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A Story of 2.0 Texts and of the Landing of the Paris Agreement

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Abstract

The Paris Agreement provides much needed momentum to the international climate change regime by providing a legal and policy platform for climate change action for the years to come. The negotiations leading to such an outcome were not easy, and a successful outcome was reached only because Parties were ready to compromise in order to secure a final agreement. The French Presidency of COP21 has repeatedly called for landing zones to be found on the most difficult areas of the negotiations. This paper compares the final Paris Agreement with the last Draft Text that was released on Thursday 10th December. It suggests that three areas of contention in the negotiations (cooperative mechanisms, loss and damage and transparency), reveal that the common red line was always differentiation between developed and developing countries.

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1. INTRODUCTION

This is a paper about two texts: the Draft Paris Outcome released by the French Presidency at the UNFCCC 21st Conference of the Parties on Thursday 10 December 2015 and the final adopted version of the COP Decision titled "Adoption of the Paris Agreement" of Saturday 12 December 2015. The first part of the paper presents my comments on the Draft Text that I had written at le Bourget itself on Friday 11 December. The second part of the paper includes my lengthier and more detailed comments written back in Glasgow on Monday 14 December 2015 based on a summary analysis of the adopted text. I deliberately did not amend or tweak the format of my comments in order to keep alive, as far as possible, the contrast between the two texts and to highlight the effect that the last day and a half of negotiations may have had on the adoption of the Paris Agreement.

2. COOPERATIVE MECHANISMS, LOSS AND DAMAGE AND TRANSPARENCY: NOT LANDED YET

(FRIDAY 11 DECEMBER 2015)

On Thursday 10 December at 9PM the French Presidency released a new version of the Paris Outcome. Interestingly, the Draft Decision precedes the Draft Agreement. Amongst people here at the COP, and elsewhere, the hope to be able to get back to "life" already by Friday evening is dissipating quickly, with most of us thinking it will take at least until Saturday, if not longer, to come up with a final outcome.

But what are the problems still pending in the Draft Agreement? While it is true that the text is shorter than the previous ones, a few areas of disagreement still remain, which will need to be ironed out. The French Presidency talked several times about the need to find landing zones, but it is clear that in some areas this has not happened yet. This does now want to be an exhaustive account of the Draft text, but just a reflection on some areas in which a landing zone may be closer, or has indeed already been reached, and some in which a compromise (another word for landing zone) still needs to be found.

Let's briefly see first where the landing zones may have been reached:

1) Article 2 has deleted the previous options which called only for a 2 °C degrees option, or just a more ambitious 1.5 °C degrees option. We now have a landing zone that calls for a 2 °C degrees with reference to the need to move, in the future, towards 1.5 °C. Interestingly in article 3 all references to quantitative limits (50%, 70% based on 2010 levels) have been eliminated and now the text

calls for greenhouse gas emissions neutrality in the second half of the century. While there are no brackets or options on the level of ambition, this does seem to be a clear compromise between those groups (AOSIS, etc…) who wanted a 1.5 °C goal and others (Umbrella, etc…) that preferred a 2.0 °C option. The extent to which this will either be reopened in today's discussions or whether it will be played out as defining the Paris Agreement as weak is yet to be seen.

2) One of the most complicated areas of the agreement was article 3.2 in which Parties were asked to explain what needed to be done to meet the goal set above. Depending on the wording of this provision countries could (or not) be considered to have a legally binding obligation. All brackets have now been removed and one can finally read the provision clearly as follows: "Each party SHALL prepare, communicate and maintain successive nationally determined mitigation contributions that it intends to achieve and SHALL pursue domestic measures to do so." So, a double shall is present, making this provision a candidate for being THE legally binding obligation of the agreement. To meet such obligation a party must prepare an INDC and implement it domestically. However, what that means depends on the meaning given to "pursue" and "domestic measures". The COP Decision that accompanies the Agreement gives some guidance, but more will be needed Post Paris.

