the UNFCCC and Paris Agreement, which is to avert dangerous interference with the climatic system, the low carbon technologies that exist and those that will be developed through further innovations need to be rapidly deployed throughout the world. One of the vexing challenges with rapid deployment of such technologies is striking the right balance between respect for intellectual property rights and the need to deploy such technologies into countries lacking robust legal frameworks.


The Paris Agreement does not solve this challenge, but creates the playbook for how Parties are to work through this issue to encourage more technology transfer along with capacity building. The Parties are encouraged to share technology and provide capacity building assistance to each other. The Technology and Financial Mechanism established by the Convention will facilitate cooperative action on the development and transfer of technology, in order to improve climate resilience and reduce GHG emissions. The mechanism will operate in accordance with a technology framework, and provide technology to developing countries, particularly at the early stage of the technology cycle.

Parties should cooperate to build the capacity of developing countries to undertake adaptation actions, develop technology, access finance, education and information to manage the impact of climate change. Capacity-building should respond to the needs of the country in question, with a view to enabling countries to assume ownership of processes. An implementation mechanism, made up of an expert panel, will assist countries in the implementation of the Agreement.

Given the structure of the new Paris Agreement, the success of it to achieve the global mitigation goal will hinge largely on the effectiveness of country efforts to implement their NDCs. These provisions of the Agreement are thus central to its success.

10 Entry into Force

The Paris Agreement is open for signature between April 22, 2016 and April 21, 2017 and will enter into force 30 days after at least 55 Parties representing at least 55% of global greenhouse gas emissions have deposited instruments of ratification. The earliest the Paris Agreement could thus enter into force would be the end of May 2016, although this seems unlikely (noting that it took 8 years for the Kyoto Protocol to enter into force) but even then it should be noted that the emissions reduction obligation only commence in 2020, although we would expect all countries to be on the path to reducing their emissions well before this date. Furthermore, as indicated in sections 12 and 13 below many countries have existing commitments that flow into what has been agreed Paris.



To ratify the Agreement, each country will have to follow its own process for ratifying international agreements. The U.S. ratification process had significant bearing on the structure and content of the Paris Agreement, and thus we have outlined that process below. In fact, on the morning of the historic day when Minister Fabius gaveled COP 21 to a successful close, a typographical error in Article 4 including the word "shall" rather than "should", threatened to derailed the whole outcome. The concern over the word "shall" is largely based on the U.S. ratification process, and the whole world understands that no treaty requiring U.S. Senate ratification would be feasible if the U.S. were to be a Party.

U.S. Ratification Process

In the U.S., an executive agreement, congressional executive agreement and sole executive agreement along with a formal treaty (that must be approved by two-thirds of the Senate) are all effective at binding the U.S. under international law. Due to the highly politicized nature of the Paris Agreement in the U.S., it is expected that President Obama would accept the Paris Agreement as a presidential- executive agreement based on his own constitutional or statutory authority and bypass congressional approval. Expected objection by some members of Congress notwithstanding, the use of an executive agreement is not entirely unusual; approximately 95% of all international agreements to which the U.S. is a party are approved by executive agreement. The U.S. acceptance of the Paris Agreement by an executive agreement rather than through ratification by Senate approval will not affect its binding nature as a treaty under U.S. and international law.

The content of the international agreement also informs the type of U.S. ratification. A Senate-ratified treaty may have been required if the Paris Agreement contained binding emission targets or new financial obligations. As one of the world's largest greenhouse gas emitters, the U.S. was a critical participant in the negotiations, and the need for the U.S. to ratify the Paris Agreement as an executive agreement informed the substance of the Agreement. Parties refrained from including financial obligations and binding emissions limits to avoid triggering the need for the U.S. to obtain congressional approval.

Nonetheless, opponents of climate action may attempt to challenge the acceptance of the Paris Agreement as a presidential-executive agreement. While we are not aware of any cases where presidential-executive agreements have been struck down as unconstitutional, there have been few decisions on the topic so the president's authority is not well defined. Lawsuits against the adoption of the Paris Agreement would also face the obstacles of showing particularized injury supporting legal standing to sue and the prohibition on federal courts from deciding "political questions", both of which may be challenging in the context of the Paris Agreement.

