

FROM BERLIN TO BALI AND BEYOND: *KILLING KYOTO SOFTLY?*

I. INTRODUCTION

The issue of climate change has captured the popular imagination like no other cause in living memory. From relative obscurity in the late 1980s when it was first discussed in the UN General Assembly,¹ it has come, less than two decades later, to be characterized as ‘the defining human development challenge for the 21st century.’²

The Fourth Assessment Report of the Intergovernmental Panel on Climate Change (IPCC), released in 2007, warned that the warming of the climate system is unequivocal and accelerating.³ The global average temperature has increased by 0.74 centigrade in the last century, the largest and fastest warming trend in the history of the Earth.⁴ Climate change will, among other impacts, increase the severity of droughts, land degradation, desertification, the intensity of floods and tropical cyclones, the incidence of malaria and heat-related mortality, and decrease crop yield and food security.⁵ There is also increasing certainty that, as the climate system warms, poorer nations, and the poorest within them, will be the worst affected.⁶ Climate change, moreover, is ‘a massive threat to human development.’⁷ The Human Development Report 2007–8,⁸ and the Stern Review 2006,⁹ underscore this.

Notwithstanding the magnitude of the problem, an effective and universal solution to address it has thus far eluded the international community. Admittedly, there are significant hurdles facing nations seeking to craft a common platform for addressing climate change. There are vast differences between countries in terms of contributions to the stock of carbon in the atmosphere, industrial advancement and wealth, nature of emissions use, and climate vulnerabilities. There is a worsening of poverty in some parts of the world, a reluctance to modify existing lifestyles or development pathways and there are differing levels of faith in technological solutions. Operating within the constraints posed by these hurdles, States have over the past two decades created a legal regime, albeit a contested one, to address climate change and its impacts.

The legal texts that comprise the climate regime—the United Nations Framework Convention on Climate Change¹⁰ and its Kyoto Protocol¹¹—are in force,¹² have

¹ GA Res 44/228 (1989)

² UNDP, Human Development Report, 2007–8, *Fighting Climate Change: Human Solidarity in a Divided World*, online, <http://hdr.undp.org/en/reports/global/hdr2007-2008/>

³ S Solomon et al., eds., *Climate Change 2007: The Physical Science Basis. Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2007)

⁴ *ibid.*

⁵ *ibid.*

⁶ *ibid.*

⁷ Summary for Policy Makers (n 2).

⁸ *ibid.*

⁹ *Stern Review on the Economics of Climate Change* (2006) online, http://www.hm-treasury.gov.uk/independent_reviews/stern_review_economics_climate_change/sternreview_index.cfm

¹⁰ *United Nations Framework Convention on Climate Change*, 29 May 1992, A/AC.237/18 (Part II)/Add. 1, reprinted in (1992) 31 ILM 849 [hereinafter FCCC]

¹¹ *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 10 December 1997, FCCC/CP/1997/L.7/add.1, reprinted in (1998) 37 ILM 22 [hereinafter the Kyoto Protocol].

¹² There are 192 Parties to the FCCC and 182 Parties to the FCCC have ratified the Kyoto Protocol, online, <http://www.unfccc.int>.

concrete content, and are binding. Resources are in place to facilitate the negotiation process¹³ and ensure emissions reductions,¹⁴ as well as to supervise and enforce compliance with the obligations imposed by these treaties.¹⁵

The Framework Convention and its Kyoto Protocol endorse the value of targets and timetables,¹⁶ and require developed countries, given their enhanced historical and current contributions to the carbon stock as well as their greater wealth and technological capacity, to take the lead in assuming and meeting ambitious greenhouse gas (GHG) mitigation targets. Both these premises of the climate regime have remained contentious through the years. The United States' rejection of the Kyoto Protocol in 2001 can, in large part, be sourced to a resistance to these premises.¹⁷ I argue in this article that the Bali Action Plan, adopted on 15 December 2007 at the 13th FCCC Conference of Parties (COP), launching a process to craft the future climate regime, offers Parties the option of jettisoning both these premises, and even the Kyoto Protocol, going forward. That is, the option of killing Kyoto softly. This is by no means the only option. Parties also have the option of arriving at an ambitious climate change mitigation strategy by 2009, albeit framed differently from the mitigation strategy in the Kyoto Protocol. This strategy will likely permit a range of mitigation actions, whatever their nature, stringency and extent, in a form that the United States (US) and large developing countries find politically palatable.

This article begins by tracing the evolution of the climate regime and outlining its conceptual apparatus. It then explains the operational significance of COP decisions such as the Bali Action Plan, and proceeds to parse and analyse the language of the Plan in support of the argument that the Bali Action Plan provides Parties the option, amongst others, of killing Kyoto softly.

II. THE CONCEPTUAL APPARATUS OF THE CLIMATE REGIME¹⁸

1. *The Framework Convention on Climate Change*

The balance of commitments under the FCCC and its Kyoto Protocol is based on the principle of common but differentiated responsibility (CBDR).¹⁹ The core content of

¹³ The FCCC and the Kyoto Protocol are serviced by a Secretariat based in Bonn, staffed with over 200 international civil servants, online, <http://unfccc.int/secretariat/items/1629.php>.

¹⁴ Through Joint Implementation, the Clean Development Mechanism and Emissions Trading, Articles 6, 12 and 17 Kyoto Protocol.

¹⁵ At the seventh FCCC COP, Parties adopted the Marrakech Accords which laid down operating rules for the mechanisms and, accounting procedures for emissions reduction credits. They established a compliance system and set out the consequences for non-compliance. See Report of the Conference of the Parties on its Seventh Session, Addendum, Part two, Action taken by the Conference of the Parties, Volume I FCCC/CP/2001/13/Add.1 (2002); See also Volume II FCCC/CP/2001/13/Add.2 (2002); Volume III FCCC/CP/2001/13/Add.3 (2002); and Volume IV FCCC/CP/2001/13/Add.4 (2002).

¹⁶ Article 3, Kyoto Protocol; Article 4(2) (b), FCCC, also contained a target and a timeframe, albeit not a country-specific one as in the Kyoto Protocol.

¹⁷ Text Of A Letter From The President To Senators Hagel, Helms, Craig, And Roberts, The White House, Office of the Press Secretary, 13 March, 2001.

¹⁸ This section draws on L Rajamani, *Differential Treatment in International Environmental Law* (OUP, 2006).

¹⁹ Article 3, FCCC; the climate regime is widely considered to be the 'clearest attempt to transform, activate and operationalize common but differentiated responsibility from a legal

the CBDR principle as well as the nature of the obligation it entails is deeply contested. Both at the negotiations, and in the scholarly literature, there are at least two incompatible views on its content. One, that the CBDR principle 'is based on the differences that exist with regard to the level of economic development'.²⁰ And the other, that CBDR principle is based on 'differing contributions to global environmental degradation and not in different levels of development'.²¹ There is, in addition, a fundamental disagreement as to the nature of the obligation it entails. While some argue that it is obligatory, others contend that it can be nothing but discretionary. The disagreements over this principle's content, and the nature of obligation it entails, have spawned debates over the legal status of this principle. Notwithstanding these debates, at its core the CBDR principle permits and indeed requires differential treatment between countries in the fashioning of treaty obligations. Accordingly, the FCCC and its Kyoto Protocol contain differing obligations for different countries or groups of countries. The FCCC lists 36 developed countries in Annex I, and relegates developing countries to the catch-all category of non-Annex I countries.

The FCCC requires developing countries to develop in a sustainable manner²² (developed countries admittedly did not) and address the adverse effects of climate change through adaptation. This responsibility is unique to developing countries in the sense that it requires developing countries to take on board sustainable development, framed in the climate context as sensitivity to GHG emissions use,²³ at a period in the trajectory of their development when, during the comparable period in their development, developed countries had no such restraints.²⁴

The FCCC requires developed countries to address climate change through specific mitigation commitments. The commitments under the FCCC, contained in Article 4, support this argument. While Article 4(1) relating inter alia to national inventories of anthropogenic emissions by sources and removals by sinks,²⁵ programmes containing measures to mitigate climate change,²⁶ and scientific and technological cooperation,²⁷ is applicable to *all* Parties, Article 4(2) containing specific commitments is limited to Annex I Parties.²⁸ Developed countries are committed by virtue of this article to

concept into a policy instrument.' See Remarks by Christopher Joyner, in C Joyner, *Transcript of Panel Discussion on 'Common but Differentiated Responsibility,'* Am. Soc'y Int'l L. Proc. (2002); See also (n 18), Chapter 5.

²⁰ See B Kellersmann, *Die Gemeinsame, Aber Differenzierte Verantwortlichkeit Von Industriestaaten Und Entwicklungsländern Für Den Schutz Der Globalen Umwelt* 335 (English Summary) (2000).

²¹ International Law Association, International Committee On Legal Aspects Of Sustainable Development, Report Of The Sixty-Sixth Conference 116 (1995).

²² In addition to the international law obligation to develop in a sustainable manner (Gabcikovo—Nagymaros (Hungary/Slovakia), 1997 ICJ Rep 15, 24, climate-specific mandates exist in the FCCC, including in the Preamble, and Articles 3 (4) and 4(1), FCCC. Article 3(4), FCCC, reads, '[P]arties have a right to and should promote sustainable development. . .'

²³ Article 4(1) (f), FCCC (requiring all countries to take climate change considerations into account, to the extent feasible, in their relevant social, economic and environmental policies).

²⁴ The IPCC noted that 'the level of energy intensities in developing countries today is generally comparable with the range of the now-developed countries when they had the same level of per capita GDP.' See Nebojsa Nakicenovic and Rob Swart eds., IPCC, Special Report on Emissions Scenarios (2000), section 2.4.10

²⁵ Article 4(1) (a) FCCC.

²⁶ Article 4(1) (b) FCCC.

²⁷ Article 4(2) (a) and (b) FCCC.

²⁸ Article 4(2) (f) FCCC.

aiming to return individually or jointly to their 1990 levels of anthropogenic emission of GHGs.²⁹

The FCCC balance of commitments between developing and developed countries is further contoured through Article 4(7) which reads:

‘The 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 eradication are the first and overriding priorities* of the developing country Parties.’³⁰

This provision conditions developing countries’ participation and implementation to developed countries’ implementation of their commitments. In doing so, Article 4(7) underpins and reinforces the compact between developing and developed countries with respect to international environmental protection. The Montreal Protocol,³¹ the Convention on Biological Diversity,³² and the Stockholm Convention on Persistent Organic Pollutants³³ contain similar provisions.³⁴

2. The Berlin Mandate and the Kyoto Protocol

The FCCC lays down guiding principles to help Parties find an acceptable formula to address the problem, and the formula is contained in the Kyoto Protocol.³⁵ The Kyoto Protocol is a product of the Berlin Mandate Process. Adopted by the first COP, the Berlin Mandate proposed strengthening the commitments of Annex I Parties through the adoption of a Protocol or another legal instrument.³⁶ The mandate further specified that the process ‘shall’ be guided by *inter alia*, Article 3(1) (CBDR principle).³⁷ It required the process to aim at setting quantified emissions limitation and reduction objectives within specified time frames for Annex I countries but *not* introduce any new commitments for non-Annex I Parties.³⁸ The Berlin Mandate reaffirmed the CBDR principle and, in keeping with the FCCC division of responsibilities between developed and developing countries, focused on mitigation activities and thereby primarily commitments of developed countries. An Ad Hoc Working Group was set up to advance the ambition of the Berlin Mandate and as a result of its deliberations, the

²⁹ Article 4(2) (b) FCCC.

³⁰ Article 4(7) FCCC [emphasis added].

³¹ Article 5(5), *The Montreal Protocol on Substances that Deplete the Ozone Layer*, 16 September 1987, reprinted in 26 ILM 1550 (1987) [hereinafter Montreal Protocol].

³² Article 20(4), *United Nations Framework Convention on Biological Diversity*, 2 June 1992, reprinted in 31 ILM 818 (1992).

³³ Article 13(4), *The Stockholm Convention on Persistent Organic Pollutants*, 22 May 2001, reprinted in 40 ILM 532 (2001).

³⁴ For an analysis of FCCC Article 4(7), and similar provisions in other environmental treaties, see L Rajamani, ‘The Nature, Promise and Limits of Differential Treatment in the Climate Regime 2005’, *Yearbook of International Environmental Law* 81 (2007)

³⁵ See Lawrence Susskind, *Environmental Diplomacy* 34 (1994).

