

Form follows Function

A note on the legal form of the Bali Action Plan outcome

Mandate of the Bali Action Plan

The Bali Action Plan launched the Ad hoc Working Group on Long-term Cooperative Action under the Convention (AWG-LCA), which is "... a comprehensive process to enable the full, effective and sustained implementation of the Convention through long-term cooperative action, now, up to and beyond 2012, in order to reach an agreed outcome and adopt a decision at its fifteenth session..."

The legal outcome mandated by this decision of the Conference of the Parties (COP) is to reach an *agreed outcome* and *adopt a decision* at COP 15 (Now extended to COP 16, in December 2010 in Cancun, Mexico). The nature of this outcome is not specified, because countries could not agree in Bali.

Legally binding treaty outcome?

In the negotiations, many countries and observers are calling for a "legally-binding" outcome, often referring to a treaty outcome. Some countries would like agreement or a clear mandate in Cancun that a new legally binding treaty/agreement/instrument will be concluded as the outcome of the AWG-LCA.

Misinformation has been spreading in the media to the public that the AWG-LCA outcome is actually supposed to be a treaty (often stated to replace the Kyoto Protocol), and hence a failure to achieve this would be a failure of the process. As such, expectations for the AWG-LCA outcome at the Cancun meeting among some countries is that a COP decision/set of decisions would be adopted, as a step towards achieving a legally binding treaty in South Africa in 2011 or after, as there is insufficient time to complete negotiations for a new treaty by Cancun.

In reality, the legal form of the agreed outcome of the AWG-LCA has yet to be determined, and is a matter to be decided by the Parties in the negotiations. In reality, the Kyoto Protocol is not expiring, and there is a specifically mandated negotiating track established two years before the AWG-LCA, that has been negotiating the second commitment period (starting in 2013) of developed countries' emission reduction commitments.

In reality, now that Parties are moving forward towards adopting COP decision(s) in Cancun, the following are the legal form options for the outcome of the AWG-LCA:

- COP decision(s) in Cancun that fulfill the mandate of the AWG-LCA
- COP decision(s) in Cancun, and further COP decision(s) in South Africa that fulfill the mandate of the AWG-LCA
- COP decision(s) in Cancun that are a stepping-stone towards a treaty in South Africa or beyond.

Parties are legally obligated to implement COP decisions

The COP is the supreme decision-making body of the Convention, which is an international treaty that is legally binding on the countries that are Party to it. Its decisions have legally binding effect on Parties.

A decision is a formal agreement between Parties to a legally binding international treaty that creates a variety of obligations on Parties. Its operational effect is to lead to various concrete implementation actions. The work of the COP is then guided by the Convention text as well as COP decisions.

The UNFCCC website confirms that a COP decision is a “formal agreement that (unlike a resolution) leads to binding actions. It becomes part of the agreed body of decisions that direct the work of the COP”.

Among other things, decisions of the COP may be considered as a ‘subsequent agreement between the Parties regarding the interpretation of the treaty or the application of its provisions’ (Vienna Convention on the Law of Treaties, 1969).

Why do developed countries want a treaty as the outcome?

Developed countries would like a treaty as they would like issues of importance to them to be established in international law. Their level of ambition is far lower and less equitable than that proposed by developing countries, and they seek to lock this into a treaty.

Other developed countries that are Kyoto Protocol Parties also hope that the United States will consent to be bound to mitigation commitments, comparable to theirs, under a new treaty. The Kyoto Protocol contains legally binding mitigation commitments with internationally determined targets and a compliance system that is enforced internationally. Parties have agreed to a “top-down” approach for the current negotiations on the second commitment period, whereby an aggregate emission reduction figure would first be agreed on, followed by the individual targets for developed country Parties. This is in recognition of the needed deep cuts as determined by science.

On the other hand, the US would simply like to legitimise its contrary proposal of discretionary pledges in a treaty with no compliance system. This would result in an international treaty that legally allows developed countries to only undertake voluntary domestic mitigation targets. As already demonstrated by such pledges made so far, this “bottom-up” approach utterly fails to meet the urgent requirements of science and equity in order to ensure the future of the planet and humanity.

This is the system of the Copenhagen Accord, which the US and some other developed countries are determined to transform into a legally binding treaty. However, it is even uncertain now, given domestic US politics, whether the US will be able to agree to such a new treaty.

