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Join the Parties: 25+ Ways to Promote Participation in Multilateral Environmental Agreements

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COLUMBIA LAW SCHOOL

SABIN CENTER FOR CLIMATE CHANGE LAW

**JOIN THE PARTIES:
25+ WAYS TO PROMOTE
PARTICIPATION IN MULTILATERAL
ENVIRONMENTAL AGREEMENTS**

By Susan Biniaz

March 2018

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INTRODUCTION

Negotiators of multilateral environmental agreements are frequently faced with the challenge of striking the right balance between stringency of commitment and breadth of participation. A perfect agreement on paper, with strong commitments and a robust compliance mechanism, might attract too few Parties (or too few key Parties) to achieve the agreement's environmental objective. Conversely, broad participation in a weak agreement might also fail to accomplish the agreement's goals.

This paper focuses on the various ways in which negotiators have worked to encourage participation in multilateral environmental agreements. In some cases, they involve steps taken before and during the negotiation of the agreement. In other cases, they involve the provisions of the agreements themselves (such as various forms of flexibility, incentives to join, and disincentives to remaining outside) or decisions taken by Parties after agreements have entered into force.

Ultimately, States participate in agreements because they consider it in their environmental, economic, and/or political interest to do so. There may be forces beyond the four corners of environmental agreements that cause States to join them or implement their provisions de facto.

- There may be bilateral or multilateral pressure to join or implement an agreement, such as through diplomatic exchanges.
- The UN may call upon States to join or implement particular agreements, such as through a UN General Assembly Resolution.
- A State may be lobbied domestically, e.g., by environmental NGOs or particular industries.
- Another State(s) may restrict imports of a particular good if it does not meet a particular international environmental standard.
- Another type of agreement, such as a trade agreement, may incorporate the requirements of an environmental agreement, either directly or by reference.

At the same time, negotiators of environmental agreements have employed a wide variety of supplementary techniques, often in combination, to further encourage participation. This paper focuses on such enticements and accommodations.

1. PARTICIPATION IN NEGOTIATIONS

Participation in an agreement is likely to be increased if States are able to take part in its negotiation. Early engagement may help them to shape the outcome and/or give them a stake in an agreement's success. As such, many negotiation processes provide for financial assistance to enable representatives from States in need to attend the negotiating rounds.

For example, the UN General Assembly Resolution establishing the Intergovernmental Negotiating Committee for the development of a framework convention on climate change established a special voluntary fund "to ensure that developing countries, in particular the least developed among them, as well as small island developing countries, are able to participate fully and effectively in the negotiating process, and invites Governments, regional economic integration organizations and other interested organizations to contribute generously to the fund...."¹

2. MANDATE FOR NEGOTIATIONS

A negotiating mandate, which sometimes acts as a pre-negotiation of an agreement (at least on certain issues), can play an important role in promoting ultimate participation in an agreement.

¹ See paragraph 10 of UNGA Resolution 45/212, <http://www.un.org/documents/ga/res/45/a45r212.htm>.

A mandate might provide a helpful procedural element. For example, requiring that the ultimate agreement be adopted by consensus may increase the chances for its broad appeal down the road.

The choice of a particular negotiating forum may make a difference. In the case of the UN Convention to Combat Desertification, it was important to some countries that it be negotiated under the auspices of the UN General Assembly, rather than the UN Environment Program, given that the relevant issues (including development) extended beyond environmental ones.²

A mandate might also contain provisions of substantive import, such as a requirement that a particular element be either included in, or excluded from, the agreement to be negotiated.

- During the development of the UNEP Governing Council’s decision to pursue the negotiation of a legally binding instrument on mercury, it was important to certain countries to secure the inclusion of provisions on financial assistance; it was important to others that the mandate *not* provide for the future agreement to address heavy metals other than mercury, either from the outset or through an adding mechanism.³
- The Parties to the UN Framework Convention on Climate Change agreed, in the “Berlin Mandate,” that the next agreement to be negotiated would not include any “new commitments” for the Parties not included in Annex I of the Convention (essentially developing countries). This exclusion contributed to the United States’ not joining the Kyoto Protocol; at the same time, for certain developing countries, it enabled their participation in both the negotiation and the resulting Protocol.⁴

² See paragraph 2 of UNGA Resolution 47/188, <http://hrlibrary.umn.edu/resolutions/47/188GA1992.html>.

³ See Section III (Mercury) of UNEP Governing Council Decision 25/5, <http://wedocs.unep.org/bitstream/handle/20.500.11822/10623/K0950890%20GC-25-17-Proceedings-FINAL.pdf?sequence=1&isAllowed=y>.

⁴ See paragraph 2(b) of the Berlin Mandate, p. 5, <http://unfccc.int/resource/docs/cop1/07a01.pdf>.

The so-called “Dubai pathway” played a key role in promoting the future acceptability of an amendment to the Montreal Protocol on hydrofluorocarbons (HFCs). It contained a long list of topics to be discussed and/or included in the amendment, as well as procedural guidance regarding the sequencing of issues to be resolved and the “package deal” nature of the negotiation (“...nothing should be considered agreed until everything is agreed”).⁵

It should also be noted that resolving a controversial issue upfront in a mandate may shorten the time needed to negotiate an agreement; this in turn may enable greater participation by States with limited financial or personnel resources.

3. FRAMEWORK CONVENTION

States may choose to enhance the likelihood of wide participation in an agreement by designing it as a “framework” convention (whether or not its title literally contains that term). Such agreements tend to include an objective, general commitments, provisions on cooperation (such as on science/research), institutional machinery (such as a “Conference of the Parties” and a Secretariat), and provision for the adoption of protocols. Even States with concerns or skepticism about the subject matter may be willing to join these types of agreements, knowing that they will be able to decide later whether to join a protocol with more specific/stringent commitments.

The framework approach has been employed frequently in the environmental field, e.g., the Economic Commission for Europe’s Convention on Long-Range Transboundary Air Pollution (“the LRTAP Convention”), the Vienna Convention for the Protection of the Ozone Layer, and the UN Framework Convention on Climate Change. Various regional

⁵ See Dubai pathway on hydrofluorocarbons, <http://ozone.unep.org/en/handbook-montreal-protocol-substances-deplete-ozone-layer/40856>.

seas agreements also serve as frameworks, with multiple protocols, e.g., the Barcelona Convention (addressing the Mediterranean Sea) and the Cartagena Convention (addressing the Caribbean Sea).

Generally speaking, a State may only join a protocol or other subsequent instrument if it is a Party to the parent convention.⁶ This requirement may have the effect of promoting participation in the parent convention or, in the case of non-Parties to such convention, inhibiting participation in the protocol/other instrument.

