

The Paris Agreement: the brand-new experiment

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'The Paris Agreement is an experiment in a bottom-up, managerial, transparency-building, and norm-building approach to global cooperation.'¹ This paper intends to assess this statement made by Meinhard Doelle regarding one of the major milestones of the international climate change regime.

Historical background

The history of climate change agendas in international negotiations has over 20 years. The Intergovernmental Panel on Climate Change² presented its first climate change report in 1990, previous to the Rio Earth Summit held in Brazil in 1992. The Summit introduced the United Nations Framework Convention on Climate Change³, which back then was signed by 166 nations. Today it has 195 signatories. The parties agreed to calculate their emissions and report them annually. In order to stabilize the climate, all nations accepted responsibilities but the developed countries have the obligation to act first: 'common but differentiated responsibilities' approach. In 1997, the Kyoto Protocol⁴ was drawn up by which developed countries would cut their emissions by an average of 5.2 % relative to 1990 levels by 2008-2012. It did not include the developing countries. The administration of George W. Bush was skeptical and worried that China would have a competitive advantage over the United States, thus they didn't sign it and neither other important

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1 Meinhard Doelle, 'The Paris Agreement: Historic Breakthrough or High Stakes Experiment?', *Climate Law*, 6, (2016), p. 20

2 Hereinafter IPCC, was established by the United Nations Environment Programme (UNEP) and the World Meteorological Organization (WMO) in 1988.

3 United Nations Framework Convention on Climate Change, New York, 9 May 1992, International Legal Materials (1992), 849, (hereinafter, UNFCCC).

4 Kyoto Protocol to the United Nations Framework Convention on Climate Change, 10 December 1997, UN Doc. FCCC/CP/1997/L.7/add. 1, 37 International Legal Materials (1998), 22.

nations. Later in 2007, a new negotiation process was arduously achieved in Bali⁵ in order to substitute the Kyoto Protocol. These agreements did not include any commitments or any recognition of the Kyoto Protocol framework problems. Later, on the way to the Copenhagen negotiation meetings in December of 2009, there were significant advances: with the election of President Barak Obama, the US returned to the climate negotiations and pledged that their emissions would be reduced by more than 80 % over 2005 level by 2050; Australia and Japan, which previously were not interested in carbon emissions targets, pledged to reduce their emissions as well; the Chinese President committed his country to reduce its energy intensity by 40-45 % by 2020; and also the Indian government set the target of carbon intensity reduction of 20-25 % by 2020. Because of this, many people were optimistic regarding Copenhagen. A total of 122 prime ministers and presidents attended. However, the whole process was chaos and the attendees failed to reach binding carbon reductions. Despite the failure of the meetings, the Copenhagen Accord⁶ was a short statement of intend but by 2010 more than 100 countries had signed up to the Accord, accounting 80 % of global greenhouse gas emissions. The next UNFCCC meeting was held on Cancun, Mexico in 2010 where the outcome was very positive. The Cancun agreements consolidated the Accord and adopted its newest version. Targets by 2020 were made by all the major emitters. The target of holding the rise of global average temperature to 2°C was officially adopted by the UNFCCC⁷. In Durban in 2011, a formal mandate was accepted to create another legal instrument with legal force applicable to all Parties⁸. It was on 12 December 2015, on the 21st Session of the COP to the UNFCCC, when 195 countries and the EU adopted the Paris Agreement (PA)⁹.

The Paris Agreement elements

The PA¹⁰ is a treaty of 12 pages, 29 articles and 16 preambular paragraphs. The operative provisions of the PA include mitigation, adaptation and implementation (capacity building,

5 Decision 1/CP.13, Bali Action Plan, FCCC/CP/2007/6/Add.1.

6 Decision 2/CP.15, Copenhagen Accord, FCCC/CP/2009/11/Add.1.

7 Anthony Giddens, *The Politics of Climate Change* (Oxford : Wiley 2013), pp. 260-274

8 UNFCCC, Decision 1/CP.17, Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action, UN Doc. FCCC/CP/2011/9/Add.1.

9 UNFCCC, Decision 1/CP.21, 'Adoption of the Paris Agreement', FCCC/CP/2015/10/Add.1.

10 Paris Agreement on Climate Change, UN Doc. FCCC/CP/2015/L.9/Rev.1, 12 December 2015.

finance, and technology transfer). It also contemplates procedural and institutional measures¹¹. The following sections review the PA features granted by Doelle.

