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Introduction

This book is a guide to the rapid developments in international law in one of the most challenging and important areas of global concern: climate change. The climate system is the result of complex and dynamic interactions between the Earth's atmosphere, biosphere and oceans which human activities are beginning to throw out of balance. Atmospheric emissions of greenhouse gases (GHGs) have risen considerably due to fossil fuel burning, deforestation, livestock farming and other human activities. If current trends continue the concentration of greenhouse gases in the atmosphere will double by the end of the century. The scientific community has warned of the potentially serious effects of climate variability caused by increased concentrations. 'Business-as-usual' scenarios predict a rate of increase in global mean temperatures greater than that seen over the past 10,000 years.[1] Resultant climate impacts include sea level rise, changes in agricultural yields, forest cover and water resources and an increase in extreme events, such as storms, cyclones, landslides and floods.

These impacts will affect the environmental, social and vital economic interests of all states and have profound consequences for virtually every aspect of human society. The atmosphere knows no boundaries. Acting alone, no country can hope to arrest climate change, but collective action by sovereign states with disparate socio-economic and environmental circumstances is difficult. Yet environmental issues that require global cooperation challenge traditional paradigms of international law-making which are underpinned by concepts of state responsibility, sovereign equality and the paramountcy of state consent. A number of factors unique to climate change make such collective action more challenging still. These include potentially irreversible damages or costs, long planning

[1] IPCC, 2001a.

horizons, regional variations, time lags between cause and effect, scientific uncertainties and complexities inherent to climate change and geographical discrepancies between those who pollute and those subject to climate impacts.

Notwithstanding these difficulties, the international community has negotiated two major international treaties in less than a decade: the 1992 UN Framework Convention on Climate Change (FCCC) and the 1997 Kyoto Protocol (KP). Both treaties have been significantly elaborated through additional legal instruments and decisions adopted by the Climate Convention's governing body, the Conference of the Parties (COP), on the basis of developments in science and politics. The FCCC has been ratified by 189 Parties and thus enjoys near universal adherence. The Kyoto Protocol, widely regarded as one of the most innovative and ambitious international agreements ever agreed, has been ratified by over 120 parties, and is shortly expected to enter into force notwithstanding the decision by the United States of America not to proceed with ratification.

The international legal and institutional framework established by these legal instruments, and its relationship to other international issues, is as intricate and far-reaching as the climate problem itself. But it is also increasingly inaccessible to the wide range of affected interests. The underlying complexity of the climate problem and the sheer pace of scientific and legal developments are contributory factors. Newcomers to the climate issue, and even those familiar with the international climate regime, now find it difficult simply to follow the trail of documents and their significance for the interpretation and implementation of the two treaties negotiated to date. Rules governing aspects of the climate regime have become ever more technical and specialised, producing experts on individual topics but few who have an overall understanding of the complete picture. Additionally, documents alone give little insight into the functioning of the regime because it is difficult to glean the institutional practices, procedures and informal understandings that help define how the international climate process actually works. Transmission of such information from one generation of climate negotiators to the next is vital but time-consuming. Those with fewer financial and human resources suffer an additional disadvantage because they have limited access to documents and external expertise to draw upon in the first place.

Discussions with climate negotiators, and the broader constituency of climate policy-makers and stakeholders, including the professionals who advise them, convinced us that there was a need for an authoritative, balanced and readable guide to the rules, institutions and procedures of the international climate regime. The realisation that an ever greater share of our time was being taken up explaining the climate change regime to an increasingly diverse range of stakeholders and scholars, encouraged us to channel our expertise on climate issues

in the form of a guide which we ourselves felt we needed. The imminent entry into force of the Kyoto Protocol, marking the conclusion of a ten-year cycle of regime development and heralding the beginning of another, provided the final impetus.

This introductory chapter sets out the scope, structure and analytical framework underpinning this guide to the climate regime. To assist readers to navigate their way around the guide, section 2 below explains how readers can find information of interest to them in the easiest and quickest manner.

