

THE DURBAN PLATFORM: ISSUES AND OPTIONS FOR A 2015 AGREEMENT



CENTER FOR CLIMATE
AND ENERGY SOLUTIONS

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December 2012

The Durban Platform talks, aiming for a new global agreement in 2015, present an opportunity to assess and strengthen the international climate change effort. Since launching the U.N. Framework Convention on Climate Change two decades ago, governments have tried both “top down” and “bottom up” approaches. Neither has achieved the levels of participation or ambition needed to reverse the continued rise of global greenhouse gas emissions. Going forward, governments should draw on both models to forge a more effective global agreement.

INTRODUCTION

The Durban Platform for Enhanced Action presents an important opening to assess 20 years of experience under the United Nations Framework Convention on Climate (UNFCCC), and to set a new course for the international climate effort.

Adopted by UNFCCC parties in December 2011, the Durban Platform calls for “strengthening the multilateral, rules-based regime under the Convention.” To that end, it launched a new round of negotiations aimed at developing “a protocol, another legal instrument or an agreed outcome with legal force” for the period from 2020 on.¹ The negotiations are scheduled to conclude in 2015.

Depending on the outcome of these talks, the Durban Platform could initiate a new stage in the evolution of the multilateral climate framework. From the start of the UNFCCC negotiations, parties have struggled to choose between two competing models: a top-down “contractual” approach favoring binding targets and timetables, and a bottom-up “facilitative” approach favoring voluntary

actions defined unilaterally. In the course of the regime’s evolution to date, parties have in fact produced examples of both: the binding Kyoto Protocol, and the parallel voluntary framework that emerged at the 2009 Copenhagen summit and was formally adopted a year later in Cancún.

In practice, each model has exhibited strengths and weaknesses; but measured against the scale and urgency of the climate challenge, neither has proven adequate. The Durban Platform presents an opportunity to forge an alternative approach, one perhaps drawing on the best of both.

This paper begins broadly by considering the elements critical to the effectiveness of an international agreement. It then analyzes the key variables in the design of a climate agreement, how these are reflected in the UNFCCC’s evolution to date, and the specific parameters framing the negotiations going forward. Finally, it considers three broad options for a possible Durban Platform outcome.

WHAT MAKES AN AGREEMENT EFFECTIVE?²

The effectiveness of an international agreement is a function not only of the stringency of its commitments, but also the levels of participation and compliance by states.³ Weakness along any of these three dimensions – stringency, participation, and compliance – will undermine an agreement’s effectiveness, regardless of how well it does on the other two. And because the three factors are inter-linked, it is important to consider how varying one factor affects the others. For example, more stringent requirements promote effectiveness, all other things being equal. But they do not necessarily boost effectiveness if they result in lower participation and/or compliance. Conversely, high participation and compliance are desirable in and of themselves, but they may not increase the overall effectiveness of an agreement if they are bought by watering down the agreement’s substantive requirements. Achieving the greatest effectiveness requires solving an immensely complex equation involving all three factors.

There is a further complication in the case of the climate change negotiations: since climate change depends on cumulative emissions rather than on emissions at any particular point in time, stringency and participation should be seen as dynamic variables. Less stringent commitments or narrower participation initially might produce greater climate effectiveness in the long run, if it is part of an evolutionary framework that leads to greater action later.⁴ One evolutionary pathway is to start with broad participation and weak commitments, and then attempt to deepen the commitments over time. Another is to start with strong commitments and narrow participation, and then attempt to broaden participation over time (although narrow participation initially creates the potential for carbon leakage and related competitiveness concerns).

Governments have deployed alternative models in the pursuit of effective agreements. Often, international negotiations are predicated on a “contractual model,” in which the rationale for an agreement is to leave all of the participating states better off. The principal function of internationally binding agreements, from a contractual perspective, is to provide an assurance that countries will comply. Each country benefits from an agreement only if its actions are reciprocated by others—in the case of

climate change, for example, only if each country gets the benefit not only of its own emission reductions, but of those by other states as well. International agreements define these reciprocal actions and, through the process of treaty commitment, provide an assurance of mutual compliance. The negotiation of the Kyoto Protocol Annex B targets was predicated on the contractual model of international law, and many assume that the Durban Platform negotiations should follow this model as well.

In some situations, however, states’ reticence to bind themselves may outweigh their desire to bind others. In that case, there may not be any negotiable agreement that the participating states think will make them each better off. In the absence of such a “contract zone,” the contractual approach to international agreements is not feasible.

