

CLIMATE GOVERNANCE AFTER THE PARIS AGREEMENT

WORKSHOP REPORT*

In November 2016, UCL's Global Governance Institute (GGI) hosted over 30 leading international practitioners and scholars in the field of climate change law, governance and policy for a workshop on the Paris Agreement and its potential to drive forward effective climate governance. The event was supported by the French Embassy in London as part of its Conference-Débat series. UCL Grand Challenge and the UCL Centre for Law and Environment co-hosted the public evening panel. This report serves as a summary of the workshop's discussions, which were held under Chatham House Rule.

Following years of deadlock, the Paris Agreement adopted in December 2015 marks a dramatic breakthrough in multilateral climate negotiation. Anne-Marie Slaughter hailed it as "a model for effective global governance in the twenty-first century".¹ Indeed, the Paris Agreement embodies a new, more flexible governance approach: a hybrid of hard, soft and non-law, bottom-up and top-down mechanisms.

A spirit of pragmatism – 'don't let the perfect be the enemy of the good' – brought negotiations in Paris to a successful conclusion. As a result, however, many of the provisions thrashed out in Paris are purposely framed in order to accelerate implementation action, leaving many questions unanswered. Considerable debate surrounds the legal, operational and normative status of provisions within the Agreement, and the potential of innovative global mechanisms, such as the global stocktake, to enable new avenues for legal and political mobilisation.

Given the Agreement's bottom-up nature it is essential that it connects with domestic governance arrangements and policy activities. Unlike previous international climate treaties, the Paris Agreement does not set mitigation targets for specific countries or regions. Instead, all state parties formulate targets or 'Nationally Determined Contributions' (NDCs) based on their own judgement. This flexible approach has made the Paris Agreement more inclusive than any previous climate deal, however, its success will depend largely on whether parties will submit increasingly ambitious revisions of their NDCs.

As policy-makers, practitioners and scholars seek to realise and ratchet up the impact of the Paris Agreement, it is essential to advance understanding of how to operationalise its provisions in practice. This policy brief takes stock of the potential of the Paris Agreement to drive forward effective climate governance, reflects on the challenges of mobilising implementation, and carves out possible pathways forward.

* Report authors: Lauriane Wolfe, Ed Procter and Julia Kreienkamp, University College London (UCL).

¹ Slaughter, A 2015, [The Paris Approach to Global Governance](#), Project Syndicate, accessed 11 January 2017.

EXECUTIVE SUMMARY

- The Paris Agreement represents a fundamental shift away from the 'top-down' governance model of its predecessor, the Kyoto Protocol. The Agreement is an experiment in a hybrid, more flexible approach to global cooperation, combining 'bottom-up' mechanisms of national target-setting with 'top-down' oversight and stocktaking procedures. It is also the first universal climate change agreement, covering 99% of global emissions.
- The Agreement reflects a global consensus on the need to confine global temperature rises to "well below 2°C above pre-industrial levels".² Of particular importance for countries most at risk from climate change was the adoption of an additional aspirational target to "limit the temperature increase to 1.5 °C"³. However, current national mitigation pledges ('Nationally Determined Contributions' or NDCs) are not yet ambitious enough. The Agreement's success therefore hinges, among other things, on whether ambition will be scaled up over time.
- Reflecting strong political momentum, the Paris Agreement became one of the fastest multilateral agreements ever to enter into force. Yet, many of the controversies that were overcome in Paris could re-emerge, including questions of differentiation between developed and developing countries, operationalising equity and the thorny issue of compensation for loss and damage.
- Beyond the United Nations Framework Convention on Climate Change (UNFCCC), implementation will be driven by a range of actors, including states, cities, businesses, civil society organisations and local communities. Domestic governance models, such as the UK Climate Change Act, can both reinforce and complement the Paris Agreement. Courts will also have a role to play, with climate change litigation emerging as a potentially powerful tool to hold governments and businesses accountable for climate (in)action.
- Article 6 of the Paris Agreement gives new life to carbon markets and cooperative mechanisms. Going forward, it is to be hoped that these mechanisms move beyond those established under the Kyoto Protocol and incorporate lessons learned, in particular from the failures of the Clean Development Mechanism (CDM). It is also crucial that robust accounting structures are established to avoid double counting of mitigation outcomes.
- As the United States under President Donald Trump will not provide leadership on global climate action in the future, it is unclear who will fill the vacuum. The EU has long portrayed itself as an international leader in the climate arena but its legal and institutional 'toolkit' remains underdeveloped. There are also signs that China could step up its engagement, although it has so far shied away from assuming a leadership role in global climate governance.
- Decarbonisation has inevitable trade-offs and it will create both winners as well as losers. It is important that all affected actors have a seat at the table and that measures are implemented to make the transition to a low-carbon economy as just as possible. In a 'post-truth' world, building broad, inclusive coalitions for climate change action might be more important than ever before.

² UNFCCC 2015, [Paris Agreement](#), accessed 13 January 2017.

³ Ibid.

CLIMATE GOVERNANCE AFTER THE PARIS AGREEMENT: TAKING STOCK AND PATHWAYS FORWARD

The Paris Agreement's flexible legal character is the innovative ingredient which ultimately triggered a major breakthrough in multilateral climate negotiations. For the first time, states can determine their own carbon emissions targets, as part of their 'Nationally Determined Contributions' (NDCs). The regulatory trait of the Paris Agreement has shifted to a more facilitative one, notably through its innovative crux: the 'pledge and review' system. As a result, the Agreement has blasted previous records to become the fastest ever comprehensive international agreement to enter into force. Moreover, it has congregated almost all states, including the largest greenhouse gas (GHG) emitters, into the climate mitigation regime. Governments are now obligated to take action towards maintaining average global temperatures below the 2°C – or ideally 1.5°C – threshold. Despite this major political success, the Paris Agreement has been criticised for its lack of binding enforcement measures and the insufficiency of national pledges made so far. There is also considerable debate surrounding the legal, operational and normative status of provisions within the Agreement.

