



Australia

Post-2012 Model Treaty Outline

Submission to the AWG-LCA and the AWG-KP

Summary of two options for the post-2012 treaty

This submission elaborates, by way of model treaty outlines, two possible legal options for the post-2012 outcome. It takes as its starting point the United Nations Framework Convention on Climate Change (the Convention) and the Kyoto Protocol, and builds on the lessons learnt from the implementation of these two treaties.

This submission addresses the structure rather than the substantive content of a post-2012 outcome. It is intended to complement and feed into the work of the AWGs and their Chairs.

This submission elaborates on Australia's earlier legal submission contained in FCCC/AWGLCA/2008/Misc.5/Add.2 (Part I). To recall, the first legal option consists of a single, new protocol that unifies action under the Convention and builds on the Kyoto Protocol (Model A). The second option entails two protocols in the form of an amended Kyoto Protocol and a new Protocol under the Convention (Model B).

Core elements of both models

The two options or models have elements common to both, with the intent of enabling commitments that do not differ in substance. It will be important for Parties' collective objective to be clearly expressed in both models. The models will need to address mitigation, adaptation and delivery commitments, actions and mechanisms, as well as reporting, compliance and institutional issues.

From the perspective of legal certainty, operational efficiency and simplicity, the most effective legal structure for a post-2012 outcome would be a single new protocol that unifies action under the Convention and builds on the relevant provisions of the Kyoto Protocol. Whilst a single treaty has evident advantages in terms of operational efficiency,

legal certainty and simplicity, Australia could accept both models as the basis for further consideration.

Implications of each model

Single treaty

A single treaty (as per Model A attached) would establish a coherent framework for the post-2012 regime, enabling a robust environmental outcome. While it would build on the Kyoto Protocol framework, it would not necessarily replicate all Kyoto provisions. It would provide clarity in relation to the objectives of the post-2012 regime, would promote transparency and comparability of legal obligations for the post-2012 period, and would lead to more predictable outcomes.

A single treaty would readily accommodate the schedule and registry approach proposed by some Parties for capturing mitigation commitments and actions. The treaty could make provision for schedules to be adopted as annexes to the treaty, similar to those used in the World Trade Organisation and Gothenburg Protocol.¹ These schedules could record a Party's mitigation commitments and actions and provide a legally-binding framework as necessary. For example, some schedules might include Kyoto-style quantified emission limitation and reduction obligations (QELROs) whereas others might include different approaches. These schedules taken collectively would represent a registry of commitments and actions.

A single treaty would facilitate negotiations. It would allow a level playing field during the negotiations, which would enable countries to properly assess comparability of effort and operationalise the principles of common but differentiated responsibility and respective capabilities. If key developed country mitigation commitments (under the amended Kyoto Protocol) were separated from commitments and actions relating to non-Parties to the Kyoto Protocol and advanced developing economies (under a new Protocol), it would be more difficult to assess comparability of effort, given such assessment would take place across two negotiating fora.

A single track of negotiations could help achieve a reasonable and politically feasible balance both among the mitigation commitments and actions and between the mitigation, adaptation and financial commitments.

¹ Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution to Abate Acidification, Eutrophication and Ground-Level Ozone.

A single treaty would also provide much greater certainty during the implementation phase. It would allow the development of a single set of institutions and procedures applying to all Parties to the regime. This is particularly important for the measurement, reporting and verification obligations, where consistent principles would enable the efficient and effective collection and use of information. It would also simplify issues relating to compliance and dispute resolution, and would reduce the cost and complexity of operating two treaties on the same issue. It would further provide a strong basis to enhance the development of international climate law.

Two treaty outcome

By contrast, a two-track approach (Model B) potentially presents a number of short-term practical and political benefits. It could facilitate a conclusion on the post-2012 legal outcome within the current two-track negotiating framework of the AWGs. It could preserve the structure and content of the current Kyoto Protocol, providing Parties with a greater level of comfort given their familiarity with current commitments and obligations. It could reduce the risk of backtracking from current commitments and obligations, and would be more likely to preserve the institutional framework of the Kyoto Protocol.

