

EU CLIMATE POLICY FROM KYOTO TO DURBAN

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Abstract

The risks posed by climate change are real and its impacts are already taking place. The biggest challenge about climate change is that there is no one single answer, no one single solution. This characteristic, together with the long history of political frictions and disputes worsened by environmental stresses suggests that global climatic changes have the potential to exacerbate existing international tensions. On December 31, 2012, the Kyoto Protocol's first commitment period will expire. Unless states agree to a second commitment period, requiring a further round of emissions cuts, the Protocol will no longer impose any quantitative limits on states' greenhouse gas emissions. Although, as a legal matter, the Protocol will continue in force, it will be a largely empty shell, doing little if anything to curb global warming.

Unlike the Kyoto Protocol negotiations, which focused exclusively on developed country emissions, the ongoing negotiations on a post-2012 climate change regime have also addressed developing country mitigation actions, without which a solution to the climate change problem is impossible. This has made the current negotiations as much between developed and developing countries as between the U.S. and the European Union. Key issues include: Legal Form; Regulatory approach; and Differentiation. By the Durban conference in December 2011 the EU needs to decide whether - and how - it will sign-up to a second commitment period for the Kyoto Protocol. This article focuses on the European Union needs to decide whether – and – how it will sign- up a second commitment period for the Kyoto Protocol. Because asking, whether others will act is the wrong question. The real question is whether signing- up to some form of second Kyoto commitment period will support Europe's fundamental interests.

Keywords: *Climate change, legal regime, International demands, EU's climate policy, Post-2012 climate change regime.*

Introduction

“Climate” and “policy” – less than fifty years ago, these two words were never heard in combination. But at least since June 1992, when about a hundred heads of state and government leaders from all over the world came together at the “Earth Summit” in Rio de Janeiro, the climate has featured on the developed nations’ political agenda. And over the last 20 years, international efforts to fight climate change have intensified in view of the global challenges being faced in the areas of food, migration and security. At the “Earth Summit”, more than 150 countries signed up to a Framework Convention on Climate Change (UNFCCC).¹ First a framework convention is adopted, establishing the basic system of governance for a given issue area. Then, regulatory requirements are negotiated in a protocol to the convention.² The UNFCCC, followed five years later by the Kyoto Protocol,³ which elaborates specific regulatory requirements to limit greenhouse gas emissions.

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¹ Cf. UN Framework Convention on Climate Change, Item 2 (New York, 1992). Text available at: http://unfccc.int/essential_background/convention/background/items/2853.php (accessed February 2, 2011). This officially recognizes the global character of climate change and the need for international cooperation in this area.

² Daniel Bodansky, *The Art and Craft of International Environmental Law*, chapter 8 (Harvard Univ. Press 2009). The ozone regime followed this pattern, starting with the adoption of the Vienna Convention for the Protection of the Ozone Layer in 1985, and continuing with the adoption of the Montreal Protocol on Substances that Deplete the Ozone Layer in 1987. Similarly, the climate change regime began with the negotiation of the 1992 U.N.

³ The Kyoto Protocol was adopted in Kyoto, Japan, on 11 December 1997 and entered into force on 16 February 2005. The detailed rules for the implementation of the Protocol were adopted at COP 7 in Marrakesh in 2001, and are called the “Marrakesh Accords.”

Paper content

1. Three features of the Kyoto Protocol are noteworthy

First, the Protocol sharply differentiates between Annex I and non-Annex I parties (roughly translatable as "developed" and "developing" countries respectively).⁴ The UNFCCC established the principle of "common but differentiated responsibilities and respective capabilities" (CBDR),⁵ but did not draw an absolute separation between developed and developing countries. It elaborated general obligations common to all parties, additional commitments relating to reporting and financial assistance for Annex I and Annex II⁶ parties respectively, a "degree of flexibility" for countries with economies in transition (i.e., the former Soviet bloc), special consideration for least developed countries, and a procedure by which the classification of countries could be reconsidered as circumstances change.⁷ In contrast, the negotiating mandate for the Kyoto Protocol categorically excluded any new commitments for non-Annex I countries, operationalizing a comparatively flexible principle in an extremely rigid way.⁸ Second, because the Kyoto Protocol negotiations focused exclusively on developed country emissions reductions, the primary axis in the negotiations was between the two main developed country powers, the United States and the European Union, in the case of the United States with support from Japan, Australia, and other members of the so-called "Umbrella Group." Third, the Kyoto Protocol's regulatory approach was modeled on the Montreal Protocol on Substances that Deplete the Ozone Layer, adopted ten years earlier. Like the Montreal Protocol, the Kyoto Protocol establishes legally-binding commitments, consisting of quantitative national performance standards, defined through a process of "top-down" international negotiations.⁹ In contrast, the UNFCCC had elaborated a bottom-up process requiring countries to develop and report on nationally-defined policies and measures to mitigate climate change.¹⁰

The active role of the EU in the international climate change negotiations is vital and must continue. The new EU member states which have joined since 2004 have set their own targets within the framework of the Kyoto Protocol. In order to meet the targets set by the Kyoto Protocol, in June

⁴ The UNFCCC refers in article 4.2 to "the developed country Parties and other Parties included in Annex I," leaving open the possibility that not all Annex I parties qualify as "developed." Conversely, the term "developing country" is never defined in the UNFCCC or the Kyoto Protocol. It is usually equated with non-Annex I status, although it is debatable whether all of the non-Annex I countries should be considered "developing," particularly since they include South Korea, Mexico, and Chile, which are now members of the Organization of Economic Cooperation and Development (OECD).

