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The EU and Climate Treaty Negotiations after the Durban Conference

Abstract

The EU has been and remains committed to concluding a comprehensive climate agreement under the United Nations Framework Convention on Climate Change (UNFCCC). In this paper, outcomes of the latest round of negotiations, based on the UNFCCC and held at the Durban Climate Conference (2011), are assessed from the perspective of the law of treaties, focusing on some critical questions. Some specific features of the Durban decisions are compared with the decisions of the Copenhagen Climate Conference (2009). Flesh added by the Durban decisions to the bones of the Cancun Climate Conference decisions (2010) is analysed, and the actual outcomes of the Durban Conference are also scrutinised. A post-Durban scenario of negotiations is explored and a way forward suggested. In this context it is essential that the key players' interests are better accommodated. Negotiations based on the needs of the parties, instead of negotiations based on their positions, are therefore recommended. Finally, a strategy for negotiations for the EU going forward is drawn, with some generic conclusions.

1 Introduction

In recent years, a series of negotiations has been conducted, within the established international tracks, in order to conclude a comprehensive climate treaty for substantive greenhouse gas emission reductions, with the ultimate aim of stabilising rising temperatures and dealing with global climate change. One track is the Conference of the Parties (COP) to the United Nations Framework Convention on Climate Change (UNFCCC).¹ The other is the Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol² (COP/MOP). Not all states representing the COP are parties to the COP/MOP. The Kyoto Protocol is the only legally binding agreement under the UNFCCC for the reduction of greenhouse gas emissions, with a binding first commitment period starting in 2008 and ending in 2012.

The latest rounds of the two tracks of the negotiations, known as the COP/MOP7 and COP17, were held simultaneously in 2011 in Durban, South Africa.³ At the Durban Conference, the COP/MOP7 agreed to a second commitment period for emission reductions under the Kyoto Protocol. The second period starts on January 1, 2013 and will end on either December 31, 2017 or December 31, 2020.⁴ The extension of the second commitment period of the Kyoto Protocol was possible as a result of the EU's active role in the Durban Conference. Since the Copenhagen Climate Conference in 2009, the EU has taken a firm position on working towards a comprehensive climate treaty. Despite the unfavourable economic and political situation, and expressed opposition from some of the key players in international climate negotiations (e.g., the United States, China and

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¹ Sources regarding UNFCCC and successive decisions taken by COPs and COP/MOP:

<http://unfccc.int/documentation/decisions/items/3597.php>.

² Kyoto Protocol:

http://unfccc.int/kyoto_protocol/items/2830.php.

³ COP17 Decision.

⁴ COP/MOP7 Decision.

India), the EU confirmed its position prior to the Durban Conference. In Durban, the EU, with other groups of states, negotiated an extension of the second commitment period of the Kyoto Protocol, in return for a roadmap for future negotiations, with all states legally obliged to commit to a more ambitious target for emission reductions. Within the COP/MOP7 and COP17, the EU's strategies helped to prevent a total collapse in the UNFCCC negotiations.⁵ In brokering the second commitment period under the Kyoto Protocol, the EU has been successful, keeping alliances along traditional lines, e.g. Annex 1, Annex 2 and non-Annex 1 countries⁶, as well as between various levels of emitter states. At the Durban Conference, a roadmap for all states to move towards a new legal framework by 2020 was established.⁷ Nevertheless, this does not, in any way, suggest that the EU has achieved its actual aim of establishing a comprehensive climate treaty in the post-2012 era.

Despite setbacks in the Durban Conference, the EU remains firmly committed to negotiating a new climate treaty as soon as possible. It is in this context that this paper aims to assess the outcomes of the COP/MOP7 and COP17 and to discuss a way forward from Durban to further negotiations.

