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SABIN CENTER FOR CLIMATE CHANGE LAW

THE CONTACT GROUP ON SOMALI PIRACY: AN UNLIKELY MODEL FOR PROTECTING THE ENVIRONMENT?

By Susan Biniaz

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About the author: Susan Biniaz was a Deputy Legal Adviser at the U.S. Department of State, as well as the lead climate lawyer for the U.S. State Department from 1989 until early 2017. She thanks current and former colleagues for their input.

International environmental law covers a wide range of subjects, is extremely detailed, and evolves very rapidly. No wonder it is challenging for practitioners to keep up with developments. An expert in marine pollution regimes may be unaware of the latest initiatives on forest conservation. Given how hyper-specialized the climate world has become, an expert on mitigation may be only mildly aware of recent advances in adaptation. And neither may be in a position to keep up with innovations in international law more broadly.

Deep knowledge has its advantages, but also some drawbacks. When we are faced with the need to address a new or emerging issue, our set of tools may be limited by our narrow specialties; we reach for solutions that are familiar but not necessarily the most effective. Moreover, when we do come up with an interesting solution to address a specific problem, it tends to remain hidden from those dealing with other problems – even if it might be useful to them.

Thinking about this situation, I have been wondering why we don't flip things around. Rather than start with a particular environmental challenge (say, what kind of international instrument should be developed to tackle marine plastics), we could start with solutions that have been used to address other international problems and ask whether there are environmental problems such solutions might be effective in addressing.

"Idea arbitrage" is not an original thought. Rather, I came across it several years ago in *Why Not?*, a provocative book by Yale professors Barry Nalebuff and Ian Ayres. There the topic was economics, and the authors were encouraging entrepreneurs to work backwards, i.e., to look at an existing solution to one problem and see if it might apply to a different problem. (I think about the concept every time I go through a tollbooth, one of the book's examples of a solution -- self-regulation -- that might apply elsewhere.)

Application of "idea arbitrage" to international environmental problems could be a useful project, one that practitioners and other experts might combine forces on, perhaps in conjunction with the upcoming 50th anniversary of the original Stockholm Conference.

During my time as a State Department lawyer, I had the opportunity to assist policymakers in developing approaches to a wide range of international issues. To get the ball rolling, this paper draws on two such approaches, one an international agreement from the environmental area (the Paris Agreement on climate change), the other an international arrangement from a completely different field (the Contact Group on Somali Piracy). The hope is that they might offer transferable problem-solving techniques for those grappling with various environmental challenges.

THE PARIS AGREEMENT

Climate change issues have had the disadvantage of being extremely challenging and controversial; at the same time, it is precisely those kinds of issues that require, and therefore generate, interesting solutions.

The Paris Agreement¹, adopted in 2015 after years of trial and error to elaborate the 1992 Framework Convention on Climate Change, reflects several approaches that, together or separately, might be of potential use in other contexts.

1. Legal Hybrid

The legal character of greenhouse gas emissions targets has been a controversial issue throughout the development of the climate change regime:

- o The original Framework Convention is itself a legal instrument. Most of the Convention's provisions are legally binding but, largely at the insistence of the United States under the George H.W. Bush Administration, the Convention's one provision that contains a specific limitation on greenhouse gas emissions (i.e., returning emissions to 1990 levels by the year 2000) was not legally binding.
- o The Kyoto Protocol, which was negotiated under the Clinton Administration, contained legally binding emissions targets but they applied only to so-called "Annex I" Parties (essentially developed countries), and the United States ended up rejecting Kyoto, largely for that reason.

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https://unfccc.int/files/meetings/paris_nov_2015/application/pdf/paris_agreement_english_.pdf

- o The 2009 Copenhagen Accord, in order to attract the participation of both the United States and China (the two largest emitters) was made non-binding in its entirety, including its emissions pledges.

The 2015 Paris Agreement is the “Goldilocks” between Kyoto (too binding) and Copenhagen (too non-binding). The Agreement contains various legally binding commitments, mostly procedural. For example, each Party must submit an emissions target or other mitigation action, update it regularly, and report on its implementation and achievement. However, the emissions targets (or other actions) themselves are non-binding, i.e., it is not a violation of the Agreement if a Party does not achieve its target. This hybrid approach, which was inspired by a proposal from New Zealand and which struck a balance between the previous extremes, allowed for broad participation in the resulting Agreement. The approach provided a reasonable level of rigor and accountability, while not pushing away those with an allergy toward binding targets (whether for ideological, legal, or political reasons).

