

# 3

## The UNFCCC Regime

The fragmented nature of interstate regulatory activity on climate change inevitably casts some doubt upon the continued significance of the UN's Climate Convention. It aspires to play a central coordinating role but is confronted by a growing array of sometimes unrelated, and usually unregulated, transnational and private governance activities (IPCC, 2014a). In the light of these circumstances, the devotion of an entire chapter to the intricacies of the UNFCCC requires some justification. Analysts have disagreed on the centrality of the Convention. For Keohane and Victor (2010) it remains at the core of the climate regime complex, but for Abbott (2012) it is one among many relevant intergovernmental, transnational and civil society entities. Where the UNFCCC sits in relation to present and future climate governance is a vitally important and unresolved question, but is not one posed in this book. Instead the focus is upon international climate politics, where attention remains fixed upon the Convention. This is despite those attempts, discussed in the previous chapter, to avoid, or even subvert, the UNFCCC. Most of these have been orchestrated by developed world governments. But the overwhelming majority of state Parties value the UN climate regime, because it is open to their influence and because they have development needs that may potentially be met within its expanding activities. In this sense, the regime is part of an underlying North–South bargain expressed in the Rio Earth Summit's concept of sustainable development. Nowhere is this more evident than in growing awareness of the necessity of properly funded adaptation to climate change impacts. This is something that has virtually no place among the many innovative mitigation activities beyond the UNFCCC regime.

The UNFCCC provides the legal framework for a commons regime. That is to say it represents an attempt by the international community to govern spaces beyond direct sovereign jurisdiction. In this sense the global atmosphere is one of four global commons, the remaining three being the oceans and deep seabed, Antarctica and outer space. Commons regimes differ from other attempts at global and trans-boundary environmental governance because they are designed to avoid what Garret Hardin (1968) famously described as 'tragedies'. Commons tragedies arise because there are short-run individual incentives to over-exploit a shared, but unregulated, resource which, unless checked, ultimately leads to collective ruin. In the case of climate change, the emission of excessive amounts of greenhouse gases and the destruction of sinks, while allowing short-term profit, leads to the loss of climatic stability with all its associated dangers. The integrity of the planetary atmosphere and climate has been described as the ultimate public good – that is something that cannot be provided through the operation of markets alone. The Stern Review (2007) characterised the climate problem as the world's greatest market failure. The point is that climatic stability has to be secured by the action of public authority. No such central authority exists in a decentralised system of sovereign states and therein lies the essential problem for international cooperation – the provision of 'governance' in the absence of government. It is a conclusion of Hardin's analysis that the avoidance of commons tragedies is impossible without the division of a shared common resource into 'enclosed' private property. For the global atmosphere this is not only a physical impossibility but there is no world government to enforce property rights and responsible behaviour.

Against what amounts to a counsel of despair, is the alternative view of commons governance championed by the work of Elinor Ostrom (1990) and her collaborators. Emerging from intensive study of large numbers of local commons institutions is the finding, contrary to Hardin's assumptions, that individual actors can build institutions and voluntarily regulate what remains a common resource. By such means have many local commons tragedies been avoided. It is a huge and uncertain step to transfer findings that apply to small face-to-face communities to a global scale, but there are several intriguing similarities. They at least provide some guidance to the institutional requirements of successful commons governance. There will need to be shared understandings of organising principles and the consequences of failure, along with means whereby neighbours can monitor and sanction each other's behaviour.

The institutional equivalents of local commons governance, at the international level, have been analysed, in the IR literature, as regimes. The regime concept first came to prominence in the aftermath of the global monetary crisis of the early 1970s in response to the question of what would replace the Bretton Woods monetary arrangements, based upon fixed dollar parities, that had underpinned the post-1945 growth of the western economies. The concept of a regime as a means of understanding and comparing the institutions of international cooperation was taken up by the dominant liberal institutionalist school of research and writing on international environmental problems. There are various other possible ways of describing international institutions, and regime categories overlap and are often inadequate. However, to avoid 're-inventing the wheel' and to facilitate comparison, they are used here to assist an analytic description of the UNFCCC and its evolution. In the classic statement provided by Krasner (1983, p. 2) and his colleagues, regimes comprise:

... sets of implicit or explicit principles, norms, rules and decision-making procedures around which expectations converge in a given area of international relations. Principles are beliefs of fact, causation and rectitude. Norms are standards of behaviour defined in terms of rights and obligations. Rules are specific prescriptions or proscriptions for action. Decision-making procedures are prevailing practices for making and implementing collective choice.

These are frequently difficult to disentangle and some analysts simply refer to norms of behaviour. There was discussion in the Intergovernmental Negotiating Committee (INC) as to whether 'principles' should figure at all in the UNFCCC text, with the United States resisting on the grounds that they might infer a legal obligation. Modifications were introduced to meet this concern by including a *chapeau* to Article 3 stating that Parties would 'be guided inter alia' by the principles (Bodansky, 1993, pp. 501–2).

There are certainly foundational beliefs of fact that underpin the regime plus central distributive principles and normative injunctions that determine who is to be responsible for taking action. The question of the differentiation of responsibilities and equity has been in contention throughout the life of the regime. Equally problematic have been the design principles of the regime in terms of 'top down' targets and timetables as opposed to less onerous 'bottom up' approaches. There are also important understandings, not always codified in treaties,

as to financial obligations between North and South and the balance between mitigation and adaptation. Principles and norms are significant because regimes are said to change when these shift. The extent to which the regime has managed to change over two decades will be considered below and, to assist the reader, a chronological overview of the regime's evolution is provided in Table 3.1. The climate regime has also amassed a major corpus of rules. Those involving information, monitoring, review and means of enforcement are of great importance to the success of a commons regime because they will determine the extent to which neighbours will trust each other and be assured that other users

*Table 3.1* Chronology of the UNFCCC regime

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1992	Convention open for signature at Rio Earth Summit
1994	Entry into force
1995	CoP I Agrees the <b>Berlin Mandate</b> for a Protocol
1996–7	AGBM meetings draft a Protocol
1997	CoP 3 <b>Kyoto Protocol</b> agreed. Differentiated commitments for Annex I Parties totalling a 5.2% emissions cut for 6 greenhouse gases by 2008–12. Flexibility mechanisms: emissions trading, JI and CDM
2000	CoP 6 Hague EU–US disagreement
2001	US denounces Kyoto signature CoP 6 bis Bonn developed detail of Kyoto Protocol CoP 7 Marrakesh, agreed final terms of Kyoto Protocol
2005	Kyoto Protocol enters into force, EU Emissions Trading System commenced CoP 11/CMP 1 Montreal starts work on second phase of Kyoto Protocol AWG-KP
2007	CoP 13/CMP 3 Agrees <b>Bali Plan of Action</b> and sets up AWG–LCA convention track
2009	CoP 15/CMP 5 Copenhagen – <b>Copenhagen Accords</b>
2010	National pledges submitted to Secretariat CoP 16/CMP 6 Cancun formalises Copenhagen Accords, launches Green Climate Fund and Adaptation Framework
2011	CoP 17/CMP 7 Durban – <b>Durban Platform</b> – launches WG–ADP for a new agreement and agrees 2nd commitment period for Kyoto
2012	First Kyoto Commitment Period ends, Second begins, CoP 18/CMP 8 Doha
2013	CoP 19/CMP 9 Warsaw, discusses 2015 agreement and institutes 'loss and damage'
2015	CoP 21/CMP 11 New climate agreement under the Convention to be concluded

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cannot 'free ride' on collective undertakings. The prevailing practices for making and implementing collective choice naturally involve not only the annual Conference of the Parties (COP) but also the subsidiary bodies and *ad hoc* negotiating groups that have been set up at various times to determine the regime's future path.

