

## **The Doha Outcomes Part III – The ADP and CDBRR**

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### **Introduction**

1. The Doha climate change conference (COP18) culminated on Saturday 8 December 2012 with the adoption of the ‘Doha Climate Gateway’, a set of decisions adopted by near universal acclamation related to amendments to the Kyoto Protocol (the KP Decision),<sup>1</sup> the closure of the Ad-hoc Working Group on Long-term Cooperative Action (AWG-LCA) (the LCA Decision),<sup>2</sup> the Ad-hoc Working Group on the Durban Platform for Enhanced Action (ADP) (the ADP Decision),<sup>3</sup> loss and damage and finance.
2. This is the third in a series of three briefing papers analysing legal aspects of the KP Decision, the LCA Decision and the ADP Decision. This briefing paper focuses on the ADP Decision.<sup>4</sup>
3. In Durban, COP17 adopted a decision which launched a process to develop “a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties”, to be adopted by 2015 and implemented by 2020<sup>5</sup> (the ADP Decision). The process was to be conducted in the ADP. Negotiations in the ADP began in May 2012 in Bonn. An in-session workshop in Bangkok (September 2012) on raising mitigation ambition and another in Doha on the 2015 agreement received a high degree of Party and observer engagement and the roundtable format of discussions, in which participants discussed concepts, facilitated a free exchange of ideas.
4. However, discussions in the ADP have not been free from controversy. Fault lines between Parties were apparent at the beginning of the ADP’s work in Bonn (related to the chairing arrangements<sup>6</sup> and the adoption of the agenda) and again at the conclusion of the Doha conference (related to the adoption of the ADP conclusions<sup>7</sup> (ADP Conclusions) and the ADP Decision). The main flashpoints revolved around the core unresolved issue in the UNFCCC

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<sup>1</sup> FCCC/KP/CMP/2012/13/Add.1, Decision 1/CMP.8.

<sup>2</sup> FCCC/CP/2012/8/Add.1, Decision 1/CP.18.

<sup>3</sup> FCCC/CP/2012/8/Add.1, Decision 2/CP.18.

<sup>4</sup> For the LRI Briefing Paper on the KP Decision see *Bavishi*, ‘The Doha Outcomes Part I – The Doha Amendment to the Kyoto Protocol’, LRI Briefing Paper No. 44 and for the LRI Briefing Paper on the LCA Decision see *Barakat*, ‘The Doha Outcomes Part II – The Agreed Outcome of the Bali Action Plan’, LRI Briefing Paper No. 45, both available at <http://www.legalresponseinitiative.org/briefing.html> (accessed 25 April 2013).

<sup>5</sup> FCCC/CP/2011/9/Add.1, Decision 1/CP.17 (Durban ADP Decision).

<sup>6</sup> The political importance of the ADP meant that getting agreement on who should chair the ADP was extremely difficult. It took the full two weeks of the negotiating session in Bonn to resolve this issue. In the end the Parties agreed to a multi-year chairing arrangement, with two co-chairs (one from a Party listed in Annex I to the Convention and one from a non-Annex I Party), see document FCCC/ADP/2012/2, paragraphs 4-8 and Annex I. This arrangement was endorsed by the COP in Doha as an exception to the draft rules of procedure (which do not provide for co-chair arrangements), see ADP Decision, note 3 above, paragraph 2.

<sup>7</sup> FCCC/ADP/2012/3, paragraphs 17-33.

regime: the application of the principle of common but differentiated responsibilities and respective capabilities (CBDRRC) and equity in the future regime.

5. This briefing paper sets out the key elements of the ADP Decision and then analyses how the issue of CBDRRC had a bearing on the adoption of the ADP agenda in Bonn, the ADP Conclusions in Doha and the ADP Decision.