³⁶ Decision 1/CP.1, *The Berlin Mandate: Review of Adequacy of Articles 4, paragraph 2, subparagraph (a) and (b), of the Convention, including proposals related to a Protocol and decisions on follow-up*, contained in Report of the Conference of Parties on its first session held at Berlin from 28 March to 7 April 1995, FCCC/CP/1995/7/Add.1 (1995)

³⁷ *ibid.*

³⁸ *ibid* (emphasis added).

draft negotiating text of the Kyoto Protocol emerged and was adopted at Kyoto in December 1997.³⁹

The Preamble to the Kyoto Protocol makes explicit reference to both FCCC Article 3 and the Berlin Mandate.⁴⁰ Further, Article 10 of the Protocol explicitly reaffirms the CBDR principle.⁴¹ Accordingly, the Protocol requires certain developed country Parties listed in Annex I to the FCCC to reduce their overall emissions of a basket of greenhouse gases by at least 5 per cent below 1990 levels in the commitment period of 2008–2012.⁴²

The Kyoto Protocol came into force on 16 February 2005, and at the first Meeting of Parties to the Kyoto Protocol and the eleventh COP, in December 2005, discussions commenced on how the climate regime might be structured after 2012. Two separate processes were initiated: an Ad Hoc open-ended Working Group to consider further commitments for developed countries beyond 2012 under the Kyoto Protocol (AWG-KP),⁴³ and a '[D]ialogue on long-term cooperative action' under the FCCC.⁴⁴ The Dialogue, which stressed development and poverty eradication, as well as the role of technology, covered actions by *all* parties but was neither binding nor authorized to open negotiations leading to new commitments.⁴⁵ The initiation of the Dialogue on these terms was perceived as a compromise in that whilst it would not launch negotiations on a future regime or call for an agreed outcome, it would permit discussions on future climate actions to continue and it would keep non-Parties to the Kyoto Protocol, such as the United States, at the table. The title—'Dialogue'—as well as the non-binding nature of the exchange of views also helped to bring developing countries on board. The Dialogue held four workshops, the last of these concluded on 31 August 2007, and led to a report by the co-facilitators of the Dialogue to the thirteenth COP.⁴⁶ The Dialogue drew to a formal close when the COP 'took note' of the report of the co-facilitators.⁴⁷ The COP President, however, drew attention to the need identified by Parties to enhance long-term cooperative action to address climate change, and for a decision in Bali on how this issue could be taken forward.⁴⁸ The President, after hearing views of Parties, established a contact group, chaired by the former co-facilitators of the Dialogue, and tasked it with determining the next steps to be taken. After a discussion in the contact group, the chairs produced an initial

³⁹ Decision 1/CP.3, *Adoption of the Kyoto Protocol to the United Nations Framework Convention on Climate Change* in Report of the Conference of Parties on its Third Session at Kyoto held from 1 to 11 December, 1997, Addendum, FCCC/CP/1997/7/Add.1 (1998) 4.

⁴⁰ Preamble, Kyoto Protocol.

⁴¹ *ibid* Article 10.

⁴² *ibid* Article 3(1).

⁴³ Decision 1/CMP.1, *Consideration of Commitments for Subsequent Periods for Parties Included in Annex I to the Convention under Article 3, Paragraph 9 of the Kyoto Protocol*, FCCC/KP/CMP/2005/8/Add.1 (2006).

⁴⁴ Decision 1/CP.11, *Dialogue on Long-Term Cooperative Action to Address Climate Change by Enhancing the Implementation of the Convention*, FCCC/CP/2005/Add.1 (2006).

⁴⁵ *ibid*.

⁴⁶ See Report on the dialogue on long-term cooperative action to address climate change by enhancing implementation of the Convention, FCCC/CP/2007/4 (19 October 2007).

⁴⁷ See Report of the Conference of the Parties on its Thirteenth Session, held in Bali from 3 to 15 December 2007, Part One: Proceedings, FCCC/CP/2007/6 (14 March 2008) 14.

⁴⁸ *ibid*.

draft which, after extensive negotiation, was adopted as the Bali Action Plan on 15 December 2007.⁴⁹

The Bali Action Plan launched a process to advance the climate regime with a scheduled end at the 15th COP in 2009 at Copenhagen.⁵⁰ Other significant decisions were also taken at Bali. The AWG-KP adopted a timetable that set 2009 as the deadline for it to conclude its consideration of the scale and allocation of mitigation efforts for future commitment periods.⁵¹ The Parties to the Kyoto Protocol launched the Adaptation Fund,⁵² and decided on the scope and content of the second review of the Kyoto Protocol.⁵³ This article focuses primarily on those paragraphs of the Bali Action Plan that relate to the commitments and/or actions required of different groups of countries.

III. THE OPERATIONAL SIGNIFICANCE OF CONFERENCE OF PARTIES' DECISIONS IN THE CLIMATE REGIME

The Bali Action Plan is a decision taken by the Conference of Parties. Before subjecting it to the kind of textual analysis usually reserved for treaties, I need to justify and rationalize my approach to what is mere COP decision language.

Decisions rendered by Conferences of Parties⁵⁴ may be considered as a 'subsequent agreement between the Parties regarding the interpretation of the treaty or the application of its provisions'⁵⁵ and as such will be relevant factors in interpreting the treaty.⁵⁶ Their precise legal status, however, will depend on the enabling clause,⁵⁷ the content of the decisions, Parties' behaviour and legal expectations,⁵⁸ all of which are prone to varying interpretations. From a formal legal perspective COP decisions are

⁴⁹ Decision 1/CP.13, Bali Action Plan, in Report of the Conference of the Parties on its thirteenth session, held in Bali from 3 to 15 December 2007. Addendum. Part Two: Action taken by the Conference of the Parties at its thirteenth session, FCCC/CP/2007/6/Add.1 (14 March 2008) [hereinafter Bali Action Plan] ⁵⁰ *ibid.*

⁵¹ Review Of Work Programme, Methods Of Work And Schedule Of Further Sessions, in Report of the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol at its resumed fourth session held in Bali, 3–11 December 2007, FCCC/KP/AWG/2007/5 (5 February 2008) 10.

⁵² Decision 1/CMP.3, Adaptation Fund, Report of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol on its third session, held in Bali from 3 to 15 December 2007, Addendum, Part Two: Action taken by the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol at its third session, FCCC/KP/CMP /2007/9/Add.1 (14 March 2008) 3.

⁵³ Decision 4/CMP.3, *Scope and content of the second review of the Kyoto Protocol pursuant to its Article 9* *ibid.* 19.

⁵⁴ The legal personality that COPs possess has been subject to academic discussion; See R Churchill and G Ulfstein, 'Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little Noticed Phenomenon in International Law', 94 *Am. J. Int'l L.* 623 (2000)

⁵⁵ Article 31(3) (a) Vienna Convention on the Law of Treaties, 23 May 1969, reprinted in (1969) 8 *ILM* 679 ⁵⁶ (n 54) 641.

⁵⁷ The enabling clause in the relevant treaty may authorize a COP decision to be binding, or require more, as for example in the case of Article 18, Kyoto Protocol (mandating that compliance procedures and mechanisms entailing binding consequences shall be adopted by means of an amendment to the Protocol), see J. Brunnée, 'COPing with Consent: Law-Making under Multilateral Environmental Agreements' 15 *Leiden Journal of International Law* 1 (2002).

⁵⁸ See A Aust, *Modern Treaty Law and Practice* 2nd edn, 2007 191

not, absent explicit authorisation,⁵⁹ legally binding.⁶⁰ This does not however detract from the operational significance and legal influence that COP decisions have come to acquire in multilateral environmental agreements, and in particular in the climate regime.

The FCCC and the Kyoto Protocol authorize the Conference of Parties to engage in the progressive normative and institutional development of the regime.⁶¹ COP decisions have enriched and expanded the normative core of the regime by fleshing out treaty obligations,⁶² reviewing the adequacy of existing obligations,⁶³ and launching negotiations to adopt further obligations.⁶⁴ COP decisions have also created an elaborate institutional architecture to supervise compliance with obligations. For example, the Clean Development Mechanism Executive Board, the Joint Implementation Supervisory Committee and the Compliance Committee, each bodies with influence and of consequence to states and non-state actors, were constituted by COP decisions.⁶⁵ Indeed, these decisions, titled the Marrakech Accords, by setting in place both the rules of the game and the institutional structure to oversee rule compliance, were responsible for the Kyoto Protocol's entry into force. In their absence, the compliance costs of the Kyoto Protocol would have remained a mystery and few governments would have been sporting enough to have undertaken legally binding targets under conditions of unknown and even unknowable costs.

A further illustration of the operational significance of COP decisions, even in the face of an explicit delimitation of its law-making powers, is furnished in the area of compliance. The Kyoto Protocol authorizes the first COP acting at the Meeting of Parties to the Protocol (CMP) to approve procedures and mechanisms relating to compliance, but requires any procedures and mechanisms entailing binding consequences to be adopted by an amendment to the Protocol.⁶⁶ The Protocol explicitly circumscribed the law-making powers of the COP and reinforced the right of states to opt for or out of procedures that entail judicial accountability. In other words the Protocol instituted a requirement for formal consent so as to limit the independent decision-making powers of the COP.⁶⁷ Absent agreement in Montreal, however, CMP 1 adopted the procedures and mechanisms in a CMP decision, and postponed the decision to seek an amendment.⁶⁸ A formal legal account of this creation story would

⁵⁹ Explicit authorization for binding law-making is provided infrequently. Article 2(9) Montreal Protocol, 1987 is an oft-quoted example ⁶⁰ (n 57) 32.

⁶¹ Article 7, FCCC; some argue that the legislative competencies provided in some multilateral environmental agreements to progressively develop the regime amount to 'powers of formal revision of the treaty.' See V. Röben, *Institutional Developments under Modern International Environmental Agreements*, Max Planck Yearbook of United Nations Law, 363, 391 (2000).

⁶² See, eg Article 6 (2), 12 (7) and 17, Kyoto Protocol, and Principles Nature and Scope of the Mechanisms pursuant to Article 6, 12 and 17 of the Kyoto Protocol, Decision 2/CMP 1, in FCCC/KP/CMP/2005/8/Add.1 (2005).

⁶³ Pursuant to Article 4(2) (d) FCCC.

⁶⁴ See, e.g. Berlin Mandate (n 36).

⁶⁶ Article 18 Kyoto Protocol.

⁶⁷ See generally J Brunnée, 'Reweaving the Fabric of International Law' in M Craven and M Fitzmaurice (eds), *Interrogating the Treaty: Essays in the Contemporary Law of Treaties* (2005) 119, 120.

⁶⁸ Decision 27/CMP.1 Procedures and Mechanisms Relating to Compliance under the Kyoto Protocol, in Report of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol on its first session, held at Montreal from 28 November to 10 December 2005, Addendum, Part II, FCCC/KP/CMP/2005/8/Add.3 (2006) 92.

suggest that whilst the compliance committee could be brought into existence in this fashion, the consequences that the committee applies could not 'bind' (that is, lend itself to judicial enforcement).⁶⁹ Undeterred by its questionable legal antecedents, the Kyoto Protocol compliance committee, in the first case of its kind, declared Greece to be in non-compliance with its national system requirements under the Protocol, required it to produce a compliance action plan, and excluded it from participating in the market mechanisms.⁷⁰ These consequences were applied in mandatory terms i.e. they were to 'take effect forthwith.'⁷¹ And, unchallenged by Greece, they did.

The operational significance of COP decisions is further strengthened by the fact that agreed language is of particular import in the environmental field. Treaty language in the environmental field is often marked by constructive ambiguity reflecting and auguring protracted dissonance. Therefore, when agreement is reached, the agreed language, however tenuous the agreement and whatever the legal form it assumes, is highlighted, cited, and reproduced in subsequent legal texts (which may be of greater legal weight). Select language from the Berlin Mandate, a COP decision, for instance, is reflected verbatim in operational provisions of the Kyoto Protocol.⁷² In cases where agreed language is neither defined nor sufficiently clear, and the language is reused in COP decisions, it merely shifts the locus of the debate from the treaty negotiations fora to the COP. The term 'developing country Parties' used in the FCCC,⁷³ and repeated in COP decisions relating to financial assistance, technology transfer, and capacity building,⁷⁴ provides a useful case in point. Countries who do not perceive themselves as developing countries but wish, as non-Annex I Parties, to avail the proffered assistance,⁷⁵ have requested the COP to define the term. The discussions on this issue are ongoing.⁷⁶ These examples serve to illustrate the operational and legal significance that COP decisions have come to acquire in the climate regime, particularly given the value accorded to agreed language.

