Improving the International Climate Change Regime's Provision for Developing Country Participation

Emily Harris

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ABBREVIATIONS

AAU	Assigned Amount Unit
APEC	Asia Pacific Economic Cooperation
CDM	Clean Development Mechanism
CER	Certified Emission Reduction
CoP	The Conference of the Parties to the UNFCCC
GEF	Global Environmental Facility
GHG	Greenhouse gas
MEA	Multilateral Environmental Agreement
MoP	The Conference of the Parties serving as the Meeting of the parties to the Kyoto Protocol
OECD	Organisation for Economic Cooperation and Development
UNFCCC	United Nations Framework Convention on Climate Change

I. BACKGROUND AND INTRODUCTION

For many decades there has been increasing scientific concern that human activities are damaging our environment via the production of 'greenhouse gases'. Greenhouse gases (GHGs) include carbon dioxide, methane and several other gases that are produced by industries as diverse as, inter alia, electricity generation, agriculture, transport, and manufacturing. Over time, the problem known as 'climate change' was found to be on such a large scale that a global response was needed.[1] The global response took the form of the United Nations Framework Convention on Climate Change (UNFCCC) and the Kyoto Protocol to the UNFCCC. While seen by many as an important "first step" [2] towards addressing the climate change problem, the UNFCCC and Kyoto Protocol have been subject to high levels of controversy and criticism.

Participation in the international climate change mitigation regime ("the regime") is voluntary. Therefore, it is crucial for the success of the regime that participation is made sufficiently attractive to nations. Currently, the regime is seen as deficient in its provision for developing countries by many stakeholders and commentators. A number of perceived shortcomings of the regime and potential improvements to overcome them are discussed in Chapters III and IV. Then the regime's alteration mechanisms are considered in relation to two potential changes that address two of the most commonly raised shortcomings of the regime, to analyse how those changes could be implemented.

Chapter V considers how the 'additionality' requirement of the clean development mechanism in Article 12(5)(c) of the Kyoto Protocol could be reinterpreted or abandoned. Such a change could be made by a decision of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol, so long as the change is not inconsistent with the words of Article 12(5)(c). If the change is inconsistent with the

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[1] See preamble to the UNFCCC. Despite the continuing scientific controversy about the causes and magnitude of climate change, the author proceeds in accordance with the scientific viewpoint that the UNFCCC is base upon; that anthropogenic causes are largely responsible for climate change, and that the effects are likely to be at least of the order to cause serious interference with human activities.

[2] See, e.g. Institute for Global Environmental Strategies, *Asian Perspectives on Climate Regime Beyond 2012* (2005); Anita M. Halvorssen "The Kyoto Protocol and the Developing Countries - the Clean Development Mechanism" (2005) 16 Colorado Journal of International Environmental Law and Policy 353, at 361; Peter D. Cameron, "The Kyoto Process: Past, Present and Future" in Peter D. Cameron and Donald Zillman (eds.), *Kyoto: From Principles to Practice* (Kluwer Law International, 2001) pp. 3-23, at 3.

c.f. Bruce Pardy "The Kyoto Protocol: Bad News for the Global Environment" (2004) 14 Journal of Environmental Law and Practice 27.

words of that provision, an amendment to the Kyoto Protocol would be needed to adopt the change.

Chapter VI analyses how specific funding obligations for Annex II parties could be imposed. While the Conference of the Parties' (CoP's) decision-making mandate is broad, there are a number of factors of the regime that suggest it stops short of empowering the CoP to impose new obligations on parties. Adopting a new protocol to the UNFCCC is a more sound and appropriate approach for imposing further obligations on parties. The analysis and conclusions reached in Chapters V and VI are equally applicable to many of the other shortcomings identified.

It is acknowledged that improving the regime's provision for developing countries would still leave it defective. There are problems with, inter alia, the emissions trading scheme and the weak compliance mechanism, and it is questionable whether the emissions reduction commitments are sufficient to achieve the objective of the UNFCCC even if they are complied with. However, the focus of this paper is limited to how the regime's provision for developing countries can be improved. The author suggests that modifying the regime to encourage developing countries to become more active participants may provide impetus for the parties to work toward solutions for the other shortcomings of the regime.

It is vital that developing country parties continue to be involved in the next phase of the international climate change mitigation effort. GHG emissions are increasing rapidly in most developing countries, and the environmental effectiveness of the regime will be undermined if increases in GHG emissions from developing countries exceed emissions reductions by industrialised countries. Furthermore, the willingness of some industrialised countries to take on further emissions reduction commitments in future is contingent on developing countries being involved in the climate change mitigation effort. Therefore, it is crucial that the parties begin to work toward some of the suggested improvements to the regime's provision to developing countries immediately, to ensure the regime's future beyond 2012.

II. THE INSTRUMENTS OF THE INTERNATIONAL CLIMATE CHANGE MITIGATION REGIME

A. United Nations Framework Convention on Climate Change

The UNFCCC was signed in May 1992 and entered into force on 21 March 1994.[3] 191 states are now parties.[4] The UNFCCC (and the Kyoto Protocol) is framed in reference to "developed country parties" and "developing country parties", emphasising that a party's developmental status determines the nature of their involvement in the regime. The UNFCCC includes twenty-six "developed" country parties[5] and fourteen parties classified as "countries that are undergoing the process of transition to a market economy". These parties are listed in Annex I to the UNFCCC. There are currently 149 non-Annex I (developing country) parties.[6] Forty-eight of those are classified as "least developed countries", which must be given special consideration under the UNFCCC.[7] The provisions of the UNFCCC recognise and provide for the needs of developing country parties in a number of ways.

1. Objective and principles

The objective of the UNFCCC is to "achieve… stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system."[8] The objective is qualified in that it must be achieved within a timeframe that "enable[s] economic development to proceed in a sustainable manner."[9] This qualification gives economic development some degree of precedence over climate change mitigation.

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[3] "The United Nations Framework Convention on Climate Change" at <http://unfccc.int/essential_background/convention/items/2627.php> (accessed 02/08/2007).

[4] Current at 10/10/2007. From "The United Nations Framework Convention on Climate Change" at <http://unfccc.int/essential_background/convention/items/2627.php> (last accessed 10/10/2007).

[5] Not counting the European Community, which is an Annex I party along with most of its member states.

[6] Current at 10/10/2007. From "List of Non-Annex I Parties to the Convention" at <http://unfccc.int/parties_and_observers/parties/non_annex_i/items/2833.php> (last accessed 10/10/2007).

[7] See UNFCCC, Article 4(9).

[8] UNFCCC, Article 2.

[9] UNFCCC, Article 2.

Article 3 sets out principles to guide parties in their actions taken pursuant to the UNFCCC. The principle of "common but differentiated responsibility" is recognition that, although all nations must share the burden of combating climate change, developed country parties should take the lead. The reasons for this are that developed countries have contributed the lion's share of historical and current GHG emissions, and have a greater capacity to pay for mitigation.[10] All parties must give "full consideration" to the "specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the effects of climate change…"[11]

There is explicit recognition that parties have a right to sustainable development.[12] Furthermore, it is recognised that "emissions originating in developing countries will need to grow to meet their social and development needs."[13] Economic development is an essential prerequisite to the ability of many parties to adopt climate change protection policies and measures, so climate change mitigation must be integrated with development.[14]

2. Commitments

Article 4(1) sets out commitments for all parties. The commitments include recording an inventory of and reporting national GHG emissions, implementing national climate change mitigation measures, promoting the development and diffusion of technologies and information relevant to climate change, promoting the management and conservation of carbon "sinks", preparing for adaptation to climate change, and promoting relevant research. These universal commitments must be read in light of the principle of common but differentiated responsibility and parties' development priorities.[15] Article 4(2) requires developed country parties to adopt policies and measures for climate change mitigation so as to "demonstrate that developed countries are taking the lead in modifying longer-term trends in anthropogenic emissions…" Article 4(7) explicitly recognises that developing countries' fulfilment of their commitments depends

[10] See UNFCCC, Article 3(1) and Preamble.

[11] UNFCCC, Article 3(2).

[12] UNFCCC, Article 3(4).

[13] UNFCCC, Preamble.

[14] UNFCCC, Article 3(4).

[15] See UNFCCC, Article 4(1).

on developed countries' fulfilment of their financial and technology transfer commitments, and that the overriding priorities of developing countries are poverty eradication and social development.

The parties are directed to "give full consideration to" what actions are necessary to meet the adaptation needs of developing countries,[16] to "take full account of the specific needs and special situations of the least developed countries in their actions with regard to funding and transfer of technology",[17] and to "take into consideration" the impact of their mitigation measures on countries with economies that are particularly vulnerable to the effects of those measures, such as fossil fuel exporting countries.[18]

Parties listed in Annex I (developed countries and countries that are undergoing the process of transition to a market economy) additionally commit to reducing their GHG emissions.[19] The UNFCCC does not set out specific emissions reduction commitments for individual parties. This was done later by the Kyoto Protocol. Parties listed in Annex II (the OECD members of Annex I, excluding the economies in transition) take on further financial and technology transfer commitments. They commit to providing new financial resources to assist developing countries in meeting their reporting commitments,[20] assisting developing countries in meeting adaptation costs,[21] and promoting, facilitating and financing the transfer of environmentally sound technologies and information.[22]

3. Financial mechanism

Article 11 provides for "[a] mechanism for the provision of financial resources on a grant or concessional basis, including for the transfer of technology". Under Article 21, the Global Environmental Facility (GEF) was placed in charge of the financial mechanism on an interim basis. The CoP decided to retain the GEF as the entity entrusted with the

[16] UNFCCC, Article 4(8).

[17] UNFCCC, Article 4(9).

[18] UNFCCC, Article 4(10).

[19] UNFCCC, Article 4(2).

[20] UNFCCC, Article 4(3).

[21] UNFCCC, Article 4(4).

[22] UNFCCC, Article 4(5).

operation of the financial mechanism.[23] Subsequently, a Special Climate Change Fund to finance projects relating to adaptation, technology transfer and capacity building, and a Least Developed Countries Fund to finance, inter alia, 'National Adaptation Programmes of Action' have been set up.[24]

B. Kyoto Protocol

The UNFCCC was intended as a framework for future agreement on specific commitments, and the creation of future documents of agreement was explicitly envisioned.[25] The Kyoto Protocol to the UNFCCC was created to impose more specific mitigation commitments on UNFCCC parties, because it was felt that the UNFCCC's vague commitments were insufficient to address the climate change problem. The Protocol was opened for signature on December 11 1997 at Kyoto. It entered into force on February 16 2005.[26] 171 states have ratified the Protocol.[27] Key states that have signed but decided not to ratify the Kyoto Protocol are the United States and Australia.

The aim of the Kyoto Protocol is to advance the objective of the UNFCCC.[28] To this end, the Protocol elaborates on the general commitments agreed to in the UNFCCC. Like the UNFCCC, the Protocol recognises that developed and developing country parties should have different commitments and incentives.

1. Commitments

The developed country parties and economies in transition listed in Annex B to the Protocol have agreed to reduce their GHG emissions to a specified percentage of their 1990 emissions by 2012.[29] Those parties commit to making demonstrable progress in

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[23] FCCC/CP/1998/16/Add.1, Decision 3/CP.4 Review of the Financial Mechanism.

[24] See FCCC/CP/2001/13/Add.1, Decision 7/CP.7 Funding under the Convention.

[25] UNFCCC, Article 17 provides for the adoption of protocols. Additionally, the reference to the Vienna Convention for the Protection of the Ozone Layer (1985) and the Montreal Protocol on Substances that Deplete the Ozone Layer (1987) in the preamble suggests that the Parties intended to use the same approach they had used to control the ozone depletion problem, i.e. agree on a framework convention then work toward specific commitments in the form of a protocol to the main agreement.

[26] This day being 90 days after the date on which at least 55 parties to the UNFCCC, including Annex I parties which account for at least 55% of the 1990 GHG emissions by Annex I parties, ratified the Protocol.

[27] This number is current at 12/10/2007. From "Parties to the Kyoto Protocol" at <http://maindb.unfccc.int/public/country.pl?group=kyoto> (accessed 02/08/2007).

[28] See the preamble to the Kyoto Protocol.

