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**Briefing paper**

# **The Paris Agreement: Practical and strategic considerations related to signature and entry into force**

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## Introduction

Following adoption of the Paris Agreement, a number of questions have been raised related to signature, ratification and entry into force of the Paris Agreement, some practical, some strategic.

These relate to the possibility of early entry into force, the status of Party INDCs both pre-ratification and post-ratification, protection of the Paris Agreement's 1.5 degree temperature limitation goal, and the implications of decision 1/CP.21 on the Paris Agreement's treatment of loss and damage.

This paper addresses the following issues:

- **background information** on signature, ratification and entry into force
- **strategic actions** that could be taken by individual Parties related to
  - possible **amendment of Party INDCs** prior to April 4, or prior to ratification, to reference the 1.5 degree temperature limitation
  - possible **interpretive declarations** related to loss and damage, in conjunction with ratification
  - possible **ratification of the Doha Amendment to the Kyoto Protocol**
- **next steps in planning** for the high-level signing ceremony in New York on 22 April
- **Questions and Answers** related to entry into force and the implications of possible early entry into force

## I. Background information on ratification and entry into force of the Paris Agreement

- The Paris outcome is comprised of various decision texts and a treaty text. Only the Annex to decision 1/CP.21 is the "Paris Agreement." Decision 1/CP.21 ("Adoption of the Paris Agreement") provides many supplementary provisions. The final version of Decision 1/CP.21 and its Annex are found at FCCC/CP/2015/10/Add.1.<sup>1</sup>
- The Paris Agreement (PA) is a treaty under international law. It was "adopted" on 12 December 2015 in Paris, but it has not yet "entered into force". It is therefore not yet legally binding on any country. It will only become legally binding for those countries that sign and ratify it, once it has entered into force.
- Article 21 of the treaty addresses the requirements for entry into force as follows:

*"This Agreement shall enter into force on the thirtieth day after the date on which at least 55 Parties to the Convention accounting in total for at least an estimated 55 percent of the total global greenhouse gas emissions have deposited their instruments of ratification, acceptance, approval or accession."*

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<sup>1</sup> [http://unfccc.int/documentation/documents/advanced\\_search/items/6911.php?preref=600008865](http://unfccc.int/documentation/documents/advanced_search/items/6911.php?preref=600008865)

- Article 21 therefore requires a double trigger for entry into force: (1) ratification by at least 55 Parties to the UNFCCC; (2) ratification by countries that collectively represent at least 55% of global greenhouse gas (GHG) emissions.
- Under its own terms, the treaty will enter into force automatically, 30 days after this double trigger is satisfied. It is therefore possible that the PA could enter into force as early as 2016.
- Two separate steps are required for a country to become a Party to the PA. First, a country must sign the PA. Second, it must present its instrument of ratification, accession, approval or acceptance.
- The Paris Agreement opens for signature at a high-level signing ceremony that will be held at the United Nations in New York on 22 April 2016. It will remain open for signature for one year, through to 21 April 2017.
- Provided that applicable domestic processes for ratification have been completed, a country could deposit its instrument of ratification as early as this New York high-level meeting.
- Upon ratification, each Party's previously-communicated INDC (its "intended nationally determined contribution") will become that Party's first "NDC" (nationally-determined contribution) for purposes of the Paris Agreement, unless a Party decides otherwise. A Party can opt to enhance its INDC by communicating a more ambitious NDC before ratification, or when depositing its instrument of ratification. See decision 1/CP.21 para. 22.
- A Party is said to "accede" to a treaty if it joins after a given treaty has already entered into force. The terms "approval" and "acceptance" refer to different processes that may be in place at the national level for ratification. Any of these means will provide the same legal result as ratification – these instruments signify a Party's expression of its intent to be bound to the terms of the treaty at the international level.
- The Ad Hoc Working Group on the Paris Agreement (the "APA") is responsible for assisting in the implementation of the work programme for the development of the rules and guidelines under the PA. SBSTA and SBI have also been tasked to develop certain rules, modalities and procedures for adoption by the CMA.
- All Convention Parties will participate in the negotiation of rules for the Paris Agreement under the APA, SBSTA and SBI. However, the entry into force ("EIF") of the PA will impact which countries subsequently participate in the negotiation of rules for the PA. After EIF, only Parties to the PA under the CMA (and not all Parties to the UNFCCC) will be able to *take decisions* under the PA on the applicable rules, though all Convention Parties may *participate as observers* in CMA sessions and proceedings. See PA Article 16.2.
- After entry into force, the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement (the "CMA") is likely to assume responsibility from the APA for further

development, consideration and adoption of the work programme under the PA and its adopting decisions.

