

The Road to Durban and Beyond

The Progress of International Climate Change Negotiations

Following a familiar pattern of UN climate change negotiations, the 2011 Durban conference of the parties (COP17) was concluded by sleep-deprived delegates well after its scheduled end, after crises and last-minute drama. Just what it might mean for the future was not immediately obvious to observers. Early reactions ranged from seeing yet another failure by governments to grasp the seriousness and urgency of climate change – ‘a disaster for us all’¹ – to much more positive assessments. The executive secretary of the UNFCCC (the United Nations Framework Convention on Climate Change), Christiana Figueres, described Durban as ‘without doubt ... the most encompassing and furthest reaching conference in the history of the climate change negotiations’.²

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To make sense of the outcome, it helps to view the short history of these negotiations through a political lens. Each conference of the parties, besides whatever operational decisions it takes and work programmes it initiates, is a snapshot of the international community’s political take on climate change. In this sense, Durban can be seen as the product of Montreal (2005), Bali (2007) and Copenhagen (2009) conferences of the parties, with clear political steps forward every two years. That is not to say the intervening COPs, Nairobi (2006), Poznań (2008) and Cancún (2010), made no contribution. They all helped advance the negotiations; Cancún indeed probably saved the multilateral process. But the intervening year COPs lacked the political impact of the others, and produced no new framing of the negotiations.

The Framework Convention and the Kyoto Protocol

Going back still further, the political history begins with the negotiation

of the framework convention in 1992, the first multilateral treaty on climate change. Informed by the first assessment report of the Intergovernmental Panel on Climate Change (IPCC), the UNFCCC sets out the core objective of stabilising greenhouse gas concentrations at a level that would avoid dangerous human-induced climate change. The principles by which this objective is to be achieved include what must be the most frequently quoted words in the UNFCCC: 'common but differentiated responsibilities and respective capabilities' (CBDR). CBDR can be seen as a very broad guiding principle for burden-sharing. Taken together with the principle of equity, it

force in 2005. The protocol provided for the first time clear accounting rules, a firm aggregate reduction target for greenhouse gas emissions, legally binding country-by-country quantified commitments, and compliance provisions. It introduced international carbon market mechanisms to help achieve mitigation at least cost, notably the innovative Clean Development Mechanism. The quantified economy-wide mitigation commitments ('qelros') listed in an annex to the protocol resolved burden-sharing among annex I parties for the first commitment period, 2008–2012. But the protocol did not address mitigation amongst non-annex I parties.

commitments incomplete. Even more important for the future, projections of global emissions showed that by the end of the Kyoto Protocol's first commitment period, China would have overtaken the United States as the largest emitter. Developing countries in aggregate would also have overtaken annex I parties, and would be the dominant source of most of the emissions growth to 2050 and beyond.

At Montreal in 2005, the built-in deadline in the Kyoto Protocol to begin negotiations on further commitments for annex I parties was the catalyst for developed countries to try to bring developing country emissions into the framework. This meant putting the negotiations on a broader footing. The absence of the United States from Kyoto meant that the developed countries' objectives could not be met simply by complementary provisions under the convention for developing countries. But any shift towards quantified mitigation commitments from developing countries was resisted as contrary to the burden-sharing principles of the convention. In practice, CBDR and the annex I/non-annex I dichotomy were combined in political rhetoric to prevent a smooth evolution of the climate change regime to reflect the changing global economy. There was too much vested interest in the status quo to allow the interpretation of these principles to evolve.

This led to a 'two-track' situation. For two years after Montreal the tracks had unequal status. The first track was a formal negotiation under article 3.9 of the Kyoto Protocol; the second a 'dialogue' under the convention which introduced the term 'long-term cooperative action' (LCA). Somewhat reminiscent of the Berlin Mandate, the decision creating the dialogue stated that it would not open any negotiations leading to new commitments. The dialogue's value was to introduce some of the themes that would later be taken up in negotiations, once the politics allowed it.

Politically, there was thus an imbalance from the point of view of annex I parties. It was unrealistic to expect them to implement further commitments without the United States and emerging

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justifies the recognition in the convention that developed countries should take the lead in combating climate change. The convention also introduced a fundamental and fateful separation of parties into two classes: annex I and non-annex I, with annex I consisting of developed countries (approximately reflecting OECD membership in 1990) plus economies in transition.

The convention contains a legally binding requirement on all parties to take measures to mitigate climate change, but no mechanism that will ensure this happens. Its only quantified goal is a non-binding target for annex I parties as a whole to return their emissions to 1990 levels by the year 2000.

