

Negotiating Climate Change in the UN:

Same Procedure as Every Year? Not Quite!

Camilla Bausch and Michael Mehling*

Heads of State of eight major industrialised nations recently affirmed that the United Nations will remain 'the appropriate forum for negotiating future global action on climate change.' Within the U.N., however, a number of concurrent 'tracks' have emerged for negotiations and discussions, accompanied by a certain degree of overlap and giving rise to questions on the mandate, scope, and limitations of each track as a pathway to a future climate regime.¹

These were the first two sentences of an article we published in the inaugural issue of the *Carbon & Climate Law Review* in 2007. The first sentence referred to an agreement by the Group of Eight (G8), at the time under German Presidency, which had achieved an implicit commitment of the United States – then still led by President Bush – to the negotiating process pursued within the United Nations Framework Convention on Climate Change (UNFCCC). This was a remarkable achievement, as it settled a political fight over the right forum, framework, and leadership in

the context of international climate negotiations. The second sentence provided a frame for the 2007 article by referencing the difficulties – and thus implicitly the political disagreements – that were also present within the UNFCCC process when it came to finding a commonly acceptable forum and mandate for negotiations on a future climate regime. Back in mid-2007, no consensus had yet emerged on the suitable negotiation track, let alone on the substantive mandate for negotiations.

A decade later, the first two sentences introducing a similar article would probably read:

Heads of State and Government of 19 major nations recently affirmed their commitment to the Paris Agreement – isolating President Trump, who has decided to withdraw the U.S. from the treaty. The Paris Agreement still lacks a detailed 'rule-book', however, and more importantly: Parties need to show that they are implementing their Nationally Determined Contributions (NDCs) to deliver on the common goal to keep global warming at least well below 2 degrees Celsius.

What this shows is that things have changed fundamentally. The path to the present has not been easy, and more akin to a rollercoaster: a high point was the breakthrough at the end of 2007, when Parties passed the so called 'Bali Action Plan'² with a mandate and defined pathway towards a new agreement. But within two short years, the negotiations reached a low point when the world witnessed their breakdown in Copenhagen³. For a few months, it even remained unclear whether the UNFCCC process – and with it any hope for meaningful multilateralism on the issue of climate change – would ever recover. Yet it did, and remarkably quickly. Under the 2008 Mexican Presidency and the impressive leadership of the foreign minister of Mexico at the time, Patricia Espinosa, who now heads the UNFCCC Secretariat, parties agreed to reengage. This new beginning culminated in a (preliminary) happy ending: passage of the Paris Agreement in 2015.⁴ Finally the world had its multilateral agreement.

* Camilla Bausch, Director, Ecologic Institute, Berlin and Brussels. For correspondence: <camilla.bausch@ecologic.eu>; Michael Mehling, Deputy Director, MIT Center for Energy and Environmental Policy Research, and Professor of Practice, University of Strathclyde School of Law. For correspondence: <mehling@mit.edu>.
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- 1 Camilla Bausch and Michael Mehling, 'Tracking Down the Future Climate Regime: An Assessment of Current Negotiations under the U.N.' (2007) 1(1) CCLR 4.
- 2 UNFCCC Dec 1/CP.13 (2007) UN Doc FCCC/CP/2007/6/Add.1 3.
- 3 An unprecedented number of participants came together in Copenhagen; more than 100 heads of state and government attended. As the summit progressed, however, it became increasingly clear that expectations going into Copenhagen had been too high, and that parties had failed to reach agreement on too many details. In the end, the Danish Presidency was unable to guide parties successfully through this difficult situation, and instead fueled the tensions with uncoordinated initiatives. Instead of passing a landmark instrument for the future climate regime, the meager result of the Copenhagen summit was a toned down 'Copenhagen Accord', which was only 'taken note of' by the parties. See UNFCCC Dec 2/CP.15 (2009) UN Doc FCCC/CP/2009/11/Add.1 4.
- 4 UNFCCC Dec 1/CP.21 (2015) UN Doc FCCC/CP/2015/10/Add.1 2.

Reasons for this success were manifold, including the skilful French Presidency; the ever more dire warnings of the scientific community; the voluntary commitments and calls for action by a multitude of players, including businesses, cities, civil society, and the Pope;⁵ and the impressive pace of clean technology innovation and cost reductions, particularly in the area of renewable energy,⁶ which has, in turn, led to renewable energy investments outpacing those for fossil fuels.⁷ More than any other factor, that latter trend has made a transition to a climate-friendly economy appear possible, affordable, and even promising with respect to the business opportunities it portends.

