

Alternative Legal Outcomes

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Introduction

This paper considers, at a very high level, the possible legal outcomes that might eventually arise out of the AWG-LCA and AWG-KP tracks and some of the legal and technical issues these outcomes will cause.

Although there may be alternatives, this paper focuses on the following five potential outcomes:

- Single new protocol under the UNFCCC (the “Convention”);
- Expanded Kyoto Protocol, covering obligations and commitments of all parties;
- Two protocols – the Kyoto Protocol and a new protocol under the Convention;
- Extended Kyoto Protocol and COP decisions under the LCA track; and
- Building on the Copenhagen Accord.

The form of the outcome is important as it has implications for the existence of the current mechanisms and institutions established under the Convention and the Kyoto Protocol. Additionally, the ‘legal form’ of the outcome of the LCA track has become a controversial issue in the negotiations since many countries do not want to be bound to its provisions under international law

This paper also considers the mandates that need to come out of Cancun to achieve these long term outcomes.

Annex 1 to this paper sets out a summary of the potential ‘legal form outcomes’, the mandates required in Cancun to achieve these and other necessary steps to ensure issues such as adaptation, flexible mechanisms, MRV and compliance regimes form part of any eventual outcome.

Single new protocol under the Convention (coming out of the LCA track)

Description

Under this outcome, the Kyoto Protocol (KP) would be terminated after the end of the first commitment period with all relevant KP provisions (e.g. flexible mechanisms, adaptation, MRV, compliance) being merged into the ad-hoc working group for long term co-operative action (the LCA track). The ad-hoc working group for further commitments for Annex I Parties (the KP track) would come to an end at any time prior to the termination of the KP. Elements of negotiations in the KP track would be folded into the LCA track.

Negotiations would continue under the LCA track to build on current progress with a view to turning it into a formal (legally binding) protocol under the Convention.

In relation to the flexible mechanisms, the Adaptation Fund, MRV and consequences of non-compliance, the appropriate language from the Kyoto Protocol would need to be inserted into LCA text and the related CMP decisions passed as COP decisions once the new single protocol comes into force. This would maintain existing institutions and mechanisms. The negotiations in respect of the development of these existing institutions could be merged into the LCA track and this could provide the opportunity to continue to refine these institutions and mechanisms.

Alternatively, if it is believed that the existing institutions and mechanisms are not suitable or need to be substantially remodelled, the mandate of the LCA track could be extended to create new protocol language and/or COP decisions so that these institutions and mechanisms would be created from scratch.

If the single protocol is intended to cover all Parties, consideration will also need to be given as to whether a graduation mechanism should be included (whether in the single protocol or in the Convention itself) so that parties can move in and out of Annex I according to objective criteria. If this is desirable, then further thought will need to be given to how this should work and comparisons with other international treaties may be helpful in this regard.

Cancun mandate required for the above:

1. **COP decision to extend mandate of AWG-LCA** to give further time for consideration and **expand mandate** to cover consideration of inclusion of relevant institutions and mechanisms from the Kyoto Protocol with a view to turning agreement into the sole legally binding protocol under the Convention by a specified date.
2. **CMP decision to terminate AWG-KP** either:
 - a. Immediately; or
 - b. Once all relevant text has been merged into the LCA text.
3. **CMP decision to:**
 - a. **Terminate the Kyoto Protocol** at end of first commitment period; or
 - b. **Explore ways to extend first commitment period** until the new protocol comes into force.

Kyoto Protocol as sole instrument

Description

Under this outcome, the LCA track would be terminated and the Kyoto Protocol would be the sole legal instrument under the Convention. It would incorporate all relevant provisions of the LCA text and create rights and obligations for all Parties that choose to accede to it. A second commitment period for Annex I Parties would be agreed together with any other amendments currently being discussed in the KP track.

Since the relevant adaptation, flexible mechanisms, MRV and enforcement institutions and mechanisms already exist under the Kyoto Protocol, there is no legal hurdle to overcome first before

all Parties which are, or become, parties to the Kyoto Protocol, can access the flexible mechanisms or apply the existing MRV or enforcement mechanisms. Naturally, these would have to be expanded to accommodate the MRV and enforcement needs arising out of the LCA track.

In respect of adaptation, amongst other things, a certain degree of rationalisation would need to occur to avoid duplication of purpose and implementation, but this is not legally difficult to overcome. The Kyoto Protocol would need to be amended (practically, this would happen at the same time as all other necessary amendments arising out of the present KP track) to accommodate the new items (e.g. NAMAs, enhanced action on adaptation, technology transfer, REDD, finance etc.) being brought over from the LCA track and the CMP given the authority to pass decisions relating to the implementation of those issues.

