

## PARIS AGREEMENT

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### Introduction

The Paris Agreement was adopted on 12 December 2015 and came into force less than a year later, on 4 November 2016. Although the 1997 Kyoto Protocol also technically remains in force, the Paris Agreement has, in effect, superseded the Kyoto Protocol as the principal regulatory instrument governing the global response to climate change.

The Paris Agreement seeks to find a middle ground – a “Goldilocks” solution – between the contrasting models of the Kyoto Protocol and the 2009 Copenhagen Accord. It does so along three dimensions:

- *Prescriptiveness* – Like the Copenhagen Accord, the Paris Agreement takes a bottom-up approach to the substance of climate change policy, allowing parties to nationally determine their contributions to address climate change, in contrast to the Kyoto Protocol, which prescribed emissions limitation targets from the top-down, through international negotiations. But, unlike the Copenhagen Accord, the Paris Agreement sets forth detailed rules on accounting and transparency to promote accountability and ambition.
- *Legal form* – Like the Kyoto Protocol and unlike the Copenhagen Accord, the Paris Agreement is a treaty within the meaning of international law, but not all its provisions establish legal obligations. Most importantly, parties do not have an obligation to achieve their nationally determined contributions (NDCs) to address climate change – thus, in that respect, NDCs are not legally binding.
- *Differentiation* – Unlike the Kyoto Protocol, which sharply differentiated between developed and developing countries (prescribing emission reduction targets for Annex I parties but no new commitments for non-Annex I parties), the Paris Agreement takes a nuanced approach to differentiation. With respect to mitigation, it establishes the same basic procedural obligations for all parties, but allows countries to self-differentiate their substantive mitigation contributions through their NDCs. With respect to finance, it imposes financial obligations only on developed country parties, but encourages other parties to provide support voluntarily. And with respect to transparency, it establishes a common transparency framework but gives carefully defined flexibility to those developing countries that need it based on lack of capacity.

The Paris Agreement’s hybrid approach to the issues of prescriptiveness, legal form, and differentiation allowed it to achieve virtually universal acceptance and hence be global in scope. After years of often contentious negotiations, the consensus adoption of the Paris Agreement represented a considerable achievement. Nevertheless, the initial round of NDCs submitted by parties pursuant to the Paris Agreement do not put the world on a pathway to limiting global warming to well below 2°C, much less 1.5°C, the temperature goals articulated in the Paris Agreement (this gap was acknowledged by the parties in the decision adopting the Paris Agreement, Decision 1/CP.21, para. 17). The ability of the Paris Agreement to achieve the objective of the 1992 United Nations Framework Convention on Climate Change (UNFCCC), namely, to prevent dangerous anthropogenic climate change, will thus depend on whether the agreement’s so-called “ambition mechanism” works as intended to ratchet up the level of ambition of parties’ NDCs over time.

## Historical context

The Paris Agreement is the third international legal agreement addressing the climate change problem.

The first agreement was the UNFCCC, which established the basic system of governance for the climate change issue, including:

- The overall objective of the regime, namely, to limit atmospheric concentrations of greenhouse gases (GHGs) to levels that would prevent dangerous anthropogenic climate change.
- Guiding principles, including the principles of common but differentiated responsibilities and respective capabilities (CBDR-RC), precaution, and cost-effectiveness.
- General obligations on all parties to develop policies to mitigate and adapt to climate change and to report on their emissions and policies.
- Differentiation of commitments based on lists of parties set forth in two annexes. Parties listed in Annex I (roughly corresponding to “developed” countries) had a non-binding goal to return their emissions to 1990 levels by the year 2000 as well as more stringent reporting obligations; parties listed in Annex II (consisting of Annex I countries minus countries with economies in transition) also were given obligations to provide finance and technology to developing countries; and parties not listed in Annex I (generally referred to as “non-Annex I parties” and often equated with “developing countries,” at least as of 1992) had only the general obligations mentioned above.
- Institutions, including the Conference of the Parties (COP), which serves as the highest governing body; Subsidiary Bodies on Scientific and Technological Advice (SBSTA) and on Implementation (SBI); Secretariat; and financial mechanism.