4. SOFTENING COMMITMENTS

The substantive content of an agreement's commitments can significantly affect prospects for participation. In some contexts, States may agree on the need for stringent, iron-clad commitments; the Antarctic Environmental Protocol reflects many such provisions. In other cases, it may be necessary to soften one or more commitments in order to attract wide participation.

- Phrases such as “as appropriate” and “as far as practicable” are often used to make commitments more flexible and therefore more widely acceptable.
- Certain verbs (such as “endeavor,” “seek to,” or “make best efforts”) may be used to make a commitment require a particular behavior, rather than a particular result.
- Provisos may be attached to commitments, such as “taking into account national priorities and capacities.”

The softening may apply to a particular commitment of concern or more broadly. For example, the Biodiversity Convention moderates many of its commitments with the phrase “as far as possible and as appropriate” or “in accordance with [a Party's] particular conditions and capabilities.”⁷ Similarly, the Vienna Convention for the Protection of the

⁶ See, e.g., Article 37.1 of the Cartagena Protocol on Biosafety, <https://bch.cbd.int/protocol/text/>.

⁷ See the Biodiversity Convention, <https://www.cbd.int/doc/legal/cbd-en.pdf>.

Ozone Layer introduces several of its general obligations with the phrase “in accordance with the means at their [the Parties’] disposal and their capabilities.”⁸

5. DIFFERENTIATED COMMITMENTS

To a much greater degree than many other fields of international law, environmental agreements often contain differentiated commitments for a particular group(s) or type(s) of Parties.

States have suggested a variety of reasons for seeking distinct treatment, e.g.:

- limited capacity (such as least developed countries);
- geography (such as the United States and Canada in transboundary air pollution agreements that are largely focused on Europe);
- fairness (such as States that took early action or those that did not contribute as much to an environmental problem as other States);
- economic reasons (such as countries with economies in transition);
- ideology (such as developing countries seeking a per se distinction from developed countries);
- membership in a regional economic integration organization, such as the EU;
- application of the principle of common but differentiated responsibilities and respective capabilities in certain contexts;
- special situations (such as small island developing States, vulnerable States, or a State(s) with an anomalous circumstance); or
- the need to develop (such as some or all developing countries).

An agreement might notionally distinguish particular Parties through a description (“those Parties that...”), a category (members of the OECD), self-identification (“if a Party

⁸ See Article 2.2 of the Vienna Convention, <http://ozone.unep.org/en/handbook-vienna-convention-protection-ozone-layer/2205>.

considers that it...”), a list (Annex X), a function (all exporting States), or a combination. The Kigali Amendment to the Montreal Protocol sets out one accommodation based on self-selection plus the endorsement of the Meeting of the Parties, while another (for countries with “high ambient temperature”) is based on factual criteria.⁹

Differentiation might take the form of, e.g.:

- exclusion from commitments (such as the Kyoto Protocol’s exclusion of non-Annex I Parties from emissions targets);¹⁰
- entirely different commitments (such as U.S. and Canadian commitments under the LRTAP Convention’s Gothenburg Protocol, which are distinct from those that apply to European Parties);¹¹
- longer timeframes or different baselines (see below); or
- self-defined commitments (see below).

Several of the LRTAP Convention’s Protocols accommodate countries with large land mass, such as Russia, by allowing Parties to choose to regulate the *transboundary fluxes* of a pollutant rather than the *national emissions* of such pollutant.¹²

An agreement might also provide for differentiation in a less explicit manner, such as through clauses that take account of national priorities, capacities, capabilities, and/or

⁹ See the Kigali Amendment, <https://europa.eu/capacity4dev/unep/document/full-text-kigali-amendment-pt-1>.

¹⁰ See, e.g., Article 3.1 of the Kyoto Protocol, <https://unfccc.int/resource/docs/convkp/kpeng.pdf>.

¹¹ See Article 3.11 of the Gothenburg Protocol, <http://www.unece.org/fileadmin/DAM/env/lrtap/full%20text/1999%20Multi.E.Amended.2005.pdf>

¹² See, e.g., Article 2.2 of the Volatile Organic Compounds Protocol, <http://www.unece.org/fileadmin/DAM/env/lrtap/full%20text/1991.VOC.e.pdf>.

circumstances.¹³ The Convention on the Transboundary Effects of Industrial Accidents subjects certain obligations to the “framework of [each Party’s] legal system.”¹⁴

Finally, an agreement might distinguish particular types of Parties not through differentiating commitments, but by recognizing such Parties in other ways.

- The UN Convention to Combat Desertification calls for Parties to give “priority” to affected African country Parties.¹⁵
- The UN Framework Convention on Climate Change lists several different categories of developing country Parties (e.g., those with arid areas, those prone to natural disasters, those with low-lying coastal areas) as meriting particular consideration in terms of their specific needs and concerns.¹⁶

6. EXTRA TIME

An agreement might impose identical substantive commitments on all Parties but allow extra time for some or all Parties to achieve them.

- The London Protocol on ocean dumping, through what it called a “transitional period,” permitted any Party, for a limited period after entry into force, to take up to five years to implement certain commitments.¹⁷

¹³ See, e.g., Article 14 of the Minamata Convention on Mercury (whose provisions on capacity-building, technical assistance, and technology transfer take account of Parties’ respective capabilities),

http://www.mercuryconvention.org/Portals/11/documents/conventionText/Minamata%20Convention%20on%20Mercury_e.pdf.

¹⁴ See Article 7 of the Industrial Accidents Convention,

<http://www.unece.org/fileadmin/DAM/env/documents/2006/teia/Convention%20E%20no%20annex%20I.pdf>.

¹⁵ See Article 7 of the UN Convention to Combat Desertification, <http://www.unccd.int/en/about-the-convention/Pages/Text-overview.aspx>.

¹⁶ See Article 4.8 of the UNFCCC,

http://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/cvneng.pdf.

¹⁷ See Article 26 of the London Protocol,

<http://www.imo.org/en/OurWork/Environment/LCLP/Documents/PROTOCOLAmended2006.pdf>

- The original Montreal Protocol and several of its amendments provide a ten-year grace period for so-called “Article 5 Parties” (those developing countries whose per capital consumption of CFCs is below a certain threshold).¹⁸
- The Kigali Amendment to the Montreal Protocol, in addition to providing a grace period for Article 5 Parties generally, allows four additional years for a subset of Article 5 Parties with “high ambient temperature” (and therefore a greater need for refrigerants). The Amendment also provides certain additional time for a sub-set of non-Article 5 Parties that includes Belarus, Kazakhstan, Russia, Tajikistan, and Uzbekistan.¹⁹
- A 2012 amendment to the LRTAP Convention’s Gothenburg Protocol provided for “flexible transitional arrangements” to encourage the accession of new Parties (principally in Central Asia, the Caucasus, and Eastern and South-Eastern Europe).²⁰

7. CHOICE OF BASELINE

Several agreements provide Parties with flexibility concerning the baseline that applies (or that they may choose to apply) to a particular commitment. In many cases, it may simply not be viable (whether because of fairness or lack of sufficient data) for all

¹⁸ See Article 5 of the Montreal Protocol, <http://ozone.unep.org/pdfs/Montreal-Protocol2000.pdf>.

