EVOLUTION OF THE INTERNATIONAL CLIMATE EFFORT

CENTER FOR CLIMATE AND ENERGY SOLUTIONS

Daniel Bodansky, Sandra Day O'Connor College of Law, Arizona State University
Elliot Diringer, Center for Climate and Energy Solutions

The international community is in the midst of shaping the next stage of the global climate effort—working both within the United Nations Framework Convention on Climate Change (UNFCCC), and through the broader "regime complex" that has grown alongside it. Within the UNFCCC, countries are working toward a new global climate agreement in 2015. This brief looks at different ways the climate effort has evolved over the years, and potential implications for the current round of international climate negotiations.

Over the past quarter century, the international response to climate change has developed in fits and starts. The UNFCCC established an open-ended framework that contemplates an evolutionary process, and in more than 500 decisions by 19 Conferences of the Parties (COPs) and nine meetings of the Kyoto Protocol parties, states have taken many incremental steps establishing and strengthening bodies and procedures. Yet, along three critical dimensions—the top-down vs. bottom-up nature of commitments, their legal character, and how they are differentiated—the climate effort has swayed back and forth.

Early on, the international regime underwent a rapid "big bang" with the negotiation of the Kyoto Protocol, which set legally-binding emissions targets for developed countries. But few parties later proved willing to sign onto a second round of legally-binding Kyoto targets, and most instead put forward nationally-determined targets and actions pursuant to the Copenhagen Accord and the Cancún Agreements.

With the Kyoto Protocol and the Cancún Agreements, parties have established two parallel tracks within the UNFCCC for mediating the international response to climate change. A new round of negotiations under the Durban Platform for Enhanced Action—aiming for a new global agreement in late 2015 in Paris—provides an opportunity to assess the relative merits of these alternative approaches and chart a more unified and effective response. The broad contours of a new hybrid approach have begun to emerge, in particular with a call at COP 19 (late 2013 in Warsaw) for parties to put forward their "intended nationally determined contributions" to the Paris agreement in early 2015.

As the UNFCCC has evolved, the climate issue also has risen on the agenda of other established regimes, like the International Maritime Organization, the International Civil Aviation Organization, and the Montreal Protocol, and has spawned a range of new international initiatives and forums. A major consideration in the future evolution of the international climate effort is the respective roles of, and linkages among, the UNFCCC and these parallel efforts.

TOP-DOWN VS. BOTTOM-UP APPROACHES

Although international agreements generally involve negotiations—and all ultimately depend on state consent—they vary widely in the latitude that they give participating countries. Some take a more top-down approach, defining particular policies and measures that parties must undertake. Others adopt a more bottom-up approach, allowing parties greater flexibility to define

their own contributions. The UNFCCC contains both bottom-up and top-down elements. Article 4.1 takes a very flexible approach, requiring all parties simply to develop (and report on) national policies and measures to combat climate change—a version of what was referred to, during the negotiations, as "pledge and review." Meanwhile, Article 4.2 reflects a more top-down model, setting forth a non-binding aim for developed countries to return their emissions to 1990 levels by the year 2000. The tension between these competing models has continued to play out as the U.N. effort has evolved.

Initially, parties chose to pursue a more top-down approach. At COP 1, they concluded that the non-binding aim contained in Article 4.2 was inadequate, and agreed to negotiate a new agreement containing emissions targets for developed countries. In doing so, they followed the model of the ozone regime, which imposes internationally-determined, quantitative limits on the production and consumption of ozone-depleting substances. The negotiating mandate adopted at COP 1 led to the negotiation of the Kyoto Protocol in 1997, only three years after the UNFCCC's entry into force. Four years later, parties adopted the Marrakesh Accords, setting forth the detailed rules for how the Kyoto Protocol would work.

The Kyoto Protocol is not purely top down (parties' targets, for instance, are not derived from an agreed common emissions goal). But its negotiation moved the regime further toward that end of the spectrum. While the protocol gives states freedom in how they *implement* their commitments, it does not give them similar flexibility in *defining* the form and nature of their commitments. Instead, it prescribes a single type of commitment (fixed emissions targets, which countries must achieve regardless of changing economic or other circumstances), the scope of those targets (economy-wide), the gases covered (a basket of six greenhouse gases), and the international offsets that can count towards meeting those targets (certified emission reductions created through the collective decision-making procedures of the Clean Development Mechanism). Moreover, rather than being determined by each country unilaterally, the initial Kyoto targets were defined through a process of international negotiations, and are subject to detailed international accounting rules to determine whether a country has complied.

