

# 1 Introductory observations and approach

## 1 Context

During the 1990s, multilateral environmental agreements (MEAs) advanced to become the most prominent instrument of environmental law-making, resulting in approximately 1,000 MEAs as of the beginning of 2010.<sup>1</sup> While MEAs are multilateral treaties concluded under international law and may therefore be mistaken for static legal instruments, they frequently provide for the establishment of an institutional apparatus and specific processes which allow for their constant dynamic evolution. It has become a characterizing feature of MEAs that negotiations on specific commitments continue for years after the adoption of the MEA. The term ‘international regime’ describes MEAs, their institutions and processes and the norms evolving from them.<sup>2</sup> In many cases, the negotiations on the further evolution of international regimes are highly contentious and progress very slowly, even though they are expected to address time critical issues. Hence, this study provides a comprehensive analysis of the mechanisms and theoretical underpinnings underlying these evolutionary processes, for the example of the international climate regime. The analysis is intended to foster a better understanding of the complexity of evolutionary processes in general and more specifically to provide a theoretical framework to practitioners and scholars working on the development of potential approaches to facilitate the evolution of the international climate regime.

<sup>1</sup> See R. B. Mitchell, *International environmental agreements database project*, <http://iea.uoregon.edu/page.php?query=home-contents.php> (2 February 2013).

<sup>2</sup> P. W. Birnie, A. E. Boyle and C. Redgwell, *International law and the environment*, 3rd edn (Oxford University Press, 2009), p. 84.

It is based on the assumption, which will be established in Chapter 2, that law lies at the heart of international regimes and that the evolution of regimes through the creation of norms is a legal process. Therefore, this study applies existing general international legal theory to the specific case of the international climate regime in order to explain comprehensively the different options available for the creation of new norms.

The international climate regime, for example, illustrates the crucial role of norms in the evolution of international environmental regimes. By the end of 2009, the international climate regime received unprecedented public attention and public awareness, despite the fact that to date its contribution to slow global warming has been small.<sup>3</sup> From the beginning parties to the United Nations Framework Convention on Climate Change (hereafter: UNFCCC or Convention)<sup>4</sup> regarded the Kyoto Protocol<sup>5</sup> as only a first step in regulating greenhouse gases (GHGs). Therefore, parties to the Convention and its Kyoto Protocol initiated further negotiations in 2005 which were long expected to culminate in one or more new agreements in 2009.<sup>6</sup> Despite discouraging developments in the global economic and political context, the UN Climate Change Conference in Copenhagen (Copenhagen conference), which took place from 7 to 18 December 2009, was still expected to set milestones and pave the way for a strengthened international climate regime after 2012.<sup>7</sup> However, during the final days of the conference, hope turned into frustration. The conference concluded on the afternoon of 19 December 2009 after a dramatic night described, among others, as the ‘worst plenary ever’,<sup>8</sup> with an outcome, which fell short of all hopes. The Conference of the Parties to the United

<sup>3</sup> For the emission limitation and reduction targets required to limit global warming to 2° Celsius see M. Meinshausen, N. Meinshausen, W. Hare, S. C. B. Raper, K. Frieler and R. Knutti, ‘Greenhouse-gas emission targets for limiting global warming to 2°C’ (2009) 458, *Nature*, 1158–63.

<sup>4</sup> United Nations Framework Convention on Climate Change, I.L.M. 31, 1992.

<sup>5</sup> Kyoto Protocol to the United Nations Framework Convention on Climate Change, I.L.M. 37, 1997.

<sup>6</sup> C. Spence, K. Kulovesi, M. Gutiérrez and M. Muñoz, ‘Great expectations: understanding Bali and the climate change negotiations process’ (2008) 17, *Review of European Community & International Environmental Law*, 142–53 at 143.

<sup>7</sup> D. Bodansky, ‘The Copenhagen Climate Change Conference: a postmortem’ (2010) 104, *American Journal of International Law*, 230–40 at 230.

