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The Aftermath of Copenhagen: Does International Law have a Role to Play in a Global Response to Climate Change?

JACOB WERKSMAN[†] & KIRK HERBERTSON[‡]

I. INTRODUCTION

International negotiations on a global response to climate change have, since they were launched in the early 1990s, faced two linked challenges: (1) agreeing on a long-term strategy for reducing greenhouse gas emissions (GHGs) that responds to the threat of climate change and that reflects the common but differentiated responsibilities of all major emitters of these gases; and (2) capturing these responsibilities in the form of a legally binding instrument.

At the fifteenth Conference of the Parties (COP-15) to the UN Framework Convention on Climate Change (UNFCCC) in Copenhagen,¹ the international community moved a step closer to responding to the first challenge. For the first time in the climate change negotiations, all major emitters—including more than ninety developed and developing countries—have come forward with pledges that reflect what they are willing to do to reduce greenhouse

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¹ United Nations Framework Convention on Climate Change, May 29, 1992, S. TREATY DOC. NO. 102-38, 1771 U.N.T.S. 107 [hereinafter UNFCCC].

gas emissions. These pledges have since been included in the appendices of the “Copenhagen Accord” as a two-page political declaration that was “noted” but not adopted at the end of the Conference.² The Accord is not a legally binding agreement. Does it matter?

Most governments, developed and developing, maintain that a legally binding instrument is essential to the next stage in the design of an international climate change regime.³ Hundreds of nongovernmental environment and development organizations have urged their governments to agree on and enter into a “fair, ambitious and *binding*” outcome.⁴ Why then, does consensus on the legal

2. See Conference of the Parties to the United Nations Framework Convention on Climate Change, Fifteenth Sess., Dec. 7–18, 2009, Copenhagen, Den., *Draft Decision -/CP.15: Proposal by the President, Copenhagen Accord*, U.N. Doc. FCCC/CP/2009/L.7 (Dec. 18, 2009) [hereinafter Copenhagen Accord], available at <http://unfccc.int/resource/docs/2009/cop15/eng/l07.pdf>.

3. See, for example, the post-Copenhagen position of the European Commission, stating that “[o]ur primary objective remains to reach a robust and legally-binding agreement under the UNFCCC.” *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: International Climate Policy post-Copenhagen: Acting now to Reinstantiate Global Action on Climate Change*, at 4, COM (2010) 86 final (Mar. 9, 2010), available at http://ec.europa.eu/environment/climat/pdf/com_2010_86.pdf. See also the post-Copenhagen submission of the United States on next steps for the climate change negotiations, indicating that:

[t]he United States considers that it would be valuable to address the intended legal character of the agreed outcome earlier rather than later. The United States supports a legally binding outcome in Mexico provided that the legally binding elements in an otherwise acceptable agreement would apply in a symmetrical manner to all major economies.

United Nations Framework Convention on Climate Change Ad Hoc Working Group on Further Commitments for Annex I Parties Under the Kyoto Protocol, Eleventh Sess., Bonn, F.R.G., Apr. 9–11, 2010, and Ad Hoc Working Group on Long-Term Cooperative Action Under the Convention, Ninth Sess., Bonn, F.R.G., Apr. 9–11, 2010, *Views on the Need for Additional Meeting Time for the Ad Hoc Working Group on Further Commitments for Annex I Parties Under the Kyoto Protocol and the Ad Hoc Working Group on Long-Term Cooperative Action Under the Convention, and on Organization of Work of the Ad Hoc working Group on Long-Term Cooperative Action Under the Convention: Submission From Parties—United States of America*, at 50, U.N. Doc. FCCC/KP/AWG/2010/MISC.1, U.N. Doc. FCCC/AWGLCA/2010/MISC.1 (Mar. 16, 2010) [hereinafter U.S. Submission to Ad Hoc Working Group], available at <http://unfccc.int/resource/docs/2010/awglca9/eng/misc01.pdf>.

4. JULIE-ANNE RICHARDS, CLIMATE ACTION NETWORK INT’L, FAIR, AMBITIOUS & BINDING: ESSENTIALS FOR A SUCCESSFUL CLIMATE DEAL 10 (2009), http://www.climatenetwork.org/climate-change-basics/CAN_FAB_Essentials.pdf

character of a climate agreement remain elusive? The analysis that follows reveals two interconnected reasons.

Firstly, even as developing countries begin to embrace, on their own terms, their part of a common responsibility for responding to climate change, they insist that the legal character of that responsibility remain differentiated from the responsibilities of developed countries. This issue is of particular concern to the so-called “major economy” developing countries, whose per capita wealth remains relatively low, but whose national emissions have grown to include a significant share of global totals. Developed country counterparts have shown a willingness to accept a high degree of differentiation between the level of effort required of richer and poorer countries but insist that all major economies—developed and developing—be part of an agreement of the same legal character. From this perspective, international legal character seems to matter very much.

Secondly, as more countries have come forward with pledges of targets and actions in the absence of a new, legally binding instrument, some governments have begun to signal that a “soft law” approach to the climate negotiations may be sufficient. What really matters is that the pledges reflect measurable, reportable, and verifiable actions and that they are embedded in domestic law. From this perspective, the international legal character of a future climate agreement seems less important.

Because UNFCCC parties have failed to adopt rules of procedure that would have allowed it to take decisions other than by consensus, parties have had a particularly challenging time closing the gap between countries on issues of the ambition and balance of commitments, as well as on the legal nature of a climate agreement. Indeed, in the absence of rules that would allow majority voting, even a substantial majority of parties must overcome the formal objections of a few before any decisions could be taken, including those that could lead to legally binding instruments.

This Article briefly describes the shifting expectations of the role of international legal character in the development of a climate change agreement. It highlights the perspective of developing country major economies (in particular Brazil, South Africa, China, and

(emphasis added).

India—the BASIC countries) which are under growing pressure to undertake legally binding commitments to reduce their emissions. It then provides a conceptual framework for analyzing the elements of legal character in other multilateral environmental agreements (MEAs) and reviews the history of how previous climate change agreements reflect these elements. Finally, it seeks to analyze the costs and benefits of entering into a legally binding agreement and what this might mean for major economies as well as for the future development of the climate change regime. It concludes that there are at least two possible ways to manage the tension between ambitious, broadly applicable commitments and a legally binding instrument. The first option would be to pursue arrangements of a nonbinding nature, under which countries “pledge and review” policies developed at the national level and rely on politics rather than law to underpin the regime at the international level. The second option is to continue to use the UNFCCC, a legally binding treaty, as the backbone for future commitments but to invest deeply in UNFCCC procedures and institutions to review and promote compliance with commitments of a “soft law” nature.

II. SHIFTING EXPECTATIONS OF THE ROLE OF LAW IN A GLOBAL CLIMATE CHANGE AGREEMENT

Since 1990, when the UN General Assembly (UNGA) first recognized the need for an international response to the threat of climate change, it has been assumed that a legally binding treaty would be key to that response.⁵ UNGA set in train a process that led to the 1992 UNFCCC, a legally binding treaty containing minimal commitments reflecting the “common but differentiated responsibilities and capabilities”⁶ in the context of climate change by dividing the world into Annex I (developed) and non-Annex (developing) countries. In many ways the UNFCCC set an expectation that the climate regime will move forward in a legally binding form as long as the commitments it contains are highly differentiated between developed and developing countries. Following a review of the scientific adequacy of the UNFCCC’s

5. See Protection of Global Climate for Present and Future Generations of Mankind, G.A. Res. 45/212, para. 7, U.N. Doc. A/RES/45/212 (Dec. 21, 1990) (calling for the “negotiations for the preparation of an effective framework convention on climate change, containing appropriate commitments, and any related legal instruments as might be agreed upon,” which led to the UNFCCC).

