

## THE PARIS AGREEMENT: SOME CRITICAL REFLECTIONS ON PROCESS AND SUBSTANCE

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### I INTRODUCTION

At the 21<sup>st</sup> Conference of the Parties ('COP21') to the *United Nations Framework Convention on Climate Change* ('UNFCCC' or 'Convention'),<sup>1</sup> 195 states and the European Union adopted the *Paris Agreement*.<sup>2</sup> The *Agreement*, which was attached as an annex to a decision of the Conference of the Parties ('COP'), opened for signature on 22 April 2016 at the United Nations ('UN') Headquarters in New York<sup>3</sup> and has since been signed by 191 states. The *Agreement* enters into force on the 30<sup>th</sup> day after at least 55 parties, representing at least 55 per cent of global emissions, have ratified it.<sup>4</sup> This ratification threshold was crossed on 5 October 2016, and accordingly the *Agreement* entered into force on 4 November 2016.<sup>5</sup> Of the 81 states that have ratified the

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1 *United Nations Framework Convention on Climate Change*, opened for signature 9 May 1992, 1771 UNTS 107 (entered into force 21 March 1994) ('UNFCCC').

2 Conference of the Parties, United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties on Its Twenty-First Session, Held in Paris from 30 November to 13 December 2015 – Addendum – Part Two: Action Taken by the Conference of the Parties at Its Twenty-First Session*, Dec 1/CP.21, UN Doc FCCC/CP/2015/10/Add.1 (29 January 2015) ('*Adoption of the Paris Agreement*'). The *Agreement* is included as an annex to this document ('*Paris Agreement*').

3 *Ibid* annex art 20(1).

4 *Ibid* annex art 21(1).

5 At the time of writing the *Paris Agreement* has been ratified by 81 states accounting for 60 per cent of global emissions. United Nations Treaty Collection, *Depositary: Status of Treaties* (17 October 2016) <[https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXVII-7-d&chapter=27&clang=\\_en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=_en)>.

*Agreement*, 13 are Pacific Small Island Developing States ('PSIDS').<sup>6</sup> Australia has signed but not ratified the *Agreement*.<sup>7</sup>

The *Paris Agreement* is a treaty as it is a written agreement between states that is governed by international law.<sup>8</sup> Treaties generally create legally binding obligations for states under international law,<sup>9</sup> which must be observed in good faith.<sup>10</sup> Yet the *Agreement* is replete with aspirational statements and contains only weak legal commitments in the form of reporting obligations. At the same time, there is no meaningful compliance mechanism despite the efforts of some states to provide for one.<sup>11</sup> In comparison to the *UNFCCC's Kyoto Protocol*,<sup>12</sup> which provides binding emission reduction targets for its developed country parties and a compliance mechanism with an enforcement branch,<sup>13</sup> the value of the *Paris Agreement* might be seen as precarious. Nonetheless, the *Agreement* has been widely hailed as a breakthrough in international climate governance based on its ensuing procedural framework that could, in theory, encourage states to raise ambition in accordance with their existing obligations under the *UNFCCC*.<sup>14</sup>

In this contribution, we analyse the *Paris Agreement*, focusing on its import as a treaty under international law. More specifically, our enquiry seeks to clarify the expectations created by international law, including the *UNFCCC*, and to evaluate to what extent the *Paris Agreement* meets these expectations. Our enquiry is guided by specific attention on the potential implications of the *Agreement* for PSIDS and other developing countries that are particularly vulnerable to the adverse effects of climate change. PSIDS in particular have been urging the international community to agree to effective climate action for decades due to the dire consequences to which climate change is already

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6 Ibid. The PSIDS that have ratified the *Paris Agreement* are the Cook Islands, Fiji, Kiribati, the Marshall Islands, the Federated States of Micronesia, Nauru, Palau, Papua New Guinea, Samoa, the Solomon Islands, Tonga, Tuvalu and Vanuatu.

7 Ibid.

8 *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 2(1)(a) ('*VCLT*'). On the legal character of the *Paris Agreement*, see also Daniel Bodansky, 'The Legal Character of the Paris Agreement' (2016) 25 *Review of European, Comparative and International Environmental Law* 142.

9 See *VCLT* art 26.

10 Ibid. See also *Nuclear Tests (New Zealand v France) (Judgment)* [1974] ICJ Rep 457, 473 [49] in which the International Court of Justice stressed that:

One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith ... the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration.

11 See below Part III(J).

12 *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, opened for signature 16 March 1998, 2303 UNTS 148 (entered into force 16 February 2005) ('*Kyoto Protocol*').

13 See generally Sebastian Oberthür and René Lefebvre, 'Holding Countries to Account: The Kyoto Protocol's Compliance System Revisited after Four Years of Experience' (2010) 1 *Climate Law* 133, 158.

14 See, eg, Peter Christoff, 'The Promissory Note: COP 21 and the Paris Climate Agreement' (2016) 25 *Environmental Politics* 765, arguing that the *Paris Agreement* 'has the potential – and processes – to encourage and discipline, even the largest and most recalcitrant emitters to improve their performance': at 782.

subjecting their people.<sup>15</sup> Together with Small Island Developing States ('SIDS') from other regions, they were the first to propose a draft text during the *Kyoto Protocol* negotiations that would reduce greenhouse gas emissions by 20 per cent from 1990 levels by 2005.<sup>16</sup> And as part of a broader coalition of developing countries, they insisted on the continuation of the *Kyoto Protocol* with renewed and more ambitious emission reduction commitments for developed countries.<sup>17</sup> The same broad coalition of developing countries has insisted for more than two decades that international climate governance should be based on equity and fairness, with a view to strengthening developing countries' ability to improve living standards for their populations while enhancing their resilience to the adverse effects of climate change.<sup>18</sup>

We start our analysis by discussing the place of the *Paris Agreement* in the overall international climate change regime established under the *UNFCCC*, which is premised on the principle of common but differentiated responsibilities and respective capabilities ('CBDRRC') and recognises the specific needs and special circumstances of developing country parties, 'especially those that are particularly vulnerable to the adverse effects of climate change'.<sup>19</sup> We then discuss some of the processes that led to the adoption of the *Agreement*, with particular attention to discussions about the relationship between the *Agreement*, the *UNFCCC* and the *Kyoto Protocol*. As part of this discussion, we analyse the special role of the United States ('US') in shaping the legal character of the *Agreement*. Finally, we discuss the purpose of the *Agreement*, including the long-term temperature goal, and review each of the major substantive parts of the treaty. Our analysis will conclude with general reflections on the implications of the *Agreement* for the future of international climate change action under the auspices of the *UNFCCC*.

## II THE ROAD TO PARIS

### A The UNFCCC and the *Kyoto Protocol*

The *Paris Agreement* was adopted following decades of politically complex negotiations under the *UNFCCC* and the *Kyoto Protocol*. In the *UNFCCC* itself, states had set an ambitious 'ultimate objective' of 'prevent[ing] dangerous anthropogenic interference with the climate system ... [to] be achieved within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to

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15 See, eg, Permanent Mission of the Republic of Nauru to the United Nations, 'Views on the Possible Security Implications of Climate Change to be Included in the Report of the Secretary-General to the 64<sup>th</sup> Session of the United Nations General Assembly' (Views, Pacific Small Island Developing States, 2010).

16 See Tuiloma Neroni Slade and Jacob Werksman, 'An Examination of the Kyoto Protocol from the Small Island Perspective' in Luis Gómez-Echeverri (ed), *Climate Change and Development* (Yale School of Forestry and Environmental Studies, 2000) 63, 66.

17 See below Part II(A).

18 See, eg, Adil Najam, Saleemul Huq and Youba Sokona, 'Climate Negotiations beyond Kyoto: Developing Countries Concerns and Interests' (2003) 3 *Climate Policy* 221.

19 *UNFCCC* art 3(1)–(2).

ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner'.<sup>20</sup> The *Convention* is premised on a set of principles, including: (i) the precautionary principle, which prescribes that precautionary measures should be taken even if scientific evidence is inconclusive;<sup>21</sup> (ii) the principles of sustainable development and poverty eradication, which provide that all countries should promote sustainable development, and that poverty eradication is an overriding priority for developing countries;<sup>22</sup> and (iii) the principle of CBDRRRC, which requires developed countries to take the lead in climate action and support developing countries in mitigation and adaptation based on developed countries' greater historical responsibility for climate change and greater capacity for addressing it.<sup>23</sup> These principles translate in a set of commitments, including common commitments of developed and developing countries (mainly related to the communication of information)<sup>24</sup> and differentiated commitments, whereby developed countries are required to take the lead in mitigation;<sup>25</sup> provide financial support for mitigation and adaptation to developing countries;<sup>26</sup> and transfer technologies and help build endogenous capacity for research, mitigation, and adaptation in developing countries.<sup>27</sup>

However, although the *UNFCCC* does contain these substantive commitments, it lacks specific emission reduction targets for individual states. The *Kyoto Protocol* was adopted to address this shortfall. Based on the principle of CBDRRRC, only developed countries undertook quantified emission reduction commitments under the *Protocol*. The *Protocol* expressly endorses the ultimate objective of the *Convention*;<sup>28</sup> however, the collective commitment of developed countries to cut their emissions by 5 per cent from 1990 levels during the first commitment period of 2008 to 2012,<sup>29</sup> with an 8 per cent increase compared to 1990 levels for Australia,<sup>30</sup> was meagre at best. When negotiations on commitments for the next commitment period commenced under the Ad Hoc Working Group on Further Commitments for Annex I Parties under the *Kyoto Protocol* ('AWG-KP'), developed country parties to the *Protocol* proved

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20 Ibid art 2.

21 Ibid art 3(3).

22 Ibid arts 3(4), 4(7).

23 Ibid art 3(1). At preamble:

Noting that the largest share of historical and current global emissions of greenhouse gases has originated in developed countries, and that per capita emissions in developing countries are still relatively low and that the share of global emissions originating in developing countries will grow to meet their social and development needs ...

See also Jeffrey McGee and Jens Steffek, 'The Copenhagen Turn in Global Climate Governance and the Contentious History of Differentiation in International Law' (2016) 28 *Journal of Environmental Law* 37, 52.

24 *UNFCCC* art 4(1).

25 Ibid art 4(2).

26 Ibid arts 4(3)–(4).

27 Ibid art 4(5).

28 *Kyoto Protocol* preamble.

29 Ibid art 3(1).

30 Ibid annex B.

reluctant to agree to more ambitious commitments and insisted that developing countries take on more of the burden. The first move in this direction was the adoption of the *Bali Action Plan* in 2007, where an Ad Hoc Working Group on Long-Term Cooperative Action Under the *Convention* ('AWG-LCA') was set up to negotiate a parallel agreement with 'nationally appropriate mitigation actions' for developing countries, that were to be taken 'in the context of sustainable development' and 'supported and enabled by technology, financing and capacity-building'.<sup>31</sup> The AWG-LCA was also mandated to conclude on 'nationally appropriate mitigation commitments or actions, including quantified emission limitation and reduction objectives' for developed country parties,<sup>32</sup> thus capturing the United States which had ratified the *UNFCCC* but not the *Kyoto Protocol*. The AWG-LCA and AWG-KP were expected to conclude their work at the 15<sup>th</sup> Conference of the Parties ('COP15') in Copenhagen, Denmark in 2009. However, neither of the working groups achieved significant results in Copenhagen, and the meeting instead resulted in the controversial *Copenhagen Accord*,<sup>33</sup> which initiated the bottom-up approach to mitigation pledges that is now reflected in the *Paris Agreement*. The mandate of the AWG-LCA was brought to an end at the 17<sup>th</sup> Conference of the Parties ('COP17') in Durban, South Africa.<sup>34</sup>

Under the AWG-KP more significant results were achieved at the 18<sup>th</sup> Conference of the Parties ('COP18') in Doha, Qatar, where developed countries reluctantly agreed to undertake new commitments under the *Kyoto Protocol* for a second commitment period from 2013–20. This agreement was reflected in the *Doha Amendment* to the *Protocol*.<sup>35</sup> However, the agreed collective emission reductions reflected *de minimis* efforts to combat climate change, amounting to a mere 18 per cent below 1990 levels by 2020, with a commitment of reducing emissions 0.5 per cent below 1990 levels for Australia.<sup>36</sup> The Kyoto regime was

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31 Conference of the Parties, United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties on Its Thirteenth Session, Held in Bali from 3 to 15 December 2007 – Addendum – Part Two: Action Taken by the Conference of the Parties at Its Thirteenth Session*, Dec 1/CP.13, UN Doc FCCC/CP/2007/6/Add.1 (14 March 2009) para 1(b)(ii) ('*Bali Action Plan*').