Due to the fact that the COP negotiations involve more states than the COP/MOP, any substantive outcome of the COP17, or any absence of outcome, has wider implications, and therefore requires appropriate assessment. A critical appreciation of the outcomes of the COP/MOP7 is also vital. An overall assessment of the outcomes of the Durban Conference is therefore necessary, and it will address some of the critical legal questions, which are:

Was there a “breakthrough” at the Durban COP17, as a United Nations Climate Change Secretariat press release suggests,⁸ or is this just window dressing for the failures of the Durban COP17?

If there has been a success, in what sense are the COP17 decisions more substantive than those of the Copenhagen COP15? In terms of content, does the COP17 provide any flesh on the bones of the Cancun COP16?

What has the role of the EU been so far, and what can the EU's role be, in the post-COP17 context, in negotiating a new climate agreement?

The aforementioned questions should be set against the official interpretation of the outcomes of the Durban Conference, which suggests that there was a “breakthrough” in the international community's response to climate change. The official interpretation may be considered to be reasonable, because there was low expectation and there were enormous difficulties negotiating a treaty at the Durban Conference. It is, however, also necessary to determine the legal status of the Durban outcomes, because these negotiations were and remain about concluding a treaty. Therefore, a legal interpretation of the decisions of the COP/MOP7 and COP17 is necessary, specifically from the point of view of the law of treaties.⁹

An assessment of the COP/MOP7 and COP17 decisions is presented below. Answers to the aforementioned questions, taking into account some earlier COP decisions, which include the Kyoto COP3, Bali COP13, Copenhagen COP15 and Cancun COP16, are explored. Focusing on the need for further negotiations on a treaty or protocol, a way forward for such negotiations is drawn from the EU perspective. From this perspective, a number of scenarios are explored concerning the interplay of the interests of the key players in different constellations; e.g., the EU, China and India; the EU and the United States; and the EU, Russia, China, India and the United States. Negotiations based on the needs of the parties, and the transfer of green technology from developed to developing countries, are suggested as possible future directions.

2 Durban breakthrough?

In the aftermath of the COP17, the United Nations Climate Change Secretariat issued a press release with a headline stating that “Durban conference delivers breakthrough in international community's response to climate change”.¹⁰ This is the official assessment of the COP/MOP7 and COP17. The press release further suggested that “in Durban, governments decided to adopt a universal legal

⁵ According to the European Commissioner for climate change, Connie Hedegaard, the EU's strategy worked in Durban, see “Durban climate deal: the verdict”, Reaction from around the world on the climate change deal struck in the early hours of Sunday at the COP17 talks in Durban, *The Guardian*, 12 December 2011.

⁶ COP/MOP7 Decision.

⁷ COP17 Decision.

⁸ *Press Release of UN Climate Change Secretariat*, Durban, 11 December 2011.

⁹ The Vienna Convention on the Law of Treaties 1969, *UN Treaty Series*, vol.1155, p.331.

¹⁰ *Press Release of UN Climate Change Secretariat*, Durban, 11 December 2011.

agreement on climate change as soon as possible, but not later than 2015". The press release is apparently referring to the text of the COP17, and specifically to the decision "to launch a process to develop a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties", as soon possible but "no later than 2015", and the decision that a legal agreement is "to be implemented from 2020".¹¹

The statement in the press release appears to be a generous interpretation of the outcomes of the COP17. From the point of view of the law of treaties, it is vague in its substance and is likely to be subject to contradictory legal interpretations, if not a dispute, between countries. Such an agreement to agree in the future, without sufficient specific content, is not enforceable either in international law or under the law of contract.

When analysed from an international law perspective, the actual text of the COP17 decision, mentioned above, seems designed to be peculiar and confusing, and to ignore the legal meaning of the very term "agreement". According to the law of treaties, in order for any agreement to be considered as a treaty it must contain binding obligations of the parties.¹² The COP17 decision does not qualify as a treaty, because the parties have neither recognised it as a legally binding decision nor renounced their right to disagree in the future negotiations. Hence, the COP17 decision does not supersede states' right to make a contrary decision at a given moment of time in the future. In other words, the COP17 decision could not be challenged in any way in a court of law if a state that is a party to the COP17 fails to be a party to a future climate treaty. Following the COP/MOP7, Canada's withdrawal from the Kyoto Protocol has itself shown that even a legally binding deal does not guarantee that countries will not walk away from their commitments. The COP17, paraphrased as "agreeing to agree" on something in the future, is nothing more than a "non-binding agreement".

