Procedural and Institutional Aspects of the Emerging Climate Change Regime: Improvised Procedures and Impoverished Rules?[1]

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1. Introduction and Analytical Framework

This article explores selected aspects of the procedural and institutional development of the Climate Change regime that are likely to continue to play a central role in shaping Parties' perceptions of its fairness and effectiveness. Analysis focuses on the two main institutional structures of the regime: the Conference of Parties and its Secretariat, which, respectively, can be said to perform legislative and administrative functions for the UN Framework Convention on Climate Change, and its Kyoto Protocol.

An analytical framework for discussion the "effectiveness" of these aspects of the Climate Change regime may be drawn from an extensive and growing literature, from both legal and political science perspectives.[2] As recently summarised by Underdal, et al, the effectiveness of an international environmental regime

> can be evaluated on the basis of the norms, principles and rules constituting its substantive contents *(output)*, . . . or on the basis of the consequences flowing from the implementation of and adaptation to these norms and rules. Whenever we are dealing with environmental regimes, the latter may be further specified by making a distinction between influence on human behaviour *(outcome)* and consequences for the state of the biophysical environment itself *(impact*).[3]

Given the relative youth of the Climate Change regime, and in particular, the recent adoption of its, as yet not operational, Kyoto Protocol, an analysis of the effectiveness of its institutions must focus on its ability to generate "output" in the form of norms, principles and rules. Studies of regime effectiveness confirm that the extent to which these norms, principles and rules will have the desired

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[2] Underdal, A, Hisschemöller, M, von Moltke, K**, "**The Study of Regime Effectiveness: Agenda-Setting Paper for the Concerted Action Workshop" 16-18 October, 1998, mimeo on file with author, [hereinafter, Underdal]; A Underdal, "The Concept of Regime Effectiveness," *Cooperation and Conflict* 27 (1992) 227-240; PH Sand, ed, *The Effectiveness of International Environmental Agreements*, (UNCED: 1992); T Bernauer, "The Effect of International Environmental Institutions: How We Might Learn More," *International Organisation* (1995) 351-377; L Boisson de Chazournes, "La mise en ouevre du droit international dans le domaine de la protecion de l'environnement: enjeux et défis," *Revue Générale de Droit International Public* 99 (1995) 37-76; H Jacobson & EB Weiss, "Strengthening Compliance with International Environmental Accords: Preliminary Observations from a Collaborative Project," *Global Governance* 1 (1995); R Mitchell, "Compliance Theory: A Synthesis", in J Cameron, J Werksman & P Roderick et al, *Improving Compliance with International Environmental Law*, (Earthscan, London: 1996); E Haas, R Keohane & M Levy eds *Institutions for the Earth*, (MIT: 1995); J Werksman ed *Greening International Institutions*, (Earthscan, London: 1996); A Roginko, "Domestic Compliance with International Environmental Agreements: A Review of Current Literature", WP-94-128, (IIASA, Laxenburg: December 1994); D Victor, K Raustialia and E Skolnikoff, eds, *The Implementation and Effectiveness of International Environmental Commitments: Theory and Practice* (IIASA, MIT, 1998); *The Effectiveness of Multilateral Environmental Agreements: A Report from a Nordic Project*, (TemaNord 1996).

[3] Underdal, at 3.

effect on state and human behaviour, is linked to perceptions of the rules' procedural and substantive "fairness."

The discussion of fairness draws from Thomas Franck's discourse on the nature of "legitimacy" or procedural fairness in international institutions. To Franck

> [t]he fairness of international law, as of any other legal system, will be judged, first by the degree to which the rules satisfy the participants' expectations of justifiable distribution of costs and benefits, and secondly by the extent to which the rules are made and applied in accordance with what participants perceive as right process. [4]

Other research in this area has assessed the distributive fairness of, for example, the Kyoto Protocol's allocation of obligations between and among industrialised and developing countries. This article will focus on the second element of Franck's definition, the concept of "right process" which requires that "for a system of rules to be fair, it must be firmly rooted in a framework of formal requirements about how rules are made, interpreted and applied."[5]

The framework of formal requirements of interest here are the central institutional and procedural (i.e. legal) artefacts of the regime thus far: the rules of procedure that govern the regime's decision-making processes, the functions and powers assigned to the Convention's institutions, and the related issue of these institutions' "legal personalities".

From these artefacts, an assessment can be made of the progress Parties to the Climate Change regime have made towards incorporating what Franck describes as the "four paradigms of 'right process'," i.e., those "operating principles which legitimate the international system of rules and rule-making":

(1) that states are sovereign and equal
(2) that their sovereignty can only be restricted by consent
(3) that consent binds; and
(4) that states, in joining the international community, are bound by the ground rules of community[6]

What emerges, in essence, is a discussion of the use of formal requirements to distribute functions and of authority between sovereign states and the institutions they create in order to carry out commonly agreed objectives that depend upon international co-operation. This survey reveals that the climate change Parties have used formal legal requirements to make a series of design choices that distribute functions and authority between:

- categories or groupings of states
- an individual state and the COP
- an individual state and the Secretariat
- the regime's institutions and other international institutions, such as the GEF and the UN system
- the Convention's institutions and those of the Protocol

In the decade that has passed since the General Assembly first established the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change, the international community has spent a minimum of six weeks a year designing the Climate Change regime. Progressive forces within the regime have sought to promote formal legal requirements that would nurture the

[4] Franck, T., *Fairness in International Law and Institutions*, (1995), 8 [hereinafter, Franck, *Fairness*].
[5] Franck, *Fairness* at 7.
[6] Franck, *Fairness*, at 29.

development of what has been described as a "dynamic" regime. Inspired by the perceived successes of the Ozone regime,[7] some parties have sought to put in place a number of formal institutional and procedural requirements based on those that have been credited, in part, with accelerating the Montreal Protocol's ability to generate "output". These included the procedures for the regular review of the adequacy of commitments in light of the latest available science, streamlined procedures for "adapting legal obligations to changing cognitive expectations,"[8] and the development of institutions and procedures for identifying and responding to non-compliance.

For a variety of reasons these efforts have had mixed results, and the Climate Change regime has lagged behind the Ozone regime in the development of formal institutional and procedural requirements. However, Thomas Gehring's seminal analysis of the Montreal Protocol and other "dynamic regimes" also recognised that formal institutional and procedural arrangements can, ironically, form a barrier to the dynamic development of a regime. Faced with these barriers, states have frequently improvised, pushing forward with decision-making, when frustrated by formal procedures.[9]

The analysis that follows reveals that the climate change Parties have also improvised institutional and procedural arrangements -- as often to overcome the absence of formal rules, as to by-pass their presence. In doing so, the Climate Change regime has confounded sceptics that felt the regime could never advance without first resolving differences over the design of formal institutional and procedural arrangements. Instead the regime has produced a remarkable degree of "output." The question raised for the medium and longer-term development of the regime is whether the improvised nature of these procedures has resulted in impoverished rules. Has the "formal soundness" of the climate regime been "sacrificed in exchange for pragmatic and swift decision-making by consensus".[10] Have weaknesses in the formal soundness of the regime eroded its "legitimacy" leaving it vulnerable to attack and/or defection by Parties and non-Parties unhappy with the way in which the regime is developing? Or has the regime's ability to improvise instead demonstrated its fundamental flexibility and "robustness"?[11]

Discussion focuses first on the regime's rules of procedure, it then turns to a discussion of unresolved issues related to the legal character of decisions that Convention's institutions may take, either in developing new rules or in enforcing existing rules. Attention then turns to the procedural and institutional challenges associated with the expansion of the regime to include developing country commitments, and to balance the demands of the two separate, related and concentric regimes, established by the Convention and the Protocol. Finally, the functions and "legal personality" of the Convention's COP and the Climate Change Secretariat are reviewed, in anticipation of upcoming discussions about the regime's place within the UN system.

2. Rules of Procedure

2.1 An Achilles heel?

The formal framework established by a regime's Rules of Procedure helps to set the parties' expectations and power relationship. The Convention and Protocol have two primary sources of procedural rules, those set out in the texts of the agreements, and those to be agreed as the rules of procedure that will govern the general functioning of the Conference of the Parties to the Convention (COP), and the Conference of the Parties serving as the meeting of the Parties to the Protocol (COP/MOP), as well as the regime's subsidiary bodies.

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[7] [cite to Ozone case study]
[8] T Gehring, "International Environmental Regimes: Dynamic Sectoral Legal Systems", 1 *Yearbook of International Environmental Law 35* (1990), at 49 [hereinafter, Gehring].
[9] Gehring, at 49.
[10] Gehring, at 50.
[11] [cite to Berlin study on regime "robustness"]

This first set of rules include the requirement that the COP's rules of procedure be adopted by consensus, that amendments to the Convention's and the Protocol's Annexes and amendments to those annexes be adopted by consensus, and should consensus fail, by a three-quarters majority vote.[12]

With regard to the second set of rules, the climate change Parties have found it impossible, after four years of operation, to agree upon rules governing adoption of substantive decisions.[13] The COP was intended to adopt its Rules of Procedure at its first session,[14] but for a variety of reasons has continued to fail to do so. Despite the efforts of three consecutive COP Presidents, Parties continue to disagree over the design of draft Rule 42(voting).

The controversy focuses essentially on subparagraph 1 of draft Rule 42 that sets out the voting procedures for taking substantive decisions. The following positions have emerged, which are reflected in the Alternatives A and B of draft Rule 42(1)[15]:

- **substantive decisions**: a small but vocal number of Parties continue to insist that all substantive decisions of the COP, including the adoption of protocols, should be taken by consensus. In theory, this could allow one state alone, by formally objecting, to block the adoption of substantive decisions. Other Parties have argued that while the Parties should always aim to reach decisions by consensus, if consensus cannot be achieved then decisions should be taken by either a two-thirds or three-fourths majority of Parties present and voting.

- **adoption of protocols**: some Parties have suggested that there should be more stringent (higher majority) requirements for the adoption of protocols by the COP than for other substantive decisions (this view is reflected in subparagraph (b) of Alternative A).

- **decisions related to the financial mechanism**: many developed country Parties are of the view that decisions related to the financial mechanism should be taken by consensus (see subparagraph (c) of Alternative A). Several developing countries have expressed the view that such decisions should be by two-thirds majority.

The current status of the Rules of Procedure is that at COP-1 and at each successive COP, the parties have decided that "the draft rules of procedure as contained in document FCCC/CP/1996/2 should continue to be applied, with the exception of draft Rule 42."[16]

The Convention's procedural obligations meant that difficult decisions on the review of the adequacy of the Convention's commitments, and on the appropriate response to such a review would come before the COP at its first and subsequent sessions. A vocal minority of a shifting membership seemed prepared to block consensus on any decision that would recognize the inadequacy of the Convention's commitments and that would seek to strengthen them. As the Parties began the negotiations on a legally binding instrument containing quantified commitments, the stakes were raised and with them, the potential for an impasse. The absence of a voting rule threatened not only to

[12] UNFCCC, Article 7.2(k), Article 15.3, Article 16.2; KP Article XX, Article XX.
[13] The Climate Change regime shares this infamy with its "sister" Convention on Biological Diversity which, for similar reasons, has yet to adopt its voting rules.
[14] UNFCCC Article 7.2(k) and Article 7.3.
[15] For a report on the most sustained effort to reach consensus on the rules, see, Organizational Matters, Adoption of the Rules of Procedure, Note by Mr Chen Chimuntengwende (Zimbabwe), President of the Conference of the Parties at its second session, on his informal consultations on the draft rules of procedure, FCCC/CP/1997/5, 19 November 1997.
[16] As of the fourth session of the Conference of the Parties to the Convention (COP-4) the Parties continue to "apply" the remaining rules and to take all substantive decisions by consensus. Report of the Conference of the Parties at its fourth session, FCCC/CP/1998/16, 20 January 1999, [hereinafter Report of COP-4].

unduly influence the choice and design of such an instrument,[17] but also to block altogether its adoption.

