

The evolution of the climate change regime after the Copenhagen Accord

by

Jozanne Dickason

B Com, LLB

Student number: 22516662

Mini Dissertation submitted in partial fulfilment of the Requirements for the Degree
Magister Legum in Environmental Law and Governance at the North-West University
(Potchefstroom Campus)

Supervisor: Professor W Scholtz

November 2011

INDEX

List of abbreviations	1
Abstract	3
Opsomming.....	5
1 Introduction	7
2 Development of the international climate change regime.....	8
2.1 The Kyoto Protocol.....	14
2.2 The Bali Action Plan.....	17
3 Conference of the Parties 15: An analysis of the Copenhagen Accord	19
4 Effect of Copenhagen Accord on current and future climate change regime	26
4.1 Cancun Agreements	31
5 Conclusion	35
Bibliography	38

List of abbreviations

<i>AJIL</i>	<i>American Journal of International Law</i>
AWG-KP	<i>Ad Hoc</i> Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol
AWG-LCA	<i>Ad Hoc</i> Working Group on Long Term Cooperative Action
BAP	Bali Action Plan
CBDR	Common but Differentiated Responsibility
CDM	Clean Development Mechanism
<i>CILSA</i>	<i>Comparative and International Law Journal of Southern Africa</i>
CO ₂	Carbon Dioxide
COP	Conference of the Parties
COP/MOP	Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol
<i>EJLS</i>	<i>European Journal of Legal Studies</i>
ENGOs	Environmental non-governmental Organisations
GHG	Greenhouse gas
<i>GJICL</i>	<i>Georgia Journal International and Comparative Law</i>
<i>ICLQ</i>	<i>International and Comparative Law Quarterly</i>
IEAs	International Environmental Agreements
IPCC	Intergovernmental Panel on Climate Change
JI	Joint Implementation
LDCs	Least Developed Countries
MOP	Meeting of the Parties
MRV	Monitoring, Reporting, Verification
NAMA	Nationally Appropriate Mitigation Action
<i>NILR</i>	<i>Netherlands International Law Review</i>
QELROs	Quantified Emission Limitation and Reduction Objectives
<i>RECIEL</i>	<i>Review of European Community and International Environmental Law</i>
REDD+	Reducing Emissions from Deforestation and Forest Degradation, plus conservation, sustainable management of forests and enhancement of forest carbon stocks
<i>SAYIL</i>	<i>South African Yearbook of International Law</i>

SBI	Subsidiary Body for Implementation
SBSTA	Subsidiary Body for Scientific and Technological Advice
UNCED	United Nations Conference on Environment and Development
UNEP	United Nation Environmental Programme
UNFCCC	United Nation Framework Convention on Climate Change, 1992
<i>UPJIL</i>	<i>University of Pennsylvania Journal of International Law</i>
USA	United States of America
WMO	World Meteorological Organisation

Abstract

Climate change is a critical sustainable development issue with implications for the environment, economies and society as we know it. The problem of climate change is caused by some countries in parts of the world that has a direct effect on people and natural resources in other parts of the world. Climate change is the effect of increased production of Greenhouse gases (GHGs).

Due to the vast complexity of the climate change regime the study does not attempt to be comprehensive or conclusive. The aim of the study is to critically evaluate and determine the purpose, enforceability, legal nature, shortcomings and strengths of the non-binding Copenhagen Accord and how the international climate change regime will evolve after the Copenhagen Accord.

The study starts with a brief explanation of the international climate change regime and its development, including international environmental law principles, specifically the common but differentiated responsibility principle.

The United Nations Framework Convention on Climate Change (UNFCCC) has the ultimate objective to achieve the stabilisation of GHG concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. The Conference of the Parties (COPs) is the ultimate decision-making and supreme body of the UNFCCC and is authorised to make and implement decisions to promote the implementation of the UNFCCC, it further has the power to adopt new protocols under the UNFCCC and plays a substantial role in the development of new obligations by the parties to the convention.

Various COPs, their respective adopted decisions and resolutions which played an important role in the development of the climate change regime are discussed. This includes COP 1 that lead to the Berlin Mandate; COP 3 and the Kyoto Protocol; COP 7 and the Marrakech Accords; COP 11 that marked the entry into force of the Kyoto Protocol; COP 13 and the Bali Action Plan.

COP 15 in Copenhagen was internationally expected and intended to be the breakthrough in addressing the post 2012 period. As is evident from the content of this study the result of COP 15 at Copenhagen means different challenges for different countries and the “bottom up” architecture of the accord could help encourage and reinforce national actions.

An overview of the effect of the Copenhagen Accord on the climate change regime, with specific reference to COP 16 in Cancun, is then done. The “bottom up” architecture of the Copenhagen Accord was brought into the official UNFCCC process by the Cancun Agreements that were reached at COP 16.

The study mostly comprised of a literature study, which reviewed the relevant international environmental law dealing with climate change, taking into account customary international law; international treaties and conventions; government documents, policies and reports; textbooks and academic journals as well as electronic material obtained from various internet sources.

Keywords

Climate change – Copenhagen Accord – Kyoto Protocol – International environmental law – Greenhouse gases (GHG) – Cancun Agreements – Bali Action Plan – Conference of the Parties (COP)

Titel van skripsie in Afrikaans

Die evolusie van die klimaatsveranderings regime na die Kopenhagen Akkoord

Opsomming

Klimaatsverandering is 'n kritiese volhoudbare ontwikkelings uitdaging wat nadelige gevolge inhou vir die omgewing, ekonomieë en die samelewing soos ons dit ken. Klimaatsverandering is 'n probleem wat veroorsaak word deur sommige lande in dele van die wêreld wat 'n direkte impak het op ander mense en natuurlike hulpbronne in ander dele van die wêreld. Klimaatsverandering word veroorsaak deur die verhoogde produksie van kweekhuisgasse.

As gevolg van die omvangryke kompleksiteit van die klimaatsveranderings regime, poog die studie nie om alomvattend of afdoende te wees nie. Die doel van die studie is om die Kopenhagen Akkoord krities te evalueer en die doel, afdwingbaarheid, regsaard, tekortkominge en positiewe aspekte van die nie-bindende Kopenhagen Akkoord, asook die evolusie van die internasionale klimaatsveranderings regime ná die Kopenhagen Akkoord, te bepaal.

Die studie begin met 'n kortlikse verduideliking van die internasionale klimaatsveranderings regime en die ontwikkeling daarvan, insluitend internasionale omgewingsregbeginsels, en meer spesifiek die 'gemeenskaplike maar gedifferensieerde verantwoordelikhede' beginsel.

Die Verenigde Nasies se Raamwerk Konvensie op Klimaatsverandering (UNFCCC) se fundamentele doelwit is die stabilisering van vlakke van kweekhuisgasse in die atmosfeer op 'n vlak wat gevaarlike inmenging met die klimaatstelsel sal verhoed. Die Konferensie van die Partye (COP) is die primêre besluitnemings- en uitvoerende liggaam van die UNFCCC. Die COP is by magte om besluite te maak en deur te voer wat die implementering van die UNFCCC sal bevorder, asook verdere magte om nuwe protokols te aanvaar onder die UNFCCC. Die COP speel verder 'n

substantiewe rol in die ontwikkeling van nuwe verpligtinge op die partye tot die konvensie.

Verskeie COPs en hulle onderskeie aanvaarde besluite en resolusies, wat 'n belangrike rol gespeel het in die ontwikkeling van die klimaatsveranderings regime, word bespreek. Dit sluit in COP 1 wat gelei het tot die Berlyn Mandaat; COP 3 en die Kyoto Protokol; COP 7 en die Marrakesj Akkoord; COP 11 waarna die Kyoto Protokol in werking getree het en COP 13 met die Bali Aksieplan.

COP 15 in Kopenhagen het hoë internasionale verwagtinge ingehou en was bedoel om 'n deurslaggewende deurbraak vir die periode ná 2012 te wees. Soos dit duidelik blyk uit die studie hou die uitkoms van COP 15 in Kopenhagen verskillende uitdagings vir verskillende lande in en die “van-onder-na-bo” argitektuur van die Akkoord kan nasionale aksie aanmoedig en versterk.

'n Oorsig van die impak van die Kopenhagen Akkoord op die klimaatsveranderings regime, met spesifieke verwysing na COP 16 in Cancun word dan gedoen. Die “van-onder-na-bo” argitektuur van die Kopenhagen Akkoord was deel gemaak van die amptelike UNFCCC prosesse deur die Cancun Ooreenkomste wat bereik is by COP 16.

Die skripsie bestaan hoofsaaklik uit 'n literatuurstudie van die relevante internasionale omgewingsreg wat betrekking het op klimaatsverandering, met inagneming van internasionale gewoontereg; internasionale verdrae en konvensies; regeringsdokumente, staatsbeleide en verslae; handboeke; akademiese joernale asook elektroniese materiaal van verskeie internetbronne.

Sleutelwoorde

Klimaatsverandering – Kopenhagen Akkoord – Kyoto Protokol – Internasionale Omgewingsreg – kweekhuysgasse – Cancun Ooreenkomste – Bali Aksie Plan – Konferensie van die Partye (COP)

1 Introduction

Climate change is a critical sustainable development issue with implications for the environment, economies and society as we know it. It is an issue that is a common concern of the global population and one that challenges the ideas of global fairness, equity, equality and justice. The effects thereof are likely to be felt worldwide, but with differential impacts.¹

In addition, there is no global law-making institution that has the jurisdictional reach and legal authority to match the scope of the climate change problem. It is clear that there is a mismatch between the scope of the problem and existing legal and governance capabilities.²

The world's eyes and hope were on the Copenhagen Conference to seal the deal on climate change, but in the early hours of 19 December 2009, in Copenhagen, Denmark, the Copenhagen Accord on Climate Change was not "adopted" but only "taken note" of by the 15th Conference of the Parties (COP) to the United Nations Framework Convention on Climate Change (UNFCCC).

