



SUSTAINABLE DEVELOPMENT LAW ON CLIMATE CHANGE

LEGAL WORKING PAPER SERIES

**06
THE CANCUN AGREEMENTS AND LEGAL
PREPAREDNESS FOR CLIMATE CHANGE
IN DEVELOPING COUNTRIES**

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March, 2011

CISDL



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Published by:

International Development Law Organization and the Centre for International Sustainable development Law (CISDL).



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THE CANCUN AGREEMENTS AND LEGAL PREPAREDNESS FOR CLIMATE CHANGE IN DEVELOPING COUNTRIES

Sarah A. Mason-Case¹

1. Introduction to the Cancun agreements

The 16th Conference of the Parties (COP16) to the United Nations Framework Convention on Climate Change (UNFCCC) resulted in the successful adoption of several substantive and procedural outcomes. Building on the Bali Action Plan and the Copenhagen Accord, those outcomes include long-term commitments under the UNFCCC as well as forward-looking provisions for the Kyoto Protocol. Developed countries scaled up climate finance with binding pledges of USD30 billion for the period 2010-2012 and of USD100 billion per year by 2020. Moreover, the Parties came to new agreements on, inter alia: nationally appropriate mitigation actions (NAMA); reducing emissions from deforestation and forest degradation (REDD+); the Clean Development Mechanism (CDM); the Cancun Adaptation Framework (CAF); the Technology Mechanism; and the Green Climate Fund.

Additional to those specific outcomes, the Cancun agreements clearly recognize that legal and institutional preparedness for climate change mechanisms are prerequisites to effective action. They champion a markedly national or “country-driven” approach to planning and reporting for developing countries in respect of all mitigation and adaptation actions. That country-driven approach prioritizes domestic needs and institutional capacity building, without which international pledges cannot be channelled to where they are actually useful.²

For developing countries, the Cancun agreements mean expanded responsibility to create an enabling environment for participation in international climate policy. Underpinning each mitigation and adaptation mechanism is the request that developing countries prepare national planning documents, which assess environmental and institutional vulnerabilities; ensure participatory decision-making, education and training; safeguard reliable monitoring, reporting and verification (MRV); and address legal and regulatory coherence.

Developing countries’ heightened reporting facilitates commensurate support from developed countries. And proactive institutional reform obviates barriers to the enjoyment of that support. The exigencies of the

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²For a definition of “country-driven” see: UNFCCC, Decision 2/CP.7, FCCC/CP/2001/13/Add.1, “The Marrakesh Accords Capacity Building in Developing Countries (non-Annex I Parties)” (29 Oct-9 Nov 2001), Annex, Art. 5.

Cancun agreements may, however, prove onerous to developing countries exactly because gaps in socio-economic capacity make such comprehensive national strategies difficult to achieve. Furthermore, any climate change national planning must integrate added concerns for development and social empowerment.

Therefore, the Cancun agreements provide developing countries with a framework to specify their needs for mechanisms such as REDD+, NAMAs and adaptation, while also challenging them to develop immediate legal education and technical training to first identify those needs. Ultimately, it is paramount that developing countries access other capacity-building initiatives, beyond the Cancun reporting framework, which provide them with the expertise to prepare assessment reports and action plans that are tailored to their capabilities and priorities.

2. Legal and institutional elements of new mitigation instruments

2.1. Nationally appropriate mitigation actions

The Cancun agreements confirm that nationally appropriate mitigation actions are increasingly the primary vehicle for developing countries' mitigation efforts. NAMAs are domestic plans for climate change mitigation that developing countries, as non-Annex I Parties to the Kyoto Protocol, undertake as voluntary commitments. They encompass a broad range of nationally defined strategies, projects and programmes that reach well beyond those allowable under the CDM.³

NAMAs permit developing countries to attract climate finance by encouraging bilateral and other alternative low-carbon investments based on country-driven priorities and capabilities. While the Bali Action Plan laid the ground for the approach in 2007,⁴ the Cancun agreements establish a formal registry to record NAMAs seeking support and to facilitate matching finance, technology and capacity building assistance from developing countries.⁵

The Cancun registry is an important step toward enhanced finance for country-initiated sustainable development actions. Nevertheless, it also increases the burden of MRV on developing countries in line with those requirements already undertaken by developed countries. For instance, developing countries are now expected to improve the content and frequency of national communications, including inventories, and to create comprehensive low-carbon sustainable development strategies.⁶

Consequently, NAMAs challenge developing countries to reform legal and institutional frameworks for clear project plans, effective implementation

³ UNFCCC, Draft decision -/CP.16 (29 Nov - 10 Dec 2010), Art. III.B "Nationally appropriate mitigation actions by developing country Parties."

