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**The Paris Agreement:
Historic Breakthrough or High Stakes Experiment?**

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Introduction

The Paris climate negotiations under the United Nations Framework Convention on Climate Change (UNFCCC)¹ attracted over 150 heads of state, over 20,000 government officials, more than 9,000 observers and almost 4,000 members of the media. The agreements adopted in Paris mark the completion of a decade long transition from a top down binding regime focused on developed country mitigation to a bottom up and substantively non-binding approach to global cooperation on climate change with key binding process elements. The new regime includes all nations and aims to address mitigation, adaptation, loss & damage, finance, technology transfer, and capacity building.²

The fact that any agreement was reached in Paris is remarkable when one considers the diversity of national circumstances, interests and perspectives that Parties brought to the negotiations. The United States, for instance, came to the negotiations with domestic political constraints that impose severe restrictions on the legal form of the agreement it can accept, and potentially on its ability to implement. Emerging economies such as China, India, South Africa and Brazil, seem, to varying degrees, conflicted between concerns that commitment to climate action will constrain future development required to meet even basic needs, and a growing awareness of the impact of unmitigated climate change on their ability to meet those very needs. Small Island States have increasingly seen their existence threatened by the lack of ambition from major emitters. Oil producing countries see their economic stability threatened by efforts of these major emitters to transition away from fossil fuels, while becoming aware that they economies have to transition and that they are not immune from the impacts of climate change.

Much had been accomplished prior to the negotiations in Paris to help to identify divergent positions of the 196 Parties to these negotiations, and to find common ground on less contentious ones. Most Parties had submitted their intended nationally

¹ United Nations Framework Convention on Climate Change, Intergovernmental Negotiating Committee for a Framework Convention on Climate Change (992), 31 I.L.M. 849, available online at <http://unfccc.int/resource/docs/a/18p2a01.pdf>.

² See Jennifer Allan et al., “Summary Of The Paris Climate Change Conference: 29 November – 13 December 2015” Earth Negotiations Bulletin Vol. 12 No. 663 (December 2015), online: <http://www.iisd.ca/climate/cop21/enb/> (ENB Summary).

determined contributions (INDCs) before the start of the Paris Conference of the Parties (COP). A draft negotiating text had been painstakingly negotiated during the course of 2015, though many issues remained unresolved. Key among the sticking points were the long term goal, how to ensure an increase in ambition to reach the long term goal, differentiation between and among developed and developing countries, finance, loss & damage, transparency, and the legal form of the overall agreement and individual commitments.

Effective global cooperation on climate change is ultimately about motivating nation states to take action beyond what they would consider to be in their national interest in the absence of global cooperation. The Kyoto Protocol represented one approach to achieving this goal. It was based on the proposition that sovereign states are more likely to take action in the collective interest if they are assured that other countries will do the same. The easiest way to do this is to align self interest with the common interest. Emission reduction targets were therefore negotiated jointly, encouraging countries to take on more ambitious targets in light of and conditional on comparable commitments made by others. In addition, there was a focus on making the targets binding, and ensuring adequate consequences in case of non-compliance.³ The Kyoto approach, while largely successful in Europe, failed to move most other developed countries demonstrably beyond “no regrets actions”.⁴ The United States never ratified the Kyoto Protocol,⁵ and Canada withdrew rather than make a serious effort to meet its emission reduction target. Most recently, most developed countries outside Europe declined to accept a second commitment period target under the 2012 Doha Amendments to the Kyoto Protocol.⁶ At the same time, emissions in many emerging economies without Kyoto targets, including China, India, South Africa, and Brazil, have continued to grow significantly, though significant efforts to curb emissions have been made by some.⁷

The Paris Outcome⁸ offers a fundamentally different approach to Kyoto. It is based on the idea that self imposed, voluntary commitments are more likely to be met than those imposed by the global community, and that demonstrated domestic progress, full transparency and regular review of the collective effort are key to moving Parties

³ M. Doelle, *From Hot Air to Action? Climate Change, Compliance and the Future of International Environmental Law* (Toronto: Carswell, 2005).

⁴ The term “no regrets actions” is used here to refer to actions Parties would consider to be in their national interest without global cooperation.

⁵ Report of the Conference of the Parties on its Third Session, Kyoto Protocol to the U.N. Framework Convention on Climate Change, 3rd Sess., pt. 2, Annex I, U.N. Doc. FCCC/CP/1997/7/add. 1, reprinted in 37 I.L.M. 22 (1998).

⁶ UN Treaty Collection, ‘7 c Doha Amendment to the Kyoto Protocol’, available online at: <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-c&chapter=27&lang=en>, retrieved January 4, 2016 (“Doha Amendment to the Kyoto Protocol”).

⁷ For emissions trends in individual countries, see Climate Action Tracker at <<http://climateactiontracker.org/>>, retrieved January 4, 2016.