Due to the vast complexity of the climate change regime this study will not attempt to be comprehensive or conclusive. The aim of this study is to examine the implications of the non-binding Copenhagen Accord. In this process some provisional answers will be offered and a proposal made for a partial re-conceptualisation of the nature and possibilities of the climate change regime after the Copenhagen Accord.

To fully understand the impact of the Copenhagen Accord on the climate change regime, this dissertation starts off with a brief explanation of the international climate change regime and more specifically the international environmental law principles and development of the climate change regime. In the light of this the outcome of the Copenhagen Conference, that is, the Copenhagen Accord, is examined. This is followed by an overview of the effect of the Copenhagen Accord on the climate

1 Birnie, Boyle and Redgwell *International Law and the Environment* 337.
2 Boyd 2010 *UPJIL* 463.

change regime with specific reference to the outcome of COP 16 in December 2010 in Cancun, Mexico. Options for the future are proposed in the conclusion.

2 Development of the international climate change regime³

Life on earth depends on energy from the sun. The radiation from the sun reaches the earth's atmosphere and eventually also the surface of the earth. Some of the energy is reflected back from the earth's surface to the earth's atmosphere where it is reflected back to earth by greenhouse gases⁴ (GHGs) and brings about a warming effect.⁵ In other words, GHGs trap infrared radiation in the atmosphere resulting in more heat entering the earth's atmosphere than is able to leave it. This phenomenon causes changes in local and regional climates. The key contributor to climate change is thought to be carbon dioxide (CO₂).

To the atmosphere it is irrelevant on what continent, region or country the GHGs are emitted because GHG emissions do not respect borders. Climate change is a problem that is caused by some countries in parts of the world that has a direct effect on people and natural resources in other parts of the world.⁶ Climate change is thus the effect of an increase in the production of GHGs.⁷ The scale and scope of the numerous potential impacts of global climate change have been well documented.⁸

3 "Regime" can be defined as "systems of norms and rules specified through a multilateral agreement between relevant states with the purpose of regulating domestic actions in relation to an issue or group of related issues". Mejiar http://www20.gencat.cat/docs/icip/continguts/Publicacions/workingPapers/Arxiu/WP10_6_ANG.pdf.

4 Greenhouse gases are defined in Article 1 of the UNFCCC as "those gaseous constituents of the atmosphere, both natural and anthropogenic, that absorb and re-emit infrared radiation".

5 Warbrick and McGoldrick 1998 *ICLQ* 446.

6 Brown <http://rockblogs.psu.edu/climate/2010/12/> [date of use 3 January 2011].

7 "Other human activities such as deforestation, also contribute to climate change, as do emissions of methane from agricultural sources and the loss of soil carbon due to excessive ploughing and intensive agriculture": Birnie, Boyle and Redgwell *International Law and the Environment* 336.

8 To name but a few of the expected impacts: sea-level rise, melting ice sheets, receding glaciers, ocean acidification, species loss, increased frequency and intensity of hurricanes and storms, flooding of coastal areas, increased droughts, water shortage and lack of access to clean drinking water, social and economic consequences for the poorest, most vulnerable countries who have the least capacity to adapt, and it is a threat to international peace and security.

Changes to local and regional climates will result in changing agricultural conditions that will impact negatively on food security with concomitant consequences for the economic and social stability of the region.⁹ Unfortunately the obvious adverse effect on the quality of human life and human rights most significantly impacts poorer countries that invariably have the least financial and technological resources.¹⁰ A recent report of the United Nations High Commissioner for Refugees identified climate change, along with conflict, as the leading causes of the worldwide rise in the number of refugees. It is estimated that 6 million people are displaced each year due to climate change¹¹ and 25 million people were uprooted due to natural disasters in 2007.¹² Climate change is creating “environmental refugees”.¹³

Thus the United Nations Conference on Environment and Development (UNCED) produced the United Nations Framework Convention on Climate Change (UNFCCC) in Rio de Janeiro in May 1992.¹⁴ The ultimate objective of the UNFCCC is to achieve “stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system”.¹⁵ The

9 Hunter 2009 *Oregon Review of International Law* 332.

10 Hunter 2009 *Oregon Review of International Law* 331; see also Bodansky 2010 *GJICL* 518 and Scholtz 2010 *AHRLJ* 2. Some of the human rights affected are the right to water, the right to adequate food, the right to health, the right to life, the right to adequate housing and the right to self-determination.

11 Mwebaza and Mateche 2010 <http://polity.org.za>; Burleson 2010 *WM & Mary Envtl. L. & Pol’y Rev* 557.

12 Burleson 2010 *WM & Mary Envtl. L. & Pol’y Rev* 557.

13 “Environmental refugees” are defined by UNEP as
“those people who have been forced to leave their traditional habitat,
temporarily or permanently, because of a marked environmental disruption
that jeopardized their existence and/or seriously affected the quality of their
life”.

14 For more information on the history of the negotiations of the Convention see Reports of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change, UN Doc A/AC 237/6 (1st session); UN Doc A/AC 237/9 (2nd session); UN Doc A/AC 237/L 9 (3rd session); UN Doc A/AC 237/18 (5th session). See also Sands *Principles of International Environmental Law* 257–261.

15 Art 2 UNFCCC 9 May 1992. “Climate change” is defined in the UNFCCC as “a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods”.

UNFCCC currently has 195 parties and entered into force on 21 March 1994,¹⁶ in accordance with Article 23.¹⁷

The UNFCCC declares that climate change is “the common concern of humankind” and reaffirms the sovereignty of states in its preamble;¹⁸ recalling the right of states to exploit their own resources pursuant to their own environmental and developmental policies.¹⁹ Common concern establishes a legitimate interest in relation to matters of global significance, which in turn may result in the creation of common responsibility.²⁰ In other words, global environment and environmental problems are the interest and responsibility of all states and compel states to cooperate internationally. The common but differentiated responsibility (CBDR) principle evolved from the notion of the common concern of humankind and emphasises the common responsibility of all states for the protection of global resources, but that states have differentiated responsibilities.²¹

The UNFCCC reflects substantial differences of opinion between the participant states in regards to the measures that need to be taken to address the problem, as well as whose responsibility it is to address the problem, thus the acknowledgment of differential treatment²² and the varying needs of developed and developing states.²³ This can also be seen from article 3 of the UNFCCC which specifically provides that the protection of the climate system by parties should be on the “basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities”.²⁴

16 <http://www.iisd.ca/climate/ccwg14> [date of use 08 May 2011];

http://unfccc.int/essential_background/convention/status_of_ratification/items/2631.php [date of use 06 October 2011].

17 This is the 19th day after the date of deposit of the 15th instrument of ratification, acceptance, approval or accession.

18 The preamble to the UNFCCC states: “reaffirming the principle of sovereignty of States in international cooperation to address climate change.”

19 Preamble to the UNFCCC; see further Scholtz 2008 *NILR* 334.

20 Scholtz 2008 *YIEL* 143.

21 Scholtz 2008 *SAYIL* 114.

22 The UNFCCC specifically refers to and includes the Common but Differentiated Responsibility (CBDR) principle in its preamble.

23 For an in depth-discussion see Birnie, Boyle and Redgwell *International Law and the Environment* 357.

24 Art 3(1) UNFCCC. Art 3(1) further provides that “the developed country parties should take the lead in combating climate change and the adverse effects thereof”; art 4(7) also states that “the extent to which developing country Parties will effectively implement their

The CBDR principle is included in important international environmental negotiations, conventions, treaties and protocols. It was developed from the realisation that developing countries have special needs that have to be taken into account in the development, application and interpretation of international environmental law.²⁵ The aim of the CBDR is not to deviate from sovereign equality but rather to seek equitable and effective results that promote substantive equality between developed and developing countries.²⁶

The CBDR principle entails differentiated standards for developing countries based on their special needs and circumstances; their future economic development and historic contributions in causing the problem.²⁷ It also resulted in the development of unique institutional mechanisms for developed countries to provide technological, financial and other assistance to developing countries in relation to specific environmental problems.

The CBDR principle in the climate change regime is, however, shrouded in controversy as it is estimated that more than half of the GHG emissions cuts that will be needed by 2030 will have to come from developing countries.²⁸ There are also scholars who are of the opinion that allowing non-Annex I countries to continue with GHG emissions at high levels is causing irrevocable damage to the environment. It can be said that it is because of the non-reduction commitments of non-Annex I countries such as India and China, that the United States chose not to ratify the Kyoto Protocol and is unlikely to be part of any agreement if there is not some form of commitment by developing countries.²⁹ Developing countries on the other hand are reluctant to accept mandatory emission reductions because they believe that

commitments under the Convention will . . . take fully into account that economic and social development and poverty eradication are the first and overriding priorities of the developing country parties”.

25 Sands *Principles of International Environmental Law* 285. The CBDR principle also developed from the application of equity in international law; Halvorsen pointed out that “the differing situations of the developing countries need to be considered if they are to be encouraged to take part in international environmental agreements”: Nanda and Pring *International Environmental Law & Policy for the 21st Century* 39.

26 Scholtz 2008 *SAYIL* 117.

27 Sands *Principles of International Environmental Law* 287–289. The CBDR principle also recognises that developing countries main objective is the eradication of poverty and the promotion of economic development.

28 Scholtz 2008 *SAYIL* 114.

29 Stone 2004 *AJIL* 280.

they are not historically responsible for climate change and that they should be able to pursue development in the same manner that developed countries have done. It is thus clear that even though states are encouraged to act in the interest of the common good they still pursue self interest.³⁰

Some developing countries such as India and China have, however, reached a stage of development that warrants more stringent obligations on their part to reduce GHG emissions.³¹

The UNFCCC does, however, make provision for the possibility that the division between developed and developing countries could evolve over time. Article 4(2)(f) provides that the parties shall review the list of parties in Annexes I and II with a view of making amendments. It then goes further in Article 4(2)(g) by allowing non-Annex I countries to opt into the hortatory target and timetable method that is established by Article 4(2)(a) and 4(2)(b). However, to date this has happened only once at Argentina's request.

