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SYMPOSIUM ON THE BIDEN ADMINISTRATION AND THE INTERNATIONAL LEGAL ORDER

CLIMATE CHANGE: REVERSING THE PAST AND ADVANCING THE FUTURE

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After four years of not simply inaction but significant retrogression in U.S. climate change policy, the Biden administration has its work cut out. As a start, it needs to undo what Trump did. The Biden administration took a step in that direction on Day 1 by rejoining the Paris Agreement. But simply restoring the pre-Trump status quo ante is not enough. The United States also needs to push for more ambitious global action. In part, this will require strengthening parties' nationally determined contributions (NDCs) under the Paris Agreement; but it will also require actions by what Sue Biniaz, the former State Department climate change lawyer, likes to call the Greater Metropolitan Paris Agreement—that is, the array of other international actors that help advance the Paris Agreement's goals, including global institutions such as the International Maritime Organization (IMO), the Montreal Protocol, and the World Bank, as well as regional organizations and non-state actors.[1] Although the Biden administration can pursue some of these international initiatives directly through executive action, new regulatory initiatives will face an uncertain fate in the Supreme Court. So how much the Biden Administration is able to achieve will likely depend significantly on how much a nearly evenly-divided Congress is willing to support.

Three Dilemmas

Climate change is the mother of all global commons problems. Solving it will require collective action by the entire international community to reduce and eventually phase out net greenhouse gas emissions. But reaching agreement internationally has been extremely challenging, given different national interests, disagreements about how to share the burdens of addressing climate change, and domestic concerns about the potential economic and social impacts of decarbonizing the economy.

In reengaging, the Biden administration must thread the needle on three issues:

First, it must balance leadership with humility. U.S. leadership was essential to the successful adoption of the Paris Agreement, and no other state or group has been able effectively to fill the leadership void left by the Trump administration's withdrawal from the Paris process. But, in pushing for stronger ambition internationally, the United States needs to be cognizant of its checkered history, recognize the contributions of other states, and be sensitive to their concerns.

Second, the United States must balance ambition with realism. The first test will come in crafting an NDC. An extremely ambitious NDC may lack credibility internationally. But an NDC that is clearly achievable may be

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[1] Susan Biniaz, *"Multilateralism," The Climate Challenge and the (Greater Metropolitan) Paris Agreement*, WILSON CTR. (Sept. 30, 2020).

criticized as insufficiently ambitious. The more the U.S. NDC can be backed up by domestic law, regulations, and policies, the more credible it will be.

Third, the United States must balance the use of cooperative and confrontational tools. Internationally, U.S. leadership will require working with other countries to promote stronger climate action. But, domestically, policies that raise the price of carbon might need to be coupled with measures that raise tensions with other countries, such as border tax adjustments, in order to protect trade-exposed U.S. industries.

A Top Ten List

With these considerations in mind, here is a Top Ten list for the Biden administration's international climate policy:

Rejoin Paris

As expected, President Biden re-accepted the Paris Agreement on Day 1 of his presidency, checking this item off his "to do" list. The acceptance will take effect after thirty days, on February 19, 2021.

The Paris Agreement was the product of years of intensive international negotiations and enjoys overwhelming international support. It is too early to say whether it will be successful in achieving its goals, but it is clearly the world's best hope to address the climate change problem, and it provides a solid foundation for international action. Among its central features:

- It calls on states to pursue efforts to limit the global increase in temperature to 1.5°C, to peak emissions as soon as possible, and to achieve net-zero emissions in the second half of the century.
- It requires each party to submit an NDC every five years, setting forth what the party intends to do to reduce emissions.
- It seeks to increase resilience to climate change.
- It promotes transparency and accountability through its reporting and review procedures.
- Finally, it promotes stronger ambition over time, by providing for a global assessment every five years of how the world is doing collectively in achieving the agreement's goals, the outcome of which is to inform parties in updating and enhancing their NDCs.[2]

Although some climate activists criticized the Paris Agreement as too weak (because parties' mitigation pledges are both "nationally determined" and not legally binding), it would have been the height of folly for the Biden administration to throw out the Paris Agreement and try to start again. Rejoining Paris was the essential first step in reengaging internationally.