In addition, COP decisions such as the Berlin Mandate and the Bali Action Plan that launch negotiations towards a legal instrument or 'agreed outcome' create a framework (with the attendant boundaries) for the negotiations, which Parties may but seldom diverge from. The Berlin Mandate specifically decries new commitments for developing countries, and the Kyoto Protocol contained none. The ongoing negotiations towards a Copenhagen outcome have framed the discussions with explicit reference to

⁶⁹ (n 57) 29.

⁷⁰ Enforcement Branch of the Compliance Committee, Final Decision, CC-2007-1-8/Greece/EB (17 April 2008).

⁷¹ *ibid*; see (n 57) 30 (discussing the extensive practice of less formal but nonetheless mandatory rule making that has developed under particular agreements)

⁷² Compare para 2(b), of the Berlin Mandate, and the chapeau of Article 10, Kyoto Protocol. Both contain language on not introducing any new commitments for Parties not included in Annex I, but reaffirming existing commitments.

⁷³ Article 4(3), (4), (5) and (7), FCCC.

⁷⁴ See Decisions 2, 4 and 6, in Report of the Conference of the Parties on its Seventh Session, Addendum, Part two, Action taken by the Conference of the Parties, Volume I FCCC/CP/2001/13/Add.1 (2002)

⁷⁵ See Letter from the Central Asia, Caucasus and Moldova Countries on their status under the Convention, Note by the secretariat, FCCC/CP/2001/12 (2001).

⁷⁶ See Report of the Conference of the Parties on its Ninth Session, Part one: Proceedings, FCCC/CP/2003/6/FCCC/CP/2003/6 (2004) 23.

the mandate contained in the Bali Action Plan.⁷⁷ At the Accra Negotiations in August 2008, Parties authorized the Chair to prepare a document assembling proposals by Parties. This document will likely lead to a draft negotiating text, and it is required to be 'in accordance with the structure of paragraph 1 of the Bali Action Plan.'⁷⁸

1. Deconstructing the Bali Action Plan

The Bali Action Plan provides a framework within which the future climate regime will be structured. A careful reading of this Plan reveals various elements that offer Parties the option of destabilizing the conceptual apparatus of the existing climate regime, and making a fundamental departure from the premises on which Kyoto is built. The elements of the framework that threaten to destabilize the existing conceptual apparatus of the climate regime are contained in the first operative paragraph of the decision, in particular in sub-paragraphs 1(b) (i) and (ii) of the Bali Action Plan. This was the final paragraph of the Action Plan to be agreed in Bali. Given its significance to the shape and structure of the future climate change regime, the remainder of this article will focus on a textual analysis of paragraph 1.

2. Launching a Process to Reach an Agreed Outcome

The chapeau to the first operative paragraph of the Bali Action Plan launches the negotiation process to advance the climate regime. It reads: [the COP] '[d]ecides to launch a comprehensive process to enable the full, effective and sustained implementation of the Convention through long-term cooperative action, now, up to and beyond 2012, in order to reach an agreed outcome and adopt a decision at its fifteenth session, by addressing, inter alia ...'⁷⁹

There are at least two significant phrases in the text of the chapeau. These are the phrases 'now, up to and beyond 2012,' and 'an agreed outcome.' The first implies that the process launched at Bali is designed not just to craft a future climate regime, viz. beyond the end of the first commitment period of the Kyoto Protocol in 2012, but also to inform and guide current efforts to address climate change. This may weaken the ability of Annex I Parties that are party to the Protocol, to use the future climate regime to opt out of Kyoto Protocol's second commitment period.⁸⁰ It also encourages

⁷⁷ See Report of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention on its first session, held in Bangkok from 31 March to 4 April 2008, FCCC/AWGLCA/2008/3 (2008)

⁷⁸ See *Enabling the full, effective and sustained implementation of the Convention through long-term cooperative action now, up to and beyond 2012*, Draft Conclusions Proposed by the Chair, in FCCC/AWGLCA/2008/L.7 (27 August 2008)

⁷⁹ Paragraph 1, *Bali Action Plan* [emphasis added]

⁸⁰ It is evident from certain Annex I Party submissions that perceive the Plan as leading to a 'new agreement' and a 'single agreement' post-2012 that they would like to preserve this option. See Submission by Canada in *Views regarding the work programme of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention*, Submissions from Parties, Addendum, FCCC/AWGLCA/2008/MISC.1/Add.2 (20 March 2008) 9, and Submission by Canada, in *Views and information on the means to achieve mitigation objectives of Annex I Parties* Submissions from Parties, Addendum, FCCC/KP/AWG/2008/MISC.1/Add.1 (17 March 2008) at 3. See *contra* Submission by India, in *infra* Submission from Parties 28, fn 85, and Statement by N. Sen Permanent Representative of India to the United Nations, General Assembly

immediate actions in the US which is not a party to the Protocol, and is therefore not subject to the GHG mitigation constraints prescribed therein for the 2008–2012 period.

The second, ‘an agreed outcome’, suggests a lack of agreement at this point on both the legal form that the likely outcome of this process could take, and the level of ambition it should reflect. The Berlin Mandate, comparable to the Bali Action Plan, in so far as it too launched a process to advance the climate regime, explicitly specified the legal form of the outcome—‘a Protocol or another legal instrument.’⁸¹ The legal form that the outcome of the Bali Action Plan could take, however, is deliberately left open. It could be a legally binding ‘Protocol or another legal instrument,’ but it could also be a COP decision alone viz., an agreed outcome reflected in a COP decision, the precise legal status of which, as discussed above, is a matter of some debate. The legal form of the outcome assumes particular significance if the outcome, as I argue it may do, destabilizes the conceptual apparatus of the existing climate regime, and in particular of the Kyoto Protocol.

The Bali Action Plan also stopped shy of prescribing the level of ambition that the ‘agreed outcome’ should reflect. Earlier drafts of the chapeau recommended ‘a comprehensive and effective global agreement for action’⁸² and a ‘comprehensive agreement for action.’⁸³ Through the last few days of negotiations, the term ‘comprehensive’ ceased to refer to the action to be taken and came to qualify the process to be launched.⁸⁴ Since no particular level of ambition is prescribed, the ‘agreed outcome’ in 2009, could, on a conservative reading, merely be to continue the negotiation process for a further period of time. There is no requirement placed on Parties to agree to particular action in 2009 (viz., it does not specify the legal content the required COP decision should have) or even ‘appropriate action’ as in the Berlin Mandate.⁸⁵

3. *A Shared Vision for Long-Term Cooperative Action*

One of the principal objectives of the process launched at Bali is to arrive at a ‘shared vision for long-term cooperative action.’ Sub-paragraph (a) of the first operative paragraph of the Bali Action Plan which contains this objective reads: [a] *shared vision for long-term cooperative action, including a long-term global goal for emission reductions*, to achieve the ultimate objective of the Convention, in accordance with the provisions and principles of the Convention, in particular the principle of common but

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⁸¹ Paragraph 3, Preamble, *The Berlin Mandate* (n 36).

⁸² Draft of 14 December, 2007, on file with the author

⁸³ Draft of 11 December, 2007, on file with the author

⁸⁴ The EU views the Bali Action Plan as leading to a ‘comprehensive post-2012 agreement’ in 2009. Some, including the United States, were careful to use the term ‘agreed outcome,’ and India, among others, considers the FCCC to be comprehensive, and the post-2012 agreement to be but a part of the picture. See Submission by Slovenia, on behalf of the European Community and its Member States, in *Views regarding the Work Programme for the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention taking into account the elements to be addressed by the group (Decision 1/CP.13)*, Submission from Parties, FCCC/AWGLCA/2008/MISC.1 (3 March 2008) 68; Submission by the United States in *ibid* 85; and Statement by N. Sen (n 80).

⁸⁵ Paragraph 3, Preamble, *The Berlin Mandate* (n 36)

differentiated responsibilities and respective capabilities, and taking into account social and economic conditions and other relevant factors.’⁸⁶

There are a range of views on a ‘shared vision for long-term cooperative action.’ At this time, however, there is little of the vision that is shared. Some countries have specific proposals. In India’s view, for instance, the climate regime should proceed on the basis of equal per capita rights to the atmosphere, and over time aim at a convergence in per capita emissions between the developed and developing world.⁸⁷ This is a view that Germany has endorsed,⁸⁸ but few others have. India is willing to commit in the meantime that its own per capita emissions will not rise beyond OECD levels.⁸⁹

Some countries conceptualize the ‘shared vision’ as a ‘long-term global goal for emissions reductions’ premised on an acceptable temperature increase of 2° C (some increase being inevitable).⁹⁰ If this goal is quantified, it would provide a global carbon budget which would enable a calculation and distribution of mitigation efforts. There are differing national and international adopted and proposed goals for 2020 and 2050, which are likely to inform the setting of a quantified global goal. The European Union has adopted unilateral targets to reduce emissions by at least 20 per cent below 1990 levels by 2020, and it has proposed an objective of 30 per cent reduction below 1990 levels by 2020 if other developed countries take comparable emissions reductions and ‘economically more advanced developing countries’ contribute ‘according to their responsibilities and respective capabilities.’⁹¹ Their long-term vision is a reduction of developed country emissions of 60 per cent to 80 per cent by 2050, below 1990 levels.⁹² The G8 summit in Hokkaido in July 2008 endorsed a goal of at least 50 per cent reduction by 2050,⁹³ but it did not refer to a base year from which such reductions would be measured. Japan has proposed a long-term global target of halving emissions from current levels by 2050,⁹⁴ and sector-specific mitigation goals in the meantime.⁹⁵

⁸⁶ Paragraph 1(a) (n 49).

⁸⁷ Joint Press Conference by Prime Minister of India, M. Singh and Chancellor of Federal Republic of Germany A. Merkel, 30/10/2007, online, <http://meaindia.nic.in/pressbriefing/2007/10/30pb04.htm>.

⁸⁸ *ibid.*
⁸⁹ PM’s Intervention on Climate Change at Heiligendamm Meeting of G8 plus 5, Heiligendamm, Germany, June 8, 2007, available at <http://www.pib.nic.in>

⁹⁰ Submission by France on behalf of the European Community and its Member States, *Ideas and proposals on the elements contained in paragraph 1 of the Bali Action Plan, Submissions from Parties*, FCCC/AWGLCA/2008/MISC.2 (14 August 2008) 4; See also Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, *Limiting Global Climate Change to 2° Celsius: The way ahead for 2020 and beyond.*, COM/2007/0002 final.

⁹¹ Presidency Conclusions, Brussels European Council, 8/9 March 2007, online, http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/ec/93135.pdf

⁹² *ibid.*

⁹³ G8 Hokkaido Toyako Summit Leaders Declaration, Hokkaido Toyako, 8 July 2008, online, http://www.g8summit.go.jp/eng/doc/doc080714_en.html

⁹⁴ Submission by Japan, in *Views regarding the Work Programme for the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention taking into account the elements to be addressed by the group (Decision 1/CP.13)*, Submission from Parties, Addendum, FCCC/AWGLCA/2008/MISC.1/Add.1 (12 March 2008) 4. See also for details of the ‘Cool Earth 50’ strategy, Shinzo Abe, *Invitation to Cool Earth 50: 3 Proposals, 3 Principles*, Speeches and Statements by Prime Minister, 24 May 2007, online, http://www.kantei.go.jp/foreign/abespeech/2007/05/24speech_e.html.

