

# Climate Law and Governance

## Legal Working Paper Series

### THE TRANSPARENCY PROVISIONS IN THE PARIS AGREEMENT

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## THE TRANSPARENCY PROVISIONS IN THE PARIS AGREEMENT

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### **Abstract**

This Legal Working Paper focuses on a key aspect of the outcomes of the Paris Conference of the Parties to the Framework Convention on Climate Change (UNFCCC): transparency. Part 1 outlines the features of the transparency-related provisions of the new Paris Agreement – Nationally Determined Contributions (NDCs), the Transparency Frameworks, the Global Stocktake, and the Implementation and Compliance Committee – and analyses how they interact with one another. Part 2 situates this nexus of provisions within international law on sustainable development, identifying overlap and convergence with the *New Delhi Declaration on Principles of International Law relating to Sustainable Development*. Part 3 presents four different national case studies to highlight key legal and governance issues for implementation of the transparency provisions in domestic contexts: Bangladesh, Canada, Brazil, and the Democratic Republic of the Congo. The authors show the commonality of challenges faced by these countries in order for strong engagement with the transparency provisions and formulate law and policy recommendations based on international sustainable development law and the four country case studies. As UNFCCC Parties consider ratification of the *Paris Agreement* and as all stakeholders prepare for COP22 in Marrakesh, this Legal Working Paper contributes to the diffusion of legal knowledge on its transparency provisions and the identification of work avenues regarding an innovative approach to compliance under international law.

### **Keywords**

*Transparency, Sustainable Development, Implementation of the Paris Agreement, Frameworks for Transparency of Action and Support, Global Stocktake, Implementation and Compliance Committee, Nationally Determined Contributions (NDC), Equity, Common But Differentiated Responsibilities (CBDR).*

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## THE TRANSPARENCY PROVISIONS IN THE PARIS OUTCOME: AN ANALYSIS FROM AN INTERNATIONAL SUSTAINABLE DEVELOPMENT LAW PERSPECTIVE

### INTRODUCTION

The December 2015 *Paris Agreement*<sup>1</sup> to the *United Nations Framework Convention on Climate Change* (UNFCCC)<sup>2</sup> contains a unique set of provisions geared at ensuring that Parties fulfil their obligations and at involving a broad range of stakeholders in this process. These provisions rely on an important common principle: transparency. Understood in broad terms, transparency provisions are those that promote compliance by compelling Parties to publicly disclose information about the level of implementation of their international obligations, in a way that allows other Parties and stakeholders to assess this information in light of applicable legal standards. Transparency is not the only principle on which the *Paris Agreement* relies to achieve compliance; it contains important provisions on cooperation, finance, technology-transfer, capacity-building, and education. Yet, as Obergassel *et al.* observe, “[a]part from increasing the level of ambition, the details of the transparency framework will be the most relevant field of work in the coming years.”<sup>3</sup> For Damassa *et al.*, transparency under the *Paris Agreement* “can promote trust and accountability among Parties, both of which are essential for successful implementation of international agreements”.<sup>4</sup> Van Asselt *et al.* expressed a similar view at the outset of an exhaustive study of options for transparency mechanisms prior to COP21.<sup>5</sup> Identifying the contours and potential of the new transparency-based provisions, both with regard to existing international legal principles and local contexts, is essential to ensure their development at the COP22 in Marrakesh by the *Ad Hoc Working Group on the Paris Agreement* (APA)<sup>6</sup> and at the first meeting of the Conference of the Parties serving as the meeting of the Parties to the *Paris Agreement* (CMA), and their effective implementation.

This Legal Working Paper analyses different provisions of the Paris Outcome that rely on transparency in order to promote compliance with the new obligations established and to achieve the overall objective of transition to a GHG neutral global economy during the second half of this century.<sup>7</sup> The expression “Paris Outcome” is used to refer to the bundle of interrelated instruments and documents comprised of the

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<sup>1</sup> *Paris Agreement to the United Nations Framework Convention on Climate Change*, December 12th, 2015.

<sup>2</sup> *Framework Convention on Climate Change*, May 9, 1992, 1771 U.N.T.S. 107.

<sup>3</sup> Wolfgang Obergassel (né Sterk), Christof Arens, Lukas Hermwille, Nico Kreibich, Florian Mersmann, Hermann E. Ott & Hanna Wang-Helmreich, *Phoenix from the Ashes — An Analysis of the Paris Agreement to the United Nations Framework Convention on Climate Change*, Wuppertal Institute for Climate, Environment and Energy, 26 January 2016, at 4.

<sup>4</sup> Damassa, T., T. Fransen, B. Haya, M. Ge, K. Pjeczka, & K. Ross, *Interpreting INDCs: Assessing Transparency of Post-2020 Greenhouse Gas Emissions Targets for 8 Top-Emitting Economies*, 2015, Working Paper, Washington, DC, World Resources Institute, at 1, online: <http://www.wri.org/publication/interpreting-indcs>. The authors referred specifically to the Intended Nationally Determined Contributions (INDC).

<sup>5</sup> Harro Van Asselt, Håkon Sælen & Pieter Pauw, *Assessment and Review Under a 2015 Climate Change Agreement*, TemaNord 2015:530.

<sup>6</sup> See UNFCCC, *Ad Hoc Working Group on the Paris Agreement* (APA), online: <http://unfccc.int/bodies/apa/body/9399.php>.

<sup>7</sup> Article 4 of the *Paris Agreement* reads: “to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century, on the basis of equity, and in the context of sustainable development and efforts to eradicate poverty.”



*Paris Agreement*, its Adoption Decision (Decision 1/CP.21), other decisions from COP21, and a multitude of engagements by state and non-state actors of a varying degree of formalism. Although we focus chiefly on the text of the treaty and on its adoption decision, this expression is a useful reminder of these instruments' interactions with other non-binding documents. In Part 1 of this Legal Working Paper, we argue that transparency is a defining feature of the Paris Outcome's approach to compliance by showing its primacy in four specific provisions: the Nationally Determined Contributions (NDC) to global greenhouse gas emissions reduction (Article 4), the two Transparency Frameworks (Article 13), the Global Stocktake (Article 14), and the Implementation and Compliance Committee (Article 15). More than a word that repeatedly comes up in the Paris Outcome, these four provisions give a central role to the concept of transparency in the outcome of the December 2015 negotiations by promoting an approach to compliance that is based on interaction and collaboration between international actors.

In Part 2, we suggest that the potential of the nexus of transparency provisions described in Part 1 is better understood in light of the seven fundamental dimensions of sustainable development identified in the 2002 *New Delhi Declaration on Principles of International Law relating to Sustainable Development*, adopted by the International Law Association.<sup>8</sup> We take these principles one by one as an enriching set of lenses through which to analyse the Paris Outcome's four transparency provisions and argue that this ecosystem of pre-existing legal rules is directly relevant to understanding their contours and content. Specifically, we show that they provide an essential starting point for the development by the APA and the CMA of concrete procedures to operationalize the transparency provisions of the Paris Outcome and for member states to adapt their domestic laws and policies accordingly. The sustainable development law corpus allows filling certain of the areas left for future development in the new climate treaty, shows its synergies with other pre-existing legal obligations of member states, and allows anticipating possible conflicts between the Paris Outcome and other fields of international law.

In Part 3, lastly, we describe the law and governance landscape relevant for the implementation of the Paris Outcome's transparency provisions in local contexts. Seeking to offer a strong diversity of regional, economic, and political contexts, we present insights from Bangladesh, Canada, Brazil, and the Democratic Republic of the Congo. As the Analytical Table of Case Studies presented in Appendix 1 shows, many challenges for the successful implementation of the Paris Outcome and of the principles of international sustainable development law presented in Parts 1 and 2 manifest themselves regardless of regions and national contexts. Drawing on these case studies and on the international sustainable development law corpus, we conclude by offering a list of seven recommendations for law and policy reform by member states for the implementation of the *Paris Agreement* in their domestic jurisdiction and in preparation for the next round of international negotiations at COP22.

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<sup>8</sup> International Law Association, *New Delhi Declaration of Principles of International Law relating to Sustainable Development*, 9 August 2002, UN Doc. A/CONF.199/8. See also: International Law Association, *Sofia Guidance Note on the Principles of International Law relating to Sustainable Development*, Sofia Biennial Conference, July 2012. And see Marie-Claire Cordonier Segger & Ashfaq Khalfan, *Sustainable Development Law: Principles, Practices & Prospects* (New York: Oxford University Press, 2004).

## PART 1: THE TRANSPARENCY PROVISIONS IN THE PARIS OUTCOME

In this first Part, we present four transparency-based provisions established in the *Paris Agreement*: the Nationally Determined Contributions (NDCs), the two Transparency Frameworks, the Global Stocktake, and the Implementation and Compliance Committee. We argue that these instruments form a coherent whole that reflects the new treaty's facilitative, non-intrusive, and non-punitive approach to compliance. Their success, however, is contingent upon their effective implementation and execution by member states, an important challenge which has yet to be surmounted and which we address through country case studies in Part 3.

### Section 1: Nationally Determined Contributions

COP21 President Laurent Fabius identified the notion of intended nationally determined contributions (INDCs) as one of the four pillars of the new climate treaty expected at the outcome of the December 2015 negotiations.<sup>9</sup> Far from being new, this concept had been progressively developed in the context of efforts by the *Ad Hoc Working Group on the Durban Platform for Enhanced Action* to develop a new legal instrument under the UNFCCC since COP19 in Warsaw.<sup>10</sup> The Warsaw outcome invited Parties 1) to prepare INDCs geared towards achieving the UNFCCC's objective of preventing dangerous climate change under Article 2, 2) to communicate them to the UNFCCC secretariat in a manner that would facilitate clarity, transparency, and understanding, and 3) emphasized the fact that these were not legally binding commitments. At COP20 in Lima, the invitation to Parties to prepare INDCs was reiterated, along with a reaffirmation of their non-legally binding nature, the introduction of the principle of increasing ambition over time (or progression), and the establishment of self-differentiation as an approach for Parties to determine themselves what is fair and ambitious in light of their national circumstances.<sup>11</sup>

The notion of INDC relies on inviting Parties to make quantifiable pledges to act under their legal obligation contained in Article 2 of the UNFCCC, while specifying that these pledges are not legally binding and will be implemented on the basis of good faith.<sup>12</sup> Before the COP21 negotiations, a total of 147 out of 196 Parties to the UNFCCC had presented an INDC, representing 75% of Parties and 86% of global emissions in 2010, even if they were not under a strict legal obligation to do so.<sup>13</sup> These reached a total of 189 parties on April 4, 2016.<sup>14</sup> Building on what appears to be a growing acceptance by UNFCCC members, negotiators entrenched this device in the Paris Outcome. Paragraph 13 of the *Paris Agreement* Adoption Decision (Adoption Decision) recalls the invitation for Parties who have not done so already to present their INDC. Furthermore, Articles 3 and 4 of the *Paris Agreement* establish the obligation of Parties to undertake and

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<sup>9</sup> Climate change - COP21 - Press briefing by Laurent Fabius, Minister of Foreign Affairs and International Development, President of the COP21, New York, June 29, 2015, online: <http://www.diplomatie.gouv.fr/en/french-foreign-policy/climate/events/article/climate-change-cop21-press-briefing-by-laurent-fabius-new-york-29-06-15>.

<sup>10</sup> Further advancing the Durban Platform, Decision 2/CP.19, article 2.

<sup>11</sup> Lima Call for Climate Action, Decision 1/CP.20, articles 8-16.

<sup>12</sup> See also: Dinah Shelton, ed, *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System* (New York: Oxford University Press, 2000).

<sup>13</sup> United Nations Framework Convention on Climate Change, Synthesis report on the aggregate effect of the intended nationally determined contributions, 30 October 2015, U.N. Doc. FCCC/CP/2015/7.

<sup>14</sup> United Nations Framework Convention on Climate Change, Aggregate effect of the intended nationally determined contributions: an update, Synthesis report by the secretariat, 2 May 2016, U.N. Doc. FCCC/CP/2016/2.

communicate, for every five-year cycle starting in 2020, a nationally determined contribution (NDC) that reflects the highest possible ambition and represent a progression over time (Articles 3 and 4). The specific information that may be included for the communication of NDCs, so as to facilitate clarity, transparency and understanding, is contained in paragraph 27 of the Adoption Decision and will be further defined by the CMA at its first meeting. Over and above NDCs, all Parties should also strive to formulate and communicate long-term low greenhouse gas (GHG) emission development strategies (Article 4(19)).

It would have been conceptually difficult to imagine a strict compliance mechanism, such as that established in the *Kyoto Protocol*<sup>15</sup> or the *Montreal Protocol on Substances that Deplete the Ozone Layer*,<sup>16</sup> to achieve the enforcement of NDCs that were established under the explicit condition that they would be voluntary and non-legally binding by nature. Rather, Parties resorted to a transparency-based approach to promoting the attainment of NDCs, based on the implicit assumption that states would not want to be seen establishing NDCs that do not reflect their fair share of the efforts necessary to decarbonize the global economy, nor to be seen failing to attain the NDCs that they had set for themselves. NDCs are recorded in an online registry maintained by the secretariat of the UNFCCC, for other state Parties, international organisations, and civil society organisations to assess.<sup>17</sup> Ducky suggests that the turn towards transparency instead of sanctions can be explained by a desire for greater inclusiveness of major emitters in the negotiation process in the post-Copenhagen era.<sup>18</sup> This innovative legal concept, that combines both binding and non-binding dimensions, called for equally innovative implementation mechanisms, which are analysed in the following sections in greater detail.

## Section 2: Frameworks for Transparency of Action and Support

Article 13 of the *Paris Agreement* establishes two transparency frameworks, respectively targeting action on climate change and support to developing country Parties. Under the framework for transparency of action, Parties are legally required to provide communications that will be subject to a technical expert review, the modalities of which are to be defined by the CMA at its first meeting. The communications must contain the following information: 1) a national inventory report of GHG emissions by sources and removals by sinks, prepared using good practice methodologies accepted by the Intergovernmental Panel on Climate Change (IPCC) and 2) information necessary to track progress made in implementing and achieving NDCs (Article 13(7)).<sup>19</sup> An adaptation communication should also be submitted for

<sup>15</sup> *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 11 December 1997, 2303 U.N.T.S. 148. See: Gerald Kutney, *Carbon Politics and the Failure of the Kyoto Protocol* (New York, NY: Routledge, 2014), Wybe Th. Douma, L. Massai & Massimiliano Montini, eds, *The Kyoto Protocol and Beyond: Legal and Policy Challenges of Climate Change* (West Nyack, NY: TMC Asser Press, 2007).

