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ADDRESSING THE "POST-KYOTO" STRESS DISORDER

REFLECTIONS ON THE EMERGING LEGAL ARCHITECTURE OF THE CLIMATE REGIME

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Abstract This article identifies and explores the range of legal form options available to states in the negotiation process, and outlines the political and strategic considerations at play which will ultimately govern choice of legal form. This article argues that one of the most significant factors hindering substantive progress on a post-2012 climate agreement is, what is characterized here as, the "post-Kyoto stress disorder"- A lack of trust amongst some developing countries that industrialized countries will, given current and past form, honour their commitments, and/or take the lead in the new climate agreement. This article makes the case that Post-Kyoto stress disorder will likely prevent certain legal form options from acquiring traction in the process and favour others.

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Introduction

There is a flurry of diplomatic activity on climate change this year. In addition to the ten weeks of scheduled inter-governmental negotiations under the auspices of the UN Framework Convention on Climate Change, there are processes such as the G-8, the Major Economies Forum, and that convened by the UN Secretary General, all of which involve considerable investment of negotiating capital. Yet notwithstanding this intense and continuing engagement at the highest-level many fundamental disagreements remain, including, rather tellingly, on what exactly it is that states are negotiating.

The climate change regime comprises the United Nations Framework Convention on Climate Change[2] and its Kyoto Protocol[3] - both of which are in force,[4] have concrete content and are binding. The emission reduction commitments made thus far however have been inadequate[5] and are inadequately implemented.[6] Moreover the emission reduction targets and timetables contained in the Kyoto Protocol apply to the first

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[2] United Nations Framework Convention on Climate Change, 29 May 1992, A/AC.237/18 (Part II)/Add.1, reprinted in (1992) 31 ILM 849 [hereinafter FCCC]

[3] Kyoto Protocol to the United Nations Framework Convention on Climate Change, 10 December 1997, FCCC/CP/1997/L.7/add.1, reprinted in (1998) 37 ILM 22 [hereinafter Kyoto Protocol]

[4] 176 countries and the EC are Party to the Kyoto Protocol, and 192 countries are Party to the FCCC, available at: http://www.unfccc.int

[5] The current commitments require industrialized countries to reduce a basket of green house gases (GHG) 5% below 1990 levels in the commitment period 2008-2012, *see* Article 3, Kyoto Protocol.
The IPCC recommends 25-40% below 1990 levels by 2020 for industrialized countries, *see* Terry Barker *et al*, CLIMATE CHANGE 2007: MITIGATION OF CLIMATE CHANGE. CONTRIBUTION OF WORKING GROUP III TO THE FOURTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (Cambridge University Press, 2007), Box 13.7 at 776. Two IPCC authors later recommended 15-30% below baseline for developing countries by 2020, *see* Michel den Elzen, *Emission Reduction Trade-Offs for Meeting Concentration Targets*, Bonn Climate Change Talks, Presentation at the IPCC in-session workshop, UNFCCC SBSTA 28, 6 June 2008, available at http://unfccc.int/files/meetings/sb28/application/pdf/sb28_ipcc_6_den_elzen.pdf

[6] For status of implementation, see Annual compilation and accounting report for Annex B Parties under the Kyoto Protocol FCCC/KP/CMP/2008/9/Rev.1. The EU-15 is currently 2.7% below 1990 levels, Economies in transition are 30-40% below 1990 levels due to economic restructuring, and other industrialized countries are marginally above 1990 levels. The US as a non-Kyoto Party is not part of the analysis.

commitment period which comes to an end in 2012.[7] And, the US, responsible for 20% of GHGs is not party to the Kyoto Protocol.[8]In December 2007 the international community adopted the Bali Action Plan, which launched a process to reach an "agreed outcome" on long term cooperative action on climate change, with a scheduled end in Copenhagen, December 2009.[9] The process launched was christened the *Ad Hoc* Working Group on Long-term Cooperative Action (AWG-LCA).[10] The term "an agreed outcome," in the Bali Action Plan suggests a lack of agreement on the legal form that the outcome of this process could take, a lack of agreement that continues to haunt the process 20 months into the two-year road leading to Copenhagen. At the Poznan Climate Conference in December 2008, Parties authorized the Chair of the AWG-LCA to prepare a draft negotiating text by June 2009 but they were clear that this text had to be drafted in language "that does not prejudge the form of the agreed outcome."[11]

There are a range of legal form options for a new climate instrument, and the choice between them for states is predicated primarily on political and strategic considerations. Nevertheless the legal status, procedural requirements, symbolic signalling effects and regime-building characteristics of different legal form options will play an important role in determining the legal form of the Copenhagen "agreed outcome." This article identifies and explores the range of legal form options available to states in the negotiation process, and outlines the political and strategic considerations at play which will ultimately govern choice of legal form. This article argues that one of the most significant factors hindering substantive progress on a post-2012 climate agreement is, what is termed here as, the "post-Kyoto stress disorder." A lack of trust amongst some developing countries that industrialized countries will, given current and past form,

[7] Article 3, Kyoto Protocol

[8] *See* 2007/2008 Human Development Report, available at, http://hdrstats.undp.org/countries/data_sheets/cty_ds_USA.html

[9] Decision 1/CP.13, *Bali Action Plan*, in Report of the Conference of the Parties on its thirteenth session, held in Bali from 3 to 15 December 2007, Addendum, Part Two: Action taken by the Conference of the Parties at its thirteenth session, FCCC/CP/2007/6/Add.1 (14 March 2008) [herinafter Bali Action Plan]. For a detailed analysis of the Bali Action Plan, on which this article builds, see Lavanya Rajamani, *From Berlin to Bali and Beyond: Killing Kyoto Softly*, 57(3) INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 909-939 (2008)

[10] The AWG-LCA is the second of the two negotiating processes under the climate treaties. The Kyoto Protocol came into force on 16 February 2005, and at the first Meeting of Parties to the Kyoto Protocol and the eleventh Conference of Parties to the FCCC, in December 2005, discussions commenced on how the climate regime might be structured after 2012. At the time, two separate processes were initiated: an *Ad Hoc* open-ended Working Group to consider further commitments for developed countries beyond 2012 under the Kyoto Protocol (AWG-KP) and a Dialogue on long-term cooperative action under the FCCC. The Dialogue covered actions by *all* parties but was neither binding nor authorized to open negotiations leading to new commitments. The Dialogue drew to a formal close at the thirteenth Conference of Parties to the FCCC in Bali, December 2007, and gave way to the Bali Action Plan, and the establishment of the AWG-LCA. See *Consideration of Commitments for Subsequent Periods for Parties Included in Annex I to the Convention under Article 3, Paragraph 9 of the Kyoto Protocol*, Decision 1/CMP.1, FCCC/KP/CMP/2005/8/Add.1 (2006); and, *Dialogue on Long-Term Cooperative Action to Address Climate Change by Enhancing the Implementation of the Convention*, Decision 1/CP.11, FCCC/CP/2005/Add.1 (2006)

[11] *Work Program For 2009, Draft Conclusions Proposed By The Chair*, Ad Hoc Working Group On Long-Term Cooperative Action Under The Convention, Fourth Session, Poznan, 1–10 December 2008, FCCC/AWGLCA/2008/L.10 (10 December 2008)

honour their commitments, and/or take the lead in the new climate agreement. Anxiety (and wariness) that industrial countries will talk the talk of equity, but in effect, seek to shift the burden of responsibility to developing countries in the "agreed outcome" at Copenhagen is now palpable in the negotiations.[12] This article makes the case that post-kyoto stress disorder will likely prevent certain legal form options from acquiring traction in the process, and favour others.

The Copenhagen Agreed Outcome

The chapeau to the first operative paragraph of the Bali Action Plan, 2007, reads: [the Conference of Parties (COP)] "[d]ecides to launch a comprehensive process to enable the full, effective and sustained implementation of the Convention through long-term cooperative action, now, up to and beyond 2012, in order to reach an agreed outcome and adopt a decision at its fifteenth session, by addressing, inter alia…"

The term "an agreed outcome," in the Bali Action Plan suggests a lack of agreement on both the legal form that the likely outcome of this process could take, and the level of ambition that it should reflect. It could be argued that the phrase "and adopt a decision" that follows "an agreed outcome" indicates that the agreed outcome should take the form of a decision. However a COP decision could decide to adopt a Protocol, append it in an Annex to the decision and invite Parties to sign and ratify it as was the case with the Kyoto Protocol.[13] The phrase "and adopt a decision" does not thereby preclude certain other legal forms of the "agreed outcome."

The Legal Form

The Berlin Mandate, comparable to the Bali Action Plan in so far as it too launched a process to advance the climate regime, explicitly specified the legal form of the outcome - "a Protocol or another legal instrument."[14] The legal form that the outcome of the Bali Action Plan could take is however is left open. A range of legal form options exist, among them:

- A legally binding instrument either to:
  - supplement the FCCC and Kyoto Protocol, or
  - replace the Kyoto Protocol

[12] *See e.g.* Statement by P. Ghosh, India, at the In-session Shared Vision workshop, Poznan, 2 December 2008 (cautioning that if the principle of equal rights to the common atmospheric resource is not followed, and unequal arrangements are sought to be foisted in Copenhagen, and there is no agreement thereby, "do not at that time feign surprise, shock, and dismay")

[13] A case in point is Decision 1/CP.3, *Adoption of the Kyoto Protocol to the United Nations Framework Convention on Climate Change*, in Report of the Conference of the Parties on its Third Session, held at Kyoto, from 1 to 11 December 1997, Addendum, Part Two, Action Taken by the Conference of the Parties, FCCC/CP/1997/7/Add.1 (25 March 1998)

[14] Paragraph 3, Preamble, Decision 1/CP.1, *The Berlin Mandate: Review of Adequacy of Articles 4, paragraph 2, sub-paragraph (a) and (b), of the Convention, including proposals related to a Protocol and decisions on follow-up*, contained in Report of the Conference of Parties on its first session held at Berlin from 28 March to 7 April 1995, FCCC/CP/1995/7/Add.1 (1995).

- An amendment or set of amendments to the FCCC including to the Annexes, and by adding Annex/es[15]
- A single COP decision or a set of COP decisions to further implement the FCCC
- A Ministerial Declaration containing the elements of the political agreement, details of which may be worked out in 2010 or later, and
- Any combination or package of the above.

