

Report Part Title: Climate Finance Obligations: Changes

Report Title: Climate Finance and Transparency in the Paris Agreement

Report Subtitle: Key Current and Emerging Legal Issues

Report Author(s): Patrícia Galvão Ferreira

Published by: Centre for International Governance Innovation (2018)

Stable URL: <https://www.jstor.org/stable/resrep24962.9>

JSTOR is a not-for-profit service that helps scholars, researchers, and students discover, use, and build upon a wide range of content in a trusted digital archive. We use information technology and tools to increase productivity and facilitate new forms of scholarship. For more information about JSTOR, please contact support@jstor.org.

Your use of the JSTOR archive indicates your acceptance of the Terms & Conditions of Use, available at <https://about.jstor.org/terms>



JSTOR

Centre for International Governance Innovation is collaborating with JSTOR to digitize, preserve and extend access to this content.

negotiate the rules for reporting climate finance under the transparency framework for support.

Climate Finance Obligations: Changes

This general continuity hides important political changes that have already produced some legal consequences, and that may signal future legal changes in the climate regime. One change has been the gradual expansion in the number of parties with financial obligations under the climate regime over the years. Under the 1992 Convention, only the group of developed countries listed in Annex II was under the obligation to provide climate finance. Nevertheless, in practice, virtually all developed countries have consistently provided some form of financial support to climate action in developing countries since 1992, even those that were not listed under Annex II. The Paris Agreement has officially expanded the number of parties with legal obligations to provide climate finance to include all developed countries, catching up with state practice.²⁶

Although the Paris Agreement did not create climate finance obligations for high middle-income developing countries and emerging economies, this was discussed during negotiations.²⁷ Despite the resistance of developing countries to this potential legal change, there are signs indicating that the climate regime is gradually evolving in the direction of emerging economies, or high middle-income countries with comparatively strong financial capacity, politically accepting to give some financial support for climate action in other developing countries. The Paris Agreement has clearly separated the *provision* of climate finance (understood to include public financial flows from developed to developing countries, although this is not defined in the agreement) from the *mobilization* of climate finance (meaning private sources mobilized by

public interventions), giving each element of climate finance a different legal treatment.²⁸

The exclusive obligation of developed countries applies only to the provision of climate finance under article 9.1. Yet article 9.2 encourages other parties “to provide or continue to provide such support voluntarily,” a formulation that was absent from previous legal instruments and decisions in the climate regime. When it comes to the mobilization of climate finance “from a wide variety of sources, instruments and channels,” parties agreed in article 9.3 that it would be “a global effort,” albeit with developed countries committing to continue taking the lead.

This separation and different legal treatment between climate finance provided and climate finance mobilized reflects a compromise. Developing countries wanted to maintain the exclusive obligation of developed countries to provide and to mobilize climate finance.²⁹ Developed countries advocated for keeping the obligation to provide climate finance, albeit expanding it to more parties, while mobilization of climate finance would be a common effort under equal legal treatment. The middle ground was to include distinct paragraphs for provision and for mobilization of climate finance. While the former remains an exclusive obligation of developed countries, the latter became a universal commitment, although still politically differentiated due to the leadership role expected from developed countries.

In practice, several developing countries, including China and Brazil, have pledged to provide and to mobilize financial support for climate action in other developing countries. In 2015, China pledged US\$3.1 billion to a “South-South Climate Fund” that will support climate action in other developing countries.³⁰ Estimates are that, as a share of GDP, China’s pledge overtakes the pledges of many developed countries, including the United States,

26 It is worth noting that the Paris Agreement has not included a definition of developed countries, leaving the decision as to which countries will fall into this group to political self-determination and collective political agreement.

27 Gastelumendi & Gnitke, *supra* note 5 at 244.

28 *Ibid* at 242.

29 Gastelumendi & Gnitke, *supra* note 5 at 243.

30 Ed King, “China makes ‘watershed’ \$3.1 billion climate finance offer”, *Climate Home News* (25 September 2015). Lina Li et al, “China and its Climate Leadership in a Changing World: From Passive Follower to Constructive Shaper of the Global Order” (2017) Climate Diplomacy Discussion Paper.

Canada and Australia.³¹ Three developing countries that are part of the Group of 20 — Indonesia, Mexico and Korea — have provided voluntary contributions to the Green Climate Fund,³² as did six developing countries.³³ Eight developing countries have provided financial contributions to the Global Environmental Facility, one of the operating entities of the financial mechanism under the UNFCCC. This movement toward universalization of climate finance provided and mobilized for developing countries thus reflects both a shifting political understanding and emerging state practice.

Considering the clear need for greater resource mobilization for climate action in developing countries, one might expect that the group of emerging economies and other high-income developing countries will be under increasing pressure to contribute their share of financial support for global climate action; as their share of global greenhouse gas emissions grow, so do their financial capabilities as compared to lower-income developing countries with significantly fewer climate responsibilities and lower financial capabilities. This gradual expansion in the number of parties offering financial support for their peers would be in line with the gradual organic evolution of the principle of common but differentiated responsibilities under the climate regime, beyond the North-South divide.³⁴

In the inception of the climate regime under the UNFCCC in the 1990s, the idea was that developed countries would take the lead by taking early emissions reduction actions and by providing the bulk of international finance for climate action in developing countries, in order to account for their historical contributions to climate change and their greater financial and technological capabilities. Yet emerging economies, with their growing emissions and their improving financial capabilities, were expected to make significant contributions over time to account for their rising responsibilities and capabilities. Although, for a long time, developing

countries resisted any formal legal change in the principle of differentiation in the climate regime, in practice, many emerging economies and other developing countries adopted substantial domestic policies to reduce emissions.³⁵ State practice has therefore contributed to a gradual evolution of the principle of differentiation beyond the North-South divide, based on voluntary action by a group of key developing countries. This state practice was recognized in the Paris Agreement.

