

Introductory Remarks

Charles E. Di Leva

American University Washington College of Law

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INTRODUCTORY REMARKS

by Charles E. Di Leva*

The path toward an international climate framework was intensely debated in Durban at the seventeenth meeting of the Conference of the Parties (“COP17”) to the United Nations Framework Convention on Climate Change (“UNFCCC”), which took place between November 28 and December 9, 2011.¹ It was not until two days after the scheduled close of the Conference that the Parties were able to forge a compromise.²

This landmark decision was noted worldwide.³ The UNFCCC’s 195 State Parties overcame substantial negotiating differences, committing to adopt a decision by 2015 that would contain emission reductions applicable to both developed and major emitting developing countries, with the decision coming into force by 2020.⁴ Parties also agreed to submit proposals on the path toward this decision as part of the “Durban Platform” as soon as three months after the close of COP 17.⁵ With China, India, and the United States hammering out the final details of the agreement, this compromise seemed a historic step forward.⁶

Even with a compromise agreed upon in Durban charting the path toward a global agreement, the situation surrounding climate law remains troubled. This concern became clear the Monday following the Durban agreement, when carbon markets sank.⁷ The situation for carbon markets several months later is no better, even in light of the European Union’s legal commitment to twenty percent emissions reductions by 2020, and its related emissions trading scheme.⁸

Why do these concerns remain so prominent, and what challenges do they pose for those committed to addressing what many view as the greatest challenge facing humankind?

Economically, the concerns remain prominent because international environmental agreements are expensive to implement and the responsibilities for historic emissions fall on countries whose economies seem to face lower rates of growth than those countries who have not assumed legally binding commitments.⁹ Thus, some challenges are indeed linked to the global economic imbalance and recession. Others may reflect the problem of having “climate winners and losers.” It has been noted that global warming, and the resulting ice cap melt, may harbor vast economic gains as mineral resources and shipping routes become accessible for the first time.¹⁰ The resulting economic and political imbalances make it difficult to forge a global regulatory framework that can enable a successful carbon market to solidify and grow. Without such a framework, the private sector that provides most of the world’s capital for clean energy may well have less incentive to invest and the range of carbon legal transactions may recede.

As well, within weeks after Durban, the political divide between developed and developing countries was evident again. As just one example, the Durban Platform submission by China

to the UNFCCC Secretariat of March 5th made it clear that the principle of common but differentiated responsibilities had not moved much from its initial inscription in 1992.¹¹ Their submission stated as follows:

Under the circumstances of a lack of finance and technology support from the developed country Parties and being confronted with the challenges of economic and social development as well as poverty eradication, developing country Parties have made their greatest efforts to take mitigation actions, whose contributions to mitigation are much greater than those of developed country Parties. Social and economic development and poverty eradication are first and overriding priorities of developing country Parties. Whether the developing country Parties could enhance their actions both on mitigation and adaptation depends on the enhanced finance and technology supports by developed country Parties.¹²

Despite these economic and political divisions, there is hope for climate change and the law. Some hope for climate change law can be gleaned by a historical perspective, as well as by some recent developments and trends. From the historical viewpoint, climate law and practice has shown steady growth with some oscillation, notably linked to the current recession. Indeed, when I attended the final UNFCCC negotiating session in 1992, it would have been difficult to envision today’s plethora of climate related courses, textbooks, blogs, and advocacy groups.

For the World Bank too, engagement in climate and related legal work has continuously grown. At the carbon transaction level, climate change efforts began in only two countries with small pilot actions handling a few million dollars, up to the point that the Kyoto Protocol became a reality.¹³ Today, the Bank manages \$2.5 billion in carbon funds, \$7 billion in climate investment funds (along with other development Banks), and has hundreds of millions in renewable energy projects that are growing every year.¹⁴ New funds dealing with United Nations Collaborative Programme on Reducing Emissions from Deforestation and Forest Degradation in Developing Countries “Plus” and related land and agriculture projects are growing,¹⁵ the same is true for

