

The Durban Platform Negotiations: Goals and Options¹

Daniel Bodansky

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In December 2011, parties to the United Nations Framework Convention on Climate Change (UNFCCC) adopted the Durban Platform for Enhanced Action, which launched a new round of negotiations aimed at developing “a protocol, another legal instrument or an agreed outcome with legal force” for the post-2020 period.² The Durban Platform negotiations got underway this year and are scheduled to conclude in 2015. This *Viewpoint* analyzes the elements of the Durban Platform and the possible role that a new instrument might play.

The Durban Platform

The Durban Platform represents a finely balanced compromise among the principal negotiating groups in the UN climate-change regime:

The European Union (EU), supported by small-island and least-developed countries (LDCs), sought a fast-start mandate to negotiate a new legally-binding instrument engaging all countries, as a condition for its agreement to a second commitment period under the Kyoto Protocol.³ The Durban Platform addresses this demand by establishing a process to negotiate “a treaty, another legal instrument or an agreed outcome with legal force,” which begins this year and is scheduled to conclude in 2015.⁴ In exchange, the European Union agreed to extend

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- 1 I would like to thank the Smith School of Enterprise and Environment at the University of Oxford for very generously providing me a research home while I worked on this *Viewpoint*. Thanks also to Sue Biniarz, Elliot Diringier, Bob Hahn, and Lavanya Rajamani for their very helpful comments on this *Viewpoint*.
 - 2 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 Lavanya Rajamani, “The Durban Platform for Enhanced Action and the Future of the Climate Regime,” 61 *International and Comparative Law Quarterly* 501 (2012).
 - 3 Council of the European Union, Council Conclusions on the EU Position at the 17th Session of the Conference of the Parties of the UNFCCC, 3118th Environment Council meeting (Oct. 2011), available at http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/envir/125026.pdf (conditioning EU’s openness to a second commitment period under the Kyoto Protocol on adoption of a “roadmap” for development of a “multilateral, rules-based legal framework engaging all Parties,” and stressing that the duration of a second commitment period “should ... be compatible with the timeline for the development and entry into force of a future global and comprehensive legally-binding framework engaging all parties”).
 - 4 Durban Platform, paras. 2–4.

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the Kyoto Protocol for another five to eight years, through adoption of an amendment at this year's Conference of the Parties (COP) in Doha, Qatar, providing for a second commitment period for the period 2012–2017 or 2012–2020.⁵

The United States insisted that it would accept a mandate to negotiate a new outcome of a legal nature only if the mandate was “symmetrical” in its application to developing as well as developed countries. The Durban Platform addresses this concern by calling for “the widest possible cooperation by all countries and their participation in an effective and appropriate international response”⁶ and by providing that the outcome of the Durban Platform negotiations will be “applicable to all parties.”⁷ These provisions represent a dramatic departure from the Kyoto Protocol negotiating mandate, which had categorically excluded any new commitments for developing countries.⁸

Among the BASIC group (Brazil, South Africa, China, India), China said that it would accept legal commitments only for the post-2020 period, while India resisted the EU's calls for a new legally-binding instrument. Consistent with these views, the Durban Platform outcome will “come into effect and be implemented from 2020”⁹ and could take the form of an “agreed outcome with legal force”—a formulation whose meaning is unclear but is presumably different from a “treaty” or “another legal instrument,” since it is listed as a third alternative.¹⁰ In exchange for their agreement to a new negotiating mandate, the BASIC countries achieved their main demand, namely, acceptance by the EU of a second commitment period under the Kyoto Protocol.

Finally, given the “ambition gap” between the pledges made under the Copenhagen/Cancun framework and the aggregate emissions pathways necessary to hold global warming below 2°C,¹¹ the small-island and least-developed countries insisted that the Durban Platform launch a work plan to enhance the level of ambition of countries' mitigation efforts, in order ensure “the highest possible mitigation effort by all Parties.”¹² Although the new instrument negotiated under the Durban Platform is to apply from 2020 onward, the paragraphs of the Durban Platform decision regarding the ambition gap are silent about the time period to which they apply and arguably address the period prior to 2020, since that is the time period covered by the Copenhagen/Cancun pledges.

