

# THE CANCUN CLIMATE AGREEMENTS: READING THE TEXT, SUBTEXT AND TEA LEAVES

## I. INTRODUCTION

The Cancun Agreements, hailed by Patricia Espinosa, Mexican Secretary of Foreign Affairs and President of the Cancun Conference, as launching ‘a new era of international cooperation on climate change,’<sup>1</sup> were concluded on 11 December 2010 to widespread acclaim. These agreements that will guide the climate negotiations for the foreseeable future represent another twist in the tale of the ongoing negotiations.

The climate regime comprises the Framework Convention on Climate Change (FCCC), 1992,<sup>2</sup> and the Kyoto Protocol, 1997.<sup>3</sup> The Parties to the Kyoto Protocol at their first Meeting in Montreal, 2005, launched the Ad Hoc Working Group on the Kyoto Protocol (AWG-KP), for considering, as required by the Protocol,<sup>4</sup> commitments for Parties listed in Annex B to the Protocol beyond the end of the first commitment period in 2012.<sup>5</sup> The Parties to the FCCC at their thirteenth Conference of Parties in Bali, 2007, launched the Ad Hoc Working Group on Long-term Cooperative Action (AWG-LCA) for long-term cooperative action under the FCCC.<sup>6</sup> These processes, launched in 2005 and 2007 respectively, are yet to conclude. The AWG-LCA negotiations were scheduled to arrive at an ‘agreed outcome’<sup>7</sup> at the 15<sup>th</sup> Conference of Parties (COP-15) in Copenhagen, 2009, however this was not to be. COP-15 resulted in decisions to continue negotiations under the FCCC and Kyoto Protocol, as well as the controversial Copenhagen Accord<sup>8</sup> reached among a subset of the Parties, at the Heads of State level, to these instruments. The Copenhagen Accord, rejected by the Bolivarian Alliance,<sup>9</sup> Sudan and Tuvalu, has no ‘formal legal

<sup>1</sup> See On Demand Webcast, COP-16, resumed 9th meeting (10 December 2010), available at, [http://webcast.cc2010.mx/grid\\_en.html](http://webcast.cc2010.mx/grid_en.html).

<sup>2</sup> United Nations Framework Convention on Climate Change (adopted 9 May 1992, entered into force 21 March 1994) 31 ILM 849 (hereinafter FCCC).

<sup>3</sup> Kyoto Protocol to the United Nations Framework Convention on Climate Change (adopted 10 December 1997, entered into force 16 February 2005) 37 ILM 22 (hereinafter Kyoto Protocol).

<sup>4</sup> Art 3(9), Kyoto Protocol. See for an overview of the climate regime P Birnie, A Boyle and C Redgwell, *International Law and the Environment* (CUP, Cambridge, 2009) 356–378.

<sup>5</sup> Decision 1/CMP.1, Consideration of Commitments for Subsequent Periods for Parties Included in Annex I to the Convention under Article 3, Para 9 of the Kyoto Protocol, FCCC/KP/CMP/2005/8/Add.1 (2006).

<sup>6</sup> Decision 1/CP.13, Bali Action Plan, in Report of the Conference of the Parties on its thirteenth session, 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).

<sup>7</sup> Para 1, Bali Action Plan.

<sup>8</sup> Decision 2/CP.15, Copenhagen Accord, in Report of the Conference of the Parties on its fifteenth session Addendum, Part Two: Action taken by the Conference of the Parties at its fifteenth session, FCCC/CP/2009/11/Add.1 (30 March 2010) (hereinafter ‘Copenhagen Accord’). See generally D Bodansky, ‘The Copenhagen Climate Change Conference’: A Postmortem’ (2010) 104 AJIL 2 230, and L Rajamani, ‘The Making and Unmaking of the Copenhagen Accord’ (2010) 59 ICLQ 3 824.

<sup>9</sup> The Bolivarian Alliance consists of Bolivia, Cuba, Ecuador, Nicaragua and Venezuela.

standing<sup>10</sup> in the FCCC process. However, 141 States have associated with it, and many have inscribed their mitigation targets and actions in its appendices.<sup>11</sup> The Cancun Agreements, arrived at by States at the 16th conference of Parties (COP-16) integrate many of the elements of the Copenhagen Accord into the FCCC process, and for this many consider it a success.<sup>12</sup> In addition to taking note of the mitigation targets and actions communicated by States, and providing for transparency in their implementation, the Agreements establish an Adaptation Framework, a Technology Mechanism, and a Green Climate Fund. The Agreements also create a framework for addressing deforestation in developing countries.

The real treasures, however, are to be mined in the text of the Agreements relating to mitigation actions and commitments. This is therefore the chosen focus of this article. This article examines the text relating to mitigation, and explores the subtext, with a view to reading the tealeaves on the post-2012 climate regime. There is much to be read in and between the lines of the Cancun Agreements, in particular if read in conjunction with the Bali Action Plan, 2007, and the Copenhagen Accord, 2009. This article argues that although few, if any, of the disagreements that led to the collapse of COP-15—including on the future (or lack thereof) of the Kyoto Protocol, the nature and extent of differential treatment between developed and developing States, and the architecture of the future legal regime have been authoritatively resolved, the Cancun Agreements clearly indicate the path the post-2012 climate regime is likely to take.

## II. TEXT AND SUBTEXT

The Cancun Agreements consist of a decision under the FCCC on the outcome of the work of the AWG-LCA,<sup>13</sup> and a decision under the Kyoto Protocol on the outcome of the work of the AWG-KP.<sup>14</sup> The LCA Outcome Decision is a 30-page document, covering the pillars of the Bali Action Plan, 2007—shared vision, mitigation, adaptation, finance and technology. The Kyoto Outcome Decision is a two-page document covering mitigation for Annex I Parties.

### *A. Shared Vision for Long-term Co-operative Action*

The LCA Outcome Decision recognizes that ‘deep cuts in global greenhouse gas emissions are required’ ... to ‘hold the increase in global average temperature

<sup>10</sup> FCCC Secretariat, Notification to Parties, Clarification relating to the Notification of 18 January 2010, 25 January 2010.

<sup>11</sup> For a list of countries that have associated with the Copenhagen Accord, and inscribed in its appendices see, <http://unfccc.int/home/items/5262.php>.

<sup>12</sup> See eg R Stavins, ‘What Happened (And Why): An Assessment of the Cancun Agreements’ (13 December 2010) available at <http://belfercenter.ksg.harvard.edu/analysis/stavins/?p=876>.

<sup>13</sup> Decision 1/CP.16, ‘The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on long-term Cooperative Action under the Convention,’ in Report of the Conference of the Parties on its sixteenth session, Addendum, Part Two: Action taken by the Conference of the Parties, FCCC/CP/2010/7/Add.1 (15 March 2011) (hereinafter LCA Outcome Decision).

<sup>14</sup> Decision 1/CMP.6, ‘The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol on its fifteenth session,’ in Report of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol on its sixth session, Addendum, Part Two: Action taken by the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol, FCCC/KP/CMP/2010/12/Add.1 (15 March 2011) (hereinafter Kyoto Outcome Decision).

below 2 °C above pre-industrial levels.<sup>15</sup> This goal first arrived at by the G-8 in L'Aquila, 2009,<sup>16</sup> and later agreed in the Copenhagen Accord, 2009, has now been incorporated in the FCCC process. The 'deep cuts' required to meet the 2 °C goal and the associated time frame for achieving this goal, however, are yet to be determined. Parties agreed to 'work towards' identifying a global goal for emission reductions and a time frame for peaking of emissions, and to 'consider' these at COP-17 in Durban in 2011.<sup>17</sup> The commitment is to 'work towards identifying' a goal and a peaking year, rather than to identify these, and to 'consider,' not finalize, them at Durban. There are deep rifts on these issues. Developing countries, in particular Brazil, South Africa, India and China (BASIC) are reluctant to accept global goals for emissions reductions in the absence of an equitable burden-sharing arrangement. In their view, without such an arrangement, these goals will translate into effective limits on their development.<sup>18</sup> Hence their insistence on references in this context to 'social and economic development and poverty eradication' as the 'first and overriding priorities of developing countries,'<sup>19</sup> and 'equitable access to sustainable development.'<sup>20</sup> The insertion of language from the FCCC that recognizes development as an overriding priority is significant. In theory, should there be a conflict between the achievement of the global goal and development, the latter would take precedence. The term 'equitable access to sustainable development' was coined anew by BASIC, and is intended to stake a claim to the requisite carbon space to develop and eradicate poverty.<sup>21</sup> The use of this term does reflect a subtle shift, however, from China and India's earlier insistence on equitable access to the atmospheric space, and to per capita entitlements.<sup>22</sup> In this new formulation, the sharing of the atmospheric space is not determined by rights-based entitlements but by needs-based sustainable development.

