THE DURBAN PLATFORM FOR ENHANCED ACTION AND THE FUTURE OF THE CLIMATE REGIME

I. INTRODUCTION

The Durban Climate Conference,[1] marked by tension, high drama and sleepless nights, agreed on a set of historic decisions under the climate regime 36 hours after the scheduled end of the conference. The climate regime—comprising the 1992 Framework Convention on Climate Change[2] and its 1997 Kyoto Protocol,[3] and decisions taken by Parties under these instruments—has been plagued in the last few years, in particular after the debacle at Copenhagen,[4] by doubt and uncertainty. Doubt over its ability to meet climate goals, and uncertainty over its future, in particular that of the Kyoto Protocol. At Durban, Parties strengthened the climate regime with decisions to implement the 2010 Cancun Agreements,[5] extend the beleaguered Kyoto Protocol, for a second commitment period,[6] and launch a new process to negotiate a post-2020 climate regime.[7] This new process, christened the Ad-Hoc Working Group on the Durban Platform for Enhanced Action, is intended to craft the agreement that will govern, regulate and incentivize the next generation of climate actions.

[1] Seventeenth session of the Conference of the Parties (COP) to the United Nations Framework Convention on Climate Change (UNFCCC) held at Durban from 28 November to 9 December 2011. Information about the COP and related documents <http://unfccc.int/meetings/durban_nov_2011/meeting/6245.php>.

[2] United Nations Framework Convention on Climate Change, 29 May 1992, reprinted in 31 ILM 849 (1992) [hereinafter 'FCCC'].

[3] Kyoto Protocol to the United Nations Framework Convention on Climate Change, 10 December 1997, reprinted in 37 ILM 22 (1998) [hereinafter 'Kyoto Protocol'].

[4] The Copenhagen Conference, 2009, resulted in a non-binding Copenhagen Accord, Decision 2/ CP.15, 'Copenhagen Accord', in FCCC/CP/2009/11/Add.1 (30 March 2010) [hereinafter 'Copenhagen Accord']. L Rajamani, 'The Making and Unmaking of the Copenhagen Accord' (2010) 59 ICLQ 824.

[5] Draft decision -/CP.17, 'Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention', advance unedited version <http://unfccc.int/files/meetings/durban_nov_2011/decisions/application/pdf/cop17_lcaoutcome.pdf> [hereinafter 'Durban LCA Decision']. The Cancun Agreements, 2010, comprise Decision 1/CP.16, 'The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on long-term Cooperative Action under the Convention', in FCCC/CP/2010/7/Add.1 (15 March 2011) [hereinafter 'Cancun Agreements LCA']; and, Decision 1/CMP.6, 'The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol at its fifteenth session', in FCCC/KP/CMP/2010/12/Add.1 (15 March 2011) [hereinafter 'Cancun Agreements KP']. See for an analysis of the Cancun Agreements, L Rajamani, 'The Cancun Climate Change Agreements: Reading the Text, Subtext and Tea Leaves' (2011) 60 ICLQ 499–519. See also M Grubb, 'Editorial: Cancun: the Art of the Possible' (2011) 11 Climate Policy 847–50.

[6] Draft decision -/CMP.7, 'Outcome of the work of the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol at its sixteenth session', advance unedited version, para 1 <http://unfccc.int/files/meetings/durban_nov_2011/decisions/application/pdf/awgkp_outcome.pdf> [hereinafter 'Durban KP Decision'].

[7] Draft decision -/CP.17, 'Establishment of an Ad Hoc Working Group on a Durban Platform for Enhanced Action, 2011', advance unedited version <http://unfccc.int/2860.php> [hereinafter 'The Durban Platform'].

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This article analyses the text of the decision launching the Ad-Hoc Working Group on the Durban Platform, with a view to distilling the central premises of the negotiations for a post-2020 climate regime, as well as identifying the likely gaps. Such textual analysis reveals that, unlike in the last two decades of climate negotiations, symmetry rather than differentiation is intended to be the central organizing principle of the future climate regime. Although differentiation is by no means dead—there are avenues for debates on equity and differentiation to inform the future climate negotiations—this article argues that the text of the Durban Platform appears to swing the pendulum in the opposite direction, and there will likely be continuing discussion over the perceived equity gap in the Durban process.[8]

In addition to the Durban Platform decision that launched a process to craft the post-2020 climate agreement, Parties took several decisions in Durban that govern climate actions in the 2012–2020 time-frame. This article will also briefly analyze developments in Durban that are likely to influence the ambition and scope of mitigation actions by the international community in the lead-up to 2020. Many of these developments are designed to ensure implementation of existing commitments and generate knowledge on climate actions across the world. This article argues that while these are valuable,[9] they do little to address the 'ambition gap' that pervades the regime. There is a considerable gap between the aggregate effect of Parties' current mitigation pledges[10] and emissions pathways consistent with holding the increase in global average temperature below 2 °C above pre-industrial levels.[11] While an important political signal, given its limited coverage, the renewal of the Kyoto Protocol does little to address this ambition gap. The Durban Platform on Enhanced Action attempts, albeit in a faint-hearted manner, to address the ambition gap; however, it is unclear whether the process to raise ambition will apply to actions before 2020. There is therefore a potential ambition gap in the 2012–2020 time-frame, and an equity gap in the post-2020 time-frame. While these gaps can be sourced to *realpolitik*, their continuing presence in the

[8] See eg on the centrality of equity, Proposals by India for inclusion of additional agenda items in the provisional agenda of the seventeenth session of the Conference of the Parties, Note by the Secretariat, FCCC/CP/2011/INF.2/Add.1 (7 October 2011), Annex. See also Press Release, 'PM Addresses 12th Delhi Sustainable Development Summit', Prime Minister's Office, Press Information Bureau, 2 February 2012 <http://pib.nic.in/newsite/pmreleases.aspx?mincode=3>; Press Release, 'Suo Moto Statement in Lok Sabha by Minister of State for Environment and Forests (I/C) on Durban Agreements', 19 December 2011 <http://pib.nic.in/newsite/erelease.aspx?relid=78811>.

[9] Credible information on actions taken by other countries fosters confidence and generates goodwill, which in turn leads to equitable and effective agreements. See K Raustiala, 'Compliance and Effectiveness in International Regulatory Cooperation' (2000) 32 Case W Res J Int'l L 387; M Ehrmann, 'Procedures of Compliance Control in International Environmental Treaties', (2002) 13 Colo J Int'l L 433–434; I Hunger and N Isla, 'Confidence-Building Needs Transparency: An Analysis of the BTWC's Confidence-Building Measures', United Nations Institute for Disarmament Research, 2006 <http://www.einiras.org/pub/details.cfm?lng=en&id=46978>.

[10] Compilation of economy-wide emission reduction targets to be implemented by Parties included in Annex I to the Convention, Revised note by the secretariat, FCCC/SB/2011/INF.1/Rev.1 (7 June 2011); Compilation of information on nationally appropriate mitigation actions to be implemented by Parties not included in Annex I to the Convention, Note by the secretariat, FCCC/AWGLCA/2011/INF.1 (18 March 2011).

[11] United Nations Environment Programme, *Bridging the Emissions Gap – A UNEP Synthesis Report* (United Nations Environment Programme, 2011).

climate regime does not bode well for the future of the climate regime, which will only be effective if it is both ambitious and equitable.

