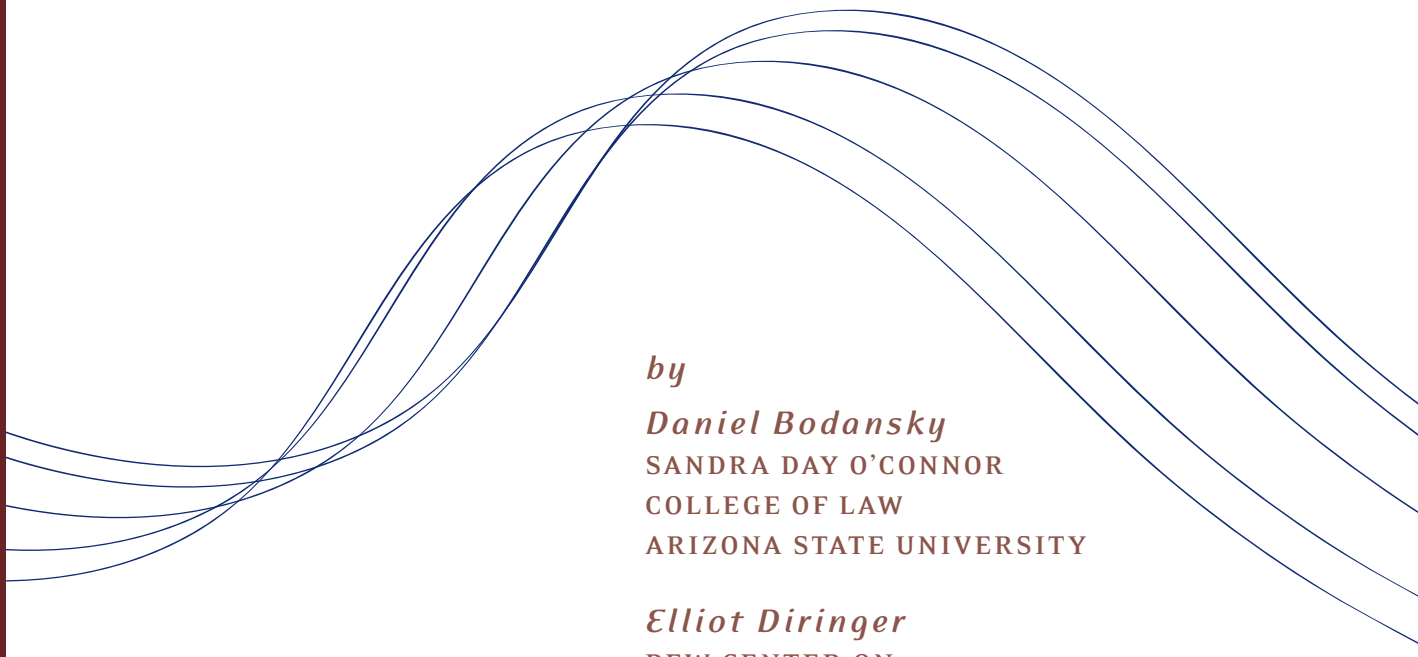
ADVANCING THE INTERNATIONAL EFFORT AGAINST CLIMATE CHANGE

THE EVOLUTION OF MULTILATERAL REGIMES: IMPLICATIONS FOR CLIMATE CHANGE



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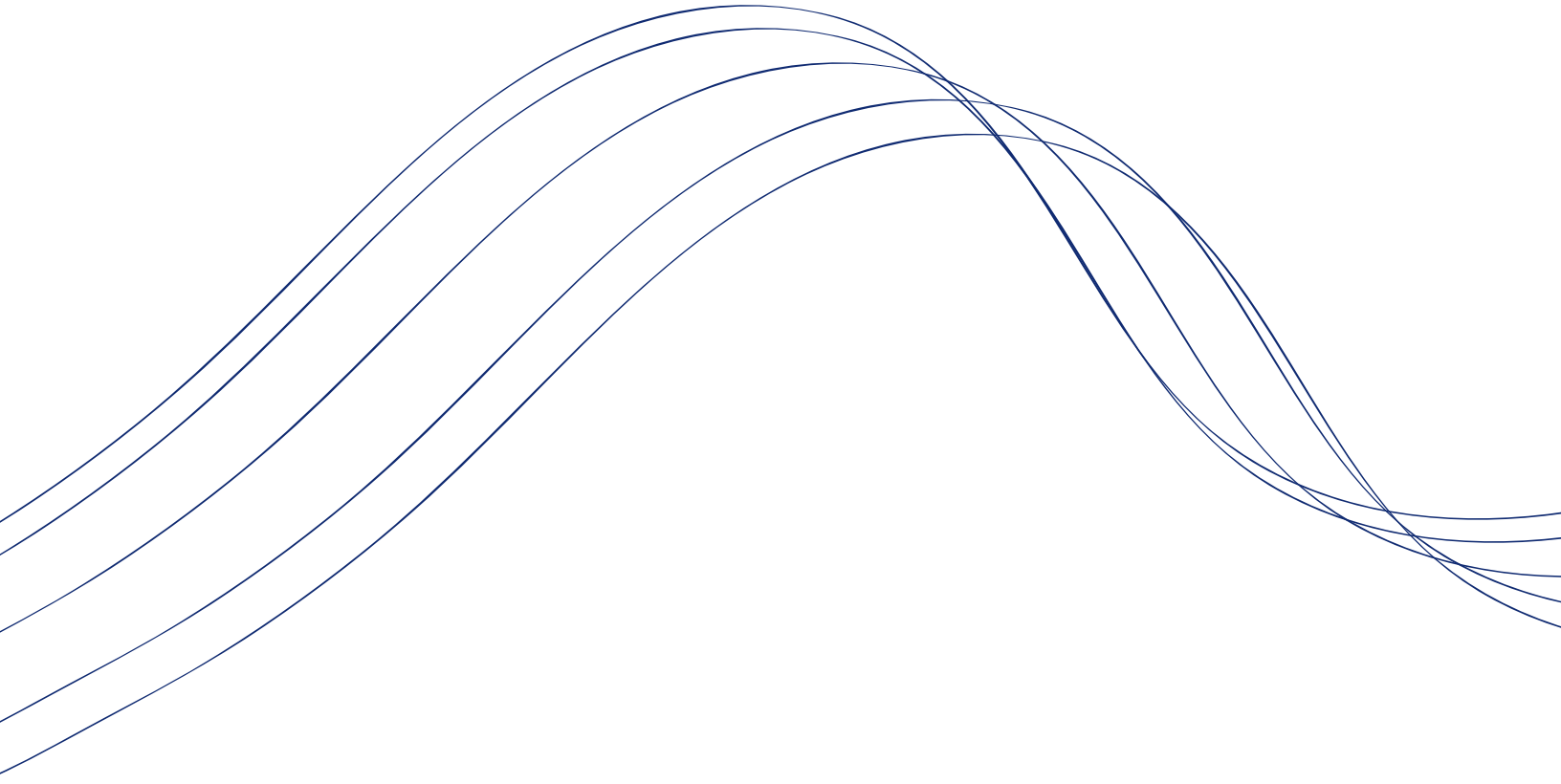

THE EVOLUTION OF MULTILATERAL REGIMES: IMPLICATIONS FOR CLIMATE CHANGE

Prepared for the Pew Center on Global Climate Change

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Introduction

The 2009 Copenhagen climate summit may in retrospect prove a critical turning point in the evolution of the international climate change effort. For a decade and a half, the principal aim under the U.N. Framework Convention on Climate Change (UNFCCC) had been to establish, and then to extend, a legally-binding regime regulating greenhouse gas (GHG) emissions. Despite late efforts to temper hopes for Copenhagen, the general expectation was that the summit would carry forward this process by producing a legally-binding outcome. The result, instead, was the Copenhagen Accord, a non-binding agreement that captured political consensus on a number of core issues but in the end was not formally adopted by the official Conference of the Parties (COP).

