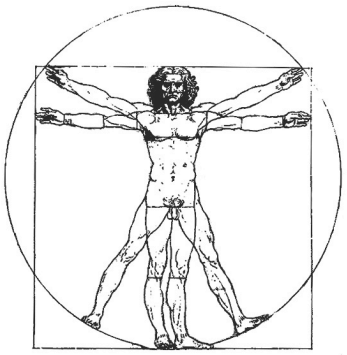
European Capacity Building Initiative
www.eurocapacity.org



ecbi background paper

The Role of Political Agreement in a Legally Binding Outcome

Nick Flynn and Nicola Peart

November 2010

Acknowledgments:
This work has been made possible through funding support to the ecbi from the **UK Department of International Development (DFID)**.

About the authors:

Nick Flynn is an environmental lawyer at international law firm, Weil Gotshal & Manges. He is a founder trustee of Advocates for International Development ("A4ID"), a charity providing free legal advice for the achievement of the Millenium Development Goals. He is also a trustee of the charity, Global Giving, an internet platform for donating to development projects. He is a director of the Legal Response Initiative ("LRI") mentioned below and the Campaign for an International Court for the Environment (the "ICE Coalition").

E-mail address: nick.flynn@weil.com

Nicola Peart is a graduate in Natural Sciences from the University of Cambridge and in Environmental Economics from Imperial College London. She is currently a Lord Haldane and Hardwicke scholar at Lincoln's Inn and is studying at the College of Law, London.
E-mail address: cnpeart@googlemail.com

The authors are both members of the LRI a capacity building initiative established to provide legal support in relation to the UN climate change negotiations.

The LRI's purpose is to provide free, high-quality and real-time legal support to developing country and NGO delegations at the UNFCCC negotiations in an attempt to level the playing field. It has no political agenda, and aims to provide only clear, objective, legal advice with no policy slant.

Table of Contents

1. Executive Summary

In the UNFCCC negotiations parties have been debating whether a 'legally binding' or a 'politically binding' outcome is appropriate. The degree to which any agreement will bind its signatories is clearly an important factor in its negotiation. The issue affects the extent to which the obligations and rights that flow from the agreement can be said to be effective in practice and to have real force. By 'effective' rights and obligations, we mean, ones to which a reasonable expectation of their being fulfilled and/or honoured can be attached.

It appears that there is disagreement among UNFCCC delegates about how effective a 'legally binding' obligation or right is compared to one that is merely 'politically binding' and that parties are not using these terms consistently. The resulting uncertainty may ultimately hamper efforts to conclude a comprehensive UNFCCC agreement on binding emissions reductions either at COP 17 or thereafter.

We examine the role of political bindingness in a legally binding outcome and how these terms interact and overlap in practice and why this may give rise to uncertainty. It is important neither to overstate the significance of mere legally binding form nor to underestimate the relevance of political factors. They are both key qualities of effective legal rights and obligations having real force. Furthermore, such rights and obligations typically combine these two aspects with a further vital quality – clear and unambiguous language.

To illustrate the above, we compare the application of the concepts of 'legally binding' and 'politically binding' in the domestic and international law contexts. It is, in our view, easier to combine these elements in order to create an effective right or obligation under domestic law than it is at the international level. We therefore explain why assumptions about the impact of legally binding form and political bindingness which are based on domestic experience are potentially misleading in the context of the UNFCCC discussions. Likewise, we consider why expectations of strong compliance and enforcement based on domestic experience may also be misleading in that context.

We conclude that, in order to be effective, any UNFCCC outcome is likely to require a different combination of politically and legally binding ingredients than would be necessary at domestic level. We suggest a minimum degree of political bindingness is always required in order for any right of obligation to be effective in the domestic or international context. However, political bindingness is, in our view, a necessary but not sufficient quality and we believe that the most effective rights and obligations will be found in an agreement which not only has broad political support, but is also legally binding and expressed in clear and unambiguous language.

The combination of legal binding form, broad political support and clear language is likely to be the most powerful expression which the international community can give to rights and obligations. It signifies that parties intend to be bound in the strongest possible

way at the international level, even if that degree of bindingness is likely to give rise to different expectations about how rights and obligations may be fulfilled compared to domestic law. And it provides the most appropriate context in which the terms of rights and obligations can be described with clarity and precision and in which effective compliance and enforcement mechanisms can be developed, even if those mechanism's use remains dependent on consensus.

