



LAW  
ENVIRONMENT AND  
DEVELOPMENT  
JOURNAL

# LEAD

## THE BALI FIREWALL AND MEMBER STATES' FUTURE OBLIGATIONS WITHIN THE CLIMATE CHANGE REGIME

Christopher Smith

ARTICLE



VOLUME  
6/3

*LEAD Journal (Law, Environment and Development Journal)*  
*is a peer-reviewed academic publication based in New Delhi and London and jointly managed by the*  
*School of Law, School of Oriental and African Studies (SOAS) - University of London*  
*and the International Environmental Law Research Centre (IELRC).*

*LEAD is published at [www.lead-journal.org](http://www.lead-journal.org)*

*ISSN 1746-5893*

*The Managing Editor, LEAD Journal, c/o International Environmental Law Research Centre (IELRC), International Environment  
House II, 1F, 7 Chemin de Ballexert, 1219 Châtelaine-Geneva, Switzerland, Tel/fax: + 41 (0)22 79 72 623, [info@lead-journal.org](mailto:info@lead-journal.org)*

## ARTICLE

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Christopher Smith

We live in a political world  
Where love don't have any place  
We're living in times where men commit crimes  
And crime don't have a face

*Bob Dylan*

This document can be cited as  
Christopher Smith, 'The Bali Firewall and Member States' Future  
Obligations within the Climate Change Regime',  
*6/3 Law, Environment and Development Journal* (2010), p. 284,  
available at <http://www.lead-journal.org/content/10284.pdf>

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# 1

## INTRODUCTION

The United Nations Framework Convention on Climate Change (the Convention) is a legally binding multinational environmental treaty with the objective of stabilising greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system 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.<sup>1</sup> The Conference of the Parties (COP) is the institution established by the Convention which shall, according to the Convention itself, make, 'within its mandate, the decisions necessary to promote the effective implementation of the Convention'.<sup>2</sup> The Bali Action Plan is one such decision, made by the COP at its 13<sup>th</sup> session held in Bali in 2007. It launched a process to reach an agreed outcome at its 15<sup>th</sup> session, held in Copenhagen in 2009, by addressing a number of critical issues which were detailed in the decision.<sup>3</sup> This process is conducted under a subsidiary body under the Convention known as the Ad Hoc Working Group on Long-term Cooperative Action (AWG-LCA).<sup>4</sup> The Bali Action Plan confirms that the aim of this process is to 'enable the full, effective and sustained implementation of the Convention'.<sup>5</sup> The Bali Action Plan is therefore, by its nature as a COP decision, an instrument to enable the implementation of the Convention. It reaffirms this aim within its own text.

The Bali Action Plan contains two subparagraphs that set out broadly the parameters within which future possible legal obligations pertaining to developed and developing Parties regarding the mitigation of climate change are to be addressed as part of the process launched by this decision. These constitute in part the

critical issues detailed in the decision and are the focus of the analysis of the Bali Action Plan in this essay. One subparagraph deals with future possible legal obligations regarding the mitigation of climate change pertaining to developed country Parties and the other deals with future possible legal obligations regarding the mitigation of climate change pertaining to developing country Parties. The content of each subparagraph differs and therefore a fundamental difference in the future possible legal obligations pertaining to developed and developing country Parties is pre-defined within the Bali Action Plan. This difference, as it is perceived by most developing country Parties, has become known colloquially as the Bali firewall. It is important to note that the obligations in question relate only to the mitigation of climate change, other aspects relevant to future obligations, for example adaptation, are not covered. This article will set out the content of the pre-defined sets of parameters and investigate the basis for this content, and difference in content in relation to the other, in the provisions and principles set out in the Convention. It will then conclude on the validity of the Bali firewall in terms of the content of the Convention. Additionally it will analyse whether the 'outcome' of the 15<sup>th</sup> Conference of the Parties falls in line with the future legal obligations of member states within the climate regime as perceived by most developing country Parties in terms of the Bali firewall.

As aim of the process launched by the Bali Action Plan is to enable the implementation of the Convention it is necessarily part of the broader process of negotiations under the Convention, the objective of which is the overall objective of the Convention, therefore this article will also analyse member states' future legal obligations within the climate change regime in the context of the overall objective of the Convention and the changing situation of the Parties over time.

# 2

## PRINCIPLES OF THE CLIMATE CHANGE REGIME

The Convention is predicated on a number of fundamental principles and, in theory, the detailed

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1 United Nations Framework Convention on Climate Change, New York, 9 May 1992, 31 *Int'l Leg. Mat.* 849 (1992), Article 2.  
2 *Id.*, Article 7(1) & (2).  
3 Bali Action Plan, Paragraph 1, Decision 1/CP.13, in Report of the Conference of the Parties on its thirteenth session, held in Bali from 3 to 15 December 2007, FCCC/CP/2007/6/Add.1 (2008).  
4 *Id.*, Paragraph 1.  
5 *Id.*, Paragraph 2.

content of the Convention should be a natural extension of these principles. Therefore, in order to make our initial comparison, it is necessary for us to identify the principles that are relevant to the future legal obligations of developed and developing countries regarding the mitigation of climate change and compare their expression within the paragraphs comprising the Bali firewall and the Convention in order to ascertain to what extent the Bali firewall has a basis in the Convention. Although principles are nebulous in nature and content,<sup>6</sup> convincing arguments can be made to draw parallels between legal instruments.

