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Combining Tools and Actors for a Better Enforcement: A Case of the 2015 Paris Agreement on Climate Change+

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Abstract. The Paris Climate Agreement can be seen as illustrating the evolution of how legal norms are enforced in international law. While the Agreement benefits from a carefully thought-out enforcement mechanism in the international legal order, with techniques that encourage compliance rather than sanction non-compliance, its enforcement is also supported by domestic legal orders. Indeed, the Paris Agreement benefits from both hard and soft enforcement mechanisms. Here, all techniques and all actors have a role to play. This contribution shows that in order to discern the enforcement mechanisms attached to a legal instrument, it is sometimes necessary to take a global and complex look at all legal orders, techniques and actors, since they can act in a complementary manner.

Keywords: Climate change, paris agreement, international environmental law, climate litigation, compliance, effectiveness, public actors, private actors

1. Introduction

The international climate regime as we know it today is the outcome of a lengthy process that started in 1988 with the establishment of an expert body, the Intergovernmental Panel on Climate Change (IPCC). In 1992, States then developed a specific international legal regime,[1] based on the United Nations Framework Convention on Climate Change (UNFCCC, 1992). With 198 contracting parties, the Convention lays down a general framework for cooperation. It determines the fundamental principles thereof and creates an institutional framework, including an annual meeting of the Parties, the COP. In 1997, the Kyoto Protocol set out concrete obligations for the reduction of greenhouse gas emissions relative to 1990 levels, but only for industrialised countries. Initially, these obligations were only imposed until 2012; after tough negotiations, the Protocol was extended for a second period which expired at the end of 2020. The regime applicable from 2021 onwards is

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1 See the definition of international regimes by S. Krasner (1983), *International regimes,* Cornell University Press, London, 2.

determined by the Paris Agreement and COP decision 1/CP.21 (which adopts and supplements the Agreement), both adopted on 12 December 2015 at the end of COP 21.

The Paris Agreement elicits mixed feelings. On the one hand, it is a real diplomatic success. With 195 parties today, it is already having an effect. A large number of countries have passed legislation to implement it.[2] Furthermore, when the US under Donald Trump withdrew from the treaty, it did not have the anticipated domino effect.[3] On the contrary, it has led the other States Parties to reaffirm their will to implement the Agreement. Many even claimed that the Agreement's implementation should be "irreversible" (at COP 22, during G20 summits, etc.).[4] The American withdrawal became effective on 4 November 2020, but one of the first decisions of Trump's successor Joe Biden, at the beginning of 2021, was to re-join the Agreement.

On the other hand, its provisions reveal real weaknesses. Indeed, the Parties' commitments may seem rather limited. The Agreement contains few substantive obligations and essentially procedural ones. Each Party must make a nationally determined contribution, with no external control over its content and level of ambition. While it must communicate this contribution to the Secretariat and update it regularly – always upwards –, it is entirely free to decide on its substance. Moreover, even though the Agreement provides that "Parties shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions" (Art. 4(2)), it does not impose a specific result in terms of greenhouse gas emission reductions. If a State fails to comply, no sanctions are provided for; the architects of the Agreement chose to focus on incentives instead. Indeed, even eight years after its adoption, the temperature limitation target set in the Agreement is still completely unrealistic based on our emissions' trajectories. While the international regime has enabled progress to be made, it is clear that at the same time, it is clearly inadequate[5]. Paradoxically, the gap between the targets set by governments and the necessary levels of mitigation, adaptation and funding continues to widen. This is established annually by the United Nations Environment Programme in its report entitled *The Emissions Gap,* which is released before each COP.[6] The latest report, published in 2022, estimates that the international community is falling far short of the Paris goals, with no credible pathway to 1.5°C in place. [7] In the same line, the IPCC's Working Group III for the Sixth Assessment Report points to a "consistent expansion of policies and laws addressing mitigation" which "has led to the avoidance of emissions that would otherwise have occurred and increased investment in low-GHG technologies and infrastructure."[8] However, it concludes that without a strengthening of policies beyond those that had been implemented by the end of 2020, "GHG emissions are projected to rise beyond 2025, leading to a median global warming of 3.2 [2.2 to 3.5] °C by 2100."[9]

Nonetheless, the Agreement's enforcement mechanisms were thought out and designed in a subtle way, and are rather innovative. Nothing was left to chance, as both the adoption and implementation of the Agreement depended on it. It was impossible to set up an international judicial review mechanism. This would have deterred many States from ratifying the Agreement. But it was necessary to include enforcement techniques. This was especially important as the States' commitments are nationally determined. Enforcing these commitments therefore constitutes the main purpose of the Agreement.