An alternative model of international law focuses on its role in catalyzing and facilitating actions from the bottom up. This “facilitative model” of international agreements starts from what countries are doing on their own, and seeks to find ways to reinforce and encourage these activities. International law can serve a number of catalytic and facilitative functions. Gatherings such as the annual meeting of the UNFCCC Conference of the Parties can focus attention, help raise public concern, and prod states to do more. For instance, although the national pledges made in the run-up to the Copenhagen summit fell short of putting the world on a pathway likely to meet the 2°C temperature limit, they represented an improvement from business-as-usual. Systems of reporting and expert review shine a spotlight on what countries are doing and allow more accurate assessments of the overall effectiveness of these national actions. And mechanisms for the provision of financial and technological assistance allow greater action by countries currently held back by a lack of capacity.

In general, the more bottom-up the approach, the easier it is to get national buy-in and implementation, but the harder it is to promote ambition. Thus, facilitative bottom-up approaches score well in terms of participation and implementation, but low in terms of stringency; top-down contractual approaches the reverse. Since the effectiveness of an agreement is a function of all three factors – participation, implementation, and ambition – it is difficult to make the case that either approach is necessarily more effective than the other.

KEY VARIABLES

Within the broad spectrum defined by contractual top-down and facilitative bottom-up approaches, parties have a wide variety of design choices in developing a new instrument pursuant to the Durban Platform. These design choices involve issues of form, structure, substance, and process.

LEGAL FORM

International instruments can take a number of legal forms:

Legal agreements – International legal agreements such as treaties, protocols, and amendments are subject to the rule of *pacta sunt servanda* (promises must be kept) and give rise to international legal responsibility if they are violated. In that sense, they are binding under international law, even if they contain no enforcement machinery. In general, legal agreements must be ratified by governments, signaling a higher level of commitment and raising the reputational costs of violation, thereby increasing the likelihood of compliance.

Secondary legislation – Decisions taken pursuant to a treaty can have legal force derivatively from the treaty, if the treaty so provides.⁵ Such decisions are sometimes referred to as “delegated” or “secondary” legislation. Arguably, decisions of the UNFCCC Conference of the Parties (COP) and the Kyoto Protocol’s equivalent body, the CMP, can have this legal character, if the UNFCCC or Kyoto Protocol expressly authorizes them to adopt rules on a particular subject. In rare, narrowly-defined cases, the UNFCCC authorizes the COP to adopt rules that are binding on states. For example, articles 4.1(a), 4.2(c), and 7.2(d) authorize the COP to adopt methodologies for the preparation of national inventories. Other UNFCCC provisions give the COP authority to establish rules for UNFCCC institutions – for example, Article 9.3, which authorizes the COP to elaborate the functions and terms of reference of SBSTA. Finally, the UNFCCC and Kyoto Protocol give the COP/CMP delegated authority to adopt rules specifying the modalities for non-mandatory activities such as joint implementation (UNFCCC Art. 4.2(d)) and emissions trading (Kyoto Protocol Art. 17). In contrast, the Kyoto Protocol provides that establishing a compliance system with legally-binding consequences would require a Protocol amendment (Kyoto Protocol Art. 18), thereby excluding the possibility of adopting such a system by CMP decision.

Recommendations – Unless a treaty gives an

international institution the authority to make legally-binding decisions, decisions by international organizations ordinarily have the status of recommendations.⁶ This is true of most COP decisions.

Political agreements – Agreed outcomes that are not adopted as treaties can have political force. Violations of such political agreements may have significant reputational costs, but they do not have any international legal consequences.

Although they are sometimes confused, the issue of an instrument’s legal form is distinct from the issue of whether particular provisions of an instrument are mandatory or hortatory. The former requires examining the instrument as a whole, and depends on whether the instrument is in writing and is intended to be governed by international law, while the latter depends on the language of the particular provision in question – for example, whether it is phrased as a “shall” or a “should.” Legal agreements can contain hortatory language and non-legal instruments (such as political agreements) can use mandatory language.⁸

In principle, legalization might make states willing to do more, to the extent it gives them a greater assurance that their actions will be reciprocated by others. But legalization can also have a negative effect on ambition, if states are more concerned about locking themselves into potentially costly commitments than about non-compliance by other states. As a result, the relationship between legal form and ambition is uncertain.