⁴ UNFCCC, Decision 1/CP.13, "Bali Action Plan," (3-14 Dec 2007) Art. 1(b)(ii).

⁵ UNFCCC, Draft decision -/CP.16 (29 Nov - 10 Dec 2010) Art. III.B.53.

⁶ UNFCCC, Draft decision -/CP.16 (29 Nov - 10 Dec 2010) Art. III.B.60-62, 65.

and accurate accounting. Achieving proactive strategies for a low-carbon economy that meet the new UNFCCC standards can only be accomplished with coherent laws that involve all levels of government and regulated sectors.

2.2. Reducing emissions from deforestation and forest degradation

The multilateral process has long recognized the mitigation potential of REDD+, including conservation, sustainable forest management and enhanced carbon stocks. Moreover, what was once a weak and fragmented ambition has become a more robust regime under the UNFCCC. The Cancun agreements now request developing countries to undertake several institutional reforms for REDD+, namely: national strategies or action plans; a national forest reference emission level; a transparent national forest monitoring and reporting system; and a system for providing information on prescribed safeguards.⁷

The country-driven approach of the Cancun agreements emphasizes that national legal reform and related local development are necessary to REDD+. Domestic forest management often involves manifold laws, regulations and stakeholder participatory processes, including impact assessments, natural resource laws, water management laws and land tenure claims. Competing governance structures and interests can often give rise to conflict and create barriers to REDD+ initiatives. As a solution, the Cancun agreements explicitly promote the establishment of “transparent and effective national forest governance structures, taking into account national legislation and sovereignty.”⁸

Activities relating to REDD+ must now be implemented in phases beginning with the development of national action plans and capacity building. National action plans must address substantive legal issues such as land tenure, forest governance, gender considerations and the rights of indigenous peoples. They must also ensure the full and effective participation of relevant stakeholders, such as indigenous peoples and local communities.⁹ Given the discrepancies in many existing forest management systems, developing countries may require considerable legal and institutional reform to align national laws with those new UNFCCC demands.

2.3. Clean Development Mechanism

The Cancun agreements mandate that the CDM be revised for the post-2012 period to overcome accessibility issues that have frustrated its success.¹⁰ Approximately 80% of all CDM projects in the pipeline are

⁷ UNFCCC, Draft decision -/CP.16 (29 Nov - 10 Dec 2010) Art. III.C, Annexes I-II.

⁸ UNFCCC, Draft decision -/CP.16 (29 Nov - 10 Dec 2010), Annex I.2(b).

⁹ UNFCCC, Draft decision -/CP.16 (29 Nov - 10 Dec 2010) Art. III.C, Annexes I-II.

¹⁰ UNFCCC, Further guidance relating to the clean development mechanism, Decision -/CMP.6 (29 Nov - 10 Dec 2010).

currently hosted by Brazil, China, India and Mexico.¹¹In preparation for Cancun, the Executive Board of the CDM reported on that unequal distribution in regional activities as well as on the underrepresentation of certain project-types.¹²The Cancun agreements respond to the Executive Board's recommendations with a number of substantial work programmes for ameliorative guidelines and methodologies.

Of particular note are the Parties' requests that the CDM rules be revised to: (a) develop standardized baselines prioritizing methodologies that are applicable to LDCs, SIDS and Parties with 10 or less registered CDM projects; (b) develop standardized baselines for underrepresented project activity types, inter alia, for energy generation in isolate systems, transport and agriculture; (c) provide support to the development and application of national grid emission factors; and (d) simplify the application of activities with multiple methods and technologies, including city-wide programmes. Additionally, the Cancun agreement on the CDM creates a fund to provide start-up loans for activities in countries with fewer than 10 registered CDM projects.

Reforms to the CDM will be conducted in consultation with designated national authorities and will necessitate parallel legal and institutional changes in host countries on a national and subnational level. While the purpose of the amendments is to simplify and facilitate access, developing countries must also adapt to evolving standards requiring elevated coordination and regulation, such as city-wide programmes, national grids and standards applying to the transport and agriculture sectors.