A two-track outcome would separate mitigation commitments and actions for Kyoto Parties from those for non-Annex I Parties and non-Kyoto Protocol Parties (non-Kyoto Protocol Parties would be unlikely to ratify an amended Kyoto Protocol because they would be unable to participate in related decision-making). The separation would retain the division between Annex I and non-Annex I countries and potentially discourage a wider range of countries from adopting legally-binding economy-wide emissions reduction targets over time. It may also discourage Annex I Parties from ratifying the amended Kyoto Protocol.

A two-track outcome would also create difficulties with regard to the flexibility mechanisms. Non-Annex I Parties and non-Kyoto Protocol Parties which take on suitable commitments and actions should be granted access to the Kyoto Protocol flexibility mechanisms. Facilitating this access under a two-track outcome would require either a complex legal linkage between the amended Kyoto Protocol and the new Protocol, or a separate set of mechanisms for each Protocol.

Implementation of a two-track approach would be more complex than a single treaty approach, and therefore more likely to lead to difficulties regarding interpretation of rights and obligations. The two-track approach would therefore also increase the potential scope for

uncertainty relating to differing legal interpretations. Such uncertainty could potentially be destabilising for the emerging carbon market.

Further, a two-track outcome would benefit from some form of legal linkage between the two Protocols to facilitate parallel implementation of the post-2012 package. This could be achieved, for example, through linked entry into force provisions.

Some countries have suggested that the output of the AWG-LCA should not involve a treaty-level instrument. If such an approach was taken, commitments and actions for non-Kyoto Parties could only be captured in decisions, rather than in legally-binding treaty text. Splitting commitments across treaty and non-treaty level instruments would weaken the global response by creating an unbalanced legal outcome.

One possible consequence of such an outcome is that some countries may not be in a position to agree to targets as ambitious as would otherwise be possible. Legal uncertainty could also reduce private sector confidence in the carbon market, and thereby reduce access to private sector resources for mitigation and adaptation.

Issues relating to the transition to the post-2012 treaty

Negotiations will also have to consider legal issues relating to coherence and consistency in the transition to the post-2012 regime. Whether the new commitments are integrated into a new Protocol, or whether they are split across a new Protocol and an amended Kyoto Protocol, there will need to be arrangements in place to provide the carbon market with a degree of legal certainty in relation to applicable rules.

The primary concern is to facilitate an outcome whereby the new Protocol, and any Kyoto Protocol amendments relating to a second commitment period, enter into force prior to the end of the first commitment period. At the same time, the legal framework relating to the accounting of emissions/removals and assigned amounts over the first commitment period, including provisions relating to QELROs, emissions trading and flexibility mechanisms will need to remain legally binding until such time as the accounting for the first commitment period has been completed.

In addition, the equivalent legal framework for the next commitment period may need to be provided some form of legal certainty prior to entry into force, to enable States and non-State actors to better manage the transition. This outcome may be achieved by including text that states that certain provisions shall have provisional effect for all State

parties prior to entry into force. This would be in accordance with Article 25(1)(a) of the Vienna Convention on the Law of Treaties.

Implications for 2009 negotiations

These points raise significant implications for the conduct of the negotiations, particularly given that Parties have now moved into full negotiating mode.

As the Parties progress the Ad Hoc Working Group (AWG) work programs agreed at Poznan, they will have to give consideration to the legal aspects of their work. For example, will agreement on a certain issue need to be reflected in an amendment to the Kyoto Protocol, be part of a new Protocol or be addressed through COP/CMP decisions?

Under the AWG-KP, Parties have already made specific provision in their work program to discuss the legal implications arising from the AWG's work. Under the AWG-LCA, Parties will need to examine the same type of legal implications through their consideration of the Chair's document.

Parties could consider ways in which the two negotiating streams could work cooperatively to progress legal issues, facilitated by the two Chairs.

MODEL A

Preamble

Text could be modelled on the approach used in the Preamble of the Kyoto Protocol, including references to decisions 1/CMP.1 and 1/CP.13.

Definitions

The style of these provisions could be based on those contained in the United Nations Framework Convention on Climate Change (the Convention) and the Kyoto Protocol.