STRUCTURE

Negotiated outcomes can be structured in different ways. An outcome can be adopted as a single instrument (or package of instruments) that states must adopt as a whole. For example, the negotiations that established the World Trade Organization resulted in a “single undertaking” consisting of more than a dozen agreements.⁹ Alternatively, a regime can allow states to pick and choose which parts to join, resulting in a “variable geometry” involving different configurations of countries for different parts of the regime. In the 1960s and 1970s, prior to the negotiation of the WTO, the trade regime took an “à la carte” approach, allowing states to decide which sub-agreements (usually designated “codes”) to accept. Similarly, many international human rights instruments have “optional protocols” establishing individual complaint procedures,

which states can decide whether or not to accept.¹⁰

Instruments can also combine the two approaches, by including both mandatory and voluntary elements. For example, the International Convention on the Prevention of Pollution from Ships (MARPOL) has two mandatory annexes (addressing oil pollution and noxious liquid substances carried in bulk) and four optional annexes. Even the WTO regime involves elements of both approaches: in addition to the mandatory agreements that comprise the “single undertaking,” the WTO regime includes four optional, “plurilateral” agreements.

SUBSTANCE

The substantive content of international environmental instruments differs widely. Key variables include the type, scope, and differentiation of commitments:¹¹

- **Type** – Commitments can be “obligations of result” or “obligations of conduct.” Obligations of result are obligations to achieve a particular outcome, such as a national emissions target. In contrast, obligations of conduct are obligations to do particular things, such as adopting a policy or measure, providing financial assistance, or promoting technology transfer.
- **Scope** – An agreement can address an issue comprehensively or it can focus on particular aspects of a problem. For example, the Convention on Biological Diversity seeks to address the problem of biodiversity loss comprehensively, whereas the Convention on International Trade in Endangered Species (CITES) protects endangered species only against threats from trade, not from habitat destruction or invasive species. Similarly, a climate change instrument could address all sources and sinks of greenhouse gases and apply to a country’s entire economy (as the UNFCCC and the Kyoto Protocol generally do), or it could address particular sectors or greenhouse gases.
- **Differentiation** – An agreement can provide for differentiation in terms of the type, stringency and/or timing of commitments.¹² For example, the Montreal Protocol gives a ten-year grace period to developing countries whose per capital consumption of ozone-depleting substances is below a specified level. Differentiation of commitments can be based explicitly on objective factors such as historical emissions, GDP level, or per capita income or emissions, or it can be determined on a more ad hoc basis through

a political negotiation or through a pledging process reflecting each country’s willingness to act. Differentiation can be effectuated by means of a schedule specifying the commitments of individual countries (as in Annex B of the Kyoto Protocol), annexes that list a group of countries with special commitments (as in Annexes I and II of the UNFCCC), or established criteria such as per capita consumption of controlled substances (as in the Montreal Protocol) or per capita GDP.

PROCESS

The substance of an international climate instrument can be determined through a top-down or a bottom-up process. On the one hand, the content and stringency of commitments can be specified through international negotiations. On the other hand, the substance of commitments can be derived from the bottom-up, by each participating country acting individually.¹³

The dichotomy between top-down and bottom-up processes defines a spectrum. Most regimes fall somewhere in between. At the top-down end of the spectrum, an international decision-making process could be used to define a greenhouse gas concentration target and then, working backwards, to define internationally-agreed emissions pathways, global emissions targets for specific time periods, and individual country targets based on a general allocation formula. At the bottom-up end of the spectrum, an agreement could allow states to define their commitments through unilateral decisions. The Kyoto Protocol lies near the middle of the spectrum. On the one hand, national emission targets were established through international negotiations. On the other hand, these political negotiations were ad hoc: countries had considerable influence over their emissions targets, and the overall global emissions reduction was merely the sum of the individual national commitments, rather than a number determined independently to promote climate change objectives.

Because the top-down contractual approach strives to induce countries to do more than they would do on their own, it depends on countries feeling that their efforts are being sufficiently reciprocated by others and that they are not being required to do more than their fair share. As a result, issues of differentiation and comparability of effort become central. Issues of reciprocity, differentiation, and comparability of effort also play a role in bottom-up processes, but more indirectly, as a consideration in influencing what countries are willing to pledge.