Options other than a Protocol replacing Kyoto would likely be accompanied by a set of amendments to the Kyoto Protocol, in particular to Annex B, pursuant to Kyoto Article 3 (9), requiring new targets for industrialized countries. There is a process underway –*Ad Hoc* open-ended Working Group to consider further commitments for developed countries beyond 2012 under the Kyoto Protocol (AWG-KP) - for this purpose.[16]

The Level of Ambition

The Bali Action Plan stopped shy of prescribing the level of ambition that the "agreed outcome" should reflect. Earlier drafts of the chapeau recommended "a comprehensive and effective global agreement for action" and a "comprehensive agreement for action." Through the last few days of negotiations the term "comprehensive" ceased to refer to the action to be taken and came to qualify the process to be launched. Since no particular level of ambition is prescribed, the "agreed outcome" in 2009, could, on a conservative reading, merely be to continue the negotiation process for a further period of time. There is no requirement placed on Parties to agree to particular action in 2009 or even "appropriate action" as in the Berlin Mandate.

The level of ambition and the legal form are closely linked. And, it is first necessary to identify the elements necessary to characterize the Copenhagen agreed outcome as a successful one before options for its legal form can be explored. This is in keeping with the view that form follows function. Needless to say, there is no consensus among Parties at this stage about the elements essential to characterize an outcome as a successful one. The elements listed below reflect a subjective assessment of that which is necessary for an agreement to be environmentally effective,[17] and to build on progress made thus far in the climate regime.

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[15] Although amendments to the FCCC are an option before Parties, it could be argued that since the process launched by the Bali Action Plan is intended to enable "the full, effective and sustained *implementation* of the Convention," the process cannot take within its fold amendments to the Convention. *See* supra note 8.

[16] Many Annex I countries are seeking, through this process, to initiate extensive amendments to the Kyoto Protocol, but there is considerable resistance to this from developing countries who argue that the mandate of the AWG-KP is limited to considering further commitments for Annex I Parties in accordance with Protocol Article 3 (9). *See* Decision 1/ CMP 1, Consideration of commitments for subsequent periods for Parties included in Annex I to the Convention under Article 3, paragraph 9, of the Kyoto Protocol, in *Report of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol on its first session, held at Montreal from 28 November to 10 December 2005* FCCC/KP/CMP/2005/8/Add.1 (30 March 2006). Japan, in seeking to integrate the work of the AWG-KP and AWG-LCA, submitted its proposed Protocol, to both the AWG-KP and the AWG-LCA.

[17] There are varying definitions of effectiveness, and effectiveness is recognized as distinct from compliance and implementation. The term effectiveness is used here to signify the degree to which the

Elements of a Successful Outcome

The following, amongst others, could be considered to be elements of a successful outcome:

- It is legally binding (or at least some important elements of it are incorporated in a legally binding instrument)
- It creates the conditions necessary to engage *all* developed countries
- It creates the conditions necessary to engage developing countries (in particular those that contribute significantly to global GHGs)
- It's ambition is tied to a stabilization of GHG levels as prescribed by the IPCC (the exact level at which stabilization must occur is a political determination and will have to be determined collaboratively[18])
- It provides the necessary means of implementation (technology, finance, capacity and access to market based instruments) for mitigation *and* adaptation
- It contains mechanisms to ensure measurement, reporting, verification, and compliance, and
- It simplifies the existing legal and institutional ecosystem, viz, it does not create an unduly complex and unwieldy stratum to the existing apparatus of climate institutions.

The challenge that states will face in the next few months is to determine the elements of the "agreed outcome" that are best reflected in a new Protocol, and those that could be adopted by COP decisions. This determination will need to be made keeping in mind the extent to which states would like the new regime, or some of its elements, to be embodied in a legally binding form. There is little agreement yet on this aspect of the negotiations. At the 14th COP in Poznan in December 2008, the President organized a ministerial round table on a "shared vision" on climate change. The summary of this informal round table prepared by the Chair suggested that participants had expressed a "resounding commitment to and optimism for achieving an agreed outcome at COP 15 that can be ratified by all."[19] Both in the informal negotiations in the last night, as well as at the final plenary, this assessment was challenged by many developing countries including India and China.[20] They argued that there was no consensus on the legal form of the outcome, and the negotiations should stay true to the Bali Action Plan which only reflected an agreement to reach an "agreed outcome" not a ratifiable one. And the final

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agreement is designed to meet the climate regime's principal policy objectives, and to induce the desired behavioural change leading to achieving these policy objectives. *See* Kal Raustiala, *Compliance and Effectiveness in International Regulatory Cooperation*, 32 CASE W. RES. J. INT'L L. 387, 393-4 (2000).

[18] The recent Declaration of the Major Economies Forum endorsed the scientific view that global average temperature increase should be limited to 2 degrees C above pre-industrial levels. *See* Declaration of the Leaders of the Major Economies Forum on Energy and Climate, L'Aquila, Italy, 9 July 2009, available at, http://www.g8italia2009.it/G8/Home/Summit/G8-G8_Layout_locale-1199882116809_Atti.htm
The Major Economies Forum comprises of a sub set, albeit an influential one, of the Parties to the FCCC, and this view is yet to be endorsed in the climate process.

[19] Report on the informal ministerial round table on a shared vision for long-term cooperative action, Revised summary by the chair, FCCC/CP/2008/CRP.1/Rev.1 (12 December 2008).

[20] *See* webcast on unfccc.int

decision mandating the Chair to produce a negotiating text expressly enjoined him to do so in a way that would "not prejudge the form of the agreed outcome."[21]

A legally binding treaty has considerable symbolic value. It would be in keeping with the gravity of the climate change problem and it would withstand the high level of public scrutiny that the process is subject to. It would also provide certainty that would instil confidence in the market. But a treaty will likely take several years to enter into force, depending both on the entry into force requirements that states introduce in the treaty and domestic ratification procedures.[22] As a result at least some elements of the new regime will need to be embodied in COP decisions, which often impose mandatory requirements without being legally binding, and which can be applied immediately. If the Kyoto and FCCC tracks continue to operate in parallel, states will also need to untangle and ensure coherence across the complex institutional supervision and compliance systems that are in place under Kyoto and those that will be created to measure, report and verify under the "agreed outcome." The procedural and legal considerations of various legal form options are explored below.

A Legally Binding Instrument under the FCCC

Several countries have expressed a preference for the Copenhagen "agreed outcome" to take the form of a new legally binding instrument. Views differ on whether such an instrument should replace or supplement the Kyoto Protocol. Japan, Australia, Canada, New Zealand,[23] and the EU have expressed a preference for a treaty that replaces the Kyoto Protocol, the AOSIS, the African Group and Costa Rica for an instrument that supplements it.[24] Views also differ on the nature of this instrument. The US has expressed a preference for an "implementing agreement"[25] that allows for legally binding approaches, while Australia, New Zealand, and Canada have expressed a preference for a treaty instrument incorporating national schedules which would contain elements that are binding and others that are not.

A Protocol to the FCCC is a legally binding instrument. A formal account of "bindingness" would suggest that the negotiated legal instrument in question would render a particular state conduct non-optional as well as judicially enforceable.[26] A

[21] *See* Work Programme for 2009, Draft Conclusions proposed by the Chair in FCCC/AWGLCA/2008/L.10 (10 December 2008).

[22] It may be possible to provide for provisional application but this has its concomitant problems.

[23] *See* submissions, *inter alia*, of Australia, New Zealand, Canada and Japan to the AWG-LCA in April 2009, available at, http://unfccc.int/meetings/ad_hoc_working_groups/lca/items/4578.php

[24] *See* submission of South Africa, 24 April 2009, available at, *id*

[25] See US Submission to the AWG-LCA, 4 May 2009, available at: available at, http://unfccc.int/meetings/ad_hoc_working_groups/lca/items/4578.php. The US submission calls for an "implementing agreement" under the Framework Convention, in order "to allow for legally binding approaches." In conjunction with the language used in the context of developed country mitigation i.e. that "Appendix 1 includes quantitative emissions reductions/removals in the 2020/[ ] timeframe, in conformity with domestic law," this suggests that the implementing agreement will be binding or non-binding based on whether the domestic law requires it to be so. *Id.*

[26] Jutta Brunnée *COPing with Consent: Law-Making under Multilateral Environmental Agreements*, 15 LEIDEN J. OF INT'L L. 1, at (2002)

Protocol or another legal instrument will be binding in this sense, although the likelihood that it will be litigated and judicially enforced in an international court of law is limited.[27] It is more likely that non-compliance will be dealt with primarily under the system created within the regime, however limited it might be.[28] That is, non-compliance with the Kyoto Protocol will be addressed by the Kyoto compliance system. It is worth noting here that should states decide not to negotiate a second commitment period to the Kyoto Protocol, non-compliance with targets by Annex B Parties, such as Canada,[29] is likely to go unaddressed, as the only punitive consequence that the committee can apply is a deduction at a penalty rate from the Party's assigned amount for the second commitment period.[30] Whether the non-compliant country might bear international responsibility is however a distinct enquiry.[31]

Functionalist logic would suggest that it is more useful to draw an operational distinction between treaty obligations (which emanate from hard law instruments and are capable of being enforced judicially), treaty-generated legal commitments (which may emanate from hard law or soft law instruments but do not seem to be capable of judicial enforcement) and principled expectations (which are created by seriously negotiated international instruments and therefore have an operational significance for those entities responsible for their making and maintenance, but are based as much on ethical considerations of good faith and public morality as on strictly legal considerations).[32] Both treaty-generated legal commitments and principled expectations are as likely to be effective as treaty obligations. This is because Parties are more likely to accept higher aspirational targets if they adopt what they perceive as non-binding, but what in effect may be non-optional.[33] States will need to decide whether the symbolic value of

[27] The regime of State Responsibility is available, but in addition to the difficulties in establishing a clear defined obligation (either custom or within the FCCC which largely contains obligations of conduct rather than result), and its concrete breach, there are difficulties in establishing a direct causal link between a particular state's conduct and the material harm produced. It will also be challenging to locate international judicial fora that the offending states have accepted the jurisdiction of. This is not to argue that the case cannot be made and sustained, but that such an action is likely to face uncharted and difficult waters. *See generally* Roda Verheyen, CLIMATE CHANGE DAMAGE AND INTERNATIONAL LAW. PREVENTION DUTIES AND STATE RESPONSIBILITY (2005), and Christina Voigt, *State Responsibility for Climate Change Damages*, 77 (1-2) NORDIC JOURNAL OF INTERNATIONAL LAW 1 (2008)

[28] A vast majority of the compliance systems in MEAs are designed to facilitate compliance rather than to punish non-compliance. The Kyoto Protocol Compliance system is the only one of its kind in that its enforcement branch contains functions of a quasi-judicial character, and entails (limited) punitive consequences.