Objective

Provisions could express Parties' "shared vision for long-term cooperative action", supporting, but not duplicating, the ultimate objective of the Convention as set out in its Article 2. As mandated in the Bali Action Plan, the ambition of the shared vision should include a long-term global goal for emissions reductions. Provisions could also express, in general terms, the shared vision of adaptation, technology and finance.

Principles

Provisions could recall the principles set out in Article 3 of the Convention. Parties may also wish to agree to additional principles, to further guide their efforts to achieve the objectives of the Convention and this Protocol.

Mitigation

Provisions could detail how Parties intend to enhance and maximise action on mitigation of climate change. Provisions could establish a spectrum of nationally appropriate mitigation commitments and actions, accepted by all Parties as representing legitimate mitigation effort.

For example, economy-wide targets in the form of quantified emission limitation or reduction commitments could represent one end of the spectrum. The spectrum could also include economy-wide no-lose targets, sectoral targets (either legally-binding or no-lose) and

low-carbon development strategies. Provision could also be made for recognising other mitigation actions, such as international research and development and financial contributions.² Article 2(1) of the Kyoto Protocol could provide a model for these provisions.

Provisions could accommodate different contributions by different types of countries, based on the principle of common but differentiated responsibilities and respective capabilities. Provisions could stipulate that countries with similar national circumstances should aim to undertake a similar level of mitigation effort.

Provisions could indicate those commitments and actions eligible for support. See outline of provisions on Financial resources, Technology cooperation, Market-based mechanisms, and a REDD mechanism. Provisions would also need to set out those commitments and actions that are to be measured, reported and verified in accordance with the provisions on Reporting and review.

Provisions would establish timeframes (for example, a commitment period) for the implementation of the mitigation commitments and actions. Provisions on related metrics would be contained in the Methodological issues article below.

The provisions would also need to address coverage, including gases, sectors/source categories. Provisions could follow the approach of the Kyoto Protocol, listing in an annex the greenhouse gases and sectors/source categories applicable to mitigation commitments and actions.

Schedule / registry approach

A system of schedules could offer one model for capturing mitigation commitments and actions consistent with the principle of common but differentiated responsibilities and respective capabilities. This could reflect the national schedule approach taken in the World Trade Organisation context and / or the action-specific approach of the Gothenburg Protocol.³ Such schedules could be adopted as annexes to this Protocol, in order to provide a legally-binding framework as necessary.

A Party could inscribe in its schedule the commitments and actions they are bound to undertake as means to enhance their action on mitigation. As noted above, in addition to any quantified target, the schedules could

² Note, these are examples of possible commitments and actions and are not an exhaustive list.

³ Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution to Abate Acidification, Eutrophication and Ground-Level Ozone.

include financial and technical assistance pledged by Parties or “matched” to meet mitigation commitments and actions undertaken by other Parties. These schedules taken collectively would represent a registry of commitments and actions.

Given the variety of commitments and actions that are likely to be undertaken by Parties, as well as the need to account for comparability of effort and national circumstances, these schedules could be negotiated through a „request – offer“ approach or an „offer - review“ approach. Provisions for the amendment of schedules could be drafted to provide the flexibility to enhance mitigation contributions throughout the commitment period (see provisions on the adoption and amendment of annexes to the Protocol, below).

Land use, land use change and forestry

Provisions could enable Parties to more fully realise the mitigation potential of the land use, land use change and forestry (LULUCF) sector. To this end, some Parties have proposed the provisions, supported by revisions to the sector’s accounting rules, modalities and guidelines, align LULUCF with other sectors to focus exclusively on anthropogenic emissions and removals of greenhouse gases.

International aviation and maritime transport

As a minimum, provisions could reaffirm the responsibility of the International Civil Aviation Organization and the International Maritime Organization to develop measures relating to international aviation and maritime transport emissions, consistent with Article 2(2) of the Kyoto Protocol.

Joint fulfilment of quantified emission reduction or limitation commitments

Provisions could enable Parties to meet targets either individually or jointly, so as to accommodate the needs of regional economic integration organisations. Consistent with Article 4(5) of the Kyoto Protocol, individual commitments would remain legally binding in the event of a failure to meet the total combined level of emission reductions.

