
**UN CLIMATE CHANGE CONFERENCE IN DURBAN:
OUTCOMES AND FUTURE OF THE KYOTO PROTOCOL**

TONY HILL*

I PURPOSE

The purpose of this paper is to provide an overview and discussion of the outcomes reached at the recently held UN Climate Change Conference in Durban, South Africa.

II BACKGROUND

The *Kyoto Protocol*¹ was adopted on 11 December 1997 and came into force on 16 February 2005.

Annex I parties under the *United Nations Framework Convention on Climate Change* ('UNFCCC')² have legally binding commitments under Article 3(1) of the Kyoto Protocol to reduce their greenhouse gas emissions collectively by at least 5% below 1990 levels during the period 2008 to 2012, known as the "first commitment period". The Annex I parties are the industrialised countries including the European Union, Japan and Australia.³ USA was also an Annex I party but did not ratify the *Kyoto Protocol* and is not a party to it.

Non-Annex I parties under the UNFCCC do not have binding commitments to reduce their GHG emissions by specific targets. The Non-Annex I parties are the developing countries including China, India and Brazil.

There is a Clean Development Mechanism (CDM) under the *Kyoto Protocol*, where Annex I parties can invest in accredited GHG emission reduction projects in Non-Annex I countries and obtain certified emission reduction units for use to the commitments of Annex I parties under the *Kyoto Protocol*.⁴ Certified emission reduction units under the CDM may also be used in domestic emissions trading

* B Sc LLB (Syd). Partner and Climate Change Panel Co-ordinator, Blake Dawson (Sydney). My thanks go to Guy Dwyer for his assistance in preparing this paper.

¹ *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, opened for signature 11 December 1997, 2303 UNTS 148 (entered into force 16 February 2005) (*Kyoto Protocol*).

² *United Nations Framework Convention on Climate Change*, opened for signature 4 June 1992, 1771 UNTS 164 (entered into force 21 March 1994) ('UNFCCC').

³ UNFCCC, Annex I.

⁴ *Kyoto Protocol*, art 12.

schemes such as the EU emissions trading scheme and the proposed Australian emissions trading scheme under the *Clean Energy Act 2011* (Cth) from 2015 onwards.

The binding emissions reduction commitments for the Annex I parties under the *Kyoto Protocol* expire at the end of the first commitment period in 2012. In 2007, at COP 13 in Bali, the parties under the *UNFCCC* agreed to embark on a “two track” negotiation process to agree future climate change action beyond the end of the first commitment period by no later than COP 15 in Copenhagen in 2009.⁵ This became known as the Bali Road Map with the main elements of the process involving commitments to:

- i. Progress the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol (‘AWG-KP’);⁶ and
- ii. Establish the Ad Hoc Working Group on Long Term Cooperative Action under the Convention (‘AWG-LCA’).⁷

The purpose of the AWG-KP was to consider further GHG emission reduction commitments for Annex I parties for the period beyond 2012 in accordance with Article 3(9) of the *Kyoto Protocol*.⁸

The purpose of the AWG-LCA was to conduct a comprehensive process to enable the full, effective and sustained implementation of the *UNFCCC* through long-term cooperative action, now, up to and beyond 2012, in order to reach and agreed outcome to be adopted by the COP.⁹ It was intended that this would include a shared vision for long term cooperative action including a long term global goal for emission reductions and enhanced national action based on common but differentiated responsibilities.¹⁰

It is now history that there was no formal legal agreement at COP 15 at Copenhagen as planned under the Bali Road Map.¹¹ Some of the Annex I countries, including the USA, wanted the larger, rapidly developing countries such as China and India to take on binding emission reduction commitments through a more comprehensive arrangement whereas the developing countries wanted the Annex I countries to take on binding emission reduction obligations through further commitment periods under

⁵ For a review of this "two track" negotiation process, see Tony Hill, *Mexican stand-off for climate change talks?* (17 December 2009) Blake Dawson <www.blakedawson.com/Templates/ServiceAreas/x_service_area_generic_content_page.aspx?id=57487>.

⁶ See UNFCCC, *Report of the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol on its resumed Fourth Session, Held in Bali from 3 to 15 December 2007*, UN Doc FCCC/KP/AWG/2007/5.

⁷ UNFCCC, *Report of the Conference of the Parties on its Thirteenth Session, Held in Bali from 3 to 15 December 2007*, UN Doc FCCC/CP/2007/6/Add.1, decision 2/CP.13.

⁸ *Kyoto Protocol, Report of the Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol on its First Session, Held at Montreal from 28 November to 10 December 2005*, UN Doc FCCC/KP/CMP/2005/8/Add.1, decision 1/CMP.1.

⁹ UNFCCC, *Report of the Conference of the Parties on its Thirteenth Session, Held in Bali from 3 to 15 December 2007*, UN Doc FCCC/CP/2007/6/Add.1, decision 1/CP.13.