- The Secretariat has produced a simple document providing "next steps" for signature and becoming a Party to the agreement<sup>2</sup>

## II. Three possible near-term strategic actions

Key issues for developing countries in Paris included, among others: strengthening the long term temperature goal to below **1.5°C** as an outcome of the 2013-2015 Review, recognition of the issue of **loss and damage** in the Paris Agreement separate and apart from adaptation and establishment of a system to address permanent and irreversible loss and damage; and ensuring an **increase of mitigation ambition** in the pre-2020 period.

There are opportunities now and over the coming months to influence the interpretation and implementation of the Paris Agreement on these issues. These opportunities include the domestic ratification process, the opportunity to adjust INDCs prior to April 4 and/or prior to ratification.

### Including reference to 1.5°C in amended INDCs

- Most Party INDCs were submitted before adoption of the 1.5°C long term temperature limitation goal in Paris. Some Party INDCs did reference the compatibility of their domestic mitigation efforts with 2 degree or 1.5 degree-consistent emissions pathways; some did not.
- In October 2015, the UNFCCC Secretariat prepared a synthesis report of the aggregate effect of Parties' INDCs. In Paris, a criticism of the *Synthesis Report on the Aggregate Effect of the INDCs* released by the UNFCCC Secretariat (FCCC/CP/2015/7), made by some SIDS, was that it compared aggregate mitigation effort to a 2 degree goal, but failed to compare this effort with 1.5°C temperature limit scenarios or pathways.
- With the Secretariat now requested to update the synthesis report **to cover INDCs communicated by 4 April 2016 and to release it by 2 May 2016**, and with the inclusion of the 1.5°C goal in the PA, there is an opportunity for Parties to emphasise the importance of having 1.5°C references in this updated report.
- One way of sending this signal is for **as many INDCs as possible to include a reference to the 1.5°C goal**. Countries could therefore consider amending their INDCs **between now and April 4**, to include a statement regarding the consistency of their INDCs with 1.5°C temperature limit pathways (if a reference to consistency with 1.5°C is not already reflected). For example, an amended INDC could refer to the 1.5°C long-term temperature goal recently adopted in Paris (Article 2) and state whether in the country's view its INDC is fair and ambitious in this regard.

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<sup>2</sup> [http://unfccc.int/files/meetings/paris\\_nov\\_2015/application/pdf/paris\\_agreement\\_next\\_steps\\_post\\_adoption.pdf](http://unfccc.int/files/meetings/paris_nov_2015/application/pdf/paris_agreement_next_steps_post_adoption.pdf)

- Communicating amendments to INDCs prior to ratification can be done electronically, by sending an amended INDC in to the UNFCCC Secretariat. This would ideally be done **prior to the 4 April deadline** for inclusion of INDCs in the Secretariat’s updated synthesis report. It may also provoke other countries to do the same and help provide momentum for a clear reflection of the 1.5°C goal in the updated synthesis report. If it is not feasible to do this prior to April 4, it could be done prior to ratification so that a reference to consistency with 1.5°C limit is reflected in the Party's NDC.

