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A Legal Form Proposal for Durban and Beyond

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WHY LEGALLY BINDING REGIMES ARE IMPORTANT

Legally binding regimes represent the highest level of commitment by governments. They provide the strongest assurances of global cooperation and the greatest certainty to private actors. They can also shift countries' perceived interests and strengthen their actions. And by anchoring interactions in stronger normative frameworks, they provide more effective scientific benchmarks for action.

THE NEED FOR A STEP-BY-STEP PROCESS

A reasonably large and diverse group of countries supports the negotiation of a legally binding agreement to cover all major emitters. However, there is currently a lack of understanding among countries regarding the pathway to get there, and the exact meaning of legally binding: who will be bound, and to what? Therefore, a step-by-step process is necessary to bring countries' expectations closer together, while affirming up front the intention to negotiate a legally binding agreement.

A TRANSITIONAL COMMITMENT PERIOD

This process should be composed of a transitional commitment period of the Kyoto Protocol, and a precise and ambitious mandate to negotiate a new, comprehensive legally binding agreement. The Protocol can play an important role to signal that developed countries remain committed to a rules and equity-based agreement; it is also important to preserve the best institutional aspects of the Kyoto Protocol. The exact legal nature and content of the transitional commitment period will be related to the precision and ambition of the mandate for a new negotiation process.

DIFFERENTIATED COMMITMENTS AND ACTIONS

Regarding the future agreement, there are a number of legal avenues to capture a spectrum of commitments and actions from developed and developing countries respectively. These could include mandatory commitments for developed countries; mandatory nationally appropriate policy packages towards their emissions objectives for developing countries; differentiated mechanisms of implementation, evolving over time; and long-term low-carbon development strategies for developed countries to create a stronger international normative context for their commitments.

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INTRODUCTION AND CONTEXT

The issue of the legal form of a future climate regime will be a key topic at the 17th Conference of the Parties (COP) to the United Nations Framework Convention on Climate Change (UNFCCC) in Durban, 2011. The approaching end of the first commitment period of the Kyoto Protocol will likely generate significant political pressure to provide some clarity on the issue of legal form in 2011 and beyond, which has bedeviled the talks at least since Bali, 2007.

It is clear that ambitious climate change mitigation will remain a collective action challenge for a long time to come. That is to say, any national benefits to climate action will only get us so far. Indeed, potential national benefits are strongly predicated on the level of international action. For example, significant global commitment to climate policy would first be necessary to sustain a progressive change in global markets and relative prices, which could then drive further action.[1]

Moreover, as regulation becomes more stringent in the future, countries will need assurances that others are likewise committed. Legally binding regimes represent the highest level of commitment by governments and provide the greatest certainty to private actors. By providing the strongest assurances of global cooperation, and of gradually changing markets, legally binding regimes can shift countries' perceived interests and strengthen their actions. By anchoring interactions in stronger normative frameworks, binding regimes provide more effective scientific benchmarks for action. Current actions are clearly insufficient to achieve the two degrees objective.

Thus a comprehensive but dynamic legally binding regime will be necessary for addressing climate change. Yet there is currently a lack of understanding on: i) how to get there; ii) what legally binding means in practice. This paper addresses both questions.

1. COUNTRY POSITIONS

A central obstacle to a legally binding regime is implementation of the principle of common but differentiated responsibilities and respective capabilities (CBDR&C), as expressed in the legal nature and substance of what countries undertake.

The **European Union** has confirmed its openness to consider a second commitment period of the Kyoto Protocol as part of a transition to a wider legally binding framework, provided that several conditions are met. This pertains in particular to agreement on a roadmap and timeline for a legally binding agreement covering all major emitters. To this end, the EU expresses its commitment to CBDR&C, but suggests implementing it in an updated and dynamic manner. Several internal issues complicate the EU's positioning, in particular the likely difficulty of ratifying a "unilateral" commitment period and the perceived political risk of calls to reopen the 2008 Climate and Energy Package in a contested ratification process.