Assessing the Paris Agreement: Opportunities and Challenges

The hybrid architecture of the Paris Agreement – constituting bottom-up mechanisms and top-down procedural obligations – represents an experimental step change from the Kyoto Protocol. The softer, imprecise elements of the treaty, however, have produced considerable concerns over equity and extensive uncertainty surrounding the oversight function, especially in monitoring and reviewing NDCs.

- **Equity, legal and operational implications:** The discussion over equity and differentiation, i.e. the question to what extent developed and developing countries have different obligations to act on climate change, is of great importance to developing states. The Paris Agreement has introduced a more nuanced approach, moving beyond the Kyoto Protocol's sharp dichotomy between Annex I and Annex II countries. This has made the Agreement more inclusive, however, it is unclear how exactly differentiation will be operationalised and how the terms 'developed' and 'developing' will be defined and applied. Apart from differentiation, loss and damage remains a particular concern for developing countries, in particular the question: Who will compensate for the incurred costs, as climate change takes its toll? The devotion of a whole article to loss and damage in the Paris Agreement was seen as a major victory for developing countries. However, the possibility of compensation was explicitly ruled out (see box below). Finally, equity concerns will also have to be taken into account when evaluating domestic action. States' access to support, resources and finance varies, and so does their ability to implement their NDCs. This suggests that equity must be built into the global stocktake, the top-down elements of the oversight system and national implementation measures, with as much transparency as possible. That will also allow for clear and coherent treatment of NDCs which include mitigation goals that are conditional upon international support.
- **A scientific assessment:** The Paris Agreement is probably the best possible outcome that could have been achieved considering the historical deadlock among state parties. Despite this major political success, however, the aggregate pledges made thus far are insufficient for maintaining global warming below 2°C. Achieving this target will necessarily entail a full economic transformation. Although the Paris Agreement witnessed the fastest ratification of any multilateral covenant or treaty, there is little evidence to suggest – given future implementation deadlines and current trajectories of carbon emissions already locked in – that it can transform the current time constants to get on the right track. Whether the Paris Agreement will help to keep temperatures below the 2°C threshold ultimately depends on the presence of a mix of enabling factors, including complementary national mechanisms, stable reviewing mechanisms for ratcheting up the ambition cycle, critical long-term planning, redirection of financial flows to decarbonise the economy, and mobilisation of non-state actors.

- **Pathways forward:** With the aim of 'ratcheting up' national pledges per 5-year cycles, the UNFCCC will need to propose a robust reviewing and monitoring mechanism to catalyse domestic action. It is crucial that this mechanism responds to concerns over transparency and equity. The development of a Paris Agreement 'rulebook' must be completed as fast as possible, to ensure accountability and proper reporting. At the same time, tailored national compliance systems will have to be put in place. The Paris Agreement also puts greater emphasis on the role of domestic and transnational non-state actors. More than ever, mitigation initiatives and policies must trickle down from governments through to businesses, financial services, investors, NGOs, and the broader civil society. The key message emanating from the Paris Agreement is that everyone can and must play a role in transitioning to a low carbon economy, or – as scientists highlight – a zero-carbon economy by approximately 2050.

LOSS AND DAMAGE: A KEY ISSUE FOR NEGOTIATORS AT PARIS

The concept of loss and damage refers to the 'residual effects' of climate change that cannot be avoided through mitigation and adaptation. This includes impacts related to extreme weather events (such as flooding, droughts, or cyclones) and slow-onset events (such as sea-level rise, desertification, or melting glaciers). Although loss and damage has emerged as a key issue in international climate change diplomacy, there is continued disagreement about how it should be defined and addressed. Most vulnerable countries associate loss and damage with liability and compensation, implying that those states which have historically emitted most greenhouse gases have a legal obligation to support poor and highly impacted states. In contrast, most developing countries stress the need for risk management and insurance, strongly opposing any claims for financial compensation.

These ideological differences were also present at the negotiations in Paris. However, the final Agreement signals an important breakthrough. With an entire article (Article 8) devoted to the issue, loss and damage now constitutes an independent third pillar of the international climate regime, in addition to mitigation and adaptation. Although the Paris Decision explicitly rules out any legal liability or compensation on the basis of Article 8, the final text of the Agreement does go a long way in establishing a framework within which cooperation on loss and damage can proceed in a less contentious manner.



Flooded house in Bangladesh. Source: "[Going shopping, by boat](#)" (CC BY-NC-ND 2.0) by [DFID - UK Department for International Development](#)

Opportunities: Institution-Building

The global climate regime is witnessing an increasingly comprehensive scope of initiatives involving a growing number of state and non-state actors. Accompanying this movement is the risk of project overlapping, resource inefficiencies and consequently ineffective governance. Meticulously designed institutions provide an opportunity for managing the complex groundswell of climate action initiatives.

- **Institution-building as governance innovation:** A growing number of institutions are being set up with the view to tackle future challenges arising from both the Paris Agreement and the broader regime complex on climate change. Institutions can act as third-party monitoring bodies and catalysers for enabling nations to negotiate, decide and implement more effectively. Institution-building is often, but not always, an efficient means for accommodating, describing and centralising expectations. It is therefore worth assessing where, when and how institutional designs maximise their effectiveness. An assessment of existing institutions within the climate change regime (including those shown in Table 1 below) suggests that institutions tend to perform well when the expectations of what they should be able to deliver align with their actual capacity to do so. Limited membership can also help institutions to perform well, as it drives them to professionalise and develop specialist expertise over time.

Table 1: Examples of newly set-up, existing and experimental institutions that share traits in terms of their governance structure.

- **Paris Committee on Capacity-Building** (*New*)

This institution, established at COP-21 in Paris, has a broad mandate to improve the effectiveness of all institutions that are contributing to the implementation of the Paris Agreement.

- **Adaptation Fund** (*Existing*)

Developing countries push hard for the Adaptation Fund (established in 2001) to play an important role under the Paris Agreement, as it is the only effectively functioning institution that finances adaptation projects and programmes in vulnerable countries.

