

12 PRELIMINARY LEGAL ISSUES IN THE HISTORIC PARIS CLIMATE AGREEMENT

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12.1 INTRODUCTION

Climate change has become one of the biggest challenges of our time. The Intergovernmental Panel on Climate Change¹ declared in its Fifth Assessment Report² in 2014 that there is a 95 percent probability that dangerous climate change is occurring and that humans are responsible for it. However climate change is a very complex phenomenon and it is far from easy to tackle. *Inter alia* there are scientific, ethical, social, political, economic, global security not least legal implications. It is obvious that only global efforts can bring truly effective and long-lasting results. In 2015 the Parties to the United Nations Framework Convention on Climate Change³ (hereafter: UNFCCC) came together in Paris to finally clinch a new, global and legally binding international climate change treaty that could address this problem. There was a huge political momentum before and during the talks. Uniquely more than 150 heads of states and governments have converged⁴ to launch the 21st Conference of the Parties⁵ (hereafter: COP 21). The Paris Agreement⁶ was finally adopted on the last day of the conference. Nevertheless, from a legal point of view there are numerous challenges around and within the new agreement that remain to be solved. In this short analysis three of them will be presented after a short historic overview of international climate talks. Firstly, it might be interesting to talk about entry into force

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1 In 1988 the Intergovernmental Panel on Climate Change (IPCC), the leading international scientific body for the assessment of climate change, was established by the United Nations Environmental Programme (UNEP) and the World Metrological Organisation (WMO). It reviews and assesses the most recent scientific, technical and socio-economic information produced worldwide relevant to the understanding of climate change.

2 <https://www.ipcc.ch/report/ar5/>. Last accessed: 19/7/2016.

3 Currently, there are 197 Parties (196 States and 1 regional economic integration organization) to the United Nations Framework Convention on Climate Change.

4 See *inter alia* www.bbc.com/news/science-environment-34963048. Last accessed: 20/7/2016.

5 The COP is the supreme decision-making body of the Convention. All States that are Parties to the Convention are represented at the COP, at which they review the implementation of the Convention and any other legal instruments that the COP adopts and take decisions necessary to promote the effective implementation of the Convention, including institutional and administrative arrangements.

6 https://treaties.un.org/doc/Treaties/2016/02/20160215%2006-03%20PM/Ch_XXVII-7-d.pdf. Last accessed: 20/7/2016.

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and its implications. Secondly, the legal status of the commitments of the Parties will be looked at and finally the role of the compliance committee under the agreement will be discussed.

12.2 A BRIEF HISTORIC OVERVIEW

Substantive international political and legal response to climate change began with the 1992 adoption of the UNFCCC,⁷ which sets out a legal framework for stabilizing atmospheric concentrations of greenhouse gases (hereafter: GHGs) to avoid “dangerous anthropogenic interference with the climate system”.⁸ It sets an overall framework for intergovernmental efforts to tackle the challenge posed by climate change. It recognizes that the climate system is a shared resource whose stability can be affected by industrial and other emissions of carbon dioxide and other greenhouse gases.⁹ However the UNFCCC itself did not specify any concrete actions for individual parties.

In December 1997 at COP 3 in Kyoto, Japan the Parties to the UNFCCC agreed to adopt a protocol¹⁰ that committed industrialized countries and countries in economic transition to achieve quantified GHG emissions reduction targets. These countries, known as Annex I Parties¹¹ under the UNFCCC, agreed to reduce their overall emissions of six GHGs by an average of 5% below 1990 levels between 2008 and 2012 (also known as the first commitment period or CP1), with specific targets varying from country to country. After lengthy ratification processes, the Kyoto Protocol finally entered into force in 2005.¹²

The first commitment period ended in 2012, however efforts have been made well before the end of CP1 to agree on a more durable basis for the international combat against climate change. Hopes were high before COP 15 in Copenhagen, Denmark in 2009, but it failed to provide the long awaited new global agreement. Nevertheless negotiations continued, and in 2012 in Doha, Qatar COP 18 resulted in a package of decisions, referred

7 https://treaties.un.org/doc/Treaties/1994/03/19940321%2004-56%20AM/Ch_XXVII_07p.pdf. Last accessed: 20/7/2016.

8 Art. 2 UNFCCC.

9 The list of greenhouse gases and their global warming potential can be found *inter alia* in https://www.ipcc.ch/publications_and_data/ar4/wg1/en/ch2s2-10-2.html. Last accessed: 21/7/2016.