<sup>16</sup> *Montreal Protocol on Substances that Deplete the Ozone Layer*, 16 September 1987, 1522 U.N.T.S. 3.

<sup>17</sup> United Nations Framework Convention on Climate Change, Intended Nationally Determined Contributions (INDCs), online: [http://unfccc.int/focus/indc\\_portal/items/8766.php](http://unfccc.int/focus/indc_portal/items/8766.php).

<sup>18</sup> Sébastien Ducky, “MRV in the 2015 Climate Agreement: Promoting Compliance through Transparency and the Participation of NGOs” (2014) 8:3 *Carbon & Climate Law Review* 175, at 186. See also: Elena Fagotto & Mary Graham, “Full Disclosure: Using Transparency to Fight Climate Change” (2007) 23:4 *Issues in Science and Technology* 73 and Aarti Gupta & Michael Mason, eds, *Transparency in Global Environmental Governance: Critical Perspectives* (Cambridge MA, USA: MIT Press, 2014).

<sup>19</sup> The information to be submitted to facilitate clarity, transparency and understanding of progress on INDCs had already been discussed in the Lima Call for Climate Action, *supra*, note 11, article 14.



consideration, and may include a national adaptation plan commenting on national priorities and support needs (Article 7(10)). Taking into account the principle of common but differentiated responsibilities and respective capabilities (CBDR-RC) and in the light of different national circumstances, the technical expert review will provide a clear understanding of the information submitted and identify good practices, priorities, needs, and gaps (Article 13(5)).

Under the framework for transparency of support, developed country Parties and other Parties that provide support should provide information regarding financial, technology transfer, and capacity-building support provided to developing country Parties (Article 13(6)). A facilitative multilateral consideration of progress will assess the information offered, along with information on support provided to developing country Parties for the planning and implementation of adaptation actions (Article 7(7)) and on financial, technology transfer, and capacity-building support provided to developing country Parties under Articles 9, 10, and 11 (Article 13(11)).

### Section 3: Global Stocktake

A further compliance provision that builds on the notion of transparency is included at Article 14 of the *Paris Agreement*. The CMA will conduct a global “stocktake” of the collective progress achieved towards the purpose of the agreement, every five years starting in 2023. This process should build on the experience accumulated during the global facilitative dialogue to take stock of the collective efforts achieved for a first time in 2018.<sup>20</sup> Considering the principle of CBDR-RC, the CMA shall analyse the actions taken by all Parties with regard to mitigation, adaptation, and support. The objective pursued is that the outcome of this process, which will provide new indications of the progress achieved to attain the objective of limiting the increase in the global average temperature to “well below 2 °C” and to pursue “efforts” to limit the increase to 1.5 °C (Article 2), will inform Parties of the eventual need to enhance their actions and support. The *Ad Hoc Working Group on the Paris Agreement* is called to develop modalities as to the pursuit of this process, which could include assessing the overall effect of the NDCs communicated, the state of adaptation efforts, and the latest reports of the IPCC, and to make recommendations to the CMA at its first meeting.<sup>21</sup> While this device provides an innovative implementation of the notion of transparency as a means to achieve compliance, observers have also “lamented the absence of a clear link on how the outcome of the global stocktake could increase ambition and enhance action and support, which remains to be nationally determined.”<sup>22</sup> Others have expressed concern regarding a possible imbalance between the degree of detail to which nationally determined commitments are defined, as opposed to how the five-year assessment would work: “the system relies entirely on the national level determining and implementing ambitious efforts and the persuasive impact of publicity, consultations and the so far unspecified global stocktake.”<sup>23</sup>

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<sup>20</sup> Adoption Decision, para. 20.

<sup>21</sup> *Ibid.*, para. 100-102.

<sup>22</sup> IISD, Policy Update #26, *Taking Stock of the Paris Agreement on Climate Change*, 28 January 2016, online: <http://climate-l.iisd.org/policy-updates/taking-stock-of-the-paris-agreement-on-climate-change/>.

<sup>23</sup> Ralph Bodle, Lena Donat & Matthias Duwe, *The Paris Agreement: Analysis, Assessment and Outlook*, Ecologic Institute, 28 January 2016, at 10, online: <http://ecologic.eu/13321>.

#### Section 4: Implementation and Compliance Committee

Under Articles 15 of the *Paris Agreement*, a procedure to facilitate implementation and promote compliance is established. It will be composed of a committee of experts, and will operate in a transparent, non-adversarial, and non-punitive way, according to procedures to be defined by the CMA at its first meeting. In the furtherance of its mandate, the Implementation and Compliance Committee shall pay particular attention to the respective national capabilities and circumstances of Parties. As established in the Adoption Decision, the committee shall consist of 12 members with recognised competence in relevant scientific, technical, socio-economic or legal fields, to be elected by the CMA on the basis of equitable geographical representation, with two members each from the five regional groups of the United Nations and one member each from the SIDS and the LDCs, while taking into account the goal of gender balance.<sup>24</sup>

It can be expected that the Implementation and Compliance Committee will focus its work on the relatively reduced number of formally binding provisions in the *Paris Agreement*, and raise concerns in case of non-fulfillment. These include the following: to prepare, communicate, and update NDCs every five years starting in 2020 (Articles 3 and 4), to communicate a national inventory of GHG emissions by sources and removals by sinks, as well as the information necessary to track progress made in implementing NDCs (Article 13), to provide assistance to developing country Parties for mitigation and adaptation (Article 9), to engage in cooperative action on technology development and transfer (Article 10) and on the building of transparency-related capacity (Article 13(15)), and to enhance climate change education, training, public awareness, public participation, and public access to information (Article 12). It remains to be seen if the committee will also dedicate attention to the broad range of other obligations contained in the *Paris Outcome* that were framed in non-strictly legally binding terms (e.g. those preceded by the words “should” or “may”).<sup>25</sup>

According to Oberthür *et al.*'s analysis of early drafts of the *Paris Agreement*, the Implementation and Compliance Committee could be available to respond to questions raised by state Parties with respect to themselves or with respect to other Parties, and could “issue its findings independently and [...] have effective measures available, including recommendations, advice, warnings, cautions, and the facilitation of support”.<sup>26</sup> How exactly it will execute its mandate in light of the text ultimately adopted remains to be determined by the APA and the CMA, but it can be hoped that the facilitative orientation of its mandate will involve reporting, both privately and eventually publicly, on any concerns regarding compliance by state Parties with their treaty obligations. The Implementation and Compliance Committee can thus be understood as likely to function in the spirit of the other transparency provisions identified in this working paper because it will operate on the basis of disclosure and exterior assessment.

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<sup>24</sup> Adoption Decision, para. 103.

<sup>25</sup> For a general discussion of this issue concerning developing countries, see: Pascale Bird & Christopher Campbell-Durufié, *Commitments by Developing Country Parties under the Paris Agreement*, LRI Briefing paper 2/2016, online: <http://legalresponseinitiative.org/commitments-by-developing-country-Parties-under-the-paris-agreement/>

<sup>26</sup> Sebastian Oberthür, Antonio G. M. La Viña & Jennifer Morgan, *Getting Specific on the 2015 Climate Change Agreement: Suggestions for the Legal Text with an Explanatory Memorandum*, Agreement for Climate Transformation Consortium Working Paper, May 2015, at 29-30.

The four provisions discussed in this first part are one of the central features to achieve compliance under the Paris Outcome and show a significant unity because of their reliance on the principle of transparency. While they will no doubt be the object of analyses from a broad range of perspectives, this working paper draws on the richness of the international sustainable development law corpus to offer, in the following part, its contribution to the discussion on their contours and potential to promote compliance under the Paris Outcome.

## PART 2: THE TRANSPARENCY PROVISIONS FROM A SUSTAINABLE DEVELOPMENT PERSPECTIVE

The principles of sustainable development under international law are particularly apposite for global efforts to address climate change.<sup>27</sup> The “context of sustainable development and efforts to eradicate poverty” was acknowledged in the central operative provisions of the *Paris Agreement* (Articles 2 and 4). Likewise, the recent Sustainable Development Goal 13, calling for “urgent action to combat climate change and its impacts”<sup>28</sup> was welcomed in one of the very first paragraphs of the Adoption Decision. This is unsurprising, as the generally accepted definition of sustainable development, “Development that meets the needs of the present without compromising the ability of future generations to meet their own needs,” cuts across and throws into sharp relief the risks posed by global climate change.<sup>29</sup>

The principles of sustainable development have progressively been refined towards more precise and operational understanding, both through major multilateral events and treaties,<sup>30</sup> and through international adjudication.<sup>31</sup> One of the decisive moments was the adoption of the International Law Association’s New Delhi Principles in 2002, which identified seven principles on sustainable development that are reflected in key treaties on sustainable development, as well as in global policy declarations and decisions of international courts and tribunals. As commentary on the ILA Principles explicitly establishes,

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<sup>27</sup> See also: Marie-Claire Cordonier-Segger, “Sustainable Development through the Paris Agreement on Climate Change” CJCIL (fc 2016); Marie-Claire Cordonier Segger with Katherine Lofts, Christopher Campbell-Durufilé, Markus Gehring, Robert Kibugi, & Christina Voigt, *Towards a New Climate Agreement – Principles and Practices for Implementation from a Sustainable Development Perspective*, CISDL Draft Legal Working Paper, 2015 and Katherine Lofts, Sharawat Shamin, Sharaban Tahura Zaman & Robert Kibugi, *SDG 13 on Taking Action on Climate Change and its Impacts: Contributions of International Law, Policy and Governance*, UNEP – CISDL Issue Brief 2016.

<sup>28</sup> UN General Assembly, Resolution 70/1, Transforming our World: the 2030 Agenda for Sustainable Development, 25 September 2015, U.N. doc. A/RES/70/1.

<sup>29</sup> World Commission on Environment and Development’s, *Our Common Future*, U.N. Doc. A/42/427, at para. 49.

<sup>30</sup> See for example: Report of the United Nations Conference on Environment and Development, Annex I, *Rio Declaration on Environment and Development*, 12 August 1992, U.N. Doc. A/CONF.151/26 (Vol. I), Johannesburg Declaration on Sustainable Development, 4 September 2002, U.N. Doc. A/CONF.199/20, *The Future We Want*, U.N. G.A. Res. 66/288, 27 July 2012, U.N. Doc. A/RES/66/288, at 61. See also: Marie-Claire Cordonier Segger & Ashfaq Khalfan, *Sustainable Development Law: Principles, Practices, and Prospects* (New York: Oxford University Press, 2004) and Marie-Claire Cordonier Segger & Judge Christopher G. Weeramantry, eds, *Sustainable Justice: Reconciling Economic, Social and Environmental Law* (Boston: Brill, 2005).

<sup>31</sup> Leading cases include the following: *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996 (I), *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, I.C.J. Reports 1997, p. 7, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010, p. 14. See also: Marie-Claire Cordonier Segger with Judge Christopher G. Weeramantry, eds, *Sustainable Development Principles in the Decisions of International Courts and Tribunals: 1992-2012* (fc Routledge, 2016).

there is an important connection between sustainable development and “the proper management of [the] climate system.”<sup>32</sup>

In this second part, we take the New Delhi principles one by one as an enriching set of lenses through which to analyse the transparency provisions contained in the Paris Outcome and presented in Part 1. These interpretive principles include: the duty of States to ensure sustainable use of natural resources, the principle of equity and the eradication of poverty, common but differentiated responsibility (CBDR), the principle of the precautionary approach to human health, natural resources and ecosystems, the principle of public participation and access to information and justice, the principle of good governance, and the principle of integration and interrelationship, in particular in relation to human rights and social, economic and environmental objectives.

Our analysis of these dispositions from the perspective of the sustainable development principles shows the interconnection of the Paris Outcome with other pre-existing obligations and general principles under international law, such as the prohibition of transboundary harm, the obligation to co-operate in order to eradicate poverty, the duty of business enterprises to respect human rights, the human rights of access to information, public participation in decision-making, and access to justice, and the principles of good governance, indivisibility of human rights, and subsidiarity. We argue that this rich ecosystem of legal rules and principles provides a useful starting point for the development by the CMA of concrete procedures to operationalize the transparency provisions of the Paris Outcome. Furthermore, the synergies between transparency provisions and other pre-existing legal obligations of member states suggest that certain domestic law and policy reforms would allow them to comply with more than one international legal regime at the same time. Some of the challenges and opportunities associated with doing so are discussed in the Part 3, where we present our four country case studies. Our study of the overlaps between the Paris Outcome and other international frameworks, lastly, provides an occasion to address constructively the challenges of fragmentation of international law.<sup>33</sup> International climate law, international sustainable development law, and international human rights law are all solicited by the implementation of the Paris Outcome, creating the risk of duplication and inconsistency between both substantive rules and international institutions under those and other regimes. At the same time, identifying the interactions between these and other regimes, pinpointing areas of overlap, and resolving tensions can cultivate what Koskeniemi and Leino have called a “politics of tolerance and pluralism” instead of the hegemony of any particular legal field.<sup>34</sup> We hope that this Legal Working Paper will provide a first step in this direction.

## Section 1: The Duty to Ensure Sustainable Use of Natural Resources

The first dimension of the sustainable development principle is the duty of states to ensure a sustainable use of natural resources. The ILA commentary on this principle directly references the rule of customary international law prohibiting activities in one jurisdiction that would cause significant damage to the

<sup>32</sup> New Delhi principles, *supra*, note 8, at *para.* 1.3. See also Marie-Claire Cordonier Segger, CJICL, *supra* note 27.

