

The Atmosphere the Paris Agreement and global governance

The 2015 Paris Agreement on climate change set a remarkable precedent for speed of entry into force of a global treaty. With the threshold of 55 parties and 55% of greenhouse gas emissions being reached within a year of its adoption, the agreement entered into force before the following Conference of the Parties (COP22) in Marrakech (November 2016). By the end of COP22 there were over a hundred ratifications.¹ This was both a vote of confidence in the agreement and a sign of the strong international commitment to tackle climate change. Less obvious is the fact that the agreement reflects a new model of international governance of climate change, in which the role of the central legal instrument has changed. It is yet to be tested, but these early signs of confidence augur well.

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In the earlier days of climate change negotiations, with the impetus coming largely from the Western powers, there was a widely shared assumption that a legally binding instrument was necessary to address this global commons problem. According to this view, it was axiomatic that to be effective, and to deal with the 'free-rider' problem, a compliance mechanism with sanctions was needed. Another assumption was that any agreement needed to be 'top-down', a term frequently used in and around the negotiations, but somewhat lacking in precision. The ultimate expression of 'top-down' perhaps was the referral of climate change to the United Nations Security Council,² the highest authority among states. It also included the concept that legal obligations would cascade down to individual states from the global level, distributed according to a burden-sharing principle.

The first and still the core international treaty on climate change, the United Nations Framework Convention on Climate Change (UNFCCC), only partly

satisfied these requirements. It was ‘top-down’ in that it defined the problem and set out some global goals. It included a burden-sharing principle, ‘common but differentiated responsibilities and respective capabilities’ (known as CBDR, but more correctly CBDR-RC, to give full weight to ‘respective capabilities’, an aspect that was later to become important in the negotiations). While the convention contains a general legal obligation on all parties to take action on climate change, this is not expressed in state-specific or quantified obligations, unlike the treaties on ozone or acid rain which had been seen as models.

The second climate change treaty, the Kyoto Protocol, came closer to satisfying the early assumptions through a quantified collective (but not global) goal, quantified, country-specific commitments and a compliance mechanism with sanctions. But these applied only to Annex I parties, broadly speaking those who were in the OECD in 1990 and the economies in transition of Eastern Europe. It was intended as a first step, with industrialised countries taking the lead. But it was adopted without a clear route towards expanding the number of parties with commitments, so could not hope to achieve the core objective of the convention. Of course the failure of the United States to ratify meant that the protocol could not fully achieve even its more limited objective.

Shortcomings of the top-down model

Difficulties with the top-down model were apparent when the Kyoto Protocol’s trigger point for negotiating further commitments was reached in 2005. Extending legally binding obligations to all parties proved a huge obstacle. The first attempt led to a two-track negotiation of unequal legal status, with one element being the further legally binding commitments under the protocol for Annex I parties, the other a ‘cooperative dialogue on long term cooperative action’ under the convention (LCA), with any new commitments excluded. The two tracks persisted, with the second one gaining status as a full negotiation only from 2007.³

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accept legally binding obligations, there was little prospect that a fully universal climate regime could replicate the Kyoto model. There were other difficulties too. Climate change reaches far more deeply and widely into sensitive areas of domestic policies than the environmental precedents of ozone and acid rain. Some states rejected the limitations on sovereignty that a binding commitment would entail. They were also reluctant to make ‘targets and timetables’ commitments far into the future because of the many uncertainties and risks they saw. If, despite these kinds of concerns, states are pushed into adopting binding

‘national circumstances’, for the most part to demonstrate the difficulties they would face in meeting an ambitious target. New Zealand’s list includes its high percentages of renewable electricity and of emissions from agriculture.

What of the convention’s CBDR principle? On the face of it this could be used to apply fairly to all parties, especially when full weight is given to ‘respective capabilities’. Unfortunately, the principle had a legacy in the negotiations that was synonymous with the dichotomy of Annex I parties with binding quantified commitments and all other parties without them. There was a

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commitments, they will be cautious and any targets will be conservative.

Notwithstanding the manifest problems with the Kyoto model, many parties wanted to pursue it, with the European Union and the small island states prominent, and the latter prepared to break ranks with the G77, which was dominated by the larger states.