[29] *See e.g. Canada sued for abandoning Kyoto Climate Commitment*, ENVIRONMENTAL NEWS SERVICE, 29 May 2007; and *'Impossible' for Canada to meet Kyoto targets: Ambrose*, CBC NEWS, 7 April 2006

[30] Decision 27/CMP.1, *Procedures and mechanisms relating to compliance under the Kyoto Protocol*, *in* Report of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol on its first session, held at Montreal from 28 November to 10 December 2005, Addendum, Part Two: Action taken, FCCC/KP/CMP/2005/8/Add.3 (30 March 2006), 92, at 102.

[31] See Christina Voigt, *State Responsibility for Climate Change Damages*, 77 (1-2) NORDIC JOURNAL OF INTERNATIONAL LAW 1-22 (2008). *See generally* Roda Verheyen, CLIMATE CHANGE DAMAGE AND INTERNATIONAL LAW: PREVENTION DUTIES AND STATE RESPONSIBILITY (2005)

[32] Douglas M. Johnston, CONSENT AND COMMITMENT IN THE WORLD COMMUNITY 197-8 (1997)

[33] See *infra* the discussion on COP decisions.

adopting a legally binding instrument is worth the likelihood of less stringent targets, as well as the lengthy time lag before the instrument enters into force.

The Procedures for Adopting a Protocol

The Six Month Rule

FCCC Article 17 requires that the "text of any proposed protocol shall be communicated to the Parties by the Secretariat at least six months before such a *session*."[34] A similar rule applies to proposed amendments to the FCCC[35] and the Kyoto Protocol.[36] However in the case of amendments the notice has to be provided six months before the *meeting*. Every session consists of several meetings. In the case of a new Protocol the text would have had to be communicated by June 6th 2009. And, in the case of amendments the text would have had to be communicated by June 17th. COP-15 at Copenhagen runs from 7th to 18th of December 2009. Several questions arose in the application of the six month rule in the ongoing negotiations.

Who may propose a Protocol? The relevant treaty text does not provide any guidance on who may propose a protocol that can then be communicated to the Parties.[37] Does the Protocol text need to emerge from a multilateral process initiated by Parties, or can a single Party submit a text that will be communicated to Parties? If both options are possible, can one of these texts function as sufficient notice for the other? That is, is the purpose of the six month rule to provide notice that a treaty will be proposed for adoption, or to provide notice of the substantive ideas presented in the text?

The Chair of the AWG-LCA was mandated to produce a text that does not prejudge the form of the "agreed outcome".[38] This text was made available in May, and discussed for the first time in June. In theory if a communication had not been sent out to Parties before the 6th of June, a Protocol on the basis of this text could not be presented for adoption in December in Copenhagen. In order to ensure that the option of adopting a treaty in December remained on the table, three routes were available.

The first route was for the AWG-LCA to mandate its Chair to communicate the negotiating text to Parties. In the case of the Kyoto Protocol, the Chair was mandated by the *Ad Hoc* Group on the Berlin Mandate (AGBM) to produce a text to be communicated

[34] Emphasis added
[35] Article 15(2), FCCC
[36] Article 21(3), Kyoto Protocol
[37] FCCC Article 17(2) reads "the text of any proposed protocol shall be communicated to the Parties..." It does not indicate who may propose a Protocol. In contrast, in the case of amendments FCCC Article 15(1) specifies, "[a]ny Party may propose amendments to the Convention," before proceeding in 15(2) to require such text to be communicated to Parties by the Secretariat.
[38] *See supra* note 10.

to Parties, in all six UN languages, in time to comply with the six month rule.[39] It is worth noting however that the AGBM provided such authorization to its Chair eight months before the Kyoto Protocol was presented for adoption.[40] In the AWG-LCA process, given the wide range of views on the legal form options among Parties, and the limited time available to reach a collective decision, Parties did not provide such a mandate to the Chair.

The second route was for the Chair, acting independently to request the Secretariat to communicate the text to Parties before the June 6th deadline. The Chair was not expressly mandated to do this. It could however have been justified on the grounds that this action would merely retain all legal form options on the table, it would not prejudge the particular legal form option that would be presented for adoption. In fact it could even be argued that had the Chair not done so it would have prejudged the legal form of the outcome. If due notice had not been provided, it would have excluded the treaty or amendment options and left Parties with the sole option of adopting COP decisions. If the Chair had chosen this route, he would have needed to ensure that the communicated text was drafted in language that contained options for the use of certain terms[41], and that the text contained final clauses (i.e. provisions dealing with signature, ratification, acceptance, approval, accession, denunciation, amendment, reservation, entry into force, settlement of disputes, depositary matters and authentic texts),[42] but placed in brackets to indicate that should Parties wish to adopt the negotiating text as a Protocol these would need to be added, but should they choose not to, these could be excluded. This route would have placed the Chair in a difficult position, given the diverse views on legal form, and his limited mandate from Parties. As such the Chair chose not to adopt this route.

The third route would be for an interested Party to request the Secretariat to communicate to Parties that it intended to present the Chair's negotiating text for adoption as a Protocol in December. Although FCCC Article 17 does not expressly allow Parties to present Protocols, it is arguable that this is permissible. First, because in a party-driven process everything that is not expressly prohibited is permitted, and second because during the AGBM process, AOSIS, among others, proposed a fully crafted draft Protocol, which was communicated to Parties.[43] This may have some persuasive precedential value.

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[39] Report of the Ad Hoc Group on the Berlin Mandate on the work of its Sixth Session, Bonn, 3-7 March 1997, in FCCC/AGBM/1997/3, paragraphs 16 and 17

[40] Neither FCCC Article 17 nor the rules of procedure require the text to be sent out in all official UN languages in order for it to constitute effective notice. The Kyoto practice is of persuasive rather than binding precedential value.

[41] A treaty for instance would use terms such as "Article," "agree," and "obligations" whereas COP decision language would contain terms such as "paragraph," "decide," and "commitments." *See* Anthony Aust, MODERN TREATY LAW AND PRACTICE 496 (Appendix G) (2007)

[42] *Id* at 434-5

[43] *See* Trinidad and Tobago on behalf of the Alliance of Small Island States, *Draft Protocol to the United Nations Framework Convention on Climate Change on Greenhouse Gas Emissions Reductions*, Implementation of the Berlin Mandate, Proposals from Parties FCCC/AGBM/1996/Misc.2 (17 May 1996)

The third route was the one that was eventually taken in June. It emerged during deliberations that the precise legal status and future of the Chair's text, on the basis of which Parties were working, was unclear. In the lead up to the 6th June deadline Australia, Japan and Tuvalu requested the Secretariat to communicate their draft protocols and the US its "implementing agreement"[44] to Parties under FCCC Article 17(2). These will be considered under an agenda item at COP-15. The Chair's negotiating text will be presented to the COP under a separate agenda item as part of a Report of the Chair on the work of the AWG-LCA. The elements of the Chair's negotiating text could conceivably be converted into COP decisions, but given the six month rule, the Chair's negotiating text could not be presented to Parties as the basis for a draft Protocol. Costa Rica decided to step in. It prefaced the Chair's text with preambular provisions and finished it with final clauses and draft Annexes, and submitted the text as the basis for the negotiation of a legally binding instrument at COP-15. This initiative from Costa Rica ensures that the Chair's text, among others, will be presented to the COP for adoption. However it is worth noting that the Chair's 49 page text has evolved, in the course of negotiations, into a text which is 200 pages long, has over 2000 brackets, and contains several proposals for restructuring.[45] Whether the Chair's text as originally conceived and communicated to Parties, is recognizable in what emerges from the negotiations in the lead up to COP-15, may well determine if the Costa Rica Protocol can function as sufficient notice under the six month rule for the outcome of the negotiating sessions to be presented to Parties for adoption as a treaty.

It is worth noting in this context that the notice, if Kyoto practice is of persuasive value, is for the substantive ideas in the proposal – of the conceptual place holders - not of the fact that a treaty will be presented for adoption. The Kyoto Chair had indicated at the time that the Kyoto negotiating text was produced that "proposals submitted after the production of the negotiating text should be clearly derived from concepts already included within it and should not contain substantially new elements."[46]

What form should the text take? The relevant treaty provisions do not provide any guidance on the nature of the text that is required to be communicated six months in advance of Copenhagen. Does the text have to be bracket-free agreed text, draft negotiating text, substantially agreed text, or a compilation of Parties' proposals? Are there any minimum requirements in terms of structure and coherence in the proposed text? Or is it sufficient merely that it be labelled a Protocol? If Parties are free to submit and propose fully-drafted alternative Protocols or competing amendments for adoption, as appears to be the case, the text referred to must mean draft text, subject to subsequent negotiation. However, if the six-month rule is intended to give Parties time for reflection on the proposed protocol, an unstructured much-bracketed, many-optioned text may not

[44] The US requested communication of its "implementing agreement." FCCC Article 17 only refers to "Protocols." It does not, by implication, appear to envisage the creation of any other type of legal instrument under the FCCC. However FCCC Article 7(2) that enumerates the powers of the COP requires the COP to "keep under regular review the implementation of the Convention and any related legal instruments." It could be argued that related legal instruments encompass instruments that are differently christened.

[45] Revised Negotiating Text, FCCC AWGLCA/2009/INF.1 (22 June 2009)

[46] *Supra* note 39 at paragraph 18

serve the purpose. It is worth noting that for Kyoto the AGBM provided the Chair with a mandate to produce a draft.[47] The draft contained many brackets but it had a broadly coherent structure which is reflected in the Kyoto Protocol. And, as highlighted above, the Chair had requested Parties to ensure that no substantively new proposals were introduced after the negotiating text was communicated. In essence states will need to consider the tabled text as a reasonable basis for negotiation. The text that AOSIS had tabled as a draft Protocol before Kyoto was not considered by the UN Office of the Legal Counsel, on being requested for an opinion, as a sufficient basis for negotiation.[48]

Ideally, by June 2009, Parties should have decided whether they wished to adopt a new Protocol, as well as to reached a coherently structured negotiating text as a basis for negotiation. Parties could not agree collectively on the former before the June 6th deadline, but the communication of the five instruments – four Protocols, one of which is based on the Chair's text, and one implementing agreement - in time has effectively retained all legal form options on the table.