⁹⁵ *ibid.* Also, Japan recently proposed a 2020 deadline for boosting energy efficiency by 30 per cent. See Special Address by Yasuo Fukuda, Prime Minister of Japan on the Occasion of the

Iceland's climate strategy includes a goal of 50–75 per cent reduction by 2050.⁹⁶ Norway has endorsed a reduction of at least half by 2050.⁹⁷ Australia has, after a recent change in government,⁹⁸ endorsed a 60 per cent reduction from 2000 levels by 2050,⁹⁹ and, Canada, a reduction of 60–70 per cent by 2050 relative to 2006 levels.¹⁰⁰

Other countries conceptualize the vision as shaped by their preferred interpretations of specific principles. China believes that the vision should take into account, inter alia, the principle of common but differentiated responsibilities, and scientific and economic feasibility.¹⁰¹ The US also refers to the CBDR principle in articulating its view on the shared vision.¹⁰² The US notes, however, that 'the notions of "responsibilities" and "capabilities" evolve as the circumstances of countries evolve in the global economy.'¹⁰³ The specific circumstance of countries it refers to are those relating to 'evolving global emissions and economic development trends,' which in its view are central to addressing the issue in an environmentally effective and economically sustainable manner.¹⁰⁴ The difficulty with an appeal to principles, however, is that each country brings its own preferred interpretation and application to bear in structuring obligations under the regime. China, for instance, perceives the CBDR principle as requiring countries like the US to undertake a 25–40% emission reduction target from 1990 levels, and for developing countries to take 'nationally determined mitigation actions.'¹⁰⁵ The US, on the other hand, envisages a focus for all countries on 'nationally appropriate actions that are measurable, reportable, and verifiable' with an understanding that 'meaningful contributions from countries with a significant emissions profile will be critical.'¹⁰⁶ The US includes China, India and other large developing countries in its list of countries with significant emissions profile.¹⁰⁷ The US supports the setting of a long term global goal (as yet unquantified), but it cautions that the 'goal should not be used as a basis for burden sharing.'¹⁰⁸

4. The IPCC's Fourth Assessment Report and Targets for Emissions Reductions

The role that the IPCC's Fourth Assessment Report should play in shaping a shared vision for long-term cooperative action, and in particular in setting a long term global goal, and specific emission reduction targets for countries, was also at issue in Bali. The preamble to the Bali Action Plan contains references to the IPCC.¹⁰⁹ In particular,

Annual Meeting of the World Economic Forum, Congress Center, Davos, Switzerland, 26 January 2008, online, http://www.kantei.go.jp/foreign/hukudaspeech/2008/01/26speech_e.html

⁹⁶ Submission by Iceland (n 84) 25.

⁹⁷ Submission by Norway (n 84) 47, 48.

⁹⁸ Kevin Rudd: *Ratifying the Kyoto Protocol*, Media Statement, 3 December 2007, online, <http://www.alp.org.au/media/1207/mspm030.php>

⁹⁹ Submission by Australia (n 80) 7.

¹⁰⁰ Submission by Canada (n 80).

¹⁰¹ Submission by China (n 84) 18.

¹⁰² Submission by the US (n 84) 85, 87.

¹⁰³ *ibid.*

¹⁰⁴ *ibid.*

¹⁰⁵ (n 101).

¹⁰⁶ (n 102).

¹⁰⁷ (n 18). The US-initiated Major Economies Meetings were designed to address the concern that large developing countries did not have emissions mitigation commitments under the Kyoto Protocol. For further details see, online, <http://www.state.gov/g/oes/climate/mem/Reference>

¹⁰⁸ Submission by the US (n 84) 85, 87.

¹⁰⁹ Preambular paragraphs 3 and 4, *Bali Action Plan*. Paragraph 3 reads, 'Responding to the findings of the Fourth Assessment Report of the IPCC that warming of the climate system is unequivocal, and that delay in reducing emissions significantly constrains opportunities to

paragraph 4 of the Preamble reads: '[r]ecognizing that *deep cuts* in global emissions will be required to achieve the ultimate objective of the Convention, and emphasizing the *urgency* to address climate change as indicated in the Fourth Assessment Report of the IPCC.'¹¹⁰ Earlier drafts of this paragraph contained specific targets for developed countries. Annex I Parties were required 'as a group to reduce emissions in a range of 25–40% below 1990 levels by 2020.'¹¹¹ These targets did not survive the final round of negotiations.¹¹² The targets were predictably unpopular with certain developed countries,¹¹³ but also curiously with some developing countries. The reason for this can be traced to the relevant text of the IPCC Report which prescribes reductions of 10–40% for developed countries by 2020, and 40–95% by 2050 to achieve stabilization levels of 450–550 ppm CO₂ eq.¹¹⁴ The IPCC notes, however, that to achieve these stabilization levels, 'developing country emissions need to deviate below their projected baseline emissions within the next few decades'¹¹⁵ The IPCC has since quantified this deviation—a 15–30% reduction from baseline by 2020 for developing countries.¹¹⁶ The targets prescribed for developed nations are premised on the expectation that certain reductions will occur in developing countries as well.¹¹⁷ And, if no such reductions are to occur in developing countries, developed country reduction targets would need to be far more ambitious. These targets proved problematic for certain developed countries because they were opposed to targets in principle, and/or to these specific targets, seeing them as too ambitious. The targets also proved problematic for certain developing countries, as more ambitious reduction targets for developed countries would have provided developing countries with additional room to grow. This concern is reflected in the conclusions of the AWG-KP that indicate that the 'ranges would be significantly higher for Annex I Parties if they were the result of

achieve lower stabilization levels and increases the risk of more severe climate change impacts.' Earlier drafts contained a reference to 'unequivocal scientific evidence' rather than unequivocal warming. Drafts of 8 and 10 December, 2007, on file with the author

¹¹⁰ Preambular paragraph 4, *Bali Action Plan* [emphasis added]

¹¹¹ Drafts of 8, 10, 11 and 14 December, 2007, on file with the author.

¹¹² Notwithstanding the intense pressure the EU brought to bear on the US, including by issuing a threat to 'boycott' the next Major Economies Meeting hosted by the US. See Emily Beament, 'Europeans step up pressure on US to agree Climate Targets', *The Herald*, 14 December 2007; Frank McDonald, 'EU may boycott US Climate Change Talks', *Irish Times*, 14 December 2007; Thomas Fuller and Elisabeth Rosenthal, 'Bitter Divisions at Climate Talks', *International Herald Tribune*, 14 December 2007; and 'Bali Talks go to the Brink', *Environmental Finance*, 13 December 2007

¹¹³ Although news reports suggest that the US, Russia, Canada and Japan were opposed to targets, insiders indicate that Russia drove the disappearance of targets from the text. On the former, See 'Accusations fly amid Bali Climate deadlock', *The Straits Times*, 13 December 2007 and *US pours cold water on Bali optimism*, *The Guardian*, 17 December 2007

¹¹⁴ T Barker et al, *Climate Change 2007: Mitigation of Climate Change. Contribution of Working Group III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2007), Technical Summary, 90.

¹¹⁵ *ibid.* See also Box 13.7 at 776.

¹¹⁶ See M den Elzen, *Emission Reduction Trade-Offs for Meeting Concentration Targets*, Bonn Climate Change Talks, Presentation at the IPCC in-session workshop, UNFCCC SBSTA 28, 6 June 2008, online, <http://www.ipcc.ch/graphics/pr-ar4-2008-06-briefing-bonn.htm>

¹¹⁷ The EU has since Bali suggested that the AWGLCA consider how nationally appropriate mitigation actions in 'advanced developing countries and major emerging economies' could lead to a substantial deviation from baseline in 2020 (n 90) 5.

analysis assuming that emission reductions were to be undertaken exclusively by Annex I Parties.¹¹⁸

In place of the disputed targets, the final text introduced a reference to the need for 'urgency' in addressing climate change. A footnote attached to the word 'urgency' takes dedicated readers first to a set of tables in the Technical Summary to the IPCC Working Group III Report, which contains a classification of stabilization scenarios according to different stabilization targets and alternative stabilization metrics, and then to a discussion on goals, participation and regime stringency.¹¹⁹ The degree of urgency, presumably, is linked to the acceptable level of temperature increase (some increase being inevitable) and related stabilization targets, and since these are yet to be determined by Parties, the text refers readers to all the possible scenarios in the IPCC Report.

5. *Achieving the Ultimate Objective of the Convention*

The shared vision for long-term cooperative action is directed at achieving 'the ultimate objective of the Convention.' FCCC Article 2 (Objective) prescribes not just stabilization of GHG, but also the parameters within which such stabilization should occur.¹²⁰ Among the three parameters in Article 2 is one requiring stabilization levels to be achieved within a time frame to enable 'economic development to proceed in a sustainable manner.'¹²¹ The US believes that the long-term global goal must be cast 'so as to ensure that global economic development' as underscored in Article 2 of the Convention, is not undermined.¹²² Developing country negotiators would argue however, that Article 2 only protects economic development in developing countries. If the intention had been to protect economic advancement in all countries, the term economic growth, rather than 'economic development,' would have been used. Some developing country negotiators also argue that the term 'sustainable' must be interpreted as 'sustained.'¹²³ This complements an intriguing variant of the inter-generational equity argument that India presents viz., unless the current generation generates and sustains high levels of economic growth, future generations will inherit an earth that is highly vulnerable to climate change. Inter-generational equity would therefore demand that the current generation prioritise development and sustained economic growth as a matter of urgency.¹²⁴ While there is merit to the argument that sustainable development enhances adaptive capacity and increases resilience,¹²⁵ if India conceptualizes sustained economic growth as business-as-usual growth, it will make it more difficult, and in the short term more expensive for other countries to adopt a low carbon

¹¹⁸ (n 51) para 3.

¹¹⁹ (n 114) 39, 90 and Box 13.7, 776.

¹²⁰ Article 2 notes that such stabilization should occur at a level that will prevent dangerous anthropogenic interference with the climate system. FCCC, 1992.

¹²¹ *ibid.*

¹²² Submission by the US (n 84) 87.

¹²³ Preambular paragraph 21, FCCC (containing a reference to 'sustained economic growth')

¹²⁴ Interview, C Dasgupta, Indian Delegation, 16 April 2007; see *also* Statement by N. Sen, in (n 84) (noting the need for India to 'ensure accelerated and sustained development').

¹²⁵ See M. L. Parry et al eds, IPCC Climate Change 2007: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change (Cambridge University Press, 2007), Summary for Policymakers, 20.

development pathway. In its turn this will render the US, and at least a few other developed countries, disinclined to engage constructively with the climate regime.

The shared vision for long-term cooperative action is required to be in accordance with the provisions and the principles of the Convention, in particular the CBDR principle. As noted above, the CBDR principle is a contentious,¹²⁶ but nonetheless central element of the conceptual apparatus of the climate regime. The shared vision is also required to take into account social and economic conditions. This mimics language in the FCCC Preamble which applies to *all Parties*.¹²⁷ In the context of developing countries, references to social and economic conditions are usually couched in language recognizing their legitimate or overriding priority needs for development.¹²⁸

6. Commitments/Actions Required of Developed and Developing Countries

Since its inception, the climate negotiations have witnessed intense bickering between, and within the developed and developing world over who should take responsibility, in what measure, and under what conditions to avert climate change. The Bali negotiations were no different. Sub-paragraph b (i) and (ii) relating to the actions required of developed countries and developing countries respectively, were the final pieces of text to be finalized in Bali. The language in this sub-paragraph proved to be deeply contentious for it represents a fundamental re-alignment in the balance of commitments between developed and developing nations in the climate regime. A careful reading of sub-paragraph (b) (i) and (ii) will serve to strengthen this argument.

The chapeau of sub-paragraph (b) prescribes 'enhanced national/international action on mitigation of climate change, including, inter alia, consideration of . . .'. The chapeau contains the first hint of the changes to come. The term 'national/international' indicates that countries have the option of taking national *or* international action, national *and* international action, or choosing between the two.¹²⁹ Arguably Parties intended to keep this choice open. An editorial amendment, under the President's authority, substituting national/international into 'national and international' was rejected by the G-77/China.¹³⁰ Thus far, the action required of Parties, whether developed or developing, has been on the national *and* international plane. Even developing countries that do not have GHG mitigation targets on the international plane have reporting commitments,¹³¹ as well as the commitment to formulate, implement, and publish national measures to mitigate climate change.¹³² It is unclear what interest is to be served by retaining the option of taking national actions that are not subject to international scrutiny, given the provisions of the FCCC, but the language of the chapeau, in and of itself, permits this possibility. The chapeau also prefaces the prescribed actions that follow in (i) and (ii) with the phrases 'including' and 'inter alia' thereby

¹²⁶ (n 18) 158–62; see also Christopher Stone, *Common but Differentiated Responsibilities in International Law*, 98 Am. J. Int'l L. 276 (2004)

¹²⁷ Preambular paragraph 6, FCCC

¹²⁸ Preambular paragraph 21 and Article 4(7), FCCC

¹²⁹ A slash can indicate 'or' or 'and' or 'or/and'. See Oxford English Dictionary, 2008

¹³⁰ See UN web cast, Conference of the Parties to the UNFCCC, Plenary Meeting, 15 December 2007, online, <http://www.un.org/webcast/unfccc/2007/>

¹³¹ Article 12, FCCC

¹³² Article 4(1), FCCC

indicating that these actions are illustrative rather than exhaustive of the actions that may be taken to address climate change.

