



The Copenhagen Agreed Outcome: Form, Shape & Influence

Lavanya Rajamani

Introduction

The final week of the climate negotiations in the lead up to the Copenhagen Climate Conference in December 2009, ended in Barcelona on November 6th with a deep sense of foreboding. Shakespearean allusions flew thick and fast, with one delegate ending the closing meeting on the fearful note that “something rotten awaits us in the State of Denmark.”

The negotiations in Bangkok in October exposed the deep and seemingly irresolvable divisions over the fate of the Kyoto Protocol.¹ Since agreement on a new legally binding instrument is inextricably linked to the fate of the Kyoto Protocol,² the weeks thereafter, including the session in Barcelona in November, witnessed the rapid management of expectations in its wake. The Danish Prime Minister, Lars Løkke Rasmussen,³ the UN Secretary General, Ban Ki-Moon,⁴ and the Executive Secretary of the Framework Convention on Climate Change Secretariat, Yvo de Boer,⁵ acknowledged that a legally binding agreement was out of reach in Copenhagen, and endorsed the need for a “politically binding agreement” that would chart the way for post-Copenhagen negotiations. The Chair of the Ad Hoc Working Group on the Long term Cooperative Action (AWG-LCA),⁶ Michael Zammit Cutajar, in a similar vein, expressed his personal assessment that given the lack of consensus at this late hour on the need for a legally binding instrument, it is unlikely that there would be one in Copenhagen.

Needless to say the levelling down of expectations from influential quarters was greeted by many, but in particular the Alliance of Small Island States (AOSIS), and the African Group, with considerable disappointment.⁷

Understandable as the disappointment is, to those who have watched this negotiation process limp painfully to the finish line, no other political assessment appears plausible: the Copenhagen Climate Conference is unlikely to produce a legally binding instrument. This article explores first, why a legally binding instrument is unlikely in Copenhagen, and next, whether it matters and if so, why. In the process, this article examines the term “legally binding,” and explores the nature of the current obligations – both the hard and soft law elements – under the Framework Convention on Climate Change⁸ and the Kyoto Protocol,² including the status, reach and limits of Conference of Parties' decisions, and the value of seriously negotiated international commitments. It also examines, given the emerging faith, albeit borne of pragmatism, in a political deal in Copenhagen, the shape that this political deal could take, and the influence it could have in the development of the climate regime going forward.

THE COPENHAGEN AGREED OUTCOME: WHY IT IS NOT LIKELY TO BE A LEGALLY BINDING INSTRUMENT

Process Dysfunction

The Bali Action Plan, 2007, launched a process to reach an “agreed outcome” on long term cooperative action on climate change, with a scheduled end in Copenhagen, December 2009.¹⁰ The term “agreed outcome,” in the Bali Action Plan indicated a lack of agreement on both the legal form that the outcome of this process could take, and the level of ambition that it should reflect. This lack of agreement continues to haunt the process. In May when the Chair submitted his draft negotiating text he was constrained, due to his mandate to produce a text that did not prejudice the form the

outcome,¹¹ to include in the cover note a paragraph indicating how auxiliary verbs had been used. And, to use the noncommittal “{shall/should}” across the text so that the text could lend itself readily, should Parties so choose, to both treaty language as well as Conference of Parties' decision text.¹²

In the next four negotiating sessions - six weeks spread from June through November - Parties first introduced their own language into the Chair's text, thereby making the text their own, and then began to consolidate, merge and streamline the text. They undertook this process with the help of Chair-appointed facilitators, and produced non-papers to capture progress. As the text took clearer shape each non-paper was superseded by a later one. This process resulted in gradual and incremental textual progress, but it was deemed necessary as it was intended to lead to a Party-owned negotiating text on the basis of which clear political choices could be made. At the end of the Barcelona session all the latest non-papers were compiled in an Annex to the Report of the Session. The text so produced “shrunk” through six weeks of negotiations from 49¹³ to 199¹⁴ to 165 pages.¹⁵ Further, many in the G-77/China were only willing to use this text as a tool for “facilitating negotiations,”¹⁶ not as the basis for negotiations. Their reluctance to stamp this text with the authority and legitimacy of a “negotiating text” indicates a subtle distancing from the process through which these non-papers were produced (seen as facilitator-driven rather than Party-driven), and the content of these non-papers (in which their proposals were not always clearly identifiable). An illustration of Party discontent with the latest set of non-papers lies in the non-paper on Shared Vision, which in the absence of agreement on the latest non-paper, contains all previous versions of the non-paper as well.¹⁷

