

ELETRÔNICOS

Direito Internacional sem Fronteiras

PARIS AGREEMENT:

an analysis from the perspective of the law of treaties

Acordo de Paris:

uma análise sob a ótica do direito dos tratados

Pablo Henrique Hubner de Lanna Costa

Master's degree in Protection of Fundamental Rights by the University of Itaúna, line of research international organizations and the protection of human rights. Graduated in Law from Dom Helder Câmara Superior School. Professor. Assessor of the Public Ministry of Minas Gerais. E-mail: < pablolanna@outlook.com >. ORCID: < <https://orcid.org/0000-0002-7664-975X> >.

Maria Aparecida Batista

Master's degree in Protection of Fundamental Rights by the University of Itaúna, line of research international organizations and the protection of human rights. Graduated in Law from University of Itaúna. Lawyer. Professor at the State University of Minas Gerais (Law School). E-mail: michelleabatista@hotmail.com

ABSTRACT: On December 2015, the so-called "Paris Agreement" was adopted at the 21st Conference of the Parties in Paris. The agreement aims to reduce and control emissions of greenhouse gases. In numerical terms, among others, the goal is to keep the average global temperature rise at less than 2°C above pre-industrial levels. The purpose of this paper is to examine the Paris Agreement from the point of view of the law of treaties. Therefore, the construction of the text will go through all stages of the treaty, from the previous negotiations and base text to the formulation of reservations and denunciation, with the adoption of the deductive method. The focus is to study these steps in a practical way, chosen the referred treaty because of the importance of its content, as well as its recent approval.

KEY WORDS: International Treaties. Paris Agreement. Environment. Climate.

RESUMO: Em dezembro de 2015, na 21ª Conferência das Partes, realizada em Paris, foi aprovado o chamado “Acordo de Paris”. O referido acordo tem por objetivo a redução e controle das emissões de gases geradores do efeito estufa. Em termos numéricos, entre outros, o objetivo é manter o aumento médio da temperatura global em menos de 2°C acima dos níveis pré-industriais. Tendo por base o referido acordo, o presente artigo terá por objetivo analisá-lo sob a ótica do direito dos tratados. Sendo assim, a construção do texto passará por todas as etapas do tratado, desde as negociações prévias e texto-base até a formulação de reservas e denúncia, com a adoção do método dedutivo para tanto. O foco é estudar as referidas etapas de maneira prática, escolhido o referido tratado em razão da importância de seu conteúdo, assim como sua recente aprovação.

PALAVRAS-CHAVE: Tratados Internacionais. Acordo de Paris. Meio Ambiente. Clima.

1 INTRODUCTION

In December 2015, at the 21st Conference of the Parties in Paris, under the auspices of the United Nations Framework Convention on Climate, the “Paris Agreement” was approved by the 195 countries participating in the Convention. The agreement aims to reduce and control emissions of greenhouse gases. In numerical terms, among others, the goal is to keep the average global temperature increase below 2°C above pre-industrial levels (UNITED NATIONS, 2015, pp.2). In order to achieve the objectives, set out in the agreement, the duties of all countries have been established. They must individually elaborate their contribution plans by communicating the decisions to the Convention secretariat (UNITED NATIONS, 2015, pp. 4).

Notwithstanding the undeniable material importance of the Paris Agreement, this paper deals with the Law of the Treaties, by means of a practical approach of the international process, making compatible and demonstrating how the theory was applied in fact. Therefore, the construction of the text will go through all the stages of the treaty, from the previous negotiations and base text to the formulation of

reservations and denunciation. To achieve the proposed objectives, the deductive method was chosen, initially by the theoretical verification of each topic of formation of the treaty, to then understand and identify each of these stages in the Paris Agreement.

2 CONTENT OF THE AGREEMENT

As already mentioned, the Paris Agreement has as its main objective the reduction and control of emissions of greenhouse gases, and the global average temperature balance. This in itself was the subject of numerous discussions at the time of its negotiation, with the contrast between "high and middle income" countries and developing countries, which wanted a more daring goal and those fought for the maintenance of the level of 2 ° C, on the grounds of fear of damage to the pursuit of economic development (WEWERINKE-SINGH & DOEBBLER, 2016, pp.1499).