*1. The categories: 'developing country parties' and 'developed country parties':
To define or not to define*

The use of the terms 'developing country parties' and 'developed country parties,' in the Bali Action Plan rather than the FCCC categories of 'Annex-I' and 'non-Annex I' Parties is significant,¹³³ not least because the use of the term 'developing countries' in COP decisions has, in the past, led to confusion. Some non-Annex I countries¹³⁴ do not perceive themselves as developing countries but expect nevertheless as non-Annex I countries to be accorded differential treatment.¹³⁵ In the context the Chair had proposed that future references to developing countries should follow FCCC language viz., 'Parties not included in Annex I.'¹³⁶ The use of the seemingly open-ended 'developing' and 'developed' rather than the static Annex I (and by extension non-Annex I)¹³⁷ in the Bali Action Plan, is designed to allow the categories of developing and developed countries to be negotiated anew.

Several developed countries are in favour of a more flexible and evolving categorisation of Parties which will permit differences within and between developed and developing countries, to be taken into account in fashioning obligations under the future climate regime. The US has long sought to differentiate between those developing countries that are major economies/emitters and those that are not.¹³⁸ The multilateral initiatives the US has launched, which include major economies/emitters alone (rather than all developing countries), stand testimony to this stance.¹³⁹ The EU also believes that differences between developing countries must be taken into account, and that the economically advanced developing countries must make 'fair

¹³³ The only reference to Annex I and non-Annex I categories occurs in paragraph 5 which relates to the Chair and Vice-Chair of the new process. See (n 49).

¹³⁴ This refers to the Central Asia and the Caucasus, Albania, and Moldova group of countries. This group consists of Albania, Armenia, Azerbaijan, Kazakhstan, Krygyzstan, Moldova, Tajikistan, Turkmenistan, and Uzbekistan.¹³⁵ See (n 75),

¹³⁶ See *Request from a Group of Countries of Central Asia and the Caucasus, Albania, and the Republic of Moldova Regarding Their Status under the Convention, Draft Conclusions Proposed by the Chair*, FCCC/SBI/2002/L.14 (2002)

¹³⁷ Annex I to the FCCC contains a list of 'developed country Parties and other Parties,' Article 4(2), FCCC, 1992. Amendments to the Convention, including its annexes, require consensus for adoption, or failing consensus, a three-fourths majority vote of the Parties present and voting in the meeting. Voting however is problematic as Parties are yet to agree on Rule 42 (Voting), of the draft Rules of Procedure, which have been applied, with the exception of Rule 42, since 1996. See *Draft Rules of Procedure of the Conference of the Parties and its Subsidiary Bodies* in FCCC/CP/1996/2, and Articles 15 and 16, FCCC. The Annex I (and by extension non-Annex I) category is also arguably static in that inclusion into and exclusion from the FCCC Annexes is, in practice, a lengthy process. The experience of Turkey is a case in point, see for a discussion of the Turkey case, (n 34) 113–4

¹³⁸ In the Ad Hoc Group on the Berlin Mandate process in the lead up to Kyoto, the US had insisted that it would take meaningful participation from key developing nations for it to undertake binding obligations. See (n 18), Chapter 7, and references contained therein; see also Submission by the US (n 84).

¹³⁹ See (nn 188–189) and accompanying notes.

and effective contributions' to the climate effort.¹⁴⁰ Japan suggests categorizing non-Annex I Parties into groups based on their stage of economic development, and encouraging mitigation actions tailored to their common but differentiated responsibilities.¹⁴¹ Australia argues that if the GDP per capita of FCCC Parties is taken there are 'more non-Annex-I Parties that are advanced economies than existing Annex-I Parties.'¹⁴² Therefore it recommends that Parties provide on an objective basis for graduation of non-Annex I Parties to Annex I, 'with a view to all advanced economies adopting a comparable effort towards the mitigation of greenhouse gas emissions.'¹⁴³

Bangladesh, a lone voice amongst developing countries, in its final plenary statement at Bali,¹⁴⁴ as well as in subsequent written submissions, stressed the 'vast differences' between developing countries, in particular between large developing countries and the least developed countries (LDCs).¹⁴⁵ Bangladesh sought unsuccessfully in the final plenary meeting to include a reference similar to the one in 1(b)(i)—'taking into account differences in their national circumstances'—in 1((b)(ii)).¹⁴⁶

Most developing countries are opposed to any efforts to differentiate between them. Notwithstanding the emerging material differences between members of the group, they perceive themselves as sharing a common ideological vision and approach to international law,¹⁴⁷ and they perceive efforts to differentiate between them as threatening their identity and leveraging power. In the climate negotiations, the differences between members of the G-77, encompassing as it does both the oil exporting countries and the small island states, run deep. However the G-77 has thus far, but for a few notable occasions,¹⁴⁸ exhibited a tenuous yet tenacious togetherness.

Be that as it may, having used the terms 'developing' and 'developed', rather than Annex I and non-Annex I, Parties now have the formidable task of defining these terms. As Japan notes, Parties will need to 'clarify the definition of "developed country

¹⁴⁰ See *Climate change: Bali conference must launch negotiations and fix 'roadmap' for new UN agreement*, IP/07/1773, Brussels, 27 November 2007; See also *Environment Council Conclusions*, 30 October 2007, and Submission by France (n 90) 5–6.

¹⁴¹ See Submission by Japan (n 90) 15–16, 25 (relevant factors identified include economic status, capacity to respond (eg GDP per capita), share of global emissions, emissions per capita and relative responsibility to climate change)

¹⁴² Submission by Australia, in *Views and information on the means to achieve mitigation objectives of Annex I Parties*, Submissions from Parties, Addendum, FCCC/KP/AWG/2008/MISC.1/Add.2 (20 March 2008) 5; see also FCCC/AWGLCA/2008/MISC.1/Add.2 (n 81) 8 (noting that of the top 15 emitters seven are in Annex I (US, EU, Russia, Japan, Canada, Australia and Ukraine), 6 are countries with a higher per capita GDP than Ukraine which is an Annex I Party (Brazil, China, Iran, Korea, Mexico, and South Africa), and two (India and Indonesia) have a lower per capita GDP than Ukraine. Arguing that as together these 15 are responsible for 3/4 of global GHG they will have to act as part of a 2012 agreement for any goal to be met)

¹⁴³ *ibid.* ¹⁴⁴ (n 130).

¹⁴⁵ See Submission by Bangladesh in (n 84) 8. ¹⁴⁶ See (n 130).

¹⁴⁷ The shared vision was perhaps best articulated in their call for a New International Economic Order (NIEO). See generally M Bedjaoui, *Towards A New International Economic Order* (1979). International environmental law encompasses several principles put forward in the context of the NIEO. See K Hossain, 'Sustainable Development: A Normative Framework for Evolving a More Just and Human International Economic Order', in *The Right To Development In International Law* (Subrata Roy Choudhary et al. eds., 1992) 259; and A Cassese, *International Law In A Divided World* 351 (1986)

¹⁴⁸ The 'green group' comprising of the G-77 without the OPEC and the EU forged an alliance which led to the Berlin Mandate. See S. Oberthür and H. E. Ott, *The Kyoto Protocol: International Climate Policy for the 21st Century* (1999) 46.

Parties” and “developing country Parties,”” and ‘identify the scope and criteria of those “developing country Parties” required to take actions.’¹⁴⁹

In theory at least, three methods exist to categorize parties to international treaties: the definition, list, and auto-election methods.¹⁵⁰ Across the gamut of new generation multilateral environmental agreements, not a single definition of ‘developing countries’ exists either in treaty text or in COP decisions.¹⁵¹ In general, members of the G-77 are considered developing countries, and members of the Organisation for Economic Co-operation and Development (OECD) as developed countries.¹⁵² In addition, a series of benchmarks, particular to each treaty, are used to categorize countries as ‘developing’ and therefore deserving of assistance.¹⁵³

In the climate regime, both the Intergovernmental Negotiating Committee in the run-up to the FCCC, and the Ad Hoc Group on the Berlin Mandate in the run-up to Kyoto, discussed criterion for inclusion into the annexes, but these discussions proved fruitless. The rough rule of thumb followed was that members of the OECD and those countries with economies in transition were included in Annex I of the FCCC, and OECD members were included in Annex II. In keeping with tradition, some Parties are keen to make, at this juncture, another attempt at defining and/or listing different categories of Parties, based on which differentiation between them can be effected.

It is unlikely that this attempt will be any more successful than the earlier ones, but the Bali Action Plan does permit Parties to re-negotiate the categories of Parties in the future climate regime, should they choose to do so. It is desirable that there is greater clarity in the system. Ambiguity in the classification of developing countries creates a legitimacy deficit in the system. It can hamper efficient distribution of scarce resources and it can prevent identification of those countries that bear greater responsibility for contributing to climate change. This holds true between developing countries as well as between developed and developing countries. It is important that criterion based on GHG contributions and economic capabilities be devised so as to identify the intended beneficiaries of differential treatment, and to assign responsibilities for mitigation.¹⁵⁴ But there are many hurdles in the way of developing such criterion. First, the terms ‘developing’ and ‘developed’ are used liberally in the Convention¹⁵⁵ and the Protocol,¹⁵⁶ and they are understood as synonyms for non-Annex I and Annex I. Most developing countries will wish to proceed on this basis.¹⁵⁷ Second, once differentiation within these different categories, in particular of developing countries, starts, it will

¹⁴⁹ See (n 94) 11.

¹⁵⁰ See G de Lacharrière, *Identification et statut de pays moins développés*, XVII Annuaire Française du droit International (1971) 461; see also M. Flory, *Adapting International Law to the Development of the Third World*, J. African L. (1982) 12.

¹⁵¹ For a detailed discussion of this issue see (n 34) 109–117.

¹⁵² *ibid.*

¹⁵³ In practice, the Global Environment Facility and the relevant environmental treaty secretariats draw from UN practice and augment it with specific treaty-relevant criterion. See eg Decision 11/CP.1, *Initial Guidance on Policies, Programme Priorities and Eligibility Criteria to the Operating Entity or Entities of the Financial Mechanism*, FCCC/CP/1995/7/Add.1 (1995).

¹⁵⁴ See (n 34).

¹⁵⁵ See, e.g. Article 4(7), FCCC (references to developing and developed country Parties)

¹⁵⁶ See, e.g. Article 10 (references to developing country Parties) and 11 (references to developing and developed country Parties), Kyoto Protocol.

¹⁵⁷ The G-77/China made this point in the Accra negotiations See ‘AWGLCA 3 and AWG-KP 6 Highlights: Saturday 23 August 2008’, 12(380) *Earth Negotiations Bulletin* (25 August 2008) 2.

open a Pandora's Box. Many of the terms—'developing countries' and LDCs for instance—are, in the case of some countries, a reflection of astute political manoeuvring¹⁵⁸ in the UN system rather than an accurate descriptor for current social and economic ranking. To take a few examples, Maldives, currently classified as an LDC,¹⁵⁹ has a higher per capita income and Human Development Index ranking than India, classified as a developing country.¹⁶⁰ Several countries classified by the World Bank as low-income countries are not considered LDCs,¹⁶¹ and several LDCs are on the World Bank's list of middle-income countries.¹⁶² Also, Mexico and the Republic of Korea, members of OECD, Singapore, ranked 25th in the Human Development Index,¹⁶³ and Cyprus and Malta, EU member states,¹⁶⁴ are currently non-Annex I countries, and would likely resist an attempt to define 'developing countries' as this would result both in limiting their entitlement to differential treatment, as well as in expanding their exposure to mitigation targets.¹⁶⁵ That Mexico and the Republic of Korea fell between negotiating groups is evident from the fact that in 2001 they forged an alliance with Switzerland to negotiate thenceforth as the Environmental Integrity Group.¹⁶⁶ Third, there are criteria other than objective or readily justifiable ones at play, and any attempt to categorize and delineate will likely bring these to the fore. India, for instance, currently has low per capita and cumulative emissions, is 128th on the Human Development Index, 44 per cent of its population lives without access to electricity, and an estimated 80 per cent of its population lives on less than US\$2 a day.¹⁶⁷ By most objective criterion it would not be required to prioritise mitigation commitments. It is nevertheless a country that is at the top of the industrialized world's list of 'advanced developing countries,' 'emerging economies,' 'major economies' etc. This presumably is due to its healthy economic growth rate,¹⁶⁸ attendant competitiveness concerns in developed countries, and its projected emissions growth trajectory. India's projected emissions growth rate is certainly a relevant factor, but it is unclear to what extent, given the fickle nature of economic growth on which it is

¹⁵⁸ Manoeuvring either to ensure a particular classification or to strenuously resist re-classification as circumstances evolve

¹⁵⁹ See Criterion and list of LDCs, online, <http://www.unohrrls.org/>

¹⁶⁰ Maldives is ranked 100th on the Human Development Index (HDI). It has a GDP per capita of 5,261 USD. India is ranked 128th on the HDI, and it has a GDP per capita of 3,452 USD, see Statistics of the Human Development Reports, 2007/8, online, <http://hdr.undp.org/en/statistics/>

¹⁶¹ e.g. Côte d'Ivoire, Ghana, India, Kenya, Democratic Republic of Korea, Kyrgyz Republic, Nigeria, Pakistan and Papua New Guinea, Tajikistan, Uzbekistan, Vietnam and Zimbabwe, see, World Bank, Data and Statistics, Country Groups, online, <http://web.worldbank.org>

¹⁶² e.g. Angola, Cape Verde, Kiribati, Lesotho and Maldives, see (n 159).