¹⁹ See Article 1 of the Kigali Amendment and paragraphs 1 and 2 of Decision XXVIII/2, <https://europa.eu/capacity4dev/unep/document/full-text-kigali-amendment-pt-1>, and [ADD CITE].

²⁰ See Section E, adding Article 3bis to the Gothenburg Protocol (amendment not yet in force), http://www.unece.org/fileadmin/DAM/env/documents/2013/air/ECE_EB.AIR_111_Add.1_ENG_DECISION_2.pdf.

Parties to be asked to limit or reduce their emissions of X in relation to what their emissions were in year Y.

For example, many climate-related instruments reflect baseline flexibility:

- The UN Framework Convention on Climate Change provided a “certain degree of flexibility” to countries “undergoing the process of transition to a market economy.”²¹ The Conference of the Parties later translated this flexibility into the ability of these Parties to use 1986 as their baseline for the Convention’s year-2000 greenhouse gas emissions aim, rather than the 1990 baseline that applied to other Annex I Parties. The premise was that a 1990 baseline would have been unfair to such countries, given their diminished economic situations (and consequent lower levels of emissions) in that year.
- The Kyoto Protocol allowed a Party to choose 1995 (instead of 1990) as its baseline for the three synthetic gases covered by the Protocol’s emissions targets.²² Some Parties had insisted that their use of those three gases in 1990 was too low to be used as an appropriate baseline for reductions during the 2008-2012 Kyoto commitment period.
- The Paris Agreement provides for Parties to “nationally determine” their emissions targets, including with respect to the applicable baseline.²³ (The EU’s 2030 target is in relation to 1990 emissions levels, for example, while the U.S. 2025 target is in relation to 2005 emissions levels.)

The NO_x Protocol to the Convention on Long-Range Transboundary Air Pollution sets 1987 as the baseline for commitments, but permits a Party to pick an earlier year if it

²¹ See Article 4.6 of the UNFCCC, http://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf.

²² See Article 3.8 of the Kyoto Protocol, <https://unfccc.int/resource/docs/convkp/kpeng.pdf>.

²³ See Article 4.2 of the Paris Agreement, https://unfccc.int/files/meetings/paris_nov_2015/application/pdf/paris_agreement_english_.pdf.

meets certain conditions.²⁴ (The absence of baseline flexibility in the SO₂ Protocol caused the United States not to be a party, given that it would have received no credit for earlier reductions.)

8. RESERVATIONS

While some environmental agreements prohibit reservations entirely,²⁵ other agreements, expressly or through silence, permit Parties to take reservations.²⁶ In the latter cases, negotiators have presumably determined that it is better for the agreement's environmental objective to have less-than-full implementation than risk the complete absence of Parties.

An agreement might permit reservations with respect to the entire agreement (such as the Aarhus Convention, by silence)²⁷ or only certain provisions. As examples of the latter:

- The Agreement on the Conservation of Populations of European Bats contains a limited reservation clause, which permits a Party to reserve with respect to any particular species of bat.²⁸

²⁴ See Article 2.1 of the NO_x Protocol,

<http://www.unece.org/fileadmin/DAM/env/lrtap/full%20text/1988.NOX.e.pdf>.

²⁵ See, e.g., Article 37 of the Biodiversity Convention, <https://www.cbd.int/convention/text/>, and Article 27 of the Stockholm Convention on Persistent Organic Pollutants,

<http://chm.pops.int/TheConvention/Overview/TextoftheConvention/tabid/2232/Default.aspx>.

²⁶ See section 2 (reservations) of the Vienna Convention on the Law of Treaties,

<https://treaties.un.org/doc/publication/unts/volume%201155/volume-1155-i-18232-english.pdf>.

²⁷ See the Aarhus Convention,

<http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf>.

²⁸ See Article VIII of the Eurobats Agreement,

http://www.eurobats.org/official_documents/agreement_text.

- The Convention on International Trade in Endangered Species (“CITES”) similarly provides for limited reservations, including with respect to the listing of particular species.²⁹

Prospective Parties may also take advantage of understandings and/or declarations to facilitate or even enable their participation. For example, with respect to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal (“the Basel Convention”), several Parties (including, e.g., Germany, Japan, Singapore) submitted declarations to the effect that the provisions of the Convention do not affect the exercise of navigational rights and freedoms as provided in international law.³⁰

9. SELF-DETERMINED COMMITMENTS

Some agreements invite greater participation by permitting Parties to fashion their own commitments.

- The Convention on Wetlands of International Importance especially as Waterfowl Habitat (the “Ramsar Convention”) provides for each Party to designate wetlands (at a minimum, one) within its territory for inclusion in the “List of Wetlands of International Importance.”³¹
- The Paris Agreement provides for each Party to design its own “nationally determined contribution” with respect to greenhouse gas emissions.³² This approach stands in contrast to the Kyoto Protocol, under which Parties’ emissions targets were negotiated and enshrined in the agreement. Because the Paris Agreement was to apply to all countries (not just developed countries, as had been

²⁹ See Article XXIII of CITES, <https://www.cites.org/eng/disc/text.php>.

³⁰ See

<http://www.basel.int/Countries/StatusofRatifications/PartiesSignatories/tabid/4499/Default.aspx>.

³¹ See Article 2 of the Ramsar Convention,

https://www.ramsar.org/sites/default/files/documents/library/scan_certified_e.pdf.

³² See Article 4.2 of the Paris Agreement,

https://unfccc.int/files/meetings/paris_nov_2015/application/pdf/paris_agreement_english_.pdf.

the case under Kyoto), and because the United States had failed to join the Kyoto Protocol in part because of its negotiated target, it was important to structure Paris so as to maximize both worldwide participation and that of key countries.

In some cases, commitments are set by the agreement, but a Party gets to self-determine whether a particular commitment applies to it. In the Minamata Convention on Mercury, for example, certain commitments relating to artisanal and small-scale gold mining apply only to a Party in whose territory such mining/processing is “more than insignificant.” Each Party determines whether its level of mining/processing meets that standard.³³

10. DEFINITIONS

Some environmental agreements include definitions that result in providing flexibility to Parties indirectly.

