

Unwrapping the Durban Package

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Introduction

1. The seventeenth UN conference on climate change concluded in Durban in the early hours of Sunday 11 December 2011, over 30 hours later than scheduled. It will be primarily remembered for the “package” of four decisions adopted by the Conference of the Parties (COP) of the United Nations Framework Convention on Climate Change (Convention) and the Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol (CMP).
2. These decisions related to the outcome of the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol (AWG-KP),¹ the outcome of the Ad Hoc Working Group on Long-term Cooperative Action (AWG-LCA),² the Green Climate Fund³ (which will not be discussed further in this paper) and the establishment of the Ad Hoc Working Group on the Durban Platform for Enhanced Action (ADP).⁴
3. This briefing paper discusses the outcome of the AWG-KP (KP Decision), the outcome of the AWG-LCA (LCA Decision) and the decision establishing the ADP (ADP Decision). In particular, it analyses the provisions of the ADP Decision, which launches 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 from 2020. This paper then concludes by identifying the elements that will need to be considered in the future negotiations, including those headline political issues that still need to be resolved.

Executive Summary

4. The package of decisions adopted in Durban has at least four significant implications:
 - (A) It has the effect of de-linking the post-2020 regime from the Bali Action Plan;⁵
 - (B) This de-linking, together with the lack of reference to “common but differentiated responsibilities and respective capabilities” (CBDR) in the ADP Decision, opens the door for the principle of CBDR to be applied differently in the post-2020 regime;

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¹ http://unfccc.int/files/meetings/durban_nov_2011/decisions/application/pdf/awgkp_outcome.pdf (accessed 12 March 2012).

² http://unfccc.int/files/meetings/durban_nov_2011/decisions/application/pdf/cop17_lcaoutcome.pdf (accessed 12 March 2012).

³ http://unfccc.int/files/meetings/durban_nov_2011/decisions/application/pdf/cop17_gcf.pdf (accessed 12 March 2012).

⁴ http://unfccc.int/files/meetings/durban_nov_2011/decisions/application/pdf/cop17_durbanplatform.pdf (accessed 12 March 2012).

⁵ Decision 1/CP.13, FCCC/CP/2007/6/Add.1.

- (C) It suggests that we are moving to a legally-binding regime post-2020, the effectiveness of which will depend on the substance of the ADP and the “legal character” of the commitments the Parties take on; and
- (D) It decides that there should be a second commitment period under the Kyoto Protocol but does not adopt or expressly provide for the full adoption of the relevant amendments necessary to ensure it is placed on a legal footing. There is, therefore, a limited risk that the second commitment period will remain as a political agreement.

The Durban Package

5. The KP Decision decides that the second commitment period under the Kyoto Protocol “shall begin on 1 January 2013” but leaves it to the AWG-KP to agree at its next session whether it should last until 31 December 2017 or 31 December 2020.⁶ Crucially, however, the KP Decision merely “takes note of the proposed amendments”⁷ required to ensure a second commitment period is legally put in place – their actual adoption is deferred to the eighth session of the CMP, at the earliest.
6. The LCA Decision builds on the COP decision relating to the Cancun Agreements adopted at COP16 (the Cancun LCA Decision).⁸ It mainly focuses on implementing and operationalising parts of the Cancun LCA Decision that required further consideration by the AWG-LCA. Agreement was reached on a number of items, with further work on these being spun off to technical bodies or the new bodies established by the Cancun LCA Decision, while other matters (such as shared vision, the review and long-term finance) will be taken up again in 2012 by the AWG-LCA. Interestingly, the LCA Decision itself neither extends the mandate of the AWG-LCA (which was due to expire in Durban pursuant to the Cancun LCA Decision) nor decides what the “agreed outcome” of the AWG-LCA should be, although both of these issues are addressed in the ADP Decision.
7. Pursuant to the ADP Decision, the AWG-LCA is extended:

“for one year in order for it to continue its work and reach an agreed outcome pursuant to [the Bali Action Plan⁹] through decisions adopted by the sixteenth, seventeenth and eighteenth sessions of the [COP], at which time the [AWG-LCA] shall be terminated.”¹⁰
8. As mentioned above, the ADP Decision also launches a *new* process to develop a “protocol, another legal instrument or agreed outcome with legal force” under the Convention and applicable to all Parties. Each of these elements has potentially significant implications for the future legal architecture of the international climate regime, particularly in relation to how the principle of CBDR should be applied, and will be dealt with separately. Finally, the ADP Decision decides that the “process shall raise the level of ambition”¹¹ and to this end the decision launches a workplan on enhancing mitigation ambition to identify options for closing the ambition gap.¹² The proposed time between adoption (2015) and implementation (2020) of the outcome of the ADP should give the Parties enough time to ratify, if appropriate, any legally binding agreement arising out of the ADP. This will also provide them with an opportunity to increase mitigation ambition during that period based on the

⁶ KP Decision, n1 above, para 1.

⁷ KP Decision, n1 above, para 3.

⁸ Decision 1/CP.16, FCCC/CP/2010/7/Add.1.

⁹ Decision 1/CP.13, n5 above.

¹⁰ ADP Decision, n4 above, para 1.

¹¹ ADP Decision, n4 above, para 6.

¹² ADP Decision, n4 above, para 7.

outcomes of the aforementioned workplan and the results of the review mandated by the Cancun LCA Decision.¹³

The “agreed outcome” of the Bali Action Plan and the significance of a *new* process

9. With much of the attention on the ADP Decision focusing on the legal nature of the outcome of the ADP (discussed below), there has been relatively little discussion about the implications of the agreement to create a *new* process, to be conducted within the ADP.