¹⁶³ See (n 160).

¹⁶⁴ Members of the EU, online, http://europa.eu/abc/european_countries/index_en.htm

¹⁶⁵ Submissions from Singapore and Korea skirt around the issue of differentiation as it applies to them but appear to proceed implicitly from the basis that they are developing countries, and as such they stress the importance of differentiation in favor of developing countries, see (n 90), Submission by Singapore 54–56, and Submission by the Republic of Korea 50–51.

¹⁶⁶ See Report of the Conference Of The Parties to the second part of its sixth session, held at Bonn from 16 to 27 July 2001, FCCC/CP/2001/5 (25 September 2001) 14.

¹⁶⁷ See (n 160) and on India, online, http://hdrstats.undp.org/countries/country_fact_sheets/cty_fs_IND.html

¹⁶⁸ India's growth rate averaged just above 8 per cent in the last four years. See Economic Surveys, Ministry of Finance, Government of India, online, <http://www.finmin.nic.in>

dependent, and the impact that climate change is likely to have on India's monsoons to which its economy is anchored.¹⁶⁹ India's projected emissions growth rate may not in itself be sufficient to make the case for it to be treated as an 'advanced developing country' in the regime today. Are competitiveness fears, however well-founded, in the developed world legitimate concerns within the climate regime?¹⁷⁰ While they may implicitly drive negotiating positions, entering into a discussion of criterion for differentiation may draw attention to such not-so-objective criterion and destabilize the negotiations.

If the experience of other multilateral environmental agreements is any indication, the most politically feasible option moving forward is auto-election. Some countries may choose to accede to Annex I. Countries that are members of the OECD or the EU may have pressure brought to bear on them within the context of those arrangements to do so. For those countries that are not members of such political and economic organizations, the conditions necessary for auto-election will need to be created. They could perhaps accede to a new Annex to the FCCC, with relevant amendments, or list their measurable, reportable, and verifiable mitigation actions, pledges, or commitments in a register, should one be created.¹⁷¹

2. *Commitments or actions required of developed country parties*

Paragraph 1(b) (i), which prescribes the commitments/actions required of developed countries reads: '[m]easurable, reportable and verifiable nationally appropriate mitigation commitments or actions, including quantified emission limitation and reduction objectives, by all developed country Parties, while ensuring the comparability of efforts among them, taking into account differences in their national circumstances.'

Every clause in this paragraph and the one that follows is a delicate work of art, and merits careful examination.

Measurable, reportable and verifiable nationally appropriate mitigation commitments or actions: Developed countries' commitments under the existing climate regime are not only measurable, reportable, and verifiable,¹⁷² but also in the case of

¹⁶⁹ A recent Government study found that up to 45 per cent of GDP variations in India in the last 50 years could be explained by fluctuations in rainfall. See a study by A. Virmani cited in 'In India a prayer for rain, despite a deluge' *The New York Times* 6 July 2007. A 2–3.5 °C temperature increase could cause as much as 0.67 per cent GNP loss, and a 100 cm increase in sea level could cause 0.37 per cent GNP loss. See J. Roy, *A Review of Studies in the context of South Asia with a special focus on India: Contribution to the Stern Review* (2006), and A. Challinor et al, *Indian Monsoon: Contribution to the Stern Review* (2006)

¹⁷⁰ Recent proposals on border carbon adjustment measures to address competitiveness concerns in the US and EU are reflective of this fear. See e.g. S-1766, Bingaman-Specter Low Carbon Economy Act, and S-2191 Lieberman-Warner, America's Climate Security Act. A draft version of the EU's third-phase emissions trading scheme contained in Article 29 a border carbon adjustment measure titled Future Allowance Import Requirement (FAIR), but this has since been dropped.

¹⁷¹ The idea of a registry was floated by South Africa in the context of Sustainable Development Policies and Measures (SD-PAMs), See Submission by South Africa, Dialogue on long-term cooperative action to address climate change by enhancing implementation of the Convention, Dialogue Working Paper (20 October 2006) 18.

¹⁷² See (n 15)

Protocol commitments, subject to compliance procedures.¹⁷³ The future climate regime envisages the possibility—since it hopes to engage FCCC Parties that are not Party to the Kyoto Protocol, such as the US—that the mitigation commitments or actions prescribed for developed countries going forward may not be subject to the scrutiny of a compliance procedure. For non-Parties it may also be possible to take this argument further to suggest that measurement, reporting and verification could be subject to national procedures rather than international. This is contrary to China's view that '[m]ethodologies, verifying mechanisms, flexible mechanisms and compliance mechanism of the Kyoto Protocol shall be applicable to commitments of Annex I' countries that are non-Parties to the Kyoto Protocol.¹⁷⁴ South Africa has a similar view.¹⁷⁵ But, China and South Africa's views are perhaps technically ill-founded. The Kyoto Protocol does not permit reservations,¹⁷⁶ and therefore it does not allow Parties to choose the extent of their obligations under it.¹⁷⁷ As such, neither can provisions of the Kyoto Protocol be selectively extended to non-Parties nor can non-Parties selectively comply with obligations and avail benefits of particular Kyoto Protocol provisions. It is possible that clones of the Kyoto Protocol mechanisms and procedures, under other names, may be created as part of the 'agreed outcome' of the Bali Action Plan. There is no indication, yet, however, that Parties intend this.

The use of the phrase 'mitigation commitments or actions' indicates that actions not amounting to targets or commitments could satisfy the demands of the new framework. Read in conjunction with the chapeau, national actions in themselves (not amounting to commitments or targets) could satisfy the new framework. The precise import of the term 'nationally appropriate,' however, is unclear. The term could indicate that the commitments or actions are to be tailored to national circumstances, and/or that they are to be nationally determined rather than internationally negotiated. Since references to national circumstances are peppered through out the climate treaties, as well as the Bali Action Plan, the term nationally appropriate must intend to take national specificities into account. If read in conjunction with the chapeau, moreover, it becomes clear that the term is also intended to encompass the second interpretation for the chapeau specifically carves out space for national action to suffice—such action is then presumably not subject to international negotiation.

Including quantified emission limitation and reduction objectives: At its core, the Kyoto Protocol embodies the wisdom that quantified emission limitation and reduction objectives, initially for developed countries alone, offer the most equitable and effective method of addressing climate change.¹⁷⁸ In the Bali Action Plan, quantified emission limitation and reduction objectives are arguably just one of the possible actions that developed countries can take to satisfy the requirements of the future

¹⁷³ See *Procedures and Mechanisms Relating to Compliance under the Kyoto Protocol*, in Report of the Conference of the Parties on its Seventh Session, Addendum, Part two, Action taken by the Conference of the Parties, Volume III, FCCC/CP/2001/13/Add.3 (2002)

¹⁷⁴ Submission by China, (n 84) 19

¹⁷⁵ Submission by South Africa (n 94) 17 (noting that 'we need to see greater commitments from *all* developed countries, which need to be measured, reported and verified using the mechanisms established under the Kyoto Protocol') (emphasis added)

¹⁷⁶ Article 26, Kyoto Protocol.

¹⁷⁷ See C Redgwell, 'Multilateral Environmental Treaty-Making', in *Multilateral Treaty-Making* (V. Gowlland-Debbas ed., 2000) 89, 99.

¹⁷⁸ Article 3, Kyoto Protocol, as required by Paragraph 2, *The Berlin Mandate* (n 36).

climate regime. Much depends on the interpretation of the term ‘including.’ If the term is used here to suggest ‘including but not limited to’ it would render quantified emission limitation and reduction objectives obligatory, but leave the door open for additional actions to be taken. If, on the other hand, the term is used to suggest ‘including, inter alia’, then quantified emission limitation and reduction objectives would constitute just one of the illustrative actions developed countries could take. The careful placing of the comma between ‘actions’ and ‘including’ suggests, however, that the latter interpretation is the correct one.¹⁷⁹ It is worth noting here that several earlier drafts of the Bali Action Plan prescribe ‘quantified national emission and limitation commitments . . . for all developed country Parties.’¹⁸⁰ Admittedly this too is a departure from the Kyoto Protocol which contains internationally negotiated quantified emission and limitation objectives rather than quantified national ones, but the final text stopped far short of even this modest ambition for the future climate regime. The Bali Action Plan lists quantified emission and limitation objectives as one of the illustrative actions possible.

By all developed country Parties: Paragraph 1(b) (i) was intended to apply only to non-Parties to the Protocol, notably, the US, as presumably the Parties to the Protocol would be bound by their existing targets for 2008–2012 and the outcomes of the AWG-KP for future commitment periods. The G-77/China proposed language in b (i) to ensure that (i) would be applicable only to ‘Annex I Parties that have not ratified the Kyoto Protocol.’¹⁸¹ Earlier drafts of the Bali Action Plan used the phrase ‘all developed country Parties’ but in the context of ‘quantified national emission and limitation commitments’ for all.¹⁸² In the final text, the extension of the potentially less rigorous Bali framework to *all* developed country Parties permits those that are reportedly reluctant Parties to the Kyoto Protocol, such as Canada,¹⁸³ to opt for the less stringent process/agreed outcome under the Convention. This may destabilize the Protocol regime, for if the agreed outcome of the Bali Action Plan is a COP decision, for Parties to the Kyoto Protocol compliance with such decision will not in itself forgive non-compliance with the Kyoto Protocol.¹⁸⁴ Those developed countries that prefer the Bali

¹⁷⁹ In the absence of the comma it could have been plausibly argued that the envisaged ‘actions’ would have to include quantified emission limitation and reduction objectives. This would, however, have rendered the difference between ‘mitigation commitments’ and such ‘actions’ illusory. An alternative interpretation of the comma could be that the term ‘quantified emission limitation and reduction objectives’ applies both to mitigation commitments and actions, that is, countries could take commitments and actions as long as they include quantified emission limitation and reduction objectives

¹⁸⁰ Drafts of 8, 10, 11, and 14 December 2007, on file with the author

¹⁸¹ G-77/China proposal, 14 December 2007, on file with the author

¹⁸² See (n 180).

¹⁸³ See eg ‘Canada stalls commonwealth climate deal’, *The Star*, 23 November 2007; Canada sued for abandoning Kyoto Climate Commitment, *Environmental News Service*, 29 May 2007; and ‘Impossible’ for Canada to meet Kyoto targets: Ambrose, *CBC News*, 7 April 2006

¹⁸⁴ The Canadian government however is arguing, in response to a lawsuit filed by Friends of the Earth, that the consequences of non-compliance with the Kyoto Protocol targets are not legally binding as such procedures were not adopted as an amendment to the Kyoto Protocol by agreement of all Parties. See Court File Number T 1683-07, Federal Court, Between *Friends of the Earth* and *The Minister of the Environment*, Memorandum of Fact and Law, 5 (paragraph 9).

menu of options may resort to rejecting the Kyoto Protocol in favour of the agreed outcome of the Bali Action Plan.¹⁸⁵

While ensuring the comparability of efforts among them: Developed countries favour a range of approaches to address the climate challenge. The EU supports and will likely take stringent quantified emission limitation commitments.¹⁸⁶ Others like the US may opt for nationally appropriate mitigation actions. This clause requires that there be a 'comparability of efforts' among them. This seemingly innocuous clause, however, hides a significant departure from the Kyoto standard. First, this clause refers to 'efforts' not results or effectiveness. There is no requirement that there be comparable levels of achievement or results, for instance, in terms of emissions reductions. The Kyoto Protocol assesses developed countries climate actions on the results that they achieve, not on their efforts. The Bali framework embraces a fundamental shift in benchmarks or criteria for success of actions taken by developed countries. Earlier drafts used the term 'comparability of efforts' in the context both of 'quantified national emission limitation and reduction commitments' and a reference to the work of the AWG-KP.¹⁸⁷ Most Parties intended that this paragraph, designed primarily to bring the US on board, would contain mitigation options acceptable to the US, but in effect ensure that efforts taken by the US are comparable to efforts undertaken by other developed countries for the Kyoto Protocol's future commitment periods. In the final text, the reference to the work of the AWG-KP was dropped, and quantified emission limitation and reduction objectives were rendered optional. The phrase 'comparability of efforts,' however survived. In the new context, nationally appropriate mitigation *commitments* are compared to nationally appropriate mitigation *actions* which may or may not include quantified emission limitation and reduction objectives. What criteria can one use to ensure comparability of efforts between *commitments* and *actions* (which may not amount to commitments or quantified emission limitation and reduction objectives)? If both the mitigation commitments and the actions take the form of quantified emissions limitation and reduction objectives, 'comparability of efforts' would ensure that the targets if not equal were symmetrical in terms of the efforts required in meeting them. If, however, one is a quantified emissions limitation and reduction objective and the other is an energy efficiency measure, how might comparability of efforts be ensured?