The UNFCCC only specified principles and objectives in an attempt to establish a process to facilitate further developments of other legal frameworks between the parties. The UNFCCC itself sets no mandatory limits on GHG emissions and provision was made in the Convention for frequent reviews to take place by the Conference of the Parties³² (COPs) in an attempt to negotiate more binding and stringent obligations.³³ The COP is an association of all the countries that are parties to the UNFCCC.

The COP is the ultimate decision-making and supreme body of the UNFCCC and is authorised "to make, within its mandate, the decisions necessary to promote the effective implementation of the Convention"³⁴ and to "exercise such other functions

30 Scholtz 2009 *CILSA* 177.

31 Brazil, India and China already emit more GHG than the United States and the European Union combined.

32 The COPs are created by Art 7 of the UNFCCC. The COPs' role is to promote and review the implementation of the UNFCCC and meets annually.

33 Birnie, Boyle and Redgwell *International Law and the Environment* 360. The aim of the UNFCCC is to establish a legally binding regime that will regulate GHG emissions.

34 Art 7(2) UNFCCC. More than 350 decisions have been made by 16 COPs.

as are required for the achievement of the objective of the Convention as well as all other functions assigned to it under the Convention”.³⁵ The COP thus has a variety of functions which includes the examining of the commitments of the parties, keeping in mind the objective of the UNFCCC, as well as expanding scientific information, findings and experience gained in implementing climate change policies.³⁶ They further review the national communications and emission inventories submitted by parties and decide on the consequences of non-compliance.³⁷

The COP adopts COP decisions and resolutions that are published in reports of the COP.³⁸ The decisions made by COP can be seen as a “subsequent agreement between the Parties regarding the interpretation of the treaty or the application of its provisions”.³⁹ The COP is authorised by the UNFCCC to adopt, by consensus, rules of procedure for the conduct of the COP’s work.⁴⁰ The COP has the power to establish subsidiary bodies⁴¹ and currently there are two permanent subsidiary bodies: the Subsidiary Body for Implementation (SBI)⁴² and the Subsidiary Body for Scientific and Technological Advice (SBSTA).⁴³

The COP plays a substantial role in the development of new obligations by the parties and has the power to adopt new protocols under the UNFCCC to establish legally binding obligations for parties to reduce their GHG emissions. Consensus between the parties is the preferred mode of decision making in the COP.⁴⁴ However, there is no definition of consensus in the UNFCCC and it can be understood “as the absence of express opposition”⁴⁵.

35 Art 7(2)(m) UNFCCC.

36 http://unfccc.int/essential_background/convention/convention_bodies/items/2629.php [date of use 03 October 2011].

37 Churchill and Ulfstein 2000 *AJIL* 626.

38 For an in-depth discussion of the legal personality that COPs possess see Churchill and Ulfstein 2000 *AJIL* 623–659.

39 Art 31(3)(a) Vienna Convention on the Law of Treaties, 23 May 1969.

40 Art 7(2)(k) UNFCCC.

41 Art 7(2)(i) UNFCCC. The subsidiary body is a committee that assists the COP.

42 The SBI assists the COP by making recommendations on policy and implementation issues.

43 The SBSTA serves as a link between the COP and information provided by scientific experts, findings and experience.

44 Art 15(3) and Art 7(2)(k) UNFCCC. Rajamani 2011 *ICLQ* 515.

45 Rajamani 2011 *ICLQ* 515.

COP 1 took place from 28 March to 7 April 1995 in Berlin, Germany and the Berlin Mandate was adopted by COP 1. The Berlin Mandate concluded that Article 4(2)(a) and 4(2)(b) are not adequate and they agreed to begin a process to strengthen the commitments of Annex I parties through the adoption of a protocol or another legal instrument.⁴⁶ The Mandate specified that the process be guided by the CBDR principle and the aim of the Berlin Mandate was to adopt a Protocol at COP 3.

2.1 The Kyoto Protocol

In 1997 the Kyoto Protocol was adopted by the delegates to COP 3 under the UNFCCC and entered into force on 16 February 2005. The Kyoto Protocol currently has 193 parties. The Kyoto Protocol is a multilateral environmental agreement that can be seen as a formula for translating the UNFCCC's principles into practice and follows the approach of an internationally negotiated agreement with wide-ranging targets and timetables. The UNFCCC is the framework convention that established the basic system of governance for the climate change regime and the Kyoto Protocol elaborates on this system by specifying the regulatory requirements to limit GHG emissions.⁴⁷

The Kyoto Protocol requires Annex I parties⁴⁸ to commit themselves to reducing their overall emissions of six GHGs by at least 5% below 1990 levels over the period 2008–2012, the first commitment period.⁴⁹ There is a five-year commitment period, instead of a single target year, to cater for annual fluctuations that may occur in emissions due to unmanageable factors. Non-Annex I countries⁵⁰ on the other hand do not have to make any comparable cuts under the Kyoto Protocol unless they choose to do so. The reason is that developed countries have historically been the major sources of GHG emissions and they are seen to have the financial and

46 Decision 1/CP.1 <http://unfccc.int/resources/docs/cop1/07a01.pdf> [date of use 27 September 2011].

47 Bodansky 2011 <http://ssrn.com/abstract=1917603> [date of use 22 September 2011].

48 Annex I parties are also known as developed countries.

49 Art 3(1) of the Kyoto Protocol placed specified and quantitative restrictions on emissions by developed countries. The gases covered by the Kyoto Protocol are CO₂, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons and sulphur hexafluoride. The emission targets, however, do not include emissions from international aviation and shipping.

50 Non-Annex I parties are also known as developing countries.

technological resources to address climate change.⁵¹ Non-Annex I countries do, however, have a general obligation to establish a national inventory of their GHG emissions.⁵²

COP 7 took place in Marrakech, Morocco in November 2001. The parties adopted the Marrakech Accords which aimed to achieve ratification of the Kyoto Protocol and laid down accounting procedures for emission reduction credits as well as operating rules for the mechanisms to be used to ensure emission reductions. The Marrakech Accords further established a compliance system that outlined the consequences for failure to reach emission targets.⁵³

The annual meeting of COP also serves as the Meeting of the Parties (COP/MOP) to the Kyoto Protocol.⁵⁴ However, the parties under the UNFCCC that are not parties to the Kyoto Protocol may only participate as observers when the COP acts in the capacity as COP/MOP.⁵⁵

COP 11, COP/MOP1 was held in Montreal, Canada in 2005 and marked the entry into force of the Kyoto Protocol. The delegates to COP11, COP/MOP1 agreed to extend the life of the Kyoto Protocol beyond 2012 and to negotiate deeper GHG emission cuts.⁵⁶ The COP/MOP has to initiate the consideration of Annex I parties' further commitments, for subsequent periods, at least seven years before the end of the first commitment period.⁵⁷ Therefore the *Ad Hoc* Working Group of Further Commitments for Annex I Parties under the Kyoto Protocol (AWG-KP) was established by COP 11, COP/MOP 1.⁵⁸

The AWG-KP had to focus on certain “building blocks”: specific emission reduction commitments, the means to achieve the targets such as the market mechanisms,

51 Preamble UNFCCC.

52 Art 4(1)(a) UNFCCC.

53 See Decisions COP7, addendum, part two at <http://unfccc.int/resource/docs/cop7/13a01.pdf> [date of use 03 October 2011].

54 Art13(1) Kyoto Protocol.

55 Art 13(2) Kyoto Protocol.

56 <http://unfccc.int/resource/docs/2005/cop11/eng/05a01.pdf> [date of use 25 September 2011].

57 Art 3(9) Kyoto Protocol.

58 Decision 1/CMP1 Considerations of Commitments for Subsequent Periods for Parties Included in Annex I to the Convention under Art 3, par 9 of the Kyoto Protocol.

national policies, accounting issues and the role of land use, land use change and forestry.⁵⁹ On mitigation the AWG-KP had to address the next round of commitments after 2012 and work on the various tools and rules for Annex I countries to reach their GHG emission reduction targets.

The original idea was that the Kyoto Protocol would continue indefinitely with a second, third, fourth and further commitment periods.⁶⁰ It is important to take note that the Kyoto Protocol does not expire in 2012, and that only the first commitment period of the Kyoto Protocol ends in 2012. The Kyoto Protocol will thus, as a legal matter, still continue in force after 2012 but it will not impose any quantitative limits on parties' GHG emissions. In other words it will be an empty shell.⁶¹

The Kyoto Protocol embodies a top-down approach to climate governance, with the prescribed form, nature and content of the commitments that countries have to undertake. The national targets of Annex I countries were determined through international negotiations and are subject to stringent international accounting rules.

Certain mechanisms were developed to help parties reach their targets in the most economical way, and parties have a choice in how they wish to reduce their emissions. Countries therefore have a choice to reduce their emission wherever the reductions are the most economical. There are four international mechanisms at play: joint fulfilment of commitments;⁶² joint implementation;⁶³ clean development mechanism (CDM);⁶⁴ and international emissions trading.⁶⁵ A carbon market was created through these mechanisms and countries also have the option of banking

59 Bali Action Plan: Key issues in the Climate Negotiations, Summary for Policy Makers 2008 http://www.undp.org/climatechange/docs/UNDP_BAP_Summary.pdf [date of use 28 February 2011].

60 Bodansky 2011 <http://www.ssrn.com/abstract=1773865> [date of use 15 March 2011].

61 Bodansky 2011 <http://www.ssrn.com/abstract=1917603> [date of use 22 September 2011]. For a general discussion of the consequences of the first commitment period ending without a second commitment period, see the "gap paper" by the UNFCCC secretariat "Legal Considerations Relating to a Possible Gap between the First and Subsequent Commitment Periods: Note by the Secretariat" un Doc FCCC/KP/AWG/2010/10.

