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**COMMA BUT DIFFERENTIATED
RESPONSIBILITIES:
PUNCTUATION AND 30 OTHER WAYS
NEGOTIATORS HAVE RESOLVED ISSUES IN THE
INTERNATIONAL CLIMATE CHANGE REGIME**

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INTRODUCTION

International climate change negotiations have a long history of being contentious, and much has been written about the grand trade-offs that have allowed countries to reach agreement. Issues have often involved, for example, the level of ambition, differentiated treatment of Parties, and various forms of financial assistance to developing countries.

Less well-known are the smaller, largely language-based tools negotiators have used to resolve differences, sometimes finding a solution as subtle as a shift in the placement of a comma. These tools have operated in different ways. Some, such as deliberate imprecision or postponement, have “resolved” an issue by sidestepping it and allowing Parties to preserve their positions. Some tools have enabled resolution by “splitting the difference” between opposing views. Still others have involved optical fixes, flexibility, or non-prejudice that helped one or more Parties go along with a particular outcome.

This compendium of textual examples, presented in rough chronological order, is drawn from my personal involvement in international climate negotiations and is by no means exhaustive. It is hoped that the examples may be of interest to those who follow climate change in particular, as well as of potential use to those who work in other international fields.

1. Identifying Issues

Climate change negotiations were controversial even before the formal negotiations began. The first task of the Intergovernmental Panel on Climate Change (IPCC) was to report on the science and impacts associated with climate change, as well as on potential response strategies. In its 1990 report, the IPCC included, among potential responses, the development of a framework convention on climate change and the “possible elements” of such a convention.¹

Participants were unable to agree on the elements, both because they had substantive disagreements and because they did not want to prejudice their respective countries’ positions during a future negotiation of such a convention. The solution was to frame the elements as a set of issues.

¹ See 1990 IPCC Response Strategies Working Group Report, Chapter 11 (Legal and Institutional Mechanisms).

The issues were not agreed, but rather represented more of a collection of proposed issues. Nevertheless, many were helpfully specific (such as “in view of the interrelationship among all greenhouse gases, their sources and sinks, should they be treated collectively?”). They were also well-organized, divided into sections called “preamble,” “general obligations,” “institutions,” “research, systematic observations, and analysis,” “information exchange and reporting,” “development and transfer of technology,” “settlement of disputes,” “other provisions,” and “annexes and protocols.” As a result, the IPCC’s identification of issues, while disappointing at the time, proved to be an excellent resource for negotiators when the time came to develop an actual framework convention.

2. “Constructive” Ambiguity

It may seem counterintuitive to the outside world that negotiators would ever deliberately draft a formulation that admits of two different interpretations. After all, they should in theory be aiming for clarity, particularly when preparing a legal instrument. However, clarity is not always an option, and the alternative to ambiguity may be failure to reach agreement. In some cases, negotiators may consider no agreement preferable to the risks inherent in perpetuating opposing interpretations. In those cases where ambiguity is preferable, though, its use is considered “constructive.”

One of the first examples of constructive ambiguity in the climate negotiations was the way in which countries tackled an issue that arose at the very end of the negotiation of the 1992 UN Framework Convention on Climate Change (the “Convention”). Negotiators had already agreed that the Convention would contain a list of Parties with certain heightened responsibilities, including more detailed reporting. The “Annex I” list would include the members of the OECD at that time, plus the former Soviet bloc. The outstanding issue was how to *characterize* the Annex I Parties in the Convention provisions that referred to them:

- For many countries, it would have been acceptable, even desirable, to simply say “The Parties listed in Annex I...,” without further characterization.
- For others, it was important to describe the Annex I Parties as “developed country Parties.” However, Russia would not agree to characterize itself as a “developed country.”

The fact that the "European Economic Community" (which was not a "country") was on the list provided the solution. Negotiators hit upon the formulation "the developed country Parties and other Parties included in Annex I."² Russia would be able to consider itself within the group of "other Parties," while others would be able to say that Russia was a "developed country" and that "other Parties" was included only for the purposes of describing the non-country European Economic Community.

The Convention negotiators also used constructive ambiguity when addressing the principle of "common but differentiated responsibilities and respective capabilities." To followers of the climate regime, it will not come as a surprise that the CBDR/RC principle, which has been one of the most contentious aspects of the regime since its inception, was the subject of disagreement when originally negotiated. Negotiators had already agreed that "developed countries should take the lead" and that this concept should follow the sentence setting out the CBDR/RC principle, but they did not agree on whether developed countries were to take the lead because of their "responsibilities," "capabilities," or both. The drafting solution was to begin the sentence with "Accordingly."³ A Party could then interpret the basis for the developed countries' leading role on whichever aspect of the previous sentence it deemed appropriate.

3. "Taking into account"

Negotiators have frequently made a commitment acceptable by tacking on the phrase "taking into account." The phrase has provided Parties with flexibility in implementing a commitment and/or built in an implicit sense of differentiation, particularly where it might have otherwise appeared that all Parties were expected to take the same kind of action.

Article 4 of the Convention (the "commitments" article) contains two significant examples:

- Article 4.1, which applies to all Parties, includes in its chapeau the very broad phrase "taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances."

² *See, e.g.*, Article 4.2 of the Convention.

³ *See* Article 3.1 of the Convention.

The phrase acts as an overlay with respect to all of the topics and subparagraphs that follow.

- Article 4.2, which addresses the mitigation policies and measures of Annex I Parties only, contains an even more extensive “taking into account” proviso, i.e., “taking into account the differences in these Parties’ starting points and approaches, economic structures and resource bases, the need to maintain strong and sustainable economic growth, available technologies and other individual circumstances, as well as the need for equitable and appropriate contributions by each of these Parties to the global effort regarding that objective.” Given the wide range of situations among the Annex I Parties, it was important to many countries to flag their differences.