At the same time, developed countries including the US would like some developing countries to also legally take on mitigation commitments or be subject to more stringent mitigation action. Many of their own mitigation pledges are conditional on this. Many developed country proposals would therefore alter the fundamental principles of the Convention, in particular, “common but differentiated responsibilities”.

The European Union particularly, is interested in an outcome that is a treaty to ensure the continuation of the carbon market (especially if the Kyoto Protocol is terminated or superceded) and the creation of new market mechanisms that it proposes is necessary to be established in international law.

Developed countries want to terminate or supercede the Kyoto Protocol. Their preference is for a new Protocol under the Convention that replaces the Kyoto Protocol, or even a new treaty that would replace or substantially alter the balance of commitments in the Convention and its Kyoto Protocol. This new treaty would likely significantly shift away from the fundamental equity and development principles of the current international climate change architecture.

Why do some developing countries want a treaty as the outcome?

A treaty is an international law that is legally binding on countries that are Parties to it. A breach of its legally binding obligations is more clearly actionable. However, any determination of non-compliance, sanctions and their enforceability are still subject to political realities and the strength of the compliance regime.

Some developing countries would like issues of importance to them, with regards to the implementation of the Convention, to be enshrined in an international treaty, including enhanced action on:

- Adaptation, including the establishment of a comprehensive and structured approach to adaptation and appropriate new institutional arrangements under the Convention;
- Technology development and transfer, including the establishment of a comprehensive technology mechanism under the Convention;
- The provision of financial resources and investment, including the implementation of an enhanced financial mechanism under the Convention;
- Mitigation commitments or actions, including comparability of efforts among developed countries; and
- Expression of a shared vision including a long-term global goal for emission reductions, in accordance with the Bali Action Plan and the Convention.

Developing countries are also particularly concerned about the following issues:

1. The US is not a Party to the Kyoto Protocol, and the hope is that it will consent to be bound, like other developed countries in the Kyoto Protocol, to mitigation commitments under a new treaty.
2. The quantum of financial obligations. The obligation of developed countries to finance developing countries is contained in the Convention itself. Developing countries are seeking for a specified amount or assessed contributions to be determined to ensure adequacy and predictability, and to operationalise the delivery of these resources.
3. Compliance issues under the Convention. In particular if the US is to make comparable mitigation commitments under the Convention, it should also have comparable compliance to other developed countries under the Kyoto Protocol. Negotiations in the AWG-LCA include these options. The Convention's multilateral consultative process is a weak facilitative mechanism and is not yet operational because agreement could not be reached on it at the COP. As such, some developing countries would like a new treaty to incorporate strong compliance provisions.

Developing countries are firmly behind agreeing to a legally binding amendment to the Kyoto Protocol for a second commitment period, as mandated. Those developing countries that prefer an AWG-LCA treaty outcome are asking for another Protocol under the Convention that would co-exist with the Kyoto Protocol.

How to achieve what developing countries want?

The form of the outcome must be sufficient to “enable the full, effective and sustained implementation of the Convention”, and to achieve the goals of developing countries in the negotiations. The agreed outcome must address all these elements in a balanced manner, and enable action commencing “now, up to and beyond 2012” as required by the Bali Action Plan. Given the growing impacts on developing countries, early action “now” to implement the Convention is particularly urgent.

Most, if not all, of the objectives of developing countries – including enhanced actions, and institutional arrangements for mitigation, adaptation, technology and finance – can be addressed adequately, and indeed have been in the past and in other UN Conventions, through COP decisions.

The Convention has considerable experience establishing institutional arrangements (e.g. the Clean Development Mechanism Executive Board and the Joint Implementation Supervisory Committee) and

financing mechanisms (e.g. the Adaptation Fund) through decisions.

In relation to the issues that developing countries are particularly concerned about:

1. There are a variety of means that legally binding mitigation for the United States could possibly be addressed, including through internationally binding national actions (e.g. a unilateral declaration of States capable of creating legal obligations – see Annex 1) and through appropriate institutional arrangements for ensuring actions/commitments are strictly internationally measurable, reportable and verifiable. These would not require a treaty outcome. There should be further efforts to explore these options and to evaluate their political feasibility.
2. The quantum of financial obligations. Developed country Parties have unambiguously assumed the obligation to provide new and additional financial resources and to ensure adequacy and predictability of such resources under the Convention. However, political will and good faith in honouring those obligations are lacking.
3. On compliance, the work has been done on the Convention's multilateral consultative process. All that remains to be done is to adopt a decision that would make it operational, based on the agreement that was achieved for the Kyoto Protocol's compliance regime. Further work can be undertaken to develop a more stringent compliance regime, including through COP decisions and amendments to the Convention.