- **Global Climate Action Agenda** (*Experimental*)

Launched at COP-22 in Marrakech, this programme brings together private actors, local authorities, and civil society under a broad regime to boost cooperative approaches on climate change.

- **Limitations:** Albeit institutions are easy to set up, expectations around their ability to produce successful outcomes are difficult to meet. While developing countries often call for the establishment of new institutions out of frustration with existing ones, developed countries are more reluctant, due to concerns over duplication and post-creation costs. If institution creation is to embody a form of governance innovation, institutional design will require meticulous consideration. New institutions should be assessed in terms of their contribution to the future evolution of the climate regime, in particular regarding the ambition cycle and the global stocktake. Balanced membership is also crucial to ensure that both developed and developing countries put trust into newly created institutions. Finally, forthcoming institutions will require highly precise mandates that align with their capabilities to deliver on those mandates.

CLIMATE REGIME: A LEADERSHIP VACUUM

Who will provide climate leadership in the future? Participation of the world's largest emitters and economies, the US and China, has proven essential in setting standards for collective action on climate change. Under President Obama, the US assumed a leadership role, encouraging businesses and other states to make strong commitments to reduce emissions. Under President Trump – an outspoken global-warming sceptic – the political trajectory of the US is much more unpredictable. Will China emerge, then, as a clean energy superpower leading the fight against climate change? After all, the country is the world's largest investor in renewable energy, a sector with vast potential for job growth and revenue. If the US relinquishes its viable position as climate forerunner, China will most likely gain competitive advantage. So far, however, China has hesitated to assume a political leadership role on climate change.

The EU also has a critical leadership role to play in scaling up political ambition and locking down policy action to decarbonise the economy. The EU has access to the power and resources necessary for implementing the Paris Agreement conditions. It can mobilise existing legal arrangements and economic instruments to accelerate market trends, including by leveraging taxation, state aid, green public procurement, competition law, energy regulation and litigation. However, this 'enabling toolkit' is currently only weakly aligned with the common 2°C objective and perhaps under-developed: Despite the EU's elaborate legal framework, no mechanism yet exists for introducing a 'ratchet and review' system. Embedding the Paris Agreement conditions within a multi-level framework such as the EU will be challenging. It is therefore important, that stable mechanisms – such as a scorecard-based assessment system – are put in place to monitor and measure the progress made towards treaty implementation.



"Comité de Paris" at COP-21. Source: "[Closing Ceremony of COP21, Paris](#)" (CC BY-NC-ND 2.0) by [United Nations Photo](#).

KEY INSIGHTS

- Incremental equity is high on the Paris Agreement agenda, particularly for developing countries. The legal framework for building in fairness must be precisely defined, for example on differentiation, loss and damage and flexibility of the oversight system. With such importance placed on domestic action, states also have a duty to implement fair and transparent legislation within their own frameworks.
- COP-21 saw some important negotiation successes for countries most at risk from environmental damage, including the adoption of the aspirational 1.5°C target. In addition, an entire article has been devoted to loss and damage, signifying an important breakthrough. Loss and damage now stands alongside adaptation and mitigation as a third pillar of the international climate regime, and we can expect it to remain high on the agenda for developing countries.
- The Paris Agreement is indubitably a landmark of successful political negotiation and consensus. However, this has little relevance if states cannot peak their emissions and maintain temperatures below the 2°C threshold. Because existing trade and investment deals have already locked in decades of future emissions, current emission trajectories and aggregate national targets are incompatible with crucial deadlines for moving towards a zero-carbon economy.
- Institution-building can act as a governance innovation for streamlining processes and the myriad mitigation initiatives that take place within the broad climate regime complex. Well-designed institutions can professionalise over time and act as third-party monitoring bodies. The challenge is to create transparent and trustworthy institutions with a clear mandate and monitor their effectiveness.
- Who will fill the climate leadership vacuum? Although Obama's legacy left a wave of affirmed commitments from the business sector, US environmental policy is set to change dramatically under Trump. There is sound opportunity for China to step forth as a forerunner in the clean energy sector, yet it has abstained from assuming a political leadership role thus far. Perhaps the EU then, can lead us into the zero-carbon game? The EU has a diverse 'toolkit' to for tackling climate change and enabling long-term structural change. However, its current framework is not yet aligned with the Paris Agreement and it still lags where opportunity is prolific.

MOBILISING THE PARIS AGREEMENT: MONITORING, POLITICAL OPPORTUNITY AND STRATEGIC LITIGATION

The Paris Agreement created international political momentum but its success hinges on mobilising implementation at the domestic level. National, regional and sub-regional governments, businesses, and civil society actors all have a crucial role to play in translating the Agreement into action and promoting a 'ratcheting up' of ambition. In addition, litigation is emerging as a potentially powerful tool for driving climate action and ensuring accountability. However, lawsuits are not a 'silver bullet'. A far-reaching economic transformation is needed to keep global temperature rises "well below 2°C". Decarbonising the economy has many co-benefits but there are also major trade-offs. It is therefore crucial to include potential 'losers' of climate change action in the discussion on how to successfully navigate the movement towards a low-carbon economy.

Looking beyond the UNFCCC

The UNFCCC remains the primary forum for multilateral cooperation on climate change. However, an overemphasis on the UNFCCC risks obscuring the role of other actors and the fact that the success of the Paris Agreement will largely depend on domestic action. COP-21 has created important political momentum, opening up new space for action by both state and non-state actors.

