Global Governance of Climate Change

The Paris Agreement as a New Component of the UN Climate Regime[1]

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The Paris Agreement, which was adopted in December 2015 and entered into force less than a year later, is the newest instrument to be adopted in the United Nations-sponsored global climate regime. The Paris Agreement takes its place under the 1992 Framework Convention on Climate Change and next to the 1997 Kyoto Protocol and 2012 Doha Amendment. After describing the historical evolution of the UN climate regime employing the tools of international law, this Article explores the structural, institutional, and legal relationships between the new Paris Agreement and the prior development and content of UN-sponsored efforts on climate protection under the auspices of the 1992 Framework Convention. The need for such an analysis is particularly urgent because the new instrument was purposely not identified as a "protocol," and its relationship to the prior Kyoto Protocol is unclear.

This Article consequently traces the development of the universal, UN-anchored climate regime from its origins in the 1990s to the present moment, with particular attention to the structural relationship among its various components and historical junctures. The Article then examines the text and structure of the Paris Agreement, along with its context, against this background. The significance of the Agreement's status as an instrument other than a "protocol," and its uncertain textual and institutional relationship to the prior Kyoto Protocol, receive particular scrutiny. The Article concludes that the Paris Agreement, from a structural and institutional point of view, represents both a break with the past designed to initiate a new, globally-inclusive multilateral approach to climate protection, but also contains indications of continuity with prior questions of global climate policy.

Key words: Paris Agreement; Framework Convention on Climate Change; Kyoto Protocol; Doha Amendment; global warming, international environmental law; sustainability; regime theory

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Introduction

The study of the international organization as a political and social phenomenon has largely focused on international organizations as institutions. Both scholars and governmental officials are accustomed to working with intergovernmental organizations created by multilateral treaties, whose state parties are de facto members . These include the United Nations itself, its specialist agencies and related organizations, and other non-UN organizations [IBRD, 1945; IDA, 1960; ILO, 1919; IMO, 1948; OECD, 1960; UN, 1945; WHO, 1946; WMO, 1947; WTO, 1994]. Some international institutions are also international organizations, even though they were not created by multilateral treaty, by virtue of their institutional structure and membership consisting of states as represented in the institution by governments.[2] Further along the continuum are other, less structured international arrangements establishing international institutions that do not qualify as international organizations.[3]

While there have been academic proposals to establish a global international organization, with a functional focus on environment, there has been little if any motion by states and governments in this direction [Charnovitz, 2002; Esty, Ivanova, 2001; Runge, 1994]. The United Nations Environment Program (UNEP) is probably closest to this model, but does not meet either the formal or structural requirements for an international organization. Instead, freestanding or semiautonomous regimes have been crafted to address such environmental challenges as protection of the stratospheric ozone layer; international trade in waste, industrial chemicals, and pesticides; persistent organic pollutants; biological diversity; desertification; and international trade in endangered species.[4]

The number of these environmental regimes is now sufficiently large that one can identify clear patterns among them [Churchill, Ulfstein, 2000; Wiersma, 2009]. One is the "framework convention plus protocols" model, which seemed to have reached a high degree of structural specificity in the UN-sponsored climate regime.[5] That pat-

[2] OSCE, CSCE/OSCE Key Documents. Available at: http://www.osce.org/resources/csce-osce-key-documents (accessed: 12 March 2017).

[3] APEC (1989) Joint Statement, First Ministerial Meeting (Canberra, Australia, 6-7 November 1989). Available at: https://www.apec.org/Meeting-Papers/Annual-Ministerial-Meetings/1989/1989_amm (accessed 16 September 2017);

Arctic Council (1996) Joint Communiqué and Declaration on the Establishment of the Arctic Council. International Legal Materials, no. 35 (6), pp. 1382–1390.

[4] Basel Convention on the Control of Transboundary Movements of Hazardous Wastes, 1989 (1673 UNTS 57); Convention on Biological Diversity, 1992 (1760 UNTS 79); Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, 1994 (1954 UNTS 3); Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), 1972 (993 UNTS 243); Montreal Protocol on Substances that Deplete the Ozone Layer, 1987 (1522 UNTS 3); Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, 1998 (2244 UNTS 337); Stockholm Convention on Persistent Organic Pollutants, 2001 (2256 UNTS 119); Vienna Convention for the Protection of the Ozone, 1985 (1513 UNTS 293).

[5] United Nations Framework Convention on Climate Change, 1992 (1771 UNTS 107).

tern was followed strictly through one protocol and a subsequent amendment to it.[6] But the Paris Agreement, adopted in 2015, at least in appearance, disrupts that model by leaving the legal and institutional relationship between prior instruments in the regime largely unstated, and to a considerable extent uncertain.

With the announcement that the United States intends to withdraw from the Paris Agreement,[7] the multilateral climate regime threatens to be thrown into a state of disarray. Although this is not the only reason to investigate the phenomenon, the reasons provided by President Trump identify what purport to be serious deficiencies in the structure of global climate governance. This Article attempts to clarify the history and results of the UN-sponsored climate negotiations, with an emphasis on the evolution of the Paris Agreement and its place in that structure. More generally, this analysis serves as a case study in the development of free-standing multilateral regimes not expressly connected to a formally-established international organization.

Accordingly, this Article first sets out the history of global climate negotiations from a structural point of view, by reference to prior models and precedents. It then traces the history of the development of that regime through the adoption of the one, and to date only, protocol formally identified as such, together with an amendment to it. The Article then takes up the negotiating history and adoption of the Paris Agreement, particularly from the point of view of its relationship to the earlier instruments. The Commentary then analyzes the significance of these developments for the further evolution of regime formation.

The Un Climate Regime Before The Paris Agreement

The UN-sponsored climate regime is an example of an autonomous institutional arrangement, anchored by a framework convention with additional protocols, that hasve been particularly characteristic of environmental subject matter. As such, the FCCC has identifiable precursors, including a regional agreement on the long-range transport of air pollutants in Europe and North America and the global stratospheric ozone regime. As background, this section traces the development of the UN climate regime from those precursors through the Framework Convention on Climate Change, through the Kyoto Protocol and its Doha Amendment. Thatis history is critical to understanding the context of the Paris Agreement.

Precursors to the Framework Convention

An important early juncture in the development of autonomous institutional arrangements on environmental issues is the multilateral Convention on Long-Range

[6] Kyoto Protocol to the Framework Convention on Climate Change, 1997 (2303 UNTS 148); Doha Amendment to the Kyoto Protocol, 2012.

[7] Statement by President Trump on the Paris Climate Accord, 1 June 2017. White House. Available at: https://www.whitehouse.gov/the-press-office/2017/06/01/statement-president-trump-paris-climate-accord (accessed: 12 March 2017).

Transboundary Air Pollution (LRTAP), concluded under the auspices of the United Nations Commission for Europe (ECE) in 1979.[8] The Convention specifically creates an Executive Body consisting of all parties to it, anticipating periodic meetings. LRTAP, as a relatively early example of this phenomenon and does not include a specific provision for the adoption of protocols.

The role of the Convention as the preliminary architecture for further cooperation is nonetheless apparent in its article 2, entitled "Fundamental Principles:"

> The Contracting Parties, taking due account of the facts and problems involved, are determined to protect man and his environment against air pollution and shall endeavour to limit and, as far as possible, gradually reduce and prevent air pollution including long-range transboundary air pollution

This language is highly qualified, adjectival, and descriptive in character. By contrast, pollution control is routinely understood to require firm, measurable, quantifiable, and reportable actions by states to limit the release of pollutants. Although this provision is clearly binding under international law, creating obligations and rights for states parties to the Convention, it is virtually impossible to implement in a uniform and meaningful fashion by the current 56 member states of the ECE without further elaboration.

That expectation has been fulfilled in the intervening time by the adoption of seven substantive ancillary agreements uniformly identified as "protocols" to the Convention. These agreements address regulatory actions for a number of specifically identified substances or categories of air pollutants: sulphur compounds; oxides of nitrogen; heavy metals; persistent organic pollutants; volatile organic compounds; and ground-level ozone.[9] Some of these protocols have since been amended to reflect the need for greater rigor or precision.

