The Normative Contours of International Environmental Law

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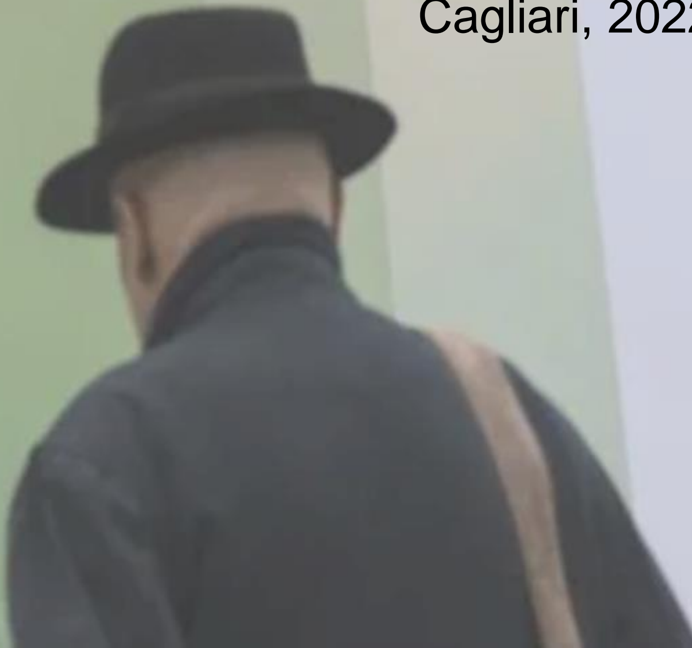

Outline

1. What is IEL?
2. The Sources of IEL
3. The Effectiveness of IEL
4. The Paris Agreement as an Example of a New Way for States to Commit Themselves

1. What is international environmental law (IEL) ?

- **IEL is hard to define.**

- It is comprised of « *those substantive, procedural and institutional rules of International Law which have as their primary objective the protection of the environment* » (Philippe Sands, *Principles of International Environmental Law*)
- Its boundaries vary (+ or – inclusive)

  => Only natural environment ? Or natural *and* cultural ? Is there still a natural environment ?

  - GMOs
  - landscapes

  « 'Landscape' means an area, as perceived by people, whose character is the result of the action and interaction of natural and/or human factors » (Art. 1, European Landscape Convention)

  - pollution
  - animal law
- Primary/secondary objective

- **IEL is anthropocentric.**

« the Court also recognizes that the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn ».

ICJ Advisory opinion of 8th July 1996, *Legality of the Threat or Use of Nuclear Weapons*, *ICJ Reports 1996,* p. 226, par. 29.

2. The sources of IEL

A central question

- The question of the sources of international law is **central in international discourse**, both from a theoretical and practical point of view.

- As Georges Abi-Saab noted, if it is **close to an obsession for international lawyers**, it is because the international legislative function is accomplished in a diffuse system of power and without function specialisation.

- The word "source" is valuable because of its **all-encompassing nature.**

- The notion can refer to the **law-making process, the resulting norm or even the type of the resulting norm** (e.g. customary or treaty-based).

Is IEL specific?

- IEL is an **increasingly critical part of international law**
- As such it **has developed within the body of legal rules and procedures that constitutes international law**
- The sources of IEL are **not specific**, but they have some **peculiarities**.

IEL as a laboratory?

- By their global nature, transversality, urgency, and controversial nature, environmental issues have challenged the classical theory of sources.
- International environmental law is thus a remarkable illustration of the changes in the law-making process and the normativity of international law.
- It is often said that it is the « laboratory » for tomorrow's international law.
- IEL has given ground to testing different processes of diversification, softening, and deformalization.
- These developments do not lead univocally to a softening of the field, but rather to a **sophisticated interweaving of norms whose scope, content and purpose are combined**. The result of these complex loops is a **polymorphic and multifaceted body of rules, combining various degrees of force and various textures.**

- A focus here: the **conventional sources of IEL** i.e. treaties.

Treaties: one formal source among others

Article 38, ICJ Statute

« (1) The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

(b) international custom, as evidence of a general practice accepted as law;

(c) the general principles of law recognized by civilized nations;

(d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law (…) ».

All hard law – Establish legally binding obligations on states.

No hierarchy – The first three categories of sources of law are not set up as a hierarchy. Nor are they entirely exclusive.

A legal system – Combination of norms

Treaties: the main IEL source

- International conventions or treaties traditionally constitute the **main source** of international environmental law.