<sup>8</sup> Delegate of Saudi Arabia, UNFCCC Secretariat, *Webcast, closing plenary of COP 15/CMP 5, 19 December 2009*, [http://cop15.meta-fusion.com/kongresse/cop15/templ/play.php?id\\_kongresssession=2761&theme=unfccc](http://cop15.meta-fusion.com/kongresse/cop15/templ/play.php?id_kongresssession=2761&theme=unfccc) (02 February 2013).

Nations Framework Convention on Climate Change (COP) ‘took note’ of the Copenhagen Accord, which was a much less ambitious version of the outcome envisaged for the Copenhagen conference, and far from the kind of result required to meet even targets in the lowest risk ranges identified in global warming science.<sup>9</sup> The role of law had already faded into the background in the lead-up to the Copenhagen conference, when the ambitions of concluding a legally binding instrument at Copenhagen declined.<sup>10</sup> During the final plenary the president of the COP, Lars Løkke Rasmussen, oblivious of the rules of procedure, asked, ‘[f]our countries will oppose this. I am not familiar with the regulations in this system. You work by consensus, so this would not be sufficient?’<sup>11</sup> Perhaps a more fundamental problem was that the Copenhagen Accord was negotiated in an informal group to which only certain countries were invited, in a procedure which was not formally recognized or agreed within the official UNFCCC process. The conference, beset with myriad procedural issues, was close to a complete breakdown. A number of parties, with broad tacit support especially among developing country parties, openly accused the COP presidency of the violation of core UN principles.<sup>12</sup> This example illustrates that norms establish the foundation and framework of an international environmental regime, providing the necessary conditions for the political agreement and collective action required to address global threats and challenges.

In 2011, two years after the Copenhagen conference, the COP agreed to establish the Ad Hoc Working Group on the Durban Platform for Enhanced Action (ADP), and gave it the mandate to negotiate a ‘protocol, another legal instrument or an agreed outcome with legal

<sup>9</sup> M. Doelle, ‘The legacy of the climate talks in Copenhagen: Copenhagen or brokenhagen?’ (2010) 4, *Carbon and Climate Law Review*, 86–100 at 91.

<sup>10</sup> L. Massai, ‘The long way to the Copenhagen Accord: climate change negotiations in 2009’ (2010) 19, *Review of European Community & International Environmental Law*, 104–21 at 112; K. Kulovesi and M. Gutiérrez, ‘Climate change negotiations update: process and prospects for a Copenhagen agreed outcome in December 2009’ (2009) 18, *Review of European Community & International Environmental Law*, 229–43 at 240 and Spence, Kulovesi, Gutiérrez and Muñoz, ‘Great expectations’ (2008), 150.

<sup>11</sup> Prime Minister of Denmark and president of COP 15 and CMP 5, during the closing plenary of the CMP, 19 December 2009, see UNFCCC Secretariat, *Webcast, closing plenary of COP 15/CMP 5*.

<sup>12</sup> Letter of the representatives of Bolivia, Cuba, Ecuador, Nicaragua and Venezuela to the Executive Secretary of the UNFCCC and the Secretary General of the United Nations, dated 18 December 2009.

force' for adoption by the COP at its 21st session.<sup>13</sup> This means that the COP only allowed four years for the completion of negotiations – very little time considering the tremendous task and fundamentally differing views of the parties involved. The failure of parties to agree on the form of the expected outcome underscores the divergence in their positions, which the negotiations need to bridge. Considering how difficult this task will be, it is crucial to analyse and learn from the experience of the Copenhagen conference, and to develop a thorough understanding of the mechanisms underlying the creation of norms in international environmental regimes in general and the climate regime in particular.

