

The Paris Climate Change Agreement and the Law: International and Domestic

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Introduction

Climate change is a wicked problem with many facets.

All disciplines have something to contribute. Here I am dealing primarily with the law contained the Paris Agreement of December 2015.

I shall try and analyse the extent of the legally binding commitments that have been achieved and also look at the political achievement of Paris. The two are not the same.

I shall then turn to briefly consider what Paris means for the two prime statutes for dealing with climate change in domestic New Zealand law: the Climate Change Response Act 2002 and the Resource Management Act 1991.

Lawyers deal in analysis of text. This can be both boring and complicated. I apologise in advance. But it is a necessary exercise if we are to sort out how far is left to go on this journey.

I was at the Earth Summit in Rio in 1992. I was Minister for the Environment when the first report of the Intergovernmental Panel on Climate Change (IPCC) was published. These issues I have followed ever since. Long exposure to the problem of climate change makes me impatient at the lack of achievement in combatting it and the perils that poses for the future of humankind.

Binding Obligations: are they sufficient?

The political achievement at Paris was substantial. It was a tribute to skillful French diplomacy. Momentum was achieved. The legal achievement of Paris on the other hand, in terms of hard law obligations was more muted. The Paris Agreement is long on aspiration and short on obligation.

The negotiating strategy devised for Paris called for nations to make Intended Nationally Determined Contributions (INDCs). These were not intended to be and are not legally binding. As expected the cumulative offers received at Paris fell well short of what will be required to keep the temperature below 2°C by the end of the century, let alone 1.5 degrees.

Since the objective of the 1992 United Nations Framework Convention on Climate Change is stabilisation of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system, we obviously have a long way to go. We are not there yet or anywhere near. So in those terms Paris is not a success. The absence of binding targets on nations means there can be no effective enforceability of the INDC commitments, inadequate though they are.

This approach was deliberate on the part of negotiators, trying to avoid some of the traps that the Kyoto Protocol fell into. They tried to keep the developing countries in the tent and to accommodate the United States, where the prospect of securing Senate consent for binding targets looked hopeless, largely due to Republican party attitudes concerning climate change denial.

Thus, the issue is whether the Paris Agreement will after further iterations ripen into a success and achieve mitigation to the level required within the time available. That in turn will depend upon how far the political momentum generated at Paris will

continue in order to ultimately produce sufficient binding obligations. The calculation was that an agreement with everyone on board was better than one where they were not, even if the price paid was to lower the level of ambition. The Paris Agreement can best be understood as a global political commitment to a future continuing process to address climate change issues. That represents welcome progress.

Lawyers deal in binding obligations. In order to find these, they look closely at the text. The text arising from Paris speaks with several voices. Analysing the binding obligations flowing from the negotiations and those which are aspirational may help in assessing the achievement. The Paris Agreement has some binding elements. And there are some binding elements of the Framework Convention and later instruments but many of these are not directly relevant to mitigation. And at this point mitigation is the critical issue.

Given the difficulties facing the negotiators and the failures of the past the legal architecture of the Paris Agreement has some impressive and interesting elements. Clearly the strategic aim was to pull all nations into the agreement by being very inclusive and avoiding division and confrontation. The strategy reminds me of the old nursery rhyme “Come into my parlour said the spider to the fly”. Once caught in the web, the threads of the agreement will tighten later and it may be very difficult for nations to remove themselves because they would be likely to lose a lot of face. Shaming in its various forms remains one of the most potent international sanctions.

Let me begin by starting at the end. Article 27 of the agreement permits no reservations to it to be made. Nations can withdraw after three years from the date the agreement entered into force. And the agreement enters into force on the thirtieth day after the date “on which at least 55 parties to the Convention accounting in total for at

least an estimated 55 percent of the total global greenhouse gas emissions having deposited their instruments of ratification, acceptance, approval or accession.”¹

The agreement is open for signature from 22 April 2016 to 21 April 2017. It is open for accession from the day following the date upon which it is closed for signature. So it will be a long time before we will know who has signed up and who has ratified. And ratification is the act “whereby a State establishes on the international plane its consent to be bound by a treaty.”² I judge it will be 2018 at the earliest before we receive the necessary ratification answers and can therefore analyse what the precise legal effect of the agreement is. It does not seem in this case that signature alone will be sufficient for a State to be legally bound.

A cunning feature of the Agreement is that a great deal of activity will take place within the councils of the Convention system before ratification occurs. Much detailed and specialised machinery was set running in Paris and while much of this does not involve legal obligations imposed on States it does mean that a great deal of work will rapidly occur that is likely to make the nature of future decisions clearer and possibly easier for States to swallow.

