

## International climate change law in a bottom-up world

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### 1. *Introduction*

When I was first approached to contribute to the present issue of *Questions of International Law* about one year ago, much was still uncertain about the outcome of the climate change negotiations in Paris in December 2015. Would countries be able to reach agreement in the first place? If so, would the outcome be in the form of a treaty and would it create legally binding obligations? And how would the agreement ensure that Parties would live up to their obligations so as to ensure that the agreement would meet the ultimate objective of the United Nations Framework Convention on Climate Change (UNFCCC) to ‘avoid dangerous anthropogenic interference with the climate system’?<sup>1</sup>

The answers to some of these questions are now crystal clear. Thanks in large part to the unparalleled diplomatic skills of the French government and a high willingness to compromise among Parties, the adoption of the Paris Agreement on 12 December was met with a thunderous applause. By now, it is also undisputable that the agreement is a

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<sup>1</sup> This Note does not pretend to offer a comprehensive analysis of the Paris Agreement. For initial analyses, see A Savaresi, ‘The Paris Agreement: A New Beginning?’ (2016) 34 *J Energy and Natural Resources* L 1; J Viñuales, ‘The Paris Climate Agreement: An Initial Examination’ (2015) <[http://papers.ssrn.com/sol3/Papers.cfm?abstract\\_id=2704670](http://papers.ssrn.com/sol3/Papers.cfm?abstract_id=2704670)>; M Doelle, ‘The Paris Agreement: Historic Breakthrough or High Stakes Experiment’ (2016) 6 *Climate L* (forthcoming).



treaty under the Vienna Convention on the Law of Treaties and that it puts in place legally binding obligations.<sup>2</sup> These obligations may not be as ‘hard’ or enforceable as some had hoped or expected ahead of Paris, but they are nevertheless legally binding under international law.<sup>3</sup>

Yet the Paris Agreement also leaves some key questions unresolved. Notably, it remains unclear how the agreement will ensure that Parties, over time, will achieve the lofty goals set by the treaty, namely ‘holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels’.<sup>4</sup> In other words, the operation of key features of what has been termed the agreement’s ‘ratcheting mechanism’ continue to hang in the balance. More fundamentally, the Paris Agreement raises the question of what role international law still has to play in a world where ‘commitments’ have been replaced with ‘contributions’, and where compliance no longer needs to be ‘enforced’ but ‘facilitated’. In other words, what is the role of international climate change law in a bottom-up world?

In this Note, I offer initial reflections on these questions. I argue that it is important that Parties design the various review processes in the Paris Agreement in such a way so as to ensure a proper functioning of the treaty’s ratcheting mechanism. I further argue that the shift to a bottom-up legal architecture confirmed by the Paris Agreement offers an opportunity for scholars and practitioners to uncover and better appreciate the functions of international climate change law that go beyond ensuring compliance with legal obligations.<sup>5</sup>

## 2. *The Paris Agreement’s ratcheting mechanism*

Already before the Paris conference took place, it became clear that the intended nationally determined contributions (INDCs) submitted by UNFCCC Parties in the course of 2015 would be insufficient to

<sup>2</sup> D Bodansky, ‘The Legal Character of the Paris Agreement’ (2016) 25 *R Eur Comparative Int Environmental L* (forthcoming).

<sup>3</sup> *ibid.*

<sup>4</sup> Paris Agreement, art 2(1)(a).

<sup>5</sup> This argument is inspired by R Howse, R Teitel, ‘Beyond Compliance: Rethinking Why International Law Really Matters’ (2010) 1 *Global Policy* 127.



achieve the long-term objective of keeping global warming below 2°C.<sup>6</sup> The prevailing narrative in Paris was therefore that the Paris Agreement would need to put in place a mechanism through which Parties (as well as non-State actors) could ratchet up their ambition over time to stay within reach of the 2°C objective.

