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2017

### The Paris Climate Agreement – Assessment of Strengths and Weaknesses

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# The Paris Climate Agreement – Assessment of Strengths and Weaknesses

**Meinhard Doelle**

## A. Introduction

Effective global cooperation on climate change is ultimately about motivating and enabling nation states to take action beyond what they would consider to be in their national interest in the absence of cooperation. The Kyoto Protocol represented one approach to achieving this goal. It was based at least in part on the proposition that sovereign states are more likely to take action in the collective interest of the global community if they are assured that other countries will do the same, and if they have some sense that the effort is distributed fairly. The goal is to align self interest with the common interest. Under the Kyoto Protocol, emission reduction targets were therefore agreed to jointly by countries (identified through an annex with responsibility to lead), seeking ultimately to encourage those countries to take on ambitious targets in light of and conditional on comparable commitments made by others. There was a focus on making the targets binding, and ensuring adequate consequences in case of non-compliance.<sup>1</sup>

The Kyoto approach, while considered largely successful in Europe, failed to move most other developed countries demonstrably beyond ‘no regrets actions’.<sup>2</sup> The United States of America (USA), for example, never ratified the Kyoto Protocol, and Canada withdrew rather than to make a serious effort to meet its emission reduction target. Australia negotiated a very modest target. Most recently, most developed countries outside Europe declined to accept a second commitment period target under the 2012 Doha Amendment to the Kyoto Protocol, preferring to deliver their targets under the Convention.<sup>3</sup> Targets were offered unilaterally, without the negotiations that took place in Kyoto. At the same time, emissions in many emerging economies without Kyoto targets, including China, India, South Africa, and Brazil, continued to grow significantly, though significant efforts to curb emissions have been made by some.<sup>4</sup>

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<sup>1</sup> Meinhard Doelle, *From Hot Air to Action? Climate Change, Compliance and the Future of International Environmental Law* (Carswell 2005).

<sup>2</sup> The term ‘no regrets actions’ is used here to refer to actions Parties would consider being in their national interest without global cooperation.

<sup>3</sup> UN Treaty Collection, ‘7 c Doha Amendment to the Kyoto Protocol’, available online at: <[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)>, accessed 4 January 2016 (“Doha Amendment to the Kyoto Protocol”).

<sup>4</sup> For emissions trends in individual countries, see Climate Action Tracker Partners, ‘Climate Action Tracker’ <<http://climateactiontracker.org/>>, accessed 4 January 2016.

The Paris Outcome<sup>5</sup> offers a different approach. It is based on the idea that self-imposed, voluntary commitments are more likely to be met than those agreed through collective negotiations by the global community, and that demonstrated domestic progress, full transparency, a collective commitment to progression and ambition and regular review of the collective effort are key to moving Parties beyond no regrets actions. The relative merits of these alternative approaches have been debated in the international relations and legal literature for some time.<sup>6</sup>

The Kyoto approach is based on the assumption that nation states will always act in self-interest, requiring a global agreement that aligns their self-interest with the global interest through binding commitments and strong compliance. The Paris Agreement is based on the idea that nation states can be moved toward action in the global interest through managerial approaches that achieve new norms of state behaviour. This managerial approach is based on transparency, a clear articulation of the collective goal, attention to the state of the science, collective progress being revisited periodically, and opportunities for interaction and information sharing, along with the flexibility to adjust to changing circumstances and science.<sup>7</sup>

Similar debates have taken place in other international and domestic contexts about the effectiveness of various regulatory approaches, with some advocating for top-down command and control approaches, while others favouring managerial, market-based or voluntary approaches. More recently, the domestic debates have resulted in a growing number of academics and practitioners advocating for a mix of approaches that is tailored to the circumstances.<sup>8</sup> A key difference between the international and domestic context is that there are effective mechanisms to implement a command and control approach in a domestic context, while this has

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<sup>5</sup> This term is used throughout to refer collectively to the Paris Decision (Decision 1/CP.21) and the Paris Agreement.

<sup>6</sup> See, for example, Abram Chayes & Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (HUP 1995); Andrew Guzman, 'A Compliance Based Theory of International Law' (2002) 90 *California Law Review* 1823; Kal Raustalia, 'Compliance & Effectiveness in International Regulatory Cooperation' (2000) 32 *Case Western Reserve Journal of International Law* 387, 391; George W. Downs, 'Enforcement and the Evolution of Cooperation' (1997-1998) 19 *Michigan Journal of International Law* 319. See also Richard Stewart and others, *Climate Finance: Regulatory and Funding Strategies for Climate Change and Global Development* (NYU Press 2009) which forecasted this shift to a bottom-up approach.