The UNFCCC has, since its inception, been based on a principle, whether seen as belief or a matter of scientific fact, that there is a need to achieve the '... stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system ...' Art. 2). Through the influence of successive IPCC assessments, national scientific reports and campaigning by NGOs, the regime has been in a continuous dialogue with scientific findings on the extent, mechanisms and projected impacts of climate change. The design of a framework convention, building on experience with the 1979 Long-range Transboundary Air Pollution (LRTAP) and 1985 Vienna Convention, was to establish an institution which was open and responsive to changing scientific advice. In the LRTAP example there has been an iterative process leading to a succession of protocols dealing with different air pollutants. The Vienna Convention's Montreal Protocol (1987) has proved to be adjustable in regulating successive classes of stratospheric ozone-depleting substances. For the global climate, an unprecedented international scientific effort, centred upon the IPCC, has produced growing confidence as to the anthropogenic causes of ever-rising atmospheric concentrations of CO<sub>2</sub>, although areas of uncertainty remain. These include, for example, the role of the oceans in the uptake of greenhouse gases and the precise location and magnitude of climatic impacts. The Convention set up a Subsidiary Body for Scientific and Technical Advice (SBSTA) to provide, as its name suggests, a continuous interface between climate and policymaking. A periodic review, linked to the publication of IPCC assessment reports, of what is termed 'the adequacy of commitments' has also been instituted (Decision 1/CP.16). The review is specifically tasked with consideration of the need to strengthen the long-term goal of the Convention in the light of evolving scientific evidence.

The anticipated proportionate response to increasing scientific understanding of the severity of the climate crisis has not yet occurred. An apparent unwillingness or inability of UNFCCC to take the scientific evidence seriously has been a source of continuous frustration, even rage, among environmental activists and those governments directly threatened by the impacts of increasingly severe weather events and rising sea levels. Progress in establishing a formal recognition of what

would constitute 'dangerous anthropogenic interference with the climate system' has been terribly slow. In 1996 the EU pronounced that a mean temperature rise of 2 °C above pre-industrial levels represented the threshold of 'dangerous' change. The 2 °C threshold is usually associated with IPCC reports, although the latter body has 'never thus far attached a specific temperature threshold' to the concept 'dangerous anthropogenic interference' with the climate (UNEP, 2013, p. 2). Although widely accepted and discussed since then, it was only in 2009 that this figure was recognised in the Copenhagen Accord and subsequently formally agreed at the 2010 Cancun COP. For the Alliance of Small Island States (AOSIS), and many others, the 2 °C figure is unacceptable and the imperative is to allow mean temperatures to rise by no more than 1.5 °C.

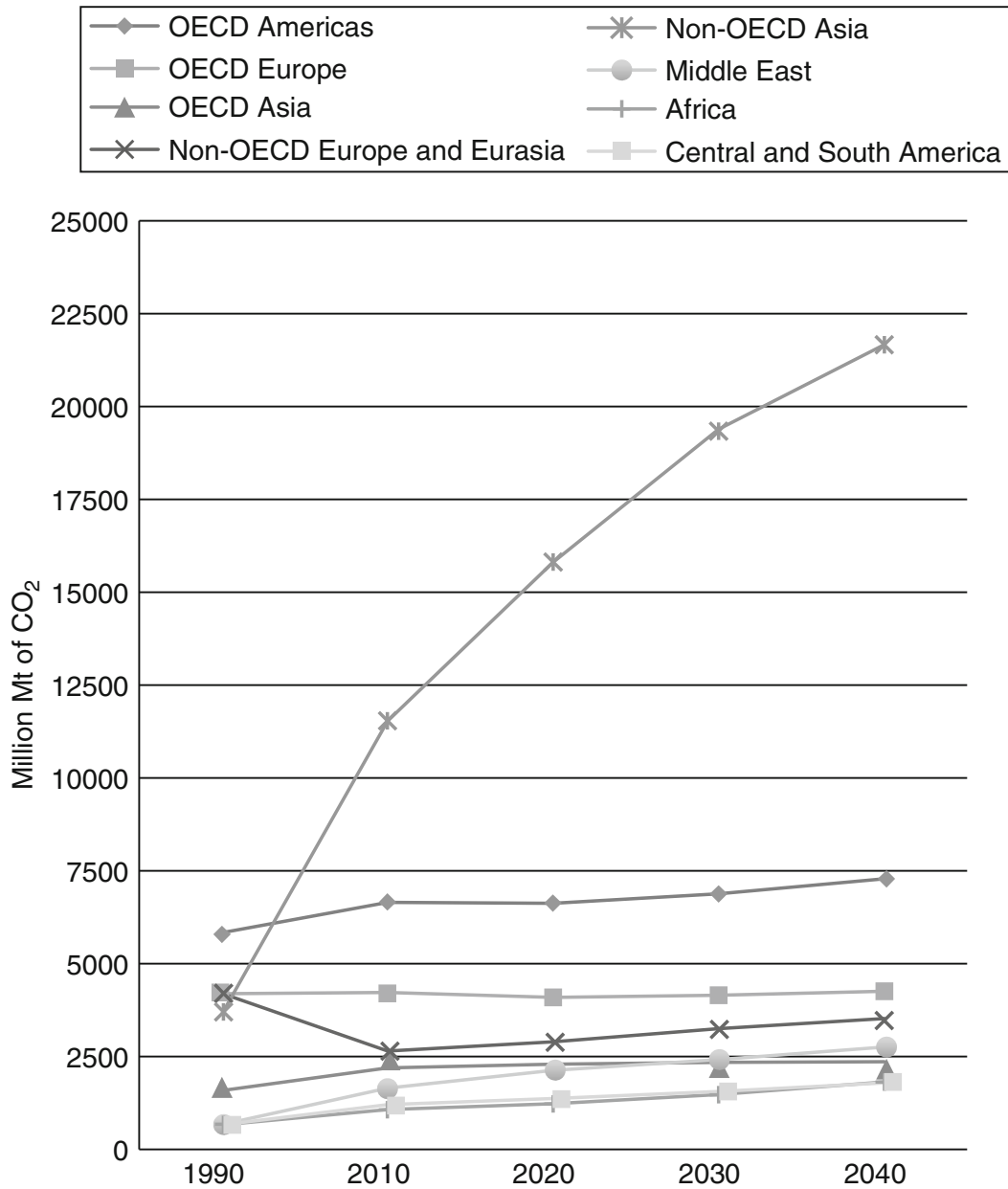
The principles of 'equity' and 'common but differentiated responsibilities and respective capabilities' (CBDR-RC) have come to occupy a place at the heart of the regime. The exact meaning of the equity principle for the regime is difficult to determine. In the view of the Indian government it is 'an absolute and inalienable right that cannot be equated with, and is far beyond fairness' (Earth Negotiations Bulletin [ENB], 2013, p. 27). Its interpretation is potentially significant. 'Equity' has increasing profile 'as the distribution and pace of mitigation responsibilities increasingly mirrors a debate on access to ecological space' (ENB, 2011, p. 30) and its equitable use. It could also serve as a key distributional principle that referenced individual *per capita* as opposed to national emissions. These issues are at the core of arguments over global climate justice discussed in Chapter 5.