The convention can be regarded as the first phase of the quest for a comprehensive multilateral climate change framework containing both principles and effective action. The second phase was the Kyoto Protocol, concluded in 1997 but only entering into

The protocol retained the political balance of the convention. Indeed, that the political balance between annex I and non-annex I obligations was unchanged was explicit in the Berlin Mandate's stipulation that there would be no new commitments for non-annex I parties.³ The protocol can be seen as a tighter and more detailed specification of annex I obligations, implementing the principle of 'taking the lead'.

Towards a comprehensive climate change regime

The third phase of negotiations began in 2005. The core objective of the convention, together with the principles on which it and the protocol were built, remained valid but could not chart a way forward. The stabilisation goal was not quantified, either as a temperature limit or a greenhouse gas concentration. Further, the absence of the United States, the largest emitter, and Australia from the Kyoto Protocol made even annex I

economies. But developing countries also complained of an imbalance. They saw annex I parties upping demands on developing countries while neither demonstrating sufficient ambition over their own commitments nor recognising the importance of adaptation, finance and technology to developing countries.

Bali, in 2007, was the turning point into a full negotiation, albeit still with two tracks, with a new political balance which took account of these concerns. The convention mandate, which retained the 'LCA' title, could be read as applying to all parties, even though developing countries at this point insisted that annex I Kyoto Protocol parties must make their commitments under Kyoto. Some new language was necessary to effect this political shift. The distinction between commitments and actions was introduced to get around the difficulty for the United States of the legally binding implication of 'commitment', and at the same time to make a distinction between the nature of what developing and developed countries would commit to. The terms 'measurable, reportable, verifiable' and 'nationally appropriate mitigation actions' (NAMAs) applied to developing country mitigation implied some quantification, but not so far as to make the actions legally binding or *qelros*. At Bali the central importance to progress in the negotiations of the relationship between the United States and China and other major developing country emitters became apparent. Legal parallelism was and remained a central theme of the United States, including at Durban. This meant that while the content of commitments could be differentiated, thus respecting the CBDR principle, their legal force had to be equivalent.

The annex I/non-annex I dichotomy was blurred in the Bali mandate (the Bali Action Plan), which refers to 'developed' and 'developing' countries, though of course the Kyoto track of solely annex I commitments continued independently. Though it was not initially made explicit, there was a strong wish among most annex I parties for a legally binding outcome under the convention track, as much to bring the US under equivalent obligations to other developed countries as to include the emerging economies.

The emerging economies were not able to agree to a legally binding outcome; the requisite constructive ambiguity was achieved by the term 'agreed outcome', the meaning of which was argued over for the next four years. The concept of comparability was also introduced, primarily aimed at the United States, to indicate that the United States would be expected to take on commitments under the convention of comparable ambition to those of other annex I parties under the protocol.

Highly inefficient and cumbersome from a negotiating perspective, the separation of the two tracks became a theme of the post-Bali negotiations, as

As the scheduled conclusion of the Bali Action Plan approached, negotiations were heading for a train wreck. None of the fundamental issues had been resolved; at one point there were about 300 pages of negotiating text, with 3,000 square brackets indicating areas of disagreement. Added to this was a lack of trust, made more acute by shortcomings in the management of the pre-Copenhagen process by the incoming Danish presidency. A symptom of the trust deficit was the Danes' having to change the signage part way through the conference from 'COP 15' to 'COP 15 CMP 5',⁴ in response to complaints from some developing countries that the Kyoto

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much for the United States, for whom the Kyoto Protocol was toxic, as for developing economies anxious to avoid being pressured into Kyoto-type commitments. For most developed countries this mode of negotiation was a second-best option, one better than the third-best that Montreal had delivered but inferior to a single negotiation. A supposed 'firewall' between the two tracks was invented, much invoked by developing countries, and tacitly supported by the United States. Efforts by chairs and moderate countries to engage in 'across the tracks' discussions to achieve some coherence on common issues such as accounting rules were always controversial and never got off the ground in the formal settings.

Bali's contribution was also to identify the elements needed in any comprehensive regime. They included mitigation, of course, but also adaptation, finance, technology, and reducing emissions from deforestation (REDD+), together with openings towards possible sectoral approaches and new market mechanisms.

Protocol was being airbrushed out of the negotiations. Previous conferences had used 'COP X' without incident.

