

## MEMORANDUM OF LAW

Subject: Circular 175: Request for authority to sign and accept the Paris Agreement

The accompanying memorandum from the Office of the Special Envoy for Climate Change (SECC) requests authority to sign and deposit an instrument of acceptance to join the Paris Agreement (“Agreement”), a multilateral agreement negotiated under the UN Framework Convention on Climate Change (“the Convention”). The United States is a party to the Convention, having been one of the first States to submit its instrument of ratification. The Agreement will be open for signature as of April 22, 2016, at UN Headquarters in New York. In addition to signing, the United States would subsequently deposit its instrument of acceptance in order to join the Agreement. For the reasons below, I conclude that there is no legal objection to signing the Agreement and depositing an instrument of acceptance (i.e., meaning that the Agreement may be concluded as an executive agreement).

The Agreement, among other things:

- establishes a long-term temperature goal of “well below” 2 degrees Celsius, as well as a corresponding greenhouse gas emissions aim of global peaking as soon as possible;
- provides mechanisms to promote achievement of the goal and aim, including, e.g., a collective stocktake every five years of progress in implementing the Agreement and the subsequent submission by Parties of their next round of emissions targets;
- provides for Parties’ emissions targets to be “nationally determined,” as opposed to negotiated or allocated through some kind of agreed formula;
- raises the profile of adaptation to climate change impacts;
- approaches “differentiation” among Parties in a manner that stands in marked contrast to the Kyoto Protocol, which contained commitments only for the so-called “Annex I” Parties (largely developed countries); and
- establishes a robust transparency framework that improves upon the existing system, including by being substantively more rigorous in terms of developing country reporting on emissions inventories, reporting on implementation, and review.

### **Legal Nature of the Agreement**

As a whole, the Paris Agreement is a “treaty” within the meaning of that term in international law. This international law conclusion, however, does not answer the separate question, addressed later in this Memorandum, of whether joining the Agreement would require the advice and consent of the Senate. The individual provisions of the Agreement are of a mixed legal nature. While some provisions are legally binding, many are not, and some (such as those in which the Parties “recognize” X or “are encouraged” to do Y) read more like recommendations or exhortations found in a UN resolution than the provisions of an international agreement. (As an example, the entire adaptation article (Article 7) contains only one provision setting forth a legally binding obligation on Parties.) This “hybrid” approach was necessary to bring all countries on board and was actively supported by the United States, including where legally binding obligations would have been impossible for the United States to fulfill without additional legislation.

As ultimately adopted, the Agreement does contain certain legally binding obligations that would apply to the United States. As discussed below, most involve the submission of information (reporting, communicating) or are otherwise within the control of the Executive Branch (such as accounting for the emissions target). Some are already U.S. obligations under the Convention (such as finance). Importantly, there is no legal obligation to either achieve or implement emissions targets. The United States strongly supported this approach, in the interest of promoting both greater ambition (which might be suppressed by targets of a legal nature) and broad participation, including that of major developing countries. (China and India would not have accepted legally binding targets.) The approach was in stark contrast to the approach taken when negotiating the Kyoto Protocol, an agreement also under the Convention but one that included emissions targets that were both legally binding and not applicable to developing countries.

### **Relationship to the Convention**

According to the negotiating mandate agreed by the Convention’s Conference of the Parties in Durban, South Africa, in 2011 (known as the “Durban Platform”), the resulting agreement was to be adopted “under the Convention.” Paragraph 1 of the cover decision used to adopt the Agreement reiterates this point.

While there is no definition of “under the Convention,” the Convention contains three provisions of relevance to any “related legal instrument,” a phrase

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that would include the Agreement:

- Article 2 of the Convention, which sets forth the Convention's objective, provides that the objective applies to any related legal instrument. Consistent with that directive, Article 2 of the Agreement sets out a global temperature goal (“[h]olding the increase in the global average temperature to well below 2°C”) that gives greater specificity to the Convention objective's reference to avoiding “dangerous anthropogenic interference with the climate system.”
- Article 7.2 of the Convention provides that the Conference of the Parties (“COP”) is to “keep under regular review” the implementation of any related legal instrument it may adopt. As this directive applies to the Convention's COP, it did not need to be reflected in the Agreement.
- Article 14 of the Convention, related to dispute settlement, provides that its provisions apply to any related legal instrument, unless that instrument provides otherwise. While it was not legally necessary to reference the Convention's dispute settlement procedures in the Agreement in order for them to apply, the Agreement nevertheless expressly provides in Article 24 for their application *mutatis mutandis* to the Agreement.