6. UNFCCC, *supra* note 1, art. 3(1).

commitments, its parties launched a new round of negotiations in 1995 aimed at strengthening the regime. In 1997, UNFCCC parties concluded the Kyoto Protocol (KP),⁷ a legally binding treaty which sets binding emissions targets and timetables for developed countries. However, like the Convention, the Protocol contains no requirement that developing countries cut emissions. For these and other reasons the U.S., the largest historical emitter of GHGs, refused to ratify the Protocol and thus seriously undermined its effectiveness. Under growing pressure to develop a new arrangement that could either extend, amend, or replace the Kyoto Protocol, in 2007, the UNFCCC parties, including the United States, agreed in the Bali Action Plan on a roadmap for a post-2012 climate agreement.⁸

The Bali Action Plan was negotiated against the backdrop of U.S. inaction, potential widespread noncompliance with the Kyoto Protocol by other developed countries, and growing emissions from major emerging countries. It called for enhanced national and international action on mitigation of climate change, including commitments by developed countries and, significantly, “nationally appropriate mitigation actions” (NAMAs) by developing countries. It called upon parties to conclude their negotiations with an agreed outcome by COP-15 but did not indicate whether that outcome would be in the form of a legally binding instrument.

In the lead up to the Copenhagen COP, an informal group of seventeen of the world’s largest emitters of GHGs⁹ launched the “Major Economies Forum” (MEF).¹⁰ In July 2009, MEF leaders signaled an apparently radical departure from previous climate agreements. They (1) recognized that, in order to prevent the global

7. Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 11, 1997, 2303 U.N.T.S. 148, 37 I.L.M. 22 [hereinafter Kyoto Protocol].

8. Conference of the Parties to the United Nations Framework Convention on Climate Change, Thirteenth Sess., Bali, Indon., Dec. 3–15, 2007, *Decision 1/CP.13, Bali Action Plan*, U.N. Doc. FCCC/CP/2007/6/Add.1 (Mar. 14, 2008) [hereinafter Bali Action Plan], available at <http://unfccc.int/resource/docs/2007/cop13/eng/06a01.pdf#page=3>.

9. These include: Australia, Brazil, Canada, China, the European Union, France, Germany, India, Indonesia, Italy, Japan, the Republic of Korea, Mexico, Russia, South Africa, the United Kingdom and the United States.

10. Major Economies Forum on Energy and Climate, *Declaration of the Leaders: The Major Economies Forum on Energy and Climate* (July 9, 2009), <http://www.majoreconomiesforum.org/past-meetings/the-first-leaders-meeting.html> [hereinafter MEF Declaration].

mean temperature from rising more than two degrees Celsius above pre-industrial levels, global emissions must drop substantially by 2050;¹¹ and (2) declared that they will “undertake transparent nationally appropriate mitigation actions, subject to applicable measurement, reporting, and verification, and prepare low-carbon growth plans.”¹² Developing major economies also, for the first time, pledged to “promptly undertake actions whose projected effects on emissions represent a meaningful deviation from business as usual in the midterm”¹³

The MEF Declaration raised expectations that a Copenhagen agreement could demonstrate how all major economies will take actions to reduce global emissions by more than fifty percent by 2020 and by more than eighty percent by 2050. If so, for the first time, both developed and developing countries would need to design, declare, and be held accountable for either NAMAs or commitments that put humanity on track towards a low-carbon future. However, as Copenhagen approached, the MEF statements also began to reveal emerging views on legal form and review procedures that would represent a significant retreat from a UNFCCC process that had been premised on the importance of a legally binding instrument. By the time they met in London in October 2009, MEF leaders had begun to describe their goal as merely to “internationalize” domestic climate policies in the form of “listings” subject only to a party-led peer-review process.¹⁴ As COP-15 approached, both the UN Secretary General and the Danish government, which would play host for and preside over the Copenhagen COP, picked up on the MEF signals and began to lower expectations as to the legal character of any COP-15 outcome.¹⁵

Over a hundred heads of state and government arrived in the last days of COP-15 to discover their delegations deadlocked. The

11. *Id.* para. 1

12. *Id.*

13. *Id.*

14. The Fifth Leaders’ Representative Meeting, Major Economies Forum on Energy and Climate Changes, London, U.K., Oct. 18–19, 2009, *Chair’s Summary: Fifth Meeting of the Leaders’ Representatives of the Major Economies Forum on Energy and Climate*, available at <http://www.majoreconomiesforum.org/past-meetings/the-fifth-leaders-representatives-meeting.html>.

15. Louis Charbonneau, *U.N. Lowers Expectations for Copenhagen Climate Deal*, REUTERS, Oct. 26, 2009, <http://www.reuters.com/article/idUSTRE59P4YY20091026>.

Copenhagen Accord¹⁶ was hammered out in the last hours among five governments that are key to the future of the climate regime (the U.S. and the BASIC countries) and with a shared reluctance to make specific commitments.¹⁷ When the Accord was brought back to the conference as a whole, those that felt excluded from the process and disappointed with the results blocked the consensus necessary (in the absence of majority voting rules) to adopt the Accord as a COP decision. Thus, at the end of COP-15, the Accord was given no official status as a UNFCCC document. It was merely taken note of.¹⁸

Setting aside issues of its legal status, the Accord contains substance of some significance. It can be read to commit the countries that agree to it to acting collectively to dramatically reduce their emissions in such a way that will limit global warming to no more than two degrees Celsius above pre-industrial levels—an achievement that many scientists believe is essential to avoid the most dangerous impacts of global warming. In keeping with the UNFCCC's and KP's principles of differentiation, it calls upon developed countries to “*commit to implement* individually or jointly the quantified economy-wide emissions targets for 2020” and to submit these for inclusion in Appendix I of the Accord.¹⁹ It calls upon developing countries to “*implement* mitigation actions” and to submit these for inclusion in Appendix II.²⁰ It also contains pledges by developed countries to provide up to \$30 billion in finance to reduce emissions and build resilience to climate impacts in developing countries in the near term and \$100 billion a year by 2020.²¹

The Accord and its appendices of targets and actions differentiate between developed and developing countries—although the gap has closed dramatically. They are not, however, legally binding.²² Indeed,

16. Copenhagen Accord, *supra* note 2.

17. Arthur Max, *UN Climate Envoy Expects Dual-Track Negotiations*, ASSOCIATED PRESS, Mar. 16, 2010, http://www.google.com/hostednews/ap/article/ALeqM5jgEChLfsInFM9sVxr1mcG_iYxHvgD9EFPGC00.

18. *Id.*

19. Copenhagen Accord, *supra* note 2, para. 4 (emphasis added).

20. *Id.* para. 5 (emphasis added).

21. *Id.* para. 8.

22. In a series of notes to the parties following the adoption of the Accord, the UNFCCC Secretariat addressed questions raised about the legal character of the accord by clarifying that,

since the Conference of the Parties neither adopted nor endorsed the Accord, but merely took note of it, its provisions do not have any legal standing within the UNFCCC process even if some Parties decide to associate

a sentence in an early draft that would have called on parties to convert these pledges into legal text at the next COP was removed because of China's refusal to contemplate legally binding commitments and the U.S. refusal to be bound without China.²³ But the Accord is politically binding on those countries that choose to support it, and dozens of delegations publicly expressed their approval of it during the final COP plenary session. Politically binding—if it means anything—means that political consequences will flow from its breach. These could include, for example, diplomatic responses, efforts at public shaming, or the withholding of discretionary funding. In this sense, the Accord can be considered a strong, high-level commitment by the countries that have adhered to it.

The Accord also describes itself as “operational immediately.”²⁴ This language was included in the Accord by parties that had hoped it would be adopted as a COP decision in Copenhagen. Because it was not, those parts of the Accord that would require a COP decision cannot be operationalized.²⁵

The chaos of the final COP plenary session and the confused state of the Accord's text left many doubts as to how many and which countries would, in the end, support the Accord. The Accord set a deadline of 31 January 2010 for countries to submit targets and actions to be included in the Accord's appendices.²⁶ When the Accord's deadline passed, 95 of the UN Framework Convention's 192 Parties had responded. Of these, thirty-eight developed countries and twenty-seven developing countries lodged their targets and

themselves with it. . . . [T]he accord is a political agreement rather than a treaty instrument

United Nations Framework Convention on Climate Change, Executive Secretary, Bonn, F.R.G., Jan. 25, 2010, *Notification to Parties: Clarification Relating to the Notification of 18 January 2010*, available at http://unfccc.int/files/parties_and_observers/notifications/application/pdf/100125_noti_clarification.pdf.