- In the North American Agreement on Environmental Cooperation (i.e., the NAFTA environmental side agreement), for example, there are country-specific definitions of “territory” for Canada, Mexico, and the United States that inform their respective substantive obligations.³⁴
- The Basel Convention, which regulates transboundary movements of hazardous wastes, defines “wastes” in part by reference to the respective national laws of the Parties.³⁵

³³ See Article 7 of the Minamata Convention on Mercury, http://www.mercuryconvention.org/Portals/11/documents/conventionText/Minamata%20Convention%20on%20Mercury_e.pdf.

³⁴ See Annex 45 of the North American Agreement on Environmental Cooperation, <http://www.cec.org/about-us/NAAEC>.

³⁵ See Article 2 of the Basel Convention, which defines “wastes” as “substances or objects which are disposed of or are intended to be disposed of or are required to be disposed of by the provisions of national law,” <http://www.basel.int/Portals/4/Basel%20Convention/docs/text/BaselConventionText-e.pdf>.

- The Caribbean region’s Protocol Concerning Specially Protected Areas and Wildlife (“the SPAW Protocol”) accords individual Parties certain latitude over which of their terrestrial areas are included within the geographic scope of the agreement.³⁶
- The Espoo Convention on Environmental Impact Assessment in a Transboundary Context defines a major term – “proposed activity” – with reference to what is subject to the decision of a competent authority under the respective national procedures of the Parties.³⁷

11. LEGAL CHARACTER

The legal character of commitments is often a controversial aspect of negotiations, one that can potentially serve to deter or facilitate participation.

The issue of legal character may involve an entire instrument. For example, the Copenhagen Accord³⁸ and the United Nations forest instrument (formerly known as the non-legally binding instrument on all types of forests)³⁹ are entirely non-legally binding.

In other cases, the legal character issue relates to particular commitments. Strictly speaking, the issue is a binary one -- a commitment is either legally binding or it is not -- and either choice may promote participation by certain Parties. However, there are also shades of nuance that can help to make an agreement more widely acceptable.

As noted above, a legally binding commitment might be softened by relating it to a Party’s behavior, rather than a specified result.

³⁶ See Article 1(c) of the SPAW Protocol, [file:///C:/Users/Owner/Downloads/SPAW%20Protocol-en%20\(1\).pdf](file:///C:/Users/Owner/Downloads/SPAW%20Protocol-en%20(1).pdf).

³⁷ See Article 1(v) of the Espoo Convention, https://www.unece.org/env/eia/about/eia_text.html.

³⁸ See the Copenhagen Accord, COP Decision 2/CP.15, p. 4, <https://unfccc.int/resource/docs/2009/cop15/eng/11a01.pdf>.

³⁹ See the United Nations forest instrument, UNGA Resolution 62/98, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N07/469/65/PDF/N0746965.pdf?OpenElement>, renamed by UNGA Resolution 70/199, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N15/450/10/PDF/N1545010.pdf?OpenElement>.

Further, an agreement might reflect a hybrid of legally binding and non-legally binding provisions that is designed to bring all potential Parties on board. Such combinations have been particularly important in the climate change regime.

- The UN Framework Convention on Climate Change generally contains legally binding commitments. However, the provision that relates to Annex I Parties returning their greenhouse gas emissions to 1990 levels in the year 2000 is not legally binding.⁴⁰
- Parties to the Paris Agreement are legally required to submit “nationally determined contributions” with respect to their mitigation efforts but they are not required to achieve them.⁴¹

There may even be shades of acceptability within non-binding provisions, such as the distinction between “may” and “should” found in certain articles of the Paris Agreement.⁴²

12. SINGLE-COUNTRY ACCOMMODATIONS

Sometimes negotiators accommodate the concerns or situation of a particular State. The accommodation may be made because the participation of that State is important for the agreement, because the State might otherwise block consensus, because the accommodation makes sense on the merits, or otherwise. Generally, such provisions do not name names, but they are often drafted so specifically that they could not realistically apply to any other State.

⁴⁰ See Article 4.2(a) and (b) of the UNFCCC, http://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/coveng.pdf.

⁴¹ See Article 4.2 of the Paris Agreement, https://unfccc.int/files/meetings/paris_nov_2015/application/pdf/paris_agreement_english_.pdf.

⁴² See, e.g., Article 7.10 of the Paris Agreement, https://unfccc.int/files/meetings/paris_nov_2015/application/pdf/paris_agreement_english_.pdf.

- The original Montreal Protocol included a provision that was written expressly for the situation of the Soviet Union. It was so specific that it was improbable that it would apply to any other State:

“Any Party not operating under Article 5, that has facilities for the production of Annex A or Annex B controlled substances under construction, or contracted for, prior to 16 September 1987, and provided for in national legislation prior to 1 January 1987, may add the production from such facilities to its 1986 production of such substances for the purposes of determining its calculated level of production for 1986, provided that such facilities are completed by 31 December 1990 and that such production does not raise that Party’s annual calculated level of consumption of the controlled substances above 0.5 kilograms per capita.”⁴³

- A similarly limited accommodation was made for Iceland with respect to accounting for emissions under the Kyoto Protocol.⁴⁴ It applied only to States in which, among other things, industrial process CO₂ emissions from a “single project” added in any one year of the commitment period more than five per cent of the total CO₂ emissions of that State in 1990 (the baseline year).
- The LRTAP Convention’s Protocol on Heavy Metals provides an exception for any Party whose “total land area is greater than 6,000,000 km²” (which includes Canada, Russia, and the United States from within the LRTAP region).⁴⁵
- The Minamata Convention on Mercury contains certain accommodations intended to allow the United States to implement the agreement under existing U.S. law. They are not as specific to a particular country as the Montreal Protocol or Kyoto

⁴³ See Article 2.6 of the Montreal Protocol, <http://ozone.unep.org/en/handbook-montreal-protocol-substances-deplete-ozone-layer/25419>.

⁴⁴ See <http://unfccc.int/resource/docs/cop7/13a01.pdf#page=68>.

⁴⁵ See Article 3.7 of the Protocol on Heavy Metals, <http://www.unece.org/fileadmin/DAM/env/lrtap/full%20text/1998.Heavy.Metals.e.pdf>.

Protocol examples. They permit any Party to take an alternative approach to regulating products containing mercury if it fulfills certain other requirements, which could conceivably also apply to countries other than the United States.⁴⁶

Some agreements do name names. Under the North American Agreement on Environmental Cooperation, the United States and Mexico are subject to one enforcement procedure, while an alternative one expressly applies to Canada.⁴⁷

13. FLEXIBILITY IN IMPLEMENTATION

An agreement might balance stringency, on the one hand, with multiple forms of flexibility, on the other.

