

---

# **The Paris Agreement: Can It Include Binding Commitments?**

**Speeches, legal obligations...: what tangible results?**

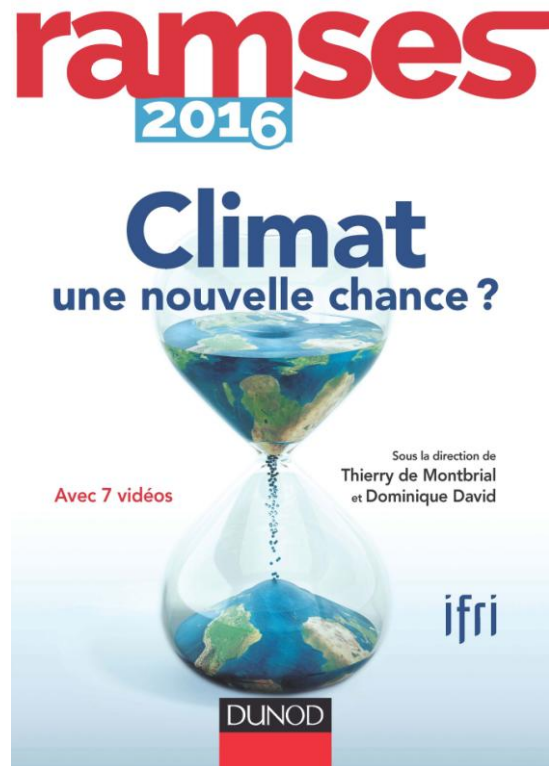
---

**Carole Mathieu**

Research Fellow at Energy Program, Ifri

*September 2015*

This text has originally been published in French in  
Thierry de Montbrial et Dominique David (dir.), *Ramses 2016, Climat :  
une nouvelle chance ?*, Paris, Ifri/Dunod, 2015.



© All rights reserved, Ifri/Dunod, 2015

Ifri  
27 rue de la Procession  
75740 Paris Cedex 15 – FRANCE  
Tél. : +33 (0)1 40 61 60 00  
Fax : +33 (0)1 40 61 60 60  
Email : [accueil@ifri.org](mailto:accueil@ifri.org)

Ifri-Bruxelles  
Rue Marie-Thérèse, 21  
1000 – Bruxelles – BELGIQUE  
Tél. : +32 (0)2 238 51 10  
Fax : +32 (0)2 238 51 15  
Email : [bruxelles@ifri.org](mailto:bruxelles@ifri.org)

Site Internet : [ifri.org](http://ifri.org)

***To avoid the pitfalls of historic divisions, climate negotiators decided to go down the self-differentiation route and leave legal matters to be resolved during the last steps of the process. The national contributions drafted by each party provide a robust basis for discussion, but we still need to ensure that these are appropriate and also monitor their implementation. The credibility of the Paris Agreement will be determined by these final procedural trade-offs.***

**A**fter more than two decades of international climate talks and very little in the way of tangible results, there is palpable weariness and COP21 is presented as a last chance conference. If it is a failure, we may have to give up on the multilateral system and try other ways of dealing with the global issue of climate change. To determine what would constitute success or failure, we need to go back to the negotiating mandate defined in Durban in 2011, when the parties to the 1992 Convention opened a new cycle of discussions with the aim of developing a “protocol, another legal instrument or an agreed outcome with legal force” which would be adopted no later than 2015 and come into force by 2020. This “Paris Agreement”, with the ultimate objective of stabilising the rise in temperatures below + 2 °C above pre-industrial levels, must be universally recognised. This means that its impact will depend on the amount of effort the parties say they are prepared to put in, as well as on the credibility of such commitments and thus their legal force. The task of reconciling both these dimensions will be far from easy; if the framework is too rigid, there is a risk that too few countries will take part in the agreement. So the negotiators are looking for new, creative legal solutions in order to establish an ambitious and yet inclusive dynamic.

