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Copenhagen and Beyond: A legal analysis of the recent climate change negotiations and decisions and their contributions towards the future International Climate Change regime.

Darlington Chidarara

208525339

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Supervisor: Professor Michael A Kidd

DECLARATION

I, Darlington Chidarara, hereby declare that the work on which this thesis is based is my original work (except where acknowledgements indicate otherwise) and that neither the whole work nor any part of it has been, is being, or is to be submitted for another degree in this or any other university.

…… ……

SIGNATURE **DATE**

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DEDICATION

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LIST OF ACCRONYMS

ADP	Ad Hoc Working Group on the Durban Platform for Enhanced Action
AOSIS	Alliance of Small Island States
AJIL	American Journal of International Law
AR4	IPCC Fourth Assessment Report
AR5	IPCC Fifth Assessment Report
AWG-KP	Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol
AWG-LCA	Ad Hoc Working Group on Long Term Cooperative Action
BASIC	Brazil, South Africa, India and China
BAP	Bali Action Plan
CBDR	Common but differentiated responsibilities
CBDRRC	Common but differentiated responsibilities and respective capabilities
CDM	Clean Development Mechanism
CERs	Certified Emission Reductions
CMP	Conference of the Parties serving as the Meeting of the Parties of the Kyoto Protocol
CO2	Carbon Dioxide
COP	Conference of the Parties
ENGOs	Environmental NGOs
ERUs	Emission reduction units
E.U	European Union
FAR	IPCC First Assessment Report
GCF	Green Climate Fund
GEF	Global Environment Facility
GHG	Greenhouse gas
IPCC	Intergovernmental Panel on Climate Change
ICLQ	International and Comparative Law Quarterly
JI	Joint Implementation
JISC	Joint Implementation Supervisory Committee
LDCs	Least Developed Countries
MRV	Measuring, reporting and verification
NAMA	Nationally Appropriate Mitigation Action

QELROs	Quantified Emission Limitation and Reduction Objectives
RECIEL	Review of European Community and International Environmental Law
REDD+	Reducing emissions from deforestation and degradation in developing countries, including conservation
SAR	IPCC Second Assessment Report
SB	Subsidiary Body
SBI	Subsidiary Body for Implementation
SBSTA	Subsidiary Body for Scientific and Technological Advice
SIDS	Small Island Developing States
TAR	IPCC Third Assessment Report
UNCED	United Nations Conference on Environment and Development
UNEP	United Nation Environmental Programme
UNFCCC	United Nations Framework Convention on Climate Change
US	United States of America
WMO	World Meteorological Organisation

ABSTRACT

Climate change has been described as the most complicated problem that the world faces today but the most serious problem that the world faces in the future. The problem of climate change is caused by an increase of greenhouse gases (GHGs) emissions in the atmosphere. During the past 150 years, human activities have led to an exponential growth in GHG emissions. Their heavy concentration in the atmosphere results in an increase in the warming potential of the atmosphere leading to global climate change. This can result in a number of adverse environmental effects.

In 1992 in Rio, countries negotiated and joined the United Nations Framework Convention on Climate Change (UNFCCC) which had as its 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. Negotiations to strengthen the global response to climate change led to the adoption of the Kyoto Protocol in 1997. The Protocol's first commitment period ran from 2008 to 2012. Since the Kyoto Protocol entered into force, the UNFCCC's aim became to negotiate what would happen after the protocol's expiry. However, due to the complexity nature of the climate change problem and the negotiations themselves, the solution finding process has suffered serious lack of progress. This resulted in parties in 2011, deciding to extend the life of Protocol from 2013 to 2020.

In continued attempts to negotiate the protocol's successor, Conference of Parties (COPs) (The COP is the ultimate decision making and supreme body of the UNFCCC authorised to make and implement decisions to promote the implementation of the UNFCCC. It is authorised to adopt new protocols under the UNFCCC and plays a substantial role in the development of new obligations by the parties to the convention) meet annually. In so doing, the COPs contribute to the evolution of the international climate change regime.

The aim of this study is to critically evaluate the extent to which the recent annual climate change negotiations (COP 15 to COP 19) have contributed to the legal evolution and shaping of the future climate change regime. The COP outcomes will be analyzed within legal lenses and in an attempt to answer the main research question; three fundamental mitigation related legal questions will be discussed. These three questions are:

(i) What approach is likely to be adopted in the future climate change regime between a bottom up and a top down approach?

(ii) What is the likely legal form and architecture of the future climate regime? And,

(iii) What are the most likely interpretations of the nature and extent of differential treatment between developed and developing states in such an instrument?

After such an extensive critical analysis of the COP decisions, a possible prognosis of the structure of the anticipated future climate regime will be given.

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CHAPTER ONE
GENERAL BACKGROUND

"Unless we do not change our direction, we are likely to end up where we are headed." [1]

1.1 INTRODUCTION: BACKGROUND TO THE STUDY

According to Houghton, 'The basic principle of global warming can be understood by considering the radiation energy from the sun that warms the Earth's surface and the thermal radiation from the Earth and the atmosphere that is radiated out to space. On average, these two radiation streams must balance. If the balance is disturbed it can be restored by an increase in the Earth's surface temperature.'[2] Such a disturbance can be caused for example by an increase in atmospheric carbon dioxide.[3]

During the past 150 years, human activities[4] have led to an exponential growth in greenhouse gas emissions (GHGs).[5] Such GHGs for example carbon dioxide and methane's heavy concentration in the atmosphere results in an increase in the warming potential of the atmosphere leading to global climate change.[6] This can lead to quite a number of adverse environmental effects including the rise of sea levels, extreme events such as storm surges to small islands and low lying areas, water and food supply shortage, threats to human health and the extinction of some vulnerable species to mention but a few. [7]

Due to the seriousness of climate change impacts, an urgent need to mitigate and manage the emissions of GHGs internationally arose and international agreements were made to that effect. By the late 1960s, a concern for addressing human environment had catalysed a

[1] An old Chinese proverb.

[2] J Houghton *Global Warming: The Complete Briefing* 4 ed (2009) 18.

[3] Ibid. See also VI Grover *Climate Change: Five Years after Kyoto* (2004) 11-12.

[4] These include activities such as burning fossilized carbon (coal, oil and gas), widespread deforestation, wetland rice cultivation, livestock rearing, solid waste land filling and nitrogen fertilization of agriculture. See JT Hardy *Climate Change: Causes, Effects and Solutions* (2003) 20; Houghton (note 2 above) 13; Grover (note 3 above) 12-13.

[5] Hardy (note 4 above) Ibid, Houghton (note 2 above) Ibid.

[6] Hardy Ibid, Houghton Ibid.

[7] Hardy (note 4 above) generally from 77-185; Houghton (note 2 above) 16.

proliferation of bilateral, regional and multilateral conventions on diverse environmental issues that were trans-boundary and these included air pollution, the world's rivers and transportation of oil on high seas.[8] The epitome of such conferences can be attributed to the Stockholm Conference held in Stockholm, Sweden from 5-16 June 1972 which led to the adoption of Stockholm Declaration.[9] Its significance was the declaration of twenty-six guiding principles which represented the first global consensus on the nature and scope of the environmental challenge that confronted the world community.[10] Since then, a rise in international agreements as fundamental and frequent tools for managing and addressing environmental problems nationally, regionally and internationally occurred.[11] The famous Earth Summit held at Rio in Brazil from 3-14 June in 1992 preceded the development and gave birth to arguably two of the most important environmental multilateral agreements ever made, namely the two sister conventions, the United Nations Framework Convention on Climate Change and the Convention on Biological Diversity.[12]

The ongoing international negotiations being conducted under the United Nations Framework Convention on Climate Change[13] and its Kyoto Protocol[14] (both of them hereinafter referred to as 'The Climate Change Regime') are attempts to tackle what has been dubbed as one of humankind's biggest and most complex contemporary environmental challenges.[15] The ultimate objective of the climate regime is the stabilization of greenhouse gas concentrations

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[8] VP Nanda *International Environmental Law and Policy* (1995) 83. See also E Louka *International Environmental Law: Fairness, Effectiveness, and World Order* (2006) 30.

[9] Ibid.

[10] Ibid.

[11] Ibid.

[12] Nanda (note 8 above) 113, 119.

[13] *United Nations Framework Convention on Climate Change,* opened for signature *4* June 1992, 1771 UNTS 107 (entered into force 21 March 1994). Hereinafter referred to as the UNFCCC.

[14] *Kyoto Protocol to the United Nations Framework Convention on Climate Change,* opened for signature 16 March 1998, 2303 UNTS 148 (entered into force 16 February 2005). Hereinafter referred to as the Kyoto Protocol.

[15] See the UNFCC official website, 'Background on the UNFCCC: The international response to climate change' available at *http://unfccc.int/essential_background/items/6031.php*, accessed on 4 September 2013; K Kulovesi 'Independent Reporting: The Role of the Earth Negotiations Bulletin in Climate Change Negotiations' (2011) *International Law-Making and Diplomacy Review* 31; B Muller 'Global Climate Change Regime: Taking Stock and looking Ahead' in VI Grover (ed) *Climate Change Five Years after Kyoto* (2004) 29.

in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.[16] This has been simplified and interpreted as to,

> Prevent dangerous anthropogenic climate change against the backdrop of continuously increasing global greenhouse gas (GHG) emissions, already observable impacts of climate change, and alarming projections on the extent of the damage that will follow if the negotiations fail and global GHG emissions are not reduced.[17]

This implies that mitigation of anthropocentric GHGs is of paramount importance as it is the central objective of the regime and the solution to preventing global climate change. Despite the efforts put into dealing with the climate problem, the climate change regime has however suffered from a number of challenges. The UNFCCC itself had difficulties from the beginning, for example the United States of America (the US) heavily criticised the Convention and only agreed to sign the treaty after a huge compromise had been reached not to include binding targets and timetables.[18] This became the UNFCCC's main shortfall apart from funding mechanisms and commitment issues.[19] The Kyoto Protocol itself has also been criticised by many academics, scholars and Non-Governmental Organisations (NGOs) as a flawed concept[20] or even criticised as an instrument that would fail *ab initio.*[21] The US has up to0 date not ratified the Kyoto Protocol[22] and in 2011 Canada pulled out of the Protocol soon after the 2011 Durban Conference. [23] At the Doha Conference in 2012, countries including New Zealand, Canada, Japan and Russia made it clear that they would not be making new

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[16] Art 2 of the UNFCCC.

[17] Kulovesi (note 15 above) 31.

[18] Nanda (note 8 above) 113; See also VP Nanda & G Pring *International Environmental Law & Policy for the 21st Century* (2003) 292.

[19] Nanda (note 8 above) 118.

[20] RN Cooper 'The Kyoto Protocol: A Flawed Concept' (July 2001). FEEM Working Paper No. 52.2001. Available at SSRN*: http://ssrn.com/abstract=278536 or http://dx.doi.org/10.2139/ssrn.278536* (accessed on 29 March 2014).

[21] RL Arcas 'Kyoto and the COPs: Lessons Learned and Looking Ahead' (2011) 23 *Hague Yearbook of International Law*, 17-90.

[22] See Status of Ratification of the Kyoto Protocol at *http://unfccc.int/kyoto_Protocol/status_of_ratification/items/2613.php,* accessed on 04 September 2014.

[23] 'Canada pulls out of Kyoto Protocol' *The Guardian* 13 December 2011, available at *http://www.guardian.co.uk/environment/2011/dec/13/canada-pulls-out-kyoto-Protocol*, accessed on 12 April 2013.

Kyoto commitments and this left the Kyoto Protocol[24] covering only a small percentage of worldwide emitted GHGs. This reduced list already excluded all the developing countries from legally binding targets to reduce or limit their GHG emissions and thus the Protocol became weaker.[25]

Parties to the Convention meet annually under The Conference of the Parties (COP)[26] at which they review the implementation of the Convention; any other legal instruments that the COP has adopted and take necessary decisions to promote the effective implementation of the Convention, including institutional and administrative arrangements.[27] In addition, the meeting of the Parties to the Kyoto Protocol (CMP) takes place simultaneously with the meeting of the COP to deal with the same issues under the Kyoto Protocol.[28] As a result, the climate negotiations become known as the Conferences of the Parties and Conferences of the Parties serving as the Meeting of the Parties to the Kyoto Protocol (COP/CMP).[29] The COP/CMP meetings have shaped the present climate regime as it exists and will shape the future of the regime, thus their decisions and how they interpret the available legal instruments are of utmost importance and deserve the attention given. Moving ahead with negotiations has however proved to be a challenging experience as seen in the way the COP/CMP meetings have been held.[30]

There has been a serious lack of progress in the UNFCCC negotiations in recent years. The parties have failed to reach an international agreement on emissions targets and timetables by all major developed and developing country emitters.[31] This has resulted in questions as to whether the UNFCCC and its Kyoto Protocol is the best and most effective forum to push for a global climate change response or whether the world is simply flogging a dead horse.

[24] 'Kyoto battle lines drawn at COP 18' *Mail and Guardian* 27 November 2012, available at *http://mg.co.za/article/2012-11-27-cop-18-kyoto-battlelines-drawn*, accessed on 20 December 2013.

[25] MN Shaw *International Law* 6 ed (2008) 880.

[26] The COP is the supreme decision-making body of the Convention. All States that are Parties to the Convention are represented at the COP, available at http://unfccc.int/bodies/body/6383.php, (accessed on 04 September 2013).

[27] Ibid.

[28] Ibid.

[29] Ibid.

[30] Arcas (note 21 above) 17.

[31] Ibid.

Furthermore, with the way the negotiations are progressing, questions have been raised whether the forum is capable of producing a deal that can save the world from the dangers of climate change in time.

This study is thus centred on the evolution of the international climate change regime as affected by the COP/CMP negotiations. The dissertation begins by setting the scientific context of climate change with a view to understand why it has received such worldwide attention and why it is important to have an international legal regulation. Thereafter, the study identifies the instruments that form the climate change regime and gives its brief analysis with a view to understand the current legal principles applicable and how they have been interpreted and evolved in the instruments. The main purpose for such an analysis is to ascertain the effectiveness and identify shortfalls that exist in the present regime which the COP/CMP seeks to address. Special attention and assessment will then be given to the COP/CMP meetings from 2009 to 2013, especially their contribution to the evolution of the climate regime. Lastly, the researcher will conclude by trying to make a possible prognosis of the long awaited new legally binding instrument by drawing possible routes it may take as hinted by the last five COP/CMP negotiations.

The motivation to conduct such a study is that climate change has been described as the most complicated problem that the world faces today but the most serious problem that the world faces in the future.[32] It is interesting to note that despite it being an environmental problem, global climate change affects almost every key aspect of human life such as development, poverty, world political order and economics therefore a solution that is inclusive of all these is critical. However, the world seems to have chosen international environmental law as the key to dealing with such a problem. With the Kyoto Protocol entering into force in 2005[33] and the world converging to negotiate a new instrument, it is interesting that there are very recent developments in the climate change regime that have not yet been subjected to much academic analysis.

The practical reasons for conducting this study are as follows: whilst under the Kyoto Protocol, emission targets were supposed to be regulated, some of the major emitters were

[32] See note 15 above.

[33] See note 14 above.

not included under the regulated countries because they were considered 'developing' countries.[34] This has created the controversies mentioned above leading to some countries refusing to ratify it or pulling out of the Protocol.[35] Despite all these potential problems, the Protocol's life was however extended for a further eight years in 2012 at Doha.[36]A new instrument is however set to be negotiated under the UNFCCC but despite all these weaknesses and controversies around the Kyoto Protocol, some states still want it to be viewed as a starting point yet others want a different approach altogether. It is thus significant to critically analyse the Protocol, its significance to the existing international climate regime, and how it may shape or affect the future of the climate change regime as a whole. As a result, one of the most important questions becomes the reason why the Kyoto Protocol remains a central figure of these negotiations. It is also of utmost importance to analyse the recent COP/CMP negotiation process and decisions to try and understand its implications to the future of the international climate change regime and whether this platform can save the world from the grave consequences of climate change.

1.2 RESEARCH QUESTIONS, OBJECTIVES AND STRUCTURE OF THE STUDY

The main objective of this study is to ascertain the extent to which the annual climate change negotiations have contributed to the legal evolution and shaping of the future climate change regime. In trying to respond to this main question, a number of sub-questions are asked towards achieving the ultimate objective of this study. The dissertation is thus divided into four parts.

Part 1 contains the first sub-question which reads as follows "what is the climate problem and why is there need for an international scale response"? In trying to answer this question, Chapter 2 will begin by explaining the major facets of climate science as it has been reported by the Intergovernmental Panel on Climate Change (IPCC). It will give the definition of climate change, declare the climate problem, and outline consequences as well as potential solutions to the climate problem. The study will also explain how and why international law plays an important role in finding the solution. It is important to note that this dissertation from the onset takes a stand in proclaiming that mitigation is the better of all options in

[34] See note 25 above.

[35] See note 22, 23 & 24 above.

[36] Decision FCCC/KP/CMP/2012/L.9.

dealing with the climate problem as prevention is in most cases better than cure. As a result, the study focuses mainly on mitigation provisions of the international climate change regime.

Part 2 of the study poses the second sub-question which is "what constitutes the current legal international climate change regime and to what extent has it succeeded in achieving its objective"? The objective of answering this question is to identify, outline and analyse the current international legal regime that has been created to address the climate problem. This will be done in Chapter 3 which will commence by giving a brief timeline in the development of international climate change law institutions in general. It will then identify the legal instruments available and then give a brief analysis of the instruments to assess their strengths and weaknesses. A deeper analysis will be done in an attempt to assess the extent to which the instruments attempt to push for, apply and incorporate principles and achieve the ultimate objective of the climate change regime. This analysis will also be done to ascertain the influence of the current climate change regime and also to ascertain its possible influence on the future climate change agreement.

Part 3 of the study houses the central research question of this study and this principal research question reads, "to what extent has the annual climate change negotiations namely COP15/CMP5 (2009) to COP19/CMP9 (2013)[37] contributed to the legal evolution and shaping of the future climate change regime"? The main objective of asking this question is to assess how the COP/CMP outcomes have affected the evolution of the international climate change regime and how they are actually shaping the future climate change regime. This will be covered in Chapter 4 and Chapter 5. Chapter 4 will deal with the recent climate change negotiation meetings in their respective order. The degree to which their decisions and outcomes have attempted to deal with the critical mitigation related questions that the negotiators face today will be assessed. The analysis will not only look at each meeting's outcomes and decisions in isolation but will investigate the degree of connection between these meetings' decisions and outcomes. In addition, a conclusion will be given as to whether each meeting's result can be classified as successful or otherwise and the degree of progress of each meeting's results in the ultimate mitigation of greenhouse gas goal.

Chapter 5 will provide a legal analysis of the five COP/CMP outcomes side by side with the aim of ascertaining how they have interpreted and incorporated the legal principles found in

[37] The research focuses on the last five meetings and excludes the 2014 Conference held at Lima in Peru because the research work for this dissertation was concluded before December 2014 when the meeting took place.

the current climate regime and give a possible outcome of the structure of the new agreement. In other words, the study agrees that the climate negotiations have resulted in the development and/or elaboration of certain principles of international environmental law, thus drawing from this analysis of the COP/CMP decisions and outcomes, this section will be narrowed down and attempt to answer the identified three fundamental mitigation related legal questions which are as follows:

(iv) What approach is likely to be adopted in the future climate change regime between a bottom up and a top down approach?
(v) What is the likely legal form and architecture of the future climate regime? And,
(vi) What are the most likely interpretations of the nature and extent of differential treatment between developed and developing states in such an instrument?

Furthermore, the implications of the decisions to the ultimate objective of the climate regime will be assessed along such an examination. After such an extensive critical analysis of the decisions, a possible prognosis of the structure of the anticipated future climate regime will be given. Lastly, possible recommendations and finally a conclusion will be given under Part 4 of the dissertation.

1.3 METHODOLOGY

The research methodology used to pursue the aims and objectives of this study is entirely desk top based. Information and data relating to the topic will be both primary sources (international treaties, instruments and COP/CMP decisions) and secondary sources (journal articles, text books, text books chapters, internet sources, NGO publications, reports from international meetings as well as reputable media reports).

PART 1:
CLIMATE SCIENCE, THE CLIMATE PROBLEM AND THE LAW

CHAPTER TWO
CLIMATE CHANGE SCIENCE

"…what we are talking about is extended world war… People would move on a massive scale. Hundreds of millions, probably billions of people would have to move…" [1]

2.1 INTRODUCTION

Before discussing the specific core legal issues on which this dissertation focuses, the study will start by introducing the climate change problem. It will do so by defining climate change, proclaim the climate problem and outline the causes and projected consequences of climate change. It is important to note that the uncertainties found in the projected consequences and their exact impact does have a very significant role in the positions that countries take when negotiating, which has huge effects on the whole climate problem and approach. This could also have not only legal implications but political, economic and development implications as well. All these issues therefore need to be considered before one dwells in-depth in the analysis of the development of the climate regime as all these factors affect the evolution of the legal climate regime itself. Furthermore, this chapter will also try to explain the reasons why international environmental law is also seen at the epitome of solution-finding to the highly pronounced climate problem.

2.2 CLIMATE SCIENCE

2.2.1 The historical development

The problem of human induced climate change was hypothesised in the early 1890s by the Swedish scientist Svante Arrhenius who warned about a possibility of a so called 'enhanced greenhouse effect' caused by excess carbon dioxide in the atmosphere.[2] In the year 1896, Arrhenius published a climate model demonstrating the sensitivity of surface temperature to atmospheric Carbon Dioxide (CO2).[3] It however took the world another century before the world's political system began to recognise and respond to the identified problem despite

[1] N Stern, *Associated Press*, Feb, 21, 2009 available at *http://www.climatism.net/quotes-on-climate-change-environment-and-energy/* accessed on 10 August 2014.

[2] SB Pralle 'Agenda-Setting and Climate Change' (2009) 18(5) *Environmental Politics* 781.

[3]JT Hardy *Climate: Causes, Effects, and Solutions* (2008) 4; JT Houghton *Global Warming: The Complete Briefing* 4 ed (2009) 23.

such early warnings by Arrhenius.[4] The concern became visible in a series of international conferences on CO2 between 1985 and 1987 under the World Meteorological Organisation (WMO) which however had disappointing results.[5]

In 1988, the United Nations Environmental Programme (UNEP) joined efforts with the WMO in order to study the scientific aspect of the climate problem.[6] The same year in November, the Intergovernmental Panel on Climatic Change (IPCC) was created and was made up of scientific and political experts.[7] The IPCC was given the task of exploring possible measures to be taken in order to protect the atmosphere.[8] In December of the very same year, the United Nations General Assembly (UNGA) endorsed the setting up of the IPCC by the UNEP and the WMO[9] thus making climate change officially a United Nations (UN) concern and agenda. The IPCC's task as outlined in the UN General Assembly Resolution 43/53 of 6 December 1988 was to prepare a comprehensive review and recommendations with respect to the state of knowledge of the science of climate change, social and economic impact of climate change, and possible response strategies and elements for inclusion in a possible future international convention on climate. [10] The IPCC has thus far prepared four reports in 1990, 1995, 2001 and 2007 respectively, with the fifth report scheduled for completion in October 2014.[11] To date, the IPCC has become the biggest and arguably the most credible science body to publish on climate science.[12]

[4] Pralle (note 2 above).

[5] A Kiss & D Shelton *International Environmental Law* 2 ed (2000) 512.

[6] Ibid; See also Intergovernmental Panel on Climate Change History, available at *http://www.ipcc.ch/organization/organization_history.shtml*, accessed on 12 September 2014.

[7] Ibid.

[8] Ibid.

[9] Ibid.

[10]IPCC, History, available at *http://www.ipcc.ch/organization/organization_history.shtml*, accessed on 12 September 2013.

[11] See *http://www.ipcc.ch/report/ar5/index.shtml* accessed on 14 August 2014. See also JC Dernbach & S Kakade 'Climate Change Law: An Introduction' 2008 *Energy LJ* 29:1, 3.

[12] WH Rodgers *at al Climate Change: A Reader* (2011) 16.

The IPCC's first assessment report published in 1990 covered the basics of climate science including the impacts.[13] The second assessment report published in 1995[14] incorporated the economic and social dimensions of climate change.[15] The third assessment report (TAR) published in 2001[16] had a synthesis report of the previous IPCC reports and tried to address quite a variety of policy-relevant questions.[17] These questions included issues on adaption and mitigation.[18] The report was even more definitive about the reality and risks of global warming.[19] The 2007 Fourth Assessment Report (AR4)[20] which is the most recent assessment also had a synthesis report and comprised of different reports by each of the IPPC's Working Groups (WG).[21] These reports included a physical science basis of climate change by the WGI; the impacts of climate change, vulnerability and the adaptation to climate change by the WGII and the mitigation of climate change by the WGIII.[22] The WGI report concluded that warming was unequivocal, based on evidence of global surface temperatures; changes in precipitation patterns; and observations of ocean and arctic temperatures.[23] It is important to note that as each report was published, increase were also observed in global average temperatures due to increases in anthropogenic or human caused greenhouse gas emissions.[24] This increase rose in each respective report from *little* observation in 1990 to *discernible*

[13] Intergovernmental Panel on Climate Change: IPCC First assessment Report: Overview and Summaries (1990), available at *http://www.ipcc.ch/publications_and_data/publications_and_data_reports.shtml#1*, accessed on 16 April 2013, See also a summary of the IPCC Reports by Dernbach & Kakade (n11) at 3.

[14] Available at *http://www.ipcc.ch/pdf/climate-changes-1995/ipcc-2nd-assessment/2nd-assessment-en.pdf,* accessed on 16 April 2013.

[15] Dernbach & Kakade (note 11 above) at 3.

[16] Intergovernmental Panel on Climate Change, Synthesis Report 2 (2001), available at *http://www.ipcc.ch/publications_and_data/publications_and_data_reports.shtml#1*, (accessed on 16 April 2013).

[17] See note 15 above.

[18] See note 16 above.

[19] VP Nanda & G Pring *International Environmental Law & Policy for the 21st Century* (2003) 291.

[20] Intergovernmental Panel on Climate Change, Fourth Assessment Report (2007), available at *http://www.ipcc.ch/publications_and_data/publications_and_data_reports.shtml#1*, accessed on 16 April 2013.

[21] Ibid.

[22] Ibid.

[23] Intergovernmental Panel on Climate Change, Working Group I Report: The Physical Science Basis of Climate Change (2007), available at *http://www.ipcc.ch/pdf/assessment-report/ar4/wg1/ar4_wg1_full_report.pdf,* accessed on 16 April 2013.

[24] Ibid.

human influence in 1995 and from a *66-90%* in 2001 to a *90-99%* in the 2007 report.[25] This increase pattern calls for immediate action to be done with regards to minimising of anthropogenic greenhouse gas emissions.

2.2.2 Definition of climate change

Under the UNFCCC, climate change usage refers to '[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'.[26]

However, under the IPCC's Fourth Assessment Report (AR4) climate change is referred to as '[a] change in the state of the climate that can be identified (e.g. using statistical tests) by changes in the mean and/or the variability of its properties, and that persists for an extended period, typically decades or longer'.[27]

The IPCC definition refers to any change in climate over time, whether due to natural variability or as a result of human activity, thus making this usage a bit different from that of the UNFCCC that seems to be centred on human activity. An important question therefore is why the UNFCCC adopted such a definition. Hardy states that scientists generally use the term "climate change" in the way defined by the UNFCCC when referring to the post-industrial era.[28] It is also of paramount importance to note that the UNFCCC is a legal document and it therefore was created with and for a purpose. Its purpose is seen widely as the same purpose of international environmental law which is to prevent international environmental harm by regulating state actions.[29] The definition therefore focuses on the human activity since that is the conduct the UNFCCC wants to regulate, as reported by the IPCCC as the main cause of global climate change. The UNFCCC definition has been

[25] See note 23 Chapter 9 at 699. See also summary as provided by Dernbach & Kakade (note 11 above) at 4.

[26] Art 1(2) of the UNFCCC.

[27] Intergovernmental Panel on Climate Change, Climate Change 2007: Synthesis Report 30 (2007) available at *http://www.ipcc.ch/publications_and_data/publications_ipcc_fourth_assessment_report_synthesis_report.htm*, accessed on 20 December 2013.

[28] Hardy (note 3 above) at 11.

[29] Kiss & Shelton (note 5 above) at 5.

described by some authors as the valid, legal and official definition of climate change.[30] As a result, the definition by the UNFCCC will be adopted for the purposes of this research.

2.2.3 Causes of climate change

There are many factors, both natural and of human origin, that determine the climate of the earth.[31] The natural factors are not an issue as far as science is concerned since one cannot do much about them. Science states that naturally, the sun heats the earth and the earth intercepts solar radiation (including that in the short-wave, visible, part of the spectrum). About a third of the solar radiation is reflected, the rest is absorbed by the different components (atmosphere, ocean, ice, land and biota) of the climate system.[32] The energy absorbed from solar radiation is balanced (in the long term) by outgoing radiation from the Earth and atmosphere.[33] This terrestrial radiation takes the form of long-wave, invisible, infra-red energy and its magnitude is determined by the temperature of the earth atmosphere system.[34] There are several natural factors which can change the balance between the energy absorbed by the earth and that emitted by it in the form of long wave infra-red radiation and these factors cause the radioactive forcing on climate.[35] One of the most important factors is the greenhouse effect.[36] This has been described in simple terms as the natural system that regulates the temperature of the earth.[37]

Basically, the earth is covered by a 'blanket' of gases which allows light energy from the sun to reach the Earth's surface, where it is converted to heat energy.[38] Most of the heat is reradiated towards space; however some of it is trapped by greenhouse gases in the atmosphere and this natural effect which keeps the Earth's temperature at a level necessary to

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[30] RL Arcas 'Is the Kyoto Protocol an adequate Environmental Agreement to resolve the climate change problem?' 2001 *European Env Law Review 282-293*.

[31] Intergovernmental Panel on Climate Change, Climate Change: The 1990 and 1992 IPCC Assessments available at *https://www.ipcc.ch/publications_and_data/publications_ipcc_90_92_assessments_far.shtml*, (accessed on 12 January 2014) 65.

[32] Ibid.

[33] Ibid.

[34] Ibid.

[35] Ibid.

[36] Ibid.

[37] VI Grover *Climate Change: Five years after Kyoto* (2004) 12.

[38] Ibid.

support life.[39] This blanketing is known as the natural greenhouse effect and the gases are known as greenhouse gases.[40] It is called natural because all the atmospheric gases were there long before human beings. [41] However, some greenhouse gases (GHGs)[42] have been defined in the UNFCCC as 'those gaseous constituents of the atmosphere, both natural and anthropogenic, that absorb and re-emit infrared radiation'.[43] This definition suggests that these gases naturally maintain the heat balance that is necessary to life on earth by trapping infrared radiation which warms the surface temperature while permitting excess heat to escape.[44]

However, human activity such as extraction and burning fossilised carbon from coal, oil and gas for fuel, forest clearing and burning, wetland rice cultivation, livestock rearing, solid waste land filling and nitrogen fertilisation of agriculture are all responsible of generating more GHGs.[45] An excess build-up of such GHGs can upset the important equilibrium and cause a rise in the Earth's surface temperature.[46] This causes what is termed the 'enhanced greenhouse effect' which means the added effect caused by the gases present in the atmosphere due to human activities.[47] Scientists are convinced that this will trap more heat and raise the Earth's surface temperature[48] therefore leading to global climate change.

There is strong scientific consensus that the Earth's climate is being affected by the build-up of GHGs caused by human activities and that action should be taken now. As a result, the global climate change problem has made it to the top of the world's top agenda.

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[39] Ibid.

[40] J Houghton *Global Warming: The Complete Briefing* 4 ed (2009) 21.

[41] Ibid.

[42] Gases such as carbon dioxide, methane, and nitrous oxide. See Hardy (note 38 above) 20; Houghton (note 40 above) 35.

[43] Article 1.2 of the UNFCCC.

[44] L Guruswamy *International Environmental Law in a Nutshell* 2 ed (2003) 180.

[45] Hardy (note 3 above) 20.

[46] Ibid.

[47] Houghton (note 40 above) 21.

[48] Grover (note 37 above) 12.

2.2.4 The potential impacts and consequences of climate change

Rapid and large climatic changes can be expected to have far reaching and in many instances unpredictable consequences not only for human societies but also for all forms of life on earth.[49] Global climate change will impact substantively but like Arcas,[50] this researcher will only focus on the three main effects namely an increase in temperatures; an increase in precipitation; and a rise in sea levels, since most of the other effects are associated with these three impacts.

2.2.4.1 Temperature increase

The Twentieth Century was the warmest century and 1990 and 2000 were the warmest decades of the past millennium.[51] There has been evidence of recent temperature increases and warming in recent decades has been greater too.[52] The AR4 states that

> For the next two decades a warming of about 0.2°C per decade is projected for a range of SRES emissions scenarios. Even if the concentrations of all GHGs and aerosols had been kept constant at year 2000 levels, a further warming of about 0.1°C per decade would be expected. Afterwards, temperature projections increasingly depend on specific emissions scenarios.[53]

Such an unprecedented rise in temperature change will have discernible and problematic effects.[54] So far, the effects include the decrease in the snow cover in the Northern Hemisphere and floating ice in the Arctic Ocean.[55] The year 2012 saw a record in that Arctic sea ice reached its minimum extent for the year and this was also a record for the lowest summer cover since satellite data collection began.[56] Scientists expect that the average global

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[49] Ibid at 23.

[50] Arcas (note 30 above) 283.

[51] Hardy (note 3 above) 40.

[52] Ibid at 41.

[53] IPCC (note 20 above) 45.

[54] Guruswamy (note 44 above) 178.

[55] Arcas (note 30 above) at 283.

[56] P Rincon 'Record minimum for Arctic Sea' *British Broadcast Cooperation* 19 September 2012 available at *http://www.bbc.com/news/science-environment-19652329* accessed on 14 August 2014. See also M Scott 'Summer 2012 brought record-breaking melt to Greenland' 4 December 2012 available at *http://www.climate.gov/news-features/understanding-climate/summer-2012-brought-record-breaking-melt-greenland* accessed on 14 January 2014.

surface temperature could rise by more than 1°C by 2100 and this will have serious consequences.[57]

2.2.4.2 An increase in precipitation

It is also projected with higher confidence that there will be an increase in the global average precipitation, most likely in areas of high-latitudes, whilst there will be a decrease in precipitation in most sub-tropical land regions.[58] As a result, future tropical cyclones (which are the typhoons and hurricanes) will become more intense and frequent with larger peak wind speeds and more heavy precipitation which is associated with increase of tropical sea surface temperatures.[59] The climate change conference in Doha became dramatic as amid the climate talks at COP18/CMP8 in 2012, more than 400 lives were lost in a hit by Typhoon Bopha in the Philippines.[60] This situation raised concerns amongst members of the UNFCCC in consideration of these events when negotiating. A year later during the opening of COP19/CMP9 in Warsaw saw The Philippines being hit by typhoon Haiyan and Yeb Sano, the Head of Delegation for the Philippines made a very emotional plea to the conference as he emphasised that 'this, *"*massive devastation*"* should be a warning to the whole world and "*it's time to stop this madness". '*[61]

2.2.4.3 Sea Level Rise

Sea levels have risen 4-10 inches over the past century as a consequence of global warming and it is likely to rise more in the next future.[62] This rise in sea levels has been described as unprecedented.[63] The sea rise is a result of ocean water warming which then leads to a rise in sea levels relative to the land.[64] Sea level rise in short could contaminate the aquifers that

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[57] IPCC (note 20 above) 45.

[58] IPCC (note 20 above) 46.

[59] Ibid.

[60] 'Typhoon Bopha: Death Toll Passes 400' *The Telegraph* 6 December 2012 available at *http://www.telegraph.co.uk/news/worldnews/asia/philippines/9726094/Typhoon-Bopha-death-toll-passes-400.html* accessed on 10 January 2014.

[61] The opening of COP19 in Warsaw in the shade of Philippines' super typhoon Haiyan available at *http://www.cop19.gov.pl/latest-news/items/the-opening-of-cop19-in-warsaw-in-the-shade-of-philippines-super-typhoon-haiyan,* accessed on 14 January 2014.

[62] See note 55 above.

[63] Hardy (note 3 above) 48.

