Unconstructive Ambiguity in the Durban Climate Deal of COP 17 / CMP 7

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

by Remi Moncel*

**INTRODUCTION**

“The Durban conference in December 2011 marked a breakthrough in international efforts to combat climate change.”1 It is in these terms that the European Commission (“EU”) Commissioner Connie Hedegaard described the 17th Conference of the Parties (“COP 17”) to the United Framework Convention on Climate Change (“UNFCCC” or “Convention”) and the seventh meeting of the Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol (“CMP 7”), which took place this past winter in South Africa.2

In Durban, governments agreed to a package composed of three main elements: 1) a continuation of the Kyoto Protocol with a second round of quantified mitigation commitments to be defined for a subset of Annex I countries;3 2) operational decisions implementing the 2010 Cancun Agreements;4 and 3) the launch of a process for a new international agreement by 2015 applicable to all Parties.5 The Durban Package is the latest development in the climate regime: the constellation of international, national and sub-national institutions and actors with capacity, expertise and authority to address climate change. While some commentators expressed skepticism on this outcome,6 the dominant view appears to be one of cautious – and at times enthusiastic – optimism, similar to the opinion expressed by Commissioner Hedegaard.7

However, several fundamental political and technical questions were left unanswered in Durban.8 Because of disagreements, negotiators delayed decisions or used ambiguous wording to express political will.9 Chief among these ambiguous phrases is “agreed outcome with legal force,” a phrase that seemed to serve as a compromise for the legal form of a future climate agreement during the final hours of the talks.10 This article examines this emblematic formulation and other important considerations beyond legal form that were left unanswered or ambiguous.

Scholars have argued that regimes can evolve gradually and that small steps can have significant effects over time.11 Borrowing the approach former U.S. Secretary of State Henry Kissinger, compromises on language may be a manifestation of “constructive ambiguity”12 that would allow the climate regime to grow stronger incrementally.13 While recognizing the benefits of an incremental approach, it is worth considering what growth is sufficient for the climate regime to be effective and whether such a threshold was secured in Durban. There is a risk that the Durban outcome in fact yielded unconstructive ambiguity in the sense that, by avoiding difficult, time-sensitive political questions today, negotiators may have missed the narrow window of opportunity that science suggests remains for limiting a rise in global average temperature to two degrees Celsius above pre-industrial levels.14 Thus, governments’ ambiguity may have de facto, and perhaps inadvertently, locked the world into a high emissions trajectory.

In that context, the purpose of this article is to evaluate the Durban outcome in terms of its ability to set the climate change regime on a path to limit the global average temperature rise to two degrees Celsius above pre-industrial levels.15 Comprehensive descriptions of the outcome of the conference have been written elsewhere. Instead, this article focuses on some of the most central provisions of a Durban-created future international climate agreement intended to facilitate international cooperation in meeting scientifically driven mitigation goals.16 Specifically, a review of key agreement provisions finds that, while it is premature to cast a definitive judgment on the success of the Durban conference, the adequacy of a global response to climate change remains unclear and presents cause for concern.

The article assesses three of the key issues under negotiation in Durban as an illustration of the phenomenon of unconstructive ambiguity: the legal form of a future agreement; national and global mitigation commitments; and equity. In the conclusion, the possible causes and implications of this outcome are discussed.

**THE LEGAL FORM OF A FUTURE CLIMATE AGREEMENT**

The question of the legal form for a future climate agreement to complement or replace the Kyoto Protocol was central in the Durban negotiations in 2011.17 Views diverge among scholars and advocates on whether voluntary or legally binding commitments lead to greater ambition and implementation of international commitments to reduce greenhouse gas (“GHG”) emissions by national governments.18 The benefits of a legally-binding international agreement may include greater legal certainty, increased incentives for domestic implementation and compliance, opportunities for legal challenges, and additional leverage for civil society to hold their governments accountable.19 By contrast, others argue that a voluntary framework would lead to greater participation and more ambitious goals.20

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In some ways, the Durban conference defied the odds with a decision that signals a move towards a “top-down” climate regime after many had assumed that the regime would take a “bottom-up” form in the aftermath of the Copenhagen Accord and the Cancun Agreements. Several elements of the Durban outcome suggest a possible shift towards a more inclusive multilateral legal framework. However, ambiguous compromises in Durban limit the ability to know with certainty the structure of the future climate regime.