The Durban Platform is significant not only for what it says, but for what it does not say. For example, it makes no reference to the 2007 Bali Action Plan,¹³ which had divided the negotiations into two tracks, one for

5 Outcome of the Work of the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol, KP Decision 1/CMP.7, Dec. 11, 2011, [UN Doc. FCCC/KP/CMP/2011/10/Add.1](#).

6 Durban Platform, preamble para. 1.

7 Id. para. 2. As discussed below, the negotiations will also take place under a new mandate, the Durban Platform, rather than under the Bali Action Plan, which some developing countries insist established a “firewall” between mandatory commitments by developed countries and voluntary actions by developing countries. Rajamani, note 1, at 505.

8 Berlin Mandate, UNFCCC Decision 1/CP.1, April 7, 1995, [UN Doc. FCCC/CP/1995/7/Add.1](#).

9 Durban Platform, para. 4.

10 Id. para. 2; see Rajamani, *supra* note 1, at 506–07.

11 UNEP, [The Emissions Gap Report: Are the Copenhagen Accord Pledges Sufficient to Limit Global Warming to 2° C or 1.5° C?](#) (Nov. 2010); UNEP, [Bridging the Emissions Gap](#) (Nov. 2011).

12 Durban Platform, para. 7.

13 Bali Action Plan, UNFCCC Decision 1/CP.13, Dec. 15, 2007, [UN Doc. FCCC/CP/2007/6/Add.1](#).

developed and the other for developing countries, suggesting that the Durban Platform negotiations represent a fresh start rather than a continuation of the Bali Action Plan process. To drive home this point, the Durban decision established a new Ad Hoc Working Group on the Durban Platform for Enhanced Action (ADP) and provides that the existing Ad Hoc Working Group on Long-Term Cooperative Action (AWG-LCA), which had been established in Bali at COP-13, will terminate at the end of 2012.¹⁴

Similarly, the Durban Platform makes no reference to the principle of equity or the principle of common but differentiated responsibilities and respective capabilities (CBDRRC), and it does not repeat the Convention's language that developed countries should "take the lead" in combating climate change.¹⁵ Indeed, the Durban Platform contains no reference to developing, developed, Annex I or non-Annex I parties,¹⁶ the categories that have dominated the climate-change regime thus far. Although the principles of equity and CBDRRC are implicitly incorporated by the statement that the Durban Platform outcome will be "under the ... Convention,"¹⁷ the lack of any explicit reference to these principles represents a significant shift in how the Durban Platform decision frames the new round of negotiations.¹⁸

More generally, although the Durban Platform addresses process issues such as timing, it is almost completely silent about the substantive content of what is to be negotiated. In effect, it is an empty vessel that can be filled with whatever content the parties choose. The only signal that the Durban Platform provides about substantive outcomes is a laundry list of issues that includes "mitigation, adaptation, finance, technology development and transfer, transparency of action, and support and capacity-building."¹⁹ This list is pretty thin gruel, however, since it provides no guidance as to how any of these issues should be addressed or even that they ought to be included in the final outcome. As a result, everything is, in effect, on the table. Key substantive issues include:

- *Regulatory approach*—Will the new regime be based on absolute emissions reduction targets like the Kyoto Protocol, or will it take a different approach to emissions reductions?
- *Level of ambition*—What level of emissions reductions should the Durban Platform negotiations seek to achieve? The G-8 countries have agreed to a global goal of reducing emissions by 50 percent by 2050,²⁰ but parties to the UNFCCC have been unable to agree on a "shared vision" about either a long-term emissions target or a date when global emissions should peak, and the Durban Platform is silent on both of these issues.²¹

14 Durban Platform, para. 1.

15 [UN Framework Convention on Climate Change](#), art. 3.1, May 9, 1992, 1771 UNTS 107.

16 Rajamani notes that the Durban Platform is perhaps the first COP decision in the history of the climate-change regime not to refer to these categories. Rajamani, *supra* note 1, at 509.

17 Durban Platform, para. 2.

18 Rajamani, *supra* note 1, at 502.

19 Durban Platform, para. 5.

20 "[G8 Leaders Declaration: Responsible Leadership for a Sustainable Future](#)," para. 65, July 8, 2009.

