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The Paris Agreement, a starting point towards achieving climate neutrality?

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

Finally and hopefully, Parties could adopt such an universal agreement -so-called the Paris Agreement- at the 21st meeting of the Conference of the Parties to the UNFCCC (COP 21), which took place from 30 November until 13 December 2015 at the Bourget, in the North of Paris.

With no pretention whatsoever to cover all legal aspects which may arise from a comprehensive analysis of the Paris Agreement, this Special Issue aims at addressing those who have raised most attention in the run up to COP21, notably the legal form of the agreed outcome and the differentiation of rights and obligations among Parties, while making a presentation of its architecture and main provisions, and to discuss some perspectives in relation to a number of opened questions.

Whatever his name, the Paris Agreement is a treaty according to the 1969 Vienna Convention on the Law of Treaties. It is legal agreement, even if it is often soft and mainly procedural.[1] It is a universal agreement applicable to all, with no strict binary differentiation between developed and developing countries anymore, but remaining based on the "CBDR&RC" principle, giving some flexibility to developing countries though in light of different national circumstances, including among themselves.

The Paris Agreement reflects upon a hybrid approach, as it provides for a rules-based regime enshrined in an international treaty (top-down), including for the elaboration and communication of Parties' contributions (NDCs), whereas the latters are nationally determined (bottom up) and "anchored" outside the agreement, in a web registry hold by the secretariat. As such, it combines international legal security with respect of national sovereignty.

With such an architecture, the Paris Agreement represents a remarkable compromise.[2] As pointed at by Ralph Bodle, Lena Donat and Matthias Duwe, it is a landmark in international climate policy. We can indeed suscribe to this viewpoint for a number of reasons. Together, both developed and developing countries recognize the need to take

[1] L. Rajamani, 'The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations', *Journal of Environmental Law* (2016) 28 (2): 337-358.

[2] C. Streck, P. Keenlyside, M. Von Hunger, 'The Paris Agreement: A New Beginning', *Journal for European Environmental & Planning Law* ,13 (2016) 3-29.

domestic action to contribute to the fight against climate change with the view to achieving a very ambitious collective long term goal which is to keep the increase of global temperature well below 2°C as compared to pre-industrial levels. Nationally Determined Contributions to be established every five years in the light of the different national circumstances become the heart of the international climate regime as from 2020.

Indeed, Parties have some flexibility to determine their contributions in the short term, and this should facilitate their adherence to the Agreement, but they must think through their actions in the longer term with a dynamic mindset, with the obligation to progress over time towards more ambition. To make this happen, the Agreement comprises some interesting instruments and procedures in order to provide incentives to be more ambitious. An enhanced transparency framework is established to monitor Parties individual progress in implementing their NDC whereas a global stocktake is foreseen every 5 years in order to assess collective progress towards achieving the purpose and long-term goals. This should create trust in collective action, by ensuring that countries are adhering to their promises and providing a picture of the scale of global progress.

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

Beyond trust and confidence building among Parties for a strengthened cooperation at the international level, this transparency should also help civil society put some political pressure on their Governement at the national level. From that perspective, the recent ruling of the District Cour of the Hague of 24 June 2015 in the case Urgenda v. The Netherlands could, if confirmed in appeal, create an appetite in other jurisdictions[3].

A more accurate monitoring and a better public access to information on the effectiveness and efficiency of action will undoubtedly provide more arguments to NGOs and groups of citizens. In that respect, Anne-Sophie Tabau shows in her article that the Paris outcome reflects a new global standard of transparency. She demonstrates that compromises are here fragile and unstable. Even if the Agreement is not a breakthrough and on the contrary builds on the previous regime, particular attention must be paid to future COP decisions on this matter as the devil is here –as often- in the details.

Let's focus a moment on, the controversial issue of differentiation, which blocked the climate negotiations since the Bali Conference. One should recognize that this issue was dealt with in a subtle, creative and quite dynamic manner by the Paris Agreement. In

[3] See the Decision : http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBDHA:2015:7196&keyword=urgenda [available on 4 March 2016]. See also the comment from C. Cournil and A.-S. Tabau, 'Nouvelles perspectives pour la justice climatique', *Revue juridique de l'environnement* n°4/2015, vol. 40, pp. 672-693.