32 *Ibid* para 1(b)(i).

33 Conference of the Parties, United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties on Its Fifteenth Session, Held in Copenhagen from 7 to 19 December 2009 – Addendum – Part Two: Action Taken by the Conference of the Parties at Its Fifteenth Session*, UN Doc FCCC/CP/2009/11/Add.1 (30 March 2010) Decision 2/CP.15 ('*Copenhagen Accord*') 4.

34 Conference of the Parties, United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties on Its Seventeenth Session, Held in Durban from 28 November to 11 December – Addendum – Part Two: Action Taken by the Conference of the Parties at Its Seventeenth Session*, UN Doc FCCC/CP/2011/9/Add.1 (15 March 2012) Decision 1/CP.17 ('*Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action*') para 1: deciding to extend the mandate of the AWG-LCA for one year and terminate it thereafter.

35 Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol, United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol on Its Eighth Session, Held in Doha from 26 November to 8 December 2012 – Addendum – Part Two: Action Taken by the Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol at Its Eighth Session*, COP Dec 1/CMP.8, UN Doc FCCC/KP/CMP/2012/13/Add.1 (28 February 2013) annex 1 ('*Doha Amendment to the Kyoto Protocol*').

36 *Ibid* art 1A.

weakened further by Canada's withdrawal from the *Protocol* and the refusal of the Russian Federation, Japan and New Zealand to undertake commitments in a second commitment period. Moreover, the *Doha Amendment* never gained formal legal effect: at present, only 66 parties to the *Protocol* have ratified the *Doha Amendment*, while 144 ratifications are required for its entry into force.<sup>37</sup> Uncertainty has therefore prevailed about the future of the *Kyoto Protocol*.<sup>38</sup> As discussed below, the *Paris Agreement* might have resolved this uncertainty, at least politically, by incorporating the bottom-up approach to mitigation pledges introduced in Copenhagen into a new legal instrument. Indeed, although the *Agreement* does not reference the *Protocol*,<sup>39</sup> its adoption is widely understood to mark the end of the top-down approach to international climate governance that was premised on legally binding emission reduction commitments for developed countries.

## B The Durban Mandate

It was at COP17 in Durban, South Africa, that states paved the way for the *Paris Agreement* by creating the Ad Hoc Working Group on the Durban Platform for Enhanced Action ('AWG-ADP') with a mandate to 'develop a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties' to be adopted at the 21<sup>st</sup> Conference of the Parties ('COP21') in 2015, and to come into effect in 2020.<sup>40</sup> The phrase 'applicable to all' was the subject of intense debate at Durban, as it communicated a 'political expectation that the climate regime must contain greater symmetry in the commitments undertaken by all Parties to the new agreement'.<sup>41</sup> In other words, the phrase signalled a definitive move away from the model of differentiation between developed and developing countries' obligations embodied in the *UNFCCC* and the *Kyoto Protocol*. The *Durban Mandate* also listed, inter alia, the following topics that were to be of concern to the AWG-ADP: 'mitigation, adaptation, finance, technology development and transfer, transparency of action and support, and capacity-building'.<sup>42</sup> There was

37 See United Nations Framework Convention on Climate Change, *Status of the Doha Amendment* (18 July 2016) <[http://unfccc.int/kyoto\\_protocol/doha\\_amendment/items/7362.php](http://unfccc.int/kyoto_protocol/doha_amendment/items/7362.php)>.

38 The *Protocol* itself requires that commitments for subsequent periods for developed country parties 'shall be established': *Kyoto Protocol* art 3(9). See also Daniel Bodansky and Lavanya Rajamani, 'The Evolution and Architecture of the Climate Change Regime' in Detlef Sprinz and Urs Luterbacher (eds), *International Relations and Global Climate Change* (MIT Press, 2<sup>nd</sup> ed, forthcoming, 2016) <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2168859](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2168859)>.

39 The Paris decision, however, references the *Protocol* in the context of pre-2020 action: see especially *Adoption of the Paris Agreement*, UN Doc FCCC/CP/2015/10/Add.1, preamble '[s]tressing the urgency of accelerating the implementation of the Convention and its Kyoto Protocol in order to enhance pre-2020 ambition' and para 105(a) '[u]rging all Parties to the Kyoto Protocol that have not already done so to ratify and implement the Doha Amendment'.

40 *Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action*, UN Doc FCCC/CP/2011/9/Add.1, paras 2–6.

41 Harald Winkler and Lavanya Rajamani, 'CBDR&RC in a Regime Applicable to All' (2014) 14 *Climate Policy* 102, 103.

42 *Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action Mandate*, UN Doc FCCC/CP/2011/9/Add.1, para 5.

thus significant overlap between the work of the AWG-ADP and that of the AWG-LCA. At the first session of the AWG-ADP in 2012, PSIDS and other small island states succeeded in their efforts to create a two-track negotiating process under the AWG-ADP with a view of closing the gap in mitigation ambition prior to 2020. Accordingly, the first track of the AWG-ADP would be devoted to the agreement that was to be adopted in 2015 ('Workstream 1') and the second track would be devoted to enhancing mitigation ambition before the new agreement comes into force ('Workstream 2').<sup>43</sup>

At COP18 held in Doha, Qatar, the work of the AWG-LCA and the AWG-KP were brought to an end. Formally, parties transferred matters still under consideration by these two ad hoc working groups to the two subsidiary bodies of the UNFCCC, but in reality the work of the ad hoc working groups had already been eclipsed by the AWG-ADP. Consequently, the meetings of the AWG-ADP also took centre stage at the 19<sup>th</sup> Conference of the Parties ('COP19') in Warsaw, Poland. Discussions continued on matters such as a long-term temperature goal, burden sharing, national plans and reporting, and market and non-market mechanisms. It was agreed that states would submit intended nationally determined contributions ('INDCs') that were to reflect states' intended climate action, in accordance with the bottom-up approach to mitigation pledges that was first introduced in Copenhagen.<sup>44</sup> However, disagreement prevailed about the scope of INDCs, with developed countries preferring mitigation-centric INDCs while most developing countries insisted that INDCs should reflect all elements of the *Durban Mandate*, including adaptation, finance, technology development and transfer and capacity-building. These differences were reflected in INDCs subsequently submitted, which demonstrate great variation in scope. Decisions on deforestation and the creation of the Warsaw international mechanism on loss and damage were also taken in Warsaw.<sup>45</sup>

In 2014, the regular May inter-sessional meeting of the parties to the UNFCCC was complemented by a second meeting in Bonn from 20–25 October 2014. The preparatory meetings showed there was little convergence among states, with PSIDS and other small island states, the Least Developed Countries ('LDCs') and the Africa group negotiating for a comprehensive agreement with legally binding mitigation and finance commitments for developed countries. Most developed countries were advocating for an agreement without substantive mitigation or finance obligations.<sup>46</sup> Contention also prevailed between developed and developing countries about how the new agreement and its operationalising

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43 Ibid paras 2, 7).

44 See Conference of the Parties, United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties on Its Nineteenth Session, Held in Warsaw from 11 to 23 November 2013 – Addendum – Part Two: Action Taken by the Conference of the Parties at Its Nineteenth Session*, Dec 1/CP.19, UN Doc FCCC/CP/2013/10/Add.1 (31 January 2014) para 2(b).

45 See Conference of the Parties, United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties on Its Nineteenth Session, Held in Warsaw from 11 to 23 November 2013 – Addendum – Part Two: Action Taken by the Conference of the Parties at Its Nineteenth Session*, Dec 2/CP.19, UN Doc FCCC/CP/2013/10/Add.1 (31 January 2014). See also below Part III(C).

46 The European Union, however, advocated for the inclusion of a legal obligation for all parties to 'implement' their INDCs: see Bodansky, 'The Legal Character of the Paris Agreement', above n 8, 146.

structures would incorporate adaptation, loss and damage, technology development and transfer and capacity building.

Against this backdrop, the 20<sup>th</sup> Conference of the Parties ('COP20') held from 1–12 December 2014 in Lima, Peru produced little progress towards a new agreement. Instead differences between states became more pronounced. Developed countries appeared more entrenched in the view that the burdens of climate change should be more equally shared among all states. Meanwhile, most developing countries continued to insist that a new instrument should contain legally binding emission reduction targets, coupled with new financial commitments, for developed countries. Thus COP20 merely reiterated what had already been previously decided, providing some technical and logistical details about how negotiations for the draft agreement would progress but making little progress on substantive issues.<sup>47</sup> No negotiating text was agreed, but it was agreed that three extra negotiation sessions would be held in 2015 before COP21 in February, August/September, and October, in addition to the annual session that is usually held in May or June in Bonn.

The first of these negotiating sessions was held in Geneva, Switzerland, on 8–13 February 2015. At this session, for the first time, text for a new agreement was proposed by states and included in a document. The co-chairs of the AWG-ADP also promised to produce a compilation of proposals by states. They indicated that this would be done after the Bonn meeting in June 2015, so as to give states an additional opportunity to add to or clarify their views on negotiating text. Nevertheless, at the end of the Geneva session, an 86 page document entitled *Negotiating Text* was produced.<sup>48</sup> The meeting from 1–11 June 2015 in Bonn, Germany, did provide an opportunity for states to clarify their views.

Again, however, what emerged were widely divergent views. In mid-July, the incoming French Presidency of the COP hosted a ministerial level meeting, which included a very limited number of civil society actors. Despite some optimistic assessments by the hosts, little in terms of substantive progress seemed to emerge. This pessimistic assessment was confirmed at the August/September AWG-ADP. On 24 July 2015, the co-chairs released an informal *Scenario Note on the Tenth Part of the Second Session of the Ad Hoc Working Group on the Durban Platform for Enhanced Action* of 83 pages, thus slightly cutting down the *Negotiating Text*.<sup>49</sup> This text was discussed before the extraordinary session that took place in Bonn from 31 August – 4 September 2015.

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47 Conference of the Parties, United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties on Its Twentieth Session, Held in Lima from 1 to 14 December 2014 – Addendum – Part Two: Action Taken by the Conference of the Parties at Its Twentieth Session*, Dec 1/CP.20, UN Doc FCCC/CP/2014/10/Add.1 (2 February 2015) ('*Lima Call for Climate Action*').

48 Ad Hoc Working Group on the Durban Platform for Enhanced Action, *Work of the Contact Group on Item 3: Negotiating Text*, 2<sup>nd</sup> sess, 8<sup>th</sup> pt ('*Negotiating Text*') <[https://unfccc.int/files/bodies/awg/application/pdf/negotiating\\_text\\_12022015@2200.pdf](https://unfccc.int/files/bodies/awg/application/pdf/negotiating_text_12022015@2200.pdf)>. This is the advanced unedited version of 12 February 2015.