21 Interestingly, the decision does not include "shared vision" among the elements to be included in the ADP work plan.

- *Legal form*—Could the requirement that the Durban Platform outcome have “legal force” be satisfied by commitments that are legally binding under a country’s domestic law, rather than under international law?²² Would this be consistent with the language in the preamble of the Durban Platform about the need to strengthen “the multilateral, rules-based regime under the Convention”?²³ Would this be one way to ensure that the outcome is “applicable to all Parties?”
- *Process*—Will countries’ commitments be defined through international agreement as in Kyoto or through unilateral national decision-making as in Copenhagen?²⁴
- *Differentiation*—In what manner and to what extent will the Durban Platform outcome differentiate among countries? Will commitments be differentiated in terms of their type, their timing, their stringency, or in some other manner? Might differentiation of other provisions be based on “type of commitment” undertaken by a country rather than on “type of party”?
- *Relation to Kyoto Protocol*—Will the Kyoto Protocol be subsumed by the new instrument and terminate, or will it continue to exist in parallel with the new instrument, through adoption of a third commitment period that applies to the post-2020 period?

What Should Be the Goal of the Durban Platform Negotiations?

The ultimate objective of the UNFCCC is to stabilize atmospheric concentrations of greenhouse gases (GHGs) at levels that would prevent “dangerous anthropogenic interference with the climate system.”²⁵ So one obvious objective of the Durban Platform outcome, as an instrument to be negotiated “under the Convention,” is what might be called “climate effectiveness.”

In theory, atmospheric concentrations of GHGs could be stabilized through “climate engineering,”²⁶ but in practice, the UNFCCC regime has focused on achieving climate effectiveness through reductions in net greenhouse-gas emissions. The exact level of reductions necessary in any given period (say, from 2020–2030) to meet the Convention’s objective is a function of three factors: first, the level of temperature increase deemed to be safe; second, the concentration levels necessary to keep global warming within that safe level; and third, the choice of an emissions pathway to achieve the desired concentration level.²⁷ In Copenhagen and Cancun, states specified the first factor, by agreeing to limit global warming to no more than 2°C above pre-industrial levels,²⁸ but the other two factors remain open questions. As a result, we cannot define precisely the level of emission

²² 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).

²³ Durban Platform, preamble para. 3.

²⁴ Daniel Bodansky, “A Tale of Two Architectures,” 43 *Arizona State Law Journal* 697 (2011).

²⁵ UNFCCC, art. 2.

²⁶ Daniel Bodansky, “[Governing Climate Engineering: Scenarios for Analysis](#),” Harvard Project on Climate Agreements, Discussion Paper 11-47 (Sept. 2011).

²⁷ UNFCCC art. 2.

²⁸ Copenhagen Accord, para. 1, UNFCCC Decision 2/CP.15, Dec. 18, 2009, [UN Doc. FCCC/CP/2009/11/Add.1](#); Cancun 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](#).

reductions over any particular time period necessary to achieve climate effectiveness. Moreover, since climate change is generally a “stock” rather than a “flow” problem, which depends on cumulative emissions rather than on the level of emissions at any particular point in time, the choice of emissions pathways is not primarily an issue of climate effectiveness, but depends on other factors such as economic costs.²⁹

What we can say, as a first approximation, is that climate effectiveness can be measured by the magnitude of global emissions reductions achieved over time and that the greater the cumulative emissions reductions, the greater the climate effectiveness. Of course, beyond a certain point, greater emissions reductions might not produce any climate benefit. But, in practice, current mitigation efforts are not close to reaching that level. Quite the reverse: the emission reduction pledges currently on the table fall well short of putting us on a pathway that would limit global warming to no more than 2°C.³⁰

What are the implications of a climate-effectiveness goal for the design of the Durban Platform instrument? Many environmentalists implicitly assume that climate effectiveness depends on the stringency of an agreement’s emissions reduction commitments: the more stringent the commitments, the better. But, as Scott Barrett persuasively argues, effectiveness is a function not only of the stringency of commitments, but also of the levels of participation and compliance.³¹ Weakness along any of these three dimensions will undermine an agreement’s effectiveness, regardless of how well it does on the other two. And because stringency, participation, and compliance are interlinked, we must consider how varying one factor affects the others. More stringent requirements promote climate effectiveness, all other things being equal. But they do not necessarily boost climate effectiveness if they result in lower participation and/or compliance. Conversely, high participation and compliance are desirable in and of themselves, but they do not make an agreement more effective if they are bought by watering down an agreement’s substantive requirements. Achieving the greatest emissions reductions requires solving an immensely complex equation involving all three factors.