Although the Convention does not specifically anticipate subsequent protocols, the protocols themselves articulate their relationship to the LRTAP regime. Most obviously, the protocols identify themselves as having been adopted under the authority of the Convention. Parties to the protocols are restricted to the subset of states party to the parent Convention – basically all of Europe, the Russian Federation, former Soviet

[8] Convention on Long-Range Transboundary Air Pollution, 1979 (1302 UNTS 217).

[9] Protocol on Reduction of Sulphur Emissions or Their Transboundary Fluxes by at Least Thirty Per Cent, 1985 (1480 UNTS 215); Protocol to the 1979 Convention on Long- Range Transboundary Air Pollution Concerning the Control of Emissions of Nitrogen Oxides Or Their Transboundary Fluxes, 1988 (1593 UNTS 287); Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution Concerning the Control of Emissions of Volatile Organic Compounds or Their Transboundary Fluxes, 1991 (2001 UNTS 187); Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Further Reduction of Sulphur Emissions, 1994 (2030 UNTS 122); Protocol to the Convention on Long-Range Transboundary Air Pollution on Persistent Organic Pollutants, 1998 (2230 UNTS 79); Protocol to the 1979 Convention on Long – Range Transboundary Air Pollution on Heavy Metals, 1998 (2237 UNTS 4); Protocol to the 1979 Convention on Long-range Transboundary Air Pollution to Abate Acidification, Eutrophication and Ground-level Ozone, 1999 (2319 UNTS 81).

constituent republics that are now sovereign states, Canada, and the United States. The protocols specify periodic review at meetings of the Convention's Executive Body, presumably in anticipation of subsequent amendments to respond to new scientific or public policy circumstances. At the other end of the regulatory process, the Executive Body also serves as a forum for the review of compliance and implementation.

The development of autonomous environmental regimes took another step forward with the UNEP-sponsored negotiations on protection of the stratospheric ozone layer. Early in this process, governments negotiating under UNEP auspices made an explicit decision to bifurcate this undertaking. One product was to be a "framework" multilateral convention. Ancillary agreements or "protocols" containing substantive regulatory measures would be appended to this convention. The ozone umbrella treaty evolved into the Vienna Convention for the Protection of the Ozone Layer, concluded in March 1985[10].

Unlike LRTAP, the Vienna Convention contains express provisions anticipating the adoption of subsequent protocols. Those include rules governing not only the adoption of protocols, but also their amendment and the adoption of annexes to those protocols. A separate article sets out the legal and institutional relationship between the Convention and the protocols to it.

To date only one protocol to the Vienna Convention has been adopted, the 'Montreal Protocol on Substances That Deplete the Ozone Layer', which was originally negotiated simultaneously with the Convention. The Montreal Protocol, which has been amended four times and adjusted six times, both to extend coverage to new ozone-depleting substances and to alter reduction schedules, as a practical matter has largely displaced the parent Convention as the locus of activity in the stratospheric ozone regime.[11]

The 1992 Framework Convention on Climate Change

The centerpiece of the international climate regime is the UN Framework Convention on Climate Change (FCCC), opened for signature at the United Nations Conference on Environment and Development (UNCED) in Rio de Janeiro in 1992.[12] The Convention is largely a procedurally oriented instrument containing obligations for reporting and information sharing. The Convention also articulates certain broad substantive principles, but contains few if any binding commitments to reduce greenhouse gas emissions.

[10] Vienna Convention for the Protection of the Ozone, 1985 (1513 UNTS 293).

[11] Under customary international law, an amendment to a multilateral treaty is binding only on those states that indicate their affirmative intent to accept those new obligations, ordinarily through ratification of the amendment [Vienna, 1969]. Article 2, paragraph 9 of the Protocol permits "adjustments" that bind all Protocol parties by a two-thirds supermajority vote. Subsequent to the adoption of the Protocol in 1987, the parties to the instrument have employed both approaches, amending the Protocol 5 times and adjusting it on 13 occasions.

[12] United Nations Framework Convention on Climate Change, 1992 (1771 UNTS 107).

The word "framework" by this time had acquired the status of a term of art, referring to an international regime established by a freestanding "umbrella" multilateral convention analogous to the Vienna Convention on the Protection of the Ozone Layer, which was the conscious model for the instrument [Wirth, Lashof, 1992]. The term by this point in the development of the autonomous regime phenomenon even appears in the title of the instrument.

Consistent with the basic model, the FCCC includes a number of components: (1) procedural requirements for data collection and exchange, periodic reporting, technology transfer, and scientific cooperation; (2) provision for adoption of ancillary protocols, along with rules for adoption and amendment of both the Convention itself and any protocols; (3) a periodic, typically annual, conference of the parties to the Convention and meetings of the parties to any protocols; and (4) requirements for periodic review of developments in science, policy, and procedural issues, typically addressed at the conference of parties; and (5) establishment of a financial mechanism.

Outputs from these conferences range from decisions – generally accepted to be legally nonbinding in character – to amendments, declarations, or a variety of other procedural formats. Also consistent with the general model, the FCCC establishes two institutional entities subordinate to the conference of the parties: a Subsidiary Body for Scientific and Technological Advice (SBSTA) and a Subsidiary Body for Implementation (SBI). The instrument further includes a standard provision identifying the need for a Secretariat, now housed in Bonn. [13]

The FCCC has a looser legal texture concerning protocols and their relationship to the parent convention than some other precedents, most notably the Vienna Convention on the Protection of the Ozone Layer. The FCCC, in an article devoted solely to the issue, anticipates the adoption of protocols. Otherwise, the treatment of protocols is much less specific than in the precursor ozone convention. The FCCC does not specify the relationship between the Convention and its protocols, or rules for the amendment of protocols or annexes to them. Nor does it set out, as the Vienna Convention does, rules for the adoption of protocols, instead merely authorizing their adoption by the conference of the parties.

Also unlike the ozone convention, the FCCC does not address protocols in final clauses dealing with such issues as ratification, acceptance, approval, accession, and entry into force. Again in contrast to the ozone model, the FCCC does not specify rules for withdrawal from protocols. It does, however, state that "[a]ny Party that withdraws from the Convention shall be considered as also having withdrawn from any protocol to which it is a Party."

[13] . The present article addresses the potentially universal, global climate regime established by the FCCC. Other institutional settings, such as the Major Economies Forum, the Asia-Pacific Economic Cooperation Forum, and the Montreal Protocol, have also been important in crafting climate policy, as has action at the subnational level [McGinnis, Ostrom, 1992; Ostrom, 2012; Stavins, 2015; Stavins et al., 2015; Victor, 2011].

That these decisions were purposeful becomes clearer by reference to an analysis of the UN Convention on Biological Diversity,[14] also intended to serve as a framework convention, and adopted at UNCED contemporaneously with the FCCC. That agreement addresses protocols in provisions dealing with the right to vote, settlement of disputes, an optional arbitral procedure, amendments, adoption and amendment of annexes, as well as in the final clauses setting out requirements for ratification, acceptance, approval, accession, and entry into force. Tellingly, the Biodiversity Convention, like the ozone convention, includes a specific provision setting out the legal and structural relationship between the convention and its protocols.

In the context of the Biodiversity Convention, the possibility for a specific protocol on genetically modified organisms, identified in the text as "living modified organisms," is identified in the text of the Convention itself. By contrast, the negotiators of the FCCC on the whole may have been less enthusiastic about the prospect of protocols, which may account for the difference. On the other hand, as suggested by a widely respected chronicler of the FCCC negotiations, the explanation may simply be that the Climate Convention negotiators chose not to include "default" options that would apply to protocols, leaving those issues to the negotiators of the protocols themselves [Bodansky, 1993].

The 1997 Kyoto Protocol

The first, and to date only, instrument expressly to be identified as a protocol to the FCCC is the Kyoto Protocol to the United Nations Framework Convention on Climate Change.[15] The Convention identifies a principle of "common but differentiated" responsibilities, and contains express statements that industrialized states would be expected to bear the burden of initial cuts in emissions of climate-disrupting gases. Although the Convention contains only a modest, arguably non-binding emissions stabilization goal, its Annex I nonetheless identified industrialized states by name that were subsequently expected to take on the more onerous emissions reductions obligations.