The phrase has also been used as part of an instruction to Parties for future work. For example, one of the controversial issues during the negotiation of the Kyoto Protocol was how the removal of greenhouse gases from the atmosphere by “sinks” would be counted against a Party’s emissions of greenhouse gases. The Protocol’s directive to the first meeting of the Kyoto Parties reflected the controversial and complex nature of the issue; it asked the Parties to determine the accounting rules, “taking into account uncertainties, transparency in reporting, verifiability, the methodological work of the Intergovernmental Panel on Climate Change, the advice provided by the Subsidiary Body for Scientific and Technological Advice in accordance with Article 5 and the decisions of the Conference of the Parties.”⁴

4. “Parties” vs. “States”

The Convention’s article on “principles” was controversial on multiple grounds, including whether there should even be such an article. Some countries were concerned that, were it included, it might be viewed as reflecting an intention to codify customary international law or to be broadly applicable to all countries, even those that did not end up joining the Convention. One bridging device between those favoring an article and those concerned about it was to change the original subject of the provisions from “States” to “Parties,” thereby making clear that the provisions were not intended to reflect customary international law or be generally applicable to States.⁵

⁴ See Article 3.4 of the Kyoto Protocol; see the chapeau of Article 10 of the Kyoto Protocol for an example of a double “taking into account” clause.

⁵ See Article 3 of the Convention.

5. Revisiting

Another means of resolving issues has been to allow one point of view to prevail for the moment, but to provide for the issue in question to be revisited.

For example, a major issue during the negotiation of the Convention was whether it should contain a legally binding emissions target for Annex I Parties. The compromise was to make the year 2000 emissions “aim” non-legally binding, but to direct the first meeting of the Parties to the Convention (the so-called “Conference of the Parties” or “COP”) to review the “adequacy” of the relevant provisions.⁶ (Although the first meeting of the Parties did end up finding the provisions inadequate and called for the negotiation of a new instrument, it was not until their second meeting that most Parties expressed the view that the next set of targets – which became Kyoto Protocol targets -- should be legally binding.)⁷

The Copenhagen Accord, for example, reflects an intention to revisit the global temperature goal. Most Parties supported the inclusion of a goal expressed as holding the increase in global temperature below 2 degrees Celsius, while some fought hard to make the goal 1.5 degrees Celsius. The Accord adopts the former view but calls for a subsequent assessment of the implementation of the Accord, which would include “consideration of strengthening the long-term goal referencing various matters presented by the science, including in relation to temperature rises of 1.5 degrees Celsius.”⁸

6. Reversing the Order

Sometimes a disagreement has been resolved by changing the emphasis. For example, during the negotiation of the Kyoto Protocol, delegates hotly debated whether (and, if so, to what extent) Parties would be permitted to use allowances from international emissions trading to help meet their emissions targets. Some considered the inclusion of an article allowing trading to be absolutely essential, while others either opposed it entirely or could support it only if trading were subject to heavy regulation under the Protocol. Several drafts of the article

⁶ See Article 4.2(d) of the Convention.

⁷ See 1996 Geneva Ministerial Declaration, paragraph 8.

⁸ See Copenhagen Accord, paragraphs 2 and 12.

had begun with “authorizing” language (making clear that Parties were free to engage in trading), before referring to any rules that might limit such trading. In order to gain wide acceptance, the final text switched the order of the two ideas. It provided:

The Conference of the Parties shall define the relevant principles, modalities, rules and guidelines, in particular for verification, reporting and accountability for emissions trading. The Parties included in Annex I may participate in emissions trading for the purposes of fulfilling their commitments under Article 3.

Beginning with the potential constraints on emissions trading (i.e., defining the applicable “principles, modalities, rules and guidelines”) and only then setting out the authorizing language (i.e., the Parties “may participate in emissions trading...), provided a balance that was palatable for both sides.⁹

7. Less is More

Negotiators have often been amenable to having their proposals deleted, provided the proposals of others were also deleted (an approach sometimes jokingly referred to as “mutually assured deletions”). The draft preamble to the Kyoto Protocol, for example, contained a long list of suggested elements, many of which were contradictory. The solution was to delete almost all of them, leaving only a handful of references to the Convention and the mandate for the negotiations.¹⁰

8. Sending It Elsewhere

Sometimes the solution to a disagreement has been to request another body or organization to address it. For example, the Parties to the Convention had been unable to agree on how to attribute, as among them, the emissions from bunker fuels used in international transport. During the negotiation of the Kyoto Protocol, rather than seek to resolve the issue, negotiators decided to send to the International Civil Aviation Organization and the International Maritime Organization, respectively, the homework of addressing greenhouse gas

⁹ See Article 17 of the Kyoto Protocol.

¹⁰ See Preamble of the Kyoto Protocol.

emissions from aviation and marine bunker fuels.¹¹

9. Saying What, Not Why

Negotiators have on occasion resolved an issue by focusing solely on which Parties agree to do what – and omitting the underlying rationale for those actions.

During the negotiation of the Convention, there was a push from some developing countries to spell out *why* so-called “Annex II” Parties (consisting of the Annex I Parties minus the former Soviet Republics and Eastern European countries) were committing to provide certain financial support to developing countries. They thought it was important to make clear that this commitment flowed from the “historical responsibility” of such countries for emitting greenhouse gases. Annex II Parties, on the other hand, considered that they were agreeing to pay for certain developing country actions because they had the capacity to do so. In fact, they affirmatively rejected the notion of “historical responsibility.” The solution was to simply state the facts – X Parties agree to do Y -- without any reasons attached. If certain Parties chose to go home and explain the provision in a particular way, they could do so, but without textual back-up.¹²

As another example, the Kyoto Protocol’s compliance regime was designed to have two branches: a facilitative branch and an enforcement branch. Everyone agreed that the facilitative branch would apply to all Parties and that the enforcement branch would apply only to Annex I Parties. Negotiators strongly disagreed, however, on why this was the case. Some developing countries took the position that, as a matter of principle, only Annex I Parties could be subjected to a stringent compliance review. Annex I Parties, on the other hand, considered that it was appropriate for them to be reviewed by an enforcement branch because:

- their commitments involved quantitative targets, the achievement of which could be objectively assessed -- while the qualitative commitments of developing countries could not; and
- given that Annex I targets could be met through the use of emissions trading, an enforcement regime was important for the environmental integrity of the system

¹¹ See Article 2.2 of the Kyoto Protocol.