Moreover, since climate change depends on cumulative emissions rather than on emissions at any particular point in time, we need to consider stringency and participation as dynamic variables. Less stringent commitments or participation now might produce greater climate effectiveness in the long run, if they are part of an evolutionary framework that leads to greater action later.³²

Thus far we have been focusing on climate effectiveness as the goal of the Durban Platform negotiations. But this is not the only possible objective. Two other oft-mentioned goals are benefit-cost optimization and climate justice.

²⁹ The need to consider other factors in choosing an emissions pathway is recognized in Article 2 of the UNFCCC, which provides that stabilization of GHG concentrations “should be achieved within a time frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure food production is not threatened and to enable economic development to proceed in a sustainable manner.”

³⁰ [UNEP Emissions Gap Report](#), *supra* note 11.

³¹ Scott Barrett, *Environment and Statecraft: The Strategy of Environmental Treaty-Making* (Oxford Univ. Press 2003).

³² Daniel Bodansky and Elliot Diringer, [The Evolution of Multilateral Regimes: Implications for Climate Change](#) (Pew Center on Global Climate Change 2010).

Benefit-cost optimization requires us to consider not just the climate benefits of emissions reductions but also their costs, including, in particular, their economic costs.³³ From this standpoint, the goal of climate policy is to maximize net benefits over time, so reducing emissions makes sense only insofar as the benefits of doing so outweigh the costs. Calculating costs and benefits is extremely difficult, of course, particularly given that many of the benefits of reducing emissions involve non-market goods that are difficult to value and will be realized far in the future.³⁴ Nevertheless, some rough weighing of costs and benefits, even if not explicit, is the basis of most decision-making.

To the extent that benefit-cost analysis figures in determining what level of climate change is “dangerous,” then benefit-cost analysis and climate effectiveness merge together. But, in practice, the choice of a 2°C temperature goal had a primarily environmental rather than economic rationale.³⁵ If the costs of achieving the 2°C goal exceed the climate benefits, then the goals of benefit-cost optimization and climate effectiveness would diverge.

The Durban Platform outcome might also aim not simply to reduce greenhouse-gas emissions, but to achieve climate justice. In contrast to climate effectiveness, for which a relatively straightforward and well-accepted metric exists, there is little consensus about what climate justice entails. Some accounts of climate justice focus on historical responsibility, others on duties to future generations, others on a fair division of burdens based on current capabilities, and others on an egalitarian principle that posits an equal right of individuals to the “atmospheric space.”³⁶

What is the relationship of climate effectiveness and climate justice? To some degree, the two are intertwined, since considerations of climate justice may be important factors in determining what level of climate change (1.5°C? 2°C?) is deemed acceptable versus unacceptable.³⁷ For example, we may prefer a 1.5°C rather than a 2°C limit because of concern about the injustice of inflicting catastrophic damage on small-island and least-developed countries.

The UN climate-change regime also makes climate justice an important factor in determining how the burdens of achieving climate effectiveness are distributed by emphasizing the principles of equity and CBDRRC. Here, climate justice does not constitute an end or goal in itself. Rather, it is relevant in determining the means by which the end of climate effectiveness is achieved.

Finally, some conceptions of climate justice may, in practice, be in tension or even conflict with the goal of climate effectiveness, if these conceptions are not accepted by states and hence discourage participation and/or compliance. For example, a proposal by experts from the BASIC group entitled, “Equitable Access to

33 Kenneth J. Arrow et al., [“Is There a Role for Benefit-Cost Analysis in Environmental, Health and Safety Regulation?”](#) 272 *Science* 221 (1996).

34 See generally Pew Center on Global Climate Change, [Workshop Proceedings: Assessing the Benefits of Avoided Climate Change: Cost-Benefit Analysis and Beyond](#) (2010).

35 Carlo C. Jaeger and Julia Jaeger, [“Three Views of Two Degrees,”](#) 11(1) *Regional Environmental Change* S15-S26 (March 2011), DOI 10.1007/s10113-010-0190-9.

