

# Alternative Models for the 2015 Climate Change Agreement

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- A primary goal of the Durban Platform negotiations should be to develop an agreement that will maximize reductions in greenhouse gas emissions over time. Achieving this objective will be a function of not only the ambition of the 2015 agreement, but also the levels of participation and compliance by states. A higher level of ambition will not necessarily make the agreement more effective, if fewer states participate or comply.
- In general, international agreements can serve a contractual, prescriptive, or facilitative function. In the climate change context, the contractual and prescriptive models are not politically realistic at this time, so the 2015 agreement should focus on the law's catalytic and facilitative roles.
- Although the Durban Platform negotiations still have a long way to go, the decision adopted last year at COP-19 in Warsaw suggests that the 2015 agreement will have a hybrid quality, which seeks to balance national flexibility and international discipline. In many if not most countries, the climate change issue is driven more by national than by international politics, so the agreement needs to allow states to determine the content of their own commitments. This approach represents a concession to political and diplomatic realities, as well as to the limits of international agreements in influencing countries' behavior in an area so vital to their interests.
- At the same time, the 2015 agreement needs to prod states to do as much as possible, through multilateral rules on transparency and accountability that help foster a virtuous cycle, in which states make progressively more ambitious contributions. Thus far, the top-down elements of the hybrid approach remain largely an abstraction. What remains to be seen is whether parties will be able to agree on rules that sufficiently discipline national flexibility and promote stronger ambition.

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## Introduction

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. The Durban Platform negotiations are scheduled to conclude next year in Paris at the 21st conference of the parties to the UNFCCC (COP-21).

The 2015 agreement will represent the fourth chapter in the development of the UN climate change regime. Thus far, the regime has vacillated between bottom-up and top-down approaches to reducing greenhouse gas (GHG) emissions. In chapter one, the UNFCCC established a bottom-up process, in which states had broad flexibility to formulate national policies and measures to limit emissions. But states quickly concluded that the UNFCCC approach was inadequate, so, in chapter two, they moved in a top-down direction, adopting the Kyoto Protocol, which prescribes a single type of mitigation commitment for developed countries (absolute, economy-wide emissions targets), defined through international negotiations.<sup>1</sup> The problem was that relatively few states were willing to accept Kyoto-style commitments, so, in chapter three, the Copenhagen Accord and Cancún Agreements moved back again towards a more flexible, bottom-up approach, giving states almost complete flexibility in defining the nature and stringency of their mitigation contributions – an approach that produced higher participation but inadequate ambition.<sup>2</sup>

Although the Durban Platform negotiations still have a long way to go, the decision

adopted last year at COP-19 in Warsaw suggests that chapter 4 of the climate change regime will have a hybrid quality, which seeks to balance national flexibility and international discipline. On the one hand, the 2015 agreement is likely to give states broad flexibility in defining their national contributions or commitments. On the other hand, the 2015 agreement will, to some degree, bound national flexibility by international rules – for example, addressing issues of transparency and accountability. By melding bottom-up and top-down elements, the goal is to encourage both broad participation and more ambitious commitments. This paper analyzes the goal of the Durban Platform negotiations, the role of the 2015 agreement in promoting that goal, and the different options for a hybrid approach.

## Background on the Durban Platform

The 2011 Durban Platform was the product of extraordinarily difficult negotiations, which dragged on more than a day after the scheduled close of COP-17. It represents a finely balanced compromise among the principal negotiating groups in the UN climate change process:

- The European Union (EU), supported by small-island and least-developed countries (LDCs), sought a fast-start mandate to negotiate a legally-binding instrument engaging all countries, as a condition for its agreement to a second commitment period under the Kyoto Protocol. The Durban Platform accommodates this desire by initiating a new round of negotiations aimed at concluding an agreement with “legal force” in 2015.
- The United States insisted that it would accept a mandate to negotiate a new legal instrument only if the mandate was “symmetrical” in its application to developing as well as developed countries. The Durban Platform addresses this concern by providing that the new agreement will be “applicable to all parties”

<sup>1</sup> Going into the Kyoto conference, for example, the United States wanted a stabilization target, but it came out of Kyoto with a 7% reduction target, as a result of the negotiations in Kyoto.

