

Justice at Cancun: Twilight or Dawn?

Justicia en Cancún: ¿Crepúsculo o amanecer?

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ABSTRACT: The principal aim under the U.N. Framework Convention on Climate Change (UNFCCC) has been to establish a legally-binding regime regulating emission of greenhouse gas. The hopes were tempered at Copenhagen which charted no clear path towards a treaty with binding commitments. The result, instead, was the Copenhagen Accord, a non-binding agreement that captured political consensus on a number of core issues absent its formal adoption by the Conference of the Parties. Thus, the achievement of an agreement in the climate summit at Cancun seemed a herculean task. However, after two weeks of hectic UN-led parleys, the nations of the world arguably reached a forward-looking deal that leaves open an extension of the Kyoto Protocol as well as the crucial question of the level of emission limitation and reduction commitments. Cancun outcome can be perceived in twin contexts; (a) As a continuation of series of efforts since the establishment of UNFCCC to have a legally binding regime; and (b) as a resurgent hope to get on board after a failed effort at Copenhagen. The dynamics of climate change presents varied dilemmas of justice. The paper, in particular, delves upon the issue of distributive justice in reference to Cancun agreements, to intuit the viability of a new era that would lead to a climate responsible pathway.

RESUMEN: El principal cometido de la Convención Marco de Naciones Unidas sobre Cambio Climático (CMNUCC) es el de establecer un régimen legalmente vinculante de regulación de emisiones de gases de efecto invernadero. Por eso, las esperanzas se matizaron en Copenhague que, sin embargo, no logró marcar un camino claro hacia un Tratado con compromisos vinculantes. El resultado fue el Acuerdo sin fuerza sancionadora de Copenhague que consiguió el consenso político sobre un número crucial de asuntos pero no su adopción formal por parte de la Conferencia de las Partes. De este modo, que se pudiera conseguir un acuerdo en la Cumbre de Cancún constituía una tarea hercúlea. Sin embargo, tras dos semanas de agitadas conversaciones conducidas por Naciones Unidas, podría decirse que las naciones alcanzaron un acuerdo para el futuro que deja abierta la posibilidad de ampliar el Protocolo de Kyoto, así como la cuestión crucial de determinar un límite en el nivel de emisiones y los compromisos de reducción de las mismas. Los resultados de Cancún pueden ser vistos desde dos contextos vinculados: (a) como la continuación de una serie de esfuerzos mantenidos desde que fuera creada la CMNUCC en vistas a la creación de un régimen legalmente vinculante; y (b) como la recuperación de la esperanza de despegar de una vez tras los intentos fallidos de Copenhague. La dinámica del cambio climático conlleva distintos problemas de justicia. En particular, este ensayo se va a centrar en el asunto de la justicia distributiva en relación con los acuerdos adoptados en Cancún. Se deja ver la viabilidad de una nueva era que nos pudiera llevar a una ruta de responsabilidades respecto al clima.

KEYWORDS: legally-binding regime, emissions limitation, hope, distributive justice

PALABRAS-CLAVE: régimen legalmente vinculante, limitación de emisiones, esperanza, justicia distributiva

1. Climate Change Odyssey: A Snapshot

The scientific evidence is convincing.¹ Climate change is “the defining human development challenges for the 21st century”² and represents the greatest existential threat for the present and future generations, as well as for non-human nature. Both the IPCC³ reports as well as The

ISSN 1989-7022

LEMATA año 2 (2011), nº 6, 31-37



Received: 07/03/2011
Accepted: 18/04/2011

Stern Report⁴ warn against proceeding under business-as-usual scenario and suggest an imperative shift towards a low-carbon economy as the benefits of stabilizing the climate far outweigh the costs.