<sup>33</sup> Report of the Study Group of the International Law Commission, 13 April 2006, U.N. Doc. A/CN.4/L.682. See also: Frank Biermann, Philipp Pattberg, Harro van Asselt & Fariborz Zelli, “The Fragmentation of Global Governance Architectures: A Framework for Analysis” (2009): 14–40 *Global Environmental Politics* 9.

<sup>34</sup> Martti Koskeniemi & Päivi Leino, “Fragmentation of International Law? Postmodern Anxieties” (2002) 15:03 *Leiden Journal of International Law* 553, at 579.

environment in other jurisdictions or in areas beyond the limits of national jurisdiction, also known as the “no harm” rule.<sup>35</sup> This piercing of the veil of national sovereignty, so to speak, directly reinforces the transparency-based approach to compliance established in the Paris Outcome. The duty of states to ensure a sustainable use of natural resources provides conceptual support to their obligations under the Paris Outcome to report on steps taken to reduce GHG emissions and to protect carbon sinks, because it establishes the close link between domestic climate policy and global harm. Whereas this has not always been the dominant understanding, the use of natural resources that may impact the global climate system, and in particular energy resources and forests, is now increasingly firmly established as a transboundary legal issue subject to principled justification to the rest of the international community.<sup>36</sup> The principle of sustainable development helps understand that transparency with regard to climate policies is directly linked to the obligation to refrain from adversely affecting the global climate as a good of global concern. In fact, the ILA commentary specifically identifies the climate, fauna, and flora as “common concern of humankind”.

## Section 2: The Principle of Equity and the Eradication of Poverty

The second dimension of sustainable development is the attainment of equity in development opportunities around the world (intra-generational equity), as well as the ability of future generations to enjoy a fair level of the common patrimony (inter-generational equity). The human right to development is helpful in this context and can be defined as the right of every person and all peoples to “equality of opportunity for all in their access to basic resources, education, health services, food, housing, employment and the fair distribution of income.”<sup>37</sup> The “context of climate change and the current global economic and financial crisis” were specifically identified in 2011 by the United Nations Secretary General as having special bearing on the realisation of the right to development.<sup>38</sup> The ILA commentary on the New Delhi principles highlights the importance of the presence of the right to development in the Adoption Decision preamble, by drawing attention to the fact that it is the corollary of the duty to cooperate in order to eradicate poverty that is affirmed in Chapter IX of the *Charter of the United Nations*.<sup>39</sup>

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<sup>35</sup> See generally: Pierre-Marie Dupuy “Due Diligence in the International Law of Liability”, in OECD, ed., *Legal Aspects of Transfrontier Pollution* (Paris: OECD, 1977) and Jan Hessbruege, “The Historical Development of the Doctrines of Attribution and Due Diligence in International Law” (2004) 36 New York University Journal of International Law and Politics 265.

<sup>36</sup> See also: Rebecca M. Bratspies, & Russell A Miller, eds, *Transboundary Harm in International Law: Lessons From the Trail Smelter Arbitration* (New York: Cambridge University Press, 2006), Roda Verheyen, *Climate Change Damage and International Law: Prevention Duties and State Responsibility* (Leiden ; Boston : Leiden: M. Nijhoff ; Brill, 2005), and Phoebe N. Okowa, *State Responsibility for Transboundary Air Pollution in International Law* (Oxford ; New York: Oxford University Press, 2000).

<sup>37</sup> United Nations General Assembly, Declaration on the Right to Development, Resolution 41/128, 4 December 1986, U.N. Doc. A/RES/41/128.

<sup>38</sup> Report of the Secretary-General, The Right to Development, 1 August 2011, U.N. Doc. A/66/216, at para. 72.

<sup>39</sup> *Charter of the United Nations*, Jun. 26, 1945, 1 U.N.T.S. XVI.



The centrality of international assistance and co-operation, especially economic and technical, is also affirmed in the *International Covenant on Economic, Social and Cultural Rights*.<sup>40</sup>

In the context of the transparency provisions described in Part 1, sustainable development comes as an additional legal foundation to the obligation of developed country Parties to contribute to international development, and to the possibility of doing so while providing financial, technology transfer, and capacity-building support to developing country Parties to face climate change. We can thus expect the focus on equity, poverty eradication, and international cooperation to be at the heart of how the performance of states is commented upon by other states, the review through the Frameworks for Transparency of Action and Support, the assessments conducted by the Implementation and Compliance Committee, the Global Stocktake, and civil society's demands in general. As the UNFCCC Preamble indicated, climate change action should be integrated with social and economic development measures, and avoid provoking any adverse impact.

### Section 3: The Principle of Common But Differentiated Responsibilities

The third dimension of sustainable development is the principle of common but differentiated responsibilities; the notion of "respective capabilities" does not appear in the New Delhi principles. The ILA commentary on these principles emphasizes the fact that developed countries "bear a special burden of responsibility in reducing and eliminating unsustainable patterns of production and consumption". This echoes and strengthens the provision of the *Paris Agreement* according to which the leading of efforts to mitigate climate change should be undertaken by developed countries (Article 4(4)). The "softening" of this provision was particularly remarkable, in that COP21 President Laurent Fabius announced a few instants only before he declared the adoption of the *Paris Agreement* during the closing plenary that the word "shall" would be replaced by the word "should".

The sustainable development principle emphasizes the special responsibility of developed countries with regard to both climate action and support, and thus provides a reference point through which to assess their performance under the transparency provisions.<sup>41</sup> CBDR-RC has been entrenched in the climate regime since the adoption of the UNFCCC (Article 3) and, while the Paris Outcome does not reproduce lists of developed and developing countries like the *Kyoto Protocol* did in its annexes, it is at the heart of the regime. The new treaty contains the extended expression "common but differentiated responsibilities and respective capabilities, in the light of different national circumstances",<sup>42</sup> thereby reinforcing the tendency to step away from the *Kyoto Protocol*'s list-based, binary, or bifurcated approach. It also contains

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<sup>40</sup> *International Covenant on Economic, Social and Cultural Rights*, Dec. 16, 1966, 993 U.N.T.S. 3, art. 2. See also: UN Committee on Economic, Social and Cultural Rights, General Comment No. 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant), 14 December 1990, U.N. Doc. E/1991/23.

<sup>41</sup> See also: Lavanya Rajamani, *Differential Treatment in International Environmental Law* (New York: Oxford University Press, 2005) and Lavanya Rajamani, "Ambition and Differentiation in the 2015 Paris Agreement: Interpretive Possibilities and Underlying Politics" (2016) 65(2) INT'L & COMP. L.Q. 493.

<sup>42</sup> See Preamble and articles 2 and 4.

many mentions of the specific needs and circumstances of SIDS and LDCs. For Bodansky, this is “one of the Paris Agreement’s signal achievements.”<sup>43</sup>

Interestingly, the ILA commentary on the New Delhi principles draws attention to another, less commonly discussed, dimension of CBDR. It affirms that international organisations, corporations (and in particular transnational corporations), NGOs and civil society also have a responsibility to cooperate in view of achieving sustainable development. This less common dimension of CBDR is not unlike the conclusion arrived at by the U.N. Secretary General Special Representative on human rights and transnational corporations and other business enterprises, John Ruggie, according to which business enterprises “should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved.”<sup>44</sup> The Paris Outcome makes multiple references to the importance of climate action by “non-Party stakeholders”, previously identified by the COP21 Presidency as another of the four pillars of a new climate treaty.<sup>45</sup> This includes a direct invitation to civil society, the private sector, financial institutions, cities and other subnational authorities,<sup>46</sup> local communities and indigenous peoples to address and respond to climate change.<sup>47</sup> This sustainable development principle draws attention to the importance of the involvement of non-Party stakeholders in the transparency provisions discussed in this working paper, to ensure that best practices can be identified and scaled up, that ambition gaps be easily identified, and that adequate methodologies be developed to monitor and measure these actions in order to avoid double counting in states’ advancements reports.

#### Section 4: The Principle of Precautionary Approach

The fourth dimension of sustainable development is the principle of precautionary approach to human health, natural resources, and ecosystems. Principle 15 of the *Rio Declaration on Environment and Development* defined this important principle as follows: “Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.” A corollary definition has been proposed by UNESCO regarding potentially harmful activities: “When human activities may lead to morally unacceptable harm that is scientifically plausible but uncertain, actions shall be taken to avoid or diminish

<sup>43</sup> Daniel Bodansky, “The Paris Climate Change Agreement: A New Hope?” *American Journal of International Law*, vol. 110, at 19 (Forthcoming).

<sup>44</sup> Human Rights Council, Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, U.N. Doc. A/HRC/17/31, 21 March 2011, at 13.

<sup>45</sup> Climate change - COP21 - Press briefing by Laurent Fabius, Minister of Foreign Affairs and International Development, President of the COP21, New York, June 29, 2015, *supra*, note 9. See also: Marie-Claire Cordonier Segger, Ashfaq Khalfan, Markus Gehring & Michelle Toering, “Prospects for Principles of International Sustainable Development Law after the WSSD: Common but Differentiated Responsibilities, Precaution and Participation” (2003) 12:1 *R Eur Community Intl Environmental L* 54. And see Marie-Claire Cordonier Segger, CJICL, *supra* note 27.

<sup>46</sup> For example, 700 mayors pledged to collectively reduce their carbon footprint by 3.7 Gt at the outcome of a meeting coinciding with COP21. Cécile Barbière, “700 cities promise renewable energy transition by 2050”, Euractiv, online: <http://www.euractiv.com/section/climate-environment/news/700-cities-promise-renewable-energy-transition-by-2050/>.

<sup>47</sup> Adoption Decision, para. 117-124 and 134-137.

that harm.”<sup>48</sup> This framing principle is particularly appropriate for the elaboration of laws and policies with regard to climate change, due to the scientific uncertainty that remains associated with the different ecological processes involved and the potentially high level of risk for humanity and ecosystems.<sup>49</sup>

The precautionary approach highlights the importance of designing laws and policies to implement the *Paris Agreement* in a way that contributes to preventing serious or irreversible climate damage. For example, the ILA commentary on the New Delhi principles identifies the following four requirements for the conduct of risk assessments regarding any activity that may impact human health or the environment:

- a) accountability for harm caused (including, where appropriate, State responsibility);
- b) planning based on clear criteria and well-defined goals;
- c) consideration in an environmental impact assessment of all possible means to achieve an objective (including, in certain instances, not proceeding with an envisaged activity); and
- d) in respect of activities which may cause serious long-term or irreversible harm, establishing an appropriate burden of proof on the person or persons carrying out (or intending to carry out) the activity.

Another important feature identified by the ILA is the requirement that consultation processes be established to involve all interested Parties, including non-state actors, and that appropriate review by a judicial or administrative body be available. Scientific research under the aegis of the IPCC and in other settings is continually advancing our understanding of the global climate system, and it is clear that NDCs and long-term low GHG emission development strategies should adjust accordingly. For example, whereas the international community had acknowledged an increase of the global average temperature of 2 °C to be the threshold to prevent dangerous climate change, new scientific developments led to a recognition in the *Paris Agreement* that “efforts” to limit the increase to 1.5 °C are in fact required. The Global Stocktake of collective progress towards achieving the purpose of the UNFCCC conducted every five years by the CMA, for example, will greatly benefit from the precautionary approach as a tool to weigh present action against future risks.

## Section 5: The Principle of Public Participation

The fifth dimension of sustainable development is the principle of public participation and access to information and justice. The ILA commentary on the New Delhi principles identifies public participation as a condition for responsive, transparent and accountable government in the context of sustainable development, thereby echoing Principle 10 of the *Rio Declaration on Environment and Development*. Public participation is also strongly rooted in international human rights law, as an integral component of

<sup>48</sup> UNESCO, The Precautionary Principle, World Commission on the Ethics of Scientific Knowledge and Technology (COMEST), 2005, at 15, online: <http://unesdoc.unesco.org/images/0013/001395/139578e.pdf>.

<sup>49</sup> Miriam Haritz, *An Inconvenient Deliberation: The Precautionary Principle's Contribution to the Uncertainties Surrounding Climate Change Liability* (Alphen aan den Rijn: Kluwer Law International, 2011), Jonathan Aldred, “Climate change uncertainty, irreversibility and the precautionary principle” (2012) 36:5 Cambridge Journal of Economics 1051, Terrence Iverson & Charles Perrings, “Precaution and proportionality in the management of global environmental change” (2012) 22:1 Global Environmental Change 161, and Catriona McKinnon, “Runaway Climate Change: A Justice-Based Case for Precautions” (2009) 40 Journal of Social Philosophy 187.

the right to take part in the conduct of public affairs affirmed at Article 25 of the *International Covenant on Civil and Political Rights*<sup>50</sup> and Article 21 of the *Universal Declaration of Human Rights*.<sup>51</sup> The notion of public affairs should be understood broadly, and “covers all aspects of public administration, and the formulation and implementation of policy at international, national, regional and local levels.”<sup>52</sup> A notable example of the affirmation of this right in the environmental context is the Economic Commission for Europe’s *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*, also known as the *Aarhus Convention*, because it strengthens three fundamental democratic processes in the context of environmental issues: access to information, public participation in decision-making, and access to justice.<sup>53</sup>

There is no doubt that the transparency provisions under the Paris Outcome are geared towards access to information and public participation in decision-making. The compliance provisions discussed in the first part of this working paper show a clear orientation towards reporting and verification by treaty Parties, expert bodies, and even civil society, as suggested by the explicit requirement for the UNFCCC secretariat to publish INDCs and national low greenhouse gas emission development strategies on its website.<sup>54</sup> While the rules of procedure for the frameworks for transparency of action and support, for the Global Stocktake by the CMA, and for the work of the Implementation and Compliance Committee are yet to be defined, these will likely provide opportunities for the participation of the nine acknowledged constituencies in the UNFCCC process,<sup>55</sup> and maybe even the input of other intergovernmental organisations. The principle of sustainable development sheds light on the importance of maximising access to information and public participation, including by women and indigenous peoples, in the transparency provisions established under the Paris Outcome.<sup>56</sup>

Access to justice, another important dimension of sustainable development, is also strongly entrenched in international human rights law. Under Article 2 of the *International Covenant on Civil and Political Rights*, individuals have a right to an effective remedy before competent judicial, administrative or legislative authorities when their rights or freedoms are violated, as well as to the assurance that authorities shall enforce those remedies granted. The Human Rights Committee has observed that, in the

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<sup>50</sup> *International Covenant on Civil and Political Rights*, Dec. 16, 1966, 999 U.N.T.S. 171.

