Centre for International Governance Innovation

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International law and governance innovations to enhance transparency, sectoral efforts and coherence between trade and climate change

Key Messages:

- Enhanced transparency in the Paris Agreement reflects the need to balance legally required reporting on emissions with the non-binding nature of nationally determined contributions (NDCs).
- Integration of emerging technologies, greenhouse gas emissions monitoring by satellite and blockchain technology, show potential to contribute to an "enhanced transparency framework" by providing additional sources of reliable data.
- Ensuring transparency in governance of market and non-market mechanisms requires that Parties implement a clear, complete, predictable and comprehensible legal framework for cooperative approaches.
- Broad transparency requirements—both qualitative and quantitative—on financial support are crucial to maintain trust and to promote broad compliance with the climate efforts under the Paris Agreement.
- Removing barriers to participation, expanding opportunities to engage in policy discourse, and developing joint work programs are avenues to engage non-Party stakeholders to implement climate action.
- Sectors that are major contributors to greenhouse gas emissions such as shipping and air transportation need to develop and implement effective climate mitigation strategies.
- It is important that trade rules support climate action including the development of a climate waiver under the WTO

Introduction

The Parties to the United Nations Framework Convention on Climate Change (UNFCCC) at COP21 recognized the importance of assessing progress on achieving climate goals through a process of facilitative dialogue. Renamed the "Talanoa" Dialogue by the Fijian Presidency of COP23, the Talanoa process aims to build trust and knowledge among Parties and stakeholders to mobilize efforts towards the goals of the Paris Agreement. Outcomes of the process conducted at the national or regional levels are to be submitted to the UNFCCC through a specialized portal, allowing for these materials to be shared online, and utilized to inform policy responses at COP 24.

This document summarizes CIGI's climate change research on international law and governance innovations that could enhance transparency, sectoral efforts and coherence between trade and climate.

Transparency is Key

The design of the Paris Agreement is such that the lack of legally binding commitments with respect to nationally determined contributions is balanced by requirements for reporting and monitoring in large measure dependent on the operational details of the "enhanced transparency framework" under Article 13. That framework provides for reporting of greenhouse gas (GHG) inventories and for tracking implementation of climate plans. Provision is also made for transparency relating to support provided including financial support.[1]

Technologies to Support Transparency

Negotiations under the Work Plan are ongoing. One of the challenges is to determine how to account for domestic emissions in respect of the requirement of Article 13 on reporting of national inventories and emissions. Difficulties in obtaining accurate and adequate data to satisfy the requirements or Article 13 could be partially alleviated through the use of new technologies such as deployment of blockchain, or distributed ledger technology, and the integration of new sources of data such as satellite monitoring.

Today, a variety of systems exist for monitoring variables that are important to an understanding of the climate system. The Global Climate Observing System (GCOS) sponsored by the World Meteorological Organization (WMO), and United Nations Environment Programme, *inter alia*, is able to monitor anthropogenic GHG fluxes. This work seeks to support national emissions inventories through atmospheric composition observations. Measurements, made from space-borne platforms, seek to augment the bottom-up statistical approaches of the IPCC guidelines and allow improved integrated estimates of emissions.[2]

In 2016, 60 space agencies pledged to respond to the Paris Agreement on climate change. The following year the Paris Declaration emerged where a group of countries pledged to develop the Space Climate Observatory which could provide additional information on emissions monitored from space. This has now been subsumed under the UN Space 2030 Agenda under the UN Office of Outer Space Affairs. The question arises of how this data could best support the requirements for data on climate change and of when and in what forum coordination of such activities should take place between the space community and the UNFCCC.

The need to accelerate and strengthen technological innovations to achieve the goals of the Paris Agreement has been recognized within the UNFCCC by the Technology Committee. Blockchain technology or distributed ledger technology has the potential to improve mechanisms for measuring and reporting.[3] Use of blockchain as a verification mechanism for smart energy grids and carbon markets is being explored and tested. Suggestions have been made that blockchain could facilitate a central registry relating to Article 6.2 on transfer of internationally transferred mitigation outcomes (ITMOs). This issue was listed as one possible further element of the guidance on Article 6.2 in the Chairs' informal note for agenda item 11(a) of Subsidiary Body for Scientific and Technological Advice (SBSTA) and merits serious consideration. However, utilization of blockchain technology for climate action should be on the basis of a development path that significantly reduces computational intensity and electricity consumption.

