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French Yearbook *of* Public Law

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Presentation

The objective of the "French Yearbook of Public Law" is to narrow the gap which has tended to develop between the French and the international debate on public law. The former remains too often isolated from the latter, for various reasons, ranging from the conviction of the French model's exemplary nature to an insufficient openness of French public lawyers to the international academic language, which English has undoubtedly become nowadays. This has two serious consequences. On the one hand French lawyers might often be unaware of developments in other legal systems, and on the other hand foreign lawyers face serious difficulties to follow French legal developments.

The French Yearbook of Public Law (FYPL) was created to mitigate precisely this mutual ignorance. This project has three main aims. On the one hand, it seeks to apprise English-speaking readers of important developments and scholarly debates in French public law. On the other hand, we wish to introduce French lawyers to key changes and academic discussions in foreign public laws. Lastly, it is our hope that the reciprocal information thus made available will foster international and comparative debates among legal scholars.

The FYPL is based at the Chair of French Public Law at Saarland University (Lehrstuhl für französisches öffentliches Recht - LFOER), headed by Professor Philippe Cossalter. Thus, the FYPL relies on the administrative and technical capacities of the LFOER without constituting a segment of it. Some of its researchers (Jasmin Hiry-Lesch, Enrico Buono, Sofia van der Reis, Lucca Kaltenecker) are especially involved.

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Climate Change in International Law. The Paris Agreement: A Renewed Form of States' Commitment?

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Abstract:

This paper discusses the adoption of the Paris Agreement, which took place in a challenging and tense context, requiring significant innovation and resourcefulness from negotiators. To ensure the participation of all states, this new treaty underwent adjustments in both structure and substance compared to its predecessor, the Kyoto Protocol. While the Paris Agreement may initially appear to emphasize flexibility, a closer examination reveals it to be a well-balanced compromise between advocates of a flexible accord and proponents of a more binding one. This study explores the agreement's form, highlighting a nuanced blend of hard and soft law in Section I. In terms of substance, it argues for an equally nuanced combination of bottom-up and top-down approaches, as discussed in Part II. The Paris Agreement thus represents a notable evolution in the way states engage with international law.

Keywords:

International environmental law, Paris Agreement, Soft law

The international climate regime as we know it today is the outcome of a lengthy process which started in 1988 with the establishment of an expert body, the Intergovernmental Panel on Climate Change (IPCC). In 1992, states then developed a specific international legal regime,[1] based on the United Nations Framework Convention on Climate Change (UNFCCC, 1992). In 1997, the Kyoto Protocol set out obligations for the reduction of greenhouse gas emissions for the period 2008-2012 relative to 1990 levels, but only for industrialised countries. Negotiations on the post-2012 regime, and later on the post-2020 regime, were slow and arduous.

The challenge to engage states – that is all states around the globe and not only industrialised countries - in the fight against climate change became apparent during the Bali Conference in 2007. Two years later, the Copenhagen Conference offered a striking example thereof, and so did the chaotic negotiations that ultimately led to the adoption of the Paris Agreement in 2015. In one Conference of the Parties (COP) after the other, the positions of the various parties seemed to make no headway, and if they did, it was only on issues that were ancillary to the negotiation agenda. Meanwhile, as both scholarship and the IPCC openly addressed the issue, awareness grew that actions needed to be taken. Yet while states henceforth agreed on the risks of climate change and were in principle willing to mitigate them, negotiations continued to stall.

It would take until 2015 for an agreement to be finally reached in Paris. The resulting treaty was signed by a large number of countries and was quickly ratified. It entered into force within a year, despite the very strict conditions attached to it.[2] As of January 2022, there are 195 signatories and 193 parties to the treaty. Fortunately, when the U.S. under Donald Trump withdrew from the treaty, this did not have the anticipated domino effect.[3] On the contrary, it has led the other state parties to reaffirm their will to implement the agreement. Many even claimed that the agreement's implementation should be "*irreversible*" (at the COP 22, during G20 summits, etc.).[4] The American withdrawal became effective on 4 November 2020, but one of the first decisions of Trump's successor, Joe Biden, at the beginning of 2021, was to re-join the agreement.

Against this background, one may wonder how such an agreement could have been reached in the first place. A comprehensive answer to that question would evidently require a thorough analysis from the perspective of international relations, and a detailed consideration of how the positions of the various parties evolved, and what coalitions were formed. However, for the purpose of this contribution, I will limit myself to the legal analysis of the apparent miracle that is the Paris Agreement.

From a legal point of view, it seems that the Paris Agreement greatly differs in form and substance from its predecessor – the Kyoto Protocol – and might have been accepted for exactly that reason by so many states. At first glance, the Agreement appears very flexible. However, on closer examination, this paper argues that this flexibility is at least

1 See the definition of international regimes by Krasner, S., *International regimes*, 1983, London, Cornell University Press, p. 2.

2 It required the ratification of at least 55 Parties to the Convention, incorporating Parties included in Annex I which accounted in total for at least 55 per cent of the total carbon dioxide emissions for 1990 of the Parties included in Annex I (Art. 25, §1).

3 Watts, J., "World leaders react after Trump rejects Paris climate deal", The Guardian, 2 June 2017.

4 See for instance "G20 Leaders Says Paris Agreement is Irreversible". Available at: https://unfccc.int/news/g20-leaders-says-paris-agreement-is-irreversible (accessed on 22 January 2022).

partly diluted or even nullified. It actually took a lot of ingenuity and a lot of collective intelligence on the part of the negotiators to strike a balance between the proponents of a flexible agreement and the proponents of a stricter agreement, and ultimately between the reluctance or the constraints of some and the willingness of all to take action and draft an effective agreement. The agreement reached in Paris represents a relatively balanced compromise from this point of view, and that was the key to its success - a diplomatic success, if not yet an environmental one.

