

Intro:

Welcome to CleanLaw from the Environmental and Energy Law Program at Harvard Law School. In this episode EELP Founding Director and Harvard Law Professor Jody Freeman speaks with Sue Biniatz, former Principal Deputy Special Envoy for Climate at the US State Department and lecturer at the Yale Jackson School of Global Affairs. For nearly three decades, Sue served as the United States' lead climate lawyer and climate negotiator.

Together, Jody and Sue break down the significance of the recent US announcement to withdraw from the United Nations Framework Convention on Climate Change. They explain what the UNFCCC does, the domestic and international legal implications of withdrawal, and what this move—along with the earlier withdrawal from the Paris Agreement—means for US credibility on the global stage. They also look ahead, exploring how climate progress can continue beyond the UNFCCC and Paris, and the need to develop bipartisan consensus for durable climate actions. We hope you enjoy this podcast.

Jody Freeman:

Welcome to CleanLaw. This is Jody Freeman, your host at Harvard Law School and today we have a special episode with Sue Biniatz. Sue served in the State Department, and for over 30 years was our lead on negotiating international climate agreements. She did that from 1989 to 2017, then did a stint out of government and returned to government in the Biden administration from 2021 to '25, and then she held the role of Principal Deputy Special Envoy for Climate. Sue has been at the center of the action of negotiating international treaties and agreements over climate change for her entire career. And I am delighted to have her with us.

Sue, welcome.

Sue Biniatz:

Hi, Jody. Thanks for having me.

Jody Freeman:

I wanted to start off with the big news, which is that the White House announced recently that the United States would be withdrawing from a wide array of international agreements. And one of them is the United Nations Framework Convention on Climate Change. That was a big piece of news in the world of climate policy experts and environmental and climate advocates. It was something that had been talked about as a possibility the president might decide to withdraw from the UN Framework Convention, but it was widely regarded as unnecessary in a sense because the president had already announced that the US would withdraw from the Paris Agreement.

So let me start by asking you to set the stage for us and talk about this UN Framework Convention on Climate Change, which was signed by the United States in 1992, a treaty that has widespread, if not universal, support around the world. Help us understand what that framework convention does and doesn't do.

Sue Biniatz:

Yeah, happy to. So you're right, the full name is the United Nations Framework Convention on Climate Change, which is quite a mouthful. So people generally refer to it as the UNFCCC, the FCC, the UNF triple C. You'll usually hear those names.

As a framework convention, it was the first agreement to come along in a series, which is usually the way these framework conventions work. The other agreements like the Kyoto Protocol and the Paris Agreement were adopted under the Framework Convention later in time. You already said that the convention was basically finished in 1992. It was opened for signature at the Rio Earth Summit, which some listeners may remember. It's a framework convention, which is not really a technical legal concept, but these framework conventions are

pretty general. The point is to get as wide participation as possible. So generally, they're not too demanding in terms of what the parties have to do. They set out some form of objective and then some general commitments and some kind of infrastructure, institutional provisions.

So in the case of the Framework Convention on Climate Change, the objective is to avoid dangerous anthropogenic, meaning man-caused, interference with the climate system. Back then, the scientists did not have a sort of quantitative measure of what that meant. So there was no talk back then about two degrees, 1.5 degrees, which you hear about these days, it was more of a qualitative objective. There were some very general commitments in the Convention, more along the lines of take appropriate measures to do X or Y with respect to mitigation and adaptation. There was a non-binding emissions aim that applied to certain parties, the so-called Annex I parties, which were more or less the developed countries and the former Soviet republics and Eastern European countries. The agreement set out various principles, including one that has now become kind of famous or infamous depending on your point of view, which is common but differentiated responsibilities and respective capabilities. That's sitting in the Framework Convention.

And then lastly, it set up various institutions, including the annual meetings of the Conference of the Parties, or the COP, and that's where the acronym COP comes from. So that's the Framework Convention.

Jody Freeman:

Can I stop you there and just ask you a couple of detailed points?

First of all, back in 1992, this is the George H.W. Bush administration, of course. This was a controversial treaty at the time. It wasn't clear that the US was going to support this, and there was internal dissension, I've written about this in my own scholarship, this is widely known, internal disagreement within the administration about how much the United States would be willing to commit to doing anything on climate change. And for those who are old enough to remember, Bill Reilly was the EPA administrator at the time and felt the US ought to be a leader. There was a different point of view within the White House represented by John Sununu, the chief of staff. And so there's a lot of behind-the-scenes detail to know about how this convention came about.

Can you talk a little bit about the sort of challenge of the political negotiation at the time, given the US government's posture?

Sue Biniaz:

Yes, sure. Well, in terms of the general politics within the administration or within the United States more broadly, I would say the key issue was about whether the emissions target would be legally binding or not. And eventually the Republicans in the administration and also in the Senate were kind of comfortable with the convention because the emissions aim was non-legally binding.