The **USA** has expressed its openness to enter into a legally binding agreement, provided that two highly demanding conditions are met. Firstly, the agreement should be symmetrically binding for all major emitters. Secondly, it should update the black and white distinction between Annex I and non-Annex II countries as enshrined in the Convention, through either explicit or implicit procedures of graduation. Although unclear, the

1. Cycles of unilateral action, technology change and multilateral action can in theory change the incentives to participate in global climate mitigation. However, the element of multilateral action is essential. Cf. e.g Pittel, K. and D. Rübbelke, "Transitions in the negotiations on climate change: from prisoner's dilemma to chicken and beyond", *International Environmental Agreements*, 2010.

concept of "legal symmetry" likely relates to three central elements: i) all commitments should be captured under an agreement with the same legal form; ii) all commitments should be mandatory and unconditional; iii) all commitments should entail the same consequences, if any, for non-implementation. These conditions are made in view of the enormous hurdles to Senate ratification or even domestic application, in the current political climate. However, they set the bar so high (or low, in point of view of equity from some perspectives) that they form an almost impossible starting point for negotiation.

The **major developing countries** express a diversity of positions regarding entry into a legally binding agreement. Some, like Indonesia, express the willingness to enter into such an agreement. Others, such as China, are more reticent, expressing the need to understand the content before agreeing on the form of an agreement, **i.e. how it implements the principle of CBDR&C.** Others, such as India, adopt a different position, and are soundly opposed to new, differentiated international obligations for developing countries. Fundamentally, developing countries fear further renegotiation of the allocation of responsibilities as perceived to be enshrined in the Convention and its subsequent body of law. This puts their position clearly at a head with that of the USA.

Thus the gulf between positions on legal and substantive symmetry or differentiation remains a central hurdle towards a legally binding agreement. The key question is therefore whether countries can agree to a precise and ambitious negotiating roadmap by 2012 at the latest, which satisfies this very small bargaining space:

- Sufficient assurance for the EU and more or less willing Annex B parties that an agreement will be achieved and merge with the Kyoto track (by 2020 at the latest), i.e. that they will not be locked into a second commitment period and uselessly expend their leverage over the other negotiating track.
- Sufficient assurance for the USA that the agreement will include major emitters in a manner that gives some chance of domestic implementation in the USA, let alone ratification.
- Sufficient assurance for developing countries that the agreement would reflect the principle of common but differentiated responsibilities and respective capabilities (CBDR&C) in an acceptable manner.

In particular, as noted, the key deadlock among countries is how to express the principle of CBDR&C, as enshrined in the eventual substance and legal nature of commitments and actions. This is why a step-by-step approach is necessary to bring Parties' expectations closer. At the same time, this needs to be balanced with sufficient *ex ante* specificity in the eventual mandate for negotiating a new legal agreement. **The Bali mandate process has shown that diplomatic ambiguity papering over fundamental differences regarding the actual purpose of the talks is not conducive to progress.**

2. WHAT ROLE FOR KYOTO?

In several ways, Kyoto represents a high point of global environmental multilateralism as it provides for a multilateral and rules-based system as a means to ensure comparability and integrity of actions. A common accounting framework; international carbon budgets for each Annex B country (AAUs) and the inclusion of a punitive compliance regime show the depth of multilateral cooperation that Kyoto embodied. The climate regime today, however, must answer to a very different situation. This concerns especially the diversity of national circumstances to be incorporated (how to capture very diverse commitments and actions meaningfully and transparently within a legally binding framework?) and the speed and seriousness with which the science is unfolding (how to create a dynamic yet credible process of formulating and strengthening commitments and actions over time?).

Therefore Kyoto's **strengths and flaws** are increasingly evident with hindsight. More than for any other environmental problem, **participation** is crucial to climate change cooperation. A sufficiently large group of major emitters – much larger than Annex B – is required to supply the global public good of a safe climate. In game theoretic terms, Annex B is much smaller than the "minimum viable coalition" necessary to tackle the problem; hence an approach based solely on Kyoto is doomed to failure. As argued above, the perception of national benefits to climate action are strongly predicated on the level of international cooperation, which Kyoto has failed to deliver.