The forward momentum is achieved by the bifurcated nature of the agreement. It comes in two parts. In a total package of 31 pages of text only 11 pages constitute the binding Paris Agreement. It is preceded by 19 pages of “decisions” made by the Conference of the Parties (COP). It was decided to adopt the Paris Agreement under the UNFCCC although the relationship between the Paris Agreement and the Convention is not on all fours. Some nations may adhere to one and not the other.

1 Paris Agreement, Article 21.

2 Vienna Convention on the Law of Treaties. Concluded at Vienna, 23 May 1969. Entered into force, 27 January 1988. 1155 UNTS 332, Article 2.

The dispute settlement mechanism for the Paris Agreement as provided in Article 24 is the same as for the Convention itself. Disputes are likely to occur between nations and the effectiveness of the Agreement may depend on how efficient the method is in settling disputes. Over time the emphasis is likely to move to enforceability issues. Nations are enjoined to seek settlement of a dispute through negotiation or any other peaceful means of their own choice.³ That mechanism stipulates that nations when ratifying the Agreement may state “in respect of any dispute concerning the interpretation for application ... it recognizes as compulsory ipso facto and without special agreement, in relation to any party accepting the same obligation ... submission to the International Court of Justice and/or Arbitration.” Such declarations are not mandatory. Where the dispute process does not produce a resolution after 12 months, the dispute is submitted to a conciliation commission, created upon the request of one of the parties. While this dispute settlement mechanism is not as strong as domestic law enforcement through municipal courts, it is stronger than many international environmental treaties.

The first part of the document recording decisions of the COP also records the decision to establish an Ad Hoc Working Group on the Paris Agreement. That group will prepare for entry into force of the Agreement and oversee the implementation of a work programme. This will start in 2016.

There is a great deal in the non-binding text about INDCs and it notes that “much greater emission reduction efforts will be required in order to hold the increase in global average temperature to below 2°C above preindustrial-levels by reducing emissions to 40 gigatonnes or to 1.5°C above pre-industrial levels.” The COP also

3 United Nations Framework Convention on Climate Change, Article 14(2).

decided to invite the IPCC to provide a special report in 2018 on the impacts of global warming of 1.5°C above pre-industrial levels and related global gas emissions pathways. The language in this part of the text evinces an intention to ratchet up the INDCs. The language requires parties to submit their INDC at least 9-12 months before the relevant COP. There is emphasis on both clarity and transparency. And there will be guidance for accounting of INDCs. Work in abundance is also ordered up from Subsidiary Body for Scientific and Technological Advice. Other Committees of Expert groups are loaded with work. The Adaptation Committee also receives instructions.

Finance is the subject of heavy attention and more work. It is the same for technology development and transfer. Capacity building similarly for developing countries also receives a big work plan. There is also a capacity building initiative for Transparency to build institutional and technical capacity to advance Article 13 of the Agreement. There is also activity around facilitating implementation and compliance. And resolution was made to enhance the provision of urgent and adequate finance with a roadmap to be produced to secure USD 100 billion annually by 2020 for mitigation and adaptation.

Much of the language in the 19 pages of COP decisions talks of “requesting” “encouraging” “striving” and similar hortatory language that speaks not the language of State obligation. But there emanates from the document a sense of urgency and vigorous activity on a wide range of fronts. The work seems designed to advance the agreement itself in quite a rapid way. Plenty will happen quickly, as it needs to do.

All of this reflects the political-break through that Paris achieved. And much of the work is explicitly aimed at providing help to developing countries of a practical and

useful sort. But activity however well directed and however productive is not in itself a substitute for binding legal obligations.

Nevertheless, the flavour of Paris represents a commitment to work towards binding legal obligations that will limit emissions. The first 19 pages of text were important in the sense they engender a feeling of activity. The bare features of the legal Agreement itself would have looked very thin without the COP decisions. The very lengthy “Decisions to give effect to the Agreement” gives the impression of substantial, even frenetic activity. Halting climate change could be the outcome in the future. There are some welcome indications, too, that the business community has read the signals and will fall into line on decarbonising economies. These signals are important and we may have turned the corner with business on the issue but it is vital the trend be sustained.

As for the Agreement itself, Article 2 provides there is a commitment to “Holding the increase in global average temperature to well below 2 degrees C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5 degrees C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change.” There are similar commitments to increasing the ability to adapt to climate change and foster climate resilience and making finance flow “consistent with a pathway towards low greenhouse gas emissions and climate-resilient development.” This general type of commitment can hardly be said to create any binding obligations on the States themselves. Article 2 is not a hard commitment to hold the increase to 1.5 degrees and we do not know what “well below 2 degrees” may mean. There is a commitment to pursue efforts to hold the temperature increase to 1.5 degrees but that is not an obligation to achieve it. But all States are required to

“undertake and communicate ambitious efforts” as defined in the Agreement “with a view to achieving the purpose of the agreement.” And this process will be a progression over time.

