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### After Madrid, W[h]ither the COP?

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SABIN CENTER FOR CLIMATE CHANGE LAW

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**AFTER MADRID,  
W[H]ITHER THE COP?**

By Susan Biniaz

January 2020

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**About the author:** Susan Biniiaz was the lead climate lawyer for the U.S. State Department from 1989 until early 2017. She thanks current and former colleagues for their input.

With Madrid behind us and Glasgow on the horizon, it is a good time for Parties and others to consider the future of the annual COP. (By “COP,” I mean the climate conference writ large, rather than the “Conference of the Parties,” the narrower technical name for the Parties to the UN Framework Convention on Climate Change.) Madrid, while a remarkably successful venue in terms of logistics, left many not only disappointed at the Parties’ failure to reach agreement and signal an increase in ambition but also confused:

- Why was there such a disconnect between the scientific imperative (as well as the public outcry) and the official outcome?
- Why were the Parties unable to reach agreement, when the remit was so much smaller than the previous year and the compromises fairly apparent?
- Did the issuance by a subset of Parties of “principles” they intend to follow have broader significance for climate governance?
- Why was it like pulling teeth to get an important climate issue (the ocean/climate nexus) considered by the Parties to what is supposed to be the foundational agreement on climate change?
- Why were emerging issues (e.g., law of the sea implications of sea level rise, carbon removal technologies) discussed only on the sidelines?
- On the whole, why did the side events seem more like the main event?

Moving forward, these and other questions are likely to be in the minds of COP Presidents, Parties, and climate watchers as they conceptualize, and set expectations for, future COPs. The design of the Paris Agreement will also be relevant. With its implementing guidance (the “rulebook”) nearly completed, and its contributions nationally determined, there will be much less for the Parties to negotiate. This puts a higher premium on other aspects of COPs, particularly their ability to catalyze national action and international support (financial, capacity-building, etc.), and may also affect the type of government representatives that need to attend the annual conference.

In short, 2020 provides an important opportunity to imagine the features of an ideal COP, recognize (and address, if possible) the challenges, and set out a desirable yet workable vision.

## IN A PERFECT WORLD

An ideal COP would serve the purposes/functions below. In the case of those that already exist, it would serve them more effectively:

### 1. Action-Forcing Event

A COP would, by its very existence, be an action-forcing event. It would take place with sufficient frequency and attention to create the necessary momentum for Parties and other actors to do more than they would have done in the absence of such an event.

### Challenges

To a certain extent, COPs are already action-forcing events. The fact that there is a COP every year has arguably been one of the most important aspects of the UNFCCC regime. The prospect of a very public COP at the end of each year has played a distinct role, to varying degrees, in Parties' and, more recently, non-Party stakeholders' thinking, preparation, commitments, and actions. (Of course, in the case of recalcitrant actors, an event is only as "action-forcing" as the actor is sensitive to attention and pressure.)

At the same time, the annual COP raises various challenges.

First, in terms of frequency, it is difficult to marshal the world's attention and push it to the same level every year. This does not necessarily mean that COPs should occur less frequently, given the magnitude and urgency of the climate challenge. However, it needs to be considered how one maintains COP momentum on an annual basis, particularly in the face of many other calls for action-related announcements throughout the year.

Second, there are sequencing-related challenges:

- Per the Paris outcome, Parties are to submit their NDCs many months in advance of the next COP – potentially reducing the prospect of big NDC announcements at COPs *per se*. The reason for advance submission was not to create a disconnect with COPs, but rather to give Parties and climate observers an opportunity to react to submitted NDCs, creating an incentive for a Party to put its best foot forward and maybe even to adjust its initial NDC in response. If Paris works

properly, the Parties will have tendered their NDCs early in the year; at the same time, a COP cannot afford to treat them as “old news.”

- Subgroups of Parties may use other venues preceding a COP (e.g., the UN, the G7, the G20, a bilateral summit) to make ambition-related announcements, whether related to mitigation, finance, or other climate action.
- Parties’ national processes regarding climate action may not align with a scheduled COP.