[29] See Kyoto Protocol, Article 3. Some of the Annex B countries are classified as economies in transition and their emission reduction commitments were calculated with reference to a different base year.

achieving their targets by 2005.[30] The Protocol envisions that further emission reduction commitments will be made for periods post 2012 by amending Annex B to the Protocol.[31]

Article 10 of the Protocol reaffirms and elaborates on the commitments agreed to under Article 4(1) of the UNFCCC, and reiterates that these must be read taking into account the principle of common but differentiated responsibility and development priorities. Annex I parties are mandated to implement policies and measures toward meeting their commitments in such a way as to minimise the adverse effects on other parties, especially developing country parties.[32]

2. Market mechanisms

Alongside domestic mitigation efforts, Annex I parties can utilise three market mechanisms to increase the cost-effectiveness of their GHG emission reductions.[33] The only one of the three that involves developing countries is the clean development mechanism (CDM). The CDM is a mutually beneficial mechanism under which Annex I parties invest in clean development projects in non-Annex I countries. The CDM benefits developing countries by giving them access to technology and investment that they would be unlikely to get otherwise, which helps them to develop sustainably, and thereby contributes to the ultimate objective of the UNFCCC.[34] Annex I countries also benefit because certified clean development projects generate "certified emission reductions" (CERs) which they can use towards meeting their emissions reduction targets.[35] To be certified, a project must create "[r]eal, measurable and long-term benefits related to the mitigation of climate change" which are additional to any benefits that would occur in the absence of the project.[36] Another benefit for developing countries is

[30] Kyoto Protocol, Article 3(2).

[31] Kyoto Protocol, Article 3(9).

[32] Kyoto Protocol, Articles 2(3) and 3(14).

[33] The market mechanisms are: joint implementation (Article 4), emissions trading (Articles 6 and 17), and the clean development mechanism (Article 12).

[34] Kyoto Protocol, Article 12(2).

[35] Kyoto Protocol, Article 12(3).

[36] Kyoto Protocol, Article 12(5).

that a share of the proceeds from CDM projects goes into an adaptation fund for parties that are particularly vulnerable to the effects of climate change.[37]

The details of how the CDM mechanism would function were decided at Conferences of the Parties subsequent to the creation of the Kyoto Protocol. It was decided that there would be no quantitative limit on how much of an Annex I party's emissions reduction could be achieved by investing in CDM projects, but that domestic action must constitute a significant element of the efforts of each Annex I country to meet its target.[38]

3. Financial provisions

Article 11(2) of the Protocol reiterates the commitments made by Annex II countries under Article 4 of the UNFCCC to provide finances to developing country parties towards meeting their commitments. The CoP has an obligation to seek to mobilise additional finances for these purposes.[39]

C. Summary of the regime's provision for developing countries

The above analysis of the provisions of the UNFCCC and Kyoto Protocol demonstrates that there is ample recognition of the needs of developing countries. The principle of common but differentiated responsibility allows developing countries to be a part of the climate change mitigation effort without imposing upon them the onerous obligations of Annex I parties. The financial and technology transfer commitments of Annex II countries provide apparent incentive for developing countries to be involved in the international climate change mitigation effort. Additionally, the clean development mechanism provides an opportunity for developed countries, developing countries and the environment to benefit simultaneously. While the provision for developing countries sounds impressive on paper, commentators from both developing and developed countries have expressed considerable dissatisfaction with the regime in practice. The next chapter examines some of the key criticisms.

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[37] Kyoto Protocol, Article 12(8).

[38] See preamble to Decision 15/CP. 7 Principles, nature and scope of the mechanisms pursuant to Articles 6, 12 and 17 of the Kyoto Protocol (FCCC/CP/2001/13/Add.2).

[39] Kyoto Protocol, Article 13(4).

III. PERCEIVED SHORTCOMINGS OF THE CURRENT INTERNATIONAL CLIMATE CHANGE MITIGATION REGIME

The current climate regime represents a compromise between the conflicting interests of the parties that has left no party totally satisfied.[40] However, it is important to reiterate that the UNFCCC and Kyoto Protocol are seen as an important "first step" towards tackling climate change by most commentators.[41] Despite its shortcomings, it is likely to achieve more climate change mitigation than would be achieved if states were left to act individually. Many developing countries believe that the principles and framework of the current regime should serve as the basis for the future.[42] However, both developing and developed country parties have identified numerous shortcomings in the regime.

A. Shortcomings from the point of view of developing countries

The Institute for Global Environmental Strategies reported that "[t]here is widespread feeling among Asian policy makers and other stakeholders that the current climate regime does not adequately address their interests, concerns and developmental aspirations."[43] This view is likely shared by most developing country parties. Several areas that have been identified as of particular concern to developing countries are discussed below.

1. Inefficiency of the Clean Development Mechanism

The CDM has not been used as much as expected for several reasons. First, there is a lack of demand for CERs. This could be because the United States, foreseen as a big user of the market mechanisms, did not ratify the Kyoto Protocol[44] or because emissions reduction targets can be met more affordably by purchasing excess Assigned Amount

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[40] Patricia Birnie and Alan Boyle *International Law and the Environment* (2nd ed., Oxford University Press, 2002) 523.

[41] See, e.g. Institute for Global Environmental Strategies, *Asian Perspectives on Climate Regime Beyond 2012* (2005); Anita M. Halvorssen "The Kyoto Protocol and the Developing Countries - the Clean Development Mechanism" (2005) 16 Colorado Journal of International Environmental Law and Policy 353, at 361; Peter D. Cameron, "The Kyoto Process: Past, Present and Future" in Peter D. Cameron and Donald Zillman (eds.), *Kyoto: From Principles to Practice* (Kluwer Law International, 2001) pp. 3-23, at 3.

c.f. Bruce Pardy "The Kyoto Protocol: Bad News for the Global Environment" (2004) 14 Journal of Environmental Law and Practice 27.

[42] Institute for Global Environmental Strategies, *Asian Perspectives on Climate Regime Beyond 2012* (2005).

[43] Ibid, iv.

[44] Ibid, 24.

Units (AAUs) from economies in transition on the emissions trading market.[45] The current lack of demand for CERs may be ameliorated by the EU's decision to allow CERs to be used towards emissions reduction targets in their domestic emissions trading scheme. Second, there is uncertainty as to the value of investment in the CDM beyond 2012. As Annex I parties currently cannot be certain about the form of the regime after 2012, they are cautious about investing in the CDM.[46] If the regime were to be radically altered, CERs might become worthless, leaving parties with no return on their investment. Third, the administration of the CDM is cumbersome. The process of obtaining approval for projects is slow and complex.[47] Assessing 'additionality' and calculating CERs is difficult, partly because developing countries' baseline emissions are not always accurately known, making it hard to calculate how much the reduction is 'worth',[48] and partly because the methodology for deciding if the 'additionality requirement' is met is complex. These complicated procedural requirements result in high transaction costs.[49]

There are also concerns with how the CDM is being used by investors. CDM project proposals do not necessarily match up with a country's development priorities. For example, methane recapture from landfills, which has commonly been proposed for CDM,[50] is cheap and reduces GHG emissions, but does not really assist in the country's sustainable development. So far, the distribution of CDM projects has not been equitable between developing countries. There appears to be a bias against the poorest countries for CDM investment and technology transfer.[51] Geographical distribution of CDM projects has been recognised by the CoP as an area to be improved.[52]

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[45] Ibid, 24.

[46] Ibid.

[47] Ibid.

[48] OECD, *Action against Climate Change - the Kyoto Protocol and Beyond* (1999) 9.

[49] Institute for Global Environmental Strategies, *Asian Perspectives on Climate Regime Beyond 2012* (2005).

[50] Ibid, 66.

[51] UN Document E/CN.17/1997/2, United Nations Commission on Sustainable Development, Overall Progress Achieved Since the United Nations Conference on Environment and Development (1997).

[52] Preamble to Decision 17/CP.7 Modalities and procedures for a clean development mechanism, as defined in Article 12 of the Kyoto Protocol at (FCCC/CP/2001/13/Add.2).

Another problem with the CDM is that nowhere is it specified whether the host party or the investor is responsible for any future emissions that result from a CDM project.[53] This is problematic for afforestation and deforestation CDM projects. Forestry projects in effect hide GHG emissions, because when the trees are cut down and burnt, or when the timber decays at the end of its useful life, GHGs are emitted.[54] Investors would take the view that when a host country agrees to a proposed project, it assumes responsibility for any future consequences of that project. Host countries would take the view that because the investor gets the benefit of CERs for its investment, it should be responsible for the emissions that result from the project. If developing countries took on quantified emissions limits in the future, the allocation of responsibility would become even more important. Current practice makes the final user (i.e. the host country for CDM projects) responsible for emissions.[55] This is a concern when poorer developing countries practically have to accept proposed projects because they cannot afford to turn down investment. [56] As stated by Cullet, "the idea of crediting the investor and penalizing the host goes against the very essence of the Convention."[57] However, it is probably impossible to make investors responsible for future emissions from CDM projects because private companies without any mitigation commitments can be investors. A better solution is to make afforestation and reforestation projects ineligible for the CDM.

2. Disappointment with the lack of technology transfer

A number of developing countries have reported disappointment with the lack of technology transfer under the climate change regime.[58] Technology transfer is critical to sustainable development in developing countries and therefore to the environmental effectiveness of the regime. To avoid developing countries progressing along the same carbon-intensive development path as industrialised countries have, technology transfer must be increased.

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[53] Phillippe Cullet *Differential Treatment in International Environmental Law* (Allgate Publishing Limited, 2003) 123.

[54] Ibid, 124.

[55] Ibid.

[56] Anita M. Halvorssen "The Kyoto Protocol and the Developing Countries - the Clean Development Mechanism" (2005) 16 Colorado Journal of International Environmental Law and Policy 353, at 368.

[57] Phillippe Cullet *Differential Treatment in International Environmental Law* (Allgate Publishing Limited, 2003) 124.

[58] Institute for Global Environmental Strategies, *Asian Perspectives on Climate Regime Beyond 2012* (2005).

Currently, there are several barriers to technology transfer. There is a lack of funding or other incentives to promote technology transfer from developed countries. Developing countries have had difficulty acquiring and implementing environment-friendly technologies because of high costs and the long term of intellectual property protection.[59] When technology is transferred, developing countries may not have the capacity to utilise it effectively.[60]

3. Lack of funding

Annex II parties committed to providing funding to developing country parties in Article 4 of the UNFCCC. Funding is needed for meeting reporting commitments, clean development, technology transfer and adaptation. Three different funds have been created under the climate change regime. These are the Special Climate Change Fund,[61] Least Developed Countries Fund,[62] and Adaptation Fund.[63] All three funds are overseen by the Global Environmental Facility, but function under the guidance of, and are accountable to, the CoP.

Adequate funding is crucial, as without it developing countries will be unable to meet their commitments and may be insufficiently prepared for adaptation. However, neither the UNFCCC nor the Kyoto Protocol contain specific quantified funding commitments. Where developed countries have pledged to provide a particular amount of funding, they do not necessarily stick to their word. For example, only 13.5% of the funds pledged to the GEF in 2005 were actually provided.[64] If developing countries feel that developed countries are failing to meet their funding obligations, they may be less willing to participate in the regime.

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[59] Ibid

[60] Ibid, 78.

[61] Created pursuant to the funding commitments made in Article 4 of the UNFCCC by decision 7/CP.7 (FCCC/CP/2001/13/Add.1) to finance activities, programmes and measures for adaptation, technology transfer, and in other specified industries.

[62] Created pursuant to the funding commitments made in Article 4 of the UNFCCC by decision 7/CP.7 (FCCC/CP/2001/13/Add.1) to support a work programme for the least developed countries, including national adaptation programmes of action.

[63] Created under the Kyoto Protocol by Decision 10/CP.7 (FCCC/CP/2001/13/Add.1) "to finance concrete adaptation projects and programmes in developing country Parties."

[64] Institute for Global Environmental Strategies, *Asian Perspectives on Climate Regime Beyond 2012* (2005) 68.

Developing countries have complained of difficulty and uncertainty in accessing funds from the GEF.[65] To obtain funding from the GEF, the project must improve the global environment or reduce risk to it,[66] which is perceived by developing countries as a difficult test to meet.[67] Even when the eligibility criteria are met, the GEF only funds the difference between a less costly, more polluting option and a costlier, more environmentally friendly option.[68] The difficulties in accessing GEF funds experienced by developing countries have been recognised by the CoP, and repeated instructions have been given to the GEF to simplify and streamline its criteria.[69]

4. Inadequate provision for adaptation

Developing countries are likely to suffer more than developed nations from the effects of climate change, because of a lack of ability to adapt. There is a strong concern that the provision for adaptation made so far has been insufficient.[70] The main reason for this is a lack of specific guidance on what parties' obligations are in relation to adaptation. Under the UNFCCC, all parties commit to preparing for adaptation to climate change, and Annex II parties commit to providing non-specific financial resources to developing countries towards meeting adaptation costs.[71] The Kyoto Protocol does little to clarify parties' obligations in relation to adaptation.

