Climate change Regime – Convention, Kyoto Protocol and further negotiations[1]

1. Introduction and background

Public international law is based on the notion of sovereign states. States represent the citizens of that country and in general have equal rights. No matter what size or economic power, the principle of "one state one vote" often applies.[2] In order to be legally bound, an independent state has to consent. Consequently, public international law depends on a system of consensus in order to ensure a degree of recognition and compliance. While the concept of sovereignty of states is fundamental to international law it can also be its Achilles' heel. The main challenge in the climate change regime is developing a consensus on meaningful solutions to what is a generally acknowledged serious problem.

The issue of climate change as such is not difficult to understand and assess. It represents the effects of industrialisation on the global climate. In this connection, science can identify who caused the problem in the past, present and future. Now the internationally community has to find ways in order to collectively reduce greenhouse gas (GHG) emissions and enhance the absorption of GHG. However, this is difficult to solve because of the need for joint action. Many states do not want to compromise with economic growth and development. Further, there is a lack of political will within some countries that have not yet identified climate change as a matter of national interest.

In response to the complexities of climate change and the variant degrees of political will a treaty was adopted in 1992 – the UN Framework Convention on Climate Change (UNFCCC). In the UNFCCC the parties' obligations are soft and non-specific. The Kyoto Protocol, adopted under the Convention, in comparison, contains clear legally binding commitments and has been designed to ensure a degree of compliance with these commitments. However, it largely failed because there was insufficient political will behind it. The relevant constituencies had not been built yet. The US, for example, was a major player in the negotiations but Congress rejected the Protocol. Moving on from the Kyoto Protocol is part of designing a more inclusive 2020 regime.

2. UNFCCC

The UNFCCC provides the framework for reaching further agreement on policies and measures to address climate change. It is not a detailed regulatory regime. Many of the concepts of the current international climate regime come from the Montreal Protocol on substances that deplete the ozone layer. The Montreal Protocol is seen as a success story that exemplifies how binding rules at the international level can change behaviour. Since it deals with pollutants that also affect the atmosphere and there is a natural geophysical connection between GHG and the ozone layer the Montreal Protocol was considered an obvious starting point to address climate change.

Based on the Montreal Protocol, the new international treaty was supposed to divide obligations between industrialised countries and developing countries. Financial support would be channelled from the richer to the poorer countries. However, while climate change gradually impacts on the environment the immediate effects of the depletion of the ozone layer were obvious in industrialised countries. Australia and North America were affected the most and forced to act quickly. Replacement products were already developed and new markets created to incentivise their use. Large corporations saw the emerging business opportunities and supported the phasing-out of ozone-depleting substances. The technological challenges in order to respond adequately to climate

[1] This section is based on a presentation by Jacob Werksman on 2 April 2013.

[2] Exceptions to the rule apply for example within the systems of the World Bank or the International Maritime Organisation.

change are far more significant. It is estimated that the transition from a fuel-based to an alternative energy economy would cost trillions of dollars.

The UNFCCC has the following overall structure:

Preamble	
Art.1:	Definitions
Art.2:	Objective
Art.3:	Principles
Art. 4:	Commitments
Art. 5:	Research and systematic observation
Art. 6:	Education, training and public awareness
Arts.7-10:	Institutional arrangements (COP, subsidiary bodies, secretariat)
Art. 11:	Financial Mechanism
Art. 12:	National Communications
Arts.13&14:	Consultation and dispute settlement
Arts.15-17:	Amendments and further instruments
Art.18:	Right to vote
Arts.19-26:	Final formal provisions on signature, ratification etc.
Annex I:	Listing developed/industrialised countries and countries with economies in transition
Annex II:	Listing of developed/industrialised OECD countries

a) Article 3 on Principles

The preamble and Article 3 (on principles) contain similar language. They tend to set out boundaries of what an acceptable climate change regime can and should do. They do not reflect obligations but rather provide general guidance. In essence they establish who should be doing what to achieve the Convention's objective to stabilise GHG emissions "at a level that would prevent dangerous anthropogenic interference with the climate system".

Art.3.1: The principle of common but differentiated responsibilities and respective capabilities (CBDRRC) indicates who takes the lead (industrialised countries) and who should be supported. The concept acknowledges the overhanging climate debt that is owed by industrialised countries.

Art.3.3: The precautionary principle is directed at government regulators and focuses on prevention. It has been incorporated in the major multilateral environmental agreements. Where there is a risk, the lack of scientific certainty should not prevent action.