To reach the stipulated goal, the agreement is basically based on two grounds: mitigation and adaptation. The mitigation mechanisms are based on contributions negotiated and applied internally by each of the countries, and they have to establish the forms and projects to reduce emissions. Because of this and other factors, the Paris Agreement is primarily based on procedural obligations, which is criticized by researchers (WEWERINKE-SINGH & DOEBBLER, 2016, pp.1502).

With respect to adaptation, the Agreement strengthens resilience and seeks to reduce vulnerability to climate change by emphasizing adaptive planning and encouraging cooperation between countries and non-governmental organizations, including by transferring funds for project implementation (CLIMATE FOCUS, 2015, pp. 1-2). In order to have the expected results, it is essential that the actions are based on transparency and the principles of good governance, which demands a high level of supervision in order to verify the status of projects and changes in each country.

3 ENTRY INTO FORCE

According to the autonomy of the will, a fundamental aspect of international law, the creation of rights and obligations derived from international treaties, with rare exceptions, arises from consent. The emergence of rights, obligations and the birth of legal-political relations in a positive manner demanded special attention from the Law of Treaties, in order to determine with precision the moment in which such situations took place, making its content opposable to those who assented with its terms and integrating the legal patrimony of its participants.

In the Vienna Convention on the Law of Treaties, article 24 establishes when international treaties come into force. Basically, the definition is delegated to the negotiating parties, which are free to determine the timing and form of entry into force. In the absence of a determination by the parties, entry into force shall take place with the expression of consent to be bound by the treaty by all negotiating States.

The Paris Agreement adopted a formula that takes into account not only the number of countries that have deposited the instrument of ratification (55 States), but also demands the deposit by a certain category of countries responsible for at least 55% of global emissions (Article 21, paragraph 1 of the Agreement). The same had been established by the Kyoto Protocol before, with the creation of a "double conditionality", considered indispensable for the effectiveness of the Agreement.

4 INTERNALIZATION PROCESS

The process of internalization of a treaty depends exclusively on domestic law, and consequently varies from state to state (PELLET; DINH; DAILLIER, 2003, pp. 234-236). In Brazil there are formal procedures of competence of the National Congress that precede the ratification of the treaty. While the ratification in Brazil is the competence of the President of the Republic, as a result of Article 84, item VII of the Federal Constitution of 1988, the internal competence to assess the treaty to be ratified is the

National Congress, as a result of Article 49, item I, of the Federal Constitution (BRAZIL, 1988).

In the National Congress, the discussion and voting of the treaty take place in separate houses, that is, in the Chamber of Deputies and in the Federal Senate. In the Chamber of Deputies the message of the President of the Republic is received, which deals with the need for an assessment, containing the entire treaty and the ministerial statement of reasons. From then on, the material is distributed to the relevant Committees in the House, following the procedure provided for in the Internal Rules of the Chamber of Deputies, until the treaty is considered by the Plenary. In the Federal Senate the treaty also follows the provisions of the Internal Regulation of the Federal Senate. The enactment of the Legislative Decree, in short, is an act of the President of the National Congress, with subsequent publication in the Official Gazette of the Union, if approved. In case of disapproval, the President is informed by message about the decision (CHAMBER OF DEPUTIES, 2017).

In the case of the Paris Agreement, Brazil concluded it in Paris (2015), and signed it on 22 April 2016. The agreement was then approved by the National Congress on August 16, 2016. The Brazilian Government deposited the instrument of ratification of the Agreement with the Secretary-General of the United Nations on September 21, 2016 and entered into force for the country in the foreign legal field on November 4, 2016. The decree promulgating the Paris Agreement is no. 9.073, dated June 5, 2017, which provides, in Article 2, that acts that may result in a revision of the Agreement and additional adjustments that entail burdensome commitments to the national patrimony will be subject to the approval of the National Congress (BRAZIL, 2017), based on article 49, item I, of the Brazilian Federal Constitution of 1988.