Transparency in Market and Non-Market Mechanisms

Market based cooperation can also contribute further, in particular considering the reference to transparency in the text on Article 6.2.

Article 6.2 of the Paris Agreement allows all Parties to engage in "cooperative approaches" to trade among themselves "mitigation outcomes" (MOs) and use these "internationally transferred mitigation outcomes" (ITMOs) towards their NDCs.[4] The Paris Agreement does not define what "cooperative approaches" and ITMOs are, nor

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[1] See: Patrícia Galvão Ferreira, Equitable Allocation of Climate Adaptation Finance: Considering Income Levels Alongside Vulnerability, CIGI Paper No. 152 (2017), online: <www.cigionline.org/publications/equitable-allocation-climate-adaptation-finance-considering-income-levels-alongside>.

[2] See: Timiebi Aganaba-Jeanty, Satellites, Remote Sensing and Big Data: Legal Implications for Measuring Emissions, CIGI Paper No. 151, (2017), online: <www.cigionline.org/publications/satellites-remote-sensing-and-big-data-legal-implications-measuring-emissions>.

[3] See: Timiebi Aganaba-Jeanty, Sam Anissimov, and Oonagh E. Fitzgerald, Blockchain Climate Cup Round Table, Conference Report (2017), online: <www.cigionline.org/publications/blockchain-climatecup-round-table>.

[4] Paris Agreement, Article 6.2.

does it specify how MOs might be produced.[5] It is generally understood that cooperative approaches offer a strong potential for achieving the goals of the Paris Agreement, especially with regard to mitigation, in a flexible and cost-efficient manner.

According to Article 6.2, where engaging in cooperative approaches that involve the use of ITMOs towards NDCs, Parties "shall" "ensure environmental integrity and transparency, including in governance", consistent with guidance adopted by the CMA. While Article 6.2 does not explicitly mandate the CMA to adopt guidance, it must be noted that fulfilling the "environmental integrity and transparency" requirement is mandatory for the Parties (as the use of the word "shall" demonstrates). In the context of Article 6.2, a key issue is therefore to determine what "transparency in governance" means and how it can be ensured. With a view to encouraging the reflection on this issue, it is worth raising the following points.

It seems important that all Parties acknowledge that ensuring transparency in governance is a mandatory requirement, which needs to be properly addressed in the workplan. It is also important that this requirement is not understood too narrowly. Transparency in governance is broader than the issues of: how actions undertaken by the Parties in the context of Article 6.2 should be reported; how transfers of ITMOs should be tracked; how ITMOS should be accounted; and how environmental integrity should be overseen.

Transparency in governance also requires clarity, predictability, completeness and, more importantly, comprehensibility of the legal framework governing Article 6.2. It also requires that the relations between Article 6.2 and other provisions of the Paris Agreement (Article 13, Article 15, Article 4.13) are clarified. Transparency in governance should be seen as a crosscutting requirement that applies both to the substance and the form of the legal framework.

Transparency in Climate Finance

The requirements for transparency under the Paris Agreement also include an obligation to address transparency of support. The more Parties can transparently show how they are implementing their commitments, how they are complying with their legal obligations, and how they are supporting global climate action, the more trust the other Parties will deposit in the long-term success of the Paris Agreement.

The purpose of the framework for transparency of support is explicitly "to provide clarity on support provided and received by relevant individual Parties in the context of climate change actions, and, to the extent possible, to provide a full overview of aggregate financial support provided, to inform the global stock take under Article 14."[6] However, in developing the modalities, procedures and guidelines the Parties should remember that, despite the absence of an express linkage, information on financial and other support provided could also inform the mechanism to facilitate implementation and promote compliance that is currently under development under Article 15.[7] The MPGs should be designed with a view to transparency to foster trust between all Parties and develop accountability for developed countries.

The transparency framework for financial support should be as comprehensive as possible. Currently, only developed countries have binding obligations, both substantively and procedurally, for providing and reporting on climate finance, which may inform the mechanism for facilitating implementation and promoting compliance. However, by reporting on the climate finance they are providing and mobilizing voluntarily, using the same reporting standards for developed country Parties, developing countries will contribute to the accuracy and the consistency of information on climate finance. The modalities, procedures and guidelines (MPGs) should be

[5] See: Geraud de Lassus Saint-Genies, Article 6.2 of the Paris Agreement: How to oversee the international transfers of mitigation outcomes, CIGI Paper (*forthcoming*).

[6] Paris Agreement, Article 13.6.