It is worth placing the trajectory that the AWG-LCA process has taken thus far in historical and comparative context. The Berlin Mandate that launched the process that led to the Kyoto Protocol, unlike the Bali Action Plan, explicitly specified the legal form of the outcome - “a Protocol or another legal instrument.”¹⁸ The Chair of the Ad Hoc Group on the Berlin Mandate, unlike the Chair of the AWG-LCA, was mandated by Parties to produce a negotiating text in all six UN languages in time to comply with the six month rule.¹⁹ The text, 29 pages, under negotiation in Kyoto, unlike the compiled non-papers, was presented to Parties as “the basis for the fulfilment of” the mandate.²⁰ The Secretariat had also produced to assist the negotiations at Kyoto a technical review of the protocol text for consistency and feasibility.²¹ No such preparatory steps have been requested of the Secretariat this time, and indeed it would be impossible, given the timeframe, to conduct a technical review of 165 pages of non-paper text at differing levels of maturity, clarity and precision.

It appears inconceivable at this point that the compiled non-papers could lead to a fully formed treaty text in December. At the same time alternative texts laying out political choices and trade-offs – prepared by Parties, the AWG-LCA Chair, the Secretariat, or the Danish Presidency – given the trust deficit in the system are also unlikely to garner sufficient support to lead to a legally binding treaty text.²² The slow yet democratic AWG-LCA process may lead eventually to a legally binding text, but not in December 2009. This was reluctantly acknowledged in Barcelona by key actors in the process. This acknowledgment led seamlessly, albeit not inevitably, to a new goal post for Copenhagen. Parties, with the exception primarily of AOSIS and the African Group, are now aiming at a “politically binding” rather than a foundational legal text.

Substantive Divisions

At the root of the halting pace of the AWG-LCA process, lie a series of differences – which perhaps for now are irresolvable. The process of massaging text allowed Parties to defer consideration of these differences for several months after the Chair's Negotiating text was presented. The Bangkok talks in October however finally unearthed a central and divisive issue - the fate of the Kyoto Protocol – an issue that has Parties lining up sharply on developed and developing lines. Most developed countries favour a single integrated instrument that replaces the Kyoto Protocol. This would, in their view, ensure greater participation and therefore effectiveness of the climate regime. This would in particular ensure the participation of the US that is responsible for 20% of the world's annual emissions and 30% of historical emissions (1900-2000).²³ The G-77/China is however vigorously opposed to such an instrument as this instrument is likely, they believe, given emerging political realities, to have a fundamentally different character to that of the Kyoto Protocol. It is likely to reflect a bottom-up rather than top-down approach, to “breach” the perceived Bali firewall, and to cherry-pick from the Kyoto Protocol, in the process altering, they fear, the balance of responsibilities in the climate regime.²⁴ They are also concerned that in the process of transitioning to a single integrated instrument, many key elements of the Kyoto Protocol, in particular, the compliance system, will be abandoned, and that other rules will be diluted.

The proposals that raise this spectre lie primarily in Non-paper 28. Non-paper 28²⁵ took birth in Bangkok as the 'cloud' issue, and remained untouched in Barcelona. It contains mitigation requirements applicable to all Parties not tailored to developed and developing countries respectively, as required, in the G-77 interpretation, by the Bali Action Plan. Non-paper 28 collates proposals, primarily from the US, Australia,

Canada and Japan that suggest a recasting of the differentiation that currently exists in the climate regime.²⁶ These proposals, drawing on FCCC Article 4(1), frame differentiation within the context of the common responsibilities Parties share. The G-77 argued in Barcelona that efforts to elaborate on “commonalities” through selective interpretation of FCCC provisions are designed to result in lighter responsibilities for developed countries and weightier ones for developing countries. In their view progress is only possible if mandates are strictly followed, and differentiation is clearly retained. Although the G-77 had raised concerns about the status and continued existence of Non-paper 28, characterizing it as a “to be or not to be” issue, they did not prevent the non-paper from being forwarded to Copenhagen. As it currently sits, Non-paper 28 appears as the chapeau to the mitigation section,²⁷ which some in the G-77 view as problematic because its content could govern and shape the specific provisions on mitigation for developed and developing countries. South Africa, among others, made an interpretive statement in the closing meeting in Barcelona that it did not accept the structure of the text as presented. This non-paper will continue to plague the negotiations in the first week in Copenhagen.