The last-minute rescue of the conference by a handful of world leaders through a side deal – the Copenhagen Accord – was, in retrospect, a decisive political intervention. Despite not being agreed by the COP, it introduced a new framing of the negotiations. Its main political advances were to agree on the global goal of limiting warming to 2°C above pre-industrial levels, to extract mitigation pledges from all parties that mattered, some at the conference itself and others in the months that followed, and to address accountability of developing countries' mitigation actions. Developing countries' actions would be subject to a form of peer review through 'international consultations and analysis', a concept that was to be further developed in Cancún and Durban. Close in importance were the provisions on finance, which included an immediate and unconditional injection over three

years of \$US10 billion per year, an aspirational target of mobilising \$US100 billion dollars from a range of sources by 2020, and the establishment of a Green Climate Fund. The core political bargain was the two-way conditionality between developing country mitigation and long-term finance.

The decisions of Cancún, concluded over Bolivian objections in successive moments of high drama, brought both the political gains of the Copenhagen Accord and the mitigation pledges it had attracted into the UNFCCC, and thereby into the formal negotiations. Cancún also set up a work programme, institutions, architecture and rules to operationalise the political gains.

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2011: The Durban year

Unlike Mexico and Denmark, who put their stamp on the preparations from early in their year, South Africa as incoming presidency gave few early signals of its approach. One point repeatedly made, however, was that the process would be open and inclusive and there would be no secret text. South Africa apparently did not want to risk a third contested ending to a COP in as many years.

Another political reframing occurred during this year. The core political issues that would have to be resolved at the COP were explored in informal meetings of ministers and senior negotiators. Parties themselves were noticeably clearer and more direct about their demands than in previous years. Three issues dominated the political discussions: the second commitment period of the Kyoto Protocol; finance (principally the Green Climate Fund); and the mandate for a negotiation of a new, comprehensive

agreement. Because of intertwining conditionalities, none of the three could be achieved without the other two. For the United States, not a demander of a new negotiating mandate, what mattered most was strict legal parity of mitigation commitments with China. 2011 also saw a stronger political role being played by the BASIC⁵ countries – the major emitters among developing countries. Arguing on the basis of equitable access to sustainable development, they maintained that they still needed room to increase their emissions; their mitigation pledges to 2020 would thus slow emissions growth, but would not be a net reduction.

What of mitigation ambition, which is surely the core of the whole negotiation?

The major players – the United States, the EU and BASIC countries – had signalled that they would maintain their existing pledges, but would not improve them. The economic recession severely limited flexibility, and it would not have been a propitious time to put pressure on governments to offer more. Nor were annex I parties going to be able to finalise the conversion of their pledges to qelos at Durban. So there could be no realistic expectations that Durban would deliver higher ambition. The common lowering of expectations on ambition among the major players had a liberating effect on the negotiations. It must be said that this exercise in realpolitik deeply disappointed small island states, least-developed and African countries, who continued to hold out for greater ambition, and for a global temperature goal of 1.5°C.

The recognition of the importance of the second commitment period by developed countries, even the United

States, which had earlier virtually ignored the Kyoto Protocol negotiations, was a useful signal. ‘Preserving Kyoto’ became an iconic theme and a touchstone of the whole climate change negotiation in the media. But the intense political focus on the second commitment period as an end in itself made it easier to reach a deal, since content was less in the spotlight. Several parties – Canada, Japan and the Russian Federation – had stated that they would not be making mitigation commitments under Kyoto. Australia and New Zealand were equivocal. Whether or not there would be a second commitment period became dependent on the European Union. The percentage of global emissions covered by likely Kyoto committers – around 15% and declining – meant that the Kyoto Protocol could not realistically be the vehicle for annex I mitigation commitments beyond 2020. That gave the EU leverage for achieving its balancing requirement of a negotiation towards a legally binding agreement that would encompass all major emitters.

Once this had been accepted, the previous status of the Kyoto Protocol as the instrument by which all annex I parties except the United States made their commitments was lost. So was any thought that a two-treaty outcome to the negotiations could work. A more stable and long-term solution was needed. So 2013–2020 came to be seen, and more and more referred to, as a transition period. To allow this to go unchallenged was a substantial concession by developing countries, and opened the way to a new negotiating mandate.

For those annex I parties not making commitments under Kyoto, and for all developing countries, the LCA had the task of constructing a parallel framework to ensure that there was full coverage of mitigation up to 2020. The challenge was to find equivalent disciplines to those embodied in Kyoto’s reporting and accounting rules. The elements, from Bali and Cancún, were all there, but this negotiation was far less mature than the Kyoto Protocol track. It had started two years later, and there was a large volume of unagreed and still not fully digested text.

