The Paris Agreement: A Legal Reality Check

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Berlin Conference on Global Environmental Change
24 May 2016
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Key challenge was and is how the UNFCCC’s ultimate goal of ‘stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system’ (Art. 2 UNFCCC) can be translated into an equitable and fair burden sharing.
Paris Agreement establishes a general framework for a universal, long-term climate regime under the UNFCCC.

Many details to be fleshed out in decisions to be adopted in the coming years.
Division of Work

**APA**
- NDCs (PA Art. 4; 1/CP.21, §§26, 28 & 31)
- Transparency (PA Art. 13; 1/CP.21, §§91 - 96)
- Global stocktake (PA Art. 14; 1/CP.21, §§99 & 101)
- Implementation/compliance (PA Art. 15; 1/CP.21, §103)

**SBSTA**
- Cooperation / mechanism / non-market approaches (PA Art. 6; 1/CP.21, §§36, 38 - 40)
- Accounting for financial resources (PA Art. 9; 1/CP.21, §57)
- Elaboration of technology framework (PA Art. 10; 1/CP.21, §67)
- IPCC input to global stocktake (PA Art. 14; 1/CP.21, §100)

**SBI**
- Modalities/procedures for the NDC registry (PA Art. 4; 1/CP.21, §29)
- Periodic assessment of support to Technology Mechanism (1/CP.21, §70)
- ToR/in-session support to Paris Committee on Cap.-Building (1/CP.21, §§75 & 76)

**SBSTA&SBI**
- Response measures: modalities, WP, functions of the forum (1/CP.21, §34)
- Technical examination process on mitigation (1/CP.21, §112)
- Technical examination process on adaptation (1/CP.21, §126)
Legal Nature

• Agreement will be formally binding on its Parties;

• Only a limited number of provisions create legally binding commitments (ie. obligations);

• Almost exclusively obligations of conduct rather than result: e.g. filing of nationally determined contributions (NDCs) and other information, but not the meeting of specific targets or other outcomes;

• No binding commitments related to the achievement of national mitigation targets or to scale up climate finance from current levels.
Art. 4 Nationally Determined Contributions

• Article 4(2) of the Paris Agreement requires each Party to prepare, communicate and maintain successive nationally determined contributions (NDCs) that it intends to achieve, as well as to pursue domestic mitigation measures with the aim of achieving the objectives of such contribution;

• Each country can list whatever it intends to ‘contribute towards achieving the objective of the Convention’ (Decision 1/cp.20, para 10) or what it sees as a ‘contribution to the global response to climate change’ (Article 3) and;

• Adopt guidance on the adjustment by a Party, at any time, of its existing NDC with a view to enhancing its level of ambition.
(a) To develop further guidance on features of the NDCs;

(b) To develop further guidance for the information to be provided by Parties in order to facilitate clarity, transparency and understanding of NDCs;

(c) To elaborate, drawing from approaches established under the Convention and its related legal instruments as appropriate, guidance for accounting for Parties.’
Differentiation

• Implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, **in the light of different national circumstances** (Art. 2.2)

• Developed countries ‘economy-wide absolute emission reduction targets’ (Art. 4.4) and being obliged to ‘provide financial resources to assist developing country Parties’ (Art. 9.1).

• Recognizes that developing country Parties will need support in order for the Agreement to be implemented effectively (Art. 3)

• Range of provisions entail obligations (cf. Art. 3 on overall efforts) or contributions (cf. Art. 4.2. on NDCs) for Parties regardless of their status.
Core Paris Agreement Review Processes

• **Implementation review** (Art. 13) - a review of measures put in place by Parties to meet their obligations;

• **Effectiveness review** (Art. 14 and UNFCCC, Decision 1/CP.21) refers to the global stocktake of policies and measures adopted by Parties to implement NDCs, and;

• **Compliance review** (Art. 15) - refers to an assessment of whether a Party has complied with its legal obligations.
Transparency Made Meaningful
Transparency Framework (Art. 13)

• ‘… to build mutual trust and confidence and to promote effective implementation … with built-in flexibility which takes into account Parties’ different capacities and builds upon collective experience (Art. 31.1)

• ‘…facilitative, non-intrusive, non-punitive manner, respectful of national sovereignty, and avoid placing undue burden on Parties’ (Art. 13.2)

• Developed country Parties shall, and other Parties that provide support should, provide information on financial, technology transfer and capacity-building support provided to developing country Parties (Art. 13.9)