[64] Ibid.

supply drinking water for Caribbean Islands while the entire Pacific could simply disappear under the sea.[65] Half of humanity lives in the coastal lands and for them, even half a metre rise could have serious consequences as they will lose the most fertile land.[66] Even half a metre rise where there is no flood defence will leave a substantial number of people living in large river deltas and small islands liable to flooding.[67] In addition, the people become more vulnerable by the likelihood of storm surges either due to more intense tropical cyclones or mid latitude storms and by other problems such as local land subsidence and the increased intrusion of salt into groundwater.[68]

2.2.5 The climate problem

The climate problem can therefore be summed up as outlined in the IPCC's Fourth Assessment Report (AR4) as it lists what it terms as 'the five reasons for concern' which were identified in its predecessor the IPCC's Third Assessment Report (TAR). These include the following:

a. heightened risk to unique and threatened ecosystems and communities,
b. likely increase in the frequency of and damage from droughts, floods and heat waves,
c. greater vulnerability of the poor and elderly to the adverse effects of climate change,
d. growing economic costs of impacts over time as atmospheric greenhouse gas concentrations increase, and
e. the possibility of significantly rising sea levels from melting of the Greenland and Antarctic ice sheets.[69]

All of the above potential impacts are just a glimpse of the projected effects of climate change. In summary therefore, climate change will lead to an increase in temperatures, a serious increase or decrease of precipitation (which will differ per regions) and an unprecedented increases in sea level rise. This will have serious impact on fresh water supplies, ecosystems, food supplies and human health. In addition, there will also be more unbearable extreme weather events. [70]

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[65] See note 55above.

[66] Houghton (note 40 above) at 181.

[67] Ibid.

[68] Ibid.

[69] IPCC (note 60 above) at 64-65 as expanded by Dernbach & Kakade (note 11 above) 5.

[70] Houghton (note 40 above) generally at 172-234. See also Hardy (note 3 above) 77-183.

2.2.6 Potential solutions to the climate problem

As climate change seems to be more of an environmental science problem, scientific solutions have been offered. These have over the time been moulded into potential policy options and these options mainly include mitigation, energy efficiency and conservation, carbon storage and adaptation.[71] These will briefly be discussed briefly in turn. The first solution suggested is mitigation. This involves a direct reduction in GHG emissions and takes a more traditional approach as pollution control.[72] The second option is energy efficiency and conservation which focuses more on an indirect reduction of GHGs emissions from fossil fuels by reducing the amount of energy used[73] as well as increasing the amount of energy generated per GHG emitted.[74] The third option is carbon storage (also referred to as carbon sequestration) which involves the reduction of CO2 at the source thus eliminating much of greenhouse warming potential.[75] This is a long term option in which CO2 is then stored underground in the soil, bedrock or other places so that it no longer returns to the atmosphere and cannot return to the atmosphere.[76] The final option is adaption and this works in the anticipation of climate change being inevitable thereby preparing for it.[77] Adaptation means adjusting to climate change (including climate variability and extremes) to moderate potential damage, to the advantage of opportunities or to cope with consequences.[78] Therefore, the object of adaptation is to anticipate and minimise the negative consequences of climate change.[79]

The above solutions are believed to be the possible solutions to effectively address climate change. Most of the other solutions fall in one of these four as well.[80] It is however important to note that the greatest efforts to date have been focused on the first two options as evidenced in the international climate talks under the UNFCCC. This researcher strongly considers mitigation of GHGs as the key to addressing the climate problem. Since climate

[71] Dernbach & Kakade (note 11 above) 8-9; See also Hardy (note 3 above) 187.

[72] Dernbach & Kakade (note 11 above) 8.

[73] Ibid.

[74] Hardy (note 3 above) 201.

[75] Ibid at 187.

[76] Dernbach & Kakade (note 11) above 8-9.

[77] Ibid at 9.

[78] Houghton (note 40 above) at 173.

[79] Dernbach & Kakade (note 11 above) at 9.

[80] Ibid at 8.

change results from collective states' GHG emissions which build up in the atmosphere for a period of time, a better solution is to control by reducing this emission rate as this helps as time progresses. A failure in mitigation means adaptation becomes the only available solution for the future. This is not guaranteed as most developing countries have very limited adaptive capacity. It has also been established that the cost of mitigation is lower than that of adaptation[81] thus a failure in mitigation actions most probably means the least developed countries (LDCs) and Small Island States (SISs) are in serious danger. To this effect, this thesis focuses mainly on the mitigation provisions of the climate change negotiations outcomes as shall be seen in Chapters 4 and 5 which address the central question of this study. The rationale behind such a focus is that there are a number of issues that are discussed at the COP/CMP negotiations. Due to space constraints this dissertation focuses only on the mitigation aspect.

2.2.7 Climate change scientific uncertainties: The political and legal implications

The IPCC in its first assessment report plainly admits that,

> There are many uncertainties in our predictions particularly with regard to the timing, magnitude and regional patterns of climate change, due to our incomplete understanding of:
>
> - sources and sinks of greenhouse gases, which affect predictions of future concentrations;
> - clouds, which strongly influence the magnitude of climate change;
> - oceans, which influence the timing and patterns of climate change;
> - polar ice sheets which affect predictions of sea-level rise.
>
> These processes are already partially understood, and we are confident that the uncertainties can be reduced by further research. However, the complexity of the system means that we cannot rule out surprises.[82]

This statement regarding the climate change's scientific uncertainty was formulated more than two decades ago but Houghton asserts that it remains a good statement of the main factors that underlie scientific uncertainty in climate science today.[83] This however does not

[81] Houghton (note 40 above) 285-286. The same assertion has recently been confirmed. See D Campbell 'After Doha: What Has Climate Change Policy Accomplished?' (2013) 25:1 *Journal of Environmental Law* 11.

[82] IPCC (note 13 above) 63.

[83] Houghton (note 40 above) 262.

mean there has been little or no progress in the understanding of climate science as significant progress has taken place in understanding development of models as evidenced by the IPCC reports.[84] In 2005, the Joint Science Academies in a statement also submitted that "there will always be uncertainty in understanding a system as complex as the world's climate".[85] However despite such a statement, the same report goes on to say that there is now strong evidence that significant global warming is occurring.[86] Despite all the serious attempts to make climate change appear controversial and casting the uncertainty debate in the popular media to try and disregard the need to act now, there is an overwhelming scientific consensus today that human activity that releases GHGs is causing a change in the Earth's climate.[87] An excellent source of information and authority in this field is the IPCC, as mentioned in the previous chapter.[88]

Uncertainties and controversies however remain with regards to the extent of possible impacts that climate change will have on human and natural systems as this cannot unequivocally be ascertained and also the causal nexus between anthropogenic forced climate change and the adverse effects.[89] The predictions by the IPCC have been challenged by a large group of dissenting scientists who have expressed themselves through some petitions.[90] They have given quite a number of arguments to discredit the IPCC's findings and predictions. The IPCC is however confident that the world will face significant adverse impacts[91] which have been discussed above.

Therefore, what can be adduced from the above discussion is that together with the uncertainty in the basic science of climate change, including the causal nexus and the predictions of future climate change impacts, there are bound also to be uncertainties in our assessment of the impacts of climate change.[92] The question to be asked now is how the

[84] Ibid.

[85] Rodgers *et al* (note 12 above) 29.

[86] Ibid.

[87] Rodgers *et el* (note 12 above) 16; Guruswamy (note 44 above) 180; See also Houghton (note 40 above) 261.

[88] For more information see *http://www.ipcc.ch/.*

[89] Guruswamy (note 44 above) 185.

[90] Ibid at 181.

[91] Ibid at 185-186.

[92] Houghton (n40) at 261.

uncertainty debate by scientists has been interpreted by policy makers and to what extent it has played a part in negotiating towards a climate solution. As a result, the issue about climate change due to this whole uncertainty debate becomes not only how much action is required to address the climate problem, but also when this action needs to be taken.[93] It is important to note that due to such uncertainty allegations, some policy makers have actually came forward and argued that the climate change case is not so strong enough for much action to be taken now.[94] Alestalo states that,

> Political negotiations and decisions concerning regional adaption to or global mitigation of human-induced climate change require solid and unequivocal scientific information as background material. This is obvious as the decisions about adaptation and especially mitigation are extremely far-reaching, influencing global economy and relations between sovereign countries. The evidence concerning the negative impacts of the human-induced climate change must be so clear and concrete that there remains no reasonable doubt about the necessity of the counter actions. And yet, as the science is expressing its best and honest understanding of future conditions, there are always certain scientific uncertainties in the analyses and calculations which just must be accepted.[95]

It is of paramount importance to note that these political negotiations lead to the adoption of legal instruments that are meant to deal with the climate problem. Clearly, today's decision-making takes place in a situation where there remains scientific uncertainty. This has affected the political will of some statesmen as well as holding hostage the process that can bring to life a reasonable legal solution to what has been described by countless scientists, statesmen, economists, environmentalists as well as academics in all different fields as one of the biggest environmental challenges facing the world today. These uncertainties in science delayed the ratification and the immediate implementation of the Kyoto Protocol and continue to haunt the climate talks as well as the possibility of a better legal instrument today.

[93] Ibid at 274.

[94] Ibid.

[95] M Alestalo 'Man-made Climate Change: The Scientific Basis and the Main Implications' 2010 *International Environmental Law-Making and Diplomacy Review* 7&8.

2.3 WHY ARE LEGAL INSTRUMENTS BEING USED TO ADDRESS THE CLIMATE PROBLEM?

Given that climate change is more of an environmental and scientific problem and even a sustainability issue, an important question that should come to mind is why the world under the United Nations has decided to rely on international multilateral legal instruments to drive the need to deal with global climate change or alternatively the source of the mandate of international law to address such a problem. One of the central questions that have been raised in the climate negotiations is whether the new instrument needs to be legally binding. This question will not be addressed in this section of the study, but rather in Chapter 6 which analyses the fundamental questions of the evolution of the climate change regime which is the core of this study. For now, the question as to where international law gets its mandate to address the climate problem and why it has been preferred is going to be addressed

Due to the fact that climate change is a problem which can be described as an environmental problem 'beyond the limits of national jurisdiction'[96] and is a result of the combined activities of many nations, international law has the basis to address the issue as with stratospheric ozone depletion and other global harms.[97] The basis of this is found under Principle 21 of the Stockholm Declaration.[98] Principle 21 reads 'States have a responsibility to ensure that the activities within their jurisdiction or control do not cause damage to the environment of other states of areas beyond the limits of national jurisdiction'.

Authors such as Birnie and Boyle present a contrasting view. They attempt to argue that the global atmosphere does not quite fit the precise terms of Principle 21 as it is not an area 'beyond the limits of national jurisdiction' but rather falls by analogy within the protection afforded by international law to common areas such as high seas.[99] They conclude that such a conclusion is implicit in the Ozone Convention and the UNGA Resolution 43/53 and in the designation of climate change as a matter of 'common concern' in the UNFCCC.[100]

[96] PW Birnie & AE Boyle International Law and The Environment 2 ed (2002) 516.

[97] VP Nanda & G Pring *International Environmental Law & Policy for the 21st Century* (2003) 290.

[98] Ibid at 290, See also Birnie and Boyle (note 96 above) 516, See also VP Nanda *International Environmental Law and Policy* (1995) 247.

[99] Birnie & Boyle (note 96 above) 516.

[100] Ibid. See also The Preamble of the UNFCCC.

However, authors such as Nanda view the principle of state responsibility enshrined under Principle 21 as an emerging doctrine of customary law which will allow international law to control emissions which cause global warming.[101] Thus international law still has a firm basis to address global climate change. Whichever view one decides to take however, it is of paramount importance to note that international law or international environmental law forms a strong basis to address global climate change. This has become evident through the existing climate regime which consists of international treaty law.

Now that the basis for international law has been established, the next question is why international law is a preferred route and why such legal regimes are important. As pointed out by Nanda firstly, the law creates what can be termed "state responsibility" which will allow international law to control emissions which cause global warming.[102] Spencer also further puts this state responsibility claim by stating that:

> Legally binding regimes represent the highest level of commitment by governments and provide the greatest certainty to private actors. By providing the strongest assurances of global cooperation, and of gradually changing markets, legally binding regimes can shift countries' perceived interests and strengthen their actions. By anchoring interactions in stronger normative frameworks, binding regimes provide more effective scientific benchmarks for action.[103]

Hare, Stockwell, Flachsland and Oberthur also strengthen the assertion and outline that legally binding agreements have several benefits, which in most cases add to the benefits discussed above.[104] These academics further outline that legally binding agreements bring about a global coordination which is needed to address the climate problem since it is a collective action which could assist in achieving rapid GHG emissions which is needed urgently.[105] They identify five functions that the so called 'global coordination' could provide and these can be summarised as follows:

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[101] Nanda (note 98 above) 247.

[102] Ibid.

[103] TA Spencer 'A legal Form Proposal for Durban and Beyond' November 25, 2011 available at *http://ssrn.com/abstract=1964697 or http://dx.doi.org/10.2139/ssrn.1964697*, accessed on 13 July 2013.

[104] Hare et al "The architecture of the global climate regime: A top-down perspective" (2010) 10 *Climate Policy* 606-607.

[105] Ibid at 606.

(i) Enhanced confidence in making commitments

Basically, a legally binding agreement signals the seriousness with which Parties to the agreement intend to take their commitments. As a result, credibility of commitments is enhanced which adds confidence in other parties to also follow suite and this will have a positive effect of increasing the real level of action.[106]

(ii) Enhanced confidence in the delivery of commitments

If legally binding agreements are compared to mere pledges (non-binding agreements), legally binding agreements actually increase the confidence of delivery since these are incorporated into domestic law by the domestic ratification process which means that they can bind future governments if they are long term because of their true legal nature and that true legal standing will be evidence of the level of commitment of the parties.[107] There are also substantial likely increased costs of non-compliance which almost all countries want to avoid where possible.[108]

(iii) Facilitates domestic implementation

Basically, there will be implementing ministries which are better equipped to deal better and effectively with other ministries. The reason for this is the need by the respective governments to comply and implement international legal agreements which they have committed to and which have become their legal mandates.[109]

(iv) Reduced transactions costs

The authors argue that theoretically there are reduced transaction costs since governments won't continue renegotiating and also as noted in the climate change context there have been benefits of burden sharing agreements through different mechanisms.[110]

One therefore comes to the conclusion that international law has a strong basis to address global climate change as there are solid principles that can compel countries to act

[106] Ibid.

[107] Ibid.

[108] Ibid.

[109] Ibid at 606 & 607.

[110] Ibid at 607.

responsibly as well as holding the same countries responsible for their actions. Furthermore, it seems that using legal regimes provides assurance and insurance that the states involved will do their best in meeting with their commitments. These legally binding regimes on an international level have gained the support of states and independent environmental bodies as well.

PART 2:
THE INTERNATIONAL CLIMATE CHANGE REGIME

CHAPTER THREE

THE INTERNATIONAL CLIMATE CHANGE REGIME

"Global warming is a fact. Now it's up to liberals to make it a reality. Hence there is crucial importance in preventing powerful, greedy free market forces from getting in the way of worsening storms and rising sea levels. The Kyoto Accord is a good first step".[1]

3.1 INTRODUCTION

According to Shaw, '[i]n the long march for mankind from the cave to the computer a central role has always been played by the idea of law – the idea that order is necessary and chaos inimical to a just and stable existence'.[2] He further pinpoints law as that element which binds the members of the community together in the adherence to recognised values or standards.[3] This has become a model in which almost every community exists and the international community has not been an exception thus the development of international law. Modern international law in general can be tracked back some 400 years back but certain basic concepts of international law can be discerned in political relationships thousands of years ago.[4] International law has not stopped growing and developing but it has continued to develop rapidly to this day. Today's significant developments have also been observed in its other branches such as international environmental law which has grown from being a narrow specialty field within the general context of international law to become a field in its own right.[5] It is important to note that international environmental law has continued to grow. Such a development can be traced to the climate change law which has also developed within the confinements of international environmental law and all can be looked at through lenses of international law.

The general pattern of growth of international environmental law has been summarised by Bodansky as follows,

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[1] A quotation by an American Comedian PJ O'Rourke available at *http://www.brainyquote.com/quotes/quotes/p/pjorour617638.html*, accessed on 21 August 2014.

[2] MN Shaw International Law 6 ed (2008) 1.

[3] Ibid.

[4] Ibid at 14.

[5] D Bodansky 'The Development of International Environmental Law' (2011) *International Law-making and Diplomatic Review* 11.

> [A] problem is discovered, often with alarm, as a result of a dramatic event such as an oil spill; public interest is aroused, leading to new initiatives; environmental legal responses spread to other countries through a process of mimicry; the difficulties and the true, often hidden, costs of addressing the problem gradually become apparent; the public becomes discouraged, bored, or diverted by the emergence of a new issue; and the issue becomes quiescent, continuing to be addressed in a routine, 'administrative' manner.[6]

This is arguably the same pattern that the international climate change regime has followed. This chapter introduces the international climate change regime. In the first part of this chapter, the researcher outlines the general history and institutional development within the climate change regime is from the Stockholm 1972 United Nations Conference on Human Development through to the famous Rio 1992 United Nations Conference on Environmental and Development (UNCED). The second part of the chapter introduces the existing international climate regime comprising of the 1992 United Nations Framework Convention on Climate Change (UNFCCC) and the 1997 Kyoto Protocol (Kyoto Protocol/The Protocol). The UNFCCC will be outlined for contextual set up and understanding. An assessment of it as a global instrument, its ultimate objective and its conceptual framework including important principles enshrined within it will also be assessed. After that, a brief analysis of the Kyoto Protocol will also be undertaken. The researcher will give a brief critical analysis of the Kyoto Protocol to assess its strengths and weaknesses, the extent to which the Kyoto Protocol have pushed for the ultimate objective and the principles in the Convention. The last part will assess the Protocol's successes, shortfalls and the effects it has had in the overall climate regime as well as the effects it may have on the future climate change regime.

3.2 HISTORY ON INSTITUTIONAL FRAMEWORK DEVELOPMENT: FROM SVANTE ARRHENIUS (EARLY 1890S) – THE POST-KYOTO PROTOCOL (1997 AND BEYOND).

Bodansky and Rajamani assert that,

> The development of the climate change regime can usefully be divided into six periods: the *foundational period*, during which scientific concern about global warming developed; the *agenda setting phase*, from 1985-1988, when climate change was transformed from a scientific into a policy issue; a *pre-negotiation period* from 1988 to 1990, when governments became heavily involved in the process; the *constitutional period* from 1991 to 1995, leading to the

[6] Ibid at 12.

> adoption and entry into force of the FCCC; and a *regulatory phase*, focusing on the negotiation, elaboration and implementation of the Kyoto Protocol from 1995 to 2007, and a second constitutional phase, from 2001 to the present, focusing on the negotiation and elaboration of the future climate regime.[7]

This is the most accurate breakdown and explanation. This study will briefly highlight such a development for a foundational understanding of the origins of climate change regime and where it is headed.

As mentioned in the previous chapter, scientifically, the problem of human induced climate change was hypothesised in the early 1890s by a Swedish scientist Svante Arrhenius who warned about a possibility of a so called 'enhanced greenhouse effect' caused by excess carbon dioxide in the atmosphere.[8] It however took the world almost another century before the world's political system began to recognise and respond to the problem despite such early warnings by Arrhenius.[9] Furthermore, in Chapter 2 of this study's discussion of international law's basis to deal with climate change in the previous chapter, a conclusion was reached that the 1972 Stockholm was a stepping stone to addressing the climate problem. International law gets such mandate in terms of Principle 21 of the Stockholm Declaration[10] which declares that, '[s]tates have a responsibility to ensure that the activities within their jurisdiction or control do not cause damage to the environment of other states of areas beyond the limits of national jurisdiction'.[11]

This therefore has been believed to encompass the principle of state responsibility for CO2 emissions that causes climate change. As a result of the Declaration, the development of the climate regime can be traced from this point. Kiss and Shelton however assert that the first signs of international concern over the problem of climate change only emerged in a series of international conferences on CO2 between 1985 and 1987 under the World Meteorological

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[7] D Bodansky & L Rajamani 'Evolution and Governance Architecture Draft' 2012 *International Relations and Global Climate Change* available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2168859, accessed on 9 December 2013.

[8] SB Pralle 'Agenda-Setting and Climate Change.' (2009) *Environmental Politics* 18:5, 781.

[9] Ibid.

[10] VP Nanda & G Pring *International Environmental Law & Policy for the 21st Century* (2003) 290, See also PW Birnie & AE Boyle International Law and The Environment 2 ed (2002) 516, See also VP Nanda *International Environmental Law and Policy* (1995) 247.

[11] *Declaration of the 1972 UN Conference on the Human Environment*, 16 June 1972 (Stockholm Declaration).

Organisation (WMO) which however had disappointing results.[12] Good examples of these meetings include the International Conference on the Atmosphere in Evolution and its Implications for the Safety of the Globe held in Toronto from June 27 to 30, 1988[13] and the Noordwijk Conference on Atmospheric Pollution and Climate Change which was held in November 1989.[14] Amongst the Noordwijk's significant decisions was the recommendation that developed countries stabilise their greenhouse gas emissions 'as soon as possible'.[15] This provision faced serious opposition up to the negotiation of the UNFCCC itself[16] but it went on to survive the UNFCCC negotiations and exists up to today.

A major institutional development however took place in 1988. In that year, the United Nations Environmental Programme (UNEP) joined efforts with the WMO to study the scientific aspect of the climate problem.[17] In November of 1988, the Intergovernmental Panel on Climatic Change (IPCC) was created, made up of scientific and political experts and given the task of exploring possible measures to be taken in order to protect the atmosphere.[18] In December of 1988 also, the United Nations General Assembly (UNGA) endorsed the establishment of the IPCC by the UNEP and the WMO.[19] The IPCC's task is as outlined in the UN General Assembly Resolution 43/53 of 6 December 1988 was to prepare a comprehensive review and recommendations with respect to the state of knowledge of the science of climate change; social and economic impact of climate change; and possible response strategies and elements for inclusion in a possible future international convention on climate. [20] The IPCC has thus far prepared four reports, in 1990, 1995, 2001 and 2007 respectively.[21] The IPCC is currently working on the Fifth Assessment Report (AR5) and

[12] A Kiss & D *Shelton International Environmental Law* 2 ed (2000) 512.

[13] Ibid; See also D Bodansky 'A Tale of Two Architectures' March 2011 available at *http://ssrn.com/abstract=1773865 or http://dx.doi.org/10.2139/ssrn.1773865*, at 5 accessed on 1 July 2014.

[14] Ibid.

[15] Ibid, quoting The Noordwijk Declaration on Atmospheric Pollution and Climate Change, Nov 7, 1989, 12 Int'I EnvrI. Rep. (BNA) 624 (Dec.13 1989).

[16] Ibid at 6.

[17] Kiss & Shelton (note 12 above) at 512; Intergovernmental Panel on Climate Change's history, available at *http://www.ipcc.ch/organization/organization_history.shtml*, (accessed on 12 September 2013).

[18] Ibid.

[19] Ibid.

[20] IPCC history available at *http://www.ipcc.ch/organization/organization_history.shtml*, accessed on 12 September 2013.

[21] Ibid; See also JC Dernbach & S Kakade 'Climate Change Law: An Introduction' 2008 29:1 *Energy LJ* at 3.

plans to release it in October of 2014.[22] On the 6th of December 1988, the UNGA also adopted a resolution on the conservation of the global climate for present and future generations of mankind which stated that climate change is a 'common concern for mankind'.[23]

After the IPCC, a number of conventions took place but one of the most notable gatherings was the Second World Climate Conference which was held in Geneva from 29 September to 7 November in 1990 which had more than 100 delegates from different states who were in some cases even led by their Heads of State or Government.[24] The meeting contained as its Final Declaration of the Conference a compromise solution requesting developed countries to establish either reduction objectives by specific dates or feasible national programmes and strategies which should have a significant effect on the limitation of CO2 and other gases having a greenhouse effect.[25] On 21 December 1990, the UNGA adopted a new resolution on the protection of the world climate for future generations and the establishment of an International Negotiating Committee (INC) which was to prepare a general and effective convention on climate change.[26] The INC negotiations concluded in 1992 with the opening for signatures of the UNFCCC at the Earth Summit held in Rio de Janeiro, Brazil.[27] The Convention entered into force less than two years later on March 21, 1994 as a result of its ratification by 50 countries and takes pride in having 196 parties today.[28] This marked the constitutional phase as named by Bodansky and Rajamani.[29] This however did not give a final solution to the climate change problem. By 1995, countries realized that emission reductions provisions in the Convention were inadequate.[30] They launched negotiations to strengthen the global response to climate change and, two years later, adopted the Kyoto

[22] Information available at *http://www.ipcc.ch/organization/organization_history.shtml ,* (accessed on 08 April 2013).

[23] Kiss & Shelton (note 12 above) 512.

[24] Ibid at 513.

[25] Ibid.

[26] Ibid.

[27] Ibid at 514. Nanda (note 10 above) 250.

[28] Bodansky & Rajamani (note 7 above) 8; Also see *https://unfccc.int/essential_background/items/6031.php* accessed 10 December 2014.

[29] Ibid Bodansky & Rajamani.

[30] Information available at *http://unfccc.int/essential_background/items/6031.php,* (accessed on 09 December 2014 2014).

Protocol.[31] The Kyoto Protocol legally binds developed countries to emission reduction targets.[32] The Protocol's first commitment period started in 2008 and ended in 2012 and the second commitment period began on 1 January 2013 and will end in 2020.[33]

It is clear that neither the convention nor the Protocol and its two commitment periods offered a final solution to the climate problem thus negotiations continue to happen annually. The Protocol has suffered a lot of criticism and a significant number of developed countries have withdrawn their support of the Protocol. This leads to asking the most fundamental question which is what happens after it finally expires. This is what the researcher will be tapping into by tracing the progress of the climate negotiations in this second constitutional phase which focuses on negotiation and elaboration of the future climate regime.

3.3 THE CLIMATE CHANGE REGIME

The international climate change regime[34] consists of two instruments which are the UNFCCC and the Kyoto Protocol.[35] These two will now be discussed in turn.

3.3.1 The United Nations Framework Convention on Climate Change

After all the above mentioned scientific and political breakthrough, in 1992 countries joined an international treaty to cooperatively consider what they could do to limit average global temperature increases and the resulting climate change and to cope with whatever impacts were by then inevitable.[36] The result was a binding international treaty which became known as the United Nations Framework Convention on Climate Change (herein after referred to as the Convention or UNFCCC).[37] The UNFCCC was opened for signature in June 1992 during

[31] Ibid.

[32] Ibid

[33] Ibid.

[34] The term 'regime' can be loosely defined as a system of principles and rules governing something and which is created by law. It is framework of legal rules, available at *http://definitions.uslegal.com/l/legal-regime/,* accessed on 21 August 2014.

[35] See note 30 above.

[36] Ibid.

[37] *United Nations Framework Convention on Climate Change,* opened for signature *4* June 1992, 1771 UNTS 107 (entered into force 21 March 1994). (UNFCCC), available at *http://unfccc.int/files/essentialbackground/background_publications_htmlpdf/application/pdf/conveng.pdf*.

the Rio de Janeiro Conference and came into force on 21 March 1994.[38] The UNFCCC has been described as the centrepiece of global efforts to combat global warming as it sets the general objectives, goals and arrangements for cooperation in addressing climate change. [39] Furthermore, it provides a forum for negotiating a more intense and detailed international agreement for the limitation of GHGs.[40]

The convention was negotiated by consensus thus it was a huge compromise and the intention was to attract universal participation.[41] It therefore reflects deep differences of opinion among the different participating states as to the measures needed and the allocated responsibility for addressing the problem[42] and this has interestingly become the convention's weaknesses and strengths.[43]

3.3.1.1 The Objective of the Convention

The Convention's objective is enshrined in Article 2 and it reads:

> The ultimate objective of this Convention and any related legal instruments that the Conference of the Parties may adopt is to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas (GHGs) concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.[44]

The objective of the Convention and that of related instruments is not to reverse greenhouse gas emissions but to stabilize them[45] 'at a level that would prevent dangerous anthropogenic interference with the climate system'.[46] It is important to note that the Convention realizes

[38] Ibid.

[39] RL Arcas (a) 'Kyoto and the COPs: Lessons Learned and Looking Ahead' 2011 (23) *Hague Yearbook of International Law* at 20. RL Arcas (b) 'Is the Kyoto Protocol an adequate Environmental agreement To Resolve the Climate Change Problem?' 2001 *European Env Law Review* at 284.

[40] Ibid.

[41] PW Birnie… et al *International Law and the Environmental* 3 ed (2009) 357.

[42] Ibid.

[43] Nanda (note 10 above) 250.

[44] Article 2 of the UNFCCC.

[45] Birnie *et al* (note 41 above) 358.

[46] Ibid at 357.

that it is only by stabilising the concentration of greenhouse gases (especially carbon dioxide) in the atmosphere that the rapid climate change which is expected to occur with global warming can be halted.[47] The Convention's objective however does not specify the level nor does it envisage that it should be achieved immediately except for simply stating that it should be 'achieved within a time frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner'.[48] According to Birnie and others, the wording of this objective reflects that the parties see some degree of climate change as inevitable and that the policy makers seem to be prepared to tolerate climate change provided it happens slowly enough to allow natural adaptation.[49]

3.3.1.2 The Convention's Guiding Principles

Article 3 sets out the principles to guide the parties in their actions to achieve the objective of the Convention and to implement its provisions.[50] These have become very important guidelines in the battle against global climate changes as the researcher will highlight. Birnie and others submit that these principles "reflect the contours of global environmental responsibility elaborated in the Rio Declaration and Agenda 21 of the Stockholm Declaration".[51] These principles include the Inter-generational Equity[52] and the Common but Differentiated Responsibility Principle (CBDR).[53] The CBDR principle assigns the lead to combat climate change to developed country parties.[54] This principle has grown to be a strong principle under the UNFCCC and it has greatly shaped the climate negotiations. This dissertation will show how and to what extent it has done so in the next two chapters. The other guiding principle is the precautionary principle or approach which states that,

[47] J Houghton *Global Warming: A Complete Briefing* 4 ed (2009) 293.

[48] Birnie *et al* (note 41) 558.

[49] Ibid.

[50] Article 3 of the UNFCCC.

[51] Birnie *et al* (note 41 above) 358.

[52] Article 3(1) of the UNFCCC.

[53] The Preamble, Article 3(1) and 4(1) of the UNFCCC.

[54] Birnie & Boyle (note 10 above) 101.

> Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing such measures, taking into account that policies and measures to deal with climate change should be cost-effective so as to ensure global benefits at the lowest possible cost.[55]

Louka argues that this precautionary version in the UNFCCC is just a diluted version of the real precautionary principle although he does not support this assertion.[56] The other principles include the right of all parties to sustainable development as well as the need to promote 'a supportive and open international economic system'.[57] There is also much focus on the aspects of promoting sustainable development and also the special needs and fears of developing countries that measures to curtail climate change could become an arbitrary restriction on trade.[58]

The above were set as the Convention's guiding principles. It is important to note that the Convention rearticulated in a binding text the principles of international law.[59] Most of these however had yet to be fully fledged.[60] However, despite these principles being 'half baked', it is important to note that Article 3 in this 'context of a dynamic and evolutionary regulatory regime such as the Climate Change Convention, it has the important merit of providing some predictability regarding the parameters within which the parties are required to work towards the objective on the convention',[61] As a result, when the parties go for Protocol negotiation, they are not faced with a 'complete blank sheet' but do have a framework.[62] These principles however do not have a legally binding force but at the same time are not without legal effect.[63] They have a soft legal effect which is indicated in Article 3 by the use of the word 'should' instead of 'must'. The article is thus relevant for interpretation and implementation

[55] Article 3(3) of the UNFCC.

[56] E Louka *International Environmental Law: Fairness, Effectiveness, and World* Order (2006) 364.

[57] Art. 4(5) of the UNFCCC.

[58] Louka (note 56) 364 quoting Art. 3(4) and Art. (5) of the UNFCCC.

[59] Ibid Louka at 364.

[60] Ibid.

[61] Birnie *et al* (note 41 above) at 359.

[62] Ibid.

[63] Ibid.

of the Convention in addition to creating expectations concerning matters which must be taken into account in good faith in the negotiation of further instruments.[64]

3.3.1.3 The General Commitments of Parties under the Convention

In the quest of achieving GHG stabilisation as stated by Article 2, the Convention carries commitments for its member parties and these are outlined and dealt with by Article 4.[65] These commitments are split into two sections. Firstly, Article 4(1) makes reference to 'all parties'[66] thus member parties, that is both the developed and the developing countries, under this article accepted a number of general commitments under the Convention.[67] These general or less onerous commitments are based on the principle of CBDR.[68] The list of commitments under Article 4(1) are tenfold and stretch from environmental issues to economic and scientific and technological cooperation.[69] The provision, despite encouraging all parties to think about climate change however does not compel the parties to adhere to any specific international standards for controlling it.[70]

The second sets of commitments are listed under Article 4(2).[71] These are more onerous and only apply to the developed countries member states and those described as 'economies in transition' namely parties of Eastern Europe which are referred to as the Annex I countries.[72] The Convention mentioned one particular aim with a relatively short-term and one long far-reaching objective.[73] This is under Articles 4(2) (a) and (b) stating that Annex I countries should take action to return individually or jointly emissions of CO2 and other GHGs not controlled by the Montreal Protocol to their 1990 levels by the year 2000.[74] It is important to note that this provision only applied to the developed country parties.[75] The reason behind

[64] Ibid.

[65] Art 4 of the UNFCCC.

[66] Art 4(1) of the UNFCCC.

[67] Arcas (b) (note 39 above) 284.

[68] Birnie *et al* (note 41 above) 359.

[69] Art. 4(1) (a)-(j).

[70] Birnie *et al* (note 41 above) 358.

[71] Art 4(2) of the UNFCCC.

[72] Art. 4(2) of the UNFCCC.

[73] Houghton (note 47 above) 291.

[74] Article 4(2)(a) & (b) of the UNFCCC.

[75] Also referred to as the Annex I parties. Art. 4(2) of the UNFCCC.

this approach was that the developed/industrialised countries have contributed the greatest share of historical and current global GHGs.[76] As a result, the developed/industrialised countries agreed upon ratifying the Convention that they would adopt policies and measures that demonstrated that they were 'taking a lead' in addressing climate change.[77] Despite such a commitment, Article 4(2) (a) sets no specific timetables and targets for limiting such emissions.[78] It only establishes that the obligations differ in that Organisation for Economic Cooperation and Development (OECD) countries should take the strongest measures whilst the countries in transition to a market economy are granted a 'certain degree of flexibility'.[79] Despite such a precise time frame, however, the wording of the commitment provisions does not create to a strong or a clear commitment.[80] However, the provision that the first Congress of Parties would review the adequacy of these policies as early as the first meeting and at regular interval afterwards balance this shortcoming.[81]

Furthermore, the Convention also creates commitments on financial issues. Article 4(3) partly reads, '[t]he developed country Parties and other developed Parties included in Annex II shall provide new and additional financial resources to meet the agreed full costs incurred by developing country Parties in complying with their obligations under Article 12, paragraph 1'[82] indicates the obligation developed countries have towards developing countries. In addition to providing such funding, the richest and developed countries are obliged to also facilitate technology transfer.[83] By doing so, the Convention seems to recognize that the extent to which developing countries implement their commitments will depend significantly on financial and technical assistance from developed countries.[84]

3.3.1.4 The UNFCCC: An assessment

Before one delves much into criticism of the Convention, one needs to look at its name which clearly states that it is a 'framework convention'. Louka outlines the purpose of a framework

[76] Preamble of the UNFCCC.

[77] Art. 4(2)(a) Ibid.

[78] Kiss & Shelton (note 12 above) 514.

[79] Arcas (b) (note 39 above) 284.

[80] Birnie *et al* (note 41above) 360.

[81] Art. 4(2)(d) of the UNFCCC. For analysis see note 80 above.

[82] Art. 4(3) of the UNFCCC.

[83] Ibid.

[84] Arcas (b) (note 39 above) 284.

convention as being 'to set the general tone for the future climate change discussions and to compromise in a single text the often irreconcilable interests and ideologies of state parties'.[85] Due to the complexity of the matter negotiated as well as the scientific uncertainties available at the time it was negotiated, the UNFCCC was regarded as a remarkable outcome which was constructed of compromises.[86] The Convention has been praised for this as it managed to achieve an equitable balance that was acceptable between the great majority of developed and developing countries.[87] Currently, 196 member states have ratified the UNFCCC which is a substantial membership.[88] The UNFCCC however suffered criticism in a number of aspects. Firstly, it was criticised for carrying the vaguest commitments regarding stabilisation and no commitments at all on reductions.[89] With regards to this, Louka expressed surprise at the Convention's inclusion of a section on "commitments" under Article 4.[90] Despite interpretations by other authors on Article 4(2) as placing specific commitments on developed countries on carbon sources and sinks, he however concludes that it is highly contestable as to whether this Article could be classified as establishing real enforceable commitments.[91] Probably one of the most notable shortfalls is that the Convention recognises climate change as a serious threat; carries as its objective to achieve stabilization of GHGs; has as its goal the reduction of these GHG emissions to the 1990 levels by the year 2000, yet the same Convention does not have the concrete steps to achieve its obligation nor does it develop any binding state targets and timetables to help achieve its 1990 GHG levels goal.[92] Furthermore, the Convention has also been criticized for having provisions that do not attempt to resolve differences but just papered over them.[93] The Convention also did not acknowledge the responsibility of industrialised countries to compensate vulnerable states for the harm caused by their GHG emissions.[94] Instead there is just a vague commitment which

[85] Louka (note 56 above) 361.