The 2 °C goal, at the insistence of the small island States, is subject to a process of review that is required to 'consider' strengthening the goal in relation to a 1.5 °C goal.<sup>23</sup> The review is set to start in 2013 and conclude by 2015. The review will coincide with the release of the Intergovernmental Panel on Climate Change's Fifth Assessment Report in 2014. At this juncture, since the mitigation proposals submitted under the Copenhagen Accord are certain, even if implemented, to lead to a higher than 2 °C temperature rise,<sup>24</sup> the theoretical possibility of strengthening the goal, may well be hot comfort.

<sup>15</sup> Para 4, LCA Outcome Decision.

<sup>16</sup> See G8 Leaders Declaration: Responsible Leadership for a Sustainable Future, L'Aquila, Italy, 9 July 2009, para 65.

<sup>17</sup> Paras 5 and 6, LCA Outcome Decision.

<sup>18</sup> See eg Jairam Ramesh, Indian Minister of State for Environment and Forests, Letter to the Members of Parliament, Cancun Agreements, (20 December 2010) on file with the author, for a reflection of this view.

<sup>19</sup> Drawn from art 4(7), FCCC.

<sup>20</sup> Para 6, LCA Outcome Decision.

<sup>21</sup> See Joint Statement Issued at the Conclusion of the Fifth BASIC Ministerial Meeting on Climate Change, Tianjin, China, (11 October 2010) and (n 18).

<sup>22</sup> See eg Submission by India, Mechanisms Pursuant to art 6, 12, and 17 of the Kyoto Protocol, Additional Submissions by Parties, FCCC/SB/2000/MISC.4/Add.2/Rev.1 (14 September 2000) 42–43.

<sup>23</sup> Paras 4 and 138–140, LCA Outcome Decision.

<sup>24</sup> UNEP, *The Emissions Gap Report: Are the Copenhagen Accord Pledges Sufficient to Limit Global Warming to 2 °C or 1.5 °C?* (November 2010) 43.

*B. Mitigation Commitments or Actions*

The Cancun Agreements, in particular in the paragraphs relating to mitigation, deploy artful drafting in the face of seemingly irreconcilable differences. In the lead-up to and at COP-16, many developed countries had argued for ways to ‘capture’ or ‘anchor’<sup>25</sup> in the FCCC process, the mitigation proposals submitted under the Copenhagen Accord. Neither the Accord, given its tortured birthing process, nor the targets and actions inscribed in its Appendices, has formal legal standing in the FCCC process.<sup>26</sup> The LCA Outcome Decision captures these targets and actions in separate paragraphs for developed and developing countries but with near-identical framing. The texts ‘take[s] note of’ Annex I ‘emission reduction targets,’ and non-Annex I ‘mitigation actions’, ‘to be implemented’ ‘as communicated by them’ and contained in information documents ‘(to be issued)’.<sup>27</sup> The texts are accompanied by identical footnotes, noting that ‘Parties’ communications to the Secretariat that are included in the INF document are considered communications under the Convention.’<sup>28</sup> The Kyoto Outcome Decision ‘takes note of quantified emission reduction targets to be implemented by Annex I Parties as communicated by them and contained in document FCCC/SB/2011/INF.1.’<sup>29</sup>

*1. Taking note*

Taking note of documents has come to acquire particular significance in the FCCC process.<sup>30</sup> COP-15, failing agreement, merely took note of the Copenhagen Accord. The LCA and Kyoto Outcome Decisions ‘take[s] note of’ mitigation targets or actions contained in designated information documents. Taking note signals an acknowledgment that these targets or actions exist, but is not an endorsement of them. This acknowledgment, however, is ironic, despite the fact that these targets and actions were in existence they had not been compiled into information documents at the time. Although some attach considerable political significance to the referencing of mitigation actions, in particular from developing countries, in the FCCC process, the legal significance, if any, of taking note of targets or actions in nonexistent documents, is negligible.

*2. Framing and tone across the developed–developing country divide*

The use of near-identical framing language, or ‘parallelism,’ in the text relating to developing countries and developed countries is the culmination of efforts launched in the Bali Action Plan by the United States, among other developed countries, to ensure that the ‘look and feel’ of obligations across developed and developing countries

<sup>25</sup> See eg Preparations for COP 16 and CMP-6, Council of the European Union, Conclusions, 14957/10, 14 October 2010; and COP-16 Plenary Statement of US Special Envoy for Climate Change, Todd Stern, High Level Segment of COP-16 and CMP-6, 9 December 2010.

<sup>26</sup> See (n 10).

<sup>27</sup> Paras 36 and 49, LCA Outcome Decision.

<sup>28</sup> Footnote 4 and 5 to paras 36 and 49 respectively, LCA Outcome Decision.

<sup>29</sup> Para 3, Kyoto Outcome Decision.

<sup>30</sup> ‘Taking note’ of documents to signal acknowledgment is not unique to the FCCC process. See eg G.A. Res 56/83, Responsibility of States for Internationally Wrongful Acts, 28 January 2002. It is unusual, however, to take note of non-existent documents.

(at least the ‘major emitters and emerging economies’), even if not its stringency, is similar.<sup>31</sup> To the United States, there is ‘no rationale for legal asymmetry, in the Convention or otherwise.’<sup>32</sup> The impetus for this position is evident in United States’ domestic politics. Among other examples, there is a Bill currently under consideration to prohibit climate change action in the United States until ‘substantially similar’ regulations are imposed on China, India and Russia.<sup>33</sup>

The gradual shift towards parallelism is accompanied by a shift towards a less prescriptive and more predictive tone in relation to mitigation. In the Copenhagen Accord, the language used to frame commitments and actions is prescriptive for developed countries (‘Annex I Parties commit to implement’)<sup>34</sup> and predictive for developing countries (‘Non-Annex I Parties will implement’).<sup>35</sup> In the Cancun Agreements, the language used is predictive for both (‘to be implemented’).<sup>36</sup>

There are, however, differences between the texts for developed and developing countries. First, mitigation in relation to developed countries is characterized as ‘quantified economy-wide emission reduction targets’ and in relation to developing countries as ‘mitigation actions.’ Second, ‘targets’ of developed countries and ‘actions’ of developing countries will be lodged in distinct information documents.<sup>37</sup>

### 3. Mitigation commitments or actions by developed countries

Mitigation in relation to developed countries has evolved in two respects in the climate regime. First, obligations appear to have given way to aspirations. Second, mitigation has come to be understood as absolute reductions alone. To elaborate, the Kyoto Protocol 1997, characterizes the mitigation obligations of developed countries as ‘quantified emission *limitation and reduction* commitments’,<sup>38</sup> the Bali Action Plan, 2007, characterizes them as ‘commitments or actions,’ (with ambiguous language on whether or not these need to encompass ‘quantified emission limitation and reduction objectives’), and the Copenhagen Accord characterizes them as ‘emissions targets’ (with no reference to reduction and/or limitation). The LCA Outcome Decision re-introduced the word ‘reduction’, but omitted the term ‘limitation’.

<sup>31</sup> See eg Submission by the United States of America, Ideas and proposals on the elements contained in Para 1 of the Bali Action Plan, Submissions from Parties, Addendum, Part II, in FCCC/AWGLCA/2008/MISC.5/Add.2 (Part II) (10 December 2008) at 71 (noting that ‘at least some developing countries (such as major emitters and emerging economies) should be taking the same kinds of mitigation actions as developed countries’).

<sup>32</sup> See Submission by the United States of America, Additional views on which the Chair may draw in preparing text to facilitate negotiations among Parties, Submissions from Parties, FCCC/AWGLCA/2010/MISC.2 (30 April 2010) 79.

<sup>33</sup> S.15. A bill to prohibit the regulation of carbon dioxide emissions in the United States until China, India and Russia implement similar reductions, 112th Congress, 1st session, 25 January 2011. This bill is unlikely to survive, however, it does reflect the diversity of interests the United States has to take into account in framing its negotiating stance.

<sup>34</sup> Para 4, Copenhagen Accord.

<sup>35</sup> Para 5, Copenhagen Accord.

<sup>36</sup> Paras 36 and 49, LCA Outcome Decision and Para 3, Kyoto Outcome Decision.

<sup>37</sup> This is evident from the chosen document numbers, for developed countries FCCC/SB/2011/INF.1 (a Subsidiary Bodies information document), and for developing countries, FCCC/AWGLCA/2011/INF.1 (an AWG-LCA information document).

<sup>38</sup> Art 3, Kyoto Protocol.