2. Form and Substance

"*There is certainly confusion amongst not only delegates, but also the public, on what 'legally binding' is and what it is not…"*

Andrew Gilder, Director at IMBEWU Sustainability Legal Specialists, January 2010

"*There is suddenly some noise about moving away from a legally binding agreement, but this is really only a US argument….virtually everyone else is still standing by the necessity of a legally binding agreement*,"

Peet du Plooy, Trade and Investment Advisor at WWF SA, January 2010

Mitigation actions by India under the Copenhagen Accord are "voluntary in nature and not in the nature of legally binding commitments."

Letter from Prime Minister of India Manmohan Singh to the Prime Minister of Denmark Lars Rasmussen, January 2010

"The term 'legally binding' has become a touchstone of sorts in international climate policy… But what does 'legally binding' even mean?"

Hannah Chang, State Of The Planet Blog, Columbia University, January 2010

"It is not so much that we're calling on China or India to make legally binding commitments now. What we're saying is we will do legally binding commitments only if they do. If they're not ready to do it, its not so much that we're criticising that, its just that we say, if that's where we are globally, then we need to push forward on the kind of politically binding structure that we're doing now and we're comfortable with that."

Todd Stern, U.S. negotiator, Cancun, December 2010

The above quotations reflect the importance attached to the concept of 'legally binding' agreements and also the uncertainty surrounding the meaning of those terms. Such uncertainty is not surprising. Their meanings are not susceptible to easy definition and they interact and overlap. They are in no sense mutually exclusive and, in practice, any effective legal right or obligation will not only have legally binding form but will also possess a minimum degree of 'political bindingness', or substance, in order to give rise to a reasonable expectation that it will be honoured and/or fulfilled.

For example, there are arguably different cultural attitudes to paying taxes in certain jurisdictions compared with others. This could be said to be at least in part due to the existence of a different political consensus in various jurisdictions on the need to respect tax law. As George III of England discovered on the loss of the American colonies,

effective tax laws ultimately require a degree of consensus on the level and type of taxation which is appropriate in order for them to be accepted. The particular degree of consensus is likely to vary according to local factors.

The meaning of 'politically binding' is, however, highly elusive and subjective. Possession of a 'legally binding' quality is, at least in part, a question of form dependent on expression in treaty, statute, judicial pronouncement or other recognised source. Possession of 'political bindingness' is, however, largely subjective. A right or obligation possesses this quality if there is a consensus among interested parties that it does so.

In our view this elusive 'politically binding' quality is a necessary ingredient of any effective law, whether international or domestic. Legally binding form will normally need to be supported by a minimum degree of political bindingness in order to be effective, but we acknowledge the difficulty of explaining exactly 'what' it is that is required and 'how much' of this elusive quality is needed. We suggest that the answer to the questions of 'what' is required and 'how much' is typically clearer in the domestic law context than in the international one. Domestic law requires only a relatively narrow form of 'political bindingness' whereas international law requires the support of a broad political consensus among states. Furthermore, 'legally binding' form itself is arguably more readily identifiable in the domestic context. This combination of narrow political bindingness and easily identified legal form in the domestic context tends, in our view, to lead to more definite and reasonable expectations that relevant rights and obligations will be honoured and/or fulfilled. It also has the potential to mislead those who assume that the same factors apply at the international level.

Although we emphasise the importance of political consensus, we do not suggest that 'political bindingness' is sufficient in itself for establishing the most effective rights and obligations. Combining it with legally binding form indicates agreement to be bound in the strongest possible fashion and gives scope for the terms of such rights and obligations to be defined with clarify and precision.

The importance of understanding how such concepts operate in the domestic context is that this is level at which most people, including UNFCCC negotiators, directly experience the law. Assumptions and perceptions about the impact of the concepts of 'legally binding' and 'politically binding' which are gained in the domestic context have the potential to influence and mislead thinking at the international level. Any UNFCCC outcome, however, is likely to require a different combination of 'legally binding' and 'politically binding' qualities than would be necessary at the domestic level in order to be effective.

