



CAN Ad-Hoc Legal Working Group  
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## COP Decisions: Binding or Not?<sup>1</sup>

*The LCA-Negotiating Text states that “several Parties have expressed the view that decisions by the COP would suffice to ensure an agreed outcome that would enable the full, effective and sustained implementation of the Convention through long-term cooperative action.”<sup>2</sup> It also reiterates a single Party’s view envisaging “a set of COP decisions that would be legally binding by nature . . . .”<sup>3</sup>*

*In this legal analysis we explore the legally binding nature and effect of COP (and CMP) decisions. By legally binding we mean not only binding in a formalistic sense, but also in the sense of being enforceable. Generally, “the legal basis for binding decision-making” by the COP is “ambiguous.”<sup>4</sup> However, it is possible to differentiate between explicit grants of authority to take decisions that are binding, and implicit grants of authority that yield binding results. This note will first discuss the legal status of COP decisions generally under international law and then consider more specifically the outcome of the AWG-LCA. Finally the note considers the treatment of COP decisions under national law, looking specifically at the United States.*

*COP decisions do not provide an unambiguous basis to impose adequately binding, enforceable commitments with respect to quantified emissions reduction commitments or financial obligations for developed countries. Accordingly, suggestions for a Copenhagen outcome with a universally uncontested and unequivocal legal nature relying only on COP decisions for such commitments may not be sufficient.*

### The Legal Status of COP Decisions in International Law Generally

International legal scholars that have examined the legal status of decisions taken by treaty bodies generally find that such decisions lack clearly binding character under international law.<sup>5</sup>

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<sup>1</sup> This is not a CAN position, but rather an analysis provided for CAN members and others as a tool to help understand the extent to which COP decisions are binding on Parties.

<sup>2</sup> Negotiating text, Note by the Chair, FCCC/AWGLCA/2009/8, 19 May 2009, at 4, Para. 15.

<sup>3</sup> *Id.*

<sup>4</sup> Brunnée, *COPing with Consent: Law-Making Under Multilateral Environmental Agreements*, 15 *Leiden Journal of International Law* 21 (2002).

<sup>5</sup> *Id.*; Gehring, *Treaty-Making and Treaty Evolution*, in: Bodansky/Brunnée/Hey, *The Oxford Handbook of International Law*, 2007, at 491 f.; Churchill/Ulfstein, *Autonomous Institutional Arrangements in Multilateral Agreements*, 94 *AJIL* (2000), at 639.

Brunnée, for example, states that “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.”<sup>6</sup> Gehring comments that “contracting parties frequently refrain from clarifying the legal status of decisions, because this endeavor might jeopardize the use of secondary decision making altogether.”<sup>7</sup>

Reflecting this general ambiguity over the binding nature of COP decisions, State Parties themselves have showed their doubts on the legal nature of COP decisions. In 1994, for example, the second COP of the Basel Convention on the Control of Transboundary Movements of Hazardous Waste and Their Disposal adopted a decision banning the export of hazardous waste to non-OECD countries from OECD countries.<sup>8</sup> The text of the convention did not explicitly grant the COP authority to implement such a ban. Despite adopting the ban by decision, many Parties expressed concern about using a decision to impose the ban instead of using the formal amendment process; some even stated that the decision did not affect rights or obligations under the convention.<sup>9</sup> Political pressure thus led the third COP to decide to implement the ban through the convention’s formal amendment procedure in order to establish an undisputed commitment.<sup>10</sup>

Likewise, the Montreal Protocol’s second Meeting of the Parties (MOP) adopted a controversial decision establishing an interim multilateral fund.<sup>11</sup> Proponents of the creation of the interim fund by a MOP decision found support in the Montreal Protocol’s article 11, paragraph 4(j), which authorized the MOP to “consider and undertake any additional action that may be required for the achievement of the purposes of this Protocol.” The same article provides an extensive list of explicit authorizations in paragraphs 4(a)-(i), leading supporters to believe that the inclusion of 4(j) must be interpreted to grant very broad authorization. Many commentators disagree with this interpretation due to its potential to burden non-consenting Parties with financial obligations.<sup>12</sup> Given concerns as to its legal effect, the MOP also adopted a formal amendment to the Protocol (that has subsequently entered into force) establishing the financial mechanism, rather than leaving the financial mechanism’s creation to a mere decision.<sup>13</sup>

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<sup>6</sup> Brunnée, *COPing with Consent*, *supra* note 4 at 32.

<sup>7</sup> Gehring, *Treaty-Making and Treaty Evolution*, *supra* note 5 at 496.

<sup>8</sup> Report of the Second Meeting of the Conference of the Parties to the Basel Convention (Basel Convention, COP, Report II), *Decision II/12*, 19-20, UN Doc. UNEP/CHW.2/30 (Mar. 25, 1994), available at <http://www.basel.int/meetings/frsetmain.php?meetingId=1>.