Compliance mechanisms in environmental agreements are usually of a facilitative nature. The Kyoto Protocol's compliance mechanism is comparatively robust on paper, but may suffer from implementation problems. This suggests that political will and other issues beside the legally binding nature of a strict compliance regime are at play.

Dangers of a treaty as the outcome

Adopting a legal instrument as an outcome of the Bali Action Plan also has implications for the timing of the outcome:

- Legal treaties usually take years to negotiate, and the text of a new legal instrument will have to be communicated by the Convention secretariat to the Parties at least six months before the meeting which is to adopt it.
- A new legal instrument also implies delays in implementation. A new legal instrument usually takes an average of three years to enter into force after its adoption.
- In addition, it may never enter into force if there are not enough ratifications, acceptances, approvals or accessions.

A decision of the COP, by contrast, is simply adopted by the Parties and has immediate direct legal effect as the COP is the supreme decision-making body of the Convention, which is an international treaty that is legally binding on the countries that are Party to it. It does not need to be ratified etc. In this sense, a decision would better fulfill the mandate of the Bali Action Plan for action commencing "now".

As well as delay, there is a range of more fundamental dangers:

1. A new treaty as the AWG-LCA outcome may supercede the Kyoto Protocol. Already, many elements of the Kyoto Protocol have been migrated to the AWG-LCA text. If a legally binding instrument under the Bali Action Plan process is concluded, including key elements of the Kyoto Protocol, then the Kyoto Protocol may effectively be rendered dead or meaningless (see Vienna Convention on the Law of Treaties, Article 30 on Application of successive treaties relating to the same subject matter). Developed countries would have effectively cherry-picked the elements of the Kyoto Protocol that they like, such as the market mechanisms, and transposed them into a new legal instrument.

A second commitment period of the Kyoto Protocol does not guarantee its survival. In the absence of a legally binding treaty in the near future, some developed countries may agree to move forward on a second commitment period, to ensure continuity of the carbon market. For them, a second commitment period is merely an interim stepping stone towards the new treaty that they seek.

There is momentum toward inscribing developed country mitigation proposals or pledges in decisions to be adopted in Cancun. It is critically important *where* mitigation commitments are inscribed, as this could determine whether or not the Kyoto Protocol is terminated or superceded.

For countries that are Kyoto Protocol Parties, their mitigation must be inscribed in the Kyoto Protocol track, and not under the AWG-LCA. Only non-Kyoto Parties can be allowed to inscribe their mitigation under the AWG-LCA. Inscribing the mitigation of all developed countries under the AWG-LCA paves the way for the eventual termination or superceding of the Kyoto Protocol, allowing developed countries to relocate their mitigation commitments/actions to the AWG-LCA outcome.

2. A new treaty containing US mitigation efforts may also mean that other developed countries may decide to “jump ship” from the Kyoto Protocol to this treaty. If there is no alternative, there is nothing for other developed countries to abandon the Kyoto Protocol for. Developed countries could withdraw from the Kyoto Protocol at any time, however this would have significant political implications. “Ship jumping” would be the easy way out for countries that no longer wish to be bound by the Kyoto Protocol, without facing a political backlash for not being part of the international climate change regime.
3. It is clear that the US will only become a Party to a treaty that essentially legalizes the Copenhagen Accord, with its pledge and review system. This would be many steps backwards from the existing climate regime of the Convention and its Kyoto Protocol, which sets internationally binding quantified mitigation targets for developed countries that are subject to enforcement.

There is momentum toward inscribing developed country mitigation proposals or pledges in decisions to be adopted in Cancun. While there is value in capturing progress, and holding developed countries to their pledges, it should be noted that developed countries’ mitigation pledges have so far not been formally adopted in any decision, and for a reason.