49 Ad Hoc Working Group on the Durban Platform for Enhanced Action, *Scenario Note on the Tenth Part of the Second Session of the Ad Hoc Working Group on the Durban Platform for Enhanced Action: Note*



Annex II of the 24 July 2015 text was a document called the *Co-Chairs' Tool: A Non-Paper Illustrating Possible Elements of the Paris Package* ('Tool'). This Document reorganised the Geneva *Negotiating Text* in three parts. First, were those provisions in which the co-chairs believed there was consensus that they should be in the draft agreement. Second, were those provisions in which the co-chairs believed there was consensus that they should be in the draft COP21 decision that would be adopted by COP21. Third, the largest part of the text contained those provisions in which there was no consensus as to where they would appear. The latter part contained several key demands of developing countries, including a roadmap for financial support to developing countries post-2020 and a standalone provision on loss and damage. According to the co-chairs, the *Tool* was 'without prejudice to the structure of the Paris Agreement or to the placement of any provision within that structure'.<sup>50</sup> Nevertheless, it met with mixed reactions by states who wanted to see their interests protected in the draft agreement, which would have a stronger legal import. On 8 September 2015 the co-chairs released a *Working Document* of 45 pages with observations by the co-chairs on the draft agreement as it appeared in the *Tool* they had circulated in Bonn in August.<sup>51</sup>

On 5 October 2015, the co-chairs released a non-paper that included what appeared to be negotiating texts of a draft agreement, a draft COP21 Decision and a separate draft COP21 Decision on Workstream 2.<sup>52</sup> The text was, however, strongly objected to by mainly developing countries on the first day of AWG-ADP 2-11 held from 19–23 October 2015 in Bonn, Germany, as it was felt that developed countries' differentiated responsibilities were not sufficiently reflected in the text despite developing countries' insistence that the new *Agreement* be premised on the principle of CBDRRC. Specifically, developing countries were concerned that the *de minimis* substantive commitments expressed in the text would allow developed countries to 'backslide' on their existing commitments on mitigation, finance, adaptation and technology development and transfer under article 4 of the *UNFCCC*. South African delegate Nozipho Joyce Mxakato-Diseko went so far as to suggest that the co-chairs were treating the proposals of the African Group with contempt, similar to that experienced by the black majority during apartheid.<sup>53</sup> Consequently, in the afternoon of 19 October, the states parties reintroduced provisions that they deemed essential, including

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by the Co-Chairs, UN Doc ADP.2015.4.Informal Note (24 July 2015) <<http://unfccc.int/resource/docs/2015/adp2/eng/4infnot.pdf>>.

50 Ibid annex II 1.

51 Ad Hoc Working Group on the Durban Platform for Enhanced Action, *Working Document*, 2<sup>nd</sup> sess, pt 10 (8 September 2015) <[http://unfccc.int/files/bodies/awg/application/pdf/adp2-10\\_8sep2015t1500\\_cwd.pdf](http://unfccc.int/files/bodies/awg/application/pdf/adp2-10_8sep2015t1500_cwd.pdf)>.

52 Ad Hoc Working Group on the Durban Platform for Enhanced Action, *Non-Paper: Note by the Co-Chairs*, UN Doc ADP.2015.8.Informal Note (5 October 2015) <<http://unfccc.int/resource/docs/2015/adp2/eng/8infnot.pdf>>.

53 Alister Doyle, 'South Africa Compares World Climate Plan to "Apartheid"' *Mail & Guardian* (online), 20 October 2015 <<http://mg.co.za/article/2015-10-20-south-africa-compares-global-climate-plan-to-apartheid>>: 'It is just like apartheid ... We find ourselves in a position where in essence we are disenfranchised'.

references to the principles and commitments of the *UNFCCC*, to the text, swelling the draft agreement from just barely nine pages to 24 pages.<sup>54</sup> Finally, in the late morning of 20 October, less than two months before the treaty was to be adopted, actual negotiations on the text began.<sup>55</sup>

Despite the rushed process, the AWG-ADP fulfilled its mandate in Paris when it provided COP21 with a draft text of the *Paris Agreement* at the end of the first week of the meeting.<sup>56</sup> This text, however, was far from finished and negotiations continued day and night during the last week of COP21 and into overtime to finalise it, culminating in the adoption of the *Paris Agreement* text about a day and a half after COP21 was planned to have ended. The *Paris Agreement* was thus the result of processes which had taken considerable time, but only produced a negotiating text after a rushed drafting process. Moreover, the AWG-ADP and then the COP and its spinoff and contact groups met in relative secrecy. Observers were excluded from almost every meeting in which negotiations took place in accordance with decisions, first of the co-chairs of the AWG-ADP, then by the President of COP21, then-French Minister of Foreign Affairs and International Development, Laurent Fabius.<sup>57</sup> It is in this context of unsteady and relatively secret negotiations that the *Paris Agreement* must be understood.<sup>58</sup>

### C The Special Case of the United States

As noted above, since COP17 in 2011 it had been agreed that the AWG-ADP was to ‘develop a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties’.<sup>59</sup> Despite the ambiguity of the terms ‘agreed outcome with legal force’,<sup>60</sup> this phrasing created an expectation that the outcome of the AWG-ADP would be a treaty, which, as noted above, generally creates legally binding obligations. This standard understanding of international law caused problems for the United States. If the *Paris Agreement* included substantive legal obligations that could not be implemented under already existing law, then it would have to receive the

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54 Copies of these informal documents are on file with the authors.

55 The revised text resulting from the negotiations was issued as another non-paper: Ad Hoc Working Group on the Durban Platform for Enhanced Action, *Draft Agreement and Draft Decision on Workstreams 1 and 2 of the Ad Hoc Working Group on the Durban Platform for Enhanced Action* (version of 23 October 2015 at 23.30) <<http://unfccc.int/files/bodies/application/pdf/ws1and2@2330.pdf>>.

56 Ad Hoc Working Group on the Durban Platform for Enhanced Action, *Draft Paris Agreement: Draft Conclusions Proposed by the Co-Chairs*, 2<sup>nd</sup> sess, pt 12, Agenda Item 3, UN Doc FCCC/ADP/2015/L.6 (5 December 2015).

57 See, eg, Nitin Sethi, ‘Civil Society Observers Barred from Climate Change Talks in Bonn’, *Business Standard* (online), 21 October 2015 <[http://www.business-standard.com/article/international/civil-society-observers-barred-from-climate-change-talks-in-bonn-115102001026\\_1.html](http://www.business-standard.com/article/international/civil-society-observers-barred-from-climate-change-talks-in-bonn-115102001026_1.html)>.

58 See also Meinhard Doelle, ‘The Paris Agreement: Historic Breakthrough or High Stakes Experiment?’ (2016) 6 *Climate Law* 1, 7: stating that the diminished transparency resulting from the exclusion of civil society ‘may have made agreement easier, but it likely did not contribute to a stronger outcome’.

59 *Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action*, UN Doc FCCC/CP/2011/9/Add.1, para 2.

60 See Lavanya Rajamani, ‘The Durban Platform for Enhanced Action and the Future of the Climate Regime’ (2012) 61 *International and Comparative Law Quarterly* 501, 507.

consent of the opposition Republican Senate before the United States would be able to ratify it.<sup>61</sup> This, it became clear, would not happen. To circumvent this obstacle and support a *Paris Agreement*, United States President Barack Obama instructed his Secretary of State, John Kerry, to work to get an agreement without substantive legal obligations so that it could qualify as an executive agreement that would not need the consent of another branch of government in the United States and could be entered into by the President alone.

This is what the Obama Administration convinced the French Presidency of the COP was necessary for the 'Paris COP' to succeed. Thus during COP21 more attention was paid to satisfying the needs of the United States for a merely procedural agreement, rather than trying to strengthen the substantive provisions of the *Paris Agreement*. In other words, instead of seeking the strong legally binding obligations for international action on emission reductions and financial support that the majority of states supported, the French Presidency led the effort to satisfy the concerns of the United States that no new substantive obligations be included in the *Agreement*. The cooperation between the French Presidency and the United States to this end reached a level of absurdity when, just minutes before the *Agreement* was adopted, the French Presidency declared that a technical revision had to be made to article 4. This technical revision changed the word 'shall' to 'should' in article 4(4) that originally read: '[d]eveloped country Parties shall continue taking the lead by undertaking economy-wide absolute emission reduction targets'.<sup>62</sup> In making this very substantive change by the mere fiat, the French COP President Laurent Fabius changed a legally binding obligation into an aspiration. The French claimed that the change was due to a mere typing error. However, some observers suggested that the text came about because US government lawyers 'had found, it was said to their horror, that they had unwittingly approved a vital word'.<sup>63</sup> And because the US reportedly refused to object to this vital word from the floor, it was felt by some 'that the US was objecting unfairly at the last possible moment to the developing countries' most important "red line".<sup>64</sup> If the change was not an honest technical revision, then it was a serious abuse of an international negotiating process.

From the perspective of United States law, however, the effort of the French Presidency to placate the concerns of the United States seems based on a faulty or misleading premise. This unsound foundation is the belief that ratification of the *Paris Agreement* as an executive agreement makes the *Agreement* legally binding on the United States government. In fact, executive agreements may not be legally binding on the United States government if a President does not feel a

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61 See also Daniel Bodansky, 'Legal Options for US Acceptance of a New Climate Change Agreement' (Report, Center for Climate and Energy Solutions, May 2015).

62 Compare the *Paris Agreement* text as contained in UN Doc FCCC/CP/2015/L.9 (12 December 2015) with the text that appears in UN Doc FCCC/CP/2015/L.9/Rev.1 (12 December 2015) and UN Doc FCCC/CP/2015/10/Add.1 (13 December 2015).

63 John Vidal, 'How a "Typo" Nearly Derailed the Paris Climate Deal', *The Guardian* (online), 16 December 2015 <<http://www.theguardian.com/environment/blog/2015/dec/16/how-a-typo-nearly-derailed-the-paris-climate-deal>>.

64 *Ibid.*

moral obligation to respect them any longer according to the US courts.<sup>65</sup> Moreover, the bipartisan Congressional Research Service has found that ‘[w]hen Congress opposes the agreement and the President’s constitutional authority to enter the agreement is ambiguous, it is unclear if or when such an agreement would be given effect’.<sup>66</sup> It is likely that environmental treaties, such as the *Paris Agreement*, fall into this category of agreements. Indeed, environmental treaties are in a category of treaties<sup>67</sup> that ‘[a]s a matter of historical practice ... have traditionally been entered [into] as treaties in all or nearly every instance’.<sup>68</sup> This would create a presumption that could be exploited by Congress or any other entity affected by the *Agreement*. Opponents of the treaty could use this argument to persuade the president making the agreement, or a future president, to ignore obligations under it. This is no revelation, but something observers of US constitutional law have known for a long time.<sup>69</sup>

The exact domestic law consequences of an executive agreement may depend on whether the agreement is self-executing or not. Self-executing agreements can create rights judiciable before the US courts. Executive agreements that are not self-executing are not enforceable before the domestic courts. It is likely that the *Paris Agreement* would be found not to be self-executing, thereby rendering a mere moral obligation that can be disregarded by subsequent presidents. Moreover, because it is only morally binding, even the US president that made the agreement can reverse his or her decision and ignore the *Agreement* with no consequence under domestic law. Of course, doing so would violate international law, which is binding irrespective of national law.<sup>70</sup>

#### D Relationship between the UNFCCC and the Paris Agreement

With the mandate of the AWG-ADP stipulating that the new instrument or outcome to be developed was to be adopted ‘under the Convention’, the relationship between the *Convention* and the new *Agreement* remained a much-discussed question throughout negotiations in the run-up to COP21.<sup>71</sup> Most

65 But see *American Insurance Association v Garamendi*, 539 US 396 (2003), where the Supreme Court of the United States held that an executive agreement that a president seeks to uphold will be binding on each of the 50 states of the United States and thereby pre-empt state legislation to the contrary: at 416.

66 Michael John Garcia, ‘International Law and Agreements: Their Effect upon US Law’ (Report No RL32528, Congressional Research Service, 18 February 2015) 6.

67 The *UNFCCC* is among the examples given by the Congressional Research Service: Ibid 7 n 45.

68 Ibid 7.

69 See, eg, Edwin Borchard, ‘Treaties and Executive Agreements – A Reply’ (1945) 54 *Yale Law Journal* 616.

70 See, eg, *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947 (Advisory Opinion)* [1988] ICJ Rep 12, 34 [57]: ‘the fundamental principle of international law that international law prevails over domestic law’; *Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United States of America) (Provisional Measures)* [1992] ICJ Rep 114, 141 (Judge Shahabuddeen): ‘[i]nability under domestic law to act [is] no defence to non-compliance with an international obligation’.

