Chapter 8

COMPLIANCE AND DISPUTE SETTLEMENT

Almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time.

—LOUIS HENKIN, HOW NATIONS BEHAVE: LAW AND FOREIGN POLICY 47 (1979)

SYNOPSIS

I. INTRODUCTION

The success of any international treaty depends on whether the Parties to the treaty implement the treaty through national legislation and comply with the treaty's obligations. Often nations comply with their international obligations out of national interest: they comply because the advantages of compliance outweigh the benefits of noncompliance. At other times, these countries may be *unwilling* to comply or, as is the case for many developing countries, they may be *unable* to comply due to a lack of resources or technical capacity. For these reasons, multilateral environmental agreements frequently include provisions for enforcement, including deterrence- and sanctions-based penalties and other measures levied against violators, as well as provisions to facilitate compliance through capacity building, technology transfer, education, and other "carrots." Thus, compliance strategies may differ depending on the severity of the problem or the underlying cause of the noncompliance. The goal is to develop both an equitable and effective approach to compliance — one flexible enough to treat different countries differently, yet strong enough to ensure that commitments are met over time.

The use of multiple compliance strategies is particularly important at the international level, because simply litigating a Party's noncompliance is almost never a realistic option — litigation before the International Court of Justice (ICJ) rarely occurs in any context and has never occurred to enforce compliance with an international environmental treaty. As a result, enforcement of treaty rules tends to occur within the treaty regime itself. While treaties typically include provisions for

binding dispute settlement through the ICJ or arbitration, they tend to use a mix of capacity building, self reporting on implementation, review of the reports by Parties or technical bodies, and, sometimes, an assessment of a Party's compliance.

With respect to climate change, the success of the Kyoto Protocol quite obviously depends on whether the Parties meet their targets and timetables. In turn, whether Parties meet their targets and timetables depends on the quality and timeliness of the data on greenhouse gas emissions provided by the Parties and the reliability of the Parties to determine whether Joint Implementation and Clean Development Mechanism projects result in reductions in emissions that are additional to any that would have occurred in the absence of the project. For many countries, however, the benefits of noncompliance — the avoidance of costs to domestic industries to reduce greenhouse gas emissions — may outweigh the more diffuse, largely global, benefits of compliance. Thus, it is essential that the Kyoto Protocol have an equitable and effective means for ensuring compliance.

Section II of this chapter explores the emerging trends in compliance mechanisms now found within international environmental treaties. As you read these materials, consider what types of compliance measures the UNFCCC and the Kyoto Protocol *should* include. Section III then provides an overview of the actual compliance mechanisms of the UNFCCC and the Kyoto Protocol and assesses their strengths and weaknesses. Section IV briefly describes the process for international dispute resolution for both climate-related disputes brought under the UNFCCC or Kyoto Protocol and disputes brought more generally under emerging principles of customary international environmental law — for example, claims brought by a low-lying island nation against a major emitter of greenhouse gases.

II. COMPLIANCE UNDER MULTILATERAL ENVIRONMENTAL AGREEMENTS

Multilateral environmental agreements (MEAs) have adopted a large number of compliance strategies. Xeuman Wang and Glenn Wiser explore these strategies in the following excerpt.

XEUMAN WANG & GLENN WISER, THE IMPLEMENTATION AND COMPLIANCE REGIMES UNDER THE CLIMATE CHANGE CONVENTION AND ITS KYOTO PROTOCOL

11 RECIEL 181, 181–184 (2002)*

Since the 1972 Stockholm Conference on the Human Environment, more than 200 MEAs have been developed. An important challenge confronting governments and the international community has been how best to implement and comply with the commitments under environmental treaties, including how to deal with countries that fail to meet their treaty obligations.