Recommit the United States to the Green Climate Fund

Also in the category of reversing President Trump's actions, the Biden administration should recommit to the Green Climate Fund, which serves as the primary financing mechanism for the Paris Agreement. President Obama pledged US$3 billion to the Green Climate Fund when the United States joined the Paris Agreement, of which US$1 billion had been delivered when the Trump administration pulled out. As a first step, President Biden should seek to restore the US$2 billion the United States already pledged, which might be possible using existing appropriations. Then, he should work to secure additional funding.

[2] Daniel Bodansky, *The Paris Climate Change Agreement: A New Hope*, 110 AJIL 269 (2016).

Submit a New NDC

When the United States becomes a party again to the Paris Agreement, it will need to submit a new NDC. Although not a requirement, the Paris Agreement provides that the U.S. NDC should include an economy-wide, absolute reduction target.[3] The NDC put forward by President Obama in 2015 called for reductions of U.S. emissions by 26–28 percent from 2005 levels in 2025. The new U.S. NDC will presumably need to have a later time frame (such as 2030), given the lapse of time since then.

Technically, the United States will be required to submit its NDC on the date of re-entry, only thirty days from the date of re-acceptance. But determining what the United States can reasonably put forward in its NDC will take time and warrant extensive consultations both within the government and with business and environmental groups. This leaves the Biden administration with two options. First, if it believes it can develop a credible, ambitious NDC relatively soon, it might meet the spirit, rather than the letter, of the Paris Agreement's technical requirement and announce that it plans to submit its NDC in the next few months. Alternatively, it could submit a provisional/interim NDC on the date of re-entry (perhaps reinstating the Obama Administration's NDC) and announce that it will submit its final NDC later this year, before the next conference of the parties in Glasgow in November.

Of course, no NDC that the Biden administration submits will be fully credible, given the volatility of U.S. politics. Even if it is backed by strong domestic measures, a future administration might reverse these policies. So any U.S. NDC will require some suspension of disbelief by other countries. My guess is that other countries are so eager for U.S. leadership that they will be willing to do so, and will welcome whatever the Biden administration proposes. If so, this would suggest that, in striking the balance between ambition and credibility, the Biden administration should tilt in favor of ambition.

Push for Stronger Ambition Internationally

When the Paris Agreement was adopted, states acknowledged that their initial round of NDCs does not put the world on a pathway to limiting temperature increase to well below 2°C, much less 1.5°C.[4] In order to achieve the Paris Agreement's goals, the ambition of parties' NDCs will need to be ramped up significantly. The Biden administration has articulated a long-term vision to address climate change, namely, for the U.S. to achieve net-zero emissions by 2050. But the U.S. also needs to put forward more immediate goals and policies if it wishes to lead by example. That is perhaps the most important rationale for submitting an ambitious NDC.

The first opportunity for parties to re-up their NDCs was last year, but COVID-19 required the postponement of the next conference of the parties until this coming November, so 2021 has now, in effect, become the "year of ambition." The Biden administration has already signaled its intention to convene an international summit within its first one hundred days, an important first step in pushing for stronger ambition.

This is only a prelude, however, to the first global stocktake of collective progress, which will begin in 2023, followed by another round of NDCs in 2025. If parties do not raise the level of ambition of their NDCs then, confidence in the Paris Agreement may begin to unravel. To prevent this, the Biden administration will need to work with like-minded countries to ensure that the global stocktake does not devolve into platitudes, but instead reaches clear conclusions about what is needed to achieve the Paris Agreement's goals.

[3] Paris Agreement to the UN Framework Convention on Climate Change art. 4.4, Dec. 12, 2015, T.I.A.S. No. 16-1104 (providing that developed country parties should undertake "economy-wide absolute emission reduction targets").