10 https://treaties.un.org/doc/Treaties/1998/09/19980921%2004-41%20PM/Ch_XXVII_07_ap.pdf. Last accessed: 20/7/2016.

11 http://unfccc.int/parties_and_observers/parties/annex_i/items/2774.php. Last accessed: 20/7/2016.

12 The Conference of the Parties, the supreme body of the Convention, shall serve as the meeting of the Parties to the Kyoto Protocol. All States that are Parties to the Kyoto Protocol are represented at the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (CMP), while States that are not Parties participate as observers. The CMP reviews the implementation of the Kyoto Protocol and takes decisions to promote its effective implementation. In: <http://unfccc.int/bodies/body/6397.php>. Last accessed: 20/7/2016.

to as the “Doha Climate Gateway.”¹³ These included amendments to the Kyoto Protocol to establish its second commitment period between 2013 and 2020, the Doha Amendment.¹⁴ However a total of 144 instruments of acceptance are required from the Parties to the Kyoto Protocol for the entry into force of the Doha Amendment, so far, almost three years after the planned start of CP2, as of 18 July 2016, 66 countries have ratified it.¹⁵ Moreover only a handful of countries have made emission reduction commitments,¹⁶ therefore it is expected that it will fail to provide significant global limitation of GHG emissions before 2020. The Kyoto Protocol will most likely come to an end, and the talks on a possible third commitment period have already been suspended.¹⁷

The shortcoming of the Kyoto Protocol and the failure in Copenhagen to adopt a new agreement invoked the so-called Durban Mandate. At COP 17 in Durban, South Africa in 2011, countries agreed that they would develop “a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties” to be adopted in 2015 at the latest. COP 21 was held in the French capital, from 30 November to 12 December 2015. The main objective of the session was to achieve a legally binding, universal and durable agreement on climate change that will be able to ensure a significant global GHG emission reduction from 2020 onwards. After lengthy discussions the COP 21 fulfilled its mandate and adopted unanimously a new, global, legally binding international treaty, the Paris Agreement on 12 December 2015. The final text of the Paris Agreement was adopted in a formal decision by the COP, Decision 1/CP.21 “Adoption of the Paris Agreement”.¹⁸ The Paris Agreement is attached in an annex to this COP decision.

12.3 ENTRY INTO FORCE

The Agreement declares that it enters into force

on the thirtieth day after the date on which at least 55 Parties to the Convention accounting in total for at least an estimated 55 percent of the total global greenhouse gas emissions have deposited their instruments of ratification, acceptance, approval or accession.¹⁹

13 http://unfccc.int/key_steps/doha_climate_gateway/items/7389.php. Last accessed: 20/7/2016.

14 <https://treaties.un.org/doc/Treaties/2012/12/20121217%2011-40%20AM/CN.718.2012.pdf>. Last accessed: 20/7/2016.

15 http://unfccc.int/kyoto_protocol/doha_amendment/items/7362.php. Last accessed: 21/7/2016.

16 37 countries and the European Union.

17 <http://unfccc.int/resource/docs/2016/sbsta/eng/l02.pdf>. Last accessed: 21/7/2016.

18 <http://unfccc.int/resource/docs/2015/cop21/eng/10a01.pdf>. Last accessed: 20/7/2016.

19 Art. 21 Paris Agreement.

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The first condition is obvious, but the second one requires further explanation. There is a document issued by the UNFCCC solely for the purpose of entry into force, that contains information on the most up-to-date total and percent of GHG emissions communicated by the Parties.²⁰ It is used to determine whether the second criteria have been fulfilled.

It follows that there was no exact date prescribed for entry into force. A previous negotiating text of the Paris Agreement²¹ however contained a possible third condition for entry into force; “not earlier than on 1 January 2020”.²² Parties have left out this option from the final text which brought a considerable amount of legal uncertainty. Following the required criteria are now fulfilled,²³ the Paris Agreement enters into force on 4 November 2016. Therefore the first Conference of the Parties to the Paris Agreement (hereafter: CMA) will be convened at the COP22 in November 2016. Consequently the recently established preparatory body’s²⁴ future is now ambiguous. Then there is a risk to jeopardize the global nature of the Agreement if important decision will be made at the first CMA by a relatively low amount of Parties to Paris Agreement. Whereas all UNFCCC Parties had a vote in the above mentioned preparatory body, decision making under the effective Agreement will only be allowed for Parties of the Paris Agreement. Still, it was not the intention to leave out anyone from decision making. A theoretical option has been discussed during the UNFCCC negotiations to suspend the first session of the CMA until more countries could join the Agreement, however it would induce further lengthy discussions on a new “threshold” i.e. the minimum required number of Parties or the length of a time period for the continuation of the CMA. However it should not be forgotten that the internal ratification processes in certain countries are objectively long and they cannot be easily shortened. It would not seem fair to leave out these countries from decision making in the beginning, but from a legal point of view it will not be easy to resolve this issue.

