

Briefing note on the ‘legal form’ of a new climate agreement¹

I. Introduction and background

The UN Climate Change Conference in Cancun ended with the adoption of a package of decisions (referred to as the ‘Cancun Agreements’). The decision on the outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action (AWG-LCA) explicitly states that *‘nothing in this decision shall prejudice prospects for, or the content of, a legally-binding outcome in the future’*.² However, the legal form of a final deal that may establish a wider comprehensive framework to tackle climate change remains an open question.

This briefing note aims to facilitate a better understanding of the different options available to the parties of the United Nations Framework Convention on Climate Change (UNFCCC) negotiation process.

II. Summary

- COP and CMP decisions are not legally-binding on the parties to the UNFCCC and the Kyoto Protocol.
- The robustness and credibility of a post-Kyoto regime depends on clear rules and incentives for compliance which are more likely to be achieved through legally binding commitments.
- A new arrangement to combat climate change is arguably not restricted by the distinction between Annex I and non-Annex I countries and may employ other forms of differentiation between parties.
- Parties have been focusing on amendments to Annex B of the Kyoto Protocol (containing emission limitation and reduction targets).
- Parties have also made proposals for new legal instruments to either supplement or replace the Kyoto Protocol.
- However, an agreement on a post-Kyoto regime appears some way off and a legally binding deal prior the expiration of the first commitment period seems increasingly unlikely.
- While a gap between commitments periods would not immediately affect the application of the Kyoto Protocol there would be no directly applicable emission reduction targets.
- In order to bridge a gap between the end of the first Kyoto commitment period and subsequent periods, it may be possible to apply the current or newly agreed emission limitation and reduction targets on a provisional basis.

¹ Initiated by the Mary Robynson Foundation – Climate Justice (MRFJ) and prepared by the Foundation for International Environmental Law and Development (FIELD) in February 2011

² Draft decision -/CP.16 Outcome of the work of the Ad Hoc Working Group on long-term Cooperative Action under the Convention

- The basic frameworks created in Cancun will be gradually complemented by further decisions of the COP/CMP and subsidiary entities.
- The qualification of a COP decision as 'legally binding' may indicate a stronger political commitment, but does not change its legal nature.
- Equally, mitigation actions that are listed in schedules as mandatory need to be integrated into a new or revised binding framework to represent a legally binding obligation under international law.
- The Copenhagen Accord may provide a blueprint for further country-driven initiatives formally outside the UNFCCC process.
- Parties may also try to expedite their work through modifications to the current two track negotiation process.
- To avoid legal uncertainties and maintain the system's credibility, changes to the current Kyoto-regime which affect emission reduction targets, the institutional framework, governance processes and accounting rules should be legally binding.
- In other areas it might be possible to temporarily accept non-binding arrangements. Depending on political priorities and judgements this may include MRV and compliance, mitigation actions by developing countries, adaptation, technology transfer, capacity building and related financing.

III. Political or legally binding commitments

The Cancun Agreements have been portrayed as a stepping stone to a legally binding agreement on climate change. However, given the broad range of issues covered by the decisions of the Conference of the Parties (COP) the interest in further work may tail off. In some areas (e.g. climate finance and funding or REDD³) it may feel that the necessary frameworks have been created and can gradually be put into operation on the basis of subsequent decisions by the COP (and subsidiary entities).

In general, legal scholars and the parties to the UNFCCC agree that COP decisions lack legally-binding character. Consequently, the Cancun Agreements (and further COP decisions) represent a set of political commitments.

In international relations legally binding obligations as such are rarely a guarantee for success. But coupled with a system of 'naming and shaming', or even enforcement, they can provide a strong incentive for compliance. In general, hard law is subject to more thorough negotiation and preparation process which results in better implementation and compliance. Binding state obligations may also allow for legal challenges and give civil society additional leverage to hold their governments accountable.

IV. New legally binding commitments

In order to create a robust framework which – at least to some degree – creates legal certainty and supports the rule of law amongst nations, binding commitments appear tantamount. This section therefore summarises the options available to UNFCCC parties for establishing legally binding obligations to tackle climate change and its impacts.