A REINVESTMENT IN MULTILATERALISM

The Durban Package included an agreement to continue the Kyoto Protocol after its first commitment period, which ends in 2012. The EU has agreed to a second commitment period. Although the end date of this second commitment period remains to be negotiated, a new set of mitigation commitments by the EU, and possibly other developed countries such as Norway, Switzerland, Australia and New Zealand, will begin on January 1, 2013. Beyond 2012, however, critics correctly point out that, given the absence of involvement in this process from other developed countries like the United States, Canada, Russia, and Japan, and quantified commitments from developing countries, the Kyoto Protocol will only include commitments from countries representing at most fifteen to sixteen percent of global greenhouse gas emissions, and is therefore inadequate. However, there are several benefits to the continuation of the Kyoto Protocol. It preserves certain multilateral rules and institutions that can serve as models for the new climate agreement proposed for adoption by 2015, such as accounting rules, a compliance mechanism, emissions trading systems, and the Adaptation Fund. Secondly, the EU restored some of the trust lost among countries by fulfilling a major demand of developing countries: the continuation of the Kyoto Protocol as a necessary condition for enhanced global action in any post-2012 climate regime.

COP 17 also established the Ad-Hoc Working Group on the Durban Platform for Enhanced Action (“AWG-DPEA”) with a view toward developing “a protocol, another legal instrument, or an agreed outcome with legal force under the UNFCCC applicable to all Parties.” This agreement is planned to be negotiated over the coming three years, to be adopted at COP 21 in 2015, and to “come into effect and be implemented from 2020.” The agreement’s significance should not be underestimated. Although several countries in the months and years preceding COP 17 had expressed a desire to establish a single legal agreement applicable to all countries, many developing countries maintained that the principle of common but differentiated responsibilities and respective capabilities required that developed countries be legally bound to reduce emissions under the Kyoto Protocol or an equivalent legal instrument that did not include similar commitments from developing countries. Other countries, particularly the U.S., argued throughout 2011, and until the end of the conference, that the politics were not right for adopting such a roadmap. The wording of Paragraph 2 of the decision establishing the Durban Platform creates a window of opportunity in 2015 to adopt a legally binding instrument, such as new protocol under the Convention or an amendment to the Convention. In fact, several developed and developing countries, as well as observers, interpret the Durban outcome as presaging a new legally binding instrument. In addition, in the fall of 2011 and during the negotiations in Durban, the EU made clear that it would agree to a second commitment period of the Kyoto Protocol only if other countries adopted a roadmap toward a universal, legally binding agreement under the Convention applicable to all Parties.

REMAINING AMBIGUITIES ON LEGAL FORM

Despite the noteworthy expressed willingness by some Parties to be bound by a common legal instrument beginning in 2020, the ambiguity of the carefully crafted phrase “agreed outcome with legal force” continues to hide diverging views about the legal form of this future agreement and the commitments it will contain. The terms “a protocol” and “another legal instrument” have a clear precedent in international climate law as both terms were used separately in the 1995 Berlin Mandate that led to the adoption of the Kyoto Protocol in 1997. The two terms convey the notion that the agreement to be negotiated will have a legally binding form. By contrast, the novel phrase “agreed outcome with legal force” has not been used in international climate law and appears to be new to international law as well. Since the meaning of the phrase is uncertain, the Durban outcome does not necessarily imply that the agreement set to be adopted in 2015 will be legally binding.

The formulation, “agreed outcome with legal force,” was the result of a compromise brokered by the EU and India. While other countries also expressed views on this question, these two actors emerged in the final hours as the crucial deal makers. The EU’s satisfaction was essential to secure a second commitment period to the Kyoto Protocol for developed countries. India’s consent was necessary because it appeared to be the most steadfast in its refusal to commit to adopting an agreement of a legally binding nature in 2015. This phrase allowed EU and India to return home without having crossed any “red lines.” In a speech to the Indian Parliament after COP 17, Minister of State for Environment and Forests Jayanthi Natarajan conveyed that India continues to oppose a legally binding agreement that includes commitments for India. She noted that “[s]ome parties led, in particular, by the EU pressed for a form of agreement that should be legally binding on all Parties.” She added that “India cannot agree to a legally binding agreement for emissions reduction at this stage of our development” and that “the [Durban] decision allows India the necessary flexibility over the choice of appropriate legal form to be decided in future.” The Minister’s insistence on wording that is different from “protocol” and “another legal instrument” suggests that she attributed a different meaning to the phrase “agreed outcome with legal force.” Meanwhile, Commissioner Connie Hedegaard suggested that neither the EU nor India had overstepped its position when she stated that “[w]hile protecting our respective interests, we gave a bit of ground to get a good result for the global community.”
Under the Durban decision, India seems to interpret a non-binding agreement, suggesting that the legal form of a future agreement actually remains to be negotiated. In the words of the Indian Minister:

The post 2020 arrangements, when finalized, may include some aspirational CoP decisions, binding CoP decisions, setting up of new institutions and bodies, and new protocols or other legal instruments as necessary to implement the decisions covering various issues with various degrees of bindingness as per domestic or international provisions of law under the Convention.55

Despite India’s protest, it may be the case that the nation’s concerns and priorities can be integrated into a legally binding agreement in 2015. India’s priority is essentially one of equity and its ability to develop.56 The way forward may lie in the design of a legally binding agreement that differentiates between developed and developing countries in the content of post-2020 commitments and allows India to articulate commitments consistent with its development and poverty eradication goals.