In the Kyoto Protocol negotiations, developing countries are arguing that a top-down approach based on scientific and equitable parameters should determine the scale of developed countries’ mitigation commitments. Developed countries however, have only put forward bottom-up pledges, many with conditions, based on what they are politically prepared to do. The pledges are dangerously inadequate, and in addition, some developed countries are attempting to lock in many loopholes that would allow them to avoid real emission reductions, and even increase their emissions. Anchoring a system of pledges is the start of locking in a pledge and review system, fundamentally shifting away from the top-down principled approach that is needed.

4. The goal of “getting the US on board” is fraught with many difficulties. Current US politics indicate that the US will not agree to a new treaty at this point. It is indeed a sorry and immoral situation that the US continues to refuse to join the rest of the world, by taking on binding mitigation targets. However, if the price of “getting the US on board” is too high, then again, the world should proceed without the US. It would be highly unfortunate to engage with US demands for a new climate change architecture, weaken the outcome and be faced with non-ratification by the US again.

Conclusion

There are some advantages to a treaty outcome, but also many disadvantages. It is quite clear that the US will not agree to a treaty outcome at this point. Should the rest of the world again risk pinning all their hopes on a treaty outcome that the US will not ratify?

If a treaty outcome is still the preferred option, however, one way to avoid the dangers of a treaty outcome (superceding the Kyoto Protocol, “ship jumping”, accepting a pledge and review system) would be to conclude a new treaty under the Convention that co-exists with the Kyoto Protocol that deals with finance, technology and adaptation. Mitigation elements can conclude with COP decisions and other options such as a unilateral declaration for the US’ mitigation efforts, or perhaps conclude in a treaty at a later stage, when the political conditions are better.

Another way could be to finalise a treaty that has all elements of the Bali Action Plan, and put in place certain safeguards and conditions that would ensure that the Kyoto Protocol is not superceded and that other developed countries do not “jump ship”. It is unclear however, if this could guarantee the survival of the Kyoto Protocol, and its system of internationally binding commitments.

The future climate change architecture is what is at stake – whether or not science and equity determine the scale of emission reductions; whether or not emission reductions are internationally binding or voluntary and domestic; and whether or not developed countries continue to take the lead in combating climate change, in accordance with their moral and historical responsibility.

A set of decisions as the final outcome of the Bali Action Plan therefore warrants serious consideration by all Parties. There is only a slim and ever diminishing hope that the US will finally accept its responsibility for climate change. The political reality of the situation very unfortunately points us in this direction.

Annex 1

Creating Comparable Legal Obligations from Unilateral Declarations

In the context of the Bali Action Plan process, many countries would prefer that the legal character of developed countries’ mitigation commitments or actions is of a legally binding and mandatory character. This would mean a continuation of the existing mandatory character of the mitigation commitments for developed countries under Art. 4.2(a) and (b) as well as under the Kyoto Protocol for those that are also Parties to the Protocol.

However, for developed countries that are not Parties to the Kyoto Protocol such as the United States, comparable binding obligations could be generated through a unilateral declaration under international law. For such unilateral declarations to create legal obligations for the declaring State, it should: ¹

- be done formally and publicly, orally or in writing;
- it should express the intent to be bound and produce obligations under international law;
- it must clearly and specify state the obligations to which the State will be bound;
- it must be made by an authority vested with the authority to do so (e.g. head of State, head of Government, or foreign ministers); and
- it must not conflict with a peremptory norm of general international law (a *jus cogens* norm).

The COP, as part of the outcome from the AWG-LCA process, could decide to invite Annex I countries which are not Kyoto Protocol Parties to unilaterally declare to the COP their intention to enhance their implementation of Art. 4.2(a) and (b) by undertaking binding emission reduction commitments and implementing such commitments through appropriate domestic policies and measures.

¹ For such a unilateral declaration to have binding legal effect on the declaratory Party and for other Parties to be able to rely on the binding nature of such a declaration under international legal effects, the declaration should be consistent with the “Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations” adopted by the UN General Assembly’s International Law Commission in 2006. The Guiding Principles were reported by the ILC to the 61st session of the UN General Assembly (see Report of the International Law Commission, 58th Session, UN Doc. No. A/61/10 (2006)), which then took note of such Guiding Principles and commended their dissemination (see UN General Assembly Resolution No. A/RES/61/34, 18 December 2006, para. 3. For the text of these Guiding Principles, see http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_9_2006.pdf. These guidelines are based in part on the 1933 decision of the Permanent Court of International Justice in the case of Norway vs. Denmark and the 1974 Nuclear Test Cases decided by the International Court of Justice.