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The Legal Character of National Actions and Commitments In a Copenhagen Agreement: Options and Implications

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This working paper clarifies a complex set of issues around the legal character of commitments that lie beyond the threshold question of whether Copenhagen should result in a legally binding treaty, and helps weigh the potential risks and benefits to developing country Parties of expressing their NAMAs in a legally binding form. The analysis reveals that commitments can differ in terms of their form (binding v. non-binding), their content (specific v. vague), and in terms of the procedures and institutions by which their implementation is reviewed.

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EXECUTIVE SUMMARY

The world's governments may be negotiating the most important treaty in modern history: a multilateral environmental agreement (MEA) that may determine whether humanity can successfully reduce anthropogenic sources of greenhouse gases and avoid the most dangerous consequences of climate change. With less than two full weeks before negotiations are scheduled to conclude in Copenhagen, delegations have yet to agree whether they are aiming at a legally binding treaty or at a political declaration. If it is a treaty, will the text contain legally binding, specific commitments, backed by robust review procedures, or will it be a legally binding agreement with a hollow core?

Even as consensus builds around the need for urgent, collective action to combat climate change, countries remain deeply divided on how efforts to reach this global goal will be equitably shared among and between developed and developing countries. Part of the controversy centers around how developing country "nationally appropriate mitigation actions" (NAMAs) will be expressed in an international agreement, and how procedures for measuring, reporting, and verifying these actions might promote implementation. This Working Paper focuses on the choices facing developing country major economies participating in the Major Economies Forum (MEF) (China, India, Brazil, South Africa, and others) that are under pressure from industrialized negotiating partners to commit to actions that are *comparable* to those contemplated by richer nations.

This Working Paper clarifies a complex set of issues around the legal character of commitments that lie beyond the threshold question of whether Copenhagen should result in a legally binding treaty, and helps weigh the potential risks and benefits to developing country Parties of expressing their NAMAs in a legally binding form. The analysis reveals that commitments can differ in terms of their form (binding v. non-binding), their content (specific v. vague), and in terms of the procedures and institutions by which their implementation is reviewed.

To provide context, the authors note recent discussions within the Major Economies Forum (MEF) which suggest that MEF countries seem to be moving towards a "bottom up" approach to a climate agreement that places less emphasis on the international legal character of countries' commitments. The authors then review the legal character and legal implications of previous undertakings in the UN Framework Convention on Climate Change (UNFCCC) and the Kyoto Protocol. The paper then reviews the major proposals submitted by countries to the Copenhagen process, as well as recent versions of the negotiating text (described in the Appendix). The paper also provides a case study of draft U.S. climate legislation, and analyzes the special challenges facing developing country major economies under pressure to take actions comparable to richer countries.

A key conclusion from our analysis is that a post-2012 climate agreement, whether agreed in Copenhagen or thereafter, should take a legally binding form, but one that contains undertakings by countries with a wide range of legal form and content, and that are subject to differentiated review procedures. It notes that some developing country major economies are likely to be held to a higher standard of legal content and review, than other, poorer or smaller developing countries.

Lessons from other treaties tell us that international agreements with binding, specific content backed by robust review procedures are generally more effective than those with vague content or limited review procedures. The chart below indicates some of the benefits and risks associated with strengthening and weakening an international agreement's legal character, content, and review procedures designed to promote implementation of the agreement.

Box 1: General Benefits and Risks of Legal Character

	Legal Form of Overall Agreement		**Content** (legal form, clarity, specificity, ambition)		**Institutions and Procedures** (e.g., MRV, compliance and enforcement)	
Standards	**Binding**	**Non-Binding**	**High**	**Low**	**High**	**Low**
Benefits	Incorporation into domestic law Greater financial support to Parties and institutions Media and public awareness Confidence of carbon markets	Wider participation Higher expressed ambition	Greater transparency, predictability, and accountability Clearer market signals Harmonization and mutual recognition of domestic legislation	Wider participation Wider ratification	Greater transparency, predictability, and accountability Clearer market signals Higher rates of domestic implementation	Wider participation Wider ratification
Risks	Lower common denominator commitments Non-participation Non-ratification	Lack of media and public awareness and support Inefficient or inoperable carbon markets Retreat from multi-lateralism and rule of law	Lower common denominator commitments Non-participation Non-ratification Widespread non-compliance	Lack of media and public awareness and support	Non-participation Non-ratification Withdrawal of non-compliant Parties	Widespread non-compliance

Each country has the opportunity to influence the design the agreement's content and, ultimately, will have to decide whether to become a Party. Signing up to legally binding, clear, specific, measurable, and ambitious commitments demonstrates strong political will to contribute and comply, encourages other countries to do the same, and thus should lead to stronger environmental outcomes. In most cases the international penalties associated with failing to comply with an international treaty are unspecified, and thus the risks of being found in non-compliance seem low. However, a post-2012 climate change regime, built from the "bottom-up" will likely combine multilaterally agreed rules and bilateral arrangements. There are indications that this regime will support performance-based financial mechanisms and carbon markets that could reward countries willing to make more specific undertakings. For example, our case study of draft U.S. climate change legislation suggests that countries undertaking commitments of a stronger legal character may have preferential access to large scale carbon markets, and may be able to avoid the unilateral trade sanctions contemplated by the U.S. and other countries. While each country must weigh these risks and benefits for itself, this Working Paper seeks to assist in this process.

1 Introduction

1.1 Shifting expectations for an international climate change agreement

The international community is in the process of negotiating a new set of relationships that will determine the success of global efforts to reduce climate change. Parties to the 1992 UN Framework Convention on Climate Change (UNFCCC) aspire to reach an agreed outcome by December 2009 that will "urgently enhance implementation of the Convention" in order to achieve its ultimate objective of stabilizing atmospheric concentrations of greenhouse gases (GHGs) at safe levels through long-term cooperative action.[1]

The question of who will act, and how, to reduce global GHG emissions has evolved significantly over the past two decades. As will be described in more detail, below, the 1992 UNFCCC is a legally binding treaty that contains minimal commitments for all Parties but clearly differentiates these between developed (Annex I), donor (Annex II), and developing countries. In 1997, UNFCCC Parties concluded the Kyoto Protocol, which set binding emissions targets and timetables for developed countries. The Protocol did not require that developing countries cut emissions, but established climate funds to support their voluntary efforts. For these and other reasons the U.S., the largest historical emitter of GHGs, refused to ratify the Protocol and seriously undermined its effectiveness. In 2007, the UNFCCC Parties, including the United States, agreed to the Bali Action Plan (BAP) a roadmap for a post-2012 climate agreement. The BAP was negotiated against the backdrop of U.S. inaction, potential widespread non-compliance with Kyoto by other developed countries, and growing emissions from major emerging countries. It calls for enhanced national and international action on mitigation of climate change including commitments by developed countries, as well as "nationally appropriate mitigation actions" (NAMAs) by developing countries. However, progress has been slow in agreeing to the distribution, form, and content of actions and commitments under the BAP.

Discussions around a new international climate agreement have also occurred outside the UNFCCC, particularly within the "Major Economies Forum" (MEF), an informal grouping of 17 of the world's largest emitters of GHGs (Australia, Brazil, Canada, China, the European Union, France, Germany, India, Indonesia, Italy, Japan, the Republic of Korea, Mexico, Russia, South Africa, the United Kingdom, and the United States). In July 2009, MEF leaders signaled an apparently radical departure from previous climate agreements. They:

- Recognized that, in order to prevent the global mean temperature from rising more than 2 degrees Celsius above pre-industrial levels, global emissions must drop substantially by 2050**;** and
- Declared that they will "undertake transparent nationally appropriate mitigation actions, subject to applicable measurement, reporting, and verification, and **p**repare low-carbon gro**w**th plans."[2]

The MEF developing major economies also, for the first time, pledged to "promptly undertake actions whose projected effects on emissions represent a meaningful deviation from business as usual in the midterm."[3]

The MEF declaration raised expectations that a Copenhagen agreement could demonstrate how all major economies will take actions to reduce global emissions by more than 50% by 2020, and by more than 80% by 2050. If so, for the first time, both developed and developing countries will need to design, declare, and be held accountable for either NAMAs or commitments that put humanity on track towards a low carbon future. More recently, however, the MEF statements have reflected emerging views on legal form and review procedures that would represent a significant retreat from a MEA with a strong legal character. Proposals to merely "internationalize" domestic climate policies in the form of "listings" subject only to a Party-led peer review process seem to reflect a race to the bottom, rather than new leadership on the road to Copenhagen (see Box 2).

Box 2: The London MEF: A Race to the Bottom Up?

Meeting in London, 18-19 October 2009, MEF leaders revisited the design of "mitigation architecture" under a climate agreement. From the Co-Chairs' summary of the meeting a consensus seemed to be emerging that efforts by both developed and developing countries should be reflected in the form of "listings" that would "internationalize" domestic climate change policies in the form of commitments and actions. The term "internationalization" has no meaning in international legal practice but suggests a deep ambivalence about the legal character of the content of these "listings." As for the procedures associated with these listings, the Co-Chairs indicated:

> [The] review of developed country targets would look at implementation of quantitative outcomes and review of developing country actions would look at implementation of such actions. The use of national communications for transparency and accountability was noted; it was also noted that the frequency, timeliness, and content of national communications could be improved. In addition, it would be important for all countries except least developed countries to provide regular national emissions inventories using IPCC guidelines appropriate for their capabilities.

The Co-Chairs' text reflects an important emphasis on transparency and accountability. However, the text introduces the term "Party review" to describe the institutional arrangement that would manage this review, suggesting it would be done by government delegations rather than a committee of legal or technical experts. The enthusiasm for Low Carbon Growth Strategies seems to have dampened, and is now qualified by concerns about sovereignty, and about the strategies being used as a conditionality for access to funding under a climate agreement.