Disagreement over the legal form of the “agreed outcome” of the AWG-LCA

10. The Bali Action Plan, which established the AWG-LCA in 2007, called for the AWG-LCA to reach an “agreed outcome” by COP15 in Copenhagen.¹⁴ This outcome (regardless of its legal form), under the Convention, was intended to sit alongside the second commitment period under the Kyoto Protocol and deal with issues beyond the narrow Annex I mitigation focus of the Kyoto Protocol.
11. Since 2007, the term “agreed outcome” has proved problematic. The Bali Action Plan gave no indication as to whether such an outcome would be legally binding under international law or whether COP decisions would suffice. The Alliance of Small Island States (AOSIS) believed that the agreed outcome should be a new protocol under the Convention, and to this end various AOSIS members submitted draft protocols to the COP for its consideration (and potential adoption) in the run-up to COP15.¹⁵
12. However, amongst other things, the lack of agreement on the legal form of the “agreed outcome” meant that these proposals were not seriously considered in Copenhagen and references in the Copenhagen Accord¹⁶ to negotiating a new protocol or legal instrument as the “agreed outcome” of the AWG-LCA were dropped at the last moment.¹⁷ As a result, the issue of the legal form of the “agreed outcome” of the AWG-LCA was once more left unresolved.
13. After sustained pressure over the course of 2010 on the part of the AOSIS, the least developed countries (LDCs) and a handful of Annex I Parties, the Cancun LCA Decision included a request for the AWG-LCA to discuss, as one part of its ongoing work:

“legal options with the aim of completing an agreed outcome based on decision 1/CP.13 (Bali Action Plan), the work done at the sixteenth session of the [COP] and proposals made by Parties under Article 17 of the Convention.”¹⁸ (Emphasis added.)

Informal group on “legal options”

14. To this end, consultations on “legal options” were conducted within an “informal group” under the AWG-LCA throughout 2011 in Bonn in June, Panama in October and Durban in December. In these sessions, AOSIS and the LDCs consistently called for the “agreed outcome” of the AWG-LCA to be a new protocol (under the Convention) which would sit

¹³ Cancun LCA Decision, n8 above, paras 138-140.

¹⁴ Decision 1/CP.13, n5 above, para 1.

¹⁵ Draft Protocol to the Convention presented by the Government of Tuvalu under Article 17 of the Convention, FCCC/CP/2009/4; and Proposal by AOSIS for the survival of the Kyoto Protocol and a Copenhagen Protocol to enhance implementation of the UNFCCC, FCCC/AWG/LCA/2009/MISC.8, p.15.

¹⁶ Decision 2/CP.15, FCCC/CP/2009/11/Add.1.

¹⁷ *Raj Bavishi and others*, ‘The Copenhagen Accord - A Legal Analysis’, 28 January 2010, para 44 and 55, available at: <http://www.legalresponseinitiative.org/briefing.html> (accessed 12 March 2012).

¹⁸ Cancun LCA Decision, n8 above, para 145.

- alongside the Kyoto Protocol. However, this demand was opposed by both the larger developing countries and many of the developed countries, although for different reasons.
15. Many of the larger developing countries were reluctant to talk about the legal form of the “agreed outcome” of the AWG-LCA before its content had been agreed, while many developed countries claimed that they could only consider a new legal agreement under the AWG-LCA if such an agreement covered all major economies and “reflected current economic realities”.
 16. With the larger developing countries and many of the developed countries refusing to compromise on their position, it seemed that the demands of AOSIS and the LDCs would not be met and not much progress was made on the issue of legal form. To break the deadlock, the Facilitator of the “legal options” informal group presented the Parties in Panama with a “menu” of legal options¹⁹ with a view to the group recommending one of the options to be acted on in Durban. The options included the adoption, in Durban, of:
 - (A) a legally binding instrument as the outcome of the AWG-LCA; or
 - (B) a COP decision:
 - (1) with a mandate to conclude a legally binding instrument with a clear roadmap;
 - (2) setting out the importance of a legally binding instrument but leaving the legal form open;
 - (3) agreeing to continue discussions on the form of the “agreed outcome”; or
 - (4) agreeing to continue to address all the pillars of the Bali Action Plan.
 17. The Parties accepted that the adoption of a legally binding instrument in Durban was highly unlikely but were split over which of the COP decision options (as supplemented by proposals by the Parties) should be supported. The Parties, broadly, fell into two camps: those that supported a strong mandate for a legally binding instrument; and those supporting the continuation of discussions on legal options. No significant progress was made on this issue in Panama.
 18. Going into Durban, the situation remained largely unaltered. In an attempt to increase pressure on those that opposed the Durban COP adopting a mandate for a legally binding instrument as the outcome of the AWG-LCA, during the first week both AOSIS and the LDCs tabled draft decision text which called for negotiations to be commenced *within the AWG-LCA* for a protocol or other legally binding instrument, for adoption by COP18.²⁰
 19. Although these proposals were not universally accepted, the timing of their distribution meant that the intention behind the proposals (i.e. to launch negotiations for a legally binding instrument in Durban) was at the forefront of everyone’s mind, including the ministers’, who were starting to arrive in Durban at the end of the first week of negotiations.
 20. However, at the beginning of the second week, Parties in the informal group were still divided into two camps and the discussions on the “legal options” for the “agreed outcome” of the AWG-LCA were going nowhere. One of the key reasons was that many large developing countries were demanding that developed countries first adopt and ratify a second commitment period under the Kyoto Protocol before they considered a legally

¹⁹ Copy on file with author.

²⁰ Copies of the LDC proposal (dated 30 November 2011) and the AOSIS proposal (dated 1 December 2011) on file with author.

binding agreement under the AWG-LCA, while developed countries maintained that the “legal options” informal group was not the correct forum to discuss issues related to the Kyoto Protocol, which were more properly within the purview of the AWG-KP. While this reasoning is technically correct, it ignores the wider political context in which progress on the legal form of the “agreed outcome” of the AWG-LCA, and the adoption of a second commitment period under the Kyoto Protocol, are intrinsically linked.

