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CLIMATE CHANGE NEGOTIATIONS: LEGAL AND OTHER ISSUES ON THE ROAD TO PARIS

*Susan Biniaz**†

This article is born of a panel discussion from September 18, 2015, regarding “Regulating and Treaty-Making: Addressing Climate Change under the Obama Presidency.” The article examines issues that affected discussions shortly before the final negotiations at the United Nations Climate Change Conference in Paris in 2015.

Thank you for having me. I would like to address some of the issues surrounding the current climate change negotiations. They are in their fourth year and are expected to culminate in an agreement on December 11th in Paris.

We are operating under the so-called “Durban mandate, which has two features worth mentioning:

- The first feature is that the agreement under negotiation is to be “applicable to all Parties.” That may sound tautological, in that an agreement is, of course, applicable to all of its Parties. But that phrase was actually very significant politically, given the history of the climate change regime. The Berlin mandate set the parameters of the negotiation that led to the Kyoto Protocol. It provided, in essence, that the agreement was to be “applicable to some,” i.e., it excluded any new commitments for developing countries. In this respect, the Durban mandate set the expectation for quite a different outcome than the Kyoto Protocol.
- The second feature is that the agreement is to have some type of “legal force.” This does not necessarily mean that the outcome must be a fully legally binding instrument. At the same time, the clear intent was to create something with more legal content than the 2009 Copenhagen Accord, which was an entirely non-legally binding instrument.

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† The views expressed in this paper are those of the author alone and are not intended to reflect the positions of the United States Department of State or any other department or agency of the U.S. Government.

Now I would like to turn to some of the current issues. I will start with the question of “ambition.” There seems to be widespread consensus that the agreement should be designed to be “ambitious,” and, when countries use this descriptor, they generally mean ambitious in relation to the agreed global temperature goal (i.e., keeping the increase below two degrees Celsius above pre-industrial levels). The challenge is how to promote ambition in a way that also encourages broad participation in the ultimate agreement.

There is the theoretical option of taking the global temperature goal, translating it into the maximum allowable level of global greenhouse gas emissions, and allocating a particular amount to each Party. Such an approach would secure the necessary ambition, but it would not achieve broad participation. Many countries would not accept being told how much how they can emit. And that assumes countries could even reach agreement on how to allocate emissions in the first place. It is more likely that they would have very different notions on what the relevant factors are and how they should be weighed.

As an alternative to such a “top down” approach, our negotiating team had the idea of having each Party “nationally determine” its own mitigation contribution. Such an approach would be more likely to garner broad participation, given that it would allow a Party to design its target or measures based on its national circumstances. But this approach raised the question of how to avoid low ambition. So we coupled the notion of “nationally determined” targets with the idea of having Parties lay out their targets in advance of Paris. The hope was that, if Parties knew that their targets would be exposed to the light of day well before December, the “sunshine” would in itself provide a good incentive to put forward their best efforts.

This concept was agreed to internationally and is basically what has been going on this year. Parties have been submitting their so-called “intended nationally determined contributions,” or “INDCs.” The United States announced a target of 26-28% below 2005 levels in 2025, which was done in conjunction with China in the Joint Announcement last November. At the moment, about a hundred INDCs have been submitted. Of course, targets set in 2015 that only go out to 2025 or 2030 are not going to be enough in relation to the global temperature goal. Therefore, the United States considers that the agreement should include other elements to promote ambition:

- It should call upon Parties to regularly submit successive emissions targets, preferably every 5 years.
- There should be an expectation that Parties’ targets move in a forward direction (which has been referred to as “progression”).

- Parties should be encouraged to produce longer-term strategies or scenarios for how they will move to low-carbon or low-emissions economies.
- The Paris outcome should include a platform for sub-national governments and businesses to reflect their commitments.