It's quite convoluted if you look at those paragraphs where the emissions aim sits, and they were not particularly scrubbed from a legal point of view. Probably they would've become unacceptable to someone in the world if they were really, really clear. But in any event, they basically say that these Annex I parties are supposed to sort of aim, but they're not bound to return their emissions to 1990 levels in the year 2000.

I really want to emphasize the point that the Senate approved this convention basically unanimously by voice vote. All the Republicans wanted was an assurance that this aim was not legally binding, also some kind of assurance, though it was not ironclad, that if we were to ever do some kind of agreement under the Convention and it had legally binding targets in it, that we would go back to the Senate. And it was really more the Democrats who were not that happy with the fact that the target was not legally binding. So it was almost more controversial on the green side than the other side.

Anyway, I think that's important to think about because the thing that we are pulling out of was actually not considered particularly controversial back in the day when it was finally finished.

Jody Freeman:

And that speaks to something important, which is sort of the difference between something that's considered to be legally binding and something that's considered to be an ambition. And that difference carries through a series of agreements, and you'll say more about that, I'm sure. But also the seed that I'm planting here around common but differentiated gets to should the developed world have to do more than the developing world? And that question and that saga plays out also over the many years since this Framework Convention. So maybe we can talk about how these themes play out over time.

Sue Biniaz:

You basically hit two of the three themes that I use as the cornerstone of the course that I teach at Yale. And one of them is exactly that.

The prominence of this issue of binding versus nonbinding is one. The other is differentiation, meaning who is bound? Is it just the developed countries? Is it everybody? Is it a continuum, et cetera? And the third that I focus on is kind of like what I think of as how much does the international agreement dictate what each party needs to do versus leave it with quite a bit of national discretion.

Now, the Framework Convention, because it's a framework convention, leaves parties with lots of discretion, take appropriate measures, et cetera. The fact that the target is nonbinding, the whole idea is to bring parties in and not scare them away. You do the more stringent and specific things later. So it's not surprising that a framework convention would be more on the national discretion end of the continuum. But I do think you can think about the entire course of the development of the global climate regime in terms of those three themes. It's a little reductive, there are obviously other things including finance and adaptation and that kind of thing. But those three really tell you a lot.

Jody Freeman:

But that brings us then squarely to the question, which is, why would the United States withdraw from this Framework Convention, which, as you say, really is about inviting parties into a process and setting up that process, laying out an ambition, but not dictating anything to the parties?

Sue Biniaz:

Well, it's a good question. First of all, let me just say that I think it was pretty much expected that the administration would pull out. I mean, they put out an executive order very early February, I think, of 2025 that said that the State Department should take a look at all international agreements and international organizations and decide which ones were essentially no longer in the US national interest. It seemed unlikely if there was going to be such a broad review of agreements that this one would remain standing.

Now, reasons. I think one might be that the dynamics within the administration are different from those during the first Trump administration. As I understand it, although I had already kind of retired from the State Department, it was actually not kind of monolithic during the first Trump administration, the view that we should pull out of the Paris Agreement. I think there were those who were saying, "We can stay in the Paris Agreement." And by virtue of how it's designed, meaning that each party designs its own so-called nationally determined contribution or its own emissions target, that the US should stay in and just change its target to be more aligned with that administration's climate and energy policies. And others thought we should pull out of both the Paris Agreement and the Framework Convention. So the compromise was to pull out of the Paris Agreement, but not the Framework Convention.

Now, because this administration, I don't think has differences of view on climate, it seemed more likely that nobody was going to stand up and defend staying inside a climate agreement. So I think that's one reason.

Jody Freeman:

Yeah. It's worth adding too, this time around the second Trump administration has a much more pronounced, and I might even say aggressive, view toward international relations generally is being much more forceful in terms of its approach to our allies and being unilateral. And so I think the pairing of the climate policy with the international posture makes it more likely that there would be a withdrawal from the UNFCCC this time than last time, where we didn't have quite that pairing, I would say. Do you think that's reasonable?

Sue Biniarz:

I do think that's right. I mean, last time around, if you recall, we did announce that we were going to pull out of the Paris Agreement, but then the US team continued to work on climate as something that was... They might not have agreed with the Paris Agreement, but it was much less of a sort of anti-climate across the board administration.

Jody Freeman:

The only other thing, Sue, I'd add and be interested in your view on is at the time in 2017 when the US was talking about withdrawing from Paris, there was tremendous reaction, not just from the environmental groups, but there was also some pushback from leading businesses that had made commitments to be on sort of net-zero paths and state and local governments. There was a much more robust reaction. I think that's been very, very quiet, if not absent this time, especially from the business community.

Sue Biniarz:

Yeah, I think that's true. I recall, I think there was an ad in the Wall Street Journal even that was taken out by several companies saying, "We should stay in the Paris Agreement. It's in our interest to be in rather than out, have a seat at the table and all of that." So yeah, this time there was less of that. There may have been some lobbying done privately, but it wasn't done publicly the way it was done last time.

