



Foley Hoag Climate Update

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*The Boston office of Foley Hoag LLP,
the Paris office of Foley Hoag AARPI and
Matthieu Wemaere collaborated on the
production of this white paper.*

The Paris Outcome

After two weeks of intense negotiations at the Paris climate conference, 195 countries finally adopted the Paris Agreement and a Decision to limit *“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”*.

According to the Vienna Convention on the Law of Treaties, the Paris Agreement is a legally-binding Treaty containing both legally binding obligations (“shall”) and provisions which are too broad to be legally binding (“invited”, “encouraged”, “should”). The Paris Agreement will enter into force 30 days after at least 55 Parties to the UNFCCC that account for 55 % of global greenhouse gas emissions have deposited their instruments of ratification, acceptance, approval or accession. Accordingly, the Paris Agreement would enter into force before 2020 if the Parties ratify it rapidly. For example, in the US, the approval of the Paris Agreement will be exempted from the vote of the Congress because it is considered as an “executive agreement” under the US Constitution.

Among the measures provided for in the Paris Agreement, several of them deserve a particular attention.

Everyone shall contribute to mitigation: the Nationally Domestic Contributions (NDC)

The NDC will constitute the core of the post-2020 climate change regime. Every five years, each Party shall prepare, communicate and maintain successive NDC to contribute to mitigation. The Parties shall also adopt domestic mitigation measures aiming at achieving their own contributions’ objectives. All the Parties shall account for their NDC. In accounting for emissions and removals corresponding to their NDC, the Parties shall promote environmental integrity, transparency, accuracy, completeness, comparability and consistency, and ensure the avoidance of double counting. Each Party shall regularly provide a national inventory report of anthropogenic emissions by sources and removals by sinks of greenhouse gases and information necessary to track progress made in implementing and achieving its NDC.

The provisions of the Paris Agreement dedicated to the NDC resolve the contentious issue of the differentiated rights and obligations between developed and developing countries. Indeed, before the opening of the COP 21, South Africa, chairing the G77 & China Group, called for a rigid binary differentiation and a division of responsibilities as provided for by the UNFCCC. This type of differentiation has been rejected by the Parties at the Paris Conference. According to the principle of *“common but differentiated responsibilities and respective capabilities, in the light of different national circumstances”*, developed countries should continue taking the lead by undertaking economy-wide absolute emission reduction targets. Developing countries should continue enhancing their mitigation efforts, and are encouraged to move over time towards economy-wide emission reduction or limitation targets in the light of different national circumstances.

The submission of the NDC with ratification/approval instruments of the Paris Agreement might represent an opportunity for the Parties to strengthen the Intended NDC submitted prior to the COP 21. This is important because the 187 Intended NDC fall significantly short of what would be required to attain the 2°C goal, let alone the 1.5°C stretch goal.

Market-based instruments in the Paris Agreement

Many Parties supported the utilization of market-based mechanisms but “Bolivarian” countries (several South American countries) condemned this initiative. Despite this opposition, Article 6 of the Paris Agreement provides a clear route for three possible frameworks: (i) possibility of linking emissions trading systems (ETS) by using “transferable mitigation outcomes”; (ii) creation of a new market mechanism to contribute to the mitigation of greenhouse gas emissions; and (iii) implementation of non-market-based approaches to sustainable development.

First, the Parties may, on a voluntary basis and with the authorization of the participating Parties, use and transfer mitigation outcomes to achieve the goals mentioned in the NDCs. By linking ETS, the Parties shall ensure environmental integrity and transparency and shall apply robust accounting to ensure the avoidance of double counting. Although guidance shall be adopted by the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement (CMA) on these different points, transfers may already take place.

Regarding the new sustainable development mechanism, it replaces the Clean Development Mechanism (CDM) combining Joint Implementation/Clean Development Mechanism features though a wider scope (i.e. the contribution to overall global mitigation). Although the rules governing this new mechanism shall be adopted by the CMA, the Paris Agreement already defines some aspects of its regime: all countries and private sector may participate to this new mechanism; allocation of credits to buyer and seller must prevent double counting; supervision will be exercised by a dedicated body. By defining these future rules, the CMA should use different elements of the JI/CDM experience: for example, the scope of the activities, the additionality of the emission reductions, or the MRV requirements.

Article 6 of the Paris Agreement lays out non-market-based approaches in an explicit manner to balance provisions between supporters and opponents to markets. This framework promotes integrated, holistic and balanced approaches in the context of sustainable development, instead of the Bolivarian approach which would have rejected the use of flexible mechanisms and carbon markets. According to the Decision 1/CP.21, the Parties request the Subsidiary Body for Scientific and Technological Advice to undertake a work program with the objective of considering how to enhance linkages and create synergy between mitigation, adaptation, finance, technology transfer and capacity-building, and how to facilitate the implementation and coordination of non-market approaches.

