

## Present at the Creation\*

### The Making of the Framework Convention on Climate Change

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Few major global agreements have been negotiated as expeditiously as the United Nations Framework Convention on Climate Change (UNFCCC). The negotiations commenced in February 1991 and were completed by May 1992, in time for the Convention to be opened for signature in the following month at the United Nations Conference on Environment and Development (UNCED) in

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Rio de Janeiro. It took only 15 months for the Intergovernmental Negotiating Committee (INC) to conclude this path-breaking agreement. By contrast, the Law of the Sea negotiations covered a full decade.

### Initial Differences

This achievement is all the more remarkable since the initial positions of the parties were far apart. The negotiations reflected a deep North–South divide as well as major differences within both these groups.

In general, developing countries pressed for an agreement based on equity, reflecting the fact that anthropogenic climate change was the result of cumulative emissions of greenhouse gases (GHGs) originating mainly in the developed countries. The developed countries, on the other hand, sought to minimize the link between commitments under the agreement and responsibility for causing climate change. The United States (US) refused to recognize the link altogether, maintaining that countries should contribute to an international effort ‘in accordance with the means at their disposal and their capabilities’ (United States of America 1991), ignoring the question of responsibility for causing climate change.

India’s position was based on the principle that every human being had an equal right to the global atmospheric resource. As head of the Indian delegation, I stated our position as follows at the outset of substantive negotiations:

The problem of global warming is caused not by emissions of greenhouse gases as such but by *excessive levels* of per capita emissions of these gases. If per capita emissions of all countries had been on the same levels as those of the developing countries, the world would not today have faced the threat of global warming. It follows, therefore, that developed countries with high per capita emission levels of greenhouse gases are responsible for incremental global warming.

In these negotiations, the principle of equity should be the touchstone for judging any proposal. Those responsible for environmental degradation should also be responsible for taking corrective measures. Since developed countries with high per capita emissions of greenhouse gases are responsible for incremental global warming, it follows

that they have a corresponding obligation to take corrective action. Moreover, these are also the countries which have the greatest capacity to bear the burden. It is they who possess the financial resources and the technology needed for corrective action. This further reinforces their obligations regarding corrective action.<sup>1</sup>

This statement introduced an Indian ‘non-paper’ setting out the full text of a draft framework convention (India 1991). The core provisions of the draft were incorporated in the article on ‘commitments’, which focused on the responsibilities of the developed countries. It set out the long-term objective of

stabilizing the concentration of greenhouse gases in the atmosphere ... on the basis of an equitable formula requiring, inter alia, that anthropogenic emissions of carbon dioxide from states should converge at a common per capita level, and which would take into account net carbon dioxide emissions during the century.

Towards this goal, the draft convention proposed that:

Developed country parties shall, as immediate measures: (a) declare, adopt and implement national strategies to stabilize and reduce their per capita emissions of greenhouse gases, particularly carbon dioxide; stabilization ... should be achieved by developed country parties at the latest by the year 2000 and should be set at 1990 emission levels, with the goal of achieving at least a (20%) (30%) (40%) (50%) reduction on these stabilized levels by the year 2005; (b) provide new and additional financial resources for developing country parties for the objective described in paragraph 4 below ...; (c) provide assured access to appropriate, environmentally sound technology on preferential and non-commercial terms to developing countries; and (d) to support developing countries in their efforts to create and develop their endogenous capacities in scientific and technological research and development directed at combating climate change.

<sup>1</sup> Statement by the leader of the Indian delegation, Second Session of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change (INCFCCC), Geneva, 19 June 1991. Copy on file with the author.

4. Developing countries may, in accordance with their national development plans, priorities and objectives, consider feasible measures with regard to climate change provided that the full incremental costs are met by provision of new and additional financial resources from the developed countries. (India 1991: 5)

Our proposals received wide support among developing countries. China, which had submitted a non-paper, calling upon the developed countries to assume the 'main responsibility' in addressing climate change, stated that the Indian non-paper to a large extent reflected the common views of many developing countries.