From this perspective, the compromise reached in Paris illustrates a certain evolution in the way states commit themselves. This paper will highlight that in terms of form, the agreement shows a subtle combination of hard and soft law (Section I). In terms of substance, it will be argued that an equally subtle combination of bottom-up and top-down approaches was adopted (Part II).

I. The form of state commitment: a subtle combination of hard and soft law

The negotiators' roadmap, established in Durban in 2011, had not settled the question of the legal form of the future agreement. The parties then agreed to "*launch a process to develop a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties*".[5] Leaving the issue entirely open was the price to pay for initiating a discussion that could lead to a global and unified regime that would include all countries in the same set of international rules. The debate primarily pitted proponents of a treaty form against proponents of a non-legally binding agreement in the form of one or more COPs. This debate long remained unresolved until eventually a proposal for a compromise emerged: a proposal for a composite and skilfully diverse legal form, avoiding the need to make a binary and divisive choice.[6] The parties ultimately agreed upon a package that includes both, a legally binding agreement – a treaty – which is relatively concise and general, and a decision of the COP (with many decisions to come). This is an interesting choice as it subtly combines hard and soft law elements. The two instruments do not exist without one another. Their content and legal force are instead complementary.

A. Different but complementary contents

The Paris Agreement is composed of a COP decision, Decision 1/CP.21,[7] adopting a treaty, the Paris Agreement, the text of which is annexed thereto. The classification of this treaty is however far from straightforward. On the one hand, it looks very similar to a protocol to the Convention, even though it does not bear that name as this would have reminded some (especially the U.S.) too much of the Kyoto Protocol. On the other hand, it could also be interpreted as a *"related legal instrument"*, a term which is used in the Convention on a number of occasions in a rather ambiguous manner.[8] While both classifications are possible, in this author's view, the Paris Agreement comes closer to a proto-

5 Decision 1/CP.17, 2011.
6 Maljean-Dubois, S., Spencer, T. & Wemaëre, M., The Legal Form of the Paris Climate Agreement: A Comprehensive Assessment of Options, *Carbon and Climate Law Review* 2015, n°1, pp. 1-17.
7 Decision 1/CP.21, 2015, *Adoption of the Paris Agreement*.
8 Article 14 in particular seems to indicate that these could be conventional instruments.

col, as it has many characteristics of a protocol. Only the parties to the Convention are allowed to adhere to it. It refers to several provisions thereof and opts for the same dispute resolution mechanism. It also uses the bodies of the Convention such as the COP, which is convened as a meeting of the parties to the Agreement, the subsidiary body for implementation, the subsidiary body for scientific and technological advice, the Green Climate Fund and the other UNFCCC-related funds, and even the secretariat.[9] Notably, this institutional linkage has facilitated the transition in the period leading up to the entry into force of the Agreement, as it clearly eased the transition until 2020 when the first cycle of national contributions began.

The decision and the Agreement cannot be read in isolation. The decision supplements and clarifies the Agreement on a number of matters. It also prepares the entry into force of the Agreement. Deciding what should be laid down in one or the other, and in possible future decisions, occupied the negotiators for a large part of 2015 and was not fully settled when the COP started.[10] This allocation thus constituted itself an additional variable to be taken into account to reach the final compromise during the COP. The issue of financing illustrates this very well. The Agreement addresses financing in article 9, which requires developed country parties to provide "*financial resources to assist developing country Parties*" (Art. 9§1). It further states that the "*mobilisation of climate finance should represent a progression beyond previous efforts*" (Art. 9§3). This wording is however rather vague as commitments are not quantified. The meaning of "*previous efforts*" is not specified. In fact, these collective "commitments", covering the period until 2020, were set out in the Copenhagen Agreement and the Cancun Agreements.[11] On this issue, the Paris Agreement must be read together with the COP decision, in which a clear amount is mentioned: *"prior to 2025 the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement shall set a new collective quantified goal from a floor of USD 100 billion per year, taking into account the needs and priorities of developing countries"* (§54).

U.S. constitutional law requirements have had a significant impact on this allocation. President Obama wanted the Paris Agreement to be considered an executive agreement rather than a treaty. While both these U.S. law categories amount to treaties under international law, U.S. law requires the ratification of a "treaty" to be authorised by the Senate with a 2/3 majority. Since the Senate, which was predominantly Republican at the time, was (and remains) hostile to this agreement, ratification of the Agreement if it were called a "treaty" was more than unlikely. However, an "executive agreement" may come into force pursuant to a decision of the President.[12] The latter may adopt such a decision even without prior consultation of Congress provided that he acts "*under existing legislative and regulatory authority*" and "*complements domestic measures by addressing the transnational nature of the problem*".[13] This is how, for instance, the United States became a party to the Minamata Convention on mercury by simple acceptance. These considerations evi-

9 See Art. 24 of the Paris Agreement, referring to Art. 14 of the UNFCCC, on settlement of disputes. The Paris Agreement makes 51 references to the UNFCCC.

10 Maljean-Dubois, S. & Rajamani, L., "L'Accord de Paris sur les changements climatiques du 12 décembre 2015", *Annuaire français de droit international 2015*, vol. 61, pp. 615-648.