23. See generally TREVOR HOUSER, PETERSON INST. FOR INT'L ECON., POLICY BRIEF: COPENHAGEN, THE ACCORD AND THE WAY FORWARD 6–7 (2010), <http://www.piie.com/publications/pb/pb10-05.pdf>.

24. Copenhagen Accord, *supra* note 2, pmbl.

25. For example, the Accord purports to decide to establish a “Copenhagen Green Climate Fund” as an operating entity of the UNFCCC's financial mechanism; this can only be done by a COP decision. *Id.* para. 10.

26. *Id.* para. 4.

actions with the United Nations.²⁷

The UNFCCC Secretariat, with support from the Danish COP Presidency and the UN Secretary General, also invited each party to the UNFCCC to send it an official communication indicating whether it wished to “associate itself with the Accord and that its name should be included in the chapeau of the Accord.”²⁸ Some influential commentators who objected to the Accord’s content and the process of its adoption sought to discourage countries—particularly developing countries—from formally associating themselves with the Accord on the grounds that this might imbue the document with a legally binding character.²⁹

Some of the BASIC countries, particularly India and China, were demonstrably reluctant to respond to the Secretariat’s request. Even after having submitted their actions for inclusion in Appendix II, both countries did so without reference to the Accord, preferring instead to make reference to provisions in the UNFCCC which encourage countries to report on their policies and measures.³⁰ Since then, following further requests for clarification from the Secretariat, both

27. See U.S. Climate Action Network, Who’s on Board with the Copenhagen Accord, <http://www.usclimatenetwork.org/policy/copenhagen-accord-commitments> (last visited Apr. 9, 2010). These pledges fall well short of the deep cuts in emissions that will be necessary to keep global temperatures at safe levels. Kelly Kevin & Rob Bradley, *Comparability of Annex I Emission Reduction Pledges 2* (World Resource Inst., Working Paper, 2010), available at http://pdf.wri.org/working_papers/comparability_of_annex1_emission_reduction_pledges_2010-02-01.pdf.

28. United Nations Framework Convention on Climate Change, Executive Secretary, Bonn, F.R.G., Jan. 18, 2010, *Notification to Parties: Communication of Information Relating to the Copenhagen Accord*, available at http://unfccc.int/files/parties_and_observers/notifications/application/pdf/notification_to_parties_20100118.pdf. The chapeau of the Accord contains a set of square brackets around the words “List of Parties” which the Secretariat has since been seeking to fill, retroactively, with the permission of each UNFCCC party.

29. “[A]ssociation with the Copenhagen Accord in writing, as requested by the Danish Presidency, would essentially be a unilateral declaration on the part of the associating Party of its willingness to be bound – in both political and international law terms – to the provisions of the Copenhagen Accord.” SOUTH CENTRE, COMMENTS ON THE COPENHAGEN ACCORD: SUMMARY, Jan. 18, 2010, http://www.southcentre.org/index.php?option=com_content&view=article&id=1216%3Acomments-on-the-copenhagen-accord&catid=129%3Aclimate-change-&Itemid=67&lang=en.

30. Letter from SU Wei, Director General, Department of Climate Change, National Development and Reform Commission of China, to Yvo de Boer, Executive Secretary, UNFCCC Secretariat (Jan. 28, 2010), available at http://unfccc.int/files/meetings/application/pdf/chinacphaccord_app2.pdf.

China and India have agreed to have their names included in the Accord's chapeau.³¹ However, neither country has chosen to state that it is "associating" with the Accord.

While these most recent responses to the Accord are promising, developing country major economies have treated the issue of its legal character skittishly, from their refusal to adopt it as a COP decision to their reluctance to "associate" with it. Understanding this reluctance and its implications for the future development of the climate regime requires a deeper analysis of the meaning of legal character for these countries.

III. IMPLICATIONS OF LEGAL CHARACTER FOR DEVELOPING COUNTRY MAJOR ECONOMIES

In this uncertain context, this Article seeks to draw conclusions about the relevance of legal character for developing country major economies (see Box 1). It is likely that an agreement subsequent to Copenhagen will continue to maintain a "development divide" that reflects significant distinctions in the commitments of developed and developing countries. It is also possible, however, that an agreed outcome will, as the Copenhagen Accord begins to do, significantly blur the previously bright lines that have distinguished the obligations of these two groups of countries. There will be considerable pressure on developing country major economies in general, and on the larger emitters among them in particular, to take on actions that are more closely comparable in their legal character to the commitments of industrialized countries. This pressure will build through a combination of international negotiations, bilateral diplomacy, and unilateral domestic policies aimed at addressing "competitiveness concerns" between those countries that are undertaking caps and those that are not. Industrialized countries will continue to push hard under the UNFCCC and through multiple other forums—such as the MEF and the G-20—to secure what they view as "comparable" commitments from major economies that are non-Annex I Parties to the UNFCCC and the Kyoto Protocol, including with regard to the legal form of those commitments. In its first formal submission post-Copenhagen, the U.S. has, for example, stated that it "supports a

31. *See, e.g.*, Letter from SU Wei, Director General, Department of Climate Change, National Development and Reform Commission of China, to Yvo de Boer, Executive Secretary, UNFCCC Secretariat (Mar. 9, 2010), *available at* <http://unfccc.int/files/meetings/application/pdf/indiacphaccord.pdf>.

legally binding outcome in Mexico provided that the legally binding elements in an otherwise acceptable agreement would apply in a symmetrical manner to all major economies.³²

Box 1: CO₂ Emissions and Development in the Major Economies Forum				
	CO ₂ Emissions Per Capita	Total CO ₂ Emissions	UNDP Human Development Index	GDP Per Capita
	2004 (Metric tons / person)	2004 (1,000,000 metric tons)	2006 (2006 ranking)	2006 (PPP US\$)
United States^{abc}	19.84	5,889	15	43,968
Australia^{abc}	17.48	351	4	33,035
Canada^{abc}	17.18	549	3	36,687
Russia^{ac}	10.89	1,575	73	13,205
Rep. of Korea^{bc}	10.63	507	25	22,985
Germany^{abc}	10.37	857	23	31,766
Japan^{abc}	10.21	1,304	8	31,951
United Kingdom^{abc}	9.19	551	21	32,654
South Africa^c	9.00	428	125	9,087
Italy^{abc}	8.25	482	19	28,828
France^{abc}	6.54	397	11	31,980
China^c	4.23	5,205	94	4,682
Mexico^{bc}	4.02	415	51	12,176
Brazil^c	1.88	346	70	8,949
Indonesia^c	1.65	368	109	3,455
India^c	1.07	1,199	132	2,489
^a Annex I; ^b OECD; ^c G20				
<i>Sources: WRI Earthtrends; UNDP Human Development Report 2008.</i>				

32. U.S. Submission to Ad Hoc Working Group, *supra* note 3, at 50.

The actions to which a developing country major economy may agree will be based on what it can afford, politically and economically, to undertake domestically and *vis-a-vis* its economic competitors. Where does a country wish to position itself geopolitically, now and in the coming decades, in relation to its peers on either side of the “development divide”? There is a great deal of unclaimed space for leadership in the climate change negotiations. Supporting high standards with regard to the legal form, content, and institutional and procedural oversight of all parties’ undertakings would be consistent with leadership. Such leadership would signal support for multilateralism and the rule of law and could generate significant goodwill from the international community. Given the soft consequences that typically flow from the breach of an MEA and the growing appetite of some developed countries for unilateral trade and investment measures to address “competitiveness concerns,”³³ the rewards of undertaking a binding commitment may prove higher than the risks.

Ultimately, the position a country takes on the legal character of an international agreement it intends to join involves a calculation about the redistribution of sovereignty. Is it willing to consent to a constraint on its own sovereignty in exchange for a reciprocal constraint on the sovereignty of other parties? Does the problem that the international agreement intends to solve depend upon these constraints? These are questions each party needs to assess in the context of a highly dynamic process.