71 On the negotiation history of the phrase, see Rajamani, ‘The Durban Platform for Enhanced Action’, above n 60, 507, citing John Vidal and Fiona Harvey, ‘Durban Climate Deal Struck after Tense All-Night Session’ *The Guardian* (online), 11 December 2011

developing countries sought to have the new instrument adopted as a subsidiary instrument under the *UNFCCC*, while most developed countries appeared to favour an outcome of the AWG-ADP that would stand on its own. These differences manifested themselves in particular in negotiations on the ‘Purpose’ of the *Agreement*, which was the title of article 2 in several previous drafts before titles were removed. At the centre of controversy around the relationship between the *Agreement* and the *UNFCCC* was the role and place of the principle of CDRRC in the new instrument. The Group of 77 (‘G77’) and the Like-Minded Developing Countries (‘LMDC’) argued that the integrity of this principle would be better preserved if the *Paris Agreement* was a subsidiary instrument under the *UNFCCC*, while most developed countries sought to keep references to the *UNFCCC* to a bare minimum precisely to achieve a break with the differentiation approach on which the *Convention* is premised.

Accordingly, most developed countries preferred a formulation of the chapeau that would not refer to the *UNFCCC* as a whole but merely to the ultimate objective of the *Convention*. The language proposed by these states stipulated the purpose of the *Agreement* as ‘to achieve the objective of the Convention as stated in its Article 2’.<sup>72</sup> Developed countries understood this language to make it possible to argue that the principles in the *Convention*, including CDRRC, were not automatically applicable to the *Agreement*. Moreover, the language was thought to suggest that ‘dangerous anthropogenic interference with the climate system’<sup>73</sup> had not yet occurred. The latter understanding would reduce the chances of developing countries successfully arguing that loss and damage associated with climate change resulted from developed countries’ non-compliance with their existing obligations under the *Convention*. Developing countries therefore favoured a different formulation that read ‘to enhance the implementation of the Convention’.<sup>74</sup> This formulation indicated the *Agreement* was under the *Convention* and also indicated that the *Convention* had not been fully implemented to date. A ‘near-final’ draft of the *Agreement* that used the phrase ‘to further implement the objective of the Convention’<sup>75</sup> was rejected outright by developing countries.

The final language of article 2 reflects a carefully crafted compromise between the two positions and reads: ‘This Agreement, in enhancing the implementation of the Convention, including its objective, aims to strengthen the global response to the threat of climate change, in the context of sustainable

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<<https://www.theguardian.com/environment/2011/dec/11/durban-climate-deal-struck>>; Michael McCarthy, ‘11<sup>th</sup>-Hour Agreement in Durban Sees Big Three Legally Bound to Reduce Carbon Emissions’ *Independent* (online), 12 December 2011 <<http://www.independent.co.uk/environment/climate-change/11th-hour-agreement-in-durban-sees-big-three-legally-bound-to-reduce-carbon-emissions-6275762.html>>.

72 *Draft Paris Agreement: Draft Conclusions Proposed by the Co-Chairs*, UN Doc FCCC/ADP/2015/L.6, art 2(1).

73 *UNFCCC* art 2.

74 *Ibid.*

75 Ad Hoc Working Group on the Durban Platform for Enhanced Action, *Draft Paris Outcome: Proposal by the President*, art 2(1) (emphasis added) <<http://unfccc.int/resource/docs/2015/cop21/eng/da02.pdf>>. This is version 2 of the agreement of 10 December 2015 at 21:00.

development and efforts to eradicate poverty'.<sup>76</sup> Although the formulation is somewhat confusing, it does make it clear that the *Agreement* is subsidiary to the *Convention*. Articles 22–4 of the *Agreement* reinforce this understanding by referring to the provisions on amendments and dispute settlements in the *Convention* as applying mutatis mutandis to the *Agreement*. Further, article 17 notes that the UNFCCC Secretariat that serves the *Convention* shall also serve the *Agreement*.

### III CONTENT OF THE *PARIS AGREEMENT*

#### A Long-Term Temperature Goal and Scope of the Agreement (Article 2)

One of the most controversial issues discussed in the years of negotiations leading up to the *Paris Agreement* was a limit for global temperature rise from pre-industrial times. This was referred to as a 'long-term temperature goal'.<sup>77</sup> A related issue was whether the new instrument should have a broader 'global goal' that would refer not only to mitigation but also to adaptation and possibly finance. These issues had been discussed consistently under the AWG-LCA and then under the AWG-ADP. The vast majority of developing countries favoured an ambitious long-term temperature goal of keeping global temperature rise 'well below 1.5° Celsius' together with a broadly formulated global goal that would include mitigation, adaptation and finance. However, a few upper-middle-income countries (including China) and two lower middle-income countries (India and Indonesia), while supporting a broadly formulated global goal, initially did not support a long-term temperature goal of staying well below 1.5°C because of concerns about the restraints such a target would pose on developing countries' capacity to pursue economic development. These countries preferred the less ambitious goal of keeping global temperature rise below 2°C.<sup>78</sup> This was also the position of major oil-producing countries led by Saudi Arabia.<sup>79</sup> Developed countries, including Australia, similarly preferred a long-term temperature goal of keeping global temperature rise below 2°C, while advocating for a global goal that would comprise mitigation only based on the argument that a 'focused' purpose would better ensure the effectiveness of the new instrument.<sup>80</sup>

Combinations of the above-mentioned options had appeared in brackets or as 'proposals' in most pre-Copenhagen drafts of texts negotiated by the AWG-LCA,

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76 *Paris Agreement*, UN Doc FCCC/CP/2015/10/Add.1, annex art 2(1).

77 See generally Petra Tschakert, '1.5°C or 2°C: a Conduit's View from the Science-Policy Interface at COP20 in Lima, Peru' (2015) 2(3) *Climate Change Responses* <<https://climatechangeresponses.biomedcentral.com/articles/10.1186/s40665-015-0010-z>>.

78 Ibid. See also Sophie Yeo, 'In-Depth: Is the 1.5C Global Warming Goal Politically Possible?', *Carbon Brief* (online), 15 June 2015 <<https://www.carbonbrief.org/in-depth-is-the-1-5c-global-warming-goal-politically-possible>>.

79 See, eg, Alexandra Sims, 'Saudi Arabia Accused of "Blocking" Climate Change Deal at Paris Summit', *The Independent* (online), 10 December 2015 <<http://www.independent.co.uk/news/world/middle-east/saudi-arabia-accused-of-blocking-climate-change-deal-at-paris-summit-a6766816.html>>.

80 See, eg, Benoit Mayer, 'Human Rights in the Paris Agreement' (2016) 6 *Climate Law* 109, 112, n 14 and accompanying text.

where the issues were discussed under the heading ‘Shared Vision’.<sup>81</sup> The choice of a 2°C goal in the *Copenhagen Accord*, coupled with a narrow focus on mitigation only, appeared to be the main reason why several developing countries, including Tuvalu, rejected the *Accord*.<sup>82</sup> Others, however, were prepared to agree to the *Accord* based on its inclusion of a provision that foresaw ‘consideration of strengthening the long-term goal referencing various matters presented by the science, including in relation to temperature rises of 1.5 degrees Celsius’.<sup>83</sup> At COP16 in Cancun, Mexico, a compromise was reached to tentatively agree on a long-term temperature goal of staying below a 2°C rise in temperature, but it was also agreed that there would be a review by 2015 on whether the goal should be strengthened to 1.5°C.<sup>84</sup> This compromise resulted in the establishment of a Structured Expert Dialogue (‘SED’) under the two subsidiary bodies of the *UNFCCC*: the Subsidiary Body for Implementation (‘SBI’); and the Subsidiary Body on Scientific and Technological Advice (‘SBSTA’), whereby scientists would be presenting evidence on the impacts associated with, and feasibility of, the more ambitious goal of keeping any temperature rise below 1.5°C. The review process resulted in a comprehensive report with recommendations, and suggested that the 2°C goal was an inadequate ‘guardrail’ to protect the most vulnerable nations against severe climate impacts.<sup>85</sup> Moreover, it challenged the framing of the long-term temperature goal as a ‘guardrail’ altogether; stating that

[s]ignificant climate impacts are already occurring at the current level of global warming and additional magnitudes of warming will only increase the risk of severe, pervasive and irreversible impacts. Therefore, the ‘guardrail’ concept, which implies a warming limit that guarantees full protection from dangerous anthropogenic interference, no longer works.<sup>86</sup>

Accordingly, it suggested that ‘efforts should be made to push the defence line as low as possible’.<sup>87</sup> The report was embraced by the most vulnerable developing countries, particularly by the Alliance of Small Island States (‘AOSIS’), as endorsing their demand for a more ambitious global temperature goal. However, it took until the final days in Paris for the COP to be able to draw

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81 See, eg. Ad Hoc Working Group on Long-Term Cooperative Action Under the Convention, *Revised Negotiating Text*, UN Doc FCCC/AWGLCA/2009/INF.1 (22 June 2009) 16 ff.

82 See, eg. Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol (19 December 2009) (Ian Fry) 3:08 <[http://cop15.meta-fusion.com/play.php?id\\_kongresssession=2755](http://cop15.meta-fusion.com/play.php?id_kongresssession=2755)>.

83 *Copenhagen Accord*, UN Doc FCCC/CP/2009/11/Add.1, para 12.

84 Conference of the Parties, United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties on Its Sixteenth Session, Held in Cancun from 29 November to 10 December 2010 – Addendum – Part Two: Action Taken by the Conference of the Parties at Its Sixteenth Session*, Dec 1/CP.16, UN Doc FCCC/CP/2010/7/Add.1 (15 March 2011) para 139(a)(iv) (‘*The Cancun Agreements*’).

85 Subsidiary Body for Scientific and Technological Advice and Subsidiary Body for Implementation, United Nations Framework Convention on Climate Change, *Report on the Structured Expert Dialogue on the 2013–2015 Review: Note by the Co-Facilitators of the Structured Expert Dialogue*, UN Doc FCCC/SB/2015/INF.1 (4 May 2015) para 22, figure 4 (‘*SED report*’): showing that ‘at 2°C of warming, aggregated risks of climate change for unique and threatened systems from extreme weather events and from distribution of impacts will become high’.

86 *Ibid* 15.

87 *Ibid* 33.

conclusions from the report: in negotiations in an SBI-SBSTA Contact Group mandated to complete the 2013–15 review, a coalition of countries led by Saudi Arabia and China consistently opposed the adoption of a draft COP decision that would enable the COP to draw conclusions from the report.

Meanwhile, negotiations on the long-term temperature goal itself were ongoing under the AWG-ADP, and later the Comité de Paris set up by the French Presidency, as part of the negotiations on article 2 of the *Paris Agreement*. Initially, negotiation texts reflected entrenched positions with the 1.5°C and 2°C options, together with an option of ‘well below 2°C’, appearing in brackets in the text.<sup>88</sup> Positions of some developed countries started to shift during the second week of COP21, with the European Union, Germany and Canada, amongst others, publicly expressing willingness to accommodate the 1.5°C goal. Only the final draft of the text contained the present language of

[h]olding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change ...<sup>89</sup>

This unlocked agreement on a COP decision on the 2013–15 review. The COP decided

that the goal is to hold the increase in the global average temperature to well below 2°C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change.<sup>90</sup>

Further, the negotiations were resolved in favour of a global goal with a broad scope. With impacts materialising and adaptation needs becoming more urgent and profound, there had been an increasingly strong call from developing countries – including from PSIDS – to place adaptation at the centre of the climate change regime, on par with mitigation. This resulted in the establishment of the Cancun Adaptation Framework at COP16,<sup>91</sup> and culminated in the broadly formulated article 2 of the *Paris Agreement*. The stated purpose of the *Agreement* includes, in addition to the long-term temperature goal stated in article 2(1)(a), sub-paragraph (b): ‘[i]ncreasing ... the ability to adapt to the adverse impacts of climate change’, and sub-paragraph (c): ‘[m]aking finance flows consistent with a pathway towards low greenhouse gas emissions and climate resilient development’. The second clause of article 2 places these goals in the context of equity and the principle of common but differentiated responsibilities and respective capabilities, ‘in the light of different national circumstances’. The

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88 See, eg, Ad Hoc Working Group on the Durban Platform for Enhanced Action, *Draft Agreement and Draft Decision on Workstreams 1 and 2 of the Ad Hoc Working Group on the Durban Platform for Enhanced Action: Work of the ADP Contact Group*, ADP.2015.11.InformalNote (6 November 2015) art 2.