⁵ UNFCCC art. 3. 1.

⁶ Annex II is a subset of Annex I composed of members of the OECD as of 1992 when the UNFCCC was adopted.

⁷ *Ibid.* Art. 4.

⁸ Berlin Mandate, UNFCCC Doc. 1/CP, April 7, 1995, UN Doc. FCCC/CP/1995/7/Add.1.

⁹ The Kyoto Protocol's performance standards consist of quantitative limits on national greenhouse gas emissions. In contrast, the quantitative targets specified in the Montreal Protocol limit production and consumption (rather than emissions) of ozone-depleting substances. Kyoto's quantitative emissions targets are defined as percentage reductions from a base year emissions level (generally 1990 emissions), and apply to a basket of six greenhouse gases. For the Protocol's first commitment period, which runs for a five year period from 2008 to 2012, European Union member states are required to reduce their emissions by 8% relative to 1990 levels, Japan by 6%, and Russia by 0%. In addition to these emissions targets, the Protocol establishes detailed requirements for the monitoring, reporting and review of national emissions inventories. It also establishes several market mechanisms that parties can use to achieve their emissions targets, including emissions trading and the Clean Development Mechanism (CDM).

¹⁰ See Daniel Bodansky, "The UN Framework Convention on Climate Change: A Commentary," 18 *Yale J. Int'l L.* 451, 508 (1993)

2000 the European Commission launched the European Climate Change Programme (ECCP).¹¹ This programme has the aim of supplementing the domestic efforts of EU countries with European strategies.¹² It is already clear that the EU will meet its Kyoto Protocol targets. The 15 EU countries have in fact managed to reduce their emissions by 14% compared to 1990. The ten new EU members have also either hit or exceeded their targets, so the EU-27 should have no problem in meeting their obligations. Only Austria and Italy are having problems meeting their targets, but this will have little impact on the overall EU result.¹³

The 15th United Nations Climate Change Conference and the 5th Meeting of the Parties to the Kyoto Protocol took place on December 7 and 8, 2009 in Copenhagen, one year on from Poznan. In line with the “Bali Action Plan”,¹⁴ negotiations on international climate protection plans for the period after 2012 should have been concluded in Copenhagen. However, after some difficult negotiating, the conference ended with nothing more than a political agreement, the “Copenhagen Accord”, which covered certain core elements of future climate policy.¹⁵ The Copenhagen Accord is not a legally-binding agreement but just a political declaration which is “acknowledged” by the party states.¹⁶ Even though the climate summit ended without any binding agreement, it should be stressed that the Accord contains major core elements of climate policy. It was also agreed in Copenhagen that talks on future climate policy under the Framework Climate Convention and the Kyoto Protocol should be continued until the next climate conference in Cancun.¹⁷

The United Nations Climate Change Conference took place in Cancun, Mexico from November 29 to December 10, 2010, and encompassed the 6th Meeting of the Parties to the Kyoto Protocol. In the run-up to the conference, the EU Council formulated its goals for Cancun. The EU

¹¹ Communication from the Commission of 8 March 2000 on EU policies and measures to reduce greenhouse gas emissions: towards a European Climate Change Programme (ECCP) [COM(2000) 88.

¹² The main outcome of this programme is the EU Emissions Trading System which was introduced in January 2005 for carbon dioxide emissions (CO₂). This is the first multinational emissions trading system in the world.

¹³ Cf. “EU schafft Kyoto-Ziel: Österreich am weitesten weg”, *Kleine Zeitung*, October 12, 2010, http://kleinezeitung.at/nachrichten/chronik/2_514576 (accessed February 2, 2011). See Celine-Agathe Caro and Christiane Ruth,

“From Kyoto to Durban – The European Union’s Climate Policy”, *Political Thought*, no. 36 (2011): 23-33.

¹⁴ The 2007 Bali Climate Change Conference culminated in the adoption of the Bali Road Map, which consists of a number of forward-looking decisions that represent the various tracks that are essential to reaching a secure climate future. The Bali Road Map includes the Bali Action Plan, which charts the course for a new negotiating process designed to tackle climate change, with the aim of completing this by 2009, along with a number of other decisions and resolutions.

¹⁵ In this Accord, the vast majority of countries confirmed that average global temperatures should not be allowed to increase by more than two degrees Celsius. But the conference failed to provide any binding international agreements or any kind of instrument to allow this two-degree target to be met.

