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The Future International Climate Change Agreement: an International Law Perspective

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Outline

- *Yesterday: An overview of climate negotiations: from Rio (1992) to Lima (2014)*
 - The normative developments
 - The institutional architecture
 - The fundamental principles
- *Today: The elements for the draft negotiating text*
 - Mitigation and Adaptation
 - Finance and Technology transfer
 - Transparency
 - Compliance matters
- *Tomorrow: Some reflections on the future developments*



A history of the negotiations

- *1992, Rio de Janeiro Summit(UNCED): Adoption of the UN Framework Convention (stabilization of GHG emissions)*
- *1997: Adoption of the Kyoto Protocol (global reduction of - 5%)*
- *2005: entry into force of the Kyoto Protocol*
- *2005-2012: negotiations on the future climate regime (post 2012)*
- *2011:Durban Platform for Enhanced Action launched a new round of negotiations for the post 2020 period*
- *2012: Adoption of the Doha Amendment (2nd commitment period of the Kyoto Protocol 2013-2020) - still not in force*
- *2014: Lima call for action - elements for an agreement*
- *May 2015: draft negotiating text*
- *December 2015: Paris Agreement*



The Climate Change Regime

A) *The UNFCCC (Bottom up approach)*

- *General obligations on: Stabilization of GHG emissions (art. 4.2) - adaptation measures - financial assistance to developing countries - institutional arrangements*

B) *The Kyoto Protocol (top-down approach)*

1st commitment period:

- Quantified emission reduction commitments for industrialized States
- no emission reductions commitments on behalf of developing countries
- Articulated financial mechanism with multiple funds
- Flexibility mechanisms (CDM, JI, IET)
- Compliance mechanism: Enforcement Branch + Facilitative Branch

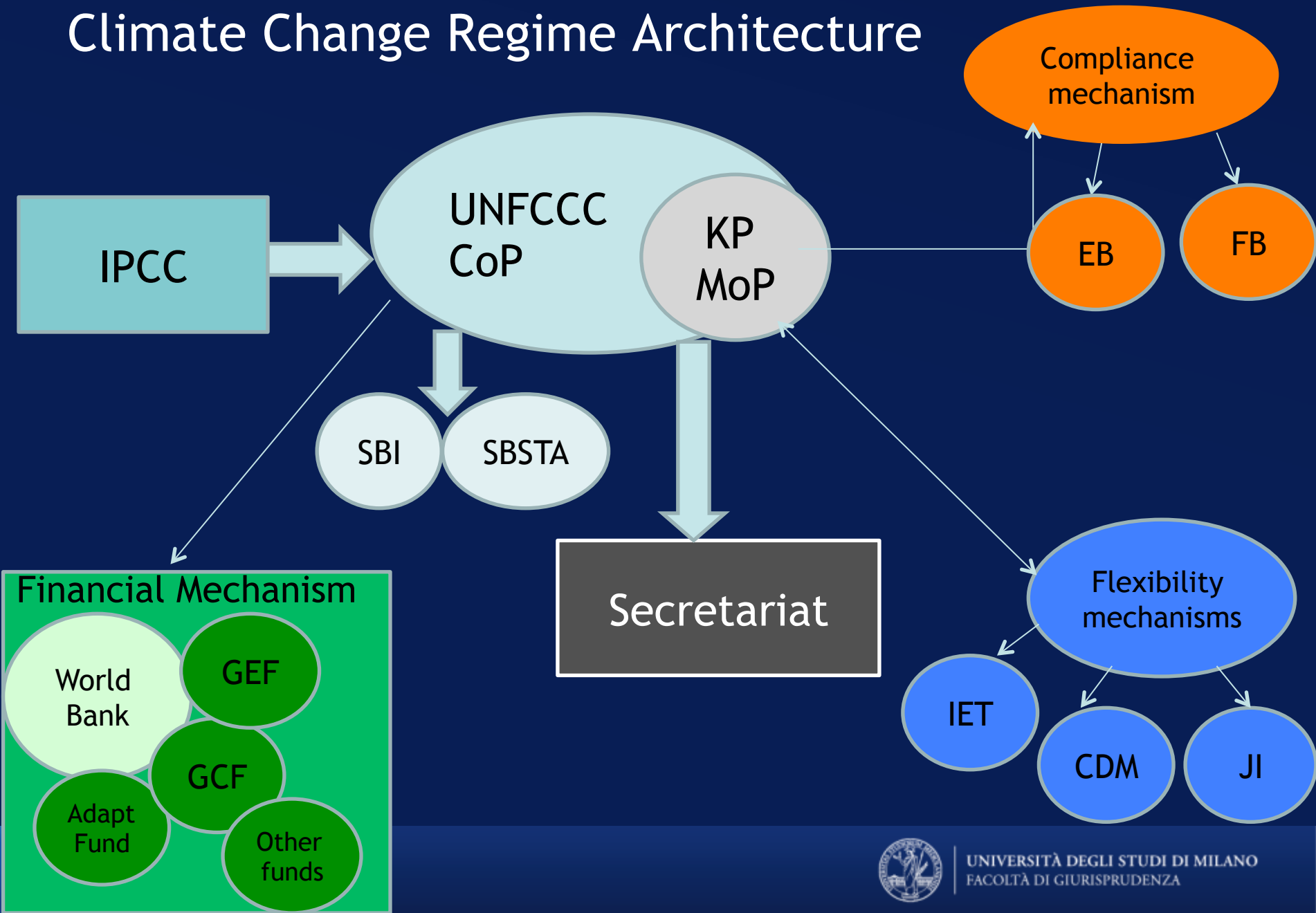
2nd commitment period: Very limited participation and voluntary pledges:

C) *Transition period: normative developments by the CoP:*

- *Adaptation*
- *Climate Finance*
- *REDD-plus mechanisms*



Climate Change Regime Architecture



The Fundamental Principles

In the UNFCCC and KP:

- Cornerstone principle of Common but differentiated responsibilities (CBDR) (and respective capabilities)
- **Sustainable Development**
- **Equity**
- **Mutual support between climate and economic policies**
- Cost-effectiveness

The future agreement recalls them and adds:

- CBDR (in light of different national circumstances)
- **Inclusiveness**
- **Transparency**

**Founding concepts: the nexus between Participation + Ambition/
stringency - compliance to ensure effectiveness (S.Barrett) + time (long-
term dimension)**



Where are we now: the main negotiating issues

Long-term objective: 1,5/2° C

Mitigation and Adaptation strategies

Transparency of action and support

*Monitoring, Reporting, Verification (MRV): International
Consultation and Analysis*

Finance and Technology Transfer

Facilitating implementation and compliance



The news in the Paris Agreement

‘MANAGERIAL’ approach with renewed emphasis on transparency - building trust

A few TOP-DOWN elements:

- *Long-term targets and timetables (?)*
- *Monitoring and verification*
- *Procedural requirements/information sharing*

... combined with a BOTTOM UP approach:

- *Focus on national circumstances (country-driven)*
- *Voluntary nationally determined contributions*
- *Increased participation of non-state actors (private investors, indigenous peoples)*



Mitigation

- *Long-term and global approach: ALL Parties, according to CBDR, enhanced ambition*
- *Parties should communicate and implement nationally determined mitigation commitments that are:*
 - Quantified or quantifiable
 - Transparent, comparable and/or verifiable
 - Accompanied with information that enhance clarity, transparency and understanding
- *Form of the commitments, OPTIONS:*
 - Zero emissions sustainable pathway
 - At least 50% by 2050 (1990 levels) - full decarbonization by 2100
 - Science-based: 40-70% (2010 levels) by 2050
 - Global emission budget to divide among all Parties
 - Stabilization at or below 350 ppm of Co2
- *Use of market mechanisms*



The Market Mechanisms

- *Purpose:*
 - mobilize the widest range of public and private investments for adaptation and mitigation
 - Create incentives for early action
- *Supplemental to domestic action*
- *Transparency*
- *Coherence*
- *Linkage among the different regional/national/sub-national climate policies/measures (cap and trade, carbon taxes, subsidies, ...)*
 - Technical issues (stringency of caps, scope, time, allocation modalities, banking)
 - Measures against leakage
 - Monitoring, reporting and verification
 - Tracking of allowances to avoid double counting



Climate finance

The channeling of public resources (towards developing countries) (for mitigation & adaptation) through frameworks and mechanisms that **leverage private sector capital**, and are in line with national development goals

Full operationalization of the Green Climate Fund:

- Catalyze new investment
- Gain the trust of Developing Countries
- Combine Developing Countries and the Private Sector Needs
- Bottom up approach/country ownership
- Direct Access
- Need of coordination among financial institutions (national, bilateral, international)
- Trust in institutions and their procedures (Consistency of funding resources, transparency and inclusiveness, legitimacy)



Transparency of action and support

Creation of a transparency framework, in order to:

- Enhance clarity, comparability between countries, accountability and mutual trust
- Facilitate tracking of progress in the implementation
- Ensure environmental integrity
- NEW: transparency of support commitments (finance and technology)

OPTIONS:

- A common framework applicable to all Parties/differentiated rules between developed and developing countries
- What kind of review? A single model for ALL Parties or:
 - International assessment and review for developed States?
 - International consultation and analysis for developing States?



Facilitating implementation and compliance

PREVIOUSLY:

UNFCCC Dispute settlement: art. 14 - never used
The Compliance Committee of the Kyoto Protocol

Principles: expert-based, non-confrontational and non-judicial

Cross-cutting SCOPE:

- Mitigation and adaptation
- Financial and Technology transfer
- Reporting

FUNCTION: essential for

- Environmental integrity
- Financial integrity
- Coherence



The 'Legal Nature' issues: Hard law v. soft law ... and soft law 'with teethes'

1) *“Protocol, another legal instrument or agreed outcome with legal force under the Convention”*

- *Pros : legal certainty, judicially enforceable, difficult to modify*
- *Cons of the “legally binding”: long time for ratification and entry into force, difficult to modify, watered down commitments,*
- *A core legally binding treaty that sets strong and sound foundations for the long-term cooperation process:*
 - *Sets the -2/1,5 C target*
 - *Sets medium and long-term emission reduction targets (2050 - 2100)*
 - *Establishes the basic commitments*
 - *Creates the institutional and procedural arrangements*
 - *MRV procedures*
 - *Compliance system*

2) *Legal nature of the Parties' commitments and of Nationally Determined Contributions*

3) *Legal nature of sanctions for non-compliance*



Some reflections on future developments

Enhance the MANAGERIAL approach:

Preference for a 'process' rather than a 'rule-based' approach

- Delegate lawmaking to the CoP to establish minimum standards
- + hybrid lawmaking:
 - to other institutions with adequate technical expertise(ex.: IMO, WHO)
 - Also non-governmental experts (ex.: IPCC, ISO)

TRANSPARENCY - ACCOUNTABILITY - COHERENCE in order to strengthened
LEGITIMACY and ENVIRONMENTAL INTEGRITY of the system

Make the best use of experience gained and of existing institutions

A look at developments outside the climate regime:

- Free trade and investment agreements (TTIP, WTO, ...)
- Mutual supportiveness and coherence



Thank you!