What voting rules should operate in the vacuum left by Rule 42 has been the subject of intense debate and speculation. Although arguments circulated that a technical solution to this deadlock might lie in the rules of customary international law,[18] most delegates seemed to concede that, in the absence of an agreed specified majority voting rule, decisions would have to be taken by consensus.

2.2 Technical slight of hand

One of the more dramatic moments in the Kyoto Protocol negotiations occurred at the eighth session of Ad Hoc Group on the Berlin Mandate, when the Chairman sought to use technical arguments to test the breadth of a working definition of consensus. The Chairman appeared to choose his moment carefully, with the intent of demonstrating that it would be possible, if it proved necessary, to combine bluster with a technical slight of hand, to force a vote over the objections of an obstructionist minority.

The moment of truth arose over a longstanding disagreement between the USA and the European Union with regard to the role the Conference of the Parties might play under the new Protocol in co-ordinating the domestic "policies and measures" of industrialised Parties. Opinions were split, and after two rounds of repetitive interventions, the Chair sought to rule that although there were three Parties in the room objecting, there was sufficient support for the inclusion of the European's proposed text, to rule that it would be included by consensus. The Chair sought to assure all delegations that the details of the final package would, after all, be open to negotiation until the final gavel fell in Kyoto.

His ruling was immediately challenged, with the USA, Canada and Venezuela arguing forcefully that there could be no consensus while Parties present were formally objecting. The Chairman then sought to rely upon the unadopted, *and* "unapplied" subparagraphs of Rule 42.2 and 42.3. Rules 42.2 and 42.3, while bracketed, had not been the centre of controversy and thus, unlike the voting rules on substance, were not expressed in the draft text as alternatives. If applied, Article 42.2 would provide that decisions on matters of procedure shall be taken by a majority vote, and would empower the President (here the Chairman) to rule on the issue of whether a matter is one of substance or one of procedure. Should his characterisation of the matter be challenged, he may, under draft Rule 42.3, then call for a vote, and the Chairman's ruling will stand unless overruled by a majority of the Parties present and voting. Thus, through a technical slight of hand, the Chairman sought to use a majority vote of the Parties, to override the efforts of a few to block consensus.

A significant number of Parties, including those that were in support of the proposed decision, were unconvinced. Their interventions suggested that three years of disagreement on the voting rules could not be simply be swept away by the application of a rule that the Parties themselves had not agreed was applicable. After a number of heated exchanges, the Chairman withdrew his proposal, and the challenge to his ruling was also withdrawn. While the Chairman used the occasion to make clear that

[17] Indeed, concern that the oil exporting developing countries would use the absence of voting majorities to block the adoption of a Protocol, led the negotiators to keep open the possibility that the Parties would strengthen their commitments through the adoption of an amendment, rather than a protocol. The Convention itself provides, in the absence of consensus, for a three-quarters majority vote on the adoption of Amendments. UNFCCC, Article 15.

[18] These arguments were based primarily on an interpretation of Article 9 of the Vienna Convention on the Law of Treaties, and were aimed specifically at breaking any deadlock over the adoption of a Protocol. Article 9 provides that "the adoption of any text of a treaty at an international conference takes place by the consent of all States participating" or by "two-thirds of the States present and voting, unless by the same majority they shall decide upon another rule." Others suggested at the time that the rules of procedure adopted by the Intergovernmental Negotiating Committee that negotiated the Convention could be applied in default. These also provided, when consensus fails, for a two-thirds majority vote on matters of substance. See also Sabel, Rules of Procedure of International Conferences [cite].

he "would not be 'held hostage' to countries methodically trying to stop progress,"[19] his effort also clearly signalled that a clever manipulation of the rules held little promise for forging agreement. Testing this option early on in the process was a wise strategy, as it forced all participants, including those that may have placed too much hope on finding a technical way out, to concentrate on forging a consensus on the basis of hard political bargaining.

A second attempt to by-pass the Convention's requirement that rules of procedure be adopted by consensus was made by the European Community in the run up to Kyoto. The EC was by this time convinced that a Protocol offered the best form of legal instrument for any new commitments the Parties might agree, and wished to ensure that it could be adopted be a majority vote if consensus was blocked. They offered a solution that would take advantage of the fact that the Convention provides for a ¾ majority vote on the adoption of amendments to overcome the fact that Convention is silent on rules for the adoption of Protocols. Under the EC's proposal, COP-3 would adopt an amendment to the Convention's provisions on the adoption of Protocols, that by its own terms would be applied "provisionally, pending its entry into force" through the Convention's procedures on amendments.[20] It was hoped that this provisional application would allow, with the support of ¾ majority of Parties, a Protocol to be adopted at COP-3. Kuwait, who along with other OPEC countries was keen to block the EC initiative, countered with its own proposed amendment that would have greatly expanded Annex II Parties' obligations to provide financial resources to developing countries. The Kuwaiti proposal was widely perceived as "non-starter" put forward intentionally to be linked to and drag down the EC amendment. Neither proposal gained wide support, and both were eventually withdrawn early on during the Kyoto meeting.[21]

As the Convention's procedural obligations drove forward the negotiations on new commitments, the Conference of the Parties and its subsidiary bodies were forced to improvise around the rules of procedure, and to attempt to form new and acceptable definitions of consensus.

3. Improvisation

The conferences of parties to international environmental agreements (and indeed most international institutions) typically operate by consensus, and have rules or practices that allow them to turn to majority voting only when efforts at consensus are exhausted.[22] States generally eschew the open confrontation that can come with voting. Furthermore, the legitimacy of a decision adopted by majority vote as applied to those who voted against it may be open to question.[23] For these reasons, the consensus-building techniques described below are common to many international institutions, including those that have voting procedures available to them.

Most international institutions operate on the basis that one Party formally objecting to a decision can block consensus. It is, furthermore, generally accepted that consensus does not equate with unanimity, and that the chairman of any proceeding is vested with considerable discretion to assess whether a Party is registering a formal objection, or some lesser level of discontent that will allow decision to go forward. Institutions do, however, either through rules or practice, develop their own highly contextual definitions of consensus.

It is not surprising that the Climate Change regime, in the absence of default voting rules has also had to improvise. At each point of conflict the regime risked pressing forward with decisions that failed to

[19] Earth Negotiations Bulletin, Vol. 12 No. 66 Monday, 03 November 1997 AGBM-8.
[20] Arrangements for Intergovernmental Meetings, FCCC/SBI/1997/15, 20 June 1997, page 11.
[21] Report of COP-3, paras 73-75.
[22] H Schermers and N Blokker, *International Institutional Law: Unity Within Diversity*, (3rd ed 1995), ss 772 et sec. [hereinafter Schermers and Blokker]
[23] Schermers and Blokker ss 772, asserting that majority decisions taken when consensus fails "will lack the necessary authority for those who were outvoted."

take into account the concerns of sovereign states Parties to the Convention, and that could potentially undermine "right process" and with it the regime's legitimacy. When assessing the outcome of these decisions, in each case it is important to weigh objectively the legitimacy of the substantive and procedural rights being asserted by those seeking to block the decision, against the collective legitimacy of the interests of the regime as a whole. The improvisation thus far has yielded a number of interesting insights into how the climate change parties have struck this balance, which techniques at generating "consensus" have succeeded, and which have failed.

The persuasive powers of the Chairman, and the personal authority he or she commands is an extremely important element in the forging of consensus, and the role of Chairman Estrada in hammering through the Kyoto Protocol has been much remarked upon. The focus here, however will be on procedural techniques that, if they are to hold lessons for the regime's future, will have to transcend the exigencies of any particular chairman.[24]

3.1 Grouping and re-grouping

In the absence of rules of procedure, it is especially important that consensus be built from the ground up. In the climate regime, as in all the other regimes studied in this project, consensus is built within groups with common interests which form agreement amongst themselves before making trade offs with groups of opposing interest. The climate regime has relied upon traditional groupings based on generic economic and regional interests, as well as *sui generis* groupings that have emerged in response to the unique interests raised by the regime itself. Trade-offs and interactions between these grouping have helped determine when consensus has been possible. Generally, consensus has been possible when an improvisation or realignment of interests works to isolate those states blocking consensus into an untenable minority.

Procedural and institutional precedents from decades of UN practice have had a particularly powerful influence on climate politics. The regime's common but differentiated responsibilities, which divide roughly between Annex I (industrialised and transition countries) and non-Annex I (developing countries) reinforced the traditional roles of the Group of 77 and of the Organisation for Economic Co-operation and Development (OECD) in providing fora for agreeing common principles and approaches. The European Union and its 15 member states negotiate as a block in the climate regime, frequently preparing joint negotiating submissions and interventions. Again, this relationship has been reinforced by the regime's substantive rules, which allow the Community to join the regime as a party in its own right and have been interpreted to allow the Community to fulfil its obligations "jointly."[25]

The traditional UN "regional groups"[26] also provide an institutional backbone to the regime. Unadopted, but applied Rule 22 of the Convention's Rules of Procedure provides that 10 of the COP's 11-member Bureau be made up of two members from each of the five UN geographic regions – Asia, Africa, Latin America and the Caribbean (GRULAC), Eastern Europe, the Western European and Others Group (WEOG). While many delegations feel that the role of these traditional groupings should be limited to the formal tasks of nominating candidates for office, the regional groups have been used, on occasion, for developing substantive positions when geography and interests have overlapped.

[24] This is not to suggest that the personality, and personal commitment of the President/Chairman of an international negotiation is unimportant – indeed it can be determinative of the success or failure of the meeting. However, well established protocol, which entitles the host country or, by turns, the relevant UN regional grouping, to appoint the chair, leaves little room for formal requirements to determine the qualifications for the post.

[25] UNFCCC, Article 22.2, KP, Article 4, Article 24.2.

[26] Schermers and Blokker, ss 766.

Groupings that have arisen as a result of the regime itself include the Alliance of Small Island States (AOSIS), the "JUSSCANNZ" group, the "umbrella group", the EU "bubble" group, and the Green Group. AOSIS is the most formally constituted of these, having been established since the Second World Climate Conference in 1990, with the express purpose of providing a negotiating block for small island and low-lying developing countries particularly vulnerable to the impacts of global warming. The special interest represented by AOSIS is formally recognised in the Article 22 of the unadopted by applied Rules of Procedure, which provide that a representative of the "small island developing states" shall fill the eleventh slot on the Bureau.[27] The JUSSCANNZ[28] is an informal grouping that coalesced from the non-European OECD countries, primarily to counterbalance the political influence of the European Union. It caucused frequently during the Protocol negotiations.

The adoption of the Kyoto Protocol and the introduction of mechanisms for joint implementation and emissions trading has caused a "re-grouping" within the climate regime. JUSSCANNZ has been largely superseded by the "umbrella group" which has extended the original membership to include the Russian Federation and the Ukraine. Similarly, the EC has begun to present its positions jointly with Switzerland and with Eastern European Countries that have expressed interested in joining the European Union, creating what has been termed the EU+friends, or the Bubble Group.[29] Both of these groupings can be see as bringing together countries with similar ideological approaches to emissions trading as well as clustering sets of countries that may be in a position to sell excess emissions "allowances" with those with a potential demand to buy the same.