<sup>51</sup> *Universal Declaration of Human Rights*, G.A. Res. 217A (III), U.N. Doc A/810 (Dec. 10, 1948).

<sup>52</sup> Human Rights Committee, CCPR General Comment No. 25: Article 25 (Participation in Public Affairs and the Right to Vote) The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service, 12 July 1996, U.N. Doc. CCPR/C/21/Rev.1/Add.7, at para. 5. See also: Office of the United Nations High Commissioner for Human Rights, Promotion, protection and implementation of the right to participate in public affairs in the context of the existing human rights law: best practices, experiences, challenges and ways to overcome them, 23 July 2015, U.N. Doc. A/HRC/30/26.

<sup>53</sup> See also: Malgosia Fitzmaurice, “Environmental justice through international complaints procedures?: comparing the Aarhus Convention and the North American Agreement on Environmental Cooperation”, in Jonas Ebbesson & Phoebe N. Okowa, eds, *Environmental Law and Justice in Context* (New York: CUP, 2009).

<sup>54</sup> Adoption Decision, para. 14 and 36.

<sup>55</sup> These are: Business and Industry NGOs (BINGO), Environmental NGOs (ENGO), Indigenous Peoples organizations (IPO), Local government and municipal authorities (LGMA), Research and independent NGOs (RINGO), Trade union NGOs (TUNGO), Farmers NGOs (Farmers), Women and gender NGOs, and Youth NGOs (YOUNGO).

<sup>56</sup> See also: Sébastien Jodoin, Sébastien Duyck & Katherine Lofts, “Public Participation and Climate Governance: An Introduction”, Special Issue: Public Participation and Climate Governance (2015) 24:2 RECIEL 1-6.

context of human rights violations, “the right to an effective remedy may in certain circumstances require States Parties to provide for and implement provisional or interim measures to avoid continuing violations and to endeavour to repair at the earliest possible opportunity any harm that may have been caused by such violations.”<sup>57</sup> On the issue of reparations, these are understood broadly as including, as appropriate, “restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.”<sup>58</sup> In the specific case of transboundary environmental harm, as may be caused by climate change, the ILA commentary on the New Delhi principles affirms that “individuals and peoples affected [must] have non-discriminatory access to the same judicial and administrative procedures as would individuals and peoples of the State in which the harm is caused.”

Whether the transparency provisions under the Paris Outcome can be considered to promote access to justice as a principle of sustainable development is unclear. The specific exclusion of any new basis for liability or compensation,<sup>59</sup> as opposed to the sophistication of the transparency provisions, signals a turn towards compliance based on reputational and diplomatic sanctions, rather than formal legal recourses. Certain observers are sceptical, and opine that the “transparency provisions cannot be a substitute for provisions for compliance”.<sup>60</sup> Furthermore, enhanced action under the Warsaw International Mechanism for Loss and Damage (Article 8) is not included within the reach of the four main transparency provisions described in this working paper. Nonetheless, as the case of the Universal Periodic Review of state performance under international human rights treaties shows, processes of disclosure, justification, and interaction may make real contributions to achieving compliance under international law.<sup>61</sup> The right of access to justice can thus bring an enriching and potentially challenging perspective on the development of the transparency provisions in the Paris Outcome.<sup>62</sup>

## Section 6: The Principle of Good Governance

The sixth dimension of sustainable development is the principle of good governance, which applies both to states and corporations, according to the ILA commentary on the New Delhi principles. With regard to states and international organisations, they establish the following guidelines:

- a) to adopt democratic and transparent decision-making procedures and financial accountability;
- b) to take effective measures to combat official or other corruption;
- c) to respect the principle of due process in their procedures and to observe the rule of law and human rights; and

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<sup>57</sup> Human Rights Committee, General Comment No. 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant, 29 March 2004, U.N. Doc. CCPR/C/21/Rev.1/Add.13, at para. 19.

<sup>58</sup> *Id.*, at para. 16.

<sup>59</sup> Adoption Decision, para. 48-52.

<sup>60</sup> Achala Abeyasinghe, Caroline Prolo & M. Hafijul Islam Khan, *Compliance in the 2015 Climate Agreement*, LDC Paper Series, November 2015, at 15, online: [https://ldclimate.files.wordpress.com/2012/webldc\\_compliance.pdf](https://ldclimate.files.wordpress.com/2012/webldc_compliance.pdf).

<sup>61</sup> See more generally Jutta Brunnée & Stephen J. Toope, “Persuasion and Enforcement: Explaining Compliance with International Law” (2002) 13 *Finnish Yb. Int’l L.* 273.

<sup>62</sup> See also: Sébastien Jodoin & Katherine Lofts, ed, *Economic, Social, and Cultural Rights and Climate Change: A Legal Reference Guide*, New Haven, Ct.: GEM, CISDL, and ASAP, 2013.



- d) to implement a public procurement approach according to the WTO Code on Public Procurement.

Seen from the perspective of sustainable development, the transparency provisions in the Paris Outcome find additional legal foundations in the principle of good governance. In particular, the new treaty establishes a Capacity-building Initiative for Transparency, to build institutional and technical capacity, to strengthen national institutions, and to provide tools, training and assistance with regard to the transparency provisions.<sup>63</sup> Furthermore, the criteria of improved reporting, transparency over time, accuracy, completeness, consistency, and comparability are among those to be included in the rules of procedure to be adopted by the CMA for the Frameworks for Transparency of Action and Support under Article 13.<sup>64</sup> Good governance is thus at the heart of the transparency-based approach to state compliance with the Paris Outcome.

With regard to non-state actors, the New Delhi principles establish that these actors “should be subject to internal democratic governance and to effective accountability”, including corporate social responsibility and socially responsible investment. This finds an echo in Principle 3 of the United Nations-supported Principles for Responsible Investment, which makes disclosure of extra-financial investment risks a key element of its strategy to avoid social harms by corporate entities,<sup>65</sup> and a growing practice in all spheres of activity around the world. The United Nations itself has engaged in disclosing yearly a complete report of its carbon footprint and updates on its objective to achieve full climate neutrality by 2020.<sup>66</sup> Similarly, an initiative like the Carbon Disclosure Project regroups 827 investor signatories representing US\$100tn and had received answers from 5,500 companies interviewed about climate change risk in 2015.<sup>67</sup> Yet another example is the proliferation of hybrid climate standards of conduct for both state and non-state actors, such as the New York Declaration on Forests,<sup>68</sup> the Statement on Putting a Price on Carbon,<sup>69</sup> or the International Standard Organisation’s standards applicable to climate change.<sup>70</sup>

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<sup>63</sup> Adoption Decision, at para. 85 and following. For a discussion of the role of the Global Environment Facility in this context, see: <https://www.thegef.org/gef/CC/capacity-building-initiative-for-transparency>. Of interest is also the Initiative for Climate Action Transparency (ICAT), established in 2015 by the Children’s Investment Fund Foundation (CIFF) and the German Federal Ministry for the Environment, Nature Conservation, Building and Nuclear Safety (BMUB), and partnering with UNEP DTU Partnership (UDP), Verified Carbon Standard (VCS) and the World Resources Institute (WRI), online: <http://www.climateactiontransparency.org/about>.

<sup>64</sup> Adoption Decision, at para. 93.

<sup>65</sup> Principles for Responsible Investment, Principle 3: “We will seek appropriate disclosure on ESG issues by the entities in which we invest”, online: <http://www.unpri.org/about-pri/the-six-principles/>.

<sup>66</sup> United Nations Environment Programme, *Moving Towards a Climate Neutral UN: The UN System’s Footprint and Efforts to Reduce It*, 2015, online: <http://www.unep.org/sustainability/publications.asp>.

<sup>67</sup> CDP, Climate Change Program, online: <https://www.cdp.net/en-US/Programmes/Pages/climate-change-programs.aspx>.

<sup>68</sup> New York Declaration on Forests, UN Climate Summit, April 2014.

<sup>69</sup> Statement on Putting a Price on Carbon, 3 June 2014. Supported by 74 countries, 23 subnational jurisdictions, and more than 1,000 companies.

<sup>70</sup> These include ISO 14064, 14065, 14001, and 50001.

The principle of good governance is thus also highly relevant as a framing principle for the multitude of climate actions to be taken by non-Party stakeholders to the *Paris Agreement*.<sup>71</sup>

## Section 7: The Principle of Integration and Interrelationship

The seventh and last dimension of sustainable development is the principle of integration and interrelationship, in particular in relation to human rights and social, economic and environmental objectives. The ILA commentary on the New Delhi principles further describes this dimension as “the interdependence of social, economic, financial, environmental and human rights aspects of principles and rules of international law relating to sustainable development”. This echoes the principle according to which “All human rights are universal, indivisible and interdependent and interrelated” affirmed in the *Vienna Declaration and Programme of Action*,<sup>72</sup> but also extends it to matters of environmental protection and economic development. The ILA commentary also incorporates the international principle of subsidiarity, to the extent that all “levels of governance – global, regional, national, sub-national and local – and all sectors of society should implement the integration principle”.

The Paris Outcome transparency provisions are rooted in the principles of integration and interrelationship, inasmuch as they require state Parties to periodically present information on their social, economic, and environmental performance. This may even be a challenge for their engagement with the Transparency Frameworks, the Global Stocktake, and the Implementation and Compliance Committee, since the amount of information necessary to monitor all these issues is endless. The following part discusses this challenge in light of four concrete examples. In this context, the transparency provisions may be more helpfully understood as distinct filters, through which local, national, and regional levels of government select manageable amounts of information in order to allow review and constructive engagement at the international level. The principle of integration will be of key relevance in this process, as a reminder that none of the dimensions of international sustainable development law may be disregarded during the process of implementing the Paris Outcome into domestic laws and policies.

## PART 3: KEY ISSUES FOR DOMESTIC IMPLEMENTATION

Law and governance transformations are currently taking place in the jurisdiction of different Parties to the *Paris Agreement* as they prepare to engage with the treaty’s four transparency provisions. In this final part, we present four different case studies -Bangladesh, Brazil, Canada, and the Democratic Republic of the Congo (DRC)- in order to highlight the diversity of institutional and political environments in which the Paris Outcome will be implemented. We have kept these case studies short to draw attention to key issues only, and acknowledge that these are embedded in contexts of great complexity.

As the Analytical Table of Case Studies presented in Appendix 1 shows, many challenges for the successful implementation of the Paris Outcome and of the principles of international sustainable development law

<sup>71</sup> See also: Eric Dannenmaier, “The Role of Non-state Actors in Climate Compliance” in Jutta Brunnée, Meinhard Doelle & Lavanya Rajamani, eds, *Promoting Compliance in an Evolving Climate Regime* (Cambridge, U.K.; New York: Cambridge University Press, 2012).

<sup>72</sup> United Nations, *Vienna Declaration and Programme of Action*, U.N. Doc. A/CONF.157/23, 12 July 1993, art. 5.

presented in Parts 1 and 2 are crosscutting. For example, both Canada and Brazil need to clarify and disclose their accounting methods for GHG emissions reductions associated with land use, land use change, and forestry, while both Bangladesh and the DRC must create a more enabling environment to benefit from technical and financial cooperation. All four countries, furthermore, must conduct a comprehensive review of their laws and policies related to climate change, in an inclusive, participative, and transparent way, with certain additional difficulties related to harmonization in federal systems such as those of Brazil or Canada, and to different forms of political or economic instability such as those faced by the DRC or Brazil. In the conclusion of this Legal Working Paper, we formulate recommendations for law and policy reform by UNFCCC member states based on the experience of these four countries in the hope that they can contribute to the debate in these and other jurisdictions.

## Section 1: Bangladesh

### Overview

This section presents existing law and policy regimes in Bangladesh, with a view to examine its preparedness to implement the *Paris Agreement's* transparency provisions. In particular, we highlight the need for a better assessment of climate change impacts in the country, a more receptive environment for technical and financial support, and an integrated and participatory plan for the review of the laws and policies relevant to engagement under the Paris Outcome.

Bangladesh is one of the world's countries most vulnerable to climate change, despite contributing less than 0.35% of global GHG emissions.<sup>73</sup> Climate change impacts and vulnerabilities are already causing harm to lives, livelihoods, and the economy of the country, and these will only increase with time.<sup>74</sup> It is thus essential for Bangladesh to prepare itself to face existing and expected climate-induced vulnerabilities.

The Government of Bangladesh is actively involved in the UNFCCC negotiation process and seeks to develop a strong international climate regime. It has also made some efforts to adapt its policies to the adverse impacts of climate change and to promote climate resilient low carbon development. The Intended Nationally Determined Contribution (INDC) of Bangladesh was submitted to the UNFCCC well before COP21 and puts forward certain mitigation actions.<sup>75</sup> It includes both unconditional and conditional GHG emissions reduction goals targeting the energy, transport, and industry sectors. The INDC also outlines an adaptation framework and includes future long-term needs and a qualitative description of the support needed.

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<sup>73</sup> World Resources Institute, *Climate Analysis Indicators Tool (CAIT) Version 2.0.*, 2014, Washington, DC, online: <http://www.adb.org/news/bangladesh-could-see-climate-change-losses-reach-over-9-gdp-report>.

<sup>74</sup> Ahsan Uddin Ahmed, Saleemul Haq, Mahbuba Nasreen & Abu Wali Raghieb Hassan, *Sectoral inputs towards the formulation of Seventh Five Year Plan (2016 – 2021)*, Climate Change and Disaster Management, 2015, online: [http://www.plancomm.gov.bd/wp-content/uploads/2015/02/11a\\_Climate-Change-and-Disaster-Management.pdf](http://www.plancomm.gov.bd/wp-content/uploads/2015/02/11a_Climate-Change-and-Disaster-Management.pdf).