A similar process may be happening in the area of climate finance. A group of developing countries is increasingly providing financial support to other developing countries. Although these developing country parties are contributing voluntarily, this opens the way for a discussion on the future expansion in the number of legally mandated providers of climate finance, based on the principle of common but differentiated responsibilities and capabilities, which considers both the unequal contributions to global greenhouse gases and financial capabilities. And there is no question that a country with the largest share of current emissions (i.e., China), which is also the second largest economy in the world in absolute GDP numbers (although not per capita GDP), has more responsibility and capabilities than a small island nation such as Fiji or a least-developed country such as Malawi.

Most probably, this evolution toward expanding the number of legally mandated financial providers will only happen if parties can agree on a burden-sharing arrangement that requires developed countries to contribute with a proportionally greater share of financial support when compared to emerging economies and high-income developing countries. From a legal perspective, however, only developed countries are currently under the substantive legal obligation to provide climate finance.

Another relevant change has been the political determination of a numeric collective goal for the provision of climate finance. Until the 2009 Copenhagen Accord, there was no indication as to how much financial support was involved in developed countries' financial obligations under the climate regime. The text of the Copenhagen

31 Joe Thwaites & Niranjali Manel Amerasinghe, "Fact-Checking Trump on Climate Finance" (June 2017), online: World Resources Institute <www.wri.org/blog/2017/06/fact-checking-trump-climate-finance>.

32 Swati Agarwal et al, *Brown to Green: The G20 Transition to a Low-Carbon Economy* (Berlin: Climate Transparency, 2017).

33 Thwaites & Amerasinghe, *supra* note 32.

34 Lavanya Rajamani, "Ambition and differentiation in the 2015 Paris Agreement: Interpretative possibilities and underlying politics" (2016) 65:2 ICLQ 493.

35 See Climate Action Tracker for a comparative assessment of the climate pledges and contributions of developed countries and developing countries over the years, online: <<http://climateactiontracker.org/countries/brazil.html>>.

Accord included the following wording: “Developed countries commit to a goal of mobilizing jointly USD 100 billion dollars a year by 2020 to address the needs of developing countries.”³⁶ This collective goal was in addition to a collective sum of US\$30 billion for the period of 2010 to 2012, known as “Fast-Start Finance.”³⁷ Parties to the Paris Agreement could not reach a consensus to include the numeric indication in the text of the legal instrument, placing the collective quantified goal in the text of the Decision of the Conference of the Parties that established the Paris Agreement instead.³⁸

Strictly speaking, therefore, developed countries have no collective legal obligation to provide the specific amount of US\$100 billion a year as a floor, as this remains a political pledge. Individually, developed countries do not have any obligations to provide any specific amount either, be it in absolute terms or in terms of GDP share. However, article 9.3 of the Paris Agreement establishes that the financial obligation should represent “a progression beyond previous efforts,” which shows that there is a political expectation not only that developed countries must collectively deliver on the US\$100 billion, but also that this goal should be seen as a floor. The Paris Decision extends the US\$100 billion commitment to 2025 and establishes a process for the COP serving as the meeting of parties to the Paris Agreement to agree on a new collective goal after 2025.³⁹ The decision does not mention that the post-2025 collective goal is exclusive to developed countries, leaving room for a political agreement to expand the basis of contributors to this collective financial commitment.

In sum, although there have been significant political advances in terms of financial commitments, from a legal standpoint there is more continuity than change between the UNFCCC and the Paris Agreement when it comes to substantive obligations related to the provision of climate finance. From a legal perspective, developed countries still have exclusive collective obligations to provide finance with low levels

of precision, leaving wide discretion for each of them to decide on the quantity, the timing and the channels they will use. Developed countries also have discretion as to how much finance they will channel to adaptation and how much to mitigation, although they are expected to respect a “balance” that is left undefined.

The Paris Agreement has, however, created a significantly more robust transparency framework for financial support under the Paris Agreement, which will contribute to facilitate implementation and to promote compliance with climate finance obligations, and may encourage the gradual legal expansion in the number of providers over time. It is important to understand the legal nature of the provisions of the transparency framework for support as well.

Enhanced Transparency Framework for Support: Institutional Elements

Article 13 of the Paris Agreement establishes a single “enhanced transparency framework for action and support” to “build mutual trust and confidence and to promote effective implementation.” The transparency framework is described as crucial for the success of the Paris Agreement, as it is expected to foster shared understandings of the NDCs and collective learning, to marshal domestic support for national climate action and to hold parties accountable for the implementation of their NDCs.⁴⁰

From a legal perspective, there are differences between the two elements of the broad transparency framework (the transparency framework for action and the transparency framework for support). The transparency framework for action establishes a universal obligation of conduct that binds all parties to regularly provide information on the implementation of their voluntary pledges for climate action: “each party shall provide information.” All parties, developing and developed alike, are legally bound, although

36 *The Conference of the Parties Takes Note of the Copenhagen Accord of 18 December 2009*, Dec/CP.15, UNFCCC at 3.

37 Smita Nakhoda et al, *Mobilising International Climate Finance: Lessons from the Fast-Start Finance Period* (ODI, World Resources Institute, Institute for Global Environmental Strategies & Open Climate Network, 2013).

38 Meinhard Doelle, “The Paris Agreement: Historic Breakthrough or High Stakes Experiment?” (2016) 6:1-2 *Climate Law* 1.

39 Zahar, *supra* note 3 at 73.

40 Asselt et al, *supra* note 2.