

## Review essay

# Negotiating failure: understanding the geopolitics of climate change

### **The History of Global Climate Change Governance.**

By JOYEETA GUPTA

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There is growing anticipation in the climate change community as expectations are running high for the United Nations Framework Convention on Climate Change (UNFCCC) Conference of the Parties 21 (COP) in Paris in 2015. At this meeting there is the expectation that a new post-Kyoto international climate change treaty will be agreed which will come into force by 2020 at the latest. The last time expectations were so high was just prior to the Copenhagen COP15 in 2009 that ended in embarrassment and failure. Some commentators have suggested it set back the negotiations and real cuts in carbon emissions by over a decade (Maslin 2014). Joyeeta Gupta's new book is therefore an accessible guide to the international climate change negotiations, and the legal and policy problems that climate change presents. It will appeal to students of climate change law and governance, those with more experience, or those who simply want to understand the difficulties in getting almost 200 countries to agree on one of the most important issues of our time.

Part 1, 'Introduction', draws on a range of disciplines to explain the nature of the climate change problem and what can be done to resolve it. In chapter 1 'Grasping the essentials of the climate change problem', Gupta lays out her approach to climate change – it is first and foremost a political problem, rather than a technocratic one, although the author does have a firm faith in the potential of technological change. Unusually for a work on international law and policy, Gupta not only briefly explains the basics of climate science, but immediately tackles the main arguments of the climate change sceptics. This likely reflects her past work with the Intergovernmental Panel on Climate Change (IPCC). Unfortunately, this is the weakest of all the chapters in the book and there are much better descriptions of the scientific evidence of climate change (e.g. Archer 2011; IPCC 2013; Maslin 2014). The author could also be accused of giving too much ground to the arguments of the sceptics. This section contains a paragraph that will irk many climate scientists – Gupta does not dispute the claim made by

climate sceptics that the scientists are 'self-serving', but with irony says that this is also true of the sceptics (p. 10).

Gupta is also critical of national media, which she criticises for 'providing a platform for two opposing views even when the views may not be equally authoritative'. This is confusing the public (p. 10) and echoes the findings of the BBC commissioned report in 2011, which pointed out that the BBC were skewing whole scientific debates when setting up one-to-one discussions on radio and TV (Jones 2011). Despite this report, recently the BBC pitted climate scientists against politicians such as the Rt. Hon. Lord Lawson (former UK Energy Secretary and Chancellor under Margaret Thatcher, and noted climate change sceptic) who feels qualified to debunk any scientific evidence he does not agree with.

Gupta then tackles the policy and economic arguments, which mainly revolve around cost. Here the author's rebuttals to the sceptics' arguments on cost effectiveness flow easily. The human rights, justice and equity approach to climate change are introduced, and the section ends with two further framings for climate change, as a 'classic North–South issue' and the South's right to develop (p. 14). These key ideas form the backdrop to Gupta's analysis. The author does however note with regards to addressing climate change that this right to develop 'is more a principle of fairness than an idea that is practical' (p. 21). Also presented here are some basic and simplified ideas on what likely occurs with economic growth, such as the demographic transition, forest transition and the rise and fall of pollution.

In chapter 2, 'Mitigation, adaptation and geo-engineering', Gupta reviews a broad range of literature in a succinct manner. Readers are presented with difficult problems regarding mitigation and adaptation, regardless of whether the solutions are technocratic or of a more fundamental nature. Slow action to implement the various measures at the disposal of policymakers is blamed on lock-in, vested interests, and fear of free-riders, leakage and loss of competitiveness. Gupta is keen to deal with contemporary ideas, and discusses the problems related to climate change disaster related insurance in a nuanced manner. The author also touches upon the scientific and legal uncertainties surrounding geo-engineering, but does not delve very deeply.

Surprisingly, the authoritative Royal Society report, which has an excellent chapter on governance, is not cited (Royal Society 2009).

Chapter 2 concludes by setting the general aim of the book, which is to 'rise above the individual challenges that each period has faced to see an overall picture of strengths, weaknesses, opportunities and threats that face the regime'. The five periods (pre-1990, 1991–6, 1997–2001, 2002–7, post-2008) are tied to the leadership paradigm that serves as Gupta's framework for exploring the negotiations.