<sup>75</sup> Government of Bangladesh, The Intended Nationally Determined Contributions (INDC), 2015, online: [http://www4.unfccc.int/submissions/INDC/Published%20Documents/Bangladesh/1/INDC\\_2015\\_of\\_Bangladesh.pdf](http://www4.unfccc.int/submissions/INDC/Published%20Documents/Bangladesh/1/INDC_2015_of_Bangladesh.pdf).

## Climate Policy Framework

The Government of Bangladesh prepared a National Adaptation Programme of Action (NAPA) in 2005.<sup>76</sup> The NAPA identified vulnerable areas and 15 adaptation projects. The NAPA was updated in 2009 to include 38 adaptation measures. In 2008, the Government also adopted the Bangladesh Climate Change Strategy and Action Plan (BCCSAP).<sup>77</sup> This provides an analysis of climatic and socio-economic realities, and outlines policies and programmes for promoting the well-being of vulnerable groups. Reviewed in 2009, the BCCSAP identified 45 adaptation and mitigation measures based on six pillars: (1) food security, social security, and health, (2) disaster management, (3) infrastructure, (4) research and knowledge management, (5) reducing GHG emissions and a conversion to low-carbon development, and (6) capacity development.

In 2010, the Government adopted the *Climate Change Trust Fund Act* with a view to establish the Bangladesh Climate Change Trust Fund (BCCTF) and support activities to address adverse climate change impacts.<sup>78</sup> The Fund is financed by the national budget. The Government also created the Bangladesh Climate Change Resilience Fund (BCCRF), originally called the Multi-Donor Trust Fund, in 2009, in order to implement the six pillars of the BCCSAP. This fund became operational in 2010.

The *Disaster Management Act* of 2012,<sup>79</sup> recognized the impacts of climate change and provided guidance for setting up an institutional mechanism for disaster management, reducing vulnerabilities, rehabilitation, and providing humanitarian assistance to the victims of disasters and climate change impacts. Additionally, different policies provide guidance for mitigation and adaption measures: the Renewable Energy Policy 2008, the Energy Efficiency and Conservation Master Plan, the Road Map of National Adaptation Plan, the National Sustainable Development Strategy, the Perspective Plan (Vision 2021), the Sixth Five Year Plan, and the National Disaster Management Plan. These are accompanied by legislation and policies in sectors such as water resource management, agriculture, or biodiversity.<sup>80</sup>

## Key Transparency-Related Issues

The existing legal and policy frameworks in Bangladesh are currently inadequate to fully engage with the transparency-based provisions of the Paris Outcome, because they fail to provide a comprehensive assessment of existing and potential climate change impacts on different socio-economic sectors. As a consequence, the Paris Outcome may have the positive outcome of leading to the creation of new policy responses to promote climate resiliency throughout the country. In particular, the publication of an updated NDC and action under the Framework for Transparency of Action could lead to a more inclusive national conversation on climate change vulnerabilities, especially if it is guided by public participation,

<sup>76</sup> Government of Bangladesh, Ministry of Environment and Forest (MoEF), National Adaptation Programme of Action (NAPA), 2005.

<sup>77</sup> Government of Bangladesh, Ministry of Environment and Forest (MoEF), Bangladesh Climate Change Strategy and Action Plan (BCCSAP), 2009.

<sup>78</sup> *Climate Change Trust Act*, 2010, Law No. 57 of 2010.

<sup>79</sup> *Act No. 34*, 2012. The Act was adopted in Bangla and there is no official translation in English yet.

<sup>80</sup> See: Mohiuddin Farooque & Rizwana S. Hasan, *Laws Regulating Environment in Bangladesh* (Dhaka: BELA, 2004).

precaution, and good governance in accordance with the New Delhi principles. Furthermore, legal and institutional frameworks are needed to guide activities of Monitoring, Reporting, and Verification (MRV), auditing, oversight, and communication, in a way that would promote accountability of public authorities.

In view of the new treaty, Bangladesh must also create an enabling environment for technical and financial support for the implementation of its policy responses, in collaboration with bilateral and multilateral mechanisms. This implies enhancing the capacity of public institutions, planners and technicians, the private sector, NGOs, and civil society organisations involved in the development sector. Where necessary, new institutional structures should be established to receive this support and increase mitigation efforts, thereby reflecting the principles of equity, poverty eradication, and CBDR-RC, as well providing an avenue to implement the duty of nations to co-operate with one another under the *Charter of the United Nations* and the *International Covenant on Economic, Social and Cultural Rights*.

As a first step, the Government of Bangladesh should initiate a comprehensive review of all its laws and policies. This would allow identifying gaps with regard to international climate law and developing a comprehensive reform plan reflecting the principles of integration and interrelationship of social, economic, and environmental concerns, rather than functioning on a case-by-case basis. Good governance also requires that this process of building institutional readiness for the implementation of the Paris Outcome's transparency provisions be conducted in a transparent, participative, and accountable way. The concrete application of these principles, rooted in international law on sustainable development, has often been lacking in Bangladesh.

## Section 2: Brazil

### Overview

Several factors render climate action in Brazil particularly important for global efforts to prevent climate change. The country is the seventh largest emitter of GHG in absolute terms, and has the eighth largest emissions per capita among top 10 absolute emitters.<sup>81</sup> It is also one of the most bio-diverse countries and home to the world's biggest rainforest, the Amazon, which considerably impacts the Earth's climate system.

Brazil hosted the Earth Summit in 1992 and Rio+20 in 2012, positioning itself as a significant actor in international climate politics. It has also been one of the key actors within the UNFCCC negotiation processes over the years.<sup>82</sup> Brazil signed the *Kyoto Protocol* in 1998, although without compulsory emissions reduction targets due to its classification as a developing country. Brazil was a key player in the definition and adoption of the Clean Development Mechanism (CDM) under the Protocol, and occupies the third position in number of projects registered.<sup>83</sup>

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<sup>81</sup> World Resources Institute, "6 Graphs Explain the World's Top 10 Emitters", online: [www.wri.org/blog/2014/11/6-graphs-explain-world-s-top-10-emitters](http://www.wri.org/blog/2014/11/6-graphs-explain-world-s-top-10-emitters).

<sup>82</sup> M Vieira, *Brazilian Foreign Policy in the Context of Global Climate Norms*, Foreign Policy Analysis, 2012.

<sup>83</sup> London School of Economics - Grantham Institute, *Climate Change Legislation in Brazil*, online: <http://www.lse.ac.uk/GranthamInstitute/wp-content/uploads/2015/05/BRAZIL.pdf>.



Brazil submitted its INDC to the UNFCCC prior to COP21, committing to reduce its GHG emissions by 37% under 2005 levels by 2025 and thereby becoming the first major developing country to pledge an absolute reduction of emissions. By adopting an economy-wide, absolute mitigation target, Brazil is aiming for a stronger contribution compared to its voluntary pre-2020 actions.<sup>84</sup>

## Climate Policy Framework

Brazil's climate policy is set out and implemented by a wide range of institutions. An Inter-Ministerial Commission on Global Climate Change (CIMGC), headed by the Ministry of Science, Technology and Innovation, was created in 1999 to bring together relevant ministries<sup>85</sup> to coordinate implementation of the UNFCCC. One of its tasks was to serve as the nationally designated authority to the CDM. Furthermore, it issues opinions upon request on proposals for sectorial political and legal instruments and norms that contain a relevant component for mitigation and adaptation to climate change; it provides input to government positions in the negotiations under the UNFCCC and subsidiary instruments to which Brazil is a Party; and it coordinates with civil society organisations to promote actions by governmental and private bodies, in compliance with Brazil's international commitments. As later specified in Law 12.187/2009, the resolutions issued by the CIMGC have the status of instruments of the National Climate Policy.<sup>86</sup>

The Inter-Ministerial Committee on Climate Change was created by Decree 6.263/2007,<sup>87</sup> as the body in charge of preparing the National Climate Change Plan for 2007/2008. The Plan provides a comprehensive framework of actions to combat climate change and proposes a series of mitigation actions, focusing in particular on reducing deforestation and increasing energy efficiency and renewable energy.

The National Policy on Climate Change (PNMC) was established in 2009 through Law 12,187/2009. The PNMC is based on Brazil's international commitment under the UNFCCC to reduce emissions between 36,1% and 38,9% by 2020, and incorporates all previous government instruments related to its key areas (including the National Climate Change Plan and the National Fund on Climate Change). All policies related to Brazil's INDC are carried out under this framework. The PNMC focuses on sectorial areas of concern: combining climate protection with socio-economic development; reducing anthropogenic GHG emissions

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<sup>84</sup> Federative Republic of Brazil, Intended Nationally Determined Contribution Towards Achieving the Objective of the United Nations Framework Convention on Climate Change, online: <http://www4.unfccc.int/submissions/INDC/Published%20Documents/Brazil/1/BRAZIL%20iNDC%20english%20FINAL.pdf>.

<sup>85</sup> The CIMGC has members from the following ministries: External Relations; Agriculture and Fisheries; Transport; Mines and Energy; Planning, Budget and Governance; Environment; Science, Technology and Innovation; Development, Industry and External Trade; the Office of the President of the Republic (Casa Civil); Cities; and Finance, online: [www.mct.gov.br/index.php/content/view/10079/Membros\\_da\\_Comissao.html](http://www.mct.gov.br/index.php/content/view/10079/Membros_da_Comissao.html).

<sup>86</sup> Comissão Interministerial de Mudança Global do Clima, *Relatório de Atividades 2011-2014*, online: <http://www.mcti.gov.br/documents/10179/546721/Comissao+Interministerial+de+Mudanca+Global+do+Clima+-+Relatorio+de+Atividades+2013-2014/a8c22739-976d-4c91-bcb2-af74bacbc2ac>, p. 4-5.

<sup>87</sup> The CIM is coordinated by the Office of the President of the Republic (Casa Civil), and consists of seventeen federal bodies: Ministries of Agriculture and Supply, Science and Technology, Defense, Education, Finance, National Integration, Health, Cities, External Relations, Mines and Energy, Agrarian Development, Development, Industry and Foreign Trade, Environment, Planning, the Budget and Planning, Transport, and the Strategic Issues Secretary of the Presidency of the Republic.

from all its sources and strengthening GHG sinks; adaptation; preservation, conservation and recuperation of national biomes; land use and reforestation measures; and the development of a national cap-and-trade mechanism. Decree 7.390/2010 regulates the PNMC, and deals more specifically with the National Climate Change Plan, the National Fund on Climate Change, the Action Plans on Deforestation Prevention and Control in National Biomes, the Sector Plans on climate change mitigation in key economic sectors and the national voluntary emission reduction commitment. The governance of the PNMC is a responsibility of the Inter-Ministerial Committee on Climate Change mentioned earlier.<sup>88</sup>

Certain elements of Brazil's climate change policy are directly relevant to its engagement with the four transparency provisions established in the Paris Outcome. One of them is the recently reformed *Law on the Protection of Native Forests* (Law 12,651/2012, known as the *Forest Code*), which directly echoes the international principle of sustainable use of natural resources. The *Code* governs the use and protection of private land in the country, and relies mainly on two types of instruments for environmental protection: 'Permanent Preservation Areas' and 'Legal Forest Reserves'. Another important policy feature is the Rural Environmental Registry (CAR), a mandatory registry for all rural properties in Brazil. The CAR provides a framework to present a full picture of land uses in Brazil, and will support better land use planning.<sup>89</sup> The deadline for landowners to enrol in the CAR was extended to May 2016. Once complete, it will be a tool to monitor and control deforestation on private land, and provide essential information for the Government to report progress on its INDC.<sup>90</sup> On a related topic, the *Law on the National System of Conservation Units* (Law 9,985/2000) establishes norms for the creation, implementation and management of protected areas, called Conservation Units. This national system includes federal, state and municipal Conservation Units destined both to sustainable use and integral conservation. One of the main objectives of the national system is the effective conservation of biodiversity *in situ* and the monitoring of compliance under this regime.

The System for the Monitoring of the Impacts of Climate Change (SISMOI) was created by the Ministry of Science, Technology and Innovation to promote the understanding of how climate change affects natural and human systems in Brazil. The SISMOI is still in its early stages, but over time should be formed of four modules: i) data; ii) interpretation; iii) access; and iv) governance. Its results will be mainly directed to policy-makers, but also to the private and academic sectors. In a way that could reflect the international principles of precautionary approach and access to information, it is expected that the SISMOI will become a tool for assessing the impacts of climate variability and change, and to support the preparation of

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<sup>88</sup> Ministry of Environment, online: <http://www.mma.gov.br/clima/politica-nacional-sobre-mudanca-do-clima>.

<sup>89</sup> I. Teixeira, *Brazil's national policy for low carbon sustainable development*, online: <http://www.climateactionprogramme.org/climate-leader-papers/brazils-national-policy-for-low-carbon-sustainable-development-at-18-May-2016>.

<sup>90</sup> At the same time, the reforms to the *Forest Code* have received strong criticism from the environmentalist community, especially on issues such as providing leniency to large landowners. See WWF, "The New Brazilian Forest Code as a Harmful Subsidy: Encouraging Waste, Punishing Efficiency", [http://assets.wwf.org.uk/downloads/forest\\_code\\_factsheet.pdf?\\_ga=1.166583869.2012245000.1465469545](http://assets.wwf.org.uk/downloads/forest_code_factsheet.pdf?_ga=1.166583869.2012245000.1465469545) at 8 June 2016.

national and state adaptation policies and investment plans.<sup>91</sup> Furthermore, Brazil is developing and implementing a modular system of MRV, the SMMARE, to monitor mitigation actions and GHG emission reductions.<sup>92</sup>

The Brazilian Forum on Climate Change, chaired by the President of the Republic, was created to raise awareness and mobilize Brazilian society to discuss and take positions on climate change. It benefits from a broad participation of governmental and non-governmental representatives and is mandated to assist the Government in the incorporation of climate change issues at various stages of public policy-making.<sup>93</sup> Lastly, the Brazilian Panel on Climate Change is a national scientific body that aims to gather, synthesize, and evaluate scientific information on different aspects of climate change in Brazil. This scientific climate network brings together over 300 national experts running publicly funded research in 15 different thematic areas and produces periodical National Assessment Reports, which providing an academic contribution to the PNMC.<sup>94</sup> It is clear that the human rights to public participation and access to information as well as the principle of good governance provide useful context for the future development of these initiatives.

