

COP Decisions: Substance and Mandates

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Introduction

1. The form of outcome of the work of the AWG-LCA at COP16 in Cancun is yet to be decided by the parties. The potential options that parties are considering include the conclusion of a new treaty or protocol, a series of COP decisions in respect of each of the AWG-LCA contact groups and a COP decision setting out a formal mandate for the conclusion of a new treaty or protocol at COP17 in South Africa (or by some other later date).
2. In this briefing paper we focus on the latter two options. We first examine the legally binding nature of COP decisions generally under international law and then go on to apply these principles in the context of using:
 - a. COP decisions for the form of outcome from the AWG-LCA negotiations (we will focus on mitigation targets and finance obligations, but similar considerations apply for other issues under negotiation in the AWG-LCA); and
 - b. COP decisions to create a negotiating mandate for future sessions of the AWG-LCA.

COP decisions in international law

The general position

3. The question of whether COP decisions are binding under international law has been much debated by legal scholars in the past. The general position is that they lack legally-binding character.
4. Brunnée, for example, states “[COP] decisions do contain terms that make conduct mandatory, and make access to certain benefits contingent upon compliance with some of these mandatory terms. Yet, they do not appear to be binding in a formal sense.”¹ This reflects the fact that although obligations in COP decisions are often framed in mandatory language, whether the obligations themselves are ‘international law’ depends on a number of other factors such as the authority of the COP to adopt such provisions and the intent of the parties.
5. The general ambiguity is illustrated by the conduct of parties in relation to the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Waste and their Disposal. At the second COP, the parties adopted a decision banning the export of hazardous waste to non-OECD countries from OECD countries. However, the COP did not have authority

¹ Brunnée, *COPing with Consent: Law-Making Under Multilateral Environmental Agreements*, 15 *Leiden Journal of International Law* 21 (2002), note 4 at 32.

under the Convention to pass such rules and political pressure from various countries led to the ban being implemented by way of a formal amendment to the Convention text.²

6. However, there are instances where decisions made by the COP are binding on parties. For example, Article 2.9 of the Montreal Protocol allows the COP to make, by decision, significant changes to the obligations of the parties to reduce consumption and production of controlled substances.
7. Ultimately what matters is the power given to a COP in the treaty which creates that COP. As a result, it is very difficult to generalise about the legally-binding nature of COP decisions; different treaties empower their respective COPs to different degrees. Analysis of the legal status of COP decisions must be conducted on a decision by decision, and treaty by treaty, basis.

Grants of authority to the COP to make changes to the treaty and to implement the treaty

8. The authority for a COP to adopt legally-binding decisions must derive from a provision in the treaty. This authority can be either explicit or implicit.
9. Explicit grants of authority are rare and where these are used, they tend to expressly allow the relevant COP to make significant changes to the (legally-binding) obligations of the parties. The Montreal Protocol is one example (see para 6 above), though others do exist. By contrast, neither the UNFCCC nor the Kyoto Protocol contains comparable explicit grants of authority empowering the COP (or CMP) to adopt decisions which make significant changes to the obligations of the parties.
10. Implicit grants of authority are far more frequent and tend to be used as a way for the parties to implement provisions of the underlying treaty or to expand on rules and modalities for mechanisms and concepts expressed within it.
11. For example, Article 12(1)(a) of the UNFCCC states that each party shall communicate to the COP:

“A national inventory of anthropogenic emissions by source and removal by sinks of all greenhouse gases not controlled by the Montreal Protocol, to the extent its capacities permit, using comparable methodologies to be promoted and agreed upon by the [COP].” [Emphasis added.]
12. Similarly, Article 12(7) of the Kyoto Protocol states:

“The [CMP] shall, at its first session, elaborate modalities and procedures with the objective of ensuring transparency, efficiency and accountability through independent auditing and verification of project activities.” [Emphasis added.]
13. There are a number of other examples in both the UNFCCC and the Kyoto Protocol.³ What is common to each of these provisions is that the COP (or CMP) is given the authority to establish rules which determine how the relevant concept will be implemented, but not to change the concept or introduce new concepts.