With the notable exception of the United States, the Kyoto Protocol was able to attract the participation of Annex I Parties by combining stringent, legally binding emissions targets with a significant number of flexibility elements in relation to implementation.⁴⁸

- While top-line targets were prescribed, Parties were free to achieve them through laws, policies, or other measures of their choosing.
- The Protocol did not prescribe specific targets for individual greenhouse gases, but rather took a “basket” approach that permitted Parties to achieve their targets through the combination they deemed appropriate.
- To a limited degree, Parties could choose to achieve their targets by enhancing removal of greenhouse gases by sinks (such as forests) rather than by reducing emissions.
- Five-year commitment periods allowed for multi-year averaging.

⁴⁶ See Article 4.2 of the Minamata Convention on Mercury, http://www.mercuryconvention.org/Portals/11/documents/Booklets/Minamata%20Convention%20on%20Mercury_booklet_English.pdf.

⁴⁷ See Annex 36A of the North American Agreement on Environmental Cooperation, <http://www.cec.org/about-us/NAAEC>.

⁴⁸ See the Kyoto Protocol, <https://unfccc.int/resource/docs/convkp/kpeng.pdf>.

- There was some ability to deviate from the general 1990 baseline. As noted above, Parties could choose 1995 for the three synthetic gases. Further, Parties with economies in transition could choose an earlier baseline, and those for which “land-use change and forestry constituted a net source of greenhouse gas emissions in 1990” could make adjustments to their baseline.
- A Party could add unused emission allowances to its allowance for the next commitment period.
- Parties (such as, but not limited to, EU Member States) could achieve their targets jointly.
- Parties could take advantage of various Kyoto mechanisms, including emissions trading among Annex I Parties and project offsets in Annex I and non-Annex I Parties, to help achieve their targets.

14. NO PREJUDICE

Sometimes prospective Parties may be more likely to join an agreement if, by doing so, they have not prejudiced their ability to argue for a different outcome on a particular issue in a future agreement.

- The Espoo Convention, for example, makes clear that its voting procedure (i.e., super-majority voting if consensus cannot be reached) “is not intended to constitute a precedent for future agreements negotiated within the Economic Commission for Europe.”⁴⁹
- The Montreal Protocol’s financial mechanism, which was added by the London Amendment in 1990, was expressly “without prejudice to any future arrangements

⁴⁹ See Article 14.6 of the Espoo Convention, http://www.unece.org/fileadmin/DAM/env/eia/documents/legaltexts/Espoo_Convention_authentic_ENG.pdf.

that may be developed with respect to other environmental issues.”⁵⁰ Some countries, including the United States, were concerned that it would become a precedent for a future agreement on climate change.

15. FINANCIAL/TECHNICAL ASSISTANCE

For some countries, particularly developing countries, their participation may depend in part on whether an agreement provides for technical and/or financial assistance.

Of those environmental agreements that include assistance provisions, some address it quite generally. For example, the Agreement on the Conservation of Albatrosses and Petrels in the Southern Hemisphere provides for Parties to “endeavor to provide training, technical and financial support to other Parties...to assist them in implementing the provisions of [the] Agreement.”⁵¹

At the other end of the spectrum, some agreements are specific about which Parties are to provide financial assistance, which Parties are eligible to receive it, and/or the mechanism for its delivery.

- The Biodiversity Convention specifies that developed countries are to provide resources, that developing countries are the beneficiaries, and that the Parties are to designate an institutional structure to operationalize the Convention’s financial mechanism.
- Rather than designate an outside institution, the London Amendment to the Montreal Protocol established a dedicated “Multilateral Fund” to serve the Protocol.

In some cases, an agreement may draw a link between implementation and financial/technical assistance. For example, the Montreal Protocol (through its London

⁵⁰ See Article 10.10 of the Montreal Protocol, <http://ozone.unep.org/pdfs/Montreal-Protocol2000.pdf>.

⁵¹ See Article VII.4 of the Albatrosses and Petrels Agreement, <http://www.cms.int/en/convention-text>.

Amendment), the Framework Convention on Climate Change, and the Biodiversity Convention all include a factual statement to the effect that the extent to which developing country Parties will effectively implement their commitments will depend upon the effective implementation by developed countries of their commitments related to financial/other assistance.⁵²

Assistance might also be available *before* a State joins an agreement – in order to put it in a position to carry out its commitments once it joins. Environmentally speaking, it may be better to take the time to ensure that a State can implement an agreement than to have it become a Party prematurely. The London Protocol, for example, provides for the IMO to assist developing countries and those in transition to market economies that have declared their intention to join the Protocol to “examine the means necessary to achieve full implementation.”⁵³

16. COMPLIANCE/IMPLEMENTATION MECHANISMS

Mechanisms to promote compliance and/or implementation can play a role in making an agreement more widely acceptable.

In some cases, States may be looking for a robust mechanism. Particularly if an agreement is to contain strong commitments with potential economic impact, States may seek to ensure that they are not put at a competitive disadvantage by another Party’s failure to comply. For these and other reasons (such as ensuring the integrity of the Protocol’s market mechanisms), the Kyoto Protocol, for example, provides for a relatively stringent “enforcement branch” that applies to its legally binding emissions targets.⁵⁴

⁵² See Article 4.7 of the UNFCCC, Article 2.5 of the Montreal Protocol, and Article 20.4 of the Biodiversity Convention.

⁵³ See Article 13.2 of the London Protocol, <http://www.imo.org/en/OurWork/Environment/LCLP/Documents/PROTOCOLAmended2006.pdf>

⁵⁴ See description at http://unfccc.int/kyoto_protocol/compliance/items/3024.php.

The Antarctic Treaty’s Protocol on Environmental Protection provides for strong compliance mechanisms, including the applicability of mandatory arbitration, with binding consequences, in relation to several of its annexes.⁵⁵ Here the likely impetus is the unique and fragile Antarctic environment, rather than competitiveness concerns.

In other cases, States (or at least some of them) may be concerned about mechanisms that they view as adversarial or potentially punitive. For this reason, most environmental agreements provide for only voluntary recourse to the International Court of Justice or binding arbitration, and many agreements provide a softer alternative. These alternatives, whether referred to as “non-compliance” procedures,⁵⁶ “compliance” procedures,⁵⁷ or a “multilateral consultative process,”⁵⁸ can vary in many respects (e.g., what triggers the process and potential outcomes), but they have in common that they are multilateral in nature and are intended to be “friendlier” than traditional compliance mechanisms.

17. URGING NON-PARTIES TO JOIN/IMPLEMENT

Some agreements put an affirmative obligation on Parties to encourage non-Parties to join.

Such provisions are found in many fisheries-related agreements. For example, both the Port State Measures Agreement and the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas

⁵⁵ See Article 19 of the Antarctic Environmental Protocol, http://www.ats.aq/documents/recatt/Att006_e.pdf.

