



BRIEFING PAPER

Treaties, protocols, and decisions by the Conference of the Parties (COP) of the UNFCCC and the Conference of the Parties serving as the Meeting of the Parties (CMP) of the Kyoto Protocol October 2009

FIELD has prepared this paper to assist developing country negotiators working on REDD-plus. It is available in English, French and Spanish at <http://www.field.org.uk/work-areas/climate-change-and-energy/climate-change/redd>.

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1 Legal format of the Copenhagen outcome

The legal format of what may be agreed in Copenhagen – or at a later date - still needs to be decided. At the time of writing it seems likely that progress in Copenhagen may be limited. In any case negotiations on many issues, including REDD-plus, will need to continue after Copenhagen.

The EU for example would like one legally binding 'instrument' (presumably a protocol, although this is not clear) that would bring together the results of the negotiations in the Ad Hoc Working Group on Long-term Cooperative Action under the Convention (AWG-LCA) and the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol (AWG-KP) and which would absorb parts of the Kyoto Protocol into the new instrument. The G77 and China believe strongly that the Kyoto Protocol must continue, rather than be merged with a new instrument.

The AWG-KP's task is to consider further commitments for Annex I Parties in accordance with Kyoto Protocol Article 3.9, which states that commitments for subsequent commitment periods shall be established in amendments to Annex B. Annex B lists the emission limitation or reduction commitments of Annex I Parties.

The Bali Action Plan is aimed at reaching 'an agreed outcome' and adopting a decision at the Fifteenth Conference of the Parties (COP 15) (see Bali Action Plan, paragraph 1). The reference to 'a decision' is not clear – it could mean several things – and the reference to 'an agreed outcome' could involve a legally binding outcome or a non-legally binding one.

There are several options and possible combinations of options for an outcome at Copenhagen or later, for example:

- A new protocol that brings together the outcomes of the AWG-LCA and AWG-KP negotiations, combined with termination of the Kyoto Protocol.
- Amendments to the Kyoto Protocol and another protocol resulting from the AWG-LCA negotiations.
- Amendments to the Kyoto Protocol and non-legally binding decisions resulting from the AWG-LCA negotiations.
- Only non-legally binding decisions, including for example a political declaration setting out a shared vision and agreement to continue negotiations.
- No agreed outcome.

2 Treaties, protocols, and COP and CMP decisions

International treaties (also known by other names, such as convention or agreement) are legally binding. One of the key principles of international law is 'pacta sunt servanda', which means that every treaty in force is binding on the Parties to it and must be performed in good faith (Vienna Convention on the Law of Treaties, Article 26). Protocols, which are sub-agreements to existing treaties, are also legally binding.

A typical way for states to give their consent to be bound by a treaty is by signature, often at a conference where the final text of the new treaty is adopted, followed by ratification, which usually means approval by parliament. This can be a lengthy process, which reflects the level of seriousness of the commitment. In contrast, COP and CMP decisions are simply adopted by the Parties, usually by consensus.

Treaty texts can be vague and unclear, as they often reflect last minute political compromises. Such provisions need to be clarified further through for example COP decisions or state practice.

Parties that do not comply with their treaty obligations can be subjected to compliance procedures set up within the treaty (e.g. under the Kyoto Protocol's Compliance Committee) or, in some situations, can be taken to the International Court of Justice or to another court (see for example UNFCCC Article 14). Penalties can involve for example increased emission reduction targets, exclusion from certain activities or suspension of certain rights under the treaty.

The COP is the decision making body for the UNFCCC and the CMP is the decision making body for the Kyoto Protocol. As a general rule, COP and CMP decisions are not legally binding – they are political decisions.

Exceptions exist in some treaties, where the decision making body (COP or equivalent body) has been granted the authority to take certain legally binding decisions (see for example Montreal Protocol Article 2.9). The Kyoto Protocol contains some provisions, for example on emissions trading (Article 17), that give the CMP authority to develop further rules, which some authors have argued could be legally binding, but this is a very unclear area.

There could also be situations where the Parties indicated that they viewed a particular decision as legally binding, but this would be unusual. COP and CMP decisions should normally be considered as not legally binding.

COP and CMP decisions can be changed by subsequent COP and CMP decisions, while changing a treaty or protocol usually requires amendment, which is a much more complicated process (see for example UNFCCC Article 15 or Kyoto Protocol Article 20).

3 REDD-plus and the legal format

There seems to be an emerging consensus among Parties that an overall, basic framework for REDD-plus could be agreed in Copenhagen, with further details to be negotiated subsequently. For example, New Zealand has suggested a framework similar to Kyoto Protocol Article 12, which established the Clean Development Mechanism (CDM).

However, this might need to be postponed if negotiations on other issues do not progress enough in time for Copenhagen.

Norway for example has suggested that a mandate (framework) for post-Copenhagen negotiations about REDD-plus is needed. A COP decision adopted in Copenhagen could set out such as mandate and could also address some of the details related to REDD-plus.

Technical REDD-plus issues could be considered further by the Subsidiary Body for Scientific and Technological Advice (SBSTA), which could make recommendations for further decisions to future COP sessions.

Further negotiations about REDD-plus could also take place as part of other continuing negotiations from Copenhagen, for example if only a political declaration is adopted in Copenhagen and Parties agree to conclude negotiations at a later date.

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