## 2 Relevance, aim and methodology of this study

This study begins with a legal perspective on international environmental regimes which provides the basis for an analysis of the processes of norm-creation in the international climate regime in later chapters. Existing studies of international environmental regimes focus mainly on their founding treaties, the MEAs themselves and, academically, the law of MEAs is covered mainly by general publications on international environmental law.<sup>14</sup> While a number of studies exist which address specific legal aspects of international environmental regimes,<sup>15</sup> only a

<sup>13</sup> Decision 1/CP.17, paragraph 2 and 4, see UN Doc. FCCC/CP/2011/9/Add.1, *Report of the Conference of the Parties on its seventeenth session, held in Durban from 28 November to 11 December 2011. Addendum. Part two: Action taken by the Conference of the Parties at its seventeenth session* (2012).

<sup>14</sup> See for example U. Beyerlin and T. Marauhn, *International environmental law* (Oxford, Portland, OR: Hart, Beck, 2011); Birnie, Boyle and Redgwell, *International law and the environment* (2009); A. Kiss and D. Shelton, *International environmental law*, 3rd edn (Ardsley, NY: Transnational Publishers, 2003); V. P. Nanda and G. Pring, *International environmental law for the 21st century* (Ardsley, NY: Transnational Publishers, 2003) and P. Sands, *Principles of international environmental law*, 2nd edn (Cambridge University Press, 2003).

<sup>15</sup> For the question of the legal nature of COP decisions see for example J. Brunnée, 'COPing with consent: law-making under multilateral environmental agreements' (2002) 15, *Leiden Journal of International Law*, 1–52 and A. Wiersema, 'The new international law-makers?: Conferences of the Parties to multilateral environmental agreements' (2009) 31, *Michigan Journal of International Law*, 231–87. For the legal status of convention secretariats see B. Desai, *Multilateral environmental agreements: legal status of the secretariats* (Cambridge, New York: Cambridge University Press, 2010). On institutions created by MEAs see also D. M. Johnston, 'Systemic environmental damage: the challenge to international law and organization' (1985) 12, *Syracuse Journal of International Law and Commerce*, 255–82; W. Lang, 'Diplomacy and international environmental law-making:

few authors have attempted to analyse the structures, mechanisms and processes of international environmental regimes comprehensively from a legal perspective.<sup>16</sup> Even in practice, the role of law in the evolution of international regimes is in many cases only mentioned in the context of mechanisms to enhance compliance with agreed provisions or the drafting of final clauses for new legal instruments.<sup>17</sup> Besides these 'legal issues', the discourse on negotiations under international regimes and related processes is mainly dominated by political considerations and international relations theory.<sup>18</sup> However, as international environmental regimes develop over time, practice evolves based on the express provisions of their founding treaties, sometimes even beyond what was originally envisaged. This study therefore aims at providing a more comprehensive legal perspective on international environmental regimes, not only on MEAs. To develop this perspective, insights from international relations theory are used to complement legal theory. They inform a broader understanding of the concept of international environmental regimes and the context in which legal norms in these regimes exist. The contribution of international

some observations' (1992) 3, *Yearbook of International Environmental Law*, 108–22; H. Ott, *Umweltregime im Völkerrecht: Eine Untersuchung zu neuen Formen internationaler institutionalisierter Kooperation am Beispiel der Verträge zum Schutz der Ozonschicht und zur Kontrolle grenzüberschreitender Abfallverbringungen*, *Völkerrecht und Außenpolitik* (Baden-Baden: Nomos, 1998), vol. 53; R. R. Churchill and G. Ulfstein, 'Autonomous institutional arrangements in multilateral environmental agreements: a little-noticed phenomenon in international environmental law' (2000) 94, *American Journal of International Law*, 623–59 and T. Gehring, 'Treaty-making and treaty evolution', in D. Bodansky, J. Brunnée and E. Hey (eds.), *The Oxford handbook of international environmental law* (Oxford University Press, 2007).

<sup>16</sup> For example, G. Bankobesa, *Ozone Protection: The International Legal Regime* (Utrecht: Eleven, 2005) and Ott, *Umweltregime in Völkerrecht*.