### **Executive Summary**

6. In Doha, the Parties noted (and endorsed) various procedural matters previously agreed by the ADP in Bonn in May 2012 and adopted the ADP's Conclusions and the ADP Decision. In particular, the conference of the parties (COP) endorsed the multi-year chairing arrangements agreed in May 2012, noted the agenda as adopted by the ADP in May 2012 (initiating two workstreams within the ADP (one on the 2015 agreement (Workstream 1) and one on pre-2020 ambition (Workstream 2)) noted the ADP Conclusions which invited Parties and observer organisations to make submissions in respect of both workstreams and set out limited milestones in respect of the work of the ADP: consideration of elements for a draft negotiating text by December 2014; and releasing the draft negotiating text by May 2015.
7. While discussions in the ADP have been relatively without conflict so far, the negotiations on each of the four items set out above highlighted the highly political nature of these negotiations (particularly with respect to the selection of the ADP's chair, with each regional group wanting to ensure that the eventual arrangement would not prejudice its interests).
8. However, the core unresolved issue in the climate regime, the application of CBDRRC and equity in the future climate regime, manifested itself in the negotiation and adoption of the ADP's agenda, the ADP Conclusions and the ADP Decision. Resolution of this issue is required sooner rather than later if Parties are to adopt a "protocol, another legal instrument or an agreed outcome with legal force" by the end of 2015.

### **The ADP Decision**

9. In Doha, the COP endorsed the ADP chairing arrangements as agreed in Bonn in May 2012, noted the ADP's agenda as adopted in May 2012 and the initiation of two workstreams (one on Workstream 1 and one on Workstream 2, see below for more details on this) and made clear it was determined to adopt a protocol, another legal instrument or agreed outcome with legal force as the outcome of the ADP's work at the end of 2015.<sup>8</sup>
10. In terms of the actual work of ADP in 2013, the COP merely welcomed the outline plan of work proposed in the ADP Conclusions (related to both Workstream 1 and Workstream 2, see below for more details on this) and, in relation to Workstream 2, decided that it would identify and explore options for a range of actions that could close the pre-2020 ambition gap with a view to identifying further activities for its plan of work in 2014.<sup>9</sup>
11. In respect of Workstream 1, the COP also set limited milestones. It was decided that the ADP will consider elements for a draft negotiating text no later than at COP20 (i.e. the end of 2014) with a view to the then co-chair's making available a negotiating text before May 2015.<sup>10</sup> The May 2015 date is significant as the negotiating text must be circulated to all Parties by that date if the outcome of the ADP is to be a protocol or an amendment (or new

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<sup>8</sup> ADP Decision, note 3 above, paragraphs 2-4.

<sup>9</sup> ADP Decision, note 3 above, paragraphs 5-6.

<sup>10</sup> ADP Decision, note 3 above, paragraphs 9.

annex) to the United Nations Framework Convention on Climate Change<sup>11</sup> (Convention) which is to be adopted at COP21 at the end of 2015.<sup>12</sup>

12. In terms of the substance of negotiations in 2013, as specified in the ADP conclusions, the Parties should advance substantive issues when they meet in Bonn from 29 April to 3 May 2013. The co-chairs have a mandate to decide the focus of the discussions based on submissions made prior to that meeting. In relation to Workstream 1, submissions were invited in respect of the application of the principles of the Convention to the ADP; building on experiences and lessons learnt from other processes; the scope, structure and design of the 2015 agreement; and ways of defining and reflecting enhanced action.<sup>13</sup> In relation to Workstream 2, submissions were invited in respect of: mitigation and adaptation benefits; barriers and ways to overcome them, and incentives for actions; and finance, technology and capacity building to support implementation.<sup>14</sup>
13. As well as the issues in respect of which submissions were invited, there are still a great number of other issues that need to be addressed. Whilst all Parties agree, particularly in the context of Workstream 1, that the ADP needs to address the key elements of mitigation, adaptation, finance, technology and capacity building, it is still unclear how, if at all, the 2015 agreement will relate to the existing processes, institutions and mechanisms under the Convention and Kyoto Protocol and whether and how unresolved issues from the AWG-LCA, such as agreeing a peak year for emissions, will find their way into the ADP.
14. Ultimately, however, it is unlikely that any of these issues will be resolved until Parties agree how the principles of the Convention will be applied to the work of the ADP. If the negotiations around the adoption of the ADP's agenda, the ADP Conclusions and the ADP Decision are anything to go by, the resolution of this issue will not be easy.

