doi:10.1017/aju.2018.76

SYMPOSIUM ON CLIMATE CHANGE LOCALISM

CHANGING INTERNATIONAL LAW FOR A CHANGING CLIMATE

Daniel C. Esty and Dena P. Adler†*

After more than two decades of inadequate international efforts to address climate change resulting from rising greenhouse gas emissions, the 2015 Paris Climate Change Agreement shifted gears. That agreement advances a "bottom-up" model of global cooperation that requires action commitments from all national governments and acknowledges the important role that cities, states, provinces, and businesses must play in delivering deep decarbonization. Given the limited control that presidents and prime ministers have over many of the policies and choices that determine their countries' carbon footprints, the Paris Agreement missed an opportunity to formally recognize the climate change action commitments of mayors, governors, and premiers. These subnational officials often have authorities complementary to national governments, particularly in federal systems (including the United States, China, Canada, and Australia). They therefore possess significant independent capacities to reduce greenhouse gas emissions through their economic development strategies, building codes, zoning rules and practices, public transportation investments, and other policies. Likewise, the world community missed an opportunity to formally recognize the commitments of companies to successful implementation of the Paris Agreement and thereby to highlight the wide range of decisions that business leaders make that significantly affect greenhouse gas emissions.

The same logic that demands a broadened strategy of engagement to deliver a more robust global response to climate change also suggests a parallel need to rethink international law to involve subnational actors whose participation may be required to deliver a successful outcome on some issues. Specifically, the global response to problems that go beyond the authority or capacity of national governments—including but not limited to climate change—would be strengthened by creating new international legal mechanisms that formalize the action commitments of mayors, governors, premiers, and CEOs. Giving these officials a way to formally signal their commitment to the success of the Paris Agreement on the international plane would help deepen the global response to the problem.

Paris Agreement Broadens Engagement But Should Go Further

After twenty-five years of setbacks and slow progress, the international community came to terms in 2015 with the inadequacies of a top-down structure of the 1992 Framework Convention on Climate Change (UNFCCC)[1] and shifted toward a "bottom-up" framework by which nation-states determine their own commitments, termed nationally determined contributions (NDCs). The Paris Agreement further recognizes "the importance of the

* *Hillhouse Professor of Environmental Law and Policy, Yale University.*

† *Climate Law Fellow, Sabin Center for Climate Change Law, Columbia Law School.*

[1] UN Framework Convention on Climate Change, *opened for signature* June 4, 1992, 31 ILM 849 (1992) (entered into force Mar. 21, 1994).

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https://doi.org/10.1017/aju.2018.76 Published online by Cambridge University Press

engagements of all levels of government and various actors."[2] More specifically, Article 7 notes the multiscale dimensions of adaptation challenges and Article 11 identifies the need for capacity-building at all levels of government.[3] In addition, in the preamble of the Conference of the Parties (COP) 21 Decision adopting the Paris Agreement, the parties agreed to cooperate to "mobilize stronger and more ambitious climate action" by "civil society, the private sector, financial institutions, cities and other subnational authorities, local communities and indigenous peoples."[4] Article 5 of that decision is devoted to these nonparty stakeholders, "inviting" them to "scale up" their efforts to address climate change. Finally, Article 4 encourages these nonparties to register their commitments in the Non-State Actor Platform (NAZCA) and outlines ways to deepen their engagement.[5]

Actors across jurisdictions and sectors have embraced this call to action. At the 2015 Local Leaders Climate Change Summit, held in parallel with COP 21, over seven hundred mayors and other subnational leaders[6] pledged to "advance and exceed the expected goals of the 2015 Paris Agreement to be reached at COP 21 to the full extent of [their] authorities."[7] Additionally, after President Trump announced his intention to withdraw the United States from the Paris Agreement,[8] a bipartisan coalition of over 2,700 mayors, governors, business executives, university presidents, tribal chiefs, and faith leaders pledged to uphold the Paris Agreement. The "We Are Still In" signatories together represent $6.2 trillion in economic activity.[9] These subnational actors can help fill what we call the "Paris Gap," which is the shortfall between the currently pledged national commitments and the Paris Agreement's target to limit average global warming to "well below 2° C" above preindustrial levels.[10]

Climate Change Presents an Opportunity to Formalize Broadened Engagement

We are not the first to see the need for changes in international law to support a deeper and broader structure of international cooperation for the twenty-first century. Academics and policy-makers have been making the case for new systems of global environmental governance for years. Anne-Marie Slaughter, for example, calls for a world order that builds on the "integration of existing networks: essentially the creation of a network of networks."[11] With regard to climate change, scholars have argued for a "polycentric approach" at multiple scales of governance;[12] a series of "regime complexes" rather than a single comprehensive regime;[13] or a "transnational regime complex" consisting of a group of institutions, including nonstate actors, that are loosely connected but still fragmented,[14] among other examples.