The enforcement of the Paris Agreement relies on a plurality of methods and actors. On the one hand, the current proliferation of climate proceedings in various domestic legal orders shows that judicial review of compliance (potentially leading to sanctions) is likely to play a key role in the enforcement of the Paris Agreement. "Hard enforcement" is very much a reality. On the other hand, while the architects of the Agreement excluded coercion

2 See the online database made by the Sabin Center/Columbia School of Law and the Grantham Research Institute on Climate Change and the Environment, https://climate.law.columbia.edu/content/climate-change-laws-world (last accessed 6 October 2023).

3 J. Watts (2017), World leaders react after Trump rejects Paris climate deal, *The Guardian*, 2 June.

4 See for instance https://unfccc.int/news/g20-leaders-says-paris-agreement-is-irreversible (last accessed 6 October 2023).

5 IPCC, *WGIII Report*, *op. cit.,* chapitre 14.

6 UNEP, *Emissions Gap Report 2022*, 27 October 2022 (https://www.unep.org/resources/emissions-gap-report-2022, consulté le 12 octobre 2023).

7 W. Steffen et al. (2015), Planetary Boundaries: Guiding human development on a changing planet, *Science* 13 Feb 2015, Vol. 347, Issue 6223, 1.

8 IPCC, 2022: *Summary for Policymakers*. In: Climate Change 2022: Mitigation of Climate Change. Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change [P.R. Shukla, J. Skea, R. Slade, A. Al Khourdajie, R. van Diemen, D. McCollum, M. Pathak, S. Some, P. Vyas, R. Fradera, M. Belkacemi, A. Hasija, G. Lisboa, S. Luz, J. Malley, (eds.)]. Cambridge University Press, Cambridge, UK and New York, NY, USA, p. 17.

9 *Ibid.,* p. 21.

and sanctions in the international legal order, they did not leave the Agreement without means of international enforcement. The absence of "hard enforcement" is counterbalanced by the introduction of "soft enforcement" mechanisms: the combination of a lack of judicial control and of an incentive and invitation to comply. Indeed, as well as developing sophisticated techniques to encourage the Parties to comply, the Agreement's architects created an opportunity for non-parties to the Agreement to give effect to the norm. Thus, the enforcement of the Paris Agreement relies on a multiplicity of techniques under international and national law. Certain techniques existing in domestic orders enable courts to ensure compliance with the Agreement by ordering sanctions in the event of non-compliance, thereby addressing the limitations of the international legal order; other techniques set out in the Agreement itself, and in some cases already in use within domestic orders, are designed to ensure compliance with the Agreement without judicial control and sanction, by encouraging and inviting compliance and by accompanying States that experience difficulties towards a return to compliance. As a result, in order to be fully understood and appreciated, the enforcement of the Paris Agreement invites us to reflect on the multiple ways this enforcement can be carried out, by adopting a view that is both global – across legal orders - and complex – through the combination of techniques. Enforcement of the Paris Agreement combines, in a very complementary manner, both hard and soft mechanisms. We will demonstrate here that while hard enforcement is essentially the result of a *de facto* transfer from the international legal order to domestic orders (**I**), soft enforcement rests on a convergence of the international and domestic orders (**II**).

2. The *de facto* Transfer of the Paris Agreement's Hard Enforcement into Domestic Orders

While the international legal order provides limited opportunities for enforcing the Paris Agreement through judicial review, this could take place at the domestic level. Domestic orders, through the intervention of the judge, can be seen here as a remedy for the weaknesses of the enforcement mechanisms of the international legal order.

(i) *The limits of hard enforcement mechanisms in the international legal order*

In theory at least, the Paris Agreement can give rise to the intervention of a judge or an arbitral tribunal in the event of a dispute between two or more States Parties regarding its application or interpretation. In Article 14, the Agreement refers to the dispute settlement clause included in the 1992 United Nations Framework Convention on Climate Change. It states that "The provisions of Article 14 of the Convention on settlement of disputes shall apply mutatis mutandis to this Agreement" (Art. 24). Article 14(1) of the UNFCCC provides that the Parties must endeavour to settle their disputes by diplomatic means. If this fails, Article 14(2) contains an optional clause for judicial and arbitrational settlement: the Parties may declare in advance that they accept the submission of disputes to the International Court of Justice or to an arbitral tribunal. This mechanism could in theory be activated in response to a violation of the Convention, especially as notions such as an injured State or "a dispute between any two or more Parties concerning the interpretation or application of the Convention" (and thus of the Agreement) should in this instance be understood quite broadly. The heart of the Agreement, which consists of obligations and tools to reduce emissions, presumably falls into the category of *erga omnes partes* obligations, ie they are owed to all parties to the treaty. Several Pacific Island States actually specified when ratifying the Agreement that their ratification did not constitute a waiver of the liability of other States under international law for the adverse effects of climate change. But in practice, because it is optional, this clause can hardly come into play. Indeed, it has not been very successful: of the 197 parties to the Framework Convention, only the Netherlands has accepted the jurisdiction of the International Court of Justice and the use of arbitration, while the Solomon Islands and Tuvalu have accepted the compulsory arbitration of Article 14(2). Because of the requirement for reciprocity, this clause could therefore only come into play to support arbitration proceedings between the Netherlands and Tuvalu or the Solomon Islands, or between Tuvalu and the Solomon Islands.