The CDM guidelines channel a two percent share of the proceeds of CDM projects into the Adaptation Fund.[72] A two percent share is seen as insufficient.[73] Compounding this, mandatory contribution to the Adaptation Fund is contingent on the success of the CDM, which is not currently flourishing.[74] Other than contribution via the CDM,

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[65] See e.g. ibid, 79.

[66] "Eligibility Criteria – GEF" at <http://thegef.org/Operational_Policies/Eligibility_Criteria/eligibility_criteria.html> (last accessed 23/09/2007).

[67] Institute for Global Environmental Strategies, *Asian Perspectives on Climate Regime Beyond 2012* (2005) 25.

[68] "Incremental Costs – GEF" at <http://thegef.org/Operational_Policies/Incremental_Costs/incremental_costs.html> (last accessed 23/09/2007).

[69] See Decision 11/CP.2 (FCCC/CP/1996/15/Add.1); Decision 2/CP.4 (FCCC/CP/1998/16/Add.1); Decision 6/CP.7 (FCCC/CP/2001/13/Add.1); Decision 5/CP.8 (FCCC/CP/2002/7/Add.1); and Decision 3/CP.12 (FCCC/CP/2006/5/Add.1).

[70] Institute for Global Environmental Strategies, *Asian Perspectives on Climate Regime Beyond 2012* (2005).

[71] UNFCCC, Article 4.

[72] FCCC/CP/2001/13/Add.2, Decision 17/CP.7 Modalities and procedures for a clean development mechanism, as defined in Article 12 of the Kyoto Protocol, at [15](a). CDM projects in the least developed countries are exempt from this levy, see [15](b).

[73] Institute for Global Environmental Strategies, *Asian Perspectives on Climate Regime Beyond 2012* (2005) 79.

[74] Ibid, 68.

contributions to the Adaptation Fund are at the parties' discretion, and have been acknowledged by the UNFCCC to be inadequate.[75]

5. Lack of compliance with emissions reduction commitments by Annex I parties

Statistics suggest that many Annex I parties are unlikely to achieve the emission reductions they committed to.[76] In failing to meet their commitments, Annex I parties are failing to uphold the principle of common but differentiated responsibility.

The likelihood of non-compliance may in part be due to the Kyoto Protocol's weak compliance mechanism. Article 18 of the Protocol instructed the CoP to approve mechanisms to address non-compliance with Protocol provisions at its first meeting. A Compliance Committee was set up at the seventh CoP.[77] When a party fails to meet its emissions reduction target, the Compliance Committee is directed to apply the following consequences:[78]

1. Declare that the party is not in compliance; and
2. Deduct "from the Party's assigned amount for the second commitment period of [sic] a number of tonnes equal to 1.3 times the amount in tonnes of excess emissions"; and
3. Direct the party to develop a compliance plan, which will be reviewed by the enforcement branch of the Committee; and
4. Suspend a party's ability to take part in emissions trading.

There are obvious problems with the current compliance mechanism. A declaration that a party is not in compliance will only be effective if that party is concerned about their reputation; and if only a small number of parties do not meet their targets.[79] The threats of deduction from a party's assigned amount for the second commitment period and

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[75] Press Release (6 April 2007) "UNFCCC Executive Secretary says significant funds needed to adapt to climate change impacts" at <http://unfccc.int/files/press/news_room/press_releases_and_advisories/application/pdf/070406_pressrel_english.pdf>.

[76] See Cass R. Sunstein "Of Montreal and Kyoto: A Tale of Two Protocols" (2007) 31 Harvard Environmental Law Review 1, at 37-40.

[77] FCCC/CP/2001/13/Add.2, Decision 24/CP. 7 Procedures and mechanisms relating to compliance under the Kyoto Protocol. This decision was approved by the CMP in Decision 27/CMP.1 (FCCC/KP/CMP/2005/8/Add.3).

[78] Ibid.

[79] Ailsa Ceri Warnock "The Climate Change Regime: Efficacy, Compliance and Enforcement" (2004) 8 New Zealand Journal of Environmental Law 99. As it is currently predicted that many parties will fail to meet their targets, the prospect of a declaration of non-compliance is unlikely to frighten many parties into compliance.

suspension of emissions trading will only motivate compliance once the future of the Protocol beyond the first commitment period is decided.

Under Article 18, any binding consequences for non-compliance must be adopted by an Amendment to the Protocol. No such amendment has yet been made, so the Compliance Committee's decisions are not binding on parties. With the ineffective and non-binding nature of the currently available compliance mechanisms, developing countries cannot be assured that Annex I countries will meet their emission reduction commitments, and therefore are unlikely to be willing to take on substantive commitments themselves.

B. Shortcomings from the point of view of developed countries

Some developed country parties have expressed concern that developing country parties currently have no emissions control commitments, and as yet have not committed to controlling their emissions in the future. The lack of emission control commitments for developing countries was a key reason for the United States' refusal to ratify the Kyoto Protocol.[80] Brazil, China, India and other fast-growing developing countries are predicted to overtake the volume of GHG emissions of many developed countries in the near future. Thus, Annex I parties have a legitimate concern that any emissions reductions they make might be dwarfed by emissions increases by advanced developing countries.[81] Some people claim that the current approach is inequitable between developed and developing country parties.[82] Others base their criticisms of developing countries' lack of emissions reduction commitments on the likelihood that this will undermine the environmental effectiveness of the regime.[83]

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[80] See the Byrd-Hagel Resolution (S. Res. 98) Expressing the sense of the Senate regarding the conditions for the United States becoming a signatory to any international agreement on greenhouse gas emissions under the United Nations Framework Convention on Climate Change (25 July 1997), available at <http://www.nationalcenter.org/KyotoSenate.html>. It must be acknowledged that the cost-effectiveness of the proposed mitigation strategy was also a major concern; arguably the key concern.

[81] Jaye Ellis and Stepan Wood, "International Environmental Law" in Benjamin J Richardson and Stepan Wood (eds.), *Environmental Law for Sustainability* (Hart Publishing, 2006) pp. 343-380, at 366.

[82] See, for example, "Text of a Letter from the President to Senators Hagel, Helms, Craig and Roberts" (White House Press Release, March 13, 2001) available at <http:// www.whitehouse.gov/news/releases/2001/03/20010314.html> (last accessed 10/12/2007).

[83] See, for example, Bruce Pardy "The Kyoto Protocol: Bad News for the Global Environment" (2004) 14 Journal of Environmental Law and Practice 27. Pardy suggests that giving development priorities explicit precedence over climate change mitigation encourages developing countries to develop along the same path as industrialised countries, by means of economies highly dependent on carbon emissions.

Another way in which developing countries' lack of commitments might undermine the environmental effectiveness of the regime is via 'carbon leakage'. The theory of 'carbon leakage' is that if only some countries are required to reduce their carbon emissions (which is expensive for carbon-intensive industries), those countries will lose international market share to competitors in countries that do not have to reduce carbon emissions.[84] Carbon leakage could have the negative flow-on effect of making it more expensive for developing countries to reduce their GHG emissions in the future.[85]

Despite their concerns about inequity and environmental effectiveness, developed countries do not expect developing countries to be treated the same as them. They recognise that any commitments by developing countries must be coloured by the principle of common but differentiated responsibility.[86]

Developing countries think they should not have to accept emission limitation commitments at this stage for a number of legitimate reasons. Industrialised countries are responsible for the vast majority of historic GHG emissions, so, based on the polluter pays principle, they should have to undertake the vast majority of mitigation. Most developing countries' per capita emissions are still far below the per capita emissions of most Annex I countries, so it is appropriate for Annex I countries to make significant emissions reductions before developing countries have to. Developing countries fear that climate change mitigation commitments will interfere with their development priorities. Poverty alleviation, improving infrastructure and economic development are the primary concerns of most developing nations.[87] Clearly, industrialised countries have a greater capacity to undertake climate change mitigation. Many developing country parties are unwilling to take on emission limitation commitments until Annex I countries demonstrate that they are going to meet their commitments.[88] As stated above, statistics

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[84] OECD, *Action against Climate Change - the Kyoto Protocol and Beyond* (1999), 38.

[85] Sheila M. Olmstead and Robert N. Stavins "A Meaningful Second Commitment Period for the Kyoto Protocol" (2007) 4(3) The Economists' Voice, Article 1, at 2.

[86] See e.g. Paul G Harris "Common but Differentiated Responsibility: The Kyoto Protocol and United States Policy" (1999) 7 New York University Environmental Law Journal 27.

[87] Institute for Global Environmental Strategies, *Asian Perspectives on Climate Regime Beyond 2012* (2005).

[88] See Cass R. Sunstein "Of Montreal and Kyoto: A Tale of Two Protocols" (2007) 31 Harvard Environmental Law Review 1, at 37-40.

suggest that many Annex I parties are unlikely to achieve the emission reductions they committed to.[89]

It is vital to the future success of the regime that developing countries are involved. As involvement is entirely voluntary, it must be kept attractive to developing countries. This will require both developed and developing country parties to make more compromises. Developed country parties will have to recognise and respond to at least some of developing parties' perceived shortcomings by agreeing to alter the regime. Developing country parties will need to show their commitment to the regime by agreeing to take on more substantive emissions mitigation commitments at some time in the future.

[89] See ibid.

IV. PROPOSED IMPROVEMENTS TO THE CURRENT INTERNATIONAL CLIMATE CHANGE MITIGATION REGIME

While some commentators have suggested that the current regime is so fatally flawed that negotiating a whole new agreement is the best option,[90] it seems unlikely that a significantly better compromise could be reached. The amount of time and resources that have gone into negotiating the current regime mean it should not be cast aside lightly. In a recent report, most Asian developing countries agreed that the current regime was a good basis for future international cooperation on climate change mitigation.[91]

Numerous potential solutions to the problems discussed in the preceding chapter have been identified. Proposed improvements include modifying existing elements of the regime, and agreeing upon future commitments for developing countries.

A. Modifying existing elements of the UNFCCC and Kyoto Protocol

1. Improve the clean development mechanism

The CDM is seen as having great potential by developing countries.[92] As the CDM benefits both Annex I and non-Annex I countries, improving its operation is in the interest of all parties. Many developing countries have commented on the slowness and inefficiency of CDM project approval.[93] There are currently many different bodies involved in the administration of the CDM. The CDM Executive Board, Designated Operational Entities, and Designated National Authorities each perform some of the necessary steps in the CDM project approval process.[94] The reason why the process involves so many steps and checks by different bodies is to ensure that the environmental integrity of the CDM is not undermined by political influences. Once parties are confident that the CDM approval process satisfactorily ensures that the CDM achieves its objectives, it may be possible to streamline the project approval process.

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[90] For example, Bruce Pardy "The Kyoto Protocol: Bad News for the Global Environment" (2004) 14 Journal of Environmental Law and Practice 27.

[91] Institute for Global Environmental Strategies, *Asian Perspectives on Climate Regime Beyond 2012* (2005).

[92] Ibid.

[93] Ibid

[94] See Annex to Decision 17/CP.7 Modalities and procedures for a clean development mechanism, as defined in Article 12 of the Kyoto Protocol (FCCC/CP/2001/13/Add.2) at [5](d), [29], [36], [40] and [64].