Art.3.4: The parties have a right to and should promote sustainable development. The word "right" is significant because it provides space for developing countries to develop to a certain standard. Developing countries have the right to grow and the right to demand support for that growth. The parties' right to promote sustainable development is different from a right to develop. It is assumed that it is possible for countries to grow and thrive, while de-linking themselves from carbon. Current discussions on low-carbon development, green growth and clean development mechanism are supposed to shift perceptions from 'sacrifice' to competition and opportunity.

b) Article 4 on Commitments

Art. 4.1 lays down the general commitments applicable to all parties: e.g. cooperating in climate research; observation of the global climate system and data exchange; promotion of education, training and public awareness; integration of climate change considerations into social, economic

and environmental policies and actions; employ methods (such as impact assessments) for mitigation and adaptation projects or measures; communicate to the COP information on implementation. These are soft commitments. They lack a degree of specificity and mandatory character.

Art.4.2 contains specific commitments for Annex I parties to adopt policies and measures with the aim of returning to 1990 levels of anthropogenic GHG emissions. These commitments apply exclusively to Annex I parties – developed/industrialised countries and countries with economies in transition (members of the former Eastern bloc). However, the text is very convoluted and makes it difficult to extract an obligation. It envisages returning to 1990 levels "individually or jointly" and the modification of current trends by the end of the "present decade" (2000) but does not specify a date. It does not require Annex I parties to do a lot except to communicate information on implementation, national inventory of GHGs by sources and sinks or steps taken or envisaged to implement the Convention to the COP.

Under Art.4.3 developed countries shall provide new financial resources in addition to existing development aid to meet the agreed full costs incurred by developing countries in complying with their reporting obligations under Art.12.1. They shall also provide resources, including for technology transfer, needed by developing countries to meet the full agreed incremental cost of implementing measures under Art.4.1. Incremental cost describe the additional cost of implementing a mitigation project in comparison to the activity the project replaces (the "business as usual" situation). The incremental cost concept indicates what donors are willing to fund. It was not meant to be a blank cheque for development. Donors must know where their funding is going to and what the benefits are.

According to Art.4.4 developed countries shall assist developing countries that are particularly vulnerable to the impacts of climate change in meeting the costs of adaptation. This largely entails responses to weather events and may involve the insurance industry (Art.4.8). Examples of adaptation include moving airports from low to higher grounds or building seawalls.

Art.4.5 on technology transfer (for mitigation and adaptation) requires developed countries to take all practicable steps to promote, facilitate and finance, as appropriate, the transfer of or access to environmentally sound technologies.

Art.4.6 allows for a degree of flexibility in the implementation of commitments for economies in transition.

Art.4.7 links the implementation of commitments by developing countries to the financial resources and transfer of technology made available by developed countries. But while developing countries demand that there should be no further expectation other than the developed countries providing resources and technology donor countries expect concrete arrangements (above 4.3).

Art.4.8 provides that in the implementation of their commitments parties shall give special consideration to particular groups of developing countries. The provision reiterates the groups of countries referred to as particularly vulnerable in recital number 19 of the preamble, adding countries with high urban atmospheric pollution, oil producing as well as landlocked and transit countries. The nine different categories of countries shall receive special consideration not only with regard to the adverse affects of climate change but also the impact of response measures.

Art.4.9 additionally requires parties to take "full account of the special needs and situations of least developed countries" in the context of funding and technology transfer. LDCs are designated by the

UN Economic and Social Council (ECOSOC) according to a set of criteria including low income, human resource weakness and economic vulnerability.

c) Other provisions

Art.11 defines a "financial mechanism" for the provision of financing on a grant or concessional basis, including for technology transfer. It functions under the guidance of, and reports to, the COP. The Global Environment Facility (GEF) was named as the entity "entrusted" with its operation (COP 1).

Art.12 deals with the Parties' differentiated reporting requirements on mitigation policies and measures. Only Annex I parties are required to give detailed descriptions of mitigation measures and policies - within 6 months of entry into force of the Convention. Non-Annex I Parties must submit their first national communications within three years of entry into force of the UNFCCC or when financial resources become available. LDCs can submit communications at their discretion.
Financial assistance is provided to non-Annex I Parties to prepare national communications (see above).

d) Differentiation between Parties

The Convention differentiates the commitments of Annex I, Annex II and developing country Parties (non-Annex I countries). Annex I countries are a larger set of industrialised countries and Annex II includes the wealthiest Organisation for Economic Co-operation and Development (OECD) member countries among them. Non-Annex I countries are the developing countries.

