

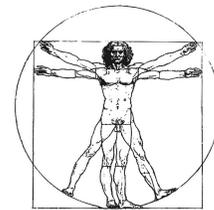
Climate Law In Brief

A brief summary of key legal issues relevant to Durban and beyond

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Disclaimer

This legal dossier briefly summarises information about legal issues in the climate negotiations. It does not provide legal advice on any specific questions.

This dossier is only meant for general information purposes.

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Basics of Treaty Law

Overview of key points in international law related to Multilateral Environmental Agreements such as the UNFCCC and the Kyoto Protocol

A *treaty* is an international agreement in written form between two or more States or other subjects of international law, governed by international law. Treaties are governed by: customary international law; general principles of international law; and the 1969 Vienna Convention on the Law of Treaties (VCLT).

Some States, for instance the US, are not party to the VCLT. However, most of the VCLT is also customary international law and therefore still applies to these States.

Background

Legal issues of particularly important relevance to Multilateral Environmental Agreements (MEAs) include: the effects of treaties on third parties; interpretation of treaties; the relationship between treaties; and reservations or interpretative declarations.¹ The conclusion and entry into force of treaties is addressed in Part II of the VCLT (see CLIB 2).

Pacta sunt servanda: This is a general principle of international law, and means that every treaty in force is binding upon the Parties and must be performed by them in good faith (VCLT Article 26). The UNFCCC and Kyoto Protocol accordingly create legally binding obligations for Parties. Parties may not invoke the provisions of their own national law to justify a failure to comply with the UNFCCC or Kyoto Protocol.

Pacta tertiis nec nocent nec prosunt: This well-established rule states that treaties are binding only upon those who are Parties to them, and cannot impose obligations on third-party States. This rule, captured in Article 34 of the VCLT, reflects the sovereignty and independence of States. However, a rule in a treaty may become binding on third party States if it becomes part of customary international law.

Interpretation of treaties: The interpretation of treaties is covered in VCLT Articles 31 and 32. Treaties are to be interpreted *in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose*. The relevant context of a treaty includes the text, preamble and annexes, as well as related agreements made by all the Parties, or connected instruments made by some Parties and accepted by the others. For example, the UNFCCC is part of the context for interpreting the Kyoto Protocol, and vice versa.

When the general rule of interpretation leads to an ambiguous or obscure meaning, or to a manifestly absurd or unreasonable result, supplementary means of interpretation may be used. These include the preparatory work of a treaty and the circumstances of its conclusion.

Reservations and Interpretative Declarations: VCLT Article 2 defines a reservation as a *unilateral statement, however phrased or named, made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State*.

VCLT Article 19 provides that a state may make a reservation unless, among other reasons, the treaty prohibits the reservation. Most recent MEAs do not allow reservations.² For instance, reservations are prohibited under Article 24 of the UNFCCC and Article 26 of the Kyoto Protocol. One reason for this is that the negotiated text often represents a series of delicate compromises, which could be undermined by allowing states to opt out of certain provisions.³

However, states have issued “interpretative declarations” explaining their understanding of a particular provision. For example, a declaration by Fiji, Kiribati, Nauru and Tuvalu to the UNFCCC states their understanding that *signature of the Convention shall in no way constitute a renunciation of any rights under international law concerning state responsibility for the adverse effects of climate change...* The legal effect of interpretative declarations is an open question.⁴

Relationships between treaties: VCLT Article 30 applies to successive treaties relating to the same subject matter. This may become relevant depending on how the international climate regime evolves. Article 30.2 states that when a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of the other treaty prevail. Under Article 30.3, when all the Parties to an earlier treaty are also Parties to a later one, the earlier treaty applies only to the extent that its provisions are compatible with the later one. Article 30.4 covers situations where the Parties to a later treaty do not include all the Parties to an earlier one.

The relationship between MEAs and trade treaties is often an important issue, for example when an environmental treaty prohibits trade in certain goods. Some Parties are concerned about the relationship between the evolving climate regime and the World Trade Organization system. In this context, UNFCCC Article 3.5 addresses disguised restrictions on trade, and Kyoto Protocol 2.3 directs Annex I Parties to strive to implement policies and measures in a way that minimises effects on international trade (see CLIB 27).

1 Sands, P (2003). *Principles of International Environmental Law*. Second edition. p.130

2 *ibid*, p.134

3 *ibid*, p.135

4 *ibid*, p.136

Becoming bound

An overview of the processes through which states become bound to international treaties

The UNFCCC entered into force in March 1994, after negotiations had culminated in adoption of the final text of the agreement at UN Headquarters, New York in May 1992. The Convention was opened for signature at Rio de Janeiro in June 1992 during the Earth Summit.

According to UNFCCC Article 22, States can become a Party by a process of ratification, acceptance, approval or accession. However, as the Convention is now closed for signature States only have the option of joining by accession.

The Kyoto Protocol was adopted in 1997, but only entered into force in September 2005. The Protocol was open for signature at UN Headquarters in New York from March 1998 to March 1999. States can now only become Party through accession.

Background

UNFCCC

The Intergovernmental Negotiating Committee for a Framework Convention on Climate Change was established by UN General Assembly Resolution 45/212 in 1990. The First Assessment Report of the Intergovernmental Panel on Climate Change (IPCC), published in 1990, provided the scientific basis for the negotiation of the draft text of the UNFCCC. (The IPCC was created at the initiative of the United Nations Environment Programme (UNEP) and the World Meteorological Organization (WMO) in 1988, to provide independent scientific assessment of the threat of climate change.)

The text of the UNFCCC was **adopted** after negotiations on the draft text. Adoption is the formal process of states consenting to accept the form and content of the treaty text that had been established through the negotiations phase.

Article 20 of the UNFCCC states that the UNFCCC can be **signed** by States that are members of the UN or of any of its specialised agencies, or that are Parties to the Statute of the International Court of Justice, and by regional economic integration organisations. The Convention could be signed by a head of state or government, a foreign minister, or other designated official with full authority to act on behalf of their country (for instance, an ambassador).

The act of signing shows the country's intention of becoming a Party to the treaty. It does not cause the state to be legally bound to the provisions of the treaty at this stage. At most it creates an obligation on the signing state to resist from acts that would go against the purpose of the UNFCCC.

To become Party to the UNFCCC and be bound by its obligations a State must **ratify** it after signature (or accept or approve it). Ratification is formal approval, often by a Parliament or other national legislature, which occurs after a country has signed a treaty. The instrument of ratification is deposited with the UN Secretary-General, who is the Depositary in accordance with Article 19.

Article 23(1) of the UNFCCC requires that a period of 90 days elapse for it to become binding on the ratifying State.

Where the domestic law of a State does not require the treaty to be ratified, **acceptance or approval** of a treaty following signature has the same legal effect as ratification, formally expressing the consent of the state to be bound by the UNFCCC. The state must deposit instruments of acceptance or approval with the Depositary.

Accession allows a state to become a Party to a treaty after it has closed for signature, and has the same effect as ratification. The time frame allotted for signature of the UNFCCC has expired. Therefore, to become a Party to the UNFCCC, States only have the option to accede to it and deposit an instrument of accession with the Depositary.

A **reservation** is an exception or concern noted for the record by a Party in the course of joining a treaty. It enables the State to be Party to a treaty, while at the same time having the option to not comply with certain provisions. It is declared when the treaty is signed, ratified, accepted, approved or acceded to. However, UNFCCC Article 24 clearly states that no reservations may be made to the Convention. Parties must comply with every obligation of the UNFCCC (see CLIB 1).

Kyoto Protocol: The Kyoto Protocol was adopted in 1997, but only entered into force on 16 February 2005. Entry into force rested on participation by industrialised states with high levels of emissions. Article 25 of the Protocol outlines the requirement: *[t]his Protocol shall enter into force on the ninetieth day after the date on which not less than 55 Parties to the Convention, incorporating Parties included in Annex I which accounted in total for at least 55 per cent of the total carbon dioxide emissions for 1990 of the Parties included in Annex I, have deposited their instruments of ratification, acceptance, approval or accession.*

Parties to the UNFCCC that have not signed the Protocol may accede to it at any time. A State must be Party to the UNFCCC to join the Kyoto Protocol (Article 24). Instruments of accession must be deposited with the Depositary. No reservations may be made to the Protocol.

Current Issues

The Kyoto Protocol's first commitment period will come to an end in 2012. A second commitment period has not yet been agreed. A major priority of the next Durban Climate Conference will be decisions related to this matter (see CLIB 15).

Parties, Observer States, Observer Organisations, and the Secretariat

The different roles of actors under the UNFCCC and Kyoto Protocol

Parties, Observer States, Observer Organisations and the Secretariat have different powers and roles in the climate negotiations. Parties are the decision makers. Observer States do not have the right to vote. Non-governmental organisations (NGOs) and some intergovernmental organisations (IGOs) must follow an admission procedure to be admitted as Observers. The Secretariat provides services to the Parties.

Background

Parties: A Party is a State or a regional economic integration organisation (such as the European Union), which has formally become bound by the UNFCCC or Kyoto Protocol. This takes place through, for example, ratification or accession (see CLIB 2).

Parties take on the relevant commitments in the UNFCCC or Kyoto Protocol and have the right to vote. Article 18 of the UNFCCC and Article 22 of the Protocol give each Party one vote, except for regional economic integration organisations which have as many votes as the number of Parties within them, so long as their members do not vote themselves.

Observer States: States that are not Parties to the UNFCCC may attend sessions of the COP as observers upon invitation of the COP President, unless at least one third of the Parties at the session object.⁵ Observer states may participate, but do not have the right to vote. The rules of procedure of the COP – including those related to observer states and observer organisations – apply *mutatis mutandis* (with changes as necessary) to the Kyoto Protocol (see CLIB 6).⁶ Therefore, observer states to the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (CMP), such as the US, cannot vote at CMP sessions.

Observer Organisations: UNFCCC Article 7.2(l) states that the COP shall *[s]eek and utilize, where appropriate, the services and cooperation of, and information provided by, competent international organizations and intergovernmental and non-governmental bodies*. Over 1,409 NGOs and 86 IGOs are currently admitted as observers to the UNFCCC.⁷

UN organisations: UNFCCC Article 7.6 and Rule 6 of the UNFCCC draft Rules of Procedure⁸ establish that the UN, its specialised agencies, international entities operating the financial mechanism of the Convention (such as the Global Environment Facility and the Adaptation Fund Board), and the International Atomic Energy Agency *may be represented* at COP sessions as observers, unless one third of the Parties present object. These organisations do not have to follow an admission procedure to become observers, and do not have the right to vote.

Admission of NGOs and non-UN IGOs: UNFCCC Article 7.6 states that *[a]ny body or agency, whether national or international, governmental or non-governmental, which is qualified in matters covered by the Convention...may be so admitted unless at least one third of the Parties present object*. To be formally admitted as observers, NGOs and non-UN IGOs must show that they are competent in matters covered by the UNFCCC and that they have non-profit or tax-exempt status.⁹ NGOs and non-UN IGOs do not have the right to vote.¹⁰

Activities of observer organisations: Observer organisations may attend sessions of the subsidiary bodies as well as the COP and CMP. Rule 30 of the draft Rules of Procedure states that COPs are held in public and subsidiary body meetings in private, unless the COP decides otherwise. However, a footnote interprets the rule to mean that accredited observers are permitted to participate in the “private” meetings of the subsidiary bodies.¹¹

Under COP decision 18/CP.4, the presiding officers of Convention bodies may invite IGOs and NGOs to attend open-ended contact groups unless one third of the Parties present at the session of the body that is setting up the contact group object. The presiding officers of contact groups may, however, close them to observers at any time.

The President of the COP or CMP, the chairs of the subsidiary bodies and the chairs of contact groups may permit interventions by observers on specific issues. Between negotiating sessions, observer organisations may be invited to make written submissions. This has been a long-standing practice for IGOs and is extended to NGOs when appropriate.

Secretariat: The climate change Secretariat, established by Article 8 of the UNFCCC, provides services to the COP, CMP and subsidiary bodies. The Secretariat is administered under UN rules and regulations, and is accountable to the COP through its Executive Secretary. Its mandate includes: making arrangements for sessions and providing support for the negotiations; facilitating assistance to the Parties, particularly developing country Parties, on request; and coordinating with the secretariats of other relevant international bodies, such as the Global Environment Facility and the Intergovernmental Panel on Climate Change.

Article 14 of the Kyoto Protocol applies Article 8 of the UNFCCC to the Protocol *mutatis mutandis*. The Secretariat carries out technical work related to the Protocol, such as on reporting guidelines.

Current Issues

The Subsidiary Body for Implementation (SBI) considered ways to enhance the engagement of observer organisations at its session in June 2011. For example, the SBI invited presiding officers of various bodies to seek opportunities for observer organisations to make interventions, encouraged future COP and CMP hosts to engage stakeholders and requested the Secretariat, where feasible and appropriate, to make use of observer inputs for the preparation of background documentation.¹²

From the point of view of LDCs it should be noted that if a situation arose where amendments to the Kyoto Protocol were to be adopted through a vote, the US would not have the right to vote.

5 UNFCCC Article 7.6; Rule 6.2 of the draft Rules of Procedure. FCCC/CP/1996/2

6 Kyoto Protocol, Article 13.5

7 http://unfccc.int/parties_and_observers/items/2704.php

8 The UNFCCC draft Rules of Procedure have been applied since COP 1, but never have been adopted. FCCC/CP/1996/2

9 The requirement that IGOs show either non-profit and/or tax-exempt status was developed by the Secretariat.

10 Rule 7, UNFCCC draft Rules of Procedure. FCCC/CP/1996/2

11 Footnote 1

12 Report of the Subsidiary Body for Implementation on its thirty-fourth session, held in Bonn from 6-17 June 2011, FCCC/2011/7, Advance version, paras.168-79

Article 2

The objective of the UNFCCC, and any related legal instrument

UNFCCC Article 2 sets out the objective of the Convention and of any related legal instrument, such as the Kyoto Protocol. According to Article 2, greenhouse gas concentrations are to be stabilised at a level that would prevent dangerous human interference with the climate system.

“Dangerous” has not been defined. The Cancun Agreements refer to 2°C and 1.5°C warming limits, the latter only as a factor in the first future review of the long-term global goal. Many would argue that the world passed the danger point years ago, with increasingly likely catastrophic impacts on LDCs.

Background

Article 2 states: *The ultimate objective of this Convention and any related legal instruments that the Conference of the Parties may adopt is to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.*

The origins of the wording in Article 2 probably date back to the Second World Climate Conference, held in Geneva in 1990, which was one of the major events on the emerging international climate change agenda.

It is important to note that the objective, as set out in UNFCCC Article 2, is also the objective of *any related legal instruments* – such as the Kyoto Protocol. If the COP adopts a new legal instrument, for example in follow-up of the negotiations under way in the AWG-LCA, it will also share the same objective.

Key issues

The most important point in Article 2 is that action under the Convention and related legal instruments aims to stabilise greenhouse gas concentrations in the atmosphere at a level that would prevent **dangerous** anthropogenic (human-caused) interference with the climate system.

What constitutes *dangerous* interference is a much-debated issue. The Intergovernmental Panel on Climate Change (IPCC), the global scientific body that assesses the science on climate change and its potential environmental and socio-economic impacts, has not determined what *dangerous* means, leaving this task to policy makers.

Defining *dangerous* in the context of UNFCCC Article 2 involves considering factors such as risk, costs, and acceptable levels of damage. For example, what is an acceptable level of risk that an island or low-lying state might disappear completely? What is the acceptable level of risk to agriculture in Africa? Many would argue that human interference with the climate system passed the danger point years ago.

The European Union has held the view that to avoid the most severe impacts of climate change, warming should be limited to no more than 2°C above pre-industrial levels, a view shared by

some other countries. Others, such as the Alliance of Small Island States and the Least Developed Country Group, have argued that warming must be limited to well below 1.5°C to reduce the risk of devastating impacts. Decision 1/CP.16 of the Cancun Agreements refers to holding the global average temperature increase below 2°C as a long-term goal and also to the 1.5°C limit, but the latter only as a factor in the context of the first review of the adequacy of the long-term goal (paragraph 4). Bolivia has proposed limiting warming to 1°C.

It is important to note that according to Article 2 a safe level of greenhouse gas concentrations is to be achieved *within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner*. Vulnerability and adaptation potential varies from country to country. There is clear evidence of changes to species and ecosystems caused by climate change: climate change is expected to become a major driver of species extinctions in the 21st century. Increasingly unpredictable weather patterns are expected to lead to falling agricultural production.

Enabling economic development to proceed in a sustainable manner has several aspects. On one hand, climate change must be slowed to a level where it does not endanger economic development. On the other hand, the costs and impacts of measures to mitigate climate change need to be considered.

Current Issues

Scientific understanding of climate change has grown dramatically since the text of the UNFCCC was adopted in 1992. This needs to be reflected in target-setting under the UNFCCC, the Kyoto Protocol and any new protocol or other legal instrument that might be adopted in future, as set out in Article 2.

