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Thomas E. Drennen
Cornell University

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Book Review

Environmental Diplomacy: Negotiating More Effective Global Agreements

By Lawrence E. Susskind

Oxford University Press, 1994, 201 pp.

REVIEWED BY THOMAS E. DRENNEN

Thomas Drennen is Visiting Scholar in the Program on Ethics and Public Life, Cornell University, and Resource Economist in the Energy Policy and Planning Department, Sandia National Laboratories. Dr. Drennen has a B.S. in Nuclear Engineering from the Massachusetts Institute of Technology, an M.A. in Public Affairs from the University of Minnesota, and a Ph.D. in Resource Economics from Cornell. He is a specialist in resource and environmental economics.

Negotiations toward reducing the threat of global warming are proceeding along a two-step process: the negotiation of the Framework Convention on Climate Change (FCCC),¹ laying out basic principles and guidelines for action, followed by regular meetings of the Parties with the expectation that protocols will emerge that strengthen the initial agreement. This two-step process has become the generally accepted method for negotiating environmental agreements, following the success of the Vienna Convention on Substances that Deplete the Ozone Layer,² and the subsequent Montreal Protocol³ and its Amendments.⁴ The Vienna Convention did not even mention chlorofluorocarbons, the main culprit in

1. United Nations Framework Convention on Climate Change, May 9, 1992, 31 I.L.M. 849 (1992).

2. Vienna Convention for the Protection of the Ozone Layer, Mar. 22, 1985, T.I.A.S. No. 11097, 26 I.L.M. 1520 (1987).

3. Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, 26 I.L.M. 1541 (1987).

4. See Adjustments and Amendments to the Montreal Protocol on Substances that Deplete the Ozone Layer, June 29, 1990, 30 I.L.M. 537 (1991); and *Report of the Fourth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer*, U.N. Doc. UNEP/OzL. Pro.4/15 (1992).

ozone destruction. It did begin a process which, although criticized initially by many for its weakness, led to one of the few successful environmental protection agreements.

Largely because of this success, I and many others were cautiously optimistic with the signing of the FCCC. The Convention garnered widespread support, with 153 member countries signing the agreement at the 1992 Earth Summit. It mandated that the Parties continue meeting at regular intervals to monitor progress to date towards achieving the goals of the FCCC. It also increased the transparency of the process through the requirement of national reports and plans. For example, the FCCC, in article 4.2.a, requires that Appendix I countries (basically, developed countries including many of the Republics of the former Soviet Union) adopt national policies that detail how these countries will attempt to achieve the goal of returning greenhouse gas (GHG) emission levels to 1990 levels by the year 2000. Even though these countries are not obligated to actually achieve 1990 emission levels, or to hold them at that level, the publication of the national reports will allow for public scrutiny of goals and accomplishments and should eventually lead to more meaningful commitments to GHG reduction.

In his book, Lawrence Susskind refers to those optimistic about the FCCC as pragmatists, finding good in what others (the idealists) decried as a dismal failure caused by the vast majority of countries caving in to the demands of a small number of powerful countries for the sake of getting something done in time for the 1992 Earth Summit. The idealists believe that no agreement would have been better than a weak agreement. Even though the pragmatists remain cautiously optimistic, they too feel a sense of disappointment with the final agreement.

Susskind argues that without some basic changes in the negotiating process, this type of agreement is probably the best that can emerge. Unlike other proposals, Susskind's approach would not require a major overhaul of the United Nations (U.N.) or that countries give up any of their sovereignty. Instead, Susskind relies on common-sense changes to the basic negotiating processes that would eliminate some of the existing problems that currently lead us to "a lowest common denominator approach to treaty making." Problems that he identifies with the existing process include the following: the requirement for consensus among 170 different member countries; the inability to deal with the scientific uncertainty inherent in complex environmental problems; the difficulty in establishing effective monitoring

and compliance regimes given financial and sovereignty concerns; and the free rider problem.