There are different reporting timeframes for different groups (see Art.12). Countries with economies in transition can choose their own base year for GHG emissions and only Annex II countries are expected to provide financial resources to meet the incremental costs of mitigation and adaptation efforts by developing countries. Annex II countries should also promote technology transfer to EITs and developing countries (non-Annex I Parties). Developing countries do not have quantitative obligations. Least Developed Countries are given special consideration.

As a result the Convention provisions have created a so called "firewall" between Annex I and non-Annex I countries. A Party that is not listed in Annex I or II is by definition a developing country. As a result states with a higher standard of living, such as Singapore or Qatar, than many Annex I countries are qualified as developing countries. Hence, there is some debate in the negotiations about the relevance of these country groupings. While some insist that the current differentiation remains valid others maintain that it has changed. Countries with economies in transition, for example, may be an outdated historical concept. While the Eastern bloc countries had heavily polluting industries and they were not particularly wealthy.

3. Kyoto Protocol

At the first meeting of the Conference to the Parties to the UNFCCC (COP 1) in Berlin, in 1995, the Parties agreed that the commitments in the Convention were "inadequate" for meeting the Convention's objective. In a decision known as the Berlin Mandate they agreed to establish a process to negotiate strengthened commitments for developed countries. This led to the adoption of the Kyoto Protocol in 1997. The Kyoto Protocol contains specific and legally binding commitments for developed countries based on scientific knowledge. It reinforces the "firewall" between Annex I and non-Annex I countries. It contains the following elements:

Preamble	
Art. 1	on definitions
Mitigation	
Art. 2	on policies and measures by Annex I Parties
Art. 2 par. 2	on the exclusion of bunker and aviation fuel
Art. 3	on the obligation of Annex I Parties to meet quantified emission limitation and reduction commitments
Art. 4	on joint fulfilment, included because of the constitution of the EU as a 'regional economic integration organisation'
Arts. 10 and 11	on activities and financial support to advance existing commitments (under Article 4.1 of the Convention) without introducing new commitments for non-Annex I Parties and contingent on the provision of financial resources (by developed countries)
Arts. 6, 12, 17	on flexible mechanisms of the Kyoto Protocol: joint implementation (Art.6), the Clean Development Mechanism (Art.12) and emissions trading (Art.17)
Transparency	
Art. 5	on a national system and methodologies to estimate GHG emissions and removals
Arts. 7 and 8	on reporting and review
Compliance	
Arts 16, 18, 19	on consultations, compliance and dispute resolution process
Institutional and operational framework	
Art. 9	on periodic reviews of the Protocol
Art.13, 14, 15	on the different treaty bodies and the secretariat
Art. 22	on 'one party one vote'
Final formal provisions	
Arts. 20, 21, 23, 24, 25, 26, 27, 28 on amendments, entry into force etc.	

a) Mitigation

Art.2 states that each Annex I Party in achieving its quantified emission limitation and reduction commitments (QELRCs) under Art.3 shall develop and implement policies and measures on, for example, the enhancement of energy efficiency, promotion of forest management, new and renewable energy, removing subsidies in relevant sectors and reducing transport emissions.

According to Art.3, Annex I Parties shall, individually or jointly, ensure that their emissions do not exceed their assigned amounts with a view to reducing overall emissions by at least 5% below 1990 levels in the period 2008-2012. Net changes in GHG emissions shall be measured by sources and removal by sinks from land-use change (limited to afforestation, reforestation and deforestation). By 2005 each Annex I Party shall have made demonstrable progress in achieving its commitments. Commitments for subsequent commitment periods should be established in amendments to Annex B.

Under Art.4, Annex I Parties have the option of meeting their targets jointly. This is known as a "bubble". The EU has chosen this method to reduce its emissions. The EU target is the overall target of -8% for the group. It is redistributed amongst member states in the form of national targets.

Art.5 requires Annex I Parties to establish a national system for the estimation of GHG emissions by sources and removal by sinks.

Art.6 on joint implementation allows Annex I Parties to invest in emissions reducing projects in another Annex I Party and receive emission reduction units (ERUs). Eligibility criteria include the project approval by all parties involved. Emission reductions (or removal by sinks) must be additional and supplemental to domestic actions to meet commitments under Art. 3. Countries must also maintain proper inventories and comply with reporting obligations.

Under Art.7, Annex I Parties shall submit annual GHG emission inventories, additional information and national communications in regular intervals. Teams of expert review these inventories and national communications and submit reports to the Meetings of Parties to the Kyoto Protocol (Art.8).