The basic principles of the climate change regime are the precautionary principle, the principle of common but differentiated responsibility (CBDR), and sustainable development. The precautionary principle - an attempt to codify the concept of precaution in law,<sup>7</sup> - if applied, should ensure a level of caution is being taken in the setting of the substantive rules within the climate change regime. The CBDR principle refers to the use of norms that provide different, presumably more advantageous, treatment to some states.<sup>8</sup> This principle forms the basis for the differential treatment embodied in the Bali firewall and derives from the notion that climate change is the common concern of humankind,<sup>9</sup> the differing contributions of states to climate change and their differing circumstances.<sup>10</sup> Sustainable Development is in essence a concept that attempts to balance economic and social development and the imperative of operating within environmental limits. However where that balance lies is the subject of a great amount of uncertainty and debate. In truth the requisite knowledge is not available to predict exactly where the balance lies, so we must feel our way to a certain extent.

It is important to also look further at the nature of the legal instrument being used to transmit principles.

According to Rajamani COP decisions are neither legally binding, in the formal sense, nor capable of creating substantive new obligations.<sup>11</sup> In addition to the fact that COP decisions, unlike treaties, cannot bind, the burden sharing arrangement cannot be fundamentally altered through COP decisions.<sup>12</sup> COP decisions, seen in these terms, are a conduit for the will of the Convention.

### 3 FUTURE POSSIBLE LEGAL OBLIGATIONS PERTAINING TO DEVELOPED AND DEVELOPING COUNTRY PARTIES AS PER THE SUBPARAGRAPHS COMPRISING THE BALI FIREWALL

The subparagraphs comprising the Bali firewall are phrased as follows. The Bali Action Plan states the intention of the COP to address, amongst other things, enhanced national / international action on mitigation of climate change, including, inter alia, consideration of:<sup>13</sup>

(1)(b)(i) Measurable, reportable and verifiable nationally appropriate mitigation commitments or actions, including quantified emission limitation and reduction objectives, by all developed country Parties, while ensuring the comparability of efforts among them, taking into account differences in their national circumstances.<sup>14</sup>

(1)(b)(ii) Nationally appropriate mitigation actions by developing country Parties in the context of sustainable development,

6 L. Paradell-Trius, 'Principles of International Environmental Law: an Overview', 9 *Rev. Eur. Community & Int'l Envtl. L.* 93, 96 (2000).

7 Jonathan Wiener, 'Precaution', in Daniel Bodansky, Jutta Brunnee and Ellen Hey eds, *The Oxford Handbook of International Environmental Law* 597 (Oxford: Oxford University Press, 2007).

8 L. Rajamani, 'The Nature, Promise and Limits of Differential Treatment in the Climate Regime', 16 *Yearbook of International Environmental Law* 81 (2007).

9 *Id.*, at 97.

10 *Id.*, at 100.

11 L. Rajamani, 'Addressing the 'Post-Kyoto' Stress Disorder: Reflections on the Emerging Legal Architecture of the Climate Regime', 58(4) *International and Comparative Law Quarterly* 803, 813 (2009).

12 *Id.*, at 814.

13 See Bali Action Plan, note 3 above, Paragraph 1.

14 *Id.*

supported and enabled by technology, finance and capacity-building, in a measurable, reportable and verifiable manner;<sup>15</sup>

The attributes of the future possible legal obligation parameters regarding the mitigation of climate change are therefore as follows for developed country Parties as per subparagraph (1)(b)(i):

- They must encompass nationally appropriate mitigation commitments or actions
- The mitigation commitments and actions encompassed within them must be measurable, reportable and verifiable
- The mitigation commitments and actions encompassed within them must include quantified emission limitation *and* reduction objectives
- The mitigation commitments and the actions encompassed within them must apply to *all* developed countries, but they do not need to be identical for all developed countries, they need to ensure comparability of efforts among developed countries taking into account differences in national circumstances.

On the face of it, it would appear that the nationally appropriate mitigation commitments or actions must include a binding commitment to cap emissions and also a binding commitment to reduce the absolute value of emissions now or at some time in the future. The text is not explicit as to whether these must cover the whole economy or specific sectors, or perhaps specific sectors at first building up to economy wide coverage. However, it is logical to assume within the context of the Convention's objective that economy wide coverage is the ultimate aim. This control must be applied to all developed country Parties; the level of the cap and the absolute reduction however can differ from country to country and must be based on an assessment of what would ensure comparability of effort taking into account circumstance. An interesting point is that this subparagraph stipulates commitments *or* actions. This

raises the question as to whether the quantified emission limitation and reduction objectives are in fact to be binding emissions cuts. No strict definition of actions is available however we can deduce that the level of obligation is less onerous than those involved with commitments. If they were to fall under the action category would developed countries in fact have to commit to them? Or would they perhaps just be aspirational objectives?<sup>16</sup>

Before the 15<sup>th</sup> session of the COP, held in Copenhagen, the U.S. was reluctant to commit to anything beyond inscribing its actions in an appendix (or schedule), and fulfilling these 'in accordance with domestic law'.<sup>17</sup> This approach was set out in its Draft implementing agreement under the Convention submitted for adoption.<sup>18</sup> Rajamani noted that the US submission called for an 'implementing agreement' under the Framework Convention, in order 'to allow for legally binding approaches' and that in conjunction with the language used in the context of developed country mitigation, i.e. that 'Appendix 1 includes quantitative emissions reductions/removals in the 2020/[ ] timeframe, in conformity with domestic law', this suggested that whether the implementing agreement would be binding or non-binding depended on whether the domestic law would require it to be so.<sup>19</sup>

Furthermore the relevant subparagraph provides for other developed country Party measurable, reportable and verifiable nationally appropriate mitigation

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<sup>15</sup> *Id.*

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<sup>16</sup> E. Diring, Mitigation Actions and Measurement, Reporting and Verification in a Post-2012 Climate Agreement (Paper presented at UNFCCC Media Workshop, Bonn, 7 April 2009) at 13. Diring indicates that a clearer definition of actions and commitments is needed.