EXISTING MODELS

How do the existing climate change instruments reflect the variables of legal form, structure, substance, and process? The UN Framework Convention on Climate Change (UNFCCC) has the following features:

- In terms of legal form, it is a treaty and hence binding under international law.⁷ Although its only emission target is characterized as an “aim” rather than a commitment and is hence not legally-binding, other features of the UNFCCC are legally-binding, including the commitments regarding reporting and the formulation and updating of national climate change measures.
- In terms of structure, the UNFCCC is a single undertaking, although it contemplates the adoption of future protocols that would be optional in nature, resulting in a variable geometry. A variable geometry has, in fact, emerged, through the refusal by the United States to join the Kyoto Protocol, the decision by Canada to withdraw from the Protocol, and the decisions by Japan and Russia not to accept second commitment period targets.
- The substance of the UNFCCC is largely constitutional rather than regulatory in nature. As a framework convention, its primary purpose is to establish a general system of governance, through the establishment of institutions such as the COP and procedures such as those relating to reporting and review. To the extent it includes obligations, these are either very general in nature (such as the commitment to formulate national policies) or are intended to support governance rather than to regulate conduct (for example, the requirement to submit emissions inventories), and are not subject to a compliance system.
- The UNFCCC envisions a bottom-up process in which states adopt and report on national programs to mitigate and adapt to climate change, with international review.

The Kyoto Protocol is similar to the UNFCCC in form and structure, but differs in substance and process.

- Like the UNFCCC, the Kyoto Protocol is a legal agreement with a unitary structure, without any optional elements.
- Unlike the UNFCCC, the Kyoto Protocol is a primarily regulatory treaty that establishes absolute, legally-binding limits on the national greenhouse gas emissions of developed country parties.
- Moreover, the Kyoto Protocol was developed through a process involving top-down elements. First, the basic form of commitments (national, legally-binding, economy-wide emissions targets) was determined in advance through international agreement, in the Berlin Mandate and the Geneva Declaration, with no room for national discretion. Second, the substance of each country’s Annex B emissions target was defined through international negotiations rather than through purely national decision-making.

Finally, the Copenhagen Accord and Cancún Agreements establish a bottom-up, pledging process. The national pledges represent political rather than legal commitments. They were defined through a national rather than international decision-making process. And they differ widely in both their type and stringency.

Recalling the three factors cited earlier as critical to an agreement’s effectiveness (stringency, participation and compliance), the UNFCCC’s evolution presents a mixed picture. While the Convention itself enjoys near universal participation, its commitments are for the most part quite general, making compliance difficult to evaluate. While the Kyoto Protocol is more stringent, at least in terms of legal form, its targets now apply to less than a quarter of global greenhouse gas emissions, and compliance is imperfect. One country, Canada, has quit the agreement rather than face consequences for noncompliance. The voluntary Cancún pledges, in contrast, cover a much broader group of countries. But they are widely viewed as lacking ambition and it is too early to know whether countries will fulfill them. So which approach is more effective remains an open question.

PARAMETERS OF THE DURBAN PLATFORM NEGOTIATIONS

The Durban Platform negotiations are governed by the terms of the Durban Platform decision, the UNFCCC, and general international law.

PARAMETERS IMPOSED BY THE DURBAN PLATFORM DECISION

As an overarching principle, the Durban Platform recognizes the importance of “strengthening the multilateral, rules-based system.” It provides that the negotiations are to begin this year and finish by 2015, and that the outcome is to be implemented from 2020. But, except with respect to these timing issues, the Durban Platform provides only very general framing:

- In terms of legal form, the Durban Platform calls for an outcome with legal force, but does not require that it be a protocol or other type of international legal agreement. If the outcome took the form of a protocol, it would need to be adopted by consensus, whereas an amendment to the UNFCCC amendment could be adopted by a three-quarters majority vote of the UNFCCC parties present and voting.¹⁴ Both would be subject to acceptance by individual states (for example, through ratification) and would be legally binding, but only on those states that give their consent. The meaning of the third possible outcome -- an “agreed outcome with legal force” -- is unclear. One meaning of “legal force” could be equivalent to “binding.” While the UNFCCC does not give the COP general authority to adopt binding decisions, COP decisions can potentially be binding by virtue of particular provisions of the UNFCCC – for example, the methodologies for the submission of emissions inventories adopted pursuant to Article 4.1(a). In addition, some parties argue that an outcome that had legal force under national rather than international law would satisfy the terms of the Durban Platform.¹⁵ Arguably, “legal force” is broader than “binding,” since it could also include rules that specify how a non-mandatory activity such as emissions trading is to be performed.¹⁶
- The Durban Platform is silent about the structure of the outcome – for example, whether it should consist of a single agreement or multiple agreements, some mandatory and others optional. It also leaves open whether the new instrument will

subsume the Kyoto Protocol or exist in parallel with it.