IV. THE ELEMENTS OF LEGAL CHARACTER

In general, the legal character of an international agreement is reflected in its form, its content, and the institutions and procedures established to promote compliance with, and enforcement of, its terms. A legally binding treaty containing specific and enforceable obligations is the highest form of expression of political commitment and will at the international level. Ratifying such a treaty signals a party’s serious intent to comply with the treaty’s terms and, in return, can generate reciprocity and good will—elements essential to improve ratification of and compliance with a treaty. However, even if the negotiations lead eventually to a legally binding agreement, it may not result in legally binding commitments for all parties and will

33. *See infra* Part VII.

likely contain commitments of a highly differentiated content (see Box 2).

One potential outcome of the ongoing negotiations is a legally binding agreement that would be open for ratification by all parties. However, not all “legally binding” agreements contain clear and enforceable commitments.

In practice, states regularly enter into agreements that take a legally binding form but are softly worded, vague, and in some circumstances unenforceable. For example, under proposals submitted by UNFCCC parties prior to Copenhagen, a legally binding instrument could, (1) for some or all parties, contain discretionary “pledges” of actions that are not expressed in legally binding language; (2) for some or all parties, provide for no mechanisms to review or enforce compliance; (3) for developing country parties, make the performance of their NAMAs contingent on developed countries meeting their obligations to provide financial support; and/or (4) limit some or all parties’ commitments to performance “in conformity with domestic law” and allow those parties to change domestic law without incurring international legal consequences.³⁴

A. *Understanding the Legal Character of a Multilateral Environmental Agreement*

Major, contemporary MEAs³⁵ are most commonly expressed in legally binding treaty *form* as “conventions” and “protocols” to those conventions.³⁶ Typically, these MEAs incorporate the formal legal elements of treaties, most notably final clauses that include provisions for signature, ratification, accession, approval, and withdrawal recognized by international treaty law and customary law as a means of expressing and withdrawing consent to be bound.³⁷

34. See United Nations Framework Convention on Climate Change Ad Hoc Working Group on Long-Term Cooperative Action Under the Convention, Sixth Sess., Bonn, F.R.G., June 1–12, 2009, *Revised Negotiating Text: Note by the Secretariat*, U.N. Doc. FCCC/AWGLCA/2009/INF.1 (June 22, 2009), available at <http://unfccc.int/resource/docs/2009/awglca6/eng/inf01.pdf>.

35. We use the term MEA in this Article to refer to legally binding treaties, not “soft law” instruments such as ministerial declarations.

36. See, e.g., Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 79.

37. See Vienna Convention on the Law of Treaties arts. 11, 54, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLOT].

In terms of their *content*, many MEAs, including the UNFCCC and the KP, contain highly differentiated commitments that vary widely with regard to their legal form, clarity, specificity, and ambition. Commitments within MEAs can be expressed in either mandatory or discretionary language. They can be understood as *obligations of conduct*, which include obligations to cooperate, prepare programs, report on progress, or promote public awareness of issues; and *obligations of result*, which require parties to achieve measurable, reportable, and verifiable results, for example, through specific targets and timetables. Thus, many contemporary MEAs contain differentiated commitments, which allow parties to the same binding treaty to have commitments that differ in their legal form as well as their clarity, specificity, and ambition.

In some cases, even though commitments in a treaty are legally binding in their form (e.g., they are described as commitments, use mandatory language, and are contained in a legally binding treaty), they may have very little legal effect at the international level. If the language in which they are expressed is vague and imprecise, assessing compliance becomes difficult. In these cases, binding text may in effect be unenforceable at the international level. Nevertheless, for many countries, the international legal character of an MEA will trigger domestic ratification procedures, rooting the agreement in domestic legal and political process and, in some circumstances, triggering the enactment of enabling legislation. The domestic legal effect of an international treaty can be more significant than what is reflected in the international instrument.

The accountability of a party under an MEA depends on the *institutions and procedures* the agreement establishes to promote implementation by monitoring, reviewing, and promoting compliance with their commitments. Many contemporary MEAs require parties to report on their progress and establish a process to review these reports. Some contemporary MEAs have established multilateral procedures and institutions that promote compliance with their terms by offering financial and technical assistance. This assistance is typically limited to eligible developing country parties or parties with “economies in transition” (EITs) to market economies.

A few of these compliance procedures are authorized to reach

conclusions as to whether a party is in noncompliance and recommend the suspension of rights and privileges under the MEAs.³⁸ Some MEAs also require, authorize, or provide a basis for justifying the use of unilateral trade measures by one party against another party for failure to comply with their terms.

Many contemporary MEAs, including the UNFCCC and the KP, provide for “latent” binding arbitration, judicial dispute settlement, or compulsory but nonbinding conciliation as the means of settling disputes that arise between parties. Many MEAs, like the UNFCCC and the KP, provide for “optional clauses” that allow parties to opt into compulsory and binding judicial dispute settlement. However, no contemporary MEA has required parties, when ratifying the agreement, to subject themselves to a compulsory and binding judicial dispute-settlement procedure, and no party to a contemporary MEA has done so.³⁹

B. *What If a Country Breaches a Legally Binding Multilateral Environmental Agreement?*

Although it remains rare for an MEA to provide for compulsory and binding enforcement procedures and define specific remedies and consequences for breach, it remains an important principle of international law—perhaps the most important principle—that breach of an international treaty gives rise to state responsibility for the consequences of that breach.

All internationally binding agreements are governed by the principle of “*pacta sunt servanda*” meaning that “[e]very treaty in force is binding upon the Parties to it and must be performed by them in good faith.”⁴⁰ Essentially, this is a statement of the “rule of law” in international relations. Customary international law is emerging to suggest that the breach of an international obligation, including an international treaty obligation, is an internationally wrongful act that

38. See, e.g., UNITED NATIONS ENVIRONMENTAL PROGRAMME, *HANDBOOK FOR THE INTERNATIONAL TREATIES FOR THE PROTECTION OF THE OZONE LAYER: THE VIENNA CONVENTION (1985), THE MONTREAL PROTOCOL (1987)* 296 (6th ed. 2003) [hereinafter *Ozone Handbook*], available at <http://www.unep.org/Ozone/pdfs/Handbook-2003.pdf>.

39. The exception, if it is to be considered an MEA, is the 1982 UN Convention on the Law of the Sea, which provides for compulsory and binding judicial dispute settlement. See United Nations Convention on the Law of the Sea art. 286, Dec. 10, 1982, 1833 U.N.T.S. 3, 21 I.L.M. 1261.

40. VCLOT, *supra* note 37, art. 26.

gives rise to state responsibility to make restitution for the consequences of that breach.⁴¹ Parties to an MEA may agree in advance what specific consequences will flow from the breach of a particular provision of a treaty. As will be mentioned, the KP's "enforcement consequences" as well as the trade bans in other MEAs, such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora,⁴² are rare but important examples of such pre-defined enforcement consequences.⁴³

C. What Is the Value of a Legally Binding Multilateral Environmental Agreement Without Strong Enforcement Procedures?

In the absence of strong enforcement procedures and consequences, MEAs can promote accountability by establishing institutions and procedures with the authority to receive, analyze, and report information on parties' activities. A data-rich environment enables parties to build trust through verification and exercise the kind of diplomatic pressure—sometimes referred to as "shaming"—that is an essential means of promoting accountability among countries.

Contemporary MEAs continue to rely heavily on transparency of information and multilateral diplomatic processes for accountability. For eligible parties, they also rely on technical and financial assistance, rather than legal formalism, to promote compliance with their terms. The formalities associated with a legally binding regime can, however, operate to exclude parties, including parties crucial to the MEA's effectiveness, from participating in the regime. Domestic ratification processes can slow or prevent a country from formally joining a regime.