Theoretically, there could be other possible bases for the jurisdiction of an international court or arbitral tribunal, such as a bilateral or multilateral dispute settlement treaty providing for such jurisdiction.[10] Two parties to a dispute may also accept such jurisdiction after such dispute has arisen. However, judicial intervention remains

10 See the American Treaty on Pacific Settlement (Pact of Bogota), 30 April 1948, *United Nations Treaty Collection*, 1949, 85.

highly unlikely, as legal obstacles are coupled with the political reluctance of States. In any event, no dispute has been submitted to the ICJ or to an arbitral tribunal pursuant to the UNFCCC and, to our knowledge, this has never been seriously considered, despite the fact that many heated disputes have arisen. The advisory proceedings underway before the International Tribunal for the Law of the Sea, the International Court of Justice and the Inter-American Court of Human Rights could, depending on the content of the opinions delivered, pave the way for future litigation.

Thus, there are real limits to the hard enforcement mechanisms of the Agreement in the international legal order. They are therefore complemented by the possibilities for hard enforcement in domestic orders. Indeed, as the "regular" judge of whether international law is complied with internally, the domestic judge is bound to play a particularly important role here in the context of the contagious explosion of climate lawsuits.

(ii) ***The possibilities for hard enforcement in domestic legal orders***

Within internal orders, each State organises how compliance with internally applicable norms is reviewed. Once the Paris Agreement (or for dualist legal systems, the law transposing its content) is applicable and can be relied on in domestic courts, interested parties have several possibilities for enforcing these norms. Right away – through legal proceedings, trials and their outcomes – domestic courts are able to make up for the weaknesses inherent in the international legal order. This is what the hundreds of climate-related lawsuits taking place around the world already suggest. Around 2,300 climate-related lawsuits have been tried or are pending, and this number is still growing.[11] While they rely on many different grounds (Law revieuw, human and constitutional rights, duty of care. . .), and excluding those against companies, these lawsuits share a common goal: they challenge the lack of ambition of a State's climate policy and seek to force it to adopt measures to combat climate change. Climate change litigation challenging the behaviour of States – but also companies – in the face of climate change did exist in the United States and Australia before the Paris Agreement was adopted. However, the Agreement has been like an electric shock, leading to an increase in litigation beyond US borders. Thanks to the involvement of civil society, it has provided fuel for climate litigation in a decisive manner and offered national courts the opportunity to position themselves as key players of climate governance.

Legal action has also been brought by cities (Commune de Grande-Synthe in France), NGOs (Millieudefensie, Notre affaire à Tous. . .) groups of citizens (American children from Our Children's Trust, Swiss senior women, a law student from New-Zealand, etc.) against major corporations whose activities are allegedly causing global warming. Globalised and transnational, these proceedings in some respects break down national borders.[12] Faced with what is perceived as a failure on the part of public authorities or companies, the law is increasingly relied on and used as a "weapon" to serve various objectives: to encourage public authorities or companies to take stronger measures to mitigate climate change, to implement more ambitious policies, to obtain compensation for damage suffered, to stop a project that emits large quantities of greenhouse gas, etc.

The way it was designed, and even though its provisions have no or little direct effect, the Paris Agreement increases the pressure on States, including, and perhaps most importantly, at the domestic level. Indeed, the Agreement, in its design, combines the international definition of an ambitious collective goal of limiting global warming with an implementation tool, referred to as the nationally determined contributions, the content, form and scope of which are almost entirely up to the Parties, to whom a very wide discretion is thus given. What could be analysed as a congenital weakness of the Agreement has actually "boosted" climate litigation and allowed claimants to define effective legal strategies.[13] Although the provisions of the Paris Agreement are only one of the elements invoked amongst other rules of international law, the Agreement is generally at the heart of arguments as well as decisions. It is almost always the entry point for other rules of international law. The combination of international climate law rules and international human rights law rules is, for instance, increasingly invoked.[14] Courts are then asked to read the States' obligations regarding the protection of human rights in the light of their climate obligations, whether in a national court,[15] or before international human rights protection bodies

11 See the Sabin Center Climate Change Litigation databases https://climatecasechart.com// (accessed 6 October 2023).

12 See for instance "German court paves way for Peruvian farmer's suit against RWE," Reuters, 30 November 2017.

13 D. Estrin (2016), "Limiting Dangerous Climate Change: The Critical Role of Citizen Suits and Domestic Courts - Despite the Paris Agreement," *CIGI Papers*, N° 101, 2016, 5.

14 J. Peel, H. Osofsky (2018), "A Rights Turn in Climate Change Litigation?" *Transnational Environmental Law*, 7(1) 37-67.