Another unresolved issue is the legal form of the commitments that countries will implement post 2020.57 The Durban decision establishing the AWG-DPEA does not specify the legal form of the commitments that countries will take.58 Rather, it merely notes that the new process “shall raise the level of ambition” and focus in part on “mitigation.”59 Even so, it is important to note that not all legally binding agreements contain legally binding commitments.60 For example, the UNFCCC is a legally binding agreement whose commitments are not expressed in specific and obligatory terms.61 Conversely, the Kyoto Protocol is a legally binding agreement with legally binding mitigation commitments applicable to developed countries but not developing countries, even though developing countries are also Parties.62 Unlike in the Kyoto Protocol, Parties agreed that the future Durban-based agreement will be “applicable to all Parties;” it follows that if the commitments are mandatory and specific, they will be mandatory and specific for all countries.63 But the possibility remains that the commitments could instead be voluntary for all countries. Despite this uncertainty, the launch of a new Ad-Hoc Working Group may be ambitiously read as Parties’ intent to create new, legally binding commitments under the Convention and not replicate the framework established by the Cancun Agreements.64

### National and Global Mitigation Commitments

Two important factors that underlie the effectiveness of the global response to climate change are: 1) the level of ambition of the commitments expressed by countries and 2) the institutions and procedures that will ensure transparency and accountability around these commitments. The Durban conference delivered the detailed rules called for in Cancun, equipping the UNFCCC to facilitate action on the part of all countries in a voluntary framework.65 These provisions are somewhat helpful in that they launch a process to increase ambition and establish institutions and procedures to coordinate and review the actions of countries.66 However, the fact that negotiators delayed decisions on several important items is a cause for significant concern.

### Unclear Prospects for Bridging the Ambition Gap

The pledges made by countries under the Cancun Agreements are, in aggregate, insufficient to meet the goal of limiting a global average temperature increase to two degrees Celsius above pre-industrial levels.68 Facing this inadequacy, two fundamental questions consequently emerge: what options exist for bridging this gap and when will countries consider and adopt such options? The Durban decisions provided partial answers to these questions.

The acknowledgement of the gap of further GHG reduction pledges (“ambition”) in the Durban decisions, and the establishment of processes to bridge it, may be seen as a reason for hope. Paragraph 7 of the Durban Platform decision establishes a “workplan on enhancing mitigation ambition” to explore options to close the ambition gap.69 Governments and observers were invited to submit views about options to increase ambition, and the UNFCCC Secretariat will organize a workshop during the year 2012 to discuss these options.70 In addition, at the insistence of the Alliance of Small Island States (“AOSIS”), the Cancun Agreements, as confirmed by COP 17 in Durban, decided to periodically review the adequacy of the long-term goal and aggregate steps taken by Parties to achieving it.71 The first such review will begin in 2013 and conclude in 2015, as a new agreement under the AWG-DPEA is meant to be adopted.72 This view thus constitutes an important lever to increase ambition over the medium term as it could trigger countries to take more ambitious action before 2020 and could determine the commitments that countries take post 2020 under the new international agreement.73

On a political level, another positive development in Durban was the emergence of a new coalition of countries supportive of ambition.74 The EU, AOSIS, and the Least Developed Countries were most visibly in support of the Durban Package that was ultimately adopted.75 This marks an important shift from previous years, in particular from the dynamics of Copenhagen, where the outcome was largely seen as the result of a deal between the United States, China, India, and Brazil.76 The Cancun Agreements, while more widely supported, merely vindicated the contents of the Copenhagen Accord.77 In Durban, the final outcome of the conference remained elusive until the very end, in part because the major players were still far apart.78 In the final days of the conference, a more minimal version of the text emerged with softer language on the ambition gap and steps to bridge it.79 It was at this point that the EU and the AOSIS allied to push back and instead support a text that clearly acknowledged the ambition gap, launched a process for bridging it, and set a date for adopting a new international agreement that would include all countries.80 Several commentators attribute the results of the conference to this new alliance, the EU in particular.81 It remains to be seen whether this coalition can be maintained but, if it is, the alliance could drive the climate regime towards increased ambition and a framework that supports the interests of pioneering countries, rather than a framework that
establishes a lowest common denominator for countries that are not ready to lead.