Against this backdrop, the United Nations Framework Convention on Climate Change (UNFCCC)⁵ set as its ultimate objective the stabilization of atmospheric concentrations of GHGs "at a level that would prevent dangerous anthropogenic interference with the climate system."⁶ Recognizing the wide range in countries' historical contributions to climate change and in their capacities to address it, governments agreed that they had "common but differentiated responsibilities."⁷ In keeping with this principle, developed countries agreed to "take the lead"⁸ and to assist developing countries in combating climate change. To this effect, the binding targets were negotiated in the Kyoto Protocol⁹ under which the developed countries agreed to an average GHG emission reduction of 5.2 percent below 1990 levels by 2008–2012, i.e., the first commitment period.¹⁰ The 37 industrialized countries with binding targets account for 60 percent of developed country emissions and about a quarter of global emissions.

In Bali in 2007, governments launched a parallel negotiating track under the UNFCCC, with the aim of an "agreed outcome" in Copenhagen in 2009¹¹ (Rajamani, Lavanya, 2008, pp. 909-939). The parties to the UNFCCC agreed to replace the Kyoto Protocol with an agreement that would create a second commitment period under the UNFCCC and would include binding emissions reductions for developed countries and new programs on adaptation for developing countries, deforestation, finance, technology transfer, and capacity building. The 'Bali Roadmap', articulated a "shared vision for long-term cooperative action" under the UNFCCC (AWG-LCA), including a long-term global goal for emissions reduction under the Kyoto Protocol (AWG-KP).¹² The Bali Action Plan also envisioned "measurable, reportable, and verifiable mitigation actions or commitments"¹³ by developed countries and "mitigation actions" ¹⁴ by developing countries.

The Copenhagen Accord, a political agreement, set a long-term goal of limiting global warming to 2 degrees Celsius; called for a new multilateral climate fund and set goals of mobilizing \$30 billion in public finance in 2010-2012 and \$100 billion in public and private finance in 2020; further defined how countries' actions are to be reported and verified; and called on countries to list mitigation pledges.¹⁵

Since the Copenhagen Accord charted no clear path towards a treaty with binding commitments, the achievement of an agreement in the climate summit at Cancun seemed a herculean task. However, after two

weeks of hectic UN-led parleys, the nations of the world arguably reached a forward-looking deal that leaves open an extension of the Kyoto Protocol, whose requirements expire in 2012, including the crucial question of the level of emission limitation and reduction commitments. The agreement also plans to set up a Green Climate Fund to administer assistance to poor nations. The deal, *inter alia*, includes measures to protect tropical forests and ways to share clean energy technologies besides helping developing nations adapt to climate change through increased financial and technical support and setting a target limit of temperature rise to 2 degrees Celsius above pre-industrial times. Further, the Kyoto Protocol's Clean Development Mechanism has been strengthened to drive more major investments and technology into environmentally sound and sustainable emission reduction projects in the developing world.¹⁶

2. Justice at Cancun: Reflections

One of the most modern attempts to defend principles of distributive justice is found in John Rawls's *A Theory of Justice* that demands equality in the assignment of basic rights and duties; and social and economic inequalities being just only if they result in compensating benefits for everyone, and in particular for the least advantaged members of society (Rawls, 1999, 116; and Rawls, 2001). Climate change deliberations have become an important forum for discussions of distributive justice so that considerations of fairness are incorporated into efforts to protect global climate and to prevent socio-economic policies that contribute to its destruction (Gardiner, 2004, 555-600).

Justice is a vital concept in the context of climate change that presents the largest (re)distributive dilemma of human history. What is each nation's fair share of safe global emissions is a classic problem of distributive justice since each nation has to decide on how to allocate emission's targets amongst them to achieve an acceptable global atmospheric target (Meyer and Roser, 2006, 249). The developed nations subscribe to the approach that takes current emission levels as the *status quo*, based on the notion of historic entitlements. This 'grandfathered' approach stipulates that the fair share of emissions for any nation should be a function of its past share of emissions, i.e., high past emissions can justify a right to high current and future emissions and no reduction can legitimately be demanded from historically acquired levels of emission (Baer, 2002, 393-408; Schneider, 2002, and Nozick, 1974). This is in sharp contrast to the stand taken by the developing countries that assert that 'Earth's ability to absorb greenhouse gases is