### The 2012 ADP agenda

15. The ADP's provisional agenda for May<sup>15</sup> included two items arising out of the Durban ADP Decision. These were:
  - (a) *Planning of work in accordance with [the Durban ADP Decision]; and*
  - (b) *Workplan on enhancing mitigation ambition.*

However, both of these items were challenged by Parties.

16. The disagreement in relation to (a) hinged on paragraph 1 of the Durban ADP Decision and the context of the negotiations which led to the adoption of that decision. In particular, there had been no agreement on including language related to the principles of the Convention in the Durban ADP Decision as this had been strongly resisted by many developed countries.<sup>16</sup>
17. Paragraph 1 of the Durban ADP Decision referred to the termination of the AWG-LCA and the agreed outcome of the Bali Action Plan.<sup>17</sup> The AWG-LCA and the Bali Action Plan were

<sup>11</sup> United Nations Framework Convention on Climate Change (Convention), opened for signature 9 May 1992, 1771 UNTS 107 (entered into force 21 March 1994),

<sup>12</sup> Convention, Articles 15, 16 and 17.

<sup>13</sup> ADP Conclusions, note 7 above, paragraph 29.

<sup>14</sup> ADP Conclusions, note 7 above, paragraph 31.

<sup>15</sup> FCCC/ADP/2012/1.

<sup>16</sup> For more detail on this issue, see *Bavishi*, 'Unwrapping the Durban Package', LRI Briefing Paper, paragraphs 58-66, available at [http://legalresponseinitiative.org/download/BP40E%20-%20Briefing%20Paper%20-%20Unwrapping%20the%20Durban%20Package%20\(12%20March%202012\).pdf](http://legalresponseinitiative.org/download/BP40E%20-%20Briefing%20Paper%20-%20Unwrapping%20the%20Durban%20Package%20(12%20March%202012).pdf) (accessed 25 April 2013).

<sup>17</sup> FCCC/CP/2007/6/Add.1, Decision 1/CP.13 (Bali Action Plan).

explicitly based on the provisions and principles of the Convention, in particular CDRRC. Many developed countries were concerned to ensure that the reference in the Durban ADP Decision to the AWG-LCA and the Bali Action Plan would not necessarily mean that the principles of the Convention would be applied in the ADP in the same way as they were in the work of the AWG-LCA. In particular, they did not want the type of differentiation between developed and developing countries set out in the Bali Action Plan and its agreed outcome, by default, to form the basis of differentiation in the ADP regime. In their view, the form of differentiation in the post-2020 regime (if it is to exist at all) is a matter for negotiation and not to be prejudiced by the form of differentiation in the AWG-LCA.

18. The second item on the provisional agenda was objected to by China on the basis that the Durban ADP Decision was not clear as to whether the workplan should be part of the ADP's work or the work of some other Convention body. China's concern, partly, was that since the extent of any differentiation under the ADP had not been agreed, a workplan to increase mitigation ambition under the ADP may have required it to take on more ambitious mitigation actions than would have been required of it under the AWG-LCA (where the Bali Action Plan form of differentiation was in application). By contrast, many developed countries wanted to keep the workplan limited to the ADP and ensure that it did not affect their mitigation pledges made under the AWG-LCA. For different reasons, the Alliance of Small Island States (AOSIS) also wanted the workplan to be conducted under the ADP.
19. After two weeks of much heated debate, a very neutral form of words was agreed to replace the two agenda items set out above:

*(3) Implementation of all elements of decision 1/CP.17:*

*(a) Matters related to paragraphs 2 to 6; and*

*(b) Matters related to paragraphs 7 and 8.<sup>18</sup>*

The first line was further footnoted as follows:

*This item will be considered within the context of decision 1/CP.17 and under the Convention, without prejudice to the position of any Party or to the work of the other Subsidiary Bodies. Two workstreams, one on paragraph 3(a) and one on paragraph 3(b) are initiated. Further workstreams may be considered as the need arises.*

20. The effect of the adopted agenda was to make it clear that the mandate of the ADP included both consideration of paragraphs 2 to 6 of the Durban ADP Decision, i.e. related to Workstream 1, and paragraphs 7 and 8 of the Durban ADP Decision, i.e. related to Workstream 2. By not referring to paragraph 1 of the Durban ADP Decision, the Parties also side-stepped (and deferred for a later date) the issue of the extent of the application of the principles of the Convention to the work and outcome of the ADP.
21. The footnote further made clear that, in theory, the ADP negotiations should have no effect on the work of the other Subsidiary Bodies (such as the AWG-LCA), thus providing some comfort to developed countries. However, the footnote also stated that the ADP negotiations should be "under the Convention" (as per the language in the Durban ADP Decision), and therefore provided China (and other developing countries) with some comfort in respect of what might be expected of them under the workplan. In practice, however, it is likely that the outcome of the Kyoto Protocol's ambition mechanism and the review of the 2

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<sup>18</sup> FCCC/ADP/2012/L.1, Agenda item 3.

degrees goal under the Convention will influence the outcome of the workplan on mitigation ambition under the ADP and as a result, the footnote is more symbolic than implementable.

### The ADP Conclusions and ‘Enhanced Action’

22. CBDRRC, implicitly, flared up as an issue during the adoption of the ADP’s Conclusions at the end of its meeting in Doha on Friday 7 December 2012. The draft conclusions prepared by the ADP co-chairs<sup>19</sup> invited Parties and accredited observer organisations to submit to the secretariat information, view and proposals on the work of the ADP.<sup>20</sup> In particular, under Workstream 1, Parties and accredited observer organisations were invited to submit information, views and proposals on “*ways of defining and reflecting undertakings*”.<sup>21</sup>
23. However, a number of Parties objected to the use of the term “undertakings” on the basis that it was too vague. The US suggested that the term “commitments”, which is the heading to Article 4 of the Convention, be used instead. However, many developing countries were unhappy with this proposal. To them “commitments” was equivalent to quantified emission limitation and reduction commitments (QELRCs) under the Kyoto Protocol and they were not prepared to agree to taking on or negotiating such obligations for themselves under the ADP before they had had a chance to engage in a broader discussion on the application of the principles of the Convention within the ADP.<sup>22</sup>
24. “A range of commitments” was put forward by South Africa as a potential compromise, but was also rejected by many developing countries on the basis that they believed it prejudged the outcome of the discussion on the application of the principles of the Convention and would have required them to take on obligations under the 2015 agreement equivalent to QELRCs before the discussion on the principles of the Convention had been concluded.
25. China, therefore, proposed a different solution: replacing “undertakings” with “commitments and actions”. This, however, was rejected by the US on the basis that it was too similar to the mitigation related language in the Bali Action Plan<sup>23</sup> and therefore risked carrying over Bali-style differentiation into the ADP, something they were extremely keen to avoid. In an attempt to break the deadlock, the EU pragmatically suggested replacing “undertakings” with “what Parties will do”. However, this too, did not find favour with other Parties.
26. At this point, the co-chairs suggested a short adjournment while the Parties which had been vocal during this issue ‘huddled’ in an attempt to reach agreement. In the end, compromise wording suggested by Egypt was agreed: the Parties in the Ad-hoc Working Group on the Durban Platform for *Enhanced Action* (emphasis added) agreed to replace the word “undertakings” with the words “enhanced action”.<sup>24</sup> This negotiating tool, of repeating a form of words that has previously been agreed when no agreement has been reached on a similar issue, has long been used in multilateral negotiations.<sup>25</sup>
27. The effect of this wording is to reaffirm the Parties’ resolve to take additional action to combat climate change without prescribing the eventual form of such action before the critically important negotiations on the application of the principles of the Convention to the work of Workstream 1 are concluded.