<sup>9</sup> See, e.g., Basel Convention, COP, Report II, at 10, 44, 46 (statements by Australia and Austria).

<sup>10</sup> Decisions Adopted by the Third Meeting of the Conference of the Parties to the Basel Convention, *Decision III/1*, UN Doc. UNEP/CHW.3/35 (Nov. 28, 1995).

<sup>11</sup> Report of the Second Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol, MOP, Report II), *Decision II/2*, Annex II, art. 2, ¶ 1, UNEP/OzL.Pro.2/3, (June 29, 1990) (hereinafter Montreal Protocol, MOP, Report II), *Decision II/2*]Montreal Protocol, MOP, Report II, *Decision II/8: Financial Mechanism*, UN Doc. UNEP/OzL.Pro.2/3 (June 29, 1990).

<sup>12</sup> Gunther Handl, *International “Lawmaking” by Conferences of the Parties and Other Politically Mandated Bodies*, in DEVELOPMENTS OF INTERNATIONAL LAW IN TREATY MAKING 130 (Rudiger Wolfrum and Volker Roben eds., 2005) (citing Gehring, *International Environmental Regimes: Dynamic Sectoral Legal Systems*, 1 YB. INT’L ENV. L. 35, 49 (1990)).

<sup>13</sup> Montreal Protocol, MOP, Report II, *supra* note 11, at Annex II, art. 1, ¶ T.

The binding nature of a COP decision eventually rests on the powers ascribed to the COP in the treaty text.<sup>14</sup> There is some acceptance that the supreme treaty body has “substantive powers” of decision-making where these powers are delegated by the Parties and provided for in the treaty text.<sup>15</sup> Scholars note that the authority to take binding decisions can be granted explicitly or implicitly,<sup>16</sup> however, it is important to note that because implicit authority can be ambiguous, it is a weaker basis for taking binding decisions.

### **Explicit Grants of Authority to Take Binding Decisions**

Explicit grants of authority to take binding action are rare.<sup>17</sup> One example of this can be found in the Montreal Protocol to the Vienna Convention for the Protection of the Ozone Layer. Article 2.9 of the Montreal Protocol clearly grants the COP the authority to make significant changes to the obligations of the Parties to reduce consumption and production of controlled substances by way of simple COP decisions. These changes, to be adopted by consensus if possible or by a two thirds vote of the Parties, are binding on all Parties. The UNFCCC and the Kyoto Protocol, however, do not contain comparable provisions explicitly granting binding authority to the COP and CMP. Thus the climate regime does not incorporate the same explicit grant of authority found in the Montreal Protocol to the COP or CMP to take binding action in a specific instance.

### **Implicit Grants of Authority to Take Binding Action**

Implicit grants of authority appear to be more common, but due to their obscurity require a case-by-case analysis. To the extent that Parties view the outcome of the LCA negotiations (particularly specific financial commitments and emission reduction commitments (in the case of the U.S.)) as articulating “new” obligations, the basis of implicit authority rests solely on Article 7.2 of the Convention which states, among other things, that the COP shall take “decisions necessary to promote the effective implementation of the Convention.” Whether this allows for “new” obligations is far from clear and is thus a weak basis for inscribing specific commitments. If, however, those outcomes are viewed purely as an elaboration of commitments already enshrined in the Convention, then the analysis rests on whether the specific articles of the Convention provide the legal basis for inscribing those commitments through COP decisions.

In the current negotiations, our understanding is that some Parties argue that the UNFCCC already clearly ascribes primary commitments and obligations and includes provisions that allow for the adoption of COP decisions which are meant to elaborate and quantify those obligations. Further those COP decisions would be legally binding since they are based upon provisions of the UNFCCC. Thus in their opinion COP decisions would suffice as legal instruments containing the means, institutional arrangements, rules and procedures to effectively implement the overarching convention. This line of reasoning is considered below.

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<sup>14</sup> Additionally, in order to have binding effect, the COP decision should express the Parties’ intention to be bound by the decision. This analysis assumes that intention.

<sup>15</sup> Submission by the European Communities to the Special Session of the World Trade Organization Committee on Trade and Environment, *The Relationship Between MEAs and WTO Agreements: Set Out in MEAs*, ¶ 31(i) TN/TE/W/31 (May 14, 2003) (03-2570).

<sup>16</sup> See Volker Röben, *Institutional Developments Under Modern International Environmental Agreements*, 4 Max Planck Yearbook of United Nations Law 364, 372 (2000).

<sup>17</sup> Röben, *Institutional Developments Under Modern International Environmental Agreements*, *id.* at 373.

Both the COP and the CMP have general powers to effectively implement the Convention and the Kyoto Protocol, respectively.<sup>18</sup> As a general matter, it is important to note that the Kyoto Protocol has numerous provisions that require the CMP to take specific action with respect to rule-making.<sup>19</sup> Thus, in the Kyoto Protocol, even though there is no explicit authority to take binding action, the nature of the requirements allows for the development of wide-ranging rules via CMP decisions. In contrast, the operational provisions of the Convention include far fewer direct references to rule-making powers for the COP.

