



## LEGAL FORM OF A NEW CLIMATE AGREEMENT: AVENUES AND OPTIONS

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### INTRODUCTION

Parties to the UN Framework Convention on Climate Change (UNFCCC) and parties to its related legal instrument, the Kyoto Protocol, are presently engaged in dual-track negotiations with the aim of reaching a new agreement or agreements at the UN Climate Change conference to be held in Copenhagen in December 2009.

In 2005, pursuant to Article 3.9 of the Protocol, Kyoto parties established an Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol (AWG-KP) to consider Annex I commitments for the period beyond 2012, when the Protocol's first commitment period ends. In 2007, Convention parties adopted the Bali Action Plan, launching a parallel process "to enable the full, effective and sustained implementation of the Convention through long-term cooperative action, now, up to and beyond 2012." An Ad Hoc Working Group on Long-term Cooperative Action under the Convention (AWG-LCA) was established with the objective of "reach[ing] an agreed outcome and adopt[ing] a decision" at COP-15 in Copenhagen.

This paper identifies the potential legal avenues for an outcome or outcomes under the Bali Action Plan and the Kyoto Protocol Article 3.9 process. Potential outcomes include decisions by the Convention's Conference of the Parties (COP) and/or the Protocol's Meeting of the Parties (CMP); amendments to one or both of the agreements; and a new protocol or other legal instrument. These different types of outcomes are not mutually exclusive, and the Copenhagen Conference could address different elements of the Bali Action in different ways, through a new legal instrument (such as an amendment or protocol) for some elements and through a decision of the parties for others.

The two AWGs are not formally linked and outcomes regarding the Convention and the Protocol would need to be adopted separately by the COP and the CMP. However, in practice, outcomes could be negotiated and considered as a package. The UNFCCC and the Kyoto Protocol share a common objective, common principles and common institutions, and many states see the outcomes of the two AWG processes as politically interdependent. Potentially, states could adopt a single instrument approved by both the UNFCCC and the Kyoto Protocol parties. Alternatively, if separate instruments were adopted, these could be expressly linked in various ways – for instance, by making entry into force of each contingent on the other(s).

## ACTION UNDER THE UNFCCC

As the “supreme body of the Convention,” the COP has primary responsibility for deciding on next steps in the development of the climate change regime under the Convention. In contrast to the 1995 Berlin Mandate, which called for the “adoption of a protocol or another legal instrument,” the Bali Action Plan does not specify the form or legal character of the outcome to be agreed at COP-15. Options for COP action include:

- A COP decision addressing further actions under the Convention.
- Adoption by the COP of an amendment to the UNFCCC or to an annex, setting forth additional actions and/or commitments by UNFCCC parties.
- Adoption by the COP of a new legal instrument that either supplements or replaces the Kyoto Protocol.

In addition to instruments resulting from the Bali Action Plan negotiations, amendments of the Convention, amendments of annexes, and new protocols could be proposed by a party or group of parties directly. The Convention requires that amendments and protocols be communicated to the parties by the Secretariat at least six months in advance of the session at which they will be considered.

## Options

### COP Decision

Article 7.2 of the UNFCCC gives the COP general authority to periodically examine the obligations of the parties in light of the objective of the Convention and to “make, within its mandate, the decisions necessary to promote the effective implementation of the Convention.” This general provision provides the COP with broad decision-making authority (for example, to recommend additional actions, to memorialize national actions in a new schedule, or to adopt new rules for the implementation of existing

commitments), but does not give the COP authority to establish new legal commitments. Instead, additional commitments would require a new legal instrument such as an amendment to the UNFCCC or a new protocol. In the absence of any agreed rules of procedure specifying a voting rule, COP decisions require consensus – a somewhat elastic term that in practice has required only the lack of formal objection by one more parties, rather than unanimous agreement.

### Amendment of the Convention

Under Article 15 of the UNFCCC, the COP may adopt an amendment to the Convention (other than an annex) by a three-quarters majority vote. The UNFCCC does not impose any substantive limitations on what the COP might agree as an amendment. Thus, an amendment could specify new commitments, change existing commitments, or establish new institutions or procedures.

In order to enter into force, an amendment must be accepted (i.e., by ratification or accession) by three-quarters of the parties. Once in force, an amendment binds only those parties that have accepted it, and applies only as between those parties. The preexisting terms of the Convention continue to apply with respect to parties that do not accept an amendment. In effect, each successive amendment to the UNFCCC would create a new treaty as between those states that ratified the amendment. In a party's treaty relations with another party, it would be bound by the most recent amendment that both it and the other state have agreed. To prevent parties from picking and choosing which amendments to accept, the COP can, when adopting amendments, bundle several amendments into a single amendment that parties must ratify as a whole – an approach that has been used under the Montreal Protocol.

### Amendment of Annexes

At present, the UNFCCC contains only two annexes, listing the Annex I and II parties. Pursuant to Article 4.2(f), the lists of countries in these annexes may be amended only with the approval of the party concerned.

