The Paris Agreement: A Starting Point towards Achieving Climate Neutrality?

Designing the post-2020 international climate regime was at the heart of the Durban Platform for Enhanced Action, which launched a new round of negotiations in late 2011 for the adoption of a new global legal framework applicable to all by 2015, to become effective by 2020. Contracting Parties to the UNFCCC agreed that such an international climate regime shall take the legal form either of “a protocol, another legal instrument or an agreed outcome with legal force under the Convention.”

Finally, Parties were able to adopt such a universal agreement – the so-called Paris Agreement - at the 21st Meeting of the Conference of the Parties to the UNFCCC (COP 21), which took place from 30 November until 13 December 2015 at Le Bourget, in the North of Paris.

With no pretention whatsoever to cover all legal aspects which may emerge from a comprehensive analysis of the Paris Agreement, this special issue of the Carbon & Climate Law Review (CCLR) aims to identify those issues which have garnered the most attention in the run up to COP 21, notably the legal form of the agreed outcome and the differentiation of rights and obligations among Parties, its architecture and main provisions, and perspectives on a number of open questions.

Regardless of its designation, the “Paris Agreement” is a treaty according to the 1969 Vienna Convention on the Law of Treaties. It is a legal agreement, even if it is often soft and mainly procedural.1 It is a universal agreement applicable to all, with no strict binary differentiation between developed and developing countries anymore, yet it remains based on the principle of common but differentiated responsibilities and respective capabilities (CBDR&RC), affording some flexibility to developing countries in light of different national circumstances even within that group of nations.

The Paris Agreement reflects a hybrid approach, as it provides for a rules-based regime enshrined in an international treaty (top-down), including the elaboration and communication of Parties’ contributions, whereas the latter are nationally determined (bottom-up) and “anchored” outside the agreement in a registry maintained by the UNFCCC Secretariat. As such, the Paris Agreement balances international legal certainty with respect for national sovereignty.

Given this architecture, the Paris Agreement represents a remarkable compromise.2 As pointed out by Ralph Bodle, Lena Donat and Matthias Duwe, it is a landmark in international climate policy, a viewpoint we can indeed subscribe to for a number of reasons. Together, both developed and developing countries recognize the need to take domestic action to contribute to the fight against climate change with the view to achieving a very ambitious collective long term goal which is to keep the increase of global temperature well below 2°C as compared to pre-industrial levels. Nationally Determined Contributions (NDCs) – which are to be established every five years in the light of different national circumstances – become the heart of the international climate regime from 2020.


Indeed, Parties have some flexibility to determine their contributions in the short term, and this should facilitate their adherence to the Agreement, but they must think through their actions in the longer term with a dynamic mindset, with the obligation to progress over time towards more ambition. To make this happen, the Agreement comprises some interesting instruments and procedures in order to provide incentives to be more ambitious. An enhanced transparency framework is established to monitor Parties’ individual progress in implementing their NDCs, whereas a global stocktake is foreseen every five years in order to assess collective progress towards achieving the purpose and long-term goals. This should create trust in collective action, by ensuring that countries adhere to their promises and providing a picture of the scale of global progress.

And a non-adversarial and non-punitive mechanism to facilitate implementation is established, driving compliance through incentives and facilitative procedures, in marked contrast to the quasi-judicial compliance regime laid down by the Kyoto Protocol. As illustrated by the withdrawal of Canada in 2010, which at the time had already overshot its Kyoto target for the first commitment period, a punitive compliance regime could have discouraged some Parties to engage in the new international climate regime in the first place.

Beyond fostering trust and confidence-building among Parties for strengthened cooperation at the international level, transparency should also help civil society apply political pressure on their governments at the national level. From that perspective, the recent ruling of the District Court of the Hague of 24 June 2015 in the case of Urgenda v. The Netherlands could, if confirmed in the appeal, create an appetite for similar litigation in other jurisdictions. A more accurate monitoring system and better public access to information on the effectiveness and efficiency of climate action will undoubtedly provide more arguments to NGOs and groups of citizens. In that respect, Anne-Sophie Tabau shows in her article that the Paris outcome reflects a new global standard of transparency. She demonstrates that compromises in this area are fragile and unstable. Even if the Agreement is not a breakthrough and – on the contrary – builds on the previous regime, particular attention must be paid to future COP decisions since the devil as so often will lie in the details.

Focusing for a moment on the controversial issue of differentiation, which has impeded the climate negotiations since the Bali Conference, it can be observed that this issue was dealt with in a subtle, creative and quite dynamic manner by the Paris Agreement. In effect, while reaffirming the CBDR&RC principle, the Paris Agreement introduces elements of a dynamic interpretation of its meaning and mode of implementation. In the operational provisions of the Agreement, it relies on self-differentiation, in particular with respect to some key obligations (for instance relating to the NDC process), to a more classical form of differential treatment – between categories of countries – for instance with respect to the means of implementation. It marks a decisive step forward in the gradual process of blurring the categories of countries towards more legal symmetry between Parties, which has been one of the conditions put forward by the United States since Bali in 2007. This shift renders the UNFCCC annexes irrelevant, at least for the interpretation and implementation of the Paris Agreement. Moving beyond the UNFCCC’s bifurcated differentiation, the Agreement better takes into account diverse national circumstances, capabilities and vulnerabilities, resulting not in less but in more differentiation. The Paris Agreement thus approaches differentiation in various ways in different parts of the agreement, carefully balancing what will be differentiated and what will be common in the post-2020 period.