What is “dangerous” for a wealthy country with large resources for adaptation differs considerably from what is “dangerous” for a vulnerable country that is facing development challenges. Whether or not a specific definition of “dangerous” is agreed, its current interpretation does not adequately reflect the realities of the worst impacted states, such as LDCs.

The Cancun Agreements failed to agree a top-down science-based approach to establishing mitigation targets although they leave open possibilities for increasing the level of ambition. The current emission reduction pledges are insufficient to keep warming to below 2°C, let alone below 1.5°C (see CLIB 16).

The urgency of achieving emission reductions that would minimise the risk of catastrophic impacts on LDCs is increasing. If this does not take place, legal strategies related to Article 2 could potentially involve dispute settlement under the UNFCCC, including the establishment of a Conciliation Commission (see CLIB 5).

Dispute settlement

A description of some of the dispute settlement provisions in the UNFCCC and the Kyoto Protocol, focusing on possibilities related to conciliation

The dispute settlement provisions of the UNFCCC and the Kyoto Protocol have not been used. The Conference of Parties (COP) has not adopted the annexes on arbitration and conciliation foreseen in the Convention. The *multilateral consultative process* whose aim would include preventing disputes, has not been adopted.

The establishment of a Conciliation Commission following notification of a dispute about interpretation or application of the UNFCCC or the Kyoto Protocol could potentially make it possible to pursue some LDC priorities in a judicial setting. However, this is likely to require considerable time and effort.

Background

A dispute settlement procedure is distinct from compliance procedures, although they could address similar issues. For instance, in addition to dispute settlement procedures, the Kyoto Protocol has established a compliance mechanism based on Article 18.

Multilateral Consultative Process: UNFCCC Article 13 aims to establish a *multilateral consultative process*, and requests the first Conference of Parties (COP) to the UNFCCC to consider its establishment. Following COP-1, a working group considered the multilateral consultative process and produced a draft text.

Most of the drafted text was agreed in COP-4, but Parties were unable to agree on the composition of the proposed Multilateral Consultative Committee. As a result, the multilateral consultative process has not been established yet.

According to the draft text, the proposed process would aim to: advise and assist Parties that encounter difficulties in implementation; promote understanding of the UNFCCC; and prevent disputes from arising (Decision 4/10).

Article 16 of the Kyoto Protocol calls on the CMP to consider and possibly modify the multilateral consultative process as soon as practicable. It has yet to do so.

Dispute settlement: The settlement of disputes is addressed in UNFCCC Article 14, which lays out that if a dispute occurs between two or more Parties concerning the interpretation or application of the UNFCCC, the Parties shall seek to settle the dispute through negotiation or any other peaceful means of their choice. This could involve, for instance, negotiation, mediation, a court decision or arbitration. The outcome could be binding or non-binding. A dispute could concern virtually any issue related to interpretation or application of the UNFCCC.

According to Kyoto Protocol Article 19, the same provisions apply *mutatis mutandis* (with changes as necessary) under the Kyoto Protocol. Article 14 will also apply automatically to any related legal instrument that the COP may adopt in the future, for example a new protocol, unless that instrument states otherwise (UNFCCC Article 14.8).

Binding dispute settlement options: Parties to the UNFCCC have two options for compulsory and binding dispute settlement: either submitting the dispute to the International Court of Justice,

following UNFCCC Article 14.2 (a); or arbitration in accordance with an annex to be adopted by the COP as soon as practicable, following Article 14.2 (b).

However, this applies only to Parties that have submitted a declaration accepting these forms of settlement. Very few Parties have done so. As concerns arbitration, the COP has not yet adopted an annex.

Conciliation: If a dispute exists between Parties and 12 months have passed since one Party notified the other of the dispute, any Party to the dispute can submit the dispute to conciliation. In such cases, a conciliation commission is to be established, consisting of an equal number of members appointed by each Party to the dispute, and a Chair selected jointly. The COP is to adopt additional procedures related to conciliation in an annex, but has not yet done so (Article 14 sub-paragraphs 5 to 7).

The award by the conciliation commission would not be binding. However, it has been suggested that this avenue could, for example, allow a State damaged by climate change to investigate the causal link between damage to their state and climate policy in a country with major emissions, possibly establishing a basis for liability under international law.¹³ This would then need to be pursued further through other legal processes.

Current Issues

As noted above, the dispute settlement provisions in UNFCCC Article 14 will apply automatically to any related legal instrument that the COP might adopt, unless the instrument states otherwise.

The dispute settlement provisions of the UNFCCC and the Kyoto Protocol have not been used, but they could offer potential to pursue some LDC concerns, although this would be likely to require considerable time and effort. The absence of *additional procedures* relating to conciliation (Article 14.7) need not stand in the way.

The possibility of establishing a Conciliation Commission could offer an avenue for pursuing questions related to the interpretation or application of the UNFCCC or the Kyoto Protocol. Potentially, such questions could relate, for example, to responsibility for damage cause by climate change or interpretation of key provisions such as UNFCCC Article 2, the objective of the Convention and of the Kyoto Protocol (see CLIB 4).

¹³ Kilinski, J. (2009). International climate change liability: a myth or reality? *Journal of Transnational Law & Policy*. Vol.18.2. pp 377-418

Draft Rules of Procedure

Status, and implications for the current negotiations

The Rules of Procedure are the rules for how the Conference of Parties (COP), Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (CMP) and subsidiary bodies do their work. They address issues such as the election of officers (for example, Chairs), setting of agendas, the role of the Secretariat and of observers, and voting in situations where the UNFCCC and the Kyoto Protocol do not provide rules.

The rules of procedure for the UNFCCC and the Kyoto Protocol have never been adopted, because Parties have not been able to agree on Rule 42 concerning voting. Instead, the COP and other bodies have continued to apply the draft rules of procedure.

Background

Usually the first COP of a Multilateral Environmental Agreement (MEA) adopts its rules of procedure in a COP decision. This was not possible in the UNFCCC due to differing views about Rule 42 on voting. The draft Rules of Procedure, drafted in 1996, also apply to subsidiary bodies (Rule 27.1) and to the CMP (Kyoto Protocol Article 13.5).¹⁴

Rule 42: The UNFCCC (Articles 15.3 and 16.2) and the Kyoto Protocol (Articles 20.3 and 21.4) include rules about voting on the adoption of amendments and annexes (by three-fourths majority vote). However, the UNFCCC does not include a voting majority for the adoption of protocols (Article 17).

This makes Rule 42 particularly important. Rule 42 includes proposed majorities for voting on matters of substance, including any proposed protocol. This is why it remains in brackets, and the rules of procedure have not been adopted. Please also see below regarding Rule 42 and points of order.

Rules on agenda: Important provisions in the draft Rules of Procedure include the rules on the agenda (Rules 9-16). The provisional agenda for each ordinary COP session is to include certain items, such as items referred to in Rule 16. According to Rule 16, items that have not been considered to completion at a session are automatically included in the agenda for the next session, unless the COP decides otherwise. This applies to the proposals for amendments, protocols and an implementing agreement made by Parties prior to the Copenhagen Summit and subsequently: they remain on the agenda for Durban (see CLIB 14).

The Secretariat, in agreement with the COP President, is to include any item proposed by a Party and received after the provisional agenda has been produced, but before the opening of the session, in a supplementary provisional agenda. The COP decides whether to add, delete, defer or amend items when adopting the agenda. Only items that the Cop considers to be urgent and important can be added (Rule 13).

Officers: The Rules of Procedure set out who is included in the Bureau (Rule 22). They also set out the powers of the President: for example that s/he shall rule on points of order and, subject to the rules of procedure shall have *complete control of the proceedings and over the maintenance of order thereat* (Rule 23.1) although s/he remains under the authority of the COP (Rule 23.3).

Points of order: When a Party representative raises a point of order, s/he is questioning whether the rules of procedure have been followed. The President must decide immediately on the point of order. A Party can appeal against the ruling. The appeal shall be put to the vote immediately and the ruling shall stand unless overruled by a majority of the Parties present and voting (Rule 34).

However, it should be noted that the contested Rule 42 includes bracketed proposals related to closing or limiting debate, or the list of speakers.

Representation and credentials: Each Party is to be represented by a delegation, with a head of delegation and other accredited representatives. Credentials are to be issued by the Head of State or Government, or by the Minister of Foreign Affairs. The COP Bureau examines the credentials and the COP decides whether to accept the credentials (Rules 17-21).

Current Issues

It has been a formality for COP Presidents to undertake consultations on the draft Rules of Procedure at each COP, but Parties have not made progress.

In May 2011, Mexico and Papua New Guinea submitted a proposal to amend the Convention to reach an agreement on voting. This proposal will be considered in Durban, together with other proposals for amendments, protocols and an implementing agreement.¹⁵

14 FCCC/CP/1996/2, available at <http://unfccc.int/resource/docs/cop2/02.pdf>

15 The proposed amendments to UNFCCC Article 7 and 18 can be found at http://unfccc.int/files/parties_and_observers/notifications/application/pdf/nv_parties_20110603.pdf

Financial Mechanism

A legal overview of the financial mechanism and its operating entities, and issues regarding the design of the Green Climate Fund

Under the UNFCCC, Annex II Parties commit to providing financial resources to help developing country Parties implement the Convention. A financial mechanism, defined in UNFCCC Article 11, gives effect to these commitments.

The Parties are currently negotiating the design of the new Green Climate Fund (GCF) established in the Cancun Agreements. Difficult issues include how the GCF is to be governed, and its relationship to the COP.

Background

The UNFCCC has only one financial mechanism to cover the *provision of financial resources on a grant or concessional basis* under the Convention.¹⁶ Under UNFCCC Article 11.1, the financial mechanism *shall be entrusted to **one or more** existing international entities*.

The reference to **existing international entities** does not mean that only entities that existed when the UNFCCC was adopted in 1992, such as the Global Environment Facility (GEF), can be operating entities of the financial mechanism. A case in point is the GCF, which was established in the Cancun Agreements *to be designated as an operating entity of the financial mechanism of the Convention under Article 11*.¹⁷ The Adaptation Fund Board is also considered to be an operating entity of the financial mechanism.

The decisions establishing the Special Climate Change Fund (SCCF), Least Developed Countries Fund (LDCF) and Adaptation Fund (AF) all state that they *shall be operated by an entity entrusted with the operation of the financial mechanism*.¹⁸

The financial mechanism functions *under the guidance of and [is] accountable to* the COP, meaning that the COP is meant to decide its policies, programme priorities and eligibility criteria.¹⁹ The UNFCCC financial mechanism and its operating entities are also those of the Kyoto Protocol.²⁰

Green Climate Fund (GCF): A key issue at Cancun was whether or not the GCF should be placed under the authority of the COP. In the end, the Cancun Agreements established the GCF with arrangements to be concluded between the COP and the GCF, *to ensure that it is accountable to and functions under the guidance of the COP*.²¹ This does not preclude arrangements that place the GCF under the authority of the COP. For example, the CMP first decided that the Adaptation Fund would function *under the guidance of and be accountable to* the CMP²² and later decided that it *should function under the **authority and** guidance of and be accountable to* the CMP.²³

However, neither the formulation *accountable to and under the guidance of* nor *under the authority of* the COP will guarantee the COP strongly governs the GCF. This will require specific measures, such as giving the COP the power to select the members of the GCF board, confirm operational rules, and financial oversight functions. Decision 16/CP.1 specifies that the GCF will be governed by a board of 24 members, equally split between developed and developing countries, specifically including LDCs.

The Cancun conference also decided that the GCF shall be designed by a Transitional Committee, which was mandated to recommend to the COP possible legal and institutional arrangements for the GCF; governance issues related to the GCF board; methods to manage financial resources, including funding windows and methods of access; and mechanisms to ensure financial accountability, and evaluate the performance of activities supported by the GCF.

A Standing Committee was also established in Cancun, *under the [COP] to assist the [COP] in exercising its functions with respect to the financial mechanism...in terms of improving coherence and coordination in the delivery of climate change financing, rationalization of the financial mechanism, mobilization of financial resources and measurement, reporting and verification of support provided to developing country Parties.* Parties agreed to further define the roles and functions of the Standing Committee.

Current Issues

The Transitional Committee has failed to reach agreement on the design of the GCF prior to Durban. Developing and developed countries have strongly differing views on issues such as the governance of the GCF by the COP, the GCF's legal capacities and the role of the private sector.

LDC representatives championed the need for enhanced direct access at the meetings of the Transitional Committee. As a result the *Draft Governing Instrument for the Green Climate Fund* annexed to the report of the Transitional Committee contains the following paragraph on direct access: *Recipient countries will nominate competent sub-national, national and regional implementing entities for accreditation to receive funding. The Board will consider additional modalities that further enhance direct access, including through funding entities with a view of enhancing country ownership of projects and programmes.*²⁴

The Cancun conference also issued further guidance on the operation of the LDCF, requesting the GEF to provide funding for updates to National Adaptation Programmes of Action (NAPAs) and reiterating a request to facilitate implementation of the other elements of the LDC work programme.²⁵

16 UNFCCC Article 11.1

17 Cancun Agreements, FCCC/CP/2010/7/Add.1, para.102

18 UNFCCC COP Decision 7/CP.7, FCCC/CP/2001/13/Add.1, 2,6; UNFCCC COP Decision 10/CP.7, FCCC/CP/2001/13/Add.1, 4

19 UNFCCC Article 11.1

20 Kyoto Protocol, Article 11

21 Cancun Agreements, FCCC/CP/2010/7/Add.1, para.102

22 COP-MOP Decision 28/CMP.1

23 COP-MOP Decision 5/CMP.2

24 Transitional Committee (2011). *Report of the Transitional Committee for the Design of the Green Climate Fund to the seventeenth session of the Conference of the Parties.* Annex 1, Section 5.4.1, Paragraph 47

25 Decision 5/CP.16

National communications

Provisions and principles, likely to be of relevance to the MRV, ICA and IAR discussions

Submission of national communications and greenhouse gas inventories are key processes under the UNFCCC and the Kyoto Protocol, which include requirements for all Parties, but distinguish between the requirements for developing and developed countries and take special account of LDCs.

The UNFCCC provisions and principles that underpin national communications are likely to form the basis for development of measuring, reporting and verification (MRV), international consultations and analysis (ICA) and international assessment and review (IAR) in the current negotiations (see CLIB 17).

Background

Taking into account their common but differentiated responsibilities and specific national and regional development priorities, objectives and circumstances, all Parties are to prepare national inventories and make them available to the COP according to UNFCCC Article 4.1(a). The inventories must be prepared in accordance with Article 12, which states that each Party is to communicate a national inventory to the extent its capacities permit; a general description of steps to implement the UNFCCC; and any other relevant information.

Under Article 12, additional requirements apply to Annex I Parties. Additional requirements also apply to Annex II Parties in relation to support to developing countries – they are to incorporate details of measures taken in accordance with Articles 4.3, 4.4 and 4.5.

Article 4.3 includes specific requirements for Annex II Parties to provide new and additional financial resources to meet the *agreed full costs* of developing country Parties in complying with their obligations under Article 12.1.

The reference to *agreed full costs* distinguishes this requirement from the requirement (also in Article 4.3) to provide financial resources to meet the agreed full *incremental* costs of measures under Article 4.1. UNFCCC Article 4.4 contains the requirement that Annex II Parties are to assist developing country Parties that are particularly vulnerable to the adverse effects of climate change in meeting costs of adaptation (see CLIB 18). Article 4.5 addresses technology transfer (which is also mentioned in Article 4.3).

UNFCCC Article 12, which sets out timelines for initial national communications, specifies that LDCs may make their initial national communication at their discretion.

Under the Kyoto Protocol, Annex I Parties are required to provide supplementary information to demonstrate that they are complying with the Protocol (Articles 5, 7 and 8).

Kyoto Protocol Article 10 contains requirements of a more general nature relevant to non-Annex I Parties.

In 1999, a Consultative Group of Experts on National Communications by Parties not included in Annex I to the Convention (CGE) was established, with the objective of improving the process of preparation of national communications from non-Annex I Parties. The CGE's current mandate ends in 2012.

Current Issues

The Cancun Agreements state that *developed countries shall improve the reporting of information on the provision of financial, technical and capacity-building support to developing country Parties.*²⁶ They also call for the enhancement of guidelines for Annex I Party reporting, including development of common reporting formats and methodology for finance.²⁷

In relation to Nationally Appropriate Mitigation Actions (NAMAs) by developing countries, the Cancun Agreements call on developed countries to provide enhanced financial, technical and capacity-building support for preparation and implementation of NAMAs and for enhanced reporting.²⁸ While deciding to enhance reporting by non-Annex I Parties, including inventories, the Agreements are clear that is clear that *additional flexibility* is to be given to LDCs and Small Island Developing States.²⁹

²⁶ Decision 1/CP.16, paragraph 40(c), <http://unfccc.int/resource/docs/2010/cop16/eng/07a01.pdf#page=2>

²⁷ Decision 1/CP.16, Paragraph 41 and 46

²⁸ Decision 1/CP.16, Paragraph 52

²⁹ Decision 1/CP.16, Paragraph 60

Common but Differentiated Responsibilities and Respective Capabilities

An application of the principle of equity in international environmental law, applied in many multilateral environmental agreements

The principle of common but differentiated responsibilities and respective capabilities (CBDRRC) has two parts: a common responsibility to protect the environment, and different standards of conduct. It is expressed in the UNFCCC and Kyoto Protocol through differential treatment for developing and developed countries. This differential treatment has been carried forward into the Cancun Agreements.