- **States:** States can send positive trend-setting signals in key areas, such as climate-friendly taxation, but they often lack the capacity and/or the political will to implement and enforce efficient climate policies. Their actions can also have negative ripple effects. For example, a massive US investment in coal and fossil fuels under President Donald Trump could encourage other states to slow action on reducing emissions and obstruct future climate negotiations.
- **Market actors:** Climate change cannot be successfully tackled without changing the behaviour of businesses and investors in key sectors such as energy, transport, agriculture and infrastructure. The Paris Agreement sent an important signal to investors, namely the long-term global commitment to shift to a net-zero carbon economy. However, in the short term, investors will react to more immediate policies and incentives, such as carbon taxes or feed-in-tariffs, as well as changing consumer preferences.
- **Civil Society:** Civil society organisations play an important role in monitoring business action and ensuring that climate change policies are accountable to the public. For example, the Volkswagen emissions scandal was initially uncovered by the European wing of a small US NGO. A growing number of NGOs is involved in climate change issues and there is an increased 'division of labour', with some organisations focusing mainly on international negotiations and others monitoring domestic implementation. However, although NGOs now maintain a major presence at multilateral climate change conferences, they are still excluded from some negotiating sessions.
- **Other multilateral bodies:** The Paris Agreement also created momentum for climate action in other multilateral institutions and bodies that historically did not consider emission reduction to be part of their mandate. For example, the adoption by the International Civil Aviation Organization (ICAO) of a global market-based mechanism (MBM) to curb CO₂ emissions of international aviation might have been impossible without the prior breakthrough in Paris.
- **Sub- and non-state actors under Trump:** Under US President Donald Trump, the role of sub-state and non-state actors is ever more important. On the sub-state level, US federal authorities, local governments and cities are increasingly active in climate change, and many of them will continue or even step up their efforts to fight climate change. Similar dynamics have been at play under former President George W. Bush: The US refusal to ratify the Kyoto Protocol was followed by a rise in city, business and civil society initiatives on climate change.

Towards a Just Transition

Keeping global warming "well below 2°C" will require substantial structural shifts in the global economy. 'Green growth' is often presented as a win-win strategy, allowing countries to improve economic and environmental outcomes at the same time. However, it is important to recognise that there are trade-offs involved in decarbonising the economy and that not everyone will automatically benefit.

- **Recognising potential trade-offs:** The relationship between socio-economic development and decarbonisation is complex. There are strong potential synergies as well as major trade-offs, especially around the nexus of energy, water and food. While halting global warming is key to achieving Sustainable Development Goals (SDGs) such as human health, an exclusive focus on decarbonisation can prevent effective action in other SDG areas. For example, climate change goals can be in conflict with providing access to affordable energy to all if fossil fuel is the cheapest available form of energy. This is especially relevant in the Global South but the transition to a low-carbon economy also creates trade-offs in the Global North: While it creates new 'green' jobs in some sectors, it inevitably leads to structural unemployment in others.
- **Building broad coalitions:** The challenge is, therefore, to identify and promote co-benefits of decarbonisation and build 'winning coalitions' while not leaving the 'losers' behind. The conversation about implementing the NDCs must involve all affected actors, including key interest groups such as trade unions, farmers associations or church organisations. There is a need for just transition measures to retrain, redeploy and potentially compensate fossil fuel workers and strategies to 'rebrand' whole cities and regions (as has already happened, for instance, with some cities in Germany's industrial Ruhr region).



Activist LED light panels raft up. Source: "[100% renewable energy](#)" (CC BY 2.0) by [Backbone Campaign](#).

Climate Change Litigation: A Double-Edged Sword?

Litigation has emerged as a response to inadequate domestic and international action on climate change and the lack of compensation mechanisms for loss and damage. However, the record of success has been mixed so far and climate change litigation poses new challenges, including the possibility of setting negative precedents and the risk of an anti-legislative backlash.

- **Promising developments:** While states are traditionally reluctant to litigate against each other, an increasing number of civil society organisations and individuals are resorting to the judiciary to demand more proactive climate action or compensation from governments and major emitters (the so-called 'carbon majors'). Climate change litigation has been primarily a US phenomenon – due to the long absence of domestic legislation – but it is now increasingly being used in other jurisdictions as well. Litigation is still a relatively new trend but likely to expand, with climate change-induced displacement emerging as major future issue. Indeed, as one workshop participant suggested, litigation might be to Paris “what carbon markets were to Kyoto”. Apart from NGOs and individuals, we can also expect other actors to use litigation as a strategic tool. For example, companies that do not adequately respond to concerns about climate change risks may face a legal backlash from investors.
- **Important caveats:** While climate change litigation can be a powerful tool of accountability, it is not a 'silver bullet'. Challenges include the difficulty of establishing causation with scientific certainty and the risk of setting negative precedents. Overall, success rates have been relatively modest. In addition, there has been a growing number of anti-regulatory climate cases as well as legal cases *against* the environmental community. Doubts have also been raised about whether courts are always the appropriate place to address these issues and whether taking the fight over climate change to the court room risks overstraining the judicial system. Arguably, however, even unsuccessful cases can contribute to driving climate change action in the long-term as they raise awareness and provoke a broader public discussion on climate change-related issues. The *Urgenda* case (see box below), for instance, galvanised a national conversation in the Netherlands about the closure of the country's remaining coal-fired power plants.
- **An activist judiciary?** Despite the caveats outlined above, there are signs that courts are becoming more comfortable with climate science and increasingly receptive of litigants' claims. In *Juliana, et al v United States* (see box below), a youth-led constitutional lawsuit, the Federal District Court in Oregon recently turned down a motion to dismiss, initiated by the Federal Government and the fossil fuel industry. US District Judge Ann Aiken delivered a strong statement⁴ calling upon the judiciary to take a bold stance on climate change: “Even when a case implicates hotly contested political issues, the judiciary must not shrink from its role as a coequal branch of government”.

⁴Juliana, et al v United States, Case No. 6:15-cv-01517-TC, [Opinion and Order \(10 November 2016\)](#), US District Court - District of Oregon, accessed 30 November 2016.