Copenhagen's "failure" has led many in and outside governments to begin rethinking the best way to mobilize an effective international response to climate change. To be certain, many parties remain fully committed to achieving new legally-binding commitments as quickly as possible; some are looking to do so at the 17th Conference of Parties (COP-17) to be held in 2011 in South Africa, or at Rio+20, the summit to be held in 2012 to commemorate the 20th anniversary of the Earth Summit in Rio de Janeiro. But many others are coming to believe that the path to a new legally-binding agreement will be longer and more incremental. In this view, the process of constructing a post-2012 international climate architecture will involve a gradual process of evolution.

U.N. Secretary General Ban Ki-moon, who had been among the most ardent voices for a comprehensive binding outcome in Copenhagen, has in its aftermath focused more on the need for "tangible progress" in specific areas.[1] Similarly, Christiana Figueres, the newly appointed UNFCCC Executive Secretary, has eschewed the "big bang theory" of climate treaty-making in favor of "incremental steps" that gradually strengthen the global effort.[2]

An evolutionary path is, in fact, quite common in multilateral regime-building. While the progression of every regime is unique, reflecting its particular policy needs and political constraints, broad patterns can be seen. Few regimes spring forth wholly formed. Generally, they grow over time, becoming broader, deeper and more fully integrated as parties gain confidence in one another, and in the regime itself.

What a more incremental approach would imply in the case of climate change is not necessarily clear, however. Short of a legally-binding agreement, what types of international arrangements are most urgent

or effective? Which of these can or should be pursued through the UNFCCC and which might be more productively pursued in other international forums? Is it critical that we know now the form of legally-binding agreement we aspire to—must it, for instance, include the Kyoto Protocol—or can that unfold over time?

This paper starts to explore these and related issues. It argues that a comprehensive and binding global agreement has strong virtues, and should be the ultimate goal, but that in working toward that end, parties should focus their efforts for now on concrete, incremental steps both within and outside the UNFCCC. The paper proceeds as follows: First, it examines why international regimes often evolve gradually over time, rather than emerging all at once. Next, it unpacks the various dimensions along which international regimes evolve. Then, it examines how the climate change regime has evolved to date. Finally, it outlines several different lines along which the climate change regime might evolve in the future.

Of course, an evolutionary process is by definition gradual and will take time. Given the urgency of addressing climate change, there is no guarantee that this process will reduce emissions quickly enough to avert catastrophic climate change. If a more rapid process were possible, it would be worth pursuing. The paper does not argue that an evolutionary approach is best; rather, it concludes that, at present, an evolutionary process is politically the most promising way forward.

I. How and Why International Regimes Evolve

International regimes rarely emerge in a single step, fully formed. Instead, a regime—as well as the broader set of agreements and institutions addressing an issue area, often referred to as a "regime complex"[3]—typically evolves over time. The world trade regime, for example, looks very different now than it did in the 1950s and 1960s. Initially, the General Agreement on Tariffs and Trade (GATT) was adopted only provisionally, its legal basis was unclear, and it did not establish any formal international institution or provide for dispute settlement. Today, the World Trade Organization (WTO) is an established international organization, with a clear legal basis and a highly-developed dispute settlement system. Similarly, the European human rights system began as a relatively weak institution, with many countries not accepting the compulsory jurisdiction of the European Court of Human Rights or the right of individuals to submit complaints. Today, the European human rights system has emerged as a powerhouse, with all member states accepting the right of individual petition and the compulsory jurisdiction of the Court, a consolidated and streamlined institutional structure and procedure, and a heavy caseload.

There are many reasons why international regimes often develop in an evolutionary manner. First, political consensus about whether a problem exists—and, if so, how to address it—often takes considerable time to emerge. When states adopted the Long-Range Transboundary Air Pollution Convention (LRTAP) in 1979, there was little agreement about the severity of the acid rain problem or the need for a strong regulatory response. So, in lieu of commitments, LRTAP provided for monitoring and scientific research, which helped reduce uncertainty and convince states about the need for action, paving the way for the eventual adoption of detailed protocols addressing the various pollutants that contribute to acid rain.

Second, an evolutionary process allows for trial and error. States can see whether a particular policy approach works before deciding what to do next. For example, they can set standards on a voluntary, non-binding basis, before deciding whether to convert the voluntary regime into a binding one. This was how the regimes addressing exports of hazardous wastes and chemicals evolved. Initially, states established systems of prior informed consent on a voluntary basis, through guidelines and a code of conduct; later, they used these voluntary systems as the basis to develop legally-binding treaties.

Third, in environmental regimes, there is a particular need for flexibility and evolution, because our understanding of problems is likely to change as science and technology develop. So regimes need to be able to respond in a flexible manner. For example, the Montreal Protocol on Substances that Deplete the Ozone

Layer contains a flexible adjustment procedure to ratchet up the level of control measures on ozone-depleting substances in response to new evidence.

Finally, in order to make binding international commitments, states need to have confidence and trust in a regime. Generally, trust emerges only slowly over time, as an institution develops a track record that states can evaluate. For example, states may ultimately be willing to accept the compulsory jurisdiction of a third-party decision-maker, such as the European Court of Human Rights or the WTO dispute settlement body, but only if they have confidence that the decision-maker will act in an impartial, fair manner, within its mandate.

Although many regimes have developed in an evolutionary manner, there is nothing inevitable about regime evolution. Whether and the degree to which a regime evolves depends on a variety of factors, including whether the level of political will to address a problem grows. Often, regimes develop in fits and starts. Indeed, at times regimes even move backwards as interest in an issue ebbs or when a regime has moved ahead too quickly, ahead of what the political traffic will bear. For example, the Security Council's authority over the use of force has waxed and waned over the last 60 years since the establishment of the United Nations, rather than evolved in a consistent direction. Following the end of the Cold War, the Security Council's success in responding to the Iraqi invasion of Kuwait led some to herald the beginning of a "new world order,"[4] but in the ensuing decade its authority declined and was further undermined by the U.S. decision in 2003 to invade Iraq without explicit Security Council authorization. Even as highly successful a regime as the European Union has suffered significant setbacks along its evolutionary path, including the Luxembourg Compromise in 1966, which limited the majority voting rule provided for in the Treaty of Rome.[5]

II. Dimensions of Regime Evolution

Regimes can evolve along one or more dimensions. First, they can become deeper. Second, they can become broader. Third, they can become more integrated. Or fourth, they can evolve along multiple dimensions at once.[6]

Deepening

Often, regimes start out quite shallow, with weak obligations, and gradually become deeper over time. The depth or strength of a regime is a function of several factors: the authority of its institutions, its legal form, the stringency and precision of its commitments, and the strength of its review and compliance systems. A regime can become deeper along one or more of these lines: by developing new institutions with greater authority, by evolving from non-legal to legal form, by establishing more stringent or precise obligations, and/or by developing stronger systems of compliance review.[7]

Institutional Evolution

One of the main ways in which a regime can deepen is through institutional developments. Over time, existing institutions may grow in authority or gain new powers, or new institutions may be created.