21. To resolve this issue, along with the others related to the second commitment period under the Kyoto Protocol and the operationalisation of the Green Climate Fund, the South Africa Presidency convened a series of “Indabas”.²¹ These are cross-cutting forums which allowed ministers to look at the bigger picture and address issues, together, and in one place, that were being discussed in the COP (Green Climate Fund), the AWG-LCA (“legal options” for the “agreed outcome” of the AWG-LCA) and the AWG-KP (second commitment period).

The Bigger Picture and the Indaba process

22. The first Indabas were held towards the end of the first week of COP17. In these sessions, the South Africans set out the bigger picture issues relating to action that was needed “now and in future”,²² highlighted the areas where urgent action was required²³ and kick-started discussions on the future legal architecture of the climate regime. Although the second commitment period was discussed, the discussions centred on, at least to start with, the legal form of the “agreed outcome” of the AWG-LCA.
23. On the basis of these discussions, the South Africans developed their note of 2 December, producing more detailed notes on 7 December²⁴ and the morning of 8 December.²⁵ The options for the legal form contained in these documents were largely based on the various options set out in the “menu” of legal options presented to the Parties in Panama by the Facilitator of the “legal options” informal group, with an additional “menu” item: to complete the “agreed outcome” of the Bali Action Plan through a series of decisions and to “begin a process to develop post-2020 arrangements”.²⁶ In addition, the 7 December document introduced the option for this process to be conducted in a new ad-hoc working group.²⁷ These two introductions were potentially significant because neither the new process nor the new ad-hoc working group were tied to the Bali Action Plan (in the way the AWG-LCA is).
24. On the basis of further ministerial consultations and Indaba sessions, the South Africans presented the Parties, late on Thursday 8 December, with a table of options for what had originally been intended to be the “agreed outcome” of the AWG-LCA (covering issues including the legal form of outcome, the forum for the negotiations and the relevant

²¹ ‘Indaba’ is an isiZulu word that refers to a gathering of people with the purpose of discussing matters of great importance to the community and to solve intractable or difficult collective challenges, see Explanatory Note:

http://unfccc.int/files/meetings/durban_nov_2011/application/pdf/cop17_cmp7_indaba_explanatory_note.pdf (accessed 12 March 2012).

²² Additional Note from the Presidency, 2 December 2011:

http://unfccc.int/files/meetings/durban_nov_2011/application/pdf/cop17_cmp7_indaba_bullets.pdf (accessed 12 March 2012).

²³ Presentation from the Presidency, 6 December 2011:

http://unfccc.int/files/meetings/durban_nov_2011/application/pdf/indaba_bigger_picture_final.pdf (accessed 12 March 2012).

²⁴ ‘Indaba: The Bigger Picture’, 7 December 2011, available at:

http://unfccc.int/files/meetings/durban_nov_2011/application/pdf/indaba_4_-_enriched_bullets_-_071211.pdf (accessed 12 March 2012).

²⁵ ‘Indaba: The Bigger Picture’, 8 December 2011: available at:

http://unfccc.int/files/meetings/durban_nov_2011/application/pdf/indaba_-_enriched_bullets_-_08122011_final.pdf (accessed 12 March 2012).

²⁶ See n24 above, p.2, Option 3 bis (under the heading ‘Task’).

²⁷ See n24 above, p.2, Option 2 (under the heading ‘Forum’).

timelines for adoption of the outcome.²⁸ This was soon followed by another document which translated the table into a list of bullet points.²⁹

25. At this point in the negotiations (the final Thursday), the idea that the new process should be conducted in a new ad-hoc working group and be divorced from the Bali Action Plan started to crystallise. Whether all the Parties were aware of the implications of this at the time is not clear. The Bali Action Plan represented a delicate balance between developed and developing countries, and although it can be argued that it started to break down the division between developed and developing countries (particularly in relation to mitigation,³⁰ the results of which are visible in the Cancun LCA Decision), the differentiation between the two groups of countries is evident in its text.
26. On Friday 9 December, the South Africans produced draft decision text encapsulating the latest thinking. This text went through a number of iterations before being adopted in the early hours of Sunday 11 December, but it is striking that among the elements to remain the same in the various drafts are the following:
 - (A) that the “agreed outcome” of the Bali Action Plan should be completed through a *series of decisions* (not a legally binding instrument) by COP18, at which point the AWG-LCA would terminate; and
 - (B) that a new process should be launched to develop, depending on the draft, either (i) a new legal framework, (ii) a protocol or another legal instrument, (iii) a protocol, another legal instrument or legal outcome or (iv) a protocol, another legal instrument or agreed outcome with legal force.
27. Ultimately, the lack of an explicit link between the Bali Action Plan and any future legally binding instrument has raised the possibility for the delicate balance agreed in Bali to be renegotiated or reinterpreted as part of the work of the ADP. Whether this comes to pass will depend on the Parties’ interpretation of the relationship between the AWG-LCA and the ADP under the Convention. The ADP Decision itself notes the LCA Decision in its preamble,³¹ and, as such, it can be argued that the agreed outcome of the AWG-LCA should influence the work of the ADP. The extent of its influence will, however, depend on the extent to which the Parties agree to incorporate elements of the AWG-LCA into the ADP.

“Protocol, another legal instrument or agreed outcome with legal force”

28. The most contentious issue in the ADP Decision related to the legal form of the outcome of the work of the ADP. In the various drafts of the decision, the legal form evolved from:
 - (A) a legal framework;³² to
 - (B) a protocol or another legal instrument;³³ to
 - (C) a protocol, another legal instrument or a legal outcome;³⁴ and finally to

²⁸ Table of options, available at: http://unfccc.int/files/meetings/durban_nov_2011/application/pdf/9pm_table_-_indaba_options_table-8122011.pdf (accessed 12 March 2012).

²⁹ ‘Indaba: The Bigger Picture’, 8 December 2011, 10pm, available at:

http://unfccc.int/files/meetings/durban_nov_2011/application/pdf/2200_text_-_8122011-indaba.pdf (accessed 12 March 2012).

³⁰ Lavanya Rajamani, ‘From Berlin to Bali and Beyond: Killing Kyoto Softly?’, (2008) 57 *International and Comparative Law Quarterly* 909.