15 See *Urgenda*, Supreme Court of the Netherlands, ECLI:NL:HR:2019:2007, Hoge Raad, 20-12-2019, para. 5.6.2.

such as the United Nations Committee on the Rights of the Child[16] or the European Court of Human Rights.[17] The *Urgenda* case demonstrated a particularly synergistic interpretation of a combination of customary norms (the Dutch duty of care or no harm rule), treaty rules under international human rights law, together with the objectives and principles of the UNFCCC.[18] This combination can be found in most similar cases, such as in Belgium, with Klimaatzaak, currently pending before the Brussels Court of Appeal, where the Court of First Instance found that there had been violations of Articles 2 and 8 of the European Convention on Human Rights, read in the light of the duty of care of the good family father (or the reasonable man in Common Law), a standard itself informed by the Paris Agreement.[19] It was also the case in France, with the "Case of the century". Here, in the light of international law (the UNFCCC and Paris Agreement), European Union law (the Climate and Energy Package) and domestic constitutional provisions (Article 3, Environmental Charter), the administrative judge decided that the State had accepted a "general obligation to combat climate change" and, more precisely, to reduce their greenhouse gas emissions.[20]

In climate litigations, international law is rarely applied directly, as a source of positive law, either because the legal system is dualist, or because the obligations in question are not viewed as self-executing and therefore cannot be directly invoked by individuals. However, the Paris Agreement, alone or in combination with other international obligations, has been successfully used in many cases to interpret domestic rules. The French climate case *Commune de Grande Synthe v. France* is a good illustration. The judge found that "Although the stipulations of the UNFCCC and the Paris Agreement (. . .) require the intervention of additional acts to produce effects with regard to individuals and are, therefore, devoid of direct effect, they must nevertheless be taken into consideration in the interpretation of the provisions of national law, in particular those (. . .), which, referring to the objectives that they set, are precisely intended to implement them."[21] In this instance, the court carries out a systemic interpretation (domestic law "in the light of," including all of the relevant legal elements, but also factual or even moral elements), a teleological interpretation (the aim is to limit temperatures as decided in the Paris Agreement) and/or an extensive interpretation. It has more discretion in its assessment of whether it is appropriate to use international law, as well as in the choice of sources relied on, which may include unratified treaties or soft law instruments. Indeed, as an interpretative source, the international norm becomes subsidiary, as it is not the implementation of the Paris Agreement that the claimants are asking for, but that national policies implement the country's international commitments or conform to a consensual standard of conduct.[22] The monist or dualist nature of the legal system thus becomes irrelevant.

3. The Convergence of Soft Enforcement Mechanisms in the Domestic and International Orders

In order to ensure the implementation of the Agreement through non-judicial means and without resorting to sanctions, and thus to make up for the fact that hard enforcement is almost impossible at the international level, the Agreement's architects paid greater attention to soft enforcement techniques. Here we see a sophistication of techniques. Contrary to hard enforcement mechanisms which are unified around judges and sanctions, soft enforcement mechanisms rely on a wide range of techniques and feature a variety of actors. In the international legal order, they encourage the Parties to comply with the Agreement; in the domestic orders, they invite non-parties to do so.

16 Petition before the Committee on the Rights of the Child on 23 September 2019, *Chiara Sacchi et al. v. Argentina, Brazil, France, Germany, Turkey*. Decision adopted by the Committee on the Rights of the Child under the Optional Protocol to the Convention on the Rights of the Child on a communications procedure in respect of Communication No. 106/2019, 21 September 2021.

17 With pending cases involving Portuguese youth, Swiss elders or an Austrian with temperature-dependent multiple sclerosis. O.W Pedersen, The European Convention of Human Rights and Climate Change - Finally! https://www.ejiltalk.org/the-european-convention-of-human-rights-and-climate-change-finally/ September 22, 2020 (last accessed 6 October 2023).

18 *Urgenda*, Supreme Court of the Netherlands, abovementioned, para. 5.7.5.

19 See their main conclusions.

20 Paris Administrative Court, France, 3 Feb. 2021/14 Feb. 2021, No. 1904967, 1904968, 1904972, 1904976.

21 Council of State, France, 19 Nov. 2020/1 July 2021, No. 427301.

22 K. Bouwer (2018), "The Unsexy Future of Climate Change Litigation", *Journal of Environmental Law*, 30(3) 492.

(i) *Soft enforcement by way of encouraging the Parties in the international legal order*

Provisions ensuring transparency and control are all the more important in a flexible system where contributions are determined by States themselves. The enhanced transparency framework has been referred to as the "*beating heart*" of the Paris Agreement.[23] It reintroduces more or less top-down aspects into an approach that is predominantly bottom-up. Importantly, it also creates trust between the States Parties, which has a positive impact on their willingness to increase their commitments. It also makes it possible to monitor the Parties' efforts, and to compare them with the target emissions trajectory. Negotiators were well aware of this and special care was dedicated to this matter on which a great part of the robustness of the Agreement depended. [24]

As regards transparency and control, the Paris Agreement merely lays down key principles in its articles 13 to 15. The Agreement outlines a process that respects state sovereignty but equally ensures the accountability of States. This procedure takes the form of a triptych composed of three - more or less distinct - parts: the transparency framework (Art. 13), the global stocktake (Art. 14), and the implementation and compliance mechanism (Art. 15).