The Co-Chairs' text seems to reflect strongly recent U.S. positions. Because of its economic and political power, and the magnitude of its emissions, the U.S. has an asymmetrical influence over these negotiations. Recent U.S. proposals have emphasized a "bottom up approach" with a very light international architecture based on the UNFCCC into which countries register and review undertakings whose legal character is determined under domestic rather than international law. In the absence of additional international accountability measures, this bottom up approach may lead to lack of clarity over whether the sum of Parties' efforts is sufficient to avoid dangerous GHG emission levels. The emphasis on domestic rather than multilaterally agreed rules could also lead to an outcome where countries increasingly take unilateral measures, such as trade sanctions and financial and carbon market conditionalities to hold other countries accountable for making GHG emission reductions. See Section 5 below.

Sources: Fifth Meeting of the Leaders' Representatives of the Major Economies Forum on Energy and Climate Co-Chair's Summary, London, UK, 18-19 October 2009; U.S. Submissions to the Bonn and Bangkok Climate Talks (see Appendix).

Meanwhile, the Copenhagen negotiations continue to reflect deep divisions on how to equitably share the challenge of reducing emissions among and between developed and developing countries. Part of the controversy centers around how developing country NAMAs will be expressed in an international agreement, and how procedures for measuring, reporting, and verifying these actions might promote implementation.

The negotiations are further complicated because they are proceeding along two closely parallel tracks. The first aims at advancing the implementation of the UNFCCC under the auspices of that Convention, while the second aims at designing a next stage for the operation of the Kyoto Protocol (KP), when its first commitment period ends in 2012. Except as otherwise indicated, this Working Paper addresses unresolved issues under the UNFCCC track for long term cooperative actions, though much of its analysis and conclusions are applicable to both negotiating tracks.

1.2 Implications for developing country major economies

In an uncertain and rapidly changing context, this Working Paper seeks to draw conclusions of particular relevance to developing country major economies (see Box 3). It is likely that an agreement at or subsequent to Copenhagen will continue to maintain a "development divide" that reflects significant distinctions in the commitments expected of developed and developing countries. It is, however, also possible that an agreed outcome will significantly blur the previously bright lines that have distinguished the obligations of these two groups of countries. There is considerable pressure on developing country major economies in general, and the larger emitters among them in particular, to take on actions that are more closely *comparable*, in their legal character, to the commitments of industrialized countries. This pressure will likely build through a combination of international negotiations, bilateral diplomacy and unilateral, domestic policies aimed at addressing "competitiveness concerns" between those countries that are undertaking caps and those that are not. Industrialized countries will continue to push hard, through the MEF and the G-20, to secure comparability of commitments from major economies that are non-Annex I Parties to the UNFCCC and the Kyoto Protocol. Whether this insistence on comparability drives the legal character of countries' undertakings to a higher or a lower standard remains to be seen.

Box 3: CO_2 Emissions and Development in the Major Economies Forum

	CO_2 Emissions Per Capita 2004 (Metric tons / person)	Total CO_2 Emissions 2004 (1,000,000 metric tons)	UNDP Human Development Index 2006 (2006 ranking)	GDP Per Capita 2006 (PPP US$)
United States[abc]	19.84	5,889	15	43,968
Australia[abc]	17.48	351	4	33,035
Canada[abc]	17.18	549	3	36,687
Russia[ac]	10.89	1,575	73	13,205
Rep. of Korea[bc]	10.63	507	25	22,985
Germany[abc]	10.37	857	23	31,766
Japan[abc]	10.21	1,304	8	31,951
United Kingdom[abc]	9.19	551	21	32,654
South Africa[c]	9.00	428	125	9,087
Italy[abc]	8.25	482	19	28,828
France[abc]	6.54	397	11	31,980
China[c]	4.23	5,205	94	4,682
Mexico[bc]	4.02	415	51	12,176
Brazil[c]	1.88	346	70	8,949
Indonesia[c]	1.65	368	109	3,455
India[c]	1.07	1,199	132	2,489

[a]Annex I; [b]OECD; [c]G20

Sources: WRI Earthtrends; UNDP Human Development Report 2008.

The actions agreed by a developing country major economy will reflect what it can afford politically and economically to undertake domestically, and *vis a vis* its economic competitors. Where does a country wish to position itself geopolitically now and in the coming decades, in relation to its peers on either side of the "development divide?" There is a great deal of unclaimed space for leadership in the climate change negotiations. Leadership could entail supporting high standards with regard to the legal form, content and institutional and procedural oversight of all Parties' undertakings. Such leadership would signal support for multilateralism and the rule of law, and should generate significant goodwill from the international community. Given the soft consequences that typically flow from the breach of an MEA, and the growing appetite among some developed countries for unilateral trade and investment measures to address "competitiveness concerns," the rewards of undertaking a binding commitment may prove higher than the risks.

Ultimately, the position a country takes on the legal character of an international agreement it intends to join, involves a calculation about the redistribution of sovereignty. Is it willing to consent to a constraint on its own sovereignty in exchange for a reciprocal constraint on the sovereignty of other Parties? Does the problem that the international agreement intends to solve depend upon these constraints? These are questions each Party needs to assess in the context of a highly dynamic process.

2 The elements of legal character

In general, the legal character of an international agreement is reflected in its **form**, its **content,** and in the **institutions and procedures established to promote compliance with, and enforce, its terms.** A legally binding treaty, containing specific and enforceable obligations is the highest form of expression of political commitment and will at the international level. Ratifying such a treaty signals a Party's serious intent to comply with the treaty's terms, and, in return, can generate reciprocity and good will—elements essential to improve ratification of and compliance with a treaty. However, even if a Copenhagen agreement takes the form of a legally binding agreement, it may not result legally binding commitments for all Parties, and will likely contain commitments of a highly differentiated content (see Box 4).

Box 4: A "Legally Binding Agreement" with a Hollow Middle

One potential outcome of the Copenhagen negotiations is a legally binding agreement that would be open for ratification for all Parties. However, not all "legally binding" agreements contain clear and enforceable commitments. In practice, states regularly enter into agreements that take a legally binding form, but that are softly worded, vague and that are in some circumstances unenforceable. For example, a legally binding Copenhagen agreement could:

- For some or all Parties, contain discretionary "pledges" of actions that are not expressed in legally binding language;
- For some or all Parties, provide for no mechanisms to review or enforce compliance;
- For developing country Parties, make the performance of their NAMAs contingent on developed countries meeting their obligations to provide financial support; and/or
- Limit some or all Parties' commitments to performance "in conformity with domestic law" and allow those Parties to change domestic law without incurring international legal consequences.

Source: Ad Hoc Working Group on Long-Term Cooperative Action under the Convention, FCCC/AWGLCA/2009/INF.1.

2.1 Understanding the legal character of a multilateral environmental agreement

In general, the legal character of an international agreement is reflected in its **form**, its **content,** and in the **institutions and procedures established to promote compliance with and enforce its terms.** A legally binding text is one whose form, content and institutional and procedural provisions reflect its Parties' consent to be bound.

Major, contemporary multilateral environmental agreements (MEAs) are most commonly expressed in legally binding treaty **form** as "conventions" and "protocols" to those conventions. (We use the term MEA in this paper to refer to legally binding treaties and not "soft law" instruments such as ministerial declarations). Typically, these MEAs incorporate the formal legal elements of treaties, most notably, final clauses that include provisions for signature, ratification, accession, approval, and withdrawal recognized by international treaty and customary law as a means of expressing and withdrawing consent to be bound.[4]

In terms of their **content**, many MEAs, including the UNFCCC and the KP, contain highly differentiated commitments that vary widely with regard to their legal form, clarity, specificity, and ambition. Commitments within MEAs can be expressed in either mandatory or discretionary language. They can distinguished between **obligations of conduct**, which include obligations to cooperate, prepare programs, report on progress, or to promote public awareness of issues; and **obligations of result**, which require Parties to achieve measurable, reportable and verifiable results, for example, through specific targets and timetables. Thus, many contemporary MEAs contain differentiated commitments, which allow Parties to the same binding treaty, to have commitments that differ in their legal form and in their clarity, specificity and ambition.

In some cases, even though commitments in a treaty are legally binding in their form (e.g., they are described as commitments, use mandatory language, and are contained in a legally binding treaty), they may have very little legal effect at the international level. If the language in which they are expressed is vague and imprecise, assessing compliance becomes difficult. In these cases, binding text may, in effect, be unenforceable at the international level. Nevertheless, for many countries, the international legal character of a MEA will trigger domestic ratification procedures, rooting the agreement in domestic legal and political process, and in some circumstances, triggering the enactment of enabling legislation. The domestic legal effect of an international treaty can be more significant than what is reflected in the international instrument.

The accountability of a Party under a MEA depends on the **institutions and procedures** the agreement establishes to promote implementation by monitoring, reviewing, and promoting compliance with their commitments. Many contemporary MEAs require Parties to report on their progress and have established a process to review these reports. Some contemporary MEAs have established multilateral procedures and institutions that promote compliance with their terms by offering financial and technical assistance.[5] This assistance is typically limited to eligible developing country Parties or Parties with "economies in transition" (EITs) to market economies.

A few of these compliance procedures are authorized to reach conclusions as to whether a Party is in non-compliance, and to recommend the suspension of rights and privileges under the MEAs.[6] Even fewer MEAs also require, authorize, or provide a basis for justifying the use of unilateral trade measures by one Party against another Party for failure to comply with their terms.