As already noted, the developed countries sought to minimize or ignore the link between responsibility for causing climate change and the burden of addressing the problem. They called upon developing countries also to accept some form of a binding mitigation commitment. Within this overall approach, however, there were significant differences of detail. Thus, Germany recognized that the developed countries have a special responsibility 'since these countries have been the main sources of the increase in atmospheric concentrations of climate-relevant gases', while also calling upon the developing countries to accept commitments because 'it is only with their broad participation that the global challenge can be met effectively' (Germany 1991). France, whose nuclear power plants met the bulk of its energy requirements, declared that it was prepared to limit its per capita emissions below 2 tonnes of carbon equivalent by 2000, provided other industrialized countries accepted the same commitment (France 1991). There were no takers for this offer among other developed countries. (In 1991–2, European Community [EC] policies were coordinated much more loosely than they are today.) At the other end of the scale, the US simply refused to recognize the question of historical responsibility.

The North and the South were divided not only on the nature of the commitments of the developing countries but also on the related question of financial and technological support. Developing countries, in general, refused to accept binding commitments, maintaining that their commitments would be conditional on receipt of finance and technology transfers from developed countries to cover the full incremental costs of response measures. The US rejected outright the demand for developed countries to assume financial commitments to

support mitigation and adaptation actions in developing countries. Other Organisation for Economic Co-operation and Development (OECD) countries were prepared to offer 'assistance' to developing countries to cover 'agreed' (as distinct from 'full') incremental costs, but this fell far short of the expectations of the South. The industrialized countries also rejected calls for technology transfer on anything other than commercial terms.

While maintaining a common front in insisting that the developing countries should assume binding mitigation commitments, the industrialized countries were deeply divided on the question of their own commitments. The EC proposed that industrialized countries should, in general, stabilize their emissions by the year 2000 at 1990 levels. Norway presented a similar proposal, calling for stabilization by OECD countries by the same date but at 1989 levels (Norway 1991).

The US opposed calls for such time-bound stabilization or reduction targets. It took the position that 'specific commitments for emissions reductions should not be included in the framework convention, because of the need for flexibility in nations' choices of their own measures' (United States of America 1991). Britain sought to find common ground between the EC and the US positions by calling for stabilization 'as soon as possible' (United Kingdom 1991).

Japan advocated a 'pledge and review' agreement, in which every country 'makes public a pledge, consisting of its past [*sic*] performance strategies' to limit emissions and targets or estimates of emissions resulting from these strategies. These would be subject to periodic reviews (Japan 1991).

Sweden urged all countries to limit GHG emissions on the basis of the best available technology and good practices. It prescribed a series of energy-efficiency measures for groups of countries selected on the basis of presumed ability to implement the commitments (Sweden 1991). This approach set aside questions of responsibility and equity.

As in the case of the North, there were significant differences also within the South. In particular, there was a major divergence between the positions of the countries whose economies were largely dependent on oil exports and the countries forming the Alliance of Small Island States (AOSIS). The oil exporters, led by Saudi Arabia,

were concerned about the potential impact of carbon mitigation measures on petroleum markets. They were opposed to ambitious mitigation commitments, even for the developed countries. On the other hand, the low-lying island states were deeply concerned about the possible submergence of their territories as a consequence of sea-level rise resulting from climate change. They, therefore, pressed for the strongest possible convention. India, China, and many other developing countries tried to steer a middle course in an effort to hold together the 'G77 and China' group.

### Coalition Diplomacy

Both of the major groups—G77 and China and the OECD countries—made strenuous efforts to bridge internal differences. The developing countries tried hard to arrive at a common negotiating text. These efforts were partially successful. Agreement was reached within the group on the section on 'principles' (initially proposed by China). Reflecting our position on the conditional character of developing country commitments, G77 and China agreed that 'commitments that might be entered into by developing countries under this Convention are contractually dependent on the fulfilment of the financial and technology transfer obligations that must be entered into by developed countries who are in the main responsible for the urgency of the present situation.' Agreement was also reached on the need for 'adequate, new and additional resources' and technology transfer to developing countries on 'favourable, concessionary and preferential terms'. However, differences persisted on a number of issues, including the question of the admissibility of reviews in regard to developing countries. Most importantly, there was no agreement within the group on the crucial question of specific emission reduction commitments for developed countries because of the wide differences between AOSIS and the oil-exporting countries.