In Article 13, the Agreement establishes an "enhanced transparency framework for action and support". However, while being referred to as "enhanced", this framework is also characterised by "built-in flexibility which takes into account Parties' different capacities" (Art.13(1) and 13(2)). It is specifically stated that this framework must be implemented "in a facilitative, non-intrusive, non-punitive manner, respectful of national sovereignty, and avoid placing an undue burden on Parties." Apart from these assertions designed to reassure the Parties, the transparency framework is based on an established system, i.e. the mechanisms, procedures, and obligations that exist under the Convention (Art. 13(4)). Article 13(5) goes on to give a "clear understanding" of the measures, "including clarity and tracking of progress towards achieving Parties' individual nationally determined contributions." This also applies to financial support measures, both received and provided, which means that information can be cross-checked here as well to provide a "clear understanding" (Art. 13(6)). The Parties are required ("shall") to "regularly" provide a national inventory report on anthropogenic emissions by sources and removals by sinks of greenhouse gases, prepared in accordance with the methodologies adopted by IPCC, and the information necessary to monitor progress in the implementation of their nationally determined contribution pursuant to article 4. In contrast, the Parties "should", rather than "shall", provide information on the support provided and received, especially as to whether it is "financial, technology transfer and capacity-building support" (Art. 13(9) and (10)).

An interesting feature is that this information is subject to a "technical expert review". This technical phase is followed by a political phase of "facilitative, multilateral consideration of progress" (Art. 13(11)). The technical review must "identify areas of improvement for the Party" (Art. 13(12)), which is in fact an understatement to refer to potential or actual infringements. The review assesses whether the information provided is consistent with the modalities, procedures and guidelines that will be established by the meeting of the Parties to the Agreement.[25] Support is provided to developing countries to assist them in the implementation of these provisions. Here the Northern countries lobbied – especially against the preferences of China and of many Southern countries – for the transparency system to be the same for all. Thus, even though this system focuses on facilitation, the outlined mechanism seems to be relatively intrusive for all. While it remains to be seen what operational details will be adopted by the meeting of the Parties, it currently seems that the system's individual nature, the wide range of information it requires as well as the dual intervention of an independent and impartial technical committee and the subsequent handover to a political body, possibly the COP, for the purpose of a multilateral review, will not make the system less intrusive for the time being.

The transparency framework, which consists of the individual review of the implementation of the Agreement by the Parties, is supplemented by the "global stocktake" contemplated in Article 14. The aim of this global stocktake is to assess the "collective progress", "in a comprehensive and facilitative manner, considering mitigation, adaptation and the means of implementation and support, and in the light of equity and the best available science" (Art. 14(1)). The first global stocktake will take place every five years. The first one

23 L. Rajamani, J. Werksman (2021), "Climate Change," *Oxford Handbook of International Environmental Law,* OUP, Oxford 505.

24 C. Voigt (2016), "The Compliance and Implementation Mechanism of the Paris Agreement," *RECIEL* 25 (2) 161-173.

25 See Decision 1/CP.21 (2015), para. 93.

is scheduled, without waiting for the end of the first cycle, at the end of 2023, and is supposed to be a key deliverable of COP 28. Yet, the States have taken further precautions. The assessment of this achieved collective progress will be facilitative (i.e. non-binding); it will consider "equity and the best available science." The reference to equity may leave the door open to a collective reflection as to the modalities of "burden sharing" in the light of the "common but differentiated" responsibilities of States in this regard.

The global stocktake, which covers mitigation and adaptation efforts as well as support measures, will play a significant role as "the outcome of the global stocktake shall inform Parties in updating and enhancing, in a nationally determined manner, their actions and support in accordance with the relevant provisions of this Agreement, as well as in enhancing international cooperation for climate action" (Art. 14(3)). This provision is evidently very carefully drafted. On the one hand, it clearly provides that the results of the stocktake will inform the determination of States' contributions. But on the other hand, it highlights that these are to be determined at national level. It should also be noted that the objectives as regards adaptation, finance or technology are, at least in the Agreement itself, qualitative rather than quantitative in nature, which introduces a degree of uncertainty in the assessment of collective progress.