The extremely polarised and contentious nature of the climate change negotiations frequently tests the integrity of each of these groupings. Perhaps the most vulnerable to fissure, as it contains the widest diversity of interests, is the G-77. Negotiations at COP-1, and the first formal review of the adequacy of commitments led to a split in the Group of 77 between the oil producing developing countries, which felt it was premature to launch a new round negotiations on emission reduction obligations for Annex I Parties, and most of the rest of the 77 membership. Repeated efforts to reach consensus within the group left the oil producing countries increasingly isolated, as borderline countries such as China, lined up behind the adoption of a negotiating Mandate. As the negotiations drew to an end, the G-77 Chair invoked the group's traditional procedure when consensus fails, that allows individual members free to back their own positions. The majority of the G-77 membership re-formed into what became know as the "Green Group" and put forward a text that provided the key elements for a draft decision. At the final session of the COP, with a majority of both developed and developing countries supporting the adoption of a Berlin Mandate, the objections of the oil producing developing countries became untenable, and the Mandate was adopted by consensus. Formal objections were registered, and these will be discussed in the following section.

Such a positive outcome seems to depend on a clean split that divides to reveal a near consensus of Parties. Within the G-77 this majority emerged with relative ease when discussions focused on the commitments of Annex I countries, rather than the participation of the developing countries

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[27] The small island constituency is not, however, entitled to a rotational seat in the offices of President or Rapporteur. AOSIS has had a similar impact on the (still applied but unadopted) draft Rules of Procedure of the Convention on Biological Diversity, which provides that its Parties, when electing the Bureau "shall have due regard to the principle of equitable geographical representation of
the Small Island Developing States;" Report of the First Meeting of the Conference of the Parties of the Convention on Biological Diversity UNEP/CBD/COP/1/17, Annex III, January 1995, Rule 21; and on the formation of the constituencies of the GEF Council, which by informal agreement, has included amongst its 32 constituencies two that are predominantly Caribbean and South Pacific in their membership. [cite].

[28] Its somewhat fluctuating membership can be said to include Japan, USA, Switzerland, Canada, Australia, Norway and New Zealand.

[29] See Non-Paper on Principles, Modalities, Rules and Guidelines for an International Emissions Trading Regime, submitted by Australia, Canada, Iceland, Japan, New Zealand, Norway, the Russian Federation and USA, 3 June 1998, and Non-Paper on Principles, Modalities, Rules and Guidelines for an International Emissions Trading Regime, submitted by the European Community, Czech Republic, Slovakia, Croatia, Latvia, Switzerland, Slovenia, Poland and Bulgaria, 5 June 1998.

themselves. The more recent negotiations, at COP-4, on the timing and design of the operation of the Protocol's Clean Development Mechanism, fractured the G-77 in a way that produced an extremely weak result. Here the interests within the group are multifarious, with significant numbers of countries dividing, for example, over whether the CDM should include forestry and land-use projects and whether the CDM should be launched as an experimental "pilot phase." The divisions within the 77 contributed to the adoption of Buenos Aires "Programme of Action" containing a work programme on the Protocol's flexibility mechanisms that includes more than 100 overlapping and contradictory "elements".[30]

It may become increasingly difficult for the Climate Change regime to rely upon the Group of 77 to bring its membership to an initial consensus. It is open to speculation as to whether a further break down of the G-77 in the climate regime will allow a more diverse and robust system of groupings to emerge, which in turn will lead to more representative and legitimate decision-making. The oil producing developing countries are not the only group within the 77 that could claim their interests have not been served by the common denominators that emerge as the Group's positions. There can be little doubt that the industrialised countries will encourage such a division, not only to weaken a formidable negotiating opponent, but also help to erode the Annex I/non-Annex I distinctions that have helped to shield the entire category of developing countries from substantive commitments.

However, the recent experience of the Biosafety Protocol Negotiations suggests that divisions within the G-77, even if they are significantly asymmetrical, will not necessarily lead to consensus decision-making. In February 1999, the Parties to the Convention on Biological Diversity, also operating without voting rules, failed to reach agreement on a Protocol. A handful of G-77 members split from the Group to join with a number of OECD countries with a common interest in exporting genetically modified agricultural products. While this "Miami Group" crossed the North/South divide and succeeded in preventing a common position from forming within the G-77, the substantial majority of the developing countries simply reformed into the "like-minded group" of countries.[31]

Although the Climate Change regime's improvised groupings (with the significant exception of the AOSIS seat on the Bureau) have remained informal, they can have a significant impact on more formal aspects of the decision-making process. Recently, this has become most evident in the operation in the use of a consensus-building technique known as the Friends of the President. It is not unusual for the Chairman of an international negotiation "to convene a representative group of 'friends of the President' at the ministerial level . . . in order to develop a strategy on how to deal with the outstanding issues.[32] From COP-1, the Climate Change regime, operating in the absence of formal rules of procedure has become particularly dependent on this technique to build consensus. When assessing the representativeness of such a group the President will (as she did at COP-4) invite members from the informal groupings. At COP-4 this led to the exclusion of a number of countries that fell between the informal groupings and that felt, as a result, their interests were not properly represented when the final deal was reached.

Those left out have called for greater transparency and formalisation of negotiation procedures, which in turn suggests that the regime's informal groupings themselves need to be formalised and stabilised as part of the decision-making procedure.[33] Comparisons with other regimes studied for this project

[30] Report of COP-4, Decision 7/CP.4, Annex.
[31] [cite International Environment Reporter]
[32] Report of COP-4, para 25.
[33] Report of COP-4, para 74. Switzerland, which had defined its position on flex mechs in such a way that does not fit neatly either into the Umbrella or the Bubble group, stated, at COP-4 that it "felt obliged to register a protest at the exclusion of many countries from the informal ministerial consultations convened by the President. . . . While he recognized the need to limit participation in such consultations, he considered that such consultative groups should be established by the Conference itself with clearly defined mandates and that the progress therein should be regularly reported to the Parties as a whole. He called upon the Bureau and the secretariat to propose, for consideration by the Conference of the Parties at its next session, ways and means of achieving a more open and democratic consultative process." Report of COP-4, para 78.

are inconclusive on this point. UNCLOS, and in particular the International Sea Bed Authority has gone furthest in formalising interest groups, such as coastal and land locked states, into its institutions and decision making rules[34]. The WTO, on the other hand, continues to operate on the basis of informal groupings, such as the "Quad" and the Cairns Group. Readers can draw their own conclusion on the relative effectiveness of these two regimes. Clearly a balance must be struck between ensuring that special interests are accommodated and entrenching those interests in such a way that prevents the common interest from being served.

In any case the identification of state interests has only just begun in the climate context and both improvisation, and overlapping and shifting between groupings can be expected for some time to come. Challenges to the legitimacy of the outcome of these procedures (such as the Swiss "protest", registered at COP-4) can be expected to increase if the President and the Bureau are not sufficiently sensitive to these shifting constituencies. The first groupings amongst Parties that the regime's built-in Rules of Procedure will formally recognize will between those Parties to the Convention that are Parties to the Protocol and those that are not. This will be raised below in the discussion on "concentric regimes", section 6.

3.2 "Objections", procedural promises and procedural hostages

The Climate Change regime has survived several crisis points in its decision-making process by allowing Parties that might otherwise have blocked its decisions to register their objections in the formal reports of the Conference. Consensus has thus been achieved through what have been described as "reservations," or "objections" either in the form of formal protests, or in the form of guarantees within COP decisions, that the Parties will take up issues that have been overlooked, at subsequent meetings. In essence these objections form part of the "package" deal necessary to the adoption of the decision.

A group of small islands and a group of oil exporting developing countries, for diametric reasons, registered their "reservations" to the adoption of the Berlin Mandate at COP-1.[35] These statements have since been relied upon to support their repeated assertions in subsequent negotiations that the negotiations were either moving too slowly, or not slowly enough. An entire Annex was required express the range of views that accompanied the adoption of the Geneva Ministerial Declaration at COP-2. When the COP decided to name, note and append the Declaration to its report, certain Parties objected either to its progressive content, to the process by which it was adopted, or to the fact that it

[34] [cite to UNCLOS case study].

[35] "58. The representative of Samoa, speaking on behalf of the Alliance of Small Island States (AOSIS), expressed its reservation on the text in paragraph 5 of decision 1/CP.1 and its understanding that the AOSIS protocol proposal, formally submitted in accordance with Article 17 of the Convention, should form the basis for the process established by that decision.

59. The representatives of Fiji, Malaysia, the Maldives, the Marshall Islands, Mauritius and Papua New Guinea all associated themselves with the above statement and expressed their disappointment that the Conference had not been able to agree on specific reduction targets and on a clearer mandate for the forthcoming negotiations.

60. The representatives of Kuwait, Saudi Arabia and Venezuela formally expressed their reservations on the decision adopted, stating that full consideration had not been given to meeting the specific needs and concerns of their countries in accordance with the Convention and the practice of the United Nations."

Report of COP-1. The Rapporteur, in order to avoid confusion, should probably have referred to these statements as objections. Both the Convention and the Protocol prohibit the use of "Reservations". UNFCCC Article 24, KP, Article 26. This prohibition refers to formal reservations to specific provisions in the text of the Convention or Protocol (and presumably any amendment, protocol or annex thereto) made by a state when "signing, ratifying, accepting, acceding" to that instrument. VCLOT, Section 2.

was labelled a "Ministerial Declaration" when many Parties had no ministers present. In the end, these statements had little bearing on the Kyoto Protocol negotiations. In the absence of rules of procedure on voting, the Report of COP-2 was adopted through what was the most raucous of COP sessions, with the Chair reading consensus on the basis of spontaneous and orchestrated outbursts of applause, from both delegates and the NGO observers. In this context, the opportunity to formally register objections provided a useful and timely safety valve for those "out-clapped" on the adoption of the Report.

Objections to COP decisions have also been registered in the form of "procedural promises" to deal with unresolved issues at a later date. While these provisions can help drive the regime forward by giving shape and priority to later negotiations, they can also provide a precondition for the participation of some states in Protocol. The two most obvious of these are the instructions from the COP to the Convention's subsidiary bodies that were tacked onto the decision adopting the Protocol. These relate to single project emissions, and the obligation in Article 3.14 of the Kyoto Protocol, which requires the COP/MOP, at its first session, to consider the concerns of oil exporting countries about the potential impacts of response measures.

The use of formal objections and procedural promises can allow unresolved issues to fester, and obstructionists to hold the process hostage, through "issue linkages" at later stages in the negotiations[36]. Oil producing developing countries relied upon the provision in Article 3.14 to block progress at COP-4 on the flexibility mechanisms. Recent statements by Iceland have suggested that it will not commit to signing the Protocol until its concerns about the impact of emissions from single projects on its ability to fulfil its Annex B target, are accommodated.[37] The use of objections and package deals may also raise questions as to whether Parties that reserve their positions when decisions are adopted may still be bound by the outcome. This will discussed below, in section 4, the context of the "legal character" of COP decisions.

The Bureau and the secretariat may give greater thought to the content, character and form in which objections and procedural promises have been accepted in the past and how they might best be expressed in the future to prevent Parties from holding the process hostage.

3.3 Marathon sessions

A well recognised technique for extracting consensus from difficult negotiations is to test the political will and the physical stamina of negotiators by holding marathon sessions that stretch into the night, or beyond the scheduled completion of the Conference.[38] This has increasingly become the case for the climate change sessions, and risks undermining the integrity of the regime's decisions.

There can be little doubt that such marathon sessions can undermine the quality of decisions, as negotiators, fatigued and under the pressure of time, fail to choose their words carefully or to ensure the consistency of the text. But the impact also tends to be regressive as the smaller, developing country delegations are culled first. Both oral and documentary translation can become unavailable or deteriorate in its quality, and English becomes the default negotiating language, particularly disadvantaging the non-English speaking, predominantly developing country delegations. Delegations dependent on less flexible (often UN-funded) air tickets may be forced to depart before the sessions are finished. The Kyoto Protocol, for example, was formally adopted on the morning of 11 December, more than 12 hours after the session was scheduled to conclude, and it is extremely doubtful that the Parties were quorate.[39]

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[36] [cite to literature on issue linkages]
[37] [cite]
[38] Schermers and Blokker,. ss753, et sec.
[39] Under the unadopted but applied Rules of Procedure, a meeting of the COP is not to be opened unless a third of the Parties are present and may not take a decision unless two thirds of the Parties are present. Draft Rules of Procedure, Rule 31.