*Charles E. Di Leva is Lead Counsel in the Environmental and International Law Unit of the World Bank Legal Department. Since 1992 he has worked in all geographic regions, specializing on issues pertaining to sustainable development, such as carbon and green finance, development and implementation of multilateral environmental agreements and national laws. He served as environmental law advisor to the World Bank during the World Summit on Sustainable Development in Johannesburg in 2002, and has represented the Bank in international treaty negotiations in areas of Climate, Biodiversity, Chemicals and Wetlands. Mr. Di Leva is an adjunct professor at the George Washington University School of Law teaching International Trade and Environment, and an adjunct at the American University Washington College of Law teaching Legal Aspects of Sustainable Development.

carbon and climate related funds at many international organizations. Clean energy portfolios in all development organizations are growing and here to stay.¹⁶ Not only do they make good economic sense, they deliver social, environmental and health benefits.¹⁷ Because of these results, and the trend of climate science, there will continue to be regulatory regimes that support the development of climate law, as evident in regional and domestic schemes. This is true of large regimes like the European Union Emissions Trading Scheme, as well as single jurisdictions like California.

Indeed, today, a wide range of climate friendly actions may eventually qualify under the Durban Platform's "new market mechanism" or, in the case of projects in developing countries, become eligible for support from the Green Climate Fund or other financing mechanism, or may simply move ahead with domestic funding alone.¹⁸ From developing countries, some of these efforts will support their nationally appropriate mitigation activities ("NAMAs"). Perhaps today's climate law practitioners can help China fulfill a commitment linked to its 12th Five Year Plan.¹⁹ The plan aims to reduce emission intensity by forty to forty-five percent from 2005 levels by 2020.²⁰ Today's practitioners can help China establish a domestic emissions trading scheme in cities and provinces with the objective of setting up a national scheme in 2015.²¹ Lawyers will be needed in India as well, as it proceeds with plans to reduce emissions and puts in place a "performance and trade system."²² Additionally, Brazil, Indonesia, Thailand, and Vietnam, are just a few of the developing countries to join China and India in a World Bank-managed Partnership for Market Readiness.²³ This partnership will help put in place domestic incentive measures such as laws and regulations that help carbon markets to grow.²⁴

Even without the development of carbon markets, the Durban Platform recognizes that there is growing interest in

other sectors to effectuate measures to reduce emissions or improve efficiency.²⁵ These measures will require lawyers to help develop laws, regulations, and innovative financial packages that will help channel the necessary finance.²⁶ Thus, going forward from Durban, Parties can now submit proposals for carbon emission reductions linked to carbon capture and storage, provided that such activities have a solid domestic legal framework.²⁷ Similarly, projects that achieve reductions in emissions from deforestation and forest degradation will have to be based on a legal regime that can address a wide range of environmental and social safeguards. Parties will also review submissions on how to improve agricultural practices in a manner that sequesters carbon as well. Many of these projects will also require a sound understanding of relevant land law and other related legal matters. Lawyers will be needed in a wide range of related settings, such as negotiations surrounding ways to address emissions related to aviation and bunker fuels, or the heavily contested litigation concerning the European Union Aviation charges.²⁸

Perhaps most compelling, climate law practitioners will be called upon to address a growing array of social challenges. Science has demonstrated why we are witnessing climate migration due to sea level rise, or changing weather patterns. These often tragic circumstances will require careful balancing of rights and responsibilities, grounded in both international and domestic law. In such settings, scientists will predict the patterns, and economists will portray the costs, but lawyers will have to shape just outcomes for the growing number of those who are affected.

In sum, just as one could not have fully predicted in 1992 the wide range of legal talents the climate regime has absorbed the past twenty years, it is equally uncertain the extent to which lawyers will be necessary going forward. However, if the past is a guide, the demands for climate change will only grow. 

Endnotes: Introductory Remarks

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² Paul Manning, *COP 17 Climate Change Agreement in Durban: the Politics of Compromise*, EHS J. (Dec. 15, 2011), <http://ehsjournal.org/http://ehsjournal.org/paul-manning/cop-17-climate-change-agreement-in-durban-the-politics-of-compromise/2011/>; see also Annalisa Savaresi, Int'l Center for Climate Governance, *The Durban Outcome: A Survey of Opinions* (Jan. 2012), http://www.iccgov.org/publications/files/reflections/01_reflection_january_2012.pdf.

