

# GERMAN YEARBOOK OF INTERNATIONAL LAW

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FORUM

PARIS CLIMATE AGREEMENT



# The Paris Agreement on Climate Change: Less is More

JORGE E. VIÑUALES\*

## I. Introduction

One of the difficulties of writing about climate change governance is that one must address a moving target. Despite the wide impression of inaction or, at best, of action in slow motion, the negotiations move at such a hectic pace, often focusing on what to the outside world appear to be mere details but, on closer scrutiny, hard fought and highly controversial details, that it is difficult to keep abreast. Such speed explains perhaps the profusion of writings over technicalities or the sometimes unconsidered attempts at launching new – and soon old – ideas, expressions, buzzwords, anecdotes. Conversely, it also explains the thriving literature on climate change policy broadly understood, encompassing legal aspects. The polyphony or even the cacophony in the literature is alas the price to pay for a powerful and creative body of analysis of climate policy.

Fortunately, the target does not move in an entirely random fashion. When one waits until the fog has somewhat dissipated and takes another look at what is still there, much remains,<sup>1</sup> and the contours of the topography appear better delineated.

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<sup>1</sup> Within the vast literature written in English on the international law of climate change see the following: Books/Studies: *Joanna Depledge*, *Tracing the Origins of the Kyoto Protocol: An Article-by-Article Textual History*, Technical Paper, FCCC/TP/2000/2 (2000); *Farhana Yamin/Joanna Depledge*, *The International Climate Change Regime* (2004); David Freestone/Charlotte Streck (eds.), *Legal Aspects of Carbon Trading* (2009); William C. G. Burns/Hari Osofsky (eds.), *Adjudicating Climate Change* (2012); Richard Lord *et al.* (eds.), *Climate Change Liability* (2012); *Joyeeta Gupta*, *The History of Global Climate Governance* (2014); *Jacqueline Peel/Hari Osofsky*, *Climate Change Litigation* (2015); Cinnamon Carlarne/Kevin Gray/Richard Tarasofsky (eds.), *The Oxford Handbook of International*

After a very preliminary examination of the Paris Agreement,<sup>2</sup> shared shortly after the

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Climate Change Law (2016); Geert Van Calster/Wim Vandenberghe/Leonie Reins (eds.), *Research Handbook on Climate Change Mitigation Law* (2015); Daniel Farber/Marjan Peeters (eds.), *Climate Change Law* (2016); Robert Stavins/Robert Stowe (eds.), *The Paris Agreement and Beyond: International Climate Change Policy post 2020* (2016); *Daniel Bodansky/Jutta Brunnée/Lavanya Rajamani, International Climate Change Law* (2017); Articles/Chapters: *Daniel Bodansky*, *The United Nations Framework Convention on Climate Change: A Commentary*, *Yale Journal of International Law* 18 (1993), 451; *Lavanya Rajamani*, *From Berlin to Bali and Beyond: Killing Kyoto Softly?* *International and Comparative Law Quarterly* (ICLQ) 57 (4) (2008), 909–939; *id.*, *Addressing the Post-Kyoto Stress Disorder: Reflections on the Emerging Legal Architecture of the Climate Regime*, *ICLQ* 58 (4) (2009), 803; *id.*, *The Making and Unmaking of the Copenhagen Accord*, *ICLQ* 59 (3) (2010), 824; *id.*, *The Cancun Climate Change Agreements: Reading the Text, Subtext and Tealeaves*, *ICLQ* 60 (2) (2011), 499; *id.*, *The Durban Platform for Enhanced Action & the Future of the Climate Regime*, *ICLQ* 61 (2) (2012), 501; *id.*, *The Devilish Details: Key Legal Issues in the 2015 Climate Negotiations*, *Modern Law Review* 78 (2015), 826; *id.*, *Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics*, *ICLQ* 65 (2) (2016), 493; *id.*, *The 2015 Paris Agreement: Interplay Between Hard, Soft and Non-Obligations*, *Journal of Environmental Law* 28 (2016), 337; Special Issue of *Climate Law on the Paris Agreement*, 6 (2016) (including contributions from *Meinhard Doelle*, *M.J. Mace*, *Sebastian Oberthür/Ralph Bodle*, *Christina Voigt/Felipe Ferreira*, *Alexander Zahar*, *Harro van Asselt*, *Francesco Sindico*, *Benoit Mayer*, *Maxine Burkett*, *Torbjörg Jevnaker*, *David A. Wirth*, *Joyeeta Gupta*, *Marjan Peeters*); Dossier devoted by the *Journal of Environmental Law* to climate change adjudication, 28/1 (2016) (including articles by *Elizabeth Fisher/Eloise Scotford*, *Lord Robert Carnwath JSC*, *Brian J. Preston*, *Philippe Sands*); Special Issue of *Review of European Community and International Law (RECIEL)* on the Paris Agreement, 25/2 (2016) (including articles from *Daniel Bodansky*, *Sandrine Maljean-Dubois*, *Christina Voigt*, *Yulia Yamineva*, *Annalisa Savaresi*, *M. J. Mace/Roda Verbeyen*, *Beatriz Martinez Romera*, *Nicholas Chan*, *Sander Chan/Clara Brandi/Steffen Bauer*); Special issue of *Climate Policy*, 17 (1) (including contributions from *Jorge Viñuales/Joanna Depledge/David M. Reiner/Emma Lees*, *Richard Kinley*, *Niklas Höhne et al.*, *Anuja Sharma*, *Isabel Hilton/Oliver Kerr*, *Emma Lees*, *Edwards et al.*, *Luke Kemp*, *John A. Mathews*); *Daniel Bodansky*, *The Paris Agreement: A New Hope?*, *American Journal of International Law (AJIL)* 110 (2016).