11 Decisions 2/CP.15, §8 and 1/CP.16, 2010, *The Cancun Agreements*, §98.

12 Henkin, L., The President and International Law, *AJIL* 1986, pp. 930-937.

13 Bodansky, D., & Day O'Connor, S., *Legal options for U.S. acceptance of a new climate change agreement*, Center for Climate and Energy Solutions, May 2015. Available at: http://www.c2es.org/publications/legal-options-us-acceptance-new-climate-change-agreement (accessed on 21 December 2021).

dently impacted the form of the Paris Agreement, which, in order to be viewed as an executive agreement, imposes rather general and unquantified obligations of conduct and does not contemplate any sanction should commitments be breached. Even though the U.S. had thereafter expressed its intention to withdraw, it initially became a party to the Agreement on 3 September 2016, after signing on 22 April 2016.[14]

B. Different and complementary legal forces

While the COP decision and Paris Agreement are hence complementary, they do not have the same legal effect. Formally, the Agreement is binding on all ratifying parties. The scope of the COP decisions is more controversial. The UNFCCC provides that the COP "*may adopt, and shall make, within its mandate, the decisions necessary to promote the effective implementation of the Convention"* (Art. 7). But the legal force of these "decisions" remains ambiguous. It can only be determined through a case-by-case analysis of the individual provisions. Can these decisions create new obligations, bearing in mind that, whether or not they are binding, they undeniably have a significant practical and operational effect and may even apply *de facto* to states? Both the Bonn-Marrakesch "package", which operationalised the flexibility mechanisms of the Kyoto Protocol, and the Decision establishing the Protocol's control mechanism, have provided a remarkable example thereof.[15]

Decisions may lay down new rules or influence the interpretation of existing rules. In 1996, the International Court of Justice (ICJ) ruled in its *Whaling in the Antarctic* (Australia v. Japan) case that recommendations of the Whaling Commission "*which take the form of resolutions, are not binding. However, when they are adopted by consensus or by a unanimous vote, they may be relevant for the interpretation of the Convention or its Schedule*".[16] Furthermore, the ICJ stated that resolutions of the UN General Assembly, "*even if they are not binding, may sometimes have normative value*".[17] That is to say that even though COP decisions may be formally non-binding, they do carry normative value. Firstly, each state is bound to review these decisions in good faith, given that it reflects the opinion of all or most of the states that are party to a treaty. Secondly, in order to comply with the decision, a state may have to repeal the application of an existing norm, provided that it does not infringe established rights of other states. In that sense, a decision has at least a permissive value.

In the case of the Paris Agreement, the COP decision clarifies the Agreement on a number of matters, most notably in that it prepared its entry into force, which could have otherwise taken considerable time. The third part of the COP decision is thus entitled: "*Decisions to give effect to the Agreement*". It "*recognises that Parties to the Convention may provisionally apply all of the provisions of the Agreement pending its entry into force*" (§5), even though states are usually reluctant to do so. Part three also creates the Ad Hoc Working Group of the Paris Agreement, which is tasked with preparing the entry into force and the full implementation of the Agreement. This new body is tasked to "*prepare draft decisions to*

14 Rajamani, L., Reflections on the US withdrawal from the Paris Climate Change Agreement, *EJIL Talk*, 5 June 2017. Available at: https://www.ejiltalk.org/reflections-on-the-us-withdrawal-from-the-paris-climate-change-agreement/ (accessed on 12 December 2021).

15 Brunnee, J., Coping with Consent: Law-Making Under Multilateral Environmental Agreements, *Leiden Journal of International Law* 2002, vol. 15, issue 1, pp. 1-52.

16 Judgement of 31 March 2014, *ICJ Reports,* 2014, § 46.

17 Advisory Opinion of 8 July 1996, *ICJ Reports,* 1996, p. 254.

be recommended through the Conference of the Parties to the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement for consideration and adoption at its first session" (§11). It is asked, together with other bodies such as the Subsidiary Body for Implementation, to clarify a number of provisions of the Agreement, such as the form, characteristics and accounting methods of national contributions, the operation of a public registry of national contributions (Art. 4), or a transparency framework for the Agreement (Art. 14). The Ad Hoc Working Group was thus responsible to prepare the adoption of the so-called "rule book" of the Paris Agreement, a set of COP decisions operationalising its implementation.[18] Conscious that "*enhanced pre-2020 ambition can lay a solid foundation for enhanced post-2020 ambition*", the decision also aimed to encourage "*Enhanced action prior to 2020*", yet without much success.[19]

Paradoxically, the content of the treaty is not always normative in the sense that not all its provisions impose binding obligations. Having said that, it is interesting to note that a third of the decision's provisions are clearly intended to be binding. According to the decision, the Conference of the Parties "*decides*" in 50 out of 140 paragraphs. The decision further produces *de facto* real and operational effects (adoption of the Agreement, creation or continuation of various bodies, material organisation of various meetings, etc.) and even imposes various obligations on parties (e.g. guidelines for the submission of national communications by the parties). For instance, Article 4§9 of the Paris Agreement specifically states that parties "*shall communicate*" a Nationally Determined Contribution (NDC) every five years "*in accordance with decision 1/CP.21*" and paragraph 25 of the decision "*decides that Parties shall submit"* future NDCs 9 to 12 months in advance of the relevant COP. Paragraph 25 is therefore undoubtly legally binding and can hence rightly begin with "*decides*".[20] This illustrates how the decision and the treaty closely complement each other and are even inextricably linked. Similarly, when the COP decision states that "*in accordance with Article 13, paragraph 2, of the Agreement, developing country Parties shall be provided flexibility in the implementation of the provisions of that Article, …*" (§89), it is evident that this provision was meant to have binding effect. Lastly, when the decision provides that "*Article 8 of the Agreement does not involve or provide a basis for any liability or compensation*" (§52), this is a clear interpretation and even specification of a provision of the Agreement.

