THE PARIS AGREEMENT
and the Fifth Carbon Budget

David Campbell

The Global Warming Policy Foundation

GWPF Briefing 22

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About the author

David Campbell is a Professor of Law at Lancaster University Law School. He is a leading commentator on the law of contract and commercial law and on forms of public regulation of economic activity.

This paper originally formed Professor Campbell's evidence to the House of Commons Energy and Climate Change Committee inquiry into setting a fifth carbon budget.

1 Introduction

The policy of mitigation of climate change requires a reduction in total global CO2e* emissions. As any CO2e emissions anywhere in the world may contribute to an increase in the atmospheric concentration of CO2e, the mitigation policy must be a global policy.

The UK is responsible for circa 2% of global emissions. UK decarbonisation of 80% or even 100% cannot achieve any significant reduction of the global concentration of CO2e without complementary action by other more significant emitters, particularly China and India, and continuation with decarbonisation in the absence of such action would be irrational. It would be as if the UK was emptying a bath with a ladle whilst China was filling it with a bucket, with India standing behind with another bucket.

Recognising the importance of 'international circumstances' as the context of the UK's decarbonisation policy, the Committee on Climate Change, as part of its 2013 Fourth Carbon Budget Review, examined the UNFCCC† negotiations leading towards Paris and concluded that they justified continuing with that policy:

> The UN has formally adopted an objective to limit warming to 2°C and is working towards an agreement aimed at peaking and reducing emissions consistent with this goal…Progress towards a global deal has been slow but broadly as expected. The key challenge is to get agreement on global emissions pathways to 2030 compatible with achieving the climate objective. The Durban Platform provides the opportunity to address this challenge, with the aim that agreement is reached in Paris by the end of 2015.

The Committee has briefly recapitulated this view in its advice on the Fifth Carbon Budget. In a statement on the Domestic Implications of the 'Paris Agreement' to Combat Climate Change it has claimed that the Paris Agreement sets the 2°C target as an 'upper bound' and that this justifies continuation with the decarbonisation policy. This claim is completely wrong and represents a profound misunderstanding of the Paris Agreement. The Committee's advice consequently is extremely poor. No fifth budget at all should be set.

2 The 2°C target under the Paris Agreement

Unlike the other climate change conferences the Committee on Climate Change discussed, Paris has actually yielded what, subject to ratification, will be a legally binding agreement over global emissions, the first since Kyoto in 1997. However, it is funda-

* CO_2 equivalents; that is, emissions of all greenhouse gases, weighted how strong the greenhouse effect they exert.

† United Nations Framework Convention on Climate Change

mentally an agreement to allow China and India, not merely not to make any reductions, but to increase their emissions as they see fit in pursuit of economic growth.

If one interprets the Committee on Climate Change's claim that 'The UN has formally adopted an objective to limit warming to 2°C' as a claim that the 2°C target has been agreed in the UNFCCC negotiating process, then this claim is wrong. Neither the 2°C target nor any such target has ever been agreed in this way. It is best to interpret this claim as being about the position of the UNFCCC Secretariat (though the meaning of 'formally adopted' remains difficult), to which the agreement of the parties to the UNFCCC was to be sought in Paris.

Article 2(1)(a) of the Paris Agreement provides:

> This Agreement, in enhancing the implementation of the Convention, including its objective, aims to strengthen the global response to the threat of climate change, in the context of sustainable development and efforts to eradicate poverty, including by: (a) Holding the increase in the global average temperature to well below 2°C above pre-industrial levels and to pursue efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change.

This is not an agreement of the 2°C or a 1.5°C target or of any target. It is a mere statement of aspiration 'to strengthen the global response to the threat of climate change', one part of the aspiration being towards 'Holding the increase in the global average temperature to well below 2°C'. Nothing concrete whatsoever is said about this 'holding'. It is true that Article 2(1)(a) is convoluted and the drafting conveys a misleading impression of concreteness. But, nevertheless, it is a mere expression of aspiration.

When assessing the weight to be given to this aspiration, two points must be taken into consideration. First, though the UK Government amongst others has welcomed the Paris Agreement as a 'historic…turning point', it must be recognised that this mere statement of aspiration is all that has been achieved after twenty five years of UN climate change negotiations. In this context of a quarter century of failure to establish a target; failure to establish an agreement for global reductions; and, far from achieving any reductions, failure to prevent the huge growth of emissions since 1990, the Paris Agreement is an overwhelmingly disappointing complete failure (if one can be disappointed by an entirely predictable, indeed predicted, outcome).

3 Unbounded growth for China and India

The failure to agree a target is not, however, the worst aspect of the Paris Agreement, for it is actually an agreement, not to reduce emissions, but to allow their unbounded growth. It will be recalled that the statement of aspiration in Art 2(1)(a) is made 'in

the context of…efforts to eradicate poverty'. This reference to 'efforts to eradicate poverty' must be read in light of Article 2(2) which provides that:

> This Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances…

There are numerous other provisions to the same effect, such as Article 4(19).

The basic strategy of climate change law has always been to distinguish between developed and developing countries and to ask both to 'protect the climate system …on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities'. Responsibility, both for historical emissions and for making emissions reductions now, has been very much placed on the developed countries as a matter of 'climate justice'. The UNFCCC's objective was set out in very general, indeed tautological, terms as the stabilisation of emissions at levels that would prevent 'dangerous anthropological interference', and that Convention imposed no concrete reductions commitments on either developed or developing countries. But, crucially, Article 4(7) provided that:

> The extent to which developing country Parties will effectively implement their commitments under the Convention…will take fully into account that economic and social development and poverty eradication are the first and overriding priorities of the developing country Parties.

