The Continuing Relevance of the Asia-Pacific Partnership (†) for International Law on Climate Change

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In an article I wrote for the inaugural Carbon & Climate Law Review (CCLR) issue ten years ago, I asked three questions:

Are we steering towards a more fragmented legal architecture, with the focus shifting away from binding international law, and with the greatest possible role of the United Nations framework being the coordination of various approaches? Or will other approaches rather fulfil a supportive function in addressing climate change under the nearly universal U.N. umbrella? And how could a diversity of approaches work together towards a common objective?¹

At the time, these rather fundamental questions were triggered by the launch of an initiative by the former United States (US) President George W Bush and the former Australian Prime Minister John Howard to promote clean technologies to address climate change and enhance energy security, the Asia-Pacific Partnership on Climate Change (APP).² As I wrote then, the main advocates of the APP clearly saw the Partnership as an alternative to the Kyoto Protocol – which had entered into force just a few months before the APP

was formed. The APP nations comprised some of the world's largest emitters, which was a major rationale for creating the APP and for its potential to be effective. Along with other scholars, I was worried about the implications of this initiative, with some of the world's major emitters pursuing an approach that in various respects was at odds with the Kyoto Protocol.³

The APP, it ultimately turned out, was short-lived. With the coming into power of the Obama Administration in 2008, the main driving force behind the initiative became less interested. And although other partners – notably Japan⁴ – sought to keep the Partnership alive, the plug was finally pulled in 2011. However, as the questions I originally asked in my article already indicate, the Partnership was of broader significance for our understanding of international climate change law and policy. Looking back at developments since then, this short reflection points to some of the features of the APP that should remain of interest to scholars and practitioners seeking to understand and improve the functioning of international climate change law and policy.

First, the APP is a quintessential example of a 'minilateral' climate initiative,⁵ or – as some prefer

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1 Harro van Asselt, 'From UN-ity to Diversity? The UNFCCC, the Asia-Pacific Partnership, and the Future of International Law on Climate Change' (2007) 1(1) CCLR 17, 17.

2 In the article, I still referred to it as 'AP6', which referred to its six founding nations, which included China, India, Japan and the Republic of Korea, in addition to Australia and the United States. After Canada joined in 2008 the Partnership was commonly referred to as the APP.

3 The APP turned out to be a fruitful topic for research. See eg Jeffrey McGee and Ros Taplin, 'The Asia-Pacific Partnership on Clean Development and Climate: A Complement or Competitor to the Kyoto Protocol?' (2006) 18(3) Global Change, Peace & Security 173; Peter Christoff and Robyn Eckersley, 'The Kyoto Protocol and the Asia Pacific Partnership on Clean Development and Climate' in Tim Bonyhady and Peter Christoff (eds), *Climate Law*

in Australia (Federation Press 2007) 32; Sarah Peay, 'Joining the Asia-Pacific Partnership: The Environmentally Sound Decision?' (2007) 18(2) *Colo J Intl Env'tl L Poly* 477; Jeffrey McGee and Ros Taplin, 'The Asia-Pacific Partnership and the United States' International Climate Change Policy' (2007) 19(2) *Colo J Intl Env'tl L Pol'y* 179; Sylvia Karlsson-Vinkhuyzen and Harro van Asselt, 'Introduction: Exploring and Explaining the Asia-Pacific Partnership on Clean Development and Climate' (2009) 9(3) *Intl Env'tl Agreements* 195; Jeffrey McGee and Ros Taplin, 'The Role of the Asia-Pacific Partnership in Discursive Contestation of the International Climate Regime' (2009) 9(3) *Intl Env'tl Agreements* 213; Peter Lawrence, 'Australian Climate Policy and the Asia Pacific Partnership on Clean Development and Climate (APP): From Howard to Rudd – Continuity or Change?' (2009) 9(3) *Intl Env'tl Agreements* 281; Harro van Asselt, Norichika Kanie and Masahiko Iguchi, 'Japan's Position in International Climate Policy: Navigating between Kyoto and the APP' (2009) 9(3) *Intl Env'tl Agreements* 319.

4 van Asselt et al (n 3).