Legally, this is probably the easiest outcome to accommodate, though it is accepted that there is likely to be significant political difficulty in getting all parties to accede to the Kyoto Protocol.

As with the previous legal form outcome, the Parties may also want to consider including a graduation mechanism (whether in the Convention or the Kyoto Protocol) for countries to move between Annex I and non-Annex I status in the Convention such that they assume KP Annex B obligations.

Cancun mandate required for the above:

1. COP decision to:

- a. **terminate mandate of AWG-LCA** at the end of COP16 in Cancun and merge into the AWG-KP; or
- b. **extend mandate of AWG-LCA** until a certain date to progress draft COP decisions until it is ready to be merged into an amended Kyoto Protocol;
- c. **mandate the AWG-LCA to redraft LCA text** as a form of amendments to the Kyoto Protocols and potential COP decisions, as appropriate.

2. CMP decision to:

- a. **extend mandate of AWG-KP** with a view to agreeing a second commitment period to be put in place by the end of the current one; or
- b. **explore ways of extending first commitment period** until such a time as the second commitment period has been agreed and is ready to come into force.

3. CMP decision to expand mandate of AWG-KP to incorporate provisions of the LCA text and **investigate** the best way to unite the two AWGs under the AWG-KP.

Two protocols (Kyoto Protocol and new protocol coming out of the LCA track)

Description

Under this outcome, the LCA text would be turned into a new legally binding protocol and a legally-binding second commitment for the Kyoto Protocol would be agreed.

Negotiations would need to continue under the LCA track to build on current progress with a view to turning it into a formal protocol under the Convention. Negotiations would also need to continue under the KP track to make any amendments as necessary to refine existing KP institutions and mechanisms and to agree a second commitment period.

Where there are two separate protocols, there are likely to be areas where they cover the same issues (e.g. adaptation, MRV, enforcement and flexible mechanisms). A decision will need to be taken as to how this duplication should be handled. Either:

1. The new protocol could establish and operate new institutions and mechanisms which are the same as those under the KP. In relation to MRV, enforcement, flexible mechanisms and adaptation, this creates unnecessary duplication and wastage. In relation to the flexible mechanisms and adaptation, in particular, this will also cause confusion. Parties who are parties to both protocols would need clear guidance from the COP or the respective CMPs as whether CDM projects should fall under the flexible mechanisms under the new convention to assist developing countries implement NAMAs or whether they should fall under the Kyoto Protocol to assist developed countries achieve their emissions reductions. For adaptation funding, Parties would need guidance as to whether contributions made would be counted towards one or the other protocol. Most importantly, double counting must be avoided to ensure emissions reductions or funding under one protocol does not also count separately under the other; or
2. The KP institutions, mechanisms and rules could be made common to both protocols so that there is minimal duplication and wastage. Under this outcome, the CMPs to each protocol could delegate to the COP (or alternative UNFCCC body) the authority over these issues. Existing CMP decisions, the Kyoto Protocol and possibly even the Convention may need to be amended (there is no way to know what exactly will require amendment until the principle is agreed and a decision is taken over which institutions and mechanisms should be made common to both protocols) and this option would require a more complete legal analysis to be undertaken. In particular, there may be issues over whether non-Kyoto Parties can take decisions in the COP (which they would ordinarily be able to do) when the outcome of that decision directly affects the operation of the KP: under article 13(2) there is a question about whether such an arrangement is permissible; or
3. The new protocol could adopt its own rules (but use existing Convention and Kyoto institutions and mechanisms) in relation to adaptation, MRV, flexible mechanisms and enforcement. While this is relatively easy to achieve (legally rather than politically), different sets of rules under the new protocol and the Kyoto Protocol could cause confusion and significant problems and obstacles. For example if MRV of finance was different under the two protocols, parties may channel less money through the protocol for which the MRV provisions are weaker.

Each of the options above could be applied to MRV, adaptation, flexible mechanisms and enforcement separately. In each case, it would be important to recognise the purpose of the obligations laid out in the relevant treaty. In relation to the flexible mechanisms, for example, Parties may consider it necessary to adopt common rules given the sophistication of the existing institutions and desire to not lose the knowledge base already built up. On the other hand, given the drivers behind the LCA track and the need for developing countries to implement NAMAs, the Parties may consider that a less strict MRV and enforcement mechanism makes sense for the new protocol, at least to start with.

As with a single protocol, thought will need to be given to how and when, if at all, Parties may graduate from obligations under one protocol to the other.

