

Scenarios and Sticking Points under the Durban Platform: The long and winding road to 2020

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Given the outcomes of COP 17 in Durban, South Africa, and subsequent negotiating sessions in Bonn and Bangkok in 2012, achieving “success” under the newly formed Ad Hoc Working Group on the Durban Platform for Enhanced Action (ADP) is proving to be a formidable task. Nonetheless, Parties have begun to envision a future where all major emitters may be under the same “mitigation tent.”

In advance of COP 18 in Doha, this commentary provides an overview of the current state of play within the United Nations Framework Convention on Climate Change (UNFCCC) negotiations, including an overview of the most recent round of negotiations in Bangkok (August 30–September 5, 2012). It then explores four scenarios, or potential outcomes, under the Durban Platform, and what each would mean in the context of reaching a new, inclusive and effective international climate change agreement.

Measured Optimism Leaving Durban: Setting the Stage for Doha

As in years past, initial relief and excitement (for some) over the outcomes of COP 17 in Durban, notably the agreement to establish the ADP, quickly dissipated into sober second thoughts and questions around the scope and role of the ADP in the negotiating process.¹ There are some who argue that, with the establishment of the ADP, now is the time for agenda-setting, exchanges of views, and slow and steady progress under this new negotiating track. On the other side, there are those who argue that, with the future of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention (LCA) hanging in the balance,

¹ The Durban Platform language agreed to “launch a process to develop a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties.” The goal of ADP platform is to reach agreement by 2015 on a framework to be implemented by 2020. Full text of the Durban Platform is available at: http://convention.int/files/meetings/durban_nov_2011/decisions/application/pdf/cop17_durbanplatform.pdf



and a lack of agreement over the length of the second commitment period of the Kyoto Protocol (not to mention the residual effect of the absence of several key parties, including Canada, Russia and Japan), the negotiations could be in as precarious a place as ever.

These dynamics were the central wedge when delegates picked up ADP negotiations in both Bonn and Bangkok, the last session before COP 18. Several key negotiating dynamics and issues further crystalized in Bangkok, and will likely define discussions in Doha.

Lack of Agreement over the Intended Outcome of the ADP, and Relationship with the LCA

The ambiguity of the Durban Platform language was both a necessary concession to achieve agreement in Durban and a flexibility measure for future negotiations. However, the broad ADP language does little to narrow down the potential form and content of a post-2020 agreement and ambiguity has allowed several parties to interpret language differently. In particular:

- **Parties remain significantly divided as to the form of agreement the ADP is seeking to reach.** The inclusion of the terms “protocol,” “another legal instrument” and “an agreed outcome with legal force” are each interpreted differently by different Parties, and provide a number of potential options on the “form” of a future agreement. There is similar ambiguity around the relationship between the various elements and mechanisms that have been negotiated under the LCA² and how these will interplay with the ADP negotiations. The division of the ADP into two work streams—one addressing the framework for agreement and mechanisms and a second addressing mitigation ambition and exploring ways to close the ambition gap—creates an even more complex negotiating environment, with seven different negotiating tracks set to meet at COP 18.
- **There was agreement in Durban that the LCA “shall be terminated” in Doha.** The Bangkok talks did little to clarify what this means; and in the absence of a clear road map under the ADP, it is unclear how certain issues under the LCA where agreement has not been fully reached would be treated once the LCA concludes—that is to say, whether they will be taken up by the convention’s subsidiary bodies, transferred to the ADP or dropped entirely. In Bangkok, some Parties argued the inverse—that work on the ADP should not begin in haste until the successful conclusion of the LCA.
- **As a result, progress under the ADP and LCA are increasingly interdependent and potentially repetitive.** Many Parties are only willing to terminate the LCA if it is clear how the issues under the LCA will be carried over or included in discussions (and a potential future agreement) under the ADP. However, without clarity on the full agenda of the ADP, other parties are hesitant to close discussions under the LCA and “switch over” to the ADP track. Unless resolved at COP 18 or shortly thereafter, these dynamics could lead to a significant duplication of work between the LCA and ADP, or a further stalling of progress altogether.

