The Paris Agreement: Onwards and Upwards?

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The PA acknowledges that a progressive approach is essential:

In order to achieve the aim of preventing dangerous anthropogenic interference with the climate system (A2 UNFCCC) by strengthening the global response to the threat of climate change (A2 PA), the PA must secure deeper emission cuts than are currently proposed by states.

The PA confirms the interdependence of mitigation, adaptation and the provision of support (climate finance) and all three elements are subject to ‘progressive’ language in the text of the Agreement.

Progressive language indicates a requirement to do more by way of emission cuts so as to align what is contributed by states with what ‘best available science’ [IPCC] indicates is required in order to secure the aims of the UNFCCC/PA.

Progressive language also, by implication, restricts/prohibits regression or ‘backsliding’ which would further undermine efforts to secure the aim of the PA/UNFCCC, taking into account the ‘gap’ identified by UNEP/IPCC.
Legal implications of progressive language

Provides a legal requirement to ‘ratchet up’ emissions cuts, as well as adaptation and support, taking into account:

the text of the PA;

the context, including the UNFCCC, the KP, scientific findings of the IPCC (best available science), the identification of a ‘gap’ by UNEP and the UNFCCC Secretariat, the principles reflected in the Convention and in customary international law including prevention, precaution, intergenerational equity and sustainable development. Also relevant are rights protected under human rights law and the international consensus on the need to eradicate poverty as reflected in the SDGs [some of these elements are ‘context’ within the meaning of A 31 VCLT, others may constitute ‘subsequent practice’/’relevant rules’]

Equity and cbdrrc will inform national contributions and support but these principles are not inconsistent with a progressive approach
Aim (A 2 PA): going beyond current commitments...

“aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, including by:

(a) Holding the increase in the global average temperature to well below 2 °C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5 °C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change;

(b) Increasing the ability to adapt to the adverse impacts of climate change and foster climate resilience and low greenhouse gas emissions development, in a manner that does not threaten food production;

(c) Making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development.
Current mitigation pledges cannot achieve the aim of the Agreement/the Convention

*Emphasizing with serious concern the urgent need to address the significant gap between the aggregate effect of Parties’ mitigation pledges in terms of global annual emissions of greenhouse gases by 2020 and aggregate emission pathways consistent with holding the increase in the global average temperature to well below 2 °C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5 °C above pre-industrial levels (9th Recital to Preamble to COP Decision 1/CP.21)*
Emergence of INDCs

COP19 (Warsaw) decision that parties in a position to do so submit INDCs by March 2015 (Decision 1/CP19)

“in a manner that facilitates the clarity, transparency and understanding of the intended contributions, without prejudice to the legal nature of the contributions”

COP20 (Lima) adopts the Lima Call to Action (limited guidance) calling on Parties to submit INDCs that were fair and ambitious (Decision 1/CP20) and:

“will represent a progression beyond the current undertaking of that Party (para 10)”
The current INDCs do not go far enough:

Notes with concern that the estimated aggregate greenhouse gas emission levels in 2025 and 2030 resulting from the INDCs do not fall within least-cost 2 °C scenarios but rather lead to a projected level of 55 gigatonnes in 2030, and also notes that much greater emission reduction efforts will be required than those associated with the INDCs in order to hold the increase in the global average temperature to below 2 °C above pre-industrial levels by reducing emissions to 40 gigatonnes or to 1.5 °C above pre-industrial levels by reducing to a level to be identified in the special report [to be provided by the IPCC in 2018] (Para 17 to1/CP.21)
How does the Agreement address this gap?

PA “aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty…” (A2)

Lays down a dynamic international process for reviewing and ‘ratcheting up’ Parties’ contributions (the NDCs) (see A’s 3, 4, 13 and 14)

Incorporates established principles which entail a progressive and restrict a regressive approach including prevention; precaution and intergenerational equity (Preamble and A2);

Indicates that the issue is one for all states to address: common concern of humankind requiring widest possible cooperation by all countries—(time) limits freedom to withdraw and arguably entails ongoing responsibilities for departing Parties/non-Parties (Preambles to 1/CP.21 and PA);
Recognizing the need for an effective and progressive response to the urgent threat of climate change on the basis of the best available scientific knowledge (4th Recital to PA);
NDCs and Progressive Approach:

As NDCs to the global response to climate change, all Parties are to undertake and communicate ambitious efforts …with the view to achieving the purpose of this Agreement as set out in Article 2. The efforts of all Parties will represent a progression over time, while recognizing the need to support developing country Parties for the effective implementation of this Agreement. (Article 3)

Each Party’s successive NDC will represent a progression beyond the Party’s then NDC and reflect its highest possible ambition, reflecting its common but differentiated responsibilities and respective capabilities, in the light of different national circumstances (Article 4).