The agreement itself comes closer to imposing specific obligations on States than the decisions of the COP, but many of the Articles contain principles rather than specific obligations. Nevertheless, there are hard law obligations to report and communicate about various matters such as each party being required to account “for their nationally determined contributions” as required by Article 4 in quite defined ways. But in many of these Articles there remain large elements of discretion left to States, and gaps. Language such as “should”, “flexibility” “strive” and “aim” and all the familiar weasel words of international agreements are employed.

Article 4 states “... Parties aim to reach global peaking of greenhouse gas emissions as soon as possible ... and to undertake rapid reductions thereafter ... so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century ...”. This language contains an important commitment, the precise nature of which is susceptible to a number of interpretations. What does “balance” mean? It does not say “net zero emissions” but does it mean that? And when will “peaking” occur? The purpose of Article 4 is clear enough but it is not accompanied by specific legal obligations later in the Agreement. Aims are not legal commitments.

There is imposed a legal duty on parties to account for their emissions and to prepare every five years and communicate successive INDCs to reflect its highest ambition and each successive one “will represent a progression” beyond the party’s then INDC. (How binding this requirement will be is not easy to judge. What happens if nations

fail to comply?) The special circumstances of developing countries and small island developing States is recognised in this Article.

Accounting for INDCs is mandatory and parties “shall promote environmental integrity, transparency, accuracy, completeness comparability and consistency, and ensure the avoidance of double counting.”⁴ Each party to the agreement is responsible for its emissions levels. Countries are obliged to pursue policies with the aim of achieving their pledges. As far as I can see there is no legal obligation on nations, although the Decisions text invites them to do so. The agreement says they are to “strive” to write a low emissions strategy by 2020.

Parties “should take action to conserve and enhance carbon sinks and reservoirs of GHGs, with an emphasis on forests. Parties “are encouraged” to reduce emissions from deforestation.⁵

Parties are free to choose voluntary cooperation in implementation of INDCs with cooperative approaches that involve the use of internationally transferred mitigation outcomes. A mechanism is established by the agreement to facilitate the market. It will be supervised by a body designated by the COP. Rules and procedures will have to be adopted. At the same time integrated, holistic and balanced non-market approaches and a framework to promote these is established by the Agreement, but without any detail. No mechanism has been set up to set an international carbon price, but it is possible a club approach by big emitters agreeing among themselves could cause such a price to emerge.

4 Paris Agreement Article 4 (13).

5 Paris Agreement, Article 5.

Adaptation is advanced by agreement on the “global goal on adaptation of enhancing adaptive capacity strengthening resilience and reducing vulnerability to climate change.” Each party shall “as appropriate engage in adaptation planning processes and the implementation of actions, including plans and policies.” There is encouragement to strengthen cooperation. Parties “should” submit and update periodically an adaptation communication setting out its plan, actions and priorities. It is to be recorded in a public registry. There is nothing much here in the nature of hard law obligations. It also omits critical areas of international law, such as adaptation allowing the collective human right of self-determination and individual human rights, such as the right to life. The fact that these were intentionally removed from the draft text creates some uncertainty as to the applicability of those laws to climate change-related issues like the relocation of peoples from small island states, especially since references to organised migration and planned relocation were also removed from the final text.

Article 8 on loss and damage revolves around the Warsaw International Mechanism for Loss and Damage associated with climate change and this may be enhanced and strengthened. It is far from clear what will come out of the loss and damage work. But it may be a positive move that it has been separated from measures for adaptation to climate change. But it is made clear in the Decisions of the COP that the agreement itself does not involve or provide a basis for any liability or compensation for loss and damage.

Article 9 deals with financial resources to assist developing countries. “Developed country parties shall provide financial resources to assist developing country parties with respect to both mitigation and adaptation in continuation of their existing

obligations under the Convention.” That is a legal duty but it is very generalised and lacks the specificity required for enforcement.

Article 10 is concerned with technology development and transfer. “Accelerating, encouraging and enabling innovation is critical for an effective, long-term global response to climate change and promoting economic growth and sustainable development.”

On capacity building, Article 11 of the Agreement says capacity building “should enhance the capacity and ability of developing countries ... and those that are particularly vulnerable to the adverse effects of climate change, such as small island developing to take effective climate change action ...”. No enforceable legal obligations arise here. And there is no methodology for measuring capacity and whether or not it has been enhanced.