And Jody, I had one more reason for why they may have considered it important to pull out of the Framework Convention. I think that they didn't like the fact, from what I hear, that when the Biden administration came back in, they were able to sort of slip back pretty quickly into the Paris Agreement. I mean, quickly by day one, President Biden signed the instrument to rejoin, and 30 days later, the US was back in the Paris Agreement. And I think there is or was a perception among some that because you have to be a party to the Framework Convention to be a party to the Paris Agreement, if you pull out of the Framework Convention, it makes it harder to rejoin the Paris Agreement. So there may have been that motivation quite apart from the other motivations like, let's not make it easy for some future administration to do exactly what the Biden administration did.

Jody Freeman:

So let's go to that. Let's talk about that. First, there's a lot of questions people are asking about, "Hey, can a president just withdraw from a treaty that the Senate has voted on, has ratified?" And second, even if a president can, is it possible to quickly rejoin? Can you talk a little bit about that?

Sue Biniarz:

Yes. Really important issues on both sides of the equation. So you have to ask yourself as a lawyer about both the international law aspect and the US law, domestic law aspect. Now, in terms of withdrawal, as a matter of international law, if you open up your Framework Convention and look at Article 25, it basically says that states that have been parties for more than three years are allowed to withdraw after one year's notice. So essentially

that adds up if you've already been in for three years and you hand in your notice, a year later, you're out. So if the US hands in its notice, at least as of a couple of days ago, it hadn't yet, but once it hands in its notice, a year later, it will not be a party anymore.

Okay. Then you go to the issue of US law, which is a little more complicated. I know it sounds a bit counterintuitive to say the president may pull out of an agreement that the Senate gave its advice and consent to, but the mainstream legal view, which I actually agree with, and it's set forth in the Fourth Restatement of Foreign Relations law, is that the president may constitutionally withdraw the United States from a Senate-approved treaty.

Two things, where the withdrawal is lawful under international law, which is why I mentioned the fact that it would be lawful under the Convention, and there's nothing in the Senate's resolution of advice and consent or any law that has put limits on withdrawal, and we don't have any limits on withdrawal in this case. It's never been definitively resolved by the courts because the one time that it was most squarely presented to the Supreme Court, and that was in this *Goldwater v. Carter* case, the Court didn't address the issue. It was considered, as you probably teach, a political question between the other two branches. So we don't really have a Supreme Court saying, "This is okay, not okay." But the practice, particularly since the *Goldwater* case, has been that the president has exercised the unilateral withdrawal power.

And there's a lot of scholarly writing and people disagree with that, some academics. To me, it's not a crazy idea at all that the president can withdraw because the Senate gives its advice and consent, but the president ratifies. So the president decides whether to join an agreement or not, not the Senate. I mean, in other words, the Senate has to say yes, but the Senate can't make the United States join an agreement.

Jody Freeman:

But why does that bear on the withdrawal? That is consent to join, yes, consent to sign the treaty, but not necessary for unilateral withdrawal.

Sue Biniarz:

Well, the president doesn't have to join that treaty in the first place. The Senate could give advice and consent and the president could say, "No, thanks. I don't think that's in the US interest." So it doesn't seem to me crazy to say, "Well, if we are a party already, a president could decide that we should not be a party to a particular treaty."

Jody Freeman:

I think what you said earlier, the idea that the court will weigh into this inter-branch dispute and view itself as having jurisdiction, I think it's very unlikely that we will see the Supreme Court resolve this.

Sue Biniarz:

Yeah, so that's probably the case. Now, the next question you've asked is, well, what about rejoining? Which is of course on people's minds as a stepping stone to rejoining the Paris Agreement. So again, as a matter of international law, rejoining is very straightforward. If you open your Convention to Article 23, speaking of nerding out, you can rejoin within 90 days just by handing in your instrument, and then you could rejoin, the US could rejoin the Paris Agreement by waiting 30 more days.

So after you look at international law, where it's pretty easy to rejoin on the international plane, we have to look at US law, domestic law. And in my opinion, there are multiple future pathways to rejoining the Convention and therefore the Paris Agreement. I mean, the first reaction people have, generally speaking, when they hear that we are going to pull out of the Convention is, "Oh no, we'll never be able to rejoin the Convention or the Paris

Agreement because you need 67 votes. How would we ever get 67 votes in the Senate these days in sharp contrast to 1992?" But I don't think that's the only method available to a future administration for rejoining the Convention.

First of all, you could also have a regular old law. Now, that wouldn't obviate the need for some kind of congressional action, but it might be easier to get both houses than 67 votes in the Senate. But I think there's a third way, and it's an idea I put forward in 2017 at a treaty law workshop among academics mostly. And one of the professors there, Jean Galbraith, kind of took it and ran with it. And she took my two pages and turned them into 100 pages. What I had seen during the various years of service was that there were a couple statutes, one for the International Labor Organization and one for UNESCO.