For more discussion on the legality of the Paris Agreement under international and U.S. law, please see Daniel Bodansky, [Key Legal Issues in the 2015 Climate Negotiations](#), Center for Climate and Energy Solutions, June 2015.

11 Legal Status and Utility of the Agreement

Once effective, the Paris Agreement will be considered a treaty under the Vienna Convention on the Law of Treaties. This means that the countries which sign the Agreement will be bound to its terms.

There is some confusion on this point, with some commentators suggesting that the Agreement is not "legally binding". The reason for this confusion is that the NDCs, the substantive plans on how countries will achieve the well-below 2°C target, are not part of the Agreement themselves (instead they are submitted to a UNFCCC registry).

The only aspects of Agreement which compel a state party to action (i.e. those articles denoted by the word "shall" rather than "should") are those which relate to obligations to share their NDCs at 5 year intervals for inclusion in a public registry. Additionally, developed countries are bound to provide climate finance to support developing countries and report on that finance every two years. Aside from these procedural points, there are no hard obligations on the Parties.

Therefore, if a country for instance, fails in its pledge to reduce emissions by its stated target, there will be no consequences under the Paris Agreement, provided it has shared its NDC, at 5 year intervals, and complied with the other procedural matters noted above. This does not mean that the Agreement is not formally "legally binding" on States, but it simply means that there are questions about the value of the binding nature of that agreement.

Article 15 of the Paris Agreement does establish a mechanism to facilitate implementation of and promote compliance with the provisions of the Agreement which "shall be expert-based and facilitative in nature and function in a manner that is transparent, non-adversarial and non-punitive". This is in contrast to the powers conferred on the implementation branch of the Kyoto Protocol, which had broader investigative powers to address non-compliances with Kyoto targets. A number of Parties had concerns about the punitive nature of the Kyoto compliance mechanism (which has limited participation in the Second Commitment Period), hence the need to find a more collaborative alternative.

Some commentators have argued that the value of the Agreement thus lies in its ability to empower civil society actors to hold countries to account for their NDCs. For instance, some commentators have suggested that the Agreement could bolster claims made by activists advancing climate change related public interest litigation (such as these cases in [Holland](#) and [Pakistan](#)). Particularly, the Paris Agreement provides further evidence that a particular government has agreed to take action on climate change and failed to do so.

12 International Commitments prior to Entry into Force

Notwithstanding the long time lag before the Paris Agreement takes effect, Parties continue to have obligations to address climate change in the period prior to 2020. Parties to the Kyoto Protocol adopted amendments to that instrument in 2012 (the Doha Amendments) which will bind those developed country Parties that ratify the Amendment to emission reduction or limitation pledges for the Second Commitment Period (2012-2020). Those pledges include Australia's 5% - 15% or 25% reduction of GHG emissions from 2000 levels, the EU's 20%-30% reduction from 1990 levels and Norway's 40% reduction from 1990 levels.⁶ Although the Doha Amendment has not yet entered into force, it is expected to do so in time and countries are continuing to utilize the flexible mechanisms developed under the Kyoto Protocol. For example, although beset by low prices due to reduced demand, the CDM remains operational and many countries and funds are purchasing post-2012 certified emission reduction units (CERs).

In addition, a large number of developed and developing countries have made mitigation pledges which were first noted in the Copenhagen Accord and subsequently included in the decisions from COP 10. Those pledges set out the voluntary actions countries intend to take during the period 2012-2020 and include reductions in the emissions intensity of economies, reducing emissions growth against business-as-usual scenarios, reductions in deforestation rates as well as absolute targets. Although non-binding, processes are in place to review (and potentially scale up) the ambition of these pledges and as the actions are bottom-up and reflect agreed domestic goals, they are expected to be adhered to.