The 'additionality requirement' of the CDM project approval process has received particular criticism for being too stringent, and thereby restricting the utilisation of the CDM.[95] A CDM project activity is 'additional' if "anthropogenic emissions of greenhouse gases by sources are reduced below those that would have occurred in the absence of the registered CDM project activity."[96] The CDM Executive Board adopted more detailed procedures for assessing additionality. The proposed project must not be the only option under the laws of the host country, must not be the most financially attractive option *or* must face barriers not faced by alternative options, and must not be the common practice.[97] Figueres claims that the additionality criterion acts as a "perverse incentive", which puts developing countries off adopting emission reduction policies for fear that these policies might be incorporated into baseline calculations, which would disqualify them from hosting some CDM projects.[98] Recognising the potential for the 'additionality requirement' to restrict the utilisation of the CDM and act as a perverse incentive does not mean that the 'additionality requirement' should be relaxed or abandoned, because it acts as an important safeguard of the environmental effectiveness of the CDM. Also, making it easier to get CDM projects approved could undermine the requirement that Annex I parties' use of the CDM be supplemental to domestic action.[99] However, as it looks likely that a number of Annex I parties will not meet their emission reduction commitments under the current approach,[100] it seems sensible to make the CDM more accessible. Allowing Annex I parties to invest in sustainable development projects in developing countries, so as to start those developing countries off on a less carbon-intensive trajectory than industrialised countries followed, even if the projects would not meet the current additionality criteria, would surely result in more environmental benefit than Annex I countries simply failing to meet their targets.

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[95] See e.g. Institute for Global Environmental Strategies, *Asian Perspectives on Climate Regime Beyond 2012* (2005) 37.

[96] Annex to Decision 17/CP.7 Modalities and procedures for a clean development mechanism, as defined in Article 12 of the Kyoto Protocol (FCCC/CP/2001/13/Add.2), at [43].

[97] CDM-EB 29 Annex 5 – Revised tool for the demonstration and assessment of additionality.

[98] Christiana Figueres "Sectoral CDM: Opening the CDM to the yet Unrealized Goal of Sustainable Development" (2006) 2 McGill International Journal of Sustainable Development Law and Policy 6, at 12.

[99] Developing countries do not want Annex I countries to be able to rely on the CDM to the exclusion of domestic mitigation measures (see e.g. Zhiguo Gao, "The Kyoto Protocol and the International Energy Industry: Legal and Economic Implications of Implementation. The Chinese Perspective" in Peter D. Cameron and Donald Zillman (eds.), *Kyoto: From Principles to Practice* (Kluwer Law International, 2001) pp. 275-288, at 283).

[100] See Cass R. Sunstein "Of Montreal and Kyoto: A Tale of Two Protocols" (2007) 31 Harvard Environmental Law Review 1, at 37-40.

It is up to Designated National Authorities in host countries to decide whether a proposal will achieve sustainable development,[101] because developing countries did not want the approval of projects to hinge upon an external definition of sustainable development.[102] Many developing countries cannot afford to turn down investment, so approve CDM projects that do not really promote their long term sustainable development.[103] One way to increase the sustainable development benefits to host parties participating in the CDM is to provide for Designated National Authorities to suggest improvements to proposed projects that would increase their sustainable development benefits. The Designated Operational Entity could then request the investor to make the changes to the proposal that it deemed appropriate before validating the project. However, any such mechanism would likely further increase the length of time taken to approve CDM projects.

There is a growing body of support for the idea of 'sectoral' or 'policy-based' CDM. Figueres comments that "current CDM projects provide only fractious and marginal attempts at decarbonizing the global economy" and do "not contribute to the sustainable development of developing countries in any meaningful way…"[104] According to Figueres, the solution is sectoral CDM. Under sectoral CDM, "developing countries would be encouraged to develop regional, sectoral, sub-sectoral, or cross-sectoral project activities, which would be the result of specific sustainable development policies…"[105] Sectoral CDM could exponentially improve the effectiveness of the CDM by "mainstreaming climate considerations into the economic growth model."[106] Figueres suggests sectoral CDM is permitted within the current CDM regulations, and that at least one sectoral CDM project activity has already been registered.[107] However, her view is

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[101] Preamble to Decision 17/CP.7 Modalities and procedures for a clean development mechanism, as defined in Article 12 of the Kyoto Protocol (FCCC/CP/2001/13/Add.2).

[102]Christiana Figueres "Sectoral CDM: Opening the CDM to the yet Unrealized Goal of Sustainable Development" (2006) 2 McGill International Journal of Sustainable Development Law and Policy 6, at 11.

[103] Anita M. Halvorssen "The Kyoto Protocol and the Developing Countries - the Clean Development Mechanism" (2005) 16 Colorado Journal of International Environmental Law and Policy 353, at 368.

[104] Christiana Figueres "Sectoral CDM: Opening the CDM to the yet Unrealized Goal of Sustainable Development" (2006) 2 McGill International Journal of Sustainable Development Law and Policy 6.

[105] Ibid, 14.

[106] Ibid.

[107] Ibid, 16.

not universal, as a number of developing countries have recently suggested that allowing sectoral CDM would improve the CDM.[108] The Meeting of the Parties (MOP)'s position on sectoral CDM is difficult to decipher. At MoP-1, they decided that a "policy or standard cannot be considered as a clean development mechanism project activity, but that project activities under a programme of activities can be registered as a single clean development mechanism activity provided that approved baseline and monitoring methodologies are used…"[109] This seems to disallow sectoral CDM as Figueres conceives it, but to promote broadening the use of the CDM beyond single, isolated project activities. Clarification of whether sectoral CDM is permitted would be beneficial for parties.

2. Increase technology transfer

Technology transfer has been perceived by developing countries as inadequate so far. It has been suggested that operating technology transfer as a market mechanism like (or integrated with) the CDM could enhance it. Incentive to transfer technology could be created by making the transferor eligible for some kind of emission reduction units in return,[110] although caution would need to be exercised to ensure that this would not further undermine the environmental effectiveness of the regime. The need for facilitation of technology transfer between developing countries has been identified,[111] and a market mechanism could contribute to this.

The Subsidiary Body for Scientific and Technological Advice has proposed establishing a new "multilateral technology cooperation fund" to finance the development and transfer of environmentally sound technologies.[112] This proposal will be put before the CoP at its next meeting. The multiple funds already operating under the regime struggle to secure sufficient funding. Therefore, it is unlikely that simply establishing another fund will increase technology transfer.

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[108] Ibid; Thomas C Heller and P R Shukla, "Development and Climate: Engaging Developing Countries" in Pew Center on Global Climate Change (ed.), *Beyond Kyoto: Advancing the International Effort against Climate Change* (2003) pp. 111-140, at 126; Institute for Global Environmental Strategies, *Asian Perspectives on Climate Regime Beyond 2012* (2005), at 27 per India, 37 per Indonesia, 53 per Korea.

[109] FCCC/KP/CMP/2005/8/Add.1, Decision 7/CMP.1 Further guidance relating to the clean development mechanism, at [20].

[110] Institute for Global Environmental Strategies, *Asian Perspectives on Climate Regime Beyond 2012* (2005) 42, 69.

[111] Ibid, 37.

[112] FCCC/SBSTA/2007/L.9 (17 May 2007) Development and Transfer of Technologies. Draft Conclusions Proposed by the Chair.

Barriers to technology transfer could be reduced if intellectual property protection was shortened, or exceptions made, for environmentally sound technology. One suggestion is that an analogy can be drawn to the exemption made for HIV/AIDS drugs under the TRIPS Agreement;[113] that protection against climate change is a public good.[114] An exemption or heavily reduced licensing fees for environmentally sound technology for developing countries is unlikely to be a strong disincentive for the continued development of such technologies, because the patent holder could continue to make money from licensing the product in developed countries.[115] If intellectual property protection was not modified, the technology transfer fund suggested above could be used towards the purchase of intellectual property.[116]

It has been suggested that technology transfer may warrant a separate protocol to the UNFCCC.[117] However, negotiating a protocol would take considerable time and resources, meaning its benefits might be outweighed by the costs.

3. Revamp the funding mechanism

The optimal way to ensure adequate funding for the regime is for Annex II parties to agree to provide specific and adequate funds. While some parties have pledged to provide specific amounts of funding to the regime,[118] there are no commitments to this effect in the UNFCCC or Kyoto Protocol. There is a risk that specific commitments would redirect existing streams of aid and other funding, rather than generate additional funding. The CoP has attempted to ensure that Annex II parties actually meet their commitment to provide "new and additional financial resources".[119] The Special Climate Change Fund and Least Developed Countries Fund were set up in response to a recognised "need for funding that is new and additional to the Global Environmental Facility's climate change focal area."[120] The preamble to a CoP decision on the modalities

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[113] Agreement on Trade-Related Aspects of Intellectual Property Rights (1994).

[114] Institute for Global Environmental Strategies, *Asian Perspectives on Climate Regime Beyond 2012* (2005).

[115] Ibid, 27.

[116] Ibid, 27.

[117] Ibid.

[118] See preamble to decisions 7/CP.7 and 10/CP.7 (FCCC/CP/2001/13/Add.1). The European Community, Canada, Iceland, New Zealand, Norway and Switzerland stated that they will collectively contribute US$410 million annually in funding under the regime.

[119] As required by UNFCCC, Article 4(3).

[120] See FCCC/CP/2001/13/Add.1, Decision 7/CP.7 Funding under the Convention, at [1].

of the CDM emphasises that "public funding for clean development mechanism projects from Parties in Annex I is not to result in the diversion of official development assistance and is to be separate from and not counted towards the financial obligations of Parties included in Annex I."[121] Neither of these measures ensures that funding is adequate to meet developing country parties' needs.

If Annex II parties are unwilling to agree to specific levels of funding, it is difficult to identify any other acceptable way to obtain funding for developing country participation. It has been argued that non-complying Annex I parties should be charged fines which would go into a fund that developing countries could apply to for sustainable development assistance,[122] but this proposition has already been rejected by the MoP.[123] Some have suggested directing existing streams of aid into sustainable development and adaptation, but developing countries are unwilling to divert resources from their priorities of poverty eradication and social development.[124]

4. Clarify and improve provision for adaptation

Adequate preparation for adaptation is crucial to the success of the regime. Revamping the funding mechanism and increasing technology transfer, as discussed above, should significantly improve parties' preparedness for adaptation. Increasing the percentage of CDM proceeds that goes into the Adaptation Fund would not be a good way to increase adaptation funding because it might put people off investing in the CDM.

Some commentators are of the view that adaptation preparation warrants a separate protocol to the UNFCCC.[125] As for technology transfer, the benefits of creating a separate protocol might be outweighed by the costs of time and resources that would have to be invested in negotiating it.

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[121] Preamble to Decision 17/CP.7 Modalities and procedures for a clean development mechanism, as defined in Article 12 of the Kyoto Protocol (FCCC/CP/2001/13/Add.2).

[122] Tom Athanasiou and Paul Baer *Dead Heat - Global Justice and Global Warming* (Seven Stories Press, 2002); Institute for Global Environmental Strategies, *Asian Perspectives on Climate Regime Beyond 2012* (2005) 37.

[123] See Ailsa Ceri Warnock "The Climate Change Regime: Efficacy, Compliance and Enforcement" (2004) 8 New Zealand Journal of Environmental Law 99, at 124.

[124] Institute for Global Environmental Strategies, *Asian Perspectives on Climate Regime Beyond 2012* (2005).

[125] For example by people from India consulted in Institute for Global Environmental Strategies, *Asian Perspectives on Climate Regime Beyond 2012* (2005) 28.

5. Improve the compliance mechanism

Under Article 18 of the Protocol, binding consequences for non-compliance can be adopted by amending the Protocol. It has been suggested that binding consequences for non-compliance could discourage some parties from participating in the regime.[126] Saudi Arabia proposed amending the Protocol in relation to compliance measures at the first MoP.[127] This proposal is on the agenda for MoP-3, to be held this December. It will be interesting to see if Saudi Arabia can raise sufficient support to adopt the amendment.

As parties must accept an amendment before it becomes binding on them, parties that thought proposed binding compliance measures were too strict could simply refuse to accept the amendment.[128] This is a real possibility, because the costs of participation in the regime are already a concern to some parties. In this situation, it may be more appropriate to increase parties' incentives to comply than to strengthen the consequences for non-compliance. This is in accordance with the MoP's view of compliance mechanisms. In deciding on the current compliance mechanism the MoP stated that compliance mechanisms, "shall be aimed at the restoration of compliance to ensure environmental integrity, and shall provide for an incentive to comply."[129] The MoP is yet to indicate what a suitable incentive might be.

Ultimately, the success of the Kyoto Protocol's compliance mechanism will depend upon increasing parties' political commitment to the regime. Until that is achieved, the parties are unlikely to agree to any binding consequences for non-compliance, and the existing compliance mechanism will continue to have little effect. One way of mustering more political commitment to the regime from industrialised countries, including the US and Australia, is to convince developing countries to agree to take on substantive mitigation commitments in the future. The situation seems like somewhat of a 'Catch-22'. Developing countries are unwilling to take on commitments until the US ratifies the Kyoto Protocol and other Annex I countries demonstrate that they will meet their

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[126] See Ailsa Ceri Warnock "The Climate Change Regime: Efficacy, Compliance and Enforcement" (2004) 8 New Zealand Journal of Environmental Law 99, at 102.

