

Legal outcomes of the Copenhagen summit

This briefing note has been prepared for informational purposes only and is not legal advice. Transmission of the information is not intended to create, and receipt does not constitute, a lawyer-client relationship. To the extent permitted by law any liability (including without limitation for negligence or for any damages of any kind) for the legal analysis is excluded.

Executive summary

This briefing note produced by the Legal Response Initiative (LRI) is intended to consider at a general level only, the legal nature of some possible outcomes from the Copenhagen summit on climate change. It is not intended to provide advice on the legal status of any specific text under consideration by the parties. Advice on any specific text will have to take into account the actual language used together with the circumstances of a text's adoption, including any statements made by the parties concerned.

We have received a number of queries seeking guidance on how to create legally binding obligations in the international context. In particular, there is concern as to whether or not any new, stand alone agreement to reduce greenhouse gas emissions by a specified amount, by a specified period will be binding under international law or will simply reflect a non-binding political understanding between the parties.

As stated above, analysis of the legal status of any text adopted will, to a large extent, have to take place after the adoption of the text. However, there are set out below some general considerations to bear in mind in seeking to negotiate a binding text or to negotiate a text which may have legal effect of some kind, for example as laying down an authoritative interpretation of an existing treaty.

As advised separately by LRI, the decisive factor in determining whether an instrument is a treaty is whether the parties concerned *intended* the text in question to give rise to rights and obligations under international law. That intention may be clear from the relevant text and/or from statements made at the time of adoption. Parties must act in good faith.

Sources of international law

Treaties are not the only source of binding obligations under international law.

There are four generally accepted forms of international law which are referred to in Article 38 of the Statute of the International Court of Justice (ICJ) which provides the grounds on which the Court will base its decisions, they are:

"...a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

b. international custom, as evidence of a general practice accepted as law;

c. the general principles of law recognized by civilized nations;

d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

Thus, for example general principles of international law can provide a platform for legally binding obligations (e.g., the no-harm rule, which is not considered in this note).

However, notwithstanding the other sources of law referred to in Article 38 (which may be important in the context of any climate-related dispute decided by an international court or tribunal), it would clearly be preferable in terms of legal certainty and enforceability, for any agreement on emissions to be set out in a new treaty and/or by way of amendment to an existing treaty.

If the parties were to adopt a declaration or decision which is intended to have political force only and not create legal rights and obligations, questions might then arise as to whether that declaration or decision has any relevance to the interpretation of existing legal obligations, in particular under the UNFCCC and/or the Kyoto Protocol.

Treaty & COP decisions

We refer to the CAN Legal paper on the legal status of COP decisions. As discussed in that paper there are issues surrounding the enforceability of COP/CMP decisions and their legal status.

Whether or not a COP decision is legally binding on Parties is dependent in large part on the enabling clause of the treaty under which it is made, i.e. the powers ascribed to the COP in the treaty text and on the language used in the decision itself. The practice of Parties to the parent convention, in relation to the status of such decisions may also be relevant.

Article 7.2 of the UNFCCC provides that the: "COP... shall make, within its mandate, the decisions necessary to promote the effective implementation of the Convention.", and it shall to this end '[m]ake recommendations on any matters necessary for the implementation of the Convention' (Art.7.2(g)). So, for example, if there are reasonable grounds for considering that the objective of the Convention might not be achieved, then it appears that the COP has the authority – indeed, is bound – *inter alia* to make recommendations in that respect.

However it does not follow that a COP decision – as opposed to a Convention amendment or protocol, or a new treaty – imposes an *obligation* on States (for example) to make specific emission reductions or financial commitments. Further analysis of the specific text and circumstances of its adoption would be required to determine the legal status of such a decision but it certainly cannot be assumed that such a decision would give rise to legal obligations.

Under Article 9.1 of the Kyoto Protocol, the CMP must periodically review the Kyoto Protocol, and based on these reviews the CMP "shall take appropriate action". Again the status of any text adopted on this basis would have to be analysed specifically but it cannot be assumed that such a text would be legally binding.

