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Entry into force and then? The Paris agreement and state accountability

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ABSTRACT

The entry into force of the Paris Agreement on climate change brings expectations that states will be held to account for their commitments. The article elaborates on why this is not a realistic assumption unless a broader multilevel perspective is taken on the nature of accountability regimes for international (legal) agreements. The formal accountability mechanisms of such agreements tend to be weak, and there are no indications that they will be stronger for the recent global goals adopted in the Paris Agreement. Looking beyond only peer review among states, national institutions, direct civil society engagement and internal government processes – while each coming with their own strengths and weaknesses – provide additional accountability pathways that together may do a better job. Scientific enquiry is, however, required to better understand, support and find improved mixtures of, and perhaps to move beyond, these accountability pathways.

Policy relevance

This perspective provides something of a clarion call for a variety of different types of actors at both global and national levels to engage in ensuring that states keep the promises they made in the Paris Agreement. It particularly highlights the importance of national institutions and civil society to step up to the task in the present world order, where states are reluctant to build strong accountability regimes at the global level.



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The Paris Agreement (PA) entered into force only one year after its adoption, representing the culmination of eight years of difficult negotiations. It has been called ‘a turning point in global efforts to deal with the climate change problem’ (Kinley, 2016). The agreement, packaged as an instrument of international law, specifies long-term global climate goals and short-term procedural steps that outline how these goals should be achieved (Bodansky, 2016). For many, the PA’s status as an international legal agreement raises the expectation that upon its entry into force states will act upon their promises, and if not, will be held accountable in some way. In national contexts where there is a reasonable level of ‘rule of law’, legal obligations are ordinarily enforced and those who violate them brought to justice. Most democratic societies also expect that public actors in positions of power will be required to (publicly) justify their actions or absence of actions in the face of binding policy commitments. In the realm of Multilateral Environmental Agreements, however, – and the PA is no exception – ‘non-compliance mechanisms’, where they exist, are ‘non-judicial, non-confrontational and consultative’,

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reflecting states' preference to 'facilitate' compliance rather than to stigmatize violations or to impose sanctions (Tanzi & Pitea, 2009). Indeed, even notions of effective 'mutual accountability' among states joining international agreements, such as the peer-to-peer facilitation of compliance as set out in the PA, are contested and remain ambiguous. Most states in the PA negotiations carefully avoided the 'a-word' in discussion of implementation follow-up and monitoring. This article argues that states' reluctance to hold each other individually to account or to institutionalize penalty mechanisms for non-compliance within the international agreement itself does not need to signify that they cannot be held to account for their actions or inaction with regard to their PA commitments. Rather, it highlights the need to look beyond the PA text itself for potential 'accountholders', and identify opportunities for strengthening accountability by other actors and at other levels in ways that support both PA implementation and democratic legitimacy. For ultimately, it is through the quality of its implementation that the PA's degree of success will be judged (Kinley, 2016).

Multilevel accountability

The PA approach for holding individual states to account includes a 'transparency framework' (UNFCCC, 2015, Article 13) and a committee tasked to 'enhance implementation and promote compliance' (Article 15). This latter expert-based committee will operate in a way that is 'facilitative, non-intrusive, non-punitive and respectful of national sovereignty' (Article 15). The PA additionally prescribes a review framework of progress towards the global goals every five years, assessing 'collective progress towards achieving the purpose ... and its long-term goal' (Article 14.1). This provision could be considered as a type of collective, peer-review forum for all state parties to hold *each other* accountable through the mechanism of global stocktaking. It is stipulated that the result of this stocktaking 'shall inform parties in updating and enhancing their actions and support' (Article 14.3).

This brief description of the formal 'accountability framework' contained within the PA itself (although not referred to as such), indicates that there is no mandate for sanctions or similar enforcement measures that many would associate with legal obligations, as typically found in national contexts. One may be tempted to conclude that it is not possible to hold states to account for non-compliance with their PA obligations in any meaningful way. Indeed, among the flurry of academic analyses of the PA are many discussing the potential accountability of states based on the varying degrees of interpreted 'bindingness' of PA obligations (Oberthür & Bodle, 2016). Many studies of the accountability of states in relation to international environmental commitments indeed tend to focus on the formal mechanisms for follow-up and review of implementation (van Asselt, Saelen, & Pauw, 2015) and particularly of (non)-compliance within international legal agreements (treaties) (Treves et al., 2009) as the principal arena where states can hold each other to account.