³ Manning, *supra* note 2.

⁴ See Forum for Env't, *Summary of Durban Outcomes of the 17th Session of the Conference of the Parties (COP17/CMP7)*, <http://climatecapacity.org/files/SVNews/Durban%20Report%20of%20ECSNCC.pdf>; see also Savaresi, *supra* note 2.

⁵ Manning, *supra* note 2.

⁶ *Positive Outcome in Durban as US, China and India Agree to Work Together*, POINT CARBON (Dec. 12, 2011, 3:56pm), <http://www.pointcarbon.com/aboutus/pressroom/pressreleases/1.1700632>.

⁷ Alessandro Torello, *EU Carbon-Permit Prices Close Down After Durban Deal*, WALL ST. J. Online (Dec. 12, 2011, 12:49 PM), <http://online.wsj.com/article/SB10001424052970203430404577094443960862340.html>.

⁸ See *EU ETS Phase III (2013- 2020)*, U.K. DEP'T OF ENERGY AND CLIMATE CHANGE, http://www.decc.gov.uk/en/content/cms/emissions/eu_ets/phase_iii/phase_iii.aspx (last visited Apr. 2, 2012).

⁹ See Savaresi, *supra* note 2.

¹⁰ See, e.g. Kathryn Isted, *Sovereignty in the Arctic: An Analysis of Territorial Disputes & Environmental Policy Considerations*, 18 J. TRANSNAT'L L. & POL'Y 343, 347 (2009).

¹¹ UNFCCC, Ad Hoc Working Group on the Durban Platform for Enhanced Action, First Session, Bonn, May 17-24, 2012, *China's Submission on Options and Ways for Further Increasing the Level of Ambition*, U.N. Doc. FCCC/ADP/2012/Misc.1, unfccc.int/resource/docs/2012/adp1/eng/misc01.pdf (last visited Apr. 2, 2012).

¹² *Id.* at 7.

¹³ *Id.*

¹⁴ *Carbon Finance*, THE WORLD BANK, <http://web.worldbank.org/> (last updated Aug. 2011); *Summary of Funds and Facilities*, THE WORLD BANK, <http://go.worldbank.org/MZZJZ5O4L0> (last visited Apr. 2, 2012); see generally *10 Years of Experience in Carbon Finance: Insights from working with carbon markets for development & global greenhouse gas mitigation* THE WORLD BANK (Dec. 2009), www.carbonfinance.org.

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¹⁵ See *The Global Climate Change Regime*, COUNCIL ON FOREIGN RELATIONS, <http://www.cfr.org/climate-change/global-climate-change-regime/p21831> (last updated November 21, 2011); see generally REDD+ *Social & Environmental Standards Factsheet*, REDD+SES, <http://www.redd-standards.org/> (last visited Apr. 2, 2012).

¹⁶ See U.N. Research Inst. for Social Dev., *The Global Political Economy of REDD+: Engaging Social Dimensions in the Emerging Green Economy*, 7-10 (Dec. 2011) (Rocio Hiraldo and Thomas Tanner).

¹⁷ See *Id.* at 1-3, 7-11; see also UNEP Finance Initiative, *REDDy Set Grow, Part 1: A Briefing for financial institutions: Opportunities and roles for financial institutions in forest carbon markets*, 28-30 (May 2011), www.unepfi.org/fileadmin/documents/reddysetgrow.pdf.

¹⁸ See CLIMATE ACTION NETWORK-INT'L, CAN-I SUBMISSION ON A NEW MARKET-BASED MECHANISM (March 2012), <http://unfccc.int/resource/docs/2012/smsn/ngo/176.pdf>; see generally Forum for Env't, *supra* note 4, at 8-10.

¹⁹ See CLIMATE ACTION NETWORK-INT'L, VIEWS ON OPTIONS AND WAYS TO FURTHER INCREASE THE LEVEL OF AMBITION 10 (March 5, 2012), <http://climatenetwork.org/publication/can-submission-views-options-and-ways-further-increase-level-ambition-february-2012>.

