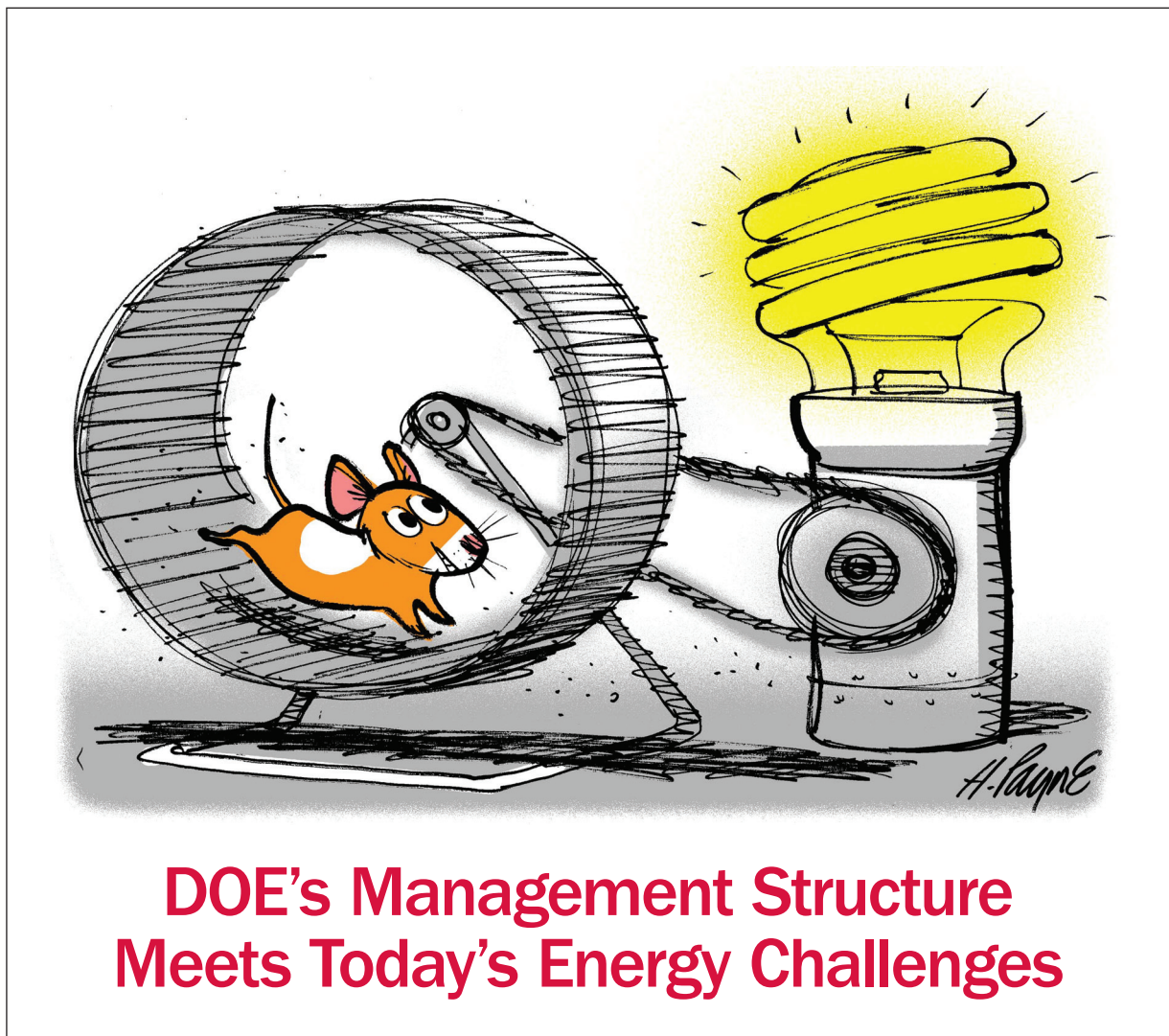


The Environmental FORUM[®]

Advancing Environmental Protection Through Analysis • Opinion • Debate



DOE's Management Structure Meets Today's Energy Challenges

TSCA, Redux

*New Bills Aim to Reap
Old Law's Promise*

eLawyering

*Modernizing Law
School Clinics*

Getting to Results

*Why the Climate Treaty
Never Quite Works*

Getting to Results

When diplomats meet in the 20th Conference of the Parties to the climate convention, they hope to negotiate legally binding commitments that will halt temperature increases. In assessing their challenge, it is time to test the assumptions behind the negotiations



Ruth Greenspan Bell is a public policy scholar at the Woodrow Wilson International Center for Scholars in Washington, D.C.