Beyond the three provisions noted, the Convention does not address the terms of any legal instrument thereunder. Some Parties asserted that an agreement “under the Convention” required, for example, the use of the Convention's Annexes (which set forth lists of Parties responsible for certain commitments) or a bifurcated approach to the provisions of the agreement (e.g., that “developed country Parties” have different commitments from “developing country Parties”). Such assertions were strongly opposed by many other Parties, particularly the United States, and were unsuccessful. The Agreement contains no references to the Annexes and, with the exception of the provisions related to financial support, does not take a bifurcated approach to commitments.

It should also be noted, while there was an effort to call the Agreement a “protocol” and to adopt it expressly pursuant to Article 17 of the Convention, this effort was not successful. The instrument is titled “Agreement,” and the authority of the Convention's COP for its adoption is unspecified. In the U.S. view, the COP's authority was provided in Article 7.2(m) of the Convention, which accords the COP residual authority necessary to achieve the objective of the Convention.

There was also an effort at one stage, principally by China, to call the agreement an “implementing agreement” under the Convention. China noted that the U.S. proposal for an agreement in 2009 was called an “implementing

agreement,” and they hoped to use that term for the agreement to be adopted in Paris. This approach, which the United States opposed, was not adopted. Thus, while, as noted below, the legally binding provisions of the Agreement can be traced to, and elaborate, various provisions of the Convention, it is not, as a formal matter, an “implementing agreement” under the Convention.

### **Domestic Form of the 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. See *Weinberger v. Rossi*, 256 U.S. 25, 30 n.6 (1982); *Dames & Moore v. Regan*, 453 U.S. 654, 682-83 (1981); *Belmont v. United States*, 301 U.S. 324, 330-31 (1937); *B. Altman & Co. v. United States*, 224 U.S. 588, 601 (1912). As detailed below, the President’s independent authority under Article II, Section 2 of the Constitution, together with the authority given to him by statute, treaty, and other indicia of Congressional support, as well as past practice concerning similar agreements, provide the President with ample authority to conclude the Agreement as an executive agreement. If approved, the Department of State will deposit an instrument of acceptance signed by the Secretary of State to join the Agreement; it would enter into force for the United States, according to the Agreement’s terms, thirty days after at least 55 States representing 55% of global greenhouse gas emissions (as counted in accordance with paragraph 104 of the decision accompanying the Agreement) have deposited their instruments.

#### **1. Authority to Implement U.S. Obligations under the Agreement**

All U.S. legal obligations under the Agreement can be implemented under existing authority. As elaborated below, nearly all of them can be implemented pursuant to the President’s constitutional authority, as exercised by the Secretary of State. Most obligations involve the communication of information and discretionary actions related to domestic action (e.g., adaptation planning) or international cooperation (e.g., public education, technology). For those that require legislative authority for implementation, such authority already exists.

The core of the Agreement is not legally binding, i.e., there is no legal obligation on Parties to either achieve or implement their emission targets (“nationally determined contributions”). There is also no legal requirement

regarding the type/stringency of Parties' targets.

The Agreement's provisions that are legally binding on the United States are as follows:

Mitigation:

- Article 4.2 requires each Party to prepare, communicate, and maintain successive nationally determined contributions ("NDCs," i.e., emissions targets) over the course of the Agreement.
- Article 4.2 also requires Parties to "pursue domestic mitigation measures, with the aim of achieving the objectives" of their NDCs.
  - Neither sentence of Article 4.2 creates a legal obligation to achieve or implement an NDC.
    - In the first sentence, it is clear from the phrase "it intends to achieve" that there is no legally binding obligation to achieve mitigation targets. (The United States proposed this language early on in the process, and it was widely disliked precisely because it made so clear that the targets were not legally binding.)
    - The second sentence requires a Party to pursue mitigation measures, but without any requirement to pursue particular mitigation measures or to implement or achieve the target.
- Article 4.8 requires each Party to provide the information necessary for clarity, transparency, and understanding, when communicating its NDC.
- Article 4.9 requires each Party to communicate an NDC every five years.
  - Because the provision states that such communication shall be made "in accordance with" the decision of the Parties taken in Paris, paragraph 25 of the adopting decision, in which the Parties decide that Parties "shall submit" future NDCs nine to twelve months in advance of the relevant meeting of Parties, is also legally binding.
- Article 4.13 requires Parties to account for their NDCs so as to promote environmental integrity and avoid double counting.
- Article 4.15 requires Parties to take into consideration in the implementation of the Agreement the concerns of Parties with economies most affected by the impacts of response measures.