By the end of 1991, it became clear that G77 and China would not be in a position to reach a consensus text on commitments. Our proposals would have to be advanced through a more compact group. Accordingly, at the year end, India joined hands with 53 other developing countries (including China) to submit a common text on 'commitments' (United Nations General Assembly 1991). The

text called on the developed countries, on the basis of assessed contributions, to 'provide on a grant basis new, adequate and additional financial resources to meet the full incremental costs of developing country Parties' in connection with mitigation and adaptation measures. It incorporated the demand of the developing countries for technology transfer on 'concessional, preferential and most favourable terms'. Developing countries would be required 'in accordance with their national development plans, priorities, objectives and specific country conditions to consider taking feasible measures to address climate change, provided that the full incremental costs' are met by the developed countries. They might also, on a strictly voluntary basis, take additional nationally determined measures.

The OECD countries were initially less successful in forging a common position. The EC made an early attempt to reach such a consensus on the basis of the Japanese proposal for a 'pledge and review' agreement. In June 1991, the EC proposed that the Convention 'should include what has come to be called a pledge and review proposal', pointing to the need for 'flexibility' (a crucial concern for the US). Its own proposal for a time-bound emission stabilization commitment for developed countries was now described as being merely 'an example of a commitment that should preferably be embodied in a protocol.'<sup>2</sup>

The new EC approach came under fire not only from the developing countries but also, very importantly, the non-governmental organization (NGO) community. Developing countries pointed out that the new statement diluted the specific commitments of the developed countries and unfairly imposed binding obligations on the developing countries. Moreover, in the absence of agreed criteria and guidelines, a review could only be an arbitrary exercise. The NGO newsletter, *ECO*, launched a devastating attack on 'pledge and review', describing it as 'hedge and retreat' proposal.

Coming under strong attack, the EC beat a hasty retreat. In the next session, held in September 1991, it recognized that the 'concept of Pledge and Review had caused a great deal of confusion. We are

<sup>2</sup> Intervention by the Netherlands delegation on behalf of the European Community and its Member States, Second Session of the INCFCCC, Geneva, 28 June 1991. Copy on file with the author.

quite ready to admit that this was also the case among Member States of the European Community. The Group of 77 was, therefore, completely right when it stated, through its Chairman, that the concept of pledge and review lacked precision and transparency.<sup>3</sup>

The OECD countries then attempted to arrive at a common text on the basis of the EC stabilization proposal. There was some movement on the part of Japan, Canada, Australia, and others but positions remained far apart. The US rejected any stabilization target. The final outcome of the negotiations between the OECD countries was a heavily bracketed text on stabilization and no less than four alternative formulations! The EC expressed its 'regret that the positions reflected in the document are as far apart as is the case' (ECO 1992b).

### Impasse

Thus, as late as in December 1991, the INC deliberations had a trilateral character. Most OECD countries, led by the EC, sought an agreement with commitments for all parties, including time-bound emission stabilization targets for all developed countries. The US wanted a very general agreement focused on further scientific studies on climate change; it refused to accept time-bound emission reduction—or even stabilization—targets, or any obligation to provide financial resources, or to transfer technology to the developing countries on anything other than commercial terms. The developing countries—in particular, the 54 countries presenting a common negotiating text—called upon the developed countries to commit themselves not only to emission limitation targets but also to provide financial resources to developing countries and transfer technology to these countries on preferential terms. They emphasized that any obligations they assumed would be conditional on receipt of adequate financial and technological support from the developed countries.

<sup>3</sup> Intervention by the Netherlands on behalf of the European Community and its Member States, Third Session of the INCFCCC, Nairobi, September 1991. Copy on file with the author.



The ‘negotiations’ took the form of a drafting exercise, with hardly any attempt at resolving substantive differences through bargaining. The net result by the end of the penultimate session in December 1991 was a ‘consolidated working document’ in which all the core provisions—covering the sections on ‘Principles’, ‘General Commitments’, ‘Specific Commitments’, and ‘Special Situations’—were placed within square brackets, reflecting divergent views. In fact, only a single word in these sections was unqualified by a bracket—the word ‘commitments’ figuring as a title!

