

## Formal Linkages and Multilateral Environmental Agreements

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### 1. Introduction

Multilateral Environmental Agreements (MEAs) have been negotiated in an ad hoc manner, as the international community has responded to transboundary environmental challenges on a case-by-case basis. Typically, negotiations are launched only when a threshold of scientific understanding and political will is reached. When these MEAs enter into force, the ad hoc intergovernmental negotiating committees are subsumed by the establishment of distinct new institutions, Conferences of the Parties. The transience of these negotiating bodies, and the independence of the new bodies they create, could lead to conflicts or overlap between the general objectives, and between the specific legal obligations contained in the MEAs. This potential can undermine the security and predictability of state relationships, and explains, in part, the calls for a more co-ordinated approach to global environmental governance.

The negotiators of MEAs have shown a remarkable awareness and foresight of the need for new regimes to acknowledge, and to dovetail into existing international commitments. This note surveys a number of MEAs in which negotiators have employed a range of techniques to accommodate or anticipate conflict with existing international agreements by express references in the treaty text.

In some circumstances a treaty will refer directly to another treaty. It may refer instead to sectors or substances governed by other regimes, or it may incorporate language or principles drawn from these regimes. In each circumstance, the negotiators of the new regime seek, as far as possible, to delineate its scope, in order to avoid conflict. They may also suggest a hierarchical relationship between the regimes, in order to signal how a conflict should be resolved, if one arises.

This “building block” approach to co-ordinating MEAs, suffers from at least three potential shortcomings from an international law perspective:

- Many MEAs do not enjoy a perfect overlap of membership with other MEAs or treaties, and explicit cross-references to external regimes could inappropriately, in some cases, lead to the application of the law of the external regime to a State that is not a Party to that regime.
- Many modern MEAs and other treaties tend to evolve over time, either through the authoritative interpretation of the regime by Parties, or by formal amendment or

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adjustment. Tight linkages between regimes might pull one regime in a direction not originally anticipated by its designers.

- However sophisticated the design of these formal inter linkages, in the absence of a single, unifying dispute settlement system, legal rules for resolving conflicts between regimes may never formally be applied.

Nevertheless, expressly cross-referencing to other regimes in the text of an MEA can signal to policy makers, and to intergovernmental and administrative bodies, the Parties' intent to map the future evolution of the MEA. This can promote co-operation and coherence through less formal mechanisms. The fact that negotiators have employed these techniques with considerable frequency, and that no serious conflicts have yet arisen, suggests that these formal cross-references may be performing a useful function.

This note will first provide a number of non-exclusive examples of where MEAs have made direct or indirect reference to other treaty regimes in the following manner:

- To delimit the scope of a new regime to certain substances or sectors not covered by existing MEAs
- To establish a hierarchy between a new regime and existing regimes or future regimes
- To incorporate into a new MEA the rules, general principles or objectives of another regime
- To set the parameters for developing future relationships with other regimes
- To unify, harmonise or update existing regimes
- To invite the co-operation or participation of other regimes

An effort will be made to identify any rules of relationship or interpretation that have helped to clarify the linkages between specific regimes, or that might lead to more generalisable rules of treaty interpretation.

Discussion will then turn to review examples of references within treaty texts that invite the positive co-operation of external international institutions in the implementation of the MEA. Finally, examples of formal agreements between the institutions that MEAs establish, i.e., the various Secretariats (administrative bodies) and Conferences of the Parties (governing bodies) and other institutions will be reviewed as examples of formal inter linkages.

## **2. Rules of relationship and interpretation**

Classical rules of treaty interpretation would govern any conflicts in rights and obligations that may arise between successive treaties that govern the same subject matter.<sup>2</sup> Generally, these rules guide decision-makers to interpret treaties in such a way that presumes the relevant provisions do not conflict. If conflict is unavoidable, rules of treaty interpretation will look first to whether the States whose rights are affected by the conflict are Parties to both treaties. If they are not, the rules contained in the treaty to which they are both Parties will govern their

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<sup>2</sup> See, e.g., Vienna Convention on the Law of Treaties (VCLT) Article 30.

mutual rights and obligations. If membership of the two treaties overlaps, an interpreter may give preference to the more specific treaty, on the presumption that the Parties intended the more detailed rules to prevail. A similar presumption may arise that favours the provisions of the treaty agreed later in time. These formalistic rules of treaty interpretation might be usefully applied to the interpretation of treaties of limited membership, narrow subject matter, and with static rules. In these circumstances it might be easy to perceive the specific trade-offs States intended to make when entering into a new or more specific agreement. These rules of treaty interpretation would not, however provide a great deal of predictability or guidance to the resolution of a clash involving the complex, differentiated and constantly evolving obligations that run between the dozens of Parties and non-Parties to MEAs.