The worst possible scenario would be the loss of years of negotiating and constructive progress under the LCA on the potential mechanisms that could characterize a future agreement, including: REDD+, NAMAs, the Technology Executive Committee and mechanism, and financing discussions. There is a risk that if the LCA is terminated before an agreement can be reached on how these discussions might continue under the ADP, such mechanisms may no longer

² Such as nationally appropriate mitigation actions (NAMAs), reducing emissions from deforestation and forest degradation and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries (REDD+), the Technology Executive Committee and mechanism, adaptation and financing discussions.

have a logical home in the negotiations or debates that had otherwise been resolved may be re-opened under the ADP or in subsidiary bodies. At the same time, there is an argument to be made that, as they were negotiated under the LCA track, many of these mechanisms (in their current form) represent a “pre-Durban world” and a clear distinction between developed and developing country responsibilities (i.e., along Annex I and non-Annex I divides), so additional discussions on their scope and role in a new agreement may be warranted.

The intention of the ADP is to broaden out the discussion and consider an architecture where all major emitters (i.e., Annex I, BASIC,³ and selected other emerging economies, including South Korea, Mexico, etc.) would take on commitments under the same “mitigation tent.” But this is, of course, interpreted differently by different Parties. Nonetheless, the revision of these mechanisms to reflect a broader mitigation tent would be much more effective than opening up the years of complex negotiations that have led to this point.

Divergent Interpretations of Convention Principles

One of the key drivers of disagreement over the nature of a future agreement under the ADP is the interpretation of the language and principles in the convention.

- **During the Bangkok discussions, many countries reaffirmed the primacy of the convention, and that the ADP’s work should in no way rewrite it.** Many developed countries (most vocally, the United States) fought to ensure the *exclusion* of terms such as “common but differentiated responsibilities” (CBDR) from the ADP language, in an effort to broaden the ADP discussions beyond the historical developed/developing country differentiation. While CBDR was not explicitly in the Durban outcomes, many developing countries invoke the convention as a way to ensure its implicit inclusion in the ADP.
- **For developing countries, the argument is multifaceted; for some major emitters, it is a matter of wanting to avoid legally binding commitments, while others worry that a “softer” ADP could lead to developed countries abandoning the commitments.** In Bangkok, many developing countries repeated mantras of “actionable differentiation,” “dynamic differentiation” and that “universality of application is not uniformity of application,” when referring to potential mitigation commitments under the ADP. There is also a growing recognition among many countries that, as the European Union has pointed out explicitly, responsibilities and capabilities evolve over time and there is a desire for a more nuanced understanding of CBDR to emerge. If negotiators can find a constructive space to discuss interpretations of this “differentiation” in Doha, there may be meaningful progress under the ADP. If not, they run the risk of entrenching the ADP in the Annex I/non-Annex I divide of the Kyoto Protocol.

The Fate of the Kyoto Protocol

The second commitment period of the Kyoto Protocol (CP2) remains a key piece of the negotiations puzzle. For many developing countries, agreement on CP2 is required before they will support tangible work under the ADP. Neither Bonn nor Bangkok brought resolution on the question of length and targets of a second period. The terms and positions are clearer now,⁴ but the path forward is less so:

³ The informal country grouping of the major developing countries of Brazil, South Africa, India and China.

⁴ The European Union and other Annex I Parties would prefer an eight-year period to coincide with Copenhagen pledges and the 2020 timeline for an ADP-based agreement; developing countries prefer a five-year period to avoid “locking in” what they see as a low level of effort and to allow for increased ambition following the expected release of the next Intergovernmental Panel on Climate Change report.

