

International Climate Change Law Prato 2010 Instructor: Stepan Wood

Written Assignment Instructions

Revision 3 (12 June 2010) (deletions indicated by ~~striketrough~~, insertions by underline)

Authors: Stepan Wood and Terry Romaniuk (Osgoode J.D. 2011)

Introduction

One of the main activities in this unit is a simulated international climate change treaty negotiation. This exercise seeks to simulate the parties, interests, positions and negotiating dynamics of the real world of global climate politics. It allows students to examine in depth the key issues in the negotiation and implementation of a post-Kyoto international climate change agreement. At the same time it seeks to break out of the existing mould of international climate negotiations somewhat to explore new ideas and options that might improve the prospects for international agreement on actions to avert dangerous changes to the climate system.

In the wake of the 2009 Copenhagen Accord and in light of the ongoing international negotiations on long-term cooperative action under the UN Framework Convention on Climate Change (UNFCCC) and a successor to the Kyoto Protocol, a number of critical issues have come to the fore. This exercise takes the form of an informal “Friends of the Chair” meeting convened by the chair of the upcoming COP 16/CMP 6 international climate change conference in Cancun, Mexico. The goal of the meeting is to achieve consensus on a “way forward” that might form the basis for discussion at Cancun on the following issues:

- Negotiation procedures;
- Greenhouse gas emissions reduction commitments;
- Measurement, reporting and verification of implementation;
- Reduced Emissions from Deforestation and forest Degradation (REDD); and
- Adaptation and financing.

The chair (Mexico) has invited the following nine states to participate, and they have agreed:

- Belgium (representing the European Union)
- Brazil
- China
- India
- Lesotho (representing the Least Developed Countries)

- Russian Federation
- South Africa
- Tuvalu (representing the Small Island Developing States); and
- United States.

Each delegation will include four or five individuals, representing the following national government departments:

- One from the ministry of foreign affairs
- One from the ministry responsible for trade, industry or economic development
- One from the ministry responsible for environmental protection
- One from the ministry responsible for natural resources, including forestry
- In the case of five-person delegations, one more from the ministry of foreign affairs

One member of each delegation should be tasked with investigating the interests and positions of the other parties to the negotiations, to identify potential common ground and disagreement.

It is up to each delegation to assign these roles amongst its members.

All members of each delegation will engage in collaborative research outside classroom time into their assigned state or group of states on relevant matters, including trends in GHG emissions and sinks; impacts of climate change; and interests and positions in international climate change negotiations.

To facilitate a frank, open and creative dialogue and the pursuit of consensus, all the parties have agreed that the meeting will be closed to media and the public and its proceedings will be strictly confidential. No minutes will be taken and no sound or video recordings will be made. The only document(s) to come out of the meeting shall be the “way forward” discussion document, if any, agreed by the parties at the conclusion of the meeting. Nothing anyone says in the meeting shall be interpreted as an official negotiating position in the international climate change negotiations unless the party so indicates, and all participants have agreed that they will not later hold anyone to anything said in the meeting.

Scope and Questions

The participants have agreed not to reopen questions that have already been resolved in the COP, the CMP, the Ad Hoc Working Group on Long-Term Cooperative Action (AHG-LCA), or the Ad Hoc Working Group on a successor to the Kyoto Protocol (AHG-KP), but to take those resolutions as a starting point and focus on questions that are still open. In that spirit, the Chair has posed the following questions for discussion at the meeting:

A. Negotiation procedures

- Should the key negotiations at the COP/CMP be restricted to a small invitation-only “Friends of the Chair” group or be conducted in plenary?
- Should the normal rule of decision by consensus be relaxed to allow majority decision-making?
- Should the negotiations proceed on multiple tracks (one involving all Parties to the Convention, a second restricted to Parties to the Kyoto Protocol, and possibly a third focused on the Copenhagen Accord), or should they be consolidated on a single track?

B. Commitments and MRV

- Should developing country Parties assume economy-wide GHG emission limitation commitments?
- What should developed and developing country Parties’ GHG emission limitation commitments be?
- Which commitments (including those related to emissions limitation, financing and technology transfer) should be subject to measurement, reporting and verification (MRV), and should MRV be domestic or international?
- Should the outcome of the negotiations be a legally binding agreement?
- Should an agreement set a quantified long-term global goal for GHG concentrations or emission reductions, and if so what should it be?

~~C. REDD~~

- ~~• Should REDD programs be financed via a “market” or “fund” approach?~~
- ~~• Should REDD programs be subject to MRV?~~

D. Adaptation and Financing

- How should the category of particularly vulnerable developing countries be defined?
- How should adaptation funding be channeled to recipient countries?

Written Assignment: Confidential Negotiation Plan

The written assignment is your party’s confidential plan for its participation in the negotiation exercise. This confidential negotiation plan shall be minimum 800 and maximum 1000 words, excluding the title page and the text of the negotiation questions. Members of each group shall work together to produce the plan and the plan shall be evaluated on a group basis. Members of one group are welcome to share ideas and questions about the written assignment with members of other groups, but ~~they shall not disclose the contents of their plan to members of other groups, and~~ each plan must be the sole work product of the members of the group concerned.