3. Examples of politically and legally binding agreements

A few examples demonstrate some of the difficulties in analyzing the impact of international agreements' legally and politically binding qualities.

3.1 UNCED

The UN Conference on Environmental Development (UNCED) in Rio in 1992 produced a number of agreements of varying legal and political character. The UNFCCC and the Convention on Biological Diversity were legally binding formal treaties whereas the Rio Declaration, Agenda 21 and UNCED forest principles were not legally binding.

3.1.1 The Rio Declaration

The Rio Declaration on Environment and Development is a non-binding set of 27 principles to guide cooperation on and development of international law in the field of sustainable development.

Principle 3 of the Declaration provides that the "*right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations.*" This was controversial at the time, being the first time that the right to development had been affirmed in an international instrument adopted by consensus[1].

Principle 4 provides a balance to principle 3 by stating that "*in order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it*."

Principle 7 outlines in general terms the concept of 'common but differentiated responsibilities.'

The Rio Declaration is an attempt to reflect the consensus on the appropriate balance between environmental and development concerns which existed in 1992 and it represented a compromise between developed and developing country views. The Declaration uses relatively normative language; for example, the words "must" and "shall" in principles 3 and 4. There is, however, in such a non-binding agreement deliberately no formal means of ensuring that relevant commitments expressed in such terms will be honoured. These commitments rely entirely for their force on the degree of real political support across a broad range of parties to determine their chances of being achieved. This is, of course, very difficult to measure. The Declaration's long-term impact will be debated, but Sands, for example, comments that "*although it is non-binding, some provisions reflect rules of customary law, others reflect emerging rules, and yet others provide guidance as to future developments.*"[2] The Declaration provided the context against which the legally binding UNFCCC was agreed and the political consensus expressed within it has also arguably influenced subsequent developments.

[1] Sands, Principles of International Environmental Law, 2nd ed, p55

[2] Sands, Principles of International Environmental Law, 2nd ed, p54

3.1.2 UNFCCC

The UNFCCC is a legally binding international convention, agreed at Rio, and provides the legislative framework within which the present UN climate change negotiations take place.

Article 2 of the UNFCCC provides that the ultimate objective of the Convention is to achieve "…. *stabilisation of the greenhouse gas incentivsations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system*."

All the parties to the Convention undertake general commitments in order to fulfil the objective of Article 2 and these are set out in Article 4(1). This provides that, taking account of their common but differentiated responsibilities, the parties should, *inter alia*, develop national inventories of anthropogenic emissions by sources and formulate programmes to mitigate climate change and facilitate adaptation to it.

Developed country parties undertake specific commitments in Article 4(2), namely that they should adopt national policies and measures on the mitigation of climate change by "*limiting [their] anthropogenic emissions of greenhouse gases*" and protecting their sinks and reservoirs in a way that "….*will demonstrate that developed countries are taking the lead in modifying longer-term trends in anthropogenic emissions consistent with the objectives of the Convention*…..".

Although legally binding, it rapidly became clear that the above commitments would need to be strengthened if any progress on emissions reductions was to be made. Efforts to address this issue have involved a mixture of legally binding and non-binding measures which have, as discussed below, achieved mixed results.

3.2 POST UNCED DEVELOPMENTS

3.2.1 Kyoto Protocol

The first Conference of the Parties of the UNFCCC in Berlin in 1995 ("COP1") agreed that the above commitments in UNFCCC Articles 4(1) and 4(2) were not adequate. Although the Convention is legally binding, the commitments in 4(1) and 4(2) are expressed in such a way as to make it very simple for a party to fulfil its obligation merely by drawing up a programme or policy or inventory regardless of how effective that is. Where action is required, such as "*limiting [their] anthropogenic emissions*" the UNFCCC provides little or no detail on what is required to be done or what the specific goal is. Consequently, COP 1 provided negotiators with the 'Berlin Mandate' for strengthening these commitments. This led to the adoption of the Kyoto Protocol at COP3 in 1997, which committed developed country parties to a timetable for quantified emissions reduction targets, with a view to reducing their overall emissions of

greenhouse gases by at least 5% below 1990 levels in the commitment period 2008 to 2012.