This reflects an understanding that for developed countries limitation of GHGs, which could be interpreted as limitations on the growth of GHGs<sup>39</sup> or as stabilization commitments,<sup>40</sup> are no longer appropriate, and mitigation targets need to be expressed in terms of absolute reductions. Further, the language of commitments, arguably signifying an obligatory undertaking, has given way to the aspirational language of targets.

In addition to these two shifts, the Cancun Agreements are remarkable for their use of an innovative bridging device between the Kyoto Protocol and FCCC tracks. The creation of a bridging device proved necessary to secure the agreement of Japan and Russia, who have publicly signaled their rejection of a second commitment period under the Kyoto Protocol.<sup>41</sup> The document number—FCCC/SB/2011/INF.1—listed in the Kyoto Outcome Decision in relation to mitigation targets for developed countries is identical to that in the LCA Outcome Decision.<sup>42</sup> Many developed countries are keen to be in the same legal basket as the United States. The Cancun Agreements contrived to achieve this through the creation of an information document containing mitigation proposals from all developed countries that will be considered by the subsidiary bodies. There is deliberate ambiguity as to whether this information document relates to the FCCC or to the Kyoto Protocol. Subsidiary bodies under the FCCC serve as the subsidiary bodies under the Protocol, and sessions of these bodies under the FCCC and Kyoto Protocol are held in conjunction with each other.<sup>43</sup> The subsidiary bodies can consider information relating both to the FCCC and the Protocol. However, only Parties to the Protocol may take decisions under it. Non-Parties such as the United States can only participate as observers.<sup>44</sup> Parties may take decisions in relation to such a document, under the Protocol, however, the extent to which these decisions will apply to non-Parties without their consent is limited.<sup>45</sup>

This bridging device permits countries to seamlessly migrate from the Kyoto Protocol track to the FCCC track over time. There are perceived advantages to such migration. Although the LCA and Kyoto Outcome Decisions contain identical language taking note of targets, the Kyoto Decision contains an agreement that further work is needed to convert targets to ‘quantified economy-wide limitation or reduction commitments.’<sup>46</sup> This requirement is in keeping with the architecture of the Kyoto Protocol and the mandate of the AWG-KP process. The LCA Outcome Decision urges

<sup>39</sup> Annex B, Kyoto Protocol, for instance, contains a +8 per cent commitment, for Australia, a limitation on the growth of GHGs.

<sup>40</sup> Annex B, Kyoto Protocol, for instance, contains stabilization commitments for Russia, Ukraine and New Zealand.

<sup>41</sup> See J Vidal, ‘Cancun Climate Change Summit: Japan refuses to extend Kyoto Protocol’ *The Guardian* (1 December 2010) and S Goldenberg, ‘Cancun Climate Change Conference: Russia will not renew Kyoto Protocol’ *The Guardian* (10 December 2010).

<sup>42</sup> Para 3, Kyoto Outcome Decision and Para 36, LCA Outcome Decision.

<sup>43</sup> Art 15, Kyoto Protocol and arts 9 and 10, FCCC.

<sup>44</sup> Art 15(2), Kyoto Protocol.

<sup>45</sup> Decisions ‘taking note’ of such an information document would not disturb rights, interests and obligations of non-Parties, and so may be permissible, but decisions that seek to create rights and obligations, to the extent that these can be in a COP decision, for non-Parties will, unless there is explicit agreement from the non-Party state, be impermissible. By extension from art 35, Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 8 ILM 679.

<sup>46</sup> Para 5, Kyoto Outcome Decision.

developed countries to increase the ambition of their targets,<sup>47</sup> but contains neither an agreement to nor a process for converting targets into commitments.

The Kyoto Outcome Decision's paragraph taking note of targets is accompanied by a footnote that states that 'the content of the table in the information document is shown without prejudice to the position of the Parties or to the right of Parties under article 21, paragraph 7, of the Kyoto Protocol.'<sup>48</sup> This footnote is intended to address concerns raised by Japan and Russia. Although COP decisions cannot modify treaty obligations, Protocol article 21(7), which identifies a specific procedural requirement, written consent from the Party concerned, for amending Annexes, offers further comfort to these countries.<sup>49</sup>

#### 4. Mitigation actions by developing countries

Mitigation in relation to developing countries has also evolved through the years. There is an increasing quantification or concretization of mitigation actions required from developing countries, and a gradual shift in emphasis from supported to unsupported mitigation actions.

The FCCC imposes qualitative commitments in relation to mitigation policies and measures on developing countries.<sup>50</sup> The Berlin Mandate that launched the process that led to the Kyoto Protocol expressly forbade imposition of new commitments on non-Annex I countries.<sup>51</sup> The Kyoto Protocol, accordingly, contained none. The Bali Action Plan suggested the adoption of 'nationally appropriate mitigation actions' (NAMAs) for developing countries, but tied this to the provision of measurable, reportable and verifiable (MRV) technology, finance and capacity-building.<sup>52</sup> There have been at least two distinct developments since Bali. First, although the Copenhagen Accord required developing countries to submit and implement mitigation actions it did not prescribe a cumulative quantitative mitigation goal.<sup>53</sup> The Cancun Agreements take a tentative step in this direction by requiring developing countries to aim at achieving a 'deviation in emissions relative to business as usual' in 2020.<sup>54</sup> Second, the Copenhagen Accord disturbed the direct link between MRV of financing and MRV of mitigation actions by placing these in separate paragraphs, and contriving to nullify interpretations that make the former a precondition to the latter.<sup>55</sup> This trend—to delink support from actions—has been taken forward in the Cancun Agreements.<sup>56</sup>

There are several references to mitigation actions in the LCA Outcome Decision: actions 'as communicated by' non-Annex I Parties<sup>57</sup> (i.e. mitigation proposals submitted under the Copenhagen Accord); additional actions that developing countries may take under the LCA Outcome Decision;<sup>58</sup> and, actions seeking international support.<sup>59</sup> The text of the COP Decision envisages several repositories for information

<sup>47</sup> Para 37, LCA Outcome Decision.

<sup>49</sup> Art 21(7), Kyoto Protocol.

<sup>51</sup> Decision 1/CP.1, The Berlin Mandate, in Report of the Conference of Parties on its first session, FCCC/CP/1995/7/Add.1 (6 June 1995).

<sup>53</sup> Para 5, Copenhagen Accord.

<sup>55</sup> Paras 4 and 5, Copenhagen Accord.

<sup>57</sup> Para 49, LCA Outcome Decision.

<sup>59</sup> Para 53, LCA Outcome Decision.

<sup>48</sup> Footnote to para 3, Kyoto Outcome Decision.

<sup>50</sup> Art 4(1), FCCC.

<sup>52</sup> Para 1(b)(ii), Bali Action Plan.

<sup>54</sup> Para 48, LCA Outcome Decision.

<sup>56</sup> Para 52, LCA Outcome Decision.

<sup>58</sup> Para 50, LCA Outcome Decision.

provided by Parties on NAMAs. First, an information document that will contain actions ‘as communicated by’ non-Annex I Parties. Second, a ‘registry,’ entrusted with the function of helping match actions to support, that will record actions seeking support as well as the provision of support.<sup>60</sup> Third, a separate section of the registry, to be regularly updated by the Secretariat, that will contain, *inter alia*, information provided by Parties relating to actions that have been matched with support and actions proposed under the Copenhagen Accord (albeit without explicit reference to it).<sup>61</sup> These repositories of information are designed to perform distinct functions. The information document is intended to capture in the FCCC process mitigation proposals submitted in relation to the Copenhagen Accord. The registry is intended to help match proposed actions to support. The separate section of the registry is intended to provide an updated picture of all the actions expected from a particular State, and to recognize the totality of actions a State is taking. This could include actions supported through the registry, actions supported domestically and actions supported through other sources.

Interestingly, first, developing countries can provide information in relation to their mitigation proposals, which the Secretariat will use to update the registry.<sup>62</sup> There is no such provision in relation to the targets of developed countries.<sup>63</sup> Second, these updates will be collated in an AWG-LCA information document, which has a limited life span. The AWG-LCA’s mandate currently extends until COP-17, 2011.<sup>64</sup> Its life span is determined a year at a time. When the term of the AWG-LCA comes to an end, this information document will likely become an historical artifact. The COP or subsidiary bodies may offer a more appropriate institutional home. Third, the separate section of the registry permits an interpretation that internationally supported actions are in addition to the mitigation proposals of states. For example, South Africa’s mitigation proposal is a deviation from business as usual emissions growth of 34 per cent by 2020 and 42 per cent by 2025.<sup>65</sup> This information will form a part of the separate section of the registry. If South Africa identifies actions requiring support in the registry, and these are matched with support, will the resulting supported action be in addition to that which South Africa would do to meet its goal, or will this supported action be an integral part of South Africa’s effort to meet this goal? In other words, will international support ratchet up the ambition or help deliver the ambition? The conditions attached to most mitigation proposals made by developing countries in the context of the Copenhagen Accord explicitly condition mitigation action to the provision of support. Such conditional mitigation proposals sit uneasily with the text of the LCA Outcome Decision. This issue is yet to be resolved. It is clear however that there is an ever-expanding role for unsupported actions required of developing countries.