Consistent with that, the Protocol specifies quantitative emissions reductions in gases that contribute to climate change by thirty-three enumerated industrialized countries and economies in transition, transposed into Annex B of the Protocol. The Protocol controls the emissions of six greenhouse gases, notably carbon dioxide, methane, and nitrous oxide, weighted according to their relative contributions to climate disruption as measured by "carbon equivalents" based on global warming potentials established by the Intergovernmental Panel on Climate Change (IPCC).

The overall goal of the Protocol is to lower global releases of these gases by those states with quantified emissions limitation or reduction ("mitigation") commitments by about 5% by reference to 1990 levels. The multilaterally agreed regulatory vehicle for

[14] Convention on Biological Diversity.

[15] Kyoto Protocol to the Framework Convention on Climate Change, 1997 (2303 UNTS 148).

accomplishing this initial reduction goal was a first commitment period commencing in 2008 and ending in 2012. The Protocol anticipates additional reductions in subsequent commitment periods. The binding reduction goals accepted by Annex I parties to the Convention are set out on a state-by-state basis in an annex to the Protocol.

Among the novel features of the Kyoto Protocol is its "cap and trade" architecture. The principal vehicles for implementing this regulatory design are the Protocol's "flexible mechanisms," designed to reduce the cost of implementation by expanding the range of options available to states in fulfilling their obligations under the agreement.

The Protocol specifies that rights to emit may be traded among parties to the Protocol with quantified emissions reductions obligations. This provision embodies the drafters' expectations concerning the establishment of markets in carbon emissions, such as that set out in the European Union's Emissions Trading System.[16] Similar markets have been set up in North America in the form of the Regional Greenhouse Gas Initiative in the Northeast and in California's state-level scheme.

Second, the Protocol permits Annex I parties to undertake cooperative projects that reduce emissions of greenhouse gases in other Annex I parties and to obtain credit for those reductions, an option known as "joint implementation". The resulting "emissions reduction units" are also tradable. Third, the Protocol establishes a "clean development mechanism" (CDM), which provides a basis for those countries with emission reduction obligations to implement those commitments by undertaking projects in developing countries. "Certified emissions reductions units" generated by such projects may also be traded.

In 2001 the infrastructure for implementation of the Protocol was completed with the adoption of the Marrakesh Accords, a set of rules governing important aspects of the operation of the agreement such as accounting for greenhouse gas emissions and reductions.[17] The Accords, a group of decisions made at the meeting of the parties to the Protocol, also adopted a compliance mechanism [Wirth, 2002].

The Compliance Committee has two branches, one identified as "facilitative" and the other as "enforcement." The Facilitative Branch is designed to assist those states that may have difficulty complying with their obligations, including those parties to the Protocol that self-identify as such. The Enforcement Branch has the authority to impose sanctions for parties found to be out of compliance with their obligations under the Protocol, including the suspension of trading under the flexible mechanisms.

[16] Directive of the European Parliament and of the Council of 13 October 2003, establishing a scheme for greenhouse gas emission allowance trading within the Community, and amending Council Directive 96/61/EC, 2003 O.J. Eur. Comm. (L 275) 32, amended, Directive 2004/101/EC of the European Parliament and of the Council, 2004 O.J. Eur. Comm. (L 338) 18, amended, Directive 2008/101/EC of the European Parliament and of the Council, O.J. Eur. Comm. (L 8) 3, amended Regulation (EC) No 219/2009 of the European Parliament and of the Council, 2009 O.J. Eur. Comm. (L 87) 109, amended, Directive 2009/29/EC of the European Parliament and of the Council, (L 140) 63.

[17] Report of the Conference of the Parties on Its Seventh Session, 1/CP.7 to 14/CP.7, U.N. Doc. FCCC/CP/2001/13/Add.1 (21 January 2002) (Marrakesh Rules).

As set out in greater detail below, the Kyoto Protocol had a difficult gestation period in the United States, the particulars of which are critical to understanding the subsequent trajectory of the climate regime. Although vigorously negotiated by the U.S. government, which contributed much to its structure including the flexible mechanisms, the agreement encountered opposition in the Senate, whose advice and consent to ratification was essential as a legal condition precedent to the United States' becoming party to the instrument. In March 2001, President George W. Bush announced that The United States did not intend to ratify the Protocol.[18] Consequently, although the agreement was signed by the Clinton Administration, the United States has remained a signatory but not a full party to the instrument.

The difficulties in the United States also endangered the prospects of the Protocol's entry into force for any state. One of the requirements for the Protocol's entry into force was ratification by states representing 55% of 1990 global emissions of carbon dioxide. Of that amount, the United States represented about 35%, meaning that a shortfall in ratifications from states representing only 10% of total Annex I emissions would preclude the Protocol's entry into force. After much uncertainty, the Protocol entered into force in February 2005, following the Russian Federation's ratification.

In December 2011, Canada formally initiated the process of withdrawal, which according to the Protocol's terms, took effect a year later, immediately before the end of the first commitment period. It was widely acknowledged that Canada would be unable to achieve its Kyoto target of a 6% reduction in greenhouse gas emissions by reference to the base year of 1990. Informal reports suggested that Canadian emissions have increased during that period by 35% or more. In addition to relieving it of its international obligations under the Protocol, Canadian withdrawal also reduced the likelihood of the imposition of sanctions by the Enforcement Branch of the Compliance Committee established by the Marrakesh Rules.

The 2012 Doha Amendment

The Kyoto Protocol specifies that negotiations on a second and subsequent commitment periods should commence "at least seven years before the end of the first commitment period," meaning 2005 [Aldy, Stavins, 2010; Olmstead, Stavins, 2007; Stavins, Aldy, 2013]. In the event, that process was initiated at the concurrent thirteenth meeting of the parties to the FCCC and the third meeting of the parties to the Kyoto Protocol (COP 13/CMP 3) in Indonesia in 2007, which adopted the Bali Action Plan, or "Bali Roadmap".[19]

The Roadmap was intended to launch intensive multilateral consultations scheduled to conclude with a comprehensive agreement at COP 15 in Copenhagen at the

[18] Letter from President George W. Bush to Senator Chuck Hagel, 13 March 2001.

[19] Report of the Conference of the Parties on Its Thirteenth Session, Dec. 1/CP.13, U.N. Doc. FCCC/CP/2007/6/Add.1 at 3 (14 March 2008) (Bali Action Plan).

end of 2009. The negotiations were divided into two tracks. The first, under the Kyoto Protocol, focused on the adoption of new binding mitigation (emissions reductions) commitments by developed (Annex I) countries that were already party to that instrument. A parallel process was undertaken directly under the Framework Convention, which involved all parties to the Convention, including the United States.

As before, the Kyoto Protocol and the Convention were inextricably linked, with the Convention meeting a number of identifiable legal and structural needs beyond the Protocol. First, the Convention served, and continues to serve, as the principal forum for coordinating global climate policy among all its 197 parties (including the European Union). That includes the relationship between and among instruments such as the Kyoto Protocol, involving differentiated commitments for industrialized countries.

Second, the Convention is a vehicle for crafting global policy with respect to issues affecting all states. These include adaptation to climate change that is already inevitable, due to "banked" emissions of greenhouse gases that have already been released, or undoubtedly will be, contributing to ever increasing concentrations of these substances in the atmosphere even if global emissions may be controlled.

Third, the Convention is a venue for addressing the need to transcend the limitations of the Kyoto Protocol in discussing mitigation commitments for non-Annex I countries, including BRICS (minus the Russian Federation, an Annex I state) and developing countries. For example, China has now surpassed the United States as the largest single national emitter.

Fourth, the Convention, as anticipated in its text, is the gateway through which financial assistance can be provided to developing countries. The costs of adaptation, for instance, may be disproportionately burdensome to non-Annex I countries.