In this article, however, we argue that this is too narrow a focus and one that runs the risk of overlooking other potentially productive arenas where accountability is or could be established – and possibly with more impact and/or higher degree of democratic legitimacy. In theories of contemporary governance and democracy, 'accountability' implies more than enforcement of law. It is rather seen as a relational concept involving the 'giving and demanding of reasons for conduct' (Roberts & Scapens, 1985) whereby such justification of conduct by 'accountors' towards 'account-holders' takes place in specified arenas (Bovens, 2007). Legal scholars include as an intrinsic aspect of accountability the possibility of employing sanctions in cases of inappropriate behaviour. We, however, follow Mashaw's (2006) broader approach, which embraces a spectrum of types of formal and informal effects that accountability mechanisms may have, from educative to punitive. This relational understanding of accountability opens a broader analysis of who could hold states to account for their PA obligations, in what arenas, according to what standards, and with what effects (Mashaw, 2006). Such effects may have an impact on state behaviour, state compliance and on the democratic 'quality' of (international) governance.

For such an approach, we draw on literature dispersed, *inter alia*, across public administration, third sector research and media studies, to examine how four alternative 'accountability pathways', each involving sets of 'account-holders' at various levels may, when taken together, provide a much stronger degree of accountability of states vis-à-vis their PA obligations in comparison to the accountability framework in the PA regime itself. These pathways are presented as separate analytical constructs, but as the final section below shows, are invariably interconnected in practice.

Pathway one: mutual accountability

Within the many legal agreements that form part of global environmental governance, tentative steps towards more formal accountability mechanisms include forms of ‘assessment and review’ (van Asselt et al., 2015) and ‘non-compliance procedures’, within which the actions of the individual state or the collective behaviour of states are discussed and assessed (Treves et al., 2009). The Kyoto Protocol climate regime, for instance, offered unusually ambitious accountability mechanisms through a compliance committee and its enforcement and facilitative branches (Oberthür & Lefeber, 2010). Under the United Nations Framework Convention on Climate Change (UNFCCC), although all parties are obliged to send in regular reports on implementation, and developed country (Annex I) reports are subject to expert review, there is no forum for the discussion of individual reports. In 2010 parties to the UNFCCC adopted new processes for ‘Measuring, Reporting and Verification’ (MRV) for developed and developing countries. Both processes, albeit different in mandate and scope, include a forum for peer-to-peer exchange on technically reviewed individual country reports accessible for the public via webcast. Almost all developed countries (Annex I) were subject to a tailored multilateral assessment process in 2014–2015 (Deprez, Colombier, & Spencer, 2015). In May 2016, the first 13 developing countries (non-Annex I), after submitting reports for technical review, went through a ‘Facilitative Sharing of Views’ (FSV) in accordance with the approved guidelines (UNFCCC, 2011). Several reported that this process influenced the development of domestic MRV systems and/or that it prepared them for the PA transparency framework.¹ The peer-to-peer exchanges for both developed and developing countries took the form of courteous questions and answers, providing a glimpse into what the explicitly ‘facilitative’ accountability framework for individual countries under the PA may look like (Article 13 paragraph 3).