Despite the possible discrepancies in the interpretation, ambition and what needs to be done to meet such an ambition seem to have been ironed out. But on the day in which the French Presidency was hoping to conclude the COP (Friday 11 December) there are still at least a few areas in which disagreement is still present. The following list is not comprehensive, but includes those areas that are more relevant from a legal perspective and that, combined, can lead to considerations regarding the effectiveness of the Paris Agreement:

1) Brackets are still present in article 3 ter in which **cooperative mechanism** could be established. Cooperative mechanism is a new term for carbon markets and has been at the core of discussions between several groups, but in particular the European Union, the Umbrella Group and ALBA (Alianza Bolivariana para los Pueblos de Nuestra América). The language present in article 3 ter 1 reminds very closely the twofold goal of the Clean Development Mechanism, which is strongly opposed by countries like Venezuela, as was clearly maintained in the delegation's statement in the Comité de Paris plenary on Wednesday night (December 9).

2) A second area where there seems to be still strong disagreement is **loss and damage**. Here we do not have brackets, but we still have options. Loss and damage comes from the call of the most vulnerable countries to climate change for increased financial assistance in cases of climate change induced disasters. These are countries that have not caused climate change and in many cases still are not contributing to it in any particular way. One of the options on the table maintains that Parties will address loss and

damage but "in a manner that DOES NOT involve or provide a basis for LIABILITY or COMPENSATION nor prejudice existing rights under international law." From this quote alone, it is self-evident that the debate on loss and damage is very heated and very emotional. To find a landing zone on this delicate topic will test the finest negotiating skills of delegations in these last hours.

3) A third and final area of disagreement seems to be **transparency**. The latter is crucial for the legal effectiveness of the agreement (leave aside the environmental effectiveness for a moment as this will depend on the level of its ambition). Amongst the many purposes that transparency fulfils, one is particularly important and is stated in article 9.4 d) as "To ensure clarity and tracking of progress made towards [INDC] and achieving individual Parties' respective mitigation [INDC] under Article 3." INDCs are in brackets in my writing because it has not yet been agreed what they will be called in the Paris Agreement. In relation to transparency we have two sets of options, but the one I want to focus on here can be found in article 9.7 of the text released on Thursday 10 December. The two options, to some extent, could not be more different and are an example where differentiation, which has always been, and still is possibly, the thorniest issue of all, really comes to the floor in all of its complexity. Option 1 calls for the SAME transparency system for ALL parties. Option 2 differentiates between developed and developing countries.

   Option 1 calls for a "thorough, objective and comprehensive" review of the Parties' performance undertaken by an "expert review team" concluding in a report that "SHALL identify any issues related to compliance in accordance with article 11".

   Option 2 qualifies the transparency system in different ways depending of which Party will be scrutinised. Developed countries will undergo a system that will be "robust", which will result "in a conclusion with CONSEQUENCES for compliance". Developing countries will experience a process that will include both a "technical review process" and a "multilateral facilitative sharing of views" resulting in a summary report (not a conclusion) taken in a manner, which is "nonintrusive, NON-PUNITIVE and respectful of national sovereignty, according to the level of support from developed country Parties."

A final, more technical, but equally important, area of discussion still pending is the provision on entry into force. Surprisingly in the previous draft text the Agreement would have entered into force with the ratification of only 55 countries. In the Thursday 10 December version of the Draft Paris Agreement the double trigger element of entry into force has been reintroduced so, if this is to be confirmed in the final text, the Agreement will enter into force only once: 1) a certain number of States have ratified it (55) and 2) these account for at least a certain amount of global emissions (55 or 70%).

In a few hours (hopefully) the French Presidency will release a new draft text. One can only hope that it will help negotiators to close the gap on those areas that are still contentious. From the analysis above it does

appear that a landing zone (another word for COMPROMISE) has been found on the level of ambition and what needs to be done to meet such ambition, at least procedurally. This appears to be THE legally binding obligation currently present in the Draft Paris Agreement (article 3.2). Compromise is still pending, at least, on three crucial areas: cooperative mechanism (market based instruments), loss and damage and transparency. Finding a landing zone on these areas, and especially on transparency, may well determine the legal effectiveness of not only the Paris Agreement, but of the future international climate change legal regime. A further discussion and analysis is warranted once the final text is released to see how countries have been able (or not) to deal with these three crucial areas.