In this context it is important to observe that, according to the Bali Action Plan which was developed at the

COP13 (2007) and is also known as the Ad Hoc Working Group on Long-term Cooperative Action Plan,¹³ the COP15 (Copenhagen) was supposed to conclude a treaty for substantive emission reductions by all states in the post-2012 Kyoto Protocol era. However, this did not happen. Therefore, it was expected that the COP16 (Cancun) decisions¹⁴ would at least be transformed into an agreement by the COP17. Instead, the COP17 actually delayed the start of a new era until 2020. This delay has in effect denied a timely climate call for justice through negotiations, and therefore according to the critics the decisions in Durban result in a "lost decade".¹⁵

This critique emphasises that, due to the COP17 decision, the consequences of climate change will remain legally ignored for yet another decade. The issues and complexities, as well as the difficulties of a treaty negotiation, were well known to all the COP17 parties in advance, and a series of conferences (e.g., 15, 16 and 17 COPs) were held in order to overcome these difficulties. The Durban decision has apparently delayed negotiations until 2015, with an additional delay in enforcement from 2020 if a treaty is concluded. In the light of the lack of results from previous negotiations, it remains to be seen if there will be a new climate treaty in force in 2020, which is the COP17's aim.

Nevertheless, in view of the development of climate treaty negotiations in recent years, the press release rightly suggests that there was a "breakthrough" in Durban, because the survival of the Kyoto Protocol was questioned prior to the Durban Conference. There is no doubt that the Protocol survived as a result of the Durban decision. There was, however, no "breakthrough" in Durban in establishing a treaty applicable in the post-2012 period. Thus, in this context, the press release appears to be a window dressing of the failures of the Durban Conference. Consequently, from the EU perspective, as well as from a legal perspective, the Durban outcomes cannot be considered as a success; the EU's aim for a new comprehensive climate treaty is far from achieved.

¹¹ COP17 Decision.

¹² Katak Malla, *The International Negotiations for a New Climate Treaty*, CLIPORE and Stockholm University Environmental Law and Policy Centre, 2011, pp. 35-39.

¹³ COP13 Decision.

¹⁴ COP16 Decision.

¹⁵ Bolivia's Ambassador Pablo Solón, in an interview with Amy Goodman, *Democracy Now*, 12 December 2011; Ambassador Pablo headed his country's climate negotiating team for the U.N. Climate Change Conference in Cancún, Mexico, and he joined climate justice activists outside the official Durban Conference, demanding legally binding emissions cuts.

3 More substantive decisions in Durban than in Copenhagen?

In essence, the notion “agree to agree” in the COP17 decisions resembles the footnote to the Copenhagen Accord issued at the COP15.¹⁶ One should recall that, according to its footnote, the Copenhagen Accord was designed as a political agreement, which was not intended to be legally binding, but in effect became politically binding. In that sense, the legal status of the COP15 and COP17 is similar, if not the same. It should be recognised that the Copenhagen Accord remains an important document, since it shows the political will, especially as a standard of due diligence by states in combating global climate change. Whatever the Durban Conference offers, it is nothing more nor less than options, so that states “can jump on and off the commitments as they prefer to do so”¹⁷, just as is the case with the Copenhagen Accord.