### *5. Populating the information documents*

Information documents have limited status in the FCCC process. Information documents are prepared merely to enlighten Parties, they are not actionable. Information documents can be revised and reissued. An example of an information document often

<sup>60</sup> *ibid.*

<sup>61</sup> Para 59, LCA Outcome Decision.

<sup>62</sup> Compare para 36, with paras 49 and 59 read together, LCA Outcome Decision.

<sup>63</sup> Para 63, LCA Outcome Decision.

<sup>64</sup> Para 143, LCA Outcome Decision.

<sup>65</sup> See Letter from South Africa, 29 January 2010, all letters from states in relation to the Copenhagen Accord, 2009, are available at, <http://unfccc.int/home/items/5265.php>.



seen at the climate negotiations is the list of participants.<sup>66</sup> It is perhaps because information documents have such carefully circumscribed status that developed countries have begun to use information documents to reflect their pledges in the AWG-KP process.<sup>67</sup>

The operational assumption is that the information documents referred to in the Cancun Agreements will be populated with the mitigation proposals that countries have put forth. There are several mitigation proposals on the table, including those submitted under the AWG-KP process, to the FCCC, and in relation to the Copenhagen Accord. The proposals submitted by Annex B Parties in the context of the AWG-KP process have been considered there.<sup>68</sup> After Copenhagen, some non-Annex I Parties submitted mitigation proposals to the FCCC rather than to the Accord (signifying thereby a distancing from the Accord and endorsement of the FCCC).<sup>69</sup> The FCCC Secretariat interpreted these as information provided by Parties in relation to Appendix II of the Copenhagen Accord, and the actions were listed accordingly. Other Parties submitted proposals explicitly in relation to the Copenhagen Accord. These proposals have, like the Accord, no legal standing in the FCCC process. Indeed, the FCCC Secretariat, was, arguably, working outside its mandate in compiling these.<sup>70</sup> It was to address this uncertain legal situation, as well as to avoid requiring re-submission (which might result in a downward revision of proposals), that the footnotes referred to above were added. These footnotes translate 'communications to the secretariat' into 'communications under the Convention,' effectively converting, without referring to the Copenhagen Accord, proposals inscribed in its appendices, into proposals submitted under the FCCC process. The proposals submitted in the context of the AWG-KP process, given the evident intent to merge, will also be incorporated in the information document containing targets of developed countries. The Secretariat gave States an opportunity informally, to confirm their proposals before incorporating them into the information document.

Proposals and inscriptions, wherever submitted, are, without exception, heavily qualified and conditioned on actions by others.<sup>71</sup> Many developing countries, including all the BASIC countries, refer in the letters transmitting their mitigation proposals to FCCC article 4(7) which links the fulfillment of developing country commitments to the provision of support by developed countries.<sup>72</sup> Developed, and some developing,<sup>73</sup> countries have also made their targets conditional on the achievement of a 'global' and 'comprehensive'<sup>74</sup> agreement, 'legally binding obligations' by 'all major emitters,'<sup>75</sup>

<sup>66</sup> See eg List of Participants, Part 1-3, FCCC/CP/2010/INF.1 (Part 1-3)(10 December 2010).

<sup>67</sup> See eg Compilation of pledges for emission reductions and related assumptions provided by Parties to date and the associated emission reductions: update July 2010, FCCC/AWG/KP/2010/Inf.2/Rev.1 (2010). 'Miscellaneous' documents have been used in the past. See eg Information on possible quantified emission limitation and reduction objectives from Annex I Parties, FCCC/KP/A WG/2009/MISC.15 (19 August 2009).<sup>68</sup> *ibid.*

<sup>69</sup> See eg Letters from China, 28 January 2010, and India, 30 January 2010. These letters do not contain any references to the Copenhagen Accord, and state that the communications are for 'information to the UNFCCC Parties' and made in accordance with relevant articles of the FCCC.

<sup>70</sup> See Rajamani (n 8).

<sup>71</sup> See *ibid.*

<sup>72</sup> See eg Letters by Brazil, 29 January 2010, China, 28 January 2010, India, 30 January 2010, and South Africa, 29 January 2010.

<sup>73</sup> See eg Letter by South Africa, 29 January 2010.

<sup>74</sup> See eg Letters by the EU, 28 January 2010, New Zealand, 31 January 2010, and Norway, 29 January 2010.

<sup>75</sup> See Letter by Russia, 29 January 2010.

or on the passage of domestic legislation in their own<sup>76</sup> or another country.<sup>77</sup> The deliberate use of the phrase ‘as communicated by them’ in the Cancun Agreements is intended to capture not just the proposals but also the full breadth of conditions and qualifications attached to these proposals. These proposals, even if faithfully implemented at the higher end of the spectrum of ambition States have identified, will not hold temperature increase to 2 °C.<sup>78</sup>

In effect, at Cancun Parties took note of documents that did not exist, and when they do, are likely to contain targets and actions that will not hold temperature increase to the stated aim of 2 °C. The Cancun Agreements recognize the inadequacy of mitigation targets proposed by developed countries. Both the LCA and Kyoto Outcome Decisions urge developed countries to increase the ambition of their targets. However, the LCA Outcome Decision urges them to do so with a view to reducing their GHGs to a ‘level consistent with,’<sup>79</sup> and the Kyoto Outcome Decision ‘in accordance with the range indicated by’ the Fourth Assessment Report of the IPCC.<sup>80</sup> In the Kyoto Outcome Decision this ‘range’ is recognized, in introductory text, as ‘25–40% below 1990 levels by 2020.’<sup>81</sup> There is no such quantification in the LCA Outcome Decision.

### *C. Measurement Reporting and Verification*

The LCA Outcome Decision text on measurement, reporting and verification (MRV) complements the text on mitigation targets and action. Across the developed–developing country divide, there is a leveling of the frequency, rigor, and review of national communications from Parties.

#### *1. MRV for developed countries*

The LCA Outcome Decision requires developed countries to submit annual greenhouse gas (GHG) inventories, and biennial reports on their progress both in achieving emission reductions and in providing financial, technology and capacity-building support to developing countries.<sup>82</sup> The decision also resolves to enhance guidelines for reporting and review of information in national communications, and establishes a work program to do so.<sup>83</sup> In addition, the decision attempts to address concerns relating to accountability for submitted targets and comparability across targets. To do this, the decision imports elements from the Kyoto Protocol on methodological issues, communication and review of information<sup>84</sup> into the FCCC process. This is evident, for instance, in the paragraph establishing ‘national arrangements’ for the estimation of anthropogenic emissions by sources and removals by sinks of all GHGs not controlled by the Montreal Protocol.<sup>85</sup> Protocol Parties already have such a system in place. This provision extends Protocol article 5 ‘national system’ requirements, to non-Protocol

<sup>76</sup> See Letter by the US, 28 January 2010.

<sup>77</sup> See Letter by Canada, tying their target to enacted legislation in the US, 29 January 2010.

<sup>78</sup> See (n 24).

<sup>79</sup> Para 37, LCA Outcome Decision.

<sup>80</sup> Para 4, Kyoto Outcome Decision.

<sup>81</sup> Introductory para 6, Kyoto Outcome Decision.

<sup>82</sup> Para 40, LCA Outcome Decision.

<sup>83</sup> Paras 41, 42 and 46, LCA Outcome Decision.

<sup>84</sup> Arts 5, 7 and 8, Kyoto Protocol.

<sup>85</sup> Para 43, LCA Outcome Decision.

developed country Parties. It does so in near-identical language, save for the rechristening of ‘national systems’ to ‘national arrangements.’<sup>86</sup>

The LCA Outcome Decision establishes a process for ‘international assessment’ of emissions and removals related to targets in the Subsidiary Body for Implementation ‘with a view to promoting comparability and building confidence.’<sup>87</sup> The notion of comparability across developed country commitments or actions first referenced in the Bali Action Plan was lost in the Copenhagen Accord, 2009, but has been rehabilitated in the Cancun Agreements. This rehabilitation comes at a cost, however. The Bali Action Plan sought to ‘ensur[e] comparability of efforts’,<sup>88</sup> and the Cancun Agreements seek to ‘promot[e] comparability’ of targets.<sup>89</sup> A further weakening is evident in that the Copenhagen Accord required delivery of reductions and financing by developed countries to be accounted for, through MRV, in a ‘rigorous, robust and transparent’ manner. The LCA Outcome Decision uses the term ‘rigorous, robust and transparent,’ but it’s unclear whether this term qualifies the establishment of the process of international assessment, or the accounting for national circumstances.<sup>90</sup> In any case the details of this ‘international assessment’ process are yet to be worked out. The text, as drafted, defines little. Even the characterization of this process differs in different paragraphs of the text—in a subsequent paragraph this process is characterized as ‘international assessment and review.’<sup>91</sup> It is unclear what this assessment and review relates to the targets, the data relating to the targets or compliance with the targets? Further, the international assessment and review process, as currently drafted, does not lead to an output.