Part 2, 'The history of the climate change negotiations', is mainly concerned with outcomes, be they the UNFCCC, Kyoto Protocol, COP or Conference of the Parties serving as meeting of the Parties (CMP) decisions. Most of the key decisions are conveniently placed in tables in each chapter, although it must be said, they are quite impenetrable. This is a history of international climate law rather than the negotiations in their entirety, and it is a sobering account.

Chapter 3, 'Setting the stage: defining the climate problem (until 1990)', demonstrates how many of the concepts, phrases, and ideas that are used contemporaneously were actually first articulated in the 1970s and 1980s. This ranges from the obvious (the precautionary principle, differentiated responsibilities, technology transfer, controlling population growth, integrated science and policy, cost effectiveness), to the less obvious (reducing deforestation, 'win-win', 'new and additional resources', liability). The 1980s is presented as an exciting time, with ideas bubbling up in different forums and with speed. In the midst of this, traditional approaches within international environmental law were reached out to (e.g. the Trail Smelter case, Stockholm Principle 21). This chapter also charts the formation of the IPCC, which originally had a far broader role than it does now. Gupta draws attention to its first assessment report which engaged with the idea of a viable environment as a 'fundamental right'. The inference from this chapter is that the problem was significantly underestimated, as Gupta notes at the chapter's close: 'the initial ideas on how the problem was to be addressed also had a very high degree of idealism and did not necessarily reflect the emerging trend of neo-liberal, neo-conservative approaches in other fields of water and energy' (p. 58).

A criticism of this chapter is its treatment of the domestic sphere. Although the North–South relationship is central to a number of these ideas, Gupta does not comment on the domestic drivers surrounding the actors and states in some of their orations on climate change at this time. Why did Margaret Thatcher uncharacteristically champion action on climate change, before a decade later becoming a sceptic? And what drove Saudi Arabia specifically to make a utopian call for 'new values linked to the concepts of global community and the

new world order'? (p. 52). These examples (along with the CDM, discussed below) reflect a certain amount of unease on the part of the author when dealing with domestic and local developments on climate change, a problem which runs through an otherwise commendable book.

In chapter 4, 'Institutionalizing key issues: the Framework Convention on Climate Change (1991–96)', Gupta explains the reasons for the unusually rapid negotiation of the UNFCCC and its speedy entry into force. The ultimate objective of the UNFCCC is phrased in 'qualitative and vague terms', and 'the Convention can be seen as an exercise in creative ambiguity to generate consensus' (p. 72). To achieve this consensus, a number of issues were left out or were left to other organisations (e.g. international aviation and maritime transport), and responsibilities were conferred by the Annex I/non-Annex I system. The leadership paradigm is seen as the agreed substitution for the liability framing and a full application of the 'no harm' principle, and this was how consensus was achieved (Article 3.1). Leadership in this context meant that developed countries would take a leading role by reducing their own emissions. They would provide help and financial assistance to the developing countries to control their emissions but would be given space to increase their own emissions as they develop. In this form, equity issues were included in the Convention despite the lack of a liability framing.

Chapter 5, 'Progress despite challenges: towards the Kyoto Protocol and beyond (1997–2001)', presents a key period in the history of climate change governance, as it is here that the leadership paradigm, only recently agreed upon, begins to deteriorate. With the regime buffeted by domestic politics and a growth in climate change scepticism, Gupta argues that the Kyoto Protocol was negotiated and adopted 'against the odds' (p. 78). In this context, Gupta states that in hindsight she is 'even more positive about the Kyoto Protocol and the role of the Clinton–Gore government in pushing the international community to move further with the protocol despite the immense domestic difficulties it face. Without the initiative of the EU in promoting strong targets, the protocol would never have emerged' (p. 85). Gupta then goes on to discuss the problems with the targets contained in the Kyoto Protocol, which were far less ambitious than needed, and the flexibility mechanisms. Gupta is positive on the latter, stating that despite the challenges, 'these market-based mechanisms have evolved over time to become successful, with the CDM delivering millions of credits' (p. 89).