¹⁶ Cf. Federal Ministry for the Environment, Nature Conservation and Nuclear Safety, “UN-Klimakonferenz in Kopenhagen – 7.

bis 18. Dezember 2009,” http://www.bmu.de/15_klimakonferenz/doc/44133 (accessed February 3, 2011). During the talks, China, India and the USA in particular were not keen to commit to binding agreements. The President of the European Council, Herman Van Rompuy, said at the end of February 2010 that Europe had been left sitting in the corridor while the USA and China struck their own deal. “We were excluded from the crucial deal between the USA and the four major developing countries.” Cf. address by Hermann Van Rompuy, President of the European Council to the Collège d’Europe, Bruges, February 25, 2010, http://consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/113067.pdf (accessed February 3, 2011).

¹⁷ In 2010 the EU continued their efforts in the sphere of European energy and climate policy. As the Lisbon Strategy expired in 2010, the European Council adopted a successor strategy, “Europe 2020”: a new European strategy for employment and growth. See European Commission (2009). Working Document. Consultation on the Future “EU2020” Strategy.

wanted specific actions on emission reduction, adaptation to climate change and deforestation.¹⁸ After some tough negotiations the international community reached an agreement which – unlike the Kyoto Protocol – also included the USA, China and other emerging and developing countries. The two-degree target was officially recognised by more than 190 participating countries, providing a basis for a successor to the Kyoto Protocol.¹⁹

The challenge is now to make the right preparations for the Climate Conference in South Africa in 2011. This means that countries have to decide how much they can reduce their emissions and how much they are prepared to pay for this. The EU already held an energy summit on February 4, 2011.²⁰

2. How should the Europe Play the Kyoto question at the Durban 2011 Climate Summit?

On December 31, 2012, the Kyoto Protocol's first commitment period will expire. Unless states agree to a second commitment period, requiring a further round of emissions cuts, the Protocol will no longer impose any quantitative limits on states' greenhouse gas emissions. Although, as a legal matter, the Protocol will continue in force, it will be a largely empty shell, doing little if anything to curb global warming. Ever since the Kyoto Protocol's entry into force in 2005, the question of what to do after 2012, when Kyoto's first commitment runs out, has been a central focus of the U.N. climate change negotiations. Developing countries such as China and India want the Protocol to continue in its present form, imposing quantitative limits on developed country emissions but not their own.

The European Union might be amenable to a new commitment period under the Protocol, but only as part of "a global and comprehensive framework engaging all major economies,"²¹ including the United States and China. Meanwhile, some Kyoto parties, such as Japan, Canada, and Russia, want to replace the Kyoto Protocol with a comprehensive new agreement with commitments by both developed and developing countries. In 2007, at the Bali conference, the parties to the U.N. Framework Convention on Climate Change established a parallel negotiating process, involving the other big emitters such as the United States and China, to consider long-term cooperative action under the Convention, with the goal of reaching a comprehensive outcome addressing mitigation, adaptation, finance, and technology.²²

Unlike the Kyoto Protocol negotiations, which focused exclusively on developed country emissions, the ongoing negotiations on a post-2012 climate change regime have also addressed developing country mitigation actions, without which a solution to the climate change problem is

¹⁸ This groundwork strengthened the EU's negotiating position because it allowed it to push for concrete and realistic actions during the talks.

¹⁹ NGOs considered the acceptance of the twodegree target to be a step in the right direction towards a new climate change treaty. Between 2013 and 2015 there will even be an appraisal of how the targets can be adapted to limit global warming to 1.5 degrees Celsius.

²⁰ In November 2010 Energy Commissioner Günther Oettinger presented a 10-year plan for the EU's energy policy. In it he

warned that the EU would not be able to hit its energy-saving targets without using nuclear energy. See: "EU: Energiegipfel

über das neue Zeitalter – Teil 2", Greenmag, January 12, 2011, <http://greenmag.de/magazin/meldung/datum/2011/01/12/>

[alles-fuer-sonne-wind-wasser-und-atom-1.html](http://greenmag.de/magazin/meldung/datum/2011/01/12/alles-fuer-sonne-wind-wasser-und-atom-1.html) (accessed February 5, 2011).

²¹ Statement of the European Union to the 16th Session of the Ad Hoc Working Group on Further Commitments under the Kyoto Protocol, Apr. 5, 2011.

²² Bali Action Plan, UNFCCC Dec. 1/CP.13, Dec. 15, 2007, U.N. Doc. FCCC/CP/2007/6/Add.1 (establishing the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention, or AWG-LCA).

impossible.²³ This has made the current negotiations as much between developed and developing countries as between the U.S. and the European Union. Key issues include: Legal form,²⁴ Regulatory approach,²⁵ and Differentiation.²⁶

Positions vary widely on these issues. The European Union is open to considering a new round of legally-binding Kyoto targets, but only as part of a global and comprehensive framework that includes the United States and China. The United States would be willing to negotiate a legally-binding agreement, but only if the mandate provided that the agreement would apply with equal legal force to all of the major emitters (including China and India). Although it accepts that developing country commitments should be differentiated from those of developed countries as to content, it insists on symmetry of legal form, meaning that the provisions for major-emitting developing and developed countries should have the same legal character. Meanwhile, the big developing countries such as China and India would like developed countries to continue Kyoto's top-down, legally-binding approach, but are unwilling to accept this approach themselves. They insist on maintaining the Kyoto "firewall" between developed countries (which have emissions limitation commitments), and developing countries (which don't).