¹² See, e.g., Article 4.3 of the Convention.

(e.g., to ensure that Parties were not selling allowances if they were exceeding their targets).

The compliance regime left unstated the reasons for the two-track system, leaving Parties free to explain it in their own ways.¹³

10. “*inter alia*”

The phrase “*inter alia*” has been inserted in several cases when there was no agreement to include a particular proposal in a listing and the proponent(s) would not agree to an exhaustive list:

- During the negotiation of the “principles” article of the Convention, negotiators could not agree on the proposed inclusion of a principle related to science. In exchange, “*inter alia*” was added to the chapeau, making clear that the list of principles was an open one.¹⁴
- The “Berlin Mandate,” the product of the first meeting of the Conference of the Parties, was to set out the negotiating instructions for the instrument that became the Kyoto Protocol. A sticking point was whether to include in the list of objectives a specific reference to international market mechanisms, such as emissions trading. The solution was to add “*inter alia*” to the chapeau, making the list non-exhaustive and precluding the potential argument during the negotiating process that ideas not on the list could not be raised.¹⁵
- In a related vein, negotiators of the 2011 “Durban Platform,” which laid out the instructions for what became the Paris Agreement, could not agree on a closed list of topics for the negotiations and therefore provided that the negotiating group was to plan its work “including, *inter alia*, on mitigation, adaptation, finance...” etc.¹⁶
- At the 2014 Conference of the Parties in Lima, negotiators were charged with developing a list of the types of information that Parties might submit along with their emissions targets in order to promote clarity. Certain proposals were opposed, including one related to whether a Party expected to use market mechanisms, such as international emissions trading, to help achieve its target. Because the provision was phrased permissively (i.e., Parties “may” include such information), there was some concern that it might be read to mean that Parties could not submit types of

¹³ See Decision 27/CMP.1.

¹⁴ See chapeau of Article 3 of the Convention.

¹⁵ See COP Decision 1/CP.1, chapeau of paragraph 2.

¹⁶ See COP Decision 1/CP.17, paragraph 5.

clarifying information that did not appear on the list. The inclusion of “inter alia” made clear that that was not the case.¹⁷

The English relative of “inter alia” -- “including but not limited to” -- has also been used liberally to resolve disagreements over listings. A recent example related to the Paris Agreement’s call for the Parties to review their progress every five years (the so-called “global stocktake”). The question was what types of information the Parties would consider as part of the global stocktake. The negotiators created a non-exhaustive list of such “sources of input” through an “including, but not limited to” clause.¹⁸

11. Commas

The comma, the most surgical of all drafting devices, has played an active role in climate negotiations.

An early example is from the negotiation of the Convention, specifically concerning the reference to sustainable development. During the drafting of what became the article on “principles,” some countries advocated the inclusion of a “right to sustainable development.” Other countries did not recognize such a right. The originally proposed sentence provided that the Parties “have a right to, and should promote, sustainable development.” By moving the comma to sit in front of the word “promote,” instead of after, negotiators were able to create a sentence that worked for everyone. It read: “The Parties have a right to, and should, promote sustainable development.” It then meant that the Parties have a right to *promote* sustainable development – and they should do so. The sentence gave enough to proponents without crossing the “red lines” of opponents.¹⁹

A comma was at the heart of the deal coming out of the 2007 COP in Bali. Negotiators were designing the mandate for the next stage of the climate regime. For this effort to succeed, it was essential to bring into the process the two largest emitting States -- the United States, which had not joined Kyoto but was now ready to re-engage in negotiations under the

¹⁷ See COP Decision 1/CP.20, paragraph 14.

¹⁸ See COP Decision 1/CP.21, paragraph 99.

¹⁹ See Article 3.4 of the Convention.

Convention, and China, which had joined Kyoto but, as a “non-Annex I” Party, did not have any specific emissions commitments.

Much effort had gone into constructing balanced paragraphs with respect to the mitigation efforts of developed and developing countries. As noted below (under “parallelism”), the mitigation actions of both developed and developing countries would be “measurable, reportable, and verifiable.” In the developed country paragraph, these adjectives were placed at the beginning:

“[m]easurable, reportable, and verifiable... mitigation commitments or actions”

In the developing country paragraph, they stood at the end:

“...mitigation actions..., supported and enabled by technology, financing and capacity-building, in a measurable, reportable and verifiable manner”

The adjectives were moved to the end at the request of certain developing country delegates, who sought to have them apply to technology, financing, and capacity-building (i.e., the support for mitigation actions). For developed countries, it was vital on both substantive and parallelism grounds that the adjectives applied to the mitigation actions themselves. The comma before “in a measurable, reportable and verifiable manner” was therefore a critical element of the paragraph; otherwise, the adjectives would logically be read to apply only to support for actions and not to the mitigation actions themselves.²⁰

At the Durban COP in 2011, there was widespread agreement that the new instrument to be negotiated should be “rules-based.” However, discussions were ongoing concerning the extent to which rules should be multilaterally agreed versus nationally-derived. The preamble to the Durban Platform thus referred to the need for strengthening the “multilateral, rules-based regime under the Convention.” The comma between “multilateral” and “rules-based” made clear that the regime would be multilateral, as well as rules-based, but did not say that the rules would be multilateral – which would have been the case without the comma.²¹

²⁰ See COP Decision 1/CP.13, paragraphs 1(b)(i) and (ii).