⁸ This term is used throughout to refer collectively to the Paris COP Decision and the Paris Agreement. The latter was adopted in Paris as an Annex to the Paris COP Decision, but is destined to become a separate, legally binding agreement. UNFCCC, ‘Adoption of the Paris Agreement. Proposal by the President’, Decision 1/CP.21 (“Paris Outcome”).

beyond no regrets actions. The relative merits of these alternative approaches have been debated in the international relations and legal literature for some time.⁹ The Kyoto approach is based on the assumption that nation states will always act in self-interest, requiring a global agreement that aligns their self-interest with the global interest through binding commitments and strong compliance. The Paris Outcome is based on the idea that nation states can be moved toward action in the global interest through managerial approaches that build new norms of state behaviour. This managerial approach is based on transparency, a clear articulation of the collective goal, attention to the state of the science, and opportunities for interaction and information sharing, along with the flexibility to adjust to changing circumstances.

Similar debates have taken place in the domestic context about the effectiveness of various regulatory approaches, with some advocating for top down command and control approaches, while others favouring managerial, market based or voluntary approaches. More recently, this domestic debate has resulted in a growing number of academics and practitioners advocating for a mix of approaches that is tailored to the circumstances.¹⁰ A key difference between the international and domestic context is that there are effective mechanisms to implement a command and control approach in a domestic context, while this has proven elusive in the international context.

The Paris Outcome represents an experiment in applying a managerial approach to seek to motivate countries beyond no regrets actions on climate change. It abandons the Kyoto approach, and instead seeks to raise ambition through careful management and norm building. It is an experiment that is driven by practical realities, such as the domestic political situation in the United States, but also has roots in managerial theories of international relations.¹¹

1. Key Elements of the Paris Outcome

The key elements of the Paris Outcome are contained in the Paris COP Decision and the Paris Agreement. The Paris COP Decision does not require ratification or acceptance, as it is not a separate legal instrument, but rather a decision under the UNFCCC. The Paris

⁹ See, for example, Abram Chayes & Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Harvard: Harvard University Press, 1995), Andrew Guzman, 'A Compliance Based Theory of International Law' (2002) 90 *California Law Review* 1823, Kal Raustalia, 'Compliance & Effectiveness in International Regulatory Cooperation' (2000) 32 *Case Western Reserve Journal of International Law* 387, at 391, George W. Downs, 'Enforcement and the Evolution of Cooperation' (1997 - 1998) 19 *Michigan Journal of International Law* 319. See also Richard Stewart, et al., *Climate Finance Regulatory and Funding Strategies for Climate Change and Global Development* (NYU Press, 2009) which forecasted this shift to a bottom up approach.

¹⁰ See, for example, OECD, "OECD Principles for Regulatory Quality and Performance," in OECD, *Regulatory Policy and Governance: Supporting Economic Growth and Serving the Public Interest* (OECD Publishing, 2011). Better Regulation Task Force, *Principles of Good Regulation* (UK: Better Regulation Task Force, 2003), Gunningham, N., "Environmental Law, Regulation and Governance: Shifting Architectures" (2009) 21 *Journal of Environmental Law* 179-212, and Tollefson, C., A. Zito, and F. Gale., "Symposium Overview: Conceptualizing New Governance Arrangements" (2012) 90 *Public Administration* 1

¹¹ See Chayes & Chayes, *Ibid.*

Agreement was adopted as an Annex to the Paris COP Decision, and will be opened for signature in April, 2016 and is expected to be ratified and ready for implementation well before 2020.¹²

The Paris Agreement represents the legally binding core of the post 2020 climate regime. It covers all key elements of the post 2020 regime, including mitigation, adaptation, loss & damage, finance, technology, capacity-building, education, transparency, stocktaking, compliance, procedural issues, and institutional arrangements. On all these issues, however, some elements of the regime are left to the Paris COP Decision.

The Paris COP Decision supplements the Paris Agreement in many key areas. It includes provisions on the process for bringing the Paris Agreement into force, and on elements of the post 2020 regime that Parties decided not to include in the Paris Agreement. Some elements included in the Paris COP Decision were considered to be of a level of detail not appropriate for the Paris Agreement. Others were included in the Paris COP Decision to allow for more flexibility, as provisions included in the COP decision will be easier to amend in the future. Yet others were included in the Paris COP Decision to distance them from the Paris Agreement, which Parties will have to submit to domestic ratification processes. Finally, the COP decision includes a number of provisions designed to enhance pre-2020 ambition through elaborations and additions to the current climate regime.

The allocation of provisions between the binding Paris Agreement and the Paris COP Decision served an important role in permitting a nuanced approach to differentiation among Parties. The issue of differentiation had been divisive for a long time, and had centered on the Annexes of the UNFCCC and the concept of common but differentiated responsibilities (CBDR) and respective capabilities. The approach taken in Paris was to move away from these hard lines and agree on more tailored approaches to differentiation depending on the issue, and to allow for more flexibility over time. The allocation of provisions between the Paris Agreement and the Paris COP Decision helped to facilitate this effort.¹³

The preamble to the Paris Agreement served as a useful middle ground between the Paris Agreement and the Paris COP Decision. It served as the host for provisions some Parties insisted on having included in the Paris Agreement that other Parties were uncomfortable including in the operative provisions. Among the issues highlighted in the preamble are the following, some recognised for the first time, and all recognised for the first time within a legally binding agreement under the UN climate regime:

- The imperative of a just transition of the workforce.
- The need to respect, promote and consider human rights.
- The need to consider the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations.