[86] Nanda and Pring (note 10 above) 293.

[87] Birnie *et al* (note 41 above) 371.

[88] See status of ratification at *http://unfccc.int/essential_background/convention/status_of_ratification/items/2631.php*, accessed on 21 August 2014.

[89] Birnie *et al* (note 41 above) 370.

[90] Louka (note 56 above) 361.

[91] Ibid at 361-362.

[92] Nanda & Pring (note 10 above) 293.

[93] Birnie *et al* (note 41 above) 370.

[94] Ibid at 371.

has as its objective to assist vulnerable developing member states to meet the costs of adaptation.[95] On this note, despite acknowledging that the developed countries were the largest sources of GHG emissions, and then recognising that the developing countries have common but differentiated responsibilities, the Convention does not resolve what or how this responsibility is to be shared.[96]

Therefore, one may come to the conclusion that it is clear that the Convention failed in as much as mandating of firm targets and timetable; and failed to decide on major outstanding issues that included mechanisms for funding, solid commitments of the developed countries, the countries in economic transition as well as the developing countries.[97] Despite these claims of failing, one must not forget the realities that the Convention is merely a framework. Louka states that the UNFCCC contains the realities of every framework convention thus it can be judged lightly for straddling the 'world of firm commitments and vague hortatory articulations'.[98] Instead the test of Convention success lies not in its commitments but in its subsequent evolution under the Protocols which it allows and the COP negotiations which it established.[99] The Convention thus offered hope and a platform to discuss the world's greatest environmental threat of all times, thus it can be regarded as a huge first step in the right direction.

3.4 THE KYOTO PROTOCOL

After the adoption of the UNFCCC, the parties realized that emission reductions provisions in the Convention were inadequate and insufficient to seriously tackle climate change.[100] As a result, negotiations that were intended to strengthen the global response to climate change were launched by the parties beginning in 1995. Two years later, the Kyoto Protocol [101] was adopted. The Protocol only came into force on 16 February 2005. The reason it took so long

[95] Ibid.

[96] Nanda and Pring (note 10 above) 294.

[97] Nanda (note 10 above) 118.

[98] Louka (note 56 above) 361.

[99] Birnie *et al* (note 41 above) 371.

[100] History available at *http://unfccc.int/essential_background/items/6031.php*, accessed on 09 May 2013.

[101] *Kyoto Protocol to the United Nations Framework Convention on Climate Change,* opened for signature 16 March 1998, 2303 UNTS 148 (entered into force 16 February 2005) *('Kyoto Protocol')* available at *http://unfccc.int/resource/docs/convkp/kpeng.pdf* accessed on 21 August 2014.

was that by 2003,[102] the 120 countries which had ratified it failed to represent a 55% of Annex I country emissions as per requirement.[103] The requirement for the Protocol to come into force was that 55 countries had to ratify it together with sufficient Annex I countries to represent 55% of Annex I country emissions.[104] The Protocol only came into effect after Russia had ratified it towards the end of 2004. The Kyoto Protocol now boasts 191 state member parties.[105]

In summary, the Kyoto Protocol legally binds developed countries to more ambitious emission reduction targets.[106] The Protocol's first commitment period started in 2008 and ended in 2012 and its second commitment period which started on 1 January 2013 will end on 31 December 2020.[107]

3.4.1 Objectives of the Kyoto Protocol

The Protocol is clear about its objective. As a Protocol to the UNFCCC, it ultimately declares that, 'the Parties to this Protocol...in pursuit of the ultimate objective of the Convention as stated in its Article 2'.[108] As a result, the Kyoto Protocol's intention is to advance the ultimate objective of the UNFCCC namely 'stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system' or simply to reduce worldwide GHG emissions.[109] Thus therefore if one is to measure any success or failure of the Protocol it must be measured against this ultimate objective.

3.4.2 Guiding Principles

As the Protocol is part of the Convention, one expects it to have the same principles as its mother-Convention. The Kyoto Protocol satisfies this as it reflects the same principles in the

[102] Ibid

[103] Houghton (note 47 above) 295-296.

[104] See Art 25(1) of The Kyoto Protocol.

[105]See status of ratification available at *http://unfccc.int/kyoto_protocol/status_of_ratification/items/2613.php*, accessed 21 August 2014.

[106] Arcas (b) (note 39 above) 85.

[107] Doha Amendment to the Kyoto Protocol, Decision 1/CMP.8 available at *http://unfccc.int/kyoto_protocol/doha_amendment/items/7362.php,* accessed 21 August 2014.

[108] The Preamble of the Kyoto Protocol.

[109] Art 2 of the UNFCCC; See also Arcas (b) (note 39 above) 286.

Convention itself. It however does not have an expressly laid out section on guiding principles as the UNFCCC does. The Protocol in its preamble however clearly states that it is 'being guided by Article 3 of the Convention'[110] and for the purposes of this research, a number of guiding principles have been identified namely the principle of inter-generational equity,[111] the common but differentiated responsibility principle (CBDR);[112] and the precautionary principle/approach.[113] These same principles have been discussed above under the UNFCCC section. The interpretation or identification of these principles will be done in the discussion of the Protocol specifically in the commitments section and whenever necessary matters arise.

3.4.3 Commitments

On 21 March 1994, the UNFCCC came into force and in April of that year, the first COP meetings were held in Berlin.[114] The central issue was to decide on the Convention's vague commitments so as to develop more specific and quantified obligations as well as a time frame for action on reduction of GHGs.[115] The Conference developed a negotiated paper known as 'The Berlin Mandate'.[116] The Berlin Mandate gave birth to the Kyoto Protocol. It is a paper that was negotiated at Berlin in 1994 which set a process and time line for the development of another instrument to achieve the UNFCCC objective.[117]

The Kyoto Protocol strengthened commitments of the UNFCCC.[118] The central feature of the Kyoto Protocol consists of the targets that were adopted.[119] Under the Kyoto Protocol,

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[110] Art 3 of the UNFCCC which has the Principles that will "guide the parties the Convention to achieve the objective of the Convention and to implement its provisions."

[111] Article 3(1) of the UNFCCC.

[112] The Preamble, Article 3(1) and 4(1) of the UNFCCC.

[113] Article 3(3) of the UNFCC.

[114] D Freestone and C Streck *Legal aspects of implementing the Kyoto Protocol mechanisms: making Kyoto work* (2005) 7; Birnie *et al* (note 41 above) 360.

[115] Ibid. See also J Gupta & A Lobsinger 'Climate Notifications from Rio to Marrakech: An Assessment' in VI Grover (ed) *Climate Change: Five Years after Kyoto* (2004) 75.

[116] Decision 1/CP1 (1995). See also Freestone & Streck (note 114 above) 7.

[117] Ibid.

[118] Ibid at 9.

[119] Gupta & Lobsinger (note 115 above) 75.

> The Parties included in Annex I shall, individually or jointly, ensure that their aggregate anthropogenic carbon dioxide equivalent emissions of the greenhouse gases listed in Annex A do not exceed their assigned amounts, calculated pursuant to their quantified emission limitation and reduction commitments inscribed in Annex B and in accordance with the provisions of this Article, with a view to reducing their overall emissions of such gases by at least 5 per cent below 1990 levels in the commitment period 2008 to 2012.[120]

According to Arcas, this provision presents three variables which are used visibly throughout the Protocol.[121] The first is the target to reduce GHGs by the Annex I countries; the second being the timetables in form of time frames which the objective and commitments should be met which is from 2008-2012; and the third being the actors in the Protocol where developing countries are not legally bound by that Protocol.[122] Therefore under the original first Kyoto Protocol, thirty-eight developed countries[123] agreed to cut back their emissions of GHGs by a total of 5% below the 1990 levels between 2008 and 2012. The number of parties has however reduced for the second commitment period.[124] The Protocol's original quantified reduction targets called on the US to reduce its emissions by 7%, the European Union (EU) by 8% and Japan by 6%.[125] Countries such as Ukraine and Russia were however allowed only to stabilize or freeze their emissions whilst Australia, Iceland and Norway were allowed to increase their emissions by 8%, 10% and 1% respectively.[126] These emissions to be controlled were from six GHGs which included Carbon Dioxide (C02), Methane (CH4), Nitrous Oxide (N20), Hydro-fluoro-carbons (HFCs), Perfluoro-carbons (PFCs), Sulphur hexafluoride (SF6).[127] These gases are therefore converted into an amount of CO2 equivalent through the use of their global warming potentials.[128]

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[120] Article 3(1) of the Kyoto Protocol.

[121] Arcas (b) (n 30 above) 286.

[122] Ibid.

[123] Annex B of The Protocol.

[124] Kyoto Protocol information available at *http://unfccc.int/kyoto_protocol/items/2830.php,* accessed on 21 August 2014.

[125] Annex B of the Kyoto Protocol. See also Gupta & Lobsinger (note 115 above) at 76; Arcas (b) (note 39 above) 286.

[126] Ibid.

[127] Annex A of the Kyoto Protocol.

[128] Houghton (note 47 above) at 295. See also Gupta & Lobsinger (note 115 above) 75-76.

Countries going through a process of transition to a market economy but also classified along with the EU, Japan, the US and as Annex I parties to the UNFCCC such as Czech Republic, Hungary, Russia, Ukraine and Poland, among others, were supposed to freeze or stabilize their emissions at the 1990 levels, meaning they were not bound to reduce their GHG emissions.[129] Most of these are referred to as the Annex II countries.[130]

Lastly, the developing country parties, those defined as 'countries in the process of becoming industrialised but have constrained resources with which to combat their environmental problems' under the Kyoto Protocol do not have any formal binding targets.[131] This means therefore that those countries in the process of industrialising under the Kyoto Protocol (including China, Brazil and India) were left without formal binding targets except for their commitments under the UNFCCC.[132] The developed countries according to the CBDR principle in the Convention were to take a lead in dealing with global climate change. The Kyoto Protocol was thus formulated in such a way that these industrialised countries would take commitments first as they were believed to have contributed more to the climate change problem.[133]

3.4.4 The Kyoto Protocol's Flexibility Mechanisms

A very significant aspect of the Kyoto Protocol was the introduction of the three so called 'flexibility mechanisms' which were created with an intention to assist to lower the costs of achieving GHG emissions reductions.[134] These three are as follows:

The Clean Development Mechanism (CDM),[135]
Emissions Trading,[136] and
Joint Implementation.

[129] Arcas (b) (note 39 above) at 286.

[130] See the list in the UNFCCC Annex II list at page 22-23.

[131] Arcas (b) (note 39 above) 286; Birnie & Boyle (note 10 above) 527.

[132] Article 4(1) of the UNFCCC.

[133] Houghton (note 47 above) 295.

[134] Art 2 of the Kyoto Protocol.

[135] Art 12 of the Kyoto Protocol.

[136] Art 17 of the Kyoto Protocol.

Basically, the purpose of these three mechanisms was to maximise cost-effectiveness of climate mitigation by providing an opportunity to reduce GHG emissions abroad at a lower cost.[137]

3.4.4.1 Clean Development Mechanism (CDM)

The CDM is reflected in Article 12 of the Protocol. It allows countries and companies in the developed countries to invest or finance projects aiming at reducing anthropogenic emissions in the non-Annex I parties.[138] It is aimed at promoting international investment in climate friendly technologies for the benefit of developing countries.[139] The CDM projects also aim to help developing countries achieve sustainable development and ultimately helping in achieving the objective of the UNFCCC as at the same time developed countries are helped in meeting their Kyoto targets.[140] A summary provided by The Greenpeace,[141] states that activities under the CDM are meant to:

- Deliver real, measurable and long term greenhouse gas emission reductions and climate change mitigation benefits which would otherwise not have occurred;
- Avoid adverse impacts of projects in host countries, e.g. environmental, social and developmental and contributing to a host country's achievement of its national environmental and development goals; and
- Provide investment that is additional to a donor country's own overseas aid budget and to its contributions to the GEF.[142]

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[137] Freestone & Streck (note 114 above) 175.

[138] Birnie *et al* (note 41 above) at 364; Gupta & Lobsinger (note 115 above) at 76. Freestone & Streck above at 175. For more information see *http://unfccc.int/kyoto_protocol/mechanisms/clean_development_mechanism/items/2718.php*, accessed 20 August 2013.

[139] Freestone & Streck (note 114 above) 175.

[140] Ibid.

[141] Greenpeace Greenpeace is an independent global campaigning organisation that acts to change attitudes and behaviour, to protect and conserve the environment and to promote peace. Information available at http://www.greenpeace.org/international/en/about/, accessed on 13 June 2103.

[142] Green Peace Analysis of the Kyoto Protocol available at *http://archive.greenpeace.org/climate/politics/reports/kyoto.pdf,* accessed on 24 April 2013 at 41.

Therefore, as its title suggests, the CDM is supposed to be used for clean development in developing countries.[143]

By investing in the CDM project activities, the industrialised countries receive credits for emission reductions from projects in the developing countries in the form of certified emission reductions (CERs) which may be used by the industrialised countries to meet their Kyoto Protocol's emissions targets.[144] The CERs can then be traded on carbon markets. This provides an incentive for industrial firms to invest in CDM projects aimed at reducing emissions in developing countries.[145] It is important to note that the structure of the CDM is a decentralised and mostly private sector oriented.[146] There are currently 7552 registered CDM projects.[147] These projects have managed to produce 2,203,953,309 CERs by the end of the first Kyoto Protocol commitment period, i.e. December 2012.[148] What is important to note is that the CDM is the only flexibility mechanism available that involves developing country member states.[149]

3.4.4.2 Joint Implementation (JI)[150]

The Kyoto Protocol does not expressly state this mechanism however Article 6[151] establishes the basis for this mechanism which became known as the "JI".[152]Under the JI, developed countries can implement projects that are aimed at reducing emissions or increase removals by sinks in the territories of other industrialised countries.[153] By investing in the JI, the investing country receives 'emissions reduction units' (ERUs) which will count towards meeting their own targets under the Kyoto Protocol.[154] A JI project (unlike the CDM) must provide a reduction of GHGs by sources or an enhancement of removal by sinks in addition

[143] Ibid.

[144] Freestone & Streck (note 114 above) 175.

[145] Ibid. See also Arcas (b) (note 39 above) 287.

[146] Freestone & Streck (note 114 above) 177.

[147] Information available at *http://cdm.unfccc.int/*, accessed on 21 August 2014.

[148] Ibid. For a total potential supply of CERs from end KP 1st CP to 2020 see *http://cdm.unfccc.int/Statistics/Public/files/201407/CER_potential.pdf,* accessed 21 August 2014.

[149] Birnie *et al* (note 41 above) 364.

[150] For more information see *http://ji.unfccc.int/index.html,* accessed on 21 August 2014.

[151] Art 6 of the Kyoto Protocol.

[152] Freestone & Streck (note 114 above) 107.

[153] Gupta & Lobsinger (note 115 above) 76; Houghton (note 47 above) 298.

[154] Ibid, also Boyle et al (note 41 above) 366.

to that which would otherwise have occurred.[155] Furthermore, projects must have approval of the host party and the participants have to be authorised to participate by a party involved in the project.[156] The similarity between the JI and the CDM is that they both offer a flexible and cost-efficient means of fulfilling a part of the Kyoto Protocol commitments.[157]

3.4.4.3 Emissions trading (ET)

Under this mechanism which is housed under Article 17[158], Annex I parties with emissions commitments are able to trade their emission allowances with other parties with the aim of convalescing the overall flexibility and economic efficiency and of making emissions cuts.[159] This mechanism is more attractive to states that are energy efficient and those that would face more costs by further reducing their emissions unless emissions are undertaken in other less efficient states.[160] The ET mechanism is very attractive to states such as Russia and Ukraine with their present emissions way below their permitted allowance, as they could sell at a profit from their large surplus.[161] The Protocol however left the Conference of the Parties to finalise the issue of how the Emissions Trading were to be conducted by requiring the COP to 'define the relevant principles, modalities, rules and guidelines, in particular for verification, reporting and accountability for emissions trading'.[162]

3.4.5 Compliance and Supervision under the Kyoto Protocol

Under The Convention,

> The Conference of the Parties, as the supreme body of this Convention, shall keep under regular review the implementation of the Convention and any related legal instruments that the Conference of the Parties may adopt, and shall make, within its mandate, the decisions necessary to promote the effective implementation of the Convention.[163]

[155] Birnie *et al* (note 41 above) 366-377.

[156] Ibid.

[157] Ibid.

[158] Art 17 of the Kyoto Protocol.

[159] Ibid. See also Arcas (b) (note 39 above) 288.

[160] Birnie & Boyle (note 10 above) 528.

[161] Ibid.

[162] Art 17 of the Kyoto Protocol.

[163] Art 7(2) of the UNFCCC.

The Kyoto Protocol also reads, 'the Conference of the Parties, the supreme body of the Convention, shall serve as the meeting of the Parties to this Protocol'.[164] As a result, the COP is identified as the principle supervisory institution for both the Convention and the Protocol and is thus required to meet regularly and to review the adequacy, implementation and effectiveness of both instruments.[165] The COP therefore assesses on the basis of information made available to it, the overall effects of the measures for implementation of the Protocol.[166] Furthermore, it approves appropriate and effective procedures and mechanisms to determine and to address cases of non-compliance with the provisions of the Protocol.[167]

The Protocol also creates two important subsidiary bodies to advice the COP.[168] The first is the Subsidiary Body for Scientific and Technological Advice (SBSTA) and the second one is the Subsidiary Body for Implementation (SBI), both established by Articles 9 and 10 of the Convention respectively.[169] The SBSTA function is to assess the state of scientific knowledge relating to climate change and the effects of implementation measures.[170] The SBI on the other hand assists the COP in the assessment of the review of the effective implementation of the Convention[171] and the Protocol[172] and considers the reports submitted by the member parties under the provisions of the Convention and the Protocol concerning implementation and projected emissions.[173] Both these bodies comprise of experts acting as governmental representatives, and together the COP, the SBSTA and the SBI provide the essential political oversight and management of the whole climate change regime.[174]

The regime in general depends a lot on expert review which is meant to provide a thorough comprehensive, technical assessment of all aspects of implementation by any party and to

[164] Art 13(1) of the Kyoto Protocol.

[165] See note 163 and 164 above; Birnie *et al* (note 41 above) 368.

[166] Art 13(4) of the Kyoto Protocol.

[167] Kiss and Shelton (note 12 above) 520.

[168] Art 15 of the Kyoto Protocol.

[169] Ibid.

[170] Birnie *et al* (note 41 above) 368.

[171] Art 12 of the UNFCCC.

[172] Article 7 of the Kyoto Protocol.

[173] Birnie *et al* (note 41 above) 368.

[174] Ibid.

identify problems or other factors influencing the fulfillment of commitments.[175] These reviews are coordinated by the Secretariat with the experts selected from nominees of governments and international organizations.[176]

In the event that a member party is failing to fulfill its commitments according to the reviews, a 'multilateral consultative process' is available to resolve questions of implementation.[177] There is no provision for sanctions but merely a power to recommend measures to facilitate cooperation and implementation and to clarify issues and promote understanding of the Convention.[178] A further option available where there are non-compliance matters is under the provisions of the Convention which reads:

> In the event of a dispute between any two or more Parties concerning the interpretation or application of the Convention, the Parties concerned shall seek a settlement of the dispute through negotiation or any other peaceful means of their own choice.[179]

This however can only work if both parties to the dispute declare acceptance of the International Court of Justice's jurisdiction and arbitration or else the provision will not come into play.[180]

3.5 WHAT HAPPENED AFTER KYOTO?

After the original text of the Kyoto Protocol was adopted by consensus in 1997 by COP3 at Kyoto, the following COP meetings were used to resolve the operational details and means to implement the Kyoto Protocol.[181] The first most notable of these COP meetings was the one held in Marrakech in November 2001 under the title 'COP7'. This conference brought about a set of agreements popularly known as the "Marrakech Accords". The accords are applauded for providing what has been described as 'the much needed framework of guidelines,

[175] Ibid at 368-369.

[176] Ibid.

[177] Art 13 of the UNFCCC; Art 16 of the Kyoto Protocol.

[178] Birnie *et al* (note 41 above) 369.

[179] Article 14 of the UNFCCC.

[180] Birnie *et al* (note 41 above) 370.

[181] Gupta & Lobsinger (note 115 above) 76-77.

modalities and rules for moving forward with the implementation of the Kyoto Protocol'.[182] The accords tried to meet the concerns of both developing and developed countries on issues such as the flexibility mechanisms on the part of the developed countries; and on part of the developing countries, the accords have decisions to promote the implementation of capacity building.[183] Furthermore, the accords try to promote technology transfer.[184] They also established the much debated and contentious Climate Fund and other two new funds namely the Least-developed Countries Fund and an Adaptation Fund.[185] A Compliance Committee was also created in terms of the accords.[186] Today, the Kyoto Protocol is active after a decision was reached to renew it and establish a second commitment period which began on 1 January 2013 and will end in 2020.[187]

3.5.1 The Kyoto Protocol: An assessment

After a brief discussion of the Kyoto Protocol, the researcher now turns to an analysis and assessment of the Protocol. This helps in understanding the reasons why the climate change regime is still evolving and needs to evolve and why the member parties still meet annually under the Convention. The Kyoto Protocol can be considered as a product of mutual concessions.[188] In this concession, the USA conceded on the stringency of the emission targets whilst the EU conceded on the flexibility mechanisms and the developing countries received exemption from mitigation targets.[189] The Protocol has also been described by authors such as Stephens as representing 'the most complex and ambitious international treaty process ever attempted'.[190] Such a conclusion was drawn on the basis of the Protocol's content and the way it developed.

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[182] Freestone & Streck (note 114 above) at 9.

[183] Gupta & Lobsinger (note 115 above) at 77.

[184] Ibid at 78.

[185] Ibid.

[186] Ibid.

[187] See note 30 above.

[188] D Bodansky & L Rajamani 'The evolution and Governance Architecture of the Climate Change Regime' 2012 *International Relations and Global Climate Change* 9.

[189] Ibid.

[190] T Stephens 'Kyoto is Dead, Long Live Kyoto! A New Era for International Climate Change Law' (April 2008) *Sydney Law School Research Paper* No. 08/45 available at *http://ssrn.com/abstract=1121605 or http://dx.doi.org/10.2139/ssrn.1121605*, accessed on 5 July 2013.

As in most instances where something is described as complex and ambitious, the Protocol has received less praise in comparison to the criticism it received from individual academics, governments, NGOs and research institutions internationally. The areas that have received much attention have been identified inter alia as:

(i) the setting of targets and timetables;
(ii) (ii) the imposing of GHG reduction targets by industrialized countries without any corresponding obligations by developing countries;
(iii) a lot of gaps in terms of how the flexible mechanisms will be implemented;
(iv) inadequate provisions on implementation and enforcement mechanisms; and
(v) whether the Protocol can tackle the climate change problem effectively.

After careful scrutiny of the above essentials of the Protocol, the shortfalls as well as issues that the Protocol blindfolded makes the researcher wonder whether it is the right regime to deal with the inevitable and dangerous climate change. The Protocol holds a number of strong provisions that are worthy of praise. This does not mean however that it is free from criticism. The main identified areas of critique will be discussed in turn.

3.5.1.1 Targets and timetables

The objective of the Kyoto Protocol as discussed above was to reduce worldwide GHG emissions averaging about 5% below 1990 levels.[191] To achieve this objective, the parties decided to have a set of targets and timetables in form of commitments in terms of the Protocol. The target in terms of the UNFCCC is to reduce world GHG emissions by at least 5% below the 1990 levels.[192] The timetable is that the above target should be achieved by the period 2008-2012 as stipulated by the Protocol.[193] Authors such as Bodansky argue that the targets and timetable approach made under the Protocol represent a good policy in the long term run but suffer in terms of political viability.[194] The reasons for such lack of political viability are that the individual actors who are supposed to act in this collective action of mitigation will incur real costs without achieving any real immediately visible environmental

[191] Art 2 of the UNFCCC; Arcas (b) (note 39 above) 286. Note 242.

[192] Ibid.

[193] Art 3(1) of the Kyoto Protocol.

[194] D Bodansky 'Targets and Timetables: Good policy but bad politics? in JE Aldy & RN Starvins (eds) *Architectures for Agreement: Addressing Global Climate Change in the Post-Kyoto World* (2007) 58-59.

benefits as climate change only occurs in the far future.[195] This leads to the loss of political will to push for action thus the use of targets and timetables does not become the best solution.[196] In summary, the main problem with this policy of targets and timetables is that the Protocol tried to address a long-term problem with unfeasible short term measures.[197] As a result, one can conclude that the Kyoto Protocol's approach is a good policy which however was and is still faced with bad politics as suggested by Bodansky.[198]

3.5.1.2 The GHG emissions reduction

The Protocol's commitments have been the center of controversy thus has received a lot of criticism. The Kyoto Protocol is the first and the only agreement under the UNFCCC that imposes binding GHG emission limitations on its member parties.[199] Furthermore, it is the only current legally binding instrument which contains some sort of legally binding constraints on GHG emissions.[200] It has to be acknowledged that it is a huge success and strength that the Protocol just managed to come into force. As discussed above, the Protocol imposes legally binding GHG emissions targets on developed countries and developing countries are left with no formal legally binding targets.[201] The KP GHG emissions reductions are binding to 38 developed countries and the EU.[202] Of these developed countries, the USA which was by far the largest source of GHG emissions (accounting for approximately 25% of the world total in 2001) was and is still not bound by the Protocol because it chose not to ratify it.[203] By binding only developed countries, the Kyoto Protocol failed to take into account the fact that rapidly growing countries such as China, Brazil and India and other developing countries will become major contributors of GHG emissions in the very near future.[204] This means that by the time the Protocol was adopted, it left over a

[195] Ibid at 63.

[196] Ibid.

[197] Arcas (b) (note 39 above) 288.

[198] Bodansky (note 195 above) 63, 65.

[199] JC Dernbach 'Achieving Early and Substantial Greenhouse Gas Reductions under a Post-Kyoto Agreement' (2008) 20 *Georgetown Int'l Law Review* 573.

[200] Ibid.

[201] Art 3(1) of the Kyoto Protocol.

[202] See Annex B of the Kyoto Protocol for the list and their reduction targets.

[203] Arcas (b) (note 39 above) 288.

[204] RN Cooper 'The Kyoto Protocol: A Flawed Concept' (2001) FEEM Working Paper No. 52.2001 at 4 available at *http://ssrn.com/abstract=278536,* accessed on 29 March 2013 4.

third of GHGs unregulated.[205] Furthermore, at that time, the developing countries were expected to contribute more than 45% of total GHG emissions by 2010[206] and this can only increase over time. Even today, the developing countries are still not under a legal obligation in terms of the Protocol to reduce their emissions. This is the point that the USA made as its justification for not ratifying the Protocol as its delegation argued that there was supposed to be 'meaningful participation' by developing countries in the treaty to reduce GHGs.[207] As a result of its commitments, the Protocol has been criticized by many as fatally flawed[208] due to this fact that it only places the responsibility of reducing GHG emissions on the developed countries whilst leaving the developing countries not legally bound.[209] To other academics, this was a serious flaw which rendered the Protocol to be doomed to failure from the moment it was adopted.[210]

3.5.1.3 Flexible Mechanisms

This area remained unfinished despite most member parties declaring victory by having a legally binding instrument with targets and time tables. Neither the institutional form nor structure of the Executive Board for the CDM was defined in the original Kyoto text. [211] In addition, despite the concept behind the JI and the CDM being clear enough, the important details of the flexible mechanisms, for example what type of projects would be admissible were not clear.[212] A good example being the question as to what type of projects were to be included in the CDM in which there was substantive debate on whether the carbon sinks should also be included in the projects.[213] It is interesting to note that Article 3.3 covered land use and forestry projects initiated since 1990, and Article 3.4 introduced pre-existing biological sinks which created more interpretation confusion.[214] It is even more interesting to note that even at COP16/CMP6 in Cancun, carbon markets (CDM and JI) were quite

[205] Ibid at 6.

[206] Ibid.

[207] Ibid.

[208] Ibid.

[209] See note 206 above.

[210] Arcas (a) (note 39 above) 17.

[211] Greenpeace Analysis (note 142 above) 41.

[212] MH Babiker *et al* 'The Evolution of a Climate Regime: Kyoto to Marrakech and beyond' (2002) 5 *Environmental Science & Policy* 196.

[213] Ibid.

[214] Ibid.

prominent on the agenda in the two Conferences of the Parties serving as the Meeting of the Parties to the Kyoto Protocol (CMP) processes; three Subsidiary Body for Scientific and Technological Advice (SBSTA) processes; one Subsidiary Body for Implementation (SBI) process; and several sessions in both the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol (AWG-KP) and the Ad Hoc Working Group on Long-term Cooperative Action under the Convention (AWGLCA). [215] Furthermore, there was no guarantee that because of the CDM, actual deforestation would have been lower than it would otherwise have been since deforestation activities could simply move to another location.[216] The CDM in itself has faced much criticism for a number of reasons such as its lack of environmental integrity and transparency, its undue governance structures, its lack of regional distribution and its cumbersome procedures.[217] Other authors also criticise the fact that since the CDM was a mechanism conceived of a financial incentive, most of the participants who entered into the projects did so mainly on that incentive and have stayed focused on such economic incentives of the CDM projects whilst ignoring the environmental impacts.[218]

One must however not ignore the fact that despite such weaknesses, the Protocol has also its merits. The CDM has, arguably, created benefits for developing countries through its contribution to sustainable development and the transfer of technologies.[219] Technology transfer was not a stated mandate of the CDM but it occurred at a significant rate.[220] Furthermore, the CDM also helped in furthering sustainable development initiatives although not as much as technological transfers and this lesser contribution was partially attributed to the insistence of national governments on preserving sovereignty over their own domestic development decisions.[221] It is also important to note that changes were said to be underway

[215] H Laurikka & A Schreyögg 'The Global Carbon Market – A Disappearing Vision?' 2010 *International Law-making and Diplomacy Review* 62.

[216] Greenpeace Analysis (note 142 above) 43.

[217] Laurikka & Schreyögg (note 215 above) 60.

[218] WIY Byun & FHC Chan 'Empirical considerations in the development of CDM projects in Asia' in Kheng-Lian *et al* (ed) *Critical Issues in Climate Change and the Kyoto Protocol: Asia and the World* (2009) 178.

[219] Laurikka1 & Schreyögg (note 215 above) 60.

[220] M Gillenwater & S Seres 'CDM: A Review of the First International Offset Program' *Pew Center on Global Climate Change* (2009) available at *http://www.c2es.org/docUploads/clean-development-mechanism-review-of-first-international-offset-program.pdf*, accessed on 21 August 2014, 29.

[221] Ibid 31.

which could later promote sustainable development within the CDM and this could lead to more projects that and these include the adoption of rules to allow a 'program of activities' or 'programmatic CDM' (for example multiple small-scale energy efficiency improvements).[222] The most important of all probably is that the CDM set into motion the GHG emission reductions without looking at how environmentally effective they were since it should be recognized that any emissions reduction is better than no reduction at all.[223]

3.5.1.4 Inadequate provisions on implementation and enforcement mechanisms

Since the adoption of the Protocol in 1997, implementation was an issue and it continued to be a heated argument until at the second session of COP 6 held in Bonn in July 2001, several issues regarding the Kyoto mechanisms and the compliance system were agreed upon under the Buenos Aires Plan of Action.[224] These included implementation rules on the legally binding commitments for the developed countries under the Protocol.[225] Positively, the Kyoto Protocol's compliance regime has been regarded by some authors as strong as it is characterized by rigorous reporting and also with strict eligibility rules for participation in its flexibility mechanisms which constitutes its central element for environmental integrity.[226]

The Protocol also had to find ways to develop a practical and credible compliance regime especially on emission-reduction rules.[227] The Joint Working Group on Compliance (JWG) was established under the Buenos Aires Plan of Action and has been operating since 1999.[228] Efforts to develop the Protocol's enforcement mechanisms failed to bear fruits in The Hague in December 2000.[229] In 2001, COP 7 produced an enforcement agreement of the Kyoto Protocol following the Buenos Aires Plan.[230] The agreement included decisions on compliance rules; flexible mechanisms and monitoring and reporting obligations for parties. COP 11 brought some progress in that this was a compliance regime for the Protocol in

[222] Ibid.

[223] Byun & Chan (note 218 above) 179.

[224] Arcas (a) (note 39 above) 48.

[225] Ibid.

[226] MS Manguiat 'Compliance under the Kyoto Protocol and its implications for the Asian region' in Kheng-Lian *et al* (ed) *Critical Issues in Climate Change and the Kyoto Protocol: Asia and the World* (2009) at 407.

[227] Arcas (a) (note 39 above) 17, 48.

[228] Ibid at 48-49.

[229] Ibid; Gupta & Lobsinger (note 115 above) 77.

[230] Ibid.

which the Compliance Committee was created which comprised of two branches, namely the facilitative branch and the enforcement branch.[231] The facilitative branch provides advice and facilitation to parties in implementation of the Protocol while the enforcement branch is responsible for determining whether a Party in Annex I is not in compliance with its emissions targets, its methodological and reporting requirements for GHG inventories and its eligibility requirements under the mechanisms.[232] Despite the enforcement mechanisms being proven effective, there is still need for improvement.[233] There was also a loud outcry on the penalties that are created in terms of the Protocol and on how the non-compliance provisions could be enforced.[234] The original text of the Protocol did not provide for 'binding consequences' in case of non-compliance.[235] The Marrakech Accords comprise of a compliance penalty involving suspension of eligibility to use the flexibility mechanisms included a deduction of any first-period.[236] Furthermore, one of the biggest weaknesses of the Protocol today is that it does not also penalize members who leave the Protocol. As a result of this, countries such as New Zealand, Canada, Japan and Russia made it clear that they will not be making new Kyoto commitments[237] after failing to achieve their pledged targets and decided to withdraw their membership. They surprisingly have the privilege of walking scot-free with no penalty whatsoever.

3.6 THE KYOTO PROTOCOL'S SIGNIFICANCE AND POTENTIAL EFFECTS ON THE FUTURE CLIMATE REGIME

Despite all of the above criticism, the climate change regime (especially the Kyoto Protocol) has actually turned out to be an important part of the quest to finding the climate solution. The most important and significant fact is that when it came into force, the Kyoto Protocol became the only instrument that established legally-binding commitments consisting of

[231] Arcas (a) (note 39 above) 49.

[232] Ibid.

[233] Ibid.

[234] Ibid.

[235] Babiker (note 212 above) 197.

[236] Ibid.

[237] 'Kyoto battle lines drawn at COP 18' *Mail and Guardian* 27 November 2012, available at *http://mg.co.za/article/2012-11-27-cop-18-kyoto-battlelines-drawn,* accessed on 20 December 2013.

quantitative national performance standards.[238] It continues to be so up to date. Spencer highlights the significance of the Kyoto Protocol when he asserts that '[I]n several ways, Kyoto represents a high point of global environmental multilateralism as it provides for a multilateral and rules-based system as a means to ensure comparability and integrity of actions'[239] thus being a solid first step for action.

The Protocol also reflected the wishes of the developing states by giving the developed country states members the burden first or by making them "take a lead" since they were believed to have contributed most to causing climate change and had greater capacity to respond to climate change than their developing country member states counterparts.[240] This argument has become very significant and has turned out to be an influential aspect in the negotiations to the post-Kyoto era. After the Kyoto Protocol came into force, a new question arose namely, what would happen after the Protocol expired? This question is still yet to be answered and settled and one could easily point to the Kyoto Protocol as the instrument that has caused this stagnation in the climate negotiations. One could also point at it as a possible tiebreaker of this UNFCCC solution seeking no progress phase. This is so because before the launch of the Protocol's second commitment period when the UNFCCC members were discussing the future climate regime, major developing countries such as China and India wanted the Protocol to continue in its present form by imposing quantitative limitations on GHGs on developed country emissions but not on them.[241] The European Union on the other hand, was willing to take a new commitment period under the Protocol but only as part of a global and comprehensive framework engaging all major economies.[242] It is important to note how the Protocol was at the center of the discussions in major respects and that these arguments became so recurrent and significant to the extent that the only way forward to getting close to agree on the legal form of the future climate change agreement in 2011 at

[238] D Bodansky 'Whither the Kyoto Protocol? Durban and Beyond' (2011) Policy Brief, Harvard Project on Climate Agreements available at *http://belfercenter.hks.harvard.edu/publication/21314/whither_the_kyoto_protocol_durban_and_beyond.html*, accessed on 21 August 2014.