### Submitting interpretive declarations with ratification in context of loss and damage

- The coming months provide an important opportunity for countries to clearly express their views on how the loss and damage provisions in the Paris outcome should be interpreted and implemented.
- The Paris Agreement explicitly addresses loss and damage in Article 8 of the PA. However, decision 1/CP.21, paragraph 52 provides language to the effect that “**Article 8 of the Agreement does not involve or provide a basis for any liability or compensation**” (1/CP.21, paragraph 52). This language is captured in decision text rather than in the treaty itself.
- In Paris, the major developing country Party pressing this decision language indicated that it did not intend, with this language, to undermine any rights developing countries had under **general international law**, outside the UNFCCC.
- To support this understanding, it may be useful for countries to **submit interpretive declarations to accompany their instruments of ratification**, declaring their understanding that ratification of the Paris Agreement does not constitute renunciation of any rights Parties may have under general international law with regard to State Responsibility.
- **There is precedent under the UNFCCC for the submission of interpretive declarations with a similar scope.** Pacific Island SIDS have submitted interpretive declarations along these same lines in connection with signature or ratification of the Kyoto Protocol (which also does not allow reservations) and its Doha Amendment:
  - **Ratification of Kyoto Protocol** (Niue, Nauru, Kiribati and Cook Islands)<sup>3</sup>
  - **Acceptance of the Doha Amendment** to the Kyoto Protocol (Marshall Islands, Federated States of Micronesia (FSM), Nauru and Solomon Islands)<sup>4</sup>
  - See for example, FSM Instrument of Ratification<sup>5</sup>: *"Now further, the Government of the Federated States of Micronesia declares its understanding that ratification of the aforesaid Doha Amendment shall in no way constitute a renunciation of any rights under international law concerning State responsibility for the adverse effects of climate change and that no provision in the Protocol as amended, can be interpreted as derogating from principles of general international law."*

<sup>3</sup> [http://unfccc.int/kyoto\\_protocol/status\\_of\\_ratification/items/5424.php](http://unfccc.int/kyoto_protocol/status_of_ratification/items/5424.php)

<sup>4</sup> [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXVII-7-c&chapter=27&lang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-c&chapter=27&lang=en)

<sup>5</sup> <http://www.fsmsgov.org/treaties/doha.pdf>

### **Ratifying the Doha Amendment to the Kyoto Protocol**

- Countries that have not yet ratified the Doha Amendment to the Kyoto Protocol may wish to consider doing so at the same time as ratification of the PA.
- The Kyoto Protocol contains legally-binding mitigation commitments and reporting obligations for covered Annex I Parties. It requires 144 countries to ratify for entry into force. 61 Parties had ratified as at 7 March 2016, with Botswana the most recent. Ratification of the Doha Amendment provides support to the role of legally-binding commitments under the Kyoto Protocol as a tool for delivering emissions reductions in the period up to 2020.

## **III. Next steps in preparation for New York - checklist**

### **Prior to 4 April 2016 – deadline for INDCs to be included in updated synthesis report**

1. Parties could consider amending their INDCs prior to April 4, to include a statement regarding whether, in their view, their planned mitigation efforts are consistent with achievement of a 1.5°C temperature limit (if a reference to a below 1.5°C goal is not already reflected). This can be done electronically by sending an amended INDC in to the UNFCCC Secretariat. See above for details.

### **Prior to 22 April 2016 – high-level signing ceremony in New York**

1. Identify which high-level representatives will attend the high-level signing ceremony, noting the guidance provided by the Secretariat on which representatives are authorized to sign the PA: see paragraphs 6-7.<sup>6</sup>
2. Identify timeframe for completing domestic processes necessary for ratification, as government representatives may be expected to speak to this issue to colleagues in New York.
3. Participate in the high-level signing ceremony for the PA on 22 April 2016 in New York, with a view to also ratifying the PA on that date, if possible.
4. Consider preparing an interpretive declaration to accompany a national instrument of ratification. Such a declaration may be useful under the Paris Agreement in connection with the result on loss and damage: see above for details.
5. If applicable, consider ratifying the Doha Amendment to the Kyoto Protocol at the same time as ratification of the Paris Agreement.

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<sup>6</sup> [http://unfccc.int/files/meetings/paris\\_nov\\_2015/application/pdf/paris\\_agreement\\_next\\_steps\\_post\\_adoption.pdf](http://unfccc.int/files/meetings/paris_nov_2015/application/pdf/paris_agreement_next_steps_post_adoption.pdf)

## IV. Questions and answers related to entry into force

### What is the current legal status of the Paris Agreement?

- The PA has not yet entered into force and is therefore not yet legally binding on any country.
- Decision 1/CP.21, which adopted the PA, expressly provides that Parties to the UNFCCC ‘may **provisionally apply** all of the provisions of the Paris Agreement pending its entry into force (see 1/CP.21, para 5).