The evolution of the European human rights system illustrates the process by which institutions gain greater authority. Today, the European Court of Human Rights is so respected that it is difficult to remember that, for many years after its creation, the success of the Court was in doubt. It took eight years for the Court to be constituted after the adoption of the European Convention on Human Rights in 1950 , another two years before it decided its first case, and another eight years before it found its first violation of the Convention. As of 1970, the Court had issued only nine judgments, a rate of less than one a year, and many states still had not accepted the Court's compulsory jurisdiction. The Court's caseload was so light that one observer described it as a "sleeping beauty, frequently referred to but without much impact."[8]

Today, in contrast, the Court issues more than 1500 decisions per year and acts in essence as the "supreme court" of Europe with respect to individual human rights issues. Although the reasons are complex for the slow accretion of the Court's authority, a basic factor is trust. Initially, states had little experience with international courts and were fearful of allowing an independent, untested decision-maker to review their

human rights performance. But, as the European Court began to decide cases, it became a familiar and trusted institution, leading more states to accept its jurisdiction and more individuals to submit claims of human rights violations. The decision by states in the 1990s to abolish the Commission on Human Rights and establish a single consolidated judicial system to hear complaints, did not dictate a new institutional structure; rather, it reflected the evolution that had already occurred in practice over the previous two decades, through which the Court had become the central institution in the European human rights system.

The Convention on International Trade in Endangered Species (CITES) has also experienced significant institutional development, but of a different kind. It has evolved through the establishment of new institutions and mandates, rather than through the enhancement of existing powers. As Peter Sand notes, "Most of the institutional structures of CITES emerged only after the treaty's entry into force, under the residual decision-making powers of the Conference of the Parties."[9] Initially, CITES provided for a rather basic set of institutions, and did not include any compliance system. In 1979, states decided to establish the Standing Committee—in essence, an executive committee of the parties, which meets on a regular basis. Then, in a series of decisions, the Standing Committee asserted new powers—first, to review the performance of individual countries, and then to recommend that states impose trade suspensions against states with persistent compliance problems, a response to non-compliance that has no specific warrant in the treaty text itself.

Legal Form

Sometimes, regimes begin as voluntary arrangements and evolve over time into legally-binding agreements.[10] For example, in regulating trade in chemicals and pesticides, states began by negotiating two voluntary instruments in the late 1980s: the Food and Agriculture Organization Code of Conduct on the Distribution and Use of Pesticides and the London Guidelines for the Exchange of Information on Chemicals in International Trade. Both established, on a voluntary basis, a system of prior informed consent (PIC) for exports of hazardous substances. This voluntary PIC procedure for pesticides and chemicals was then made legally binding through the negotiation and adoption of the 1998 Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade.[11] The PIC procedure for exports of hazardous wastes underwent a similar process of evolution, starting with the voluntary 1989 Cairo Guidelines, which provided the basis for the adoption two years later of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes. Similarly, the regime regulating pollution of the North Sea has developed new standards primarily through ministerial declarations that established political commitments, which then provided the basis for legal regulation through the OSPAR Convention for the Protection of the Marine Environment of the North-East Atlantic.[12]

As these cases illustrate, non-legal arrangements can be a useful first step, helping to initiate a process of behavioral change. Although non-binding, they can increase public awareness, prompt domestic policy

debates, encourage social learning, create a sense of political obligation, lead to domestic implementing measures,[13] and establish mechanisms to review national performance—helping to lay the groundwork for later legal regulation. Indeed, in some cases, non-binding arrangements have proven remarkably effective on their own, in the absence of any later treaty. The UN General Assembly on Driftnet Fishing, for example, has had a very significant impact in reducing high seas driftnet fishing.[14]

But although non-legal arrangements can be important, converting them into a legally-binding form tends to strengthen a regime. Legal obligations represent a higher level of commitment by states than non-legal arrangements, with correspondingly higher reputational costs for violation. Moreover, they often provide for stronger compliance review internationally and, in some countries, can be enforced by domestic courts, thereby providing greater assurance of compliance. For these reasons, states typically take the negotiation of a legally-binding agreement more seriously than a non-binding instrument, and the outcomes therefore better reflect what states are, in fact, prepared to do. In turn, by providing parties a higher degree of confidence that others will fulfil their obligations, binding commitments can create a greater sense of reciprocity, enabling countries to undertake stronger action than they might otherwise.

Precision

Another way a regime may deepen is through greater precision. Regimes often begin by articulating very general standards and then provide greater precision over time, either through decisions of the parties or though additional legal instruments such as protocols or annexes. The Ramsar Convention, for example, requires states to promote the "wise use" of wetlands within their territory. But it is not at all self-evident what constitutes a "wise use" of a wetland. Through subsequent decisions, the Ramsar parties elaborated the meaning of "wise use" in much greater detail.[15] Similarly, in the 1970s, the GATT adopted a series of side agreements that elaborated its quite general provisions on subsidies, dumping, government procurement, and a host of other issues.

The dimension of precision is independent of legal form, since legal agreements sometimes contain very vague standards, while non-binding instruments can sometimes set forth very precise rules. On the one hand, a treaty such as the Ramsar Convention contains a very vague standard for states to promote the wise use of their wetlands. On the other hand, the non-binding World Bank Guidelines on the Treatment of Foreign Direct Investment contain very detailed rules for the calculation of compensation in expropriation cases.[16]

The evolutionary path from general standards to precise rules is the basis of the framework convention/protocol approach, which has been used extensively in international environmental law, including in the climate change regime. First, states start with a framework convention that establishes a general system of governance, including the overall objective of the regime as well as basic institutions and procedures. Later, as

uncertainties are resolved and political will strengthens, states develop regulatory protocols that establish more precise obligations.[17]

Regimes can also evolve towards greater precision through judicial decisions. Through their decisions in individual cases, the European Court of Human Rights has given a great deal of very specific content to the general provisions of the European Convention on Human Rights. UN human rights treaty bodies have similarly made legal obligations more precise both through their opinions in individual cases and through their adoption of "general comments."

What Makes a Regime Binding?

Although people often refer to a regime as "binding" or "non-binding," as if "binding" were a unitary concept, there are several distinct elements of "bindingness" that contribute to a regime's effectiveness.

Lawyers usually characterize an agreement as "binding" if it is adopted as a treaty, rather than as a political agreement or a voluntary code of conduct. Treaties establish legal obligations, whereas non-legal agreements such as the Copenhagen Accord can establish only political commitments. Whether a decision of an international organization is legal in character depends on whether the organization is authorized by its founding treaty to make legally-binding decisions and, if so, whether it makes use of this power.

Alternatively, when we refer to a provision as "binding" we may mean that it is phrased in mandatory as opposed to hortatory terms—as a "shall" rather than a "should." This element of bindingness differs from legal form, since treaties may use hortatory language (for example, Article 4.2(b) of the UNFCCC sets forth only an "aim" to return emissions to 1990 levels), while political agreements or decisions of international organizations may use mandatory language.

Another important element of "bindingness" is precision. Provisions that set forth very general standards constrain behaviour less than precise rules. Compare, for example, a requirement that states use "best efforts to reduce their emissions, taking into account their capacity and circumstances," with a requirement to reduce emissions by a specified amount.

Finally, the degree to which a regime establishes compliance or dispute settlement mechanisms contributes to its binding character. Some treaties don't establish any review process or dispute settlement mechanism. Although their provisions are binding as a matter of legal form, they are less binding than similar agreements that establish strong systems of compliance review.

For more on these different dimensions of "bindingness" or "legalization," see Judith Goldstein (2001); Bodansky (2009), ch. 5.

Compliance/Dispute Settlement

Finally, a regime can become deeper through the development of stronger review, dispute settlement, and enforcement mechanisms.[18] The trade regime is perhaps the best known example of this process of "judicialization." Originally, the GATT didn't provide for dispute settlement at all. When a system of dispute settlement began to emerge in the 1950s and 1960s, it was at first highly political. Cases were heard by ad hoc panels usually comprised of government officials who sought outcomes that would be acceptable to all of the parties concerned, in part because each party to a dispute retained the ability at each stage to block an outcome. Through a slow process of evolution in the 1970s and 1980s, the GATT dispute settlement process gained great authority, and in the 1994 Uruguay Round agreements, it was transformed into the WTO dispute settlement system, with compulsory jurisdiction, authority to make binding decisions, and a permanent appellate body comprised of independent jurists.