Another expression of CBDRRC is the special consideration given to LDCs in UNFCCC Article 4.9. It has been implemented through, for example, the creation of National Adaptation Programmes of Action (NAPAs), the LDC Expert Group, and the LDC Fund. Special consideration for LDCs is also expressed in certain provisions of the Cancun Agreements.

Background

CBDRRC does not, by itself, generate legal obligations for states. It has no fixed content and can support many kinds of differential treatment – for instance, priority in receiving financial assistance or technology transfer, delayed implementation, or fewer obligations. However, once treaties apply CBDRRC by establishing specific differential treatment, such treatment becomes legally binding for Parties to those treaties.

The first clear example of CBDRRC was in the 1992 Rio Declaration on Environment and Development. Principle 7 of the Declaration cited two reasons why stricter standards of conduct apply to developed countries: they contribute more to global environmental problems; and they have greater technological and financial resources to respond to these problems.

UNFCCC Article 3.1 does not refer to the historical responsibility of developed countries. It states *[t]he Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.*

A reference to historical responsibility is found in the UNFCCC Preamble, which states that the *largest share of historical and current global emissions of greenhouse gases has originated in developed countries, [and] that per capita emissions in developing countries are still relatively low....* CBDRRC is also referred to in UNFCCC Article 4.1 and Kyoto Protocol Article 10 (both on commitments for all Parties).

The UNFCCC and Kyoto Protocol apply CBDRRC by dividing Parties into three groups, each with different commitments: Annex I Parties (members of the OECD in 1992 and economies in transition); Annex II Parties (members of the OECD in 1992); and Non-Annex I Parties (developing countries). Under the UNFCCC, Annex I Parties commit to adopting policies and measures that demonstrate that they are taking the lead in reducing emissions, and report more often and in greater detail than non-Annex I Parties. Annex II Parties commit to the provision of financial resources to developing countries, and to promoting the development and transfer of environmentally sound technologies. Under the Kyoto Protocol, each Annex I Party has agreed to

a quantified emission limitation or reduction commitment for the first commitment period (2008-2012). The Kyoto Protocol also establishes further additional commitments for Annex I Parties.

Developing and developed country mitigation action is included in the Bali Action Plan, Copenhagen Accord, and the Cancun Agreements, but is treated differently. Developed country mitigation often refers to quantified emission reduction commitments or targets. Developing country mitigation does not refer to commitments, and is set in the context of sustainable development, supported and enabled by technology, financing, and capacity building from developed countries.

Special consideration for LDCs: As a further expression of CBDRRC, certain groups of countries within non-Annex I are given special consideration. Article 4.9 states that *[t]he Parties shall take full account of the specific needs and special situations of the least developed countries in their actions with regard to funding and transfer of technology*. Although Articles 4.8 and 4.10 recognise other groups of countries, there are strong legal arguments why Article 4.9 gives the LDCs special priority:

- Article 4.9 requires that Parties *take full account of* the LDCs specific needs and ***special situations***. Article 4.10 uses *take into consideration*, which is weaker.
- The Parties did not intend for Article 4.9 to be redundant as a result of Article 4.8, and therefore must have intended that it provide more than Article 4.8 does.
- The ultimate objective of the UNFCCC, as stated in Article 2, is to achieve *stabilization of greenhouse gas emissions in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system*. Since climate change poses a great threat to LDCs, giving the LDCs special priority is consistent with this objective.

UNFCCC Article 4.9 has been implemented through the creation of a work programme supported by the LDC Fund, which includes the preparation and implementation of NAPAs and the work of the LDC Expert Group.

Current Issues

In the Cancun Agreements, LDCs and SIDS receive additional flexibility on reporting, and priority with regard to fast-start finance for adaptation. LDCs have reserved representation on many bodies established by the Cancun Agreements, including the Technology Executive Committee, the board of the Green Climate Fund (GCF), and the Transitional Committee for the design of the GCF. The Transitional Committee is also discussing special support for private sector enabling activities in SIDS and LDCs.³⁰

Article 4.9 provides a strong and unambiguous basis for giving LDCs special priority in the ongoing and future negotiations, given its strong language: *Parties shall take full account of the specific needs and special situations of LDCs in their actions regarding funding and technology transfer*.

³⁰ Transitional Committee (2011). *Draft outline of the report of the Transitional Committee for the design of the Green Climate Fund to the Conference of the Parties: Note by the Co-Chairs and Vice-Chairs* (2 September 2011) TC-3/2, p. 8

Polluter Pays Principle, and transboundary harm

An overview, and limitations of potential relevance to LDCs

The polluter pays principle and state responsibility to prevent, reduce and control transboundary harm are important legal concepts, whose application in the context of the UNFCCC negotiations is politically charged.

Background

Polluter Pays Principle: The Polluter Pays Principle (PPP) provides that the costs of pollution should be borne by the entity responsible for causing the pollution. It has been widely incorporated in domestic legal systems, and reference to it can also be found in international instruments. However, the PPP is not recognised as a rule of customary international law that would apply between States.³¹

The PPP aims to internalise costs of pollution at source – focusing primarily on industry, not States or governments.³² Principle 16 of the 1992 Rio Declaration, for example, states: *National authorities should endeavor to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution....*³³

Application of the PPP within the UNFCCC context has been strongly rejected by developed country Parties. During the drafting of the Convention, India – supported by many G77 nations – proposed the inclusion of a reference to the responsibility of industrialised countries for existing levels of pollution in UNFCCC Article 3, but this was opposed by most developed countries.³⁴ In addition, various amendments to Article 3 during the negotiations limited its scope, to ensure that no obligations beyond those in Article 4 (on commitments) were created.³⁵

Responsibility for transboundary harm: It is a widely recognised principle under customary international law that a State is duty-bound to prevent, reduce and control the risk of environmental harm to other states.³⁶ The legal precedent usually cited in this context concerns a Canadian smelter, whose sulphur dioxide emissions caused damage in the US. The arbitral tribunal determined that Canada had to pay the US compensation for the damage.³⁷

Several international courts and tribunals have subsequently confirmed the principle. In the advisory opinion on the threat or use of nuclear weapons, the International Court of Justice (ICJ) explicitly stated: *The existence of the general obligation of states to ensure that activities within their jurisdiction and control respect the environment of other states or of areas beyond national control is now part of the corpus of international law relating to the environment.*³⁸

Based on Principle 21 of the 1972 Stockholm Declaration, the preamble of the UNFCCC endorses the obligation to avoid damage, but emphasises that *States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies....*³⁹

The preamble reflects the common understanding that environmental protection has to be balanced against the sovereign right to exploit resources and develop economically. States neither have the freedom to carry out activities on their territory regardless of consequences to

other States or areas beyond national control, nor the absolute right to be free of impacts from other States.

There is a general consensus that transboundary interference must be *of serious consequence* and cause at least *significant, substantial or appreciable* harm. Minimal, trivial or simply detectable impacts do not meet that threshold.⁴⁰ However, even if this threshold is met the resulting legal consequences are subject to debate.

Some legal commentators have argued that under certain circumstances, there may be an absolute prohibition on serious transboundary environmental harm.⁴¹ However, there is little jurisprudence and state practice to support that view. Efforts to regulate the effects of transboundary pollution on, for example, the ozone layer, rivers and oceans suggest that there is no obligation to completely abstain from certain hazardous activities.

The dominant opinion is that the responsibility for transboundary pollution merely results in an obligation to regulate and control the source of harm. The obligation does not automatically render an activity that creates serious harm unlawful. In order for it to violate international law, it is necessary to establish that the State concerned does not comply with relevant standards of diligent conduct.

The duty of due diligence involves at least the following elements: the opportunity to act or prevent; the foreseeability that a certain activity could lead to transboundary damage; and proportionality of measures required to prevent harm or minimise the risk.⁴² If, despite the foreseeability of events, proportionate measures capable of protecting the environment of other States are not taken, a State may be considered careless and held responsible for a breach of international law.

Current Issues

The PPP and state responsibility for transboundary harm are relevant to the most contested and politically charged issues in the UNFCCC negotiations, such as historical responsibility, allocation of future emission reduction commitments and financing. However, the fact that the PPP is not recognised as a principle of customary international law and the negotiating history of the UNFCCC limits its strength as a potential legal argument in support of LDC priorities.

31 Sands, P. (2003). *Principles of International Environmental Law*, 2nd ed., Cambridge, p.282

32 Boyle, A (2005). Globalising Environmental Liability, the Interplay of National and International Law. *Journal of Environmental Law*. p.8

33 <http://www.unep.org/Documents.multilingual/Default.asp?DocumentID=78&ArticleID=1163>

34 Informal papers related to the preparation of a FCCC, UN Doc. A/AC.237/Misc.1/Add.3, p.3

35 Rajamani, L. (2000). The Principle of Common but Differentiated Responsibility and the Balance of Commitments under the Climate Regime. *Review of European Community & International Environmental Law*. Vol.9, p.124

36 Brownlie, I (2008). *Principles of Public International Law*, 7th ed., p.275

37 http://untreaty.un.org/cod/riaa/cases/vol_III/1905-1982.pdf

38 ICJ, Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, ICJ Reports 1996, p.226 para.29.

39 Preamble recital no 8

40 http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_7_2001.pdf

41 Scovazzi, T. (2001). Yearbook for International Environmental Law, Vol.12, p.43; Barboza, J (2011) *The Environment, Risk and Liability in International Law, Legal Aspects of Sustainable Development*. Martinus Nijhoff Publishers. p.19.

42 International Law Commission, Draft articles on Prevention of Transboundary Harm

Equity and burden-sharing

Equitable decisions carry greater legitimacy, and encourage better cooperation

Developing countries have done little to cause climate change, but they – in particular the poorest amongst them – will be worst affected. These countries are faced with unprecedented social, economic and environmental challenges without the resources and technologies that could help build their adaptive capacity. As a result, questions of equity and burden-sharing are important in the current climate change debate.

Equity

Equity is an ethical and people-oriented concept with social, economic and environmental dimensions. It focuses on the fairness of both the processes and outcomes of decisions. Equitable decisions carry greater legitimacy, and encourage all parties to cooperate better in carrying out mutually agreed actions.

In international environmental law, equity usually describes the equitable utilization of natural resources or equitable costs sharing in managing environmental concerns.⁴³ The International Court of Justice distinguishes between equity within the law, as a gap-filler outside, and against the law (*intra, praeter and contra legem*).⁴⁴

In the UNFCCC, equity complements the principle of common but differentiated responsibilities and respective capabilities (CBDRRC). Article 3.1 states that Parties *should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities*.

Hence, while the term *equity* is distinct from the principles of inter- and intra-generational equity, which determine specific objectives, the significance of *equity* is less clear.

The UNFCCC addresses the distributive and procedural dimensions of equity. In the context of financial governance, Article 11.2 requires the Convention's financial mechanism to *have an equitable and balanced representation of all Parties within a transparent system of governance*. There is, however, no common understanding on the substantive (outcome focused) dimension of equity as a possible basis for the differential treatment of Parties and burden sharing.

The Convention contains a system to distinguish between Parties and their obligations, which reflects the concept of equality (in the sense of treating likes alike and unalikes unlike). While protecting the climate system is a *common concern of humankind*, developed countries are expected to take the lead. Each of these Parties shall make *equitable and appropriate contributions* to the global effort.⁴⁵ The situation of, for example, particularly vulnerable developing countries and LDCs is given additional consideration (see CLIB 9).⁴⁶

Parties frequently invoke the notion of equity in their submissions, and it features in several COP decisions. The Cancun Agreements, for example, refer to it in connection with a shared vision, joint efforts to keep global warming below 2°C, and nationally appropriate mitigation commitments and actions.

While equity is traditionally discussed at the inter-state level, the Cancun Agreements reflect a growing concern for the differences and inequalities within countries. They refer explicitly to the

interests of vulnerable populations, groups and communities, women, children, the elderly, minorities, people with disabilities and indigenous peoples.

Burden-sharing

According to the UNFCCC preamble, *the largest share of historical and current global emissions of greenhouse gases has originated in developed countries.*⁴⁷ Justice and equity may demand that those who have benefited the most from the accumulation of greenhouse gases in the atmosphere bear a greater share of the burden for addressing the problem. Article 3.1 states that *developed country Parties should take the lead in combating climate change and the adverse effects thereof.*

However, emissions from economically advanced developing countries are growing rapidly. Many Annex I countries expect developing countries such as China, India and Brazil to take on certain obligations to limit their emissions. Whether this constitutes a departure from the principles of equity and CBDRRC is one of the contested issues in the current negotiations.

Many developing countries have argued that a modified climate regime that deviates from the distinction between Annex I and non-Annex I Parties would be inconsistent with the UNFCCC. The UNFCCC, however, only provides a general framework to combat climate change. Parties have a responsibility to protect the climate system in accordance with CBDRRC. The preamble (which is not part of the Convention's operative provisions but helps to clarify their meaning or purpose) explicitly recognises that *the share of global emissions originating in developing countries will grow to meet their social and development needs.*⁴⁸

Some Annex I Parties have argued that differentiation between countries on the basis of different situations and needs does not have to be static.⁴⁹ The Convention is a living instrument that requires further elaboration in the light of present day conditions and arguably, does not preclude alternative forms of differentiation in future agreements.

The counter position emphasises that due to the non-equitable use of the available atmospheric space to date, the emission space of developing countries and their opportunities to develop are now limited. Thus, it can be argued that the entire climate negotiation process is set in the context of the preambular paragraphs, and that in order to make good for previous injustice and start settling the existing climate debt, developed country Parties need to continue taking the lead in combating climate change. Any mitigation efforts by developing countries should be contingent on financial and other support, with special attention given to LDCs (Article 4.9) (see CLIB 9).

Current Issues

There is a need to achieve emission reductions that will reduce the risk of catastrophic impacts on LDCs, but this needs to be in full conformity with the principles and provisions of the Convention, with Annex I Parties showing leadership by raising their level of ambition to the scale required by science and equity. These issues are at the centre of current negotiations.

43 Shelton, D. (2007). Equity. *Oxford Handbook of International Environmental Law*

44 Lowe, V. (1988-89). The Role of Equity in International Law. *Australian Yearbook of International Law*.

45 UNFCCC, Article 4, Paragraph 2 (a)

46 UNFCCC, Article 3, Paragraph 3, Article 4, Paragraphs 8 and 9

47 Preamble recital 3

48 Preamble to the UNFCCC, recital 3

49 For example, UNFCCC Art.4 para.2 (f)

Precautionary Principle

Precaution in international law, and in the UNFCCC

Scientists are now virtually certain that human activities are changing the composition of the earth's atmosphere. As a result, global warming has occurred and atmospheric concentrations of greenhouse gases are continuing to rise. There are also scientific uncertainties associated with climate change. For example, it remains unclear how much and how fast warming will occur and exactly how warming will affect for example precipitation patterns, sea level rise and extreme weather events.

Background

Precaution in international law: In the context of international environmental law, precaution is usually described as a principle or approach to prevent further environmental damage against a backdrop of scientific uncertainty – predominately referred to as the *precautionary principle*. This principle has been used as a procedural tool to lower the standard of proof in situations where the complexity of scientific facts leads to a degree of uncertainty.

Principle 15 of the Rio Declaration states: *In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.*

While Principle 15 is phrased in general terms, an increasing number of international treaties outline the application of the precautionary principle in more detail. This includes the 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR), the 1995 UN Fish Stocks Agreement, the 2000 Cartagena Protocol on Biosafety and the 2001 Stockholm Convention on Persistent Organic Pollutants.

Some writers and governments have argued that the precautionary principle or approach has become a rule of customary international law.⁵⁰ It has been pleaded in the Gabcikovo-Nagymaros case (by Hungary) before the International Court of Justice (ICJ) and in the MOX plant cases (by Ireland) before the International Tribunal for the Law of the Sea (ITLOS). The European Community argued in favour of its application in the World Trade Organization biotechnology and asbestos cases.⁵¹ The European Union treaty explicitly provides that European community policy shall *be based on the precautionary principle and on the principles that preventive action should be taken.*⁵²

Criteria for the appropriate application of precaution can include: best available science and technology; objective risk assessment; proportionality of measures, costs and benefits; or consistency with other measures previously taken.

To date, however, international courts and tribunals have been hesitant to accept that the precautionary principle has become a norm of international customary law. While the measures prescribed by ITLOS in the *Southern Bluefin Tuna* case were based on the application of a precautionary approach, the judgment studiously avoids the term.⁵³ In the final judgment of the *Pulp Mills* case, the ICJ considered that *while a precautionary approach may be relevant in the interpretation and application of a treaty agreed between both states, it does not follow that it operates as a reversal of the burden of proof.*⁵⁴

Precaution under the UNFCCC: Precaution played an important part in the conception and adoption of the UNFCCC. At the time, there were still doubts as to the extent and causes of climate change.