In order to achieve this overall commitment various developed country parties took on specific and definite commitments. The EU agreed to an 8% reduction on emissions as against emissions in the base year of 1990. The US agreed to a 7% reduction. Japan and Canada agreed to a 6% reduction.

In comparison to Articles 4(1) and 4(2) these are specific and tightly drafted legally binding commitments. Subject to accurate data being available, it should therefore be reasonably clear whether or not they have been fulfilled. Satisfaction of the obligation cannot be achieved merely by drawing up a policy or inventory or creating a committee; it requires concrete action to achieve emissions reductions. Having said that, it is arguable whether a significant number of parties can be said to be fully honouring their commitments under the Kyoto Protocol. The US did not ratify the Protocol and does not consider itself bound by it. Canada has exceeded its emissions limits by a significant margin and its government does not appear to intend to take action on that. Japan may be closer to achieving its targets, but it argued at Cancun that there should be no further commitment periods under Kyoto. Notwithstanding the legally binding emissions reduction commitments on developed countries under the Protocol, global greenhouse gas emissions have continued to rise.

Although it predates the UNCED, we note here that the legally binding 1987 Montreal Protocol to the 1985 Vienna Convention for the protection of the Ozone, has arguably been significantly more successful at achieving real emissions reductions than the Kyoto Protocol. This may be because all parties, not just developed countries, agreed to reduce their use and production of ozone-depleting substances which may have created a broader political consensus in its support. Such broad political support for legally binding obligations for all parties, combined with precisely framed obligations, has given the rights and obligations under the Montreal Protocol real effect.

3.2.2 The Copenhagen Accord

The expectations for COP 15 in Copenhagen in 2009 were initially that it would produce a legally binding comprehensive treaty to address the threats associated with latest climate change science. As it became increasingly clear that significant obstacles stood in the way of achieving such an agreement, expectations were downgraded and leading figures began to talk about achieving a politically binding agreement instead. An acrimonious conference closed without a legally binding comprehensive agreement and with the COP merely taking note of, rather than adopting, the brief and non-binding Copenhagen Accord. The Accord marked a departure from the Kyoto Protocol principle that legally binding emissions reductions should be required from developed countries alone and it invited all parties to submit their own voluntary non-binding mitigation pledges in the months after the conference.

Although the Accord saw the US and China agreeing for the first time to the need to keep temperature rises to below 2 degrees and provided for significant amounts of fast start funding for adaptation and mitigation by developing countries, it was merely a statement of political intent by a small group of approximately 30 countries and it was arguable in December 2009 whether it had enough support to be regarded even as politically binding. However, since then more than 180 countries have submitted their voluntary mitigation pledges under the Copenhagen Accord.

For example, the US's non-binding mitigation pledge under the Accord is to cut its emissions "*in the range of 17%, in conformity with anticipated US energy and climate legislation, recognising that the final target will be reported to the Secretariat in light of enacted legislation*." The relevant legislation is presently stalled in congress and facing considerable opposition. We can contrast this with the US's commitment under the Kyoto Protocol to make definite and quantified emissions of 7% as against a 1990 base year by the period 2008 to 2012. The latter, placed within the framework of clear and precise treaty obligations would be less likely to allow the US opportunity for subsequent re-interpretation and revision of its obligations in comparison with the US's Copenhagen Accord commitment. Of course, the US's Kyoto Protocol commitment, clear and specific as it was, never became legally binding because of a lack of political support in Congress that led to its failure to ratify the Protocol.

3.2.3 Cancun Agreements

COP 16 in Cancun produced COP decisions that have been described as 'anchoring' the non-binding mitigation pledges of the Copenhagen Accord into the UNFCCC process. This has been portrayed as a significant step on the path to turning such pledges into legally binding commitments at COP 17 in Durban. The language of the relevant COP decision "*takes note*" of the quantified emissions reductions to be implemented by developed countries (pursuant to their voluntary Accord pledges) and "*recognizes*" that Intergovernmental Panel on Climate Change ("IPCC") advice requires developed countries as a group to reduce emissions in the range of 25-40% below 1990 levels by 2020[3]. It also "*takes note*" of the nationally appropriate mitigation actions to be implemented by developing countries (pursuant to their voluntary Accord pledges)[4].

