Cross-Cutting Issues in the UNFCCC:
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Background Brief for the Policy Workshop on:
Cross-Cutting Issues

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"Legal Architecture Issues"[1]

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I. INTRODUCTION

The purpose of this brief is two-fold. First, it briefly provides an overview of country positions on the legal architecture for a post-2012 outcome at Copenhagen based on recent submissions in the context of the AWG-KP. Second, it provides an analysis of two major options for a legal architecture: a new Copenhagen protocol, and amended Kyoto protocol plus COP decisions going forward. The analysis identifies certain key issues that may be implicated in the choice of legal form for the Copenhagen outcome as well as practical considerations.

II. APPROACHES OF NEGOTIATING GROUPS AND COUNTRIES

This section provides an overview of country positions on the legal architecture for a post-2012 outcome at Copenhagen. At present, there have been two calls for submissions from the AWG-KP on legal architecture questions: views on the legal implications arising out of the work of the AWG-KP; and views on possible amendments to the Kyoto Protocol.[2] The country positions are based on what can be gleaned from the public documents released in connection with those calls.

Australia

Australia submitted a proposal that includes two different options for the post-2012 outcome: a single, new protocol (Model A); and two protocols in the form of an amended Kyoto Protocol and a new Protocol under the Convention (Model B).[3] The core elements of both models would include provisions that address: mitigation; adaptation and delivery commitments; actions and mechanisms; and reporting, compliance and institutional issues. According to Australia the most

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[1] This paper is based on research carried out by CIEL on legal architecture issues.
[2] *See generally*, KP, AWG-KP, *Views on possible elements for amendments to the Kyoto Protocol pursuant to its Article 3, paragraph 9: Submissions from Parties*, FCCC/KP/AWG/2009/MISC.7 (Apr. 7, 2009) [hereinafter AWG-KP, *Views on Possible Elements for Amendments*]; KP, AWG-KP, *Views on the legal implications arising from the work of the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol pursuant to Article 3, paragraph 9: Submissions from parties*, FCCC/KP/AWG/2009/MISC.6 (Feb. 27, 2009) [hereinafter AWG-KP, *Views on the legal implications of AWG-KP Work*].
[3] KP, AWG-KP, *Views on the legal implications arising from the work of the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol pursuant to Article 3, paragraph 9, of the Kyoto Protocol: Submissions from Parties (Addendum 2)*, FCCC/KP/AWG/2009/MISC.6/Add.2 (Mar. 26, 2009).

effective option would be a single new Protocol that unifies action under the Convention and builds on the relevant provisions of the Kyoto Protocol.[4]

In Australia's view, a single treaty would establish a coherent framework for the post-2012 regime. While it would build on the Kyoto Protocol, it would not necessarily replicate its provisions.[5] In general, a unified Protocol would lead to more efficient negotiations and certainty during implementation. For example, it could accommodate a single registry system, with a variety of different schedules that captures both mitigation commitments and actions.[6] This would simplify the process of assessing comparability of efforts -- a process that would be difficult to conduct "across two negotiating fora."[7] It would also allow for a "single set of institutions and procedures," which will make MRV, compliance procedures and dispute settlement more consistent and efficient.[8]

According to Australia, a two-treaty outcome would have some short-term practical and political benefits by maintaining the current two-track negotiating process, and preserving the Kyoto Protocol, which countries are now familiar with.[9] However, Australia notes that the division of mitigation efforts could potentially discourage countries from adopting legally binding economy-wide reduction targets over time.[10] Further, facilitating flexibility mechanisms under the two-track approach requires either complex linkages between the two protocols or separate mechanisms.[11] Implementation could also be difficult, particularly with respect to legal interpretation of the two protocols. [12] Australia also discourages the use of COP decisions to represent the Convention track outcome, because commitments for non-Annex I Parties could only be captured in decisions as opposed to legally binding treaty text.[13]

Belarus

Belarus suggests that the work on improvements to the Convention and the Protocol be directed at the integrity and coordination of both agreements.[14] Further, given the experience of joining Annex B through amendment procedures, Belarus notes that the process is unreasonably long and creates legal uncertainty with respect to Parties that do not ratify the amendment.[15] Therefore, Belarus suggests that the amendment procedure for Annex B (and potentially other situations in which commitments or actions are adopted) be simplified in a manner that takes into account those issues.[16]

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[4] *Id.* at 2.
[5] *Id.* at 3.
[6] *Id.* at 3.
[7] *Id.* at 3.
[8] *Id.* at 4.
[9] *Id.* at 4.
[10] *Id.* at 4.
[11] *Id.* at 4.
[12] *Id.* at 4.
[13] *Id.* at 5.
[14] AWG-KP, *Views on the legal implications of AWG-KP Work, supra* note x, at 3.
[15] *Id.* at 3.
[16] *Id.* at 3, 4.