The second climate change agreement was the *1997 Kyoto Protocol*, which established an elaborate regulatory regime to limit emissions of Annex I parties. Important elements of the Kyoto Protocol’s regulatory approach included:

- Legally binding, economy-wide emissions limitation targets for Annex I countries. The initial round of targets set forth in the Protocol applied to a five-year commitment period running from 2008-2012, with the expectation that new sets of targets would be adopted for subsequent commitment periods.
- Several market mechanisms to allow Annex I parties to implement their emissions targets flexibly, including emissions trading and the Clean Development Mechanism (CDM).
- Detailed reporting requirements on Annex I parties.
- A compliance mechanism that included an “enforcement” branch.
- A bifurcated approach to differentiation that imposed legal limits on Annex I party emissions and no new commitments on non-Annex I parties.

Following the adoption in 2001 of the Marrakesh Accords (Decisions 2-24/CP.7), which set forth detailed rules to operationalize the Kyoto Protocol, and the Protocol’s entry into force three years later, attention turned to the issue of what to do after 2012, when the Protocol’s first commitment period ended. In 2005, the parties to the UNFCCC and the Kyoto Protocol decided to proceed on two tracks: one track to negotiate a second commitment period under the Kyoto Protocol, the other track to consider “long-term cooperative action” under the UNFCCC. It quickly became apparent, however, that relatively few countries were willing to accept further emissions reduction commitments under the Kyoto Protocol. The long-term-cooperative-action track therefore became the focus of efforts to broaden the regime to encompass a greater share of global emissions. This track was initiated by the 2007 Bali Action Plan (Decision 1/CP.13) and led first to the 2009 Copenhagen Accord (Decision 2/CP.15), then the 2010 Cancun Agreements (Decision 1/CP.16), and eventually, in transmuted form, to the Paris Agreement.

## Negotiating history

The negotiations resulting in the Paris Agreement were launched in 2011 by the Durban Platform for Enhanced Action (Decision 1/CP.17). The impetus for the negotiations was the desire of some parties – in particular, the European Union and small island developing States – to develop a legally binding agreement, in contrast to both the Copenhagen Accord, which was a political agreement, and the Cancun Agreements, which were adopted as a COP decision and hence lacked legal force. The Durban Platform established an ad hoc working group (the ADP) to negotiate a new instrument by 2015, but States were unable to agree on the legal form of the instrument, so the Durban Platform instead used the deliberately ambiguous formulation, “a protocol, another legal instrument or an agreed outcome with legal force” (Decision 1/CP.17, para. 2). Unlike the Berlin Mandate (Decision 1/CP.1), which initiated the Kyoto Protocol negotiations and spelled out in considerable detail the substance of the instrument to be negotiated (the 1995 Berlin Mandate, Decision 1/CP.1, specified that the agreement to be negotiated establish quantitative emissions limitation targets for Annex I parties and no new commitments for non-Annex I parties), the Durban Platform left the substance of the Paris Agreement completely open. Notably, it contained no reference to the UNFCCC’s annexes or to the principle of CBDR-RC, instead simply stating that the new instrument would be “under the Convention” and “applicable to all Parties.”

Important milestones in the Paris negotiations included:

- The 2013 Warsaw decision on “Further Advancing the Durban Platform,” which pointed the way to the hybrid legal form of the Paris Agreement by articulating the concept of nationally determined “contributions” rather than “commitments” (Decision 1/CP.19, para. 2(b))—a formulation that explicitly left open whether NDCs would be legally binding.
- The 2014 Lima Call for Action, which elaborated informational requirements for countries’ intended nationally determined contributions (INDCs) (Decision 1/CP.20, para. 14), to ensure that they clearly articulated what a country was pledging to do (in contrast to some countries’ pledges under the Copenhagen Accord, which were not transparent or understandable because they were specified so vaguely).
- The joint announcement by the United States and China in November 2014, which put forward a refined version of the principle of CBDR-RC, adding the element, “in light of different national circumstances.”

As has been the pattern in the United Nations climate change negotiations from the start, progress was slow initially, and the ADP was not able to produce an initial negotiating text until February 2015. Nevertheless, throughout 2015, States began to submit INDCs and, by the beginning of the Paris Conference, more than 180 States had done so. During the Paris Conference itself, the COP president, French foreign minister Laurent Fabius, issued a series of draft texts, based on consultations with the different negotiating groups, which progressively narrowed the open issues, leading to adoption of the Paris Agreement by acclamation on 12 December 2015.