In the medium or long term an equitable and effective compromise is not out of reach. It is evident that behind the public expressions of solidarity for the longevity of the Kyoto Protocol, at issue is the balance of responsibilities between Parties. Any shift in the balance of responsibilities towards more defined and scaled up actions from developing countries, would need to be accompanied by a radical increase in the provision of financial and technological assistance.²⁸ If an equitable balance of responsibilities based on a shared understanding of the principle of common but differentiated responsibilities and respective capabilities is maintained, developing countries may conceivably be open to a new instrument that builds on the Kyoto Protocol. The compromise may be built around the central and simple premise that all countries need to do more to tackle climate change mitigation and adaptation; developed countries need to more than developing countries, and developed countries need to assist developing countries, given the latter's legitimate developmental priorities and capacity constraints, in doing more.

The difficulty in the short term, however, is the dearth of ambitious commitments – on mitigation and finances – from developed countries. The former reinforces the trust deficit and the latter renders scaled up action in developing countries uncertain and limited. The mitigation pledges announced thus far by developed country Parties to the Kyoto Protocol are expected to result in aggregate emissions reductions of

16-23% below 1990 by 2020.²⁹ If the US Waxman-Markey target is included, the aggregate reductions fall to 10-23% in one estimate,³⁰ and 11-18% in another.³¹ The current pledges fall below even the lower end of the IPCC range of 25-40% consistent with 450 ppm.³² Moreover some of these pledges are conditional and/or provisional, and in converting the pledges into commitments, which developed countries have been reluctant to do, the aggregate reductions may fall further.

The dearth of ambitious mitigation commitments is in part due to the fact that the rest of the developed countries are waiting on the US administration, which in turn is waiting on the uncertain outcome of its domestic legislative process. US officials have made clear that they will await Senate ratification before making an international commitment.³³ And, it is now evident that such legislative approval will not be forthcoming before Copenhagen.³⁴ The US may provide a provisional target in Copenhagen indeed without such a number even a political deal may not be possible. However, the US is unlikely to convert this provisional number into a legal commitment until it has the requisite legislation in place.

THE SPACE WITHIN AND BETWEEN POLITICALLY AND LEGALLY BINDING AGREEMENTS

Defining Politically and Legally Binding

The Copenhagen agreed outcome therefore is likely to be a “politically binding” agreement. A politically binding agreement, to venture a definition, is an agreement the breach of which will lead to political rather than legal consequences. A politically binding agreement pays homage to a legally binding one, in that it is precisely because states take legally binding instruments seriously that they would choose not to enter into one until they were confident that they could comply with it.

The term “legally binding” has been bandied about with evangelical fervour since Bali, but is rarely discussed in any detail. The term is typically applied to negotiated legal instruments that render a particular state conduct mandatory as well as, at least in principle, judicially enforceable.³⁵ Such instruments are characterized in the literature as “hard law.”

The Space Within and Between

Treaties such as the FCCC and the Kyoto Protocol are binding in this sense. But, compliance, implementation and effectiveness of these instruments rests on a range of factors, some of which are independent of their status as legally binding instruments.³⁶ One such factor

is the normative content as well as precision of the provisions within these treaties. The FCCC has numerous provisions that are couched in discretionary and contextual language. For instance, the commitments of industrial countries relating to financial resources and technology transfer are peppered with phrases such as “as appropriate,” “if necessary,” “in so far as possible,” and “all practicable steps.”³⁷ Although the discretion provided is with regard to the manner or timeframe of performance of a particular obligation, rather than as to performance or non-performance, it nevertheless renders the setting of a standard, a finding of compliance or non-compliance, and the resulting visitation of consequences, a problem-ridden task. This in turn affects compliance with and effectiveness of such provisions. The fact, therefore, that the FCCC is “legally binding” may in these cases offer little comfort.

