



Highlights from Meeting on Possible Legal Form of a New Climate Agreement

Key messages:

1. A positive outcome is possible at the 17th Conference of the Parties (COP17) in Durban.
2. In order to facilitate this, steps need to be taken now to address the key questions spanning over the two negotiating tracks to prepare a package for Durban
3. Champions are needed to advocate and develop this middle ground package and pave the way for a convergence phase during which the Kyoto Protocol continues to operate (e.g. in a transition phase) and steps are taken to work towards a new legally-binding instrument through agreement on milestones, rules and accounting mechanisms.
4. The political messaging for action on climate change must focus on the positive opportunities that green growth and sustainable development offer for economic recovery, equitable access to resources and sustainable job creation.

Introduction

The objective of this note is to distil the key messages that emerged from the meeting on possible 'legal form' options for a new climate agreement. The meeting was held at the London School of Economics (LSE) on the 9th September 2011 and was hosted by the Mary Robinson Foundation – Climate Justice (MRFJ) with support from the Grantham Research Institute on Climate Change and the Environment. Discussions were held under Chatham House Rules so this note reflects the key points that were raised, without ascribing them to any individual participant.

Why a Legally-binding Agreement is Important

- There was general agreement that a legally-binding agreement (LBA) is desirable as it would offer predictability and certainty and could lead to assurances of a more equitable outcome. This would particularly be the case if an LBA contained robust greenhouse gas (GHG) emissions reductions targets and timetables. One participant referred to an LBA as signalling the 'highest expression of political will'. Legally-binding commitments increase confidence among participants, while reporting seems to motivate the political and bureaucratic branches of Government.
- In the absence of an LBA, different national approaches to climate legislation may lead to a fragmented regulatory approach, inefficiency in carbon market operation and uncertainty for investors about the long-term continuity of extant carbon markets. Furthermore, movement away from an LBA could further erode confidence in the multilateral process.
- From a formal legal perspective, Conference of the Parties (COP) decisions are not legally-binding and cannot create substantive new obligations for Parties. However, they do offer operational significance and signal political agreement or consensus.

Effectiveness of Legally-binding Agreements

- Arguments were raised about the general effectiveness of an LBA in the area of climate change negotiations, with one participant suggesting there was “a fetish” about the notion of an LBA. However, another participant responded that an LBA was important from the perspective of domestic ratification, which leads to national-level commitment.
- Several participants commented on the fact that an LBA is only effective if it commits Parties to ambitious outcomes. Therefore, a second commitment period under the Kyoto Protocol, or a new LBA that locks in low-level ambition GHG emissions reductions targets risks being meaningless.
- The cumulative impact of the Cancún Agreements, if implemented at the upper end of their range and without conditionalities, is two-thirds of the way between a business as usual (BAU) scenario and a 2 degrees Celsius trajectory. Therefore, additional efforts in GHG emissions reduction as well as an effective accounting and compliance regime are needed to ensure that the 2 degrees Celsius “guardrail” is not exceeded and the possibility of limiting warming to even less than this remains. There must be a sense of urgency in delivering these commitments and staying on track to meet the global goal so as to minimise the impacts of climate change on vulnerable countries, communities and households.

Prospects of a Legally-binding Agreement

- Most Parties to the United Nations Framework Convention on Climate Change (UNFCCC) are generally in agreement that some form of an LBA is needed, although the prospects depend on what it required and of whom. Some countries continue to argue that substance precedes form and that it is premature to decide the legal form now.
- At the moment it is unlikely that a new LBA will be agreed at COP17 in Durban. A new window of opportunity might arise in 2014-2015 because of, *inter alia*:
 - (a) the completion of the review of the global goal of reducing temperature increase to 2 degrees Celsius by 2015;

- (b) the Intergovernmental Panel on Climate Change (IPCC) 5th Assessment Report, to be published in 2014;
- (c) political circumstances in key countries may have become more favourable to new steps in international climate change (e.g. United States);
- (d) New domestic policies and plans may be in place that allow countries such as China to move forward.
- Although an LBA seems unlikely at present, action on the ground is being facilitated at national and regional level. There is domestic legislation in the USA at state level and Phase III of the EU Emissions Trading Scheme (ETS) will be in operation from 2013 to 2020. Furthermore, nationally-appropriate mitigation actions (NAMAs) by emerging economies and political agreement on carbon markets, technology transfer and REDD+ offer some promise.