The COP decision adopting the Paris Agreement (Decision 1/CP.21) elaborated some of its provisions and established a work program to develop additional rules, modalities, procedures, and guidelines to flesh out and operationalize the often-barebones provisions of the Paris Agreement itself. Negotiation of the “Paris Rulebook” took another three years and was mostly completed with the adoption in 2018 of a comprehensive set of decisions at COP-24 in Katowice, Poland, addressing mitigation, adaptation, finance, transparency, the periodic global stocktake, and the new implementation and compliance mechanism (Decisions 3-20/CMA.1), leaving only the rules for the article 6 market-based approaches left to be determined.

## Overview of the Paris Agreement

The Paris Agreement is a comprehensive agreement addressing all aspects of the climate change problem, with provisions on mitigation, adaptation, loss and damage, finance, technology, capacity

building, transparency, implementation and compliance, and institutions. Key elements of what might be called the “Paris paradigm” include the following:

- First, it is global.
- Second, it has a hybrid legal form, as discussed above: it is a treaty within the meaning of international law, but not all its provisions are legally binding.
- Third, it abandons the annex-based approach of the UNFCCC and the Kyoto Protocol, instead elaborating a more nuanced, carefully calibrated approach to differentiation.
- Fourth, it establishes ambitious temperature, emissions, adaptation, and finance goals.
- Fifth, it adopts a bottom-up approach that allows States to nationally determine the substance of their mitigation and adaptation actions.
- Sixth, it relies on transparency rather than legal bindingness to promote accountability.
- Seventh, its “ambition mechanism” establishes an iterative process to promote progressively stronger NDCs over time.

## Summary of key provisions

### A. *Mitigation*

The Paris Agreement establishes both temperature and emissions goals that supplement the UNFCCC’s objective of stabilizing concentrations of greenhouse gases at levels that would prevent dangerous anthropogenic interference with the climate system (UNFCCC art. 2). Article 2.1(a) specifies two temperature goals: first, to hold temperature increase to “well below” 2°C above pre-industrial levels; second, to pursue efforts to limit temperature increase to 1.5°C. Article 4.1 adds two emissions goals: first, to reach global peaking of emissions as soon as possible and to undertake rapid reductions thereafter; and second, to achieve net zero emissions in the second half of the century.

To achieve these goals, article 4 sets forth a number of legal obligations on parties, including to:

- Prepare and communicate an NDC every five years, with the information necessary for clarity, transparency and understanding (ICTU) (arts 4.2, 4.9).
- Maintain successive NDCs (art. 4.2).
- Account for their NDCs (art. 4.13).
- Pursue domestic measures with the aim of achieving the objective of their NDCs (art. 4.2).

Notably, these obligations apply to all parties, with the exception of least developed countries and small island developing States, which may develop strategies, plans and actions reflecting their special circumstances (art. 4.6). Rather than differentiate obligations in terms of categories of countries (such as “developed” and “developing” or Annex I and non-Annex I), article 4 allows parties to self-differentiate their actions through their NDCs. The Paris Rulebook decision on mitigation provides further guidance on the obligations of parties to provide ICTU and to account for their NDCs (Decision 4/CMA.1). Although ordinarily COP decisions are not legally binding, the article 4 provisions on ICTU and accounting provide that parties are to act “in accordance with” relevant COP decisions (technically, decisions of the Conference of the Parties serving as the Meeting of the Parties to the Paris Agreement, or CMA), making the Paris Rulebook decisions on ICTU and accounting binding on parties.

In addition to establishing legal obligations, article 4 articulates several normative expectations, including that:

- Successive NDCs will represent a progression and reflect the highest possible ambition (art. 4.3).
- Developed country parties should undertake absolute economy-wide emission reduction targets, with developing countries encouraged to move towards such targets over time (art. 4.4).

- All parties should strive to formulate and communicate long-term low greenhouse gas emission development strategies (art. 4.19).