3.1 Flesh on bones

It is fair to say that the Cancun COP16 brought the global negotiations back on track, since they were in fact derailed by the Copenhagen COP15. One should recall that the COP15 took decisions outside the COP process and structure. As mentioned above, at the COP15 there should have been an agreement according to the Bali Action Plan. As the result of stalled negotiations the COP15 was brokered, outside the COP13 Bali Action Plan, among the Presidents of the United States, China, Brazil and South Africa and the Prime Minister of India. The only new substance added to the framework of the COP16 by the COP17 was the decision “to launch a process to develop a protocol, another legal instrument or agreed outcome with legal force under the Convention applicable to all Parties through a subsidiary body under the Convention hereby established and to be known as the Ad Hoc Working Group on Durban Platform for Enhanced Action.”¹⁸

The Durban Platform, established by the COP 17, shows similarities to the Bali Action Plan. The Durban Platform has to address many negotiation issues, and the details of any agreement are yet to be agreed. The text calls for “the widest possible cooperation by all countries and their participation in an effective and appropriate international

response”.¹⁹ The COP17 was hailed as a success in the press release concerning the following specifics.

3.2 Green Climate Fund

With regard to the Green Climate Fund, the contribution of the COP17 is the establishment of a Standing Committee, comprising 20 developed and developing countries.²⁰ The Committee is to govern and distribute \$100 billion a year to developing countries, based on pledges made by the latter. The fund had already been agreed by the Copenhagen COP15. The Cancun COP16 developed guidance on how to handle the Green Climate Fund, including principles for prioritising and governing this aid, emphasising both mitigation and adaptation.

According to the COP17, the Green Climate Fund must start as soon as possible. However, a roadmap for long-term finance has not yet been set. The COP17 failed to adopt a common reporting format for finance, meaning that information provided under the reporting guidelines is likely to be limited in completeness, comparability, transparency and accuracy.

3.3 Adaptation

The key objective in terms of adaptation is to help strengthen the adaptive capabilities of the poorest and most vulnerable countries so that they receive better protection against loss and damage caused by extreme weather events related to climate change.²¹ In addition to the Green Climate Fund, adaptation initiatives comprise National Adaptation Plans and the Adaptation Committee. A new Climate Adaptation Framework (CAF) was approved by the Cancun COP16. The Framework identifies a broad set of priority areas for action: migration, disaster risk reduction, and the strengthening of institutions and adaptation technology.

The Durban COP17 established the Adaptation Committee which will be composed of 16 members, and which will be responsible for coordinating actions at a global level, especially for the poorest and most vulnerable countries. The developing countries will have a majority of seats on the Committee, which will play a coordinating role, reviewing and synthesising the processes of the UNFCCC. Through its subsidiary bodies, the Committee will report to the COP.

¹⁶ COP15 Decision.1 Sources regarding UNFCCC and successive decisions taken by COPs and COP/MOP: <http://unfccc.int/documentation/decisions/items/3597.php>.

¹⁷ Robert Stavins, “Assessing the Climate Talks -Did Durban Succeed?”, *Huff Post Green, The Internet News-paper* Posted 12/12/11 08:21 PM ET.3 COP17 Decision.

¹⁸ COP17 Decision.

¹⁹ Ibid.

²⁰ Ibid.

²¹ Ibid.

3.4 Technology

According to the COP17, the Technology Mechanism (TM), established by the COP16, will be operational in 2012, transferring clean technologies to developing countries.²² The TM has two components, the Technology Executive Committee (TEC) and the Climate Technology Centre and Network (CTCN). The TEC consists of 20 experts (11 from developing and 9 from developed countries). It is responsible for identifying technology needs, coordinating international efforts, and making recommendations to make these efforts more effective. The CTCN will provide practical support, responding to requests received from developing countries regarding mitigation and adaptation technologies.

4 Actual outcomes of the COP/MOP7 and COP17

The COP/MOP7 established, first of all, a forum and a programme for dealing with the “unintended” consequences of climate change actions and policies. Secondly, Carbon capture and storage (CCS) projects are to be adopted and the guidelines are to be reviewed every five years.²³ The consequences of the implementation of the CCS project on the Clean Development Mechanism (CDM) remain to be seen. Thirdly, a new market-based mechanism will be established in 2012 to assist developed countries in their emission reductions. Finally, the rules and mechanisms of the Kyoto Protocol continue to function, including the CDM, Joint Implementation (IM) and carbon trade. The Parties to the Protocol are required to submit their economy-wide emission reduction targets for review by May 1, 2012. This means that the actual decision for economy-based emission reduction targets has been postponed to the next COP/MOP. At the same time, it should be noted that, following the COP/MOP7 decision, Canada has withdrawn from the Kyoto Protocol and both Russia and Japan are opposed to an extension of the Kyoto Protocol.