In both cases, the statutes authorized the president to join a particular international organization. One president in history had joined each of those, another president in history had withdrawn from each of them, and a third president had rejoined both of them. And of course, nobody questioned, "Well, how was that possible?" Because there was a law that said, "Go for it, President." And somebody went for it and then went against it and then went for it again.

So I started thinking, is there any distinction legally speaking between a law and a Senate resolution of advice and consent in that regard? Obviously there are other distinctions. A Senate resolution of advice and consent is not legislation, it's different. But I wondered why would it be extinguished just because a president pulls out of an agreement? The president never had to join the agreement in the first place. So why if we did join and then we unjoined, would that resolution have gone away?

I could see the argument if the treaty in the meantime had sort of materially changed or something like that, you might say, "Well, wait a minute, that's not the case with respect to the Framework Convention on Climate Change." So I actually think Jean makes a much more persuasive case than I did because I was mostly asking the question and kind of semi-making the argument. But I think she makes a very good case for, yeah, that is still an option for a future administration.

Jody Freeman:

So in other words, the resolution is forever, it's not time barred. And the idea is it would continue just as a piece of legislation would continue in perpetuity.

Sue Biniaz:

Exactly. Now, could the Senate, I assume by 67 votes extinguish it? Yeah, there would be steps that would probably have to be just as stringent to change it, but otherwise I would think it would continue.

Jody Freeman:

That understanding is really important because it flips the default. It's hard to muster 67 votes. If the default presumption is the resolution is still valid, it's going to be really hard to extinguish it. I mean, I think that's what this accomplishes.

Sue Biniaz:

Exactly. So I take comfort in that idea. Obviously it's up to a future administration to decide what to do as a matter of international climate policy. I would imagine that rejoining the convention and the Paris Agreement would be at least one prong of future climate policy in addition to whatever else might be part of it.

Jody Freeman:

Let me put a pin in that "whatever else," because I do want to come back to other possible supplementary or alternative approaches to international climate policy beyond the UN process and the COP meetings and the Paris Agreement, we'll get to that a little bit later. But first, just one more point on this legal argument you're making, I want to make sure folks understand it. It does sound like the corollary to, "Well, there's no reason a president can't withdraw us unilaterally because the president was given consent from the Senate to join, but no mandate to join." In other words, it's up to the president. It seems like a logical corollary to say once the Senate has expressed that permission, it's there for the president to then take up again. So those seem to be consistent things to say. Is that also part of the argument?

Sue Biniaz:

Yes, I think that's precisely... Now, some have argued that if you apply a sort of mirror theory, that the mirror of Senate advice and consent is that the Senate needs to approve withdrawal. But I guess I look at the mirror a little bit differently. To me, the mirror is more what you just said.

Jody Freeman:

Let's assume you're right about what you just said, that presumably a different administration interested in making progress on climate would once again want to rejoin the US to both the UNFCCC and the Paris Agreement, if that. So let's just give people a grounding, a reminder, a refreshment on the major structural features of the Paris Agreement. You were a key architect of this. Many people who follow these issues are familiar with it, but some are not. Why it was an advance, why it's so important that this structure was adopted compared to prior approaches.

Sue Biniaz:

Yeah, sure. So we have the Framework Convention, which as I mentioned, was quite general, and the only timeframe it had in it was year 2000 because the nonbinding aim went out to 2000. So there was a lot of sense at the very first COP, COP1 in Berlin, that there should be something following, at least as a matter of dealing with the post-2000 era. But other countries also thought, "We're not happy," particularly the Europeans, not really happy with the nonbinding aim. And the US wasn't very happy with the fact that only the Annex I parties were subject to any kind of emissions constraint, whether binding or not binding.

So there were a lot of issues kind of kicking around in Berlin when they were figuring out the mandate for this next thing, the thing that became the Kyoto Protocol. And the Kyoto Protocol ended up enshrining binding emissions targets that were also negotiated. So everybody had to agree on each other's targets.

So if you take my three themes, you would say the differentiation was stark. Only the Annex I parties had commitments. The national discretion was minimal because everything was pretty much dictated by the agreement, and the targets were legally binding. So it really was at one end of the spectrum on each one of those themes.

Now, the United States ended up not joining. There was a 95-to-zero Senate resolution saying pretty much, "Don't even think about sending that agreement up to the Senate because it doesn't include..." I think the main beef was that if it included binding targets or mandatory targets, as they called them, it had to include some kind of mandatory targets for developing countries in the same timeframe, even though they didn't have to be the same. Well, the Kyoto Protocol failed that test. Okay. So fast-forward many, many years.