Adaptation:

- Article 7.9 requires each Party, as appropriate, to engage in adaptation planning processes and the implementation of actions.

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### Support:

- Article 9.1 requires developed country Parties to provide financial resources to assist developing country Parties with both mitigation and adaptation, in “continuation of their existing obligations under the Convention.” (This commitment is a “collective” one, as was made clear in the memorandum of law to sign the Convention, as well as the transmittal package to the Senate. Further, in the Convention context, it has consistently been interpreted by the United States and other Parties as a collective, not individual, commitment.)
- Article 10.2 requires Parties (collectively) to strengthen cooperative action on technology development and transfer. Article 10.2, as well as Article 12 described below, are obligations to cooperate and thus are indeterminate obligations for which Parties cannot be held to specific results.

### Reporting/Review:

- Article 13.7 requires each Party to regularly provide a greenhouse gas inventory and the information necessary to track progress in implementing and achieving its nationally determined contributions.
- Articles 9.5, 9.7, and 13.9 require developed country Parties to communicate various types of information concerning financial, technology transfer, and capacity-building support.
- Article 11.4 requires all Parties to regularly report on any actions or measures they take to enhance the capacity of developing countries to implement the Agreement.
- Article 13.11 requires each Party to participate in a facilitative, multilateral consideration of, inter alia, the implementation/achievement of its mitigation target.

### Other:

- Article 12 requires Parties (collectively) to cooperate to enhance climate education, training, public awareness, public participation, and public access to information. As is the case with Article 10.2 described above, this is an indeterminate obligation.

The United States would be in a position to implement each of these legally binding obligations under the Agreement under existing domestic authority:

- Eight of the obligations (Article 4.2, sentence one; Article 4.8; Article 4.9; Article 11.4; Article 13.7; Article 9.5, Article 9.7; Article 13.9) are procedural and involve the reporting/submission/communication of information by the

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Executive Branch. These obligations do not require legislative authority but rather can be carried out under the President's authority to conduct foreign affairs under Article II of the Constitution, as exercised by the Secretary of State under 22 U.S.C. 2656.

- The United States already has substantial reporting requirements under the Convention, as elaborated by decisions of the Convention's Conference of the Parties. Article 12 of the Convention in particular requires reporting, *inter alia*, on mitigation (greenhouse gas inventories, mitigation policies and measures) and on actions taken with respect to finance and technology support to developing countries. One example of reporting under Article 12 is the recently submitted 2016 U.S. Biennial Report. The Agreement's reporting requirements elaborate upon these existing obligations.
- The United States would implement any additional reporting requirements under the Agreement pursuant to the same authorities.
- The obligation in the second sentence of Article 4.2, to "pursue domestic mitigation measures," can be implemented by the Executive Branch under existing authorities.
  - This obligation is already being implemented, given that it is an existing U.S. obligation under Article 4.1(b) of the Convention. ("All Parties...shall... [f]ormulate, implement, publish and regularly update national...programmes containing measures to mitigate climate change....")
  - Statutory authorities include, e.g., the Clean Air Act (42 U.S.C. 7401 et seq.) and the Energy Policy and Conservation Act (42 U.S.C. 6291-6317), and regulations thereunder.
  - There is ample existing regulatory authority to pursue mitigation measures, as evidenced by the numerous regulatory actions that have already been taken to control U.S. greenhouse gas emissions, including, e.g.:
    - Under Section 202 of the Clean Air Act (42 U.S.C. 7521), EPA adopted standards controlling CO<sub>2</sub>, N<sub>2</sub>O, and CH<sub>4</sub> for light-duty vehicles for model years 2012-2025 and for heavy-duty vehicles for model years 2014-2018.
    - Acting pursuant to its authority in 49 U.S.C. 32902, the Department of Transportation has adopted fuel economy standards for passenger cars and light trucks, as well as for medium- and heavy-duty vehicles. The authority to regulate the former types of vehicles was provided in the Energy Policy and Conservation Act

