

# Climate Change Policy Through the Rear View Mirror

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## INTRODUCTION

Several decades of United Nations Framework Convention on Climate Change (“UNFCCC”) negotiations have brought the international community no nearer

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to the UNFCCC's objective of stopping concentrations of greenhouse gases ("GHGs") at 450 parts per million (ppm) in the atmosphere and winding them down. The objective stated in Article 2 of the Framework Convention is "stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system." In Cancun, Mexico in 2010, it was agreed that, to meet that goal, global warming should not rise beyond two degrees Celsius ("2° C") above pre-industrial levels.<sup>1</sup> This requires that GHG concentrations must be held approximately to 450 ppm CO<sub>2</sub>-equivalent.

The 400 ppm threshold was passed in May 2013.<sup>2</sup> Absent an unlikely immediate full-stop in the use of fossil fuels, the 450 ppm level will likely be reached within decades,<sup>3</sup> fueled by current business-as-usual emissions and by atmospheric loading already "baked in" by past emissions.<sup>4</sup> Some experts overtly question the reality of the 2° C goal.<sup>5</sup> The disconnect between this enormous challenge and a lumbering UNFCCC progress is disheartening.<sup>6</sup>

In separate papers with Barry Blechman and Micah Ziegler,<sup>7</sup> I considered whether the history of weapons negotiations, where progress was eventually

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1. United Nations Framework Convention on Climate Change, Nov. 29-Dec. 10 2010, *Report of the Conference of the Parties on its Sixteenth Session*, U.N. Doc. CP/2010/7/Add.1 (Mar. 15, 2011).

2. See, e.g., Bryan Walsh, *Greenhouse Effect: CO<sub>2</sub> Concentrations Set to Hit Record High of 400 PPM*, TIME (May 2, 2013), <http://science.time.com/2013/05/02/greenhouse-effect-co2-concentrations-set-to-hit-record-high/#ixzz2kkHkp7aK> ("Nor will CO<sub>2</sub> levels stop at 400 ppm—barring a virtually impossible immediate turn away from fossil fuels, CO<sub>2</sub> emissions will keep growing globally, and CO<sub>2</sub> concentrations will keep rising . . . [as] CO<sub>2</sub> can stay in the atmosphere for centuries . . . we've already baked in far more warming than we've yet experienced."); see also Douglas Main, *Arctic Temperatures Reach Highest Levels In 44,000 Years, Study Finds*, HUFFINGTON POST (Dec. 24, 2013), [http://www.huffingtonpost.com/2013/10/24/arctic-temperatures-highest-44000-years\\_n\\_4157863.html](http://www.huffingtonpost.com/2013/10/24/arctic-temperatures-highest-44000-years_n_4157863.html) ("This study really says the warming we are seeing is outside any kind of known natural variability, and it has to be due to increased greenhouse gases in the atmosphere." (internal quotation marks omitted)).

3. Rob Monroe, *Measurement Notes: What Does This Number Mean?*, SCRIPPS INSTITUTION OF OCEANOGRAPHY AT UNIVERSITY OF CALIFORNIA, SAN DIEGO (July 28, 2014), <https://scripps.ucsd.edu/programs/keelingcurve/2014/07/28/what-does-this-number-mean/>; see also John Upton, *Is The World's Main Climate Goal Misguided?*, CLIMATE CENTRAL (Oct. 2, 2014), <http://www.climatecentral.org/news/climate-goal-2-degrees-misguided-18121> (providing additional discussion on the 2° C goal).

4. Another explanation of the likelihood of various degrees of warming depending on the enactment of policy is found in the Greenhouse Gamble wheels. See *Greenhouse Gamble Wheels*, MIT JOINT PROGRAM ON THE SCIENCE AND POLICY OF GLOBAL CHANGE, <http://globalchange.mit.edu/focus-areas/uncertainty/gamble> (last visited Oct. 30, 2014). As of 2009, the MIT analysis says that with the reference case of "no policy" (assuming no action is taken to try to curb the global emissions of greenhouse gases), the temperature at which there is a 50% chance of falling above or below that level is 5.2° C (9.36° F). *Id.*

5. See David G. Victor & Charles F. Kennel, *Climate Policy: Ditch the 2° C Warming Goal*, NATURE (2014).

6. See Glenn Scherer and DailyClimate.org, *Climate Science Predictions Prove Too Conservative*, SCI. AM. (Dec. 6, 2012), <http://www.scientificamerican.com/article/climate-science-predictions-prove-too-conservative/> ("Checking 20 years' worth of projections shows that the Intergovernmental Panel on Climate Change has consistently underestimated the pace and impacts of global warming.").

7. See Ruth Greenspan Bell & Barry Blechman, *A Course Adjustment for Climate Talks*, ISSUES IN SCI. AND TECH. (2012), available at [www.stimson.org/images/uploads/research-pdfs/Issues\\_in\\_Science\\_and\\_Technology\\_bellblechman\\_winter\\_2012.pdf](http://www.stimson.org/images/uploads/research-pdfs/Issues_in_Science_and_Technology_bellblechman_winter_2012.pdf); Ruth Greenspan Bell & Barry Blechman, *How Much Did the*

achieved in fits and starts, might offer lessons to the all-or-nothing UNFCCC strategy. The present paper seeks to identify underlying assumptions of, and potential implications for, the UNFCCC pathway, as well as some of the choices made along that route.

Negotiators have, apparently, uncritically accepted the proposition that a huge basket of climate-related issues—each of them very complex and requiring for their execution the cooperation of many parties with often wildly disparate views—can (indeed, must) be resolved in one comprehensive agreement. They also assume that such agreements, should they be signed and ratified, will lead to assured changes in the GHG emission practices of the many parties to the agreement. Similarly, the UNFCCC in December 1977 adopted the niche tool of emissions trading—one that had, at that time, only been proven in a very specific U.S. context—as a principal method for carrying out core emissions control functions across massively different governance and institutional traditions in the many countries that make up the UNFCCC.<sup>8</sup>

As this article explores, the history of international environmental agreements and other relevant research poses challenges to each of these propositions. Proving the counterfactual and determining whether other ways of mobilizing the control of emissions might have been more effective is, of course, impossible. However, close examination of the weapons negotiations shows, for example, the merits of separating issues and negotiators, and, where possible, acting opportunistically to resolve elements that can be resolved, rather than waiting to assemble an entire package.

Although time is running short, there is still the possibility of identifying more productive alternatives and supplements to the UNFCCC process that might begin to resolve pending issues. It is only by asking questions, element by element, that one can begin to assess whether following the UNFCCC model can lead the world to a genuine reduction in GHG emissions or whether other approaches might be desirable. This article poses such questions as a predicate to identifying and assessing alternatives to this model.

It is time for a serious examination of what can be accomplished through the current negotiations and in what timeframe, and to consider whether there might exist, or be invented, more nimble supplements or alternatives to the UNFCCC model. The question that must be answered as quickly as possible is whether the

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*Climate Talks in Durban Accomplish: Why More of the Same Could Be Dooming the Planet*, FOREIGN AFF., Dec. 13, 2011, available at <http://www.foreignaffairs.com/articles/136762/ruth-greenspan-bell-and-barry-blechman/how-much-did-the-climate-talks-in-durban-accomplish>; Ruth Greenspan Bell et al., *Beyond the Durban Climate Talks: To Fix the Climate, Fix the Negotiations*, FOREIGN AFF., Oct. 30, 2011, available at <http://www.foreignaffairs.com/articles/136627/ruth-greenspan-bell-barry-blechman-and-micah-ziegler/beyond-the-durban-climate-talks> [hereinafter Bell et al., *Beyond the Durban Climate Talks*].

8. WTO-UNEP Report, *Trade and Climate Change* (2009), available at [https://unfccc.int/files/adaptation/adverse\\_effects\\_and\\_response\\_measures\\_art\\_48/application/pdf/part\\_iv\\_trade\\_and\\_climate\\_change\\_report.pdf](https://unfccc.int/files/adaptation/adverse_effects_and_response_measures_art_48/application/pdf/part_iv_trade_and_climate_change_report.pdf) (last visited Nov. 9, 2014). Among the parties to the UNFCCC is the European Union. *Id.*

objective of a global, unified agreement addressing multiple issues and agreed to by 196 parties is realistically going to reduce domestic emissions. If the answer is no, or at least in doubt, are there other ways to get traction?

I. QUESTIONING THE EFFICACY OF MULTILATERAL ENVIRONMENTAL AGREEMENTS IN REDUCING GHG EMISSIONS: IF YOU BUILD IT, WILL THEY COME?

GHG control demands reliable action at a variety of governmental and institutional levels. Promises from participating parties are not sufficient. Global negotiations like those of the UNFCCC are predicated on the notion that reforms flow top-down from global agreement, leading to domestic results, and thereby can be counted on. By and large, UNFCCC negotiations follow the model established in Stockholm in 1972, when 113 countries, 19 inter-governmental agencies, and more than 400 inter-governmental and non-governmental organizations from around the globe arrived at an agreement for guidelines for national governments facing environmental challenges.<sup>9</sup> They worked under the auspices of the United Nations (“UN”).

A great deal of trust had been invested in the top-down logic to address a variety of environmental challenges. Approximately 250 multilateral agreements,<sup>10</sup> and overall 900 international legal instruments “either primarily directed to international environmental issues or contain[ing] important provisions on them,”<sup>11</sup> have been negotiated, written, and ratified. Given the immediacy of the climate challenge, it is necessary to ask whether the top-down global agreement model works, or whether the insistence on negotiating a massive UNFCCC agreement is a leap of faith. Those of us who must rely on the outcome of this deliberation must have an adequate level of confidence that this process can result in lowering greenhouse gas emissions. Proponents and doubters of the UNFCCC model both have evidence supporting their positions.

The case for the doubters is found in mid-1990s reports by two all-star academic teams who took a careful look at the implementation, or the “functioning or effectiveness,” of international environmental cooperation.<sup>12</sup> In other

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9. The principles worked out in Stockholm helped introduce environmental impact assessment to countries worldwide. See United Nations Conference on the Human Environment, Stockholm, Swed., June 5-16, 1972, *Declaration of the United Nations Conference on the Human Environment* (June 16, 1972).

10. *The Doha Mandate on Multilateral Environmental Agreements (MEAs)*, WORLD TRADE ORG., [http://www.wto.org/english/tratop\\_e/envir\\_e/envir\\_neg\\_mea\\_e.htm](http://www.wto.org/english/tratop_e/envir_e/envir_neg_mea_e.htm) (last visited Oct. 30, 2014) (“There are over 250 multilateral environmental agreements (MEAs) dealing with various environmental issues which are currently in force.”).

11. Edith Brown Weiss, Symposium, *International Law for a New World Order: International Environmental Law: Contemporary Issues and the Emergence of a New World Order*, 81 GEO. L. J. 675, 675 (1993).