The second aspect of this facilitative accountability is the establishment of global stocktaking under the Paris Agreement. The initial version, a ‘facilitative dialogue’, is to take place in 2018 and will test whether this process will lead to an upscaling of ambition and therefore revised Nationally Determined Contributions (NDCs). The lack of material sanctions does not necessarily mean states will try to free-ride and avoid taking any action: sensitivity to ‘peer pressure’ and concern for reputational damage can affect state behaviour. However, Guzman (2002) argues that the degree of such damage depends on, among other factors, how clear and precise commitments are. With only a global collective goal and no specific allocation of discrete responsibilities to individual parties for achieving that goal – except with very general directions (see Oberthür and Bodle (2016) – the chances of effective mutual accountability through peer-pressure among states may seem rather slim. Nonetheless, if for other reasons a critical mass of countries announce that they will upscale their NDCs this could create a ‘norm cascade’ making initially reluctant countries follow suit (Finnemore & Sikkink, 1998), so that the PA could develop a political narrative that ‘punch[es] well above the weight of its legal content’ (Oberthür & Bodle, 2016, p. 57). Such positive peer-pressure seemed to be a mechanism at work for the unexpectedly large number – from 188 of the 196 Parties (Höhne et al., 2017) – of preliminary NDCs submitted ahead of the 21st Conference of Parties (COP 21) in Paris. States will of course be more easily swayed if they have come to realise it is in their interest to address climate change through both mitigation and adaptation. There seems to be a clear shift, albeit very slow, of many countries realising their self-interest in addressing climate change notwithstanding pushback after national elections, such as in the US. Altogether, it is still difficult to envision how the facilitative dialogue in 2018 and future global stocktaking could lead to sufficiently enhanced NDCs without further pressure from other types of actors, in other arenas than the COP. We argue that the primary drivers for government actions and the strongest accountability relationships could be in domestic contexts.

Pathway two: domestic institutions holding their governments to account

States, and more specifically their executive governments, may be held to account for obligations under the PA by domestic institutions such as parliaments, audit agencies and judicial bodies in line with constitutional divisions of powers in the state. The idiosyncrasies of each state’s legal/political system delimit the role of such institutions in assessing and sanctioning their government for conduct covered by international obligations. There are of course much more limited roles for such domestic institutions to hold the government to account in

autocracies, and within democracies constitutional provisions will influence the strength of various account-holding roles, as will provisions in the laws adopted for implementing international commitments. The international legal nature of the PA requires from all countries formal expressions of consent to be bound (Article 20) and, in most countries, implementation through national laws. A particular challenge for the PA in this regard is that procedural aspects of submitting NDCs are legal obligations, whereas their content (e.g. the specific mitigation and adaptation measures promised) are not (Bodansky, 2016). The PA provides weakly prescriptive guidance on the content of the NDCs, stating for example that they should ‘reflect [.. the] highest possible ambition’ followed by various qualifiers such as the diversity of national circumstances (Article 4.3) and general commentary on the conduct that should accompany NDCs (namely, that parties ‘shall pursue domestic mitigation measures, with the aim of achieving the objectives of such contributions’ (Article 4.2)). The role of parliaments in developing the ambition level of the NDCs, and in subsequent reviews of the effectiveness of policy measures, is uncertain. Zurn (2004) and others have noted the tendency for weak coordination between legislative and executive branches in matters of global governance. Parliaments can play a key role but this will depend both on parliamentarians’ interest and how well informed they are as to progress on domestic implementation and on the overall advancement towards the goal of the PA. The latter will be crucial if the mutual accountability mechanism through the global stocktaking mechanism is to have any prospect of informing the development and revision of NDCs. Clearly, domestic institutions’ interest in demanding accountability depends on domestic public support (McHarg, 2011), which may not always be forthcoming, thus making this pathway vulnerable to vicissitudes in public interest. Despite its weaknesses, this pathway holds promise for two reasons: it avoids the reluctance of states to be held to account by non-national actors and it leverages established formal national accountability mechanisms that can be strong in democracies in particular.

Pathway three: public(s) holding governments to account

Individual and collective actors, such as scientists or civil society organizations, may hold governments directly to account and, with that engagement, partially compensate for both tepid accountability through traditional national processes and the current democratic deficit in global governance where executive governmental actors play a dominant role (Steffek, 2010). The public may, in fact, appropriate or be assigned roles in formal state-to-state accountability mechanisms, for example by being permitted to initiate non-compliance procedures or to contribute additional information for such procedures (Duyck, 2014). Overall, however, the possibilities for this sort of contribution in the PA are limited (van Asselt, 2016). One possible exception is that the PA stipulates that the global stocktaking should be based on the best available science (Article 14.2), which opens opportunities for scientists and NGO experts to contribute (van Asselt, 2016). Furthermore, NGOs are actively engaged in ‘account holding’ of states in and around the COP meetings and in transnational virtual spaces. This might include influencing actors (such as states or individual experts) who play formal roles in the follow-up and review mechanisms, engaging in evaluating the fairness of NDCs, monitoring compliance and exposing insufficient implementation – thus increasing public scrutiny and building popular pressure (Duyck, 2014).