The post-Bali negotiations represented important shifts in the direction of the global climate regime. First, developing countries, for the first time, formally discussed mitigation (emission reduction) commitments. In recognition of the principle of common but differentiated responsibilities articulated in the Convention, these "nationally appropriate mitigation actions" (NAMAs) were not expected to be framed in numerical economy-wide percentage reduction goals, as for Annex I parties under Kyoto. But this development nonetheless reflected progress in casting the mitigation net wider.

Second, the United States, under the Obama presidency, had reengaged with the UN-sponsored climate negotiations. These intensive multilateral consultations were scheduled to conclude with a comprehensive agreement at COP 15 in Copenhagen at the end of 2009.

Interpretations of the Copenhagen meeting differ, but it certainly did not fully meet prior expectations[20]. The meeting did not even produce a non-binding consensus statement in the form of a COP decision - an unfortunate precedential juncture for the UN climate regime, which ordinarily acts by consensus. Objections by a few states such

[20] Report of the Conference of the Parties on its Fifteenth Session, Dec. 2/CP.15, U.N. Doc. FCCC/CP/2009/11/Add.1 at 4 (18 December 2009) (Copenhagen Accord).

as Venezuela, Sudan, Bolivia, and Nicaragua meant that the COP was able merely to "take [] note" of the Copenhagen Accord.

Formally speaking, that instrument consequently has no formal status in the UN climate regime. Its text was negotiated by a group of about 29 countries, including numerous heads of state. The breakthrough in negotiations came after a personal meeting between U.S. President Obama and the heads of state of the four BASIC countries – Brazil, South Africa, India, and China (BRICS minus Russia, an Annex I state). The result borders on incoherence to any but the most seasoned climate aficionado. The meeting did, however, result in a process in which non-Annex I states identified nonbinding NAMAs and Annex I states and set out their intentions with respect to future economy-wide reductions.

After the Copenhagen juncture, multilateral efforts regrouped around a COP 21 new goal in Paris in 2015, this time in a more structured manner with clearer goals agreed in an incremental fashion along the way. After the disappointing Copenhagen outputs, the FCCC negotiations were somewhat reinvigorated at COP 17/CMP 7 held in Durban at the end of 2011[21] [FCCC Durban Platform for Enhanced Action, 2011]. There, the parties to both the Convention and the Protocol embarked on a stopgap effort to address the then-looming end of the first commitment period under Kyoto, as well as further collective action thereafter [Aldy, Stavins, 2012; Olmstead, Stavins, 2012].

The Durban meeting took a nonbinding decision proposing an amendment to extend the Kyoto Protocol for a second commitment period, beginning on January 1, 2013, the day after the expiration of the first commitment period, through the end of 2017 or 2020. Consistent with the requirements of the Convention and Protocol, the Amendment was formally adopted the next year in Doha mere days before the expiration of the first commitment period in 2012.[22] The Amendment clarifies that the second commitment period extends until 2020 and sets out further reduction obligations until then for Annex I states, thus formally maintaining the continuity of the Kyoto Protocol through the end of the current decade.

The Doha Amendment, however, can hardly be considered a success story from either an institutional or public policy point of view. Canada, having earlier withdrawn from the Protocol, did not accept further commitments. The Russian Federation, Japan, and New Zealand also declined. Those four states are literally represented by blank grey boxes on the FCCC's official website setting out the text of the Doha Amendment and parties to it[23]. The Doha Amendment consequently serves as a vehicle for binding emissions reductions primarily for the EU, Norway, Ukraine, Belarus, and Kazakh-

[21] Report of the Conference of the Parties on Its Seventeenth Session, Dec. 1/CP.17, U.N. Doc. FCCC/CP/2011/9/Add.1 at 2 (15 March 2012) (Durban Platform for Enhanced Action).

[22] Doha Amendment to the Kyoto Protocol, 2012.

[23] Status of the Doha Amendment. Режим доступа: http://unfccc.int/kyoto_protocol/doha_amendment/items/7362.php.

stan. Australia, in accepting reductions for the first time after the Protocol itself allowed it an increase of 8%, identified a new base year of 2000.

A total of 144 instruments of acceptance are required for the Amendment to enter into force, which as of this writing, has secured only slightly more than half the required number and consequently, is not in force. The overwhelming majority of ratifications have come from Convention parties that are not Annex I states and consequently do not have quantified emission reduction obligations under either the Protocol or the Amendment.

The EU is applying the Doha obligations among its member states on a mandatory basis within this supranational organization, but has been unable to confirm those efforts through ratification on the international level due to a veto by Poland. Consequently, the Doha Amendment quite plausibly may not enter into force before the expiration of the second commitment period in 2020.

The Paris Agreement

Against this lengthy and convoluted history, the Paris Agreement took shape in the years 2011–2015, in the form of implementation of the Durban Platform at successive COPs. The final package, consisting of the text of the Paris Agreement proper and an accompanying non-binding decision, is much more loosely textured than the Kyoto Protocol as implemented by the Marrakesh Accords. It is also less clearly anchored in the infrastructure of the previously established structure consisting of the Convention, the Protocol, the Marrakesh Rules, and the Doha Amendment. This section consequently analyzes the negotiation of the Paris Agreement by reference to the earlier development of the regime, and assesses the significance of its structural and institutional posture with respect to further implementation.

Negotiating History of the Paris Agreement

Despite the Kyoto Protocol's difficulties, objective reports indicate that states parties have been uniformly successful in implementing their obligations [Shishlov et al., 2016]. But by the time of the Durban meeting in 2011, Convention parties had become convinced of the need to revisit the structure of the regime going forward in a structured, ordered manner that increased the likelihood of a successful outcome in Paris in 2015.

Some of this sentiment stemmed from the prior unfortunate history in Copenhagen, which from a structural point of view, was a low point in terms of both content and broad acceptance for what has always been understood to be a global regime. Second, the Kyoto Protocol had been subject to intense criticism, especially in the United States, for its allegedly rigid, "top down" structure – notwithstanding the self-evident observation that the Kyoto negotiators had voluntarily agreed to the diverse, state-by-state numerical reduction obligations.

Third, and perhaps most importantly, there was a recognition of the need to expand the coverage of the regime to include mitigation undertakings from all states, not just Annex I parties. The Kyoto Protocol's emissions reductions goals were always understood to be at best modest by comparison with the need, and global GHG releases have in fact increased during the time it has been in force.

Apart from its other attributes, the Protocol came to be viewed as the embodiment of the debilitating divide, between Annex I states and others, that dates back to the 1992 Convention. Indeed, this approach had come to be seen as the "original sin" of the UN climate regime, in part by creating a precedent for non-Annex I parties to resist mitigation undertakings, regardless of the otherwise agreed need for differentiation among Convention parties.

It consequently became clear that a mechanism was needed to engage all states in global efforts to protect the climate. Unlike the ozone regime, in which the process of evolution over time had involved the expansion in the substances covered, from the beginning in the climate negotiations there had been agreement about the principal gases of concern and the need to minimize their total impact by reference to their weighted impact on climate disruption. The negotiations leading to Paris, by contrast, involved the expansion of meaningful mitigation undertakings beyond a group of roughly the same number and economic status as the OECD.

The negotiations leading to COP 21 in Paris consequently were predicated on the assumption that a new instrument should apply to all states, not just Annex I parties. A number of states, including in particular the EU, which negotiates as a bloc, insisted on a binding legal instrument. But as described in section IV.A below, the term "protocol" had acquired a pejorative connotation in the United States, especially in the U.S. Senate. Consequently a compromise was reached on the "Durban Platform" at COP 17 in 2011 on the formulation of the goal for Paris in 2015 as "a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties," to take effect in 2020 – that is, at the end of the Kyoto Protocol's second commitment period.[24]

Described as a "bottom up" approach, by contrast with the "top down" structure of the Protocol, the core mitigation undertakings were anticipated no longer to be binding, but instead are unilaterally-determined, voluntary, nonbinding "nationally determined contributions" (NDCs). This met the needs of non-Annex I countries, whose prior undertakings in the form of NAMAs were often phrased in terms of sectoral initiatives or, as in the case of China, a reduction in greenhouse gas "intensity" in the form of emissions per unit of GDP, and not in Kyoto-style economy wide percentage reduction terms. This structure also met the need of some countries, such as the United States, not prepared to frame their undertakings by reference to the Kyoto base year of 1990.