12. See generally David G. Victor, *The Montreal Protocol's Non-compliance Procedure: Lessons for Making Other International Environmental Regimes More Effective*, THE OZONE TREATIES AND THEIR INFLUENCE ON THE BUILDING OF INTERNATIONAL ENVIRONMENTAL REGIMES 58 (Winfried Lang ed., 1996); see also Harold K. Jacobson & Edith Brown Weiss, *Strengthening Compliance with International Environmental Accords:*

words, they asked how effectively international agreements were achieving their goals and whether all those carefully crafted and negotiated agreements were having any actual impact on practice. Simplifying their results, both groups, as well as an earlier General Accounting Office (“GAO”) review (in response to a request from Senator Daniel Patrick Moynihan), raised considerable doubt about whether the agreements were robust enough to tackle the environmental challenges they were negotiated to address.<sup>13</sup> David Victor summarized: “In contrast [to certain other areas of international diplomacy], the history of international environmental diplomacy has been marked by states adopting symbolic or opaque commitments without the intention to implement them fully.”<sup>14</sup>

Assessing the effectiveness of concluded environmental agreements did not prove easy for the academic teams. There were definitional challenges, such as how to measure the success of these agreements. It is not particularly easy to determine whether the agreements controlled pollution or protected natural resources, if indeed that is the definition of success. The group led by Edith Brown Weiss and Harold Jacobson focused on what they characterized as *implementation*, defined by them as the process of drafting and incorporating the necessary domestic legal framework for institutionalizing international environmental obligations. For this study, the steps beyond formal law drafting involved compliance.<sup>15</sup> To the International Institute for Applied Systems Analysis (“IIASA”) group, on the other hand, *implementation* signified the process by which intent is translated into action.<sup>16</sup>

Each of these definitions presents unavoidable problems. For example, domestic implementation in the form of writing laws has varying significance in different countries and legal traditions. In some countries, once written and enacted, there is some assurance that the law’s mandate will be put into practice. In other countries, different models and conclusions can reasonably be drawn from the same steps. In certain countries, the rule of law is robust or at least reliable; other countries exhibit “rule by law,” involving selective implementation of laws to serve other purposes, such as keeping elites in power.<sup>17</sup> Some

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*Preliminary Observations from a Collaborative Project*, 1 GLOBAL GOVERNANCE 119, 123-31 (1995).

13. See U.S. GEN. ACCOUNTABILITY OFFICE, GAO/RCED-92-43, INTERNATIONAL ENVIRONMENT: INTERNATIONAL AGREEMENTS ARE NOT WELL MONITORED 4-5 (1992), available at <http://www.gao.gov/assets/160/151430.pdf> [hereinafter GAO, AGREEMENTS ARE NOT WELL MONITORED].

14. Victor, *supra* note 12, at 76.

15. See Jacobson & Weiss, *supra* note 12, at 123-31.

16. See, e.g., David G. Victor & Eugene B. Skolnikoff, *Implementing Environmental Commitments: How Governments, Industry, and NGOs Put International Agreement Into Practice*, OPTIONS 7-8 (IIASA ed., Spring 1997), available at <http://www.iiasa.ac.at/web/home/resources/publications/IIASAMagazineOptions/opt97-1spr.pdf>.

17. See, e.g., Steven Lee Meyers, Jo Becker & Jim Yardley, *Private Bank Fuels Fortunes of Putin’s Inner Circle*, N.Y. TIMES, Sept. 28, 2014, at A1, available at [http://www.nytimes.com/2014/09/28/world/europe/it-pays-to-be-putins-friend.html?hpw&rrref=world&action=click&pgtype=Homepage&version=HpHedThumbWell&module=well-region&region=bottom-well&WT.nav=bottom-well&\\_r=1](http://www.nytimes.com/2014/09/28/world/europe/it-pays-to-be-putins-friend.html?hpw&rrref=world&action=click&pgtype=Homepage&version=HpHedThumbWell&module=well-region&region=bottom-well&WT.nav=bottom-well&_r=1) (“But what looked like a

(China, for example) are not historically rooted in laws as the West understands them, despite recent efforts to write laws and find ways to make them work; practice is more consistent with domestic cultural and governance norms.<sup>18</sup>

A different set of analytic difficulties arises in assessing the intent of international agreements, specifically, what the parties agreed to accomplish. If drafters fudge critical elements to gain agreement, what is the metric to measure success? The IIASA group said that, often, the actual commitments involved in these agreements were fairly trivial, meaning that high levels of compliance meant little in terms of environmental outcomes. The IIASA group also found that “inadequate attention to implementation at both the national and international levels is a large part of the reason why” such agreements have fallen short of their promise.<sup>19</sup>

The third study, by GAO, looked at the reporting and monitoring information provided by parties to the secretariats of eight agreements. Its investigation concluded that many reports are submitted late, incomplete, or not at all.<sup>20</sup> GAO also expressed concern that secretariats to the treaties generally lacked authority and resources to monitor implementation and noted the “growing sense within the international community that systematic monitoring is warranted, given the

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debacle for Video International turned out to be a boon for Bank Rossiya. The new law depressed the company's value—and thus its purchase price . . . . Reflecting on the way the government's antimonopoly office has looked the other way, Mr. Aleksashenko, the former deputy finance minister, invoked the saying “my friends get everything, while my enemies get the law.”)

18. See, e.g., William Partlett, *Mr. Putin's “Rule-by-Law State,”* BROOKINGS INST. (June 19, 2012), <http://www.brookings.edu/research/opinions/2012/06/19-putin-law-partlett>. See generally Ruth Greenspan Bell, *Environmental Law Drafting in Central and Eastern Europe*, 22 ENVTL. L. REP. 10597 (1992) [hereinafter Bell, *Environmental Law*]; see also *supra* text accompanying notes 7-13. Many more recent comments point out the concept of “rule by law” employed by those such as Vladimir Putin of Russia. The lack of “independent, impartial adjudicative bod[ies] to review arbitrary actions by officials,” a key part of rule of law, is noted by many including Jerome A. Cohen. See, e.g., Jerome A. Cohen et al., *China and the WTO: Progress, Perils, and Prospects*, 17 COLUM. J. ASIAN L. 1, 13 (2003).

19. A similarly pessimistic look at the efficacy of international environmental agreements was articulated more recently in a report from the UN Environment Program. See UNITED NATIONS ENVIRONMENT PROGRAM, GLOBAL ENVIRONMENTAL OUTLOOK, ENVIRONMENT FOR THE FUTURE WE WANT (2012), available at [http://www.unep.org/geo/pdfs/geo5/GEO5\\_report\\_full\\_en.pdf](http://www.unep.org/geo/pdfs/geo5/GEO5_report_full_en.pdf); see also *World Remains on Unsustainable Track Despite Hundreds of Internationally Agreed Goals and Objectives*, UNEP NEWS CENTRE (June 6, 2012), <http://www.unep.org/newscentre/default.aspx?DocumentID=2688&ArticleID=9158> (“Treaty congestion” has led to proliferated agreements, 500 in the past 50 years, covering subjects from atmosphere, biodiversity, chemicals, hazardous substances and waste; land and water). THE GUARDIAN summarized the most recent UN findings, after examining 90 agreements: (a) “Some” progress was shown in only 40 goals, including the expansion of protected areas such as national parks and efforts to reduce deforestation; (b) “Little or no” progress was detected in 24 including climate change, fish stocks, and desertification and drought; and (c) “Further deterioration” was posted for eight goals including the state of the world's coral reefs; and no data was available for 14 other goals. John Vidal, *Many Treaties to Save the Earth, but Where's the Will to Implement Them?*, THE GUARDIAN, June 7, 2012, available at <http://www.theguardian.com/environment/blog/2012/jun/07/earth-treaties-environmental-agreements>.

20. See GAO, AGREEMENTS ARE NOT WELL MONITORED, *supra* note 13, at 4; see also U.S. GEN. ACCOUNTABILITY OFFICE, GAO/RCED-92-188, INTERNATIONAL ENVIRONMENT: STRENGTHENING THE IMPLEMENTATION OF ENVIRONMENTAL AGREEMENTS 4 (1992), available at <http://www.gao.gov/assets/220/216570.pdf>.

seriousness of international environmental problems and the high costs of correcting or preventing them.”<sup>21</sup> Finally, GAO warned that the “inability to comply with agreements is a serious underlying problem in many instances.”<sup>22</sup>

On the other hand, supporters of the UNFCCC process point to multilateral environmental agreements that appear to have achieved their purposes. The most notable, and most cited, is the Montreal Protocol, which by many accounts is highly effective in reducing the use of chlorofluorocarbons (“CFCs”). Parson, in *Protecting the Ozone Layer* (2003),<sup>23</sup> argued not only its success but also its viability as a model for managing other global pollution challenges, saying “its specific lessons about regime formation, negotiation strategy, and technological assessment may apply to other issues where conditions are sufficiently similar.” Richard Elliot Benedick, a State Department lead negotiator for Montreal, has similarly touted the Montreal Protocol as a model for controlling greenhouse gas emissions.<sup>24</sup> There is also literature arguing the contrary,<sup>25</sup> including those who point out that Montreal was a treaty implementing a ready-made solution, namely that substitutes for CFCs had already been developed.

I find the doubters’ position more tenable, but let’s assume the jury is out. At minimum, if studies almost twenty years ago warned against unfettered faith in the UN-brokered, multi-party top-down model, there seems to be little justification for doing only more of the same. In the instance of GHG emissions, confidence in the implementation of commitments is vital. A critically important question is whether control of GHGs is sufficiently similar to control of CFCs that the world community can be assured that a climate agreement will have the same successful outcome as did the Montreal Protocol or whether the likely fate of a UNFCCC agreement will be more similar to those agreements reviewed by GAO, Weiss/Jacobson, and IIASA. Prudence would call for hedging this bet singularly focused on the UNFCCC.

## II. THE CHALLENGE TO REACHING CONSENSUS IN THE MULTILATERAL CONTEXT: ARE TOO MANY PARTIES AT THE TABLE TO COME TO AGREEMENT ON ANYTHING?

The UNFCCC negotiations involve 196 parties that understandably often have wildly disparate interests and objectives in engaging in climate negotiations.

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21. *Id.*

22. *Id.* at 5.

23. EDWARD A. PARSON, *PROTECTING THE OZONE LAYER, SCIENCE AND STRATEGY* viii (2003).

24. Richard E. Benedick, *Perspectives: Avoiding Gridlock on Climate Change*, *ISSUES IN SCI. & TECH.*, Winter 2007, available at [http://issues.org/23-2/p\\_benedick/](http://issues.org/23-2/p_benedick/).

25. See generally Brian J. Gareau, *Dangerous Holes in Global Environmental Governance: The Roles of Neoliberal Discourse, Science, and California Agriculture in the Montreal Protocol*, 40 *ANTIPODE* 102 (2008), available at <http://www.umsl.edu/naumannj/professional%20geography%20articles/Dangerous%20Holes%20in%20Global%20Environmental%20Governance.pdf>.

Countries big and small, major and minor contributors to greenhouse gas emissions, the industrialized and less-industrialized countries, small island states that may be inundated by sea level rise and poor African countries, all have equal status. The goal of each party is to keep alive their own objectives and interests; the sum total of this interaction is a lot of moving parts, difficult to draw to conclusion.<sup>26</sup>

The extraordinary number of parties, in turn, is bound up with the sheer number of issues under active examination. There are two ways to look at this. One is whether the UN rules of decision-making, including the rule of decision by consensus, are a barrier to getting much done, or, more narrowly, whether having many parties is tantamount to paralysis. The second, discussed in the following section, is whether progress is impeded by bundling issues (or might be achieved by separating them).

Consensus is the final point in a long negotiating process, but arguably symbolic of the ability of a small number to defeat efforts of the whole. The significance of the rule of consensus to countries that worry about being marginalized in the UNFCCC negotiations is summed up in an article in the Times of India. Reporting on the perceived collapse in the 2012 Doha negotiations: “of the most basic principle of UN climate negotiations in Doha—that all decisions should be taken only with complete consensus of . . . countries party to the convention,”<sup>27</sup> the article characterized consensus as long ensuring “that the concerns of even the economically and geopolitically less influential countries are not lost.”<sup>28</sup> The threat inherent in consensus—blocking decisions—is an obvious tool to keep issues in play.