The CBDR-RC principle is closely related, but has found concrete expression in the categorisation of Convention Parties. The Parties to the Convention were divided into Annex I developed countries, charged with initial responsibility for taking the lead in emissions reductions and provision of development finance under Article 4.2, and the rest. In the INC negotiations no criteria for establishing the difference between developed and developing countries were established. The developed countries were simply listed. They comprised Organisation for Economic Cooperation and Development (OECD) members (identified in a separate Annex II) and the old Soviet Eastern bloc, defined as Economies in Transition and exempted from providing finance under Article 4.3. The composition of Annex I has come to seem increasingly outmoded as economic giants such as South Korea remain outside its ranks, but it has proved nearly impossible to add to its membership.<sup>1</sup> The Convention text was finalised in compromises agreed by the INC

immediately before the Rio conference (Brenton, 1994, pp. 191–2). CBDR-RC wording does not appear to have loomed as large in the negotiators' minds as the related questions of whether to include emissions targets for developed countries and the arrangements for development funding. Both North and South supported the principle, but it was read in different ways. Developing countries stressed that 'common but differentiated responsibilities' reflected the culpability of the developed world, while the latter understood it as a commitment to take the lead because of their (then) superior economic and technical capabilities (Bodansky, 1993, p. 503). In this respect it is important to recall the adjoining phrase 'according to their respective capabilities' that is often omitted in representations of the principle. Subsequent contention over the extent to which it enshrines a permanent differentiated commitment has been one of the dominant themes in the evolution of the UNFCCC.

By 1994, when the Convention entered into force, the United States and its allies were already calling for developing country commitments but the compromise, on which the Berlin Mandate was built, ensured that these would form no part of the planned Kyoto Protocol.<sup>2</sup> It took two years to negotiate the terms of the Protocol, which mandated emissions reductions only by Annex I developed countries. Even before the signature of the Kyoto Protocol in late 1997, CBDR-RC and the absence of mitigation obligations for non-Annex I countries had become an issue in US domestic politics. The 'unfairness' of a system in which emergent economic rivals to the United States were required to make no emissions reductions became a central part of the Bush administration's justification of its rejection of the Kyoto Protocol in 2001.

The Kyoto Protocol finally entered into force through the efforts of the EU, and in the face of strong US opposition, in February 2005. As attention turned to what would replace the Protocol, on the expiry of its first commitment period (in 2012), the inevitability of mitigation action by developing non-Annex I countries, if there were ever to be an effective regime, was starkly apparent. In 2007 China had replaced the United States as the foremost (current) emitter of carbon dioxide and, since 2004, the International Energy Agency (IEA) has been predicting that by 2020 non-Annex I emissions would exceed those of the developed countries (Figure 3.1). In the same year the Conference of the Parties in its Bali Plan of Action (Decision 1/CP.13) recognised this by introducing the concept of Nationally Appropriate Mitigation Actions (NAMAs) for developing countries. This was part of a package deal



*Figure 3.1* World energy-related CO<sub>2</sub> emissions  
 Source: EIA (US Energy Information Administration) 'International Energy Outlook 2013'  
 Available at: <http://www.eia.gov/forecasts/ieo/table21.cfm>. Accessed: 22/06/2014.

involving a 'shared vision' of comprehensive action in accordance with the CBDR-RC principle that acknowledged the importance of adaptation alongside:

Nationally appropriate mitigation actions by developing country Parties in the context of sustainable development, supported and enabled by technology, financing and capacity-building, in a reportable and verifiable manner. (Decision 1/CP.13.1(b)(ii))



The importance of this new formulation should not be underestimated. Its use of words began to break down the rigid distinction between Annex I and the rest while holding out the possibility of differentiated commitments for developing countries according to their economic circumstances (ENB, 2007, p. 19). The intent of the Bali Action Plan was to pave the way for an agreement at the Copenhagen COP to be held in 2009. Shortly before the Conference both China and India set out their own mitigation actions in terms of decreases in the energy intensity of production, rather than quantified emissions reductions commitments. NAMAs were a key part of the Copenhagen Accord, which was the controversial outcome of the COP, and were later announced in a range of national mitigation pledges collected by the UNFCCC secretariat in the early part of 2010. The terms of the Copenhagen Accord were formally accepted in the following year at the Cancun COP, including developing country agreement on a range of diverse NAMAs (Decision 1/CP.16).

CBDR-RC and the Annexes have not been abandoned, but many Parties, including the United States, argue that the 'firewall' between developed and developing countries, that had been erected in 1992 and confirmed in the Kyoto Protocol, had been eroded. An important further step towards a new comprehensive climate agreement was taken in 2011 with the agreement of the Durban Platform (Decision 1/CP.17). This stated that negotiations should proceed towards an 'agreed outcome with legal force *applicable to all Parties*' (emphasis added). Arguments have continued over the nature of 'differentiation' between the Parties. The Umbrella Group of developed countries opposed mention of 'common but differentiated responsibilities' as the determinant of future obligations, and their G77 counterparts continued to insist upon it. At the Doha COP in 2012 the Umbrella Group and the EU expressed the view that 'Convention principles should be seen in an evolving context, noting the need to discuss further the principle of equity in terms of fairness and changing realities'. Developing countries stressed their opposition to 'any re-writing or re-negotiation of the Convention's principles' (ENB, 2012, p. 16) but the changes evident since Bali still seem to offer significant room for compromise on the construction of a new comprehensive regime. Nonetheless, the question of differentiating between the obligations and responsibilities of the Parties runs like a red thread through the elements of the Convention that will be discussed in this chapter, just as the negotiations within the Ad Hoc Working Group on the Durban Platform for Enhanced Action (ADP) have been 'permeated' by the question of how differentiation will be reflected in a 2015 Paris agreement (ENB, 2014, p. 43).