[24] Report of the Conference of the Parties on Its Seventeenth Session, Dec. 1/CP.17, U.N. Doc. FCCC/CP/2011/9/Add.1 at 2 (15 March 2012) (Durban Platform for Enhanced Action).

There was also a discussion as to whether establishing mitigation goals that are non-binding with respect to outcome (unlike the Kyoto Protocol's legally binding targets) might encourage greater ambition on the part of individual states. There is no clear answer to this question as a matter of principle. On the one hand, states might be more inclined to accept more aggressively ambitious aims if they are phrased on non-binding, aspirational, and hence clearly unenforceable, terms [Stern, 2014]. On the other, states might be inclined to take binding targets more seriously. In general, the EU tended to support binding, Kyoto-like targets, at least for developed country parties, whereas others, including the United States, tended toward the non-binding approach, partially as a result of experience with the Kyoto Protocol.

In a stroke of structural inspiration, COP 19, held in Warsaw in 2013, called for "intended nationally determined contributions" (INDCs) to be identified by the first quarter of 2015, "by those Parties ready to do so," eight months before the actual conference and well out of the public eye [FCCC Further Advancing the Durban Platform, 2013]. One hundred sixty four parties to the Convention have submitted INDCs as of this writing.[25]

The EU INDC was phrased on classic Kyoto terms:

> At least 40% domestic reduction in greenhouse gas emissions by 2030 compared to 1990.

The U.S. INDC utilized a different base year:

> 26–28% reduction by 2025, compared to 2005.

The format allowed further variations among formulations by Annex I countries, such as Russia's INDC:

> Limiting anthropogenic greenhouse gases in Russia to 70–75% of 1990 levels by the year 2030 might be a long-term indicator, subject to the maximum possible account of the absorbing capacity of forests.

China's is typical of non-Annex I states in eschewing an economy-wide percentage reduction target and instead including the following undertakings:

- To achieve the peaking of carbon dioxide emissions around 2030 and making best efforts to peak early;
- To lower carbon dioxide emissions per unit of GDP by 60% to 65% from the 2005 level;
- To increase the share of non-fossil fuels in primary energy consumption to around 20%; and
- To increase the forest stock volume by around 4.5 billion cubic meters on the 2005 level.

[25] Report of the Conference of the Parties on Its Nineteenth Session, Dec 1/CP.19, U.N. Doc. FCCC/CP/2013/10/Add.1 at 2, para. 2(a) (31 January 2014) (report of Warsaw COP 19).

Brazil, another non-Annex I state, nonetheless phrased its contribution in economy-wide terms:

> [To] reduce greenhouse gas emissions by 37% below 2005 levels in 2025. Subsequent indicative contribution: reduce greenhouse gas emissions by 43% below 2005 levels in 2030.

States tend to coalesce into loosely configured, like-minded groups or blocs in the global climate regime, which tends to make these immensely complicated negotiations somewhat more manageable[26] [Gupta, Mandal 2015]. The membership of some groupings, such as the European Union, a regional economic integration organization responsible for at least some of the implementation of the resulting agreement, are pre-ordained by existing structures. Others, such as the Alliance of Small Island States (AOSIS), which has worked as an identifiable coalition since negotiations on the Framework Convention, have relatively obvious common interests – in this case, avoiding the risks of inundation by rising sea levels.

In Paris, the negotiations overcame the numerous impediments to success for a number of reasons. First, the extraordinarily elevated hopes for success, with 150 heads of state or government attending, raised expectations to a very high level. A disappointing repeat of COP 15 in Copenhagen, while possible, was consequently a highly undesirable result, and it was in all delegations' interest to reach a compromise and avoid being identified as impeding consensus. Second, the preparation period of essentially six years since Copenhagen facilitated early airing, and resolution of, participating delegations' concerns well before the actual conference. Indeed, appropriately viewed, the Copenhagen Accord itself is a direct precursor to the Paris Agreement, in which many of the major issues had already been resolved [Bodansky, 2016]. Third, the open and very loosely-textured nature of the Paris Agreement – whose obligation are closer in kind to the Framework Convention than to the Kyoto Protocol – made it relatively easy for states to accept the new instrument.

This context facilitates compromise on the questions left unresolved before the time of the actual conference. Some of the outstanding issues, even going into the meeting itself, were quite contentious, such as the temperature target at which mitigation efforts would be directed. AOSIS favored the most aggressive goal, 1.5 ºC, by comparison with the prevailing view of other delegations focused around 2º C[27]. In the end, this question was resolved in article 2, paragraph 1(a) of the text, which articulates the 2º C target while preserving the 1.5 ºC goal as a desirable aim that would further reduce

[26] Paris Climate Talks: Who are the Negotiating Groups? (27 November 2015). Available at: https://www.carbonbrief.org/interactive-the-negotiating-alliances-at-the-paris-climate-conference (accessed: 23 June 2017);

Yeo S. Paris 2015: What do the negotiating alliances want? (17 November 2015). Available at: https://www.carbonbrief.org/paris-2015-what-do-the-negotiating-alliances-want (accessed: 23 June 2017).

[27] Earth Negotiations Bulletin, Summary of the Paris Climate Change Conference, no. 12 (663). International Institute for Sustainable Development (15 December 2015). Available at: http://enb.iisd.org/vol12/enb12663e.html (accessed: 23 June 2017).

the risk of climate disruption. Another example concerns the legal force of the NDCs, with the European Union and other delegations arguing in favor of their internationally legally binding character[28]. In the end, the NDCs were instead determined to be non-binding as to outcome for all parties to the Agreement, including the EU. Yet a third example concerns article 4, paragraph 4 of the Agreement, which articulates the need for developed country parties to take the lead in proposing successively more ambitious mitigation goals, as articulated in subsequent NDCs. In what was identified as a typographical error, the final minutes of the conference were delayed by the demand of the United States, that this provision be phrased in non-legally binding terms, as indicated by the word "should" [Bodansky, 2015]. Not surprisingly, all of these compromises involve a relaxation of the rigor of the Agreement, toward a least-common-denominator result. [29]

Structure and Basic Content of the Paris Agreement

The Paris Agreement is intended to set out a new framework for global cooperation by all parties to the Convention. A number of its substantive goals go well beyond those of the Kyoto Protocol. For example, the Agreement sets out a goal of limiting average global warming to 2º C, and (as discussed above) identifies a further need for efforts to confine the increment to 1.5º.[30] Reflecting much prior learning from the global warming negotiations in terms of the need for, and difficulty of identifying near-term obligations, the Agreement specifies that total global emissions should peak and begin to decline only "as soon as possible," as opposed to identifying a specific date.

A further global target is the achievement of "a balance between anthropogenic emissions by sources and removals by sinks of greenhouse gases in the second half of this century." Like many other locutions in the climate lexicon, the meaning of this phrase is less than apparent upon first encounter. The intent, however, was clear enough: to assure net zero global greenhouse gas emissions or worldwide "carbon neutrality" by 2050, with any remaining GHG emissions fully offset by removal mechanisms, such as efforts to expand forest cover.

The binding mitigation obligations going forward, like many other components of the Paris Agreement, are primarily procedural in nature. All states are obliged to submit successively more ambitious NDCs covering 5-year increments. As of this writing, 143 parties to the Convention have submitted final NDCs covering at least the period 2020-

[28] Submission by Latvia and The European Commission on Behalf of the European Union and Its Member States (6 March 2015). Available at: http://www4.unfccc.int/Submissions/INDC/Published%20Documents/Latvia/1/LV-03-06-EU%20INDC.pdf (accessed: 23 June 2017).

[29] Just as the Obama Administration played a particular role in negotiating the Copenhagen Accord, so too a joint China-United States bilateral initiative played a major role in overcoming impediments to conclusion of the Paris Agreement [White House, 2014].