12.4 COMMITMENTS UNDER THE PARIS AGREEMENT

The issue of commitments that Parties are obliged to make under the Paris Agreement are probably the most controversial and ambiguous aspect of the document. The philosophy behind the new approach that led to the adoption of the Agreement was that countries should be able to determine their own pathways for emission reductions, which cannot be “enforced” by the international community. This “bottom-up” approach was a radical

20 http://unfccc.int/files/paris_agreement/application/pdf/10e.pdf. Last accessed: 20/7/2016.

21 https://unfccc.int/files/bodies/awg/application/pdf/negotiating_text_12022015@2200.pdf. Last accessed: 14/10/2016.

22 *Ibid.*, p. 83.

23 <https://treaties.un.org/doc/Publication/CN/2016/CN.735.2016-Eng.pdf>. Last accessed: 14/10/2016.

24 <http://unfccc.int/bodies/apa/body/9399.php>. Last accessed: 14/10/2016.

change compared to the Kyoto Protocol's "top-down" quantified emission reduction targets, contained in an annex to the Protocol. Obviously, from a merely legal point of view compliance or enforcement seems much easier if there are clear, comparable, easily understandable and quantified obligations. The bottom up approach unavoidably brings uncertainty into the system. Before COP 21 the Parties to the UNFCCC, intending to join the Paris Agreement were requested by Decision 1/CP.19²⁵ to prepare and communicate their Intended Nationally Determined Contributions (hereafter: INDC)

without prejudice to the legal nature of the contributions, in the context of adopting a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties.²⁶

The submitted INDCs can be found in a web portal operated by the UNFCCC Secretariat.²⁷ It can be seen that the various submitted INDCs are hardly comparable and measurable. These INDCs however are not binding by any means to the Parties.

In place of INDCs, the Paris Agreement requires from the Parties to "prepare, communicate and maintain successive nationally determined contributions"²⁸ (hereafter: NDC) that they intend²⁹ to achieve. It follows that it is a core criteria of the Agreement from all the Parties to have NDCs. NDCs however will not form part of the Agreement itself. Before the final text was adopted, alternative options had been raised to attach the NDCs to the Agreement in a form of annexes, or to adopt a protocol under the Agreement – just like in the case of Kyoto – and include the various NDCs into that document. But all this ideas disappeared and NDCs will only be simple submissions to a dedicated online registry, operated by the UNFCCC Secretariat. Decision 1/CP.21, Paragraph 30 requested the UNFCCC Secretariat to make available an interim public registry³⁰ in the first half of 2016 for the recording of NDCs submitted in accordance with Article 4 of the Agreement, pending the adoption by the CMA of the modalities and procedures referred to in Paragraph 29. Paragraph 29 of the same decision, requested the Subsidiary Body for Implementation³¹ to develop modalities and procedures for the operation and use of the public registry referred to in Article 4, Paragraph 12, of the Paris Agreement, for consideration and

25 <http://unfccc.int/resource/docs/2013/cop19/eng/10a01.pdf>. Last accessed: 20/7/2016.

26 Ibid.

27 <http://www4.unfccc.int/submissions/indc/Submission%20Pages/submissions.aspx>. Last accessed: 20/7/2016.

28 Art. 4, para. 2 Paris Agreement.

29 Probably the weakest term to express an obligation in the text.

30 <http://www4.unfccc.int/ndcregistry/Pages/Home.aspx>. Last accessed: 20/7/2016.

31 The Subsidiary Body for Implementation (SBI) is one of two permanent subsidiary bodies to the Convention established by the COP/CMP. It supports the work of the COP and the CMP through the assessment and review of the effective implementation of the Convention and its Kyoto Protocol. The SBI also advises the COP on budgetary and administrative matters. <http://unfccc.int/bodies/body/6406.php>. Last accessed: 20/7/2016.