Many contemporary MEAs, including the UNFCCC and the KP, provide for "latent" binding arbitration or judicial dispute settlement, or compulsory, but non-binding conciliation, as means of settling disputes that arise between Parties. Many MEAs, like the UNFCCC and the KP, provide for "optional clauses" that allow Parties to opt into compulsory and binding judicial dispute settlement. However, no contemporary MEA requires Parties, when ratifying the agreement, to subject themselves to a compulsory and binding judicial dispute settlement procedure, and no Party to a contemporary MEA has done so.[7]

2.2 What if a country breaches a legally binding multilateral environmental agreement?

Although it remains rare for a MEA to provide, in its terms, for compulsory and binding enforcement procedures, and to define specific remedies and consequences for breach, it remains an important principle of international law – perhaps the most important principle – that breach of an international treaty gives rise to state responsibility for the consequences of that breach.

All internationally binding agreements are governed by the principle of "pacta sunt servanda" meaning that "[e]very treaty in force is binding upon the Parties to it and must be performed by them in good faith."[8] Essentially this is a statement of the "rule of law" in international relations. Customary international law is emerging to suggest that the breach of an international obligation, including an international treaty obligation, is an internationally wrongful act that gives rise to state responsibility to make restitution for the consequences of that breach.[9] Parties to a MEA may agree in advance what specific consequences will flow from the breach of a particular provision of a treaty. As will be mentioned, the KP's "enforcement consequences" as well as the trade bans in other MEAs, such as the Convention on International Trade in Endangered Species (CITES) are rare but important examples of such pre-defined enforcement consequences.[10]

2.3 What is the value of a legally binding multilateral environmental agreement without strong enforcement procedures?

In the absence of strong enforcement procedures and consequences, MEAs can promote accountability by establishing institutions and procedures with the authority to receive, analyze, and report information on Parties' activities. A data rich environment enables Parties to build trust through verification, and to exercise the kind of diplomatic pressure – sometimes referred to as "shaming" – that is an essential means of promoting accountability among countries.

Contemporary MEAs continue to rely heavily on transparency of information, and multilateral diplomatic processes for accountability. For eligible Parties, they also rely on technical and financial assistance, rather than a formal legal response, to promote compliance with their terms. The formalities associated with a legally binding regime can, however, operate to exclude Parties, including Parties crucial to the MEA's effectiveness, from participating in the regime. Domestic ratification processes can slow or prevent a country from formally joining a regime.

The international legally binding character of a MEA is properly understood as a signal of the international community as a whole and of its individual Parties, of the highest level of political will of the Parties to achieve its objectives. While legally binding treaty need not include mandatory content for all Parties, it does tend to generate more sophisticated and robust institutions and procedures necessary to support transparency and accountability of performance. The legally binding nature of an agreement correlates, for example, with the budgets and political clout of the institutions associated with these regimes, including their ability to attract financial support, the attention of high level representation, media attention, and the support of civil society and the public at large.

3 A brief history of legal character under the climate change regime

3.1 The UNFCCC

The UNFCCC and KP have, in many ways, followed the form, content, and procedural and institutional characteristics of the ozone layer protection regime, widely regarded as among the most successful MEAs.[11] The 1985 Vienna Convention for the Protection of the Ozone Layer and the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer forged a legally binding set of schedules for the phase out of the consumption and production of chemicals that threaten the stratospheric shield that protects life on earth from ultraviolet radiation. In two decades, its legal framework of commitments, financial and technical support, and compliance system, led developed and developing countries to dispose of stockpiles, transform industrial processes, and dramatically reverse the deterioration of the ozone layer.

Like the Vienna Ozone Convention, the UNFCCC is a "framework" treaty. It is legally binding in its form, relatively weak in its content, but provides for quite robust procedures and institutions, including the means to enhance its commitments through the adoption of Protocols. As a ratifiable international agreement, the Convention provides a legally binding framework that sets out an overall objective, a set of principles, a series of procedural obligations, and a set of institutions designed to oversee the implementation and development of the regime. Those commitments that are applicable to all Parties are general obligations of conduct, including the commitment to develop national climate programs, national emissions inventories, and report these to the Conference of the Parties (COP).

The UNFCCC also contains a softly worded "aim" that suggests developed (Annex I) Parties should return their GHG emissions to 1990 levels by 2000. It establishes a financial mechanism to support the incremental costs of developing country implementation of their commitments. Countries members of the OECD in 1992 (Annex II Parties) are required to provide an unspecified amount of "new and additional" financial resources to the UNFCCC's financial mechanism.

All Parties are required to develop national inventories of GHGs, and to formulate and implement national programs containing measures to mitigate emissions and facilitate adaptation to climate change. This information is to be communicated to the Conference of the Parties (COP), which is mandated to:

> *"[a]ssess, on the basis of all information made available to it in accordance with the provisions of the Convention, the implementation of the Convention by the Parties, the overall effects of the measures taken pursuant to the Convention, in particular environmental, economic and social effects as well as their cumulative impacts and the extent to which progress towards the objective of the Convention is being achieved."*

The commitments of non-Annex I Parties under the UNFCCC and the KP are, in the view of some Parties, *contingent* upon the fulfillment of Annex II Parties of their obligation to provide new and additional funding to support developing country implementation.[12] Arguably, this contingency affects the legally binding character of developing country commitments, by tying it to the performance of other Parties.

The national communications and national GHG inventories of Annex I Parties have become subject to an expert review process under the UNFCCC, which, at least in theory, provides an opportunity for the COP or its Subsidiary Body on Implementation to assess the implementation of individual Annex I Parties.[13] The COP's failure ever to do so arguably undermines an aspect of the legally binding character of Parties' commitments by signaling that Parties are reluctant to hold each other to account for non-compliance.

The UNFCCC has a set of final clauses that include standard language on dispute settlement including articles on judicial dispute settlement and arbitration. For those Parties that agree, either in general or when a specific dispute arises, to subject themselves to these procedures, the dispute will be resolved with a legally binding judgment. The UNFCCC also provides for a conciliation process, which has compulsory jurisdiction over all Parties, but will operate only when triggered by one Party against another, and can only "render a recommendatory award, which the Parties shall consider in good faith."[14] None of these procedures have been invoked.

The UNFCCC Parties negotiated, and nearly completed, the design of a Multilateral Consultative Process (MCP), based largely on the Montreal Protocol's non-compliance system, that would have facilitated compliance with the Convention. The MCP was never finalized, as the negotiations of the KP were seen to overtake the need for compliance system under the UNFCCC.[15]

3.2 The Kyoto Protocol

The KP develops the climate regime further through the introduction of quantified emissions limitation and reduction objectives (QELROs) for Annex I Parties, which are specific, time-bound "obligations of result." Each Annex I Party is provided an "assigned amount" of GHG emissions allowed it during the KP's commitment period of 2008-2012. The KP's "flexibility" mechanisms are designed to reduce the costs to developed countries of remaining within their assigned amounts, by allowing them to trade allowances among themselves and to acquire offsets through investments in GHG reducing projects in developing countries. The KP enhances the UNFCCC's procedures and institutions for reviewing the performance of Annex I Parties, and establishes a compliance procedure, designed both to facilitate and to enforce compliance with its terms. Like the UNFCCC, the KP has a dispute settlement procedure that would only become operational if Parties choose to opt into it.

The delegations that led the design of the Kyoto Protocol followed the principle that more specific commitments, and functioning flexibility mechanisms, required a more robust compliance system to ensure accountability among Parties, and predictability for investors. More particularly, they argued that an international emissions trading system should be backed by a compliance system with an enforcement mechanism. This logic led the negotiators to enhance accountability by improving the procedures for carrying out expert review of developed country inventories and national communications. Expert Review Teams, operating under the auspices of the UNFCCC Secretariat are authorized to carry out in depth reviews of the quality of reported data, and can raise questions of implementation with regard to a Party's performance.

The logic behind legally binding commitments also led to a mandate, under Article 18 of the KP, to:

> "approve appropriate and effective procedures and mechanisms to determine and to address cases of non-compliance with the provisions of this Protocol, including through the development of an indicative list of consequences, taking into account the cause, type, degree and frequency of non-compliance. Any procedures and mechanisms under this Article entailing binding consequences shall be adopted by means of an amendment to this Protocol."

This mandate proved to be both an engine of innovation and a brake on the legal integrity of the KP. The Marrakech Accords to the KP put in place a Compliance System that is authorized to review questions of implementation raised (either by the Expert Review Teams or by a Party) with regard to the performance of both developing and developed Parties. A question raised by or with regard to developing country Party is referred to the "Facilitative Branch" of the KP's Compliance Committee, which can provide advice and assistance to that Party.

A question of implementation raised with regard to a developed country's compliance with its obligation to report and to comply with its QELROs can, if substantiated, be referred to the Compliance Committee's "Enforcement Branch." If, during the KP's commitment period, the Enforcement Branch finds that a Party is in non-compliance with its obligations to report on its national GHG emissions, the Branch can suspend that Party's eligibility to engage in the KP's market mechanisms. If, at the end of the KP's commitment period a Party, having been given a chance to purchase additional offsets or allowances, still exceeds its assigned amount, the Enforcement Branch can require that Party to deduct 1.3 tonnes of carbon equivalent emissions from the subsequent commitment period for each one it exceeded its assigned amount.

The KP's compliance system was adopted as part of the Marrakech Accords in 2001, as a set of decisions taken by the UNFCCC COP in preparation for the entry into force of the KP, and both Branches of the Compliance Committee have begun operations. Indeed the Enforcement Branch has dealt with two cases of potential non-compliance – both of which resulted in the improved performance of the Parties in question.[16]

However, the enforcement consequences associated with the findings of non-compliance – the suspension of the eligibility to participate in the Protocol's "flexibility mechanisms," and the imposition of the 30 percent penalty – were never "adopted by means of amendment" to the Protocol, as required by Article 18. Furthermore, the KP Parties have yet to agree upon their Assigned Amounts for the second commitment period. This leaves open the real possibility that if a Party were found by the Enforcement Branch to be in non-compliance at the end of the KP's commitment period, the enforcement penalties would be non-operational.