Consensus has been defined through ad hoc decisions at the point when Conferences of the Parties (“COPs”) have been presented with major decisions. In several COPs, objections to proposed actions have been gaveled through or overridden, allowing a result to be reached despite a small handful of objections. Perhaps the most famous example of such an override occurred in 1995, when then-minister Angela Merkel, chairing the conference, decided that the Berlin Mandate, a precursor to the Kyoto Protocol, should be adopted despite Saudi objections.<sup>29</sup> In Cancun’s COP, Bolivia’s objections were similarly ignored.<sup>30</sup> On

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26. See generally Sophie Yeo, *African Countries Demand \$7 Billion for Green Fund by December*, RTCC GLOBAL CLIMATE CHANGE NEWS & ANALYSIS (Oct. 14, 2010), <http://www.rtcc.org/2014/10/07/african-countries-demand-7-billion-for-green-fund-by-december>.

27. Nitin Sethi, *India, Developing Nations Worried Over Consensus Bering Buried in Climate Talks*, TIMES OF INDIA, Dec. 17, 2012, available at [http://articles.timesofindia.indiatimes.com/2012-12-17/global-warming/35868125\\_1\\_climate-talks-doha-talks-doha-round](http://articles.timesofindia.indiatimes.com/2012-12-17/global-warming/35868125_1_climate-talks-doha-talks-doha-round).

28. *Id.*

29. Alex Morales, *Warming Talks Risk Fizzling With Disorder on the Dais*, BLOOMBERG (Nov. 11, 2013), <http://www.bloomberg.com/news/2013-11-11/global-warming-talks-risk-fizzling-as-rules-snarl-debate.html>.

30. John C. Rudolf, *In Cancún, a Roar of Indignation From Bolivia*, N.Y. TIMES, Dec. 10, 2010, available at <http://green.blogs.nytimes.com/2010/12/10/in-cancun-a-roar-of-indignation-from-bolivia> (stating that Bolivia argued for larger emissions reductions and against carbon markets).

the other hand, opposition by two politically weak countries, Bolivia and Sudan, was deemed sufficient to block adoption of the Copenhagen Accord (2009),<sup>31</sup> where some criticized the presiding chair for allowing those objections to derail decisions that a large number of world leaders had agreed upon.<sup>32</sup>

Although there has been ongoing concern about how this rule has been managed, the gavel-through approach explicitly became an issue in 2013. Russia, Ukraine, and Belarus denounced the rule as “too vague” after they were overruled at UN talks in Qatar in 2012.<sup>33</sup> The three countries requested clearer rules for UNFCCC decision-making, presumably rules that give more deference to dissenters.<sup>34</sup> The full consequence of this request may not be known for some time, but various parties and observers have expressed fear of the impact of this opposition on the hoped-for 2015 agreement, which is the current target of negotiations.<sup>35</sup>

One conclusion from this is that there may be too many parties to get to consensus-based decisions that might mitigate greenhouse gas emissions. Overriding the objections of a handful of countries, peripheral to solving the core issues of greenhouse gas emissions, might be an implicit recognition of the value of narrowing issues and negotiating with parties who can do the most to solve them. In the words of the Mexican Presidency, “I cannot disregard the position and wish of 193 other parties, hence the decision has been duly adopted.”<sup>36</sup> Whether the UNFCCC can continue to follow the Mexican logic might depend on who is objecting relative to the task at hand. Overriding Bolivia and Sudan in Copenhagen, two countries that contribute relatively little to greenhouse emissions, when a key actionable part of the accord had to do with reduction commitments by major greenhouse gas producer-states, could be entirely rational.

On the other hand, it might be harder to gavel down a major power or key actor. And if the desired outcome or end point is concrete results from an agreement and concrete actions such as emission reductions or protection of forests, it would seem wise not to override a party critical to obtaining that result. Masking fundamental differences in intention can have repercussions in future negotiations and implementation stages.

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31. *Copenhagen Accord Not Enough to Address Climate Change*, INT’L CTR. FOR TRADE AND SUSTAINABLE DEV., Feb. 1, 2010, <http://www.ictsd.org/bridges-news/bridges/news/14-copenhagen-accord-not-enough-to-address-climate-change>.

32. Antto Vihma, *A Climate of Consensus: The UNFCCC Faces Challenges of Legitimacy and Effectiveness*, FINNISH INST. FOR INT’L AFF. (March 2011), [http://www.fiia.fi/assets/publications/UPI\\_Briefing\\_Paper\\_75.pdf](http://www.fiia.fi/assets/publications/UPI_Briefing_Paper_75.pdf).

33. Andrew Allan, *Russia Challenges Consensus Rule at Heart of U.N. Climate Talks*, REUTERS (June 14, 2013), <http://in.reuters.com/article/2013/06/014/climate-russia-idINDEE95D08A20130614>.

34. *Id.*

35. *See, e.g.*, CLIMATE STRATEGIES, <http://climatestrategies.wordpress.com/home> (last visited Nov. 9, 2014); *see also* Vihma, *supra* note 32.

36. *Id.*

More than twenty years of practice have been conducted under the assumption and ground rules that every party can and must have an opinion on issues that fundamentally require changes in the practices of a more limited number of parties. One factor in a path to substantive progress might be to narrow negotiations to the actual parties that can make a difference or initiate specialized agreements either within or outside the UNFCCC frame.

### III. THE PROBLEM OF AN OVERBURDENED AGENDA: DO NEGOTIATIONS BITE OFF MORE THAN CAN BE CHEWED?

Each of many issues before the UNFCCC would by itself constitute an unusual test of human problem-solving skills and a worthy goal. The issues are more elaborate than the already complex tasks of setting a global goal for reducing global emissions and working out the emission reduction responsibilities of developed and developing countries. Indeed, the many tasks before the UNFCCC beyond GHG emission reductions aim to: (1) consider the multiple and interlocking ways that greenhouse emissions happen and are modulated by natural processes; (2) reconcile the differences among parties, including those committed to the Kyoto Protocol and its specific tools and reduction commitments, and those who have resisted or withdrawn from it; (3) strengthen the adaptive capacities of the most vulnerable and provide vulnerable populations with protection against loss and damage from climate change; (4) provide financial and other support to developing country mitigation actions; (5) consider the issues of "climate justice," so that the burdens and benefits of climate change are fairly shared, in response to those who fear that solutions worked out in the UNFCCC will negatively impact poor and vulnerable peoples; (6) work out the structure for and provide long-term financial support to developing nations; (7) fight deforestation; and (8) make technology available to "enable clean energy investments and sustainable growth in developing countries."<sup>37</sup>

There is a constituency for every one of these issues. That they are all admirable goals should not prevent the international community from asking whether putting them all together, an increasingly decorated Christmas tree of virtuous but complicated-to-resolve issues, might be decreasing the chances of resolving any single one of them in a reasonable period of time. The UNFCCC may not be the right place to resolve enduring and very difficult issues of equity or deforestation. Even if it is the right place, perhaps there is a way to prioritize issues or act opportunistically to begin to make even small amounts of progress, particularly on core issues such as reductions in greenhouse gas emissions.

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37. *The Doha Climate Gateway*, UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, [http://unfccc.int/key\\_steps/doha\\_climate\\_gateway/items/7389.php](http://unfccc.int/key_steps/doha_climate_gateway/items/7389.php).

#### IV. THE DIFFICULTY IN DEFINING A STANDARD OF SUCCESS: ARE NEGOTIATIONS TOO FOCUSED ON RATIFICATION?

It is not surprising that a group of people who understand the implications of climate science for human health and welfare would be interested in developing an agreement that places real demands on the parties. Negotiators want the highest level of assurance that commitments will be followed, the catch phrase being “legally binding.” Ratification is the process by which some countries become formally bound and incorporate provisions into their domestic law. Non-binding agreements typically do not require this additional step.

Under this view, a ratified regime shows the highest level of political intent and thus increases the probability of implementation. Proponents believe that these formalities result in better implementation and compliance and that the consequent binding obligations “may also allow for legal challenges and give civil society additional leverage to hold their governments accountable.”<sup>38</sup> According to the Mary Robinson Foundation, legally binding commitments tend to be subject to more thorough negotiation and preparation processes.<sup>39</sup> Hare et al., posit that legal form is “an indicator of the likelihood of [commitment] fulfillment,” providing enhanced confidence in making and delivering commitments and facilitating domestic implementation.<sup>40</sup> Even when arguing for diversifying the approaches addressing climate change, Bodansky and Diringer take the position that in the long-run, a legally-binding agreement “makes sense.”<sup>41</sup>

How is this position squared with research indicating that formal adoption is far from a guarantee of treaty effectiveness? Some time ago, Jose Goldemberg cautioned that “history is littered with international agreements that took many years to negotiate but were never implemented,”<sup>42</sup> and James K. Sebenius, whose specialty is complex negotiations, warned that “[a]dvocates of international cooperation on climate change should bear in mind the distinction between success measured by the ratification of diplomatic instruments and actual policy shifts implemented over time.”<sup>43</sup>

Also bear in mind that the very act of negotiating and signing a convention means different things to different countries. For some, including the United

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38. Foundation for International Environmental Law and Development, *Briefing Note on the Legal Form of a New Climate Agreement*, MARY ROBINSON FOUNDATION—CLIMATE JUSTICE 2 (Feb., 2012) available at [http://www.mrfcj.org/pdf/Briefing\\_Note\\_on\\_the\\_legal\\_form\\_of\\_a\\_new\\_climate\\_agreement.pdf](http://www.mrfcj.org/pdf/Briefing_Note_on_the_legal_form_of_a_new_climate_agreement.pdf).

39. *Id.*

40. William Hare et al., *The Architecture of the Global Climate Regime: a Top-down Perspective*, 10 CLIMATE POL'Y 600, 606 (2010), available at <http://courses.washington.edu/pbaf595/Readings/Hare2010.pdf>.

41. DANIEL BODANSKY & ELLIOT DIRINGER, *THE EVOLUTION OF MULTILATERAL REGIMES: IMPLICATIONS FOR CLIMATE CHANGE* 23 (2010), available at <http://www.c2es.org/docUploads/evolution-multilateral-regimes-implications-climate-change.pdf>.

42. José Goldemberg, *The Road to Rio, NEGOTIATING CLIMATE CHANGE: THE INSIDE STORY OF THE RIO CONVENTION* 184 (Irving M. Mintzer & J. Amber Leonard eds., 1994).

43. *Id.* at 315.