International criminal law has undergone a similar process of judicialization. Initially, war crimes and crimes against humanity were addressed in the 1990s by ad hoc tribunals established by the Security Council, such as the International Criminal Tribunal for Former Yugoslavia. These have now been institutionalized through the establishment by treaty of the International Criminal Court in 1998.

Judicialization has gone the furthest within the European Community, where the European Court of Justice has become, in essence, a transnational rather than interstate judicial body, where "judges are insulated from national governments, societal individuals and groups control the agenda, and the results are implemented by an independent national judiciary."[19]

In the international environmental arena, CITES is an example of a regime that has evolved a strong compliance system, thus far primarily through decisions of the parties. Today, the CITES secretariat regularly reviews the adequacy of state's implementing legislation, and the CITES Standing Committee recommends trade suspensions against countries with systematic compliance problems.

Broadening

A regime can also evolve through the broadening of its membership or substantive scope, starting with a comparatively small number of like-minded states and then adding new members and new subject areas.

Starting with a narrow agreement has several benefits. First, the initial group is able to design the agreement the way it likes. The participants need to reach agreement only among themselves rather than satisfy a larger number of states. Second, a small initial membership makes the decision-making process more manageable, particularly if the substantive scope of the regime is comparatively narrow. The regime grows in membership and scope not by making compromises at the outset to satisfy a broad variety of states, but by proving over time that it works.

The European Union is perhaps the best example of a treaty regime that has broadened over time. It began in the 1950s with relatively deep agreement among a small number of states, addressing only economic integration. Today, it has grown to 27 members, with competence over a wide range of economic, social and environmental issues.

The Antarctic Treaty System has similarly grown in both membership and substantive scope. Initially, it included a relatively small number of states engaged in Antarctic research, and focused on reducing conflict by demilitarizing the Antarctic and by putting the issue of territorial claims on hold. The regime's restricted membership led to questions about its legitimacy, but also contributed to its substantive success in managing the Antarctic. And this track record of success has, in turn, made the Antarctic Treaty System the presumptive forum for addressing new issues such as environmental protection and Antarctic tourism. The system has grown in legitimacy not by allowing anyone to join, but rather by demonstrating that it was an effective steward of the Antarctic and by gradually accepting new members as they demonstrated an interest in the region.[20]

The European human rights system illustrates one possible mechanism for broadening a regime, namely the use of an opt-in procedure. In joining the European Convention on Human Rights, states were not required to accept the individual complaint procedure or the compulsory jurisdiction of the European Court of Human Rights. Instead, these provisions were optional. In order to be bound by them, a state had to affirmatively opt in. As a result, even though many states did not accept these provisions initially, the provisions could be included in the Convention, thereby creating a pathway for the regime's evolution. As confidence in the system grew, states decided one by one to accept the individual complaint procedure and the Court's jurisdiction—both of which are now accepted by all member states.

Regimes can also broaden from regional to global arrangements. Initially, a regional agreement may be easier to negotiate than a global agreement because countries within a region may have a greater sense of community and be more like-minded. The regional agreement can then become a model for a later global agreement. This process is similar to the development of regulations within federal states, where the constituent units often serve as laboratories, trying out different regulatory approaches that might serve as models for a national program. [21]

Integrating

A final dimension of regime evolution is integration. Initially, states address a problem in a fragmented way, through a number of different instruments, institutions, or procedures. Over time, these become more integrated through institutional consolidation or linkages.

Many international regimes follow this evolutionary pathway. For example, in the LRTAP regime, states initially negotiated a series of protocols that addressed individual pollutants, including sulphur dioxide,

nitrogen oxides, and volatile organic compounds. Then, in 1999, they decided to integrate these separate protocols into the Gothenburg Protocol—a single comprehensive protocol that adopts an integrated multi-pollutant approach.

Similarly, in the regional regime to protect the North Sea, agreements addressing pollution from ocean dumping and from land-based sources were initially developed separately. Later, these two treaty regimes were merged in a single comprehensive regime: the OSPAR Convention on the Protection of the Marine Environment of the North-East Atlantic.

The law of the sea has undergone a similar process of evolution. When states held the First UN Conference on the Law of the Sea in 1958, they adopted four separate agreements, each with different memberships, addressing different aspects of the law of the sea, including the territorial sea, the high seas, the continental shelf, and marine living resources. Fifteen years later, when they initiated the Third UN Conference on the Law of the Sea, they decided to negotiate a single comprehensive legal agreement addressing all aspects of the law of the sea.

In each of these cases, a more fragmented approach initially allowed countries—or groups of countries—significant latitude in determining the pace and focus of their commitments. But, ultimately, governments found that stronger integration was useful in allowing closer coordination and delivering a higher level of effort.[22]

Evolution along Multiple Dimensions

Thus far we have been considering these three different dimensions of evolution separately. But, of course, many regimes evolve along more than one dimension at once. The European Union, for example, has both broadened and deepened. The same is true of the Montreal Protocol, which has adopted progressively more stringent regulations to phase out an expanding list of ozone depleting substances, and has created a non-compliance procedure and a financial mechanism to support actions by developing countries, even as its membership has expanded significantly. Broadening and deepening often go together because they share a common cause: namely, growing confidence and trust in a regime, inspired by a track record of success.

The trade regime is perhaps the best illustration of how a regime can evolve along all three dimensions concurrently. The GATT was originally intended simply to memorialize the tariff negotiations among 23 countries. It did not establish any formal organization. It had no provisions on amendment or dispute settlement. And even its legal status was unclear, since it came into effect only as a result of a "Protocol of Provisional Application." But when the International Trade Organization (ITO) died as a result of U.S. refusal to join, the GATT became, de facto, the central instrument of the trade regime. And over the next 50 years, it underwent a remarkable process of evolution. It became an organization as well as an agreement. It developed new institutions such as the GATT Council, and a dispute settlement process. It spawned a series of "side agreements" that addressed particular

issues in greater depth. It expanded dramatically in membership. And, ultimately, it led to the adoption of the Uruguay Round Agreements, which established the WTO, put the trade regime on a more secure legal footing, established a highly developed system of dispute resolution, and integrated the various side agreements into a single package deal. The process was, of course, not unidirectional. Indeed it was marked at the outset by a tremendous setback—the rejection of the ITO. But eventually it evolved into an even stronger regime than the one originally envisioned.

III. Evolution of the Climate Change Regime

Since climate change emerged as an international issue roughly 25 years ago, the international response has in many ways developed along an evolutionary pathway. In some key respects, however, it has proceeded in fits and starts—and, at this stage, has arguably stalled, and perhaps even moved backward.

The UNFCCC established an open-ended regime that contemplates an evolutionary process. In more than 350 decisions by 15 COPs and five Meetings of the Parties (to the Kyoto Protocol), parties have taken many incremental steps establishing and strengthening bodies and procedures addressing issues such as transparency, finance, emissions crediting and adaptation.[23] Yet, along one critical dimension—the legalization of countries' core commitments—the regime has been marked by step-change and, more recently, retrenchment. It underwent a very rapid process of deepening—a "big bang"—through the negotiation and adoption of the Kyoto Protocol and its elaboration in the Marrakesh Accords. But since Kyoto's entry into force, the push for a second round of binding commitments has thus far proved unsuccessful. Meantime, the broader regime complex has become more fragmented, with the emergence of initiatives such as the Major Economies Forum (MEF) only loosely connected with the UNFCCC. Most recently, the adoption of the Copenhagen Accord by world leaders might suggest that the regime is now moving in the direction of political rather than legal commitments.