³¹ ADP Decision, n4 above, fifth preambular paragraph.

³² Indaba: The Bigger Picture, 9 December at 08:00, Chair’s Proposal, para 4, available at:

http://unfccc.int/files/meetings/durban_nov_2011/application/pdf/materials_indaba_9_dec_document_1.pdf (accessed 12 March 2012).

³³ Indaba: The Bigger Picture, 9 December at 23:00, Chair’s Proposal, para 4, available at:

http://unfccc.int/files/meetings/durban_nov_2011/application/pdf/2325_text_-_9122011-indaba.pdf (accessed 12 March 2012).

- (D) a protocol, another legal instrument or an agreed outcome with legal force, as per the ADP Decision.³⁵
29. “Legal framework” was rejected by most countries, including the EU, AOSIS and the LDCs, as not giving enough certainty regarding legal form. A “framework” was viewed as too vague, with not enough specificity on whether it would be a platform from which further legally binding commitments could be agreed, similar to the Convention, or whether it would contain legally binding commitments without the need for further negotiations.
30. On the basis of further discussions, the second draft of the ADP Decision replaced the “legal framework” with “protocol or another legal instrument”. While this fell short of *explicitly* stating that the protocol or legal instrument would be legally binding under international law, those Parties advocating for a legally binding outcome felt that the text *implicitly* called for this. However, whether because of the implicit suggestion or otherwise, India felt unable to accept such a formulation as it stood and submitted that a third option, “a legal outcome”, should be added to the list of possible outcomes.
31. The third draft of the ADP Decision, therefore, stated that the legal form of the outcome of the ADP should be “a protocol, another legal instrument or a legal outcome”. However, the EU objected to this addition, arguing that a “legal outcome” was significantly weaker than a protocol or legal instrument since the use of “legal” as a qualifier to “outcome” could have two opposite interpretations. Either it could mean that the outcome was legal, in the sense that it was allowed, or it could mean that the outcome was legally binding. As a result, the COP President ordered the Indian and EU delegations to “huddle” in an attempt to find compromise language. The compromise text, suggested by a combination of the US, Brazil and India, is that which ultimately appears in the ADP Decision: “a protocol, another legal instrument or an *agreed outcome with legal force*” (emphasis added).
32. It is clear, however, that there is still room for interpretation of this formulation. A “protocol” is generally accepted as being legally binding under international law. However, there is room for some (limited) interpretation in relation to “legal instrument” and, more significantly, in relation to “agreed outcome with legal force”.

“Another legal instrument”

33. The Berlin Mandate,³⁶ which led to the adoption of the Kyoto Protocol, called for “the adoption of a protocol or *another legal instrument*” to strengthen the commitments of Annex I Parties to the Convention.³⁷ Given that the Berlin Mandate was concluded with the adoption of a protocol, this does not assist in determining the meaning of “legal instrument”. Looking to other multilateral environmental fora is similarly unhelpful. In most cases, the decision (or underlying treaty provision) launching negotiations provides for the negotiation and adoption of a protocol, without offering an alternative option such as “another legal instrument”.³⁸ Therefore, in order to determine the meaning of “legal instrument”, recourse

³⁴ Draft Decision, FCCC/CP/2010/L.10, 10 December 2011, para 2.

³⁵ ADP Decision, n4 above, para 2.

³⁶ Decision 1/CP.1, FCCC/CP/1995/7/Add.1.

³⁷ Berlin Mandate, *ibid*, fourth preambular paragraph (emphasis added).

³⁸ Decision II/5 of the second COP of the Convention on Biological Diversity commenced a process to develop a “protocol on biosafety”, which led to the Cartagena Protocol; decision I/5 of the first COP of the Basel Convention on Transboundary Movement of Transboundary Waste created a working group to “consider and develop a protocol on liability and compensation”, which led to the Basel Protocol; and decision 13/18 of the UNEP Governing Council convened “a diplomatic conference for the purpose of adopting a protocol”, which led to the Montreal Protocol on Substances That Deplete the Ozone Layer.

must be had to its ordinary meaning and the context in which it is used.³⁹

34. The ordinary meaning of “legal instrument” is slightly ambiguous and open to interpretation in the same way as “legal outcome”. On the one hand, the use of “legal” as a qualifier to “instrument” could mean only an instrument that was legally adopted – i.e. a COP decision that was adopted following the correct procedures. As has been discussed by many commentators, COP decisions only rarely create legally binding obligations under international law. More normally, they do not.⁴⁰
35. On the other hand, the term “legal instrument” could mean an instrument that is legally binding under international law (e.g. a protocol, treaty, convention, charter, constitutive act etc.). It would also cover amendments to the Convention and its annexes and the adoption of new Annexes which fall short of a new legally binding instrument, but which would nonetheless be legally binding (once they have entered into force).
36. The ordinary meaning of the term does not by itself, therefore, assist in ultimately determining whether “legal instrument” is intended to be legally binding under international law. Reference must thus be made to the context of the term “legal instrument”. Looking to the context of the term lends significant support to the second interpretation (i.e. that it is intended to be legally binding) for two reasons.
37. First, the relevant part of the ADP Decision calls for the development of “a protocol, another legal instrument or agreed outcome with legal force” within the ADP, which is required to report back to the COP (the ultimate decision-making body of the Convention).⁴¹ Pursuant to the Convention, the COP is entitled to adopt new protocols (which outcome is separately envisaged in the ADP Decision),⁴² amendments to the Convention and existing annexes, and new annexes.⁴³
38. In context, therefore, it is a reasonable interpretation that the term “legal instrument” in the ADP Decision refers to amendments to the Convention and/or its annexes as well as new annexes pursuant to Articles 15 and 16 of the Convention.
39. Second, the term “legal instrument” is used in the context of developing a “protocol” or “another legal instrument” (emphasis added). In context, a reasonable interpretation is that the “other” legal instrument would be of equivalent character to the “protocol”.
40. Taking these two considerations together, and applying them to the alternative interpretations that can be derived from the ordinary meaning of “legal instrument”, leads to the conclusion that the second interpretation of “legal instrument” is the correct one, i.e. that such an outcome is intended to be legally binding under international law.