Bottom-up approach

A bottom-up approach gives privileges to economic and institutional issues around the implementation process, while a top-down approach takes as its starting point the science around climate change and consequent constructions of concentration thresholds and emission targets. These two approaches have different legal, political and substantive implications; they are imprecisely defined though. The bottom-up approach implies a lack of legal accountability, along with weak rules; while the top-down approach is often associated with quantitative output targets, backed by strong enforcement measures, all packaged within a legal formulation. However, a bottom-up approach could be constructed with strong rules under a legal framework, and its main importance is that climate change is most likely to be tackled when effective change is driven by local actions. The recommendation of Dubash and Rajamani was to open up a constructive middle ground by identifying the most compelling arguments behind each approach to improve them mutually¹². It seems like their recommendation was followed in the negotiations of the PA. Sandrine Maljean-Dubois and Matthie Wemaëre affirm that ‘the Paris Agreement reflects a hybrid approach, as it provides for a rules-based regime enshrined in an international treaty (top-down), including the elaboration and communication of Parties’ contributions, whereas the latter are nationally determined (bottom-up) and “anchored” outside the agreement in a registry maintained by the UNFCCC Secretariat’. They say the PA is a balance between international legal firmness and respect for national sovereignty¹³. This is not necessarily what Doelle meant, he infers the PA is entirely a bottom-up approach. Which I don’t think it is for what is indicated above. It is in fact an experiment (like he alleged) because we don’t know if this mixed top-down/ bottom-up approach is actually going to work. We already gave the top-down model a shot (the Kyoto Protocol), let’s wait and see about this one.

11 Annalisa Savaresi, ‘The Paris Agreement: A New Beginning?’, *Journal of Energy and Natural Resource Law*, 34.1, (2016), pp. 16-26

12 Navroz Dubash, Lavanya Rajamani, ‘Beyond Copenhagen: Next Steps’, *Climate Policy*, 10.6, (2010), pp. 593-599

13 Sandrine Maljean-Dubois, Matthie Wemaëre, ‘The Paris Agreement: A Starting Point towards Achieving Climate Neutrality?’, *Carbon and Climate Law Review*, 10.1, (2016), pp. 1-4

Managerial approach

In the context of multilateral environmental agreements, there is an important debate between managerial and sanction-oriented models. The managerial model is compatible with a constructivist vision; it advocates a 'cooperative, problem-solving approach' to comply and holds the assumption that non-compliance rarely results from disregard but from norm ambiguity or capacity limitations. Accordingly, sanctions and penalties are not effective for this type of model. The compliance action should identify and manage the causes of non-compliance through a transparent, dispute settlement, and capacity-building process. At the end, managerialism's ultimate explanation is rationalist. Since the growing interdependence means that most states can only realize their sovereignty through participation in international regimes, their general tendency is to comply with international law in order to stay a 'member in good standing of the international system'. On the other hand the sanction-oriented models, as its name implies, is based on a competing, enforcement-oriented theory where strong incentives apply for no-compliance ('deep cooperation'). It maintains that a managerial model fosters only 'shallow cooperation' on many treaties¹⁴. From a broader perspective, is claimed that managerialism is represented by soft law; and the sanction-oriented models by hard law¹⁵. Doelle asserts that the PA is based on the initiative that states can be moved toward action in the global interest through a managerial approach that builds a new behavior¹⁶. I completely agree with this, the PA is the living proof of the managerial approach; too managerial if you ask me. One of its axes is the nationally determined contributions¹⁷ which are entirely up to each state. Article 4.13 of the PA states that: 'In accounting for anthropogenic emissions and removals corresponding to their nationally determined contributions, Parties shall promote environmental integrity, transparency, accuracy, completeness, comparability and consistency, and ensure the avoidance of double counting'. It says 'shall', not 'should'. Also, Article 15 states that the mechanism to facilitate implementation of and promote compliance 'shall consist of a committee that shall be expert-based and facilitative in nature and function in a manner that is transparent, non-adversarial and non-punitive'. In this

¹⁴ Jutta Brunnée, 'Promoting Compliance with Multilateral Environmental Agreements', in *Promoting Compliance in an Evolving Climate Regime*, (Cambridge University Press 2011), pp. 38-54

¹⁵ Annto Vihma, 'Analyzing Soft Law and Hard Law in Climate Change', in *Climate Change and the Law*, (Springer Netherlands 2013), vol.21, pp. 143-164

¹⁶ Supra note 1

¹⁷ Paris Agreement Article 3

regard, the Kyoto approach is abandoned too¹⁸. I believe there should be some sort of sanctions as the last resource for the countries that are not putting enough effort in the national targets compliance or in the formulation of the nationally determined contributions.