It should be considered whether there are ways to bolster the COP’s role in maintaining momentum on the climate issue, including how COPs can better relate to climate action that is undertaken according to other timeframes and in other venues. Even if a COP is not the time or venue for the coordination and announcement of action or support, the success or failure of the COP could depend upon them.

## **2. Forum for Negotiations**

A COP would provide an opportunity to the Parties to the Convention or the Paris Agreement (as the case may be) to reach agreement on issues under negotiation. While, as noted, there are likely to be fewer and fewer of such issues, there will nevertheless continue to be a need for the Parties to take decisions of various sorts.

### **Challenges**

COPs already afford the Parties to the Convention and Paris Agreement the opportunity to reach agreement; taking decisions has in fact been a primary purpose of COPs to date. At the same time, the UNFCCC’s default decision-making rule (whether considered consensus or near-consensus<sup>1</sup>) is worth reconsidering:

- On the one hand, the need to get all, or nearly all, Parties on board could be viewed as a strength; arriving at a decision requires taking into account the Parties’ wide variety of viewpoints, and, once a decision is taken, a widely supported outcome is more likely to be upheld and implemented.

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<sup>1</sup> At the close of the Cancun plenary, the United States expressed the view that the adoption of the Cancun agreements was legitimate not because there was consensus (given the formal objection by Bolivia) but because there is no agreed decision-making rule in the UNFCCC and the practice has been closer to “general agreement.” Some Parties may consider that there was actually consensus, because Bolivia apparently did not reiterate its objection *after* adoption of the decision; the United States (and presumably some other Parties) disagreed with the need to repeat an objection in order to block consensus.

- On the other hand, the procedure enables one Party (or a handful) to block or postpone a decision on any ground; without a climate-engaged United States, it may become even harder to reach agreement; decisions that can be agreed upon often reflect a weak least common denominator; and widely agreed decisions are not necessarily upheld -- Parties often re-open, explicitly or implicitly, decisions that they agreed to reluctantly.

At this point, the benefits of consensus/near-consensus are arguably outweighed by the growing disconnect between what is expected of the key agreements on climate change (e.g., the ability to say that ambition needs to be enhanced, the ability to adopt guidance on market mechanisms) and what can actually be delivered. The regime risks losing credibility, as well as potentially pushing subsets of Parties to address issues in their own way (e.g., the issuance by a group of Parties of the “San Jose Principles” when the Paris Parties failed to reach agreement on Article 6 guidance).

Perhaps it is time to seriously consider other approaches, at least with respect to some types of issues/decisions. These might include, e.g., super-majority voting (as the GCF Board agreed to in 2019 for certain issues) or the ability of a Party to formally record its objection/different view (akin to IPCC procedures). In this regard, it should be noted that the Convention expressly contemplates that its rules of procedure (which also apply under the Paris Agreement, unless the Paris Parties decided otherwise) “may include specified majorities required for the adoption of particular decisions.” The Catch-22 here is that decision-making rules must be agreed by consensus/near-consensus; thus, it would require consensus/near-consensus to agree to deviate from consensus/near-consensus....

Short of a change in decision-making, Parties might make greater use of declarations. These can send important signals even if they are not universally embraced (such as the Geneva Declaration’s advancement of the Berlin Mandate).

### **3. Promotion of Party Implementation**

A COP would promote Party implementation. Both because negotiated issues will decline and because the UNFCCC/Paris goals cannot be met without serious implementation, a COP would devote ample time and attention to these issues.

Certain mandated features of the Paris Agreement will address the extent of Party implementation, including the transparency framework for Parties individually and the periodic global stocktake for the Parties collectively. Both are centerpieces of the Agreement.