The negotiations on a post-2012 climate change regime were initially supposed to wrap up at the 2009 Copenhagen Conference. But the Copenhagen Accord — a political agreement establishing a bottom-up process based on national pledges — was not formally adopted by the conference.^{27,16} And although the following year, the Cancun conference adopted decisions that elaborate the Copenhagen framework and anchor the Copenhagen pledges in the Convention, it extended the negotiating process and left open the final legal form of the regime, including the possibility of a second commitment period under the Kyoto Protocol.¹⁷ So the battle over policy architectures will continue at this year's conference of the parties in Durban, South Africa, and most likely at the 2012 climate conference scheduled in Qatar.²⁸

²³ According to some estimates, developing country emissions will grow so rapidly over the next 20 years that, even if developed countries were to phase out their greenhouse gas emissions completely, global emissions would still be higher in 2030 than today. Project Catalyst, "Limiting Atmospheric CO₂e to 450 ppm — The Mitigation Challenge," at 13 (Feb. 2009).

²⁴ Will the post-2012 regime be established through a legally-binding agreement (or agreements), such as an amendment to the Kyoto Protocol, a new legal agreement defining mitigation commitments for states that do not have Kyoto targets (such as the United States and China), or a comprehensive agreement that embraces all states and replaces the Kyoto Protocol? Or will the post-2012 regime be defined through a political agreement or decisions of the parties? See Jacob Werksman, "Law and Disorder: Will the Issue of Legal Character Make or Break a Global Deal on Climate?" German Marshall Fund of the United States Policy Brief (July 2010).

²⁵ Will the post-2012 regime continue the top-down approach of the Kyoto Protocol, in which internationally-defined commitments are adopted in order to drive national action? Or will the regime switch to a more bottom-up approach, in which countries unilaterally define their own national climate change approach, or adopt some kind of hybrid approach?

²⁶ Will the post-2012 climate change regime continue to draw an absolute wall between developed and developing countries, as the Kyoto Protocol does? Or will it provide for greater parallelism or symmetry between developed and developing countries — for example, by imposing legally-binding commitments on both, or by adopting common rules on accounting, mechanisms, reporting, review and/or compliance? See Jacob Werksman, "Legal Symmetry and Legal Differentiation under a Future Deal on Climate Change," 10 *Climate Policy* 627 (2010).

²⁷ Rather than defining emissions targets from the top down through international negotiations, the Copenhagen Accord establishes a bottom-up process that allows each country to define its own commitments and actions unilaterally. The Accord specifies that developed countries will put forward national emissions targets in the 2020 timeframe, but allows each party to determine its own target level, base year, and accounting rules. Other key elements of the Copenhagen Accord include: (1) a long-term aspirational goal of limiting climate change to no more than 2° C; (2) significant new financial assistance for developing country mitigation and adaptation; and (3) a process for international analysis and review of national actions. See Daniel Bodansky, "The Copenhagen Climate Change Conference: A Postmortem," 104 *Am. J. Int'l L.* 230 (2010).

²⁸ Harvard University, "Whither the Kyoto Protocol? Durban and Beyond," Harvard University, http://belfercenter.ksg.harvard.edu/publication/21314/whither_the_kyoto_protocol_durban_and_beyond.html (accessed August 2011).

The next UN climate summit will take place in Durban, South Africa from 28th November to 9th December. This follows the unsuccessful 2009 Copenhagen summit and the partially-successful one in Cancun in 2010. The EU has the opportunity to lead the world in climate negotiations by strengthening its climate and energy policies, and by offering bilateral financial deals to developing countries which accept obligations under the UN climate framework.

There is no doubt that the Durban summit will not lead to final agreement on new international legally-binding commitments. Differences between negotiating parties, on how deep emissions reductions should be and who should foot the bill, remain too great. At best the summit can lay the groundwork for a new legal agreement. But progress will only be possible with greater leadership, and only the EU can provide such leadership. US politics make leadership by the Obama administration impossible. China, India and other emerging global powers regard international climate negotiations with deep suspicion – part of attempts by ‘the West’ to keep them in their place.

The EU should provide leadership in Durban by stressing that climate policies can strengthen, not hinder, economic recovery. It should outline how its own climate policies will be made more effective. And it should offer countries resisting UN targets on climate change strong economic and financial incentives to accept such targets. The EU line at Durban should be based on four main points: Continuing to promote the Kyoto Protocol framework; Continuing to offer an increase in its 2020 emissions reduction target from 20 per cent to 30 per cent,²⁹ if other countries commit to ambitious targets; On energy efficiency and renewables, outlining how the existing 20 per cent targets will be met, notably by stressing that the draft energy efficiency directive will be top of the EU’s agenda in 2012; and A statement that the EU’s ETS will be strengthened with a Europe-wide floor price, with border tax adjustments to protect energy-intensive European decarbonisation policies should be introduced and implemented whatever the state of international climate negotiations.