In the movie *Groundhog Day*, TV weatherman Bill Murray finds himself in a time loop, constantly repeating the same day, until he begins to learn from his experience. Eventually, this education puts him on a pathway to a more productive way of managing his life. He saves lives, helps townspeople, and finds love. I've often thought about this film, directed by the late Harold Ramis, when I consider the annual UN Framework Convention on Climate Change negotiating process — which inevitably, in recent years, ends with yet another agreement to negotiate a long laundry list of issues. Meanwhile, greenhouse gas concentrations build up in the atmosphere and resolution of this complex challenge seems ever more distant.

One step beyond this loop might be to examine the assumptions underpinning the UNFCCC negotiating process. Is a global agreement addressing multiple issues and agreed to by 195 parties really possible? What happens after the ink dries — will agreement guarantee the necessary domestic emission-reduction results? Are there alternatives?

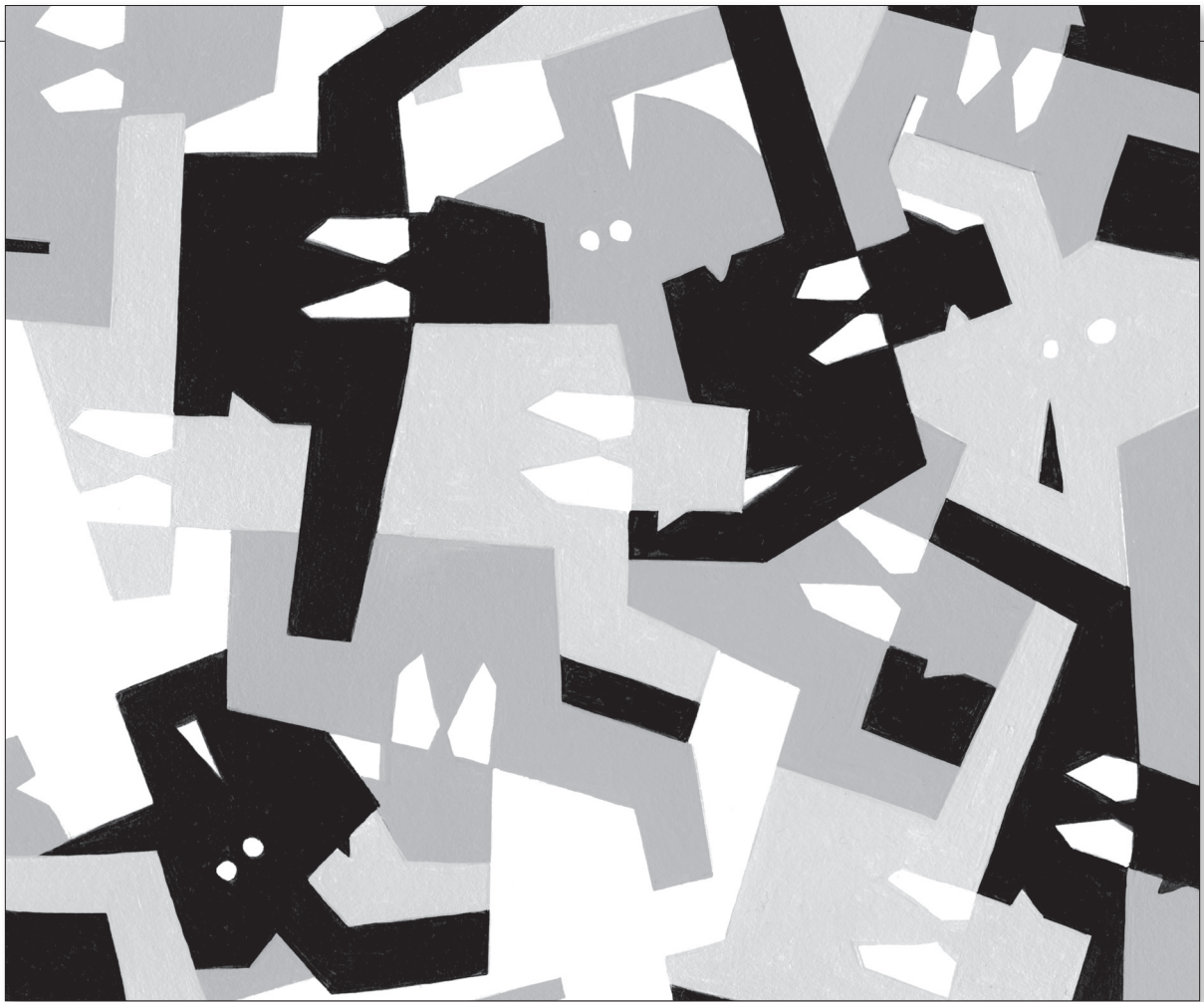
If you build it, will they come? Control of greenhouse gases demands reliable action — not mere promises — at many governmental and institutional levels. Much trust has been invested in the logic that global agreement produces domestic results. The case that this might be a leap of faith is found in two mid-1990s reports. A team led by Harold K. Jacobson and Edith Brown Weiss and a group working out of the Austria-based International Institute for Applied Systems Analysis (IIASA) each took a careful look at imple-