2. “Nationally Determined” Contributions

The Paris Agreement embeds the concept of “nationally determined contributions” (NDCs), i.e., each Party develops its own emissions targets or other mitigation actions in line with its national circumstances.

The negotiators had various choices, at least theoretically, when it came to the design of the Agreement’s emissions targets/action:

- o They might have derived and apportioned them “top down” from some overall limit, but this would have been politically impossible, even if technically achievable.
- o They might have negotiated them, but this would have been logistically difficult, given the number of Parties, as well as politically unlikely to succeed.
- o That essentially left the option of Parties’ self-defining their mitigation contributions, an option put forward by the United States relatively early in the negotiation process.

Negotiators recognized the risk of self-defining targets and sought to avoid a race to the bottom. As such, they included various add-ons to promote ambitious NDCs.

These included, for example, having Parties submit their NDCs several months in advance (in the hopes that such a “sunshine” period would inspire Parties to aim high); requiring Parties to be clear about what they are committing to (to avoid the vagueness that surrounded Copenhagen submissions); overlaying NDCs with certain disciplines (such as with respect to accounting); and encouraging progressively higher ambition with each successive NDC.

It should also be noted that the “nationally determined” approach to mitigation efforts had the advantage of enabling negotiators to sidestep the intractable issue of whether there should be categories of countries with respect to emission commitments and, if so, which ones. By allowing each Party to decide on its contribution, i.e., allowing for “self-differentiation,” there was no need for categories.

3. Long-Term Goal + Mechanisms to Achieve It

The Paris Agreement is a long-term framework for addressing climate change, setting out a global temperature goal along with various mechanisms to promote its achievement.

The original Framework Convention has no expiration date, but other features potentially stood in the way of its long-term utility. Its objective was qualitative (avoiding dangerous anthropogenic interference with the climate system) rather than quantitative, and its only specific emissions commitment related to a past year (2000).

The Kyoto Protocol also had long-term limitations. It initially contained specific emissions commitments to 2012, which were later extended out to 2020. While these might have been extended further, the fact that developing countries were excluded from commitments and developed countries either never joined (the United States) or progressively dropped out (most countries other than the EU) made Kyoto a non-viable instrument in the longer term.

The Copenhagen Accord (later adopted, in elaborated fashion, as part of the Cancun agreements) turned the Convention’s qualitative long-term goal into a quantitative one (limiting the increase in global average temperature to below 2° C.) but

its commitments extended only to 2020, and it provided no mechanism for continuation thereafter.

Thus, the Paris Agreement is the first climate instrument with all the ingredients of a long-term approach or “ambition cycle.” It reflects a quantitative long-term goal, i.e., limiting the increase to “well below” 2° (as well as pursuing efforts to reach 1.5), and sets forth various means to promote its achievement. Recognizing that the initial set of NDCs would not put the world on track to achieve the Agreement’s global temperature goal, the Agreement provides for:

- o regular “global stocktakes” of collective progress toward the temperature goal (and the other objectives of the Agreement);
- o regular updating of NDCs, informed by the stocktakes and expected to progress over time; and
- o a transparency framework that includes robust reporting and review of Party implementation.

4. Continuum of National Discretion

A recurring theme in the history of the climate change regime has been the extent the agreement in question dictates requirements versus leaves Parties with certain national discretion.

The Kyoto Protocol and the Copenhagen Accord, roughly speaking, represent two ends of the spectrum, with Kyoto being international rule-heavy and Copenhagen according the Parties with wide latitude. Negotiators of the Paris Agreement had mixed views as to where on the continuum the new agreement should lie. Some favored Kyoto-style rules for all Parties; some favored Kyoto-style rules just for developed countries, with latitude for developing countries; some favored a less-than-Kyoto/more-than-Copenhagen approach, applicable to all Parties; and so on.