[127] FCCC/KP/CMP/2005/8/Add.3, Decision 27/CMP.1 Procedures and mechanisms relating to compliance under the Kyoto Protocol.

[128] Kyoto Protocol, Article 20(4).

[129] Annex to Decision 27/CMP.1 Procedures and mechanisms relating to compliance under the Kyoto Protocol, Part V [6] (FCCC/KP/CMP/2005/8/Add.3).

commitments. Developed countries have little motivation to meet their commitments when their reductions are likely to be cancelled out by the increasing emissions of emerging industrial giants such as China and India. However, it would start the compromise ball rolling if developing countries demonstrated their willingness to take on some form of substantive mitigation commitments at some specified point in the future,.

B. Future commitments for developing country parties

GHG emissions in the most advanced developing countries are growing so rapidly that they will need to take on some form of emission restrictions in the near future in order for the climate change regime to be environmentally effective. The regime needs to stop developing countries from following the same carbon-intensive industrialisation trajectory as developed countries did. However, it is crucial that any proposed commitments for developing countries are based on the principle of common but differentiated responsibility. Pushing developing countries to accept commitments that do not adequately reflect that principle is likely to put them off participating at all, which would lead to environmental disaster.

Some developing countries have already expressed willingness to take on emission limitation commitments in future,[130] and some have already undertaken domestic mitigation measures despite no commitment to do so.[131] The questions thus arise, what type of commitments would be most appropriate for developing countries, and when should developing countries' commitments begin?

1. Types of commitments

Many different types of commitments have been suggested as appropriate for developing countries to take on in the future. Each has advantages and disadvantages, which will be discussed below. Based on the principle of common but differentiated responsibility, developing countries could take on commitments of a different nature than the quantified emissions limits that Annex I countries currently have. However, it may be considered desirable that all parties have the same type of commitments. Keeping these

[130] Institute for Global Environmental Strategies, *Asian Perspectives on Climate Regime Beyond 2012* (2005).

[131] Ibid.. For example, India and China.

considerations in mind, each type of commitment is evaluated on its suitability for developing countries and for Annex I countries.

(a) Quantified emission targets

If developing countries were to take on quantified emission limitation targets like Annex I parties have already, this would have the advantage of creating consistency between parties, reducing the scope for allegations of inequity in the regime. The challenge would be agreeing on how to calculate developing countries' limits. Adopting a base year after 1990, or using 1990 as the base year but allowing emissions to increase by a specified percentage from the baseline are possibilities. The author believes that historic emissions should not serve as the basis for future commitments for developed or developing country parties, because it rewards the states that have polluted the most in the past.

A possible alternative is to base targets for developing countries on projected future emissions.[132] The problem with this approach is that it is difficult to predict what a reasonable level of future emissions will be for any given country. A prediction that is too high will not provide sufficient incentive for environmentally sound development, and a prediction that is too low will unfairly restrict a country's development. However, it is likely that developing countries' commitments would be regularly reassessed alongside Annex I countries' commitments, which would mitigate these risks.

Another basis on which parties' emissions limits could be allocated is their ability to pay for mitigation measures.[133] Those parties with the greatest resources would be allocated the most demanding reduction targets, and vice versa. Targets could be allocated by agreeing on an overall emissions target, and dividing the necessary reductions between parties according to their relative wealth. Indexing parties' commitments to their GDP growth is another possibility, but it does not guarantee a particular level of reduction in emissions overall. Differentiated commitments based on ability to pay could also be used for action-based or policy-based commitments, discussed below.

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[132] Ibid, 16 (per China).

[133] Suggested as a replacement method of allocating emission reduction commitments for the whole regime in OECD, *Action against Climate Change - the Kyoto Protocol and Beyond* (1999); and in Sheila M. Olmstead and Robert N. Stavins "A Meaningful Second Commitment Period for the Kyoto Protocol" (2007) 4(3) The Economists' Voice, Article 1.

Caution should be exercised in giving developing countries an emissions limit in excess of their current level of emissions. Developing countries would have to be permitted to trade their excess Assigned Amount Units (AAUs) on the emissions trading market or they would be at a disadvantage compared to Annex I countries. This might allow Annex I parties to fulfil their emissions reduction commitments by buying excess AAUs from developing countries without any actual reduction in GHG emissions occurring. This is already a risk from the excess emissions allocated to Annex I economies in transition. Allowing developing countries to do the same would further reduce the environmental effectiveness of the regime. The detriment to the environmental effectiveness of the regime could be ameliorated if developing countries agreed to use the proceeds of selling AAUs only for sustainable development purposes.[134] Alternatively, incentives could be provided to induce developing countries to "bank" their excess AAUs for future use under Article 3(13) of the Protocol.

If developing countries had excess AAUs to sell, and these were cheaper than acquiring CERs under the CDM, purchasing countries would probably buy AAUs rather than invest in the CDM. This would be detrimental to developing countries because they would miss out on the long-term benefits of investment in sustainable development (unless the proceeds from selling AAUs were invested in such projects, which could not be guaranteed in the absence of a specific requirement to that effect).

(b) Uniform per capita emissions limit for all countries

The idea of setting a uniform per capita emissions limit for all parties that developing countries could increase up to and industrialised countries would have to reduce down to is supported by a number of commentators.[135] A uniform per capita limit gives every person an equal 'right' to emit GHGs. It is possible to move toward a uniform per capita limit from the current system of quantified emission targets. The parties would need to decide on an overall permissible level of GHG emissions, and divide this between parties

[134] Suggested in Tom Athanasiou and Paul Baer *Dead Heat - Global Justice and Global Warming* (Seven Stories Press, 2002) 77.

[135] See Bruce Pardy "The Kyoto Protocol: Bad News for the Global Environment" (2004) 14 Journal of Environmental Law and Practice 27; Tom Athanasiou and Paul Baer *Dead Heat - Global Justice and Global Warming* (Seven Stories Press, 2002); OECD, *Action against Climate Change - the Kyoto Protocol and Beyond* (1999); Ailsa Ceri Warnock "The Climate Change Regime: Efficacy, Compliance and Enforcement" (2004) 8 New Zealand Journal of Environmental Law 99.

according to their relative population size.[136] A uniform per capita limit could uphold the principle of common but differentiated responsibility by determining the length of time each party was allowed to come into compliance with its limit based on its level of development.

National circumstances will affect how difficult it is for a party to meet its emissions target. Climate and availability of natural energy sources will influence a party's energy requirements, while land area and population density will determine the extent to which a party can utilise carbon sinks toward meeting its target.[137] To achieve true equity between parties, national circumstances would need to be factored into parties' limits. This does not undermine the basis of a uniform per capita limit, but rather enhances the equity between parties, equity being the underlying rationale for the uniform per capita limit approach. However, unless considerable restraint was used in determining which circumstances could be taken into account, and to what extent, parties attempting to promote their self-interests could use this flexibility to undermine the equitable basis of and environmental effectiveness of, a uniform per capita emissions limit.

The most serious potential problem with the uniform per capita emissions limit approach is the same as for a quantified emissions limit approach; if it is perceived as too costly to achieve, states will refuse to participate. The United States is against a uniform per capita emissions limit because such a limit would require it to transfer significant resources to other countries to meet its target.[138] As equity between all people is the underlying basis for the uniform per capita emissions limit approach, it would probably only work with universal participation. It has been suggested that adopting a uniform per capita limit would motivate states to encourage population growth,[139] which would exacerbate environmental problems.

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[136] See methodology described in Bruce Pardy "The Kyoto Protocol: Bad News for the Global Environment" (2004) 14 Journal of Environmental Law and Practice 27.

[137] Tom Athanasiou and Paul Baer *Dead Heat - Global Justice and Global Warming* (Seven Stories Press, 2002) 94.

[138] Cass R. Sunstein "Of Montreal and Kyoto: A Tale of Two Protocols" (2007) 31 Harvard Environmental Law Review 1, at 61.

[139] See Phillippe Cullet *Differential Treatment in International Environmental Law* (Allgate Publishing Limited, 2003) 118; Tom Athanasiou and Paul Baer *Dead Heat - Global Justice and Global Warming* (Seven Stories Press, 2002) 80.

(c) Action-based or policy-based commitments

Commitments could be framed in terms of actions or policies required of parties, for example, increase energy efficiency by X% by date Y. The lingering uncertainty about the magnitude of climate change introduces an element of arbitrariness into the selection of quantitative targets.[140] In contrast, we can tell presently what types of actions and policies will mitigate climate change, and these actions or policies often have benefits additional to mitigation of climate change. For example, increasing energy efficiency will also free up resources to be used elsewhere and decrease pollution to the benefit of human health. Thus, action or policy based commitments could be advantageous for the regime as a whole, not just for developing countries.

The main downside of action-based and policy-based commitments is that they do not guarantee a particular level of environmental efficacy. As with quantitative emissions limits, action-based and policy-based commitments would need to be regularly updated to encourage continuing improvement. The US opposed action-based and policy-based commitments in the Kyoto Protocol negotiations because of their cost-ineffectiveness,[141] so securing global participation with commitments of this type is unlikely.

(d) Sectoral approach

Rather than applying commitments to nations, commitments could be applied to entire international sectors of industry. Quantified emissions limits or action-based and policy-based commitments could be applied to industry players. A sectoral approach could overcome the problem of carbon leakage, because if all players in the industry had limits, the option of relocating to a country without mitigation commitments would not exist. This outcome could only be achieved if all nations participated in the regime. Unless emissions trading between sectors was permissible, the sectoral approach would decrease the cost-effectiveness of mitigation by preventing countries from making reductions where it is cheapest to do so.[142]

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[140] Elliot Diringer, "Overview: Climate Crossroads" in Pew Centre on Global Climate Change (ed.), *Beyond Kyoto: Advancing the International Effort against Climate Change* (2003) pp. 1-10.

[141] Daniel Bodansky, "Climate Commitments: Assessing the Options" in Pew Center on Global Climate Change (ed.), *Beyond Kyoto: Advancing the International Effort against Climate Change* (2003) pp. 37-60, at 42.

[142] Ibid, 52.

(e) Aspirational goals or non-binding commitments

Addressing climate change with aspirational goals or non-binding commitments was championed by the United States and Australia at the APEC summit in September 2007. The UNFCCC contains non-binding qualitative commitments, and the very reason that the Kyoto Protocol was created was that these non-binding commitments were ineffective.[143] Reverting to non-binding commitments would be a clear step in the wrong direction for the environment. However, non-binding commitments could provide a stepping stone for developing countries towards binding commitments. This possibility is discussed further in the next section.

2. Deciding when developing countries will take on limits

If developing countries are to take on commitments in the future, there will need to be agreed criteria for deciding when commitments commence. The timing of commitments is inextricably linked to the type of commitment chosen. If a uniform per capita limit was chosen, or developing countries were allocated quantified emissions limits that allowed them to initially increase their emissions, these commitments could theoretically come into force straight away, as they would not impinge upon a countries' ability to develop until it neared its limit sometime in the future. However, developing countries feel that it would be more appropriate if they had an initial period of non-binding or voluntary commitments before they undertook binding commitments alongside Annex I countries.[144] This would promote the incorporation of climate change mitigation measures into national systems, making the acceptance of binding commitments logistically easier and less expensive. Incentives could be provided for meeting voluntary commitments, for example funding,[145] or, if the commitment was a quantified emissions limit, the ability to trade excess AAUs for revenue.

The transition from non-binding to binding commitments could be triggered by a developing country reaching a specified threshold. Using a per capita income threshold

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[143] See Ailsa Ceri Warnock "The Climate Change Regime: Efficacy, Compliance and Enforcement" (2004) 8 New Zealand Journal of Environmental Law 99.

[144] See Institute for Global Environmental Strategies, *Asian Perspectives on Climate Regime Beyond 2012* (2005) 84.

[145] Ibid, 30 (suggested by India).

has US support.[146] Emissions per capita is another possible threshold.[147] Another alternative is a staggered approach along the lines of the approach used for the Montreal Protocol on Substances that Deplete the Ozone Layer. Non-Annex I parties could be grouped according to their relative level of development, and each group assigned a future point in time at which their mitigation commitments would come into force.