36 Compare Steve Vanderheiden, *Atmospheric Justice: A Political Theory of Climate Change* (Oxford Univ. Press 2009) with Eric A. Posner and David Weisbach, *Climate Change Justice* (Princeton Univ. Press 2010).

37 I am indebted to Stephen Gardiner for this point.

Sustainable Development,”³⁸ would establish a global carbon budget for the period from 1850 onwards and then allocate that budget on the basis of equal per capita emissions for those both living and dead. Since, according to this proposal, industrialized countries have already unjustly occupied more than four times their fair share of the “atmospheric space,” they should have negative net emissions in the future. Whatever its merits from a philosophical standpoint, this conception of climate justice stands no chance, politically, of being accepted by industrialized countries, so it would not contribute to climate effectiveness. To the extent that other conceptions of equity—for example, based on historical entitlements—are equally unacceptable to developing countries, then they suffer from the same liability. If the overriding goal of the UN climate-change regime is to achieve climate effectiveness, then the Durban Platform outcome must reflect climate justice in a manner that is acceptable to the major emitters, both developed and developing, so as not to discourage participation and compliance.

Three Models of International Law

In general, international law can perform three sorts of functions: a contractual function, a prescriptive function, and a facilitative function. Which of these roles can international law play in addressing the climate change problem? To what degree can it promote the goals of climate effectiveness, benefit-cost optimization, and/or climate justice?

Contractual model

Ordinarily, international negotiations are predicated on a contractual model. The rationale of contracts is that they leave both sides better off. They produce what economists refer to as a “Pareto improvement.” States engage in treaty negotiations because they think they will be better off with a treaty than without one. If a treaty will not improve a country’s position, then it has no incentive to participate.

Often, climate-change agreements like the Kyoto Protocol are portrayed as imposing burdens. But if climate-change agreements imposed only costs, then there would be no reason to negotiate them. From a contractual perspective, the premise of the Durban Platform negotiations is that there are potential outcomes that would yield a net global benefit: that is, outcomes where the costs of reducing emissions are outweighed by the benefits of avoiding climate change.

In a contractual model, international climate negotiations are a means to promote benefit-cost effectiveness and should focus on two questions: First, what level of emissions reductions over time produce the greatest global benefit? The answer to that question determines the overall level of emissions reductions that the agreement should seek.³⁹ Second, how should that global net benefit be divided among countries? In order to leave every state better off (and hence satisfy the contractual model), the agreement must allocate the burden of reducing emissions in such a way that the cost for each country of reducing emissions is less than climate

38 BASIC Experts, “Equitable Access to Sustainable Development: Contribution to the Body of Scientific Knowledge” (2011), available at http://www.erc.uct.ac.za/Basic_Experts_Paper.pdf.

39 Since environmental costs and benefits generally depend on cumulative emissions over time, rather than emissions at any particular point in time, an emissions budget could be calculated for a very long period of time, such as a century. This would allow the market to determine the emissions pathway that minimizes economic costs. In practice, however, a very long-term target would likely lack credibility, so global emissions targets need to be calculated for shorter periods of time.

benefit it receives from the agreement. But, beyond this minimum condition, the contractual model is silent about distributional issues.

Often, who gets the most out of an agreement depends on the relative power of the players: the countries that are most powerful are able to capture the biggest share of the gains. The UNFCCC, in contrast, provides that the climate-change regime should be guided by the principles of equity and CBDRRC.⁴⁰ This suggests that states with greater responsibilities and capabilities should receive less of the net benefit of the agreement, while those with lesser responsibilities and capabilities should receive more.

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 their 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.⁴¹

In many contexts, the contractual model describes how international law works. The contractual model is the basis, for example, of arms control agreements and the international trade regime. In these issue areas, negotiations are hard fought, since each state wants to capture the biggest share possible of the overall benefit provided by the agreement. But ultimately agreement is possible because outcomes exist that each participant thinks will leave them better off. The set of these outcomes defines what negotiations theorists refer to as the “contract zone.”

The negotiation of the Kyoto Protocol Annex B targets were arguably predicated on the contractual model of international law, and many assume that the Durban Platform negotiations should follow this model as well. But the contractual model faces several difficulties in the climate-change context.