<sup>17</sup> L. Rajamani, 'The Cloud over the Climate Negotiations: From Bangkok to Copenhagen and Beyond' 1, 2 (New Delhi: Centre for Policy Research 2009).

<sup>18</sup> Draft implementing agreement under the Convention prepared by the Government of the United States of America for adoption at the fifteenth session of the Conference of the Parties, FCCC/CP/2009/7 (6 June 2009).

<sup>19</sup> See Rajamani, note 11 above at 819. See also Rajamani, note 17 above at 5 where it is stated that 'It is worth noting that in the proposed implementing agreement, the US requires developing countries mitigation actions to be consistent with the levels of ambition needed to contribute to meeting the objective of the Convention, but for developed countries it prescribes emissions reductions/removals in the 2020/[ ] timeframe, in conformity with domestic law'.

commitments or actions. These could regulate for example technology standards, set renewable energy and energy intensity targets, efficiency standards and forestry goals.<sup>20</sup> The real nature of these commitments or actions is not prescribed, however their inclusion is permitted within the scope of negotiations. Once again they must apply to all developed countries ensuring comparability of effort taking into account circumstance. The level of obligation related to actions would once again be less onerous than that attached to commitments as per the logic used above.

Also, there are future legal obligations for developed country Parties that relate to mitigation but that are grounded in subparagraph (1)(b)(ii) – the developing country clause. Developing country Party mitigation actions must be supported and enabled by technology, finance and capacity-building. This support necessarily comes from developed country Parties who are obligated to provide it as per their commitments under the Convention.<sup>21</sup> The details are however not prescribed in the subparagraph (1)(b)(ii), they are dealt with in other parts of the Bali Action Plan however.

Moving on to developing country Parties we can see that the attributes of the future possible legal obligation parameters regarding the mitigation of climate change are as follows for these Parties as per subparagraph (1)(b)(ii):

- They must encompass nationally appropriate mitigation actions (NAMAs)
- The mitigation actions encompassed within them must be constructed within the context of the notion of sustainable development
- The mitigation actions encompassed within them must be supported and enabled by technology, finance and capacity building and therefore it is reasonable to assume that they would be constructed with a presumption of a reasonable measure of this support
- The mitigation actions encompassed within them must be carried out in a measurable, reportable and verifiable manner

There appears to be no difference between the strict sense of ‘measurable, reportable and verifiable NAMAs’ and ‘NAMAs in a measurable, reportable and verifiable manner’. However there is an intention of softening the obligations of developing country Parties in comparison to developed country Parties within this element of the text, through the movement of the ‘measurable, reportable and verifiable’ criteria, and in other elements of text too. Specifically through omission in that the word ‘commitments’ has been left out. No strict definition of actions is available however we can deduce that the level of obligation is less onerous than those involved with commitments. Additionally, it is not specified that NAMAs must include quantified emission limitation and reduction objectives. There is contention however as to whether the text precludes binding emissions cuts for some developing country Parties. Eilperin writes ‘As soon as the agreement [the Bali Action Plan] was inked, the Bush administration made it clear that it did not think this language would preclude binding emission cuts for major emerging economies. But countries like China and India made it clear they think it does, and their officials refer back to the Bali Action Plan any time they’re asked to commit to mandatory cuts’.<sup>22</sup> It is the opinion of this author that the fact that this terminology was excluded from subparagraph (1)(b)(ii) indicates that developing country Party NAMAs are not to include binding

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<sup>20</sup> See Diringier, note 16 above at 10.

<sup>21</sup> See UNFCCC, note 1 above, Article 4(7). ‘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 related to financial resources and transfer of technology and will take fully into account that economic and social development and poverty eradication are the first and overriding priorities of the developing country Parties’; UNFCCC, note 1 above, Article (6)(b)(ii) ‘[In carrying out their commitments under Article 4, paragraph 1 (i), the Parties shall: Cooperate in and promote, at the international level, and, where appropriate, using existing bodies:] the development and implementation of education and training programmes, including the strengthening of national institutions and the exchange or secondment of personnel to train experts in this field, in particular for developing countries’ and see Rajamani, note 8 above at 105. ‘The UNFCCC provisions offering financial assistance and technology transfer, as operative provisions in multilateral treaties, are, in theory, legally binding’.

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<sup>22</sup> J. Eilperin, ‘What Does Bali Mean for Copenhagen’, *The Washington Post*, 12 December 2009, available at [http://views.washingtonpost.com/climate-change/post-carbon/2009/12/what\\_does\\_bali\\_mean\\_for\\_copenhagen.html](http://views.washingtonpost.com/climate-change/post-carbon/2009/12/what_does_bali_mean_for_copenhagen.html).



mitigation commitments including binding emissions cuts as per the Bali Action Plan. The second element that indicates the intention to soften the obligations of developing countries is that the NAMAs must be constructed within the context of the notion of sustainable development. Sustainability is an inherent element of the context when negotiating the mitigation of climate change because of its nature. However, the emphasis of development as the context to developing country Party NAMAs indicates that those actions should allow for development and that they should not be as onerous as that which is required of developed country Parties. Finally the NAMAs must be supported and enabled by technology, finance and capacity building and therefore it is reasonable to assume that they would be constructed with a presumption of a reasonable measure of this support. Rajamani notes however that even if not supported developing country Parties would have a responsibility to mitigate climate change as the principle of common but differentiated responsibility (CBDR) first and foremost establishes the common responsibility of all states.<sup>23</sup>

NAMAs could include a wide range of actions dealing with for example technology standards, renewable energy and energy intensity targets, efficiency standards and forestry goals.<sup>24</sup> The real nature of these actions is not prescribed however their inclusion is permitted within the scope of negotiations. They are obviously to be nationally appropriate and carried out in a measurable, reportable and verifiable manner.