Beyond these factors, the success of the Paris climate summit can also be attributed to some of the overriding features of the new agreement itself.⁸ For one, the Paris Agreement allows parties to define their desired level of climate ambition themselves in their (Intended) Nationally Determined Contributions [(I)NDCs]. Furthermore, it embraces a very modest notion of compliance. This party-driven approach was a condition for its broad and nearly universal endorsement. Bearing in mind the urgent need for swift and ambitious action, however, the agreement also includes some features to balance and strengthen the regime over time:

- 1) The long term objective of keeping global warming well below 2°C, with efforts to stay below 1.5°C, including further qualifications (such as the commitment to achieve peak emissions ‘as soon as pos-

sible’, and to arrive at net zero greenhouse gas emissions during the second half of the century) (Articles 2 and 4 of the Paris Agreement);

- 2) Engagement of all parties in climate action pursuant to an evolved understanding of ‘common but differentiated responsibilities’ (CBDR). The old Annex I/non-Annex I divide, which had been a defining feature of the Kyoto Protocol, was finally superseded. The Bali Action Plan had already opened the door to broader engagement in 2007 with its concept of ‘nationally appropriate mitigation actions’ (NAMAs) for developing countries. Now, Article 3 of the Paris Agreement defines the general obligation that ‘all Parties are to undertake and communicate ambitious efforts’ in order to achieve the purpose of the agreement;
- 3) A global stocktake (Article 14 of the Paris Agreement), which is to take place every five years. It is designed to regularly assess the collective efforts in relation to the aforementioned goal;
- 4) The progression of NDCs over time. Parties are asked to update their intended efforts based on the outcome of the global stocktake. According to Article 4 of the Paris Agreement, the ‘efforts of all Parties will represent a progression over time’, with each new contribution being more ambitious than the former one. Thus, an ambition mechanism is established to help closing the so-called ambition gap;⁹
- 5) Highlighting the importance also of action of non-state actors.

5 Pope Francis published his Encyclical ‘Laudato Si’ at a strategically chosen point in time ahead of the 2015 Paris climate summit. It was drafted with the support of several recognized scientists, and highlighted the impacts of – and the need for action on – major environmental challenges like climate change. See Pope Francis, *Laudato Si’: On Care for Our Common Home* (Encyclical, 2015) <http://w2.vatican.va/content/francesco/en/encyclicals/documents/papa-francesco_20150524_enciclica-laudato-si.html> accessed 16 August 2017.

6 There are many analyses of the trajectory of technology costs which point in the same direction: a radical decline of prices for renewable energy technologies, and a tendency of mainstream forecasts (eg from the International Energy Agency) to underestimate the growth in renewable energy capacities. As the International Renewable Energy Agency (IRENA) has shown, for instance, the levelised cost of electricity from utility-scale renewable energy sources such as onshore wind and hydroelectric generation had already fallen below the cost range of fossil thermal generation in many areas of the world and as early as 2014, and newer or costlier renewable energy technologies such as solar photovoltaics and offshore wind were also on a pathway towards convergence with the cost of conventional thermal technologies, see IRENA, *Renewable Power Generation Costs in 2014* (IRENA, 2015) 27. But there are difficulties to overcome, not least the challenge of low coal prices and an unfortunate

abundance of direct and indirect fossil fuel subsidies, see for example Ottmar Edenhofer, ‘King Coal and the Queen of Subsidies’ (2015) 349 *Science* 1286.

7 This has highlighted a general and fast-paced trend which still persists, as reflected in investment patterns. See, for instance, Renewable Energy Policy Network for the 21st Century (REN21), *Renewables 2017: Global Status Report* (REN21, 2017) 116: ‘In 2016, renewable power technologies continued to attract far more investment dollars than did fossil fuel or nuclear power generating plants. An estimated USD 249.8 billion was committed to constructing new renewable power plants (including \$226.6 billion without large-scale hydropower, plus an estimated \$23.2 billion for hydropower projects larger than 50 MW). This compares to approximately \$113.8 billion committed to fossil fuel-fired generating capacity and \$30 billion for nuclear power capacity. Overall, renewable energy accounted for about 63.5% of the total amount committed to new power generating capacity in 2016.’

8 For an overview of the agreement, see Ralph Bodle, Lena Donat and Matthias Duwe, ‘The Paris Agreement: Analysis, Assessment and Outlook’ (2016) 10(1) CCLR 5.

9 The ambition gap refers to the fact that, even if all NDCs are implemented, more mitigation action will be needed to achieve the committed temperature stabilisation.

Parties have enthusiastically embraced the Paris Agreement. It entered into force with unprecedented speed within a timeframe of roughly one year. To contrast this with the other international agreement elaborated under the auspices of the UNFCCC: it took eight years for the Kyoto Protocol to enter into force.¹⁰ And maintaining the focus on the Kyoto Protocol: while, in 2007, it still appeared to be one potentially important pillar of a future regime, it has by now been largely sidelined.