mentation of international environmental cooperation agreements to ask if the many enacted accords actually protected endangered species or reduced pollution.

Simplifying their results, both groups, and an earlier General Accounting Office review, raised fundamental doubts about the model followed since the Stockholm Declaration following the 1972 UN Conference on the Human Environment, where 113 countries, 19 inter-governmental agencies, and more than 400 inter-governmental and non-governmental organizations hammered out guidelines for national governments facing environmental challenges. David Victor of the IIASA group 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."

Admittedly, assessing the track record of environmental agreements is not easy, starting with definitional challenges — what is success? The intent of a treaty and what, specifically, parties agreed to often turn out to be something less than eliminating the pollution in question. To get to yes, drafters might fudge rather than specify critical elements. Expressing concern about "inadequate attention to implementation at both the national and international levels," IIASA concluded that frequently the actual commitments were fairly trivial; high levels of compliance meant little for environmental outcomes.

On the other hand, supporters of the UNFCCC process point to multilateral agreements that appear



to have achieved their purposes. The most notable is the 1987 Montreal Protocol, by many accounts highly effective in reducing the use of chlorofluorocarbons. In his 2003 book *Protecting the Ozone Layer*, Edward A. Parson argued not only for its success but also its viability as a model for managing other global pollution challenges, specifically “its specific lessons about regime formation, negotiation strategy, and technological assessment.” Richard Elliot Benedick, a State Department lead negotiator for Montreal, similarly believes it is a model for controlling GHGs.

Is GHG control sufficiently similar to CFC control, or is the likely fate of a UNFCCC agreement more similar to those agreements reviewed by GAO, Weiss-Jacobson, and IIASA?

Too many parties to come to agreement on anything? UNFCCC ground rules seek assent from 195 parties whose interests vary widely. But all parties have equal status. Under current rules, any one can block agreement, in part due to the decision rule of “consensus.”

Consensus is the final point in a long negotiating process, but also affords a small number the ability to defeat efforts of the whole. The developing world is very protective of this rule, believing, as Nitin Sethi said in the December 2012 *Times of India*, it ensures “that the concerns of even the economically and geopolitically less influential countries are not lost.”

Consensus has been defined through ad hoc decisions when annual Conferences of the Parties are confronted with major decisions. In several, as in 1995, objections were disregarded; then-minister Angela Merkel, chairing the conference, decided the Berlin Mandate, a pre-cursor to the Kyoto Protocol, should be adopted despite Saudi objections. But in 2009 the COP chair allowed opposition by Bolivia and Sudan to block adoption of the Copenhagen Accord, an important commitment agreement, even though it was a decision hammered out in person by world leaders. Russia, Ukraine, and Belarus, overruled in the 2012 Doha COP, have now denounced consensus as “too vague.” The potential impact of this objection on future decisionmaking is unknown.