In keeping with its approach earlier in the year, South Africa chose not to step in at Durban and take over from the chairs of the two ad hoc negotiating groups to craft a deal. There were some informal consultations under the presidency – ‘indabas’ – in parallel, but these were always to feed back into the negotiations under the chairs. Very late in the conference South Africa invited some ministers, including Tim Groser from New Zealand, to facilitate agreement on the sticking points under the LCA. South Africa presided over discussions on the new negotiating mandate, which did not have a home in either negotiating group. A late and successful intervention by the COP president called for adoption of the Kyoto Protocol and LCA decisions and the new mandate as a package. The result was that, although it might have taken longer than necessary, and came close to failure, there can be no doubt that there was a full consensus on the outcome and that Durban was a party-driven result. That is a firmer base on which to negotiate than either Copenhagen or Cancún.

The Durban deal

Results under the Kyoto Protocol, the convention and the new mandate are a surprisingly coherent package.⁶ The Kyoto Protocol establishes the second commitment period, thus avoiding a legal vacuum after 2012. A more important achievement under Kyoto for the longer term was the settling of most accounting rules for the second commitment period. The post-2012 rules on land use change and forestry (LULUCF), which were unfinished business from 10 years earlier, were finalised with a package centred on the new concept of reference levels, and other rule changes. The market mechanisms were also maintained intact, whereas they had been under threat during the negotiations.

The impact of the LCA and other related COP decisions is to provide a structure for mitigation commitments and associated needs such as finance, technology and adaptation, applicable to all parties up to 2020. In combination with the Kyoto Protocol, 80% of global emissions are now covered. The distinction between *qelos* and actions

is retained, thereby maintaining some of the long-standing dichotomy among parties. It sets out a viable alternative to the Kyoto Protocol’s model, having to meet similar concerns of comparability, transparency and review. The Durban outcomes under the convention can be seen as building blocks which will be part of the new regime to be negotiated by 2015, and to apply from 2020. The Kyoto Protocol and convention outcomes are complementary, and make the transition period complete.

The biggest political advance of Durban is, of course, the mandate for a new negotiation, the Durban Platform for Enhanced Action (DPA), towards ‘a protocol, another legal instrument or an

mandate is unequivocal that it ‘shall’ raise ambition. A work plan on increasing ambition will be established. The approach to increasing ambition is consistent across the Kyoto Protocol, the LCA and the DPA. A review is to take place in 2013–2015, which will include consideration of the IPCC’s fifth assessment report. What the IPCC has to say about global goals (whether expressed as temperature, peaking year or emissions reduction) and the means of attaining them will come under intense scrutiny, even more so than the fourth assessment report. It is very likely that aggregate efforts will still be inadequate in 2015, in which case there will be pressure on parties to do more. That was why many developing

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agreed outcome with legal force’ under the convention, ‘applicable to all’. There is still some constructive ambiguity in the term ‘outcome with legal force’, found in the final ‘huddle’ in the plenary. But the context of these words gives, compared to Bali’s ‘agreed outcome’, a stronger implication of something closer to a legal instrument than to a set of non-binding decisions. The words ‘applicable to all’ also strengthen the political framing in the same direction. The mandate leaves open how the Kyoto Protocol and LCA results will be incorporated in a new agreement; there is no explicit requirement to retain the annex I/non-annex I dichotomy. Nor is CBDR restated.

And ambition? There was no progress at Durban that could be measured in tonnes of CO₂. But ambition was not ignored. It is hard to imagine stronger political language than the ‘grave concern’ expressed at the gap between aggregate efforts and any emissions trajectories that could achieve the 2°C target. The DPA

countries would not accept an eight-year second commitment period at Durban, even though, to be coherent with LCA, it is the only logical one. The outcome under the LCA will apply to 2020, so if the Kyoto Protocol’s second commitment period were to end in 2017 a potential three-year gap under the protocol would create uncertainty. The need to decide on five or eight years may give developing countries some negotiating leverage to trade off eight years for something more on ambition.

The model of accountability for emissions reductions that is being explored under the pledge and review approach emerging from the LCA is one of peer pressure and transparency. This would operate more like some OECD or World Trade Organization review mechanisms, and less like the legally binding with compliance provisions model of Kyoto. This does not necessarily make it less effective. It has been recognised that the will of states to do

what they say is not synonymous with the degree of 'bindingness' of any obligation.⁷ Within a legally binding framework, such as the convention itself, there may be effective non-legally binding disciplines. This is often described as a 'bottom-up' approach, in contrast to Kyoto's supposed 'top-down' model. But just as Kyoto is not entirely top-down, this convention model is not purely bottom-up. A top-down approach is still necessary to assess collective progress against global goals, and indeed to address the global goals themselves. The integrity of the system will still need to be ensured by rigorous rules and enforcement of reporting of emissions.