1 Scope

Political and legal control over human activities contributing to climate change is fragmented between states, international organisations and an array of other actors. Climate change thus necessitates concurrent policy-making at multiple levels of governance. This book is concerned primarily with the body of international rules concerning climate change applicable to states and the institutions and procedures states have created to oversee their implementation, enforcement and further development. The Convention and the Kyoto Protocol constitute the core of the international climate regime and are therefore the central focus of this book. But states also have rights and obligations in respect of the environment which arise from legal sources other than the Convention and the Protocol. Additionally, institutions such as the Intergovernmental Panel on Climate Change (IPCC) and the Global Environment Facility (GEF), which have a remit that is broader than climate change, also play a role. Thus the climate regime encompasses these additional elements.

Climate change is a high profile political issue because GHG emissions currently arise from virtually all aspects of the global economy. International regulation of GHG emissions thus impinges on sovereignty which states are reluctant to concede, as evidenced by protracted debates on the need for legally binding reductions targets, the legal personality of the COP, majority-voting decision-making and procedures for determining non-compliance. Such debates also evidence a huge variation in the level of understanding among delegations about the consequences that flow from particular legal characterisations. Disparities in legal knowledge and lack of access to expertise characterise most areas of global concern and in this respect, climate change is no different. This book is intended to help level one small part of the knowledge playing field. This purpose has helped us frame its scope: to cover in a comprehensive manner all aspects of the climate regime which a country delegate unfamiliar with the climate issue and with limited resources and time might need to understand to function effectively in the international climate negotiations.

Our focus on the international climate regime means we do not cover national legislation relating to climate change. Because the majority of FCCC Parties have, or are in the process of developing, national programmes and legislation concerning climate change, with many incorporating elements of the FCCC and KP into their national frameworks, a compendium of national legislation would be a helpful tool for those concerned with implementation, but it is beyond the scope of this book. Nor do we examine matters covered by private international law, which concerns the rules developed by states as part of their domestic law to resolve disputes between private persons involving a foreign element, such as choice of applicable law and whether a national court has jurisdiction.

All rules, whether national or international, influence and are moulded by prevailing political, economic and geographical circumstances. Reference to these circumstances, and other 'real world' constraints, can advance understanding of the rules, and we have referred to such matters where appropriate. We have, however, limited inclusion of such material as other sources provide detailed negotiating histories. To help newcomers, a brief overview of the historical development of the regime and its key features is provided in chapter 2.

2 Structure and user's guide

This section explains the structure of this book and navigational tips to help users find information they need as efficiently as possible.

Chapters 1–3 serve as important orientation points for those not familiar with international negotiating processes generally and with the evolution of the climate regime. Chapter 1 explains the international legal foundations on which the climate regime is built, including how international rules come to be in existence generally and the implications of different kinds of binding, non-binding and soft law rules, all of which are used in the climate regime. Chapter 2 provides a historical overview of the climate change problem and the main features of the FCCC and KP. Chapter 3 explains the role of various participants in the climate change regime, including governments, inter-governmental and non-governmental organisations, research and academic organisations, business groups and negotiating blocs.

Chapters 4–12 cover the substantive rules of the climate regime. Chapter 4 examines the Convention's ultimate objective and principles. Mitigation commitments lie at the heart of the climate regime and are examined in chapter 5. The achievement of these commitments is linked to use of flexibility mechanisms such as emissions trading, joint implementation and the clean development mechanism which are described in chapter 6. Chapter 7 covers two issues which are vital to the effective development of the regime: research and systematic

observation and cooperation on scientific information and education, training, public awareness and access to information. Chapter 8 explains commitments relating to adaptation to the adverse effects of climate change, and chapter 9 explains the issue of the impacts of response measures which concerns negative economic impacts one country might face when another takes mitigation action. Like other modern environmental treaties, the climate regime provides for capacity-building and the transfer of financial and technological resources to developing countries: these provisions are explained in chapter 10. The climate regime is at the forefront of developing non-confrontational mechanisms to monitor, verify and promote compliance with its rules. Chapter 11 explains the reporting and review provisions which underpin these processes, and chapter 12 describes the ground-breaking non-compliance mechanisms and procedures recently adopted by the regime.