89 *Paris Agreement*, UN Doc FCCC/CP/2015/10/Add.1, annex art 2(1)(a).

90 Conference of the Parties, United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties on Its Twenty-First Session, Held in Paris from 30 November to 13 December 2015 – Addendum – Part Two: Action Taken by the Conference of the Parties at Its Twenty-First Session*, Dec 10/CP.21, UN Doc FCCC/CP/2015/10/Add.2 (29 January 2016) para 4.

91 *The Cancun Agreements*, UN Doc FCCC/CP/2010/7/Add.1, para 13.



latter formulation first emerged in the US–China bilateral agreement on climate change<sup>92</sup> and found its way into the climate change regime through a COP decision adopted at COP20 in Lima, Peru.<sup>93</sup> Although the language appears to be intended to dilute the principle of CBDRRC by shifting the emphasis from historical responsibility to climate change to a more amorphous concept of national variation, the fact that the *Agreement* remains anchored in the *Convention* and its principles means that the additional seven words are unlikely to have much legal impact.<sup>94</sup> The centrality of adaptation in the global goal is complemented by a comprehensive separate article on adaptation that is discussed below in section C, namely article 7.

## B Mitigation (Article 4)

As noted above, the *Paris Agreement* fails to address mitigation with legally binding mitigation targets that built on the targets that had been set in the *Kyoto Protocol*. PSIDS and most developing countries had been calling for continued legally binding emission reduction commitments for developed countries for many years; first in the negotiations under the AWG-KP and the AWG-LCA (for the United States, the major developed state that is not a party to the *Kyoto Protocol*), and then in negotiations under the AWG-ADP. While, as mentioned above, this call was partly successful at COP17 in Durban where at least some developed countries agreed to a second commitment period under the *Kyoto Protocol*, as negotiations progressed under the AWG-ADP, it became apparent that developed countries did not intend to undertake legally binding emission reduction commitments under a new agreement. The main reason was that participation by the United States in a new agreement seemed unlikely if it would have included such commitments.<sup>95</sup>

Instead, in a lengthy article 4, the *Paris Agreement* establishes a system of emission reduction reporting that is based on ‘nationally determined’, rather than internationally negotiated, ‘contributions’. Although nationally determined contributions (‘NDCs’) are to be prepared, communicated and maintained ‘with the aim of achieving the objectives of such contributions’,<sup>96</sup> the language of article 4 falls short of requiring that parties actually achieve or implement their NDCs. There is no sanction or corrective action foreseen for a state that does not undertake the action it reports it will take. Clause 3 of article 4 stipulates that each party’s successive NDC ‘will represent a progression beyond the Party’s

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92 Office of the Press Secretary, The White House, ‘US–China Joint Announcement on Climate Change’ (Press Release, 12 November 2014) [2] <<http://www.whitehouse.gov/the-press-office/2014/11/11/us-china-joint-announcement-climate-change>>: ‘committed to reaching an ambitious 2015 agreement that reflects the principle of common but differentiated responsibilities and respective capabilities, in light of different national circumstances’.

93 *Lima Call for Climate Action*, UN Doc FCCC/CP/2014/10/Add.1, para 3.

94 Cf Lavanya Rajamani, ‘Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics’ (2016) 65 *International and Comparative Law Quarterly* 493, 508: arguing that ‘the clause “in light of different national circumstances” ... introduces a dynamic element to the interpretation of the principle’.

95 See Part II(C).

96 *Paris Agreement*, UN Doc FCCC/CP/2015/10/Add.1, annex art 4(2).

then current [NDC] and reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances'. However, it must be emphasised that there is no sanction or corrective action foreseen for a state that reports that it will only undertake *de minimis* action. Because this framework is based almost exclusively on procedural obligations, it will be difficult to hold states accountable for emission reduction action or inaction. It is the lack of more substantive commitments that has led leading climate scientists to call the *Paris Agreement* a 'fraud' with 'no action, just promises'.<sup>97</sup>

### C Adaptation (Article 7)

Two questions dominated negotiations on adaptation: the links between adaptation and other parts of the *Paris Agreement* – especially finance – and the provisions on the implementation of adaptation actions. The importance of adaptation in the *Agreement* had partly been decided by its inclusion in article 2, which places it on par with mitigation. It is also confirmed in article 7 of the *Agreement*, which establishes a qualitative global goal for adaptation, namely of 'enhancing adaptive capacity, strengthening resilience and reducing vulnerability ... with a view to contributing to sustainable development and ensuring an adequate adaptation response in the context of the temperature goal'.<sup>98</sup> The link with the long-term temperature goal was an important demand of AOSIS and the LDCs, and is reaffirmed by paragraph 4 of article 7 in which parties recognise 'that greater levels of mitigation can reduce the need for additional adaptation efforts'.<sup>99</sup> Article 7 further provides that

adaptation action should follow a country-driven, gender-responsive, participatory and fully transparent approach, taking into consideration vulnerable groups, communities and ecosystems ... based on and guided by the best available science and, as appropriate, traditional knowledge, knowledge of indigenous peoples and local knowledge systems ...<sup>100</sup>

As to adaptation finance, developing countries had been hoping for strengthened finance commitments to turn the USD100 billion per year by 2020 aspirational pledge from COP15<sup>101</sup> into a legally binding ceiling for climate finance, with scaled-up finance for the years thereafter and comparatively more finance for adaptation. They had also advocated for more capacity-building support and greater access to technology, to support their adaptation efforts. However, the progress made in Paris on adaptation finance is not so much about substance and very much about process, similar to the handling of mitigation. As noted above, the *UNFCCC* already creates an obligation for developed country parties to assist particularly vulnerable countries, including SIDS, with

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97 Oliver Milman, 'James Hansen, Father of Climate Change Awareness, Calls Paris Talks "a Fraud"', *The Guardian* (online), 12 December 2015 <<http://www.theguardian.com/environment/2015/dec/12/james-hansen-climate-change-paris-talks-fraud>>.

98 *Paris Agreement*, UN Doc FCCC/CP/2015/10/Add.1, annex art 7(1).

99 *Ibid* art 7(4).

100 *Ibid* art 7(5).

101 *Copenhagen Accord*, UN Doc FCCC/CP/2009/11/Add.1, para 8.

adaptation. The *Agreement* appears to reaffirm this obligation but does not expand it.<sup>102</sup> It does, however, stipulate that the international support provided should enable developing countries to cooperate on enhancing adaptation action,<sup>103</sup> plan and implement adaptation actions,<sup>104</sup> and submit and update adaptation communications.<sup>105</sup> The provision of support for both planning and implementation was a key demand of AOSIS and the LDCs.<sup>106</sup>

Equally important is that the *Paris Agreement* integrates adaptation into all implementation-related parts of the *Agreement*. For example, the *Agreement* requires states parties to submit and periodically update an adaptation communication on the action, planning and support provided and received for adaptation, which will be stored in a public registry.<sup>107</sup> It is stated that this should not ‘creat[e] any additional [reporting] burden for developing country Parties’.<sup>108</sup> Adaptation is also included in the global stocktake in a comprehensive manner, and is aimed at (i) recognising adaptation efforts; (ii) enhancing the implementation of adaptation actions; (iii) reviewing the adequacy and effectiveness of adaptation and support provided; and (iv) reviewing overall progress towards achieving the global goal on adaptation.<sup>109</sup> The qualitative global goal on adaptation is particularly important in light of the adaptation component of the global stocktake, as it clarifies the content of developed countries’ existing obligations to provide financial support for adaptation and will shed light on compliance with these obligations.

From a doctrinal perspective, however, the mitigation and adaptation sections of the *Agreement* remain as aspirational text with procedures, but little substance. This means that PSIDS and other developing countries will continue to rely on the good faith of each of the developed countries to provide them with the finance, capacity building, and access to technology that they need to adequately adapt to climate change. Articles 9, 10 and 11, on finance, access to technology, and capacity building, respectively, offer the same procedural enticements, but little other action.

#### D Loss and Damage (Article 8)

Although loss and damage are not expressly mentioned in either the *UNFCCC* or the *Kyoto Protocol*, PSIDS and other small island states have called for an insurance mechanism in the time since the *Convention* was negotiated.

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102 *Paris Agreement*, UN Doc FCCC/CP/2015/10/Add.1, annex art 7(13): ‘Continuous and enhanced international support shall be provided to developing country Parties’ for adaptation actions under the *Agreement*.

103 *Paris Agreement*, UN Doc FCCC/CP/2015/10/Add.1, annex art 7(7).

104 *Ibid* art 7(9).

105 *Ibid* arts 7(10)–(11).

106 Achala Abeysinghe, Brianna Craft and Janna Tenzing, ‘The Paris Agreement and the LDCs: Analysing COP21 Outcomes from LDC Positions’ (Issue Paper, International Institute for Environment and Development, March 2016) 14.

107 *Paris Agreement*, UN Doc FCCC/CP/2015/10/Add.1, annex art 7(10)–(12).

108 *Ibid* art 7(10).

109 *Ibid* art 7(14). See further below Part III(I).

Insurance was mentioned again in selected COP decisions<sup>110</sup> but an insurance mechanism never materialised. The first time loss and damage was expressly mentioned in a formal decision was in *The Cancun Agreements*, which initiated consideration on ‘approaches to address loss and damage associated with climate change impacts’ in particularly vulnerable developing countries,<sup>111</sup> and in 2013 the Warsaw International Mechanism on Loss and Damage (‘WIM’) was established. The WIM was to be the main vehicle under the *Convention* to ‘promot[e] the implementation of approaches to address loss and damage associated with the adverse effects of climate change ... in a comprehensive, integrated and coherent manner’.<sup>112</sup>

At COP20 in Lima, AOSIS, the LDCs and other developing countries unsuccessfully tried to secure the inclusion of loss and damage on the list of issues the *Paris Agreement* would address. At that same meeting, the first review of the WIM was scheduled for COP22, a year after the Paris negotiations. However, developing countries – with PSIDS at the forefront – made it clear that a standalone article on loss and damage in the *Paris Agreement*, which would give loss and damage a permanent place in the climate regime, was a red line demand.<sup>113</sup>

The inclusion of a standalone article on loss and damage in the *Paris Agreement* was a surprising victory for PSIDS. The provision in article 8 anchors the WIM into the *Agreement*, thus giving it a durable legal basis. The WIM will be able to work in crucial areas including, amongst other areas: early warning systems, emergency preparedness, slow onset events, irreversible and permanent loss and damage, risk insurance facilities, and climate risk pooling. However, the loss and damage package came with a trade-off: in the decision accompanying the *Paris Agreement* the parties ‘agree[d] that Article 8 of the Agreement does not involve or provide a basis for any liability or compensation’.<sup>114</sup> This language seeks to exclude compensation for damage caused by the actions of countries that contribute the most to climate change from the WIM’s mandate. Although some observers were concerned about the potential broader implications of this language for states’ existing rights to compensation under general international law,<sup>115</sup> a COP decision – which is not in itself binding – cannot override the

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110 See, eg, *Bali Action Plan*, UN Doc FCCC/CP/2007/6/Add.1, para 1(c)(ii).

111 *The Cancun Agreements*, UN Doc FCCC/CP/2010/7/Add.1, para 26.

112 Conference of the Parties, United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties on Its Nineteenth Session, Held in Warsaw from 11 to 23 November 2013 – Addendum – Part Two: Action Taken by the Conference of the Parties at Its Nineteenth Session*, Dec 2/CP.19, UN Doc FCCC/CP/2013/10/Add.1 (31 January 2014) para 5.

113 See, eg, Pacific Island Development Forum Secretariat, *Suva Declaration on Climate Change* (4 September 2015) para 15: ‘Emphasize that the 2015 Paris Climate Change Agreement must provide in a balanced manner all the six elements identified in the Durban Mandate. Loss and damage must be included separately as the seventh element’.