Although this aspect of the climate change process has not yet been formally challenged, the COP's last minute decisions thus far have largely dealt with commitments of Annex I parties. As negotiations turn to address directly the participation of developing countries, the Bureau and the secretariat may need to be more sensitive to the need to avoid marathon sessions that tend to exclude smaller delegations, and those from developing countries.

3.4 Ministerial Involvement

The presence of ministers at an international negotiation lends prestige and political momentum to the decision-making process. The planning process for each of the climate COPs has begun with a discussion of whether to provide for a "ministerial segment", and for each COP thus far ministers have been invited. Their involvement in the consensus building process has ranged from the fatuous to the formidable. Of least consequence to generating output are the formal ministerial statements by "ministers and by other heads of delegation of Parties". This annual ritual provides an opportunity for each delegation to read out from the lectern a prepared statement of a highly predictable and rhetorical nature, expressing the importance of the issue, thanking the host government and setting out basic aspirations "on the road" to or from the next or most recent venue.

Two, more relevant approaches to ministerial involvement are worth mentioning. The first occurred at COP-2, when the Bureau decided to organise an "informal round table" in addition to the formal ministerial segment. The workshop, entitled, "Climate change: new scientific findings and opportunities for action," was clearly aimed at the outset to provide a chance to negotiate a ministerial declaration to respond the IPCC's Second Assessment Report, and to maintain the momentum behind the Berlin Mandate.[40] While the round table succeeded in agreeing a text, transforming the outcome of an "informal" workshop into a formal ministerial declaration proved problematic. There was clearly no consensus within the COP in support of the content of the Declaration, and it only entered the formal documentation of the Conference as an Annex to the Report. This Declaration recorded a critical watershed in the Berlin Mandate negotiations, by endorsing the findings of the IPCC's second assessment report (SAR) and clarifying that the outcome of the Berlin Mandate negotiations should be quantified and legally binding commitments for Annex I Parties. As has been mentioned, the legitimacy of process by which the Declaration was agreed was challenged by a number of Parties[41].

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[40]The outgoing President, in addressing the opening session of COP-2 expressed her "hope that the Conference of the Parties would make clear statements on the urgency of further action in the light of the IPCC findings, on further efforts regarding the implementation of the existing Convention commitments and on the intensification of negotiations to flesh out the Berlin Mandate. A ministerial declaration in that vein would be an important signal of the Parties' joint willingness to take action." Report of COP-2, para 2.

[41] "The delegations of the following Parties: Bahrain, Jordan, Kuwait, Nigeria, Oman, Qatar, the Russian Federation, Saudi Arabia, Sudan, the Syrian Arab Republic, the United Arab Emirates, Venezuela and Yemen, and of one observer State, the Islamic Republic of Iran, formally object to adoption or approval or acceptance of the draft Ministerial Declaration, dated 18 July 1996, for the following reasons:

Lack of opportunity for the Conference of the Parties to discuss the draft Ministerial Declaration;

Failure of the draft Ministerial Declaration to reflect the views of many Parties as stated by them at the second session of the Conference of the Parties, with the result that the draft Ministerial Declaration reflects only some of the views that exist among the Parties to the Convention;

Non-objective characterization and selective reference to only some of the information in the IPCC Second Assessment Report, with the result that the draft Ministerial Declaration is biased and misleading; and

Failure to adhere to the customary procedures of United Nations bodies in the absence

4. The Legal Character of COP Decisions: Making and Enforcing Rules

A central question that ties together rules of procedure, right process, and the legitimacy of the emerging Climate Change regime, is what legal character the decisions taken by the COP, or the COP/MOP should have. In other words, to what extent will Parties to the regime be bound by decisions made by the regime's institutions? As Franck reminds us, right process must balance the each Party's sovereign and equal right to withhold or grant its consent, and once that consent has been granted, a Party's obligation to comply and to follow the "ground rules of community". Two relevant points in the climate procedures to study are the processes for the adoption of rules, and the process for their enforcement.

The Climate COP, as most of the other regimes studied in this project, has both specific and general procedural rules for the adoption its decisions. As was raised in the discussion of rules of procedure, both the Convention and the Protocol have specific rules of procedure for the adoption and entry into force of Amendments, Annexes, and to a lesser extent, for Protocols. These are designed to ensure the transparency of procedures, by requiring the advance circulation of draft texts, the broad acceptance of Parties of the adoption of the texts, and the specific consent (or non-objection) of each Party that will be bound by the text.[42] The implications of these rules for the inclusion of developing country commitments is discussed below, in section 5.2, below.

The focus here, is instead is on the legal character of other decisions taken by the COP or the COP/MOP that may be used to adopt or to enforce Parties' obligations. The COP is empowered by "make, within its mandate, the decisions necessary to promote the effective implementation of the Convention" and to "exercise such other functions as are required for the achievement of the objective of the Convention."[43] The question arises as to whether this generally expressed authority can be used to achieve quickly changes in the regime's substantive rules or to enforce those rules, in a way that that might otherwise have been delayed or prevented by the process of ratification of an amendment, an annex or a protocol. Such attempts have raised questions about the scope of the COP's implied legislative powers, and the legal character of its decisions.[44]

Two aspects of the Kyoto Protocol raise this issue in sharpest relief. The Protocol's drafters left undecided many rules, guidelines and procedures that will be necessary to fully understand the nature of each Party's obligations, to be able verify its compliance with those obligations and to take actions to enforce those obligations. The text of the Protocol instructs the COP/MOP, for example, to adopt "rules and guidelines":

- as to how, and which, additional human-induced activities related to changes in greenhouse gas emissions by sources and removals by sinks in the agricultural soils and the land-use change and

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of adoption of rules of procedure for the Conference of the Parties."

Report of COP-2, Annex IV.

[42] UNFCCC, Article 15, 16, and 17; KP, Article 20, 21.

[43] UNFCCC, Article 7.2, chapeau and (m). In similar language the Protocol's COP/MOP is empowered to "make, within its mandate, the decisions necessary to promote the [Protocol's] effective implementation" and to "exercise such other functions as may be required for the implementation of this Protocol." KP, Article 13.4 chapeau and (j).

[44] The issue was raised several years ago by the parties to the Basel Convention on the Transboundary Shipment of Hazardous Wastes. Efforts to introduce significant new commitments by way of a COP decision failed, and proponents were forced to try again via the adoption of an amendment. See J Werksman, "Conferences of Parties to Global Environmental Treaties", in *Greening International Institutions*, J Werksman, ed, (Earthscan: 1996)

forestry categories shall be added to, or subtracted from, the assigned amounts for Parties included in Annex I;"[45] and

- for verification, reporting and accountability for emissions trading.[46]

There can be little doubt that the design of these "rules and guidelines" will have a significant impact on the effective "size" of the commitments undertaken by Annex I Parties in Article 3 and Annex B of the Protocol. Reaching consensus on these rules is already proving difficult and there is a substantial risk that some Parties may be unhappy with the outcome. It would seem essential in these circumstances, that the COP/MOP expresses a common understanding that rules and guidelines adopted by the COP/MOP form part of the Protocol's binding obligations.

The legal character of these decisions will be relevant to the Protocol's non-compliance procedures, should questions arise regarding a particular Party's performance. This procedure will raise two closely related issues:

- Are COP/MOP decisions subject to such procedures?

- Are any decisions resulting from the non-compliance procedure itself, binding upon the Party or Parties they address?

The negotiators' choice of the term "rules" to describe at least some of the COP/MOP's anticipated decisions, provides a basis for arguing that states, when ratifying the Protocol, will be granting their consent to the COP/MOP to legislate in this area. This interpretation is reinforced by the direct connection between these rules and the size and shape of the Annex B targets, which depend upon these rules for their meaning. In any case, an emerging understanding of non-compliance procedures extends the coverage of these procedures to categories of state behaviour that may not amount to the formal "breach" of binding rules.

As for any decisions resulting from the non-compliance procedure itself, most delegations agreed that the procedures adopted under Article 18 of the Protocol should be empowered to impose binding consequences on Parties found to be in non-compliance. Consensus failed, however, on the issue of whether these binding consequences would have to be enumerated and agreed in the Protocol itself, or whether instead to empower of the Protocol's institutions to impose binding consequences should be granted in principle, leaving the specific consequences to be developed later.

Deadlock on this issue left the text with a compromise that may prove awkward for the further development of non-compliance responses. It was agreed that an indicative list of consequences, taking into account the cause, type, degree and frequency of non-compliance would be approved by the COP/MOP at its first session. However, any "procedures and mechanisms under this Article entailing binding consequences shall be adopted by means of an amendment of this Protocol," which will require a potentially cumbersome ratification procedure before it would enter into force.[47]

4.1 Conclusion

Lessons from the Montreal Protocol and from the WTO regimes suggest that effective non-compliance and dispute settlement procedures have been greatly enhanced by the ability of the regime's institutions to adopt decisions that address the non-compliance of a particular Party over the objections of that Party. For example within the regimes studied in this project, the Montreal Protocol Parties have (though on rare occasion) followed the practice of adopting decisions on a "consensus minus

[45] KP, Article 3.4.
[46] KP, Article 17.
[47] J. Werksman, "Compliance and the Kyoto Protocol: Building a Backbone into a "Flexible" Regime" Yearbook of International Environmental Law, (forthcoming 1999).

one" basis, overriding the objections of a single Party.[48] The WTO effectively formalised a similar rule in the context of its dispute Settlement Understanding which requires a consensus of the Dispute Settlement Body in order to overturn the recommendations of a dispute settlement panel.

The Ozone Parties have developed these procedures with relative speed, through improvisation, and through the adoption of decisions of the Meeting of the Parties. The GATT negotiators spent decades developing their procedures which have now been formalised into the comprehensive WTO Charter and Dispute Settlement Understanding, which distributes the power to "clarify", interpret and amend its rules across a range of institutions.

A general principle can, however, be drawn from these regimes to guide the climate change negotiators in striking the balance between Franck's paradigm's of sovereign consent and sovereign obligation to community rules. This principle would design procedures that require the clearest indications of sovereign consent (such as signature, ratification or accession) when primary rules are designed and adopted, provide for collective decision-making institutions with the technical refinement of those rules (via consensus and majority decision-making), and entrust the collective decision-making institutions to take the decisions necessary to enforce the rules (via "consensus minus one" decision-making.)

5. Developing Country Commitments

At COP-4, a number of developing countries[49] expressed their willingness to do more to control their greenhouse gas emissions in order to contribute to the Convention's objective. This section explores briefly the potential legal and political implications of these declarations, and what procedures and mechanisms the Convention and the Protocol have already put in place to incorporate "new entrants" into the Protocol's regime of legally binding and quantified emissions limitation and reduction commitments.

The more formal and specific of the COP-4 statements may run the risk of being interpreted as "unilateral declarations" of a State's intent to be bound, or of its intent to enter into negotiations to be bound by quantified commitments. In the past international courts and tribunals have interpreted certain unilateral declarations as having the effect of creating legal obligations, when it is the intention of the State making the declaration that it should become bound. The Kazakhstani statement may well come close, in its formality and specificity, to meeting these criteria. The Argentine statement, made by the President himself, while less specific, has certainly raised expectations that a binding commitment will emerge by COP-5.