<sup>19</sup> FCCC/ADP/2012/L.4.

<sup>20</sup> See paragraph 12 above for more details.

<sup>21</sup> Draft ADP conclusions, note 19 above, paragraph 13(d).

<sup>22</sup> This discussion was intended to form, and will become, part of the ADP’s work in 2013, see the ADP Conclusions, note 7 above, paragraph 29(a).

<sup>23</sup> Bali Action Plan, note 17 above, paragraph 1(b)]

<sup>24</sup> ADP Conclusions, note 7 above, paragraph 29(d).

<sup>25</sup> See, for example, the third preambular paragraph to paragraph 54 of the LCA Decision (note 2 above) on response measures which repeats, almost verbatim, Article 3 paragraph 5 of the Convention.

## **CBDRRC and the 2012 Rio Declaration**

28. In the negotiations leading up to the adoption of the ADP Decision, a number of developing countries had wanted to make clear that the principles of equity and CBDRRC should underpin the work of the ADP. In this context, they pushed for an express reference to the outcome document of the Rio+20 Summit (titled '*The Future We Want*')<sup>26</sup> in the draft ADP Decision text. Paragraph 191 of the outcome document stated:

*...We recall that the United Nations Framework Convention on Climate Change provides that parties should protect the climate system for the benefit of present and future generations of humankind on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities... (emphasis added)*

29. This was strongly resisted by the US (mainly) during the closing plenary of the ADP in a further attempt to insulate the work of the ADP from the principles of equity and CBDRRC, despite the US having agreed to the outcome document at the Rio summit only 6 months earlier. As a result, all references to the Rio+20 outcome document were dropped, and the ADP Decision (as adopted) only contains, in its final preambular paragraph, a reference to the fact the ADP's work will be guided by the principles of the Convention.
30. Although the US did not try to block the adoption of the ADP Decision, it indicated, in its intervention to the joint COP and CMP plenary, which was opened after the adoption of the Doha Climate Gateway, that it would reject any attempt to invoke the principles of the Convention as the basis for negotiations under the ADP. This sets the stage for difficult negotiations ahead. Resolving this issue is crucial, however, if parties are to meaningfully engage on how mitigation, adaptation and means of implementation will be addressed in the 2015 agreement.

## **Conclusion**

31. Reflecting on the ADP Decision, it is clear that only modest progress was achieved in Doha. The failure to agree milestones and timelines for agreeing issues in respect of the 2015 agreement is disappointing, and the decision to only begin considering its draft negotiating text at COP20 (2014) does not bode well for the goal of adopting the ADP's outcome by COP21 (2015). In respect of Workstream 2, the inability of Parties to agree an increase in mitigation ambition pre-2020 in Doha demonstrates once again that some Parties are still only paying lip service to the acknowledgement that mitigation ambition urgently needs to be increased.
32. In addition, the negotiations in Doha showed that parties have, in some cases, very different views over how to interpret the Durban Platform's mandate, particularly in relation to the application of the principles of the Convention. Reaching agreement on this is likely to involve difficult negotiations over the next two and a half years. It is hoped, however, that the closure of the LCA and resolution of issues around the second commitment period (CP2) will mean that Parties will now be able to progress discussions in the ADP in a productive, urgent and efficient manner and that the 2014 world leaders' summit announced by UN Secretary General Ban Ki-moon<sup>27</sup> will add much needed political momentum to the process.

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<sup>26</sup> UN General Assembly Resolution 66/288, A/RES/66/288.

<sup>27</sup> ADP Decision, note 3 above, paragraph 8.