II. THE DURBAN PLATFORM FOR ENHANCED ACTION: AN EQUITY GAP?

A. The Backdrop: The 'Legal Form' Debate

The decision launching the Durban Platform on Enhanced Action is the much-awaited outcome of several years of acrimonious discussions on the 'legal form' of the future climate agreement. The 2007 Bali Action Plan launched a process, the Ad-Hoc Working Group on Long-term Cooperative Action (AWG-LCA), to reach an 'agreed outcome' on long-term cooperative action on climate change.[12] The term 'agreed outcome' indicates a lack of agreement on both the legal form that the likely outcome of this process could take, and the level of ambition that it should reflect. The options for legal form range from protocols and amendments that are legally binding and can deliver the benefits of consistent application, certainty, predictability and accountability, to soft law options such as decisions taken by the Conference of Parties (COP), which, while operationally significant, are not, absent explicit treaty authorization,[13] legally binding.[14]

This lack of agreement on legal form has haunted the negotiating process since 2007. The AWG-LCA process was scheduled to come to an end at the Copenhagen Climate Conference, 2009, however this was not to be.[15] The AWG-LCA was unable to complete its mandate in part because of disagreements over the legal form of its outcome.[16] Several Parties, frustrated with the pace of discussions over the legal form of the Bali agreed outcome, submitted proposals for legally binding instruments under FCCC Article 17. These include Protocols from Japan,[17] Australia,[18] Tuvalu,[19] Costa Rica[20]

[12] Decision 1/CP.13, 'Bali Action Plan', in FCCC/CP/2007/6/Add.1 (14 March 2008) [hereinafter 'Bali Action Plan']. For a detailed analysis of the Bali Action Plan, see L Rajamani, 'From Berlin to Bali and Beyond: Killing Kyoto Softly' (2008) 57 ICLQ 909–39.

[13] Explicit authorization for binding law-making is provided infrequently. Article 2(9) Montreal Protocol, 1987 is an oft-quoted example.

[14] On the legal status of COP decisions see, J Brunnée, 'COPing with Content, Law-Making under Multilateral Environmental Agreements' (2002) 15 LJIL 1–52. See for an analysis of legal form options, L Rajamani, 'Addressing the Post-Kyoto Stress Disorder' (2009) 58 ICLQ 803–34, and D Bodansky, *White Paper: Legal Form of a New Climate Agreement: Avenues and Options* (Pew Center on Global Climate Change, Washington, April 2009).

[15] The AWG-LCA's mandate was renewed twice in successive COPs. See para 143–5, Cancun Agreements LCA, and Decision 1/CP. 15, 'Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention', in FCCC/CP/2009/11/Add.1 (30 March 2010), para 2.

[16] See eg Preambular recital 2, Cancun Agreements LCA, for a reflection of this.

[17] Draft protocol to the Convention prepared by the Government of Japan for adoption at the fifteenth session of the Conference of the Parties, FCCC/CP/2009/3 (13 May 2009).

[18] Draft protocol to the Convention prepared by the Government of Australia for adoption at the fifteenth session of the Conference of the Parties, FCCC/CP/2009/5 (6 June 2009).

[19] Draft protocol to the Convention presented by the Government of Tuvalu under Article 17 of the Convention, FCCC/CP/2009/4 (5 June 2009).

[20] Draft protocol to the Convention prepared by the Government of Costa Rica for adoption at the fifteenth session of the Conference of the Parties, FCCC/CP/2009/6 (8 June 2009).

and Grenada[21] and an Implementing Agreement from the United States.[22] In the meantime, negotiations over the Kyoto Protocol's second commitment period, launched in 2005, continued, seemingly without end,[23] even as some developed countries began to distance themselves from the Kyoto Protocol.[24]

Although in the early days of the debate over the legal form of the Bali agreed outcome, positions were drawn firmly along developed or developing country lines, in the lead-up to the Durban Climate Conference, 2011, these lines became blurred. Many countries, including the host, South Africa, had coalesced in favour of a legally binding instrument to crystallize mitigation and other commitments that will chart the world through to a 2 °C or even 1.5 °C world.[25] The Alliance of Small Island States and other vulnerable countries, on the frontlines of climate impacts, believed anything short of a legally binding instrument to be an affront to their grave existential crisis. The European Union indicated that they would offer the Kyoto Protocol a lifeline to ensure its survival for a transitional commitment period conditional on the adoption at Durban of a deadline-driven roadmap towards a 'global and comprehensive legally binding agreement' under the FCCC.[26] Brazil, China and India had argued that extending the Kyoto Protocol is a legal obligation,[27] not a bargaining tool to extract further concessions from developing countries. These countries were only willing, if at all, to consider a mandate for a new legally binding instrument after the release of the fifth assessment report of the Intergovernmental Panel on Climate Change,[28] and the completion of the review of the long-term global goal of 2 °C slated by the Cancun

[21] Proposed protocol to the Convention submitted by Grenada for adoption at the sixteenth session of the Conference of the Parties, FCCC/CP/2010/3 (2 June 2010).

[22] Draft implementing agreement under the Convention prepared by the Government of the United States of America for adoption at the fifteenth session of the Conference of the Parties, Note by the secretariat, FCCC/CP/2009/7 (6 June 2009).

[23] See Decision 1/CMP.1, 'Consideration of commitments for subsequent periods for Parties included in Annex I to the Convention under Article 3, paragraph 9, of the Kyoto Protocol', in FCCC/KP/CMP/2005/8/Add.1 (30 March 2006).

[24] Russia and Japan have formally indicated their intention not to assume targets under the Kyoto Protocol's second commitment period. See Letter to Ms C Figueres, Executive Secretary of the UNFCC, from the Head of Roshydromet, National Climate Change Coordinator, The Russian Federation, 8 December 2010 <http://unfccc.int/files/meetings/cop_15/copenhagen_accord/application/pdf/russianfederation_cph10.pdf>; and, Letter to Ms C Figueres, Executive Secretary of the UNFCC, from the Japanese Ambassador for COP16 of the UNFCCC, 10 December 2010 <http://unfccc.int/files/meetings/ad_hoc_working_groups/kp/application/pdf/japan_awgkp15.pdf>; Canada has formally withdrawn from the Kyoto Protocol. See Canada: Withdrawal, Kyoto Protocol to the United Nations Framework Convention on Climate Change, C.N.796.2011.TREATIES-1 (Depositary Notification), 16 December 2011, <http://unfccc.int/files/kyoto_protocol/background/application/pdf/canada.pdf.pdf>.

[25] The Copenhagen Accord prescribes 2 °C as the temperature goal for the climate regime; the Cancun Agreements and Durban decisions provide avenues for further strengthening this goal to 1.5 °C. See para 1, Copenhagen Accord, para 4, Cancun Agreements (LCA) and preambular recital 3, Section II.A, Durban LCA Decision.

[26] Council of the European Union, Preparations for the 17th session of the Conference of the Parties (COP 17) to the United Nations Framework Convention on Climate Change (UNFCCC) and the 7th session of the Meeting of the Parties to the Kyoto Protocol (CMP 7) (Durban, South Africa 28 November – 9 December 2011), *Council Conclusions*, 3118th Environment Council meeting, Luxembourg, 10 October 2011 <http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/envir/125026.pdf>.

[27] Art 3(9), Kyoto Protocol.

[28] For information on the Fifth Assessment Report, see <http://www.ipcc.ch/activities/activities.shtml#.T0ZKHodA8qw>.