The Kyoto Protocol, given its targets and time-tables approach, lends itself more readily to standard setting, and it has its own compliance system.³⁸ However even the Protocol contains provisions and terms which defer to the judgment of Parties on what is or is not appropriate in the circumstances, which in turn renders the setting of standards and finding of non-compliance problematic. For instance, the Kyoto Protocol requires developed country Parties to make “demonstrable progress” by 2005 in achieving their identified mitigation commitments.³⁹ While non-compliance with mitigation commitments is subject to enforcement through the compliance system, non-compliance with the requirement to demonstrate progress, given the inherent subjectivity of the term, may not lend itself to such action.⁴⁰ These examples suggest that although a Convention or a Protocol may, as it is a legally binding instrument, offer the comfort of presumed rigour, whether in practice its provisions create mandatory obligations, and lend themselves to compliance, implementation and effectiveness is less certain. Provisions, even within legally binding instruments, have differing levels of normativity and precision. In multilateral settings, given domestic political and capacity constraints, Parties choose a finely balanced set of soft⁴¹ and hard obligations (between which there is dynamic interplay) to demonstrate their commitment to addressing a global environmental problem.

If external pressure builds towards hard law before the text and political negotiations have reached a sufficient level of maturity, states will likely protect themselves by negotiating language providing flexibility, discretion and endless interpretative possibilities. It is evident that neither the text nor the political negotiations have yet to reach the level of maturity required for a serious legal instrument that Parties are willing to be bound by,

and it is this perhaps that has led those in charge of the process to recommend, as a first step, a focus on soft law instruments that can catalyze and shape a subsequent hard law instrument.

THE COPENHAGEN AGREED OUTCOME: SHAPE AND FORM

Functionalist logic suggests that it may be useful to draw a distinction between treaty obligations (which emanate from hard law instruments and are capable of being enforced judicially), treaty-generated legal commitments (which may emanate from hard law or soft law instruments but do not seem to be capable of judicial enforcement⁴²) and principled expectations (which are created by seriously negotiated international instruments and therefore have an operational significance for those entities responsible for their making and maintenance, but are based as much on ethical considerations of good faith and public morality as on strictly legal considerations).⁴³ The Copenhagen agreed outcome is likely within this functionalist typology to either constitute a treaty-generated legal commitment, or a principled expectation. Conference of Parties decisions, emanating as they do from the FCCC, would fall within the former and Ministerial Declarations (among a subset of Parties) into the latter.

A range of scenarios could unfold in Copenhagen. Among others,

- Parties are unable to arrive at a political deal;
- Parties arrive at a framework political deal, and defer consideration of the elements of the deal, as well as whether such a deal must be captured in treaty text, to a later period of time;
- Parties arrive at a substantive and comprehensive political deal but are unable to reach agreement on the need to convert such a deal into treaty text; and,
- Parties reach a substantive and comprehensive political deal as well as agree on the need to convert such a deal into treaty text within a defined timeframe.

In the current political climate, the last appears to be the most ambitious of the options that Parties could aspire to in Copenhagen. Whichever scenario unfolds, however, the documentary form that a political deal could take is as COP decisions or a Ministerial Declaration (which may or may not be a COP decision).

The AWG-LCA Chair suggested in Barcelona a single overarching COP decision, possibly with Annexes, and complemented by several linked decisions on the pillars of the Bali Action Plan. These decisions would, in his vision, be substantive and convey political

commitment. In addition, should Parties concur, they could work explicitly towards a legally binding instrument in 2010 that converts any political deal reached in Copenhagen into a legally binding treaty. This is broadly the vision that the Executive Secretary of the FCCC has as well.⁴⁴ A COP decision that performed an analogous function in 2001 is one titled “The Bonn Agreements.”⁴⁵ This decision was taken months after the collapse of COP-6 at The Hague, and the subsequent rejection of the Kyoto Protocol by the US. It contained in annexes a series of agreements on the “core elements” of the deal, and it required Parties to negotiate and adopt a “balanced package of further decisions incorporating and giving full effect to the agreements.”⁴⁶ COP decisions, since they have assumed centre stage in the climate regime, merit further discussion.