<sup>7</sup> Of course, the Paris and Kyoto approaches share much in common. Both, for example, are based on the idea that collective, ambitious action on climate change will result in national and global economic benefits. Both are based on strong transparency, even if the transparency under Kyoto is focused on compliance, whereas the transparency in Paris is directed at progression of ambition.

<sup>8</sup> See, for example, OECD, 'OECD Principles for Regulatory Quality and Performance' in OECD (ed), *Regulatory Policy and Governance: Supporting Economic Growth and Serving the Public Interest* (OECD Publishing 2011); Better Regulation Task Force, *Principles of Good Regulation* (Better Regulation Task Force 2003); Neil Gunningham, 'Environmental Law, Regulation and Governance: Shifting Architectures' (2009) 21 *Journal of Environmental Law* 179; Chris Tollefson, Anthony Zito, and Fred Gale, 'Symposium Overview: Conceptualizing New Governance Arrangements' (2012) 90 *Public Administration* 1.

proven elusive at the international level. This suggests additional reasons to not rely exclusively on command and control approaches in the international context.

The Paris Outcome represents an experiment in applying a more managerial approach to seek to motivate countries beyond no regrets actions on climate change. While it retains important elements of the Kyoto approach, it nevertheless represents a significant departure in that it seeks to raise ambition through careful management and norm-building. It is an experiment that is driven in part by practical realities, such as the domestic political situation in the USA, and long-standing divisions between and among developed and developing countries, but it also has strong roots in managerial theories of international relations.<sup>9</sup>

## B. Assessment of key elements

This part offers a bird's eye view of the key elements of the Paris Agreement. For a detailed assessment of these elements, the reader is referred back to the relevant chapters of Part II of this book. The focus here is on the key elements as context for the overall assessment of the Paris Outcome.

### 1. Preamble

The preamble to the Paris Agreement served as an important vehicle to capture concepts and provisions in a space that sits, so to speak, between the Agreement's operative legal provisions and the Paris Decision. It served as the host for a number of novel provisions and concepts that emerged in the negotiations only recently. Some Parties insisted on having these provisions included in the Paris Agreement while other Parties resisted including them. Some of the important issues highlighted in the preamble are recognized for the first time within a legally binding agreement under the UN climate regime. They include:

- The imperative of a just transition of the workforce,
- The recognition of concepts such as 'Mother Earth' and 'climate justice',
- The need to respect, promote and consider human rights,
- The need to consider the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and
- The need to consider the right to development, to gender equality, to the empowerment of women and to intergenerational equity when taking action on climate change.

### 2. Long-term goal (Article 2)

The decision to include the objective of keeping global average temperature increase to "well below" 2 °C, and the aspiration to limit this increase to 1.5 °C was perhaps the biggest surprise and a key accomplishment of the Paris negotiations.

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<sup>9</sup> See Chayes and Chayes (n 6).

Arguably, 1.5 °C has now become the ultimate standard against which the success of collective mitigation efforts will be measured. This ambitious long-term goal provides an important foundation for each country's future nationally determined contributions (NDCs), their justification on the grounds of equity, and the five-year cycles of NDC communication and the Global Stocktake. Over time, the 1.5 °C goal can be expected to shape discussions on other elements of the long-term ambition, such as more specific time frames for the expressed need for global emissions to peak as soon as possible and for reaching a balance of emissions and removals.

The long-term temperature goal also provides important context for other key elements of the Paris Agreement, particularly adaptation and finance. Meeting the long-term goal is an essential pre-condition for adaptation efforts, and finance in turn is critical for meeting both the mitigation and adaptation goals of the Paris Agreement. Important connections are made to poverty eradication and sustainable development. Through the process of the Global Stocktake, the long-term goal articulated in Article 2 is expected to become the ultimate guide for the implementation of the Paris Agreement.

### 3. Mitigation and cooperative approaches (Articles 4-6)

The starting point for mitigation in the Paris Agreement is the collective mitigation effort represented by the NDCs measured against the long-term temperature goal. Successive NDCs are to be strengthened every five years starting in 2025 following a global stocktaking exercise carried out two years before each updated NDC is due.<sup>10</sup> The Paris Agreement offers important guidance on how Parties are to determine the adequacy of their NDCs with respect to mitigation.