Despite these positive developments, several elements suggest that the most difficult political questions were simply postponed and that the prospect of meeting the two degree Celsius goal is dim. Despite the periodic review to be underway in 2013, negotiators were unable to conclude the specific scope of negotiations that will be subject to review. In addition, countries were unable to reach agreement on a global mitigation goal or peak year, despite earlier discussion of these topics in Copenhagen and Cancun. In Durban, negotiators once again postponed the decision for consideration at COP 18. Further, some countries and observers fear that countries will not increase the level of ambition of their commitments until 2020, when the new agreement will enter into force. The adoption of a work program for 2012 on options to increase ambition may be a sign that such steps could be taken sooner, but the actual results remain to be seen given the rapidly closing window for meeting the two degree Celsius goal.

**Improved but Insufficient Transparency**

On the mitigation front, one of the main achievements of the Durban talks was the adoption of guidelines and procedures for the regular reporting to the Convention and peer review of Parties’ greenhouse gas emissions, mitigation actions, support provided, and support received. The Copenhagen Accord in 2010 and COP16 in Cancun in 2011 together mark an important shift on the question of measurement, reporting, and verification (“MRV”). Those agreements established that developed and developing countries would produce regular reports that are subject to some form of international review. In Durban, Parties made this new framework operational by adopting modalities for reporting and review to be applied to developed and developing countries. Developed countries will submit their first biennial reports by January 2014 and developing countries will submit their first biennial update reports by December 2014. These reports will be subject to a process of “international assessment and review” and “international consultations and analysis” for developed and developing countries respectively.

The adequacy of these guidelines can be best assessed based on their end goals. First, an MRV framework can help countries better understand other countries’ actions and gain confidence that all parties are living up to their commitments. Second, MRV can provide accountability. Regular reporting and review of countries’ emissions and actions intend to expose countries that are not fulfilling their commitments. In theory, the threat of being “named and shamed” provides an incentive to countries to comply with their obligations. Third, an adequate MRV system would generate information that is sufficiently complete and comparable to enable an assessment of whether countries, in aggregate, are doing enough to stabilize greenhouse gas concentrations in the atmosphere at the levels needed to meet global mitigation goals.

However, the Durban decisions provide limited country accountability and aggregate accounting in practical terms. The Durban decisions give no explicit right to observers, such as nongovernmental organizations and representatives of the media, to attend or offer comments or questions during the sessions in which the reports of countries are discussed. This will likely reduce the level of interest among civil society in these reports and consequently weaken the “name and shame” effect of the process. Secondly, the information requested of countries in these guidelines is likely to be insufficient to enable an accurate assessment of the world’s progress towards the two degree Celsius goal. This is due in part to the fact that many of the countries’ pledges under the Cancun Agreements have special conditions associated with them and leave many assumptions unspecified. For example, the EU and Australia have expressed their pledges as ranges, vowing to commit to the higher end of their range only in the context of a comprehensive climate agreement. China indicated that it would reduce the emissions intensity of its economy by forty to fifty percent below 2005 levels by 2020, but has not specified base year emissions or GDP projections for the year 2020. Developed countries put forward economy-wide emissions targets but, unlike the Kyoto Protocol, the Cancun Agreements do not specify in which sectors of their economies these countries will reduce emissions. The United Nations Environment Programme (“UNEP”) estimates that this uncertainty surrounding countries’ pledges and the way in which they will be implemented will result in an emissions gap ranging from six to eleven giga tons CO2 emissions (“GtCO2e”) in 2020 compared to what is needed to have a likely chance of meeting the two degree goal. The Durban decisions do call on developed countries to submit additional information about their pledges using a standardized template. The UNFCCC Secretariat will also organize workshops to clarify the pledges of countries. However, developing countries are not required to use a similar template. In addition, the Durban decisions neither include an agreement on common accounting rules nor set up a process to agree to such rules. The topic of common accounting rules has been hotly debated among negotiators. The EU and the AOSIS in particular have been advocates for such rules, whereas the U.S. has resisted these demands. In the end, the division was bridged through a paragraph with no real operational effect and which reduces the prospects of adoption of common accounting rules in the future.

Common accounting rules are necessary to ensure that countries account for their emissions reductions and enhanced removals in a complete and standardized manner. One risk to integrity, for example, is that countries could use different multilateral or bilateral offset programs. Without common accounting rules for these offsets, emission reductions could be counted multiple times. UNEP estimates that such “double-counting” could result in an increase in emissions of up to 1.3 GtCO2e in 2020.