First, even when there is, in principle, an outcome that would leave all sides better off, the parties to a negotiation may not be able to achieve it. If the distribution of benefits is too unequal, the parties that are short-changed may refuse to agree, preferring no agreement to an inequitable one.⁴² Or negotiations may involve so many countries or so many issues that they become unwieldy. Or the rules of procedure could give a small number of countries the ability to block an agreement from which the vast majority would benefit, by requiring that decisions be made by consensus. All of these dynamics are, to some degree, arguably present in the Durban Platform negotiations.

But the contractual model faces a more fundamental problem in connection with climate change: many of the big players such as the United States and China, whose participation is critical, do not seem to believe that they would be better off through a reciprocal exchange of commitments. This is very different from the situation in the 1990s when the Kyoto Protocol was negotiated.⁴³ At that time, Annex I countries wished to reach an agreement, so they engaged in serious substantive negotiations, first about the Kyoto Protocol and then about

⁴⁰ UNFCCC, art. 3.

⁴¹ Daniel Bodansky, [“Climate Commitments: Assessing the Options,”](#) in *Beyond Kyoto: Advancing the International Effort Against Climate Change* (Pew Center on Global Climate Change 2004).

⁴² Steven J. Brams and Alan D. Taylor, *Fair Division: From Cake-Cutting to Dispute Resolution* (Cambridge Univ. Press 1996).

⁴³ The Kyoto Protocol negotiations began with the adoption of the 1995 Berlin Mandate and ended with the adoption of the 2001 Marrakesh Accords, which provided the rulebook for how the Protocol would work.

the Marrakesh Accords. But, in the end, few countries have proved willing to participate in the Kyoto Protocol's regulatory approach, some of these countries are now dropping out,⁴⁴ and the remainder account for a small and shrinking share of global greenhouse-gas emissions.⁴⁵ Today, the European Union is the only major economy that clearly accepts the basic premise of the contractual model. The United States, China, and the other major economies all seem unwilling to do more to reduce their emissions in exchange for action by others. That is why, despite frequent meetings, the negotiations have made so little progress over the last decade, with states preferring to restate their positions over and over again, rather than to engage in genuine negotiations about substance.

Why is there relatively little acceptance of the contractual model in the climate-change context? One possible explanation is that states do not take the climate-change problem seriously. This may be true of some countries, or of groups within some countries, but probably not many. The more basic problem is that, in deciding whether to commit, states do not simply weigh economic and environmental costs and benefits; they also factor in the costs to their national autonomy, which are potentially immense. Climate change implicates virtually every area of domestic policy, including industrial, agricultural, energy, transportation, and land-use policy. As a result, the climate-change regime raises much greater domestic sensitivities than other international regimes, which have a more limited scope.

How do these autonomy costs compare to the environmental benefits of a climate-change agreement? For least developed and small island states, the environmental benefits of an agreement clearly outweigh the costs to their national autonomy, since these countries will be most heavily affected by climate change. But for the United States, China, and the other major economies, the net benefits of an agreement are highly uncertain (owing to uncertainties both about the economics costs of reducing emissions and the environmental benefits), while the costs to future autonomy are real and immediate. For these countries, the main obstacle to agreement is not concern about reciprocity and compliance. Nor is it simply a matter of the wrong negotiating forum or the wrong rules of procedure. All of these factors, of course, contribute to making the climate change negotiations so difficult. But the overriding obstacle to agreement is that many of the key players are more concerned about binding themselves than they are desirous of binding others. So they are not willing to engage in a serious negotiation about a reciprocal exchange of commitments. Unless they have a change of heart, the contractual approach will fail the test of participation, as Kyoto has.

Prescriptive model

Some discussions of climate change assume that international law can prescribe what countries should do, though usually they do not say so explicitly. Consider, for example, the BASIC expert group's climate-justice proposal, described above, which would allocate the total global budget of greenhouse-gas emissions since the Industrial Revolution on an equal per capita basis.⁴⁶ In contrast to the contractual model, where the aim of

⁴⁴ Japan and Russia have announced that they will not participate in a second commitment period under the Kyoto Protocol, and Canada is withdrawing from the Protocol altogether.