- Indeed, although fairly recent, international environmental law has experienced very important conventional developments. **Conventional methods have allowed the formalization of institutionalized international regimes, organized and supported by financial commitments, area by area and domain by domain.**

Treaties: the main IEL source

- International conventions or treaties are, to this day, the **most operative type of interstate cooperation because**
  - they allow concrete and specific international cooperation (prohibiting certain chemicals, regulating the trade of threatened wild species for which a certain type of form will be required, etc);
  - they allow the institutionalization of cooperation, the development of collective means of inciting compliance and reacting to non-compliance;
  - they allow the initial regime to evolve through treaty modification, adoption of protocols or, more simply, derived/secondary law.

Treaties: the main IEL source

- More than **1300 multilateral treaties** dealing with the environment, having universal or (for the most part) regional scope, have been adopted.

- The development of these instruments resulted in what some scholars have characterized as **treaty fatigue**, indicating thereby that greater attention needs to be paid to the ratification and implementation of existing conventions rather than to the adoption of new treaties.

Treaties: the main IEL source

- The **degree of effectiveness varies from one regime to another.**
- Very few measures are self executing and precise enough to have a direct impact on national law, but conventional environmental law has a large influence on the development of internal laws.

Ex. « *Each contracting party shall, as far as possible, and where appropriate (…)* » or with « *Each contracting party shall, in accordance with its particular conditions and capabilities (…)* » (Rio Convention on Biological Diversity).

Combination of treaty-based and customary rules

No harm – due diligence as customary foundations of international environmental law

ICJ, 2010, Pulp Mills case: « *The Court points out that the principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory* ».

"A State is (…) obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State".

- A customary rule
- A positive obligation – to regulate the conduct of private actors (direct/indirect)
- An obligation of conduct and not of result
- A general/abstract rule
- Some corollaries of the general due diligence obligation: information, notification, cooperation, impact assessment and continuous monitoring

Combination of treaty-based and customary rules

Potential synergies between customary and treaty rules

- Customary and conventional rules do not work in isolation but, on the contrary, enjoy a **close relationship** extending as far as fertilization and mutual pollination.
- The customary rules that have emerged so far provide a **useful complement** to conventional rules.
- Because of their “open texture” and general nature, they still have a role when conventional rules, bringing more details and certainty, are developed.
- A treaty may declare a pre-existing custom, participate in the crystallization of an emerging custom or participate in the birth of a custom.
- The interest in thinking systematically about the relationship between custom and treaties has been less explored so far.
- **The due diligence obligation is a general obligation – applicable to all States regardless of whether or not they have ratified any treaties. It is binding on all States, including those who has not ratified a specific treaty.**
- **Most of the time, it applies alongside conventional obligations. In this case, it remains an interesting basis that could be relied on, in addition to such obligations.**

Combination of treaty-based and customary rules

Potential synergies between customary and treaty rules

Ex. Regarding **climate change**, the customary obligation of due diligence complements conventional obligations, keeping in mind that, to this day, the commitments to reduce emissions pursuant to climate treaties are inadequate and insufficient to “prevent dangerous anthropogenic interference with the climate system”.

In other words, climate treaties do not yet fully embody the customary due diligence obligation. A State may comply with its conventional commitments while failing to meet its customary obligation, with regard either to the substantial or procedural components of this obligation. As for conventional obligations (in particular arising out of the UNFCCC, Kyoto Protocol, Paris Agreement, and related decisions of the Parties), they must be interpreted in the light of the customary obligation, which can result in additional obligations. In practice, conventional and customary due diligence obligations mutually feed and shed light on one another.

Ex. The recent award on the **South China Sea** reflects the mutually reinforcing relation that can take place between these different kinds of obligations: in this instance, the Tribunal found that the no-harm rule “informs the scope of the general obligation in Article 192” of the United Nations Convention on the Law of the Sea.

Combination of soft and hard law

- Soft law is **remarkably abundant** in IEL.
- Soft law is **extremely varied**.

- Many key principles, concepts and prescriptions of international environmental law are contained in soft law instruments (the Stockholm Declaration, 1972; World Charter for nature, 1982; Rio Declaration, 1992).

- Soft law in this field also encompasses strategic action plans, programs, orientation documents (ex. Action 21).

