

The logo for ReedSmith, with "Reed" in a dark serif font and "Smith" in a red serif font.

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A photograph of a massive glacier with a blue-tinged surface, flowing down a rocky, brown cliffside. The glacier's surface is textured with crevasses and icebergs. The water at the base of the glacier is a deep blue color.

Anticipating the outcome of the 2015 Paris Climate Change Conference

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INTRODUCTION

The 21st Conference of the Parties (“**COP**”) to the United Nations Framework Convention on Climate Change (“**UNFCCC**”) meets in Paris at the end of this year¹ to seek to achieve the vaulted ambition set by the Durban Platform² of “*developing a protocol or other legal instrument or agreed outcome with legal force under the Convention applicable to all Parties*”³ on climate change within the specified deadline of 2015. In terms of the world’s response to the challenges posed by climate change and the likelihood of any potential success of that response, a great deal will turn on the positions negotiated and reached (or not) over the course of the two weeks in Paris. The EU Council’s conclusions on the preparations for COP21 describe this meeting as of “*critical importance*” and “*a historic milestone for enhancing global collective action*”.⁴

Ever since the climate change negotiations in Copenhagen in 2009 collapsed under the weight of inflated hype and expectation, everyone involved in the process launched by the Durban Platform has sought to limit, temper and manage expectations for the new agreement. This approach has been so successful that today, on the eve of one of the most significant international global treaty negotiations, the question being asked is just what meaningful impact can follow from the little that may be achieved in Paris?

In this client paper, we therefore explore what may follow when little is expected.

30-second overview

- The international climate change meeting in Paris is likely to lead to a new international agreement. This agreement will replace the Kyoto Protocol and is to take effect from 2020. In contrast to the previous attempt in Copenhagen in 2009, this time China and the U.S. are active supporters of the new “bottom up approach” which invites action to address climate change from all 196 countries to the UNFCCC.
- Although reaching such an agreement in Paris will not be without challenges, these challenges are capable of being overcome. Some of the key challenges to be overcome include (a) the legal form and length/tenure of the agreement, (b) the role of the pre-notified intended national contributions, (c) the accounting measures to gauge impact of the collective efforts and to judge cooperative arrangements adopted by various countries, and (d) the role of finance to assist developing countries bring about the necessary change and to adapt to the adverse impacts of climate change.



BACKGROUND

It is not a given that an agreement will be reached in Paris. However, unlike Copenhagen, there are key differences that support a more positive outcome this time. These include:

- The inclusive nature of the new agreement – the active participation in combating climate change by all country parties (“Parties”), and not just by the few OECD and other developed countries ensures there is more ‘skin in the game’.
- The “bottom-up” approach of the new agreement enables each Party to offer up what it can do toward combating the adverse effects of climate change in a less prescriptive form than the last time around in Copenhagen.
- Flexibility to recognise local politically constrained domestic policies – by not insisting the new agreement should take the form of a legally binding treaty – frees up countries such as the United States to make commitments that do not necessarily require formal national legislative ratification.
- China and the U.S. are vocal, active and highly engaged participants in the Durban Platform process. Given that these two key greenhouse gas emitting countries made a joint announcement in November 2014 regarding their respective post-2020 climate change ambitions in the hope that *“they can inject momentum into the global climate negotiations and inspire other countries to join in coming forward with ambitious actions as soon as possible”*, there has been a demonstrable material shift in position since 2009.

A number of other significant events have also helped to create momentum towards Paris. Recognising, since Copenhagen, the importance of mobilizing a broad circle of influence within and outside the UN negotiation process, the following announcements⁵ support a swing towards climate change making it back towards the top of the political agenda.

- The release of the IPCC’s Fifth Assessment Report (AR5)⁶ which concludes that it *“is extremely likely⁷ that human influence has been the dominant cause of the observed warming since the mid-20th century.”⁸*
- The G7 Leaders Summit Declaration⁹ regarding the phasing out of fossil fuels by the end of the century.
- The UN Climate Summit in New York 2014 to create a platform for dialogue outside of the formal UNFCCC process in advance of Paris.¹⁰
- The Obama administration’s release of the final Clean Power Plan setting emission guidelines for each state to use in developing plans to reduce greenhouse gas emissions from existing fossil fuel-fired power plants from 2022¹¹.
- Pope Francis’ encyclical calling for action to curb climate change, in which it states climate change is caused by human activities¹².
- China’s 27 September 2015 announcement of the introduction of a sector-wide emissions trading scheme from 2017.