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- (1975) and to regulate the latter types was provided in the Energy Independence and Security Act (2007).
- Under the Energy Policy and Conservation Act (42 U.S.C. 6291-6317), the Department of Energy has finalized multiple measures addressing building sector emissions, including energy conservation standards for 29 categories of appliances and equipment.
  - Under Section 612 of the Clean Air Act (42 U.S.C. 7671k), through the Significant New Alternatives Policy program (SNAP), EPA has approved more climate-friendly alternatives to ozone-depleting substances for use in lieu of high global warming potential HFCs in certain applications. Further, it has listed certain high GWP HFCs as unacceptable in specific applications.
- Similar to the reporting obligations, the obligation in Article 4.13 to “account” for NDCs so as to promote environmental integrity/avoid double counting (e.g., count emissions/removals in specified ways) can be carried out by the Executive Branch without the need for additional authority. As under the Convention, the Executive Branch will submit periodic reports on the progress the United States is making towards achieving its emissions target. It will include/exclude emissions and removals of greenhouse gas in a manner that is reflective of any binding rules agreed pursuant to this provision.
  - The obligation in Article 4.15 to take into consideration the concerns of Parties with economies most affected by the impacts of response measures, particularly developing country Parties, is discretionary and can be implemented by the Executive Branch without the need for additional authority.
    - This obligation is nearly the same as existing U.S. obligations under Articles 4.8 and 4.10 of the Convention:
      - Article 4.8 of the Convention provides: “In the implementation of the commitments in this Article, the Parties shall give full consideration to what actions are necessary under the Convention, including actions related to funding, insurance and the transfer of technology, to meet the specific needs and concerns of developing country Parties arising from...the impact of the implementation of response measures....”
      - Article 4.10 of the Convention provides: “The Parties shall...take into consideration...the situation of Parties, particularly developing country Parties, with economies that are vulnerable to the adverse effects of the implementation of measures to respond to climate change.”

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- The obligation in Article 7.9 to engage in adaptation planning processes and implementation of actions is discretionary (“as appropriate”). It can be implemented by the Executive Branch under various existing statutory and Executive Branch authorities, e.g., the Coastal Zone Management Act (Pub. L. 92-583); the Clean Water Act (33 U.S.C. 1251 et seq.); E.O. 13653: Preparing the United States for the Impacts of Climate Change; E.O. 13690: Establishing a Federal Flood Risk Management Standard and a Process for Further Soliciting and Considering Stakeholder Input; E.O. 13689: Enhancing Coordination of Federal Efforts in the Arctic; and E.O. 13677: Climate-Resilient International Development.
  - This obligation is nearly the same as the existing U.S. obligations under Article 4.1 of the Convention.
    - Article 4.1(b) of the Convention provides: “All Parties...shall...formulate, implement, publish and regularly update national and, where appropriate, regional programmes containing...measures to facilitate adequate adaptation to climate change....”
    - Article 4.1(e) of the Convention provides: “All Parties...shall...[c]ooperate in preparing for adaptation to the impacts of climate change; develop and elaborate appropriate and integrated plans for coastal zone management, water resources and agriculture, and for the protection and rehabilitation of areas, particularly in Africa, affected by drought and desertification, as well as floods....”
- Article 9.1 provides: “Developed country Parties shall provide financial resources to assist developing country Parties with respect to both mitigation and adaptation in continuation of their existing obligations under the Convention.” This obligation is not only unquantified but, as noted above, applies collectively to developed country Parties (i.e., not individually to the United States). While not required, U.S. support will be carried out through a variety of means, including, e.g., direct bilateral foreign assistance and contributions to various multilateral trust funds managed by international financial institutions. Legal authority for such support varies depending on the specifics of the support, but may include relevant appropriations acts and the Foreign Assistance Act of 1961.
  - By linking the provision of financial resources to a continuation of “existing obligations under the Convention,” the provision makes clear that the obligation of the United States (which, as noted, is part of a collective obligation) goes no further than existing U.S. financial obligations under the Convention.