The binding character of an MEA under international law is properly understood as an expression of the highest level of political will of the parties to achieve its objectives. While legally binding

41. Responsibility of States for Internationally Wrongful Acts, G.A. Res. 56/83, at 8, U.N. Doc. A/RES/56/83 (Jan. 28, 2002).

42. Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 [hereinafter CITES].

43. Chatham House, Sustainable Development Programme, *The CITES Treaty and Compliance: Progress or Jeopardy?* 4 BP 04/01 (Sept. 2004) (prepared by Rosalind Reeve), available at http://www.chathamhouse.org.uk/files/9267_bp0904cites.pdf.

form need not include legally binding content for all parties, it does tend to generate the more sophisticated and robust institutions and procedures necessary to support transparency and accountability of performance. The legally binding nature of an agreement correlates, for example, with the budgets and political clout of the institutions associated with these regimes, including their ability to attract financial support, the attention of high level representation, media attention, and the support of civil society and the public at large.

V. A BRIEF HISTORY OF LEGAL CHARACTER UNDER THE CLIMATE CHANGE REGIME

A. *The UNFCCC*

The UNFCCC and KP have in many ways followed the form, content, and procedural and institutional characteristics of the ozone-layer-protection regime, widely regarded as among the most successful MEAs.⁴⁴ The 1985 Vienna Convention for the Protection of the Ozone Layer⁴⁵ and the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer⁴⁶ forged a legally binding set of schedules for the phase out of the consumption and production of chemicals that threaten the stratospheric shield that protects life on earth from ultraviolet radiation. In two decades, its legal framework of commitments, financial and technical support, and compliance system led developed and developing countries to dispose of stockpiles, transform industrial processes, and dramatically reverse the deterioration of the ozone layer.

Like the Vienna Ozone Convention, the UNFCCC is a “framework” treaty. It is legally binding in its form and relatively weak in its content but provides for quite robust procedures and institutions, including the means to enhance its commitments through

44. *See, e.g.*, PHILIPPE SANDS, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 345–46 (2d ed. 2003) (describing the Montreal Protocol as “a landmark international environmental agreement, providing a precedent for new regulatory techniques and institutional arrangements”); PATRICIA BIRNIE & ALAN BOYLE, INTERNATIONAL LAW AND THE ENVIRONMENT 522–23 (2d ed. 2002) (noting that “the Ozone Convention and the Montreal Protocol have provided one of the most sophisticated and effective models of international regulation and supervision for environmental purposes”).

45. Vienna Convention for the Protection of the Ozone Layer, Mar. 22, 1985, T.I.A.S. No. 11,097, 1513 U.N.T.S. 293 [hereinafter Vienna Ozone Convention].

46. Montreal Protocol on Substances that Deplete the Ozone Layer, Sep. 16 1987, S. TREATY DOC. NO. 100-10, 1522 U.N.T.S. 3 [hereinafter Montreal Protocol].

the adoption of protocols. As a ratifiable international agreement, the Convention provides a legally binding framework that sets out an overall objective, a set of principles, a series of procedural obligations, and a set of institutions designed to oversee the implementation and development of the regime. Those commitments that are applicable to all parties are general obligations of conduct, including the commitment to develop national climate programs and national emissions inventories and report these to the COP.

The UNFCCC also contains a softly worded “aim” which suggests that developed (Annex I) parties should return their GHG emissions to 1990 levels by 2000. It establishes a financial mechanism to support the incremental costs of developing country implementation of their commitments. Annex I parties that were also members of the Organization for Economic Cooperation and Development (OECD) in 1992 (Annex II parties) are required to provide an unspecified amount of “new and additional” financial resources to the UNFCCC’s financial mechanism.

All parties are required to develop national inventories of GHGs and to formulate and implement national programs containing measures to mitigate emissions and facilitate adaptation to climate change. This information is to be communicated to the COP, which is mandated to:

[a]ssess, on the basis of all information made available to it in accordance with the provisions of the Convention, the implementation of the Convention by the Parties, the overall effects of the measures taken pursuant to the Convention, in particular environmental, economic and social effects as well as their cumulative impacts and the extent to which progress towards the objective of the Convention is being achieved.⁴⁷

The commitments of non-Annex I parties under the UNFCCC and the KP are, in the view of some parties, *contingent* upon the fulfillment of Annex II parties of their obligation to provide new and additional funding to support developing country implementation.⁴⁸

47. UNFCCC, *supra* note 1, art. 7.2(e).

48. *Id.* art. 4.7 (providing that “[t]he extent to which developing country Parties will effectively implement their commitments under the Convention will depend on the effective implementation by developed country Parties of their commitments under the Convention related to financial resources and transfer of technology and will take fully into account that economic and social development and poverty

Arguably, this contingency affects the legally binding character of developing country commitments by tying it to the performance of other parties in providing finance.

The national communications and national GHG inventories of Annex I parties have become subject to an expert review process under the UNFCCC, which, at least in theory, provides an opportunity for the COP or its Subsidiary Body for Implementation to assess the implementation of individual Annex I parties.⁴⁹ The COP's failure to ever assess a country's implementation arguably undermines an aspect of the legally binding character of parties' commitments by signaling that parties are reluctant to hold each other to account for noncompliance.

The UNFCCC has a set of final clauses that include standard language on dispute settlement including articles on judicial dispute settlement and arbitration. Those parties that agree, either in general or when a specific dispute arises, to subject themselves to these procedures, the dispute will be resolved with a legally binding judgment. The UNFCCC also provides for a conciliation process, which has compulsory jurisdiction over all parties but will operate only when triggered by one party against another and can only "render a recommendatory award, which the parties shall consider in good faith."⁵⁰ None of these procedures has been invoked.

The UNFCCC parties negotiated and nearly completed the design of a Multilateral Consultative Process (MCP), based largely on the Montreal Protocol's noncompliance system, which would have facilitated compliance with the UNFCCC. The MCP was never finalized, as the negotiations of the KP were seen to overtake the need for a compliance system under the UNFCCC.⁵¹

B. *The Kyoto Protocol*

The KP develops the climate regime further through the introduction of quantified emissions limitations and reduction objectives (QELROs) for Annex I parties, which are specific, time-bound "obligations of result." Each Annex I party is provided an

eradication are the first and overriding priorities of the developing country Parties").

49. *Id.* art. 10.2(b).

50. *Id.* art. 14.6.

51. *Id.* art. 13.

“assigned amount” of GHG emissions it is allowed during the KP’s commitment period of 2008 to 2012. The KP’s “flexibility” mechanisms are designed to reduce the costs to developed countries of remaining within their assigned amounts by allowing them to trade allowances among themselves and acquire offsets through investments in GHG-reduction projects in developing countries. The KP enhances the UNFCCC’s procedures and institutions for reviewing the performance of Annex I parties and establishes a compliance procedure designed both to facilitate and to enforce compliance with its terms. Like the UNFCCC, the KP has a dispute settlement procedure that would become operational only if parties choose to opt into it.

The delegations that led the design of the Kyoto Protocol followed the principle that more specific commitments and functioning flexibility mechanisms required a more robust compliance system to ensure accountability among parties and predictability for investors. More particularly, they argued that an international emissions trading system should be backed by a compliance system with an enforcement mechanism. This logic led the negotiators to enhance accountability by improving the procedures for carrying out expert review of developed country inventories and national communications. Expert Review Teams, operating under the auspices of the UNFCCC Secretariat, are authorized to carry out in-depth reviews of the quality of reported data and can raise questions of implementation with regard to a party’s performance.

The logic behind legally binding commitments also led to a mandate, under Article 18 of the KP, to:

approve appropriate and effective procedures and mechanisms to determine and to address cases of non-compliance with the provisions of this Protocol, including through the development of an indicative list of consequences, taking into account the cause, type, degree and frequency of non-compliance. Any procedures and mechanisms under this Article entailing binding consequences shall be adopted by means of an amendment to this Protocol.⁵²

This mandate proved to be both an engine of innovation and a

52. Kyoto Protocol, *supra* note 7, art. 18.

brake on the legal integrity of the KP. The Marrakesh Accords⁵³ to the KP put in place a Compliance System that is authorized to review questions of implementation raised (either by the Expert Review Teams or by a party) with regard to the performance of both developing and developed parties. A question raised by or with regard to a developing country party is referred to the “Facilitative Branch” of the KP’s Compliance Committee, which can provide advice and assistance to that party.