- In Bangkok, the European Union and Australia suggested a mechanism for increasing ambition midway through the commitment period, likely in the form a **midterm review**. While many least-developed countries (LDCs) would like to see ambitious targets under CP2 from the beginning, the remaining developed countries that are willing to take on CP2 are not in a position to set these ambitious targets (especially given the absence of notable CP1 Parties like Canada, Japan and Russia) and do not want to be seen as willing to “make up the difference.” In Doha, developing countries may accept this midterm review option for fear of losing the stop-gap of a CP2 altogether if they do not.
- Given the time needed for domestic ratification to take place, most experts would argue that the time to avoid a gap between the first and second commitment periods has already passed; but in the negotiations, the expedient implementation of CP2 (for those participating Parties) is still an important piece of the **political puzzle**.⁵ It is very much connected to the ADP and LCA, particularly for those least-developed and developing countries that see this second period as the only potential bridge to future agreements in the long term—or at the very least to avoid a legal vacuum in the near term. Some countries appear to be on the fence as to whether or not they are willing to participate in CP2, including Australia, New Zealand and some economies in transition. It has been calculated that Parties currently willing to take commitments under the Kyoto Protocol amount to less than 15 per cent of the global emissions.

While there were no major breakthroughs (or breakdowns) in Bangkok, the latest round of talks made it increasingly clear that while the ADP presents a potential venue for “new” discussions on an inclusive post-2020 climate change agreement, many of the same “old” issues and roadblocks dot the road ahead. It is equally clear that, whatever the future holds, action will be driven by much more “bottom-up” and nationally appropriate frameworks and commitments than the “top-down” approach of Kyoto.

Making the Durban Platform Count: Possible Scenarios Moving Forward

Despite persistent challenges and a negotiating landscape fraught with divisions, the ADP does afford negotiators the opportunity to envision (and negotiate) a future agreement that could look very different from those of the past. Taking the text of the Durban Platform as a starting point, one could consider the following scenarios in terms of the potential form of a post-2020 agreement:

- A **legally binding protocol**, including commitments for all major emitters
- Another **legal instrument** under the convention to reflect commitments by all major emitters
- Another “**agreed outcome with legal force**”
- **No agreement** under the convention

Negotiators, policy-makers and civil society alike have been left to work through the various moving pieces in the negotiations, and determine the best path forward in light of the political dynamics that will shape future discussions under the convention. Although each of these scenarios is in no way mutually exclusive, they form a useful framework

⁵ In an effort to address this potential gap, some Parties (such as Australia) have proposed different options like “provisional application,” in order to allow time for domestic ratification, though the Alliance of Small Island States (AOSIS) strongly objects to this “softer” approach.

to explore the potential opportunities in the pursuit of an international climate change agreement by 2015, for implementation by 2020.

The sections below provide a brief overview of the parameters of each scenario, provide high-level political analysis of the feasibility of each and highlight critical challenges or opportunities for progress in reaching an inclusive outcome under the ADP.

A Legally Binding Protocol, Including Commitments for All Major Emitters

The most ambitious but least plausible outcome is a legally binding protocol (under Article 17 of the convention) with mitigation commitments by all major emitters:

- Such a protocol could be designed in a similar top-down manner to the Kyoto Protocol, including an aggregate objective, mitigation commitments, reporting deadlines with some form of international oversight and review, and the inclusion of market mechanisms.⁶
- However, a post-2020 protocol is likely to differ from Kyoto insofar as compliance mechanisms will likely be less stringent in order to gain acceptance by key Parties such as the United States, China and India.

The phrase “legally binding” means different things to different people and elements of differentiation highlighted by several developing countries as of late will play a particularly important role under a more stringent scenario.