Building on these frameworks, we believe that for global issues such as climate change, in which a successful policy response requires activating dispersed authorities, nation-states should reform their approach to

[2] Paris Agreement, Dec. 13, 2015, *in* UN Framework Convention on Climate Change, Report of the Conference of the Parties on its Twenty-First Session, Addendum, at 21, UN Doc. FCCC/CP/2015/10/Add.1 (Jan. 29, 2016).

[3] *Id.* at 25-27, 29-30.

[4] *Id.* at 3.

[5] *Id.* at 15-20.

[6] Cécile Barbière, *700 Cities Promise Renewable Energy Transition by 2050*, EURACTIV (Dec. 7, 2015).

[7] Climate Summit for Local Leaders, Paris City Hall Declaration: A Decisive Contribution to COP21 (Dec. 4, 2015).

[8] The White House, Statement by President Trump on the Paris Climate Accord (June 1, 2017).

[9] "WE ARE STILL IN" DECLARATION.

[10] UN ENVT. PROGRAMME, EMISSIONS GAP REPORT 2017 (Nov. 2017).

[11] ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 132 (2004).

[12] Elinor Ostrom, *A Polycentric Approach for Coping with Climate Change* (World Bank Policy Research Working Paper No. 5095, 2009).

[13] Robert O. Keohane & David G. Victor, *The Regime Complex for Climate Change* (Discussion Paper 2010-33, Harvard Project on International Climate Agreements, 2010).

[14] Kenneth W. Abbott, *Strengthening the Transnational Regime Complex for Climate Change*, 88 TRANSNAT'L ENVTL L. 543 (2012).

https://doi.org/10.1017/aju.2018.76 Published online by Cambridge University Press

international agreements to encourage action and commitments across all levels of government and within all institutions where the authority and capacity to deliver solutions resides. As we noted above, cities and states control important policy levers that drive greenhouse gas emissions, including economic development, housing, transportation, and land use. National governments must still play a leadership role in setting the direction for international coordination, but we see no reason not to formalize the role of subnational actors as a way to ensure their active focus and vigorous support.

Mayors, governors, CEOs, and other leaders have already demonstrated a willingness to scale up their climate change actions, but weaving their commitments into the fabric of international law and the formal structure of cooperation offers several advantages. Formally acknowledging subnational commitments would deepen the sense of responsibility of the officials who put their cities, states, and organizations on the line—and thus would increase the probability that they follow through on their climate change action agendas. A formal role within the Paris Agreement also would provide an opportunity to aggregate and validate the actions they take—thus allowing for greater coordination, tracking of progress, exchange of knowledge, and identification of best practices. While a structure for subnational climate change action pledges already exists (the NAZCA platform),[15] the commitments registered there are almost impossible to aggregate because of methodological inconsistencies across countries and even within jurisdictions. Further, these pledges do not fulfill the transparency and reporting measures of the Paris Agreement. A more formalized role for subnational entities could better align pledges with these metrics. Creating a place within the Paris architecture for subnational commitments need not replace existing climate change coalitions of mayors (such as the C40),[16] governors (such as the R20),[17] or business leaders (such as We Mean Business),[18] but could serve as an umbrella to unite these existing disparate efforts.

Options for Formalizing Subnational Climate Commitments

While neither the Paris Agreement nor its accompanying Decision of the Parties provides a formal mechanism for recognizing subnational climate change action commitments, there remains an opportunity to do so. The Paris Agreement created a flexible legal infrastructure that can incorporate a formal recognition of subnational actors in a variety of ways. Thus, an upcoming COP could agree to allow mayors, governors, premiers, or CEOs to sign on to the Paris Agreement in an amendment or annex. Mayors could be offered, for example, the chance to show their support for greenhouse gas emissions control consistent with the Paris Agreement by signing a paragraph that states:

> We, the undersigned mayors, commit our cities to the full extent of our authority to advancing the goals of the 2015 Paris Climate Change Agreement.