A question of implementation raised with regard to a developed country’s compliance with its obligation to report and comply with its QELROs can, if substantiated, be referred to the Compliance Committee’s “Enforcement Branch.” If, during the KP’s commitment period, the Enforcement Branch finds that a party is not in compliance with its obligation to report on its national GHG emissions, the Enforcement Branch can suspend that party’s eligibility to engage in the KP’s market mechanisms. If, at the end of the KP’s commitment period, a party, having been given a chance to purchase additional offsets or allowances, still exceeds its assigned amount, the Enforcement Branch can require that party to deduct 1.3 tonnes of carbon equivalent emissions from the subsequent commitment period for each tonne that exceeds its assigned amount.

The KP’s compliance system was adopted as part of the Marrakesh Accords in 2001 as a set of decisions taken by the UNFCCC COP in preparation for the entry into force of the KP, following which both branches of the Compliance Committee have begun operations. Indeed, the Enforcement Branch has dealt with two cases of potential noncompliance—both of which resulted in the improved performance of the parties in question.⁵⁴

However, the enforcement consequences associated with the

53. Conference of the Parties to the United Nations Framework Convention on Climate Change, Seventh Sess., Marrakesh, Morocco, Oct. 29–Nov. 10, 2001, *Report of the Conference of the Parties on its Seventh Session, held at Marrakesh from 29 October to 10 November 2009—Part Two: Action Taken by the Conference of the Parties*, U.N. Doc. FCCC/CP/2001/13/Add.2 (Jan. 21, 2002) [hereinafter Marrakesh Accords], available at <http://unfccc.int/resource/docs/cop7/13a02.pdf>.

54. See René Lefeber, *The Practice of the Compliance Committee Under the Kyoto Protocol to the United Nations Framework Convention on Climate Change (2006–2007)*, in NON-COMPLIANCE PROCEDURES AND MECHANISMS AND THE EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL AGREEMENTS 303 (Tullio Treves et al. eds., 2009) [hereinafter *Non-Compliance Procedures 2009*].

findings of noncompliance—the suspension of the eligibility to participate in the Kyoto Protocol’s “flexibility mechanisms” and the imposition of the thirty percent penalty—were never “adopted by means of amendment” to the Kyoto Protocol, as required by Article 18. Furthermore, the KP parties have yet to agree on their Assigned Amounts for the second commitment period. This leaves open the real possibility that, if a party were found by the Enforcement Branch not to be in compliance at the end of the KP’s commitment period, the enforcement penalties would be nonoperational.

C. Lessons for a Climate Change Agreement

Legally binding form, specific content, and robust institutions and procedures were justified under the Kyoto Protocol by arguments that linked the rule of law to environmental integrity, mutual accountability, and the carbon market’s need for stability and predictability. By linking the legal form of parties’ commitments to specificity of content and robustness of institutions and process, the KP climate change regime has introduced significant innovations to international environmental law.⁵⁵

There are several noteworthy successes. First, transparency and accountability have been improved through the monitoring and evaluation of developed country parties’ performance by Expert Review Teams authorized to conduct in-country visits, deploy third-party data, and raise questions of implementation. Second, the principle of common but differentiated responsibility has been implemented through the split functions and jurisdictions of the facilitative and enforcement branches in a way that gained the acceptance by both developed and developing countries of enhanced oversight of their performance. Third, while it is operating on somewhat unstable legal grounds due to the language in Article 18, the KP’s Compliance System is developing an important track record in promoting compliance.

This suggests that a climate change agreement designed as an

55. Jacob Werksman, *The Negotiations of a Kyoto Compliance System*, in IMPLEMENTING THE CLIMATE REGIME: INTERNATIONAL COMPLIANCE 17–37 (Olav Schram Stokke, Jon Hovi & Geir Ulfstein eds., 2005); Geir Ulfstein & Jacob Werksman, *The Kyoto Compliance System: Towards Hard Enforcement*, in IMPLEMENTING THE CLIMATE REGIME: INTERNATIONAL COMPLIANCE 39–62 (Olav Schram Stokke, Jon Hovi & Geir Ulfstein eds., 2005).

advance on the KP should maintain a logical link between form, content, and procedures but should also seek to reach agreement on the consequences for noncompliance *within the ratifiable instrument* that contains the new commitments.

Market mechanisms are creatively used under the KP to both reduce the costs of compliance and—through the threat of suspension of the ability to trade—create incentives for compliance. International emissions trading between Annex I countries depends upon the legally binding character of their QELROs to create assigned amount units that would be fungible across different domestic legal systems. Offset trading based on the Clean Development Mechanism (CDM) depends on project-level contracts, enforceable through a mixture of domestic legal systems, international arbitration, and, indirectly, decisions made by the CDM Executive Board. The legal and institutional character of the CDM arrangements have been essential to providing credibility and predictability to buyers and sellers, as well as environmental integrity to the system as a whole. If a climate change agreement also relies on carbon markets, whether at the allowance, project, or sectoral level, similar kinds of arrangements will be necessary. Indeed, the emissions reduction purchase agreements (ERPAs) and the CDM Executive Board's mandate to approve project baselines and certify emissions reductions, by providing a legal and institutional framework for project-level performance of developing countries, may provide a prototype for the kind of results-based, measurable, reportable, and verifiable (MRV) manner anticipated under the climate change negotiations.⁵⁶

As discussed later, it is not clear that the Bali Action Plan and the subsequent negotiations are taking a path similar to the KP with regard to the legal character of a post-2012 agreement and its multilaterally agreed approach to carbon markets. As was described above, some developed countries have rejected what they see as the KP's heavily "top-down" approach. Others that championed the need for strong rules and institutions during the KP negotiations have been disappointed by the performance of parties and the institutions created under the KP. Efforts by developed countries to include more specific commitments by major developing economies in a climate

56. See DAVID FREESTONE & CHARLOTTE STRECK, LEGAL ASPECTS OF THE IMPLEMENTING THE KYOTO PROTOCOL MECHANISMS: MAKING KYOTO WORK 295–377 (2005).

change agreement have also dampened the enthusiasm of developing countries for a legally binding regime with a tough compliance mechanism. Some have begun to emphasize the need for a greater focus on the legal character of domestic rules and the capacity of national institutions as the main engines of implementing and enforcing climate change policy.

VI. BALI, COPENHAGEN, AND THE LEGAL CHARACTER OF A FUTURE CLIMATE CHANGE AGREEMENT

In the absence of a COP decision in Copenhagen, the COP's decisions in Bali, as informed by the Copenhagen Accord, will guide the climate change negotiations going forward. Together, they leave unsettled the legal form, content, and institutional and procedural dimensions of a future climate change agreement. However, they do contain two major breakthroughs that could have implications for the legal character of the post-2012 regime and that have been reflected and developed further in the Copenhagen Accord. First, the Bali Action Plan (BAP) set the expectation that all parties to a climate change agreement, developed and developing, will demonstrate how they are contributing to the UNFCCC's objective. This expectation has now been at least partially fulfilled by the pledges of developed country targets and developing country actions in the Accord's appendices. Second, the Bali Action Plan and the Accord have confirmed the expectation that all parties describe the content of their commitments and actions in an MRV manner.

A. *Legal Form*

The UNFCCC and the Kyoto Protocol provide for four types of "related legal instruments"—protocols, amendments, annexes, and amendments to annexes. Each of these would be legally binding on the parties that ratified the respective instrument. As has been described, many parties continue to aspire for the negotiations to lead to a new treaty, an amendment of the UNFCCC or KP, or both.

The Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (CMP) also has the ability to reach decisions and, in the past, has provided fora for the adoption of "Ministerial Declarations." While mainstream interpretations of international law do not view such decisions of COPs as legally binding on parties, they have had important political and legal effects on parties'

commitments.⁵⁷

The Marrakesh Accords to the Kyoto Protocol, for example, contain authoritative interpretations, clarifications, and elaborations of the KP's text. Most significantly, the CMP's interpretations of the appropriate method for calculating emissions from Land Use, Land Use Change, and Forestry had specific and direct consequences for the levels of emissions reductions expected of certain forested countries. Detailed rules for the implementation of the CDM were adopted by decision and led to the operationalization of the CDM and the authorization of the CDM Executive Board to take authoritative decisions that determine which methods and projects will generate offsets.

Thus, past practice under the UNFCCC and the KP sets a precedent for COP and CMP decisions to interpret and advance significantly the implementation of existing commitments but not to create new, legally binding commitments. One possible next step in the negotiations would be for the UNFCCC COP to reach the consensus it failed to reach in Copenhagen and adopt the Accord, or much of its content, as a decision. While this would not convert its content into a legally binding form, it would allow the parties to "operationalize" those aspects of the Accord that are within the COP's authority, such as the establishment of a new financial mechanism.

B. *Content*

The BAP and the Accord differentiate between the outcomes expected for developed countries and those expected for developing countries that will be parties to a post-Copenhagen agreement. The BAP does make clear, however, that developed countries are expected to emerge with "[m]easurable, reportable and verifiable nationally appropriate mitigation commitments or actions, including quantified emission limitation and reduction objectives [QELRCs] . . . while ensuring the comparability of efforts among them, taking into account differences in their national circumstances."⁵⁸ The Accord provides more precision by indicating that developed (more specifically Annex I) countries will "*commit to*

57. Jutta Brunnée, *COPing with Consent: Law-Making Under Multilateral Environmental Agreements*, 15 LEIDEN J. INT'L L. 1, 24–26 (2002).

58. Bali Action Plan, *supra* note 8, para. 1(b)(i).

implement individually or jointly the quantified economy-wide emissions targets for 2020,”⁵⁹ and these have since been included in the Accord’s Appendix I. A full analysis of these submissions is beyond the scope of this Article, but even a superficial review can identify a wide range of differences. While there is consistency across submissions with regard to their specificity, the target pledged by the European Union represents a twenty percent cut of emissions from 1990 levels by 2020 and is enshrined in binding legislation. The target pledged by the United States represents a seventeen percent cut of emissions from 2005 levels and is based on draft legislation whose prospects for passing diminish daily.

In the Bali Action Plan, developing country parties will, by contrast, emerge with “[n]ationally appropriate mitigation actions [NAMAs] . . . in the context of sustainable development, supported and enabled by technology, financing, and capacity-building in a measurable, reportable, and verifiable manner.”⁶⁰ The Accord develops this further by providing that developing (more specifically non-Annex I) countries will:

implement mitigation actions, including those to be submitted to the secretariat by non-Annex I Parties in the format given in Appendix II by 31 January 2010, for compilation in an INF document, consistent with Article 4.1 and Article 4.7 and in the context of sustainable development. Least developed countries and small island developing States may undertake actions voluntarily and on the basis of support.⁶¹

The choice of the words “commitment” in the BAP and “commit to implement . . . targets” in the Accord to describe the participation of developed countries, as contrasted with “will implement . . . actions” in the Accord to describe the participation of developing countries, is deliberate. This, as well as the Accord’s distinct appendices, perpetuates what a number of developing country delegations have characterized as an essential “firewall” or “development divide” between rich and poor countries. Arguably, the use of different terms could draw a line, in the future, between legally binding obligations of result for developed countries and softer obligations of conduct—or even nonbinding “pledges”—by

59. Copenhagen Accord, *supra* note 2, para. 4 (emphasis added).

60. Bali Action Plan, *supra* note 8, para. 1(b)(ii).

61. Copenhagen Accord, *supra* note 2, para. 5.

developing countries. The references to Article 4.7 of the UNFCCC and the special circumstance of least developed countries and small island developing states, as well as the remarks included with many developing country submissions to Appendix II of the Accord, suggest that performance of at least some of the actions listed will remain contingent on whether financial resources are available to support those actions.

If the Accord remains a high water mark for what the negotiations are able to achieve, then both developed and developing country commitments will simply remain soft law of a different texture. Which countries will be considered “developed” and which “developing” is undetermined by the BAP, while the Accord reverts back to the Annex I/non-Annex I division in place since 1992.

Again, an analysis of Appendix II pledges is beyond the scope of this Article, but they appear in great variety and have proved difficult to analyze and compare with regard to their ambition and likely impact.⁶²

C. *Institutions and Procedures*

The concept of measuring, reporting, and verifying (MRV) both developing country actions and developed country financing of such actions also carries with it a strong institutional and procedural expectation, raising the question of by whom and how QELRCs, financial commitments, NAMAs, targets, and pledges will be measured, reviewed, and verified. The BAP does not contain any further reference to monitoring, review, or compliance procedures. The Accord seeks to move this issue a notch further by providing that developed country targets, as well as their financial pledges, “will be measured, reported and verified in accordance with existing and any further guidelines adopted by the Conference of the Parties, and will ensure that accounting of such targets and finance is rigorous, robust and transparent.”⁶³

Scrutiny of developing country actions will also be tightened under the Accord. Developing country NAMAs that do not receive financial support under the Accord will be domestic MRV systems, and the

62. See TARYN FRANSEN, WORLD RESOURCES INSTITUTE, SUMMARY OF GHG REDUCTION PLEDGES PUT FORWARD BY DEVELOPING COUNTRIES (2009), http://pdf.wri.org/summary_of_non_annex1_pledges_2009-12.pdf.

63. Copenhagen Accord, *supra* note 2, para. 4.

results of this review will be reported to the UN and subjected to “international consultations and analysis under clearly defined guidelines that will ensure that national sovereignty is respected.”⁶⁴ NAMAs that do receive support “will be subject to international measurement, reporting, and verification in accordance with guidelines adopted by the Conference of the Parties.”⁶⁵

These institutions and procedures for MRV represent significant advances over existing systems under the UNFCCC, particularly for developing countries. They fall well short of the compliance procedures as applied to Annex I countries under the Kyoto Protocol. It should be noted, however, that these Accord provisions appear to require additional actions by the COP and are not, therefore “operational immediately.”⁶⁶

VII. UNILATERAL STANDARD SETTING FOR LEGAL CHARACTER: A CASE STUDY OF DRAFT U.S. CLIMATE LEGISLATION

The pressure on developing countries, particularly major economies, to strengthen and fulfill the pledges they have made as part of the Copenhagen Accord in a way that is comparable in their legal character to developed country commitments is likely to grow. Bilateral diplomacy will build this pressure further and may well be backed by the threat of unilateral, domestic policies aimed at addressing “competitiveness concerns” between those countries that are undertaking caps and those that are not. Both the U.S. and the European Union have been actively considering the use of “border adjustment measures” as means of encouraging their major trading partners to adopt climate policies that are comparable to theirs. Other industrialized countries are taking a wait-and-see approach but may be reasonably expected to follow the lead of the world’s largest economies. One of the stated objectives of U.S. measures is to prevent emissions “leakage” that might occur through the relocation of GHG-intensive supply chains and production processes from capped to uncapped countries.

The stated purposes and specific measures contained in the American Clean Energy and Security Act⁶⁷ (ACES) passed by the

64. *Id.* para. 5.

65. *Id.*

66. *Id.* pmb1.