¹² Paris COP Decision in Paris Outcome, supra note 8, at paras. 1-10.

¹³ See, for example, Ibid., at paras. 53-65 on Finance, and at paras. 85-99 on Transparency.

- The need to consider the right to development, to gender equality, to the empowerment of women and to intergenerational equity when taking action on climate change.¹⁴

A comprehensive assessment of all elements of the Paris Outcome is not possible here. Provisions dealing with technology, capacity, education, and institutional arrangements,¹⁵ while clearly deserving of attention, are not addressed, and elements on cooperative approaches and forests are only briefly considered.¹⁶ The focus is on long term ambition, mitigation, finance, adaptation, loss & damage, and transparency & compliance.

1.1 The Negotiating Process

The Paris negotiation session from November 30th to December 12th represented the culmination of years of negotiations that were formally put in motion in 2011 in Durban. Of course, the first formal negotiating mandate can be traced back to Bali in 2007 and the informal negotiations back to 2005 in Montreal. It was the failure of COP 15 in Copenhagen in 2009 to conclude the negotiations initiated in Bali that resulted in Parties ultimately hitting the reset button in Durban with an eye toward negotiating a new post 2020 climate regime by 2015 in Paris.¹⁷

With respect to the negotiating process itself, it is clear that the French presidency had learned from past process failures such as the Copenhagen COP in 2009.¹⁸ It resisted, throughout the two-weeks, the temptation to shift to a negotiation process, sometimes referred to as the “Friends of the Chair”, that would have excluded all but a few negotiating blocs and Parties considered to be key to a successful outcome. Instead, the French presidency made an effort to keep all Parties engaged by utilizing the plenary setting to identify areas of contention, and by encouraging informal negotiating groups to self identify to seek common ground on areas of disagreement. It also ensured every Party had the opportunity to review each successive version of the text, and to submit its views directly to the presidency. No president’s text was ever released. In the end, it was a remarkable outcome of this effort that in spite of strong disagreements on substance and clear diversity of national interests and perspectives, the agreement was adopted with universal agreement, and Nicaragua stood alone in openly criticising the Paris Outcome during the closing plenary.¹⁹

If there was a shortcoming in the process, it was that negotiations were less accessible to civil society than other recent climate negotiations. The French presidency closed negotiating sessions to observers much earlier in the process than usual, leaving very limited opportunities for civil society in Paris to follow the negotiations. The result were perhaps unnecessary speculations about a range of issues, such as which Parties were responsible for the removal of gender and human rights language from the purpose

¹⁴ Paris Agreement, in Paris Outcome, *Ibid.*, at annex. Some of the principles included in the preamble of the Paris Agreement had been referenced in previous COP decisions.

¹⁵ *Ibid.*, at articles 10-12, and 16-19.

¹⁶ *Ibid.*, at articles 5-6.

¹⁷ See M. Doelle, ‘The Legacy of the Climate Talks in Copenhagen: Copenhagen or Brokenhagen?’ (2010) 4 *Carbon & Climate Law Review* 86.

¹⁸ *Ibid.*

¹⁹ See ENB Summary, *supra* note 2.

section, the weakening of some of the long-term ambition language, and the removal of international shipping and aviation from the final agreement.²⁰ It also meant it was more difficult for civil society to play its role of holding obstructive delegations to account for their role in the negotiations. This diminished transparency may have made agreement easier, but likely did not contribute to a stronger outcome.

Given this more limited transparency in the final stages, it is difficult to identify with certainty the key substantive issues that plagued the negotiations. The desire of the United States to reach an agreement that can be ratified by the Obama administration without endorsement by Congress was undoubtedly among them, as exemplified by the last minute delay caused by the need to replace the word “shall” in Article 4.4 of the Paris Agreement with “should” in reference to economy-wide absolute emission reduction targets by developed countries. Differentiation between developed and developing countries was clearly another, with Turkey’s claim for special status as a small symbol of this broader tension. Divisions over the need for a top down assessment of Parties’ contributions clearly also persisted, as exemplified by Nicaragua’s dissent and plea for an assessment based on responsibility in case nationally determined contributions (NDCs) continued to be inadequate.²¹

1.2 Long Term Ambition (Articles 2-3)

The decision to include the commitment to keep global average temperature “well below” 2 degrees, and the desire to limit increases to 1.5 degrees was perhaps the biggest surprise and a key accomplishment of the Paris negotiations. Small-island developing states had been pushing for a 1.5 degree long term ambition goal since before Copenhagen, arguing that anything more would threaten their existence. Until Paris, these efforts were largely ignored by the major negotiating blocks and seemed to have little hope of success in Paris. Surprisingly, Parties agreed to include the 1.5 goal as part of the long term ambition text, even if it is framed in more aspirational language than the more clear commitment to keep temperature increases well below 2 degrees.²² Arguably, 1.5 degrees has now become the ultimate standard against which the success of collective mitigation efforts will be measured. The long term ambition goal provides an important foundation for each country’s future nationally determined contributions, their justification on equity grounds, and the five year (stock taking) review cycles. Over time, the 1.5 degree goal can be expected to shape discussions on other elements of the long term ambition text, such as more specific timeframes for global peaking of emissions and for reaching GHG neutrality.