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- Existing financial obligations under the Convention are contained in Articles 4.3, 4.4, and, to an extent, 4.5.
  - Article 4.3 of the Convention provides: “The developed country Parties...shall provide new and additional financial resources to meet the agreed full costs incurred by developing country Parties in complying with [certain reporting obligations]. They shall also provide such financial resources...needed by the developing country Parties to meet the agreed full incremental costs of [certain mitigation measures].”
  - Article 4.4 of the Convention provides: “The developed country Parties...shall also assist the developing country Parties that are particularly vulnerable to the adverse effects of climate change in meeting costs of adaptation to those adverse effects.”
  - Article 4.5 of the Convention provides: “The developed country Parties...shall take all practicable steps to promote, facilitate, and finance, as appropriate, the transfer of, or access to, environmentally sound technologies and know-how to other Parties....”
- The obligation in Article 13.11 to participate in a facilitative, multilateral consideration of the implementation/achievement of its nationally determined contribution can be implemented by the Executive Branch pursuant to the President’s constitutional authority to conduct foreign affairs, as exercised by the Secretary of State.
- The obligations in Articles 10.2 and 12 involve unspecified collective “cooperation” with respect to technology and public education, etc., respectively, and can be implemented by the Executive Branch under existing authorities, e.g., Section 204 of the International Cooperation in Global Change Research Act of 1990, Pub. L. 101-606 (Title II); Section 102 (e) of the Global Change Research Act of 1990, Pub. L. 101-606; National Climate Program Act, 15 U.S.C. Section 2904 (d); the Marine Protection, Research and Sanctuaries Act, 33 USC Sections 1442 (a) and (b); Section 103 of the Clean Air Act, as amended, and Section 102(2)(F) of the National Environmental Policy Act (which authorize EPA to engage in and support various cooperative technology transfer activities); the Coastal Zone Management Act, 16 U.S.C. 1451 et seq. (which provides NOAA authority to conduct a program of technical assistance and management-oriented research in coastal zone management in connection with possible sea-level rise); and the Weather Bureau Act, 15 U.S.C. 313a (which authorizes the development of an international basic meteorological reporting network in the Western Hemisphere and the Arctic, including cooperative programs in and with other countries).

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It should be noted that the Agreement includes several provisions that, while written in mandatory terms (“shall”), do not apply to Parties (either individually or collectively). Some apply to institutions, e.g., directions to the Warsaw Institutional Mechanism (Article 8), to the Secretariat (Article 4.12), or to the COP meeting as the Parties to the Paris Agreement (throughout). Others are written to provide an assurance in one article that a particular issue is addressed in one or more other articles, e.g., Article 4.5 (“[s]upport shall be provided...”).

### **2. Statutory and Congressional Support**

In addition to the President’s constitutional authority, his authority to conclude the Agreement as an executive agreement derives support from statute and other Congressional actions. As discussed above, multiple statutes provide the authority necessary to implement many of the obligations contained in the Agreement. In addition, Congress has expressed support for international engagement on environmental protection and on climate change in a number of laws and other actions detailed below.<sup>1</sup>

- The National Environmental Policy Act of 1969 contains a specific directive from Congress that, “to the fullest extent possible,” “all agencies of the Federal Government...shall recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind’s world environment.” 42 U.S.C. 4332(2)(F).
- The Global Climate Protection Act of 1987 (amended in 1993), expresses strong Congressional support for U.S. international engagement on climate change, including, e.g., that U.S. policy should seek to “work toward multilateral agreements.”

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<sup>1</sup>Congressional authorization for the President’s conclusion of an international agreement may be either explicit or implicit. As observed by a leading Congressional study of treaties and international agreements conducted by the Congressional Research Service for the Senate Committee on Foreign Relations, “Congress has enacted statutes providing authority in advance for the President to negotiate with other nations on a particular matter. This authority may be explicit, or, in the case of agreements concluded in conformity with a generally enunciated congressional policy, implied from the terms of the enactment.” *Treaties and Other International Agreements: The Role of the United States Senate*, 106<sup>th</sup> Con., 2d Sess., S. Prt. 106-71 (2001), at 69. See also Restatement (Third) of Foreign Relations Law, Section 303, cmt. E (Congress may enact legislation that requires, or fairly implies, the need for an agreement to execute the legislation.”); *Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981)(“When the President acts pursuant to an express or implied authorization from Congress, he exercises not only his powers but also those delegated by Congress.”)

