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Connecting Climate Change and the Law

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COP27 Concludes with Agreement On Loss and Damage

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By Duncan Grieve
Special Counsel | White Collar Defense and Investigations

COP27 drew to a close in Sharm El Sheikh, Egypt with the almost 200 countries in attendance reaching an agreement to establish a dedicated fund to assist developing countries respond to loss and damage caused by climate change. “Loss and damage” refers to the concept that wealthier nations, which have been the largest emitters of greenhouse gas emissions, should compensate developing nations for harm caused by climate change. That an international agreement was reached on this issue represents a potentially significant development that may have resulted, in part, from the severe climate-related natural disasters that occurred in 2022 as well as successful lobbying by developing countries most affected by climate change. Despite this milestone, the agreement is a framework with many material elements still to be determined. The United Nations **press release** announcing the “loss and damage” fund states that “Governments took the ground-breaking decision to establish new funding arrangements, as well as a dedicated fund, to assist developing countries in responding to loss and damage. Governments also agreed to establish a ‘transitional committee’ to make recommendations on how to operationalize both the new funding arrangements and the fund at COP28 next year. The first meeting of the transitional committee is expected to take place before the end of March 2023.” The committee, with representatives from 24 countries, will determine how much each country should contribute and receive. The conference participants also failed to reach agreement on binding progress toward “mitigation,” which was the focus of COP26 in Glasgow last year, in the form of additional commitments on phasing out fossil fuel use and reducing greenhouse gas emissions. That raises questions on the ability of nations to maintain the goal of limiting global warming to the 1.5C target articulated in the Paris Agreement.

The EU, earlier on in the negotiations, had threatened to leave the talks if the agreement was not sufficient to “keep 1.5 alive.” EU climate chief Frans Timmermans stated that “we should have done much more. Our citizens expect us to lead. That means far more rapidly reduced emissions,” he said. The EU ultimately signed up to the deal “reluctantly” in order “to allow the process to move forward.” This position was echoed by former COP president and House of Commons MP Alok Sharma, who listed several proposed measures that were excluded from the final text of the agreement, including “[e]missions peaking before 2025,” “[c]lear follow-through on phase down of coal,” and “[a] clear commitment to phase out all fossil fuels.” Sharma also stated that “If we do not step up soon and rise above the minute to midnight battles to hold the line [on 1.5C] we will all be found wanting.”

The location of next year’s conference, COP28, is already proving controversial because it will be held in Dubai, United Arab Emirates (UAE), whose wealth in large part derives from sales of fossil fuel and is one of the highest per capital greenhouse gas emitters in the world.

Taking the Temperature: Because the Conference of Parties (”COP”) to the UN Framework Convention on Climate Change never adopted Rules of Procedure first proposed in 1996, all decisions require “consensus,” a term whose meaning itself is subject to debate. Loosely, it means that, given the absence of a vote, the COP President decides whether consensus exists based on views expressed at the conference. In practice, it means that COP decision-making is a slow and grinding process, and each COP likely will yield only a few major breakthroughs. The loss and damage fund framework is the headline achievement of COP27, but the conference by and large did not result in firm commitments by countries to more quickly reduce the emission of greenhouse gases that are a root cause of climate-related harm. Addressing that challenge through global action and putting meat on the bones of the loss and damage fund will have to await the COP28.

Regulation: Shift in Control of House of Representatives Could Impact Climate Crisis Committee

November 22, 2022

Regulation

By Sara Bussiere
Associate | Global Litigation

By Timbre Shriver
Associate | Global Litigation

With Republicans assuming control of the House of Representatives in January, the fate of the House Select Committee on the Climate Crisis appears uncertain at best. Garret Graves (R-LA), the Ranking Member on the panel, recently stated that "The climate crisis committee will not exist" with a spokesperson for Graves stating that "We don't see a scenario where the 'Climate Crisis Committee,' a creature of Pelosi, will continue to exist" and that "Garret is committed to delivering on the energy components of the Commitment to America and will be intimately involved in making sure that happens."

The **Commitment to America**, as mentioned by Graves, is a Republican policy document that advocates "policies that make it easier for the U.S. to mine its strategic minerals; policies that speed up the licensing process and construction of renewable hydropower projects; and policies that increase the U.S.'s production of oil and natural gas." The Committee on Climate Crisis was established by the Democrat majority in 2019.

The current chair of the Select Committee on the Climate Crisis, Kathy Castor (D-FL), responded in a **statement** that "House Republicans ignore the climate crisis to the detriment of America. It's baffling that the GOP has no plan to address the rising costs and escalating impacts of climate change. Their inaction and lockstep alliance with polluters are exacting a toll on everyday Americans, farmers, and communities alike - making it harder to afford basics like water, electricity and energy."

Taking the Temperature: We have previously discussed the increasing politicization of climate change, a development that is taking place in a variety of contexts, notably in the area of asset management. Whatever the merits of any party's positions, it seems likely that the outcome will be the difficulty (if not the impossibility) of passing federal climate-related legislation. Of course, given that Congress this term enacted the Inflation Reduction Act, which is estimated to have approximately $369 billion in climate-related measures, it was always unclear whether there would be congressional appetite for additional legislation. We expect President Biden and federal agencies to continue to attempt to move forward via executive order and agency rulemaking, although we also anticipate legal challenges to such efforts, especially in light of the Supreme Court's

perceived concerns about agency overreach following its decision in *West Virginia v. EPA*, 597 U.S. __ (2022).

Governance: Growth of Board ESG Engagement at Top 100 Public Companies

November 22, 2022

Governance

By Jason Halper
Partner and Co-Chair | Global Litigation

The Sustainability Board Report (TSBR) in October published a report titled **Boards: Stepping Up as Stewards of Sustainability** and subsequently in November, a **Data Book**.

The report shows increasing levels of ESG engagement: 80% of surveyed companies have an ESG committee, 27% of directors surveyed serve on sustainability committees (versus 16% in 2019), and 45% of the directors sitting on the committees were "ESG-Engaged," i.e. they are knowledgeable on ESG-related issues and have capacity to act on those issues. To underscore this progress, Frederik Otto, the Founder of TSBR, stated in his foreword to the report that "many leading organizations have recognized the need to act on the climate emergency and to provide equal opportunity for their people and the communities they operate in. They are trying to make their businesses work toward more societal benefit—at least in theory. One might remember the widely published redefinition of the purpose of a corporation to promote an economy that serves all, by the influential Business Roundtable in America in 2019. A sustainable future is desirable for obvious reasons, but it is also good for business and long-term investment."

Taking the Temperature: The report observes that in "many parts of the world, engagement, measurement and progress is greatest for environmental topics, as these may be easier to understand and quantify." And in that sense, it may be more straightforward for the board to engage on climate issues as opposed to social impact issues like board or work-place diversity. Even so, the Report also observed that "many boards lack the skill and knowledge to translate" monitoring of ESG-related issues and performance into "improved governance — and that progress on setting and meeting ESG goals varies widely between companies and sectors." In short, the Report depicts a governance environment where boards are dedicating more time and resources to sustainability issues but may lack the necessary board or management-level expertise, or corporate tools and sophistication, to make the information actionable. Boards should be taking steps to assure that there is sustainability-related expertise at the board and senior management levels, processes and procedures are sufficient to permit decision makers to assess and act on climate-related risks and opportunities, and disclosure regarding these and other climate-related issues is accurate, based on contemporaneously-documented information and consistent with regulatory guidance and stakeholder needs.