Cancun mandate required for the above:

1. **COP decision to extend mandate of AWG-LCA** until a certain date with a view to eventually turning it into a formal proposal for a new protocol to the Convention.
2. **CMP decision to:**
 - a. **extend mandate of AWG-KP** with a view to agreeing a second commitment period to be put in place by the end of the current one; or
 - b. **explore ways of extending first commitment period** until such a time as the second commitment period has been agreed and is ready to come into force.
3. **COP and CMP decision to explore issue of duplication** across the two protocols.

Kyoto Protocol and COP decisions under the LCA decisions

Description

Under this outcome, the outcome of the LCA track would be a series of non-legally binding COP decisions either in Cancun or at a later COP. The outcome of the KP track would be an agreement on a legally binding second commitment period and any necessary amendments to the Kyoto Protocol or an extension of the current mandate to achieve such an outcome by a certain time.

As with the two protocol outcome, there are likely to be areas of overlap between the Kyoto Protocol and the COP decisions coming out of the LCA track, mainly in relation to MRV, market mechanisms and adaptation. Although enforcement and consequences of non-compliance is a common issue to both tracks, since the LCA outcome would be non-legally binding, there is limited scope for putting in place an effective enforcement mechanism in the LCA track.

In relation to the other areas of overlap, similar considerations to those set out in the two protocol outcome apply. Particularly in relation to MRV, the Parties could agree to replicate Kyoto MRV provisions in the LCA track, create different MRV rules or use common rules. In this latter instance, the CMP would have to first delegate its authority to the COP to make rules in respect of Kyoto Protocol MRV provisions. The same issue relating to article 13(2) of the Kyoto Protocol (mentioned above) will apply here as well.

Further thought would also need to be given to how non-Kyoto Parties could access the flexible mechanisms and whether they could use credits generated by Kyoto projects to meet LCA 'targets'.

Cancun mandate required for the above:

1. **COP decision on agreed LCA outcomes** or **extension of mandate of AWG-LCA** to agree draft decisions by a certain date.
2. **CMP decision to:**
 - a. **extend mandate of AWG-KP** with a view to agreeing a second commitment period to be put in place by the end of the current one; or
 - b. **explore ways of extending first commitment period** until such a time as the second commitment period has been agreed and is ready to come into force.

3. **COP and CMP decision to explore issue of duplication** across the Kyoto Protocol and the LCA track outcomes.

Copenhagen Accord goes forward as the basis for further action

Description

Under this outcome, the mandates of the AWG-LCA and AWG-KP are either allowed to lapse or are consciously brought to an end. This would leave the Copenhagen Accord (the "Accord") as the fallback agreement on which the Parties which have associated with it can build.

There are two complicating factors which will dictate how the Accord can be built on:

1. whether the Accord is formally brought within the UNFCCC process; and
2. whether the KP is formally terminated.

If the Accord is formally adopted by the COP (which will require consensus) then the COP will have formal authority to undertake the actions requested of it by the Accord (for example, in relation to the setting guidelines for MRV) in order to implement it. If the KP is kept alive, albeit with no second commitment period, the flexible mechanisms that survive the end of the first commitment period could potentially be used by Parties to achieve their pledges. However, if the Kyoto Protocol is formally terminated at the end of the first commitment period, this would not be possible. New market mechanisms would need to be established in order for Parties to the Accord to purchase 'credits' which help them meet their pledges or to raise finance for developing countries.

If the Accord is not formally adopted by the COP, then references to the COP in the Accord are likely to have little effect, since it would not have formal authority to implement the Accord. This would leave the Parties to the Accord free to take it forward in a different forum, one which is potentially less accessible than the UNFCCC such as the MEF, G20 or an informal friends of the Accord grouping. To an extent, this is already occurring. If the KP is kept alive after the first commitment period, then the flexible mechanisms which survive could potentially be used by the Accord Parties to meet their pledges. However, any reform of the flexible mechanisms would need to be made within the UNFCCC and specifically the CMP. Any KP Party that does not like that the Accord is being taken forward (whether inside or outside the UNFCCC), could block those CMP decisions that attempt to reform the flexible mechanisms. If the KP is formally terminated at the end of the first commitment period, the flexible mechanisms would not be available to the Parties to the Accord. In this case, as above, new market mechanisms would need to be established.

Cancun mandate required for the above:

1. In respect of the **AWG-LCA**:
 - a. **a COP decision to terminate its mandate** at the end of COP16 in Cancun with no outcome; or
 - b. **no COP decision to extend its mandate**, meaning the present mandate lapses.
2. In respect of the **AWG-KP**:
 - a. **a CMP decision to terminate its mandate** at the end of CMP6 in Cancun with no outcome; or
 - b. **no CMP decision to extend its mandate**, meaning the present mandate lapses.