[7] Paris Agreement, Article 15.

designed in a way to encourage developing countries to provide information on finance needed, received and used, in order to build trust and provide clarity on the full extent of climate finance under the Paris Agreement.

The question of climate finance to cover loss and damage is still undefined. The identification of financial support by either developed country Parties or developing country Parties in respect of loss and damage in reporting on their financial flows to developing countries, would also help to build a more complete picture of climate finance under the global climate regime. By showing how they are implementing their commitments, complying with their legal obligations, and supporting global climate action, Parties will foster the long-term success of the Paris Agreement.

The aim of the transparency framework is to "build mutual trust and confidence and to promote effective implementation."[8] This is a key aspect of the implementation of the Paris Agreement, which has not received detailed scrutiny from legal experts. Considering the specificities of the transparency framework for support, Parties should pay special attention to certain aspects while discussing the operationalization of the MPGs.[9]

Due to the legal nature of the climate finance obligations for developed countries, the transparency framework for support also has a legal function. Despite the absence of an explicit linkage, the information on financial support under the framework may inform the compliance element of the mechanism to facilitate implementation and to promote compliance under the Paris Agreement according to Article 15.[10] Both the facilitation of implementation and the promotion of compliance elements will be non-adversarial and non-punitive. The MPGs should be designed with a view to allow information on finance provided to inform the promotion of compliance, which is one way to increase trust and ensure accountability for developed countries.

To ensure clarity and a full overview on climate finance under the Paris Agreement, the transparency framework for support has to be as comprehensive as possible. Currently only developed countries have binding obligations, both substantively and procedurally, for providing and for reporting on climate finance, which may inform the mechanism for facilitating implementation and promoting compliance. However, by reporting on the climate finance they are providing and mobilizing voluntarily, using the same reporting standards for developed country Parties, developing countries will contribute to the accuracy and the consistency of information on climate finance. The MPGs should be designed in a way to encourage developing countries to provide information on finance needed, received and used, to track the full extent of climate finance under the Paris Agreement. The inclusion of any financial support by either developed country Parties or developing country Parties in reporting on their financial flows to developing countries would also help to build a more complete picture of climate finance under the global climate regime.

Stakeholder Engagement

Participation of "non-Party stakeholders" in the work of the UNFCCC was affirmed in the decision adopting the Paris Agreement. Non party Stakeholders, including civil society organizations, the private sector, financial institutions, cities and subnational authorities, local communities, and Indigenous peoples, were noted as having a specific role in sharing experiences, cooperating in the implementation of national climate efforts, and catalyzing actions to strengthen adaptation and mitigation initiatives.[11] The UNFCCC has robust civil society participation in terms of numbers in attendance, but could benefit from further improvements. Five approaches that could advance stakeholder engagement in the UNFCCC include increased coordination of observer inputs, the creation of a permanent forum for engagement, transparent participation through some form of disclosure of conflict of

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[8] Paris Agreement, Article 13.1.

[9] See: Patrícia Galvão Ferreira, Climate Finance Transparency in the Paris Agreement: Overview of Key Legal Issues, CIGI Paper (*forthcoming*).

[10] Paris Agreement, Article 15.

[11] Decision CP.21, Paris Agreement, *preamble,* para 109, 117-118, 133-136.

interests, creation of a funding mechanism to support participation, and the preparation of guidelines for domestic consultation.[12]

Currently there are nine constituencies that are active under the UNFCCC. Development of a coordinating body for non-Party stakeholder input, participation, and integration could further advance the goals of the Paris Agreement. It could be composed of regional representatives of each constituency and members of the Secretariat, and could work to coordinate submissions, participation, and inputs within both the individual constituency and across non-Party stakeholders more broadly to enhance the effectiveness of mechanisms such as official statements, the Marrakech Partnership, the Indigenous Platform, and the Talanoa Dialogue.

The establishment of a permanent forum for stakeholder engagement, which would include high-level discussions, and enhanced participation would assist with overcoming identified limitations of the UNFCCC stakeholders process. Multi-stakeholder dialogues could be facilitated thereby allowing broader stakeholder contributions. The Marrakech Partnership for Global Climate Action holds great potential to provide a permanent forum which fosters regular discourse and collaboration. The Talanoa Dialogue, with a mandate ending at COP24, could be provided with a renewed mandate to serve as a vital input into the global stocktake allowing for continued sharing of national experiences to buttress adaptation communication as envisioned under the Paris Agreement Work Program (PAWP).