### What steps are required for ratification of the Paris Agreement?

- Two steps are required for a country to join and become a Party to the PA: (1) signature of the PA; (2) ratification of the PA.

### What are the implications of signing the Paris Agreement?

- Once a country **signs** the PA, it is **obliged to “refrain from acts which would defeat the object and purpose of”** the PA (Vienna Convention on the Law of Treaties, Article 18).

### What is the difference between ratification, accession, acceptance and approval?

- **Ratification** involves depositing an “instrument of ratification, acceptance, approval or accession” with the Secretary-General of the United Nations (which serves as the depositary for the PA). This is the formal step that indicates a country’s **consent to be bound** by the PA and results in a country **legally becoming a Party** to the PA.
- After the one-year signing period ends (21 April 2017), a country can still become a Party to the PA by depositing an instrument of “accession”. This has the same legal effect as signature and ratification.
- Acceptance and approval have the same legal effect as ratification, and are used by some Parties when domestic constitutional law does not require a treaty to be ratified by the head of State (Vienna Convention on the Law of Treaties, Articles 2.1.b and 14.2).

### What are domestic requirements for ratification?

- The **process** for ratification in each country is normally determined by its domestic constitutional or legislative requirements. These might include, for example, notification and introduction to Parliament; consent of one or more houses of Parliament; passage of national legislation; executive agreements. Requirements will be different in each country.
- The decision on timing for ratification will generally be determined by a country’s **domestic political circumstances** and/or the timeframe required to comply with domestic constitutional or legislative requirements.

## What is the significance of the year 2020?

- By decision 1/CP.17 (para 4), the Parties agreed to develop and adopt an agreement by 2015 and “*for it to come into effect and be implemented from 2020.*”
- Several early draft texts of the Paris Agreement contained a provision that referred to entry into force “not earlier than 1 January 2020”. **This language has not been included in the adopted text of the PA.**
- Some commentary on the PA has suggested that the mandate provided in Decision 1/CP.17 (para 4) to develop and adopt an agreement by 2015 and “*for it to come into effect and be implemented from 2020*” nevertheless means that the PA cannot enter into force before 2020. This is not correct. **Article 21 of the PA now provides the only criteria for when the PA will come into force.**

## Is early entry into force beneficial or problematic?

Some commenters have questioned whether early entry into force is beneficial or whether it might prove to be problematic. For vulnerable countries, the balance of interests clearly favors early entry into force. Early entry into force will:

- **help build and continue political momentum** at the international level for the Paris Agreement, and create further momentum for domestic implementation
- **lock in a base level of ambition from ratifying Parties**, by locking in Parties' initial INDCs as NDCs, rather than giving Parties an opportunity to reconsider (and potentially weaken) the INDCs they have just brought forward; Parties to the PA may always increase their ambition before ratification, or at any time after ratification under the PA.
- provide a better chance of **limiting the temperature increase to 1.5 degrees**: achievement of the 1.5 degree temperature limit will only occur if all Parties act promptly to put in place measures to implement their NDCs.
- **bring the legally binding requirements of the Paris Agreement into place**: the PA contains a number of commitments that will only become applicable to Parties once entry into force has occurred.
- **help ensure that Parties update their NDCs every five years**: One PA requirement is that each Party must communicate an NDC every five years. This requirement will only become legally binding upon entry into force. If current INDCs are fully implemented, it has been calculated that they would produce a **2.7 degree** global temperature increase<sup>7</sup>. Parties must be required to bring forward new, more ambitious efforts at regular intervals, or the 1.5 degree temperature limit may be lost.

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<sup>7</sup> <http://climateactiontracker.org/news/253/Climate-pledges-will-bring-2.7C-of-warming-potential-for-more-action.html>



- **put pressure on Parties to agree the necessary PA rule set and guidance at the earliest possible time:** Without the pressure of entry into force, Parties have been known to delay the conclusion of rules. In the Kyoto Protocol negotiations, Parties waited until the last moment in 2012 to agree rules to be applicable from 2013. Some hoped to negotiate rules that would lessen their effort; some blamed the absence of final rules for their own delays in bringing forward quantified mitigation commitments. It will be unhelpful to recreate this dynamic under the PA.