By and large, the Paris Agreement puts in place the core elements of this ratcheting mechanism.<sup>7</sup> First, by agreeing on a long-term temperature goal, and striving to ‘achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century’,<sup>8</sup> Parties offer a clear indication of the ‘direction of travel’ towards a low- or zero-carbon economy. The Paris Agreement also provides for the second element by establishing a regular (five-yearly) cycle for the formulation and communication of nationally determined contributions (NDCs).<sup>9</sup> In addition to the regular submission of NDCs – which usually have a time frame of five or ten years – the agreement encourages (but not requires) Parties to draft long-term low-greenhouse gas emission development strategies, allowing Parties to elaborate a longer-term vision of how they expect to increase ambition.<sup>10</sup> A third element of the ratcheting mechanism is the idea that each

<sup>6</sup> An analysis by the non-governmental organization Climate Action Tracker suggested that the INDCs, if fully implemented and achieved, would limit the temperature increase compared to pre-industrial levels to 2.7°C. See <<http://climateactiontracker.org/incls.html>>.

<sup>7</sup> There are different interpretations of what constitutes a ‘ratcheting mechanism’. Hale also includes the extent to which an agreement supports the wide variety of non-State action and continuing diplomatic efforts to pursue bilateral, unilateral and sectoral deals. Thomas Hale, ‘Ratchet Up: Five Tools to Lift Climate action after Paris’, Blavatnik School of Government Policy Memo (October 2015) <[www.bsg.ox.ac.uk/sites/www.bsg.ox.ac.uk/files/documents/2015-10\\_Hale\\_RatchetUp.pdf](http://www.bsg.ox.ac.uk/sites/www.bsg.ox.ac.uk/files/documents/2015-10_Hale_RatchetUp.pdf)>. Arguably, Decision 1/CP.21 accompanying the Paris Agreement also includes these elements, by encouraging further non-State action pre-2020, and providing for the announcement of voluntary efforts, initiatives and coalitions. Decision 1/CP.21, Adoption of the Paris Agreement, FCCC/CP/2015/10/Add.1, paras 115-123. For the purposes of this short Note, however, the focus will be on the four elements highlighted in the main text.

<sup>8</sup> Paris Agreement, art 4(1).

<sup>9</sup> Paris Agreement, art 4(9). The NDCs pertain to the period beyond 2020. However, the time frames of NDCs have not yet been harmonised (with some specifying a time frame of five years (eg 2021-2025), and others a time frame of ten years (eg 2021-2030). Harmonising the time frames is on the agenda of future meetings of Parties to the Agreement. Paris Agreement, art 4(10).

<sup>10</sup> Paris Agreement, art 4(19).



NDC ‘will represent a progression beyond the Party’s then current nationally determined contribution and reflect its highest possible ambition’.<sup>11</sup> This provision may not in itself offer a guarantee for a race to the top among Parties, but at the very least it avoids a race to the bottom in the next rounds of NDCs.<sup>12</sup> The fourth and final element of the ratcheting mechanism is periodic review, which would allow Parties (and other stakeholders) to regularly assess whether they are on track to meet the long-term goal.<sup>13</sup> The Paris Agreement also incorporates this element by including three review processes: (i) a review of implementation through its ‘enhanced transparency framework’, which is to build on the reporting and review processes of the UNFCCC;<sup>14</sup> (ii) a review of compliance through an implementation and compliance mechanism;<sup>15</sup> and (iii) a review of overall ambition through a five-yearly ‘global stocktake’, which seeks to ‘assess the collective progress towards achieving the purpose of [the] agreement’.<sup>16</sup> The first stocktake is to be held in 2023. Before 2020, the Paris Agreement suggests to hold a one-off ‘facilitative dialogue’ in 2018 ‘to take stock of the collective efforts of Parties’.<sup>17</sup>

At first blush, the main elements of a ratcheting mechanism are present in the Paris Agreement. However, there are still some important uncertainties about the design of the review processes, which may influence the ratcheting up of ambition in practice. Most importantly, it is unclear how the outcomes of review processes will influence Parties’ future efforts. This concern applies to all three review processes.

For the transparency framework, it is yet to be decided how the review process will be organised. What is clear is that the process will in-

<sup>11</sup> Paris Agreement, art 4(3). See in more detail the contribution by C Voigt in this issue of QIL.