- Soft law **provides a platform for consensus-building, catalyzes the development of hard law, and guides the interpretation and evolution of treaties.**

In the *Whaling* case, the ICJ considered that the International Whaling Commission's recommendations "*which take the form of resolutions, are not binding. However, when they are adopted by consensus or by a unanimous vote, they may be* ***relevant for the interpretation of the Convention*** *….*"

Whaling in the Antarctic (Australia v. Japan: New Zealand intervening), Judgment, I.C.J. Reports 2014, p. 226, §46.

Combination of soft and hard law

• Even if the instruments of soft law are at first sight non-binding, in practice they can still have **some normative value.**

- See the care taken in negotiating the content of such instruments (COP decisions…)

- See States occasionally accepting the implementation of monitoring and compliance mechanisms.

• The **degrees of normativity** and effectiveness of soft law instruments are in fact **variable.**

• **The *summa divisio* between *hard* and *soft*, between mandatory and non-mandatory (binding and non-binding) does not, in any case, stand up to an in-depth analysis.**

Even more so when we think of **the combination of soft law and hard law.**

Combination of soft and hard law

- Soft law can be seen as pre-law or « green law » *in statu nascendi,* a crucible for positive law, whether it marks a stage in the creation of a conventional or an unconventional rule.

- It can also reveal the existence of a customary law.
  Ex. Considerable role played in the ulterior development of international environmental law, by the Stockholm Declaration in 1972 or the Rio Declaration in 1992, or even the World Charter for Nature in 1982.

- They prepared the adoption of conventional rules and crystallized or contributed to crystallizing them, or even revealed the existence of new customary rules.
  Ex. Numerous guidelines have, in several cases, become international conventions.

As G. Abi-Saab sums up : soft law thus serves as a <u>precursor</u> and an <u>engine</u> to the dynamic and cumulative process of law development ; it marks its passage through grey areas.

Combination of soft and hard law

- Soft law can be not only a means to an end but the end itself. It should then be analyzed not as *pre-law* but as another type of law.

  Ex. Agenda 21 (1992), UNESCO's Man and Biosphere program, the European Diploma of the European Council, SDGs…

  Ex. the World Bank Inspection Panel, set up as an independent organization within the World Bank in charge of examining complaints from people directly impacted – or potentially impacted – by projects financed by the IBRD or the International Development Association (IDA), which control these agencies' compliance with its policies and operating procedures & guidelines

  Ex. « decisions » (*de facto* if not *de jure*) regularly taken by the Conference of Parties. In an international regime, the treaty is often the visible part of the iceberg.

Combination of soft and hard law

- Can it be said that the **increasing porosity between hard and soft law** is pushing the question of the value of the instruments into the background ?

- Many of them, of uncertain normativity, are **still applied daily** without any questions being raised about their normativity.
  Many conventional or customary obligations are, on the other hand, **wrongly applied.**

- Finally, as long as the state of mutual interest continues peacefully, the legal aspects of the relationships can seem secondary. Is the fundamental question (or the fundamental factor) in the ***compliance pull*** not then that of the **legitimacy** of the instruments?
  To say this does not mean denying the importance of the procedures and processes of normative creation. The more open, transparent and inclusive they are, the more the norms will fit some criteria of internal legitimacy.

3. The effectiveness of IEL

Compliance, implementation, effectiveness

- The terms of compliance, implementation and effectiveness are often perceived to be interchangeable. But they have particular connotations in international environmental scholarship.
- The term **compliance** refers to a state of conformity or identity between an actor's behaviour and a specified rule.
- **Implementation** refers to the process of putting international commitments into practice. This includes incorporation of international laws into domestic regulatory and institutional frameworks.
- Although implementation is usually a critical step towards compliance, compliance can occur without implementation, as for instance where an international commitment mirrors national law and practice, or where factors external to the legal process induce compliance.
- The term **effectiveness** is a multi-layered concept that focuses on the causal link between a given rule and state behaviour. Effectiveness could refer to the degree to which a given rule induces the desired behavioural change, improves the state of the env. problem, or achieves its policy objectives.The latter two are difficult to gauge, the first is more modest and perhaps verifiable.

Compliance, implementation, effectiveness

- It is important to distinguish between **compliance with commitments *per se* and the impact that commitments have on state behaviour**. Behavioural change is what matters.

  Ex. Russia was in full compliance with the Kyoto Protocol because of the collapse of its economy in the early 1990s. Such compliance did not lead, however, to behavioural change, and its emissions have been on the rise as soon as its economy picked up.

- **In general States comply. Why ?**

- There are numerous theories trying to identify the factors that influence state-behaviour.

⇨ **Rationalist theories** explain compliance in relation to the nature of the problem, the structure of the chosen solution and the costs and benefits associated with different behaviours.