62 Art 4 Kyoto Protocol.

63 Art 6 Kyoto Protocol.

64 Art 12 Kyoto Protocol.

65 Art 17 Kyoto Protocol.

any of their unused credits.⁶⁶ These mechanisms are an important reason why many states agreed to the Kyoto Protocol. However, a limit is placed on the use of these mechanisms and the reduction achieved by using the mechanisms has to be supplemental to domestic actions.⁶⁷

The most significant challenge to the Kyoto Protocol is, however, that the world's largest single emitter of GHGs, the United States of America (USA),⁶⁸ has refused to ratify the Kyoto Protocol, even though they originally signed the Kyoto Protocol. If the Kyoto Protocol were to continue unchecked, GHG emissions will increase in the period between 2005 and 2030, with the USA, China, India and Russia contributing two-thirds of the increase.⁶⁹ China, India and Russia are non-Annex countries, and have no emission limitation obligations under the Kyoto Protocol.

2.2 The Bali Action Plan

In the negotiations for a second round of binding emission targets for developed countries for the period after 2012, it was clear that the majority of the developed countries were unwilling to commit themselves without some form of commitment from the United States as well as the major emerging developing countries.

Therefore the Bali Action plan⁷⁰ was formulated and adopted in Bali, Indonesia in December 2007 at COP 13. The Bali Action Plan launched a parallel track under the UNFCCC to address the period after 2012. The preamble to the Bali Action Plan states:

66 Art 3(13) Kyoto Protocol.

67 Examples of domestic actions include: energy cost reductions; to change national legislation that includes the limitation of GHGs; cooperative GHG regulatory arrangements among GHG emitters; energy cost reductions from transportation and to reduce GHG emissions from road transport; to make more use of bio energy; to reduce waste; recycling and energy making; promoting energy efficiency and clean coal, including the collection, storing and processing of carbon to name but a few.

68 The USA roughly accounts for 25% of global GHG emissions.

69 Executive Summary, World Energy Outlook 49 (2007), <http://www.iea.org/Textbase/np-sum/WEO2007SUM.pdf> [date of use 01 October 2011].

70 Bali Action Plan, Dec1/CP.13, UN Doc FCCC/CP/2007/6/Add.1 hereafter referred to as the Bali Action Plan. This paper does not analyse the Bali Action Plan. For a comprehensive discussion of the Bali Action Plan see Rajamani 2008 *ICLQ* 909–939.

Recognising that deep cuts in global emissions will be required to achieve the ultimate objective of the convention and emphasising the urgency to address climate change as indicated in the fourth Assessment Report of the Intergovernmental Panel on Climate Change.⁷¹

Many issues had to be addressed and considered by the Bali Action Plan and the five priority areas, each with its own “building block structure”, is a shared vision for long-term cooperative action; enhanced action on adaptation, especially in the most vulnerable countries; enhanced national and international action on mitigation; technology transfer and diffusion of green technologies; the provision of financial resources and capacity building.⁷²

The Bali Action Plan makes a clear distinction between the nationally appropriate mitigation actions (NAMAs) of developing countries and the nationally appropriate mitigation commitments of developed countries.⁷³ Developed countries thus have Quantified Emission Limitation or Reduction Objectives (QELROs) and developing countries only NAMAs, that do not constitute binding emission reduction requirements.⁷⁴

The *Ad Hoc* Working Group on Long Term Cooperative Action under the Convention (AWG-LCA) was established under the Bali Action Plan. The mandate of the AWG-LCA is to develop a comprehensive outcome by focussing on key elements of the Bali Action Plan: a shared long-term vision, adaptation, mitigation, finance and technology transfer. They were to complete their work in 2009 in order to present their results to COP 15 for adoption.

The establishment of the AWG-LCA resulted in a two-track negotiation process, one under the Convention, the AWG-LCA, and one under the Kyoto Protocol, the AWG-KP, maintaining strict differentiation between developed and developing countries.

71 <http://unfccc.int/resource/docs/2007/cop13/eng/06a01.pdf> [date of use 07 March 2011].

72 Par 1(a)–1(d) Bali Action Plan.

73 Par 1(b)(i) Bali Action Plan reads: “measurable, reportable and verifiable nationally appropriate mitigation commitments or actions, including quantified emission limitations and reduction objectives, by all developed country Parties, while ensuring the comparability of efforts among them, taking into account differences in their national circumstances.”

74 Par 1(b)(ii) Bali Action Plan reads: “nationally appropriate mitigation actions by developing country Parties in the context of sustainable development, supported and enabled by technology, financing and capacity-building, in a measurable, reportable and verifiable manner.”

COP 13, COP/MOP 3, was the third session of the AWG-KP and the parties took note of the IPCC conclusion that: “GHG emission reduction commitments between 25% and 40% below 1990 levels were needed on the part of developed countries for the period beyond 2012 to limit a mean global temperature increase.”⁷⁵

COP 15 was set as a deadline for the conclusion of all negotiations under both working groups. Developed and developing countries have divergent opinions towards the two-track system. Developed countries are reluctant to accept a second round of emissions targets under the Kyoto Protocol unless all major emitters of GHGs accept emission reduction targets, irrespective of whether they are developed or developing. Developing countries are, however, opposed to a one-track approach and wish to keep the firewall between developed and developing countries and furthermore most refuse to differentiate between advanced developing countries and other developing countries.⁷⁶

3 Conference of the Parties 15: An analysis of the Copenhagen Accord

The 15th session of the Conference of the Parties (COP 15) under the UNFCCC, which met from 7–19 December 2009 in Copenhagen, Denmark, had to address and consider three main issues: developing countries mitigation; developed countries mitigation and financial and technological support.⁷⁷

During the Copenhagen Convention there was intense bickering between and within the developed and developing world about whether to adopt a second round of emission targets for developed countries under the Kyoto Protocol or whether to make emission targets also applicable to developing countries.

75 Bali Action Plan: Key issues in the Climate Negotiations, Summary for Policy Makers 2008 http://www.undp.org/climatechange/docs/UNDP_BAP_Summary.pdf [date of use 28 February 2011].

76 For a discussion in this regard see Scholtz 2010 *AHRLJ* 15. There are, however, some developing countries, especially the small island states, that are of the opinion that major developing countries should accept legal emission reduction commitments as well.

77 Depledge 2008 17(2) *Reciel* 155.

The last three days of COP 15, the high-level segment, was attended by over 110 world leaders.⁷⁸ On these three days informal negotiations took place in small groups between leaders of major economies and emitters, representatives of regional groups as well as representatives of the most vulnerable and least developed countries. The negotiations that took place between a group of 28 leaders⁷⁹ resulted in a document known as the Copenhagen Accord,⁸⁰ with the final agreement being decided by the United States of America and the four major developing economies, Brazil, India, South Africa and China.

However, COP 15 only resulted in a political agreement, namely, the Copenhagen Accord. Where in the past COPs normally ended with a series of binding decisions,⁸¹ COP 15 in Copenhagen only “took note” of the Copenhagen Accord since it was neither adopted nor endorsed by the Copenhagen Conference. The conference was marked by heated discussion over transparency or rather the lack thereof and the perceived undemocratic process followed in the negotiations, as the group that informally negotiated the Copenhagen Accord was not authorised by the COP nor was the COP kept up to date on the progress of the negotiations.⁸² The Accord is therefore not a legally binding document and its provisions do not have any legal standing within the UNFCCC process.

Parties wishing to associate themselves with the Copenhagen Accord are to notify the UNFCCC.⁸³ As of 1 August 2011, more than 140 countries have expressed their intention to be listed as agreeing to the Accord and more than 80 countries have

78 <http://www.iisd.ca/climate/ccwg14/> [date of use 08 May 2011]. More than 40 000 people applied for accreditation at the Copenhagen Conference.

79 This group consisted of the BASIC countries (Brazil, South Africa, India and China), Algeria, Australia, Bahamas, Canada, Columbia, Denmark, Ethiopia, European Community, European Commission, Gabon, Grenada, Indonesia, Japan, Korea, Lesotho, Maldives, Mexico, Papa New Guinea, Poland, Norway, Russia, Saudi Arabia, Sudan, Sweden and the USA.

80 Copenhagen Accord in COP15 Report, UN Doc. FCCC/CP/2009/11/Add.1 hereafter referred to as the Copenhagen Accord.

81 To name a few examples: COP 1 the Berlin Mandate, COP 2 the Geneva Declaration, COP 7 Marrakesh Accords, COP 8 Delhi Declaration on Climate Change and Sustainable Development, COP 11 decisions establishing the AWG-KP, COP 13 Bali Road Map.

82 <http://www.cprindia.org> [date of use 03 March 2010].

83 Para 4 Copenhagen Accord.

provided information on their emission reduction and other mitigation targets.⁸⁴ The Appendices to the Copenhagen Accord, with the countries' listed targets and actions will, however, not have an effect on the future of the climate change regime if it is not binding on states in some or the other way.⁸⁵

The Copenhagen Accord is a short document consisting of five pre-ambular recitals and twelve paragraphs. The key elements of the Copenhagen Accord include: the long-term aspirational goal of limiting climate change to no more than 2° Celsius, it however does not indicate by when GHG emissions should peak; significant financial resources and assistance; a system of “pledge and review” for both developed and developing country mitigation commitments and provides for “international consultation and analysis” of developing countries' actions.⁸⁶

The five pillars of the Bali Action Plan – shared vision, mitigation, adaptation, finances and technology – are all covered by the Copenhagen Accord. The Copenhagen Accord also unequivocally endorses the continuation of the two-track negotiations under the UNFCCC.⁸⁷

The Copenhagen Accord provides in paragraph 1: “We emphasise our strong political will to urgently combat climate change in accordance with the principle of common but differentiated responsibilities and respective capabilities,”⁸⁸ and furthermore that “deep cuts” in emissions are necessary. The Copenhagen Accord, however, does not quantify the “deep cuts” nor does it indicate how this burden is to be shared between countries.⁸⁹

84 For a list of countries that have associated with the Copenhagen Accord see <http://www.unfccc.int/home/items/s262.php>.