² For a further example related to the Montreal Protocol on Substances That Deplete the Ozone Layer, see *COP Decisions: Binding or Not?*, Can International, 8 June 2009.

³ E.g. Articles 4(1)(a), 4(2)(c) and (d), 4(8), 7(2), 7(3), 8(2)(g), 9(3), 11(1), 11(3), 11(4), 12(5), 12(6), 12(8), 12(9), 13, 14(2)(b) and 14(7) of the UNFCCC and Articles 2(1)(b), 2(2), 2(3), 3(4), 3(5), 3(9), 3(14), 5(1), 5(2), 5(3), 6(2), 7(3), 7(4), 8(1), 8(2), 8(4), 8(6), 9(1), 12(3)(b), 12(4), 12(5), 12(8), 13(4), 13(5), 13(6), 17 and 18 of the Kyoto Protocol.

14. It could be argued that the Adaptation Fund, which is not specifically referred to in the UNFCCC or the Kyoto Protocol, is an example of the parties introducing new legally-binding concepts by way of COP decision⁴. However, the preamble to the COP decision establishing the Adaptation Fund (and later the CMP decision in relation to the Adaptation Fund Board⁵) specifically refers to provisions of the Kyoto Protocol (Articles 10, 11 and 12(8)) and it is these provisions which provide the legal basis for the legally-binding nature of the relevant COP decisions.
15. It is generally accepted that the authority to establish the Adaptation Fund is implicit in the Kyoto Protocol. Articles 10, 11 and 12(8) of the Kyoto Protocol required implementation and the parties decided that establishing the Adaptation Fund was the best way to do so.
16. Therefore, where a treaty authorises the COP to take action (whether explicitly or implicitly), then provided the subject matter of the COP decision falls within the grant of authority to the COP by the treaty and is intended to be legally-binding, then the COP decision will be legally-binding on the parties. The more ambiguous nature of implicit grants of authority form a weaker legal basis for legally-binding COP decisions.

COP decisions for the form of outcome from the AWG-LCA negotiations

17. A present concern for a number of parties in the UNFCCC negotiations is whether or not an outcome of the AWG-LCA made up of COP decisions would be legally-binding on the parties. As discussed above, any such decisions would need to be fully analysed to see if the COP had the authority to adopt legally-binding decisions in respect of that subject matter. For present purposes, this paper looks only at the position in relation to mitigation targets and finance obligations, though similar considerations would apply to COP decisions related to REDD, technology transfer, capacity building etc.
18. Using the example of the Adaptation Fund, it has been suggested that although specific mitigation targets and finance obligations have not been set out in the UNFCCC, the COP nonetheless retains an implicit grant of authority to adopt legally-binding decisions on these two issues. We believe that this is an incorrect interpretation of the authority granted to the COP but the relevant line of reasoning goes as follows:
 - a. Pursuant to Article 4 of the UNFCCC, various developed country parties are required, *inter alia*, to take measures to reduce their greenhouse gas emissions and provide financial resources to developing country parties so that they can implement their own mitigation actions and meet the costs of adaptation to the adverse effects of climate change;
 - b. COP decisions relating to specific mitigation targets for and financial contributions by developed country parties do not create new obligations but instead merely clarify the existing obligations in the UNFCCC;
 - c. Therefore, COP decisions on these issues would be legally-binding; and
 - d. Even if Article 4 by itself does not allow for this conclusion, Article 7.2 of the UNFCCC allows the COP to make decisions necessary to promote the implementation of the UNFCCC. In particular, this would include the objective of the UNFCCC:

⁴ Decision 10/CP.7.

⁵ Decision 1/CMP.3.