The traditional, adversarial approach to addressing non-compliance — in which States seek damages for harm caused by injurious behaviour, or in which they suspend their performance under a treaty in response to another's failure to perform — has inherent disadvantages for MEAs. Many MEAs deal with the

'global commons,' such as the atmosphere, oceans, or biological diversity. Thus, it can be difficult or impossible for a State to establish the causal link between an injury it suffers and a specific act of non-compliance by another State. Moreover, States have been reluctant to use the International Court of Justice (ICJ) to resolve cases of non-compliance under MEAs, because ICJ proceedings tend to be very time-consuming and inherently confrontational, thereby posing political risks to bilateral relationships. For similar reasons, the dispute-settlement mechanisms provided in most MEAs have rarely been used. Instead, a discrete compliance theory has gradually evolved in which compliance under MEAs is addressed in three ways: preventing non-compliance, facilitating compliance and managing compliance.

Preventing Non-Compliance

Most MEAs are intended to protect the global commons. One country's non-compliance thus harms everyone, and reciprocating that country's non-compliance by suspending one's own compliance with the treaty will only make the situation worse. Consequently, the task of devising effective mechanisms for compliance and enforcement in MEAs is difficult. Because reciprocity will mean only greater environmental damage, MEAs must, in the first instance, strive to prevent non-compliance. States have tried to accomplish this by concentrating on facilitating and managing compliance, rather than punishing non-compliance.

Facilitating Compliance

The capacity of a State to comply with its commitments under an MEA is often the key factor that determines its status of compliance. Building up a domestic compliance system to implement an MEA requires sufficient technical, bureaucratic and financial resources. A party may adopt a commitment in good faith, but nevertheless fail to comply due to lack of resources or capacity. * * *

Lack of sufficient capacity for compliance is common in developing countries. Environmental issues do not receive priority in the agendas of many developing country governments because limited resources must be allocated to more pressing concerns. In many cases, developing countries are unable to comply with their MEA obligations unless they receive outside assistance.

As non-compliance is thus often due not to willful disobedience, but instead to a lack of capability, approaches for addressing non-compliance must be directed at the root of the problem. Two policy instruments, among others, are now used in MEAs to induce compliance: capacity building and reduction of compliance costs.

Capacity building strives to enhance the ability of States to implement and comply with their commitments. In MEAs, capacity building may include technical and financial assistance, transfer of technology, training and education. For example, the Global Environmental Facility (GEF) administered by the World Bank Group funds developing countries to assist them in implementing their obligations in focal areas such as climate change and biodiversity. Outside of the World Bank system, the Montreal Protocol Fund has successfully supported projects in developing countries that have resulted in a considerable phase-out of the consumption of ozone-depleting substances.

Some MEAs affirmatively link [developing-country] compliance with the availability of financial resources. For instance, Article 20(4) of the Convention on Biological Diversity states that:

> the extent to which developing country Parties will effectively implement their commitments under this Convention will depend on the effective implementation by developed country Parties of their commitments under this Convention related to financial resources and transfer of technology and will take fully into account the fact that economic and social development and eradication of poverty are the first and overriding priorities of the developing country Parties.

The second policy instrument is intended to make compliance easier by lowering its costs. Some commentators predict that compliance costs in MEAs like the Kyoto Protocol could be substantial. To encourage compliance, the Kyoto Protocol creates market-based mechanisms to increase flexibility and cost effectiveness. As discussed in the third part of this article, these mechanisms will facilitate the attainment of the Protocol's environmental obligations, while assisting States to secure economic and social policy objectives as well.

Managing Compliance

Policy instruments alone are insufficient to address compliance in MEAs. To address this gap, managerial approaches have been developed to handle compliance in a systematic manner. The most common of these is the establishment of a regulatory framework, or compliance system. The purpose of these systems is to make compliance processes transparent, to identify any potential compliance problems at an early stage, to help parties fix problems and, finally, to respond to non-compliance.

A comprehensive compliance system may contain three steps: (1) reporting, (2) verification, and (3) assessing compliance and responding to non-compliance. Each is reviewed in turn below.