Based on this prevailing view at the time, the 2007 article elaborated on the negotiations conducted under Article 3.9 of the Kyoto Protocol regarding the mandate to negotiate future commitment periods (of which the first one ended in 2012). Although an amendment to the Kyoto Protocol that introduced a second commitment period was passed in 2012,¹¹ major emitters such as the United States, Japan, Russia, and Canada declared they would not ratify this amendment.¹² Although the first commitment period boasted a favourable record of full compliance,¹³ the lack of buy-in from these major emitters rendered the Kyoto Protocol little more than a hollow shell. Already marginalised, its relevance has been further diminished with the entry into force of the Paris Agreement.

But as young as it is, the Paris Agreement has also had to pass some early litmus tests. For instance, the US has announced its intention to withdraw from the treaty less than a year after its entry into force. So far, the global community has stood by the Agreement – and in fact the numbers of ratifications con-

tinued to increase – despite the defection of the largest economy and largest historical emitter. In the course of the G20 summit, which took place shortly after President Trump's withdrawal announcement, the US ended up in an isolated position on climate change, while the remaining nations – dubbed the 'G19' – not only confirmed their commitment to the Paris Agreement, but passed the 'G20 Hamburg Climate and Energy Action Plan for Growth',¹⁴ which is closely linked to the contents of the Paris Agreement.

Looking back at 2007, it is a striking coincidence that ten years later, the German Chancellor Angela Merkel should once again have to negotiate with a Republican US President averse to climate action. Then as now, a key controversy centred around the role of the international climate regime. In 2007, Chancellor Merkel had to manage the controversy in the G8 context, where leaders came to an agreement in the end; in 2017, Germany presided over the larger and more heterogeneous G20, and this time the US decided to adhere to its isolated position (as it had already done during the G7 under the Italian Presidency earlier in the year).

Despite its notification of withdrawal from the Paris Agreement, the US will still have a voice in the negotiations on implementation of the Paris Agreement, and it will continue sitting at the negotiating table for several years. This is due to Article 28 of the Paris Agreement, which states that a party can withdraw '[a]t any time after three years from the date on which this Agreement entered into force ... [a]ny such

10 The legal thresholds for both treaties were similar. Art 21 of the Paris Agreement states: 'This Agreement shall enter into force on the thirtieth day after the date on which at least 55 Parties to the Convention accounting in total for at least an estimated 55 per cent of the total global greenhouse gas emissions have deposited their instruments of ratification, acceptance, approval or accession.' Similarly, Article 25 of the Kyoto Protocol reads: 'This Protocol shall enter into force on the ninetieth day after the date on which not less than 55 Parties to the Convention, incorporating Parties included in Annex I which accounted in total for at least 55 per cent of the total carbon dioxide emissions for 1990 of the Parties included in Annex I, have deposited their instruments of ratification, acceptance, approval or accession.'

11 UNFCCC Dec 1/CMP.8 'Doha Amendment to the Kyoto Protocol' (2012) UN Doc FCCC/KP/CMP/2012/13/Add.1.

12 By August 2017, less than 100 parties had ratified the amendment, lacking also many major emitters. An official overview of the ratifications can be accessed here: <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-7-c&chapter=27&clang=en> accessed 16 August 2017.

13 Igor Shishlov, Romain Morel and Valentin Bellassen, 'Compliance of the Parties to the Kyoto Protocol in the First Commitment

Period' (2016) 16(6) Climate Policy 768; it bears noting, however, that Canada – which was set to miss its quantified emission reduction commitment – withdrew from the Kyoto Protocol late in the first commitment period, invoking the process set out in art 27.

14 The plan addresses a broad range of issues, including NDCs, long-term low-carbon development strategies, energy sector transition, energy efficiency, renewable energy expansion, access to sustainable energy, climate resilience and adaptation, financial flows, and inefficient fossil fuel subsidies. While lacking, for example, timelines for measures such as the phase-out of inefficient fossil fuel subsidies, the plan can be considered a step forward towards developing a more concrete roadmap and towards integration of the traditionally separate climate and energy topics, a key innovation of the 2017 German Presidency. The US position was clarified in a footnote: 'The United States is currently in the process of reviewing many of its policies related to climate change and continues to reserve its position on this document and its contents'. G20, 'Annex to G20 Leaders Declaration: G20 Hamburg Climate and Energy Action Plan for Growth' (2017) <http://www.g20.org/Content/DE/_Anlagen/G20_2017-g20-climate-and-energy-en.pdf?__blob=publicationFile&v=> accessed 16 August 2017.

withdrawal shall take effect upon expiry of one year from the date of ... notification'. It remains to be seen which political approach the US will take while still a party to the Paris Agreement – an 'empty seat' approach, an obstructionist or distracting approach that seeks to hamper efforts of others, or an engagement approach, trying to shape decisions in a way that would possibly open up political options to remain in the treaty.