The decision on NAMAs, quoted above, references another key principle of the regime – that the ‘Parties have a right to, and should promote sustainable development’ (UNFCCC, Art. 3.4). This serves as an expression of an underlying understanding, central to environmental politics since the first UN environment conference in 1972 and reinforced by the Rio Earth summit, at which the UNFCCC was opened for signature, that there was a necessary relationship between environmental action and development. In the Convention text it appears as an obligation placed upon developed countries to provide ‘new and additional financial resources, to meet the agreed full costs of developing countries in fulfilling their reporting obligations’ (Art. 4.3). More broadly, the Convention recognises the need for development aid and technology. It is possible to regard the obligation of developed countries to provide the funds for assisting mitigation, adaptation and participation by the developing world as a regime principle beyond the precise wording in the text, as the reciprocal basis for any deal that may be struck on a comprehensive approach to greenhouse gas (GHG) mitigation. This has been implicit in the various offers of climate funding that have been made in advance of the Copenhagen COP and in preparation for a 2015 agreement.

### **Mitigation principles and rules**

While CBDR-RC attempts to assign the relative burden of GHG mitigation, the nature of such commitments, and whether or not they should be internationally determined and enforced, has been a contentious issue throughout. It was the central subject of EU–US dispute during the INC negotiations, leading to the compromise embodied in Article 4.2(b) of the Convention, whereby the Parties would merely ‘aim’ to reduce their emissions to 1990 levels by 2000. The achievement of the Kyoto Protocol was to put in place an internationally agreed and binding set of mitigation commitments for six GHGs, to be achieved, in line with the CBDR-RC principle, by developed Parties by 2008–12. The national commitments were differentiated, leading to an overall 5.2 per cent reduction against a 1990 baseline. National commitments were operationalised as Quantified Emissions Limitation or Reduction Objectives (QELROs). Kyoto may, therefore, be described as a ‘top down’ agreement with a defined international reduction target and quantified and binding commitments by its developed (Annex I) Parties.

The Protocol, agreed in outline in 1997, was only developed into a detailed instrument, capable of ratification, in a process organised by the EU, in the face of US opposition, during 2001 (COP 7 Marrakesh Accords). After a demanding quest for the necessary number of ratifications,

once again led by the EU, it entered into force in February 2005. Even before ratification, the ambitions of the Protocol were widely disparaged as inadequate to the task of reducing GHG emissions to the levels required if the assessment reports of the IPCC were to be taken seriously. Advocates of the Protocol could respond that, despite its limitations (exacerbated by the way in which developed Parties either failed to ratify or subsequently reneged on their commitments) it at least provided an international foundation upon which future progress in mitigation could be built. The Stern Review of 2007, and mainstream economic commentary, have stressed the importance of establishing a global carbon price to include the 'externalities' of fossil fuel use and to encourage alternative and climate-friendly investment. The Kyoto Protocol could thus be represented as an essential first international step in this direction.

Its architecture was both complex and path-breaking. At American insistence, an agreement on 'targets and timetables' was made contingent upon the acceptance of 'flexibility mechanisms' – Joint Implementation (JI), the Clean Development Mechanism (CDM) and emissions trading. These provisions were intended to provide economically efficient 'market-based' alternatives for governments which did not wish to simply impose restrictions or taxes on emissions in order to achieve their mitigation commitments. It is worth noting that the applicability of 'market-based' instruments is still a matter of dispute among the Parties and is by no means universally accepted.

National and international carbon markets have been created using the Kyoto rules – the principal international example being provided by the Emissions Trading Scheme of the EU. These are linked to the other offset mechanisms of the Protocol, CDM and JI. Both allow Parties to invest in emissions reductions projects in other countries and earn credits, Certified Emission Reduction Units (CERs) in the case of the CDM and Emission Reduction Units (ERUs) for JI. They can be traded or used to achieve the investing countries' own national targets. Each CER is equivalent to one tonne of CO<sub>2</sub> emissions avoided. The logic of the system is that it will encourage those developed Parties that are already energy efficient to achieve greater carbon reductions by investing money elsewhere – in the case of JI, in other developed countries, and in the case of the (very much larger) CDM, in carbon reduction projects in developing countries. Since 2006 the CDM has grown apace, with over 7,000 registered projects but also amidst accusations of fraud and sharp practice. Such a system has required unprecedented levels of institutionalisation and regulation, through a central transaction log and registry, along with a highly developed enforcement and compliance system to counter the evident opportunities for abuse. Alongside the

flexibility mechanisms, Parties can also gain emissions credits by investing in land use, land use change and forestry initiatives (LULUCF). It should be recalled that the Convention covers both sources and sinks for GHGs, and the LULUCF sector involves both. LULUCF has proved controversial over the years because of the opportunities it might provide to avoid making actual emissions reductions. Hence, complicated accounting rules were devised that have been revisited in ongoing specialised negotiations.

The other sources of credits for Kyoto Parties are surplus 'assigned amount units' (AAUs). These occur when actual emissions are below annual targets and can be traded. Such dealings in 'hot air' have been a source of outrage among environmental activists, who point to the way in which Russia, for example, has accrued a large surplus of AAUs, its faltering economic performance having caused it to undershoot its predicted emissions.<sup>3</sup>

Although it was the progenitor of these 'market-based' systems of emissions mitigation, the United States never ratified the Protocol. It was the EU that reversed its previous reliance on 'command and control' regulation and embraced the new approach. By 2005 EU-US climate relations had descended to a new low as the former championed the Protocol while the latter denounced 'targets and timetables' and even questioned the scientific basis of the regime. The first Kyoto commitment period expired in 2012 and the terms of the Protocol (Art. 3.9) required that a successor should be the subject of international discussion by 2005. In the search for a post-2012 agreement it was readily apparent that the United States, and even some existing developed Parties, would not subscribe to a new 'top down' approach. On the other side, the G77 and China required that there be a second commitment period for Kyoto as a condition of their own participation in future mitigation actions. At the Bali COP in 2007 a procedural solution was found by splitting the negotiations along two tracks, the existing one on the future of Kyoto, in which the United States did not participate, and the other, a new working group on 'long-term co-operative action' under the Convention, in which it did.<sup>4</sup>

The two negotiating tracks were supposed to converge at the 2009 Copenhagen COP, at which a comprehensive post-2012 agreement was to be produced. In the event, the formal negotiations stalled and the COP produced something rather different in the Copenhagen Accord (CP/2009/L.7). A central feature of this agreement, between the United States and the new BASIC coalition of Brazil, China, India and South Africa, was its reliance on 'bottom up' pledges on emissions

reductions, which had a purely national character. Annex I countries were to submit 'quantified economy wide emissions targets for 2020' while others would undertake NAMAs. Within the Accord the context of these undertakings was the provision of finance to developing countries and the creation of the Green Climate Fund. In early 2010 two lists of national offers were compiled as appendices to the Accord. The quantified pledges of Annex I countries differed widely in terms of their percentage reductions and associated baselines and there was even more variation among the NAMAs submitted by non-Annex I Parties. The Copenhagen Accord was formalised at the subsequent Cancun COP of 2010.

It is very unlikely that the various pledges submitted by 42 developed countries and 55 developing country parties will be sufficient by themselves to close the 'emissions gap' by 2020. The 'gap' is the difference between the emissions levels that will be achieved in 2020, if all commitments and pledges are achieved, and that which would be consistent with stabilising mean temperatures at 2 °C and 1.5 °C increase over pre-industrial levels. The question of its achievement will be considered in detail in Chapter 8.