The text of the Convention reflects the precautionary principle or approach in Article 3.3: *The Parties should take precautionary measures to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost effective so as to ensure global benefits at the lowest possible cost...*

The nature, status and functions of principles in international law vary. They can range from merely aspirational to legally binding. The Parties to the UNFCCC have endorsed precaution as one of the Convention's principles to guide them *[i]n their actions to achieve the objective of the Convention and to implement its provisions...* Hence, in the context of the UNFCCC, precaution provides a parameter for interpretation of the convention, aims to lead decision makers in a particular direction, and informs the development of further rules. However, the nature of Article 3.3 (guiding principle) and language (*should*) suggest that this Article does not create a right for a Party to demand specific measures.

The issue of precaution is frequently invoked during the climate negotiations – in particular by small islands states increasingly threatened by sea level rise and extreme weather events. In 2001, the European Community and developing countries invoked precaution under Article 3.3 to exclude additional activities from land use, land use change and forestry (LULUCF) under the Kyoto Protocol.

Current Issues

Precaution is relevant to the current negotiations in the AWG-LCA and in the AWG-KP, in particular in relation to future emission reductions targets and in relation to the first review of the adequacy of the long-term goal in decision 1/CP.16 from the Cancun Agreements.

As LDCs and other countries have argued, limiting warming to 2°C will not be adequate to avoid severe impacts on them. It could be argued that precaution demands a limit of 1.5°C or less in light of the risk of catastrophic impacts on LDCs.

50 Trouwborst, A (2001). *Evolution and Status of the Precautionary Principle in International Law*. The Hague, p.284
 51 European Communities – Measures affecting the approval and marketing of biotech products, Reports of the Panel, doc. WT/DS WT/DS291-3/R of 29 Sept 2006, pp.97-98, paras.4.523 & 4.524; Measures affecting asbestos and asbestos-containing products, Reports of the Panel, WT/DS135/R of 18 Sept 2000, p.121 paras.3.311 and 3.312; WTO disputes are available at http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm.

52 Treaty on European Union and of the treaty establishing the European Community. *Official Journal of the European Union*. C 321 E/1, 29 Dec 2006, Art.174

53 ITLOS, Provisional Measures, Order of 3 August 1999, Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan); MOX Plant Case (Ireland v. United Kingdom), Provisional Measures, 2001

54 ICJ (2010). Pulp Mills at the river Uruguay case, Judgement of 20 April 2010, para.164

Legal form options

A brief overview of main legal form options, including rules for adoption

The legal form of future climate agreement/s is one of the key topics in the current negotiations. It could involve a second commitment period under the Kyoto Protocol, a new protocol, a single new agreement, an implementing agreement, non-legally binding decisions or various combinations of these.

Background

The first commitment period of the Kyoto Protocol ends in 2012. A new agreement or agreements, and a transitional arrangement that bridges the gap after the first commitment period ends, are high on the agenda of current negotiations.

The results of the negotiations in the Ad Hoc Working Group on Long Term Action (AWG-LCA), aiming for an outcome based on the Bali Action Plan and Cancun Agreements, and the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol (AWG-KP) could be separate or combined. They could be legally binding, non-binding or a combination.

Decision 1/CP.16 of the Cancun Agreements explicitly states that nothing in the decision shall prejudice prospects for, or the content of, a legally-binding outcome in the future. It also requests the AWG-LCA to continue discussing legal options (Paragraph 145).

A new legal instrument under the UNFCCC: The COP may adopt protocols to the Convention at any ordinary session. The text of a proposed protocol must be communicated to the Parties by the Secretariat at least six months in advance. The requirements for entry into force will be determined by the protocol itself (UNFCCC Article 17).

Article 17 does not include rules for voting to adopt protocols. Additional rules for voting are contained in the UNFCCC draft Rules of Procedure, which have never been adopted by COP because of disagreement on Rule 42 on voting (see CLIB 6).

Parties have submitted several proposals for new protocols since 2009, some of which would co-exist with the Kyoto Protocol (for instance, proposals by Tuvalu and by AOSIS) while others would replace it (for instance, a proposal by Japan) (see CLIB 14).

The outcome of the negotiations in the AWG-LCA could be framed as an additional protocol. Alternatively a new legal instrument could consolidate the outcomes of the AWG-LCA and AWG-KP negotiating tracks, replacing the Kyoto Protocol, as some Annex I Parties propose.

The US has proposed the adoption of an *implementing agreement*. Such an agreement usually aims to enhance the effectiveness of the governing treaty. It is either concluded by some or all of the Parties to an original treaty to adapt the rules of that treaty to a specific region or topic; or to supplement the original legal instruments with additional rules. In the latter case, an implementation agreement is often envisaged by the original treaty.⁵⁵ It would be similar to a protocol.

Implementing agreements exist, for example, under the UN Convention in the Law of the Sea (UNCLOS). A risk with an implementing agreement is that it could, in the wrong circumstances, result in undesirable changes to the UNFCCC. One of the implementing agreements under

UNCLOS made fundamental changes to a key part of UNCLOS, affecting the interests of developing countries.

Amendments to the UNFCCC and Kyoto Protocol and annexes: The rules for amendments to the UNFCCC and the Kyoto Protocol are similar. Several Parties have proposed amendments.

Amendments must be adopted at an ordinary session of the COP or the CMP. The text of any proposed amendment must be communicated to the Parties by the Secretariat at least six months before the meeting at which the amendment is proposed for adoption.

As a last resort, if no agreement is reached, an amendment may be adopted by a three-fourths majority vote of the Parties present and voting.

Similar rules apply to amendments to annexes. Annexes are lists, forms and other material of a descriptive nature of a scientific, technical, procedural or administrative character.⁵⁶ Amendments to the emission limitation and reduction commitments contained in Annex B to the Kyoto Protocol also require the written consent of the Parties concerned.

COP and CMP decisions: In general, legal scholars and most Parties to the UNFCCC agree that COP decisions lack legally binding character. This also applies to CMP decisions.

At the Durban Conference and thereafter a series of no-binding decisions can be expected that will gradually fill the broader institutional and regulatory frameworks created in Cancun. They could, for example, include recommendations for voluntary application of existing emission reduction targets. However, such decisions would merely indicate a political commitment, and would not be legally binding.

Current Issues

The proposals for amendments, protocols and the US proposal for an implementing agreement that were made prior to the Copenhagen Summit in 2009 remain on the agenda for the Durban Conference (in accordance with Rules 10(c) and 16 of the draft Rules of Procedure). So, they do not need to be circulated again six months in advance.

There is an increasing risk that a second legally binding commitment period will not be agreed in time to avoid a gap after the first commitment period under the Kyoto Protocol ends. However, options such as provisional application exist for bridging the gap (see CLIB 15).

From the perspective of LDCs, the option of a second commitment period under the Kyoto Protocol would offer a straightforward legal format for ensuring legally binding commitments for Annex I Parties. In addition to ensuring legally binding emission reduction commitments for Annex I Parties, possible transitional arrangements related to legal options should reflect the priority concerns, specific needs and special situations of LDCs (for instance, under Article 4.9).

55 Kojima, C. and Vereshchetin, V.S. (2006). Implementation Agreements. *Max Planck Encyclopedia of Public International Law*. www.mpepil.com

56 UNFCCC Articles 15 and 16, and Kyoto Protocol Articles 20 and 21

Proposals for amendments, protocols and an implementing agreement

An overview of current proposals and some of their main features

Although it does not seem likely that the Durban Conference will adopt a legally binding agreement, several proposals for legally binding changes or new legally binding agreements are formally on the agendas in Durban.

Background

Amendments, annexes and protocols to the UNFCCC are adopted at ordinary sessions of the Conference of Parties (COP).⁵⁷ Amendments and annexes to the Kyoto Protocol are adopted at ordinary sessions of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (CMP).⁵⁸

The six month rule provides that proposed amendments to the UNFCCC and Kyoto Protocol, and proposed new protocols, must be communicated to the Parties by the Secretariat at least six months before the meeting at which they are proposed to be adopted.⁵⁹ This rule also applies to new annexes and amendments to annexes of the UNFCCC and Kyoto Protocol.⁶⁰

New proposals are included on the agenda of the relevant COP or CMP. If consideration of an agenda item has not been completed, in accordance with Rules 10(c) and 16 of the draft Rules of Procedure, it is automatically carried forward and included in the agenda of the next ordinary session of the COP or CMP.

COP 17 will consider six proposals for protocols to the UNFCCC, and three proposals for amendments to the UNFCCC.⁶¹ The six proposals for protocols were carried forward from COP 16.⁶² CMP 7 will consider 13 proposals to amend the Kyoto Protocol, and one proposal for an amendment to Annex B – all carried forward from CMP 6.⁶³ Other important proposals have been made, for example Australia and Norway's more recent proposal on a process leading to a legally binding treaty in 2015, but these are not subject to the six month rule.⁶⁴

Proposals submitted under the UNFCCC: The six proposals for protocols under the UNFCCC differ in many respects. Some would exist in combination with the Kyoto Protocol, while others would replace it. The proposals from Tuvalu and the Alliance of Small Island States (AOSIS) calls for stabilising greenhouse gas concentrations below 350 ppm and limiting warming to 1.5°C above pre-industrial levels, while the Australian proposal aims for 450 ppm.

The proposed protocols from Annex I Parties (Japan, Australia and the US) all require mitigation actions from rapidly industrialising developing countries. For example, Japan's proposal includes emission intensity targets for non-Annex I Parties *which have substantial contribution to the global emissions of greenhouse gases and have appropriate response capabilities*.⁶⁵ The US and Australian proposals include mitigation provisions for developing countries *whose national circumstances reflect greater responsibility or capability*.⁶⁶

The legal forms of the proposed commitments also differ. The Australian proposal envisages the use of *national schedules* to register mitigation commitments and actions that countries can achieve according to their respective capabilities (LDCs are invited to establish a national schedule *at their discretion*).

The US has proposed an implementing agreement that, like a protocol, would be legally binding. However, an implementing agreement has previously been used to modify important parts of the UN Convention on the Law of the Sea, and could in the wrong circumstances, risk undermining fundamental principles and provisions in the UNFCCC, to the potential detriment of LDCs.⁶⁷

Several proposed protocols are only rough outlines and do not include text for many articles. The proposed protocol from AOSIS explicitly provides for its provisional application. Provisional application may be important given the end of the Kyoto Protocol's first commitment period in 2012 (see CLIB 15).

The three proposed amendments to the UNFCCC are on various matters, such as periodic review of the lists in Annexes I and II (Russian Federation) and voting rules (Papua New Guinea and Mexico).

Proposals submitted under the Kyoto Protocol: Most of the 13 proposals for amendments to the Kyoto Protocol include the extension of quantified emission limitation and reduction commitments for Annex I Parties beyond the first commitment period (2008 to 2012). This is done in various ways, including replacing Annex B (Grenada), adding a new column to Annex B (China and others), or inserting a new Annex B-I (Tuvalu). The proposed new emission reduction commitments vary, and some proposals do not list figures. Several developing country proposals (China and others, Colombia, Bolivia) determine new Annex B commitments by applying the principle of historical responsibility. Two of the proposed amendments to the Kyoto Protocol, from Australia and Japan, are the same (or similar) to their proposed protocols to the UNFCCC.

In addition to new emission reduction commitments, the proposed amendments also cover a variety of other issues, such as: the inclusion of emissions from air and maritime transport in the Kyoto regime (EU); a crediting and trading mechanism for Nationally Appropriate Mitigation Actions (New Zealand); REDD+ (Papua New Guinea); and a simplified procedure for adoption and entry into force of amendments to Annex B (Belarus). The one proposal to amend Annex B to the Kyoto Protocol, by Kazakhstan, would add Kazakhstan to Annex B.

Current Issues

The current proposals for amendments and protocols touch on many issues of great concern to LDCs. Chief among these are the need for legally binding commitments for a second commitment period of the Kyoto Protocol and limiting warming to 1.5°C above pre-industrial levels.

Whether LDCs choose to support a particular proposal, or to develop their own, is likely to depend on the political and negotiating context more than legal considerations.

57 UNFCCC Articles 15.1 (amendments), 16.2 (annexes) and 17.1 (protocols)

58 Kyoto Protocol Articles 20.2 (amendments) and 21.3 (protocols)

59 UNFCCC Articles 15.2 (amendments) and 17.2 (protocols); Kyoto Protocol Articles 20.2 (amendments)

60 UNFCCC Article 16.2; Kyoto Protocol Article 21.3

61 COP 17 Provisional Agenda, FCCC/CP/2011/1

62 Ibid. para. 41

63 CMP 7 Provisional Agenda, FCCC/KP/CMP/2011/1

64 FCCC/AWGLCA/2011/MISC.9

65 FCCC/CP/2009/3

66 FCCC/CP/2009/7; FCCC/CP/2009/5

67 Hyvarinen, J. and Schwarte, C (2009). *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*. FIELD.

http://www.field.org.uk/files/FIELDImplAgreementsBriefingNoteJune2009_0.pdf

Implications of a gap after the first commitment period of the Kyoto Protocol

Although the first commitment period ends in 2012, not all elements of the Kyoto Protocol will be affected

A gap at the end of the first commitment period under the Kyoto Protocol is highly likely, unless Parties find a way to establish effective interim or transitional arrangements in Durban. Several options exist for avoiding a gap – including, for instance, a political agreement or legal options such as the provisional application of amendments to the Kyoto Protocol.

Background

The quantified emission limitation and reduction commitments of Annex I Parties apply in the first commitment period 2008-2012.⁶⁸ Parties have not been able to agree on new targets for a second commitment period. Some Parties (for instance, Japan and Russia) have stated that they will not accept a second commitment period. Even if Parties agreed amendments to the Kyoto Protocol in Durban, it is highly unlikely that there will be time for these to enter into force in the normal way.⁶⁹

Status of the Kyoto Protocol after the first commitment period: The Kyoto Protocol will remain in force after the end of the first commitment period, but the lack of Annex I Party reduction targets will affect parts of the Protocol.

Those parts of the Kyoto Protocol that do not depend on the existence of Annex I Party reduction targets will continue, such as the obligations under Article 10 (to have in place national programmes with measures to mitigate and facilitate adaptation to climate change) and the financial commitments under Article 11.⁷⁰ The Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (CMP), the Adaptation Fund and the Compliance Committee would continue to exist.

The parts of the Kyoto Protocol that depend on the existence of targets include emissions trading (Article 17) and Joint Implementation (Article 6). In the absence of new targets for Annex I Parties, these would lose their purpose.

Clean Development Mechanism: The CDM might be able to continue despite the absence of targets for Annex I Parties. The CDM could be seen as having three purposes: to assist developing country Parties in achieving sustainable development and contributing to the ultimate objective of the Convention; and to allow developed countries to undertake emission reduction projects in developing countries, and use the reductions towards their targets under the Kyoto Protocol (Article 12).⁷¹

CDM projects could continue on the basis that they assist developing country Parties to achieve sustainable development and contribute to the objective of the Convention, as set out in Article 2, and shared by the Kyoto Protocol (see CLIB 4 and 23). However, the absence of mandatory international emission reduction targets and a related compliance market could limit the prospects for this. A two per cent share of the proceeds of CDM projects finance the Adaptation Fund, which is likely to be affected, unless other arrangements can be made (for example, through voluntary contributions or a negotiated agreement).

Current Issues

Interim or transitional arrangements after the first commitment period ends are high on the agenda for Durban. Several options exist for ensuring that the international climate regime continues while Parties find agreement on a second commitment period under the Kyoto Protocol or another new agreement/s.

This could include a political agreement (without legally binding force) among Parties on commitments and actions for the period after 2012, until continuing negotiations are finalised, expressed in a CMP decision or a freestanding political agreement. It should be noted that as a general rule, COP and CMP decisions are not legally binding.

The first commitment period can also be extended through an amendment to the Kyoto Protocol. Such an amendment would be unlikely to enter into force in time to avoid a gap (which refers to the lack of new agreed emission reduction targets for Annex I Parties), but Parties could agree to apply the amendment provisionally.

Provisional application, where Parties agree to apply an amendment as if it had entered into force, could also be used in relation to other amendments to the Protocol, and can provide a possible route to realising some LDC priorities. Provisional application of treaties or parts of them is a well-established procedure in international law.⁷² For example, the 1995 UN Fish Stocks Agreement provided for provisional application.⁷³

68 Kyoto Protocol Article 3.1

69 Articles 21.7 and 20.5

70 See for example Daniel Bodansky (2011). *Whither the Kyoto Protocol? Durban and Beyond*. Harvard Project on Climate Agreements, August 2011 http://belfercenter.ksg.harvard.edu/files/Bodansky_Viewpoint-Final.pdf

71 Curnow, P. and Hodes, G. (eds.) (2009). *Implementing CDM Projects: a guidebook to host country legal issues*. UNEP Risoe Center, p17

72 Vienna Convention on the Law of Treaties, Article 25

73 UN Fish Stocks Agreement, Article 41

Developed and developing country pledges

The Cancun Agreements make reference to pledges, but it is not clear that these pledges have been incorporated into the UNFCCC framework in a legal sense

At the 2009 Copenhagen Summit, the COP *took note* of the Copenhagen Accord. In their follow-up of the Accord, Parties submitted *pledges* – information about national actions in the case of developing countries, and quantified economy-wide targets in the case of developed countries.