Gupta's focus on the global scale leads to a weakness in dealing with multi-level governance, i.e. how the international agreements can be implemented at regional, national and local levels. The rush to implement the CDM meant that credits for projects involving the capture of industrial gases (hydrofluorocarbons or HFCs) were regrettably easy to

game. Although Gupta acknowledges this flaw, the analysis lacks detail. The mechanism created a perverse incentive for companies to produce more HCFC-22, a refrigerant and powerful greenhouse gas (GHG) being phased out under the Montreal Protocol, in return for windfall profits for capturing the HFC-23 by-product from its production. About 70% of Certified Emission Reductions in the CDM have come from projects of this kind. Depressingly, the European Commission concluded in 2012 that production of HCFC-22 would have been lower today if the CDM had been absent (EU Commission Regulation 2011).

Gupta ends chapter 5 with a section on conditional leadership and a section on the role of actors in this period. Both are of interest, as it is here that Gupta identifies a key switch in the developed countries approach from the leadership role to a discourse based on a fear of the free-riding of developing countries, carbon leakage, and loss of economic competitiveness. In general, the years 1997–2001 therefore set the grounding for the debates that would occupy the negotiations for the following 15 years to the present day. Less clear in Gupta's analysis is what drivers compelled the EU to become a leader on climate change issues, and its switch of opinion on the flexibility mechanisms.

Chapter 6, 'The regime under challenge: leadership competition sets in (2001–2007)' details the major milestones of the Marrakesh Accords (2001), the entry into force of the Kyoto Protocol and the Montreal COP11 and CMP1 decisions (2005), and the Bali Action Plan (2007). This chapter also contains a section on the climate funds. Gupta describes the regime as being challenged by leadership competition, due to the US promotion of alternative agreements on climate change (e.g. the International Partnership for Hydrogen and Fuel Cells, the Carbon Sequestration Leadership Forum, the Methane Markets Initiative, the Renewable Energy and Energy Partnership, and the Asia Pacific Partnership on Clean Development and Climate). The regime was also challenged by a more strident scepticism, and a fragmentation in negotiating positions, which affected both the developing and developed states. Gupta argues 'there was flagging leadership from the North' (p. 121). This conclusion is derived from the delay in ratification (and non-ratification) of the Kyoto Protocol, the length of time it took to quantify 'dangerous climate change', the inadequate levels of funding for developing countries, and the US led external agreements on energy. The positives from this period are the EU's continuing commitment to the multilateral process and the growth of interest from the judiciary and lower levels of government.

Chapter 7, 'Enlarging the negotiating pie (2008–2012)', the final part of Gupta's history, is an account of the difficulties that the regime has encountered in the most recent period. Gupta presents the key develops as new commitments on GHG targets

are attempted to be negotiated, including the Copenhagen Accord, the Cancún agreements, and the creation of the Ad Hoc Working Group on the Durban Platform for Enhanced Action. This is presented with the backdrop of the 2008 economic crash in the West, the Euro-zone crisis, WikiLeaks, the Fukushima Daiichi nuclear disaster in 2011, US President Obama's domestic battles, the illegal hacking and misrepresentation of emails from University of East Anglia climate scientists and resultant boon to climate change scepticism, and changing geopolitics (i.e. the new grouping of the BASIC countries).

Although expectations were 'very high' for Copenhagen, Gupta does not dwell on the failure of the negotiating process here. Whilst the Copenhagen Accord is an important piece of soft law and has played a role in the development of the regime, Gupta's treatment of the negotiations is a key weakness in this history, as it was a pivotal moment. Subsequently, momentum has slowed, cynicism set in, and interest in the regime faded, as new GHGs reduction targets were delayed by at least a decade. By simply placing Copenhagen in its correct historical perspective in terms of the decisions adopted, Gupta seems to have accepted the undermining of the negotiations by the USA, in concert to a lesser extent with a number of the major emitters, as part of the natural process. The author's decision to avoid controversy, and instead focus on outcomes, results in an incomplete history, with the poor quality of the diplomacy and the acrimony of the negotiations left out. Leading actors are rarely quoted, if mentioned at all, and the negotiations remain fairly abstract to the reader. This is a major flaw, not only of Gupta's treatment of Copenhagen, but the history generally.