85 Rajamani 2010 *ICLQ* 841.

86 Bodansky 2010 <http://ssrn.com/abstract=1553167>.

87 The preamble to the Copenhagen Accord states that the results of the two *Ad hoc* Working Groups are noted and that the Copenhagen Accord endorses decision 1/CP.15 to extend the mandate of the AWG-LCA to enable it to continue its work and decision 1/CMP.5 that requests the AWG-KP to continue its work.

88 Para 2 Copenhagen Accord provides: “[T]ake action to meet this objective consistent with science and on the basis of equity. We should cooperate in achieving the peaking of global and national emissions as soon as possible, recognizing that the time frame for peaking will be longer in developing countries and bearing in mind that social and economic development and poverty eradication are the first and overriding priorities of developing countries and that a low-emission development strategy is indispensable to sustainable development.”

89 Rajamani 2010 *ICLQ* 827.

When we look at mitigation, both developed and developing countries have obligations under the Accord that are briefly discussed. The developed countries are obliged to commit to the implementation of emission targets for 2020.⁹⁰ Developing countries mitigation has evolved through time and in the Copenhagen Accord developing countries are required to submit and implement mitigation actions and the least developed countries (LDCs) and small island developing states may undertake voluntary actions on the basis of support.⁹¹

The Copenhagen Accord, however, lacks specific emission reductions targets for countries even though it makes reference to strengthening the long-term goal to temperature rises of 1.5° Celsius.⁹²

Differential treatment for developing countries is further visible in the Copenhagen Accord. The language used to frame developed countries' targets is prescriptive – “commit to implement”⁹³ – while in case of developing countries it is predictive: “will implement mitigation action”⁹⁴.⁹⁵

The mitigation commitments of developed countries will be measured, reported and verified (MRV) in a “rigorous, robust and transparent” manner, “in accordance with existing and any further guidelines adopted by the COP”.⁹⁶

It is, however, clear that developing countries are being dealt with more strictly than before, even though they are not forced to take any mitigation action. However, when they voluntarily choose to do so they will be subject to the requirements of the Copenhagen Accord. Developing countries can formulate their own nationally

90 Para 4 Copenhagen Accord 2009.

91 Para 5 Copenhagen Accord 2009. Developing countries' mitigation action will be subject to their domestic measurement, reporting and verification” in biannual national communications. These communications must provide for “international consultations and analysis under clearly defined guidelines that will ensure that national sovereignty is respected”. For the first time in the climate change regime a clear distinction is made between various developing countries.

92 Para 12 Copenhagen Accord 2009.

93 Para 4 Copenhagen Accord 2009.

94 Para 5 Copenhagen Accord 2009.

95 Rajamani 2010 *ICLQ* 841–842.

96 Para 4 Copenhagen Accord 2009.

appropriate mitigation actions (NAMAs) that they have to submit to the UNFCCC secretariat.⁹⁷

Developing countries have to submit their proposed mitigation action, in a defined format, and these actions in turn have to be subject to their domestic measurement, reporting and verification and must be reported in national communications every two years. Provision must also be made for international consultations and analysis under clearly-defined guidelines that respect national sovereignty.⁹⁸ Developing countries seeking international aid for implementing mitigation actions will furthermore be subject to international MRV “in accordance with guidelines adopted by COP”.⁹⁹ No guidelines have, however, been adopted by COP.

The Accord thus still recognises and adheres to the CBDR principle by requiring developed countries to take mitigation measures, by establishing their own reduction target levels, base year and accounting rules and committing themselves to implement measures to achieve targets. Developing countries in turn are required to implement mitigation actions but there is no cumulative quantitative mitigation goal prescribed for them.¹⁰⁰ Unfortunately the pledges made after the Accord are only politically binding and not legally.

The mitigation actions of developing countries should be consistent with Article 4.1¹⁰¹ and 4.7¹⁰² of the UNFCCC and sustainable development.

On adaptation, the Copenhagen Accord recognises that there is an urgent need for “enhanced action and international cooperation on adaptation”.¹⁰³ There is also an

97 A list of the NAMA pledges can be seen at <http://unfccc.int/home/items/5265.php>.

98 The Copenhagen Accord, however, does not specify how or by whom these guidelines should be drafted.

99 See para 5 of the Copenhagen Accord 2009; see also Bodansky 2010 *AJIL* 6–7.

100 Para 5 Copenhagen Accord 2009.

101 Art 4(1) of the UNFCCC specifically provides for “all parties taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances”.

102 “[A]cknowledging that the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response, in accordance with their common but differentiated responsibilities and respective capabilities and their social and economic conditions.”

103 Para 3 Copenhagen Accord 2009.

agreement between parties that developed countries will “provide adequate, predictable and sustainable financial resources, technology and capacity-building to support the implementation of adaptation action in developing countries”.¹⁰⁴

Technology development and transfer have been a fundamental target of the UNFCCC since its inception¹⁰⁵ and therefore the Copenhagen Accord established a Technology Mechanism to “accelerate technology development and transfer in support of action on adaptation and mitigation”.¹⁰⁶ Technology is thus to be made available to developing countries to help reduce their GHG emissions.

With regards to finance, the Copenhagen Accord states that “scaled up, new and additional, predictable and adequate funding as well as improved access shall be provided for developing countries”¹⁰⁷ and the funding should be utilised for mitigation, adaptation, technology development and transfer and capacity building.¹⁰⁸ Provision is made for short- and long-term financial support by developed countries for developing countries, especially the LDC.¹⁰⁹

In support of this the Accord provides for the establishment of the Copenhagen Green Climate Fund. This fund must be used to support projects, programmes and other activities in developing countries.¹¹⁰ The Fund will also assist developed countries in providing “adequate, predictable and sustainable financial resources, technology and capacity-building to support the implementation of adaptation action in developing countries”.¹¹¹ There are, however, no details of where the new financing that the wealthier developed countries has to provide to the poorer

104 Para 3 Copenhagen Accord 2009.

105 Art 4.5 of the UNFCCC requires developed countries to “take all practicable steps to promote, facilitate and finance, as appropriate, the transfer of, or access to environmentally sound technologies and know-how to other Parties, particularly developing country parties to enable them to implement the provisions of the Convention”. Art 4.7 of the UNFCCC further establishes a connection between the extent to which developing country parties will implement their commitments and the effective implementation by developed country parties of their commitments related to financial resources and transfer of technology.

106 Para 11 Copenhagen Accord 2009.

107 Para 8 Copenhagen Accord 2009.

108 Para 8 Copenhagen Accord 2009.

109 Para 8–10 of the Copenhagen Accord is devoted to climate finance.

110 Para 10 Copenhagen Accord 2009. The Copenhagen Green Climate Fund must be utilised to support projects in developing countries related to “mitigation, including REDD-plus, adaptation, capacity building, technology development and transfer”.

111 Para 3 Copenhagen Accord 2009.

developing countries will come from. It is described in general terms as coming from a “wide variety of sources public and private, bilateral and multilateral, including alternative sources of finance”.¹¹² \$30 billion fast-start funding must be financed between 2010 and 2012 and thereafter \$100 billion a year by 2020. The developed countries can only list their funding commitments in an annex to the Accord. The Accord does, however, create a High Level Panel under the COP to study the contribution of funding and review the implementation of the funding. However, the powers of the Panel are unclear, as are the proper guidelines as to how the money in the Green Climate Fund should be used.¹¹³

It is thus clear that the political willpower to make funding available is present and that countries generally agree that funding is required to assist developing countries. Developing countries feel that they are entitled to payment from developed countries for their “carbon debt” regarding past emissions, while developed countries opine that the financial assistance should be reciprocated by developing countries’ mitigation commitments.

Reduced emissions from deforestation and forest degradation (known as REDD+) are brought into climate policy by the Copenhagen Accord.¹¹⁴ REDD+ is an ambitious endeavour, as approximately 15% of global carbon emissions are due to deforestation and forest degradation. For that reason the Copenhagen Accord requires the “immediate establishment of a mechanism including REDD-plus” and that funds must furthermore be mobilised for REDD+ from developed states. REDD+ is an international system to reduce deforestation and degradation while at the same time enhancing forest carbon stocks in developing countries.

It should be kept in mind that a legally binding agreement can be ineffective, as there are very little international legal tools to compel a country to comply with the

112 Para 8 Copenhagen Accord 2009.

113 Para 9 Copenhagen Accord 2009.

114 Para 6 Copenhagen Accord 2009 provides that “we recognise the crucial role of reducing emission from deforestation and forest degradation and the need to enhance removals of greenhouse gas emissions by forests and agree on the need to provide positive incentives to such actions through the immediate establishment of a mechanism including REDD-plus, to enable the mobilisation of financial resources from developed countries”.

agreement. The converse, however, is that a political agreement can be effective if the parties are motivated by self and mutual interest to comply with the agreement.

4 Effect of Copenhagen Accord on current and future climate change regime

The Copenhagen Accord signifies an inflection point for international climate change policy.¹¹⁵ In many countries the current climate policy discourse is marked with near total confusion and dismay and the Copenhagen Accord represents a breakthrough in an attempt at shedding light and supplying structure and initiative for the future of the climate change regime.

When one compares the Kyoto Protocol with the Copenhagen Accord it is clear that there are great distinctions between the two and that the climate change regime has evolved tremendously since 1997 when the Kyoto Protocol was adopted.

The most significant difference is the bottom-up process that is established in the Copenhagen Accord unlike in the Kyoto Protocol, where the emission targets are defined from the top-down through international negotiations. Developed countries can establish their own target emission-reduction levels, as opposed to specific levels that are set for developed countries in the Kyoto Protocol.

