

Legal issues and development of the international climate regime

August 2011

The Durban Climate Conference

In December 2010 the Conference of the Parties (COP 16) in Cancun requested the Ad Hoc Working Group on Long-term Cooperative Action under the Convention (AWG-LCA) to continue discussing legal options (decision 1/CP.16 paragraph 145 at <http://unfccc.int/resource/docs/2010/cop16/eng/07a01.pdf>). In parallel the Ad Hoc Working Group on Further Commitments under the Kyoto Protocol for Annex I Parties (AWG-KP) is struggling with its mandate.

Many Parties believe that one of the priorities for the Durban Climate Conference (28 November – 9 December 2011) should be to make progress in addressing the legal form for the next phase of the international climate regime.

A more urgent task for Durban may be to agree on a transitional arrangement to bridge the increasingly unavoidable gap between the end of the first commitment period under the Kyoto Protocol and a new agreement.

On the Durban agenda will also be the proposals that have been made for new protocols, amendments and an implementing agreement, the latter a US proposal, before the Copenhagen Summit in 2009 and subsequently. These remain on the agenda after Cancun and Copenhagen in accordance with rules 10(c) and 16 of the draft rules of procedure.

Legal form

Some Annex I Parties are insisting strongly on one global agreement that includes developing countries with large emissions, instead of a second commitment period under the Kyoto Protocol. Developing countries have argued strongly that the Kyoto Protocol must continue.

One route to resolving the disagreements about future legal form may lie in building on the ideas reflected in the Bali Action Plan from 2007 and related decisions: a second commitment period or other successor to the Kyoto Protocol with legally binding commitments, complemented by COP decisions under the UNFCCC.

There are many potential structures for the legal form. Another route to reconciling the opposing views of states could involve a creative approach.

Multilateral Environmental Agreements (MEAs) such as the UNFCCC and the Kyoto Protocol invent themselves as they evolve. There is scope to innovate and explore non-traditional solutions.

Architectural options worth considering might include an overarching legally binding, but “soft” global agreement, which incorporates certain hard targets in a Kyoto successor component (for example, an annex).

An overarching global agreement, soft enough to overcome the concerns of certain countries, but underpinned by strong principles might have potential to reconcile the differing views of states, if it incorporated a component with unambiguous emission reduction commitments for Annex I countries.

Such an agreement could incorporate varying degrees of legal commitment, including pledges made in the Copenhagen Accord and following Cancun. It might not be a perfect solution, but there is unlikely to be a perfect solution in the short term.

Including a clear review process linked to Article 2 of the UNFCCC, which sets out the ultimate objective of the Convention and any related legal instruments, could allow strengthening of the regime in stages. Such a review should focus on adequacy of the agreement rather than implementation.

The US proposal for an implementing agreement

As the proposal for an implementing agreement was made by the US, which is strongly opposed to the Kyoto Protocol, it may merit particular attention. Implementing agreements are legally binding agreements, similar to protocols, and would most likely require the same ratification processes.

An implementing agreement could co-exist with another legally binding agreement and it could be similar in content to a protocol.

Disadvantages include the risk that an implementing agreement could, in the wrong circumstances, risk re-interpreting fundamental principles that underpin the UNFCCC, as was the case with one of the implementing agreements under UN Convention on the Law of the Sea (UNCLOS).

Further information about implementing agreements can be found in the FIELD briefing note “An implementing agreement under the UN Framework Convention on Climate Change - the US proposal and experience with the UN Convention on the Law of the Sea” (http://www.field.org.uk/files/FIELDImplAgreementsBriefingNoteJune2009_0.pdf).

Measuring, reporting, verification (MRV) and related issues

Many Parties consider progress on measuring, reporting and verification (MRV) and related issues as one of the indicators for success in Durban. This relates in particular to pledges under the UNFCCC in the context of the AWG-LCA negotiations.

In Cancun the COP established a work programme on MRV for developed countries including modalities and procedures for “international assessment and review” (paragraph 46 of decision 1/CP.16). The COP also established a work programme on MRV for developing countries including “international consultation and analysis” (paragraph 66 of decision 1/CP.16).

The MRV system and the pledges form a grey area where legal and political compromises might be struck, as has already happened with the concept of “international consultation and analysis” in Copenhagen.

Status of the pledges

The Cancun Agreements include many elements of the Copenhagen Accord in the form of text from the Accord that found its way into negotiating texts during 2010 and subsequently into the Cancun Agreements.

In this sense it is correct to refer to the Cancun Agreements as bringing parts of the Copenhagen Accord into the UNFCCC framework. Whether the national pledges, originally made in the Copenhagen Accord, have been incorporated in a legal sense in the UNFCCC framework through the Cancun outcomes is a matter of interpretation.

Decision 1/CP.16 from Cancun states that the COP takes note of quantified economy-wide emission reduction targets to be implemented by Annex I Parties as communicated by them and contained in document FCCC/SB/2011/INF.1 (at <http://unfccc.int/resource/docs/2011/sb/eng/inf01r01.pdf>) (paragraph 36 of decision 1/CP.16).

The decision also states that the COP takes note of nationally appropriate mitigation actions to be implemented by non-Annex I Parties as communicated by them and contained in document FCCC/AWGLCA/2011/INF.1 (<http://unfccc.int/resource/docs/2011/awglca14/eng/inf01.pdf>) (paragraph 49 of decision 1/CP.16).

COP 15 in Copenhagen “took note” of the Copenhagen Accord. Statements by the UNFCCC Executive Secretary and legal interpretations at the time confirmed that this is not the same as adopting or approving. “Taking note” - used in both paragraphs above - means recognising that something exists, no more than that.

A possible difference might be in footnote 4 to paragraph 36 on Annex I Party pledges and footnote 5 to paragraph 49 on non-Annex I Party pledges which both read:

“Parties’ communications to the secretariat that are included in the information document are considered communications under the Convention”.

It seems a stretch to consider information that has been communicated in this way to have become incorporated in the UNFCCC. National communications, dealt with in UNFCCC Article 12, include a wide range of information.

However, the interpretation that Cancun incorporated the pledges from Copenhagen under the UNFCCC has political importance.

Governance implications of the expanding climate agenda

A successful response to climate change needs engagement across all sectors in society. At the same time the UNFCCC and Kyoto Protocol processes are struggling to tackle a large and constantly expanding agenda.

This raises questions about the relationships between issues raised in the climate change negotiations and other international agreements or bodies with mandates to tackle such issues (for example agriculture, aviation, health).

A balance needs to be found between the UNFCCC regime's role and the roles of other agreements and bodies and it may need to find expression in the global governance arrangements.

One example of a treaty that "delegates" tasks to other international bodies and treaties is UNCLOS, which recognises the role of "competent international organisations" such as the International Maritime Organisation. It may offer lessons for the climate regime.

The Joint Liaison Group of the UNFCCC, the UN Convention on Biological Diversity (CBD) and the UN Convention to Combat Desertification (CCD) brings together the secretariats of the three conventions. This may be a small step in the right direction, but cooperation should perhaps be at the intergovernmental, rather than secretariat levels.

An issue to consider is what the UNFCCC regime's role should be when progress in other international bodies on questions related to climate change is inadequate.

The expanding climate change agenda may raise the question whether a new global organisation with climate change at its core should be considered.

However, so far the regularly recurring debate about whether a "world environment organisation" should be established has absorbed time, resources and political energy with minimal results.

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