### What are the benefits for LDCs and SIDS of joining the Paris Agreement early?

Early ratification by SIDS and LDCs will:

- help put pressure on larger countries to ratify, or face criticism that they are holding up the entry into force of the PA.
- create an additional incentive for countries that have not ratified the PA prior to EIF to ratify promptly, so that they can participate in, and seek to influence, the work and outcomes of the CMA.
- ensure that when the PA enters into force, SIDS and LDCs that are Parties can participate fully in all rule making under the PA, including with respect to the new compliance committee and the Warsaw International Mechanism to address loss and damage (WIM), both of which will be subject to guidance from the PA.
- ensure that SIDS and LDCs have access to any potential benefits available under the PA to Parties. This may include access to capacity building and financial support.

Accordingly, SIDS and LDCs may wish to initiate and complete domestic processes required for ratification as soon as possible.

### What are the implications of an early entry into force (e.g. 2016 or 2017) for the work of the APA and development of the Paris Agreement rule set?

- It is possible that the PA could enter into force as early as this year (2016), or else at another time prior to 2020.
- Decision 1/CP.21 establishes the **APA as the body responsible for preparing for EIF of the PA.** Its responsibilities include overseeing implementation of the work programme resulting from requests in Decision 1/CP.21 and preparing draft decisions to be recommended through the CMA for consideration and adoption at the CMA's first session. The first session of the APA will be at the Bonn session in May 2016. All Convention Parties may participate. The COP has requested that the APA completes its work by the first session of the CMA. (see Decision 1/CP.21, paras 7-11).

- The first **CMA will be convened in conjunction with the first session of the COP that is scheduled after the date of entry into force (30 days after the dual trigger for EIF is satisfied – at least 55 Parties responsible for at least 55% of emissions)** (Article 16.6). If, for example, EIF takes place in September 2016, the CMA will meet for the first time in conjunction with COP22 in Marrakech. If EIF takes place in July 2017, its first session will be in conjunction with COP23.
- All Parties to the UNFCCC will participate in **consideration of applicable rules** for the Paris Agreement through the time of entry into force. After EIF, in contrast, while all countries may participate as observers in consideration of applicable rules, only Parties to the PA (and the CMA) may take those decisions (see Articles 16.2 for the CMA and 18.2 for SBSTA and SBI).
- Decision 1/CP.21 (para 10) requests the APA to complete its work by the first session of the CMA. **Only the CMA can adopt decisions that affect the implementation of the PA.** Any work that is completed by the APA, or recommendations made by the CMA, will still have to be adopted by the CMA.
- Decision 1/CP.21 contains a number of **dates/deadlines between 2016 and 2020** for the completion of elements of the work programme (e.g. development and recommendation of modalities, procedures and guidance by the APA). An early EIF that precedes any of these particular dates will mean that responsibility for completing the work will likely transfer to the CMA, even though Decision 1/CP.21 indicates that this work is to be done by the APA.
- The **CMA will** put in place a body under the PA that is **constituted only by Parties to the PA.** Once the PA is in force, Parties to the PA will have responsibility for negotiating and taking decisions on rule-sets that relate to the work programme mandated under the PA and its adopting decision (Decision 1/CP.21; compare Article 16.2 and 16.4).
- A range of other factors beyond just the timing of EIF will influence whether particular areas of work will be completed in accordance with deadlines specified in Decision 1/CP.21 and the PA. For example, failure of Parties under the APA (i.e. all Parties to the Convention) to reach agreement on a particular set of modalities and procedures could mean that deadlines are not met and that work carries over into subsequent sessions.
- The other practical effect of an early EIF in this context is that it creates an additional incentive for countries that have not ratified the PA prior to EIF to ratify promptly so that they can participate as Parties to the PA in the work of the CMA and seek to influence its outcomes.