Although Susskind does not limit his focus to any one environmental problem, for the purpose of this short review, I will summarize Susskind's proposal and relate it back to the climate change negotiations. First, however, I should note that substantial progress has occurred toward the second phase of negotiations on the FCCC since the publication of Susskind's book. Most importantly, the FCCC officially entered into force on March 21, 1994, ninety days after receipt of the fiftieth ratification. As of July 1994, eighty countries had ratified the FCCC.⁵ As mandated by the FCCC, the Parties will again convene at the First Conference of the Parties (CoP) in Berlin, March 28 to April 7, 1995. The goal at that meeting will be to begin negotiation on subsequent protocols that may contain more concrete commitments. While this progress leaves room for optimism that the process is working, there are equally disturbing signs that countries will not be able to meet even the voluntary commitments of the FCCC. For example, the United States released a comprehensive plan for meeting its commitments in October 1993.⁶ However, recent forecasts by the Energy Information Administration⁷ project that carbon dioxide (CO₂) emissions in 1995 will exceed the Climate Change Action Plan (CCAP) projections for that year by about the same amount (65 million metric tons carbon (mmtc)) as is specified for total CO₂ reductions in the CCAP for the year 2000 (66 mmtc).

Susskind recommends that all future negotiations follow a three-stage process. While maintaining some of the flexibility of the current process, Susskind's approach would set a specific time schedule for each phase, making negotiations more predictable. Another major change would be doing away with the current requirement for unanimity in terms of approval of treaty language. Under the current system, any one country can request that a word, phrase, or whole article be bracketed, meaning that it is unacceptable as currently written. This process allows just one country to block passage of any or all of the treaty text.

5. The United States ratified the FCCC on October 15, 1992, becoming the fourth country to do so. United Nations, *Convention Countdown*, CLIMATE CHANGE BULLETIN, no. 4, 1994, at 7.

6. WILLIAM CLINTON & AL GORE, THE CLIMATE CHANGE ACTION PLAN (1993) [hereinafter CCAP].

7. ENERGY INFORMATION ADMINISTRATION, U.S. DEP'T OF ENERGY, SHORT TERM ENERGY OUTLOOK: QUARTERLY PROJECTIONS, DOE/EIA-0202(94/2Q) (1994).

Under Susskind's proposal, Stage I negotiations would commence whenever fifty percent of U.N. Member Countries agreed that a threat existed that might require international action. The goal of Stage I negotiations would be a document that defined the scope of the threat and that listed key principles to be applied in the formation of a response. As examples, Susskind lists "the precautionary principle," the "principle of polluter pays," and "the principle of additionality of aid."⁸ This first stage would have a six month time limit.

If Stage I were successful in terms of producing a final document, Stage II of negotiations would commence within one year of the initiation of Stage I and would last a maximum of twenty-four months. It seems that what Susskind is really proposing in this next stage has two separate components. The goal of the first part would be the negotiation of general commitments, specific commitments, financial arrangements, institutional arrangements, and reporting or monitoring requirements. Susskind recommends that other details, including mechanisms for ratification, dispute resolution, etc., be standardized ahead of time to cover all negotiations. If fifty percent of member countries that began Stage II negotiations agreed on a draft text, negotiations would move directly into the protocol phase. If at least fifty percent did not approve of a text within the mandated twenty-four month period, then negotiations would end for at least two years. The purpose of this time limit would be to terminate unproductive negotiations and to instill some specific deadlines for parties to work towards.

The second part of Stage II negotiations is Susskind's solution for dealing with uncertainty. During this phase, countries would negotiate multiple protocols, often with contradictory wordings, with specific triggers for each protocol. Hence, rather than making vague statements such as the need to conduct additional research or to share scientific and technical data, countries would agree ahead of time on actions that they would take if a certain triggering event occurred. Of course, gaining agreement on what might trigger a specific action could turn out to be a negotiating nightmare. But Susskind is basically correct: there will always be some uncertainty, and this requirement would force negotiators to decide what action they would take for a specified level of change. Of course, one valid concern with Susskind's proposal is that if the specified triggering events are far

8. LAWRENCE SUSSKIND, ENVIRONMENTAL DIPLOMACY: NEGOTIATING MORE EFFECTIVE GLOBAL AGREEMENTS 143 (1994).

enough in the future, it may be too late to take appropriate action to counter many undesirable effects.