⇨ **Norm-driven theories** focus on the power of ideas to influence state behaviour. For instance, T. Franck argues that the legitimacy of rules and processes generates a “compliance pull.” And, A. Chayes supports “managing compliance” through financial or technical assistance, or political dialogue.

⇨ **Liberal theories** suggest that liberal societies because of their domestic reverence for the rule of law are more likely to comply with decisions of international tribunals than illiberal states.

4. The Paris Agreement as an example

A subtle combination of tools and actors… for better enforcement?

The main steps

- 1988: establishment of an expert body, the **Intergovernmental Panel on Climate Change** (IPCC)
- 1992: adoption of the **United Nations Framework Convention on Climate Change** (UNFCCC, 1992) - 197 contracting parties - lays down a general framework for cooperation - determines the fundamental principles and creates an institutional framework, including an annual meeting of the Parties, the COP
- 1997: adoption of the **Kyoto Protocol** - set out concrete obligations for the reduction of greenhouse gas emissions relative to 1990 levels, but only for industrialised countries.
- 2015: adoption of the **Paris Agreement** (COP decision 1/CP.21 adopts and supplements the Agreement)

  A real **diplomatic success** =

  194 parties

  A large number of countries have passed legislation to implement it...

Weaknesses

- Contains few substantive obligations and essentially procedural ones.
  - Ex. Each Party must make a nationally determined contribution, with no external control over its content and level of ambition.
  - While it must communicate this contribution to the Secretariat and update it regularly – always upwards –, it is entirely free to decide on its substance.
- The PA provides that "Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions" (Art. 4(2)). But it does not impose a specific result in terms of greenhouse gas emission reductions.
- If a State fails to comply, no sanctions are provided for => The focus is on incentives.
- 7 years after, the temperature limitation target set in the Agreement is still completely unrealistic based on our emissions' trajectories.
  - UNEP report *The Emissions Gap (*2021) estimates that even if the Parties' contributions are all taken together, they do not come close to 2°C, but rather 2.7°C. This is undoubtedly progress compared to the 4 or 5 °C expected by so-called "business-as-usual" scenarios, but we are still very far from the objective set out in the Paris Agreement and, perhaps even more importantly, from a safe operating planetary space.

The legal form of the Agreement

- **Decision 1/CP.17 (2011)** to "*launch a process to develop a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties*".
- Leaving the issue entirely open was the price to pay for initiating a discussion that could lead to a global and unified regime that would include all countries in the same set of international rules.
- The debate primarily pitted proponents of a treaty form against proponents of a non-legally binding agreement in the form of one or more COPs. This debate long remained unresolved until eventually a proposal for a compromise emerged: a proposal for a composite and skilfully diverse legal form, avoiding the need to make a binary and divisive choice.
- The parties ultimately agreed upon a package that includes both, a legally binding agreement – a treaty (the PA) – which is relatively concise and general – and a COP decision (with many other decisions to come).
- This is an interesting choice as it **subtly combines hard and soft law elements. The two instruments do not exist one without the other. Their content and legal force are instead complementary.**

The legal form of the Agreement

- The decision and the Agreement cannot be read in isolation. The decision supplements and clarifies the Agreement on a number of matters. It also prepares the entry into force of the Agreement.
- Deciding what should be laid down in one or the other, and in possible future decisions, occupied the negotiators for a large part of 2015 and was not fully settled when the COP started.
  - Ex. On financing, Article 9 requires developed country parties to provide "*financial resources to assist developing country Parties*" (Art. 9§1). It further states that the "*mobilisation of climate finance should represent a progression beyond previous efforts*" (Art. 9§3). This wording is however rather vague as commitments are not quantified. The meaning of "*previous efforts*" is not specified.
  - BUT the Paris Agreement must be read together with the COP decision, in which a clear amount is mentioned: *"prior to 2025 the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement 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"* (§54).

The legal form of the Agreement

- The national contributions are recorded in a public register held by the secretariat (Art. 4§12 & 7§12).
- The advantage of this approach, which was already used in respect of states' pledges to reduce emissions pursuant to the above-mentioned Cancun Agreements, lies in its flexibility.
- This is all the more important as contributions are renewed every five years and in the meantime "*a Party may **at any time** adjust its existing nationally determined contribution with a view to enhancing its level of ambition*" (Art. 4§11).