## **> > Self-differentiation: advantages and limitations**

The unhappy experience of the Copenhagen Conference has left its mark on international climate negotiations. The objective set for the 2009 COP15 was to define a new global agreement on climate which would follow on from the Kyoto protocol and involve every country in the fight against climate change. Although there was a very strong involvement

and media coverage, discussions on how to share efforts fairly between countries and formalise commitments became bogged down. In the end, the Conference could only issue a "political declaration" which COP "noted". To break the deadlock, it was decided that negotiations would start with the substance of the agreement and would consider the form at a later stage. The post-2020 regime will not be reliant on commitments – the term used in the Kyoto Protocol to set the obligations for annex I countries – but will be based on national contributions. This clearly signals a change of approach. To conduct this particularly complex self-differentiation exercise, developed countries have agreed to share their experience and offer technical support to any party which requests it.

> **National contributions are very diverse – perhaps too diverse**

It was in 2013, in Warsaw, that the parties made a formal commitment to submit their "intended nationally determined contributions". Using clear, transparent language and allowing for the specific circumstances of each country, these contributions must describe the objectives which each country is prepared to set for itself and the implementation steps it intends to take.

To reflect the principle of common but differentiated responsibility, it was decided at Lima in December 2014 that less developed countries and small developing island states were not obliged to present targets in terms of emissions reduction. Instead, they could provide more general information about their strategy for coping with climate change. Similarly, every party was asked to explain the extent to which their own contributions were "fair and ambitious", in the context of the collective effort required to limit the rise in temperatures.

Despite the European Union (EU)'s attempts to encourage the negotiators to put in place a framework for this self-differentiation approach, the requirements governing the content of national contributions remained very vague. As a result, the documents received by the Convention's secretariat are particularly heterogeneous. While some countries, like the United States and the EU, chose to focus their contributions on their mitigation efforts, others, like Mexico, considered they should bring their adaptation efforts to the attention of the international community. Emission reduction objectives are also expressed in widely different ways with considerable disparities, for example, in relation to the baseline years and the target years. While the EU wished to present its 2030 objectives in relation to 1990 in order to demonstrate its progress in comparison to previous decades, Japan preferred to use 2013 as the starting point for a new trajectory so that the post-Fukushima context could be taken into account. Lastly, since it was such a difficult exercise, some countries decided not to provide a global target for emission reduction and proposed targets for each economic sector, or listed all the measures they intended to put in place, whether for supporting renewable energy, reducing fossil fuel subsidies or changing agricultural practices.

One advantage of self-differentiation is that it creates momentum. If sufficient countries choose to submit contributions, this will be a clear incentive for the others to follow suit so as not to risk diplomatic isolation. This logic is now at work. Nevertheless, the deadline is 1st October 2015, and many fear that the pressure may adversely affect the consistency of national contributions, making comparisons very difficult.

> **Will countries' contributions be negotiated before Paris?**

In spite of these imprecise instructions, the self-differentiation method can produce effective results if contributions are assessed in the light of the Convention's objectives. This too was the subject of fierce discussion at the Lima conference. Many countries are afraid that if the UN authorities are allowed to examine their contributions, those authorities will dictate how they behave. Because they are anxious to preserve their sovereignty, they were not prepared to accept assessment tools unless these would facilitate the national processes rather than pointing at naughty pupils. It was therefore decided not to organise a major consultation and the Convention secretariat was asked to prepare a report for 1st November 2015 on the aggregate effect of the national contributions registered by 1st October 2015.