114 *Adoption of the Paris Agreement*, UN Doc FCCC/CP/2015/10/Add.1, para 52.

115 See, eg, Laurie Goering, ‘Climate Deal Could Bar Poor from Seeking Compensation for Losses’ *Reuters* (online), 11 December 2015 <<http://uk.reuters.com/article/uk-climatechange-summit-damage-idUKKBN0TU23R20151211>>; Alex Pashley, ‘Did the Paris Deal Rule Out Climate Compensation?’ *Climate Home* (online), 18 December 2015 <<http://www.climatechangenews.com/2015/12/18/did-the-paris-deal-rule-out-climate-compensation>>.

general rules of state responsibility under international law that require ‘full reparation’ for internationally wrongful conduct.<sup>116</sup> To be on the safe side, however, several PSIDS have made declarations upon ratification of the *Agreement* to preserve their rights to compensation for climate damages under general international law.<sup>117</sup>

### E Finance (Article 9)

Finance is a major obstacle for developing countries seeking to make a significant contribution to climate change mitigation and to protect their own peoples’ wellbeing through adaptation actions. For this reason, the expectations of PSIDS and other developing countries had been high, when discussions of the *Paris Agreement* had started in earnest in 2014, that some modality for providing them adequate finance would be guaranteed at COP21. Despite significant efforts to achieve some imperative language during the course of 2015, by the time states arrived in Paris, it appeared the most that could be expected was a reiteration of mainly moral commitments. Whether even this was achieved is questionable.

Article 9 uses the imperative language of ‘shall’ to describe the duty of developed countries to ‘provide financial resources to assist developing country Parties with respect to both mitigation and adaptation in continuation of their existing obligations under the Convention’.<sup>118</sup> This article is consistent with article 4 of the *UNFCCC*,<sup>119</sup> but does little to build on that text and even appears to backtrack by failing to mention that the finance from developed countries must be ‘new and additional’ as explicitly required by the *UNFCCC*.<sup>120</sup> Other countries are encouraged to provide support, but are not required to do so.<sup>121</sup> There is recognition of ‘the significant role of public funds’, which are part of ‘a wide variety of sources, instruments and channels’ from which finance should come.<sup>122</sup> There is also a recognition that ‘scaled-up financial resources should aim to achieve a balance between adaptation and mitigation’ in a paragraph that recognises developing countries and then particularises those ‘vulnerable to the adverse effects of climate change and have significant capacity constraints’,

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116 International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, 53<sup>rd</sup> sess, Supp No 10, UN Doc A/56/10 (November 2001) ch IV(E)(2), art 31. On the implications of the clause for the *Paris Agreement*, see M J Mace and Roda Verheyen, ‘Loss, Damage and Responsibility after COP21: All Options Open for the Paris Agreement’ (2016) 25 *Review of European Community and International Environmental Law* 197.

117 See, eg, United Nations Treaty Collection, *Declaration by the Marshall Islands* (4 October 2016) <[https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=XXVII-7-d&chapter=27&clang=\\_en](https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-d&chapter=27&clang=_en)>: ‘the Republic of the Marshall Islands declares its understanding that ratification of the Paris Agreement shall in no way constitute a renunciation of any rights under any other laws, including international law’. The Cook Islands, the Federated States of Micronesia, Nauru, the Solomon Islands, Tuvalu and Vanuatu made similar declarations.

118 *Paris Agreement*, UN Doc FCCC/CP/2015/10/Add.1, annex art 9(1).

119 *UNFCCC* arts 4(3)–(4).

120 *Ibid* art 4(3).

121 *Paris Agreement*, UN Doc FCCC/CP/2015/10/Add.1, annex art 9(2).

122 *Ibid* art 9(3).

naming ‘least developed countries and small island developing States’ as needing ‘public and grant-based resources for adaptation’.<sup>123</sup>

The article also contains provision for the reporting by developed countries on resources provided to developing countries<sup>124</sup> through a global stocktake process.<sup>125</sup> But the benefit and reliability of this stocktaking process will depend on the quality and honesty of the quantitative and qualitative data to be reported. In the past, developed countries have shown themselves to be masters of double counting and unreliable climate finance claims. A striking example is the 2015 climate finance report produced by the developed country-dominated Organisation of Economic Cooperation and Development (‘OECD’), which claimed that the USD100 billion per year commitment by developed countries had almost been met.<sup>126</sup> However, a Discussion Paper produced by the respected Climate Change Finance Unit of the Department of Economic Affairs of the Government of India described the OECD methodologies used as ‘inconsistent with the literature and best practice and even “bent” in ways to find more flows than reality’.<sup>127</sup> Marjorie Williams points out that the OECD report was counting mainly private investment,<sup>128</sup> which often instead of injecting resources into a needy country amounts to a net outflow of resources.<sup>129</sup>

Moreover, although states usually create new institutions or mechanisms when they intend to provide significant funding, the *Paris Agreement* does neither. No new institutions or mechanisms were created. Instead ‘[t]he Financial Mechanism of the [UNFCCC], including its operating entities, shall serve as the financial mechanism of this Agreement’.<sup>130</sup> This refers to the article 11 Financial Mechanism in the UNFCCC, namely the Global Environmental Facility (GEF), as well as the Green Climate Fund. But it should also have included the two funds administered by the GEF, the Special Climate Fund and the LDC Fund, as well as the Adaptation Fund that is formally linked to the Kyoto Protocol.<sup>131</sup> All

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123 Ibid art 9(4).

124 Ibid art 9(5).

125 Ibid arts 9(6)–(7), 14.

126 Organisation for Economic Co-operation and Development, ‘Climate Finance in 2013–14 and the USD 100 Billion Goal: A Report by the OECD in Collaboration with Climate Policy Initiative’ (Report, October 2015) 10.

127 Climate Change Finance Unit, Department of Economic Affairs (India), ‘Climate Change Finance, Analysis of a Recent OECD Report: Some Credible Facts Needed’ (Discussion Paper, 27 November 2015) abstract.

128 Marjorie Williams, ‘More Half Empty than Half Full: A Preliminary Review of the OECD/CPI Report, *Climate Finance in 2013–14 and the USD 100 Billion Goal*’, *Third World Network* (online) 30 October 2015 <<http://www.twm.my/title2/climate/info.service/2015/cc151004.htm>>.

129 See, eg, Jesse Griffiths, ‘The State of Finance for Developing Countries, 2014: An Assessment of the Scale of All Sources of Finance Available to Developing Countries’ (Report, European Network on Debt and Development, December 2014). This report estimates that ‘[s]ince 2010, repatriated profits have exceeded new inflows of Foreign Direct Investment’: at 6.

130 *Paris Agreement*, UN Doc FCCC/CP/2015/10/Add.1, annex art 9(8).

131 See generally Smita Nakhoda, Charlene Watson and Liane Schalatek, ‘The Global Climate Finance Architecture’ (Climate Finance Fundamentals No 2, Climate Funds Update, December 2015) for an up-to-date description of the global climate funds linked to the UNFCCC and the *Kyoto Protocol*.

of these have been criticised as being under-financed,<sup>132</sup> and the *Agreement* does little to ensure adequate financing in the future.

The background to these rather carefully negotiated, yet regressive, finance provisions was the claim by developed countries that there had been a shift in the world's economy and that, therefore, the financial burden of responding to climate change, which was squarely placed upon developed countries in the *UNFCCC*, should be given a wider base that includes developing countries. These latter countries however countered by pointing out that developing countries still needed assistance from developed countries.<sup>133</sup> Credible observers noted that in the most recent years for which measurement is available, the economic development gap between the rich and poor countries – developed and developing countries – had actually been widening.<sup>134</sup> Moreover, despite the *de minimis* obligations in the *Agreement*, it has been estimated that 'financial requirements of developing nations to meet proposed actions far exceed (probably by a factor of 5 times) the USD100 billion' that developing countries pledged.<sup>135</sup> An honest effort at funding the action that is necessary for addressing climate change would likely include new mechanisms, new sources of funds, a reiteration of funding commitments, and most importantly, a plan for ensuring an adequate level of funding. The *Paris Agreement* includes none of these, nor even language that would appear to inspire such actions.

Perhaps the most significant shortcoming of article 9 is that it falls far short of meeting the expectations of the developing countries for assurances that they will get the finance that their people depend on to achieve sustainable development and protection from the most significant adverse effects of climate change. Nowhere in the *Paris Agreement* is the USD100 billion pledge of assistance by developed countries repeated or even mentioned, although it dates back to 2009.<sup>136</sup> Moreover, if the actual contributions of rich states to existing climate funds<sup>137</sup> or humanitarian funds<sup>138</sup> are any indication of their generosity, it

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132 Alice Caravani et al, 'Climate Finance Thematic Briefing: Adaptation Finance' (Climate Funds Update, Climate Finance Fundamentals, No 3, Heinrich Böll Stiftung, December 2014) 1.

133 Although the negotiations were secret and closed to observers, one of the authors, who was an observer, obtained this information from discussions with negotiators and occasionally was able to informally witness the discussions himself. Unless otherwise noted discussions in this section are based on the author's observations.

134 See Task Force on Difference, Inequality, and Developing Societies, 'The Persistent Problem: Inequality, Difference, and the Challenge of Development' (Report, American Political Science Association, July 2008), pointing out as an example that '[i]nequality between the United States and the world's poorest country, in terms of per capita income, rose from 38.5 to 1 in 1960 to 64 to 1 in 2005': at 2, 12. See also Tatyana P Soubbotina, *Beyond Economic Growth: An Introduction to Sustainable Development* (World Bank Institute, 2<sup>nd</sup> ed, 2004) 123.

135 Ian Callaghan, 'Climate Finance after COP21: Pathways to the Effective Financing of Commitments and Needs' (Report, InvestorWatch, December 2015) 10.

136 This pledge is mentioned in *Adoption of the Paris Agreement*, UN Doc FCCC/CP/2015/10/Add.1, para 54.

137 Williams, above n 128.

138 See 'Leaders Gather for Controversial World Humanitarian Summit,' *BBC* (online), 23 May 2016 <<http://www.bbc.com/news/world-36357688>>: quoting UN Secretary-General Ban Ki-moon's statement to the opening of the summit in which he states that '[e]very year the needs rise and the funding shortfalls grow'. The UN estimates that at least USD15 billion of aid is pledged each year, but not delivered.

is likely that article 4 of the *UNFCCC* will continue to be violated by developed countries. The *Paris Agreement* appears to offer little in terms of hope that this situation will be addressed.

### F Technology Access (Article 10)

Access to technology is crucial for many developing countries as it is the gateway to both development and climate resilience. Moreover, access to the latest technology is of essential importance for greening developing countries' economies. The technology for ensuring carbon neutral energy production and manufacturing is often inaccessible to developing countries due to an intricate web of intellectual property rights.<sup>139</sup> Both the cost of technology<sup>140</sup> and existing intellectual property regimes<sup>141</sup> prevent developing countries from acquiring the technology they need to protect their citizens from the adverse effects of climate change. While most '[d]eveloped nations did not face such protectionist policies in the past and were able to develop by reverse engineering and imitation',<sup>142</sup> these means are now denied to developing countries. The alternatives for getting around such obstacles include increasing external debt to unsustainable levels as happened in Nauru,<sup>143</sup> or ignoring intellectual property rights<sup>144</sup> and risking being subject to litigation to enforce those rights. In the former case, a country's development can become arrested by the accumulation of unsustainable debt as the case of Nauru indicates.<sup>145</sup> In the latter case, actors in developing countries may find themselves subject to litigation from private companies based in developed countries that are acting to protect their profits.<sup>146</sup>

The *UNFCCC* calls for all parties to cooperate on technology transfer<sup>147</sup> and states in imperative language that

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139 See Christian Friis Bach, 'Intellectual Property Rights: Blocking an Equitable Solution to the Climate Crisis?' (Report, DanChurchAid, June 2009).

140 See, eg, Milad Samari et al, 'The Investigation of the Barriers in Developing Green Building in Malaysia' (2013) 7(2) *Modern Applied Science* 1, 8.