Article 12 is succinct. It erects a legal duty of cooperation “to enhance climate change education, training, public awareness, public participation and public access to information, recognizing the importance of these steps with respect to enhancing actions under this Agreement.”

If this Agreement solves the problem of climate change in the future it will be, in my opinion, because of the provisions in Articles 13 and 14 operating in conjunction with Article 4. Enhanced transparency is the goal of Article 13, which provides that “an enhanced transparency framework for action and support, with built-in flexibility which takes into account parties’ different capacities and builds upon collective experiences is hereby established.” Its purpose “is to provide a clear understanding of climate change action in light of the objective of the Convention as set out in its Article 2, including clarity and tracking of progress towards achieving parties’

individual nationally determined contributions under Article 4, and parties' adaptation actions under Article 7 including good practices, priorities, needs, and gaps to inform the global stocktake under Article 14.”

There is a transparency of action and a transparency of support — both are established. The reporting requirements established for both of these is specific and is the subject of technical expert review. Provision of the required information and reporting is mandatory. This appears to be one of the most effective provisions in the Agreement and one likely to make a difference. A periodic global stocktake of the implementation of the agreement is required every five years, the first being in 2023.

This should be of material assistance in reaching the goal of the agreement.

Article 15 provides for a mechanism to facilitate implementation and to promote compliance with the Agreement. An expert-based committee is established for the purpose. It must function “in a manner that is transparent, non-adversarial and non-punitive.” Its procedures remain to be settled.

It is difficult to assess how all this will work or whether it will produce the desired outcome in time. It all depends upon continuing political will. And there are many geo-political problems that could knock the process all off-course. But it has to be said it is a positive start, if a long delayed one. The hallmark of all the previous 20 Conferences of the Parties has been procrastination; putting off hard decisions until later. That has occurred again here and time is rapidly running out. An earlier start would have made the problems of adjustment much easier. But it is a start. The mechanism for ratcheting up the INDCs over time may prove to be a successful strategy. But it must be understood the rate of decarbonising the economies of the

world must be very rapid and there is nothing in the Agreement that directly addresses fossil fuels and their use, only the emissions that result from that use.

The Agreement has potential. Whether the potential will be realised is a question of speculation. The Agreement does not assure us that temperatures will not rise by more than 2°C, let alone be restricted to 1.5°C. It is more a political agreement to keep trying than a legal set of binding obligations that will produce the necessary result. But the Agreement does contain sufficient binding obligations that could in time make a difference. When the detail has been developed we will know more.

I am not prepared to judge at this juncture whether the approach taken in Paris will succeed. I hope it does. But it seems virtually certain that it will not succeed in holding the warming to 1.5°C by 2050. The next test will be the climate summit in Morocco in November 2016. Then in 2020 the emission cutting plans of nations must be submitted. Paris could succeed or it could fail as Kyoto did. For me it is a case of one hand clapping. Whether the Paris Agreement will succeed in combatting climate change is a question with no answer at this juncture.

The Paris Agreement does offer some solace to Small Island Developing States but it appears to be too little too late. The reference to 1.5°C is directed at their interests. They succeeded in having that reference included in the Agreement. They will secure funding from the Green Climate Fund to assist them in adaptation. There will be more funds made available and they will be better directed than in the past. There will be more research into and enhanced transfer of technologies that may assist them. More technical support is likely to be made available. They will secure help to develop their capacity to cope with the problems as explicitly provided for in Article 11. They will be cut some slack in complying with aspects of the Agreement. They

will benefit from the sense of urgency that infuses the whole international effort. It seems difficult to conclude, however that the Maldives, Tuvalu, Kiribati and the Marshall Islands will avoid catastrophe.

The Implications for New Zealand of the Paris Agreement

It is commonly accepted that New Zealand has been a laggard in its domestic policy terms to the climate change threats. That will have to change after Paris and it should change quickly. How much will be done before the election in 2017 must be regarded with skepticism given the actions that have been taken by the National led Government since they were elected in 2008. To find out whether Paris has produced a change in approach we will have to wait and see. The timetable arising from Paris does not legally require an urgent approach in the present parliamentary term.

What needs to be done in New Zealand is plain enough in policy terms.

First, some clear guidance and leadership should be provided to local government in order to cope with the challenges that it will face in relation to inundation from rising sea levels that will result in coastal flooding, coastal erosion and interfere with coastal groundwater. The Parliamentary Commissioner for the Environment has made that abundantly clear in the eight recommendations contained in her 2015 report. Seven of them concern actions by central government and they should be heeded.