European Union

The EU considers the broad ranging work plan of the AWG-KP to be acceptable unless Parties decide otherwise by consensus. It disagrees with the view that the AWG-KP only has the power to consider amendments to Annex B, because it is not possible "to give effect to amendments of Annex B or under Article 3.9 without wider amendments (for example, to Article 3)."[17] While noting that the negotiations under the Bali Action Plan and the legal form of a Copenhagen outcome may have implications for the legal work of the AWG-KP, the EU suggests the following basic amendments in order to give effect to a second commitment period: amendments to duration and overall emission reduction aims (Article 3.1); updating of deadlines (Article 3.5); additional wording in Article 3.7; amendments to Article 3.9; and new commitments inscribed in Annex B.[18]

Other proposed amendments include: new or additional policy elements; simplification of procedures (e.g., those relating to amending Annex B); expansion of the coverage of gases under the Kyoto Protocol; improvements to flexibility mechanisms by introducing sectoral credits and sectoral emissions trading; approaches to limit bunker fuel emissions; and amendments to LULUCF.[19]

Indonesia

Indonesia states, at the outset, that it supports South Africa's proposals for amendments to the Kyoto Protocol; in particular, the structure of the text.[20] In addition, Indonesia suggests an amendment to Article 9 that states that the CMP would initiate the consideration of subsequent commitment periods at least five years before the end of the preceding commitment period.[21]

Japan

Japan is in favor of a single new protocol that covers the obligations of both developed and developing countries.[22] To this end, Japan strongly requests joint discussions between both AWG tracks.[23] In the absence of a new protocol, the Kyoto Protocol should be amended to reflect the same; a simple amendment to the current Kyoto Protocol framework would not be comprehensive, fair or effective.[24]

New Zealand

New Zealand considers that negotiations from the AWG-KP and AWG-LCA should be integrated into one single post-2012 instrument within the UNFCCC framework.[25] This instrument "must be legally binding," and cover commitments and actions for both developed

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[17] AWG-KP, *Views on the legal implications of AWG-KP Work, supra* note x, at 5, 6.
[18] *Id.* at 5.
[19] *Id.* at 9-11.
[20] *Id.* at 16; *see* discussion *infra* Part J. South Africa's proposal can be found in FCCC/KP/AWG/2009/CRP.3 or at AWG-KP, *Views on Possible Elements for Amendments, supra* note x, at 29-32.
[21] *Id.* at 16, 17.
[22] AWG-KP, *Views on the legal implications of AWG-KP Work, supra* note x, at 7.
[23] *Id.* at 7; AWG-KP, *Views on Possible Elements for Amendments, supra* note x, at 19.
[24] AWG-KP, *Views on Possible Elements for Amendments, supra* note x, at 18.
[25] AWG-KP, *Views on the legal implications of AWG-KP Work, supra* note x, at 8.

and developing countries.[26] As such, New Zealand suggests that AWGs for both tracks work together closely, particularly on legal issues. If, instead of a new protocol, the Kyoto Protocol is amended, then significant changes would have to take place to reflect the various obligations of both developed and developing countries.[27]

New Zealand also favors a simplified procedure to include new commitments by Parties. New Zealand suggests looking to the *Gothenburg Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution to Abate Acidification, Eutrophication and Ground-Level Ozone*, which has an adjustment model with an opt-out clause.[28] A hybrid between that approach and the current ratification procedure could also be useful.[29] On inclusion of gases in Annex A (if amending the Kyoto Protocol) or a new annex, New Zealand proposes that it is more beneficial to itemize gases similar to the approach in the *Montreal Protocol on Substances that Deplete the Ozone Layer*.[30]

If the Kyoto Protocol is amended for a second commitment period, New Zealand suggests the inclusion of a new "Annex C" to contain all commitments in that period. This Annex would provide flexibility for Parties in terms of how they express their emission reduction targets; Parties could choose either a percentage of base year or period, or a budget of carbon dioxide equivalent for calculating their assigned amount.[31]