There may be other legal and political consequences associated with even a non-binding pledge to "take action". It must be recalled that both the financial mechanism and the Clean Development Mechanism will provide financial incentives to those developing countries undertaking actions that "are additional to any that would [otherwise] occur".[50] This suggests that a developing country wishing to host a GEF or CDM project may first have to demonstrate that the project was not part of its existing development programme, or that, in the absence of GEF, CDM or other funding, it would not have the technical or financial resources to carry out the project. For these reasons, it may be useful for developing countries wishing to make such statements to stress that their ability to take

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[48] See J Werksman, "Compliance and Transition: Russia's Non-compliance Tests the Ozone Regime," *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht* (Heidelberg: 1996), p 771, note 70, citing the Ozone Secretariat's interpretation of the practice of the Parties to that "when only one Party objected to a draft decision, that decision would be carried by consensus and the position of the dissenting Party would be clearly reflected in the report of the Meeting."

[49] See Speech of Dr. Seribek Zh. Daukeev, Minister of Ecology and Natural Resources of the Republic of Kazakhstan and Head of Delegation to COP-4, Buenos Aires, November 12, 1998; Address by the President of the Republic of Argentina, Report of the Conference of the Parties on its Third Session, Held at Kyoto, FCCC/CP/1998/16, Annex I.

[50] KP, Article 12.5(c).

action will continue depend upon funding through the Convention and the Protocol's financial mechanism, through bilateral sources or through the CDM.

Of primary interest to the Parties now, however, is what the multilateral response of the Convention's institutions should be to these unilateral statements.

5.1 Current Categories and Commitments

5.1.1 The Convention

For the purposes of emissions reduction commitments, the Convention divides countries into two categories, Annex I and non-Annex I Parties. The membership of each group was agreed in the last moments of the negotiation of the Convention. Annex I, or "developed" parties were drawn from what were then the 24 members of the Organisation for Economic Co-operation and Development (OECD),[51] 11 countries from Eastern Europe and the Former Soviet Union that were "undergoing the process of transition to a market economy", and the European Community itself. All other countries participating in the negotiations, most of which would be considered developing or least developed countries, fell, by default into the non-Annex I category.

The Convention provided for two mechanisms whereby a country not included in Annex I (or Annex II) of the Convention, could either join that Annex or otherwise undertake the Convention's "quasi-target" on emissions limitation (Articles 4.2(a)&(b)). Through the first mechanism, under Article 4.2(f), the COP can adopt by consensus (or if that fails, a ¾ majority) amendments to the list in Annex I. The Party being added or removed from the list must approve the amendment. These amendments will enter into force sixth months later for all Parties, other than for those that have notified the Depositary with their written "non-acceptance" of the amendment. Through the second mechanism, under Article 4.2(g), a Party to the Convention may unilaterally bind itself to the quasi-target in Article 4.2 (a) & (b), but without necessarily joining Annex I.

In practice, the two mechanisms have been used in tandem. Industrialised countries that are not OECD members (Monaco and Liechtenstein), and countries with economies in transition that were not independent states at the time the Convention was adopted (Croatia, the Czech Republic, Slovakia and Slovenia) have since joined Annex I.[52] While these changes in the membership of Annex I have been important in demonstrating the ability of the Convention to respond flexibly to changing circumstances, it is important to emphasise that in none of these cases has a country originally classified as "developing" taken on the classification or commitments of a "developed country." This is despite the fact that a number of newly industrialising developing countries are by some measures wealthier per capita than some Annex I Parties, and indeed some have since joined the OECD (*e.g.*, Korea, Mexico).

5.1.2 The Protocol

The Kyoto Protocol maintains the division between Annex I and non-Annex I Parties established by the Convention. However, it includes a further category of countries, Annex B Parties. These are the Parties which were present in Kyoto when the Protocol was negotiated and which agreed to have

[51] Turkey was one of the OECD's founding members and remains a member to this day. It has a rather schizophrenic attitude towards its development status, and has refused to sign or ratify the Convention or the Protocol until its name is removed from Annex II and Annex I of the Convention, on the grounds that it has neither the wealth nor the historical emissions to justify such a categorisation. See Submission of the Islamic Republic of Pakistan, FCCC/SBI/1997/15.

[52] See Report of the Conference of the Parties on its Second Session, FCCC/CP/1996/15, 29 October 1996; Decision 4/CP.3, Report of the Conference of the Parties on its Third Session, Held at Kyoto, FCCC/CP/1997/7/Add.1 25 March 1998. These amendments to Annex I entered in force six months after the transmission of this decision to the Depositary in accordance with Article 16.3 of the Convention.

assigned to them a specific quantified emission limitation or reduction commitment (QERLC) as set out in Annex B. All Annex I Parties to the Convention, including the six most recently added to Annex I, are listed in Annex B.[53]

Thus, as the Protocol is currently structured, each Party wishing to undertake a QERLC would need to join BOTH the Convention's Annex I and the Protocol's Annex B. Each Party would also have to agree a specific commitment that would be assigned to it under the Protocol. The process for amending the Protocol's Annex B is much the same as amending the Convention's Annex I, though it provides the Party concerned with more opportunities to prevent a commitment from being designed or assigned to it without its consent.[54] Indeed such a new commitment under Annex B would not enter into force until ¾ of the Parties to the Protocol, including the Party concerned, had accepted it.[55]

However, the Protocol does not expressly indicate a process or a set of principles whereby the specific commitment assigned to Party joining Annex B might be agreed. Attempts to adopt principles of "differentiation" that would have guided the design of new or strengthened commitments under Annex B or other Annexes were discussed during the Kyoto Protocol negotiations, but never adopted.[56] Instead the negotiators engaged in rather loosely structured political horse-trading. If any one principle might describe the basis for the distribution of burdens in Annex B, it would be "grandfathering." In other words it assigns commitments in such a way that allows most parties to maintain their present slice of what will become a (-5%) smaller "pie" of Annex B emissions.

In the absence of explicit guidelines for the next stage of commitment negotiations, recent calls by developed country negotiators for non-Annex I countries to undertake commitments (and the response of some developing countries), have fallen into a legal and procedural vacuum.

5.2 "Voluntary Commitments for Developing Countries"

Before, at, and since the adoption of the Kyoto Protocol, US and other developed country negotiators have been calling upon developing countries to "voluntarily take on commitments to limit greenhouse gases."[57] This is part of a broader effort (including Activities Implemented Jointly and the Clean Development Mechanism) to ensure the "meaningful participation" of developing countries in international efforts to curb GHG emissions.

The term "voluntary commitments" is intentionally ambiguous. It combines two words, the first which implies non-binding actions, and the second which implies binding obligations. Under the law of treaties all commitments are "voluntary" in the sense that they require the willing consent of the state (through signature and ratification) before they become binding. The term "commitment" as it

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[53] Both Turkey and Belarus are listed in Annex I of the Convention, but neither has signed or ratified the Convention, and neither agreed to be included in Annex B.

[54] Both the FCCC and KP processes require that the decision to add a Party may be taken by consensus, or a ¾ majority, but in both circumstances, with the approval of the Party concerned (FCCC, Article 4.2(f); KP Article 21.7). In the case of the KP, the Party must provide its consent in writing. Amendments to Annex I of the Convention enter into force with regard to the Party concerned unless it objects, while amendments to Annex B of the Protocol will only enter force when accepted by ¾ of the Parties to the Protocol and will bind only those Parties that have accepted them. (KP, Article 21.7, 20)

[55] It is important to keep in mind that there may be circumstances in which Parties to the Protocol may wish to block a Party from entering Annex B. As will be discussed below, Parties wishing to preserve the environmental effectiveness of the existing commitments in Annex B could seek to block the adoption or the entry into force of amendments to Annex B containing commitments that they considered too weak.

[56] This set of proposed principles, which became known as "Annex C" during the negotiations, contained a list of differentiation proposals that ranged from a straight GHG per capita formulation, to formulae that would have required less of countries with greater land area, or of those with higher energy efficiency. See, e.g. Information Submitted by Parties on Possible Criteria for Differentiation, Note by Secretariat, FCCC/AGBM/1997/MISC.3.

[57] Earth Negotiations Bulletin, Vol 12. No 97, Monday, November 16 1998, http://www.iisd.ca/linkages/vol12/enb1297e.html.

has been used in the climate regime has always referred to an obligation of a legally binding character. Under this reading, the "voluntary" commitments undertaken by developing countries would be similar in design those already set out in Annex B, i.e., they would be binding commitments voluntarily entered into.

The word "voluntary" might, however, also be interpreted to mean:

- **Undertaken without coercion**, i.e., industrialised countries will refrain from seeking to pressurise or impose commitments on a developing country; or

- **Undertaken unilaterally**, i.e., a developing country undertaking a commitment would be allowed wide discretion to select its own target; or

- **Non-binding**, i.e., that the target undertaken by developing countries would be considered a voluntary pledge, rather than a firm legal obligation

Thus, the ambiguity in the term "voluntary commitments" raises the broader issue as to how QERLCs undertaken by developing countries wanting to do more than they are currently required to do under Protocol could or should be *different* in their design from the commitments currently in Annex B. Should new entrants follow the legal character and basic pattern set in Annex B, or should the Climate Change regime's tradition of highly differentiated commitments continue in yet another form?

Current Annex B commitments can be said to share the same basic design features:

Links to other Major "obligations" [58]	**Links to certain "rights"**	**Legal Character**	**Baselines**	**Target**	**Commitment Period**
• Demonstrable progress by 2005 (3.2) • Subsequent commitments (3.9) • National inventories (5) • National reporting (7) • In Depth Review (8)	• Emissions trading (3.10,3.11,17) • Joint Fulfilment (4) • JI (3.10,3.11,6) • CDM (3.12,12)	Binding	Historical/single year (1988,89 or 90) Historical average (1985-87)	-8 to +10	2008-12

It is possible that some countries are using the term "voluntary commitments" to suggest that developing countries be allowed to differentiate their commitments from Annex B commitments with regard to any or all of these design features. In other words, developing countries could be encouraged to undertake commitments by providing access to "rights" currently available only to Annex I countries under the Protocol, or by relaxing for developing countries the obligations that have been required of existing Annex I countries.

It is beyond the scope of this note to explore fully the implications of differentiating these rights and obligations for developing countries. As a general and preliminary observation, it should be noted that any expansion of commitments should seek to preserve the environmental effectiveness of the bargain struck in Kyoto. Any approach must seek to ensure that "global" emissions of GHGs between 2008-12 are no higher than they would have been had the Protocol been implemented as currently constructed. For countries already included in Annex B, this means ensuring that collectively, they do not emit more than their combined "assigned amounts." For countries currently outside Annex B, their emissions should be no greater (and preferably, should be fewer) than what they are likely to have emitted under a plausible "business as usual" scenario.

[58] References here are to Articles in the Kyoto Protocol. This chart does not include the rights and obligations that apply to Annex I Parties under the Convention.

The effectiveness of existing Annex B QERLCs and the effectiveness of any new QERLCs are directly linked through the mechanisms in the Protocol that allow Parties with QERLCs to trade parts of their assigned amounts (Article 17, Article 4). In other words, if the QERLCs of new entrants to the Protocol are not designed properly they may, through emissions trading, undermine the environmental effectiveness of the existing commitments in Annex B.

5.2.1 Links to other major obligations

The Kyoto Protocol will require all Annex I Parties, in addition to achieving their QERLCs, to fulfil the major obligations relating to monitoring and verification, set out in the chart above. Some may argue that, in order to encourage developing countries to undertake QERLCs, one or all of these commitments should be relaxed or waived. Some precedent has already been established for this approach by Article 3.6 of the Protocol which calls upon the COP/MOP to allow Annex I countries with economies in transition "a certain degree of flexibility" with regard to commitments other than QERLCs. However, high quality, comparable and verifiable inventory data will be essential for any participant in an emissions trading regime. Only a rigorous system of monitoring and verification will allow parts of various parties' assigned amounts to be exchanged as common "currency".