Another obstacle was that it was proving impossible to agree on burden-sharing criteria. In a context of a long-term agreement, some common understanding on burden-sharing is critical. There was then, as now, no shortage of burden-sharing methods, the subject of much work by academics. But all are problematic in the real world; none would be considered ‘fair’ by all countries. For example, basing the burden-sharing on per capita emissions, as many advocate, would directly oppose the two most populous countries, China and India; it suits the latter but not the former. Any burden-sharing principle is subject to challenge by countries listing

disincentive on parties to agree to shift from the commitment-free zone, hence the absurdity of some of the wealthiest countries in the world invoking CBDR to maintain their status quo. The United States stated clearly in the negotiations that it had no difficulty with the principle per se. But because of how it was being interpreted by many parties, retaining it unchanged in a new agreement was unacceptable. The dichotomy of CBDR reflected the 1990 world economy, the negotiations were taking place a quarter of a century after this, and the new agreement would need to look out towards mid-century. The biggest change factor was the emerging economies, with China in particular overtaking the United States as the world’s highest emitter, and the emerging economies as a whole being responsible for most of the growth in global emissions.

Another weakness of the model, in the light of the evolution of the world economy, was the absence of non-state actors. Local government (especially

major cities) and business, two key sectors in the mitigation of greenhouse gases, were involved only on the periphery of the climate regime, and mostly informally. Local government everywhere was having to deal with the challenge of adaptation, which led to them addressing mitigation as well. As for business, aside from their own recognition of climate change, there was convergent evidence through economic analysis that most of the investment to achieve the transition from fossil fuels to clean energy would need to come from the private sector (UNFCCC, 2007, 2008).

These difficulties combined with poor handling of the conference to derail the Copenhagen COP in 2009. But the failure of the formal negotiations was accompanied by a politically conceived

agreement negotiated among political leaders of only a small number of parties, attracted more participants with pledges in the months following the conference. The following COP at Cancun brought the gains of the Copenhagen Accord into the UNFCCC, and its legacy is seen in the current 2020 pledges. But it takes time for such evolution in thinking to find its way into the formal negotiations, so anyone listening in on subsequent meetings would not have noticed much new.

Only with the 2011 Durban mandate was the basis for the Paris Agreement laid. Finally there was to be an agreement 'applicable to all', with no *prima facie* binary division. To achieve this required a continuation of Kyoto's commitment periods until 2020. The last point to be resolved was over legal 'bindingness'. An

a compliance mechanism through heightened transparency, and reporting and review rules. This had been formalised as early as the 2007 Bali negotiating mandate and taken somewhat further in the Copenhagen Accord.

An advance in thinking aided by some further research was the idea that the way to reconcile the disagreement over legal form was a 'hybrid' agreement, with the core disciplines split between binding and non-binding. There was no appetite for an agreement that would need continued renegotiation, so it was important to find an outcome that would be future-proof and able to attract universal or near-universal participation. There was much exploration following Durban of which elements of an agreement might be in each category.

Discussions after Durban produced a further refinement on burden-sharing. Whereas CBDR was absent from the Durban mandate (except as implied by its reference to the negotiations being under the convention), it subsequently returned with some additional words, 'in the light of different national circumstances'. This modification of CBDR lessened its *de facto* inflexibility. It allowed individual parties more confidence that their own circumstances could be recognised. This was consistent with the term 'nationally determined', which was often interpreted as a shift to a 'bottom-up' model. But equally it lessened the scope for countries to shelter behind the dichotomy to avoid making a fair contribution.

The period after Copenhagen was also notable for the efforts by successive COP presidencies to facilitate greater involvement by business. Mexico and France were the most successful. Local government also had a growing presence at COPs. These sectors came together at high level at the mid-point of COP21 (2015) to throw their weight behind an agreement, two further sides of a global leadership triangle whose first side was the 150 heads of state and government at the beginning of the conference. A powerful argument was that both local government and business were taking action on climate change independently of the UNFCCC, but that a new global

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pivot towards a different model through the Copenhagen Accord. The accord was silent on the Annex I/non-Annex I dichotomy, instead referring to developed and developing countries. It was neither legally binding nor 'top-down'. Copenhagen indeed stimulated much rethinking about binding versus non-binding agreements, helped by research which demonstrated that the correlation between 'bindingness' (an awkward neologism that emerged from the negotiations) and effectiveness was weak (Bodansky and Diringer, 2010). Some advocates of a legally-binding agreement came to realise that the most important objective was to get a universal agreement which could deliver emissions reductions by all parties.