⁵⁶ See Article 8 of the Montreal Protocol, <http://ozone.unep.org/pdfs/Montreal-Protocol2000.pdf>.

⁵⁷ See Article 11 of the London Protocol,

<http://www.imo.org/en/OurWork/Environment/LCLP/Documents/PROTOCOLAmended2006.pdf>

⁵⁸ See Article 13 of the UNFCCC,

http://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf.

(“the FAO Compliance Agreement”) require Parties to encourage non-Parties to join the Agreement and/or adopt laws and regulations consistent with the Agreement.^{59 60}

Under the Convention for the Prohibition of Fishing with Long Driftnets in the South Pacific, Parties have an obligation to “consult” with non-Parties regarding driftnet fishing activities that “appear to adversely affect” conservation of marine living resources within the Convention area; further, they are to “seek to reach agreement” concerning the prohibitions under the Convention.⁶¹

18. TAKING UNSPECIFIED MEASURES AGAINST NON-PARTIES

Some agreements go beyond requiring Parties to urge non-Parties to join or implement.

- Some fisheries-related agreements obligate Parties to exchange information with respect to activities of fishing vessels flying the flags of non-Parties that undermine the effectiveness of international fisheries-related conservation/management measures.⁶²
- Such agreements may contain a further obligation to cooperate “to the end that” such vessels “do not engage” in such activities.⁶³ It is not specified exactly which measures Parties are to take, but the fact that the obligation is bounded by consistency with international law suggests they might include, *inter alia*, trade

⁵⁹ See Article 23.1 of the Port State Measures Agreement, <http://www.fao.org/3/a-i1644t.pdf>.

⁶⁰ See Article VIII (1) of the FAO Compliance Agreement, http://www.fao.org/fileadmin/user_upload/legal/docs/012t-e.pdf

⁶¹ See Article 5 of the Driftnet Convention, <https://iea.uoregon.edu/treaty-text/1989-prohibitiondriftnetssouthpacificentxt>.

⁶² See, e.g., Article VIII (3) of the FAO Compliance Agreement, http://www.fao.org/fileadmin/user_upload/legal/docs/012t-e.pdf.

⁶³ See, e.g., Article VIII (2) of the FAO Compliance Agreement, http://www.fao.org/fileadmin/user_upload/legal/docs/012t-e.pdf.

measures with respect to fish caught in a manner inconsistent with the agreement in question.

- The Agreement on Conservation of Polar Bears requires Parties to “take action as appropriate” to promote compliance with the Agreement by nationals of States not party....”⁶⁴

The Antarctic Treaty’s Protocol on Environmental Protection contains two provisions of note.

- The Antarctic Treaty Consultative Meetings are to “draw the attention of any State which is not a Party...to any activity undertaken by that State, its agencies, instrumentalities, natural or juridical persons, ships, aircraft or other means of transport which affects the implementation of the objectives and principles” of the Protocol.⁶⁵
- Further, each Party is to “exert appropriate efforts, consistent with the Charter of the United Nations, to the end that no one engages in any activity contrary to this Protocol.”⁶⁶

The International Convention for the Prevention of Pollution from Ships (“MARPOL”) provides that, with respect to the ships of non-Parties to the Convention, Parties are required to apply to Convention’s requirements “as may be necessary to ensure that no more favourable treatment is given to such ships.”⁶⁷

⁶⁴ See Article VIII of the Agreement on Conservation of Polar Bears, <http://sedac.ciesin.org/entri/texts/polar.bears.1973.html>.

⁶⁵ See Article 13 of the Antarctic Environmental Protocol, http://www.ats.aq/documents/recatt/Att006_e.pdf; Article X of the Convention for the Conservation of Antarctic Marine Living Resources contains a similar provision, <https://www.ccamlr.org/en/organisation/camlr-convention-text>.

⁶⁶ See Article 13 of the Antarctic Environmental Protocol, http://www.ats.aq/documents/recatt/Att006_e.pdf.

⁶⁷ See Article 5(4) of MARPOL, <http://www.marpoltraining.com/MMSKOREAN/MARPOL/intro/a5.htm>.

19. TRADE CONTROLS VIS-À-VIS NON-PARTIES

Several environmental agreements expressly limit Parties' trade with non-Parties in the good(s) that is the subject of the agreement. Such provisions are generally intended to prevent leakage or unfair advantage ("free riding") but may also have the effect of encouraging non-Parties to participate, either de jure (by joining the agreement) or de facto (by implementing the substantive provisions of the agreement).

- The Montreal Protocol restricts Parties from trading with non-Parties in the substances controlled under the Protocol (such as CFCs).⁶⁸ The restriction does not apply if the non-Party is in de facto compliance with key provisions of the Protocol; the compliance determination is made by the Meeting of Parties. (Even if a State is a Party to the Protocol, it is considered a non-Party with respect to a controlled substance if it has not joined the particular amendment controlling that substance.)
- The Basel Convention prohibits a Party from trading with a non-Party in hazardous wastes covered by the Convention, unless those two States have an agreement or arrangement that provides the equivalent stringency of the Convention.⁶⁹ (Certain "grandfathered" agreements and arrangements are subject to a lower standard.) Unlike under the Montreal Protocol, it is the Party trading with the non-Party under such an agreement or arrangement that determines the extent to which it meets the Basel standard.
- Under CITES, a Party may trade with a non-Party in CITES-covered species if the non-Party issues "comparable documentation" that "substantially conforms" to the Convention's requirements.⁷⁰

⁶⁸ See Article 4 of the Montreal Protocol, <http://ozone.unep.org/pdfs/Montreal-Protocol2000.pdf>.

⁶⁹ See Articles 4.5 and 11 of the Basel Convention, <http://www.basel.int/Portals/4/Basel%20Convention/docs/text/BaselConventionText-e.pdf>.

⁷⁰ See Article X of CITES, <https://www.cites.org/eng/disc/text.php#X>.

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- The Biodiversity Convention’s Cartagena Protocol on Biosafety addresses “transboundary movements of living modified organisms” between Parties and non-Parties, but in very general terms. Such movements are to be “consistent with the objective” of the Protocol.⁷¹

In some cases, steps need to be taken to avoid an impact on too many non-Parties. For example, amendments to the Montreal Protocol have specified low thresholds for early into force (e.g., twenty Parties). If new trade controls under the Protocol were to become effective immediately upon entry into force, they would apply to an enormous number of States. For this reason, the amendments have generally provided for delayed application of the trade control provisions. In the case of the Kigali Amendment on HFCs, the target date for entry into force of the trade provisions is a full ten years after the other provisions (2029 vs. 2019), and 70 (vs. 20) instruments must have been deposited.⁷²

20. ABILITY TO GO BEYOND THE AGREEMENT

Countries often seek an assurance that joining an agreement will not preclude them from taking measures that are more stringent than the agreement’s terms.

