

Exceptionalism United?: Unpacking UNFCCC Article 7.2 ©

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EXCEPTIONALISM UNITED?: UNPACKING UNFCCC ARTICLE 7.2(c)

by Niranjali M. Amerasinghe and Kristen Hite*

INTRODUCTION

In the wee hours of the United Nations Framework Convention on Climate Change's ("UNFCCC" or "Convention") fifteenth Conference of the Parties ("COP-15"), the United States invoked Article 7.2(c) of the Convention,¹ an obscure and little understood provision, in a last-minute effort to reach agreement on the post-2012 climate regime.² What is Article 7.2(c), and what are its potential applications beyond the specific context of the negotiations at Copenhagen? Some have suggested that this particular provision could present a unique opportunity for specific groups of countries to take coordinated action to address climate change while remaining under the UNFCCC umbrella. This article offers an initial analysis of the scope of Article 7.2(c) and its potential application to international efforts to address climate change.

Under the UNFCCC, Article 7.2(c) provides 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: . . . (c) **facilitate, at the request of two or more Parties, the coordination of measures adopted by them to address climate change and its effects**, taking into account the differing circumstances, responsibilities and capabilities of the Parties and their respective commitments under the Convention.³

Article 13.4(d) of the Kyoto Protocol ("KP" or "Protocol") has nearly identical language to the text contained in Convention Article 7.2(c). Like the Convention text, KP Article 13.4(d) gives the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol ("CMP") the authority to:

Facilitate, at the request of two or more Parties, the coordination of measures adopted by them to address climate change and its effects, taking into account the differing circumstances, responsibilities and capabilities of the Parties and their respective commitments under this Protocol.⁴

Indeed, the difference between the Convention text and this provision lies only in the commitments: the Convention text applies to the commitments of the Convention, while the Protocol text applies to commitments "under this Protocol."⁵

For the purposes of this article, we focus our analysis on the authority given to the Conference of the Parties ("COP") to

facilitate coordination of measures adopted by a group of Parties based upon the specific text in Article 7.2(c). We begin with the Vienna Convention on the Law of Treaties ("Vienna Convention") for guidance on interpreting treaty-level text.⁶

LEGAL FRAMEWORK

Rules for treaty interpretation are contained in Articles 31 and 32 of the Vienna Convention.⁷ These rules are widely considered to be a codification of customary international law regarding treaty interpretation.⁸ Thus, they are applicable with respect to a given State regardless of whether it has ratified the Vienna Convention.⁹

The primary rule of interpretation states, "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."¹⁰ "Context," in relevant part, can include other provisions of the treaty,¹¹ "any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions,"¹² "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation,"¹³ "any relevant rules of international law applicable in the relations between the parties,"¹⁴ and any special meaning given to a term.¹⁵ Therefore, with respect to interpreting Article 7.2(c) of the UNFCCC, relevant sources would include: operative and preambular text of the UNFCCC, and its annexes; the Kyoto Protocol, which would constitute a subsequent agreement applying provisions of the UNFCCC (including, but not limited to, Article 4.2(a) and (b) of the UNFCCC, relating to Annex I mitigation); COP decisions and CMP decisions, which would constitute subsequent practice to the extent that they establish agreement of the Parties on interpretation of UNFCCC provisions;¹⁶ and other relevant rules of international law.¹⁷ For the purpose of this preliminary scoping, we will focus on context provided by provisions within the UNFCCC and the Kyoto Protocol.

Based on this Vienna Convention guidance, the relevant terms of Article 7.2(c) should be analyzed in accordance with

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their ordinary meaning in context and in light of the object and purpose of the UNFCCC. The next section of the article contains this analysis, followed by an examination of procedural requirements for invoking the power, as well as additional considerations and a conclusion.

INTERPRETATION

The purpose of this preliminary scoping is to provide initial guidance on what it would mean for the UNFCCC if the COP were to facilitate coordination of measures adopted by two or more Parties. As such, we have limited the examination of “context” to key provisions within the UNFCCC and the KP (which constitutes a subsequent agreement).¹⁸ For the purposes of Article 7.2(c), the key operative phrase is, “facilitate coordination of measures adopted.”¹⁹ The remaining portions of the paragraph provide broader context and procedural considerations, which we address in later sections.²⁰ We now consider the ordinary meaning of these terms and their context, taking into account the object and purpose of the UNFCCC.²¹

ORDINARY MEANING

Recognizing the key operative phrase of Convention Article 7.2(c) is “facilitate coordination of measures adopted,” we now examine the ordinary meaning of “facilitate,” “coordinate,” “measures,” and “adopted.”²² The UNFCCC does not define any of the above terms, so without explicit guidance on definitions we begin our analysis with standard dictionary definitions.²³ The ordinary meaning of “facilitate” is to “make easy or easier.”²⁴ To “coordinate” is to “adjust (various parts) so as to have harmonious action.”²⁵ “Measures” typically refers to some form of legislative enactment, or a course of action to achieve a specified goal.²⁶ And “adopt” implies some type of formal acceptance process.²⁷

Based on these plain meaning definitions, the power to “facilitate coordination of measures adopted” means: making easier the harmonization of courses of action accepted by a formal process. Of course, this does not shed much light on what facilitation or coordination might involve, nor what kinds of actions can be considered measures for UNFCCC purposes. For this we look to context—both specific to the terms and broadly applicable to the power—provided in the UNFCCC and the KP, and the object and purpose of the UNFCCC.