When the UNFCCC was first negotiated in 1991–1992, the primary issue was whether to adopt binding targets and timetables to reduce developed country emissions, or to establish a non-binding system of "pledge and review."[24] Ultimately, parties struck a very careful compromise. In defining developed country commitments, the UNFCCC set only a hortatory numerical target,[25] but it required developed countries to formulate and report on their national mitigation programs.[26] The Convention also contemplated that these national reports would be subject to some form of review by the COP[27]—thus, in effect, establishing a system of "pledge and review," as some states had favored. For proponents of this bottom-up approach, the rationale was that regular reporting and review would help encourage national action, develop a base of information, and gradually build confidence in the regime. However, the UNFCCC also implicitly acknowledged that this process might be insufficient, by calling in Article 4.2(d) for a review of the adequacy of its commitments at COP-1. The UNFCCC thus also left the door open to a top-down targets-and-timetables approach by creating a pathway that could lead to legally-binding targets.

At COP-1 in 1995, parties decided to pursue the targets-and-timetables approach that had been considered but not fully adopted in the UNFCCC. In doing so, they chose to follow the model of the ozone

regime, which developed very quickly, essentially over a five-year period from 1985 to 1990, and has proved highly successful.[28] The negotiating mandate adopted at COP-1 led to the negotiation of the Kyoto Protocol in 1997, only three years after the UNFCCC's entry into force. Four years later, parties adopted the Marrakesh Accords setting forth the detailed rules for how Kyoto would work. While in many subsidiary respects the regime was evolving incrementally, on the fundamental issue of legal form, its development was transformational, deepening in just a few years from pledge-and-review to binding targets-and-timetables.

In addition to deepening quite quickly, the UNFCCC adopted a comprehensive architecture from the outset. Rather than starting with particular dimensions of the emissions challenge and gradually broadening the focus, parties chose to set emission targets encompassing all GHGs and all sectors of the economy. This comprehensive approach was continued in the Kyoto Protocol, which establishes binding economy-wide targets covering a basket of GHGs—albeit for only a limited number of countries.

Finally, while developing rapidly, the UNFCCC has remained quite rigid in certain respects. The UNFCCC appropriately differentiates between the obligations of developed and developing countries, reflecting the principle of common but differentiated responsibilities and respective capabilities. But it also contemplated that this division of the world into developed and developing countries could evolve over time,[29] for instance, with countries graduating from one status to the other as they develop. Instead, the division between Annex I (developed) and non-Annex I (developing) countries has became entrenched and has proven strongly resistant to evolution.

These factors have not prevented the climate change regime from continuing to evolve in important ways. A series of decisions have elaborated a system for the reporting and expert review of national communications and GHG inventories. The regime's financial mechanism has grown, most recently with the operationalization of the Kyoto Protocol Adaptation Fund. The Clean Development Mechanism (CDM) Executive Board has established and oversees a set of institutional and procedural arrangements for the review and approval of offset-generating CDM projects. And adaptation efforts have been strengthened through steps such as the preparation and approval of national adaptation programmes of action for least developed countries.

But agreeing on the regime's fundamental legal architecture for the post-2012 period has proved more problematic. As mandated under the Kyoto Protocol, the first Meeting of the Parties in 2005 launched negotiations for a second round of binding emission targets for developed countries, to apply after 2012. From the start, however, it was clear that at least some of the developed country parties to Kyoto were unwilling to assume new binding commitments without some form of parallel agreement covering the United States and the major emerging economies. So in Bali in 2007, a second track of negotiations was initiated under the UNFCCC, with the aim of a comprehensive "agreed outcome" two years later in Copenhagen.[30] Although the Bali Action Plan did not specify what form of agreement was to be reached, the expectation grew among

parties and stakeholders that the product of Copenhagen was to be legally binding. Some favored a two-track outcome—with new targets under the Kyoto Protocol and a parallel agreement under the UNFCCC—while others argued for a single comprehensive agreement. In the end, however, neither of the formal negotiating tracks produced any form of agreement. The Copenhagen Accord instead emerged from an ad hoc political negotiation among heads of state and government. This nonbinding agreement, which was not formally adopted by the UNFCCC parties, elaborates a framework looking in many respects like the pledge-and-review approach considered earlier in the regime's development.

As the formal UNFCCC process has struggled to make progress, the broader regime complex has diversified—or become more fragmented, depending on one's view.[31] Following its rejection of the Kyoto Protocol, the Bush Administration led the formation of alternative forums such as the Asia Pacific Partnership on Clean Development and Climate—a technology initiative encompassing seven countries and eight sectors—and the Major Economies Meetings, which under the Obama Administration evolved into the MEF. In addition, states have pursued reductions in particular GHGs and sectors in more specialized forums, including the efforts to phase out hydrochlorofluorocarbons (HCFCs) and possibly hydrofluorocarbons (HFCs) through the Montreal Protocol, the recent discussions of black carbon in LRTAP, and the work on emissions from international transport in the International Maritime Organization (IMO) and the International Civil Aviation Organization (ICAO). The IMO is currently considering proposed ship efficiency standards, which could be adopted as an amendment to the International Convention on the Prevention of Pollution from Ships (MARPOL). Meanwhile, ICAO has adopted a goal of improving fuel efficiency by 2 percent a year and has established a process to consider the use of economic instruments such as emissions trading.

Moving from Copenhagen to COP-16 in Cancún, parties have generally conceded that binding outcomes are not on the immediate horizon; the aim instead is a "balanced package of decisions." As political guideposts for these decisions, some parties point to the Copenhagen Accord while others emphasize the Bali Action Plan. Agreement is broadest on potential operational elements of the package: a new climate fund; mechanisms to address adaptation, technology and forestry; and a framework to measure, report, and verify countries' actions and support for developing country efforts. More difficult issues include whether and how to inscribe detailed mitigation pledges, and how to address the issue of future legal form, including the fate of the Kyoto Protocol.

There are, of course, many reasons why the evolution of the climate regime appears to have stalled in recent years. Most importantly, many of the key countries have yet to mobilize serious domestic efforts or are unprepared to accept significant international commitments—a problem only exacerbated by the global economic crisis. But part of the explanation for the current stalemate may be that the regime tried to deepen too quickly along the legal dimension—not in relation to the problem's urgency, but ahead of what the political

traffic would bear. Arguably, the leap was too ambitious for a relatively young regime, which had not had time for trust to develop. A continued drive for binding commitments in the near term could produce a string of failures, and risk undermining the credibility and relevance of the UNFCCC process in the eyes of parties and observers alike.

IV. Pathways Forward for the Climate Change Regime

Given where we are now, how might the climate change regime evolve in the future? Which evolutionary pathways are likely to be most fruitful? This section looks at possibilities both within and outside the UNFCCC process and how these might eventually be integrated through an overarching international agreement.

Evolution within the UNFCCC Process

The agenda for Cancún contains two major elements: a set of near-term operational or institutional issues, and broader questions about the ultimate direction and legal form of the climate regime. For many parties, clarity on the second set of issues is critical to guide decisions on the first, and to provide confidence that legally binding outcomes remain the ultimate objective. But even absent agreement on those longer-term issues, a set of concrete operational decisions could represent a significant step forward in the evolution of the climate regime.[32] Such decisions could launch an institution-building phase that deepens the UNFCCC regime and helps to set the stage for a later legal agreement. The evolutionary path, in this scenario, would give priority initially to institutional development, then turn gradually to legalization.