2. THE LANDING OF THE PARIS AGREEMENT

(MONDAY 15 DECEMBER 2015)

Now that the brackets, options and Latin words *bis* and *ter* have gone we can read through the final and adopted version of the Paris Agreement. In particular, I wish to focus on the three areas that on 11 December 2015 I had highlighted as most controversial (cooperative instruments, loss and damage and transparency) because they still presented options in the draft text, and even brackets in some cases. It is fascinating to see how the text has either changed as a result of the negotiations on the last day, or has moved from the Paris Agreement to the COP Decision. While not being in the Indabas myself prevents me from knowing precisely why a change or a move has been made, comparing the Thursday 10 December draft text with the final adopted version of Saturday 12 December seems to reveal some of the fault lines (or red lines as many have called them) of the negotiations. But, before moving to the controversial areas that needed to be ironed out in the last hours of the negotiations, let's revisit that part of the Agreement that in my previous comment I argued had already provided a landing zone between the Parties: ambition.

1) The heated debate in the Comité de Paris meeting on Wednesday night between countries not wanting to concede anything less than 1.5 °C and those who argued for 2 °C found a middle ground in the Paris Agreement that now invites Parties to "hold the increase in the global average temperature to well below 2.0 °C degrees above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5 °C above pre-industrial levels,". What is clear is that article 2 has not incorporated any direct reference to human rights, or any of the other language (the rights of indigenous people, children, persons with disabilities, etc…) that a coalition of countries and civil society led by Mexico (the Friends of the Principles) tried to include until the last minute. Whether the reference to "equity" is capable of including these rights and principles will be tested in the implementation of the Paris Agreement. Furthermore, just like in the Draft Text of Thursday 10 December, all references to quantitative limits have been removed. In what was previously article 3.1, currently article 4.1 of the Paris Agreement, "greenhouse gas emissions neutrality" has been changed to "balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases".

Similarly, to the dropping of quantitative limits, there is also no reference to any specific date/year by when such balance needs to be achieved, except for a vague "second half of this century" rendezvous… This was picked up by Ecuador in the final meeting of the COP in Paris following the adoption of the Paris Agreement when it compared the ambition and mitigation landscape in the Paris Agreement to a fairy tale highlighting vague words such as "as soon as possible" and "rapid".

2) Where the Paris Agreement confirmed the Draft Text released on Thursday 10 December is on what, from a procedural point of view, needs to be done in order to move towards the goal of the Agreement. Article 4.2 (previously 3.2) reads almost *verbatim*: "Each Party SHALL prepare, communicate and maintain successive nationally determined contributions that it intends to achieve. Parties SHALL pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions." The provision has kept its strong language and it can be seen as THE legally binding obligation of the Paris Agreement, as previously commented. The COP Decision clarifies that the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement will need to work hard in the next few years to develop clear modalities and procedures regarding nationally determined contributions. This last comment makes it clear that in most cases the Paris Agreement can be considered as a framework agreement that needs of two things to be properly implemented: 1) further clarification through COP Decisions to operationalise many of its provisions and 2) domestic measures at a national level to truly implement the Agreement, considering its bottom up nature and approach.

I will now move to explain what happened to cooperative mechanism, loss and damage and transparency in the Paris Agreement. The change in wording from the Thursday Draft Text to the Saturday adopted final version reveals that the real challenge was always to find a way around differentiation. The latter is at the heart not only of the three red lines above, but of all aspects of the Paris Outcome. Ever since the Durban COP Decision that launched the Ad Hoc Working Group on the Durban Platform for Enhanced Action (ADP) negotiations, many have argued that this would be the first climate change agreement truly universal because it would be applicable to ALL. While this is true, just like the Sustainable Development Goals also recently adopted, at the same time the Paris Agreement provisions can be divided into those that apply to: 1) Each Party; 2) Developed Country Parties; 3) Developing Country Parties; 4) Least Developing Country Parties and 5) Small Island Developing States. In the preamble one can even find references to concepts that apply only to "some", such as Mother Earth or climate justice. In other words, what many, especially in the COP plenary following the adoption of the Paris Agreement, have hailed as the first "universal" climate agreement can also be seen, as suggested by some delegations, as a monument in differentiation. So, how has this differentiation battleground played out in the context of the three areas discussed in the previous comment?