SPECIFIC CONTEXTUAL CONSIDERATIONS

In this section we examine specific contextual considerations associated with each of the key terms. Under the Vienna Convention, “context” in relevant part includes, *inter alia*, other provisions of the treaty;²⁸ and “any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions.”²⁹ We now analyze “context” based on the specific key terms of Article 7.2(c) and their broader context within the UNFCCC and Kyoto Protocol.³⁰

Facilitate

In the context of the scope of activities that may be facilitated, the UNFCCC contains several helpful references. With respect to Party obligations, there are provisions that expressly connect facilitation with: adequate adaptation measures to be

taken by all Parties;³¹ and the transfer of technologies and capacity building for developing countries by developed country Parties, including those in Annex II.³² “Facilitate” could also indirectly apply to both mitigation and new and additional financing measures through the application of Articles 7.2(b) or 7.2(c), which provide for facilitation of measures to address climate change and its effects; however there are no express provisions that link “facilitate” with mitigation or new and additional financing measures.³³ Additionally, facilitation can apply to: “(i) the development and implementation of educational and public awareness programmes on climate change and

its effects; (ii) public access to information on climate change and its effects; (iii) public participation in addressing climate change and its effects and developing adequate responses; and (iv) training of scientific, technical and managerial personnel.”³⁴ This type of facilitation may be at national levels, and as appropriate, sub regional and regional levels.³⁵

In terms of COP powers, there are two explicit powers to “facilitate:” Article 7.2(b) on facilitating the exchange of information,³⁶ and Article 7.2(c) on facilitating coordination.³⁷ Additionally the Secretariat can provide facilitation with respect to the provision of assistance in compilation and communication of information required by the Convention, which is aimed at assisting developing countries.³⁸ Finally, within the UNFCCC, “facilitate” is distinct from “promote” and “finance.” There are several provisions that call for Parties/bodies to “promote and facilitate”³⁹ and one provision that requires Parties to “promote, facilitate and finance,”⁴⁰ indicating that the term “facilitate” is distinct from the other two.

Based on this Vienna Convention guidance, the relevant terms of Article 7.2(c) should be analyzed in accordance with their ordinary meaning in context and in light of the object and purpose of the UNFCCC.

In the context of the scope of activities that may be facilitated, the Kyoto Protocol offers several textual references for consideration. The Kyoto Protocol specifically allows for the facilitation—including by the CMP—of adequate adaptation measures.⁴¹ Further, it allows for indirect facilitation of mitigation measures to address climate change and its effects.⁴² Additionally, like the UNFCCC, “facilitate” can apply to technology transfer, capacity building, and the exchange of information.⁴³ Yet another similarity with the Convention is that, within the Protocol, “facilitate” is distinct from “promote” and “finance.”⁴⁴

While the Protocol and Convention have largely similar, and in some cases identical, provisions regarding facilitation, the KP provides context, as per the Vienna Convention framework, as a subsequent agreement applying provisions of the UNFCCC. Beyond the express powers of facilitating exchange of information and coordination, the Kyoto Protocol specifically mandates the CMP to facilitate cooperation with respect to Annex I (“AI”) Parties’ obligations.⁴⁵ An additional consideration is that the Protocol has provisions that explicitly allow for facilitation at the national and international levels, while the Convention also allows for facilitation at the sub-regional and regional levels.⁴⁶

In sum, facilitate seems to mean enhancing something beyond promoting or financing, at various levels. To better understand what that “something” is, we now consider the specific context for “facilitate coordination.”

Coordination

Article 7.2(c) clearly indicates that coordination can apply to measures that address climate change and its effects. There are few other references to coordination in the UNFCCC;⁴⁷ however, they do indicate that, in addition to measures, coordination can apply to specific instruments, such as “relevant economic and administrative instruments developed” by AI Parties “to achieve the objective of the Convention.”⁴⁸ Additionally, the UNFCCC provides the Secretariat with powers to undertake coordination activities with secretariats of other relevant international bodies.⁴⁹ With respect to COP powers, as noted above, there are two types of facilitation powers granted to the COP: the power to facilitate exchange of information (Article 7.2(b)), and the power to facilitate coordination (Article 7.2(c)).⁵⁰ Noting that exchange of information relates to measures by all Parties, and coordination relates to a subset of Parties,⁵¹ the two separate COP powers point to the inference that “coordinate” and “exchange of information” are distinct. However, to the extent that harmonizing action may involve the exchange of

information, “coordinate” could involve or be enhanced by, but not be limited to, exchanges of information. Indeed, it is possible that facilitating the exchange of information of measures adopted by all Parties under Article 7.2(b) is part of what would allow the COP to coordinate measures taken by a subset of Parties.

“Coordination,” in the context provided by the KP, has a similar meaning as in the UNFCCC. It is clear that policies and measures may be coordinated.⁵² “Coordination” can involve specific activities, including developing the “ways and means”

for coordination, enabling consideration of reviews undertaken across the UNFCCC and KP, and establishing expert teams.⁵³ “Coordinate” is a distinct term from “cooperate” or “promote,” although the terms are not necessarily completely distinct.⁵⁴

In the context of seeking “harmonious action,” as the plain language indicates, “coordination” in the context of the UNFCCC and KP can include the development of ways and means to undertake actions regarding policies and measures, consideration of reviews across relevant treaties, and minimization of adverse impacts.⁵⁵ For

the purposes of this analysis, we focus on “facilitate coordination” of “measures.”

Measures

The UNFCCC provides some interesting context for the meaning and use of measures. At a general level, there are references to “measures” with respect to: “addressing climate change;”⁵⁶ taking action to “combat climate change;”⁵⁷ taking precautionary action “to anticipate, prevent or minimize the causes of climate change;”⁵⁸ and protecting the “climate system against human-induced change.”⁵⁹ Measures taken to combat climate change can be unilateral.⁶⁰ Measures taken to protect the climate system should be tailored to “the specific conditions of each Party” and be “integrated with national development programmes.”⁶¹ Additionally, for all measures undertaken pursuant to the UNFCCC, the COP is required to assess their overall effect, particularly “environmental, economic and social effects as well as their cumulative impacts and the extent to which progress . . . is being achieved.”⁶²

More specifically, measures are referenced in the context of specific actions. For example, measures adopted by Parties to “mitigate climate change” and to facilitate adaptation, “taking into account” national circumstances, must be included in the formulation, implementation, and publication of all Parties’ national or regional programs.⁶³ In implementing these measures, certain considerations, including “social, economic, and