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Agreements for 2015.[29] In their view, if contributions to the stock of global carbon rather than merely current contributions are taken into account, developed countries have vastly exceeded and developing countries are well below their entitlements to carbon space.[30] This requires developed countries, in their view, to take the first of several steps, not wait for developing countries to walk in tandem. The United States, nervous about the gathering momentum in favour of a Durban mandate, had indicated that any new legally binding instrument, if and when it becomes necessary, must incorporate symmetrical mitigation commitments, at least in form, for all significant emitters. In their view the fact that current Chinese emissions have exceeded that of the Americans,[31] for instance, is sufficient to require symmetrical commitments from them. It is against this backdrop that the Durban Platform for Enhanced Action was negotiated and adopted.

B. The Fate of the Ad Hoc Working Group on Long-term Cooperative Action and the Bali 'Firewall'

The Durban Platform decision—as its first order of business—extended the AWG-LCA for one year in order for it to reach the Bali 'agreed outcome' through COP decisions.[32] In so doing, the Durban Platform decision achieved two objectives. First, it set a date for the termination of the AWG-LCA. Second, by concluding that the 'agreed outcome' shall be reached through COP decisions, it brought an end to the dispute over the legal form of the Bali 'agreed outcome'. The Bali Action Plan will, through COP decisions—including those taken at Cancun, 2010, and Durban, 2011, and to be taken in Qatar, 2012—reach its agreed outcome in 2012, at which time the AWG-LCA will be terminated.

There is tremendous significance to this seemingly benign act of finalizing the outcomes of the Bali Action Plan as COP decisions, and terminating the AWG-LCA in 2012. The Bali agreed outcome could have been determined to be a 'Protocol or another legally binding instrument', as the Alliance of Small Island States had sought. The Bali Action Plan could then have offered the template for the new climate regime, as developing countries had argued. Indeed at the time the Bali Action Plan was negotiated, it was intended to do precisely this. Subsequent interpretations of the Bali Action Plan, however, have served to render this instrument deeply unpopular with certain developed countries. The Bali Action Plan is interpreted by many developing countries as creating a 'firewall' between developed country mitigation commitments and developing country mitigation actions.[33] In the context of long-standing disputes

[29] Para 138 and 139, Cancun Agreements LCA.

[30] See eg Experts from BASIC countries, *Equitable access to sustainable Development, Contribution to the Body of Scientific Knowledge – A Paper by Experts from BASIC Countries* (2011) 4–21 <http://www.erc.uct.ac.za/Basic_Experts_Paper.pdf>.

[31] In 2008, China's CO_2 emissions constituted the highest share—24.01%—of the world's emissions. See data for Yearly Emissions for countries, Climate Analysis Indicators Tool (CAIT), World Resources Institute <http://cait.wri.org>.

[32] Para 1, The Durban Platform.

[33] See eg Algeria on behalf of the African Group in Ideas and proposals on the elements contained in paragraph 1 of the Bali Action Plan, Submissions from Parties, FCCC/AWGLCA/2009/MISC.4 (Part I) (19 May 2009), 11. See also, Statement of Common Position, African Group, Group of Least Developed Countries and ALBA Group, 7 October 2011 <http://climate-justice.

over the nature and extent of differentiation in the climate regime, the United States, among others, in a bid to move away from the Bali 'firewall', insisted on terminating the AWG-LCA process in 2012, and on launching a new process to negotiate the future climate regime, one less susceptible to such seemingly extreme interpretations of differentiation between developed and developing countries. Durban delivered both a deadline for the termination of the AWG-LCA, as well as a new process to negotiate the future climate regime.

C. The Legal Form of the Future Climate Agreement

The Durban Platform decision launched 'a process to develop a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties, through [. . .] the Ad Hoc Working Group on the Durban Platform for Enhanced Action'.[34] The phrases that comprise this sentence are terms of art, and are worthy of further scrutiny.

The terms 'Protocol' and 'another legal instrument' are reminiscent of the 1995 Berlin Mandate,[35] which launched the process that led to the Kyoto Protocol. The Berlin Mandate mandated Parties to arrive at a 'Protocol or another legal instrument'.[36] Protocols are explicitly recognized in FCCC Article 17 as a method of expanding the climate regime. 'Legal instrument', in the context of the Berlin Mandate discussions referred to the possibility of amendments to the FCCC, which were being considered at the time.[37] In the context of the Durban Platform decision, 'legal instrument' could refer to any of the legal instruments that the COP is empowered to adopt—amendments,[38] amendment to Annexes[39] and Protocols.[40] The COP is however also empowered to take decisions, and although as noted above these are not considered legally binding, absent explicit treaty authorization, if the term 'legal instrument' is not reflexively interpreted as a 'legally binding instrument', COP decisions could also conceivably be brought within the fold of 'legal instrument'. Given the gathering momentum towards a legally binding instrument in the lead-up to the Durban Climate Conference, it would be safe to assume that the majority of countries that negotiated the Durban Platform, however, did not intend this to be the case.

info/wp-content/uploads/2011/11/Statement-of-Common-Positions-Afr-LDC-ALBA-FINAL.pdf>. It is worth noting that although this distinction between commitments and actions came to be characterized as a 'firewall' after Bali, many developing countries source such a firewall to the FCCC. In conversation, JM Mauskar, Special Secretary, Ministry of Environment and Forests, India, and lead climate negotiator.

[34] Para 2, The Durban Platform.

[35] See Decision 1/CP.1, 'Berlin Mandate: Review of Adequacy of Articles 4, paragraph 2, subparagraph (a) and (b) of the Convention, including proposals related to a Protocol and decisions on follow-up', in Report of the Conference of the Parties on its First Session, held at Berlin from 28 March to 7 April 1995, Addendum, Part Two: Action Taken by the Conference of the Parties at its First Session, FCCC/CP/1995/7/Add.1 (6 June 1995) [hereinafter 'The Berlin Mandate'].

[36] Preambular recital 3, The Berlin Mandate.

[37] Report of the Ad Hoc Group on the Berlin Mandate on the Work of its Third Session, held at Geneva from 5 to 8 March 1996, FCCC/AGBM/1996/5 (23 April 1996), and Ad Hoc Group on the Berlin Mandate, Possible Features of a Protocol or Another Legal Instrument, Institutional issues, Note by the secretariat, FCCC/AGBM/1996/4 (13 February 1996).

[38] Art 15, FCCC. [39] Art 16, FCCC. [40] Art 17, FCCC.

The term 'agreed outcome with legal force' was the result of a 'huddle' with the EU and India at its centre, 30-odd hours after the scheduled end of the Conference.[41] The US, the UK, and South Africa also played a role in brokering the final deal.[42] India, until the final hours of the conference, alone among developing countries, had insisted that agreeing to a legally binding instrument was a red line that it could not cross. Since the terms 'Protocol' and 'another legal instrument' are interpreted by most as referring to legally binding instruments under the FCCC, a more ambiguous third option was necessary to accommodate India. India argued that it could agree to launch a process towards a 'legal outcome'—which would leave the precise legal form of the instrument open. This formulation—'legal outcome'—lacked the clarity and ambition that the EU, the Alliance of Small Island States, the Least Developed Countries, many Latin American countries, and even India's BASIC allies, Brazil and South Africa, were seeking. Critically, this was not sufficient for the EU to endorse a Kyoto second commitment period. India agreed in the end to substitute the term 'legal outcome' with a marginally less ambiguous term, 'agreed outcome with legal force,' thus triggering the acceptance of a Kyoto second commitment period by the EU and its allies.