Article 4.1 provides that Parties will aim to reach global peaking of emissions as soon as possible, and to undertake rapid reductions thereafter on the basis of science and equity. Parties recognize that it will take longer for developing country emissions to peak, putting pressure on developed countries to accelerate their emission reductions to achieve a global peaking as soon as possible. Parties are to achieve a collective balance between emissions and removals of greenhouse gases (GHG) from the atmosphere in the second half of the century, suggesting that GHG concentrations should stabilize and start to decline sometime after 2050.

These provisions offer some clarity on the scale and allocation of mitigation efforts, and create a number of procedural obligations, but they neither provide a method for determining appropriate NDCs for individual Parties, nor a legal obligation to implement NDCs. It is noteworthy that the long-term mitigation goals are framed in technology-neutral language and thereby leave open how much specific technologies, from renewable energy to carbon capture and storage and the

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<sup>10</sup> The Paris Agreement refers to highest ambition and the need for progression (art 4.3), and new NDCs every five years (art 4.9) informed by the Global Stocktake (arts 4.9 and 14).

enhancement of sinks, should contribute to the effort.<sup>11</sup> The additional guidance for Parties on what is expected of them takes on added significance as the Paris Outcome explicitly recognizes that there is an ambition gap between commitments made by Parties to date and the long-term goal: The ambition gap is quantified in Decision 1/CP.21 to be upward of fifteen gigatonnes by 2030.<sup>12</sup>

The Paris Agreement affirms the importance of the enhancement and conservation of sinks, and specifically mentions forests in this context.<sup>13</sup> Further, the Paris Agreement confirms that international emissions trading and other market mechanisms are acceptable tools for Parties to meet their emission reduction goals, as long as they increase the level of ambition.<sup>14</sup> The Agreement sets out general principles for the use of market mechanisms, such as the avoidance of double counting, environmental integrity, robust accounting, and transparency. The Paris Agreement also makes provision for non-market approaches to assist Parties with the implementation of their NDCs.

Detailed rules for these various mechanisms will have to be established before a thorough assessment of their environmental integrity and their potential to contribute toward the ultimate objective of the Paris Agreement can be carried out. Among the observations to be made about the basic framework is that motivating domestic efforts will be key, and that developed country leadership will be critical in bridging the ambition gap and meeting the long term goals. Transparency, the Global Stocktake, and the long-term mitigation strategies<sup>15</sup> will be central process tools to realize the ambitious mitigation goals set in the Paris Agreement. If Parties understand that they will reduce their need for and cost of adaptation and their exposure to loss and damage through effective cooperation on mitigation, this should help to provide the necessary motivation.

#### 4. Adaptation (Article 7)

The Paris Agreement contains few surprises with respect to adaptation. It does recognize, for the first time, a global goal of enhancing adaptive capacity, strengthening resilience and reducing vulnerability to climate change. It also articulates the link between the adequacy of mitigation in the form of the long-term temperature goal and the adaptation needs of developing countries. More generally, it makes the point that ambition with respect to mitigation will reduce adaptation

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<sup>11</sup> Geo-engineering is not specifically addressed. This leaves open the possibility that it could be relied upon to contribute to the long-term temperature goal, though it would not contribute to the balancing of emission and removal of GHG in the second half of the century. Of course, only some geo-engineering technologies can be used to achieve GHG emission neutrality.

<sup>12</sup> Decision 1/CP.21 para 17.

<sup>13</sup> Paris Agreement art 5.

<sup>14</sup> *ibid* art 6.

<sup>15</sup> *ibid* art 4.19.

costs. It calls for balance between mitigation and adaptation funding, and more generally between adaptation and mitigation throughout the Paris Agreement.<sup>16</sup>

Otherwise, the Agreement largely continues with previous efforts to support adaptation in developing countries at a regional, national and sub-national level. Notably, the Agreement recognizes the need for adaptation efforts to be gender-responsive, participatory and transparent. Finally, adaptation is part of the Global Stocktake under Article 14 of the Paris Agreement, even though it is not included in the stocktaking exercise in 2018 provided for in Decision 1/CP.21. Enhanced transparency on adaptation is another key step forward.