Paris ultimately took a hybrid approach with respect to the balance between its nationally and internationally determined elements. For example, NDCs are, by definition, nationally determined. In this sense, and on a key aspect of the regime, Paris resembles Copenhagen. However, Paris both included, and provided for the elaboration

of, various guidelines, modalities, and other internationally agreed disciplines. In that sense, it significantly tightened up the looseness of the Copenhagen approach.

The tension between international rules versus national discretion played out in a particularly interesting manner when it came to the clarity of NDCs. As noted, while a Party to the Paris Agreement determines its own mitigation contribution, it must (in contrast to one of Copenhagen's deficiencies) provide the information necessary for "clarity, transparency and understanding." The decision accompanying the Paris Agreement listed types of clarifying information, but in a non-mandatory fashion.

Negotiators of the elaborating guidance had to decide whether to expand the list of information but, more controversially, whether to make it mandatory. Some Parties found it unacceptable to leave entirely up to Parties which information to provide, while others found it unacceptable to have no discretion. The compromise included a legal requirement on Parties to provide the listed information (which was expanded) but "as applicable" to their particular NDCs. Thus, while the guidance moves toward the international end of the continuum in terms of an agreed list of clarifying information, a Party retains some flexibility to decide which types of information are necessary for clarity with respect to its NDC.

5. Differentiated Differentiation

Another interesting feature of Paris is that each aspect of the Agreement addresses "differentiation" in a distinct manner.

As noted above with respect to nationally determined contributions, one of the persistently controversial issues in the climate negotiations regime has been the extent to which Parties are divided into different categories for purposes of emissions commitments, funding commitments, eligibility for assistance, eligibility for special consideration, etc. While the original Convention set forth several different groupings of Parties, and generally established relatively few distinctions among them, the Kyoto Protocol reflected a major paradigm shift; it imposed legally binding, economy-wide emissions targets on "Annex I" Parties and no new commitments on developing

countries. The Copenhagen Accord reduced the delta between developed and developing countries, providing for mitigation pledges – albeit of different types -- from all Parties.

A major issue during the negotiation of the Paris Agreement was whether commitments would be differentiated and, if so, which commitments and on what basis. After years of negotiation (and several contributions from U.S.-China bilateral diplomacy), the result Paris Agreement is a highly differentiated agreement but not in the Kyoto sense of differentiation, with legally binding emissions targets for one category of Parties and no new commitments for the other. Rather, Paris takes many different approaches to differentiation, sometimes even within a single article. To paraphrase *Anna Karenina*, each differentiated piece of the Agreement is differentiated in its own way.

For example:

- o The procedural commitments related to NDCs (submitting, updating, etc.) apply to all Parties, but with discretion for least developed countries and small island developing States.
- o As noted above, Parties' mitigation efforts will be self-differentiated through "nationally determined" contributions.
- o Parties' adaptation efforts will be differentiated *de facto*, given the variations in countries' physical and other situations.
- o Financial commitments continue to apply to developed countries for the benefit of developing countries, with other Parties encouraged to contribute voluntarily.
- o The transparency framework accords "flexibility" to a sub-set of developing countries, i.e., those that need it in light of their capacity.

6. Non-State Actor Engagement

Paris did not break new ground regarding who can formally join the Agreement. Like most international agreements, it permits only States and regional economic integration organizations (such as the EU) to become Parties. However, the broader Paris outcome is unusual in its emphasis on the engagement of so-called "non-Party stakeholders."

In the run-up to the Paris conference, there was wide support for promoting climate-related efforts by actors normally beyond the purview of an international agreements (e.g., cities, states, regions, businesses), as well as creating a means to reflect such efforts. The rationales included, for example:

- o that commitments from sub-national governments and the private sector could potentially enhance the credibility of a national government's emissions target (or even enable higher ambition);
- o that emissions are substantially generated by the private sector, which should be encouraged to undertake its own commitments; and
- o that the breadth of climate actors would send a market signal about the irreversibility of the "transformation" to low-emission economies.

As a result, the Paris outcome not only expressly recognized the contribution of non-Party stakeholders but provided for many forms of engagement, including a dedicated portal to reflect commitments; two climate "champions" (one each from the outgoing and incoming Presidencies hosting the annual COP) to work with non-Party actors; various thematic "action" days during the COP, etc. The Paris-related opportunities for stakeholder engagement have only grown since 2015.

