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The Durban Package and the Goals of Pacific Small Island Developing States

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Introduction

Early on Sunday morning, December 11, 2011, the seventeenth session of the Conference of the Parties to the United Nations Framework Convention on Climate Change ("UNFCCC") yielded the "Durban Package." At first glance, the Durban Package appears to fulfill several

objectives of countries that are among the most vulnerable to climate change: the Pacific Island Developing States ("PSIDS") and the larger Alliance of Small Island States ("AOSIS"). They hoped that the negotiations would produce more ambitious greenhouse gas emission reduction pledges by developed countries, a second commitment period under the Kyoto Protocol, and a mandate for a new legally-binding agreement. They also wanted the institutions mandated by the 2010 Cancun Agreements to become fully operational and to complete the terms of reference for the review of the long-term global goal for emission reductions.

In fact, the Durban Package comprises decisions under both the UNFCCC and the Kyoto Protocol that accomplish many of the PSIDS and AOSIS goals for adaptation, finance, technology transfer, and capacity building. On mitigation, however, it is clear that the Durban Package falls well short of what these countries wanted—and need to avoid catastrophic climate change impacts. Action taken on the Kyoto Protocol's second commitment period is no more than a proposal to formalize pledges made last year in Cancun by developed country Kyoto Protocol parties and does not include major emitting countries such as the United States, Canada, Russia, and Japan. UNFCCC parties agreed to establish the Ad Hoc Working Group on the Durban Platform for Enhanced Action ("AWG-DPEA") to adopt, by 2015, a new "protocol, legal instrument or agreed outcome with legal force."^[1] While the new AWG-DPEA has a mandate to develop proposals on the full range of climate change issues, its focus will clearly be on raising the "level of ambition" with respect to mitigation for all parties. It is doubtful, however, that the AWG-DPEA will avoid the same political stalemates that have prevented increased ambition to date.

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Mitigation

A. Level of Ambition

The views of the parties on emission reductions fell along predictable lines. AOSIS countries wanted to conclude negotiations for a new treaty with substantially greater emissions reductions by the end of 2012. The United States, however, argued that it is premature to ask countries to increase their emissions reduction goals when they just agreed to pledges two years ago in Copenhagen. The United States also insisted on “legal symmetry,” that is, comparable commitments from all major economies. Meanwhile, major emitting developing countries such as Brazil, South Africa, India, and China refused to commit to any binding obligations.

The United States was not alone in pressing developing countries to increase their ambition through legally binding commitments. Switzerland, the European Union, and others called for parties to rethink the meaning of common but differentiated responsibilities (“CBDR”), the UNFCCC’s cornerstone principle. In the climate change regime, CBDR means that developed countries bear a disproportionate responsibility to mitigate climate change given their disproportionate historic emissions. Because China is now the world’s largest emitter of greenhouse gases and developing country emissions of carbon dioxide exceed those of developed countries,^[2] these countries argued that CBDR must “evolve” to take into account these contemporary circumstances. As Switzerland declared during the negotiations, “CBDR is not static, it is dynamic.” The G77-China, the coalition of 132 developing countries, responded by referring to a report showing that developing countries have pledged under the Cancun Agreements to mitigate more greenhouse gas emissions than developed countries.^[3]

As a result, the Durban Package neither increases ambition nor adopts formal amendments to the Kyoto Protocol. Instead, it tentatively establishes a second five-year commitment period running from January 1, 2013, to December 31, 2017.^[4] Ensuring that the second commitment period will end in 2017 rather than 2020 was a major victory for the PSIDS, because they did not want to lock in low ambition for an eight-year period, as favored by the European Union (“EU”).

The second commitment period is tentative because the parties must complete many steps to make it a reality. The Durban Package merely “takes note” of the proposed amendments to Annex B of the Kyoto Protocol, which restate the pledges these countries have already anchored in the Cancun Agreements. In addition, the Durban Package “takes note” of the “intention” of Annex I (developed country) parties to convert their pledges into quantified emission limitation and reduction objectives (“QELROs”); this step is needed to make pledges comparable as some countries have chosen different base years from which to measure reductions or used different assumptions for calculating emission reductions. Once this is done, the Kyoto Protocol parties will review the QELROs and decide whether to adopt them as amendments. The second commitment period will enter into force when three-fourths of the Kyoto Protocol parties ratify the amendments. Since it will be impossible to enter the amendments into force before the first commitment period expires on December 21, 2012, the parties will also need to agree to provisionally apply the amendments pending entry into force or create a “gentlemen’s agreement” to do so.