Ultimately, the expectation is that the long-term goal will be matched by individual actions of Parties that are collectively sufficient to ensure the goal is met. Actions are expected in a number of areas, most notably mitigation, adaptation, technology transfer, and finance. The agreement identifies principles of equity and of common but differentiated responsibility and respective capacity in light of national

²⁰ Of course, in many instances, civil society still has access to reliable sources, as a number of Party delegations work closely with the NGO and research community.

²¹ See ENB Summary, *supra* note 2, at 12.

²² Paris Agreement in Paris Outcome, *supra* note 8, at article 2.

circumstances (CBDR&RC&NC) as guiding the allocation of actions needed to accomplish this goal. The Paris Agreement does not, however, provide for a top down assessment of the adequacy of individual contributions in light of these board principles. Rather, as discussed below with respect to mitigation, adaptation and finance, it requires a progression and justification over time from the current inadequate contributions to adequacy as measured against the long-term goal, but without agreeing on clear allocation rules.²³

1.3 Mitigation (Articles 4-6)

The starting point for mitigation in the Paris Agreement is the collective mitigation effort represented by the nationally determined contributions (NDCs) measured against the long-term temperature goal. The initial NDCs will be formally filed in combination with Parties' ratification or acceptance of the Paris Agreement. The INDCs filed by most countries in advance of Paris will serve as the default NDC unless they are strengthened as a result of domestic processes²⁴ or the initial stocktaking process scheduled for 2018 or on a Party's own initiative.²⁵ NDCs are to be strengthened every five years starting in 2025 following a global stocktaking exercise carried out two years before each updated NDC is due.²⁶

The Paris Agreement does offer additional guidance on how Parties are to determine the adequacy of their NDCs with respect to mitigation. Article 4.1 provides that Parties will aim to reach global peaking of emissions as soon as possible, and to undertake rapid reductions thereafter on the basis of science and equity. Parties recognize that it will take longer for developing country emissions to peak, putting pressure on developed countries to accelerate their emission reductions to achieve a global peaking as soon as possible. Parties are to achieve a collective balance between emissions and removals of GHG from the atmosphere in the second half of the century, suggesting that GHG concentrations should stabilize and start to decline sometime after 2050.²⁷

These provisions offer some additional clarity on the scale and allocation of mitigation efforts, but they do not provide a method for determining appropriate NDCs for individual Parties. In other words, the Paris Agreement does not offer a clear formula for bridging the mitigation gap represented by the current INDCs, the focus is on offering guidance to Parties and on process. It is also noteworthy that the long-term goals are framed in technology neutral language. They leave open how much various technologies, from renewable energy to carbon capture and storage and the enhancement of sinks,

²³ See Paris COP Decision, in Paris Outcome, *supra* note 8, at para 27. Parties are asked to communicate how their NDCs are fair and ambitious.

²⁴ Canada, for example, has indicated that it will revise its INDC.

²⁵ Paris COP Decision, in Paris Outcome, *supra* note 8, at para 20. See also Paris COP Decision, in Paris Outcome, *supra* note 8, at article 4.11 regarding enhancement of NDCs.

²⁶ The Paris Agreement (in Paris Outcome, *Ibid.*) refers to highest ambition and the need for progression (art 4.3), and new NDCs every 5 years (art 4.9) informed by global stocktaking (art 4.9, 14).

²⁷ *Ibid.*, at article 4.1.

should contribute to the effort.²⁸ The implication is that it is largely left to individual Parties and other multilateral efforts to ensure climate mitigation and adaptation is pursued in a manner that promotes integrated solutions and maximises sustainability benefits while minimizing risks.²⁹

The additional guidance for Parties on what is expected of them takes on added significance as the Paris Agreement explicitly recognizes that there is an ambition gap between commitments made by Parties to date and the long-term goal. The ambition gap is quantified in the COP decision to be upward of fifteen gigatonnes by 2030.³⁰ To bridge this gap, Parties' nationally determined contributions are to be reviewed through stock taking exercises starting with mitigation only in 2018 and then continued every 5 years under the Paris Agreement starting in 2023 as part of a more comprehensive stocktaking exercise. Consistent with the commitment to bottom up contributions, each Party will be asked, through the stocktaking process, to reflect on scientific advice provided by the IPCC³¹, and on the Party's responsibility, capacity and national circumstances, as well as unspecified equity considerations, as a basis for reviewing, revising and justifying its contribution to the global effort.³²

Bridging the pre-2020 ambition gap was particularly challenging due to the shortness of time and because inadequate interim arrangements for the period up to 2020 had only recently been put into place, largely based on voluntary pledges resulting from the Copenhagen Accord, complemented by binding commitments from a few developed countries in the form of the 2012 Doha Amendment to the Kyoto Protocol.³³ The focus of the negotiations had, for some time, been on the post 2020 regime, with the pre-2020 discussions taking on largely symbolic importance. The Paris COP Decision nevertheless continues to push Parties to address the pre-2020 emissions gap. It does so by encouraging Parties to engage in various processes to continue efforts to bridge the gap, and through the appointment of two high level champions to increase the ambition.³⁴

The Paris Agreement confirms that international emissions trading and offsetting is an acceptable tool for Parties to meet their emission reduction goals.³⁵ The Agreement

²⁸ Geo-engineering is not specifically addressed. This leaves open the possibility that it could be relied upon to contribute to the long-term temperature goal, though it would not contribute to the balancing of emission and removal of GHG in the second half of the century. Of course, only some geo-engineering technologies can be used to achieve GHG emission neutrality.