Voting for Adoption

FCCC Article 17 relating to Protocols does not specify a particular voting requirement for adoption of Protocols.[49] In its absence and in the absence of adopted Rules of Procedure governing voting, unless Parties adopt a particular voting procedure *ad hoc*, any new Protocol will need to be adopted by consensus. This may in turn lead to levelling down the substantive ambition of the Protocol, whether in its clear terms, or as reflected in the proliferation of constructively ambiguous phrases or aspirational rather than prescriptive language. In the light of this, if feasible, states may wish to decide *ad hoc* on a voting procedure for any new Protocol. Voting, however, on such a voting procedure would have to be by consensus.

Entry into force Requirements

Since this new phase of negotiations is designed to draw in a wider range of actors and commitments than Kyoto, any new Protocol will need to have an entry into force requirements designed to reflect this.[50] These in practice would be similar to the

[47] *See* Report of the Ad Hoc Group on the Berlin Mandate on the work of its Sixth Session, Bonn, 3-7 March 1997, Addendum, Proposals for a Protocol or another legal instrument, Negotiating text by the Chairman, FCCC/AGBM/1997/3/Add.1 (22 April 1997)

[48] Inter-Office Memo, From the Under-Secretary General, Office of the Legal Counsel to the Executive Secretary, UNFCCC, Adoption of a Protocol to UNFCCC, Interpretation of Article 17, paragraph 2, 29 May 1996 (on file with the author).

[49] The EC had in 1997, perhaps to forestall any difficulties encountered in adopting the Kyoto Protocol, suggested an amendment remedying this. Arrangements for Intergovernmental Meetings**,** Amendments to the Convention or its Annexes, *Netherlands (on behalf of the European Community and its member states): proposed amendment to article 17 of the convention*, FCCC/SBI/1997/15 (20 June 1997) (proposing a 3/4 majority voting procedure should efforts at consensus fail)

[50] Japan's proposed Protocol contains an entry into force provision that reflects this change from the Kyoto's Article 25. It proposes a bar of XX Parties (not just Annex I Parties as in the Kyoto Protocol) accounting for XX percent of global energy-related carbon dioxide emissions for 2007. See A Draft Protocol to the UNFCCC, *A Negotiating text for consideration at AWG-LCA-6*, 24 April 2007; the US

Kyoto entry into force requirement that sought a certain percentage of the GHG emissions from industrialized countries to be represented before entry into force. A new Protocol's entry into force requirement may need to take IPCC assessments into account in terms of who needs to participate, when and how.[51] These entry into force requirements however, if framed to ensure that all or most of those elements essential to the success of the Protocol are represented, will likely take several years to be fulfilled.

The Kyoto Protocol's experience may not be typical but it took 8 years to enter into force. And, at least some of the countries who it will be essential to engage have the proven nerve to hold out in the face of strong international disapproval. Further ratification procedures vary from country to country based on constitutional and legal specificities. In countries where international treaties need to be translated into domestic legal instruments before they take effect, the vagaries of domestic politics and legal processes have the potential to create further delay.

Given the imperatives of science and the urgency of mitigation action on the one hand and the need for high threshold requirements for entry into force on the other, it is important to consider incorporating provisions on provisional entry into force and provisional application of any new treaty.

Provisional Entry into Force: A treaty may enter into force provisionally – pending fulfilment of the formal criteria for entry into force - if the text of the treaty provides for it to do so, or if in the absence of such a text, parties agree between themselves to do so. A case in point is Article 42 of the International Coffee Agreement, 2007,[52] which provides, inter alia, that if the agreement has not entered into force "definitively" by a certain date, it shall enter into force "provisionally" on that date. The interests of legal certainty demand that for those that have agreed to bring the treaty into force provisionally, the provisions of the treaty are legally binding.[53]

Provisional Application pending Entry into Force: The need for immediate action on climate change in advance of entry into force was recognized during the negotiations leading to the FCCC, hence the discourse at the time on "prompt start" of the FCCC.[54] In the context of the Kyoto Protocol, an article on provisional application was proposed by Australia but not considered.[55] Article 25 of the Vienna Convention on Law of Treaties

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Implementing Agreement also contains a note on entry into force stating that it should neither be "over-inclusive (in terms of number of Parties) nor under-inclusive (in terms of the types of Parties whose participation is necessary for the Agreement to enter into force)," Article 10, *US Submission on the Copenhagen Agreed Outcome*, 4 May 2009, both available at:
http://unfccc.int/meetings/ad_hoc_working_groups/lca/items/4578.php

[51] Terry Barker *et al*, CLIMATE CHANGE 2007: MITIGATION OF CLIMATE CHANGE. CONTRIBUTION OF WORKING GROUP III TO THE FOURTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (Cambridge University Press, 2007), Technical Summary, at 90, and Box 13.7 at 776

[52] Available at: http://dev.ico.org/documents/ica2007e.pdf

[53] *Ibid.*

[54] Abram Chayes and Eugene B. Skolnikoff with David G. Victor, *A Prompt Start: Implementing the Framework Convention on Climate Change*, Harvard Law School, 1992

[55] *Tracing the Origins of the Kyoto Protocol: An Article by Article Textual History*, FCCC/TP/2000/2 at 108.

provides for provisional application of a treaty pending its entry into force.[56] Again, as with provisional entry into force, the treaty itself may provide for provisional application or the negotiating states may agree to apply the treaty provisionally in advance of entry into force. The COP did precisely this in facilitating the prompt start of the Clean Development Mechanism (CDM), before Kyoto entered into force.[57]

There are a range of examples in treaty law of provisional application. The General Agreement on Tariffs and Trade (GATT), 1947, is an oft quoted example. The GATT was applied provisionally by a Protocol of Provisional Application for nearly four decades.[58] The Implementation Agreement of the UN Convention on the Law of the Sea, 1994,[59] and the Energy Charter, 1994,[60] are additional examples. Typically, provisional application is rendered subject to national legal systems.[61] In addition in some cases, a certain degree of flexibility is built in. The Antarctic Treaty Environmental Protocol, 1991, provides for provisional application such that pending entry into force the treaty is applied "in accordance with their [states] legal systems and to the extent practicable."[62] Such formulations permit considerable flexibility in application and are therefore attractive to states.

Linkage Arrangements: It is worth noting that given the political necessity of a "package deal" that links ambition in terms of mitigation and support between different sets of Parties subject to different legal agreements (assuming the Copenhagen agreed outcome is supplementary to the Kyoto Protocol), there will need to be provisions in the treaty that link entry into force of both amendments to the Kyoto Protocol and the new treaty by 2012. Entry into force of one can be made contingent on the entry into force of the other.

A Legally Binding Instrument under the FCCC to replace the Kyoto Protocol

Japan has expressed a preference for a "new Protocol, ensuring fairness and effectiveness."[63] Although it did not explicitly call for this new Protocol to replace the Kyoto Protocol, this can be inferred from the draft Protocol that it submitted in April

[56] Article 25, Vienna Convention on the Law of Treaties, 23 May 1969, *reprinted in* 8 ILM 679 (1969) [hereinafter Vienna Convention]

[57] Decision 17/CP.7, *Modalities and procedures for a clean development mechanism as defined in Article 12 of the Kyoto Protocol,* in Report Of The Conference Of The Parties on its Seventh Session, held at Marrakesh from 29 October to 10 November, Part Two: Action Taken by the Conference of the Parties, Addendum, Volume II, 2001 FCCC/CP/2001/13/Add.2, at 20.

[58] Protocol of Provisional Application of the General Agreement on Tariffs and Trade, 30 October 1947, in 55 UNTS308

[59] 1994 *Agreement relating to the Implementation of Part XI of the UN Convention on the Law of the Sea of 10 December, 1982*, 28 July 1994, (1994) 33 ILM 1309. Article 7 provides that the Agreement shall be applied provisionally from a certain date, unless a State notifies the depositary that it will not so apply this agreement. In this version of provisional application, implied consent to provisional application was provided for. *See supra* note 41 at 174

[60] *Energy Charter Treaty*, 1994, *in* 33 ILM 367 (1995)

[61] For instance, Article 45 of the Energy Charter contains the caveat "to the extent that such provisional application is not inconsistent with its constitution, laws or regulations."*Id*

[62] *Protocol on Environmental Protection to the Antarctic Treaty*, *in* 30 ILM 1455 (1991)

[63] Submission by Japan, in *Ideas and proposals on the elements contained in paragraph 1 of the Bali Action Plan*, Submissions from Parties, FCCC/AWGLCA/2009/MISC.1 (13 March 2009).

2009 which mirrors the Kyoto Protocol, but rewrites its central provisions relating to the mitigation obligations of Parties.[64] Australia, Canada, New Zealand and the EU, albeit tentatively, have also expressed a preference for a single treaty under the FCCC,[65] The US, which is not a Party to the Kyoto Protocol, has refrained from expressing a view on whether it's implementing agreement should replace the Kyoto Protocol or not although it would be safe to assume that it would so wish.[66]

Most industrialized countries prefer this option because any treaty that replaces the Kyoto Protocol would place the obligations of *all* countries – in particular the US, and the large developing countries - in the same legal and institutional framework. It would also ensure that all Annex I Parties are subject to comparable legal obligations that are similarly enforced and/or facilitated. In addition this option would ensure policy coherence, universal participation, as well as institutional and legal consistency and coordination in the international regulation of climate change. Most of the countries that favour this option expect that many key provisions of the Kyoto Protocol will be scavenged and recycled within the new instrument, in particular the provisions relating to review and accounting in Kyoto Articles 5, 7 and 8.