141 Spencer Schloss, 'Implementing a Green Economy in Least-Developed Countries: The Challenges of Intellectual Property Rights and Technology Transfers within the TRIPS Agreement' (Paper No 1638, Independent Study Project Collection, 2013) <[http://digitalcollections.sit.edu/isp\\_collection/1638](http://digitalcollections.sit.edu/isp_collection/1638)>.

142 Ibid 30.

143 Graham Baines, 'The Political Economy of Transitioning to a Green Economy in Nauru' in Nadine Smith, Anna Halton and Janet Strachan (eds), *Transitioning to a Green Economy: Political Economy of Approaches in Small States* (Commonwealth Secretariat, 2014) 158, 158–77.

144 See, eg, Confederation of Tanzanian Industries, 'Effects of *Counterfeit* and Substandard Goods on the Tanzanian Economy: The Case of the Manufacturing Sector' (Position Paper, 20 April 2008), which points out that counterfeits or products made ignoring patents are widespread throughout the developing world. The paper was financed by BEST-AC (now BEST-DIALOGUE), a Danish government (Danida) funded project to support businesses.

145 Baines, above n 143.

146 See, eg, Song Hong, 'The National Patent Regime and Indigenous Innovations in Compliance with TRIPS: A Case Study of China' in Sunil Mani and Richard R Nelson (eds), *TRIPS Compliance, National Patent Regimes and Innovation: Evidence and Experience in Developing Countries* (Edward Elgar Publishing, 2013) 172, which discusses the numerous lawsuits brought against China's BYD electric car manufacturer concerning rechargeable batteries by companies based in developing countries: at 213–15.

147 *UNFCCC* art 4(1)(c).



developed country Parties ... shall take all practicable steps to promote, facilitate and finance, as appropriate, the transfer of, or access to, environmentally sound technologies and know-how to other Parties, particularly developing country Parties, to enable them to implement the provisions of the Convention.<sup>148</sup>

Meagre steps were taken to implement these provisions at the COPs held between 2010–13 when the Technology Executive Committee as well as the Climate Technology Centre and Network were established and made operational.<sup>149</sup>

Despite the challenges concerning access to technology, states have shown signs of moving in the direction of cooperation prior to COP21. For example, several technology mechanisms were already established in previous COPs and COP decisions to establish and operationalize these bodies already existed.<sup>150</sup> The *Paris Agreement* would have had to strengthen the existing mechanisms to actually ensure technology transfer. This did not happen. Proposals to strengthen the existing technology mechanisms under the *UNFCCC* were rejected.<sup>151</sup> Furthermore, developed countries maintained their unwillingness to discuss issues of intellectual property. As a result, Article 10 of the *Paris Agreement* merely calls for establishing a Technology Framework to provide advice and guidance to the already existing Technology Executive Committee and Climate Technology Centre and Network. Moreover, these bodies are also not mandated to discuss intellectual property rights. Once again, it would appear the *Paris Agreement* adds little to the obligations on technology transfer that already exist in the *UNFCCC*.

### G Capacity Building (Article 11)

With access to technology and finance, capacity building was the third pillar of what developing countries deemed necessary to secure their development and to protect their people from the adverse effects of climate change. Oddly, however, like the two preceding articles, article 11 on capacity building says little

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148 Ibid 4(5).

149 See *The Cancun Agreements*, UN Doc FCCC/CP/2010/7/Add.1, app IV ; Conference of the Parties, United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties on Its Seventeenth Session, Held in Durban from 28 November to 11 December 2011 – Addendum – Part Two: Action Taken by the Conference of the Parties at Its Seventeenth Session*, Decs 2/CP17, 4/CP17, UN Doc FCCC/CP/2011/9/Add.1 (15 March 2012); Conference of the Parties, United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties on Its Eighteenth Session, Held in Doha from 26 November to 8 December 2012 – Addendum – Part Two: Action Taken by the Conference of the Parties at Its Eighteenth Session*, Decs 1/CP18, 13/CP18, 14/CP18, UN Docs FCCC/CP/2012/8/Add.1 and Add.2 (28 February 2013); Conference of the Parties, United Nations Framework Convention on Climate Change, *Report of the Conference of the Parties on Its Nineteenth Session, Held in Warsaw from 11 to 23 November 2013 – Addendum – Part Two: Action Taken by the Conference of the Parties at Its Nineteenth Session*, Dec 25/CP19, UN Doc FCCC/CP/2013/10/Add.3 (31 January 2014).

150 Ibid.

151 Even the Subsidiary Body for Implementation's conclusions adopted at COP21, merely call for further work on the already adopted Poznan Strategic Programme on Technology Transfer: Subsidiary Body for Implementation, United Nations Framework Convention on Climate Change, *Poznan Strategic Programme on Technology Transfer*, 43<sup>rd</sup> sess, Agenda Item 10(b), UN Doc FCCC/SBI/2015/L.29 (3 December 2015).

that expands on already existing commitments. Instead, the five paragraphs of article 11 read more like an aspirational preamble than anything that should have made its way into the operative part of a treaty.

Although pursued without success during the treaty negotiations, a Capacity-Building Initiative for Transparency ('CBIT') mandated to 'support developing country Parties, upon request, in meeting enhanced transparency requirements as defined in Article 13 of the Agreement in a timely manner',<sup>152</sup> turned up in the COP21 decision. This initiative is nearly identical to what the United States unsuccessfully tried to place in the *Paris Agreement*. Its appearance in the COP decision might be explained by the establishment of the Paris Committee on Capacity-building ('PCCB'), mandated to 'address gaps and needs, both current and emerging, in implementing capacity-building in developing country Parties and further enhancing capacity-building efforts',<sup>153</sup> similar to what the G77 and China had unsuccessfully tried to place in the *Paris Agreement*.

Subsequently, the terms of reference for the PCCB were agreed upon during the 44<sup>th</sup> session of the SBI from 16–26 May 2016 in Bonn, Germany, and the first meeting of the Committee is scheduled for May 2017.<sup>154</sup> Arrangements to support the establishment and operation of the CBIT were to be made by the Global Environmental Facility, which has started to consult with 'entities engaged in various aspects of enabling activities and transparency-related activities' on the CBIT<sup>155</sup> while parties to the *UNFCCC* have started to discuss transparency more generally under the Ad Hoc Working Group on the *Paris Agreement* ('APA').<sup>156</sup>

The developments concerning capacity building appear to add little to what has already been mandated by the *UNFCCC* and the mechanisms that were already being developed in the ongoing discussions concerning capacity-building under the *UNFCCC* mandate.

## H Participation and Transparency (Articles 12 and 13)

Article 4(1)(i) of the *UNFCCC* states imperatively that

[a]ll Parties, taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances, shall ... [p]romote and cooperate in education, training and public awareness related to climate change and encourage the widest participation in this process, including that of non-governmental organizations ...

152 *Adoption of the Paris Agreement*, UN Doc FCCC/CP/2015/10/Add.1, para 84.

153 *Ibid* para 71.

154 Subsidiary Body for Implementation, United Nations Framework Convention on Climate Change, *Draft Text on SBI 44 Agenda Item 12(c), Capacity-Building under the Convention: Terms of Reference for the Paris Committee on Capacity Building*, Draft Decision CP.22 (22 May 2016) paras 1, 6 (copy on file with authors). This is version 1 of the agreement as at 22 May 2016 at 12:30pm.

155 See Global Environment Facility, 'Consultative Dialogue on Capacity Building Initiative for Transparency' (Agenda, 11 April 2016) <[http://pfbcb-cbfp.org/news\\_en/items/GEF-Consultative.html?file=docs/news/Mai-juin%202016/CBIT%20Meeting%20April%2011%202016.pdf](http://pfbcb-cbfp.org/news_en/items/GEF-Consultative.html?file=docs/news/Mai-juin%202016/CBIT%20Meeting%20April%2011%202016.pdf)>.

156 Ad Hoc Working Group on the Paris Agreement, United Nations Framework Convention on Climate Change, *Items 3 to 8 of the Agenda: Draft Conclusions Proposed by the Co-Chairs*, 1<sup>st</sup> sess, Agenda Items 3–8, UN Doc FCCC/APA/2016/L.3 (26 May 2016) para 8(c): inviting parties to submit, by 30 September 2016, their views on '[m]odalities, procedures and guidelines for the transparency framework for action and support referred to in Article 13 of the Paris Agreement'.

This legal obligation is reiterated in *UNFCCC* article 6 using the same imperative ‘shall’ as in article 4 of the *UNFCCC*. Thus the obligation to encourage participation in the *UNFCCC* includes ‘[p]ublic access to information on climate change and its effects’<sup>157</sup> and ‘[p]ublic participation in addressing climate change and its effects and developing adequate responses’.<sup>158</sup> In comparison, article 12 of the *Paris Agreement* merely mentions ‘public participation’ and ‘public access to information’ in a list that includes climate change education, training, and public awareness. As a consequence, article 12 reads as *lex generalis* to the *lex specialis* of the *UNFCCC*. It is indeed unusual for states to include broader language in a treaty adopted to implement a more general framework treaty.

Article 13 of the *Paris Agreement* on transparency begins with a first paragraph that might appear to finally provide for action; stating that

[i]n order to build mutual trust and confidence and to promote effective implementation, an enhanced transparency framework for action and support, with built-in flexibility which takes into account Parties’ different capacities and builds upon collective experience is hereby established.

However, a closer examination of the article in the context of the Paris Conference would seem to indicate that this compromise was also a retreat from language in the *Convention* in some respects. According to Meenakshi Raman of the Third World Network, one of the closest observers of the process, during the negotiations the option for the transparency framework

included a differentiated framework between developed and developing countries building on existing arrangements (proposed by the Like-minded Developing Countries); a unified system with built-in flexibility to take into account Parties’ differing capacities and applicable to all (proposed by the US and New Zealand); a tiered system based on self-differentiation with no backsliding (proposed by the Arab Group) and a framework, building on existing arrangements that takes into account Parties’ different capacities (a proposal from Brazil and the African Group).<sup>159</sup>

The Brazilian and African proposal appears to have been the basis of the compromise text in paragraphs 1 to 3 of article 13, but not without being watered down to an extent that makes it weaker than the *Convention* provisions themselves. For example, the *Paris Agreement* framework recognises the special circumstances of LDCs and SIDS,<sup>160</sup> but seems to not fully recognise the pressing challenges that virtually all developing countries face.<sup>161</sup> Paragraphs 14 and 15 seem to help remedy this neglect to a limited extent by recognising that ‘[s]upport shall be provided to developing countries for the implementation of this Article’<sup>162</sup> and that ‘[s]upport shall also be provided for the building of

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157 *UNFCCC* art 6(a)(ii).

158 *Ibid* art 6(a)(iii).

159 Meenakshi Raman, ‘The Climate Change Battle in Paris: An Updated Analysis of the Paris COP21 and the Paris Agreement’ (Briefing Paper, Third World Network, 2016) 17.

160 *Paris Agreement*, UN Doc FCCC/CP/2015/10/Add.1, annex art 13(2)–(3).

161 See African Union, *Draft African Union Strategy on Climate Change*, AU Doc AMCEN-15-REF-11 (May 2014), which lists the challenges faced by African countries: at 5–13.