²⁹ See M. Doelle, 'Integration among Global Environmental Regimes: Lessons Learned from Climate Change Mitigation' in Aldo Chircop et al eds., *The Future of Regime-Building in the Law of the Sea: Essays in Tribute to Douglas M. Johnston* (Leiden, The Netherlands: Martinus Nijhoff Publishers, 2009) 63.

³⁰ Paris COP Decision, in Paris Outcome, supra note 8, at para 17.

³¹ Including the 2018 special report on 1.5 degrees pathways referred to in the Paris COP Decision, which will play a critical role in clarifying the emissions gap for the 1.5 degree long term goal.

³² Paris COP Decision, in Paris Agreement, supra note 8, at para 27, Paris COP Decision, in Paris Outcome, supra note 8, at articles 4, 14.

³³ See Doha Amendments to the Kyoto Protocol, supra note 6. The amendments are not yet in force, as of the date of publication, due to insufficient ratifications.

³⁴ See Paris COP Decision, in Paris Outcome, supra note 8, at para 122.

³⁵ Paris Agreement, in Paris Outcome, supra note 8, article 6.

sets out general principles for emissions trading, such as the avoidance of double counting, environmental integrity, robust accounting, and transparency. A replacement for the Clean Development Mechanism (CDM) is established in a manner that recognise that all Parties are expected to have some form of mitigation commitment. As the CDM was based on the assumption that host countries did not have mitigation commitments, it is clear that the new mechanism will require a reconsideration of rules on baselines, additionality, and the avoidance of double counting. The Paris Agreement also makes provision for non-market approaches to assist Parties with the implementation of their NDCs. Detailed rules for these various mechanisms will have to be established before a thorough assessment of their environmental integrity and their potential to contribute toward the long-term goal of the Paris Agreement can be carried out.

The Paris Agreement commits Parties to establishing accounting and reporting rules, building on those already developed under the UNFCCC, both for emissions and for emission reduction efforts. The development and application of these rules are to be guided by a number of principles, including clarity, transparency, accuracy, completeness, comparability, and consistency.³⁶ Avoidance of double counting and environmental integrity are highlighted as goals of accounting and reporting of emissions and reduction efforts.³⁷ All Parties are furthermore encouraged to develop and share long-term low greenhouse gas emission development strategies.³⁸

1.4 Adaptation (Article 7)

The Paris Agreement contains few surprises with respect to adaptation. It does recognize, for the first time, a global goal of enhancing adaptive capacity, strengthening resilience and reducing vulnerability to climate change. It also articulates the link between the adequacy of mitigation and the adaptation needs of developing countries, and provides for balance between mitigation and adaptation funding, and more generally throughout the Paris Agreement.³⁹ Adaptation can now formally be an individual Party's contribution to the objective if the Party so chooses.

Otherwise, the agreement largely continues with previous efforts to support adaptation efforts in developing countries at a regional, national and subnational level. Notably, the agreement recognizes the need for adaptation efforts to be gender responsive, participatory and transparent. Finally, adaptation is part of the global stocktaking process under Article 14 of the Paris Agreement, though it is not included in the stocktaking exercise in 2018 provided for in the Paris COP Decision.

1.5 Loss & Damage (Article 8)

Loss & damage lived up to its promise to be among the issues that would pre-occupy negotiators to the very end. The issue had only recently made its way onto the formal agenda of the UN climate regime, and only after persistent efforts by small-island

³⁶ Ibid., at articles 4.8, 4.13.

³⁷ Further details are provide under Article 13 in combination with accounting and reporting rules for Parties' other efforts under the Paris Agreement, such as finance and adaptation.

³⁸ Ibid., at article 4.19.

³⁹ Ibid., at articles 6.1, 9.1, 9.4, 10.1, 10.2, and 11.1

developing states since 2010.⁴⁰ In Warsaw in 2013, a loss & damage mechanism was set up under adaptation, and with a narrow investigative mandate that excluded financial support. In Paris, small island states and other like-minded Parties were pushing for loss & damage to be formally recognized as a stand alone issue with a broader mandate. A number of developed countries, including the United States and Australia, were trying to keep loss & damage out of the agreement all together, or at least keep it under adaptation with the narrow mandate established in Warsaw.