“A Party may at any time adjust its existing NDC with a view to enhancing its level of ambition, in accordance with guidance adopted by the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement. “ (Art4(11)
Non-regression/progression is also relevant to climate finance and adaptation:

Article 2 PA sets out three aspects to be included in the strengthened response to climate change: mitigation; adaptation and finance.

In relation to the climate finance to be mobilized by developed country parties:

“Such mobilization of climate finance should represent a progression beyond previous efforts.” (Art 9(3))

Compliance with obligations under Articles 7 (adaptation) and 9 (climate finance) subject to transparency, technical expert review and facilitative multilateral consideration of progress (A13,14)
Parties will convene a facilitative dialogue among Parties in 2018 to take stock of the collective efforts of Parties in relation to progress towards the long-term goal referred to in Article 4, paragraph 1, of the Agreement and to inform the preparation of NDCs pursuant to Article 4, paragraph 8, of the Agreement (para 20 of 1/CP.21);
Post 2020: NDCs

Emphasis on transparency (A13): “to provide a clear understanding of climate change action in the light of the objective of the Convention as set out in its Article 2, including clarity and tracking of progress towards achieving Parties’ individual NDCs under Article 4”, Parties must regularly provide “Information necessary to track progress made in implementing and achieving its NDC under Article 4”

Technical expert review shall consider the Party’s support provided, as relevant, and its implementation and achievement of its NDC.
Institutional framework for NDC review and replacement:

Parties must submit (I)NDC no later than submits instrument of ratification/accession etc (para 22 1/CP.21)

Facilitative dialogue in 2018 (to prepare for first global stocktake)

The Ad Hoc Working Group on the Paris Agreement to develop further guidance on features of the NDCs for consideration and adoption by the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement at its first session (drawn up by AHWGPA): IPCC accounting and consistent methodology…(to apply to second and subsequent NDCs)

INDCs/NDCs will be housed in an interim public registry from early 2016 pending adoption of modalities for permanent public registry by COP

Parties whose INDC contains a time frame up to 2025 urged to communicate by 2020 a new NDC and to do so every five years thereafter pursuant to Article 4, paragraph 9, of the Agreement (para 24 1/CP.21)

Parties should submit NDC under Art4 9-12 months ahead of COP (Secretariat will prepare synthesis report)
The Global Stocktake (A14 PA)

Ex post review…

The [COP] serving as the meeting of the Parties to the Paris Agreement shall **periodically take stock of the implementation of this Agreement to assess the collective progress towards achieving the purpose of this Agreement and its long-term goals** (referred to as the “global stocktake”). It shall do so in a comprehensive and facilitative manner, considering mitigation, adaptation and the means of implementation and support, and in the light of equity and **the best available science**.

2. The COP …shall undertake **its first global stocktake in 2023** and every five years thereafter unless otherwise decided by the COP …

3. The outcome of the global stocktake **shall inform Parties in updating and enhancing, in a nationally determined manner**, their actions and support in accordance with the relevant provisions of this Agreement, as well as in enhancing international cooperation for climate action.