The question, however, remains despite the attempts at mobilising a broad circle of influence, whether the challenges remaining for Paris can be overcome.

Key reasons why a more positive outcome is expected in Paris, compared to Copenhagen in 2009:

- The “bottom-up” approach of the new agreement gives each Party more flexibility in choosing how it wants to combat climate change.
- China and the U.S., each key greenhouse gas emitting countries, are vocal, active and highly engaged in the new agreement process.
- A broad circle of influence has been mobilized within and outside the UN negotiation process to help bring climate change back toward the top of the political agenda. These include the UN Climate Summit in New York 2014 that created a platform for dialogue outside of the formal UNFCCC process and the release of the IPCC’s Fifth Assessment Report concluding that it is 95–100% certain that human influence has been the dominant cause of warming.

THE CHALLENGES FOR PARIS

There are a number of political, economic, legal and practical challenges that may thwart the efforts of the negotiating Parties in Paris. There is already a lot of literature available on what these are; therefore, we highlight those that are more legal in nature.

The legal form of the agreement

One of the largest legal stumbling blocks awaiting negotiators in Paris is the question of the form that the international agreement will take. The criteria prescribed by the Durban Platform does provide the Parties with options (e.g. a protocol, other legal instrument or agreed outcome with legal force) but the reality is that, irrespective of the title applied to the document, it will need to meet the criteria for a treaty under the Vienna Convention on the Law of Treaties. Otherwise, the Paris agreement may not inspire the confidence that commitments will be met or that real action will be required by greenhouse gas emitters in light of the Paris agreement. The determination of the Paris agreement as a treaty would turn on whether it was intended to create legal obligations on Parties and whether those Parties expressed consent to be bound. Therefore, the provisions in the Paris agreement relating to the conditions for its entry into force will be a significant aspect of these negotiations. Neither the current draft negotiating text for the Paris agreement circulated following the ADP¹³ meeting in Geneva (the “**Geneva Text**”) nor the ADP co-chairs consolidated version text of the Geneva Text¹⁴ circulated in July (the “**Co-chairs Tool**”) seeks to resolve this issue or even reduce some of the options.

The role of INDCs under the Paris agreement

Following on from the 2013 COP meeting in Warsaw (“**COP19**”), Parties were invited to specify their intended nationally determined contributions (“INDCs”) in the context of the Paris agreement so that the UNFCCC secretariat could prepare, by 1 November 2015, a synthesis report on the aggregate effect of the INDCs communicated by Parties by 1 October 2015. As of the end of September 2015, 125 countries of the 196 countries (or +75% of global greenhouse gas emissions) has submitted their INDC to the secretariat. Assuming all countries submit their necessary INDC in time for the secretariat’s synthesis report (the “**Synthesis Report**”), the status of these INDCs vis-a-vis the Paris agreement remains unclear.

For example, if the Synthesis Report indicates the collective levels of contribution from the INDCs are insufficient to achieve the target to limit the increase of average global temperatures to 2 degrees Celsius (the “**2°C Target**”), will there be attempts in Paris to renegotiate further contributions to the efforts, making the pre-Paris published INDCs merely a starting point for those discussions? Have the Parties submitted INDCs knowing they need to keep something in reserve to ‘give-up’ during the negotiations? For example, the EU’s INDC provides “at least” a 40% cut against 1990 levels by 2030, suggesting that more cuts could follow depending on the actions of other Parties. If there is to be no haggling over contributions in Paris, then clearly the Paris agreement may need to provide a process that caters for voluntary increases of INDCs post-Paris or requires the INDCs submitted pre-Paris to be subjected to additional review further down the line. The answers to these questions may influence the location, under the Paris agreement, of these INDCs (although not their legal character); for example, in an annex to the agreement, in an INF document, in a list or website maintained by the UN, etc.

The question of whether the respective INDCs emerging from Paris will be binding on the Parties will turn on the way in which the Paris agreement treats them. For example, does the agreement seek to ‘lock-in’ the pre-

Paris INDCs (so that no one can do less than the stated commitment) or merely create obligations by reference to an INDC? The Geneva Text and the Co-chairs Tool suggests there is a lot to negotiate around this in Paris.