In conclusion, the decision clarifies and specifies the Agreement. It prepares both its entry into force and its implementation. This interpenetration of soft and hard law is commonplace in international environmental law, as a treaty, as part of a legal regime, is often only the tip of the iceberg. Non-binding soft law instruments adopted by treaty bodies are far more common and *"provide the detailed rules and technical standards required for implementation by the parties to a multilateral treaty and thereby ensure a common understanding of what that treaty requires*."[21] Contrary to what some might think, this is not a sign of a diluted normativity.[22] In fact, soft law is flourishing around a treaty where previously the treaty would have been the only instrument adopted. This represents a shift towards more law, even if it is *soft* law, in order to complement the treaty, rather than constituting an overall relaxation of regulations. It does however blur the lines between what is

18 This has also been the case for its predecessor under the Kyoto Protocol.
19 See below.
20 Bodansky, D., The Legal Character of the Paris Agreement, *RECIEL* 2016, vol. 25, issue 2, pp. 142-150.
21 Boyle, A. & Hey, E., Soft law, *Oxford Handbook of International Environmental Law,* 2021, Oxford, OUP, p. 425.
22 Weil, P., Towards Relative Normativity in International Law?, *American Journal of International Law* 1983, pp. 413-442.

or is not law, and thereby increases the porosity between hard and soft law. In international environmental law, "*de-formalisation*" is a fact of life;[23] it means that the question of whether instruments are legally binding becomes secondary. In fact, many dubiously binding instruments are nevertheless applied on a daily basis without the question of their bindingness ever being raised. Then again, many contractual or customary obligations are poorly applied. Ultimately, "*as long as the stage of mutual interest continues peacefully, the legal aspects of the relation can seem secondary*".[24] Isn't the central issue in the concept of "*compliance pull*"[25] primarily related to the legitimacy of the instruments in question? This does not mean denying the importance of the procedures and processes of law-making. The more open, transparent, inclusive the law is, the more it meets certain criteria of internal legitimacy.[26]

This interpenetration may be commonplace, but in the Paris Agreement it is clearly taken to the extreme. Not only were many future COP decisions necessary to specify the operational details of the Agreement, but perhaps more strikingly, the decision, which was meant to supplement the Agreement, was adopted at the very same time as the latter. This is a new feature, which can be explained not only by the demands of U.S. constitutional law but also by the requirements of international administration, which are ever more increasing and are accompanied by a significant bureaucratisation.

II. The content of state commitment: a subtle combination of top-down and bottom-up approaches

Not only the form of the Paris Agreement exhibits hybrid features, also its substance shows a hybrid mixture of bottom-up and top-down approaches. The contributions determined at national level do reflect a bottom-up approach, while other provisions in the Agreement like the transparency framework clearly demonstrate a top-down approach. As will be shown below, the Agreement therefore subtly combines both approaches in order to protect the sovereignty of states while engaging them in a process that is designed to be dynamic and incentivising.

A. The bottom-up approach at the heart of the Agreement

The bottom-up approach is at the heart of the Agreement, through the central tool of national contributions, but also through the recognised role of non-national and subnational actors.

- **Nationally determined contributions**
  In the negotiation marathon that led from Durban to Paris,[27] the 2013 Warsaw Con-

23 Koskenniemi, M., *The Politics of International Law*, Oxford, Hart, 2011; Pauwelyn, J., Wessel, R. & Wou, J., When Structures Become Shackles: Stagnation and Dynamics in International Lawmaking, *EJIL* 2014, vol. 25, issue 3, pp. 733-763.
24 Lachs, M., Some Reflections on Substance and Form in International Law, in *Transnational law in a changing society. Essays in honour of Philip c. Jessup* 1972, New York, CUP, p. 100.
25 Boyle, A., & Chinkin, C., *The Making of International Law*, 2007, Oxford, OUP.
26 Brunnee, J., Coping with Consent: Law-Making Under Multilateral Environmental Agreements (2002), op. cit., pp. 1-52.
27 Decision 1/CP.17, 2011, *Durban Platform for Enhanced Action.*

ference constituted a key milestone. Up until then, the negotiations had pitted the proponents of a Kyoto Protocol-inspired approach, a prescriptive approach with "top-down" coordination, against the supporters of the approach adopted in Copenhagen, which offers more incentives and is based on "bottom-up" coordination. The latter approach prevailed in Warsaw. The COP thus invited "*all Parties to initiate or intensify domestic preparations for their intended nationally determined contributions"* (Decision 1/CP.19 (2013), *Further advancing the Durban Platform)* - thus launching a process that essentially had two advantages. First of all, it was to lead each party to undertake a reflection on its contribution to the future agreement in terms of form, content and level of ambition, and thus to prepare for it well in advance, often initiating a national debate within and/or outside of parliaments. In addition to that, it led states to "*lay all their cards on the table*" before the COP 2021 to enable each state to approach that conference with the knowledge of the others' commitment. This process, which is the opposite of the one adopted for Copenhagen, strengthens trust between parties and facilitates negotiation, especially as it is specified that these "*domestic preparations*" are "*without prejudice to the legal nature of the contributions*" (A/CP.19 §2 b).