The truth is that the Bali Action Plan is a political tool and compromise as well as a legal instrument.<sup>25</sup> When attempting to assess what the future possible legal

obligations pertaining to developed and developing country Parties are, as per the two relevant subparagraphs, the answer depends on the point of view of the interpreting state although some interpretations appear to be more removed from the text than others. Rajamani states, 'treaty language in the environmental field is often marked by constructive ambiguity reflecting and auguring protracted dissonance'.<sup>26</sup> The wording as analysed was in fact settled upon because it meant different things to different people.

## 4 DIFFERENCES IN FUTURE POSSIBLE LEGAL OBLIGATION PARAMETERS AS PERCEIVED BY DEVELOPING COUNTRIES: THE BALI FIREWALL

The Bali firewall is the perceived interpretation of the relevant subparagraphs of most developing country Parties.<sup>27</sup> In this interpretation developing country NAMAs are distinguished categorically from developed country mitigation commitments. As per this view developed countries are expected to take on binding mitigation commitments including binding emissions cuts and developing countries are not. Sustainable Development is a commitment that developing countries have undertaken under the Convention.<sup>28</sup> To this end they must carry out NAMAs but are not bound to specific NAMAs. They must move to a sustainable development pathway and therefore mitigate climate change (in line with their common responsibility) if they are not already on this pathway – their actions are to be seen in the global context and specifically in the context of developed country nationally appropriate mitigation commitments.

Some, notably the U.S., however, perceive the Bali Action Plan as representing a bridge, rather than a firewall, between developed and developing country mitigation commitments/actions. It prefers to trace its negotiating

23 See Rajamani, note 8 above at 104.

24 See Diring, note 16 above at 10.

25 Summary of the Meeting of the UNFCCC Subsidiary Bodies 20-31 October 1997, 12(66) *Earth Negotiations Bulletin* 3 (1997) as cited in Rajamani, note 8 above at 84. In 1997, the United States Senate unanimously passed the Byrd-Hagel Resolution forbidding the United States from signing any legal agreement regarding the UNFCCC that would 'mandate new commitments to limit or reduce greenhouse gas emissions for Annex 1 countries, unless the protocol or other agreement also mandates new specific scheduled commitments to limit or reduce greenhouse gas emissions for developing country Parties within the same compliance period' (Senate Resolution 98, 25 July 1997). This illustrates that the United States position regarding commitments to limit or reduce emissions is based heavily on political considerations.

26 See Rajamani, note 11 above at 813.

27 See Rajamani, note 17 above at 2.

28 See Rajamani, note 8 above at 93.

position to the common obligations identified in Article 4(1) of the Convention.<sup>29</sup>

After all the legal wrangling however it does seem evident that on the face of it the Bali Action plan does within these two paragraphs provide for a differentiation between future commitments. No Party has argued that it doesn't. The disagreement is predominantly with regard to who will commit to binding emissions cuts.

## 5 THE BASIS FOR THE BALI FIREWALL IN THE UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE AND THEREFORE ITS VALIDITY

As previously mentioned the Convention is predicated on a number of fundamental principles and if the Bali firewall (as perceived) is an accurate reflection of the intent of the Convention this would be due to the successful transfer of those principles upon which the Convention is based and that are relevant to the future legal obligations of member states regarding the mitigation of climate change, from the Convention to the text comprising the Bali firewall. All three basic principles imbedded in the Convention, the principle of common but differentiated responsibility, the precautionary principle and sustainable development are relevant to the future legal obligations of member states.

The Convention's preamble acknowledges that climate change is a common concern of humankind and that the global nature of climate change calls for the widest possible cooperation by all countries and their participation in an effective and appropriate international response, in accordance with their common but differentiated responsibilities and respective capabilities and their social and economic conditions. It also notes that the largest share of historical and current global emissions of greenhouse gases has originated in developed countries, recognises the need for developed

countries to take immediate action in a flexible manner on the basis of clear priorities, as a first step towards comprehensive response strategies and recognises that certain countries and areas are particularly vulnerable to the adverse affects of climate change.<sup>30</sup>

Article 3 subparagraph 1 of the Convention states that the Parties should protect the climate system on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. It states that accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof. Article 3 subparagraph 2 states that the specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change, and of those Parties, especially developing country Parties, that would have to bear a disproportionate or abnormal burden under the Convention, should be given full consideration. Article 3 subparagraph 3 requires policies and measures to take into account different socio-economic contexts.<sup>31</sup>

The Convention thus emphasises each Parties' situation based upon their relevant capabilities and social and economic conditions. It elaborates, singling out developing country Parties' specific needs and special circumstances and then further singles out those developing country Parties that are particularly vulnerable to the adverse effects of climate change. It however doesn't only differentiate with regard to developing country Parties, it indicates that Parties that bear a disproportionate or abnormal burden under the Convention, should be given full consideration. Within this category it emphasises once again developing country Parties but does not neglect developed country Parties to whom this is applicable. It indicates that developed countries have differentiated responsibility in that they are required to take the lead in combating climate change and the adverse effects thereof and it stresses the greater contribution of developed countries to climate change.

Critical *differences* exist between countries and these are at the root of the burden-sharing arrangement. These are differences in the nature and degree of countries' contribution to climate change, differences in their

<sup>29</sup> See Rajamani, note 17 above at 2.

<sup>30</sup> See UNFCCC, note 1 above, Preamble.