Art.17 states that Annex I Parties can participate in international emissions trading supplemental to domestic action. Trading schemes exist in Europe and the US. Tradable units are certified emission reductions (CERs), emission reduction units (ERUs), assigned amount units (AAUs) and removal units (RMUs). Each tradable unit equals 1 metric tonne of emissions in carbon dioxide equivalents (1 AAU = 1 RMU = 1 CER = 1 ERU).

The Kyoto compliance mechanism was established in Decision 24/CP.7 of the Marrakesh Accords. The Compliance Committee has two branches. The Facilitative Branch aims to provide advice and assistance to Parties in order to promote compliance. The Enforcement Branch has the power to determine consequences for Parties not meeting their commitments. Each branch has 10 members, one from each of the five official UN regions, one from the small island developing states, two each from Annex I and non-Annex I Parties. The Committee meets in a Plenary composed of both branches. A Bureau comprising the Chairs and Vice-Chairs of each branch supports the Committee's work.

The Kyoto Protocol repeatedly states that the Parties included in Annex I "shall" and contains very specific regulations on how to manage a global carbon budget. It reflects a top-down approach but also allows for a degree of flexibility through the international carbon markets.

b) Finance

Art.12 on the clean development mechanism (CDM) projects seeks to achieve emission reductions and involvement of the private sector. Annex I parties can implement emissions reduction projects in non-Annex I countries and receive certified emissions reduction credits (CERs). Thus they can potentially meet their targets and promote sustainable development in developing countries.

CDM eligibility criteria include voluntary participation of all parties involved; real, measurable, and long-term reduction in emissions; emissions reduction that is additional to any that would occur in the absence of the certified project activity. The host country must sign off on the project idea first. CDMs have been operating since 1997, and there are two types of reviews: a more intensive international assessment and review for developed countries, and a (less stringent) international consultation and analysis for developing countries.

A 2% share of the proceeds from certified CDM activities goes to the Adaptation Fund to support concrete adaptation projects, particularly in vulnerable developing countries. The Adaptation Fund is governed by the Adaptation Fund Board (AFB). The Global Environment Facility (GEF) provides secretariat services to the AFB and the World Bank serves as trustee of the Adaptation Fund on an interim basis. The GEF was established in the 1990s as an innovate mechanism for global environmental issues. It has been funding climate change projects in developing countries since 1995 and put the incremental cost concept under the Convention (Art.4.3) into operation.

The climate regime provides for different types of climate finance: grant concessional financing, carbon markets and CDM tax levy from carbon markets. To date, however, this has only generated limited resources to support mitigation and adaptation. As a result developed countries made new additional financial commitments in Copenhagen in 2009: USD 20 billion per year of public finance and USD 100 billion per year of public and private financial support (from a variety of sources including markets).

4. Kyoto Protocol amendments

Although the UNFCCC envisages a progressive development of the legal framework to address climate change, Canada (in accordance with Article 27) officially withdrew from the Kyoto Protocol while Russia, Japan and New Zealand do not participate in a second commitment period.

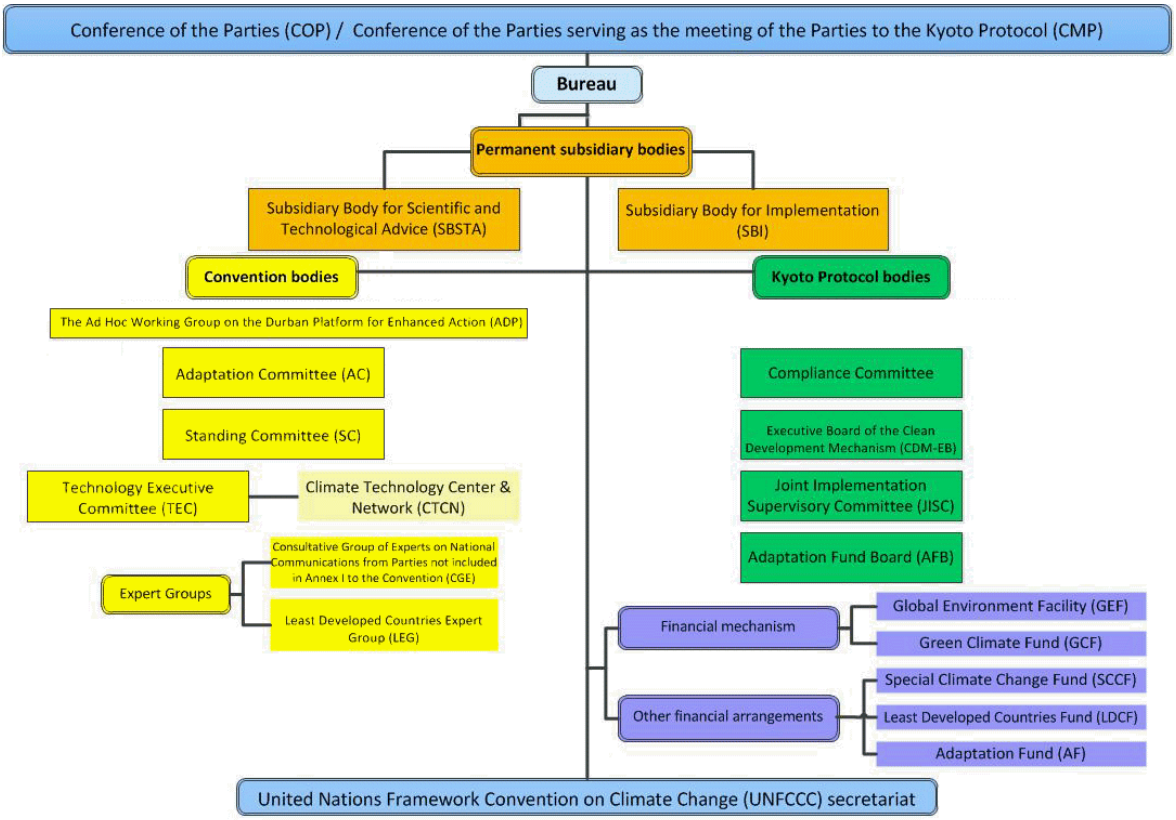
In Doha in 2012, the Parties agreed on a new 8 year commitment period (until the end of 2020). They adopted treaty amendments and decisions that preserved the Protocol's legal regime and operation. The second commitment period, however, will only cover around 15% of global greenhouse gas emissions and the commitment of some countries (e.g. Belarus, Ukraine and Kazakhstan) remains uncertain.