The term 'agreed outcome with legal force' is only marginally less ambiguous than 'legal outcome', but its creative ambiguity leans in a different direction. While the ambiguity in 'legal outcome' creates room for COP decisions, the ambiguity in 'agreed outcome with legal force' creates room for a fresh set of possibilities for legal form. It is unclear whether this was contemplated by India and the EU at the time, but among these is the possibility that an 'agreed outcome with legal force' could be interpreted as an outcome that derives legal force from municipal rather than international law. This is reminiscent of the US proposal for an 'implementing agreement' that allows for 'legally binding approaches' based on targets and actions embodied in municipal law.[43] It is worth noting, however that the phrase 'under the Convention', that follows 'agreed outcome with legal force' could be interpreted to limit this range of possibilities to those that exist in the FCCC ie protocols, amendments and amendments to annexes.

The term 'under the Convention' has another dimension to it as well. It could, as suggested above, be read as qualifying the legal nature of the instruments referred to. It could also be read as qualifying the content of the legal instrument that eventually emerges. If the latter, the negotiation process for the future climate agreement would implicitly engage all the principles and provisions of the Convention. There is a context, discussed below, to the introduction of this loaded term 'under the Convention'.

D. Recasting Differentiation?

In marked contrast to several previous COP decisions launching negotiations towards future agreements,[44] the Durban Platform decision does not contain a reference to 'equity' or 'common but differentiated responsibilities', the usual markers for

[41] See, J Vidal and F Harvey, 'Durban climate deal struck after tense all-night session', *The Guardian* (11 December 2011); M McCarthy, '11th-hour agreement in Durban sees Big Three legally bound to reduce carbon emissions' *The Independent* (12 December 2011).

[42] Images of the 'huddle' and its participants <http://www.iisd.ca/climate/cop17/photoindex.html>.

[43] Draft implementing agreement (n 22).

[44] See, eg para 1(a), The Berlin Mandate and para 1(a), Bali Action Plan.

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differentiation in the climate regime. This is no benign oversight. Through the two weeks of the conference, developed countries were unanimous in their insistence that any reference to 'common but differentiated responsibilities' must be qualified with a statement that this principle must be interpreted in the light of contemporary economic realities. This reflects their long-standing displeasure with the perceived rigid differentiation embodied in the FCCC and Kyoto Protocol between the 'haves' and 'have nots' of mitigation obligations, broadly corresponding to developed and developing countries. In their view, economic and political realities have evolved since the FCCC was negotiated in 1992, and common but differentiated responsibilities must be interpreted as a dynamic concept that evolves in tandem with changing economic and other realities.[45] The future agreement, the EU argued, must contain a broader spectrum of differentiation in the obligations among Parties than is currently the case under the Convention. India, among other developing countries, argued in response that this would tantamount to amending the FCCC.[46] One way out of this impasse was to draft the text such that it was rooted in the Convention—'under the Convention'—thereby implicitly engaging its principles, including the principle of common but differentiated responsibilities. This, it was believed, would hold efforts to reinterpret and qualify this principle at bay, or at least leave the issue of 'differentiation' to be resolved in the future. Nevertheless, the fact that the divisions on the application of this principle are such as to preclude even a rote invocation of it, signals a recasting of differentiation in the future climate regime.

Another indicator of such recasting of differentiation lies in the phrase 'applicable to all Parties'. Developed countries, in particular the US, Japan and Australia were insistent that the future regime must be 'applicable to all'. Needless to say, merely because an instrument is applicable to all does not imply that it is applicable in a symmetrical manner to all. Universality of application does not translate into uniformity of application. The FCCC and Kyoto Protocol are applicable to all Parties, but they do not contain symmetrical commitments for all Parties. The term 'applicable to all' has therefore political rather than legal significance. It is a signal that the future regime will move towards symmetrical obligations, at least in so far as the nature and form of the obligations (even if not their stringency) are concerned.[47] In a similar vein, preambular

[45] See, eg Submission of Australia, in Ideas and proposals on the elements contained in paragraph 1 of the Bali Action Plan, Submissions from Parties, Addendum, Part I, FCCC/AWGLCA/2008/Misc.5/Add.2 (Part I) (10 December 2008), 73; Submission of Japan, in Ideas and proposals on the elements contained in paragraph 1, of the Bali Action Plan, Submissions from Parties, FCCC/AWGLCA/2008/MISC.5 (27 October 2008), 41; and Submission of the United States, in Ideas and proposals on the elements contained in paragraph 1 of the Bali Action Plan, Submissions from Parties, FCCC/AWGLCA/2008/MISC.5 (27 October 2008), 106. It is worth noting that several international tribunals have approached treaties as 'living instruments' and applied the 'evolutionary' method of treaty interpretation. See generally for a discussion of these, I Van Damme, *Treaty Interpretation by the WTO Appellate Body* (OUP, Oxford, 2009); G Letsas, 'Strasbourg's Interpretive Ethic: Lessons for the International Lawyer' (2010) 21 EJIL 509–41.

[46] The FCCC permits non-Annex I Parties to graduate to Annex I, through amendment to the Annexes, should be wish to do so. See Art 16, FCCC. Thus far the only cases of such graduation have been Malta and Cyprus (yet to enter into force), and both have sought such graduation as a consequence of their joining the EU.

[47] See, eg Todd Stern, the US Climate Change Envoy commented after Durban, '[f] undamentally, we got the kind of symmetry we have been focused on since the beginning of the Obama administration.' See L Friedman and J Chemnick, 'Durban talks create ''platform'' for new climate treaty that could include all nations', ClimateWire, 12 December 2011. See also, Reaction

recitals to the Durban Platform decision call for 'all Parties' to urgently address climate change and for the widest possible cooperation 'by all countries'.[48] This is balanced however by a reference to the need for a multilateral rules-based regime 'under the Convention'. This reference to 'under the Convention' is not qualified, unlike in the text of the decision, by the term 'applicable to all Parties'.[49]

Further evidence is offered in a subsequent paragraph of the Durban Platform decision that launches a work plan for enhancing mitigation ambition 'with a view to ensuring the highest possible mitigation efforts by all Parties'.[50] This work plan, applies to 'all Parties' not just to 'developed countries Parties'. It is worth noting that the Cancun Agreements urged 'developed country Parties to increase the ambition of their economy-wide emission reduction targets',[51] while agreeing that 'developing country Parties will take nationally appropriate mitigation actions in the context of sustainable development, supported and enabled by technology, financing and capacity building'.[52] In the lead-up to Durban, and even at Durban, the work plan on mitigation ambition was proposed and discussed in the context of the AWG-LCA negotiations on mitigation commitments or actions by developed country Parties.[53] This distressed several developed country Parties who attempted to exclude these paragraphs from the AWG-LCA decision text. The Alliance of Small Island States, however, supported by the EU refused to overlook such an exclusion of ambition from the agenda. In an attempt at compromise, in the final hours of the negotiations the paragraphs on mitigation ambition were moved to the Durban Platform decision. In the process the work plan on mitigation ambition shed its applicability exclusively to developed country Parties and became applicable to 'all Parties'. Perhaps for the first time in the history of the climate regime, the Parties thus arrived at (or permitted) a decision that does not contain the terms 'developed country' and 'developing country' Parties.