²¹ See COP Decision 1/CP.17, preambular paragraph 4.

12. Parallelism

As noted, the Bali negotiators aimed to bring both the United States and China into the next phase of the climate regime. In this regard, the main issue was the extent to which the mandate would reflect differentiation between “Annex I” and “non-Annex I” Parties (or between “developed” and “developing” countries).

In terms of both substance and optics, the United States in particular sought a single paragraph addressing the mitigation mandate relevant to all Parties. Others, including China, insisted upon a clear distinction, both substantively and optically, between two categories, whether based on the Convention’s Annex I or developed/developing countries.

The compromise was to have two separate paragraphs but with a substantial amount of parallel content:²²

- The mitigation efforts of both developed and developing countries were described as “nationally appropriate.”
- The mitigation efforts of both developed and developing countries would be “measurable, reportable, and verifiable.”
- While a distinction was drawn between the type of efforts to be considered for developing countries (“actions”) versus for developed countries (“commitments or actions”), the “or” made clear that the Bali mandate could be fulfilled by considering only “actions” for developed countries.

13. De facto

Sometimes an approach to problem-solving has not even been visible.

When, in Copenhagen, countries determined that it was simply too late to list their respective emissions targets/actions in the Accord, they agreed to give themselves a few months to make submissions. This delay raised the question of how a country could ensure, in making its submission, that other “key” countries would also make submissions. Given the backdrop of the Kyoto Protocol, developed countries, including the United States, were not interested in an instrument that included only developed countries. They wanted to ensure that, at a minimum, the major developing countries participated. However, major developing countries opposed any sub-dividing of the category of “developing countries,” such that, for example, those with

²² See COP Decision 1/CP.13, paragraphs 1(b)(i) and (ii).

higher levels of emissions would be expected to make a submission. Further, attempts to ensure that the Accord would only enter into effect once a particular threshold of emissions from both developed and developing countries had been met were not accepted.

As a result, several countries worked behind the scenes to ensure that the countries whose participation they considered critical were also planning to make submissions. Although the text of the Copenhagen Accord does not reveal it, this choreography resulted in the de facto participation of all the major economies, including both developed and developing countries.

14. Changing the Subject

Problem-solving at the Cancun Conference of the Parties in 2010 necessitated changing the subject of the sentence.

The Cancun meeting followed the previous year's meeting in Copenhagen, where the Parties (with a few exceptions) had agreed on the Copenhagen Accord. The Accord used different verbs for Annex I vs. non-Annex I Parties, i.e., it provided that Annex I Parties "commit" to implement their mitigation pledges and that non-Annex I Parties "will" implement theirs.

In Cancun, it had been agreed that the decision text would refer, separately, to the pledges that Annex I and non-Annex I Parties had signed up to implement. Annex I Parties sought to avoid perpetuating the use of two verbs in the Cancun outcome, lest they be interpreted differently. If the subjects of the two relevant provisions were different -- "Annex I Parties" and "non-Annex I Parties" -- it might have been difficult to avoid repeating the Copenhagen verbs.

The solution was to start both sentences with the same subject, namely the "Conference of the Parties" (COP). That then allowed the verbs ("takes note of") to be identical. Thus, the developed country sentence provided that the COP "takes note of quantified economy-wide emission reduction targets to be implemented by Parties included in Annex I to the Convention as communicated by them and contained in document FCCC/SB/2011/INF.14 (to be issued)," and the developing country sentence provided that the COP "takes note of nationally appropriate mitigation actions to be implemented by Parties not included in Annex I to the

Convention as communicated by them and contained in document FCCC/AWGLCA/2011/INF.15 (to be issued).”²³

15. Footnotes

Referring to the Parties’ various mitigation pledges in Cancun also required finessing an issue through the use of a footnote. As noted above, negotiators sought to refer to the pledges that had been made by Parties under the Copenhagen Accord. They were housed in two so-called “INF” (for “information”) documents, one for Annex I Parties and one for non-Annex I Parties. The handful of countries that had opposed the Accord, preventing it from being formally adopted in Copenhagen, refused to recognize the INF documents and considered any reference to them to be illegitimate. Failure to recognize Copenhagen pledges would have been highly problematic, as one of the objectives of the Cancun COP was to give more formal status to such pledges than the not-officially-adopted Copenhagen Accord had been able to achieve.

After many hours of deliberation, negotiators hit upon a solution. They would refer to the INF documents in the text of the decision but would add, in a footnote, that “[p]arties’ communications to the secretariat that are included in the information document are considered communications under the Convention.” Thus, the pledges were deemed to be communications under the Convention, not only under the Copenhagen Accord, and could therefore be recognized by those that had opposed the Accord.²⁴

16. “Without Prejudice”

Particularly when negotiations span several years, countries have sometimes been concerned that taking a particular decision, or using a particular word, might prejudice their positions in the longer term.

For example, at the Conference of the Parties in Warsaw in 2013, two years before the expected conclusion of the Paris Agreement, an issue arose concerning the noun that would be used to describe what ultimately became known as nationally determined “contributions.”

²³ See COP Decision 1/CP.16, paragraphs 36 and 49.

²⁴ See COP Decision 1/CP.16, footnotes 4 and 5.

Negotiators were nearly set to call them nationally determined “commitments.” At the last minute, however, some delegates took the position that “commitments” are, by definition, legally binding.