The COP17, as has been explained above, is yet another non-binding decision.²⁴ It does not add anything to the

COP16, which already included a shared vision for long-term cooperative action, including adaptation and mitigation, monitoring, reporting and verifications (MRV), REDD and REDD+²⁵, finance, technology development and transfer, and capacity building. The COP17 has made the MRV system operational to a certain extent, but failed to integrate detailed rules pertaining to reporting and reviews of countries’ emissions, or actions and finance. There is also a lack of clarity and positive incentives on the REDD+ policy and approaches. At the COP17, for the first time, all countries agreed to be part of future negotiations in the period up to 2015 that will presumably result in a legally binding agreement which will be implemented from 2020. One should not, however, underestimate the difficulties, in the post-COP17 situation, in negotiating a legal agreement that is acceptable to the developed as well as the developing countries.

For any future COP decision to be legally binding, it should follow the lines of the COP3, which resulted in the Kyoto Protocol; the Kyoto Protocol can certainly be regarded as an international climate treaty. The Protocol was negotiated by the COP3, opened for signature by state parties and came into force in accordance with its Articles 24 and 25 after completion of the process of signature and ratifications. Of course, a new climate treaty should ideally have more ambitious aims, in terms of reducing emissions, than the Kyoto Protocol.

5 A way forward from Durban

A way forward could be laid out for negotiations in the post-Durban era, acknowledging the difficulties of the past negotiations which were largely based on the geo-political and economic positions of the parties. New negotiations have to be based on the needs of the parties, rather than on their positions. An equally important issue to be considered is that there should be “more carrots than sticks” when developed countries negotiate with developing countries.²⁶ Furthermore, a “shared implementation” mechanism is a must for a new climate treaty to be practically successful.²⁷

²² Ibid.

²³ Ibid.

²⁴ Ibid.

²⁵ REDD: Reducing Emission from Deforestation and Forest Degradation and REDD+ mechanisms include offsetting emissions through “sustainable forest management”, “conservation” and “increasing forest carbon stocks” in developing countries.

²⁶ This can be suggested based on the negotiations of the Vienna Convention for the Protection of the Ozone Layer 1985, and its Montreal Protocol 1987, to which India and China became parties along with other developing countries. This is known as the successful environmental treaty regime. See, Martin Dixon, Robert MacCorquodale and Sarah Williams, *Cases and Materials on International Law*, Oxford University Press, 2003, p. 461.

²⁷ Ibid.

At the COP17, the United States, China and India were on board for a future global climate deal, but unless their needs are adequately addressed it seems unlikely that these states will agree on a legally binding climate agreement in the future. This means that the negotiations will have to recognise the needs of the parties in order to arrive at a legal agreement, especially when setting targets on how far each country could cut its emissions.

Based on the UNFCCC's recognition of "climate change and its adverse effects as a common concern of humankind"²⁸ there are humanitarian reasons that oblige states to conclude a new climate treaty. The IPCC has recommended that a stabilisation of global temperature rises to less than 2 to 1.5°C is necessary for the protection of the earth's ecosystem. A quantified economy-wide emission reduction target is one option for negotiations for a treaty among developed countries.²⁹ Such an emission reduction target is also based on voluntary submissions by the parties,³⁰ including developed and developing countries. For example, China is the world's biggest emitter of greenhouse gases, and is committed to lowering its emissions per unit of GDP by between 40 and 45 per cent by 2020 compared with 2005 levels.³¹ The United States is the world's second biggest emitter and has conditionally pledged to reduce emissions by 17 per cent by 2020 from its 2005 levels.³² India is the third biggest emitter and has voluntarily, but conditionally, agreed to reduce the intensity of its emissions by 20-25% of their 2005 levels by 2020.³³ Although this is not sufficient, China and India have both expressed their intention to reduce emissions based on units of their GDP.³⁴ In this situation, if the United States proposes more emission cuts, the EU should consider being involved in the negotiations in order to encourage China and India to upgrade their emission cuts.³⁵