A System More Complex than the Kyoto Era

Given the size and scope of negotiations now, it would seem extremely difficult for a full-fledged protocol to be negotiated in the next three years (2012–2015), as stipulated by the Durban mandate. These complexities include:

- The history of the United States failing to ratify Kyoto (after agreeing to a legally binding mandate), and the extreme unlikelihood that the U.S. Senate would ratify any future climate treaty will certainly give pause to any other parties negotiating for this outcome (i.e., India/China) and could scuttle such a process before it gets to completion if the United States again backs away. The timing of COP 18 so close to the U.S. presidential election also does not bode well for U.S. negotiator flexibility at COP 18, and depending on election outcomes could further hamstring their positions moving forward.
- Though the United States and China remain key players in the negotiations as the world’s largest emitters, the “coalition” formed between the European Union, LDCs and AOSIS will be important. The alignment witnessed in the final Durban negotiations could add an interesting element to negotiations under the ADP, insofar as the group may become a more concrete negotiating bloc working to bridge the gap between developed and developing countries, and championing the legally binding option under the ADP. In any case, without the United States and BASIC countries on board, a coalition’s ability to shepherd a multilateral agreement would be limited.

⁶ Convention, art. 17: “The Conference of the Parties may, at any ordinary session, adopt protocols to the Convention.

- The text of any proposed protocol shall be communicated to the Parties by the secretariat at least six months before such a session.
- The requirements for the entry into force of any protocol shall be established by that instrument.
- Only Parties to the Convention may be Parties to a protocol.
- Decisions under any protocol shall be taken only by the Parties to the protocol concerned.”

- The potential splitting of the G-77 and China could also significantly affect the direction of negotiations. In Bonn and Bangkok, China continued to back away from legally binding commitments, while India seems to be playing a more constructive role in trying to find a middle ground behind the scenes. However, outwardly, both Parties continue to include themselves in the “group of like-minded” countries that stress the “traditional” interpretations of CBDR and developing country action contingent on financing support from developed countries (BASIC allies Brazil and South Africa do not share this view). Both dynamics have led to something of a schism in the G-77, and in scenarios where China has historically influenced the position of the G-77 bloc, G-77 countries may begin speaking without the support of China. Going forward, China may be expressing its negotiating positions unilaterally.

Another Legal Instrument under the Convention to Reflect Commitments by All Major Emitters

Both the convention and ADP language allow several options, other than a new protocol, that could contain an additional regime for the establishment of mitigation commitments by all nations. The instrument would most likely take the form of an amendment of the convention under Article 15,⁷ or a new or amended annex under Article 16.⁸

- **Amendment under Article 15:** Amendments to the convention can be made, if adopted by consensus or a three-quarters majority. Unlike the negotiation of a new protocol that would follow general United Nations rules to agree by consensus, such an amendment would only need to be adopted by a qualified majority.
- **New or amended annex under Article 16:** Another option would be to amend Annex I to the convention to include all major emitters—rather than the current division among developed and developing nations—following the procedures set out in Article 16. Amending the Annexes to the convention presents the procedural benefit of not requiring ratification by national governments, and thus could be adopted by a three-quarters majority, although it certainly would require the consent of all countries to be included in the amended Annex I. An amendment to the convention’s Annex I could affect a new agreement to be negotiated, or future commitment periods of the Kyoto Protocol itself, as it refers to Annex I of the convention to define the list of parties that are expected to assume binding emissions reduction commitments.
- **Amendment to the Kyoto Protocol:** If Annex I to the convention were to be amended to reflect the reality of present emission pathways and country responsibilities, the option would exist to include, for example, all G-20 countries in Annex B to the Kyoto Protocol with binding commitments to reduce their emissions on a third commitment period. This option, although it would satisfy the requirement of having all major emitters obliged to mitigation is politically unviable at this stage, given (amongst other things) the very high unlikelihood that the United States would ever ratify Kyoto.

⁷ UNFCCC art. 15: “[...] Amendments to the Convention shall be adopted at an ordinary session of the Conference of the Parties. [...] (3) The Parties shall make every effort to reach agreement on any proposed amendment to the Convention by consensus. If all efforts at consensus have been exhausted, and no agreement reached, the amendment shall as a last resort be adopted by a three-fourths majority vote of the Parties present and voting at the meeting. [...] (6) For the purposes of this Article, “Parties present and voting” means Parties present and casting an affirmative or negative vote.”