---

By doing so, Parties have sought to find the right balance between bottom-up and top-down approaches in international climate cooperation. The flexibilities given to Parties are counterbalanced by a relatively robust common framework, and did not come at the cost of ambition, which was a genuine risk. As already mentioned above, this approach, supported by the principles of progression and of the highest possible ambition for NDCs, raises hopes that the level of ambition of collective action will further improve over time.

As Rajamani has argued, “the relationship between ambition, differentiation and support was clear from the start – the greater the overall ambition, the greater the need for differentiation in efforts between developed and developing countries as well as for financial resources to support ambitious efforts.” From this perspective, with its sophisticated design, the Paris Agreement has found a good balance between ambition, differentiation and support. It breaks down the barrier represented by endless discussions on a burden-sharing arrangement to deal with the remaining carbon budget, and offers a new vision of fairness as a matter of effectiveness. Based on multiple and moving categories, self-identification and self-determination, it also introduces some uncertainties. But this pragmatic approach has been the price to pay in order to avoid a race to the bottom.

In the end, one of the key questions is whether the Paris Agreement will prove ambitious enough to tackle the challenge of climate change. Obviously it is too early to say, all the more given that the Paris rulebook has yet to be written on important details of implementation, with the real discussion on modalities starting in Marrakech at COP 22. However, it is clear than the success of the Paris Agreement will primarily depend on the political will of Parties to engage in ambitious policies and measures at domestic level and on their ability to work together, with a greater sense of solidarity, through this strengthened international cooperation framework.

With this historic agreement now adopted, it is time to think about its implementation. This special issue does not look at the details of its eventual entry into force, which will be the subject of further discussions at COP 22 in Marrakech. Rather, it suggests looking at the implementation from a Party’s perspective, namely the EU’s, which is a very special contracting Party due to its status as a regional economic integration organisation. When acting jointly with its Member States, the EU has always claimed a leadership role in the climate negotiations, leading by example with its ambitious climate policy. Here, Sebastian Oberthur offers a comprehensive analysis of the ongoing EU political and legislative agenda for the approval and implementation of the Paris Agreement, where he raises some questions on the EU capacity to maintain such leadership in the future. Because this special issue was largely prepared in advance, it does not discuss the implications of the Brexit referendum in the UK for the future of EU climate policy. But one can anticipate that implications will be far-reaching, given that the UK has always been a frontrunner on climate action since Kyoto and very active on the front of EU climate diplomacy.

Thinking about its effectiveness, one also has to wonder whether the Paris Agreement will affect the position of the UNFCCC in global climate governance vis-à-vis other organ-

---

4 See also Navroz Dubash and Lavanya Rajamani, “Beyond Copenhagen: Next Steps”, 10(2) Climate Policy (2010), at p. 593.
isations, treaties and initiatives on the horizontal axis, and vis-à-vis non-state and subnational actors on the vertical axis. The COP Decision and the Paris Agreement contain several indicators reflecting greater openness towards alternative arenas of action than had been previously displayed by the UNFCCC and the Kyoto Protocol. They acknowledge the need for a global approach to such challenges, which goes beyond the forum of meetings of contracting Parties to the Paris Agreement. But does the agreement carry the potential for a redefinition of climate governance? This is the fundamental question raised by Harro van Asselt and Stefan Bösner, who points to the need for Parties to the UNFCCC and to the Paris Agreement to make concerted efforts to leverage the potential that could deliver the wider institutional complex for climate change, and makes concrete suggestions on how such relationships could be strengthened.

The Paris Agreement marks the end-point of a long process of climate talks which actually started in Bali in 2007, but it is also a starting point of a new era of climate action at all levels: from global cooperation to local action on the ground, involving citizens and consumers, in a way that can link intergovernmental decision-making and mobilisation of non-state actors to support and enhance the ambition embodied in NDCs.

Now the key question will be to know whether the promise of a climate-neutral world can be kept, and we need to ensure that the response will be commensurate to the scale of the challenge. COP 22 in Marrakech will be a test in that respect, kicking off the formal negotiations on implementing modalities for the Paris Agreement, but also consolidating the Action Agenda, with the Lima-Paris Action Agenda now becoming the Global Climate Change Alliance. From these two complementary perspectives, COP 22 should be the “COP for Action”.

*Sandrine Maljean-Dubois and Matthieu Wemaëre*

*Guest Editors of this CCLR special issue on the Paris Agreement. Sandrine Maljean-Dubois, National Centre for Scientific Research (CNRS), Aix-Marseille University, University of Toulon, University of Pau and Pays de l’Adour, DICE, CERIC, Aix-en-Provence, France. Matthieu Wemaëre, Attorney-at-Law specialising in environmental and climate law and policy, admitted at the Paris and Brussels Bar Associations, research Associate at CERIC, Aix-en-Provence, France.*