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The Durban Climate Conference: Prospects for a Legally Binding Agreement Post 2012

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Ever since the Bali Action Plan, 2007, launched the current phase of negotiations under the Framework Convention on Climate Change (FCCC), parties have been dithering over the legal form that the "agreed outcome" to these negotiations should take. The options 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, save in the exception, legally binding. This divisive issue has taken centre-stage at the ongoing Durban Climate Change Conference.

Many countries, including the host country, South Africa (part of the BASIC group of Brazil, South Africa, India and China) have coalesced in favour of a legally binding instrument to crystallise mitigation and other commitments that will chart the world through to a 2°C or even 1.5°C world. The Alliance of Small Island States and other vulnerable countries on the frontlines of climate impact believe that anything short of a legally binding instrument would be an affront to their grave existential crisis. The EU has indicated that they will 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. This agreement, applicable to all, is intended to take effect post-2020.

Brazil, China and India argue that extending Kyoto is a legal obligation, not a bargaining tool to wrench further concessions from developing countries. These countries are, if at all, only willing to consider a mandate for a new legally binding instrument after the completion of the review of the long-term global goal of 2°C slated for 2015. The United States, nervous about the gathering momentum in favour of a Durban mandate, has 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 this they are joined by the Australia, Japan, New Zealand, and others. Needless to say, the BASIC countries will find such symmetry unpalatable.

Whatever the merits of these positions, it is worth stepping back from the ever-dire politics of the blame game, and exploring what legally binding instruments do that COP decisions cannot; why, if at all, we need such an instrument; and why developing countries, may have little to fear and much to gain from a legally binding instrument.

Legally binding instruments can, unlike COP decisions, create substantive new obligations for parties. If existing legal instruments and obligations — not just on greenhouse gas mitigation but also on financing, technology and adaptation — are insufficient (and they are) to meet the objective of the FCCC, it would appear self-evident that new obligations and therefore, a new legally binding instrument is necessary. Such an instrument does not have to bite developing countries as hard as it does others. Provisions, even within legally binding instruments, have differing levels of rigour and precision, and different degrees, therefore, of "teeth". The FCCC and its Kyoto Protocol are prime examples. Parties can negotiate a finely balanced set of soft and hard obligations based on equity in relation to the architecture of the instrument, the range and character of obligations within it, the degree of flexibility it allows different parties and the nature and extent of differentiation it contains.

The debates in some developing countries often mistakenly conflate the form of the instrument with the character of greenhouse mitigation commitments within it, thereby constructing the negotiation of a legally binding instrument exclusively as a threat. Admittedly, the efforts of the US, Japan, Canada, Russia and the EU to shift the goalposts in these negotiations away from comforting (to developing countries) interpretations of differentiation will pose significant negotiating challenges for developing countries. Contestations over differing interpretations of the principle of common but differentiated responsibilites and respective capabilities have assumed centre stage in Durban. Most developed countries, with differing degrees of insistence, are arguing that this principle needs to be interpreted and applied in the light of current economic realities. Assuming BASIC countries have the mettle to withstand such challenges to their preferred interpretations of this principle, the negotiation of a new legally binding instrument built on the FCCC and its Kyoto Protocol could offer useful opportunities. First, they could insist on continued differentiation between mitigation commitments (for developed countries) and actions (for developing countries) — in form, content and stringency — within this instrument. In doing so, given current politics, these countries may need to carefully re-imagine differentiation between parties, without, however, moving established goalposts or breaching their red lines. Second, BASIC countries and other developing countries could seek to create concrete enforceable obligations in relation to finance, technology and adaptation. This would deliver the certainty, predictability and accountability developing countries have been seeking on assistance obligations. Third, these countries, such as for instance, India, could advance their agenda items on "equitable access to sustainable development" and unilateral trade measures. Such issues are best addressed in a legally binding climate instrument rather than in international dispute settlement bodies with little climate-relevant expertise, as the controversial EU aviation scheme is likely to. Finally, these countries could also seek to provide a firm basis and future to the Clean Development Mechanism (CDM), thereby providing their industry with the predictability they need to invest in CDM projects.

In the ultimate analysis, a legally binding instrument is a signal of seriousness. Kyoto needs to be treated with more seriousness by developed countries than it has thus far. And, if BASIC countries wishes to be perceived as responsible climate actors, the growing demand for a new legally binding instrument to advance the climate regime needs to be treated with due seriousness.