<sup>12</sup> The Geneva negotiation text agreed upon in February 2015 included several options relating to *force majeure*, which, in theory, could have allowed for Parties backtracking on their pledges. Ad Hoc Working Group on The Durban Platform for Enhanced Action, Negotiation Text (12 February 2015) <[https://unfccc.int/files/bodies/awg/application/pdf/negotiating\\_text\\_12022015@2200.pdf](https://unfccc.int/files/bodies/awg/application/pdf/negotiating_text_12022015@2200.pdf)>, para 79-79ter.

<sup>13</sup> On assessment and review in general, see H van Asselt, P Pauw, H Sælen, *Assessment and Review under a 2015 Agreement* (Nordic Council of Ministers 2015).

<sup>14</sup> Paris Agreement, art 13.

<sup>15</sup> Paris Agreement, art 15.

<sup>16</sup> Paris Agreement, art 14.

<sup>17</sup> Decision 1/CP.21, para 20.



clude a technical expert review as well as a multilateral consideration,<sup>18</sup> in which not only emissions data will be considered, but also '[i]nformation necessary to track progress made in implementing and achieving [a Party's NDC].'<sup>19</sup> The transparency framework is likely to follow the design of existing review processes under the UNFCCC – notably international assessment and review (IAR) for developed country Parties and international consultations and analysis (ICA) for developing country Parties,<sup>20</sup> with the important difference that guidelines will now be common to all Parties. However, it remains doubtful that the process will provide a clear outcome urging a Party to step up its implementation efforts, as the outcome of both IAR and ICA do not require a Party to do so. This is underlined by the Paris Agreement, which suggests that the transparency framework 'be implemented in a facilitative, non-intrusive, non-punitive manner, respectful of national sovereignty ...'.<sup>21</sup> In other words, it remains unclear what kind of incentives<sup>22</sup> the transparency framework will offer for Parties to ratchet up implementation.

Likewise, the details of the implementation and compliance mechanism of the Paris Agreement remain up in the air. Also in this case it is unclear whether the outcome will ultimately require Parties to do more. The committee established by the mechanism is to be 'facilitative in nature and function in a manner that is transparent, non-adversarial and non-punitive',<sup>23</sup> suggesting that it will be difficult for the committee to arrive at judgments that may be perceived as political. Nonetheless, Parties may give the committee a mandate to apply consequences, such as

<sup>18</sup> Paris Agreement, art 13(11)-13(12).

<sup>19</sup> Paris Agreement, art 13(7)(b).

<sup>20</sup> Decision 1/CP.16, The Cancun Agreements: Outcome of the Work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention, FCCC/CP/2010/7/Add.1, paras 44 and 63. See also Decision 2/CP.17, Outcome of the Work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention, FCCC/CP/2011/9/Add.1, paras. 23-31 and Annex II (for IAR); and paras 56-62 (for ICA).

<sup>21</sup> Paris Agreement, art 13(3).

<sup>22</sup> To be clear, such incentives need not be limited to 'sticks' (eg financial penalties or other sanctions), but may also be in the form of 'carrots' (eg financial support).

<sup>23</sup> Paris Agreement, art 15(2).



requiring a plan to return to compliance or finding a Party in non-compliance (which may entail reputational costs).<sup>24</sup>

The global stocktake is perhaps most clearly intended to function as part of the agreement's ratcheting mechanism. The outcome of the stocktake, according to the agreement, 'shall inform Parties in updating and enhancing, in a nationally determined manner, their actions and support in accordance with the relevant provisions of this Agreement, as well as in enhancing international cooperation for climate action'.<sup>25</sup> Similarly, the facilitative dialogue in 2018 is 'to inform the preparation of [NDCs]'.<sup>26</sup> Yet the crucial question – *how* will it inform new or updated NDCs – remains unanswered. This will depend largely on the organisation of the global stocktake (as well as the facilitative dialogue, which could be seen as a pilot for the stocktake). The stocktake is to include, *inter alia*, information on the overall effect of NDCs communicated by Parties, reports submitted as part of the transparency framework and reports by the Intergovernmental Panel on Climate Change.<sup>27</sup> These inputs could allow for an analysis of how the NDCs, in aggregate, fare against the global temperature goals. However, the Paris Agreement does not explicitly call for such an analysis. Moreover, even if such an analysis would be carried out and it would find that the NDCs are out of step with the goals of the agreement, it is unclear whether and how such a finding about *collective* efforts could influence *individual* NDCs.