Notwithstanding this seemingly clear vote for symmetrical obligations in the future climate agreement, the battle over differentiation is far from over. First, the term 'under the Convention' does offer India, among other developing countries, an avenue to engage the principles and provisions of the Convention, in particular the principle of

of Connie Hedegaard, EU climate commissioner, after Durban: 'The big thing is that now all big economies, all parties have to commit in the future in a legal way and that's what we came here for' in 'Reaction to UN climate deal', BBC News Science and Environment, 11 December 2011 <http://www.bbc.co.uk/news/science-environment-16129762>.

[48] Preambular recital 1, The Durban Platform.

[49] Preambular recital 3, The Durban Platform.

[50] Para 7, The Durban Platform.

[51] Para 37, Cancun Agreements LCA.

[52] Para 48, ibid. See also para 51 that requests the Secretariat to organize workshops to understand the 'diversity of mitigation actions' submitted, noting 'different national circumstances and respective capabilities of developing country Parties'.

[53] See for the progress of the work on mitigation ambition during Durban, Update of the amalgamation of draft texts in preparation of a comprehensive and balanced outcome to be presented to the Conference of the Parties for adoption at its seventeenth session, Note by the Chair, FCCC/AWGLCA/2011/CRP.38 (7 December 2011), ch II, para 7 and Amalgamation of draft texts in preparation of a comprehensive and balanced outcome to be presented to the Conference of the Parties for adoption at its seventeenth session, Note by the Chair, FCCC/AWGLCA/2011/CRP.37 (3 December 2011), ch 11, para 7. For the work on mitigation ambition in the lead-up to Durban see Work of the AWG-LCA Contact Group, Agenda item 3.2.1, Nationally appropriate mitigation commitments or actions by developed country Parties, Discussion on matters relating to paras 36–8 of the Cancun Agreements, *Co-facilitator's summary*, 14 October 2011.

common but differentiated responsibility and respective capabilities.[54] Needless to say, although there is universal support for this principle, there is very little agreement on its core content, the nature of the obligation it entails, the extent of differentiation it permits, and its application in particular situations.[55] Nevertheless, at its core this principle authorizes differentiation, and when it is introduced back into the discussions under the Durban Platform, Parties will perforce need to consider varying forms of differentiation among Parties, and which, if any, of these should be included in the future climate agreement.

Second, the process to negotiate the future climate agreement, according to the Durban decision, shall be informed by, inter alia, 'the Fifth Assessment Report of the Intergovernmental Panel on Climate Change, the outcomes of the 2013–2015 review and the work of the subsidiary bodies'.[56] The Cancun Agreements instituted a process of review to strengthen the long-term global goal, from the current 2 °C to possibly 1.5 °C.[57] This process was fleshed out in Durban.[58] The relevant decision text recorded an agreement among Parties that the review 'shall be guided by the principles of equity and common but differentiated responsibilities and respective capabilities'.[59] This text offers an avenue for 'equity and common but differentiated responsibilities and respective capabilities' to feed into the process of crafting a future climate agreement. The 'work of the subsidiary bodies' offers another such avenue. The AWG-LCA, a subsidiary body, in its five years of existence, has generated tremendous knowledge-based rule making across the pillars of the Bali Action Plan—shared vision, mitigation, adaptation, technology and finance.[60] Although the nature of differentiation countenanced in the outcomes of the AWG-LCA has shifted over time,[61] differentiation based on the Bali Action Plan pervades the AWG-LCA outcomes. The AWG-LCA will come to an end in 2012, but its outcomes survive in the form of COP decisions, and these will be available to the Ad Hoc Working Group on the Durban Platform. In particular, the AWG-LCA was tasked at Durban with considering the issue of 'equitable access to sustainable development' through a workshop, and to report on this to the COP.[62] This workshop, a response to India's request for an in-depth discussion on equity,[63] may reach conclusions on operationalizing 'equitable access to sustainable development'.[64] The AWG-LCA will report on its work to the COP, including on the workshop, and its work and outcomes could shape the Durban Platform negotiations.

[54] P Ghosh and C Dasgupta, 'Smoke and Mirrors' *Financial Express* (14 December 2011); Suo Moto Statement in Lok Sabha by Minister of State for Environment and Forests (n 8).

[55] For a detailed analysis see L Rajamani, 'The Reach and Limits of the Principle of Common but Differentiated Responsibilities and Respective Capabilities in the Climate Change Regime', in NK Dubash, (ed) *Handbook of Climate Change and India: Development, Politics and Governance* (OUP, New Delhi, 2011) 118–129. See also P Birnie, A Boyle and C Redgwell, *International Law and the Environment* (3rd edn, OUP, Oxford, 2009) 132–7. It is worth noting that there are divergences even among BASIC countries on how this principle is to be operationalized. See generally Expert from BASIC countries (n 30).

[56] Para 6, The Durban Platform.

[57] Para 4 and 138–40, Cancun Agreements LCA.

[58] Para 157–67, Durban LCA Decision.

[59] Para 160, ibid.

[60] These five issue areas identified in the Bali Action Plan as meriting further cooperation on, have been labelled by Parties as the 'pillars' of the Bali Action Plan.

[61] See L Rajamani (n 5) 512–13.

[62] Para 4, Durban LCA Decision.

[63] Proposals by India for inclusion of additional agenda items (n 8).

[64] Term first cited in para 6, Cancun Agreements LCA. See also Experts from BASIC countries (n 30).

E. Time-frame and Focus

The Ad-Hoc Working Group on the Durban Platform is scheduled to commence its work in 2012 and complete it in 2015, so as to adopt the legal instrument Parties devise in time for it to come into effect and be implemented from 2020.[65] This timeline, with a lengthy gap between the end of the negotiating phase, 2015, and the beginning of the implementation phase, 2020, is a product of a compromise between the short timeline that the Alliance of Small Island States, Least Developed Countries and the EU sought, and the lengthy timeline some of the major economies, in particular, China and the United States favoured. China had made it clear in the lead-up to and at Durban that it would not participate in a legally binding climate agreement before 2020.[66] The United States has long held the position that it would not participate in any instrument to which other major economies, in particular China, were not party. This was indeed one of the principal reasons the US withdrew from the Kyoto Protocol.[67] Although there were efforts made to budge China and the US, with Barbados characterizing the lengthy timeline until 2020 as 'nine years of drift', the 2020 date proved non-negotiable. Instead, Parties agreed to begin negotiations 'as a matter of urgency',[68] and conclude it as soon as possible. Given the need to incorporate the Intergovernmental Panel on Climate Change's latest scientific findings, and the results of the 2013–2015 review of the long-term global goal, the earliest deadline appeared to be 2015.

The Ad Hoc Working Group on the Durban Platform is required to plan its work in the first half of 2012, including on 'mitigation, adaptation, finance, technology development and transfer, transparency of action, and support and capacity building'.[69] In the discussions on the content of the proposed legal instrument, developed countries sought to focus on mitigation, transparency, and market instruments while some developing countries sought to spread the focus across the pillars of the Bali Action Plan. In the final hours of the negotiations, developed countries ensured that the phrase 'transparency of action, and support' was introduced into the text, thereby shifting the centre of gravity towards mitigation and away from adaptation, finance, technology and capacity building. The strategically placed comma between action and support is also worth noting for a few reasons. First, it is unclear, given the placement of the comma, whether the new agreement will cover transparency of mitigation actions as well as provision of support, or merely the former. Second, the fact that there is an independent reference to 'support' could be interpreted as an endorsement of differentiation, albeit in assistance, in favour of developing countries in the post-2020 climate regime.