LEGAL ACTION ON CLIMATE CHANGE - NOTABLE CASES

- In *Juliana, et al v United States*, 21 youth plaintiffs brought a constitutional lawsuit against the US Federal Government for failing to protect them from climate change. They assert that, by not taking adequate action to reduce emissions and by actively promoting the use of fossil fuels, the government has violated their constitutional rights to life, liberty, and property, as well as failed to comply with its duties under the Public Trust Doctrine. The Public Trust Doctrine requires the government to protect and maintain certain shared resources fundamental for human health and survival. In November 2016, the Federal District Court in Oregon rejected a motion to dismiss, raised by the Federal Government and the fossil fuel industry, determining that the lawsuit can proceed.
- In *Urgenda Foundation v The Kingdom of the Netherlands*, the plaintiffs successfully brought a claim in tort against the Dutch government in a domestic court. The Urgenda Foundation and 886 Dutch citizens argued that by failing to adequately regulate and curb greenhouse gas emissions, the state was committing the tort of negligence against its citizens. In June 2015, the District Court of The Hague ruled that the Dutch government must step up its action on climate change and reduce emissions by at least 25% by 2020, relative to 1990 levels. This was the first climate liability suit brought under human rights and tort law. Similar to the strategy employed in *Juliana, et al v United States*, the plaintiffs developed their case around the concept of a public trust doctrine.
- In *Lliuya v RWE*, a Peruvian farmer filed a claim for damages against major German energy firm RWE, alleging it is partly responsible for climate change-induced glacial retreat in the Andes which is threatening his home town. The plaintiff demanded RWE to pay part of the costs for urgent measures to protect his home from flooding. After an initial hearing, the regional court in Essen dismissed the lawsuit on 15 December 2016, concluding that there was a lack of "legal causality" linking RWE's emissions and the climatic changes threatening Lliuya's hometown. Lliuya is likely to appeal the decision at the Higher Regional Court Hamm. This has been the first proceeding of this kind in Europe, probing in detail the question to what extent major emitters must contribute to the costs of adaptation measures.
- ExxonMobil is currently being investigated by a group of US state attorney generals, led by New York Attorney General Eric Schneiderman, over whether it deliberately misled shareholders and the public about climate change risks. The investigation followed reports that the company was aware of climate change risks as early as the 1970s but publicly raised doubts about climate science for decades and funded groups that denied serious climate risks. The attorney generals issued subpoenas to ExxonMobil demanding extensive documents related to the company's climate change policies and research. However, they faced an unprecedented backlash with ExxonMobil in turn suing and investigating the state prosecutors, claiming that their investigation violates the company's constitutional right to freedom of speech.
- In July 2016, the Commission on Human Rights (the National Human Rights Institution or NHRI) of the Philippines summoned 47 'carbon majors' to respond to a petition delivered by a group of typhoon survivors and civil society organisations. The petitioners argued that these companies had knowingly contributed to the root causes of climate change, thereby breaching the fundamental rights of Filipinos to life, health, food, water, sanitation, adequate housing and self-determination. While not a court case, this is the first inquiry of its kind launched by an NHRI. A public hearing is scheduled for April 2017.

KEY INSIGHTS

- The Paris Agreement has established innovative multilateral mechanisms, such as the global stocktake, that have the potential to mobilise, assess and increase climate change action by State Parties. However, to understand which drivers and actors will ultimately be decisive in determining whether or not the Agreement's objectives will be realised, we need to look beyond the UNFCCC.
- State policies can have both positive as well as negative 'ripple effects' on other states and market actors. The behaviour of investors and businesses will primarily be driven by immediate incentives and mechanisms, such as carbon taxes or feed-in-tariffs. Finally, civil society has a vital role to play in monitoring state and business action and driving the Paris momentum.
- To keep global temperature rises in check, a far-reaching economic transformation is needed. However, there are inevitable trade-offs involved in this process. Decarbonisation can lead to structural unemployment in certain sectors and, especially in the Global South, it has to be squared with delivering on the SDGs. Therefore, broad alliances need to be formed around the implementation of NDCs, including both 'winners' and potential 'losers' of climate change policies.
- Litigation can be a useful tool of holding governments and businesses accountable for their climate actions, especially considering the bottom-up nature of the Paris Agreement. Recent case law leaves room for cautious optimism but success is always depended on domestic social, political and legal contexts. Unsuccessful cases can set negative precedents and there is also the risk of inspiring backlash from legislators and counter-mobilisation by corporates.



Protestor holding up a sign claiming that ExxonMobil knowingly misled the public on climate change. Source: "[Exxon Knew](#)" (CC BY-SA 2.0) by [Johnny Silvercloud](#).

DOMESTIC GOVERNANCE ARRANGEMENTS IN THE CONTEXT OF THE PARIS AGREEMENT

The importance and the impact of domestic climate governance arrangements is regularly emphasised. If the design of the Paris Agreement serves to drive ambition, then it is the design of national laws which will turn ambition into progress. There is a number of well-entrenched domestic governance mechanisms centred around climate change, and their existence raises questions as to how they may support or pose barriers to the implementation of the Paris Agreement.

Carbon Markets in the Paris Agreement: Article 6

Emissions mitigation must necessarily scale up, with preliminary data calling for net-zero carbon emissions by the latter half of this century. A vital element of achieving this will be accelerating the adoption of carbon pricing. Article 6 of the Paris Agreement provides the foundation for international cooperation through markets, and details incentives around carbon pricing, as an important tool in enabling the full implementation, and eventual upscaling, of NDCs.