- With respect to substance, the Durban Platform suggests that the work plan for the negotiations (although not necessarily the final outcome) should address mitigation, adaptation, finance, technology, capacity building, and transparency, among other things.¹⁷ But it gives parties complete freedom to decide how to address these issues – for example, through a comprehensive or sectoral approach, through emissions targets or policies and measures, or through a multi-gas or gas-by-gas approach. The Durban Platform also states that the new instrument will be “applicable to all parties.” While this frames the negotiations very differently from the Kyoto Protocol negotiating mandate,¹⁸ which specifically excluded any new commitments for developing countries, it provides no guidance as to an alternative approach to differentiation.
- Finally, with respect to process, the Durban Platform is silent about the degree to which the substance of the outcome will be defined through international or national decision-making.

PARAMETERS IMPOSED BY THE UNFCCC¹⁹

The Durban Platform decision provides that the Ad Hoc Working Group on the Durban Platform (ADP) is to “develop a protocol, another legal instrument, or an agreed outcome with legal force under the United Nations Framework Convention on Climate Change” (emphasis added). A key issue in the Durban Platform negotiations will be the degree to which the proviso, “under the ... Convention,” imposes substantive limits on the Durban Platform outcome. Ordinarily, a treaty amendment can modify any aspect of a treaty. So if the Durban Platform outcome took the form of a UNFCCC amendment, the amendment could, in theory, modify some or all of the Convention, including the definitions in Article 1, the objective specified in Article 2, and the principles enumerated in Article 3. To protect against this possibility, some states have taken the view that the phrase “under the UNFCCC” means, “under the existing UNFCCC” – in effect, ruling out amendments of the Convention (or at least, amendments of the Convention’s core provisions such as the objective and principles). However, such an interpretation leaves unclear what the reference in the

Durban Platform decision to “another legal instrument” might include, if not a Convention amendment.

If the Durban Platform outcome were to take a form other than a treaty amendment, it would need to be consistent with the UNFCCC as it currently stands, including the provisions defining the scope of the agreement (Article 1), its objective (Article 2), and its guiding principles (Article 3).

Article 1 defines the term, greenhouse gases, as “those gaseous components of the atmosphere, both natural and anthropogenic, that absorb and re-emit infrared radiation.” This definition would seem to exclude short-lived climate forcers such as black carbon, so the inclusion in the Durban Platform instrument of provisions addressing black carbon might require an amendment to the Convention.

Article 2 of the UNFCCC establishes the ultimate objective of not only the Convention itself, but “any related legal instruments that the Conference of the Parties may adopt,” namely, to stabilize atmospheric concentrations of greenhouse gases “at a level that would prevent dangerous anthropogenic interference in the climate system..., within a time frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened, and to enable economic development to proceed in a sustainable manner.” In the Cancún Agreements, the parties to the UNFCCC agreed to the goal of limiting global warming to no more than 2° C above pre-industrial levels.²⁰ Although this goal is likely to have considerable political weight in the Durban Platform negotiations, a process to explicitly assess the outcome’s consistency with 2° goal or the Article 2 objective appears unlikely.

Article 3 of the UNFCCC sets forth various guiding principles for actions by the parties to achieve the objective of the UNFCCC, including common but differentiated responsibilities and respective capabilities (CBDRRC),

precaution, and cost-effectiveness. These principles are intended to provide guidance to the parties and are stated in hortatory (“should”) rather than mandatory (“shall”) terms. The inclusion of the term “inter alia” in the chapeau of Article 3 suggests that the list of principles in article 3 is not intended to be exhaustive, and that future actions by the parties might also be guided by other considerations not explicitly elaborated.

Of the principles in Article 3, CBDRRC has received the most attention.²¹ It recognizes that all countries have a responsibility to address climate change, but that their responsibilities differ, and what they should do to protect the climate system varies, depending on their different responsibilities and capabilities. The division between Annex I and non-Annex I parties is an application of the principle of common but differentiated responsibilities and respective capabilities, but the Convention does not explicitly link the two, nor does it preclude alternative forms of differentiation in future agreements that supersede the division between Annex I and non-Annex I parties.²²

PARAMETERS IMPOSED BY INTERNATIONAL LAW GENERALLY

In general, international law does not limit what states may do by mutual agreement. The only substantive limitation imposed by general international law on treaty-making is that a treaty may not violate a peremptory norm of international law (referred to as *jus cogens*).²³ However, it is difficult to conceive how any potential action relating to climate change could be considered void on the ground that it violates *jus cogens*. There is little agreement internationally as to what norms constitute *jus cogens*,²⁴ and no rule of *jus cogens* appears relevant to the climate change regime. Thus, it does not appear that general international law imposes practical limitations on what action might be undertaken pursuant to the Durban Platform.