Terminating Kyoto

Several issues arise in the context of a Protocol designed specifically to *replace* the Kyoto Protocol. The Kyoto Protocol does not contain a provision on its termination. In its absence, its termination may take place "by consent of all the Parties after consultation with other contracting States"[67] or by "conclusion of a later treaty relating to the same subject-matter."[68] In the case of the latter, Parties must have "intended that the

[64] *See* Japan's draft Protocol, in particular Article 3, Article 17 and Annex C, in its submission to the AWG-LCA, 24 April, 20009, available at, http://unfccc.int/meetings/ad_hoc_working_groups/lca/items/4578.php

[65] Submission by Australia, in *Ideas and proposals on the elements contained in paragraph 1 of the Bali Action Plan*, Submissions from Parties, FCCC/AWGLCA/2009/MISC.1/Add.3 (27 March 2009); *See also* New Zeland's Submission to the AWG-LCA, 27 April 2009, available at, http://unfccc.int/meetings/ad_hoc_working_groups/lca/items/4578.php

[66] The US has suggested a particular legal form option – an "implementing agreement under the Framework Convention, in order to allow for legally binding approaches and to reflect the Bali Action Plan's mandate to further the implementation of the Convention." *See* As the US draft agreement includes final clauses, it is intended to be a legally binding instrument. The content of this implementing agreement will likely be limited. It will be a shell or a framework allowing for different approaches through appendices. The careful use of the term "legally binding approaches" here signifies the status of different national approaches. The content of the approaches, targets if they contain any, will be legally binding in some countries under domestic law, and not so in others. The proposed Implementing Agreement in *form* is akin to a Protocol under Article 17. Protocols to framework treaties are intended to implement the treaties either generally or with respect to some of its provisions. In practice, Parties adopted the Kyoto Protocol in 1997 to implement the Convention. The Implementing Agreement would be another such, albeit christened differently. The designation of this text as an Implementing Agreement appears to be primarily for political reasons - it highlights the differences with the Kyoto Protocol not only in substance, but also in its legal form. It is intended to stress "implementation" of the Convention, the parent treaty to which the US is and has been a Party to. This may help the US nudge the Implementing Agreement through its domestic legislative process.

[67] Article 54, Vienna Convention

[68] Article 59, Vienna Convention

matter should be governed" by the later treaty, or the provisions of the later treaty are so incompatible with the earlier one that they are not capable of being applied at the same time.[69] If either because of lack of appropriate "intention," notoriously difficult to determine, or because some aspects of the later treaty can be applied in conjunction with the earlier one, Kyoto is not deemed terminated or suspended, Article 30 of the Vienna Convention, a legal and interpretational minefield, applies.[70] If the Parties to the earlier treaty are also Parties to the later one, the earlier treaty applies to the extent of incompatibility. If the Parties are not the same, as is likely to be the case here, the situation is rather more complex. To avoid creating a legal minefield, states will need either to specify clearly that the Kyoto Protocol is terminated, or if that is not the intention, specify the differing areas of operation of the two treaties. If a treaty is terminated it releases Parties from any obligation to further perform the treaty.[71]

It is likely, however, that developing and industrialized countries will disagree on terminating Kyoto. Some or many Annex I Parties may choose to withdraw from Kyoto which states are permitted to do by virtue of Article 27.[72] This may lead to a situation in which the number of Parties representing the necessary proportion of Annex I GHG emissions may fall below the requirements for entry into force.[73] Kyoto will not terminate as a result of this alone.[74] But it will not be operational for those countries that have withdrawn from it, and if this represents a majority of Annex I countries, there may be little of Kyoto left to operationalize. It is worth noting that should Kyoto be terminated, it can be subsequently revived by Parties through a short simple treaty.[75]

Cherry Picking & Inheriting from Kyoto

If Parties decide to terminate or supersede Kyoto then they will have to determine which parts of Kyoto they would like to carry over to the new treaty, and which parts of it they will discard. This cherry-picking is evident in the proposed Japanese Protocol[76] as well as in Australia's preferred one-treaty model.[77] Such cherry picking between substantive Kyoto provisions in itself may well be a contentious exercise,[78] but in addition, Parties will have to decide which CMP ("Conference of Parties to the FCCC

[69] Article 59 (a) and (b), Vienna Convention
[70] Article 30, Vienna Convention
[71] Article 70, Vienna Convention
[72] Article 27, Kyoto Protocol, permits states to withdraw after three years after the Protocol's entry into force. Any such withdrawal will take effect one year after the notice of withdrawal.
[73] Article 25, Kyoto Protocol, lays out the entry into force requirements for the Protocol - 55 Parties to the Convention, incorporating Parties included in Annex I which account in total for at least 55 per cent of the total carbon dioxide emissions for 1990 of the Parties included in Annex I.
[74] Article 55, Vienna Convention, provides that "a multilateral treaty does not terminate by reason only of the fact that the number of the parties falls below the number necessary for its entry into force."
[75] *See supra* note 3541 at 177.
[76] *See supra* note 64
[77] See supra note 64.
[78] This is contentious because Parties do not have the mandate either under the Bali Action Plan that established the AWG-LCA or under Decision 1/CMP 1 that established the AWG-KP to engage in such an exercise. *See* Decision 1/ CMP 1, FCCC/KP/CMP/2005/8/Add.1

Meeting as the Meeting of Parties to the Kyoto Protocol") decisions, and to what extent, and by what means will be carried forward.

The compliance regime of the Kyoto Protocol, which fleshes out Protocol Article 18, is contained in a CMP decision.[79] Assuming Article 18 is replicated in the new treaty, can this regime be carried forward as well? Should Parties choose to do so, they can introduce a provision in the new treaty to carry such a system forward. Article XVI of the World Trade Organization, 1994, contains a provision relating to the earlier GATT, that might be instructive in this regard: "[e]xcept as otherwise provided under this Agreement ....the WTO shall be guided by the decisions, procedures and customary practices followed by the Contracting Parties to GATT 1947 and the bodies established in the framework of GATT 1947."[80]

Amendments to the FCCC

Amendments to the FCCC may conceivably be part of the Copenhagen agreed outcome that Parties arrive at. The mandate of the AWG-LCA, tasked with negotiating the agreed outcome, is to "enable the full effective and sustained implementation of the Convention."[81] As such amendments to the Convention itself may arguably not be permissible. A point highlighted by Brazil and India in their recent submissions. Brazil argues that the limited mandate given to the AWG-LCA by the Bali Action Plan does not authorize a renegotiation of the commitments, or the "careful balance between those it establishes for Annex I Parties and non-Annex I Parties."[82] India points to the language in the plan on a shared vision for long-term cooperative action which contains the phrase "in accordance with the provisions and principles of the Convention," to argue that no amendments to the FCCC are permissible.[83] Some industrialized countries, however, would like this round of negotiations to re-negotiate the Annex I – non-Annex I category of Parties in the Convention.[84] It is this that led to the use of the language "developed

[79] *See* supra note 29.

[80] Marrakesh Agreement Establishing the World Trade Organization, 15 April 1994, The Legal Texts: the Results of the Uruguay Round of Multilateral Trade Negotiations, 1867 U.N.T.S. 154, in 33 I.L.M. 1144 (1994). Available at: http://www.wto.org/english/docs_e/legal_e/legal_e.htm#wtoagreement

[81] *See supra* note 9.

[82] Submission by Brazil, *Ideas and proposals on the elements contained in paragraph 1 of the Bali Action Plan, Submissions from Parties,* in FCCC/AWGLCA/2009/MISC.1 (13 march 2009) at 17

[83] *See* Submission by India, *Ideas and proposals on the elements contained in paragraph 1 of the Bali Action Plan, Submissions from Parties,* in FCCC/AWGLCA/2008/Misc.5/Add.2 (Part I) (10 December 2009) at 155

[84] Japan suggests categorizing non-Annex I Parties into groups based on their stage of economic development, and encouraging mitigation actions tailored to their common but differentiated responsibilities. *Submission by Japan* in *Views regarding the Work Programme for the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention taking into account the elements to be addressed by the group (Decision 1/CP.13),* Submission from Parties, Addendum, FCCC/AWGLCA/2008/MISC.1/Add.1 (12 March 2008) at 15 -16, 25 (relevant factors identified include economic status, capacity to respond (e.g. GDP per capita), share of global emissions, emissions per capita and relative responsibility to climate change). Australia argues that if the GDP per capita of FCCC Parties is taken there are "more non-Annex-I Parties that are advanced economies than existing Annex-I Parties." And, therefore it recommends that Parties provide on an objective basis for graduation of non-Annex I Parties to Annex I, "with a view to all advanced economies adopting a comparable effort towards the

country Parties and "developing country Parties" rather than the Convention categories of Annex I and non-Annex I Parties in the Bali Action Plan. Differentiation between non-Annex I countries, and graduation from non-Annex I to Annex I, is a contentious issue.[85] New Zealand has suggested amending FCCC Article 4 so as to enable an increase in the list of countries with financial obligations in FCCC Annex II.[86]

New annexes to the FCCC, if deemed politically desirable, could be created through amendments. These new Annexes may list developing countries that have offered to adopt voluntary commitments/aspirational targets/ pledges, or to list nationally appropriate mitigation actions (NAMAs) and/or sustainable development policies and measures that they have chosen to undertake. [87]

Even if amendments to the FCCC are not permissible as part of the Copenhagen agreed outcome, concerns expressed in the negotiations that some non-Annex I countries that are economically advanced (as indicated by their membership in the OECD or the EU) should be part of Annex I, could be addressed by amendments to the FCCC Annexes. Some countries might decide to or be persuaded to join the FCCC Annexes. Malta, part of the EU but currently non-Annex I, has already indicated its intention to join Annex I.[88]

Amendments to the Convention including its Annexes, require consensus for adoption, or failing consensus, a three-fourths majority vote of the Parties present and voting in the meeting. Voting however is problematic as Parties are yet to agree on Rule 42 (Voting), of the draft Rules of Procedure, which have been applied, with the exception of Rule 42, since 1996.[89] The six-month rule discussed above applies to amendments as well, bearing in mind that for amendments the notice period is six months before the meeting at which it is proposed for adoption not the session.

Parties could decide in Copenhagen to simplify procedures for amending Annexes. Inclusion into and exclusion from the FCCC Annexes is, in practice, a lengthy process. The experience of Turkey is a case in point. It took Turkey five years to have its name removed from FCCC Annex II.[90] It argues in the current negotiations that it is a

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mitigation of greenhouse gas emissions." Submission by Australia, in *Views and information on the means to achieve mitigation objectives of Annex I Parties, Submissions from Parties, Addendum*, FCCC/KP/AWG/2008/MISC.1/Add.2

[85] Lavanya Rajamani, *Differentiation in the post-2012 Climate Regime*, 4(4) POLICY QUARTERLY 48 (2008)

[86] New Zealand's submission to the AWG-LCA, 27 April 2007, available at, http://unfccc.int/meetings/ad_hoc_working_groups/lca/items/4578.php

[87] See generally on sustainable development policies and measures (SD-PAMS), Harald Winkler et al, *Sustainable development policies and measures: starting from development to tackle climate change*, in K Baumert et al (eds), BUILDING ON THE KYOTO PROTOCOL: OPTIONS FOR PROTECTING THE CLIMATE, 61-87 (2002).