- **Provisions under Article 6:** As was widely anticipated, Article 6 was one of the last to be agreed upon at COP-21, largely due to the relevance of the Article to the environmental integrity of the Agreement. There was also a certain ideological opposition by some countries to the inclusion of any provisions that referred to markets, or could be seen as facilitating markets. Against prevailing predictions which anticipated at best only very marginal reference to anything market-related, and at worse a total omission of markets, Article 6 can be seen as a major success. It includes provisions for cooperative approaches that parties may engage in to achieve the emission reductions outlined in their NDCs (Article 6.2), creating significant avenues for ratcheting up domestic action. It also provides the framework for a new international carbon market mechanism (Article 6.4), often referred to as Sustainable Development Mechanism (SDM), which aims to facilitate voluntary emission trading and support sustainable development.
- **Lessons to be learned from Kyoto:** Although the SDM bears strong resemblance to the Clean Development Mechanism (CDM) set up under the Kyoto Protocol, there are some key differences. First, there are no geographic restrictions under the Paris Agreement: emissions – or “internationally transferred mitigation outcomes” – can be reduced in any country (developed or developing) and bought by any other country. Participation of “private entities” is also encouraged. Second, the SDM goes beyond the CDM as it aims to ensure an overall reduction in global emissions (rather than merely offsetting emissions). In the past, CDM projects have been widely criticised for contributing little to sustainable development, creating adverse incentives and, in some cases, having a negative social and human rights impact. For the new mechanism to be effective, it is therefore vital that it incorporates lessons learned from the failures of the CDM, and that strong monitoring, transparency and accounting frameworks are put in place.

PARIS AGREEMENT - ARTICLE 6.4

A mechanism to contribute to the mitigation of greenhouse gas emissions and support sustainable development is hereby established under the authority and guidance of the Conference of the Parties serving as the meeting of the Parties to this Agreement for use by Parties on a voluntary basis. It shall be supervised by a body designated by the Conference of the Parties serving as the meeting of the Parties to this Agreement, and shall aim: (a) To promote the mitigation of greenhouse gas emissions while fostering sustainable development; (b) To incentivize and facilitate participation in the mitigation of greenhouse gas emissions by public and private entities authorized by a Party; (c) To contribute to the reduction of emission levels in the host Party, which will benefit from mitigation activities resulting in emission reductions that can also be used by another Party to fulfil its nationally determined contribution; and (d) To deliver an overall mitigation in global emissions.

Carbon Accounting under Paris

Accurate accounting of emissions is crucial to ensure transparent and informed decision-making. Article 6 of the Paris Agreement states that parties "shall apply robust accounting to ensure, inter alia, the avoidance of double counting".⁵ However, given the 'bottom-up' nature of the Paris Agreement, setting up reliable accounting structures is not an easy task.

- **Transitioning between Kyoto and Paris:** Accounting structures under the Paris Agreement are yet to be elaborated but they are likely to be more diverse and more complex than those applied under the Kyoto Protocol, mainly because there are no absolute reduction targets for individual countries. The NDCs are very diverse and national emission targets are not always exactly defined in terms of quantification of commitment. So questions arise over how to ensure a level of accountability without undermining targets. Another concern is that only focusing on emissions is insufficient to evaluate and measure performance. For example, a country's emissions profile alone says little about the progress made towards a long-term structural change in energy consumption. We will know precisely what action is sufficient further down the line, after the global stocktake. This is when the process of driving up ambition will prove vital. Domestic measures to improve individual targets, combined with the cooperative effort facilitated by Article 6, will have to adapt as states become more acutely aware of the contributions required of them. In this sense, we are heading into waters we are as yet unable to chart in terms of what will qualify as sufficient measures to meet the meta-objective of "well-below 2°C".
- **The role of the EU:** Accounting structures in the EU remain anchored in the Kyoto era, with some rules having been adapted to domestic circumstances. As the Paris Agreement does not set a binding international emissions cap, there is a call to continue setting EU-wide caps.⁶ Under the current system, Member States regularly report on outcomes of emissions caps. However, the EU does not have a single coherent accounting system, which has allowed for a range of parallel models to emerge. Nevertheless, the EU's multilayer accounting system can provide an example to other states, demonstrating how diverse models can operate within a common framework. The EU is also leading the way in terms of tracking, and accounting for, structural change. It is increasingly important to look at policies and targets other than those related to GHG emissions, such as determining common energy and climate monitoring mechanisms. The EU can promote these practices elsewhere, giving Parties a better chance of achieving the 2030 and 2050 targets, by undertaking sector-by-sector investigations into the underlying drivers of emissions.

PARIS AGREEMENT - ARTICLE 6.2

Parties shall, where engaging on a voluntary basis in cooperative approaches that involve the use of internationally transferred mitigation outcomes towards nationally determined contributions, promote sustainable development and ensure environmental integrity and transparency, including in governance, and shall apply robust accounting to ensure, inter alia, the avoidance of double counting, consistent with guidance adopted by the Conference of the Parties serving as the meeting of the Parties to this Agreement.

⁵ UNFCCC 2015, [Paris Agreement](#), accessed 13 January 2017.

⁶ These caps are currently set by the EU's Emissions Trading Scheme (EU ETS), which has been operating since 2005.

Adaptation, Mitigation and Loss and Damage: National-Level Responses

Mitigation and adaptation have traditionally been considered the two principle policy responses to climate change. The Paris Agreement established loss and damage as a third pillar, independent from mitigation and adaptation. What are the domestic governance arrangements corresponding to these three policy-tracks?