“Agreed outcome with legal force”

41. While it is clear that the reference in the ADP Decision to “protocol” (inherently) and “another legal instrument” (by interpretation) refer to something which will be legally binding under international law, the position in relation to “agreed outcome with legal force” is not clear.

³⁹ Although the ADP Decision is not a treaty, the rules for the interpretation of treaties contained in Articles 31 and 32 of the Vienna Convention on the Law of Treaties 1969 are equally applicable here.

⁴⁰ Jutta Brunnée, ‘COPing with Consent: Law-Making Under Multilateral Environmental Agreements’, (2002) 15 *Leiden Journal of International Law* 21, note 4 at 32.

⁴¹ ADP Decision, n4 above, para 3.

⁴² Convention, Article 17.

⁴³ Convention, Articles 15 and 16.

42. The critical words are “with legal force”. The AWG-LCA, established by the Bali Action Plan, was to present its “agreed outcome” to the COP for adoption. As discussed above, when it was adopted, the Bali Action Plan did not specify what the legal form of that “agreed outcome” would be. The debate over whether it should be a new legally binding instrument (such as a protocol, amendments to the Convention and/or new annexes) or COP decisions (which are generally recognised as not legally-binding) was only settled with the ADP Decision which stated that the “agreed outcome” would be the COP decisions adopted at COP16 (Cancun), COP17 (Durban) and COP18 later this year in Qatar.
43. The words “with legal force” are clearly intended to add something to the term “agreed outcome”, as used in the Bali Action Plan. But what? Taken literally, the term “agreed outcome with legal force” implies an outcome, agreed by the Parties, that has the force of law. This then raises a further question: the force of national or international law?
44. The context suggests that it is the latter. Many of the Parties must involve their national legislatures in order to pass national laws. Such Parties’ involvement in international negotiations between sovereign states to reach an “agreed outcome with legal force” can only reasonably be construed as an attempt to do so at the international level.
45. While this seems to suggest something akin to legally binding under international law, the choice of “agreed outcome with legal force” rather than, for example, “legally binding outcome” is significant and potentially represents something softer than an instrument that would need to be ratified by each Party.⁴⁴ Nonetheless, as Rajamani suggests, “[the] implication of [agreed outcome with legal force] as well as the political machinations surrounding it is that we are moving towards a legally binding regime.”⁴⁵ These views support the EU’s observation that this formulation is the weakest of the three legal form outcomes and therefore the least desirable⁴⁶ but also that it is still intended to bring about legally binding commitments.⁴⁷
46. But what type of outcome does “agreed outcome with legal force” actually cover? Protocols, amendments and new annexes are already covered by the Convention and the ADP Decision; “agreed outcome with legal force” must therefore refer to some other type of outcome.
47. In her statement on the Durban conference to the Lower House of the Indian Parliament, the Minister of State for Environment and Forests, Jayanthi Natarajan stated that the outcome of the ADP could include “aspirational COP decisions, binding COP decisions, setting up of new institutions and bodies, and new protocols or other legal instruments...”⁴⁸
48. The reference to “binding COP decisions” is consistent with interventions made by India in the negotiations over the past few years in which India has stated that it considers that COP decisions are legally binding. However, this is misleading: unless a COP decision in relation to a particular matter has explicit or implicit authority from an underlying treaty,⁴⁹ it will not,

⁴⁴ Jacob Werksman, ‘Q & A: The Legal Aspects of the Durban Platform Text’, 14 December 2011, available at: <http://insights.wri.org/news/2011/12/qa-legal-aspects-durban-platform-text> (accessed 12 March 2012).

⁴⁵ Lavanya Rajamani, ‘Decoding the Durban Platform’, 14 December 2011, available at: <http://www.ejiltalk.org/decoding-the-durban-platform/> (accessed 12 March 2012).

⁴⁶ Werksman, n44 above.

⁴⁷ ‘Durban climate conference agrees deal to do a deal – now comes the hard part’, *The Guardian*, 12 December 2011, available at: <http://www.guardian.co.uk/environment/2011/dec/12/durban-climate-change-conference-2011-southafrica> (accessed 12 March 2012).

⁴⁸ Suo Moto Statement in Lok Sabha by Minister of State for Environment and Forests on Durban Agreements, 16 December 2011, available at: <http://pib.nic.in/newsite/erelease.aspx?relid=78811> (accessed 12 March 2012).

⁴⁹ See, in this connection, Article 12 of the Kyoto Protocol which establishes the clean development mechanism and which leaves certain matters to be developed by the CMP.

- strictly speaking, be legally binding.⁵⁰ However, it may of course influence the behaviour of the Parties.
49. Instead, the reference to “agreed outcome with legal force” may simply be an invitation to the Parties to propose any type of outcome that might be acceptable to all Parties. In particular, two types of outcomes come to mind, but they are by no means the only options.
50. First, the Parties could resort to making unilateral declarations to bind themselves under international law.⁵¹ Unilateral declarations have the benefit of not requiring ratification before they create legally binding obligations. However, when making such a declaration, a state must intend to be bound by it and to observe the obligation so created in accordance with the rule of *pacta sunt servanda*. Undertakings of this kind may be given orally or in writing and do not depend on the reply or reaction of other states.⁵²
51. However, resorting to unilateral declarations brings with it its own downsides. Their unilateral nature leaves it to each individual Party to decide what it wants to be bound by. This inherently impacts what levels of mitigation action a Party is likely to propose (e.g. absolute emissions cuts or deviation from business-as-usual scenarios) as well as which other elements of the negotiations it is willing to endorse. In effect, it would allow for Parties to ‘cherry-pick’ the aspects of the negotiations it feels it can support and to reject those it does not. While this would provide flexibility for individual Parties, such an approach (unless each Party takes on ambitious commitments) is unlikely to be consistent with achieving the ultimate objective of the Convention and is only marginally stronger than the ‘pledge and review’ system embodied in the AWG-LCA.
52. A consequence of ‘cherry-picking’ is that it will lead to a patchwork of legal obligations, with each Party being bound by different sets of rules. This would make it increasingly difficult to determine whether a Party has fulfilled its relevant obligations and could undermine any confidence in the international climate regime.
53. A second type of outcome is an agreement that the Parties might agree to internationally, but that is not submitted for ratification.⁵³ This could take the form of, for example, an agreement that reflects the existing domestic law of the Parties (and thus does not require further legislative approval). The problem with this option is that the agreement would be dragged down to the lowest common denominator – the country with the weakest ambition would in effect dictate the terms for all other Parties.