3.3 Lessons for a Copenhagen agreement

Legally binding form, specific content, and robust institutions and procedures were justified under the Kyoto Protocol by arguments that linked the rule of law to environmental integrity, mutual accountability, and the carbon market's need for stability and predictability. By linking the legal form of Parties' commitments to specificity of content and robustness of institutions and process, the KP climate change regime has introduced significant innovations to international environmental law.[17] Key successes include:

- Transparency and accountability have been improved through the monitoring and evaluation of developed country Parties' performance by Expert Review Teams authorized to conduct in country visits, deploy third-Party data and to raise questions of implementation.
- The principle of common but differentiated responsibility has been implemented through the split functions and jurisdictions of the facilitative and enforcement branches, in a way that gained the acceptance by both developed and developing countries of enhanced oversight of their performance.
- While it is operating on somewhat unstable legal grounds due to the language in Article 18, the KP's Compliance System is developing an important track record in promoting compliance.

This suggests that a Copenhagen agreement designed as an advance on the KP should maintain a logical link between form, content and procedures, but should also seek to reach agreement on the consequences for non-compliance *within the same ratifiable instrument* as contains the new commitments.

Market mechanisms are used under the KP creatively to both reduce the costs of compliance, and – through the threat of suspension of the ability to trade – create incentives for compliance. International emissions trading between Annex I countries depends upon the legally binding character of their QELROs to create assigned amount units that would be fungible across different domestic legal systems. Offset trading based on the Clean Development Mechanism depends on project level contracts, enforceable through a mixture of domestic legal systems, international arbitration, and indirectly, subject to decisions

made by the CDM Executive Board. The legal and institutional character of the CDM arrangements have been essential to providing credibility and predictability to buyer and sellers, as well as environmental integrity to the system as a whole. If a Copenhagen agreement also relies on carbon markets, whether at the allowance, project or sectoral level, similar kinds of arrangements will be necessary. Indeed the emissions reduction purchase agreements (ERPAs) and the CDM Executive Board's mandate to approve project baselines and certify emissions reductions, by providing a legal and institutional framework for project level performance of developing countries, may provide a prototype for the kind of results based MRV anticipated under the Copenhagen negotiations, discussed below. [18]

As discussed later it is not clear that the Bali Action Plan and the subsequent negotiations are taking a similar path as the KP with regard to the legal character of a post-2012 agreement, and its multilaterally agreed approach to carbon markets. Some developed countries have rejected what they see as the KP's heavily "top-down" approach. Others that championed the need for strong rules and institutions during the KP negotiations have been disappointed by the performance of Parties and the institutions they created under the KP. Efforts by developed countries to include more specific commitments by major developing economies in a Copenhagen agreement has also dampened the enthusiasm of developing countries for a legally binding regime with a tough compliance mechanism. As the outcome from the MEF meeting in October 2009, suggests, some countries have begun to emphasize the need for a greater focus on the legal character of domestic rules and the capacity of national institutions as the main engines of implementing and enforcing climate change policy.

4 The Bali Action Plan and legal character under a Copenhagen agreement

The Bali Action Plan, which is guiding the negotiations towards an "agreed outcome" in Copenhagen, leaves unsettled the legal form, content and institutional and procedural dimensions of a Copenhagen agreement. However, the BAP contains two major breakthroughs that could have implications for the legal character of the post-2012 regime. First, it sets the expectation that all Parties to a Copenhagen agreement, developed and developing, demonstrate how they are contributing to the Convention's objective. Second, it sets the expectation that all Parties, describe the content of their commitments and actions in a measurable, reportable and verifiable (MRV) manner.

4.1 Legal form

The UNFCCC and the Kyoto Protocol provide for four types of "related legal instruments" – protocols, amendments, annexes, and amendments to annexes. Each of these would be legally binding on the Parties that ratified the respective instrument.

The COP or the CMP can each also reach decisions, and have provided fora for the adoption of "Ministerial Declarations." While mainstream interpretations of international law do not view such COP decisions as being legally binding on Parties, they can and have had important political and legal effects on Parties' commitments.[19]

The Marrakech accords to the Kyoto Protocol, for example, contain authoritative interpretations, clarifications, and elaborations of the KP's text. Most significantly, the CMP's interpretations of the appropriate method for calculating emissions from Land Use, Land Use Change and Forestry had specific and direct consequences for the levels of emissions reductions expected of certain forested countries. Detailed rules for the implementation of the Clean Development Mechanism were adopted by decision, and led to the operationalization of the CDM and the authorization of the CDM Executive Board to take authoritative decisions that determine which methods and projects will generate offsets.

Thus, past practice under the UNFCCC and the KP sets a precedent for COP and CMP decisions to significantly interpret and advance the implementation of existing commitments, but not to create new, legally binding commitments.

4.2 Content

Like the Berlin Mandate, the BAP differentiates between the outcomes expected for developed countries and those expected for developing countries that will be Parties to a Copenhagen agreement. The BAP does make clear, however, that developed countries are expected to emerge with "[m]easurable, reportable and verifiable nationally appropriate mitigation commitments or actions, including quantified emission limitation and reduction objectives [QELRCs] . . . while ensuring the comparability of efforts among them, taking into account differences in their national circumstances."

Developing country Parties will, by contrast, emerge with "[n]ationally appropriate mitigation actions [NAMAs] . . . in the context of sustainable development, supported and enabled by technology, financing and capacity-building, in a measurable, reportable and verifiable manner."

The choice of the word "commitment" to describe the participation of developed countries, and "action" to describe the participation of developing countries is deliberate. A number of developing country delegations have characterized this choice of words as an essential "firewall" or "development divide" between rich and poor countries. Arguably the use of different terms draws a line between legally binding obligations of result for developed countries and softer obligations of conduct – or even non-binding "pledges" – by developing countries.

Which countries will be considered "developed" and which "developing" is undetermined by the BAP with delegations expressing strong differences of view over whether a Copenhagen agreement should continue to reflect the Annex I/non-Annex I division in place since 1992. This will be discussed further below. However, under the BAP both QELRCs and NAMAs must be measurable, reportable and verifiable. This will affect both the content of these commitments/actions, as MRV implies a degree of specificity, as well as an emphasis on obligations of result.

In the view of some delegations the BAP links any legal obligation of a developing country to carry out a NAMA with the availability of financial, technical or capacity building support from developed countries. In so doing, it extends the contingent relationship between developing country commitments and developed country financial obligations from the UNFCCC to a Copenhagen agreement.

4.3 Institutions and procedures

The concept of monitoring, reporting and verifying (MRV) both developing country actions and developed country financing of such actions, also carries with it a strong institutional and procedural expectation, raising the question of by whom and how QELRCs, financial commitments and NAMAs will be measured, reviewed and verified. The BAP does not contain any further reference to monitoring, review or compliance procedures.

5 State of play: Snapshot of a moving process

The Appendix to this paper provides an analysis of countries positions on legal form, content and institutions and procedures designed to promote implementation of a climate agreement, which is summarized below:

Legal Form:

- Many delegations, including many major economies, support a Copenhagen agreement that takes the form of a legally binding treaty instrument, though some prefer a new treaty or Protocol under the UNFCCC, while others limit their support of a legally binding instrument to an amendment to the Kyoto Protocol.

Content:

- Most delegations recognize that developed country commitments should be included in this agreement as specific, quantified emissions reduction commitments (QERCs), i.e., targets and timetables.

- Most delegations consider that developed country commitments should, at least informally, be differentiated on the basis of some principles of comparability that take into account historical, current and projected emissions, as well as countries' current and future capacity to invest in emissions reductions.

- Most delegations acknowledge that actions and commitments undertaken by countries should not compromise their development objectives. Major economies have acknowledged the value of pursuing these objectives in the context of low carbon growth plans.

- All delegations agree that developing countries should undertake NAMAs under a Copenhagen agreement.

- Most delegations agree that developing country NAMAs should share common characteristics, and anticipate that these NAMAs should meet common standards for transparency and accountability.

- Some delegations favor an agreement that would identify a new category of developing country Parties whose national circumstances reflect greater responsibility or capability, and that would be required to agree to more specific, quantified content than other developing country Parties.

Institutions and Procedures:

- Many delegations support the use of a schedule or registry that would allow for the form and content of commitments and NAMAs to be measured, reported, verified, and compared in a transparent manner.

- Most delegations agree that NAMAs that receive financial and technical support should be verified by the financial, or carbon market mechanisms providing that support.

- Some delegations, including developing country major economies such as China and India, have expressed the view that developing country NAMAs that are not receiving support should be verified by domestic rather than international institutions and procedures.

- While the issue of compliance has received limited attention so far in the Copenhagen negotiations, some delegations have supported the use of the procedures and institutions developed under the

UNFCCC and the Kyoto Protocol to report, review, promote and enforce compliance with commitments to be applied to developed country commitments under a post-2012 regime.

6 Unilateral standard setting for legal character: A case study of draft U.S. climate legislation

The pressure on developing countries, particularly major economies, to undertake NAMAs that are comparable in their legal character to developed country commitments, may continue to build as the international negotiations reach Copenhagen. The U.S.-led Major Economies Forum has already made some progress in pressing for increasingly stronger statements with regard to "global goals" and "low carbon growth plans" (though, as has been described, it has more recently taken what appears to be a weak stance on legal character).