Measures taken to protect the climate system should be tailored to “the specific conditions of each Party” and be “integrated with national development programmes.”

environmental policies,” must be taken into account in order to minimize adverse economic, health, and environmental effects of such measures.⁶⁴ Parties must also include details of these measures in their national communications.⁶⁵ In the specific context of AI mitigation, measures (in tandem with policies) are required on both national and regional levels.⁶⁶ AI Parties can jointly implement these measures.⁶⁷ Detailed information on these policies and measures must be included in national communications in accordance with relevant articles.⁶⁸ On mitigation generally, the COP can promote and guide comparable methodologies to evaluate the “effectiveness of measures to limit the emissions and enhance the removals of these gases.”⁶⁹

Measures can also apply to obligations of developed country Parties and other Parties in Annex II for the provision of financial resources and technology transfer.⁷⁰ Although measures are not explicitly referenced in respect of providing financial resources for developing country mitigation, adaptation, and technology transfer to developing countries when setting out Party obligations, Article 12.3 on inclusion of details in national communications specifically refers to such activities as “measures.”⁷¹ Thus, measures can be involved in the provision of financial resources and technology transfer.⁷²

Finally, “policies” and “measures” appear to have distinct meanings in the UNFCCC. Particularly in the context of mitigation, the provisions refer to “policies and measures,” which imply that there is a distinction between the two.⁷³ Thus, for the purposes of Article 7.2(c), the COP could facilitate coordination of activities that can be considered “measures” but not those that would constitute “policies.”

We further consider the context of “measures” by looking beyond the Convention context to the use of the term in the Kyoto Protocol. Under the Protocol, “measures” refers to adaptation and mitigation, for both AI and non-AI Parties.⁷⁴ Measures may be adopted by Parties, tailored to national circumstances, included in national communications, as well as included in the formulation, implementation, and publication of all Parties’ mitigation and adaptation measures.⁷⁵ Additionally, measures should minimize adverse effects, including social environmental and economic impacts, and can enable the COP to take further action, where appropriate.⁷⁶

In the specific context of AI mitigation, the scope of “measures” appears broad and in tandem with “policies,” includes, *inter alia*: enhancements of energy efficiency sectors, sinks, transport, and some ozone depleting substances; protection of sinks; promotion of sustainable forest management and agricultural practices, as well as of technologies; research for technologies; and public sector economic interventions, such as taxes, incentives, duties, and subsidies.⁷⁷ Specifically for AI Parties, the COP may consider the “ways and means” of mitigation measures based on a CMP decision that coordination is beneficial.⁷⁸

For all Parties, including non-AI Parties, measures can be included in national and regional programs that apply to certain sectors, such as energy, transport, industry, agriculture, forestry and waste management, as well as adaptation technologies and spatial planning.⁷⁹ Even those “measures” undertaken by specific

Parties can nevertheless involve cooperation to “enhance individual and combined effectiveness.”⁸⁰

In sum, “facilitate coordination of measures,” in this particular context, seems to refer to enabling and enhancing harmonious action to address mitigation and adaptation actions, potentially including ways and means such as financing and transfer of technology. As such, “measures” would seem to be most associated with the plain-meaning definition of a “course of action to achieve a specified goal. At the same time, the alternative plain meaning of “measures” as a legislative enactment may also be relevant given the need for “adoption” of measures. We now consider what “adopted” could mean.

Adopt

What does it mean to have “adopted” measures? In the UNFCCC, “adoption” can apply generally to the Parties⁸¹ and to the COP.⁸² For example, all Parties can adopt measures to address climate change and its effects.⁸³ However, in the context of AI mitigation, UNFCCC Article 4.2(a) mandates that AI Parties “adopt national policies and take corresponding measures,”⁸⁴ also known as mitigation commitments, which includes policies and measures adopted by regional economic integration organizations.⁸⁵ The UNFCCC also specifies when amendments to these specific mitigation commitments are permitted.⁸⁶

Further, the COP can adopt treaty-level text prior to further acceptance or ratification, such as: legal instruments related to the UNFCCC⁸⁷ to the extent that such instruments constitute a treaty; protocols, with specified procedures on adoption by voting if all efforts to reach consensus fail;⁸⁸ amendments to the UNFCCC, with procedures for voting if consensus fails;⁸⁹ and annexes, including amendments to those annexes, with procedures for voting if consensus fails.⁹⁰ Other items include: legal instruments that do not constitute treaty-level text;⁹¹ decisions on matters within its mandate;⁹² rules of procedure and financial procedures for itself and for any subsidiary bodies;⁹³ guidelines for national communications;⁹⁴ regular reports on the implementation of the Convention;⁹⁵ and rules of procedure for conciliation and arbitration in the context of dispute settlement.⁹⁶

We look to the Kyoto Protocol for additional context. First, similar to the UNFCCC, “adopted” can apply generally to the CMP as well as specifically to Parties, including at the national and international levels.⁹⁷ At the international level, the CMP may adopt future treaty text that has not yet entered into force, as well as amendments and annexes.⁹⁸ Note that treaty text can specify when adoption can impact future commitments.⁹⁹ Certain provisions must be adopted by undertaking amendment procedures such as a vote, but prior to ratification.¹⁰⁰

Other items beyond treaty-level text may also be adopted in the context of the Protocol. The CMP may adopt decisions, including adoption “under” or “pursuant to” treaty provisions.¹⁰¹ Other items the KP explicitly references in the context of “adopted” include commitment periods, guidelines for the preparation of information, and national communications.¹⁰² Finally, as already noted in this article, Parties may adopt measures to address climate change and its effects.¹⁰³

In sum, adoption is consistent with the plain meaning of a formal acceptance process. In this context, recognizing that the ordinary meaning of “measures” is either a course of action or legislative enactment, “adopt” functionally modifies “measures” to those on which formal action has been taken by Parties, whether specifically legislative in nature or otherwise.