a global common and this vital global common should be shared equally on a per capita basis' (Agarwal and Narain, 1991; Agarwal, et.al., 2002, 173). As a basic principle of equity, the egalitarian argument has an intrinsic appeal. Developing countries cannot be denied access to their equitable share of the global atmospheric resource and carbon space as they have the general 'right to development'.¹⁷ It must be recognized that, for poorer countries, rapid development is not only an economic and social imperative but also an essential requirement for building up a coping capacity against the adverse impacts of climate change. In this context, the imperative of development for adaptation is essential even from the point of right to life and basic issues of survival.

Notwithstanding the aforesaid, the 'status quo' rights were an important determining factor for distribution of emission quota amongst industrialized countries under Kyoto Protocol,¹⁸ and the same 'grandfathered' approach has been carried forward in Cancun agreements. The Cancun agreements set a goal of holding the increase in global average temperature below 2 °C above pre-industrial levels. At the Copenhagen Summit, the "Emissions Gap Report"¹⁹ presented by United Nations Environment Programme reveal that the emission levels of approximately 44 GtCO₂e of carbon dioxide equivalent in 2020 would be consistent with a 'likely' chance of limiting global warming to 2° C. But if the lowest-ambition pledges were implemented in a 'lenient' fashion, emissions could be lowered slightly to 53 GtCO₂e leaving a significant gap of 9 GtCO₂e. Further, under business-as-usual projections, global emissions could reach 56 GtCO₂e in 2020, leaving a gap of 12 GtCO₂e.²⁰

Climate change represents an urgent and potentially irreversible threat to human societies and the planet, and thus requires to be urgently addressed by all Parties. Any additional warming from current levels is ethically problematic because current temperatures are already dangerous for vulnerable communities around the world and an additional 1°C temperature rise is already locked in by prior emissions.²¹ The developed countries have accumulated a 'historical emissions debt' whereby they can be held accountable for the amount of greenhouse gas emissions remaining in the atmosphere emanating from a country's historical emissions (Neumayer, 2004, 186). Developed countries are responsible for more than three times as many emissions between 1850 and 2002 than developing countries (Baumert, et.al. 2005).

Thus, deep cuts in global greenhouse gas emissions are required by the developed nations so as to hold the increase in global average temperature below 2 °C above pre-industrial levels. At the same time, this objective of restricting temperature rise to 2 °C must be firmly embedded in a demonstrably equitable access to atmospheric space with adequate finance and technology available to all developing countries.

Further, the Cancun agreements established no legally binding emission reduction commitments and this lack of will is insensitive to needs of the vulnerable communities and has the tendency to lock members of developing countries into a permanent state of poverty and under-development. The Cancun agreements fail to ensure robust GHG emissions reductions in order to assure that the international community is on an emissions reduction pathway.

Further, adaptation to climate change presents formidable dilemmas of justice, many of which are most acute in natural-resource-dependent communities in the developing world. The Cancun agreement did manage to create an adaptation framework to enhance adaptation efforts by all countries; a process to help least developed countries (LDCs) to develop and implement national adaptation. The agreement also incorporated the finance goals set out in the Copenhagen Accord, i.e., a collective commitment by developed countries to provide \$30 billion in fast-start finance for developing countries in 2010-12; and to mobilize \$100 billion a year in public and private finance by 2020 in the context of meaningful mitigation actions and transparency on implementation. The Cancun agreement established a Green Climate Fund operating under the guidance of, and accountable to, the Conference of the Parties (COP). The agreement outlined a phased approach to strengthen efforts by developing countries to reduce emissions from deforestation and other forestry-related activities, starting with the development of national strategies and evolving into results-based actions that should be fully measured, reported, and verified. Yet, Cancun failed to identify dedicated sources of funding outside some non-binding pledges made by some countries. Equity demands an adaptation agenda that is based upon mandatory contributions to new, predictable, and additional sources of funding.