<sup>2</sup> ‘Adoption of the Paris Agreement’, Decision 1/CP.21, 12 December 2015, FCCC/CP/2015/L.9 (‘Decision’), paras. 2–3. The Paris Agreement is appended as an Annex to the Decision. The agreement, technically a treaty under the international law of treaties (although it may not be qualified as such under some constitutional orders), was signed by 175 States on 22 April 2016. See ‘List of representatives to High-level signature ceremony’, available at: <http://newsroom.unfccc.int/paris-agreement/175-states-sign-paris-agreement/> (accessed on 28 August 2016). The authentic version of the Paris Agreement (hereafter ‘Paris Agreement’) is available at: [http://unfccc.int/files/essential\\_background/convention/application/pdf/english\\_paris\\_agreement.pdf](http://unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf) (accessed on 28 August 2016). Pursuant to Article 21 (1), the Agreement required to enter into force ratification by ‘at least 55 parties to the Convention [*i.e.* the UNFCCC] accounting in total for at least an estimated 55 per cent of the total global greenhouse gas emissions’. These thresholds were reached in early October 2016 and the Agreement entered into force on 4 November 2016. See [http://unfccc.int/paris\\_agreement/items/9485.php](http://unfccc.int/paris_agreement/items/9485.php) (accessed on 8 November 2016). Of particular note is the ratification by the world’s two main emitters, China and the United States (US). On 1st June 2017, the US Republican President announced that the US would withdraw from the Paris Agreement. Legally, however, this can only be done if certain conditions are respected. Thus, at the time of writing, the US are still a Party to the Paris Agreement.

text of the Agreement became public,<sup>3</sup> the writing of this article for the German Yearbook of International Law has given me the opportunity to offer more general observations about this important instrument and what it represents more broadly from the perspective of international and – to some extent – transnational<sup>4</sup> and comparative law.<sup>5</sup> With the benefit of hindsight, I believe that the significance of the Paris Agreement can be pinned down to a foundational compromise, whereby the expansion of the geographical and substantive scope of the instrument was made possible in exchange for significant de-internationalisation. Whether the price paid is high or low will very much depend on what is effectively done at the domestic and transnational levels. Some may say that internationalisation presents, in all events, no particular advantage. I may have subscribed to such a view, but after seeing the clear impact on mitigation not only of the Montreal Protocol<sup>6</sup> but also of the unloved Kyoto Protocol,<sup>7</sup> I am more inclined to give credit to top-down – international – climate regulation. But, realistically, there are cases where less is more and the Paris Agreement is, in my view, one such case.

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<sup>3</sup> See *Jorge E. Viñuales*, *The Paris Climate Agreement: An Initial Examination*, in CEENRG Working Papers No. 6, 16 December 2015.

<sup>4</sup> See *Harriet Bulkeley et al.*, *Transnational Climate Change Governance* (2014).

<sup>5</sup> See *Michael Mehling*, *The Comparative Law of Climate Change: A Research Agenda*, *RECIEL* 24 (2015), 341. More generally, see Emma Lees/Jorge E. Viñuales (eds.), *The Oxford Handbook of Comparative Environmental Law* (2018).

<sup>6</sup> Montreal Protocol on Substances that Deplete the Ozone Layer, 16 September 1987, UNTS 1522, 3. By 2005, the production and consumption of all ozone-depleting substances had been cut down by 95%. See *Danielle Fest Grabel*, 'Crucial Crossroads', in *Our Planet Magazine*, United Nations Environmental Programme (UNEP), (2007), 20, available at: <http://www.unep.org/PDF/OurPlanet/2007/sept/EN/ARTICLE7.pdf> (accessed on 28 August 2016). And these cuts have had a positive impact on the restoration of the ozone layer. See *Martyn P. Chipperfield et al.*, *Nature Communications* 6 (2015), 7233.

<sup>7</sup> Kyoto Protocol to the United Nations Framework Convention on Climate Change, 11 December 1997, UNTS 2303, 148. According to a recent study, all 36 countries of Annex B that fully participated in the Kyoto Protocol (excluding the US and Canada) were in compliance with their targets in the first (2008–2012) commitment period. Of these, only nine emitted more than their initial target and had to rely on the flexible mechanisms (acquiring carbon credits) to meet their commitments. Such a finding holds even when so-called 'hot air' (*i.e.* the amount of emissions made available by the contraction of the economies in transition, hence not resulting from genuine mitigation action) and land policies, so-called 'LULUCF' (*i.e.* which may remove carbon and could be taken into account in the overall allowance) are taken into account. But it would not have been achieved if the US and Canada are taken into account. See *Igor Shishlov/Romain Morel/Valentin Bellassen*, *Compliance of the Parties to the Kyoto Protocol in the first commitment period* (2016) *Climate Policy* 16 (2016).