⁸ UNFCCC, art. 16: “(1) [...] Annexes to the Convention shall [...] be restricted to lists, forms and any other material of a descriptive nature that is of a scientific, technical, procedural or administrative character. (2) Annexes to the Convention shall be proposed and adopted in accordance with the procedure set forth in Article 15, paragraphs 2, 3 and 4. (3). An annex that has been adopted in accordance with paragraph 2 above shall enter into force for all Parties to the Convention six months after the date of the communication by the Depositary to such Parties of the adoption of the annex, except for those Parties that have notified the Depositary, in writing, within that period of their non-acceptance of the annex.”

CBDR is Still a Driver, but Its Changing Nature Complicates the Picture

It seems likely that Parties' differing interpretations of the principles of CBDR and respective capabilities will continue to underpin any outcome of the process, as exhibited by recent Party submissions to the ADP.⁹ Although the interpretation and content of such a principle varies among countries, it does not preclude the assumption of stronger commitments by all major emitters. If an amendment were to be made to Annex I of the convention to include all major emitters, it would only come as a result of significant softening related to the principle on the part of countries like China and India, similar to the dynamics under Scenario I. This type of amendment would likely give rise to strong conflict among developing countries, given the changing nature of the principle of CBDR. The current emissions levels of some major developing countries have surpassed historical emissions of many other developed nations, making "historical responsibility" an increasingly difficult argument for key developing countries to invoke.¹⁰

More Space for a Monitoring, Reporting and Verification (MRV) Framework Relative to a Protocol Scenario

Under this scenario, there is significant space to consider the adoption of an MRV system, although it would likely need to be accompanied by an amendment to Annex I to include all major emitters in order to be politically viable. An amendment to the convention could add an article on a stronger MRV framework applicable to all Parties, as well as a compliance mechanism.

In the absence of an additional MRV framework, an amended Annex I to the convention would require all those additional Parties now a part of the Annex (BASIC countries, for example) to comply with the most stringent type of national communications.

Another "Agreed Outcome with Legal Force"

Perhaps the vaguest of the options included in the initial ADP platform, this scenario would not entail the adoption of a new instrument, but solely an "outcome with legal force." This could describe any possible outcome under the UNFCCC, as it is itself a legal instrument. We interpret it to entail a decision within the convention, agreed by consensus among all Parties (*agreed outcome*), that utilizes existing legal instruments or develops compliance mechanisms without resorting to a new instrument (*legal force*).

The inclusion of the option of "another agreed outcome with legal force" in the ADP text was a compromise between BASIC countries and the European Union (with the support of AOSIS and LDCs) in the final hours of negotiation in Durban. It reflected the "line in the sand" drawn by the European Union in terms of the minimal level of effort acceptable by all nations to mitigate climate change for it to be able to agree to continue on a second commitment period for the Kyoto Protocol. It also included a guarantee that the second commitment period of the Kyoto Protocol was to only be seen as a bridge to a future agreement including all major emitters. An "agreed outcome with legal force" is also much more likely to be bottom-up in nature, relative to the previous two scenarios, as discussed below.

⁹ See <http://convention.int/bodies/awg/items/6656.php> for all Party submissions to ADP to date.

¹⁰ In their recent submission under the ADP, Argentina expressed this concern explicitly. See page 2 at: http://convention.int/files/documentation/submissions_from_parties/adp/application/pdf/adp_argentina_17042012_eng.pdf

Seeking Pragmatism

This alternative potentially allows for the fastest process for adoption, as it could entail countries building on the Copenhagen Accord, the second commitment period of Kyoto, or other publicly stated targets, which, in most cases, expire in 2020. Most major emitters have adopted domestic emissions reduction targets, albeit not yet in comparable form or under one singular agreed-upon framework. Some key considerations:

- Obtaining consensus for a decision of this nature (particularly from LDCs) would likely require an increase in the ambition of major emitters' country targets from what has been presented since Copenhagen.
- Negotiating rounds such as those that take place in the World Trade Organization among major emitters could provide a possible avenue for countries to increase the ambition of pledges in exchange for bilateral benefits (such as financial support, or the inclusion of national or regional emissions trading schemes).