#### 5. Loss and damage (Article 8)

Loss and damage lived up to its promise to be among the issues that would preoccupy negotiators to the very end. The compromise outcome was a stand-alone article for loss and damage in the Paris Agreement with a somewhat broader mandate, but with an explicit exclusion of compensation and liability. This exclusion is articulated in Decision 1/CP.21, not in the Paris Agreement, allowing for future changes to be made by the Conference of the Parties (COP).<sup>17</sup> Also moved to the Decision in the later stages of the negotiations was a call for integrated approaches to displacement associated with climate change.<sup>18</sup>

Key among the progress made to broaden the mandate for loss and damage in the Paris Agreement are references in Article 8 to early warning systems, comprehensive risk assessment and management, preparedness, risk insurance, and community resilience. The new mandate would appear to turn the predominantly reactive mechanism established in Warsaw into a more proactive mechanism. Article 8 refers to enhancing support for loss and damage, but does not identify funding as a means of providing support. Loss and damage is not included in the list of items in Article 3 that Parties are asked to address in their contributions to the global response to climate change.

#### 6. Finance (Article 9)

Finance was predicted to be one of the possible deal breakers of the negotiations. A key issue was the adequacy and status of the previous commitment to mobilize climate finance of USD 100 billion a year by 2020. Other areas of disagreement included sources of funding, the split between public and private funding, and the allocation of climate finance among mitigation, adaptation and loss and damage. Another battleground concerned the need for predictable scaled-up funding before 2020.

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<sup>16</sup> *ibid* arts 6.1, 9.1, 9.4, 10.1, 10.2, and 11.1. Adaptation can now formally be part of an individual Party's contribution to the objective if the Party so chooses.

<sup>17</sup> Decision 1/CP.21 para 51.

<sup>18</sup> *ibid* paras 49-50.

In the end, the main surprise with respect to finance was how little progress was needed in order to enable an overall agreement in Paris. The floor of USD 100 billion was confirmed, but only in the Decision, as was the expectation to increase this mobilization goal prior to 2025.<sup>19</sup> The Paris Agreement requires developed countries to provide financial resources to assist developing countries with mitigation and adaptation in continuation of existing obligations under the United Nations Framework Convention on Climate Change (UNFCCC); developing countries are encouraged to contribute on a voluntary basis. Developed countries are expected to continue to take the lead on mobilizing financial resources. The collective commitment of USD 100 billion applies only to developed countries, with any contribution from developing countries being outside this collective commitment.<sup>20</sup> Not much progress was made with respect to sources of funding. In terms of distribution of funding, Parties largely agreed to continue to utilize existing funding mechanisms, including the Green Climate Fund (GCF).<sup>21</sup>

Agreement was reached on transparency and review of financial support and its use through biannual reporting and the Global Stocktake to be carried out every five years starting in 2023.<sup>22</sup> There is general support for funding to reduce emissions from deforestation and forest degradation (REDD-plus), but no firm commitments or goals.<sup>23</sup> References in earlier drafts to the phase-out of domestic fossil fuel subsidies did not survive the final round of negotiations. This is consistent with the general approach to refrain from dictating specific domestic policies to achieve the goals in the Paris Agreement.

With respect to pre-2020 finance, Decision 1/CP.21 points out that increased financial support from developed countries is critical to enhancing the ambition of pre-2020 commitments. It calls for an increase in financial support with an emphasis on adaptation funding and the importance of public funds.<sup>24</sup> It urges developed countries to come up with a concrete roadmap for achieving the 2020 goal of USD 100 billion, and decides to conduct a facilitative dialogue in 2016 to assess progress.<sup>25</sup> Potentially the most powerful tool the Agreement offers with regard to finance is the direction and dynamic it establishes for an increase of ambition over time. It does so mainly through three ingredients, namely by: (1) setting the objective of making *all* finance flows consistent with a low-emissions and

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<sup>19</sup> *ibid* paras 53 and 114.

<sup>20</sup> *ibid* para 53.

<sup>21</sup> *ibid* paras 58 (reference to GCF, GEF, LDCF, SCCF) and 59 (reference to AF); Paris Agreement art 9.8 (reference to FM).

<sup>22</sup> Biannual reporting is required for developed countries and encouraged for developing countries that decide to contribute on a voluntary basis. See Paris Agreement art 9.5.

<sup>23</sup> Paris Agreement art 5.2 and Decision 1/CP.21 para 54. The reference in Article 2 to the long term goal of net zero GHG emissions by the second half of the century is perhaps the clearest signal of the important role of sinks, as it suggests that at some point, any emissions will have to be offset by removals.