³ Reducing Emission from Deforestation and Forest Degradation in developing countries

1. Amendments to existing legal instruments

The rules for amendments to the UNFCCC and the Kyoto Protocol are almost identical. Amendments must be adopted at an ordinary session of the COP or the COP serving as the meeting of the Parties to the Kyoto Protocol (CMP), respectively. The text of any proposed amendment must be communicated to the parties by the Secretariat at least six months before the meeting at which the amendment is proposed to be adopted.⁴

Both the Convention and Kyoto Protocol require that every effort should be made to reach agreement on a proposed amendment. As a last resort, if no agreement is reached an amendment may be adopted by a three-fourths majority vote of the parties present and voting. Amendments to the emission limitation and reduction commitments contained in Annex B to the Kyoto Protocol also require the written consent of the parties concerned.

At present there are 13 proposals by parties for amendments to the Kyoto Protocol. These amendments cover a wide range of issues such as: the inclusion of emissions from air and maritime transport in the Kyoto regime (EU), the creation of a crediting and trading mechanism for nationally appropriate mitigation actions (New Zealand), or establishment of a mechanism to reduce emissions from deforestation and forest degradation (Papua New Guinea).

The extension of quantified emission limitation or reduction commitments past the initial commitment period from 2008 to 2012 is included in most of the proposals. For this purpose parties have proposed replacing Annex B (containing a list of parties and their targets) with a new Annex B (Grenada); including a new column on a subsequent commitment period (Algeria and others) in Annex B; or inserting a new Annex B-I (Tuvalu).

2. Kyoto gap

The first commitment period of the Kyoto Protocol ends on 31 December 2012. For a subsequent commitment period to begin on 1 January 2013, amendments to the Kyoto Protocol must enter into force on or before that date. An amendment will enter into force 90 days after the date of receipt by the Depository of an instrument of acceptance from three fourths of the parties to the Kyoto Protocol.⁵

In order to meet these requirements the CMP will need to adopt an amendment at its seventh session in Durban. Subsequently, three fourth of the parties will need to complete their domestic ratification processes and deposit their acceptance of amendments by 3 October 2012. A gap between the end of the first commitment period and the beginning of a new one is therefore a real possibility.

In the short or medium term, a gap would not affect the application of the Kyoto Protocol. The CMP could continue to carry out its function and decide on subsequent commitments at a later point in time. But there would be no directly applicable emission reduction targets. Consequently, the operation of some of the Kyoto Protocol's processes (reporting or maintenance of a national system) and

⁴ UNFCCC, Arts.15 & 16, and Kyoto Protocol, Arts.20 & 21

⁵ UNFCCC, Art.20 para.4

mechanisms (in particular joint implementation and emission trading) are put into question.

In a note entitled '*Legal considerations relating to a possible gap between the first and subsequent commitment periods*' the UNFCCC secretariat has undertaken an assessment of the possible legal consequences. It is available at <http://unfccc.int/resource/docs/2010/awg13/eng/10.pdf>. The note further outlines the three legal options available to address a possible gap between subsequent commitment periods:

a) Amending the amendment procedures: In order to facilitate the entry into force of new emission reduction targets and future commitment periods the current amendment procedures could be changed. However, such changes would be subject to the existing entry into force provisions (see above). This option may be relevant for subsequent commitment periods. It would not help to expedite proceedings with regard to a commitment period starting on 1 January 2013.

b) Provisional application of an amendment to the Kyoto Protocol: According to the 1969 Vienna Convention on the Law of Treaties (VCLT), the negotiating states can agree to apply '*[a] treaty or a part of a treaty*' provisionally pending its entry into force.⁶ This represents a voluntary act of the state. If subsequently a national parliament refuses to ratify the treaty, the government concerned would notify the other states accordingly and discontinue the provisional application.