The confidential negotiation plan shall have a title page containing the following information:

LAW4532E
International Climate Change Law
Instructor: Stepan Wood

Confidential Negotiation Plan:
[Name of Party (and group of states represented, if applicable)]

Date:
Submitted by:
[Names of all group members]
Word count (excluding this page): [insert word count]

The body of the plan must contain the following sections:

1. The value climate

This section should assess what is “up for grabs” in the negotiation. A useful first step in planning for a negotiation is an assessment of the resources available to be bargained for in coming to a negotiated agreement: the “value climate”. This encompasses more than the explicit focus of the negotiation (e.g., goods to be delivered by one party and the price to be paid by another party). Parties to a potential agreement are rarely in possession of only one resource, and they are usually interested in getting a “better deal” if they can. They might do this by getting a larger slice of an existing “pie,” or by enlarging the “pie” so there is more to go around. The value climate represents the “pie”. While the focus is usually on the “goods” or benefits that are available to be bargained over, the value climate also includes the value placed by parties on avoidance of various “bads” or harms that are at stake in the negotiation.

Assessment of the value climate may proceed in stages, with the most obvious benefits and harms being addressed first, and more subtle, indirect ones requiring some abstract thinking. These less evident values, though, often form the foundations upon which enduring agreements are constructed.

The value climate should be assessed before identifying specific interests or developing negotiating positions. Ideally, it is an impartial tally of what is available to be negotiated over. That said, the value climate in any negotiation is not static. You should continually re-assess the value climate throughout the negotiation to ensure that you bargain for the best possible options for the party you are representing.

This process is part of the “integrative” stage of bargaining, in which the parties establish how much value is available to be distributed and, with the right combination of skill and luck, find ways to create or discover new value. Inevitably, parties to a negotiation will move from integrative to “distributive” bargaining, in which they bargain over which party is to receive what amount of the value under what circumstances. If a party moves to distributive bargaining before all the value is created, it may not obtain the best result for itself.

2. **Interests and positions**

This section should identify and explain both the positions you plan to take on each of the major issues in the negotiation exercise, and the interests behind these positions.

Once you have assessed the value climate as well as you can at the pre-negotiation stage, you should consider what your party’s positions and interests are going into the negotiation. Positions can be thought of as the quantifiable assertions and demands made by a party while interests are the reasons why those positions are being asserted.

Positions are often easier to formulate (e.g. “I will offer X, but no more than X+10 for those widgets”), but interests are more fundamental. A negotiation that is focused on interests offers more opportunities for mutual gain than one focused on a battle of positions. If something were to change in the course of the negotiation that addressed the underlying interest, the position may change dramatically (i.e. I am willing to offer more to A than to B for the widgets as A offers payment by installment and we are likely going to need this over the next while). If negotiators focus on understanding and satisfying their parties’ interests, they are more likely to achieve a more appropriate solution, increasing the chance of creating a more a more lasting agreement.

With these instructions in mind, this section should be broken into subsections A through D, corresponding to the four issue areas identified above. Within each subsection, summarize the following information for each question posed by the Chair: your Party’s **real-world position** on the question as gleaned from the required readings and your own research; your **proposed position** in the negotiation exercise; and the **interests** underlying your Party’s position. You should not normally depart from your Party’s real-world positions; if you do, you should explain why it is desirable and realistic to do so. If you are unable to determine your Party’s real-world

position, indicate that it is “unknown”. This information on positions and interests can be presented in tabular form if you wish.

You should conclude this section with a final subsection E. Priorities and Linkages in which you answer the following questions:

- Is there a priority by which your Party’s interests should be ordered, and if so, why?
- Are your positions and interests related to certain questions connected to or dependent upon those related to other questions? If so, are there linkages, synergies or trade-offs you wish to pursue?

3. BATNA, deal breakers and targets

This section should discuss briefly how your Party will fare if it does not participate in the negotiation, as well as its goals and deal breakers. One of the only elements in a negotiation likely to remain constant is a party’s BATNA, or “best alternative to a negotiated agreement”. This is not because a BATNA equals the *status quo ante*. It doesn’t. It is because a BATNA exists outside any influence on a party or by a party to a negotiation. It is defined by the question, “what is the best case scenario if we do not participate in this negotiation?” There is a tendency for parties to portray their alternatives as more attractive than they really are, so you should be as dispassionate and honest as you can in assessing your Party’s BATNA.

A “resistance point” or “deal breaker” is a threshold a party designates as a “line in the sand” with respect to whether or not to establish an agreement. If the proposed agreement is better than the resistance point, the party will commit to it; if not, it will forego an agreement unless it improves. Unlike a BATNA, resistance points are flexible and moveable, subject to change through the acquisition of new or better information.

It is important to identify both your own and other parties’ resistance points as clearly as possible so that the “Zone of Possible Agreement” (ZOPA) can be established. The difference between parties’ resistance points, the ZOPA, indicates the range within which an agreement can be made that all parties will theoretically agree to.

If no ZOPA can be established at the outset of a negotiation, this does not mean that no agreement is achievable, just that more information is required that will change the value climate. It may be that certain information is not being factored in correctly or that certain information will be made available moving one or more parties’ resistance points such that a ZOPA will appear.

When establishing a negotiation plan with multiple positions that may have many resistance points associated, you should know which, if any, resistance points rely on other positions or interests being satisfied so that if matters develop rapidly during the distributive bargaining

stage, you will not become lost trying to sort out whether this is a good agreement for your party.

“Target points”, are those that would be achieved with an optimal agreement. These points are good to establish in as much as if an offer is made that exceeds an identified target point, it could signal that either your party or the offering party has missed a key piece of information that might derail the agreement later on. It is always worth checking your information again if an offer like this is made. As they say, if something looks too good to be true, it probably is.

Your plan may also include an introduction and conclusion, if you desire.

Negotiation Exercise

Instructions for the in-person negotiation exercise will be distributed in a separate document.