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- The Senate unanimously approved the Convention in 1992. The Paris Agreement was adopted under the Convention, and its purpose is directly linked to the Convention. Specifically, Article 2 of the Agreement makes clear, as an overarching matter, that the Agreement is “enhancing the implementation of the Convention, including its objective.” Further, the specific provisions of the Agreement are substantially similar to (in some cases, extending Convention provisions that apply only to developed countries to all countries), elaborate, and/or cross-reference various provisions in the Convention:
  - Article 4.2 of the Agreement, which calls for the periodic communication of nationally determined contributions (i.e., mitigation targets or other measures), is substantially similar to Articles 4.1(b) and 4.2(a) of the Convention. Article 4.1(b) calls for all Parties to formulate, implement, publish, and regularly update, mitigation measures. Article 4.2(a), which applies only to developed country Parties, calls for adopting mitigation measures and communicating detailed information on such measures.
  - Article 4.8 of the Agreement calls for all Parties to provide clarity in communicating their mitigation targets/other measures. Article 4.2(b) and Article 12.2(a) of the Convention, which apply only to developed country Parties, call for a “detailed” description of such measures.
  - Article 4.9 of the Agreement calls for all Parties to communicate their mitigation targets/measures every five years. This makes more specific the obligation in Article 4.2 of the Convention (which applies only to developed countries) to “periodically” communicate their mitigation measures.
  - Article 4.13 of the Agreement, which calls for Parties to account for their mitigation targets/measures, elaborates Articles 4.2(b) and 12.2 of the Convention, which calls for developed country Parties to communicate detailed information on their mitigation measures.
  - As explained above, Article 4.15 of the Agreement is substantially similar to Articles 4.8 and 4.10 of the Convention.
  - As explained above, Article 7.9 of the Agreement is substantially similar to Articles 4.1(b) and 4.1(e) of the Convention.
  - As explained above, Article 9.1 of the Agreement, which calls for financial support from developed country Parties, by its terms goes no further than existing financial obligations under Articles 4.3, 4.4, and 4.5 of the Convention.
  - Article 10.2 of the Agreement, which calls for Parties to strengthen cooperative action on technology development and transfer, is substantially similar to Article 4.5 of the Convention, which calls for developed country Parties to take all practicable steps to promote the

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transfer of technologies, as well as to support the development of technologies of developing countries.

- Article 11.4 of the Agreement, which calls for all Parties that are enhancing the capacity of developing country Parties to communicate on these actions, is substantially similar to Article 12.3, which calls for developed country Parties to communicate details of measures taken into accordance with Article 4.5 (which includes developing the capacity of developing countries).
- Article 12 of the Agreement, which calls for Parties to cooperate in relation to climate change education and public awareness, is substantially similar to Articles 4.1(i) and 6 of the Convention, which, respectively, call for Parties to promote and cooperate on education, training, and public awareness related to climate change, and lay out specifics with respect to the implementation of Article 4.1(i).
- Article 13.7 of the Agreement, which calls for all Parties to regularly provide information on their greenhouse gas inventories and on their progress in implementing and achieving their mitigation targets/measures, is substantially similar to Articles 4.1(a) and 12.1(a) of the Convention (which call for the communication of greenhouse gas inventories) and Articles 4.2(b) and Article 12.2 (which, for developed country Parties, call for the communication of information on the implementation of mitigation measures).
- Articles 9.5, 9.7, and 13.9 of the Agreement, which call for developed country Parties to communicate information on their provision and mobilization of support to developing country Parties, elaborate Article 12.3 of the Convention, which calls for developed country Parties to communicate details of measures taken to implement Articles 4.3, 4.4, and 4.5 (which address financial and other forms of support to developing country Parties).
- Article 13.11 of the Agreement, which calls for Parties to participate in a facilitative, multilateral consideration of its implementation, elaborates Article 10 of the Convention, which provides for the Subsidiary Body on Implementation's consideration of information communicated by developed country Parties concerning their implementation of mitigation measures.