Market-based mechanisms, including flexibility mechanisms

Provisions could establish market-based mechanisms, including flexibility mechanisms, as a means of: contributing to the objective of this Protocol; assisting Parties in achieving sustainable development;

and assisting Parties in giving effect to their mitigation commitments and actions at least cost. Provisions could also affirm Parties' commitment to building a comprehensive and well-functioning carbon market.

The mechanisms could include international emissions trading, an enhanced clean development mechanism (CDM) and joint implementation (JI), but could also include new mechanisms, such as sectoral trading, sectoral crediting and the REDD mechanism outlined below.

The provisions could clarify the scope and availability of the mechanisms to Parties, noting the linkages to the provisions on Mitigation above. For example, some Parties have suggested that provisions should allow for CDM credits to be awarded against sectoral or technology-based benchmarks. Parties could consider what modalities and procedures would be necessary to support these enhanced mechanisms, including governance arrangements. Parties could also consider the extent to which modalities and procedures are elaborated in this Protocol on the one hand, and in decision text on the other.

REDD (reducing emissions from deforestation and degradation in developing countries) mechanism

Provisions could accommodate the establishment and operation of a REDD mechanism. The provisions would assert that the objective of the mechanism is to mobilise investment on the scale necessary to realise the full potential of REDD to contribute to the ultimate objective of the Convention. Some Parties have proposed that the mechanism could include deforestation, afforestation and reforestation.

Adaptation

Provisions could build on existing principles in the Convention and Kyoto Protocol related to adaptation. The provisions would define, and where appropriate, establish mechanisms to support the most vulnerable developing countries in identifying, prioritising and communicating their adaptation needs and to support the implementation of adaptation actions.

This Protocol could include principles relating to the scaling up of financing for adaptation. The generation of financial resources for adaptation could be addressed under the general financial resources provisions. However, adaptation-specific principles may also be established, including those relating to broad guidelines for adaptation actions, the governance and disbursement of funds, the scope of costs

and activities to be funded, methods for reviewing implementation and outcomes, and any specific requirements relating to the prioritisation of support to the most vulnerable Parties.

Spillover effects

If required, provisions could involve the establishment of principles on how Parties can best address spillover effects.

Financial resources

Provisions could establish architecture for the generation of new financial resources; set out the governance arrangements for such resources; and establish principles for the disbursement of funds.

To generate financial resources, provisions could establish principles relating to how existing and potentially new mechanisms could contribute to the generation of such funds. Provisions could continue to recognise, in accordance with Article 11(5) of the Convention, the importance of financial and technical contributions, including in-kind support, both within and outside the Convention framework.

Provisions could establish architecture to govern support in an efficient and coherent manner, while allowing for issue-specific provisions and governance as appropriate. Governance arrangements would need to be accountable and transparent, applying principles of measurement, reporting and verification and incorporating lessons learnt from existing architecture. Provisions would establish the role of the CMP to this Protocol, including the level of direction it would have over various elements of the architecture.

Principles relating to the disbursement of funds would be included in this Protocol's provisions and could be elaborated in subsequent CMP decisions.

Technology cooperation

Provisions could set out principles for enhancing technology cooperation. Provisions could elaborate on the Convention's facilitative role in technology cooperation and recognize the existing frameworks and mechanisms relating to technology. Provisions could address the role of the Experts Group on Technology Transfer (EGTT). Governance arrangements would need to be accountable and transparent, applying principles of measurement, reporting and verification and incorporating lessons learnt from existing architecture.

Given the need for financing for clean technology in this Protocol, the provisions might indicate linkages to the financial resources provisions outlined above.

Reporting and review

Inventory reporting

Provisions could specify minimum annual national inventory reporting to be undertaken by all Parties, and related review arrangements. These provisions would be designed to provide the robust, comprehensive data on anthropogenic greenhouse gas emissions and removals considered by the Parties to be integral to effectively tracking their progress towards the Convention's ultimate objective. To better facilitate any capacity building required for submission of the inventories on an annual basis, the provisions could stagger commencement of the reporting requirement.