The bottom-up architecture of the Copenhagen Accord is a pledge and review system. It entails that states have presented pledges for emission reductions. These pledges are expressed as a percentage reduction relative to a base year, which needs to be achieved by a given year in the future. In other words the participating states voluntarily select their own targets, base year, accounting rules and actions according to their own political, economical and social circumstances, subject to MRV.¹¹⁶ The down side to the bottom-up process is that the various pledges are accepted without any negotiations in an effort to develop stronger commitments. Because of the threat of economic loss, countries will be hesitant to commit

115 Boyd 2010 *UPJIL* 457.

116 Bodansky 2010 *AJIL* 6; Leal-Arcas 2011 *EJLS* 42; it is a system of "pledge and review".

themselves to action if they are not sure that that their actions will be reciprocated by others.¹¹⁷

The current pledges of emission targets by developed countries and NAMAs by developing countries are most probably insufficient to reach the goal of achieving the 2° Celsius target. However, the current commitments under the Kyoto Protocol have failed to generate any noticeable reductions in GHG emissions since its adoption and entry into force.¹¹⁸ A quantified long-term goal was for the first time in the history of the climate change regime articulated in the Copenhagen Accord.

It is important to take note of the fact that the Copenhagen Accord represents a fundamental breakthrough in the climate change negotiations in that it was the first COP that specifically addressed developed as well as developing countries' emissions. The Kyoto Protocol contained no commitments on developing countries and the Bali Action Plan only suggested the adoption of NAMAs. As developed countries are increasingly insisting on addressing the emissions of developing countries as well, the Copenhagen Accord was the first event where all major emitting countries placed their pledges on the same record.

Climate change must be viewed as an adaptation challenge because it goes to the very core of structural vulnerabilities in the world.¹¹⁹ We have to realise that the international and political order is fragmented and new and alternative ways of framing the challenges are required and therefore the Copenhagen Accord should be seen as "a point of departure rather than a final product".¹²⁰

In the words of Boyd¹²¹

It is critical to recognise and build upon the great deal of ongoing climate governance activities happening in many diverse places around the world

117 Bodansky 2011 <http://ssrn.com/abstract=1773865> [date of use 15 March 2011].

118 For an in-depth discussion see Leal-Arcas 2011 *EJLS* 29.

119 Boyd 2010 *UPJIL* 462: climate change highlights the "resilience and adaptive capacity of social and ecological systems, the obligations of the rich to the poor, the prospect of seemingly permanent states of emergency".

120 Scholtz 2010 *AHRLJ* 22.

121 Boyd 2010 *UPJIL* 469.

and at multiple levels (including the UN process). All of which is messy, incoherent, highly politicised, and wrapped into larger strategic concerns.

A comprehensive and binding agreement would be ideal but it is clear from Copenhagen that it might be time for all parties involved to focus on tangible steps, within and outside the UNFCCC process, to address the problem.¹²² The role of the climate change regime should be to “help generate greater political will by raising the profile of the climate change issue and providing greater transparency”.¹²³ The Copenhagen Accord does indeed establish a transparent framework for the evaluation of countries’ performance against the pledges that they made.

Some scholars are of the opinion that countries have given up on developing a legally binding agreement as it is difficult to envisage a document with which all 193 member states will be satisfied and willing to commit to.¹²⁴ One can think that there is now a formal process run under the UNFCCC to try and negotiate an outcome of reducing GHG emissions, as well as informal negotiations between certain developed and developing countries to try and reach consensus within intergovernmental groups. Rajamani¹²⁵ takes the stance that if the Accord was an independent plurilateral agreement with its own operational architecture and normative core it could have had considerable force.

The climate change regime might be moving in the direction of political agreements rather than legal commitments, as a politically binding agreement is a *bona fide* pledge that the country will comply with the agreement through its domestic laws.¹²⁶ It might be good for the climate change regime to evolve through other forums¹²⁷ and through additional means, with bilateral, regional and multilateral actions and

122 Bodansky, Diringier 2010 <http://ssrn.com/abstract=1773828> [date of use 10 March 2011].

123 Bodansky 2011 <http://ssrn.com/abstract=1773865> [date of use 15 March 2011].

124 Leal-Arcas 2011 *EJLS* 29; Bodansky 2010 *AJIL* 3 the question is whether it is necessary to for an outcome to be legal in nature seeing that it is the actions of the countries that matter and not the legal character.

125 Rajamani 2010 *ICLQ* 828; <http://www.cprindia.org> [date of use 03 March 2011].

126 Leal-Arcas 2011 *EJLS* 30; See generally Bodansky *The Art and Craft of International Environmental Law*.

127 For example: World Trade Organisation; Organisation for Economic Cooperation and Development; International Energy Agency; International Trade Organisation. Another possibility is for smaller groups of states, for example the G-20 and the Major Economies Forum on Energy and Climate, to organise initiatives to address specific issues, for example technology research and development, forestry, etc.

agreements outside of the UNFCCC structures. This will complement evolution within the UNFCCC and might assist with the reduction of GHG emissions.¹²⁸

It is, however, clear that there are certain elements that have to be included and combined in any future climate change agreement: the aim to stabilize GHG emission levels; a climate fund that has to be over and above existing aid budgets and including a framework on carbon markets; binding emission reduction targets for *all* developed countries; binding emission reduction targets for wealthier developing countries; a framework to measure, report, and verify countries' actions; support for developing countries' actions; mechanisms to implement and address adaptation; mitigation; technology and forestry.¹²⁹

With regard to mitigation action, most of the developed countries consider a second commitment period under the Kyoto Protocol to be contingent on a legally binding framework that has to include all of the world's major emitters of GHGs. Unfortunately some of the world's largest emitters of GHGs have already declared that they will not commit to a second commitment period. These countries include Canada, Japan, the Russian Federation and of course the USA, seeing that they have not yet ratified the Kyoto Protocol.¹³⁰

With speculations going around regarding the feasibility of a second commitment period, developing countries continue to emphasise the importance of the Kyoto Protocol as a "safeguard" between the compulsory binding mitigation commitments of developed countries and the voluntary mitigation actions of developing countries.

Another hurdle in the way of agreeing to a legally binding agreement is that various countries have declared their willingness to adopt binding emission commitments subject thereto that the USA will do the same. The USA in turn will commit to binding

128 Bodansky, Diringier 2010 <http://ssrn.com/abstract=1773828> [date of use 10 March 2011]; Leal-Arcas 2011 *EJLS* 34.

129 Bodansky, Diringier 2010 <http://ssrn.com/abstract=1773828> [date of use 10 March 2011]; Burleson 2010 *WM & Mary Env'tl. L. & Pol'y Rev* 534.

130 <http://www.iisd.ca/climate/sb34/> [date of use 31 July 2011].

emission commitments subject to China's commitment and China in turn is unwilling to accept any form of legally binding emission commitments.¹³¹

An evolutionary process will take time and it allows for trial and error.¹³² The commitments and standards are now first set on a voluntary non-legally binding basis, after which the countries can decide whether or not they wish to convert the voluntary regime into a binding one. It provides states with flexibility and an opportunity to learn from experience and build up trust in the new system.¹³³

Bodansky¹³⁴ is further of the opinion that the Copenhagen Accord should have higher status than any other COP decisions, because while other COP decisions are negotiated by mid-level civil servants or other authorised officials the Copenhagen Accord was negotiated directly by world leaders and adopted by the leaders of the world's major economies. It should, however, be kept in mind that it is irrelevant by whom the climate negotiations are done because at the end of the day the decisions made have to be adopted by COP to be binding on the parties.

The Copenhagen Accord was not adopted as a COP decision due to the fact that consensus¹³⁵ could not be reached. A small group of countries led by Bolivia, Sudan, Cuba and Venezuela objected to the endorsement of the Accord by the COP, their objections being due to the procedural irregularities in the negotiation process as well as the substantive weakness of the Accord. This is a further illustration of why other forums outside of the UNFCCC should be considered, since the UNFCCC requires consensus decision-making.

It is suggested by Burleson¹³⁶ that "future international climate negotiations could proceed using a system of two-thirds majority vote rather than consensus". How the

131 Grubb 2010 *Climate Policy* 129.

132 States can evaluate whether a particular policy approach works before they decide what they want to do. Bodansky, Diringier 2010 <http://ssrn.com/abstract=1773828> [date of use 10 March 2011].

133 Bodansky 2011 <http://ssrn.com/abstract=1773865> [date of use 17 March 2011].

134 Bodansky 2011 <http://ssrn.com/abstract=1773865> [date of use 17 March 2011].

135 Consensus is required for the adoption of a COP decision. Consensus is usually defined as the absence of formal objections and not necessarily unanimity.

136 Burleson 2010 *WM & Mary Env'tl. L. & Pol'y Rev* 544.

understanding of consensus will evolve through time will be most interesting and it might have a long-term impact on UNFCCC negotiations.

4.1 Cancun Agreements

COP 16 that took place in Cancun, Mexico, from 29 November–11 December 2010 resulted in the Cancun Agreements and even though the Cancun Agreements barely avoided a complete breakdown of the UNFCCC process, they still represent a very modest positive step towards keeping the multilateral process under the UNFCCC alive.

The negotiations in Cancun focused on achieving a balanced package of outcomes. Therefore all efforts were made to safeguard the UNFCCC process, transparency was given priority and all participants were kept informed of the process.

The Cancun Agreements consist of two formal COP decisions¹³⁷ and various elements of the Copenhagen Accord were integrated into the UNFCCC process by the Cancun Agreements. One can even say that the non-binding Copenhagen Accord was brought to life by the binding Cancun Agreements. The Agreement that came out of the AWG-LCA is a more substantive agreement and can be seen as the successor to the Copenhagen Accord. It can be argued that the five-page Copenhagen Accord evolved into a more comprehensive document consisting of 30 pages.¹³⁸

The bottom-up approach of the Copenhagen Accord based on national pledges was officially brought into the UNFCCC process with the Cancun Agreements. The Cancun Agreements further succeeded in covering the five priority areas identified in the Bali Action Plan, namely, a shared long term vision, adaptation, mitigation, finance and technology transfer.

137 Decision 1/CP.16 includes the outcome of the AWG-LCA and covers the elements of the Bali Action Plan. Decision 1/CMP.6 reflects the outcome of the work done by the AWG-KP and covers mitigation for Annex I Parties.