- **Adaptation:** Over the past decade, there have been some concrete success stories, such as the UK National Adaptation Programme or the UK Climate Change Risk Assessment (published by the Committee on Climate Change), both of which present examples of genuine transformation in the domestic European arena. Outside of Europe, many countries have also started to focus explicitly on adaptation and resilience within the framework of their national and local planning processes. Nepal, for example, was the first country in the world to officially endorse a Local Adaptation Plan of Action (LAPA) as part of its national adaptation strategy. In addition, cities and municipalities have been more active around adaptation, including through the remodelling of cities. These policies have been shown to permeate at the national level in many ways. Even if we are not yet seeing the outcome of these policies directly, local level plans are being rolled out, and climate change is certainly becoming a mainstream topic. The Paris Agreement offers a poly-centric approach to adaptation, with decentralised units providing feedback to other levels to feed into policy planning and decision making. We can see this clearly in the emphasis based on the work of individual cities in contributing towards the effort. The foreseeable problems arise when we consider how we measure the effectiveness of adaptation measures under the Paris Agreement. In contrast to mitigation, where effectiveness can be measured through the amount of GHG emissions reduced, there is no accepted metric for assessing adaptation effectiveness and there is a danger that adaptation actions are not necessarily directly related to climate change. However, there is renewed optimism that the Paris Agreement will refocus the relation between adaptation, loss and damage and climate change specifically.
- **Mitigation:** We have seen a lot of action on mitigation post-Kyoto with thousands of CDM projects having been implemented over the past 15 years. By setting up a similar mechanism, Article 6 of the Paris Agreement endorsed and reinforced the Kyoto approach of flexible mechanisms. The need to speed up the global energy transition and the critical role of forests in emissions mitigation have both been more heavily endorsed by the Paris Agreement, with explicit reference made to REDD+ (a recent recipient of a NOK 3 billion annual pledge by Norway⁷). However, it is to be hoped that the Agreement will push the scope beyond institutions like the CDM and the Joint Implementation (JI) mechanism to represent something more transformative. The important role of NDCs post-Paris will likely revolve around getting the private sector involved, initially in a domestic framework, and encouraging individual cities to closely monitor emissions, investment in green infrastructure, etc.
- **Loss and damage:** The Paris Agreement has put the issue of loss and damage firmly on the international climate change agenda. There are existing local examples both in the Global North and South of mechanisms that are able to address loss and damage – even though most of them are not specifically designed for this purpose. Amid the absence of international financing on loss and damage, the countries that are most at risk are developing national strategies and putting resources towards the issue. Bangladesh, for instance, is currently considering the development of a national mechanism specifically designed to address loss and damage. The country has already established two funds to finance climate mitigation and adaptation projects, with some money reserved for emergency purposes, such as addressing impacts of extreme weather events. Bangladesh has also initiated the “Loss and Damage in Vulnerable Countries Initiative”, which aims to aid the voice of developing countries in their call for action on loss and damage. Going forward, scientific risk assessment will be crucial to focus the loss and damage discussion on operational rather than definitional questions.

⁷ Norwegian Ministry of Climate and Environment 2016, [Norway and the US strengthen their collaboration on forests and climate change](#), accessed 16 February 2017.

The UK Climate Change Act

Under the Climate Change Act, which was passed in 2008, the UK is obliged to reduce emissions by at least 80% in 2050, from 1990 levels. The UK is the first country to set legally binding emission targets. How well is the Climate Change Act doing and can it be considered a model for national law, especially in light of the Paris Agreement?

- **Extraordinary potential:** The UK Climate Change Act sets a benchmark against which government action can be judged and held to account. The Act requires the government to set legally binding carbon budgets every five years. It also established an independent Committee on Climate Change, which provides scientific advice and publishes annual progress reports. Importantly, the Act is now aligned with the Paris Agreement's five-yearly review cycle, meaning both are able to interact with and complement each other. Five carbon budgets, running from 2008 to 2032, have already been legislated under the Act and, according to former Prime Minister David Cameron, the UK is "over-delivering against [its] first three carbon budgets".⁸ Political commitment remains high, even after the vote for Brexit, and the Climate Change Act has facilitated open dialogue within the government on climate change. Given the specific 'bottom-up' nature of the Paris Agreement, it is a promising model for national legislation elsewhere.
- **Signs of neglect:** However, progress has not been as striking as some might imagine. A 2016 report by the Committee on Climate Change revealed that there has been essentially no progress since 2012 in reducing emissions outside of the power sector. The UK has also suffered continuous falls in its ranking in terms of renewable energy attractiveness. A number of political actions have inhibited the Climate Change Act, in particular, after the end of the coalition government in 2015. For example, the 'Zero-Carbon Homes' initiative, aimed at making all new homes in the UK carbon neutral, was abandoned just at the point of implementation. In addition, coordination between domestic governance institutions, including the London Climate Change Partnership, the London centre for expertise on climate change adaptation, has effectively ended. The Carbon Plan, a report which sets out the government's plans for achieving the first four carbon budgets, does not provide a clear, long-term pathway to reducing emissions. In particular, the document fails to show how the government intends to meet the fourth carbon budget (2023-2027). This 'policy gap' shows no sign of closing as the Carbon Plan has never been updated since its publication in 2011, despite government promises to do so annually. These policy shifts reflect a gross failure of the handling of the Climate Change Act by successive governments. There is a fear that this might negatively impact the level of support of the Paris Agreement from the incumbent government.



A power plant in the UK. Source: "[Power Station](#)" (CC BY 2.0) by [shiple43](#).

⁸ Liaison Committee 2016, [Oral evidence: Evidence from the Prime Minister, HC 712](#), accessed 13 January 2017.

KEY INSIGHTS

- Article 6 of the Paris Agreement contains provisions for cooperative approaches to implement the NDCs and scale up ambition. It also establishes a new carbon market mechanism to contribute to mitigation and sustainable development. Crucially, this new mechanism must learn from the failures – and successes – of the flexible mechanisms established under the Kyoto Protocol, such as the CDM or the JI mechanism. In particular, a robust carbon accounting framework must be put in place to avoid double counting and safeguard the environmental integrity of the Agreement.
- The Paris Agreement ushered in a novel style of accounting for emissions, and this will play out particularly intriguingly at the state level. The diversity of NDCs and the lack of clearly defined, top-down emission targets means the onus is firmly on state parties to determine their accounting profile. The EU could lead the way in terms of adapting the Paris Agreement to domestic accounting arrangements. By promoting accounting structures that capture not just emissions but also structural economic change, the EU can give other states a better chance of reaching the 2030 and 2050 targets.
- Many countries, developed as well as developing, are responding to mitigation and adaptation challenges with national-level initiatives, for example by formulating national adaptation programmes. There is also increasing activity on the regional, local and city level and a growing number of private sector initiatives. As adaptation alone appears insufficient to guard against severe climate change impacts, loss and damage has also emerged as a key concern for domestic and local actors. Bangladesh, for instance, is one of the first countries considering the development of a national mechanism specifically designed to address loss and damage.
- It is at the national level where we will see the necessary 'dirty work' carried out to adhere to the overall framework of the Paris Agreement as it is the design of national laws that will turn ambition into progress. In the UK, the 2008 Climate Change Act already mandates a significant reduction of GHG emissions. However, the extraordinary potential of the Climate Change Act has never been fully realised and the UK is currently on track to miss its fourth carbon budget. The evident policy gap must be closed in order for the UK to effectively align its conservation efforts with its NDC. If there is a recognition that the failures of the Climate Change Act are a result of political neglect (not bad legislation), much of the litigation which went into its conception can be used to facilitate necessary changes in domestic policy to implement the NDC.