<sup>2</sup> Daniel Bodansky and Elliot Diringer, *Evolution of the International Climate Effort*, Center for Climate and Energy Solutions (May 2014).

(preamble para. 2). This provision represents a dramatic departure from the Kyoto Protocol negotiating mandate, which had categorically excluded any new commitments for developing countries.

- Finally, among the big emerging economies, which now account for most of the growth in global emissions, China said that it would not accept legal commitments before 2020, while India resisted the EU's calls for a new legally-binding instrument. Consistent with these views, the Durban Platform provides that the 2015 agreement will "come into effect and be implemented from 2020" and could take the form of an "agreed outcome with legal force" – a formulation whose meaning is unclear, but which is presumably different from a "treaty" or "another legal instrument," since it is listed as a third alternative.

The Durban Platform is significant not only for what it says, but for what it doesn't say. In contrast to the 2007 Bali Action Plan, the Durban Platform makes no reference to developing, developed, Annex I, or non-Annex I parties, the categories that have dominated the UN climate change regime thus far. Accordingly, it has proceeded along a single track, addressing developed and developing countries together, rather than dividing the negotiations into two tracks, as the Bali Action Plan had done. Although the principles of equity and common but differentiated responsibility and respective capabilities (CBDRRC) are implicitly incorporated by the statement that the Durban Platform outcome will be "under the ... Convention," the lack of any explicit categorization of countries represents a significant shift in how the Durban Platform decision frames the new round of negotiations.<sup>3</sup>

The Durban Platform is also virtually silent about the substantive content of what is to be negotiated, in contrast to the Kyoto Protocol mandate, which explicitly called for the negotiation of quantified emission limitation and reduction objectives (QELROs) for Annex I parties. In effect, the Durban Platform is an empty vessel, which can be filled with whatever content states 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."

### What Is the Goal of the Durban Platform Negotiations?

The ultimate objective of the UNFCCC is to stabilize atmospheric concentrations of greenhouse gases at levels that would prevent "dangerous anthropogenic interference with the climate system" (UNFCCC art. 2). As an instrument to be negotiated "under the Convention," one obvious goal of the Durban Platform negotiations is what might be called "climate effectiveness" – that is, moving the world onto a pathway to stabilize atmospheric concentrations of GHGs at safe levels. The Cancún Agreement elaborated this objective by adopting an aim of limiting global warming to below 2° C.

Many environmentalists implicitly assume that climate effectiveness depends on the ambition of an agreement's emissions reduction commitments: the more ambitious the commitments, the better. But, as Scott Barrett persuasively argues, effectiveness is a function not only of the ambition of commitments, but also of the levels of participation and compliance.<sup>4</sup> 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 ambitious 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 a 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 ambition and participation as

<sup>3</sup> Lavanya Rajamani, "The Durban Platform for Enhanced Action and the Future of the Climate Regime," *International and Comparative Law Quarterly* 61(2): 501-18.

<sup>4</sup> Scott Barrett, *Environment and Statecraft: The Strategy of Environmental Treaty-Making* (Oxford Univ. Press 2003).

dynamic variables. Less ambitious commitments or participation now might produce greater climate effectiveness in the long run, if they are part of an evolutionary framework that leads to stronger action later.

In addition to climate effectiveness, the Durban Platform negotiations might also aim to achieve climate justice. But, in contrast to climate effectiveness, for which we have a relatively straightforward and well-accepted metric, there is little consensus about what climate justice entails.<sup>5</sup> 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 still others on an egalitarian principle that posits an equal right of individuals to the “atmospheric space.” 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 in promoting climate effectiveness: a contractual function, a prescriptive function, and a facilitative function. Which of these roles might a 2015 agreement play in addressing the climate change problem?

#### 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.” 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. The international negotiations seek to reach agreement on the outcome that will produce the biggest net benefit and to divide up this benefit among the participating states so that they will all come out ahead.

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.