The VCLT does not address the provisional application of amendments. A new or revised treaty instrument emerging from the climate negotiations could contain an express clause on its provisional application. It is therefore arguable (based on an *a maiore ad minus* conclusion) that an amendment to the Kyoto Protocol creating a subsequent commitment period, could also be provisionally applied.⁷ To avoid a gap the amendment would need to be agreed prior to the expiration of the first commitment period.

c) Extension of the first commitment period: An extension to the first commitment period would require an amendment to Annex B and other provisions of the Kyoto Protocol. This would require compliance with the amendment procedures, and result in the same time constraints as above. However, as outlined under 2.b an amendment concerning the extension of the first commitment period could also be provisionally applied.

3. New legal instruments

The rules for adopting new protocols under the UNFCCC correspond with the procedures for amendments to the Convention and the Kyoto Protocol. The COP may adopt protocols to the Convention at any ordinary session. The text of a proposed protocol must be communicated to the Parties by the Secretariat at least six months in advance of the ordinary session. The requirements for the entry into force of a protocol will be established in the language of the protocol itself.⁸

⁶ Vienna Convention on the Law of Treaties, Art.25

⁷ Note by the secretariat, Legal considerations relating to a possible gap between the first and subsequent commitment periods, FCCC/KP/AWG/2010/10, July 2010

⁸ UNFCCC, Art.17

To date, proposals for six new legal instruments have been submitted by the parties to the UNFCCC. While some of them would sit alongside the Kyoto Protocol (Tuvalu, Grenada on behalf of the Alliance of Small Island States - AOSIS), others would replace it (Japan, Costa Rica). The Australian proposal envisages the use of schedules to register mitigation commitments and actions that countries can achieve according to their respective capabilities, while the US has suggested an implementation agreement.

Several proposals contain provisions in rough outline only. The draft protocol submitted by Grenada (focusing on the elements of the Bali Action plan) explicitly provides for its provisional application.⁹ An implementation agreement would have the same legally binding effect as a protocol and could coexist with a post-Kyoto regime. However, the device has previously been used to modify a governing agreement (Part XI of the UN Convention on the Law of the Sea) and enjoys little support from other parties. All proposals can be accessed under agenda item 5 at: [http://unfccc.int/documentation/documents/advanced_search/items/3594.php?such=i&meeting=%22\(COP\),+sixteenth+session%22&sorted=agenda#beg](http://unfccc.int/documentation/documents/advanced_search/items/3594.php?such=i&meeting=%22(COP),+sixteenth+session%22&sorted=agenda#beg)

4. Scope of COP authority

The mandate of the COP to amend the UNFCCC and the Kyoto Protocol, or adopt a new legal instrument that either supplements or replaces the Kyoto Protocol is broadly limited by the UNFCCC's objective and guiding principles. The aim of the Convention and any related legal instruments that the COP may adopt is to achieve the '*stabilisation of greenhouse gas concentrations at a level that would prevent dangerous anthropogenic interference with the climate system*'.¹⁰ The guiding principles include the principle of common but differentiated responsibilities and respective capabilities.¹¹

On the basis of the Convention's distinction between developed and developing country parties, and the formers' historic responsibility for GHG emissions, developing countries have argued that under the UNFCCC only Annex I countries should have a legal obligation to reduce GHG emission. In their view, a post-Kyoto regime that deviates from the principle distinction between Annex I and non-Annex I parties would be inconsistent with the UNFCCC.

The UNFCCC, however, only provides a general framework to combat climate change. Parties have a responsibility to protect the climate system in accordance with their common but differentiated responsibilities and respective capabilities. The preamble explicitly recognises that '*the share of global emissions originating in developing countries will grow to meet their social and development needs*'.¹² Hence the differentiation between countries on the basis of different situations and needs is not static.¹³ The Convention is a living instrument that requires further elaboration in the light of present day conditions.¹⁴ It arguably does not preclude alternative forms of differentiation in future agreements.