During the following months, the form of the agreement emerged, but the legal force of the national contributions to the global effort to be submitted by the states remained to be determined. Right up until the end, drafts of the agreement left open the possibility for these contributions to be annexed to the treaty. However that seemed rather unlikely as many states strongly opposed this approach. Furthermore, this option had the disadvantage of freezing these national contributions, even if a mechanism facilitating their review was contemplated.[28] Shortly prior to the COP 21, their recording in a register held by the secretariat seemed to be the most likely option. But what would be the status of these contributions? Was the treaty going to impose their submission? Or was it going to impose the submission and implementation thereof? Or were they going to remain non-binding under international law?

It was eventually decided that these contributions were to be recorded in a public register held by the secretariat (Art. 4§12 & 7§12). The advantage of this approach, which was already used in respect of states' pledges to reduce emissions pursuant to the above-mentioned Cancun Agreements, lies in its flexibility. This is all the more important as contributions are renewed every five years and in the meantime "*a Party may at any time adjust its existing nationally determined contribution with a view to enhancing its level of ambition*" (Art. 4§11).

As to the legal force of these contributions, it was also a compromise that prevailed. Article 4§2 provides that "*each Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions*". The parties thus do have the (procedural) obligation to prepare and submit a national contribution, no later than at the time when they submit their ratification instrument. The parties' obligation is not one of result but one of conduct: they are obliged to adopt internal measures to achieve their objectives. In addition, nationally determined contributions may be seen as unilateral declarations which also create legal obligations of various types. As demonstrated by Benoît Mayer, the potential "*double-bindingness"* of NDCs should be a central consideration in the interpretation of international law obligations regarding climate change.[29]

28 Kerbrat, Y., Maljean-Dubois, S. & Wemaëre, M., Conférence internationale de Paris sur le climat en décembre 2015 : comment construire un accord évolutif dans le temps ?, *Journal du Droit International* 2015, issue 4.

29 Mayer, B., International law obligations arising in relation to Nationally Determined Contributions, *Transnational*

- **Mobilizing non-state and sub-national actors**

In line with the Lima Paris Action Agenda (LPAA) which played an important role in the preparation of COP 21, the Paris Agreement also directly addresses non-state and sub-national stakeholders. Whether civil society, large corporations, or mayors of the world's biggest cities - COP 21 has demonstrated at official and informal level how many initiatives there are to help create an optimistic climate and place negotiators in front of their responsibilities. Is it possible for an international agreement to support such a movement directly, to acknowledge the action of such actors? Or should it rely, in a more traditional manner, on state obligations and leave states to pass these on to private and local stakeholders? These questions were discussed at length, but many states were reluctant, and the outcome of the COP 21 is therefore well beneath the expectations raised in this respect. The Agreement simply recognises, in its preamble, "*the importance of the engagements of all levels of government and various actors, in accordance with respective national legislations of Parties, in addressing climate change*". The preamble of the COP decision is more specific as it sets out the need *"to uphold and promote regional and international cooperation in order to mobilise stronger and more ambitious climate action by all Parties and non-Party stakeholders, including civil society, the private sector, financial institutions, cities and other subnational authorities, local communities and indigenous peoples*". The decision actually dedicates a whole section to "*Non-Party stakeholders*". In section V, it "*welcomes the efforts of all non-Party stakeholders to address and respond to climate change, including those of civil society, the private sector, financial institutions, cities and other subnational authorities*". Beyond that, it merely invites them to step up their efforts and to demonstrate them on the internet platform on climate action.

The reactions of U.S. sub-state and non-state stakeholders following the announcement of the U.S.' withdrawal from the Paris Agreement, continuing to commit to the Agreement even without the White House, have demonstrated the usefulness of this innovative process, which encourages, recognises and supports actions that are essential to the effectiveness of the commitments made by states and, moreover, to the mechanism as a whole.[30]

B. The added value of the Agreement: the top-(back-)down approach

As contributions are nationally determined, the question arises as to whether the Agreement retains its *raison d'être*. The answer is yes, for two reasons.

1. Creating a dynamic

The first *raison d'être* of the treaty is to create a dynamic by encouraging states first to commit, and then to gradually increase their level of commitment.

- **Encouraging states to commit**

Negotiators were well aware of the lack of ambition of States' climate policies and used the following image: the Agreement was like a bus. The key thing was that everyone should get on board. The rest would then be settled later. It seems that everybody feared that the agreement would suffer a fate similar to that of the Kyoto Protocol where the U.S.

Environmental Law 2018, vol. 7, issue 2, pp. 251-275.

30 See for instance the "We are still in initiative". Available at: https://www.wearestillin.com/ (accessed on 22 January 2022).

had not joined in the first place and Canada had left.

The Agreement hence aimed to pursue this objective by being quite soft and mostly incentivising in its substance. Commitments were based on nationally determined contributions respecting national sovereignty. It contains mostly procedural obligations and only few substantial ones. This is clearly the case for national contributions: their substance is to be determined by the states, but in terms of procedure the Agreement sets very specific standards as regards the communication and transparency of such contributions. Commitments – such as the commitment to limit global warming – are often collective rather than individual. Statements such as "*Support shall be provided to developing country Parties"* (Art. 4§5) do not have a specific addressee. They set out a vague obligation for all states and institutions, but are not worded as an individual obligation. No sanction can be imposed if a state does not comply with the Agreement. Instead, the Agreement merely provides that control will be "*facilitative in nature and function in a manner that is transparent, non-adversarial and non-punitive*" (Art. 15).