The third component to ensure transparency is the non-compliance mechanism. This kind of mechanism is very common in international environmental law and its effectiveness has been demonstrated on numerous occasions in the past.[26] Apart from a number of common features, each procedure is ultimately unique. It will differ in terms of how it is initiated, the handling of presumed infringements or the reaction to a proven infringement. What is however common to all of these procedures, is that they aim to identify the challenges faced by States as early as possible and to address them through gradual and adapted means (support, incentives, sanctions). They tend to be facilitative and rarely lead to sanctions, which are generally counterproductive anyway. The goal is rather to prevent non-compliance and when it occurs, to assist States back to compliance. Pursuant to the Kyoto Protocol, a very intrusive procedure had been put in place that could lead to relatively hefty sanctions.[27] Praised as a remarkable innovation at the time, it also swiftly revealed its limits. In fact, Canada used its right to leave the Protocol in order to avoid its sanction under this procedure.

Since States apparently learned the lesson from this experience, and because the spirit of the Paris Agreement is very different from that of the Kyoto Protocol, the procedure chosen here is much more traditional. All the precautions were taken to prevent the Implementation and Compliance Committee from sanctioning a non-complying State. This approach is not without criticism. It has been condemned as one of the great weaknesses of the Agreement by several commentators.[28] In fact, this weakness goes beyond the Paris Agreement and is frequently observed in international law. The absence of sanctions in the Paris Agreement, at the end of the day, shows that lessons have been learned from the past. Since the spirit of the Paris Agreement is utterly different from the Kyoto Protocol, arguably sanctions would have been incompatible with the former. Beyond that, the question arises as to whether the effectiveness of international law depends solely on the ability to sanction non-compliance. In fact, in our view, it generally does not depend on it at all.

(ii) ***Soft enforcement by way of inviting non-parties to comply in internal orders***

Soft enforcement by way of inviting non-parties to comply with the Agreement was also carefully thought out by the Agreement's architects. While welcoming "the efforts of all non-Party stakeholders to address and respond to climate change, including those of civil society, the private sector, financial institutions, cities and other subnational authorities" (para. 133), the COP 21 decision that adopts and specifies the Agreement "*Invites* the non-Party stakeholders (. . .) above to scale up their efforts and support actions to reduce emissions and/or to build resilience and decrease vulnerability to the adverse effects of climate change and demonstrate these efforts via the Non-State Actor Zone for Climate Action platform" (para. 134), a network created at the instigation of France, Peru and the UN Secretary General on the occasion of COP 20 in Lima. Thus, in a novel way, assuming that the actions of these non-parties can converge with the objectives set by the Agreement and/or the national contributions, the Paris Agreement invites them to take action. Therefore, the enforcement of the Paris Agreement

26 See for instance, M. Koskenniemi (1992), "Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol," *Yearbook of International Environmental Law*, Volume 3, Issue 1, 123.

27 See Decision 27/CMP.1 (2005), *Procedures and mechanisms relating to compliance under the Kyoto protocol.*

28 For instance, D. Gros (2015), The Paris Agreement Is the Shove the World Needs, *Slate,* 14 December 2015.

could be underpinned in an original way by the actions within domestic orders of actors not directly targeted by the Agreement.

Like the limits on hard enforcement by way of sanctions in the international legal order and the preference for soft enforcement by way of incentive, enforcement by way of invitation stems here from a realistic and pragmatic view of the conditions governing the effectiveness of the Agreement. On the one hand, non-parties – in particular sub-state actors (cities, regions, federated states, etc.) and private actors (companies and investors) – can and do play an important role in the fight against climate change. They are the addressees of the internal norms adopted by States to implement their international commitments, but they can also take action of their own accord and do more through voluntary initiatives, ie a variety of voluntary commitments (adherence to greenhouse gas emission accounting systems, commitments to increase their reduction, etc.) which are seen today as the normative manifestations of corporate social responsibility.[29] Given the risk that States might not comply with the Agreement and because we know that, taken all together, States' contributions are not enough to achieve the objective of limiting temperatures as set out in the Agreement,[30] it is therefore appropriate to mobilise these actors. On the other hand, they are not parties to the Agreement and therefore cannot be directly targeted by its provisions. The drafters could not impose on them obligations that could be sanctioned in the event of non-compliance, nor procedural obligations of transparency that would ultimately allow their measures to be monitored. It is therefore understandable that they chose to "invite" them to act by promoting their initiatives. While leaving them free to act as they wish, the Agreement again relies on transparency to make their actions visible. However, this technique is not as "proceduralised" as it is for States Parties. No monitoring system exists at the moment, although the UN Secretary General announced the creation of a high-level expert group for this purpose during COP 26.

Nonetheless, the reality is that initiatives have consistently increased since the adoption of the Paris Agreement. They also grew strongly following the announcement of the US withdrawal from the Paris Agreement. They are spreading under the impetus of networks bringing together regions, cities and federal states, and private actors such as companies and – increasingly – investors, as in the case of organisations like C40 Cities, R20, Greenhouse Gas Protocol, WE MEAN BUSINESS, Institutional Investors Group on Climate Change (IIGCC) or WE ARE STILL IN. As highlighted by some authors,[31] these actors aim not only to help their members strengthen their climate efforts by encouraging the sharing of information on best available techniques for reducing and accounting for GHG emissions, but also to connect them with investors to support their energy transition.