The inclusion of this language in the COP decision is significant because it is the first time during the UNFCCC negotiations that developed and developing country emissions reductions have been on the table at the same time. It has not however transformed the non-binding nature of the Copenhagen Accord pledges. We do not address here the wide debate on the factors necessary to render a COP decision or its content legally binding, but would comment that although the language used at Cancun, in which the parties 'take

[3] Decision [1]/CP16 (Ad Hoc Working Group on Long-term Co-operative Action), paragraphs 36 and 37; Decision [1]/CMP.6 (Ad Hoc Working Group under the Kyoto Protocol), paragraphs 3 and 4.

[4] Decision [1]/CP16 (Ad Hoc Working Group on Long-term Co-operative Action), paragraph 49

note' of and 'recognize' non-binding commitments, may represent a significant political step forward, it does not alter the non-binding nature of the Accord pledges. The challenge of delivering a comprehensive and legally binding treaty on emissions reductions remains.

3.2.4 Analysis

The examples above suggest that politically binding agreements at the international level can have a real impact but that there is likely to be considerable uncertainty about their effect. Goals will tend to be broad and loosely defined, with the means to achieve them being at the discretion of participants, as under the Copenhagen Accord. The adoption of legally binding form does not necessarily alter this. The UNFCCC emissions reduction goals were couched so broadly that a need for greater clarity and precision was swiftly identified. The Kyoto Protocol provided this clarity and precision, but has prompted significant political tensions which have arguably undermined its effectiveness in delivering the agreed reductions.

We will discuss the underlying reasons for the fact that legally binding agreements at the international level are susceptible to being undermined by lack of political support, but we suggest that they nevertheless remain the best forum for requiring meaningful action of parties and for describing in precise terms what that action should be, notwithstanding the difficulties in the international sphere in holding a reluctant party to account for a failure to honour its commitments.. The Kyoto Protocol has been controversial, but it, and other less controversial agreements such as the Montreal Protocol, have provided the driver for real action on emissions reductions in many countries and regions in a way that would be unlikely as a result of a merely political agreement.

4. International and domestic law

As discussed, an analysis of the effectiveness of rights and obligations in the domestic context is helpful in understanding their effectiveness at the international level. Many of the consequences attaching to the possession of legally binding form either do not apply at international level, or have a weaker effect, and this is relevant to why parties to international agreements may feel able to disregard the requirements of legally binding agreements such as the Kyoto Protocol, in certain circumstances, in a way that is far less easy for the ordinary citizen to disregard the national law. It is important to bear these differences in mind when considering what the practical effect of a legally binding outcome at COP 17 would be.

In considering the different balance of political and legal elements which we suggest is required to create effective rights and obligations in the domestic and international law contexts, we should start by emphasising that these areas of law developed to serve very different purposes and they are different in practical effect.[5] Domestic law typically

[5] Akehurst, Modern Introduction to International Law, chapter 1

serves the needs of the state in regulating relationships between numerous subjects and a relatively strong central government. International law serves the needs of the international community of a limited number of sovereign and equal states plus a small number of international institutions.

4.1 Relevance of centralised authority

One fundamental difference for the purpose of comparing the effectiveness of rights and obligations under domestic and international law is the typical presence in a domestic state of a strong central authority or government which has the power to identify what is legally binding and to enforce it, and the absence of such an entity in the international sphere. This difference has an impact on what 'legally binding' and 'politically binding' each mean at the domestic and international level. The degree of political consensus which is required for any domestic law to be effective typically becomes narrower in scope and easier to identify than is the case under international law. In addition, a reasonable expectation that rights and obligations will be fulfilled and/or honoured becomes easier to sustain and the significance that can be attached to mere legally binding form alone becomes greater than in comparison with the international context.

4.2 Degree to which 'politically binding' is required

For a right or obligation to be effective and to have real force in either context, it is suggested that it should ideally possess both 'legally binding' and 'politically binding' qualities, but that a minimum degree of political bindingness is always required. These elements are, however, required to different degrees depending on whether domestic or international law is involved.