5 See also Robert Falkner, 'A Minilateral Solution for Global Climate Change? On Bargaining Efficiency, Club Benefits, and International Legitimacy' (2016) 14(1) *Perspectives on Politics* 87.

to call it – a ‘climate club’.⁶ A wide range of such initiatives involving only a limited number of countries have started to address climate change in the past decade, including high-level political forums such as the Group of 20 (G20), which has taken up the causes of climate finance and fossil fuel subsidy reform; forums for technical cooperation and information-sharing such as the World Bank’s Partnership for Market Readiness; and issue-specific initiatives such as the Climate and Clean Air Coalition on short-lived climate pollutants. While minilateral initiatives are associated with certain advantages in theory, such as speedier decision-making,⁷ the question – one I sought to answer for the APP – is whether and how these theoretical benefits play out in practice. With a variety of potential case studies to work with, this question is of ongoing importance. Specifically, further research could provide insights into the institutional and legal design of such initiatives, with a view to identifying conditions under which such initiatives can attract further members and/or induce deeper emission reduction commitments.⁸

Second, the creation of the APP can be understood as an example of ‘forum shopping’⁹ or ‘regime shifting’.¹⁰ At the time, the concern was that by creating a new initiative involving some of the world’s major emitters, the United States and Australia sought to establish a new regime built according to their own preferences and interests, and moving away from some of the core principles of the United Nations Framework Convention on Climate Change (UNFCCC).¹¹ The ability of powerful nations to turn their backs on existing international regimes that do not

meet their interests and resort to forum-shopping has been suggested as a key risk of the fragmentation of international law.¹² However, competition between international regimes may also lead to mutual adaptation, eventually resulting in what Gehring and Faude call a ‘division of labour’.¹³ Testing theories about the effects of competition between international forums, and whether (and how) powerful actors benefit from the existing fragmentation in international law on climate change, is therefore another ongoing issue meriting further study.

Third, and related to the previous point, the case of the APP was instructive for further understanding the relationship between the UNFCCC and initiatives undertaken outside of it.¹⁴ My article concluded with a set of options for strengthening the linkages between the UNFCCC and the APP.¹⁵ This same question – what kind of linkages could ensure that the sum is greater than its parts? – can similarly be asked for a variety of existing initiatives.¹⁶ In some cases, stronger coordination on the part of the UNFCCC may be warranted, but it remains uncertain in which cases such coordination is desirable. In some cases, linkages with the UNFCCC may in fact stifle innovative approaches outside of it.¹⁷ What is therefore needed is further analyses of how – for individual initiatives as well as categories of non-UNFCCC action (e.g. non-state action; minilateral initiatives; other international legal regimes) – productive linkages can be developed and nurtured.¹⁸

Fourth, the APP can be seen as an instance of a voluntary approach to international climate law. When the Partnership was launched, the focus of in-

6 See, eg, David Victor, *The Case for Climate Clubs*, E15 Expert Group on Measures to Address Climate Change and the Trade System Think Piece (International Centre for Trade and Sustainable Development and World Economic Forum 2015); William Nordhaus, ‘Climate Clubs: Overcoming Free-Riding in International Climate Policy’ (2015) 105(4) *American Economic Review* 1339.

7 Falkner (n 5) 95.

8 See also Lutz Weischer, Jennifer Morgan and Milap Patel, ‘Climate Clubs: Can Small Groups of Countries make a Big Difference in Addressing Climate Change?’ (2012) 21 *RECIEL* 177.

9 Marc L. Busch, ‘Overlapping Institutions, Forum Shopping, and Dispute Settlement in International Trade’ (2007) 61(4) *Intl Org* 735.

10 Laurence Helfer, ‘Regime Shifting: The TRIPs Agreement and New Dynamics of International Intellectual Property Lawmaking’ (2004) 29(1) *Yale JIL* 1. Arguably, the creation of the APP is not an instance of ‘forum shopping’ or ‘regime shifting’, as it involved the creation of a new institution rather than shifting towards another existing one. See for another example Thijs Van de Graaf, ‘Fragmentation in Global Energy Governance: Explaining the Creation of IRENA’ (2013) 13(3) *Global Envtl Politics* 14.

11 van Asselt (n 1).