Participation of a variety of stakeholders is essential to contribute to the low carbon future. Establishing a procedure whereby stakeholders could disclose their significant interests could be useful. Development of a funding mechanism to support the attendance of non-Party stakeholders from the global south to meetings under the UNFCCC would be beneficial to a range of non-Party stakeholders and would likely increase the diversity of available perspectives informing policy discussions, including Indigenous peoples and climate vulnerable communities.

Important factors in the success of climate measures are domestic processes of outreach, consultation, and engagement. Parties may benefit from some common principles to assist in guiding the domestic consultation process. While many jurisdictions have domestic processes underway these vary in approach. Talanoa Dialogue principles such as “constructive, facilitative and solutions oriented” could inform domestic approaches. Voluntary guidelines could be developed to facilitate multi-stakeholder dialogue domestically and between networks of non-Party stakeholders. Sub-national and local leadership non-Party stakeholders could play an important role in strengthening local action, providing inputs to inform technical review, and informing ongoing implementation strategies.

Engaging local and regional governments, the private sector, and civil society is essential to transition national economies to a low carbon future and to achieve the goals of the Paris Agreement. Use of technological solutions as an alternative to physical participation including streaming of contact groups, and online participation for workshops and dialogues could increase accessibility and assist in reducing the environmental footprint of global climate meetings. Effective integration of non-Party stakeholder engagement is needed across all aspects of global society to assist countries to achieve their NDCs.

Increasing Sectoral Ambition

Sectors that are major contributors to greenhouse gas emissions such as shipping and air transportation need to develop and implement effective climate mitigation strategies.[13] A sector that will have the ability to assist in

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[12] See: Freedom-Kai Phillips, Participation of “non-Party stakeholders” under the United Nations Framework Convention on Climate Change: Options for Future Engagement, CIGI Paper (*forthcoming*).

[13] Silvia Maciunas, Will ICAO Do Its Part to Meet the Climate Change Challenge?, CIGI Opinion (28 August 2016), online: <www.cigionline.org/articles/will-icao-do-its-part-meet-climate-change-challenge>; Markus Gehring, Does Historic Pact on Aviation Emissions Go Far Enough?, CIGI Interview (21 October 2016), online: <www.cigionline.org/articles/does-historic-pact-aviation-emissions-go-far-enough>; Markus Gehring and Freedom-Kai Phillips, Intersections of the Paris Agreement and Carbon

alleviating the climate burden is that of international maritime shipping. In April 2018, the International Maritime Organization (IMO) adopted an initial strategy on the reduction of GHG emissions from ships. This achievement—which seeks to tackle the GHG emissions of the international shipping industry—represents the IMO's contribution to the global response to climate change as set out in the Paris Agreement, namely the commitment to keep the global average temperature increase to "well below" 2°C above pre-industrial levels and to strive to limit it to 1.5 degrees or less.[14]

Emissions from international shipping currently represent just over two percent of global emissions but would increase significantly if the industry continued to operate on a business-as-usual scenario.

The IMO deliberations took place at the seventy-second session of the IMO's Marine Environment Protection Committee (MEPC 72) after protracted and at times divisive negotiations. The IMO was under intense pressure to show leadership on this critical issue, not only because of its urgency, but also because of the potential for unilateral efforts by the European Union and the need to bridge wide differences between major maritime states, while also demonstrating sensitivity and responsiveness to the plight of developing countries, most notably small island developing states. The initial reactions from the IMO itself, and from member states, industry bodies, environmental non-governmental organizations, external stakeholders and observers, have been generally positive some hailing it as a landmark achievement, others expressing more cautious optimism.

While the strategy reflects the IMO's commitment to mitigation as a matter of urgency, it adopts a gradual approach to the decarbonization of the industry. It is guided by the principles of non-discrimination and no more favourable treatment in the IMO conventions to guide technical measures and common but differentiated responsibilities and respective capabilities in the light of different national circumstances in the climate regime with respect to economic measures. The inclusion of both principles in this manner resolved a long-standing controversy in the MEPC.

The IMO will have to maintain a credible process and the goodwill that will enable the strategy to deliver on the compromise and keep pace with the Paris Agreement. This will not be an easy process, in part because the current support for the strategy reflects the state of understanding of climate change and the response needed based on the IPCC's 2015 assessment report. The special IPCC report on the target of 1.5 degrees which came out in October 2018 portrays a grimmer picture and highlights the inadequacy of states' efforts under the Paris Agreement, let alone any shortcomings of the IMO strategy.