effect, while reaffirming the CBDR&RC principle, it introduces elements for a dynamic interpretation of its meaning and mode of implementation. In the operational provisions of the Agreement, it relies on self-differentiation, in particular with respect to some key obligations, for instance relating to the NDC process, to a more classical form of differential treatment – between categories of countries – for instance with respect to the means of implementation. It marks a decisive step forward in the gradual process of blurring the categories of countries towards more legal symmetry between Parties, which was one of the condition put by the USA to come back to the table of the negotiations since Bali in 2007. This shift renders the UNFCCC annexes irrelevant, at least for the interpretation and implementation of the Paris Agreement. Moving beyond the UNFCCC's bifurcated differentiation, the Agreement better takes into account diverse national circumstances, capabilities and vulnerabilities, resulting not in less but in more differentiation. The Paris Agreement thus approaches differentiation in various ways in different parts of the agreement, carefully balancing what will be differentiated and what will be common in the post-2020 period. By doing so, parties have sought to find the right balance between bottom-up and top-down approaches in international climate cooperation.[4] The flexibilities given to parties are counterbalanced by a relatively robust common framework, and did not go at the cost of ambition, which was a genuine risk.[5] As already mentioned above, this approach, as supported by the principles of progression and of the highest possible ambition for NDCs, raises hopes that the level of ambition of collective action will further improve over time.

As Rajamani has argued, "the relationship between ambition, differentiation and support was clear from the start – the greater the overall ambition, the greater the need for differentiation in efforts between developed and developing countries as well as for financial resources to support ambitious efforts".[6] From this perspective, with its sophisticated design, the Paris Agreement has found a good balance between ambition, differentiation and support. It breaks down the barrier represented by endless discussions on a burden-sharing arrangement to deal with the remaining carbon budget, and offers a new vision of fairness as a matter of effectiveness.[7] Based on multiple and moving categories, self-identification and self-determination, it also introduces some uncertainties. But this pragmatic approach has been the price to be paid to avoid a race to the bottom[8].

In the end, one of the key question is to know whether the Paris Agreement is ambitious enough to tackle the challenge of climate change. Obviously it is too early to say all the

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[4] See also N. Dubash and L. Rajamani, 'Beyond Copenhagen: Next Steps', 10:2 *Climate Policy* (2010), 593.

[5] See L. Rajamani, 'The Changing Fortunes of Differential Treatment in the Evolution of International Environmental Law', 88:3 International Affairs (2012), 616-617.

[6] See also L. Rajamani, 'Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilitis and Underlying Politics', *International and Comparative Law Quarterly*, Volume 65 / Issue 02 / April 2016, 493-514.

[7] P. Cullet, Differential Treatment in International Environmental Law (Ashgate, 2003), 172.

[8] On the issue of differentiation, see also S. Maljean-Dubois, 'The Paris Agreement: A New Step in the Gradual Evolution of Differential Treatment in the Climate Regime?', *RECIEL* (2016, forthcoming).

more that the Paris Rulebook is still to be written on many details for a proper implementation by Parties, with the real discussion on modalities starting in Marrakech at COP22. However, it is clear than the success of the Paris Agreement will primarily depend on the political will of Parties to engage in ambitious policies and measures at domestic level and on their ability to work together, with a greater sense of solidarity, through this strengthened international cooperation framework.

This historic Agreement being adopted, it is now time to think about its implementation. This Special Issue does not look at the details of its eventually rapid entry into force, which will be subject for further discussions at COP22 in Marrakech. Rather, it suggests to look at the implementation from a Party's perspective, namely the EU, which is a very special Contracting Party as a « REIO » when acting with its Member States, who has always claimed for a leadership in the climate negotiations, leading by example with its ambitious climate policy. Sebastian Oberthur offers here to read a very comprehensive analysis of the EU political and legislative on-going agenda for the approval and implementation of the Paris Agreement, where he raises some questions on the EU capacity to maintain such leadership in the future. In as far this Special Issue was prepared well in advance, it does not discuss about the implications of the Brexit on the design of future EU climate policy. But one can anticipate there will be many, as the UK has always been a front runner in climate action since Kyoto and very active on the front of EU climate diplomacy.

Thinking about its effectiveness, one has also to wonder if the Paris Agreement is going to affect the position of the UNFCCC in global climate governance, on the horizontal axis, vis-a-vis other organizations, treaties and initiatives, and on the vertical axis, vis-a-vis non-States and subnational actors. The COP Decision and the Paris Agreement include several indicators showing a greater openness towards external challenges than what the UNFCCC and the Kyoto Protocol did in the past. They acknowledge the need for a global approach to such challenges, which goes beyond the forum of meetings of Contracting Parties to the Paris Agreement. But does the Agreement carry the potential for a redefinition of climate governance? This is the fundamental question raised by Harro Van Asselt, who points at the need for Parties to the UNFCCC and to the Paris Agreement to make concerted efforts to leverage the potential that could deliver the wider institutional complex for climate change, and makes concrete suggestions on how such relationships could be strengthened.

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

Now the key question is to know whether the promise of a climate-neutral world can be kept, we should be very careful that the response will be effectively commensurate to the challenges. COP22 in Marrakech will be a test in that respect, with the start of formal negotiations of implementing modalities of the Paris Agreement as well as with the consolidation of the Action Agenda, with the LPAA now becoming the Global Climate

Change Alliance. From these two complementary perspectives, COP22 should be the « COP for Action ».

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