Climate initiatives spear-headed by the US may serve to illustrate the concerns raised with this text. The US has been at the forefront of two multilateral initiatives on climate change: the Major Economies Meetings, which aims to craft a new post-2012

¹⁸⁵ A withdrawal under Protocol Article 27 takes effect a year from the date of notification of withdrawal. If a Party can predict that it is unlikely to be in compliance with its commitments, it could withdraw from the Protocol before the end of the first commitment period and avoid having compliance consequences visited upon it. There may be an even longer time frame within which to withdraw. Assessment of compliance, and the more stringent compliance consequences (subtraction from the Party's second commitment period's assigned amounts at a penalty rate of 1.3 times the amount in tons of excess emissions) will only come into play at the end of the commitment, accounting and review period, estimated by some to be in 2015, *ibid* paragraph 8.

¹⁸⁶ See Proposal for a Decision of the European Parliament and of the Council on the effort of Member States to reduce their greenhouse gas emissions to meet the Community's greenhouse gas emission reduction commitments up to 2020, Presented by the Commission, COM(2008) 17 final, 2008/0014 (COD), Brussels, 23 January 2008

¹⁸⁷ Drafts of 11 and 14 December 2007, on file with the author

framework on climate change by the end of 2008;¹⁸⁸ and the Asia Pacific Partnership on Clean Development between Australia, Canada, China, India, Japan, South Korea and the US. The Major Economies Meetings build on the Partnership which focuses on ‘voluntary practical measures’ to ‘create new investment opportunities, build local capacity, and remove barriers to the introduction of clean, more efficient technologies.’¹⁸⁹ The emphasis is on an unidentified ‘long term goal’ to reduce GHGs, and the path towards this goal is clean energy technology coupled with national strategies.¹⁹⁰ The Major Economies Meetings, in US President Bush’s words, would enable nations to develop a long term global goal and ‘establish midterm national targets and programs that reflect their own mix of energy sources and future energy needs.’¹⁹¹ Neither the Partnership documents nor the Major Economies Meetings have thus far led to targets and timetables even at the national level. In essence these initiatives impose soft obligations of effort (rather than of results) and create multilateral fora for engagement (rather than for action) such that best efforts and participation in themselves will suffice. It is likely this generous yardstick the US would like to bring to the multilateral FCCC process as well.

The lost reference to the work of the AWG-KP is also of concern. A reference to the work of the AWG-KP would have ensured that the two ongoing processes—the AWG under the Kyoto Protocol and the new process under the Convention—and their outcomes would be developed and interpreted harmoniously so as to complement each other. As it stands, however, the process under the Convention, and/or its outcome could, in theory, supplant the process created under the Kyoto Protocol. The earlier reference to ‘all developed country Parties’ also lends credence to this interpretation.¹⁹² It is worth noting here that the only reference to the Kyoto Protocol in the entire text of the Bali Action Plan is in a paragraph which records an agreement that the new process will be informed by, *inter alia*, ‘experience in implementation of the Convention and its Kyoto Protocol’.¹⁹³ Needless to say, since Kyoto is the preferred pejorative of climate sceptics for everything from wrong-headed government regulation to job losses and looming economic disaster, the experience referred to in this paragraph might well be negative.

3. *Actions required of developing country parties*

The nature and extent of developing country participation in the climate regime is a long-standing site of conflict in the negotiations.¹⁹⁴ Developing countries have consistently and thus-far successfully rejected mitigation targets.¹⁹⁵ The Bali Action Plan,

¹⁸⁸ Further details online, <http://www.state.gov/g/oes/climate/mem/>

¹⁸⁹ *President Bush and the Asia-Pacific Partnership on Clean Development*, Office of the Press Secretary, 27 July 2005. See also *Vision Statement of Australia, China, India, Japan, the Republic of Korea and the United States of America for a New Asia-Pacific Partnership on Clean Development and Climate*, 28 July 2005, online, <http://www.asiapacificpartnership.org/>

¹⁹⁰ See (n 188, 189).

¹⁹¹ President George W. Bush, 31 May 2007, online, <http://www.whitehouse.gov/news/releases/2007/09/20070927.html>

¹⁹² See (nn 181–183), and accompanying text

¹⁹³ Paragraph 11, Bali Action Plan

¹⁹⁴ For further details see (n 18) Chapter 7

¹⁹⁵ *ibid* and references cited therein

arguably, represents a step forward in fostering more proactive mitigation actions from developing countries. Indeed, the adoption of the Bali Plan of Action, in itself, is an advance from the G-77/China's position—firmly held and carried through in the framing document initiating the Dialogue.¹⁹⁶ The Dialogue was not authorized to open negotiations leading to new commitments, but it has. This is an achievement.

Paragraph 1(b) (ii) which prescribes the actions required of developing countries reads: '[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.'

Measurable, reportable and verifiable: The placement of the phrase 'measurable, reportable and verifiable' within this sub-paragraph was the final element of the Action Plan at issue in Bali. The COP President's text issued the day after the scheduled end of the conference, placed this phrase at the very beginning of this sub-paragraph, such that, the first line was a mirror image of the text pertaining to developed countries. India, supported by the G-77/China, successfully insisted that this phrase be placed at the end of the sub-paragraph. Much hinges on the precise placement of this text. As it stands, at least four interpretations are possible.

First, the phrase 'measurable, reportable and verifiable' applies to both nationally appropriate mitigation actions and to the provision of technology, financing and capacity-building. Thus, both developed and developing countries would have to fulfil their commitments in a measurable, reportable and verifiable manner. The interpretative statements delivered during the final Plenary by various developing countries, including by Pakistan, as Chair of the G-77/China support this interpretation.¹⁹⁷

Secondly, the phrase 'measurable, reportable and verifiable' applies only to the provision of technology, financing and capacity-building. This interpretation, albeit favoured by a few of the more conservative amongst the developing countries, distorts the plain meaning of the text. There is a well-considered comma that creates the embedded clause on technology, financing and capacity-building, and subjects it as well as 'nationally appropriate mitigation actions' to measurement, reporting and verification.

Thirdly, the phrase 'measurable, reportable and verifiable' applies only to those nationally appropriate mitigation actions that have been supported and enabled by technology, financing and capacity-building (in a measurable, reportable and verifiable manner). The reasoning behind the third interpretation is this. Not all nationally appropriate mitigation actions will lend themselves to measurement, and therefore necessitate reporting and verification. The text in this sub-paragraph offers a principled basis to distinguish between those actions that are required to be measured, reported and verified, and those that are not so required viz., only those mitigation actions that are supported and enabled by technology, financing and capacity-building in a measurable, reportable and verifiable manner will be subject to measurement, reporting and verification. In this rendering, the assistance would have to be provided in the required manner as a condition precedent to measurement, reporting and verification of mitigation actions in developing countries.

¹⁹⁶ See (n 44).

¹⁹⁷ See (n 130) (see in particular statements by South Africa and Brazil). See also Submission by South Africa (n 94) 17.

Fourthly, since the phrase ‘measurable, reportable and verifiable’ is not qualified by a requirement that the measurement, reporting and verification be carried out at the international level, it could be argued, as China has, that mitigation actions by developing countries should be subject only to national procedures for measurement, reporting and verification.¹⁹⁸ The flip side of this argument is that it could apply to the provision of technology, financing and capacity-building as well.

The choice that countries make between these, and other possible interpretations, in the lead up to the 2009 deadline, will determine the level of ambition in the future climate regime. If the more conservative interpretations are favoured—encompassing national measurement, reporting and verification procedures for nationally determined mitigation actions, and even that, only when technology, finance and capacity building is forthcoming—then at best the Bali Action Plan will represent only a modest advance on FCCC Article 4 (1) (b) and 4(7). Article 4(1)(b) requires all Parties to formulate, implement, publish and regularly update national and regional programmes containing measures to mitigate climate change,¹⁹⁹ while Article 4(7) conditions developing countries’ implementation to developed countries’ provision of technology transfer and financing.²⁰⁰

Supported and enabled by technology, financing and capacity building: If mitigation actions can be interpreted to be subject to national procedures on measurement, reporting and verification alone, so too perhaps can actions related to technology, financing and capacity-building. Technology, financing and capacity building, however, are Convention obligations,²⁰¹ endorsed in the Kyoto Protocol²⁰² and compliance with these obligations, at least in theory, falls within the remit of the facilitative branch of the Kyoto Protocol compliance committee.²⁰³ In practice, however, the technology and financing provisions are drafted in such a manner as to render the application of such compliance procedures unlikely. This is because the legal content of FCCC Articles 4(3) and 4(5) is fairly limited. The technology transfer obligation is hedged in with phrases such as ‘as appropriate’ and ‘all practicable steps.’²⁰⁴ To discharge this obligation, developed countries would only need to show that they have taken practicable steps to transfer technology, not that they have actually transferred technology. The financial assistance provision is less guarded in that it requires that developed countries ‘shall provide new and additional financial resources,’ but it is nonetheless constructed to ensure that the provision of resources is linked to the implementation of specific commitments, such as reporting, and that the costs are ‘agreed’ to by the developing country in question and the operational entity of the financial mechanism.²⁰⁵

Further, the text on technology, financing and capacity building in paragraph 1(b) (ii) does not identify those tasked with providing this support. It is possible to interpret

¹⁹⁸ Submission by China (n 84) 19. This interpretation is plausible also because the chapeau permits a choice between national and/or international action

¹⁹⁹ Article 4(1), FCCC ²⁰⁰ See (nn 30–34) and accompanying text

²⁰¹ Articles 4(3), 4(5) and 4(7), FCCC

²⁰² Article 10, Kyoto Protocol

²⁰³ See (n 173). The facilitative committee is tasked with the overall responsibility of ‘promoting compliance by Parties of their commitments under the Protocol.’ *ibid* section IV, paragraph 4; the financing and technology commitments could also be brought within the specific mandate of the facilitative branch relating to Article 3(14) of the Kyoto Protocol. *ibid* section IV, paragraph 5 ²⁰⁴ Article 4(5), FCCC

²⁰⁵ Article 4(3), FCCC

this text therefore as referring to provision of support not only from developed countries but also through international organizations, public and private, and even perhaps developing countries themselves.²⁰⁶ It could for instance, refer to technology, financing and capacity-building channelled through the Clean Development Mechanism (CDM).²⁰⁷ In India the vast majority of CDM projects are unilateral, viz they do not involve an investor developed country and the necessary technology, financing, and capacity building is arranged by the domestic investor entrepreneur. Will such provision, albeit not by a developed country, be sufficient to trigger measurement, reporting and verification of mitigation actions in paragraph 1(b) (ii)?²⁰⁸ Or will this be deemed to be covered since, whatever the form of the Clean Development Mechanism project, the Certified Emission Reductions are eventually bought by industrialized countries?

IV. KILLING KYOTO SOFTLY? A 'POST-KYOTO' REGIME²⁰⁹ IN THE MAKING

This analysis of a single, but crucially significant, paragraph of the Bali Action Plan reveals both a shift in the rules of the climate game as well as realignment in the balance of commitments between developed and developing countries.

The Bali framework creates a host of options for countries to consider in the future climate regime. Developed countries can choose between: national and/or international action; commitments or actions; quantified emission limitation and reduction objectives or other actions; benchmarks or criteria for success based on results or on efforts; and, measurement, reporting and verification through national or international procedures. Developing countries can choose between: measurement, reporting and verification through national or international procedures; measurement, reporting and verification of nationally appropriate mitigation actions as well as technology, financing and capacity building or only of the latter, or only the former when the latter is forthcoming.

Parties may well choose the more environmentally responsible options going forward, and the 'agreed outcome' in 2009 may contain an effective solution tailored to the magnitude and gravity of the climate problem. The text as it stands, however, allows countries choices between options, many of which if exercised, will militate against the central premises of the Kyoto Protocol.