Apart from this particular requirement for Annexes I and II, the more general procedure for adopting new annexes or amending existing annexes is set forth in Article 16 of the UNFCCC. Article 16 restricts the content of annexes to “lists, forms, and any other material of a descriptive nature that is of a scientific, technical, procedural or administrative character.” The COP may adopt new annexes or amend existing annexes by a three-quarters majority vote. In contrast to amendments to the Convention, adoption or amendment of annexes does not require explicit acceptance by a party (with

the exception noted above for Annexes I and II). Instead, new annexes and amendments to existing annexes enter into force after six months for all parties, except those that submit written notification of non-acceptance.

If a developing country wished to assume new commitments (for example, relating to reporting), one possible avenue would be for it to assume the commitments of Annex I parties. The UNFCCC sets forth two procedures for the assumption of Annex I commitments. First, a party may make a unilateral declaration pursuant to Article 4.2(g) that it wishes to be bound by the specific commitments of Annex I parties. This takes effect automatically and does not require approval by the COP. Kazakhstan has assumed the commitments of Annex I parties by this means. Second, the COP may amend Annex I pursuant to Article 4.2(f) and 16, with the approval of the party concerned. Monaco, Slovenia, Croatia, Liechtenstein, the Czech Republic and Slovakia have become parties to Annex I by this means.

### Adoption of a New Protocol

Article 17 authorizes the COP to adopt protocols to the UNFCCC, but does not specify any particular procedure for doing so. In the absence of COP rules of procedure regarding voting, adoption of a Protocol would require consensus.

A new protocol under the UNFCCC could complement or, with the approval of the CMP, supersede the Kyoto Protocol. In either case, the new agreement could incorporate parts or all of the Kyoto Protocol by reference, rather than starting over again from scratch. For example, the 1994 WTO agreements were based on the previous GATT regime and incorporated GATT 1947 by reference, but included many new agreements that went well beyond the earlier GATT.

Because the UNFCCC does not specify the requirements for entry into force of a protocol, any new protocol would need to specify the requirements for its own entry into force. For example, the Kyoto Protocol provided for entry into force 90 days after the 55<sup>th</sup> ratification, including Annex I parties representing 55% of 1990 carbon dioxide emissions by Annex I parties. Only UNFCCC parties may join a protocol.

### Limitations on Action

There are two potential sources of limitations on actions under the UNFCCC: first, limitations imposed by general international law; and second, limitations imposed by the UNFCCC itself.

In general, international law does not limit what states may do by mutual agreement. The only substantive limitation imposed by general international law on treaty-making is that a treaty may not violate a peremptory norm of international law (referred to as *jus cogens*) (Vienna Convention on the Law of Treaties, art. 53). However, it is difficult to conceive how any potential action relating to climate change could be considered void on the ground that it violates *jus cogens*. There is little agreement internationally as to what norms constitute *jus cogens*,<sup>1</sup> and no rule of *jus cogens* appears relevant to the climate change regime. Thus, it does not appear that general international law imposes practical limitations on what action might be undertaken pursuant to the UNFCCC.

As to possible limitations imposed by the UNFCCC itself, it is important to note, initially, that the UNFCCC is intended generally to facilitate further actions to control climate change, rather than to limit such action. The UNFCCC sets forth the procedures by which the COP may take different types of actions (for example, the adoption of amendments and protocols), but does not, in general, impose specific limits on the substance of these actions.

The two provisions most clearly relevant to future action under the UNFCCC are Articles 2 and 3. Article 2 of the UNFCCC establishes the objective of not only the Convention itself, but “any related legal instruments that the Conference of the Parties may adopt.” Any legal instrument that helped address climate change would arguably be consistent with this objective, even if it did not fully achieve it.

Article 3 of the UNFCCC sets forth various guiding principles for actions by the parties to achieve the objective of the UNFCCC, including common but differentiated responsibilities (CBDR), precaution, and cost-effectiveness. These principles are intended to provide guidance to parties and are stated in hortatory (“should”) rather than mandatory (“shall”) terms. The inclusion of the term “inter alia” in the chapeau of Article 3 suggests that the list of principles in article 3 is not intended to be exhaustive, and that future actions by the parties might also be guided by other considerations not explicitly elaborated.

The principle of common but differentiated responsibilities and respective capabilities implies that all countries have a responsibility to address climate change, but that their responsibilities differ, and what they should do to protect the climate system will vary, depending on their different responsibilities and capabilities. The division between Annex I and non-Annex I parties is often associated with the principle of common but

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<sup>1</sup> Possible norms of *jus cogens* include the prohibition on the use of force (i.e., an agreement between states to commit aggression against another state would be void), and the prohibition on genocide and on violations of other fundamental human rights.

differentiated responsibilities and respective capabilities, but the Convention does not explicitly tie the two, or preclude alternative forms of differentiation in future agreements. For instance, in addressing future mitigation efforts, the Bali Action Plan refers to “developed country” and “developing country” Parties, not to Annex I and non-Annex I Parties.<sup>2</sup>

## ACTION UNDER THE KYOTO PROTOCOL

The process initiated by MOP-1 pursuant to Article 3.9 of the Kyoto Protocol contemplates the adoption of an amendment to Annex B, setting forth a new round of emission reduction targets for Annex I parties. But the Article 3.9 process does not preclude the MOP from adopting a decision or an amendment to the main body of the Kyoto Protocol.