**Equity**

**Context**

The topic of equity has been among the most central and contentious in the climate negotiations since the adoption of the UNFCCC in 1992. The Convention treaty enshrined
the notion of equity in Article 3.1 through the principle of “common but differentiated responsibilities and respective capabilities.” Parties have since been at odds over how to interpret this principle. The Intergovernmental Panel on Climate Change acknowledged that favoring certain proposals over others comes down to “a policy judgment.” A major source of discord has thus been how to make this widely accepted principle operational. Academics and policy analysts have written extensively on the topic of equity as it relates to climate change. Until now, the debate has mostly centered on the way in which responsibilities for future emissions cuts among countries should be allocated. Most proposals use countries’ capacity and responsibility for past emissions (also known as historical responsibility) as a basis for their reduction recommendations. The following section examines how UNFCCC negotiators at the Durban conference have tackled the notion of equity. Though this central issue is one of the keys to unlocking other roadblocks, governments have made little progress until now on the way in which equity should be integrated into an international agreement. The Durban decisions offer a window of opportunity to begin a dialogue on this question. But statements by negotiators reveal that views are still far apart and that much work will be needed to find common ground.

The Treatment of Equity in Durban and Beyond

Progress on the question of ambition, which this article discussed above, will likely be closely tied to progress on the question of equity. In the lead-up to the Durban conference, the Government of India requested that three items be added to the provisional agenda of COP 17, one of which related to “equitable access to sustainable development.” The submission states that “[t]he decisions at Cancun imply that the global goal of climate stabilization in terms of limiting the temperature rise to two degrees Celsius above pre-industrial levels should be preceded by a paradigm for equitable access to sustainable development.” The essence of the Indian position, which has received support from other developing countries, is that UNFCCC Parties should reach agreement up-front on the way in which the global “carbon budget” will be divided, developing countries will not have sufficient flexibility to prioritize their development and poverty eradication goals. These discussions have become relatively contentious because what India and its allies describe as a legitimate claim to fairness and development, some developed countries view as an effort on the part of the major emerging economies to escape the increasing responsibilities that come with economic growth and higher greenhouse gas emissions, or as a distraction at best. In the end, Parties agreed at COP 17 to hold a workshop in 2012 on the topic of “equitable access to sustainable development.”

In addition, the issue of equity was central to the discussions on the Durban Platform. In a departure from the approach taken under the Kyoto Protocol, developed countries insisted that any future legally binding international agreement should include commitments from all countries, or at least the major economies, rather than commitments from developed countries only. The United States, for example, conditioned its acceptance of a future legally binding climate agreement on the fact that commitments under this agreement should apply symmetrically to developed and developing countries. The adoption of the decision on the Durban Platform suggests that a balance was struck between this demand and the concern expressed by India that any future agreement should reflect equity. It is striking that the word equity and the principle of “common but differentiated responsibilities and respective capabilities” are absent of the decision on the Durban Platform.

Some commentators have read this absence as the result of demands by some developed countries. U.S. Climate Envoy Todd Stern reported that he did not want any terms used that could “be read by others to perpetuate [...] that firewall.” The firewall is a term widely used to refer to the traditional sharp distinction under the UNFCCC and the Kyoto Protocol between the level of responsibility for future action of developed countries and developing countries.

Meanwhile, Indian and Chinese negotiators have offered a different interpretation of the Durban Platform decision. They believe that equity actually features in the text of the future climate agreement because Paragraph 2 states that the new agreement will be “under the United Nations Framework Convention on Climate Change. . . .” These negotiators argue that this phrase ensures that a future agreement will respect the principles of the Convention, including the principle of common but differentiated responsibilities and respective capabilities.

Future negotiations are therefore likely to focus less on whether equity will be a part of the future climate agreement, and more on how the principle of equity should be integrated in this agreement. Importantly, symmetry and equity are not necessarily mutually exclusive. There are ways to integrate the principles of common but differentiated responsibilities and equity into a legally binding agreement that includes mandatory commitments for all Parties. The U.S., for example, has argued that the content of future commitments could differ between developed and developing countries, as long as their legal character is identical. Developed countries could commit to absolute economy-wide reductions in greenhouse gas emissions, while developing countries could commit to reducing emissions compared to a business as usual scenario or could commit to implementing certain climate policies. The way forward may therefore lie in identifying ways in which symmetry and equity can be made compatible. Better trust and understanding on equity are necessary to inform and ultimately adopt countries’ individual and collective mitigation commitments post 2020.

These examples show that the issue of equity will certainly remain central to the climate negotiations in the months and years to come. The Durban decisions, through carefully worded compromises, have postponed political decisions on equity that, however difficult, are necessary to make progress on other critical issues, including ambition. The silver lining may be the
workshop on equity called for under the Durban decisions. It has the potential to start an overdue dialogue on options for integrating equity in an international agreement on climate change in a way that reconciles Parties’ varied needs and aspirations, as well as global mitigation goals.