[30] An analysis of the INDCs taken together suggests that this goal is unlikely to be met through existing commitments, even if fully implemented [UNEP, 2016]. Instead, the likelihood is closer to 3ºC, and a goal of 1.5º C is probably already beyond the range of reasonable expectations.

2025[31]. Developed country – no longer "Annex I" – parties are expected to continue to frame their NDCs in economy-wide percentage emission reduction targets. Russia, which as of this writing has not ratified the Paris Agreement, has not yet submitted a final NDC.

With respect to adaptation, the Paris Agreement requires parties to prepare and periodically transmit adaptation plans. Adaptation plans are to (1) be "country-driven, gender-responsive, participatory and fully transparent in approach; (2) "tak[e] into consideration vulnerable groups, communities and ecosystems; and (3) be "based on and guided by the best available science and, as appropriate, traditional knowledge, knowledge of indigenous peoples and local knowledge systems, with a view to integration adaptation into relevant socioeconomic and environmental policies and actions, where appropriate."

The Paris Agreement further specifies the need for international financial support for developing countries with respect to both mitigation and adaptation. The nonbinding accompanying COP decision reiterates the goal of contributions of $100 billion (U.S.) per year. The Agreement further sets out the need for support for capacity building, technology transfer, and climate education. The Agreement identifies the need for a "transparency framework," so as to assure the reliability and comparability of reporting under it. Periodic "global stocktakes" are identified, commencing with the first in 2023, to be reviewed every five years thereafter. The Conference of the Parties is directed to establish a new compliance mechanism, and the Agreement specifies that further work on the controversial issue of compensation for loss and damage will continue.

The Paris Agreement as a Component of the un Climate Regime

As set out the Durban Mandate, the Paris Agreement meets the requirement that it be adopted "under the Convention." For one thing, the Paris Agreement was adopted by the Conference of the Parties to the Convention. The Agreement and its accompanying decision refer repeatedly to the Convention, as in establishing that the Convention COP will serve as the meeting of the parties under the agreement, that the Convention's Secretariat will service both agreements, and that the Convention's amendment procedures apply to the Paris Agreement as well.

Although article 17 of the Convention authorizes "protocols" to that instrument, it does not establish it as the only form of ancillary or subsidiary agreements. The Conference of the Parties, which adopted the Paris Agreement, arguably has considerable flexibility in identifying the structure and forms of actions that it takes. The Paris Agreement is clearly consistent with the Durban Mandate, adopted by the Conference of the Parties, impliedly in recognition of the possibility that the resulting instrument might

[31] Intended Nationally Determined Contributions, 2017. Available at: http://unfccc.int/focus/indc_portal/items/8766.php (accessed: 23 June 2017).

not be a "protocol." And in any event, the Paris Agreement bears a relationship to the Convention similar to that of a protocol, although not expressly identified as such.

This may be just a question of terminology, or, alternatively, it may signal a more significant difficulty in accommodating the Paris Agreement within the larger UN-sponsored, autonomous climate regime. Accordingly, this section first addresses the reason for avoiding the term "protocol." Then it takes on the more difficult question of the relationship between the Paris Agreement and its direct precursor, the Kyoto Protocol as modified by the Doha Amendment.

The Difficult Term "Protocol"

Terminology can be challenging, and occasionally fraught, in multilateral interactions. During the negotiations on the Convention, Malta proposed the identification of climate as a component of the global commons, the "common heritage of mankind." The phrase, however, proved to be too closely connected with the use of the same term in the context of the controversial deep seabed mining provisions in Part XI of the 1982 UN Convention on the Law of the Sea. In the end, the phraseology "common concern of mankind" was included in the Convention instead [Bodansky, 1993].

Similarly, the term "Protocol" acquired a highly charged connotation in the United States, to the point that governments had widely understood that the next agreement could not be called a 'protocol' without complicating U.S. participation. This is reflected in the Durban Platform's call for a "legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties," mandated by COP 17. Negotiators subsequently referred to this formula by the neutral shorthand "Paris Outcome" during the preparations leading to COP 21.

The options available strictly within the Convention regime are quite clear. The most obvious is a new protocol, which could be applicable to all Convention parties, including the United States.

An additional amendment to the Kyoto Protocol beyond the Doha Amendment might technically meet the test established in the Durban Platform, but would be fraught with procedural and political difficulties, especially given the United States' rejection of Kyoto. The Kyoto Protocol, moreover, does not apply to "all parties."

The identification of a third commitment period under Kyoto would likely have encountered even worse analytical and political difficulties. Other important states, including Japan, Canada, and the Russian Federation, had already declined to accept further reduction commitments under the Doha Amendment.

Yet another option for a legally binding instrument applicable to all parties could conceivably have been an amendment to the Convention itself, expressly anticipated by article 15 of that instrument. A decision of the Conference of the Parties would not meet the requirement of "legal force," as decisions are generally not understood to be legally binding.

The United States negotiators signalled their discomfort with these choices, by electing the answer, in effect, "none of the above". The form of the next multilateral climate agreement, as indicated in part by the name of the instrument, was discussed as far back as the year before COP 15 in Copenhagen, which laid the foundation for the broad contours of the Paris Outcome. The U.S. submission to the pre-Copenhagen process uses the unexpected (from the perspective of the Convention and the Protocol) term "implementing agreement"[32]. The U.S. submission prior to COP 20 in Lima in 2014 referred specifically to the "Paris Agreement."

The term "protocol" carries additional baggage in the United States because of the history accompanying adoption of the Convention, to which the Senate gave its advice and consent in 1992 and to which the United States has been party since the instrument entered into force.[33] Neither the President's Letter of Transmittal nor the Secretary of State's Letter of Submittal of the Convention to the Senate mentions the domestic procedure anticipated to be followed with respect to subsequent protocols to the UNFCCC[34].

In response to subsequent written questions from the Senate Foreign Relations Committee, the Executive Branch stated that, if a protocol containing targets and timetables "were negotiated and the United States wished to become a party, we would expect such a protocol to be submitted to the Senate"[35]. Then the Senate Foreign Relations Committee, in its report on the resolution of ratification for the UNFCCC, expressed the expectation that future actions, that would require legally binding emission reductions, would require the Senate's advice and consent[36].

The Kyoto Protocol itself received a scathing response in the U.S. Senate. The Kyoto Protocol was negotiated for the United States by the Clinton Administration, and the agreement owes much of its content to US government input. But even before the Protocol's adoption, the Senate had expressed its objection to the agreement in a resolution sponsored by Senators Byrd and Hagel and adopted by a vote of 95-0, referencing two factors: the Protocol's failure to identify emissions reduction goals for non-Annex I countries; and anticipated "serious harm to the economy of the United States"[37].

Vice President Al Gore nonetheless signed the Kyoto Protocol in November 1998, toward the end of the Clinton presidency, presumably on the expectation that the com-

[32] U.S. Submission on Copenhagen Agreed Outcome, 2009. Available at: unfccc.int/files/kyoto_protocol/application/pdf/usa040509.pdf (accessed: 23 June 2017).

[33] Senate resolution of advice and consent to Framework Convention, U.S. Senate 138 Cong. Rec. 33527 (1992).

[34] The United Nations Framework Convention on Climate Change, adopted May 9, 1992, by the resumed fifth session of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change ("Convention"), and signed on behalf of the United States at the United Nations Conference on Environment and Development (UNCED) in Rio de Janeiro on June 12, 1992.

[35] More generally, the Executive noted that, "given that a protocol could be adopted on any number of subjects, treatment of any given protocol would depend on its subject matter."

[36] S. Exec. Rept. 102-55, 102nd Cong., 2d Sess. (1992), at 14.

[37] S. Res. 98, 105th Cong. (1997).

position of the Senate would shift in a direction more receptive to the agreement. In the end, the Protocol was never submitted to the Senate for its advice and consent. In March 2001, President George W. Bush announced that the United States would not ratify the Kyoto Protocol[38].