Transparency: building trust and confidence

The Paris Agreement establishes an “*enhanced transparency framework*” for action and support. At its first session, the CMA shall, building on experience from the arrangements related to transparency under the UNFCCC, adopt common modalities, procedures and guidelines, as appropriate, for the transparency of action and support. The purpose of this framework is to provide a clear understanding of climate change action including tracking of progress towards achieving the Parties’ individual NDC.

The transparency framework shall take into account the Parties’ different capacities. In that respect, less developed countries and small island developing States could be exempted from these obligations. However, the verification principles appear to be quite weak: the transparency framework shall be implemented in a facilitative, non-intrusive, non-punitive manner, respectful of national sovereignty, and avoid placing undue burden on the Parties.

Climate finance to support the Paris Agreement objectives

Climate finance is another tool to achieve the Paris Agreement long term goals. According to Article 2, finance flows, presumably including development cooperation, will have to be made consistent with a pathway towards low greenhouse gas emissions.

Industrialized countries shall provide financial resources to assist developing countries in continuation of their existing obligations under the UNFCCC. They should continue to take the lead in mobilizing climate finance from a wide variety of sources, noting the significant role of public funds. Such mobilization should represent a progression beyond previous efforts. Scaled-up financial resources should aim to achieve a balance between adaptation and mitigation. Developing countries can also provide climate finance voluntarily. The Paris Agreement recognizes the South-South cooperation.

Developed Parties shall biennially communicate indicative quantitative and qualitative information, including projected levels of public financial resources. Other Parties providing resources are encouraged to communicate biennially such information on a voluntary basis.

The global stocktake shall take into account the relevant information provided by developed country Parties and/or Agreement bodies on efforts related to climate finance.

According to Decision 1/CP.21, developed countries intend to continue their existing collective mobilization goal through 2025. Prior to 2025, the CMA shall set a new collective quantified goal from a floor of USD 100 billion per year, taking into account the needs and priorities of developing countries. This aspect of the Decision 1/CP.21 could be an issue. Indeed, developed countries are only urged to scale up their level of support, but there is no clear roadmap for how finance is to be leveraged. The Copenhagen goal of 100 billion may be a floor, but there is no short term collective quantified target. A financial goal for adaptation is not established. There is nothing on phasing out fossil fuel subsidies. The list of the different entities contributing to the application of the Paris Agreement does not mention explicitly the Adaptation Fund.

Other issues

On loss and damage, Article 8 provides that the Parties should enhance understanding, action and support, including through the Warsaw International Mechanism, on a cooperative and facilitative basis. However, Article 8 “does not involve or provide a basis for any liability or compensation”.

On compliance, a mechanism is established to facilitate implementation of and promote compliance with the provisions of the Paris Agreement. The mechanism shall consist of a committee that shall be expert-based and facilitative in nature and function in a manner that is transparent, non-adversarial and non-punitive.

Conclusion: what’s new? Is it better? Is it historic?

Compared to past climate conferences, COP 21 is definitely a success in the fight against climate change. Indeed, the Paris Agreement, concluded under the auspices of the French presidency, relies on an hybrid approach. The Paris Agreement’s provisions are contained in an universal legally binding treaty (top-down), including for preparing and maintaining NDCs, which are nationally determined (bottom up).

Although the level of ambition (2°C; 1.5°C) remains modest, the Paris Agreement presents flexibility and dynamism with a regular review of the efforts made by the Parties. Furthermore, the Agreement requires

the involvement of many actors: NGO, subnational entities (continuation of the Lima-Paris Action Agenda), and the private sector.

According to the Paris Agreement, the principle of equity will also play an important role in the future climate change regime: there is a distributive differentiation across issues and countries. The rigid opposition between “Annex I” and “non-Annex I” countries, provided by the Kyoto protocol and the UNFCCC, has been replaced by a common global framework. The abandon of this nomenclature was one of the reasons why the negotiations during the COP 21 were strained.

The success of the Paris Agreement will largely depend on the political will of countries and the effectiveness of the international cooperation.

[Post script: The Supreme Court Stays the Clean Power Plan. Will the stay impact COP21?](#)

On February 9, the Supreme Court issued a stay of EPA’s Clean Power Plan. The case is set for expedited review by the D.C. Circuit Court of Appeals, so that it is possible that the case could reach the Supreme Court in the 2016-2017 term, but it is more likely that the case would not be heard until the 2017-2018 term. In that case, the rule could be stayed for two years or more. In the meantime, the states opposed to the rule, which include some of the largest GHG emitters, will certainly not be working on their implementation plans.

What does it mean for the Paris Agreement? Technically, nothing, at least for now. The United States’ NDC remains its NDC and the Paris Agreement is no more or less enforceable against the United States than it was before the stay was issued. At a practical level, its significance could be great. The Paris Agreement still relies on each nation committing to attaining its NDC. If other nations lose confidence in the United States’ will to comply, those nations may waver as well. Time will tell, but this did not help the momentum.