Following the Kyoto Protocol's entry into force in 2005, states began to move back towards a more flexible bottom-up approach. The states willing to accept the initial Kyoto targets (for 2008–2012) represented only about a quarter of global emissions; the smaller subset of countries taking second-round targets (through 2020) account for only 14 percent. To engage other countries in the post-2012 effort, the 2009 Copenhagen Accord and 2010 Cancún Agreements embraced a fundamentally different architecture. Rather than defining emissions targets through international negotiations, they established a bottom-up process that allowed each developed country party to define its own emissions target, including the target's stringency, base year, and accounting rules. Meanwhile, developing countries were given even greater latitude in formulating nationally appropriate mitigation actions (NAMAs).

The differing results under the Kyoto and the Copenhagen/Cancún tracks offer some perspective on the relative strengths and weaknesses of top-down and bottom-up approaches. Kyoto, while both legally and technically more rigorous, suffers from shrinking participation. By contrast, the greater flexibility of the Copenhagen/Cancún approach has drawn much stronger participation, with quantified pledges from 90+ countries, including all major economies. However, these pledges were difficult to evaluate and compare, due to differences in approach and limited transparency; and in the aggregate, they fall well short of the reductions needed to limit warming to 2°C. From the standpoint of the UNFCCC's ultimate objective, neither track has produced an adequate response.

LEGAL FORM

A second area where the international climate effort has vacillated is the legal character of commitments. In the UNFCCC, the bottom-up requirements of Article 4.1 were stated as legally-binding commitments, applicable to all parties, while the target in Article 4.2 was stated as an aim, not a legal obligation, illustrating that the issue of top-down vs. bottom-up is distinct from that of legally binding vs. non-legally binding.

The 1995 Berlin Mandate, which served as the negotiating mandate for the Kyoto Protocol, called for the negotiation of a "protocol or another legal instrument" containing quantitative emission limitation and reduction objectives (QELROs) for developed country parties, but left open the question of whether the QELROs would be

legal obligations or aims (like the emissions target contained in Article 4.2 of the UNFCCC). However, at COP 2 the following year, the Geneva Declaration said that the QELROs under negotiation would be legally binding. The Kyoto Protocol followed this guidance, and its emissions limitation targets are legal obligations, with enforcement consequences under Kyoto's compliance mechanism.

In contrast, the 2007 Bali Action Plan, which initiated the negotiation of a post-2012 regime, left open the legal character of its work product. Although some parties sought to negotiate a new legal agreement, the 2009 Copenhagen Accord was adopted as a political agreement, not a legal instrument, and the eventual outcomes of the Bali Action Plan were adopted in Cancún, Durban, and Doha as COP decisions. As a result, the targets and NAMAs submitted pursuant to the Cancún Agreements are not legal obligations, because they are not contained in a legally-binding instrument.

EQUITY/DIFFERENTIATION

Finally, the principles of equity and "common but differentiated responsibilities and respective capabilities" (CBDRRC) have been operationalized differently at different stages in the UNFCCC's development.

The Convention itself includes common as well as differentiated responsibilities. It distinguishes broadly between developed and developing countries, and establishes two explicit lists: Annex I countries (developed countries and economies in transition), with more detailed mitigation obligations; and Annex II countries, a subset of these parties, with commitments to support developing country efforts. In a further categorization, the Convention also recognizes the "specific needs and special situations" of least developed countries. Recognizing the potential need to update the lists, the Convention calls for a review of Annexes I and II and establishes a procedure for amending them.

In contrast, the Kyoto Protocol's negotiating mandate focused exclusively on differentiated commitments, excluding any new commitments for non-Annex I parties. Accordingly, the emissions targets set forth in the Protocol apply only to Annex I parties.

The 2007 Bali Action Plan represented a return to the UNFCCC's blend of common and differentiated responsibilities. It called for consideration of enhanced mitigation action by all countries, and differentiated between "developed" and "developing" country parties, rather than between "Annex I" and "non-Annex I" parties. The Copenhagen Accord and Cancún Agreements followed suit, operationalizing the principle of CBDRRC through differentiated provisions on mitigation, finance and measurement, reporting and verification (MRV).