States, ratification puts the matter ratified squarely on the domestic agenda with legal force, as is the case when treaty ratification has constitutional consequences. For others, it is more symbolic and requires further domestic legal implementing action.<sup>44</sup> Parties bring a variety of motivations to their very participation, some of which may have little to do with the subject matter, as Russia did when it used participation in certain international environmental agreements to advance a broader political agenda.<sup>45</sup>

History and experience tell us that there is always the danger that requirements might be honored selectively, defeating the purpose of setting out a comprehensive approach and defeating belief in ratification. As an example, the Russian government has invoked domestic environmental rules to discipline companies and individuals showing more independence of mind than they like in an exercise commonly called “rule by law” (as contrasted with rule of law). Thus, a way to gain more control over a valuable asset such as an oil company is to invoke, “selectively and manipulatively,” environmental requirements, which have otherwise been ignored and have nothing to do with the actual dispute between the government and the company.<sup>46</sup> And, even achieving signature of an agreement plus formal ratification may not carry guarantees, as Canada’s actions in renouncing the Kyoto Protocol have shown.<sup>47</sup> Politics change. With a new government, Australia is backing out of what seemed like firm domestic greenhouse gas commitments.<sup>48</sup>

Furthermore, emphasis on achieving ratification and a formal process might be bad tactically. Parties may sacrifice critical specificity to get to an agreement that

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44. See, e.g., Peter Malanczuk, *Source of International Law*, in AKEHURST’S MODERN INTRODUCTION TO INTERNATIONAL LAW 35, 45 (1997), available at [http://www.academia.edu/2440951/Peter\\_Malanczuk\\_Akehurst\\_s\\_Modern\\_Introduction\\_to\\_International\\_Law\\_Seventh\\_edition\\_1997](http://www.academia.edu/2440951/Peter_Malanczuk_Akehurst_s_Modern_Introduction_to_International_Law_Seventh_edition_1997). But see, *How International Labour Standards are Used*, INTERNATIONAL LABOR ORGANIZATION, <http://ilo.org/global/standards/introduction-to-international-labour-standards/international-labour-standards-use/lang—en/index.htm> (last visited Nov. 9, 2014) (“International labour standards are primarily tools for governments which, in consultation with employers and workers, are seeking to draft and implement labour law and social policy in conformity with internationally accepted standards . . . . Still others ratify ILO conventions fairly quickly and then work to bring their national law and practice into line . . . . For such countries, ratification is the first step on the path to implementing a standard . . . . Sources of international law applied at the national level: In numerous countries ratified international treaties apply automatically at the national level . . . .”).

45. See, e.g., Robert G. Darst, *Smokestack Diplomacy: Cooperation and Conflict in East-West Environmental Politics* (2001) (examining why USSR engaged with various environmental treaties including the 1979 Convention on Long-Range Transboundary Air).

46. With respect to Russia’s selective enforcement of environmental laws, see for example, Sander Goes, *Foreigners in the Russian petroleum sector: the cases of Sakhalin-II and TNK-BP*, Doctoral thesis submitted for the degree of PhD, Faculty of Humanities, Social Sciences and Education, University of Tromsø, February 2013, available at <http://munin.uit.no/bitstream/handle/10037/5348/thesis.pdf?sequence=2>.

47. Suzanne Goldenberg, *Canada Reveals Climate Stance with Praise for Australian Carbon Tax Repeal*, THE GUARDIAN, Nov. 17, 2013, available at <http://www.theguardian.com/environment/2013/nov/13/canada-climate-australia-carbon-tax>.

48. Andrew Probyn, *Carbon Tax Fight Takes Shape*, THE WEST AUSTRALIAN, Sept. 9, 2013, available at <http://au.news.yahoo.com/a/18836203/carbon-tax-fight-takes-shape/>.

has a chance of widespread ratification. Victor and Skolnikoff of the IIASA study concluded that,

[H]igh compliance with international environmental commitments often reflected . . . that the commitments were fairly trivial . . . [and] the effectiveness of those commitments in lessening environmental problems was also low . . . . As efforts to tackle environmental problems have intensified . . . commitments have become more demanding and thus the incentives to cheat have grown.<sup>49</sup>

Finally, there is a major consideration that cannot be ignored for those who pin their hopes on ratification: the dismal prospect of U.S. ratification. That the Convention on the Rights of Persons with Disabilities,<sup>50</sup> an agreement explicitly patterned on pioneering U.S. laws, failed to attain U.S. Senate approval is a strong signal that the current Senate is uncomfortable with any formal international commitments, much less a highly controversial one.<sup>51</sup>

Does a focus on ratification obscure other pathways toward compliance? The United Nations Convention on the Law of the Sea was not adopted in the U.S., but has arguably become customary law adopted into general practice.<sup>52</sup> President Obama's voluntary Copenhagen commitment to a 17% reduction by 2020<sup>53</sup> apparently will be met because his administration has the willpower to make it happen, despite Congressional resistance.<sup>54</sup> Both demonstrate the possibility of making progress toward climate goals without the formality of ratification.

#### V. THE NEED TO CONSIDER NEGOTIATION PARAMETERS: IS THE UNFCCC NEGOTIATING FRAMEWORK FLEXIBLE ENOUGH TO ADDRESS CHANGING CONDITIONS AND NEW LEARNING?

One lesson from past decades is how little was really understood about the climate threat and the limitations on predicting changes in the governments and

49. David G. Victor & Eugene B. Skolnikoff, *Translating Intent into Action: Implementing Environmental Commitments*, ENVIRONMENT: SCIENCE AND POLICY FOR SUSTAINABLE DEVELOPMENT, available at <http://www.tandfonline.com/doi/abs/10.1080/00139157.1999.10544061>.

50. See generally Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106, U.N. Doc. A/RES/61/106, available at <http://www.un.org/disabilities/convention/full.shtml>.

51. Jennifer Steinhauer, *Dole Appears, but G.O.P. Rejects a Disabilities Treaty*, N.Y. TIMES, Dec. 9, 2014, available at <http://www.nytimes.com/2012/12/05/us/despise-doles-wish-gop-rejects-disabilities-treaty.html?module=Search&mabReward=relbias%3Aw%2C%7B%221%22%3A%22R1%3A10%22%7D>.

52. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW V, INTRO. NOTE (1987).

53. The U.S. announced a target to reduce emissions in the range of 17 percent below 2005 levels by 2020, 42 percent below 2005 levels by 2030, and 83 percent below 2005 levels by 2050. These targets were aligned with the energy and climate legislation passed by the House of Representatives, which was never passed into law. See *From Copenhagen Accord to Climate Action: Tracking National Commitments to Curb Global Warming*, NAT'L ENVTL. DEFENSE COUNCIL, nrdc.oeg, <http://www.nrdc.org/international/copenhagenaccords/> (last visited Dec. 22, 2014).

54. Dallas Burtraw and Matt Woerman, *US Status on Climate Change Mitigation*, (Res. For The Future, Discussion Paper No. RFF DP 12-48, 2012), available at <http://www.rff.org/RFF/Documents/RFF-DP-12-48.pdf>.

institutions that must act to address it. Successive Intergovernmental Panel on Climate Change (“IPCC”) reports have used current knowledge to sharpen up and nail down, as much as possible, the rapidly evolving science. The reduction targets set some time ago have been eclipsed by a deepening comprehension of climate change science and an enhanced understanding of the dynamics of the climate change process. Further surprises are also inevitable.

Institutionally, this is a very different world with unexpected major players than was assumed in 1992 when the process began. Countries—notably China and India—then not even thought to be industrialized, are now significant contributors to GHG accumulation. The balance of power, and their very importance to obtaining resolution, is shifting among nations that must come to agreement.

Inevitably in multi-decade negotiations dynamics change, as they will with massive numbers of parties and intensifying challenges. It is fair to ask whether the current model of a convention is flexible and nimble enough to adapt to new information and changed conditions and address them, as well as what might be done to develop an agreement that can adjust to accommodate unexpected changes. The fundamental question should be: how can the international community make sure that negotiations account for the conditions of the world as they actually are, rather than the outdated reality of previous years?

The Convention on International Trade in Endangered Species (“CITES”)<sup>55</sup> was thought to be a modestly successful agreement, in part because parties were required to designate a “Management Authority” (to grant import and export permits) and at least one “Scientific Authority” (to determine whether trade in a particular species is detrimental to its survival).<sup>56</sup> Lately, however, demand for endangered species has exploded. The suppliers are often rebel and armed groups in Africa and elsewhere who kill and sell endangered animals to buy weapons and fund their activities.<sup>57</sup> They cater to a voracious Chinese appetite for “medicines” concocted with exotic wild animals.<sup>58</sup> Poaching on a huge scale to respond to the demand for ground rhino horn to cure cancer—at a reward of up to \$65,000 a

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55. See *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, March 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243, available at <http://www.cites.org/eng/disc/E-Text.pdf>.

56. Kevin D. Hill, *The Convention on International Trade in Endangered Species: Fifteen years Later*, 3 LOY. L.A. INT'L & COMP. L. REV. 231, 234 (1990), available at, <http://digitalcommons.lmu.edu/cgi/viewcontent.cgi?article=1215&context=ilr>.

57. Jeffery Gettleman, *Elephants Dying in Epic Frenzy as Ivory Fuels Wars and Profits*, N.Y. TIMES, Sept. 3, 2012, available at [http://www.nytimes.com/2012/09/04/world/africa/africas-elephants-are-being-slaughtered-in-poaching-frenzy.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2012/09/04/world/africa/africas-elephants-are-being-slaughtered-in-poaching-frenzy.html?pagewanted=all&_r=0); see also *Zimbabwe: 81 Elephants Killed*, N.Y. TIMES, Sept. 25, 2013, at A10, available at <http://www.nytimes.com/2013/09/25/world/africa/zimbabwe-81-elephants-killed.html?src=recg> (“Zimbabwean authorities say at least 81 elephants have been killed for their ivory tusks by poachers using cyanide poison in water holes in a vast western national park . . .”). See generally INT'L FUND FOR ANIMAL WELFARE, CRIMINAL NATURE: THE GLOBAL SECURITY IMPLICATIONS OF THE ILLEGAL WILDLIFE TRADE (2013), available at [http://www.ifaw.org/sites/default/files/ifaw-criminal-nature-2013-low-res\\_0.pdf](http://www.ifaw.org/sites/default/files/ifaw-criminal-nature-2013-low-res_0.pdf).

58. *Id.*

kilogram (around \$29,500 a pound)<sup>59</sup>—is decimating the populations that CITES seeks to protect. The same suppliers serve the demand for ivory in China, the U.S., and elsewhere.<sup>60</sup> The confluence of demand, and strong motivations to service that demand, have eroded the tools CITES has to offer.

The inability of CITES to manage this crisis is also a cautionary note to the climate negotiations. What seemed on its surface to be an environmental issue may actually be reflective of other festering issues in society. If this is correct, it may be a waste of time for the international community only to try to fix the treaty. It may be more productive to focus its attention on the forces that drive demand. Poaching rare animals in the wild, for example, may be only partially an environmental matter. The more fundamental issues might be intertwined with security, health, aesthetics, and culture. Most importantly, it is entirely possible that, if these intertwined issues are addressed only in the context of CITES, other opportunities that may better address the fundamentals that drive poaching may be missed. For example, the beginning of an alternative approach might focus on changing perceptions of the medical uses, or addressing the tensions that allow warlords to flourish.

We face analogous challenges in spades in the reality of the build-up of GHGs. Ultimately, GHG mitigation is about confronting the sheer dimensions and interconnectedness of how and why humans use energy. The negotiations are about limiting emissions, but more fundamentally, among other things, about how human beings live, house, transport and feed themselves; and produce the goods and services on which they depend. The negotiations are also about forests that can ameliorate emissions; the harm emissions impose on populations, especially the disadvantaged; and fairness to people who have not enjoyed the benefits of a high-carbon lifestyle but who suffer its impacts. The UNFCCC may not be the right or the most productive platform to address and resolve all of these complex factors.

#### VI. THE PROBLEM OF CIRCUMSCRIBING CLIMATE CHANGE TO THE ENVIRONMENTAL GHETTO: DO CLIMATE NEGOTIATIONS HAVE THE WRONG NEGOTIATORS TO GET THE RIGHT ATTENTION?