1) Those countries like the United States of America, New Zealand or Chile, amongst others, who have negotiated in favour of keeping **market based measures** anchored into the agreement, have been successful. Article 6 (previously art 3 ter) establishes "a mechanism to contribute to the mitigation of greenhouse gas emissions and support sustainable development". The mechanism appears to be very similar to the Kyoto Protocol Clean Development Mechanism. What has changed from the Draft Text to the Paris Agreement is a clearer reference in the text of the Agreement to areas in which the CDM has been severely criticised, such as "environmental integrity" and "governance". It will be for the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement to develop proper safeguards that will enable those who will be participating in the Mechanism to not repeat the errors of the past. It is worth reminding that, because there is no legally binding emission reduction cap in the Agreement, and because countries are allowed to design and implement their nationally determined contributions as they wish, participation in the Mechanism is completely voluntary. In other words, the Paris Agreement opens the door to (and welcomes) the use of carbon markets offsets in national climate plans, but the extent to which countries wish to rely on them to meet their nationally determined contributions is a domestic political decision.

   The discussion on "cooperative mechanism" has always been one between those groups (like the Umbrella Group) that advocated the need to increase ambition through flexibility by using the markets, and some other groups (like ALBA) that opposed the use of markets. The latter see recognised their efforts through the inclusion in the Paris Agreement in art. 6.7 and following of a "framework for non-market approached" and by a request to the Subsidiary Body for Scientific and Technological Advice to undertake a work programme under such framework.

   Some may argue that differentiation may not have been at the heart of the negotiations on cooperative mechanisms, considering that allowing or not carbon markets and offsets in the Paris Agreement was a "principled" debate between countries that favoured markets and others that oppose them. However, even when looking back at the principle of supplementarity in the Kyoto Protocol, differentiation does become relevant. In fact, the debate has always been whether developed countries should not undertake most of their mitigation efforts domestically, rather than in developing countries. But let's move on now to see how loss and damage has been settled in the Paris Agreement in light of the challenges of differentiation.

2) **Loss and damage** appears to be, at least from a cursory view of both the Paris Agreement and of the COP Decision, one of the areas where landing zones were more difficult to find. Some developing countries like the Philippines reminded the COP Plenary after the adoption of the Paris Agreement of the annual "loss and damage" it suffers after

each typhoon. For countries like the Philippines and for coalitions like AOSIS (the Alliance of Small Island States) going home without a stand-alone provision on loss and damage would have not been acceptable. The question, however, was what price were they willing to pay to have such a provision in the Paris Agreement. Reading between the lines of the Draft Text released on Thursday 10 December suggested two possible options: a facilitative non-confrontational approach vs one that included liability and compensation. A third one was not present in the draft text, but could have still creped in had delegations supporting a stand-alone provision on loss and damage not fought hard enough: and that was taking loss and damage back into the adaptation provision. This was an unacceptable option for LDCs (Least Developed Countries) and SIDS (Small Island Developing States) and this explains possibly why the final provision on loss and damage in the Paris Agreement (article 8, previously article 5) refers to it as a cooperative and facilitative instrument. Cooperation and facilitation will be pursued by working together in a number of areas such as "early warning systems, slow onset events, etc…." Interestingly "events that may involve irreversible and permanent loss and damage" has been kept in the Paris Agreement, while "climate change induced displacement, migration and planned relocation" has been deleted from the text of the Agreement. Events that may involve irreversible and permanent loss and damage was linked to "slow onset events" in the Draft Text, which one can understand as the daunting scenarios of countries literally disappearing due to sea level rise. However, the very controversial issue of climate "migrants" is not in the Paris Agreement. The question is whether it has resurfaced in the COP Decision. And it has, at least in some way. Paragraph 50 deals directly with climate induced displacement and creates a Task Force to "develop recommendations for integrated approaches to avert, minimize and address displacement related to the adverse impacts of climate change;" In other words, the Paris Outcome (combination of both the COP Decision and of the Paris Agreement) does not refer to climate change refugees or climate migrants, but opens the door to working towards better understanding and dealing with climate induced displacement.