Reporting. The first step in the compliance systems of most MEAs is self-reporting by parties. Parties report information on their performance in implementing their treaty commitments. They may also include information submitted by international organizations or non-government organizations (NGOs), as is the practice under the Convention on International Trade in Endangered Species (CITES). To improve the quality of data and ensure timely reporting, technical and financial assistance may be needed to help parties — in particular developing countries — collect and prepare their national reports. As the data generated in the reports constitute the basis for assessing compliance in the future, it is important to establish a uniform format of reporting, with clear and precise requirements as to how and what to report.

Verification. The second compliance step is verification of the reported information. Key considerations are who will conduct the verification and how they will do it. The Convention Secretariats or a group of experts may undertake the task of checking the reliability and accuracy of data. On-site monitoring with the consent of parties may also be an option to verify compliance. The UNFCCC and the Ramsar Convention on Wetlands authorize country visits to review implementation of their obligations. However, unlike the practice in arms-control agreements, such as the Chemical Weapons Convention, verification processes under MEAs are generally non-confrontational, and have the aim of discovering problems and helping parties to fix them so that they can avoid non-compliance.

Assessing Compliance and Responding to Non-Compliance. One of the most common features of compliance assessments under MEAs is their non-judicial nature. Most assessments are conducted in a facilitative, cooperative manner aimed at helping to bring parties back to compliance. The Montreal Protocol was the first

major environmental treaty to create an institutionalized non-compliance procedure. The Protocol's Implementation Committee identifies facts and possible causes of individual cases of non-compliance. It makes recommendations to the party concerned on ways to remedy the non-compliance, and can provide and arrange for assistance, including technical assistance for data collection, financial assistance and transfer of technology. More MEAs now follow the Montreal Protocol model, calling for the establishment of specialized compliance procedures carried out by a standing compliance committee empowered to assess the compliance of parties.

Backing up the compliance assessment are the responses to non-compliance mandated under the regime. So far, only a few MEAs explicitly provide for response measures to non-compliance. These measures may include the provision of technical and financial assistance, publication of cases of non-compliance, issuance of cautions, or suspension of treaty rights and privileges. . . . Stronger enforcement measures ('sticks'), in which trade sanctions or threats of trade sanctions have been used to enforce compliance, have been explored in MEAs such as CITES.

It should be noted that the strictness and comprehensiveness of a compliance regime under an MEA depends to a significant extent on the nature of the commitment embodied in the agreement. Not all MEAs need to adopt the full three-step system outlined above. If the nature of the commitments in the agreement is both general and soft (thus, leaving much of its interpretation and implementation up to the discretion of individual parties), a strong compliance system may not be appropriate. On the other hand, if an MEA contains hard, precise and measurable commitments, a comprehensive compliance regime with 'teeth' may provide an effective way to prevent free riders and ensure the full implementation of the obligations.

QUESTIONS AND DISCUSSION

1. The mix of carrots and sticks has been essential to the effectiveness of the compliance mechanisms of the Montreal Protocol and CITES. Ultimately, however, the threat of trade sanctions or other penalty appears essential. For example, when the Montreal Protocol's Implementation Committee publicly invited nine Parties to explain their persistent failure to supply their baseline data, only five of those countries submitted their data before the meeting. Another 17 Parties submitted missing data only after the Implementation Committee recommended that they lose their Article 5 status — a status that makes them eligible for funding under the Montreal Protocol's Multilateral Fund and the Global Environment Facility. David G. Victor, *The Operation and Effectiveness of the Montreal Protocol's Non-Compliance Procedure, in* THE IMPLEMENTATION AND EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL COMMITMENTS 137 (David G. Victor et al. eds., 1998).

Under CITES, which regulates international trade in species of conservation concern, all Parties are required to have adequate implementing legislation. If a Party does not have adequate legislation, it is offered technical assistance from the Secretariat. Nonetheless, this assistance is sometimes refused. If after a period of years the Party fails to implement adequate legislation, then the Parties recommend the suspension of trade in CITES-listed wildlife with that Party.

> A situation involving seven parties highlights how the positive and negative incentives of the CITES compliance process operate. These seven parties were known to have significant implementation problems and the parties had worked for several years to help them. Finally, the parties directed the CITES Standing Committee to determine if trade should be

suspended in CITES specimens with these seven countries. Doc. SC.42.12.2, "Implementation of the Convention in individual countries: Implementation of Decisions 10.18 and 10.64."