It may be difficult for the EU to position itself between the two opposing groups in the climate negotiations. Needs-based negotiation by the parties could be a strategy worth considering in this situation. While negotiations based on positions are difficult, needs-based negotiations, accommodating the interests of the parties, tend to be more successful.³⁶

5.1 Negotiation of needs

The future negotiations are expected to be dependent on an interplay of the needs of the Basic group (Brazil, South Africa, India and China), the EU and the United States.³⁷ If Brazil and South Africa accept binding obligations in return for possible benefits from the Green Climate Fund, an accommodation of the Chinese and Indian interests will also be necessary. There are a number of conditionalities that the EU needs to take into consideration when preparing its position in the future climate negotiations. These conditionalities relate to the configuration of various groups of states and the actual scenario of the negotiations; between the EU and China and India, on the one hand, and the EU and the United States, on the other,³⁸ and between the EU, on one side, and the United States, Russia, China and India, on the other side.

5.2 The EU, China and India

China and India are the developing giants in terms of economic growth, with rapidly increasing emissions in recent decades. Although China and India do not consider themselves responsible for historic emissions, the two countries agree that climate change is a big problem. China and India have the largest populations in the world, and they are not prepared to accept binding emission reduction targets equal to those of the EU and the United States. Therefore, at the COP17, India's Minister of Forests

²⁸ Preamble of the UNFCCC; *UNDocDistr GA/AC.237/18 (Part II) Add.1*, 15, 15 May, 1992.

²⁹ Annex I UNFCCC biennial reporting guidelines for developed countries (III) can be used as an example.

³⁰ For such voluntary emission reduction targets submitted by the parties see, *UNFCCC/TP*, 3 June 2011. See "Quantified Economy-wide Emission Reduction Targets by Developed Country Parties to the Convention: Assumptions, Conditions and Comparison of the Level of Emission Reduction Efforts". For more information: <http://unfccc.int/resource/docs/2011/tp/01.pdf>.

³¹ *Ibid.*

³² *Ibid.*

³³ *Ibid.*

³⁴ *Joint Statement by BASIC Group* (Brazil, South Africa, India and China), 24 January 2010.

³⁵ The United States produces 29 tons of carbon dioxide emissions per person compared with 3.1 tons in China and 1.8 tons in India; Richard Wilkinson and Kate Pickett, *The Spirit Level. Why Equality is Better for Everyone*, Penguin Books, 2009, p. 222.

³⁶ Fisher Roger and William Ury, *Getting to Yes: Negotiating Agreement Without Giving In*, NY, Penguin Books, 1991.

³⁷ Katak Malla, *The EU and Strategies for New Climate Treaty Negotiations*, *European Policy Analysis (EPA)*, 2011:12.

³⁸ *Ibid.*

and Environment, Jayanthi Natarajan said; “Equity is the centerpiece, it cannot be shifted. This is not about India. Does fighting climate change mean we have to give up on equity?” The view expressed by the India’s Minister was strongly endorsed by China’s Minister of Environmental Protection, Xie Zhenhua, which allowed a coalition of convenience to emerge between the two countries.

Such a coalition of interests between China and India suggests that the two countries may accept an obligation to reduce emissions which is based on the equity principle. This means that the interests of China and India have to be taken into account in the potential negotiations. In these interest-based negotiations, it is logical to anticipate that, with green energy initiatives and technical support, the Basic group may be more open to climate negotiations and more inclined to accept obligations to take action to reduce greenhouse emissions. This anticipation can be supported with the following arguments.