OPTIONS FOR THE DURBAN PLATFORM OUTCOME

Within these parameters, the Durban Platform outcome could reflect many possible combinations of the variables relating to form, structure, substance and process discussed earlier. Issues of particular relevance include: the particular legal form to be applied; if elements of the agreement are to be legally binding, which ones; how responsibilities are balanced across, and among, developed and developing countries; and the agreement's role, if any, in regulating or facilitating international emissions trading. This section sketches out three possible options: first, an expanded Kyoto-like approach; second, a legalization of the Cancún architecture; and third, a multi-track approach.

EXPANDED KYOTO-LIKE APPROACH

The Durban Platform outcome could retain the basic architecture of the Kyoto Protocol, modified so as to include a greater number of countries. As noted earlier, the Kyoto Protocol approach involves a legally-binding form and specification of commitments through international negotiations. Central substantive elements of a Kyoto-like approach include:

- absolute, national emissions targets;
- international accounting rules;
- international emissions trading rules and mechanisms;
- international expert review; and
- an international compliance system.

In order to encourage other countries to accept a Kyoto-like approach, the Durban Platform outcome might give countries greater flexibility in their choice of target types – for example, by allowing countries to adopt indexed rather than absolute targets, and/or sectoral rather than economy-wide targets. The stringency of the targets could also be differentiated to encourage participation and to promote equity. For example, some countries might have targets that could be achieved at no net cost with trading.²⁵

A more ambitious variant of this option would include a top-down formula for setting global and national emission targets. For example, the international agreement might specify a stabilization concentration objective (e.g., 450 ppm CO₂eq), an emissions pathway to achieve that stabilization level, and a formula for setting national emissions targets, in order to allocate the allowable global emissions among countries.

LEGALIZATION OF CANCÚN ARCHITECTURE

A second possible outcome of the Durban Platform negotiations would be to memorialize in legal form a bottom-up architecture, like that reflected in the Copenhagen Accord, Cancún Agreements, and Durban decisions. Of the various alternatives, this would seem to be the easiest to achieve politically, since it would reflect elements that have already been agreed. As in the Cancún process, the substance of each country's commitments would be determined through a bottom-up process of national decision-making. Some countries might adopt absolute emission targets, others indexed or efficiency targets, and others particular policies and measures.

What would be the value-added of encapsulating the Cancún architecture in an outcome with legal force? As noted earlier, because legal instruments signal a greater level of commitment by states than political agreements, and in the case of treaties require greater domestic buy-in due to the special procedures required for ratification, legalization of the Cancún architecture might be expected to increase the likelihood of compliance.²⁶ This legalization could be achieved by way of a UNFCCC amendment, a protocol, or possibly a COP decision.

In terms of structure, a Durban Platform outcome could consist of a core agreement together with one or more annexes or schedules listing differentiated national targets and actions.²⁷ The core legal agreement might include institutional arrangements; a financial mechanism; procedures for monitoring, reporting and verification (MRV); provisions relating to international emissions trading; as well as procedures for amending and adding to the agreement over time. The agreement could make only the core provisions legally-binding, not the schedules listing national emissions reduction targets and actions, which would represent political commitments. Or it could include the schedule in the legally-binding part of the outcome, converting the pledges from political into legal commitments, which parties would have an international obligation to implement. A variant of the legalization approach could require states to have domestically-binding climate change legislation, which would be inscribed in a schedule to the agreement. The rationale of such a domestically-binding approach is that national law is typically more effective than international law. So a country's national legislation to address climate change would arguably provide a greater assurance of action

TABLE 1: Overview of Options

	FORM	STRUCTURE	SUBSTANCE	PROCESS
<i>Expanded Kyoto-Like Approach</i>	Legally-binding agreement	Unitary	National emission targets	Moderately top-down: Negotiated target or target formula
<i>Legalization of Cancún Architecture</i>	COP decision or legal agreement that is partly or fully binding	Unitary or variegated	National targets and actions / national legislation	Bottom-up
<i>Multi-Track Approach</i>	Legal agreement: Some parts binding, others not	Variegated	Multiple types of commitments	Some tracks top-down, others bottom-up

than an international commitment.