[88] *Malta to join developed nations in UN Climate Change Convention*, TIMES OF MALTA, 15 December 2008

[89] *See Draft Rules of Procedure of the Conference of the Parties and its Subsidiary Bodies* in FCCC/CP/1996/2, and Articles 15 and 16, FCCC.

[90] See Matters Referred to the Subsidiary Body for Implementation by the Conference of the Parties, *Proposal to Amend the Lists in Annexes I and II to the Convention, Proposal to Amend the List in Annexes I*

"sui generis case vis-a-vis the Annex I Parties" and as such plans to take "NAMAs for emission limitation" and adopt a "no-lose target."[91] Such actions under the Bali Action Plan are prescribed for developing countries not for developed countries. Turkey is making the point it is a developing country, albeit in Annex I. The language of FCCC Article 4(2) that prescribes certain commitments for "developed country Parties and other Parties included in Annex I" supports Turkey's implicit assumption that Annex I includes Parties that are not developed.

The six month rule for amendments required Parties to identify by 17 June 2009 those elements of the Copenhagen package that need to be brought into existence through amendments to the FCCC and Kyoto Protocol, including new Annexes, and amendments to Annexes.[92] Although New Zealand had proposed an amendment to FCCC Article 4 in a submission, it did not formally request communication under FCCC Article 15(2) of its intention to seek an amendment at COP-15. Therefore no proposals for amendments to the FCCC will be presented to COP-15.

COP Decisions

COP decisions are emerging as the favoured option among large developing countries like Brazil,[93] India[94]the Philippines,[95] and Colombia.[96] In addition, several other developing countries have framed their submissions either in narrative or in language that explicitly or implicitly lends itself to COP decision text rather than treaty language.[97]Some of these countries argue, on a textual analysis of the Bali Action Plan, that the Plan only mandates a COP decision.[98] The Philippines considers COP decisions to be "legally binding," whilst others consider COP decisions operationally significant, and as such sufficient for the purposes of fulfilling the Bali Action Plan. Egypt, while toe-ing the African Group line, has nevertheless argued in oral interventions the merits of COP decisions in particular that they do not permit Parties to opt out, while treaties do.

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and II to the Convention by Removing the Name of Turkey: Review of Information and Possible Decisions under Article 4, Paragraph 2 (F), Recommendation of the Subsidiary Body for Implementation, Doc. UNFCCC/SBI/2001/L.8 (2001)

[91] Turkey's Views on the Fulfillment of the Bali Action Plan and the Components of the Agreed Outcome, 24 April 2009, available at, http://unfccc.int/meetings/ad_hoc_working_groups/lca/items/4578.php

[92] Articles 15(2) and 15(3), FCCC and Articles 20(2) and 21(3), Kyoto Protocol

[93] Submission by Brazil, *Views and Proposals on Paragraph 1 of the Bali Action Plan*, 6 February 2009, at 3 "[r]egarding the legal nature of the outcome of the Bali Action Plan, Brazil believes it could be expressed, for example, in a set of COP decisions").

[94] India's recent submissions to the AWG-LCA use COP decision language. *See* Submissions by India,24 April 2009, available at, http://unfccc.int/meetings/ad_hoc_working_groups/lca/items/4578.php

[95] Philippine Submission to the AWG-LCA, 24 April 2009, available at:

[96] Submissions by Colombia, 25 April 2009, available at, available at, http://unfccc.int/meetings/ad_hoc_working_groups/lca/items/4578.php

[97] An exception is the text submitted by Panama, Paraguay and El Salvador, 29 April, 2009 (which is drafted in language that is more easily associated with treaty text), available at, http://unfccc.int/meetings/ad_hoc_working_groups/lca/items/4578.php

[98] *See* text accompanying *supra* note 12.

Notwithstanding these initial statements of position, several Parties have stressed in oral interventions at the negotiations that "form follows function." In doing so, they have kept open the possibility that should function and content require it, they could be persuaded to change their position. Brazil has argued that once there is agreement on content, if COP decisions are deemed insufficient to achieve the agreement, alternative legal forms could be explored. Brazil has also added that form should follow ambition. If the collective ambition is poor it would be pointless to place it in a legally binding text. India, of the large developing countries, appears the most reluctant to consider an agreement that extends beyond COP decisions. An analysis of the legal status, operational significance and limits of COP decisions may serve to explain this initial preference large developing countries have indicated for COP decisions.

Legal Status of COP Decisions

Decisions rendered by Conferences of Parties[99] may be considered as a "subsequent agreement between the Parties regarding the interpretation of the treaty or the application of its provisions"[100] and as such will be relevant factors in interpreting the treaty.[101] Their precise legal status, however, will depend on the enabling clause,[102] the content of the decisions, Parties' behaviour and legal expectations,[103] all of which are prone to varying interpretations. From a formal legal perspective COP decisions are not, absent explicit authorisation,[104] legally binding.[105] And, COP decisions cannot impose substantive new obligations on Parties, as such substantive new obligations, would require state consent expressed through the conventional means (signature/ratification/etc). This does not however detract from the operational significance and legal influence that COP decisions have come to acquire in multilateral environmental agreements, and in particular in the climate regime.

COP Decisions in the Climate Regime

The FCCC and the Kyoto Protocol authorize the COP to engage in the progressive normative and institutional development of the regime.[106] The COP is

[99] The legal personality that COPs possess has been subject to considerable academic discussion. *See* R. Churchill and G. Ulfstein, *Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little Noticed Phenomenon in International Law*, 94 AM. J. INT'L L. 623 (2000)
[100] Article 31(3) (a), Vienna Convention on the Law of Treaties
[101] *Supra* note 99 at 641
[102] The enabling clause in the relevant treaty may authorize a COP decision to be binding, or require more, as for example in the case of Article 18, Kyoto Protocol (mandating that compliance procedures and mechanisms entailing binding consequences shall be adopted by means of an amendment to the Protocol), *see* J. Brunnée *COPing with Consent: Law-Making under Multilateral Environmental Agreements*, 15 LEIDEN JOURNAL OF INTERNATIONAL LAW 1-52 (2002)
[103] *See supra* note 40 at 238-243.
[104] Explicit authorization for binding law-making is provided infrequently. Article 2(9) Montreal Protocol, 1987 is an oft-quoted example
[105] *See supra* note 10225.
[106] Article 7, FCCC; some argue that the legislative competencies provided in some multilateral environmental agreements to progressively develop the regime amount to "powers of formal revision of the

authorized "to make, within its mandate, the decisions necessary to promote the effective implementation of the Convention."[107] To this end, it is also authorized to: "[e]xercise such other functions as are required for the achievement of the objective of the Convention as well as all other functions assigned to it under the Convention."[108]

The COP has significant law-making powers in relation to Parties' substantive obligations. It has indirect law-making powers in that it is authorized to negotiate amendments[109] and Protocols[110] to agreements (indirect because these require ratification by Parties). It has direct or "genuine" law-making powers[111] in that it is authorized in some cases to develop rules, as for instance for emissions trading,[112] and these rules, although not legally binding have mandatory force.[113] The COP also adopts soft law measures.

COP decisions have enriched and expanded the normative core of the regime by fleshing out treaty obligations,[114] reviewing the adequacy of existing obligations,[115] and launching negotiations to adopt further obligations.[116] COP decisions have also created an elaborate institutional architecture to supervise compliance with obligations. The Clean Development Mechanism Executive Board, the Joint Implementation Supervisory Committee and the Compliance Committee were authorized by the Kyoto Protocol, but constituted and operationalized by COP decisions.

The operational significance of COP decisions is further strengthened by the fact that agreed language is of particular import in the environmental field. Treaty language in the environmental field is often marked by constructive ambiguity reflecting and auguring protracted dissonance. Therefore, when agreement is reached, the agreed language, however tenuous the agreement and whatever the legal form it assumes, is highlighted, cited and reproduced in subsequent legal texts (which may be of greater legal weight). Select language from the Berlin Mandate, a COP decision, for instance, is reflected verbatim in operational provisions of the Kyoto Protocol.[117]

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treaty." *See* V. Röben, *Institutional Developments under Modern International Environmental Agreements*, MAX PLANCK YEARBOOK OF UNITED NATIONS LAW, 363-443, 391 (2000)

[107] Article 7(2), FCCC

[108] Article 7(2) (m), FCCC

[109] Article 15, FCCC

[110] Article 17, FCCC

[111] *Supra* note 98.

[112] Article 17, Kyoto Protocol

[113] *Supra* note 113

[114] *See e.g.* Article 6 (2),12 (7) and 17, Kyoto Protocol, and *Principles Nature and Scope of the Mechanisms pursuant to Article 6, 12 and 17 of the Kyoto Protocol*, Decision 2/CMP 1, in FCCC/KP/CMP/2005/8/Add.1 (2005)

[115] Pursuant to Article 4(2) (d), FCCC

[116] *See e.g.* Berlin Mandate, *supra* note 13.

[117] Compare paragraph 2(b), of the Berlin Mandate, and the chapeau of Article 10, Kyoto Protocol. Both contain language on not "introducing any new commitments for Parties not included in Annex I, but reaffirming existing commitments"

In addition, COP decisions such as the Berlin Mandate and the Bali Action Plan that launch negotiations towards a legal instrument or "agreed outcome" create a framework (with the attendant boundaries) for the negotiations, which Parties may but seldom diverge from. The Berlin Mandate specifically decries new commitments for developing countries and the Kyoto Protocol contained none. The ongoing negotiations towards a Copenhagen outcome have framed the discussions with explicit reference to the mandate contained in the Bali Action Plan.[118] At the Accra negotiations in August 2008 Parties authorized the Chair to prepare a document assembling proposals by Parties. This document was required to be "in accordance with the structure of paragraph 1 of the Bali Action Plan."[119] Both the Assembly of Prposals prepared by the Chair of the AWG-LCA and the subsequent negotiating text are faithful to the structure of the Plan.[120]

A whole host of consequences can be generated through COP decisions at Copenhagen. The "Registry" of developing country mitigation actions and pledges, proposed by South Africa,[121] and the Republic of Korea,[122] can be created through a COP decision. Parties can extend the deadline for negotiations through a COP decision - the deadline in the Bali Action Plan, itself a COP decision, can simply be extended through another COP decision, which would replace the earlier agreement with a new one. A Ministerial Declaration reflecting the elements of a political agreement, if it represents the will of the COP in its entirety can also be adopted through a COP decision. An example of one such in the climate process is the Delhi Ministerial Declaration on Climate Change and Sustainable Development, 2002.[123]

The Limits of COP decisions

However as COP decisions are neither legally binding, in the formal sense, nor capable of creating substantive new obligations they are limited and limiting instruments in the evolution of the climate regime.

