

Legal Form of a New Climate Agreement: Avenues and Options

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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

Legal Form: Decision of the Parties

- 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)

Legal Form: New Protocol

- 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