Bilateral diplomacy will build this pressure further, and may well be backed by the threat of unilateral, domestic policies aimed at addressing "competitiveness concerns" between those countries that are undertaking caps and those that are not. Both the U.S. and the European Union have been actively considering the use of "border adjustment measures" as means of encouraging their major trading partners to adopt climate policies that are comparable to their climate policies.[20] Other industrialized countries have not taken such measures, but may be reasonably expected to follow the lead of the world's largest economies. One of the stated objectives of U.S. measures is to prevent "leakage" through the relocation of GHG intensive supply chains and production processes from capped to uncapped countries.

The stated purposes and specific measures contained in the American Clean Energy and Security (ACES) Act passed by the U.S. House of Representatives (but not yet enacted as law) is an extreme example of a set of legal implications that might arise from the legal character of commitments that a country signs up to in Copenhagen, or subsequently.

ACES would, if it became law, set negotiating goals for the U.S. delegation that would include:

> "to induce foreign countries, and, in particular, fast-growing developing countries, to take substantial action with respect to their greenhouse gas emissions consistent with the Bali Action Plan developed under the United Nations Framework Convention on Climate Change."[21]

Furthermore, the bill provides that:

> "[i]t is the policy of the U.S. to work proactively under the United Nations Framework Convention on Climate Change, and in other appropriate fora, to establish binding agreements, including sectoral agreements, committing all major greenhouse gas-emitting nations to contribute equitably to the reduction of global greenhouse gas emissions."[22]

More specifically, under the bill the U.S. Administration would be directed to achieve the following negotiating objectives:

> (1) to reach an internationally binding agreement in which all major greenhouse gas-emitting countries contribute equitably to the reduction of global greenhouse gas emissions;
>
> (2) (A) to include in such international agreement provisions that recognize and address the competitive imbalances that lead to carbon leakage and may be created between Parties and non-Parties to the agreement in domestic and export markets; and

> (B) not to prevent Parties to such agreement from addressing the competitive imbalances that lead to carbon leakage and may be created by the agreement among Parties to the agreement in domestic and export markets; and
>
> (3) to include in such international agreement remedies for any Party that fails to meet its greenhouse gas reduction obligations in the agreement.[23]

Thus, the U.S. would be seeking, in an international agreement, comparable efforts from major economies, and remedies to enforce them. If these negotiating objectives were not met by January 2018, ACES would trigger the establishment of a "border adjustment" program that could penalize importers of products made by U.S. competitors in energy or GHG intensive, trade exposed sectors, when those products are produced or manufactured in a country that failed to meet at least one of several tests. While the detailed methodologies of how border measures would be applied to specific products, sectors and countries have not been developed in the bill, these tests give an indication of what the U.S. will be looking for in terms of "comparability" of efforts of its major trading partners:

> (1) The country is a Party to an international agreement to which the U.S. is a Party that includes a nationally enforceable and economy-wide greenhouse gas emissions reduction commitment for that country that is at least as stringent as that of the U.S.
>
> (2) The country is a Party to a multilateral or bilateral emission reduction agreement for that sector to the [sic] which the United States is a Party.
>
> (3) The country has an annual energy or greenhouse gas intensity . . . for the sector that is equal to or less than the energy or greenhouse gas intensity for such industrial sector in the United States in the most recent calendar year for which data are available.[24]

It is worth noting that ACES also contains provisions that would limit the eligibility of countries to receive United States financial assistance generated by the bill. Eligibility would be reserved for those developing countries that entered into an international agreement to which the United States is a Party, "under which such country agrees to take actions to produce measurable, reportable, and verifiable greenhouse gas emissions mitigation" or has "in force national policies and measures that are capable of producing measurable, reportable, and verifiable greenhouse gas emissions mitigation;" and "has developed a nationally appropriate mitigation strategy that seeks to achieve substantial reductions, sequestration, or avoidance of greenhouse gas emissions, relative to business-as usual levels."[25]

Finally, ACES sets standards for which countries that have established emissions trading schemes will be allowed to sell allowances into the U.S. cap and trade program. . These standards are based on a U.S. government assessment of whether that country's scheme is "at least as stringent as the program established by this title, including provisions to ensure at least comparable monitoring, compliance, enforcement, quality of offsets, and restrictions on the use of offsets."[26]

From this analysis it can be concluded that if a major developing economy undertakes commitments that are more comparable in form, content and process, to commitments undertaken by developed countries it will be less likely to be subject to these kinds of unilateral measures from the U.S. It also suggests that the institutions and procedures that may be making important determinations about a country's compliance with its domestic climate policy or its international commitments may include regulatory agencies in other countries.

Finally, it is important to note that a number of these unilateral measures would have an impact on the flow of products, services and capital between countries and as such could trigger the application of multilateral,

regional and bilateral trade and investment agreements. In some instances, this could include their dispute settlement mechanisms. This could lead to a situation in which, for example, a WTO dispute settlement panel is called on to assess whether restricting trade in products based on the comparability of climate legislation between two trading partners is a justifiable trade measure.[27]

7 Conclusions: The benefits and risks of legal character

Lessons from other treaties tell us that international agreements with binding, specific commitments backed by robust review procedures are generally more effective. However, each country must weigh for itself the risks and benefits of supporting and joining such an agreement. As illustrated in Box 1 on page 3 of this paper, these risks and benefits relate to the legally binding form of the agreement, as well to the legal character of the content of that agreement, including the legal form, clarity, specificity and ambition of obligations; and the requirements for reporting and verifying compliance and enforcement. Signing up to legally binding, clear, specific, measurable, and ambitious commitments demonstrates strong political will to contribute and comply, encourages other countries to do the same, and thus should lead to stronger environmental outcomes.

Developing country major economies are likely to remain under pressure to take on commitments that are more closely comparable in their legal character to the commitments of industrialized countries. The contributions of a developing country major economy to the negotiations will be in part based on what it can afford politically and economically to undertake domestically and *vis a vis* its economic competitors, and where it wishes to position itself geopolitically, in the coming decades in relation to its peers on either side of the "development divide."

While the compliance system agreed as part of the Kyoto Protocol was viewed by many at the time as essential to promoting the effective implementation of Parties' commitments, the application of a similar system that would apply to both developed and developing countries under a post-2012 agreement, has not found widespread support. Indeed, recent developments in the MEF suggest a growing interest among both developed and developing major economies to reject Kyoto's "top-down" approach for a "bottom up" agreement that relies for its effectiveness on the legal character of domestic, rather than international laws and institutions.

This approach also carries risks and benefits. Rooting climate change actions in domestic law seems essential to nationally owned and effectively implemented policies. However, in the absence of multilaterally agreed rules on compliance and enforcement, countries may find themselves facing compliance-related sanctions and conditions developed unilaterally, under national legislation. There are indications that a more bottom-up regime may lead, for example, to performance-based financial mechanisms and carbon markets that would reward countries on the basis of unilateral assessment of country commitments and compliance. For example, our case study of draft U.S. climate change legislation suggests that countries undertaking commitments of a stronger legal character may have preferential access to large scale carbon markets, and may be able to avoid the unilateral trade sanctions. While each country must weigh these risks and benefits for itself, this Working Paper seeks to assist in this process.

Appendix

Country preferences for legal design options under a Copenhagen agreement (As of September 2009)

As has been noted, the international climate negotiations are currently proceeding on two closely parallel tracks. The Ad Hoc Working Group on Long Term Cooperative Action (AWG-LCA) is negotiating an outcome aimed at advancing the implementation of the Convention; the Ad Hoc Working Group on the Kyoto Protocol (AWG-KP) is seeking a deal that would create a new set of commitments for when the KP's first commitment period ends in 2012. The need for two tracks arises primarily from the fact that the membership of the two regimes does not perfectly overlap and that the United States, which is responsible for nearly 25% of global emissions, is unlikely to join the KP. Unless indicated otherwise, the analysis that follows focuses on proposals under the AWG-LCA track.

This appendix analyzes delegations' preferences regarding the design options for the legal form, content and procedures and institutions that will determine the legal character of actions and/or commitments under a Copenhagen agreement. Our analysis is drawn from the submissions made so far in the negotiations and focuses on those made by the major economies, as well as other major negotiating groups.

Legal form

The legal form of a Copenhagen agreement remains undetermined. A delegation's choice of form reveals its preferences for which instrument, the UNFCCC, the KP, or both, will be the legal focus for post-2012 commitments and action. Many delegations wish to maintain the legal and institutional gains made under the KP, and to hold Annex I countries accountable for their commitments under the Protocol. Many developing countries want to keep the KP "alive" as a means of maintaining the "development divide" between the KP's tough targets and timetables for developed countries, and maintain the UNFCCC as a track for softer obligations for developing countries. Many delegations also recognize the need to draw the United States, which is not a KP Party, into the post-2012 regime, and would prefer to merge the more innovative aspects of the KP, including the flexibility mechanisms, the accounting framework including international standards for LULUCF, and the compliance procedure, into a new legal instrument that would replace the Kyoto Protocol.

Proposals for an amendment to the Kyoto Protocol

Many delegations, including the EC, China, India, Brazil and South Africa have proposed an amendment to the Kyoto Protocol under Articles 20(2) and 21(2).[28] This arrangement would continue to hold Parties accountable to current commitments. One key disadvantage with this arrangement, however, is that the U.S. would not be able to ratify the agreement and would only be able to participate as an observer.[29] During negotiations most Parties have expressed a strong preference to include the United States within whatever post-2012 climate regime is agreed.