Mitigation commitments and actions

Provisions could also detail how the mitigation commitments and actions undertaken by Parties in accordance with the Mitigation article would be measured, reported and verified. The provisions would recognise the need for robust, high quality and transparent arrangements to assess Parties' implementation of their mitigation commitments and actions, and instil confidence in the credibility of the reported outcomes. The measurement, reporting and verification (MRV) arrangements detailed in the provisions could draw on lessons learned from implementation of the Convention and Kyoto Protocol reporting and review arrangements, in particular the independent third party review arrangements of Article 8 of the Kyoto Protocol. The provisions could also be designed to harmonise, to the extent possible, the timing and format of reporting and review arrangements under this Protocol and the Convention.

Provisions could recognise the need to build some Parties' capacity to implement the Article and indicate the linkages with the provisions on Financial resources and Technology cooperation in this regard.

Methodological issues

Provisions would specify the metric to calculate the carbon dioxide equivalence of anthropogenic emissions and removals of the gases covered by this Protocol. Provisions would also specify the procedure by which each gas-specific metric and the emission/removal estimation

methodologies for sectors/source categories would be adopted to determine fulfilment of mitigation commitments and actions. The approach in Article 5 of the Kyoto Protocol could provide the basis for such provisions.

Compliance procedure

Noting the alternative approach outlined in the provisions on the Multilateral Consultative Process below, provisions could require the CMP to develop procedures and institutional mechanisms to promote compliance with this Protocol, determine cases of non-compliance, and secure timely return to compliance. The Parties could consider the extent to which these procedures and mechanisms are elaborated in this Protocol, and in decision text.

Multilateral consultative process

The provisions on procedures and institutional arrangements for the promotion of compliance proposed for inclusion in the above article, could alternatively be incorporated into this Article.

Immunities for persons serving on bodies constituted under the Protocol

Provisions could confer immunities on persons serving on bodies constituted under this Protocol in their official capacity, as a means to secure participation by the most qualified persons and the ability of such persons to discharge their official duties in a professional and conscientious manner.

Institutional arrangements *[previously COP/MOP, Secretariat, Subsidiary Bodies]*

Provisions could confirm that the Conference of the Parties would serve as the Meeting of the Parties to this Protocol (CMP), that is, as a functionally integrated but legally distinct body (as per Article 13 of the Kyoto Protocol). Provisions could also address the functions of the new CMP and outline the rules concerning participation of non-Parties and other organisations; the timing of sessions; and rules of procedure.

A provision could nominate the secretariat of the Convention to serve as the secretariat of this Protocol.

Provisions could establish that the Subsidiary Body for Implementation (SBI) and the Subsidiary Body for Scientific and Technological Advice (SBSTA) will serve as the SBI and SBSTA of this Protocol. Provisions could also be made for Parties to establish new subsidiary bodies as necessary.

Dispute settlement procedure

While not strictly necessary, provisions could apply the provisions of Article 14 of the Convention on settlement of disputes between any two or more Parties concerning the interpretation or application of the Convention, *mutatis mutandis*, to this Protocol.

Review of the Protocol

Provisions could require the CMP to review this Protocol at regular intervals, based on the best available scientific, technical, social and economic information relevant to climate change and its impacts. The provisions could require the CMP to take appropriate action, based on the findings of the review. The provisions could also specify the CMP at which the first review should take place.

Amendments to the Protocol

Provisions could accommodate the amendment of this Protocol in line with the arrangements under Article 20 of the Kyoto Protocol and Article 15 of the Convention.

Adoption and amendment of Annexes to the Protocol

Provisions could accommodate the adoption and amendment of the annexes to this Protocol in line with the arrangements under Article 21 of the Kyoto Protocol. Reflecting recent proposals to facilitate Parties' efforts to enhance their individual mitigation contribution within the timeframe set out in the provisions on Mitigation, the provisions could also accommodate an accelerated amendment procedure. Key elements of such an accelerated procedure could be that: (a) an amendment to change a mitigation commitment or action of a particular Party could only be proposed by that Party; (b) the amendment must add a new commitment or action, or enhance an existing commitment or action; and, (c) such an amendment must first be adopted by the CMP.

Right to vote

Provisions could confirm that each Party shall have one vote, except where regional economic integration organisations are concerned, in which case the practice could follow that outlined in Article 18 of the Convention and Article 22 of the Kyoto Protocol.