But as in 2007, the US is not the only difficult partner for climate cooperation. The 2007 article discussed the Russian proposal, which was less driven by substance as much as it was an angry reaction after a Russian negotiator felt he was not being heard. Now, in 2017, Russia has signed, but not yet ratified the Paris Agreement.¹⁵ It remains to be seen if and how it will move forward with ratification, and how it will behave during the negotiations.

Speaking of the negotiations: what is their current status? With the Paris Agreement adopted and in force, one might expect fewer challenges than we diagnosed in 2007, for instance regarding overlapping tracks and confusing mandates. But much work remains to be done. In Paris, parties decided on a comprehensive work program. The UNFCCC Secretariat presented an overview of relevant topics and respective fora in March 2016,¹⁶ illustrating that the 'big' questions – especially those related to mitigation – were referred to the 'Ad Hoc Working Group on the Paris Agreement' (APA).

The APA was established by Decision 1/CP.21. Working under the auspices of the UNFCCC, it was designed to prepare for the entry into force of the Paris Agreement. Like the Marrakesh Accords were prepared for adoption at the first Meeting of the Parties to the Kyoto Protocol, the APA has been mandated with completing its work by the first 'Conference of the Parties serving as Meeting of the Parties to the Paris Agreement' (CMA). This mandate encompasses eg elaborating guidance on the features of the NDCs (including questions of transparency and accounting), clarifications with respect to the global stocktake (sources of input, modalities of the stocktake), certain financing issues, and the rules for 'effective operation of the committee to facilitate implementation and promote compliance.' Everything seemed to be neatly organised.

And then an unexpected thing happened: the surprisingly swift entry into force of the Paris Agreement. Consequently, the CMA already convened for

the first time in 2016, less than a year after adoption of the Paris Agreement. Unsurprisingly, the APA had not yet finalised its draft decisions, resulting in renewed potential for confusion. Established under the UNFCCC, the APA has the advantage that all parties who have signed the Paris Agreement can actively participate in the negotiations. Negotiations under the CMA, by contrast, will only take place between the parties who also have ratified the Paris Agreement. In order to allow those UNFCCC parties that will need more time for their ratification process to still participate in the process of shaping the future regime, the APA work will continue – most likely until the end of 2018. As a result, the APA will resume its work at the 2017 climate summit (COP27) in Bonn¹⁷, where the CMA will hold its 'second part of the first session.'

What, then, has changed since 2007? Whereas the article published in 2007 highlighted key questions for any future regime,¹⁸ the core questions at present evolve around a new regime with 154 NDCs that have already been submitted. This is a strong basis to work from. Going forward, all parties to the Paris Agreement will have to submit NDCs, and subsequently have to implement their NDCs, raise their ambition, and render the Paris Agreement fully operational, so that collectively they may achieve the agreed temperature stabilisation goal. While negotiations have remained difficult a decade after our earlier article, the Paris Agreement with its NDCs provides a good starting point for meaningful climate action, and directs

15 As of August 2017, 159 of the 197 parties to the UNFCCC have already ratified the Paris Agreement. An official overview of signatures and ratifications can be accessed here: <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtsg_no=XXVII-7-d&chapter=27&clang=en> accessed 16 August 2017.

16 UNFCCC, 'Taking the Paris Agreement Forward: Tasks Arising from Decision 1/CP.21' (March 2016) <http://unfccc.int/files/bodies/cop/application/pdf/overview_1cp21_tasks_.pdf> accessed on 16 August 2017.

17 The APA agenda can be found here: UNFCCC, 'Agenda of the Ad Hoc Working Group on the Paris Agreement at its First Session' (2017) <http://unfccc.int/files/meetings/bonn_nov_2017/application/pdf/apa_1-4_agenda.pdf> accessed on 16 August 2017.

18 At the time, our article highlighted the following questions: 'any future climate regime will have to define answers to the following general questions: Who will participate? What kind of targets can developed countries agree upon? What kind of commitments are developing countries willing to take on? What kind of country groups can and should be established, especially: should there be new forms of differentiation within the group of developing countries? How should questions relating to adaptation needs and technology be answered? What types of incentive schemes and sanctions can and should be institutionalised?', see Bausch and Mehling (n 1) 6.

its parties in the right direction. During the same period, the market prospects for abatement technologies such as renewable energy have dramatically improved. In other words, there are good reasons to be optimistic. Now it will be crucial to keep up the mo-

mentum expressed in the 'Paris spirit': a spirit of compromise and commitment that may help parties avoid getting lost in procedural issues. In this context, the facilitative dialogue of 2018 will be an important opportunity to gauge the political situation.