<sup>31</sup> *Id.*, Article 3.

vulnerability to climate change and their different capacities to take remedial measures.<sup>32</sup> The Convention thus, in the quoted extracts, is explicit about the capacity and vulnerability elements underlying this principle. However, the fact that a greater contribution towards climate change has been made by developed country Parties and that developed country Parties emissions are used to fuel non-essential activities is not detailed explicitly in the operational section of the Convention, their greater contribution is noted, but only in the preamble. In the operational section however it is intimated in the requirement to base the protection of the climate system on equity. Thus the principle of common but differentiated responsibility is to a large extent fully expressed in a broad conceptual manner within the Convention based on the above criteria, in a manner that differentiates predominantly between developed and developing Country Parties as groups but also differentiates within the subset of developed Country Parties.

The truth is that the Convention is, like the Bali Action Plan, a political compromise. During the negotiations, most industrial countries opposed the inclusion of Article 3 in the Convention as it could potentially introduce a note of uncertainty into the context of Convention obligations. When it became clear that an Article on principles would be part of the Convention, they opposed any language pertaining to contribution to environmental degradation.<sup>33</sup> In other words developed country Parties did not want to embed the notion that the principle of differential treatment was based on the fact that they had contributed more to climate change.

Within the substantive provisions of the Convention differential treatment is expressed with regard to the central obligations of the Parties. These are those that, when executed, fulfill the purpose or objective of the treaty.<sup>34</sup> The ultimate objective of the Convention is described as the 'stabilisation of greenhouse gas concentrations in the atmosphere at a level that would

prevent dangerous anthropogenic interference with the climate system'.<sup>35</sup>

Articles 4(2)(a) and (b) of the convention requires Annex I countries (industrialised countries including Economies in Transition) to 'commit themselves specifically' to undertake policies and measures on the mitigation of climate change with the aim of returning anthropogenic emissions of carbon dioxide and other GHGs by 2000, individually or jointly, to 1990 levels.<sup>36</sup> This obligation is exclusive to industrial countries and is intended to demonstrate that 'developed countries are taking the lead in modifying longer-term trends in anthropogenic emissions'.<sup>37</sup>

Articles 4(2)(a) specifies that this should be done 'taking into account the differences in these Parties starting points and approaches, economic structures and resource bases... available technologies and other individual circumstances, as well as the need for equitable and appropriate contributions by each of these Parties to the global effort regarding that objective'.<sup>38</sup> Norms of differential treatment are thus applied to Country Parties within the Annex 1 grouping.<sup>39</sup>

Thus the Convention expresses differentiation between industrialised countries (including those with Economies in Transition) and developing countries with regard to binding commitments to mitigate climate change including commitments to cut emissions; industrialised countries have them, developing countries don't.<sup>40</sup> This reflects the structure of the Bali firewall, apart from the fact that, as developed countries are not defined, it is not apparent where Economies in Transition fit within the Bali firewall designations. Also, we see that the

<sup>32</sup> See Rajamani, note 8 above at 89.

<sup>33</sup> *Id.*, at 101. 'Further, the United States introduced various amendments to circumscribe the legal potential of Article 3 and ensure that the principles, unofficially so titled, applied only to the parties and only in relation to the UNFCCC and not as general law'.

<sup>34</sup> *Id.*, at 91.

<sup>35</sup> See UNFCCC, note 1 above at Article 2.

<sup>36</sup> See Rajamani, note 8 above at 91 and UNFCCC, note 1 above at Article 4.

<sup>37</sup> *Id.*

<sup>38</sup> See UNFCCC, note 1 above at Article 4.

<sup>39</sup> See Rajamani, note 8 above at 87. This is an example of what Rajamani refers to as implicit norms of differential treatment in that while the norms themselves provide identical treatment to all states affected by the norm their application may require (or permit) consideration of characteristics that might vary from country to country.

<sup>40</sup> *Id.*, at 92. While the obligation to take policies and measures is couched in obligatory language (Parties 'shall'), the obligation to mitigate emissions within the context of a framework treaty is characterised as an 'aim' and has therefore been termed a 'quasi-target' and 'quasi-timetable'.

differentiation within the category of industrialised countries reflects the requirement in the paragraphs comprising the Bali firewall to ‘ensure the comparability of efforts among developed countries, taking into account differences in their national circumstances’.

Within the substantive provisions of the Convention differential treatment is also expressed with regard to the context to implementation of the country Party obligations.<sup>41</sup> The principle of common but differentiated responsibility is referred to in Article 4 (1) which states: ‘Parties, taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances...’<sup>42</sup> It then goes on to indicate obligations relevant to all Parties.<sup>43</sup> These are however, to be implemented within the context as described within the Convention. This context to implementation is similar to that reflected in the Bali firewall which states that commitments/actions should be nationally appropriate and that developing country NAMAs must be constructed within the context of the notion of sustainable development.<sup>44</sup> Article 3(4) to the Convention states that all Parties have a right to, and should, promote sustainable development.<sup>45</sup> The Conventions objective includes enabling development to proceed in a sustainable manner.<sup>46</sup> The preamble to the Convention states that all countries, especially developing countries, need access to resources required to achieve sustainable social and economic development and that, in order for developing countries to progress towards that goal, their energy consumption will need to grow.<sup>47</sup> Article 4(7) emphasises that economic and social development and poverty eradication are the first

and overriding priorities of the developing country Parties.<sup>48</sup> The Convention thus also emphasises sustainable development with the regard to the context to implementation for developing countries as the Bali firewall does.