Philippines

The Philippines proposes that the Kyoto Protocol be amended to reflect a series of emission reduction targets that correspond to different commitment periods.[32] To reflect this, the Philippines proposes adding two new columns to Annex B of the Kyoto Protocol, and amendments to Articles 7 and 9 of the Protocol.[33]

South Africa

South Africa suggests that a new protocol under the UNFCCC that co-exists with the Kyoto Protocol should be the way forward.[34] This new protocol should have legally binding mitigation commitments for developed countries that have not ratified the Kyoto Protocol and should be comparable to the targets in the Kyoto Protocol. It should also contain provisions for a binding regime for delivery of financial support and technology from developed countries to developing countries, as well as a system for recognizing mitigation actions by developing countries.[35]

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[26] *Id.* at 8.
[27] *Id.* at 9.
[28] *Id.* at 9.
[29] *Id.* at 9.
[30] *Id.* at 11.
[31] AWG-KP, *Views on Possible Elements for Amendments, supra* note x, at 22, 23.
[32] *Id.* at 25, 26.
[33] *See id.* at 27, 28.
[34] National Statement Delivered at the UN Climate Change Conference in Poznan by Marthinus van Schalkwyk, Minister of Environmental Affairs and Tourism, South Africa, 1, 2 (Dec. 11, 2008).
[35] *Id.*

Regarding specific amendments to the Kyoto Protocol, South Africa has suggested a number of changes to Articles 1, 3, 7 and 9, and Annex B.[36] In essence, they reflect a second and third commitment period for the Protocol.

Thailand
Thailand supports the continuation of the existing Kyoto Protocol framework, and suggests that future work should address comparability of the Protocol commitments and any new system that is created.[37]

Tuvalu
Tuvalu believes that the overall structure of the Kyoto Protocol should remain as it is, with a limited number of amendments to enhance a second commitment period.[38] Tuvalu has suggested a number of amendments to the Protocol, including: creating an Annex C for the second commitment period, which could potentially include commitments by non-Annex I Parties; amending Annex A to provide for the inclusion of new gases; adding new sectors relating to aviation and maritime transport; and including the procedures and mechanisms relating to compliance that have been agreed upon by the CMP in the Kyoto Protocol text.[39] Consequential amendments, stemming from these, are *inter alia*: including a definition of non-Annex I Parties in Article 1; amendments to Article 3 to include the new gases and form baseline years for those gases; specifically stating the five-year second commitment period (2013-2017); and a procedure for reviewing commitments in subsequent commitment periods.[40]

United States of America
The United States proposes an implementing Agreement[41] under a Copenhagen decision to address the AWG-LCA track. It explicitly does not address any outcomes under the AWG-KP. However, the United States approach presumes that it will not be party to outcomes under the AWG-KP. The implementing agreement is an attempt to create a legally binding decision under the Convention that exists in parallel with any changes to the Kyoto Protocol. The United States proposes an Appendix 1 for developed countries that would include quantitative reductions, and provide for a process for graduation into the appendix based on "objective criteria" of economic development. The proposal includes a framework for REDD, Adaptation, and technology.

Summary
It is possible to draw some conclusions on preferred legal architecture from those countries that have made submissions. Countries have expressed a variety of preferences with differing degrees of specificity. There appears to be three main approaches: 1) creating a new protocol and ending the Kyoto Protocol after its first commitment period (favored by Australia, Japan,

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[36] AWG-KP, *Views on Possible Elements for Amendments, supra* note x, at 30-32.
[37] *Id.* at 33.
[38] KP, AWG-KP, *Views on the legal implications arising from the work of the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol pursuant to Article 3, paragraph 9, of the Kyoto Protocol: Submissions from Parties (Addendum 1)*, 2-10, FCCC/KP/AWG/2009/MISC.6/Add.1 (Mar. 13, 2009).
[39] *Id.* at 2.
[40] *Id.* at 2-4.
[41] US Submission to AWG-LCA available at http://unfccc.int/files/kyoto_protocol/application/pdf/usa040509.pdf

and New Zealand); 2) continuing, and amending the Kyoto Protocol for a second commitment period, leaving other commitments and/or actions to be dealt with under the Convention Track (favored by Belarus, EU, and Tuvalu); and 3) continuing, and amending the Kyoto Protocol while creating another protocol, with action/commitments for developing countries and non-Kyoto Protocol Parties (favored by South Africa, and suggested as a secondary option by Australia). With respect to continuing the Kyoto Protocol, South Africa suggests extending it to a third commitment period. Extending the Protocol for a third commitment period is supported by the Philippines and Indonesia; however their respective positions on the Convention architecture is unclear.