Studies have confirmed that the developing country pledges amount to greater emission reductions than the developed country pledges. This shows that developed countries are not taking the lead in combating climate change, as they are required to do under the UNFCCC.⁷⁴

The pledges are not sufficient to reduce temperature warming to 2°C or less. Inadequate pledges by Annex I Parties increase the risk of catastrophic impacts on LDCs due to the high vulnerability and low adaptive capacity of LDCs.

Background

Copenhagen Accord: At the 2009 Copenhagen Summit many – but not all – Parties agreed to the Copenhagen Accord. The Copenhagen Accord is a political agreement outside the UNFCCC, not a decision under the Conference of Parties (COP) or the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (CMP). The COP *took note* of the Copenhagen Accord in Decision 2/CP.15. This means that the COP acknowledged its existence – not that it adopted or approved the Accord. UN General Assembly Resolution 55/488 confirms that *notes* or *take note of* are neutral terms that do not mean approval or disapproval.⁷⁵

According to the Copenhagen Accord, Annex I Parties were to submit information on quantified economy-wide targets and non-Annex I Parties on mitigation actions.⁷⁶ The Accord states that LDCs and SIDS can undertake actions voluntarily, and on the basis of support (Paragraph 5).

Cancun Agreements: During negotiations in 2010, text from the Copenhagen Accord was included in various negotiating texts and subsequently reflected in the Cancun Agreements. Several commentators have stated that the pledges from Copenhagen were incorporated into the UNFCCC framework through the Cancun Agreements. This may be correct in a political sense, but it is not clear that the pledges were incorporated into the UNFCCC in a legal sense through the Cancun Agreements.

According to Decision 1/CP.16 of the Cancun Agreements, the COP *takes note* of quantified economy wide emission reduction targets communicated by Annex I Parties, and contained in document FCCC/SB/2011/INF.1.⁷⁷ The decision also states that the COP *takes note* of nationally appropriate mitigation actions (NAMAs) to be implemented by non-Annex I Parties as communicated by them and contained in document FCCC/AWGLCA/2011/INF.1.⁷⁸ Taking note – used in both cases above – means acknowledging that something exists, no more than that.

Both, footnote 4 to Paragraph 36 on Annex I Party pledges and footnote 5 to Paragraph 49 on non-Annex I Party pledges, read: *Parties' communications to the secretariat that are included in the information document are considered communications under the Convention*. It is debatable if one could say that such “communications” are incorporated legally in the UNFCCC. For instance, national communications contain a wide range of information (see CLIB 8).

In practice, the development of measurement, reporting and verification (MRV), international assessment and review (Decision 16/CP.1, Paragraph 46(d)) and international consultations and analysis (Paragraph 63) seems likely to bring the pledges into the UNFCCC framework through new obligations to provide information and associated review processes.

Although the Cancun Agreements refer to nationally appropriate mitigation *actions* in relation to non-Annex I Party pledges, some of the information provided by non-Annex I Parties includes references to quantified aims. For example, Brazil expects that its mitigation actions will lead to an emissions reduction between 36.1 and 38.9 per cent below projected emissions in 2020.⁷⁹ China will endeavour to lower its CO₂ emissions per unit of GDP by 40-45 per cent by 2020, compared to 2005 levels.⁸⁰

Failure of Annex I Parties to take the lead: According to the UNFCCC Articles 3.1 and 4.2(a), Annex I Parties are to take the lead in combating climate change. However, several analyses have confirmed that the pledges by Annex I Parties are not adequate. For example, a recent review of several studies by the Stockholm Environment Institute confirms that developing country pledges amount to more mitigation than developed country pledges.⁸¹ Several studies have also indicated that the current level of pledges is insufficient to restrict likely global temperature warming to a level of 2°C or less (see CLIB 4).

Current Issues

There are concerns that the pledges could lead to a “pledge and review” system, where Annex I Parties set their own targets without compliance arrangements, instead of emission reduction targets agreed under the UNFCCC or the Kyoto Protocol.

The pledges could form the basis for an interim phase leading to a future agreement with international targets, as proposed by some Parties. However, a pledge-based system is unlikely to offer an adequate framework in light of the urgency for Annex I Parties to raise their level of ambition to the scale required by science and equity. The inadequacy of the current Annex I pledges demonstrates clearly that they are not fulfilling the requirement under UNFCCC Articles 3.1 and 4.2(a), that they take the lead in combating climate change and in modifying longer-term trends in emissions consistent with the objective of the Convention (see CLIB 4).

From an LDC perspective it reinforces the need for clear, ambitious and quantified mitigation commitments for Annex I Parties.

74 Article 3.1 and 4.2(a)

75 See for example South Centre (2010). Comments on the Copenhagen Accord: Summary. *South Centre Informal Note* 52. 18 January, p 4, footnote 2

76 Information about the pledges submitted in follow-up of the Copenhagen Accord can be found at http://unfccc.int/meetings/cop_15/copenhagen_accord/items/5262.php

77 Paragraph 36, Decision 1/CP.16 <http://unfccc.int/resource/docs/2011/sb/eng/inf01r01.pdf>

78 Paragraph 49, Decision 1/CP.16 <http://unfccc.int/resource/docs/2011/awglca14/eng/inf01.pdf>

79 FCCC/AWGLCA/2011/INF.1, Paragraph 30

80 FCCC/AWGLCA/2011/INF.1, Paragraph 43

81 Kartha, S. and Erickson, P. (2011). *Comparison of Annex 1 and non-Annex 1 pledges under the Cancun Agreements*. Stockholm Environment Institute, 11 June

MRV, ICA and IAR

The difference between these three terms related to measurement, reporting and verification

Effective measurement, reporting and verification (MRV) enables Parties to assess how well others are fulfilling their obligations. In line with the principle of common but differentiated responsibilities and respective capabilities (CBDRRC), MRV of developing country mitigation actions and MRV of developed country quantified emission reduction targets are treated differently. The terms international consultations and analysis (ICA) and international assessment and review (IAR) embody this differential treatment.

Background

Measurement, reporting and verification (MRV): The UNFCCC establishes obligations to measure, report and review information. Parties submit national inventories, which include quantitative information on emissions and removals, and national communications, which report on a wider range of activities, including policies and measures. The requirements for non-Annex I Parties are less onerous than for Annex I Parties.

The Kyoto Protocol adds additional obligations for Annex I Parties. For example, Annex I Parties must report information on policies and measures to meet their targets, and on transactions under the Kyoto mechanisms (see also, for example, Article 10(a) regarding non-Annex I Parties).

The concept of MRV was introduced in the Bali Action Plan (BAP) in 2007. In relation to developed countries, paragraph 1(b)(i) refers to *[m]easurable, reportable and verifiable nationally appropriate mitigation commitments or actions, including quantified emission limitation and reduction objectives, by all developed country parties....*

For developing countries, paragraph 1(b)(ii) refers to *[n]ationally appropriate mitigation actions by developing country Parties in the context of sustainable development, supported and enabled by technology, financing and capacity-building, in a measurable, reportable and verifiable manner.*

International consultations and analysis (ICA): The Copenhagen Accord, a political agreement, clearly distinguished between developing and developed countries in relation to MRV. Unsupported developing country mitigation actions are subject to domestic MRV, reported through their national communications, and to *international consultations and analysis under clearly defined guidelines that will ensure that national sovereignty is respected*. Supported developing country mitigation actions are subject to international MRV in accordance with COP guidelines. Developed country mitigation and delivery of finance is subject to the strongest MRV in accordance with COP guidelines, which will *ensure that accounting of such targets and finance is rigorous, robust and transparent*.

ICA emerged as a less demanding form of MRV in Copenhagen, and was reportedly a compromise between the US and China. It reflects the expectations that MRV for developed countries be more demanding than for developing countries, and that developed countries take the lead in combating climate change. In paragraph 5, the Accord states that LDCs and Small Island Developing States (SIDS) may undertake mitigation actions voluntarily, on the basis of support.

The difference between ICA and international assessment and review (IAR): Under the Cancun Agreements, developed countries are to submit biennial reports that include information on mitigation actions to achieve their targets, and on the provision of support to developing countries. Paragraph 40 on enhancing national communications states clearly that *[d]eveloped countries shall improve the reporting of information on the provision of financial , technology and capacity-building support to developing country Parties*. Paragraph 44 establishes a process for *international assessment of emissions and removals related to quantified economy-wide emission reduction targets under the [Subsidiary Body for Implementation], taking into account national circumstances, in a rigorous, robust and transparent manner, with a view to promoting comparability and building confidence*. Paragraph 46 establishes a work programme which includes *[m]odalities and procedures for international assessment and review of emissions and removals related to...paragraph 44....*

Developing countries are also to submit biennial reports, consistent with their capabilities and the level of support provided for reporting. Paragraph 63 states that these reports will be subject to *international consultations and analysis...under the [SBI], in a manner that is non-intrusive, non-punitive and respectful of national sovereignty; the international consultations and analysis will aim to increase transparency of mitigation actions and their effects, through analysis by technical experts in consultation with the Party concerned and through a facilitative sharing of views, and will result in a summary report*⁸². Paragraph 66 establishes a work programme that includes ICA.

The wording of the Cancun Agreements makes it clear that IAR is a stronger form of MRV that applies to developed countries, while ICA is a weaker form of MRV that applies to developing countries, reflecting CBDRRC. The purposes of IAR and ICA are different. A recent EU submission, for example, states that IAR should contribute to ensuring compliance with emission reduction commitments and promoting comparability, while ICA should support developing countries in implementing their mitigation actions.⁸²

The Cancun Agreements give the LDCs and SIDS additional flexibility in reporting, including with respect to the new biennial reports.⁸³

Current Issues

In addition to the concepts above, provision of information, monitoring and transparency is relevant to many areas currently under negotiation in the AWG-LCA – for example, in paragraph 33 of decision 16/CP.1 regarding adaptation, paragraph 55 related to support for NAMAs and paragraph 96 on financing. REDD+ may raise particular issues for some LDCs (see CLIB 21).

Negotiations under the work programmes established by paragraphs 46 and 66 of the Cancun Agreements are ongoing. Several Annex I Parties, including the US, see progress on MRV as one of the benchmarks for success at the Durban climate conference. The additional flexibility for LDCs provided by paragraph 60 should help ensure that LDCs are not burdened with unnecessary reporting or related tasks as the MRV system develops.

⁸² Submission by Poland and the European Commission on behalf of the European Union and its Member States (26 September 2011), FCCC/AWGLCA/2011/MISC.7/Add.5, p. 3

⁸³ Cancun Agreements, Decision 1/CP.16, FCCC/CP/2010/7/Add.1, para. 60

Adaptation

A brief overview of provisions in the UNFCCC and the Kyoto Protocol, and some current issues

The UNFCCC recognises the special needs of developing country Parties, especially those particularly vulnerable to the adverse effects of climate change. According to Article 4.4, developed countries are to assist developing countries that are particularly vulnerable to the adverse effects of climate change in meeting costs of adaptation. However, this provision is limited as it does not refer to *the* (that is, all) costs. Article 4.9 gives special priority to LDCs in relation to funding, which includes funding for adaptation.

Background

UNFCCC Article 3.2 states that the *specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change* should be given full consideration.

UNFCCC Article 4.1 (b) and Article 10 (b) of the Kyoto Protocol require all Parties to have national programmes including measures to facilitate adequate adaptation to climate change. Each Party is left to determine the measures necessary and what they consider to be *adequate*.

UNFCCC Article 4.1(e) calls on all Parties to cooperate in preparing for adaptation, and develop plans for coastal zone management, water resources and agriculture, and for protection and rehabilitation of areas (particularly in Africa) affected by drought and desertification, and floods.

Article 4.8 states that Parties shall give full consideration to what actions are necessary under the UNFCCC, including actions related to funding, insurance and transfer of technology, to meet the specific needs and concerns of developing countries arising from the adverse effects of climate change and/or the impact of response measures. The article lists certain groups of countries for particular attention, such as small island countries, countries with areas prone to natural disasters and countries with areas liable to drought and desertification. Kyoto Protocol Articles 2.3 and 3.14 also make specific reference to UNFCCC Article 4.9, which gives LDCs priority in relation to funding and technology transfer (see CLIB 9).

There are no fixed definitions of “adaptation” or “vulnerability” in either the Convention or the Protocol.

Funding adaptation: According to Article 4.4, Annex II Parties shall assist developing countries that are particularly vulnerable to the adverse effects of climate change in meeting costs of adaptation to those adverse effects. This article uses mandatory wording (*shall* rather than *should*), but it is limited by not referring to *the* costs (which would imply *all* costs).

Article 4.9 may help to make the case against imposing conditions such a co-financing on LDCs. It requires all Parties to take full account of the specific needs and special situations of LDCs in their actions with regard to funding and technology transfer (CLIB 9).

Funding of adaptation efforts is a contentious issue, which includes the costs of *adaptive methods* (for instance, strengthening infrastructure) and costs of *damages* (for instance, flooding). The quantification of such costs can be more complicated than the costs of mitigation. A key question related to funding of adaptation is when it may be considered as *compensation* for damage caused by emitting countries (CLIB 10).

Adaptation funding is particularly relevant for implementation of National Adaptation Programmes of Actions (NAPAs)⁸⁴ through the Least Developed Countries Fund (LDCF). The Adaptation Fund under the Kyoto Protocol is funded through a 2 percent share of the proceeds of the Clean Development Mechanism (CDM). Its governance structure incorporates equitable representation of developing countries, a major step forward.

Nairobi Work Programme: The objective of the Nairobi Work Programme on Impacts, Vulnerability and Adaptation to Climate Change (NWP) is to assist, in particular, developing countries and especially LDCs and SIDS, to understand and assess impacts, vulnerability and adaptation; and make informed decisions on practical adaptation actions and measures. It provides a structured framework for knowledge sharing and collaboration among Parties and organisations.

Adaptation Committee: The Cancun Agreements included the adoption of the Cancun Adaptation Framework, aimed at enhancing action on adaptation, including through international cooperation and coherent consideration of matters relating to adaptation under the Convention.⁸⁵

In the same decision, the COP established the Adaptation Committee to promote implementation of enhanced action on adaptation in a coherent manner under the Convention (paragraph 20). The COP requested the AWG-LCA to elaborate the composition, modalities and procedures related to the Adaptation Committee for adoption by COP 17 in Durban. The COP also requested the AWG-LCA to define linkages with other institutional arrangements under and outside the UNFCCC, including at national and regional levels (paragraphs 23-24). This would include financial bodies and the Least Developed Countries Expert Group (LEG).

Work programme on loss and damage: The Cancun Agreements also established a work programme to consider approaches to address loss and damage associated with climate change impacts in developing countries that are particularly vulnerable to the adverse effects of climate change (paragraph 26). This might for example include a climate risk insurance facility (paragraph 28) (see CLIB 19).

The Subsidiary Body for Implementation has started considering the work programme on loss and damage at its session in June 2011.⁸⁶ Its development could open new opportunities for LDCs to advance their concerns.

Current Issues

The terms of reference for the design of the Green Climate Fund refer to achieving *a balanced allocation between adaptation and mitigation*,⁸⁷ which the negotiations in the Transitional Committee must take into account. UNFCCC Article 4.4 can help support the case, although it has limitations as noted above. From the point of view of LDCs, Article 4.9 clearly includes funding for adaptation and can reinforce arguments based on Article 4.4 and other articles.

⁸⁴ The National Adaptation Programmes of Action (NAPAs) are different from the relatively new National Adaptation Plans (NAPs) decided in the Cancun Adaptation Framework. The NAP process should not detract attention from NAPA implementation

⁸⁵ Decision 16/CP.1 paragraph 13

⁸⁶ Report of the Subsidiary Body for Implementation on its thirty-fourth session, held in Bonn from 6-17 June 2011 UN Doc. FCCC/2011/7 Advance version paragraphs 103-116

⁸⁷ Decision 16/CP.1 appendix III, paragraph 1(c)

Loss and Damage

Some points in international law relating to transboundary claims, and provisions in the UNFCCC and the Kyoto Protocol

According to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change (IPCC), there has been a global increase in weather-related disasters between 1980 and 2003, resulting in economic losses of US\$ 1 trillion.

In LDCs, losses from such disasters are exacerbated by the limited emergency response capabilities and lack of systematic disaster management programmes. Slow-onset impacts such as sea-level rise, glacier melt, biodiversity loss and loss of arable land add to the burden for LDCs.