### *Delimitation of Scope*

Where substances, activities, or sectors regulated by one regime directly interact with those regulated by another, MEA designers have sought to delimit the scope of each regime. These delimitations have already proved important in preventing regimes from developing in such a way that one might undermine the other's objectives.

Conscious that ozone depleting substances and their substitutes were also significant greenhouse gases, the negotiators of the UN Framework Convention on Climate Change (UNFCCC) stated clearly that this MEA's rules would apply only to "greenhouse gases not controlled by the Montreal Protocol" on Ozone Depleting Substances (MP).<sup>3</sup> This provision has proved particularly important in the negotiation of the Kyoto Protocol (KP), which similarly excludes from its coverage greenhouse gases controlled by the ozone regime.<sup>4</sup>

The potential conflict arose concretely during the negotiation of the Kyoto Protocol. Certain delegations sought to introduce rules that would have allowed Parties to take credit under the climate regime for greenhouse gas emissions reductions that would have resulted from the destruction of substances that had been stockpiled as a result of the fulfilment of their commitments under the Montreal Protocol. Because the ozone commitments restrict production and consumption, but not the destruction, of these substances, the release into the atmosphere of these stockpiles (while both deeply irresponsible and unlikely) was arguably permitted under the Montreal Protocol.<sup>5</sup> However, counting the destruction of these substances, which have extremely powerful global warming potentials, as emissions avoided under the climate regime would have substantially lightened the burden of some countries to reduce other greenhouse gases. The strict delimitation within the UNFCCC provided a solid legal basis for preventing a weakness in one regime from undermining the other.

Delimitations in scope have also been incorporated in MEAs on the basis of regulated substances or activities, but without explicit reference to the text or title of another MEA. For example the recently adopted Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, expressly provides that its scope will not extend to narcotic drugs and psychotropic substances; radioactive materials; wastes; or food.<sup>6</sup> Each of these categories of substance is already covered by internationally

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<sup>3</sup> UNFCCC, Preamble; Art. 4.; (a)-(d); 4.2 (b).

<sup>4</sup> Kyoto Protocol, Art. 2.1(a)(ii).

<sup>5</sup> See Oberthur, in this series.

<sup>6</sup> Rotterdam Convention, Art. 3.2. A further example is the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, which provides that:

agreed rules on trafficking, transport, trade and transboundary movement. Carving out these substances from the coverage of the new regime avoids conflict, but also prevents negotiators from eroding what may be pre-existing higher internationally agreed standard. Were two regimes simultaneously to govern the same substances, States could choose to join the regime with the lower standard and still claim to be supporting global efforts to protect the environment.

### *Agreements of general principle*

When States enter agreements of general principle, defining the appropriate relationship between these agreements and existing and future agreements is more challenging than simply delimiting jurisdiction on the basis of target substances and activities.

The negotiators of the Convention on Biological Diversity (CBD) recognised that they were designing a regime of very broad scope, containing a number of potentially far-reaching and untested principles. Biological diversity is defined by the CBD to include the “variability among living organisms from all sources including, *inter alia*, terrestrial, marine and other aquatic ecosystems”. The Convention thus has the potential to provide an umbrella of principles extending over many existing agreements. In an effort to maintain the treaty’s universal application and to promote its fundamental objectives, but without undermining the rights and obligations of Contracting Parties under existing agreements, the Convention provides that:

“The provisions of this Convention shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity”.<sup>7</sup>

This effort to clarify relationships lays an interpretative minefield. The first phrase appears to subordinate the CBD to the rights and obligations of Contracting Parties under any international agreements – not just MEAs -- existing between those States, presumably at the time of the entry into force of the Convention for them. In other words, to the extent that a conflict arises, the rights and obligations under the existing agreements prevail. It is an explicit reversal of the classical rule of treaty interpretation, mentioned above, which would have had the subsequent, rather than the pre-existing treaty prevail.<sup>8</sup>