Those who either were opposed to legally binding emissions targets or wanted to keep open the question of their legal character objected to the use of the term. On the other hand, those supporting legally binding emissions targets were concerned that the use of the substitute “contributions” might give the impression that it had already been agreed that targets would not be legally binding. The solution was to use the word “contributions” but accompany it with the phrase “without prejudice to the legal nature of the contributions.”²⁵

One year before Paris, at the Lima Conference of the Parties, negotiators were still debating whether the scope of an “intended nationally determined contribution” (INDC) was limited to mitigation or included more elements, such as adaptation, finance, etc. Because the Lima decision leaned in the direction of suggesting that such contributions were to be mitigation-focused, the decision also provided that “the arrangements” specified in the decision were “without prejudice” to, among other things, “the content” of INDCs and “the content” of the future Paris agreement.²⁶

The Lima decision also contained a “no prejudice” clause with respect to the future form of the Paris outcome. There had been no decision yet on whether the agreement would be a “protocol” or other type of agreement. If it was to be a protocol, Article 17 of the Convention provided that the secretariat was to communicate the text to Parties at least six months before the Paris session. The Parties sought to meet this deadline, just in case, but those not supporting a protocol did not want to suggest that, by calling for the secretariat to circulate the text, they had decided on a protocol. The request to the secretariat therefore noted that its communication of the text “will not prejudice” whether the outcome would be a “protocol, another legal instrument or an agreed outcome with legal force” (citing the trilogy from the Durban Platform mandate).²⁷

²⁵ See COP Decision 1/CP.19, paragraphs 2(b) and (c).

²⁶ See COP Decision 1/CP.20, paragraph 8.

²⁷ See COP Decision 1/CP.20, paragraph 7.

17. Finding the “Just Right” Adjective

At the 2013 Warsaw COP, there was emerging agreement that Parties would put forward their “nationally determined contributions” (in essence, their emissions targets) in advance of the Paris Conference. The idea was to subject targets to the sunlight, giving other Parties and civil society an opportunity to see them well before Paris and, in so doing, to inspire Parties to put their best foot forward. However, there was disagreement about how to characterize these previews:

- For some Parties, there was no distinction between the preview version of their contribution and the final version; the contribution was not to be negotiated with other Parties or otherwise changed. Those Parties favored no adjective before “nationally determined contributions.”
- For others, it was important to at least leave open the possibility that previewed contributions might ultimately change, such as in response to questions seeking clarification of a target or even in response to pressure to increase the level of ambition. Those Parties favored an adjective making clear the provisional nature of the preview, such as “proposed” contributions. To the other Parties, this suggested too little finality, as if the contributions needed to be somehow approved by others.

The Goldilocks “just right” solution was to call the contributions “intended,” with the perfect flavor of not necessarily absolutely final but also not up for negotiation with, or approval by, other Parties.²⁸

18. Using the Preamble

The preamble has frequently been the salvation of provisions that negotiators could not agree to place in the operative provisions of an instrument. In the Paris Agreement, for example, while many Parties supported the inclusion of a reference to human rights in the body of the Agreement (specifically in Article 2, which lays out the Agreement's aims), others did not. The solution was to reference human rights in the preamble.²⁹

²⁸ See COP Decision 1/CP.19, paragraph 2(b).

²⁹ See preambular paragraph 12 of the Paris Agreement.

19. Passive voice

The passive voice has come in handy in order to avoid litigating an issue in more than one negotiating forum and/or addressing it in more than once place in the text. For example, a major issue during the negotiation of the Paris Agreement was which Parties would be expected to provide financial and other forms of support to developing countries to assist in their implementation. The issue was being addressed in the finance negotiations. Some developing countries sought to include references to support in the other articles of the agreement, such as mitigation, in order to provide reassurance that various efforts of developing countries would be supported. However, there was reluctance on the part of donors to engage in the “who pays” debate in multiple fora. They were also concerned about potentially inconsistent references to finance in various articles of the Agreement. The passive voice (“[s]upport shall be provided..., in accordance with Articles...”), which avoided a subject of the sentence, allowed for the inclusion of the reassurance, while leaving the question of the providers of support to the finance negotiating forum and the finance article of the Agreement.³⁰

20. Putting It Off

Climate negotiators have often “resolved” issues by not resolving them, i.e., by postponing the discussion/resolution to a later time. Sometimes the issue was not urgent and could safely be left until the future; most of the Kyoto Protocol’s rules were put off, given that the Protocol was adopted in 1997, and the commitment period was not to begin until 2008.

At times, however, issues have been put off because there was no agreement. For example, delegates to the Framework Convention negotiations could not agree on whether, in addition to the inclusion of traditional bilateral dispute settlement procedures, they should establish a multilateral procedure to address questions regarding the implementation of the Convention. They elected to direct the first COP to “consider” the establishment of such a process.³¹ (While the Parties came close to establishing such a process, they never did. Disagreement concerning, *inter alia*, the composition of the body that would address questions

³⁰ See Article 4.5 of the Paris Agreement, as well as Articles 7.13, 13.14, and 13.15.

³¹ See Article 13 of the Convention.

of implementation prevented consensus.)

As another example, negotiators could not agree on a common time frame for mitigation targets in the Paris Agreement. In the run-up to Paris, countries had submitted initial targets in both the 2025 and 2030 timeframes. In Paris, some countries sought a provision making clear that, post 2030, all Parties would need to set targets in the same time frame (such as every five years). Others either disagreed that there would ever be a need for harmonization or disagreed on what the harmonized time frame should be. As a result, delegates agreed instead that the Parties to the Agreement were to consider common time frames at their first meeting.³²

21. small letter

On at least once occasion, negotiators addressed a challenge through the use of a small letter. At COP 17 in Durban, certain Parties sought to establish a formal institution to address the impacts of response measures, i.e., impacts that arise from measures taken to address climate change, as opposed to impacts arising from climate change itself. Other Parties were not enthusiastic about agreeing to establish a body or institution that was either too formal or too permanent. The compromise was to create “a forum” (as opposed to “a Forum” or “The Forum”) on the impact of the implementation of response measures and to call for a future session to review “the need for its continuation.”³³

22. “For some”

There has often been widespread agreement to include a particular phrase in an instrument. In the Paris Agreement, for example, negotiators were able to agree on the inclusion of a reference to “a just transition.”³⁴ However, there have also been occasions where a few countries have sought to include a particular phrase, while other countries have not necessarily wanted to be associated with that phrase. The Paris Agreement's preamble contains two such examples: “Mother Earth” and “climate justice.” In both cases, the solution was to

³² See Article 4.10 of the Paris Agreement.