The policy considerations explored include the overall long-term goal, key milestones toward the goal, measures and timelines to achieving the goal, and reporting and review. A critical starting point will be the determination of the industry's fair contribution to the goals of the Paris Agreement and the overall climate mitigation effort expected from the sector. Key milestones include the peak year, the rate of emissions reduction after emissions have peaked, and a timeline for full decarbonization explored in the context of short-, medium- and long-term targets.

Technical and operational regulations, market-based mechanisms, and mechanisms to review and adjust both the targets and role of the measures to achieve them are among the potential tools considered. A key consideration is the opportunity to synchronize the efforts of the IMO with commitments, review cycles, mechanisms and institutions under the Paris Agreement. Legal considerations are underscored by the global nature of maritime

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Offsetting: Legal and Functional Considerations, CIGI Policy Brief No. 88, online: <www.cigionline.org/publications/intersections-paris-agreement-and-carbon-offsetting-legal-and-functional>.

[14] See: Aldo Chircop, Meinhard Doelle, and Ryan Gauvin, Shipping and Climate Change: International Law and Policy Considerations, CIGI Special Report (2018), online: <www.cigionline.org/publications/shipping-and-climate-change-international-law-and-policy-considerations>.

regulation, the necessity to anticipate the steps needed to secure universal acceptance and uniform application of the measures adopted in or under the IMO strategy, and the relationship with other global and regional regimes.

Further considerations include whether states should be encouraged to extend international rules and standards to domestic shipping to facilitate GHG regulatory consistency across all forms of shipping. The finalized IMO strategy will need to give thought to how it will facilitate compliance.

Trade and climate

The trade and climate agenda has a range of interfaces providing regulations governing global trade. The challenge for policy makers is how to maintain relatively free, undistorted trade, while giving states sufficient policy space to implement effective measures to combat climate change. There is a clear need for policy makers in both realms to better coordinate and ensure that the legal regimes governing climate and trade evolve in complementary ways. Although it is recognized that international trade law and institutions will not be the primary vehicles for advancing the climate agenda, it is agreed that more could be done to ensure the trade regime supports climate goals.

Neither the UNFCCC or the World Trade Organization (WTO) has fully considered the potential for trade restrictions forming a part of national measures enacted to address climate change. Such measures could well contravene the WTO Agreement and lead to lengthy WTO dispute settlement processes.[15] Such trade-restrictive national measures will be fed by domestic fears of "carbon leakage" and loss of national competitiveness and resulting WTO disputes will raise novel questions of law. To minimize the political risks of such a collision for the WTO and the UNFCCC, and achieve the most benefit for the climate with least risk to trade, Parties should investigate the relationship between trade rules and potential climate measures.

Areas that should be explored include the use of environmental provisions in bilateral and regional trade agreements, changing the subsidies regime to allow for green subsidies and a mechanism to allow some flexibility to member states in the WTO to undertake appropriate climate measures. In respect of the latter, one approach would be that of a WTO climate waiver. The waiver would allow climate measures that could otherwise run afoul of the trade rules due to the "exceptional circumstances" of climate change.

To secure such a legal waiver, WTO members must recognize the impending conflict between the trade and climate legal regimes, and negotiators on both topics should meet to discuss the nexus between the two. The relationship between trade and climate change should be placed on the WTO agenda with a view to developing a WTO climate waiver. WTO members will also need to revise and realign WTO rules in accordance with the objectives of sustainable development.

Conclusions

Enhanced transparency is a requirement under the Paris Agreement that depends on robust reporting by Parties on their respective nationally determined contributions to provide information on climate action. To address some of the challenges in obtaining accurate and verifiable information, Parties may benefit from integrating emerging innovations such as satellite monitoring and blockchain technology. Transparency is also an element under the Article 6.2 requirements for internationally transferred mitigation outcomes. Reporting on climate finance will contribute to an "enhanced transparency framework." Enhanced stakeholder engagement will increase public understanding of climate change and help encourage climate action.

Increased ambition from key polluting sectors such as shipping and air transportation is also critical. Adoption of a WTO climate waiver could start a reform process to reconcile the trade and climate agendas. Efforts within the UNFCCC and more broadly in the areas of shipping and trade are necessary and urgent to make the economy wide changes needed to meet the Paris Agreement goals.

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[15] See: James Bacchus, The Case for a WTO Climate Waiver, CIGI Special Report (2017), online: <www.cigionline.org/publications/case-wto-climate-waiver>.