3. Epilogue: The Climate Pathway Ahead

From the stand-point of the UNFCCC long history, Cancun was another feeble attempt to forge a global solution to climate change where the issues of distributive justice have been sidetracked. However, the triumph of the multilateral process at Cancun has the potential to see the world community succeed, in the near future, structure a global deal on climate change that lay the foundations for a future era of a dynamic low-carbon growth that succeeds in both cutting emissions and sustaining the growth in developing countries which is necessary to reduce poverty. The balance of scientific evidence points clearly to the need for all countries to plan credible emissions reduction policies now, if mankind is to avoid substantial risks to future generations. An appropriate distributive criterion for greenhouse gas emissions must pass the test of justice and fairness. The need in future is to move away from the 'grandfathering' criterion towards an 'equal per capita emission rights' through the 'convergence'

framework. Equally, an efficient climate change strategy would require an early participation of developing countries, the modest beginning of which has been made at Cancun. Consequences of global climate change can be limited and combated only if both developed and developing countries reduce their greenhouse gas emissions. Unilateral efforts by the developed industrialized countries, while essential, will be overwhelmed as the large developing countries use more energy and produce more environmental pollutants. Such persuasion will require substantial concessions on the part of the developed countries, including redistribution of funds and technology. Last but not the least, to move forward for a safe climate future, it is of vital importance that the world community take more ethically responsible positions based on justice and equity. It is hoped that the world community awakens to this new dawn of climate responsible pathway.

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Notes

1. S. Solemn et al., eds., *Climate Change: The Physical Science Basis (Contribution of WG I to the Fourth Assessment Report of the IPCC)* (Cambridge University press, 2007); See also, 'Synthesis Report of the IPCC Fourth Assessment Report' available at <http://www.ipcc.ch>.
2. *Fighting Climate Change: Human Solidarity in a Divided World* (UNDP, Human Development Report, 2007-08) available at www.undp.org; See also, UNGA Resolution 43/53. "Climate change is a common concern of mankind...."
3. N. Nakicenovic et al., *IPCC Special Report on Emissions Scenarios*, Cambridge University press, Cambridge, 2000, pp.599.
4. Stern Report on the Economics of Climate Change, available at http://www.hm-treasury.gov.uk/independent_reviews/stern_review_economics_climate_change/sternreview_index.cfm.
5. With 192 Parties, the UNFCCC has near universal membership; Ratification Status available at <http://unfccc.int>; See also, (1992) 31 ILM 849.
6. UNFCCC, Article 2.
7. UNFCCC, Article 3.1; See also, UNCED, Rio Declaration, Principle 7.
8. UNFCCC, Article 4.2(b).
9. The Kyoto Protocol has now been ratified by 193 countries; Ratification Status available at <http://unfccc.int>; See also, (1998) 37 ILM 22; The USA, responsible for 20% of the global emissions of GHG has not ratified the Kyoto Protocol, See supra note 2.
10. Kyoto Protocol, Article 3
11. Decision 1/CP.13, *Bali Action Plan*, available at <http://unfccc.int>.
12. *Bali Action Plan*, Paragraph 1(a).
13. *Bali Action Plan*, Paragraph 1(b) (i).
14. *Bali Action Plan*, Paragraph 1(b) (ii).
15. *Copenhagen Accord* available at <http://unfccc.int>.
16. *Cancun Agreements* available at <http://unfccc.int>.
17. See, 'Declaration on the Right to Development', UNGA Res. 41/28 (1986).
18. See, Kyoto Protocol to the UNFCCC, (1998)37 ILM 22.
19. The Emissions Gap Report: Are Copenhagen Accord sufficient to Limit Global Warming to 2°C or 1.5° C?: A preliminary Assessment (UNEP, 2010) available at <http://www.unep.org/publication/ebook/emissionsgapreport>.
20. Ibid.
21. D. Brown, "An Ethical Analysis of the Cancun climate summit, available at <http://climateethics.org>