It was realised that other factors, such as reputation, could also be an incentive for action. The Copenhagen Accord itself, despite being voluntary and a side-

explicit mandate for a legally binding agreement was needed by the European Union, but was unacceptable to India. In the final moments of the COP, the EU appealed for an agreement where all parties were 'equally legally bound'. The disagreement was resolved by the necessarily ambiguous – and legally imprecise – wording of 'agreed outcome with legal force'.

To some extent the discussion of 'bindingness' was a proxy for something else: how to get other countries to take action commensurate with their responsibilities. At the same time as some parties were pushing for a legally binding agreement under the convention in the LCA track, alternatives to a Kyoto-type compliance mechanism were being explored. Negotiators came up with yet another term, MRV ('measurable, reportable and verifiable'), designed to describe something approaching

agreement was essential to enable their action to be more effective.

Thus, over the ten years since the start of this phase of climate change negotiations, the limitations of the old model had been well explored, and some new ideas injected, tested and, if promising, socialised. Much of this new thinking came about through research and informal, offline meetings. The contribution of this accumulated work to the success of the Paris Agreement should not be underestimated.

Paris: towards a new model of climate governance

The Paris Agreement is a treaty and in anything but name is a second protocol to the UNFCCC.⁴ It can be seen as a 'hybrid' consistently with the way this concept emerged during the negotiations. Broadly, its legally binding provisions are contained in the agreement itself, and the non-legally binding ones in the accompanying COP decisions. The fundamental distinction centres on the nationally determined contributions (NDCs). There is a binding obligation to *have* an NDC in order to ratify the Paris Agreement, but the content of the NDC, principally any target or targets, is not binding. The legal obligation under article 4.2 is to *intend* to achieve the NDC, and to pursue domestic measures towards achieving it. It is also a requirement for successive NDCs to be a progression beyond the previous one, and to reflect a party's highest level of ambition. Taken together, the non-binding and nationally determined aspects go a long way to allaying states' concerns about the risks such as a target that could not be met, or competitive risk if other countries do not take on a commensurate share of the burden. This represents the resolution of the long-standing differences on legal form among parties. Within this broad distinction there is a range of different levels of obligation in both the agreement and the decisions, conveyed by such terms as 'shall', 'should', 'parties aim to', 'should strive to', etc.⁵ A sign of the critical importance of the language around obligations was that the final issue to be resolved at Paris required a late change from 'shall' to 'should' to satisfy the United States.

Much better science communication helped to clarify what the fundamental objectives of the global climate regime should be. The aim of limiting global temperature increase to well below 2° in article 2 is supplemented by references in article 4 to peaking and to implied carbon neutrality (a balance between sources and sinks) before the end of the century. These were informed by the contribution of science to understanding the importance of cumulative long-lived gases. Together they give substance and precision to the convention's objective of stabilising greenhouse gases at a safe level (UNFCCC article 2).

pledge their highest possible ambition. They are also expected to demonstrate how their contributions are consistent with the goals of the agreement. The incentive thus becomes a positive one of maintaining reputation rather a negative one of avoiding penalties.

Another achievement of Paris is to revise and reintegrate other elements of the international climate change regime that had been built up under the UNFCCC. In its core article 2, the Paris Agreement gives adaptation and finance equal status with mitigation. Its provisions on adaptation, technology, capacity-building, finance, and loss

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The agreement overcomes the rigidity of CBDR in another way by retaining the reference to developed and developing countries, and adding an expectation that developing countries will move towards quantified economy-wide targets as they are able to. This nicely complements the reference to different national circumstances in article 2, and gives the flexibility that the Kyoto Protocol lacked. The problematic binary distinction based on two lists of countries would not be consistent with the agreement. Only least developed and small island developing states retain separate recognition.