[239] TA Spencer 'A Legal Form Proposal for Durban and beyond' (2011) available at *http://ssrn.com/abstract=1964697 or http://dx.doi.org/10.2139/ssrn.1964697* accessed on 21 August 2014, 6.

[240] Birnie & Boyle (note 10 above) 101.

[241] Bodansky (note 239 above) 1.

[242] Ibid.

COP 17 was to adopt these options. This shows the significance of the Kyoto Protocol on the negotiating process.[243] The Protocol has thus proven to be very significant not just as the first step to fighting global climate change, but also in having huge potential to shape the future of the climate change regime thus worthy of discussion before one focuses on the post-Kyoto era. Its success provisions and stories such as its implementation mechanisms and the way it dealt with differentiation by demonstrating that developed countries remain strongly committed to a rules and equity-based multilateral agreement actually resulted in bringing on board the major developing countries for emission reductions.[244] All these Kyoto inspired positions especially the positives could actually be retained and built on in the new agreement.

3.7 CONCLUSION

In this chapter, the study introduced and gave an in-depth analysis of the current international climate change regime. It established that the climate change regime consists of two instruments namely the UNFCCC and the Kyoto Protocol. The thesis observed that the UNFCCC set out a number of legal principles and much generalised commitments for all its members. Most importantly, it set up a platform where the climate change problem could continue to be negotiated, thus a step in the right direction. It however lacked in terms of assigning commitments on GHG reduction. To address this weakness, the Kyoto Protocol was created. It had firmer commitments that were directed at reduction of GHG emissions by only developed country member states. It has been criticised substantially by a number of academics, governments and action groups for its chief weaknesses which include binding only a few developed countries whilst leaving major emitters with no commitments leading to the US refusing to ratify the Protocol. In addition to this was the insufficient guidance on the flexibility mechanisms as well as the insufficient compliance measures. It however should also be applauded for successfully coming into force; being 'fair' by making the wealthiest countries with greatest historical emissions to take the lead in the fight against climate change; creating flexibility mechanisms for nations to comply with commitments as well as creating a market-based approach which was meant to be cost effective. These need to be noted despite its overall success in adequately reducing meaningful GHG emissions highly

[243] For a discussion on how countries reached an agreement in Durban 2011 see L Rajamani 'The Durban Platform for enhanced action and the future of the climate regime' (2011) 61 *ICLQ* 506-507.

[244] For a full and depth discussing on the role the Kyoto Protocol could play see Spencer (note 240 above) at 6-7.

questionable. The Protocol had its flaws but was probably a needed small step to the big journey which actually became significant as it has proven itself to have that significance in the negotiations for a new and post-2020 agreement. The gaps left by the Convention and its Protocol thus paved the way for further needed negotiations that the following section of this study will now look at.

PART 3:

THE CLIMATE CHANGE NEGOTIATIONS & THE EVOLUTION OF THE CLIMATE CHANGE REGIME.

CHAPTER FOUR

THE CLIMATE CHANGE NEGOTIATIONS: COPENHAGEN TO WARSAW

4.1 INTRODUCTION

After the entry of the Kyoto Protocol[1] in 2005, the focus of the United Nations (UN) climate change regime and negotiations shifted.[2] Its central question became what to do after 2012 as this was when the Kyoto Protocol's initial legally binding limits on GHG emissions would expire.[3] This however was resolved after seven years of intensive negotiations at COP 18 in Doha, Qatar as the Kyoto Protocol's life span was extended for a further eight years in Doha in 2012, with the Protocol therefore expiring in 2020.[4] This however did not do much in answering the main question which was what is next after the Kyoto Protocol. This issue still remains the central focus of the UN' climate change negotiations and current debate. The need for effective way to regulate greenhouse gases (GHGs) is essential and central to slowing global climate change. Moving the climate change agenda successfully forward multilaterally amongst the 196 parties to the UNFCCC[5] has however proven to be a serious challenge.[6] The lack of progress in the UNFCCC negotiations in recent years, especially the failure to internationally agree on emission limitation targets and timetables by all major developed and developing country emitters, has led to questions such as whether the UNFCCC process is the best and most effective platform for mobilising a global response to

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[1] *Kyoto Protocol to the United Nations Framework Convention on Climate Change,* opened for signature 16 March 1998, 2303 UNTS 148 (entered into force 16 February 2005). Hereinafter referred to as the Kyoto Protocol or The Protocol.

[2] D Bodansky (a) 'The Copenhagen Climate Change Accord' (2010) 14:3 *The American Society of International Law* 1; D Bodansky (b) 'A Tale of Two Architectures: The Once and Future U.N. Climate Change Regime' March 2011 available at *http://ssrn.com/abstract=1773865 or http://dx.doi.org/10.2139/ssrn.1773865*, at 2 accessed on 1 July 2013.

[3] Ibid.

[4] Doha Decision FCCC/KYOTO PROTOCOL/CMP/2012/L.9

[5] *United Nations Framework Convention on Climate Change* opened for signature *4* June 1992, 1771 UNTS 107 (entered into force 21 March 1994). (UNFCCC), available at *http://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf*

[6] RL Arcas (a) 'Kyoto and the COPs: Lessons Learned and Looking Ahead' 2011 (23) *Hague Yearbook of International Law* 17; See also *https://unfccc.int/essential_background/items/6031.php,* accessed on 10 December 2014.

climate change.[7] In trying to map a way forward, the parties to the UNFCCC and the Kyoto Protocol meet under the COP annually to negotiate and agree on with decisions to determine what will happen next in the international climate change arena.

Before discussing the specific legal questions that have risen under these negotiations, this chapter will give a brief summary of events from the COP15/CMP5-COP19/CMP9. A special focus will be on the significant events that occurred during the meetings and the meetings' outcomes concerning to emissions of GHG mitigation. An analysis of the outcomes or decisions of each respective conference will then be undertaken. The discussion of these meetings will be broken into the following focus questions:

(i) What was the main and intended GHG emissions agenda of the meeting?
(ii) What transpired at the meeting?
(iii) What ultimately emerged by the end of the negotiations?
(iv) What significance and contribution does such a result have on the ultimate objective of the Convention and what impact does such an outcome have on the development of the climate regime and to the much needed climate solution?

A conclusion will be given as to whether each meeting's results can be classified as successful or otherwise in light of the Convention's GHG mitigation objective. This undertaking is important because it gives detailed information about the negotiation meetings and their results and also gives an understanding on how the negotiations were conducted. It is also important to note that the negotiations deal with a number of issues but this study, as mentioned in the first chapter, will focus on the GHG mitigation provisions in-depth and not the other issues not directly related to mitigation efforts.

4.2 THE CONFERENCE OF PARTIES (COP)

The UNFCCC[8] established the platform to deal with such issues under the Conference of Parties (COP) which is defined and described as,

> [T]he supreme body of this Convention, shall keep under regular review the implementation of the Convention and any related legal instruments that the Conference of the Parties may adopt,

[7] Ibid.

[8] Art 7(2) of the UNFCCC. For details on the UNFCCC bodies visit *http://unfccc.int/bodies/items/6241.php,* accessed on 28 August 2014.

and shall make, within its mandate, the decisions necessary to promote the effective implementation of the Convention.[9]

The rest of the provisions give the detailed description of the COP's duties and functions.[10] In summary, the COP has three broad functions and these are:

a) Adoption of Protocols to the Convention.[11]
b) Supervision of the implementation of the Convention by the parties.[12]
c) Mobilise financial resources.[13]

Under its first function, the parties have been met annually to discuss the way forward with regards to developing the Convention and the Convention of Parties to the UNFCCC (COP). Ever since the Kyoto Protocol came into force, the COP has also served as the meeting of the Parties to the Kyoto Protocol (CMP). The annual meetings of the parties to the Convention and the Protocol therefore became known as the Conference of the Parties /Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (COP/CMP).[14] The COP/CMP meetings have shaped the present climate regime and no doubt will shape the future of the regime. Decisions and how members interpret and possibly develop the available legal principles and instruments are therefore of utmost importance.

For a clear illustration of the UNFCCC Bodies refer to the diagram below.[15]

[9] Ibid.

[10] See Articles 7(3)-7(6) of the UNFCCC.

[11] Article 17(1) of the UNFCCC.

[12] Articles 7(2), 10, 12(1)-(2) of the UNFCCC. A Kiss & D Shelton *International Environmental Law* 2 ed (2000) 515.

[13] Article 7.2 (h) of the UNFCCC. See also Kiss & Shelton (note 12 above) 516.

[14] See *http://unfccc.int/bodies/items/6241.php*, accessed on 30 August 2014.

[15] Diagram accessed at the Official UNFCCC website, available at *http://unfccc.int/bodies/items/6241.php*, accessed on 30 August 2014.

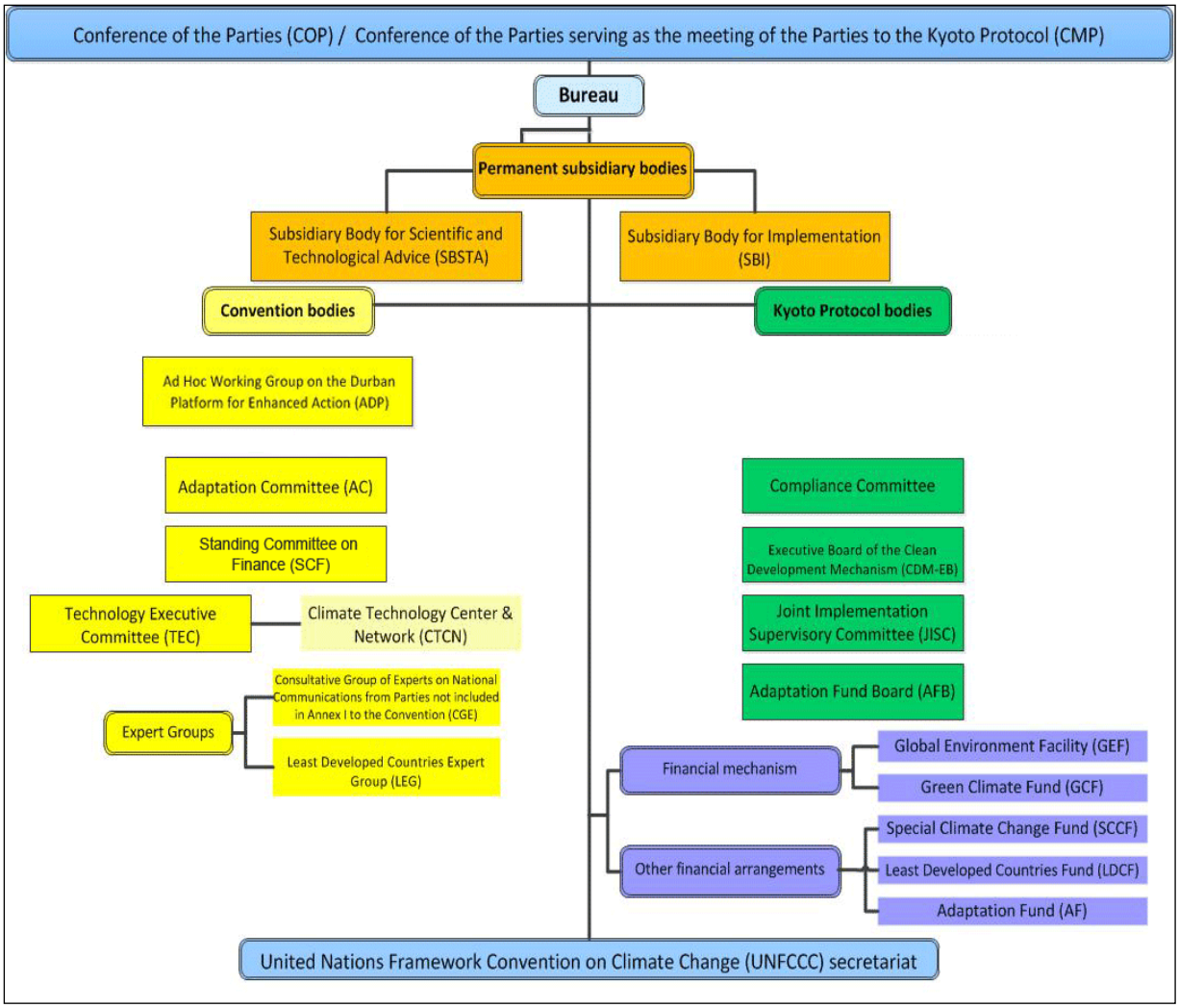

Figure 1

4.2.1The legal nature of the COP/CMP Decisions

The COP and CMP are empowered to adopt decisions concerning a range of matters provided for in the UNFCCC and Kyoto Protocol.[16] The extent of this power depends however on the wording of its parent provision (the UNFCCC and the Kyoto Protocol). This can range from the adoption of operating procedures to establishing of new mechanisms and facilitating information exchange.[17] If validly adopted, the COP/CMP decision could create valid legal structures and rules which bind the parties legally.[18] French and Rajamani submit that the rationale whether the COP decisions are formally binding or not is irrelevant as they can be

[16] Art 7 of the UNFCCC.

[17] 'The Cancun Agreements: Summary and Analysis' (January 2011) *Climate Focus* available at *http://climatefocus.com/documents/files/Cancun%20Briefing%20Jan%202011%20v.1.0.pdf*, accessed on 30 August 2014, 2.

[18] Ibid.

binding in their operational impact.[19] Decisions are however adopted only if parties reach a consensus.[20] The term consensus has commonly been understood both inside and outside the UNFCCC as the absence of formal objection[21] or the absence of express opposition.[22] The UNFCCC however provides for the COP/CMP to adopt its own voting rules thus consensus decision-making is the default procedure for adopting decisions.[23] However, the term consensus has not been formally defined under the UNFCCC process[24] and has been interpreted in different ways under the UNFCCC system as shall be discussed below on the different negotiating meetings.

4.3 THE ROAD TO COPENHAGEN

It is important to note that before the COP15/CMP5 at Copenhagen, the UNFCCC and Kyoto Protocol members had met the previous year in Bali, Indonesia. The meeting took place in December 2007[25] and its significance was that it had to set in motion the negotiations on a follow-up agreement to be concluded before the expiry of GHG emission targets set for industrialised countries in 2012.[26] It obliged all parties to work for a new global climate change treaty.[27]The result was the Bali Road Map[28] which brought about a two way formal process to deal with the post Kyoto issues.[29] The first being the Ad Hoc Working Group on

[19] D French & L Rajamani 'Climate Change and International Environmental Law: Musings on a Journey to Somewhere' (2013) 25(3) *Journal of Environmental Law* 444.

[20] Art 7(2)(k) of the UNFCCC; Climate Focus (note 17 above) at 2, French & Rajamani (note 19 above) 449.

[21] Climate Focus (note 17 above) 2.

[22] French & Rajamani (note 19 above) 449.

[23] Climate Focus (note 17 above) Ibid 2; French & Rajamani (note 19 above) 449.

[24] Ibid.

[25] IISD (a) 'Summary of the Copenhagen Climate Change Conference: 7-19 December 2009' (2009) 12(459) *Earth Negotiations Bulletin*, 2 available at *http://www.iisd.ca/download/pdf/enb12459e.pdf*, accessed 30 August 2014.

[26] H Van Asselt 'Copenhagen Chaos? Post-2012 Climate Change Policy and International Law' (2010) 2(2). *Amsterdam Law Forum,* 11.

[27] RL Arcas (b) 'Is the Kyoto Protocol an adequate Environmental agreement To Resolve the Climate Change Problem?' 2001 *European Env Law Review* at 284.

[28] Decision 1/CP.13, Bali Action Plan, in Report of the Conference of the Parties on its thirteenth session, held in Bali from 3 to 15 December 2007, Addendum, Part Two: Action taken by the Conference of the Parties at its thirteenth session, FCCC/CP/2007/6/Add.1 (14 March 2008) (hereinafter 'Bali Action Plan, 2007').

[29] Arcas (b) (note 27 above) 26.

Long-term Cooperative Action (AWG-LCA) established with a mandate to focus on key elements of long-term cooperation identified during Convention Dialogue namely mitigation, adaptation; finance and technology; and capacity building.[30] This forum includes all parties to the UNFCCC. The second forum is the Ad Hoc Working Group on the Kyoto Protocol (AWG-KYOTO PROTOCOL) which aimed to reach an agreement on targets for the developed countries' (the Annex 1 countries) participation in the Protocol.[31] The Bali Road Map also generated a call for articulating of a 'shared vision for long-term cooperative action,' including a long-term global goal for emissions reduction.[32]

4.4 COP15/CMP5, 2009

4.4.1 *The Copenhagen Conference*

Copenhagen expectations were high and this was for a justified reason.[33] As mentioned above, the 'Bali Action Plan' was there to launch a new international agreement and Copenhagen was the place where this had to be done.[34] In other words, the conference was a historic event as it marked the end of two years of intensive negotiations under the UNFCCC, a period which was supposed to give birth to a new global climate change agreement in simple terms a new climate change treaty.[35] To show the seriousness of Copenhagen, six formal negotiating sessions took place in 2009 alone between Bali and Copenhagen.[36] To prove its significance, the Conference brought together 115 Heads of States and Government which was reported as one of the largest high level gathering outside of New York (Normal United Nations Head of States meetings) and had more than 40 000 applicants for accreditation for the Conference which had a venue capacity of 15 000 people.[37] Large and violent demonstrations were reported to have taken place in the city as people and action groups tried to push world leaders to come to a meaningful agreement.[38]

[30] IISD (a) (note 25 above) 2.

[31] Ibid.

[32] IISD (a) (note 25 above) 2.

[33] Van Asselt (note 26 above) 11.

[34] Ibid.

[35] IISD (a) (note 25 above) 27.

[36] Van Asselt (note 26 above) 11.

[37] IISD (a) (note 25 above) 27.

[38] Ibid.

The fifteenth Conference of Parties (COP 15) of the United Nations Framework Convention on Climate Change (UNFCCC) and the fifth Conference of the Parties serving as the Meeting of the Parties (COP/MOP 5) of the Kyoto Protocol opened on the morning of Monday 7 December 2009 in Copenhagen, Denmark.[39] It had the theme 'Seal the Deal' as the Mayor of Copenhagen Hon Ritt Bjerregard was quoted as saying that COP 15 needed to "go very far and fast" and he called on the delegates to turn Copenhagen into "Hopenhagen" and to live up to the theme 'Seal the Deal.'[40] The parties elected Connie Hedegaard, the Minister for UN Climate Change Conference in Copenhagen 2009, Denmark as the COP 15 President.[41]

4.4.2 The negotiating process

The Copenhagen Conference was characterised by many dramatic events.[42] In the first week, the major problem for the delegate was to tackle complex issues such as deciding on a surfeit of texts that were competing for attention in the very limited time available.[43] At the COP/MOP Plenary on Thursday 10 December 2009, a number of proposals regarding Protocol amendments were received from countries such as Australia, Belarus, Bolivia, Columbia, Japan, the European Union (EU),[44] New Zealand, Papua New Guinea, the Philippines, China and two from Tuvalu.[45] Tuvalu's proposal that argued on complementing, but not replacing, the Kyoto Protocol by creating a contact group to bring about a Protocol

[39] IISD (a) (note 25 above) 3.

[40] Ibid.

[41] Ibid.

[42] Ibid at 28.

[43] G Nagtzaam 'What Rough Beast? Copenhagen and Creating a Successor Agreement to the Kyoto Protocol' (2010*)* 36(1) *Monash University Law Review* 218.

[44] The European Union (E.U) is a union of European countries and has up to 28 member states that are united in an economic and political union. Information about the E.U and its member states available at *http://europa.eu/about-eu/countries/index_en.htm, accessed* on 31 January 2014. The E.U is a strong supporter of the UNFCCC and the Kyoto Protocol in particular and wants to do more with regards to the Kyoto commitments but is worried about the little action concerning the Protocol thus its concerns with the positions of the U.S, China and India. All this worries the E.U and affects its decision to offer more unless these countries agree to offer better action too on the negotiating table. The E.U has also taken a hard stance against the U.S. See Arcas (note 27 above) at 290-291.

[45] Nagtzaam (note 43 above) 218.

amendment and a new 'Copenhagen Protocol' requiring binding emissions targets from both wealthy and developing nations was the one that garnered the most attention.[46]

4.4.3 The Danish Text

From the onset, rumours about a certain 'Danish Text' which was a document intended to be tabled at Copenhagen circulated. The rumours stated that this text had been shown to selected countries which had participated in the Pre-COP 15 negotiations.[47] The document was leaked to the public in the first week of negotiations first through the Guardian Newspaper in the UK and then other media.[48] This angered many delegates especially those from the developing countries who voiced their concern over the text's undermining of the negotiations and their transparent and democratic efforts which they had shown throughout the year to develop a negotiating text under the rightful paths of the AWG-LCA and AWG-KYOTO PROTOCOL.[49] The text was believed to have been a product of the hosting Danish government and a number of unnamed developing states and it argued that "the process it was undertaking was pursuant to the Bali Road Map and was building on the two Ad Hoc Working Groups".[50] A full day was consumed to address this Danish Text problem and it was later agreed that only texts developed by the AWG-LCA and AWG-KYOTO PROTOCOL would be used as basis for further discussion.[51]

In addition to the Danish text drama, there were also other time consuming procedural hurdles that started in the second week of negotiations.[52]A good example being on Monday, 14 December when the African Group and the Least Developed Countries (LDC's)[53] with the

[46] Ibid.

[47] IISD (a) (note 25 above) 3.

[48] IISD (a) (note 25 above) 28; 'Copenhagen climate summit in disarray after 'Danish text' leak' *The Guardian* 8 December 2009, available at, *http://www.guardian.co.uk/environment/2009/dec/08/copenhagen-climate-summit-disarray-danish-text,* accessed on 11 April 2014; 'Copenhagen: Danish text row rumbles on' *Business Green* 9 December 2009, available at *http://www.businessgreen.com/bg/news/1801812/copenhagen-danish-text-row-rumbles,* accessed on 18 April 2014.

[49] Ibid.

[50] Nagtzaam (note 43 above) 220.

[51] IISD (a) (note 25 above) 28.

[52] Ibid.

[53] This group has the least developed countries of the world and some of the most vulnerable member parties to the effects of climate change. As a result, they want developed countries to lead the action against climate change as they also feel that since the developed countries are responsible for almost 90% of the GHG

support of G-77/China[54] called for the suspension of negotiations under the AWG-LCA and also issues under the AWG-KYOTO PROTOCOL. They protested against the discussion of AWG-LCA issues being discussed in informal ministerial discussions.[55] This move which was described as a 'walk out' frustrated most developed nations.[56] This hurdle also disturbed vital key meetings such as the AWG-KYOTO PROTOCOL which was supposed to report the following day to the plenary.[57] The argument also triggered transparency issues not only between the negotiating parties such as the G-77/China but also amongst civil society, especially those who had not been granted access into the negotiations.[58] It is important to note that the AGW-KYOTO PROTOCOL text was only presented to the COP President for review on the evening of 15 December and to delegates the following day (five days later than what had initially been planned).[59] The text was surprisingly supported by the G-77 but seriously opposed by the developed nations since it had GHG emissions levels reductions for industrialised nations.[60] Furthermore, the AGW-LCA text was not seen at this time and questions were asked by the Brazilian and Chinese delegations as to why they had not seen a

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emissions that has occurred to date then they should take the lead. List of these countries available at *http://unctad.org/en/pages/aldc/Least%20Developed%20Countries/UN-list-of-Least-Developed-Countries.aspx*, accessed on 19 April 2014.

[54] The G8 is an assembly of world leaders who meet annually to discuss global issues. They meet each year at a Leaders' Summit in which Heads of State and Government of member countries meet to discuss and attempt to reconcile and tackle global issues including important contemporary topics such as the economy and climate change. It comprises of the heads of government from Canada, France, Germany, Italy, Japan, the Russian Federation, the United Kingdom and the United States and also The European Union which is represented by both the president of the European Commission and the leader of the country that has European Union presidency. The G8 discusses and creates global policies but adherence to these policies is not obligatory, and other countries can decide whether or not to obey. It acknowledges the efforts under the UNFCCC and wish to continue negotiating under the UNFCCC tracks. However, it is interesting to note that as discussed under different nations, the different member states of the G8 have different positions with countries like the US and Canada not being members of the Kyoto Protocol and the EU supporting the Protocol. Information available at *http://www.g77.org/doc/* accessed on 17 August 2014, See also T Stephens 'Kyoto is Dead, Long Live Kyoto! A New Era for International Climate Change Law' (April 2008) *Sydney Law School Research Paper No. 08/45* available at *http://ssrn.com/abstract=1121605*, accessed on 30 August 2014.

[55] IISD (a) (note 25 above) 28.

[56] Ibid.

[57] Nagtzaam (note 43 above) 23-224.

[58] Ibid.

[59] Ibid at 225.

[60] Ibid.

draft that was supposed to have been before them on 11 December.[61] China then raised issues of trust between the host nation and the parties as the text was being endlessly postponed[62] and all these arguments and unsettling events wasted precious time.

4.4.4 The 'Heads of States' intervention

The Head of States started arriving on Friday 18 December to supposedly sign a new agreement but alas no such instrument had been concluded.[63] This changed the dynamics and the routine of the negotiations[64] and the US[65] and the BASICs[66] using the name 'Friends of the Chair' took it upon themselves to try and come up with an agreement.[67] The US President, President Barack Obama led these discussions. This meeting angered a number of leaders who became very upset on two main points namely the lack of respect for them and the failure to be consulted when such a decision was being made behind 'secret closed door meetings'.[68]

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[61] Ibid.

[62] Ibid.

[63] Ibid.

[64] IISD (a) (note 25 above) 28.

[65] The US is not a member of Kyoto Protocol and it has as its agenda the pushing for a new treaty which should include major developing countries especially China as they argue that at that major leading emitters are developing countries but are not under a legal obligation to cut their GHG emissions. For UNFCCC state of ratification see *http://unfccc.int/essential_background/convention/status_of_ratification/items/2631.php,* and for the Kyoto Protocol state of ratification available at *https://unfccc.int/files/kyoto_Protocol/status_of_ratification/application/pdf/Kyoto Protocol_ratification.pdf*, both accessed on 30 August 2014.

[66] The BASIC group is a group which includes a list of countries like Brazil, South Africa, India and China which have cooperated in international climate negotiations, reflecting their aspiration to have a larger say in global politics. They stand together in pushing their developmental concerns so that they are considered in how far they can contribute to the climate discussions and actions. Available at *http://www.sei-international.org/publications?pid=1963,* accessed 12 January 2014. Furthermore, together these developing nations are reluctant to accept global goals for emissions reductions in the absence of equitable burden-sharing arrangement. See L Rajamani (a) 'The Cancun Climate Agreements: Reading the text, subtext and tea leaves' (2011) 60(2) *ICLQ* 501.

[67] Nagtzaam (note 43 above) 227.

[68] Ibid at 227-228.

4.4.5 The Outcome

In the end, an agreement was reached and it became known as the Copenhagen Accord.[69] It is an agreement that was reached among 28 parties to the UNFCCC including all the major emitters and economies and also some countries representing the least developed and most vulnerable states.[70] This was a major shift from the normal and formal official negotiations which meant that the negotiating countries did not have the COP's authorisation to negotiate the Accord in the first place.[71] This triggered a lot of debate and emotions amongst the world's leaders with some agreeing with the move, but others calling it a not so 'democratic and diplomatic' move.[72] The Accord received substantial opposition. There was thus no consensus to adopt it and instead, it was simply agreed to 'take note' of the Copenhagen Accord.[73]

The Copenhagen Accord is a very short document consisting of two and half pages, including two tables for members who join, contains five preambular recitals and twelve operational paragraphs, covering the pillars of the Bali Action Plan.[74]

4.4.6 A general outline of provisions

The Copenhagen Accord as mentioned above covered the five pillars of the Bali Action Plan which include a shared vision, mitigation, adaptation, finance and technology.[75]

In terms of the Shared Vision, it recognised the scientific view that the global temperatures should be kept below 2 degrees Celsius[76] and that deep cuts in global emissions would be needed in order to achieve this.[77]

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[69] Decision 2/CP.15 Copenhagen Accord in Report of the Conference of Parties on its fifteenth session held in Copenhagen from 7 to 19 December 2009, Addendum, Part Two: Action taken by the Conference of the Parties at its fifteenth session FCCC/CP/2009/11/Add.1 (30 March 2010) 4 (hereinafter 'Copenhagen Accord')

[70] L Rajamani (b) 'The making and unmaking of the Copenhagen Accord' (2010) 59 *ICLQ* 825.

[71] Ibid.

[72] IISD (a) (note 25 above) 28.

[73] Rajamani (b) (note 70) 826.

[74] See analysis in Rajamani (b) (note 70) 827.

[75] Ibid at 826.

[76] Ibid; See Para 1 of the Copenhagen Accord, 2009.

[77] Para 2 of the Copenhagen Accord, 2009.

On mitigation, the Accord required Annex I parties to commit to targets and non-Annex I parties to undertake mitigation actions.[78] To allow for transparency amongst the mitigation actions, the Accord required non Annex I parties to submit national communications every two years and to ensure domestic measurement, reporting and verification (MRV) of mitigation actions, report these through national communications and provide for 'international consultation and analysis.[79] With regards to adaptation, the Accord recognises the need for urgent adaptation action and it required developed country parties to support adaptation action and support in developing countries.[80] On finance, the Accord captured an agreement by developed countries that they would raise $US30 billion in the period 2010-2012 (short term financing) and mobilise a $US100 billion per year by the year 2020 (long term financing).[81] The sources of the finance were identified as very wide and they included public and private, bilateral and multilateral including alternative sources of finance.[82] Finally, the Accord established a Technology Mechanism and a REDD+ Mechanism (reducing emissions from deforestation and forest degradation in developing countries).[83]

4.4.7 An analysis of the mitigation related provisions

After outlining the general provisions of the Accord, an assessment of the agreement with special focus on the mitigation related provisions shall be done in order to see how important and effective the agreement is, as well as assisting in assessing whether it can be regarded as a success or a failure.

Despite the Accord acknowledging and recognising the need to make deep cuts in global emissions so as to keep the global temperatures below 2 degrees Celsius, the Accord fails to either quantify the 'deep cuts' needed to reach the 2 degrees Celsius goal or indicate how the burden will be shared between states.[84] It also fails to specify a bench mark from which the 2 degree Celsius increase is to be judged as well as prescribing a specified peak year or frame

[78] Paras 5 & 12 of the Copenhagen Accord (respectively), 2009.

[79] Para 5 of the Copenhagen Accord, 2009.

[80] Para 3 of the Copenhagen Accord, 2009.

[81] Para 8 of the Copenhagen Accord, 2009.

[82] Ibid.

[83] Para 11 & 6 of the Copenhagen Accord, 2009.

[84] Rajamani (b) (note 70 above) 827.

but rather leaves all this to be determined by states.[85] On mitigation, analysts say that the mitigation provisions and agreements by the developed countries are 'clearly weak' and 'a step backwards from the Kyoto Protocol'.[86] This is because in terms of the Accord, the developed country parties do not commit themselves to legally-binding emissions reductions.[87] In addition, the Accord does not prescribe aggregate or individual targets in either the mid-term or long-term for either the developing countries or developed countries.[88] States have to make their own pledges as to how much they will reduce their emissions and the existing cuts pledges so far fall short of the necessary reduction to achieve the 2 degree Celsius stabilisation.[89] Furthermore, the distinction between targets (set for developed countries) and actions (set for developing countries) is not explained at all.[90] There is also a provision in which developing countries are required to submit national communications every two years which is a more frequent reporting system (MRV) than the Annex I states currently.[91] The reason for this provision was to ensure transparency. This created tension between the developed and developing countries especially between the US and China who did not agree with international interference in its MRVs. In order to reach some sort of compromise, the negotiators included some language stating that there would be some provisions for "international consultations and analysis", a concept that was yet to be defined.[92]

Lastly, The COP and COP/MOP also agreed to extend the mandate of the AWG-LCA and AWG-KYOTO PROTOCOL for another year.[93] However, no decision was taken on when and where the negotiations would continue.

4.4.8 The legal implications and the significance of the Copenhagen Accord

The Copenhagen Accord could not rally the support of all the parties thus it was not adopted as a decision by the COP.[94] Despite having the support of the likes of EU, the Maldives,

[85] Ibid.

[86] IISD (a) (note 25 above) 29.

[87] Ibid.

[88] Rajamani (b) (note 70 above) 828.

[89] Ibid at 827.

[90] Ibid; IISD (a) (note 25 above) 29.

[91] Rajamani (b) (note 70 above) 827.

[92] Ibid.

[93] ISSD (a) (note 25 above) 29.

LDCs, UK, Russia, Philippines, Singapore, Ethiopia and the African Union (AU) represented by Algeria, the Accord still faced opposition from states such as Bolivia, Venezuela, Sudan, Nicaragua, Cuba and Tuvalu and thus no consensus was reached according to the UN consensus decision-making rules.[95] As a result the document was not adopted and does not have a legal standing of a treaty or a legally binding international agreement, but is simply a political declaration by a limited number of countries.[96]

A delegate at the conference was quoted as saying that had the Copenhagen Accord been adopted, "it would have been an important step towards a better and legally-binding outcome".[97] In addition, upon leaving the conference, many delegates were somewhat reluctant to analyse the legal and operational implications of the Accord after long nights of tense negotiation.[98] However, the significance and relevance of the Accord had to be reviewed at some point. Scholars such as Rajamani clearly stated that there was a huge uncertainty that existed in relation to the status and significance of the Accord and this would create a political drag as well as pose serious operational and legal challenges.[99] It was quite clear that despite the Accord's aim to be "operational immediately", it could not be operationalized in its current form but needed further negotiation to add more details to it.[100]

Furthermore, the reception of the Accord and the reaction of the parties left a lot to be desired. Most member parties reacted to the Accord with mixed feelings and most Environmental Non-Governmental Organisations (ENGOs) were unhappy with the final draft and regarded it as an absolute failure.[101] Most delegates agreed to the document being weak by carrying little weight as it had not been formally adopted but simply taken note of, yet others still remained hopeful that the Accord could still be a good catalyst to a future legally binding agreement[102] or that it was even a potential breakthrough.[103] A lot of countries

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[94] Ibid.

[95] Nagtzaam (note 43 above) 231.

[96] Van Asselt (note 26 above) 13.

[97] IISD (a) (note 25 above) 29.

[98] Ibid.

[99] Rajamani (b) (note 70 above) 831.

[100] Ibid at 835.

[101] Nagtzaam (note 43 above) 232.

[102] Ibid.

[103] D Bodansky (c) 'The Copenhagen Conference: A Post Mortem' (2010) 104 *American Journal of International Law* 239.

acknowledged it as a political instrument, a political agreement or a mere political statement[104], of which all acknowledgements highlight on its political significance but not its legal significance.

4.4.9 Conclusion

As its main agenda, the Copenhagen Climate Change Conference was highly acclaimed and it was supposed to finalise two years of work by producing a legally binding outcome.[105] It even became clear a few weeks before the Conference that a legally binding agreement was not going to be achieved in the Copenhagen Summit but probably just a 'set of detailed political decisions including a timeline'.[106] Indeed, the Copenhagen Conference did not bear the expected fruits only the Copenhagen Accord which is just a political decision with no legal standing within the UNFCCC framework. Whether the Copenhagen Conference was a success or a failure depends on which angle one looks at it from. With regards to producing a legally binding outcome as it was mainly intended to, the COP in Copenhagen failed to deliver.[107] Furthermore, Copenhagen failed to clarify how stabilising GHGs was going to be achieved.[108] As a result, the Accord failed to advance the ultimate objective of the UNFCCC namely to stabilise GHGs. The Conference also raised a number of transparency issues and this was marked by endless protests by NGOs who had been denied access to the venue.[109] The most contested of this aspect was the fact that the Accord was only negotiated by a few selected countries. This resulted in a number of delegates including attending Head of States feeling disrespected which contributed vastly to failure in reaching a consensus to adopt the Accord.[110] According to Asselt, 'the COP in Copenhagen was one of the most chaotic UN conferences in recent history…and certainly the most bizarre conference'.[111] This has led many scholars and NGOs claiming that the Conference was a total failure, a disaster or even worse.[112] However, a reasonable number of academics still saw light inside the Copenhagen

[104] Rajamani (b) (note 70 above) 829.

[105] IISD (a) (note 25 above) 27.

[106] Van Asselt (note 26 above) 12; Nagtzaam (note 43 above) 233.

[107] Nagtzaam (note 43 above) 236.

[108] Ibid.

[109] IISD (a) (note 25 above) 28.

[110] Ibid.

[111] Van Asselt (note 26 above) at 15.