Susskind does not provide examples of triggering events. In the case of global warming, if negotiators had followed Susskind's approach, they might have specified varying degrees of reduction based on some specific triggering event. For example, one protocol might have mandated a twenty percent reduction in each country's CO₂ emissions if some international group, such as the World Meteorological Organization, concludes before 2005 that the earth's temperature has increased one degree celsius over pre-industrial levels. A second protocol might specify a ten percent reduction in CO₂ emissions if atmospheric concentrations of CO₂ increased at a rate greater than 1.5 percent for three consecutive years. A third protocol might specify a carbon tax schedule if global efforts failed to hold 2010 emissions from fossil fuels to less than seven billion metric tons. Such protocols would clearly involve different degrees of difficulty in specifying the triggering event; in the three cases proposed here, the first would be far more difficult to measure than the other two, but would definitely signal the onset of global warming, something that the other two do not do.

The final stage of negotiations, Stage III, would focus on annual reviews of reporting and monitoring results and could lead to a tightening of requirements. Susskind proposes that this stage last three years following signing of the Stage II treaty and that it occur only if two-thirds of the Stage II signatories vote to initiate it. Otherwise, the process would terminate for twenty-four months and then begin again if fifty percent of all U.N. members agree to restart the process. The final goal of Stage III would be a tightened treaty and a revised set of protocols, again each with a clear trigger.

Susskind suggests that had countries followed this three-step approach to climate change negotiations, it might have been possible for several European countries to reconcile their differences with the United States. For example, Susskind notes that many European countries were holding out for what he calls a Stage III type treaty, with specific commitments, full funding, and elaborate reporting and monitoring requirements.⁹ The United States, on the other hand, was more interested in a Stage I type treaty. Because the United States was insistent on either this or nothing, the

9. *Id.* at 145.

Europeans had to give in because there was no more time for negotiations. Susskind argues that the three-step approach would avoid this type of confrontation by setting up a predictable schedule and allowing movement toward the best possible treaty or package of treaties. Of course, it is unlikely that even under Susskind's approach countries would move forward without participation by key countries, such as the United States, since without their concurrence, the financial commitments to carry through would be lacking. Still, Susskind's approach would avoid the all-or-nothing quality of current negotiations.

Throughout his book, Susskind argues for a more open role for what he calls non-governmental interests (NGI).¹⁰ While these groups did play an active role in behind-the-scenes lobbying during climate change negotiations, ground rules for these groups vary from treaty negotiation to treaty negotiation, requiring that considerable time be spent establishing rules for their inclusion each time. Susskind suggests that their inclusion be specified ahead of time to include a right to be involved in negotiations, but that they should not have voting rights. While some will undoubtedly disagree, Susskind argues that the non-governmental organizations' (NGO) influence at the Rio Earth Summit was, at times, counterproductive. For example, he notes that the official NGO forum, the Citizen's Forum, was held miles away from the main negotiations and resulted in counter versions to each official Framework Convention, eroding public confidence in the official agreements.

Susskind also proposes a sensible solution to the ongoing problem of compliance with international environmental agreements. He concludes that given the importance of the sovereignty principle and the unwillingness of the U.N. to use force to achieve compliance, "it is important to do more to convince each nation that its self-interest is best served by complying with all treaties it has signed."¹¹ He then proposes the establishment of groups within each country, linked together internationally, that would monitor compliance and be able to shame noncomplying nations into changing their behavior. He goes on to fashion these groups after Amnesty International,

10. Unlike an NGO, Susskind's NGIs also include business interests in addition to environmental, religious, or academic groups.

11. SUSSKIND, *supra* note 8, at 113.

referring to them as the Green Amnesty International (GAI).¹² "GAI reports," argues Susskind, "would play a role in treaty tightening, and all of this would be done without any further encroachment on national sovereignty than has already occurred in the human rights field."¹³

The proposals in Susskind's book stem from his participation in the "Salzburg Initiative," an international assembly of diplomats, scientists, negotiation experts, international relations theorists, development specialists, and environmental activists that met in 1990 in Salzburg, Austria, to draft proposals for reforming the negotiation process prior to the 1992 Earth Summit. He notes that although the conclusions of the Salzburg Initiative were presented to world leaders and policymakers, change did not occur prior to the Earth Summit. Hopefully, some of the excellent recommendations of this Initiative, as further elaborated on by Susskind, will lead to future reform.

12. Others have mentioned similar groups. See, e.g., Alfred C. Aman, Jr., *The Earth as Eggshell Victim: A Global Perspective on Domestic Regulation*, 102 YALE L.J. 2107, 2121 (1993).

13. SUSSKIND, *supra* note 8, at 117.