Kazakhstan has made clear it wishes to join Annex B "through Annex I of the UNFCCC", and would presumably undertake all related obligations Annex I obligations. Argentina, on the other hand, has been less precise, suggesting that it will "establish targets within the framework of the Convention" but without reference to a particular Annex or set of obligations**.**

Inconsistencies in the texts of Articles 3, 6 and 17, raise certain technical challenges that could be open to abuse by Parties wishing to gain access to the regime's privileges without undertaking the appropriate obligations. For example, if a non-Annex I Party to the Convention joined Annex I without joining Annex B of the Protocol, it might be able to participate in Article 6, without having undertaken an assigned amount. If the new entrant were a country with significant project-based emissions reduction potential, this could inflate Article 3 cap. This possibility is raised by the relative ease of entry into Annex I, via Article 4.2(g)[59](as well as the specific anomalies of Belarus and Turkey); the reference in Article 6 to Annex I (rather than Annex B) Parties; and the reference in Article 3.10 and 3.11 to Parties (rather than Annex B Parties). However, Article 3.10 and 3.11 also clearly anticipate that under Article 6 a Party may only acquire and add to its assigned amount ERUs that are being transferred from a Party WITH AN ASSIGNED AMOUNT. Article 3.11 expressly provides that ERUs "shall be subtracted from the assigned amount for the transferring Party." Interpreting either the Convention or the Protocol differently would violate the customary rules of treaty interpretation which require that provisions should be read in such a way 1) that avoids conflicting meanings and 2) that does not render one of the provisions meaningless. While the ambiguity in the references to categories of Parties could be read permissively to allow a non-Annex B Party to participate in Article 6, there is no way to make sense of Article 3.10 and 3.11 unless both participating Parties have assigned amounts. At the moment the only assigned amounts in the regime are those "inscribed" in Annex B.

Another concern might be that a non-Annex I Party to the Convention would join Annex B, seek to participate in emissions trading under Article 17 (which refers only to Annex B Parties) but by-pass the obligations referred in the Protocol as attaching to Annex I (not Annex B) Parties. These include the Article 5 and 7 reporting and inventory obligations that all Parties that have expressed an opinion have acknowledged are central to the integrity of any emissions trading regime. However, this scenario would require the amendment of Annex B supported by a consensus, or failing that, a 3/4

[59] Under Article 4.2 (g) of the Convention, any non-Annex I Party to the Convention may notify its intent to be bound by Article 4.2 (a) and (b) of the Convention. No review or approval of the Parties is required. Article 1.7 of the Protocol provides that any Party to the Protocol that has made such a notification under Article 4.2(g) will be defined as an Annex I Party for the purposes of the Protocol.

majority of Parties to approve. If that level of majority of Parties is bent on allowing Parties to trade without undertaking, at the very least, the commitments that bind Annex I Parties under the Protocol, the regime is doomed anyway.

5.2.2 Links to "rights"

The right to participate in any system of joint implementation, joint fulfilment or emissions trading regime is likely to provide the most powerful incentive for developing countries to undertake QERLCs. Both the Argentine and the Kazakhstani declarations have stressed their governments' desires to participate in the regime's "flexibility mechanisms." If either country were able to negotiate for itself a "generous" target, it could to sell off that part of its assigned amount it did not need. For this reason, other delegations may seek to withhold the right to access the emissions trading regime unless they are assured that a new entrant has undertaken a QERLC that, at the very minimum, caps future emissions at plausible business as usual projections.

While entering Annex I and Annex B would entitle a Party to participate as an investor under the Clean Development Mechanism, it would, presumably, no longer be entitled to be a host of CDM project activities. It should also be recalled, as was pointed out in the opening paragraphs of this note, that even pledges of a non-binding character may compromise a developing country Party's "rights" to participate in the Convention's financial mechanism, or the CDM. Both the financial mechanism and the Clean Development Mechanism will provide financial incentives to those developing countries undertaking actions that "are additional to any that would [otherwise] occur". This suggests that a developing country wishing to host a project may first have to demonstrate that the project was not part of its existing development programme, or that, in the absence of GEF, CDM or other funding, it would not have the technical or financial resources to carry out the project.

5.2.3 Legal Character

It would be a valuable step forward for the climate regime to provide a mechanism that would allow developing countries to make qualitative pledges or statements; and even to quantify emissions reduction limitations in a non-legally binding manner. The legally binding character of existing Annex B QERLCs is, however, essential to emissions trading, and voluntary pledges should not be allowed to be traded as parts of assigned amount. This may argue for the eventual establishment of a separate Annex for a category of countries prepared to make quantified pledges, but not ready to legally bind themselves to such pledges. These countries could be subject to a distinct set of rights and obligations (that would not include, for example, the right to participate in emissions trading).

5.2.4 Baselines

As indicated above, Annex B QERLCs are all based on historical base years or periods. Having a fixed level of emissions (a baseline) against which to measure rises and reductions is essential to the successful monitoring of commitments. However, for a variety of reasons, many developing countries do not have detailed or reliable historical inventories of emissions, and are only now beginning to submit their initial national communications. It is expected that countries like Argentina will seek instead to build a target on a base year of future, projected emissions. The Montreal Protocol provides some precedent for setting targets for developing countries based on future baselines. While necessary in circumstance in which historical data is not available, agreeing future base years introduces an additional uncertainty into the negotiations. Actual emissions reductions will not be calculable until the base year has come and past. The Montreal Protocol experience suggests that setting targets on future base years can provide a "perverse incentive" for countries to increase (or to take no measures to decrease) their emissions in the run-up to the base year. If a new entrant is allowed to choose a base year as far into the future as 2008, some form of interim obligations may be required to constrain

that country's emissions growth prior to the start of the commitment period. (The 2005 "demonstrable progress" review required by Article 3.2 may provide such a mechanism).

5.2.5 Targets

Closely tied to the base year for emissions, is the size of the QERLC itself. The Annex B commitments have already set the precedent that a QERLC can be in the form of reductions or in the form of a cap, that allows for increases above present levels. It is expected that all developing countries will seek this same latitude. The crucial challenge to negotiators in agreeing these targets will be to ensure that they set them at levels at or below plausible business as usual projections. QERLCs based on unreasonably "optimistic" projections of economic and emissions growth would, combined with emissions trading rights, seriously undermine the environmental effectiveness of the existing commitments in Annex B.

5.3 Conclusion

The Argentine and Kazakhstani declarations, as well as the statements by Niue and Nauru, have caused both controversy and confusion. Most developing countries are not yet prepared to undertake binding targets. Many are concerned that the declarations will set a precedent for ad hoc, bilateral negotiations that isolate and pressurise individual countries into accepting targets before they are ready to do so. Others are concerned that the manner in which these new commitments are designed may undermine the environmental effectiveness of the commitments already agreed in Kyoto. Targets that are set too generously may, through the Protocol's system of emissions trading, allow an overall increase in Annex I emissions. Targets that are unrealistically ambitious may, without proper financial and technical support, lead to extensive non-compliance. Rushing to ad hoc negotiations may prevent the Climate Change regime from developing a coherent, long term strategy for dealing equitably and effectively with global emissions trends.

The current procedures for amending Annex I and Annex B to the Convention and the Protocol should provide a sufficient filter for blocking out proposals that would seriously undermine the regime. But the political pressure will be very high to allow developing countries in under terms that are sufficiently relaxed to make their participation attractive both to their own domestic constituencies and to Annex B parties interested in increasing the market for cheap emissions reductions.

Parties should see the "rigidity" of Annex B amendment procedures as a welcomed safeguard for preventing an ad hoc approach that might otherwise have undermined the "integrity" of the Annex B cap. However, the willingness of developing country Parties to formalise their desire either to do more than they are currently obliged to do, or to put on record what they are already prepared to do voluntarily, should be encouraged. This could be readily accommodated by a series of Annexes to the Protocol (or the Convention) in which developing country Parties could post their pledges. While these would also be subject to the regime's decision-making and entry into force rules on Annexes, as their content would be less contentious than amendments to Annex B, they are more likely to be adopted by consensus and enter into force without difficulty.

6. Concentric Regimes

Concentric regimes develop out of two related phenomena, the differentiation of commitments between developed and developing countries within the same legal instrument, discussed above, and the incremental growth of a treaty through a process of the adoption and ratification of separate but related legal instruments. The entry into force of the Protocol will create a further distinction within the regime, between those countries that are Parties to both, and those that are just Parties to the Convention. While all parties ratifying the Protocol must first be parties to the Convention, all parties to the Convention need not become party to the Protocol. All parties are bound by the Convention's

"inner circle" of core objectives, principles and commitments, but only those states that formally ratify the Protocol will be bound by the "outer circle" of strengthened commitments.

Legal purists might argue that the Kyoto protocol will create its own, largely distinguishable treaty, which encompasses only those states that are parties to it. Having reciprocally ratified the same new legal agreement, the Protocol Parties should be entitled to form their own COP and legislate future commitments accordingly. Other parties should be allowed to participate only with regard to decisions effecting whatever inner rings of obligation they have ratified. Pragmatists might respond that the current rings of differentiation are only temporary anomalies. While all countries may not at present be bound by the same obligations, all share a legitimate interest in the future development of the treaty as a whole. As developing countries grow, they will be expected to graduate to the outer ring. Allowing them to participate in the design of what will become their future obligations may help ensure their longer term involvement in the regime.

State practice thus far has sought to strike a balance between both approaches. Under the Montreal Protocol, non-parties to later amendments, and, indeed, non-parties to the Protocol itself, have been allowed to participate fully in the development of consensus decisions through formal negotiations in the COP and in its subsidiary bodies. However, if the Montreal MOP were ever pressed to a vote, only those countries parties to an amendment would be entitled to vote on an adjustment to that amendment. The Climate Change Convention anticipated a similar procedure, providing explicitly that "decisions under any protocol shall be taken only by parties to the protocol concerned."[60]

Negotiations on the design of the Protocol's governance split roughly along North-South lines. Many G-77 members argued for the need to maintain, through the COP, the supremacy of the principles and distribution of obligations reflected in the Convention, and were uncertain as whether they would be prepared to ratify the Protocol. Industrialised countries pressed for a greater independence for the Protocol and were growing less tolerant of the G-77's numerical majority in the COP. When designing the institutional and procedural relationship between the Convention and the Protocol, the negotiators sought to strike a similar balance, through the application of the following design principles:

- maintaining the coherence in the implementation of the two treaty instruments as forming part of the same "regime"

- avoiding a duplication of institutional costs and capacities

- respecting the "sovereign" independence of each treaty instrument to take its own decisions

The resulting text is an improvisation, which provides that the "Conference of the Parties, the supreme body of the Convention, shall serve as the meeting of the Parties to this Protocol."[61] This "COP/MOP" is a unique hybrid of institutional design developed specifically to deal with the challenges of concentric regimes. Built-in rules of procedure follow the Montreal approach. They grant Parties to the Convention observer status when the COP is serving as the MOP, but bar non-Parties to the Protocol from participating in the COP/MOP when decisions are being taken. The same decision-making rules apply to the Convention's Subsidiary Bodies on Implementation and on Scientific and Technological Advice, which will be available to "serve" the Protocol's Parties.