The reservation is defined in Article 2 of the Vienna Convention on the Law of Treaties as "a unilateral declaration, whatever its wording or designation, made by a State when signing, ratifying, accepting or approving a treaty, or adhering to it with the

objective of excluding or modifying the legal effect of certain treaty provisions" (BRAZIL, 2009). The State's ability to reserve certain provisions of a multilateral treaty is first and foremost the expression of the principle of sovereignty (Shaw, 2014, pp. 663), but the main purpose of the reservation is to enable a greater number of States to be bound by it (SHAW, 2014, pp. 663, MAZZUOLI, 2015, pp. 265). The Vienna Convention on the Law of Treaties, section 2, deals with legal effects, objections, withdrawal and the procedure relating to reservations. However, Article 27 of the Paris Agreement expresses the impossibility of reservations (Brazil, 2017) in relation to any of its provisions.

5 TERMINATION, DENUNCIATION OR WITHDRAWAL

According to the Vienna Convention on the Law of Treaties (Article 70), unless otherwise provided in the treaty itself, or by agreement of the parties, termination of the treaty: "(a) release the parties from any obligation to continue to comply the treaty; b) is without prejudice to any right, obligation or legal situation of the parties created by the execution of the treaty before its extinction ". In addition, it provides that the release provided for in item "a", in case of denunciation or withdrawal of a State "shall apply in relations between that State and each of the other parties to the treaty, from the date on which said denunciation takes effect or withdrawal". PELLET, DINH and DAILLIER (2003, pp. 311-324) point out that the ideal situation would be the one in which the treaty itself disposes of its own extinction. However, the Convention itself provides for the possibility of a subsequent agreement between the parties, so that a treaty is terminated.

With regard to the Paris Agreement, it does not contain any explicit clause regarding its termination. In the meantime, Article 28 is the provision in the Agreement dealing with the complaint, stipulating in the first paragraph that after three years after its entry into force for a Party, it may denounce it at any time by giving written

notification to the Depositary. According to the second paragraph, the denunciation shall have effect one year after the date of receipt by the Depositary of the notification of denunciation, or at a later date if so stipulated therein. The addition of the third paragraph stipulates that any Party denouncing the Convention shall also be deemed to have denounced the Agreement (BRAZIL, 2017). The Convention to which it refers is the United Nations Framework Convention on Climate Change itself.

On June 1, 2017, US President Donald Trump announced the US withdrawal from the Paris Agreement, negatively impacting the international environmental scene, creating great uncertainty for the rest of the world. With respect to international law, however, even if the US formally manifests the intent to denounce the Agreement, such action will take effect only four years after the entry into force of the Agreement, that is, on November 4, 2020, since it entered into force on November 4, 2016. Thus, the effects of the denunciation will only become valid one day after the election of the next American president. This mitigates, but does not eliminate, the negative effects of the American's President decision.

6 CONCLUSIONS

The study of the Paris Agreement, internally and internally, is capable of providing elucidative elements which, in conjunction with the general theory of international treaties, ultimately form an illuminating framework that demonstrates the importance of the Paris Agreement and facilitates the understanding of the stages of formation of international treaties. This is because the study of these stages is relevant both to scholars of the law of nations and to those who only dedicate themselves to internal questions related to the Law, as shown by the research when dealing with the process of internalization of the treaties.

Moreover, understanding the process of formulating reservations, as well as the hypotheses and consequences of the termination and denunciation of treaties, makes

some issues clearer, while greatly influencing the factual reality around the globe. Here, one can cite the example of the United States withdrawal from Paris Agreement. Although the immediate effects of President Donald Trump's attitude will have little immediate effect on international law, since the denunciation will only come into force in 2020, it will influence, albeit indirectly, the attitudes of States with respect to the Paris Agreement, taking into account the American influence worldwide. Understanding the general theory of treaties thus facilitates not only the understanding of the formation of the rules of international law *per se*, but also helps in understanding political issues that eventually relate to the process of treaty formation, albeit indirectly.