[112] Bodansky (c) (note 103 above) 9 in footnote 7 states that, "Lavanya Rajamani, for example, says that the Accord "can plausibly be characterized as 'rotten' not just because it is weak and will not contain climate

Accord dark tunnel. Cantley-Smith quotes de Boer who was the COP President in Copenhagen from a positive viewpoint stating,

> Three key things that Copenhagen produced are: 1) It raised climate change to the highest level of government; 2) The Copenhagen Accord reflects a political consensus on the long-term, global response to climate change; 3) The negotiations brought an almost full set of decisions to implement rapid climate action near to completion.[113]

In such a statement, hope in breaking the impasse between developed and developing countries is found especially with regards to vital issues concerning emissions reduction targets, mitigation as well as adaptation commitments.[114] As a result, a number of authors, delegates and NGOs saw the Copenhagen Accord not as a total failure *per se* but as a small step which could help in the fight against global climate change.[115]

In conclusion therefore, the Copenhagen Conference left a lot of disagreements on the substantive issues unresolved by not finalising the legally binding agreement as intended. Primarily, it failed in its quest to effectively regulate GHG emissions. Besides the hope depicted by some authors, it can be concluded that realistically, the climate negotiations after Copenhagen were far from bringing about a multilateral resolution towards combating global climate change.

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change in its current form, but also because even in this weak form it faces considerable legal and procedural challenges to its operationalization."' Lavanya Rajamani, Copenhagen Accord: Neither Fish nor Fowl 26, 26 (Feb. 2010) (Centre for Policy Research Seminar 606, paper), available at *http://www.cprindia.org/*. Similarly, Navroz Dubash refers to the Accord as a "paper-thin cover-up of what was a near complete failure," and suggests that the results in Copenhagen may "represent[ ] the worst possible outcome the overlay of a thin veneer of success over what is a deeply flawed outcome, perpetuating a process that is unable to overcome entrenched differences." Navroz K. Dubash, *Copenhagen: Climate of Mistrust*, 44 ECONOMIC & POLITICAL WEEKLY 8, 10 (Dec 26, 2009)."

[113] R Cantley-Smith 'Climate Change and the Copenhagen Legacy: Where to From Here?' (2010) 36(1) *Monash University Law Review* 278.

[114] Ibid.

[115]Van Asselt (note 26 above) 16; Nagtzaam (note 43 above) 237, Cantley-Smith (note 113 above) 303, Bodansky (c) (note 103 above) 239.

4.5 COP16/CMP6, 2010

After the Copenhagen Conference was described by many observers as a near failure, the expectations for the next conference were modest.[116] A few people were looking forward to a legally-binding outcome or agreements on the outstanding issues whilst many still hoped that Cancun would produce meaningful progress on some of the key issues though. [117]. A number of matters had been identified during the Conference build up period in which a 'balanced package of outcomes could be agreed'.[118] These issues included mitigation; adaptation; financing; technology; reducing emissions from deforestation and forest degradation in developing countries including conservation; sustainable management of forests and enhancement of forest carbon stocks (REDD+); monitoring, reporting and verification (MRV); and international consultation and analysis (ICA).[119] These were the key issues that negotiators focused on in the two weeks of the Conference.[120]

4.5.1 The negotiating process

The United Nations Climate Change Conference in Cancun, Mexico, took place from 29 November to 11 December 2010.[121] It was the sixteenth session of the Conference of the Parties (COP 16) to the United Nations Framework Convention on Climate Change (UNFCCC) and served as the sixth session of Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol (COP/MOP 6).[122] The negotiations brought together almost 12 000 participants, including almost 5 200 government officials, 5 400 representatives of the UN bodies and agencies, intergovernmental organizations and NGOs, and 1 270 accredited members of the press.[123]

The main focus of the Cancun Conference was on a two-track negotiating process aiming to enhance long-term cooperation under the Convention and the Protocol (the AWG-LCA and

[116] IISD (b) 'Summary of the Cancun Climate Change Conference: 29 November – 11 December 2010' (2010) 12(498) *Earth Negotiations Bulletin,* 1 available at *http://www.iisd.ca/download/pdf/enb12498e.pdf,* accessed 30 August 2014.

[117] Ibid.

[118] Ibid.

[119] Ibid.

[120] Ibid.

[121] Ibid.

[122] Ibid.

[123] Ibid.

the AWG-KYOTO PROTOCOL).[124] The original deadline for completing these negotiations was supposed to be the previous Conference in Copenhagen.[125] However, a number of fundamental issues had remained outstanding, thus the mandates of the two AWGs were to be extended until Cancun.

After the dramatic events in Copenhagen, little was expected in terms of achieving any meaningful global action on climate change, let alone restoring the trust that had been lost in the UNFCCC and its Kyoto Protocol negotiations.[126] The Copenhagen Conference however had an influence on the negotiating process and expectations for Cancun.[127] Due to feelings of such mistrust, the Mexican Presidency led by COP President Espinosa realised that change in the negotiation procedure and tone was needed in Cancun.[128] As a result, the Conference was marked with serious commitment to a 'transparent and inclusive' process which was achieved.[129] The Conference carefully followed the multi-pronged process in which the main two way negotiating process under the AWG-LCA and the AWG-KYOTO PROTOCOL were used as forums for all parties to bring forward views and to come up with a 'compromise text' on the central issues.[130] Furthermore, NGOs were updated of the negotiations and press conferences held as well as open sessions with various groups who had a keen interest in the result and these were conducted by the Mexican President Felipe Calderon and this method of openness yielded results.[131]

4.5.2 The Outcome: Reaching a 'consensus'

After the two weeks of negotiating, there was a prodigious sense in the negotiating room that everyone was willing to accept the agreements that the parties had come to settle on.[132] However a crucial moment came when Bolivia went on to mention a number of substantive

[124] Ibid.

[125] Ibid.

[126] IISD (b) (note 116 above) 28.

[127] Ibid.

[128] Ibid.

[129] Ibid.

[130] Ibid.

[131] Ibid.

[132] Ibid.

concerns and stated their refusal to agree to the decisions being adopted.[133] Despite the clear, stated and noted objections by Bolivia, the decisions were nevertheless adopted.[134] In adopting the decisions and 'taking note' of the objections, the COP President Espinosa 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 of veto, and can prevent 193 others from moving forward after years of negotiations on something that our societies and future generations expect.[135]

Basically, parties of both the UNFCCC and the Kyoto Protocol supported the Mexican Presidency's decision stating that the concept consensus did not necessarily require unanimity thus the agreement to adopt the Cancun agreements was made.[136] Due to this decision however, the integrity of the process became questionable.[137] A small number of observers expressed displeasure and upset as to why the decisions had been adopted despite Bolivia's opposition.[138] The vast number however supported the decision by Madam President Espinosa as the right and correct approach.[139] It is however not a secret that the Cancun agreements represent the first instance under the UNFCCC that a decision was adopted despite positive objection, thus disturbing the traditional consensus rule.[140]

4.5.3 The Cancun Agreements

The negotiations produced and adopted decisions known as the Cancun Agreements. The Cancun Agreements consist of a decision under the UNFCCC outcome of the work of the AWG-LCA[141] and a decision under the Kyoto Protocol on the outcome of the work of the AWG-KYOTO PROTOCOL.[142] The two will be briefly discussed below.

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[133] Ibid.

[134] Climate Focus (note 17 above) 2.

[135] IISD (b) (note 116 above) 28.

[136] Ibid; Climate Focus (note 17 above) 2.

[137] IISD Ibid.

[138] Ibid at 29.

[139] Ibid.

[140] Rajamani (a) (note 66 above) 516.

[141] Decision 1/CP.16, 'The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on long-term Cooperative Action under the Convention,' in Report of the Conference of the Parties on its sixteenth session, Addendum, Part Two: Action taken by the Conference of the Parties, FCCC/CP/2010/7/Add.1 (15 March 2011) (hereinafter LCA Outcome Decision).

(a) The AWG-LCA Outcome Decision

This is a 30 page document which covers the pillars of the Bali Action Plan of 2007 including a shared vision, mitigation, adaptation, finance and technology.[143] The following is an outline on the mitigation related outcomes.

Firstly, on a shared vision for long-term cooperation, the outcome recognise that 'deep cuts in global GHG emissions are required' in order to hold the temperature increase below 2 degrees Celsius.[144] The Cop agreed that the 2 degrees Celsius goal was to be subject to a periodic review so that it could be strengthened to a more ambitious 1,5 degrees Celsius goal.[145]

Under mitigation, the Cancun Agreements follow the Copenhagen Accord method by formally putting the pledges of parties under the Copenhagen Accord in the UNFCCC documents.[146] While recognising the principle of common but differentiated responsibilities and respective capabilities, the Agreements emphasize the need to make 'deep cut' in global GHG emissions by both developed and developing nations.[147] Developing country parties are to take measures aimed at achieving a "deviation in emissions" relative to business-as-usual emissions in 2020, with developed country support.[148] A registry will be set up by the UNFCCC Secretariat to record and match finance, technology, and capacity building needs with international support.[149] Internationally supported mitigation actions will be subject to domestic and international measuring, reporting, and verification measures (MRV) similar to those already applicable to developed countries in accordance with guidelines to be

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[142] Decision 1/CMP.6, 'The Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol at its fifteenth session,' in Report of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol on its sixth session, Addendum, Part Two: Action taken by the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol, FCCC/KYOTO PROTOCOL/CMP/2010/12/Add.1 (15 March 2011) (hereinafter Kyoto Outcome Decision). For a detailed summary of the decisions, see C Romano & E Burleson 'The Cancun climate Conference' (2011) 15(41) *ASIL*.

[143] Rajamani (a) (note 66 above) at 500.

[144] Para 4 of the LCA Outcome Decision.

[145] Ibid.

[146] Rajamani (a) (note 66 above) at 502.

[147] Para 6(a) of the LCA Outcome Decision.

[148] Ibid.

[149] Para 53 of the LCA Outcome Decision.

developed.[150] Domestically supported mitigation actions will be subject to domestic MRV in accordance with guidelines yet to be developed.[151] On the other hand, developed country parties decided to enhance reporting on progress made in emission reductions and provision of finance, technology and capacity-building support to developing countries as well as to enhance reporting on their progress in reducing GHG.[152]

Furthermore, an incentive mechanism for Reducing Emissions from Deforestation and Forest Degradation, and Conservation, Sustainable Management of Forests and Enhancement of Forest Carbon Stocks in Developing Countries (REDD+) was established. Under the REDD+, developing country parties were encouraged to reduce emissions from deforestation and degradation, to conserve and enhance forest carbon stocks and to practice sustainable forest management.[153] As part of this objective, developing countries are requested to develop a national strategy or action plan, national forest reference emission levels, a robust and transparent national forest monitoring system, and a system for providing information on how the safeguards are being addressed throughout implementation.[154] The Cancun Agreements affirmed that adequate and predictable financial and technological support would be given to all developing country parties who should 'aim to slow, halt and reverse forest cover and carbon loss'.[155]

(b) The AWG-KYOTO PROTOCOL Outcome Decision

The Kyoto Outcome decision is a two-page document that covers mitigation for Annex I Parties.[156] The decision urged Annex I countries to increase their level of ambition in their GHG emissions reduction.[157] It was also agreed that further work was required in order to

[150] Para 61 of the LCA Outcome Decision.

[151] Romano & Burleson (note 142 above) 3.

[152] Para 40 of the of the LCA Outcome Decision.

[153] Para 68 of the LCA Outcome Decision.

[154] Ibid.

[155] Para 70 of the LCA Outcome Decision; See also Romano & Burleson (note 142 above) at 3.

[156] Rajamani (a) (note 66 above) 500.

[157] Romano & Burleson (note 142 above) 4.

make the Copenhagen targets by Annex I countries binding commitments under the Kyoto Protocol.[158]

4.5.4 An analysis of the Cancun Agreements

4.5.4.1 The AWG-LCA Outcome Decision

Under the 'shared vision' decision, despite an acknowledgement of making 'deep cuts' to meet the 2 degrees Celsius goal, the Cancun Agreements still did not clarify the issue of how and in what time frames this goal was to be achieved as this was left as yet to be determined.[159]

On mitigation commitments and actions, the Cancun Agreements have been praised for their very 'artful drafting' which incorporates the Copenhagen mitigation proposals which reflected differences which were seemingly irreconcilable into the UNFCCC process.[160] Despite not having a formal legal standing in the UNFCCC process, they have an agreed significance and since they were 'taken note of' thus being acknowledged by all parties, developed and developing countries, this means they are capable of being built on.[161] It is however worrisome that the language used before in the Kyoto Protocol, which indicated and signified some kind of obligatory undertaking of targets has been slowly transforming and giving way to the aspirational language of targets.[162] The obvious result is that the parties now declare their own aspirations and so far the declared proposals under the Copenhagen Accord and endorsed by the Cancun Agreements, even if they are faithfully implemented will not hold temperature increase to the required 2 degrees Celsius.[163] In short, these targets fall short of the required recommendations of the IPCC.[164]

4.5.4.2 Agreement under the AWG-KYOTO PROTOCOL

Despite the language that was used in order to try and reduce emissions and adopting a set of rules that would assist parties in progressing towards a second commitment period, the text

[158] Ibid.

[159] Rajamani (a) (note 66 above) 501.

[160] Ibid at 502.

[161] Ibid.

[162] Ibid at 504.

[163] Ibid at 508; Climate Focus (note 17 above) 3.

[164] Ibid, Climate Focus.

left a number of important issues such as accounting for forest management emissions and removals that had been discussed in the previous three years unfinished.[165] The Cancun Agreements also failed to decide on the very important and fundamental issue regarding the Kyoto Protocol's second commitment period.[166]

4.5.5 Legal status and significance of the Cancun Agreements

The Cancun Agreements clearly are not legally binding as mentioned by a number of authors[167]despite the decisions having been adopted with Bolivia's objection. The fact that they were however adopted elevates them higher than the previous mere political statement, the Copenhagen Accord. The Cancun Agreements received overwhelming support. The Climate Focus (an NGO) argues that despite not being legally binding or rather, the doubts with regards to the agreements' legal status, the support the Cancun Agreements got simply means that their legal status may be of little consequence.[168]

The Cancun Agreements despite the critics however in many areas made significant progress and positively created the Green Climate Fund (GCF), the Technology Mechanism and the Cancun Adaptation Framework.[169] Despite failing to agree on the second commitment period under the Kyoto Protocol, the agreements succeeded in bringing the developed countries' mitigation targets and developing countries' mitigation action formally under the UNFCCC negotiating process.[170] Probably the most significant aspect of the Conference in Cancun was the fact that it managed to restore faith in the multilateral climate change negotiating process under the UNFCCC which had been lost at Copenhagen.[171]

4.5.6 Conclusion

Despite the Cancun Agreements succeeding in restoring faith in the UNFCCC negotiating system and succeeding in other areas such as establishing the Green Climate Fund, the

[165] Ibid at 2.

[166] Ibid at 6.

[167] J Liu 'Legislation and Policy: The Cancun Agreements' (2011) 13 *ENV L REV* 43. L Rajamani (c) 'The Climate Change Regime in Evolution: The Disagreements that survive the Cancun Agreements' (2011) 2 *CCRL* 137; Climate Focus (note 17 above) 2-3.

[168] Climate Focus (note 17 above) 3.

[169] IISD (b) (note 116 above) 29.

[170] Ibid.

[171] Ibid; Liu (note 167 above) 43; Rajamani (a) (note 66 above) 519.

Technology Mechanism and the Cancun Adaptation Framework as well as making further advancement on MRVs and the REDD+, the question as to whether they can be regarded as a success still needs to be looked at in the light of what was expected of them and what progress was made with regards to the key decisions that are needed to address global climate change which are the mitigation related decisions. The Cancun Agreements still failed to decide on the second commitment period of the Kyoto Protocol. In addition, they did not conclude the negotiations that had been launched under Bali which was to produce a new legal agreement (or agreements) addressing the post-2012 period. Furthermore they made decisions that fell short of advancing the main objective of the UNFCCC by allowing mitigation targets and actions that fall short of the required target. Therefore, the Cancun Conference while not labelled by a number of academics and critiques as a failure, was perceived widely as a stepping stone to a future agreement and as laying a robust framework for a future legally binding agreement. Its result however only extended the negotiating process, left open the final form of the regime, the possibility of a second commitment period under the Kyoto Protocol and still falls short of what is required to tackle dangerous global climate change.

4.6 COP17/CMP7, 2011

The United Nations Climate Change Conference in Durban, South Africa, was held from 28 November to 11 December 2011. It involved a series of events including the seventeenth session of the Conference of the Parties (COP 17) to the UNFCCC and the seventh meeting of the Conference of the Parties serving as the Meeting of Parties to the Kyoto Protocol (CMP 7).[172] The Conference drew over 12 480 participants, including over 5 400 government officials, 5 800 representatives of UN bodies and agencies, intergovernmental organizations and civil society organizations, and more than 1 200 members of the media.[173] The Durban Conference was facilitated by the newly elected COP President Nkoana-Mashabane and adopted the informal motto "Working together saving tomorrow today".[174]

[172] IISD (c) 'Summary of the Durban Climate Change Conference: 28 November-11 December 2011' (2011) 12(538) *Earth Negotiations Bulletin*, 2 available at *http://www.iisd.ca/download/pdf/enb12534e.pdf*, accessed 30 August 2014.

[173] Ibid.

[174] SB Banerjee 'A Climate for Change? Critical Reflections on the Durban United Nations Climate Change Conference' (2012) 33(12) *Organization Studies*, 1760.

The COP President made it clear from the outset that the negotiations were going to be transparent.[175] As in Cancun, expectations for Durban were also modest with many countries feeling that 'operationalizing' the Cancun Agreements was all that could be achieved.[176] Others however wanted a balanced and interdependent package within a year that resolved the Kyoto Protocol question and a package that moved to a new legally-binding treaty and operationalized the Green Climate Fund.[177] As a result, the key issues that were dominant on the Durban Conference negotiating table were the second commitment period of the Kyoto Protocol, finance under the Green Climate Fund and the mandate for negotiating of a new, comprehensive agreement.[178] The Conference was marked by tension, high drama and protracted negotiations. The parties only came to agreement on a set of historic decisions under the climate regime some 36 hours after the scheduled end of the conference.[179]

4.6.1 Negotiating positions

Part of the drama at the Conference was the unusual alliances which ended up being created in Durban.[180] The US in maintained a position that it would accept a mandate to negotiate a new outcome of a legal nature only if that mandate applied to both developing and developed countries.[181] The E.U, which was allied with the LDCs, on the other hand sought an immediate start mandate to negotiate a new legally-binding instrument engaging all countries and this was a condition set by the E.U to agree on a second commitment period under the Kyoto Protocol.[182] The BASIC group stood firm in its position that it would accept legal

[175] A Macey 'The Road to Durban & beyond-The progress of International Climate Change Negotiation' (2012) 8(2) *Policy Quarterly,* 26.

[176] IISD (c) (note 172 above) 29.

[177] Ibid.

[178] Macey (note 175 above) 26.

[179] L Rajamani (d) 'The Durban Platform for Enhanced Action and the future of the Climate Regime' (2012) 61 *ICLQ* 501.

[180] L Fuhr et al 'COP 17 in Durban: A largely Empty Package' 2011 available at *http://www.boell.de/sites/default/files/assets/boell.de/images/download_de/oekologie/Boell_Analysis_COP_17_Durban_final.pdf,* accessed on 26 September 2014, 7.

[181] D Bodansky (d) 'The Durban Platform Negotiations: Goals and Options' 2012 *Harvard Project on Climate Agreements: Viewpoint*, available at *http://ssrn.com/abstract=2102994*, accessed on 13 July 2013, 2; T A Spencer 'A Legal Form Proposal for Durban and Beyond' 2011, available at *http://ssrn.com/abstract=1964697* accessed on 13 July 2013, 6.

[182] See Bodansky (d) (note 181 above) at 3.

commitments only for the post-2020 instrument.[183] Amongst this group however, India stood out as it resisted any calls by the E.U and other members for it to agree to a new legally-binding instrument and China also wanted to view the contents of this new instrument first.[184] The Umbrella Group,[185] who have always been against the Kyoto Protocol's extension, managed to slow the process down after they fabricated a fake text that caused confusion.[186] The African Group also made it clear that what they wanted in Durban were two outcomes as mandated by the Bali Road Map including an agreed outcome to implement the Convention and secondly, a Kyoto Protocol second commitment with clear mitigation ambitions.[187]

4.6.2 The negotiating process

The negotiations took place in a period of two weeks and a further 36 hours had to be added to reach an agreement between negotiators who were extremely tired and had had sleepless nights.[188] As discussed above, remarkable 'progressive' alliances were formed in Durban, for example between the E.U, the Alliance of Small Island States (AOSIS)[189] and the LDCs.[190] These alliances actually helped break the impasses and the development of an agreement. The Conference was praised for trying to be transparent and for trying to facilitate a clear

[183] Ibid.

[184] Ibid.

[185] The Umbrella Group is a loose coalition of non-EU developed countries which formed following the adoption of the Kyoto Protocol. Although there is no formal list, the Group is usually made up of Australia, Canada, Japan, New Zealand, Kazakhstan, Norway, the Russian Federation, Ukraine and the U.S. Information available at *http://unfccc.int/parties_and_observers/parties/negotiating_groups/items/2714.php*, accessed on 12 January 2015.

[186] Fuhr (note 180 above) 7.

[187] Ibid at 8.

[188] Rajamani (d) (note 179 above) 501.

[189] This group of is a coalition of Small Island and low-lying coastal countries that share similar development challenges and concerns about the environment, especially their vulnerability to the adverse effects of global climate change. It has a membership of 44 States and observers drawn from all oceans and regions of the world including Africa, Caribbean, Indian Ocean, Mediterranean, Pacific and South China Sea and if put together, this community constitutes some 5% of the global population. It functions primarily as an ad hoc lobby and negotiating voice for Small Island Developing States (SIDS) within the United Nations system. Since they are some of the most vulnerable states of adverse climate change effects, they negotiate for ambitious and harsh GHG emissions reductions so that global climate change is avoided at all cost. Information available at *http://aosis.org/documents/climate-change/* accessed on 18 April 2014.

[190] Fuhr (note 180 above 228) 7.

dialogue. This was achieved by the use of what was termed the 'Durban Indaba' which was held throughout the first week, and involved all party members and observers to try and promote an open process of deliberation.[191]

4.6.3 Reaching the decision in Durban

In the end, the Durban Climate Change Conference reached an agreement after 36 more hours had been added.[192] The outcomes covered a wide range of topics, notably the establishment of a second commitment period under the Kyoto Protocol, a decision on long-term cooperative action under the Convention and agreement on the operationalization of the GCF. Parties also agreed to launch the new ADP with a mandate 'to develop a Protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties and is scheduled to complete negotiations by 2015' and this outcome should enter into effect from 2020 onwards.[193]

4.6.4 The Durban Platform: A general outline

The outcome in Durban was named the Durban Platform for Enhanced Action and it has three main elements.[194]

The first decision was the birth of the "Durban Platform for Enhanced Action" (Durban Platform) which is a working group which will work to develop a 'new Protocol, another legal instrument or an agreed outcome with legal force'.[195] This is basically a new negotiating process which has as its goal to reach an agreement by 2015 that will bring all countries under the same legal regime by 2020.[196] It is interesting to note that the Durban decision established a new Ad Hoc Working group on the Durban Platform for Enhanced Action

[191] Fuhr (note 180 above) 7; IISD (c) (note 172 above) 30-31.

[192] Rajamani (d) (note 179 above) 501.

[193] Ibid.

[194] Fuhr (note 180 above) 3.

[195] Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action, UNFCCC Decision 1/CP.17, Dec. 11, 2011, UN Doc. FCCC/CP/2011/9/Add.1; Ibid at 4.

[196] JE Aldy & RN Stavins 'Climate Negotiations Open a New window: Key Implications of the Durban Platform for Enhanced Action' (2011) *Harvard Project on Climate Change* available at *http://belfercenter.ksg.harvard.edu/files/durban-brief_digital5.pdf*, accessed on 26 September 2014, 8.

(ADP) and then provides that the current AWG-LCA which was established in Bali by COP-13 terminates at the end of 2012.[197]

Secondly, COP-17 in Durban came to an agreement with regards to the extension of the Kyoto Protocol's second commitment period.[198] It was agreed that there would be a second commitment period commencing on 1 January 2013 but the length of this period was not agreed upon and was left to be decided in the next COP.[199]

The third main decision that was made was that concerning finance through the launching of the Green Climate Fund and agreements on the operationalization of the fund. The progress in this decision included the work completed in mobilising funds from both public and private funders to provide for a balanced allocation of resources for adaptation and mitigation activities including the REDD+.[200] The GCF therefore became the intended main global fund for climate change finance.[201]

4.6.5 An analysis of the Durban Platform

The Durban Conference outcome has been received with mixed feelings and has also been critiqued by many. The outcome needs to be analysed in light of the outcomes. However, the study will analyse Durban's success in light of its decisions that are mitigation related.

The launching of the Ad-hoc Working Group on the Durban Platform for Enhanced Action (ADP), has been dubbed the potentially most important decision[202] as it launched a new negotiating to develop a "new Protocol, another legal instrument or agreed outcome with legal force" that will be applicable to all Parties to the UNFCCC.[203] This has caused a number of concerns especially with regards to the language used, as to the accommodation of principles such as the CBDR as many writers state. This will be deeply discussed at in the next chapter of this study. Unfortunately, nothing really measurable in tonnes with regards to GHG emissions was achieved in Durban[204] despite a mere mention of the 2 degrees Celsius

[197] Bodansky (d) (note 181 above) 4.

[198] Fuhr (note 180 above) 3. Aldy & Stavins (note 196 above) 7.

[199] Ibid.

[200] Aldy & Stavins (note 196 above) at 8.

[201] Ibid.

[202] Ibid at 7.

[203] See note 195 above.

[204] Macey (note 175 above) 27.

goal that Fuhr says the Durban Platform simply 'pays lip service to'.[205] Furthermore, despite the Durban Platform's addressing of issues such as timing, it is completely silent on the substance that is to be negotiated and is thus 'an empty vessel which can be filled with whatever content the parties choose'.[206] Despite all that however, a lot of hope has been put in the ADP by many who think it will be able to come up with a mandate by 2015 even if it may start with low beginnings.[207]

Furthermore, Durban successfully agreed on extending the Kyoto Protocol's commitment period and it is believed that without this development, the talks would have collapsed as speculations had it that the emerging economies China, India, Brazil, South Africa, Korea and Mexico among others planned to walk out if that was not going to be the case.[208] This was however only agreed upon after the E.U had been granted its wish that the major developing economies including the BASICs agreed to take 'legal commitments' but they only agreed to do so after 2020.[209] The parties however failed to agree on how long this second commitment period will be and they decided to finalise that in the next meeting the following year.[210]

It is not a secret that the Kyoto Protocol in allocating emissions reduction targets to a few industrialised countries thus lacked an instrument to address the climate change problem in a meaningful way. The fact that the US is not a party to the Kyoto Protocol, the major rising economies are not legally bound by the Protocol, and Canada at Durban announced its intended withdrawal from the Protocol together with Japan and Russia makes the Protocol even weaker than before.[211] It is thus ineffective as a tool to limit global temperature increase to no more than 2 degrees Celsius.

4.6.6 Legal status and significance of the Durban Outcome

In Durban, parties managed to reach consensus and the agreement was adopted as a COP decision, hence the Durban outcome has a legal standing in the UNFCCC process. In

[205] Fuhr (note 180 above) 3.

[206] Bodansky (d) (note 181 above) 4.

[207] Macey (note 175 above) 28.

[208] Aldy & Stavins (note 196 above) 7.

[209] Bodansky (d) (note 181 above) 3.

[210] Aldy & Stavins (note 196 above) 7.

[211] Ibid at 7-8; See also Fuhr (note 180 above) at 3.

addition, the delegates reached a non-bonding agreement to reach an agreement by 2015 that will bring all countries under the same legal regime by 2020.[212] From this, one can adduce that the Durban Platform itself is not a legally binding agreement but a COP decision which shall create a legally binding instrument in the future.

Durban however was marked with great significance as compared to the 'Copenhagen trauma as well as the Cancun struggle' which was to rescue the multilateral climate change regime.[213] Durban was hailed for not only turning a corner and resuscitating the nearly dead Kyoto Protocol but also in taking a step forward by making a decision that would see negotiations on a move to a new 21st century climate regime 'with something approaching symmetrical reporting systems for country efforts on mitigation.'[214] In addition, the Cancun-Durban packages managed to restore sufficient momentum for new negotiations that will need to be shaped by moving beyond the old lines that divided developed and developing countries.[215] In addition, the creation of a new negotiating process to address the fundamental issue of developing a 'new Protocol, another legal instrument or agreed outcome with legal force' which involves all parties was a very significant and departure from the 'traditional' view point.[216] By doing so, COP-17 turned away from the distinction between Annex I/Non-Annex I parties' distinction which had been central to the climate change negotiations as established by the Berlin Mandate in 1995 which gave birth to the Kyoto Protocol.[217] By doing so, the Durban Platform opened a new window in which delegates are challenged to come up with a new climate change policy that follows this proposal, but still in line and consistent with the mother Convention, the UNFCCC.[218]

Also by extending the Kyoto Protocol, the Durban outcome also saved the talks from collapsing given that the key emerging countries planned to walk out had the Protocol not had an extended life. Despite Canada and other countries being no longer interested in the second commitment of the Protocol, this move managed to keep the major emerging economies in the talks. The Durban Outcome also managed to proceed with the main

[212] Aldy & Stavins (note 196 above) 8.

[213] IISD (c) (note 172 above) 31.

[214] Ibid.

[215] Ibid.

[216] Aldy & Stavins (note 196 above) 8.

[217] Ibid at 9.

[218] Ibid.

agreement above which gave way to creation of the ADP which will decide on an instrument that binds all parties.[219] Furthermore, the uncertainty surrounding the Kyoto Protocol was cleared, a legally binding instrument was endorsed and the leadership by industrialised countries in tackling the climate problem was once again reinforced.[220]

4.6.7 Conclusion

If the Durban outcome is judged by the objectives of the Convention, the outcome leaves much to be desired. Durban may not be considered a 'success' if judged according to that and also according to putting the world on a path to solve the climate problem by making reasonable emissions reductions of GHGs.[221] Furthermore, as a response to the Bali Action Plan, the Durban outcome also did not do much as well. The Durban outcome has been described as, 'far from perfect'[222] and 'a large empty package,'[223] by some academics just to name a few. However, besides lacking in these fundamental areas and such criticisms, the Durban Climate Conference has also been viewed in a positive light. This has been done especially by those who choose to judge the outcome based on the complexities of the process and taking into consideration the fact that global climate change is a long-term problem thus negotiations are to be viewed as to whether the negotiations at hand managed to put the world on a trajectory where it is more likely to reduce GHGs than it was previously.[224] In this light, Durban managed to build upon the Cancun progress to move forward especially by creating a new negotiating process where an instrument that includes all parties will be made as this is a mandate of change.[225] Rajamani also applauds the Durban outcome for ending the uncertainty surrounding the Kyoto Protocol and also the launching of the ADP which she says is a necessary step forward despite the fact that it leaves a number of issues such as differentiation unresolved which the ADP will need to deal with as it starts its

[219] Ibid at 7-8.

[220] Rajamani (d) (note 179 above) 515.

[221] Aldy & Stavins (note 196 above) 10.

[222] C Carpenter, 'Taking Stock of Durban: Review of Key Outcomes and the Road Ahead' (2012) *http://www.undpcc.org/docs/Bali%20Road%20Map/English/UNDP_Taking%20Stock%20of%20Durban.pdf,* accessed on 25 September 2014, 32.

[223] Bodansky (d) (note 181 above) 4.

[224] Aldy & Stavins (note 196 above) 10.

[225] Ibid.

work.[226] In conclusion therefore, the Durban Platform judgement depends on the angle one decides to judge the Conference on.

4.7 COP18/CMP8

4.7.1 Introduction

After Durban, expectations for Doha were modest since the Conference was not as important as compared to its predecessors which had very high expectations as they carried deadlines with them.[227] The most crucial task to be completed was to decide how long the Kyoto Protocol's second commitment period was going to be as well as defining short-term emissions reduction strategy.[228] Basically, Doha had as its major objective to decide and define on the amendments to the Kyoto Protocol.[229] Also, the work of the AWG-LCA and the AWG-Kyoto Protocol were supposed to be closed and concluded in Doha as this was long overdue.[230] The issue on long term funding of the developing countries was also on the agenda.[231]

4.7.2 Negotiating Process

The United Nations Climate Change Conference in Doha, Qatar, took place from 26 November to 8 December 2012.[232] It included the eighteenth session of the Conference of the Parties (COP 18), the UNFCCC and the eighth session of the Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol (CMP 8).[233] The Conference also included meetings by five subsidiary bodies and amongst these included the second part of the seventeenth session of the Ad hoc Working Group on Further Commitments for Annex I

[226] Rajamani (d) (note 179 above) at 515.

[227] M Davide 'The Doha Climate Gateway: A First-Key Point Assessment' (2012) *Review of Environment, Energy and Economics* available at *http://www.feem.it/userfiles/attach/201212141236424Re3-M.Davide-20121214.pdf,* accessed on 25 September 2014, 1.

[228] Ibid; See also IISD (d) 'Summary of the Doha Climate Change Conference: 26 November-8 December 2012' (2012) 12(567) *Earth Negotiations Bulletin* available at *http://www.iisd.ca/download/pdf/enb12567e.pdf,* accessed 25 August 2014, 26.

[229] Ibid. See also Davide (note 227 above) 2.

[230] Ibid Davide (note 227 above); See also IISD (d) (note 228 above).

[231] Ibid.

[232] IISD (d) (note 228 above) 1.

[233] Ibid.

Parties under the Kyoto Protocol (AWG-KYOTO PROTOCOL 17), the second part of the fifteenth session of the Ad hoc Working Group on Long-term Cooperative Action under the UNFCCC (AWG-LCA 15) and the second part of the Ad hoc Working Group on the Durban Platform for Enhanced Action (ADP1).[234] This was the first time that UN climate change negotiations took place in the Middle East.[235] The conference attracted about 9 000 participants, including 4 356 government officials, 3 956 representatives of UN bodies and agencies, intergovernmental organizations and civil society organizations, and 683 members of the media.[236] Negotiations in Doha focused on ensuring the implementation of agreements reached at previous conferences.

The Conference was marked by dramatic events such as the protests by activists against the Qatari hosts' emissions record for the host nation as they wanted them to reduce their GHG emissions and show leadership.[237] Campbell also ridicules the hosting venue which he in depth describes as,

> [The] magnificence of the Qatar International Convention Centre, where desert temperatures can be agreeably mitigated by a very effective, if sadly very local, system of climate control. Though we are inevitably told that the Centre has been designed to 'the highest level of environmental and sustainable standards' and is '32 percent more efficient compared to a similarly designed building' operating that system contributes to the energy consumption of Qatar, the absolute emissions of which have at least doubled since 1990, to now make its emissions the largest per capita in the world, three times those of the USA.[238]

Despite this drama, the Conference went well and managed to produce an agreement.[239]

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[234] Ibid.

[235] Ibid.

[236] Ibid.

[237] D Campbell 'After Doha: What Has Climate Change Policy Accomplished?' (2013) 25(1) *Journal of Environmental Law* 136; L Gray 'Doha: Talks on Brink of Collapse as anger Rises against Qatari Hosts' *Daily Telegraph* 6 December 2012, available at *http://www.telegraph.co.uk/earth/environment/9727685/Doha-Talks-on-brink-of-collapse-as-anger-rises-against-Qatari-hosts.html*, accessed on 22 March 2014.

[238] Campbell above at 136.

[239] IISD (d) (note 228 above) 1; Davide (note 227 above) 1.

4.7.3 The Doha Climate Gateway

Finally, on the evening of Saturday 8 December, a package of decisions was adopted in Doha and it became known as the Doha Climate Gateway.[240] The package included amendments to the Kyoto Protocol to establish its second commitment period.[241] In addition, having been launched at CMP 1 in 2005, the AWG-Kyoto Protocol had its work terminated in Doha.[242] Furthermore, the parties also agreed to terminate the AWG-LCA and negotiations which had been long held under the Bali Action Plan.[243] In addition, the key elements of the outcome included agreement to consider loss and damage, 'such as institutional mechanism to address loss and damage in developing countries that are particularly vulnerable to the adverse effects of climate change', which however is not a mitigation related decision.[244]

4.7.4 An analysis of the Doha Climate Gateway

Amendments to the Kyoto Protocol stated that the second commitment period would run from January 2013 to December 2020.[245] This means that the Annex I parties continue to be bound by the Kyoto Protocol in the mandate to achieve average emission reduction of 5% below 1990 levels. Despite the members such as the EU willingness to be involved in the second commitment period, countries such as Canada, Japan, New Zealand and Russia made their intentions of 'jumping off the ship' quite clear.[246] With major developing country party emitters and the USA not bound by the Kyoto Protocol, this leaves less than 15% of world GHG emissions covered by the Protocol.[247] This leaves a lot to be desired if the fight against global climate change is to be achieved. Clearly, the 2013-2020 GHG emissions reduction will not be enough in putting the world on the path to avoid a 2 degrees Celsius temperature increase but it was adopted anyway.[248] Termination of the AWG-Kyoto Protocol which had

[240] Ibid, IISD.