The compromise outcome was a stand-alone article for loss & damage in the Paris Agreement with a somewhat broader mandate, but with an explicit exclusion of compensation and liability for loss & damage. This exclusion is articulated in the Paris COP Decision, not in the Paris Agreement. Also moved to the COP decision in the later stages of the negotiations was a call for integrated approaches to displacement associated with climate change.⁴¹

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

1.6 Finance (Article 9)

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

In the end, the main surprise with respect to finance was how little progress was needed to in order to enable an overall agreement in Paris. The floor of US\$100 billion was confirmed, but only in the Paris COP Decision, as was the expectation to increase funding starting in 2025.⁴² The Paris Agreement requires developed countries to provide financial resources to assist developing countries with mitigation and adaptation in continuation of existing obligations under the UNFCCC. Developed countries are expected to continue to take the lead on mobilizing financial resources, and developing countries are encouraged to contribute on a voluntary basis. The collective commitment of US\$100 billion applies only to developed countries, with any contribution from developing countries provided outside this collective commitment.⁴³ Not much progress was made with respect to sources of funding. In terms of distribution of funding, Parties

⁴⁰ M. Doelle, 'The Birth of the Warsaw Loss & Damage Mechanism: Planting a Seed to Grow Ambition?' (2014) 8 Carbon & Climate Law Review 35.

⁴¹ Paris COP Decision, in Paris Outcome, supra note 8, at paras 48-52.

⁴² Ibid., at paras 54, 115.

⁴³ Ibid., at para 54.

largely agreed to continue to utilize existing funding mechanisms, including the Green Climate Fund.⁴⁴

Agreement was reached on transparency and review of financial support and its use through biannual reporting and the global stocktaking process to be carried out every five years starting in 2023.⁴⁵ There is general support for funding for reducing emissions from deforestation and forest degradation (REDD-plus), but no firm commitments or goals.⁴⁶ References in earlier drafts to the phase out of domestic fossil fuel subsidies did not survive the final round of negotiations. This is consistent with the general approach to refrain from dictating specific domestic policies to achieve the goals in the Paris Agreement.

With respect to pre-2020 finance, the Paris COP Decision points out that increased financial support from developed countries is critical to enhancing the ambition of pre-2020 commitments. It calls for an increase in financial support with an emphasis on adaptation funding and the importance of public funds.⁴⁷ It urges developed countries to develop a concrete roadmap for achieving the 2020 goal of US\$100 billion, and decides to conduct a facilitative dialogue in 2016 to assess progress.⁴⁸ The Global Stocktake includes funding, and there is a commitment to increase funding over time.

1.7 Transparency, Stocktaking & Compliance (Articles 13, 14, 15)

Differentiation among Parties was perhaps the most contentious issue with respect to transparency and compliance. Many developed countries were pushing for identical transparency and compliance rules for all Parties, whereas key developing countries, such as India and China, were pushing for clear differentiation, with strong transparency and compliance for developed countries, and largely self-monitoring and facilitation of implementation for developing countries. A few Parties were advocating for strong enforcement, though it seemed clear for some time that a facilitative approach was favoured by most as more consistent with the bottom up approach the negotiations had moved toward since Copenhagen.

The end result on transparency was a compromise, one that is broadly in line with the approach favoured by developed countries. The transparency rules apply to all Parties, with some modest differentiation, mainly through a commitment to flexibility and support for developing countries. For all Parties, the information they submit will be subject to a technical expert review and a multilateral, facilitative consideration of progress. Importantly, flexibility with respect to transparency is specifically linked to capacity, not to the broader concept of CBDR&RC or national circumstances. Special

⁴⁴ Ibid., at paras 59, 60; Paris Agreement, in Paris Outcome, supra note 8, at article 9.8.

⁴⁵ Biannual reporting is required for developed countries and encouraged for developing countries that decide to contribute on a voluntary basis. See Paris Agreement, in Paris Outcome, supra note 8, at article 9.5.

⁴⁶ Ibid., at article 5.2, Paris COP Decision, in Paris Outcome, supra note 8, at para 55. The reference in Article 2 to the long term goal of net zero GHG emissions by the second half of the century is perhaps the clearest signal of the important role of sinks, as it suggest that at some point, any emissions will have to be offset by removals.

⁴⁷ Paris Agreement, in Paris Outcome, supra note 8, at articles 9.3, 9.4.

⁴⁸ Paris COP Decision, in Paris Outcome, supra note 8, at paras 115-116.

accommodations are included for the Least Developed Countries (LDCs) and for Small Island Developing States (SIDS).⁴⁹ Transparency is a focus of capacity building efforts under the Paris Agreement, a signal that developed country Parties are motivated to help build capacity in developing countries in order to minimize differentiation on transparency.⁵⁰

The Paris Agreement signals the intention to build on and enhance transparency arrangements under the UNFCCC, including national communications, biennial reports and biennial update reports, international assessment and review and international consultation and analysis.⁵¹ It specifically calls for more regular and comprehensive reporting, a more harmonized verification process,⁵² and common modalities, procedures and guidelines.⁵³ The Paris Agreement offers a surprising level of detail on accounting and reporting in the fifteen subsections of Article 13 as well as references to transparency in key provisions on mitigation, adaptation, finance, and capacity-building.⁵⁴

The stocktaking process is another core element of the overall effort to ensure the goal of the Paris Agreement is met through the collective efforts of Parties. The Global Stocktake set out in Article 14 covers mitigation, adaptation, means of implementation and support. The first Global Stocktake is to take place in 2023, in time for the revision of Parties' NDCs in 2025. The goal of the Global Stocktake is to enhance national action and international cooperation.