12 Eyal Benvenisti and George W. Downs, ‘The Empire’s New Clothes: Political Economy and the Fragmentation of International Law’ (2007) 60(2) *Stan L Rev* 595.

13 Thomas Gehring and Benjamin Faude, ‘A Theory of Emerging Order within Institutional Complexes: How Competition among Regulatory International Institutions Leads to Institutional Adaptation and Division of Labor’ (2014) 9(4) *Rev Intl Org* 471.

14 See further Harro van Asselt and Stefan Bößner, ‘The Shape of Things to Come: Global Climate Governance after Paris’ (2016) 10(1) *CCLR* 46.

15 van Asselt (n 1) 25–28.

16 See eg Harro van Asselt and Fariborz Zelli, ‘Connect the Dots: Managing the Fragmentation of Global Climate Governance’ (2014) 16(2) *Envtl Economic Pol’y Studies* 137.

17 Michele Betsill et al., ‘Building Productive Links between the UNFCCC and the Broader Climate Governance Landscape’ (2015) 15(3) *Global Environmental Politics* 1.

18 *ibid.*

ternational climate law was still mainly on how to implement the legally binding emission reduction commitments of the Kyoto Protocol. The APP, by contrast, was explicitly non-legally binding and entailed voluntary action on the part of its members. Cooperation on clean technologies was based on the interests of the partner countries, and any funding commitments were based on what countries were willing to put forward. Furthermore, as Karlsson-Vinkhuyzen and McGee observe, 'the APP made no effort to measure and verify the actions of individual countries, or to monitor compliance with self-imposed domestic goals'.¹⁹ In the end, the model did not work, as funding dried up and interest in continuing the Partnership waned. The question is: what does this mean for international climate law after the Paris Agreement? While the Agreement at least puts in place review mechanisms, its core commitments are also based on what countries are willing to do. While this may have led to an Agreement that entered into force rapidly and enjoys wide participation, the risk remains that, like the APP, countries do not follow through. What remains to be determined is how international agreements that include such voluntary elements can ensure that countries do not backtrack. The mechanisms of the Paris Agreement – the 'no-backsliding' principle, the transparency framework, the global stocktake, its implementation and compliance mechanism – may suffice, but their functioning in practice will require careful assessment.

Finally, the APP is part of one chapter in the ongoing saga on the relationship between the world's second-largest emitter, the United States, and international climate law.²⁰ Even though the United States had turned its back on the Kyoto Protocol, it still felt it was necessary to engage in an internation-

al initiative to address climate change. At a time where the United States seems to be back in a similar – or, from the perspective of climate change mitigation, potentially worse – situation, it is important to understand how the foreign policy drivers underpinning the US position on international climate policy have evolved, and examine whether and how non-climate-related factors – notably energy security and independence – can help to keep the country engaged.²¹

A decade after the launch of CCLR, I feel that the answers to the first two questions I posed in my original article have started to become clear. By now, the Paris Agreement has affirmed a modest shift away from binding international law, and underscored the role of the United Nations climate regime as a coordinator of various initiatives undertaken by countries individually or jointly. It also is increasingly evident that other approaches outside the UNFCCC play a supportive role. But the third question – perhaps the most pertinent one – remains to be convincingly answered. Ten years from now, after ten more volumes of CCLR, I hope we have made significant strides in this direction.

19 Sylvia Karlsson-Vinkhuyzen and Jeffrey McGee, 'Legitimacy in an Era of Fragmentation: The Case of Global Climate Governance' (2013) 13(3) *Global Env'tl Politics* 56.

20 See also Tora Skodvin and Steinar Andresen, 'An Agenda for Change in U.S. Climate Policies? Presidential Ambitions and Congressional Powers' (2009) 9(3) *Intl Env'tl Agreements* 263.

21 Though it can be questioned to what extent the current Administration is genuinely interested in any international initiative to avoid dangerous climate change, the announcement that the US would withdraw from the Agreement does not necessarily mean that the government is disengaging completely. See eg Karl Mathiesen, 'Trump Lays Groundwork for Staying in Paris Agreement' *ClimateHome* (11 August 2017) <<http://www.climatechangenews.com/2017/08/11/trump-lays-groundwork-staying-inside-paris-agreement/>> accessed 29 August 2017.