First, there is an increasing need for energy in China and India. Secondly, it is well known that these countries do not consider themselves to be stakeholders in the Green Climate Fund, and, if and when they become stakeholders, they are likely to engage seriously in climate negotiations. Thirdly, the quantity of greenhouse gas emissions is increasing on an alarming scale in all the Basic countries, and energy demand is increasing. Finally, despite the economic growth in recent decades, these countries continue to suffer from poverty, insufficient infrastructure development, and a lack of the best available technology and necessary energy supplies. On the whole, the innovation and transfer of green technology, such as for

wave energy, hydro-electricity, bio-gas and other natural gas, from the developed to the developing countries will be used as a case in point.³⁹

5.3 The EU and the United States

When Brazil, China and India undertake obligations to reduce emissions, the EU could in parallel start to engage the United States in negotiations, especially negotiations concerning innovation and the transfer of technology. The US President Barack Obama seems to be reluctant to make a commitment on climate change at this time, because of US domestic politics. Furthermore, even if he wins a second term in November 2012, and agrees a binding obligation for emission reduction targets, the US Congress may be reluctant to ratify such a treaty. It is more likely that the United States will support agreements on green technology and the transfer of such technology. This would also seem to be possible with a republican US President.⁴⁰

In order to reinvigorate climate treaty negotiations in that context, the EU could also explore possibilities along the lines of the EU’s “climate and energy package”.⁴¹

The United States may agree to contribute in the area of innovation and transfer of green technology, along the lines of the recently concluded “US-India Nuclear [energy] deal”.⁴² It is noteworthy that the United States seems to emphasise the relationship between climate change and traditional security.⁴³ The EU could, thus, consider initiating a dialogue with the United States in order to include climate security related issues in the climate discussions.

³⁹ One potential area of negotiation between the EU, China and India could be a green energy related agreement concerning the development of hydro-electricity. The International Center for Integrated Mountain Development (ICIMOD) has been established in the Hindu Kush-Himalaya region, and consists of eight regional member countries. The ICIMOD has hosted a number of programmes relating to sustainable development. It is recommended that the EU uses its good offices to help establish a green energy related agreement within the ICIMOD region, including the two large countries China and India, which would cover a number of potential trans-boundary watercourses, as well as national watercourses. For more information: <http://www.icimod.org/?q=abt>.

⁴⁰ For example, the US President George W. Bush initially stated his opposition to the Kyoto Protocol, but said that he believed global warming is real. Bush signed an executive order to create an inter-agency task force to streamline energy projects, and announced the Advanced Energy Initiative to increase energy development research.

⁴¹ See more about the EU’s Climate and Energy Package: http://ec.europa.eu/clima/policies/package/index_en.htm.

⁴² The U.S. Congress on October 1, 2008, gave final approval to an agreement facilitating nuclear cooperation between the United States and India. The deal is seen as a watershed in U.S.-India relations and introduces a new aspect to international nonproliferation efforts, *Council on Foreign Relations*: <http://www.cfr.org/india/us-india-nuclear-deal/p9663>.

⁴³ For example, an article written by two senior members of the United States Joint Chiefs of Staff in a personal capacity, under the pseudonym of “Mr. Y”, and signed by 11 retired military officers from the United States Army, Navy, Air Force, and Marine Corps emphatically endorsed the scientific findings and their implications for security, *Foreign Policy*, 13 April, 2011.

5.4 The EU, Russia, China, India and the United States

In future climate negotiations, Russia's interests also need to be accommodated, as do those of the United States. In Durban, Russia proposed that the developing countries' obligations to reduce emissions be upgraded.⁴⁴ Except for Russia's demand for amendment of the UNFCCC to upgrade the obligations of developing countries, there is an implied coalition of interests between Russia and the United States. The United States has taken the position that China and India ought to upgrade their emission reduction obligations, and Russia has also insisted on this. At the same time, it is relevant to note that the United States, Russia, China and India oppose the EU decision to impose a carbon tax on air travel, starting from January 1, 2012. These countries consider that the EU decision to impose a carbon tax on air travel violates international law.⁴⁵ The EU could and should use the UNFCCC principles⁴⁶ to justify its decision, and engage in further negotiations concerning trade and climate, with the United States, Russia, China and India and other states opposing its decision. As a rule, specific treaty takes precedence over general international law.