3. Preparedness for enhanced commitment to adaptation

3.1. National or country-driven approach to adaptation

Adaption decisions are largely decentralized and carried out at the local level where losses are incurred. National and subnational governments are important decision-makers for adaptation as climate change affects commonly regulated public goods and services such as transport, health and water management. Therefore, effective adaptation planning requires governments to formulate proactive strategies that integrate public agencies and the private sector at various levels including national, local, sectoral and project levels.¹³

The Cancun agreements accept that "adaptation must be addressed with the same priority as mitigation" and that it "requires appropriate institutional arrangements to enhance adaptation action and

¹¹ "CDM projects by host region" UNEP RISO Centre online: <http://www.cdmpipeline.org/cdm-projects-region.htm#1>.

¹² UNFCCC, Annual report of the Executive Board of the clean development mechanism to the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol, FCCC/KP/CMP/2010/10 (3 November 2010).

¹³ S. Agrawala & S. Fankhauser, *Economic Aspects of Adaptation to Climate Change: costs, benefits and policy instruments* (OECD, 2008); OECD, *Integrating Climate Change Adaptation into Development Co-operation* (OECD, 2009).

support.”¹⁴ Accordingly, Parties are invited to strengthen and/or establish national-level institutional arrangements and regional networks to enhance adaptation actions in a manner that is country-driven, gender-sensitive, participatory and fully transparent, taking into consideration vulnerable groups, communities and ecosystems.¹⁵

3.2. Cancun Adaptation Framework and developing country adaptation plans

Adaptation to climate change enjoins developing countries’ priority needs for the achievement of sustainable economic growth and the eradication of poverty. Therefore, affirming that enhanced action on adaptation is needed, the Parties to COP16 established the Cancun Adaptation Framework, which advocates for a country-driven approach “with a view to integrating adaptation into relevant social, economic and environmental policies.”¹⁶

The CAF requests that LDCs and other developing countries formulate extensive national adaptation planning documents. National adaptation programmes of action (NAPA) have long provided a process for LDCs to prioritize their needs for urgent support to adapt to climate change. The CAF now expands on the NAPA approach to invite LDCs, and other developing countries, to establish national adaptation plans as a means to identify long-term needs and to foster commensurate support.¹⁷

Recommended adaptation planning documents should include, inter alia, financial and social impact assessments, evaluative adaptation options and disaster risk reduction strategies. In particular, the CAF identifies that programmes should address water resources, health, agriculture and food security, infrastructure, socio-economic activities and coastal zones, among others.¹⁸ This very specific country-driven adaptation planning will undoubtedly oblige developing countries to comprehensively assess, and were necessary amend, existing legal and regulatory regimes impinging on adaptation measures.

4. Scaled-up climate finance and evolving mechanisms

4.1. Scaled-up finance and new market-based mechanisms

The Cancun agreement legally binds the Parties to quantitative pledges of scaled-up climate finance. Developed countries collectively committed to fast-start finance of USD30 billion for the period 2010-2012, prioritized to benefit the most vulnerable developing countries. Long-term finance will follow in the amount USD100 billion per year by 2020. Both types of finance will be allocated equally between mitigation and adaptation and

¹⁴ UNFCCC, Draft decision -/CP.16 (29 Nov - 10 Dec 2010) Art. I.2(b).

¹⁵ UNFCCC, Draft decision -/CP.16 (29 Nov - 10 Dec 2010) Art. I.12, 14, 30, 32, 34.

¹⁶ UNFCCC, Draft decision -/CP.16 (29 Nov - 10 Dec 2010) Art. II.12. See also: Art. III.E.

¹⁷ UNFCCC, Draft decision -/CP.16 (29 Nov - 10 Dec 2010) Art. II.14-16.

¹⁸ UNFCCC, Draft decision -/CP.16 (29 Nov - 10 Dec 2010) Art. II.14.

may come from a wide variety of sources, public and private, bilateral and multilateral, including alternative sources.¹⁹

The acknowledgement at COP16 of broad sources of finance reflects the growing proliferation of alternative trade and investment agreements for a low-carbon economy. Consistent with the country-driven approach, those types of funding sources will require developing countries to independently seek out investment opportunities beyond the multilateral regime. In order to harness those disparate and wide-ranging instruments, however, professional and institutional capacity must be strengthened to guarantee “good governance and robust market functioning and regulation.”²⁰

The Parties to the Cancun agreements also agreed to consider the establishment of one or more market-based mechanisms for mitigation in 2011. Although those market-based mechanisms remain undecided, general parameters were set for their design. Importantly, future market mechanisms must promote fair and equitable access to all country Parties and compliment other means of support for developing countries’ mitigation efforts under NAMAs.²¹