The firmest action on mitigation has been taken by the EU and those other countries that have undertaken quantified reduction commitments (QELRCs) for a second commitment period, 2013–20, under the Kyoto Protocol.<sup>5</sup> This was a negotiating demand of the G77 but, as will be seen, various original Parties to the Protocol have refused to be involved in its continuation. Non-participating Annex I parties, including the United States and Japan, have submitted pledges of varying ambition which do not constitute binding commitments and are generally expressed in terms of reductions from historic baselines, usually 1990. For non-Annex I countries with development ambitions the situation is necessarily different. Their NAMAs are calculated in relation to 'business as usual' on their development trajectories – that is to say as a reduction against estimated future emissions levels. For China and India there are pledges to cut future emissions intensity – reducing the amount of carbon emitted per unit of GDP. Other developing countries have submitted a variety of nationally appropriate actions which may involve sectoral targets or even specific projects.

## **Post-2020 mitigation**

It is relatively certain that the planned agreement for 2020 will not resemble the Kyoto Protocol. As we have seen, the absolute distinction

between Annex I and the rest has been removed to the extent that mitigation actions will be an obligation for all Parties in an agreement 'applicable to all'. There is also an acceptance, even by the United States and the Umbrella Group, that the principle of CBDR-RC still pertains, but with 'national efforts ... differentiated across a broad range of parties' (EU, 2013, p. 2; United States Government, 2014, p. 1). The US chief negotiator in 2013 argued that the avoidance of 'top down' targets such as those in the Kyoto Protocol made it possible to maintain CBDR-RC through a flexible approach where countries could protect their development aspirations under a new agreement applicable to all (Stern, 2013, pp. 5–7).

In a critical departure from the principles upon which Kyoto was built, 'contributions' will be nationally determined. The phrase used in the ADP negotiations is 'Intended Nationally Determined Contributions' (INDCs). This means that the agreement will be 'bottom up' and constructed in terms of what Parties are willing to pledge, rather than 'top down' according to some agreed global target similar to that for developed countries contained in the 1997 Kyoto Protocol. An important compromise reached at the Warsaw COP, in late 2013, was that the language of 'commitment' would be replaced by that of 'contribution'. The EU, in line with its previous policy, had pressed for a comprehensive new protocol that would include legally binding national commitments. This proved unacceptable to India and other developing countries. The compromise wording which was eventually agreed left wide open the question of the precise legal nature of the obligations to be assumed under the 2020 agreement.<sup>6</sup> A previous compromise at Durban, in 2012, had contained a catch-all phraseology that the 2015 agreement should be in the form of a 'protocol, legal instrument or agreed outcome with legal force' (ENB, 2011, p. 28). This is not simply the result of developing countries wishing to avoid being forced into inequitable legal obligations that would compromise their economic prospects; it is also a concern for the United States, where the legal characteristics of 'contributions' are significant because of the difficulties in implementing commitments proposed by the Executive Branch that would require the approval of Congress.

The emerging agreement may bear some resemblance to the kind of 'pledge and review' mechanism proposed by Japan, but rejected during the preparatory INC negotiations on the Convention. Discussion in 1991 dealt with the legal nature of pledges, whether they should be unilateral or in response to a given international target. According to a Chatham House study group convened to consider the question,

'pledges should be *clear, significant and defined in such a way that undertakings can be verified*' (Royal Institute of International Affairs [RIIA], 1991, p. 5, emphasis added). Pledges would be the expression of national mitigation strategies, but concern was expressed about the expectation that developing countries would be required to produce pledges and incur costs 'to address a problem that they had played scarcely any part in creating'. For many, but not all, developing countries this remains the case. In other areas, uncertainty expressed about a future regime in 1991 has been replaced by a great deal of accumulated institutional experience – on offset mechanisms, accounting rules and the critical question of monitoring and verification.

### **Measurement reporting and verification (MRV)**

Satisfactory rules for monitoring and verifying participant behaviour constitute a vital prerequisite of any effective commons regime. It will be necessary to establish the extent to which problems are being solved and targets met and, indeed, to identify the nature and extent of problems that imperil the commons. Without information, it will not be possible to understand the deficits in capability, which prevent full participation in the regime. Paramount will be the requirement to establish trust and to demonstrate the fulfilment of commitments, without which there will always be concerns over cheating. Such requirements were recognised and embodied in the 1992 Framework Convention. Indeed, the provision of information was the main obligation undertaken by all signatories.<sup>7</sup>

Over the lifetime of the Convention the development of MRV has been extensive. Annex I Parties submit regular biennial national communications on policies and measures and many other aspects of their response to climate change which since 2014 have been subject to an International Assessment and Review (IAR) process to promote comparability of reporting. They are also required to submit annual national inventories of GHGs which are subject to expert technical review. Developed country Parties to the Kyoto Protocol are also subject to additional reviews and there is a compliance mechanism which is justly described as 'among the most comprehensive and rigorous systems' to be found in any multilateral environmental agreement (UNFCCC, 2013, p. 32). It is necessitated by the need to prevent fraud and to maintain the integrity of carbon markets.

Special consideration has always been given to the needs of developing countries often lacking the capacity to fulfil the information-gathering

requirements of the Convention. The reporting and analysis problems encountered can be very substantial. For example, in the case of Malaysia, a middle-income developing country, it took ten years to compile data on its situation in 2000. In the context of the 2020 agreement there is real concern that governments will be pressured into accepting NAMAs without a full understanding of their economic implications.<sup>8</sup> Ever since MRV was introduced for all parties in the Bali Action Plan (2007) there have been North–South arguments over sovereignty and the extent of funding for ‘capacity building’. The sensitivity of the MRV issue is reflected in the agreed description of the International Consultation and Assessment (ICA) process for developing countries as ‘non-intrusive, non-punitive and respectful of national sovereignty’ (ENB, 2013, p. 6).

Review processes remain critical to the design of the post-2020 regime. Although Secretariat spokesmen have been at pains to avoid using the term ‘pledge and review’, the experience with the national pledges notified in 2010 reflects the difficulties likely to be encountered in assessing the adequacy of the diverse ‘contributions’ to a new agreement. There are calls from the EU and United States for a robust comparative element of international assessment which will allow parties to assess the sufficiency of global effort in aggregate and provide incentives for Parties to engage in strict implementation.<sup>9</sup> There is also the matter of when assessment should occur and the argument that this should be *ex ante*, before a 2020 deal is concluded. As always in such international agreements there is the lingering suspicion that rivals will take advantage of an agreement which is neither transparent nor subject to watertight verification.