²⁰ *Id.*

²¹ *Id.*

²² Robin Lancaster, *Ready, Steady, Go: The Partnership for Market Readiness is Sowing the Seeds for Carbon Trading in Several Developing Countries*, CARBON TRADING Feb. 2012, at 16, http://issuu.com/carbon-tradingmagazine/docs/carbon_trading_february_2012-1.

²³ See *About the Partnership for Market Readiness (PMR)*, THE WORLD BANK CARBON FIN. UNIT, <http://wbcarbonfinance.org/Router.cfm?Page=PMR&FID=61218&ItemID=61218&ft=About> (last visited Apr. 2, 2012).

²⁴ See *Durban Conference Delivers Breakthrough in International Community's Response to Climate Change*, UNITED NATIONS, <http://www.un.org/wcm/content/site/climatechange/pages/gateway/the-negotiations/durban> (last visited Apr. 2, 2012); see generally United Nations Framework Convention on Climate Change, Draft Dec. -/CP-17, *Conference of the Parties, Green Climate Fund-Report of the Transitional Committee*, 17th Sess., Nov. 28-Dec. 9, 2011, U.N. Doc. FCCC/CP/2011/L.9 (Dec. 10, 2011), http://unfccc.int/files/meetings/durban_nov_2011/decisions/application/pdf/cop17_gcf.pdf

²⁵ See Ernst & Young, *Durban dynamics: navigating for progress on climate change*, 1-15, <http://www.ey.com/ZA/en/Newsroom/News-releases/2011—Press-Release—November—Ernst—Young-report-indicates-possible-US-45-billion-climate-change-funding-gap-ahead-of-COP-17> (last visited Apr. 2, 2012) (discussing financial aspects of climate change from a global perspective).

²⁶ See Forum for Env't, *supra* note 4, at 8-11.

²⁷ See CAN-International submission on how to address drivers of deforestation and forest degradation, Climate Action Network-International (Feb. 20, 2012), <http://www.climatenetwork.org/publication/can-submission-how-address-drivers-deforestation-and-forest-degradation-feb-2012> (discussing measures necessary for REDD+ to succeed, including both domestic and international factors).

²⁸ See Daniel Michaels, *EU's Airline-Emissions Fees Face Challenge*, THE WALL STREET JOURNAL (Feb. 16, 2010 1:10 PM), <http://online.wsj.com/article/SB1000142405297020405980457722173526305492.html>; see generally UK Environment Agency, *EU Emissions Trading System – Aviation*, <http://www.environment-agency.gov.uk/business/topics/pollution/107596.aspx> (last updated March 23, 2012).

Endnotes: UNCONSTRUCTIVE AMBIGUITY IN THE DURBAN CLIMATE DEAL OF COP 17 / CMP 7

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⁴ The two most notable decisions implementing the Cancun Agreements were the decision launching the Green Climate Fund and the decision on many operational modalities that were under discussion on the Ad-Hoc Working Group on Long-Term Cooperative Action ("AWG-LCA"). See UNFCCC, Draft Dec. -/CP-17, *Conference of the Parties, Green Climate Fund-Report of the Transitional Committee*, 17th Sess., Nov. 28-Dec. 9, 2011, U.N. Doc. FCCC/CP/2011/L.9 (Dec. 10, 2011); UNFCCC, Draft Dec. -/CP/17, *Outcome of the Work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention* (Advance Unedited Version), http://unfccc.int/files/meetings/durban_nov_2011/decisions/application/pdf/cop17_lcaoutcome.pdf.

⁵ UNFCCC, *Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action*, U.N. Doc. FCCC/CP/2011/L.10 (Dec. 10, 2011).

⁶ See Janet Redman, *Durban's Climate Debacle*, FOREIGN POL'Y IN FOCUS (Jan. 5, 2012), http://www.fpij.org/articles/durbans_climate_debacle; *Politicians Listen to the Polluters at UN Climate Talks*, GREENPEACE INT'L (Dec. 11, 2011), <http://www.greenpeace.org/international/en/news/features/Politicians-Listen-to-the-Polluters-at-UN-climate-talks/>.