Thus, day after day, non-parties are becoming key actors in giving effect to the Paris Agreement. They do so in two different ways: on the one hand, through their initiatives, they enable States Parties to fulfil their main obligation, which is to take measures to achieve the objectives of their national contribution. Here non-parties are contributing to the implementation of the Agreement. On the other hand, these initiatives can also be seen as a response to the failure of the Parties to the Agreement. Thus, the WE ARE STILL IN network intends to implement the objectives of the Paris Agreement through the initiatives of its members. In this case, these initiatives are a "substitute" for States who are failing to fulfil their obligations. It is no longer a question of collaborating with the State to help it meet its obligations, but to fulfil them in its place. However, since they cannot be parties to an international agreement, these actors only play the role of 'guarantor' by voluntarily implementing a key instrument that is not directly addressed to them.

Of course, like all the above-mentioned enforcement techniques, the effectiveness of this "invitation" remains conditional. It depends both on what domestic law imposes on these actors and on the added value of the measures that the latter adopt beyond that, without constraints. However, upon examination, domestic law can already play an important role, through the intervention of lawmakers as well as the courts. It calls for better voluntary commitments and the combination of soft and hard enforcement mechanisms.

On the one hand, it is worth noting that some countries, including members of the European Union, have adopted *environmental reporting* systems pursuant to which a number of large companies are required to disclose

29 G. De Lassus Saint-Geniès (2016), "À la recherche d'un droit transnational des changements climatiques," 1 *Revue juridique de l'environnement,* 81 and following.

30 See UNEP (2021), *Emissions Gap Report 2021, The heat is on. A world of climate promises not yet delivered*, abovementioned.

31 See for instance T. Hickmann (2016), *Rethinking Authority in Global Climate Governance, How transnational climate initiatives relate to the international climate regime*, Routledge.

to shareholders and the public certain non-financial information about their climate commitments.[32] Companies are thus encouraged to take action in order to protect their good reputation on the market, to reassure investors and shareholders and to avoid legal sanctions in case of non-compliance. Furthermore, the European Parliament has adopted its position on the proposed directive on corporate sustainability due diligence.[33] In the future, based on the mechanism that already exists under French law and was created by the "Duty of vigilance" Act" in 2017,[34] these companies should be required to draw up and implement a vigilance plan containing measures to prevent environmental damage caused by their activities and those of their subcontractors and suppliers. It will then be through hard law that companies will be required to take action that will incidentally be beneficial to the implementation of the Paris Agreement.

On the other hand, through the action of the courts, companies are increasingly ordered both to commit to reducing their greenhouse gas emissions and to fulfil these commitments. While the growing risk of a legal sanction – hard enforcement – no longer constitutes an invitation but an incentive – soft enforcement –, the sanction itself forces the company to take action or to scale up its efforts and reinforces the initially soft enforcement mechanism set out in the Paris Agreement. Again, this is evidenced by the climate trials taking place around the world. Initiated in the US, where they have so far failed to produce results, climate lawsuits against companies are increasing in other countries. Already, in the wake of the *Urgenda* case, the Dutch court in The Hague has condemned Shell for its contribution to global climate change and its consequences at the local level, following a liability action brought by environmental organisation Milieudefensie.[35] Relying to hard and soft law instruments, international or domestic, including on the various voluntary acts demonstrating that the company had itself incidentally agreed to ensure that its activities (and those of the companies within its sphere of influence) reduce their greenhouse gas emissions, the Court found that Shell had failed to comply with the duty of care imposed on it pursuant to Article 6:162 of the Dutch Civil Code. Accepting in this case to take into account new social expectations in order to adapt the content of this duty of care and to play a preventive role, the judge asked Shell to strengthen its GHG reduction policy. In this litigation, the Paris Agreement was widely invoked by the plaintiffs. They asked the defendant (Royal Dutch Shell) to set up some new policy standards to respect the Paris Agreement's goals. Above all, in its reasoning, the Court noted that "The non-binding goals of the Paris Agreement represent a universally endorsed and accepted standard that protects the common interest of preventing dangerous climate change" and added that these goals played a role in "its interpretation of the unwritten standard of care". As the judge said: "that it is generally accepted that global warming must be kept well below 2oC in 2100, and that a temperature rise of under 1.5oC should be strived for" (4.4.27). In other words, the decision shows that it is possible to use the Paris Agreement's Article 2 to assess the expected behaviour of companies. This is quite significant in the context of our analysis: without being a party to the Paris Agreement, the oil company is incidentally required to participate in the implementation of its objectives.