<sup>24</sup> Paris Agreement arts 9.3 and 9.4.

<sup>25</sup> Decision 1/CP.21 paras 114-115.



climate-resilient development pathway,<sup>26</sup> (2) applying the progression principle to climate finance,<sup>27</sup> and (3) including finance in the Global Stocktake.<sup>28</sup>

#### 7. Technology (Article 10)

Considerable efforts had been made within the UN climate regime since COP 15 in Copenhagen to make progress on the development, transfer and deployment of technology in developing countries, particularly through the establishment and operationalization of the Technology Mechanism (TM), consisting of the Climate Technology Centre and Network (CTCN) and the Technology Executive Committee (TEC). The Paris Agreement offers a new technology framework, but with significant potential for overlap with the existing TM, and limited progress on the key substantive issues.

As explored in more detail in Chapter 15, much work remains to adequately support the development, transfer and deployment of technology in developing countries. There is no funding commitment specific to technology in the Paris Agreement. There are also no clear links between the TM and the financial mechanism of the Agreement; though finance for means of implementation (including technology) will be part of the Global Stocktake. The COP decided to periodically assess the effectiveness and adequacy of support of the TM. The important role of capacity-building to effectively implement appropriate technologies will need the attention of Parties going forward.

#### 8. Capacity-building (Article 11)

Perhaps the most notable development for capacity-building is that the ongoing effort since COP 13 in Bali to raise the profile of this topic resulted in capacity-building receiving its own article in the Paris Agreement. This was complemented with the establishment of a new institution, the Paris Committee on Capacity Building (PCCB).<sup>29</sup> A full assessment of its role will only be possible as it is fully operationalized and develops and implements its work plan. The increased profile of capacity-building is in part connected to the more nuanced approach to differentiation, particularly with respect to transparency and review under Article 13, in that it was the commitment to capacity-building that enabled agreement on transparency. The link between capacity-building and flexibility in the transparency rules for developing countries, including through the Capacity-Building Initiative for Transparency (CBIT), will be key for the effective implementation of Article 13 of the Paris Agreement.<sup>30</sup>

#### 9. Transparency, Global Stocktake & Compliance (Articles 13, 14, 15)

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<sup>26</sup> Paris Agreement art 2.1(c).

<sup>27</sup> *ibid* arts 3 and 9.3.

<sup>28</sup> *ibid* arts 14.1 and 9.6.

<sup>29</sup> Decision 1./CP.21 paras 71-81.

<sup>30</sup> *ibid* paras 84-88.

The provisions on transparency were a compromise, but one that is broadly in line with the approach favoured by developed countries. The transparency rules apply to all Parties, with some modest differentiation, mainly through a commitment to flexibility and support for developing countries. For all Parties, the information they submit will be subject to a technical expert review and a multilateral, facilitative consideration of progress. Importantly, flexibility with respect to transparency is specifically linked to capacity, not to the broader concept of common but differentiated responsibilities and respective capabilities (CBDRRC) or national circumstances. Special accommodations are included for the least developed countries (LDCs) and for small island developing states (SIDS).<sup>31</sup> Transparency is a focus of capacity-building efforts under the Paris Agreement, a signal that developed country Parties are motivated to help build capacity in developing countries in order to minimize differentiation on transparency.<sup>32</sup>

The Paris Agreement signals the intention to build on and enhance transparency arrangements under the UNFCCC, including national communications, biennial reports and update reports, international assessment and review and international consultation and analysis.<sup>33</sup> It specifically calls for more regular and comprehensive reporting, a more harmonized verification process,<sup>34</sup> and common modalities, procedures and guidelines.<sup>35</sup> The Paris Agreement offers a surprising level of detail on accounting and reporting in the fifteen paragraphs of Article 13 as well as references to transparency in key provisions on mitigation, adaptation, finance, and capacity-building.<sup>36</sup>

The establishment of a stocktaking process is another core element of the overall effort to ensure the goal of the Paris Agreement is met through the collective efforts of Parties. The Global Stocktake set out in Article 14 covers mitigation, adaptation, means of implementation and support. The first Global Stocktake is to take place in 2023, in time for the revision of Parties' NDCs by 2025. The goal of the Global Stocktake is to enhance national action and international cooperation. An initial stocktaking process among Parties, called 'facilitative dialogue', is scheduled for 2018.<sup>37</sup>

The compliance mechanism is to be facilitative, non-adversarial, and non-punitive in nature and applies to all Parties.<sup>38</sup> The compliance committee is to consist of twelve members with relevant technical expertise, with membership determined in a manner similar to the facilitative branch of the compliance committee under the

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<sup>31</sup> Paris Agreement art 13.7-13.10; Decision 1/CP.21 paras 89, 90.