Similar paragraphs could be constructed for governors/premiers, CEOs, and other categories of leaders. Such commitments would be *political* rather than *legal* in character. They would not displace or modify the legally binding formal obligations undertaken by nation-states to carry out the Paris Agreement. But they would be a powerful signal reinforcing the global climate change action agenda.

Alternatively, the annual COPs present an opportunity to adopt a provision explicitly recognizing subnationally determined contributions to greenhouse gas emissions control in a manner similar to those provided for NDCs. Such a COP decision could subject subnational commitments to NDC standards of transparency and reporting.

[15] NAZCA Platform for Global Climate Action.

[16] C40 Cities.

[17] Regions of Climate Change.

[18] We Mean Business Coalition.

https://doi.org/10.1017/aju.2018.76 Published online by Cambridge University Press

Each of the above measures would need to navigate the political hurdles of the UNFCCC process and potential national political and legal barriers, including questions under U.S. constitutional law (discussed below).

Another option would be to have the Paris Agreement "link" to existing or forthcoming compacts between subnational entities—or to adopt these commitments by reference. Under this framework, subnational actors could self-organize by jurisdictional level, sector, or role in civil society (e.g., universities, religious institutions) and develop "category compacts" that provide a mechanism for individual entities to make climate change commitments. These category compacts could explicitly reference the Paris Agreement and then be themselves referenced in an amendment to the Paris Agreement or through a COP decision. Such linkages would integrate, organize, and build upon the existing arrangements between subnational actors such as the Global Covenant of Mayors for Climate & Energy, the Global Climate Action Agenda, Paris Pledge, Paris City Hall Declaration, Under2 MOU Coalition, America's Pledge, and the "We Are Still In" Coalition. Referencing such compacts within the international legal framework would advance the initiatives by explicitly recognizing and operationalizing their role in responding to the challenge at hand. The parties to the Paris Agreement might also make their formal recognition of these compacts conditional on the use of transparency and reporting measures similar to those in the 2015 Agreement, making it easier to validate and aggregate the emissions control accomplishments of these subnational actors and thus link their progress to the national efforts.

Whereas in the first option subnational entities would adhere politically to the international legal architecture, in the second option these actors would sign on to their "category compacts" instead. Precedents for having one element of the international legal system adopt by reference decisions from other institutions already exist. For example, the World Trade Organization has a mechanism to adopt decisions of the International Monetary Fund regarding currency manipulation.[19] Likewise, nation-states often implement international agreements through their domestic institutions of governance. The Convention on International Trade in Endangered Species of Wild Flora and Fauna, for instance, sets general principles to prohibit trade of endangered species, but requires all parties to implement specific protections through domestic legislation.[20]

At a minimum (and as a third option), the NAZCA platform could be improved by creation of a NAZCA+ commitment level with carefully structured reporting, transparency, and other standards to improve aggregation and tracking of subnational climate change actions and demonstrated emissions reductions. Interested entities could voluntarily pursue this NAZCA+ level, while the UNFCCC would still maintain the more basic NAZCA framework for entities unwilling to undertake further requirements.

Potential Legal Barriers

Nothing in international law explicitly prohibits the inclusion of subnational entities in international agreements. While the Vienna Convention on the Law of Treaties only governs treaties between nation-states, that is not to say other arrangements between subnational entities could not exist (subject to domestic law constraints), but merely that they would not be governed by the Vienna Convention. In fact, in preparing a draft of the Vienna Convention, the International Law Commission considered the possibility of various other subjects entering into treaties alongside nation-states, but ultimately excluded the issue from the Convention's purview.[21]

[19] General Agreement on Tariffs and Trade art. 15, Oct. 30, 1947, 55 UNTS 194. *See also* explanation in DANIEL C. ESTY, GREENING THE GATT: TRADE, ENVIRONMENT, AND THE FUTURE 123-24 (1994).

[20] The Convention on International Trade in Endangered Species of Wild Flora and Fauna art. 8, Mar. 3, 1973, 993 UNTS 243.

[21] Anthea Roberts & Sandesh Sivakumaran, *Lawmaking by Nonstate Actors: Engaging Armed Groups in the Creation of International Humanitarian Law*, 37 YALE J. INT'L L. 107, 113-14 (2012); *See also* Vienna Convention on the Law of Treaties art. 3, May 23, 1969, 1155 UNTS 331.