The second phrase, however, provides an important exception to the rule in the first phrase. It appears to allow the CBD to affect the exercise, by Contracting Parties, of their existing rights and obligations in the narrow circumstance where this would “cause a serious damage or threat to biological diversity”. The phrase “serious damage or threat” bears comparison to the precautionary principle, which enjoins decision-makers, when faced with such a threat, to act even if the science may be uncertain.<sup>9</sup>

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“Wastes which, as a result of being radioactive, are subject to other international control systems, including international instruments, applying specifically to radioactive materials, are excluded from the scope of this Convention.” (Article 1.3)

<sup>7</sup> CBD, Art. 22.1.

<sup>8</sup> The provision is, however, entirely consistent with Article 30.2 of the VCLT, which provides that “when a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail.”

<sup>9</sup> The expression of the precautionary principle in the CBD appears in its preamble, which notes that “where there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize such a threat.”

When combined, the phrases produce a relationship of hierarchy that shifts depending on context-specific law (the agreements existing between relevant States) and facts (the seriousness of the damage or threat to biodiversity). In the abstract, these rules do not greatly improve predictability. It is nevertheless tempting to speculate whether this approach could be generalisable to deal with conflicts between other MEAs or between MEAs and non-environmental treaties. It suggests a rule of precaution and proportionality, in which a hierarchy between regimes is established on a case-by-case basis, and conflicts would be resolved in favour of the regime whose rules would prevent the more serious damage or threat. The application of such a rule does, however presume the existence of an overarching third part adjudicator, capable of finding facts and law, and of authoritatively balancing the rights and obligations of more than one regime. The CBD provides no guidance as to how and by whom the seriousness of the threat would be determined.<sup>10</sup>

The CBD negotiators also made specific reference to the relationship between the Convention and the law of the sea:

“Contracting Parties shall implement this Convention with respect to the marine environment consistently with the rights and obligations of States under the law of the sea.”<sup>11</sup>

Here the relationship being defined is narrower than the previous rule in some respects and broader in others. This interpretative rule applies only with respect to the marine environment. However, it refers more generally to the implementation of the Convention (not just to the exercise of rights and obligations under the Convention), and requires the Contracting Parties to respect the rights and obligations of third States (including those that are not Contracting Parties to the CBD). Finally, it refers to rights and obligations of States “under the law of the sea”, and thus embraces both treaty and customary law, as they currently exist, and, presumably as they may evolve over time (i.e. there is no limitation here to “existing” international agreements).

The CBD’s principles, and division of rights and obligations on the preservation of biodiversity, the regulation of access to genetic resources, and the distribution of the benefits of biotechnology depend upon clear understandings about the limits of national jurisdiction. Perhaps the most important aspect of this reference to the law of the sea is to seek to clarify the CBD’s jurisdictional scope.<sup>12</sup> It implicitly recognises the importance of the specialised rules developed under the law of sea regarding the rights and obligations of States over marine resources, including those located on the high seas and on the deep sea bed.<sup>13</sup>

<sup>10</sup> The CBD, at Art 27, and Annex II, provides for binding adjudication or binding ad hoc arbitration of disputes arising between those Parties that have declared themselves subject to the jurisdiction of these procedures. Compulsory, non-binding conciliation procedures may be invoked by any Party against another and would result in recommendations by an ad hoc conciliation commission. The Vienna Convention on the Protection of the Ozone Layer, the UNFCCC and PIC have almost identical provisions.

<sup>11</sup> CBD, Art. 22.2.

<sup>12</sup> See also CBD, Art 4.

<sup>13</sup> The Convention on the International Trade in Endangered Species (CITES) similarly acknowledges the special role of the law of the sea regime in describing jurisdiction over marine resources:

“Nothing in the present Convention shall prejudice the codification and development of the law of the sea by the United Nations Conference on the Law of the Sea [...] nor the present or future claims and legal views of any State concerning the law of the sea and the nature and extent of coastal and flag State jurisdiction.”