As a strictly legal matter, these junctures are not necessarily impediments to the conclusion of a protocol subsequent to Kyoto, even by the Executive Branch without Senate advice and consent [Wirth, 2015; Wirth 2016]. At best, the action of the Senate Foreign Relations Committee in 1992 is a preference expressed by a Congressional committee, and was not included as a formal reservation to the resolution of advice and consent adopted by the full Senate, which has wide discretion to give or withhold its consent to ratification subject to binding conditions or reservations. Committee reports, while perhaps helpful in interpreting the Senate's resolution of advice and consent, do not have the force of law. The Byrd-Hagel resolution is non-binding and confined to the Kyoto Protocol. And in any event, the Paris Agreement is self-evidently designed effectively to respond to the two criteria identified in the resolution.

These junctures nonetheless continued to haunt the U.S. posture in the negotiations, and by implication have held the rest of the world hostage to representations in some cases made a quarter of a century ago. In the process, the term "protocol" acquired a highly suspect connotation as a political if not a legal matter. Indeed, as described above the U.S. delegation held up the final minutes of the Paris negotiations in navigating a delicate divide to assure that the multilateral text would conform to the distinction in American law that would allow the United States to conclude the pact as an "executive agreement" without the need for Senate advice and consent to ratification.

There is at least one instance in which this legal ambiguity may have practical significance. With the U.S. having announced its intention to withdraw from the Paris Agreement, the legal relationship between that instrument and the Framework Convention is now no longer a question in a hypothetical scenario. Denunciation of the Framework Convention was one of the options under consideration by the White House in the lengthy, public deliberations before President Trump's actual announcement[39]. In addition to the mitigation commitments undertaken by the United States, that decision also terminated an anticipated contribution of $2 billion toward a $3 billion pledge made in 2014 by President Obama, of which $1 billion had been paid by the end of Obama's term[40].

That approach might have reduced the hiatus between a notice of withdrawal and the effective cessation of legal obligations under the Agreement from four years to one. It would also, not coincidentally, require withdrawal from two multilateral treaties, in-

[38] Bush G.W. Letter from President George W. Bush to Senator Chuck Hagel, 13 March 2001.

[39] Park M. Three Ways Trump Could Dump Paris Climate Agreement//CNN, 1 June 2017. Available at: http://edition.cnn.com/2017/06/01/politics/paris-climate-agreement-trump-ways-to-withdraw/index.html (accessed: 23 June 2017).

[40] Fact-Checking Trump on Climate Finance. World Resources Institute, 2017. Available at: http://www.wri.org/blog/2017/06/fact-checking-trump-climate-finance (accessed: 23 June 2017).

cluding the Framework Convention, the foundation on which the remainder of the global regime has been erected. The legal effectiveness of this option turns on the interpretation of the text of the Convention's article 25, paragraph 3, which specifies: "Any Party that withdraws from the Convention shall be considered as also having withdrawn from any protocol to which it is a Party."

If this option had been elected, a relatively obvious legal question would arise, namely "Is the Paris Agreement a protocol to the Framework Convention?" While perhaps having a purpose similar to that of a protocol to the Convention judged in terms of its structure and function, the Paris Agreement is expressly not a "protocol". Moreover, the negotiating history quite plausibly suggests that that choice was a purposeful rejection of a characterization of the Paris Agreement as a "protocol" [41].

In this instance, the legal ambiguity is partially resolved by the Paris Agreement, which provides in its article 28, paragraph 3, that "any party that withdraws from the Convention shall be considered as also having withdrawn from this Agreement." But what about the time frames in this scenario? Would the withdrawal provisions of the Convention apply? Or would those of the Paris Agreement? Does it make a difference that the Paris Agreement is not a "protocol," in which case only the standard set out in the Paris Agreement would apply? These are open legal questions as to which, depending on the future behavior of key actors such as the United States government, there may be a need for resolution. The absence of a binding, third-party, neutral dispute resolution mechanism in the Paris Agreement adds further uncertainty to the mix.

From a public policy point of view, it would certainly make sense to conclude that a party cannot speed its withdrawal from the Paris Agreement by withdrawing from the Convention. That result would create perverse incentives for states to withdraw from both. On the other hand, would it make sense for a state in the position of the United States to have withdrawn from the Framework Convention, but still to be bound by the Agreement, which is the cornerstone of the international regime? Moreover, because the Convention is so widely accepted and has been in force for so long, most states would be in the position of the United States – that is, having become party to the Convention so long ago that the initial three-year waiting period passed long ago. It is too early to say whether there are significant consequences to other, currently less obvious situations in which the uncertain legal relationship between the Paris Agreement and the Convention may assume significance, such as the requirement in the Convention that the Secretariat service not only the Convention but its protocols as well.[42]

[41] Consulting the negotiating history ("*travaux préparatoires*") in interpreting a treaty is appropriate only when the plain meaning of the text leaves the result ambiguous, obscure, unreasonable, or manifestly absurd [Vienna, 1969]. In this particular situation, both the text and the *travaux* seem to support the conclusion that the Paris Agreement is not a protocol to the Convention.

[42] Another example in which prior previously-established procedures were circumvented, also to accommodate the United States, is the Agreement Relating to the Implementation of Part XI of the 1982 Convention on the Law of the Sea, which modified a major multilateral through a procedure other than that specified in the parent agreement [UNCLOS, 1994].

The Paris Agreement's Relationship to the Kyoto Protocol

In the end, the Paris Agreement is not a "protocol . . . under the Convention," but a "legal instrument or an agreed outcome with legal force," as set out in the Durban Mandate. This, of course, does not affect its binding legal character, which is clear by reference to the usual tests, such as those set out in the Vienna Convention on the Law of Treaties[43]. The more interesting question is the Paris Agreement's legal and structural relationship to the larger UN climate regime, consisting of the FCCC, the Kyoto Protocol, the Doha Amendment, the Marrakesh Rules, and a host of other decisions adopted, and actions taken, by twenty-two successive conferences of the parties.

More problematically, although the non-binding decision in which the Paris Agreement is embedded makes passing reference to the Kyoto Protocol, the Paris Agreement proper makes not a single reference to that instrument. The context and structure of the negotiations leading to Paris indicate that the Agreement is intended to be a successor instrument to the Protocol, if for no other reason than that the Agreement is intended to govern the period beginning in 2020, after the end of the second commitment period under Kyoto.

Beyond that however, little is clear. One possibility, presumably of interest to Kyoto parties such as the EU that have invested a great deal in the scheme, would be to salvage as much as possible from the earlier undertaking. Another, presumably represented by non-Annex I states that did not have emission reduction obligations under Kyoto, along with the United States which never became party to the instrument, might be to approach implementation of the Paris Agreement as writing on a clean slate. Or there might be some amalgam of the two.

While there is nothing to prevent continued use of the flexible mechanisms, they are now optional and are no longer part of the overall binding structure of the deal. There is no express reference to emissions trading in the Paris Agreement, despite its central importance to the EU's Emissions Trading System, the U.S. northeastern states' Regional Greenhouse Gas Initiative (RGGI), California's state-level scheme, and elsewhere[44] [Jaffe, Stavins, 2008; Ranson, Stavins, 2008, 2012].

Emissions trading and joint implementation survive in some form or other under article 6 of the Paris Agreement as voluntary "internationally transferred mitigation outcomes", which "shall be supervised by a body designated by the COP". A principal

[43] Vienna Convention on the Law of Treaties 1155 UNTS 331, 1969.

[44] Directive of the European Parliament and of the Council of 13 October 2003, establishing a scheme for greenhouse gas emission allowance trading within the Community, and amending Council Directive 96/61/EC, 2003 O.J. Eur. Comm. (L 275) 32, amended, Directive 2004/101/EC of the European Parliament and of the Council, 2004 O.J. Eur. Comm. (L 338) 18, amended, Directive 2008/101/EC of the European Parliament and of the Council, O.J. Eur. Comm. (L 8) 3, amended Regulation (EC) No 219/2009 of the European Parliament and of the Council, 2009 O.J. Eur. Comm. (L 87) 109, amended, Directive 2009/29/EC of the European Parliament and of the Council, (L 140) 63.

purpose, as under Kyoto, is to "deliver an overall mitigation in global emissions" as a result of such trades.