Finally, it should be noted that, while the presence of legally binding emission targets would not necessarily trigger the need for Senate advice and consent (e.g., the Administration's proposal in 2009 for an agreement with binding targets was made in the context of having the U.S. international target track the

domestic emissions cap under the anticipated Waxman-Markey bill), the absence of legally binding targets here is significant. The legal character of emission targets was at the heart of the Senate's consideration of the Convention in 1992. The Senate sought reassurance from the Executive Branch that the emissions "aim" in the Convention was not legally binding and expressed the view that any future decision of the Convention's Conference of the Parties that included legally binding "targets and timetables" would need to be submitted to the Senate for advice and consent (Exec. Rept. 102-55, p. 14). During the ratification process, the Executive Branch stated, in response to a question whether it would submit a "protocol" with "targets and timetables" (understood in that context to mean legally binding targets) to the Senate, that it "expected" to send to the Senate any future agreement with such targets and timetables (S. HRG. 102-973, p. 106).

While this ratification history would not legally compel Senate advice and consent even if the Paris Agreement did contain legally binding targets, the history indicates that the Senate had a particular focus in terms of its role vis-à-vis future agreements under the Convention. This focus is bolstered by the complete absence of calls from the Senate to have a role in the approval of the Copenhagen Accord, which contained non-legally binding targets. The fact that the Agreement does not contain legally binding targets – and this does not appear to be contested, even by those advocating Senate approval – supports the appropriateness of concluding the Agreement as an executive agreement.

### **3. Past Practice/Precedent**

The President's authority to conclude the Agreement as an executive agreement finds further support in past practice with respect to similar agreements. The Supreme Court has cited Congress' acquiescence in the President's entry into prior agreements as executive agreements as a relevant consideration establishing his authority to enter into subsequent similar agreements. *See Dames & Moore*, 453 U.S. at 682; *American Insurance Assn. v. Garamendi*, 539 U.S. 396, 45 (2003).

In terms of past climate agreements, the Executive Branch sent the Convention to the Senate for its advice and consent to ratification. (The memorandum of law in the Circular 175 package to sign the Convention declares that the Convention will be concluded in this manner, but without analyzing whether Senate approval was legally necessary.) The Executive Branch did not send the Kyoto Protocol to the Senate after its adoption because of, *inter alia*, the absence of commitments for developing countries. (Even if the Executive Branch

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had sent the Kyoto Protocol to the Senate, it would be distinguishable from the Paris Agreement, given, among other things, the highly legally binding nature of the Protocol, including its legally binding emission targets.) The Copenhagen Accord, a political rather than legal instrument, was not sent to the Senate.

There are numerous examples of international environmental agreements with legally binding obligations – including obligations similar to those contained in the Paris Agreement – having been concluded as executive agreements, including, e.g., the Convention on Long-Range Transboundary Air Pollution (“LRTAP”); the NO<sub>x</sub> Protocol to LRTAP; the Heavy Metals Protocol to LRTAP; the Multi-Pollutant Protocol to LRTAP; the U.S.-Canada Air Quality Agreement; the OECD Decision of 2001 on the control of transboundary movements of hazardous wastes, and, most recently, the Minamata Convention on Mercury:

- There is no perfectly analogous precedent to the Paris Agreement. Among other things (such as that the Agreement elaborates an existing treaty, as discussed above), the precedents actually contain *far more* substantive commitments than does the Paris Agreement.
  - In contrast to the Agreement, the LRTAP Protocols, the Air Quality Agreement, and the Minamata Convention all contain legally binding constraints on emissions.
  - The LRTAP Protocols contain specific, legally binding emission limits on pollutants, as well as legally binding obligations with respect to, e.g., research, technology, and monitoring.
  - The Air Quality Agreement contains specific, legally binding reduction targets for emissions of sulphur dioxide and nitrogen oxides, as well as legally binding obligations with respect to, e.g., environmental impact assessment and compliance monitoring.
  - The Minamata Convention contains not only legally binding limits on mercury emissions but also legally binding obligations with respect to, *inter alia*, the mining of mercury, the import and export of mercury, the manufacture of mercury, and the treatment of mercury waste.
  - The OECD Decision contains legally binding obligations regarding the export and import and specified hazardous waste.
- As noted above, the main obligations in the Paris Agreement (setting aside those that repeat Convention obligations or call for unspecified forms of cooperation) involve reporting. The above agreements all

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contain legally binding reporting requirements, e.g., Article 21 of the Minamata Convention, Article VII of the Air Quality Agreement, and Article 7 of the LRTAP Multi-Pollutant Protocol.