The Standing Committee noted that only Indonesia, Malaysia-Sabah, and Nicaragua had demonstrated that they had adopted new legislation that generally met the requirements for the implementation of CITES. The four remaining parties, the Democratic Republic of the Congo, Egypt, Guyana, and Senegal, had failed to adopt appropriate legislation. As a result, the Standing Committee recommended to the parties that the trade in specimens of CITES-listed species with Egypt, Guyana, and Senegal be suspended unless the Secretariat verified in the meantime that the countries had enacted legislation that generally meets the requirements of CITES. It agreed, however, that in the case of Senegal, there would be no such suspension if the Standing Committee agreed, at its next meeting, on a recommendation from the Secretariat, that Senegal enacted legislation that generally meets the requirement for the implementation of CITES. Regarding the Democratic Republic of the Congo, the Standing Committee agreed to defer a decision for two meetings. The Secretariat then sent three letters of reminder to these Parties, pointing out the need to adopt legislation meeting the criteria specified in Resolution Conf. 8.4 and, in particular, advising Senegal that its case would be considered again at the next meeting of the Standing Committee. By the time the Standing Committee met one month later, Egypt had adopted adequate legislation and averted trade sanctions. Without progress from Guyana and Senegal, the Secretariat notified the parties that they should refuse any trade with Senegal and Guyana in CITES specimens until further notice. Five days after the recommendation to impose trade sanctions, Guyana submitted regulations to the Secretariat that adequately implemented CITES; Senegal took about 75 days to adopt adequate legislation and, as with Guyana, the recommendation of trade sanctions was withdrawn.

CHRIS WOLD, SANFORD GAINES, & GREG BLOCK, TRADE AND THE ENVIRONMENT: LAW AND POLICY 661–62 (2005). For a comprehensive analysis of CITES and compliance, see ROSALIND REEVE, POLICING INTERNATIONAL TRADE IN ENDANGERED SPECIES: THE CITES TREATY AND COMPLIANCE (2002); *see also* Marceil Yeater & Juan Carlos Vasquez, *Demystifying the Relationship between CITES and the WTO*, 10 RECEIL 271, 274–275 (2000).

2. Unlike the Montreal Protocol and CITES, which cover trade in specific substances or species, the UNFCCC and Kyoto Protocol seek to reduce emissions of certain gases which derive from a large variety of sources. Are trade sanctions a realistic option for penalizing noncompliance with a Party's commitment to reduce or limit greenhouse gas emissions? If not, what types of penalties might be effective for ensuring that Parties submit their inventories of greenhouse gases and meet their targets and timetables? For further information on trade sanctions and the rules of the World Trade Organization, see Chapter 10, Section VI.

III. COMPLIANCE WITHIN THE CLIMATE CHANGE REGIME

A. The Climate Change Convention

Although the UNFCCC does not set any targets and timetables or otherwise commit Parties to reduce emissions of greenhouse gases, it does establish a three-step process for reporting, reviewing, and assessing a Party's performance of certain provisions. Article 12 requires Parties to report their greenhouse gas inventories each year. Annex I Parties must also periodically submit national reports on their overall implementation of the UNFCCC — known as "national communications" — according to dates set by the Conference of the Parties (CoP). The fourth national communications were due on January 1, 2006. Non-Annex I Parties must also submit national communications, but they do not have fixed dates for submitting them. Nonetheless, 132 of 148 non-Annex I Parties have submitted their initial national communications. They have been asked to submit their second national communications (or in some cases their third), although the Parties have made clear that the least developed countries have flexibility in completing their communications. Decision 8/CP.11, *Submission of Second and, Where Appropriate, Third National Communications from Parties Not Included in Annex I to the Convention* (2005).

