The Future International Climate Change Agreement: an International Law Perspective

Dr. Francesca Romanin Jacur
Università degli Studi di Milano
francesca.romanin@unimi.it
Outline

  - The normative developments
  - The institutional architecture
  - The fundamental principles

• **Today: The elements for the draft negotiating text**
  - Mitigation and Adaptation
  - Finance and Technology transfer
  - Transparency
  - Compliance matters

• **Tomorrow: Some reflections on the future developments**
A history of the negotiations

- 1992, Rio de Janeiro Summit (UNCED): Adoption of the UN Framework Convention (stabilization of GHG emissions)
- 1997: Adoption of the Kyoto Protocol (global reduction of - 5%)
- 2005: entry into force of the Kyoto Protocol
- 2011: Durban Platform for Enhanced Action launched a new round of negotiations for the post 2020 period
- 2012: Adoption of the Doha Amendment (2nd commitment period of the Kyoto Protocol 2013-2020) - still not in force
- 2014: Lima call for action - elements for an agreement
- May 2015: draft negotiating text
- December 2015: Paris Agreement
The Climate Change Regime

A) The UNFCCC (Bottom up approach)
- General obligations on: Stabilization of GHG emissions (art. 4.2) - adaptation measures - financial assistance to developing countries - institutional arrangements

B) The Kyoto Protocol (top-down approach)
  1st commitment period:
  - Quantified emission reduction commitments for industrialized States
  - no emission reductions commitments on behalf of developing countries
  - Articulated financial mechanism with multiple funds
  - Flexibility mechanisms (CDM, JI, IET)
  - Compliance mechanism: Enforcement Branch + Facilitative Branch

  2nd commitment period: Very limited participation and voluntary pledges:

C) Transition period: normative developments by the CoP:
- Adaptation
- Climate Finance
- REDD-plus mechanisms
Climate Change Regime Architecture

IPCC

UNFCCC CoP

KP MoP

SBI

SBSTA

Compliance mechanisms

EB

FB

Flexibility mechanisms

IET

CDM

JI

Financial Mechanism

World Bank

GEF

GCF

Adapt Fund

Other funds

Secretariat
The Fundamental Principles

In the UNFCCC and KP:

- Cornerstone principle of Common but differentiated responsibilities (CBDR) (and respective capabilities)
- Sustainable Development
- Equity
- Mutual support between climate and economic policies
- Cost-effectiveness

The future agreement recalls them and adds:

- CBDR (in light of different national circumstances)
- Inclusiveness
- Transparency

Founding concepts: the nexus between Participation + Ambition/ stringency - compliance to ensure effectiveness (S. Barrett) + time (long-term dimension)
Where are we now: the main negotiating issues

*Long-term objective: $1.5/2^\circ C$*

*Mitigation and Adaptation strategies*

*Transparency of action and support*

  *Monitoring, Reporting, Verification (MRV): International Consultation and Analysis*

*Finance and Technology Transfer*

*Facilitating implementation and compliance*
The news in the Paris Agreement

‘MANAGERIAL’ approach with renewed emphasis on transparency - building trust

A few TOP-DOWN elements:
• Long-term targets and timetables (?)
• Monitoring and verification
• Procedural requirements/information sharing

... combined with a BOTTOM UP approach:
• Focus on national circumstances (country-driven)
• Voluntary nationally determined contributions
• Increased participation of non-state actors (private investors, indigenous peoples)
Mitigation

• Long-term and global approach: ALL Parties, according to CBDR, enhanced ambition

• Parties should communicate and implement nationally determined mitigation commitments that are:
  • Quantified or quantifiable
  • Transparent, comparable and/or verifiable
  • Accompanied with information that enhance clarity, transparency and understanding

• Form of the commitments, OPTIONS:
  • Zero emissions sustainable pathway
  • At least 50% by 2050 (1990 levels) - full decarbonization by 2100
  • Science-based: 40-70% (2010 levels) by 2050
  • Global emission budget to divide among all Parties
  • Stabilization at or below 350 ppm of Co2

• Use of market mechanisms
The Market Mechanisms

- **Purpose:**
  - mobilize the widest range of public and private investments for adaptation and mitigation
  - Create incentives for early action
- **Supplemental to domestic action**
- **Transparency**
- **Coherence**
- **Linkage among the different regional/national/sub-national climate policies/measures (cap and trade, carbon taxes, subsidies, ...)**
  - Technical issues (stringency of caps, scope, time, allocation modalities, banking)
  - Measures against leakage
  - Monitoring, reporting and verification
  - Tracking of allowances to avoid double counting
Climate finance

The channeling of public resources (towards developing countries) (for mitigation & adaptation) through frameworks and mechanisms that leverage private sector capital, and are in line with national development goals

Full operationalization of the Green Climate Fund:
• Catalyze new investment
• Gain the trust of Developing Countries
• Combine Developing Countries and the Private Sector Needs
• Bottom up approach/country ownership
• Direct Access
• Need of coordination among financial institutions (national, bilateral, international)
• Trust in institutions and their procedures (Consistency of funding resources, transparency and inclusiveness, legitimacy)
Transparency of action and support

Creation of a transparency framework, in order to:

- Enhance clarity, comparability between countries, accountability and mutual trust
- Facilitate tracking of progress in the implementation
- Ensure environmental integrity
- NEW: transparency of support commitments (finance and technology)

OPTIONS:

- A common framework applicable to all Parties/differentiated rules between developed and developing countries
- What kind of review? A single model for ALL Parties or:
  - International assessment and review for developed States?
  - International consultation and analysis for developing States?
Facilitating implementation and compliance

PREVIOUSLY:
- UNFCCC Dispute settlement: art. 14 - never used
- The Compliance Committee of the Kyoto Protocol

Principles: expert-based, non-confrontational and non-judicial

Cross-cutting SCOPE:
- Mitigation and adaptation
- Financial and Technology transfer
- Reporting

FUNCTION: essential for
- Environmental integrity
- Financial integrity
- Coherence
The ‘Legal Nature’ issues:
Hard law v. soft law ... and soft law ‘with teethes’

1) “Protocol, another legal instrument or agreed outcome with legal force under the Convention”
   • Pros: legal certainty, judicially enforceable, difficult to modify
   • Cons of the “legally binding”: long time for ratification and entry into force, difficult to modify, watered down commitments,

   ➢ A core legally binding treaty that sets strong and sound foundations for the long-term cooperation process:
      ➢ Sets the -2/1.5 C target
      ➢ Sets medium and long-term emission reduction targets (2050 - 2100)
      ➢ Establishes the basic commitments
      ➢ Creates the institutional and procedural arrangements
         ➢ MRV procedures
         ➢ Compliance system

2) Legal nature of the Parties’ commitments and of Nationally Determined Contributions

3) Legal nature of sanctions for non-compliance
Some reflections on future developments

Enhance the MANAGERIAL approach:
Preference for a ‘process’ rather than a ‘rule-based’ approach
• Delegate lawmaking to the CoP to establish minimum standards
• + hybrid lawmaking:
  • to other institutions with adequate technical expertise (ex.: IMO, WHO)
  • Also non-governmental experts (ex.: IPCC, ISO)

TRANSPARENCE - ACCOUNTABILITY - COHERENCE in order to strengthened
LEGITIMACY and ENVIRONMENTAL INTEGRITY of the system

Make the best use of experience gained and of existing institutions

A look at developments outside the climate regime:
• Free trade and investment agreements (TTIP, WTO, …)
• Mutual supportiveness and coherence
Thank you!