Some delegations have proposed a two-track approach to address concerns with the United States' non-ratification of the Kyoto Protocol. South Africa, for example, has made the case for including both the Kyoto Protocol and a supplemental legally binding instrument ("convention track") in the negotiated outcome at Copenhagen. The convention track would cover all developed countries, guarantee support for developing country actions, and create mechanisms for international recognition of developing country actions. The Kyoto Protocol and supplemental instrument would be linked to "allow the application of legally binding consequences for non-compliance with commitments by all developed countries."[30]

Proposals for a new protocol to replace the Kyoto Protocol

Some proposals, including from Japan, have taken the form of a new protocol.[31] A new protocol would create opportunities for greater coherence among implementing institutions and improve efficiency more than might be possible under an amended Kyoto Protocol.[32] However, it may also require participating countries to agree to new obligations and ways to differentiate among themselves.

Proposal for an implementing agreement

In June 2009, the United States proposed that the outcome of the Copenhagen COP be an "implementing agreement."[33] The proposal took many delegations by surprise, as this is not a legal instrument contemplated under the UNFCCC. The U.S. delegation described an implementing agreement as "meant to further enhance the implementation of the Convention to which [the United States] is a Party."[34] In contrast to other proposals to amend (or substantially amend) the Kyoto Protocol, the implementing agreement would be "framed as a complete agreement, not as an amendment to one paragraph or section of the Convention…"[35] According to the U.S. proposal, the implementing agreement would lead to new obligations and ways to differentiate among countries.

The U.S. proposal is deliberately ambiguous as to the legal form of an "implementing agreement," and the U.S. delegation has sent mixed messages as to whether its legal binding character refers to the international or the domestic characteristic of countries' commitments.

On the one hand, the proposal refers to the need for a Copenhagen outcome to be "a strong international Agreement" . . . "based on both the robust targets and ambitious actions that will be embodied in U.S. domestic law" and that it allow for "legally binding approaches." The U.S. proposal also shares many characteristics of a treaty instrument (e.g., the use of preambular paragraphs, numbered articles, and the term "shall" and "Party" to describe commitments). On the other hand, the proposal qualifies what would be the most important commitment in the agreement, developed countries' targets and timetables, with the phrase "in conformity with domestic law."

The U.S. delegation has since made it clear that this phrase is intended to limit the U.S. (and other Parties') international legal commitments to what it is bound by under domestic law. Under the current draft climate legislation being considered in the U.S. Congress, the U.S. would thus be obligated to meet its national emissions cap, and may take supplementary measures for further reductions, such as support for avoided deforestation. The "domestic law" limitation could be interpreted as effectively gutting the international legal force of the agreement by providing Parties with a defense against non-compliance that would otherwise be excluded under the law of treaties. The Vienna Convention, for example, in describing what makes a treaty binding under international law provides that "[a] Party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."[36]

By choosing a form not described or pre-defined in the UNFCCC, the proposal is also designed to give itself and other countries greater flexibility as to how to bring a new set of commitments into force. No U.S. administration has been able to convince the U.S. Senate (which must approve all treaties) to ratify a major MEA since the UNFCCC itself,[37] and some feel that characterizing the Copenhagen outcome as an implementing agreement rather than a new treaty, protocol or amendment might ease its way towards consent by the required super majority of 67 Senators.

The U.S., because of its economic and political power, and the sheer magnitude of its GHG emissions will continue to have an asymmetrical influence over the design of the Copenhagen agreement.

Indeed, the U.S. proposal's emphasis on the character of domestic law, rather than international law has raised the possibility that the fundamental architecture of the Kyoto Protocol will be rejected outright, for a "bottom up" approach. While the contours of this approach are unclear at this stage, one possible way

forward might be a very light international architecture based on the UNFCCC into which countries register and review commitments whose legal character is determined under domestic rather than international law. This could lead to an outcome of very low standards in terms of the legal character of a Copenhagen agreement and jeopardize GHG reduction goals. Such an approach would also seem to do away with any international accounting standards, a prerequisite for ensuring that GHG reduction efforts can be compared in a meaningful way. Instead, each country would determine what rules and standards it would use to count and inventory LULUCF or carbon offsets.

Ironically, given the U.S. Administration's desire to meet the expectations of Congress, this approach would be somewhat at odds with the negotiating mandate contained in the most recent draft of U.S. climate legislation, discussed in more detail in section 6 of this paper. This would mandate the Administration to "to include in [an *internationally binding agreement* on reducing greenhouse gas emissions] agreed remedies for any Party to the agreement that fails to meet its GHG reduction obligations in the agreement."[38]

Proposals for a COP decision

Several Parties who would like the Kyoto Protocol to be amended to include a second commitment period have proposed that all other outcomes in Copenhagen should be captured in a COP decision.[39] As mentioned earlier, the predominant view of international legal experts is that COP decisions are subsequent agreements between Parties on the interpretation or implementation of the treaty.[40] COP decisions therefore generally cannot result in substantial changes to the treaty and are not legally binding in the sense that they could be enforced in international courts.[41]

However, at least one delegation, the Philippines, has been advancing the argument that a COP decision could be considered legally binding if phrased to reflect the Parties' intent to be bound.[42] The International Court of Justice has in the past ruled that such declarations, when they were made unilaterally but were relied upon as binding by other Parties can give rise to legally binding obligation.[43] Applying this logic to a COP decision would be a radical leap for state practice position, and most delegations would likely resist it, in part to avoid creating a precedent that might be used against their interests in another context.

Content

Parties have proposed a variety of binding obligations for countries to take on through their NAMAs and commitments. The scope of these obligations is not limited to emission reduction targets, but in many cases includes obligations for developing countries to undertake certain activities. Many proposals also differentiate between the subset of developed countries and the subset of developing countries. A spectrum of proposals also exists on the likely role of developing country major economies.

Scope of obligations

The content of proposals varies in three fundamental ways: language (which indicates legal form), specificity, and ambition, including whether they describe obligations of conduct or obligations of result.

Language can be either "mandatory" or "hortatory." Mandatory language requires that Parties *shall* undertake some obligation. Hortatory language recommends that Parties *should* undertake some obligation (although this language can also appear in phrases such as *shall strive to*, *shall pursue*, or *shall encourage*, which are unenforceable in practice).

Proposals may also vary in specificity. Some proposals include quantified *targets* and/or *timetables* for completing an obligation. The primary use of a target and timetable is a reduction of GHG emissions by a certain percentage by a certain year. The content of other proposals, in contrast, does not impose targets or timetables on Parties.

The nature of Parties' obligations may also vary. *Obligations of result* are those that are measured according to the outcome they achieve, such as quantified emission reductions. *Obligations of conduct* are measured by whether the country takes certain actions, such as submitting a low carbon development plan, regardless of the outcome of that action.

Proposals for developed country commitments and actions

For the most part, Parties have proposed that developed countries assume commitments that are mandatory, include targets and timetables, and require obligations of result.[44] These targets may be either economy-wide or sector-wide. For example, one of the options put forward in the June 2009 chair's negotiating text is that "All developed country Parties {shall} adopt legally binding mitigation commitments including economy-wide quantified emission reduction objectives for the period from {2013} until 2020…"[45] Similar, another option put forward in the Negotiating Text is that "the developed countries will adopt legally binding commitments …focusing on those sectors, sources and gases that contribute most to total greenhouse gas emissions…"[46]

Parties have also proposed to require developed countries to undertake certain mitigation actions, such as submitting low-carbon strategies and adopting national climate change policies. Some of these proposals are mandatory and include a timetable for completing the action,[47] others are mandatory but do not include a timetable,[48] while others are voluntary.[49]

However, most proposals also assume that each developed country Party will have its own unique target and timetable. The Bali Action Plan established the concept of *comparability* as a way to differentiate between the obligations of developed country Parties. Parties have proposed various criteria for measuring comparability. Depending on which criteria are selected, some of the more advanced economies that were considered developing countries under the Kyoto Protocol may face emission reduction commitments during future negotiations.

Some of the proposed criteria for comparability include:

- Magnitude and level of mitigation ambition.[50]
- Historical responsibility for emissions and capability.[51]
- Compliance mechanism in place.[52]
- Legal form of commitments.[53]
- Provisions for monitoring, reporting, and verification.[54]
- Time frames and commitment periods.[55]
- Population trends and GHG emissions per capita.[56]
- National and regional development priorities.[57]
- Natural and geographical characteristics.[58]
- Availability of low-emission energy supply options.[59]
- Sector-specific circumstances and sectoral energy efficiency.[60]

Proposals for developing country NAMAs

Proposals for the scope of obligations for developing country NAMAs vary more widely in structure than for developed countries, but few require developing countries to commit to GHG emission reduction targets and timetables. These proposals address four types of developing country mitigation actions: (1) low carbon strategies; (2) actions without support; (3) actions with support; and (4) actions eligible for carbon offsets or emissions trading.