Each of these substantive chapters is structured to cover all the rules relevant to a particular area, whether these are contained in the Convention or Protocol, because issue areas rather than article numbers correspond more closely to the underlying interests at stake. An article by article approach tends to fragment the substantive rules and processes that have emerged to track them. Because the Protocol is grafted onto the Convention but establishes a legally distinct regime, each chapter first explains the provisions of the Convention and then additional rules on that subject set out in the Protocol. Sections entitled 'rule development' describe the interpretation, guidance and further development of these rules agreed within the climate regime, usually in the form of COP decisions. This structure ensures legal clarity between the Convention and the Protocol, which is important because not all Convention Parties will become Parties to the Protocol, and also because there is a need to distinguish clearly between the legally binding rules set out in the texts of the Convention and the Protocol themselves and their subsequent iteration and elaboration as agreed by the COP through its decisions and practices. We have tried to keep the main discussion of the rules within the body of the text, with text boxes being largely devoted to providing historical and explanatory materials that might be of interest to some readers in need of additional background information.

Chapters 13–18 examine the institutions and procedures established by the regime to oversee implementation, enforcement and future development of its rules. Chapter 13 explains the mandate and working modalities of institutions directly established by the climate regime, including the role of the COP, the Kyoto Protocol's governing body, the Conference of the Parties serving as the meeting of the Parties (COP/MOP), and the various subsidiary bodies. Chapter 14 describes in detail the mechanics of climate negotiations, including the function and

procedures of various kinds of negotiating groups, which many newcomers find daunting and complex. Chapter 15 looks at how the climate regime considers scientific and technical input, including from the IPCC. Chapter 16 explains the budgetary and administrative aspects of the regime, including the role of the Secretariat in the smooth functioning of the regime. Chapter 17 examines the increasing number of linkages between climate change and other policy areas, including links with regimes dealing with ozone, biodiversity and trade. Chapter 18 sets out provisions in the Convention and the Protocol, as well as more broadly, that are relevant for the evolution of the climate regime beyond the current commitments set out in these instruments. The final chapter, chapter 19, concludes by addressing the nature of future challenges facing the regime as it evolves beyond the current framework.

Appendix I provides an alphabetical table of Parties, listing their regional, political and Annex I/non-Annex I groupings together with key statistics (GDP per capita, total CO_2 emissions and CO_2 emissions per capita). These have been included in one table for ease of reference. The technical and graphical fact sheets in Appendix II set out detailed factual information for forty countries that have accepted quantified commitments under the climate regime, known as 'Annex I Parties', including each country's current and projected emissions, as these are critical for understanding the implications of each country's mitigation commitments. Appendix III provides a table organised according to articles and COP decisions to help readers quickly track down treaty provisions and related COP documents. Readers can also make use of the subject index at the back of the book to find key words and issues. Finally, the bibliography provides information on all official documents and all secondary literature to which we have referred in the book. To keep the referencing system as short as possible in the main text, the full titles of official documents and COP decisions, which are in all cases set out in the reports of the COP adopted by each session, are listed in the bibliography.

3 Analytical framework

This section explains what we mean by key terms such as regime, rules and principles and how we have identified the applicable rules. It also explains the role of soft law in environmental regimes such as climate change because this is important for understanding, inter alia, the way in which we used the term 'rule development'.

Political scientists and, in recent years, international lawyers have begun to use the term *regime* to refer to the rules, regulations and institutions relevant to a particular subject area. In international relations a regime has been defined as 'a set of implicit or explicit principles, norms, rules and decision-making

procedures around which actors' expectations converge in a given area in international relations'.[2] A distinction is frequently made between principles and rules which prescribe norms relevant to the problem the regime addresses and those elements which deal with the more structural aspects such as institutions and decision-making processes. Of course, there is a close interplay between the substantive rules and the institutional and procedural 'tools' through which rules come to be implemented, enforced and further developed. We use the term *regime* here to refer to these normative rules together with the institutions and procedural tools established to oversee their implementation, development and enforcement.