### Key Transparency-Related Issues

Considering its engagement with the UNFCCC process and the strength of its existing legal and institutional framework related to climate change, Brazil seems well prepared to respond to the requirements of the transparency provisions contained in the Paris Outcome.<sup>95</sup> The Brazilian INDC is rated as having a “medium” level of ambition, and more is needed for it to contribute fairly to the overall goal of limiting warming to 2°C if no other countries make deeper reductions and greater efforts. Current policies, nonetheless, are considered to put the country on the right track to achieve its INDC pledges,<sup>96</sup> but this will not come without challenges and studies suggest that transparency gaps remain.

The forestry sector is at the heart of one of Brazil’s major challenges. On the one hand, as a result of strong policies to fight deforestation (especially in the Amazon), Brazil has turned its negative deforestation trends around and decreased its emissions associated with land use, land use change and forestry (LULUCF) by 85% between 2005 and 2012. This has yielded almost 2 Gt of CO<sub>2</sub> in reduction from the highest reported level in 1996.<sup>97</sup> However, while it specifies coverage of the land sector in the national GHG emissions target, Brazil’s current INDC does not provide details on the accounting approach used.<sup>98</sup>

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<sup>91</sup> Brazil Ministry of Science, Technology and Innovation, Sistema de Monitoramento e Observação dos Impactos das Mudanças Climáticas, online: [http://www.mct.gov.br/index.php/content/view/361704/SISMOI\\_Sistema\\_de\\_Monitoramento\\_e\\_Observacao\\_dos\\_Impactos\\_das\\_Mudancas\\_Climaticas.html](http://www.mct.gov.br/index.php/content/view/361704/SISMOI_Sistema_de_Monitoramento_e_Observacao_dos_Impactos_das_Mudancas_Climaticas.html) at 18 May 2016.

<sup>92</sup> UNFCCC, *Summary report on the technical analysis of the first biennial update report of Brazil submitted on 31 December 2014*, para 34, online: <http://unfccc.int/resource/docs/2015/tasr/bra.pdf>.

<sup>93</sup> I. Teixeira, *Brazil’s national policy for low carbon sustainable development*, *supra*, note 89, at 9.

<sup>94</sup> *Idem*.

<sup>95</sup> Brazil submitted its first Biennial Update Report to the UNFCCC, which was commended for being comprehensive. UNFCCC, *Summary report on the technical analysis of the first biennial update report of Brazil submitted on 31 December 2014*, *supra*, note 92, at para. 43.

<sup>96</sup> Climate Action Tracker, Brazil, online: <http://climateactiontracker.org/countries/brazil.html>.

<sup>97</sup> *Idem*.

<sup>98</sup> Damassa, T., T. Fransen, B. Haya, M. Ge, K. Pjeczka, & K. Ross, *supra*, note 4, at 10.

Implementation and enforcement of existing legislation and policies also face significant gaps. While the new *Forest Code* shows potential as a policy promoting action against climate change and efficient land use, it relies on the Brazilian states and individual landowners to ensure compliance. The states must enact further legislation for the *Code's* implementation, and an intricate system of regulations must be integrated at the state and local levels. In addition, individual rural landholders are expected to initiate a process of environmental compliance, which requires them understanding the law and complying with its requirements by its not yet fully the case.<sup>99</sup> A sign of the difficulties of translating legislation into action is the fact that deforestation levels in the Amazon have risen again between 2013 and 2015, after having fallen between 2004 and 2012.<sup>100</sup> Considering the significant share of emissions from this sector, developments in this area will be key to assessing the success of Brazilian climate action in the near future.

Additionally, although the INDC specifies that Brazil intends to use international market mechanisms to achieve its targets, it did not specify at what level these will be implemented.<sup>101</sup> Different carbon pricing instruments are currently being considered by the Ministry of Finance, including economic and regulatory impact assessments expected to culminate in a White Paper with design recommendations. Furthermore, the Ministry of Finance has launched a strategy to strengthen the understanding of carbon pricing instruments among stakeholders through engagement, communication, and consultation.<sup>102</sup> The ongoing political and economic crisis experienced in the country since 2015, however, may prevent moving these initiatives forward.

Lastly, the political context will make it challenging to keep climate policy and action as a priority on the political agenda, and to increase the country's institutional readiness to engage with the four transparency provisions presented in Part 1 of this working paper. The national debate on how and when the government will put in place the climate plan has slowed down, and especially the activities of the Committee on Climate Change. The transparency of climate decisions is also being questioned. While the institutional framework described above has allowed the private sector and civil society groups to engage in the debate, including through roundtables to discuss low-carbon scenarios with policymakers, it is reported that the Paris climate pledges were decided with little public consultation.<sup>103</sup>

In addition, from a coordination perspective, while climate policy at the federal level is at a crossroads, states are developing their own regional climate plans. States like Mato Grosso, Para, and Acre, for example, are developing strategies to combat deforestation. However, experts highlight the importance of collaboration and coordination between federal and state governments to ensure policy harmonization in this area.<sup>104</sup>

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<sup>99</sup> Climate Policy Initiative, *Brazil's New Forest Code: Paths and Challenges to Compliance*, 2015.

<sup>100</sup> Climate Home, "Brazil Climate Plan on Standby as Rousseff Totters", online: <http://www.climatechangenews.com/2016/01/11/brazil-crisis-puts-climate-plan-on-ice-analysts>.

<sup>101</sup> Damassa, T., T. Fransen, B. Haya, M. Ge, K. Pjeczka, & K. Ross, *supra*, note 4, at 9.

<sup>102</sup> International Carbon Action Partnership, *ETS Detailed Information – Brazil*, updated 16 April 2016, online: [https://icapcarbonaction.com/en/?option=com\\_etsmap&task=export&format=pdf&layout=list&systems%5B%5D=79](https://icapcarbonaction.com/en/?option=com_etsmap&task=export&format=pdf&layout=list&systems%5B%5D=79).

<sup>103</sup> Climate Home, 'Will Brazil New Climate Sheriffs Get Paris on Track?', online: <http://www.climatechangenews.com/2016/03/04/will-brazil-new-climate-sheriffs-get-paris-pledges-on-track>.

<sup>104</sup> Climate Home, *supra*, note 100.

This combination of factors makes Brazil an interesting example of the difficulties of balancing a complex legal and institutional framework for climate action, with the need for an enabling economic and political environment to move things forward.

### Section 3: Canada

#### Overview

In 2016, Canada ranked poorly in terms of sustainable quality of life, earning a “D” and ranks 14<sup>th</sup> among 16 peer countries, only in front of the U.S.A. and Australia.<sup>105</sup> Overall, the country ranked 56<sup>th</sup> out of 61 on climate action,<sup>106</sup> and presented amongst the highest GHG emissions per capita.<sup>107</sup> Despite the country’s small population, it is part of the ten most important emitters in the world in absolute terms.<sup>108</sup> To this day, Canada has never adopted, let alone implemented, binding emission reduction targets that are sufficient in view of the international scientific and political consensus.<sup>109</sup> Canada is also the only country to have withdrawn from the *Kyoto Protocol*, the only internationally binding agreement mandating specific GHG reductions to date.

Canada is emerging from ten years of strong focus on the development of Alberta’s oil sands. This high carbon intensity resource development strategy had a devastating impact on the environment – especially the global climate– and divided the country over approval of the pipelines necessary to increase production of the landlocked resource in a context of plummeting oil prices. New policies are, however, being adopted which permitted strong climate engagement at COP21, advocating for respect of Indigenous rights and striving for the ambitious target of limiting global warming to 1.5 °C. However, thorny obstacles lie ahead.

Despite its willingness to “meet or exceed” the current target, Canada may not be intending to change the Intended Nationally Determined Contribution (INDC) submitted to the UNFCCC secretariat in May 2015, which establishes an economy-wide GHG emission reduction target of 30% below 2005 levels in

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<sup>105</sup> The 10 indicators in the overall environment report card cover four broad categories: air pollution, waste, freshwater management, and climate change. See more at: The Conference Board of Canada, How Canada Performs, “Provincial and territorial ranking - Environment”, April 2016, online: <http://www.conferenceboard.ca/hcp/provincial/environment.aspx>.

<sup>106</sup> See German Watch, *Climate Performance Index 2016*, page 9, online: <https://germanwatch.org/en/download/13626.pdf>. Brazil, the only other country assessed in this paper that is part of the ranking is doing better than Canada at 43 out of 61.

<sup>107</sup> Conference Board, “International Ranking” and “Provincial and Territorial Ranking”, online: <http://www.conferenceboard.ca/hcp/details/environment/greenhouse-gas-emissions.aspx>.

<sup>108</sup> See: World Resources Institute, *CAIT Climate Data Explorer*, online: <http://www.wri.org/blog/2014/11/6-graphs-explain-world%E2%80%99s-top-10-emitters>.

<sup>109</sup> See for example the methodology put forward by Climate Action Tracker, online: <http://climateactiontracker.org/methodology/85/Comparability-of-effort.html>.



2030.<sup>110</sup> This INDC was rated as inadequate by Climate Action Tracker, on the grounds that it is not consistent with various interpretations of an equitable approach to a 2 °C pathway.<sup>111</sup> Post-Paris, efforts are only starting to assess what would be Canada's share of global emission reductions under approaches that seek to limit temperature rises to 1.5 °C. One study indicated that reductions ranging from 90 to 99% would be necessary by 2030.<sup>112</sup> Even current targets labelled insufficient are likely not to be met by Canada: if the *statu quo* remains, Canada's GHG emissions projections are projected to be 768 Mt of CO<sub>2</sub> equivalent in 2020 (compared to a target of 622) and 815 Mt of CO<sub>2</sub> equivalent in 2030 (compared to a target of 524).<sup>113</sup>

## Climate Policy Framework

Canada is taking steps to establish a pan-Canadian climate change framework by early 2017. The plan is intended to build on provincial initiatives, be supported by broad engagement with Indigenous Peoples and all Canadians, and be informed by science. A first meeting of the Canadian Intergovernmental Conference (CIC) in January 2016, comprised of the Canadian Prime Minister and the Premiers of each province, examined Canada's GHG projections to 2020 and 2030 and concluded that "more needs to be done" to develop a framework of action and green infrastructures, and to comply with the *Paris Agreement*.<sup>114</sup> In March 2016, the CIC adopted the *Vancouver Declaration on Clean Growth and Climate Change*, whereby the Premiers committed themselves to meeting or exceeding Canada's 2030 target of a 30% reduction below 2005 levels of emissions, increasing the level of ambition of environmental policies in a way consistent with the *Paris Agreement*, and better coordinating GHG emissions reporting systems among jurisdictions.<sup>115</sup>

The CIC established intergovernmental working groups to identify options for actions based on clean technology, innovation and jobs; carbon pricing mechanisms; specific mitigation opportunities; and adaptation and climate resilience. Each working group will assess impacts on economic and environmental outcomes. Groups are encouraged to commission expert analysis and engage stakeholders. The reports will be provided and analyzed ahead of the next CIC meeting in the fall of 2016, where the Premiers are

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<sup>110</sup> INDC Canada (communicated on 2015-05-15), online: <http://www4.unfccc.int/submissions/indc/Submission%20Pages/submissions.aspx>.

<sup>111</sup> *Idem*.

<sup>112</sup> Dr. Simon Donner & Simon Fraser, *Canada's contribution to meeting the temperature limits in the Paris Climate Agreement*, February 2016, online: <http://blogs.ubc.ca/sdonner/files/2016/02/Donner-and-Zickfeld-Canada-and-the-Paris-Climate-Agreement.pdf>.

<sup>113</sup> See Environment Canada, *Canada's Greenhouse Gas Emissions Projections in 2020 and 2030*, last update 2016-01-29, online: [http://news.gc.ca/web/article-en.do?nid=1030489&\\_ga=1.159941502.238940361.1461000980](http://news.gc.ca/web/article-en.do?nid=1030489&_ga=1.159941502.238940361.1461000980).

<sup>114</sup> Government of Canada, News, January 29, 2016, Ottawa, "Federal, provincial and territorial governments working together on first steps towards a pan-Canadian framework to address climate change", last update 2016-01-29, online: <http://news.gc.ca/web/article-en.do?nid=1030449>.

<sup>115</sup> Canadian Intergovernmental Conference, *Vancouver declaration on clean growth and climate change*, March 3, 2016, at 3, online: [https://news.gov.bc.ca/files/Vancouver\\_Declaration\\_clean\\_Growth\\_Climate\\_Change.pdf](https://news.gov.bc.ca/files/Vancouver_Declaration_clean_Growth_Climate_Change.pdf).

to finalize the pan-Canadian framework on clean growth and climate change, and review progress on the Canadian Energy Strategy.<sup>116</sup>

The Government of Canada is favouring a decentralized and collaborative approach to its international obligation: it has “committed to ensuring that the provinces and territories have the flexibility to design their own policies to meet emission reductions targets”<sup>117</sup> and “to complement and support their actions without duplicating them, including by promoting innovation and enabling clean growth across all sectors.”<sup>118</sup> Notably, legislative reform is not mentioned in federal strategies, where focus on investments and flexibility dominate. Regulatory action is only briefly alluded to in the provisional version of the federal Sustainable Development Strategy, which is currently subject to consultation.<sup>119</sup>

### Key Transparency-Related Issues

Although it is too early to tell whether new policy directions will lead to more ambitious climate targets and policies in the future, one area that raises concerns with regard to Canada’s participation with the Paris Outcome’s transparency provisions is accounting for future GHG emissions reductions associated with land use, land use change and forestry (LULUCF). The UNFCCC clearly requires accounting for LULUCF and seeking to conserve and enhance carbon reservoirs and GHG sinks such as biomass and forests,<sup>120</sup> including under Article 5 of the *Paris Agreement*. Canada has always excluded emissions from and removals by the LULUCF sector from the national emission totals, partly because large sources of LULUCF emissions, such as forest fires, are not human-caused and vary from year to year. Rather, Canada reports on LULUCF emissions separately: in 2014, this net flux amounted to emissions of 72 Mt and increased total GHG emissions by about 9.8%.<sup>121</sup>

Canada’s Ministry of Environment and Climate Change (ECCC) has proposed a methodology for estimating upstream GHG emissions associated with major oil and gas projects undergoing federal environment assessment in March 2016.<sup>122</sup> This methodology has obvious deficiencies such as excluding downstream emissions,<sup>123</sup> LULUCF, and electricity generation from upstream emission sources. Excluding such emissions when assessing climate impacts of federally regulated projects such as pipelines misses an important source of emissions subject to federal regulation. Worryingly, the first draft assessment

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<sup>116</sup> *Ibid.*, at 8.