Now I will turn to what many in the negotiating process call “accountability.” We need to design the agreement to make Parties accountable for what they agree to take on. The issue has a number of dimensions:

- First, Parties need to be clear about what they are undertaking. One of the problems with the Copenhagen Accord was that many Parties were not very clear about the meaning of their pledges; in fact, it took many months and workshops to get a sense of what they were committing to do
- Second, there is a history of “conditionality” in the climate regime: “we’ll do X if others do X” or “we’ll do X if we get external funding,” etc. Here, we are saying that at least a part of each Party’s undertaking needs to be unconditional. It is acceptable if the Party includes another component that might be achieved conditionally. But, without any unconditional piece, a Party is not really accountable for anything.
- Third, there need to be some rules and norms. Mitigation targets will be nationally determined, but there should be some agreed parameters when it comes to, for example, how a Party accounts for various aspects of its target. There have been two extremes in the climate regime so far. The Kyoto Protocol dictated nearly every aspect of a Party’s target, while the Copenhagen Accord was very open-ended. Here, we need to find the proper balance, in order to encourage broad participation but also promote accuracy and environmental integrity.
- Fourth, Parties need to report on their greenhouse gas emissions, as well as on the progress they are making in implementing and achieving their targets.
- Fifth, there needs to be adequate review of implementation, both to know whether individual Parties are achieving their targets and to see whether the world, in the aggregate, is on track in relation to the global temperature goal.

Some would argue that Parties will not be accountable for their mitigation targets unless they are legally binding. Others would say that this is not the case, given that there are plenty of examples, both within and outside the climate world, of non-compliance with legally binding commitments and “compliance” with non-legally binding ones. Further, in this case, reporting and review are essential features

of accountability that do not necessarily follow from the legal character of commitments. There are also potential downsides to legally binding targets in this context, including the potential for Parties to reduce their level of ambition if they are concerned about violating a legal obligation and the likelihood that a legally binding approach will deter some Parties from participating in the new agreement. One option under consideration is a “hybrid” approach, put forward by New Zealand, which combines non-legally binding targets with legally binding commitments to put forward successive targets on a regular basis, to provide clarifying information, to report, and to be reviewed.

A third issue at play is that of “differentiation.” This issue relates to whether Parties are treated the same or differently and, if differently, on what basis. In the 1992 Framework Convention on Climate Change, there was a very light divide between the commitments of the Parties listed in Annex I of the Convention (so-called “Annex I Parties”) and other Parties. Those in Annex I had heightened reporting obligations and a non-legally binding emissions aim. It is the Kyoto Protocol that sharpened the divide between the two categories, including legally binding emissions targets for Annex I Parties and essentially excluded non-Annex I Parties from any new commitments. The Copenhagen Accord moved back toward the less bifurcated nature of the Convention, with certain separate provisions for Annex I and non-Annex I Parties, but with everyone expected to take on emissions pledges of some sort.

For Paris, no one is taking the position that all Parties need to do the same thing. Rather, it is widely recognized that Parties have widely varying national circumstances. Some consider that the Annex I/non-Annex I categories should continue to play a role in the Paris agreement. Others, including the United States, consider that a climate agreement based on categories from 1992, or even based on a rigid divide between developed and developing countries, would not be a tenable approach to an agreement that takes effect from 2020 and is intended to be long-lasting. The challenge will be how to reflect appropriate differentiation among Parties across the various elements of the agreement in a manner that is acceptable to all.

So, how will these and other issues get resolved? There are many possibilities:

- Parties might change their positions on an issue so as to achieve convergence.
- Parties might trade one issue for another.
- Sometimes Parties will agree to state who will do what under an agreement and avoid the question of “why,” which can raise ideological questions.

- Issues in the climate regime have on occasion been addressed through “constructive ambiguity,” such as the use of a comma that arguably allows a sentence to be read in two different ways.
- Contentious issues are often postponed for resolution, for example, by having the agreement direct the Parties to address an issue at a later date.
- An issue might be sent to a different forum, such as the Kyoto Protocol’s sending issues regarding international aviation and maritime emissions to ICAO and IMO, respectively.
- An issue might be addressed in a lower-profile “decision” of the Parties, rather in the agreement per se.
- A controversial provision might be made more acceptable by softening its legal character or by lengthening the time period during which it must be fulfilled.

It is likely that some or all of these methods will be necessary to putting together the final deal in Paris.