Annex 1: A Summary of the possible long term outcomes under the Convention and their respective Cancun mandates

	Necessary LCA outcome in Cancun	Necessary KP outcome in Cancun	Adaptation/mitigation/REDD & other LCA provisions	FlexMex/Adaptation Fund & other KP provisions	MRV Provisions	Enforcement Provisions
Single new protocol under the Convention merging KP and LCA tracks	1) Extended Mandate to work towards a Protocol by folding KP provisions into the LCA track	1) Mandate to merge into LCA 2) Static after 2012 – i.e. no 2 nd commitment period 3) Termination after 2012	1) Negotiations to continue, subject to policy positions and political will	1) Transfer provisions to LCA text and adoption by COP of all relevant CMP decisions 2) New protocol to include new provisions and new set of operational COP decisions	1) Transfer of provisions to LCA text and COP to adopt existing CMP rules on MRV 2) New MRV language to be added to LCA text and COP to create new rules on MRV	1) Transfer of non-compliance provisions in KP to LCA text and COP to adopt existing CMP rules on enforcement 2) New non-compliance language to be added to LCA text and COP to create new rules on MRV
Kyoto Protocol as sole instrument, with expanded provisions	1) Terminates in Cancun 2) Mandate to continue with a view to termination	1) Mandate to continue Second Commitment Period commitments and expanded to cover LCA track items as well	1) Fold into expanded KP mandate, subject to policy positions and political will	1) Continue negotiations to develop rules in KP track 2) No changes	1) Expand KP regime (via amendment or new CMP decisions) to govern MRV for previous LCA commitments. 2) Create new MRV provisions for LCA commitments	1) Continue negotiations to develop rules in KP track 2) No changes
Two Protocols (KP and new one resulting from LCA track)	1) Mandate to work towards a Protocol	1) Second Commitment Period via amendments 2) Temporary extension with a view to later amendment	1) Negotiations to continue, subject to policy positions and political will	1) Duplicate in LCA and keep in KP 2) Create common rules under COP (CMP for both protocols to delegate authority to make rules to the COP) 3) Keep KP rules and create new rules for LCA	1) Duplicate in LCA and keep in KP 2) Create common rules under COP (CMP for both protocols to delegate authority to make rules to the COP) 3) Keep KP rules and create new rules for LCA	1) Duplicate in LCA and keep in KP 2) Create common rules under COP (CMP for both protocols to delegate authority to make rules to the COP) 3) Keep KP rules and create new rules for LCA

	Necessary LCA outcome in Cancun	Necessary KP outcome in Cancun	Adaptation/mitigation/REDD & other LCA provisions	FlexMex/Adaptation Fund & other KP provisions	MRV Provisions	Enforcement Provisions
Kyoto Protocol and COP decisions under LCA track	1) COP decisions 2) Mandate to work towards COP decisions	1) Agreement of Second Commitment Period 2) Mandate to continue work with a view to later agreement on Second Commitment Period	1) Negotiations to continue, subject to policy positions and political will	1) Duplicate in LCA and keep in KP 2) Create common rules under COP (CMP for KP to delegate authority to make rules to the COP) 3) Keep KP rules and create new rules for LCA	1) Duplicate in LCA and keep in KP 2) Create common rules under COP (CMP for KP to delegate authority to make rules to the COP) 3) Keep KP rules and create new rules for LCA	1) Duplicate in LCA and keep in KP 2) Create common rules under COP (CMP for KP to delegate authority to make rules to the COP) 3) Keep KP rules and create new rules for LCA
No agreement in either track - Copenhagen Accord goes forward	1) Terminates in Cancun 2) Mandate to continue with ultimate termination	1) KP track terminates in Cancun (or later without agreement). KP itself to continue without Second Commitment Period 2) KP track to terminate and KP itself to terminate in after 1CP 3) Mandate for either of the above, with a view to later termination of KP	1) Accord formally adopted by COP and COP to pass decisions on these workstreams, subject to political will 2) Accord to formally remain outside with other groupings taking these workstreams forward (e.g. MEF, G20, Friends of Accord etc)	1) If KP not terminated, certain flex mechs could be used by Accord Parties to achieve 'pledges' for emissions reductions 2) If KP terminated post-2012, Convention amendments required to 'recreate' flex mechs and Adaptation Fund etc if Accord brought within UNFCCC – if not brought into UNFCCC then no access to former KP mechanisms (these would all be terminated with the KP)	1) If brought into UNFCCC, COP to adopt new MRV rules or adopt previous CMP rules for KP. 2) If not brought within UNFCCC, amendments to Accord required to remove references to COP and new MRV mechanism to be created by body taking the Accord forward (e.g. MEF, G20, Friends of Accord etc)	1) No legal consequences since Accord is not legally binding 2) Possible political consequences