Conclusions

54. While it appears to be relatively clear that a “protocol” or “another legal instrument” would have the effect of binding the Parties under international law, there is still some scope for disagreement in relation to an “agreed outcome with legal force”.
55. It is likely that this last term was chosen for the very reason that it is ‘constructively ambiguous’ thus allowing all the Parties to agree to take things forward without conclusively agreeing on the form of outcome. As a result, a decision on the final legal form of the outcome of the ADP has been deferred and the hard decisions left for a later time. Even if

⁵⁰ ‘COP Decisions: Substance and Mandates’, *Legal Response Initiative*, 4 October 2010, available at: <http://www.legalresponseinitiative.org/briefing.html> (accessed 12 March 2012); *Brunée*, n40 above.

⁵¹ The binding character of unilateral declarations under international law has been recognised by the International Court of Justice in *Nuclear Tests (Australia v France)*, Judgment, *ICJ Reports*, 1974, p.253, para 43 and *Nuclear Tests (New Zealand v France)*, Judgment, *ICJ Reports*, 1974, p.457, para 46.

⁵² *Nuclear Tests (Australia v France)*, *ibid*, paras 43-46; and *Nuclear Test (New Zealand v France)*, *ibid*, paras 46-49.

⁵³ See, for example, the 1994 Agreement relating to the implementation of Part XI of the 1982 UN Convention on the Law of the Sea, which the US signed (and accepted as international law) but did not ratify (though many other countries did).

Parties can be persuaded that “agreed outcome with legal force” should refer to an outcome that is legally binding under international law (and the comments of many Parties suggest that this will be a difficult and long task), taking this route is beset with problems.

56. Employing the device of unilateral declarations might lead to a regime wherein the patchwork of legal obligations makes it difficult to determine each Party’s progress with their own commitments, while relying on domestic law to drive forward the international process is likely to result in a ‘race to the bottom’.
57. Neither scenario, ultimately, is likely to ensure that global temperature increases will be kept to below 2 degrees Celsius or that the ultimate objective of the Convention will be achieved.

“Under the Convention”

58. One of the most striking features of the ADP Decision is the absence of any express reference to CBDR. While this may seem strange given the centrality of CBDR to the current climate regime, in Durban the political climate made agreement on its inclusion impossible.
59. CBDR’s absence does not reflect an abandonment of the principle on the part of the developing country Parties. Instead, it has become increasingly clear over the past year or so that developed country Parties would have attempted to require any express reference to CBDR to be interpreted “dynamically” and by reference to “current economic realities”. In effect, this would have allowed developed countries to begin breaking down the firewall between Annex I and non-Annex I Parties.
60. The absence of CBDR from the ADP Decision therefore reflects the more fundamental issue that the Parties disagree on: how to apply it. In the face of opposing views, the only option was to not refer expressly to CBDR.
61. However, this does not mean that CBDR is no longer relevant. Instead, the “protocol, another legal instrument or agreed outcome with legal force” is to be developed “*under the Convention*”. Developing country Parties view this as meaning that the principles which guide the Convention (which include CBDR) will also guide the process conducted in the ADP. This is a persuasive argument and is further supported by the terms of the Convention itself.
62. Article 2 of the Convention, which states its ultimate objective, begins as follows:

“The ultimate objective of this Convention and any related legal instruments that the [COP] may adopt is to achieve, in accordance with the relevant provisions of the Convention...” (emphasis added).
63. Any protocol, amendment or new annex adopted by the COP as a result of the work of the ADP will, by its very nature, be “related” to the Convention. Thus, the ultimate objective of those instruments will be the same as that of the Convention (i.e. stabilisation of atmospheric greenhouse gas concentration at safe levels) and those instruments must achieve this objective “in accordance with the relevant provisions of the Convention”.
64. The most pertinent “relevant provisions of the Convention” are those contained in Article 3 of the Convention, which sets out certain principles that the Parties must be guided by. Amongst these, in Article 3(1), is the principle of CBDR.
65. Thus, any protocol, amendment or new annex adopted by the COP as a result of the work of the ADP will have to be “in accordance with the relevant provisions of the Convention” and thus be guided by, amongst other things, the principle of CBDR.

66. Although not expressly provided for by Article 2 of the Convention, given the context of the ADP Decision, it is likely that any “agreed outcome with legal force” will also have to respect the principle of CBDR. As a result, the absence of explicit reference to CBDR in the ADP Decision may not be as significant as it may seem, although its omission may be used by developed country Parties to attempt to minimise its influence on the outcome of the ADP. The more significant issue is how it will be applied in the post-2020 regime. This issue is likely to be fiercely negotiated over the coming years and the political context may make it difficult for developing country Parties to insist on a strict application of CBDR (as it existed in 1992 with the adoption of the Convention) in the post-2020 regime.