¹⁰ *Ibid.*

¹¹ See Tony Hill, *The Copenhagen Accord – political statement or blueprint for the future?* (21 December 2009) Blake Dawson <www.blakedawson.com/Templates/ServiceAreas/x_service_area_generic_content_page.aspx?id=57487>.

the *Kyoto Protocol*. The differences between countries at the Copenhagen conference resulted in the release of a short non-legally binding statement known as the “Copenhagen Accord” which has shaped GHG emission reduction negotiations since. Under the Copenhagen Accord, amongst other things:

- the Annex I countries were to commit to implement individually or jointly quantified economy-wide emission targets for 2020 by 31 January 2010;
- Non-Annex I countries are to implement mitigation actions including those submitted to the UN by 31 January 2010;
- there would be an assessment of implementation of the Copenhagen Accord by 2015; and
- the parties would continue to the AWG-KP and AWG-LCA process with a view to completing these negotiations by COP 16 in Cancun in 2010.¹²

There was no formal post-2012 treaty agreed at the COP 16 at Cancun in 2010 and the work of the AWG-KP and AWG-LCA was again extended to COP 17 at Durban.¹³

In the lead up to COP 17 in Durban, there was no firm pathway to achieve a formal agreement as the Bali Road Map had foundered at Copenhagen. Durban then became temporally important because it was held at a time when the end of the first commitment period under the *Kyoto Protocol* was imminent.

The critical issue at the conference was to determine whether there would be a second commitment period under the *Kyoto Protocol* or the development of a new legally binding treaty through the AWG-LCA or some other mechanism. An equally important issue was to determine how the CDM mechanism and associated rules and modalities developed at various conferences since 1997 could be preserved after 2012 if there was no formal agreement on post 2012 action. Finally, part of the focus of the Durban Conference was also to progress the detail of the initiatives which were agreed to be established at the Cancun conference in 2010.

III OUTCOMES

COP 17 at Durban concluded on 11 December 2011.

The main outcome from COP17 was that the *UNFCCC* parties agreed to launch a new process to develop 'a protocol, another legal instrument or an agreed legal outcome with legal force' under the *UNFCCC* applicable to all parties to achieve GHG emissions reductions.¹⁴ The process would be undertaken through a new subsidiary body under the *UNFCCC* to be known as the Ad Hoc Working Group on the Durban Platform for Enhanced Action ('AWG-DPEA').¹⁵

¹² UNFCCC, *Report of the Conference of the Parties on its Fifteenth Session, Held in Copenhagen from 7 to 19 December 2009*, FCCC/CP/2009/11/Add.1, decision 2/CP.15.

¹³ See Andrew Kelly, James Shepherd and Tony Hill, *Key outcomes of the Cancun climate talks* (15 March 2011) Blake Dawson <www.blakedawson.com/Templates/Publications/x_article_content_page.aspx?id=61625&terms=key+outcomes+of+cancun>.

¹⁴ *Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action – Proposal by the President (Draft Decision)*, FCCC/CP/2011/L.10, decision 2.

¹⁵ Ibid.

The AWG-DPEA is required to start work immediately and complete its work as early as possible but no later than 2015 in order for the new instrument to be adopted at COP 21 in 2015. The new instrument is to come into effect and be implemented from 2020.¹⁶ The development of the new instrument is to be informed by both the IPCC's 5th Assessment Report and the outcomes of the 2013-2015 global review.¹⁷

It was agreed that the AWG-LCA would continue its work another year to achieve its outcomes from the Bali Road Map and then be terminated.¹⁸

A number of Governments, but not including Australia, Japan and Russia, agreed to a second commitment period under the *Kyoto Protocol*. Parties to this second commitment period will turn their economy wide targets into quantified emission limitation or reduction objectives and submit them for review by 1 May 2012.¹⁹

Other matters which were agreed at Durban included:

- A significantly advanced framework for reporting of emission reductions for both developed countries and developing countries was agreed;²⁰
- Full implementation of the package to support developing nations was agreed. This includes the Green Climate Fund, an Adaptation Committee and a Technology Mechanism;²¹
- Acknowledgment that the current sum of pledges to cut emissions from both developed and developing countries is not high enough to keep the global average temperature below 2°C;²²
- Governments adopted procedures to allow for carbon capture and storage projects as part of the CDM;²³ and
- Governments agreed to develop a new market based mechanism to assist developed countries in meeting part of their targets or commitments under the Convention.²⁴

IV ISSUES AND DISCUSSION

The key outcome from Durban was to agree a process to arrive at a new emissions reduction protocol and to preserve the measurement and trading features of the *Kyoto Protocol* pending development of the new agreement. Durban was important because

¹⁶ Ibid, decision 4.

¹⁷ Ibid, decision 6.

¹⁸ Ibid, decision 1.

¹⁹ COP17, *Durban conference delivers breakthrough in international community's response to climate change* (Media Release, 11 December 2011) < <http://www.cop17-cmp7durban.com/en/news-centre/media-releases/breakthrough-response-to-climate-change-20111211.html>>.

²⁰ Ibid.

²¹ Ibid.