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adoption by the CMA at its first session. It is visible that the legal status and the control of such submission are at least ambiguous and far from predictable. Anybody whose task will be to monitor and evaluate the implementation of these NDCs will not be in an easy position. Moreover from a legal point of view, it seems that basically almost any kind of submission should be accepted as satisfactory under Article 4, which questions the success of the Agreement and rely heavily on the goodwill of the Parties. Discussions have started under the APA to have some standards for future NDCs, however it is not decided yet if these standards should be applied already for the first round of NDCs.³² Not to mentioned the problem of the possible gap between the aggregated effect of the submitted NDCs and the final long term goal of the Agreement, i.e. to hold the increase in the global average temperature to well below 2 °C above pre-industrial levels.³³

12.5 THE COMPLIANCE COMMITTEE

A well-functioning compliance mechanism is essential to build mutual trust between Parties and it also contributes to ensure transparency in the implementation of the Agreement. All Parties have the right to be able to monitor how others are going on with their own commitments. However as the commitments have become more and more complex and they not only involve GHG emission reductions but for instance adaptation measures as well,³⁴ the task to build up a solid compliance mechanism is difficult than ever before.

The Kyoto Protocol has a relatively well-developed compliance mechanism.³⁵ The Paris Agreement merely establishes a mechanism “to facilitate implementation of and promote compliance with the provisions of the Agreement”.³⁶ This mechanism *inter alia* “shall consist of a committee that shall be expert-based and facilitative in nature and function in a manner that is transparent, non-adversarial and non-punitive.”³⁷ The committee shall operate under the modalities and procedures adopted by the CMA at its first session and report annually to it.³⁸ It is clear that this committee will not have any enforcement function, such as the Kyoto Protocol’s compliance mechanism, but it will only serve to facilitate the compliance of the Parties. It will not have the power to impose any sanctions on Parties. Although Article 15 of the Paris Agreement declares that the committee “shall pay partic-

32 According to Art. 4, para. 3 Paris Agreement, Parties will need to update their NDCs regularly.

33 Art. 2(a) Paris Agreement.

34 However adaptation commitments will likely be contained by a separate registry.

35 http://unfccc.int/kyoto_protocol/compliance/items/3024.php. Last accessed: 20/7/2016.

36 Art. 15 Paris Agreement.

37 Ibid.

38 Ibid.

ular attention to the respective national capabilities and circumstances of Parties³⁹ it is still unclear how this differentiation will be made, and on what basis.

As it was also analysed above, the exact requirements for the NDCs are still not visible. It still remains to be seen when the Compliance Committee detects a conflict between a declaration in an NDC and the aim of the Agreement and how it will address this conflict. It is also an unsolved issue who will have the right to trigger a compliance procedure and exactly what can be the result of such procedure apart from it cannot be a punitive one. The exact rules for the members of the committee also remain to be seen. It will be essential to ensure the necessary independence for the members to be able to carry out their duty as objectively as possible.

Nevertheless based on the text of the Agreement, it appears that non-compliance basically would not impose any consequence on a Party in question. Again, the provisions rely on Parties' good-will and their voluntary compliance. From a legal point of view this kind of a compliance mechanism and compliance committee can only be seen as a consultative body without any real power. A possible positive outcome however of the non-adversarial and non-punitive nature of the committee could be that it "may increase the willingness of national courts to adjudicate on the sufficiency of a particular Party's climate change efforts."⁴⁰ At least a recent example exists in the Netherlands that could promote such kind of development, where a national court, for the first time in history has granted the plaintiffs' claims, and ordered the Dutch government to take more effective climate action to reduce the Netherlands' GHG emissions.⁴¹

12.6 CONCLUSION

To sum up from a political point of view, the adoption of the Paris Agreement is a promising achievement, the significance of the mere existence of the now soon effective treaty should not be underestimated. However from a legal point of view the picture is much more complex. There are many legally binding requirements in the treaty but most of them are not detailed and no sanctions have been attached to them. The bottom up approach resulted in voluntary obligations which rely heavily on the Parties' voluntary acts. Presumably politically it seemed the only possible way to clinch the deal, but from a legal point of view it left many issues still to be solved. The coming negotiations will continue to play a very important role in that regard, and after all, national and local govern-

39 Ibid.

40 www.6pumpcourt.co.uk/2016/02/finance-transparency-and-compliance-key-features-of-the-paris-agreement-part-two/. Last accessed: 21/7/2016.

41 www.urgenda.nl/en/climate-case/. Last accessed: 21/7/2016.

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ments, NGOs, companies and the public needs to contribute to the success of the Agreement. The canvas is up on the wall and now it is waiting for to be painted.