<sup>32</sup> Paris Agreement arts 11, 13.15; Decision 1/CP.21 paras 84-88.

<sup>33</sup> Paris Agreement art 13.4.

<sup>34</sup> Through a technical expert review, *ibid* art 13.11-13.12.

<sup>35</sup> *ibid* art 13.13.

<sup>36</sup> *ibid* arts 4.8, 4.13, 6.2, 7.5, 9.7, 11.1. Transparency is referenced throughout Decision 1/CP.21.

<sup>37</sup> Decision 1/CP. 21 para 20.

<sup>38</sup> Paris Agreement art 15.

Kyoto Protocol.<sup>39</sup> The committee is to be sensitive to national capabilities and circumstances of Parties in carrying out its work.<sup>40</sup>

The transparency provisions with respect to Parties' implementation of their NDCs, in combination with the Global Stocktake and the compliance system, are at the heart of the process put in place under the Paris Agreement to ensure progression of individual and collective ambition toward the long term goal. The basic elements are in place in the form of Articles 13 to 15, and they appear sound. However, the detailed rules are yet to be negotiated. Furthermore, the success of the transparency, review, stocktaking and compliance approach in the Paris Agreement in increasing ambition sufficiently to meet the long-term goal will ultimately depend on many factors outside the purview of the new climate regime, most notably the economic, political and social circumstances in key member states.

### C. Was the Paris Outcome a breakthrough?

The Paris Outcome is assessed here in the context of what it aims to do, to motivate state action beyond no regrets action toward an agreed long-term goal through a hybrid, managerial rather than a top-down approach based on an assumption that Parties will act prominently out of self-interest and to spur climate action more broadly. Seen in this light, the key strengths of the Paris Outcome include the long-term goal, the effort to significantly enhance transparency, and the five-year cycles for the Global Stocktake combined with the commitment to submit progressively more ambitious NDCs within two years of each Global Stocktake. Most importantly, perhaps, the Paris Agreement seeks to engage all Parties in a truly global effort to address climate change.

The biggest question about the effectiveness of the Paris Outcome is whether its hybrid managerial approach built upon transparency and norm-building with collective long-term goals and transparency and review can deliver sufficient efforts beyond no regrets action to achieve its long-term goal. However, even within the context of the managerial approach, there are some potential limitations in the Paris Outcome that are worth noting. They include the following:

- a) Gender equity, human rights, intergenerational equity, and climate justice are largely limited to the preamble of the Paris Agreement, making their full integration into the implementation of the regime less certain.
- b) The inability of the Parties to agree to a peak year and a decarbonization year in line with either the 1.5 or the "well below" 2 °C temperature goals may make efforts to bridge the ambition gap more difficult and seems to place

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<sup>39</sup> Decision 1/CP.21 para 102. Interestingly, there is no reference back to the detailed rules of procedure developed for the Compliance Committee under the Kyoto Protocol.

<sup>40</sup> Paris Agreement art 15.2.

- heavy reliance on speculative negative emissions in the second half of the century.
- c) Failure to explicitly signal the phase-out of fossil fuels or the elimination of fossil fuel subsidies risks prolonging the debate over the future of fossil fuels in some countries, and thereby risks diverting attention away from integrated solutions to climate change, though the end of fossil fuels is clearly signalled through the GHG neutrality goal and the temperature goal.
  - d) Parties made limited progress on finance, leaving serious questions about the ability to raise the finance needed to effectively implement the Paris Agreement and achieve its ultimate objective.
  - e) The exclusion of liability and compensation for loss and damage in the Paris Decision may make the inevitable discussions on responsibility for loss and damage more difficult.
  - f) Though not surprising given the pace of negotiations leading up to Paris, there was limited detail provided on the roles of sinks, emissions trading, offsetting and non-market mechanisms. However, the basic elements are included, and there is provision for negotiating the details in these key areas in the near future.
  - g) There was surprisingly little attention paid in the final negotiations to the role of non-state actors and sub-national governments, in spite of considerable attention having been given to their potential role in increasing the mitigation ambition of Parties.