### Options

#### MOP Decision

The Kyoto Protocol contains several hooks for a CMP decision, apart from Article 3.9. First, Article 9 requires the CMP to periodically review the Protocol in light of the best available scientific information and to take appropriate action. The second such review was initiated at CMP 2. Second, Article 13.4 requires the CMP to keep under regular review the implementation of the Protocol and to assess the progress towards achieving the objective of the Convention. Subparagraph (b) of this article specifically requires the CMP to examine periodically the obligations of the Protocol parties in light of the objective of the Convention, and does not limit this examination to Annex I or Annex B parties. Both of these provisions provide a potential basis for CMP action, although the Bali conference agreed that the Article 9 review “shall not lead to new commitments for any Party.”

#### Amendment of the Protocol

The Kyoto Protocol does not specify any substantive limits on what might be agreed by means of an amendment. Thus, an amendment might modify any aspect of the Protocol, including which parties are subject to commitments, the nature of commitments, or the rules for emissions trading and the CDM.

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<sup>2</sup> The UNFCCC does not anywhere define the term “developing countries” or identify which countries fall into this category, nor is there any official definition within the UN system. Under the terms of the UNFCCC, the division between Annex I and non-Annex I parties may not be equivalent to the division between developed and developing countries, since Annex I by its terms includes both developed country parties and “other Parties.”

The procedural requirements for amending the Kyoto Protocol are set forth in Article 20 of the Protocol and are the same as for amendments of the UNFCCC, including in particular the requirement of a three-quarters affirmative vote (see above).

### Amendment of Protocol Annexes

Annexes to the Kyoto Protocol may be amended pursuant to Article 21. With the exception of amendments to Annex B of the Protocol (which may be adopted only with the *written* consent of the party concerned), the provisions for amending annexes to the Protocol are the same as for amending annexes to the Convention (see above).

Article 3.9 specifies the procedure for adopting commitments for Annex I parties for subsequent commitment periods. Under Article 3.9, future targets must be adopted by amendment to Annex B, not by CMP decision. Under Article 21.7, amendments to Annex B may be adopted only with the written consent of the party concerned. An amendment to Annex B could take virtually any form, including a new target number or a new type of target (e.g., an intensity target).

### Limitations on Action

Action under the KP would be subject to the same limitations as action under the UNFCCC discussed above, flowing either from general international law or the terms of the UNFCCC.

## OPTIONS TO LINK UNFCCC AND KYOTO PROTOCOL DECISIONS

A comprehensive outcome establishing a single integrated climate regime would have several benefits.<sup>3</sup> It would promote greater reciprocity between states by facilitating political tradeoffs. It would promote economic efficiency through emissions trading. And it would promote greater consistency, coordination and administrative efficiency.

Such an outcome could be effectuated most directly by adoption of a single new instrument under the Convention (either a Convention amendment or a new protocol), which addressed actions and/or commitments by both Kyoto Protocol parties and Convention parties that are not parties to the Protocol. A single instrument would allow

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<sup>3</sup> See generally Daniel Bodansky and Elliot Diringer, *Towards an Integrated Multi-Track Framework* (Pew Center on Global Climate Change, 2007).

the regime to have a single set of institutions and procedures (for example, relating to reporting), while still allowing commitments and actions to be differentiated among countries in terms of type, stringency and/or timing – for example, through annexes that specify different sets of commitments or actions for different groups of countries, or through a country-by-country schedule of commitments. Such a new agreement could incorporate by reference some or all of the elements of the Kyoto Protocol.

If the parties to the UNFCCC and the Kyoto Protocol prefer to adopt two decisions, one relating to the Convention and the other relating to the Protocol, this would make the establishment of a single integrated regime more complex, but would not preclude various kinds of linkages between the Convention and Protocol decisions. Options include the following:

- *Political linkage* – Although at present, the ad hoc working groups under the Kyoto Protocol and the Convention are not formally linked, and the outcomes under the UNFCCC and the Protocol would need to be formally adopted in two separate decisions, they could be negotiated and agreed as a package.
- *Legal linkage* – If the COP and CMP were to adopt new legal instruments (such as protocols or amendments) to the UNFCCC and Kyoto Protocol, respectively, these legal instruments could be linked through entry into force requirements that made entry into force of each contingent on the other.
- *Operational linkage* -- New legal instruments under the Convention and Protocol could be operationally linked through cross-references. For example, if each instrument allowed emissions trading, the trading systems could be operationally linked through mutual recognition of allowances and use of a common transaction log. Similarly, to provide for a common system of reporting and review, one agreement could piggyback its reporting and review procedure on the other.



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