Additionally the convention expresses differential treatment with respect to:

Financial assistance – in that the developed country Parties and other developed Parties included in Annex II (which does not include Economies in Transition) are required to provide financial resources to meet the full costs incurred by developing country Parties in complying with their communication obligations detailed in Article 12 (1) and to meet the full incremental costs of implementing measures that are covered by Article 4 (1).<sup>49</sup> The developed country Parties included in Annex II shall also assist the developing country Parties that are particularly vulnerable to the adverse effects of climate change in meeting costs of adaptation to those adverse effects;<sup>50</sup>

technology transfer – in that the developed country Parties and other developed Parties included in Annex II shall take all practicable steps to promote, facilitate and finance, as appropriate, the transfer of, or access to, environmentally sound technologies and know how to other Parties, particularly developing country Parties, to enable them to implement the provisions of the Convention;<sup>51</sup>

capacity building – in that the Parties are to cooperate in and promote, at the international level, and, where appropriate, using existing bodies the development and implementation of education and training programmes, including the strengthening of national institutions and the exchange or secondment of personnel to train experts in this field, in particular for developing countries.<sup>52</sup>

Also, the Convention contains a linking clause which states that the extent to which developing country Parties will effectively implement their commitments under the

<sup>41</sup> *Id.*, at 83.

<sup>42</sup> *See* UNFCCC, note 1 above at Article 4.

<sup>43</sup> *See, e.g.* UNFCCC, note 1 above, Article 4 (1)(c). It states that [All Parties, taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances, shall:] Promote and cooperate in the development, application and diffusion, including transfer, of technologies, practices and processes that control, reduce or prevent anthropogenic emissions of greenhouse gases not controlled by the Montreal Protocol in all relevant sectors, including the energy, transport, industry, agriculture, forestry and waste management sectors.

<sup>44</sup> *See* Bali Action Plan, note 3 above, Paragraph 1.

<sup>45</sup> *See* UNFCCC, note 1 above, Article 3(4).

<sup>46</sup> *Id.*, Article 2.

<sup>47</sup> *Id.*, Preamble.

<sup>48</sup> *Id.*, Article 4(7).

<sup>49</sup> *Id.*, Article 4(3).

<sup>50</sup> *Id.*, Article 4(4).

<sup>51</sup> *Id.*, Article 4(5).

<sup>52</sup> *Id.*, Article 6(b) (ii).

Convention will depend on the effective implementation by developed country Parties of their commitments under the Convention related to financial resources and transfer of technology.<sup>53</sup> Therefore the Bali firewall's contention that NAMAs must be supported and enabled by technology, finance and capacity building reflects the Conventions provisions as described.

It is the opinion of this author that the Convention's conception of justice and equity as embodied in the principle of common but differentiated responsibilities as expressed in detail in the Convention, along with the conception of sustainable development within the Convention as an overriding priority of developing country Parties particularly, is effectively expressed in the Bali firewall as perceived by the majority of developing nations. Additionally no adjustment to the level of precaution embodied in the Convention is made by the paragraphs comprising the Bali firewall. The requirement to enhance action on the mitigation of climate change detailed in the Bali Action Plan is a reflection of the increased understanding of the urgency of the climate change situation that existed at the later date at which it was produced and the fact that time had moved on and the limitation of GHG emissions envisaged by the Convention was being progressively implemented, not due to a increased level of caution being applied. The firewall is valid in terms of the Convention.

## 6 DOES THE OUTCOME OF THE 15<sup>TH</sup> CONFERENCE OF THE PARTIES FALL IN LINE WITH THE FUTURE LEGAL OBLIGATIONS OF MEMBER STATES WITHIN THE CLIMATE REGIME AS PERCEIVED BY MOST DEVELOPING COUNTRY PARTIES IN TERMS OF THE BALI FIREWALL?

The Bali Action Plan launched a process to reach an agreed outcome at its 15<sup>th</sup> session, held in Copenhagen

<sup>53</sup> *Id.*, Article 4(7).

in 2009.<sup>54</sup> The COP, at this session, took note of the Copenhagen Accord (the Accord) of 18 December 2009 by way of decision 2/CP.15.<sup>55</sup> The UNFCCC website lists 139 countries (as on 3 October 2010) that have expressed their intention to be listed as agreeing to the Accord.<sup>56</sup> The Accord is not a COP decision but will, regardless of the manner in which it legally relates to the broader process of negotiations under the UNFCCC and the product thereof, have considerable sway in terms of how country Parties perceive their legal obligations within the climate regime, how they will negotiate within the UN forum in the future and their actions on the ground. It is therefore pertinent to ask whether the Accord falls in line with the future legal obligations of member states within the climate regime as perceived by most developing country Parties in terms of the Bali firewall. This analysis will not cover all aspects of the Copenhagen Accord but will point out some fundamental departures from the Bali firewall configuration.

Paragraph 4 of the Accord states Annex I Parties commit to implement individually or jointly the quantified economy wide emissions targets for 2020, to be submitted in the format given in Appendix I by Annex I Parties to the secretariat by 31 January 2010. Annex I Parties that are Party to the Kyoto Protocol will thereby further strengthen the emissions reductions initiated by the Kyoto Protocol.<sup>57</sup> While Paragraph 5 of the Accord states Non-Annex I Parties to the Convention will implement mitigation actions including those to be submitted to the secretariat by non-Annex I Parties in the format given in Appendix II by 31 January 2010.<sup>58</sup> The implementation of Non-Annex I Party mitigation actions is to be consistent with Article 4.1 of the UNFCCC.<sup>59</sup> As this article indicates that common but differentiated responsibilities and specific national development priorities, objectives and circumstances be

<sup>54</sup> See Bali Action Plan, note 3 above, Paragraph 1.

<sup>55</sup> Copenhagen Accord, Decision 2/CP.15, *in* Report of the Conference of the Parties on its fifteenth session, Copenhagen, 7 - 19 December 2009, Doc. No. FCCC/CP/2009/11/Add.1, 30 March 2010).

<sup>56</sup> Some Parties listed stated in their communications to the secretariat specific understandings on the nature of the Accord and related matters, based on which they have agreed to be listed.