BROADER CONTEXTUAL CONSIDERATIONS

In this section, we briefly examine contextual considerations relevant to the power as a whole.

In international law, “Parties” typically means those States for whom the treaty in question is in force.¹⁰⁴ Because the UNFCCC does not define Parties, we assume for the purpose of this analysis that “Parties,” in the context of the UNFCCC, means countries that have ratified the UNFCCC.¹⁰⁵ Thus, only countries that have consented to be bound (i.e. through formal ratification procedures) by the UNFCCC can invoke Article 7.2(c), and only measures adopted by those countries are eligible for coordination by the COP.¹⁰⁶

In the case of the Kyoto Protocol, “Party” means, unless the context otherwise indicates, a Party to this Protocol.¹⁰⁷ While the KP’s governing body (the CMP) is legally distinct from the UNFCCC’s COP, the Protocol does include provisions that apply to the UNFCCC’s AI Parties.¹⁰⁸ For KP Article 13.4(d), only “Parties,” as opposed to “Party included in Annex I,” is mentioned. Thus, unless the context indicates otherwise, “Parties” here means Parties to the Kyoto Protocol.

The second half of Article 7.2(c) shapes the power to facilitate coordination of measures by requiring the COP to take “into account the differing circumstances, responsibilities and capabilities of the Parties and their respective commitments under the Convention.”¹⁰⁹ It therefore follows that the COP has an obligation, in facilitating coordination of measures, to consider how those measures relate to differentiated responsibilities and national circumstances, as well as the specific commitments of different groupings of Parties within the UNFCCC.

Additional context is provided by the chapeau of Article 7.2:

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.¹¹⁰

This demonstrates that the primary role of the COP is to promote effective implementation of the UNFCCC, thus any exercise of powers must contribute to achieving this goal. Further, the chapeau provides guidance on the form of action that the COP can take within its powers; the COP shall make the *decisions* necessary to implement the UNFCCC.

OBJECT AND PURPOSE

The primary objective of the UNFCCC is to “achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at

a level that would prevent dangerous anthropogenic interference with the climate system.”¹¹¹ This objective is guided by, *inter alia*: common but differentiated responsibilities and respective capabilities; the specific needs and circumstances of the particularly vulnerable; the need to take precautionary measures; the promotion of sustainable development; and promotion of an open international economic system.¹¹² The KP affirms the overall objective of the UNFCCC.¹¹³ These are all important considerations regarding the COP’s power to facilitate coordination of measures.

PROCEDURAL MATTERS AND ADDITIONAL CONSIDERATIONS

Although it is beyond the scope of this article to examine similar provisions in other Multilateral Environmental Agreements (“MEAs”), which could be helpful in determining the application of powers to facilitate coordination of measures, initial research shows that the explicit power to facilitate coordination of measures adopted by a subset of Parties is rare.¹¹⁴ Nevertheless, broadly speaking, there are examples of other conventions granting powers or creating bodies that have the effect of coordinating measures adopted by different subsets of parties.¹¹⁵ Analyzing these examples in the future might be helpful in informing what kinds of actions the UNFCCC COP could authorize under Article 7.2(c).

As noted above, there is a specific procedural requirement to invoke the COP’s power under Article 7.2(c): “at the request two or more Parties.” Typically, rules for this kind of procedural matter are contained in the rules of procedure of a convention’s governing body, however the UNFCCC COP to date has not formally adopted rules of procedure,¹¹⁶ due to an inability to reach consensus on draft rule of procedure 42, containing, *inter alia*, voting rules for substantive matters.¹¹⁷ Instead, the Parties provisionally apply draft rules of procedure, except for rule 42, at all COP and CMP meetings until the rules are formally adopted, which means that most procedural and substantive issues—unless specified in treaty text or outside of rule 42—must be decided by consensus.¹¹⁸ Therefore, at the moment, the draft rules of procedure as provisionally applied can provide guidance on the procedural elements of requesting facilitation of coordination measures.

The primary power of the COP is to take “the decisions necessary to promote the effective implementation of the Convention,” as stated in Article 7.2. These decisions are adopted at COP sessions, which are mandated to take place once every year with the possibility of extraordinary sessions if Parties so request.¹¹⁹ To ensure that an item is considered, it should be included in the agenda for the session. According to the draft rules of procedure, an item may be added to the agenda in one of three ways: before circulation of the provisional agenda; after circulation of the provisional agenda but before the opening of the session, which would then be included in a supplementary provisional agenda; or at the adoption of the agenda.¹²⁰ The Secretariat, in agreement with the President of the session, drafts the provisional and supplementary provisional agendas, which

include “as appropriate: [a]ny item proposed by a Party.”¹²¹ At adoption of the agenda, items can be added, deleted, deferred, or amended only if the COP *decides* to do so.¹²² Thus, to get an item on the agenda before adoption merely requires a proposal by a Party and the agreement of the President and cannot be deleted, deferred, or amended without consensus, whereas items introduced at the meeting must initially have consensus to be added to the agenda. Additionally, items can only be added at the meeting if the COP considers it urgent and important.¹²³

Considering all of these procedural matters, perhaps the most likely way that the COP would consider a request to facilitate the coordination of measures would be through a formal agenda item proposed prior to circulation of the provisional agenda. Presumably this could occur via a request from a single Party on behalf of two or more Parties, or as a joint proposal from multiple parties for inclusion as a COP agenda item of facilitating coordination of measures adopted by a group of Parties. Once the item is placed on the agenda, it would then become incumbent on the COP to consider it and to facilitate the coordination of measures, potentially through a COP decision (which, pursuant to the draft rules of procedure, would need to occur via consensus).

CONCLUSION

Following the Vienna Convention’s direction on treaty interpretation by looking at the ordinary meaning, context, objective, and purpose of a treaty, we begin to form a better understanding of the scope of activities that may be undertaken pursuant to UNFCCC Article 7.2(c).