However, the top down approach is needed too.³⁰ EU institutions can themselves implement top down policies to require unenthusiastic or ineffective member-states to take action. But global agreement gives arguments for Europe-wide action greater traction.³¹

3. Was Durban a significant step forward?

The United Nations Climate Change Conference in Durban, South Africa, was held from 28 November - 11 December 2011. The conference involved a series of events, including the seventeenth session of the Conference of the Parties (COP 17) to the UN Framework Convention on Climate Change (UNFCCC) and the seventh meeting of the Conference of the Parties serving as the Meeting of Parties to the Kyoto Protocol (CMP 7).³²

²⁹ Commission of the European Union, Doc. COM(2009) 647/3.

³⁰ Not all governments are committed to protecting the climate, and many of those that are committed rhetorically have made little progress on delivery. For example, UK governments under Prime Ministers Tony Blair, Gordon Brown and David

Cameron have repeatedly emphasized their commitment to reducing emissions and moving to clean energy, but the UK gets a lower proportion of its energy from renewables than all other European countries except Malta and Luxembourg.

³¹ Centre for European Reform, “EU climate policies without an international framework,” Centre for European Reform, http://www.cer.org.uk/sites/default/files/publications/attachments/pdf/2011/pb_climate_21oct11-3892.pdf (accessed October, 2011).

³² In support of these two main bodies, four other bodies convened: the resumed 14th session of the *Ad hoc* Working Group on Long-term Cooperative Action under the Convention (AWG-LCA); the resumed 16th session of the *Ad hoc* Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol (AWG-KP); and the 35th sessions of the Subsidiary Body for Implementation (SBI) and the Subsidiary Body for Scientific and Technological Advice (SBSTA). The Conference drew over 12,480 participants, including over 5400 government officials, 5800 representatives of UN bodies and agencies, intergovernmental organizations and civil society organizations, and more than 1200 members of the media.

The meetings resulted in the adoption of 19 COP decisions and 17 CMP decisions and the approval of a number of conclusions by the subsidiary bodies.³³ These outcomes cover a wide range of topics, notably the establishment of a second commitment period under the Kyoto Protocol, a decision on long-term cooperative action under the Convention, the launch of a new process towards an agreed outcome with legal force applicable to all parties to the Convention, and the operationalization of the Green Climate Fund. After the frustrations at the Copenhagen conference and the struggle to rescue the multilateral climate regime in Cancun, negotiators in Durban turned a corner and not only resuscitated the Kyoto Protocol but, in doing so, adopted a decision that will lead to negotiations on a more inclusive 21st century climate regime. There was a strong sense that elements of the Durban package, guided by a need to fulfill long overdue commitments that go back to the Bali Roadmap, restored sufficient momentum for a new negotiation process, one that will continue to witness a anthropogenic interference” with the climate system.³⁴

The talks resulted in the adoption of the 'Durban Platform' – a roadmap to a global legal agreement applicable to all parties. Negotiations for the new agreement, to begin early in 2012, are to conclude, as early as possible, and not later than 2015. The commitments in the new agreement will take effect from 2020.

This was accompanied by an agreement to a second commitment period of the Kyoto Protocol from 2013,³⁵ and the launch of the Green Climate Fund to distribute the US\$100 million in assistance pledged by developed nations to assist developing nations with mitigation efforts.³⁶

The agreed second commitment period to the Kyoto Protocol will begin in 2013 and will avoid a gap in reduction commitments that could have arisen when the current phase of the Kyoto Protocol expires at the end of 2012. The parties that signed up to the Kyoto extension must commit to firm emission reduction targets by next year. They must also decide by next year whether the second commitment period will last until 2017 or 2020 and whether surplus emission rights from the first commitment period will be eligible for carry-over into the second period.³⁷

Actually, the key points of the Durban Platform are as follows:

- Agreement to negotiate a new international climate treaty as an “outcome with legal force” by 2015.
- Provides for a second commitment period for the Kyoto Protocol.
- Effectively secures the future of the Clean Development Mechanism.
- Little short-term impact on the EU’s Emissions Trading Scheme.

Finally, one of the positive aspects at Durban was that the EU regained a central position, having been sidelined in Copenhagen. The EU was calling for a 'roadmap' for future negotiations.³⁸ This was agreed – eventually. China, India and the US all signed up to negotiating an agreement with binding targets by 2015, with the targets coming into force in 2020. Getting China and India to agree that they could at some stage have targets was progress.³⁹ However, the rich and powerful fossil fuel

³³ U.N. Doc. FCCC/CP/2011/L.1, Dec. 7, 2011.

³⁴ The Convention, which entered into force on 21 March 1994, now has 195 parties. See International Institute for Sustainable Development (IISD), “*Earth Negotiations Bulletin*”, Vol. 12 No. 534 (2011): 1-2.