Another area of contention in the Draft Agreement was the provision that stated that Parties should operate in a cooperative and facilitative basis "in a manner that DOES NOT involve or provide a basis for LIABILITY or COMPENSATION nor prejudice existing rights under international law." This provision is not present in the Paris Agreement, which may appear as a victory for many of the LDC countries that did not want to preclude a future system that could allow them to seek compensation for loss and damage from climate change. This was clearly stated by Nicaragua in its remark at the COP Plenary when it explained why it had not agreed to the consensus behind the adoption of the Paris Agreement (another case of consensus-1). Nicaragua argued that it was unfair to not provide compensation to those countries that have contributed the least to climate change

and are suffering the most. Bolivia, again in the final plenary, deemed as unacceptable a provision in an international treaty that prevented a Party to seek justice. It argued that, despite the paragraph in the COP Decision (see below), the door to international litigation was still open for climate justice. This has always been a very heated discussion, and one that has always put countries in a difficult position at the negotiating table. Hence, by comparing the two texts it can be argued that developing countries got what they wanted by having an ad-hoc provision on loss and damage, but that developed countries also succeeded by clarifying that such a mechanism will be facilitative and non-confrontational. However, by deleting any reference to liability and compensation in the Agreement this could be perceived as a victory for developing countries, as it could have meant that in a not a so distant future, as argued by Nicaragua, LDCs could have reopened the possibility of liability and compensation, should the efforts coming from developed countries not be enough. However, this is where it becomes extremely important to read the Paris Outcome as a whole. In fact, paragraph 52 of the COP Decisions seems to close this door quite abruptly in clarifying that "Article 8 of the Agreement DOES NOT involve or provide a basis for any liability or compensation;"

Loss and damage is of one the areas where differentiation comes to the floor more emotionally. It does so in the speeches at the end of the negotiations, and most likely also in the late hours of night in the never ending Indabas. It is difficult to predict who has been the winner or loser in the negotiations on loss and damage. And it's probably not very productive to even label countries as winners and losers in such debate, considering that this is an area of climate change, as reminded us by the Philippines, where people affected have names, families and, unfortunately, in some cases no future. What is clear from the Paris Agreement is that loss and damage is here to stay and that it has a stand-alone provision, but it will be very difficult, for the time being, at least to provide it with any "judicial teeth" as some developing countries negotiations were advocating.

3) The final area of the negotiations where no landing zone had been reached in the Thursday 10 December draft was transparency. Any legal instrument will be toothless if it does not have a system to check that the obligations provided therein are pursued. I have argued that THE legally binding obligation in the Paris Agreement is article 4.2 that calls for ALL parties to implement national measures to pursue the national emission reductions targets set in their nationally determined contributions. In this framework, the negotiations about transparency were about finding ways to check that what countries pledge in their national plans is actually taking place, and what to do if it does not. Article 13.5 confirms this interpretation by stating that "the purpose of the framework for transparency of action is to provide a clear understanding of climate change action…. Including clarity and tracking of progress towards achieving

Parties' individual nationally determined contributions under Article 4." Regarding transparency there have been significant changes in the two texts signalling that it was indeed a heated area of the negotiations. Differentiation was without any doubt at the heart of this debate.

The negotiations concluded clarifying the overarching goal of the transparency system as follows: "In order to build mutual trust and confidence and to promote effective implementation, an ENHANCED transparency framework for action and support, with built-in flexibility which takes into account Parties' different capacities and builds upon collective experience is hereby established." Article 13.1, just quoted, brings together three options previously present in the Thursday Draft Text (previous article 9.1). "Enhanced" replaces ROBUST in the adopted version. Article 13.3 sets the tone for the overall nature of the transparency framework maintaining that it will be "implemented in a facilitative, non-intrusive, non-punitive manner, respectful of national sovereignty, and avoid placing undue burden on Parties." Interestingly this provision applies allegedly to ALL parties, not just developing countries. But where the negotiations were even more complicated was in providing further details as to how transparency would operate for the different categories of countries Parties to the UNFCCC. In the Thursday text an option provided for clear differentiation with developed countries being asked to undergo a more thorough review, and developing countries subject to a much more lax and less rigorous scrutiny. How was this tension solved in the adopted version of the Paris Agreement?