APPLICATION OF PARIS' DISTINCTIVE FEATURES TO OTHER ISSUES

It is unlikely that Paris' features, which emerged in response to the particular dynamics of the climate regime, would carry over wholesale to any other issue; however, individually, one or more features might be useful in other contexts.

For example, there are at least two aspects of Paris that might be considered for importation into the "**Post-2020 Global Biodiversity Framework**," currently being negotiated under the Convention on Biological Diversity. The Framework is expected to update the existing "Aichi targets," which are global biodiversity targets with a 2020 timeframe. However, the process also involves considering ways to improve implementation of the targets, which has not been particularly successful.

Assuming that insufficient progress toward achievement of the Aichi targets is at least in part attributable to the design of the system, rather than simply the targets themselves, one Paris feature that could potentially improve implementation is the NDC. An NDC-like approach might not be considered appropriate in cases where, for example, it is politically viable to negotiate commitments or where a competitive industry (aviation, shipping) requires uniformity of commitment. However, NDCs could be useful where they would actually increase the structure, clarity, and accountability of the existing approach.

Under the Biodiversity Convention, the expectation regarding a Party's articulation of its national plans is very loose. Parties are "urged" to come up with national targets but the approach is so flexible that, beyond not being required, a Party's plan does not have to address anything in particular or be clear about it. Almost by definition, a Party is not subject to review concerning its implementation. An NDC-type approach might promote better implementation by creating a stronger expectation that each Party will announce in advance the specific action(s) it intends to take and do so in a clear, transparent manner.

- o National action could be linked to each global target or a sub-set of targets.
- o Although it would not be legally required to submit the NDC-like plan (the mandate for the Post-2020 Framework does not provide for a legal instrument), the decision language could nonetheless be made much stronger than it currently is.
- o An NDC-like approach would promote individual Party accountability, with respect to both whether a Party had submitted its plan and the extent to which it had implemented it.
- o Like NDCs, biodiversity plans could be made clear in a standardized way; this would enable comparison across Parties, as well as better assessment of global progress.

A Paris-style "ambition cycle" could be useful in cases where there is at least one long-term objective and where regular pit-stops along the way could help drive up ambition over time. The Biodiversity Convention Parties, in addition to updating their global targets to the 2030 timeframe, are considering one or more long-term goals derived from a "2050 Vision." As such, in addition to NDC-like national plans, the

Post-2020 Framework might incorporate one or more long-term goals, periodic assessments of how the Parties are doing collectively (akin to the Paris global stocktakes), and subsequent updating by each Party of its national plans.

Another environmental challenge that might profit from a Paris feature is **marine plastics pollution**. Here the Paris approach to engaging non-State actors might be an inspiration. As with climate change, non-State actors (e.g., the private sector; cities and other sub-national governments) significantly contribute both to the problem and the solutions. The international community has formally taken up the issue of marine plastic litter and microplastics; specifically, the United Nations Environment Assembly has established an expert group to examine various aspects of the problem, as well as activities by a wide range of stakeholders to reduce such pollution.

To date, there has been no UNEA decision to develop a new instrument (legal or otherwise) to address the issue. However, an instrument addressing marine plastics is likely to be on the horizon. To the extent that one is ultimately developed, and whether it is global or regional, the process might take a page from the Paris playbook in terms of supporting and recognizing the efforts of actors beyond national governments. At a minimum, there could be a parallel means for a wide range of non-State actors to inscribe their “commitments.” An instrument could even break new ground. For example, an innovative instrument might contain distinct chapters, some of which were, per tradition, amenable to being joined by States, while others were open to being joined by companies, associations, sub-national governments, and other non-State actors.

THE CONTACT GROUP ON SOMALI PIRACY

The “Contact Group on Piracy off the Coast of Somalia” is a good example of a newer type of international cooperation, one that was created to fit its purpose and then adapted, as needed, as it went along. As an EU official said: “The Contact Group on

piracy is unique. It is a laboratory for innovative multilateral governance to address complex international issues. The great thing is that it is delivering.”²

In 2008, faced with an increasing number of Somali pirate attacks, the United States considered it necessary to pull together a group of countries to address the problem. Given that the attacks were happening in real time, it was also important to do it quickly. The resulting Contact Group successfully tackled multiple aspects of the problem, reducing the number to just a handful in a very short timeframe. It had several interesting features.