The designers of the United Nations Convention on the Law of the Sea (UNCLOS) faced a similar challenge when negotiating this “constitution of the seas.” When setting out broad constitutional principles, UNCLOS had to be sensitive to its relationship with existing and future rights and obligations that would run between its Parties. With regard to obligations under other conventions on the protection and preservation of the marine environment UNCLOS indicates that:

“237.1 The provisions of this Part are without prejudice to the specific obligations assumed by States under special conventions and agreements concluded previously which relate to the protection and preservation of the marine environment and to agreements which may be concluded in furtherance of the general principles set forth in this Convention.

237.2 Specific obligations assumed by States under special conventions, with respect to the protection and preservation of the marine environment, should be carried out in a manner consistent with the general principles and objectives of this Convention.”<sup>14</sup>

Again, the negotiators seek to strike a balance between the existing, the new and the future; the general and the specific.

#### *Concentric Regimes: The Framework/Protocol Approach*

An approach favoured by a number of recent MEAs is to begin a new environmental regime with the negotiation of a general “framework” Convention, which sets out basic objectives, principles, institutions or procedures. Specific obligations are then developed through amendments, protocols or other related legal instruments. The Vienna Convention on the Protection of the Ozone Layer, and its Montreal Protocol; the UN Framework Convention on Climate Change, and its Kyoto Protocol; and the Convention on Long-range Trans-boundary Air Pollution (LRTAP), and its seven Protocols, including on SO<sub>x</sub>, NO<sub>x</sub>, and VOCs, are prime examples.

These concentric or “nested” regimes are obviously designed with the parent and sibling agreements in mind, and are intended to create an internally coherent whole. Instruments developed under the same umbrella will often share, and cross-refer to common objectives, common principles, and will make use of common governance structures and secretariats. The parent or the subsequent agreement may require or presume that a State that wishes to be a Party to a protocol must first become a Party to the framework parent Convention.<sup>15</sup> Nevertheless, the possibility exists that the parent and sibling agreements will not share the same membership (as some States will choose not to join one or all of the siblings) and thus may take their shared heritage in different directions. The interests of the Parties to the parent agreement must be balanced with interests of those that join and undertake the additional obligations of the new agreement.

The Kyoto Protocol represents the most recent attempt to balance the rights and obligations between Parties to a parent, and Parties to a subsequent, related agreement. It ties the futures of the two agreements together by assigning the tasks related to the implementation of the

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Art. XIV (6) CITES.

<sup>14</sup> UNCLOS, Article 237.

<sup>15</sup> UNFCCC, Art 17.4; Montreal Protocol, preamble.

Protocol to the Convention's existing secretariat, financial mechanism, subsidiary bodies, and places them under the direction of the Conference of the Parties (to the Convention) *servicing as the meeting of the Parties to the Protocol.*

The independence of the Protocol is provided for through Protocol's rules of procedure. When the climate change COP is serving as the MOP (COP/moP), the membership of its Bureau would, if necessary, shift to include representatives of only those States Parties to the Protocol, and COP/moP decisions will be taken only by those States which are Parties to the Protocol. It is possible to imagine that the Protocol does not grow to include the 170+ Parties to the Convention and that a smaller group might wish to move the regime forward more quickly than certain members of the larger group do. The Protocol Parties might develop interpretations of the regime's objective and its principles, and place burdens on its institutions that do not meet with the support of some members of the larger group. This prospect was one reason some delegations that had doubts they would ever join the Protocol, insisted on maintaining close ties between the two instruments. Most likely the arrangements agreed will be more than sufficient to meet any concerns about conflict. But until the memberships of the two instruments overlap, the potential for conflict remains.<sup>16</sup>

The framework/protocol model will be of interest to those wishing to formalise the present building-block approach to treaty-making under the umbrella of a single institution. Such an initiative, if pursued, would also have to construct institutional arrangements that would take into account differences in memberships of individual regimes and the need to preserve the balance of legal obligations that run between States.

#### *MEAs and International Trade Law*

The relationship between trade rules and MEAs is discussed elsewhere.<sup>17</sup> The main rules and principles that promote and protect free trade have been in place since the GATT entered into force 50 years ago. Early MEAs recognised that trade related measures could provide incentives to encourage Parties to join and to comply with environmental regimes. Indeed two major MEAs agreed prior to the UNCED (CITES and the Montreal Protocol) contain trade measures that arguably run counter to GATT obligations, by restricting trade in otherwise like products or substances on the basis of country of origin. Neither of these treaties mentions its relationship to international trade law. Neither of them has led directly to a GATT or a WTO challenge.