Paragraphs 7, 11, 12 and 13 need to be read in conjunction to get an initial picture of how transparency of action, that is transparency in the context of mitigation and adaptation, will operate. Transparency of support refers to transparency in the context of climate finance and is not covered in this commentary. ALL parties SHALL "provide information necessary to track progress made in implementing and achieving its nationally determined contribution". This information will be subject to a "technical expert review" followed by a "facilitative, multilateral consideration of progress" about the "implementation and achievement of the nationally determined contribution." The technical review and the consideration of progress appear to be the "scrutiny" to which all countries will be subject to. What are the outcomes of such a review? What will happen if such a review considers that a country is not implementing or meeting its nationally determined contribution? Article 9.12 partially answers this question: "The review SHALL also identify areas of improvement for the Party, and include a review of the consistency of the information with the modalities, procedures and guidelines referred to in paragraph 13 of this Article." In other words, the ultimate response to non-achieving or non-implementing THE legally binding obligation of the Paris Agreement is an identification of "areas of improvement" … Looking back at the Thursday Draft Text those countries that

advocated for a non-intrusive and non-punitive system are probably quite pleased with this result. Developing countries were given further flexibility by making "in-country reviews" optional, according to para 90 of the COP Decision. In any case, paragraph 13 leaves to the Conference of the Parties serving as the meeting of the Parties to the Paris Agreement the final word regarding the details of how the transparency framework will operate. The COP Decision refers to this work in several occasions throughout its section on transparency. It is very likely that differentiation will surface again as a contentious point in the next few years when negotiators will sit down to discuss how to develop such framework "building on experience from the arrangements related to transparency under the Convention".

The last point that was discussed in the commentary to the Thursday Draft Text was the disagreement over the provision on entry into force. Article 21 has confirmed the double trigger approach stating that for the latter to enter into force 55 countries need to ratify the Agreement, and that the latter group of countries must amount to at least 55% of total greenhouse gas emissions. Whether the Agreement could enter into force before 2020, should these two triggers be actioned, is yet to be discussed, considering the reference to 2020 in the ADP mandate.

3. CONCLUSION

In conclusion, cooperative mechanisms, loss and damage and transparency were not the only fault lines of the negotiations, but were those that appeared more clearly from the text of the Thursday Draft Agreement. This commentary has tried to read between the lines of both texts, the Draft and the final one adopted on 12 December 2015, to try to understand how differentiation played out in the context of these three difficult areas of the negotiations.

In the mostly relaxed and smiling atmosphere of the COP plenary following the adoption of the Paris Agreement many countries hailed the Paris Outcome as historic and as a turning point for generations to come. However, as several countries like Nigeria said, the Agreement is only the first step in a long journey and the legacy of the Paris Agreement will mainly lie on its implementation. The Agreement leaves many areas wide open for further discussion, debate and negotiation. It could not be otherwise when 196 countries are given a strict deadline by when an agreement must be adopted. At the end of these negotiations landing zones (another word for compromise) need to be found. Whether these areas of contention will become new red lines for some delegations in the future will be a matter for future negotiations. The Paris Agreement is not perfect. Both the United States of America and Singapore in the final plenary acknowledged this, with Singapore quoting Voltaire saying that "best is enemy of the good". Angola, on behalf of the LDCs also said that it is not a perfect agreement, but a necessary agreement. I agree that the Paris Outcome may not be the best outcome, but it is a good start for implementing better international and domestic climate change policy.

Bourget, the venue of COP21, was known until now mainly for being the airport where in 1927 Charles Lindbergh's first transatlantic flight landed. Bourget will now be known also as the venue where an even

more challenging endeavour has landed: after four years and two full weeks of negotiations the Paris Agreement has finally landed. But let us be reminded that after the handshakes and the celebrations, an even more difficult journey has to leave Bourget, one called the implementation of the Paris Agreement.

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