In many contexts, the contractual model describes how international law works. But the contractual model faces several difficulties in the climate change context. First, even when, in principle, there is 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.<sup>6</sup> 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, present in the Durban Platform negotiations.

As if these problems weren’t enough, the contractual model faces a more fundamental problem in connection with climate change. Today, few countries seem to accept its basic premise, namely that they should each be willing to commit to do more to reduce their emissions, in exchange for commitments by others. Most prefer to allow each state to define its level of emissions reduction unilaterally, rather than to negotiate their reductions on a reciprocal basis.

Why is there comparatively little acceptance of the contractual model in the climate change context? One possible explanation is that states don’t take the climate change problem seriously. The more basic problem is the one noted earlier: namely, that the climate change issue is driven much more by domestic than by international politics. Climate change mitigation implicates virtually every area of domestic policy, including industrial,

<sup>5</sup> 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).

<sup>6</sup> For a discussion of so-called “ultimatum” or “fair division” games, see Steven J. Brams and Alan D. Taylor, *Fair Division: From Cake-Cutting to Dispute Resolution* (Cambridge Univ. Press 1996).

agricultural, energy, transportation, and land-use policy. As a result, what a state can agree to do to reduce its emissions is a function of what the domestic political process allows, rather than of the level of emissions reductions by other states.

### Prescriptive model

Some discussions of climate change assume that international law can prescribe what countries should do, though usually they don't say so explicitly. Consider the proposal made by a group of developing country experts to allocate the total global budget of greenhouse gas emissions since the Industrial Revolution on an equal per capita basis.<sup>7</sup> In contrast to the contractual model, where the aim of an agreement is to leave all sides better off, this proposal would entail a massive redistribution of wealth from developed to developing countries to correct for putative historical injustices. 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, 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.

The problem, of course, is that enforcement mechanisms are few and far between in international law. Generally, international law lacks institutions that can induce states to participate and comply with its prescriptions.

For example, even if the International Court of Justice were to issue an opinion finding that international law requires states to reduce their emissions – an approach that some have sought – the opinion would be very unlikely to change the behavior of key countries such as the United States and China. The assumption that the 2015 agreement could tell a country such as the United States or China what to do seems similarly unrealistic.

### Facilitative model

Since the prescriptive and contractual models are unlikely to deliver compliance and participation, this suggests that the 2015 agreement should instead seek an outcome that reflects a different model of international law – one that focuses on the law's catalytic and facilitative roles. 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. 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 up from the bottom.

International law can serve a number of catalytic and facilitative functions.<sup>8</sup> Mega-meetings like the 2009 Copenhagen conference 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 an improvement over business-as-usual. Systems of reporting and expert review shine a spotlight on what countries are doing, help empower domestic constituencies in favor of stronger action, and allow more accurate assessments of the overall effectiveness of national efforts. 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 Cancún Agreements reflect a facilitative model by encouraging national pledges, establishing reporting and assessment mechanisms to promote transparency, and creating the Green Climate

<sup>7</sup> Harald Winkler et al., "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](http://www.erc.uct.ac.za/Basic_Experts_Paper.pdf)

<sup>8</sup> See generally Peter M. Haas, Robert O. Keohane and Marc Levy, *Institutions for the Earth: Sources of Effective International Environmental Protection* (MIT Press 1993); Xinuan Dai, *International Institutions and National Policies* (Cambridge: Cambridge University Press 2007).

Fund to assist developing countries with mitigation and adaptation. The 2015 Agreement could build on this approach – for example, by requiring participating states to submit a national contribution, establishing more robust processes of ex ante consideration of these national contributions and ex post review of implementation, which would focus peer pressure on states to put forth their best effort, and establishing a long-term architecture that provides for the regular updating and upgrading of national actions. Even if such an approach does not keep climate change from exceeding 2° C, it would still be of great value if it limited global warming to less than would occur in the absence of an agreement – to 3 or 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 ambition, participation, and compliance, considered dynamically over time.