An initial stocktaking process, called a facilitative process among Parties is scheduled for 2018 under the Paris COP Decision. Its focus appears to be on mitigation, as it does not provide for a review of finance or adaptation.⁵⁵ It is designed to consider progress toward the long-term goal in the Paris Agreement, taking into account the results of the Intergovernmental Panel on Climate Change (IPCC) report on 1.5 degree pathways mandated in the Paris COP decision.⁵⁶ The process seems designed to encourage Parties to enhance mitigation contributions in their NDCs before the Paris Agreement comes into force in 2020. The reference to NDCs does open the door to consideration of issues beyond mitigation.⁵⁷

The compliance mechanism is to be facilitative, non-adversarial, and non-punitive in nature and applies to all Parties.⁵⁸ The compliance committee is to consist of twelve members with relevant technical expertise, with membership determined in a manner

⁴⁹ Paris Agreement, in Paris Outcome, supra note 8, at article 13.7-13.10; Paris COP Decision, in Paris Outcome, supra note 8, at para 91.

⁵⁰ Paris Agreement, in Paris Outcome, supra note 8, at article 11; Paris COP Decision, in Paris Outcome, supra note 8, at paras 85-89.

⁵¹ Paris Agreement, in Paris Outcome, supra note 8, at article 13.4.

⁵² Through a technical expert review, see *Ibid.*, at articles 13.11-13.12.

⁵³ *Ibid.*, at article 13.13.

⁵⁴ *Ibid.*, at articles, 4.8, 4.13, 6.2, 7.5, 9.7, 11.1. Transparency is referenced throughout the Paris COP Decision.

⁵⁵ *Ibid.*, articles 4.1, 4.8, and COP Decision, at para 20.

⁵⁶ This report is expected in 2018, see Paris COP Decision, in Paris Outcome, supra note 8, at para 21.

⁵⁷ *Ibid.*, at para 20.

⁵⁸ Paris Agreement, in Paris Outcome, supra note 8, at article 15.

similar to the facilitative branch of the compliance committee under the Kyoto Protocol.⁵⁹ The committee is to be sensitive to national capabilities and circumstances of Parties in carrying out its work.⁶⁰

2. Assessment of the Paris Outcome

The Paris Outcome is assessed in this section in the context of what it aims to do, to motivate state action beyond no regrets action toward an agreed long-term goal through a bottom up, managerial approach rather than a top down approach based on an assumption that Parties will act prominently out of self-interest. Seen in this light, the key strengths of the Paris Outcome include the long term goal, the effort to significantly enhance transparency, and the five year cycles for the Global Stocktake combined with the commitment to submit progressively more ambitious NDCs two years after each Global Stocktake.

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

- Gender equity, human rights, intergenerational equity, and climate justice are largely limited to the preamble of the Paris Agreement, making their full integration into the implementation of the regime less certain.
- The inability of the Parties to agree to a peak year and a decarbonisation year in line with either the 1.5 or the “well below” 2 degrees temperature goals may make efforts to bridge the ambition gap more difficult.
- Failure to explicitly signal the phase out of fossil fuels or the elimination of fossil fuel subsidies risks prolonging the debate over the future of fossil fuels in some countries, and thereby risks diverting attention away from integrated solutions to climate change, though the end of fossil fuels is clearly signalled through the GHG neutrality goal.
- There are serious questions about the effectiveness of measures in the Paris COP Decision to bridge the pre-2020 ambition gap, especially with respect to mitigation and finance, at least in part due to the limited time remaining.
- The failure to address emissions from international shipping and aviation under the UNFCCC will likely continue to plague the regime, as emissions from these sectors are expected to grow and threaten to undermine efforts at the national level, and efforts to deal with the issue outside the UNFCCC have not been successful to date.
- The exclusion of liability and compensation for loss and damage in the COP decision may make the inevitable discussions on responsibility for loss & damage more difficult.

⁵⁹ Paris COPE Decision, in Paris Outcome, supra note 8, at para 103. Interestingly, there is no reference back to the detailed rules of procedure developed for the compliance committee under the Kyoto Protocol.

⁶⁰ Paris Agreement, in Paris Outcome, supra note 8, at article 15.2.

- Though not surprising given the pace of negotiations leading up to Paris, there was limited detail provided on the roles of sinks, emissions trading, offsetting and non-market mechanisms. However, the basic elements are included, and there is provision for negotiating the details in these key areas in the near future.
- There was surprisingly little attention paid in the final agreement to the role of non-state actors and subnational governments, in spite of considerable attention having been given to their potential role in increasing the mitigation ambition of Parties.