An alternative approach might narrow issues and negotiating parties to those best situated to solve them. Indeed, the gavel-through approach (disregarding some objections) might be implicit, albeit inconsistent, recognition of this principle. The presiding official at the Cancun COP declined to “disregard the position and wish of 193 other parties.” The force of the Mexican logic might depend on who is objecting relative to the task at hand. Overriding two countries that contribute relatively little to greenhouse emissions could be entirely rational if the objective is to obtain GHG reduction commitments. On the other hand, it would

seem unwise to override a party critical to obtaining the result under consideration, whether those are emission reductions or forest protection. The countries who perceive themselves on the losing end when fundamental disagreements are masked are unlikely to have much enthusiasm for carrying out treaty requirements.

Marching in lock-step makes it more difficult to develop solutions better suited to the deep governance and problem-solving differences among the UNFCCC parties. Unlinking and devolving issues could lead sub-groups of countries, within or outside the climate convention, to share experience and develop mitigation methods and compliance tools better suited to their unique circumstances.

Smaller groupings and bilateral arrangements can be opportunistic and flexible should unexpected events allow more rapid movement, as they were in reducing nuclear threats following the Soviet Union's breakdown. As the weapons world demonstrates, outsourcing contentious or technical issues to specialized agencies or different venues can facilitate breakthroughs that are more difficult within a single, centralized process.

A foundation for diversifying discussions already exists with the 30 nations working on black carbon and other pollutants that contribute to rapid warming, and in forums such as the Asia-Pacific Partnership on Clean Development and Climate, the Major Economies Forum on Energy and Climate, and the G-20. Small successes can breed more success and mutual confidence, something sorely lacking in the climate world.

Decouple issues for decision? Each of many issues before the UNFCCC would by itself constitute an unusual test of human problem-solving skills. Beyond emissions reductions, they include financial issues, fair sharing of climate change's burdens and benefits, and technology availability for clean energy investments and sustainable growth in developing countries. Together, they reflect the difficulty of the task before humanity.

Undeniably, each issue has a constituency and is worthy of consideration. Nevertheless, does joining them together impede the chances of resolving any single one in a reasonable period of time? Is the UNFCCC the right place to resolve enduring and very difficult issues of equity or complex problems like deforestation? Even so, could issues be prioritized or addressed opportunistically?

As only a handful of countries make significant GHG contributions, perhaps world leaders should follow the advice in these pages ("The Insurance Analogy," January/February) of master negotiator George P. Shultz, who was secretary of state during the negotiation of the Montreal Protocol: "Go to key countries and work it out." Once there is a pattern, enlarge it.

"And then finally, when the fix is in, so to speak, you have the big meeting and everybody signs." As I and Micah Ziegler explained in "Stepping Stones" (November/December 2011) bilateral arrangements can be even more agile, as they have been in the nuclear context. In trade, they have substituted, piloted, or complemented global agreements. If the history of weapons and trade agreements is believed, failure of major actors to engage is not fatal. Sometimes, they join late or act in parallel. Informal groupings can also take action.

Obsessing on ratification? Everyone wants an outcome with the highest level of assurance that commitments will be kept, a concept summarized in the phrase "legally binding." The common distinction is between formal commitments and non-binding agreements.

Ratification proponents such as William Hare of Climate Analytics, a Berlin-based NGO, believe these formalities bring a higher probability of implementation and compliance and produce binding obligations that give civil society leverage to hold their governments accountable. The Mary Robinson Foundation argues that the prospect of binding responsibilities improves the negotiation and preparation processes. Even Daniel Bodansky and Elliott Diringer, who argue for diversifying the approaches addressing climate change, say that in the long run, a legally binding agreement "makes sense."

How is this squared with the IIASA's and Jacobson-Weiss's findings that formal adoption is far from a guarantee of treaty effectiveness? Or with the history of nuclear weapons negotiations, where even unratified agreements have led to substantial reforms?

In practical terms, ratification means different things to different countries. U.S. ratification, for example, constitutionally puts the matter squarely on the domestic agenda with legal force, even if some implementing legislation follows later. This is not the case worldwide. Even more critically, parties bring a variety of motivations to their very participation, sometimes calling into question their commitment to implementation; Robert G. Darst's examination of USSR engagement with the 1979 Convention on Long-Range Transboundary Air Pollution shows that formal agreement helped the Soviets accumulate good will to pursue other objectives even as they did little to implement the commitments. Canada's actions renouncing the Kyoto Protocol demonstrated why formalities don't equal guarantees. And Australia's new government appears to be back-pedaling from seemingly firm domestic GHG-reduction commitments, including a groundbreaking carbon tax.