Post-Copenhagen, Gupta notes the switch to conditional targets, observing that, 'The bottom line was that all developed countries were waiting for the USA (and Australia and Canada) to adopt a binding target, and the USA was waiting for its own Senate to give the green light. Target setting had become captive to USA's domestic politics' (pp. 129–30). The following COP 16 at Cancún was seen as 'heralding the demise of a legally binding approach in favour of a bottom-up voluntary approach consistent with a neo-liberal approach' (p. 131). Despite the attempt with the Durban COP to 're-inject enthusiasm into the negotiations . . . the Durban agreements were seen as empty' (pp. 133–4). The history concludes with COP18 in Doha.

Although Gupta refrains from making explicit predictions on the future of the negotiations, her analysis does suggest that more of the same should be expected: 'it is clear that the developed countries, with the exception of those of the EU, are unlikely to push the regime much further' (p. 141). It is unknown whether the major emitting developing countries will be able to provide the necessary solutions. Their voluntary commitments 'may not go far enough'.

Funding from the developed states remains inadequate, and it is becoming clear that commitments from both developed and developing countries 'may not necessarily lead to US commitments' (p. 143). It can be inferred from this that Paris 2015 is unlikely to satisfy those who want stringent reductions in GHGs.

Gupta also deals in this chapter with 'Reducing emissions from deforestation and forest degradation' (REDD) and dedicates a section to the numerous difficulties with this mechanism, which 'if not designed well on paper and in the execution phase, may lead to a "lose-lose" situation' (p. 135). Gupta draws on a healthy literature on REDD and the negatives presented here may well outweigh the positives. Further progress is needed on the multiple equity issues, the reduction of global demand for tropical timber, the creation of developing country monitoring systems and financial dispersal systems, and the provision of resources from the North (Maslin and Scott 2011). With the major difficulties that the main negotiations have encountered, it is clear that REDD++ (the pluses represent safeguards to protect local people and local ecosystem and biodiversity) has taken on greater significance as a means of securing developing world participation, but it is likely to remain a niche mechanism, and certainly is not a panacea to cure all climate change and poverty ills.

Part 3, 'Issues in global climate governance, consists of two chapters, chapter 8 'Countries, coalitions, other actors and negotiation challenges', and chapter 9 'Litigation and human rights'. Chapter 8 begins with a discussion on the difficulties of defining states between rich-poor/developed-developing. These difficulties are then elaborated on as Gupta presents the main negotiating positions and how they have changed over time for the EU, the USA, Russia, Africa, the Alliance of Small Island States (AOSIS), the LDCs, OPEC, China, India, the NGOs and business interests. This chapter contains a number of useful diagrams, which demonstrate the evolution of the regime in terms of negotiating blocs, and participation levels. It is also noteworthy for containing Gupta's most noticeable criticism of the entire book, which is directed at the OPEC countries led by Saudi Arabia. Gupta comments that they have opposed policies to reduce oil consumption in the developed countries (such as carbon taxes), and that they have 'continuously blocked progress in the negotiations rather than supported it' (p. 167). Although Gupta does recognise the influence of the fossil fuel lobby in the USA in this context, the clear avoidance of strongly criticising the USA along with the other laggards here, and throughout the book more generally, is telling. This is despite the fact that one in every three human-generated carbon dioxide molecule in the atmosphere was produced by the USA, and that there is a strong case to be made that

they have undermined the negotiations, most spectacularly at the Copenhagen COP. Gupta is perhaps too close to the regime and its institutions to provide a warts-and-all account, and at times is too diplomatic.

The rationale for chapter 9 is Gupta's belief that, in the future, 'as the impacts of climate change become increasingly more evident, I think it will be inevitable that legal avenues will be chosen by countries and social actors as a way to promote climate justice', (p. 173) Gupta evaluates how this might occur, arguing that such action is likely to be in domestic, rather than international courts. Gupta then examines the legal principles, paying particular attention to the principle of common but differentiated responsibilities (CBDR), arguing that it should take a more central role.