Conference of Parties Decisions

COP decisions represent the collective will of the Parties to a multilateral treaty. The FCCC and the Kyoto Protocol authorize the Conference of Parties⁴⁷ to engage in the progressive normative and institutional development of the regime.⁴⁸ COP decisions have enriched and expanded the normative core of the regime by fleshing out treaty obligations,⁴⁹ reviewing the adequacy of existing obligations,⁵⁰ and launching negotiations to adopt further obligations.⁵¹ COP decisions have also created an elaborate institutional architecture to supervise compliance with obligations.⁵²

COP decisions have considerable operational significance and reach in the climate regime. But, their legal status in international law, however, is less certain. COP decisions are relevant factors in interpreting the treaty.⁵³ Their precise legal status, however, depends on the enabling clause,⁵⁴ the language and content of the decisions, and Parties' behaviour and legal expectations. All of these are typically prone to varying interpretations. From a formal legal perspective COP decisions are not, absent explicit authorisation,⁵⁵ legally binding.⁵⁶ And, they are not capable of creating substantive new obligations, since such substantive new obligations, would require state consent expressed through the conventional means (signature/ratification/etc). The FCCC does not explicitly authorize binding law making by the COP. The Kyoto Protocol does, but only with respect to a circumscribed set of reporting and accounting obligations.⁵⁷ As such, from a formal legal perspective, COP decisions and CMP decisions (save those explicitly authorized under Protocol Articles 7(1) and 7(4)) in the climate regime are not legally binding.

Intriguingly, COP decisions in the climate regime, even in the absence of explicit authorisation for binding

law-making, on occasion use language that is prescriptive (e.g. “shall”). COP decisions use such prescriptive language not just when they impose requirements on the Subsidiary Bodies or the Secretariat, which as the supreme body under the Convention it is authorized to do,⁵⁸ but more controversially, in relation to Parties.⁵⁹ Further, COP decisions have also put in place rules, and rendered access to certain benefits contingent on compliance with these rules.⁶⁰ To the extent that Parties understand these rules as “mandatory” and agree to subject themselves to these rules, some have argued that the distinction between binding and non-binding COP decisions is apparent rather than real.⁶¹

Ministerial Declarations

A COP decision can be elevated to the status of a Ministerial declaration. The Delhi Ministerial Declaration, 2002, is an example.⁶² If the Copenhagen agreed outcome is a COP decision elevated to the level of a Ministerial declaration then it will likely contain the key elements of the political bargain arrived at, and it will extend the process for a further period of time so as to allow Parties to work out the details of the bargain, as well as to convert it into treaty text.

A Ministerial declaration at times represents the collective will of a sub set of the Parties to the FCCC, in which case it cannot be adopted as a COP decision, since COP decisions require consensus.⁶³ A Ministerial declaration of this type will be easier to secure, but it is relatively weak as it cannot direct Parties, the Secretariat, the subsidiary bodies and its officers. An example of such a declaration is the Geneva Ministerial Declaration.⁶⁴ It instructs its own representatives to engage in particular conduct,⁶⁵ rather than Parties more generally.

COP decisions and Ministerial Declarations – largely soft law instruments - have considerable operational significance, and may be effective, some argue even more so, in inducing the desired behavioural change, than hard law instruments. This is because Parties are more likely to accept higher aspirational targets if they are to adopt what they perceive as non-binding (but what in effect may be mandatory).⁶⁶ Following this train of thought an optimistic reading of the current political climate would suggest that developed countries may be encouraged to pledge, given the non-binding form, to more ambitious targets than they have thus far. Indeed there is an effort afoot to draw prompt start pledges from developed countries,⁶⁷ both on mitigation and on finances.

CONCLUSION

The Bangkok and Barcelona negotiations

demonstrated that the international climate negotiations have yet to reach the level of maturity required for states to adopt a legally binding instrument. Disappointing as this may be, an analysis of provisions and instruments that are not legally binding in the formal sense, in their operational significance offer promise in the interim, that the international community could, with due diligence, at least avoid “something rotten” in the State of Denmark.”