**Conclusion**

What did the Durban climate talks deliver? The examples reviewed in this article show that, on the most fundamental issues that will determine the effectiveness of global efforts to address climate change, the record is mixed. Parties did manage to achieve some incremental progress, at times defying the odds, which could signal a shift in the climate regime towards greater ambition. But several of the delicate compromises struck on legal form, national and global mitigation commitments, and equity did not bridge cleavages on the most sensitive and fundamental political questions.

To those who have followed the UNFCCC negotiations for some time, this diagnostic is familiar because it is reminiscent of previous meetings of the COP and CMP. This result is also perhaps natural. After all, climate change is one of the most difficult environmental, economic and social issues of our time and the ongoing negotiations and deals serve to incrementally build a coordinated global response to this threat. However, time is of the essence. Further delays risk thwarting our ability to reach the stated two-degree Celsius goal.

In conclusion, one may reflect on the causes and possible remedies for this misalignment between the urgency of the problem and the slow, limited, and incremental solutions that the international climate negotiations have been able to deliver until now. The problem can be seen as one of misalignment of politics and expectations. While the UNFCCC has long been seen as the main and sometimes only legitimate international body for dealing with climate change, the time may have come to redefine the roles of various actors in the broader climate regime. This calls for focusing the UNFCCC on the essential functions it is best placed to fulfill. It also calls for catalyzing and assigning responsibility to other international initiatives, national governments, and local actors to play their part.

Climate change, despite its global dimensions, requires action at the national and sub-national level. Critics of the UNFCCC will use this fact to argue that a bottom-up regime will create greater incentives for action. But rather than discount the UNFCCC, one should define a catalytic role for it. The UNFCCC arguably remains best placed to fulfill certain fundamental functions. This may include setting international goals, tracking the individual and aggregate performance of countries to stay on track with those goals, balancing country interests in an equitable manner, and providing a legal framework that generates confidence that all countries will implement their commitments. With regard to these functions, some of the outcomes of Durban were meaningful. The Durban decisions create a new window of opportunity for increasing ambition and securing a meaningful commitment to collective action in 2015 in a new international agreement.

But it is true that the UNFCCC alone cannot deliver the level of global action needed. Efforts to generate greater ambition will be successful only if actions are taken to generate political support at the domestic level. In many ways, the resolve of ministers and negotiators at the UNFCCC is a reflection of domestic political will. Issues such as national commitments to mitigation and public climate finance are driven by national political and economic agendas rather than international bargaining among governments. The development and deployment of low-carbon technology also depends on the cooperation of many actors outside the U.N., including the private sector. While the UNFCCC can inform, reflect, measure, and coordinate the actions of countries, the level of ambition of these actions and the adequacy of the new agreement that will be adopted in 2015 will be in large part determined by our ability to generate domestic political support for climate action. Domestic and international institutions need to act in tandem and reinforce each other over time.

Other international initiatives can also complement the UNFCCC, including the United Nations Convention on Sustainable Development (“Rio + 20 Summit”), the World Trade Organization, the G20, the Montreal Protocol, the International Maritime Organization, the International Civil Aviation Organization, and bilateral initiatives. Here again, the objective would not be to seek alternatives to the UNFCCC but to think more strategically about the defined roles that the UNFCCC, other international organizations, national governments, and sub-national actors can play to collectively achieve our common goal. The Durban conference opened a narrow window of opportunity for increasing ambition in time to meet the two degree goal. Unless we mobilize domestic constituencies and international institutions to generate sufficient political will, the odds are high that future climate meetings will be unable to unlock the ambiguities that persisted in Durban and we will miss our target goal.

**Endnotes:**

2. Id.

Endnotes: Introductory Remarks
continued from page 5


18 See Climate Action Network-Intl’, 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.


20 Id.

21 Id.


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-february-2012 (discussing measures necessary for REDD+ to succeed, including both domestic and international factors).


Endnotes: UNCONSTRUCTIVE AMBIGUITY IN THE DURBAN CLIMATE DEAL OF COP 17 / CMP 7
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9 See Broder, supra note 8; Crossland, supra note 8.


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://gberridge.diplomacy.india.gov.in/dict_comp_a_e.htm.


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 GtCO2e (range: 39-44 GtCO2e), 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).


A top-down climate regime typically refers to a regime in which a global agreement, generally of a legally binding nature, governs international cooperation among countries to reduce greenhouse gas emissions by setting commitments for each country in such a way as to meet, in aggregate, a mutually agreed and scientifically driven global reduction goal. By contrast, a bottom-up system generally refers to a more loosely structured regime in which an international agreement that is not legally binding contains voluntary pledges that each country puts forward unilaterally. See Daniel Bodansky, A Tale of Two Architectures: The Once and Future U.N. Climate Change Regime, 43 ARIZ. ST. L.J. 697 (2011).