It is worth noting the contribution New Zealand made to the Durban outcome. Being represented as Kyoto Protocol chair, and having Tim Groser facilitating core political elements of the LCA gave New Zealand the major role in achieving the mitigation package across the two existing tracks of the negotiation. In addition, New Zealand officials were influential in several areas of the discussions.

New Zealand's interests emerged intact. New Zealand retained its flexibility on not only where its mitigation commitment will be made, but also the final figure. There were notable gains for New Zealand in the new Kyoto Protocol forestry rules, which achieved provisions New Zealand had been seeking on land use flexibility and harvested wood products, as well as reference levels, a way of smoothing out the effects of longer-term planting and harvesting trends. Advances on market mechanisms and on agriculture were also welcome. The certainty over the Kyoto accounting rules should be helpful to the emissions trading scheme.

Prospects

The initial challenge for the negotiations is logistic more than political. Three ad hoc negotiating bodies will meet during 2012: the Kyoto Protocol and the LCA groups in their final year, and the new DPA. The

LCA still has much work to conclude. Several other new bodies, including for adaptation, finance, technology and response measures, have to be fitted into the tight schedule. Already most negotiating meetings have been limited to 90 minutes, which means not much more than an hour of actual negotiating time. The absurdly high number of meetings, many overlapping, makes huge demands on small delegations and on the secretariat which must service them. There is also more work required in capitals to prepare the submissions invited on nearly 40 separate subjects for 2012. This could all spell a procedural quagmire.

Negotiators may struggle with their workload in 2012, and the DPA may make a slow start, but this takes nothing away from the political gains made at Durban. Following the two-yearly cycle of political progress, Durban should be good for at least another two years, perhaps even longer this time. The UNFCCC has four years to conclude an agreement, twice the time it took to negotiate the Kyoto Protocol.

The elements of the new regime are likely be those listed in the DPA and in the Bali Action Plan before it. The neatest solution to legal form would be for another protocol under the convention, with common rules which might incorporate much of the Kyoto Protocol *acquis*. One would also expect much of the LCA outcome to be reflected in the new instrument. The core mitigation component of the future regime will thus logically be a merging of Kyoto and the convention, with commonality of treatment among major emitters, whether developed or developing. Mitigation commitments are likely to be more varied, with other measures such as intensity targets co-existing alongside economy-wide emissions caps. The distinction between major emitters and groups such as the small island states and least-developed countries may replace the annex I/non-annex I dichotomy. If this

does happen, CBDR can still be respected by invoking 'national circumstances'.

There are many uncertainties as the transition period approaches. Carbon prices remain depressed as a result of economic recession and uncertainty about the future of climate change negotiations. Durban did not lift the market. Will the major economies continue to direct their own countries down the path of low emissions growth so that there are incentives to keep up investment in the green economy? Will the United States be able to deliver on its 2020 mitigation pledge? Will the politics allow a step change in ambition in 2015? Will the international community come up with a way of dealing with the unfinished business of air and maritime emissions, on which the UN has made no real progress? How will the BASIC countries use their increasing weight, in terms of both their economies and their emissions? Will the UNFCCC adopt more efficient modes of negotiation in 2013?

The political groundwork has been done to allow the completion of the third phase of the international response to climate change. If the political will holds, and some creative thinking is applied, this could settle the legal framework to mid-century, without needing constant renegotiation. But it will be two or three years before it will be possible to judge whether or not the UNFCCC executive secretary was right in what she said in January 2012.

1 Claudia Roth, co-chair of the German Greens, quoted in *Deutsche Welle*, 12 December 2011, www.dw.de/dw/.

2 Speech to World Future Energy Summit, Abu Dhabi, 12 January 2012, unfccc.int/files/press/statements/application/pdf/120119_speech_wfes.pdf.

3 Decision 1/CP.1 in document FCCC/CP/1995/7/Add.1, 6 June 1995.

4 CMP is the acronym for the Conference of the Parties of the Convention serving as the Meeting of the Parties to the Kyoto Protocol.

5 Brazil, South Africa, India and China. BASIC meets quarterly at ministerial level, and has continued to be active since Durban, for example in opposing the European Union's carbon tax on airlines.

6 For a summary and analysis of the Durban results, see <http://www.iisd.ca/climate/cop17>. The Durban texts are on the UNFCCC website: unfccc.int/meetings/durban_nov_2011/meeting/6245.php.

7 See, for example, Daniel Bodansky and Elliott Diringer, *The Evolution of Multilateral Regimes*, Washington, DC: Pew Center, 2010.