Some time ago expert José Goldemberg of Brazil cautioned that "history is littered with international

agreements that took many years to negotiate but were never implemented” and Harvard Business School professor and complex negotiation specialist James K. Sebenius warned of “the distinction between success measured by . . . ratification . . . and actual policy shifts implemented over time.”

Finally, there is the bleak prospect of U.S. ratification. The recent failure of the Convention on the Rights of Persons with Disabilities, patterned on existing U.S. laws, to get Senate approval strongly signals current discomfort with any formal international commitments, much less a highly controversial one.

Ratification might obscure other pathways toward compliance. The United States never ratified the Law of the Sea treaty; nevertheless, it has been widely observed. The Comprehensive Test Ban Treaty has yet to come into legal force, but the organization it provisionally created built and manages a world-wide network of sensors capable of detecting even very small nuclear tests, in turn fostering great confidence that agreements can be verified. There is progress toward President Obama’s voluntary Copenhagen commitment to reduce emissions to four percent below 1990 levels by 2020 because the will exists within his administration, despite congressional resistance.

Can the UNFCCC negotiating frame address changing conditions and new learning? If the goal of negotiations is to reduce GHG emissions, diplomats must negotiate in the world as it exists, not an outdated model. Periodic reports of the Intergovernmental Panel on Climate Change inform negotiators of scientific developments, but reduction targets and differentiated responsibilities were set years ago, when the world was a very different place. And the negotiations aim to set GHG emissions limits rather than address underlying causes.

Recent insights into the limitations of the Convention on International Trade in Endangered Species in managing the crisis of poached endangered animals might be a cautionary note to the climate negotiations. CITES was designed to cut off illicit trade, using tools such as parties’ designating “management authorities” (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).

Seen through a different lens, poaching of rare animals implicates security, health, aesthetics, and culture. Rebel and armed groups feed the voracious Chinese appetite for “medicines” concocted from parts of exotic wild animals and broad international (including American) demand for ivory. Proceeds are used to buy weapons and fund their activities. Does the CITES focus miss opportunities to address the fundamentals that drive poaching? Would it be more productive to improve understanding of medical efficacy, or address

the tensions that allow warlords to flourish?

Climate change similarly resides in the environmental ghetto, but is actually a vast, interconnected challenge involving many levels of financial interests and cultural norms — the entire energy economy is at stake. Resolution requires facing up to how and why humans use energy — in their daily lives, in transport, and in the production of essential goods and services. Is the UNFCCC the right platform for this fundamental inquiry? Would it make more sense to look to the forces that drive — and sustain — energy demand?

There are other costs of viewing climate change negotiations as an environmental matter. Like it or not, there is a foreign policy pecking order. As an environmental issue, climate falls low on that priority list, even acknowledging that “power” ministries have participated in important COPs and 115 world leaders were at the 2009 15th COP at Copenhagen, where they made significant pledges to reduce emissions. Foreign ministries, including the U.S. Department of State, implicitly prioritize political and security concerns; they respond to threats in the headlines and weapons in the streets. Environment and other slowly unfolding threats fall to the bottom of the list.

Preconceptions and group-think in the environmental community is also limiting. One bit of evidence, in my view, is that the commitments forged by the world leaders at Copenhagen, to hold warming to 2 degrees Celsius and to record individual country mitigation actions, did not fit into expectations for the desired “legally binding result.” Opportunities were lost as the attention of world leaders drifted off.

What would happen if the negotiating responsibility was handed to the current equivalent of Balkan-conflict power negotiator Richard Holbrooke? If the secretary of state employed shuttle diplomacy between the major emitters? Would emphasis on the geopolitical ramifications and great potential dangers from this existential threat get better attention than an environmental framing? There was a time when controlling nuclear weapons was a similarly fuzzy subject largely promoted by do-gooders.