Endnotes

- ¹ See Lavanya Rajamani, 'Cloud' over Climate Negotiations: From Bangkok to Copenhagen and Beyond, *ECONOMIC & POLITICAL WEEKLY*, 24 October 2009, on which this article builds
- ² See Lavanya Rajamani, *Exploring Legal Form Options*, *ECONOMIC & POLITICAL WEEKLY* 8 August 2009, on which this article builds
- ³ Statement by Prime Minister Lars Løkke Rasmussen, *GLOBE Copenhagen Legislators Forum*, 24 October 2009
- ⁴ Edith M. Lederer, *UN signals delay in climate change treaty*, *ASSOCIATED PRESS*, 27 October 2009
- ⁵ Michael von Bülow, *World leaders: Legally binding treaty out of reach in Copenhagen*, 16 November 2009, available at, <http://en.cop15.dk/news>
- ⁶ The AWG-LCA is the second of the two negotiating processes under the climate treaties. The first is the Ad Hoc Working Group to consider further commitments for developed countries beyond 2012 under the Kyoto Protocol (AWG-KP) See Decision 1/CMP.1, *Consideration of Commitments for Subsequent Periods for Parties Included in Annex I to the Convention under Article 3, Paragraph 9 of the Kyoto Protocol*, in FCCC/KP/CMP/2005/8/Add.1 (30 March 2006)
- ⁷ See AOSIS and African Group statements, *LCA Closing Plenary, Barcelona*, 6 November 2009 (on file with the author)
- ⁸ *United Nations Framework Convention on Climate Change*, 29 May 1992, A/AC.237/18 (Part II)/Add.1, reprinted in (1992) 31 ILM 849 [hereinafter FCCC]
- ⁹ *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 10 December 1997, FCCC/CP/1997/L.7/add.1, reprinted in (1998) 37 ILM 22 [hereinafter Kyoto Protocol]
- ¹⁰ *Decision 1/CP.13, Bali Action Plan*, in FCCC/CP/2007/6/Add.1 (14 March 2008) [hereinafter Bali Action Plan]
- ¹¹ *Work Program For 2009, Draft Conclusions Proposed By The Chair*, FCCC/AWGLCA/2008/L.10 (10 December 2008)
- ¹² *Negotiating Text, Note by the Chair*, FCCC/AWGLCA/2009/8 (19 May 2009), paragraph 19
- ¹³ *Id*
- ¹⁴ *Revised Negotiating Text*, FCCC/AWGLCA/2009/Inf.1 (22 June 2009)
- ¹⁵ *Non-papers containing revised negotiating texts*, available at, http://unfccc.int/meetings/ad_hoc_working_groups/lca/items/5012.php
- ¹⁶ *Organization of Work, Draft Conclusions proposed by the Chair*, FCCC/AWGLCA/2009/L.5 (6 November 2009)