³³ See COP Decision 8/CP.17.

³⁴ See preambular paragraph 11 of the Paris Agreement.

include the phrase but to make clear at the same time that not necessarily all Parties embrace the concept:

- In the case of "Mother Earth," it is "recognized by some cultures."³⁵
- In the case of "climate justice," the preamble notes the "importance of the concept for some."³⁶

23. Self-Judging

One of the more controversial proposals during recent climate negotiations has been the formulation "Parties in a position to..." Although the phrase was not necessarily intended to create an objective standard, that is how some negotiators perceived it. They were concerned that others might attempt to judge whether a Party was or was not "in a position to" do X or Y. In the run-up to Paris, the phrase was associated with proposals related to the provision of financial resources. However, it initially came up during discussions at the Warsaw Conference of the Parties about previewing nationally determined contributions.

Negotiators had largely agreed that Parties would be invited to submit their contributions "well in advance" of the Paris COP, but there was an additional proposal to the effect that Parties "in a position to do so" would be invited to submit theirs even earlier, i.e., by March 31st of that year. Several delegates expressed concern. When the word "ready" was offered as a substitute for the offending "in a position," it was quickly accepted. It was considered more self-judging than "in a position..." because it would be difficult for others to second-guess a Party's readiness.³⁷

24. Avoiding Particular Words

Particular words have often caused problems for certain countries, whether for domestic political reasons, ideological reasons, or otherwise. Work-arounds have often been necessary.

During the negotiation of the Paris Agreement, for example, many countries supported the inclusion of provisions on the use of "markets" in relation to implementing emissions

³⁵ See preambular paragraph 14 of the Paris Agreement.

³⁶ See preambular paragraph 14 of the Paris Agreement.

³⁷ See COP Decision 1/CP.19, paragraph 2(b).

targets. However, for a few countries, that term was unacceptable. The way out was to draft an article that clearly addresses markets but without using that word. (It refers to “cooperative approaches that involve the use of internationally transferred mitigation outcomes towards nationally determined contributions.”)³⁸

A similar issue arose with respect to setting a long-term emissions goal in the Paris Agreement. Many catch phrases had been proposed for the goal, including “carbon neutrality,” “decarbonization,” “climate neutrality,” and “net zero emissions.” However, each proposal raised a problem with one or more constituencies:

- Word and phrases containing the word “carbon” (such as “decarbonization” and “carbon neutrality”) were problematic for oil-exporting countries, because they focused exclusively on carbon dioxide.
- Other countries, while not necessarily disagreeing with the concepts of “net zero emissions” or “climate neutrality,” had issues with those terms. Some did not like the extreme nature of the word “zero,” while others did not like the inclusion of the limiting “net.” Some found the phrase “climate neutrality” too vague.

The solution was to spell out the long-term goal in terms of substance, rather than particular terms: “...Parties aim...to undertake rapid reductions ... so as to achieve a balance between anthropogenic emissions by sources and removals by sinks of greenhouses gases in the second half of this century....”³⁹

Finally, it is interesting to note that there has been a distinct allergy to the word “report” when used as a verb. Instead, the Parties “communicate” information (under the Convention⁴⁰ and the Paris Agreement⁴¹), “provide” information under the Paris Agreement⁴², and “submit” information under the Kyoto Protocol.⁴³

³⁸ See Article 6 of the Paris Agreement.

³⁹ See Article 4.1 of the Paris Agreement.

⁴⁰ See, e.g., Article 12.1 of the Convention.

⁴¹ See, e.g., Article 9.5 of the Paris Agreement.

⁴² See, e.g., Article 13.7 of the Paris Agreement.

⁴³ See, e.g., Article 7.3 of the Kyoto Protocol.

25. Borrowing

It has been helpful on occasion to borrow agreed text from other places:

- Borrowings have come from previous COP decisions. For example, the preambular reference in the Paris Agreement to "equitable access to sustainable development" lifts that phrase from previously agreed language in the decision adopted at the Cancun COP in 2010.⁴⁴
- There have also been important examples of borrowing from bilateral statements, particularly those between the United States and China. For example:
 - Negotiators at the Lima COP in 2014 broke a logjam on the contentious issue of how to refer to the principle of "common but differentiated responsibilities and respective capabilities" by adopting the formulation agreed in the U.S.-China Joint Announcement a month earlier (i.e., "common but differentiated responsibilities and respective capabilities, in light of different national circumstances").⁴⁵
 - The Paris Agreement itself also used certain formulations from the 2015 U.S.-China Joint President Statement, such as agreement that the transparency regime under the Agreement would afford flexibility to "those" developing countries that need it in light of their "capacities."⁴⁶

26. Titles

At least two debates over the years have involved the titles of articles:

- During the negotiation of the Convention, the articles had working titles. Article 3 was titled "principles." Paragraph 3 of that article, which had been agreed, included what many countries referred to as the "precautionary principle." The United States, while embracing the substance of the paragraph, did not agree that it was a "principle" (characterizing it instead as the precautionary "approach"). As such, the United States considered that titling the article "principles" would be prejudicial to its view. One possible solution, namely to delete all titles, was opposed, because many countries thought it would be easier to understand the Convention if the articles had titles. Instead, negotiators included a footnote at the beginning of the Convention providing that "[t]itles of articles are included solely to assist the reader."⁴⁷

⁴⁴ See COP Decision 1/CP.16, paragraph 6.