• Developing country Parties should provide information on financial, technology transfer and capacity-building support needed and received (Art. 13.10)
Transparency Framework

• Support … to developing countries for the implementation of this Article (Art. 13.14)

• Support … for the building of transparency-related capacity of developing country Parties on a continuous basis (Art. 13.15)

• ‘Common modalities, procedures and guidelines, as appropriate, for the transparency of action and support’ to be adopted at first COP/MPA –shall build on experience from the arrangements related to transparency under the Convention’ (Decision 1/CP.21, paragraphs 84–88)

• Environmental integrity, transparency, accuracy, completeness, comparability and consistency, and the avoidance of double counting, are key principles in this respect (Art. 4.13).
Global Stocktake

• Art 14.1 - assess the collective progress .... in a comprehensive and facilitative manner, considering mitigation, adaptation and the means of implementation and support, and in the light of equity and the best available science.

• Art 14.3 - The outcome of the global stocktake 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.
Art. 14 Global Stocktake - Sources

• Best available science (Art. 14.2)

• But also - information on ‘[t]he overall effect of nationally determined contributions communicated by Parties’, the adaptation communications, GHG inventories and other regular reports, information on ‘[t]he mobilization and provision of support’, the latest Intergovernmental Panel on Climate Change (IPCC) reports, and reports of the UNFCCC subsidiary bodies.’ (Decision 1/CP.21)

• But which sources are acceptable to all Parties?

• The APA to report to the COP on this as well as on modalities for the stocktake.
2018 Facilitative Dialogue

• CP.21/ 20. *Decides* to convene a facilitative dialogue among Parties in 2018 to take stock of the collective efforts of Parties in relation to progress towards the long-term goal referred to in Article 4, paragraph 1, of the Agreement and to inform the preparation of nationally determined contributions pursuant to Article 4, paragraph 8, of the Agreement;
Art. 15 Compliance Mechanism

• Mechanism to facilitate implementation of and promote compliance (Art. 15.1);

• Consist of a committee that shall be expert-based and facilitative in nature and function in a manner that is transparent, non-adversarial and non-punitive. The committee shall pay particular attention to the respective national capabilities and circumstances of Parties (Art. 15.2)

• Report annually to the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement.

• Possible Models – Kyoto Protocol facilitative branch; Montreal Protocol and Aarhus Convention
Review Process: Ultimate Goal

Ultimate goal of the overall review process should be to motivate Parties to increase the ambition of their actions and support over time:

- Transparency of level of achievement, effort and barriers for each Party
- Knowing which Parties are achieving or exceeding their NDCs
- Getting recognition for genuine efforts to achieve or exceed NDCs
- Getting recognition for genuine efforts to increase ambition
- Getting help to overcome barriers to progress that challenge the capacity of the Party involved
- Learning how to overcome barriers
- Learning how to accelerate progress

(Streck, 2016)
Reality Check

Parties will, to varying degrees, fail to meet, meet or exceed elements of their NDCs for a broad range of reasons, such as:

- inadvertence,
- lack of capacity,
- evolving views on fairness and comparability,
- unforeseen events,
- domestic political issues,
- economic factors,
- changes in our scientific understanding of the problem and solutions,
- changes in technologies, and;
- changes in public support.

The review process needs to be designed with this diversity of circumstances in mind, and with a full appreciation of the complexity of the Paris Agreement within a broader global law and policy landscape.
Climate Change and Legal Landscape

- UNFCCC regime
- Public international law
- Private international law
- Regional law
- Courts – local, national, regional and international
- National law
- Sub-national law
- Customary law
- Religious law
- Other sources e.g. transnational guidelines etc.
e.g. NAZCA = Non-State Actor Zone for Climate Action

- launched by the Peruvian Presidency of COP20, alongside the Lima Paris Action Agenda (LPAA) in 2014;
- 11615 total commitments to action commitments based on entity;
- Voluntary commitments means they are not governed by an internationally standardized MRV (monitoring, reporting, and verification) system;
- NAZCA portal itself should not be seen as a tool for tracking and monitoring.
Conclusions

• Paris Agreement is part of a broader climate change regime that continues to evolve (it will change by 2050!);

• It is a toolkit – in the design phase;

• The political will is needed to make use of the tools;

BUT

• Equity and fairness need to be embedded in the design and use of tools – this is an ongoing struggle at all levels;

• Other legal and policy tools exist that will influence and can contribute e.g. human rights law, trade and investment law;

• Non-state actors from all regions are key architects, designers and workers.
Thank you

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