<sup>117</sup> *Ibid.*, at 3.

<sup>118</sup> *Ibid.*, at 5.

<sup>119</sup> Draft Sustainable Development Strategy, at p. 13, online: [http://www.fsds-sfdd.ca/downloads/3130%20-%20Federal%20Sustainable%20Development%20Strategy%202016-2019 .pdf](http://www.fsds-sfdd.ca/downloads/3130%20-%20Federal%20Sustainable%20Development%20Strategy%202016-2019.pdf).

<sup>120</sup> UNFCCC, Reporting of the LULUCF sector by Parties included in Annex I to the Convention, online: [http://unfccc.int/land\\_use\\_and\\_climate\\_change/lulucf/items/4127.php](http://unfccc.int/land_use_and_climate_change/lulucf/items/4127.php).

<sup>121</sup> Environment Canada, National Inventory report (1990-2014), Summary, 2016, ISSN: 2371-1310, at 10, online: <https://www.ec.gc.ca/ges-ghg/default.asp?lang=En&n=3E38F6D3-1>.

<sup>122</sup> Canada Gazette Part 1, March 19, 2016, Order 2016-87-04-02 Amending the Non-domestic Substances List, online: <http://www.gazette.gc.ca/rp-pr/p1/2016/2016-03-19/html/notice-avis-eng.php#nl4>.

<sup>123</sup> See for example the IQ Carbon assessment of downstream emissions from Energie Est Oleoduc, online: <http://www.iqcarbhone.org/nouvelle-publication-di-qcarbhone-estimant-les-emissions-en-aval-resultant-de-l-oleoduc-energie-est/>.

released under this proposed methodology also fails to assess expected upstream emissions from new pipelines in relation to Canada's commitments under the *Paris Agreement*.<sup>124</sup>

Furthermore, since environment and climate change are shared responsibilities under Canadian federalism,<sup>125</sup> provinces and territories have taken on a more active role on climate action and begun to price carbon and to set GHG reduction targets.<sup>126</sup> The current patchwork of provincial legal frameworks, policies and measures may constitute a major impediment to establishing a common action plan and meaningfully engaging with the transparency provisions established in the Paris Outcome.

The 2016 budget proposed over 4 billion dollars in various forms of investments in clean technology, other forms of GHG reductions, and climate-related initiatives. The Canadian government also announced plans to provide \$61.3 million over five years, starting in 2016–17, to advance Canada's climate change and air pollution objectives at the international level. It is clear that Canada intends to play a leadership role in international environmental organizations such as the UNFCCC, and such commitments permit the country to work toward a North American clean energy and environmental agreement with the United States and Mexico.<sup>127</sup> Furthermore, Canada will provide CAD 2.65 billion over the next five years in international climate finance to help developing countries tackle climate change by support for transition to low-carbon economies.<sup>128</sup> Though the Climate Action Network estimated Canada's fair share of financial support, based on its national share of GHG and its industrial status, at CAD 4 billion,<sup>129</sup> the announcement may be a welcome one.

<sup>124</sup> Environment and Climate Change Canada, "Trans Mountain Pipeline ULC – Trans Mountain Expansion Project – Review of Related Upstream Greenhouse Gas Emissions Estimates" Draft for Public Comments released May 19, 2016, online: <http://www.ceaa-acee.gc.ca/050/document-eng.cfm?document=114550>.

<sup>125</sup> INDC Canada (communicated on 2015-05-15) online: <http://www4.unfccc.int/submissions/indc/Submission%20Pages/submissions.aspx>.

<sup>126</sup> Environment Canada, *Provincial and territorial action* (last update 2016-04-19), online: <http://www.climatechange.gc.ca/default.asp?lang=En&n=64778DD5-1>.

<sup>127</sup> Government of Canada, Budget 2016, March 22, 2016, Chapter 4 at 159, online: [www.fin.gc.ca](http://www.fin.gc.ca).

<sup>128</sup> See for example Prime minister of Canada Justin Trudeau, News, "Prime Minister announces investment in Global Climate Change Action", Malta, 27/11/2015, online: <http://www.pm.gc.ca/eng/news/2015/11/27/prime-minister-announces-investment-global-climate-change-action>. See also UNFCCC, *List of Recent Climate Funding Announcements, Interactive Graphic*, online: <http://newsroom.unfccc.int/financial-flows/list-of-recent-climate-funding-announcements/>. This follows a Canadian contribution of \$1.2 billion to the collective commitment under the Copenhagen accord for fast start financing approaching US\$30 billion for the period 2010–2012. In November 2014, Canada also pledged \$300 million to the Green Climate Fund to supports projects and programs to address climate change in developing countries. Environment Canada, *Engagement in international environmental agreements*, online: <https://www.ec.gc.ca/international/default.asp?lang=En&n=045000D9-1>.

<sup>129</sup> Radio-Canada, "Le Canada consacrera 2,65 milliards pour lutter contre les changements climatiques", November 27, 2015, online: <http://ici.radio-canada.ca/nouvelles/environnement/2015/11/27/001-changement-climatique-canada-aide-pays-ges-environnement-trudeau-dion.shtml>; Prime minister of Canada Justin Trudeau, "Prime Minister announces investment in Global Climate Change Action", November 27, 2015, <http://www.pm.gc.ca/fra/nouvelles/2015/11/27/premier-ministre-annonce-soutien-financement-de-la-lutte-contre-les-changements>. See also: Annex Indicative scale of contributions from Parties to the Convention for the biennium 2016–2017, UNFCCC Decision 22/COP21, online: <http://unfccc.int/resource/docs/2015/cop21/eng/10a03.pdf#page=2>.

Given a burdensome legacy of incapacity to shoulder its common but differentiated responsibilities, coming years may be critical for Canada to establish credibility on climate action. Law on sustainable development can provide useful guidance for interested provincial, territorial, and federal actors to update their climate laws and policies, particularly inasmuch as sustainable use of natural resources, CBDR-RC, international cooperation, and precaution are concerned. Likewise, engagement with the transparency provisions of the Paris Outcome may catalyze the efforts to coordinate and harmonize the actions taken by various levels of government and increase the sense of accountability to others in the international community.

## **Section 4: Democratic Republic of the Congo**

### **Overview**

The Democratic Republic of Congo (DRC) is today a low carbon-emitting country. Its per capita Gross Domestic Product is less than 1 US per day. The informal and rural sectors of the economy have a low capacity for creating well-paid jobs and prevail at the national level (70%).<sup>130</sup> Yet, the DRC has an important natural capital and growth potential composed of forests, hydroelectric potential, and an interconnection position with other countries of the sub-region. It should not come as a surprise, then, that the DRC's Intended Nationally Determined Contribution (INDC) and the Government's Action Program for 2012-2016 identify mining, agriculture, forestry, and the diversification of the industrial fabric as its priorities.<sup>131</sup> In an attempt to tap this potential, the DRC adopted a development vision for 2060 sequenced in three phases: 1) 2012 to 2020, to transition from a low-income country to a middle-income country through agricultural transformation, 2) 2020 to 2030, to become an emergent country by intensive industrialization through the development of energy sector in order to support the mining industry and the agricultural sectors, and 3) 2030 to 2060, to transition from an emergent country to a developed country, by implementing a green economy and developing a knowledge society.

### **Climate Policy Framework**

The DRC Ministry of Environment and Sustainable Development (MEDD), through the Sustainable Development Division (SDD), is responsible for coordinating and monitoring the implementation of the government's action on climate change. It is charged with ensuring the management of GHG inventories as well as meeting other transparency-related commitments in the Paris Outcome.<sup>132</sup> Teams of experts, from government ministries and agencies, national research centers and universities, private institutions and NGOs, are currently defining methodological approaches to estimate GHG emissions and evaluate technology-transfer needs. A National Climate Committee submits GHG emissions inventory reports to the Government for formal approval.

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<sup>130</sup> Democratic Republic of the Congo, Second National Communication on Climate Change, November 2009.

<sup>131</sup> Democratic Republic of the Congo, Intended Nationally Determined Contribution, August 2015.

<sup>132</sup> *Idem*.

The DRC has not established a new mechanism for good governance and transparency of proposed activities as part of its efforts to mitigate climate change at the national level. Without a specific new arrangement for engagement under the Paris Outcome, the existing institutions will have to be used temporarily. For example, a national system for Monitoring, Verification and Reporting (MRV) activities related to REDD+ has been developed within the MEDD. Operational technical units are working along the following pillars: (i) Monitoring System Satellite Land, (ii) National Forest Inventory, and (iii) Greenhouse Gases Inventory. All three have made considerable progress in terms of outputs and of strengthening of human and technical capacities. A similar system for monitoring GHG emissions not related to forests is currently being developed in the context of the DRC's low-carbon development strategy and of its NAMAs projects (Nationally Appropriate Mitigation Action).

Other institutional frameworks of importance to the DRC's climate actions include 1) its Economic Governance Matrix, 2) the *Mining Code*, 3) the *Oil and Hydrocarbons Act*, 4) the *Forest Code*, 5) the *Agriculture Act*, and 6) the *Electricity and Energy Act*. These are briefly discussed in the following paragraphs.

### 1. *Economic Governance Matrix*

The DRC's Economic Governance Matrix was set up in 2011 in order to restore confidence in natural resource management by improving the business climate, efficiency of natural resource use, and transparency of public spending. It has received support by the World Bank, the Extractive Industries Transparency Initiative (EITI), the Lubumbashi Conference on Good Governance and Transparency in the Mining Sector, and the International Monetary Fund.<sup>133</sup>

### 2. *Mining Code*

Mining is one of the main income sources of the DRC. In its INDC submission, the DRC has identified efforts that can be made in this sector to significantly contribute to the achievement of its obligations under the UNFCCC. According to the explanatory notes of the *Mining Code*'s chapter on mining titles, this regime is characterized by transparency, swiftness, thoroughness, and objectivity.<sup>134</sup> However, the *Code*'s reform process has revealed abuses, especially regarding non-compliance with the tendering procedure established at Article 33, which is often suspended by the National Minister of Mines. The need for transparency, objectivity, and respect for the public interest (Articles 32 and 33) require that the tendering process be treated as mandatory. Importantly, the *Code* lacks sanctions for non-fulfillment of transparency obligations.<sup>135</sup>

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<sup>133</sup> International Monetary Fund, IMF Country Report No. 14/301, October 2014, at 2, online: <https://www.imf.org/external/pubs/ft/scr/2014/cr14301.pdf>.

<sup>134</sup> Democratic Republic of the Congo, *Code minier, Loi n°4-2005 du 11 avril 2005*, online: <http://www.droit-afrique.com/upload/doc/congo/Congo-Code-minier-2005.pdf>.

<sup>135</sup> The Platform of Organizations of Civil Society working in the mining sector in Katanga (POM), proposed amendments to the DRC *Mining Code*, 2012, online:

The Extractive Industries Transparency Initiative (EITI) is an international framework that aims to improve the governance in the extractive sector in countries rich in oil, gas and minerals, and thus the effectiveness of laws such as the *Mining Code* or the *Oil and Hydrocarbons Act*. It is meant to assist the Government of the DRC and the various stakeholders to increase disclosure and transparency of all government revenues that originate from extractive activities. The DRC joined the initiative in 2005 and was considered by the EITI-DRC Multipartite Group to have made significant progress between 2005 and 2008.<sup>136</sup> In 2010, however, the country was temporarily suspended by the EITI Board of Directors because of lack of adequate reporting by companies involved in the extractive sector. The DRC's compliant status was only granted in July 2014, in which year extractive industries contributed US 1.77 billion to the state.<sup>137</sup> A lengthy list of recommendations remained in course of implementation at that time, however, and dealt with matters such as accuracy and timeliness of the information disclosed by the government.<sup>138</sup>

### 3. *Oil and Hydrocarbons Act*

The *Oil and Hydrocarbons Act* was promulgated on August 1, 2015 and filled a vacuum that has long delayed the effective development of hydrocarbon resources by affirming state ownership of underground petroleum.<sup>139</sup> This new law will help the DRC to face three major energy-related challenges: 1) the development of its hydrocarbon resources, 2) meeting the growing energy needs of the population and supporting economic development, and 3) respecting its obligations under the UNFCCC. The new regime sets up mechanisms to regulate prospecting, exploration, and exploitation of hydrocarbons as well as the sharing of oil revenues.

### 4. *Electricity and Energy Act*

According to Article 40 of the *Electricity and Energy Act*, the granting of concessions and licenses as well as the selection of operators is done by the electricity authority in compliance with principles of fairness, transparency, and non-discrimination.<sup>140</sup> However, this transparency mechanism is not yet operational. The energy sector regulator has not yet been created because of delays in the text's implementation, thereby strongly limiting the capacity of the DRC to meaningfully engage with the Paris Outcome's transparency provisions.

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<http://congominer.org/system/attachments/assets/000/000/463/original/POM-2012-Propositions-amendement-code-minier.pdf?1430928856>.

<sup>136</sup> Democratic Republic of the Congo, Secteur des Hydrocarbures, Rapport ITIE RDC 2011, at 5, online: <https://eiti.org/files/Rapport%20ITIE%202011%20Hydrocarbures%20%20vf.pdf>.

<sup>137</sup> Democratic Republic of the Congo, Comité Exécutif de L'Initiative pour la Transparence dans les Industries Extractives, Rapport ITIE RDC 2014, at 7, online: [https://eiti.org/files/rapport de conciliation itie rdc 2014 - final.pdf](https://eiti.org/files/rapport%20de%20conciliation%20itie%20rdc%202014%20final.pdf).