III. ANALYZING THE OPTIONS

There are three alternative scenarios for the legal architecture of the Copenhagen outcome. First, there is a new, Copenhagen protocol that would incorporate the results of both the AWG-LCA and the AWG-KP into a single agreement. Under this scenario, the Kyoto Protocol would be terminated – presumably as some point after the entry into force of the new Protocol and after the wrap up period following the first commitment period. The second option would combine an amended Kyoto Protocol with a series of COP and CMP decisions with any linkages necessary to provide a coherent outcome. The third, and least likely, is a continuation of the Kyoto protocol with a parallel new Copenhagen protocol. This section highlights a number of issues that are important in thinking about issues of legal architecture for the Copenhagen outcome. This is not intended to be an exhaustive list of issues.

1. Merging or Cross Referencing Results of AWG-LCA and AWG-KP

For now, the two AWGs are operating independently with little to no formal linkages. One major unknown between now and Copenhagen is the extent to which the two tracks will be merged or continue separately. In addition, given that the Kyoto Protocol has already dealt in one way or another with many of the topics being negotiated, the question of how the Copenhagen outcome will relate to the existing provisions, institutions and rules developed under the Kyoto Protocol must be considered. These two dynamics give rise to the issues below.

Emissions Trading, CDM and JI

There appears to be wide support for continuing the use of the market-based mechanisms in the post 2012 climate regime. Some have raised concerns that to ensure the orderly development of carbon markets, the UNFCCC negotiations must ensure a smooth transition and send clear signals to the market that it will continue without significant interruption in the transition to a post 2012 regime. Given that these mechanisms were created under the Kyoto Protocol, questions arise in the context of a post-2012 outcome that terminates the Kyoto Protocol or builds parallel arrangements. To what extent can the mechanisms be recreated or incorporated into the post-2012 architecture?

Monitoring, Reporting and Verifying (MRV)

The BAP highlights the importance of monitoring, reporting and verification with respect to actions and commitments taken pursuant to Articles 1(b)(i) and (ii). The Parties in submissions and statements have highlighted the importance of the MRV provisions of the Copenhagen

outcome. At the same time, the Convention and Kyoto Protocol have provisions that impose various inventory and reporting obligations on the Parties. Understandably, the reporting and review provisions of the Kyoto Protocol applicable to Annex I Parties are more extensive and robust. The extent to which the Copenhagen outcome draws upon these existing provisions and the ability to match greater non-Annex I monitoring and reporting with financial and capacity building resources will be important elements of the outcome.

Compliance: Facilitation and Enforcement

While some Parties have mentioned the need for compliance elements to be included in the Copenhagen outcome, there has been little detailed discussion of the specifics. To the extent that developing country Parties are considering taking on NAMAs and developing low carbon development plans, there may be a need to create a new or enhance the existing facilitative mechanism under the Kyoto Protocol. Given that the compliance features of the Kyoto Protocol (including the facilitative branch) apply only to Annex I Kyoto Parties at this point, the compliance system may require a significant expansion of its mandate, powers and linkages to financial mechanisms.

2. Treatment of Parties

Another key issue implicit in the negotiations is the treatment of several groups of parties. Legal architecture options will impact how various Parties are able to take on commitments.

Inclusion of Annex I non-Parties to Kyoto Protocol

One of the most significant questions from both a practical and political perspective is how to engage the United States in the post-2012 regime. While a party to the UNFCCC and signatory to the Kyoto Protocol, the United States has refused to ratify the Kyoto Protocol and has remained outside the Annex I reduction framework thus far. The Obama Administration's new submission suggests that they intend to remain that way while pursuing commitments under the AWG-LCA track.