The content of the Agreement

- Also a **subtle combination of top down and bottom up approaches**
- The contributions determined at national level do reflect a bottom-up approach, while other provisions in the Agreement like the transparency framework clearly demonstrate a top-down approach.
- The Agreement therefore subtly combines both approaches **in order to protect the sovereignty of states while engaging them in a process that is designed to be dynamic and incentivising.**

The content of the Agreement

The bottom-up approach is at the heart of the Agreement

- **through the central tool of national contributions**
  - "*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*" (Article 4§2).
  - The parties' obligation is not one of result but one of conduct: they are obliged to adopt internal measures to achieve their objectives.
- **through the recognised role of non- and sub-national actors**
  - The Agreement recognises, in its preamble, *"the importance of the engagements of all levels of government and various actors, in accordance with respective national legislations of Parties, in addressing climate change*".
  - The preamble of the COP decision is more specific as it sets out the need *"to uphold and promote regional and international cooperation in order to mobilise stronger and more ambitious climate action by all Parties and non-Party stakeholders, including civil society, the private sector, financial institutions, cities and other subnational authorities, local communities and indigenous peoples*".
  - The decision actually dedicates a whole section to "*Non-Party stakeholders*". In section V, it "*welcomes the efforts of all non-Party stakeholders to address and respond to climate change, including those of civil society, the private sector, financial institutions, cities and other subnational authorities*".
  - Beyond that, it merely invites them to step up their efforts and to demonstrate them on the internet platform on climate action NAZCA.

The Non-State Actor Zone

Global Climate Action
NAZCA

Actor tracking | Cooperative Initiative tracking | Register your actions | Event tracking | About

Towards more open climate action data
The Climate Data Steering Committee, created by French President Emmanuel Macron and UN Special Envoy for Climate Ambition and Solutions Michael R. Bloomberg, recommends an open climate data utility that should built to be part of the Global Climate

Cooperative Initiative Tracking
The portal features 150 registered cooperative initiatives, including 67 who have provided updates and progress information. Explore them here

Actor Tracking
Explore here how over 30,000 companies, investors, organizations, regions and cities are engaging in global climate action and making progress toward their commitments

Tracking initiatives announced in events
Explore the progress on voluntary actions reported by the cooperative initiatives launched at the UN SG's 2019 Climate Action Summit here

Actors

- 13,909 Companies
- 1,562 Investors
- 3,451 Organizations
- 287 Regions
- 11,361 Cities
- 196 Countries

Locations and Regions

Locations
Select

30,766 actors engaging in climate actions

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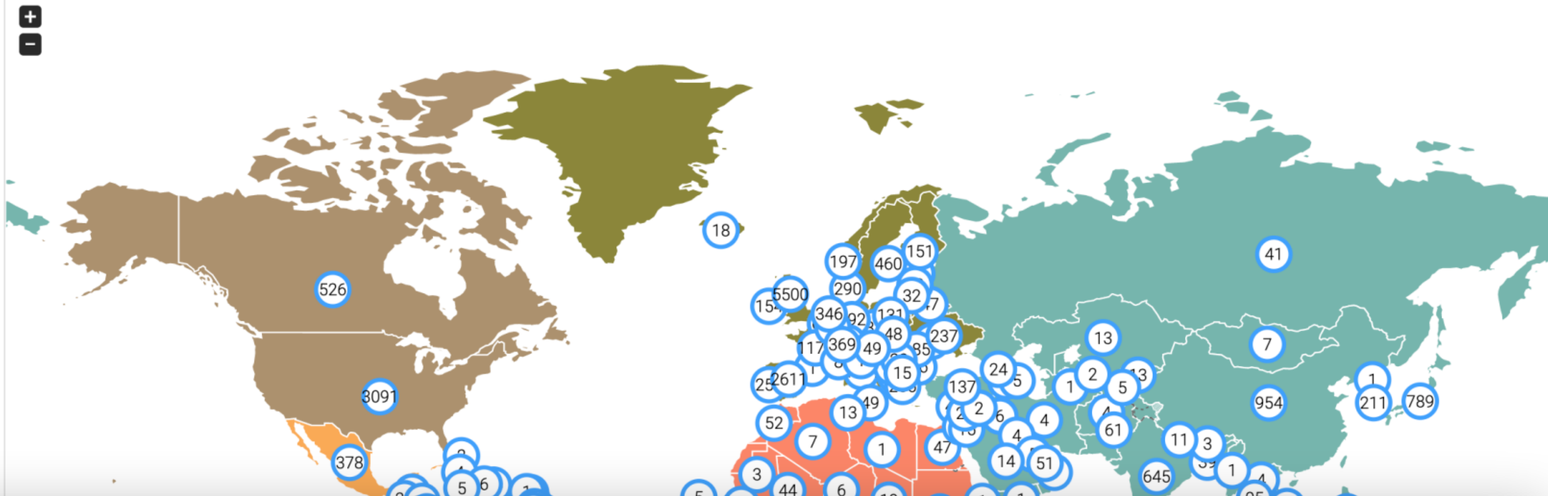

The content of the Agreement

The added value of the Agreement is the top-(back-)down approach.