⁴⁵ The countries likely to participate in a Kyoto Protocol second commitment period accounted for about 5.2 GtCO₂-eq emissions in 2009, or only a little more than 10 percent of global emissions of 49.5 GtCO₂-eq. UNFCCC, [National Greenhouse Gas Inventory Data for the Period 1990-2009](#), Nov. 16, 2011, UN Doc. FCCC/SBI/2009/9 (inventory of GHG emissions of EU, Australia, New Zealand, Norway, Switzerland, and Ukraine); UNEP, [Bridging the Emissions Gap](#) 15 (Nov. 2011) (estimate of global GHG emissions).

⁴⁶ [BASIC Experts Proposal](#), *supra* note 38.

an agreement is to leave all sides better off, an agreement reflecting the BASIC experts' conception of climate justice would entail a massive redistribution of wealth from developed to developing countries to correct for putative historical injustices, leaving developing countries better off and developed countries worse off. Since developed states are very unlikely to agree to such a regime, this proposal is implicitly premised on a prescriptive model of international law, which can impose a result on unwilling states.

In a prescriptive model, the role of international law is not to assure compliance with privately-negotiated rules, which all parties perceive as promoting their interests, but rather to require the "correct" result—as a matter, say, of climate effectiveness or climate justice. If we believe that one side is right and the other wrong – for example, as a matter of justice—then the law is justified in proclaiming winners and losers rather than seeking a compromise that leaves all sides better off.

The prescriptive model is the basis of domestic legal systems, in which legal institutions can create winners and losers—legislatures by prescribing new legal rules and courts by applying them to particular disputes. Internationally, a prescriptive model would require analogous institutions that could impose legal rules on non-consenting parties—for example, through COP decisions adopted without consensus or through judicial opinions.

Although few explicitly acknowledge that they assume a prescriptive model of international law, such a model undergirds proposals like that of the BASIC experts regarding equitable sharing of the atmospheric space. It also provides the basis for the proposal by Palau that the UN General Assembly request an advisory opinion from the International Court of Justice (ICJ) concerning states' obligations to reduce their greenhouse-gas emissions.⁴⁷ Because requests for advisory opinions by the General Assembly do not require consensus, they provide a mechanism that enables international rules to be defined for states without requiring negotiations. Of course, in theory, the ICJ is required to base its advisory opinions on existing legal rules. But because the rules in question concerning transboundary pollution are extremely general,⁴⁸ their application to the problem of climate change will inevitably have a prescriptive element.⁴⁹

How well does the prescriptive model do with respect to climate effectiveness? Assuming that international institutions existed that could prescribe norms, they could potentially adopt stringent norms. And since the norms would apply to all states, whether they agree or not, the prescriptive model need not address the problem of participation. Instead, the prescriptive model founders on the problem of compliance. Since enforcement mechanisms are conspicuously absent in international law, international law has no way of inducing states to comply with its prescriptions. For example, even if the ICJ were to issue an advisory opinion finding that international law requires states to reduce their emissions, the opinion is unlikely to change the behavior of key countries such as the United States and China. The assumption that the Durban Platform outcome could tell a country such as the United States or China what to do seems similarly unrealistic.

47 [“Press Conference on Request for International Court of Justice Advisory Opinion on Climate Change,”](#) UN Press Release, Feb. 3, 2012.

48 One relevant rule, for example, requires states to use due diligence to prevent transboundary pollution. See Günther Handl, “Transboundary Impacts,” in Daniel Bodansky, Jutta Brunnée, and Ellen Hey, *Oxford Handbook of International Environmental Law* 531 (Oxford Univ. Press 2007). But the ICJ has a huge amount of leeway in defining how this rule applies to climate change.

49 Armin van Bogdandy and Ingo Venzke, [“Beyond Dispute: International Judicial Institutions as Lawmakers,”](#) 12 *German Law Journal* 979 (2011).

Facilitative model

Since the prescriptive and contractual models are unlikely to deliver compliance and participation, this suggests that the Durban Platform should instead seek an outcome that reflects a different model of international law, which focuses on its catalytic and facilitative role. A considerable amount is already being done “on the ground” to address climate change at the national and sub-national levels and by private actors.⁵⁰ The question for the Durban Platform negotiators is how the international climate-change regime can best encourage, reinforce, and facilitate these activities that are bubbling from the bottom up.⁵¹

International law can serve a number of catalytic and facilitative functions.⁵² Meetings like the 2009 Copenhagen COP focus attention on the climate-change issue, help raise public concern, and prod states to do more. Although the national pledges made in the run-up to Copenhagen fell short of putting the world on a pathway likely to meet the 2°C temperature limit, they represented a significant 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.