*B. Market mechanisms*

Article 6 allows parties to implement their NDCs through cooperation with other parties. It provides for two such voluntary cooperation mechanisms:

- First, article 6.2 allows parties on a voluntary basis to internationally transfer mitigation outcomes (i.e., emission reductions) and to use these internationally transferred mitigation outcomes (ITMOs) to achieve their NDCs – in essence, a form of emissions trading. Article 6.2 requires that parties, when engaging in ITMOs, promote sustainable development, ensure environmental integrity and transparency, and apply robust accounting rules to ensure no double counting.
- Second, article 6.4 establishes an offset mechanism, similar to the Kyoto Protocol’s Clean Development Mechanism, and directs the CMA to adopt rules, modalities, and procedures for the new mechanism.

As of July 2021, the negotiation of rules on the article 6.2 and 6.4 mechanisms were still ongoing.

*C. Adaptation and Loss and Damage*

In contrast to the Paris Agreement’s mitigation provisions, which establish comparatively precise goals and legal obligations, the agreement’s adaptation provisions are more general and, for the most part, are hortatory and expository rather than obligatory. Articles 2.1(b) and 7.1 articulate the general goals of enhancing adaptive capacity, fostering and strengthening climate resilience, and reducing vulnerability. The only obligation relating to adaptation contained in article 7 is to engage in adaptation planning processes and even this is qualified by the modifier, “as appropriate” (art. 7.9). Otherwise, article 7 simply recognizes that the need for adaptation is significant (art. 7.4), that adaptation action should be country driven and guided by the best available science (art. 7.5), that international cooperation is important and should be strengthened (arts. 7.6 and 7.7), and that parties should submit and periodically update adaptation communications, as appropriate (art. 7.10).

Article 8 incorporates the Warsaw International Mechanism for Loss and Damage (WIM) into the Paris Agreement and subjects it to the authority and guidance of the CMA. However, the COP decision adopting the Paris Agreement explicitly provides that article 8 shall not provide a basis for any liability or compensation (Decision 1/CP.21, para. 51).

*D. Finance*

Article 2.1(c) of the Paris Agreement establishes the goal of making “finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development.” This goal goes well beyond the traditional focus of climate finance on the provision of support to developing countries. It encompasses private as well as public financial flows and calls not only for increasing green finance flows to support low emission technologies and climate resilience, but also for phasing out brown finance flows used to fund greenhouse gas emitting technologies (such as coal-fired power plants).

Article 9 contains the only commitments in the Paris Agreement that continue to be differentiated along developed/developing country lines. Article 9.1 reiterates the commitment of developed countries under the UNFCCC to provide financial resources to assist developing countries mitigate and adapt to climate change, and article 9.5 requires developed countries to provide quantitative and qualitative information on a biennial basis about their financial support. In a break from earlier climate instruments, however, which were silent about the provision of financial support by other countries, article 9.2 seeks to enlarge the donor pool by “encouraging” other countries to provide financial support on a voluntary basis. Although article 9 does not specify any quantitative finance goal, the decision adopting the Paris Agreement extended through 2025 the collective finance goal set forth in the Copenhagen Accord – namely, that developed countries mobilize jointly US\$100 billion per year from public and private sources for mitigation and adaptation in developing countries (Dec. 1/CP.21, para. 53).

### *E. Transparency*

Since the Paris Agreement does not make parties' NDCs legally binding, it relies on transparency to hold countries accountable for achieving their NDCs. Accordingly, article 13 establishes an "enhanced transparency framework" (ETF) involving self-reporting by States and both technical expert and peer review. The ETF is applicable to all parties, albeit with flexibility for "those developing countries that need it in the light of their capacities" (art. 13.2). It consists of three elements:

- First, biennial transparency reports (BTRs), including the following required elements:
  - A national inventory of greenhouse gas emissions and removals.
  - The information necessary to track progress in implementing and achieving a party's NDC.
  - For developed countries, financial, technology transfer, and capacity building support provided to developing countries.

In addition to these required elements, the Paris Agreement recommends that parties provide information on climate change impacts and adaptation, and that developing countries provide information on financial, technology transfer and capacity building support needed and received.

- Second, technical expert review to consider the consistency of the information provided by a party with the Paris Rulebook and to identify possible areas of improvement.
- Third, peer review by the parties (called "a facilitative, multilateral consideration of progress").