[65] Paras 3 and 4, The Durban Platform.

[66] 'China sets conditions on binding climate change commitment after 2020' *Xinhuanet News* (6 December 2011) <http://news.xinhuanet.com/english/china/2011-12/06/c_131290906.htm>; M Hart, 'Reading China's Climate Change Tea Leaves', Centre for American Progress (8 December 2011) <http://www.americanprogress.org/issues/2011/12/china_climate_change_durban.html>; A Hsu, 'Propelling the Durban climate talks – China announces willingness to consider legally binding commitments post-2020', ChinaFAQs, The Network for Climate and Energy Information, 6 December 2011 <http://www.chinafaqs.org/blog-posts/propelling-durban-climate-talks-china-announces-willingness-consider-legally-binding-comm>.

[67] See text of a letter from George W Bush, the President of the United States, to Senators Hagel, Helms, Craig and Roberts (13 March 2001).

[68] Para 3, The Durban Platform.

[69] Para 5, ibid.

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The emphasis on mitigation in the Durban Platform decision is further strengthened by the launch of the work plan on enhancing mitigation ambition.[70] The decision text is unclear however on whether this work plan is intended to enhance mitigation ambition in the post-2012 or post-2020 time-frame. The paragraphs on mitigation ambition, as discussed above, have their origins in the work of the AWG-LCA, where it was intended to apply to developed country parties alone, and be effective immediately. In its move to the Durban Platform decision, it became applicable to all Parties, but perhaps only post-2020, as that is the time-frame the rest of the decision is set to. Needless the say, the Alliance of Small Island States, and the EU, the champions of this work plan, will seek to have it apply immediately. In their support, they will likely raise the reference in a preambular recital to the gap between the mitigation pledges until 2020 and the emissions pathways consistent with achieving the 2 °C goal.[71] This gap can, arguably, only be addressed if the pledges are revised before 2020. The Durban Platform decision scheduled an in-session workshop in early 2012 'to consider options and ways for increasing ambition and possible further actions'.[72] The champions of the mitigation ambition work plan will likely use the outcomes of this workshop to seek COP decisions designed to bridge the ambition gap.

It is worth noting that the work plan on enhancing mitigation ambition is arguably not limited to mitigation actions alone. The Durban Platform decision launched the work plan so as to identify and explore options for a 'range of actions' that can close the ambition gap 'with a view to ensuring the highest possible mitigation efforts by all Parties'.[73] Closing the ambition gap requires not just mitigation actions but also actions on finance, technology and capacity building. It is only when such a wide range of actions are initiated, that, arguably, all Parties can engage in the highest possible mitigation efforts.

III. FROM 2012 TO 2020: AN AMBITION GAP?

A. The Kyoto Protocol: Biding Time

The launch of the Durban Platform on Enhanced Action, albeit significant, is but one of several important developments at Durban. After years of uncertainty about the future of the Kyoto Protocol, in Durban Parties finally extended the Kyoto Protocol for a second commitment period.[74] Although negotiations on a second commitment period have been ongoing since 2005, in the wake of the US rejection of the Kyoto Protocol, and the gradual disenchantment of the rest of the developed world with a regime that did not include either the US or emerging economies, the prospects for a renewal of the Kyoto Protocol appeared dim. The EU, Australia, New Zealand, Norway and Switzerland, alone among Kyoto Annex B Parties, were willing to take on a second commitment period under the Kyoto Protocol. Their willingness was conditional however on the adoption of a roadmap towards a legally binding agreement applicable to all. Since the Durban Platform delivered such a roadmap, it was possible then to agree to a Kyoto second commitment period in Durban. There was much, however, that Parties could not agree on: the length of the commitment period—whether it would be five or eight years;[75] the scale or ambition of individual quantified emissions limitation and

[70] Para 7, ibid.
[71] Preambular recital 2, ibid.
[72] Para 8, ibid.
[73] Para 7, ibid.
[74] Para 1, Durban KP Decision.
[75] Para 1, ibid.

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reduction objectives (QELROs);[76] and, on the implications of 'carry-over' of assigned amount units to the second commitment period.[77] These are due to be decided at the next COP in Qatar in 2012.[78]

The Durban Kyoto Protocol decision 'takes note' of the quantified economy-wide emission reduction targets submitted by Parties under the Cancun Agreements,[79] and of their intention to convert these to QELROs under the Kyoto Protocol,[80] but does not set either an overall reduction goal, as the Kyoto Protocol does,[81] or prescribe individual mitigation goals. Although the decision contains preambular language aiming at ensuring that 'aggregate emissions of greenhouse gases by Parties included in Annex I are reduced by at least 25–40 per cent below 1990 level by 2020',[82] this extends not just to Kyoto Annex B Parties, but to all Annex I Parties, to many of whom the decision does not apply. It appears then that while Parties were in agreement on the need to extend the Kyoto Protocol in a symbolic show of solidarity for a legally binding climate agreement, they were not in agreement over many of the mechanics of such an extension. There is an end-2012 deadline for the remaining tasks, but unlike the AWG-LCA, the Ad Hoc Working Group on the Kyoto Protocol (AWG-KP) does not have a set termination date. The AWG-KP is merely required to 'aim to' complete its work by 2012.[83] The Durban deal, however, and in particular the launch of the post-2020 process, was premised, on a Kyoto second commitment period. If the remaining Kyoto questions are not resolved in time, the Durban deal may well unravel. BASIC Ministers in a thinly veiled threat have indicated that the presentation by May 2012 of QELROs by Kyoto Parties is an 'important and necessary first step for the success of the process agreed to at Durban'.[84]

B. Operationalizing the Cancun Agreements: Plugging the Knowledge and Implementation Gaps?

In Durban Parties also delivered, albeit in a limited manner, on the promise of the Cancun Agreements. The Cancun Agreements had set the Durban Climate Conference as the deadline for agreeing on a long-term goal for substantially reducing global emissions by 2050,[85] and for identifying a time-frame for global peaking of greenhouse gas emissions.[86] As these issues continued to prove intractable, decisions on these were deferred for another year.[87] Parties agreed, however, as indicated before, to request the AWG-LCA to consider the related issue of 'equitable access to sustainable

[76] Para 5, ibid. [77] Para 7, ibid. [78] Para 1, 5 and 7, ibid.

[79] Annex, ibid. It is worth noting that all the conditions and qualifications that Parties had entered in relation to their pledges remain intact. [80] Para 4, Durban KP Decision.

[81] Art 3, Kyoto Protocol. Some do not consider the Kyoto 'at least 5 per cent' to be an overall reduction goal in the sense of a negotiated number, but rather an aggregation of individual commitments listed in Kyoto Annex B. In conversation, Michael Zammit Cutajar, former Executive Secretary, UNFCCC Secretariat.

[82] Preambular recital 9, Durban KP Decision. [83] Para 10, ibid.

[84] Joint Statement issued at the Conclusion of the 10th BASIC Ministerial meeting on Climate Change, New Delhi, 13–14 February 2012 <http://www.moef.nic.in/downloads/public-information/10th-BASIC-Meeting-Delhi-Joint-Statement.pdf>.

[85] Para 5, Cancun Agreements LCA. [86] Para 6, ibid.

[87] Para 1 and 2, Durban LCA Decision.

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development' through a workshop in 2012.[88] The extent to which the outcomes of this workshop will feed into the Durban Platform process, however, remains to be seen.