## **Adaptation**

Adaptation refers to the adjustment of ecological, social and economic systems to the actual or potential impacts of a changing climate. It involves the assessment of climate vulnerability and the means to plan, implement and fund necessary remedial action. All societies will face adaptation problems but the least developed will tend to be the most vulnerable, often lacking the means to preserve their economic and social fabric. This was recognised in the Convention (Art. 4.4) but downplayed in the sense that adaptation did not figure, alongside mitigation, as an Article 2 objective. This was reflected in initial funding arrangements and the Global Environment Facility (GEF) rules required global environmental benefits which precluded spending on adaptation (South Centre, 2011, p. 8). In 2001, it was agreed that the



Kyoto Protocol should have an adaptation fund which receives 2 per cent of CER returns. Adaptation achieved greater prominence as the effects of climate change became more evident, and was given equal weighting to mitigation in the 2007 Bali Action plan, formalised in 2010 in the Cancun Adaptation Framework. This involves the drawing up by developing countries, with an emphasis on least-developed countries, of National Adaptation Plans (NAPs). The intention is that these will be funded, initially, through the GEF and a dedicated adaptation fund. Developing countries have demanded that a prerequisite of their mitigation actions should be international funding of adaptation. In their view there is an enduring link between emissions reduction and development and adaptation finance. 'Only when finance was provided could a developing country be expected to carry out its pledge' (ibid., p. 11). They also argue that in a 2020 agreement the 'global challenge' of adaptation 'be addressed with the same urgency as, and in political and legal parity with mitigation' (UNFCCC, 2014, p. 2). Contrary to the wishes of developed countries, this would make adaptation and adaptation funding one of the 'intended nationally determined contributions'.

Provisions for 'loss and damage' are a recent addition to the adaptation framework, formalised in the Warsaw International Mechanism for Loss and Damage (2/CP19). The reference is to impact upon particularly vulnerable developing countries occasioned by 'extreme weather events and slow onset events' that cannot be prevented by any amount of mitigation. These arrangements, which are intrinsic to discussions of responsibility and justice in the regime, are further discussed in Chapter 5. For less-developed countries and Small Island Developing States (SIDS) it is important that 'loss and damage' provisions and funding are kept separate from other parts of the adaptation agenda, and that they should form part of a 2020 agreement.

## Finance

That cooperation, reporting and action by non-Annex I developing countries are contingent upon the provision of financial aid, technology transfer and capacity building by their developed counterparts may be regarded as an operating principle of the regime. Article 4.3 of the Convention commits developed countries to provide 'new and additional financial resources to meet the agreed full costs incurred by developing Parties in fulfilling their reporting obligations and the incremental costs of their more general commitments'. Responsibility for providing the funds fell to the Annex II countries (Annex I minus the East European and Russian 'economies in transition').

A financial mechanism for resource and technology transfers was part of the Convention (Art. 11) but without any concrete arrangements. Controversially, the GEF of the World Bank was selected as its operating entity, although distrusted by developing countries as a body beyond their, or the COP's, control. The funding provided was limited and largely targeted at mitigation efforts.<sup>10</sup> The GEF's operations were also criticised for their lack of transparency and for the way in which World Bank indicators were deployed without consultation (Gomez-Echeverri and Müller, 2009).

Since the 1990s, as the scale of the overall task of responding to mitigation and adaptation challenges began to be apparent, climate change became a major part of the remit of development institutions and bilateral aid programmes. The sums required dwarfed those provided under the UNFCCC/GEF arrangements; they would only increase should both developed and large developing countries fail to take timely action. Thus, part of the Bali Action Plan of 2007 was the call for 'enhanced action on the provision of financial resources'. The response was agreement in the Copenhagen Accord, formalised at Cancun in 2010, for \$30 billion 'fast start finance' donated between 2010 and 2012 and for the setting up of a longer-term dedicated Green Climate Fund under the Convention. The Fund was established with headquarters in South Korea and by the end of 2014 had been capitalised to the sum of \$10.2 billion from developed countries. Its projected target was to raise \$100 billion from public and private sources by 2020, but it remains unclear how this is to be achieved and whether such a sum will be adequate to the task. Some estimates predict that the sums needed by 2030 will be three times that figure (South Centre, 2011, p. 9). There are also major issues of transparency and 'additionality' surrounding climate funding in general and 'fast start finance' in particular. Whereas developed donors have apparently committed the promised 'fast start funds', there is uncertainty as to what percentage of them are actually new grant money as opposed to loans and repackaged aid. The extent to which developing countries can be confident of the future funding of climate action remains a major determinant of their participation in a comprehensive 2020 agreement.

Over the years a number of development-related mechanisms and programmes have been established within the UNFCCC, for example various technology transfer mechanisms and a Technology Executive Committee (TEC) charged with developing links with the funding agencies discussed above. Another long-discussed way in which developed countries could contribute to climate-related actions in the developing

world is through Reduction of Emissions from Deforestation and Forest Degradation (REDD+). This approach to the inclusion of forest sinks and sources in the UNFCCC dates from a 2005 proposal introduced by Papua New Guinea, although the forestry issue had long been a staple of North–South discussions, involving the failure to conclude a forests agreement complementary to the 1992 Climate and Biodiversity Conventions. In fact, the forestry dimension of the UNFCCC is very underdeveloped in comparison to other international arrangements and to the large number of private and public forestry initiatives that have emerged elsewhere.<sup>11</sup>

After years of discussion a package, ‘The Warsaw Framework for REDD+’, was agreed in 2013 on institutional arrangements, principles, methodologies, monitoring and potential funding. It is to be stressed that this is still a framework rather than an operational system rewarding efforts to conserve the carbon in forests. Although the management of forests is a very significant part of both the climate problem and its solution it has proved to be an extremely difficult issue for the regime, resulting in the abandonment of attempts to negotiate a forest component of the Kyoto Protocol. The problems encountered in this sector are a subset of the broader difficulties of building a climate regime. How to establish that forestry actions are long term, not subject to misallocation and ‘additional’? How, also, to ensure the environmental integrity of forests beyond simply ensuring that emissions are avoided and sinks preserved? These tasks might, after all, be accomplished by cutting down ancient woodlands and replacing them with fast-growing commercial plantations, with potentially dire consequences for biodiversity and local indigenous livelihoods.

REDD+ involves a North–South deal – ‘In the context of the provision of adequate and predictable support to developing country Parties, Parties should collectively aim to halt and reverse forest cover and carbon loss’ (Warsaw Framework for REDD+). The Global Climate Fund is supposed to fund REDD+ initiatives, but this makes them subject to the funding problems discussed above. Otherwise, there is the question of the extent to which markets should come into play and the potential for sharp practice when forestry offsets are created and traded – thus raising the issue of the validity of market mechanisms in an acute fashion. Additionally, there is the suspicion, among developing countries, that Annex I Parties may use support for REDD+ as offsets to avoid their emissions reduction obligations (BASIC, 2013a). Finally, REDD+ demonstrates the painfully slow process of rule development within the principles of the regime.