A much narrower form of 'political bindingness' is required to give a right or obligation force at the domestic level than in the international. To be effective a domestic right or obligation having legal form must also possess at least a minimum degree of political support from the central authority in control of the machinery of state. That central authority can up to a point, if it wishes, ignore any lack of broader political support within the state for a law and this combination of legal form and narrow 'political bindingness' can be sufficient to give it real force. Those subject to the resulting laws do not, in these circumstances, have the choice of opting out of their scope in the way that the US did with the Kyoto Protocol.

In international law, by contrast, a broad degree of political support is required for any right or obligation to be effective. The subject matter of such rights and obligations may well involve complex and controversial trans-boundary issues, such as climate change, that require sustained global co-operation to be addressed effectively. International law is based on consensus and reciprocity among states that are, at least in principle, on an equal footing with each other, but who are likely to have differing national priorities and concerns in connection with a subject matter such as climate change. No central

authority exists whose narrow political support is sufficient by itself to give any measure force in the absence of broader political consensus. Legally binding form in this context must, therefore, be complemented by a 'politically binding' quality in the broadest sense of the term in order for any right or obligation to be effective.

This politically binding quality is, however, in our view necessary but not sufficient by itself for international law to be meaningful. It is the legally binding element that provides the most appropriate context for precision and clarity regarding the content of the relevant rights and obligations, as demonstrated in the Kyoto and Montreal Protocols, the latter of which the US has ratified and consented to be bound by.

4.3 Impact of legally binding form

The political support for a measure and its legal form can be more closely identified with each other at the domestic than the international level. A national government can reflect its political support for a measure merely by allowing it to have or retain legally binding form so that it benefits from that form's direct association with the machinery of state, such as legislature, courts and state agencies, that can give effect to it. This association can give the measure real force even in the absence of any broader supporting consensus. In this domestic combination of 'legally' and 'politically' binding, the 'legal form' can be very much to the fore and easy to identify while the political element can be forgotten. It is easy to assume that any 'force' such a domestic measure has is dependent on its legally binding form alone.

This is not the case in the international law context. The existence of the minimum political requirement at international law is not based on a central state authority allowing a measure to take the benefits of legally binding form, but rather the existence of broad consensus among many sovereign and equal states that the particular measure should bind. Once these states have taken the step of reflecting that consensus in legally binding form, there are limited if any mechanisms to give that measure real effect or force should any party depart from the consensus. Hence, the strength of that effect, therefore, rests directly on the existence of the intangible quality of consensus and not on any association with the power of any legislature, courts or state agency . While in the domestic context it may be tempting to assume that the force of any measure is derived from its legally binding form, this assumption is even more misleading in the international context. A significant part of any measure such as the Kyoto or Montreal Protocol's force in international law depends simply on intangible qualities that are more difficult to define and detect than they are in the domestic context and this means that parties ultimately retain a degree of discretion regarding whether they will submit to such measures that is simply lacking for subjects in the domestic sphere.

That is not to say, however, that legally binding form is not important at international law. It may require a greater degree of political bindingness than domestic law in order to be effective, but it is still the more appropriate context in which to include precise and clear language and suitable compliance mechanisms.

5. Compliance and enforcement

The concepts of compliance and enforcement are also applied differently in the international or domestic context. The potential for compliance and enforcement tends to be much weaker in international than in domestic law. This is the result of the absence in the former of the strong central authority with the power to enforce its will which is a typical feature of the latter. This does not mean that international law is inferior to or any less legal than domestic law. It merely reflects the fact that the two forms of law have very different histories and were developed to serve wholly different purposes. The difference does again affect what 'legally binding' and 'politically binding' each mean at the domestic and international level and make it easier to identify these qualities at the domestic level. And again it affects both the reasonableness of expectations that rights and obligations will be fulfilled and/or honoured as well as the significance that can be attached to mere legal form alone in each scenario.

Compliance with domestic law may occur for a variety of reasons, but ultimately rests on the fact that there are typically relatively non-negotiable and serious consequences for disobedience. A relatively strong expectation of compliance and enforcement is arguably perceived by many subjects of the law as an important quality attaching to any right or obligation's 'legal' nature and also as something which differentiates the 'law' from mere socially and politically binding convention. The prospect of enforcement by courts and states agencies gives considerable force, and increases the reasonableness of expectations that rights and obligations which possess legal form will be fulfilled and/or honoured. Merely 'politically binding' measures are not associated with specific and clear compliance and enforcement consequences. It remains easy to assume that the effectiveness of any measure is strongly associated with its legally binding form.