In relation to mitigation, the Cancun Agreements had taken note of developed countries' quantified economy-wide emission reduction targets,[89] and developing countries' nationally appropriate mitigation actions.[90] These targets and actions are however heavily qualified, and conditioned, in many cases, on action by others.[91] Although little could be done to encourage countries to shed these qualifications, in Durban Parties decided to strengthen knowledge of Parties' targets and actions. The Durban LCA decision invites Parties to provide further information so as to clarify developed countries' targets,[92] and understand the diversity of developing countries' mitigation actions.[93] This, it is believed, will build 'trust and confidence', among Parties.[94] Parties agreed to reporting guidelines for the enhanced and more frequent reporting required of developing and developed countries, respectively, under the Cancun Agreements.[95] Parties also fleshed out the modalities for the transparency processes instituted by the Cancun Agreements—'international assessment and review'[96] and 'international consultation and analysis'[97]—for developed and developing countries targets and actions respectively. Both international assessment and review and international consultation and analysis are a judicious mix of technical and political components. The political component in the case of developed countries is a 'multilateral assessment' comprising both written and oral questions posed to and responses by the Party under review,[98] and in the case of developing countries a 'facilitative sharing of views' in the Subsidiary Body for Implementation.[99] These processes have been designed to be robust and to generate credible information on and confidence in mitigation targets and actions,[100] but they are not authorized or tailored to address the issue of 'adequacy' or 'ambition' of these targets and actions in relation to the 2 °C goal.

A determination of 'adequacy', to be useful, must be premised on a shared understanding not just of desired levels of ambition, but also of just shares of the effort required in meeting that ambition. No such shared understanding exists thus far. There is an understanding that deep cuts in global greenhouse gas (GHG) emissions are

[88] Para 4, ibid.

[89] Para 36, Cancun Agreements LCA.

[90] Para 49, ibid.

[91] See Compilation of economy-wide emission reduction targets to be implemented by Parties included in Annex I to the Convention (n 10) and Compilation of information on nationally appropriate mitigation actions to be implemented by Parties not included in Annex I to the Convention (n 10).

[92] Para 5, Durban LCA Decision.

[93] Para 33, ibid.

[94] Preambular recital 5, Section II.A and Preambular recital 5, section II.B, ibid.

[95] Para 40 and 60, Cancun Agreements LCA; See also, para 12 and Annex I (for Parties included in Annex I to the Convention) and para 39 and Annex III (for Parties not included in Annex I to the Convention), Durban LCA Decision.

[96] Para 44 and 46(d), Cancun Agreements LCA; para 24 and Annex II, Durban LCA Decision.

[97] Para 63 Cancun Agreements LCA; para 58, and Annex IV, Durban LCA Decision.

[98] Para 3(b) and 8–12, Annex II, Durban LCA Decision.

[99] Para 3(b), Annex IV, ibid.

[100] Parties' reports are required to include information on their progress in meeting their targets and actions. The biennial reporting guidelines for developed country Parties require Parties to report on progress in achievement of quantified economy-wide emission reduction targets. The biennial update reporting guidelines for non-Annex I Parties require Parties to report on progress in the implementation of their mitigation actions. See para 6, Annex I and para 12, Annex III, ibid.

required to hold the global average temperature increase to 2 °C,[101] and that there is a gap between current pledges and required effort.[102] But these lead merely to preambular recitals 'urging' developed countries to increase the ambition of their targets,[103] and recognizing that developing countries 'could enhance their mitigation actions' depending on provision of support.[104]

Such support takes the form, inter alia, of the operationalization of the Green Climate Fund,[105] officially launched in the Cancun Agreements,[106] but promised in the Copenhagen Accord.[107] The decision operationalizing the Fund, however, does not spell out sources of financing, except that the fund will receive financial inputs from developed country Parties, and a 'variety of other sources, public and private, including alternative sources'.[108] Thus far, pledges have only been forthcoming from Germany and Denmark.[109]

IV. CONCLUSION: MINDING THE GAPS

The package of decisions taken at the Durban Climate Conference advanced the climate regime in several respects. First, it ended the uncertainty surrounding the future of the Kyoto Protocol by extending it for a second commitment period. By so doing Parties endorsed not just a legally binding instrument with a labyrinth of rules and institutions governing climate action, it also appeased developing countries by reinforcing, albeit one last time, developed country leadership in the climate change regime. Second, the Durban Climate Conference charted a roadmap—the Durban Platform on Enhanced Action—towards a post-2020 climate regime applicable to all. Although a necessary step forward, it did recast equity and differentiation in the future climate regime. Given the critical importance of differentiation in facilitating the engagement of many developing countries, this will need to be addressed, as a matter of urgency, in the Durban Platform process as it emerges. Third, the Durban Climate Conference took several decisions aimed at fulfilling the promise of the Cancun Agreements. In relation to mitigation, these are designed primarily to strengthen the knowledge base and

[101] Para 4, Cancun Agreements LCA; preambular recital 3, section II.A (developed country Parties) and preambular recital 2, section II.B (developing country Parties), Durban LCA Decision.

[102] Preambular recital 4, section II.A (developed country Parties) and preambular recital 3, section II.B (developing country Parties), Durban LCA Decision. See also, Preambular recital 2, The Durban Platform.

[103] Preambular recital 6, section II.A, Durban LCA Decision.

[104] Preambular recital 5, section II.B, ibid. See generally for a discussion on facilitating compliance, C Redgwell, 'Facilitation of Compliance', in J Brunnée, M Doelle and L Rajamani (eds), *Promoting Compliance in An Evolving Climate Regime* (CUP, Cambridge, 2011) 177–93.

[105] Draft decision -/CP.17, 'Green Climate Fund – report of the Transitional Committee', advanced unedited version <http://unfccc.int/files/meetings/durban_nov_2011/decisions/application/pdf/cop17_gcf.pdf>.

[106] Para 102, Cancun Agreements LCA.

[107] Para 10, Copenhagen Accord.

[108] Para 29 and 30, Annex IV, Draft decision -/CP.17, Green Climate Fund (n 105).

[109] Germany has pledged €40 million, see Statement of the German Federal Minister of the Environment, Nature Conservation and Nuclear Safety Dr. Norbert Röttgen, High Level Segment of the UNFCCC 2011 COP 17 and CMP 7, Durban (07 December 2011) <http://www.bmu.de/english/climate/climate_conferences/17th_conference_durban/doc/pdf/48122.pdf>; and Denmark has pledged nearly €15m, see 'Money starts trickling into Green Climate Fund', ACT Alliance (8 December 2011) <http://www.actalliance.org/stories/money-starts-flowing-into-green-climate-fund>.

information flow on mitigation actions and targets, thereby, it is hoped, generating confidence and trust.

These advances in the climate regime, however, do little to mask the fundamental gaps that remain. There is a potential ambition gap in the 2012–2020 time-frame, and an equity gap, in the post-2020 time-frame.