⁴⁵ See COP Decision 1/CP.20, paragraph 3; see U.S.-China Joint Announcement of November 14, 2014, paragraph 2.

⁴⁶ See U.S.-China Joint Statement of September 25, 2015, paragraph 4; see Article 13.2 of the Paris Agreement.

⁴⁷ See footnote accompanying the title of Article 1 of the Convention.

- During the negotiation of the Paris Agreement, there was an issue concerning the relationship between “adaptation” and “loss and damage.” As noted above, at the Warsaw COP in 2013, delegates had provisionally resolved the issue in favor of placing loss and damage under the umbrella of adaptation, subject to a review in 2016. In Paris, there was a push to create separate articles and clearly label them “adaptation” and “loss and damage.” Those seeking to preserve the notion that loss and damage falls under adaptation, or at least to retain ambiguity on the subject, agreed to have a separate article addressing loss and damage, provided the agreement had no titles. It is for this reason that the Paris Agreement has no titles.⁴⁸

27. Non-Legally Binding

The issue of the legal character of commitments has been at the heart of many Conferences of the Parties, and the resolution has sometimes been to take a non-legally binding approach. The Copenhagen Accord is an extreme example. Designing the Accord as a completely non-legally binding instrument was the only way to reconcile, on the one hand, the opposition by some developing countries to taking on legal commitments themselves and, on the other hand, the insistence by the United States and certain other developed countries that they would take on legal commitments only if such commitments were widely applicable.

There are many other examples of facilitating agreement at the level of individual provisions by making them non-legally binding:

- As noted, the Convention’s 1990-levels-by-2000 emissions goal for Annex I Parties was made non-legally binding in order to make it acceptable, particularly to the United States.⁴⁹
- The issue that almost created a breakdown in the final hours of the Paris Conference involved the legal nature of one of the mitigation provisions. The legal character of emissions targets was addressed in Article 4.2, which made clear that such targets were not legally binding. A separate provision, Article 4.4, was intended to address the question whether, recognizing that each Party’s mitigation contribution would be “nationally determined” (per Article 4.2), there should nevertheless be certain expectations concerning the respective contributions of developed vs. developing countries. Negotiators had carefully worked out language to the effect that the expectation regarding developed countries would be the continuation of economy-

⁴⁸ See title accompanying paragraphs 47-51 of COP Decision 1/CP.21.

⁴⁹ See Article 4.2(b) of the Convention.

wide absolute emission reduction targets, while that of developing countries would be to enhance their efforts, with an encouragement to move over time towards economy-wide emission reduction or limitation targets in light of their different national circumstances. Both clauses used the verb "should" and were non-legally binding. When the "final" version of the Agreement was issued, however, the verb attached to the developed country phrase had been switched to "shall." This change, of mysterious origin, not only would have made the developed country clause legally binding but would have created a distinction between the legal nature of the developed country and developing country clauses; neither of these results would have been acceptable to the United States, among others. Once the error was corrected and the proper verb reinstated, the adoption of the Agreement was able to move forward.⁵⁰

- Another example from the Paris Agreement involved the submission of adaptation communications. There was an early push from some Parties to create legal parallelism between mitigation and adaptation, such that Parties would be required to submit communications in both areas. Ultimately, however, while there was support for mandatory mitigation communications, there was insufficient support to make adaptation communications mandatory. The solution was to provide that each Party "should, as appropriate, submit...an adaptation communication...."⁵¹

28. "Voluntary"

In several cases, even where it was already clear from the word "may" that a Party could freely choose whether or not to do X, emphasizing the notion of voluntariness provided the necessary comfort to reach agreement. For example:

- In the Convention, developing country Parties may, "on a voluntary basis," propose projects for financing.⁵²
- In the Copenhagen Accord, the mitigation paragraph relevant to developing countries provides that least developed countries and small island developing States "may undertake actions voluntarily."⁵³
- In the Paris Agreement's finance article, Parties other than developed countries are "encouraged to provide or continue to provide such support voluntarily."⁵⁴

⁵⁰ See Article 4.4 of the Paris Agreement.

⁵¹ See Article 7.10 of the Paris Agreement.

⁵² See Article 12.4 of the Convention.

⁵³ See paragraph 5 of the Copenhagen Accord.

⁵⁴ See Article 9.2 of the Paris Agreement.

29. Decision Instead of Agreement

One of the most frequently used devices for resolving differences has been to reflect provisions in the “decision” adopted by the Conference of the Parties, rather than in the agreement itself. Placement in the decision has not necessarily related to legal character, as a provision in an agreement can be non-legally binding and a provision in a decision can be legally binding (assuming an adequate legal hook in the agreement). Rather, it has often been the lower-profile nature of the decision that provided the way out.

For example, at the end of the negotiation of the Kyoto Protocol, the United States introduced a proposal to exclude emissions from certain international military operations from Parties’ national totals. While the substance of the proposal was not necessarily controversial, there was a certain amount of resistance to addressing military-related issues in the text of the Protocol itself. The solution was to include the exclusion in a decision on “methodological issues.”⁵⁵

Two significant features of the Paris outcome were included in the decision accompanying the Agreement:

- Developed countries were amenable to continuing through 2025 the goal that had been agreed in Copenhagen, namely a collective goal of mobilizing \$100 billion a year by 2020 to address the needs of developing countries, in the context of meaningful mitigation actions and transparency on implementation. However, they were averse to including quantified figures in the Agreement itself. As a result, the continuation of the goal is reflected in the decision.⁵⁶
- A core aspect of the deal that enabled inclusion of the subject of “loss and damage” to be reflected in the Paris Agreement was a clear statement that it did not involve liability or compensation. Because there was sensitivity on the part of some countries to including the statement in the Agreement itself, and because the statement would not be weakened substantively by its placement, it was agreed to address the issue in the decision.⁵⁷

⁵⁵ See COP Decision 2/CP.3, paragraph 5.