However, a COP could go beyond such mandated features to promote better implementation. For example:

- The Paris Agreement encourages Parties to prepare and submit mid-century, low-emissions strategies. It could be helpful to Parties developing such a strategy (or considering whether to do so) to know how other Parties went about the process and/or whether there are expert resources to help.
- Similarly, Paris Parties are expected to increase over time the ambition of their nationally determined contributions. Given that enhancing ambition is at the very core of the Agreement, using the COP to help facilitate actual enhancement seems unarguably important.

In addition, a COP could help Parties implement aspects of the Paris Agreement that have not been specifically operationalized. For example, the Agreement sets forth as one of its three objectives “[m]aking financial flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development” (Article 2.1.c). A COP could bring expert resources to bear on ways in which Parties could bring this objective to life, both domestically and internationally.

#### **Challenges**

It would appear possible to have a COP focus more time on Party implementation if the COP President made it a priority. (As noted above, it would be more challenging if the Parties as a whole had to agree.) The Presidency has reasonable discretion to highlight topics of particular interest without agreement of all the Parties and can make them a focus of the COP by setting up roundtables, panels, high-level events, etc. In



terms of a COP's "value added," if COP 25 had focused more on the pragmatic aspects of enhancing NDCs and creating mid-century strategies, it is possible that such effort might have been more effective in promoting ambition than the effort spent seeking to get all Parties to agree to wording that went slightly beyond a mere repetition of past decisions.

One of the challenges here is press coverage, i.e., it has historically been difficult to make catchy headlines out of "implementation." Relatedly, COP Presidents are generally Ministers, and Ministers are political beings who are likely to seek a punchier outcome.

#### **4. Focus on Non-Party Actors**

A COP would focus on implementation by non-Party actors. Given the vital role that sub-national governments, businesses, and other non-State actors are playing with respect to reducing emissions and taking other significant climate action, a COP would be a venue for showcasing their accomplishments (ideally, based on rigorous measurement and reporting akin to Paris Agreement requirements) and making future commitments.

#### **Challenges**

In recent years, COPs have significantly increased their emphasis on the actions of non-Party stakeholders. Peru and France both made non-Party actor engagement a priority, and the extensive Paris outcome on the "Action Agenda" has been increasingly beefed up since 2015. As sub-national action becomes a more and more essential ingredient of successful global action and as U.S. sub-national action (at least temporarily) stands in for U.S. national action, it should be considered whether there are additional innovative ways to bolster their visibility and credibility, while maintaining the primarily intergovernmental nature of the UNFCCC regime.

With respect to sub-national governments in particular:

- there might be a consolidated space (rather than diffuse pavilions) in which leaders of sub-national governments could present on their implementation;
- access by representatives of sub-national governments (e.g., to badges, to observer status) might be facilitated; and/or
- submissions on implementation could be captured/formalized.

In order to make it valuable for leaders of sub-national governments to attend and engage at COPs, they could be invited to participate in high-level events with national leaders/ministers to share experiences or be recognized for their leadership.

The challenges here may be fewer than for other issues; not only has there been substantial Party support for the Action Agenda, but both a Presidency and the Secretariat are in a position to take certain steps that do not require agreement of the Parties as a whole.

## **5. Forum for Subsets of Parties**

A COP would provide a forum for subsets of Parties to develop, announce, and report on cooperative action. This might include sectoral approaches (e.g., the key countries with heavy cement industries developing an approach to decarbonization), regional approaches, or other initiatives. Such efforts might be more of an official feature than carried out in the shadows of the COP.

### **Challenges**

COPs already provide an unofficial forum for subsets of Parties to develop common approaches, announce various initiatives, etc. Some groups form for the purpose of supporting a particular negotiating position (e.g., the High Ambition Coalition in Paris) and do not require any particular UNFCCC support. However, others commit to specific climate actions and/or engage in cooperative endeavors (e.g., the Climate Vulnerable Forum, Mission Innovation). Such groups currently operate on the side, without official support or recognition.