This is followed by a discussion on a number of issues on the legal process at the international and national level. Gupta's arguments on proving causality are not convincing, and the transposition of 99% scientific certainty on the Bayesian scale to 'virtually certain' on the IPCC scale, to 'beyond reasonable doubt', may strike some as reductionist, or an oversimplification. Gupta does concede, however, that 'there is a distinction between general causation and context-specific causality – and this may be much more difficult to prove' (p. 181). Gupta finishes this section with a focus on liability, and argues that this tool may be used eventually. A discussion on how climate change has been dealt with by the human rights literature follows, and represents another argument and potential route for action on climate change.

Part 4, 'Towards the future', consists of one final chapter (chapter 10 'Climate governance: a steep learning curve!'), the purpose of which is to argue that the 'UN process is both necessary and successful' (p. 194). This chapter contains two essays, one on learning and one on the need to embrace the rule of law through constitutionalisation at the international level. The latter is a somewhat controversial area.

The author fits the five phases into the notion of first, second and third order learning in this chapter. This analytical framework could have been used from the beginning, and is arguably a superior framing than the chronological five phases. It would appear that Gupta feels it is enough that the international governance framework exists and that the correct issues are incorporated to describe the UN process as successful – that the international community learns. Gupta notes that '[i]n comparison with negotiations on fresh water, energy, forests and food, the UNFCCC is the only comprehensive legitimate regime that binds practically all countries in the world' (p. 194). Adopting a pragmatic approach, Gupta attempts to lower our expectations of what can be considered successful at the international level, and her arguments are a watered down version of Bodansky's (2010) ideas on effectiveness. It is difficult to disagree

with the author's case 'in favour of promoting the climate change regime as the arena in which science-based targets are developed, national communications required and compliance mechanisms organized'. It is obvious that the UNFCCC is a necessary core component of climate change governance, and the stronger the better. Gupta's implicit message to the detractors can be discerned here: support the international legal process, or risk losing a significant piece of the puzzle.

However, is Gupta correct in this assertion that the regime has been successful? This is where we and the author must agree to disagree. Although the process has been necessary and remains important, Gupta sets the bar quite low in terms of success. The treaty objectives are yet to be achieved, the apparent shift to soft law has undermined the regime's legal strengths, the commitments are becoming less precise, and the institutions are struggling to foster co-operation. While the regime does have legitimacy, all states must respect the process. Its major successes at present include the leadership of the IPCC, the regime's promotion of domestic laws and policies on climate change, and the continued participation of states in the process (largely as a result of the flexibility mechanisms), that is to say, that the regime has not yet fallen apart. In terms of environmental effectiveness in the form of reducing global carbon emissions to save us from dangerous climate change, all evidence would point to it being a complete failure. Whether the present climate change governance regime can evolve to provide such a solution is debatable. What is worrying here is the very different views of successes between different academic disciplines and it is clear that there is very little cross-disciplinary dialog when it comes to global governance.

Although Gupta seemingly makes an argument for the status quo in the first part of chapter 10, she ends the book drawing heavily on the ideas of Koskenniemi (2009). In a somewhat controversial and idealistic manner, having defended the regime, the author now turns to argue for its reform – a form of third-order learning in the form of a new paradigm in international law. Gupta calls for the embedding of the 'technological optimism and market innovativeness in a world of good governance and strong international rule of law to support environmental governance' (p. 205). Alone this seems fairly reasonable, but as Gupta details all the necessary changes that this would involve, it is quite clear that it will lead to a conflict with state sovereignty. This change will come about, the author believes, as a counter-balance to the current perception of

fragmentation and the proliferation of rules at the international level. It is undoubtedly idealistic, and as often occurs with these arguments, Gupta falls back onto the idea of a social movement to bring this about, a return to politics, along with a coming together of institutions supportive of this goal. Although we have doubts about whether this is possible, Gupta's writing is passionate, if not convincing. Intriguingly, it is not the scale of the climate change problem with which the author ends on, rather the future growth likely to occur in the South, and the opportunity for them to develop sustainably with support from the West: 'this is the right moment to push for the completion of this project!' (p. 211).

To conclude, therefore, this new history is a useful resource for those interested in understanding the dynamics of the climate change regime. It is a highly detailed and diplomatic overview. Not all of Joyeeta Gupta's ideas will be agreed with, but her commitment and hope for the future of climate change governance is admirable.

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