Even with these limitations, the Paris Outcome marks a significant breakthrough in the evolution of the UN climate regime. While much work remains, and the approach taken represents a high stakes experiment in multilateral cooperation, the Paris Agreement does provide a strong foundation for mobilizing countries to transition to a low-emissions, climate-resilient development path, away from fossil fuels, and toward a hundred per cent renewable energy world. The Paris Agreement insures sufficient nation state control over mitigation efforts and financial contributions to keep nations engaged. It provides significant, if still inadequate assistance for developing countries, a strong basis for full transparency, and regular stocktaking and review.

These elements, in combination with an ambitious set of long-term goals, do offer a recipe for success. Importantly, the Agreement makes it clear that current mitigation and financial pledges represent the floor, not the ceiling of efforts required. There is every reason to expect that each five-year stocktaking and review cycle will pressure Parties to increase their ambition toward a collective effort sufficient to meet the long-term goals set out in the Agreement. A key question will be whether adequate NDCs are possible without further progress on principles of equity and the sharing of burdens and benefits of the transition, and without stronger incentives for clean technologies and for the abandonment of unsustainable production and consumption.

A related question is to what extent principles incorporated into the operational provisions of the Paris Agreement and the preamble, such as intergenerational equity, the principles of highest ambition and progression, and common but differentiated responsibilities and respective capabilities in light of different national circumstances (CBDRRC-NC), will influence the Global Stocktake and the enhancement of NDCs over time. In short, can the managerial approach adopted in Paris succeed without a stronger top-down component?

Among the provisions that have the potential to encourage a race to the top is Article 4.11, which allows Parties to enhance their NDCs at any time, not just at the pre-determined times following each five-year Global Stocktake. This is an important feature of the Paris Agreement, as it enables progressive governments to enhance their NDCs when the political opportunity arises, rather than having to wait for the end of a given five-year cycle to do so. Developing the guidance needed to fully operationalize this provision needs to be a priority for negotiators if Parties are to close the ambition gap.

The approach to differentiation is another key aspect of the Paris Outcome. At the core of the new approach is the modified principle of CBDRRC-NC. The addition of different national circumstances broadens the scope of factors on the basis of which Parties can be differentiated beyond responsibility and capacity, and thereby seeks to sidestep the divisive debate that had dominated differentiation for the past twenty-five years. The broadened principle has been inserted throughout the Paris Agreement, whereas reference to the narrower version had been resisted by developed countries since COP 13 in 2007 in Bali. A related critical breakthrough was the implicit abandonment of the annexes of the UNFCCC.

These fundamental changes allowed for an approach to differentiation that is more nuanced in that it considers the different needs and circumstances of developed and developing countries on an issue-by-issue basis, and recognizes the special needs and circumstances of LDCs and SIDS. The move away from the UNFCCC annexes in particular facilitated this more nuanced approach to differentiation.

On mitigation and adaptation, Parties largely agreed on self-differentiation through the NDCs, though with some broader differentiation on economy-wide targets, and with an explicit recognition that developing countries require support. The solution to the differentiation impasse, which amounts to a combination of self-differentiation in NDCs, progression, and commitment to developed country leadership and funding was a key to the success in Paris. On finance, there is a clear separation between mandatory language for collective support from developed countries and voluntary language for developing countries. On transparency and compliance, differentiation largely focused on the need for flexibility in the implementation of rules, particularly for LDCs and SIDS. The end result is a remarkably pragmatic approach to differentiation.

The Paris Outcome offers a strong foundation for the emerging new climate regime, but much work on detailed rules and effective implementation remains. Detailed guidance is needed on reporting and review, emissions trading and offsetting, market and non-market mechanisms, the Global Stocktake, and on compliance. Fifty-five countries, representing fifty-five per cent of global emissions had to ratify or accept the Paris Agreement in order for it to come into force. This took place much sooner than expected, with the Paris Agreement coming into force on November 4, 2016. The initial stocktaking process in 2018 will be critical in signalling a serious effort to narrow the emission gap.