It might be considered whether there is a way to lend greater UNFCCC support to such groups, without compromising the situation of non-participating Parties. Among other possibilities, a potential role for Article 7.2(c) of the UNFCCC might be considered. It provides for the COP to “[f]acilitate, at the request of two or more Parties, the coordination of measures adopted by them to address climate change and its effects....”

It is clear from this provision that the Convention contemplated cooperation by, and some kind of support to, subgroups of Parties.

## **6. Combined Universes**

An ideal COP would minimize the feeling of “parallel universes” between Party and non-Party stakeholder events. Bringing the negotiating and non-negotiating worlds closer together serves several important goals, including knowledge-sharing, reducing the gap between “negotiators” and “implementers,” and reducing culture clash.

In terms of space, there would be fluidity between the negotiator and non-negotiator areas. In terms of time, negotiators would have some freedom to attend side events and meet with non-negotiators, whether through planned meetings or spontaneously in hallways; these interactions can be one of the important values of a COP.

## **Challenges**

The challenge for a COP here is largely one of logistics. It would seem that COP organizers should make every effort to minimize the distance between Party and non-Party stakeholder events, and both sets of events should be scheduled so as to allow for ample cross-pollination. Madrid, for example, had a favorable layout, with negotiators walking right through the “blue zone” (with various pavilions and side events) on their way to negotiate. Seamless zones should be the new normal.

In addition, taking a page from the UN Climate Summit, the more a COP can encourage multi-stakeholder coalitions (i.e., those mixing Parties and non-Party stakeholders), the thinner the line will become between the two categories. Making space for such coalitions would also serve other purposes (e.g., creating a forum for subsets of Parties, focusing on non-Party stakeholder implementation, and potentially addressing emerging issues and cross-pollination).

## **7. Addressing Emerging Issues**

A COP would facilitate the ability of the Parties to discuss and, as appropriate, address emerging climate-related issues. As one example, the IPCC report on 1.5 degrees indicates the likely need for significant reliance on carbon dioxide removal. It would presumably be useful to have Parties exchange views on the topic, which might include potential ways to cooperate.

## **Challenges**

The challenge here is, once again, that it is difficult for the Parties to agree to take up new issues. The Madrid COP's treatment of the ocean/climate nexus is instructive. It was easy (i.e., a unilateral decision) for the Presidency to call the COP "blue" and include various ocean-related events, but, notwithstanding the highly disturbing IPCC report on the subject, it was much more challenging to get the Parties to agree for a subsidiary body to hold a dialogue on the subject, even on a one-time basis. Many had concerns about prejudging what might happen next, including having the issue turn into a permanent agenda item.

Addressing new issues in the UNFCCC context undoubtedly raises challenges, e.g., the Parties already face a crowded agenda, not all new issues are necessarily ripe for discussion, a topic might become unduly politicized, and/or there might only be agreement to discuss X if Y is also discussed (as in Madrid, where a dialogue on climate and land was the quid pro quo for a dialogue on climate and the ocean). At the same time, it would be unfortunate, both on substantive grounds and for the credibility of the regime, if the Parties could not find mutually agreeable ways to at least discuss important emerging issues – even if no action were taken. It is difficult to explain to the outside world why the Parties to the key international agreements on climate change are so resistant to discussing issues related to ... climate change.

## **8. Cross-Pollination**

A COP would promote meaningful interaction between those responsible for the UNFCCC/Paris Agreement and those responsible for other international agreements and

institutions. There is a strong substantive need for better understanding of, and coordination/alignment among, climate-related topics:

- The ambitious Paris goals cannot be met by Paris action alone; they require help from other places, both environmental (e.g., the Montreal Protocol) and non-environmental (e.g., ICAO, IMO, international financial institutions).
- As Parties increase their climate ambition over time, they may encounter challenges in international trade or investment fora.
- Climate change has impacts on the ocean, biodiversity, etc.; at the same time, there are potentially valuable nature-based solutions to climate change.