In contrast to emissions targets, which are obligations to achieve a particular result, the domestically-binding variant would involve obligations of conduct, for example, to list and implement national climate change legislation. The new instrument could require countries to adopt new climate change legislation, or it could allow countries to inscribe on the schedule existing legislation related to climate change. In the latter case, the main effect would be to “internationalize” a country’s domestic legislation through listing on the schedule. To avoid rigidity and promote participation, the agreement might allow states to change their legislation, so long as the new legislation was estimated to result in a comparable or greater level of emissions reduction. A similar approach can be found in the Ramsar Wetlands Convention, which allows states to delist a wetland, so long as they compensate for the loss by listing additional wetlands elsewhere.²⁸

Since the national legislation that each party listed would be domestically binding, this variant could be considered an “agreed outcome with legal force” under the Durban Platform, even if it were adopted as a COP decision rather than a protocol or treaty amendment, if “legal force” were interpreted to include legal force under domestic law, as some parties have suggested.

Whatever its form, however, legalization would not necessarily address what many argue is the chief weakness of the Cancún approach, namely a lack of ambition in the pledges that countries have made to reduce their emissions.²⁹ This lack of ambition is usually attributed to the bottom-up nature of the pledges,

rather than to their non-legal character.

One option to promote ambition would be to provide for ex ante review of national pledges by parties or international experts, in order to determine the emission reductions likely to result. This could have the effect of exerting pressure on states to provide credible pledges. To promote transparency, the listed actions and targets could also be assessed by international experts ex post, to evaluate countries’ implementation efforts and the emission reductions that actually resulted.

MULTI-TRACK APPROACH

Given ongoing differences about whether emissions targets should be governed by international or national rules, a new agreement could potentially give countries flexibility, by including a number of different annexes, among which states could pick and choose.³⁰ The multi-track approach is defined primarily in terms of structure. Rather than consisting of a single package, which countries must accept as a whole, a multi-track approach would allow a variable geometry, with different configurations of countries involved in different parts of the overall regime. The different tracks would be tied together by a core agreement addressing matters such as institutional arrangements, metrics and methodologies for comparing commitments under different tracks, reporting, and compliance. The rationale for a multi-track approach is that it introduces “bottom-up” flexibility while retaining some of the cohesion and reciprocity of top-down approaches.

In essence, a multi-track approach would combine several of the approaches considered previously. For

example, one track might involve internationally-defined emissions targets with common accounting rules, as in the “expanded Kyoto” approach. Countries that assumed a target pursuant to this track might be allowed to engage in a newly-defined UNFCCC emissions trading mechanism, as under the Kyoto Protocol. A second track might involve an annex containing nationally-defined emissions target governed by national accounting rules. These targets would be tradable only through bottom-up, bilateral linkages between particular countries that agreed to mutually recognize each other’s allowances. Other tracks might consist of the “domestically-binding approach,” address particular sectors or particular climate forcers such as black carbon, facilitate broad and equitable access to existing and emerging technologies, facilitate adaptation planning and implementation, or provide financial support.

By picking and choosing which parts to join, states could have multiple commitments under different tracks. For example a country could participate in an international sectoral agreement on transportation and could also offer policy-based commitments to reduce emissions from its electric power and land-use sectors. In this case, the commitments would be additive—the

country’s overall effort would be the aggregate of its individual commitments. Another country could have an economy-wide emissions target, participate in one or more sectoral agreements, and commit to provide technology and adaptation assistance. In this case, reductions achieved under the sectoral agreements would count toward the country’s economy-wide target; the former, in essence, would be a means of achieving the latter.

Rather than give countries complete latitude to decide which tracks to pursue, parties could agree at the outset on terms of engagement requiring particular countries (or classes of countries) to negotiate toward commitments under particular tracks. For example, countries with per capita GDPs above an agreed threshold might be expected to assume economy-wide emission targets, while others might have the option of taking sectoral targets or policy-based commitments instead. Generally, countries will be more willing to negotiate commitments if the terms of engagement ensure that both they and their counterparts are negotiating within tracks appropriate to their respective circumstances.

CONCLUSION

The Durban Platform confronts nations once again with core issues that have run through the international climate negotiations from the very start: whether the global effort should be driven from the top or built from the bottom up; how countries' obligations are best reflected in international law; and how to achieve an equitable distribution of responsibility across countries of very varied, and evolving, circumstances.

Past efforts to wrestle with these issues have led in different directions, resulting in a disjointed regime of parallel structures with uncertain futures. The Durban Platform presents an opportunity to craft a more coherent and enduring approach. Doing that, however, requires a candid assessment, in the light of two decades' experience, of the capabilities and role of the U.N. Framework Convention on Climate Change.