1. Light UN Tether

An initial question facing the United States, which took the lead in establishing the Contact Group, was which countries to include. It recognized that it was not necessary to engage the entire world in what was taking place in a specific region and affecting the interests of only a sub-set of countries. In addition, there was simply no time to get bogged down in a lengthy process to negotiate the terms of a new UN treaty or international organization. These factors pointed in the direction of an informal grouping of relevant countries.

At the same time, there was an interest in pursuing some form of UN backing to, among other things, highlight the problem, call for international cooperation, recognize the applicable law of the sea framework, and, given the unique political situation in Somalia (i.e., the absence of a regular government), authorize foreign flag vessels to undertake enforcement operations against piracy in the Somali territorial sea. Three Security Council resolutions were adopted in quick succession, the last of which specifically encouraged the establishment of an “international cooperation mechanism to act as a common point of contact between and among states, regional and international organizations on all aspects of combating piracy and armed robbery at sea off Somalia coast....”³

² Maciej Popowski, *2014/2015 Chair of the Contact Group*

³ <http://unscr.com/en/resolutions/doc/1851>

Thus, the Contact Group was not a UN body and was free to operate without the bureaucratic constraints (including delays) that might have faced such a body; at the same time, it enjoyed the political and legal support of the UN Security Council.

2. Wide Range of Participants

The Contact Group was not a traditional diplomatic initiative, i.e., one limited to States. It also did not have formal membership. Rather, given the nature of the problem, it was a multi-stakeholder initiative involving those actors considered necessary to get the job done. Thus, it included the participation of certain international organizations (such as the UN Office on Drugs and Crime), as well as the private sector (including the shipping industry and the maritime insurance industry).

In terms of States, the Contact Group included those both in and outside the region; in some cases, it was a State's military component that participated, while in others it was the civilian component. Ultimately, over sixty countries took part in the Contact Group in some way, as well as organizations as far-flung as the International Maritime Organization, NATO, and the Arab League.

3. Different Contributions

The implicit mantra of the Contact Group was that everyone does what they are in the best position to do. Contributions were so varied that they make the Paris Agreement's "nationally determined contributions" look practically uniform. Some participants made one type of contribution, while others made many. For example:

- o Several participants, including the United States, China, Russia, and the European Union, were in a position to send naval ships to the region to seize pirate ships and otherwise repress piratical acts in accordance with the law of the sea.
- o Kenya and the Seychelles were both in a position, both geographically and legally, to prosecute suspected pirates and house convicted pirates.
- o Denmark and others were in a position to provide legal expertise concerning the application of international and domestic law to piracy suppression and enforcement.
- o The UN Office of Drugs and Crime provided funding and relevant expertise.

4. Improvisation/Flexibility

Throughout its life, the Contact Group engaged in a significant amount of improvisation. Particularly in the early stages, it needed to figure out which actions and which actors were necessary. It had to consider the most basic issues⁴, such as:

- o legal aspects of suppressing piracy at sea;
- o operational aspects of suppressing piracy at sea, including how to coordinate the naval vessels, given their limited number and the vastness of the relevant sea area;
- o where prosecutions of suspected pirates could take place (in the region and otherwise);
- o whether there was sufficient jail capacity for convicted pirates; and
- o what the shipping industry could do to better protect itself.

The Contact Group started with a plenary and five working groups to address the key initial topics. There was no standing secretariat or permanent chair; rather, “ownership” was spread around. The UK chaired the group on naval cooperation, Denmark chaired legal issues, Korea chaired self-defensive action (which involved the private sector and consideration of best management practices), Egypt chaired public diplomacy, and Italy ran the group on the flow of illegal funds.

The Contact Group’s unorthodox meetings promoted the spirit of a common purpose, rather than the prospect of a contentious negotiation. The Group issued no binding decisions, plenary meetings were generally no longer than one day, and any written outcome document was produced by the host country in consultation with participants, rather than through a line-by-line drafting exercise.

The Contact Group was also able to provide assistance in a nimble manner. It established a trust fund that was housed at the UN, bringing with it the UN’s expertise and imprimatur. At the same time, the fund was run by a board composed of Contact Group participating States, which could disperse funds quickly and to the places where they needed the most.