For the near term, this approach would effectively institute the system of "pledge and review" rejected earlier in the regime's development and resurrected in the Copenhagen Accord. Although the Accord remains formally outside the UNFCCC architecture, more than 80 countries, including all of the major economies, have made specific national mitigation pledges under the Accord, which have been recorded by the UNFCCC Secretariat. Inscribing these or revised pledges by way of a COP decision would anchor them within the UNFCCC process, lending them greater weight for many, although not establishing them as legally binding commitments. Starting in this manner would not "lock in" a voluntary approach or prejudge the ultimate legal form of the regime. As the experience of other regimes illustrates, voluntary arrangements can evolve into legally-binding commitments, as confidence in the regime grows.

Whether or not parties can immediately agree on a formulation to formally inscribe mitigation pledges, they can take decisions that begin to establish the types of architectural elements envisioned under either or both the Bali Action Plan and the Copenhagen Accord. These include a stronger support structure for developing countries—including a new multilateral fund and mechanisms addressing adaptation, technology and forestry issues—and a more fully elaborated system for the measurement, reporting and verification (MRV) of countries' mitigation actions and of support for developing country efforts.

In many of these areas, parties may only be able to get as far as agreeing on a broad framework or initial steps, with further decisions needed to fully operationalize the new mechanisms or practices. In the case of MRV, for instance, parties might agree on an overall framework for reporting, review and "international consultations and analysis,"[33] and a timeline for achieving more detailed decisions on each element. A new MRV framework would incorporate or build on existing UNFCCC practices with respect to mitigation actions—most notably, the reporting and review of developed countries' GHG inventories—as well as develop additional procedures for the reporting and verification of support to developing countries.

Elaborating these architectural elements could significantly strengthen the UNFCCC's role as an international forum for action, as opposed to negotiation. A new multilateral fund, once established, would provide an important vehicle for scaling up support for developing countries even in the absence of binding financial commitments. A fully functioning MRV system—in which countries regularly report on their emissions and actions, with some form of international review or consultation—would significantly enhance transparency and provide some measure of accountability. These and other elements of an enhanced UNFCCC architecture would build parties' confidence in one another and the regime itself, which could over time promote stronger efforts and enable further evolution culminating in binding commitments.

This type of evolutionary path does not depend on agreement about the ultimate nature or form of the climate regime. Indeed, initiating the process may be possible at this stage only if parties are willing to defer on such looming questions. Many parties continue to push strongly for a second commitment period under the Kyoto Protocol; some of them also favor a parallel binding agreement under the UNFCCC. Others, however, argue for a single comprehensive legal agreement. One possibility, at the point when parties are prepared to legalize their commitments, would be to initially adopt parallel agreements, and only later merge the two tracks in a single agreement.

One quandary in pursuing an evolutionary approach, and deferring for now the question of ultimate legal form, is that it leaves the Kyoto Protocol in a state of limbo. It also suggests the greater likelihood of a "gap" between the existing Kyoto Protocol targets, which expire after 2012, and any subsequent commitments. To address this problem, Parties could choose to keep elements of the Kyoto Protocol operational beyond the first commitment period. For instance, the CDM could continue to generate credits for emission reductions in developing countries that could be used to meet the requirements of domestic or regional trading systems. Eventually, the CDM and other Kyoto institutions could be subsumed into the institutional structure established by a new legal agreement. In the interim, the "gap" could to some degree be addressed through a political agreement extending the existing Kyoto Protocol targets or through the provisional adoption of new ones.[34]

Evolution outside the UNFCCC Process

In addition to evolution within the UNFCCC, the broader regime complex might also evolve through bilateral and plurilateral actions in other forums. As described in Section IV, this evolutionary process is already underway, through actions in the Montreal Protocol, LRTAP, the IMO and ICAO. Even if the UNFCCC continued to make progress, pursuing the climate change issue in other forums could complement evolution within the UNFCCC. But these non-UNFCCC processes would assume additional urgency should efforts within the UNFCCC stall. Progress may be easier to achieve initially through a more fragmented approach, in which countries are able to pursue specific initiatives in varying configurations of states. Under either scenario, by helping to diversify the portfolio of international climate change efforts, non-UNFCCC efforts would serve to reduce the risk of policy failure.

Some bodies such as the G-8, the G-20 and the MEF could continue to serve primarily as forums for political discussion and agreement, while others could be vehicles for more formal agreements and concrete action. To the extent that states are able to utilize existing institutions to address climate change, this could bring significant advantages. Existing institutions have established procedures and forums that can be used. Specialized institutions such as the ICAO and IMO often have significant expertise. Institutions with limited membership such as the Organisation for Economic Cooperation and Development (OECD) may involve comparatively like-minded countries. And in institutions with a track record of success like the Montreal Protocol, participants have developed working relationships that instill trust and facilitate progress.

A number of existing forums have already begun to consider the climate change issue. Recently, the WTO hosted a joint conference on fossil fuel subsidies at which the WTO Deputy Director described fossil fuel subsidy reform as "one of the important tools in the hands of the international community to address climate change."[35] According to some estimates, subsidy reform could cut carbon emissions by up to 18 percent by 2050. A recent study by the International Institute for Sustainable Development proposes a roadmap for addressing fossil fuel subsidies that is essentially evolutionary in character, beginning with national initiatives and evolving into a legal agreement.[36] The strategy would build off the G-20 initiative for fossil fuel subsidy reform and would involve, among others, the International Energy Agency (IEA), the OECD, and the WTO, which could provide the home for an eventual legal agreement.

Similarly, measures to address short-lived GHGs such as black carbon could potentially be addressed in a number of existing forums, including LRTAP, the Arctic Council and the IMO. In 2009, the parties to LRTAP established an Ad-Hoc Expert Group on Black Carbon, which met two times in 2010. The Arctic Council has also established a Task Force on Short-Lived Climate Forcers to assess black carbon emissions from Arctic Council countries and to recommend measures to reduce emissions. Currently, most Arctic Council countries do not have inventories of black carbon emissions, so the process will necessarily involve a

number of incremental steps, beginning with better inventories and including identification of policy measures and, ultimately, the development of international responses. The IMO could in parallel address black carbon emissions from ships.

Apart from initiatives in existing international organizations, smaller groups of countries could organize initiatives on an ad hoc basis to address particular issues such as forestry, finance, or technology research and development. Already, a joint Norwegian-French initiative to establish a partnership on REDD+ (reducing emissions from deforestation and forest degradation) has resulted in an Agreement on Financing and Quick-Start Measures to Protect Rainforests. The non-binding agreement, adopted by more than 50 states, establishes a framework for measures to reduce deforestation and has resulted in pledges of more than $4 billion. Although the explicit aim is for this REDD+ framework to feed into the UNFCCC, it could potentially proceed on its own if the UNFCCC parties are unable to reach agreement.

Many other climate-related issues might be addressed, by design or by default, outside the UNFCCC. As more countries move forward with domestic emissions trading systems, they likely will look for opportunities to link them through bilateral or plurilateral arrangements. If climate-related trade disputes begin to arise more frequently, they could easily lead to cases before the WTO, which might then be forced to consider rules to mediate between trade and climate policy. Another possibility would be to head off trade disputes—particularly, in energy-intensive industries such as steel and aluminum whose goods trade globally—by negotiating agreements to regulate GHG emissions on a sectoral basis.[37]

Bringing the Elements into an Integrated Framework

To a significant degree, the different strands of work within and outside the UNFCCC could proceed independently. International issues such as climate change are often addressed through "regime complexes" rather than by a single integrated agreement.[38] The climate change regime complex—encompassing activities both within and outside the UNFCCC—might evolve for some time along a variety of tracks concurrently, as described above.