The Paris Agreement's alternative to a compliance mechanism for NDCs is called an 'enhanced transparency framework'. It stems from the earlier discussion around MRV. It aims to 'facilitate clarity, transparency and understanding' and to 'build mutual trust and confidence and to promote effective implementation'. The rules still to be negotiated will be important to monitor progress, and to encourage countries to continue to

and damage draw together and update existing mechanisms and bodies in a more coherent framework. It is not quite complete. There remains uncertainty and controversy about carbon markets, which are important to many parties. But there is implied if not explicit recognition of their legitimacy in article 6. How the technology framework established under the agreement will function is also unclear, but its role in 'addressing the transformational changes envisioned in the Paris Agreement' was usefully acknowledged in Marrakech (UNFCCC, 2016).

There is also stronger recognition of the role of non-state actors. This is somewhat limited in the agreement itself, which recognises 'the importance of the engagements of all levels of government and various actors ... in addressing climate change'. But in the final preambular paragraph of the accompanying decisions this is expanded to agreeing 'to promote regional and international cooperation in order to mobilize stronger and more

ambitious climate action by all Parties and non-Party stakeholders, including civil society, the private sector, financial institutions, cities and other sub national authorities, local communities and indigenous peoples'. The message here is that tackling global warming requires a cooperative effort across sectors, with governments as but one player. This in itself is a significant shift from earlier legal instruments, and indeed from the beginning of the latest phase of negotiations in 2005, when there was little explicit recognition of this fact.

So is the 'hybrid' Paris Agreement top-down or bottom-up? It is both, and

budget that the agreement's goals imply will also be a useful frame of reference, though it remains unrealistic to expect individual shares to be determined from this and allocated through the agreement. In the context of moving towards global carbon neutrality, it is the nature, speed and direction of the transitions that will matter most. This implies a hard look at each economy, sector by sector, and could prove a more powerful organising principle than five- or ten-yearly economy-wide targets and timetables.

The legal instrument at the centre of governance of climate change has thus changed in nature. Previously this

and Marrakech COPs,⁶ as did the Kigali amendment to the Montreal Protocol, on HFCs (hydrofluorocarbons), described by UN Environment Programme as 'another global commitment to stop climate change.'⁷

The emerging governance model for climate change is thus an amalgam of traditional intergovernmental provisions and recognition of the role of entities other than governments. It expresses a shared responsibility, where the role of the intergovernmental agreement is to provide the best conditions for the other entities to pay their part. The Paris Agreement is at the centre, by itself not saving a single tonne of CO₂, but providing impetus and guidance, and enabling a network of links to actors and actions that will. Some of these links are binding and non-binding legal ones with governments; the others are informal but still capable of stimulating action and providing a favourable context for it. A perfect illustration of the new model in operation is the 2050 pathways platform launched at COP22.⁸ Conversely, the momentum amongst the broader network of actors recognised and facilitated by the agreement can potentially limit the effect of any adverse policy shifts by central governments.

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in fact it renders these terms obsolete. The fact that parties determine their own contributions does not make the whole agreement bottom-up. Arguably the most important dimension is the global goals, which are all top-down; they provide an overall framing with which nationally determined contributions must be consistent. And they give an authoritative high-level message to other actors.

Prospects

In the Paris Agreement and its associated decisions, two approaches coexist: what one might call the 'targets and timetables' and 'long-term transition'. The five-yearly NDCs reflect the former. Over the long term it is likely that the latter will dominate, with the targets and timetables still useful to monitor progress. There will still be value in regular assessment of progress towards the global goals through the five-yearly reviews. The global carbon

was seen as the arrangement among governments needed to effect change. From defining and imposing obligations, it has moved more towards a framework to facilitate, support and encourage action among not only governments but also non-state actors. The context outside the negotiations has seen governments and other actors taking autonomous action. The Paris Agreement has already had an influence that goes far beyond the scope of its legal provisions. As an illustration, while silent on the maritime and aviation sectors, the agreement has supported and stimulated progress in their respective bodies. These two categories were not included in the Kyoto Protocol's legal disciplines, and consensus on how, if at all, they might be brought into the post-2020 UNFCCC arrangements is elusive. But the Paris Agreement provided a context which these sectors could not ignore. Both delivered results between the Paris