Background

Loss and damage related to the impacts of climate change raise the possibility of state responsibility for hazardous activities under their control. However, as a result of uncertainties in public international law, the lack of clear remedies and competent judicial bodies, to date, countries have focused on the international negotiations on climate change to address the problem of loss and damage at the interstate level (see CLIB 10).

In the legal context, the transboundary impacts of hazardous activities are more frequently addressed through environmental litigation between private individuals (or legal entities) and the responsible enterprise. International law requires that States should take all necessary measures to ensure prompt and adequate compensation for the victims of transboundary harm.⁸⁸

According to Principle 13 of the Rio Declaration, *States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage...* Based on the principle of non-discrimination, transboundary claimants should have access to legal remedies equal to that of individuals based in the country where the hazardous activity is carried out. In Europe and North America, this rule of equal access to compensation is reflected in several international agreements, and has been widely integrated into domestic law.⁸⁹

According to the International Law Commission, a body of international lawyers elected by the UN to develop and codify international law, measures to ensure prompt and adequate compensation for the victims of transboundary harm could include the establishment of industry-wide funds at the national level. If private liability arrangements are insufficient to provide adequate compensation, the State of origin should ensure that additional financial resources are made available.⁹⁰

Loss and damage in the UNFCCC and Kyoto Protocol

The UNFCCC implicitly recognises that climate change may result in loss and damage.⁹¹ In 1991, during the drafting process of the Convention, the Alliance of Small Island States suggested the creation of an insurance pool to provide compensation and respond to climate change. The reference to “insurance” in Article 4.8, which addresses needs and concerns of developing countries arising from the adverse effects of climate change and/or impact of response measures, is the remaining trace of that proposal.

The related Kyoto Protocol Article 3.14 also includes a reference to insurance. In addition, Article 3.14 refers not only to UNFCCC Article 4.8, but also to Article 4.9. According to Article 4.9, Parties are to take full account of the specific needs and special situations of LDCs (see CLIB 9). Although insurance is not mentioned in UNFCCC Article 4.9, the reference to insurance and to Article 4.9 in Kyoto Protocol Article 3.14 creates a link.

Under the Bali Action Plan in 2007, Parties agreed to consider *[d]isaster reduction strategies and means to address loss and damage associated with climate change impacts in developing countries that are particularly vulnerable to the adverse effects of climate change*.⁹²

The Cancun Agreements refer to loss and damage as a result of the adverse effects of climate change, *including impacts related to extreme weather events and slow onset events* and (in a footnote) *including sea level rise, increasing temperatures, ocean acidification, glacial retreat and related impacts, salinization, land and forest degradation, loss of biodiversity and desertification*.⁹³

In Cancun, Parties established a work programme to consider approaches to address loss and damage and mandated the Subsidiary Body for Implementation (SBI) to develop relevant activities. Specific recommendations will be considered at COP18 in 2012.

Current Issues

The SBI began considering loss and damage in June 2011. Submissions on the work programme have been summarised in document FCCC/SBI/2011/MISC.8 for SBI 35 in Durban.⁹⁴

There are significant differences in views among Parties on, for instance, whether mainly compensation or insurance-based approaches should be used; whether private losses should be included; and how technical issues such as methodologies and information gaps should be addressed. While many developing countries and civil society organisation support financial compensation arrangements for damage, developed country Parties predominately focus on risk management and risk transfer. Their proposals reflect the expectation that governments will strengthen domestic disaster risk response strategies while the insurance industry will develop new products.

Concerns raised by LDCs so far include: capacity to address technical issues related to loss and damage; support for assessing risk where data is not available; assistance in exploring different tools and approaches; and the need for the UNFCCC to address loss and damage as a leading priority. These concerns are supported by UNFCCC Articles 4.9, 4.8 and also Article 4.4.

The arrangements to address loss and damage under the UNFCCC in future could include an institutional framework; provisions to deal with a failure to honour commitments; and compensation or insurance arrangements providing equal access to affected stakeholders on the basis of legal obligations (rather than charity). Controversial issues are likely to include criteria for causation, and the attribution of damages and liability.

88 International Law Commission (2006). *Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities*. Principle 4, para.1

89 For instance, the 1991 Convention on Environmental Impact Assessment in the Transboundary Context, 1992 Convention on the Transboundary Effects of Industrial Accidents or the 1998 Aarhus Convention

90 International Law Commission (2006). Principle 4, paragraphs 4 & 5

91 UNFCCC preamble recital no 8, Art.3 para.3

92 Decision 1/CP.13, FCCC/CP/2007/6/Add.1, Bali Action Plan, para.1(c)(iii)

93 Decision 1/CP.16 paragraph 25 and footnote 3

94 Available at <http://unfccc.int/resource/docs/2011/sbi/eng/misc08.pdf>

Technology development and transfer

The Cancun Agreements established a new Technology Mechanism, composed of a Technology Executive Committee and a Climate Technology Centre and Network

All Parties commit to cooperating on technology transfer under the UNFCCC. Annex II Parties take on specific commitments to transfer technology to developing countries. The definition of technology transfer has broadened over time. In the current negotiations, *technology development and transfer* includes mitigation and adaptation technologies, and encompasses not only the transfer and diffusion of technologies, but also different stages in the technology cycle, including the development of endogenous (in-country) technologies in developing countries.

The LDCs receive priority with respect to technology transfer under UNFCCC Article 4.9, and have a reserved seat on the new Technology Executive Committee, established in the Cancun Agreements.

Background

Article 4.1(c) and Kyoto Protocol Article 10(c): UNFCCC Article 4.1(c) states that all Parties shall *[p]romote and cooperate in the development, application and diffusion, including transfer, of technologies, practices and processes that control, reduce or prevent anthropogenic emissions of greenhouse gases...in all relevant sectors, including the energy, transport, industry, agriculture, forestry and waste management sectors.*

While Article 4.1(c) addresses only mitigation technologies, Kyoto Protocol Article 10(c) covers *...environmentally sound technologies, know-how, practices and processes pertinent to climate change, in particular to developing countries....* In light of LDC priorities, it should be noted that this includes adaptation as well as mitigation technologies.

The term *environmentally sound technologies* (ESTs) comes from Agenda 21, the action plan adopted at the 1992 UN Conference on Environment and Development, and encompasses technologies that may offer significantly improved environmental performance relative to others.⁹⁵

Article 4.5 and the technology transfer framework: UNFCCC Article 4.5 states that Annex II Parties shall *take all practicable steps to promote, facilitate and finance, as appropriate, the transfer of, or access to, environmentally sound technologies and know-how to other Parties, particularly developing country Parties...developed country Parties shall support the development and enhancement of endogenous capacities and technologies of developing country Parties.*

The 2001 Marrakesh Accords included a technology transfer framework to enhance the implementation of Article 4.5, with five main themes:

- *Technology needs and needs assessments*, a set of country-driven activities to determine mitigation and adaptation technology priorities;
- *Technology information*, addressing the flow of information between stakeholders;
- *Enabling environments*, government policies that create and maintain an environment conducive to technology transfer;
- *Capacity building*; and
- *Mechanisms for technology transfer*, to facilitate the support of financial, institutional and technology activities.

Article 4.3 on financial resources and incremental costs: UNFCCC Article 4.3 requires Annex II Parties to provide new and additional financial resources, including for technology transfer, *needed by the developing country Parties to meet the agreed full incremental costs of measures covered by Article 4.1 (on commitments) and that are agreed between a developing country Party and the international entity or entities referred to in Article 11....*

The *entities* referred to in Article 11 are those entrusted with the operation of the financial mechanism – currently the Global Environment Facility and Adaptation Fund Board. *Incremental costs* refer to the part of the costs of a project that result in global benefits, distinct from the costs of the project resulting in national benefits.

Article 4.9 and the specific needs and special situations of LDCs: LDCs receive priority under UNFCCC Article 4.9, which requires that Parties *take full account of the specific needs and special situations of the [LDCs] in their actions with regard to funding and transfer of technology.*”

Current Issues

The Cancun Agreements established a new Technology Mechanism under the guidance of, and accountable to, the COP. The Technology Mechanism is composed of a Technology Executive Committee (TEC) and a Climate Technology Centre and Network (CTCN).

The TEC is composed of 20 experts serving in their personal capacity, 9 from developed countries and 11 from developing countries – one of the latter is reserved for LDCs. As the policy and strategy arm of the Mechanism, TEC will make recommendations and promote collaboration on technology transfer. It will implement the technology transfer framework established at COP 7 and enhanced at COP 13. One of the TEC’s functions is to recommend guidance on technology transfer policies and programme priorities, with special consideration to LDCs.⁹⁶

The CTCN will be an operational body focused on implementation of technology transfer. It will facilitate a large technology transfer network; provide advice and support at the request of a developing country; stimulate technology transfer; and encourage cooperation.

The Cancun Agreements established a 2011 work programme on technology transfer in the AWG-LCA. They do not, however, refer to intellectual property rights (IPR) because of strong resistance from developed countries. Parties accordingly disagree on whether the TEC or CTCN should address IPR, which falls under the discussions on additional functions for the TEC and CTCN. Some Parties do not see a place for IPR in the current discussions, while others have suggested that the TEC or CTCN could undertake certain functions with respect to IPR.

95 Yamin, F. and Depledge, J (2004). *The International Climate Change Regime: A Guide to Rules, Institutions and Procedures* (Cambridge) 306

96 Cancun Agreements, Paragraph 121(c)

REDD+

An overview of some legal conceptual questions related to REDD+, highlighting the issue of safeguards

REDD+ refers to *reducing emissions from deforestation and forest degradation in developing countries, and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries*.⁹⁷ It is aimed at reducing forest-related emissions in developing countries, and providing funds to enable this.

The components of the REDD+ concept have not been defined clearly. Some terms, such as *reforestation* and *deforestation* have definitions under the Kyoto Protocol, but these apply to Annex I Parties and would not automatically apply to REDD+. In any case, they apply only in the first commitment period, and are currently under renegotiation.

Background

Papua New Guinea (PNG) and Costa Rica, supported by other countries, introduced REDD+ into the UNFCCC negotiations in 2005. It grew from Reducing Emissions from Deforestation (RED) to REDD+. The plus is generally considered to refer to *conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries*, although the terminology has not always been clear.

REDD+ is not a clearly defined concept. The Kyoto Protocol (Decision 16/CMP.1) contains some definitions for terms such as *afforestation, deforestation* and *forest management*, in relation to land use, land-use change and forestry (LULUCF) for Annex I Parties. These do not correspond directly to the components of REDD+, and do not include definitions of terms such as *forest degradation* and *conservation*.

The LULUCF definitions will not automatically apply to REDD+, which concerns developing countries and is under negotiation under the Convention, not under the Kyoto Protocol. (Under the Clean Development Mechanism, Parties wishing to host an afforestation or reforestation project select their forest definition and notify it to the Executive Board). The definitions in the Kyoto Protocol apply only in the first commitment period, and are currently under renegotiation.

Sustainable management of forests: The meaning of *sustainable management of forests* is unclear. Some non-government organisations have argued that it is not the same as Sustainable Forest Management (SFM) that, in their view, has been used to justify damaging industrial logging.

There is no international legal definition of SFM, but the following definition, included in the UN Forum on Forests' 2008 *Non-legally binding instrument on all types of forests*, is often mentioned: *Sustainable forest management, as a dynamic and evolving concept, aims to maintain and enhance the economic, social and environmental values of all types of forests, for the benefit of present and future generations*.⁹⁸

The scope of REDD+: Decision 16/CP.1 from Cancun lists the following activities included in REDD+: reducing emissions from deforestation; reducing emissions from forest degradation; conservation of forest carbon stocks; sustainable management of forests; and enhancement of forest carbon stocks.⁹⁹

The decision does not explicitly clarify if Parties need to undertake all these activities, or any one of them to implement REDD+ activities under the UNFCCC and be eligible for financing. Many Parties seem to assume that any of these activities would be eligible, without a need to undertake all of them. This could be interpreted as consistent with the wording of the relevant Paragraph 70: *... by undertaking the following activities, as deemed appropriate by each [developing country] Party and in accordance with their respective capabilities and national circumstances.*

The relationship between *reducing emissions from deforestation and forest degradation and conservation, sustainable management of forests and enhancement of forest carbon stocks* is not clear, and Parties have not defined these terms. *Conservation* could be a means of reducing deforestation and forest degradation. *Enhancement of forest carbon stocks* could include afforestation (planting trees on land that has had no forest for at least 50 years) and reforestation (planting on deforested land), but might also include other activities.

Parties have not agreed what role market mechanisms should play in financing REDD+ activities, and there are diverging views even among developing countries. For instance, while PNG supports a role for the market, Bolivia does not. Future negotiations may raise further legal questions in this context, such as whether credits raised through REDD+ activities (if such activities are allowed to generate tradable credits) should be fungible (interchangeable) with other credits in international emissions trading.

Safeguards: Decision 16/CP.1 of the Cancun Agreements includes safeguards to, among other things, protect the knowledge and rights of indigenous people and local communities and avoid conversion of natural forests to plantations (see CLIB 24).¹⁰⁰ These safeguards are to be *promoted and supported* – that this means may become clearer through the continuing negotiations on how information on safeguards should be provided.

The countries of the Central African Forest Commission (COMIFAC) have argued that while Annex I Parties have sought flexible rules for themselves in the LULUCF negotiations under the AWG-KP, developing countries are expected to take on stricter rules in relation to REDD+. For example, under current LULUCF rules Annex I Parties are allowed to replace natural forests with plantations.

Current Issues

Key issues under negotiation on REDD+ include financing of results-based activities; measuring, reporting and verification; and information on safeguards. Decision 1/CP.16 distinguishes between monitoring and reporting of other activities and *[a] system for providing information on how the safeguards referred to in appendix I.... are being addressed and respected*¹⁰¹

From the perspective of LDCs, ensuring new and additional sustainable, predictable and adequate funding for readiness and implementation will also involve engagement in the negotiations related to the Green Climate Fund (see CLIB 7).

97 Decision 1/CP.13, Bali Action Plan, Paragraph 1(b)(iii)

98 For further details, see UN General Assembly (2008). Resolution 62/98, UN Doc. A/RES/62/98, Annex, Paragraph 4, 31 January 2008. <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N07/469/65/PDF/N0746965.pdf?OpenElement>

99 Paragraph 70 (a)-(b)

100 Appendix I of Decision 16/CP.1

101 Decision 16/CP.1, Paragraph 71(d)

Emissions trading

A brief background about emissions trading under the Kyoto Protocol, and some current issues related to market mechanisms

Some Parties see market mechanisms as critical components of the future climate regime. Although some market-based mechanisms could offer potential opportunities like the Clean Development Mechanism (CDM) has, increasing emphasis on market-based mechanisms in the negotiations risks diverting attention from public funding and the need to honour financial commitments.

Background

Emissions' trading is aimed at achieving mitigation at the lowest possible cost. Under Article 3.1 of the Kyoto Protocol, Annex I Parties take on emissions targets, which are listed in Annex B of the Protocol. These targets are used to calculate each Party's allowable level of emissions – or assigned amount, expressed in units called “assigned amount units” (AAUs). Each unit represents one metric tonne of carbon dioxide equivalent.

Annex I Parties can acquire and transfer emissions reduction allowances through the three “Kyoto mechanisms”: Joint Implementation (Article 6), CDM (Article 12); and Emissions Trading (Article 17) to help them meet their targets.

Kyoto Protocol Article 17 states that *[t]he [COP] shall define the relevant principles, modalities, rules and guidelines, in particular for verification, reporting and accountability for emissions trading. The Parties included in Annex B may participate in emissions trading for the purposes of fulfilling their commitments under Article 3. Any such trading shall be supplemental to domestic actions for the purpose of meeting quantified emission limitation and reduction commitments under the Article.* The modalities for emissions trading were later agreed as part of the Marrakesh Accords.¹⁰²

The last sentence of Article 17 includes the concept of complementarity. COP Decision 15/CP.7 and CMP Decision 2/CMP.1 provide that *use of the [Kyoto mechanisms] shall be supplemental to domestic action and that domestic action shall thus constitute a significant element of the effort made by each Party included in Annex I to meet its quantified emission limitation and reduction commitments under Article 3, paragraph 1.* The word *significant* does not have any quantitative meaning, and was chosen over words such as “principal” and “primary”, which do.¹⁰³ Parties must provide relevant information in accordance with Article 7 of the Protocol, for review under Article 8.¹⁰⁴ Questions of implementation regarding this review are to be addressed only by the facilitative branch of the Kyoto Protocol Compliance Committee.¹⁰⁵

An Annex I Party may acquire an unlimited number of units under Article 17, but is limited in the number of units it may transfer to other Parties. This is because each Annex I Party must maintain a commitment period reserve which does not fall below 90 per cent of its assigned amount, or 5 times its most recently reviewed inventory, whichever is lowest.¹⁰⁶ The commitment period reserve prevents Annex I Parties from transferring too many emissions allowances and impairing their own ability to meet their emission reduction commitments.¹⁰⁷

Participation in Article 17 emissions trading is voluntary, so Annex I Parties are free to restrict who they trade with, and what types of emissions allowances are traded. Such restrictions do not

appear to generate trade law implications, since Kyoto units are sovereign commitments not covered by international trade law (see CLIB 27).¹⁰⁸

The Kyoto Protocol does not address domestic or regional emissions trading. However, any transfer of units between entities in different Parties under domestic or regional trading systems would be subject to Kyoto Protocol rules and must be reflected in the Kyoto Protocol accounting. The largest example of such a trading system is the European Union Emissions Trading Scheme.