28 UNFCCC Draft decision, supra note 3 (Paragraph 1 notes that the second commitment period will extend to either 2017 or 2020. The end date of the second commitment period will be negotiated over the coming months and agreed to at the seventeenth session).

29 See Daniel Bodansky, Why the Kyoto Protocol? Durban and Beyond, HARV. PROJECT ON CLIMATE AGREEMENTS (Aug. 11, 2011), http://beelfercenter.ksg.harvard.edu/publication/21314/whither_the_kyoto_protocol_durban_and_beyond.html


34 UNFCCC Dec. 1/COP17, supra note 3.


36 Statement on Behalf of the Group of 77 and China by H.E. Ambassador Mr. Alberto Pedro D’Aalto, Vice Minister of Foreign Affairs of Argentina, at the Joint High-Level Segment of the Seventeenth Session of the Conference of the Parties of the Climate Change Convention and the Seventeenth Session of the Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol (Dec. 6, 2011), http://www.g77.org/statement/getstatement.php?id=111206a.


Hedegaard, supra note 1.

Natarajan, supra note 50.


See Jacob Weksman, Law and Disorder: Will the Issue of Legal Character Make or Break a Global Deal on Climate?, 3 CLIMATE Pol’y 672-77 (July 2010), Weksman distills the concept of legal character into four components: the legal form of the agreement; the legal form of the commitments within the agreement; the specific and prescriptive nature of these commitments; and the institutions and procedures designed to hold parties accountable for these commitments.


UNFCCC Dec. -/CP/17, supra note 3. See id. (explaining “countries regularly enter into agreements that take a legally binding form but that contain ‘commitments’ that are softly worded or highly contingent.”)

See id. (noting the UNFCCC is an example of a “soft law” approach with no formal status).

See id. (noting a tension between an insistence by developed countries on “legal symmetry” and an equally strong demand by developing countries for “legal differentiation” which has allowed for this difference in the Kyoto Protocol)

See Berlin, supra note 41, ¶ 2(b) (excluding the adoption of quantified mitigation commitments for developing countries and stating that the new agreement will “not introduce any new commitments for Parties not included in Annex I . . . .”)

See Werksman, supra note 42.

See UNFCCC Dec. -/CP/17, supra note 3; Cancun, supra note 23, at ¶ 80.

See UNFCCC Dec. -/CP/17, supra note 3.


See UNEP, supra note 14.

UNFCCC Dec. -/CP/17, supra note 3.

See Moncel, Building the Climate Change Regime: Survey and Analysis of Approaches, supra note 17. For examples of options to increase ambition within the UNFCCC.

See, supra, Cancun, note 23, paras. 4.138–140; UNFCCC Draft dec. [-/CP/17], supra note 4, at paras. 157-67.

UNFCCC Draft dec. [-/CP/17], supra note 4 at para. 6.


Tobias Rapp, Christian Schwagerl & Gerald Trautner, Copenhagen Protocol: How China and India Sabotaged the UN Climate Summit, SPEIEl ONLINE (May 5, 2010), http://www.spiegel.de/international/world/0,1518,692861-2,00.html.


See id.


See Jayaraman, supra note 39, Ox Yam, supra note 39.

Cameron & Morgan, supra note 16.

See Levin & Moncell, supra note 73.

UNFCCC Draft Dec. [-/CP/17], supra note 4, at paras. 1-2.


See UNEP, supra note 14.


See id.

See Levin & Moncell, supra note 79.

See id.

See id.

See Dean Kuipers, Progress at the End of Durban COP17 Climate Talks, L.A. TIMES (Dec. 12, 2011), http://articles.latimes.com/2011/dec/12/local/la-me-gs-progress-at-end-of-durban-cop17-climate-talks-20111212 (“It’s the fact that [Parties] have other issues on which they want to deal with each other, and the name-and-shame aspect that will push countries to at least negotiate,” according to Jake Schmidt, International Climate Policy Director for Natural Resources Defense Council).


See id.

See Org. for Econ. Co-Operation and Dev., Design Options for International Assessment and Review (IAR) and International Consultations and Analysis (ICA), U.N. DOC. COM/ENV/EPOC/IEA/SLT(2011) 4 (Nov. 17, 2011) (analyzing mechanisms in other regimes which allows stakeholders to contribute to or observe the review process).


See Levin & Moncell, supra note 73.

See Cameron & Morgan, supra note 16.

UNFCCC Draft Dec. [-/CP/17], supra note 4, at para. 5.


Kelly Levin & Remi Moncel, Transparency and Accountability (MRV) in the Durban Climate Deal, supra note 88.