While there are several examples of environmental agreements having gone to the Senate, many are distinguishable in terms of the nature of their legally binding provisions and/or the need for new legislation to implement U.S. obligations. For example, the Basel Convention on Transboundary Movements of Hazardous Wastes and their Disposal, the Rotterdam Convention on the Prior Informed Consent Procedures, and the Stockholm Convention on Persistent Organic Pollutants all contained extensive *substantive* legal obligations and required new legislative authority to carry out U.S. obligations. Moreover, unlike the Paris Agreement, these agreements were not concluded under existing treaties to which the Senate had already given its advice and consent.

In sum, there is ample precedent for treating an agreement such as the Paris Agreement as an executive agreement. Congress' acquiescence in this past practice provides further support for the President's authority with respect to entering into the Paris Agreement.

#### **4. Counter-Arguments on Domestic Form**

The arguments that have been advanced in support of the necessity for Senate approval are unpersuasive:

- It has been argued, for example, that the inclusion of any legally binding provisions in an agreement means it requires Senate approval.
  - This is of course erroneous. There is no constitutional basis for the assertion and, in fact, the Executive has routinely entered into executive agreements with legally binding provisions throughout U.S. history.
- It has been argued that the Agreement sets up an expectation that the United States will undertake more and more ambitious targets indefinitely and that, even if such expectation is not legally binding, the Senate should be a part of the decision to create such an expectation.
  - Political expectations are often set in motion by instruments that do not require Senate approval, e.g., the Helsinki Accords, the Copenhagen Accord, and the Washington Nuclear Security Summit Communique.
- It has been argued that Article 4.3 of the Agreement legally binds Parties to take on more and more ambitious targets over time, which in turn requires the Agreement to get Senate approval.

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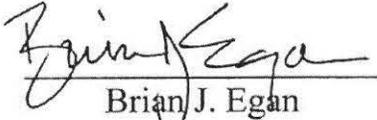
- Article 4.3 provides: “Each Party’s successive nationally determined contribution will represent a progression beyond the Party’s then current nationally determined contribution and reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.”
- The provision in question is not legally binding. While the United States sometimes uses the verb “will” in its practice to signify a binding obligation and seeks to avoid its use in non-binding situations to avoid confusion, there was no intent in this case to create a binding obligation.
- Not only do most countries generally consider “will” to be non-binding, but, in this particular context, the negotiating States were almost uniformly opposed to a legally binding obligation. They were confused about the exact meaning of “progression,” which made them nervous about what they would be undertaking; in addition, they were concerned that a binding obligation to “progress” targets over time would result in suppression of ambition. We do not have to reach the issue here whether a legally binding provision to “progress” targets would affect the need for Senate approval.
- It has been asserted that the Executive Branch committed to send up any future agreement with “targets and timetables.”
  - As noted above, the phrase “targets and timetables” had the meaning at the time of legally binding targets. Further, as noted, the Administration at the time did not *commit* to sending up a future agreement, even if it had been a “protocol” that contained “targets and timetables.”
- It has been asserted that the Convention was approved by the Senate and that, therefore, this Agreement needs to be a treaty as well.
  - This is not accurate as a matter of law. Just because an agreement was approved by the Senate does not mean that any agreement thereunder needs to be a treaty; it depends upon its form and content. The fact that the Senate has already approved an agreement can, as in this case, actually provide support for the conclusion of an executive agreement because the subsequent agreement is within the scope of, and advances the object and purpose of, the original agreement.

### Conclusion

Based on the above, there is no legal objection to signature of the Agreement. Further, the United States may join the Agreement as an executive agreement (as opposed to a treaty requiring the Senate’s advice and consent) as a matter of domestic legal form. If approved, the Department of State would deposit

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an instrument of acceptance to join the Agreement. It would enter into force for the United States, according to Article 21 of the Agreement, on the thirtieth day after 55 Parties to the Convention accounting in total for at least an estimated 55 % of total global GHG emissions have deposited their instruments of ratification, acceptance, approval, or accession.

  
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Brian J. Egan  
Legal Adviser