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The role of law in a bottom-up international climate governance architecture: early reflections on the Paris Agreement

by QIL-QDI on Mar 24, 2016 • 16:30

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Introduced by Annalisa Savaresi and Francesco Sindico

On 12 December 2015, Parties to the United Nations Framework Convention on Climate Change (UNFCCC) adopted a new climate treaty. The Paris Agreement potentially breaks the impasse that for several years affected international climate governance, by opening the way to enhanced universal action to address climate change.

The climate regime, consisting of the UNFCCC and of the 1997 Kyoto Protocol to the UNFCCC, had over the years become increasingly inadequate to deliver the transition towards low carbon economies necessary to avert catastrophic climate change. Building upon a static differentiation between 'developed' and 'developing' countries,^[1] the Kyoto Protocol imposed emission reduction targets only on the first. With ever growing emissions in emerging economies, like China and India, however, scientists repeatedly flagged that reducing emissions in developed countries only would not be enough. Furthermore, political will under the Kyoto Protocol had significantly faltered. Some developed countries that had initially undertaken emissions reductions commitments under the Kyoto Protocol – ie Canada and the US – have retreated, either by refusing to ratify or by dis-ratifying protocol. Others – ie Japan, New Zealand and the Russian Federation – have declined to undertake targets for the second commitment period of the Kyoto Protocol. The faltering support for the Kyoto Protocol has left the European Union and a handful of developed countries, including Australia, Norway and Switzerland, as the sole Parties with emission reduction targets under the Protocol. Taken together, these set of circumstances made the extant legal framework untenable and inadequate to tackle climate change.

Starting with the ill-fated Copenhagen Climate Change Conference in 2009,^[2] Parties to the climate regime have progressively moved away from the 'targets and timetables' approach to international climate change law embedded in the Kyoto Protocol,^[3] replacing it with a 'pledge and review' approach.^[4] This new approach entails that UNFCCC Parties unilaterally declare the action they are to undertake.^[5] In this process, UNFCCC institutions and processes act as a 'notary' collecting, and eventually enabling the rev

the implementation of Parties' pledged action. This approach has been described as 'bottom up', as it leaves a very wide margin of discretion to States on how to contribute to the endeavor of tackling climate change, therefore contrasting with the rather more prescriptive 'top down' approach embedded in the Kyoto Protocol.

Since 2009, UNFCCC Parties have painstakingly negotiated measures to review what they have pledged to do.^[6] The mechanisms established to address this tricky question have only just started to be tested. One evident stumbling block, however, is that Parties have reported their pledges as they see fit – for example, choosing different years as a baseline to measure their emission reductions – thus engendering a great deal of confusion as to what they are actually committing to do. Another stumbling block was the lack of means to sanction lack of compliance and to ratchet Parties' ambition. So, while ahead of Paris an intergovernmental process to encapsulate and review Parties' bottom-up efforts had been created, this process needed to be perfected and strengthened.

The Paris Climate Change Conference held in December 2015 was expected to set the bases for a new 'hybrid' architecture, to bring together Parties' pledged action under a unitary framework.^[7] The conference was expected to adopt 'a protocol, another legal instrument or a legal outcome' applicable to 'all Parties' to be implemented from 2020.^[8] In principle at least, this new instrument could adopt a new approach to differentiation, with emission reduction commitments for all Parties.^[9]

The road to Paris was long and winding, and, on the eve of the conference, only limited progress had been made on the development of a text for the new agreement.^[10] Yet, after two weeks of intense work, the conference concluded with the adoption of the Paris Agreement. The new treaty is not meant to replace the UNFCCC, but simply to enhance its implementation,^[11] arguably working as a protocol in everything but name.^[12]

The Paris Agreement dismantles the approach to differentiation embedded in the Kyoto Protocol, by requesting that all Parties make efforts to reduce their emissions, with a view to keeping the increase in global average temperature well below 2° C as compared to pre-industrial times.^[13] Most importantly, the Paris Agreement builds on and institutionalizes the bottom up architecture that emerged after the Copenhagen debacle, endowing it with measures for the review and the ratcheting up of ambition. Thus, not only does the Paris Agreement provide that all Parties make efforts to reduce their emissions, but it also sets the basis for an architecture to review progress towards achieving the global goal,^[14] and enhance it, when needed. It does so by sketching a framework to review both progress towards achieving the global goal,^[14] as well as each Party's contribution to it.^[15] This review process will build upon, enhance, and eventually supersede existing arrangements under the UNFCCC.^[16] Although the details of the process largely remain to be determined, Parties will submit information concerning action they intend to undertake to implement the Paris Agreement every 5 years,^[17] with a quinquennial stocktake starting in 2023.^[18]