The initial preference that large developing countries have indicated for COP decisions may be explained in this context. These countries perceive COP decisions as a "safe harbour." In addition to the fact that COP decisions, unlike treaties, cannot bind, the burden sharing arrangement in the FCCC cannot be fundamentally altered through COP decisions. In contrast, a new legal instrument could alter the conceptual apparatus of the

[118] *See* Report of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention on its first session, held in Bangkok from 31 March to 4 April 2008, FCCC/AWGLCA/2008/3 (2008)
[119] *See* Enabling the full, effective and sustained implementation of the Convention through long-term cooperative action now, up to and beyond 2012, *Draft Conclusions Proposed by the Chair*, in FCCC/AWGLCA/2008/L.7 (27 August 2008)
[120] Ideas and Proposals on Paragraph 1 of the Bali Action Plan, *Revised Note by the Chair*, FCCC/AWGLCA/2008/16/Rev.1 (10 December 2008)
[121] See Submission by South Africa, in Ideas and proposals on the elements contained in paragraph 1 of the Bali Action Plan, Submissions from Parties, FCCC/AWGLCA/2009/MISC.4 (Part II) at 95.
[122] *See* Submission by the Republic of Korea, *ibid* at 78
[123] Decision 1/CP.8, Report of the Conference of the Parties on its eighth session, held at New Delhi from 23 October to 1 November 2002, Addendum, Part Two: Action taken by the Conference of the Parties, FCCC/CP/2002/7/Add.1 (28 March 2003)

FCCC.[124] Several industrialized countries have advocated in their proposals that all Parties should be required to take similar types of actions (even if these are not identical in content or stringency), of the same legal character (whatever that might be) and offering the same flexibility (or lack thereof). In particular, these proposals are seeking comparability of "commitments" between developed and "advanced" developing countries.[125] Most developing countries consider such proposals as breaching the FCCC, in particular the principle of common but differentiated responsibility, as well as the Bali "firewall."[126] At negotiations in March 2009, India requested the Chair, who was mandated to produce a text by May, to relate operative paragraphs of his text to the specific provisions of the FCCC whose implementation they were intended to enhance. As the Chair's text had to be based on Parties' proposals, and he could not engage in the exercise of interpreting the intent of Parties, he requested Parties to consider indicating in their future submissions the relationship between their proposals and the specific provisions of the FCCC or Bali Action Plan they were intended to enhance.[127] Few countries followed this advice. And, one of the most significant disagreements in the negotiations today lies in the extent of conformity (or lack thereof) between certain proposals and the FCCC burden sharing arrangement. In the circumstances, developing countries believe COP decisions to represent a safe and reassuring option. Fundamental changes to the FCCC burden sharing arrangement are less likely to be implemented through COP decisions.

Should COP decisions be the chosen route forward, however, given their limits, they will pose fundamental constraints on the evolution of the post-2012 legal architecture. If the Copenhagen agreed outcome is reflected solely in COP decisions, the mitigation commitments of the US, which is not a party to the Kyoto Protocol, will – like developing countries, but unlike the rest of the industrialized world - be subject to a non-legally binding regime alone. The rest of the industrialized countries will, presumably, be

[124] A new legal instrument such as a Protocol" under a framework treay could in theory be either a supplementary instrument or an amending instrument. *See* Anthony Aust, MODERN TREATY LAW AND PRACTICE 27(2nd edn, 2007); However it could be argued the climate regime only envisions supplementary rather than amending instruments. FCCC Article 17 (4) specifies that only Parties to the Convention may be Parties to the Protocol. Protocols to the FCCC are therefore not stand-alone instruments. FCCC Article 15 provides a detailed procedure for amendments to the Convention, suggesting by implication that Protocols under Article 17 were intended to be supplementary not amending instruments.

[125] Although the Bali Action Plan only requires "nationally appropriate mitigation actions" of developing countries, Japan has indicated in oral interventions at the negotiations that it expects "advanced" developing countries to take "commitments." Interesting also in this context, is that the US in the AWG-LCA August intersessional informal consultations, referred to "nationally appropriate mitigation actions" for all.

[126] The Bali Action Plan uses different formulations in paragraphs 1(b)(i) and 1(b) (ii) for developed country mitigation commitments and developing country nationally appropriate mitigation actions, and the distinction has come to be termed as the Bali "firewall." The US, however, perceives the Bali Action Plan as representing a bridge, rather than a firewall, between developed and developing country mitigation commitments/actions.

[127] Note from the Chair of the AWG-LCA regarding inputs to the negotiating text , 17 April 2009, available at,
http://unfccc.int/files/meetings/ad_hoc_working_groups/lca/application/pdf/note_from_awg-lca_chair_090417.pdf

subject to the Kyoto Protocol's second commitment period, as well as its compliance system. While differential treatment between industrialized and developing countries is a foundational pillar of the climate regime's architecture, differentiation between the US and the rest of the industrialized countries, in particular in the legal character of the commitments, may prove difficult to justify or sustain. This therefore will likely lead to two consequences. First, Kyoto Annex B Parties, who will not wish to be subject to commitments different in character, form and stringency from the US, will likely abandon the Kyoto Protocol, a legally binding instrument with a strong compliance system, to join the US in this new aspirational regime. Second, Kyoto Annex B Parties that have defaulted on their Kyoto commitments will, by killing Kyoto, effectively avoid accountability under Kyoto's compliance system.

Further, as COP decisions cannot give rise to substantive new obligations, there can be no new obligations with respect to aspects of the regime that do not touch on mitigation targets. For example, COP decisions will not permit the creation of new obligations with respect to provision by industrialized countries of the necessary "means of implementation" for developing countries to meet their mitigation goals or adaptation needs, or to the extension of the compliance system to take into account support/enablement obligations of industrialized countries. Even if new structures and frameworks are permissible on the fiction that they merely flesh out the FCCC, these, and any quantitative commitments Parties make within these frameworks will not lend themselves to enforcement.

A Ministerial Declaration

Yet another legal form option for the Copenhagen agreed outcome is a Ministerial declaration. Notwithstanding any suggestion of gravitas a Ministerial Declaration signals, such an outcome will represent the least ambitious of the spectrum of possible outcomes of COP-15. A Ministerial declaration may represent the collective will of the Parties gathered and if so it can be adopted as a COP decision. The Delhi Ministerial Declaration, 2002, is an example.[128] If such a declaration is adopted at Copenhagen then it will likely contain the key elements of the political bargain arrived at, and will extend the negotiations for a further period of time so as to allow Parties to flesh out the details of the bargain.

A Ministerial declaration can also represent the collective will of a sub set of the Parties to the FCCC, in which case it cannot be adopted as a COP decision, COP decisions requiring consensus. Such a Ministerial declaration will be easier to secure, but it is a weak outcome as it cannot direct Parties, the Secretariat, the subsidiary bodies and its officers. An example of such a declaration is the Geneva Ministerial Declaration.[129]

[128] Decision 1/CP8, *Delhi Ministerial Declaration on Climate Change and Sustainable Development*, in Report of the Conference Of The Parties on its eighth session, held at New Delhi from 23 October to 1 November 2002, Addendum, Part Two: Action taken by the Conference of the Parties at its eighth session, FCCC/CP/2002/7/Add.1 (28 March 2003).

[129] *Ministerial Declaration*, Review of the Implementation of the Convention and of decisions of the first session of the Conference of the Parties, FCCC/CP/1996/L.17 (18 July 1996).

The Declaration instructs the signatories' representatives to engage in particular conduct.[130]

Evaluating Legal Form Options: Strategic and Political Considerations

It is axiomatic that form should follow function, and that the treatment of the legal form question should be guided by the substantive outcomes that emerge from the negotiations. However some form options, for reasons discussed before, will not be in keeping with a fair, effective and ambitious post-2012 climate agreement – the use exclusively of COP decisions and/or a Ministerial Declaration fall in this category. If the Copenhagen 'agreed outcome' is to be a legally binding instrument, the choice between an instrument that supplements the Kyoto Protool and one that replaces it will be governed by various strategic and political considerations.

The considerations which argue in favour of a new legal instrument to supplement the Kyoto Protocol are numerous. First, the FCCC is an umbrella convention, and a whole host of protocols can be adopted under it. As long as the fields of operation are kept distinct, the new legal instrument could strengthen the current regime. Second, there is a trust deficit in the climate regime, and efforts to kill Kyoto, however softly, will deepen the mistrust. The Kyoto Protocol contains a unique burden sharing arrangement, as well as an acknowledgment of industrial country leadership. If Kyoto Parties do not abide by the legal mandate of Kyoto Article 3(9) requiring Annex B Parties to negotiate targets for the second commitment period, developing countries may not have the confidence that industrial countries would honour the next instrument they negotiate. The increase in GHG emissions in some industrial countries does not also augur confidence. Third, if Kyoto is abandoned, all decisions under the Protocol lapse. If these are to be re-negotiated or if any space is created for adopting some but not other CMP decisions (or any selection of parts of the Kyoto Protocol), then there is a risk that provisions on compliance, accounting and land use, land use change and forestry, among others, will be re-opened and diluted. In this context, a transitional arrangement that is focused on addressing the trust-deficit in the system has much to recommend itself.

The considerations which argue in favour of replacing Kyoto are two-fold. First, the US will not ratify the Kyoto Protocol, even in an amended form, and most industrialized countries would prefer to be in the same legal basket as the US. They would not, for instance wish to undertake legally binding commitments under the Kyoto Protocol's second commitment period if the US is subject to non-legally binding aspiration commitments under a COP decision. Second, the current multi-track process is burdensome and unwieldy, and a single new instrument incorporating key elements of the Kyoto Protocol would ensure greater policy coherence and institutional coordination in the climate regime. There may be ways of addressing, even if only partially, the trust deficit in the regime in this option as well. As for instance if industrialized countries

[130] See e.g. *ibid* at para 8.

subjected themselves to the accounting and compliance procedures of the Kyoto Protocol, and thereby allowed the Kyoto cycle to come to a natural end. [131]

How do you deal with a problem like the US?