- ¹⁷ *Non-paper 52*, available at, *supra* note 15
- ¹⁸ *Decision 1/CP.1, The Berlin Mandate*, in FCCC/CP/1995/7/Add.1 (6 June 1995), preambular paragraph 3
- ¹⁹ *Report of the Ad Hoc Group on the Berlin Mandate on the work of its Sixth Session, Bonn, 3-7 March 1997*, in FCCC/AGBM/1997/3 (8 April 1997), paragraphs 16 and 17; Article 17 requires that the “text of any proposed protocol shall be communicated to the Parties by the Secretariat at least six months before such a session.” FCCC, 1992
- ²⁰ *Adoption Of A Protocol Or Another Legal Instrument: Fulfilment of the Berlin Mandate, Revised text under negotiation*, FCCC/CP/1997/2 (12 November 2009)
- ²¹ *Technical review of the Revised Text Under Negotiation*, FCCC/CP/1997/CRP.1 (29 November 1997)
- ²² *Japan, Australia, Tuvalu, and Costa Rica submitted draft Protocols, and the US, an Implementing Agreement, for adoption at COP-15, in compliance with the six month rule. These will be on the agenda for COP-15. Texts produced by others will either have to be rooted in one of these instruments or wait six months for adoption.*
- ²³ *Contributions to Global Warming: Historic Carbon Dioxide Emissions from Fossil Fuel Combustion, 1900-1999, Earth Trends, Environmental Information, World Resources Institute*, available at, <http://earthtrends.wri.org/>
- ²⁴ *Discussed in supra note 1*
- ²⁵ *Non-paper 28*, available at, *supra* note 15
- ²⁶ *Id*
- ²⁷ *See List of Non-papers*, 6 November 2009, available at, *supra* note 15
- ²⁸ *This is the thrust of FCCC Article 4(7), FCCC, 1992, oft-quoted by developing countries.*
- ²⁹ *Compilation of information relating to possible quantified emission limitation and reduction objectives as submitted by Parties, Informal Note by the Secretariat*, 29 September 2009
- ³⁰ *Kelly Levin and Rob Bradley, Comparability of Annex I Emission Reduction Pledges, World Resources Institute Working Paper, September 2009*
- ³¹ *Alliance of Small Island States, Aggregate Annex-I reductions for 2020*, 28 September 2009 (on file with the author)
- ³² *See Terry Barker et al, CLIMATE CHANGE 2007: MITIGATION OF CLIMATE CHANGE, CONTRIBUTION OF WORKING GROUP III TO THE FOURTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (Cambridge University Press, 2007), Box 13.7 at 776*
- ³³ *US not to sign new climate pact without Senate nod*, *HINDUSTAN TIMES*, 14 November 2009
- ³⁴ *Daniel Samuelsohn, Climate Bill Signing 'Not Going to Happen' by Copenhagen – Browner*, *NYTIMES*, 2 October 2009
- ³⁵ *Jutta Brunnée COPing with Consent: Law-Making under Multilateral Environmental Agreements*, 15 *LEIDEN JOURNAL OF INTERNATIONAL LAW* 1, 32(2002), noting however that most norms that are enforceable in principle are often not enforced in practice
- ³⁶ *See Kal Raustiala, Compliance and Effectiveness In International Regulatory Cooperation* 32 *CASE W. RES. J. INT'L L.* 387 (2000), defining and distinguishing compliance, implementation and effectiveness. In his view, compliance refers to a state of conformity or identity between an actor's behaviour and a specified rule. Implementation refers to the process of putting international commitments into practice. Effectiveness is a multi-layered concept,

which could refer to the degree to which a given rule induces the desired behavioral change, improves the state of the underlying problem, and achieves its inherent policy objectives.

³⁷ Article 4(5), FCCC, 1992

³⁸ See Decision 27/CMP.1, Procedures and mechanisms relating to compliance under the Kyoto Protocol, in FCCC/KP/CMP/2005/8/Add.3 (30 March 2006)

³⁹ Article 3(1) and (2), Kyoto Protocol, 1997

⁴⁰ Several Kyoto Protocol Parties were above their 1990 levels of emissions, some well above them, in 2007. Data available at, http://unfccc.int/ghg_data/ghg_data_unfccc/items/4146.php

⁴¹ Soft law is defined as that which is "either not yet or not only law." Pierre-Marie Dupuy, *Soft Law and the International Law of the Environment* 12 MICH. J. INT'L LAW 420 (1991); and is used in reference to "international prescriptions that are deemed to lack requisite characteristics of international normativity," but which, nevertheless, "are capable of producing certain legal effects." See Remarks by Gunther Handl in W. Michael Reisman et al. *A Hard Look At Soft Law* 82 AM. SOC'Y INT'L L. PROC. 371 (1988)

⁴² A distinction should be drawn here between COP decisions that are legally binding (based on explicit treaty-based authority), and those that are not. Both are treaty-generated legal commitments. The former will be legally binding so enforceable, and the latter not. See discussion and references on COP decisions.

⁴³ Douglas M. Johnston, CONSENT AND COMMITMENT IN THE WORLD COMMUNITY 197-8 (1997)

⁴⁴ Address by FCCC Executive Secretary, Yvo de Boer, *A Package that Delivers Immediate Action*, Pre-COP Consultations, 16-17 November 2009

⁴⁵ Decision 5/CP.6, *The Bonn Agreements on the implementation of the Buenos Aires Plan of Action* in FCCC/CP/2001/5 (25 September 2001)

⁴⁶ *Id* at 36

⁴⁷ The legal personality of COPs is discussed in R. Churchill and G. Ulfstein, *Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little Noticed Phenomenon in International Law*, 94 AM. J. INT'L L. 623 (2000)