Recognizing that the key operative component of Article 7.2(c) is “facilitate coordination of measures adopted,” we have considered the meaning of the specific phrase and its broader context. Both the Convention and the Kyoto Protocol contexts generally support the plain meaning of the terms, which collectively could be read as “making easier the harmonization of courses of action accepted by a formal process.” In simpler terms, we could say that a plain meaning interpretation of Article 7.2(c) supports the COP’s enabling the harmonization of formal national-level actions, whether legislative or otherwise.

What does this process of enabling harmonization of formal domestic actions mean in the specific context of the Framework Convention? To answer this question we look to the specific context of these terms as well as the broader context of the UNFCCC and its successor treaty, the Kyoto Protocol.

Based on an analysis of the context of the specific terms, it seems most helpful to consider Article 7.2(c), first based on the action taken by the COP: “facilitate” in the context of “coordination,” and then consider the activity undertaken by specific Parties: “measures adopted by them.” As such, we can piece together the ordinary meaning and context of the two operative clauses of Article 7.2(c): “facilitate the coordination” and “measures adopted by them.”

First, with respect to “facilitate the coordination,” we have seen that “facilitate” means enhancing or enabling “something” beyond promoting or financing, at various levels. That

“something” is better explained in the specific context of “coordinate” or “coordination” under the UNFCCC and KP, which includes the development of ways and means to undertake actions regarding, *inter alia*, “measures.” Putting these terms together, in light of their ordinary meaning, we can thus conclude that “facilitate the coordination” could be interpreted to mean enhancing or enabling the achievement of a goal, including through ways and means.

What is the specific goal we are seeking to achieve in the context of Article 7.2(c)? To answer this question we must define “measures adopted by them.” The ordinary meaning of “measures” is “course of action” or “legislative enactment,” which is informed by the UNFCCC and KP subset of actions and enactments to address mitigation and adaptation. In looking at the relevant treaties, we see that some specific measures connote specific mitigation actions by AI Parties, and, in some cases, other Parties associating under Convention Article 4.2(g), while other “measures” are relevant to all Parties, including AI and non-AI Parties. We also see that measures can broadly involve adaptation and mitigation, including enhancements, protections, and promotion of specific activities, research, and public sector interventions. We also see that these measures can apply at both national and regional levels.

Given the relatively broad scope of potential “measures” under the UNFCCC and KP, we focus on the meaning of the “adopted” modifier. In the context of Convention Article 7.2(c), “adopted” measures seem to be consistent with their plain meaning involving a formal acceptance process. As such, “measures adopted by them” means those measures to which formal action has been taken by Parties.

Putting these terms together, “facilitate coordination of measures,” in this particular context, would seem to refer to enabling and enhancing harmonious action to address mitigation and adaptation actions formally adopted by specific Parties, and potentially include ways and means such as financing and transfer of technology. Taking this phrase in light of the complete text of Article 7.2(c), we see that the COP has a mandate to take action, such as issuing decisions, to ensure effective implementation of the Convention’s objective of avoiding anthropogenic interference with the climate system in a manner that supports sustainable development and takes into account common but differentiated responsibilities.

Noting that the Kyoto Protocol has nearly identical language for facilitating the coordination of measures and affirms the same objective as the Convention, *either* or *both* the COP and CMP would have an affirmative obligation to act if two or more of their respective Parties issue a request pursuant to Convention Article 7.2(c) and/or Protocol Article 13.4(d). As such, it is certainly possible that a subset of Parties could request the COP and CMP to facilitate the coordination of formally adopted domestic measures, and in doing so obligate the COP or CMP to act on such a request. While in theory this could enable a subset of countries to act, due to the provisional rules of procedure, in practice the COP may find it difficult to fulfill its mandate given that any decision taken would need to be by consensus.

Nevertheless, real possibilities exist for enhanced coordination at the international level—potentially even between the COP and CMP as governing bodies—to work towards achieving the

ultimate objective of the Convention and avoiding dangerous human interference with the Earth's climate.



Endnotes: Exceptionalism United?: Unpacking UNFCCC Article 7.2(c)

¹ United Nations Framework Convention on Climate Change, May 5, 1992, 1771 U.N.T.S. 107, U.N. Doc. A/AC.237/18, available at <http://unfccc.int/resource/docs/convkp/conveng.pdf> [hereinafter UNFCCC].

² This last-minute effort revolved around securing adoption of the “Copenhagen Accord,” a document negotiated by roughly 30 heads of State that was forwarded to the COP. Because it was by a subset of parties, and represented that subset of Parties’ interests, there was significant objection to the Accord as well as the COP’s ability to formalize it. As a result, the Accord was not adopted as a decision, and was taken note of instead. See UNFCCC Website, Decisions taken at COP-15, available at http://unfccc.int/files/meetings/cop_15/application/pdf/cop15_cph_auv.pdf. The decisions from COP-15 are still in advanced unedited format.

³ UNFCCC, *supra* note 1, at art. 7.2(c) (emphasis added).

⁴ Kyoto Protocol to the United Nations Framework Convention on Climate Change, art. 13.4(d), Dec. 10, 1997, 37 I.L.M. 22 [hereinafter KP], available at <http://unfccc.int/resource/docs/convkp/kpeng.pdf>.

⁵ *Id.*

⁶ Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 available at http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf [hereinafter Vienna Convention].

⁷ *Id.* arts. 31, 32.

⁸ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 (July 9), ¶ 94, at 174; Case Concerning Legality of Use of Force (Serb. & Mont. v. U.K.), Preliminary Objections, Judgment, 2004 I.C.J. 1307 (Dec. 15), ¶¶ 98, 99, at 1345; Case Concerning Avena and Other Mexican Nationals (Mex. v. U.S.), Judgment, 2004 I. C. J. 12 (Mar. 31), ¶ 83, at 48.

⁹ See, e.g., Avena and Other Mexican Nationals, *supra* note 8 (providing an example of a case in which the Vienna Convention was applied, when the U.S. has accepted, but not ratified the treaty).