However, since these contributions are in the public domain they can be analysed by civil society. Particular mention must be made of a partnership formed by four research institutes, which have proposed a tool designed to monitor and compare national contributions. This tool, the Climate Action Tracker<sup>1</sup>, advocates classifying contributions on a country-by-country basis, starting with "inadequate" and culminating in "exemplary". But the deadlines seem too close for the parties to agree to modify their efforts on the basis of these assessments. Defining a trajectory for emissions is a particularly complex exercise which requires various political tradeoffs. As far as the EU is concerned, discussions on the 2030 objectives began in 2011 and were only completed in autumn 2014. Small-scale adjustments may be possible, but it's harder to imagine significant changes. And yet, even though the content of some contributions is still unknown, it now seems to be accepted that their aggregate effect will be insufficient to ensure that temperatures do not rise by more than 2° C. Simply registering national contributions cannot of itself guarantee that efforts will be shared in an equitable manner. If there is no room for debate, then the prospect of breathing life into the principle of common differentiated responsibility is nothing more than an illusion.

> **After Paris: rethinking national ambitions**

Once this is recognised, we are obliged to consider the situation post-Paris and define the procedures required to plug the gap between the objectives which will be presented at COP21 and those which the Intergovernmental Panel on Climate Change (IPCC) considers necessary. This part of the negotiations is even more important because the parties want the Paris agreement to last instead of being limited to a defined period of engagement like the Kyoto Protocol. A five-yearly progress review should therefore be incorporated. On this basis, the parties would be invited to suggest new national contributions embracing, for example, reduced costs for technology, yet still consistent with their respective responsibilities and capabilities.

Those negotiating the Paris Agreement could also reinforce this positive dynamic by stating their long-term and very long-term objectives. Rather than limiting references to the + 2° C limit, this would mean inserting new targets for mitigation efforts in the agreement itself. Thus, the G7's final declaration at the Elmau conference in June 2015 emphasized the need for a "decarbonisation of the global economy over the course of this century" and supported a reduction of global emissions "at the upper end" of the -40% to -70% range (by 2050,

---

1. See the results of their analysis at: <[climateactiontracker.org](http://climateactiontracker.org/)>.

based on 2010 levels). These efforts were implicit in the 2° C ceiling as they correspond to the IPCC recommendations, but they make the 2009 commitment much more concrete and credible for the economic players. Whether these clarifications will be acceptable to all parties remains to be seen, given that they necessitate profound social and economic change, especially for developing countries.

## > > **The thorny question of legal constraints**

Discussions on content are progressing, as envisaged in Durban. At the time, participants did not envisage debating the form of the agreement until the final stages of the process, but in reality the uncertainty needs to be rapidly dispelled to avoid compromising the outcome of the conference. In terms of international law, the legal force which the Paris Agreement will have is a highly controversial matter. The EU, which favours tight legal security, wants the collective action decided on in Paris to be enshrined in a protocol, with the national contributions forming an integral part of that protocol. This would give them the same legal force as the other provisions in the agreement. Other parties are opposed to this solution, which was inspired by Kyoto, particularly the United States. President Obama, who is committed to the success of the Paris Conference, has rejected the option of a protocol requiring ratification by a two-thirds majority in the Senate. Instead, the Obama administration is arguing for an "international legal instrument containing certain restrictive elements in terms of international law<sup>2</sup>", the elements referred to deriving from the 1992 Convention, in which the United States are a party. This subtlety would then enable the American President to accept the Paris Agreement by using his executive powers and thus avoid a vote in Congress.

### > **Choosing the legal form**

Of the three options proposed in the Durban mandate, the first one – the protocol - would create a new agreement based on article 17 of the 1992 Convention. It would be legally binding on all parties who have established their consent to be bound by this treaty, whether by ratification, acceptance or approval, by virtue of article 14 of the Vienna Convention on the Law of Treaties. The date when it comes into force would then depend on the terms specified in the protocol itself. The European Commission's proposal is that it should come into force as soon as it is ratified by states representing, in total, more than 80 % of current global emissions.

There is no common definition for the "legal instrument", which is the second option, but the 1992 Convention should foresee or allow its adoption by the Conference. It could be an amendment to the Convention, a new appendix, an amendment to one of the existing appendices, or even a new type of instrument which would contribute to the Convention's objectives and principles. By omitting any specific reference to article 17 of the 1992 Convention, this legal instrument could then be adopted as something other than a "protocol", so that it would be classified as a treaty under the Vienna Convention – but perhaps not under American constitutional law.