Depositary

Provisions would establish the Secretary-General of the United Nations as Depositary of this Protocol.

Signature, ratification, acceptance or approval

This provision would enable signature, ratification, acceptance or approval by States and Regional Economic Integration Organisations (REIOs) which are Parties to the Convention. Participation by REIOs would be governed in a manner consistent with Article 22 of the Convention and Article 24 of the Kyoto Protocol.

Entry into force

Provisions should compel participation of major emitters and key economies to help achieve a post-2012 outcome that has environmental integrity and encompasses a global response. The entry into force requirements of this Protocol could build on the „double-trigger“ model of Article 25(1) of the Kyoto Protocol, involving ratification by a minimum number of Parties and ratification by a minimum percentage of Annex I emitters. Negotiations could further refine each of these triggers so that they reflect current political and environmental needs.

Reservations

This provision would prevent reservations to this Protocol.

Withdrawal

In line with Article 25 of the Convention and Article 27 of the Kyoto Protocol, this provision could allow Parties to withdraw from this Protocol after a set period of time and establish a minimum time frame for any such withdrawal to take effect.

Authentic texts

This provision would establish equal authenticity for the deposited texts in all six UN languages.

Annexes

To promote clarity as to this Protocol's coverage of greenhouse gases and sectors/source categories, it could contain an annex based on Annex A of the Kyoto Protocol. Modifications to Annex A proposed by Parties to date would result in the annex under the new Protocol including nitrogen trifluoride; individually listing each of the HFCs and PFCs contained in table 2.14 of the errata of the IPCC Fourth Assessment Report of Working Group I (AR4 table 2.14 errata) (<http://www.ipcc.ch/pdf/assessment-report/ar4/wg1/ar4-wg1-errata.pdf>); and, citing both the common name and chemical formula of each gas.

MODEL B

Parties should aim to achieve under a Model B approach (amended Kyoto Protocol and new Protocol) the environmental, developmental and economic outcomes that would be achieved under a Model A approach.

AMENDED KYOTO PROTOCOL	NEW PROTOCOL
Preamble	Preamble
Existing KP provisions retained.	Similar to Model A, with the exception of the reference to decision 1/CMP.1.
Definitions	Definitions
Amendments unlikely to be required.	Based on the style of the Kyoto Protocol provisions.
Objective	Objective
Provisions could be added to complement the provisions of the new Protocol.	Similar to Model A, these provisions would express Parties' "shared vision for long-term cooperative action", supporting, but not duplicating, the ultimate objective of the Convention. The provision could refer to the respective roles of the new Protocol and the Kyoto Protocol in achieving the ultimate objective. The provision could also establish a long-term global goal for emissions reductions.
<p><i>Commentary: If the Kyoto Protocol was not amended to add the suggested provisions, the Model B approach would reduce the utility of agreeing a long-term global goal, as a large element of the means to achieve that goal would fall outside of the new Protocol.</i></p>	

Principles	Principles
No change.	Provisions in the new Protocol could recall the principles set out in Article 3 of the Convention. Parties may also wish to agree to additional, new principles, but these could not be inconsistent with Article 3 principles.
Mitigation	Mitigation
<p>KP would continue to form the basis of mitigation commitments for those Parties whose national circumstances enable them to take on quantified emission limitation or reduction commitments. At a minimum, amendments would be required to Annex B and some parts of Article 3.</p> <p>With regard to international aviation and maritime transport and the LULUCF sector, KP amended as per Model A.</p>	<p>Provisions could, in a similar fashion to Model A, establish a spectrum of binding nationally appropriate mitigation commitments and actions. The other elements of the mitigation provisions of Model A could also be taken up in the new Protocol.</p> <p>With regard to international aviation and maritime transport, may also need to contain provisions as per Model A, so that this commitment applies to the broadest possible number of Parties.</p> <p>With regard to the LULUCF sector, would include provisions as per Model A.</p>
<i>Commentary: In separating quantified emission limitation or reduction commitments from other mitigation commitments and actions, the Model B approach would make a comparison of mitigation commitments and actions across Parties more difficult.</i>	
Joint fulfilment of quantified emission reduction or limitation commitments	Joint fulfilment of quantified emission reduction or limitation commitments
Existing KP provisions retained.	Mirror KP provisions (as per Model A).