The United States has also said, in the past, and may continue to do so in the future, that any new protocol must include emissions reduction commitments from China, at the least, but also from other major developing country economies. It is important to note that any approach in which China and other major economies take on quantitative emissions reductions commitments will implicate existing categories of parties either requiring alteration, shifting of parties, or some other new categorization as well as perhaps a process for 'graduation.' The United States has suggested an Appendix 1 that would include some major economies with NAMAs that are quantified, as well as a process for graduation into the appendix.

Expedited Procedure for Non-Kyoto Parties to take on voluntary commitment and this become eligible for emissions trading and JI.

Several Parties have sought to join Annex B of the Kyoto Protocol by taking on binding economy-wide emission limitation or reduction targets. The terms of the Kyoto Protocol currently require that the Parties adopt and ratify an amendment in order to add Parties to Annex B. See Article 21(7). This has proven to be a significant limitation for those parties seeking to

take on commitments under the Kyoto Protocol. For example, since March 2006 Belarus has sought to join Annex B of the Kyoto Protocol and the CMP adopted an amendment to that effect in November 2006, however the amendment will not enter into force until ratified by three-fourths of the Parties to the Protocol. [42]

Possible New Divisions of Parties

Although it remains a controversial topic among the Parties, there has been some discussion of "differentiation" among Parties – particularly non-Annex I Parties. Some Parties have steadfastly resisted the notion of drawing additional distinctions among Parties, preferring to maintain the current Annex I/non-Annex I formulation. Others have argued that a more nuanced approach is desirable. Other Parties appear to favor an approach that would essentially allow Parties to "self-select" into new categories based on the level and character of NAMAs they are willing to undertake. Those choices could result, for example, in different levels of MRV requirements being applied or being accorded greater access to market-based mechanisms.

3. Timing Issues: Ensuring Continuity between Current and Post-2012 Regime

With a goal of December 2009 for conclusion of the current negotiations, there may be enough time for the outcome to enter into force before the end of the first commitment period under the Kyoto Protocol in 2012. However, the negotiations could extend beyond the current target date, or the agreed outcome – particularly if incorporated into a form that requires ratification – could result in a protracted delay between adoption and entry into force. In either event, the result could be a gap between the end of the Kyoto Protocol and the new regime. This gap could pose a number of potential problems for the operation of the climate regime, including the operation of carbon markets and compliance mechanisms. The options will need to be evaluated in terms of how they may be subject to or avoid this timing problem.

IV. A NEW PROTOCOL WITH TERMINATION OF THE KYOTO PROTOCOL

A number of Parties have called for an approach to legal architecture that captures the result of both AWGs into a single new protocol.[43] This section briefly describes the option, considering it from a practical perspective before evaluating the option in light of the key issues discussed previously, noting the need for particular attention to coherence and transitional elements.

The basic idea of a Copenhagen Protocol is to have a single legal instrument adopted at COP-15 that captures the combined results of the two negotiating tracks – the AWG-LCA and AWG-KP. The Copenhagen Protocol could build upon the architecture of the Kyoto Protocol; indeed it could incorporate significant portions of that instrument and thus build on rather than recreate the institutional structure and rules developed under Kyoto.

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[42] See http://unfccc.int/kyoto_protocol/amendment_to_annex_b/items/4082.php and Submission of Belarus in FCCC/KP/AWG/2009/MISC.6.

[43] Add reference to submission of Canada and Japan citing preference for single protocol.

1. Practical Aspects of a New Protocol

A single instrument that captures the Copenhagen outcome has a number of practical benefits. One of the most appealing aspects of a single protocol is that it provides a measure of simplicity. Not that a Copenhagen Protocol would be uncomplicated, but having a single instrument would help streamline the resulting climate regime. It could reduce the need for complex linkage provisions between parallel instruments. A single protocol could thus result in a more coherent approach to international efforts to address climate change and provide a clearer platform for future efforts.

There may be several practical disadvantages to the single protocol approach. Given the short time frame until COP-15 in Copenhagen and the difficulty of reaching agreement on the range of issues on the negotiating table, a Copenhagen Protocol may follow the same dynamic as the Kyoto Protocol, where it took several more years of negotiations to further define the specifics of the protocol such that Parties could be comfortable in ratifying the Kyoto Protocol.

A single protocol outcome is predicated on an integration of the two AWGs and a significant effort to ensure consistency between the outcomes of the two groups. Not only does this pose practical difficulties, but the political reality is that the Parties are sharply split on the question of merging – or even integrating – the two tracks. The longer the question of integration remains unresolved, the more difficult it will be to bring the tracks together.