Jody Freeman:

And wait, just a point of specificity here. The Clinton administration didn't try. I mean, they understood what this meant, so they didn't try.

Sue Biniarz:

Right. They signed it, but they did not ever send it up to the Senate.

Jody Freeman:

And of course, the George W. Bush administration withdrew us from the Kyoto Protocol. So that sort of put the nail in that coffin from the US perspective.

Sue Biniarz:

Yes. We didn't ever join. So he basically withdrew us from ever thinking about joining.

So fast-forward several years, at the very end of the second Bush administration, there was a thought that US didn't look very good on climate. Our reputation was bad having rejected the Kyoto Protocol. So there was an attempt to kind of restore honor and rejoin. They both set up a major economies process and rejoined the UNFCCC process to come up with another round of negotiations.

Jody Freeman:

When you say major economies process, you're talking about the Major Economies Forum. So a different international forum in which to do this.

Sue Biniarz:

Yeah. So they picked 15 or 16 countries, including the EU, that represented about 80% of emissions, population, and GDP as a place to talk about climate. But some of the other countries said, "Well, we like that idea, but only if you also rejoin the global process." So it was we went from sort of nothing to two big things.

Jody Freeman:

So again, just to make sure folks understand, you're talking about these annual meetings of all the parties to the UNFCCC, the Framework Convention, who meet to discuss whether they want to sign more specific agreements, whether they want to sign up for particular actions. And you're talking about how this process unfolds. And the important meeting in Copenhagen was the first meeting of the Obama administration. So it was the first opportunity to say, "We're back, we're here, and we want to help launch a new round of climate policy or climate commitments." And you're joining that to the next meeting in Cancún.

Sue Biniarz:

Yes. To get a little more specific, the Obama administration was quite mindful, I would say every administration since that Senate resolution was quite mindful of that Senate resolution, whether they did it consciously or not, but the Obama administration came in and basically said, "We don't want to bring home another Kyoto Protocol. It's not in anyone's interest, certainly not in the US interest, but it's not on the world's interest to lead everybody down a particular path and then say, 'Oops, we can't join.'"

I mean, the world cared a lot about the major two biggest emitters, US and China, being part of something. So there was a lot of motivation to get something done that would bring both of us in. At the same time, there was

a lot of support for continuing the Kyoto Protocol, which was not going to work for the US or China. So you basically knew you had to come up with some kind of alternative. And that's what Copenhagen was about.

Now, if we combine it and Cancún together, they're pretty much at the opposite end of the spectrum on all of those themes that I mentioned. The whole thing is nonbinding. It isn't a legal instrument, neither the Copenhagen Accord nor the Cancún Agreement. And on the second issue of differentiation, it's very different from the Kyoto Protocol because everybody's in. Now, there's some distinctions in how they are brought in, but all parties are covered and expected to have some kind of mitigation target or action.

Jody Freeman:

And can I just interject there, again, just to provide a little domestic background? I mean, we were part of that administration, and I remember these conversations and big meetings talking about the need for an alternative approach, the need for an alternative structure, and the conversation that you were leading along with some others in the State Department, but also in the White House, conversations about how do you create a different system that will be more inclusive of all the countries of the world, not this sort of dividing line between the developed world that has to do stuff and the developing world that doesn't, because that's a nonstarter, as you said, but also that would allow for countries to come and say, "Here's what we can do"?

And that was linked, at least in the conversations that I was part of, linked to the domestic commitments the Obama administration was making to say, "We are going to try to get a bill passed by Congress to do something about, say, creating a national cap on emissions and create a trading system. And if that fails, we're going to use the domestic law that is available, the Clean Air Act, and we're going to show the world that we can make progress using regulation to cut emissions from the biggest sectors of the economy."

That was the sort of domestic playbook, and it was all connected to being able to go in to the international community and say, "Here's our pledge based on what we domestically are capable of doing with our law." And so they kind of were tied together at the time, and we were sort of part of all that conversation.

Sue Biniarz:

Absolutely. The idea was we couldn't or did not want to, for our part, and many others didn't either, want to negotiate our targets the way the Kyoto Protocol had worked. It was going to be so-called bottom-up approach, which as you say, you take what you have domestically and what you think you can do domestically, and you put it on the table, but not for anybody's approval.

Now, the timing of it was tricky because, as you recall, when we went to Copenhagen to that COP, the Waxman-Markey law had passed the House, but not the Senate. So one of my jobs as the lawyer who was always walking a tightrope between domestic and international, I had to help figure out how do we put in a target when we don't really have that law? And we did some consultations, well, both obviously with the White House, but also with the Senate. The number 17% reduction had come out of the House, and the Senate sort of, well, at least people thought it would probably come out somewhere around there, but no one was quite sure. So we ended up with this kind of famous language called "in the range of 17% in conformity with anticipated climate and energy legislation."

Jody Freeman:

But can I fast-forward you, though, to this being the seeds for Paris, but in Paris you achieved the new structure and what is it?