A major effort is needed to mobilize the funding and investment needed to ensure that developing countries will be able to do their part to mitigate and adapt to climate change, including for technology transfer, capacity-building and education. Finally, there is an urgent need to integrate efforts under the UN climate regime with the implementation of the Sustainable Development Goals (SDGs). While there is reference to sustainable development throughout the Paris Outcome, and reference in the preamble to the 2030 Agenda for Sustainable Development,<sup>41</sup> the challenge of effectively integrating the UN climate regime with the Sustainable Development Goals, the other Rio Conventions, and other relevant global efforts toward sustainability cannot be overstated. These issues are explored in more detail in the following chapter.

## D. Conclusion

The key elements of the Paris Outcome include the NDCs, significant finance for developing countries, five-year stocktaking and review cycles, enhanced transparency, and a facilitative approach to compliance. These individual elements are collectively expected to contribute to meeting the ambitious long-term goal that confirms the need for all countries to contribute in light of their capacities, responsibilities and other national circumstances. Preambular language in the Paris Agreement includes strong references to gender equity, human rights and intergenerational equity.

The overall message is clear. All nations will have to do their best for the global community to meet the ambitious goals set in Paris. Developed countries will have to reach net zero GHG emissions as soon as possible to make a fair contribution to the long-term goal. While there are no legally binding quantified emission reduction commitments in the Paris Agreement, developed countries, along with other high emitting Parties, are now under ever-increasing scrutiny, and will face growing pressure to demonstrate that they are making an equitable contribution to the global mitigation effort and the long-term goal they have endorsed. Given this long-term goal, and developed countries' high historical and current total and per capita emissions, and given their high capacity, it seems clear that anything short of best

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<sup>41</sup> Decision 1/CP.21 Preamble para 4.

efforts to get to net zero GHG emissions as quickly as possible will not pass any reasonable equity test.

The Paris Agreement amounts to an experiment of a hybrid approach to global cooperation. It includes bottom up elements in the form of managerial, transparency and norm-building, along with top down elements, such as the Global Stocktake and the long term goal. The approach is a reasonable gamble in light of the failed efforts over the past two decades to implement the more top down approach under the Kyoto Protocol, and in light of clear and ongoing domestic political constraints in key countries, such as the USA and other major emitters.

To give this approach a chance of success, it will be important for Parties to resist the temptation to introduce additional top-down elements too quickly without giving the balance between top down and bottom up under Paris a chance. An example of an additional element that might be considered if the Paris approach proves unsuccessful would be an up front assessment of the adequacy and fairness of individual NDCs. Such efforts have the potential to enhance ambition, but could risk returning Parties to the equity impasse that plagued negotiations for so long. At the same time, the science is clear that the global community is running out of time to avoid climate tipping points that would have disastrous global consequences.

In short, the Paris Agreement represents a historic breakthrough in that it marks the end of a decade long impasse over the full integration of the USA and emerging economies into the regime and the engagement of all Parties in a global effort to effectively respond to the climate change challenge. Paris represents a historic moment in the evolution of the UN climate regime, a moment of unity, of creating a new dynamic of cooperation and motivation for collective global action. At the same time, it is inevitably a high stakes experiment, as there are no guarantees of success, and no time left for second changes in case of failure.

Success now significantly depends on what happens at subnational, national and regional levels, and how those efforts feed into domestic efforts and into the new regime's five-year review cycles. Full engagement of state and non-state actors will be equally important. National implementation and enhancement of pre-2020 commitments represent the first critical steps. Support from non-state actors and subnational governments will be key in this process. Only time will tell whether the breakthrough in Paris also turns into a breakthrough in the global challenge of keeping temperatures at reasonably safe levels and climate impacts at a minimum.

For now, we can take some comfort from the fact that we are in a better position today than we were before the Paris negotiations, and that Paris has offered the global community an opportunity to rise to the challenge. It is more clear than ever, however, that the UN climate regime is just one, though critically important, element of the global effort to address climate change. It needs to work in concert with and mobilize adequate and effective efforts at global, regional, national and subnational levels. Some of the existing links, such as those with the sustainable development

goals, ozone layer depletion, shipping and aviation, will have to be strengthened. In other areas, such as global trade, the effort to ensure efforts work in harmony to address climate change has not begun in earnest.<sup>42</sup>

In short, success will depend on significant progress in three key areas. First, Parties to the Paris Agreement need to negotiate a robust and effective rulebook for its implementation. Second, Parties will have to effectively implement and exceed their NDCs, and need the constructive engagement of non-state actors in achieving them. Third, the global community needs to achieve much better integration and coherence of all efforts at international and domestic levels.

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<sup>42</sup> These issues are explored in more detail in the next chapter