Secondly, **dynamic flexibility in the face of new information** is vital in view of rapidly developing scientific understanding and changing international circumstances. There is a potential tradeoff between the rigor and transparency of the institutional and legal machinery of cooperation (i.e. the framework for capturing, monitoring and updating commitments and actions) and its dynamism and flexibility. To address the dialectic of dynamic flexibility and credibility, a flexible common accounting framework would need to be

combined with a dynamic approach to capturing and updating country commitments and actions.

More fundamentally, despite proposals for a more dynamic approach to updating Annex B, Kyoto eventually enshrined a black and white assignment of responsibilities increasingly detached from the realities of the world.[2] This has created a path-dependency, which significantly contributes to the "arrested development" of the climate regime, i.e. its inability to evolve dynamically.[3] An approach to continue with Kyoto and include developing countries within a new Kyoto annex would likely be politically predicated on significantly amending this allocation of responsibilities, which returns us to the central dilemma outlined above.[4]

Thirdly, the depth of cooperation necessary to address the climate problem will require, in the longer-term, evolving effective **implementation mechanisms**. Kyoto's implementation mechanism contains very effective elements, in particular concerning compliance with rigorous reporting requirements.[5] It has so far been less effective, however, at formally identifying and addressing *ex ante* concerns of implementation with regard to emissions targets.[6] Regarding emissions targets, Kyoto's *ex post* punitive compliance mechanism is unusual in international law for its apparent stringency; in practice, it is poorly designed and creates perverse incentives for non-participation, i.e. it doesn't raise the (economic) cost of opting out in a case of non-compliance.[7] **So Kyoto's implementation mechanisms represent a success story in some respects, which should be retained and built on further**.

What role can Kyoto play in breaking the differentiation/symmetry deadlock outlined above? A second commitment period of Kyoto with limited participation would have little to zero incremental environmental benefits. It may even be detrimental in terms of locking in lower ambition levels; perpetuating a dysfunctional allocation of responsibilities between states, and releasing political pressure from the Convention track. On the other hand, Kyoto can play an important role as a signaling device, demonstrating that developed countries remain strongly committed to a rules and equity-based multilateral agreement. Kyoto is also a sophisticated rulebook on which an improved rules-based framework could be built. **In sum: a second commitment period of Kyoto is politically and institutionally important; *environmentally* it can only bring added value if used to leverage progress towards a more comprehensive and ambitious global regime.**

3. STEP BY STEP TOWARDS A LEGALLY BINDING AGREEMENT

This section identifies the kind of roadmap that could be developed towards a legally binding regime; more definition is given in the section that follows on the understanding of legally binding and room for symmetry/differentiation within a legally binding agreement. The steps and timing are indicative, and stakeholders will certainly have differing views on when and in what sequence steps should and could be taken. **What seems most important is not the roadmap's timing but its quality**, i.e. the balance with which it navigates the deadlock described above while still giving clarity towards the ultimate goal. **Another Bali roadmap towards an unknown destination should be avoided.**

3.1. Step 1: Agreeing to the Kyoto Protocol and a new negotiation mandate

Step 1. Option 1: Ideally, a strong transitional commitment period of the Kyoto Protocol and a precise and ambitious roadmap would be achieved already in Durban. To avoid another Bali, the

2. See e.g. Depledge, J., "The road less travelled: difficulties in moving between annexes in the climate change regime", *Climate Policy*, 9, 2009.
3. Young, O., *Institutional Dynamics: Emergent Patterns in International Environmental Governance*, Cambridge, Mass: MIT Press, 2010.
4. This seems to be the central argument against building directly on the Kyoto Protocol, i.e. by including the developing countries in a new annex to the agreement.
5. Doelle, M., "Early experience with the Kyoto compliance system: Possible lessons for MEA compliance system design", *Climate Law,* 1, 2010; Oberthür, S. and R. Lefeber, "Holding countries to account: The Kyoto Protocol's compliance system revisited after four years of experience", *Climate Law,* 1, 2010.
6. So far the facilitative branch of the Kyoto compliance committee has not "proceeded to the merits" on any question of implementation with regard to emissions targets. Parties have been reluctant to use the party-to-party trigger, with the sole exception of the South African submission on behalf of the G77 and China regarding failure to comply with Article 3.2 of Kyoto regarding "demonstrable progress" towards Kyoto targets. Although ostensibly mandated to do so under article 8(3) of the Kyoto Protocol and IV.1 of Decision 27/CMP.1, independent expert review teams have yet to trigger questions of implementation with regards to emissions targets under Kyoto in the current commitment period.
7. See the discussion in Barrett, S., *Environment and Statecraft: The Strategy of Environmental Treaty-Making*, Cambridge: CUP, 2003, ff. 383.