³⁵ Thus preserving the 'Kyoto architecture' – the rules and legal framework for managing emissions.

³⁶ Whilst EU representatives applauded the Durban Platform as an historic breakthrough in the fight against climate change, the agreement has received mixed reactions from politicians, green groups and climate change experts.

³⁷ Energy & Climate Change, “The UNFCCC’S Durban Platform Explained”, Energy & Climate Change, http://www.hfw.com/_data/assets/pdf_file/0016/17422/Client-Brief-UNFCCCs-Durban-A4-4pp-January-2012.pdf http://www.hfw.com/_data/assets/pdf_file/0016/17422/Client-Brief-UNFCCCs-Durban-A4-4pp-January-2012.pdf (accessed January, 2012).

³⁸ Roadmap being the current jargon term of choice for anything the EU does on climate and energy.

³⁹ Back in 1997, the US senate voted 96-0 against any international agreement that didn't impose binding targets on China and India. Therefore, a US President would theoretically have a chance of getting a future treaty based on the Durban agreement ratified by Congress.

lobby in the US would then inevitably find other reasons to oppose a new climate treaty. And China and India still have the option of refusing binding commitments in 2015. All they've agreed so far is that they will talk about them.

Having a top-down international agreement would be valuable. Governments and negotiators should certainly keep talking, but a top-down framework is not essential. Bottom-up progress can be made without one. So politicians and policy makers should not allow the UNFCCC process to take their attention away from national or regional policies.

The EU should give priority to adopting the draft energy efficiency directive and rescuing the Emissions Trading System from irrelevance.⁴⁰

Conclusion

The international political response to climate change began with the adoption of the UNFCCC in 1992. The UNFCCC sets out a framework for action aimed at stabilizing atmospheric concentrations of greenhouse gases to avoid “dangerous anthropogenic interference” with the climate system. In December 1997, delegates to the third session of the Conference of the Parties (COP) in Kyoto, Japan, agreed to a Protocol to the UNFCCC that commits industrialized countries and countries in transition to a market economy to achieve emission reduction targets.⁴¹ COP 13 and COP/MOP 3 took place in December 2007 in Bali, Indonesia. Negotiations resulted in the adoption of the Bali Action Plan. Parties established the AWG-LCA with a mandate to focus on key elements of long term cooperation identified during the Convention Dialogue: mitigation, adaptation, finance, technology and a shared vision for long-term cooperative action.⁴² The UN Climate Change Conference in Copenhagen, Denmark, took place in December 2009. The event was marked by disputes over transparency and process, as well as with political agreement “Copenhagen Accord.”⁴³ Following four preparatory meetings in 2010, the UN Climate Change Conference in Cancun, Mexico, took place from 29 November to 11 December 2010. By the end of the conference, parties had finalized the Cancun Agreements, which include decisions under both negotiating tracks.⁴⁴ In 2011, three official UNFCCC negotiating sessions were held in the lead up to Durban. In April, the two AWGs convened in Bangkok, Thailand. The AWG-LCA engaged in procedural discussions on its agenda, finally agreeing on an agenda for its subsequent work. Two months later, negotiators gathered in Bonn, Germany, for sessions of the SBI, SBSTA, AWG-LCA and AWG-KP. SBSTA

⁴⁰ Proposal for Directives 2004/8/EC and 2006/32/EC [COM (2011) 370, 22/06/201]. The Danish government, which holds the EU presidency in the first half on 2012, has said that it will try to do both of these things.

⁴¹ These countries, known as Annex I parties under the UNFCCC, agreed to reduce their overall emissions of six greenhouse gases by an average of 5.2% below 1990 levels between 2008-2012 (the first commitment period), with specific targets varying from country to country. At the end of 2005, the first steps were taken to consider long-term issues. Convening in Montreal, Canada, the first session of the COP/MOP 1 decided to establish the AWG-KP on the basis of Protocol Article 3.9, which mandates consideration of Annex I parties' further commitments at least seven years before the end of the first commitment period. COP 11 agreed to consider long-term cooperation under the Convention through a series of four workshops known as “the Convention Dialogue,” which continued until COP 13.

⁴² The Bali conference also resulted in agreement on the Bali Roadmap. Based on two negotiating tracks under the Convention and the Protocol, the Roadmap set a deadline for concluding the negotiations in Copenhagen in December 2009.

⁴³ It established a process for parties to indicate their support for the Accord and, during 2010, over 140 countries did so. More than 80 countries also provided information on their national emission reduction targets and other mitigation actions. On the last day of the Copenhagen Climate Change Conference, parties also agreed to extend the mandates of the AWG-LCA and AWG-KP, requesting them to present their respective outcomes to COP 16 and COP/MOP 6.