In order to meet their mitigation pledges, a number of countries are exploring the use of market-based mechanisms such as emissions trading schemes, with new schemes commencing in recent years in countries such as South Korea and China and many more under development. These schemes may well underpin the ITMOs contemplated by the Paris Agreement.

In the interim period prior to the Paris Agreement coming into force, the Paris Decision encourages Parties to ratify the Second Commitment Period of the Kyoto Protocol, continue to meet their mitigation pledges under the Copenhagen Accord, and otherwise comply with ongoing international policy still in place. The Decision, also calls on non-state parties to continue taking action during this interim period. In practice, those countries which are proactive and take a leading position on producing NDCs and converting them into policy and legal frameworks, will be advantaged, potentially getting greater access to the large and growing pools of climate finance.

⁶ The U.S. did not ratify the Kyoto Protocol and thus will not be subject to the Doha Amendments. However, the U.S. is expected to continue implementation of the Clean Power Plan and other emission reduction activities to work toward its NDC pledge.

13 National and Sub-National Action Reinforced and Further Developed at COP


It is important to note that while the Paris Agreement sets a global framework for action on climate change, it in no way impedes the policy and legal activity which is already occurring at a national and sub-national level. Indeed many of these existing activities at a national and sub-national level will become an important part of how countries achieve their NDCs. For instance, the [World Bank's State and Trends of Carbon Pricing 2015](#) reports that the number of implemented or planned carbon pricing schemes around the world has almost doubled since 2012. The report shows that about 40 nations and 23 cities, states or regions have carbon pricing instruments. Among the countries implementing carbon initiatives, the EU ETS is well established. China and the United States lead with the largest volume of emissions covered by carbon pricing. In China, the carbon schemes cover the equivalent of 1 billion tons of CO₂, while in the U.S. they cover the equivalent of 0.5 billion tons of CO₂.

The Paris Agreement re-enforces the importance and need for such measures and encourages countries who have not yet taken such action to do so. Additionally, The Paris COP also saw the launch and expansion of a series of sub-national initiatives by major cities and state governments in respect of climate change action, collectively representing almost two-thirds of the worlds population. In particular, some highlights included:

- 58 new signatories at COP 21 to the [Under 2 MOU](#) climate agreement – an agreement under which signatories agree to reduce their emissions 80 to 95%, or limit to 2 metric tons CO₂-equivalent per capita, by 2050. The new signatories brought the tally of signatories to 123 jurisdictions representing more than 720 million people and \$19.9 trillion in combined GDP;
- the 2014 launched [Compact of Mayors](#), expanded to 445 cities;
- the Government of South Australia announced its aim for its capital city, Adelaide to be the world's first carbon-neutral city, with an ambitious target of net zero emissions by 2050; and
- various state governments, including the Australian Capital Territory Government, signed the [Paris City Hall Declaration at the Climate Summit for Local Leaders](#), which included a commitment towards 100% renewable energy and 80% reduction in emissions by 2050.

14 Civil Society, Business and Investment Initiatives Announced at COP 21

While the Paris Agreement is a significant development for global national government cooperation on climate change, COP 21 was equally significant for a number of major announcements outside the formal negotiations. In fact, the new structure of the Paris Agreement, which does not itself create obligations



on states to reduce emissions, meant that the events outside the negotiations provided some of the clearest signals of changing market dynamics, as what was occurring within the negotiation forums. The substantial non-state involvement at COP 21 was driven by the [Lima-Paris Action Agenda](#), launched at COP 20, with the aim of boosting civil society involvement and commitment to the climate agenda.