Ad Hoc Working Group On Long-Term Cooperative Action Under the Convention, Fourteenth Session: Work of the AWG-LCA Contact Group, Nationally Appropriate Mitigation Commitments or Actions by Developed Country Parties (Oct. 14, 2011) (possible elements of draft decision for adoption of the guidelines for biennial reports of developed country Parties), http://unfccc.int/files/bodies/awg-lca/application/pdf/revised_co-facilitators_summary_3.2.2.pdf (paras. 4, 5b, 5st).


Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention, UNFCCC Draft Dec. [-/CP/17]
different approaches and proposals, but the choice of particular proposals is a

assessment-en.pdf (“The IPCC can clarify scientifically the implications of

http://www.ipcc.ch/pdf/climate-changes-1995/ipcc-2nd-assessment/2nd-

Change ConfeRenCe

International%20Climate%20Policy/Baumert%20-%20Great%20Expectations%

background/items/1355.php

117 Bushey & Jinnah, supra note 116, at 9 (discussing the “persistent puzzle” of

operationalizing the concept of “common but differentiated responsibilities”).

118 See, e.g., EDWARD A. PAGe, CLIMATE CHANGE, JUSTICE AND FUTURE GENERATIONS


mitigation); Aaditya Mattoo & Arvind Subramanian, Equity in Climate Change:

An Analytical Review 5-11 (The World Bank Dev. Research Grp. Trade and


proposals for allocating emissions to promote equity); Cameron, “HUMAN RIGHTS AND CLIMATE CHANGE”; Winkler and Beaumont, “Fair and
effective multilateralism in the post-Copenhagen climate negotiations.”

119 See generally Kevin Baumert et al., Great Expectations: Can International


120 Remi Moncel et al., Building the Climate Change Regime: Survey and

Analysis of Approaches 41-46 (U.N.E.P. World Resources Institute, Working


121 Baumbert, supra note 120, at 139 (discussing the failure of governments to

address long-term agreements on international trade).

122 The other requested additions related to technology transfer and unilateral

trade measures. U.N. Framework Convention on Climate Change, Proposals

by India for Inclusion of additional agenda items in the provisional agenda of

the seventeenth session of the Conference of the Parties 2 (2011), http://
re.indiaenvironmentportal.org.in/files/file/india%20cop.pdf.

123 Id. at 2.

124 See generally id.

125 Prabir Purkayastha & Tirthankar Manda, A Note on Carbon Space as

Development Space, in CONFERENCE ON GLOBAL CARBON BUDGETS AND EQUITY IN

CLIMATE CHANGE 18, 18 (Tata Institute of Social Science & Ministry of

Environment & Forests eds., 2010), http://moe.nic.in/download/public-information/tiss-conference-cc-2010.pdf (“The developed countries are arguing that
countries such as India should work out a low carbon low energy path.”).

126 See U.N. DEP’T OF STATE, TODD STERN’S BRIEFING ON THE U.N. CLIMATE

texttrans/2011/12/20111213184856su02956965.html#axzz1loqqacil6 (describing
the idea of equity as a distraction).

127 Kelly Levin & Remi Moncel, Ambition in The Durban Climate Deal, WRI

INSIGHTS (February 13, 2012), http://insights.wri.org/news/2012/02/
Morgan & Cameron, supra note 139 (giving an optimistic report of COP 17, saying that while there was much work to be done, things are moving in the right direction).

Territorial Approach to Climate Change, supra note 146 (“Climate change mitigation and adaptation requires concerted action at multiple levels and by different actors.”).


Endnotes: WHAT LITIGATION OF A CLIMATE NUISANCE SUIT MIGHT LOOK LIKE

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18 See JAN PAUL ACTON & LLOYD S. DIXON, INST. FOR CIV. JUSTICE, RAND CORP., SUPERFUND AND TRANSACTION COSTS: THE EXPERIENCES OF INSURERS AND VERY LARGE INDUSTRIAL FIRMS (2002), http://www.rand.org/content/dam/rand/pubs/reports/2007/R4132.pdf (finding on average that transaction costs were 88% of total expenditures; individual expenditures ranged from 80% to 96%).


20 Alien Tort Statute, 28 U.S.C. § 1350 (2006). But see Sosa v. Alvarez-Machain, 542 U.S. 692 (2004) (holding that, in establishing a valid Alien Tort Statute, courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized”); Kiobel v. Royal Dutch Petroleum Co., 621 F.3d 111 (2d Cir. 2010) (imposing liability on corporations for violations of customary international law “has not attained a discernible, much less universal, acceptance among nations of the world in their relations inter se” and would therefore not meet the requirements of Sosa).

Endnotes: AN UN-CONVENTIONAL APPROACH: ECUADOR’S YASUNÍ-ITT INITIATIVE IS IN DISCORD WITH THE UNFCCC

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66 Id.


68 Id. at 2.