¹⁰ Vienna Convention, *supra* note 6, art. 31.1.

¹¹ *Id.* art. 31.2.

¹² *Id.* art. 31.3(a).

¹³ *Id.* art. 31.3(b).

¹⁴ *Id.* art. 31.3(c).

¹⁵ *Id.* art. 31.4. In this context, we consider any special meaning assigned to a term to be specific definitions provided in the UNFCCC, if any.

¹⁶ JOSE ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 82-92 (2005) (noting that institutional practice as context-setting is not undisputed, but that it is nevertheless commonly relied upon by treaty interpreters as context, insofar as the institution is acting within the purposes of the treaty).

¹⁷ Vienna Convention, *supra* note 6, art. 31.3(c).

¹⁸ UNFCCC, *supra* note 1, art. 7.2(c). We do not look at COP and CMP decisions, or other relevant rules of international law, which according to the Vienna Convention would provide additional context. See Vienna Convention, *supra* note 6.

¹⁹ UNFCCC, *supra* note 1, art. 7.2(c).

²⁰ The first half of the sentence in Convention Article 7.2(c) can be deconstructed to separate procedural and specific contextual considerations from the key terms requiring analysis: “at the request of” is a procedural issue relating to how matters can be brought before the COP and we address this in Part III; additionally, “to address climate change and its effects” speaks to the types of measures that can be coordinated and will therefore be included in the analysis of “measures.” The second half of the Convention Article 7.2(c) and the *chapeau* provide broader context, which are addressed below.

²¹ Vienna Convention, *supra* note 6, art. 31.1.

²² UNFCCC, *supra* note 1, art. 7.2(c).

²³ See UNFCCC, *supra* note 1, art. 1.

²⁴ WEBSTER’S NEW WORLD COLLEGE DICTIONARY 508 (4th ed. 2001).

²⁵ *Id.* at 320.

²⁶ *Id.* at 892.

²⁷ *Id.* at 19.

²⁸ Vienna Convention, *supra* note 6, art. 31.2.

²⁹ *Id.* art. 31.3(a).

³⁰ Though beyond the scope of this initial analysis, further consideration could be given to additional context such as COP decisions and CMP decisions, which would constitute subsequent practice to the extent that they establish agreement of the Parties on interpretation of UNFCCC provisions, as well as other relevant rules of international law.

³¹ UNFCCC, *supra* note 1, art. 4.1(b) (mandating Parties to undertake measures to “facilitate adequate adaptation to climate change”).

³² *Id.* art. 4.5.

³³ *Id.* arts. 7.2(b)-(c) (providing that the COP can facilitate exchange of information and coordination of measures taken to address climate change and its effects).

³⁴ *Id.* art. 6(a).

³⁵ *Id.* art. 6(a).

³⁶ *Id.* art. 7.2(b).

³⁷ *Id.* art. 7.2(c).

³⁸ *Id.* art. 8.2(c).

³⁹ *Id.* arts. 4.5, 6(a), 7.2(b).

⁴⁰ *Id.* art. 4.5.

⁴¹ KP, *supra* note 4, art. 10(b) (mandating Parties to undertake measures to “facilitate adequate adaptation to climate change,” including, inter alia, sectoral programs, adaptation technologies for spatial planning, mitigation, and adaptation measures).

⁴² *Id.* art. 13.4(c) (addressing “facilitate” in the context of CMP functions); see also *id.* 13.4(d)).

⁴³ See *id.* art. 10(c), (e).

⁴⁴ See *id.* art. 10(c).

⁴⁵ See *id.* art. 2 (mandating the CMP to facilitate cooperation with respect to Annex I Parties’ obligations to “enhance the individual and combined effectiveness” of measures, by sharing experiences; exchanging information; and improving comparability, transparency, and effectiveness; with a mandate to take into account all relevant information).

⁴⁶ Compare UNFCCC, *supra* note 1, art. 6(a), with KP, *supra* note 4, art. 10(e).

⁴⁷ See UNFCCC, *supra* note 1, arts. 4.2(e)(i), 7.2(b), 8.2(e).

⁴⁸ *Id.* art. 4.2(e)(i).

⁴⁹ *Id.* art. 8.2(e).

⁵⁰ See *id.* arts. 7.2(b), 7.2(c).

⁵¹ Compare *id.* art. 7.2(b), with *id.* art. 7.2(c).

⁵² See KP, *supra* note 4, art. 2.4 (referencing policies and measures regarding KP, *supra* note 4, art. 2.1(a)).

⁵³ See *id.* art. 2.4 (supporting coordination of measures via the elaboration of ways and means, taking into account national circumstances and potential effects); *id.* art. 9.1 (referencing UNFCCC reviews required by UNFCCC arts. 4.2(d) and 7.2(a) and requiring the CMP to “take appropriate action”); *id.* art. 8.2 (allowing the Secretariat to undertake coordination activities, such as coordinating review teams based on parties’/IGOs’ proposals based on CMP guidance).

