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Analysing the legal scope of the Paris Agreement and related commitments

Blogpost series - 5th anniversary of the Paris Agreement

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The Paris Climate Agreement (PA), signed in December 2015 at COP21 of the United Nations Framework Convention on Climate Change (UNFCCC), has the central and ultimate goal of “holding 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” (see Art. 2.1.a).¹ All of the Parties to the Climate Convention agreed on this goal, and contribute to it, supported by all non-state actors, through different types of commitments (Nationally Determined Contributions, Long-Term Strategies) and monitoring instruments. This blog post analyses the legal scope of these commitments, at the international and national levels, and questions the potential enforceability of the agreement, in a context of growing judicialisation of climate (in)action.

This blogpost is part of a [series](#) produced by IDDRI on the effects of the Paris Agreement, on the occasion of its 5th anniversary.

Articulating international law and national laws

The Paris Agreement² is a treaty within the definition of the Vienna Convention on The Law of Treaties,³ under which the Parties are obligated to one another. The binding nature of the text of the agreement is variable, with some obligations that are mandatory while others are flexible (“shall” *versus* “should”)⁴. This “third generation” treaty, as it is known in environmental governance, is progressive in nature and creates temporal dynamics for implementation. Indeed, the procedural mechanisms underpinning it (in particular the rules on accountability and transparency, among other elements of the agreement’s Rulebook) can be integrated mutually between the national and international levels: they not only contribute to improving the international governance of climate law, but also, through the nationally determined contributions (NDCs) submitted by states, to generating country-level measures that will be mandatory under national law. The constraints are therefore not only legal in the strict sense, but are of a new type that creates a virtuous articulation between international law and national laws.⁵

In its recent Municipality of Grande-Synthe ruling, the French Council of State specified its vision of this articulation by indicating that “although the provisions of the UNFCCC and the PA (...) have no direct effect, they must nevertheless be taken into account in the interpretation of positive law”, in other words European law and national law, which are themselves directly applicable.⁶

Beyond the mechanisms that are not directly legal and which can be expected from this type of architecture (peer pressure, collective learning), how can we characterise its strictly legal effects, especially on decisive policy processes? Here we are referring to impacts on the different public policies (fiscal policies, sectoral policies, infrastructure and territorial planning, investment, for example.).

With regard to the national level, Article 4.2⁷ of the agreement creates an obligation to transpose the NDCs into a national implementation system (in France, the National Low-Carbon Strategy⁸ is the instrument for the application of the PA). The national level is therefore quite strictly regulated, and a country that fails to take national measures to implement its NDC (in other words its commitments under the agreement) could be in breach vis-à-vis the other Parties.

Moreover, the PA is based on two principles included in the Climate Convention back in 1992:⁹ the precautionary principle and the principle of common but differentiated responsibilities. These two principles, the first of which has been echoed in numerous national laws, are potential levers for the creation of legal obligations.

Aligning (ambitious) objectives with implementation

The PA also expresses the tension between the need for ambition for all Parties (see Art. 2), but without allocating this ambition, and a certain number of mechanisms through which the countries will need to individually and progressively attempt to align with this level of ambition. The objectives and the tools to achieve them (NDCs, Long-Term Strategies (see Art. 4.19)) are consequently separate and independent elements in the agreement, which “leaves” the interplay between stakeholders (States, companies, etc.), at the international and national levels, to provide the necessary coherence between short-term measures and long-term changes towards the ultimate goal of holding the increase in temperature to +2°C, or even 1.5°C.

Although it does not formally require the Parties to ensure this compatibility and does not validate their commitments (this is done by the Parties themselves), the PA establishes a polycentric governance system that gives different stakeholders the possibility to question these commitments in case of their inadequacy in relation to the overall ambition. This horizontal governance means that anticipatory actions and alignments can be conducted at different levels, in accordance with the objectives of the agreement.

Thus, since 2015, some stakeholders, especially from international finance, have completely changed their stance, which is now centred on alignment with the PA. Although the actual implementation of this new paradigm remains to be demonstrated and evaluated, the change driven by the system the agreement has created—a complete conceptual turnaround from the top-down verticality of the Kyoto Protocol, and based on the expectation of virtuous autonomy of stakeholders—is already in motion.

Ensuring accountability for commitments

The political strength of the PA, as shown by the intention of the President-elect of the United States, Joe Biden, to rejoin the agreement upon taking office, therefore seems to be a given, and further supports its legal enforceability. Even though this enforceability is not to be taken for granted (invoking an NDC before a national court depends on the legal situation of each country), the PA confirms, strengthens and proposes levers for action, by creating interactions and collective synergies that contribute to making laws and case law.

Although climate disputes brought before the different national courts exist and have increased in number over the last few decades, the PA provides an additional framework of reference, including before the domestic courts. Several cases illustrate this trend: in France, the above-mentioned “Municipality of Grande-Synthe v. French state”, and “L’Affaire du siècle”; “Urgenda” in the Netherlands; and the Heathrow Airport case before the Supreme Court in London.¹⁰ These court cases have the potential to progressively drive not only the development of national climate policies and more ambitious climate laws at state level, but also dynamics of change within international law itself.¹¹ Building increasingly on the PA, thereby giving it interpretive force, a new multi-level climate governance system is taking shape. Momentum is now building towards changes in positive law on climate issues in the different countries where climate disputes emerge.

¹ https://unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf

² The Paris Climate Agreement, signed in December 2015, formally entered into force in 2020.

³ https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf

⁴ <https://onlinelibrary.wiley.com/doi/abs/10.1111/reel.12154>

⁵ <https://theconversation.com/la-montee-en-puissance-dune-justice-climatique-mondiale-105867>

⁶ https://www.legifrance.gouv.fr/ceta/id/CETATEXT000042543665?tab_selection=all&searchField=ALL&query=427301&page=1&init=true

⁷ "Each Party shall prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions".

⁸ <https://www.ecologie.gouv.fr/strategie-nationale-bas-carbone-snbc>

⁹ <https://unfccc.int/resource/docs/convkp/conveng.pdf>

¹⁰ <http://climatecasechart.com/non-us-principle-law/paris-agreement/>

¹¹ <https://theconversation.com/bonnes-feuilles-justice-climatique-proces-et-actions-149750>

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