Many environmental agreements contain such an assurance.

- The Aarhus Convention, for example, provides that it does not affect “the right of a Party to maintain or introduce measures providing for broader access to information, more extensive public participation in decision-making and wider access to justice in environmental matters than required by this Convention.”⁷³

⁷¹ See Article 24 of the Biosafety Protocol, <https://bch.cbd.int/protocol/text/>.

⁷² See Article IV.2 of the Kigali Amendment, <https://europa.eu/capacity4dev/unep/document/full-text-kigali-amendment-pt-1>.

⁷³ See Article 3.5 of the Aarhus Convention, <http://www.unece.org/fileadmin/DAM/env/pp/documents/cep43e.pdf>.

- The Espoo Convention contains a similar provision.⁷⁴

Particularly in the context of agreements that relate to trade, these provisions often include a reference to international law, meaning that, while the agreement in question does not preclude or limit more stringent measures, other sources of international law (such as WTO rules) might. Examples include the Rotterdam Convention on Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade⁷⁵ and the Basel Convention.⁷⁶ An international law clause may also appear in a marine pollution agreement, such as the International Convention on the Control of Harmful Anti-Fouling Systems on Ships,⁷⁷ where it presumably refers to the law of the sea.

21. “TACIT” AMENDMENTS

Some agreements use tacit amendment procedures, which flip the usual presumption; instead of a Party being bound by an amendment only if it affirmatively joins it, an amendment applies to a Party unless it affirmatively opts out. The tacit procedure serves to promote participation in two different ways.

- The approach generally broadens the applicability of an amendment (by avoiding the need for ratification), as well as accelerates it (given how lengthy many States’ ratification procedures can be).

⁷⁴ See Article 2.9 of the Espoo Convention, http://www.unece.org/fileadmin/DAM/env/eia/documents/legaltexts/Espoo_Convention_authentic_ENG.pdf.

⁷⁵ See, e.g., Article 15.4 of the Rotterdam Convention, <http://www.pic.int/TheConvention/Overview/TextoftheConvention/RotterdamConventionText/tabid/1160/language/en-US/Default.aspx>.

⁷⁶ See Article 4.11 of the Basel Convention, <http://www.basel.int/Portals/4/Basel%20Convention/docs/text/BaselConventionText-e.pdf>.

⁷⁷ See Article 1.3 of the Anti-Fouling Convention, <http://www.flagadmin.com/middleware/filemanager/userfiles/LIBRARY/2001InternationalConventionontheControlofHarmfulAnti-foulingSystemsonShips-pdf.pdf>.

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- The opt-out feature can increase participation in the underlying agreement by providing future Parties with an assurance that they do not have to be bound by an amendment that they find unacceptable.

While the tacit procedure is often associated with amendments of a more technical nature,⁷⁸ this is not always the case. Some of the most high-profile environmental agreements apply the procedure to amendments that are both significant and substantive.

- The International Convention for the Regulation of Whaling, for example, permits a Party to object to the addition of a new regulation to the Schedule, in which case it is not bound.⁷⁹
- CITES uses the procedure for additions to Appendices I and II (which list specimens of species covered by the Convention).⁸⁰

In certain cases, such as where uniformity is important or where there might be competitiveness concerns, the procedure may provide for an amendment to apply to all Parties, without the possibility of opting out.

- So-called “adjustments” to the Montreal Protocol (which modify the regulation of an ozone-depleting substance that is already controlled under the Protocol) apply to all Parties automatically.⁸¹

⁷⁸ See, e.g., Article 16 of the UNFCCC (which restricts the tacit procedure to “lists, forms and any other material of a descriptive nature that is of a scientific, technical, procedural or administrative character”), http://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/coveng.pdf.

⁷⁹ See Article V of the International Whaling Convention, <https://www.animallaw.info/treaty/international-convention-regulation-whaling>.

⁸⁰ See Article XV of CITES, <https://www.cites.org/eng/disc/text.php#XV>.

⁸¹ See Article 2.9 of the Montreal Protocol, <http://ozone.unep.org/pdfs/Montreal-Protocol2000.pdf>.

- Amendments to certain annexes of the Stockholm Convention on Persistent Organic Pollutants apply to all Parties; the inability to opt out is mitigated by the requirement that such amendments be adopted by consensus.⁸²

Some countries may be uncomfortable signing up to an agreement where amendments will automatically bind them unless they take an affirmative step. They may be concerned that it will be difficult to keep track of such amendments and their limited timeframes for opting out and/or they may want to keep open prerogatives for their legislature to approve such amendments. To address this concern, the Convention to Combat Desertification provides for a Party to re-flip the presumption with respect to itself, i.e., it will be bound by a tacit amendment only if it affirmatively joins it.⁸³ This accommodation has been repeated in several other agreements, e.g., the Stockholm Convention.⁸⁴ The inclusion of such a modified tacit amendment procedure in an agreement promotes participation in three ways:

- by broadening participation in a given amendment;
- by inviting participation in the underlying agreement by those States potentially concerned about being bound by a *particular* amendment; and
- by inviting participation in the underlying agreement by those States potentially concerned about being bound by *any* amendment without its express approval.

22. ENTRY INTO FORCE CLAUSES

Entry into force provisions can be designed to promote participation.

⁸² See Article 22.5 of the Stockholm Convention, [file:///C:/Users/Owner/Downloads/UNEP-POPS-COP-CONVTEXT-2009.En%20\(1\).pdf](file:///C:/Users/Owner/Downloads/UNEP-POPS-COP-CONVTEXT-2009.En%20(1).pdf).

⁸³ See Article 34.4 of the Desertification Convention, http://www2.unccd.int/sites/default/files/relevant-links/2017-01/UNCCD_Convention_ENG_0.pdf.

⁸⁴ See Article 25.4 of the Stockholm Convention, [file:///C:/Users/sbiniiaz/Downloads/UNEP-POPS-COP-CONVTEXT-2009.En%20\(1\).pdf](file:///C:/Users/sbiniiaz/Downloads/UNEP-POPS-COP-CONVTEXT-2009.En%20(1).pdf).

Negotiators might set a high numerical threshold for entry into force, thereby providing an incentive for many States to join (or at least precluding entry into force if they do not). The entry into force of the Convention to Combat Desertification, for example, required fifty instruments to be deposited.⁸⁵

A weighted entry into force clause can promote the participation of particular types of States or even one or more combinations of particular States.