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

These elements, in combination with an ambitious set of long-term goals, do offer a recipe for success. Importantly, the agreement makes it clear that current mitigation and financial pledges represent the floor, not the ceiling of efforts required. There is every reason to expect that each five-year stocktaking and review cycle will pressure Parties to increase their ambition toward a collective effort sufficient to meet the long-term goals set out in the agreement. A key question will be whether adequate NDCs are possible without further progress on principles of equity and the sharing of burdens and benefits of the transition. A related question is to what extent principles incorporated into the operational provisions of the Paris Agreement and the preamble, such as intergenerational equity and common but differentiated responsibilities and respective capabilities in light of different national circumstances (CBDR&RC&NC), will influence the Global Stocktake and the enhancement of NDCs over time. In short, can the managerial approach adopted in Paris succeed without a strong top down component?

Among the provisions that have the potential to encourage a race to the top is Article 4.11, which allows Parties to enhance their NDCs anytime, not just at the pre-determined times following each five year Global Stocktake. This is an important feature of the Paris Agreement, as it enables progressive governments to enhance their NDCs when the political opportunity arises, rather than have to wait for the end of a given 5 year cycle to do so. A potential concern in this regard is that while it is implicit from the overall agreement that Parties are not to weaken their NDCs at any time, this is not made as explicit in the Paris Agreement as it might have been.⁶¹

⁶¹ Of course, there are limits to the ability of any agreement to prevent backsliding, as Parties always have the option to withdraw from the agreement. On the other hand, it is important to note that the commitments related to NDCs in Article 4.2 of the Paris Agreement (Ibid.) refer to maintaining and filing NDCs and to taking domestic measures to implement. They do not refer explicitly to an obligation to meet the targets set out in the NDCs.

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

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

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

The Paris Outcome offers a strong foundation for the post 2020 climate regime, but much work on detailed rules and effective implementation remains. Detailed guidance is needed on reporting and review, emissions trading and offsetting, market and non-market mechanisms, the Global Stocktake, and on compliance. Fifty-five countries, representing fifty-five per cent of global emissions have to ratify or accept the Paris Agreement in order for it to come into force. The initial stocktaking process in 2018 will be critical in signalling a serious effort to narrow the emission gap. A major effort is needed to mobilize the funding needed to ensure developing countries will be able to do their part to mitigate and adapt to climate change. Finally, there is a desperate need to integrate efforts under the UN Climate regime with the implementation of the Sustainable Development Goals. While there is reference to sustainable development throughout the Paris Outcome, and reference in the preamble to the 2030 Agenda for Sustainable Development,⁶² the challenge of effectively integration of the UN climate regime with the Sustainable Development Goals, the other Rio Conventions, and other relevant global efforts toward sustainability cannot be overstated.

Conclusion

The key elements of the Paris Outcome include the NDCs, significant funding for developing countries, five year stock-taking and review cycles, enhanced transparency, and a facilitative approach to compliance. These individual elements are collectively

⁶² Paris COP Decision, in Paris Outcome, supra note 8, at Preamble.

expected to contribute a strong long-term ambition goal that confirms the need for all countries to contribute in light of their capacity, responsibility and other national circumstances. Preambular language in the Paris Agreement includes strong references to gender equity, human rights and intergenerational equity.

The message to developed countries is clear. They will have to reach net zero GHG emissions as soon as possible to make a fair contribution to the long-term goal. While there are no legally binding emission reduction commitments in the Paris Agreement, developed countries, along with other high emitting Parties, are now under ever-increasing scrutiny, and will face growing pressure to demonstrate that they are making an equitable contribution to the global mitigation effort and the long-term goal they have endorsed. Given the long term goal, and developed countries high historical emissions, high current emissions, and high capacity, it seems clear that anything short of best efforts to get to net zero GHG emissions as quickly as possible will not pass any reasonable equity test.

The Paris Agreement is an experiment in a bottom up, managerial, transparency and norm building approach to global cooperation. The shift in approach is a reasonable gamble in light of the failed efforts over the past two decades to implement the top down approach under the Kyoto Protocol, and in light of clear and ongoing domestic political constraints in key countries, such as the United States and other major emitters. To give this approach a chance at success, it will be important for Parties to resist the temptation to undermine it by introducing top down elements too quickly, as such efforts would risk returning Parties to the impasse that plagued negotiations for so long. At the same time, the science is clear that the global community is running out of time to avoid climate tipping points that would have disastrous global consequences.

In short, the Paris Agreement represents a historic breakthrough in that it seems to have broken a decade long impasse over the full integration of the United States and all developing countries into the regime. At the same time, it is inevitably a high stakes experiment, as there are no guarantees of success, and no time left for second changes in case of failure.

Success now largely depends on what happens at subnational, national and regional levels, and how those efforts feed into national efforts and into the new regime's five-year review cycles. National implementation and enhancement of pre-2020 commitments represent the first critical steps. Support from non-state actors and subnational governments will be key in this process. Only time will tell whether the breakthrough in Paris turns into a breakthrough in the global challenge of keeping temperatures at reasonably safe levels. For now, we should take some comfort from the fact that we are in a better position today than we were before Paris, and that Paris has offered the global community an opportunity to rise to the challenge. It is more clear than ever, however, that the UN climate regime is just one, though critically important, element of the global effort to address climate change. It needs to work in concert with and mobilize adequate and effective efforts at regional, national and subnational levels.