CONCLUSION: CLIMATE GOVERNANCE IN A POST-TRUTH WORLD?

The biggest achievement of the Paris Agreement is perhaps political: It reflects a global consensus that climate change is real and urgently needs to be addressed by all states, industrialised and developing. However, this historical consensus is in danger of breaking down. The old divide between developing and developed states might re-emerge if major issues, such as equity and access to finance, remain unsettled. Even more worrying, however, is the emergence of what has been termed a 'post-truth' world. With populist leaders brazenly – and successfully – disregarding facts in favour of emotions, what are the ways forward for the Paris Agreement?

- **Finalising the Paris 'rulebook' as soon as possible:** Given the Agreement's rapid entry into force, the timeframe for rule development is unexpectedly short. Crucially, the Paris 'rulebook' needs to operationalise differentiation, transparency and how the Agreement will accommodate states' differing needs and capabilities. Progress made at COP-22 in Marrakech was largely procedural, leaving controversial substantive issues such as climate finance unresolved.
- **Addressing inevitable climate impacts:** The mitigation pledges made so far are insufficient to keep global warming under the 2°C – let alone the 1.5°C – threshold. Even if ambitions are scaled up, the current trajectory of emissions already locked-in suggests that some severe climate change impacts will be unavoidable. This highlights the importance of adaptation and loss and damage, with the latter set to remain a major sticking point in future negotiations. If not adequately addressed, loss and damage could further exacerbate the divide between developed and developing states.
- **Building trust at the national level:** While the Paris Agreement sets the overall framework for addressing climate change, the national level is where the 'dirty work' will be carried out. Political and legal accountability are essential to make domestic mechanisms strong, ambitious and responsive. In a 'post-truth' context, this is going to be ever more pertinent: if domestic governance is not accountable, ethical and transparent, public trust will continue to erode.
- **Involving both winners and losers:** A broad societal coalition is needed to support the deep economic transformation necessary to keep global temperature rises below the 2°C threshold. Therefore, it is essential that national-level implementation processes engage both the likely winners and the potential losers of this transformation. Policies need to be both 'green' and 'just', including concrete measures addressing job losses in the fossil fuel sector.
- **Making climate change a legal issue:** Litigation has played a significant role in shaping US climate policy and will likely continue to do so. Outside the US, an increasing number of activists are also taking up legal action on climate change. A promising avenue for future litigation is framing the issue in the context of the public trust doctrine and/or human rights law.
- **Engaging non-state actors:** The Paris regime puts unprecedented emphasis on the role of businesses, cities, regional governments, civil society organisations and other non-state actors. The private sector was more active in Paris than at any previous COP with major corporations and financial institutions vowing to double down on their climate commitments. There is reason to believe that a number of US federal states and cities will also step up their efforts under President Trump. The Attorney General of California, for instance, has reaffirmed his state's commitment to reducing emissions, "irrespective of what goes on in Washington".⁹
- **Keeping up the political momentum:** Donald Trump's campaign pledge to withdraw from the Paris Agreement has created major uncertainty. However, unlike in 2001, when George W. Bush pulled out of the Kyoto Protocol, the major emerging economies now see climate change as a major barrier to their economic development. US retreat may open up space for new and unlikely climate coalitions to emerge – for example between China and the EU.

⁹ Nagourney, A and Fountain, H 2016, [California, at Forefront of Climate Fight, Won't Back Down to Trump](#), New York Times, accessed 30 January 2017.

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Jean Arlat, Science and Technology Department, French Embassy in London
Alina Averchenkova, London School of Economics and Political Science (LSE)
Peter Betts, Department of Energy and Climate Change, UK Government
Emily Boyd, University of Reading
Simon Caney, University of Oxford
Christophe Cassen, Centre International de Recherche sur l'Environnement et le Développement (CIRED)
Jonathan Church, ClientEarth
David Coen, University College London (UCL)
Daniel Compagnon, Sciences Po Bordeaux
Sila Guance, Department for Business and Industrial Strategy, UK Government
Celine Guivarch, Centre International de Recherche sur l'Environnement et le Développement (CIRED)
Tom Hale, University of Oxford
Martin Hession, DG Climate Action, European Commission
Jane Holder, University College London (UCL)
Frank Lecocq, Centre International de Recherche sur l'Environnement et le Développement (CIRED)
Maria Lee, University College London (UCL)
Peter Newell, University of Sussex
Dan Osborn, University College London (UCL)
Gita Parihar, independent legal consultant, formerly Friends of the Earth
Tom Pegram, University College London (UCL)
Roberta Pierfederici, Institut du Développement Durable et des Relations Internationales (IDDRI)
Lavanya Rajamani, Centre for Policy Research (CPR)
Christopher Rapley, University College London (UCL)
Tim Rayner, University of East Anglia (UEA)
Anna Lisa Savaresi, University of Stirling
Joanne Scott, University College London (UCL)
Thomas Spencer, Institut du Développement Durable et des Relations Internationales (IDDRI)
Sharon Turner, European Climate Foundation (ECF)
Lisa Vanhala, University College London (UCL)
Jacob Werksman, DG Climate Action, European Commission
Farhana Yamin, Track 0 and University College London (UCL)

Report written by Lauriane Wolfe, Ed Procter and Julia Kreienkamp, University College London (UCL).