1/CP.21 para 100: confirms information on adaptation and support as well as mitigation and IPCC assessments are to inform process
Principles to underpin non-regression/progression

“In pursuit of the objective of the Convention, and being guided by its principles, including the principle of equity and common but differentiated responsibilities and respective capabilities, in the light of different national circumstances “ (3rd Recital to PA)
UNFCCC principles reinforcing progressive approach:

**Prevention:** In order to meet ultimate goal under A2 UNFCCC [prevent dangerous anthropogenic interference with the climate system] and specific goals under Cancun/PA: must adopt mitigation measures which are sufficiently ambitious in the light of IPCC assessments, UNEP and Secretariat reports (‘best available science’);

**Precaution:** Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be **cost-effective so as to ensure global benefits at the lowest possible cost** (A3(3) UNFCCC)

Relevant to timetable for mitigation and peaking ‘as soon as possible’

**Intergenerational Equity:** Parties should not, by delaying measures, increase costs/risks for subsequent generations
SDGs: Poverty and Climate Change

COP Decision 1/CP.21 refers to the SDGs (UNGA A/RES/70/1):

“Sustainable development recognizes that eradicating poverty in all its forms and dimensions, combating inequality within and among countries, preserving the planet, creating sustained, inclusive and sustainable economic growth and fostering social inclusion are linked to each other and are interdependent.” Transforming our World Oct 2015 A/Res/70/1)

Eradication of extreme poverty and hunger by 2030 (SDGs1 and 2) and take urgent action to combat climate change and its impacts (SDG13)

“Implement the commitment undertaken by developed-country parties to the United Nations Framework Convention on Climate Change to a goal of mobilizing jointly $100 billion annually by 2020 from all sources to address the needs of developing countries in the context of meaningful mitigation actions and transparency on implementation and fully operationalize the Green Climate Fund through its capitalization as soon as possible” Goal 13(a)
Duty of good faith (A26 VCLT/A31)

ICJ *Australia v Japan* indicates likelihood of a forensic judicial approach to review of decisions based, or said to be based on science, (buttressed by transparency and requirements for ‘best available science’ in PA).

Duty of good faith limits, although does not remove, discretion at national level (ambition, IPCC timetable, scrutiny). Must cooperate with all procedural requirements for NDCs as individual contributions are the basis for collective progress.

**Issues**: maintenance of subsidies for fossil fuels? Failure to supply climate finance support ($100 billion pa floor)? Lack of ambition in NDC?
Legal redress

**National level**: administrative/constitutional law-statutory targets and budgets (UK), human rights protections?

**EU level**: Governance debate in the EU-debate about approach to take to ensure 2030 targets met on renewables; energy efficiency; effort sharing and ETS-should not regress-issue of binding national targets or not…[OMC]

The Regulatory environment for **international investment**:
“The result will be a very clear signal to the marketplace of the world that people are moving into low carbon, no carbon, alternative renewable energy…” John Kerry about Paris commitments (reported in UK Guardian 13 December 2015)

**International**: A 14 UNFCCC dispute settlement. Scrutiny of agreement in international for a (trade, investment and others). Implications for non-parties/states which withdraw?
The UK’s approach under the Climate Change Act and the advice provided by the Committee on Climate Change, has been one of steady progress to meet the 2050 target. It has explicitly sought to avoid unexpected needs to ratchet up effort quickly, with the associated costs of doing so. The global agreement makes clear that current global commitments fall short of what is needed to meet the ambition…Some nations will have to ratchet up effort – potentially over relatively short periods of time. That might include the EU as a whole; the UK Government has supported a position that the EU should increase effort from 40% to 50% emission reduction by 2030 if other countries also ratcheted up their ambition. ..The advice provided by the Committee on Climate Change is explicitly intended to minimise the need for large changes in the emissions’ trajectory of UK. CCC (January 2016)
The **fifth carbon budget advice** is based on the least-cost path (balancing a range of factors including affordability, security of supply and competitiveness) to reduce UK emissions by at least 80% by 2050. The 2050 target (which is set by the Climate Change Act) was based on a global ambition of keeping central estimates of temperature rise close to 2°C. The Paris Agreement clarifies that the 2°C ambition is an upper bound...The 5th Carbon Budget represents the most cost effective route to our statutory target for 2050. Even without Paris there is no elbow room in that budget that would allow us to lessen our ambition. The Paris outcome is likely to reinforce that situation and **we shall have to decide whether to recommend that further steps will need to be taken and at what point in the future.** CCC (January 2016)
“Last but not least are reports that a number of leaders have returned to capitals, Paris Agreement in hand, only to announce that domestic policy need not change in light of the new global deal. That’s unlikely to be true – and they don’t have the long term assurance that is written into our Climate Change Act. **Tangible action remains the only real solution to dangerous climate change.**”

Committee on Climate Change (January 2016)