The world started off under the apparent assumption that climate change is an environmental issue. With a much deeper understanding, it is more accurately, as noted above, a vast, interconnected challenge at many levels involving energy,

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59. U.N. OFFICE ON DRUGS & CRIME REG'L OFFICE FOR S. AFR., *Bulletin on Organised Crime in Southern Africa: Rhino Poaching in Southern Africa*, Issue Jan., 2012, at 5, available at [http://www.unodc.org/documents/southernafrica/Bulletin\\_on\\_organised\\_crime\\_in\\_Southern\\_Africa/UNODC\\_ROSAF\\_-\\_Bulletin\\_on\\_Organised\\_Crime\\_in\\_Southern\\_Africa\\_-\\_Issue\\_1.pdf](http://www.unodc.org/documents/southernafrica/Bulletin_on_organised_crime_in_Southern_Africa/UNODC_ROSAF_-_Bulletin_on_Organised_Crime_in_Southern_Africa_-_Issue_1.pdf).

60. 'Blood Ivory' Worth \$10bn to Be Crushed by US Officials, THE GUARDIAN, Nov. 14, 2013, available at <http://www.theguardian.com/environment/2013/nov/14/blood-ivory-stock-crush-us>.

food security, health, financial and security interests, cultural norms, national expectations, and the potential for outlaws to either take advantage of the system or work around it. This is an important issue for problem solving and, as I learned when I worked at the State Department, there is a foreign policy pecking order. The guardians of the current climate negotiations have been the environment/climate change community, but since it is characterized as an environment issue, climate falls low on the foreign policy world's priority list.<sup>61</sup> Foreign ministries, including the U.S. Department of State, implicitly prioritize political and security concerns; they respond to threats in the headlines and people carrying guns in the streets.<sup>62</sup>

Foreign ministries and people managing international relations have greater difficulty with the sustained attention needed for slowing evolving threats. The substantive area of "the climate" continues to reside in what I have called the "environment ghetto." By this, I mean that labeling climate as an environmental issue confines it to a distinct place in the foreign policy world, often with distinct and generally lower-level actors managing the negotiations—in effect isolating the issue. I believe this to be true, even acknowledging that representatives of "power" ministries have participated in important COPs and that well over 100 world leaders attended the Copenhagen negotiations and, more recently, the Secretary General's Climate Summit.<sup>63</sup>

Drawing negotiating lessons from the weapons world might help shift the conversation to an arena that officials who manage security better understand. They know and respect issues with geopolitical consequences and great potential dangers, but they generally do not believe that threats to the environment fall into that category.<sup>64</sup> This is starting to change; clearly, significant parts of the defense community are convinced that climate change has widespread ramifications and acts as a threat multiplier of their usual risks.<sup>65</sup>

Many of the wider issues, including that the negotiations involve the natural systems upon which humans rely for every aspect of life, are part of the

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61. See generally Bell & Blechman, *A Course Adjustment for Climate Talks*, *supra* note 7.

62. See Patrick Kevin Day, *Jon Stewart reveals threat deadlier than Islamic State, Ebola combined*, L.A. TIMES, Oct. 3, 2014, available at <http://www.latimes.com/entertainment/tv/showtracker/la-et-st-jon-stewart-daily-show-20141003-story.html> (providing a humorous but accurate take on prioritizing risk).

63. See U.N. CLIMATE SUMMIT 2014, <http://www.un.org/climatechange/summit/> (last visited Dec. 22, 2014).

64. See Bell & Blechman, *A Course Adjustment for Climate Talks*, *supra* note 7.

65. See GEN. GORDON SULLIVAN ET AL., *National Security and the Threat of Climate Change*, CNA CORP., 2007, available at <http://www.cna.org/sites/default/files/news/FlipBooks/Climate%20Change%20web/flipviewerexpress.html> (last visited Nov. 17, 2013) (providing detailed reports about the ramifications of climate change); CENTRA TECH., INC., & SCITOR CORP., *2010 Conference Reports: the Impact of Climate Change to 2030: Southeast Asia, Mexico Caribbean Central America & 2009 Conference Reports: the Impact of Climate Change to 2030: Russia, North Africa, India, and China*, NAT'L INTELLIGENCE COUNCIL, available at <http://www.dni.gov/index.php/about/organization/national-intelligence-council-nic-publications> (last visited Nov. 17, 2013); JOHN D. STEINBRUNER, ET AL., CLIMATE AND SOCIAL STRESS: IMPLICATIONS FOR SECURITY ANALYSIS, NAT'L RESEARCH COUNCIL, 2013.

UNFCCC negotiations but subsumed under the climate (and therefore the environment) banner. It would be worth knowing whether reframing climate as the multifaceted threat it actually is would give this issue a fighting chance of getting the attention it needs in governments that think the environment is not an issue for power politics. Might attracting new voices to the discussion help break down the insularity of this group, which has been convening essentially since the Rio Conference in 1992? The current group of negotiators and supporting institutions might be too locked into current assumptions to be open to new opportunities and perspectives. Any group of people that meets continuously over decades to try to solve defined problems will develop a common language, culture, and unique reference points. This history may be an asset, but it also may be a liability if it creates a closed system, impervious to alternatives. This group may be too committed to climate as an environmental issue to be able to countenance broadening the discussion.

Evidence of this phenomenon is that the commitments forged by 115 world leaders at the fifteenth COP at Copenhagen to hold warming to 2° C and to record individual country mitigation actions<sup>66</sup> did not initially fit the expectations of much of the climate negotiating community for the desired “legally binding result.” An opportunity may have been lost, as the attention of world leaders drifted off. We will never know whether there might have been some way to better take advantage of what looked like the beginning of high-level support for action. Instead, after much angst, pieces of the Copenhagen agreement were eventually incorporated into the very long work agenda that came out of Cancun’s COP one year later.

A more adventurous and possibly effective approach might be to hand negotiating responsibility to the current equivalent of power-negotiator Richard Holbrooke, who was routinely assigned to high-profile tasks such as ending the Bosnian war. Alternatively, the Secretary of State could employ shuttle diplomacy, in which a negotiator goes back and forth between principals to hasten agreement on difficult issues, to demonstrate urgency. Perhaps more emphasis on the geopolitical ramifications and great potential dangers from this existential threat to humans might receive better attention than an environmental framing. There was a time when controlling nuclear weapons was a similarly fuzzy subject largely promoted by do-gooders.

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66. U.N. Framework Convention on Climate Change, *Copenhagen Climate Change Conference- Dec. 2009*, [http://unfccc.int/meetings/copenhagen\\_dec\\_2009/meeting/6295.php](http://unfccc.int/meetings/copenhagen_dec_2009/meeting/6295.php) (“The Copenhagen Climate Change Conference raised climate change policy to the highest political level. Close to 115 world leaders attended the high-level segment, making it one of the largest gatherings of world leaders ever outside UN headquarters in New York.”).

VII. THE UNRELIABILITY OF FOCUSING ON MARKET-BASED APPROACHES TO REDUCING GHG EMISSIONS: DO NEGOTIATORS HAVE AN UNCRITICAL BELIEF IN ECONOMICS AND THE ROMANCE OF MARKETS?

In 1997, in Kyoto, Japan, negotiators set emission targets and a timetable for capping and then gradually reducing GHG emissions, coupled with international emissions trading.<sup>67</sup>

Kyoto also established the mechanisms for doing this—straight out of the economist's playbook. Enchanted with the idea that environmental protection could be effective and economically efficient, the theory developed that polluters could be motivated to put environmental controls in place on the basis of self-interest if they were allowed to trade their pollution in an open market.

I personally saw how these ideas were promoted to manage other forms of pollution when I lived and worked in Poland during the economic transition. All of the Soviet bloc countries had environmental laws on the books; very few of these laws had any impact on practice, with very bad consequences for pollution control.<sup>68</sup> People with little experience with functioning legal systems—and huge disillusionment with the practices of their former Soviet rulers—wanted new ideas. They were besotted with capitalism, although, in many cases, they did not understand it very well. The economists contrasted their market approaches with what they characterized as “command and control,” thus cleverly tapping into the frustrations of experience with command economies. In my view, some dishonestly suggested that environmental laws and regulations were equivalent to Soviet-style directives.<sup>69</sup>

As to whether these market-driven ideas could work, advocates pointed to the market-based policy instruments that in the United States are used to control emissions of sulfur dioxide (SO<sub>2</sub>) and nitrogen oxides, as well as a large body of theoretical work.<sup>70</sup> In Kyoto, “flexible mechanisms” were adopted as the solution to global GHG emissions.<sup>71</sup> Participants could meet their targets by purchasing emission credits rather than making reductions themselves. Those that have an

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67. Kyoto Protocol to the United Nations Framework Convention on Climate Change, art. 3-4, 6, 12, adopted Dec. 11, 1997, 37 I.L.M. 22.

68. See Bell, *Environmental Law*, *supra* note 18, at 10598-10600.

69. See generally Ruth Greenspan Bell, *Exporting Environmental Protection*, 23 ENVTL. L. REP. 10701 (1993); Bell, *Environmental Law*, *supra* note 18; Ruth Greenspan Bell, *Industrial Privatization and the Environment in Poland*, 22 ENVTL. L. REP. 10092 (1992).

70. Ruth Greenspan Bell & Clifford Russell, *Ill-Considered Experiments*, 24 HARV. INT'L REV. 20 (2003).

71. Kyoto Protocol to the United Nations Framework Convention on Climate Change, art. 3-4, 6, 12, adopted Dec. 11, 1997, 37 I.L.M. 22; see also Ruth Greenspan Bell, *What To Do About Climate Change*, FOREIGN AFF., May-June 2006, at 105, 107 [hereinafter Bell, *What To Do*]; Ruth Greenspan Bell, *Market Failure*, ENVTL. FORUM, March/April 2006, at 28, 28 [hereinafter Bell, *Market Failure*]; Ruth Greenspan Bell, *The Kyoto Placebo*, ISSUES IN SCI. AND TECH., Winter 2006, at 28, 28 [hereinafter Bell, *Kyoto Placebo*]; Ruth Greenspan Bell, *No Magic Solutions: What is Wrong with Current Plans to Manage Climate Change*, RESOURCES, Fall 2005, at 11, 11.

easier time controlling their emissions may sell credits to those experiencing greater difficulty or higher costs. The Clean Development Mechanism (“CDM”) facilitated trading with the developing world.<sup>72</sup> Joint Implementation allowed a “donor” country to invest in pollution abatement measures in a “host” country in return for emission credits.<sup>73</sup> All this was predicated on the assumption that the industries and practices of the developing world were greatly more inefficient and cheaper to fix than those in the developed world. In theory, this emissions market would allow participating countries to meet their CO<sub>2</sub> goals, with minimal disruption to their economies.

There were many reasons at the time to believe this could not work.<sup>74</sup> A trading system of this breadth, crossing national borders, had never been tried before. Experience in even the United States was limited, to say the least. And the U.S. program was far from laissez-faire. Its integrity rested on strict requirements, strong reliable enforcement, and mandated monitoring of pollutants with results sent via computer to the Environmental Protection Agency (“EPA”) headquarters in Washington.<sup>75</sup> The acid rain program’s basic regulatory demands—a steady decrease of emissions over time—were nonnegotiable, regulated down to small details and vigorously enforced.<sup>76</sup> Traders were required to use elaborate accounting measures and work in such complete transparency that transactions were tracked on the EPA website.<sup>77</sup> As this illustrates, an environmental credits market in fact requires as much, if not more, infrastructure and regulatory oversight as conventional pollution control methods. The SO<sub>2</sub> program also depended on often uniquely American laws, practices, and institutions.