At the national level, civil society actors seek to engage formal institutions by, for example, taking governments to court over carbon emission regulation in several countries. National litigation addressing climate change launched by civil society has to date found some success, with, for example, a landmark case in the Netherlands which demonstrated that quantifiable commitments at the international level may provide tools that civil society may use to compel government action (Fukuda-Parr, 2014). The Hague District Court ruled in 2015 that the Dutch State must take further action to reduce greenhouse gas emissions, in order to fulfil a duty to protect the living environment of citizens, holding that national emissions in the year 2020 must be at least 25% lower than those in 1990, a target guided, *inter alia*, by international norms, scientific analysis and government statements on climate policy.² Individuals have also been successful with such public interest litigation in Pakistan, for example, and other suits are being pursued in diverse jurisdictions around the world, including the United States, Belgium, and Norway.

The strength of publics lies in their ability to sponsor their own research, devise campaigns in both traditional and social media, and to effectively engage policy-makers in national and global arenas. The effectiveness of this pathway is, however, just as powerful, malleable and fickle as the public interest, and the associated

financial donations needed (McHarg, 2011). It can be severely constrained if traditional media shows limited interest, e.g. in the inevitable slackening of attention subsequent to agreement adoption and related high-profile events (Karlsson-Vinkhuyzen, Friberg, & Saccenti, 2016). More importantly, not all governments provide space in which civil society may operate (Falkner, 2016), nor are governments equally swayed by public pressure.

Pathway four: governments holding themselves to account

The relational aspect of accountability has been stressed above, but to these we add another pathway, in which executive governments might hold themselves to account, e.g. through their own internal systems of monitoring and evaluation of policy effectiveness and efficiency. One important example is procedures they develop where they use accurate and comprehensive national data on greenhouse gas emissions as a basis for evaluating climate policies. Such inventory data, however, have to be linked to evaluation of the (in)effectiveness of particular policies if this is to become a useful tool for the 'self-evaluation' that this accountability pathway involves. Here, there is progress to be made as formal state-led evaluation capacities for climate policy are very underdeveloped, at least in EU member states, compared to the fast development of new policies in this field and an EU regulation from 2004 requiring states to carry out quantitative estimates of the effects of policies and measures on emissions (Huitema et al., 2011). Also the independent reviews of National Communications have stressed the frequent lack of quantitative ex post analysis of policy effectiveness (Hildén, Jordan, & Rayner, 2014). The quality of a government's evaluation systems is also important for other pathways of accountability to function, such as enabling its parliament to do its job as account-holder. For example, the Swedish parliament repeatedly urged the government to improve the continuous follow-up and evaluation of climate policies and measures with respect to efficacy, cost effectiveness, transparency and long-term emission trajectories (Riksrevisionen, 2013). In response, the Swedish government will, adjacent to a new climate law, establish a council whose mandate will be to support the government via an independent evaluation of the alignment of its overall politics with its climate goals.³ This means that the government is not relying on self-evaluation but rather strengthens the second accountability pathway by creating an independent body. The fourth pathway can also be supported by the establishment of clear responsibilities *within* the government for goal achievement. In the UK, specific departments are responsible for their own share of public-sector emissions as well as those from their assigned economic sectors. Each department must publicize plans for achieving reductions as well as progress reports (McHarg, 2011).

How this pathway functions depends on the traditions and administrative cultures of each state, and the legal and policy options they adopt (Townshend et al., 2013). Internal accountability is fundamental on its own even if governments are not making the data they use publicly available. It is also important for enabling the functioning of the other pathways, through the transparency on policy performance and effectiveness it can provide. It is supported by reporting requirements in the international climate agreements but is still also vulnerable to shifts in national politics and public opinion (McHarg, 2011).