The Copenhagen Accord and Cancun Agreements reflect a facilitative model by seeking to encourage national pledges, establishing reporting and assessment mechanisms to promote transparency, and creating the Green Climate Fund to assist developing countries with mitigation and adaptation. The Durban Platform outcome could memorialize these facilitative arrangements in treaty form. Or it could go beyond them—for example, by making the national pledges under Copenhagen legally-binding.

Since states may want to go at different speeds, the Durban Platform outcome also could create a hybrid of the contractual and facilitative models, involving a core agreement and a number of optional annexes among which countries could pick and choose. For example, one annex could consist of Kyoto-style emissions targets and another could take the form of a schedule listing national laws that countries commit to implement. The result would be a “house with many rooms,” in which all countries could find a place.

By giving countries flexibility, this type of approach would likely score well in terms of participation and compliance, but less well in terms of stringency. The hope would be that, over time, participation and compliance would provide dynamic feedbacks, leading countries to ratchet up their level of ambition as they became more comfortable with the system. But whether this would happen at all or would happen quickly enough to prevent dangerous climate change, is very uncertain. It is doubtful that a facilitative approach would lead to emission reductions sufficient to limit global warming to less than 2°C. Nevertheless, a facilitative outcome could still be of great value, if it limited global warming to less than would occur in the absence of an agreement—to 3–4°C, say, rather than the 5–7°C that could result if states continue on their business-as-usual trajectories. And it may well be of greater value than an agreement based on a contractual model that failed to optimize among stringency, participation, and compliance, considered dynamically over time.

50 Miranda Schreurs, [“From the Bottom Up: Local and Subnational Climate Change Politics,”](#) 17 *Journal of Environment and Development* 343 (2008).

51 On bottom-up approaches generally, see David G. Victor, *Global Warming Gridlock: Creating More Effective Strategies for Protecting the Planet* (Cambridge Univ. Press 2011).

52 Peter M. Haas, Robert O. Keohane and Marc Levy, *Institutions for the Earth: Sources of Effective International Environmental Protection* (MIT Press 1993).

CONCLUSION

The Durban Platform negotiations present a set of alternatives that are sub-optimal from a climate-effectiveness standpoint. On the one hand, we can pursue a comparatively unambitious outcome, which is likely achievable and would represent an improvement in climate effectiveness compared to business-as-usual, but which is unlikely to prevent dangerous climate change. On the other hand, we can go for broke, seeking a more ambitious agreement that, if fully implemented, would prevent dangerous climate change, but that is unlikely to be achieved and, in any event, would face serious problems of participation and compliance.

Why not hedge our bets by pursuing both options simultaneously? We could pursue the facilitative approach by continuing to elaborate and implement the Copenhagen Accord and Cancun Agreements, while at the same time seeking to negotiate a more ambitious outcome in the Durban Platform process. The danger is that, given limited political resources, one process will sap the energy behind the other.⁵³

All of the options thus pose risks, albeit for different reasons. The choice among them requires a difficult political calculation involving many imponderables. Until there is agreement about which option to pursue, the Durban Platform process will continue the pattern of the last decade, in which states are engaged, not in a negotiation of the text of an agreement, but rather a meta-negotiation about what to negotiate.

⁵³ Arguably, this is what happened following the adoption of the UNFCCC. The UNFCCC established a system of pledge and review. But this system was never given a chance to flourish, because almost from the moment the Convention entered into force, states shifted their attention to the Kyoto Protocol negotiations.

AUTHOR AFFILIATION

Daniel Bodansky, *Sandra Day O'Connor College of Law, Arizona State University*

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The goal of the Harvard Project on Climate Agreements is to help identify and advance scientifically sound, economically rational, and politically pragmatic public policy options for addressing global climate change. Drawing upon leading thinkers in Australia, China, Europe, India, Japan, and the United States, the Project conducts research on policy architecture, key design elements, and institutional dimensions of domestic climate policy and a post-2012 international climate policy regime. The Project is directed by Robert N. Stavins, Albert Pratt Professor of Business and Government at the Harvard Kennedy School.

Project Email: climate@harvard.edu

Project Website: <http://belfercenter.ksg.harvard.edu/climate>