### What are the implications of an early EIF for INDCs and NDCs?

- **First**, an early EIF will not **impact the 2025/2030 end dates for implementation of INDCs/NDCs and is likely to assist Parties to the PA with domestic mandates to implement their NDCs:**

- Virtually all countries have already communicated their INDCs, which will, by default, become their NDCs upon ratification (unless a Party explicitly decides otherwise – see Decision 1/CP.21, para 22).
  - INDCs (and therefore NDCs) generally do not specify a “start date” of 2020; rather, they mostly only include an end date of 2025 or 2030 to achieve specified emission reduction targets.
  - An early EIF therefore would simply serve to legally formalise Parties’ obligations to “*maintain*” its first NDC earlier than would be the case if EIF was in 2020 or a later date.
  - This should be viewed as a positive in the sense that it creates more time, and should increase domestic political mandates, for Parties to fulfill their obligations to “*pursue domestic mitigation measures, with the aim of achieving the objectives of such [NDCs]*” (Art 4.2).
  - The impact of EIF timing on implementation and achievement of NDCs becomes more significant if EIF creeps closer to 2020 or is delayed beyond 2020. For example, it could impact the likelihood that Parties will fully implement and achieve their NDCs by 2025 or 2030, or it may dampen momentum around Parties bring forward new/updated NDCs by 2020.
- **Second**, early EIF will help to crystallise the legal requirement and political momentum for second NDCs to be communicated by 2020. Reasons for this include:
    - The obligation in the PA to communicate an NDC every 5 years (Art 4.9) will only apply after EIF, which will provide added legal weight to the more discretionary language in Decision 1/CP.21 (paras 22-24) (assuming the INDCs communicated in 2015 are taken to be the first NDC).
    - Early EIF, particularly if it is significantly before 2020, should make it more politically difficult for Parties to argue that there was legal uncertainty or insufficient time to prepare and communicate a second NDC by the 2020 deadline.

### Could a push for early EIF be detrimental to securing greater ambition?

- A Party's INDC will automatically become its first NDC upon its ratification of the PA (see Decision 1/CP.21, para 22), unless that Party does not want its INDC to become its NDC. Regardless, a Party must present an NDC no later than ratification.
- A Party can opt to enhance its INDC by communicating a more ambitious NDC before or when submitting its instrument of ratification.
- The PA also provides that a Party may at any time adjust its existing NDC with a view to enhancing its level of ambition (Art 4.11). In other words, even after ratification, a Party is free to increase the ambition of its NDC at any time.
- Some have argued that early ratification will not give sufficient time to complete domestic/regional approval processes required for increasing INDC/NDC ambition. Several points can be made in response:

- Each country is responsible for deciding if and when it will ratify the PA. Some countries will ratify before EIF, others' instruments may be brought forward after EIF. The choice of timing may be driven by practical and/or strategic factors.
- Regardless, a country can decide at any time prior to ratification, and communicate, that its first NDC will be more ambitious than its INDC (see Decision 1/CP.21, para 22)
- The process for amending an INDC prior to ratification is a simple one – it requires communication of an updated INDC to the UNFCCC Secretariat.

### **What still needs to happen by 2020 if there is an early EIF?**

- The significance of '2020' in a sense has been diminished by the possibility that EIF can happen prior to this date, and the fact that many INDCs do not specify a 'start date' of 2020 (most only include an end date – to achieve targets by/in 2025 or 2030).
- However, the 2020 date is still significant for a number of reasons:
  - Parties are requested to communicate/update by 2020 a new NDC and to do so every 5 years thereafter
  - Parties are invited to communicate mid-century long-term low GHG emission development strategies by 2020
  - various pre-2020 processes will feed into these NDCs and long-term development strategies: an updated synthesis report, due by 2 May 2016; an IPCC Special Report 2018 which will address the 1.5 degree temperature limit; a Facilitative Dialogue 2018 that will take stock of Parties' progress; and the development of various required rule-sets
  - various work plans are scheduled to run from 2016-2020 under Paris Decision 1/CP.21 – e.g. in connection with the Paris Committee on Capacity-building and various actions under the "Enhanced action prior to 2020" banner.
- Some fundamental issues will become more challenging if EIF is delayed to 2020 or beyond 2020. It will be more difficult to gather momentum at the international level to ensure countries bring forward new/updated NDCs by 2020. It may also become more difficult to ensure that countries maintain domestic momentum for a solid start in implementing their first NDCs.