Moving to a single new protocol may also open debates on the specifics of elements of the Kyoto Protocol and the CMP decisions that have elaborated it provisions. Thus some fear that reopening the Kyoto Protocol and the Marrakesh Accords could complicate the negotiations further and jeopardize the progress made under Kyoto.

Finally, there is a concern that there may not be enough time to complete negotiations on a new protocol before Copenhagen and the result would be a delay in the process. Some may feel that a single protocol is premature at this point in the ongoing effort to develop a long-term international approach to climate change. According to this point of view, given that many countries are not yet willing or able to take on binding commitments, a single, universal protocol is premature.

2. Examining the Key Issues in light of this Option: Coherence and Transitions

The inclusion of emissions trading and the project-based mechanisms appears highly likely in the post-2012 regime. Relying mostly on COP decisions could raise a number of difficult linkage issues particularly if those decisions were the vehicle to bring the United States and potentially some non-Annex I Parties within the framework of economy-wide emission limitation or reduction commitments. These linkage issues could be avoided or minimized through the use of the single protocol model. Presumably U.S. commitments could be included in an annex analogous to Annex B of the Kyoto Protocol along with the other Annex I Kyoto Parties. This provides a coherent approach and a clear basis for U.S. participation in the emissions trading market. It would also aid in determining the comparability of effort called for under the BAP.

Similarly, the new protocol could specify the mechanism for those non-Annex I Parties willing to take broad commitments and join the emissions trading market. It could both include those Parties willing to take on greater commitments now, as well as creating an expedited process for Parties to do so in the future.

Likewise, with respect to REDD, the new protocol would provide the opportunity to incorporate REDD in a number of ways depending on the outcome of negotiations. For example, if initially REDD were to be a fund-based mechanism it could easily be linked to any funding mechanism created under the new protocol. If it is to be linked to existing market mechanisms (most likely CDM) that could be accomplished within the protocol. Finally, the protocol could accommodate an entirely new market mechanism designed specifically to support REDD activities.

Since the inception of the UNFCCC process, the Parties have recognized the importance of generating accurate and comprehensive information regarding GHG emissions and removals. The BAP emphasis on MRV with respect to both emission related actions and the associated financial and technology commitments underscores again the importance of accurate information. A single protocol helps to centralize the collection and coordination of information from Parties, easily building on the existing mechanism created under Kyoto Protocol Articles 7 and 8 with appropriate modifications to support information efforts in non-Annex I countries.

Again, a single protocol approach allows parties to build upon the existing compliance structures. One transitional matter the Parties will want to consider is how to treat any cases of non-compliance with the first commitment period obligations. In addition, the Parties will likely wish to consider how the facilitative branch of the compliance body can be strengthened to provide non-Annex I Parties with greater support to improve inventory and reporting capabilities, development of Low Carbon Development Plans, NAMAs and country specific adaptation strategies.

A new protocol could provide opportunities to actively bring additional Parties into the post 2012 regime. The new protocol could incorporate the structure of emission reduction commitments for Annex I parties from the Kyoto Protocol and potentially include the United States in that structure. This could avoid the difficulties discussed below with respect to using COP decisions to bring the United States into the post-2012 regime.

To that end, the single protocol could include any of a number of different options for including non-Annex I countries. Some have suggested a registry approach for NAMAs that would allow individual countries to self declare the actions they are able or willing to take with appropriate financial and technological support. Alternatively, parallel provisions could provide an expedited procedure for countries not already subject to economy-wide commitments to voluntarily take on such commitments and by so doing allow for their direct participation in the international carbon market.

Adopting a new protocol is an ambitious undertaking. Given the broad range of elements under negotiation, it is likely a protocol adopted in Copenhagen, like the Kyoto Protocol, would require significant additional fleshing-out through decisions by the COP. This raises the possibility of delaying the entry into force for the new protocol. With the first commitment period of the Kyoto Protocol ending in 2012, the possibility thus exists that the new protocol might not yet be

in effect by then. Thus there could be a gap between the two regimes. A gap could create several problems, including undermining the effectiveness of emerging carbon markets and resulting in confusion as to the emissions reduction and other commitments in the new regime. Under the Vienna Convention on the Law of Treaties, the Parties could choose to forestall the gap problem by providing for the provisional application of the new protocol in whole or in part.[44]

V. AMENDED KYOTO PROTOCOL AND ADOPTED COP/CMP DECISIONS

The second option consists of several elements. First, the Kyoto Protocol would be amended to continue in the post-2012 time frame. Second, a series of COP decisions would capture the results of the AWG-LCA negotiations. In addition, there could be one or more decisions under the COP/CMP that would memorialize changes to the Kyoto Protocol rules that do not rise to the level of needing an amendment – for example changes in specific rules governing LULUCF or CDM.