“Applicable to all”

67. The requirement that the outcome of the ADP should be “applicable to all” was also included in the ADP Decision at the insistence of developed country Parties. On the face of it, this requirement for the post-2020 regime seems benign. The Convention is “applicable to all” Parties that have ratified it, as is the Kyoto Protocol. The fact that an agreement is applicable to all Parties does not necessarily mean that all Parties have the same obligations.
68. For example, Article 4(1) of the Convention is applicable to all Parties, while Article 4(2) applies only to developed country Parties (and other Parties included in Annex I to the Convention). Similarly, the Kyoto Protocol creates new mitigation obligations for Annex I Parties⁵⁴ while making it clear that it does not introduce any new commitments for Parties not included in Annex I.⁵⁵
69. Thus the principle of CBDR can be applied to an agreement which is “applicable to all” Parties. Yet another example can be found in the 1987 Montreal Protocol on Substances That Deplete the Ozone Layer (as amended). Although it does not specifically state that CBDR is applicable to the Ozone regime, its application is apparent in the provisions of the protocol. Article 5 (as amended) takes into account the special situation of developing countries (calculated by reference to the level of consumption of controlled substances rather than by static lists as in the Convention) and gives them longer timeframes within which to phase out production and consumption of controlled substances. It also makes the effective implementation by developing countries of their obligations dependent on the provision of sufficient financial and technological support from developed countries (similar to Article 4(7) of the Convention). In this way, developing countries are afforded differential treatment despite the Montreal Protocol being “applicable to all” Parties.
70. However, the inclusion of this phrase in the ADP Decision, when viewed against the backdrop of the lack of explicit reference to CBDR and the term “applicable to all” not appearing in the Convention, Kyoto Protocol, Bali Action Plan or the Cancun LCA Decision, is significant. It could be interpreted as requiring developed and some developing country Parties to work towards taking on similar commitments, something to which developing country Parties have thus far not agreed. While it is true that the term can also be interpreted so as to provide for differentiated commitments for developed and developing country Parties in the absence of an explicit reference to CBDR (as in the Montreal Protocol), the political context of the adoption of the ADP Decision suggests the application of CBDR in the post-2020 regime may not reflect the application of CBDR in the Convention or the Kyoto Protocol.

⁵⁴ Kyoto Protocol, Article 3.

⁵⁵ Kyoto Protocol, Article 10, chapeau.

The missing piece(s)

71. The ADP Decision is only the start of the process for building the post-2020 regime. It contains a number of options for the legal form of its outcome. It states that it will be “applicable to all”, though what this means is open to interpretation. It also sets out that it will address, “inter alia, mitigation, adaptation, finance, technology development and transfer, transparency of action, and support and capacity building”.⁵⁶
72. However, the substance of the outcome is yet to be elaborated and it is likely that much of the ADP’s work in 2012 (and perhaps beyond) will be taken up with negotiations over what specifically the outcome should address. The specific content and ambition will determine whether the outcome, whatever the form, could, if adopted, ratified and implemented by all Parties, be effective in addressing the threat posed by climate change.⁵⁷
73. Equally important is the “legal character” of the content: even if legally binding, will obligations be discretionary or mandatory, how specific will they be and will there be consequences for non-compliance?
74. Werksman has identified four components to “legal character”: the legal form of the agreement (which is partly addressed by the ADP Decision), with the other three components being the three referred to above (which are not).⁵⁸ An outcome with strong legal character will thus need to be legally binding, contain mandatory and specific obligations and contain a mechanism for assessing non-compliance and enforcement.
75. However, an agreement with strong legal character will not, by itself, ensure that the content of that agreement will be sufficient to address climate change. The effectiveness of an agreement will be further dependent on the relationship between the legal character of the obligations and their substance and ambition. If the mitigation obligations are inadequate from a scientific perspective, no amount of legal character will remedy this. The danger, however, is that excessive focus on the legal character of the post-2020 regime will distract from its substance and lead to an ineffective regime.
76. The Parties thus have to walk a tightrope: ensuring sufficient legal character to give confidence to all Parties that the agreement will be complied with while also ensuring that the ambition (on all fronts, not just mitigation) is sufficient to keep global temperature increases below 2 degrees Celsius and help developing country Parties adapt to the adverse effects of climate change.
77. The task of the ADP over the next four years is to find the right balance. Reaching an agreement on the best, fairest and most politically acceptable outcome, and one which represents a global response to the threat of climate change will not be easy. The Parties should be encouraged to use every tool at their disposal. If this means implicitly employing CBDR to gain the widest possible participation, such an approach should not be rejected out of hand by developed country Parties, especially given that Article 3(1) of the Convention requires them to “take the lead” in combating climate change.

⁵⁶ ADP Decision, n4 above, para 5.

⁵⁷ The necessary substance and level of ambition required to ensure an effective outcome is beyond the scope of this paper. It should be noted, however, that the preamble and para 7 of the ADP Decision recognise that the current levels of mitigation ambition are not sufficient to keep global temperature rises to below 2 degrees Celsius and launch a “workplan on enhancing mitigation ambition to identify and explore options for a range of actions that can close the mitigation ambition gap”.

⁵⁸ *Jacob Werksman, ‘Legal Symmetry and Legal Differentiation under a Future Deal on Climate Change’ 10(6) Climate Policy 672.*