Furthermore, the Agreement relies on a very subtle differentiation of the states' obligations depending on factors such as their level of development or the country group they form part of. If the ambitious goals, specific obligations and strict monitoring mechanism of the Paris Agreement were to be applied to all states in the same way, they likely would not have been accepted by most developing countries. This is why the Agreement is firmly embedded in the principle of common but differentiated responsibilities and respective capabilities of the parties, which is enshrined in the Convention, but will henceforth be implemented "*in the light of different national circumstances"*.[31] A similar wording had already been included in the Lima decision in 2014 (aforementioned, §3) and was then inspired by the Chinese-American Agreement of 12 November 2014. It is again the outcome of a compromise. Southern countries were satisfied with the reference to the principle, and Northern countries considered that this addition allows for the possible evolution of differentiation in the future as this wording allowed for a dynamic interpretation in light of evolving national circumstances. This is also mentioned five times in the Paris Agreement (Preamble, Art. 2§2, 4§3, 4§4, 4§19).

Compared with the binary mechanism of the Kyoto Protocol, the Agreement actually adopts a much more nuanced form of differentiation in favour of developing countries. It also extends the financial, technological and capacity-building support that they may receive. The Agreement could not have become an acceptable compromise for all countries without this subtle balance between differentiation and ambition.

The Agreement operationalises differentiation in various ways, adapting to the specificities of each element of the Agreement (mitigation, adaptation, finance, technology, capacity-building and transparency). The forms of differentiation thus vary depending on the aspects involved. Differentiation also relies on a basis that is less ideological and more pragmatic than it used to be. With regard to mitigation for example, the provisions do not formally differentiate between Northern and Southern countries (except for Art. 4§4). In reality however, differentiation is taken to the extreme through the system of nationally determined contributions that constitutes a self-differentiation. In respect of finance however, differentiation is based on a more traditional consideration, distinguishing between developed and developing countries, even though article 9 reveals a third

31 The Agreement refers several times to the principle but also to equity or climate justice. Article 2 is the most significant provision in this respect.

category, the "other parties" category, in between developed and developing countries.

- **Encouraging the states to be more ambitious**

The collective effort is therefore the result of the aggregation of "*nationally determined*" contributions. With a view to the common goal of keeping global warming well below 2°C, it is for the parties themselves to determine how ambitious they want to be in their contribution. Until now, there has been no burden-sharing of the implementation of this collective objective. This was different under the Kyoto Protocol, where the burden was equally shared at the international level as well as between the fifteen (at the time) countries of the European Union, who had allocated between themselves a common objective of reducing their emissions by 8%.[32]

This is why everything is being done to encourage states to increase their contributions, to adjust them on the basis of scientific and technological knowledge and depending on the economic, political and social contexts. The parties are required to submit their updated contribution on a regular basis.[33]

In fact, each contribution must constitute a progress from the previous contribution, which goes above and beyond the principle of non-regression defended by some environmentalists (Art. 3).[34] This principle, which became known as the "no-backsliding" principle, goes back to the decision adopted in Lima.[35] Many developing countries defended it, to ensure that developed countries would not make less ambitious commitments in comparison with the ones they made under the Kyoto Protocol. This principle was also at the heart of the Brazilian proposal of "concentric differentiation", which envisaged a gradual evolution towards increasingly ambitious commitments for all parties.[36] But also under this proposal the parties are free to determine their respective progression, which may lie in the form and/or substance of their contributions.[37]

The contribution must amount for each party to "*its highest possible ambition*", while "*reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances*" (Art. 4§3). The objective is clearly differentiated between the Northern and Southern countries. Thus, it is provided that: "*[d]eveloped country Parties should continue taking the lead by undertaking economy-wide absolute emission reduction targets. Developing country Parties should continue enhancing their mitigation efforts, and are encouraged to move over time towards economy-wide emission reduction or limitation targets in the light of different national circumstances*" (Art. 4§4). The final two hours of the negotiations led to the replacement of the mandatory 'shall' by a recommended 'should' at the request of

32 This *burden sharing* was carried out by applying a basket of criteria established by the Utrecht University, based on the population, growth and energetic efficiency as well as opportunity or more political considerations. Phylipsen, G., Bode, J., Blok, K., Merkus, H. & Metz, B., A triptych sectoral approach to burden differentiation; GHG emissions in the European bubble, *Energy Policy* 1998, n° 26, pp. 929-943.

33 The Paris Agreement provides that the meeting of the Parties to the Paris Agreement will "*consider common time frames*" (Art. 4 §10, §23 of the Decision). National contributions should thus ultimately follow synchronised timeframes based on 5-year cycles; Decision -/CMA.3, *Common time frames for nationally determined contributions referred to in Article 4, paragraph 10, of the Paris Agreement*, adopted at the COP26 in Glasgow (2021).

34 Prieur, M. & Sozzo, G. (eds.), *La non-régression en droit de l'environnement*, 2012, Bruxelles, Bruylant.

35 Decision 1/CP.20, 2014, *Lima call for climate action*, §10.

36 UNFCCC, 6 November 2014, *Views of Brazil on the Elements of a New Agreement under the Convention Applicable to All Parties*.