If it was agreed that action-based or policy-based commitments were appropriate for developing countries, the flexibility inherent in these approaches would make a binding commitment threshold unnecessary. All countries could take on commitments at the same time, but to differing degrees appropriate to their national circumstances.

3. Conclusion on future commitments

A uniform per capita emissions limit for all countries would best achieve both equity between states and environmental effectiveness. It would give effect to the principle of common but differentiated responsibility, because developing countries could be given more time to come into compliance with their limits. To avoid excessive costs for developed countries, their emissions limits could initially be set above the uniform per capita limit and decrease towards the limit over time. There is also scope to tailor commitments to individual parties' circumstances while maintaining equity. The fact that Annex I countries currently have different emissions reduction targets shows that national circumstances are already factored into mitigation commitments. Beneficial features of the current regime such as emissions trading, the CDM, technology transfer and adaptation funding could and should be retained alongside uniform per capita emissions limits. On a practical note, the position of developing countries beyond 2012 needs to be finalised as soon as possible, so that if they are going to take on some form of mitigation commitments they can start preparing.

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[146] Daniel Bodansky, "Climate Commitments: Assessing the Options" in Pew Center on Global Climate Change (ed.), *Beyond Kyoto: Advancing the International Effort against Climate Change* (2003) pp. 37-60.

[147] Suggested in OECD, *Action against Climate Change - the Kyoto Protocol and Beyond* (1999).

C. Political limits on the ability to make the suggested improvements

As well as the difficulties related to achieving specific improvements discussed above, there are political limits to altering the regime that could restrict the ability to make any or all of the suggested improvements.

1. Difficulty in reaching consensus because of parties' clashing interests

The long, protracted nature of the Kyoto Protocol negotiations demonstrate how difficult it is to reach an agreement between a large number of countries that are all attempting to protect their own interests. Industrialised nations' key interests are cost-effectiveness of mitigation measures and maintaining their international competitiveness. Most developing nations are primarily concerned with the potential for climate change mitigation commitments to interfere with their development priorities. Some vulnerable low-lying countries are more worried about their ability to adapt to the effects of climate change. Nations that are heavily reliant on oil exports are apprehensive about the impact of decreased use of fossil fuels on their economies.

Just as there is no unified view amongst OECD countries on the best approach to climate change mitigation, developing countries can not be looked at as a homogenous group with a single view. It has been suggested that a successful climate change regime would need to incorporate more flexibility than the current regime does, so that each competing interest could be provided for as much as possible.[148]

2. Requiring too much financial commitment from developed countries

Many of the suggested improvements to the regime would require additional funding. Commentators often suggest additional funding would improve an aspect of the regime without suggesting where that funding would come from.[149] The implication is that it would come from developed countries. While developed countries' historical responsibility for emissions and greater wealth justify requiring them to provide funds toward the regime, there is a limit to how much they are willing to pay. Rather than simply expecting the governments of developed countries to pay more, the focus needs to shift to promoting and facilitating more private investment.

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[148] Institute for Global Environmental Strategies, *Asian Perspectives on Climate Regime Beyond 2012* (2005).

[149] See e.g. ibid.

3. Lack of a long-term target for the regime

It has been suggested that a long-term quantitative target for the climate change regime would make it easier to agree on future commitments.[150] A long-term target might reassure parties that the regime has a future, and thereby increase their motivation to comply. However, the lingering controversy about the magnitude of global warming and the parties' conflicting interests may make it impossible to agree on an appropriate long-term target. Short-term targets would still be needed, to ensure that parties do not delay implementing mitigation measures.

[150] Institute for Global Environmental Strategies, *Asian Perspectives on Climate Regime Beyond 2012* (2005); Ailsa Ceri Warnock "The Climate Change Regime: Efficacy, Compliance and Enforcement" (2004) 8 New Zealand Journal of Environmental Law 99.

V. PROCEDURES FOR ALTERING THE ADDITIONALITY REQUIREMENT OF THE CDM

The previous chapters illustrate that numerous shortcomings in the international climate change mitigation regime have been identified, and many improvements have been suggested. However, scant attention has been directed toward how these improvements should be achieved. Setting aside the political limits on the ability to make the suggested changes, discussed above, there is a need for consideration of the mechanisms that could be used to alter the regime. The possibilities are CoP or MoP (CoP/MoP) decision, adopting a new protocol, or amending the relevant instrument. For clarity, specific improvements discussed in the preceding chapter are used as examples in this chapter and the next, but the analysis and conclusions of each chapter are applicable to a number of the other improvements discussed.

Developing countries see improving the CDM as one of the most important issues for the future of the regime.[151] Utilisation of the CDM could potentially be increased significantly by relaxing or discarding the 'additionality requirement'. Currently, a CDM project activity is considered to meet the Article 12(5)(c) requirement that "[r]eductions in emissions… are additional to any that would occur in the absence of the certified project activity" if "anthropogenic emissions of greenhouse gases by sources are reduced below those that would have occurred in the absence of the registered CDM project activity."[152] This interpretation was adopted by the CoP and approved by the MoP. The 'additionality requirement' has been criticised as restricting utilisation of the CDM, and creating a perverse incentive that could restrict developing countries' pro-activeness in mitigating GHG emissions.

A possible replacement threshold is that a project must reduce emissions relative to the most common practice in the industry in developing countries at the time. That test would often be easier to satisfy than the 'additionality requirement' as set out in Article

[151] Institute for Global Environmental Strategies, *Asian Perspectives on Climate Regime Beyond 2012* (2005).

[152] Annex to Decision 17/CP.7 Modalities and procedures for a clean development mechanism, as defined in Article 12 of the Kyoto Protocol (FCCC/CP/2001/13/Add.2), at [43].

12(5)(c) of the Protocol and elaborated upon by the CDM Executive Board.[153] It would remove the perverse incentive created by the 'additionality requirement', because host countries' environmental policies and autonomous mitigation measures would cease to be relevant to the eligibility of proposed CDM projects.

What the appropriate mechanism for replacing the 'additionality requirement' with the 'common practice test' is depends on whether the 'common practice test' is inconsistent with Article 12(5)(c). If the 'common practice test' is inconsistent with Article 12(5)(c), adopting it would require amending the Kyoto Protocol. If the 'common practice test' is not inconsistent with Article 12(5)(c), the substitution may be able to be made by a decision of the MoP.

A. Is the 'common practice test' inconsistent with Article 12(5)(c) of the Kyoto Protocol?

Substituting the proposed 'common practice test' for the current 'additionality requirement' appears literally to be counter to the words of Article 12(5)(c) of the Protocol, because the 'common practice test' does not require that the project be shown to generate "[r]eductions in emissions that are additional to any that would occur in the absence of the certified project activity."

However, if the effect of the 'common practice test' is looked at, it can be viewed as a different interpretation of Article 12(5)(c). If a project has to reduce emissions relative to the most common practice in the industry in developing countries at the time, and the assumption is made that, in the absence of the project, the host country would have followed the common practice, then most projects that meet the 'common practice test' would also be 'additional' under Article 12(5)(c). They would generate a reduction in emissions additional to what would occur in the absence of the project even though many of them would not meet the stringent additionality requirements set out by the CDM Executive Board.[154] Thus, the substitution of the 'common practice test' for the current interpretation of the 'additionality requirement' would not be counter to the words of Article 12(5)(c).

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[153] See CDM-EB 29 Annex 5 – Revised tool for the demonstration and assessment of additionality, discussed above at p 20.

[154] See discussion above at page 20.

The 'common practice test' would allow a project that would not satisfy Article 12(5)(c) where the assumption that the host country would have followed the common practice in the absence of the project does not hold true (i.e. if the host country would have adopted environmentally sound technology even in the absence of CDM investment). As such projects are likely to constitute a small minority of CDM projects, and the majority of projects approved under the 'common practice test' *would* generate 'additional' reductions, the 'common practice test' can still be said to be an alternative, more permissive, interpretation of the Article 12(5)(c) requirement.

Thus, there are two tenable conceptions of the 'common practice test'. The first is that it is contrary to the words of Article 12(5)(c), so an amendment to Article 12(5)(c) would be required to adopt the 'common practice test'. The procedure for amending the Kyoto Protocol is discussed below. The second is that the 'common practice test' is merely a more permissive interpretation of Article 12(5)(c). Whether, on this interpretation, the 'common practice test' could be substituted for the current 'additionality requirement' by a decision of the MoP is considered below.

B. Amending the Kyoto Protocol

Procedures for amending the Kyoto Protocol are set out in its Articles 20 and 21. Any party may propose an amendment. Amendments can be adopted at a MoP. Parties must make every effort to reach consensus on proposed amendments, but amendments can be adopted by a three-fourths majority of the parties present and voting if consensus is unable to be reached. However, an amendment will not come into force for a party until ninety days after three-fourths of the parties, including that party, deposit an instrument of acceptance of the amendment. A party that does not accept an amendment will not be bound by it. No amendments have been made to the Kyoto Protocol thus far.

To substitute the 'common practice test' for the 'additionality requirement', the current words of Article 12(5)(c): "Reductions in emissions that are additional to any that would occur in the absence of the certified project activity" should be replaced with "reductions in emissions relative to the most common contemporary practice in the industry in developing countries."

C. Is replacing the 'additionality requirement' with the 'common practice test' within the mandate of the MoP?

The current interpretation of Article 12(5)(c), that a CDM project satisfies Article 12(5)(c) if "anthropogenic emissions of greenhouse gases by sources are reduced below those that would have occurred in the absence of the registered CDM project activity" was adopted in a CoP decision and approved by the MoP.[155] The MoP's adoption of a more specific interpretation of the words of Article 12(5)(c) was clearly within the MoP's mandate. Article 13(4) of the Kyoto Protocol empowers the MoP to "make, within its mandate, the decisions necessary to promote [the Protocol's] effective implementation." Article 12(4) makes the CDM "subject to the authority and guidance of the Conference of the Parties serving as the meeting of the Parties…" Providing specific guidance as to when a project will satisfy Article 12(5)(c) comes within the MoP's role under Article 12(4), and promotes the effective implementation of the Protocol, so is within the MoP's Article 13(4) power.

If it was within the MoP's mandate to provide guidance on how to interpret the Article 12(5)(c) requirement, and the 'common practice test' is merely a different interpretation of Article 12(5)(c), substituting one interpretation for the other must be within the MoP's mandate.

As discussed above, a methodology for demonstrating the additionality of a project was adopted by the CDM Executive Board.[156] Although this methodology is not the only acceptable way to demonstrate that a proposed project is 'additional' it would need to be discarded if the 'common practice test' were adopted. This could be done by a decision of the Executive Board, or by a decision of the MoP in its role as the "authority" of the CDM.

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[155] See Decision 17/CP.7 Modalities and procedures for a clean development mechanism, as defined in Article 12 of the Kyoto Protocol (FCCC/CP/2001/13/Add.2) and Decision 3/CMP.1 Modalities and procedures for a clean development mechanism, as defined in Article 12 of the Kyoto Protocol (FCCC/KP/CMP/2005/8/Add.1).

[156] See CDM-EB 29 Annex 5 – Revised tool for the demonstration and assessment of additionality, discussed above at p 20.

D. The MoP's decision-making process

Article 7(3) of the UNFCCC directs the CoP to adopt its own rules of procedure at its first session. Those rules must include decision-making procedures for matters not already covered by the UNFCCC.[157] Article 13(5) of the Kyoto Protocol decrees that the CoP's rules of procedure shall apply *mutatis mutandis* to MoPs, unless the MoP decides otherwise. The MoP has decided to adopt the same rules of procedure as the CoP.[158]

A draft set of rules of procedure was introduced at CoP-1,[159] but consensus could not be reached, and has not been reached at any of the subsequent CoPs. The draft rules have been applied at CoPs and MoPs, with the exception of the most controversial rule, Rule 42, which sets out required majorities for particular types of decisions. Rule 31 requires that two-thirds of the parties be present before any decision can be taken.[160]

Two alternatives are proposed for Rule 42, the decision-making rule.[161] Alternative A is that parties must make every effort to reach consensus on matters of substance, but if this is impossible, most decisions may be taken by a two-thirds majority of the parties present and voting. There are three exceptions: where the UNFCCC or the financial rules made pursuant to its Article 7(2)(k) provide otherwise, adopting a new protocol (which would require a three-fourths majority), and specified decisions relating to the financial mechanism (which would need to be taken by consensus). Alternative B would require that all substantive decisions be made by consensus, except that decisions on financial matters could be taken by a two-thirds majority. In the absence of agreement on Rule 42, all substantive decisions of the CoP/MoP have been taken by consensus.[162]

What "consensus" actually requires is not set in stone. The predominant view is that "consensus is distinct from unanimity" and "it is generally defined negatively to mean

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[157] UNFCCC, Article 7(4).