<sup>138</sup> *Ibid.*, at 105.

<sup>139</sup> Democratic Republic of the Congo, *Loi sur le régime général des hydrocarbures, Loi Numéro 15-012 du 1er août 2015*.

<sup>140</sup> Democratic Republic of the Congo, *Loi relative au secteur de l'électricité, Loi N°14/011 du 17 juin 2014*.



## 5. Forest Code

The DRC's forests occupy 52% of the territory and are largely unexploited. The authorities recently announced their intention to lift the moratorium on the granting of new logging titles, which had been in place since 2002.<sup>141</sup> That year, 163 logging titles have been recovered by the state for a total area of 25.5 million hectares. In 2005, 24 other titles representing an area of approximately 2,800,000 hectares were recovered.<sup>142</sup>

The *Forest Code* is a fundamental element of the natural resources management framework in the country.<sup>143</sup> Despite some positive developments driven by *Act No. 011/2002* of 2002 on publicity, however, there remain weaknesses that have been highlighted through the reports of several national and international agencies.<sup>144</sup> The implementation of the REDD+ framework in the DRC in this context is a challenge and requires the design of new mechanisms to clarify the rules of access to resources and profits distribution, as well as the establishment of territory management mechanisms and development planning incorporating the cross-sectorial dimension of REDD+.<sup>145</sup>

## 6. Agriculture Act

The *Agriculture Act* establishes fundamental principles relating to agriculture and rural development and adopts an integrated approach to conservation, exploration, collection, and sustainable use of plant genetic resources for food and agriculture.<sup>146</sup> This law was closely followed by the adoption of the National Agricultural Investment Plan.<sup>147</sup> Several risks impede the implementation of both instruments in a way compatible with international sustainable development law and the Paris Outcome. These include (i) lack of institutional and human capacity for the implementation of agricultural programs, (ii) lack of capacity to mobilize external financial resources, (iii) lack of access to information by stakeholders regarding the law's implementation process, (iv) the socio-political crises in the country, (v) the international economic

<sup>141</sup> Stuart Winter, "Rainforest TWICE the size of France in danger of being destroyed by loggers", *Express*, March 2, 2016, online: <http://www.express.co.uk/news/nature/649174/Rainforest-TWICE-France-torn-down-by-loggers>.

<sup>142</sup> Joël Kiyulu & Augustin Mpyoi Mbunga, *Mécanismes d'amélioration de la gouvernance forestière en République Démocratique du Congo - Rapport national d'études juridiques et socio-économiques*, International Union for Conservation of Nature, August 2007, online: [https://cmsdata.iucn.org/downloads/2\\_10\\_drc\\_svbc\\_assessment\\_1.pdf](https://cmsdata.iucn.org/downloads/2_10_drc_svbc_assessment_1.pdf).

<sup>143</sup> Democratic Republic of the Congo, *Loi n° 011/2002 du 29 août 2002 portant sur le code forestier*, Articles 2, 4, 7, 10, online: <http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/Annex16.pdf>.

<sup>144</sup> See generally: Democratic Republic of the Congo, "Cinquième rapport national sur la mise en œuvre de la Conservation sur la Diversité Biologique" République Démocratique du Congo, Juin 2014, online: <https://www.cbd.int/doc/world/cd/cd-nr-05-fr.pdf>.

<sup>145</sup> Democratic Republic of the Congo, *Stratégie-cadre nationale REDD+, 3<sup>rd</sup> Version*, 2013, p. 70, online: [https://www.forestcarbonpartnership.org/sites/fcp/files/2013/june2013/strategie-cadre\\_nationale\\_redd\\_de\\_la\\_rdc\\_version\\_3.pdf](https://www.forestcarbonpartnership.org/sites/fcp/files/2013/june2013/strategie-cadre_nationale_redd_de_la_rdc_version_3.pdf).

<sup>146</sup> Democratic Republic of the Congo, *Loi n° 11/022 du 24 décembre 2011 principes fondamentaux relatifs à l'agriculture*, Preamble, Article 5, online: <http://www.leganet.cd/Legislation/Droit%20economique/Agriculture/RDC%20-%20Loi%20agriculture%20principes%20fondamentaux-%2024%2012%202011.pdf>.

<sup>147</sup> Democratic Republic of the Congo, *Plan national d'investissement agricole 2014-2020*, September 2012, at 10, online: <http://faolex.fao.org/docs/pdf/cng146463.pdf>.

and financial crises, (vi) the energy crisis, (vii) lack of coordination of development support and lack of harmonization of technical and financial partnership procedures, (viii) lack of transparency in administrative management, (ix) the volatility of world prices for agricultural products, and (x) climate change.<sup>148</sup> A feedback loop situation may emerge, with climate change impacts on the DRC being both a cause and a possible consequence of the limited implementation of the *Agriculture Act* and of the National Agricultural Investment Plan.

### Key Transparency-Related Issues

Consideration of the DRC's legislative and policy frameworks from the perspective of the New Delhi principles allows identifying different transparency-related issues, which were alluded to in the previous section. Important barriers to good governance and transparency in the management of the DRC's rich natural resources include the limited capacity of the judicial system and of the regulatory bodies in the industrial, energy and transport sectors, as well as challenges addressing corruption.<sup>149</sup> Development is occurring following protracted periods of internal armed conflict in the 1990s, and in the context of ongoing conflict continuing to this day in the eastern parts of the country. Many of the legal texts and institutions that we have discussed contain useful provisions for the DRC's participation in the Paris Outcome's transparency provisions, especially inasmuch as mining and forestry are concerned, but face problems of impunity, inconsistency, and lack sanctions. At their best, the Paris Outcome and the sustainable development principles can provide incentives for the country to pursue a larger project of building good governance and fostering political and social stability. Stronger political will is necessary, however, to consider the exploitation of the country's rich natural resources from a perspective that goes beyond industrial operation by local and foreign actors, and that generates long-term benefits for the country's population.

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<sup>148</sup> See generally: Tanguy Smoes, "Agricultural Development in the Democratic Republic of the Congo (DRC)" *Global Growing Casebook: Country Analysis DRC* (2012), at 44-85, online: [http://global-growing.org/sites/default/files/GGC\\_DR Congo.pdf](http://global-growing.org/sites/default/files/GGC_DR Congo.pdf).

<sup>149</sup> See generally: Marie Chêne, "Overview of Corruption and Anti-Corruption in the Democratic Republic of the Congo" Transparency International (2014), online: [http://www.redd-monitor.org/wp-content/uploads/2015/05/Country\\_Profile\\_DRC\\_2014.pdf](http://www.redd-monitor.org/wp-content/uploads/2015/05/Country_Profile_DRC_2014.pdf); African Development Bank, "Democratic Republic of Congo: 2013-2017 Country Strategy Paper" (June 2013), online: <http://www.afdb.org/fileadmin/uploads/afdb/Documents/Project-and-Operations/Democratic%20Republic%20of%20Congo%20-%202013-2017%20-%20Country%20Strategy%20Paper.pdf>.

## CONCLUSIONS

By relying on transparency-oriented provisions, the recent Paris Outcome sets out an approach to the performance of Parties' under the UNFCCC that strives to be facilitative, non-intrusive, and non-punitive. It suggests an intention of the Parties to favour dialogue and evidence-based arguments regarding their respective climate change actions, and to rely on interactions between states, international organisations, corporations, and civil society to correct inadequate performance, rather than formal recourses, rights of action, and sanctions. The provisions on the Nationally Determined Contributions (Articles 3 and 4), the Transparency Frameworks on Climate Change Action and Support (Article 13), the Global Stocktake (Article 14), and the Implementation and Compliance Committee (Article 15) that we have analysed in this working paper are particularly reflective of this orientation.

We have shown how the transparency provisions on which the Paris Outcome relies to achieve compliance are intimately related to the seven dimensions of international sustainable development law. Specifically, the ILA New Delhi principles on sustainable development point to a rich ecosystem of pre-existing legal rules and principles that are directly relevant to understanding the contours and content of the provisions described in Part 1 of this working paper. International law on sustainable development that is briefly explained in Part 2 is highly relevant to the implementation of the Paris Outcome's transparency provisions in domestic jurisdictions around the world, because of its multiple areas of overlap with the *Paris Agreement*. Each Party to the new treaty, based on its unique circumstances and specific institutional architecture, should thus benefit from considering sustainable development law and the Paris Outcome jointly at the moment of adapting its laws and policies to participate effectively under its transparency provisions. The same observation applies to the research agenda on the Paris Outcome looking forward.

Our analysis suggests that international law on sustainable development not only establishes additional requirements for the complex institutional reforms to be conducted by state Parties to the new *Paris Agreement*. It can also be part of the solution. The principles of integration and interrelationship, the human rights of access to information, public participation in decision-making, and access to justice, and the principles of good governance, subsidiarity, and precaution have relevance to compliance with the Paris Outcome because they identify concrete standards, concepts, and principles for the implementation of its transparency-based provisions. The challenges faced and progresses made by Bangladesh, Canada, Brazil, and the Democratic Republic of the Congo, as discussed in Part 3, show how that the sustainable development perspective can be relevant for all Parties to the *Paris Agreement* at the moment of engaging with the Nationally Determined Contributions, Transparency Frameworks, Global Stocktake, and Implementation and Compliance Committee. The Analytical Table of Case Studies presented in Appendix 1 summarises certain processes of domestic institutional reforms relevant to compliance with these provisions and shows the variety of opportunities for input from international sustainable development law.

As UNFCCC Parties consider the ratification of the *Paris Agreement* and as all stakeholders prepare for COP22 in Marrakesh, monitoring domestic law and governance initiatives and diffusing knowledge as to

the rich international law ecosystem in which they grow will be highly beneficial to the success of the four transparency-based provisions in the Paris Outcome, and of this historical agreement more generally.

In this context and based on our country case studies, we recommend the following avenues for action at the intersection of the Paris Outcome and international sustainable development law:

- 1) **Increase institutional readiness of state Parties to report on the implementation of their climate-related measures.** Examples include Brazil's National Policy on Climate Change and Bangladesh's Climate Change Strategy and Action Plan. These developments should contribute to satisfying the international legal principles of integration, subsidiarity, transparency, and accountability.
- 2) **Increase institutional readiness to channel international cooperation.** Examples include Bangladesh's Climate Change Trust Fund and Climate Change Resilience Fund. Institutional change should allow both developed and developing state Parties to implement the duty of nations to co-operate with one another.
- 3) **Increase scientific capacity regarding climate mitigation and adaptation.** Examples include the Brazilian Panel on Climate Change and System for the Monitoring of the Impacts of Climate Change. This should reflect the principles of transparency and precautionary approach to human health, natural resources, and ecosystems.
- 4) **Increase opportunities for public participation.** An example is the Brazilian Forum on Climate Change. These institutions should further the enjoyment of the rights of access to information and public participation, and the principle of good governance.
- 5) **Improve the governance of natural resources, including through participation in international frameworks.** Examples include Brazil's Rural Environmental Registry and the DRC's engagement with the Extractive Industries Transparency Initiative (EITI). These reforms should promote the sustainable use of natural resources, access to justice, and good governance, including transparency, financial accountability, fighting against corruption, and respect for human rights.
- 6) **Include a sustainable development component in the procedures of the transparency-oriented provisions of the *Paris Agreement* developed by the *Ad Hoc Working Group on the Paris Agreement (APA)* and the *Conference of the Parties serving as the meeting of the Parties to the Paris Agreement (CMA)*.** Of particular relevance are the modalities that will be applicable to the Nationally Determined Contributions (Articles 3 and 4), the Transparency Frameworks on Climate Change Action and Support (Article 13), the Global Stocktake (Article 14), and the Implementation and Compliance Committee (Article 15).

## APPENDIX 1: ANALYTICAL TABLE OF CASE STUDIES

	Bangladesh	Brazil	Canada	DRC
<b>Overview</b>	<p>Low GHG emitter per capita</p> <p>High vulnerability to climate change</p> <p>High involvement with the UNFCCC</p>	<p>Large GHG emitter in absolute terms</p> <p>Mega-diverse and Amazonian country</p> <p>High involvement with the UNFCCC</p>	<p>Large GHG emitter per capita</p> <p>Low involvement with the UNFCCC</p>	<p>Low GHG emitter per capita</p> <p>Important growth potential based on forests, hydro power, and mines</p> <p>Low involvement with the UNFCCC</p>
<b>Framework</b>	<p>National Adaptation Programme of Action, Climate Change Strategy and Action Plan, Climate Change Trust Fund, Climate Change Resilience Fund, <i>Disaster Management Act</i>, Renewable Energy Policy, etc.</p>	<p>Inter-Ministerial Committee on Climate Change, National Policy on Climate Change, System for the Monitoring of the Impacts of Climate Change, Forum on Climate Change, Panel on Climate Change, etc.</p>	<p>Canadian Intergovernmental Conference and related working groups, Low Carbon Economy Trust, Canadian Energy Strategy, Sustainable Development Strategy, etc.</p>	<p>National Climate Committee, Economic Governance Matrix, <i>Forest Code</i>, <i>Mining Code</i>, Extractive Industries Transparency Initiative, etc.</p>
<b>Key Issues</b>	<p>1) providing a comprehensive assessment of climate change impacts, 2) creating an enabling environment for technical and financial cooperation, 3) conducting a comprehensive review of all laws and policies.</p>	<p>1) accounting for GHG emissions reductions associated with land use, land use change and forestry (LULUCF), 2) specifying how international carbon market mechanisms will be implemented, 3) harmonizing state-level frameworks, 4) increasing institutional readiness despite periods of economic and political crises</p>	<p>1) accounting for GHG emissions reductions associated with land use, land use change and forestry (LULUCF), 2) estimating the upstream GHG emissions associated with major oil and gas projects, 3) harmonizing existing provincial frameworks, 4) providing equitable climate finance to developing countries and international initiatives</p>	<p>1) strengthening judicial and administrative institutions and fighting corruption, 2) addressing the shortcomings of the forestry and mining regimes, 3) creating an enabling environment for technical and financial cooperation</p>