Current Issues

Parties are currently considering new market-based mechanisms. Annex I Parties such as Australia are arguing for a broad range of market mechanisms in the post-2012 climate regime. Some Nationally Appropriate Mitigation Actions (NAMAs) by developing countries could potentially generate tradable credits for sale on the international carbon market. Proposals in the negotiations include market-based financing for REDD+, sectoral crediting and sectoral trading.

With sectoral crediting, a developing country would receive credits for reducing emissions below a sectoral target. There would be no penalties for failing to achieve the target. But credits would be received only after verification of reductions, which means that developing country governments would have to spend money upfront and risk not recovering their costs.

Sectoral trading tries to solve this problem by issuing credits upfront based on a sectoral target, which could be used to pay for mitigation actions. Additional credits would be received if emissions were reduced below the target, but if the target is not achieved, the developing country would have to buy credits to cover the shortfall.

These mechanisms may not be appealing to many developing countries, including LDCs. Few developing countries have the technical capacity to establish reliable sectoral emission inventories, and some sectors may be too small to warrant a sectoral approach. LDCs could face significant barriers unless extensive financial and technical support is made available.

Although some LDCs may wish to take advantage of future market-based mechanisms, the emphasis on market-based approaches in the negotiations risks diverting attention from financial commitments by developed countries, and shifts the focus further from public to private financing.

Reliance on global market mechanisms could also create loopholes in future Annex I Party targets, lessening the likelihood of keeping warming below 1.5°C, a significant concern for LDCs. Environmental integrity requires closing these loopholes and ensuring that Annex I Parties meet ambitious mitigation commitments.

102 COP Decision 18/CP.7

103 Yamin, F. and Depledge, J. (2004). *The International Climate Change Regime: A guide to Rules, Institutions and Procedures*. Cambridge, 145

104 COP Decision 15/CP.7; CMP Decision 2/CMP.1

105 COP Decision 15/CP.7; CMP Decision 2/CMP.1, Paragraph 4; COP Decision 24/CP.7, Paragraph IV(5)(b)

106 COP Decision 18/CP.7, Annex, Paragraph 6; CMP Decision 11/CMP.1, Annex, Paragraph 6.

107 UNFCCC, 'Kyoto Protocol Reference Manual on Accounting of Emissions and Assigned Amount', p. 16

108 Yamin, F. and Depledge, J. (2004). *The International Climate Change Regime: A guide to Rules, Institutions and Procedures*. Cambridge 159, citing Werksman, J., *WTO Issues Raised by the Design of an EC Emissions Trading System*, paper prepared for the European Commission

Clean Development Mechanism

The main current legal question related to the CDM concerns its status in the absence of agreement on a second commitment period under the Kyoto Protocol

The Clean Development Mechanism (CDM) has so far offered limited opportunities, with equitable geographical distribution of CDM projects being a particular concern for LDCs. The CDM's complex procedures and methodologies create difficulties, for example when it comes to demonstrating "additionality".

The main current legal question related to the CDM concerns its status in the absence of agreement on a second commitment period under the Kyoto Protocol. How the CDM's purposes, set out in Article 12, are interpreted may partially answer this question. LDCs may need to consider how their requirements should be reflected in any transitional arrangements related to the CDM in a possible gap after expiry of the first commitment period (see CLIB 15).

Background

The CDM, defined in Article 12 of the Kyoto Protocol, could be viewed as having three purposes: assisting developing country Parties in achieving sustainable development and in contributing to the ultimate objective of the UNFCCC; and assisting developed countries to meet their commitments under the Kyoto Protocol by undertaking emission reduction projects in developing countries and counting the reductions towards their targets (Article 12.2 and Decision 3/CMP.1).¹⁰⁹

CDM projects generate Certified Emission Reductions (CERs), which Annex I Parties can use to meet their targets. One CER represents one metric tonne CO₂ equivalent. Afforestation and reforestation projects generate temporary CERs (tCERs) or long-term CERs (ICERs).¹¹⁰ Countries wishing to host CDM projects need to have a Designated National Authority (DNA) to approve proposed CDM projects.

Emissions reductions are to be *additional* to what would occur in the absence of the project.¹¹¹ There is no agreed international legal definition of *additional* in the context of the CDM, and the rules for baselines and demonstrating additionality are complicated. The CDM Executive Board has established a tool for demonstrating additionality to be used as a general framework, with a separate tool for demonstrating additionality for afforestation/reforestation projects. Decision 3/CMP 6 from Cancun requested the Executive Board to develop standardised baselines for certain projects, prioritising methodologies that are applicable to LDCs, SIDS and countries with less than 10 CDM projects (Paragraph 46).¹¹²

LDCs are exempt from paying the registration fee for CDM projects (Decision 2/CMP.3). Following Cancun, the Executive Board is in the process of operationalizing a special loan scheme for countries hosting less than 10 CDM projects (Decision 3/CMP.6, Paragraph 64).

Equitable distribution of CDM projects is a key concern. Although a recent UNEP report argues that LDCs have achieved much better engagement with the CDM since 2007, achieving equitable regional and subregional distribution of projects remains a priority for the Executive Board.¹¹³ For example, Africa currently has less than 2 per cent of registered CDM projects.

Regarding governance, the Executive Board is to supervise the CDM *under the authority and guidance of the COP/MOP, and be fully accountable to the COP/MOP*.¹¹⁴ The Executive Board

does not, strictly speaking, have the power to determine rules for the CDM – this power belongs to the COP-MOP (CMP).

A *share of the proceeds* from CDM projects is to cover administrative expenses, and assist developing country Parties that are particularly vulnerable to the adverse effects of climate change to meet the costs of adaptation (Article 12.8). Based on this provision, the Adaptation Fund receives a 2 per cent share of proceeds of CDM projects. CDM projects in LDCs are exempt from paying the share of proceeds.

Current Issues

The current AWG-KP negotiations on the CDM include questions such as what percentage of the share of proceeds should apply in the future, an important issue for LDCs, and whether nuclear projects could be eligible. In addition the AWG-KP negotiations on LULUCF include CDM related proposals, for example whether additional LULUCF activities should be included under the CDM.

However, the main current question concern what happens to the CDM when the first commitment period under the Kyoto Protocol ends. This will be part of negotiations in Durban about the transitional arrangements between the end of the first commitment period and the following phase in the international climate regime.

As explained in a note by the UNFCCC Secretariat, what happens to the CDM depends on interpretation of Article 12.2.¹¹⁵ If it is considered sufficient for CDM projects to assist developing country Parties *in achieving sustainable development and in contributing to the ultimate objective of the Convention*, the CDM could continue even in the absence of emission reduction targets for Annex I Parties (there would be a need to agree new modalities for afforestation and reforestation projects).

From the point of view of LDCs, it may become important to ensure that any transitional arrangements related to the CDM fully reflect their needs. Countries such as Japan and Russia have stated that they will not support a second commitment period under the Kyoto Protocol, but interest in market mechanisms, including the CDM, remains high among Annex I Parties. Should a COP decision be adopted regarding transitional arrangements, LDCs may wish to ensure that the decision makes adequate reference to their requirements.

¹⁰⁹ Paul Curnow & Glen Hodes (Eds.) (2009). *Implementing CDM Projects: a guidebook to host country legal issues*. August 2009 UNEP Risø Center, p 17

¹¹⁰ The former expire at the end of the commitment period subsequent to the one in which they were issued, the latter at the end of the crediting for the project

¹¹¹ Article 12.5(c)

¹¹² For further information see <http://cdm.unfccc.int/index.html>

¹¹³ Lütken, S.E. (2011). *Indexing CDM distribution: Leveling the playing field*. CD4CDM Working Paper Series, Working Paper No. 10, UNEP Risø Centre, May

¹¹⁴ Decision 3/CMP.1, Annex Paragraph 5

¹¹⁵ UNFCCC (2010). *Legal considerations relating to a possible gap between the first and subsequent commitment periods*. FCCC/KP/AWG/2010/10

Safeguards

An overview of safeguards to prevent negative impacts of implementing the UNFCCC, focusing on finance, REDD+ and the relationship of safeguards to sovereignty

Negotiations under the UNFCCC aim to prevent dangerous interference with the climate system. However, policies, programmes and activities to achieve this objective can have detrimental impacts on people's lives and livelihoods. For instance, although the Clean Development Mechanism (CDM) is meant to promote sustainable development there have been projects, such as the construction of large hydroelectric dams, resulting in the forced displacement of local people and environmental damage.

Safeguards to ensure that measures under the UNFCCC and Kyoto Protocol do not cause disproportionate harm have therefore gained attention. Most development agencies and international finance institutions have already integrated environmental and social performance criteria in their decision-making processes.

Background

Donor countries increasingly tie the provision of grants or loans to conditions pertaining to human rights, gender equality, biodiversity conservation, and other ethical principles. The European Union, for example, has committed to development cooperation that promotes *respect for human rights, fundamental freedoms, peace, democracy, good governance, gender equality, the rule of law, solidarity and justice*.¹¹⁶ The European Commission's *Guidelines on the Programming, Design and Management of General Budget Support* require verification that certain conditions are met before funds are disbursed.

Similarly, the lending activities of international financial institutions such as the World Bank or regional development banks are usually regulated through policies, procedures and rules. The World Bank has developed safeguard policies providing guidelines for use during the identification, preparation and implementation of development programmes and projects. These include, *inter alia*, safeguard policies related to environmental assessment, natural habitats, forests, involuntary resettlement and indigenous peoples. The latter requires the borrower to *engage in a process of free, prior, and informed consultation* with project-affected indigenous peoples, ensure that the bank-funded projects result in *social and economic benefits that are culturally appropriate* and avoid, minimise or mitigate adverse effects.¹¹⁷

UNFCCC finance safeguards: In Cancun, the UNFCCC COP decided to establish a Green Climate Fund (GCF). The World Bank is expected to administer the GCF's assets as an interim trustee (subject to a review three years after the fund commences operations). In undertaking this task, World Bank staff should be expected to apply existing safeguard policies.

The COP set up a Transitional Committee (TC) to help design the GCF, mandating the Committee to develop a number of operational documents. This includes a document on *[m]echanisms to ensure financial accountability and to evaluate the performance of activities supported by the Fund, in order to ensure the application of environmental and social safeguards*.¹¹⁸

The draft report of the TC to COP17 leaves the development of operational guidelines to the Board that will govern the GCF, and suggests that the Board will develop and adopt

environmental and social safeguards in line with internationally agreed conventions.¹¹⁹ It further envisages that the GCF will provide resources to enhance institutional capacities in recipient countries to enable them to meet the Fund's environmental and social safeguards, and that the Board will establish a redress mechanism to receive complaints and evaluate the implementation of the Fund's social and environmental safeguards.¹²⁰

REDD+ safeguards: In Decision 16/CP.1 of the Cancun Agreements, the COP requested developing country Parties to develop a system to provide information on how safeguards are being addressed and respected. The safeguards, listed in an appendix to the decision, include: complementarity or consistency with the objectives of national forest programmes and relevant international conventions and agreements; transparent and effective national forest governance structures, taking into account national legislation and sovereignty; respect for the knowledge and rights of indigenous peoples and members of local communities; full and effective participation of relevant stakeholders, in particular, indigenous peoples and local communities; consistency with the conservation of natural forests and biological diversity to ensure that mitigation actions are not used for the conversion but incentivise conservation of natural forests; and actions to address the risks of reversals and the displacement of emissions.¹²¹

Safeguards and sovereignty: According to Decision 16/CP.1, the safeguards are to be *promoted and supported*. The meaning of this phrase may be elaborated in future negotiations. While the COP requested the development of a system for providing information on how the safeguards are being addressed and respected, it also underlined the need to respect national sovereignty.

Some LDCs have expressed concerns about the conditions imposed on developing countries through safeguards, for example in relation to REDD+, contrasting this with greater flexibility for Annex I Parties in relation to corresponding obligations.

Current Issues

Safeguards will be an important part of the arrangements for financing under the UNFCCC in relation to REDD+ and other issues. However, the financial, technical and other support needed to assist LDCs, in particular, to develop country-driven processes need to be taken into account. Decision 16/CP.1 recognises that the implementation of REDD+ depends on national circumstances, capacities and capabilities, and on the level of support received.¹²² This is consistent with UNFCCC Article 4.7, which states that the extent to which developing country Parties will effectively implement their commitments under the UNFCCC will depend on effective implementation of developed country Parties commitments related to finance and technology.

116 Joint Statement by the Council and the Representatives of the Governments of the Member States Meeting within the Council, the European Parliament and the Commission on European Union Development Policy: *The European Consensus*, 2006, O.J. C 46/01, Paragraph 13

117 World Bank (2005). OP 4.10 - Indigenous Peoples. <http://go.worldbank.org/TE769PDWN0>

118 Decision 1/CP.16, The Cancun Agreements, Appendix III, Paragraph 1(h)

119 Transitional Committee (2011). *Report of the Transitional Committee for the Design of the Green Climate Fund to the seventeenth session of the Conference of the Parties*, 7 October

http://unfccc.int/cancun_agreements/green_climate_fund/items/6038.php

120 *ibid*, Paragraphs 79 and 82

121 Appendix I to Decision 1/CP.16, Guidance and safeguards for policy approaches and positive incentives on issues relating to reducing emissions from deforestation and forest degradation in developing countries; and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries

122 Decision 1/CP.16, Cancun Agreements, Paragraph 74

UNFCCC and human rights law

Recent developments, including in the UN Human Rights Council and issues related to climate-induced displacement

The link between climate change and human rights is becoming increasingly prominent, and ranges from issues such as the impacts of actions to mitigate climate change to the disappearance of states.

Background

Human rights are commonly divided into three categories or “generations”. The first generation includes civil and political rights such as the right to liberty and security of the person. These are found in the 1966 International Covenant on Civil and Political Rights and other international instruments. The second generation includes economic and social rights, such as the right to education, health, and work. These are found in the 1966 International Covenant on Economic, Social and Cultural Rights and other international instruments. The term “third generation rights” refers to the doctrine of the rights of peoples. It is commonly suggested or assumed that they are not part of existing law, and are emerging.¹²³

Climate change impacts directly on many human rights.¹²⁴ For example, loss of land, lack of clean water, and damage to coastal infrastructure affect the rights to life, health, and adequate housing. These are issues felt acutely in many LDCs.

The human rights framework can humanise climate change and amplify the voices of those disproportionately affected.¹²⁵ By addressing issues such as displacement and the potential loss of territory it can fill in gaps in the climate regime.

UN Human Rights Council and other international bodies: The Maldives hosted a meeting of small island states in 2007, resulting in the Malé Declaration on the Human Dimension of Global Climate Change. The declaration asserted that *climate change has clear and immediate implications for the full enjoyment of human rights* and advocated that the UN address the issue.

In 2008, the UN Human Rights Council (HRC), through Resolution 7/23, recognised the effect of climate change on human rights, stating that climate change would pose an *immediate and far-reaching threat to people and communities around the world*.¹²⁶ It mandated the Office of the UN High Commissioner for Human Rights (OHCHR) to prepare a study on the relationship between climate change and human rights.¹²⁷ The OHCHR study, submitted in 2009, advanced an innovative theory of extraterritorial obligation in the context of international cooperation to promote and protect economic, social, and cultural rights.

The HRC adopted Resolution 10/4 in 2009, which highlighted the importance of human rights to the climate negotiations. In the preamble it recognised that *climate change-related impacts have a range of implications, both direct and indirect, for the effective enjoyment of human rights*. These include the right to life, the right to adequate food, the right to health, the right to adequate housing, the right to self-determination and human rights obligations related to access to safe drinking water and sanitation. It also recalled that *in no case may a people be deprived of its own means of subsistence*.¹²⁸

There are no explicit references to human rights in the UNFCCC, the Kyoto Protocol, the Bali Action Plan or the Copenhagen Accord. However, the preamble of Decision 1/CP.16 in the

Cancun Agreements notes HRC Resolution 10/4 on human rights and climate change. Paragraph 8 of Decision 1/CP.16 *[e]mphasizes that Parties should, in all climate change related actions, fully respect human rights.*

Climate-induced displacement: Climate-induced displacement is raised in Paragraph 14(f) of Decision 1/CP.16. It invites Parties to enhance action on adaptation by undertaking *[m]easures to enhance understanding, coordination and cooperation with regard to climate change induced displacement, migration and planned relocation, where appropriate, at the national, regional and international levels.*

In 2009, the government of the Maldives hosted an underwater cabinet meeting to highlight rising sea levels. In 2009, Pacific island states also sponsored a UN General Assembly resolution on climate change and its possible security implications.¹²⁹

A focus on loss of territory might be misplaced in the current dialogue regarding human rights, as small island states are likely to become uninhabitable before the islands physically disappear.