The term of the Paris agreement


The term or duration of the Paris agreement is currently unsettled. It is likely to turn on a number of factors, such as the role of the INDCs, whether the agreement has a sufficient framework to address the necessary interplay between other instruments such as the Kyoto Protocol's Clean Development Mechanism and the various institutions of the UNFCCC, and whether it provides the required enabling framework to allow all the Parties to take the steps or implement their efforts in the manner they wish. Given that the Kyoto Protocol was negotiated in 1997 and had to carry relatively unambitious actions of the Parties until 2020, logic dictates that the Paris agreement will need to underpin international, national and sub-national efforts on climate change until at least 2040, if not 2050 and beyond. Optimistically, the Geneva Text and Co-chairs Tool includes the negotiating option of "durable forever," which is an unlikely outcome.

As the various Parties journey down their respective pathways of development, the depth of their INDCs will need to change and if the Paris agreement framework facilitates this change through a review or INDC update process, then the durability of the Paris agreement becomes more realistic. In particular, if the level of aggregate commitment in Paris from 2020 to 2030 is weak in the context of the 2°C Target, then the existence of a dynamic (but practical and effective) process within the Paris agreement to ratchet up that commitment level will be essential to the agreement's durability.

The accounting mechanism

Although the nature of the accounting mechanism under the Paris agreement is not a legal issue, it is fundamental to the success of Paris that the agreement enshrines an enabling framework that allows the various national and sub-national efforts of the Parties to count towards the common intended outcome. It is all good and well for each Party to go off and do its own thing, as is likely to be allowed within reason by the Paris agreement, but if there is no way to ascertain whether those efforts are real, adequate and ultimately taking us collectively towards the 2°C Target, then all will be for naught and it may be too late before that is discovered unless the tools are in place from the outset. Hence the importance of clear, shared accounting systems that are supported by robust, transparent monitoring and reporting requirements.

- Whatever the form of the Paris agreement, its treatment as a treaty will turn on whether it was intended to create legal obligations on Parties and whether those Parties expressed consent to be bound.
- How the Paris agreement treats the country INDCs will determine whether they are binding on the Parties and therefore, the status of INDCs vis-à-vis the Paris agreement may influence their location within the agreement.
- Because the Paris agreement will need to underpin international, national and sub-national efforts on climate change until at least 2040, if not 2050 and beyond, its term should reflect that.
- The durability of the Paris agreement becomes more realistic if the framework facilitates changes in the depth of the INDCs through a review or INDC update process.
- Clear, shared accounting systems that are supported by robust, transparent monitoring and reporting requirements are important to the fundamental success of the Paris agreement.
- The accounting methodology needs to enable consistency so that, for example, standards can be applied for setting credible reference levels of benchmarks for calculating emission reductions.



To have common accounting tools is not the same as saying that the Parties are subject to compliance scrutiny – a thorny topic for many of the key Parties to the negotiations including both the U.S. and China. The accounting methodology needs to enable consistency so that, for example, standards can be applied for setting credible reference levels or benchmarks for calculating emission reductions, inaccuracies from fraud or error can be addressed in a similar manner, and that allowances can be made for divergence from standards in acceptable circumstances, common registry and unit issuance systems, etc. These accounting principles will be needed where new market mechanisms (“**NMM**”) under the authority of the COP are developed (e.g. REDD+) but also where domestic market mechanisms that are linked with other jurisdictions are developed to help the compliance obligations of those jurisdictions (presumably under the Paris agreement) via the framework for various approaches (“**FVA**”).

However, although it isn’t necessary that the details of these accounting principles are agreed on in Paris, it is important that the necessary mandate to put them in place is given by the Paris agreement, whether by subsequent decisions of the COP or through multilateral common standards acknowledged and agreed to outside of the UNFCCC framework (but recognised by it). That said, pre-2020 action by parties is to be encouraged and therefore, it is important to adopt a stepped approach to the accounting standards early to enable that progress to be made so that the absences of some pieces do not hold up the others.