[241] Decision 1/CMP.8 available at *http://unfccc.int/files/kyoto_Protocol/application/pdf/Kyoto Protocol_doha_amendment_english.pdf,* accessed on 28 September 2014.

[242] Decision 1/CP.18.

[243] Decision 1/CP.17.

[244] Decision 3/CP.18.

[245] Decision FCCC/KYOTO PROTOCOL/CMP/2012/L.9.

[246] IISD (d) (note 228 above) 26; Davide (note 227 above) 2.

[247] Ibid.

[248] Ibid.

been established in 2005 was also done.[249] It had been tasked to present its results 'as soon as possible' but it however took seven years to 'complete' its task and surprisingly, at its termination a number of outstanding issues were raised and arguments were visible until the last minute thus resulting in Russia, Ukraine and Belarus attempting to block the adoption of the AWG- Kyoto Protocol outcome.[250] The outcome was adopted despite Russia's objection and the same Cancun incident which had transpired against Bolivia repeated itself in which an express objection was simply ignored thus raising questions of legitimacy of the Doha decision within the UNFCCC process.[251] Doha however have been credited for achieving the AWG- Kyoto Protocol mandate which it did by creating a second commitment period but only if one closes eyes to its actual environmental effectiveness.[252]

Doha also made a significant decision by achieving the planned termination of the AWG-LCA after five years of its birth in Bali 2007.[253] However, one wonders whether at its termination, the AWG-LCA had managed to achieve its mandate of creating a new agreement. In 2009 at Copenhagen which was the AWG-LCA's supposed deadline to its mandate, instead of delivering, the meeting nearly collapsed and it was unfortunate the life of the AWG-LCA had to be extended for another year.[254] The following year in Durban also, the AWG-LCA's life had to be extended and only a decision to terminate it in Doha in the following year was boldly reached.[255] The question becomes therefore whether the AWG-LCA managed to achieve its mandate after its prolonged life had been extended? There has however been a number of praises given to the AWG-LCA. The first achievement under this Bali established negotiating track was that it managed to convince the developing countries to undertake mitigation efforts whilst developed countries agreed to undertake measurable reportable and verifiable nationally appropriate mitigation commitments or actions.[256] Furthermore about 85 countries, both developed and developing countries, have signed their pledges to reduce GHG emissions since the Copenhagen agreement.[257] However, many of

[249] IISD (d) (note 228 above) 26.

[250] Ibid 26-27.

[251] Ibid.

[252] Ibid

[253] IISD (d) (note 228 above) 27.

[254] Ibid.

[255] Ibid.

[256] Ibid.

[257] Ibid.

these pledges have been found to be very unclear, established to be too low to achieve the much needed below 2 degrees Celsius rise or were made based on conditions.[258] The Doha Agreement also further urged members to adopt more ambitious emission reduction targets[259] despite not defining these targets.

The AWG-LCA also before being terminated managed to make a number of important financial issues which will not be discussed as they are not directly related to mitigation actions.

With these unsettled issues, the AWG-LCA was terminated. However, for one to give a judgement as to whether it effectively succeeded in its mandate will be a difficult task which may only be passed on how effectively the institutions under it as discussed above implement their mandate.[260] The baton to carry on with the negotiations to a new climate change agreement which must be completed by 2015 was then passed to the ADP.

4.7.5 Legal status and significance of the Doha Climate Change Gateway

The Doha Climate Gateway was adopted as a COP decision. This meant it could create valid legal structures and rules which bind the parties legally.[261] Issues of legitimacy which could be raised however especially with the AWG-Kyoto Protocol decision where the outcome was adopted despite Russia's objection are not to be ignored as these could come with commitment issues.[262] In fact, this has been evident as other countries including Russia itself clearly communicated their non-support for the Kyoto Protocol second commitment which will have obvious commitment consequences.

The Doha Conference however was very significant in a number of ways. It was described as a 'closing down' conference as it closed down a number of negotiating tracks including the AWG- Kyoto Protocol and the AWG-LCA, extending the only legally binding agreement available to limit GHG emissions and opening of the next negotiating track which is the

[258] Ibid.

[259] Ibid.

[260] Ibid.

[261] Climate Focus (note 17 above) 2.

[262] For a full discussion on consensus see Climate Focus (note 17 above) 2; See also French & Rajamani (note 19 above) 449.

ADP.[263] It therefore was accordingly described as the 'transitional' conference as it was about 'moving forward on a trajectory towards adopting a universal climate change agreement by 2015 rather than immediately raising ambition as demanded by many youth and NGOs'.[264]

Therefore, the significance of the Doha Climate Change Conference was in its special task on decisions it made which, although were not directly linked to the objective of the UNFCCC were decisions that affected the negotiation strategies and tracks.[265] This will help in the climate change negotiation process especially focusing on the development of a new climate change agreement.

4.7.6 Conclusion

It is no secret that the Doha Climate Gateway is by no means a breakthrough but probably a successor to the line of least achieving climate change negotiations.[266] In summary, Doha 'successfully' terminated the two track negotiations and left the action to be taken by the newly established ADP, extended the Kyoto Protocol's life, endorsing the Republic of Korea as the headquarters of the GCF and negotiating the institutional development to compensate developing countries for climate change related loss and damage. With all this, the question becomes whether it was a 'success' or not. COP President Al-Attiyah on being quoted admitted that the package by no means a perfect package by saying, "I am not saying what is in store is a perfect package".[267] He thus acknowledged that despite reaching an agreement, Doha had fallen short.[268] Authors such as Campbell see the conference as a failure and even go as far as saying,

> [T]he Doha Conference is arguably the most embarrassing episode in the history of environmentalism. Whatever spin-doctoring pronouncements are now made about the

[263] A Marcu 'Doha/COP 18: Gateway to a New Climate Change Agreement' (2012) *CEPS* available at *http://www.ceps.eu/book/dohacop-18-gateway-new-climate-change-agreement*, accessed on 28 September 2014, 1.

[264] IISD (d) (note 228 above) 26.

[265] Ibid.

[266] Marcu (note 264 above) at 4.

[267] IISD (d) (note 228 above) 28.

[268] Ibid.

Conference, the thousands who flew in had no possibility of achieving any global emissions reductions.[269]

However, some have described the Doha Conference as a 'modest step towards the achievement of a coordinated action to effectively tackle climate change'[270] Probably as it has been described as a 'transition' from the old negotiation tracks to the new and back to focusing only on the making of a new climate agreement by 2015, it achieved what it was supposed to if one is to look at the bigger picture and maybe its success shall be judged only after 2015.[271]

4.8 COP19/CMP9, 2013

4.8.1 Introduction

The annual conference commenced in Poland just a few days after Typhoon Haiyan, the strongest storm to ever make landfall, ravaged the Philippines leaving a serious trail of destruction.[272] Naderev Saño, the lead negotiator of the Philippines chose actions over words to drive his message by undertaking a voluntary fast which was joined by over 200 supporters and they vowed not to stop until a meaningful outcome was reached in Warsaw.[273] The fast and super typhoon and the many marches and protests, became touchstones of the urgency of climate action, backed by alarms sounded by the scientific community leading up to COP 19.[274] In addition, the IPCC's Working Group I had also launched a report two months before the Conference which called for the need to reduce anthropogenic GHG emissions if climate change was to be limited and the World Meteorological Organisation had confirmed that 2013 was in the top ten warmest years of all times and that the melting ice caps and glaciers brought global sea level to a new record high.[275] On the other hand, the UNEP Emissions Gap Report showed an increase in emissions in 2013 which meant that the 2 degrees Celsius

[269] Campbell (note 237 above) 136.

[270] Davide (note 227 above) 3.

[271] Ibid.

[272] IISD (e) 'Summary of the Warsaw Climate Change Conference: 11-23 November 2013' (2013) 12(594) *Earth Negotiations Bulletin* available at *http://www.iisd.ca/download/pdf/enb12594e.pdf,* accessed on 1 October 2014, 27.

[273] Ibid.

[274] Ibid.

[275] Ibid.

target was not going to be possible.[276] Basically, there was a backdrop of urgency for ambitious mitigation, serious adaptation and firm efforts on loss and damage for the Warsaw Conference.[277]

4.8.2 The negotiation process

The Warsaw Climate Change Conference took place from 11-23 November 2013 in Poland.[278] It included the 19th session of the Conference of the Parties (COP 19) to the UN Framework Convention on Climate Change (UNFCCC) and the ninth session of the Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol (CMP 9)[279] and this was the second time that the UN climate change negotiations had taken place in Poland.[280] Over 8 300 participants including 4 022 government officials, 3 695 representatives of UN bodies and agencies, intergovernmental organizations and civil society organizations, and 658 members of the media attended the meeting.[281]

Expectations for the conference were modest with many expecting it to focus only on either finance or implementation whilst others wondered whether it was going to be a REDD+ COP.[282] Negotiations in Warsaw however did put some focus on implementation of agreements that had been reached at previous meetings, including pursuing the work of the Ad Hoc Working Group on the Durban Platform for Enhanced Action (ADP).

Unlike its predecessors after Copenhagen who managed to take control of the process and retain confidence in the process, the Warsaw Conference was marked by some unfortunate events. Firstly was the issue of trust within the negotiation process which seemed to be losing its grip and this was observed by the endless complaints from the developing countries member parties as they were discontent about broken promises especially on the

[276] See *http://www.unep.org/newscentre/default.aspx?DocumentID=2755&ArticleID=9683,* accessed on 1 October 2014; Report available at *http://www.unep.org/publications/ebooks/emissionsgapreport2013*/, accessed on 1 October 2014.

[277] IISD (e) (note 272 above) 27.

[278] Ibid at 1.

[279] Ibid.

[280] Ibid.

[281] Ibid.

[282] Ibid at 28.

implementation of agreed commitments on finance.[283] There was also a lot of finger pointing and blame game which ensued between member parties.[284] Accusations were also thrown and controversial statements directed at each other were said during press conferences.[285] The Guardian Newspaper even described the event as 'characterized by discord and acrimony'.[286]

Despite all the drama, mistrust and lack of confidence, 27 hours after its scheduled closing time, the meeting adopted some decisions including an ADP decision that invited parties to initiate or intensify domestic preparations for their intended nationally-determined contributions, and resolved to accelerate the full implementation of the Bali Action Plan and pre-2020 ambition. Parties also adopted a decision establishing the Warsaw International Mechanism on Loss and Damage, and the "Warsaw REDD+ framework," a series of seven decisions on REDD+ finance, institutional arrangements and methodological issues.[287]

4.8.3 The Warsaw Outcomes: A general outline

Decisions were adopted under the ADP for the purposes of advancing the Durban Platform.[288] The main expectation was that the ADP would intensify its work on the content of the 2015 agreement and on concrete outcomes on pre2020 ambition.[289] The Warsaw Outcome saw a timeframe being proposed and agreed upon. This stated that parties were to communicate their 'intended nationally-determined contributions' by March 2015 and that

[283] Ibid.

[284] Ibid; 'How rich countries dodged the climate change blame game in Warsaw' *The Guardian,* 25 November *2013,* available at *http://www.theguardian.com/environment/planet-oz/2013/nov/25/climate-change-warsaw-rich-countries-blame-paris-deal,* accessed on 14 April 2014.

[285] Ibid.

[286] 'Warsaw climate talks set 2015 target for plans to curb emissions' *The Guardian*, 24 November 2013, available at *http://www.theguardian.com/environment/2013/nov/24/warsaw-climate-talks-greenhouse-gas-emissions,* accessed on 14 March 2014.

[287] IISD (e) (note 272) 1, *https://unfccc.int/meetings/warsaw_nov_2013/meeting/7649/php/view/reports.php*, accessed on 14 April 2014.

[288] Ibid.

[289] IISD (e) (note 272 above) 26.

the ADP was requested to identify before COP20 in Lima the information provided by parties when they put forward their contributions.[290]

Warsaw also achieved what was described as a long 'overdue success' on the REDD+ by establishing the Warsaw Framework for REDD+ which had been on the negotiation list for almost a decade.[291]

Outside mitigation, other key decisions in Warsaw included the establishment of an institutional arrangement which is the Warsaw International Mechanism for Loss and Damage and also finance related decisions[292]

4.8.4 An analysis of the outcomes

Under the ADP decision, parties are still working on developing of a 'Protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all.'[293] Therefore, main work and expectations of the ADP is that it should be intensifying work on the 2015 agreement.[294] In Warsaw, the parties pressed on and managed to come up with a time frame by which countries should submit their pledges by the first quota of 2015 which will be considered by the ADP for the new instrument.[295] It is interesting to note that the Warsaw ADP decision focuses on member countries to communicate their own pledges because this raises questions as to whether it will be possible to have meaningful, ambitious and effective GHG emissions reductions.[296] Many countries went on to give pledges that were substantially less than what had been prescribed for them under the Kyoto Protocol which makes the mitigation pledges inadequate.[297]Apparently, this is the only 'success' they

[290] N Fujirawa 'Navigating the road from Warsaw towards a Climate Change agreement in 2015' 2013 *CEPS* available at *http://www.ceps.eu/book/navigating-road-warsaw-towards-climate-agreement-2015, a*ccessed on 2 October 2014, 2.

[291] IISD (e) (note 272 above) 28; The Guardian (note 284 above).

[292] IISD (e) (note 272 above) 28.

[293] Fujirawa (note 290 above) at 1.

[294] IISD (e) (note 272 above) 29.

[295] Ibid.

[296] Ibid at 30.

[297] Ibid.

made under their mandate of producing a new instrument[298] which directly relates to real GHG emissions in the future instrument.

However, another decision at Warsaw that has a link with GHG emissions reduction was the REDD+ decision. It was regarded as the most successful aspect of the Warsaw Outcomes.[299] Under the REDD+, a new mechanism was completed with the purpose of keeping the world's remaining forests standing thus reducing emissions from deforestation and degradation.[300] This had been work in progress and was long overdue. The parties agreed on a package agreement but institutional and financial arrangements proved to be difficult tasks.[301]

4.8.5 Legal status and significance

The Warsaw Outcomes were basically adopted as COP Decisions thereby implying that they have the potential to create valid legal structures and rules which bind the parties legally.[302] With regards to significance, the Warsaw Conference failed to meet its expectations even though these were very modest.[303] However, it brought about some significant decisions as well. With regards to mitigation of GHGs, the finalising of the REDD+ agreement package was a ground-breaking and significant outcome. Special reference was also given to the decision making process of adopting decisions as the procedures had raised a number of legitimacy issues starting from Cancun where a decision was adopted ignoring Bolivia's objections[304] and in Doha where Russia's objection was also quashed by the then COP President Al-Attiyah.[305] In addition to all the above issues was the long standing question as to whether the UNFCCC negotiating process still had the ability to deliver. This was so because there has been lack of progress which is indeed a paramount enquiry.[306] Feeling frustrated due to the lack of progress in the process, it was reported that hundreds of civil society representatives some of them known for their engagement couldn't take it anymore

[298] Ibid.

[299] Ibid; The Guardian (note 284 above).

[300] Ibid.

[301] Ibid.

[302] Climate Focus (note 17 above) 2.

[303] IISD (e) (note 272 above) 29.

[304] Ibid.

[305] Ibid.

[306] Ibid at 30.

and they decided to walk out of COP19 as a way of demonstrating their worry.[307] This therefore should send a message to the member party negotiators and help in questioning and probably retaining relevance of the UNFCCC process.[308]

4.8.6 Conclusion

Warsaw therefore successfully adopted a number of decisions, including an ADP decision inviting parties to initiate or intensify domestic preparations for their intended nationally-determined contributions; and to accelerate the full implementation of the Bali Action Plan and pre-2020 ambition; a decision establishing the Warsaw international mechanism on loss and damage, and the 'Warsaw REDD+ framework,' which is a series of seven decisions on REDD+ finance, institutional arrangements and methodological issues. However, these decisions have been described as modest and failing to meet even the modest of COP19 expectations.[309] Primarily, nothing positively addressed fundamental issues such as ambitious mitigation efforts at the centre of avoiding a more than 2 degrees Celsius increase in global temperature, the ultimate objective of the UNFCCC.[310]

4.9 CONCLUSION

In this chapter, this dissertation gave a brief summary of events that happened from the COP15/CMP5 to COP19/CMP9, these are the recent five climate change negotiations meetings. The study observed that the central focus as per the Bali Action Plan was to create a new instrument to uplift the objectives of the Convention thus creating an instrument with ambitious GHG emissions reductions to keep the global temperatures from rising beyond 2 degrees Celsius. A look into the negotiations analysis of all the discussed COP/CMP meetings observed that with regards to the new instrument, nothing except the prolonged life of the Protocol happened. Secondly, after a thorough analysis of the outcomes, all the meetings as much as they tried to come up with GHG emissions targets, they all fell short of the required ambition. It was also observed that the negotiations moved on a string of decisions that encouraged countries to determine their own mitigation targets as done at Copenhagen and confirmed in Cancun and Durban, despite the reality that the pledges fall short of the required emissions cuts.

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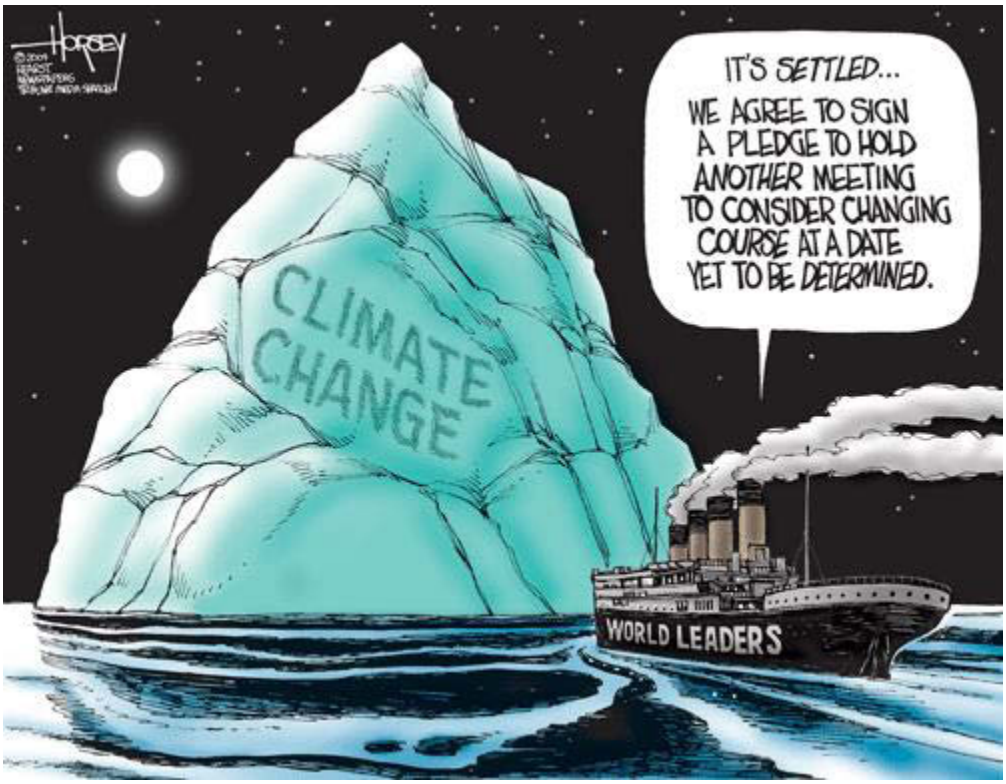
[307] Ibid.

[308] Ibid.

[309] IISD (e) (note 272 above) 29.

[310] Ibid at 27.

Figure 2[311]



[311] S Kallbekken *Climate Change Policy* 2013 (Unpublished class notes, Centre for Climate and Environmental Research, University of Oslo) 35.

CHAPTER FIVE

COPENHAGEN AND BEYOND: TOWARDS A POST-2020 CLIMATE AGREEMENT

5.1 INTRODUCTION

After the entering into force of the Kyoto Protocol, the only legally binding agreement that obliged countries to cut their greenhouse gas emissions (GHG), the focus of the climate change negotiations shifted to focusing on what would be next after its exit. To try and respond to this question, Parties to the UNFCCC launched the Bali Action Plan (BAP)[1] in 2005 which was to reach "towards an agreed outcome" by 2009. The mandate of the BAP failed to be reached in 2009 and 2010 but finally a direction was provided in 2011 at Durban where the life of the Kyoto Protocol was extended to 2020. To answer the fundamental questions, countries agreed to negotiate on a new agreement to reach an agreement by 2015. This takes place under the realm of the UNFCCC COP/CMP negotiations held annually and the quest to the new agreement continues and most probably is its peak.

In the previous chapter, the study provided a detailed summary of events at the climate change negotiations from Copenhagen 2009 (COP15/CMP5) to Warsaw 2013 (COP19/CMP9). The chapter gave the brief outcomes and analysed these decisions as well as their legal standing within the UNFCCC process. It is an undeniable fact that the decisions adopted during the negotiations have resulted in the development, evolution and elaboration of certain principles in international law and international environmental law. In this chapter, the study undertakes a legal analysis of the recent five negotiating meetings on how by trying to settle the fundamental questions within the regime which include the legal form and architecture of the future climate regime; the approach likely to be adopted by the climate change regime between a bottom up or a top down approach; and the interpretation of the nature and extent of differential treatment between developed and developing states in such an instrument; have actually affected the legal evolution of the climate change regime and the actual future climate change regime. The researcher also tries to analyse possible routes the negotiations are directing towards agreement on the new instrument as hinted by the

[1] Decision 1/CP.13, Bali Action Plan, in Report of the Conference of the Parties on its thirteenth session, held in Bali from 3 to 15 December 2007, Addendum, Part Two: Action taken by the Conference of the Parties at its thirteenth session, FCCC/CP/2007/6/Add.1 (14 March 2008) (hereinafter 'Bali Action Plan, 2007').

decisions, thus attempting to give a prognosis of what the long awaited new legally binding instrument may look like.

5.2 THE QUESTION ON LEGAL FORM OF THE NEW INSTRUMENT

It is almost impossible for one to start mentioning the legal form of a new climate change regime without mentioning the developments that happened in 2007 at the Bali Climate Change Conference. Under the decision named the Bali Action Plan (BAP), a process to reach an 'agreed outcome' to advance the climate regime with a scheduled end at COP15 in 2009 at Copenhagen was launched.[2] The phrase 'an agreed outcome', in the BAP indicated a lack of agreement on both the legal form that the likely outcome of this process could take, and the level of ambition that it should reflect thus the next COP negotiations had to clarify this. The following section of the study gives an analysis as to what extent the question of the legal form of the so called 'agreed outcome' has been settled or at least tried to be settled by the COP meetings from Copenhagen in 2009 to Warsaw in 2013.

5.2.1 The possible forms available at Copenhagen

The Kyoto Protocol[3] is the only legally binding instrument with obligations to developed countries to reduce GHG emissions under the United Nations Framework Convention on Climate Change.[4] It took the form of a protocol whereas the UNFCCC itself is regarded as a treaty. A treaty is defined by the Vienna Convention on the Law of Treaties for the purposes of the Convention as 'an international agreement concluded between states in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation'.[5] A Protocol is defined as the original draft of a diplomatic document, especially of the terms of a treaty agreed to in conference and signed by the parties.[6] These two are thus far the existing 'forms' in existence within the climate change regime. After the entry into force of the Kyoto Protocol in 2005,

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[2] Ibid.

[3] *Kyoto Protocol to the United Nations Framework Convention on Climate Change* opened for signature 16 March 1998, 2303 UNTS 148 (entered into force 16 February 2005). Hereinafter referred to as the Kyoto Protocol.

[4] *United Nations Framework Convention on Climate Change* opened for signature *4* June 1992, 1771 UNTS 107 (entered into force 21 March 1994). Hereinafter referred to as the UNFCCC.

[5] Article 2(1) of the Vienna Convention on the Law of Treaties, 1969.

[6] *http://www.oxforddictionaries.com/definition/english/Protocol* accessed on 10 October 2014.

questions as to what would happen after its expiry in 2012 became the centre of attention as well as a fundamental question of the climate change negotiations. The question was whether:

a) Kyoto Protocol was to be extended through the adoption of a second commitment period, with a new round of emission reduction targets for developed country parties?
b) A new agreement be adopted under the UNFCCC which addresses the emissions of countries that either are not parties to the Kyoto Protocol (the United States) or do not have Kyoto emissions targets (developing countries)? Or
c) Should a single new agreement be adopted that replaces the Kyoto Protocol and is more comprehensive in coverage, addressing both developed and developing country emissions?[7]

This question still remains the central focus of the negotiations, despite the first option being removed as shall be indicated later by the thesis. The reasons why legal instruments are important and have been preferred have been discussed by Chapter 2. Basically legally binding instruments provide assurance and insurance that the states involved will do their best in meeting with their commitments. As a result, it is therefore important for the form of the post 2020 climate change instrument to be defined for the above mentioned reasons. This section of the thesis analyses the negotiations in the light of this fundamental aspect.

5.2.2 What the COP decisions suggest: An analysis

5.2.2.1 Copenhagen 2009

The Copenhagen Conference in 2009 was intended to be the deadline to resolve the question on the legal form on the post-2012 climate regime. This was reflected in its unofficial slogan which the conference adopted which read 'Seal the deal.'[8] The result of this Conference (as already dealt with thoroughly in the previous chapter) was the Copenhagen Accord which was simply a political agreement and not a legal instrument. It is unfortunate that with regards to the legal form question, the Copenhagen Accord failed to offer any guidance on

[7] D Bodansky (a) 'The Copenhagen Climate Change Accord' (2010) 14(3) *ASIL,* 1.

[8] IISD (a) 'Summary of the Copenhagen Climate Change Conference: 7-19 December 2009' (2009) 12(459) *Earth Negotiations Bulletin*, 1 available at *http://www.iisd.ca/download/pdf/enb12459e.pdf*, accessed 30 August 2014.

the future of the climate change regime.[9] As a result, the BAP's 'agreed outcome' under the Copenhagen Accord was left uncertain.[10]

It is however on record that by June 2009 five proposed agreements, including Protocols from Japan, Australia, Tuvalu and Costa Rica and an Implementing Agreement from the United States had been submitted for communication to Parties and appeared on the agenda of COP15 but these were never discussed at Copenhagen.[11] It had become clear by June 2009 that some countries favoured a new legally binding instrument under UNFCCC. However, the fate of the Kyoto Protocol and its relationship to such a new agreement still remained ambiguous.[12] Interestingly, the EU, Australia, Canada, Japan, New Zealand and Russia (arguing that the two-track process was burdensome) were believed to be in support of a new single integrated instrument replacing the Kyoto Protocol to ensure greater participation and effectiveness in the climate regime which would include the US.[13] The G77/China (developing countries) however were believed to be against such an instrument as they considered that this instrument, given the emerging political realities, would have a fundamentally different character to that of the Kyoto Protocol such as reflecting a bottom up approach and not the top-down thus breaching the perceived Bali 'firewall'[14] (commitments versus actions) and top "cherry-pick" from the Kyoto Protocol.[15] They thus feared the balance of responsibly in this new climate regime. Developing countries however were believed to be divided in their approach too, with India and China opposing a new instrument which made them address their own emissions whereas some developing countries including the small island states supported negotiating a new instrument which would complement the Kyoto Protocol and include the US and major developing countries like China, India and

[9] L Rajamani (a) 'The making and unmaking of the Copenhagen Accord' (2010) 59 *ICLQ* 841.

[10] Ibid at 838.

[11] Ibid at 839.

[12] Ibid.

[13] Ibid.

[14] The Kyoto Protocol by dividing countries between Annex I and non-Annex I parties succeeded in establishing what has been termed a firewall which the developing countries are unwilling to give that up now by replacing Kyoto with a new legal instrument which could end up giving them the same responsibilities as the developed or Annex I parties.

[15] Rajamani (a) (note 9 above) 839.

Brazil.[16] Furthermore, an earlier draft of the Accord is believed to have carried a paragraph requiring Parties to negotiate 'one or more legal instruments under the Convention, ideally within six months but no later than December 2010'.[17] This provision however disappeared in the final draft, together with a similar reference to a 'legally binding instrument in the COP decision extending the work of the AWG-LCA'.[18]

At the end of the Conference however, there was no reference to the adoption of a 'legally binding treaty' at COP16[19] except that the mandate of the AWG-LCA to develop an 'agreed outcome' was extended to COP16 in Mexico the following year.[20]

5.2.2.2 Cancun 2010

In Cancun, six agreements including Protocols from Japan, Australia, Tuvalu, Costa Rica and Grenada as well as an Implementing Agreement from the US had been communicated to parties.[21] These all appeared on the agenda of COP16 and were discussed in conjunction with the discussion on the legal form of the AWG-LCA.[22] The negotiating positions of different countries and their respective options remained the same as in Copenhagen. After intensive negotiations, a set of decisions were adopted at Cancun. These however are not legally binding but simply received the support of all UNFCCC members except for Bolivia which objected.[23]

Negotiations on the form of the new climate change path were agreed to continue in 2011 in Durban with the aim of building on the Cancun Agreements to develop more comprehensive agreement(s) and to determine the legal form which might end up being one, two or more agreements in the form of a Protocol, other legally-binding mechanism or be a COP

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[16] D Bodansky (b), 'The Copenhagen Conference: A Post Mortem' 2010 available at *http://www.fao.org/fileadmin/user_upload/rome2007/docs/Copenhagen_Climate_Change.pd*f, accessed on 22 October 2014, 4.

[17] Rajamani (a) (n9) at 839.

[18] Ibid at 841.

[19] L Massai 'The Long Way to the Copenhagen Accord- Climate Change Negotiations in 2009' (2009) 19 (1) *RECIEL* 119.

[20] Rajamani (a) (note 9 above) 838.

[21] L Rajamani (b) 'The Cancun Climate Agreements: Reading the text, subtext and tea leaves' (2011) 60(2) *ICLQ,* 513.

[22] Ibid.

[23] J Liu 'The Cancun Agreements' (2011) 13 *ENV L REV* 43.

decision.[24] In short therefore, the Cancun Agreements still failed to resolve the question on the legal form to any measure such as Copenhagen but simply extended discussions on the above mentioned available three legal options.[25]

5.2.2.3 Durban 2011

After the rigorous negotiations in Durban, where countries expressed their diverse views,[26] parties under the COP ended up with a decision on the establishment of an *Ad Hoc* Working Group on the Durban Platform for Enhanced Action (FCCC/AWGLCA/2011/L.10). They agreed to:

> Launch a process to develop; a Protocol, another legal instrument or an agreed outcome with legal force" under the UNFCCC applicable to all parties, through a subsidiary body under the Convention established and known as the *Ad Hoc* Working Group on the Durban Platform for Enhanced Action.[27]

This marked the express declaration for the first time in years of the possible forms which the new climate change agreement could take. It is important to note that these three options have been regarded as unprecedented by a number of authors in the realm of international law and international environmental law as shall be discussed below. It is thus of paramount importance to try and understand these unparalleled three possible forms.

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[24] 'Analysis from Conservation International: Outcome of Cancun climate Negotiations' 2010 available at *http://sp10.conservation.org/Documents/CI_analysis_UNFCCC_COP16_Nov-Dec_2010_Cancun_outcomes.pdf,* accessed on 22 October 2014, 6.

[25] Rajamani (b) (note 21 above) 514; L Rajamani (c) 'The Climate Regime in Evolution: The Disagreements that Survived the Cancun Agreements' (2011) 5(2) *Carbon & Climate Law Review* 136; D Bodansky (c). 'Whither the Kyoto Protocol? Durban and Beyond' (August 26, 2011). *Harvard Project on Climate Agreements*, available at *http://ssrn.com/abstract=1917603*, accessed on 30 August 2014; IISD (b) 'Summary of the Cancun Climate Change Conference: 29 November – 11 December 2010' (2010) 12(498) *Earth Negotiations Bulletin,* 29 available at *http://www.iisd.ca/download/pdf/enb12498e.pdf,* accessed 30 August 2014.

[26] For different countries suggestions and views see; IISD (c) 'Summary of the Durban Climate Change Conference: 28 November-11 December 2011' (2011) 12(538) *Earth Negotiations Bulletin*, 22-23 available at *http://www.iisd.ca/download/pdf/enb12534e.pdf*, accessed 30 August 2014.

[27] Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action, UNFCCC Decision 1/CP.17, Dec. 11, 2011, UN Doc. FCCC/CP/2011/9/Add.1.

5.2.2.4 Understanding the options under the Durban Platform

Leading scholars in international law and international environmental law have given their thoughts into trying to understand these unprecedented terms and options. At the outset, it is important to note that protocols are explicitly recognized in the UNFCCC[28] as a method of expanding the climate regime. Their definition and legal status have been discussed above.[29] The UNFCCC and the Kyoto Protocol are both legally binding agreements which are regarded as the highest forms of expression for political will that the international community can bestow.[30]

Rajamani states that the terms 'protocol' and 'another legal instrument' in the Durban Platform are a reminiscent of the Berlin Mandate of 1995 which launched the process that led to the Kyoto Protocol.[31] The term 'legal instrument' in the context of the Berlin Mandate discussions referred to a number of possibilities, including the possibility of amendments to the UNFCCC, which were being considered at that time.[32] However, the same term used in the context of the Durban Platform decision, could refer to any of the legal instruments that the COP is empowered to adopt including amendment to annexes and protocols.[33] The COP is also empowered to take decisions although these are not considered legally binding in the absence of explicit treaty authorization.[34] If however the term 'legal instrument' is not automatically interpreted as a legally binding instrument, then it could be logical to bring COP decisions within the fold of a 'legal instrument'.[35]

Given the gathering momentum towards a 'legally binding instrument' in the lead-up to the Durban Climate Conference, it would be safe to assume that the majority of countries that

[28] Article 17 of the UNFCCC.

[29] See note 5 above.

[30] C Carpenter, 'Taking Stock of Durban: Review of Key Outcomes and the Road Ahead' (2012) *http://www.undpcc.org/docs/Bali%20Road%20Map/English/UNDP_Taking%20Stock%20of%20Durban.pdf,* accessed on 25 September 2014, 12.

[31] L Rajamani (d) 'The Durban Platform for Enhanced Action and the future of the Climate Regime' (2012) 61 *ICLQ* 506.

[32] Ibid.

[33] Ibid.

[34] Ibid.

[35] Ibid.

negotiated the Durban Platform may however not intend the above to be the case.[36] There comes the second unprecedented term an 'agreed outcome with legal force.' The term was a result of a huddle with the EU and India at its centre and was only created 30 intense hours after the scheduled end of the Conference in which India insisted that agreeing to a legally binding instrument was a red line that it could not cross since there would be legally binding commitments.[37] Since the terms 'protocol' and 'another legal instrument' are interpreted by most as referring to legally binding instruments under the UNFCCC, a more ambiguous third option was necessary to accommodate India.[38] India argued that it could agree to launch just a process towards a 'legal outcome' which would leave the precise legal form of the instrument open for negotiation for some time.[39] The difference between the two, if there is any, leaves a lot to be desired.

However, this formulation 'legal outcome' lacked the clarity and ambition that the EU, the Alliance of Small Island States, the Least Developed Countries, many Latin American countries, and even India's BASIC allies, Brazil and South Africa, were seeking.[40] Critically, this was not sufficient for the EU to endorse a Kyoto second commitment period therefore India agreed in the end to substitute the term 'legal outcome' with a marginally less ambiguous term 'agreed outcome with legal force', which then triggered the acceptance of a Kyoto second commitment period by the EU and its allies.[41] Bodansky asserts that this formulation does not have any precedent in international law.[42] This makes it the first time such a formulation and such a kind of agreement have been talked of not only in the realm of international environmental law but in international law as a whole. This was a new option that used language not contained in the convention itself.[43] Bodansky argues that 'legal force' means the same thing as legally-binding.[44] The addition of 'with legal force' to 'agreed outcome' which is the BAP language means that the outcome is something more than what

[36] Ibid.

[37] Ibid at 507.

[38] Ibid

[39] Ibid.

[40] Ibid.

[41] Ibid.

[42] D Bodansky (d) 'Evaluating Durban' (2011), available at *http://www.c2es.org/print/blog/bodanskyd/evaluating-durban*, accessed on 20 September 2014.

[43] Carpenter (note 30 above) 12.

[44] Bodansky (d) (note 42 above).