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⁵⁴ See UNFCCC, *supra* note 1, art. 6(b); KP, *supra* note 4, art. 2.1(b).
⁵⁵ UNFCCC, *supra* note 1, at pmb.; KP, *supra* note 4, art. 2.4 (mandating consideration of effects/impacts of actions as well as national circumstances, and referencing KP art. 2.1(a)) & 8.2(referring to reviews conducted pursuant to Article 7).
⁵⁶ UNFCCC, *supra* note 1, arts. 3.4, 7.2(b), 7.2(c).
⁵⁷ *Id.* art. 3.5.
⁵⁸ *Id.* art. 3.3.
⁵⁹ *Id.* art. 3.4.
⁶⁰ UNFCCC, *supra* note 1, art. 3.5 (explicitly stating measures should not “constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.”).
⁶¹ *Id.* art. 3.4.
⁶² *Id.* art. 7.2(e).
⁶³ *Id.* art. 4.1(b).
⁶⁴ *Id.* art. 4.1(f).
⁶⁵ *Id.* art. 12.1.
⁶⁶ *Id.* art. 4.2(a).
⁶⁷ *Id.* art. 4.2(a).
⁶⁸ *Id.* arts. 4.2(b), 12.2(a), 12.2(b) (expressly providing in Article 12.2(b) that an estimate of effects on anthropogenic emissions of the policies and measures must be included in the national communication).
⁶⁹ See *id.* art. 7.2(d).
⁷⁰ Compare *id.* arts. 4.3–5, with *id.* art. 12.3 (referring to activities required in Articles 4.3, 4.4, and 4.5 as “measures”).
⁷¹ Compare *id.* arts. 4.3–5, with *id.* art. 12.3 (referring to activities required in Articles 4.3, 4.4, and 4.5 as “measures”).
⁷² The COP can also take measures with respect to the financial mechanism, however, this is mandated to take place at the COP’s first session or as soon as practicable after that. UNFCCC, *supra* note 1, art. 11.4.
⁷³ See *id.* arts. 3.3, 3.4, 4.1(f) (use of words policies and measures to deal with climate change implies that policies and measures are distinct).
⁷⁴ KP, *supra* note 4, art. 10 (noting that this cannot be utilized to confer new commitments upon NAI Parties while affirming Article 4.1 of the Convention); see also *id.* art. 2.1(a)(i–vii) (specifying mitigation measures for Annex I Parties); *id.* art. 10(b)(ii) (differentiating the degree of obligation between AI and Non-AI measures); *c.f.* *id.* art. 10(b)(2) (referencing “adaptation measures” contained in national communications).
⁷⁵ See *id.* art. 13.4(c); *id.* art. 2.1(a); *id.* art. 10(b)(ii) (mandating the inclusion of measures addressing mitigation, sinks, adaptation, and capacity building in national communications).
⁷⁶ See *id.* art. 2.3 (also referencing spillover effects under the Convention); see also *id.* art. 13.4(a) (mandating the CMP to assess overall effects of measures taken, including “environmental, economic and social effects as well as their cumulative impacts and the extent to which progress towards the objective of the Convention is being achieved.”).
⁷⁷ *Id.* art. 2.1(a)(i–vii).
⁷⁸ See *id.* art. 2.4.
⁷⁹ See *id.* art. 10(b)(i).
⁸⁰ See *id.* art. 2.1(b) (explicitly referencing UNFCCC art. 4.2(e)(i)).
⁸¹ See *e.g.*, UNFCCC, *supra* note 1, arts. 4.2(a), 7.2(b).
⁸² See *e.g.*, *id.* 2, 7, 12.8.
⁸³ *Id.* arts. 3.4, 7.2(b), 7.2(c).
⁸⁴ *Id.* art. 4.2(a).
⁸⁵ *Id.* arts. 4.2(a) n.1.
⁸⁶ *Id.* art. 4.2(d) (relates to adequacy review and allows amendments to mitigation commitments in Article 4.2(a) and (b)).
⁸⁷ See *id.* art. 2.
⁸⁸ See *id.* art. 17 (specifying that ratification procedures are to be determined by the protocol itself); see also *id.* art. 19.
⁸⁹ See *id.* art. 15 (containing provisions that describe entry into force requirements similar to regular ratification procedures).
⁹⁰ See *id.* art. 16 (stating in Article 16.1 that without prejudice to annexes on dispute settlement, annexes are restricted to “lists, forms and any other material of a descriptive nature that is of a scientific, technical, procedural or administrative character” and further including an opt out procedure for entry into force of annexes and amendments to any annexes).

⁹¹ See *id.* art. 2.
⁹² See *id.* art. 7.2; see also *id.* art. 7.3.
⁹³ See *id.* art. 7.2(k), 7.3; see also *id.* art. 7.6.
⁹⁴ *Id.* art. 12.8 (specifying that Parties may submit joint national communications subject to such guidelines).
⁹⁵ *Id.* art. 7.2(f).
⁹⁶ *Id.* arts. 14.2, 14.7.
⁹⁷ See KP, *supra* note 4, art. 13.4(c)–(d) (referencing adoption of measures by Parties); *id.* art. 21.3 (concerning adoption by the CMP).
⁹⁸ See *id.* art. 1 (defining “Convention” as the agreement adopted in New York on May 9, 1992); *id.* art. 20 (specifying the process of adopting an amendment to treaty text prior to formal Party acceptance when consensus is not achievable); *id.* art. 21.3 (specifying additional processes for adoption of annexes); see also *id.* art. 18; *id.* 21.1 (“Any annexes adopted after the entry into force of this Protocol shall be restricted to lists, forms and any other material of a descriptive nature that is of a scientific, technical, procedural or administrative character.”).
⁹⁹ See *id.* art. 5.2–3; *id.* art. 4.4 (specifying that adopted commitments may alter subsequent obligations related to regional economic integration); *c.f.* *id.* art. 1 (defining “Montreal Protocol” by the agreement adopted in Montreal on September 16 1987 “and as subsequently adjusted and amended,” potentially indicating that certain adopted items may be distinct from future amendments and adjustments).
¹⁰⁰ See *id.* art. 21.4–7; see also *id.* art. 18 (“Any procedures and mechanisms under this Article entailing binding consequences shall be adopted by means of an amendment to this Protocol.”).
¹⁰¹ See generally *id.* pmb. (“[p]ursuant to the Berlin Mandate adopted by decision 1/CP.1 . . .”); see *id.* art. 2 (referencing Parties’ “policies and measures adopted under this Article, pursuant to Article 4, paragraph 2(e)(i), of the Convention.”).
¹⁰² See *id.* art. 5.2 (referring to the adoption of commitment periods); *id.* art. 7.4 (referencing guidelines for preparation of information and national communications); *c.f.* *id.* arts. 8.1, 10(a) (referencing the adoption of guidelines for information submitted under Article 7 and the adoption of guidelines for the preparation of national communications).
¹⁰³ See *id.* art. 13.4(c), (d) (specifying measures adopted by Parties).
¹⁰⁴ See Vienna Convention, *supra* note 6, art. 2.1(g) (defining “party to a State which has consented to be bound by the treaty and for which the treaty is in force.”).
¹⁰⁵ See UNFCCC, *supra* note 1, art. 1.
¹⁰⁶ See *id.* art. 7.2(c).
¹⁰⁷ KP, *supra* note 4, art. 1.6.
¹⁰⁸ See *id.* art. 1 (defining “Party” as a Party to the KP except where the context indicates otherwise, and specifying that “Party included in Annex I” means those included in Annex I and others indicating an intent to be so bound pursuant to UNFCCC art. 4.2(g)); see also *id.* art. 4.1 (explaining the relationship between UNFCCC’s COP and the KP’s CMP: “the Conference of the Parties, the supreme body of the Convention, shall serve as the meeting of the Parties to this Protocol.”).
¹⁰⁹ UNFCCC, *supra* note 1, art. 7.2(c).
¹¹⁰ *Id.* art. 7.2 (emphasis added).
¹¹¹ *Id.* art. 2.
¹¹² See *id.* art. 3.
¹¹³ See *id.* at pmb. ¶2.
¹¹⁴ See *e.g.*, Basel Convention on the Transboundary Movement of Hazardous Wastes and Their Disposal, Mar. 22, 1989, 1673 U.N.T.S. 57, 28 I.L.M. 649, available at <http://www.basel.int/text/con-e-rev.pdf>; Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, Sept. 10, 1998, 2244 U.N.T.S. 337, available at http://www.pic.int/en/ConventionText/RC%20text_2008_E.pdf; Convention on Biological Diversity, June 5, 1992, 1760 U.N.T.S. 79, available at <http://www.cbd.int/convention/convention.shtml>; Cartagena Protocol on Biosafety, Jan. 29, 2000, 2226 U.N.T.S. 208, available at <http://www.cbd.int/doc/legal/cartagena-protocol-en.pdf>; United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397, available at http://www.un.org/Depts/los/convention_agreements/texts/unclos_e.pdf; United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, June 17, 1994, 33 I.L.M. 1328,