OTHER DEVELOPMENTS UNDER THE UNFCCC

Notwithstanding these continuing tensions within the UNFCCC process, the climate change effort has continued to evolve in important ways. A series of COP decisions have elaborated a system for the reporting and expert review of national communications and greenhouse gas inventories, and for peer review of new biennial reports. The UNFCCC's financial mechanism has been strengthened, most recently with the establishment of the Green Climate Fund. The Clean Development Mechanism (CDM) Executive Board has established and oversees a set of institutional and procedural arrangements for the review and approval of offset-generating CDM projects. A Technology Mechanism has been established, with a Climate Technology Centre and Network. And adaptation efforts have been strengthened through the adoption of the Cancún Adaptation Framework.

Among the issues in the Durban Platform negotiations is how the new agreement incorporates or links to these established bodies and processes.

ACTIVITIES ALONGSIDE THE UNFCCC

As the formal UNFCCC process has evolved, the broader regime complex addressing climate change has grown and diversified. For many years, leaders have periodically addressed climate issues in political forums such as the G8 and the G20. Following its rejection of the Kyoto Protocol, the Bush Administration established the Major Economies Meeting, which under the Obama Administration evolved into the Major Economies Forum (MEF). States have pursued reductions in particular greenhouse gases and sectors within other established legal regimes, including: the efforts to phase out hydrochlorofluorocarbons (HCFCs) and possibly hydrofluorocarbons (HFCs) through the Montreal Protocol; the

discussions of black carbon under the Convention on Long-Range Transboundary Air Pollution (LRTAP); and the work on emissions from international transport in the International Maritime Organization (IMO) and the International Civil Aviation Organization (ICAO). Meantime, countries have joined together in a growing number of cooperative initiatives, including the REDD+ Partnership, the Clean Energy Ministerial, and the Climate and Clean Air Coalition (CCAC).

One issue facing countries going forward is whether this proliferation of forums and initiatives leads to an overly fragmented, inefficient regime, or whether it is possible to establish linkages and a distribution of effort delivering a more coordinated, effective global response.

THE DURBAN PLATFORM: CONSTRUCTING A NEW PARADIGM

With the adoption of the Durban Platform at COP 17 in 2011, and an attendant decision at COP 19 in Warsaw, parties have begun to sketch the broad parameters of a new paradigm for the next stage of the regime's evolution. Now parties must reach agreement on the full contours of this new paradigm, identify its key elements, and begin fleshing them out.

The Durban Platform establishes certain key parameters. It specifies that the Paris outcome is to "come into effect and be implemented from 2020," and that it must be: "under the Convention;" "applicable to all;" and of a form that has "legal force." It also calls for a strengthening the Convention's "multilateral, rules-based regime." Although not stated explicitly in the Durban Platform, there is very broad if not unanimous concurrence that the Paris agreement must be fully in keeping with the Convention's core principles—most especially, the principle of "common but differentiated responsibilities and respective capabilities." Many parties also have emphasized the importance of the agreement being dynamic and, hence, durable.

Much of the discussion since Durban has revolved around the notion of a hybrid approach that couples top-down and bottom-up elements to achieve both broad participation and ambitious commitments. The decision in Warsaw points towards a strong bottom-up element, through its focus on "nationally determined contributions." (Those parties "prepared to do so" are to present their "intended" contributions in the first quarter of 2015. The information to be provided in presenting these contributions is to be decided at COP 20.)

The Warsaw decision, however, says little about the nature of any top-down or rules-based elements to be included in the agreement to help ensure that parties' contributions are ambitious, initially and/or over time. Nor does the decision directly address the scope of parties' contributions (mitigation-only, or broader) or how they are to be differentiated. And it is expressly "without prejudice" to their legal nature. These are among the core issues in fully elaborating a new paradigm for the post-2020 period.

CENTER FOR CLIMATE AND ENERGY SOLUTIONS

The Center for Climate and Energy Solutions (C2ES) is an independent nonprofit organization working to promote practical, effective policies and actions to address the twin challenges of energy and climate change.

2101 WILSON BLVD. SUITE 550 ARLINGTON, VA 22201 703-516-4146 C2ES.ORG