Other non-legal challenges:

Even though this paper does not focus on the non-legal challenges to the success of the Paris agreement, those challenges are too large to not be mentioned. The key topics are:

- Dealing with the differentiation of Parties with respect to legal form, commitment type, stringency, timing, and compliance as reflected in their respective commitments, including the mechanism for evolution of those commitments over time or compliance periods.
- Determining how the COP19 mechanism of ‘loss and damage’ is reflected as a tool within the agreement.
- Ensuring that the necessary finances for developing countries for adaptation and mitigation of the adverse effects of climate change are effectively and efficiently: (i) mobilised, (ii) leveraged, (iii) distributed and (iv) utilised. Currently the Green Climate Fund is the main vehicle for this but other vehicles and instruments may be needed.
- The engagement of private sector capital in the climate change efforts to help raise the above mentioned finances and the role of markets to facilitate low cost abatement. The consensus among observers is that the Paris agreement must not prohibit the use of markets but should, at the same time, not simply remain silent on the point. The Geneva Text included six market related options, but in the Co-Chairs Tool, [most of] these currently appear in the third section entitled “*Provisions whose placement requires further clarity among Parties in relation to the draft agreement or draft decision*”. In other words, in the ‘too difficult to get consensus ahead of Paris’ box.

PREDICTING THE OUTCOME

What will the agreement tell us

The saying that “a week is a long time in politics” does not apply to the politics associated with the COP negotiations. However, the outcome of the two week negotiation process in Paris is likely to have a long lasting impact for the future. Therefore, predicting the outcome of this COP is particularly challenging. That said, the following outcomes are quite possible to envisage when an output document becomes available in the early hours of 13 December.

- (a) There will almost certainly be a new international agreement but it will not be very long or very detailed. This will consist of a ‘core agreement’ under the umbrella of the UNFCCC, followed by a series of decisions aimed at facilitating the operationalization of the agreement from 2020.
- (b) The new international agreement will likely not be in the form of a Protocol (this will be difficult for the U.S. to ratify) but may fall into the category of “an agreed outcome with legal force”.
- (c) The term of the agreement will most likely be until at least 2030 but possibly until 2050 if it has built into it a method for the INDCs, submitted in advance of the Paris meeting, to be reviewed and adjusted upwards. One method for doing this may be to adopt the ‘Dynamic Contribution Cycle’ approach proposed by Brazil during the last COP in Lima. Under this approach, the INDCs would have a 10-year cycle with a 5-year contribution and a further 5-year indicative contribution. The purpose of the second cycle would be to enable the party to confirm or adjust upward its contribution of the period. For example, the 2015 INDC would have to be confirmed or adjusted upward by 2020 for the period of 2020-25 and offer a further indicated contribution for 2025-30. Prior to the end of the 2025 period (e.g. by 2023) the Party would confirm or adjust its 2025-30 contribution and propose its 2030-35 contribution. The merit of such an approach is appealing when it is recognised that the 2015 INDC levels (as seen so far) will not be sufficient to meet the 2°C target and further that no Party will be in a position in Paris to review upwards their INDC levels.
- (d) The need to ratchet up the INDC levels means that they are likely to be contained outside the ‘core agreement’; for example, in an ‘information’ (INF) document (as was the Copenhagen Decision). However, just because the INDCs rest outside the core agreement, it will not necessarily prevent them from being binding commitments on the Parties concerned. This will turn on whether the core agreement requires the Parties to achieve their INDCs. Certainly it will be easier for Parties to agree to do so where they have a shorter term binding commitment (e.g. the first 5 years of the 10-year cycle in the Dynamic Contribution Cycle) than if there was an attempt to tie them into longer term commitments. It is notable that this mechanism is also reflected in the EU Council’s conclusions on the preparations for COP21.
- (e) On the question of an accounting mechanism, it is likely that the Paris agreement will create a process to elaborate or establish those (e.g. via SBSTA) through subsequent decisions of the COP in the years between 2015-20. Whether these amount to a common set of accounting rules applicable to all Parties or merely high level principles for each Party to abide by may be reflected in the core agreement in Paris.

- It is very likely that there will be a new international agreement in Paris.
- The agreement may not be a Protocol but it may be “an agreed outcome with legal force”.
- INDC levels are likely to be contained outside the ‘core agreement’; for example, in an ‘information’ document.
- The Paris agreement will likely create a process to elaborate or establish an accounting mechanism through subsequent decisions of the COP in the years between 2015-20.

The background of the page is an aerial photograph of a beach. In the top left, there is a dark, pebbly area. The rest of the image shows the ocean with white foam from waves crashing onto a sandy beach. The word 'CONCLUSIONS' is written in a large, white, sans-serif font across the top left, with a thin white horizontal line extending to the right from the end of the word.