4.2. Green Climate Fund

The Cancun agreements confirm the establishment of the “Green Climate Fund,” first suggested in the non-binding Copenhagen Accord.²² The Green Climate Fund will be the operating entity of UNFCCC financial mechanisms with a significant share of new multilateral funding for adaptation to flow through it. Arrangements for the Fund’s administration are to be concluded between it and the Parties as a means to ensure that it is accountable to those Parties. To that end, the Green Climate Fund will be governed by a board of 24 members comprising an equal number from developing and developed countries and including representation from the UN regional groupings, such as SIDS and LDCs. The World Bank will continue to serve as interim trustee of the Green Climate Fund until at least three years after its operationalization.²³

While the Green Climate Fund is to be administered in a manner that is supportive of developing countries, before and during the development of the Green Climate Fund, they may continue to encounter common procedural barriers in accessing climate finance through persisting World Bank and other funds.²⁴ Moreover, in contributing to the Green Climate Fund’s new design and improved administration, developing countries will first need sufficient professional expertise to accurately review and evaluate the drivers behind historical obstacles to climate finance, including prohibitive domestic regulations where applicable.

¹⁹ UNFCCC, Draft decision -/CP.16 (29 Nov - 10 Dec 2010) Art. IV.A.95-99.

²⁰ UNFCCC, Draft decision -/CP.16 (29 Nov - 10 Dec 2010) Art. II.D.80(g).

²¹ UNFCCC, Draft decision -/CP.16 (29 Nov - 10 Dec 2010), Art. III.D.

²² UNFCCC, Decision 2/CP.15, Copenhagen Accord, FCCC/CP/2009/11/Add.1 (7-19 Dec 2009).

²³ UNFCCC, Draft decision -/CP.16 (29 Nov - 10 Dec 2010), Art. IV.A.100, 102-111.

²⁴ See for instance: GEF Evaluation Office, Progress Report from the Director, GEF Council (November 2009).

4.3. Technology development and transfer

The Cancun agreements advocate for increased action on technology development and transfer, including research and development, demonstration, deployment, and diffusion. The newly established Cancun Technology Mechanism is intended to facilitate actions on those objectives through cross-sectoral and country-to-country network partnerships. The Climate Technology Centre and Network will promote national, regional, sectoral and international technology networks, organizations and initiatives with a view to engaging a wide-range of participants.²⁵

Despite that collaborative approach to technology development and transfer, however, the Cancun agreements still emphasize the necessity of determining technology needs on a national-level. For instance, they single out priority areas as the “strengthening of national systems of innovation and technology innovation centres” as well as the “development and implementation of national technology plans for mitigation and adaptation.” Moreover, they encourage individual country Parties “to undertake domestic actions identified through country-driven approaches” and “to engage in bilateral and multilateral cooperative activities.”²⁶

Evidently, before engaging in any collaborative initiatives, developing countries will first require technical and institutional know-how to assess their needs. Those needs are not limited to direct technology transfer, but will also call into question existing domestic policies on green technology, including how to incentivize a low-carbon economy through tax code amendments, subsidies and other market regulation.

5. Conclusion

The Cancun agreements have been lauded as an important step toward a post-2012 multilateral climate change regime. They confirm developed countries’ binding commitments for unprecedented levels of finance, the equal prioritization of adaptation and mitigation, and advances on specific mechanisms including REDD+, NAMAs, CAF, the Green Climate Fund and the Technology Mechanism.

The Cancun agreements also suggest a principled national or “country-driven” framework for mitigation and adaptation actions across the board. That framework evinces the primacy of domestic legal and institutional preparedness for international climate policy. For each multilateral mechanism, developing countries are now requested to identify their needs and to plan or report on ameliorative plans of action. While some reporting requirements are suggestive and broad, others include the consideration of particular laws, regulations and stakeholder decision-making processes.

²⁵ UNFCCC, Draft decision -/CP.16 (29 Nov - 10 Dec 2010) Art. IV.B.123.

²⁶ UNFCCC, Draft decision -/CP.16 (29 Nov - 10 Dec 2010) Art. IV.B. 114-115, 120(f)-(g).

Proactive and transparent reporting can foster support that is commensurate to developing countries' capacity and development priorities. Nevertheless, the preparation of such national planning documents, and certainly their subsequent implementation, will require considerable professional expertise, technical training and institutional reform tools. Consequently, developing countries may wish seek to access capacity building support for domestic legal and institutional assessments from the outset in order to meet the evolving exigencies of the new UNFCCC regime.

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