<sup>17</sup> For non-compliance mechanisms of international environmental regimes see U. Beyerlin, P.-T. Stoll and R. Wolfrum (eds.), *Ensuring compliance with multilateral environmental agreements: a dialogue between practitioners and academia*, *Studies on the law of treaties* (Leiden, Boston, MA: Martinus Nijhoff, 2006), E. M. Mrema, 'Implementation, compliance and enforcement of MEAs: UNEP's role', in M. Berglund (ed.), *International environmental law-making and diplomacy review* (University of Joensuu, 2005), p. 125 and C. Redgwell, 'Multilateral environmental treaty-making', in V. Gowlland-Debbas (ed.), *Multilateral treaty-making: the current status of challenges to and reforms needed in the international legislative process*, *Nijhoff Law Specials* (The Hague: Martinus Nijhoff, 2000), vol. 47, p. 106.

<sup>18</sup> See for example the negotiations for a post-2012 climate regime leading up to and at the Copenhagen conference, in which negotiating groups on various issues were established, including one on 'legal matters', which rarely even met. See Kulovesi and Gutiérrez, 'Climate change negotiations update' (2009), 231 and Massai, 'The long way' (2010), 111 and 116.

relations theory to the understanding of international regimes, which traditional legal scholarship does not provide, consists largely of theories on the reasons and forms of cooperation and the options for improved cooperation.<sup>19</sup>

The main intention of this study is to analyse and ascertain the role of law within the dynamic function of international environmental regimes, also described as their ability to evolve over time. It will be argued that this function is inherently legal and comprises the creation of new norms or the advancement of existing ones. Thus, to analyse these processes this study will link them to the body of general international legal theory. The resulting theoretical framework is based on the relationship between sources of norms and fundamental, underlying theories of international law, on the one hand, and between sources and different types of norms, on the other. It shows that the establishment of certain sources of norms depends on a change in the fundamental theory of international law. Applying the theoretical framework to a practical example, this study provides an overview of the options available for norm-creation in the international climate regime. It will be argued that the international climate regime is mainly based on a positivist understanding of international law and that therefore, in the short run, the options for norm-creation are limited to sources associated with this understanding of international law. The theoretical framework will be used, in particular, to evaluate different concepts and proposals for the creation of new norms or the advancement of existing norms that evolved, for example, in the context of the negotiations for a post-2012 international climate regime. Some scholars have acknowledged that international environmental regimes require dynamic development and continuous adjustment to changing circumstances, but that their parties struggle to agree to new norms. Therefore, they have provided studies on the development of more flexible norm-creating processes and presented a theoretical basis and legal rationale for a more dynamic legal system – in other words ‘creative legal engineering’.<sup>20</sup> However, the international climate regime shows that these attempts to advance the evolutionary processes within international environmental regimes have not yet been successfully implemented in practice. An analysis

<sup>19</sup> K. W. Danish, ‘International relations theory’, in D. Bodansky, J. Brunnée and E. Hey (eds.), *The Oxford handbook of international environmental law* (Oxford University Press, 2007), p. 206.

<sup>20</sup> R. Lefeber, ‘Creative legal engineering’ (2000) 13, *Leiden Journal of International Law*, 1–9 at 1.

of such proposals from the perspective of general international law provides a better understanding of their potential role in international environmental regimes. The general theoretical framework developed in this study may also serve as a basis for studies in different international environmental regimes, thereby reducing the necessity to reinvent the wheel<sup>21</sup> for each regime. Thus this study contributes to the academic literature on international environmental regimes as it attempts to illustrate the relationship between new approaches to law-making under international environmental regimes and different concepts of international law, revealing their potentials and risks. As Baxter states, '[t]he lawyer is indeed a social engineer and in that role, he must be able to invent or to produce machinery that will assist in the resolution of disputes and differences between the States. He must be prepared to fine-tune the law, to exploit its capacity for adaption to the needs of the parties, and to promote movement and change.'<sup>22</sup>