Bali contemplated (which included COP decisions). However, the inability to reach an agreement on the 'legally-binding' aspect thus suggests that at least some parties thought that the term 'legal force' might mean something less than 'legally binding'.[45] Fuhr and others argue that this 'legal outcome' (wanted by India) could actually result in a set of COP decisions that might just be political statements of intent but not necessarily binding commitments under international law for which parties could be held accountable for thus confirming Bodansky's assertions.[46]

Rajamani however suggests that the term 'agreed outcome with legal force' is only marginally less ambiguous than the term 'legal outcome' but its creative ambiguity leans in a different direction.[47] She argues that while the ambiguity in the term 'legal outcome' does create room for COP decisions, the ambiguity in the term 'agreed outcome with legal force' also creates room for a fresh set of possibilities for legal form.[48] Whether this was contemplated by India and the EU at the time still remains unclear, but among these is the possibility that an 'agreed outcome with legal force' could be interpreted as an outcome that derives legal force from municipal rather than international law.[49] This comes from the suggestions of the US proposal for an 'Implementing Agreement' allowing for legally binding approaches based on targets and actions embodied in municipal law rather than international law.[50]

It is also worth noting, that the phrase 'under the Convention' that follows 'agreed outcome with legal force' could be interpreted to limit this range of possibilities to those that exist in the UNFCCC, i.e. protocols, amendments and amendments to annexes.[51] As a result, the option 'outcome with legal force' can therefore be taken to allow the negotiations producing an outcome other than the legal instruments mentioned above but still 'under the

[45] Ibid.

[46] L Fuhr et al 'COP 17 in Durban: A largely Empty Package' 2011 available at *http://www.boell.de/sites/default/files/assets/boell.de/images/download_de/oekologie/Boell_Analysis_COP_17_Durban_final.pdf,* accessed on 26 September 2014, IV.

[47] L Rajamani (d) (note 31 above) 507.

[48] Ibid.

[49] Ibid

[50] Ibid.

[51] Ibid; Carpenter (note 30 above) 12. These are allowed by Art 15, 16, 17 of the UNFCCC.

Convention'.[52] This could mean something not stronger than the Bali's 'agreed outcome' but something closer to a legal instrument which is weaker but definitely not a set of non-binding decisions.[53] However, the term 'under the Convention' has another dimension to it as well which could be read as qualifying the legal nature of the instruments referred to.[54] This could furthermore be read as qualifying the content of the legal instrument that eventually emerges as well.[55]

In summation therefore, the Durban Conference provided a measure of direction on the legal form of the agreement to be adopted in 2015 as well as to a lesser extend the legal form of the action or commitments within it.[56] It however still remains unknown what the contents of the agreement will be.[57] Durban seems to have left a lot more questions than answers however with regards to the form the new climate change agreement would take.

5.2.2.5 Doha 2012

In Durban as mentioned before in this study, the negotiating parties decided to develop 'a Protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all parties' with the objective to complete its work as early as possible but no later than 2015, so it could be implemented in 2020.[58] These negotiations have been entrusted to the recently-established *Ad hoc* Working Group on Enhanced Action under the Durban Platform (ADP).[59] In Doha, the ADP met and discussed this mandate to decide on the legal form of a post 2020 agreement. Only a few things were said or decided that point to the 'form' of the new agreement. Firstly, there was a discussion on the new agreement where divergent views prevailed during many of these exchanges, particularly on how the mandate will be "applicable to all." Discussions also focused on whether the

[52] Ibid Carpenter.

[53] A Macey 'The Road to Durban & beyond-The progress of Int Change Negotiation' (2012) 8(2) *Policy Quarterly,* 27.

[54] Ibid; Carpenter (note 30 above) 52.

[55] Ibid.

[56] L Fuhr *et al* (note 46 above) 13.

[57] Ibid.

[58] See note 27 above.

[59] Ibid.

Convention's principles, including the principles of equity and common but differentiated responsibilities, would be at the core of the new regime.[60] Basically a direct decision or pointer to the developments in Durban was not seen. Instead, an agreement on a 'firm timetable to adopt a universal climate agreement by 2015' and a path to raise necessary ambition in the context of discussions on raising ambition for the pre-2020 period under the ADP's work stream 2 was reached.[61] This basically means that the discussion on form was postponed to a later date. Doha thus strengthened the need to resolve the climate problem and set out a timetable to adopt a universal climate agreement by 2015, which will come into effect in 2020.[62] The important question of form was however not addressed. The only legal decision taken was the extension of the Kyoto Protocol which was extended to a second commitment period from January 2013 to December 2020.[63]

5.2.2.6 Warsaw 2013

At Warsaw, negotiations to clarify the legal form of the post 2020 period climate change agreement as the predecessor Conference also left this fundamental issue unresolved.[64] The only decision made in Warsaw with regards to the new agreement was a decision to agree on timeframe for the new agreement due in COP21 in Paris in 2015 and ways to enhance ambition levels in pre2020 mitigation pledges.[65] This however does not shed light on the question of what form the new agreement would take thus the Durban Platform proposals still remained unexplained. This therefore makes the question on the form of the 2015 climate change agreement to remain stagnant at the 2011 options which however have yet to be explained and selected.

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[60] IISD (d) 'Summary of the Doha Climate Change Conference: 26 November-8 December 2012' (2012) 12(567) *Earth Negotiations Bulletin* available at *http://www.iisd.ca/download/pdf/enb12567e.pdf,* accessed 25 August 2014, 28.

[61] Ibid.

[62] See *https://unfccc.int/key_steps/doha_climate_gateway/items/7389.php* accessed on 8 may 2014.

[63] Decision FCCC/KP/CMP/2012/L.9.

[64] IISD (e) 'Summary of the Warsaw Climate Change Conference: 11-23 November 2013' (2013) 12(594) *Earth Negotiations Bulletin* available at *http://www.iisd.ca/download/pdf/enb12594e.pdf,* accessed on 1 October 2014, 29.

[65] N Fujirawa 'Navigating the road from Warsaw towards a Climate Change agreement in 2015' 2013 *CEPS* available at *http://www.ceps.eu/book/navigating-road-warsaw-towards-climate-agreement-2015, a*ccessed on 2 October 2014, 1.

5.3 THE LEGAL ARCHITECTURE: THE BOTTOM UP OR TOP DOWN APPROACH?

The second fundamental legal question that the climate change negotiations need to address is the question of the new agreement's architecture which relates to the regulatory approach for GHG mitigation that the post 2020 regime will adopt. The focus question which remains to be addressed is whether the new regime will continue with the Kyoto Protocol's top-down approach or whether there will be a switch to a bottom-up approach or even somewhat adopt a hybrid approach which will incorporate the two. This study, before giving an analysis of the COP negotiation agreements, will first give an analysis of the UNFCCC and the Kyoto Protocol to ascertain what approaches they have used, why these were used and the influence these may have on the future of the climate change instrument's architecture. After doing so, it will then analyse the COP decisions and what they point at before trying to draw a prognosis into what the new instrument is likely to be shaped, based on the indications from these recent COP decisions.

5.3.1 The definition of concepts: Top-Down versus Bottom-Up approach

The top-down approach is defined in the field of international law as an approach whereby internationally-defined commitments are adopted so as to drive national actions.[66] This means that as a result of particular policies and measures, what parties must undertake is defined at an international level.[67] On the other hand, the bottom-up approach is one in which participating states are free and are allowed to unilaterally define their own national climate change measures, targets and approaches.[68]

One may ask why the issue of choosing between the two becomes such a fundamental issue. The central question (as this thesis has mentioned before) currently in the climate change regime is how to secure the most rapid, deepest global emission reductions over a sustained period of time spanning many decades in the new instrument. Typically, the top down and the bottom up approaches have been described best in the words of Hare and others in the following paragraph:

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[66] Bodansky (c) (note 25 above) at 4.

[67] D Bodansky (e) 'A Tale of Two Architectures: The Once and Future U.N. Climate Change Regime' (March 1, 2011) 2 available *at http://ssrn.com/abstract=1773865 or http://dx.doi.org/10.2139/ssrn.1773865*, accessed on 1 July 2014.

[68] Bodansky (c) (note 25 above) at 4.

> At one extreme, a strong top-down approach would involve strong global coordination, be centred around the pursuit of a common objective, and be implemented through targets and timetables based on commonly agreed rules, which would be progressively broadened and strengthened over time and would be legally binding, with a strong measuring, reporting and verification (MRV) system and compliance mechanism. At the other extreme, a weak bottom-up approach would have little or no global coordination of efforts, with coordination confined to, perhaps, a small group of countries. Countries' emission actions would be based on unilateral pledges, rather than on the outcome of multilateral negotiations with set levels of ambition, for which accountability would be assessed domestically and not at the international level (i.e. no international compliance). There would be little or weak common MRV and accounting rules.[69]

Basically the advantages and disadvantages of each system can also be observed in this paragraph. It is therefore with due care and diligence that the negotiators choose wisely between the two or even devise a way to fuse the two as long as positive results come out of the process.[70]

5.3.2 The UNFCCC and the Kyoto Protocol

For one to understand the current state of negotiations, it is of paramount importance to first trace the roots of the two approaches from firstly the mother Convention, the UNFCCC and then to the only legally binding instrument which contains GHG commitments under the Convention, namely the Kyoto Protocol. Such a reflection clarifies how these influence member countries' negotiating positions as well as determines the shift in the climate change architecture (if there has been any) as well as what is affecting change or lack of change.

The UNFCCC incorporated aspects of both approaches.[71] Article 4.1 reflects a bottom approach as it requires all parties to develop and report national policies and measures to combat climate change.[72] This has been referred to at the 'pledge and review' process under the negotiations. On the other hand, Article 4.2 reflects a top-down approach whereby it sets forth a non-binding aim for developed countries to return their emissions to 1990 levels by

[69] W Hare at al 'The architecture of the global climate regime: A top down perspective' (2011) 6 *Climate Policy* 601.

[70] For full comparison of the two, see Bodansky (e) (note 67 above) 14-17.

[71] Ibid at 6.

[72] Ibid.

the year 2000.[73] In essence therefore, Bodansky argues that the history of the climate change regime has ever since consisted of variations of these two approaches.[74]

The Kyoto Protocol however is described by Bodansky as the one that marked the ascendency of the targets-and-timetables approach where emissions targets were set for developed countries.[75] As a result of this, it reflects a strong top-down approach as it sets such targets to run for a period of five years from 2008-2012[76] and finally for a second commitment period running from 2012-2020.[77] The Kyoto Protocol however gives freedom to member parties in how they implement their commitments and also in deciding how to reduce emissions.[78] It introduces 'flexible mechanisms' allowing states to reduce emissions wherever emissions are cheapest. The Protocol however does not award the same flexibility in defining form and nature of their commitments.[79] This shows its strong top-down aspect. In short therefore, despite the Kyoto Protocol being a good example of a strong top-down kind of architecture in the climate regime, it also has some elements of flexibility in it. One could argue that this reflects some components of a bottom-up approach though this argument may not be strongly substantiated. Generally, the Protocol is a good example of a top down approach though it cannot be said to represent the approach in its extremities as stated above.[80]

5.3.3 The COPs and what their decisions suggest: An analysis

5.3.3.1 Copenhagen 2009

The Copenhagen Climate Conference, held in December 2009, was originally intended as the end point of the parallel negotiating tracks launched under the BAP. Many expected it to produce a new legal agreement (or agreements) addressing the post-2012 period and this view was reflected in the unofficial slogan of the conference 'Seal the deal'.[81] The

[73] Ibid.

[74] Ibid.

[75] Ibid at 7.

[76] Art 3 Kyoto Protocol.

[77] Decision FCCC/KP/CMP/2012/L.9).

[78] Bodansky (e) (note 67 above) 7-8.

[79] Ibid at 8.

[80] Hare *et al* (note 69 above) 601.

[81] Bodansky (note 67 above) 10.

Copenhagen Accord, a non–legally binding but political decision of the Copenhagen Conference, may be perceived as leaning towards a bottom-up non-prescriptive architecture in that it allows states to self-elect their targets and actions and inscribe them in the Appendices.[82] According to the Accord, Annex I parties were to define their own target levels, base year and accounting rules to submit their targets in a defined format for compilation by the UNFCCC Secretariat.[83] Furthermore, Annex I countries agreed to "commit to implement" their GHG targets, individually or jointly subject to international monitoring, reporting and verification (MRV).[84] As with developed country emissions targets, Copenhagen also established a bottom-up process by which developing countries would submit their mitigation actions in a defined format, for compilation by the UNFCCC secretariat (including both autonomous and supported mitigation actions).[85] However with regards to addressing the architecture question, the fact that the Accord contained appendices listing targets and actions by countries may not necessarily be a solid pointer that predetermines the architecture of the future climate regime.[86] Furthermore, the Accord in itself faced a lot of opposition and ended up not adopted as a COP decision but merely taken note, of thus giving it no official status in the UNFCCC process and hence no much conclusion can be drawn from it.

5.3.3.2 Cancun 2010

The Cancun Agreements of 2010 brought various elements of the Copenhagen Accord into the UNFCCC process (as discussed in the previous chapter). As the agreements were adopted as a COP decision, they stand with an amount of authority within the UNFCCC process.[87]As a result, it can be said that the Cancun Agreements legitimised the bottom up approach which had been launched by the Copenhagen Accord.[88] To further strengthen this assertion, Rajamani states that the language of commitments previously used which arguably signifies that of an obligatory undertaking was replaced by the aspirational language of targets.[89]

[82] Rajamani (a) (note 9 above) 841.

[83] Bodansky (b) (note 16 above) 6.

[84] Para 4 of the Copenhagen Accord.

[85] Bodansky (b) (note 16above) 6.

[86] Rajamani (a) (note 9 above) 841.

[87] Bodansky (e) (note 67 above) 12,13,14.

[88] Ibid at 14.

[89] Rajamani (b) (note 21 above) 504.

5.3.3.3 Durban 2011

According to Rajamani and Carpenter, the Durban Platform just like the Cancun Agreements, strengthened the climate regime with decisions to implement the 2009 Copenhagen Accord and the 2010 Cancun Agreements.[90] This means that, under Copenhagen, Cancun and Durban, all industrialised countries and a list of 49 developing countries have made their own pledges covering the period from 2012-2020 thus reflecting a bottom-up approach.[91] However, some academics differ from this view. Moncel states that:

> In some ways, the Durban conference defied the odds with a decision that signals a move towards a "top-down" climate regime after many had assumed that the regime would take a "bottom-up" form in the aftermath of the Copenhagen Accord and the Cancun Agreements.[92]

Rajamani goes on to say that there are a number of provisions in the Durban Platform calling for better and more ambitious targets[93] and this can be argued to support Morcel's argument. Morcel further argues however that a number of elements in the Durban outcome suggest a possible shift towards a more inclusive multilateral legal framework.[94] While all this may suggest a blended approach of both the top-down and bottom-up approaches rather than a one sided approach, it does not really shed clear light to the understanding of the decision of the architecture of the future climate change regime.[95] The primary reason why these do not actually shed light is that they are a result of academic analysis rather than actual negotiations' direct decisions where substance is agreed.

5.3.3.4 Doha 2012

Just like most of its predecessors after Bali's declaration, the Doha Conference followed the devolution from a top-down approach to a bottom-up approach by "urging" developed country parties in Doha to increase the ambition of their emission reduction targets to levels recommended by science and it also established a work programme to continue clarification

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[90] Rajamani (d) (note 31 above) 515; Carpenter (note 30 above) 8, 10.

[91] Carpenter (note 30 above) 10.

[92] R Moncel 'Unconstructive ambiguity in the Durban Climate Deal of COP17/CMP7' (2012) 2(12) *Sustainable Development & Policy*, 7.

[93] Rajamani (d) (note 31 above) 515.

[94] Ibid.

[95] Ibid.

of these pledges.[96] Apart from that, nothing else suggests a direct decision on what turn the architecture of the new climate change regime will or may take.

5.3.3.5 Warsaw 2013

The Warsaw Conference was a significant meeting because it marked two years before the 2015 deadline and two years since the launching of the Durban Platform to produce the new climate change agreement. Observations made with regards to the architecture seem to be pointing out that the 2015 agreement is developing into a purely bottom-up approach.[97] This has followed the general precedent of the previous three conferences since Copenhagen where countries agreed to determine their own nature and extent of contributions.[98] Warsaw strengthened the bottom-up approach by making a decision that invited all parties to 'initiate or intensify domestic preparations for their intended nationally-determined contributions' and to communicate them well in advance of COP 21 in Paris, by the 1st quarter of 2015 'in a manner that facilitates the clarity, transparency and understanding of the intended contributions'.[99] However, how the bottom-up approach will be incorporated into the new instrument is still unclear as there are questions that still have to be answered.[100] Such questions include whether these party individually determined emission targets are substantial enough to stay within the recommended 2 degrees Celsius target or whether there may arise a need for a top-down commitments and pledge and review mechanism that will assess countries' contributions and their effectiveness.

5.4 THE DIFFERENTIAL TREATMENT IN THE CLIMATE CHANGE REGIME

The principle of common but differentiated responsibility (CBDR) is undoubtedly a key principle in the climate change regime.[101] It is not only a key principle of the regime but it

[96] IISD (d) (note 60 above) 27.

[97] IISD (e) (note 64 above) 29.

[98] Ibid.

[99] Decision, CP19, Further Advancing the Durban Platform.

[100] IISD (e) (note 64 above) 29.

[101] A Shawkat et al *Routledge Handbook of International Environmental Law* (2013) 55; E Louka *International Environmental Law: Fairness, Effectiveness, and World* Order (2006) 54; H Winkler & L Rajamani 'CBRD in a regime applicable to all' (2014) 14(1) *Climate Policy* 102; J Brunnee & C Streck 'The UNFCCC as a negotiation forum: Towards Common But more Differentiated Responsibilities' (2013) 13 *Climate Policy* 5, 589.

has actually proven to be a central aspect of the regime and has shaped the evolution of the climate change regime as a whole as well and affected the way agreements are made within the climate change negotiations 20 years after the adoption of the UNFCCC.[102] The principle has played a major role in the post-2012 climate change agreement negotiations.[103]This part of the research highlights how the climate negotiations have been shaped by the principle of CBDR, as well as how the principle itself has evolved and how it has continued to be been interpreted under the UNFCCC with a special reference from Copenhagen up to Warsaw. This will be done after an analysis as to how the principle has been interpreted from the UNFCCC, the Kyoto Protocol and the Bali Action Plan so as to set the basis for analysis. Finally, an insight into what the future interpretation of the principle within the new climate change regime will be or will look at shall be attempted based on the COP negotiations and their decisions.

5.4.1 The definition

There is no universally accepted definition of the principle of CBDR. However, it is reasonably described and understood as a two folded principle and these are described as follows:

> First, all states have a common responsibility for the protection of the environment. Second, this common responsibility needs to take into account different circumstances, resources and capabilities to carry it out and different contributions to the particular environmental problem. It requires all states to participate in the international response to the problem and take measures to address it. However, obligations imposed on different states have to be varied depending on the level of economic development, circumstances and capabilities.[104]

Basically, the principle has been described as a possible articulation of the concept of "equity"[105] or as having been developed from the application of the principle of equity within the international law realm and the realisation that the special needs of developing states need to be taken into account.[106] This principle has constantly featured and has been accepted in a

[102] Brunnee & Streck (n99) at 589.

[103] T Deleuil 'The Common but Differentiated Responsibilities Principle: Changes in Continuity after the Durban Conference of the Parties' (2012) 21(3) *RICIEL* 271.

[104] Shawkat *et al* (note 101 above) 54.

[105] Louka (note 101 above) 54.

[106] Shawkat *et al* (note 101 above) 53.

number of treaties and soft law instruments. It has also been found in important documents such as the Stockholm Declaration in Principle 23 in 1972 and the Principle 7 of the Rio Declaration 20 years later when the climate change regime was initiated in Rio.[107]

Within the climate change regime and negotiation framework, despite garnering different interpretations, the principle has been understood as defined above. It is stated that the common responsibility that the countries have is differentiated because not every country has contributed to the same extent to environmental degradation and certainly not everyone has the amount of same resources to devote in addressing of environmental problems.[108] Consequently, a higher standard of conduct has been set for the developed countries on the basis that they contributed most to the causing of climate change and that they have better resources and capacity to respond to this problem as compared to their developing countries counterparts.[109] The reason why the differential treatment and the CBDR is the third fundamental legal question is that it is of paramount important to have a 'common understanding of the principle of CBDRC is essential for the burden sharing and responsibilities under a future climate agreement'.[110]

5.4.2 The legal status of the principle in international law

As mentioned above, the principle has been accepted in treaties and 'soft law 'instruments.[111] Brunnee and Streck argue that the principle has however not acquired the status of customary international law but it has its legal significance determined in the context of every regime within which it is incorporated into.[112] Within the climate change regime, it has no doubt served to frame the on-going negotiations, the treaty interpretation and even the possible future agreements.[113] Since the principle has its origins in the Rio Declaration which guides not only the UNFCCC but a number of other multilateral environmental agreements launched

[107] Ibid at 53-54.

[108] Louka (note 101 above) 54.

[109] PW Birnie… et al *International Law and the Environmental* 3 ed (2009) 133.

[110] Brunnee & C Streck (note 101 above) 589.

[111] Shawkat *et al* (note 101 above) 53.

[112] Brunnee & Streck (note 101 above) 592

[113] Ibid.

at Rio, it can therefore be implied that the principle CBDR is soft law.[114] It therefore has legal status and significance in international environmental law.

5.4.3 The UNFCCC

As stated above, the CBDR is a key principle in the climate change regime[115] because traces of it are visible in both the climate change instruments. The principle is included in the UNFCCC as follows:

> The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.[116]

From this provision, the UNFCCC proclamation of the CBDR adds the words 'respective capabilities' to the normal CBDR principle. This has led to arguments by authors such as Deleuil to put forward the reasoning that the fact that developed countries were strongly against the idea of making reference to their historical emissions resulted in the parties making that addition.[117] Brunnee and Streck also acknowledge this addition. They note further the emphasis placed especially on the 'capabilities' part rather than the 'responsibilities' aspect,[118] which strengthens Deleuil's assertion. The CBDR under the UNFCCC also contains commitments by all parties[119] which however instead of ending on 'respective capabilities' (as done under Article 3.1) further adds 'and their specific national and regional development priorities, objectives and circumstances' thus becomes the CBDRRC.[120] This in actual fact marks the first departure from the traditional principle of CBDR which is made under the Convention. As a result, it can be understood that differentiation (the CBRD Principle) as defined under the UNFCCC (the CBDRRC based) suggests that there are two understandings and basis of differentiation. The first one is the understanding based on the capacity of the member states and the second one is that which

[114] Winkler & Rajamani (note 101 above) 103.

[115] See note above.

[116] Article 3 of the UNFCCC.

[117] Deleuil (note 103 above) 272.

[118] Brunnee & Streck (note 101 above) 592-593.

[119] Article 4.1 of the UNFCCC.

[120] Ibid; See also Winkler & Rajamani (note 101 above) 104.

draws straight form the Rio Principle 7 (CBDR) which has as its basis the historical contribution to environmental harm.[121] As a result, there is a distinction between the original version of the CBDR and the one adopted in the UNFCCC. The one found the Convention reads 'common but differentiated responsibilities and respective capabilities' and as such, this thesis will differentiate the original principle as the CBDR and refer to the UNFCCC version[122] as the CBDRRC.[123]

Also to show the incorporation of the principle under the Convention, commitments are placed on the Annex I member parties (the developed countries) to provide developing countries with financial assistance,[124] assisting developing countries with adaptation costs[125] and to transfer technology.[126] Article 4.7 has however been dubbed the "summarised version" of the balanced responsibilities under the Convention and this article has been invoked on a frequent basis by the developing countries' negotiators. It reads:

> The extent to which developing country Parties will effectively implement their commitments under the Convention will depend on the effective implementation by developed country Parties of their commitments under the Convention…[127]

Furthermore, the Convention has a number of other provisions for the commitments of different states.[128] The above provisions are the provisions which are in the UNFCCC and advance and support the incorporation of the 'principle of common but differentiated responsibilities and respective capabilities'.[129]

[121] Winkler & Rajamani (note 101 above) 104.

[122] UNFCCC Art 3.

[123] Deleuil (n101) at 274 and Winkler & Rajamani (note 101 above) 104.

[124] Article 4.3 UNFCCC.

[125] Art 4.4 UNFCCC.

[126] Article 4.5 UNFCCC.

[127] Art 4.7 of the UNFCCC.

[128] See also Art 4.8 and 4.9 of the UNFCCC.

[129] Winkler & Rajamani (note 101 above) 104.

5.4.4 The Kyoto Protocol

The Kyoto Protocol's Preamble clearly states that 'the Parties to this Protocol, being guided by Article 3 of the Convention'.[130] This is in direct relation to the CBDRRC principle that is found in the Convention in which the Protocol shows that it will follow the principles as outlined and defined in the Convention.[131] Article 10 of the Protocol further reaffirms and builds upon Article 4.1 of the UNFCCC by stating that:

> All Parties, taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances, without introducing any new commitments for Parties not included in Annex I, but reaffirming existing commitments under Article 4, paragraph 1, of the Convention, and continuing to advance the implementation of these commitments in order to achieve sustainable development, taking into account Article 4, paragraphs 3, 5 and 7, of the Convention, shall…[132]

The Protocol focuses mainly on the emissions reduction targets of member parties. In doing so, it imposes legally binding GHG emission targets on developed member parties (Annex I) and the rationale behind such a move was to allow developed country members to exercise leadership by making early reductions.[133] Basically, the way the Protocol adopted the CBDRRC was that provisions were drawn which created a line between the developed and developing country member parties. The result was that, with regards to the central obligations of the Protocol, developed country members were given targets and timetables for GHG mitigation while developing country members were not given any mandatory commitments under the first commitment period (2008-2012).[134] Furthermore, this interpretation is reflected in a number of provisions that appeal to the developed country member states to assist the developing member states in a number of ways including finance, technology and helping them to achieve their commitments. This interpretation has however

[130] Preamble of the Kyoto Protocol.

[131] This therefore specifies that the Kyoto P Protocol is to be guided by the Convention's Principles and Art. 3.1 of the UNFCCC in particular.

[132] Art 10 Kyoto Protocol.

[133] JC Dernbach 'Achieving Early and Substantial Greenhouse Gas Reductions under a Post-Kyoto Agreement' (2008) 20 *Georgetown Int'l Law Review* 592.

[134] L Rajamani (e) 'Differentiation in the Emerging Climate Change Regime' 2011 (14)151 *Theoretical Inquiries in Law* 155.

been dubbed controversial and proven to be contentious. It was opposed by a number of members resulting in countries such as the US' refusal to ratify the Protocol in 2001.[135]

The Protocol's model of the CBDRRC has been contentious and created some controversy. It has therefore played a central role in the negotiation of a future and new post 2012 climate change global agreement as shall be discussed below. The interpretation and trajectory that the negotiations have taken since the conference in Bali is of particular interest as shall be shown in the following section.

5.4.5 The COP interpretation then and now

The thesis will now focus on the recent COP/CMP meetings starting from Copenhagen in 2009 to Warsaw in 2013. It is however of paramount importance for this research to first mention what happened in Bali in 2007 as one cannot ignore the important developments of this conference that are reflected even in today's negotiation patterns. The Bali Action Plan (BAP) launched a process to reach an 'agreed outcome' and made a significant departure from the Kyoto Protocol premises that gave only developed countries/Annex I member states obligatory commitments by requiring developing country members to take measurable, reportable and verifiable nationally appropriate mitigation actions.[136] It has been argued that the BAP may have been carefully drafted to erode and do away with differentiation, and also to uplift symmetry which is also termed "parallelism" which exists between developed and developing member states.[137] It permits the developed and developing countries such as the USA and India to be subject to "nationally appropriate mitigation actions" in the future climate change regime and these actions will be voluntary and nationally tailored, measurable, reportable and verifiable thus placing them in the same bracket as opposed to the UNFCCC and mostly the Kyoto Protocol's interpretation.[138] Two years before the Copenhagen Conference were thus spent by the developed countries trying to achieve parallelism between developed and large developing country actions.[139] On the other hand, the developing countries hold the argument that any attempt to move away from the

[135] Shawkat *et al* (note 101 above) 56.

[136] Para 1 (b) (ii) of the Bali Action Plan.

[137] Rajamani (e) (note 134 above) 156.

[138] Ibid.

[139] Ibid at 157.

UNFCCC and Protocol's framework and interpretation of differentiation with regards to mitigation obligations, amounts to renegotiating and redrafting of the UNFCCC and the Kyoto Protocol[140] which they will not take lightly. It is therefore because of this difference in views that it comes not as a surprise that the differentiation debate formed and is still a central aspect the anticipated 2015 climate change agreement as will be discussed below.

5.4.5.1 Copenhagen 2009

As have been mentioned before, Copenhagen was meant to 'Seal the Deal' but the 192 members failed to reach a consensus during the negotiations at the Fifteenth Session of the UNFCCC Conference of Parties in Copenhagen (COP15\CMP5).[141] One of the central reasons why consensus was not reached in Copenhagen was the differentiation controversy, especially the lack of agreement on binding commitments for developing countries.[142]

The Copenhagen Accord, a non-legal outcome at the COP15\CMP5 to which a number of countries associated themselves, does not offer any guidance on the differentiation debate.[143] The Accord however described as a 'political necessity', continues to reflect the principle of CBDRRC in a very different manner than in the Kyoto Protocol[144] or rather it endorses differentiation but in a number of ways[145] that have been dubbed 'special' by some authors. Firstly, the Accord obliges Annex I countries to adopt targets whilst non-Annex I countries are only to implement mitigation actions.[146] The Accord has two appendices, one for developed countries' economy-wide emission 'targets', which will be subject to international MRV, the other for developing country 'actions,' which will be subject to international MRV only if a mitigation action receives international support and to national MRV otherwise.[147] It is of importance to note that for the first time, the major developing countries agreed to reflect their national emissions reduction pledges in an international instrument; to report on their GHG inventories and their mitigation actions in biennial national communications; and

[140] Ibid at 159.

[141] Shawkat *et al* (note 101 above) 56.

[142] Ibid.

[143] Rajamani (a) (note 9 above) 841.

[144] D Bodansky (b) (note 16above) 10.

[145] Rajamani (c) (note 25 above) 144; Rajamani (a) (note 9 above) 841.

[146] Para 4 and 5, Copenhagen Accord, 2009.

[147] Bodansky (b) (note 16 above) 10; Rajamani (a) (note 9 above) 842, See also Rajamani (e) (note 134 above) 145.

to subject their actions either to MRV (for internationally supported actions) or international consultation and analysis under clearly defined guidelines that will ensure that national sovereignty is respected (for domestically supported actions).[148] This seems like a rather modest achievement but its significance is that it represents the first time that these countries have accepted any type of internationalization of their national climate change policies.[149] Thus as modest as it seems, it is of paramount significance. This also marks the beginning of the breaking of the so called proclaimed 'firewall' which was said to exist between developed and developing country member parties as there was a significant shift especially by the biggest developing country emitters which include China, Brazil, India and South Africa.[150]

Thirdly, the language used to frame Annex I Parties' targets is prescriptive language as it states that, 'Annex I Parties commit to…'[151] On the other hand, the language used to frame non-Annex I mitigation actions is predictive and it reads 'Non- Annex I Parties…will implement…'[152] Moreover, non-Annex I mitigation actions are anchored in UNFCCC Articles 4 (1), and 4(7), and sustainable development.[153] Although the Accord envisages that such mitigation actions will be voluntary and on the basis of support only for least developed countries and Small Island states, many large developing countries have in their submissions emphasized that their submitted actions are undertaken on a voluntary basis[154] which would and has created problems as discussed later in the thesis.

There are also still however provisions that that the members still take into consideration the differences between developed and developing states capabilities especially with regards to meeting the GHG emissions reductions. A good example is one that reads 'developed countries shall provide adequate, predictable and sustainable and financial resources, technology and capacity building to support the implementation of adaptation action in

[148] Ibid.

[149] Ibid.

[150] Bodansky (b) (note 16 above) 10.

[151] Para 4 and 5 of the Copenhagen Accord; See also Rajamani (a) (note 9 above) 842; Rajamani (e) (note 134 above) 145.

[152] Para 5 of the Accord.

[153] Rajamani (a) (note 9 above) 842, See also Rajamani (e) (note 134 above) 145.

[154] Ibid.

developing countries'.[155] A number of initiatives under the Accord for example the Green Climate Fund[156] will also support projects in developing countries. This can be argued to still advance and be consistent with the CBDRRC the principle.[157]

Despite the Accord not giving guidelines on the CBDRRC principle, the above analysis on its content reflects how different member parties interpret the principle to their favour in negotiating. It is also clear that there have been strong attempts in removing the differentiation 'firewall' that exists between developed and developing member states and that the world is moving towards increased 'parallelism'.[158]

5.4.5.2 Cancun 2010

The Cancun Agreements are similar to the Copenhagen Accord in that they also fail to actually settle the debate on the nature of differential treatment between developed and developing countries in the post 2012 agreement.[159] The Cancun Agreements however do signal a shift towards greater parallelism between developed and developing countries in a number of ways.[160] First and foremost, they anchor the Copenhagen Accord into the UNFCCC process as they were adopted as COP decisions and since almost all of its content is at the heart of the Accord.[161] Secondly, they incorporate the Copenhagen Accord approach in that mitigation actions/targets are listed and taken note of terms of requirements related to mitigation actions/targets and to related MRV.[162] What this means is that the Cancun Agreements, like the Copenhagen Accord permit self-elected mitigation targets and actions by parties. [163] This aspect endorses differentiation however, this differentiation if for all parties rather than differentiation for developing countries only.

[155] Para 3, Copenhagen Accord, 2009.

[156]Para 3, 8, 10, Copenhagen Accord, 2009.

[157] Shawkat *et al* (note 101 above) at 56.

[158] Rajamani (a) (note 9 above) 842, See also Rajamani (e) (note 134 above) 145.

[159] Rajamani (b) (note 21 above) 511.

[160] Ibid.

[161] Rajamani (e) (note 133 above) 161.

[162] Para 5, Copenhagen Accord, 2009.

[163] Rajamani (e) (note 134 above) 161.

It is of interest furthermore to note the difference in the language used in the two documents. The Cancun Agreements, unlike the Copenhagen Accord, make use of identical framing language which is predictive language rather than prescriptive for both mitigation actions from developing countries and mitigation targets from developed countries.[164] On the other hand, the Copenhagen Accord made use of prescriptive language for developed countries and predictive for developing countries language to frame their commitments and actions respectively.[165] Therefore, the gradual shift towards parallelism is thus accompanied by a shift towards a less prescriptive and more predictive tone in relation to mitigation.[166]

In addition, Cancun strengthened the Copenhagen position that had deconstructed a link that existed between the MRV for financing and the MRV of mitigation by placing them in separate paragraphs and the effect of this in interpretation is that financing becomes a precondition of actions achieved by non-Annex I parties.[167] All of the above show how the road to parallelism from Bali has been cleared slowly but surely. Developing countries have thus taken several steps forward since Bali, Copenhagen and Cancun by agreeing to both list their actions and permitting in whatever form measurement, reporting and verification (MRV) of these actions.[168]

It is therefore summarised that the Cancun Conference followed the trend of doing away with the famous 'firewall' that had existed between the developed and developing countries in a number of aspects despite not actually settling the differential nature of obligations in the future and post 2015 agreement.

5.4.5.3 Durban 2011

The Durban Conference brought in some surprising changes with regards to the principle of CBDRRC and the whole equality debate.[169] In a very surprising and striking turn, the agreement reached in form of the Durban Platform makes no reference to the principle of

[164] Rajamani (b) (note 21 above) 503.

[165] Rajamani (e) (note 134 above) 161-162.

[166] Ibid at 161.

[167] Ibid at 162-163.

[168] Rajamani (c) (note 25 above) 144.

[169] D Bodansky (f) 'The Durban Platform Negotiations: Goals and Options' (2012) *Harvard Project on Climate Agreements Viewpoint* available at *http://ssrn.com/abstract=2102994* accessed on 2 November 2014, 4.

equality or the principle CBDRRC.[170] A number of indicators in Durban Platform show a possibility in the relaxing of the CBDRRC principle however. A good illustration of this is that the Durban Platform did not repeat the Convention's language that developed countries should "take the lead" in combating climate change.[171] It furthermore made no reference to developing or developed and also Annex I or non-Annex I parties, which were the categories for classification that had dominated under the regime thus far.[172] This may to a greater extent suggest that the position on differentiation relaxing as pushed by countries such as the US.[173] In support of that, Moncel quotes the US Climate Envoy Todd Stern who expressly stated that he was keen not to use any terms which could 'be read by others to perpetuate […] that firewall.'[174] It has been argued that the CBDRRC may have been incorporated in the Durban Platform implicitly under the statement 'applicable to all'.[175] The lack of an explicit reference to the principle should not be taken lightly however as this is a representation of a significant shift in how the Durban decision frames climate negotiations.[176]

The above arguments have been regarded by some as enough to conclude that the CBDRRC is about to be dropped especially after the Durban decision. As mentioned above, the Durban Platform embodies decisions that launched a work plan for enhancing mitigation ambition with a view to ensuring the highest possible efforts by all parties.[177] The recurrence of the phrase "applicable to all parties" which has been viewed as supporting the relaxing of the CBDRC is to be noted and can be viewed in a strict light.[178] It is of importance to note however that the UNFCCC and the Kyoto Protocol are both 'applicable to all parties' but they do not contain symmetrical commitments for all parties.[179] It can thus be argued that if one looks at the applicability of the UNFCCC and the Protocol's application that universality does not categorically amount to uniformity of application and this argument has been put

[170] Ibid at 4; See also Moncel (note 92 above) 10.