[4] Adoption of the Paris Agreement, Decision 1/CP.21, para. 17, UN Doc. FCCC/CP/2015/10/Add.1 (Jan. 29, 2016).

In the end, however, the United States has only limited ability to influence the domestic climate policies of countries like China and India. Some of its potential levers, such as border tax adjustments, would provoke significant conflict with other countries, making cooperation under the Paris Agreement more difficult. The United States could also try to make its new NDC conditional on action by others. But, after years of U.S. recalcitrance, the Biden administration may decide it needs to reestablish U.S. credibility first, before resorting to provocative tactics.

Work to Make International Financial Flows Climate-Friendly

Article 2.1(c) of the Paris Agreement establishes the goal of making public and private financial transfers and investment consistent with the Paris Agreement's other aims. Achieving this goal will involve not only promoting green finance (i.e., finance of mitigation and adaptation actions, including investments in renewables and other clean energy sources) but also curbing "dirty" finance (i.e., finance of carbon-intensive industries). Potential policies include:

- Supporting international standards for climate-related financial disclosure, as a means of influencing private financial flows.[5]
- Pushing for a global phaseout of fossil fuel subsidies in the G20 and at the World Trade Organization.
- Placing international pressure on China to address the climate impacts of its "belt and road" initiative.[6]
- Ensuring that U.S. support for investment by U.S. companies in foreign projects (for example, through the U.S. International Development Finance Corporation) considers the investment's climate impacts.

Seek Senate Approval of the Kigali Amendment

In addition to working within the Paris Agreement, the United States should seek to address sectoral emissions using other international fora. In 2016, the parties to the Montreal Protocol on Substances that Deplete the Ozone Layer adopted the Kigali Amendment, which provides for the phasedown of hydrofluorocarbons (HFCs), a particularly potent class of greenhouse gases that the Montreal Protocol had previously encouraged as a substitute for ozone-depleting substances. Full implementation of the amendment will avoid an estimated one-half degree Celsius of warming by the end of the century.[7]

The United States has not yet ratified the Kigali Amendment. Although consent by two-thirds of the Senate might seem at first glance unlikely, the amendment enjoys strong industry support. So it is not inconceivable that the Senate would approve the amendment.

Support Stronger Measures Under the IMO

Another sector that the Biden administration should address is maritime shipping, which represents a small but growing source of greenhouse gas emissions. In 2018, the IMO adopted global goals to reduce emissions from maritime shipping consistent with the Paris Agreement's temperature objectives.[8] The IMO goals call on the shipping industry to:

[5] On the limitations of climate-related financial disclosure, see Nadia Ameli et al., *Climate Finance and Disclosure for Institutional Investors*, 160 CLIMATIC CHANGE 565 (2020).

[6] Sagatom Saha, *The Climate Risks of China's Belt and Road Initiative*, 76 BULL. ATOMIC SCI. 249 (2020).

[7] Coral Davenport, *Nations, Fighting Powerful Refrigerant that Warms Planet, Reach Landmark Deal*, N.Y. TIMES (Oct. 15, 2016).

[8] Tae-Hwan Joung et al., *The IMO Initial Strategy for Reducing Greenhouse Gas (GHG) Emissions, and Its Follow-up Actions Towards 2050*, 4 J. INT'L MARITIME SAFETY, ENVT'L AFF. & SHIPPING 1 (2020).

- Cut total greenhouse emissions by 50 percent from 2008 levels by 2050.
- Pursue efforts to totally phase out emissions.
- Improve the carbon intensity of maritime shipping by 40 percent by 2030.

The IMO is now working on ship design and operational measures to achieve these goals. The Biden administration needs to support this work by engaging fully at both the technical and political levels.