162 *Paris Agreement*, UN Doc FCCC/CP/2015/10/Add.1, annex art 13(14).

transparency-related capacity of developing country Parties on a continuous basis'.<sup>163</sup> The *Convention* in contrast recognises

[t]he specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change, and of those Parties, especially developing country Parties, that would have to bear a disproportionate or abnormal burden ...<sup>164</sup>

In the 15 paragraphs of article 13 in the *Paris Agreement*, it quickly becomes apparent that the enhanced transparency framework for action and support is more a set of compromise-based aspirations based on vague processes rather than concrete commitments:

The purpose of the framework ... is to provide a clear understanding of climate change action in the light of the objective of the Convention ... including clarity and tracking of progress towards achieving Parties' individual nationally determined contributions ... and Parties' adaptation actions ... including good practices, priorities, needs and gaps, to inform the global stocktake ...<sup>165</sup>

Paragraph 6 further states that its purpose is to provide clarity on 'support provided and received' for mitigation, adaptation, finance, access to technology, and capacity building.<sup>166</sup>

## I Global Stocktake (Article 14)

Article 14 of the *Paris Agreement* provides for a 'global stocktake' to assess 'the collective progress towards achieving the purpose of this Agreement and its long-term goals'.<sup>167</sup> The first global stocktake is envisaged to take place in 2023, two years before parties are expected to revisit their NDCs, with subsequent sessions every five years thereafter.<sup>168</sup> The process is explicitly aimed at informing parties in 'updating and enhancing ... their actions and support ... as well as in enhancing international cooperation for climate action'.<sup>169</sup> As mentioned above, the global stocktake is mandated to consider mitigation, adaptation and the means of implementation and support.<sup>170</sup> The COP21 decision further provides for a preliminary stocktake, called a 'facilitative dialogue', in 2018.<sup>171</sup> This process is aimed at taking stock of the collective efforts of parties 'in relation to progress towards the long-term goal referred to in Article 4, paragraph 1 ... and to inform the preparation of [NDCs]'.<sup>172</sup> The timing of this facilitative dialogue is aligned with the release of a special report of the Intergovernmental Panel on Climate Change on the impacts of global warming of 1.5°C above pre-industrial levels and related emission pathways, which parties

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163 Ibid art 13(15).

164 UNFCCC art 3(2).

165 *Paris Agreement*, UN Doc FCCC/CP/2015/10/Add.1, annex art 13(5).

166 Ibid art 13(6).

167 Ibid art 14(1).

168 Ibid art 14(2).

169 Ibid art 14(3).

170 Ibid arts 4(8), 4(13), 6(2), 7(5), 9(7), 11(1).

171 *Adoption of the Paris Agreement*, UN Doc FCCC/CP/2015/10/Add.1, para 20.

172 Ibid.

also requested in the COP21 decision.<sup>173</sup> Adaptation, finance and capacity-building are not explicitly mentioned, but might be included in the review in light of their relevance to the NDCs.<sup>174</sup>

The extent to which the facilitative dialogue, followed by the global stocktakes, will actually lead to the ratcheting up of efforts to address climate change may be defining for the success of the *Paris Agreement*. Currently, the INDCs outlining parties' post-2020 action, if fully implemented, would still imply a median warming of 2.6–3.1°C by 2100.<sup>175</sup> The COP21 decision therefore underscores 'the urgent need to address the significant gap between the aggregate effect of Parties' mitigation pledges ... and aggregate emission pathways consistent with [the long-term temperature goal]'.<sup>176</sup> It similarly recognises 'the urgency of accelerating the implementation of the Convention and its Kyoto Protocol in order to enhance pre-2020 ambition' and 'the urgent need to enhance the provision of finance, technology and capacity-building support by developed country Parties, in a predictable manner, to enable enhanced pre-2020 action by developing country Parties'.<sup>177</sup> However, as noted above, it remains unclear as to what extent the facilitative dialogue will cover issues beyond mitigation. Another outstanding question is to what extent the principles incorporated in the *UNFCCC* and the *Paris Agreement*, including CBDRRC, will influence the facilitative dialogue, the global stocktake and the revision of NDCs.<sup>178</sup> These and other questions will need to be resolved by the COP and the APA.<sup>179</sup>

## J Compliance (Article 15)

As mentioned above, the *Paris Agreement* lacks a strong compliance mechanism. Although article 15 does create '[a] mechanism to facilitate implementation of and promote compliance with the provisions of this Agreement', it stipulates that this mechanism shall be 'a committee that shall be expert-based and facilitative in nature'.<sup>180</sup> The committee will 'function in a manner that is transparent, non-adversarial and non-punitive ... [while] pay[ing] particular attention to the respective national capabilities and circumstances of Parties'.<sup>181</sup> In comparison, the compliance mechanism established under the *Kyoto Protocol* has an enforcement branch with the power to impose sanctions on states that do not comply with their obligations.<sup>182</sup>

An ambitious proposal by Bolivia to include a Climate Justice Tribunal remained in the text during most of the negotiations after having been introduced

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173 Ibid para 21.

174 See also Doelle, above n 58, 15.

175 Joeri Rogelj et al, 'Paris Agreement Climate Proposals Needs a Boost to Keep Warming Well Below 2°C' (2016) 534 *Nature* 631, 634.

176 *Adoption of the Paris Agreement*, UN Doc FCCC/CP/2015/10/Add.1, Preamble para 9.

177 Ibid Preamble paras 11–12.

178 See Doelle, above n 58, 19.

179 *Adoption of the Paris Agreement*, UN Doc FCCC/CP/2015/10/Add.1, paras 100–2.

180 *Paris Agreement*, UN Doc FCCC/CP/2015/10/Add.1, annex art 15(1)–(2).

181 Ibid art 15(2).

182 *Kyoto Protocol* art 18.

in early 2015.<sup>183</sup> It appears states were not willing to remove this proposal in front of observers, but once the negotiations went into secret sessions in Bonn and Paris, this proposal came under fire. Still it remained in the text until the very last hours when the French Presidency of the COP, bowing to pressure from mainly developed countries, forced its removal. As a consequence, it appears that one of the most basic constituents of the rule of law, a means of minimal enforcement of compliance with international obligations, does not feature in the *Paris Agreement* – that is unless article 15 would be interpreted in the broadest possible sense.

The provision in article 15 does provide room for interpretation and development. In contrast with earlier drafts of the *Paris Agreement*, it does not specify circumstances that would automatically trigger the involvement of the committee.<sup>184</sup> This and other questions are left to be resolved by the APA, which was tasked with developing modalities and procedures for the effective operation of the committee for consideration and adoption by the COP serving as the meeting of the parties to the *Paris Agreement* at its first session.<sup>185</sup> However, the first session of the APA made little progress on developing such modalities and procedures. Instead, the APA requested its co-chairs ‘prepare, by 30 August 2016, a set of guiding questions to assist Parties in further developing their conceptual thinking on features and elements of the committee’.<sup>186</sup>

#### IV CONCLUDING REMARKS

The aspirational goals articulated in the *Paris Agreement*, together with their procedural and institutional arrangements, provide an opportunity for states to mould their aspirations to combat climate change into action. The five-year stocktaking and review cycles, starting with the facilitative dialogue in 2018, could encourage states to ramp up action and increase support for mitigation, adaptation, technology transfer and development, and capacity building. Moreover, the outcome of the 2018 facilitative dialogue could lead to a firmer agreement that all action and support should be aimed at a long-term temperature goal of keeping global warming below 1.5°C. The transparency and compliance provisions of the *Agreement* could promote adherence to this goal, and to the related goals on adaptation and finance, by shedding light on inadequate performance. The greatest weakness of the *Agreement* is the lack of any legally binding substantive commitments to guarantee that the necessary action to minimise the risks of climate change for vulnerable states and their populations will actually be taken.

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183 See, eg. *Draft Paris Outcome: Proposal by the President*, para 112.

184 Anju Sharma et al, ‘Pocket Guide to the Paris Agreement’ (Report, European Capacity Building Initiative, April 2016) 29 <<http://legalresponseinitiative.org/wp-content/uploads/2016/04/PocketGuide-Digital.pdf>>.

185 *Adoption of the Paris Agreement*, UN Doc FCCC/CP/2015/10/Add.1, para 101.

186 *Items 3 to 8 of the Agenda: Draft Conclusions Proposed by the Co-Chairs*, UN Doc FCCC/APA/2016/L.3, para 11.

It is reassuring that the *Agreement* does reaffirm some commitments made by states when they ratified the *UNFCCC* in 1992, including developed countries' commitment to provide financial support for climate action in developing countries. However, the *Agreement* also seems to interpret other commitments restrictively, such as the commitments related to participation. This triggers the question whether state parties to the *Paris Agreement* could argue that the *Paris Agreement's* provisions supersede the provisions of the *Convention*, based on the Latin maxim *lex posterior derogat legi priori*. Similarly, it might be asked whether the rule decreeing that more general law must give way to the application of more specific law, expressed by the Latin maxim *generalia specialibus non derogant*, favours application of the *Paris Agreement* over application of the *UNFCCC*. In our view, there are several reasons why the proposition that the *Paris Agreement* can override provisions of the *UNFCCC* is not plausible. First, the *Durban Mandate* that resulted in the adoption of the *Agreement* stated explicitly that the *Agreement* was to be 'under the Convention'.<sup>187</sup> This understanding is confirmed by the stipulation in article 2 that the *Agreement* is to 'enhanc[e] the implementation of the Convention'.<sup>188</sup> Therefore, the *Agreement* is subsidiary to the *Convention* and, accordingly, the provisions of the *Convention* guide the interpretation of the *Agreement* rather than the other way round. Second, it can be argued that the principle of non-regression prohibits a more restrictive interpretation of existing obligations under the *UNFCCC*.<sup>189</sup> Third, precisely because the *Agreement* does not add more specific substantive commitments to those contained in the *Convention*, it is unlikely to override any of the provisions of the latter by virtue of the *generalia specialibus non derogant* doctrine. And lastly, a more restrictive interpretation of provisions of the *UNFCCC* might conflict with other international agreements, such as international human rights treaties, which will apply even in cases where they are in conflict with later treaties.<sup>190</sup>

Finally, it is worth noting that all 191 signatories to the *Agreement*, including Australia, have a legal obligation not to defeat the object and purpose of the treaty.<sup>191</sup> In light of recent scientific evidence which shows that five years of current emissions would use up the carbon budget for no more than a 1.5 degree Celsius temperature rise,<sup>192</sup> it is clear that many states, including Australia, will need to change course drastically and urgently to comply with this obligation.

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187 *Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action*, UN Doc FCCC/CP/2011/9/Add.1, para 2.

188 *Paris Agreement*, UN Doc FCCC/CP/2015/10/Add.1, annex art 2.

189 See generally Mario Peña Chacon (ed), *El Principio de No Regresión Ambiental en Iberoamérica* (IUCN Environmental Law Centre, 2015).

190 *Capital Bank AD v Bulgaria* (2005) 44 Eur Court HR 48 [111]: noting that 'Contracting States' responsibility continues even after they assume international obligations subsequent to the entry into force of the Convention or its Protocols' and that '[i]t would be incompatible with the object and purpose of the Convention if the Contracting States, by assuming such obligations, were automatically absolved from their responsibility [to ensure human rights]'.

191 *VCLT* art 18(a).

192 Robert McSweeney and Rosamund Pearce, *Analysis: Only Five Years Left Before 1.5C Carbon Budget Is Blown* (19 May 2016) Carbon Brief <<http://www.carbonbrief.org/analysis-only-five-years-left-before-one-point-five-c-budget-is-blown>>.

Similarly, scaled-up amounts of finance for adaptation in developing countries will need to be provided and mobilised urgently by developed countries to meet the objective of ‘[i]ncreasing the ability to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emissions development, in a manner that does not threaten food production’.<sup>193</sup> A failure to take these objectives more seriously could motivate PSIDS and other vulnerable states to seek redress for loss and damage resulting from climate change outside the *UNFCCC* regime; a prospect that has been made more likely with the apparent exclusion of liability and compensation from the scope of the loss and damage provision of the *Agreement*. Thus, the implications of the *Paris Agreement* for the future of international climate change action under the auspices of the *UNFCCC* now largely depend on the extent to which its aspirational goals and procedures succeed in catalysing the necessary action at the national and regional levels.

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193 *Paris Agreement*, UN Doc FCCC/CP/2015/10/Add.1, annex art 2(1)(b). See United Nations Environment Program, ‘The Adaptation Finance Gap Report’ (Report, 10 May 2016) xii, 12 <<http://climateanalytics.org/files/agr2016.pdf>>, which estimates that the cost of adaptation to climate change in developing countries will range between \$140 and \$300 billion per year in 2030, and between \$280 and \$500 billion per year in 2050 and noting that for scenarios of global warming exceeding 2°C global temperature rise, estimates are higher even in early years.