- For example, the Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships (“MARPOL 73/78”) required fifteen States, “the combined merchant fleets of which constitute not less than 50 per cent of the gross tonnage of the world’s merchant shipping....”⁸⁶
- The Montreal Protocol required not only that at least eleven States/REIOs join, but they needed to represent at least two-thirds of 1986 estimated global consumption of the controlled substances.⁸⁷
- The Kyoto Protocol required not only fifty-five UNFCCC Parties to join, but they needed to include Annex I Parties accounting for at least 55 % of Annex I CO₂ emissions in 1990.⁸⁸

Participation can also be spurred by setting a target date for entry into force. Such date does not change the entry-into-force threshold(s) but can accelerate States’ efforts to join. For example, the Kigali Amendment to the Montreal Protocol on HFCs provides that it “shall enter into force on 1 January 2019, provided that at least twenty instruments...have

⁸⁵ See Article 36 of the Desertification Convention, <http://www.unccd.int/en/about-the-convention/Pages/Text-Part-VI.aspx#art36>.

⁸⁶ See Article V of MARPOL 73/78, <http://library.arcticportal.org/1699/1/marpol.pdf>.

⁸⁷ See Article 16 of the Montreal Protocol, <http://ozone.unep.org/pdfs/Montreal-Protocol2000.pdf>.

⁸⁸ See Article 25 of the Kyoto Protocol, <https://unfccc.int/resource/docs/convkp/kpeng.pdf>.

been deposited.” It further provides that, if the condition has not been fulfilled by that date, it will enter into force ninety days after the condition has been fulfilled.⁸⁹

23. PROVISIONAL APPLICATION

An agreement (or its adopting instrument) might provide for a State to provisionally apply it, either pending the agreement’s entry into force (such as the Paris Agreement⁹⁰) or its entry into force for that State (such as the Kigali Amendment to the Montreal Protocol⁹¹). Such provisions can have the effect of both accelerating and broadening implementation of the agreement’s terms.

24. INVOLVEMENT OF NON-PARTY STATES

Even where an agreement has not succeeded in attracting States as formal participants, its processes may still invite their engagement. Many multilateral environmental agreements provide for non-Parties to participate as observers at meetings, where they may enjoy many of the (non-voting) rights of Parties.⁹² Such participation may ultimately enable them to join the agreement. In the case of the Montreal Protocol, for example, several large developing countries were non-Parties until after the adoption of its 1990 London Amendment, which they heavily influenced (by the inclusion, *inter alia*, of a new Multilateral Fund).

⁸⁹ See Article IV of the Kigali Amendment, <https://europa.eu/capacity4dev/unep/document/full-text-kigali-amendment-pt-1>.

⁹⁰ See paragraph 5 of COP Decision 1/CP.21, <https://unfccc.int/resource/docs/2015/cop21/eng/l09r01.pdf>.

⁹¹ See Article V of the Kigali Amendment, <https://europa.eu/capacity4dev/unep/document/full-text-kigali-amendment-pt-1>.

⁹² See, e.g., Article 7.6 of the UNFCCC, http://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf.

25. PARTICIPATION OF NON-STATE ACTORS

The Paris Agreement reflects an unusual approach to the engagement of sub-national governments and other non-State actors, including businesses and NGOs. While only a State or regional economic integration organization may formally join the Agreement, the larger Paris outcome invites the participation of so-called “non-Party stakeholders” in various processes that contribute to the climate goals of the Agreement.⁹³ The engagement of cities, states, regions, companies, etc., will normally take place alongside that of a State Party; however, it might also substitute for the participation of a Party, as will likely be the case should the United States ultimately withdraw from the Agreement.

26. OTHER EXAMPLES

Several other means have been used to gain wider participation.

- Some agreements make clear that an environmental agreement, particularly one related to trade, is not intended to affect rights and obligations under other international agreements.⁹⁴ (In order to address the concerns of other States, they may also include clauses to make clear that the particular legal hierarchy in that case, i.e., that the environment agreement is not intended to affect other agreements -- which would include trade agreements -- should not be understood as a political hierarchy of trade agreements over environmental agreements.)⁹⁵

⁹³ See paragraphs 116 et seq. of COP Decision 1/CP.21, <https://unfccc.int/resource/docs/2015/cop21/eng/10a01.pdf>.

⁹⁴ See, e.g., preambular paragraph 9 of the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, <http://www.pic.int/TheConvention/Overview/TextoftheConvention/RotterdamConventionText/tabid/1160/language/en-US/Default.aspx>, and preambular paragraph 10 of the Biosafety Protocol, <https://bch.cbd.int/protocol/text/>.

⁹⁵ See, e.g., preambular paragraph 10 of the Rotterdam Convention and preambular paragraph 11 of the Biosafety Protocol.

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- Some agreements include “principles,” in addition to commitments, in order to accommodate those States that consider it necessary to have the agreement capture a particular viewpoint or lay down a concept to inform the future development of the regime. The UNFCCC contains such an article,⁹⁶ as do the Biodiversity and Desertification Conventions.⁹⁷
 - In some contexts, agreements provide an assurance to sensitive States that a provision is not intended to infringe upon Parties’ sovereignty. For example, the Ramsar Convention makes clear that inclusion of a wetland in the International List of Wetlands of International Importance does not prejudice “exclusive sovereign rights of the Contracting Party in whose territory it is situated.”⁹⁸ The Paris Agreement provides that its transparency framework will be implemented in a manner that, *inter alia*, is “respectful of national sovereignty.”⁹⁹
 - To the extent that an agreement provides for elaborating rules or guidelines to be adopted by a particular deadline (such as the first meeting of the Conference of the Parties), States may have an incentive to join in time to influence the outcome.

States have developed a wealth of ideas for encouraging participation in multilateral environmental agreements, whether by literally joining or, less formally, by carrying out key commitments from the outside. As noted, participation in an agreement is one, but not the only, important factor in the design of an agreement. Certain accommodations may so weaken an agreement that its environmental objective is no longer served. Others, even if

⁹⁶ See Article 3 of the UNFCCC, http://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf.

⁹⁷ See Article 3 of the Biodiversity Convention and Article 3 of the Desertification Convention.

⁹⁸ See Article 2.3 of the Ramsar Convention, http://archive.ramsar.org/cda/en/ramsar-documents-texts-convention-on/main/ramsar/1-31-38%5E20671_4000_0.

⁹⁹ See Article 13.3 of the Paris Agreement, https://unfccc.int/files/meetings/paris_nov_2015/application/pdf/paris_agreement_english_.pdf.

consistent with an agreement's environmental objective, may attract some countries but deter others. In addition, one agreement's set of enticements and accommodations may not work for another agreement. Whether particular choices were wise ones is beyond the scope of this paper, but may be worth studying.