⁴⁴ See Doc. /SB/2011/INF.1/Rev.1 and FCCC/ AWGLCA/2011/INF.1, both issued after Cancun), and Decision 1/CP.16, created the Green Climate Fund (GCF), which was designated to be the new operating entity of the Convention's financial mechanism and is to be governed by a board of 24 members. They also recognized the commitment by developed countries to provide US\$30 billion of fast-start finance in 2010-2012, and to jointly mobilize US\$100 billion per year by 2020.

agreed to a new agenda item on impacts of climate change on water and integrated water resources management under the Nairobi Work Programme. This item will be taken up in Durban.⁴⁵ The AWG-LCA and AWG-KP reconvened from 1-7 October 2011 in Panama City, Panama.⁴⁶ The outcome for most of the informal group discussions was some “form of text” forwarded to Durban as a basis for further discussions. Since the negotiations in Panama, a number of meetings have been held that are relevant to Durban.⁴⁷

Another climate change conference has come to an end at which the hope of binding global action to combat climate change has not been fulfilled.⁴⁸ Instead, this has once again been adjourned. With the document agreed (the Durban Platform for Enhanced Action), a road map has been drawn up that foresees a global treaty by 2020. This will mean almost ten more years of the negotiation marathon with an uncertain outcome and no fixed global measures.⁴⁹ The EU and some of the world's poorest countries vulnerable to climate change impacts have launched a joint bid for a strong outcome for binding targets by 2015. With the EU pact gaining support from over 120 countries, the world's largest polluters, China and India, could come under pressure to come on board.⁵⁰

The alliance between the EU, the Alliance of Small Island States (AOSIS) and the Least Developed Countries (LDCs), facilitated by Denmark and Gambia, includes over half the world's governments. Other countries in Africa and Latin America also back its goals. This show of unity between developed and developing countries is possibly the first in the history of the UN climate convention, and marks a new dynamic in the often fractured process. The US and a number of big developing countries including Brazil, China and India want any negotiations to start in 2015 at the earliest, and not come into effect until after 2020.⁵¹

As part of a transition to the wider international climate regime that is needed, the EU is open to a second Kyoto period on condition that agreement is reached on:

- The roadmap and deadline for a comprehensive and legally binding global climate framework that should enter into force no later than 2020;
- Strengthening Kyoto's environmental integrity through a robust accounting framework for forest management and through a solution to the issue of the surplus of emission budgets ("AAUs")

⁴⁵ No agreement was reached on other proposed new items, such as blue carbon and rights of nature and the integrity of ecosystems, and a work programme on agriculture.

⁴⁶ The AWG-KP concentrated on outstanding issues and further clarifying options concerning mitigation targets, the possible nature and content of rules for a second commitment period, and the role of a possible second commitment period within a balanced outcome in Durban.

⁴⁷ For more information on many of these events, visit IISD Reporting Services' *Climate Change Policy and Practice* knowledgebase: <http://climate-1.iisd.org>.

⁴⁸ At the Durban Conference the EU has clearly stated that any new agreement would need to be binding according to international law. General expectations as regards the legal form consist of a clear wording, with clearly defined commitments and monitored implementation. It is very important that all commitments, no matter whether they are high or low, have a similar form, i.e. are of the same legally binding status.

⁴⁹ Scientists have been warning of the ever smaller time window for effective measures to limit global warming to 2°C for years now. Extension of the Kyoto Protocol with binding aims is considered too weak. Leading polluters such as Canada, Russia and Japan have already declared their unwillingness to support an extension of the Kyoto Protocol – Canada even wishes to withdraw from the Kyoto Protocol before it has even expired. However, the remaining states produce just 15 percent of greenhouse gas emissions. The reduction commitments for a further commitment period are only to be agreed next year, and it remains unclear when exactly this period should begin and end.

⁵⁰ China has however shown promising signals, although skepticism remains over its position. India has insisted it is unfair to expect them to slash emissions when it could hamper economic development and poverty reduction. Brazil, an emerging economy that plays a significant role in climate negotiations, also said there was convergence on a deal in Durban.

⁵¹ AOSIS and the LDCs say that is too late as such a plan will most likely result in mean global temperatures increasing by more than 1.5C, wreaking havoc with climate change disasters such as drought and sea-level rises.

from the first commitment period. This solution must be non discriminatory and preserves incentives for overachievement of emission targets;

- Establishing one or more new market-based mechanisms in order to boost the development of a robust international carbon market.

As is always the case at international conferences where diplomacy and the different interests of individual states play an important role, one must take a closer look at the details. It then becomes clear that with its refusal policy, the USA is losing influence – primarily to China. The EU has entered into a strategic alliance with the small states affected the most by climate change, such as the island states that fear that their territories could already be submerged in just a few years time. For them the international process is one of the few opportunities to bring their interests to the attention of more influential governments.

The setting up of a Green Climate Fund, which is to primarily make funding available to the poorer states for climate protection and adjustment to the consequences of climate change, was celebrated as a key success (100 billion US dollars each year until 2020). The interim committee established at last year's conference in Cancun was officially confirmed, and the fund designated an operating entity of the financing mechanism of the Convention. However, it remains unclear where funding for this should actually come from. Several states have applied to host the fund, including Germany.