There is general agreement that the term *norm* is a broad category covering any provision with prescriptive content and that the distinction between rules and principles relates to the specificity of the prescribed conduct.[3] *Rules* are more specific and seem to apply in an all-or-nothing fashion whilst *principles* denote more general standards of behaviour which might be consistent with a range of policy options.[4] In this book we have used the term *rule* as an umbrella term covering all types of legal norms. This is because labelling provisions as either rules or principles seems to prejudge, rather than explain, the crucial issues at stake: what is the scope and strength of the obligation under discussion and what legal consequences attach to particular provisions?

Binding legal rules entail international legal responsibility and a failure to comply can give rise to recourse to judicial proceedings. The sense of obligation, of being legally bound, distinguishes legal rules from other types of rules which states observe in their dealings with one another such as rules of politeness, convenience and goodwill.[5] Lawyers also tend to distinguish legal rules from rules of morality, which define how states or private persons ought to behave. Rules of morality appeal essentially to conscience rather than to enforcement by an external authority, as is the case with legal rules. The relationship between law and morality is complex. Although legal rules often reflect prevailing moral values and concepts, principles of morality must first have been derived from a valid legal source if they are to be recognisable as legally applicable to states. This is a particularly important point in the climate change context because developed and developing countries alike appeal to wider notions of social justice, equity and fairness in support of their positions, not all of which have a basis in existing law.[6]

Because the creation and enforcement of binding rules through treaties and customary international law, discussed below in the section on rule creation, is

[2] Krasner, 1982. [3] Krasner, 1982: p. 2. [4] Bodansky, 1993; and Sands, 1995b: p. 185.
[5] Oppenheim, 1996: p. 51. [6] See e.g. Claussen and McNeilly, 1998; Yamin, 1999.

problematic for many reasons, in recent years lawyers have also paid considerable attention to the role of legally non-binding norms, sometimes referred to as 'soft law', in the international system.[7] Soft law instruments typically include ministerial declarations, memoranda of understanding, resolutions of international conferences, action plans and decisions by conferences of parties established by treaties, such as the COP of the FCCC. Soft law instruments contain a variety of legal norms: some are highly prescriptive whilst others are open-ended, indeterminate and incapable of creating precise standards of conduct. Soft law instruments can become binding if accepted as such by states.

Many multilateral environmental agreements (MEAs) now combine a framework convention with accompanying protocol(s) and/or 'secondary' or 'delegated' soft law resulting from the statements and practice that develop around a treaty to provide guidance to the interpretation, elaboration or application of hard law, typically in the form of further decisions adopted by Parties.[8] Climate change is typical of this approach.[9] Thus understanding when, why and in what circumstances Parties to the Convention use particular types of legal instruments is crucial to understanding both the implications of the outputs of the regime and sometimes the power asymmetries underlying it.

There are many good reasons for increased use of soft law in the field of environment. Typically global environmental issues involve large numbers of states as well as private actors, and are likely to give rise to differentiated standards that need continual adjustment to respond to changing scientific knowledge and political circumstances – matters which are typically more difficult to accommodate within traditional forms of law-making. Soft law instruments by contrast provide flexibility and their use avoids time-consuming ratification requirements, enabling decision-making that is responsive, or helps 'road test' complex policy solutions to provide experience for negotiating firmer commitments. The diverse nature of the interests involved means that global environmental issues often raise equity issues and demands for social justice. In these situations, soft law instruments can act as a 'half-way' stage in environmental law-making processes, bridging law with policy to which states wish to adhere but which they are reluctant to enshrine in binding, highly prescriptive forms.

Soft law also has some disadvantages because it is difficult to work out when soft law becomes 'hard', binding law.[10] The resulting fuzziness does not always sit well with the need for legal certainty. Thus whilst the flexibility and fluidness of

[7] For a more detailed discussion of the function, role and status of soft law see Shelton, 2000.

[8] Chinkin, 2000: p. 27

[9] Chapter 18 describes provisions relevant to the evolution of the regime.