138 Formally known as decision 1/CP16 see FCCC/CP/2010/7/Add.1.
http://unfccc.int/files/meetings/cop_16/application/pdf/cop16_lca.pdf.

The Cancun Agreements recognised the need for global GHG emission cuts in order to achieve the target of a maximum overall 2° Celsius temperature rise set by the Copenhagen Accord. The need to consider the strengthening of this long-term global goal is further recognised in the Cancun Agreements.¹³⁹

The pledges of the emission targets and actions pursuant to the Copenhagen Accord were acknowledged and officially recognised by the two information documents, the one for NAMAs to be implemented by developing countries and the other for emission reduction targets of developed countries.¹⁴⁰ There will thus be two distinct information documents, the one for the mitigation actions taken by developing countries and the other for the quantified economy-wide emission reduction targets of developed countries.

The Cancun Agreements further established a registry for the listing of NAMAs for which international technological,¹⁴¹ financial and capacity-building support is required.

The Cancun Agreements call for the enhancement and development of MRV and international consultation and analysis modalities and processes for all countries.

To strengthen the MRV of mitigation actions, the Cancun Agreements require more detailed reporting from both developing and developed countries in their national communications of mitigation actions and commitments. The Cancun Agreements further call for new biennial reports by developed countries on the support provided to developing countries as well as on their progress in reducing emissions of GHGs.¹⁴²

139 Para 4 Decision 1/CP.16: "strengthening the long-term global goal on the basis of the best available scientific knowledge, including in relation to a global average temperature rise of 1.5° C".

140 Para 6 (a), Decision 1/CMP.6. Para 36 and 49 Decision 1/CP.16

141 Para 53 Decision 1/CP.16.

142 Para 40 Decision 1/CP.16.

On technology transfer and development the Cancun Agreements state that the “objective of enhanced action on technology development and transfer is to support action on mitigation and adaptation in order to achieve the full implementation” of the UNFCCC.¹⁴³ Technology therefore needs to be nationally determined, based on national priorities and circumstances.¹⁴⁴

New institutions and processes also created in the Cancun Agreements are the technology mechanism,¹⁴⁵ to enhance action to facilitate technology development and transfer, especially for developing countries; the Cancun Adaptation Framework and Adaptation committee.¹⁴⁶ The standing committee on Finance and the Framework for REDD+ was also established.

The REDD+ mechanism under the UNFCCC was officially launched by the Cancun Agreements. A REDD+ framework was agreed upon in the Cancun Agreements and countries are encouraged to slow, halt and reverse destruction of forests. More specifically, developing countries are encouraged to contribute to mitigation actions in the forest sector.¹⁴⁷

The climate fund created by the Copenhagen Accord was officially created through Decision 1 – the Green Climate Fund. The Green Climate Fund is to be the new operating entity of the UNFCCC’s financial mechanisms with a board of 24 members to be appointed, with equal representation from developed and developing countries.¹⁴⁸ The Green Climate Fund will be administered by the World Bank for the first three years. The parties further recognised the commitments of developed countries under the Copenhagen Accord to provide \$30 billion of fast start finance for the period 2010–2013,¹⁴⁹ to be used for mitigation and adaptation, and thereafter to mobilise \$100 billion per year in public and private finance by 2020.¹⁵⁰ The Cancun

143 Para 113 Decision 1/CP.16.

144 Para 114 Decision 1/CP.16.

145 The Technology Mechanism includes a Technology Executive Committee and a Climate Technology Centre and Network. See para 121 and para 123 Decision 1/CP.16.

146 Para 13, para 14, para 20 and para 21 Decision 1/CP.16.

147 Para 68 Decision 1/CP.16.

148 The Green Climate Fund will be accountable to and function under the guidance of the COP.

149 Para 95 Decision 1/CP.16.

150 Para 98 Decision 1/CP.16.

Agreements further called for scaled-up, new and additional, predictable and adequate funding for developing countries.¹⁵¹

When implemented, this will be an unprecedented flow of resources from developed countries to developing countries to assist them to cope with the impacts of climate change and to adopt clean energy technologies.

If a multilateral fund can be established, it will provide support for developing countries even if there are no binding financial commitments.

The Cancun Agreements calls upon countries to consider the establishment of market-based mechanisms to enhance the cost effectiveness of mitigation actions,¹⁵² and to build on the existing mechanisms under the Kyoto Protocol.¹⁵³

In Cancun at COP 16 only Bolivia objected to the adoption of the text of the Cancun Agreement¹⁵⁴ but for the first time the chairperson of the COP deviated from the consensus decision-making norm and only noted Bolivia's objection whereafter she proceeded.¹⁵⁵ This decision by the COP chairperson leads the UNFCCC "process into unchartered procedural waters".¹⁵⁶ Bolivia threatened to launch a legal challenge before the International Court of Justice because of the violation of procedural rules – the lack of complete consensus.

151 Para 97 Decision 1/CP.16.

152 Para 80 Decision 1/CP.16.

153 Para 83 Decision 1/CP.16.

154 Bolivia objected because they were of the opinion that the Cancun Agreements didn't address climate change sufficiently and would not lead to a socially fair and environmentally ambitious outcome.

155 The COP 16 chairperson was of the opinion that one country does not have the right to refuse a decision on which all the other parties agreed on and said: "Consensus requires that everyone is given the right to be heard and have their views given due consideration, and Bolivia has been given this opportunity. Consensus does not mean that one country has the right to veto, and can prevent 193 others from moving forward after years of negotiations on something that our societies and future generations expect": ENB 2010 <http://www.isd.ca/download/pdf/enb12485e.pdf>.

156 Rajamani 2011 *ICLQ* 517. For a discussion of the effect of this decision by the chairperson of the COP see Rajamani 2011 *ICLQ* 514–519.

The COP further undertook to have the work of the AWG-KP and the AWG-LCA finalised as soon as possible to ensure that there is no gap between the first and the second commitment periods under the Kyoto Protocol.¹⁵⁷

The Cancun Agreements follow a bottom-up, non-prescriptive pledge and review approach. Yet many parties to the UNFCCC realise that the architecture of the Kyoto Protocol has to remain a cornerstone of the climate change negotiations. The alternatives discussed to achieve this are either to keep the Kyoto Protocol in its current form with a separate Protocol under the AWG-LCA or a new Protocol that combines elements of the Kyoto Protocol with the AWG-LCA outcome.¹⁵⁸ The problem is that there are parties that will not sign or ratify any treaty that would bind them legally.¹⁵⁹

5 Conclusion

A critical turning point in the evolution of the climate change regime was reached in Copenhagen.¹⁶⁰ For the first time in the history of the climate change regime serious attention was given to the emissions of developing countries and for the first time developing countries will reflect their emission pledges in an international instrument. Other firsts are that a quantified long-term goal was set (holding climate change below 2°C) and provision was made for the establishment of the Copenhagen Green Climate Fund and a Technology Mechanism. The fact that it is only a politically binding agreement should not be seen as a major drawback as states will sometimes take legal agreements lightly and political agreements seriously. The Copenhagen Accord was further brought to life by the Cancun Agreements.

The climate change regime is in disarray with many parties arguing for a single comprehensive legal agreement under the UNFCCC and others pushing for a second commitment period under the Kyoto Protocol with a parallel binding

157 Para 1 Decision 1/CMP.6.

158 Submissions under the Cancun Agreements, Enhanced action on Mitigation/AWG-LCA/AWG-KP September 2011 http://unfccc.int/files/meetings/ad_hoc_working_groups/lca/application/pdf/australia_norway_mitigation_submission_.pdf [date of use 03 October 2011].

159 Examples of these parties are the USA as well as the LDC.

160 Bodansky, Diringier 2010 <http://ssrn.com/abstract=1773828> [date of use 10 March 2011].

agreement under the UNFCCC.¹⁶¹ What is evident, however, is that deep cuts in global GHG emissions are urgently required to avert further serious climate destabilisation. Nonetheless, the credibility and relevance of the UNFCCC process in the eyes of observers and parties could be undermined if countries continue to push too fast for binding commitments, as it can cause a string of failures.¹⁶² In the words of Bodansky¹⁶³ “oftentimes strong, stable and legally binding architectures are not simply hatched; they are built step by step over time” of which the Copenhagen Accord is a fine example.

All parties imagine a different future and therefore an integrated approach, encompassing a collective agreement among the key contributors, is required. It is also important for all countries to motivate and “promote sustainable lifestyles and climate-resilient development”¹⁶⁴ and by implication more sustainable production and consumption.

The current multi-track process and the expectations from the UNFCCC may be too much, seeing that the process to ensure that there is no gap between commitment periods after 2012 has already started in 2005 with the lack of progress evident, and to date the collective political will to achieve this has not been there. None of the parties on either side of the negotiations are prepared to take a leap of faith without the reassurance that their actions will be reciprocated by the other side with the confidence that their economic interests are being fairly and equally treated. It is time to rethink the legal approach to climate change and the current instruments addressing it.

Any future climate change agreement needs to create binding commitments, including quantified emission reduction commitments for developed countries, dynamic targets for wealthier developing countries and voluntary targets for the LDC as well as enforcement mechanisms. It further has to include a strong support structure for developing countries which will have to include mechanisms that will

161 Bodansky, Diringier 2010 <http://ssrn.com/abstract=1773828> [date of use 10 March 2011].

162 Leal-Arcas 2011 *EJLS* 39.

163 Bodansky, Diringier 2010 <http://ssrn.com/abstract=1773828> [date of use 10 March 2011].

164 Burleson 2010 *WM & Mary Envtl. L. & Pol’y Rev* 560.

address adaptation, technology and a system for MRV of countries' mitigation actions.

Time will tell what happens at COP 17 which takes place from 28 November 2011 to 09 December 2011 in Durban, South Africa. The predicament is that the Kyoto Protocol targets expire after 2012; and in its current form the Kyoto Protocol does not even cover a third of global emissions. It is therefore vital for any future agreement to include the USA as well as developing countries such as South Africa, Brazil, India and China.