<sup>57</sup> See Copenhagen Accord, note 55 above, Paragraph 4.

<sup>58</sup> *Id.*, Paragraph 5.

<sup>59</sup> *Id.*

taken into account in the implementation of measures to mitigate climate change it is evident that the mitigation actions referred to in the Copenhagen Accord are to be nationally appropriate.<sup>60</sup>

It is evident therefore that the Accord requires Annex I Parties to commit to quantified economy wide emissions *targets* and Non-Annex I Parties to the Convention *will implement* mitigation actions including those submitted to the secretariat. This wording results in a subtle manipulation of the Bali firewall:

Firstly, as Annex 1 Parties are required to commit to quantified economy wide emissions targets, and Parties to the Kyoto Protocol will thereby further strengthen the emissions reductions initiated by the Kyoto Protocol, countries that are not Party to the Kyoto Protocol in fact only need to commit to a target and not a cut. In the context of climate change this would be an absurd eventuality, however it appears to be the implication of the relevant wording. It is interesting to note which states are not Party to the Kyoto Protocol, they are: Afghanistan, Andorra, the Palestinian Authority, the Sahrawi Arab Democratic Republic, Taiwan, the Vatican City and the United States of America.<sup>61</sup>

Secondly, because once a Non-Annex 1 Party has submitted a mitigation action the state 'will implement' it, and can therefore perhaps be seen to have taken on a binding mitigation commitment at this point. The Times of India noted in February this year that key developing countries had distanced themselves from the Copenhagen Accord 'after an assessment that the political pact was filled with minefields that could trap the emerging economies into commitments'.<sup>62</sup> Perhaps this is one of the minefields referred to.

Additionally, the Copenhagen Accord does not fall in line with the Bali firewall as the resultant developed country commitments as envisioned by the text comprising the Bali firewall (an instrument to enable the implementation of the Convention) where intended to be negotiated under the Convention and not to be voluntary targets chosen by the implementing state - it is the opinion of this author that the requirement that the COP review Annex 1 commitments, detailed under 4(2)(d) of the Convention, implies that the Parties should negotiate *how onerous* Annex 1 commitments are to be, and that voluntary targets chosen by the implementing state are not an option.<sup>63</sup>

## 7

### MEMBER STATES' FUTURE LEGAL OBLIGATIONS WITHIN THE CLIMATE CHANGE REGIME IN THE CONTEXT OF THE OVERALL OBJECTIVE OF THE CONVENTION AND THE CHANGING SITUATION OF THE PARTIES OVER TIME

Halvorssen states that the CBDR principle does have its limits. She states that once the differences between the countries cease to exist, differential treatment should no longer be used. Additionally she points out that the CBDR principle should not be incompatible with the object and purpose of the treaty in question, if its implementation defeats the object and purpose of the treaty, it has gone beyond the limits of the treaty.<sup>64</sup>

The objective of the Convention is the 'stabilisation of GHG concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system'.<sup>65</sup>

<sup>60</sup> See UNFCCC, note 1 above, Article 4(1).

<sup>61</sup> The website indicates that 192 countries are party to the protocol. Those sovereign nations that aren't listed within that number are not party to the Protocol - this result is dependant on one's view as to the list of sovereign nations that exist. Status of Ratification of the Kyoto Protocol is available at [http://unfccc.int/kyoto\\_protocol/status\\_of\\_ratification/items/2613.php](http://unfccc.int/kyoto_protocol/status_of_ratification/items/2613.php).

<sup>62</sup> 'Copenhagen Accord a Voluntary Commitment, Cannot be Legalized: PM', *The Times of India*, 6 February 2010, available at <http://timesofindia.indiatimes.com/india/Copenhagen-accord-a-voluntary-commitment-cannot-be-legalised-PM/articleshow/5540464.cms#ixzz0yZeSCW5g>.

<sup>63</sup> See UNFCCC, note 1 above, Article 4(2) (d).

<sup>64</sup> Anita M. Halvorssen, 'Common, but Differentiated Commitments in the Future Climate Regime - Amending the Kyoto Protocol to Include Annex C and the Annex C Mitigation Fund', 18 *Colo. J. Int'l Envtl. L. & Pol'y* 247, 249 (2007).

<sup>65</sup> See UNFCCC, note 1 above, Article 2.

Halvorsen goes on to note that this objective would be defeated if the developing countries' emissions of GHGs continue to grow to meet their development needs, leading to dangerous anthropogenic interference with the climate system. Thus, sustainable development requires that economic growth in all countries is balanced with the climate change objectives.<sup>66</sup>

However, if aiming to limit global emissions to a set target (for example the emissions that would lead to an increase in global temperature below two degrees Celsius) then a decrease in emissions from either developed or developing nations would allow an equivalent increase in emissions from the other group. We do not know definitively the specific emissions allowance for developing countries that equates to an equitable solution and we must keep in mind that if 'the developing countries' emissions of GHGs continue to grow to meet their development needs, leading to dangerous anthropogenic interference with the climate system' they will have done so in tandem with developed country emissions. Additionally, Halvorsen's assertions regarding the balancing of economic growth in all countries with climate change objectives fails to note that practically this is only economic growth that derives from the net emission of GHGs. Growth derived from activity that does not result in the net emission of GHGs does not need to be balanced with climate change objectives. The CBDR principle is intended to encourage the mandatory limitation of developed country economy emissions first and binding mitigation commitments including binding emissions cuts are primary in fulfilling this objective.