CONCLUSIONS

Although the Paris agreement will not have legal force until 2020, the published INDCs of the various countries that are expected to be referenced by the Paris agreement will set the scene for the minimum efforts that are likely to be enshrined in the national laws of the country concerned in the lead up to that date. This may be the first time that some countries will publish laws relating to climate change which will therefore impact business and industry in such countries. Under the Kyoto developed/developing country divide, many businesses and industries (as well as multinationals with a carbon footprint in those developing countries) did not have to concern themselves with legal restrictions on their greenhouse gas emissions. Depending on that country's INDC, that position may change sooner than expected. This is what the Paris agreement is likely to tell us in the most immediate term.

The Paris agreement should also give a boost to climate finance, particularly through the contribution of the private sector via instruments such as the Green Climate Fund. If so, this will provide much needed assurance to the investor community regarding the overall regulatory framework within which their investments rest. The question of whether market mechanisms will also form part of the core agreement is quite thorny. However, most recent discussions are trending towards the use of markets at least receiving a mention in the core agreement.

Should this be the outcome in Paris, most seasoned climate change observers with a memory of the debacle in Copenhagen will regard Paris as a considerable success.

NOTES/REFERENCES

- ¹ Between 30 November and 11 December 2015
- ² Decision 1/CP.17 “Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action”
- ³ Article 2 Decision 1/CP.17
- ⁴ 11926/15 Council conclusions on the preparation for the 21st session of the Conference of the Parties (COP21), at Para 1
- ⁵ Please note this is a non-exhaustive list and does not include or reference many other complementary and parallel efforts aimed at developing consensus and support for a new international agreement.
- ⁶ In particular, the work of Working Group 1, which was tasked with an assessment of new evidence of climate change based on many independent scientific analysis from observations of the climate system, paleoclimate archives, theoretical studies of climate processes and simulations using climate models.
- ⁷ AR5 adopts a methodology of quantitatively describing the likelihood, or probability of some well-defined outcome having occurred or occurring in the future and assigns 95–100% for “extremely likely”.
- ⁸ Working Group I, 5th Assessment Report, Summary for Policy Makers, Section D.3, 2.2, 6.3, 10.3-6, 10.9
- ⁹ Leaders’ Declaration G7 Summit, 7–8 June 2015
- ¹⁰ Held on 23 September 2014 to “raise political momentum for a meaningful universal climate agreement in Paris in 2015 and to galvanize transformative action in all countries to reduce emissions and build resilience to the adverse impacts of climate change”.
- ¹¹ The Environment Protection Agency: Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 3 August 2015.
- ¹² In the Papal Letter released on 18 June 2015 named ‘*Laudato Si*’.
- ¹³ The Ad Hoc Working Group on the Durban Platform for Enhanced Action (“ADP”)
- ¹⁴ Scenario note on the tenth part of the second session of the Ad Hoc Working Group on the Durban Platform for Enhanced Action; Note by the Co-Chairs, 24 July 2015
- ¹⁵ The first draft of the Paris agreement for further negotiation in advance of COP 21 is due on 1 October 2015 with the last ADP session scheduled for 19-23 October.
- ¹⁶ The Subsidiary Body for Scientific and Technological Advice, a permanent body of the UNFCCC.

OUR CLIMATE CHANGE PRACTICE

At Reed Smith we recognize that differing global perspectives on climate change mean that no one approach or viewpoint can be considered as final or definitive.

We understand that although climate change is an environmental issue, the measures taken to address it, whether adaptation or mitigation, are essentially finance driven.

In some countries, including the UK and the United States, this will require significant capital expenditures. Capital will also be required in the non-industrial sectors in many countries, with increased investment in soil sequestration, avoided deforestation, bio-fuels and bio-diversity initiatives, and others.

A multi-disciplinary approach is needed to manage the complex interplay of assets and liabilities generated by climate change. By turn, the legal support required by a dynamic industry of constant and often mercurial change, must provide skill sets that are cross-border, cross-practice and sector focused.

As a leading international law firm, with a dedicated climate change team, Reed Smith is strongly positioned to advise on the global regulatory framework and risks, together with the associated opportunities linked to climate change.

We assist clients on matters that span the climate change spectrum, whether transactional, environmental, corporate, regulatory, or dispute related.

Our lawyers are available to assist clients throughout our offices in Europe, the United States, the Middle East and Asia.

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About Reed Smith

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