Sue Biniaz:

Absolutely. So I always think of Paris as the Goldilocks between Kyoto and Copenhagen and Cancún in the sense of too cold, too hot, just right for those of you who know that story. So you wanted to keep the wide participation of Copenhagen-Cancún, but you wanted some of the rigor of the Kyoto Protocol. And the question was, how are we going to achieve that while also raising the ambition level of the temperature goal, et cetera, et cetera? The mandate on the legal issue kind of rejected the Copenhagen approach by saying this new thing had to have some kind of legal force, but pretty flexible. And it rejected the Kyoto mandate by saying that it would be applicable to all parties. So it was pretty clearly a political statement that this was not going to be another Kyoto Protocol.

I would say there were a lot of contributors to the ultimate design. New Zealand came up with the idea of a legal hybrid. So let's make more of the procedural elements of the agreement, like you have to hand in a target, you have to update it, you have to be clear, you have to be reviewed, all that kind of stuff, be legally binding, but the targets themselves not be legally binding. So a little Kyoto, a little Copenhagen there.

We came up with the idea of nationally determined commitments or contributions. One, it would be a bottom-up structure where you would not negotiate your target, as you say. And that would be probably more acceptable if you're going to bring in the whole world. I mean, most developing countries were not going to be willing to negotiate their targets. And we as the United States didn't want to either. And we thought it would solve the problem of differentiation because if everybody can design their own target, you don't need categories. We keep the notion of developed countries and developing countries, but we handle that in a very nuanced manner depending on what issue we're talking about.

So if we're talking about these nationally determined contributions, basically every party has the same procedural commitments. Now, you can hand in whatever you want, and that may depend on your development status among other national circumstances, but there's no, "these parties must do it and these parties don't need to do it."

So it's a very nuanced approach to differentiation that doesn't go all the way towards everybody's the same, but certainly doesn't go back to the Kyoto bifurcated approach. I mean, there are a million other issues in the Paris Agreement, but if you just take the themes that you and I both articulated a few minutes ago, you end up with a legal hybrid, so that's kind of Goldilocks. You end up with a hybrid between national discretion and rules. So you sort of take the bottom-up structure of Copenhagen-Cancún, but you don't have a wild west scenario where you just hand it in and run away, as Todd Stern used to say, you slip it under the door, knock on the door, then run.

Jody Freeman:

So let me stop you there just to say, the reason I wanted to go into all of that is to remind us of how difficult, how nuanced, how creative these international agreements have to be when you're trying to attract a majority of the countries of the world to sign on for them in a context this complex with very different emissions histories, different emissions trajectories, different national capabilities. It's incredibly difficult to get a kind of universal agreement. And this discussion explains the challenge you faced in constructing the Paris Agreement, but that brings us to the critiques of it.

We hear people say, "It all sounds very lawyerly and proceduralist and detailed, but it doesn't sound like it's going to force any country to make any major commitments. Where is the forcing mechanism that makes people deliver on these commitments?" And I've been in these discussions, you've been in these discussions. I remember once I was at a big meeting, and of all people, George W. Bush was there, and we got into, by accident, kind of an impromptu debate in front of a bunch of people where he basically said, "The Paris Agreement is worth nothing. It's useless." Along these lines of, "There's no forcing mechanisms, there's no such thing as legal obligation." And I ended up fighting back. I was trying to channel my Sue Biniaz. And at the end of

this big debate and discussion, he did end up hugging me, which I don't know, I feel like that was some kind of accomplishment.

But my point is just to say, you're often in a position of having to sort of defend the Paris Agreement and explain why, "Yes, the targets have been missed, and yes, it's a voluntary structure, but it has many benefits." And I just want to give you the opportunity, given that the Trump administration has in fact withdrawn the United States, given that we're withdrawing from the UNFCCC, could you articulate the best case for, "Well, actually it's been a very positive agreement and it's important for us to stay in"?

Sue Biniaz:

Well, I often say that the Paris Agreement is, it's a little bit like what Winston Churchill said about democracy, which is it's the worst form of government except for all the others. So yeah, sure. You can say, "Well, wait a minute, the targets aren't binding. So what happens if you don't meet your target? It's therefore sort of voluntary and yada, yada." But okay, think about the alternatives. What if we had done an agreement like the Kyoto Protocol with binding negotiated targets? Would anyone have joined who you care about? Yeah, some countries would've. The EU would've joined, but I don't think the US would've joined. China wouldn't have joined. So you'd be right back in the, is it better to have an agreement without the major economies or is it better to have an agreement with the major economies?

So I usually take, with a grain of salt, these sort of criticisms that don't bear any relationship to the way the real world works. Now, we are in a better situation now, temperature-wise, than we were before the Paris Agreement. I think we were headed for something like the high threes or four degrees warming. We are in a much better situation now because of the Paris Agreement.