In addition, because this duty of care is recognised in civil law as well as common law countries (under different ways of course), its use in climate litigation is likely to expand and encourage other *carbon majors* to strengthen their climate policy.

In France, several climate change cases against big transnational companies are now relying on this type of reasoning. For instance, in "Notre affaire à tous v. Total Energies" case (filed in 2020), the plaintiffs asked the judge to condemn the French company for its violation of the statutory duty of vigilance (in the Commercial Code) but also the violation of the general duty of vigilance recognized in the Civil Code. To do that, the plaintiffs asserted that: "The lack of an objective to mitigate direct and indirect emissions generated by TOTAL's activities as well as the lack of a precise schedule for emission reduction going as far as 2050, in line with the IPCC's

32 Directive 2014/95/EU of the European Parliament and of the Council of 22 October 2014 amending Directive 2013/34/EU as regards disclosure of non-financial and diversity information by certain large undertakings and groups Text with EEA relevance, OJ L 330, 15.11.2014, 1-9.

33 Proposal for a Directive of the European Parliament and of the Council on corporate sustainability due diligence and amending Directive (EU) 2019/1937, COM/2022/71 final. See on this subject, the Report of the Club des Juristes: https://think-tank.leclubdesjuristes.com/les-commissions/publication-du-rapport-devoir-de-vigilance-quelles-perspectives-europeennes/

34 Article L. 225-102-4 of the French Commercial Code, 27 March. 2017 Act.

35 The Hague District Court, 26 May 2021: http://climatecasechart.com/non-us-case/milieudefensie-et-al-v-royal-dutch-shell-plc/ (last accessed 13 October 2023).

work and the Paris Agreement, overall constitute a failure in vigilance" (2.3.3. of the complaint)[36]. admittedly, the Paris judicial court declared the action inadmissible on July 5, 2023 for procedural reasons. However, the case is still pending, and we'll have to wait for the appeal decisions to find out what the judge thinks of invoking the Paris Agreement and the role it can play in assessing corporate behaviour.

4. Conclusion

An analysis of the enforcement techniques of the Paris Agreement provides two main lessons. On the one hand, the assessment shows the variety of enforcement techniques - litigation, transparency, voluntary instruments. It is based on various tools from various legal orders, domestic and international, producing various, gradual effects, from sanction to incentive to invitation, and implemented by various actors, some acting through control mechanisms – either because they carry out such control (the judge for hard enforcement and experts for soft enforcement), or because they instigate it (plaintiffs in legal proceedings) –, others acting of their own accord and sometimes outside of any control.

In addition to that, the analysis demonstrates the complementarity of enforcement techniques. While each technique has its advantages and disadvantages (sanctions allow compliance to be enforced but are counterproductive in international law; incentives are more appropriate but may not be effective in practice), it is only when taken together, as part of a global and complex vision of the law, that these enforcement techniques prove to be complete. Indeed, the soft law techniques of the Paris Agreement, which are deployed in both the domestic and international legal orders, play an essentially preventive and incentivising role. If soft law fails or is insufficient, hard enforcement mechanisms can come into play. In this situation, the benefits of sanctions resurface.

Despite the way in which the Paris Agreement was designed, and even though its provisions have no or little direct effect, the Agreement increases pressure on States, including - and perhaps most importantly - at the domestic level. As scientists continue to warn about the race against time when it comes to climate change, and given that greenhouse gas emissions are cumulative, any delay in international action jeopardises the chances to actually hold the temperature increase well below 2°C and *a fortiori* below 1.5°C. In the light of the findings of the IPPC-1.5°C-Report[37] and the IPCC's Sixth Assessment Report (AR6),[38] and the growing mobilisation of civil society, it becomes ever more difficult politically speaking for States to stick to national contributions that, once aggregated, could not lead to a drastic reduction of emissions that would remain "well below 2°C" and as close as possible to 1.5°C. The Paris Agreement has significantly contributed to increasing the number of domestic climate trials thanks to the involvement of civil society. This has given national courts the opportunity to position themselves as important actors in climate governance. Even if the results are not yet satisfactory (*will* and even *can* they be?), this somewhat renewed form of international commitment by the States has in turn led to renewed forms of control that - hopefully - will lead to greater effectiveness.

36 https://climatecasechart.com/non-us-case/notre-affaire-a-tous-and-others-v-total/

37 IPCC (2018) *Global Warming of 1.5°C. An IPCC Special Report on the impacts of global warming of 1.5°C above pre-industrial levels and related global greenhouse gas emission pathways, in the context of strengthening the global response to the threat of climate change, sustainable development, and efforts to eradicate poverty*.

38 IPCC (2023) *Climate Change 2023: Synthesis Report. Summary for Policy Makers. A Report of the Intergovernmental Panel on Climate Change:* https://www.ipcc.ch/report/ar6/syr/downloads/report/IPCC_AR6_SYR_SPM.pdf (last accessed 13 October 2023).