It is unclear whether in practice, the COP v. COP/MOP distinction will remain relevant. This will depend on how closely the memberships of the instruments will overlap when the Protocol enters into force, and how relevant the Convention's unique procedures and obligations will continue to be to the

[60] UNFCCC, Article 17.5.
[61] KP, Article 13.1.

regime.[62] The Meetings of the Parties to the Montreal Protocol have, in effect, made irrelevant the Conferences of the Parties to the Vienna Convention. Perhaps the clearest indications that the two bodies will at some level be distinct, are the provisions that instruct the COP/MOP to "consider any assignment resulting from a decision" of the COP, and the ability of the Parties to the Protocol to hold extraordinary sessions of the COP/MOP, when the COP itself is not meeting.[63]

If the membership of the two regimes does not converge, short-term difficulties might arise first in the area of administrative finance and financial resources. The budget set for the Secretariat follows UN practice and is based on an "indicative scale of contributions" distributed amongst Parties on the basis of GDP.[64] Making distinctions between administrative work undertaken for the Convention, and that undertaken on behalf of the Protocol, may seem somewhat artificial. However, there can be little doubt that Protocol-specific research and analysis, such as that associated with the Protocol's "flexibility mechanisms" is absorbing a growing amount of Secretariat resources. Efforts to establish a principle for dividing these costs between Parties and non-Parties to the Protocol were discussed during the Protocol negotiations and rejected. The Executive Secretary suggested that the overheads associated with calculating the differences would probably outweigh the savings to any particular Party.

A more serious concern may be raised by the relationship between the COP, the COP/MOP and the financial mechanism they share. The Kyoto Protocol has not established its own financial mechanism, and the Parties will be expected to rely, as they will for many other institutions, on the Convention's financial mechanism. Article 11 of the Protocol essentially confirms that the GEF will play the role it currently plays for the Convention in funding the implementation of whatever additional developing country activities are characterised as falling under Article 10 of the Protocol. The GEF Assembly has, since Kyoto, expressed its willingness for the GEF to serve as the operating entity of the financial mechanism for the Protocol.[65]

The Protocol text does not, however, clarify whether the Parties to the Protocol have been granted the authority to provide guidance directly to the GEF. The Protocol tries to anticipate potential difficulties by indicating that both past and future COP guidance will apply *mutatis mutandis* to funding decisions under Article 10 and 11 of the KP.[66] If the membership of the Protocol and the Convention do not coincide, it is possible that the COP/MOP could seek to provide guidance to the GEF that differs from the guidance provided by the COP as a whole. One could imagine, for example, the Protocol Parties requesting the GEF to provide funding for capacity building in support of the Protocol's Clean Development Mechanism, or to withhold funding for those countries that had not yet ratified the Protocol.[67] Under these circumstances, questions could be raised as to whether the GEF would be under any obligation to take the COP/MOP guidance into account.

6.1 Conclusion

For the moment, the Parties seem to have resolved their differences over the institutional and procedural relationship between the Convention and the Protocol. As with many other international

[62] The Protocol will enter into force when not less than 55 Parties to the Convention, incorporating Parties included in Annex I which accounted in total for at least 55 per cent of the total carbon dioxide emissions for 1990 of the Parties included in Annex I, have deposited their instruments of ratification, acceptance, approval or accession. On the basis of signatures registered so far, there should be a substantial overlap in membership between the Parties to the two instruments.
[63] KP, Article 13.4(j).
[64] See, e.g., Report of COP-4, Decision 17/CP.4, Annex.
[65] The New Delhi Statement of the First GEF Assembly, 3 April 1998, available on <http://www.gefweb.com>.
[66] The COP/MOP does however have the express authority to "seek to mobilize financial resources" and the residual authority to "exercise such other functions as may be required for the implementation of this Protocol."
[67] While such a development may seem unlikely, an analogous conditionality has been adopted in the GEF's ozone portfolio. The GEF Council provides funding only to those Parties that have ratified both the Protocol and its London Amendments. GEF Operational Strategy, Chapter 5.

environmental agreements that aspire to "universal" membership, rules on participation have been interpreted broadly and inclusively. Parties and non-Parties, Parties with and without substantial commitments, participate in the full range of formal negotiations over the implementation and future development of commitments. Procedure and practice for formal meetings allows all countries to join the list of speakers and to shape the sense and the momentum of the debate. The absence of any voting rules has meant that the "procedural fix" that separate out Parties and non-Parties in the context of a specific decision, may never be invoked.[68]

Problems of "right process", which were raised during the negotiations, may be raised again if the obligations within each agreement, and the memberships between the agreements remain substantially asymmetrical. Ironically, those states that had called for a greater separation of powers between the COP and the MOP, have themselves often taken advantage of the liberal treatment of observers in other international environmental regimes. The USA, for example, has participated actively as an observer state in the negotiations of the Basel Convention and the Biodiversity Convention, and spearheaded the redrafting of substantial portions of the UNCLOS, without having ratifying any of these agreements.

7. Legal Personality

The law of international institutions describes the legal character, functions and powers of bodies created by states in order to achieve objectives that depend upon international co-operation. States' understanding of this law helps determine an international institution's legal personality, which, in turn, circumscribes the scope of activities that an institution is explicitly and implicitly authorised to engage in on the international plane.

There is no universally agreed definition of what constitutes international legal personality with respect to an international institution. While a number of international environmental agreements that set up bodies, do provide an express grant of legal personality, many are silent on what, precisely such a grant is intended to entail.

Analysts have sought, instead to provide objective indicia, or tests, to determine whether legal personality has been implicitly granted by a constituent instrument, or has arisen organically through the institution's functioning.

Brownlie's treatise on pubic international law proposes that an institution can be found to have international legal personality when three elements are present:

- a permanent association of states, with lawful objects, equipped with organs
- a distinction, in terms of legal powers and purposes, between the organisation and its member states
- the existence of legal powers exercisable on the international plane and not solely within the national systems of one or more states[69]

Other analysts have developed a similar test which looks at the related issue of whether the institution requires international legal personality in order to carry out its functions. If a "functional necessity" can be established, then personality will be implied. As will be seen, this test is supported by an

[68] The Montreal Protocol has never tested the operation of the rule that would deny observer states the right to vote, as no vote has ever been called.
[69] Brownlie, I, *Principles of Public International Law*, (4th ed., 1990) 681-682.

advisory opinion of the International Court of Justice, and has influenced the approach taken recently by the United Nations Office of Legal Affairs (OLA).[70]

A more conservative view, held by a minority of academics, but supported by the legal advisors of a number of influential states, asserts that international legal personality must be premised on specific powers affirmatively granted by its constituent instrument. These analysts will demand clear evidence that the states establishing the institution clearly intended to provide it with international legal personality. As will be seen, this approach, influenced by wider political considerations, seeks to tightly restrict the ability of international institutions to operate autonomously from the states that have created them.

7.1 Parents and subsidiaries: delegated capacity

A related issue, important for the analysis of the institutions established under the Convention, is the extent to which the legal capacities of one body depends, vicariously, on the legal personality of a parent body. International institutions will often create subsidiary organs to carry out specific, delegated tasks. These organs may vary greatly in character, depending upon their assigned functions. They may be, for example, intergovernmental in character, (such as the Convention's Subsidiary Body on Scientific and Technological Advice), be composed of experts (such as the Global Environment Facility's Scientific and Technological Advisory Panel) or may be made up of international civil servants (such as the Convention's Secretariat).

While these subsidiary organs may have many of the attributes of international organisations, their close links with and dependence upon their parent institutions limits both the practical and legal scope of their autonomy. Many analysts will view this dependence on the parent organisation as definitive indicia that the subsidiary body has no independent international legal personality. The extent to which the subsidiary body can operate on the international plane will depend upon legal capacity being delegated, either explicitly or implicitly, by the parent institution.

This parent/subsidiary relationship will be relevant both to analysing the COP's relationship to the Protocol's "meeting of the Parties", (COP/MOP), and the Secretariat's relationship to the United Nations Organisation.

7.2 Law and politics

The legal interpretation a state or group of states will advance when assessing the autonomy of international institutions will depend on both general policies and the political interests associated with the particular institution in question. Political issues that may arise include:

- concerns over threats to state sovereignty
- concern over the proliferation of international institutions including:
    - the costs associated with new institutions
    - the need to rely on existing institutional capacity

7.2.1 Perceived threats to state sovereignty

While the creation of an international organisation is intended to facilitate co-operation and advance the interests of its member states, it can also pose a potential threat to state sovereignty. Once the international organisation is created it can develop interests and a will of its own that may not conform to the interests and will of each of its member states, or indeed, those of non-member states.

[70] See, Jennings, R and Watts, A, Oppenheim's International Law (9th ed. 1992),Vol I, sec 7, citing Reparations for Injury in the Service of the United Nations, ICJ Rep (1949) pp 178, 180.

Theoretically, international legal personality may enable the international organisation to access international procedures and mechanisms that will allow it to advance its interests.

Thus the extent to which a state will support greater autonomy for a particular international institution will depend on the perceived potential of that institution to take actions adverse to the state's interest. This perception will be based on the state's role in the institution's decision-making mechanisms and the extent to which the institution's overall objectives threaten the state's national interests.

7.2.2 Avoiding proliferation

The principles for institutional design agreed at the United Nations Conference on Environment and Development provide a further political overlay for this discussion. In addition to the specific directives on the role of UNEP and international environmental agreements, which will be discussed below, Agenda 21 endorsed the principle that states should avoid creating new international institutions and should rely, to the extent possible, on existing institutions to carry out new initiatives.[71]

These arguments, based largely on cost effectiveness and efficiency, are difficult to refute at face value. The cross-cutting character of recent environmental treaties, including the Convention, will necessarily benefit from drawing upon the work and expertise of existing organisations. Nevertheless, once a group of states has decided, through a new treaty, to create a new series of substantive and procedural obligations, additional costs and demands will inevitably be placed on the international system.

Many of these costs, especially those associated with administering the intergovernmental process of rule-making and implementation review, would be incurred whether or not a new, or an existing institution is utilised. Recognising this, most new international treaties provide, as does the UNFCCC, that despite the Convention's reliance on institutions such as UN organisation, that the Parties to the Convention alone will provide the budget for the operation of the Convention. Furthermore, the legal formality of granting or acknowledging that a new international "person" has been established does not in itself create any additional costs.

7.3 Abstract theory and concrete examples

Issues related to the legal character of the Convention and of the institutions it establishes are very difficult to resolve, either legally or politically, in the abstract. For this reason, this analysis draws upon legal and political arguments that have been raised in three relevant and recent negotiations:

- linkages between the Climate Change other MEAs and the Global Environment Facility;
- the headquarters agreement of the Climate Change secretariat;
- the legal personality of the Multilateral Fund for the Montreal Protocol

7.4 The COP

In establishing the COP the Convention does not expressly create an international organisation, nor does it endow the COP with international legal personality. Nevertheless the COP is assigned a number of important legislative and administrative powers and functions that have the characteristics of an international organisation.

[71] [insert footnote]

A conservative interpretation of the legal character of the COP, would describe the COP as nothing more than a set of rules and procedures that govern the diplomatic conferences convened as meetings of the Parties to the Convention. According to this approach, the COP, as an organ, cannot be described as having a will or a personality of its own, as it merely provides a forum for expressing the collective will of its Parties. In the words of one legal adviser to an OECD delegation, the COP is nothing more than a "rolling diplomatic conference."

The United Nations Office of Legal Affairs has taken a more liberal approach. In response to a series of questions on the nature of the relationship between the FCCC and the GEF, the OLA concluded that "[o]nce [th UNFCCC] enters into force it will establish an international entity/organisation with its own separate legal personality, statement of principles, organs and a supportive structure in the form of a Secretariat."

