Legal Form of a New Climate Agreement: Avenues and Options

Daniel Bodansky
University of Georgia School of Law

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Bali Action Plan

- Bali Action Plan calls for an “agreed outcome,” but leaves legal form open
- UNFCCC intended to facilitate and promote actions to control climate change, not limit them
General options on legal form

- Decisions of parties
  - UNFCCC: COP
  - Kyoto Protocol: CMP

- Amendment
  - Amendment of UNFCCC
  - Amendment of Kyoto Protocol
  - Amendment of Annex to UNFCCC or Kyoto Protocol

- New Protocol
• UNFCCC art. 7.2: COP can make decisions “necessary to promote the effective implementation of the Convention”
  – KP art. 13.1: CMP has similar authority regarding the Protocol
• Cannot establish new legal obligations
• But could
  – Set forth political commitments
  – Establish a register/schedule memorializing national commitments or actions
  – Adopt rules for the implementation of existing commitments (e.g., MRV procedures)
Legal Form: Amendment

- No substantive limits on what an amendment might do
- Amendment to UNFCCC could:
  - Modify existing commitments or establish new commitments
  - Modify or elaborate the objective or principles of the UNFCCC
  - Modify existing institutional arrangements or establish new institutions
- Amendment to KP could
  - Establish new targets for Annex I countries
  - Create other types of commitments
  - Create commitments for other groups of countries
  - Create new flexibility mechanisms or change existing ones
  - Change MRV and compliance procedures
**Legal Form: Amendment**

- **Procedures**
  - Amendment of UNFCCC or KP (UNFCCC art. 15, KP art. 20)
    - 3/4 vote of UNFCCC or KP parties
    - Ratification by 3/4 of parties
    - Binds only those states that ratify
  - Amendment of annex to UNFCCC or KP (UNFCCC, art. 16, KP art. 21)
    - In general, amendment of annex requires
      - 3/4 vote of UNFCCC or KP parties
      - Applies to all parties unless they object within 6 months
  - **Special rules**
    - Amendment of UNFCCC Annex I or II requires approval of state concerned (UNFCCC art. 4.2(f))
    - Amendment of KP Annex B requires written consent of state concerned (KP art. 21.7)
• **UNFCCC art. 17**
  – Authorizes COP to adopt protocols
  – No specified requirements for adoption or entry into force
    • In practice, adoption of new protocol requires consensus of UNFCCC parties
    • Entry into force requirements specified in the new protocol itself
Promoting an integrated regime

- Benefits of an integrated regime
  - Promoting reciprocity and stronger effort
  - Promoting economic efficiency
  - Promoting consistency and coordination
    - Common institutions, reporting and review requirements, compliance system
Single instrument

- Types of single instruments
  - UNFCCC decision(s) of parties
    - Could be used to memorialize a political rather than legal outcome
  - Comprehensive amendment of UNFCCC
    - Could be adopted by $\frac{3}{4}$ majority vote
    - Could potentially change anything in the regime
  - New protocol
    - Adoption would require consensus
    - Must be consistent with the Convention’s terms

- Some or all of the elements of the KP could be incorporated by reference into the new instrument
Multiple instruments with linkages

- **Political linkage:** adoption as a package
- **Legal linkage:**
  - Interdependent entry-into-force requirements, either for instruments as a whole or for particular provisions
  - Mutual recognition of allowances/credits and common transaction log to allow trading
- **Operational linkage**
  - Common institutions, MRV procedures
Multiple instruments could include:

- **KP amendment**
  - Adopt post-2012 emission targets
  - Modify CDM (e.g., to allow sectoral CDM)
  - Establish new financial or technology commitments (e.g., share of proceeds on allowances)

- **UNFCCC Amendment/Protocol**
  - Establish schedule of new commitments for UNFCCC parties
    - NAMAs
    - Finance and technology
    - Adaptation
    - MRV

- **UNFCCC decision**
  - Shared vision
  - Registry of national mitigation actions
  - MRV procedures
  - New financial or technology mechanisms
  - Adaptation plan of action
Conclusions

• UNFCCC establishes a very flexible legal architecture: many options and avenues
• Legal form should follow function
  – First need to decide on substantive provisions
  – Then let lawyers figure out how to best effectuate these outcomes