Uncritical belief in the romance of markets? The Kyoto Protocol established emission targets for the developed countries and a timetable for capping and gradually reducing GHGs. Its principal tool is international emissions trading — straight out of the economists’ playbook. Enchanted with the idea that environmental protection could be economically efficient, negotiators signed up to the proposition that self-interest would motivate polluters to put controls in place if they were allowed to trade their pollution in an open market.

Similar ideas were promoted to manage pollution in the former Soviet bloc during the economic transition following dissolution of the USSR. All of these

countries had relatively decent environmental laws and very bad pollution. Having little experience with functioning legal systems — and huge disillusionment with the Soviet system — they wanted new ideas. They were besotted with capitalism, although in many cases, they didn't understand it very well. The economists contrasted market approaches with regulation, labeling that as "command and control," thereby cleverly tapping into frustrations with command economies and Soviet-style directives. For proof of concept, advocates pointed to the market-based policy instruments used in the United States to control sulfur dioxide and nitrogen oxides emissions, part of the 1990 amendments to the Clean Air Act.

The Kyoto "flexible mechanisms" allowed participants to meet their GHG targets by purchasing emission credits rather than making reductions themselves, on the assumption that the industries of the developing world were more inefficient, and cheaper to fix, than in the developed world. The Clean Development Mechanism facilitated trading with developing world countries that had no reduction commitments. Joint Implementation allowed a country with emission reduction or limitation commitments to invest in pollution abatement measures in a "host" country in return for emission credits.

The many reasons at the time to believe this could not work are set out in my article "Market Failure" (March/April 2006). A global emissions trading system was entirely novel and actually puts even higher demands on infrastructure and regulatory systems than conventional pollution methods. The prototype SO₂ and NO_x trading experience in the United States was limited and depended on often uniquely American laws, practices, and institutions. Far from laissez-faire and invisible hand, the U.S. program rested on strict requirements, reliable enforcement, and mandated pollutant monitoring. Traders were required to use elaborate accounting measures and transparently track transactions on the EPA website. Trading was, and in some cases still is, brand-new territory for many governments and their regulated industries. Experience has revealed perverse incentives, process defects, and outright cheating.

Operational challenges multiply when trading is applied to forests. It isn't easy for anyone, much less an under-resourced developing economy, to plant and protect forests or track their capacity to absorb carbon. Resolving issues such as how to compensate preservation of existing forests; quantify numerous intangible values; determine whom to compensate; and manage corruption, informal or institutionalized, remains challenging. The scheme adopted in Kyoto, and now functionally moribund, absorbed huge amounts of resources and planning time that might have been better spent

on other ways to reduce greenhouse gas emissions.

But there are deeper reasons for concern. Social science research challenges the economists' paradigm that valuing emissions improves behavior, suggesting that emphasizing markets may also have been a bad behavioral bet. The push to monetizing could distort human motivations in ways that might reduce the propensity for joint problem solving.

Assume the climate crisis may eventually demand the kind of human mobilization and individual sacrifice that was necessary to fight World War II. If, as Nobel laureate Daniel Kahneman points out, introducing money as a motivation can produce "some troubling effects" in the sense of overriding altruistic motivations, the economists' paradigm may diminish or even obliterate the very characteristics highly important to rallying people to pull together and make sacrifices in times of crisis. It elicits "a reluctance to be involved with others, to depend on others, or to accept demands from others." Renegade economist John Gowdy, drawing from neuroscience, warns that money can be drug-like and the mere mention of money may make people more individualistic and less social.

As the climate challenges deepen, framing climate reductions as money-making propositions may not have been entirely wise.

What is the way out? As the stranglehold of greenhouse gas emissions tightens, humanity must decide whether it is more important to sign a paper or to do something about global warming. The current lack of mitigation progress makes it increasingly important to find other ways — either alternative or supplementary to the climate convention — to impose some control on this dangerous situation.

The building blocks for diversifying negotiating venues and breaking issues out for resolution can already be seen. Developments such as the coalition on black carbon are a beginning recognition that changing how humans manage energy consumption is a multifaceted challenge that must involve individuals, institutions, as well as governments at every level. It would be encouraging if this marked a quiet trend away from depending entirely on the single UNFCCC model, and a more realistic appreciation of the likelihood of what Eliot Dinger of the Center for Climate and Energy Solutions called "a grand solution."