The Kyoto Protocol, notwithstanding its euphorically-welcomed renewal, covers a small percentage of global emissions. The EU, Australia, New Zealand, Norway and Switzerland, between them account for 22 per cent of global emissions.[110] Even if contributions to the global carbon stock or historical responsibility are factored in, these countries will account for only 25.4 per cent of global emissions.[111] While their participation is important, it will not, as these countries have been arguing, by itself, address the ambition gap. The Cancun Agreements and the Durban decisions implementing the Cancun Agreements, which will govern actions until 2020, offer few opportunities to raise the level of ambition. The two potential avenues are first, the work plan on enhancing mitigation ambition launched by the Durban Platform decision,[112] and second, the 2013–2015 review, launched by the Cancun Agreements, and fleshed out in Durban.[113] The work plan on enhancing mitigation ambition, given its placement in the Durban Platform decision that is directed towards post-2020 actions, could arguably be intended to have effect in that later time-frame as well. The 2013–2015 review is aimed at assessing the 'adequacy of the long-term global goal in the light of the ultimate objective of the Convention and the overall progress made towards achieving it'.[114] As currently structured, this review permits a judgment on the adequacy only of the long-term global goal, not of individual and collective targets and actions, and their ambition or lack thereof. Parties agreed in Durban to continue working on the 'scope of the review',[115] and it might be that Parties agree in the near future on an expansive scope that permits determinations of adequacy of mitigation actions and targets in the light of the desired long-term global goal. For now, however, there appears to be an ambition gap that will need to be addressed.

This is not to suggest that there will be a hiatus until 2020—Parties will take the necessary steps to comply with their Cancun pledges, and these will be monitored by the climate regime. However, in so far as these pledges fall short, and they clearly do, there are limited avenues to discuss, review and enhance the ambition of these pledges before 2020. It appears that if any upward revision of mitigation pledges occurs in this time-frame these will be driven by national will rather than international action or persuasion.

In the same vein, the equity gap in the negotiations for the post-2020 time-frame is troubling. Although the exclusion of the common but differentiated responsibility principle from the Durban Platform text can be sourced to an effort to hold reinterpretations of it at bay, the vacuum it has left in its place is likely to be one that will impair the attractiveness of the climate regime to many developing countries, and therefore its efficacy. The principle of common but differentiated responsibility, and

[110] Data for 1970–2008: EU (27) – 19.94%; Australia – 1.27%; Norway – 0.15%; New Zealand – 0.11%; Switzerland – 0.21%. See Climate Analysis Indicators Tool (CAIT) (n 31).

[111] Data for Concentrations of GHG Emissions (1850–2008): EU (27) – 23.81%; Australia – 1.18%; Norway – 0.16%; New Zealand – 0.12%; Switzerland – 0.21%, Climate Analysis Indicators Tool (CAIT), ibid.

[112] Para 7, The Durban Platform.

[113] Para 139(b), Cancun Agreements LCA; para 158, Durban LCA Decision.

[114] Para 157, Durban LCA Decision.

[115] Para 159, ibid.

differentiation which is its application, is a part of the conceptual apparatus of the current climate regime. Even if the perceived rigid differentiation between developed (Annex I) and developing (non-Annex I) countries, may have outlived its utility, as many developed countries claim, differentiation, more broadly, tailored to the needs, capacities, and responsibilities of Parties, has not. Rather than seeking to replace it with unworkable notions of symmetry, even if only in form, across disparate countries, Parties could choose to countenance a wider spectrum of differentiation among developing countries in the future regime.

Many countries have in the ongoing negotiations suggested objective criteria for differentiating between countries.[116] While such differentiation based on objective criteria has intuitive appeal, the selection of criteria will invariably involve subjective considerations, and the application of different sets of criteria will have differing burden-sharing consequences. For instance, should historical responsibility be factored in as an objective criterion?[117] If not, why? If 'yes', should the cut-off date for calculating historic responsibility be the start of the Industrial Revolution or the year when the negotiations for the FCCC were launched?[118] The capacity of the international community to discuss and arrive at a set of representative objective criteria, however desirable, is, given past evidence, limited. Discussions on criteria for differentiation have proven contentious.[119] Until the climate negotiations have reached a sufficient degree of maturity to permit the emergence of a representative and balanced set of objective criteria to guide differentiation, the future regime could create the conditions necessary for countries to differentiate amongst themselves ie for self-elected differentiation.

The Bali Action Plan, the Copenhagen Accord, the Cancun Agreements and the Durban decisions, contain the seeds of such self-elected differentiation among developing countries. First, in addition to the broad categories of 'developing' or 'non-Annex I' and 'developed' or 'Annex I' countries, the following categories of developing countries—the least developed countries, small island developing states,[120] and Africa[121]—have been singled out for special treatment as they are considered particularly vulnerable to the adverse effects of climate change. Such differentiation would not have emerged had there not been an understanding among developing countries that these groups of developing countries deserve preferential access to assistance.

There is also an understanding that in terms of mitigation-related obligations, some developing countries will do more. The Cancun Agreements require 'developing

[116] There have been numerous efforts in the negotiations by Australia, Japan, the US and others to argue for differentiation between developing countries based on 'objective' criteria such as GDP per capita, relative rates of economic and population growth, stage of economic development, etc. These efforts were not fruitful. Submissions of Parties (n 45).

[117] See for a set of criteria identified by experts from BASIC countries, Experts from BASIC countries (n 30) 12–15.

[118] See eg B Müller, N Höhne and C Ellermann, 'Differentiating (Historic) Responsibilities for Climate Change' (2009) 9 Climate Policy 593–611.

[119] Summary of the Third Session of the Ad Hoc Working Group under the Convention and Sixth Session (Part one) of the Ad Hoc Working Group under the Kyoto Protocol: 21–7 August 2008, (2008) 12(383) Earth Negotiations Bulletin 1, 4 <http://www.iisd.ca/download/pdf/enb12383e.pdf>.

[120] Bali Action Plan, Copenhagen Accord, Cancun Agreements LCA and Durban LCA Decision.

[121] Bali Action Plan and Copenhagen Accord.

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countries' to submit biennial update reports 'consistent with their capabilities and level of support provided for reporting'.[122] This requirement was intended primarily for the fast growing developing countries. The term 'consistent with their capabilities' permits developing countries to determine based on self-perception whether they have or would like to be perceived as having the required 'capabilities' and they will accordingly submit biennial update reports. Least developed countries and small island developing states can submit biennial update reports at their discretion,[123] and also undergo the international consultation and analysis process as a group.[124]

In relation to mitigation actions as well, although the Copenhagen Accord, merely notes that '[n]on-Annex I Parties will implement mitigation actions', and the Cancun Agreements 'take note' of such mitigation actions, countries have submitted actions in line broadly with both their self-perception and others' expectations of them. The BASIC countries have volunteered to undertake more ambitious actions than other developing countries,[125] and indeed even arguably some developed countries.[126] This is not to suggest that self-elected differentiation is more equitable than differentiation based on a multilaterally agreed representative and balanced set of objective criteria. A poor country for instance India may due to its sense of importance and place in the international community, pledge more ambitious actions than a richer developing country, such as the United Arab Emirates. While this would not be equitable, since self-elected differentiation recognizes and respects India's agency, it would be more palatable. Until a representative and balanced set of objective criteria to guide differentiation emerges from the climate negotiations, seeds of differentiation based on self-perception will need to be nurtured and extended in the future climate regime.

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[122] Para 60(c), Cancun Agreements LCA and para 41(a), Durban LCA Decision.
[123] Para 41 (a), Durban LCA Decision.
[124] Para 58 (d), ibid.
[125] See pledges of BASIC countries in Compilation of information on nationally appropriate mitigation actions to be implemented by Parties not included in Annex I to the Convention (n 10).
[126] S Kartha and P Erickson, *Comparison of Annex 1 and non-Annex 1 pledges under the Cancun Agreements* (Stockholm Environment Institute, June 2011).

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