## 2. MRV for developing countries

The LCA Outcome Decision enhances the frequency and rigour of national reporting and inventory requirements for developing countries, with a rider that the content and frequency of national communications from non-Annex I Parties will not be more onerous than that for Annex I Parties.<sup>92</sup> The decision requires national communications every four years as well as biennial update reports from non-Annex I Parties.<sup>93</sup> Thus far, non-Annex I Parties have been required to submit their national communications every four to five years,<sup>94</sup> and Annex I Parties every four years.<sup>95</sup> In practice given the wide discretion offered to non-Annex I Parties, submissions have been far less frequent than required.<sup>96</sup> This decision renders national communication requirements

<sup>86</sup> Compare para 43, LCA Outcome Decision and art 5(1), Kyoto Protocol.

<sup>87</sup> Para 44, LCA Outcome Decision.

<sup>89</sup> Para 44, LCA Outcome Decision.

<sup>91</sup> Para 46(d), LCA Outcome Decision.

<sup>92</sup> Para 60, LCA Outcome Decision.

<sup>94</sup> Art 12(5), FCCC, 1992, read with Decision 8/CP.11, Submission of second and, where appropriate, third national communications from Parties not included in Annex I to the Convention, FCCC/CP/2005/5/Add.1 (30 March 2006) 17.

<sup>95</sup> Art 12, FCCC, 1992, read with relevant COP decisions, including Decision 10/CP.13, in FCCC/CP/2007/6/Add.1 (14 March 2008) at 44.

<sup>96</sup> At last count, of the 153 non-Annex I Parties, 140 had submitted their initial national communications, 40 their second national communications, and a handful, their third and fourth national communications. Information, and full text of national communications available at, [http://unfccc.int/national\\_reports/non-annex\\_i\\_natcom/submitted\\_natcom/items/653.php](http://unfccc.int/national_reports/non-annex_i_natcom/submitted_natcom/items/653.php).

symmetrical across developed and developing countries. While requirements placed on developing countries are not more onerous, they are not less onerous either.

The LCA Outcome Decision also recognizes a clear distinction between supported and unsupported mitigation actions—domestically supported actions will be subject to domestic MRV, internationally supported actions will be subject to domestic and international MRV.<sup>97</sup> Further, the decision establishes an international consultation and analysis (ICA) process for biennial update reports from developing countries.<sup>98</sup> The origins of the ICA process are in the Copenhagen Accord, 2009.<sup>99</sup> The ICA process has since been fleshed out, and provided with a counterpart, international assessment and review, for developed countries. The decision requires the ICA process to be conducted in a manner that is ‘non-intrusive, non-punitive and respectful of national sovereignty.’<sup>100</sup> It confines the review of information to the non-threatening realm of technical experts, and excludes a discussion on the ‘appropriateness’ of domestic policies and measures.<sup>101</sup> Unlike the international assessment and review process for developed countries, however, the ICA process results in a ‘summary report.’<sup>102</sup> The rationale for such asymmetry between developed and developing countries is not readily evident—why is a summary report deemed necessary in relation to developing country mitigation but not in relation to developed country mitigation?<sup>103</sup> It is also unclear what use this summary report can be put to. Is it merely for information or can it generate a pressure to ratchet up the ambition of the action? Further, although the ‘appropriateness’ of domestic policies and measures is not part of the analysis, can questions relating to the extent or adequacy of actions be raised?

### *3. A New locus of action: the subsidiary body for implementation*

The MRV provisions of the Cancun Agreements dramatically increase not just the informational demands of States, but also the workload of the Subsidiary Body for Implementation (SBI). The SBI will likely consider the information document containing developed country targets.<sup>104</sup> It has also been charged with conducting the process of international assessment and review for developed countries, and ICA for developing countries.<sup>105</sup> It will also consider annual GHG inventories and biennial progress reports from developed countries, and more frequent national communications and biennial updates, including of inventories, from developing countries.<sup>106</sup> The Cancun Agreements provide some guidance on the nature of the ‘consideration’ that

<sup>97</sup> Paras 61 and 62, LCA Outcome Decision.

<sup>98</sup> Para 63, LCA Outcome Decision.

<sup>99</sup> Para 5, Copenhagen Accord.

<sup>100</sup> Para 63, LCA Outcome Decision.

<sup>101</sup> Paras 63 and 64, LCA Outcome Decision.

<sup>102</sup> Para 63, LCA Outcome Decision.

<sup>103</sup> Admittedly existing review processes for national communications and GHG inventories from developed countries are more rigorous than those for developing countries. Much of the rigour comes from Kyoto Protocol requirements, however, and in any case this does not address the need for comparable outputs from comparable processes under the Cancun Agreements.

<sup>104</sup> The reference to ‘SB’ in the document number in para 36 of the LCA Outcome Decision and para 3 of the Kyoto Outcome Decision suggests that these documents will be considered in the Subsidiary Bodies. At least some part of this task falls within the mandate of the SBI. See arts 9 and 10, FCCC.

<sup>105</sup> Paras 44 and 63, LCA Outcome Decision.

<sup>106</sup> Paras 40 and 60, LCA Outcome Decision. National communications from Parties fall within the mandate of the SBI. See art 10, FCCC.

this information will be subject to, but leave the uses to which that the information may be put unclear. It is worth recalling the mandate of the SBI. According to the FCCC, the consideration of the information provided differs based on the source of information. Information provided by all Parties can be used to 'assess the overall aggregated effect of the steps taken by the Parties.'<sup>107</sup> Information provided by developed countries can be used to assist the COP in carrying out a review of adequacy of developed country commitments. The COP is authorized to take 'appropriate action' on the basis of such reviews. This may include the initiation of processes to adopt more stringent commitments for developed countries.<sup>108</sup>

### III. READING THE TEA LEAVES

Like the Copenhagen Accord before them, the Cancun Agreements did not settle any of the fundamental cleavages that currently exist: the fate of the Kyoto Protocol, the legal form and architecture of the future legal regime, and the nature and extent of differential treatment between developed and developing States.<sup>109</sup> However, they offer a vivid glimpse into the future.

#### A. The Future of the Kyoto Protocol

The LCA Outcome Decision, save for a solitary reference to the Kyoto Protocol in the context of market mechanisms,<sup>110</sup> does not link to the Kyoto Protocol. The Kyoto Outcome Decision records agreement that that AWG-KP will continue its work with a view to having its results adopted 'as early as possible and in time to ensure that there is no gap between the first and second commitment periods.'<sup>111</sup> This text borrows language from the decision that launched the AWG-KP.<sup>112</sup> It does not identify a deadline for the completion of the AWG-KP's work, merely requiring that a gap be avoided. At this juncture, a gap between commitment periods is unavoidable. For a gap to be avoided, amendments to Annex B would need to enter into force by 1 January 2013, which in turn would require three-quarters of Kyoto Parties to have deposited instruments of ratification 90 days before this date.<sup>113</sup> States can only adopt amendments in Durban, CMP-7, December 2011, but for this the proposed amendments would have to be communicated to Parties six months before the meeting.<sup>114</sup> This requires Parties to request the Secretariat to communicate their proposed amendments by June 2011.<sup>115</sup> It is safe to assume that a process launched in 2005 that has yet to collectively present amendments for adoption, given the lack of political will, is unlikely to deliver in the next few months. Most of the proposals for amendments to the Kyoto Protocol that relate to quantitative commitments post-2012 have been proposed by non-Annex B

<sup>107</sup> Art 10(2)(a), FCCC.

<sup>108</sup> Art 10(2)(b), read with art 4(2)(d), FCCC.

<sup>109</sup> Discussed in detail in Rajamani (n 8). See also L Rajamani, 'From Berlin to Bali and Beyond: Killing Kyoto Softly' (2008) 57 ICLQ 3 909–939.

<sup>110</sup> Para 83, LCA Outcome Decision.

<sup>111</sup> Para 1, Kyoto Outcome Decision.