67. American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. (2009).

U.S. House of Representatives (but not yet enacted into law) are an extreme example of a set of legal implications that might arise from the legal character of commitments that a country signs up to at a post-Copenhagen conference. Similar types of measures have been contemplated in more recent draft legislation and proposals emerging from the Senate.⁶⁸

ACES would, if it became law, set negotiating goals for the U.S. delegation that would include: “induc[ing] foreign countries, and, in particular, fast-growing developing countries, to take substantial action with respect to their greenhouse gas emissions consistent with the Bali Action Plan developed under the United Nations Framework Convention on Climate Change.”⁶⁹ Furthermore, the bill provides that “[i]t is the policy of the U.S. to work proactively under the United Nations Framework Convention on Climate Change, and in other appropriate fora, to establish binding agreements, including sectoral agreements, committing all major greenhouse gas-emitting nations to contribute equitably to the reduction of global greenhouse gas emissions.”⁷⁰

More specifically, under the bill, the U.S. Administration would be directed to achieve the following negotiating objectives:

- (1) to reach an internationally binding agreement in which all major greenhouse gas-emitting countries contribute equitably to the reduction of global greenhouse gas emissions;
- (2) (A) to include in such international agreement provisions that recognize and address the competitive imbalances that lead to carbon leakage and may be created between parties and non-parties to the agreement in domestic and export markets; and (B) not to prevent parties to such agreement from addressing the competitive imbalances that lead to carbon leakage and may be created by the agreement among parties to the agreement in domestic and export markets; and
- (3) to include in such international agreement agreed remedies for any party to the agreement that fails to meet its greenhouse gas reduction

68. *E.g.*, Clean Energy Jobs and American Power Act, S.1733, 111th Cong. (2009); Carbon Limits and Energy for America’s Renewal (CLEAR) Act, S.2877, 111th Cong. (2009).

69. H.R. 2454 § 401.

70. *Id.*

obligations in the agreement.⁷¹

Thus, the U.S. would be seeking, in an international agreement, comparable efforts from major economies and remedies to enforce them. If these negotiating objectives were not met by January 2018, ACES would trigger the establishment of a “border adjustment” program that could penalize importers of products made by U.S. competitors in energy or GHG-intensive, trade-exposed sectors, when those products are produced or manufactured in a country that failed to meet at least one of several tests. While the detailed methodologies of how border measures would be applied to specific products, sectors, and countries have not been developed in the bill, these tests give an indication of what the U.S. will be looking for in terms of “comparability” of efforts of its major trading partners:

(1) The country is a party to an international agreement to which the United States is a party that includes a nationally enforceable and economy wide greenhouse gas emissions reduction commitment for that country that is at least as stringent as that of the United States. (2) The country is a party to a multilateral or bilateral emission reduction agreement for that sector to the [sic] which the United States is a party. (3) The country has an annual energy or greenhouse gas intensity . . . for the sector that is equal to or less than the energy or greenhouse gas intensity for such industrial sector in the United States in the most recent calendar year for which data are available.⁷²

It is worth noting that ACES also contains provisions that would limit the eligibility of countries to receive U.S. financial assistance generated by the bill. Eligibility would be reserved for those developing countries that entered into an international agreement to which the United States is a party, “under which such country agrees to take actions to produce measurable, reportable, and verifiable greenhouse gas emissions mitigation” or has “in force national policies and measures that are capable of producing measurable, reportable, and verifiable greenhouse gas emissions mitigation”; and “has developed a nationally appropriate mitigation strategy that seeks to achieve substantial reductions, sequestration, or avoidance of

71. *Id.*

72. *Id.*

greenhouse gas emissions, relative to business-as-usual levels.”⁷³

Finally, ACES sets standards for which countries that have established emissions trading schemes will be allowed to sell allowances into the United States cap and trade program. These standards are based on a United States government assessment of whether that country’s scheme is “at least as stringent as the program established by this title, including provisions to ensure at least comparable monitoring, compliance, enforcement, quality of offsets, and restrictions on the use of offsets.”⁷⁴

From this analysis it can be concluded that if a major developing economy undertakes commitments that are more comparable in form, content, and process to commitments undertaken by developed countries, it will less likely be subject to these kinds of unilateral measures from the United States. It also suggests that the institutions and procedures that may be making important determinations about a country’s compliance with its domestic climate policy or its international commitments may include regulatory agencies in other countries.

Finally, it is important to note that a number of these unilateral measures would have an impact on the flow of products, services, and capital between countries and as such could trigger the application of multilateral, regional, and bilateral trade and investment agreements. In some instances, this could include their dispute-settlement mechanisms. This could lead to a situation in which, for example, a WTO dispute-settlement panel is called on to assess whether restricting trade in products based on the comparability of climate legislation between two trading partners is a justifiable trade measure.⁷⁵

VIII. CONCLUSIONS: THE BENEFITS AND RISKS OF LEGAL CHARACTER

Lessons from other treaties tell us that international agreements with binding, specific commitments backed by robust review procedures are generally more effective. In general, signing on to

73. *Id.*

74. *Id.* § 311.

75. *See, e.g.,* WORLD TRADE ORGANIZATION & UN ENVIRONMENT PROGRAMME, TRADE AND CLIMATE CHANGE (2009), http://www.wto.org/english/res_e/booksp_e/trade_climate_change_e.pdf; GARY C. HUFBAUER, STEVE CHARNOVITZ & JISUN KIM, GLOBAL WARMING AND THE WORLD TRADING SYSTEM (2009).

these kinds of commitments demonstrates strong political will, encourages other countries to do the same, and thus should lead to better environmental results. In most cases, the international penalties associated with failing to comply with an international treaty are unspecified, and thus the risks of being found in noncompliance seem low.

Box 2 summarizes the risks and benefits that would be associated with a climate agreement that is either legally binding or nonbinding in its form; that contains high or low quality content, in terms of legal form, clarity, specificity, and ambition of obligations; and that contains more or less robust requirements for reporting and verifying compliance and enforcement.

It is important to note that a treaty with a high standard of legal character has the potential to exclude the participation of some countries. The additional hurdles required by domestic ratification processes can act to exclude even some governments that would otherwise wish to join the regime. Others may simply feel unready to commit to its terms. In circumstances where this would lead to the exclusion of countries crucial to the treaty's success, the different aspects of legal character need to be weighed carefully and, potentially, traded off against other aspects of an agreement.

There are indications that a post-2012 climate change regime will support performance-based financial mechanisms and carbon markets that could reward countries that are willing to make specific undertakings. Our case study of draft U.S. legislation suggests that countries undertaking legally binding commitments may have preferential access to large-scale carbon markets and may be able to avoid the unilateral trade sanctions contemplated by the United States and others.

There will be intense pressure on developing country major economies in general, and the higher emitters among them in particular, to take on commitments that are more closely *comparable* in their legal character to the commitments of industrialized countries. Industrialized countries will continue to push hard through the MEF and through the G-20 to secure commitments from major economies that are non-Annex I Parties to the UNFCCC and the KP that move them towards standards of form, content, and procedural and institutional oversight that are comparable to their own.

2010]

THE AFTERMATH OF COPENHAGEN

141

The contributions of a developing country major economy to the negotiations will be in part based on what it can afford to undertake politically and economically *vis-a-vis* its economic competitors and where it wishes to position itself geopolitically in the coming decades in relation to its peers on either side of the “development divide.”

Given this wide diversity of views, the prospect of agreeing to a new, legally binding instrument that is widely perceived as balanced in terms of its form, content, and procedural and institutional treatment of commitments appears remote—particularly in the context where the adoption of such an instrument will require a consensus of all parties. There are at least two possible ways forward signaled by the Copenhagen Accord. The first is that countries that have long championed the need for a legally binding international instrument explicitly or implicitly abandon this goal and begin to pursue methods of “internationalizing” the pledge and review of national policies through soft law approaches outside the UNFCCC process. This could have long-term consequences for the international community’s perception of the necessity and the utility of international law as a response to global environmental challenges. Alternatively, the UNFCCC parties could choose to reinvest in strengthening those aspects of the legal character of the climate change regime that are already within the UNFCCC’s mandate as a legally binding treaty. While the COP cannot, by decision alone, adopt new targets and actions that are binding on its parties, it has provided (and can continue to provide) a forum for its parties to report on their efforts to reduce emissions, such as those now contained in the Accord’s appendices. More importantly, it can strengthen and expand the operation of the institutions and procedures designed to ensure quality of data, harmonize standards and policies, coordinate carbon markets, and review parties’ performance. The insistence that there can be no progress without a new legally binding instrument, if it blocks movement forward within the UNFCCC, could, ironically, permanently undermine the credibility of the Convention—which remains the only legally binding instrument of near universal membership.