We drew a blank in our efforts to sound the EC and the US separately on the possibility of a deal. I came to the conclusion that neither of these parties was prepared to enter into substantive negotiations with the developing countries until they succeeded in forging a common position between themselves. (As noted earlier, the attempt to resolve differences within the OECD came to naught in the December 1991 session.) The result was a deadlock in the INC.

The fifth and final session of the negotiations opened in New York in February 1992, with only four months remaining for the Rio de Janeiro Summit on Environment and Development. But little progress could be achieved even at the February meeting.<sup>4</sup>

The original plan was to complete negotiations on the framework convention by the fifth session of the INC in February 1992. However, in view of the impasse in the negotiations, the INC decided to resort to a typical United Nations (UN) device. It was decided to ‘resume’ the fifth session in May, in the hope of a breakthrough.

## Breakthrough

In my report to New Delhi on the outcome of the February meeting, I ventured the following assessment:

At the present moment the prospects of a successful conclusion of the negotiations in May are not promising. Nevertheless, it is possible that a last minute effort will be made to bridge the differences between the US and the EC by adoption of an ambiguous formulation concerning

<sup>4</sup> For details of the limited outcome of the February meeting, see Dasgupta (1994: 141–2).

stabilisation and reduction of emissions of developed countries. This could be the basis of an attempt to shift the balance of responsibility from the North to the South. Our delegation would have to be prepared for this eventuality.

In May, an agreement of sorts was finally reached between the EC and the US. This was the result of a last-minute British initiative to bridge the divide. Anglo-US talks in Washington produced a formulation on the mitigation commitments of the developed countries. This was riddled with ambiguities concealing the substantive differences between the US and EC positions. The EC Environment Commissioner initially rejected the formulation as ‘completely unacceptable’, but member countries finally accepted it with minor amendments (Bodansky 1993: 491). Thereupon, the US–EC draft was incorporated verbatim in a ‘Chairman’s text’ presented at the beginning of the ‘resumed’ fifth session in May.

When the text was debated in plenary, Philippines, on behalf of G77 and China, sought clarification on no fewer than fifteen obscure points in the formulation. Supporting the G77 position, I pointed out the artful ambiguity of the formulation, describing it as legal ‘striptease’. In response to my intervention, the Chairman acknowledged that the ambiguity reflected lack of agreement between the industrialized countries (*ECO* 1992a).

The Chairman’s text was weighted in favour of the developed countries. In keeping with the EC position, all countries would be required to ‘coordinate’ their economic and administrative instruments in the context of a climate change response, in order to avoid so-called ‘distortions’ in international trade. Financial support to developed countries would cover only ‘agreed’, not ‘full’, incremental costs. In a partial concession to the South, the term ‘review’ was eschewed in relation to the developing countries but these countries were asked to link proposals for financial support with their ‘national communications’. This opened the possibility for reviews of policies and measures reported by developing countries in their ‘national communications’. Above all, the chair sought to treat as sacrosanct the US–EC text on commitments of the developed countries, insisting that reopening the issue would inevitably lead to the collapse of the negotiations.

On the chair's suggestion, negotiations were largely confined within an 'enlarged bureau', which included, in addition to members of the bureau, countries which he regarded as 'key' players. In response to the chair's position on the non-negotiable nature of the US–EC text on the mitigation commitments of the developed countries, we insisted that the chair's text as a whole was under negotiation, reserving our right to press for an amendment on the US–EC formulation.

Vigorous negotiations ensued in the 'enlarged bureau' (Dasgupta 2012). One of our earlier successes in the session was an agreement on provision of financial resources to developing countries to cover the 'agreed full incremental costs'. Coordination of economic and administrative instruments was limited exclusively to developed countries. It took much longer to secure acceptance of our position on the inadmissibility of reviews of developing country actions. A 'review' implies a binding commitment and is, therefore, inapplicable in respect of actions that are purely voluntary. We were prepared to communicate information about our national policies and measures but only for the purpose of estimating global trends, not a review of these policies and measures. We were finally able to exclude all references to a review of the voluntary actions of developing countries.