<sup>112</sup> See (n 5).

<sup>113</sup> Art 20, Kyoto Protocol.

<sup>114</sup> See generally Legal considerations relating to a possible gap between the first and subsequent commitment periods, Note by the Secretariat, FCCC/KP/AWG/2010/10 (20 July 2010).

<sup>115</sup> Art 21 (2), Kyoto Protocol.

Parties.<sup>116</sup> Even assuming it does, and States adopt the proposed amendments in Durban, they will have less than nine months to fulfill the domestic legislative and other requirements necessary to ratify these amendments to ensure that they enter into force by 1 January 2013. At this juncture the question is not if there will be a gap between commitment periods but if that gap will come to an end. On this the reading from the tealeaves is clear. The Cancun Agreements seek first to begin the bridging process between the tracks, next drain the Kyoto Protocol of its politically palatable content, and finally allow the Kyoto Protocol to wither away through studied neglect.

The Cancun Agreements as noted above, create a bridging device—an information document containing developed country pledges—across the Kyoto Protocol and FCCC tracks, a first step towards eventual merger of the tracks, and indeed replacement of the Kyoto Protocol. The LCA Outcome Decision seeks to salvage those parts of the Kyoto Protocol that are politically palatable, namely, the communication and review provisions in articles 5, 7 and 8.<sup>117</sup> The export, even if partial and selective, of language from these provisions into the decision, while sensible, in that these requirements can be harmonized, built on, and applied to all developed countries, does also bode ill for the Kyoto Protocol. In addition the Cancun Agreements seek to create a lifeboat for the Protocol mechanisms, and the associated decisions that flesh it out. The Kyoto Outcome Decision provides that emissions trading and the project-based mechanisms under the Kyoto Protocol ‘shall continue to be available to Annex I Parties, in accordance with relevant decisions of the CMP.’<sup>118</sup> The LCA Outcome Decision undertakes to ‘build upon existing mechanisms, including those established under the Kyoto Protocol.’<sup>119</sup> The less politically palatable elements of the Kyoto Protocol—quantified emission limitation and reduction objectives as well as the compliance system—will fall by the wayside. If Annex I countries do not assume targets for the second commitment period, very little of the Kyoto Protocol, after the compliance assessment cycle is complete in 2015/2016, will survive.

### *B. Differentiation*

Although the Cancun Agreements, 2010, refer to the principle of common but differentiated responsibilities and respective capabilities,<sup>120</sup> and even unusually, to ‘historical responsibility,’<sup>121</sup> in keeping with the effort to move beyond the Kyoto Protocol, there is a gradual erosion of the form of differentiation in evidence there.

From Bali to Cancun, the international community has moved towards increasing parallelism between the mitigation commitments and actions taken by developed and (some) developing countries. Since the political conditions for strengthening the overall mitigation effort are missing, such symmetry has been achieved at the cost of ambition, and by leveling down the mitigation efforts required of developed countries. Taking note of non-existent documents likely to contain pledges that will not meet the stated 2 °C goal, as the Cancun Agreements do, is a far cry from Kyoto-style quantitative targets and timetables. In addition there is a gradual delinking of the mitigation

<sup>116</sup> See eg Proposal from Grenada for amendments to the Kyoto Protocol, FCCC/KP/CMP/2010/3 (2 June 2010).

<sup>117</sup> See text accompanying (n 84–86).

<sup>118</sup> Para 6(b), Kyoto Outcome Decision.

<sup>119</sup> Para 83, LCA Outcome Decision.

<sup>120</sup> Para 1, LCA Outcome Decision.

<sup>121</sup> Introductory para 2 to s III.A, LCA Outcome Decision.

actions required of developing countries from the support provided for these. Developing countries, especially those labeled ‘emerging economies’ and ‘major emitters,’ are expected to do more and more for less and less.

The international community has also moved towards increasing parallelism in the informational demands—measurement, reporting and verification—placed on developed and developing countries. There is an increase in the frequency, rigor and review of national communications for developing countries, and an extension of the requirements placed on Protocol Parties to non-Parties. The Cancun Agreements establish similar processes to consider the information—international assessment and review for developed countries, and international consultation and analysis for developing countries. The increasing parallelism in this area has been achieved by leveling up the demands placed on developing countries. Intriguingly, there are some instances in the Cancun Agreements of greater burdens on developing countries. The ICA process, for instance, unlike the international assessment and review process, leads to a summary report. Developing countries’ mitigation proposals, unlike developed country mitigation proposals can be updated.<sup>122</sup> It is conceivable that in combination with the ICA summary reports, these could be constructed as a ratchet mechanism to require developing countries to increase the ambition of their mitigation proposals.

### *C. Legal Form and Architecture*

The Bali Action Plan that launched the process towards an ‘agreed outcome’ in Copenhagen left the legal form as well as the ambition of that outcome uncertain.<sup>123</sup> Six agreements—Protocols from Japan,<sup>124</sup> Australia,<sup>125</sup> Tuvalu,<sup>126</sup> Costa Rica<sup>127</sup> and Grenada<sup>128</sup> and an Implementing Agreement from the United States<sup>129</sup>—have been communicated to Parties. All these instruments appeared on the agenda for COP-16, and were discussed, in conjunction with a discussion on the legal form of the AWG-LCA outcome. Many countries favor a new legally binding instrument under the FCCC, but architecture of this new instrument, as well as the fate of the Kyoto Protocol and its relationship to such a new instrument remains unclear. Most developed

<sup>122</sup> Paras 49 and 59, LCA Outcome Decision.

<sup>123</sup> For a discussion of issues relating to legal form see L Rajamani, ‘Addressing the Post-Kyoto Stress Disorder: Reflections on the Emerging Legal Architecture of the Climate Regime’ (2009) 58 ICLQ 3 803–834; and, J Werksman, ‘Legal Symmetry and Legal Differentiation under a Future Deal on Climate’ (2010) 10 Climate Policy 6 672–677.

<sup>124</sup> Draft protocol to the Convention prepared by the Government of Japan for adoption at the fifteenth session of the Conference of the Parties, FCCC/CP/2009/3 (13 May 2009).

<sup>125</sup> Draft protocol to the Convention prepared by the Government of Australia for adoption at the fifteenth session of the Conference of the Parties, FCCC/CP/2009/5 (6 June 2009).

<sup>126</sup> Draft protocol to the Convention presented by the Government of Tuvalu under Article 17 of the Convention, FCCC/CP/2009/4 (5 June 2009).

<sup>127</sup> Draft protocol to the Convention prepared by the Government of Costa Rica for adoption at the fifteenth session of the Conference of the Parties, FCCC/CP/2009/6 (8 June 2009).

<sup>128</sup> Proposed protocol to the Convention submitted by Grenada for adoption at the sixteenth session of the Conference of the Parties, FCCC/CP/2010/3 (2 June 2010).

<sup>129</sup> Draft implementing agreement under the Convention prepared by the Government of the United States of America for adoption at the fifteenth session of the Conference of the Parties, FCCC/CP/2009/7 (6 June 2009).

countries favor a single integrated instrument that replaces the Kyoto Protocol. This would, in their view, ensure greater participation and therefore effectiveness of the climate regime. In particular it would ensure the participation of the United States. The European Union, among others, aims to build on the key elements of the Kyoto Protocol, but the extent to which this is possible, given the negotiating positions of the United States, is unclear. The small island States and other vulnerable countries are also in favor of a legally binding instrument, albeit one that would complement the Kyoto Protocol, as they believe this to be the appropriate vehicle for an ambitious and effective climate regime. China and India, among other developing countries, are opposed to such an instrument. This instrument is likely, in their view, to reflect a bottom-up approach, erode the distinctions between developed and developing countries, and cherry-pick from the Kyoto Protocol, in the process losing many key elements of the Kyoto Protocol—in particular, the compliance system—and diluting other rules. This instrument is also likely to create more onerous obligations for developing countries and these may constrain their development prospects.<sup>130</sup>

The Cancun Agreements do not resolve the contested issue of legal form. An introductory paragraph to the LCA Outcome Decision notes that ‘nothing in this decision shall prejudice prospects for, or the content of, a legally binding outcome in the future.’<sup>131</sup> The AWG-LCA is mandated ‘to continue discussing legal options’ to reach an ‘agreed outcome’ based on the Bali Action Plan, 2007, the work done at COP-16, and Parties’ proposals.<sup>132</sup> The mandate of the AWG-LCA, set out in the Bali Action Plan, thus extended to cover consideration of the treaty proposals submitted by Parties, implies that the issue of legal form will be discussed in one rather than multiple negotiating forum from here on. There is no deadline, however, indicated in the Cancun Agreements for a resolution of this issue. The process feared by some developing countries—weakening of the Kyoto Protocol—even in the absence of a new legally binding instrument, made headway in Cancun, and is likely to gather steam ahead.