The scope of the amendment to the Kyoto Protocol could be rather narrow or broader depending on the ambition of the Parties. At a minimum, it would include establishing a second commitment period and revising the Annex B quantified emission limitation or reduction commitments for the Annex I Kyoto Parties. Moreover, depending on the outcomes of the AWG-LCA negotiations there may need to be linking provisions in the amended Kyoto Protocol. For example, Parties may want to be able to link into the market mechanisms or use the compliance system under the Protocol.

An important consideration here is how the United States may be brought into the post-2012 system. While it would seem logical for the United States to join the amended Kyoto Protocol this is unlikely because of the political animosity to the Kyoto Protocol in the U.S. Congress. This dynamic goes back to the Byrd-Hagel resolution adopted by a vote of 95-0 in 1997 which expressed the sense of the Senate that any agreement that imposed emission reduction commitments for Annex I countries should include analogous and contemporaneous commitments for non-Annex I countries.[45] As a result, under this scenario, the United States entry into the post-2012 regime would likely need to be through a COP decision.

1. Practical Aspects of an Amended Kyoto Protocol and COP Decisions

This scenario is attractive from a practical perspective for a number of reasons. Potentially, some or all of this option could enter into force quickly. While an amendment to the Kyoto Protocol would require ratification by Parties before it would enter into force, the COP (and any COP/CMP) decisions could be effective upon adoption. Moreover, the Parties may be able to provide for provisional application of the Kyoto Protocol amendment to ensure that there is no gap between the two commitment periods. This could ensure a quick implementation of the Copenhagen outcome.

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[44] Vienna Convention on the Law of Treaties, Article 25.

[45] Add cite to S.Res. 98, adopted July 25, 1997(105th Congress, 1st Session)

Notwithstanding the multiple instruments used under this option to capture the Copenhagen outcome, the Parties would likely view the outcome as a single agreement or package deal. Thus there may be an unwillingness to accept a situation where part of the agreed outcome was in place without all other parts.

As noted above, the difficulty of bringing the two tracks together could mean that this approach might be better suited to memorializing a two-track Copenhagen outcome. The extent to which there would need to be linkages between the amended Kyoto Protocol and the COP decisions would tend to undermine this scenario.

On the other hand, this scenario raises a number of practical impediments. The relationship between the Kyoto Protocol on the one hand and a series of COP decisions on the other could result in a lack of clarity as to the operation of the UNFCCC system as a whole – with particular impacts on the emerging carbon market.

2. Examining the Key Issues in light of this Option

Under this scenario with multiple agreements in different forms, the creation of linkages to ensure a coherent and rational system will be critical. While the AWG-LCA negotiations could be captured in one overarching COP decision, it is more likely that there would be a series of decisions for different elements of the outcome – perhaps following the outline of the BAP. In this case there will need to be both linkages among those decisions and any institutional structures they establish as well as between those decisions and the Kyoto Protocol as amended.

A basic design question the Parties must face is whether under this scenario they will create a parallel structure with stand alone mechanisms and institutions roughly following the division between the AWG-LCA and AWG-KP. Or alternatively, try to integrate the two as much as possible and minimize the parallel structure. Thus for example, the series of COP decisions could create market mechanisms in parallel to those under the Kyoto Protocol with distinct rules and operational oversight. Provisions could be made for the resulting units to be interchangeable with those under the Kyoto Protocol – a mutual recognition system.

Another example would be the Adaptation Fund established under the Kyoto Protocol. Given that adaptation is a key element of the AWG-LCA agenda, a COP decision on adaptation (and possibly the protocol amendment) would need to address how the Fund might interact with the adaptation priorities set through the COP decision process. In addition, the COP decisions are likely to establish new funding architecture that would need to interface with the Adaptation Fund.