Few if any of these conditions exist or existed in the many countries expected to participate in global carbon markets.<sup>78</sup> This was, and in some cases still is, new territory for many governments and their regulated industries. Pollution trading, or market approaches, requires the quantification and monetization of difficult-to-capture intangibles and values. This market increasingly encompasses many aspects of the natural world that have impacts, positive or negative, on green-

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72. See UNEP COLLABORATING CTR. ON ENERGY AND ENV’T, *Introduction to the CDM*, UNITED NATIONS CONVENTION ON CLIMATE CHANGE, at 1, 9, 16, [https://unfccc.int/files/cooperation\\_and\\_support/capacity\\_building/application/pdf/unepcdmintro.pdf](https://unfccc.int/files/cooperation_and_support/capacity_building/application/pdf/unepcdmintro.pdf) (last visited Oct. 26, 2014).

73. UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, *Joint Implementation*, [http://unfccc.int/kyoto\\_protocol/mechanisms/joint\\_implementation/items/1674.php](http://unfccc.int/kyoto_protocol/mechanisms/joint_implementation/items/1674.php) (last visited Oct. 26, 2014).

74. See Bell, *What To Do*, *supra* note 71, at 108-09; Bell, *Market Failure*, *supra* note 71, at 28; Bell, *Kyoto Placebo*, *supra* note 71, at 28.

75. Bell, *What To Do*, *supra* note 71, at 108; Bell, *Market Failure*, *supra* note 71, at 30; Bell, *Kyoto Placebo*, *supra* note 71, at 29.

76. Bell, *What To Do*, *supra* note 71, at 108; Bell, *Market Failure*, *supra* note 71, at 30; Bell, *Kyoto Placebo*, *supra* note 71, at 29.

77. Bell, *What To Do*, *supra* note 71, at 108; Bell, *Market Failure*, *supra* note 71, at 30; Bell, *Kyoto Placebo*, *supra* note 71, at 29.

78. See Ruth Greenspan Bell, *Choosing Environmental Instruments in the Real World*, at 1, 8-11, 15-16, OECD.ORG, (Mar. 2003), available at <http://www.oecd.org/environment/cc/2957706.pdf>.

house gas loading into the atmosphere. New forests must be planted, but—and this took much negotiation—someone must be compensated for not felling trees. Think about the “values” of forests, both tangible and intangible: Is preserving the forest merely a matter of forgoing income from sending trees to be milled? Who, in any country, but particularly in a poor country, should be compensated for those values? And in such cases, how does one go about protecting these transactions from corruption, informal or institutionalized?

Even a seemingly straightforward task such as planting a forest to act as a CO<sub>2</sub> sink or carbon reservoir (i.e. using photosynthesis to remove carbon from the atmosphere by incorporating it into biomass) strains the competencies of some developing countries. For the forest to offset continuous CO<sub>2</sub> releases in some other part of the world, the trees will have to survive, thrive, and avoid being cut down for firewood or commercial use, or dying from lack of care. Someone must track the forest's capacity to absorb CO<sub>2</sub> and, as with any activity to reduce CO<sub>2</sub>, guarantee continuous, reliable reductions over many years. This demands a sustained attention to environmental performance that is notably lacking in much of the world.<sup>79</sup>

These are all obvious complications set in motion by decisions at Kyoto. Every one of these concerns has been explored and rehashed in the literature.<sup>80</sup> Experience has shown some significant problems, including perverse incentives and process defects that suggest the weaknesses of supposed safeguards against cheating.<sup>81</sup> Fundamentally, no trading system can operate independently of the prevailing government, or legal and economic culture. The scheme adopted in Kyoto absorbed huge amounts of planning time and other resources. Its results are debatable: there was systematic cheating,<sup>82</sup> and the system is currently functionally moribund. All of these considerations raise the question whether in putting so much reliance on market-based approaches to greenhouse gas control, a great deal of time has been lost that might have productively been spent developing more effective ways of controlling emissions.<sup>83</sup>

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79. See A.G. KABANETS, B.J. MILAKOVSKY & E.A. LEPESHKIN, *ILLEGAL LOGGING IN THE RUSSIAN FAR EAST: GLOBAL DEMAND AND TAIGA DESTRUCTION* 18 (D.Y. Smirnov, ed., Brian Milakovsky & Nikolay Shmatkov, trans., World Wildlife Federation, 2013).

80. Michael Wara, *Measuring the Clean Development Mechanism's Performance and Potential*, 55 *UCLA L. REV.* 1759, 1762-63, 1765, 1771 (2008).

81. See *id.* at 1764, 1784. See also Keith Bradsher, *Outsize Profits, and Questions, in Effort to Cut Warming Gases*, *N.Y. TIMES*, Dec. 21, 2006, available at [http://www.nytimes.com/2006/12/21/business/21pollute.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2006/12/21/business/21pollute.html?pagewanted=all&_r=0). A report by India's Center for Science and Environment (CSE) looked at two active CDM projects and concluded that it is impossible to check whether the transactions meet Kyoto standards because their terms are not transparent; that the projects may have been approved by Indian authorities on the basis of the prestige of the consultant that validated the projects rather than the projects' merits; and that certain conditions of the transactions are yet to be met, despite being specified in the project design document. CSE questioned whether the process or the results contributed to genuine sustainable development or the purposes of GHG reduction. See Bell, *Kyoto Placebo*, *supra* note 71, at 31.

82. Wara, *supra* note 80, at 1785-87, 1789.

83. Research by Margaret Taylor of Lawrence Berkeley National Laboratory suggests that cap and trade, as

Other research—found in the world of behavioral social sciences—suggests that such a strong emphasis on economic incentives may also have amounted to a bad behavioral bet. A market approach predicated on economic gain might distort human motivations in ways that might reduce the propensity for joint problem solving. The conventional wisdom, and a basic tenet of neo-classic economics, is that putting a dollar value on carbon emissions will cause behavior to change. Emissions trading (and carbon taxes) monetize significant aspects of climate controls and related activities, such as preserving or eliminating forest cover, on the assumption that doing so will motivate action. Behavioral research indicates a potentially different outcome.

As Nobel laureate Daniel Kahneman points out, introducing money as a motivation can produce “some troubling effects.”<sup>84</sup> It brings to the fore “a reluctance to be involved with others, to depend on others, or to accept demands from others.”<sup>85</sup> Reminders of money can override altruistic motivations. In other words, it may act to diminish or obliterate the very characteristics highly important to rallying people to pull together and even make sacrifices in times of crisis.

Renegade economist John Gowdy points to “findings from neuroscience and behavioral economics [that] indicate that money itself has some profound effects on how people feel and act in a variety of market and non-market situations.”<sup>86</sup>

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compared to traditional regulation, may suppress, rather than stimulate, technological innovation. Looking at the model U.S. SO<sub>2</sub> program she concludes:

[E]arly investments in clean technology adoption and invention will often turn out to be overvalued once trading begins. When this becomes clear to emissions sources and innovators, one logical effect should be reassessment of investment commitments. Supporting evidence for this has been documented in the case of SO<sub>2</sub> control under Title IV and for NO<sub>x</sub> control under RECLAIM, when emissions sources chose to cancel significant in progress clean technology installations . . . . The implication is that CTPs do not inherently provide sustained incentives for private sector R&D investments in clean technologies, but may add to the uncertainty inherent in inventive activity. This effect is worth noting, given the likely importance for long-term climate stabilization of capturing the potential of R&D to create and improve clean technologies, as well as develop scientific personnel and organizational innovative capacity.

Margaret R. Taylor, *Innovation Under Cap-And-Trade Programs*, PROCEEDINGS OF THE NAT'L ACAD. OF SCIS. OF THE UNITED STATES OF AM., vol. 109, no. 13, at 4808-09 (Hans Schellnhuber ed., Mar. 27, 2012).

84. DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* 55 (2001).

85. *Id.* at 56.

86. John Gowdy et al., *The Social Brain and the Diffusion of Pro-social Behavior: Background Paper for the Garrison Institute Climate, Mind, and Behavior Program*, GARRISON INST., at 8 (2011); see also John Cassidy, *Mind Games: What Neuroeconomics Tells Us about Money and the Brain*, THE NEW YORKER, Sept. 18, 2006, available at [http://www.newyorker.com/archive/2006/09/18/060918fa\\_fact](http://www.newyorker.com/archive/2006/09/18/060918fa_fact); Brian Knutson, Charles M. Adams, Grace W. Fong, and Daniel Hommer, *Anticipation of Increasing Monetary Reward Selectively Recruits Nucleus Accumbens*, 21 J. NEUROSCIENCE 1, 2 (2001); Samuel M. McClure et al., *Separate Neural Systems Value Immediate and Delayed Monetary Rewards*, 306 SCIENCE 503, 506 (2004); Spreckelmeyer, Katja N. et al., *Anticipation of Monetary and Social Reward Differently Activates Mesolimbic Brain Structures in Men and Women*, 4(2) SOC. COGNITIVE AFFECT NEUROSCIENCE 158, 158 (2001); Dathlenn D. Vohs, Nicole L. Mead, and Miranda R. Goode, *The Psychological Consequences of Money*, 314 SCIENCE 1154, 1156 (2006).

Money can be a “drug” as well as a tool:

[M]oney can apparently be a substitute for social interactions in some cases, and the presence of money can reduce social behavior including altruism [citing Lea & Webly] . . . . If money acts as a drug, then it may have the same effect on the brain as a natural motivator but may not have the same benefits . . . . Experiments suggest that the mere mention of money may make people more individualistic and less social [citing Vohs, Mead & Goode (2006)] . . . . The reasons for this behavior are unclear. It may mean that possessing money gives people more control over their own lives, making them less dependent on the charity of others. Or there may be something deeper going on. There may be biological as well as social reasons why people are so attracted to money [citing Knutson et al. (2001)].<sup>87</sup>

Commenting on the results of these and similar experiments, Fehr, Fischbacher, & Kosfeld (2005) write: “Such studies enable us to go beyond the prevailing ‘as if’ approaches in economics by uncovering the neural mechanisms behind individual decisions.”<sup>88</sup> Gowdy challenges the environmental policy community to consider that “in the long term, it may well be that neuroeconomic insights fundamentally change the current ‘preferences and beliefs’ approach that prevails in economics.”<sup>89</sup>

As the climate challenges deepen, it may well be that framing climate reductions as money-making propositions was not an entirely wise move. This suggests the need for developing an alternative toolbox to manage greenhouse gas emissions.

#### VIII. THE POTENTIAL OF SEGMENTING ISSUES OR OTHERWISE DEVELOPING NEW CONFIGURATIONS TOWARD AGREEMENT AND COOPERATION: IS THERE TOO MUCH FOCUS ON ONE-SIZE-FITS-ALL SOLUTIONS?

The experience with the Kyoto Protocol, and the assumption that all countries could effectively use market instruments to manage greenhouse gas emissions, whether or not they had the institutions and domestic history to support these tools, is one part of a larger question. All parties stand equal in the international negotiations, but there are major differences among them in their particular contributions to overall emissions, how they may be impacted, and their capacity to manage significant weather changes, among others. There are also meaningful differences in how they carry out international obligations; how they implement policy to manage domestic problem solving; and in their capacity, experience, and sometimes level of commitment, some of which were previously discussed.