It might be time to opt for an alternative solution – an agreement comprising of ambitious and legally binding GHG emission reduction commitments, adaptation, technology transfer commitments, finance commitments between a group of progressive countries, irrespective of being developed or developing countries, which are willing to proceed. This can then build towards multilateralisation. However, action must be swift, as the first commitment period of the Kyoto Protocol ends in 2012.

In conclusion, the ultimate aim should be an effective and comprehensive binding climate change agreement that provides assurance of compliance, bearing in mind that there is a need for flexibility and evolution as science and technology keep on developing and with that our understanding of the climate change problem.

Bibliography

Articles

Bodansky 2010 *AJIL*

Bodansky D "The Copenhagen Climate Change Conference: A Post Mortem"
2010 *AJIL* 1–10

Bodansky 2010 *GJICL*

Bodansky D "Climate Change and Human Rights: Unpacking the Issues"
2010(38) *GJICL* 511–524

Boyd 2010 *UPJIL*

Boyd W "Climate Change, Fragmentation, and the Challenges of Global
Environmental Law: Elements of a Post-Copenhagen Assemblage" 2010 32:2
UPJIL 457–550

Burleson 2010 *WM & Mary Env'tl. L. & Pol'y Rev.*

Burleson E "Climate Change Consensus: Emerging International Law" 2010
(34) *WM & Mary Env'tl. L. & Pol'y Rev.* 543–588

Churchill and Ulfstein 2000 *AJIL*

Churchill RR and Ulfstein G "Autonomous Institutional Arrangements in
Multilateral Environmental Agreements: A Little-Noticed Phenomenon in
International Law" 2000 (94)4 *AJIL* 623–659

Depledge 2008 17(2) *Reciel*

Depledge J "Crafting the Copenhagen Consensus: Some Reflections" 2008
17(2) *Reciel* 154–165

Grubb 2010 *Climate Policy*

Grubb M "Copenhagen: Back to the Future?" *Climate Policy* 127–130

Hunter 2009 *Oregon Review of International Law*

Hunter DB "Human Rights Implications for Climate Change Negotiations"
2009 (11) *Oregon Review of International Law* 331–363

Leal-Arcas 2011 *EJLS*

Leal-Arcas R "Alternative Architecture for Climate Change: Major Economies"
2011 (4)1 *EJLS* 26–56

Liu 2011 13(1) *Environmental Law Review*

Liu J "Legislation and Policy: The Cancun Agreements" 2011 13(1)
Environmental Law Review 43–49

Palmer 1992 *AJIL*

Palmer G "New Ways to make International Environmental Law" 1992 (86)
AJIL 259–283

- Rajamani 2008 *ICLQ*
Rajamani L “From Berlin to Bali and Beyond: Killing Kyoto Softly?” 2008 (57) *ICLQ* 909–939
- Rajamani 2010 *ICLQ*
Rajamani L “The Making and Unmaking of the Copenhagen Accord” 2010 *ICLQ* 824–843
- Rajamani 2011 *ICLQ*
Rajamani L “The Cancun Climate Agreements: Reading the Text, Subtext and Tea Leaves” 2011 *ICLQ* 499–519
- Scholtz 2008 *NILR*
Scholtz W “Custodial Sovereignty: Reconciling Sovereignty and Global Environmental Challenges amongst the Vestiges of Colonialism” 2008 *NILR* 323–341
- Scholtz 2008 *SAYIL*
Scholtz W “Different Countries, one Environment: A Critical Southern Discourse on the Common but Differentiated Responsibilities Principle” 2008 *SAYIL* 113–136
- Scholtz 2008 *YIEL*
Scholtz W “Collective Environmental Security: The Yeast for the Refinement of International Law” 2008 *YIEL* 135–162
- Scholtz 2009 *CILSA*
Scholtz W “Equity as the Basis for a Future International Climate Change Agreement: Between Pragmatic Panacea and Idealistic Impediment. The Optimisation of the CBDR Principle *via* Realism” 2009 *CILSA* 166–182
- Scholtz 2010 *AHRLJ*
Scholtz W “The Promotion of Regional Environmental Security and Africa’s Common Position on Climate Change” 2010 *AHRLJ* 1–25
- Stone 2004 *AJIL*
Stone CD “Common but Differentiated Responsibilities in International Law” 2004 *AJIL* 276–301
- Olivier and Abioye 2008 *SAYIL*
Olivier M and Abioye F “International Environmental Law: Assessing Compliance and Enforcement under South African and International Law” 2008 *SAYIL* 184–216
- Warbrick and McGoldrick 2008 *ICQL* 446
Warbrick C and McGoldrick “Global Warming and the Kyoto Protocol” 2008 (47) *ICLQ* 446–461

Books

- Birnie, Boyle and Redgwell *International Law and the Environment*
Birnie PW, Boyle AE and Redgwell C *International Law and the Environment*
3rd ed (Oxford University Press Oxford 2009)
- Bodansky, Brunnee and Hey *The Oxford Handbook of International Environmental Law*
Bodansky D, Brunnee J and Hey E *The Oxford Handbook of International Environmental Law* (Oxford University Press Oxford 2007)
- Bodansky *The Art and Craft of International Environmental Law*
Bodansky D *The Art and Craft of International Environmental Law* (Harvard University Press, Cambridge 2009)
- Brierly *The Outlook for International Law*
Brierly JL *The Outlook for International Law* (Oxford Clarendon Press 1944)
- Dugard *International Law a South African Perspective*
Dugard J *International Law a South African Perspective* 3rd ed (Juta Landsdowne 2005)
- Nanda and Pring *International Environmental Law & Policy for the 21st Century*
Nanda VP and Pring G *International Environmental Law & Policy for the 21st Century* (New York 2003)
- Rajamani *Differential Treatment in International Environmental Law*
Rajamani L *Differential Treatment in International Environmental Law* (Oxford University Press Oxford 2006)
- Sands *Principles of International Environmental Law*
Sands P *Principles of International Environmental Law* 2nd ed (Cambridge University Press 2003)
- Swanson and Johnston *Global Environmental Problems and International Environmental Agreements*
Swanson T and Johnston S *Global Environmental Problems and International Environmental Agreements: The Economics of International Institution Building* (Edward Elgar Publishing Limited Cheltenham 1999)

Internet Sources

- Bodansky, Diringier 2010 <http://ssrn.com/abstract=1773828>
Bodansky D, Diringier E *The Evolution of Multilateral Regimes: Implications for climate change* <http://ssrn.com/abstract=1773828> [Date of use 10 March 2011]

- Bodansky 2011 <http://ssrn.com/abstract=1773865>
 Bodansky D *A Tale of Two Architectures: The Once and Future U.N Climate Change Regime* <http://ssrn.com/abstract=1773865> [Date of use 17 March 2011]
- Bodansky 2011 <http://ssrn.com/abstract=1917603>
 Bodansky D *W[h]ither the Kyoto Protocol? Durban and Beyond* <http://ssrn.com/abstract=1917603> [Date of use 22 September 2011]
- Brown 2010 <http://rockblogs.psu.edu/climate/2010/12/>
 Brown DA *An Ethical Analysis of the Cancun Climate Negotiations Outcome* <http://rockblogs.psu.edu/climate/2010/12/> [Date of use 03 January 2011]
- ENB 2010 <http://www.isd.ca/download/pdf/enb12485e.pdf>
 Summary of the Cancun Climate Change Talks: 29 November – 11 December 2010 Environmental Negotiations Bulletin <http://www.isd.ca/download/pdf/enb12485e.pdf> [date of use 28 May 2011]
- Mejia http://www20.gencat.cat/docs/icip/continguts/Publicacions/workingPapers/Arxius/WP10_6_ANG.pdf
 Mejia DA *The Evolution of the Climate Change Regime: Beyond a North-South Divide?* http://www20.gencat.cat/docs/icip/continguts/Publicacions/workingPapers/Arxius/WP10_6_ANG.pdf [date of use 29 June 2011]
- Mwebaza and Mateche <http://www.polity.org.za>
 Mwebaza R and Mateche DE *Is climate Change Creating More Environmental Refugees than War in Africa* <http://www.polity.org.za> [Date of use 04 Aug 2010]
- Rajamani <http://www.cprindia.org>
 Rajamani L *Neither fish nor fowl* <http://www.cprindia.org> [date of use 03 March 2010]
- The Bali Action Plan: Key issues in the Climate Negotiations, Summary for Policy Makers 2008 http://www.undp.org/climatechange/docs/UNDP_BAP_Summary.pdf [date of use 28 February 2011].
- http://unfccc.int/essential_background/convention/status_of_ratification/items/2631.php [date of use 06 October 2011].
- http://unfccc.int/essential_background/convention/convention_bodies/items/2629.php [date of use 03 October 2011].
- <http://unfccc.int/home/items/5262txt.php> [date of use 29 October 2010]
- http://unfccc.int/files/meetings/cop_16/application/pdf/cop16_lca.pdf [date of use 01 August 2011]
- <http://unfccc.int/resource/docs/cop7/13a01.pdf> [date of use 03 October 2011].

<http://unfccc.int/resource/docs/2005/cop11/eng/05a01.pdf> [date of use 25 September 2011].

http://unfccc.int/files/meetings/cop_16/application/pdf/cop16_kp.pdf [date of use 01 August 2011]

<http://www.iisd.ca/climate/ccwg14/> [date of use 08 May 2011]

<http://www.iisd.ca/climate/sb34/> [date of use 31 July 2011]

International Instruments

Bali Action Plan (2007)

Cancun Agreements (2010)

Copenhagen Accord (2009)

Kyoto Protocol to the United Nations Framework Convention on Climate Change (1997)

Rio Declaration on Environment and Development (1992)

Stockholm Declaration (1972)

United Nations Framework Convention on Climate Change (1992)

Vienna Convention on the Law of Treaties (1969)