



# Count down to Copenhagen: legal architecture of a post-2012 global climate agreement

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CANA International Climate Summary Sheet #4

## Background

There are a number of scenarios regarding the legal 'architecture' of the agreement that may be developed at the UNFCCC negotiations in Copenhagen in December 2009. Like other Annex 1 governments, Australia has indicated that it favours "a single new protocol that unifies action under the Convention and builds on the relevant provisions of the Kyoto Protocol" (Submission to AWG-KP April). However, the Australian Government is politically pragmatic and recognises a two treaty outcome is also possible. This would involve the Kyoto Protocol being amended and another treaty also being agreed that could cover the USA and the other elements, such as developing country actions and international financing.

There are benefits and limitations to all of these possible scenarios. Submissions made by Australia in recent months effectively rule out supporting an outcome from Copenhagen that leaves the international community with an amended Kyoto Protocol and no other treaty, with new commitments being simply "decisions" under the COP<sup>1</sup>. Australia is very interested in the problem of legal architecture, and has proposed a "schedule" approach, where all parties make mitigation commitments of various kinds, and these are recorded on a schedule. Developed countries would have Kyoto-like targets but developing countries could register national commitments and other actions like renewable energy targets in their schedule, and this would become internationally binding.

## Key legal questions

- Under what mechanism/s will the agreements made at Copenhagen be made?
- Will the Kyoto Protocol continue, with additional nations becoming parties, with additional gases, mechanisms and commitments?
- Will there be a new treaty that replaces Kyoto, or just one covering areas that Kyoto does not?
- Will there be two treaties, or will the additional aspects not covered by Kyoto be recorded simply as unenforceable decisions by the Convention?

## Problems and issues to consider:

- **Important measures must be retained:** The Kyoto Protocol is problematic, but it also consecrates hard-won accounting and compliance measures. If a new treaty replaces Kyoto, some countries may use the opportunity to negotiate these away.

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<sup>1</sup> CAN Ad-Hoc Legal Working Group, June 8, 2009, "COP Decisions: Binding or Not?" concludes, "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."

- **Equity and trust:** It is fundamental to the UNFCCC that developed economies must bear greatest responsibility for mitigation and that climate change mitigation must not come at the expense of social and economic development in less wealthy countries. The Kyoto Protocol reinforces this, requiring binding commitments only of countries listed in Annex 1 (A1) of the UNFCCC. This differential expectation between A1 and non-A1 (NA1) is a central and highly contentious issue in the negotiations.
- **Urgency:** It took many years to agree to the elaborate legal architecture of the Kyoto Protocol, but all parties need to agree to post-2012 commitments quickly. This is also important to provide business with investment certainty on low carbon solutions.
- **Binding nature of treaty:** International treaties need to be binding on all parties to that agreement. However, the level of commitment between A1 and NA1 parties will be different, subject to different levels of measurement, verification, reporting and compliance. For example, under the UNFCCC, developing countries have a binding commitment to help avoid dangerous climate change but to not have the measurable, reportable and verifiable emission targets that are subject to the Kyoto Protocol's compliance regime.

### Australia's position

Australia proposes that all parties to the Convention establish a National Schedule that sets out long term emissions pathways to 2050, as well as specific mitigation commitments and/or actions that are unique to each party and which can be updated. All advanced economies would retain Kyoto-style top down targets and built into the proposal are provisions to ensure that no country can backslide or weaken existing new commitments. These commitments and actions can include not just economy-wide quantified emissions limitations and reductions, but also sectoral targets, emissions intensity targets, energy efficiency and "clean energy" commitments.

Australia's proposed "Schedule approach" has brings both benefits and drawbacks.<sup>2</sup> The Australian Government has said that this approach can be adopted either under a single new treaty (model A) or under an amended Kyoto Protocol and new Copenhagen protocol (model B). Features of this schedule approach may be:

- It may allow for a range of commitments to be made by all parties to the UNFCCC, not just Annex 1 parties, and cover areas beyond emissions reduction commitments. This is politically challenging as it breaks down the differentiation between A1 and NA1 commitments.
- It could allow for a single treaty that includes countries that are not party to, or have not ratified, the Kyoto Protocol
- The central challenge with this approach – as it is with any legal structure – is that its effectiveness will ultimately be determined by the levels of ambition in the agreement itself.

### Further information:

See the other 'Count down to Copenhagen' summary sheets in CANA's international climate series:

Summary Sheet #1 What to look for, What to expect

Summary Sheet #2 International finance for climate mitigation and adaptation

Summary Sheet #3 Global adaptation to climate change

Summary Sheet #4 Legal architecture

Summary Sheet #5 Mitigation

Summary Sheet #6 LULUCF and REDD

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<sup>2</sup> CAN Ad-Hoc Legal Working Group, 8.6.2009, "Considerations Regarding National Schedules for Climate Change Mitigation" concluded, "While the exact nature of the approach has yet to be fleshed out, ... [d]epending on how it is structured, a schedule could lead to unilateral mitigation pledges with no overall targets; however, if structured carefully (i.e. if national targets are an integral part of the shared vision), it could provide a flexible and iterative means of expressing climate mitigation action."

Summary Sheet #7 International climate acronyms

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