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87. Gowdy, *supra* note 86, at 9.

88. Ernst Fehr et al., *Neuroeconomic Foundations of Trust and Social Preferences: Initial Evidence*, 4(2) AMER. ECON. R. 346, 350 (2005), available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2686229/>.

89. Gowdy, *supra* note 86.

But, as noted earlier, the UN negotiations model assumes that, at the end of the day, everyone involved can count on the requisite domestic steps to carry out an international accord. If domestic action is critical for the successful outcomes of international commitments, acknowledging these functional distinctions might change how the international community thinks about negotiations, and particularly about the importance of achieving a single agreement.

Rather than pretending 196 parties with 196 governance structures and different connections to the climate crisis all conduct business in the same way or are all equally essential in problem solving, an alternative could be more specifically crafted approaches. One strategy might be to pull apart the various issues, identify who is necessary to make progress on each of the issues, and narrow the negotiators on any specific issue. Negotiators must consider which parties really need to be at the table to come to a decision.

Only a handful of countries make significant greenhouse gas contributions. Perhaps they could work together to set goals and figure out how monitoring, reporting, and verification might work, either outside the framework of the UNFCCC or supplementing it. A series of smaller or more specific agreements could suit the needs of a subset of countries and thus, as observer Andrew Crawford said of economic global agreements, serve as “a vehicle for some countries to undertake deeper integration or liberalization regarding selected subjects . . . [despite] the unwillingness of other members to go along.”<sup>90</sup>

Narrowing down to bilateral arrangements can introduce even greater negotiating agility with more potentially productive outcomes than efforts seeking multi-party agreement. In the trade arena, bilateral deals have acted as a substitute, pilot, or complement to a global agreement.<sup>91</sup> Bilateral agreements or deals have also been significant in the nuclear context. Bilateral climate agreements could pilot efforts or experiments that fit the needs of the engaged countries, as seems to be the intent behind the China-U.S. agreement on GHG emission reductions announced in November, 2014.<sup>92</sup> Trust developed in all of these interactions can lay the ground for productive ad hoc actions, such as when the G8 pledged twenty billion dollars in 2002 to build down the former Soviet Union’s Weapons of Mass Destruction (“WMD”) infrastructure.<sup>93</sup>

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90. Andrew Confield, *Variable Geometry for the WTO: Concept and Precedents*, UNITED NATIONS CONF. ON TRADE AND DEV., Discussion Paper No. 171 (2004), available at <http://www.rff.org/RFF/Documents/RFF-DP-12-48.pdf>.

91. *World Trade Report 2011*, WORLD TRADE ORG. 6, available at [http://www.wto.org/english/res\\_e/publications\\_e/wtr11\\_e.htm](http://www.wto.org/english/res_e/publications_e/wtr11_e.htm).

92. See generally Ruth Greenspan Bell & Barry Blechman, *What Obama gets right about climate-change fight*, CNN (Nov. 17, 2014), <http://www.cnn.com/2014/11/14/opinion/bell-blechman-climate-obama/index.html> (last visited Jan. 14, 2015).

93. CTR. FOR STRATEGIC AND INT’L STUDIES, *ASSESSING THE G8 GLOBAL PARTNERSHIP: FROM KANASKIS TO ST. PETERSBURG 15* (July 2006), available at [http://csis.org/files/media/isis/pubs/060701\\_g8\\_global\\_partnership.pdf](http://csis.org/files/media/isis/pubs/060701_g8_global_partnership.pdf); THE ASPEN INST., *THE CHALLENGE OF PROLIFERATION 21* (Kurt M. Campbell ed., 2005), available at <https://www.aspeninstitute.org/sites/default/files/content/docs/asg/ASGChallengeTextwCOVER.pdf>.

The obvious fear is that major actors will sit out key negotiations. But if the history of weapons and trade agreements is believed, failure to engage is also not fatal. If certain powers want to sit on the sidelines, there is precedent for separating issues out and allowing fewer parties to introduce optional, plurilateral instruments, and/or for the possibility of others joining late or acting in parallel. Informal groupings can also take action. As trade expert Thomas Cottier notes, sometimes free riders can be ignored, if the major powers agree and form a critical mass.<sup>94</sup>

Alternative groupings can serve a different function related to developing realistic compliance tools. Groups of countries can work together to share experience and develop practice methods and compliance tools better suited to their unique circumstances. Emissions trading might work in some circumstances but in others, countries without the set of necessary conditions to make market instruments work might confer on how to improve their regulatory regimes or whether other kinds of policy tools or incentives exist more attuned to their governance traditions.

Reshaping and reconfiguring might also improve the possibility of being alert to domestic opportunities. When the Indian Supreme Court ordered commercial vehicles in Delhi to use compressed natural gas as their pollution-reducing fuel,<sup>95</sup> public interest lawyers quickly brought similar lawsuits to the highest courts in Pakistan and other neighboring countries.<sup>96</sup> The litigants in those other countries understood that even in a chaotic legal system, the rulings of their own supreme courts, as in India, were generally respected, and how that domestic dynamic might be used to break environmental deadlock.

Issue subgroups can be developed within or outside the UNFCCC and could individually facilitate reaching overall goals. Informal groupings can allow “economically and geographically crucial countries to meet”<sup>97</sup> and build a critical mass to resolve an impasse. These could be regional or by affinity or using some other standard.

Smaller scale agreements that, for example, segment out parts of larger challenges or work with a smaller number of countries for specific purposes can be used to pilot problem-solving ideas. A series of agreements on smaller parts of the overall global challenge can help build mutual confidence about the potential for success. As has been seen in the trade and weapons arena, bilateral deals may

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94. RUTH GREENSPAN BELL ET AL., BUILDING INTERNATIONAL CLIMATE COOPERATION: LESSONS FROM THE WEAPONS AND TRADE REGIMES FOR ACHIEVING INTERNATIONAL CLIMATE GOALS 1, 49 (Ruth Greenspan Bell & Micah S. Ziegler eds., 2012), available at [http://www.wri.org/sites/default/files/pdf/building\\_international\\_climate\\_cooperation.pdf](http://www.wri.org/sites/default/files/pdf/building_international_climate_cooperation.pdf) [hereinafter BELL, BUILDING INTERNATIONAL CLIMATE].

95. Ruth Greenspan Bell et al., *Clearing the Air: How Delhi Broke the Logjam on Air Quality*, 46 ENV'T 22, 29 (Apr. 2004).

96. See, e.g., JONA RAZZAQUE, PUBLIC INTEREST ENVIRONMENTAL LITIGATION IN INDIA, PAKISTAN, & BANGLADESH (Klewer Law International 2004).

97. BELL, BUILDING INTERNATIONAL CLIMATE, *supra* note 94, at 49.

substitute or complement a globalized system.<sup>98</sup> Interim approaches could demonstrate progress and build trust among countries until the time is right for wider agreements. Additionally, smaller groupings can be more opportunistic and flexible when unexpected events allow for more rapid movement. In the papers with Blechman and Ziegler, we examined how significant advancement was achieved in reducing nuclear threats between the United States and the Soviet Union. The long history of bilateral agreements, and the deep relationships that developed during those decades of discussion, provided an organizational foundation to secure nuclear weapons, at the point where they were put at risk by the unprecedented breakdown of the Soviet Union.<sup>99</sup>

Some interesting alternative groupings already exist for sharing ideas and technology: the Asia-Pacific Partnership on Clean Development and Climate (“APP”), the Major Economies Forum on Energy and Climate (“MEF”), and the G-20.<sup>100</sup> These and others might be made vehicles for discrete regulatory efforts that get the members of the group working on various greenhouse gas reduction projects.<sup>101</sup> Decoupling issues and outsourcing elements of the regime to specialized bodies is another way to catalyze progress. In a complex negotiation, ensuring that the regime has the agility to press forward with parts of the puzzle while other discussions stall is vital to meeting the overall objective. Moreover, as the weapons world demonstrates, outsourcing contentious and often technical issues to specialized agencies or to different venues can often lead to breakthroughs that are more difficult within a single, centralized process.

Keohane and Victor argue that diversification in the climate world already exists in the form of a “regime complex,” or “a loosely coupled set of specific

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98. *Id.* at 5.

99. See generally Bell & Blechman, *A Course Adjustment for Climate Talks*, *supra* note 7; Bell & Blechman, *How Much Did the Climate Talks in Durban Accomplish: Why More of the Same Could Be Dooming the Planet*, *supra* note 7; Bell et al., *Beyond the Durban Climate Talks*, *supra* note 7.

100. Launched in July 2005, the APP is a voluntary partnership among Australia, Canada, China, India, Japan, Korea, and the United States “cooperating in an effort to address increased energy needs and the associated issues of air pollution, energy security, and climate change.” See ASIA-PACIFIC PARTNERSHIP ON CLEAN DEVELOPMENT AND CLIMATE, *Frequently Asked Questions*, <http://www.asiapacificpartnership.org/english/faq.aspx> (last visited Nov. 2, 2014). The MEF, launched in March 2009 by President Obama but built on a previous organization, the MEM process, begun by President Bush, convenes 17 major economies in an effort to “to facilitate a candid dialogue among major developed and developing economies” and “advance the exploration of concrete initiatives and joint ventures that increase the supply of clean energy while cutting greenhouse gas emissions.” MAJOR ECONOMIES FORUM, <http://www.majoreconomiesforum.org/> (last visited Nov. 2, 2014). The G-20 was established in 1999 to address international economic matters and in 2009 was designated by its leaders to be “the premier forum for international economic cooperation.” While ostensibly economically focused, the G-20 has also studied, and might further address, climate change and energy issues. OECD, *OECD and the G20*, <http://www.oecd.org/g20/meetings/pittsburgh> (last visited Nov. 2, 2014).

101. This is no longer such a revolutionary idea; for example, President Obama and Indian Prime Minister Modi recently announced an agreement to accelerate India’s shift to renewable fuels. Joby Warrick, *Obama and Modi Announce Agreement on U.S.-India Efforts to Fight Global Warming*, WASH. POST, Sept. 30, 2014, available at [http://www.washingtonpost.com/national/health-science/obama-modi-announce-modest-progress-in-joint-efforts-to-fight-global-warming/2014/09/30/c3e7464e-48aa-11e4-b72e-d60a9229cc10\\_story.html](http://www.washingtonpost.com/national/health-science/obama-modi-announce-modest-progress-in-joint-efforts-to-fight-global-warming/2014/09/30/c3e7464e-48aa-11e4-b72e-d60a9229cc10_story.html).

[r]egimes.”<sup>102</sup> Elements like the Clean Development Mechanism Board, Global Environment Facility, Intergovernmental Panel on Climate Change, International Renewable Energy Agency, and European Union Emissions Trading System (and the others referenced by Keohane and Victor) are multi-layered sets of institutions that support and deliver various kinds of results, some under the overall directions set by the UNFCCC negotiations and others more independently. In economic relationships, direction is set by the World Trade Organization (“WTO”), but a variety of institutions, arrangements, and agreements work out the all-important details.

When 196 parties are engaged in negotiations, it is inevitable that they will have divergent interests. Thus, the urgency of climate science might better be addressed through more flexible configurations of negotiation and agreement.

CONCLUSION: EVALUATING ALTERNATIVE APPROACHES TO MULTILATERAL  
CLIMATE CHANGE AGREEMENTS—WHAT IS THE WAY OUT?