The level of private sector engagement at the Paris COP was particularly notable. Hundreds of CEOs participated on the side-lines of the negotiations, including CEOs of Ikea, Kellogg Company, Ericsson, and Schneider. Even major power and resource companies were represented including, for instance, the CEO of Australia's largest emitting entity, power company AGL Energy Limited. Major global companies also made individual commitments to climate action such as [Philips' commitment to become carbon neutral by 2020](#) and [Goldman Sachs' commitment](#) to invest \$150 billion in clean energy projects and technology. There were also major coalitions of companies which formed and made announcements at the COP. Notably, among many other initiatives were the:

- [We Mean Business Coalition](#), made up of 363 companies which made a number of commitments, including internal carbon pricing and conversion to renewable energy;
- the [Science Based Targets initiative](#) which enlisted 114 global companies, with the aim of setting strict science based emissions targets; and
- the [Green Freight Action Plan](#) which includes Deutsche Post, HP, Ikea and Volvo as members as well as 24 nation-states with the aim of enhancing green freight options.

Institutional investors and banks also made a number of announcements at the COP regarding the way climate change would shape their investments. This included:

- the [Paris Green Bonds Statement](#) of representing USD 11.2 trillion worth of assets under management put out a statement on how they would support policies that drive the development of long term, sustainable global markets in green bonds; and
- expansion of the [Portfolio Decarbonization Coalition](#), a group of investors who have committed to systemically integrate carbon information into their portfolios, bringing the value of the Coalition's assets under management to USD 600 billion.

The private sector also pledged to help finance technological innovations which would support achieving the well-below 2 °C goal. This included, for instance, the [Breakthrough Energy Coalition](#), financed by Bill Gates, Mark Zuckerberg, Jeff Bezos, Jack Ma and Richard Branson to try and increase R&D and innovation with respect to energy generation, storage and efficiency, transportation and agriculture.

In an effort to track the corporate and non-State commitments in a transparent manner and encourage action implementing the commitments, the pledges are registered under the [UN Non-State Actor Zone for Climate Action](#). Over 10,000 total commitments have been made from cities, regions, companies, investors and civil society organizations.

What the Paris Agreement may mean for Key Sectors and Areas to Watch

15 Carbon Markets

The Paris Agreement establishes the international policy infrastructure required to support carbon markets, at a domestic, regional and international level. As discussed above, countries are able to include market mechanisms as part of the approach that they will use in their NDCs, supporting the possibility of domestic carbon markets. Countries are also able to jointly agree on NDCs, thus creating a framework by which regions could group together to develop carbon markets. Internationally, the new mechanism for mitigation and sustainable development outcomes could potentially allow for programs and projects to be developed for which outcomes could be traded in an international carbon market.

While this high-level policy framework has been laid out by the UNFCCC, further detailed rules are still to be set down by the CMA. To that end, some of the key outstanding issues to be considered are:

- how the CDM and generated CERs will interact with the mechanism. It is not clear at this stage whether CERs will be able to be used as part of the Agreement framework. However, a hint in this regard is that the Paris Decision encourages Parties to promote the voluntary cancellation of units issued under the Kyoto Protocol.
- the nature and scope of the projects and programs which can be used as part of the trading mechanism. For instance, it will be important to determine with the mechanism will include sustainable development outcomes as well as carbon outcomes;
- what "mitigation outcomes" will be encompassed by ITMOs , and whether all of such outcomes will be able to be used cooperatively with other countries; and
- whether the new project mechanism, which does not expressly require projects to be located in developing countries, will allow for developed country project based international credit trading.

In addition to the negotiated outcomes, there were also a number of multilateral information sharing and joint initiatives between negotiating states suggesting a resurgence of interest in carbon markets:

- the [Ministerial Declaration on Carbon Markets](#) which was a coalition of countries formed to "ensure the development of standards and guidelines for the environmental integrity of international market mechanisms used towards nationally determined mitigation contributions";
- the [Carbon Pricing Leadership Coalition](#), which is a group that aims to bring together government, private sector and civil society leaders to discuss carbon pricing;
- the [G7 Carbon Market Platform](#), which was led by the German Government for G7 states to collaborate on carbon markets.

While there is reason to be optimistic about the long-term future of carbon markets following the Paris Agreement, what will follow in the immediate term is further detailed negotiation setting out the rules of the future markets. This means that there will unlikely be readily available sources of finance for carbon abatement projects in the short term, but, at this stage, there are much improved prospects for such markets over the longer term. As further details are agreed under the CMA process, this may lead to increased activity from long term investors re-entering carbon markets.