[10] Chinkin, 2000: p. 37.

soft law in overall terms helps the progressive development of international law, in particular instances it can also generate uncertainty as well as simply providing states with an opportunity to be seen to be doing something whilst avoiding any obligation actually to comply.[11]

Because of the important role different kinds of legal norms occupy in the climate regime, in this book we have examined all types of rules, institutions and procedures agreed as applicable to states, whether or not states consider them to be legally binding or soft law. Thus, in sections on 'rule development' we have referred to COP decisions which are generally taken to be non-legally binding in form. We have also explained widely agreed practices and procedures. In our view, a book which focused only on the rules states currently considered to be legally binding would fail to convey the full measure of what states have agreed to adhere to in their dealings with each other in the climate context. Additionally, in a new area of international concern such as climate change, rules are at differing stages of legal maturity and state practice is highly dynamic with regard to expectations of standards of state behaviour. Thus limiting our subject matter to legally binding rules or 'hard law' would result in exclusion of legal norms which could, in due course, come to be regarded as binding.

We are conscious that in a highly politicised area such as climate change, presenting the current rules, institutions and procedures is not an easy undertaking. We have tried to be as objective as possible in our assessment of what has been agreed and acknowledge that our estimate of consensus may not always coincide with the view of any single state or group of states. Accordingly, in some areas that are particularly contentious, we have opted to report the divergent views that exist rather than to accord privilege to one viewpoint, as doing the former would, in our view, promote a better understanding of the existing framework, however inchoate this might be.

4 Legal foundations and structures

The world's 6 billion people and most of its geographical regions are divided into some 200 separate political units called states. These states are sovereign, in the sense that they control the individuals, natural resources and territory subject to their jurisdiction. Sovereignty implies equality and thus no state legally recognises another as a superior authority. Other actors (individuals, groups, transnational organisations, multinational corporations, financial structures and media networks) work across national borders. They drive political agendas, educate public opinion, provide sources of expertise for rule

[11] Chinkin, 2000: p. 26.

development and assist with implementation to an ever-greater extent but they cannot adopt binding rules for states.[12]

States have found it increasingly convenient to create international organisations and entrust them with a certain degree of legal autonomy necessary for carrying out specific tasks to achieve common goals. Some international organisations are empowered to take binding decisions for their members, but legally all international organisations are essentially creatures under the control of the group of states that created them and could cease to exist should they so decide. The international legal order is thus comprised principally of sovereign and independent states, international organisations endowed by states with international legal personality and bodies such as the FCCC COP whose legal character is discussed in chapter 13.

Historically, the freedom of states to decide upon their internal set-up, national legislation and foreign policy was virtually unrestricted, giving states maximum freedom to pursue their self-interest. Over time, legal constraints emerged as states began to accept, on a voluntary and reciprocal basis, a variety of restrictions. International law was seen as a series of rules restricting the freedom of action of states. Individuals and other kinds of entities were to be regulated through the quite distinct and formally separate system of municipal law. Today international rules are no longer regarded merely as limitations upon states and there is increasing, but not universal, recognition that rules of international law establish foundations upon which the very rights of states rest. International law is seen, in other words, as validating or invalidating all legal acts or any other legal system and in this sense is widely regarded as being at the top of the legal pyramid.[13] Although most national systems require international law to be transformed into national statutes before national courts apply it, the relationship between international law and municipal legal systems is now more 'porous' and integrated.[14]

Interdependency is a defining characteristic of the modern world and international rules shape a significant aspect of our daily lives. But the sovereign equality of states, and the voluntary acceptance of international obligations, still underpins the modern conception of international law.[15] States have established a number of international organisations and vested them with limited legal powers sufficient to achieve particular common goals. But there is no central legislative body at the international level. And there is no mechanism to determine at what level – bilateral, regional or multilateral – international rules should be created, nor what issues should be addressed by states, and with what level of priority. Disparities in wealth, power and influence between states, as well as the nature of the environmental problem, all help determine whether an issue will

[12] Yamin, 2001. [13] Cassese, 2001. [14] Cassese, 2001: p. 164. [15] See Oppenheim, 1996.