“...stabilisation of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system”; and

- e. As such, any COP decision taken to promote the implementation of the UNFCCC would be legally-binding.
19. In our view, this line of reasoning does not hold true for two reasons:
- a. First, there is a big difference between saying developed countries collectively must reduce emissions (without a target) and saying these are the specific targets for individual countries which must be achieved by a certain date. The latter is not a mere clarification of the former; instead it imposes an obligation which previously did not exist onto a party and for this reason, COP decisions on these issues rest on a questionable legal basis; and
 - b. Second, even if it could be argued theoretically that COP decisions on mitigation actions and finance obligations could be legally-binding when viewed in a vacuum, the fact that the Kyoto Protocol was agreed and subsequently entered into force presents a problem to this theoretical argument.
20. Given that specific mitigation targets for developed country parties were made legally-binding by the Kyoto Protocol (rather than a COP decision), it is far more difficult to argue that COP decisions would suffice to create legally-binding obligations in respect of mitigation targets; the precedent for such obligations being introduced by way of treaty (or amendment) has been set. This does not mean that COP decisions are definitely inappropriate, but it would be very difficult to argue that they were capable of creating legally-binding mitigation targets.
21. It should be noted that even if COP decisions are not legally-binding, they still contain political commitments which are arguably more likely to be met than if they are not set out in the decision in the first place.
22. A final procedural point relating to a COP decision outcome (whether legally-binding or not) is that under the current (draft) rules of procedure for the COP⁶, all decisions of substance need to be taken by consensus (i.e. with no-one objecting). Any party that objects to the provisions of a decision can block its adoption by the COP. For example, the Copenhagen Accord was not ‘adopted’ by COP15 due to a number of parties objecting to the manner in which it was negotiated; instead it was ‘taken note of’ by the COP.
23. In conclusion, it appears that COP decisions on issues of substance, to the extent they introduce new obligations or change existing obligations, would not be legally-binding unless there is a treaty provision which grants the COP the authority to make decisions in respect of those issues. In the absence of such grants of authority, the COP decisions will remain as political statements of intent until such time as the provisions of the decisions are incorporated into a new or existing treaty.

⁶ FCCC/CP/1996/2.

COP decisions to create a negotiating mandate for future sessions of the AWG-LCA

24. The most well known negotiating mandates created by COP decision are the Berlin Mandate (“BM”)⁷ and the Bali Action Plan (“BAP”)⁸.
25. The BM set out the terms of reference for two years of negotiations which ultimately led to the adoption, signature and ratification of the Kyoto Protocol. The BAP set out the terms of reference for the AWG-LCA negotiations for a period of two years. The outcome of those negotiations should have been presented to COP15 for adoption.
26. However, the parties were unable to agree the form (and substance) of an outcome at COP15 and so the mandate was extended by the COP by a further year⁹; the parties agreed that the outcome of the AWG-LCA negotiations should be presented for adoption at COP16.
27. The COP decisions relating to the BM and the BAP did two things:
 - a. Instructed the parties to negotiate in line with particular terms of reference; and
 - b. Asked the negotiating groups to present their outcome to the full COP for adoption by a certain date.
28. Both decisions succeeded in satisfying the first item by the creation of the AG-BM (Ad Hoc Group on the Berlin Mandate) and the AWG-LCA, but only the former has succeeded in presenting an outcome to the full COP (so far).
29. Arguably, the requirement to create a negotiating group is legally-binding on the parties since it could be said that this merely relates to the implementation of the UNFCCC (Article 7.2 of the UNFCCC).¹⁰
30. However, the requirement to present an agreed outcome to the COP cannot be legally-binding on the parties for a number of reasons. Firstly, this requirement does not derive any authority (explicit or implicit) from a provision of the COP and as such has no legal basis. Secondly, it is not possible to bind parties into agreeing an outcome when they do not know what the eventual outcome will consist of and in respect of which they may not agree.
31. Where a mandate expires without its objectives being achieved, as happened to the BAP at COP15, there are no legal consequences. Other factors may make such a situation undesirable, however, and may have led to the timeline for achieving the BAP being extended until COP16.

⁷ Decision 1/CP.1.

⁸ Decision 1/CP.13.

⁹ Decision 1/CP.15.

¹⁰ In relation to the Kyoto Protocol, the CMP had explicit authority to create the AWG-KP pursuant to Article 3(9).