⁴ The Contact Group did not focus on the root causes of Somali piracy; these were being addressed by other parts of the UN focused on instability/conflict in Somalia.

As time went on, the issues and needs began to change, and the Contact Group's institutional arrangements evolved accordingly. For example, at a certain point, the legal questions had been sufficiently examined, and it was no longer necessary for that working group to meet, at least not in person. It was easy to move any remaining work to a virtual format. When there was a need to examine an emerging issue, it could readily be taken up. A 2014 reform process, including a "lessons learned" exercise, resulted in even more adjustments, reducing the number of working groups and shifting certain areas of focus (such as to prosecuting pirate kingpins). Throughout, the Contact Group's flexibility – its lack of entrenched bureaucracy, rules, and formality – was a distinct advantage; the arrangements could evolve quickly, in step with evolving needs.

APPLICATION OF THE CONTACT GROUP'S DISTINCTIVE FEATURES TO OTHER ISSUES

The Contact Group's flexibility, including its ability to form quickly and readily add/subtract topics, could be a good model for addressing issues that straddle two or more environmental agreements.

Our current system of international environmental governance, which consists largely of specialized agreements, has many benefits. Agreements are "fit for purpose," Parties can delve deeply into their respective topics, etc. At the same time, it can be challenging to address coherently subjects that cut across regimes. There may be bureaucratic resistance, either domestically or internationally; delegates may lack expertise beyond the remit of the agreement in question; or rigid procedural rules may hinder, rather than facilitate, cross-cutting discussion.

Such difficulties have been particularly pronounced recently, as various issues related to "nature" – including climate change, biodiversity, and the ocean -- become more obviously inter-twined. As a matter of forum, climate change is principally addressed by the UNFCCC/Paris Agreement; biodiversity is principally addressed by the

Biodiversity Convention; and the ocean is addressed by several different agreements/processes. However, as a matter of fact, there is no end to the overlaps:

- o Climate change adversely affects both biodiversity and the ocean.
- o The ocean can help mitigate climate change through the enhancement of blue carbon, a so-called “nature-based solution.”
- o Forests preserve biodiversity and act as carbon sinks.
- o Certain climate responses, such as removing carbon from the atmosphere, could have impacts on biodiversity if carried out at scale.
- o And so on...

Various efforts are being made to think about these related issues more holistically. For example, within the UNFCCC/Paris context, a group of Parties calling themselves “Friends of the Ocean and Climate” has succeeded in raising awareness of the climate-ocean linkages and securing an UNFCCC-based dialogue to discuss them.

However, one could imagine going beyond integration efforts in specific fora and forming a “Contact Group” with the goal of promoting integration across a range of fora. It could have an overarching goal (general or specific) of better integrating climate change, biodiversity, and the ocean, and map out which decisions/actions need to be taken under each environmental agreement and in each process to promote such goal. As in the piracy context, such a group could rotate the lead(s), take decisions rapidly, and shift its areas of focus over time, as appropriate to the negotiations and other events on the horizon.

Another area where a Contact Group-like approach could be useful is where an issue, rather than being cross-cutting across multiple fora, is not being considered in any of them. One interesting aspect of the UNFCCC/Paris regime is that, although it is the primary forum for addressing climate change, sometimes emerging issues are more likely to be discussed in “side events” at the COP than by the Parties themselves. For example, recent side events have addressed technologies to remove carbon dioxide from the atmosphere, technologies to reflect sunlight, and the law of the sea implications of sea level rise. Other offline initiatives have begun to consider how/where best to acquire the necessary minerals for the green transition. A Contact Group might gather interested

Parties to address one such issue, or “emerging issues” as a whole, in a non-politicized, non-negotiating atmosphere.

“Idea arbitrage” needs to be carried out carefully. An idea that works in one context may or may not transfer successfully to another. In addition, sometimes successful ideas come in pairs, i.e., one worked only because it was coupled with another. Thus, there are really two challenges before us. First, we need to assemble a toolbox of interesting ideas that have worked in one context or another – and both the Paris Agreement and the Contact Group on Somali Piracy provide potentially useful examples. Second, for any emerging environmental problem, we need to figure which tool is best fit for purpose.

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