#### IV. PROCESS AND PROCEDURE

The Cancun climate negotiations stretched into the early hours of the day after its scheduled end. The events of the final day were less acrimonious than in Copenhagen, yet remarkable nonetheless. Notwithstanding the avowals to transparency and inclusiveness, the final days were marked, as ever, by closed-door Ministerial consultations on discrete pieces of text sown together by the Mexican Presidency. These pieces of text were drawn from non-papers that facilitators, both at the Ministerial and negotiator levels, had prepared, which in turn were based on Parties’ submissions and elements of the Copenhagen Accord. While these texts had not been negotiated in formal or informal sessions, they were familiar to Parties. The final deal was drafted to ensure that compromises, where struck, did not breach red lines for the key players. Areas ‘criss-crossed with red lines’<sup>133</sup> such as global goal and peaking year, on which effective compromises were not possible, were placed on the agenda for Durban or later.

<sup>130</sup> See (n 18).

<sup>131</sup> Introductory para 2, LCA Outcome Decision.

<sup>132</sup> Para 145, LCA Outcome Decision.

<sup>133</sup> Andreas Carlgren, Swedish Minister for Environment, facilitating the ‘global goal’ negotiations.



When Espinosa presented the Cancun Agreements to Parties in an informal plenary on the last day, she was treated to the first of many standing ovations. Climate negotiators, still reeling from the trauma of Copenhagen, and in search of a glimmer of hope, found it in Cancun. Bolivia asked but was not granted the floor at this informal plenary. The Cancun Agreements were presented a few hours later in formal meetings of the AWG-LCA and AWG-KP, from whence they were forwarded for adoption to the COP and CMP. In each of these formal meetings the Bolivian delegation, led by Ambassador Pablo Solón Romero, registered a lengthy, lucid and unequivocal objection to the decisions. Bolivia argued that the decisions needed to be discussed and negotiated, and that no opportunity had been afforded to do so. Bolivia also argued that the decisions were not sufficiently ambitious, they would lead to a voluntary regime for developed countries, and that taking note of documents that did not exist was tantamount to signing a 'blank cheque.'<sup>134</sup> For these and other reasons, Bolivia rejected the Cancun Agreements.<sup>135</sup> The presiding officers, however, overruled Bolivia, declared consensus, and adopted the Cancun Agreements, to thunderous applause.

The FCCC authorizes the COP to adopt, by consensus, rules of procedure for the conduct of its work.<sup>136</sup> In the absence of consensus on the rules of procedure relating to voting, decisions in the FCCC and Kyoto Protocol process, except where otherwise expressly provided,<sup>137</sup> are taken by consensus.<sup>138</sup> There is no established definition of consensus in the FCCC process. Consensus has come to be generally understood, through the practice and codified rules of other multilateral processes,<sup>139</sup> as the absence of express opposition.<sup>140</sup> It is this understanding that has guided the practice in the climate process. There are examples of presiding officers presuming consensus in the face of imminent opposition. It took such a well-judged presumption to reach agreement on the FCCC. The Chair of the Intergovernmental Negotiating Committee, Jean Ripert, gavelled the FCCC through with Member States of the Organization of Petroleum Exporting Countries (OPEC) and Malaysia requesting the floor. The President of the

<sup>134</sup> See On Demand Webcast, AWG-LCA 13, second meeting, (10 December 2010), webcasts of all official meetings held at Cancun are available at, [http://webcast.cc2010.mx/grid\\_en.html](http://webcast.cc2010.mx/grid_en.html).

<sup>135</sup> See also Submissions from Bolivia, 21 February 2011, available at, [http://unfccc.int/meetings/ad\\_hoc\\_working\\_groups/lca/items/4578.php](http://unfccc.int/meetings/ad_hoc_working_groups/lca/items/4578.php)

<sup>136</sup> Art 7(2)(k), FCCC.

<sup>137</sup> See eg art 15(3), FCCC and art 20(3), Kyoto Protocol.

<sup>138</sup> Parties have 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. In the absence of agreement, decisions are taken by consensus. See Draft Rules of Procedure of the Conference of the Parties and its Subsidiary Bodies in FCCC/CP/1996/2 (22 May 1996). Consensus has been identified as the preferred mode of decision-making in Articles 15(3), and 7(2)(k), FCCC, and arts 13(5), 20(3) and 21(4), Kyoto Protocol.

<sup>139</sup> See generally for the evolution of consensus-based decision-making Barry Buzan, 'Negotiating By Consensus' (1981) 75 AJIL 324; MJ Peterson, *The General Assembly in World Politics* (Allen & Unwin, London, 1986) 81–90; and, A Boyle and C Chinkin, *The Making of International Law* (OUP, Oxford, 2007) 157–160.

<sup>140</sup> See eg art 161(8)(e), United Nations Convention on the Law of the Sea, 10 December 1982, 1833 UNTS 397; para II(A)2, Rules of Procedure of the Organization for Security and Cooperation in Europe, 1 November 2006, MC.DOC/1/06; Footnote 1 to art 2.4, Dispute Settlement Rules: Understanding on Rules and Procedures Governing the Settlement of Disputes, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, reprinted in 33 ILM 1226 (1994); Art 11, Rules of Procedure of the Organization of the Black Sea Economic Cooperation, 22 October 2007. See also definition offered in Daniel Vignes, 'Will the Third Conference on the Law of the Sea Work According to Consensus Rules?' 69 AJIL 119, 119–222 (1975).

first Conference of Parties, Angela Merkel, gavelled the Berlin Mandate through with member states of OPEC waving their flags.<sup>141</sup> These are instances of imminent but not express opposition. The would-be objectors in these cases did not later challenge the adoption as unlawful. There have been two instances of express objections—at COP-2, Geneva, 1996, and at COP-15, Copenhagen, 2009. In these instances the documents in question—the Geneva Ministerial Declaration and the Copenhagen Accord—were ‘taken note of’ rather than adopted as decisions.<sup>142</sup> The Cancun Agreements represent the first set of decisions in the climate regime adopted in the face of an express objection from a State. It could be argued that the earlier understanding of consensus in this process has now been displaced or at least disturbed. Yet it is unclear what it has been replaced with—a rule of ‘quasi-consensus,’ ‘general agreement,’<sup>143</sup> ‘consensus minus one,’<sup>144</sup> or as one negotiator characterized it, ‘terror by applause’?<sup>145</sup>

Consensus is a political rather than a legal concept.<sup>146</sup> Consensus does not require full agreement, as consensus can be said to exist even when there are abstentions.<sup>147</sup> Consensus does not also translate into unanimity, as consensus, unlike unanimity, is arrived at without a vote, and can accommodate dissent, in so far as it is not express. However, consensus has, thus far, been identified by the absence of express objection. If this no longer holds, how else can consensus be identified? Espinosa justified the declaration of consensus on the ground that she could not disregard the vision, positions, and request of 193 States.<sup>148</sup> In her interpretation, consensus could be interpreted as ‘consensus minus one’ or ‘quasi consensus.’<sup>149</sup> The United States intervened to suggest that the practice followed in the FCCC process was one of decision-making by ‘general agreement’ rather than consensus.<sup>150</sup> In this interpretation, a general convergence of opinion, which could arguably accommodate more than one express objection, is the operative rule of decision-making. It is unclear however how ‘general agreement’ differs from the majority view. Colombia noted that ‘the acclamation with which this document was accepted’ demonstrates consensus.<sup>151</sup> Gabon agreed that a ‘standing ovation’ demonstrates the will of the international community.<sup>152</sup>

<sup>141</sup> I am grateful to Michael Zammit Cutajar for these examples.

<sup>142</sup> See Report of the Conference of the Parties on its Second Session, held at Geneva, from 8 to 19 July 1996, FCCC/CP/1996/15 (29 October 1996).<sup>143</sup> See (n 1).

<sup>144</sup> The rule of ‘consensus minus one’, thus far applied, is designed to exclude a party that is in violation of its obligations. See eg Prague Document on Further Development of Commission on Security and Cooperation in Europe (CSCE) Institutions and Structures, 2nd CSCE Council, Prague, 30–31 January 1992 (deciding that in cases of a State’s ‘clear, gross and uncorrected violation’ of CSCE commitments, decisions could be taken without the consent of the State concerned). A similar rule was applied in the Montreal Protocol process in relation to Russia’s non-compliance. See Report of the Seventh Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, Vienna, 5–7 December 1995, UNEP/OzL.Pro.7/12, paras 130–132. See J Werksman, ‘Compliance and Transition: Russia’s Non-Compliance Tests the Ozone Regime’ (1996) 56 *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* 750.