The Paris Rulebook decision on transparency (Decision 18/CMA.1) sets forth, in great detail, "common modalities, procedures, and guidelines" (MPGs) for the ETF, and is the longest decision in the Paris Rulebook, totaling 35 pages. It allows countries to self-determine whether they need flexibility based on lack of capacity, but carefully circumscribes this flexibility by: (1) specifying the provisions for which flexibility is available and the types of flexibility available, and (2) requiring that parties claiming flexibility specify their capacity constraints and provide an estimated time frame for addressing those constraints (Decision 18/CMA.1, para. 6).

### *F. Ambition mechanism / global stocktake*

To achieve its goals, the Paris Agreement establishes an iterative process intended to increase ambition over time. Every five years:

- Parties submit their NDCs.
- Each party's progress in achieving its NDC is subjected to technical expert and peer review.
- The parties undertake a global stocktake of collective progress in achieving the Paris Agreement's purpose and long-term goals.
- Informed by the outcomes of the stocktake as well as the principle of progression in article 4.3, parties submit another round of NDCs and the cycle begins anew.

The global stocktake is intended to play a key role in the ambition mechanism by providing regular assessments of how well the parties are doing collectively in achieving the Paris Agreement's goals. It includes a review of not only mitigation, but also adaptation and financial support. Stocktakes will be undertaken every five years, beginning in 2023.

### *G. Implementation and compliance*

Article 15 establishes a facilitative, non-adversarial, and expert-based implementation and compliance mechanism, governed by a 12-member committee elected by the parties. The Paris Rulebook decision elaborating modalities and procedures for the new mechanism attempts to strike a balance between those countries that wanted the committee to play a "help desk" function, involving the provision of assistance to countries having compliance difficulties, and those that wanted the

committee to play a more independent role in policing compliance by parties. Rather than allowing only self-referrals, the Paris Rulebook allows the committee to initiate proceedings, but only in carefully circumscribed circumstances, including: (1) when a report has “significant and persistent” inconsistencies with the rules, (2) to consider issues that would otherwise escape review (for example, failure by a party to submit an NDC or mandatory report), and (3) to consider systemic issues.

#### *H. Institutions*

In general, the Paris Agreement makes use of the UNFCCC’s institutions, including the:

- Conference of the parties (designated the Conference of the Parties serving as the Meeting of the Parties to the Paris Agreement, or CMA) (art. 16)
- Secretariat (art. 17)
- Subsidiary bodies on scientific and technological advice (SBSTA) and on implementation (SBI) (art. 18)
- Financial mechanism (art. 9.8).

In addition, the Paris Agreement establishes its own Implementation and Compliance Committee (art. 15), as noted above.

### **Influence on international environmental law**

Although most of the Paris Agreement’s distinctive features have precursors or analogues, the intense international focus on the climate change issue will likely make the Paris Agreement unusually influential. Elements of the agreement that may influence international environmental law more generally include:

*Building ambition over time* – The Paris COP was important not only in adopting the Paris Agreement, but also in creating a political moment that induced both States and non-State actors to come forward with more ambitious climate policies. The Paris Agreement’s ambition mechanism is intended to create similar political moments every five years, which focus political attention on the climate change problem and generate pressure to do more. Whether the Paris Agreement will succeed in creating these political moments remains to be seen. But this approach to generating ambition is one of the Paris Agreement’s most innovative elements and might be applied to other international environmental problems.

*Calibrating legal bindingness* – The Paris Agreement successfully bridged the differences among States over the issue of legal bindingness by distinguishing the legal form of the overall instrument – the Paris Agreement is unquestionably a treaty within the meaning of international law – from the legal force of its particular provisions, which vary widely:

- Some provisions create legal obligations – for example, article 4.2, which requires that each party *shall* submit an NDC every five years.
- Some provisions are hortatory – for example, the first sentence of article 4.4, which recommends that developed countries *should* adopt economy-wide, absolute emission reduction targets.
- Some provisions encourage action – for example, the second sentence of article 4.4, which *encourages* other parties to move towards economy-wide, absolute targets over time.
- Some express general normative expectations – for example, article 4.3, which provides that successive NDCs *will* represent a progression and reflect a party’s highest possible ambition.
- Some merely express relevant background understandings – for example, articles 7.2 and 7.4, which *recognize* that adaptation is a global challenge and that the current need for adaptation is significant.