Perhaps the most difficult negotiations concerned a paragraph drafted by us. This read as follows in its final form:

The extent to which developing country parties will effectively implement their commitments under the Convention will depend upon the effective implementation by developed country parties of their commitments under the Convention related to financial resources and transfer of technology and will take fully into account that economic and social development and poverty eradication are the first and overriding priorities of the developing country Parties.

We were able to secure agreement on this crucial paragraph only after very hard and protracted negotiation. It stands as Article 4, paragraph 7, of the Convention.

Thus, the Framework Convention conforms to our basic position concerning the voluntary and non-negotiable nature of the actions taken by the developing countries without international support. Developing countries have no obligation to implement mitigation

measures involving incremental costs, unless these costs are met in full by the developed countries. When thus supported, developing countries assume a contractual or conditional commitment but unlike the binding commitments of the developed countries.

However, there was an unfinished task at the conclusion of the negotiations. The US–EC formulation incorporated in the Convention as Article 4.2(a) and (b) failed to specify time-bound emission reduction targets for the developed countries. The Kyoto Protocol (KP), adopted in December 1997, filled this lacuna.

### Postscript: From Rio to Paris<sup>5</sup>

The climate change convention adopted in 1992 Rio de Janeiro was a framework agreement. It did not spell out time-bound emission reduction targets for each developed country after 2000. This lacuna was filled by the KP adopted in 1997.

In addition to specifying quantitative emission limitation and reduction objective (QELRO) targets for each developed country party, the KP also introduced the innovative Clean Development Mechanism (CDM). This enabled enterprises in a developed country to meet a part of their emission reduction targets by meeting the costs of emission limitation measures in developing countries. Thus, the KP provided for mitigation measures in both developed and developing countries, through commitments by developed countries with a historical responsibility for precipitating climate change.

The KP satisfied the criterion of equity, being based on the principle of ‘common but differentiated responsibility’. It met the criterion of efficiency since it enabled developed countries to meet emission reduction targets cost-effectively through mitigation actions in other countries. It also had the potential of satisfying the criterion of adequacy. However deep the emission reductions required by a climate stabilization goal, these could be achieved flexibly through mitigation actions anywhere, provided the QELRO commitments of developed countries were sufficiently ambitious. The UNFCCC and

<sup>5</sup> This postscript is additional text that has been added to this reprint of the original article.

the KP provide for emission limitation actions in developing countries as well, through the Global Environment Facility (GEF) and the CDM. The potential for such actions is unlimited—provided that the incremental costs involved are met by developed countries. The financial burden of mitigation would be shouldered by developed countries on the basis of their differentiated responsibilities, including their historical responsibility.

This extremely heavy burden was, of course, politically unacceptable to developed countries, which were left with two possible options. They could continue to make modest contributions under the KP while paying ritual obeisance to the principle of common but differentiated responsibilities, or they could seek a new agreement that would erode the centrality of the principle.

In the event, the developed countries chose the latter alternative. Their choice was largely determined by a tectonic shift in the balance of global economic power. In the 1990s, the OECD countries were the unchallenged leaders of the global economy. In the new millennium, however, the dramatic rise of China, followed at some distance by other large economies such as India and Brazil, raised deep competitive concerns in the developed countries. There was a growing reluctance to accept a climate regime that imposed mitigation costs on their industries but not on their rivals in developing countries. These concerns initially prompted proposals for countervailing border levies on carbon-intensive imports from developing countries, but this raised questions of compatibility with the World Trade Organization (WTO) regime. The alternative course of negotiating a new climate change regime found increasing favour in the developed countries.

The end result was the Paris Agreement (2015), which does away with mandatory, time-bound emission reduction commitments for developed countries. It calls on every country to make a Nationally Determined Contribution (NDC), while shifting the emphasis from the ‘principle of common but differentiated responsibilities and respective capacities’ to a vaguely defined ‘national circumstances’ as a basis of differentiation. In essence, the Paris Agreement is a ‘pledge and review’ agreement, not unlike the Japanese proposal of 1991 which, as we saw, was rejected at the time as inadequate. The climate change negotiations have turned a full circle.

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