⁹ Draft protocol to the Convention prepared by the Government of Grenada for adoption at the sixteenth session of the Conference of the Parties, FCCC/CP/2010/3, Art.21

¹⁰ UNFCCC, Art.2

¹¹ UNFCCC, Art.3 para.1

¹² Preamble to the UNFCCC, recital 3

¹³ For example: UNFCCC Art.4 para.2 (f)

¹⁴ Options to adopt and amend the Convention, protocols and annexes (UNFCCC Arts.15-17)

V. Other legal forms

Although many parties insist that a legally binding outcome of the climate negotiations - and in particular a second commitment period of the Kyoto Protocol - is essential, the debate over how to best capture targets and other commitments in the short and medium term continues. This section provides an overview of other possible legal forms:

1. Further decisions

In Cancun, the COP confirmed the mandate of both working groups. It decided that the AWG-KP shall aim to have the results of its work adopted by the CMP *'as early as possible and in time to ensure that there is no gap between the first and second commitment periods'*.¹⁵ It *inter alia* agreed that *'further work is needed to convert emission reduction targets to quantified economy-wide limitation or reduction commitments'*.

Depending on the progress made in the AWG-KP, the CMP could take *'the decisions necessary'* to promote the Kyoto Protocol's effective implementation.¹⁶ This could, for example, include a decision to extend the first commitment period, or a request or recommendation to this effect. In addition, it could also provide guidance on the length of the extension period, reporting obligations, and the impacts on the mechanisms for joint implementation, clean development or emission trading. However, such a decision would merely indicate a political commitment, and would not be legally binding.

In Cancun the AWG-LCA was extended for one year to present the results of its work to COP 17 in Durban. Its mandate includes a number of specific tasks. For example: developing proposals for the composition and procedures of the newly created Adaptation Committee; considering the establishment market and non-market-based mechanisms to promote mitigation actions; and elaborating the modalities regarding institutional arrangements for capacity-building. Hence, at COP 17 a series of further (non binding) decisions can be expected that will gradually fill the broader institutional and regulatory frameworks created in Cancun.

2. Political agreement

In connection with COP 15, but outside the formal UNFCCC negotiations, the Copenhagen Accord was drawn up by a limited number of governments. Its provisions arguably do not have any legal standing under the UNFCCC process. Subsequently, however, many countries have associated themselves with the Accord (and submitted targets or actions to the Secretariat). Others have explicitly stated their disagreement (amongst others: Bolivia, Kuwait and Tuvalu).¹⁷

The Cancun Agreements – in particular the outcomes the AWG-LCA track negotiations – build directly on the Copenhagen Accord. Although the COP only

¹⁵ Draft decision -/CMP.6

¹⁶ Kyoto Protocol, Art.13 para.4

¹⁷ A listing of reactions to the Copenhagen Accord is available at:
<http://www.usclimatenetwork.org/policy/copenhagen-accord-commitments>

noted the Accord, its subsequent decisions very much reflect the cornerstones of the agreement (2 degrees Celsius target, USD 100 Million per year by 2020, Green Climate Fund, REDD plus etc.). Encouraged by the guidance effectively provided to the negotiations by the Copenhagen Accord, parties may launch similar political initiatives.

3. Mixed bags

It was initially expected that a post-Kyoto regime would essentially be created through amendments to the Kyoto Protocol prepared by the Ad-hoc Working Group on further commitments for Annex I parties under the Kyoto Protocol (AWG-KP), and additional COP decisions based on the work of the AWG-LCA.

More recently it has been contemplated whether a decision under the UNFCCC or the Kyoto Protocol in respect of targets could be qualified as 'legally binding' by the parties. This would be unusual but could potentially result in stronger pressure at the international and domestic level for national compliance.

Legally, however, it remains an additional political self-commitment to adhere to a particular decision. Through its decisions (under Art.7 para.2 and Art.13 para.4 Kyoto Protocol respectively) the COP and the CMP act as the principal organ of an intergovernmental organisation – not as a group of states. Being bound by a COP/CMP decision described as 'legally binding' would be legally less significant than an obligation under international law which has been created following the process of adoption, signature, national ratification and deposition.