Compliance at the international level, by contrast, is based on cooperation, consensus and reciprocity rather than any ultimate power of compulsion. There are few, if any, non-negotiable consequences for breach and consequently only a relatively weak expectation of compliance and enforcement. Such expectations are not directly relevant to whether rights or obligations possess the quality of 'law' or political convention. The key factor in determining whether any international agreement is formally 'legally binding' depends simply on the extent to which the parties use language which makes clear their intention to be legally bound.

The subsequent effectiveness of any such international agreement does not depend heavily on the existence of mechanisms for enforcement that are based on legislatures, domestic courts and state agencies which have a strong association with legal form. Compliance mechanisms and courts do exist at international law. The Kyoto Protocol compliance mechanism[6] and the International Court of Justice are examples. International compliance mechanisms sit most naturally within a framework of legally binding rights and obligations in which the requirements for fulfilling them, and the

[6] [Marrakech Accords, [ ]]

consequences of failure to do so, can be set out with precision and clarity. Such consequences might involve, for example adjustments to a party's targets or a loss of voting rights or other sanctions. Compliance mechanisms are strengthened by the existence of international fora which have the formal power to give rulings regarding interpretations of the agreed rules. Such mechanisms and fora are not suited to merely 'politically binding' agreements in which the parties are, almost by definition, determining that their agreement should not have such formal consequences. Nevertheless, regardless of mechanism or fora, compliance or obedience in the international context cannot be as easily compelled as a national government can compel a subject. Ultimately a state will comply with international law only because it agrees to do so and, regardless of whether such agreement is enthusiastic or reluctant or in response to a fear of reprisals, this is largely a political consideration. Legally binding form may be the most suitable form in which to describe clear and precise consequences for non-compliance with internationally agreed measures, but the effectiveness of international law remains highly dependent on intangibles such as the existence of broad consensus among sovereign states that are difficult to define and detect.

6. Language

An agreement which is 'legally binding' in international law must not only possess a broad 'politically binding' quality, however difficult that is to define, in order for rights and obligations flowing from it to have real effect or force in practice. A further element is also required, namely clear and unambiguous language.

The choice of words used in any agreement is likely to significantly affect its impact. Weak and ambiguous language will undermine the effectiveness of any agreement regardless of its legal form. Such language can be included in both legally or politically binding agreements. Its effect is the same in both cases: it potentially provides flexibility and discretion regarding how any commitment should be implemented and allows a party scope to avoid obligations while, at the same time, making it difficult for such a party's critics to identify clear examples of failure to honour the agreement.

Use of terms such as "shall/will/agree/commit" can make it easier to identify when parties are failing to honour a commitment than if vaguer, more aspirational terms such as "should/may/consider/plan to/intend" are used. Such language promotes clarity, certainty and predictability.

As we have seen, the legally binding UNFCCC language expressed in Article 4(2) in terms of developed country parties "*limiting [their] anthropogenic emissions of greenhouse gases*" and protecting their sinks and reservoirs in a way that "*….will demonstrate that developed countries are taking the lead in modifying longer-term trends*

in anthropogenic emissions consistent with the objectives of the Convention….." was subsequently regarded by the parties as too imprecise to be effective.[7]

This imprecision was addressed in the Kyoto Protocol, article 3(1) of which provides that developed country parties "*shall individually or jointly, ensure that their aggregate anthropogenic carbon dioxide equivalent emissions of [greenhouse gases] do not exceed their assigned amounts."* A formula was provided to convert the percentage emissions reduction commitments against the 1990 base year, for example the EU's 8% reduction, into an assigned amount or quantity of emissions to be permitted for each relevant party during the period 2008-2012[8]. The use of language such as 'ensure' combined with the degree of precision concerning permitted assigned amounts of emissions provides a clear framework against which fulfilment or otherwise of obligations can be assessed.