The Paris Agreement anchors the bottom-up system of 'pledge and review' in international law. Yet, as this section has shown, how the 'review' part of the equation will function, and how it will feed into new pledges, remains in question. To make the ratcheting mechanism work, Parties in the coming months and years will need to clarify the design of the various review processes, and ensure that follow-up will be an integral part of the review process. There is no dearth of suggestions on how to do this.<sup>28</sup> For instance, review processes can be organised to in-

<sup>24</sup> See C Voigt, 'The Compliance and Implementation Mechanism of the Paris Agreement' (forthcoming 2016).

<sup>25</sup> Paris Agreement, art 14(3).

<sup>26</sup> Decision 1/CP.21, para 20.

<sup>27</sup> Decision 1/CP.21, para 99.

<sup>28</sup> See, for instance, Van Asselt, Pauw and Sælen (n 13); Y Dagnet et al, 'Improving Transparency and Accountability in the Post-2020 Climate Regime: A Fair Way For-



clude a wider range of actors than just national governments. Non-State actors (including civil society as well as intergovernmental organisations) could complement the information provided by governments, and could offer independent views on how well Parties are doing without the political constraints experienced by other Parties.<sup>29</sup> Parties could also specify that if a review process points to scope for further action (whether in the area of mitigation or support provided to developing countries), this would require follow-up by the Party in question (if only so it can be addressed in the next round of reviews). Finally, as suggested above, Parties could decide that the implementation and compliance committee may apply certain consequences in case of non-compliance.

These are just some examples of how the ratcheting mechanism could be strengthened in the impending negotiation process. It is beyond the scope of this Note to assess these various options in detail. Suffice it to say that one of the hopes and expectations usually associated with international law – that it can hold countries to account if they do not live up to what they have promised – is not (yet) fulfilled. This brings us to the next question: so what, then, *is* the role of international climate change law post-Paris?

### 3. *The potential effects of international climate change law*

As a legally binding treaty, the Paris Agreement may be expected to lay down rules that can be enforced or backed up by sanctions in case of non-compliance. This raises the expectations for international climate change law significantly, perhaps unreasonably so. Indeed, if this were the benchmark, the Paris Agreement would likely fail, as the previous section has shown. Yet ensuring compliance with legal obligations is but one out of several potential effects of international law.<sup>30</sup> A more

ward' (WRI 2015); S Duyck, 'MRV in the 2015 Climate Agreement: Promoting Compliance through Transparency and the Participation of NGOs' (2014) 8 Carbon & Climate L Rev 175.

<sup>29</sup> See also H van Asselt, 'The Role of Non-State Actors in Reviewing Ambition, Implementation, and Compliance under the Paris Agreement' (2016) Climate L (forthcoming).

<sup>30</sup> Howse, Teitel (n 5).





accurate assessment of the Paris Agreement would also include a variety of other effects. Below I consider a few of these effects.

First, international law can offer important signals. The Paris Agreement, solely by virtue of being adopted – and being adopted as a treaty under international law – arguably offers the signal that ‘the transformation of our global economy from one fuelled by dirty energy to one fuelled by sustainable economic growth is now firmly and inevitably under way’.<sup>31</sup> But also the substance of the agreement can offer an important signal. The inclusion of the 1.5°C objective offers a good example. For States, the inclusion of 1.5°C can offer an incentive for reconsideration of the INDCs, especially if the targets contained in INDCs are based on assumptions related to a 2°C scenario. For instance, pressure has been building for the European Union to revise its 2030 target upwards to ensure it is in line with the 1.5°C<sup>32</sup> – although this call has met with resistance from Member States, and was ignored by the European Commission in its first post-Paris communication.<sup>33</sup> But the 1.5°C also offers more clarity for non-State actors about the fact that efforts to combat climate change will be stepped up over time. For instance, large investors, such as pension funds, may take this as a signal to divest from fossil fuels and into low-carbon alternatives.<sup>34</sup> Whether

<sup>31</sup> Former United States Vice-President Al Gore, quoted in: J Vidal, A Vaughan, ‘Paris Climate Agreement “May Signal End of Fossil Fuel Era”’ *The Observer* (13 December 2015).