As under the new protocol scenario, the Parties may decide to establish a new REDD mechanism. To the extent it is a stand-alone, fund based mechanism there would be limited need to integrate with the Kyoto Protocol. On the other hand, if the REDD mechanism is to be linked to the CDM, provisions would be needed to ensure that REDD efforts would meet criteria and qualify for certified emission reduction units (CERs).

Similar issues arise with respect to MRV provisions as well as potential compliance features. Again, the fundamental decision facing the Parties is whether or to what extent to establish

entirely new systems for information management and compliance versus building upon the existing mechanisms under the Kyoto Protocol. Given the link between providing timely and accurate information and participation in the market mechanisms, there would have to be linkages between the systems wherever they are located. Moreover, strong linkages with financial and capacity building assistance would be essential to the effective operation of MRV and compliance systems.

One of the key issues in terms of the treatment of Parties under this scenario would be the inclusion of the United States in the post-2012 regime in a way that is comparable to other Annex I Parties. Given the likelihood that the United States would refuse to enter into the Kyoto Protocol, that leaves a COP decision as the vehicle for including the United States under this scenario.

A threshold question arises with respect to the extent to which COP (or COP/CMP) decisions are binding on the Parties. The Parties to the UNFCCC and the Kyoto Protocol have established an accepted pattern of practice of using COP and COP/CMP decisions to develop wide-ranging rules for the Kyoto Protocol.[46] Decisions taken under the Protocol have been used for example to establish the comprehensive system of inventory, reporting and review outlined by Articles 5, 7 and 8 of the Protocol, to establish the rules governing emissions trading and the project based mechanisms, to design and adopt a comprehensive compliance structure, and to create the Adaptation Fund. These decisions have been based on the authority granted to the COP (by the Convention) and the COP/CMP (by the Protocol) to make decisions necessary to promote the effective implementation of the respective agreements.[47] The Parties appear to have fully accepted this practice.

There is less clarity with respect to the use of COP or COP/CMP decisions to alter the basic substantive emissions reduction obligations of the Kyoto Protocol. It is accepted, though not widely practiced, for a treaty body to take decisions with binding effect on the Parties' substantive obligations under the treaty. Article 2.9 of the Montreal Protocol to the Vienna Convention for the Protection of the Ozone Layer clearly grants the COP the authority to make significant changes to the obligations of the Parties to reduce consumption and production of controlled substances. These changes, to be adopted by consensus if possible or by a two-thirds vote of the Parties, are binding on all parties. The Kyoto Protocol contains a similar provision in Article 21, which allows a decision to bind all Parties to changes to an annex of the Protocol with two important differences. First Article 21 allows Parties to "opt out" by providing written notice. Second, the terms of Article 21 do not apply to Annexes A and B of the protocol, which contain the covered gasses and sources and the substantive emission reduction commitments. Thus the climate regime does not incorporate the same explicit grant of authority found in the Montreal Protocol to the COP or COP/CMP to change substantive emission reduction requirements. This may be why the United States has chosen the model of an implementing agreement under the Convention as a COP decision plus instrument. The legal nature of such an

[46] See Jutta Brunnée, "Reweaving the Fabric of International Law" Patterns of Consent in Environmental Framework Agreements, in Wolfrum and Roben, id at page 101.
[47] UNFCCC, Article 7.2 and Kyoto Protocol, Article 14.4.

instrument in international law remains unclear in the absence of direct authority to the COP to engage in such agreements.

To the extent that Parties may be moving towards a voluntary, "pledge and review" approach to taking on commitments in the post-2012 system, the concern with the binding nature of COP decisions (at least as regards substantive emission reduction commitments) is lessened. Having made the voluntary commitments, Parties could be subject to MRV and possibly compliance provisions to ensure that they have respected those commitments.

A related element is that the Parties may view the Copenhagen outcome – regardless of how many different agreements or vehicles are used to capture the outcome – as a single interconnected package. Thus there may be concerns that a failure to gain sufficient ratifications for the Kyoto amendment to enter into force should be linked to commitments taken under the related COP decisions. In other words, the Parties would want to avoid a situation where some but not all of the elements of the Copenhagen outcome would become effective. Therefore, Parties may consider ways to link the entry into force of the amendment and COP decisions. Since the COP decisions would become effective upon adoption by the COP, the Parties could consider including sunset provisions that would terminate the effectiveness of the COP decisions if the Kyoto Protocol amendment had not entered into force by a certain date.