The designers of more recent MEAs have however felt it necessary to place these new environmental agreements more explicitly into the context of international trade rules. Neither the UNFCCC nor the Kyoto Protocol contain directly trade-related measures. The Kyoto targets do contain binding targets which many Parties will find difficult to meet, and that will require significant regulatory interventions. These in turn will likely have a significant impact on the competitiveness of certain countries' products. The temptation will be strong to design measures in such a way that does not place domestic products at a net

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<sup>16</sup> See also Art 5 of the Protocol on Environmental Protection to the Antarctic Treaty, which provides:  
 "The Parties shall consult and co-operate with the Contracting Parties to the other international instruments in force within the Antarctic Treaty system and their respective institutions with a view to ensuring the achievement of the objectives and principles of this Protocol and avoiding any interference with the achievement of the objectives and principles of those instruments or any inconsistency between the implementation of those instruments and of this Protocol."

<sup>17</sup> See Sampson, and Campbell, in this series.

competitive disadvantage. Both the Convention and the Protocol incorporate the principle, that

“Measures taken to combat climate change, including unilateral ones, should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade.”<sup>18</sup>

The words “arbitrary”, “unjustifiable” and “disguised restriction” are taken directly from the “chapeau” of Article XX of the GATT. Together they form the essential filter through which all environmental measures that might otherwise violate the GATT must pass if they are to qualify for one of the GATT’s “environmental” exceptions. Incorporating this language into the climate change texts is intended to restrain Parties, when acting jointly or unilaterally, from implementing the Convention or the Protocol in a manner that might violate their trade obligations.

No country or COP would consider itself as acting in an arbitrary, unjustifiable or disguised manner. These terms only take on meaning when a specific measure is being tested, and a third party adjudicator is called upon to balance, among other things, whether the impact on trade is justifiable in relation to the environmental threat and the effectiveness of the measure in responding to that threat. The question arises whether these principles, derived from the trade regime, but incorporated into an MEA, may be interpreted, developed and balanced more generously. In theory, the WTO has no more of a monopoly on the interpretation and application of these basic principles of fairness and proportionality than other treaties have on concepts such as “good faith” or “equity”. Thus the cross pollination of principles might lead to parallel or diverging interpretations of the meaning of those principles.

A further example of negotiators struggling to reflect the trade and environment balance within a treaty text is in the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (PIC). Explicitly both a trade and environment agreement, this treaty, when in force, will set the conditions and circumstances under which exporting Parties must inform, and importing Parties may ban the trade in certain identified substances.

The Rotterdam Convention anticipates its relationship with the WTO both at the level of general principle, and in the design of its specific rules. In the PIC preamble, the negotiators emphasise that:

“ . . . nothing in this Convention shall be interpreted as implying in any way a change in the rights and obligations of a Party under any existing international agreement applying to chemicals in international trade or to environmental protection,

The text carries on to reflect an

Understanding that the above recital is not intended to create a hierarchy between this Convention and other international agreements”

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<sup>18</sup> UNFCCC, Art 3.5, KP, preamble. The KP also provides in Article 2.3 that “The Parties included in Annex I shall strive to implement policies and measures under this Article in such a way as to minimize adverse effects, including the adverse effects of climate change, effects on international trade, and social, environmental and economic impacts on other Parties



Read together, these paragraphs suggest that in the opinion of the negotiators, the PIC agreement is compatible with existing international trade agreements, including the WTO. And indeed specific obligations in the PIC have been crafted to survive a WTO challenge.

At its heart the PIC authorises any PIC Party, under certain circumstances, to withhold its consent to the import of substances listed in Annex III of the Convention. In other words, a Party may impose a trade ban – i.e., a quantitative restriction on the trade in a product. This would be a *prima facie* violation of GATT Article XI’s prohibition on quantitative restrictions.

Clearly sensitive to trade concerns, the PIC designers have incorporated WTO principles of notification and transparency, and non-discrimination into the Convention’s obligations. A PIC Party imposing a trade ban must be publish the nature and justification of such a ban, must prohibit the import of the same chemical from any source (most favoured nation treatment), and must also prohibit the domestic production of the same chemical for domestic use (national treatment). The procedures for adding substances to Annex III require the consensus of all Parties, and thus the consent of the Parties to a potential ban is obtained in advance and with regard to a narrow and highly specific list of substances. These procedures also closely follow WTO principles and rules on Technical Barriers to Trade, that require, for example, risk assessments in accordance with internationally agreed procedures and standards. The PIC is perhaps the clearest effort yet of a trade and environment instrument seeking to provide a set of rules and principles that are “mutually supportive” with WTO disciplines.