## Decision-making procedures

The supreme body of the Convention is its Conference of the Parties (COP). It holds annual meetings, its slot in the international calendar being November–December. Since the entry into force of the Kyoto Protocol it has been conjoined with the Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol (CMP). Thus, in a particular year, say 2015, there will be a Conference designated as COP 21/CMP11. COPs have become large and high-profile international events, attracting very substantial participation from global civil society. At COP 1 in Berlin in 1995 there were 2,900 participants, of which 757 were delegates. At COP 3 in Kyoto in 1997 the number of participants had risen to 6,000 (Yamin and Depledge, 2004, p. 31). The 2009 Copenhagen COP 15 represented something of a peak, with no less than 10,951 delegates and 13,482 other participants (Schroeder et al., 2012, p. 835). The 2013 COP 19 at Warsaw was on a more typical scale with 8,300 participants, including 4,022 government delegates (ENB, 2013, p. 1). Normally, more than half of registered participants are not accredited delegates and COPs have been enlivened, not only by a range of side events often with commercial, scientific or NGO sponsors, but also by sometimes flamboyant political protests in which NGOs, among their various other significant roles, serve as a kind of Greek chorus to the formal negotiations. In the last decade the availability of online video casts of Conferences, allied to social messaging, has expanded such opportunities. This may be viewed as a prominent example of the rise of a new, ‘real time’ interconnected engagement by global civil society, but it is difficult to gauge its impact on the course of negotiations.

The formal business of the COPs is conducted by governmental representatives who sit on the many committees and subgroups, including meetings of the subsidiary bodies, which convene for a fortnight below the level of plenary meetings of the Conference. While most of the business is conducted by officials, government technical specialists and representatives of special interests included in national delegations, the final few days are designated the ‘High Level Segment’, when ministers and even presidents and prime ministers put in an appearance. Plenary sessions of the COP can become very lengthy as many of the 196 Parties may wish to make formal statements of position alongside invited speeches from dignitaries such as the UN Secretary General and head of the IPCC. The presence of ministers and the need to conclude with a positive outcome frequently lead to last-minute negotiations, late-night sessions and the over-running of the conference deadline that have almost become a standard operating procedure of the COP.

The Presidency of the COP is held by a ministerial representative of the host country. At its very first meeting in Berlin in 1995 it was a position held by Angela Merkel (ENB, 1995, p. 9). The Presidency plays an important role in setting the agenda, in consultation with the national representatives elected on to the bureau of the COP, and in orchestrating negotiations when the Conference is in session. The occasionally high political visibility of the COPs should not obscure the fact that the attempt to negotiate new agreements and to conduct the business of the regime continues year round. Numerous bodies have been established under the Convention and Kyoto Protocol (see Figure 3.2) but the most important are the Subsidiary Body for Scientific and Technological Advice (SBSTA) and the Subsidiary Body for Implementation (SBI). The function of the SBSTA is evident from its title. It considers, at expert level, informational requirements and methodological issues. The SBI has a parallel role, specifically in the consideration of national communications that are mandated under the Convention. Both bodies meet regularly at mid-year in Bonn, the seat of the Convention Secretariat, as well as at the COP. Much attention will focus on the *ad hoc* temporary bodies set up to draft future agreements. The first was the AGBM (*Ad Hoc* Group on the Berlin Mandate) that negotiated the text of the Kyoto Protocol over eight meetings during 1996–7. The two *ad hoc* negotiating groups on the future of the Kyoto Protocol (AWG-KP) and the Convention (AWG-LCA) were mentioned earlier in discussion of the two-track approach adopted as part of the Bali Plan of Action. In the event the AWG-LCA's laborious negotiation of heavily square-bracketed text came to nothing as leading Parties agreed to the alternative Copenhagen Accord. Both groups were wound up at the Doha COP in 2012. Their replacement had already been launched in 2011, the ADP or *Ad Hoc* Working Group on the Durban Platform for Enhanced Action. It has met regularly to consider the terms of the new agreement for 2020 that will be presented at the 2015 Paris COP. These negotiations centre upon a laborious exercise in textual drafting. While there are plenary sessions of the ADP to take stock and to approve outcome documents, detailed work will be undertaken in contact groups which are 'open ended' in terms of participation and informal consultations which are not. Here the Conference Presidency, along with the Co-Chairs of the ADP, plays a significant role in organising meetings and determining the delegations that will be invited to participate.<sup>12</sup>

The Conference was supposed to agree to its rules of procedure, including majority voting on specified issues, at its first meeting (Convention Art. 7.3). However, there were objections from Saudi Arabia and other Parties fearing that they would not be able to cast