mandate should, at least, contain i) the date for the adoption of the agreement; ii) the legal nature of the outcome, while leaving its exact form open; iii) flesh out the principle of CBDR&C by specifying which responsibilities are common and which are differentiated, to the extent possible. The table below displays the actions in both tracks that would be taken under this scenario. The section below goes into more detail regarding the eventual legal nature of a transitional second commitment period.

Kyoto	Convention
adoption of a transitional commitment period for all or some Annex B parties agreement and application of Kyoto rules, pending eventual ratification alongside the adoption of a new global agreement.	adoption of a COP decision outlining a comprehensive, time-bound mandate towards a legally binding regime. progress in implementing the transwparency regime of the Cancun agreements

Step 1. Option 2: However, for several reasons it may be necessary to break step 1 into several stages, with final adoption of a transitional commitment period and a new negotiating mandate achieved at COP18 in 2012. Firstly, some Annex B countries may be unwilling to lock the current level of ambition. Secondly, the discussions under the informal legal group are not particularly advanced and crafting a mandate that satisfies the small bargaining space outlined above could take time. Thirdly, a two-step process towards a mandate and amendment could fit better with the political calendar: it uses the 2012 deadline imposed by Kyoto and it delays the decision on the direction of the regime until after the US elections and Chinese leadership transition. Potentially, it allows issue linkage with the results of likely discussions in 2012 on long-term finance.

In this scenario, Durban would achieve interim progress towards step 1 option 1 above, which would then ultimately be achieved at COP18. This could take the form of a CMP decision expressing the intention to adopt a transitional commitment period by COP18 in 2012, with all or some Annex B parties agreeing to inscribe targets at that date. In the LCA track, it could take the form of a COP decision continuing and clarifying the remit of the informal legal group established under paragraph 145 of the Cancun agreements. **At the least, this should set a definite purpose and end date to the discussion on legal options, i.e. COP18 should take appropriate action based on the discussions of this group.**

The table below displays the actions that could be taken by the CMP and COP as interim steps towards the adoption of a transitional commitment period and a mandate on a new negotiating process by COP18.

Kyoto	Convention
CMP decision expressing the intention to adopt a transitional second commitment period by COP18 at the latest. All/some Annex B parties agree to inscribe targets in the Amendment at that date, linked to the adoption of a mandate in the Convention track.	COP decision continuing and clarifying the remit of the informal legal group established under paragraph 145 of the Cancun agreements. Progress in implementing the transparency regime of the Cancun agreements.

What form would a Kyoto second commitment period take and why is it important?

Understanding the nature and implications of the options for a second commitment period is important for the eventual willingness of developed and developing countries to accept any of them. A ratified second commitment period may be difficult to achieve directly, in view of the reluctance of Annex B countries to expend their leverage over the Convention track and likely domestic difficulties with ratification. However, *ex ante* rejection of a ratifiable second commitment period would likely reduce any political benefits of this option, i.e. a strong signaling by willing developed countries that they are committed to a binding rules and equity based agreement. A hybrid approach may be consistent with the reciprocal, step-by-step process advocated in this paper.

Procedurally, a political second commitment period could take the form of a CMP decision. This would be non-binding, as it would not be adopted according to the procedures of Article 20 of the Protocol. This CMP decision could spell out details on QELROs, the accounting rules applied, and the fate of the Kyoto mechanisms. For example, it could mandate continued application of Kyoto articles 5, 7 and 8, including with respect to new QELROs adopted, and continued expert review of inventories. The exact legal status of questions of implementation raised thereby may be ambiguous, as a political second commitment period would not be legally binding.