The successor to the CDM, also addressed in article 6, is "[a] mechanism to contribute to the mitigation of greenhouse gas emissions and support sustainable development." Unlike the project-based approach of the CDM, policies and programs may also qualify. Because tradeable credits can be generated in any country, there is the potential for some overlap with Kyoto's joint implementation mechanism, which governs offsets among Annex I parties. There are provisions against double-counting of emissions in both originating and host states, but as to most of the details of implementation, the COP is instructed to "adopt rules, modalities and procedures" to implement the mechanism.

Because of the altered status of trading, the elaborate compliance mechanism of the Marrakesh Rules is no longer needed. Instead, a new compliance process is to be crafted by the Conference of the Parties pursuant to article 15 that is, in contrast to the Marrakesh Rules' Enforcement Committee, "facilitative in nature and... non-adversarial and non-punitive".

Moreover, consistent with its bottom-up, loose texture, the text of the Paris Agreement includes a mixture of binding and non-binding provisions. This is indicated in the text by an alternation between "should" and "shall" [Bodansky, 2016a]. This is a considerable departure from Kyoto's structure, which relied heavily on the binding nature of obligations and their enforceability, particularly to insure the integrity of internationally-traded emissions rights.

Challenges of Implementation

COP 22 took place in Marrakech, which also served as the first Meeting of the Parties to the Paris Agreement (CMA 1) after the Agreement's entry into force on November 4, 2016. The meeting began three days later, on November 7, one day before the U.S. election in which that country voted for a new President who had campaigned on a promise to "cancel" the Paris Agreement. In response, COP 22 – which by all accounts was considerably disrupted by the event – adopted the high-level Marrakech Action Proclamation for Our Climate and Sustainable Development [FCCC, 2017].

COP 22 began the process of adoption of the "Paris Rulebook," scheduled to be completed as a series of decisions by 2018, presumably somewhat analogous to the earlier Marrakech Rules implementing the Kyoto Protocol. On account of the work still in progress, the meeting was extended going forward to COP 23 in Bonn in 2017, concluding "at the latest" at COP 24 in 2018. This is far from unprecedented, and a similar approached was utilized at least once before in extending COP 6, also disrupted by a U.S. election [Wirth, 2002].

Analogous to the two standing bodies established in the Convention, SBSTA and SBI, the decision accompanying the adoption of the Paris Agreement at COP 21 es-

tablished a new Ad Hoc Working Group on the Paris Agreement (APA). Although it is still too early to predict the outcome of negotiations on the Paris Rulebook, a number of issues emerged in Marrakech that are familiar from the history of the earlier negotiations set out above. Depending on one's point of view, the meeting also exposed the persistence of prior issues, despite the new context of the Paris Agreement.

The work of COP 22 was largely preliminary and preparatory. In addition to mitigation and adaptation, issues expected to be addressed in future decisions include market mechanisms, implementation and compliance, finance, transparency, and accounting. The COP also started preparatory work on the "global stocktake" mandated by the Paris Agreement.

On June 1, 2017, President Trump announced his intention on the part of the United States to withdraw from the Paris Agreement[45]. His statement also proposed renegotiating the Paris Agreement. In response, the heads of state and government of France, Germany, and Italy released a joint statement stating that "the momentum generated in Paris in December 2015 [is] irreversible," and "that the Paris Agreement cannot be renegotiated"[46]. As of this writing, the United States has not given formal, written notice to the depositary, the United Nations, as required by the Paris Agreement. Instead, it has stated that it "intends to exercise its right to withdraw from the Agreement . . . in accordance with Article 28, paragraph 1 of the Agreement [by providing] formal written notification of its withdrawal as soon as it is eligible to do so," in November 2019[47]. In any event, all of Trump's demands can likely be accommodated within the existing structure of the Agreement [Wirth, 2017].

Conclusion

Although often governed by legal rules, international organizations are ultimately political institutions whose principal purpose is to serve as vehicles to fulfil the coordinated policy objectives of their member states. It is tempting to think of autonomous institutional arrangements on climate and other environmental questions – or any other functional issue such as trade, for that matter – as establishing a rule of law framework that channels and confines future actions by states.

Before Paris, there was wide acceptance of the need for maturation and differentiation in the UN-sponsored climate regime to engage all states on the planet, not just those with quantified emissions reductions under the Kyoto Protocol. And so, too,

[45] Statement by President Trump on the Paris Climate Accord, White House, 1 June 2017. Available at: https://www.whitehouse.gov/the-press-office/2017/06/01/statement-president-trump-paris-climate-accord (accessed: 23 June 2017).

[46] Statement on the United States of America's announcement to withdraw from the Paris Agreement on climate change // Bundesregierung, 1 June 2017. Available at: https://www.bundesregierung.de/Content/EN/Pressemitteilungen/BPA/2017/2017-06-01-joint-statement_en.html (accessed: 23 June 2017).

[47] Depositary Notification of United States Intent to Withdraw, 8 August 2017. Available at: https://treaties.un.org/doc/Publication/CN/2017/CN.464.2017-Eng.pdf (accessed: 23 June 2017).

there is arguably a commensurate need to rethink existing institutional structures to accommodate those twenty-first century needs.

In particular, if the Paris Agreement had been identified as a "protocol," that could very well have doomed its chances of acceptance by one important state, the United States. But at the same time, the makeshift workaround, in which continuity with the existing Kyoto Protocol and its Doha Amendment were abandoned, at least as a formal matter, may yet have unintended consequences, including but not limited to uncertainty in the interpretation of the withdrawal provisions in the Framework Convention.

In any event, states are the ultimate masters in such regimes, and are free to alter what appear to be fundamental principles, rules, and procedures just as they are to create them. As demonstrated by the Paris Agreement, when there is a need for a new structural approach, the present needs of states can prevail over the requirements of apparently well-accepted previously-established architecture. From a public policy point of view, that is not necessarily good or bad, desirable or undesirable. But, as demonstrated by the case of the Paris Agreement, it is wise to keep that dynamic in mind as an ever-present possibility in dealing with the discipline of international organization.

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Парижское соглашение: новый компонент климатического режима ООН[1]

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Парижское соглашение, подписанное в декабре 2015 г. и вступившее в силу менее чем через год, является новейшим инструментом климатического режима ООН. По своей значимости Парижское соглашение занимает позицию после Рамочной конвенции ООН об изменении климата 1992 г. наравне с Киотским протоколом 1997 г. и Дохинской поправкой 2012 г. Настоящая статья описывает процесс становления международного климатического режима ООН с точки зрения международного права, а также раскрывает структурные, институциональные и правовые взаимосвязи Парижского соглашения с более ранними нововведениями в сфере защиты климата под эгидой Рамочной конвенции ООН об изменении климата 1992 г. Потребность в подобном анализе обусловлена тем, что новый инструмент не носит статус «протокола», а его взаимосвязь с Киотским протоколом остается неочевидной.

В представленной статье рассматривается процесс развития универсального климатического режима ООН от его истоков в 1990-е годы и до настоящего момента. Особое внимание уделяется структурным взаимосвязям между компонентами режима и реалиями исторического периода, проводится анализ текста и структуры Парижского соглашения с учетом исторического контекста. Тщательно рассматривается важность статуса Парижского соглашения в качестве инструмента, а не «протокола», а также его неочевидная текстуальная и институциональная взаимосвязь с предшествующим Киотским протоколом. В заключительной части статьи сделан вывод о том, что Парижское соглашение со структурной и институциональной точек зрения представляет новый тип соглашения, призванный закрепить инклюзивный, многосторонний подход к защите климата. Кроме того, было выявлено, что Парижское соглашение несет признаки преемственности с более ранними инструментами глобальной климатической политики.

Ключевые слова: Парижское соглашение; Рамочная конвенция ООН об изменении климата; Киотский протокол; Дохинская поправка; глобальное потепление; международное экологическое право; устойчивость; теория режимов

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