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⁸ See John M. Broder, *In Glare of Climate Talks, Taking on Too Great a Task*, N.Y. TIMES (Dec. 10, 2011), <http://www.nytimes.com/2011/12/11/science/earth/climate-change-expands-far-beyond-an-environmental-issue.html>; Fitriani Adriansyah, *Mixed Results from Durban Climate Talks for Indonesia*, THE JAKARTA POST (Dec. 16, 2011), <http://www.thejakartapost.com/news/2011/12/16/mixed-results-durban-climate-talks-indonesia.html>; David Crossland, *The Durban Climate Agreement is Almost Useless*, SPIEGEL ONLINE INT'L (Dec. 12, 2011), <http://www.spiegel.de/international/world/0,1518,803158,00.html>.

⁹ See Broder, *supra* note 8; Crossland, *supra* note 8.

¹⁰ UNFCCC, Draft Dec. -/CP-17, *Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action* (Advance Unedited Version), http://unfccc.int/files/meetings/durban_nov_2011/decisions/application/pdf/cop17_durbanplatform.pdf.

¹¹ See, e.g., DANIEL BODANSKY & ELLIOT DIRINGER, THE PEW CENTER ON GLOBAL CLIMATE CHANGE, *THE EVOLUTION OF MULTILATERAL REGIMES* (2010) (explaining

the reasons international regimes often develop in an evolutionary manner); K. Levin et al., *Playing it Forward: Path Dependency, Progressive Incrementalism, and the "Super Wicked" Problem of Global Climate Change*, 6 IOP CONF. SERIES: EARTH AND ENVTL. SCI. 502002 (2009).

¹² The expression "constructive ambiguity" is generally attributed to Henry Kissinger and is widely used in the field of diplomacy. It has been defined as "the deliberate use of ambiguous language on a sensitive issue in order to advance some political purpose." See G. R. Berridge & Alan James, *A Dictionary of Diplomacy* (July 21, 2008), http://grberridge.diplomacy.edu/dict_comp_a_e.htm.

¹³ See HE Patricia Espinosa, Sec'y of Foreign Affairs, Mex., Address at the Chatham House: From Cancun to Durban: Implications for Climate and Multilateral Diplomacy (June 30, 2011), <http://www.chathamhouse.org/sites/default/files/300611espinosa.pdf>.

¹⁴ Scientific estimates indicate that emission pathways consistent with a "likely" chance (i.e. greater than sixty-six percent) of meeting the two degree Celsius goal "generally peak before 2020, have emission levels in 2020 around 44 GtCO_{2e} (range: 39-44 GtCO_{2e}), have steep emission reductions afterwards and/or reach negative emissions in the longer term." See UNEP, *THE EMISSIONS GAP REPORT: ARE THE COPENHAGEN ACCORD PLEDGES SUFFICIENT TO LIMIT GLOBAL WARMING TO 2° C OR 1.5°?* (Nov. 2010), http://www.unep.org/publications/ebooks/emissionsgapreport/pdfs/EMISSIONS_GAP_TECHNICAL_SUMMARY.pdf.

¹⁵ See *id.* (noting the concern revealed in the recent UN reports regarding the difficulty maintaining the average temperature rise within two degrees Celsius).

¹⁶ See *Summary of the Durban Climate Change Conference*, EARTH NEGOTIATIONS BULL. (Dec. 2011), <http://www.iisd.ca/download/pdf/enb12534e.pdf>; Wolfgang Sterk et al., *On the Road Again: Progressive Countries Score Realpolitik Victory in Durban While the Real Climate Continues to Heat Up*, WUPPERTAL INST. FOR CLIMATE, ENV'T AND ENERGY (Dec. 13, 2011), http://www.wupperinst.org/uploads/tx_wibeitrag/COP17-report.pdf; Edward Cameron & Jennifer Morgan, *Reflections on COP 17 in Durban*, WRI INSIGHTS (Dec. 16, 2011), <http://insights.wri.org/news/2011/12/reflections-cop-17-durban>.

¹⁷ See Remi Moncel et al., *Building the Climate Change Regime: Survey and Analysis of Approaches* (World Resources Inst., Working Paper, 2011), at 53, available at http://www.unep.org/PDF/PressReleases/UNEP-WRI_BuildingClimateRegime_ADVANCED.pdf.