⁴⁸ Article 7, FCCC, 1992

⁴⁹ See e.g. Article 6 (2), 12 (7) and 17, Kyoto Protocol, and Principles Nature and Scope of the Mechanisms pursuant to Article 6, 12 and 17 of the Kyoto Protocol, Decision 2/CMP.1, in FCCC/KP/CMP/2005/8/Add.1 (2005)

⁵⁰ Pursuant to Article 4(2) (d), FCCC, 1992

⁵¹ See e.g. Berlin Mandate, *supra* note 18

⁵² See *supra* note 38

⁵³ COP decision may be considered as a "subsequent agreement between the Parties regarding the interpretation of the treaty or the application of its provisions" Article 31(3) (a), Vienna Convention on the Law of Treaties, 1969

⁵⁴ The enabling clause in the relevant treaty may authorize a COP decision to be binding, or explicitly require further consent for it to be binding, as for example in the case of Article 18, Kyoto Protocol (mandating that compliance procedures and mechanisms entailing binding consequences shall be adopted by means of an amendment to the Protocol), see *supra* note 35 at 24

⁵⁵ Explicit authorization for binding law-making is unusual. Article 2(9) Montreal Protocol, 1987 is an oft-quoted example.

⁵⁶ See *supra* note 35 at 32

⁵⁷ Article 7(1) read with Article 7(4), Kyoto Protocol, 1997, renders Decision 15/CMP.1 binding in a formal sense. Decision 15/CMP.1, Guidelines for the preparation of the information required under Article 7 of the Kyoto Protocol, in FCCC/KP/CMP/2005/8/Add.2 (30 March 2006)

⁵⁸ Article 7, FCCC, 1992

⁵⁹ See e.g. Decision 7/CP.7, Funding under the Convention, in FCCC/CP/2001/13/Add.1 (21 January 2002), paragraphs 1(b) and (e)

⁶⁰ See e.g. COP decisions under Article 17 (emissions trading), and, *supra* note 35 at 32-33

⁶¹ *Id* at 33

⁶² Decision 1/CP.8, Delbi Ministerial Declaration on Climate Change and Sustainable Development, in FCCC/CP/2002/7/Add.1 (28 March 2003)

⁶³ COP decisions are adopted by consensus (not unanimity), because although the Rules of Procedure provide for voting, Parties are yet to agree on Rule 42 (Voting), of the draft Rules of Procedure. As a result the Rules of Procedure have been applied, with the exception of Rule 42, since 1996. See Draft Rules of Procedure of the Conference of the Parties and its Subsidiary Bodies in FCCC/CP/1996/2 (22 May 1996)

⁶⁴ Ministerial Declaration, Review of the Implementation of the Convention and of decisions of the first session of the Conference of the Parties, FCCC/CP/1996/L.17 (18 July 1996)

⁶⁵ See e.g. *id* at paragraph 8

⁶⁶ David G. Victor, *The Use and Effectiveness of Non-Binding instruments in the Management of Complex International Environmental Problems*, 91 AM. SOC'Y INT'L L. PROC. 241 (1997)

⁶⁷ Address by Danish Prime Minister Lars Løkke Rasmussen, Pre-COP Consultations Copenhagen, 17 November 2009, focusing both on numbers on the table as well as action starting in 2010

Lavanya Rajamani is Professor, Centre for Policy Research, New Delhi. These views are personal and do not reflect the views of individuals or institutions I am associated with. I am grateful to Cam Carruthers, Chad Carpenter, Navroz Dubash, Harald Winkler and Michael Zammit Cutajar for comments on an earlier version of this article. This Brief appears in the Economic & Political Weekly, 28 November 2009.

The Centre for Policy Research (CPR) is an independent think tank set up in 1973. The Centre conceives its larger role as one of stimulating advanced thinking on major policy issues and suggesting alternative policy options.

CPR's Climate Initiative seeks to generate research and analysis on the global climate negotiations, and on the links between the global climate regime and domestic laws, policies and institutions in India. It also seeks to create a platform from which scholars and activists can engage in policy and academic debate on climate change.

For further details on our work visit, <http://www.cprindia.org>