Flexibility mechanisms	Flexibility / Market-based mechanisms
<p>The Kyoto Protocol provisions establishing the flexibility mechanisms (Articles 6, 12 and 17) would be amended in line with the consensus emerging from the AWG-KP discussions on this issue. The provisions would also be amended to link to mitigation commitments and actions taken under the new Protocol.</p>	<p>Provisions for eligibility to access KP provisions.</p>
<p><i>Commentary: The aim is to enable all Parties that take on suitable commitments and actions to participate in all market-based mechanisms. This aim could be achieved under Model B by: (i) provisions in the new Protocol on criteria by which Parties to that Protocol could access the market-based mechanisms of the amended KP; and, (ii) amending the KP's provisions linking the flexibility mechanisms to mitigation commitments and actions taken under the new Protocol. Such cross-referencing between agreements is a novel and relatively untested approach. Model B would establish the bodies to govern the flexibility mechanisms of both Protocols under the amended KP. This approach should reduce complexity, but would also mean that not all Parties have access to the decision-making processes of the bodies. Alternatively, a separate set of governance bodies could be established under each Protocol, which would have its own inherent difficulties.</i></p> <p><i>Model B also makes the design of the REDD mechanism vis a vis its possible linkages with the existing market-based mechanisms more complex. See next section for further detail.</i></p>	
	<p>REDD mechanism</p>
	<p>As per Model A.</p>
<p><i>Commentary: The REDD mechanism logically sits in the new Protocol given its aim is to provide developing countries with a vehicle through which to contribute to mitigation. To mobilise the investment necessary to support developing countries' REDD, however, the mechanism may be designed to generate units that could be fully fungible in the carbon markets supported by both Protocols. Such a design would present greater challenges under Model B. Linking the new Protocol's REDD mechanism with the carbon markets supported by the amended KP could, inter alia, require the revision of Article 17 modalities and procedures. Non-Parties to the amended KP could not participate in related decision-making and the approach would constitute another instance of the relatively novel and untested approach of cross-referencing between agreements.</i></p>	

Adaptation	Adaptation
Parties would need to reconsider the relevance of Article 11(2) of the KP.	As per Model A.
Impact of response measures	Spillover effects
Elements of Articles 2(3) and 3(14) of the KP may not remain relevant and could be amended.	As per Model A.
Financial resources	Financial resources
Article 12(8) of the KP may need to be amended to reflect any outcome relating to the share of proceeds negotiations.	As per Model A above. If the generation of resources relates to mechanisms involving the flexibility mechanisms or the issuing of AAUs, there would need to be linkages between these provisions and the relevant provisions of the amended KP.
<i>Commentary: It is important that a broad spectrum of both donor and recipient countries ratify the treaty containing provisions on financial resources. In order to encourage such broad ratification, entry into force provisions could be appropriately crafted (see provisions below). However it may be legally difficult to split provisions relating to the generation of resources in one treaty and the mechanism for governing and disbursing such resources into another.</i>	
Technology cooperation	Technology cooperation
Existing KP provisions retained.	As per Model A.
Reporting and review	Reporting and review
Existing KP provisions (Articles 5, 7 and 8) retained.	As per Model A.
<i>Commentary: The Model B approach provides less scope for streamlining MRV arrangements and therefore associated resource requirements, placing a greater burden on the already limited technical, administrative and institutional resources of the Parties and their expert reviewers. This could in turn lower Parties' ambitions with respect to their mitigation commitments and actions. Model B also increases the complexity associated with setting deadlines for reporting and verification and maintaining an appropriately consistent approach to the MRV of</i>	

quantifiable commitments and actions recorded in both instruments.

Methodological issues	Methodological issues
Existing KP provisions retained.	Provisions could specify that the metrics and estimation methodologies used in determining fulfilment of mitigation commitments and actions would be those adopted by the new Protocol's CMP, mirroring the procedure contained in the existing KP provisions.