There seems to be a slow but discernible shift underway toward a more fragmented, bottom-up implementation vision of how to tackle climate change. President Obama has now concluded agreements with both China and India directed in different ways toward coordinated emissions reductions or other ways to fight climate change, and more agreements may be on the horizon.<sup>103</sup> Official efforts that began or accelerated under Secretary of State Hillary Clinton break out specific issues and form coalitions to address them. The effort to address the so-called short-term (or short-lived) “forcers”—black carbon, methane, and other air pollutants that contribute to rapid warming—has been structured as a club of some thirty nations plus a number of non-state partners.<sup>104</sup> The aim is to encourage actions at the national and regional level to reduce emissions of black carbon. Clinton has cited the Climate and Clean Air Coalition (“CCAC”) as a harbinger of change and part of a “new architecture” to address global challenges.<sup>105</sup>

The effort to address HFCs, another short-term forcer, under the Montreal Protocol is another such example. The hope is to achieve concrete results more

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102. Robert O. Keohane & David G. Victor, *The Regime Complex for Climate Change*, PERSPECTIVES ON POLITICS 7-23, 9 (2011), available at [http://belfercenter.ksg.harvard.edu/files/Keohane\\_Victor\\_Final\\_2.pdf](http://belfercenter.ksg.harvard.edu/files/Keohane_Victor_Final_2.pdf).

103. Matt Hoyer & Holly Yan, *U.S. and China Reach Historic Climate Change Deal, Vow to Cut Emissions*, CNN (Nov. 12, 2014), <http://www.cnn.com/2014/11/12/world/us-china-climate-change-agreement/index.html>.

104. CLIMATE AND CLEAN AIR COALITION TO REDUCE SHORT-LIVED CLIMATE POLLUTANTS, <http://www.ccacoalition.org> (last visited Oct. 6, 2014). A list of partners is found at *Country Partners*, CLIMATE AND CLEAN AIR COALITION TO REDUCE SHORT-LIVED CLIMATE POLLUTANTS, <http://www.unep.org/ccac/Partners/CountryPartners/tabid/130289/Default.aspx#sthash.05iC0sTv.dpuf> (last visited Oct. 6, 2014).

105. Rebecca Lefton, *Super Pollutants 101*, CTR. FOR AMER. PROGRESS (June 13, 2013), <http://www.americanprogress.org/issues/green/report/2013/06/13/66262/super-pollutants-101>.

quickly than has been the case under the UNFCCC.<sup>106</sup> HFCs were considered an interim solution to the Montreal Protocol-CFC phase-out because of their lower ozone depleting potential, but their use is quickly growing and their global warming impact is quite high—hundreds to tens of thousands of times more potent than CO<sub>2</sub>, albeit with a shorter atmospheric lifetime (generally less than 15 years).<sup>107</sup> Without repeating here how the Kyoto Protocol actually encouraged greater (rather than reduced) HFC production in some Asian countries,<sup>108</sup> it is clear that a phase-out of HFC could prevent 0.5° C of warming by 2100 and yield other environmental and economic benefits.<sup>109</sup>

The Natural Resources Defense Council (“NRDC”), a major U.S. environmental organization, is using Secretary Clinton’s construct to reframe how progress might be made toward global sustainability goals. The core of this idea is, “[w]here once a few strong columns could hold up the weight of the world, today we need a dynamic mix of materials and structures.”<sup>110</sup> Under the banner of “PINCs,” NRDC has identified a variety of “Partnerships, Initiatives, Networks, and Coalitions,” many of them essentially voluntary pledges that cumulatively are hoped to “drive the transformative changes we need to address climate change and the broader challenge of sustainability.”<sup>111</sup> Using this broad definition, green business start-ups and voluntary and private actions stand with more

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106. American Progress explains that in the best case, a UNFCCC agreement finalized by 2015 anticipates implementation starting in 2020:

Recognizing this, as part of the Durban agreement, countries also decided to explore ways to close the pre-2020 ambition gap between the total emissions reductions from parties’ pledges up to 2020 under the 2009 Copenhagen Accord and the global emissions trajectory for meeting the 2 degrees Celsius goal. The North American proposal [to amend the Montreal Protocol] would decrease the amount of CO<sub>2</sub> equivalent by 1.9 gigatons by 2020—about the same as shutting down almost 200 coal-fired power plants. There is no greater opportunity than a phasedown of HFCs in the Montreal Protocol to reduce emissions by the level necessary by 2020 before an international climate agreement takes effect to keep the world on trajectory to meet the 2 degrees goal.

*Id.* CAP goes on to point out, among other reasons, that the Montreal Protocol organization already has the “relevant technical expertise to tackle HFCs, and the structure is already in place.” *See id.*

107. Rebecca Lefton and Ben Bovarnick, *Top 5 Reasons to Phase Down HFCs in the Montreal Protocol*, CTR FOR AMER. PROGRESS, Oct. 23, 2013, available at <http://www.americanprogress.org/issues/green/news/2013/10/23/77798/top-5-reasons-to-phase-down-hfcs-in-the-montreal-protocol>; see also United Nations Environment Programme (UNEP), *HFCs: A Critical Link in Protecting Climate and the Ozone Layer* 16 (Nov. 2011), available at [http://www.unep.org/dewa/portals/67/pdf/HFC\\_report.pdf](http://www.unep.org/dewa/portals/67/pdf/HFC_report.pdf).

108. Wara, *supra* note 80, at 1785.

109. Y. Xu, D. Zaelke et al., *Avoiding HFC Growth Is Critical for Keeping Global Warming below 2 °C During the 21st Century*, 12 *ATMOSPHERIC CHEM. AND PHYS. DISCUSSIONS* 6083, 6087 (2013), available at <http://www.atmos-chem-phys.net/13/6083/2013/acp-13-6083-2013.pdf>.

110. Aamer Madhani, *Clinton Touts U.S. Leadership in Last Official Speech*, USA TODAY, Jan. 31, 2013, available at <http://www.usatoday.com/story/news/politics/2013/01/31/hillary-clinton-american-leadership-speech/1880797>.

111. *Id.*; Jacob Scherr, *New Hope for a New Generation: Can PINCs save the Planet?*, NATURAL RES. DEFENSE COUNCIL BLOG (Feb. 5, 2013), [http://switchboard.nrdc.org/blogs/jscherr/new\\_hope\\_for\\_a\\_new\\_generation.html](http://switchboard.nrdc.org/blogs/jscherr/new_hope_for_a_new_generation.html).

traditional efforts. For example, NRDC's Jacob Scherr cites commitments made at the Rio+20 meetings where hundreds of PINCs were launched, expanded, and enhanced<sup>112</sup> when he stated:

The UN established a registry for what it labels "voluntary commitments." The UN initially counted some 700 promises worth more than 500 billion dollars. The UN's excellent Sustainable Development in Action webpage now lists almost 1400 commitments with a value of some \$637 billion.<sup>113</sup>

Another manifestation of this disaggregated approach has been articulated in the planning toward the Paris 2015 UNFCCC Conference of the Parties, where it is again hoped that a global agreement can be reached. Rather than a one-size-fits-all, many (including in the U.S. environmental advocacy leadership) now envision a series of national solutions held together by some form of international guidelines and a vetting process.<sup>114</sup> The model for this might be commitments made at COP15 in Copenhagen, though bolstered in some way to be somewhat less voluntary.<sup>115</sup> France, the 2015 host, has outlined a possible compromise that might include voluntary, but nationally binding, post-2020 targets offered up by 2015, "bucked up" by some combination of negotiations and peer review, plus a mechanism for countries to do better over time.<sup>116</sup>

In the most breathtaking example of a shift in fundamental positions, the block of least developed countries has agreed to cut GHGs. Although the least developed countries generally are not major emission contributors, their willingness to accept a level of responsibility for climate change might help along a process of decoupling issues to get some to resolution. In any case, it seems a startling recognition of climate priorities.<sup>117</sup> Furthermore, several poor countries

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112. For more about the CLOUD, see CLOUD OF COMMITMENTS, <http://www.cloudofcommitments.org/about-the-cloud/> (last visited Nov. 3, 2014). See generally Jacob Scherr, *New Hope for a New Generation: Can PINCs save the Planet?*, NATURAL RES. DEFENSE COUNCIL BLOG (Feb. 5, 2013), [http://switchboard.nrdc.org/blogs/jscherr/new\\_hope\\_for\\_a\\_new\\_generation.html](http://switchboard.nrdc.org/blogs/jscherr/new_hope_for_a_new_generation.html).

113. *SD in Action Registry*, SUSTAINABLE DEVELOPMENT KNOWLEDGE PLATFORM, <http://sustainabledevelopment.un.org/index.php?menu=1348> (last visited Nov. 3, 2014).

114. See CLOUD OF COMMITMENTS, <http://www.cloudofcommitments.org/about-the-cloud/> (last visited Nov. 3, 2014).

115. Basically, France offered a process of countries offering voluntary but nationally binding post-2020 targets, hopefully enhanced in the year leading up to the Paris COP 21. Elliot Diring, executive vice president of the Center for Climate and Energy Solutions, explains this solution as having "some degree of bindingness, but also degrees of flexibility that invites broad participation . . . [and hopefully] some kind of mechanism for countries to bolster their emissions targets over time, making whatever comes out of Paris an ever-evolving document." Lisa Friedman, *Negotiations: How France Is Charting A 'Pragmatic' Path Toward A 2015 Climate Deal*, E&E NEWS (Oct. 21, 2013), [www.eenews.net/stories/1059989095](http://www.eenews.net/stories/1059989095).

116. See Jacob Scherr, *New Hope for a New Generation: Can PINCs save the Planet?*, NATURAL RES. DEFENSE COUNCIL BLOG (Feb. 5, 2013), [http://switchboard.nrdc.org/blogs/jscherr/new\\_hope\\_for\\_a\\_new\\_generation.html](http://switchboard.nrdc.org/blogs/jscherr/new_hope_for_a_new_generation.html).

117. Alex Kirby, *Least Developed Countries Agree to Cut Greenhouse Gas Emissions*, THE GUARDIAN, Apr. 3, 2013, available at <http://www.guardian.co.uk/environment/2013/apr/03/climate-change-greenhouse-gas-emissions#start-of-comments>.

will contribute to an international climate fund.<sup>118</sup> These are examples demonstrating that the environmental community is starting to come to terms with the distressing contrast between lengthy, grand promises and defects in the implementation process.

There are at least two reasons to be cheered by these developments. One is the implicit recognition that making changes in how humans manage energy consumption is a multifaceted challenge that must involve individuals, institutions, as well as governments at every level. The second is that much of this movement appears to indicate a quiet trend away from depending entirely on the single UNFCCC model, and a more realistic appreciation of the likelihood of what Elliot Diringer of the Center for Climate and Energy Solutions called a grand solution.<sup>119</sup> As the stranglehold of GHGs tightens, it will become increasingly important to find other ways—either alternative or supplementary to the UNFCCC—to impose some control on this dangerous situation.

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118. Lisa Friedman, *Did the U.S.-China climate deal break up a powerful bloc of developing nations?*, E&E NEWS (Nov. 24, 2014), <http://www.eenews.net/climatewire/2014/11/24/stories/1060009459>.

119. Elliot Diringer, *Climate Change: A Patchwork of Emissions Cut*, NATURE, Sept. 18, 2013, available at <http://www.nature.com/news/climate-change-a-patchwork-of-emissions-cuts-1.13742#auth-1>.