Focus on Saving the Arctic[9]

The Arctic is warming twice as fast as the global average. Some scientists estimate that the Arctic could be free of sea ice within a matter of decades. This warming not only threatens Arctic communities, wildlife, and ecosystems, it also triggers feedbacks that exacerbate global warming. Thawing permafrost could release vast quantities of carbon dioxide and methane, using up much if not all of the total remaining budget of global greenhouse gas emissions consistent with limiting temperature increase to less than 2°C. Moreover, as blue water replaces white sea ice, the Arctic's albedo changes, reflecting less sunlight and leading to further warming. Finally, as land ice melts and drains into the North Atlantic, it contributes to sea level rise.[10]

Given the urgency of the Arctic crisis, the Biden administration should pursue options that could reduce temperatures rapidly, before a tipping point is crossed that leads to runaway change. One option is to reduce emissions of black carbon, which could produce a very rapid climate response due to black carbon's short atmospheric lifetime.[11] Under the Obama administration, the United States formed the Climate and Clean Air Coalition to address emissions of black carbon and other "short-lived climate forcers."[12] The Biden administration needs to reinvigorate this effort—in particular, by working through the Arctic Council. In addition, the Biden administration should jump-start efforts to research the development of techniques to reflect sunlight back into space (solar climate interventions), which also have the potential to cool the Arctic rapidly.[13] Unless we act quickly, the Arctic may soon cross the point of no return.

Increase International Investments in Technology R&D

In conjunction with the adoption of the Paris Agreement in 2015, the United States, China, India, France, Germany, the United Kingdom, the European Union, and eighteen other countries launched Mission Innovation, an initiative to double their public expenditures on clean energy research and development by 2020. However, during the Trump administration, this initiative languished. Actual spending has not come close to doubling,[14] and the second phase of Mission Innovation, adopted in September 2020, does not contain a new quantitative spending goal.

During the campaign, Biden pledged to quadruple domestic R&D spending on clean energy. In conjunction with this effort, his administration should work with other countries to strengthen international investment in clean energy, including through enhanced cooperation with the private sector. It should also support research on climate interventions that involve removing carbon from the atmosphere or reflecting sunlight, so that we

[9] The Antarctic is less immediately at risk, since it is much colder to begin with.

[10] Arctic Monitoring & Assessment Program, Snow, Water, Ice and Permafrost in the Arctic (2017).

[11] Rebecca Lefton & Cathleen Kelly, *Saving the Arctic: The Urgent Need to Cut Black Carbon Emissions and Slow Climate Change* (Center for American Progress, 2014).

[12] "Short-lived climate forcers" are greenhouse gases with a relatively short atmospheric lifetime.

[13] Daniel Bodansky & Hugh Hunt, *Arctic Climate Interventions*, 35 INT'L J. MARINE & COASTAL L. 596 (2020).

[14] Zdenka Myslikova & Kelly Sims Gallagher, *Mission Innovation Is Mission Critical*, 5 NATURE ENERGY 732 (2020).

better understand their risks and benefits. Since both China and India participate in Mission Innovation, research and development of clean energy and climate intervention technologies offers a potential area of cooperation.

Integrate Climate Change into U.S. Domestic and Foreign Policy Generally

Finally, the Biden administration should restore the climate change issue as both a domestic and foreign policy priority. The appointment of former Secretary of State John Kerry as Special Envoy for climate change sends a strong signal in this regard. His presence on the National Security Council will help ensure that climate change is fully integrated into U.S. foreign and national security policy.

Conclusion

Addressing climate change will require action on many fronts—by promoting implementation of the Paris Agreement and pushing to strengthen the ambition of parties' NDCs, pursuing initiatives in sectoral and regional fora, making climate change a central element of our bilateral relations, and working with non-state actors. How much the Biden administration is able to accomplish internationally will depend, to a significant degree, on how much it is able to do domestically. The Obama administration chose to spend its political capital primarily on health care and had little left for climate change legislation. As a result, it had to rely on executive rather than Congressional action. The Biden administration will also likely need to rely signficantly on executive action and may be further hamstrung by a conservative Supreme Court as well as by the need, initially, to prioritize the response to COVID-19 and its impact on the economy. So the challenge for the Biden administration is daunting. To be successful, it will need to work with state and local governments, business, and environmental groups, as well as Congress, to develop pragmatic, durable policies. In the case of climate change, foreign policy must begin at home.