### Emerging Hybrid Model

The outlines of the emerging hybrid model are reflected in the 2013 decision on the Durban Platform adopted by the Warsaw COP. On the one hand, the decision includes a strong bottom-up element, inviting parties to communicate their “intended *nationally-determined* contributions” (emphasis added) well ahead of the Paris conference – and by the first quarter of 2015, for “those ready to do so.” But the Warsaw decision also plants the seeds of a top-down component, through its mandate that the Lima COP, scheduled for December 2014, specify the information that states should provide about their contributions to ensure “clarity, transparency, and understanding.”

The question going forward is what additional top-down elements might be included in the 2015 agreement. Options include:<sup>9</sup>

- Specifying parameters for national mitigation contributions (NDCs) – for example, that they be quantified (such as an emissions reduction target) or quantifiable. Quantifiable contributions are important in order to allow contributions to be compared and to determine whether, collectively, they are sufficiently ambitious to achieve the 2° C temperature

limit agreed to in Cancún. Along the same lines, another possible parameter is that each country, in its NDC, identify its envisaged long-term emissions trajectory.

- Requiring that parties reflect their NDCs in domestic legislation or regulation.
- Specifying a common time frame for contributions.
- Defining accounting rules, particularly for areas where accounting can be problematic, such as the land sector and carbon markets.
- Providing for ex ante review of parties’ proposed NDCs before they are finalized.
- Establishing a procedure for parties to ratchet up their contributions in response to changing circumstances.
- Establishing a system to review states’ performance in implementing their contributions.
- Including rules for the elaboration of successive rounds of contributions.

Thus far, comparatively little progress has been made in elaborating these top-down elements and many are politically challenging. Realistically, therefore, the Paris agreement may have only a modest top-down dimension, which will hopefully strengthen over time as the regime matures.

### Conclusion

The Durban Platform negotiations present a set of difficult choices. On the one hand, states can go for broke, seeking an ambitious agreement that, if fully implemented, would prevent dangerous climate change, but that would face serious problems of participation and compliance. On the other hand, states can pursue a less ambitious outcome that is unlikely to prevent dangerous climate change, but that is probably achievable and would represent an improvement compared to business-as-usual.

The emerging hybrid approach represents a concession to political and diplomatic realities, as well as to the limits of international law in influencing countries’ behavior in an area so vital to their interests. Thus far, the hybrid approach remains largely an abstraction. With the decision in Warsaw calling for “intended nationally determined contri-

<sup>9</sup> Bodansky and Diringer, *Building Flexibility and Ambition into a 2015 Climate Agreement*, *supra*.

butions,” parties have for all intents and purposes established the core bottom-up element of the 2015 agreement: parties’ individual commitments will be set unilaterally, at least in the first instance, not negotiated. What remains to be seen is whether parties can now agree on the kinds of top-down elements that will be needed to bound that flexibility and ensure strong ambition as well.

Parties face significant challenges in fleshing out the hybrid paradigm. They have little time to more fully define the nature of nationally-determined contributions, let alone agree on detailed rules or guidance, before they are expected to begin communicating their intended contributions in early 2015. Indeed, it may be possible to reach agreement only on an overall architecture in Paris, with detailed rules on issues such as accounting and accountability deferred until later.

Apart from the tight timeline, reaching agreement in Paris will require some resolution of perennial, and highly political, issues—most notably, how countries’ obligations will be differentiated, and how to mobilize stronger support for developing countries.

Finally, judging from the signals emerging thus far from key capitals, there is a good chance that the post-2020 contributions that governments bring to Paris will not suffice to bring global emissions in line with the 2° C goal. This strongly suggests that for a hybrid approach to appear credible—and to in fact deliver on the promise of stronger action—the agreement must include mechanisms to progressively strengthen ambition over time.

The UNFCCC is, and will for some time remain, a work in progress. The turn toward a hybrid approach is a new stage in its evolution, but will take time to elaborate. It is especially critical, then, that the new agreement be durable – that it establish and hold countries’ confidence over the long haul. To be successful, a hybrid climate agreement must not only capture all the political will that can be mustered at its inception, but, by strengthening confidence that all are contributing their fair share, it must help to steadily build the political will needed to deliver stronger action in the years beyond.

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