Climate exiles crossing state borders due to climate change or environmental reasons alone cannot be classified under the legal term *refugee*, as defined in the 1951 Convention relating to the Status of Refugees and its 1967 Protocol. Therefore, they will not receive the same protections as *refugees*, which include admission and the right to stay in another country.

Several regional efforts to expand the definition of ‘refugee’ can be interpreted to include climate exiles, such as the 1969 Organization of African Unity (OAU) Convention and the 1984 Cartagena Declaration on Refugees. Highly debated proposals include amending the definition in the Refugee Convention to cover climate exiles, to recognise climate displacement in a post-Kyoto agreement, and to establish a new UNFCCC protocol on climate refugees.¹³⁰

Current Issues

The LDCs are at the heart of the nexus between climate change and human rights. They are among the most vulnerable to the impacts of climate change. In the LDCs, these impacts are felt in terms of human rights – in loss of life, threats to livelihoods, increase in disease, climate-induced displacement, and shocks to development. The strong human rights arguments that LDCs have can complement their strong arguments on responsibility for climate change.

Human rights issues also arise in the context of negotiations on safeguards – for example, safeguards related to the rights of local communities in implementation of REDD+ activities (see CLIB 24).

123 Brownlie, I. (2008). *Principles of Public International Law*, 7th edn. Oxford, 567

124 For example, Marc Limon, “Human Rights and Climate Change: Constructing a Case for Political Action”, Harvard Environmental Law Review 33(2) 439, Annex

125 Ibid. 450

126 UN Human Rights Council, Resolution 7/23, “Human rights and climate change”

127 Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights, A/HRC/10/61 <<http://www.ohchr.org/EN/Issues/HRAndClimateChange/Pages/Study.aspx>>

128 UN Human Rights Council, Resolution 10/4, “Human rights and climate change”

129 UNGA Resolution 63/281 (3 June 2009), A/RES/63/281

130 Wei, D. (2011). *Receding maritime zones, uninhabitable states and climate exiles: How international law must adapt to climate change*. Foundation for International Environmental Law and Development.

http://www.field.org.uk/files/climate_exiles_dw.pdf

Aviation and shipping

An overview of efforts to address emissions from aviation and shipping

Emissions from fuel used for international aviation and maritime transport (“bunker fuels”) have been addressed under the UNFCCC in the past with limited progress. Negotiations on bunker fuels have been under way in the AWG-LCA since 2007, where it has not been possible to come to a conclusion. Several proposals related to raising finance from aviation and shipping have also been made, including the LDC Group proposal for an International Air Passenger Adaptation Levy (IAPAL) in 2008.

Background

The effectiveness of multilateral environmental agreements is increasingly considered dependent on their interaction with other international regimes and bodies. In general, treaty-to-treaty cooperation and a wider discourse of issues affecting different international processes help develop holistic approaches and improve treaty compliance.¹³¹

UNFCCC Article 7.2(l) states that the Parties shall *[s]eek and utilize, where appropriate, the services and cooperation of, and information provided by, competent international organizations and intergovernmental and non-governmental bodies*. Kyoto Protocol Article 2.2 directs Annex I Parties to *pursue limitation or reduction of emissions of greenhouse gases not controlled by the Montreal Protocol from aviation and marine bunker fuels, working through the International Civil Aviation Organization and the International Maritime Organization, respectively*.

International aviation and shipping emissions are not included in emission reduction targets under the Kyoto Protocol. Due to the aviation and shipping industry’s global activities and complex operations it is difficult to attribute emissions. Limited progress in the International Civil Aviation Organization (ICAO) and International Maritime Organization (IMO) increase the urgency of addressing these issues effectively in the AWG-LCA negotiations.

Aviation: ICAO is the UN specialised agency created in 1944 to promote safe and orderly development of international civil aviation throughout the world. It sets standards and regulations on aviation safety, security, efficiency and environmental protection. This includes climate change.

Growth in aviation emissions is expected to be approximately 3-4 per cent per year. Mitigation efforts through improved fuel efficiency can only partially offset the overall growth of emissions. In relation to climate change, ICAO’s current work focuses on developing global commitments on fuel efficiency improvements, a framework for market-based measures, and measures to assist developing states.

In September 2010, the ICAO Assembly affirmed the international air transport industry’s goal to improve CO₂ efficiency by an average of 1.5 per cent per annum from 2009 until 2020; to achieve carbon neutral growth from 2020; and to reduce carbon emissions by 50 per cent by 2050 compared to 2005 levels. It also aims to develop a CO₂ standard for commercial aircraft by 2013.¹³²

The possibility of raising finance from aviation has been considered in the UNFCCC negotiations. The LDC Group introduced the proposal for an International Air Passenger Adaptation Levy

(IAPAL) in 2008. The IAPAL concept envisages a levy on all air passengers, designed specifically to support adaptation in developing countries. The levy could be raised through national entities in developing countries to help ensure no-net incidence (NNI) on LDCs. NNI refers to avoiding costs for developing countries, and can be a way of making measures compatible with the principle of common but differentiated responsibilities and respective capabilities (see CLIB 9).

Shipping: Shipping carries around 90 per cent of world trade and is estimated to have contributed about 2.7 per cent to the global emissions of CO₂ in 2007. Efforts to tackle greenhouse gas emissions from international shipping have centred on IMO, the UN specialised agency with responsibility for the safety and security of shipping and the prevention of marine pollution by ships.

The IMO has developed several voluntary initiatives and instruments to limit and reduce greenhouse gas emissions from shipping. These include studies and policies as well as good practice guidelines on technical and operational energy efficiency measures. A ship 'CO₂ design index' is meant to support ship designers and builders to construct ships.

For the first time, mandatory measures to reduce emissions of greenhouse gases from international shipping were recently adopted by the Parties to Annex VI of the 1973 International Convention for the Prevention of Pollution from Ships as modified by the 1978 Protocol (MARPOL). The amendments to MARPOL Annex VI introduce new regulations that make a Ship Energy Efficiency Management Plan mandatory for all ships, and the Energy Efficiency Design Index (EEDI) mandatory for new ships.

The regulations apply to all ships of 400 gross tonnage and above, and are expected to enter into force on 1 January 2013. With regard to certain ships, the requirement to comply with the EEDI may be waived for an interim period.

Current Issues

In April 2011, the EU Commissioner for Climate Action stated that COP 17 in Durban should focus on emissions from bunker fuels. She suggested that shipping could become part of the EU's emissions trading scheme (EU ETS) if there is no agreement within the UNFCCC.

Aviation will come under the EU ETS from 2012. A legal challenge by American airlines before the European Court of Justice is likely to fail. The Advocate General of the European Court of Justice held that such a step would not interfere with the sovereignty of third countries and comply with all relevant aviation agreements.

If the AWG-LCA makes progress towards agreement on international bunker fuels, this could provide an opportunity to advance proposals such as the IAPAL proposal. An international agreement to reduce emissions from bunker fuels, depending on how it was structured, could potentially also have economic consequences for LDCs, unless NNI is ensured. Article 4.8 and also Article 4.9, with its specific focus on LDCs, could assist in ensuring that LDC needs are taken into account.

¹³¹ Chambers, W.B. (2008). *Interlinkages and the Effectiveness of Multilateral Environmental Agreements*. United Nations University Press. Tokyo. pp.3-4.

¹³² ICAO, Resolution A37-19: Consolidated statement of continuing ICAO policies and practices related to environmental protection – Climate change. http://www.icao.int/env/A37_Res19_en.pdf

The Climate Regime and International Trade Law

Potential areas of conflict between the UNFCCC and Kyoto Protocol, and the WTO

The 1947 General Agreement on Tariffs and Trade (GATT), which governed the international trade regime, was replaced by the World Trade Organization (WTO) in 1995. The WTO seeks to reduce trade barriers and prohibits discrimination between trading partners.

Neither the UNFCCC nor the Kyoto Protocol impose restrictions on international trade to achieve mitigation of greenhouse gases.¹³³ However, mitigation policies and measures could conflict with WTO rules if not designed properly.¹³⁴ Other areas at the interface of the international climate change and trade regimes include technology transfer and intellectual property rights.

Background

Trade under the UNFCCC and Kyoto Protocol: UNFCCC Article 3.5 states that *[t]he Parties should cooperate to promote a supportive and open and international economic system that would lead to sustainable economic growth and development in all Parties, particularly developing country Parties, thus enabling them to better address the problems of climate change. Measures taken to combat climate change, including unilateral ones, should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.* This wording neither endorses nor prohibits using trade measures to increase the effectiveness of the UNFCCC.¹³⁵ The language is similar to that found in Principle 12 of the Rio Declaration.

The Kyoto Protocol incorporates this principle in Article 2.3, which states that Annex I Parties should strive to implement policies and measures in such a way as to minimise adverse effects, including on international trade.

In 2003, the 18th meeting of the Subsidiary Body for Scientific and Technological Advice (SBSTA) *encouraged Parties to coordinate issues relevant to the Convention and the WTO at the national level.*¹³⁶ Although SBSTA regularly includes an agenda item on cooperation with relevant international institutions, this specific issue has not been raised again.

Environment under the WTO: None of the trade agreements under the WTO directly address environmental issues. However, GATT Article XX(b) permits measures *necessary to protect human, animal, or plant life or health*, and Article XX(g) permits measures *relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption*. Both of these are subject to the requirement in the chapeau of Article XX, that *such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade....*

The WTO Committee on Trade and Environment (CTE) was set up to *identify the relationship between trade measures and environmental measures, in order to promote sustainable development*. The CTE does not take decisions, and can only make recommendations to the WTO General Council and WTO Ministerial Conference. Its record of influencing WTO policy-making has been weak. The UNFCCC Secretariat has observer status at the CTE.

In 2001, the Doha Ministerial Declaration stated that *under WTO rules no country should be prevented from taking measures for the protection of human, animal or plant life or health, or of the environment at the levels it considers appropriate*, subject to the restrictions in the chapeau of

GATT Article XX. In Paragraph 31(i), the Declaration launched negotiations on *the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements*. These issues are being negotiated in special sessions of the CTE. There has been no outcome after many years of negotiations, although an outcome would likely address general principles, sharing national experiences, specific trade obligations, dispute settlement procedures, and technical assistance and capacity building. Many important disputes under the WTO's dispute settlement procedures have involved environmental issues, such as the Tuna-Dolphin and Shrimp-Turtle cases.

Current Issues

In 2007, the EU and the US submitted a proposal in the WTO Doha Round negotiations to reduce international barriers to trade in environmental goods and services, including in important "climate-friendly" technologies such as clean coal, energy-efficient appliances, wind and hydropower turbines, and solar water heaters. This led to concern over a possible breach of UNFCCC Article 3.5. Developing countries called on developed countries not to resort to unilateral measures against goods and services imported from developing countries on the grounds of protecting the climate.

In 2009, India suggested negotiating text at an informal group meeting under the AWG-LCA, stating that developed Parties should not resort to any form of Unilateral Trade Measures (UTMs) including countervailing border measures, against goods and services imported from developing countries on grounds of protecting and stabilising the climate. India, supported by Saudi Arabia, South Africa and Brazil, argued that this would violate Articles 3.1, 3.5, 4.3 and 4.7 of the UNFCCC.

India has added an item to the COP 17 provisional agenda on UTMs. Its explanatory note for this item states that *recourse to ...UTMs... on any grounds related to climate change, including protection and stabilization of climate, emissions leakage and/or cost of environment compliance would be tantamount to passing mitigation burden onto developing countries, and would clearly contravene the fundamental principles and provisions of equity, common but differentiated responsibility and respective capabilities, and the principle enshrined in Article 3 of the Convention. Parties should expressly prohibit use of unilateral trade measures on such grounds, as such UTMs will have negative environmental, social and economic consequences for developing countries and will compromise the principles and provisions of the Convention.*¹³⁷

How this proposal develops in the negotiations remains to be seen. UTMs are also a potential concern for LDCs, whose economies could suffer significant detrimental effects. Factors to take into consideration in addressing this issue in the negotiations include other priorities such as the need to reduce warming to below 1.5°C, which could require strong policies and measures in a number of areas.

133 Yamin, F. and Depledge, J. (2004). *The International Climate Change Regime: A Guide to Rules, Institutions and Procedures*. Cambridge. 530

134 Halvorssen, A.M. (2008). UNFCCC, The Kyoto Protocol, and the WTO – Brewing Conflicts or are they Mutually Supportive? *Denver Journal of International Law and Policy*. 369, 377

135 Yamin, F. and Depledge, J. (2004). *The International Climate Change Regime: A Guide to Rules, Institutions and Procedures*. Cambridge. 73

136 FCCC/SBSTA/2003/10 (31 July 2003), Paragraph 42(f)

137 FCCC/CP/2011/INF.2

Overlaps with other Multilateral Environmental Agreements

Issues of fragmentation and overlap among MEAs and developments in the UNFCCC

Climate change impacts virtually all aspects of the environment – including many that are covered by other Multilateral Environmental Agreements (MEAs).

The issue of synergies between MEAs in development and implementation of National Adaptation Programmes of Action (NAPAs), and potentially National Adaptation Plans (NAPs), is particularly relevant to LDCs, as is the general issue of MEA proliferation and the growing implementation and reporting burden on LDCs.

Background

Over the last decades, climate change has emerged as an increasingly important factor in areas of activity covered by other MEAs such as the UN Convention on Biological Diversity (CBD) and the UN Convention to Combat Desertification (UNCCD). These other MEAs may already have addressed, or be in the process of addressing, issues that are or could come under consideration under the UNFCCC or Kyoto Protocol.

For instance, the CBD has already addressed biodiversity safeguards in relation to REDD+, and also geoengineering, inviting Parties and others to observe a moratorium on climate-related geoengineering that could affect biodiversity.¹³⁸

The fact that many countries are Parties to the UNFCCC and the other MEAs may suggest that they would take similar positions in all the MEAs, and a similar course of action would evolve in each MEA as a result. However, this may not always be the case. In practice, different government ministries may take the lead in different MEAs, resulting in different approaches.

A direct conflict between the legal provisions of two MEAs would be unusual. Should there be a direct conflict, however, the Vienna Convention on the Law of Treaties addresses conflicts between treaties. In practice, conflicts would be more likely to arise in interpretation or implementation of decisions or recommendations under MEAs (see CLIB 1).

The fragmentation of international environmental governance creates challenges for all countries, but in particular LDCs. They do not have the resources to engage in negotiations in different fora, and fulfil separate implementation and reporting requirements for each. Some steps have been taken to address this – for example, recognising the heavy burden on LDCs and SIDS, the GEF is piloting a project on integrated reporting under the Rio Conventions (the UNFCCC, CBD and UNCCD).¹³⁹

Synergies in NAPA implementation: There has been increasing interest in promoting synergies among MEAs to overcome the lack of coordination, and the increasing implementation and reporting burden on countries in recent years. The issue of synergies has received particular attention in the context of development and implementation of National Adaptation Programmes of Action (NAPAs),¹⁴⁰ which are expected to take into account the National Biodiversity Strategies and Action Plans (NBSAPs) prepared under the CBD and the National Action Programs (NAPs) prepared under the UNCCD. The terms of reference of the Least Developed Countries Expert Group (LEG) include promoting synergies with other multilateral conventions in preparation and implementation of NAPAs.¹⁴¹

Joint Liaison Group: The Joint Liaison Group (JLG) brings together the secretariats of the Rio Conventions to enhance coordination. The JLG has considered issues such as NAPAs and possibilities for harmonised reporting, but it has not met very frequently. The JLG is not an inter-governmental body, where Parties could take decisions, which limits its role.

Current Issues

In addition to NAPAs, synergies with other MEAs may become relevant for LDCs in the process in formulating and implementing National Adaptation Plans (NAPs), as a follow-up of Decision 1/CP.16 from Cancun.

While synergies among the Rio Conventions have been discussed, synergies with other MEAs such as the 1972 World Heritage Convention and the 1971 Ramsar Convention on Wetlands may also be relevant to both NAPAs and NAPs.

It is a challenge for capacity-strapped LDCs to track and engage in developments related to climate change in other MEAs, even if such development could also offer opportunities to raise and reinforce concerns such as the impact of climate change on dry and sub-humid lands. Lack of coordination among MEAs, duplication, increasing numbers of MEA meetings and increasing reporting requirements create great difficulties. LDCs, in particular, need additional support to cope.

138 CBD COP Decision X/33 on biodiversity and climate change, Paragraph 8(w)

139 For a summary see <http://www.iisd.ca/mea-l/questarticle89b.html>

140 See, for example, *Synergies among multilateral environmental agreements in the context of national adaptation programmes of action*. Technical Paper. FCCC/TP/2005/3 6. April 2005 <http://unfccc.int/resource/docs/2005/tp/eng/03.pdf>

141 Decision 29/CP.7. Annex Paragraph 9(d)