Let's assume the jury is out on the effectiveness of the UNFCCC model. If studies almost 20 years ago warned against unfettered faith in the UN-brokered, multi-party, top-down model, what is the justification for doing only more of the same? Wouldn't prudence call for hedging this bet? •

The Emerging Climate Governance Complex

The UN Framework Convention on Climate Change recently turned 20 years old. Its critics are legion and its failings easy to identify. No one can claim that it has been able to get close to its stated objective of “avoiding dangerous anthropogenic interference with the climate system” or that humanity as a whole is even going in the direction of missing this outcome.

Much of the problem lies in a mismatch between the expectations made of the UNFCCC (by both supporters and critics) and the nature of climate change as a problem. Climate change is a problem of extreme complexity, or as Kelly Levin of the World Resources Institute and colleagues say, as a “super-wicked” problem: “time is running out”; “those who cause the problem also seek to provide a solution”; no central authority exists but decisionmaking is dispersed; and “policy responses discount the future irrationally.” The combination of these features means that expecting a single site of decision-making to be able to resolve all the major problems is unreasonable.

Nevertheless, international negotiations have a sort of path-dependence in the way they operate that constrains what negotiators can do. Expecting talks to depart radically from this path is unlikely to bear fruit. On the other hand the sorts of things that critics of the UNFCCC process often plead for — more flexible agreements among countries, cooperation between public and private sectors, cooperation at multiple levels, and the like — is in fact already happening. What is variously called transnational, multilevel, or private governance is perhaps better developed in the climate change field than in any other area of global politics.

These initiatives include agree-

ments among major world cities to collaborate to reduce emissions and rebuild urban infrastructure around low-carbon development; initiatives by large institutional investors to get companies to disclose their emissions and climate change exposures; certification schemes by NGOs and business groups to govern carbon offset markets; and partnerships to deploy particular technologies. There are successful examples of each of these.

There are signs that those within the UNFCCC process are starting to realize both the extent of the myriad initiatives going on outside their negotiating halls and the limits of what can be achieved within the convention itself. At the 2013 COP, negotiators talked about the distinction between a “facilitative” and a “prescriptive” approach. The report of Working Group III of the Intergovernmental Panel on Climate Change, on policy responses, is due out later this year. It embeds the international treaty process in a much broader range of collaborative arrangements among cities, national governments, NGOs, and private sector organizations. The UNFCCC may be *primus inter pares*, but it is not the only game in town.

These initiatives have emerged for a number of reasons: in part to fill the void left by frustration with the UNFCCC and in part because of the logic of complexity: lots of actors at various levels and across the public-private divide affect GHG emissions. But in part many of these initiatives exist in the shadow of the UNFCCC. That is, they have emerged partly because of rules set up within the convention, not in opposition to it.

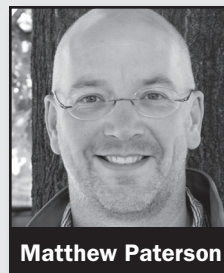
To take just one example, many of the carbon market initiatives —

both the various national, regional, and subnational cap-and-trade schemes that have emerged and continue to proliferate and NGO offset certification initiatives — have been enabled precisely by the basic design rules for carbon markets that were included in the Kyoto Protocol and finalized in 2001. The rules about how to count carbon emissions, equivalences between different gases, systems of registries and transaction logs, rules for offset projects, and so on were developed there and borrowed in innovative ways by other initiatives beyond the UNFCCC system.

The lesson is that while expecting the convention to govern all aspects of climate change effectively is certainly like one of Don Quixote’s windmills, the UNFCCC has certainly left an important legacy that should not be ignored. There are certain sorts of things that only interstate agreement among governments can do, and that if they were done well the initiatives by a whole range of other actors could flourish and better achieve their potential — in building markets, shaping investment, rebuilding cities, accelerating the uptake of new technologies, and so on.

Identifying what precisely the UNFCCC can do is an urgent task both for researchers and policymakers, but our experience to date suggests the lesson that basic accounting rules for carbon emissions and clear emissions reductions that create expectations for investors might be good places to start.

Matthew Paterson is professor of political science at the University of Ottawa, Canada, and a current lead author for the Intergovernmental Panel on Climate Change, Working Group III.



Matthew Paterson