There is, however, no formal linkage or established “hierarchy” between the WTO and the PIC. The substances regulated under the Rotterdam Convention may eventually be expanded beyond the relatively uncontroversial list of highly toxic and largely obsolete chemicals in Annex III, to more trade sensitive substances. The PIC Parties have not yet agreed a compulsory dispute settlement system. Thus a Party to the PIC that is also a WTO member might opt to bring a PIC-related trade dispute to the trade body. If the PIC membership is low (it may enter into force with only 50 ratifications), a PIC-based trade ban may be vulnerable to WTO challenge by a non-Party to the PIC. Ironically, the PIC’s incorporation of the MFN principle would require a PIC Party to extend any ban enacted vis a vis PIC Parties, to PIC non-Parties as well. A PIC non-Party that did not participate in the decision to list a substance, but finds itself subject to a ban may have no recourse other than to the WTO dispute settlement process.

### **3. “Contracting out” to other regimes**

On occasion, MEA negotiators have sought to build inter linkages by assigning tasks to other MEAs or institutions that may be better suited, on the basis of greater expertise or principles of subsidiarity, to carry forward the regime’s objectives. UNCLOS provides an early example of States acting at the global level recognising that some rules would be better developed at the regional level. Specifically, UNCLOS encourages its Parties to create new rules and institutions at the regional level to govern the sustainable management of marine resources when those resources straddle EEZs or swim the high seas.<sup>19</sup>

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<sup>19</sup> UNCLOS, Art 64.1; Art 118. See also Kimball, and Hyvarinen, in this series.

Parties to an MEA may also contract out specialised tasks to agencies with greater scientific or technical expertise. The climate change negotiators were unable to reach agreement in Kyoto on a methodology for assigning responsibility amongst Parties for greenhouse gas emissions generated by international transport – through combustion of so called “bunker fuels”. These fuels, which make up a significant and growing quantity of global emissions, bring economic benefits to the economies of countries of departure and to countries of destination, as well as the home countries of the airline, its passengers or cargo. Because these emissions are released into the atmosphere in international air space or on the high seas, they escape the regime’s basic principle that countries are responsible for limiting emissions within their territory. When agreement at Kyoto on bunker fuels proved impossible, the negotiators indicated that

“The Parties included in Annex I [industrialised countries] shall pursue limitation or reduction of emissions of greenhouse gases not controlled by the Montreal Protocol from aviation and marine bunker fuels, working through the International Civil Aviation Organization and the International Maritime Organization, respectively.”<sup>20</sup>

ICAO and IMO had already been co-operating with UNFCCC on these issues, its representatives attended the sessions in Kyoto, and presumably, along with their member states negotiating the Kyoto Protocol, approved this text. Since this text was adopted, the climate change negotiators have debated the intended scope of this unilateral assignment. Should it be read as a request for technical support, discussion and recommendation, or instead are these organisations expected to agree their own targets and timetables for the limitation and reduction of bunker fuel emissions? Developing countries, which have secured a temporary moratorium on commitments within the climate change regime, are concerned that the very different political dynamic within these other bodies could push them into undertaking quantified targets. Methodologies that assigned emissions on the basis of economic benefits could have a significant impact on developing countries with substantial shipping or fishing interests or tourist industries.

The relationship between the climate regime and the Intergovernmental Panel on Climate Change (IPCC) has been less controversial. Here the climate change Parties were far clearer in requesting the IPCC’s participation in a purely advisory role. While the work of the IPCC has been extremely influential on the pace of the climate change negotiations, the Panel has studiously avoided encroaching on policy making. Furthermore, unlike ICAO and IMO, the IPCC has no constitutional authority to adopt binding rules.

The contracting out of responsibilities from an MEA to another international organisation should be done with great care, and a clear division between technical advice and policy-making needs to be drawn.