As the dedicated global forum for addressing a quintessentially global challenge, the UNFCCC is, and

should remain, a central locus of countries' collective climate efforts. If imbued by parties with sufficient political will, it has the potential to significantly strengthen global climate action. However, the principal lesson from Kyoto to Cancún is that while some parties are prepared to contractually bind themselves, many others remain more comfortable at this stage with a more facilitative and flexible approach.

The aim of the Durban Platform negotiations should be the most ambitious agreement that is politically feasible. The Cancún framework has demonstrated the value of greater flexibility in broadening participation. The challenge now is to retain sufficient flexibility to achieve strong participation while also raising ambition – both in terms of legal form and, more importantly, in the collective level of effort.

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ENDNOTES

1 Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action, UNFCCC Decision 1/CP.17, Dec. 11, 2011, UN Doc. FCCC/CP/2011/9/Add.1. For a legal analysis of the Durban Platform decision, see Rajamani 2012.

2 This section is adapted from Bodansky 2012.

3 Barrett 2003.

4 Bodansky and Diringner 2010.

5 Brunnée 2002.

6 This is true regardless of whether the authority of COPs is analyzed as a matter of international institutional law or treaty law. Brunnée 2002, at 16 and note 75. Under some circumstances, a COP decision may be considered to represent subsequent practice by the parties to the agreement, and hence have legal force as an interpretation of the treaty text.

7 Vienna Convention on the Law of Treaties, art. 2(1)(a). If the parties are not explicit about their intent, criteria for determining whether an agreement is intended to be governed by international law include the language used in specifying the parties' undertakings and the inclusion of final clauses governing such matters as signature, ratification, and entry into force.

8 Bodansky 2009a, ch. 5.

9 Wolfe 2009.

10 Human rights instruments with optional protocols establishing individual complaint procedures include the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the Convention on the Elimination of All Forms of Discrimination against Women.

11 See generally Bodansky 2004.

12 See generally Rajamani 2006.

13 Bodansky 2011.

14 UNFCCC art. 15-17 (specifying the rules for amending the Convention, amending annexes to the Convention, and adopting protocols).

15 The possibility that the Durban outcome might derive its "legal force" from a country's domestic law is suggested in the Indian submission regarding the ADP work plan. Indian Submission on ADP Work Plan, para. 7, UN Doc. FCCC/ADP/2012/Misc.3, at 33 (April 30, 2012).

16 For example, the Vienna Convention on the Law of Treaties – which provides the general rules for how treaties are formed, interpreted, and terminated – does not impose any commitments on states. States have no obligation to enter into treaties. And, even if states do enter into a treaty, they are free to deviate from the Vienna Convention, since the Vienna Convention rules are mostly default rules, which apply only in the absence of any agreement to the contrary. Nevertheless, the Vienna Convention clearly has "legal force," and will be applied by international tribunals in deciding issues of treaty validity, interpretation, application and so forth.

17 Durban Platform para. 5.

18 Rajamani 2012.

19 This section and the next are adapted from Bodansky 2009b.

20 Cancún Agreements: Outcome of the Work of the AWG-LCA, para. 4, UNFCCC Decision 1/CP.16, Dec. 10, 2010, UN Doc. FCCC/CP/2010/7/Add.1.

21 Rajamani 2006.

22 The UNFCCC does not define the term “developing countries” or identify which countries fall into this category, nor is there any official definition within the UN system. According to the terms of the UNFCCC, the division between Annex I and non-Annex I parties may not be equivalent to the division between developed and developing countries, since Annex I by its terms includes both developed country parties and “other Parties.”

23 Vienna Convention on the Law of Treaties, art. 53.

24 Possible norms of jus cogens include the prohibitions on the use of force (i.e., an agreement between states to commit aggression against another state would be void), on genocide, and on violations of other fundamental human rights.

25 Bosetti & Frankel 2011, at 2; see also Frankel 2007.

26 Bodansky 2004.

27 For example, the Cancún Agreements established two documents, one listing the targets of Annex I parties and the other listing the actions of non-Annex I parties. The Durban outcome could adopt a similar approach, with separate annexes or schedules for different categories of countries, or it could establish a single annex or schedule for all parties, listing their different targets and actions.

28 Ramsar Wetlands Convention art. 4.2.

29 UNEP 2010.

30 See generally Bodansky and Diringer 2007.



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