Ideally, a COP would operate as a two-way street, enabling both the UNFCCC regime and other regimes to better inform their decisions and policies in light of each other.

## **Challenges**

In addition to facing some of the same challenges as other potential purposes/functions (e.g., difficulty in getting the Parties to agree, limited time, etc.), having a COP serve to help integrate various climate-related strands poses additional ones:

- The scope of cross-cutting issues is very broad.
- International agreements/institutions have historically operated quite independently of one another.
- Governments are not necessarily well coordinated internally on climate-related issues.
- Even if UNFCCC/Paris Parties were to decide to use a COP to better align various agreements/institutions, it is not clear who would represent the non-UNFCCC ones. (Secretariats have limited ability to represent the Parties.)

If Parties were fully coordinated at the domestic level, it would promote coherence and mutually reinforcing policies in various international venues. Barring that, a climate COP should at, at a minimum, provide for serious informational exchanges on what is taking place in various international fora and the impacts of UNFCCC-related decisions on other issues (and vice versa).

## **9. Operation of Machinery**

A COP would enable the machinery of the UNFCCC/Paris Agreement to operate effectively. This would include, for example, meetings of various bodies (such as the Standing Committee on Finance and the Warsaw International Mechanism). The review/accountability processes under the Paris Agreement, including the Global Stocktake, will likely take on greater importance as negotiations recede and the need for climate action intensifies.

### **Challenges**

COPs have routinely included the operation of various committees, mechanisms, reviews, etc. This function will increase as various Paris processes and mechanisms kick in. Regarding the effectiveness of the various pieces of the UNFCCC “machinery,” the challenge will lie in having the Parties bring to the table a combination of technical expertise and political will.

At some point, it might be useful to consider whether there are now actually too many bodies/overlapping functions in the UNFCCC system. Recognizing that this might not be a high priority, and that it is always difficult to pare back institutions/functions once established, it could be healthy for the regime to reduce redundancy and increase efficiency, as needed. The UNFCCC expressly contemplates such consideration, calling upon the Parties to “[p]eriodically examine ... the institutional arrangements under the Convention...” (Article 7.2(a)).

## **10. Positive Signals**

Perhaps most importantly, the ideal COP would send a positive signal(s) to the international community, including investors, regarding the Parties’ and other stakeholders’ direction of travel.

### **Challenges**

Having a COP send the right signal(s) poses more of a political challenge than a technical one. Technically, there is no single way to send a signal; it might be the ability

of the Parties to converge on complex rules, the commitment by a handful of major economies to upgrade their targets, a large number of world leaders in attendance, or a combination of outcomes. The political challenge is much more daunting, likely requiring (at a minimum) a concerted year-long effort by the Presidency, interested Parties, non-Party stakeholders, and civil society.

## **MOVING FORWARD**

Parties and others should embrace the opportunity 2020 brings to reconsider the potential of the COP.

Of course, not all COPs can or should be alike. Each will have certain mandated elements, and, given the limits of time, money, and attention, not everything can be a priority. At the same time, there is room to give greater consideration to any given COP's value added. Particularly if COPs continue to take place annually, they will need to evolve in some way in order to retain their relevance and ability to prompt action. Otherwise, they are likely to unduly raise expectations – and later be branded as failures.

In this regard, future COP hosts might be selected on the basis of which one has the most compelling vision, rather than on the basis of rotating regional groups. (There are other reasons to move beyond regional rotation, including that some of the groupings are outdated (e.g., much of Eastern Europe is now part of the EU); only Poland has ever hosted for Eastern Europe; and any process that takes place every five years (such as the Global Stocktake) will always happen in the same region.)

In any event, without some rethinking and adjustment, there is a significant risk that COPs will render themselves out of touch and not up to the job of moving the world closer to where it needs to go. It may also be the case that, upon further reflection, Parties and others will conclude that the issues with COPs are more political than institutional and that, in the absence of a significant increase in political will to tackle climate change, the effectiveness of the COP will have its limits.