As trailblazer in climate policy, the EU has to continue to pursue ambitious goals,⁵² but must also be aware that climate change is not afforded the same importance in other countries. In order to encourage countries like the USA to get on board, the EU will have to be willing to make compromises. On an international level, Europe needs to be seen as a role model, not as a teacher. If it manages this, then more important progress may be made after the Durban's 2011 Conference in the fight against climate change. But, it remains to be seen whether this will be sufficient to succeed in limiting global warming to two degrees Celsius in the long-term.

References

- Bali Action Plan, UNFCCC Dec. 1/CP.13, Dec. 15, 2007, U.N. Doc. FCCC/CP/2007/6/Add.1.
- Berlin Mandate, UNFCCC Doc. 1/CP, April 7, 1995, UN Doc. FCCC/CP/1995/7/Add.1.
- Bodansky, Daniel. "The Copenhagen Climate Change Conference: A Postmortem." 104 *Am. J. Int'l L.* 230 (2010).
- Bodansky, Daniel. "The UN Framework Convention on Climate Change: A Commentary." 18 *Yale J. Int'l L.* 451, 508 (1993).
- Bodansky, Daniel. *The Art and Craft of International Environmental Law*, chapter 8. Harvard Univ. Press, 2009.
- Caro, Celine-Agathe and Ruth, Christiane. "From Kyoto to Durban – The European Union's Climate Policy". *Political Thought*, no. 36 (2011): 23-33.
- Centre for European Reform. "EU climate policies without an international framework," Centre for European Reform, http://www.cer.org.uk/sites/default/files/publications/attachments/pdf/2011/pb_climate_21oct11-3892.pdf.
- Commission of the European Union, Doc. COM (2009) 647/3.

⁵² The EU needs to adapt its emissions reduction targets to reflect these changes and set itself the goal of reducing emissions by 30% by 2020. This would cost very little more than the previous 20% target, but would boost the EU's credibility in international climate talks and put the European economy in a good position for the future. Estimates suggest that an increase to 30% would only cost an extra 11 billion Euro compared to the original 20% figure. This represents less than 0.1% of the EU's economic output. And the cost of delaying is high: the International Energy Agency (IEA) estimates that delays in investing in low-carbon energy sources worldwide incurs annual costs of 300 to 400 billion Euro. See: "30 Prozent weniger Emissionen bis 2020", *Frankfurter Allgemeine Zeitung*, July 15, 2010, <http://faz.net/- 01d9g0> (accessed February 8, 2011).

- Communication from the Commission of 8 March 2000 on EU policies and measures to reduce greenhouse gas emissions: towards a European Climate Change Programme (ECCP) [COM(2000) 88].
- Doc. /SB/2011/INF.1/Rev.1 and FCCC/ AWGLCA/2011/INF.1, both issued after Cancun, and Decision 1/CP.16, created the Green Climate Fund (GCF).
- Energy & Climate Change. "The UNFCCC'S Durban Platform Explained", Energy & Climate Change, http://www.hfw.com/_data/assets/pdf_file/0016/17422/Client-Brief-UNFCCCs-Durban-A4-4pp-January-2012.pdf.
- European Commission (2009). Working Document. Consultation on the Future "EU2020" Strategy.
- "EU schafft Kyoto-Ziel: Österreich am weitesten weg", *Kleine Zeitung*, October 12, 2010, <http://kleinezeitung.at/>
- "EU: Energiegipfel über das neue Zeitalter – Teil 2", Greenmag, January 12, 2011, <http://greenmag.de/magazin/meldung/datum/2011/01/12/alles-fuer-sonne-wind-wasser-und-atom-1.html>.
- Federal Ministry for the Environment, Nature Conservation and Nuclear Safety, "UN-Klimakonferenz in Kopenhagen – 7.bis 18. Dezember 2009," http://www.bmu.de/15_klimakonferenz/doc/44133 (accessed February 3, 2011).
- Harvard University. "W[h]ither the Kyoto Protocol? Durban and Beyond," Harvard University, http://belfercenter.ksg.harvard.edu/publication/21314/whither_the_kyoto_protocol_durban_and_beyond.htm l.
- IISD Reporting Services'. Climate Change Policy and Practice, IISD Reporting Services', <http://climate-i.iisd.org>.
- International Institute for Sustainable Development (IISD), "*Earth Negotiations Bulletin*", Vol. 12 No. 534 (2011): 1-2.
- [nachrichten/chronik/2_514576](http://www.nachrichten.ch/nachrichten/chronik/2_514576).
- Proposal for a Directives 2004/8/EC and 2006/32/EC [COM (2011) 370, 22/06/201].
- U.N. Doc. FCCC/CP/2011/L.1, Dec. 7, 2011.
- UN Framework Convention on Climate Change, Item 2 (New York, 1992).
- UNFCCC art. 3. 1.
- Werksman, Jacob. "Legal Symmetry and Legal Differentiation under a Future Deal on Climate Change." 10 *Climate Policy* 627 (2010).