The US's non-binding mitigation pledge under the Copenhagen Accord is to cut its emissions "*in the range of 17%, in conformity with anticipated US energy and climate legislation, recognising that the final target will be reported to the Secretariat in light of enacted legislation*." Of course, the US did not ratify the Kyoto Protocol, but in comparison with its Kyoto target of a 7% reduction in emissions against a 1990 base year, to be translated into assigned amounts for the period 2008-2012, the US's Copenhagen Accord pledge gives it considerably more discretion about what its obligation should be.

The language of the COP decision in Cancun 'taking note' of the Copenhagen Accord pledges such as those made by the US and 'recognising' that conformity with IPPC advice on climate change would require developed country parties to reduce emissions 'in the range of 25-40%' against 1990 levels by 2020 is a political advance on the Copenhagen Accord, but does not render its pledges legally binding or give them the precision and clarity that is arguably needed to promote effective action on emissions reduction.

The degree of discretion which the language chosen makes available to parties to an agreement is a key issue, as is the underlying political and factual context. Where a consensus exists that urgent and specific action is required, language that defines and mandates obligations with clarity and precision is likely to be most effective and 'legally binding form' is, in our view, the most suitable vehicle for such language.

---

[7] A broad discretion is not necessarily incompatible with fundamental and legally binding treaty obligations. For example, Article 5 of the NATO Treaty of 4 April 1949 expresses a fundamental NATO principle, namely that an attack on one member is an attack on all. In the event of such an attach, each NATO member undertakes to maintain the security of the NATO area by taking "such action as it deems necessary, including the use of armed force."

[8] Kyoto Protocol, article 3(7)

7. Conclusions

It is harder in international law than in domestic law to determine what combination of 'legally binding' and 'politically binding' qualities is needed to give any agreement real force and effect. The presence in the domestic context of relatively strong central authorities and robust mechanisms for compliance and enforcement has a number of consequences which do not transfer simply into international law. One consequence is that in domestic law it is typically easier to generate a reasonable expectation that rights and obligations will be honoured and/or fulfilled than it is in international law.

Another consequence is that this expectation that rights or obligations will be honoured is often strongly associated with legally binding form at the domestic level and that the required element of narrow political bindingness there may be overlooked. The reasonableness of any such expectation under international law, by contrast, is very much more dependent on the existence of the essentially political and intangible quality of broad consensus. This is, as suggested above, a highly elusive quality. It cannot be captured merely by a form of words. However, although this political element is necessary, we do not think it sufficient by itself for truly effective rights and obligations.

Those arguing for a merely 'politically binding' agreement are, by definition, proposing that there should be no formal compliance or enforcement mechanism and are relying on the ability to create and sustain a broad consensus which will necessarily involve a considerable degree of discretion on the part of states as to how goals should be achieved. It is for delegates to judge whether this is an adequate response to the complex and long-term problems that are the subject of the UNFCCC discussions.

Those arguing for a 'legally binding' agreement should, though, recognize that legally binding form's effect is considerably weaker at the international than at the domestic level. It does not, in combination with only a minimum 'politically binding' element, give rise to strong expectations that rights and obligations will be honoured. Instead, such expectations at the international level require the existence of a strong and broad degree of consensus. Legally binding form is, nevertheless, the most appropriate context into which to insert the language and the compliance mechanisms which support truly effective rights and obligations.

Provided the language used is clear and unambiguous and the parties are collectively prepared to give effect to that language, legally binding form is likely to be the most powerful expression which the international community can give to rights and obligations. It signifies that they intend to be bound in the strongest possible way at the international level, even if that degree of bindingness is likely to give rise to different expectations about how rights and obligations may be fulfilled compared to domestic law. And it provides the context in which effective compliance and enforcement mechanisms can be developed even if those mechanism's use remains dependent on consensus.

This essentially political, difficult to define and unavoidable requirement for strong and broad consensus does distinguish international law from domestic and makes separation of 'legally binding' from 'politically binding' extremely difficult. They overlap and interact and the UNFCCC outcome having the most powerful effect is, in our view, likely to be one which possesses both qualities alongside clear and unambiguous language.

Contact:
Postal Address: 57 Woodstock Road, Oxford, OX2 7FA, UK
Phone +44 (0) 1865 889 128, Fax: +44 (0) 1865 310 527
e-mail: admn.ocp@gmail.com