#### **4. Negotiating links between and among MEAs and other institutions**

One common form of inter-agency inter linkage is the Memorandum of Understanding (MOU) that typically runs between MEA secretariats. These MOUs have tended to be brief and formalistic documents, memorialising a spirit of co-operation between agencies. They provide for regular exchange of information, as well as inviting “reciprocal representation” of agencies at each others’ intergovernmental meetings. These agreements have been discussed in more detail in another Background Paper.<sup>21</sup>

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<sup>20</sup> KP Art 2.2.

<sup>21</sup> See Ulfstein in this series.

More formal links have been negotiated when at the request of governments, tasks and responsibilities have been divided between independent agencies. The network of inter linkages that was designed to bring together various MEAs, and implementing agencies in the operation of the Global Environmental Facility (GEF) is the leading example of formalised inter-agency co-operation on the global environment. These agreements set out the divisions of labour and chains of accountability between the Conferences of Parties to the UNFCCC and CBD, the GEF Council, and between and among UNEP, UNDP and the World Bank.

The full series of formal inter linkages that makes up the GEF constituent instruments required several years of negotiation between all the agencies involved, and the approval of the resulting text through parallel resolutions of the governing bodies of each participating agency. While the GEF operations have not been trouble-free, the clear delineation of responsibilities between each body, reflected in a formal instrument, and endorsed at high level, has most likely helped avoid worse squabbles in what is a highly politicised and contentious area.

The GEF negotiations and the resulting instruments might also provide models for the type of arrangements that would be necessary to transform an ad hoc, building block approach to MEA design into a more formally constructed system of global environmental governance, should the international community ever choose to do so.

## **5. Concluding observations**

This brief survey of attempts by negotiators to avoid conflict and promote synergies among and between MEAs and related regimes suggests a growing awareness of the interaction between regulated substances and activities, and a greater appreciation of the diversity of expertise and competence available in the international system.

However, efforts to formalise these interrelationships, either through unilateral references in treaty text or through mutual agreement, have had mixed results. While acknowledging the existence of other, potentially competing rules and institutions most of these provisions would not do much to clarify relationships or increase the predictability of an outcome, should a conflict arise. Much of the treaty language cited in this note tends to reflect ambiguous compromise, or is tucked into preambular paragraphs of questionable legal force.

That serious conflicts have not yet arisen is attributable to informal rather than formal inter-linkages, and to the self-restraint of governments. The international circuit of MEA negotiations has fostered a breed of specialist diplomats, from both developed and developing countries, who have ensured some level of consistency in language and approach between agreements. The role these groups and individuals play in the system certainly deserves closer study. Furthermore, governments appear to have chosen, thus far, not to exploit gaps and overlaps by triggering disputes that might damage the fragile compromises reflected in these agreements.

There is however, an observable trend in a number of areas towards stricter obligations that will cut more deeply into individual government interests. The commitments in the Kyoto Protocol, the north-south trade ban under Basel, the PIC regime, the phasing in of developing country commitments under the Ozone regime, and the proposed biosafety and POPs agreements all signal the advent of a new, tougher generation of MEAs. These emerging

obligations may test the limits of self-restraint of both Parties and non-Parties to these regimes.

Each of these tougher regimes also promises to have a direct or a strong indirect impact on the international trade of goods and services. No directly MEA-related dispute has reached the GATT/WTO, and trade principles on transparency and non-discrimination are being introduced into MEAs in an effort to further inoculate them from a trade law challenge. Nevertheless, as the level of obligation increases, economic stakes are raised, and with them, the chances for a dispute. Vague, unilateral provisions within MEAs, or informal arrangements between secretariats will not by themselves shield trade related environmental measures from a WTO challenge. The absence of compulsory and binding dispute settlement provisions within the MEAs mean that the only outlet for a trade related dispute that emerges from an MEA will be the WTO.<sup>22</sup> Formal rules without formal procedures to interpret and apply them may, in the longer term do little to promote synergy or to avoid and resolve conflict. However building the capacity of MEAs to resolve their own disputes internally merely opens the next frontier of inter-linkages, by raising the question of who or what would resolve differences in interpretation that overarch two regimes of equal but competing strength.

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<sup>22</sup> While the negotiators of each instrument have recognised the need for tougher non-compliance procedures, Neither the KP, the Basel Convention, the PIC Convention nor the draft Biosafety Protocol have been able to agree what these procedures might look like.