Scenarios for the Kyoto Protocol

- Three potential scenarios for the Kyoto Protocol were considered:
 - a) Amending Annex B of the Kyoto Protocol in time to avoid a gap in the commitment periods as well as agreeing on a new LBA to complement the Kyoto Protocol.
 - b) Ignoring, terminating or suspending the Kyoto Protocol and agreeing to a new LBA to replace the Kyoto Protocol.
 - c) An interim or transitional Kyoto scenario with a second legally-binding commitment period or a politically-agreed commitment period by way of a decision of the Meeting of the Parties to the Kyoto Protocol (CMP). This latter scenario would also contain a COP decision containing a mandate to negotiate a new LBA, which would eventually subsume the Kyoto Protocol.

Legal Form Options

- The 'bindingness' of legal form options ranges along a continuum from : (a) Kyoto-style prescriptive commitments with top-down mitigation commitments in the form of targets and timetables to (b) more bottom-up and flexible Cancún-type commitments, where obligations are qualified and depend upon actions by others.

- It appears that recently there has been a shift in focus from the Kyoto Protocol architecture to Cancún-type commitments, as well as increasing parallelism between developed and developing countries. The nature of how top-down the Kyoto Protocol actually is was questioned and it was argued that, while it is an international instrument, it was left open for national parliaments to ratify, thereby including bottom-up elements.
- There was discussion on the need to re-examine the differentiation between Annex I and non-Annex I countries in light of economic growth in emerging economies, which were originally classified as non-Annex I Parties under the 1992 UNFCCC. It was also suggested that the participation of major GHG emitters, who are not Parties to the Kyoto Protocol, in a new LBA might encourage involvement by the USA in line with their request for 'legal symmetry', even if commitments differ in terms of content.

Options for COP17 in Durban

- A range of options for COP17 at Durban was presented. Under the UNFCCC track, it was suggested that an agreement:
 - (i) to a new LBA at Durban was unrealistic;
 - (ii) to a COP decision containing a mandate to negotiate a LBA with a clearly-defined scope and outcome was ambitious;
 - (iii) to a COP decision containing a mandate to negotiate a LBA with a more open-textured scope and outcome was ambitious but possible; and
 - (iv) to continue discussing legal form was the default option.
- Under the Kyoto Protocol track, it was suggested that an agreement:
 - (i) to a second legally-binding commitment period and amendments to Annex B including all current Annex B Parties was unrealistic;
 - (ii) politically to a second commitment period through a CMP decision was ambitious but possible;
 - (iii) to apply in principle the Kyoto rules/mechanisms/targets for a defined period until there is a single agreement was possible; and
 - (iv) to continue discussions or 'do nothing' was the default option.

- The Kyoto Protocol is a combination of 2 steps: (a) the Protocol itself, which was adopted in 1997 and entered into force in February 2005, and (b) the implementation framework, which was agreed under the 2001 Marrakech Accords and which set out the operational rules for emissions trading, compliance and accounting. This sequencing or staged approach could offer valuable lessons as Parties negotiate the next steps in Durban, where the sequencing could be reversed by first agreeing an MRV framework and later encapsulating this in a treaty.
- A warning was voiced that, if Parties are too impatient, they could damage political capital and goodwill and destroy any prospect of an LBA.
- Participants concluded that political agreement to a second commitment period of the Kyoto Protocol in return for a declaration by all Parties to work towards binding outcomes under the long-term cooperative action (LCA) track was possible. This would be sufficient to avoid the end of the Kyoto Protocol, although it is unlikely that Japan, Canada or Russia would be willing to engage in a continued Kyoto Protocol.

Priorities for COP17 in Durban

- It was suggested that three things need to and can happen at COP17 in Durban:
 - (i) Parties must confirm the need for an international rules-based system;
 - (ii) Parties must address but not delay the question on Kyoto, including options on transitional arrangements, and seek clarity on demand for offsets; and
 - (iii) the LCA track needs to be given a clear objective or 'mandate'.
- Fundamentally, there is a need for clarity on the destination of the UNFCCC process. There is also a need for legally-binding rules on reporting as well as clarity on technical accounting, e.g. the inclusion of forests in reducing GHG emissions.
- There is a need for champions for a 'middle ground' solution at COP17. Parties must avoid going to Durban with extreme and divided views, which could lead to an impasse at this critical juncture.
- Participants at the meeting agreed that a positive outcome in Durban is possible. With the right political guidance, there is an opportunity between now and COP17 to prepare a package which could initiate a chain of events which could culminate in the agreement of a LBI in 2015. Areas where progress in Durban is possible and which would contribute to this package include:

- a) Finance – operationalize the Green Climate Fund and agree a work plan for the Standing Committee, including a deadline for an agreement on sources and monitoring, reporting and verification (MRV) of finance;
- b) Mitigation and MRV, including guidelines for independent assessment and review (IAR) for Annex I Parties as well as a NAMA registry and international consultations and analysis (ICA) guidelines for non-Annex I Parties;
- c) Agreement on the guidelines and modalities for National Adaptation Plans (NAPs);
- d) Agreement on a process for clarification of pledges and a mandate for an LBA by 2015 based on equity and common but differentiated responsibilities (CBDR) under the LCA track with a process of ratcheting up commitments at any time; and
- e) Language of a mandate with a possible deadline of 2015 for an LBA under the LCA track with implementation some time thereafter. This future regime could possibly incorporate ‘variable geometries’ or sliding scales of participation for different countries.

Green Growth / Positive Political Messaging

- It was suggested that an explicit link needs to be made between COP17 at Durban and the ‘green growth’ agenda at the United Nations Conference on Sustainable Development (“Rio+20”) in 2012 to promote a *good news story* for action on climate change.
- The current global green economy is estimated at \$8 trillion, consisting largely of technology-innovators such as the USA, the EU, India and China and countries seeking access to innovative technology or ‘technology-takers’.
- A more positive narrative might enable a move from the UNFCCC being seen as a ‘house of pain’ to a ‘house of gain’. While awareness is growing of the potential of the green economy, converting this into economic growth and jobs has yet to become a reality.
- As part of this positive messaging, it was suggested that there needs to be a shift in focus from absolute GHG emissions reductions targets to targets for renewable energy investment. A potential coefficient of dollars invested in renewables/tonnes GHG emissions mitigated was proposed to highlight this. This means that as well as

asking countries to reduce GHG emissions, which has perceived negative connotations for development, the process and discourse may be reoriented to also reward countries for making investments in green energy and jobs. This approach could be instrumental in making up the current one-third shortfall in emissions reductions needed to reach the 2°C goal.

Next Steps

- Mary Robinson sent a letter highlighting the major messages from the meeting to President Felipe Calderón of Mexico and President Jacob Zuma of South Africa in advance of the leaders' meeting on the 20th September in New York.
- Other opportunities to make progress on the issue of legal form in the lead up to COP17 include;
 - i. The Pre-COP Informal Ministerial Consultation in South Africa on 20-21 October 2011; and
 - ii. A meeting on the issue of legal form, which will be hosted by Mexico, South Africa and Spain in Madrid on 10-11 November.

Appendix 1: List of Participants

First Name	Second Name	Title
Ismael	Aznar	Deputy Director-General, Spanish Climate Change Office
Sharan	Burrow	General Secretary, International Trade Union Conference (ITUC)
Yvo	De Boer	Special Global Adviser, Climate Change and Sustainability, KPMG
Maria	Del Socorro Flores Liera	Minister and Special Adviser for Climate Change, Mexican Government
Elliott	Diringer	Vice President, International Strategies, Pew Center on Global Climate Change
Conor	Gearty	Professor of Human Rights Law, London School of Economics (LSE)
Kaveh	Guilanpour	Lawyer, Department of Energy and Climate Change (DECC)
Sirkka	Haunia	Director Climate Change, Ministry of the Environment
Tom	Heller	Executive Director, Climate Policy Initiative
Martin	Hession	Chair, Executive Board of the Clean Development Mechanism (CDM)
Saber	Hossain Chowdhury	Chair, Bangladesh All-Party Group on Climate Change and Environment
Michael	Jacobs	Visiting Professor, London School of Economics (LSE)
Vivien	Life	Head of Climate Change and Energy Group, UK Foreign and Commonwealth Office (FCO)
H.E. Mohamed	Nasheed	President of the Republic of Maldives
Seth	Osafo	Legal Adviser, African Group of Negotiators
Bongiwe	Qwabe	Deputy High Commissioner, Republic of South Africa
Lavanya	Rajamani	Professor, Centre for Policy Research, India
Mary	Robinson	President, Mary Robinson Foundation – Climate Justice (MRFCJ)

First Name	Second Name	Title
Tara	Shine	Head of Research and Development, Mary Robinson Foundation – Climate Justice (MRFCJ)
Nicholas	Stern	Chair of the Grantham Research Institute on Climate Change and the Environment at the London School of Economics
Halldór	Thorgeirsson	Director of Implementation Strategy, UNFCCC
Jacob	Werksman	Program Director, Institutions and Governance Program, World Resources Institute (WRI)

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