Now, has everybody put forward the best thing they can do? No, not necessarily. And I wrote a critique of China's latest NDC. So I'm not the first one to say when parties have not done what they should do, but are we in a better position now than we would've been without the Agreement? I think definitely yes, with respect also to adaptation and finance and all of those things. Would there have been some better model that might have been devised that would also have gotten all the major economies in? I kind of doubt it, actually. And I think it's very important that we have never, even since the beginning, thought that Paris was the be-all and end-all of the international regime.

I myself wrote an article a million years ago called Paris Can't Do It Alone. And my premise was, unlike most international environmental agreements, which I think if everyone goes home and does what they are committed to do with some extra money thrown in, usually can meet the environmental objective of that treaty, whether that's trade in endangered species or the Montreal Protocol and protection of the ozone layer, the climate goals are huge. Minimizing temperature rise, making the whole world adapt to climate impacts and more resilient, aligning financial flows in the entire world with those other objectives. I mean, it's huge.

So that's one reason. You also have this consensus process, which is it's very hard to get 200 countries to agree on things. And on and on, we don't have all the expertise within the UNFCCC Paris Agreement regime to work on everything. So right from the beginning, there have been other things going on. And that really kind of exploded a few years ago at the COP in Glasgow, where the UK made a concerted effort to start a bunch of initiatives, whether it was on particular greenhouse gases or particular sectors.

Jody Freeman:

Like the methane agreement.

Sue Biniarz:

Yeah. And the United States put forward with the EU, exactly the Global Methane Pledge focused on a gas that had not gotten enough attention. We also started the Green Shipping Challenge with Norway. Those were just sort of US initiatives. UK had a bunch, other countries have had a bunch. So if anything, the complaint these days is, "Oh, there's so many initiatives you can hardly keep track of them."

Jody Freeman:

Well, that gets me to one of my last questions for you, which is, with all of this history in mind, having now a little perspective on the Paris Agreement, and of course in the context of the United States retreating, the question is, what else? Beyond the UN process and the Paris Agreement, what else is promising?

And you're talking about that. You're saying Paris can't do it alone, and we never thought it could. People are now discussing CBAM, the Carbon Border Adjustment Mechanism idea, sort of a border tariff, if you will, or border tax idea as a way of getting certain countries on board with that and then building momentum for it outside the UN process. There are ideas for how to do other things. And I guess I'm interested in your perspective on, would these supplant the UN process and the Paris Agreement, or do you see them as complements How do you understand the emerging alternatives?

Sue Biniarz:

Yeah, no, it's a good question. I myself don't see them as supplanting. I think there is a theory out there, and you do hear it at these different conferences on various panels, like, "Oh, why do we need Paris? All the rules are done, and so what's the point? Let's just do action." But actually I think the action depends on having that core Convention and Paris Agreement. And there are many people who agree with that and I just heard it from others on a panel I was on yesterday.

So these outside groups take different forms. So let me just divide them up.

If you're doing a typology, one would be another treaty. And there you have a good example of Montreal Protocol and the Kigali Amendment dealing with HFCs. So that was a substance that we knew would be a good alternative to ozone-depleting substances, but then turns out to be a powerful greenhouse gas. So the parties to the Montreal Protocol enter into an amendment to reduce consumption and production. So that's sort of one type of example.

Then you have these UN organizations, so they're not really treaties in the same way, but they involve the production of greenhouse gases from various activities. And ICAO and IMO would be in those categories from aviation and maritime respectively, and they have both taken up the greenhouse gas issue, ICAO several years ago, IMO with a revised greenhouse gas strategy and most recently postponed what it was going to do because of a push by the US.

Jody Freeman:

Well, right. I mean, just to intervene here, the Trump administration is sort of big-footing some of these alternative international measures for now. But I think what you're saying is, in a different administration, you could revive them, and they would be good complements.

Sue Biniarz:

Yeah, exactly. So I'm trying to give the flavor of the different types of things that are out there that are maybe catalyzed by the Paris Agreement, driven by the Paris Agreement, but not directly under the Paris Agreement.

Jody Freeman:

And you can see them, Sue, as sectoral, like it's aviation emissions, shipping emissions. And so you're sort of taking smaller pieces of the challenge.

Sue Biniac:

Exactly. And even more related to what I call the Greater Metropolitan COP. So not in a different forum, but sort of not involving necessarily 200 parties, but subsets of the parties often at the COP, you'll have these initiatives initiated or continued with respect to, let's say, agriculture, or there's another one called Beyond Oil and Gas. There's an offshore wind one. You name it in terms of the sector, the gas, the activity, and you've basically got some group.

And there are quite a few advantages to doing it that way, not just that it supplements the Paris Agreement, but often they can be done more quickly because you've got a smaller number of countries, you don't have all the procedural rigmarole that you have with the COP, the Paris Agreement. You also can deal with topics that might not be amenable to being handled by 200 countries. You can take action. There's a group dealing with nuclear energy, which you wouldn't have 200 countries agreeing on that.