16 Fossil Fuels

For fossil fuel reliant energy and resource companies, the signals from the Paris COP are clear: governments - both at a national and sub-national level - have committed to a reduction in emissions over the long term; they have committed to building policy infrastructure to give effect to that transition in the form of carbon markets; and there is growing interest in carbon neutrality from investors and consumer bases. Given that the primary source of emissions is industrial and energy sources which are in the main reliant on fossil fuels, unless measures are implemented to negate emissions from such activities, the future use of fossil fuels and the development of fossil fuels reserves will be curtailed.

There is also continuing and increasing reevaluation of investments into fossil fuels by the investment community, driven by the growing divestment movement. This investor led movement and the trajectory of government policy has led to increasing concern that many older high emitting fossil fuel assets are becoming stranded. The point was very clearly made at the COP by the [Bank of England Governor who stated that under a 2°C carbon goal the "vast majority of reserves"](#) of oil, gas and coal would become stranded. Indeed, measures such as the proposed [OECD limitation on export financing for new coal assets](#) would deal a significant blow to the coal sector. The Paris Agreement has simply reinforced this trend with post COP share price

movements downwards and upwards for fossil fuel and clean energy stocks respectively.⁷

It will therefore be important for energy and resource companies to consider how to diversify towards less emissions intensive asset classes. Additionally, while the Paris COP signaled a reduction in reliance on fossil fuels, it is worth noting that the Agreement does not call for zero emissions to be produced altogether. Rather, as soon as possible after 2050 it calls for countries to have net-zero emissions, meaning that any emissions produced by a country should be offset by sinks. Therefore, these companies should ensure that investments are made into offsetting activities (through REDD+, ITMOs or other activities such as CCS) to ensure that any ongoing emissions can be justified by governments hosting emissions intensive assets. These companies ought to monitor NDC development in countries where they have operations and the development of the trading mechanisms under the Paris Agreement.

17 Land-use

Land use featured prominently in the Paris COP. While agriculture did not feature strongly in the Paris Agreement text (save for a reference to "food security" in the Preamble), forests were strongly represented. Perhaps the most significant development in this regard was the inclusion of REDD+ into the Paris Agreement and the potential for that mechanism to form part of the Agreement's trading mechanisms (discussed above). Additionally, the reference to net-zero emissions also contemplates a potentially substantial role for forestry offsets.

Outside the negotiations too, numerous financial and technical initiatives were announced at the COP to promote forest conservation, including:

- the [African Resilient Landscapes Initiative](#) and the [AFR100](#) which aims to bring 100 million hectares of degraded and deforested land under restoration by 2030 through USD\$1 billion in development finance and over \$540 million in private sector investment. There will be 9 financiers and 10 organizations providing technical support, including the NEPAD Agency, Germany's Federal Ministry for Economic Cooperation and Development and the World Resources Institute;
- the [Watershed Project](#) which is led by more than 125 governments (municipal and regional governments) across the Andes, and is focused on protecting upstream water sources by conserving forests. It will be funded by local government and donors, private sectors investors and foundations; a [Joint Statement by the Governments of Germany, Norway and the United Kingdom of Great Britain and Northern Ireland](#) pledging increased support for REDD+ if countries come forward with ambitious and high quality

⁷ See <http://www.reuters.com/article/us-climatechange-summit-stocks-idUSKBN0TX22A20151214>

proposals, with an aim to provide USD1 billion per year by 2020, or to provide over USD 5 billion in the period 2015-2020; and

- a Global Rainforest Recovery Initiative led by the Australian Government in which rainforest nations from across the three rainforest basins – Asia-Pacific, Africa, and Central and South America – will join with donor partners, civil society and international organizations, and the private sector in a pledge to work towards a Global Rainforest Plan to slow, halt and reverse the loss of rainforests.