Conclusion

Will this model of climate change governance prove effective? Before the ink was dry on the agreement, expert commentators rushed in to spoil the Paris party by stating the obvious, that the tabled NDCs were collectively far short of the ambition needed to stay within the 2° target, let alone 1.5°. But this was to miss the point of the achievement, overstating the role of the agreement itself, and underestimating the future contributions from non-state actors. Assuming the remaining details, such as the transparency and accounting rules, can be completed and adopted by 2020, the agreement's first major test will be the 2023 global stocktake. It is very likely that a further round of international political leadership will be needed to stimulate more ambitious mitigation efforts.

The Paris Agreement is not perfect, but it has demonstrably created momentum.

It appears capable of evolution without major renegotiations because, as the early entry into force showed, it got the fundamentals right. This makes the agreement a vehicle for greater ambition. It should also be resilient against temporary defections. Providing all its essential rules are in place and are seen to work, it may become a precedent that the international community can use to meet future global commons challenges.

- 1 In contrast, the Doha amendment to the Kyoto Protocol, adopted three years before the Paris Agreement, had by the same date received only about half the number of acceptances necessary for its entry into force.
- 2 The Security Council has addressed climate change on several occasions, including two thematic debates in 2007 and 2011 at the initiative of the UK and Germany respectively. Ban Ki-moon, UN secretary general, described

its attention to climate change as 'appropriate and essential'. But the Security Council has not been able to agree that climate change is a threat to peace and security. Many countries wanted to avoid any leakage of negotiations from the UNFCCC, whose CBDR principle (see below) would not apply in the Security Council.

- 3 For the history of the negotiations from 2005 to the Paris Agreement see Macey (2012, 2016).
- 4 The term 'protocol' would have made it more difficult for the US administration to classify it as an executive agreement, and hence avoid the need for Senate approval.
- 5 For a detailed legal analysis of the Paris Agreement see Bodansky (2016).
- 6 After the Paris Agreement, silent, to the dismay of some, on maritime emissions, a maritime industry official commented: 'the shipping industry remains committed to ambitious CO₂ emission reduction across the entire world merchant fleet, reducing CO₂ per tonne-km by at least 50% before 2050 compared to 2007'. See other, similar comments at <http://worldmaritimeneews.com/archives/178732/cop21-paris-remains-silent-on-shipping-and-aviation>. The International Maritime Organisation's maritime environment protection committee (MEPC), at its October 2016 meeting, agreed on further measures, including a CO₂ monitoring system. At this meeting frequent reference was made to the Paris Agreement, and the need to front up to COP22 with a positive story. Industry associations called for work to determine shipping's

"fair share contribution" towards reducing the world's total CO₂ emissions'. See https://www.bimco.org/News/Press-releases/20161019_Shipping_industry_united_in_seeking_further_progress_on_CO2_at_critical_IMO_meeting. It was a similar story for aviation. An air transport body, the Air Transport Action Group, would have liked to see aviation included in the Paris Agreement, but nonetheless saw it as providing 'positive momentum' for the sector. ATAG also reiterated the goal of carbon neutral growth from 2020. See <http://aviationbenefits.org/newswire/2015/12/aviation-co2-emissions-to-be-dealt-with-next-year-at-icao>. This momentum was real: less than a year later, in October 2016, the International Civil Aviation Organization established a new global market-based measure (GMBM) to control CO₂ emissions from international aviation. See <http://www.icao.int/Newsroom/Pages/Historic-agreement-reached-to-mitigate-international-aviation-emissions.aspx>.

- 7 <http://web.unep.org/kigali-amendment-montreal-protocol-another-global-commitment-stop-climate-change>.
- 8 The platform will 'support countries seeking to develop long-term, deep decarbonisation strategies ... It will also build a broader constellation of cities, states, and companies engaged in long-term low-emissions planning of their own, and in support of the national strategies'. See <http://newsroom.unfccc.int/media/791675/2050-pathway-announcement-finalclean-3.pdf>.

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