And the other thing is you can involve stakeholders that are not necessarily national governments. You asked about CBAM. And so I would've said you can also add to the mix individual party actions that supplement the agreement. So in the case of the EU and the CBAM, they have very stringent targets.

Jody Freeman:

I mean, the theory of it is if the EU has adopted these goals and targets and is essentially, there's an economic cost to that. They don't want to have to have imports coming in from countries that have no restrictions and therefore the price of the goods is lower. So they're really trying to equalize for the lack of a carbon mechanism. And the genius of it, in theory, is you're really telling the country you're importing from, "You can impose a carbon price at home and collect all the revenue from that yourself, or you can pay us this tariff to send your goods to our country." It's sort of an interesting model.

Sue Biniac:

Yeah, exactly. And it could remain an individual mechanism, or countries could join together and do it collectively. And some countries are talking about doing that, but I don't think it takes the place of the global. I think it adds to and bolsters the work towards the achievement of the various goals, whether it's finance or mitigation.

Jody Freeman:

The other thing I wanted to ask you about, Sue, is you hear people criticize keeping a temperature target in the Paris Agreement 1.5. They argue, "We're going to blow past 1.5. There's no need to pick an arbitrary temperature target." Do you have a view about that?

Sue Biniac:

Yeah, you do hear that. Now, technically the temperature goal is well below two, pursuing efforts to 1.5. So I don't think it totally discredits the Paris Agreement to say that we may go over 1.5. I think if we are going to go over, you need to minimize the overshoot. The thing that I object to is not people saying 1.5 is not achievable, but some people come to the conclusion then, "Let's then just forget about it."

Jody Freeman:

So it's useful to have it as an anchor, some kind of temperature target?

Sue Biniaz:

Yeah, an anchor indicator or whatever, because otherwise, what is the alternative to just say, "We don't care how much the temperature rises because we can't..." I mean, you don't need to be too dogmatic about the whole thing. We often, at least when I was in the government over the last couple of years, we tended to talk about it as keeping 1.5 within reach, keeping 1.5 on the table, that kind of thing, so as not to give the impression this was, if you didn't meet it, the whole enterprise had failed and you should just give up.

Jody Freeman:

All right, last question. The US has been a fickle partner internationally. We could say that more generally about United States foreign policy, but stick to our domain, climate. The follow-up on Kyoto that didn't materialize, the now withdrawal from Paris twice, we're on the verge of withdrawing from the UNFCCC. I really want to get your view on how we are going to return to being a reliable and credible partner. I think there's some real risk that we've now lost a lot of credibility and trust. Do you agree with that idea?

Sue Biniaz:

Of course. I don't see how anyone could disagree with that. And I think 2029 will be different from 2021 if a climate-friendly administration gets elected because in 2021, I think most of the world... Yeah, we had already been somewhat unreliable negotiating Kyoto and then not joining, and then putting the squeeze on countries with respect to ambition under Obama and sort of designing Paris much to our liking and then withdrawing right away. So we'd already done a lot of back and forth, and there would've been every reason for countries to say, "Well, we're not going to take you that seriously or follow your lead in 2021." But they pretty much did. I mean, along with other countries, obviously we weren't the only leader, but I think we were a pretty important player internationally.

But I don't think that's going to happen again in the same way. We'll have to see what happens over the next couple of years, so it's hard to think ahead. But even if a climate-friendly administration were to come back in 2029, I do think there'd be questions about what kind of space is there for the United States to reengage. There might be little tolerance, there might be quite a bit. It might depend on whether other countries have reorganized themselves and filled in the gaps of the roles that the United States used to play. And it may be that other countries say, "We're okay following your lead on X, Y, or Z initiative, but maybe not beyond the four years of the administration. If it looks like we're going to be going through an every-couple-year zigzag."

I also think it's really important to spend the next couple of years developing some bipartisan consensus on at least certain aspects of climate. It would certainly help us internationally if we didn't have such black and white views and something you know probably a lot more about than I do.

Jody Freeman:

Well, I really hope that's possible. I couldn't agree with you more, and I agree with you, certainly there will be a need for a big reconstruction effort in a very different context, and we'll have to be creative and flexible to meet the moment. But, we're going to have to meet the moment, Sue, right? Because climate change isn't going anywhere, and serious people understand the risks and the opportunities both.

Sue Biniaz:

Yeah.

Jody Freeman:

So let's leave it there. You've been very generous with your time. I so appreciate your expertise and perspective, and let's hope you get another stint being a lead negotiator for the United States government on climate agreements.

Sue Biniarz:

I'll be watching you guys from the old age home.

Jody Freeman:

Not at all. Sue, thank you so much. Been a pleasure.

Sue Biniarz:

Thanks, Jody.