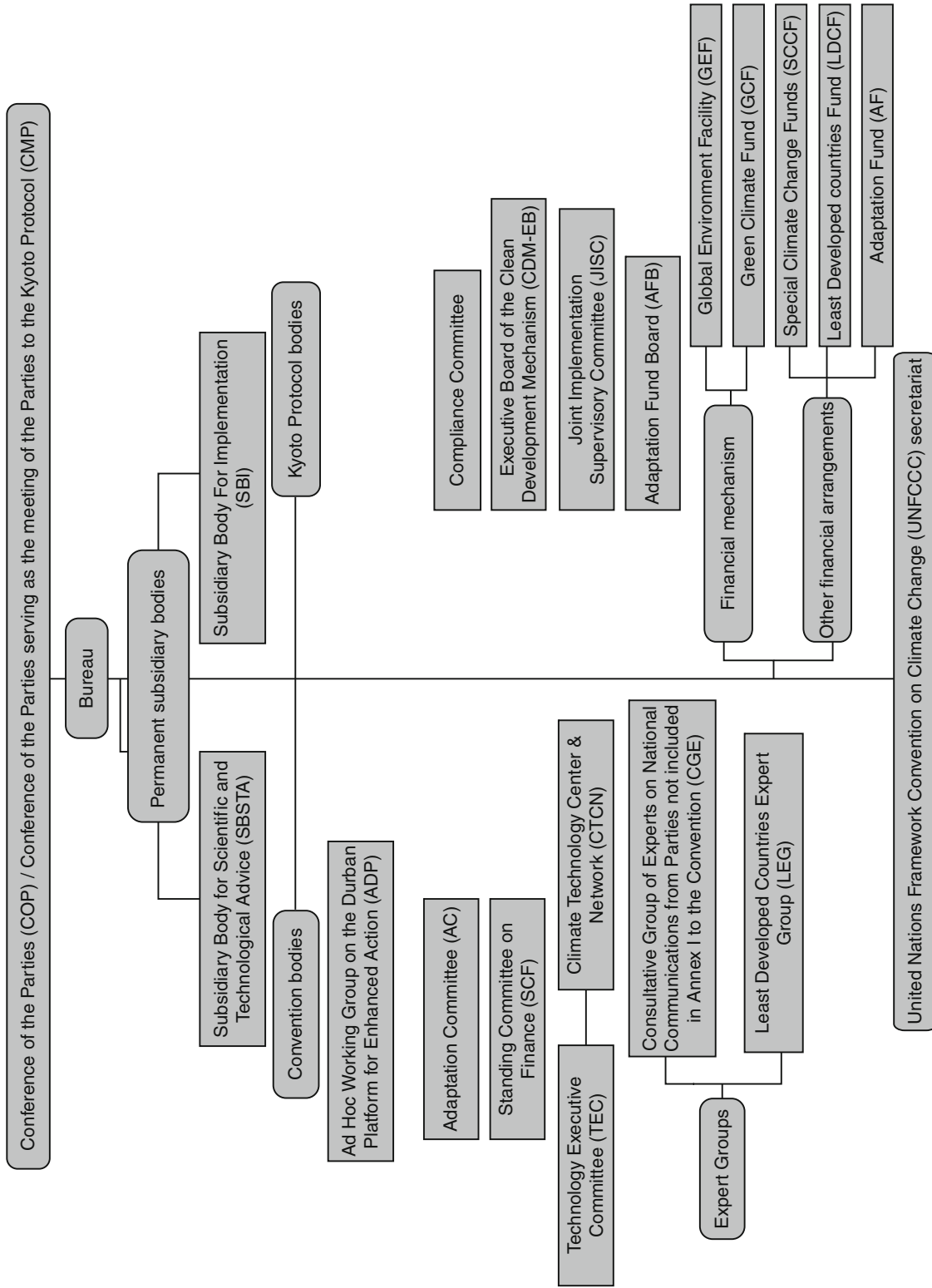


Figure 3.2 Organigram, UNFCCC regime. Acknowledgement. Reproduced from the UNFCCC Secretariat website, unfccc.int

veto on questions prejudicial to their interests. As a result, draft rules of procedure have been applied ever since – with the exception of rule 42 on voting (FCCC/CP/1962/2). It soon became clear, however, that the Parties were willing to act without a full consensus. They first proceeded on this basis in issuing the Geneva Ministerial Declaration of July 1996 (Bodansky, 2001, pp. 35–6). The 2009 Copenhagen Accord was an ‘accord’ rather than a formal act of the COP because there was no consensus on account of the objections raised by Venezuela, Cuba and other members of the Bolivarian Alliance (ALBA). More recently, objections by Russia, Belarus and Ukraine at the 2012 COP went ‘unnoticed’ by the chair, leading to retaliation at a subsequent SBI meeting.<sup>13</sup> The issue of whether Parties shall be allowed to block the will of a clear, even overwhelming, majority is likely to recur.

In common with other large multilateral gatherings, there is a continuing problem with the effective exclusion of many small and developing Parties from key informal discussions, and even from any meaningful participation, in substantial parts of the regime’s work. There are important ‘capacity’ issues. Delegation sizes vary significantly, with most Parties only able to send a handful of delegates while the big players and host countries of the Conference are able to field delegations sometimes running to hundreds of personnel, with a range of expertise sufficient to cover the full span of the work of the COPs and subsidiary bodies (Schroeder et al., 2012) –

... many sessions take place in parallel, span a wide range of issue areas and continue into the night during the final ‘push’ for agreement at the end of a conference. As a result ‘negotiation by exhaustion’ constrains many smaller delegations much more severely than larger ones. (Ibid., p. 835)

One of the critical functions of interested environmental NGOs has been to attempt to close this ‘capacity’ gap, but developing Parties are still faced with the issue of whether it makes sense to deploy what are often a limited number of national experts at the international level, as opposed to the potentially more useful work that they could undertake at home.<sup>14</sup>

Compounding the capacity problem is the need to negotiate through informal meetings, ‘drafting groups’ and appointed ‘Friends of the Chair’. They may be necessary in order to resolve difficult issues in private but their membership is necessarily selective. The most egregious example of exclusion occurred in the final cabal between the

United States and China, India, South Africa and Brazil at the 2009 Copenhagen COP that drafted the Accord. Since then there have been serious efforts to increase the transparency and inclusiveness of conference processes. Much depends on the willingness of the host Presidency of the COP to engineer informal processes that allow fuller and more balanced involvement. For example, the South African Presidency at Durban arranged a series of 'indaba' meetings that appear to have promoted agreement (ENB, 2011, p. 30). Nevertheless, distrust of the Convention's procedures remains, often expressed in demands for a 'Party driven process'.

## Conclusions

The international climate regime has had a bad press over a long period. Climate 'gridlock' was predicted even before the signature of the Convention (Skolnikoff, 1990) and has been a recurring description (Victor, 2011). Skolnikoff (1990, p. 78) argued that the Convention that he expected to be negotiated by 1992 would most likely 'be an empty shell for many years' because of the high barriers to action and agreement and the public's unwillingness to commit to issues that were both 'costly and intangible'. As it turned out, relatively rapid progress was made after 1992, with the implementation of the Convention and the negotiation of the Kyoto Protocol. The price of initial agreement was to embed a North-South distinction at the heart of the principles of the regime, which was sustained in the formulation of the Protocol. This created many difficulties in implementing the Protocol and limited its potential effectiveness and acceptability, as rapidly changing economic conditions radically altered the 'respective capabilities' of the Parties. The rigid division of the world into Annex I and non-Annex I has proved particularly difficult to alter because it reflected the entrenched economic interests of major developing countries while responding directly to demands for climate justice. It could also be said that a further price of initial agreement was a loose definition of objectives which, among other things, provided ample scope for special pleading on sources and sinks. The decision-making procedures of the regime and the failure to agree voting rules provided veto opportunities for self-interested Parties, alongside the many which already existed within national political systems. Shortly after the final entry into force of the Kyoto Protocol one commentator described the regime as 'ossified' and incapable of learning from experience in the ways that one might expect of a long-established international institution (Depledge, 2006). Since



2007 and the Bali Programme of Action there has been a discernible alteration in norms and principles indicating regime change. Although the 'bifurcation' of the regime in terms of Annex I and non-Annex I remains, even in the institution of co-chairmanships of UNFCCC bodies, there has been movement in the direction of a new comprehensive agreement involving mitigation action by all Parties. Of course the nature of the 'differentiation' between Parties remains hotly contested and, for many, the founding principles of the Convention remain sacrosanct. However, at the same time, there has been a retreat from the mitigation principles of the Kyoto Protocol. The price of agreement on the 2011 Durban Platform by developing countries was an undertaking by the EU that it would, unlike Canada, Japan and others, engage in a Second Commitment Period. But it has also become clear that a 2020 agreement will not resemble Kyoto. Instead negotiators have adopted a looser 'bottom up' approach to collective mitigation efforts that substitutes 'contributions' for 'commitments'.

More positively, the UNFCCC, from its inception, has organised and provided 'capacity-building' funds for a vital international reporting effort without which Parties would not have compiled comparable data and inventories. This was their sole concrete obligation under the Convention. Subsequently, the Kyoto Protocol provided a novel experiment and a painstakingly constructed international architecture for emissions trading and carbon offsets with an innovative compliance system. Technology transfer, funding mechanisms, forestry initiatives for the preservation of sinks and new departures on supporting adaptation in developing countries, alongside compensation for 'loss and damage', have all evolved, if often in embryonic form and at a snail's pace. Finally, the often predicted collapse of the entire system has not occurred, but, as will be discussed in Chapter 6, the UNFCCC also serves a number of functions for its state Parties that may be largely unrelated to the search for an efficient international means to curb climate change.