Directions for strengthening state accountability

Taken independently, these four pathways are not likely to adequately shape the conduct of even mildly reluctant state parties. Together, however, they have the potential to interact in ways that are mutually reinforcing. Each pathway can provide distinct 'levers' whose manipulation may cascade impact through other pathways. For example, the PA 2018 facilitative dialogue could provide further evidence that the promised, collective contributions of parties are insufficient to achieve the 'well-below' two-degree target. Such conclusions 'shall inform' parties in the development of revised and thus potentially more ambitious NDCs (Article 14.3). We argue that there is a higher likelihood for this to transpire if, for example, civil society campaigns in transnational arenas and domestically (in countries where they are free to operate), are encouraging and pushing governments to increase their ambitions. If such campaigns find receptivity in various spheres of public dialogue, parliamentarians may become more alert to examine possibilities for governments to revise NDCs. And if internal evaluation systems of governments have prepared implementation scenarios for a range of alternative ambition levels informed by good evaluation of the effectiveness of various existing climate policies (e.g. as suggested by their audit institutions,

or linked to preparations of PA/UNFCCC reporting requirements), they may be more receptive to the mutual 'encouragement' among parties to revise their NDCs during the facilitative dialogue. Other factors will contribute to whether a 'norm cascade' and strengthening will take place (Finnemore & Sikkink, 1998), such as actions by neighbouring countries or countries in a position to model moral leadership in support of the international regime. In contrast, if the 2018 dialogue takes place in a political vacuum away from public and parliamentary attention, fewer countries will be sensitive to the mutual encouragement and/or peer scrutiny among parties in the dialogues, or feel pressed to revise their NDCs, despite the obligating 'shall' in the PA.

Much remains to be learned about these complex pathways, their interactions, the underlying principles of the different accountability relationships, the diversity of ways accountability can be enacted through formal and informal mechanisms, and their effects in various countries with different political, legal and cultural contexts. Answering such questions will require focussed collaborative efforts across disciplines including political science, public administration, international relations law and sociology, ideally with the benefit of diverse comparative case studies. One challenge will be the sensitivity of the topic of accountability for many governments in relation to international regimes. An academic challenge in relation to further study will be the need to overcome pervasive methodological differences and to develop approaches deemed valid across disciplines – approaches such as those which identify otherwise 'intangible' values of groups of people, relevant to state buy-in and to changes in state behaviour (Burford et al., 2013).

Detailed studies of these pathways and interactions, followed by their active strengthening, will improve the probability that governments will go beyond basic compliance with their NDCs and will internalize the necessary durable commitments to fulfil the purpose and global long-term goals of the PA (des Bouvrie, Karlsson-Vinkhuyzen, & Jollands, 2015).

Adequate understanding of and effective contributions to these pathways, joined with the very high costs, both economic and in form of human suffering, of not reaching the PA objectives, may also shift awareness, such that nations overcome reluctance to cede jurisdiction to an eventual supranational authority which obliges compliance from recalcitrant states. Significant reforms to the international institutional architecture, founded on a strong empirical case, have been proposed to remedy well-documented deficiencies in global environmental governance in the long-term (Biermann et al., 2012). However, recognition and combination of the four pathways described above may afford an effective interim framework, and lay potential foundations for the structural transformations required for more globally coordinated responses in the future. Scientific and societal attention need not be limited to current formal international accountability mechanisms.

Notes

1. Field notes by Sylvia Karlsson-Vinkhuyzen taken during the first FSV, Bonn, 20–21 May 2016.
2. See more at <https://www.lexisnexis.com/legalnewsroom/climate-change/b/climate-change-blog/archive/2015/09/17/the-dutch-climate-case-beginning-of-a-new-era-of-climate-litigation.aspx#sthash.AltEsCDK.dpuf>.
3. See <http://www.regeringen.se/48fe4b/contentassets/7b33bbdda7e24f54b86c09c4463b826d/faktablad-lagratsremiss-om-ett-klimatpolitiskt-ramverk-for-sverige.pdf>. This measure by the Swedish government in essence implies an accountability design involving an external independent actor thus a move towards the second accountability pathway.

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