<sup>32</sup> See, for instance, the call by a wide range of civil society and business organisations and local authorities, released on 1 March 2016: <[www.caneurope.org/docman/position-papers-and-research/un-climate-negotiations-2/2826-statement-from-the-coalition-for-higher-ambition/file](http://www.caneurope.org/docman/position-papers-and-research/un-climate-negotiations-2/2826-statement-from-the-coalition-for-higher-ambition/file)>.

<sup>33</sup> European Commission, *The Road from Paris: Assessing the implications of the Paris Agreement and accompanying the proposal for a Council decision on the signing, on behalf of the European Union, of the Paris Agreement adopted under the United Nations Framework Convention on Climate Change, COM(2016) 110 final*. The Commission states that ‘... the EU will take part in the first global stocktake in 2023, which is relevant for considering progressively more ambitious action by all Parties for the period *beyond 2030*’, indicating that the 2030 target will not be revised. *ibid* 4 (emphasis added).

<sup>34</sup> B Buchner, J Wilkinson, ‘The Paris Agreement is a Signal to Unlock Trillions in Climate Finance’ (Climate Policy Initiative 2015) <<http://climatepolicyinitiative.org/2015/12/14/the-paris-agreement-is-a-signal-to-unlock-trillions-in-climate-finance/>>. Already before Paris, Norway’s government pension fund pledged to move away from coal funding. Damian Carrington, ‘Norway Confirms \$900bn Sovereign Wealth Fund’s Major Coal Divestment’ *The Guardian* (5 June 2015).





these signals are strong enough and carry through also after the post-Paris momentum has waned remains to be seen, and will likely depend on the ratification of the agreement by a wide range of countries, as well as further signals that Parties are serious about implementation.

Second, the Paris Agreement may not only influence State behaviour, but may also have effects on non-State action. This influence is not limited to direct influence, such as the general encouragement by the Paris outcome of further non-State action,<sup>35</sup> but the effects can also be indirect. For instance, the number of transnational climate change governance initiatives<sup>36</sup> increased markedly following the adoption (in 1997) and the entry into force (in 2005) of the Kyoto Protocol.<sup>37</sup> The rise of non-State action can be linked to specific provisions of the international agreement – in the case of the Kyoto Protocol, the inclusion of market-based flexibility mechanisms.<sup>38</sup> The Paris Agreement’s acknowledgement of ‘voluntary cooperative approaches’ using ‘internationally transferred mitigation outcomes’ and its establishment of a ‘mechanism to contribute to the mitigation of greenhouse gas emissions and support sustainable development’<sup>39</sup> may similarly provide an impetus for carbon markets in the coming period.<sup>40</sup>

Third, international law can be used by a set of domestic actors to shape and interpret domestic law and policy, irrespective of implementation by the national government. Two sets of actors are worth mentioning here: parliamentarians and domestic courts. Parliaments play a key role by monitoring the actions of national governments and holding them to account for their (lack of) action. They also usually have powerful tools to their avail, such as approving government budgets. Parliaments in countries that have signed and/or ratified the Paris Agreement thus can invoke the provisions of the treaty to incentivise their govern-

<sup>35</sup> See (n 7).

<sup>36</sup> Transnational climate governance can be defined as transboundary cooperation involving ‘the authoritative steering of network constituents to achieve public goals’. LB Andonova, MM Betsill, H Bulkeley, ‘Transnational Climate Governance’ (2009) *Global Environmental Politics* 52, 53.

<sup>37</sup> H Bulkeley et al., *Transnational Climate Change Governance* (CUP 2014) 63.

<sup>38</sup> *ibid* 64.

<sup>39</sup> Paris Agreement, art 6(2)-6(4).