Kyoto Protocol limbo

78. Until the outcome of the ADP is implemented, the Kyoto Protocol will remain the only legally binding agreement in the climate regime that imposes hard mitigation targets and obligations on any Party (the outcome of the AWG-LCA being a series of COP decisions). As such, it is important that the second commitment period enters into force as soon as possible, since without it (after the expiry of the first commitment period on 31 December 2012) no Parties will be legally bound to reduce their emission reductions by a specific amount. This is implicitly recognised in the KP Decision adopted in Durban.⁵⁹
79. As noted in “The Durban Package” section above, the CMP decided that the second commitment period shall begin on 1 January 2013. However, rather than adopting the necessary amendments to the Kyoto Protocol and its annexes (which would have allowed Parties to proceed to ratification of the amendments), the KP Decision merely takes note of the proposed amendments, which are annexed to it as annexes 1, 2 and 2. Annex 1 sets out amendments to Annex B to the Kyoto Protocol (including the pledges for emission reductions from developed country Parties), Annex 2 sets out amendments to Annex A to the Kyoto Protocol (the inclusion of nitrogen trifluoride (NF₃) to the list of greenhouse gases controlled by the Kyoto Protocol). Annex 3 sets out the amendments to the provisions of the Kyoto Protocol necessary to give effect to the proposed amendments to Annex A and B of the Kyoto Protocol (as well as a small number of other amendments).
80. The KP Decision notes the intention of the Parties to convert the pledges for emission reductions contained in the proposed amendments to Annex B to the Kyoto Protocol into quantified emission limitation or reduction objectives (QELROS) for the second commitment period and mandates the AWG-KP to complete this task by CMP8 in Qatar. The AWG-KP is then requested to deliver the results of its work on QELROs to CMP8 *with a view to* the CMP adopting those QELROs as amendments to Annex B of the Kyoto Protocol.⁶⁰
81. Therefore, while the KP Decision envisages (but again does not require) the adoption of amendments to Annex B to the Kyoto Protocol (contained in annex 1 to the KP Decision) at CMP8, the position in relation to the amendments to the provisions of the Kyoto Protocol and to its Annex A (contained in annexes 2 and 3 to the KP Decision) is not entirely clear.
82. Paragraph 10 of the KP Decision requests the AWG-KP “to aim to deliver the results of its work pursuant to decision 1/CMP.1 in time to complete its work by [CMP8]”. However, there is no *obligation* in Decision 1/CMP.1 for the AWG-KP to complete its work with the adoption of all the relevant amendments; this was the *aim*, not a legally binding commitment. As such, despite paragraph 10, there is *no guarantee* that the amendments to the provisions of the Kyoto Protocol and to its Annex A will be adopted in at CMP8.⁶¹
83. Article 21(6) of the Kyoto Protocol provides any amendment to an annex (e.g. Annex B) shall not enter into force until the corresponding amendments to the Kyoto Protocol (if any) enter into force. As such, the proposed amendments to Annex B (even if accepted by all relevant Parties pursuant to Article 21(7) of the Kyoto Protocol) will not enter into force until the relevant proposed amendments to the Kyoto Protocol (i.e. those contained in annex 3 to the KP Decision) enter into force.

⁵⁹ KP Decision, n1 above, eighth preambular paragraph.

⁶⁰ KP Decision, n1 above, paras 4-6.

⁶¹ The provisional agenda and annotations for the seventeenth session of the AWG-KP dated 2 March 2012 (FCCC/KP/AWG/2012/1, Section III, Part 3, para 18) and the Scenario Note on the seventeenth session of the AWG-KP dated 5 March (FCCC/KP/AWG/2012/2, Section III, para 6(c)) both *expect* that the AWG-KP will finalise the proposed amendments to the Kyoto Protocol and its annexes but neither document explicitly states that they *will* necessarily be adopted at CMP8.

84. As a result, even if the amendments to Annex B are adopted at CMP8 and quickly ratified by a sufficient number of Parties, the second commitment period (and related QELROs) will not have effect until such time that the proposed amendments to the Kyoto Protocol are adopted by the CMP and ratified by the necessary number of Parties.⁶²
85. It may be that the failure of the KP Decision to explicitly refer to the adoption of annexes 2 and 3 to the KP decision at CMP8 (at the same time as the amendments to Annex B) is merely an oversight and that the understanding of the Parties is that all amendments to the Kyoto Protocol (i.e. those set out in annexes 1, 2 and 3 to the KP Decision) should be adopted at the same time.⁶³ If this is the intention, Parties must ensure that all proposed amendments to the Kyoto Protocol are placed on the agenda for CMP8 in Qatar.

Conclusions

86. The decisions adopted in Durban relating to the future architecture of the climate regime are significant. At a high level, they have the potential to represent a truly global response to the threat of climate change. However, such a way forward is not without considerable costs.
87. Chief amongst these is the fact that the ADP Decision does not specifically provide for the negotiations in the ADP to be guided by CBDR. While it can be argued that CBDR will (by implication) apply to the negotiations since the work of the ADP is to be “under the Convention”, this does not resolve the key difference between the Parties: how should CBDR be applied to the post-2020 regime? Discussion of this issue has been deferred and will likely be one of the most contentious issues over the coming years.
88. By agreeing to the ADP Decision, the Parties effectively agreed to split the post-2012 climate regime into two separate parts. The first relates to the period between 2012 and 2020, which will be covered by the non-binding outcome of the AWG-LCA (and, for some Parties, the second commitment period of the Kyoto Protocol, provided it is adopted and ratified by the relevant number of Parties). The second deals with the period after 2020, which will be covered by the outcome of the ADP.
89. Splitting the regime in this way raises various issues. First, it de-links the outcome of the ADP from the Bali Action Plan (with all the implications for CBDR discussed previously). Second, it begs the question of whether the AWG-LCA outcomes will in any way inform the substantive ADP negotiations. The fact that the ADP Decision notes the LCA Decision in its preamble suggests that there will be some crossover. However, the extent of such a crossover is another item that negotiators will have to grapple with over the coming year or years.
90. Another difficult issue, which still requires final resolution, is the legal form of the final outcome of the ADP. While the language in the ADP Decision suggests we are moving towards a legally-binding regime post-2020, achieving such an outcome will require further difficult negotiations.
91. At the same time, negotiators will need to remain aware of the risks of focusing exclusively on these three issues and ensure that the substance and legal character of the outcome of the ADP are not neglected in their attempt to resolve the headline political issues.

⁶² Alternatively, the proposed amendments could be brought into force immediately if Parties agreed to provisionally apply them until such time as the amendments formally enter into force. An overview of provisional application is beyond the scope of this paper. For more information on this, see ‘Provisional Application Overview’, *Legal Response Initiative*, 4 October 2010, available at: <http://www.legalresponseinitiative.org/briefing.html> (accessed 12 March 2012).

⁶³ Based on the documents referred to in n61 above, this appears to be the case.