As the GATT Uruguay Round agreements illustrate, however, after states have engaged in a period of flexibility and experimentation, they may be ready to integrate the different pieces of a regime into a single framework, as they did in moving from the GATT a la carte approach to the single, integrated agreement that established the WTO. Similarly, as the climate change regime matures, states might find some elements of integration to be desirable.[39]

For example, integration of monitoring, reporting and verification would allow states to assess the overall level of international effort to combat climate change and evaluate whether additional actions are needed. A global agreement could expand the UNFCCC's MRV system to encompass activities undertaken pursuant to

initiatives outside the UNFCCC, such as fossil fuel subsidy reform, measures to reduce black carbon emissions, and sectoral initiatives. A global framework could also facilitate integration of the global trading system by establishing a single "currency" of emission reduction units across the various mitigation efforts in different forums. This would promote economic efficiency by expanding the international emissions trading system.

Ultimately, however, the levels of emissions reductions necessary to prevent dangerous climate change are likely to require the stronger levels of integration provided by binding commitments under a single comprehensive agreement. A comprehensive agreement would facilitate greater coordination and reciprocity, by allowing countries to make political tradeoffs between activities undertaken in different arenas. In general, states can be expected to do more to address climate change if their efforts are reciprocated by other states. Reciprocity gives states a greater incentive to undertake stronger action, since their efforts not only mitigate climate change directly, but also, in essence, buy action by others.

V. Conclusions

The international climate community does not face an either-or choice. Given its urgency and enormity, the *only* choice is to confront the climate challenge on all practical fronts. The real question, at any given moment, is which avenues offer the greatest promise of moving countries forward.

Nearly two decades ago, in adopting the U.N. Framework Convention on Climate Change, governments recognized the fundamentally global nature of the climate dilemma—and, what follows, the need for a global solution. Almost ever since, the primary thrust of the UNFCCC negotiations has been to establish, and then to extend, a legally-binding framework. This preoccupation has arguably overshadowed or even precluded other forms of multilateral cooperation within the UNFCCC framework. More worrisome, it has produced a state of perennial stalemate. In its present form, covering less than a third of global emissions, the Kyoto Protocol does not on its own provide a politically stable foundation for a post-2012 legal framework. And with other key players still unready, there is little prospect of another binding agreement—whether succeeding Kyoto, or in parallel—in the near future.

As an ultimate aim, a legally-binding agreement makes sense. While experience across multilateral arenas shows that non-binding agreements can produce strong action, it also demonstrates that binding commitments can lead to stronger efforts—particularly in addressing "public goods" such as the climate. The problem, perhaps, has been one of impatience. Driven by the urgency of reducing GHG emissions, parties have felt compelled to erect a binding framework as quickly as possible. The multilateral record, however, shows that oftentimes strong, stable and legally binding architectures are not simply hatched; they are built step by step over time.

This tenuous moment in the international effort, in the wake of Copenhagen's "failure," calls for a certain duality. It calls, on the one hand, for an appreciation of the importance in the long run of a binding framework to mediate and propel the collective effort against one of the most profound challenges ever to confront the international community. It calls, on the other hand, for a deeper appreciation that assembling that framework is an evolutionary process.

Deferring the goal of a binding architecture does not in any way mean relaxing the international effort to combat climate change. Within the UNFCCC, there is ample opportunity to establish mechanisms and practices that not only can deliver stronger resources, transparency and action in the near term, but can

grow the connective tissue of an ultimately binding framework. At the same time, parties should seize any opportunity for progress in parallel efforts outside the UNFCCC.

It will be important through this phase not to lose sight of the longer-term objective; indeed, it would be helpful for parties to unequivocally affirm that their aim is a binding framework. And, to the degree that that is in fact their goal, parties would be well served to guard the legitimacy and credibility of the UNFCCC, so that it might remain the forum of choice once the global will is there.

Notes

1. http://www.un.org/News/Press/docs//2010/sgsm13051.doc.htm.

2. http://www.clintonglobalinitiative.org/ourmeetings/2010/meeting_annual_multimedia_player.asp?id=26&Section=OurMeetings&PageTitle=Multimedia.

3. Raustiala and Victor (2004).

4. Speech of President George H.W. Bush to a Joint Session of Congress, Sept. 11, 1990.

5. The Luxembourg Compromise was adopted in 1966 to resolve the "empty chair crisis" resulting from France's boycott of European Council meetings in protest of the gradual transition from unanimous to qualified majority voting. The Luxembourg Compromise provided that decisions subject to qualified majority voting would be postponed if any member state felt that very important interests were at stake. The compromise effectively gave each member state a veto, and thereby moved back towards a unanimity requirement.

6. For a similar typology, see Abbott and Snidal (2004).

7. For similar typologies, see Goldstein et al. (2001); Werksman and Herbertson (2010). Goldstein et al. (2001) refer to this process of deepening as "legalization."

8. Frowein (1984), 5, 8.

9. Sand (1997).

10. See generally Abbott and Snidal (2001); Raustiala (2005).

11. Langlet (2009); Victor (1998).

12. The 1992 OSPAR Convention integrated two existing regional conventions addressing the marine environment of the North-East Atlantic, the 1972 Oslo Convention for the Prevention of Marine Pollution from Dumping from Ships and Aircraft, and the 1978 Paris Convention for the Prevention of Pollution from Land-Based Sources. For a discussion of the interplay of non-binding and binding agreements to protect the North Sea, see Skjaerseth, Stokke and Wettestad (2006).

13. For example, the EC incorporated the non-binding FAO/UNEP PIC procedure into a regulation on the export and import of dangerous chemicals. Council Reg. 2455/92/EEC, July 23, 1992, 992 OJ L 251.

14. Rothwell (2003).

15. Ramsar Secretariat, *Ramsar Handbook on the Wise Use of Wetlands* (3d ed. 2007). Available at http://www.ramsar.org/pdf/lib/lib_handbooks2006_e01.pdf.

16. World Bank Development Committee (1992).

17. *See* Bodansky (1999).

18. Keohane, Moravcsik and Slaughter (2001).

19. *Id.* at 469.

20. Stokke and Vidas (1997).

21. Esty (1996).

22. Bodansky and Diringer (2007).

23. UNFCCC (2006).

24. The concept of "pledge and review" was first introduced during the UNFCCC negotiations by Japan at the second session of the Intergovernmental Negotiating Committee (INC2). Under the Japanese proposal, states were required to make unilateral pledges of their national strategies and response measures, which would be periodically reviewed by international expert teams—essentially the same structure of reporting and review established for developed countries by Articles 4, 7 and 12 of the UNFCCC. "Pledge and review" was the subject of a symposium organized by the Royal Institute of International Affairs in August 1991 and received extensive discussion at INC3. *See generally* Bodansky (1993), p. 486, 508.

25. Article 4.2(a) and (b) establish only an "aim" of returning emissions to 1990 levels by the end of the decade, rather than a legal commitment.

26. Articles 4.1, 12.

27. Article 7.2(e).

28. The ozone regime began with the adoption in 1985 of the Vienna Convention for the Protection of the Ozone Layer, a framework convention similar to the UNFCCC. This was followed only two years later by the Montreal Protocol on Substances that Deplete the Ozone Layer, a regulatory treaty like the Kyoto Protocol. Then, three years after that, the Parties adopted the 1990 London Amendments, which established a multilateral funding mechanism and a non-compliance procedure. Although the ozone regime has continued to evolve since then through the regulation of additional chemicals and the adoption of progressively more stringent phase-out schedules, the main elements of the regime were in place in 1990, within five years of its creation.

29. For example, Article 4.2(f) of the UNFCCC provides that the parties shall review the lists of parties in Annexes I and II with a view to making amendments. Article 4.2(g) further allows non-Annex I countries to opt in to the hortatory target and timetable established by Article 4.2(a) and (b).

30. Decision 1/CP.13; Bali Action Plan.

31. For a positive assessment of the emergence of a diversified "regime complex" on climate change, see Keohane and Victor (2010).

32. Winkler and Beaumont (2010).

33. Decision 2/CP.15; Copenhagen Accord.

34. UNFCCC (2010).

35. http://www.wto.org/english/news_e/news10_e/ddg_14oct10_e.htm/.