In the Convention, the primary commitments of Parties are contained in Article 4. There is no overall reference to the COP in this article, instead the COP is required or allowed to take action in specific paragraphs. For example, the commitment to reduce GHG emissions in Annex I Parties is contained in Article 4.2 of the Convention, which directs the COP to review the commitments of Article 4.2(a) and (b) and “take appropriate action”. However, rather than using COP decisions to further elaborate those obligations, the Parties used the Kyoto Protocol to establish quantified emission reduction targets for Annex I Parties. Thus, it is clear from the Parties’ past practice that to bring the US in with binding targets requires a treaty approach and not a COP decision.

The main references to finance are contained in Articles 4.3, 4.5, and 4.7 of the Convention. These paragraphs do not mention the COP. There is, however, a reference to finance in Article 4.8 in the context of implementing actions necessary to meet the “specific needs and concerns of developing country Parties . . . .” The primary call is for Parties to give full consideration to this issue, and it goes on to state that the COP “may take actions” as appropriate. This language is ambiguous, at best. In addition, within the COP’s implementation power, the COP has the power to “seek to mobilize financial resources in accordance with Articles 4.3, 4.4, and 4.5 . . . .”<sup>20</sup> Whether this refers to inscribing specific, binding financial commitments is unclear, particularly due to the vagueness of the term “seek to mobilize.” The uncertainty is enhanced by the fact that in other Articles that deal with the financial mechanism and related communication, the COP is specifically referenced in respect to implementation.<sup>21</sup> Thus, while it is clear that the COP has powers to implement financing generally (including mobilizing financial resources), whether this translates to inscribing binding country specific financial commitments is far from clear.<sup>22</sup> Further, given this ambiguity, it is likely that Parties will disagree on the binding nature of commitments inscribed in COP decisions.

Even if Parties decide that outcomes of the AWG-LCA negotiation flow directly from Convention provisions and that COP decisions are thus sufficiently binding in a formalistic sense, there does not appear to be any “hook” in the Convention that could be used to justify the adoption of a compliance system to enforce those outcomes. Since the COP’s authority to act

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<sup>18</sup> UNFCCC, art. 7.

<sup>19</sup> See, e.g., Kyoto Protocol, arts. 3.4, 5.1, 6.2, 7.4, 8.4, 12.7, 16, 17, and 18.

<sup>20</sup> UNFCCC, art. 7.2 (h).

<sup>21</sup> See UNFCCC, arts. 11, 12.

<sup>22</sup> There is also a provision in Article 7.2 (m) stating that the COP shall “[e]xercise such other functions as are required for the achievement of the objective of the Convention as well as all other functions assigned to it under the Convention.” However, these functions would flow from the Convention; thus, it would still rest on an analysis of Article 4 and specific powers in Article 7.

flows from the provisions in the Convention, the COP would have no authority to enact a compliance regime to make commitments enforceable. To do so, Parties would most likely need to amend the Convention.

### **The Binding Nature of COP Decisions Under National Law: The Case of the US**

Finally, it is also worth considering the extent to which a COP decision including quantified emission reduction targets or specific financial commitments would be viewed as binding law under domestic law. While a comprehensive survey of domestic legal systems is beyond the scope of this note, we include a brief consideration of US law. For both political and legal reasons COP decisions provide a problematic basis for domestically binding obligations.

First, as a political matter, the position of the U.S. Senate has been that any further obligations arising under the treaty must be put to the Senate for advice and consent. While the Senate “strongly” endorsed ratification of the UNFCCC, it noted that “a decision by the Conference of the Parties to adopt targets and timetables would have to be submitted” for Senate debate and approval prior to any instruments of ratification being deposited.<sup>23</sup> It also noted that the Executive Branch did not have the authority under the shared understanding of the Convention between the Congress and the Executive Branch to adopt targets and timetables on its own.<sup>24</sup>

Second, a 2006 court decision casts doubt on the binding nature (under U.S. domestic law) of decisions of the Parties to a treaty. A panel of the U.S. Circuit Court of Appeals for the District of Columbia found that “without congressional action, however, side agreements reached after a treaty has been ratified are not the law of the land; they are enforceable not through the federal courts, but through international negotiations.”<sup>25</sup>

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<sup>23</sup> S. Exec. Rept. 102-55, at 14 (1992).

<sup>24</sup> *Id.*

<sup>25</sup> N.R.D.C. v. EPA, 464 F.3d 1, 10 (2006) (the court examined the effect of COP decisions under the Montreal Protocol concerning the critical use exemption on the implementation efforts of the U.S. EPA). Only two judges joined in the majority opinion; the third judge concurred in the result only.