Notwithstanding the commitments set out in Annex B to the Kyoto Protocol (as amended), each Party's commitment during the second commitment period must be at least as ambitious as its actual annual average emissions between 2008 and 2010. To increase the level of mitigation ambitions Parties are also required to review their commitments by the end of 2014 and a new adjustment procedure (Article 3, paragraphs 1 ter and quater) has been introduced to facilitate their adoption. The Doha amendments also expand the list of greenhouse gases regulated by the Kyoto Protocol to include nitrogen triflouride (NF3).

For the current number of ratifications of amendments to the Kyoto Protocol see http://unfccc.int/kyoto_protocol/doha_amendment/items/7362.php

5. Institutional framework

The institutional framework of the climate regime (UNFCCC and Kyoto Protocol) is available at: http://unfccc.int/bodies/items/6241.php



6. ADP negotiations

In Durban in 2011, the Conference of the Parties (COP) agreed to develop a protocol, another legal instrument or an agreed outcome with legal force under the Convention applicable to all Parties to be adopted no later than 2015, and to come into effect and be implemented from 2020. Subsequently, in Doha in 2012, the COP decided that the Ad hoc Working Group on the Durban Platform for Enhanced Action (ADP) will consider elements for a draft negotiating text no later than at its session in December 2014 with a view to making available a negotiating text before May 2015.

While the process has been broadly outlined, the Parties are still largely free to decide if and how to address the various issues that will be part of a new agreement. In Durban, the COP agreed on several subject areas that the workplan for the negotiations should address. On this basis the main components of a future agreement could include provisions on the following substantive issues: mitigation, adaptation, finance, technology transfer, transparency, implementation, compliance, capacity-building, and differentiation amongst Parties. In addition, a new agreement is likely to contain at least a preamble, definitions, provisions on the institutional and operational framework, and procedural rules on its adoption, amendment and entry into force.

The legal nature and form of the negotiation outcome is important. A legally binding treaty is valuable because it reflects the will of states to be held accountable for the consequences of not adhering to an agreement. If the instrument is described as non-binding or voluntary, it usually indicates a lack of political will. Legally binding instruments have final clauses which allow for states to, for example, ratify the agreement or to withdraw. They can include provisions on transparency, compliance and enforcement mechanisms. Legally binding agreements are more likely to focus the attention and resources of governments.

The national circumstances of countries in the ADP negotiations will determine what they are prepared to do in order to address climate change. One of the main questions is whether the resulting commitments of Parties (under the new instrument) will be self-selected or negotiated. Climate finance is also central to the negotiations. While developing countries expect new and additional financial support, developed nations rather want to apply the incremental cost concept. It is also an open question from which sources the necessary money for mitigation and adaptation in developing countries will come. The question of funding under a new agreement could also be relevant to the institutional arrangements that parties agreed to establish on loss and damage.