available at <http://www.unccd.int/convention/text/convention.php>; Convention on Long-Range Transboundary Air Pollution, Nov. 13, 1979, 18 I.L.M. 1442 available at <http://www.unece.org/env/lrtap/full%20text/1979.CLRTAP.e.pdf>; Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 27 U.S.T. 1087, 993 U.N.T.S. 243 available at <http://www.cites.org/eng/disc/text.shtml>; Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Waste Within Africa, art. 4(1), Jan. 29, 1991, 2101 U.N.T.S. 177 available at http://www.ban.org/Library/bamako_treaty.html; International Tropical Timber Agreement, Jan. 27, 2006, UN Doc. TD/TIMBER.3/12, available at <http://www.itto.int/en/itta/>. The authors would like to thank Omer Duru, Andy Hosaido, and Blake Mensing for their valuable assistance in this research.

¹¹⁵See e.g., Biosafety Clearing House, mechanism of the Cartagena Protocol, available at <http://bch.cbd.int/> (last visited Mar. 1, 2010), Conference of the Parties to the Basel Convention on the Control of the Transboundary Movements of Hazardous Wastes and Their Disposal, Geneva, Switz., Dec. 9-13, 2002 *Partnership with Industry*, Oct. 31, 2002, UNEP/CHW.6/32/Add.1, available at <http://www.basel.int/meetings/cop/cop6/english/32a1e.pdf>.

¹¹⁶See e.g., UNFCCC, Conference of the Parties on its fourteenth session, Poznan, Pol., Dec. 1-12, 2008, *Report of the Conference of the Parties on its fourteenth session*, ¶ 8, at 6, FCCC/CP/2008/7 (Mar. 19, 2009) [hereinafter *COP-14 Report*], available at <http://unfccc.int/resource/docs/2008/cop14/eng/07.pdf> (noting that there was still no consensus on applying Rule 42 of the draft rules of procedure).

¹¹⁷*Id.* at 6.

¹¹⁸See UNFCCC, Conference of the Parties on its first session, Berlin, F.R.G., Mar. 28-Apr. 7, 1995, *Report of the Conference of the Parties on its first session*, ¶ 10, at 8 FCCC/CP/1995/7 (May 24, 1995), available at <http://unfccc.int/resource/docs/cop1/07.pdf> (confirming that the COP agreed to apply the draft rules provisionally, save for rule 42); *COP-14 Report*, *supra* note 116, ¶ 8, at 6; Kyoto Protocol, *supra* note 4, art. 13.5 (stating that “rules of procedure of the Conference of the Parties . . . shall be applied *mutatis mutandis*” unless “otherwise decided by consensus of the” CMP); Kyoto Protocol, Conference of the Parties serving as the meeting of the Parties to this Protocol on its fourth session, Poznan, Pol., Dec. 1-12, 2008, *Report of the Conference of the Parties serving as the meeting of the Parties to this Protocol on its fourth session*, ¶ 26, at 9, FCCC/KP/CMP/2008/11 (Mar. 19, 2009), <http://unfccc.int/resource/docs/2008/cmp4/eng/11.pdf> (demonstrating that the CMP provisionally applies the draft rules of procedure of the COP).

¹¹⁹UNFCCC, *supra* note 1, arts. 7.3, 7.4, 7.5.

¹²⁰UNFCCC, Conference of the Parties on its second session, Geneva, Switz., July 8-19, 1996, *Organizational Matters: Adoption of the Rules of Procedure – Note by the Secretariat*, rules 10, 12, 13, FCCC/CP/1996/2, (May 22, 1996), available at <http://unfccc.int/resource/docs/cop2/02.pdf>.

¹²¹*Id.* at rules 9, 10, 12.

¹²²*Id.* at rule 13.

¹²³*Id.* at rule 13.