They were:⁶

- (1) Recommendation to the Minister for the Environment and the Minister of Conservation:

⁶ Report of Parliamentary Commissioner for the Environment, Preparing New Zealand for rising seas: Certainty and Uncertainty (Wellington, November 2015)
<http://www.pce.parliament.nz/media/1390/preparing-nz-for-rising-seas-web-small.pdf>.

- (a) Take direction on planning for sea level rise out of the New Zealand Coastal Policy Statement and put it into another National Policy Statement, such as that envisaged for dealing with natural hazards.
 - (b) Direct officials to address the matters raised in this investigation in the revision of the 2008 MfE Guidance Manual.
- (2) Recommendation to the Minister for the Environment:
- In revising central government direction and guidance on sea level rise, include protocols for the procurement of elevation data, and work with Land Information New Zealand and other relevant agencies to create a national repository for LiDAR [this is a methodology used to measure the data] elevation data.
- (3) Recommendation to the Minister for the Environment:
- In revising central government direction and guidance on sea level rise, set standards for the use of IPCC projections of sea level rise to ensure they are used clearly and consistently across the country.
- (4) Recommendation to the Minister for the Environment:
- In revising central government direction and guidance on sea level rise, specify planning horizons that are appropriate for different types of development.
- (5) Recommendation to the Minister for the Environment:
- In revising central government direction and guidance on sea level rise, specify that ‘best estimates’ with uncertainty ranges for all parameters be used in technical assessments of coastal hazards.
- (6) Recommendation to the Minister for the Environment:

- In revising central government direction and guidance on sea level rise, include a standard process for council engagement with coastal communities.
- (7) Recommendation to the Minister for the Environment:
- In revising central government direction and guidance on sea level rise, specify that councils develop whole coast plans for dealing with sea level rise, and expand coastal monitoring systems to enable adaptive management.
- (8) Recommendation to the Minister of Finance:
- Establish a working group to assess and prepare for the economic and fiscal implications of sea level rise.

The second policy should be to amend the Resource Management Act 1991 to allow local government to properly deal with climate change factors when making environmental decisions. At present it is largely prevented from doing so when assessing and granting consents. The 2004 Amendments to the Act introduced provisions prohibiting consent authorities from consider the effects of greenhouse gas emissions on climate change when making rules to control discharges in air and when considering an application for discharge permit. Furthermore, a National Policy Statement or Environmental Standard on Climate Change needs to be designed and agreed. These are major policy tasks.

Thirdly, the massive and deliberate emasculation by repeated statutory amendments to the Climate Change Response Act 2002 will have to be undone if the greenhouse gas trading scheme is to be given capacity to actually reduce New Zealand's emissions.

At present the scheme has notorious weaknesses:

- it has had a negligible effect in reducing domestic emissions;
- the only reason New Zealand will meet its Kyoto commitments from 2008-2012 will be units acquired from short-term forestry absorption, not because New Zealand has been reducing its emissions — its gross emissions are in fact increasing;
- forestry trading seems to be a virtual standstill;
- failing to implement quantitative limits on offset use — buying cheap units elsewhere means no pressure comes on domestic emitters to reduce their emissions;
- there are few incentives to invest in decarbonisation, subsidies to coal and gas industries continue — the carbon bill in New Zealand is effectively socialised at present;
- we need to head for zero emissions but we are not.

The Government has issued a Discussion Paper upon which it is taking submissions from the public.⁷ Big and bold changes will need to restore credibility to the trading scheme and actually address the problem.

Fourth, an agreed policy needs to be forged among the parties represented in Parliament. On this issue above all others regulatory lurches of policy when the Government changes are exactly what must be avoided. Yet that it is exactly what we have had. In the United Kingdom cross-party consensus on climate policy was achieved before the 2015 election. The Prime Minister, the Leader of the Opposition

⁷ Ministry for the Environment, Emissions Trading Scheme Review 2015-16 (Wellington, 21 November 2015) <http://www.mfe.govt.nz/publications/climate-change/new-zealand-emissions-trading-scheme-review-2015-16-discussion-document>.

and the leader of the Liberal Democratic Party all signed on to a policy pledge to a fair, strong, legally binding global climate deal that limits temperature rises to below 2°C. And they agreed to work across party lines on carbon budgets and to accelerate steps towards a low carbon economy and end the use of unabated coal for power generation.

It ought not to be beyond an MMP Parliament in New Zealand to achieve such an approach. So far they do not seem to have even tried. Tenderness to vested special interests needs to give way to the public interest. That is what a Parliament is for, after all.