[158] The MoP decided at its first meeting that the draft CoP rules of procedure, with the exception of the controversial rule 42, should apply without alteration to MoPs (FCCC/KP/CMP/2005/8 Report of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol on its first session, held at Montreal from 28 November to 10 December 2005. Part One: Proceedings).

[159] The draft rules are contained in FCCC/CP/1996/2 Adoption of the Rules of Procedure.

[160] Rule 31 in FCCC/CP/1996/2.

[161] See Rule 42 in FCCC/CP/1996/2.

[162] See Joanna Depledge *The Organization of Global Negotiations: Constructing the Climate Change Regime* (Earthscan, 2005) 91.

that there are no stated or formal objections to a decision."[163] At CoP/MoPs, "consensus" has been treated as a malleable concept, and decisions have been taken by "consensus" where a small minority of parties were strongly opposed, but the Chairman of the meeting ruled that their opposition did not amount to a formal objection.[164] This appears to be a desirable approach in a situation where parties are keen to make their positions clear, but at the same time are loathe to be seen to be obstructing the decision-making process where a clear majority is in favour.[165]

As the 'common practice test' on its face appears inconsistent with the words of Article 12(5)(c), and could be seen as making it 'too easy' to gain approval for a CDM project, it might be difficult to achieve unanimity on a decision to adopt it. As long as only a small number of parties disagreed, and did not formally object, the decision could be taken by 'consensus'. Assuming consensus could be reached, another relevant consideration in deciding upon the appropriate mechanism for effecting the substitution is whether the MoP's decision would be binding.

E. Are MoP decisions interpreting Protocol provisions binding on parties?

Churchill and Ulfstein posit that where a body such as the MoP is expressly authorised to interpret provisions of its governing instrument by the instrument itself, its interpretations will binding the parties.[166] In contrast, where the governing instrument does not explicitly authorise the decision-making body to interpret it, any interpretation cannot derive binding force in the same way.[167]

The Kyoto Protocol does not explicitly authorise the MoP to interpret its provisions. However, it would be unduly technical to say that the MoP's interpretation of Article 12(5)(c) is not binding on parties given that the operation of the CDM is "subject to the authority and guidance" of the MoP. At any rate, as Churchill and Ulfstein recognise, if an interpretation adopted by the decision-making body is not contested by the parties, it

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[163] Ibid, 92.

[164] Ibid, 98-101.

[165] See ibid, 98.

[166] Robin R. Churchill and Geir Ulfstein "Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law" (2000) 94 The American Journal of International Law 623, at 641.

[167] Ibid.

is likely to be regarded as authoritative.[168] Because the MoP makes decisions by consensus, they would tend to be uncontested and therefore authoritative. Thus, an interpretation of Article 12(5)(c) adopted by the MoP is binding in a practical sense, even if not in a strict legal sense.

F. Summary and conclusions

If the parties agree that the 'common practice test' is not inconsistent with Article 12(5)(c), it could be substituted for the current 'additionality requirement' by a decision of the MoP. If the CoP reached consensus on the substitution, the decision would become binding in the sense that meeting the 'common practice test' would become a prerequisite to participation in the CDM.

If some of the parties think that the 'common practice test' is inconsistent with Article 12(5)(c), an amendment to Article 12(5)(c) would be needed to adopt it. Amending the Protocol is time-consuming. Proposed amendments must be notified at least six months prior to the CoP at which they will be considered.[169] Then an amendment will not come into force for a party until ninety days after three-fourths of the parties, including that party, accept it.[170] An amendment is legally binding on the parties that accept it.

If the 'common practice test' is not inconsistent with Article 12(5)(c), but consensus of the MoP cannot be reached, amendment by majority could be used to achieve the substitution. As parties are only bound by an amendment if they accept it, this approach risks creating divisions between parties, and making parties in the minority feel alienated.

If the substitution of the 'common practice test' for the 'additionality requirement' can be achieved by a decision of the MoP, that is preferable to amending the Protocol. MoP decisions can be made much more quickly and simply than amendments. The requirement that decisions be made by consensus ensures that all parties accept the decision, which preserves unity in the regime. In the climate change regime, where the parties have strong conflicting interests, it is desirable that all alterations are made by

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[168] See ibid.

[169] Kyoto Protocol, Article 20(2).

[170] Kyoto Protocol, Article 20(4).

consensus. So, if consensus cannot be reached on a proposed alteration, the alteration probably should not be made. Parties should be employing all of their diplomatic and persuasive skills to convince dissenting parties that a proposed alteration is in the interests of the regime, rather than imposing majority changes on a dissatisfied minority.

VI. PROCEDURES FOR IMPOSING ADDITIONAL OBLIGATIONS ON PARTIES

Many of the improvements to the regime discussed in Chapter IV would require the imposition of additional obligations on parties. One example that arose repeatedly, and has the potential to improve a number of aspects of the regime, is adopting specific funding obligations for Annex II parties. Annex II parties committed to providing financial resources to developing country parties,[171] but have not committed to provide any particular level of financial support. Imposing specific funding commitments on Annex II parties could bring into consideration the procedures for altering the UNFCCC or the Kyoto Protocol or both, depending on which fund the specific funding obligations pertained to. Therefore, the alteration procedures of both instruments are considered.

Neither the UNFCCC nor the Kyoto Protocol explicitly provides for the CoP/MoP to impose specific financial obligations on Annex II parties. Likewise, nowhere do the instruments explicitly say that the CoP/MoP can *not* impose specific financial obligations on Annex II parties. Analysis of the instruments provides an idea of the scope of the CoP/MoP's decision-making mandate, and whether it includes decisions that impose additional obligations on the parties. If the CoP/MoP's decision-making mandate allows the imposition of additional obligations on parties, the issue of whether such obligations are binding arises.

If the decision-making mandate does not encompass imposing additional obligations, specific funding commitments for Annex II parties could be adopted in the form of a protocol to the UNFCCC. The procedure and implications of adopting a funding protocol are discussed below.

A. The decision-making mandate of the CoP under the UNFCCC

The CoP is designated as the supreme body of the UNFCCC, with the power to "make, within its mandate, the decisions necessary to promote the effective implementation of the Convention."[172] The UNFCCC does not specify what the 'mandate' of the CoP is.

[171] UNFCCC, Article 4(3), (4) and (5); Kyoto Protocol Article 11(2)(a) and (b).

[172] UNFCCC, Article 7(2).

The CoP has made a number of important decisions on the implementation of the UNFCCC and Kyoto Protocol. The voluminous Marrakesh Accords are a good illustration.[173] At Marrakesh the CoP decided on, inter alia, the operational rules for the CDM[174] and the compliance mechanisms for the Kyoto Protocol.[175] The words of the UNFCCC and the number of important decisions made by the CoP so far suggest that the CoP's decision-making mandate is broad.

The wording of the provisions that deal with Annex II parties' funding obligations suggest that the CoP may have the power to decide on specific financial commitments. The provisions of the UNFCCC relating to funding use mandatory language.[176] For example, Article 4(3) states that the Annex II parties "shall provide new and additional financial resources to meet the agreed full costs incurred by developing country Parties in complying with their obligations under Article 12, paragraph 1." The wording of Article 4(3) suggests that the financial commitment made pursuant to it must be sufficient to meet developing countries' costs incurred in meeting their Article 12(1) commitments. Furthermore, Article 4(3) states that "[t]he implementation of these commitments shall take into account the need for adequacy and predictability in the flow of funds and the importance of appropriate burden sharing among the developed country Parties." These provisions appear to provide scope for the CoP to decide on specific contributions from Annex II parties that are adequate to cover the costs incurred by developing countries in meeting their obligations.

B. The decision-making mandate of the MoP under the Kyoto Protocol

Article 13(4) of the Kyoto Protocol requires the MoP to "keep under regular review the implementation of this Protocol and… make, within its mandate, the decisions necessary to promote its effective implementation." Like the corresponding provision for CoP, the MoP's "mandate" is not specified. Since the MoP's general decision-making power is expressed in identical language to the CoP's general decision-making power, it appears that the MoP's "mandate" is intended to be equally as broad as the CoP's.

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[173] The "Marrakesh Accords" are a record of the decisions made at CoP-7 at Marrakesh.

[174] FCCC/CP/2001/13/Add.2, Decision 17/CP.7 Modalities and procedures for a clean development mechanism, as defined in Article 12 of the Kyoto Protocol.

[175] FCCC/CP/2001/13/Add.2, Decision 24/CP. 7 Procedures and mechanisms relating to compliance under the Kyoto Protocol.

[176] See UNFCCC, Article 4 (3), (4), (5).

The provisions of the Kyoto Protocol that deal with Annex II parties' funding obligations suggest that the MoP may have the power to decide on specific financial commitments. As under the UNFCCC, mandatory language is used to describe the obligations.[177] For example, Article 11(2) states that Annex II parties "shall… [p]rovide new and additional financial resources to meet the agreed full costs incurred by developing country Parties in advancing the implementation of existing commitments…" Requiring Annex II parties' financial contribution to "meet the agreed full costs incurred by developing country Parties…" appears to provide scope for the MoP to impose specific funding obligations on the parties to ensure that requirement is met. The direction to "take into account the need for adequacy and predictability in the flow of funds …" in Article 11(2)(b) strengthens that impression.

C. Does the CoP/MoP's mandate extend to making decisions that impose additional obligations on parties?

Whether the CoP/MoP has the power to make decisions that impose additional obligations on the parties is not explicitly addressed in the UNFCCC or Kyoto Protocol. According to Churchill and Ulfstein, the powers of international institutions are usually set out in the agreement they are constituted under, but they may possess additional "implied powers" to allow them to achieve their objectives.[178] Churchill and Ulfstein believe that the doctrine of implied powers, while traditionally applied to international institutions, is equally applicable to the "autonomous institutional arrangements", such as the CoP and MoP, that have replaced international institutions in many modern multilateral environmental agreements (MEAs).[179] Ensuring that Annex II parties contribute adequate and specific funding would go towards achieving the objective of the climate change regime, and thus could be said to fall within the CoP/MoP's implied powers.

While the provisions of the UNFCCC and Kyoto Protocol discussed above and the doctrine of implied powers suggest that the CoP/MoP has the power to decide on

[177] See Kyoto Protocol, Articles 3(14), 11(2), 12(8), and 13(4)(g).

[178] Robin R. Churchill and Geir Ulfstein "Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law" (2000) 94 The American Journal of International Law 623, at 632-634.

[179] Ibid.

specific funding obligations for Annex II parties, other aspects of the regime suggest otherwise. The fact that the UNFCCC and the Kyoto Protocol provide mechanisms for their amendment implies that there are some decisions that must be made by amending those instruments, and cannot be made by a decision of the CoP/MoP. As discussed in the preceding chapter, alterations that are inconsistent with the words of one of the instruments could only be made by amending the pertinent instrument. There are other alterations that, while not inconsistent with the words of the instruments, must or should be made by amendment rather than by CoP/MoP decision. Imposing additional obligations on the parties where there is no express empowerment to do so in the governing agreement is one such situation.

Churchill and Ulfstein regard decision-making by CoPs on matters not expressly provided for in the governing agreement as unstable.[180] Such decisions could be challenged by disgruntled parties as ultra vires the CoP, or as attempts at amending the governing agreement without following the proper amendment procedure.[181] The UNFCCC CoP's general power to "make… decisions necessary to promote the effective implementation of the Convention"[182] may make it difficult to argue that any decision relating to the regime is ultra vires. However, experience under another MEA shows that even a general power to make decisions to promote the effective implementation of the regime and consensus decision-making may not be enough to make a decision safe from challenge.

The Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (BC-CoP) decided to prohibit the transboundary movement of hazardous waste from OECD to non-OECD member states.[183] Despite the decision being made by consensus, some parties subsequently contended it was not binding, because the general power of the BC-CoP to "undertake any additional action that may be required for the achievement of the purposes of this

[180] Ibid, at 640.