Within these four types of actions, several proposals differentiate between various developing countries. Just as many proposals use the concept of comparability to differentiate between developed country obligations, some proposals also differentiate among developing country obligations, for example:

- Proposals that obligations should be commensurate with "national responsibilities and capabilities."[61]
- Proposals that place greater obligations on developing country Parties "whose national circumstances reflect greater responsibility or capability."[62]
- Proposals that do not impose any mandatory obligations on Least Developed Countries.[63]
- Proposals that keep existing classifications of Annex I and non-Annex I Parties.[64]
- Proposals that indicate that national circumstances will change over time.[65]
- Proposals that create common requirements for all Annex C Parties.[66]

Obligations to submit low carbon growth plans or strategies. Most proposals obligate developing countries to submit low carbon strategies. Some require developing countries to submit these strategies according to a specified timetable,[67] while others require submission of a strategy but do not establish a timetable.[68] Several proposals, especially from developed countries, differentiate among developing countries. For example, the U.S. proposed that developing country Parties whose national circumstances reflect greater responsibility or capability "formulate and submit a low-carbon strategy for long-term net emissions reductions by 2050" that includes nationally appropriate mitigation actions "that are quantified."[69] Similarly, Australia proposed that developing country Parties whose national circumstances reflect greater responsibility or capability must register in their national schedules "nationally appropriate mitigation commitments and/or actions aimed at achieving substantial deviation from baselines."[70] China's proposal, conversely, does not differentiate among developing countries.[71]

The U.S., Japan, the EU and Australia all proposed fewer obligations for Least Developed Countries with respect to low carbon strategies. The U.S. proposed that "Other developing country Parties should implement nationally appropriate mitigation actions and develop low-carbon strategies, consistent with their capacity."[72] Australia proposed that "LDCs are invited to establish a national schedule for the commitment period [20XX] to [20XX] at their discretion."[73]

Actions without support. Many proposals also distinguish between types of developing country NAMAs. Those not receiving international support (also called unilateral actions) typically are characterized as "voluntary" actions.[74]

Actions with support. Those that receive international support are also voluntary actions, but some proposals require that these actions lead to a measurable, reportable, and verifiable reduction of emissions,[75] while others require MRV but are not required to lead to quantifiable emission reductions.[76]

Actions eligible for emissions trading. Finally, a few proposals require that NAMAs meet a target and timetable in order to be eligible for emission trading.[77]

Proposals for common obligations

The UNFCCC includes some common obligations for all Parties, such as submission of national communications.[78] Several proposals do not entirely distinguish between developed and developing countries, but also outline common obligations for all Parties. Examples of proposed common obligations include actions to:

- Implement respective nationally appropriate mitigation actions.[79]
- Formulate and submit low-carbon strategies, national schedules, or programs that articulate an emissions pathway to 2050.[80]

- Submit a verified national inventory of anthropogenic emissions.[81]

- Pursue limitation or reduction of GHG emissions not controlled by the Montreal Protocol for international aviation and maritime transport.[82]

Institutions and procedures

Several Parties have proposed ways to build on existing Kyoto procedures and mechanisms, but to make them more robust. The design of these procedures and institutions depends on the extent to which the Copenhagen agreement continues the Kyoto Protocol, and on how the agreement differentiates between Parties.

Measurement, reporting, and verification

The use of NAMAs presents a challenge to the international climate system, because these actions will be diverse and require a system to assure countries that their efforts are meeting the global goals of the UNFCCC. As has been described, the Bali Action Plan proposes measurement, reporting, and verification (MRV) as a system to hold countries accountable for their commitments and actions. *Measurement* implies direct physical measurement or estimation of GHG emissions; *reporting* implies reporting to the UNFCCC in a transparent and standardized manner; and *verification* implies an independent assessment of the accuracy and reliability of the reported information.[83]

In particular, MRV would ensure all Parties that developed countries are meeting their commitments to reduce GHG emissions, ensure developing countries that they receive necessary support for their mitigation efforts, and ensure developed countries that the support they provide is used effectively on the ground.[84] As a result, the design of the MRV system depends on which Parties undertake GHG emission reduction commitments, and which Parties will require support to undertake mitigation actions.

Scope of the MRV system. MRV will assure the Parties that their actions are contributing to the UNFCCC's shared vision, but the Copenhagen agreement may not require all mitigation actions to be MRVed. Proposals differ on the scope of MRV.

The Bali Action Plan calls for MRV for *developed country commitments and actions*. Almost every proposal is consistent with this.[85]

Proposals differ on whether *developing country actions* should be required to undergo MRV. Currently the UNFCCC and Kyoto system requires developing countries to report on mitigation measures, but there is no standardized way of doing this. There is also no agreement on whether unilateral actions should undergo MRV. Some countries have opposed MRV for unilateral actions but call for international recognition of these actions.[86] Views also differ on whether MRV for unilateral actions should occur at the national or international level.[87] However, agreement is emerging that NAMAs that receive developed country support should undergo MRV, but that countries may voluntarily choose to seek this support.[88] One option put forth in the Chairman's Negotiating Text, for example, provides: "MRV of NAMAs and their desired outcomes shall apply only in such cases where, and to the extent that, they are enabled and supported in terms of finance and technology by the Annex I country Parties through an agreed financing mechanism."[89]

The Bali Action Plan states that *support for developing countries* should be MRV.[90] Currently the UNFCCC requires Annex I Parties to report information on the support they provide to developing countries,[91] but this information is not presented in a standardized or comparable way, nor is there agreement on what types of financing can be reported. Parties also disagree on whether non-UNFCCC funding would be considered support.[92] In particular, debate continues on whether financing must be "new and additional."[93] Furthermore, support may not come exclusively from developed countries. Mexico proposed a "green fund", for example, to which developing countries might also contribute support.[94]

Concerns with the existing UNFCCC reporting system. Several proposals within the Chairman's negotiating text suggest that a new MRV system will build on existing Kyoto and UNFCCC mechanisms, such as national communications and inventories.[95] Nevertheless, there is wide recognition of the need to improve the existing system, due to concerns including:[96]

- Lack of standardized reporting for non-Annex I countries.
- Lack of standardized methodologies for accounting for GHG emissions.
- Lack of linkages between developing country actions and support.
- Failure to account for NAMAs that are undertaken at the sub-national level.
- Inconsistent implementation of Annex I national communications.
- Lack of financing to develop sustainable country reporting programs.

Registry proposals. To address these concerns, South Korea, the Republic of Korea, and several other countries have proposed a registry, which would provide international recognition for developing country actions.[97]

The design of the registry will have legal implications for developing country Parties. First, most NAMAs submitted to the registry will have to be in such a form that their implementation can be monitored, reported and verified. Most proposals agree that any actions receiving financial, technical, or capacity support must meet MRV requirements. Second, the registry will help developing countries comply with their mitigation commitments by facilitating a selection of mitigation actions, access to financing, coordination and shared learning. . Third, a registry can help provide assurances in the event of countries taking unilateral trade measures. For example, a registry could help assure importing countries that exporting countries' mitigation policies are "comparable" to their own and do not create leakage. To do so, however, the registry would need to include NAMAs that lead to regulatory and policy reforms within a country.

Most proposals provide incentives for developing countries to place NAMAs in a registry, for example by making international support through technology, finance, and capacity building conditional on the monitoring, reporting and verification of developing country actions. [98] A registry would also help facilitate linkages between actions and support. Furthermore, most proposals agree that developing countries must be monitored, reported and verified by an independent mechanism in order to participate in carbon markets.[99]

The legal character of MRV obligations for developing countries may be either: (1) multilateral and treaty-based – determined under the terms of a Copenhagen agreement; (2) bilateral and contractual – determined on a case-by-case basis through, for example, grant agreements with donors, and emissions reduction contracts with carbon market investors; or (3) a combination of both.

Proposals disagree on whether developing countries' unilateral actions should be included in the registry. Some proposals allow voluntary registration of unilateral actions that can be MRVed by countries themselves using internationally agreed guidelines.[100] Other proposals include unilateral actions in countries' national communications or annual reporting to the UNFCCC, reserving use of the registry for actions that receive international support.[101] Few proposals require that unilateral actions be registered.[102]

The benefits of reporting unilateral actions are that developing countries receive international recognition for their mitigation efforts, and the UNFCCC can more accurately measure global progress towards the shared vision of emissions reductions.

It is also unclear whether developed country NAMAs or commitments will be included in the same or a similar registry as developing countries. If the Copenhagen agreement results in a largely "bottom up" approach that allows all Parties, developed and developing, to unilaterally lodge their NAMAs within a relatively light legal framework, the treatment of developed and developing country obligations may merge.

Compliance and enforcement

The UNFCCC and Kyoto Protocol outlined the basic elements of a compliance system, but subsequent COP/MOP decisions elaborated specific procedures. Copenhagen may follow the same process, particularly because few Parties have proposed specific compliance changes at this point. Nevertheless, Parties may choose to reach consensus on key principles to effectively adapt the compliance system to the outcomes reached in Copenhagen.

Existing compliance system. As has been described, Article 18 of the Kyoto Protocol calls on the COP/MOP to "approve appropriate and effective procedures and mechanisms to determine and to address cases of non-compliance with the provisions of this Protocol…" Two subsequent decisions, 27/CMP.1 and 4/CMP.2, establish the procedures for compliance review.[103]

Annex I national inventories are subject to an expert review process, which assesses reports and recommends adjustments.[104] Parties can trigger the compliance mechanism in three ways: (1) findings from the expert review team; (2) one Party raising concerns with another Party; and (3) a Party raising concerns about its own performance.[105] The compliance mechanism conducts an investigation and the Enforcement Branch takes a decision, which the Party can appeal.[106]

The outcome of the process can be either facilitated implementation or an enforcement "consequence." A Facilitative Branch [of what?] promotes compliance by providing guidance.[107] However, the Enforcement Branch can deduct from Parties' assigned amounts for the second commitment period, require a Party to develop a compliance action plan, or suspend eligibility to make transfers.[108]

Concerns with the existing system. In its current design, the compliance mechanism does not meet the standards necessary for the Copenhagen agreement to implement an MRV system or to place obligations on developing countries. Non-Annex I Parties are not currently subject to the expert review process, and thus do not benefit from the associated feedback that could support capacity building.[109] Measuring compliance of non-Annex I Parties also depends on standardized measurements and deadlines for submitting data, which is not currently required of developing countries. Furthermore, WRI research notes that "the expert review process for national communications falls short of verification, in that it assesses the document's adherence to reporting guidelines, rather than the reliability of reported information."[110]

Current proposals for compliance and enforcement. Parties have not yet submitted extensive proposals for a post-2012 compliance system. Of those that have commented on compliance and enforcement, three variations exist.