A legal second commitment period would take the form of an amendment to Annex B, and may include transitional avenues if Annex B parties are reluctant or unable to directly ratify it. In this instance, a second commitment period could be negotiated in the form of a ratifiable amendment to Annex B, but applied provisionally via a CMP decision to this effect, for example pending the adoption of a new global agreement. Provisional application has been used before under multilateral

agreements, and is generally accepted as bringing the treaty or treaty amendment into force provisionally.[8] However, provisional application could run into difficulties with domestic legislation or legal systems. Moreover, formal provisional application, as it involves sovereign consent and entry into force of the agreement provisionally, implies a much greater level of legal commitment than a political commitment period.

Ultimately, policy makers would have to decide the balance between the precision and ambition of the mandate and the legal nature and contents of the second commitment period.

3.2. Step 2: Adoption of the new agreement and ratification of the Kyoto second commitment period

The toolbox for designing a new agreement to negotiate the symmetry vs. differentiation divide is discussed further below. This section briefly addresses the timing of the pathway there.

A key issue that would probably need some clarification *ex ante* concerns the timing for the adoption (2015 or 2017?) and ultimate entry into force of the new agreement (2017/18 or 2020?), and therefore the sequencing with the transitional commitment period of Kyoto. Several conflicting considerations need to be set out in the open. The later (e.g. 2020) the prospective entry into force of a new agreement, the more likely this would be acceptable *ex ante* to major developing countries and the USA. However, proponents of environmental integrity would likely prefer a short transitional commitment period and an earlier entry into force of a new agreement (e.g. 2017/18). The very short window of time left to set systems of production and consumption on a path consistent with the two degrees objective (6 years or so according to the IEA) certainly calls for much more stringent action. However, it is perhaps moot what framework could leverage this in the short term.[9]

The introduction argued that a legally binding framework is necessary to give certainty of cooperation and change perceptions of long-term national interests, allowing countries to go further than they would otherwise. However, the key issue seems to be: by when could the USA and developing countries be ready to adopt commitments and actions that it would be meaningful to express within a legally-binding framework? Legally binding commitments or actions do not deliver much added value if they are imprecise or conditional; internationalize baseline domestic actions; or are not backed by any credible domestic pathway to achieve them. The creation of a durable, dynamic, science-based and long-term framework is potentially more important than this or that date of entry into force, *provided that sufficient transparency and assurances of cooperation can be provided to accelerate domestic actions in the meantime*. In this regard, consideration should be given as to how the 2013/2015 review could be used to add further substance and legal force to pledges.

Kyoto	Convention
Eventual ratification of the second commitment period, related to the length of commitment period and entry into force of the Convention agreement	Adoption of legally-binding agreement, entry into force linked to the end of the transitional commitment period.

4. DESIGN ELEMENTS FOR THE LONG-TERM REGIME

For our purpose, a legally binding instrument can be defined as an agreement negotiated purposefully under a formal source with a recognized law-making effect. The COP of the UNFCCC is not granted a law making effect by the Convention, therefore its decisions are non-legally binding, although they may indeed have much normative force and procedural effect, both for states and non-state actors.

Within a legally binding framework there is room for a spectrum of commitments and actions, and implementation mechanisms. In particular, these relate to the:

- Stringency of commitments, i.e. the extent to which they demand a deviation from business as usual.
- Strength of commitments, i.e. the extent to which they are backed by implementation mechanisms raising the (political or economic) cost of non-implementation.

Stringency relates more to the political economy of negotiation, and the normative and scientific principles of the regime. We focus here more on legal differentiation, which could be pursued with respect to the following:

Mandatory quality: commitments can be expressed in mandatory and non-conditional or hortatory and conditional terms. Under a future agreement, developed country commitments and certain actions of developing countries would

8. See the discussion in FCCC/KP/AWG/2010/10

9. Raustiala, K., "Form and Substance in International Agreements", *The American Journal of International Law*, 99, 2005.

likely need to have a mandatory quality under the international instrument – at least, this seems to be a red line for the US, as well as for the EU and some other countries like AOSIS. The choice of substance could be voluntary,[10] but once inscribed, implementation would take on a **mandatory quality.**