As discussed in separate advice COP decisions may provide authoritative guidance on the interpretation of treaty articles and/or may constitute 'subsequent agreement' or subsequent practice' within the meaning of Article 31(2) of the Vienna Convention.

Types of COP decisions

The Kyoto Protocol has numerous provisions that require the CMP to take specific action with respect to rule-making. By way of example – Article 3.4 of the Kyoto Protocol reads: "[CMP] shall... decide rules as to which... additional human induced activities and land use change and forestry

categories... shall be added to the assigned amounts for Annex 1 Parties” . On the basis of this language there appear to be strong arguments that a CMP decision to add a forestry category would be binding.

Article 7.2 of the Convention provides: “COP... shall make, within its mandate, the decisions necessary to promote the effective implementation of the Convention.” But it does not go on to say what kind of decisions are necessary, and so the legal status of any such decision must be analyzed in part by reference to whether the particular decision under discussion is based on a commitment already in the Convention (i.e. will be “necessary to promote the effective implementation”), or whether it is an entirely new kind of obligation.

Therefore, by way of example – a binding target for emissions would require a treaty (or protocol) provision, and a COP decision would arguably not be taken to be legally binding. As another example, it is unlikely that financial commitments would be accepted as binding if only made in a COP decision, so a treaty (or protocol) provision is more likely to be enforceable.

The Bali Action Plan adopted by COP-13 is an example of a COP decision that has no enabling treaty text. It is a politically persuasive roadmap that established a two-track process (Convention and the Kyoto Protocol) to arrive at a post-2012 global climate change regime to be adopted by COP-15 and COP/MOP5 in Copenhagen this year. That the Bali Action Plan has not been re-opened is due to good faith on the part of the parties in the context of setting the framework of further negotiations.

General principles recognized by civilised nations

The inclusion of general principles in Article 38 of the ICJ Statute provides a mechanism for a court to use, for example, widely accepted municipal law as a form of filler for areas in which treaty law is found lacking.

In the context of climate change there have been suggestions that an agreement, although not provided in ratifiable treaty form, could be binding on the states present through the general principles of international law. Such an argument would be built around the principle of ‘good faith’, suggesting that states would be bound by their agreement as a result of the inequity of a breach of their word. There are examples in international law that suggest it is possible to bind a state in this manner¹, however certain factors restrict the possibility of using this method in relation to any agreement reached in Copenhagen.

Firstly in order to be bound in this manner there needs to be evidence of an intention to create legal obligations, and such an intention would have to be demonstrated to a high level of proof. Unfortunately negotiations on climate change and statements of consensus following such negotiations may not offer proof of legal intent to the required standard due to the nature of the issues being discussed. Secondly, any declaration may be creating a new legal obligation which is not attached to an existing binding international agreement to which such a declaration can be attached. This would be likely to mean that the declaration could not be enforced.

Some have suggested that a declaration could be tied to the Kyoto Protocol and therefore acquire legal status in that way. However an analysis of the provisions of Article 4 of the Kyoto Protocol

¹ See ICJ decision in *Nuclear Test Cases* (1974) ICJ Reports 267,268 – note that this was in relation to a unilateral declaration.

appears to indicate that it does not provide for the creation of new limits and obligations in this manner, merely allowing parties to declare their intention to meet already existing targets communally and to be bound by that intent. In order to have legal certainty in relation to such commitments it would be necessary to amend the protocol itself.

The 'no-harm' rule, which may be regarded as a general principle of international law and as constituting customary international law, can provide a separate legal basis for arguing (for example) that there are legally-binding duties on certain States to reduce greenhouse gas emissions. The issues that such a possibility presents are beyond the scope of this Note.

Conclusion

Given the fact that any text emerging from Copenhagen will have to take into account the actual language used together with the circumstances of a text's adoption, including any statements made by the parties concerned, that text will have to be analysed after it is agreed to assess whether it is legally binding or merely politically binding. The decisive factor will be the intention of the parties in respect of whether or not they are creating legally binding rights and obligations under international law.