

## **Paris Agreement: Overview of Legal Issues**

(SBU) This paper provides an overview of key legal issues related to the Paris Agreement, to inform Principals in making a recommendation to the President regarding the approach to the Paris Agreement. It provides: (1) an overview of the Agreement and U.S. obligations under the Agreement; (2) a description of the legal form of the Agreement and the basis for concluding it as an executive agreement; and (3) withdrawal options.

### **1. Overview of the Paris Agreement and U.S. Legal Obligations**

(U) The Paris Agreement is an international agreement that was adopted in December 2015 under the United Nations Framework Convention on Climate Change (the “Framework Convention”).<sup>1</sup> After signing the Paris Agreement in April 2016, the United States formally joined it in September 2016 by submitting an instrument of acceptance to the United Nations, which serves as depositary for the Agreement. The Paris Agreement entered into force on November 4, 2016. At present, over 190 countries have signed the Agreement, of which over 140 have become Parties.

(SBU) The Paris Agreement sets out a framework for addressing both mitigation of climate change and adaptation to climate impacts. Key features include: an aspirational goal of limiting the global average temperature increase to well below 2 degrees Celsius; the submission by all Parties of non-binding and nationally determined emissions reductions that they intend to achieve, called “nationally determined contributions”; a reporting and review regime under which all Parties report on emissions and progress towards meeting their nationally determined contributions.

(SBU) In its key elements, the Agreement can be contrasted with the 1997 Kyoto Protocol, which the United States rejected in 2001. The Kyoto Protocol created a system of internationally-negotiated, legally-binding emissions targets that applied to developed countries only – thus exempting from its key requirements China and other major emitter emerging countries. Conversely, the Paris Agreement creates a framework based on nationally determined, non-legally binding targets that must be submitted by all Parties, both developed and developing.

(SBU) The Paris Agreement includes a combination of legally binding and non-legally binding provisions. The legal obligations are relatively few and are generally process-oriented (*e.g.*, submitting information), discretionary in their application, or repeat existing obligations already contained in the Framework Convention. Of note:

- ❑ Each Party is required to prepare and communicate nationally determined contributions (NDCs) every five years. The Agreement does not dictate any particular domestic measures a Party must take to achieve its NDC, nor does it require that a Party must achieve the mitigation results reflected in its NDC. Although the

---

<sup>1</sup> The Convention was ratified by the United States in 1992 following the unanimous advice and consent of the Senate.

Agreement encourages changes to NDCs to be more ambitious than the Party's previous NDC, it does not prohibit changes in the other direction. However, a party must always have an NDC in place; it cannot withdraw its existing NDC without submitting a new one.

- ❑ Parties are also required to submit various reports, on a biennial basis, on their emissions, progress towards achieving NDCs, and support provided and received.<sup>2</sup>
- ❑ The Paris Agreement does not create any new finance obligations on the United States. Rather, it merely restates existing unquantified finance obligations under the Convention for developed countries collectively to provide assistance to developing countries for certain costs related to addressing climate change and reporting on climate action. There is not an individual binding obligation on the United States to provide such financing, and thus no specific amount that the United States is required to provide at any particular time or over any particular period. Relatedly, the pledge that the United States made in 2014 to provide up to \$3 billion to the Green Climate Fund is not legally binding.

## **2. Domestic Legal Form and Basis for Concluding as an Executive Agreement**

(SBU) As a matter of domestic law, the United States joined the Paris Agreement as an “executive agreement.” The Supreme Court has consistently recognized the authority of the President to conclude international agreements without the advice and consent of the Senate where the President's own constitutional authority, authority derived from Congressional action, or some combination of them, provides support for the President's actions. Indeed, the vast majority of international agreements concluded by the United States are concluded as executive agreements and not as advice-and-consent treaties.

(SBU) The conclusion of the Paris Agreement as an executive agreement was consistent with the President's authorities and with past practice of Presidents. The rationale underlying the conclusion of the Paris Agreement as an executive agreement is as follows:

- ❑ All U.S. legal obligations under the Agreement can be implemented under existing authority. Nearly all obligations (which primarily involve the communication of information or are highly discretionary) can be implemented pursuant to the President's constitutional authority. In addition to the President's authority under Article II of the Constitution, the President's authority to enter into the agreement also derives support from legislative authority found in statutes and in the Senate's approval of the 1992 Framework Convention; many of the agreement's provisions are substantially similar to or elaborate provisions of the Convention.

---

<sup>2</sup> Under Framework Convention reporting requirements, Parties provide certain reports, with reporting requirements different for developed vs. developing countries. The Paris Agreement reporting requirements will not generally introduce new requirements for the United States beyond what is currently provided under the Framework Convention. However, the Paris Agreement will apply the same basic requirements to developing countries, who have more minimal reporting requirements under the Framework Convention.

- ❑ The President's authority also finds support in significant past practice with respect to the conclusion of similar agreements as executive agreements, which the Supreme Court has found to be a relevant consideration in establishing authority to enter into executive agreements.
- ❑ In sum, the President's independent authority under Article II of the Constitution, together with the authority given to him by statute and treaty, as well as past practice concerning similar agreements, provided the President with a solid basis to conclude the Paris Agreement as an executive agreement.

(SBU) A position that looks back and asserts that the Paris Agreement required Senate advice and consent would suggest the existence of new limits on the President's constitutional authority to conclude executive agreements. This would constrain the President's flexibility to conclude executive agreements in other contexts in accordance with established authorities. Because the large majority of international agreements concluded by the United States are concluded as executive agreements, this could have far-reaching implications for our conduct of foreign affairs. This could also cause other States to doubt the validity of other existing international agreements concluded by the United States as executive agreements. It could also prompt other States to be reluctant to conclude future agreements with the United States that do not receive Senate advice and consent.

### **3. Withdrawal Options**

(SBU) The Paris Agreement provides for a Party to be able to withdraw three years after the Agreement enters into force for that Party. Withdrawal takes effect one year thereafter. The United States could therefore withdraw as of November 4th, 2019, and such withdrawal would take effect a year later. Upon its effective date, the United States would no longer be subject to obligations under the Paris Agreement, nor would it be able to participate in decision making of the Parties or exercise rights under the Agreement.

(SBU) While formal withdrawal could not be initiated until November 2019, in effect the United States could announce a plan to withdraw and reduce or cease participation in Paris Agreement activity earlier. We would not have any Paris Agreement reporting requirements to fulfill in the meantime, as the first reports under the Paris Agreement reporting system are not expected to need to be submitted until at least 2021 or 2022.

(SBU) The Paris Agreement also provides that any Party that withdraws from the Framework Convention shall be considered as also having withdrawn from the Paris Agreement. The United States could provide notice to withdraw from the Convention at any time, with withdrawal taking effect one year after notification of such withdrawal. If the United States were to withdraw from the Convention, upon the effective date of withdrawal (i.e., one year after notice) we would no longer be able to participate in decision making of the Conference of the Parties to the Convention.

(SBU) Attempts to withdraw from the Paris Agreement outside of the above-described withdrawal provisions would be inconsistent with international law and would not be accepted internationally.