<sup>145</sup> In conversation, JM Mauskar, Indian delegation, 21 January 2011.

<sup>146</sup> LB Sohn, ‘United National Decision-Making: Confrontation or Consensus?’ (1974) 1 *Harv Int’l LJ* 438.<sup>147</sup> *ibid.*

<sup>148</sup> See On Demand Webcast, CMP-6, resumed 10th meeting (10 December 2010), available at, [http://webcast.cc2010.mx/grid\\_en.html](http://webcast.cc2010.mx/grid_en.html).

<sup>149</sup> The President is empowered to ‘announce’ decisions not interpret or take them, and she remains under the authority of the COP in the exercise of her functions. Rule 23, Draft Rules of procedure, as applied (n 138).<sup>150</sup> See (n 1).

<sup>151</sup> See (n 134).<sup>152</sup> *ibid.*

These interpretations identify the existence of consensus not by the absence of express objection but the presence of acclamation, or an unspecified decibel level of applause. Admittedly, presiding officers often use acclamation to gauge the mood in the room, to close debates,<sup>153</sup> and to adopt decisions. Indeed, COP/CMP officers are elected by acclamation. However it would be unfortunate if acclamation were used to overpower objections rather than signal consensus.

Colombia, Gabon and Espinosa, among others, noted that consensus does not deliver a veto power to every nation.<sup>154</sup> Many consider the exercise of a veto an abuse of the consensus rule. It is worth considering whether Bolivia's actions can be characterized as an attempt to exercise a veto. If yes, it would appear that Espinosa was correct in respectfully overruling it. If not, what protects Bolivia's actions from such a charge?

Consensus, in the conventional sense, is intended to serve a useful function. As an alternative to confrontation, it requires greater diplomacy, bargaining, and negotiation, and therefore ensures wider buy-in and commands greater moral authority.<sup>155</sup> At least some of these have been in shortly supply in the FCCC process. Parts of the Cancun Agreements were never discussed, let alone negotiated. The formal sessions met to adopt not negotiate the texts emerging from Ministerial consultations. The prevailing sentiment was that the FCCC process needed a face-saving deal, after the Copenhagen debacle, to legitimize its existence and secure its future. There was consensus in Cancun on this, not on the texts, which will, undoubtedly, be re-negotiated in times to come. The fact that negotiators at the Bangkok meetings of the AWG-LCA, that concluded on 8 April 2011, used the entire meeting just to arrive at an agenda of work for 2011, substantiates this view. Bolivia was seeking 'an opportunity to discuss and negotiate,' not to exercise a veto, which, in their view, is not a democratic device. Bolivia was 'not opposed to consensus emerging from a democratic discussion.'<sup>156</sup> The texts produced in Cancun did not emerge from a democratic discussion. Indeed, such democratic discussions in the fraught FCCC process have become anathema to deal making. Yet it is precisely such democratic decision-making that the consensus rule seeks to incentivize.

The adoption of the Cancun Agreements in the face of Bolivia's express objection will likely lead the FCCC process into unchartered procedural waters. A solitary express objection it appears can be overruled. This is problematic because, as Bolivia pointed out, the fate meted out to Bolivia in Cancun may be visited on another State. From this to selective application of rules to suit the majority, is a small step.<sup>157</sup> It is perhaps in recognition of this that Venezuela, which, unlike in Copenhagen, did not support Bolivia, nevertheless asked that Bolivia's concerns be accommodated in a 'legal way.'<sup>158</sup> Bolivia's objection has since been duly reflected in the report of the conference.<sup>159</sup> Should Venezuela have chosen to join Bolivia, could two express

<sup>153</sup> Presiding officers are authorized to close debates, Rule 23(2) Draft Rules of procedure, as applied (n 138).

<sup>155</sup> *ibid.*

<sup>156</sup> See (n 1).

<sup>154</sup> See (n 146).

<sup>157</sup> See (n 148).

<sup>158</sup> On Demand Webcast, AWG-KP-15, second meeting (10 December 2010), available at, [http://webcast.cc2010.mx/grid\\_en.html](http://webcast.cc2010.mx/grid_en.html).

<sup>159</sup> Report of the Conference of the Parties on its sixteenth session, Part I: Proceedings, FCCC/CP/2010/7 (15 March 2011) at 14.

objections be overruled and consensus declared? If consensus is interpreted as ‘general agreement’ or a function of applause, it presumably could.

The opening up of the definition and practice of consensus in the FCCC process in this fashion will function to marginalize States, not just from the process of decision-making in discrete instances, but from ownership of the process itself. Bolivia has no recourse barring perpetual objection or non-participation. Since COP decisions are not in a formal sense legally binding,<sup>160</sup> Bolivia could choose not to implement the Cancun Agreements. Yet the negotiations over the next few years will be conducted on the basis at least in part of these decisions. At Cancun, Bolivia threatened to ‘apply to all international bodies’ if an infringement of the consensus rule occurred.<sup>161</sup> But, this path is fraught with sufficient legal difficulties—establishing jurisdiction of a dispute settlement body,<sup>162</sup> identifying a respondent with international legal personality etc—to make such recourse an exercise in frustration. The open-textured interpretation of consensus applied in Cancun also has the potential to amplify power imbalances. It is inconceivable, for instance, that China would be overruled in the fashion that Bolivia was—however sustained the applause. The determining factor, then, it appears is the extent to which the objecting State is politically consequential to the effective implementation of the decision.

The opening up of the definition and practice of consensus may, on the other hand, create the conditions necessary to resolve procedural issues that have created a drag on the evolution of the climate regime. The pursuit of consensus has wrested a heavy price in terms of time, presidential dexterity, and substantive content (creating as it does a pull towards the lowest common denominator).<sup>163</sup> Contrary to its intended effect, in practice the search for consensus has also driven negotiations into informal settings, thereby diluting transparency and accountability.<sup>164</sup> In the absence of a voting procedure to resort to, strict adherence to the consensus rule can also deliver veto power to every nation. In this context it is worth enquiring if the character of the decisions (political or legal) determines the application (or not) of the consensus rule. Arguably decisions that provide political direction rather than substantive guidance do not attract the consensus rule.<sup>165</sup> In any case, since agreement on the rules of procedure, to be arrived at by consensus, is not on the horizon, arguably the evolution of the climate regime hinges on political judgments, however troubling, of the sort arrived at by Espinosa in Cancun.

Bolivia’s interventions on substance and procedure were irrefutable, but in Cancun, they were on the wrong side of history. It remains to be seen as these negotiations unfold if history will judge Bolivia as a pesky rabble-rouser, or the sole, if ineffectual, gatekeeper of integrity, equity and ambition in the climate negotiations.

<sup>160</sup> The enabling clause in the relevant treaty may authorize a COP decision to be binding, but in its absence formally COP decisions are not legally binding, see J Brunnée ‘COPing with Consent: Law-Making under Multilateral Environmental Agreements,’ (2002) 15 *LJIL* 1.

<sup>161</sup> *ibid.*

<sup>162</sup> Art 14(2), FCCC, 1992, permits states to accept the jurisdiction of the ICJ in relation to disputes. Few states have done so.

<sup>163</sup> See (n 146).

<sup>164</sup> See N Woods, ‘Good Governance in International Organizations’ (1999) 5 *Global Governance* 1, for examples in other regimes.

<sup>165</sup> I am grateful to Geir Ulfstein for this point.

## V. CONCLUSION

Given the many political constraints the international climate negotiations face, the Cancun Agreements represent the best of what could realistically be delivered. While the mitigation text is inadequate and perplexing, it merely mirrors the permanent flux the international community is in due to the reluctance of the United States to accept constraints on its GHG-intensive lifestyle, and of large developing countries to entertain limits to their development prospects. In other areas, the Cancun Agreements were instrumental in integrating the compromises reflected in the Copenhagen Accord into the FCCC regime, and in the process ironing out the creases that had crept in during the Heads of State level negotiating exercise. The Cancun Agreements like the Copenhagen Accord leave the fundamental cleavages between Parties—on the future of the Kyoto Protocol, differentiation and legal form and architecture—unresolved. Nevertheless they provide a clear indication of the path the future climate regime is likely to take. This path is likely to forsake the Kyoto Protocol, its ‘targets and timetables’ approach, its unique form of differentiation and its compliance system. The future climate regime is likely instead to be structured around symmetrical obligations relating to self-selected mitigation targets and actions and a robust MRV system. Only time will tell if this path will achieve the stated goal of limiting temperature increase to 2 °C. But in the meantime, the climate negotiations, and the FCCC process were given a new lease of life at Cancun.

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