[171] Ibid Bodansky at 4.

[172] Ibid.

[173] Deleuil (note 103 above) 277.

[174] Moncel (note 92 above) 10.

[175] Para 2 of the Durban Platform.

[176] Bodansky (f) (note 169 above) 4.

[177] Paragraph 7 of the Durban Platform. See a quotation in Rajamani (c) (note 25 above) 508.

[178] Ibid Rajamani at 509.

[179] Ibid at 508.

forward by countries such as India and China.[180] The two have essentially offered a different interpretation of the Durban Platform particularly by relying on the fact that Paragraph 2 of the Platform stated that the new agreement would be 'under the UNFCCC' thus there is a need to respect principles within the UNFCCC including the CBDRRC.[181] They even strengthened their argument by stating that doing away with CBDRRC in such a way will be tantamount to amending the UNFCCC.[182] It is of paramount importance to note that these two are leading negotiators of the G77 and thus could influence a number of countries, especially most developing countries which if taken in total emit more GHGs, thus their position too cannot be taken lightly.

Furthermore, despite the so called 'explicit' absence of the CBDRRC in the Durban Platform that has been identified by many academics and analysts, there are still a number of possibilities that suggest the implicit inclusion of the CBDRRC in the Durban decision. Firstly this has been as noted above in the interpretation and secondly, the CBDRRC features can be noticed mainly in the decisions in its outcomes which incorporate differentiated obligations and assistance.[183] These also include the reporting obligations; review mechanisms which has two different systems including an 'international assessment of emissions' related to targets for Annex I parties; and an 'international consultation and analysis of biennial reports' for developing countries.[184] Importantly, on mitigation, the Durban decision like the Cancun Agreements creates a division between nationally appropriate mitigation commitments or actions by developed country Parties and nationally appropriate mitigation actions by developing country parties.[185] It is noticeable that the word 'commitment' only concerns developed countries. However, some emerging economies have agreed to take on commitments under a future agreement. The Durban decisions also recognize that some developing country parties are already contributing to global mitigation efforts which are in accordance with the principles and the provisions of the Convention.[186]

[180] Ibid.

[181] Moncel (note 92 above) 10.

[182] Rajamani (b) (note 21 above) 508.

[183] Deleuil (note 103 above) 278.

[184] Ibid.

[185] Para 60(c) of the Cancun Agreements LCA and Para 41(a) of the Durban LCA Decision; See Deleuil (note 103 above) 278; See also Rajamani (e) (note 134 above) 517-518.

[186] Ibid Deleuil.

This therefore shows how the role of emerging economies and developing countries in fighting climate change is growing.

It can therefore be concluded that despite the silence treatment being given to the principle CBDRRC especially after Durban, developing countries can still use the term 'under the Convention' found in the Durban decision and this can still offer them an avenue to engage the principles found in the Convention which include the CBDRRC in particular. Despite such a statement however, the lack of any explicit reference to the principle as well as the complete dropping of the 'Annex I/non-Annex I or developed and developing' countries distinction could be interpreted to represent a significant shift in how the Durban Platform decision frames the new round of negotiations, and in most instance the future climate change agreement, especially in the matters relating to differentiation.

5.4.5.4 Doha 2012

After the Durban Conference where the differentiation question had taken a surprising and unexpected twist, it would be natural to be curious as to how the debate would be treated in the next set of negotiations. At Doha, the member states managed to engage on the differentiation issue. They followed up on the Durban decision. Parties in Durban had agreed to develop 'a Protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all parties'.[187] The interpretation of the part where the agreement states it would be 'applicable to all parties' became the centre of discussions in Doha.[188] Parties had divergent views on how the new instrument would be 'applicable to all.'[189] The focus was also on what principles would be at the base of the new instrument and the CBDRRC was one of the main principles discussed and that would be at the base of such an instrument.[190] For some parties, the core of the matter lies in how to apply the CBDRRC not whether or not to apply the principle.[191] This raises a lot of questions on progress as parties seem to hold different views which could actually impact on the 2015 deadline,

[187] Para 2 of the Durban Platform.

[188] IISD (d) (n60) at 27; M Davide 'The Doha Climate Gateway: A First-Key Point Assessment' (2012) *Review of Environment, Energy and Economics* available at *http://www.feem.it/userfiles/attach/201212141236424Re3-M.Davide-20121214.pdf,* accessed on 25 September 2014, 3; See also

[189] Ibid IISD (d) (note 60 above) 27.

[190] Ibid; See also Davide (note 188 above) 3.

[191] Ibid IISD.

especially in agreement on real substance such as the differentiation issue. As a result, nothing much specifically with regards to the CBDRRC and its interpretation materialised from the negotiations except that the Doha decision[192] contained specific references to the 'principles of the Convention' which are found only in the in preambular recitals.[193] At the end of the Conference, Doha did not manage to give any meaningful direction on the level of differentiation or the interpretation of the CBDRRC principle in the new instrument. Authors such as Roberts thus described the outcome as an 'Alice in Wonderland-like experience' stating that it is 'a portal through which we fall to an unknown destination with unpredictable consequences.'[194]

5.4.5.5 Warsaw

After such a difficult meeting in Doha, Warsaw had modest expectations and the 'Alice in Wonderland' experience especially with the interpretation of the CBDRRC principle awaited negotiators. It is important to note that the Warsaw Conference marked the halfway point from the Durban Conference of 2011 that launched negotiations towards a 2015 climate agreement and the Paris Conference of 2015 which is the supposed deadline for these negotiations.[195] Probably to relieve the mounting pressure, the parties in the run-up to Warsaw had extensive discussions with the intention of trying to agree on what the Durban-born phrase 'applicable to all' meant.[196] They were also trying to find ways to reconcile the concept 'applicable to all' with the Convention's principles especially the CBDRRC principle.[197] Warsaw, in a surprise move then adopted the term 'contributions' instead of the usual term, 'commitments.'[198] This may be viewed as representing a division in views between the developed and developing country member parties.[199] Whether this adoption is

[192] Decision 2/CP.18 Preambular Recital 4.

[193] L Rajamani… *et al* 'Legal Principles Relating to Climate Change: Report of the International Law Association's Committee on Legal Principles Relating to Climate Change' (2014) *International Law Association - Washington Conference* available at *http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2461556,* accessed on 1 November 2014, 27.

[194] D Roberts 'Cities OPT in while nations COP out: Reflections on COP 18' (2013) 109(5/6) *SAJS* 2.

[195] L Rajamani (f) 'The Warsaw climate negotiations: Emerging understandings and battle lines on the road to the 2015 climate agreement' (2014) 63(3) *ICLQ*, 721.

[196] Fujirawa (note 65 above) 2.

[197] Ibid.

[198] IISD (e) (note 64 above) 29.

[199] Ibid.

destroying the 'firewall' and unifying developed and developing country member parties remains to be seen however.[200] Similar to the Doha Decisions, the Warsaw Outcome also does not have specific provisions relating to the CBDRRC principle, but also has specific references to the principles of the Convention just in its preambular recitals.[201] In conclusion therefore, Warsaw also did not provide solid direction on the cross-cutting issues of differentiation and equity in the new agreement despite it being viewed as a watermark Conference which marked the halfway point on the journey to the much anticipated new climate change agreement.[202]

5.5 PROGNOSIS OF THE NEW CLIMATE CHANGE AGREEMENT BASED ON THE ANALYSIS OF THE COP/CMP OUTCOMES

After a critical legal examination of the climate change negotiations' outcomes with regards to the fundamental legal issues above, the study now tries to give a possible prognosis of the new and awaited post 2020 climate change agreement as hinted by the negotiations' outcomes.

5.5.1 The possible form of the post-2020 agreement

As observed by this study, the present day climate change regime is made up of the UNFCCC which is an international treaty and its Kyoto Protocol which is a legally binding protocol.[203] At the beginning of the Post-Kyoto negotiations, three options were available and these were whether:

a) Kyoto Protocol was to be extended through the adoption of a second commitment period, with a new round of emission reduction targets for developed country parties?
b) A new agreement be adopted under the UNFCCC which addresses the emissions of countries that either are not parties to the Kyoto Protocol (the United States) or do not have Kyoto emissions targets (developing countries)? Or

[200] Fujirawa (note 65 above) 2.

[201] Decision 1/CP.19, 'Further advancing the Durban Platform' available at, *http://unfccc.int/files/meetings/warsaw_nov_2013/decisions/application/pdf/cop19_adp.pdf>,* Preambular recital 4; See Rajamani et al (f) (note 195 above) at 27.

[202] Rajamani et al (f) (note 195 above) 20-21.

[203] See section 5 Above.

c) Should a single new agreement be adopted that replaces the Kyoto Protocol and is more comprehensive in coverage, addressing both developed and developing country emissions?[204]

This was the departure period until Bali agreed to come up with an 'agreed outcome' which was to be finalised in 2009 at Copenhagen.[205] Copenhagen however failed to finalise the issues of the new agreement's form and neither did it define what the 'agreed outcome' would be but simply prolonged the discussion to Cancun.[206] Cancun also failed to make this fundamental decision as it was busy rebuilding the trust that had been lost at Copenhagen and thus extended the discussions.[207] A breakthrough was however made at Durban where the question of legal form was partially answered. Firstly, it was made clear that the Protocol would continue being in place until 2020.[208] Secondly, the Durban Outcome also agreed to:

> Launch a process to develop; a Protocol, another legal instrument or an agreed outcome with legal force under the UNFCCC applicable to all parties, through a subsidiary body under the Convention established and known as the *Ad Hoc* Working Group on the Durban Platform for Enhanced Action.[209]

Of the above three possible options, only a protocol is a traditionally known form of an international instrument. The other two still remain to be defined or at least be interpreted by the negotiators.[210] Unfortunately the two meetings after Durban held in Doha in 2012 and Warsaw 2013 have not done anything to define the Durban options or settle the form of the post 2020 agreement. As a result, the instrument will definitely be a new instrument which will be either another legal instrument or an agreed outcome. The interpretation so far is still yet to be officially attended to by the negotiators but possibilities on its legal nature have been explored by leading scholars as discussed above.

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[204] Bodansky (a) (note 7 above) 1. See section 5.1.2 above.

[205] See section 5.1.2 above.

[206] See section 5.2.1 above.

[207] See section 5.2.2 above.

[208] See section 5.2.3 above.

[209] Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action, UNFCCC Decision 1/CP.17, Dec. 11, 2011, UN Doc. FCCC/CP/2011/9/Add.1.

[210] For possible interpretation of the options, see discussion on section 5.2.4.

5.5.2 The possible architecture of the post 2010 agreement

The second fundamental legal question that this dissertation examined was the issue of whether the new climate change regime will adopt a top-down approach or a bottom-up approach as its regulatory approach for GHG emissions reductions. The study observed that the UNFCCC is made up of both approaches whereas the Kyoto Protocol contains a strong top-down approach as it sets emissions targets were set for developed country member parties alone for the period 2008-2020.[211] Since the launch of the Bali Action Plan's agreement to come up with an 'agreed outcome' in 2009, the question of what architecture the new agreement would take became one of the central legal issues. Firstly, an attempt to settle this in Copenhagen was made by the Copenhagen Accord which allowed states to self-elect their targets and actions and inscribe them in the Appendices which were provided in the Accord.[212] The Accord however does not have a legal standing in the UNFCCC process as it was not adopted but simply 'taken note of' thus one cannot really settle on it since it failed to garner enough support to get consensus. At Cancun however, the parties legitimised the bottom up approach which had been launched by the Copenhagen Accord as the Cancun Agreements which were adopted and incorporated aspects of the Copenhagen Accord aspects.[213] At Durban, a generalised view of the outcome reflects a bottom-approach as Durban agreed to implement the 2009 Copenhagen Accord and the 2010 Cancun Agreements.[214] Despite the scholarly arguments stating that Durban may be viewed as a departure of a blended approach, this cannot be settled upon from a scholarly analysis with not much backing from the adopted decisions' provisions.[215] Furthermore, Doha simply urged developed country parties to increase the ambition of their emission reduction targets to levels scientifically recommended.[216] This highly suggests that it endorsed self-proclaimed pledges as its predecessors thus leaning towards a bottom-up approach. Warsaw also strengthened the bottom-up approach by making a decision that invited all parties to 'initiate or intensify domestic preparations for their intended nationally-determined contributions' and to communicate them well in

[211] See section 5.3.2 above.

[212] See section 5.4.1 above.

[213] See section 5.4.2 above.

[214] See section 5.4.3 above.

[215] Ibid.

[216] See section 5.4.4 above.

advance of COP 21 in Paris, by the 1st quarter of 2015.[217] This implies its strengthening of self-proclaimed pledges thus certifying the bottom-up approach.

From the above examination of the recent five COP/CMP negotiations, it is strongly evident that the Kyoto top-down strong approach is being abandoned for a bottom up self-proclaimed pledge system. The only problem is that the pledges made so far fall short of the scientifically required amount of reductions. The COP may face a dilemma of calling for intensified pledges which may not be a pure bottom-up approach but rather a blended approach. It however can be concluded that the post 2020 instrument may to a greater extent, adopt a bottom-up approach.

5.5.3 Nature of differentiation in the post 2020 agreement

Finally, the interpretation of the CBDR principle and issues of differentiation in the new instrument were examined. The study observed a pattern of development of the principle of CBDR right from its incorporation into the UNFCCC. The Kyoto Protocol further made a division creating a line between developed and developing country member parties in the sense that with regards to the central obligations of the Protocol, developed country members were given targets and timetables for GHG mitigation while developing country members were not given any mandatory commitments under the first and second commitment periods.[218] The negotiations towards a new climate change agreement have not provided a UNFCCC or Kyoto Protocol straightforward interpretation of the nature of differentiation. In fact, this aspect has become the most controversial and most contested and a central aspect of the negotiations.

In Copenhagen, the Accord produced two appendices, one for developed countries' economy-wide emission 'targets', which will be subject to international MRV; the other for developing country 'actions', which will be subject to international MRV only if a mitigation action receives international support and to national MRV.[219] Furthermore, the Accord uses different language for mitigations. For Annex I targets it uses prescriptive language whereas for non-Annex I mitigation actions there is use of predictive language.

[217] Decision, CP19, Further Advancing the Durban Platform; Section 5.4.5 above.

[218] See Section 5.5.4 above.

[219] See section 5.6.1 above.

All this shows the shift from the old interpretation where Annex I parties only had mitigation targets. Non-Annex I also take actions too under the Accord thus differentiation is only now in the implementation. The absolute 'firewall' seems to have been done away with. The little differentiation does not hide the fact that all members now take some kind of action in reducing their GHG emissions. One may however argue that it is not wise to settle on the Accord's interpretation since it does not have a legal standing in the UNFCCC process. However, the Accord received confirmation from the Cancun Agreements s which incorporated the Accord into the UNFCCC process.[220] Cancun even went further by using the same predictive language for both Annexes to show the deconstruction of the firewall that had existed between the developed and developing countries in a number of aspects. This does not however really settle the differential nature of obligations in the future and post 2020 agreement.

The Durban Platform in a very surprising and striking turn makes no reference to the principle of equality or the principle CBDRRC.[221] This has been interpreted by some scholars as suggesting that differentiation in the UNFCCC process no longer exists. This however cannot go unchallenged as the Durban Agreement proposed to negotiate a Protocol, another legal instrument or an agreed outcome with legal force under the UNFCCC 'applicable to all' parties.[222] The phrase 'applicable to all parties' have been put forward to support the end of differentiation. However, the phrase 'under the Convention' has been argued by leading scholars like Rajamani as a salvation for major developing countries as that means they can invoke the principles of the Convention and the CBDRRC is of course one of them.[223] In fact, they argue that the CBDRRC has been tacitly incorporated into the UNFCCC process again in that phrase. This however remains subject to further negotiations but one cannot hide from the fact that greater parallelism is being pushed for in the UNFCCC process. As a result, Doha's central focus was on how the new instrument was going to be 'applicable to all.' Some member parties argued that the only question was how to apply the CBDRRC not whether to or not to apply it as they said the term 'under the Convention' must be interpreted to include the principle.[224] Doha

[220] See section 5.6.2 above.

[221] See section 5.6.3 above.

[222] Ibid.

[223] See argument in section 5.6.3 above.

[224] See section 5.6.4 above.

however in the end failed to give any meaningful direction on the level of differentiation or the interpretation of the CBDR principle in the new instrument. In Warsaw, negotiators attempted to find ways how to reconcile the concept 'applicable to all' with the Convention's principles especially the CBDR principle[225] which they however did not achieve. In short therefore, the Warsaw negotiations also failed to produce solid results relating to the nature of differentiation of obligations in the new instrument.

The study therefore examines the recent climate change negotiations in light of the CBDR principle and what they suggest the principle will be interpreted in the post 2020 agreement. One striking feature is that the traditional division or firewall between developing and developed country members has been done away with as all parties are expected under the new agreement to take some form of action. The remaining question is therefore how their mitigation actions will be differentiated according to their respective capabilities as per the Convention. This however also remains to be defined or interpreted. An analysis of the recent negotiations however suggests that the new instrument will give emissions targets to all members alike, these may differ in burden if the developing parties invoke the principles of the Convention. In conclusion, the negotiations have from the adoption of the UNFCCC, Kyoto Protocol and into the negotiation of a post 2020 agreement resulted in the development, evolution and elaboration of the CBRD principle and this still happening by each meeting. The negotiations have however not managed provide solid direction on the cross-cutting issues of differentiation and equity in the new agreement despite the 2015 deadline drawing closer.

5.6 CONCLUSION

The chapter gives a legal analysis of the recent five climate change negotiation meetings outcomes. It examines how by trying to settle the fundamental questions within the regime which include the form and architecture of the future climate regime; the approach likely to be adopted by the climate change regime between a bottom up or a top down approach; and the interpretation of the nature and extent of differential treatment between developed and developing states in such an instrument have actually affected the legal evolution of the climate change regime and the actual future climate change regime. The chapter observed that on the question of the 'form' of the post 2020 agreement, the UNFCCC parties have not

[225] See section 5.6.5 above

yet reached a settled agreement. They argue as to whether to agree on an agreement that is legally binding or not since major developing countries are not willing to take up legally binding emissions reductions as yet because they know the legal consequences of such an instrument. The chapter on the question of the architecture of the post 2020 agreement observed that negotiators again are in contention as to whether to maintain the Kyoto Protocol's top-down approach or to shift towards the bottom-up approach. The latter approach however seems to have been gaining momentum since Copenhagen despite the fact that the pledges the member parties are offering to make are not enough to achieve the long-term aspirational goal which is to limit temperature rise to no more than 2 degrees Celsius. As a result, member states are still yet to settle this issue although pointers are highlighting a chance of shifting to the bottom-up approach. Lastly, on the question of differentiation which seems to be the most contested issue, the members are working towards parallelism that is reflected under the Protocol. Despite that fact however, it seems like the applicability of the new instrument may vary according to different countries as the members are yet to still come up with the working definition of 'applicable to all' that is housed in the Durban decision. Developed counties seem to be favouring a shift to absolute parallelism but major developing countries still want a measure of differentiation, possibly in the applicability of the new instrument. In all, the principle CBDR has not remained untouched as it has shifted to become CBDRRC in the UNFCCC. It seems it will be very visible in the new instrument by just being interpreted differently; this will most probably be in the applicability of provisions in such an instrument.

PART 5: CONCLUSION

CHAPTER SIX: CONCLUSION

"Let us just agree to disagree then"[1]

6.1 INTRODUCTION

The dissertation exemplifies the significant issues within the climate change regime and its solution seeking process under the UNFCCC annual negotiations. Chapter one introduces the subject matter, the research questions and objectives. Chapter two defines what climate change is, identifies the causes and potential impacts and consequences of global climate change. It also identifies the climate problem and discusses potential solutions to the climate problem. The thesis takes a position in this chapter and states mitigation of greenhouse gases (GHGs) as the most preferable solution. Lastly it ascertains the reasons why international law and international environmental law in particular has been the chosen route to address this complicated problem. Chapter three introduces the international climate change regime. It gives the history of institutional development and then discusses and analyses the UNFCCC and the Kyoto Protocol. The Kyoto Protocol came as an aid to the UNFCCC so as to strengthen mitigating of GHG emissions. An examination of the two instruments identified gaps within the UNFCCC that were filled by the Kyoto Protocol. A further analysis of the two instruments especially the Kyoto Protocol further revealed more shortcomings that still need to be addressed by the COP/CMP. An analysis of the Kyoto Protocol's potential influence on the new climate change agreement was lastly discussed. Chapter four gives a brief summary of the climate change conferences from COP15 to COP19 with a special focus being a discussion on the significant events that transpired during these meetings and the main provisions of the outcomes, especially the provisions directly related to mitigation of GHG emission. Chapter five which is the core section is a legal analysis of the recent five COP/CMP meetings' outcomes as they try to settle the outstanding fundamental questions in developing a new post-2020 climate change agreement. These fundamental legal questions include the legal form of the future climate regime, the legal architecture or approach that is likely to be adopted by this new agreement between a bottom up or a top down approach in regulating GHG emissions and finally the interpretation of the nature and extent of

[1] This is an English expression used if two people agree to differ, or agree to disagree, they accept that they have different opinions about something and stop trying to change each other's opinion. See *https://www.englishclub.com/ref/esl/Idioms/Quizzes/Mixed_2/agree_to_differ_agree_to_disagree_139.htm,* accessed on 10 November 2014.

differential treatment of commitments between developed and developing states in such an instrument. An analysis of the possible routes the negotiations are directing towards agreeing on the new instrument as hinted by the decisions was done, and a prognosis of what the long awaited new legally binding instrument may look like was attempted. This chapter (chapter six) will summarise the findings on all the issues raised and discussed.

The central research question this dissertation intended to answer was "to what extent has the annual climate change negotiations contributed to the legal evolution and shaping of the future climate change regime or agreement"? This thesis worked through the central research question by posing a number of sub-questions in its chapters. To this effect, the findings of this research have been divided into four sections and the division flows from the structural discussion of the research question and its sub-questions as follows:

6.2 Summary of findings

6.2.1 Urgent need to address global climate change

In response to the first sub-question that was raised in this thesis, Chapter 2 concludes that there is urgent need to act primarily in mitigating of GHGs so as to avoid or delay maximum consequences of global climate change.[2] Despite the uncertainties that exist scientifically on the extent of damage and when the damage will exactly transpire, ample and sound scientific evidence and consensus that supports the need to act now strongly exists.[3] Climate change consequences such as increase in temperatures, an increase in precipitation and a serious decrease or an unprecedented increase in sea level rise will result if timeous and adequate action is not taken and these will negatively impact billions of people and mostly from developing nations.[4] Finally, this Chapter concluded that legal instruments are favored as a way to formulate a solution because they provide solid principles that have the ability to compel countries to act responsibly as well as holding the same countries responsible for their actions.[5] They also provide assurance and insurance that the states involved will do their best in meeting their commitments.

[2] See Chapter 2 section 2.2.1.

[3] See Section 2.2.7.

[4] See section 2.2.4.

[5] See section 2.3.

6.2.2 *Inadequate and non-effective current international climate change regime on mitigation of GHGs*

In answering the second question, this thesis concludes that despite being in existence for a number of years, the current international climate change regime on the central aspect of GHG mitigation is inadequate and non-effective in a number of ways as indicated below:

(i) The first instrument that this thesis introduced was the UNFCCC which has as its ultimate objective to stabilize atmospheric GHG concentrations.[6] Being the first instrument, one cannot expect it to be a complete silver bullet to the problem at hand. The thesis observed that the Convention despite creating a positive first step in bringing over 196 nations to the table to discuss a complex issue as climate change still falls short of its own objective as it creates vague commitments regarding stabilisation of GHGs and also has no specific commitments at on reduction of GHGs.[7] That became its main weakness.

(ii) The second instrument that the thesis discussed is the Kyoto Protocol to the UNFCCC which claims to uphold the Convention's objective.[8] In trying to uphold the Convention's objective, the Protocol was created to fill the gap that the Convention had on GHG mitigation commitments.[9] The Protocol then put a burden on the developed or Annex I member parties to cut back their emissions of GHGs by a total of 5% below the 1990 levels between 2008 and 2012 and this was extended to 2020.[10] Despite its attempt to cover the gap left by the UNFCCC, the Protocol's major flaw as observed by this thesis was imposing quantified emissions only to developed member parties which only covered about two thirds of all GHG emissions which has become less than this today as other countries left the Protocol.[11] The inadequate GHG emissions were not the only observed flows of the Protocol as there were a number of weaknesses which include gaps in terms

[6] See Chapter 3 section 3.3.1.

[7] 3.3.1.4.

[8] See Chapter 3 section 3.4.1.

[9] Ibid.

[10] See section 3.4.3.

[11] See section 3.5.1.

of how the flexible mechanisms were be implemented and also inadequate provisions on implementation and enforcement of its mechanisms.[12] To cover its flaws, the COP/CMP meetings since 2005 started working on developing a new instrument which would be effective in a way that it would cover an ample amount of emissions. Despite its flows however, the protocol thesis observed that it was probably a needed small step to the big journey which as it became significant and this has been proven by the way its structure has been the centre of the COP/CMP negotiations and a possible build up for a new climate change agreement.[13]

The thesis concluded that the current climate change regime was a step in the right direction at the time of adoption. However, today the climate change regime is highly inadequate especially on GHG emissions reductions commitments and also non-effective environmentally as the covered GHG emissions cannot help in staying below the required 2 degrees Celsius. This therefore calls for the need of a new agreement which the parties agree with hence the annual negotiations happen to cater for this major flow in the regime.

6.2.3 *A general lack of meaningful mitigation-effective decisions on the recent international climate change negotiation decisions*

Given the number of issues the climate change conferences deal with, this thesis was limited to GHG mitigation based negotiations and decisions. As in Chapter 2 this thesis identified mitigation as the best and cheaper option to prevent climate change. The thesis focused on the recent meetings which include the period 2009-2013 in Chapter 4. In response to the second sub question, the thesis confirms that the recent annual climate change negotiation meetings despite the sense of urgency to act and produce meaningful and effective GHG mitigation related decisions. This means that they are short of the Convention's supposed objective if they are strictly viewed.

In coming to this conclusion, this thesis gave a brief outline of events of the recent five climate change conferences, their outcomes/decisions and finally an analysis of these

[12] Ibid.

[13] See Section 3.6.

meetings. Firstly, the thesis observed that in Copenhagen in 2009, the result was a non-legally binding agreement; the Copenhagen Accord which failed to garner the support of all members available thus there was no consensus on adopting it.[14] Despite the Accord's acknowledgement of the need to take serious cuts in GHG emissions, it failed to either quantify the cuts needed to reach the 2 degrees Celsius goal or indicate how the burden would be shared between states.[15] The main weaknesses of the Accord was that it is not legally binding and the developed countries that decided to take commitments under the Accord are not legally bound and further, countries pledge what they can make on their own and if all the pledges made are taken into account, they are too weak to stay under the required 2 degrees Celsius target.[16] In 2010 at Cancun, nothing much materialised except for formalising and adoption of what had been agreed at in Copenhagen. Cancun like Copenhagen also acknowledged the need for deep cuts in GHG emissions but still did not clarify on the issue of how and in what time frames this goal was to be achieved.[17] In 2011 in Durban, a decision to continue with the Kyoto Protocol was made[18] and this implies that the GHG emissions reduction targets of 2005 are now in effect up to 2020, and even less since a number of countries withdrew from the Protocol's second commitment period which leaves the Protocol even much weaker than before. In 2012 at Doha apart from confirming that the Protocol's second commitment period would last to 2020 the negotiators simply urged members to adopt more ambitious emission reduction targets.[19] By Doha, about 85 countries including developed and developing countries had signed up and made their pledges to reduce GHG emissions since the Copenhagen Agreement.[20] This thesis however observed that these pledges are unclear and have been made conditionally and were also established to be too low to achieve the scientifically recommended below 2 degrees Celsius rise.[21] Finally in 2013 at Warsaw, a number of decisions with regards to mitigation of GHG emissions were reached. First, the decision with a timeframe was proposed and agreed for parties to communicate

[14] See Chapter 4 section 4.4.8.

[15] See section 4.4.7.

[16] Ibid.

[17] See section 4.5.4.

[18] See section 4.6.4.

[19] See section 4.7.4

[20] Ibid.

[21] Ibid.

their 'intended nationally-determined contributions' by March 2015.[22] In addition, the REDD+ mechanism decision which seeks to keep the world's remaining forests standing and this reduces emissions from deforestation and degradation.[23] These decisions however were observed to be inadequate just like their predecessors.

All in all, the thesis came to a stern conclusion that despite the UNFCCC and Kyoto Protocol member parties meeting annually ever since the coming of the Kyoto Protocol into action so as to strengthen the GHG emissions targets, the recent five decisions and pledges made by individual countries under these outcomes are not enough in putting the world on the path to avoid a 2 degrees Celsius temperature increase in this century.

6.2.4 *Vague, imprecise and uncertainty in decisions intended to settle the fundamental legal cleavages needed to agree on the new climate change agreement*

Chapter 5 discussed the central question of this dissertation and in trying to respond to the main research question, the dissertation identified and looked at three fundamental legal questions which the climate change meetings have been trying to answer to ever since Bali in 2007. These will now be summarised in turn.

Firstly, on the question of the form of the post 2020 agreement, the thesis observed that this fundamental question has not been settled as yet and that the recent five meetings have failed to agree on the exact form of the post 2020 agreement, for example whether the agreement should be legally binding or not. The only pointer that exists so far has been provided by the Durban outcome which made a decision to negotiate 'a protocol, another legal instrument or an agreed outcome with legal force'. However, the options available under the Durban outcomes are unprecedented in international law.[24] The protocol option was removed in favour of the other two which still remain to be defined or at least be interpreted by the negotiators.[25] Unfortunately the two meetings after Durban held in Doha in 2012 and Warsaw 2013 have not done anything to shed light on the Durban options or settle the question of

[22] See section 4.8.3.

[23] Ibid.

[24] D Bodansky (d) 'Evaluating Durban' (2011) Available at *http://opiniojuris.org/2011/12/12/evaluating-durban/*, accessed on 20 September 2014.

[25] For possible interpretation of the options, see discussion on chapter 5 section *5.2.2.4.*

form of the post 2020 agreement. It seems like only time will tell whether the awaited agreement will be legally binding or not as the two options have attracted different interpretations and definitions as observed by this dissertation.[26]

Secondly, on the question of the architecture of the new instrument as in which approach between the top-down approach or the bottom-up approach as its regulatory approach for GHG emissions reductions will adopt, the study observed that the decisions suggest that the new instrument will most likely adopt the weak bottom-up approach. The decisions showed strong evidence of an evolution of abandoning the Kyoto top-down strong approach and leaning more towards the self-proclaimed pledge and review system.[27] The only remaining challenge however is that the pledges made so far fall short of the scientifically required amount of reductions thus the COP may face a dilemma as to how it can make a calling for intensified pledges. The main question that now remains is how to make sure that pledges made are strong enough so as to limit the global climate change to 2 degrees Celsius.

Finally, the quest to settle the differentiation issue under the principle CBDR also still remains unsolved. An analysis of the recent negotiations from Copenhagen however shows a trend of moving away from the traditional differentiation and drawing closer to parallelism which suggests that the new instrument will have emissions reductions provisions for both developed and developing member states alike.[28] The degree of this differentiation is however yet to be defined. The dissertation's analysis of the negotiations also suggest that the new instrument will give emissions targets to all members alike but these may differ in burden if the developing parties invoke the principles of the Convention as they continue to do. Conclusively, the negotiations have from the adoption of the UNFCCC, Kyoto Protocol and into the negotiations of a post 2020 agreement resulted in the development, evolution and elaboration of the CBRD principle. As this still happens at each meeting, one wonders what the post 2020 agreement will finally settle on. The negotiations have however not managed to provide solid direction on the cross-cutting issues of differentiation and equity in the new agreement despite tthe 2015 deadline drawing nearer.

[26] See section 5.5.1 above.

[27] See section 5.5.2 above.

[28] See section 5.5.3 above.

6.3 CONCLUSION

More than two decades after the adoption and coming into force of the UNFCCC and almost a decade after its Protocol also came into force, the question as to what happens next in the path of trying to combat global climate change remains a concern. The climate change negotiations under the UNFCCC have provided the platform to answer such an important question. There is however no gainsaying the fact that in negotiating and attempting to come up with a global climate change solution, the decisions adopted during the negotiations have resulted in the development, evolution and elaboration of certain principles in international law and international environmental law.[29]

The climate change regime currently is still in disarray despite the world expecting a fully-fledged new agreement by 2015 (which should take effect from the year 2020). Despite the nearing of the due date, a number of fundamental questions still remain partially answered or unanswered at all. It therefore becomes a case of time will tell as the negotiating process has been 'stuck in perpetual stasis'.[30] What the parties agree on though is that for them to avert further serious climate destabilisation, deep cuts in global GHG emissions are urgently required so as to keep the global temperatures from rising beyond 2 degrees Celsius. However, an analysis of the mitigation of GHG emissions related decisions by the recent five negotiations observed that the negotiations except for extending life of the Protocol in 2011 at Durban tried to come up with GHG emissions targets but they all fall short of the required ambition. It was also observed that the negotiations have moved on a string of decisions that encourages countries to determine their own mitigation targets as done at Copenhagen and confirmed in Cancun, Durban, Doha and Warsaw despite the reality that the pledges fall short of the required emissions cuts to stay below 2 degrees Celsius.[31] This therefore renders all the recent climate change negotiations a failure in this regards, which happen to be the ultimate objective of the Convention.

With regards to the three fundamental issues that received the central attention of this study, the dissertation observed that decisions adopted during the negotiations have resulted in the

[29] A Gilder 'Climate Change negotiations as a source of legal dynamism' 2014 *Without Prejudice,* 1.

[30] Ibid.

[31] See Chapter 4 of this dissertation above.

development, evolution and elaboration of certain principles in international environmental law to a greater extent despite failing in settling these outstanding cleavages. What the future climate change agreement needs is to create binding commitments and quantified emissions reduction commitments for developed countries and a compromise of targets for major and economically strong developing countries as well as some voluntary targets for the LDCs.[32]

It might also be time to start thinking or opting for alternate solutions. It is common cause that an agreement with ambitious GHG emission commitments is the ultimate goal. The ADP under the UNFCCC is still a good platform to build upon what is in existence thus far under the regime and to negotiate a more comprehensive international agreement that covers all aspects of the UNFCCC and allows for holistic approaches (an example is a hybrid of systems rather than sticking to the traditional ones)[33]. The major challenges will include how to achieve fairness in the targets set for Parties while taking into account the constraint-based perspective of the UNFCCC; determination of an approach or approaches to commitments consistent with UNFCCC principles; integration of operational mechanisms already established under the UNFCCC; and an appropriate legal form that balances wider participation with a higher level of binding obligations.

In conclusion therefore, the climate change meetings have no doubt by trying to negotiate towards a post 2020 agreement and by making attempts responding to the fundamental issues within the climate change regime have to a greater extent resulted in the development, evolution and elaboration of certain principles in international environmental law such as the principle of CBDR. However, the fundamental legal

[32] J Dickason The evolution of the climate change regime after the Copenhagen Accord (unpublished LL.M thesis, North-West University).

[33] For discussion on hybrid architectural approaches and the interplay between differentiation see: L Rajamani 'The Warsaw Climate Negotiations: Emerging understandings and the battle lines on the road to the 2015 climate agreement' (2024) 63(03) Int & Comparative LQ 721-740. For hybrid approaches within the legal form issues see: X Ngwadla, A C Abeysinghe & A Freitas, 'The 2015 Climate Agreement: Lessons from the Bali Road Map' 2013 available at *http://www.eurocapacity.org/downloads/2015ClimateAgreement.pdf*, accessed on 5 December 2014; See also D Bodansky 'Issues for a 2015 climate agreement' 2014 *Center for Climate and Energy Solutions* available at *http://www.c2es.org/publications/issues-2015-climate-agreement,* accessed on 07 December 2014.

questions under the climate change regime still need to be resolved so as to come up with a new and effective climate change agreement.

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