It is true however, that developing country emissions cannot be allowed to go above a certain environmentally unsound and inequitable, unknown level. The global negotiating process under the auspices of the UN is intended to identify this level as accurately as possible. If the resultant treaty and related protocols developed through this process do not at some point, while attempting to stabilise GHG concentrations in the atmosphere, require developing nations to reduce emissions, it is doubtful that this objective will be met. So, if the Convention does not provide for this it is deficient, however it does intimate this requirement through its overall objective as pointed out by

Halvorsen.<sup>67</sup> Thus although the Bali firewall is valid in terms of the Convention the burden sharing arrangement has always been implemented with the understanding that country situations may change and within the context of the Convention's overall objective. Also, as noted previously the CBDR principle first and foremost establishes the common responsibility of all states – thus differentiated responsibility, if casting into doubt the achievement of the overall objective, must be trumped by common responsibility. Therefore, it is reasonable to say that at some point the requirement to implement the Bali firewall must change to achieve the overall objective of the Convention.

Is this perhaps what happened in Copenhagen? The answer must be a resounding no; as the COP did not make a decision. An impasse was reached and the process broke down. The Copenhagen Accord is a weak political compromise out of which its parties are already trying to wriggle. The Indian Prime Minister, Manmohan Singh, has stated that the 'Copenhagen Accord, which we fully support and will take forward, is a catalogue of voluntary commitments and not a set of legal obligations'.<sup>68</sup> Rajamani has noted that it is 'neither a COP decision that can be operationalised through the FCCC institutional architecture and draw on the existing normative corpus, nor is it an independent plurilateral agreement with its own operational architecture and normative core'.<sup>69</sup>

Under the Convention developed nations generally are required 'to take the lead in combating climate change and the adverse effects thereof'.<sup>70</sup> In terms of this

<sup>66</sup> See Halvorsen, note 64 above at 250.

<sup>67</sup> Also see UNFCCC, note 1 above at Article 7(2) (a). Article 7(2) states that: 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. To this end, it shall:

(a) Periodically examine the obligations of the Parties and the institutional arrangements under the Convention, in the light of the objective of the Convention, the experience gained in its implementation and the evolution of scientific and technological knowledge.

<sup>68</sup> See Copenhagen Accord a Voluntary Commitment, Cannot be Legalized: PM, note 62 above.

<sup>69</sup> L. Rajamani, 'Neither Fish nor Fowl', 606 Seminar Web Edition, February 2010, available at [http://www.india-seminar.com/2010/606/606\\_lavanya\\_rajamani.htm](http://www.india-seminar.com/2010/606/606_lavanya_rajamani.htm).

<sup>70</sup> See UNFCCC, note 1 above, Article 3(1).

requirement it is the opinion of this author that many developed countries have disregarded equity to an extent, sought to preserve their own economic advantage and failed to lead sufficiently. This display is most striking in the case of the United States of America, the wealthiest, most powerful country on earth.

The United Nations Framework Convention on Climate Change is pro poverty alleviation and pro technological advance – fundamental stated aims of the modern capitalist system and the economic growth requirements that are promoted in its application. The proponents of this system - the U.S. being an enthusiastic one of these - conventionally characterise these aims as being progressive. The Convention envisages achieving these aims through: empowering developing countries – literally - through enabling them to emit GHG initially without binding mitigation commitments and; simultaneously requiring the development of ‘clean’ developed country economies if growth is to be achieved in the developed world. It promotes these aims in tandem with its Kyoto Protocol through embedding the principle of common but differentiated responsibility within the climate change regime. Broadly speaking the Convention has in fact has two fundamental objectives; the mitigation of climate change and the redistribution of ecological space.<sup>71</sup> While developed countries do desire the mitigation of climate change they do not want to redistribute ecological space, this applies particularly to the U.S. who is taking up the most space. They want to retain a competitive economic advantage globally and they refuse to sacrifice this for the good of others.

The U.S. has hijacked the process of negotiations under the Convention and attempted to implement bottom-up commitments through domestic legislation from developed countries. This is evident from the fact that, in Copenhagen, in terms the division of responsibility, a substantial departure from what came before occurred, and this new direction reflects the approach taken by the U.S. in its proposal for Copenhagen - the ‘draft implementing agreement under the Convention’ as previously discussed. The U.S. is stalling and attempting to *avoid responsibility to lead globally*. It seems willing to reap the benefits of a globalised economy, based on the net emission of GHG, but not to take responsibility for its negative implications. The quantified economy-wide emissions targets for 2020 submitted by the U.S. require the emission reduction in 2020 to be in conformity with domestic energy and climate legislation.<sup>72</sup> Legislation of this type has not yet, despite numerous attempts, been passed in the U.S. The majority of the power base within the U.S. is comprised of Luddites. Their bad faith may continue to the point where all nations including India and China are morally bound to commit to specific binding mitigation commitments including binding emissions cuts. This point has not yet been reached but it is not far away.

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71 See Rajamani, note 11 above at 93. The UNFCCC preamble contains a recognition that ‘the share of global emissions originating in developing countries will grow to meet their social and development needs’. Elsewhere in the preamble, the UNFCCC adds that in order for developing countries to progress towards sustainable social and economic development ‘their energy consumption will need to grow’. The recognition that the share of developing countries’ emissions will grow is to be read in conjunction with the first objective to ‘stabilise GHG emissions’ and the emphasis in the principle of common but differentiated responsibilities and elsewhere that the industrial world is responsible for the largest share of historical and current GHGs and must assume a leadership role in rising to the climate challenge. It follows that industrial countries are required under the climate regime to reduce the ecological space that they occupy in favour of developing countries’.

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72 Letter to the Executive Secretary of the United Nations Framework on Climate Change from the United States Department of State, Office of the Special Envoy for Climate Change (28 January 2010), available at [http://unfccc.int/files/meetings/application/pdf/unitedstatescphaccord\\_app.1.pdf](http://unfccc.int/files/meetings/application/pdf/unitedstatescphaccord_app.1.pdf).



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