As, given foreseeable technology, emissions reductions that might prevent dangerous anthropological interference must involve huge economic costs that seriously hinder poverty eradication, this provision means that there can be no significant limits placed on the emissions of developing countries that wish to pursue economic growth in order to eradicate poverty. The major industrialising countries, including China and India, are classed as developing countries and their economic policies are precisely ones of such growth. The permission given to these countries by the UNFCCC to emit as much as they see fit was affirmed at Kyoto and at all of the climate change conferences, including and subsequent to Copenhagen, and now including Paris.

The mitigation policy can work only if it caps emissions. Whilst there never have been any caps on any countries' emissions which are related to a global target for emissions reduction, there have been some actual caps placed on the emissions of the developed countries under Kyoto. But, following the 'common but differentiated responsibilities and respective capabilities' strategy, no caps have ever been placed on developing countries, and Article 4(7) effectively stipulates that there cannot be. The common responsibility of the major industrialising countries such as China and India is so differentiated that it does not exist. These countries have been principally responsible for the enormous growth in emissions since 1990 and their emissions trajectories are, in themselves, not merely enough to make the reductions necessary to achieve the 2°C target, but to prevent any global reductions at all.

The UNFCCC is, then, based on an agreement to allow an unbounded growth of emissions and has made mitigation impossible from the beginning of international climate change policy; the Paris Agreement affirms this. It is arguably supererogatory, then, that that agreement actually strengthens the permission granted to China and India not to make reductions. Article 4(4) of the agreement provides that:

> Developed country Parties should continue taking the lead by undertaking economy-wide absolute emission reduction targets. Developing country Parties should continue enhancing their mitigation efforts, and are encouraged to move over time towards economy-wide emission reduction or limitation targets in the light of different national circumstances.

'Absolute' emissions reductions are actual reductions of emissions. Other 'mitigation efforts' are in this provision explicitly distinguished from absolute emissions reductions and the newly industrialising countries, including China and India, are in the category of developing country Parties, which cannot be asked to make absolute reductions. The implicit, though categorical enough, permission to increase emissions under Article 4(7) of the UNFCCC is now strengthened by an explicit provision under Article 4(4) of the Paris Agreement that China and India cannot be required to make reductions.

The mitigation effort, defined as something other than absolute reductions, that has been most discussed in the UNFCCC negotiations is reduction in carbon intensity. When reviewing the Fourth Carbon Budget, the Committee on Climate Change said of China that:

> In the Copenhagen Accord China pledged to reduce its carbon intensity by 40-45% by 2020 compared to 2005 levels. In 2011 China adopted its 12th five-year plan, covering the period 2011–15. This set out the policies planned to put China on track to meet its 2020 carbon intensity target…Evidence suggests that measures already in place, together with those set out in the 12th five-year plan, mean the high ambition of China's Copenhagen Pledge for 2020 is achievable…recent policy announcements, if agreed and delivered, could put Chinese emissions on a trajectory consistent with the global emissions pathways required to meet our climate objective.

Reduction in carbon intensity and reduction in the absolute level of emissions must be strongly distinguished. Carbon intensity is a measure of the amount of CO2e that must be emitted to obtain a certain increase in GDP. Such a reduction carries no implication that it will involve an absolute reduction of emissions. Broadly speaking, absolute emissions and economic growth are strongly correlated, but, with increasing sophistication of technology, the rate at which growth requires emissions, that is to say, carbon intensity, falls. China's economic growth will, as the Committee on Climate Change claims, involve a reduction of carbon intensity as new plant is installed and old plant is retired. But reduction in carbon intensity may be perfectly consistent with unbounded absolute growth in emissions, depending on how much economic

growth there is, and such are China's and India's economic growth targets that their reductions in carbon intensity will be made, not despite but because of, a growth in absolute emissions. China will not retire existing generating capacity and replace it only with an equivalent or smaller capacity generated by lower-intensity plant. It will retire older capacity in the course of an immense expansion of overall capacity. In such circumstances, as new plant is installed and old plant is retired, carbon intensity falls, but the fall is obtained through absolute growth of emissions, and the faster the fall in intensity, the greater the rise in absolute emissions. China's extremely ambitious and apparently positive intensity targets actually represent a statement that the increase in its emissions will be vast.

This position is set out in China's statement of its intended Nationally Determined Contribution under the Paris Agreement, which also states China's complete refusal to undertake absolute emissions reductions in a way which seems to have been adopted almost verbatim in the Paris Agreement.

4 Conclusion

The UNFCCC is based on an agreement that the emissions of the developing countries can grow unboundedly in pursuit of economic growth and poverty eradication. The major industrialising countries such as China and India are classed as developing countries. The growth of their emissions cannot be and never have been capped and those emissions have grown enormously since 1990, being the principal cause of a concomitant growth in global emissions. Under the UNFCCC, the mitigation policy has always been impossible, has proven to be impossible, and will continue to be impossible. The Paris Agreement confirms, and indeed strengthens, this position. For the UK to pursue its decarbonisation policy in these international circumstances is irrational. A fifth carbon budget should not be set.

Refusal to set a carbon budget will, of course, lead to criticism of the Committee on Climate Change and many other agencies of UK and EU climate change policy. This criticism should be based on recognition of the following: UNFCCC Article 4(7), Kyoto provisions to similar effect, reiterations of Article 4(7) in subsequent climate change negotiations, and now the Paris Agreement, have made the mitigation policy impossible since the UNFCCC was agreed. The UK government has been a party to all these negotiations and agreements. In its own capacity and through its influence on EU diplomacy, the UK government entered into the agreement, reinforced at Paris, that makes global reductions impossible. For the government to continue to set carbon budgets having internationally agreed that any such effort will be completely fruitless is irrational.

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Published by the Global Warming Policy Foundation

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