Given its low level of enforceability, this option would indeed allow for countries to be more ambitious in their goals for mitigation. This scenario is likely most preferred by the United States and China, who would still favour an outcome not requiring national ratification. However, because of its lack of structure and ratified legal force, it is difficult to see LDCs and AOSIS supporting this form of outcome, unless targets were not only much stronger, but also included a clear indication that the countries proposing the targets stood behind them (i.e., that the targets have meaning) and there was a clear indication that financing goals would be achieved. Similarly, there could be a similar concern from developing countries that this process would be too replicative of the LCA track of negotiations.

No Agreement under the Convention by 2015

In order to provide a complete view of possible scenarios, the potential that countries may not reach an agreed outcome under the ADP by 2015 must be considered, especially given the historically slow pace of negotiations and challenges to adhering to an ambitious timeline. No agreement under the ADP by 2015 could result in a number of different scenarios:

- It may simply result in continued negotiations under the ADP or other tracks of negotiation (as was the case at COP 16 when the LCA and KP tracks were extended beyond their anticipated timelines). Political declarations and voluntary commitments (similar to the Copenhagen Accord) may "bide time" and allow the negotiating process to continue.
- It may give rise to the adoption of agreements in other forums outside of the UNFCCC (such as the G-20 or Major Economies Forum) or within bilateral or regional schemes (agreements to participate in the European Union Emissions Trading System, for example). Such agreements could lead to policy fragmentation and potentially serious concerns about comparability of effort, the use of border carbon adjustments and an increased potential for trade disputes, as the ongoing experience with the European Union aviation levy has exemplified.
- A worst case scenario would be an impasse or complete breakdown in the UNFCCC process altogether. There is some concern that without any major breakthroughs at COP 18, the process could see complete paralysis in the coming years. The parallels to the World Trade Organization Doha Rounds are not lost on the climate change negotiators as they head into Doha themselves.

Let Not the Perfect Be the Enemy of the Good

As this analysis has shown, the negotiations can take a number of paths in the years leading to 2020, and more critically to 2015, when the Durban Platform is to produce an outcome for implementation by 2020. The ADP has added yet another layer of complexity and conflict to the negotiating process, but it can provide a practical and inclusive venue for constructive discussions on a post-2020 agreement. Though discussions over the past year have tended towards the former, it will be in Doha that a path forward for the ADP could really be forged. Though an important aspiration goal, it is unlikely that the UNFCCC can produce a legally binding outcome akin to the Kyoto Protocol. **It is clear that the top-down governance structure of Kyoto will not be effective moving forward, and a more organic bottom-up and nationally driven process is being sought, and will drive policy, moving forward. Parties must work towards an equitable outcome under the ADP that reflects not only mitigation commitments from all major emitters, but also includes a broad range of supporting mechanisms to help both developed and developing countries reach their commitments.**

The lessons of the past and the political realities of the present lead to the conclusion that an ambitious outcome in the long term can only be achieved if a number of loose ends are tied up in Doha. The fate of the LCA, the second commitment period of the Kyoto Protocol, and the setting of agendas and potential timelines under the ADP will all be considered. The negotiations are undoubtedly complex, and the future of the ADP is very much dependent on commensurate progress under the KP, LCA, and overarching issues of the level of ambition and financing commitments. **For COP 18 to be considered a success, negotiators must tangentially balance cautious progress under the ADP with outcomes under the other negotiating tracks. Rushing outcomes prematurely under the ADP could risk years of progress made elsewhere, yet leaving the ADP fully at the behest of the other tracks could lead to the full entrenchment of the same old divisions in this new venue for negotiations.**

In the words of the COP 16 president, one must not let the perfect be the enemy of the good. Those searching for perfectly designed processes and air-tight commitments are unlikely to ever find them under the UNFCCC. Parties must seek to see the bigger picture and choose the path most likely lead to a politically feasible climate change agreement that allows for an effective global response to the risks and impacts of climate change.

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