---

2. "US Submission on Elements of the 2015 Agreement", UNFCCC, 12<sup>th</sup> February 2014.

The last option – an agreed outcome with legal force – is even more ambiguous. This outcome would not be considered fully binding under international law: it might consist of decisions made at the Conference of the Parties (COP), which are adopted by consensus and apply as soon as they are adopted, yet only have a operational dimension rather than a legal one.

These different options are not mutually exclusive: a combined approach could be the most appropriate, giving the different elements under discussion, and in particular the national contributions, a specific legal force.

### > ***The Paris Agreement or the Paris "Alliance"?***

If the Paris Conference is to satisfy the demands of all 196 parties and still give a powerful signal, it should result in a number of different instruments being adopted. This Paris "Alliance" would consist of a principal agreement in the form of a protocol or another legal instrument, and different COP decisions – on funding, for example – together with separate documents – like the register of national contributions – and political declarations – on such subjects as the collective effort to bring about mitigation. Despite this fragmentation, national contributions could still be considered binding if the provisions of the principal agreement which reference them were sufficiently robust. Most importantly, the principal agreement should contain rules of procedure and in particular a definition of the status of contributions. It should also commit the parties to conducting an exercise every five years aimed at upgrading the emission reduction objectives.

The first big question is: will the provisions of the agreement go even further? And will they require the parties to attain the objectives they set themselves and incorporate them into their national law, or maybe try their utmost to adopt corresponding implementation measures? The second big question relates to monitoring the progress achieved and thus the extent to which national processes can be subject to interference. At the very least the agreement should define common standards for measuring emission reduction and require the different parties to communicate regularly. Compliance mechanisms might also be considered, whether in the form of assessment reports published by independent bodies or even financial sanctions. Whether or not these various procedures are included in the principal agreement, the very process of formulating them will influence the binding nature of national contributions.

Lastly, if parties are still hesitating about accepting certain objectives, then political declarations may enable them to formalise those objectives and give them strength, even if it is not legal strength. This is what happened with the Copenhagen Accord, which was not adopted by COP but still had significant political impact: the following year, its key provisions figured in the Cancun Agreements (2010) which are certainly based on a COP decision.

### > ***Legal creativity and intelligibility***

At the end of the Bonn negotiating session in June 2015, most of the negotiators indicated that an agreement was possible and desired by the great majority of parties, despite the fact that many legal matters remained open. The outcome of the Paris conference should therefore be a favourable one, even though it will no doubt appear a very complex legal edifice. This level of complexity is probably necessary to enable sufficient ambition while

ensuring universal participation. Nevertheless, it could make the result of negotiations difficult to understand, although one of the Conference's chief objectives is sending a strong signal about the inevitability of the transition to a low-carbon economy.

Thus, the Paris Conference can only be called a success if observation shows that all the texts adopted are consistent both in terms of the complementary nature of commitments and the extent to which each commitment is legally binding. If they are indeed consistent, that won't mean we have saved the climate, but it will at least mean that the foundations have been laid for a complete transformation and that a virtuous dynamic has truly been triggered.

**C. M.**

**FURTHER READING**

- D. Bodansky and S. Day, "Legal Options for U.S. Acceptance of a New Climate Change Agreement", Center for Climate and Energy Solutions, May 2015.
- J. Morgan, Y. Dagnet and D. Tirpak, "Elements and Ideas for a 2015 Paris Agreement", *Working Paper*, Washington, DC, Agreement for Climate Transformation World Resources Institute, December 2014.
- L. Rajamani, "Negotiating the 2015 Climate Agreement: Issues relating to Legal Form and Nature", *Research Paper*, no. 28, Cape Town, MAPS, May 2015.