37 Article 3 echoes this provision: "*The efforts of all Parties will represent a progression over time*". However, the progression, which is broader as it concerns all "*efforts*" (mitigation, adaptation, financing, etc.) is assessed collectively here.

the United States and some developing countries. This replacement significantly reduces the strength of this provision.[38]

Next to the obligation to submit a contribution that is as ambitious as possible, and that is more ambitious than the previous one, parties may "*at any time*" amend their contribution "*with a view to enhancing its level of ambition*" (Art. 4§11).

Moreover, in order to assess the adequacy of the efforts aggregated altogether against the envisaged global goal, and to increase the pressure on states, Article 14 lays out the principle of a global review, referred to as a "*global stocktake*", that is to take place every five years.

Unfortunately, even six years after its adoption, the temperature limitation target set in the Agreement based on our emissions' trajectories is still completely unrealistic. This is established annually by the United Nations Environment Programme in its report entitled *The Emissions Gap,* which is released before each COP.[39] The latest report, which was published in 2021, estimates that even if the parties' contributions are all taken together, they do not come close to 2C°, but rather 2.7°C. This is undoubtedly progress compared to the 4 or 5 °C expected by so-called "business-as-usual" scenarios, but we are still very far from the objective set out in the Paris Agreement and, perhaps even more importantly, from the safe operating range of our planet.[40]

2. Guaranteeing the transparency of actions and policies

The provisions ensuring transparency and control are all the more important in a flexible system where contributions are determined by states themselves. The enhanced transparency framework has been referred to as the "*beating heart*" of the Paris Agreement.[41] It reintroduces more or less top-down aspects to an approach that is predominantly bottom-up. Importantly, it also creates trust between the state parties, which has a positive impact on their willingness to increase their commitments. It equally enables the monitoring of parties' efforts, and to confront them accordingly to the target emissions trajectory. Negotiators were well aware of this, and special care was dedicated to this matter on which a great part of the robustness of the Agreement depended.[42]

The strength of the adopted provisions comes from the concerted efforts of an informal group of key negotiators, emanating both from developing and developed countries, including in particular South Africa, the European Union, the United States, Switzerland, New Zealand, Australia, and Singapore.[43] This informal group, which is referred to as "*Friends of Rules*" was formed after Lima, when its members realised that the rules of

38 This amendment was presented as a typographic correction in order to enable the adoption of the Agreement. It obviously went way beyond that.

39 UNEP, 2021, *Emissions Gap Report 2021, The heat is on. A world of climate promises not yet delivered*, Executive Summary, IV.

40 Steffen, W. et al., Planetary Boundaries: Guiding human development on a changing planet, *Science* 13 Feb. 2015, vol. 347, issue 6223, p. 1.

41 Rajamani, L. & Werksman, J., Climate Change, *Oxford Handbook of International Environmental Law,* 2021, Oxford, OUP, p. 505.

42 Voigt, C., The Compliance and Implementation Mechanism of the Paris Agreement, *RECIEL* 2016, vol. 25, issue 2, pp. 161-173.

43 Maljean-Dubois, S. & Rajamani, L. (2015), L'Accord de Paris sur les changements climatiques du 12 décembre 2015, op. cit., p. 615.

the game are of great significance for the integrity and effectiveness of the climate agreement, especially when political questions overshadow the negotiation process.

As regards transparency and control, the Paris Agreement merely lays down key principles in its articles 13 to 15. The Agreement provides a glimpse into a process that respects state sovereignty but equally ensures the accountability of states. This procedure takes the form of a triptych composed of three – more or less distinct – parts: the transparency framework (Art. 13), the global stocktake (Art. 14), and the control itself (Art. 15).

In article 13, the Agreement thus proceeds to establish an "*enhanced transparency framework for action and support*". However, while being referred to as "*enhanced*", this framework is equally characterised by "*built-in flexibility which takes into account Parties' different capacities*" (Art. 13§1 §2). It is specifically recognized that this framework must be implemented "*in a facilitative, non-intrusive, non-punitive manner, respectful of national sovereignty, and avoid placing an undue burden on Parties*". Apart from these assurances to reassure the parties, the transparency framework is based on an established system, i.e. the mechanisms, procedures, and obligations that exist under the Convention (Art. 13§4). Article 13§5 continues to give a "*clear understanding*" of the measures, "*including clarity and tracking of progress towards achieving Parties' individual nationally determined contributions*". This also applies to measures of financial support, both received and provided, which means that information can be cross-checked here as well to provide a "clear understanding" (Art. 13§6). The parties are required ("*shall*") to "*regularly*" provide a national inventory report on anthropogenic emissions by sources and removals by sinks of greenhouse gases, prepared in accordance with the methodologies adopted by the IPCC and the information necessary to monitor progress in the implementation of their nationally determined contribution pursuant to article 4. In contrast, the parties "should", rather than "shall", provide information on the support provided and received, especially as regards the question whether it is "*financial, technology transfer and capacity-building support*" (Art. 13§9-10).

What is interesting is that this information is subject to a "*technical expert review*". This technical phase is followed by a political phase of *"facilitative, multilateral consideration of progress"* (Art. 13§11). The technical review shall *"identify areas of improvement for the Party*" (Art. 13§12), which is in fact a paraphrase to refer to potential or actual infringements. The review assesses whether the information provided is in accordance with the modalities, procedures and guidelines that will be established by the meeting of the parties to the Agreement.[44] Support is provided to developing countries to assist them in the implementation of these provisions. Here the Northern countries have pushed through- especially against the preferences of China and of many Southern countries - that the transparency system is the same for all. Thus, even though this system is focused on facilitation, the outlined mechanism seems to be relatively intrusive for all. While it remains to be seen what operational details will be adopted by the meeting of the Parties, it currently seems that the system's individual nature, the large range of information it requires as well as the dual intervention of an independent and impartial technical committee and the subsequent passing of the baton to a political body, possibly the COP, for the purpose of a multilateral review, will not make the system less intrusive for the time being.