First, some proposals want to apply the existing Kyoto compliance system. Brazil's submission, for example, provides that "[t]o ensure the same conditions of measuring, reporting, and verifying, Kyoto Protocol rules should be applied for all Annex I countries. This includes articles 5 (estimation of emissions and removals), 7 (information on compliance with commitments), 8 (review by expert teams) and associated guidance defined by the COP."[111]

Second, some proposals call for making the existing Kyoto compliance system more robust.[112] China, for example, proposes to continue applying the compliance system only to developed countries, but that "[s]imilar arrangements [of MRV] shall be applied to the quantified emissions reduction commitments of developed countries under the Kyoto more robust compliance system based on existing mechanisms to prevent non-compliance."[113] Japan also proposes to build on the existing system, but extend the expert reviews to non-Annex I Parties.[114]

Finally, Australia's proposal applies the compliance system only to carbon markets. Its June 2009 submission provides that "nationally appropriate mitigation actions registered in Parties' National Schedules

would not be subject to the compliance regime (to be established), except for the purpose of maintaining the integrity of the international carbon market and its mechanisms."[115]

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[2] Declaration of the Leaders: The Major Economies Forum on Energy and Climate, L'Aquila, Italy, on July 9, 2009, hereinafter "MEF Declaration, July 2009."
[3] Ibid.
[4] See the Vienna Convention on the Law of Treaties, 23 May 1969, hereinafter "VCLOT," arts. 11 and 54.
[5] It should be noted that a number of recent efforts to introduce robust compliance systems to MEAs – under the Rotterdam and Stockholm Conventions -- have failed, in part due to developing countries' concerns about the potential impacts on sovereignty.
[6] See, for example, "Non-compliance Procedure of the Montreal Protocol," sect. 2.7, in UN Environment Programme, *Handbook for the International Treaties for the Protection of the Ozone Layer* 6th edition (2003), hereinafter "Ozone Handbook."
[7] The exception, if it is to be considered a MEA, is the 1982 UN Convention on the Law of the Sea, which provides for compulsory and binding judicial dispute settlement.
[8] VCLOT, art. 26.
[9] Responsibility of States for Internationally Wrongful Acts (2001). Text adopted by the International Law Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session.
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[11] See Ozone Handbook.
[12] UNFCCC, art. 4.7 provides that "[t]he extent to which developing country Parties will effectively implement their commitments under the Convention will depend on the effective implementation by developed country Parties of their commitments under the Convention related to financial resources and transfer of technology and will take fully into account that economic and social development and poverty eradication are the first and overriding priorities of the developing country Parties."
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[21] American Clean Energy and Security Bill H2 sec 761(c)(1).
[22] Ibid, sec 765(b).
[23] Ibid, sec 766.
[24] Ibid, sec 767.
[25] Ibid, sec 444.
[26] Ibid, sec 728(a)(2).
[27] See, e.g. World Trade Organization & UN Environment Programme, *Trade and Climate Change* (2009); G. Hufbauer, S. Charnovitz and J. Kim, *Global Warming and the World Trading System* (PIIE:2009).
[28] See e.g., submissions from South Africa 24 April 2009; European Community 11 June 2009; New Zealand 12 June 2009; 37 countries, including Brazil China, India and South Africa 15 June 2009.
[29] Report of Bonn I ad hoc group on legal form; L. Rajamani, *Addressing the "Post-Kyoto" Stress Disorder: Reflections on the Emerging Legal Architecture of the Climate Regime* (2009), at 20.
[30] South Africa presentation, Legal Architecture Seminar, 7 August 2009, Bonn Germany.
[31] See e.g., Japan June 2009 submission to AWG LCA; Japan presentation, Legal Architecture Seminar, 7 August 2009, Bonn Germany. Japan prefers adoption of a new protocol, but is open to an amendment to the Kyoto Protocol if all necessary elements of improvement are covered, and if all major economies participate.
[32] Bonn I ad hoc group on legal form.
[33] U.S. June 2009 submission to AWG LCA.
[34] Press Conference, Jonathan Pershing, U.S. Deputy Climate Envoy, Bonn, 12 June 2009, hereinafter "Pershing press conference, 12 June 2009."
[35] Pershing press conference, 12 June 2009.
[36] VCLOT, art. 27.
[37] The U.S. ratified the United Nations Convention to Combat Desertification (UNCCD) in 2000.
[38] See discussion on the American Clean Energy Security Act, section 6, below.
[39] See e.g., Brazil February 2009 submission to AWG LCA, UN Doc. FCCC/AWGLCA/2009/MISC.1; India April 2009 submission to AWG LCA, UN Doc. FCCC/AWGLCA/2009/MISC.4(Part I); Philippines April 2009 submission to AWG LCA, UN Doc. FCCC/AWGLCA/2009/MISC.4(Part II), Philippines June 2009 submission to AWG LCA; Colombia April 2009 submission to AWG LCA, UN Doc. FCCC/AWGLCA/2009/MISC.4(Part I).
[40] Rajamani 2009, at 17-20; UNFCCC art. 7(1).
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[43] Nuclear Tests Case, ICJ Reports (1974) 253. See discussion of unilateral declarations in T Frank, "Word Made Law: The Decision of the ICJ in the Nuclear Test Cases," 69 American Journal of International Law 612 (1975).
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[45] Chairman's Negotiating Text, p. 74, alternative 5 to para. 55.
[46] Chairman's Negotiating Text, p. 75, para. 55.4.
[47] See e.g., Chairman's Negotiating Text, p. 70, para. 62 option 3; U.S. submission June 2009 to AWG LCA, art. 2(1); Japan June 2009 submission to AWG LCA, article 4(1), 5(1)-(2).
[48] See e.g., Chairman's Negotiating Text, p. 75, para. 55.1; China April 2009 submission to AWG LCA.
[49] See e.g., Chairman's Negotiating Text, p. 80, para. 63, option 5.
[50] See e.g., Chairman's Negotiating Text, p. 75, para. 56; p. 76 alternative 1 to para. 56; p. 77, para. 57f; p. 77, alternative 2 to para. 57; Brazil February 2009 submission to AWG LCA; China April 2009 submission to AWG LCA.
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[52] See e.g., Chairman's Negotiating Text, p. 75 para. 56; p. 76 alternative 1 to para. 56; p. 76 alternative 2 to para. 56; Brazil February 2009 submission to AWG LCA; China April 2009 submission to AWG LCA.

[53] See e.g., Chairman's Negotiating Text, p. 75 para. 56; p. 76 alternative 1 to para. 56; p. 76 alternative 2 to para. 56; China April 2009 submission to AWG LCA.
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[57] See e.g., Chairman's Negotiating Text, p. 77 para. 57b.
[58] See e.g., Chairman's Negotiating Text, p. 77 para. 57c.
[59] See e.g., Chairman's Negotiating Text, p. 77 para. 57d.
[60] See e.g., Chairman's Negotiating Text, p. 77 para. 57g.
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[63] See e.g., Chairman's Negotiating Text, p. 92 para. 74; U.S. June 2009 submission to AWG LCA.
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[67] See e.g., Chairman's Negotiating Text, p. 86 para. 70 section 1; p. 91 para. 74 option 3; Japan June 2009 submission to AWG LCA; Australia June 2009 submission to AWG LCA, p. 6 para. 4.
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[75] See e.g., Chairman's Negotiating Text, pp. 87-88 para. 71; Lesotho on behalf of Least Developed Countries April 2009 submission to AWG LCA.
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[78] UNFCCC, arts. 4.1 (a), (b), (j); art 12.
[79] See e.g., Chairman's Negotiating Text, p. 72 addition 1,2; p. 74 x.2; Canada April 2009 submission to AWG LCA.
[80] See e.g., Chairman's Negotiating Text, p. 70 addition 3; p. 71 addition 4; p. 72 addition 5; Canada April 2009 submission to AWG LCA; U.S. June 2009 submission to AWG LCA; Australia June 2009 submission to AWG LCA.
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[93] Fransen 2009; see also FCCC/IDR.4/U.S.A 2007. In its 2007 report, the United States considered all funding in any given year to be new and additional.
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[101] South Africa December 2008 submission to AWG LCA; South Africa April 2009 submission to AWG LCA; powerpoint; Algeria on behalf of the African Group April 2009 submission to AWG LCA. Similarly, Australia has proposed a schedule that includes a role for a registry and facilitative platform, reserving the registry only for supported actions. See submissions to AWG LCA from December 2008, March 2009, April 2009, May 2009, and June 2009.
[102] But see U.S. presentation, Legal Architecture Seminar, 7 August 2009, Bonn Germany., which calls for inclusion of all developed and developing country actions in an "annex."
[103] Non-Compliance Procedures 2009, p. 68.
[104] Kyoto Protocol art. 8; Marrakech Accords; Fransen 2009.
[105] Non-Compliance Procedures 2009, pp 72-75.
[106] Ibid.
[107] Non-Compliance Procedures 2009, pp 68-72.
[108] Decision 27/CMP.1, sections xiv, xv; Non-Compliance Procedures 2009, pp. 78-79.
[109] Fransen 2009. However, in 1999 the COP established a Consultative Group of Experts to provide technical support to these Parties to improve national communications.
[110] Fransen 2009, p. 12.
[111] Brazil February 2009 submission to AWG LCA.
[112] See e.g., Chairman's Negotiating Text, p. 81 para. 66.2; p. 82, para. 68 option 1; China February 2009 submission to AWG LCA, section 2(b); Japan June 2009 submission to AWG LCA, art. 6.
[113] China February 2009 submission to AWG LCA, section 2b.
[114] Japan June 2009 submission to AWG LCA, art. 6.
[115] Australia June 2009 submission to AWG LCA, p. 12.