5.5 Transfer of technology to developing countries

The transfer of technology from developed to developing countries entails, in particular, addressing the issues of innovation and the transfer of green technology. It has to be pointed out, though, that the transfer of technology involves issues of individual intellectual property rights. These issues need to be taken into account by the developed countries when negotiating a workable agreement with the developing countries, between the EU and the United States as well as between the EU and Russia. There are several areas and models for the international transfer of technology.⁴⁷ A workable model should be "more demand effective than enacting restrictions on intellectual property protection for clean technologies",⁴⁸ and is already functioning, for example in the health sector.⁴⁹

With regard to potential negotiations with the developing and the least developed countries, the EU has already recognised their difficulties in coping with the challenges of climate change. The negotiating position of the EU suggests that it is prepared to assist the most affected countries to adapt to and mitigate climate change, both in terms of the Green Climate Fund and of technology transfer. Therefore the EU could play a valuable role in neutralising the firm position of the United States, and in bringing others on board while starting talks on binding obligations.

6 Conclusions

Except for a little success relating to the Green Climate Fund, and to technology mechanisms, there was no substantive decision made in Durban which compares with those of Cancun. The only noteworthy COP17 decision is "to launch a process to develop a protocol, another legal instrument or agreed outcome with legal force under the Convention applicable to all Parties". This decision has to be seen in terms of the underlying difficulties, especially the ongoing global economic crisis, which contributed to the inability to conclude a new climate deal in Durban.

From the perspective of the EU's position before the Durban Conference, the result is not satisfactory, as no binding treaty was concluded. Nevertheless, the decision to commit all parties politically to future negotiation towards a binding instrument can be seen as providing more favourable circumstances for a continued effort to reach an internationally accepted agreement. Even if the Durban commitment is not in itself legally binding, it does create political pressure. Hence, it will strengthen the position of those parties for whom a binding comprehensive treaty is an ultimate goal. This should be an important signal, not least for the EU in its future efforts.

At the moment, the EU is weakened by its financial crisis, which affects its international position and its negotiating potential. From that perspective, the postponement of

⁴⁴ At the COP17, Russia proposed an amendment of Article 4.2 (f) of the UNFCCC, reflecting the dynamics and reality of the current socio-economic development of the Parties:
http://unfccc.int/files/meetings/durban_nov_2011/statements/application/pdf/111208_cop17_hls_russia.pdf.

⁴⁵ India, Russia, US, "China plan anti-carbon tax talks", *Terra Daily News About Planet Earth*, 4 February 2012.

⁴⁶ UNCCC principles point to the common but differentiated responsibility and respective capabilities.

⁴⁷ David Popp, "The Role of Green Technology Transfer in Climate Policy", *RFF Policy Commentary Series*, 28 June 2010.

⁴⁸ Ibid.

⁴⁹ For example, AIDS treatments in Africa:
<http://www.clintonfoundation.org/what-we-do/clinton-health-access-initiative>.

the negotiations, as decided in Durban, may be seen as a window of opportunity for the EU to recover from its current problems, adopt a “green economy perspective”⁵⁰ and assume a leading role in international climate negotiations. Seen in this light, the failures of the Durban conference should not be considered as an end to climate negotiations under the COP process. A new way for

further negotiations, which can be encouraged by the EU, is negotiation based on the needs of the parties, especially concerning climate and energy, involving states with large-scale greenhouse gas emissions. In the upcoming Rio Conference, the EU could definitely assert its position regarding the importance of moving towards such need-based negotiations.

⁵⁰ For example, the UN launched a report on the Green Economy, recognising the multiple crises in the past four years, including financial, food and energy, 4 December 2011, See: http://www.wmo.int/pages/mediacentre/news/documents/EMGpressrelease_141211.pdf.

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