The transparency framework, which consists of the individual review of the implementation of the Agreement by the parties, is supplemented by the "*global stocktake*" con-

44 See Decision, §93.

templated in article 14. The aim of this global stocktake is to 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§1). The first global stocktake will take place at the mid-cycle, without waiting for the end of the first cycle, in 2023, and, subsequently, every five years. Yet, the states have taken further precautions. The assessment of this achieved collective progress will be facilitative (i.e. non-binding); it will take into account "*equity and the best available science*". The reference to equity may leave the door open to a collective reflection as to the modalities of "*burden sharing*" in the light of the "*common but differentiated*" responsibilities of the states in this regard.

The global stocktake, which covers mitigation and adaptation efforts as well as support measures, will play a significant role as "*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§3). This provision is evidently very carefully drafted. On the one hand, it clearly provides that the results of the stocktake will inform the determination of states' contributions. But on the other hand, it highlights that these are to be determined at national level. It should also be noted that the objectives as regards adaptation, finance or technology are, at least in the Agreement itself, qualitative rather than quantitative in nature which introduces a degree of uncertainty in the assessment of collective progress.

The third component to ensure transparency is the non-compliance mechanism. This kind of mechanism is very common in international environmental law, and its effectiveness has been demonstrated on numerous occasions in the past.[45] Apart from a number of common features, each procedure is ultimately unique. It will differ in terms of how it is initiated, the handling of presumed infringements or the reaction to a proven infringement. What is however common to all of these procedures, is that they aim to identify the challenges the states face as early as possible and to address them through gradual and adapted means (support, incentives, sanctions). They tend to be facilitative and rarely lead to sanctions, which are generally counterproductive anyways. The goal is rather to prevent non-compliance and when it occurs, to assist the state to comply. Pursuant to the Kyoto Protocol, a very intrusive procedure had been put in place that could lead to relatively hefty sanctions.[46] Praised as a remarkable innovation at the time, it also swiftly revealed its limits. In fact, Canada used its right to leave the Protocol in order to avoid its sanction under this procedure.

Since states apparently learned the lesson from this instance, and because the spirit of the Paris Agreement is very different from that of the Protocol, the procedure chosen here is much more traditional. All the precautions are taken to prevent the Committee from sanctioning a non-complying state. But also this approach is not without criticism. It has been condemned as one of the great weaknesses of the Agreement by several commentators.[47] In fact, this weakness goes beyond the Paris Agreement and is frequently observed in international law.

45 See for instance: Koskenniemi, M., Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol, *Yearbook of International Environmental Law* 1992, vol. 3, issue 1, pp. 123-162.
46 See Decision 27/CMP.1, 2005, *Procedures and mechanisms relating to compliance under the Kyoto protocol.*
47 For instance: Gros, D., The Paris Agreement Is the Shove the World Needs, *Slate,* 14 Dec. 2015.

The absence of sanctions in the Paris Agreement, at the end of the day, shows that lessons have been learned from the past. Since the spirit of the Paris Agreement is utterly different from the Kyoto Protocol, arguably sanctions would have been incompatible with the former. Even further, one may question whether the effectiveness of international law depends solely on the ability to sanction non-compliance. In fact, in this authors view, it generally does not depend thereon at all.

Conclusion

To conclude, I could not agree more with Serge Sur who argued that the positive analysis of international law shows that its foundations have not changed much. According to Sur both state actions and the international commitment of states still form the basis of international law.[48] International climate negotiations have proven this. Yet, at the same time, the Paris Agreement shows that the function assigned to an international treaty, or in other words, the way in which states commit themselves, evolves over time.[49] In this regard, the form and substance of the Agreement have been carefully crafted to enable a consensus that seemed unattainable just a few months before.

Despite the way in which the Paris Agreement was designed, and even though its provisions have no or little direct effect, the Agreement increases pressure on states, including – and perhaps most importantly – at the domestic level. In fact, scientists continue to warn about the race against time when it comes to climate change. Given that greenhouse gas emissions are cumulative, any delay in international action jeopardises the chances to actually hold the temperature increase well below 2°C and *a fortiori* below 1,5°C. In view of the findings of the IPPC-1,5°C-Report,[50] the first part of IPCC's Sixth Assessment Report (AR6),[51] and the growing mobilisation of civil society, it becomes ever more difficult politically speaking for states to stick to national contributions that, once aggregated, could not lead to a drastic reduction of emissions that would remain "*well below 2°C*" and as close as possible to 1,5°C. The Paris Agreement has decisively contributed to increase the number of domestic climate litigation thanks to the engagement of civil society. This has given national courts the opportunity to position themselves as important actors in climate governance. Even if the results are not yet satisfactory, this somewhat renewed form of international commitment by the states has in turn led to renewed forms of control that – hopefully – will lead to greater effectiveness.

48 Sur, S., *Les dynamiques du droit international*, 2012, Paris, Pedone, 316 p.
49 Chan, S., Brandi, C. & Bauer, S., Aligning Transnational Climate Action with International Climate Governance: The Road from Paris, *RECIEL* 2016, vol. 25, issue 2, pp. 238-247.
50 IPCC, 2018, *Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty.*
51 IPCC, 2021, *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change.*