[181] Ibid.

[182] UNFCCC, Article 7(2).

[183] Basel Convention Conference of the Parties Decision II/12 (1994) (UNEP/CHW.2/30).

Convention"[184] did not include the power to alter parties' obligations.[185] In an attempt to rectify the situation, the BC-CoP proposed an amendment to the Convention incorporating the substance of the decision at its next meeting, but the amendment struggled to get sufficient support to come into force.[186] As the UNFCCC-CoP's general decision-making power is framed in similar terms to the BC-CoP's general decision-making power, if the UNFCCC-CoP made a decision which altered the parties' obligations, it could face the same criticism and undesirable controversy.

Another factor that suggests that the CoP/MoP's decision-making mandate may not include imposing additional obligations on the parties is that both the UNFCCC and the Protocol list as one of the CoP/MoP's functions to "[m]ake recommendations on any matters necessary for the implementation of [the instrument]."[187] This provision could be read as suggesting that there are some matters on which the CoP/MoP can only make recommendations and not decisions. To give effect to the recommendations, a new protocol would need to be adopted, or an amendment made, to the relevant instrument. Alternatively, the CoP/MoP's power to make recommendations could be intended as a less formal alternative, or preliminary step, to decision-making. Recommendations could be intended as a vehicle for raising matters for the consideration of the parties, with a view to making a decision on those matters at a later date. The CoP/MoP have not made use of recommendations so far, so a conclusion cannot be drawn on their function one way or the other.

Imposing additional obligations on parties is probably outside the CoP/MoP's decision-making mandate. It is unlikely that the parties would have intended to grant a decision-making power with such significant consequences for them and such imposition on their sovereignty without explicitly saying so. However, since it is possible that an ambitious party might attempt to put a decision on specific funding obligations for Annex II parties on the agenda of a CoP/MoP, it is relevant to consider how such a decision would be made by the CoP/MoP, and whether it would be binding.

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[184] Basel Convention, Article 15(5)(c).

[185] See Robin R. Churchill and Geir Ulfstein "Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law" (2000) 94 The American Journal of International Law 623, at 639.

[186] Ibid.

[187] UNFCCC, Article 7(2)(g); Kyoto Protocol, Article 13(4)(f).

D. The CoP/MoP's decision-making procedure for adopting specific financial obligations for Annex II parties

In the absence of agreement on the draft rules of procedure, the CoP and MoP have made all decisions by consensus. [188] Interestingly, one of the exceptions to consensus decision-making in Alternative B of Rule 42 of the draft rules of procedure is that decisions on financial matters could be taken by a two-thirds majority.[189] The reference to "financial matters" is somewhat ambiguous; it could mean all financial aspects of the regime, including the financial obligations of Annex II parties, or it could refer only to the financial affairs of the CoP and its subsidiary bodies. The latter meaning is almost certainly the intended one, given that Alternative A would require decisions relating to the financial mechanism of the regime to be made by consensus whilst allowing most other decisions to be taken by majority. Thus, it seems that regardless of whether Alternative A or B is eventually adopted, consensus would be required for decisions relating to the financial mechanism of the UNFCCC. At any rate, consensus would be required if a decision to impose specific funding obligations on Annex II parties were to be taken at the present time.

If a small number of parties disagreed with the imposition of specific financial obligations on Annex II parties, the decision could still be taken by 'consensus', unless the dissenters went so far as to formally object.

E. Would a CoP/MoP decision to impose specific funding obligations be binding on Annex II parties?

A CoP/MoP decision to impose specific financial obligations on Annex II parties would be worthless if the Annex II parties were not bound to their obligations. There is nothing in the UNFCCC or Kyoto Protocol to indicate directly whether a CoP/MoP decision that imposed new obligations on parties would be binding. The only explicit mention of the binding or non-binding nature of CoP/MoP decisions is in Article 18 of the Kyoto Protocol, which states that any compliance procedures or mechanisms entailing binding consequences must be adopted by an amendment to the Protocol. The explicit

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[188] See Joanna Depledge *The Organization of Global Negotiations: Constructing the Climate Change Regime* (Earthscan, 2005) 91.

[189] See Rule 42 in FCCC/CP/1996/2.

requirement for binding consequences to be adopted by amendment in the context of compliance could be read as implying that any decisions with binding consequences must be adopted by amendment, and therefore CoP/MoP decisions are not binding on parties. In accordance with this interpretation, Kiss asserts that "an international body can adopt binding resolutions only if it has been empowered by its statute to do so."[190] States tend to be reluctant to give too much decision-making power away, so Kiss' comment about international bodies seems equally applicable to decision-making bodies under international agreements such as the CoP/MoP. Further supporting this interpretation, Birnie and Boyle describe decisions made within the framework of MEAs that do not actually amend the MEA as "good faith commitment[s]" that are "non-binding."[191]

Alternatively, the Article 18 requirement that binding consequences be adopted by amendment could be a special requirement for compliance mechanisms, because compliance mechanisms tend to impose disadvantage on parties. On this interpretation, all other CoP/MoP decisions are binding without the need for amendment. However, the former reading is more consistent with academic thinking on international law. Furthermore, other aspects of the regime suggest that a decision by the CoP/MoP to impose specific financial obligations on Annex II parties would not be binding.

1. The amendment provisions suggest that CoP/MoP decisions are not binding

The regime provides for amendments to its instruments as well as decision-making by the CoP/MoP. Amending the instruments is a much more complicated and time-consuming process than CoP/MoP decision-making. The notification and acceptance requirements discussed above[192] mean the minimum time an amendment can take to come into force from when it was proposed is more than nine months. Then parties are only bound if they formally accept the amendment. The extra procedural safeguards placed on amendments suggest that amendments are the method intended to bind parties rather than CoP/MoP decisions.

2. The possibility of majority decision-making suggests that CoP/MoP decisions are not binding

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[190] Alexandre C. Kiss *Survey of Current Developments in International Environmental Law* (Morges, 1986).

[191] Patricia Birnie and Alan Boyle *International Law and the Environment* (2nd ed., Oxford University Press, 2002) 25.

[192] See p 37-38.

If Alternative A of Rule 42 were adopted (although this seems unlikely), it is possible that substantive obligations, other than financial obligations, could be undertaken by majority decision. The draft rules of procedure do not provide for any opt-out or objection procedure for parties that disagree with a majority decision. If a party disagreed with a CoP/MoP majority decision and refused to comply with it, that would reflect badly upon the party politically, but it is unlikely that it would amount to a breach of the UNFCCC. The "fundamental rule"[193] of international law that no obligation may be imposed on any state without its consent implies that even if the parties agreed that some CoP/MoP decisions could be taken by majority, unless they explicitly agreed that minority and non-voting parties were to be bound by majority decisions, parties could probably avoid being bound by decisions they did not agree with. The risk of such situations occurring, and generating conflict between the parties to the regime, is no doubt why some parties have steadfastly refused to countenance majority decision-making at the CoP/MoP. Moreover, it provides further justification for regarding CoP/MoP decisions as not legally binding. It would be undesirable for decisions to become binding only on the parties that agreed to them, but in the absence of an explicit provision that majority decisions will bind the minority, that would be the situation.

The Montreal Protocol gives its MoP the power to make adjustments to the schedules, including adjustments to the required reductions in production and consumption of ozone-depleting substances, by a two-thirds majority (if consensus cannot be reached).[194] It is explicitly stated that majority decisions bind all parties.[195] The express statement of the majority's power to bind the minority suggests that, in the absence of such a provision, substantive decisions taken by majority do not bind the minority. The absence of an equivalent provision in conjunction with Alternative A of the UNFCCC CoP/MoP decision-making rule suggests that CoP/MoP decisions are not intended to be binding.

Given that decisions of bodies like the CoP/MoP are usually regarded as non-binding in international law, and the implications that can be drawn from the provision for

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[193] See Patricia Birnie and Alan Boyle *International Law and the Environment* (2nd ed., Oxford University Press, 2002) 209.

[194] Montreal Protocol, Article 2(9)(a) and (c).

[195] Montreal Protocol, Article 2(9)(d).

amendment of the regime and the possibility of majority decision-making, it is appropriate to regard CoP/MoP decisions as not legally binding.

F. The safer option: adopting a new protocol to the UNFCCC

Adopting specific funding obligations for Annex II parties in the form of a protocol would be in accordance with the practice of the CoP/MoP under the regime so far. All of the significant new substantive obligations that have been adopted since the UNFCCC's inception were adopted in the form of the Kyoto Protocol, rather than by decisions of the CoP/MoP. This is probably because adopting a protocol has more demanding procedural requirements than CoP/MoP decision-making, so is seen as a more legitimate way to impose obligations upon parties than CoP/MoP decisions.

Like amendments, protocols must be communicated to the secretariat at least six months before the CoP at which their adoption will be considered.[196] The requirements for a protocol to enter into force are determined by the protocol itself.[197] Alternative A of Rule 42 of the draft rules of procedure would require a three-fourths majority to adopt a new protocol, but in the absence of agreement on the decision-making rules a protocol would need to be adopted by consensus, as the Kyoto Protocol was.

Commitments inscribed in a protocol would bind parties that ratified it. The protocol would need to include its own compliance mechanism, because the Kyoto Protocol's compliance mechanism only applies to specified compliance issues arising from its provisions.

G. Summary and conclusions

While the words of the UNFCCC and Kyoto Protocol provisions that deal with the CoP and MoP's decision-making powers and Annex II parties' financial obligations appear to provide scope for the CoP/MoP to impose specific financial obligations on the parties, a number of other factors suggest otherwise. The controversy resulting from the Basel Convention CoP's decision to prohibit the transboundary movement of hazardous waste from OECD to non-OECD member states demonstrates that CoP/MoP decisions that

[196] UNFCCC, Article 17(2).

[197] UNFCCC, Article 17(3).

alter parties' obligations may be unstable, even when they are made by consensus. Furthermore, CoP/MoP decisions that impose additional obligations on parties are not strictly binding. The appropriate vehicle for imposing specific financial commitments on Annex II parties is a new protocol to the UNFCCC, because protocols are perceived by the parties as a legitimate way to impose new binding obligations.

VII. CONCLUSION

Climate change is a global problem, and global participation is necessary to deal with it. It is critically important to retain and build upon the participation of developing countries, as their GHG emissions will tend to increase over the coming years, and could cancel out the effect of reductions by Annex I parties. To retain developing country participation, the regime needs to continue to embody the principle of common but differentiated responsibility, and maintain its explicit recognition that poverty alleviation and social development are the priorities of developing countries. More specifically, improvements to the CDM, increasing technology transfer and funding, and better preparation for adaptation would address developing countries' concerns. Furthermore, before developing countries will be prepared to undertake substantive mitigation commitments, Annex I countries' fulfilment of their commitments needs to be assured. Adopting stronger non-compliance measures would facilitate this.

Decisions by the Conference of the Parties or Meeting of the parties could be useful tools in improving the regime because change can be achieved more quickly and straightforwardly than amending the regime or adopting another protocol. The current practice of making decisions by consensus ensures that the positions of all parties must be catered for. CoP/MoP decisions are the optimum mechanism for procedural changes, and changes that are made to promote the effective implementation of the regime. As well as possibly relaxing the 'additionality requirement' of CDM project approval, CoP/MoP decisions could, inter alia, streamline the administration of the CDM, create a "multilateral technology cooperation fund", and provide for Designated National Authorities to suggest improvements to proposed CDM projects that would increase their sustainable development benefits to the host nation. However, the CoP/MoP's decision-making mandate does not extend to imposing additional obligations on the parties, and CoP/MoP decisions are not legally binding.

If decisions that alter parties' substantive obligations need to be made, adopting a new protocol is the appropriate mechanism. In addition to imposing specific funding commitments on Annex II parties, adopting a new protocol would be the appropriate

way to create a market mechanism for technology transfer and to impose substantive mitigation commitments on developing countries in the future.

When an alteration is inconsistent with the words of the UNFCCC or the Kyoto Protocol, an amendment to the pertinent instrument will be needed. Also, if binding consequences for non-compliance with Kyoto Protocol can ever be agreed upon, an amendment to the Protocol will be needed to supply their binding force.

The parties to the UNFCCC and Kyoto Protocol will need to negotiate new assigned amounts for Annex I parties for the next commitment period in the near future. These negotiations should be used as an opportunity to make further improvements to the regime, to encourage continuing participation and build political will to tackle the climate change problem.

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