In reaching this conclusion, the OLA relied not on an express establishment of the COP as an international organisation, nor did it rely on an express grant of international legal personality. Instead, following the reasoning of the International Court of Justice in the Reparations Case, the OLA relied on the powers and functions granted to the COP from which it could be implied that the Parties had intended to create an international legal person. In particular, OLA noted:

- the characterisation in the UNFCCC of the COP as the Convention's "supreme body"
- the authority of the COP to take, within its mandate, the decisions necessary to promote the effective implementation of the Convention
- the power of the COP to seek and utilise the co-operation of competent international organisations and bodies
- the residual authority of the COP to exercise such other functions as required for achievement of the objective of the Convention

In the context of these provisions, the OLA concluded that the COP has the international legal capacity, within the limits of its mandate, to enter into treaty instruments, including agreements and other arrangements with entities, such as states, intergovernmental and non-governmental organisations.[72] The OLA has since returned to the issue of the COP's legal character in the context of reviewing the "juridical personality and legal capacity of the Secretariat" of the Climate Change Convention. Here the OLA remarked, with less precision, that the COP and other institutional aspects of the Convention, "have certain distinctive elements *attributable to* international organisations."[73] (emphasis added)

The OLA opinions on the COP and secretariat provide a persuasive source of legal reasoning, and in many ways reflect what has been described as the prevailing view of legal academics. However, these

[72] Memorandum from Carl August Fleischhauer, Under Secretary General for Legal Affairs, United Nations Office of Legal Affairs to Michael Zammit Cutajar, Executive Secretary, Intergovernmental Negotiating Committee for a Framework Convention on Climate Change, on Arrangements for the implementation of the provisions of Article 11 of the UN Framework Convention on Climate Change concerning the financial mechanism, 4 November 1993. Mr Fleischhauer has since been elected judge of the International Court of Justice, and was replaced by Hans Corell, who responded to a follow up request. Memorandum of 23 August 1994 to the Executive Secretary from Mr Hans Corell, Under-Secretary-General for Legal Affairs, The Legal Counsel, A/AC.237/74, Annex. At the Bank's request, this memorandum replaced an earlier version, which had been sent to the climate change secretariat. Memorandum of 22 June 1994 to the Executive Secretary from Mr Hans Corell, Under-Secretary-General for Legal Affairs, The Legal Counsel. On GreenNet/Econet, conference un.fccc, "74:Linkages COP&Operating Entities."

[73] Advice of the Office of Legal Affairs to the Executive Secretary of the Climate Change Convention, 18 December 1995, reproduced in FCCC/SBI/1996/7.

particular OLA opinions were not well-received by a number of influential legal advisors on key delegations. While the opinions were never publicly debated, the legal advisors on both the US and the UK delegations informally expressed their views that the OLA's conclusions were poorly reasoned. They argued that, as negotiators active in the design of the Convention, they were in a better position to assess whether the Convention established an international organisation than was the OLA.

The political context of this discussion helps explain the disparity between the majority academic view and the view that prevailed in this circumstance. The Climate Change parties were in the midst of contentious negotiations over the relationship between the COP and the GEF. The OLA's conclusions on the legal and institutional character of the COP were intended to help determine the legal character of the agreement to be negotiated between the COP and the GEF. Because it was able to find that the COP had legal personality, the OLA was also able to conclude that the appropriate form of agreement between the COP and the operator of its financial mechanism should be a legally binding instrument.

However, many donors were concerned that such a formal legal relationship could:

- lead the COP to interfere unduly with the operations of the GEF

- require the involvement of the World Bank, which as the Trustee of the GEF Trust Fund, would have to formalise any legally binding agreement between the COP and the GEF.[74] Such involvement would have raised the profile of the Bank at a moment when the GEF was being portrayed as having been restructured and made "functionally independent" from the Bank..

Thus many donors preferred that any arrangements between the COP and the GEF remain non-legally binding. One way of ensuring this was by maintaining that COP did not have legal personality to enter into formal legal arrangements. The COPs to both the UNFCCC and the Biodiversity Conventions have since been persuaded to reflect the relationship between themselves and the GEF in the form of Memoranda of Understanding (MOU) drafted in non-binding language. Because they are non-binding, and are not intended to give rise to legal consequences, these MOUs do not require either the GEF or the COP to have independent legal personality.

7.5 The Secretariat

It is theoretically possibly for the COP to have granted or to grant the Secretariat legal personality without the COP itself having legal personality of its own. Even if one accepts the conservative view that the COP provides only a forum through which the states Parties to the Convention act, these States may, through their joint action, endow the Secretariat with legal personality. For example, the Meeting of the Parties to the Montreal Protocol, a body analogous to the Convention's COP, granted legal personality to its Multilateral Fund.[75]

As with the COP, the legal character of the Secretariat must be derived from the provisions of the Convention, and subsequent practice of the Parties, including the decisions of the COP. Article 8 of the Convention establishes the Secretariat and provides very general guidance as to its functions and powers.

7.5.1 Functions

The basic functions any secretariat would require include the powers, rights and duties to:

[74]GEF Instrument, Annex B, para 7.

[75] [cite MOP decision]

- ensure that its staff enjoys the necessary privileges and immunities in the territory of the country in which the Secretariat is located

- enter into contractual relationships

- acquire and dispose of movable and immovable property

- institute legal proceedings

As is the case with the COP, the Convention does not expressly vest the Secretariat with international legal personality. It does, however, empower the Secretariat to, inter alia:

- ensure the co-ordination with the secretariats of other relevant international bodies

- enter, under the overall guidance of the COP, into such administrative and contractual arrangements as may be required for the effective discharge of its functions,[76] and

- perform such other functions as may be determined by the Conference of the Parties.[77]

Since the entry into force of the Convention, the Executive Secretary and the Secretariat have been authorised by the COP to:

- under the supervision of the Chairman of the Subsidiary bodies to run the In-Depth Review process, including the co-ordination of the report and the compilation and synthesis of data (Decision 2/CP.1);

- to prepare draft arrangements on the relationship between the COP and the Global Environmental Facility for consideration by the Subsidiary Body for Implementation (Decision 10/CP.1);

- to coordinate with the relevant United Nations agencies and other organizations and institutions in support of efforts to gather information on technology transfer; (Decision 13/CP.1)

7.5.2 Legal personality

The OLA has addressed the issue of the "juridical personality and legal capacity" of the Climate Change secretariat. As with the FCCC's COP, the OLA concluded that the FCCC secretariat has "certain distinctive elements attributable to an international organisation". This conclusion appears to rest heavily on the provision in the Convention, that empowers the Secretariat to "enter into contractual arrangements."[78]

However, the OLA fell well short of concluding that the FCCC's provisions alone granted independent legal personality to the FCCC's secretariat. Neither did the OLA feel that the FCCC's link to the United Nations was clear enough to allow the legal regime enjoyed by the UN to "automatically attach" to the Secretariat. In light of the need to conclude a headquarters agreement with Germany before the FCCC secretariat completed its move to Bonn, the OLA recommended to FCCC COP-2 that it would "be appropriate to clarify the ambiguity concerning the nature and legal status of the of Convention Secretariat under international law."

[76] UNFCCC, Article 8.2(c).
[77] UNFCCC, Article 8.2 (g)
[78] UNFCCC, Article 8.2(f).

The OLA suggested, more specifically, that the Climate Change Parties clarify the status of their secretariat in the same manner as the Parties the Montreal Protocol recently determined the status of the Multilateral Fund of the Montreal Protocol. The legal and political character of this decision will be discussed below.

Once again, the Climate Change parties chose not to follow the OLA's advice. When deciding not to grant the FCCC secretariat legal personality, the Climate Change parties relied on a number of arguments. In addition to the need to avoid the proliferation of international institutions, and to take advantage of capacity already existing institutional capacity, legal advisors from several industrialised countries parties were fundamentally unpersuaded that the FCCC secretariat had demonstrated any need to have an international legal personality of its own.

Two main arguments were advanced, and eventually accepted:

- the legal and institutional umbrella provided by the United Nations Organisation, through its "institutional linkages" to the Climate Change Secretariat was felt adequate to allow for the negotiation and formalisation of the FCCC Secretariat's Headquarters Agreement under UN auspices

- the Headquarters Agreement, signed by UN Secretary General, the FCCC Executive Secretary and the government of Germany would not, in any case, require the exercise of international legal personality. The legal rights and duties, privileges and immunities necessary for the functioning of the FCCC Secretariat, and provided for under the agreement, are granted under German and not international law.

This last point was particularly persuasive. The legal personality deemed necessary for the Secretariat's functioning was not international legal personality requiring the recognition of a distinct institution operating on the international plane, but rather domestic legal personality, recognised under the laws of host country Germany. Such an approach raises none of the complex legal and political issues associated with the establishment of a distinct new international legal person.

In the course of the FCCC discussion, the decision by the parties to the Montreal Protocol with regard to the Multilateral Fund was expressly rejected by one industrialised country legal advisor as "bad law" that should be avoided rather than followed. It was further argued that even if one were to look to the Montreal Decision as valuable precedent, the effect of the decision, like the FCCC headquarters agreement, was limited to having domestic legal consequences. Although the decision purports in its chapeau to "clarify the nature and legal status of the Fund as a body under international law," the substance of the decision grants powers, rights and duties to enter into contracts, to engage in legal proceedings and to invoke privileges and immunities that are fully exercisable under Canadian law[79], and do not require international legal personality.

Thus, while the application of a "functional necessity" test to the circumstances presented by the FCCC Secretariat would appear to give rise to a finding that the Convention and the decisions of the Conferences of the Parties, had granted the Secretariat a degree of international legal personality, a more conservative view has prevailed.

It must, however, be kept in mind that while the Parties to the Climate Change Convention effectively determined that the secretariat did not require international legal personality in order to carry out the functions assigned to it, they left open the possibility that the issue would be revisited. The Climate Change Parties have scheduled to return to the issues of the Climate Change secretariat's place in the UN system, and the need for international legal personality by 1999. This decision may signal both the continuing political interest in some Parties to advance the secretariat's and the convention's status, and a

[79]Decision VI/16 of the sixth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer.

recognition by some Parties that the passage of time and the growth of responsibilities may require a secretariat with greater autonomy and power.

7.6 Conclusion

The most frequently cited example of the organic development of international legal personality for a institution established without the intention of creating an international organisation is the General Agreement on Tariffs and Trade. After having operated for more than 40 years without express legal personality, the GATT was widely recognised as having the attributes of an international organisation. While academics puzzled over how precisely the GATT could or should be characterised, the GATT's Director of Legal Affairs noted, very tellingly that:

> The administrators of [the GATT] are as fascinated by [the issue of the GATT's legal status] as birds are by ornithology. The fact that counts for them is that the GATT has been acting consistently as an entity legally separate from its contracting parties and has been treated as having legal capacity.[80]

In other words, the daily practice of the institution, its relationship with its members and non-members, and the implicit endorsement of the contracting parties of the institution's increasingly independent activities were adequate to ensure that it was able to fulfil its functions, even in the absence of legal formalities.

8. Conclusion

As the international community tackles new and greater challenges, the lessons it has learned from previous efforts are likely have only limited value. Improvisation will continue to be essential to the design of regimes that respond the special interests of individual sovereign states, as well as answering to the needs of the community as a whole. However, a regime as complex and demanding as the Convention and its Protocol will also need to begin to codify its practice in a way that provides Parties with a sense of predictability, stability and clarity.

Given the vested interests and complexity of issues it faces, the Climate Change regime has achieved a remarkable level of output, providing the institutions and procedures that have lead to the adoption of what are undeniably the most ambitious international environment obligations ever agreed. The Kyoto Protocol has since attracted an impressive rate of signature, which suggests states accept the legitimacy of the process and the fairness of the rules it has produced. However, as process of ratification begins, and domestic legislatures begin to assess the implications of these rules, questions may well be raised as to how the negotiators arrived at this point, and how they are likely to move the next stage in the development of the regime.

It is hoped that the predictability, stability and clarity that is intended to be provided by formal legal relationships will, in the interim, be provided by good will and co-operation. The risk inherent in this approach is that should good will and co-operation break down, there will be no formal institutional or procedural framework to fall back on.

[80] Schermers and Blokker, sec 44, citing F. Roessler, The Agreement establishing the World Trade Organisation, report presented at a conference organised by the College of Europe (Brugge 18/19 Nov. 1994).