⁵⁶ See COP Decision 1/CP.21, paragraph 53.

⁵⁷ See COP Decision 1/CP.21, paragraph 51.

30. Incrementalism

With respect to certain issues, countries have made themselves more and more comfortable with a particular concept over time, dropping the qualifiers along the way.

Taking the example of the global temperature goal, the Convention does not specify a quantitative goal. Its objective is qualitative, i.e., “stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.”⁵⁸

As science advanced, the issue arose whether and, if so, how to reflect a translation of the Convention’s qualitative language into a quantitative goal. The Major Economies Forum (“MEF”) grappled with the question in July, 2009, in the run-up to the Copenhagen Conference. As there was no consensus to adopt a goal at that point, the Declaration of the MEF Leaders instead included a recognition of “the scientific view that the increase in global average temperature above pre-industrial levels ought not to exceed 2 degrees C.”⁵⁹

The Copenhagen Accord took the issue a few steps further. Like the MEF Declaration, it recognized the “scientific view;” however, its characterization of the view was that the increase in global temperature should be “below” 2 degrees Celsius.⁶⁰ In addition, the Accord reflected a version of a global temperature goal, specifically that deep cuts in global emissions were required and, citing the IPCC’s Fourth Assessment Report, “with a view to reduce global emissions so as to hold the increase in global temperature below 2 degrees Celsius.”⁶¹ As noted above, the Accord, in a separate place, called for future consideration of strengthening the goal, with a specific reference to 1.5 degrees C.

The 2011 Durban COP, for the first time, referred to “below 2 degrees” and “1.5 degrees” in the alternative:

“Noting with grave concern the significant gap between the aggregate effect of Parties’ mitigation pledges in terms of global annual emissions of greenhouse gases by 2020 and aggregate emission pathways consistent with having a likely

⁵⁸ See Article 2 of the Convention.

⁵⁹ See L’Aquila Declaration of the Leaders, the Major Economies Forum on Energy and Climate, July 9, 2009, paragraph 1.

⁶⁰ See Copenhagen Accord, paragraph 1.

⁶¹ See Copenhagen Accord, paragraph 2.

chance of holding the increase in global average temperature below 2 °C or 1.5 °C above pre-industrial levels...”⁶²

However, the decision did not establish 1.5 degrees as a new policy goal. Rather, the reference to 1.5 was broadly agreeable because it was embedded in a factual statement concerning the relationship between current efforts and the likelihood of holding the global temperature increase below that level.

The Paris Agreement moved beyond scientific views and factual statements in relation to global temperature, as well as strengthened the reference to “well below” 2 degrees:

“The Agreement...aims to strengthen the global response...including by...holding the increase in the global average temperature to well below 2 degrees C... and pursuing efforts to limit the temperature increase to 1.5 degrees C above....”⁶³

31. Separating/Clustering

In some cases, the solution to an impasse has been to separate out a particular clause or provision. For example, the Paris Agreement’s preamble references the least developed countries separately from developing countries that are particularly vulnerable. Negotiators from the former felt strongly that their specific needs and situations with respect to assistance, also referenced in the Convention,⁶⁴ warranted separate treatment.⁶⁵ At the opposite end of the spectrum, negotiators have on occasion “clustered” various provisions together to as to reduce the spotlight on one or more of them. For example, the Paris Agreement’s preamble combines about a dozen different concepts, most related to various “rights,” into one paragraph.⁶⁶ (In this case, clustering also served to put all the concepts under the rubric of “their respective obligations on...,” an acknowledgement that not all Parties have obligations with respect to all the “rights” and other concepts that follow.)

The foregoing examples are by no means a complete survey of the textual tools used to

⁶² See COP Decision 1/CP.17, third preambular paragraph.

⁶³ See Article 2 of the Paris Agreement.

⁶⁴ See Article 4.9 of the Convention.

⁶⁵ See the Paris Agreement, preambular paragraphs 6 and 7.

⁶⁶ See the Paris Agreement, preambular paragraph 12.

resolve differences over the course of twenty-five years of climate change negotiations. At the same time, they provide a glimpse into some of the inventive ways in which negotiators have been able to move the process forward.

As noted, the tools have worked in different ways:

- Many have sidestepped issues, enabling most or all Parties to preserve their positions. In some cases, this was done through imprecision or omission (e.g., constructive ambiguity, less is more, taking into account, titles, saying what, not why). In other cases, it was done through postponing resolution (e.g., identifying issues, revisiting, sending it elsewhere, putting it off) or other means (e.g., footnotes, de facto).
- Some have given confidence to one or more Parties that their future ability to raise an issue or take a particular position would not be impaired (e.g., without prejudice, inter alia).
- Some have given Parties the flexibility or other type of comfort necessary to go along with a particular commitment or provision (e.g., self-judging, taking into account, non-legally binding, incrementalism).
- Some have improved the optics for one or more Parties (e.g., avoiding particular words, reversing the order, voluntary, decision rather than agreement, clustering).
- Some have split the difference between competing views (e.g., small letter, for some, Parties versus States, parallelism, passive voice, preamble, “just right” adjective, decision instead of agreement).
- Commas have been used for a variety of purposes, including the removal of ambiguity.

While the techniques may not save us from the impacts of climate change, they contributed to saving several climate conferences and, recognizing that many are unique to the peculiarities of the climate change regime, may inspire the resolution of diplomatic differences in other contexts.