Whilst it is clear that Parties' action proposed to date will be insufficient to achieve the temperature goal identified in the Paris Agreement, in theory at least there will be means to revise and increase the level of ambition. How this will happen in practice, however, remains to be seen. The same may be said with regard to the expert-based, facilitative compliance mechanism to be established under the new treaty.^[19] In this regard, the adoption of the Paris Agreement is just the beginning of a new, predictable long, regulatory season, whereby Parties will flesh out the processes and the rules to assist its implementation.^[20]

This issue of QIL reflects on the outcome of the Paris Conference and on how international climate law has changed since the adoption of the UNFCCC. In particular, it reflects on the role of law in what has become a 'bottom-up' system of unilateral actions to address climate change,^[21] and on the means that the Paris Agreement has laid out to ensure that the aggregate level of effort is commensurate with the sizeable task at hand. From the perspective of international law, this raises fundamental questions concerning the role of review and compliance in the climate regime. What is the role of international law in a bottom-up climate governance system? What means does the Paris Agreement provide to ensure the review of implementation and address the matter of compliance? And are these processes likely to be fit for purpose? We have invited two experts renowned for their work on the international climate change law, Harro van Asselt and Christina Voigt, to provide a response to these intriguing questions.

^[1] UNFCCC, Annexes I and II.

^[2] Decision 2/CP.15, Copenhagen Accord, FCCC/CP/2009/11/Add.1.

^[3] L Rajamani, 'From Berlin to Bali and Beyond: Killing Kyoto Softly' (2008) 57 ICLQ 909; and D Bodansky, 'Whither the Kyoto Protocol? Durban and Beyond' (Harvard Project on Climate Agreements 2011) <www.c2es.org/docUploads/whither-kyoto-prot>

[durban-and-beyond.pdf](#)>.

^[4] H van Asselt, M Mehling, C Siebert, 'The Changing Architecture of International Climate Change Law' in G van Calster, W Vanderberghe, L Reins (eds), *Research Handbook on Climate Change Mitigation Law* (Edward Elgar Publishing 2015).

^[5] See for example D Bodansky, E Diringer, 'The Evolution of Multilateral Regimes: Implications for Climate Change' (Pew Center Global Climate Change 2010) <www.pewclimate.org/docUploads/evolution-multilateral-regimes-implications-climate-change.pdf>
D Bodansky, 'A Tale of Two Architectures: The Once and Future U.N. Climate Change Regime' (2011) <<http://papers.ssrn.com/abstract=1773865>>.

^[6] Decision 1/CP.16, Cancun Agreements, paras 44-46 and paras 63-64.

^[7] D Bodansky, 'The Durban Platform: Issues and Options for a 2015 Agreement' (Social Science Research Network 2012) SSRN Scholarly Paper ID 2270336 <<http://papers.ssrn.com/abstract=2270336>>.

^[8] Decision 1.CP/17, Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action, FCCC/CP/2011/Add.1, 2 and 4.

^[9] L Rajamani, 'The Durban Platform for Enhanced Action and the Future of the Climate Regime' (2012) 61 ICLQ 501.

^[10] A Savaresi, 'UN Climate Change Negotiations: Last Tango in Paris?' EJIL: Talk! <www.ejiltalk.org/un-climate-change-negot-last-tango-in-paris/>.

^[11] Paris Agreement, art 2.

^[12] A Savaresi, 'The Paris Agreement: A New Beginning?' (2016) 34 J Energy and Natural Resources L 1, 5.

^[13] Paris Agreement, arts 1(a), 3 and 4.

^[14] Paris Agreement, art 14.

^[15] Paris Agreement, art 13.

^[16] Decision 1/CP.21, 99.

^[17] Paris Agreement, art 4.9.

^[18] Paris Agreement, art 14.2.

^[19] Paris Agreement, art 15.

^[20] On the law-making powers of COPs, see RR Churchill and G Ulfstein, 'Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law' (2000) 94 AJIL 623, 638-641.

^[21] On the legal nature of the Paris Agreement see F Sindico, 'Is the Paris Agreement *really* Legally Binding?' (2015) SCELG Policy Brief <www.strath.ac.uk/media/1newwebsite/departmentsubject/law/climatechangelawpolicy/SCELG_policy_brief.pdf>

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