Precision of commitments: precise commitments make non-implementation more apparent. Economy-wide commitments by developed countries are more precise than developing county actions relative to BAU emissions or economic output.[11] This makes expressing the latter meaningfully within a legally binding instrument difficult – how to account for unforeseen appreciation in the Chinese Yuan, for example? Differentiation could take the form of precise, economy-wide commitments by developed countries, and less precise packages of actions by developing countries, including overarching emissions objectives and more precisely specified underlying policies. Developed countries would be bound to the **output of actions**, i.e. the emissions results, whereas developing countries would be bound to the **input of actions**, i.e. the implementation of policies identified *ex ante* towards their actual emissions objective. For this system of differentiation, an effective transparency regime would be necessary to ensure that countries meet commitments and implement actions; experience in multilateral policy monitoring has been gained under the Trade Policy Review Mechanism of the GATT/WTO, for example.

Implementation mechanisms: mechanisms to monitor and facilitate the achievement of commitments and the implementation of actions could occupy a differentiated spectrum. Indeed, there is already evidence of such a system emerging within the differentiated system of IAR and ICA agreed in Cancun.[12] At this stage of cooperation, punitive enforcement mechanisms could deter participation. In any case, these are extremely difficult to design and implement effectively in the case of climate change.[13] However, the post 2012 regime should contain provisions to distinguish commitments from actions and, accordingly, foresee appropriate consequences. Developed countries' commitments should be subject to an implementation regime that would build upon the Kyoto provisions and implementing decisions. Consequences should rather be of a **facilitative nature** (appropriate assistance, cautions and requirements to adopt corrective action plans) in the course of the commitment period, and should be independently triggered by expert review teams.

However, in view of the depth of cooperation eventually required to address climate change, there will likely be a role in the longer-term for increasingly stringent mechanisms in an effective regime in the future.[14] The important thing therefore would be that transparency and implementation mechanisms should contribute to differentiation and participation, while **evolving further** over time.

A long-term context for commitments. A long-term normative context in which short-term commitments are framed can increase their strength. Framing short-term commitments for developed countries in the context of **non-binding**, **long-term low-carbon development strategies** would provide science-based benchmarks for, and greater information around, their commitments, and create a normative benchmark for continued interactions between countries. Information is crucial to strengthen assurances of action and gradually shift the perceived interests of other countries, as well as to create internationalized normative frameworks to shape the actions of future governments. By providing science-based benchmarks and greater strength to commitments, such low-carbon development strategies could form an important aspect of a differentiated but universal legally-binding regime.

CONCLUSIONS

The international talks are clearly at a very difficult stage. The US's room for maneuver is restricted by domestic circumstances; the EU is caught in a

10. as indeed it arguably always is under international environmental law. The power of the Montreal COP to update binding control measures by two/thirds majority being a notable exception. See Montreal Protocol, §2.9c and d

11. Although indeed within economy wide commitments there is impressive scope for flexibilities and creative accounting. The Kyoto experience of Article 3.7, surplus assigned amount units and vagaries of additionality within the CDM is a case in point.

12. International Assessment and Review of developed country commitments and International Consultation and Analysis for developing country actions.

13. See note 7.

14. Downs for examples shows that increasing depth of cooperation in international environmental agreements is correlated with increasing stringency of punitive mechanisms. See Downs, G., "Enforcement and the evolution of cooperation", Michigan Journal of International Law, 19, 1998.

conflagration of debt and existential angst, and developing countries remain reluctant to adopt legal commitments that would be perceived to unacceptably redefine the principle of CBDR&C. The public is sick of watching an interminable process that produces no outwardly comprehensible progress.

This paper has argued that there are three key ingredients for moving towards a legally binding agreement over time:

- A shared understanding of the timeline and direction of travel towards a legally binding agreement, and its interaction with the Kyoto Protocol, achieved by COP18 at the latest.
- A step-by-step, reciprocal process in both tracks to break down the achievement of a second commitment period and a comprehensive legally binding agreement into manageable steps. This could include a transitional commitment period, eventually applied provisionally, and a clear yet sufficiently flexible mandate for a new negotiation process.
- A better understanding of the legal tools to bridge the symmetry vs. differentiation divide.

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