This study applies the theoretical framework described in the last section to a concrete practical example, the international climate regime.<sup>23</sup> It is thereby intended to illustrate the crucial role of law in the development of possible solutions to the fundamental problems in the evolution of this regime, which were revealed at the Copenhagen conference. Frequently, the participants in a specific international regime focus on the development of practical solutions and, as noted in the context of the international trade regime, they react to questions about legal theory 'as fascinated by that issue as birds ... by ornithology'.<sup>24</sup> Thus, this study aims to bridge the gap between the practical application of international environmental law and its foundations

<sup>21</sup> G. Palmer, 'New ways to make international environmental law' (1992) 86, *The American Journal of International Law*, 259–83 at 263.

<sup>22</sup> R. R. Baxter, 'International law in "her infinite variety"' (1980) 29, *International and Comparative Law Quarterly*, 549–66 at 566.

<sup>23</sup> 'Standard legal scholarship is typically directed towards a judge, and occasionally to a legislator, administrator, or equivalent public decision-maker', see E. L. Rubin, 'The practice and discourse of legal scholarship' (1988) 68, *Michigan Law Review*, 1835–905 at 1850, legitimizing non-academic addressees of academic legal studies.

<sup>24</sup> F. Roessler, 'The agreement establishing the World Trade Organization', in J. H. J. Bourgeois, F. Berrod and E. Gippini Fournier (eds.), *The Uruguay Round results: a European lawyer's perspective*, The Bruges conferences (Brussels: Europ. Interuniv. Press, 1995), No. 8, p. 69. At the same time it should be noted that legal scholarship especially in international law enjoys a significant impact on the practice of creating and defining law, see U. Fastenrath, *Lücken im Völkerrecht: Zu Rechtscharakter, Quellen, Systemzusammenhang, Methodenlehre und Funktionen des Völkerrechts*, Schriften zum Völkerrecht (Berlin: Duncker & Humblot, 1991), vol. 93, p. 124.

in general international legal theory, thereby providing enhanced legal clarity.<sup>25</sup> Between the two methodological categories of legal scholarship – questions of doctrine or prescription – the study is therefore more focused on a question of doctrine, examining the legal mechanisms which govern the international climate regime, rather than a question of prescription, which would ask which law should best govern this subject area.<sup>26</sup>

While this study intends to address the specific case of the international climate regime, this practical example also helps to provide the context and practical circumstances in which international environmental regimes emerge. Legal scholars are considered as ‘participants in, not just students of, the legal system’s practices’.<sup>27</sup> To provide the necessary context for the legal analysis, an overview of the history and development of negotiations in the international environmental regime is included in Chapter 3.<sup>28</sup>

The international climate regime was selected as an example for this study due to its prominence among international environmental regimes. While comparisons are beyond the scope of this study, the Kyoto Protocol is particularly appropriate for present purposes as it is widely recognized as the strongest and possibly the most progressive legal instrument in the MEA context. At the same time, as reflected in the events of the Copenhagen conference, parties in the international climate regime have grappled with fundamental legal issues in ways other MEAs have not. With nearly universal participation, the international climate regime enables its parties to negotiate on a multitude of complex, interrelated issues with immense financial implications. While some authors suggest that an examination of other international environmental regimes would be more worthwhile, as the international climate regime already receives significant attention,<sup>29</sup> the international climate regime with its

<sup>25</sup> For a discussion of problems arising from a lack of legal clarity see Ott, *Umweltregime im Völkerrecht* (1998), vol. 53, p. 34.

<sup>26</sup> Danish, *International relations theory* (2007), p. 206.

<sup>27</sup> J. Goldsmith and A. Vermeule, ‘Empirical methodology and legal scholarship’ (2002) 69, *The University of Chicago Law Review*, 153–67 at 154. See also W. Lang, ‘Die Verrechtlichung des internationalen Umweltschutzes: Vom ‘soft law’ zum ‘hard law’ (1984) 22, *Archiv des Völkerrechts*, 283–305 at 302.