B. Measurement, Reporting, and Verification

The UNFCCC parties made progress on measurement, reporting, and verification of their

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mitigation commitments. Beginning in 2014, each Annex I party must submit a biennial report that provides information on its mitigation actions and progress towards meeting its targets.^[5] Developing countries, known as non-Annex I parties, will be expected to complete biennial update reports on greenhouse gas emissions and control measures consistent with their capabilities and level of financial support received for reporting, by December 2014, although Least Developed States ("LDCs") and Small Island Developing States may submit reports at their discretion.^[6] The parties also adopted procedures for verification, called International Assessment and Review ("IAR") for Annex I parties^[7] and International Consultation and Analysis ("ICA") for non-Annex I parties.^[8] Generally speaking, both IAR and ICA consist of a review of information about implementation of a country's pledge. Parties will be invited to pose questions to a party, and that party may respond orally to those questions.

Adaptation, Technology Transfer, and Capacity-Building

The UNFCCC parties further developed institutions and processes for adaptation, technology transfer, and capacity-building. They determined the Adaptation Committee's composition and charged the committee with compiling and sharing information, knowledge, and expertise concerning adaptation.^[9] They adopted guidelines for LDCs to prepare national adaptation plans.^[10] They also took further steps to launch the Climate Technology Center and Network^[11] and established a Durban Forum to share experiences, ideas, and best practices concerning capacity-building.^[12]

Finance

The UNFCCC parties took several steps to channel funding to developing countries for adaptation and mitigation. Perhaps most significantly, they approved the governing instrument for the Green Climate Fund ("GCF"),^[13] which will provide a significant portion of the \$100 billion per year in long-term adaptation and mitigation finance that developed countries have pledged to mobilize by 2020. Despite a full year of negotiating the GCF's governing instrument, delegates continued to debate whether the Global Environment Facility ("GEF") should be the secretariat for the GCF. Developing countries prevailed and obtained an independent secretariat that answers to the GCF's Board, which itself will be accountable to the Conference of the Parties ("COP"). The parties also debated at length where to locate an interim secretariat until a host country could be found. Developing countries, mistrustful of the GEF, wanted the interim secretariat placed anywhere but there. Others, particularly the United States, viewed the GEF and other institutions with significant financial expertise as best suited to act as interim secretariat. In the end, the parties reached an awkward compromise—the GEF and an autonomous section of the UNFCCC secretariat will jointly provide interim secretariat services.

The parties also established a new Standing Committee to make recommendations to coordinate the proliferating sources of climate change financing under the UNFCCC and the Kyoto Protocol, including the GCF, the Adaptation Fund, and the Least Developed Countries Fund.^[14] The Standing Committee will also provide advice on monitoring, reporting, and verification of support provided to developing countries. The parties will also develop a work program on long-term finance to help scale up the mobilization of climate finance.^[15]

Land Use, Land-Use Change, and Forestry

The Durban Package reflects a fundamental change in reporting and accounting for Land

Use, Land-Use Change, and Forestry ("LULUCF") for Kyoto Protocol parties.[16] Perhaps most importantly, this decision requires developed country Kyoto Protocol parties to account for emissions and removals of greenhouse gases from forest management even though such accounting is voluntary under Kyoto Protocol Article 3.4. However, the parties adopted rules to account for emissions and removals from forest management that Tuvalu and others consider a "loophole." Under these rules, emissions are calculated relative to a reference level based on a country's projection of its anticipated emissions and removals. If actual emissions are below this figure, then the party will have net removals. Only if emissions exceed this reference level will a party incur emissions. Based on this methodology, a party could have substantial emissions from forest management—that is, it cut more forest than it replanted—but the party may show no emissions or even removals, because it factored this into its reference level. In fact, most Annex I parties estimate that they will have zero net emissions from forest management during the second commitment period. The parties also approved new rules for harvested wood products and natural disturbances. The rules for wood products are intended to more accurately reflect that deforestation and forest management may not result in emissions the moment the timber is cut—known as "instantaneous oxidation" in Kyoto Protocol jargon. Instead, timber from deforestation and forest management is often used to make tables, chairs, and other products that store the embedded carbon for many years. Thus, while the rules now require Annex I parties to calculate emissions from wood products, they may use estimates for changes in the carbon stored in these products based on the *2006 IPCC Guidelines for National Greenhouse Gas Inventories* or use country-specific data, provided that verifiable and transparent data are available. However, wood products resulting from deforestation must be accounted for as instantaneous oxidation. In addition, imported wood products are excluded from this accounting.[17]

Countries may also exclude from accounting emissions resulting from natural disturbances—activities such as fires, pests, and extreme weather events that are beyond a party's control—if they exceed 1990-2009 background levels for forest disturbance emissions.[18] The rules for natural disturbances have also been criticized for allowing parties to "hide" emissions.