A strategic and political consideration that applies across board to all legal form options is the one that has plagued the climate negotiations for several years: how do you deal with a problem like the US? The US is an active participant in negotiations, but a reluctant participant in treaties. The US has its fingerprints all over the Kyoto Protocol, which it subsequently rejected. And it is the US rejection of the Kyoto Protocol that led to the two-track climate regime. The US is engaging more constructively under the new Obama administration, but it may still not be able to garner sufficient domestic support to enable it to take appropriately ambitious commitments at the international level. In this context, Parties will need to determine the extent to which they will allow the US to shape an agreement that it may well not be able to ratify. Parties will also need to consider whether they will be willing to accept a unilateral declaration from the US in lieu of participation in the Copenhagen 'agreed outcome'. Should the political will exist, absent legislative support, the US may choose the device of a unilateral declaration.

Unilateral declarations can create legal obligations. But in order to do so the intention of the State making the declaration must be clear. The form in which the intent is expressed is irrelevant.[132] The ICJ in the *Nuclear Tests Case* noted that "..declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations." However it is the intention of the State making the declaration that is determinative. If the State making the declaration intended that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking. The *Nuclear Tests* case emphasized that "[a]n undertaking of this kind, if given publicly, and with a intent to be bound, even though not made in the context of international negotiations is binding."[133] The attribution of

[131] It is conceivable that the EU, even in the absence of second commitment period targets under the Kyoto Protocol, will subject itself to the accountability procedures of the Kyoto Protocol. If no second commitment period targets are negotiated under the Kyoto Protocol, it would not be possible in the case of a finding of non-compliance to apply a penalty rate to the targets for the next commitment period. Given current compliance data and trends, this is likely to be a problem primarily for Canada, and possibly for Japan. Canada has already indicated that it does not consider the consequences of non-compliance with the Kyoto Protocol targets to be legally binding as they have not been adopted as an amendment to the Kyoto Protocol by agreement of all Parties. *See* Court File Number T 1683-07, Federal Court, Between *Friends of the Earth* and *The Minister of the Environment*, Memorandum of Fact and Law, at 5 (paragraph 9).

[132] The ICJ in the *Temple of Preah Vihear* case noted that where the emphasis is on the intention of the Parties, "the law prescribes no particular form, parties are free to choose what form they please, provided their intention clearly results from it." 1961 ICJ Rep. 31

[133] 1974 ICJ Rep. 253, 457. Note also that "In these circumstance nothing in the nature of a *quid pro quo* nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the State was made."

intention to a State's unilateral statements however "should be subject to strict conditions" and "the fulfillment of the most stringent criteria."[134]

Should the US choose to commit itself to a particular target through a unilateral declaration it would create room for exceptionalism which is objectionable in principle, but it is also problematic in practice because it may start a trend. Such a unilateral declaration may nevertheless function as a sufficient guarantee for Annex B Parties that they will have the same legal character of commitments as the US, and that they will, like the US, be subject to GHG controls.

Should such a unilateral declaration satisfy developing countries? And, if not, how should they condition their response to such an act by the US? Much will depend on the nature, content and language of the declaration. The US is likely to commit itself internationally only to that which is contained in its domestic legislation. The Waxman Markey Bill's targets both on financing for developing countries as well as on GHG mitigation are modest.[135] The US may therefore commit itself irrespective of whether developing countries take on binding obligations or not. However, any financing or technological assistance it will provide will not be tied to equitable FCCC criterion. In these circumstances, developing countries may be justifiably reluctant to enter into another legally binding agreement under the FCCC. There are at least two reasons for this. First, assuming Kyoto continues, the only countries with obligations to take mitigation actions under this new agreement will be developing countries. Second, the support provisions without the US may be of limited significance.

Addressing the Post-Kyoto Stress Disorder through Choice of Legal Form

Given the current state of the negotiations, and the range of legal form options that countries are exploring, a compromise route for COP-15 to adopt may be a transitional option that builds on the strengths of the Kyoto Protocol, provides a lead-in time for more ambitious engagement from key players, and eventually draws Parties towards a coherent and ambitious climate regime that lends itself to effective implementation.

This route envisages two tracks and two legally binding instruments under the umbrella of the FCCC[136] - the Kyoto and Copenhagen ones - for the next one or two commitment periods, eventually leading in 2020 to a single unified track. In the transitional period, there would be negotiated targets for all Annex B Parties for Kyoto's second commitment period, and a new legal instrument, the Copenhagen protocol, to address elements of the Bali Action Plan.

The Copenhagen protocol would require mitigation targets from *all* industrialized countries (Quantified Emission Reduction Commitments) and mitigation actions from

[134] Case Concerning Sections 301 – 310 of the Trade Act of 1974 (European Union v. USA, 1999)
[135] *See* American Clean Energy and Security Act, 2009 (Waxman Markey Bill) Discussion Draft, available at http://energycommerce.house.gov/index.php?option=com_content&task=view&id=1560
[136] The FCCC is an umbrella convention, and a whole host of protocols can be adopted under it.

developing countries. The mitigation actions that developing countries take could be captured in a register of nationally appropriate mitigation actions (NAMAs). In addition, there would be provisions on measurement, reporting and verification (MRV) for developing country mitigation actions, and provisions on measurement, reporting and verification of the means provided to implement these actions.

The targets that Kyoto developed countries agree to for the second commitment period could be incorporated/reiterated verbatim in the Copenhagen protocol at the time when the agreement is adopted (such that these targets would form an integral part of both Kyoto and the Copenhagen protocols).The Copenhagen protocol however will ensure that the US, a non-Kyoto industrialized country, and its target is covered by the regime. The US target would be of the same legal character as that of other industrialized countries, but would be different in stringency to the one inscribed in Kyoto for the US. The new agreement would contain benchmarks for comparability across the targets taken by industrialized countries so as to ensure symmetry in the character, rigour and effectiveness of both tracks moving forward.

The Copenhagen protocol would also include: measurement, reporting and verification for industrialized country commitments, building on existing Kyoto architecture, incorporating compliance and mutatis mutandis, the Marrakech Accords;[137] credible, visible and substantial means of implementation (technology, finance, capacity, and market based instruments) for mitigation *and* adaptation, in a measurable, reportable and verifiable manner; a separate chapter on adaptation, consolidating existing work and adding provisions on funding and implementation; and a chapter creating appropriate incentives for reducing emissions from deforestation in developing countries (REDD+). And, finally, the Copenhagen protocol would incorporate an agreement that there would be a review in 2016 of mitigation commitments by developed countries and mitigation actions by developing countries, with an understanding that this could lead to strengthening the ambition of the regime, as well as merging the two tracks.

An aside, this transitional proposal is premised on the idea that the Copenhagen protocol will contain Kyoto style targets for non-Kyoto industrialized countries. This is essential to ensure that there is some measure of comparability across industrialized countries. In conjunction with such targets for non-Kyoto industrialized countries, this option contains a bottom-up approach to developing country actions. This is in keeping with the burden sharing arrangement in the FCCC – which clearly distinguishes between developed and developing country obligations – and remains respectful of the Bali firewall. This arrangement makes a significant demand on developing countries as they transition from qualitative to quantitative mitigation obligations that will be measured, reported and verified, and framed in a legally binding agreement. This will, nevertheless, be resisted by those industrialized countries, such as the US, Australia and others that are

[137] The Marrakesh Accords are a set of COP decisions that *inter alia* operationalize the Kyoto Protocol's market mechanisms, and put into place the compliance system. *See* Report of the Conference of the Parties on its Seventh Session, held at Marrakesh from 29 October to 10 November 2001, Addendum, Part Two: Action Taken by the Conference of the Parties FCCC/CP/2001/13/Add.1 (21 January 2002).

in favour of a bottom-up approach for *all* countries, one that implicitly transcends the Bali firewall.

Two Instruments in a transitional phase, albeit inelegant, would have several advantages. It would provide Annex B Parties that are not already doing so a chance to reduce GHG emissions and make progress within the context of an agreement, Kyoto, that was premised on industrialized county leadership. It would provide non-Kyoto industrialized countries an opportunity to aggressively make up for last time by reducing emissions. And it would provide all industrialized countries a chance to pull together means of implementation commensurate with the scale of the problem and the scale of the responses required of developing countries. As India's Ambassador Dasgupta noted in an intervention at AWG-LCA-5 in Bonn in April 2009, statements that industrialized countries make on the ambition required of developing countries' mitigation actions, are in effect statements on the ambition required of industrialized countries in terms of providing the appropriate means of implementation for these actions.

Two instruments in a transitional phase would also provide the US, among other industrialized countries, time to assess domestic buy-in, the costs and benefits of different policies and measures, and to make an ambitious yet realistic international commitment. This would, in part, catalyze more proactive proposals from developing countries. It would give developing countries the comfort that their participation will be dealt with, at least at this juncture, in the context of a distinct legal instrument, which in itself is an acknowledgment of differential treatment. It would demonstrate that, where relevant, industrialized countries are willing to account for their non-compliance with Kyoto targets. It would also provide developing countries a chance to assess domestic buy-in, and reflect on the costs and benefits of different policies and measures, the credibility, quantity and predictability of international enablement, and to arrive at an ambitious yet realistic international commitment. An ambitious target from the US in 2016 or 2020, as it is demonstrably complying with its less ambitious (given Kyoto benchmarks, rather than US politics) yet tangible commitment under the new agreement,[138] will augur confidence, and likely catalyze more responsive policies and commitments from developing countries, both nationally and internationally. Developing countries would also have by then a better sense of cost and opportunity implications, having seen the new agreement and the enablement provisions in operation.

[138] The Waxman Markey Bill passed by the Congress, but yet to be tested at the Senate, proposes to reduce US GHG emissions by 17% below 2005 levels by 2020. *See supra* note 134. As GHG emissions in the US grew significantly between 1990 and 2005, this translates into a stabilization target or at best a few percent below 1990 by 2020. Kyoto, which the US signed and then rejected, required the US to take their emissions to 7% below 1990 by 2012. The Waxman Markey target, albeit representative of a significant shift in US climate policy, is still far from ambitious in the context of the international negotiations.

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