18 Renewable Energy


While the Paris Agreement does not specifically address renewable energy, it remains one of the key mitigation measures that has widespread international support. Consequently the sector continues to attract investment. In addition, as noted above, there were also substantial financial commitments made with respect to renewables, and R&D into new clean technologies. In addition, 80% of INDCs which (at 26 October 2015) included plans to increase clean and renewable energy supply in coming decades. This strong government commitment coupled with a sharp decline in installed costs of renewables technology have meant that growth rates have been impressive and steady despite global economic challenges.

In light of these developments we think that there will be continued growth of renewable and clean energy. The key will be continuing to eliminate barriers to trade in clean technologies and to develop the legal system foundations across developing countries to facilitate much greater private investments in renewables in such countries.

19 Contextualizing the Paris Agreement Among other Climate Change Agreements

The 1992 UNFCCC provides a framework to address global climate change, setting a long-term objective for the global community to stabilize "greenhouse gas concentrations in the atmosphere to a level that would prevent dangerous anthropogenic interference with the climate system". The Parties to the Convention are required to work to achieve this common goal. However, only limited guidance on actions and targets is provided in the Convention itself. In addition, the UNFCCC acknowledged Parties' differentiated responsibilities, with so-called developed country Parties bearing a larger responsibility, having historically been the primary emitters contributing to the accumulation of greenhouse gas concentrations in the atmosphere.

Shortly after the UNFCCC came into effect in 1994, and using its governance framework, the Parties to the COP unanimously agreed to adopt the Kyoto Protocol in 1997. The Protocol, which came into force in 2005, was a binding



instrument setting compulsory emissions targets for an annexed list of developed countries, and no targets for developing countries. The targets varied between commitments to reduce emissions by 10% from 1990 emission levels, stabilization of 2005 levels and allowable increases from 1990 levels. The First Commitment Period to reduce emissions was to run from 2008-2012 and then replaced in 2012 by a second and subsequent commitment periods which ratcheted up mitigation action. To achieve these commitments, a number of "flexible mechanisms" were included in the Protocol; namely, International Emissions Trading to trade country commitments referred to as AAUs and CDM and Joint Implementation (JI) mechanisms which would allow developing countries to host projects and programs to reduce emissions and transfer such emission reductions to developed countries to offset their emissions.

The Kyoto Protocol while effective in many ways, did not ultimately gain full international support. The binding nature of the Protocol and shifting U.S. political landscape, meant that the U.S. - the world's largest emitter at the time - could not ratify that agreement. A number of other conservative governments, such as Australia, also declined to ratify the Protocol for many years.⁸

Additionally, the long period between adoption of the Protocol in 1997 and entry into force in 2005 meant that the global emissions landscape had changed markedly. Notably a number of developing countries - such as China - had sharply increased their emissions output in the intervening years. One major emitting country, Canada, withdrew from the Protocol and a number of others including Russia and Japan indicated that they would not sign up to a Second Commitment Period. The Kyoto Protocol now covers only around 15% of global emissions. In addition, many countries have not met the 2012 targets they agreed to.

As a result of the need to develop a more globally inclusive regime to mitigate GHG emissions, the COP embarked on a process of developing an alternative structure, for a truly global climate agreement. Parties met in Copenhagen in 2009 with the intention of arriving at a new global agreement on climate change which would apply to all Parties for the period after 2012 (when the First Commitment Period of the Kyoto Protocol ended). Despite high expectations and the presence of many world leaders, Parties were unable to finalize a new legally binding agreement at that meeting and indeed the final decision of the COP merely noted the Copenhagen Accord.

Although viewed as a failure by some, the Copenhagen Accord was significant for a number of reasons. It represented the first time all Parties - developed and developing - had outlined their nationally appropriate mitigation actions; established a framework for REDD+; and included new goals to scale up climate finance. The key elements of the Accord were formalized in the

⁸ Australia ratified the Kyoto Protocol in early 2008 shortly following the election of the Rudd Labor government.

decisions of the COP the following year in Cancun and in 2011 the COP set up the Durban Platform for Enhanced Action, a process by which countries would submit mitigation pledges in advance of a meeting in Paris in 2015, to have a second attempt at creating a new global climate change agreement.