Durban to Doha: Next Steps

For PSIDS, the failure to increase mitigation ambition in Durban is certainly a defeat, despite gains on adaptation, finance, and technology transfer. Not only are these countries already feeling the effects of climate change in fundamental ways, but conditions are likely to worsen. The United Nations Environment Programme has noted that the gap between mitigation pledges and the goal of keeping temperature increases to no more than 2°C above preindustrial levels is 6 Gigatonnes of CO₂ equivalent.[19] The International Energy Agency ("IEA") has reported that, if CO₂ concentrations are to be kept below 450ppm, 80% of the cumulative CO₂ that may be emitted worldwide between 2009 and 2035 is already "locked-in" by existing infrastructure or infrastructure currently being built.[20] Unless internationally coordinated action is taken by 2017, "all new infrastructure from then until 2035 would need to be zero-carbon, unless emitting infrastructure is retired before the end of its economic lifetime to make headroom for new investment." [21]

As the negotiations shift from Durban to Doha, the site of COP18, Pacific Island States will likely turn their attention to obtaining steep emissions reductions through the new AWG-DPEA. Yet, they face formidable obstacles. First, parties will not even be halfway through

implementation of their Cancun pledges before they are asked to adopt new commitments. Second, the Review Mechanism, which will review the adequacy of the long-term global goal for emissions reductions, and the fifth report of the Intergovernmental Panel on Climate Change may not be completed in time to inform governments. Third, the AWG-DPEA will inherit the seemingly intractable issue of whether any future climate deal should take the form of a “protocol, legal instrument or agreed outcome with legal force.” As such, it will take a substantial breakthrough to avoid business-as-usual political and emissions trends.

About the Author:

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Endnotes:

[1] Decision -/CP.17, Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action, ¶ 2 (advanced unedited edition). All draft decisions from COP17 and CMP7 are available at the Climate Change Secretariat’s website, <http://unfccc.int/2860.php>.

[2] International Energy Agency, CO2 Emissions from Fuel Combustion: Highlights 7 (2011).

[3] Stockholm Environment Institute, Comparison of Annex 1 and Non-Annex 1 pledges under the Cancún Agreements 1 (2011), available at <http://www.sei-international.org/publications?pid=1987>.

[4] Draft Decision -/CMP.7, Outcome of the Work of the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol at its Sixteenth Session (advanced unedited version); see also FCCC/KP/AWG/2011/L.3/Add.1, ¶ 1 (Dec. 10, 2011).

[5] Decision -/CP.17, Outcome of the Work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention (advanced unedited edition), ¶¶ 12–22, Annex I [hereinafter AWG-LCA Outcome]. See also FCCC/AWGLCA/2011/L.4.

[6] *Id.* ¶¶ 39–44, Annex III.

[7] *Id.* ¶¶ 23–31, Annex II.

[8] *Id.* ¶¶ 56–62, Annex IV.

[9] *Id.* ¶¶ 92–119, Annex V.

[10] Decision -/CP.17, National Adaptation Plans (advanced unedited edition); see also FCCC/CP/2011/L.8/Add.1.

[11] AWG-LCA Outcome, *supra* note 5, ¶¶ 133–43, Annexes VII, VIII.

[12] *Id.* ¶¶ 144–56.

[13] Draft decision -/CP.17, Green Climate Fund: Report of the Transitional Committee (advance unedited version).

[14] AWG-LCA Outcome, *supra* note 5, ¶¶ 120–25, Annex VI.

[15] *Id.* ¶¶ 126–32.

[16] Decision -/CMP.7, Land Use, Land-Use Change and Forestry. See also FCCC/KP/AWG/2011/L.3/Add.2 (Dec. 10, 2011).

[17] *Id.* Annex I, ¶¶ 14, 16, 26–32.

[18] *Id.* Annex I, ¶¶ 14, 33–36. Other rules apply, but this is the basic framework for natural disturbances.

[19] UNEP, Bridging the Emissions Gap: A UNEP Synthesis Report 9 (Nov. 2011), *available at* www.unep.org/pdf/UNEP_bridging_gap.pdf.

[20] International Energy Agency, World Energy Outlook 2011 Factsheet 2 (2011), *available at* <http://www.iea.org/weo>.

[21] *Id.*