²² *Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action – Proposal by the President (Draft Decision)*, FCCC/CP/2011/L.10

²³ *Modalities and procedures for carbon dioxide capture and storage in geological formations as clean development mechanism project activities – Proposal by the President (Draft Decision)*, FCCC/KP/CMP/2011/L.4.

²⁴ COP17, above n 19.

a new process was established to fill the void arising from the failure of the Bali Road Map to deliver at Copenhagen and Cancun agreed post 2012 action.

The Durban Platform is a new “road map” to navigate towards a global agreement. It differs though from the Bali Road Map because it does not involve a “two track process”. The “two track process” was problematic because on the one hand, further commitment periods were being negotiated within the Annex I and Non-Annex I framework of the *Kyoto Protocol* which does not include the USA, and on the other hand, broader actions were being negotiated amongst all *UNFCCC* parties under the Long Term Co-operative arrangements.

Instead, the Durban Platform is focused on a single arrangement for post-2020 emission reductions. The single track process, which involves all *UNFCCC* parties including the USA, provides a conceptually and administratively simpler negotiating framework to arrive at a global agreement.

The Durban Platform is silent on the framework and key terms of the new global agreement. It does not set, for example, an overall emissions reduction goal. The Durban Platform notes ‘with grave concern’ the significant gap between emission reduction pledges and the likely chance of holding the increase in global average temperature below 2 °C above pre-industrial levels,²⁵ but does not necessarily set this as the emissions reduction target for the new agreement.

The Durban Platform does not provide guidance on the detail of the new protocol including the emission reduction trajectories, whether the new agreement will have separate types of obligations for Annex I and Non-Annex I parties, what the emission reductions for each party will be, the nature of binding commitments to be provided, the emission trading regimes to be allowed and the timing for implementation of the commitments. These are all issues to be shaped, developed, discussed and agreed over the next few years.

The Durban Platform, in many respects, is an “agreement to agree” a new protocol by 2015. Like any such agreement, it is not really enforceable and will depend on the goodwill, commitment and interests of the parties to achieve an outcome by 2015.

In this respect, the proposed timing for the new agreement is ambitious. The Durban Platform calls for work to begin in the first half of 2012 with the terms of the protocol intended to be agreed within 4 years at COP 21 in 2015. Given the architecture and detail of the new agreement needs to be negotiated and settled amongst more than 190 parties and historically progress on binding emissions reduction commitment has been slow, it is conceivable that an agreement will not be reached by 2015 and the timeframe may slip towards the 2020 commencement date. It is possible, for example, that the parties may have significantly different views on the basic architecture of the agreement and the application of the common but differentiated responsibilities principles which may take some time to resolve.

In the meantime, there will be no comprehensive emissions reduction agreement in place before 2020. It is true that some countries will have binding emission reduction

²⁵ *Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action – Proposal by the President (Draft Decision)*, FCCC/CP/2011/L.10.

commitments through a second commitment period in the *Kyoto Protocol*, but these represent a minor part of global emissions and in any event it is up to the countries to make their reduction pledges for the period. Other major emitters, including USA, China, India, Canada and Australia, will not have binding emission reduction obligations under the extended *Kyoto Protocol*.

The practical effect then of Durban has been to agree a longer timeframe to arrive at a comprehensive treaty. This may be seen as delaying specific action on climate change through emission reduction commitments. Alternatively, it may reflect the reality of the difficulties in reaching agreement on a complex and significant issue and give the parties the necessary breathing space and structure to negotiate a more comprehensive solution in an ordered manner. In the meantime, aggregate emissions continue to rise and time will tell whether the 10 year negotiation and implementation period is an appropriate course.

The agreement of some countries to agree to a second commitment period under the *Kyoto Protocol* is another important feature of Durban. Whilst these countries represent a percentage only of global emissions, the development is important because it demonstrates the commitment of the EU and some other countries to take formal action to reduce emissions. It also has an important practical effect because it provides a mechanism to preserve the accounting rules, mechanisms and markets under the *Kyoto Protocol*. In particular, it preserves the rules for measurement, modalities and CDM market mechanisms which can then be continued to be used in the domestic emissions trading and voluntary emission reduction markets post 2012.

Finally, Durban progressed some important detail aspects of climate change action. For example, rules and guidelines for carbon capture and storage projects as part of the CDM were formally adopted at Durban. These will enable carbon capture and storage projects to be developed in Non-Annex I countries and enable the creation of certified emission reduction units which may be used in Annex I countries or some domestic emissions trading schemes. This will assist in the technical and commercial facilitation of carbon capture and storage projects around the world.

IV CONCLUSION AND NEXT STEPS

The *UNFCCC* parties are required to lodge submissions on the proposed architecture of the new agreement in February 2012 with more detailed negotiations to commence during the first half of 2012.²⁶ The parties then progress to COP 18 in Qatar in November 2012.²⁷ Developments during the first half of 2012 will be critical as parties will be adopting their positioning on the structure of the new deal and will give some indication of whether the new process developed at Durban has a reasonable chance of success in a timely manner.

²⁶ Ibid, decision 3.

²⁷ COP17, above n 19.