As contributions are nationally determined, the question arises as to whether the Agreement retains its *raison d'être*. It does, for **two reasons.**

1) Creating a dynamic

The first raison d'être of the treaty is to create a dynamic by encouraging states first to commit, and then to gradually increase their level of commitment.

❑ Encouraging States to commit

The substance of national contributions is to be determined by the states, but in terms of procedure, the Agreement sets very specific standards as regards the communication and transparency of such contributions. Commitments – such as the commitment to limit global warming – are often collective rather than individual. Statements such as *"Support shall be provided to developing country Parties"* (Art. 4§5) do not have a specific addressee. They set out a vague obligation for all states and institutions, but are not worded as an individual obligation. No sanction can be imposed if a state does not comply with the Agreement. Instead, the Agreement merely provides that control will be *"facilitative in nature and function in a manner that is transparent, non-adversarial and non-punitive"* (Art. 15).

To be accepted by developing countries, the PA operationalises the principle of common but differentiated responsibilities and respective capabilities of the parties "*in the light of different national circumstances*" in various ways.

The content of the Agreement

1) Creating a dynamic

- **Encouraging states to be more ambitious**

- The parties are required to submit their updated contribution on a regular basis.
- Each contribution must constitute a progress from the previous contribution (Art. 3) [“no-backsliding” principle]
- Parties may “at any time” amend their contribution “with a view to enhancing its level of ambition” (Art. 4§11).
- In order to assess the adequacy of the efforts aggregated altogether against the envisaged global goal, and to increase the pressure on states, Article 14 lays out the principle of a global review, referred to as a “global stocktake”, that is to take place every five years (first: 2023).

The content of the Agreement

2) Guaranteeing the transparency of actions and policies

- ✓ The provisions ensuring transparency and control are all the more important in a flexible system where contributions are determined by states themselves.
- ✓ The enhanced transparency framework (art. 13) has been referred to as the "*beating heart*" of the Paris Agreement (Christina Voigt).
- ✓ It reintroduces more or less top-down aspects to an approach that is predominantly bottom-up. Importantly, it also creates trust between the state parties, which has a positive impact on their willingness to increase their commitments. It equally enables the monitoring of parties' efforts, and to confront them accordingly to the target emissions trajectory.
- ✓ Negotiators were well aware of this and special care was dedicated to this matter on which a great part of the robustness of the Agreement depended.
- ✓ Conduced *"in a facilitative, non-intrusive, non-punitive manner, respectful of national sovereignty, and avoid placing an undue burden on Parties*"
- ✓ But the information provided by parties is subject to a "*technical expert review",* followed by a political phase of "*facilitative, multilateral consideration of progress*" (Art. 13§11). The technical review shall *"identify areas of improvement for the Party"* (Art. 13§12), **which is in fact a paraphrase to refer to potential or actual infringements.**

Conclusion

- The Paris Agreement shows that the function assigned to an international treaty, or in other words, the way in which states commit themselves, evolves over time. In this regard, **the form and substance of the Agreement have been carefully crafted to enable a consensus that seemed unattainable just a few months before.**
- Despite the way in which the Paris Agreement was designed, and even though its provisions have no or little direct effect, the Agreement **increases pressure on states, including - and perhaps most importantly - at the domestic level**.
- In view of the findings of the IPPC reports (Sixth Assessment Report, AR6), and the growing mobilisation of civil society, it becomes ever **more difficult politically speaking for states to stick to national contributions that, once aggregated, could not lead to a drastic reduction of emissions** that would remain "well below 2°C" and as close as possible to 1,5°C.
- The Paris Agreement has decisively contributed to ***increasing the number of domestic climate litigation*** thanks to the engagement of civil society. This has given national courts the opportunity to position themselves as important actors in climate governance. Even if the results are not always satisfactory, this somewhat renewed form of international commitment by the states has in turn led to renewed forms of control that – hopefully – will lead to greater effectiveness.

Thank you for your attention

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