The Kyoto Protocol contains obligatory (not discretionary or voluntary) emission reduction targets for developed countries hence it endorses commitments (and not just actions). It favours internationally-negotiated commitments, albeit implemented nationally and regionally (rather than nationally-determined ones). It gives pride of place to quantified emission limitation and reduction objectives (over policies and

²⁰⁶ This interpretation would accord with the US position that financing will be generated outside the Convention as well—both domestically in developing countries and through bilateral and other arrangements. Submission by the US (n 84) 88

²⁰⁷ Article 12, Kyoto Protocol

²⁰⁸ There is, of course, an elaborate system for verification of CDM credits, but under the Kyoto Protocol, see (n 15).

²⁰⁹ This term used widely in the last few years to refer to the post-2012 phase is inaccurate and politically-charged, for it is not the Kyoto Protocol that comes to an end in 2012, but the first commitment period. It may however have been prescient in that the post-2012 phase may well be a 'post-Kyoto' phase

measures). It assesses performance against targets and timetables (rather than on efforts) and provides international measurement, reporting, verification and compliance procedures. Moreover, the Kyoto Protocol endorses and underscores the notion that developed countries should lead by example in assuming and meeting GHG reduction targets.

Under the realigned balance of commitments permissible in the Bali Action Plan, it is conceivable that the US and India may subject themselves or be subject in the future climate regime to the same requirements, that is, to ‘nationally appropriate mitigation actions.’ Actions in both these countries will be voluntary, nationally determined and tailored.²¹⁰ The actions will be measurable, reportable and verifiable but possibly under national reporting procedures alone.²¹¹ In the case of India the nationally appropriate mitigation actions will need to be in the context of sustainable development, and supported and enabled by technology, financing and capacity building—also in a measurable, reportable and verifiable manner—but such support could be from national, bilateral, multilateral or other sources. This is a far cry from the differential treatment between developed and developing countries contained in the Kyoto Protocol.²¹²

The US objection to the Kyoto Protocol is long-standing. In the negotiations at Bali, the US ensured that there is no reference to the AWG-KP and only a non-committal one to the Kyoto Protocol in the Action Plan. In the process forward, the US urges ‘creative thinking’ in areas ‘where past approaches may no longer be adequate.’²¹³ Elsewhere it reiterates that ‘we should not be bound by previous ways of looking at things.’²¹⁴ It reminds us that ‘the world in 2008 is different from the world in 1992, in important ways.’²¹⁵ It is this openness to ‘creative’ thought, and resistance to the premises of the Kyoto Protocol, that the US brought to bear in the negotiations on the Bali Action Plan, and presumably will bring to the table in the road ahead.

Whether the agreed outcome in 2009 will effectively jettison the premises of the Kyoto Protocol or not, will depend on the options countries exercise in the lead up to the 15th COP in Copenhagen. The AWG-KP process is also scheduled to come to an end in 2009. Unlike the Bali Action Plan, the AWG-KP conclusions highlight the IPCC estimates that to stabilize emissions at the lowest levels Annex I Parties as a group would have to reduce emissions in a range of 25–40 per cent below 1990 levels by 2020.²¹⁶ It is possible that the AWG-KP will conclude its work by adopting ambitious reduction targets in line with IPCC estimates for all developed countries that are Party to the Kyoto Protocol. In such event, paragraph 1(b) (i) will in practice only be availed of by the US, and 1(b) (ii) by large developing countries. A significant factor pressing in favour of this pro-Kyoto outcome is the investments—financial, infrastructural and institutional—which have been made in the carbon market, predicated on the existence of firm GHG targets and therefore an appropriate price for carbon. However, much will depend on political and economic developments the world over, in particular, in the US

²¹⁰ Submission by the US (n 84) (noting that ‘we see discussions on mitigation focusing on nationally appropriate *actions* that are measurable, reportable, and verifiable’) [emphasis added]

²¹¹ *ibid* 85 (noting that ‘environmental effectiveness requires *national* undertakings and review mechanisms’) [emphasis added]

²¹² Whether the differential treatment contained in the Kyoto Protocol is legitimate and/or excessive is a separate enquiry. See (n 18), Chapter 7, for discussion of this question

²¹³ Submission by the US (n 84) 85.

²¹⁵ *ibid* 87.

²¹⁴ *ibid* 86.

²¹⁶ See (n 51).

in the next few years. But, the necessary options should countries so choose—to make a fundamental departure from the premises on which Kyoto is built viz, *to kill Kyoto softly*—exists in the framework of the Bali Action Plan.

1. A Few Procedural Hurdles in the Way

It is worth referring, in passing, to a few procedural hurdles that lie in the way of crafting an ambitious new climate regime in the allocated time. First, if there is to be a Protocol as part of the ‘agreed outcome,’ how will it be adopted? FCCC Article 17 relating to Protocols does not specify a voting requirement for adoption of Protocols.²¹⁷ In its absence and in the absence of adopted Rules of Procedure governing voting,²¹⁸ unless Parties adopt a particular voting procedure ad hoc, any new Protocol will need to be adopted by consensus. This will in turn likely limit the substantive ambition of the Protocol, whether in its clear terms, or as reflected in the proliferation of constructively ambiguous phrases or framework/guiding language. FCCC Article 17 also requires that the ‘text of any proposed protocol shall be communicated to the Parties by the Secretariat at least six months before such a session.’ A similar rule applies to proposed amendments to the FCCC²¹⁹ and the Kyoto Protocol.²²⁰ The relevant treaty provisions do not provide any guidance on the nature of the text that is required to be communicated six months in advance of Copenhagen. Does the text have to be bracket-free agreed text, draft negotiating text, substantially agreed text, or a compilation of Parties’ proposals? Are there any minimum requirements in terms of structure and coherence in the proposed text? Or is it sufficient merely that it be labelled a Protocol? Since Parties are free to submit and propose fully-crafted alternative Protocols or competing amendments for adoption, the text referred to must mean draft text, subject to subsequent negotiation. However, if the six-month rule is intended to give Parties time for reflection on the proposed protocol, an unstructured much-bracketed, many-optioned text may not serve the purpose. Parties may therefore have to decide both that they wish to adopt a new Protocol, as well as to reach a relatively well structured and coherent draft negotiating text by June of 2009. There is no agreement on the former as yet and limited likelihood of the latter as a result, unless an extraordinary COP is scheduled for the spring/summer of 2009.

Moving forward, Parties will also need to determine the elements of the ‘agreed outcome’ that necessitate amendments to the FCCC, those that are best reflected in a new Protocol, and those that could be adopted by COP decisions. This determination will need to be made keeping in mind the extent to which Parties wish for the new regime, or some of its elements, to be embodied in a legally binding form. While legally binding treaty language may be appealing given the severity of the problem and its political signalling effects, a treaty will likely take several years to enter into force, depending both on the entry into force requirements that Parties introduce in the treaty

²¹⁷ The EC had in 1997, perhaps to forestall any difficulties encountered in adopting the Kyoto Protocol, suggested an amendment remedying this. Arrangements for Intergovernmental Meetings, Amendments to the Convention or its Annexes, *Netherlands (on behalf of the European Community and its member states): proposed amendment to article 17 of the convention*, FCCC/SBI/1997/15 (20 June 1997) (proposing a 3/4 majority voting procedure should efforts at consensus fail)

²¹⁹ Article 15(2), FCCC.

²²⁰ Article 21(3), Kyoto Protocol.

²¹⁸ See (n 137).

and domestic ratification procedures. At least some elements of the new regime may be embodied in COP decisions, which often impose mandatory requirements without being legally binding, and which can be applied immediately. If the Kyoto and FCCC tracks continue to operate in parallel, Parties will also need to untangle and ensure coherence across the complex institutional supervision and compliance systems that are in place under Kyoto and those that will be created to measure, report and verify under the 'agreed outcome.' No mean task.

V. SOME CONCLUSIONS

The Bali Action Plan represents an advance in several respects. The Dialogue, which was not authorized to open negotiations leading to new commitments, in effect, did precisely this, thereby paving the way for a future climate regime. The Bali Action Plan requires that now and in this future climate regime developing countries as well as *all* developed countries take measurable, reportable and verifiable mitigation actions. This is necessary in light of existing and likely cumulative GHG contributions of certain countries. According to the 2007 World Energy Outlook, if current policies continue unchecked, CO₂ emissions will increase by 57 per cent between 2005 and 2030, with the US, China, India and Russia contributing to two-thirds of this increase.²²¹ India is predicted to become the third largest emitter by 2015, after China and the US.²²² In the circumstances, achieving the ultimate objective of the climate regime will require stringent mitigation actions in the US, which opted out of the Kyoto regime in 2001, as well as in certain developing countries (where reductions will be from business as usual increases, not in absolute terms).²²³ It is appropriate that the mitigation actions required of developing countries are not framed as commitments. This is in keeping with the effort sharing arrangement, the need for economic and social development in developing countries—characterized in the Bali Action Plan as 'global priorities'²²⁴—and the historical and current GHG contributions of developed countries.²²⁵ It is also appropriate that the differences between developing countries be considered in allocating efforts and resources under the future climate regime. The Bali Action Plan permits such differentiation or at least a possible re-negotiation of the categories of developing and developed countries. Finally, the emphasis in the Bali Action Plan on national strategies and actions, albeit a departure from Kyoto requirements, may permit experimentation with inexpensive mitigation options tailored to national circumstances and experiences. This may lead in due course to a better sense of cost implications, political palatability, and co-benefits, and it may therefore facilitate negotiations over commitments and effort-sharing.

Of these advances, perhaps the most significant is the substantive re-engagement of the US with the climate regime. But this was wrought at considerable cost to the premises on which the Kyoto Protocol is built, of which leadership from developed

²²¹ Executive Summary, World Energy Outlook 49 (2007), available at: <http://www.iea.org/Textbase/npsum/WEO2007SUM.pdf>

²²³ See (n 114).

²²⁴ Paragraph 2, Preamble, *Bali Action Plan*.

²²⁵ See *contra* views of the White House 'US pours cold water on Bali optimism', *The Guardian* (noting that the US has 'serious concerns' because the Bali Action Plan does not adequately address the responsibilities of developing countries)

countries in mitigating climate change is just one. Developed countries have the option in the Bali Action Plan of taking commitments *or* actions, and these actions may or may not include quantified emission limitation and reduction objectives. This is disappointing given the effort sharing arrangement, their historical and current GHG contributions, and their inability in large part to meet even the modest ambition of the existing climate regime. Indeed if it had not been for the collapse of the economies of the former USSR, emissions levels in Annex I countries as a group would have increased significantly. The latest National Communications from Annex I Parties indicate that Annex I Parties as a group had by 2005 reduced their GHG emissions to 2.8 per cent below 1990 levels.²²⁶ The vast majority of the reductions occurred, however, in Annex I economies in transition where GHG emissions are 35.2 per cent below 1990 levels.²²⁷ Other Annex I countries, have as a group increased their emissions by 11 per cent from 1990 levels.²²⁸ Of these, the EU Member States are reportedly on track to meet their Kyoto commitments,²²⁹ and possibly Japan,²³⁰ but not the others. The US emissions are 16.3 per cent above 1990 levels.²³¹ Canada's emissions are 25.3 per cent above 1990 levels.²³² Australia's emissions are 25.6 per cent above 1990 levels.²³³ To offer these developed countries the option of taking nationally determined mitigation actions in the future climate regime is to reward their resistance to global response to the climate change problem built on cooperation, solidarity and mutual aid, and to hamper the ability of the international community to address 'the defining human development challenge for the 21st century.'

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²²⁶ See National Greenhouse Gas Inventory Data FCCC/SBI/2007/30 for the period 1990–2005, 24 October 2007, FCCC/SBI/2007/30, at 8. The figures if LULUCF is included are:—4.6 per cent for all Annex I,—36.2 for Annex I, and +10 for other Annex I.

²²⁷ *ibid*

²²⁸ *ibid*

²²⁹ The latest projections by Member States show that implemented policies and measures are expected to reduce EU-15 emissions to 4 per cent below base year levels by 2010. Further reductions are expected from the implementation of the measures in the 23 January 2008 Climate and Energy Package proposed by the Commission. See *Climate change: EU on track towards Kyoto target but efforts must be maintained, projections show*, IP/07/1774, Brussels, 27 November 2007

²³⁰ See 'Japan says can meet Kyoto Goals', *Reuters*, 11 February 2008

²³¹ See (n 226).

²³² *ibid*.

²³³ *ibid*.

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