<sup>28</sup> The description of the international climate regime is based on selected secondary literature, exchanges with key actors in the field and the experience of the author, who participated in the negotiations leading up to and at the Copenhagen conference as observer on different delegations.

<sup>29</sup> T. Gehring and S. Oberthür (eds.), *Internationale Umweltregime: Umweltschutz durch Verhandlungen und Verträge*, 1st edn (Opladen: Leske & Budrich, 1997), p. 10.



unprecedented scope and its interesting recent developments appears as the most appropriate object of this study. It reflects the struggle to integrate the environmental, economic and social dimensions on an unprecedented scale in a meaningful way and has the potential to pave the way towards a 'green economy', as is promoted by various actors in the field.<sup>30</sup> Consequently, the international climate regime may serve as a role model for future developments under international environmental regimes, because, as Lang states, 'treaty-making means – by necessity – learning from past successes and failures'.<sup>31</sup>

### 3 Structure

Chapter 2 following these introductory remarks is intended to establish an understanding of the need for international cooperation on international environmental issues and describes the development of international environmental regimes as a form of such cooperation. The role of international law in establishing MEAs as a basis for cooperation is illustrated, followed by a discussion of the role of institutions in the implementation and more dynamic evolution of MEAs using concepts from international relations theory. The notion of international environmental regimes is introduced and discussed from the perspective of regime theory and international law, establishing international environmental regimes as 'systems of norms'.

Chapter 3 of this study summarizes the history and status of the international climate regime. Following a brief description of the scientific basis of global warming, early developments and the negotiations and content of the UNFCCC and the Kyoto Protocol, as well as the development of the international climate regime, are illustrated. The Bali mandate, which followed the adoption of the Kyoto Protocol and the negotiation of the 'Kyoto rule book' (Marrakech Accords) and led to the failed Copenhagen conference, is also summarized. The chapter includes a description of the Copenhagen conference and its results and concludes with the status of negotiating processes after the UN climate conference in Doha held in December 2012.

<sup>30</sup> See for example the announcement of the 'green new deal' by Achim Steiner, Executive Director of the United Nations Environment Programme, P. Eccleston, 'UN announces green "New Deal" plan to rescue world economies', *The Daily Telegraph*, 22 October 2008.

<sup>31</sup> Lang, 'Diplomacy and international environmental law-making' (1992), 110.

In Chapter 4, the concept of effectiveness of international environmental regimes is addressed. After a brief general discussion, relevant theoretical models are applied to the international climate regime. 'Robustness' is given special consideration as an important criterion for effectiveness of the international climate regime. This chapter is intended to establish a link between the international climate regime as a system of norms, its ability to evolve over time, and mechanisms to create new or further develop existing norms. Chapter 5 considers international environmental regimes as normative systems. It examines the relationship between norms, sources of norms and the general theory of international law underlying these sources. The chapter discusses these elements generally and concludes with the development of a theoretical framework for the examination of different theories for the development of new norms.

In the subsequent chapters, the theoretical framework is applied to the international climate regime. Chapter 6 develops a methodology to determine the underlying theories of international law on which the international climate regime is based. In Chapter 7, the sources of international law considered in the negotiations for a post-2012 regime leading up to and at the Copenhagen conference are analysed. Chapter 8 reviews the decisions of the Compliance Committee of the Kyoto Protocol. Based on the analysis in Chapters 7 and 8, the sources of international law and the underlying theory of international law in the international climate regime are determined.

Chapter 9 applies the theoretical framework developed in Chapter 5 to different proposals for facilitating the process of norm-creation in the international climate regime. Rooting them in the theoretical framework of international law and comparing them with the established status quo of the international climate regime provides a clearer understanding of the requirements for successfully implementing them within the international climate regime and their practical feasibility. Based on these insights, a way forward for the international climate regime is suggested and complemented with relevant developments under the international climate regime from 2010–2012.