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Domestic law might raise more challenging legal hurdles. For the United States, providing a place in international agreements for subnational actors could raise several constitutional issues. First, the Compact Clause has broad language prohibiting states from entering an agreement or compact with another state or foreign power without the consent of Congress.[22] However, the Supreme Court has long construed this clause narrowly to ban states from undertaking agreements that "encroach upon or interfere with the just supremacy of the United States."[23] A carefully crafted *political* commitment by which mayors or governors signal their support for the goals of an international agreement therefore need not run afoul of this clause.[24] Other issues arise under the Commerce Clause, which delegates to Congress the power to "regulate commerce with foreign nations."[25] Likewise, the "Dormant Commerce Clause" prevents states from taking actions that infringe on Congress' domain over interstate commerce—and creates a virtually per se rule of invalidity for any state statute that discriminates against or attempts to control actors outside the state.[26]

These constitutional challenges can likely be diminished by clarifying—as our proposed mayoral Paris Agreement ratification paragraph above does—that any endorsement by a subnational government official is limited to the extent of his or her authority. Although a mechanism allowing subnational entities to formally "sign up" to the Paris Agreement would offer the strongest reinforcement for the global climate change action agenda, it would undoubtedly face significant legal scrutiny and resistance from those worried about reframing the Westphalian system of international relations that has centered on nation-states for nearly four hundred years. However, the option of "linked" agreements might survive legal challenge based on the precedent of existing compacts and MOUs between subnational entities[27] and between subnational entities and foreign powers.[28]

Tailoring International Law to Match the Structure of the Problem at Hand

While we seek to recast international law to open the Paris Agreement to participation by cities, states, and corporations—and, in doing so, deepen their sense of responsibility for delivering climate change solutions—we acknowledge that this new legal architecture aimed at broadening engagement will not make sense in all circumstances. Indeed, the structure of the issue to which an international agreement responds should determine the scope of the parties invited to participate. On issues where nation-states continue to enjoy a near monopoly of power over the relevant actors and policies, the traditional international legal infrastructure—limited to nation-states—remains functional. Thus, for issues such as nuclear weapons or landmines, which fall almost entirely within the authority and capacity of national governments, treaties among nation-states make sense. Where, however, authority and response capacity is more diffuse, such as public health challenges, including the optimal response to Zika virus or Ebola, as well as climate change, a multi-tiered governance approach is required—and an international legal architecture that aligns with this reality will likely deliver better results. Like climate change, controlling public health threats requires coordinated, international action and goal-setting. Ultimately,

[22] U.S. Const. art. I, § 10, cl. 3.

[23] Virginia v. Tennessee, 148 U.S. 503, 519 (1893).

[24] *See, e.g.*, Daniel A. Farber, *Climate Change, Federalism, and the Constitution*, 50 Ariz. L. Rev. 879 (2008) (arguing that informal agreements between state officers should be construed as valid under the Constitution when structured in certain ways).

[25] U.S. Const. art. I, § 8, cl. 3.

[26] Philadelphia v. New Jersey, 437 U.S. 617, 624 (1978).

[27] *See, e.g.*, The Regional Greenhouse Gas Initiative.

[28] *See, e.g.*, Memorandum of Understanding to Enhance Cooperation on Climate Change and the Environment, Cal. (U.S.)- Ministry of Env't & Natural Res., Nat'l Forestry Comm'ns (Mex.), July 28, 2014. *But see* Douglas A. Kysar & Bernadette A. Meyler, *Like A Nation State*, 55 UCLA L. Rev. 1621 (2008) (analyzing the significance of the legal obstacles, but concluding the policy benefits may justify the risk).

https://doi.org/10.1017/aju.2018.76 Published online by Cambridge University Press

a successful response hinges on delivery of on-the-ground solutions by local health authorities who must be adequately integrated into the response.

We see the policy logic of our refined model for international treaty architecture flowing from the indisputable fact that global issues occur along a structural spectrum, with some needing multi-tiered solutions and some being amenable to more traditional top-down solutions. Where on this spectrum a particular issue falls depends on the specific nature of the concern and the distribution of authority and capacity to respond.

Conclusion

Although international law has thus far failed to mobilize an adequate response to climate change, recognition of the structural shortcomings of the 1992 UNFCCC and the Kyoto Protocol might ultimately translate into an awareness that some problems require an international legal framework that engages a broader set of actors. Climate change could demonstrate the value of a new international legal architecture for the twenty-first century that creates appropriate space for subnational actors—and, in doing so, save international law from rigid adherence to the Westphalian system, which appears ill-equipped to deal with many of today's global challenges.

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