Transparency–building approach

The PA gives a special focus to transparency. All Parties shall provide the information regarding their nationally determined contributions for clarity, transparency and understanding¹⁹. An enhanced transparency framework for action and support, with built-in flexibility which takes into account Parties' different capacities and builds upon collective experience is established. The transparency framework shall enhance the transparency arrangements under the Convention, recognizing the particular circumstances of the least developed countries and small islands States, and be implemented in a facilitative, non-intrusive, non-punitive way, respecting national sovereignty, and avoid giving undue burden on Parties. It was agreed that the first session of the Conference of the Parties shall adopt modalities, procedures and guidelines for the transparency of action and support²⁰. In order to support the above, a Capacity-building Initiative for Transparency with the aim of build institutional and technical capacity was established. This initiative will support developing countries in meeting enhanced transparency requirements, also will aim: 'a) To strengthen national institutions for transparency-related activities in line with national priorities; b) To provide relevant tools, training and assistance for meeting the provisions stipulated in Article 13 of the Agreement; c) To assist in the improvement of transparency over time.'²¹ The Kyoto Protocol and the Copenhagen Accord also take transparency into account, but not near close to the PA. The Kyoto Protocol mentions transparency regarding the policies and measures adopted under the Protocol²², greenhouse gases reporting²³, and the clean development mechanism²⁴. The Copenhagen Accord notices it in the implementation of mitigation actions in the context of funding from the developed countries. And in its Conference of the Parties was agreed that the Consultative Group of

¹⁸ Supra note 1

¹⁹ Paris Agreement Article 4

²⁰ Paris Agreement Article 13

²¹ Supra note 9

²² Kyoto Protocol Article 2

²³ Kyoto Protocol Article 3

²⁴ Kyoto Protocol Article 12

Experts on National Communications from Parties not included in Annex I to the Convention shall improve transparency of information in their national communication²⁵.

Norm-building approach

In general terms, “norms” are standards of behavior created through mutual expectation in a social scenery. There are many social norms that are never converted into legal norms²⁶. According to Doelle, the PA is based on the idea that nations can be moved toward actions in the global interest through managerial ways that build new norms of state behavior²⁷. This is congruent to the reflections of Christiana Figueres, former Executive Secretary of the UNFCCC, who led the PA negotiations. She says one of the main reasons why Copenhagen was a failure was because of the division between global North and global South. She knew a change in the tone of the conversation was crucial. Therefore, for 6 years she stubbornly injected optimism into the system. Later, changes started to happen in many areas, one of them was technology; in particular renewable energy technologies. With this shift people began to recognize that with climate change came economic advantages and other benefits: clean air, better health, better transportation, livable cities, energy security, more energy access to the developing world; in resume, a better world. Non national governments, the private sector, industry, insurance companies, among many others, began to understand that this could actually be of their interest. Soon after, national governments came to the same page. They were asked to send their contributions to global efforts based on their national interest. Once you protect the center interest of nations, they start to converge onto a common pathway with a common direction. The understanding was shifted and that’s why 195 governments unanimously decided to change the course of the global economy to protect the most vulnerable and improve life for everybody²⁸. This is the base of the new norm-building approach of the PA. Honestly, I don’t think without this switch of behavior and norms we would be writing about a PA. Christiana and her team did a great job with their stubborn optimism.

²⁵ Decision 5/CP.15, Terms of reference of the Consultative Group of Experts on National Communications from Parties not included in Annex I to the Convention, FCCC/CP/2009/11/Add.1.

²⁶ Jutta Brunnée, Stephen J. Toope, ‘Constructivism and International Law’, in *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art*, (Cambridge University Press 2012), pp. 119-145

²⁷ Supra note 1

²⁸ TED Idea worth spreading. (2016, February). ‘Christiana Figueres: The inside story of the Paris climate agreement’ [WWW document] URL https://www.ted.com/talks/christiana_figueres_the_inside_story_of_the_paris_climate_agreement?language=en#t-658334 (visited 2016, November 4)

Conclusion

The PA is not the so-called impossible document anymore. Its formulation and design has been arduously calculated through many years and meetings. But this is just the first of many steps. There is still missing architecture in this process to ensure the achievement of the global peaking greenhouse gas emissions as soon as possible. It's important to know and analyze the settlement bases of the PA for the continuity and success of this process. So, if I were to re-write Doelle's sentence I'd say the Paris Agreement is an experiment in a bottom-up/top-down mix, managerial, transparency-building, and inspiring norm-building approach to global cooperation.

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