Commentary: It would be more difficult to promote consistency of methodologies and metrics under Model B, and therefore more difficult to promote comparability and transparency of the resulting greenhouse gas data, unless Parties under the new Protocol were willing to adopt decisions of the amended KP's CMP.

Non-compliance	Non-compliance
Existing KP provisions retained.	Provisions would require the CMP adopt procedures and institutional mechanisms, modelled on those of the KP, to promote compliance with the new Protocol, determine cases of non-compliance, and secure timely return to compliance.

Commentary: The Model B approach would involve two compliance bodies, potentially applying different procedures and mechanisms. This would complicate efforts to promote consistent and equitable treatment of similar compliance issues. It could be particularly problematic where an instance of potential non-compliance before a compliance body under one Protocol concerned market-based mechanisms accessible to Parties under both Protocols. Two compliance bodies would also increase demands on existing institutional arrangements (the secretariat).

Multilateral consultative process	Multilateral consultative process
Existing KP provisions retained.	Provisions could require the CMP to consider the development of a multilateral consultative process, in light of the compliance procedures and mechanisms adopted under the above article.

Immunity of persons serving on bodies established under the Protocols	Immunity of persons serving on bodies established under the Protocols
Provisions added per Model A, covering persons serving on specified bodies constituted under the amended Kyoto Protocol and the new Protocol.	Provisions would mirror those contained in the amended KP.
<i>Commentary: The Model B approach, compared to Model A, may provide less protection to persons serving on the bodies of the two Protocols. This is because it may not be possible, owing to some Parties' domestic arrangements for the conferral of immunities, to include in the provisions of the two Protocols the requirement that Parties to confer immunity on persons serving on bodies established under both Protocols, regardless of whether they are a Party to both Protocols.</i>	
Institutional arrangements	Institutional arrangements
Existing KP provisions retained.	Provisions would need to address the same issues as outlined under this heading for Model A.
<i>Commentary: Requiring existing institutional arrangements (the COP and the secretariat) to service a second, separate Protocol would increase the burden on the UNFCCC secretariat. In contrast, a Model A approach could eventually result in streamlining of institutional arrangements.</i>	
Dispute settlement	Dispute settlement
Existing KP provisions retained.	As per Model A.
Review of the Protocol	Review of the Protocol
Existing KP provisions retained.	As per Model A.
Amendments	Amendments
Amendments unlikely except as a means to link the entry into force provisions of both Protocols.	As per Model A.
<i>Commentary: see commentary below on entry into force provisions.</i>	

Adoption and amendment of Annexes	Adoption and amendment of Annexes
Provisions amended to add an accelerated amendment procedure to enable any Party to assume mitigation commitments or actions, or enhance existing commitments or actions, during the timeframe agreed under the Mitigation article.	As per Model A.
Right to vote	Right to vote
Existing KP provisions retained.	Based on Kyoto Protocol provisions.
Depositary	Depositary
Existing KP provisions retained.	As per Model A.
Signature, ratification, acceptance or approval	Signature, ratification, acceptance or approval
Existing KP provisions retained.	As per Model A.
Entry into force	Entry into force
Existing KP provisions retained.	As per Model A. In addition, it may be useful to include provisions linking its entry into force with the entry into force of the amendments to the KP, discussed below.
<p><i>Commentary: The provisions of an amended Kyoto Protocol and a new Protocol may benefit from simultaneous entry into force, as the two legal instruments are likely to be negotiated as an indivisible package, and some provisions (eg financial resources, flexibility mechanisms, REDD mechanism) require the broadest possible ratification to be fully effective. However, linking entry into force provisions presents challenges owing to the apparent lack of precedent in international law and the current rules for amendments to the Kyoto Protocol.</i></p> <p><i>There may be alternatives to establishing an explicit legal linkage between the entry into force provisions. Entry into force might be achieved within similar time frames by building sufficient incentives into each treaty so that countries would choose to become Parties to both, rather than just one.</i></p>	

Reservations	Reservations
Existing KP provisions retained.	As per Model A.
Withdrawal	Withdrawal
Existing KP provisions retained.	As per Model A.
Authentic texts	Authentic texts
Existing KP provisions retained.	As per Model A.
Annex A	Annex A
Amended per Model A.	As per Model A.