*Balancing international prescription and national discretion* – The Paris Agreement is also carefully calibrated in balancing international prescription and national discretion. On the one hand, multilaterally agreed rules play an important role in promoting reciprocity and accountability, which

are crucial given the collective action nature of the climate change problem. On the other hand, protecting national discretion is also crucial, given the embeddedness of the climate change problem in domestic policy and politics. The Paris Agreement largely leaves the substance of climate policy to national discretion and prescribes procedural rules. But it also reflects quite innovative combinations of prescription and discretion – for example, by allowing developing States to self-determine whether they face capacity constraints that warrant flexibility under the enhanced transparency framework, but requiring them to explain the nature of their capacity constraints and to provide a timeline for addressing those constraints. Similarly, the Paris Rulebook gives parties discretion in choosing the quantitative and qualitative indicators they use to track progress in achieving their NDCs, but requires them to be transparent about the indicators they use.

*Nuanced differentiation* – Finally, the Paris Agreement’s approach to differentiation is also quite nuanced, in contrast to earlier climate agreements. Only a few obligations are differentiated on a categorical basis, as was the case in the UNFCCC and the Kyoto Protocol. Many obligations are not differentiated at all; others are self-differentiated; and others provide limited flexibility.

The Paris Agreement’s calibrated approach to the issues of legal bindingness, international prescription, and differentiation allowed it to bridge seemingly irreconcilable positions and be acceptable to all States. It could potentially be used as a model in addressing other international environmental issues that involve significant domestic sensitivities.

*This Introductory Note was written in July 2021.*

## **Related Materials**

### ***A. Legal instruments***

United Nations Framework Convention on Climate Change, New York, 9 May 1992, United Nations, *Treaty Series*, vol. 1771, p. 107.

Kyoto Protocol to the United Nations Framework Convention on Climate Change, Kyoto, 11 December 1997, United Nations, *Treaty Series*, vol. 2303, p. 162.

Paris Agreement, Paris, 12 December 2015.

### ***B. Documents***

Report of the Conference of the Parties on its first session, held in Berlin from 28 March to 7 April 1995, Decisions adopted by the Conference of the Parties, Decision 1/CP.1: The Berlin Mandate, 7 April 1995.

Marrakesh Accords, Decisions 2-19/CP.7.

Report of the Conference of the Parties on its thirteenth session, held in Bali from 3 to 15 December 2007, Decisions adopted by the Conference of the Parties, Decision 1/CP.13: Bali Action Plan, 14–15 December 2007.

Report of the Conference of the Parties on its fifteenth session, held in Copenhagen from 7 to 19 December 2009, Decisions adopted by the Conference of the Parties, Decision 2/CP.15: Copenhagen Accord, 18–19 December 2009.



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Report of the Conference of the Parties on its seventeenth session, held in Durban from 28 November to 11 December 2011, Decisions adopted by the Conference of the Parties, Decision 1/CP.17: Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action, 11 December 2011.

Report of the Conference of the Parties on its nineteenth session, held in Warsaw from 11 to 23 November 2013, Decisions adopted by the Conference of the Parties, Decision 1/CP.19: Further Advancing the Durban Platform, 23 November 2013.

Report of the Conference of the Parties on its twentieth session, held in Lima from 1 to 14 December 2014, Decisions adopted by the Conference of the Parties, Decision 1/CP.20: Lima Call for Action, 14 December 2014.

Report of the Conference of the Parties on its twenty-first session, held in Paris from 30 November to 13 December 2015, Decisions adopted by the Conference of the Parties, Decision 1/CP.21: Adoption of the Paris Agreement.

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### ***C. Doctrine***

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L. Rajamani and D. Bodansky, “The Paris Rulebook: Balancing International Prescriptiveness with National Discretion,” *International and Comparative Law Quarterly*, vol. 68, 2019, pp. 1023-40.

M. Roelfsema et al., “Taking Stock of National Climate Policies to Evaluate Implementation of the Paris Agreement,” *Nature Communications*, 2020, 11: 2096.

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Various authors, “Special Issue on the Paris Agreement,” *Climate Law*, vol. 6, issue 1-2, 2016.