Notwithstanding the shortcomings of the Kyoto Protocol, a number of parties, including the EU and Australia, have expressed their intention to ratify the Second Commitment Period under the Kyoto Protocol. Those Parties that do participate in the Second Commitment Period will continue to provide regular reports on their GHG emissions but will also have access to the flexible mechanisms to source international units which can assist in meeting their targets.

20 Key Events During 2016

There will be a number of key events during the course of this year which could have implications for the progressive implementation of the Paris Agreement outcomes. These include:

22 April 2016	High Level Signing of the Paris Agreement (New York)
16–26 May 2016	Ad Hoc Working Group on the Paris Agreement (interim body prior to CMA being established) will begin meeting for first time (Bonn)
4–5 September 2016	G20 meeting may have potential relevance as there is strong emphasis on sustainable development (Hangzhou, China)
7–18 November 2016	COP 22 (Marrakech, Morocco)

21 Final Reflections

The Paris COP was an important event in advancing progress towards a solution to global climate change and highly significant for the development of international climate change law. The negotiated outcomes of the COP, the Paris Agreement and its accompanying Decision, have set up the policy infrastructure through which states can work towards meeting the well-below 2°C goal. The innovative structure of the Agreement, the pledges of climate finance and the plethora of civil society led financial and technical initiatives announced create the right conditions for a global reduction in emissions. This is the consensus view of leading governments and private sector stakeholders, with Goldman Sachs commenting that Paris Agreement was the "most important climate agreement since the Kyoto Protocol", and President Obama calling it a "turning point for the world."

There remain, however, a number of critical policy processes at the international level to be completed. Future COPs and the CMA still must meet to agree important rules on, among other things, the market mechanisms and the approach to loss and damage. Critically, domestic governments must now effectively implement and achieve the INDC and NDC pledges they have made



and will make, introducing effective and timely policy and legal measures to achieve their pledged emission reductions. It will be in these critical next steps that the success or failure of the Paris Agreement framework will be determined. In the meantime, the Paris COP has shown that there is substantial activity occurring at a sub-national level. Companies and other organizations need to follow these developments as well as those occurring at a national government level in coming years.

In summary, we consider the main takeaways from the Paris COP to be as follows:

- The Paris COP was significant because it showcased the now much more coordinated private sector, civil society and government collaborations towards a shared goal to reduce emissions. In so doing it has sent a clear signal to business that there will be a progressively reducing tolerance for emissions generating industry, from government, investors and consumer bases.
- The Paris Agreement has set up an ambitious framework for global emission reductions. While the framework does not empower the UN to enforce state pledges, it reinforces international momentum and creates a system in which states will likely be held to account for their role in achieving the well below 2 °C goal by their citizens, civil society and other states on a regular basis, arming these groups with the political tools to influence government behavior.
- The Paris Agreement and the approach to NDCs will provide clear frameworks within which countries transform their economies into ones focused on low carbon growth and climate resilience with significant international finance to support them. The development of low emissions growth and climate adaptive infrastructure will be a core focus.
- Finally, the Paris Agreement reinforces and creates renewed momentum for the many existing, policy initiatives by countries, sub-national governments, provinces and cities that were occurring pre-COP. COP 21 itself saw the announcement of many new initiatives, such as the Under 2 MOU, in which some 123 sub-national jurisdictions have pledged a 80-95% reduction in emissions by 2050.

In conclusion, when considered alone the Paris Agreement is an important document creating the framework for countries to limit global warming to "well below 2°C" by requiring them to make, and be held to account for, plans to transform their economies and adapt for climate change. When considered within the broader context of existing national, sub-national initiatives and regulatory frameworks to reduce emissions, not to mention the many private sector endeavors announced at COP, it is now clear that governments, companies and organizations must consider climate change and the financial, regulatory and social opportunities and challenges it presents.

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