REFERENCES

AMIRFAR, Catherine. The United States withdraws from the Paris Agreement on climate change. **Client Alert**. Debevoise & Plimton: New York. 2017.

BODANSKY, Daniel; O'CONNOR, Sandra Day. Could a future president reverse U.S approval of the Paris Agreement? **Legal Note**. Center for Climate and Energy Solutions: Arlington. 2016.

BRASIL. Constituição (1988). **Constituição da República Federativa do Brasil**. Brasília, DF, Available at: <http://www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm>. Acesso em: 02 dez. 2017

BRASIL. **Decreto nº 4.388, de 25 de Setembro de 2002**. Promulga o Estatuto de Roma do Tribunal Penal Internacional. Estatuto de Roma do Tribunal Penal Internacional. Brasília, DF. Available at: <http://www.planalto.gov.br/ccivil_03/decreto/2002/d4388.htm>. Acesso em: 03 jan. 2018.

BRASIL. **Decreto nº 7.030, de 14 de dezembro de 2009**. Promulga a Convenção de Viena sobre o Direito dos Tratados, concluída em 23 de maio de 1969, com reserva aos Artigos 25 e 66. *Convenção de Viena sobre o Direito dos Tratados*. Brasília, DF, Available at: <http://www.planalto.gov.br/ccivil_03/_ato2007-2010/2009/decreto/d7030.htm>. Acesso em: 27 nov. 2017.

BRASIL. **Decreto nº 9.073, de 05 de junho de 2017**. Promulga o Acordo de Paris sob a Convenção-Quadro das Nações Unidas sobre Mudança do Clima, celebrado em Paris, em 12 de dezembro de 2015, e firmado em Nova Iorque, em 22 de abril de 2016. Acordo de Paris. Brasília, DF, Available at: <http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2017/decreto/D9073.htm>. Acesso em: 27 nov. 2017.

CÂMARA DOS DEPUTADOS. **Tramitação dos Atos Internacionais no Congresso**. 2017. Estudos e Notas Técnicas. Consultoria de Portas Abertas. Palestra 9. Plenário 15. Disponível em: <http://www2.camara.leg.br/a-camara/documentos-e-pesquisa/estudos-e-notas-tecnicas/copy_of_portas-abertas-1/Palestra9.pdf>. Acesso em: 02 dez. 2017.

CLIMATE FOCUS. The Paris agreement summary. **Briefing Note**: Amsterdam. 2015.

DAILLIER, Patrick; DINH, Nguyen Quoc; PELLET, Alain. **Direito Internacional Público**. 2. ed. Lisboa: Fundação Calouste Gulbenkian, 2003. Tradução de Vítor Marques Coelho.

DOEBBLER, Curtis; SINGH, Margaretha Wewerinke. The Paris Agreement: some critical reflections on process and substance. **UNSW Law Journal**. vol. 39(4). pp. 1486-1517. Sidney. 2016.

MAZZUOLI, Valerio de Oliveira. **Curso de direito internacional público**. São Paulo: Editora Revista dos Tribunais. 2015.

MAZZUOLI, Valerio de Oliveira. The Law of treaties: a comprehensive study of the 1969 Vienna convention and beyond. Rio de Janeiro: Forense; São Paulo: Método. 2016.

MINISTÉRIO DO MEIO AMBIENTE. **Acordo de Paris**. Mma.gov.br. Retrieved 14 January 2018, from <http://www.mma.gov.br/clima/convencao-das-nacoes-unidas/acordo-de-paris>. 2018.

SHAW, Malcolm. **International law**. Cambridge: Cambridge University Press. 2017.

UNITED NATIONS. **Treaty Handbook**. Prepared by the Section of the Office of Legal Affairs. New York: United Nations Publication. 2012.

UNITED NATIONS. **The Paris Agreement. Framework convention on climate change**. FCCC/CP/2015/L.9/Rev.1. Paris. 2015.

UNITED NATIONS Framework Convention on Climate Change. **Paris Agreement - Status of Ratification**. Washington. 2017.