<sup>40</sup> International Carbon Action Partnership, *Emissions Trading Worldwide: International Carbon Action Partnership Status Report 2016* (ICAP 2016) 25.



ments to do more.<sup>41</sup> National courts can play an important complementary role by interpreting the provisions of the Paris Agreement,<sup>42</sup> particularly since the text of the agreement is in many ways indeterminate, and often intentionally so. Climate-related court cases have started to emerge on a wider scale in recent years,<sup>43</sup> with the *Urgenda* case in the Netherlands – in which the Dutch government was ordered to step up its emission reduction targets – as perhaps the most well-known example.<sup>44</sup> The Paris Agreement, for instance by requiring regular reports of Parties' actions to implement the treaty, can provide further impetus for such cases.<sup>45</sup>

Lastly, international law can facilitate dialogue, build legitimacy and 'acculturate' or 'socialise' States around emerging norms.<sup>46</sup> An example is perhaps the rise of 'loss and damage' on the agenda of the climate change negotiations – and its ultimate inclusion in a separate provision in the Paris Agreement. The issue – referring to the loss and damage arising out of climate change impacts that can neither be mitigated nor adapted to – has been on the negotiation agenda since the early days of the UNFCCC, but the inclusion of a provision in the Paris Agreement suggests that more needs to be done.<sup>47</sup> Although there are some important caveats – not least that the decision accompanying the agreement specifies that the relevant provision 'does not involve or provide a basis for any liability or compensation'<sup>48</sup> – the inclusion of the provision

<sup>41</sup> The Inter-Parliamentary Union, the international organisation of parliaments, is to adopt a Parliamentary Action Plan on Climate Change in March 2016. See <[www.ipu.org/splz-e/cop21/dr-papcc.pdf](http://www.ipu.org/splz-e/cop21/dr-papcc.pdf)>.

<sup>42</sup> The role of courts is also highlighted by Howse, Teitel (n 5) 132.

<sup>43</sup> See generally J Peel, HM Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (CUP 2015).

<sup>44</sup> *Urgenda Foundation and 886 citizens v the State of The Netherlands*, [2015] C/09/456689/HA ZA 13-1396 <<http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2015:7196>>.

<sup>45</sup> S Stefanini, 'Next Stop for Paris Climate Deal: The Courts' Politico (13 January 2016) <[www.politico.eu/article/paris-climate-urgenda-courtslawsuits-cop21/](http://www.politico.eu/article/paris-climate-urgenda-courtslawsuits-cop21/)>.

<sup>46</sup> Acculturation is referred to as 'the general process by which actors adopt the beliefs and behavioral patterns of the surrounding culture'. R Goodman, D Jinks, *Socializing States: Promoting Human Rights through International Law* (OUP 2013) 4.

<sup>47</sup> Paris Agreement, art 8.

<sup>48</sup> Decision 1/CP.21, para 51.



could allow for the development of a substantive framework to assist the most vulnerable countries in dealing with this issue.<sup>49</sup>

#### 4. *Conclusions*

The Paris Agreement establishes the main elements that could allow for the ratcheting up of ambition and efforts over time. Yet, as this Note has shown, important decisions on the organisation of the various review processes are left to be addressed by future negotiations. This is not necessarily problematic; close observers will know that delaying decisions on difficult issues is one of the key features of international climate change negotiations. However, the development of more detailed rules for each of the review processes is needed for strengthening the ratcheting mechanism, notably by ensuring that the outcomes of these processes will be followed-up.

While it thus remains uncertain whether the Paris Agreement will ensure that Parties meet the long-term objectives they set out to achieve, and implement and comply with their legal obligations, the Note also pointed to a range of other potential effects of international climate change law that have largely been overlooked. The list of potential effects discussed in this Note is not exhaustive. Moreover, the extent to which these effects will materialise in practice remains to be seen, and will likely depend on whether and how Parties follow through with signing, ratifying and implementing the agreement. The point of this Note is merely to draw attention to the (types of) effects that the Paris Agreement may bring about in the future. Only by looking at this wider range of effects will it be possible to properly assess the role of the agreement – and international climate change law in general – in avoiding dangerous climate change.

<sup>49</sup> See also W Burns, 'Loss and Damage and the 21st Conference of the Parties to the United Nations Framework Convention on Climate Change' (2016) <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2710086](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2710086)>.