Similarly, a listing in schedules of commitments described as 'legally binding' and other anticipated actions would mainly indicate a difference in emphasis and political commitment. In order to become legally binding emission pledges (or other agreed arrangements) would subsequently need to be integrated into a revised Kyoto Protocol or a new legal instrument. In this connection, however, the schedule approach may help to clarify country positions and represent a step forward to new legally binding obligations under public international law.

4. Changes to the negotiation process

In Cancun the COP set up a contact group to consider the proposals for the adoption of new legal instruments under the UNFCCC. AOSIS and others pushed for the establishment and continued deliberations of this contact group in order to increase pressure on the negotiation process to agree on a legally binding outcome. Previously, informal consultations on legal matters were held within the AWG-KP. Other parties were concerned that the new contact group could lead to a third stream of negotiations on a post-Kyoto regime.¹⁸

Parties to the UNFCCC have previously recognised that the subject areas addressed by the AWG-KP and AWG-LCA partially overlap. Therefore, consolidation of the two tracks into one has been contemplated. Other (probably equally unlikely) changes could be the establishment of a smaller group of states to lead the negotiations, or

¹⁸ In its decision on the Outcome of the work of the Ad Hoc Working Group on long-term Cooperative Action, the COP (in para.145) has requested the AWG-LCA to continue discussing legal options.

the extension of session periods to reach conclusions before the first commitment period expires.

5. Distinction between subject areas

A detailed analysis if and to what extent all aspects of the current UNFCCC negotiations need to be translated into binding legal commitments would exceed the scope of this briefing paper (and also depends on political priorities).

However, it appears safe to say that the credibility and success of a system to stabilise greenhouse gas concentrations at a certain threshold level depends first of all on clear and mandatory emission limitation and reduction targets. To make such a system work it needs to enjoy the trust of its members and other stakeholders. Substantially different national practices are likely to undermine that trust and compromise the system.

Consequently, the basic rules related to, for example, land use, land-use change, and forestry (LULUCF), emissions trading or the clean development mechanism have to apply to all participants in a consistent and uniform manner. For that purpose it is probably essential that all changes to the current regime that affect the institutional framework, governance processes and accounting rules are of a legally binding nature.

As a rule of thumb, additional components to the system, such as monitoring, reporting and verification (MRV) or compliance mechanisms, in a legally binding form are likely to contribute significantly to its credibility and robustness. But for a limited period, new or modified arrangements could probably be based on COP/CMP decisions without jeopardising its operation.

The Convention (in Art.3 para.1) implies that all parties have a responsibility to protect the climate system (in accordance with their capabilities). On that basis, some Annex I countries expect to see their emission reduction pledges mirrored by the same degree of legal commitment from growing economies (e.g. China, India or Brazil) to undertake mitigation actions. However, such actions by developing countries would be an addition to the existing regime and could be integrated even in a purely voluntary form through COP/CMP decisions.

Similarly, developing countries have relied on the UNFCCC provisions to argue that developed country parties have a legal obligation to support adaptation efforts, the transfer of technology and capacity building. Through their decisions in Cancun, the parties have begun to create a framework destined to address these issues (e.g. Cancun Adaptation Framework, Technology Executive Board or Green Climate Fund). The elaboration of further arrangements, modalities and procedures will follow and thus create a normative and binding environment for its participants and beneficiaries. The integration of these arrangements into a legally binding instrument remains an option, but may not be a priority.

With regard to the provision of the required financial resources this might be different. The Green Climate Fund, through which a significant share of new multilateral funding for adaptation should flow, has been established with little clarity about its sources of funding.

Following the adoption of the Bali Action Plan many Least Developed Countries and AOSIS members supported the establishment of a mechanism for adaptation funding that would not only provide adequate, predictable and additional resources, but also link financial contributions to a country's responsibility for greenhouse gas emissions. In their view, the new mechanism should deviate from the traditional model of charitable aid and instead incorporate the legal obligation of the polluter to pay for damages.

Based on previous experience with missed funding targets (e.g. agreed at the Gleneagles G8 summit or adaptation funding) the creation of binding obligations to effectively secure a flow of public funds from North to South could play a crucial role in achieving a fair and equitable post-Kyoto climate regime.

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