36. Lang, Wooders and Kulovesi (2010).

37. Bodansky (2007).

38. Raustiala and Victor (2004).

39. *See* Bodansky and Diringer (2007).

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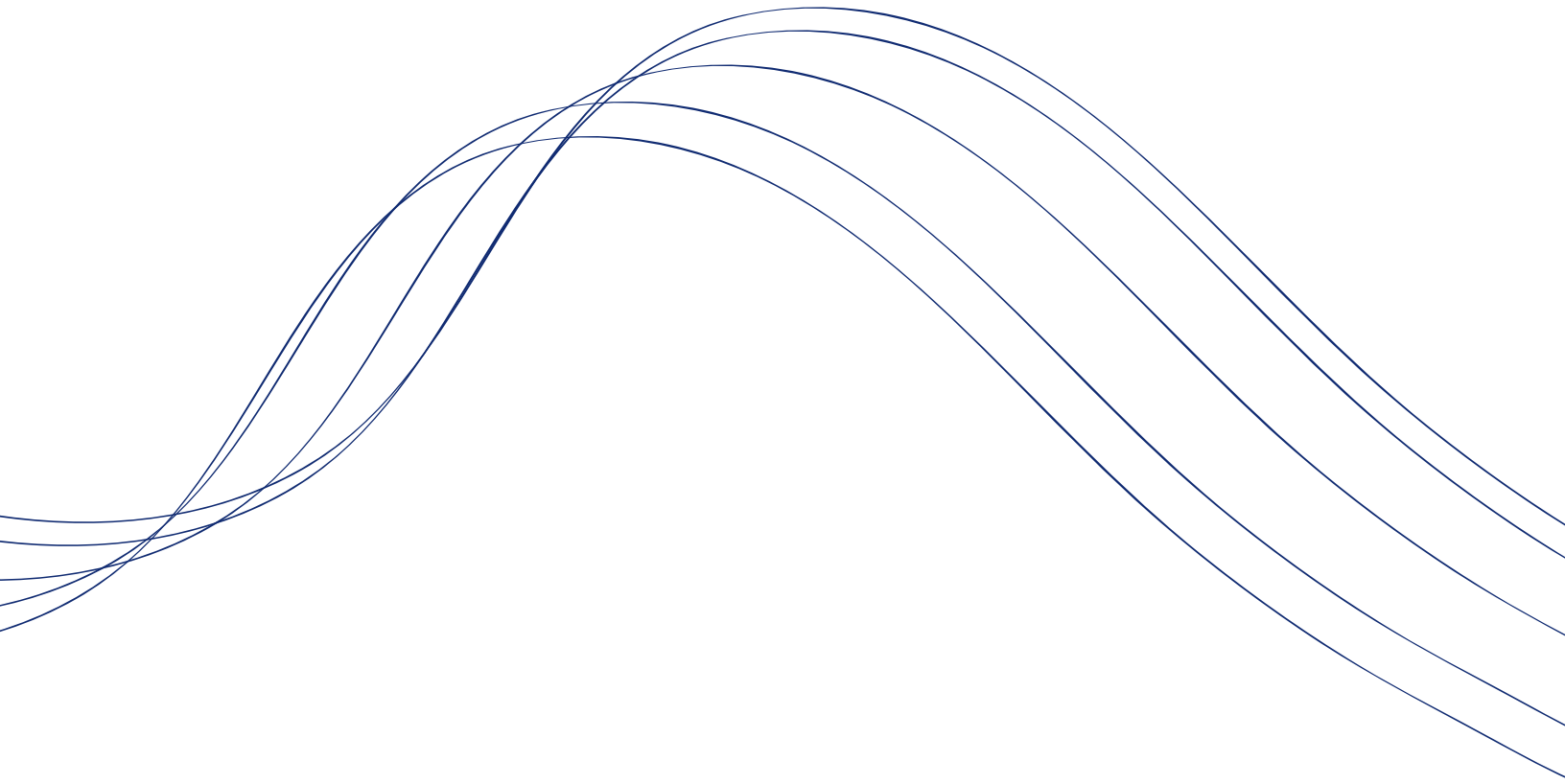
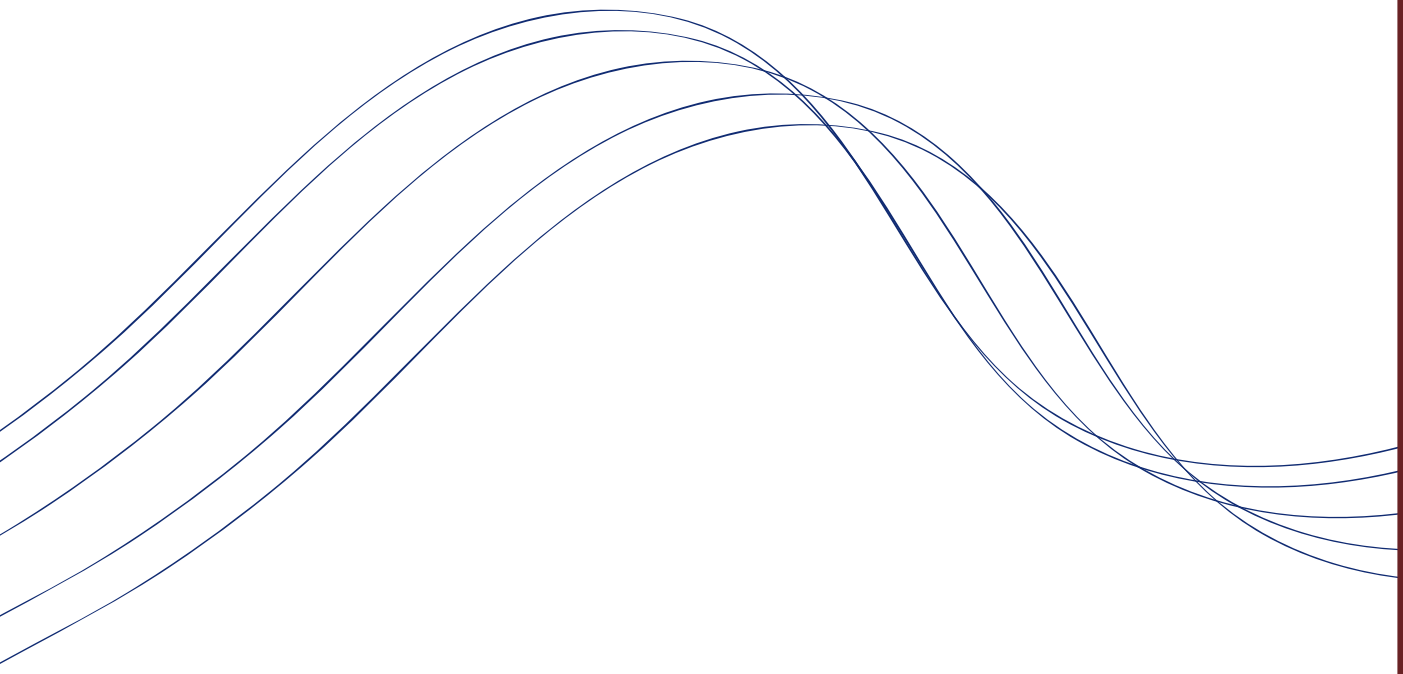


This paper explores the evolution of multilateral regimes and implications for the future of the climate change regime. It is part of a Pew Center series on *Advancing the International Effort Against Climate Change.* The Pew Center was founded in 1998 to bring a cooperative approach and critical scientific, economic, and technological expertise to the global climate change debate. We inform this debate through wide-ranging analyses in the areas of policy (domestic and international), economics, environment, and solutions.



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