The Secretariat is charged with compiling the information, which is then reviewed by technical experts. Unlike the communication from non-Annex I Parties, the national communications of Annex I Parties then undergo an "in-depth" review by a team of international experts, coordinated by the UNFCCC Secretariat, which results in an "in depth review report." With the consent of the reporting Party, the technical experts may make an in-country visit to ensure the accuracy and consistency of the information. These reports have, at times, identified implementation problems or suggested areas where implementation could be improved. However, because the UNFCCC does not commit Parties to concrete actions, other than the reports themselves, it is almost impossible to determine whether a Party is in noncompliance. To address specific implementation concerns in a less political forum, the Parties contemplated the establishment of a ten-member multilateral consultative committee. However, they failed to agree on the committee's composition and size.

In addition, the Parties directed two subsidiary bodies, the Subsidiary Body for Implementation (SBI) and the Subsidiary Body for Technological Advice (SBSTA) to provide the CoP with scientific and technical information and guidance on the steps that Parties have taken to implement their obligations. While the two bodies have "actively promoted the implementation process of the UNFCCC and have provided a forum for Parties to conduct a constructive dialogue on the general problems of implementation," the politicized nature of their processes has stifled actions to improve implementation. Wang & Wiser, at 185.

QUESTIONS AND DISCUSSION

In negotiating the UNFCCC, the Parties well understood that developing countries would need assistance in implementing the treaty. To that end, Article 4.3 directs developed countries to provide "new and additional financial resources to meet the agreed full costs incurred by developing country Parties in complying with their [reporting] obligations." That article also directs developed countries to "provide such financial resources, including for the transfer of technology," that developing countries need to meet "the agreed full incremental costs" of implementing measures under Article 4.1, such as the development of programs for greenhouse gas mitigation. This emphasis on capacity-building has been an important part of the successful implementation of the Montreal Protocol and is widely seen as critical to the future of the climate change regime.

B. The Kyoto Protocol

The inclusion of specific targets and timetables in the Kyoto Protocol, as well as the perceived economic benefits that noncompliance could bring, helped push compliance mechanisms to the forefront of the Kyoto Protocol negotiations. Given the difficulties of negotiating agreement on any commitments, the negotiators were unable to develop a fully fledged compliance regime. However, the Kyoto Protocol inherited the UNFCCC's procedures and institutions, including the SBSTA and SBI. With respect to reporting, the Parties have continued to improve the quality and ensure the comparability of the data submitted by Parties.

Moreover, Article 8 of the Kyoto Protocol requires expert review teams to review Annex I Parties' annual inventory of anthropogenic emissions by sources and removals by sinks of greenhouse gases. The expert review teams also review each Annex I Party's submissions concerning its compliance with its commitments under the Protocol. The expert review teams, composed of experts nominated by the Parties and, as appropriate, by intergovernmental organizations, are expected to provide a comprehensive technical assessment of all aspects of a Party's implementation of the Protocol.

1. *The Kyoto Protocol's Compliance Mechanism*

In negotiating the Kyoto Protocol, the Parties could not reach consensus on the details of a compliance regime. Instead, Article 18 committed the Parties, at their first meeting, to adopt "appropriate and effective procedures and mechanisms to determine and to address cases of non-compliance." Article 18 placed an importation limitation on any future compliance regime, however, by requiring any mechanism with legally binding compliance measures to be adopted by means of an amendment to the Protocol. Despite this limitation, the Parties developed a compliance mechanism with consequences, if not legally binding measures, through Decision 27/CMP.1, Annex, *Procedures and Mechanisms Relating to Compliance under the Kyoto Protocol* (2005). That compliance mechanism, described below, includes two separate branches: a "facilitative" branch and an "enforcement" branch.

UNFCCC SECRETARIAT, AN INTRODUCTION TO THE KYOTO PROTOCOL COMPLIANCE MECHANISM

available at,
http://unfccc.int/kyoto_protocol/compliance/introduction/items/3024.php

The Kyoto Protocol compliance mechanism is designed to strengthen the Protocol's environmental integrity, support the carbon market's credibility and ensure transparency of accounting by Parties. Its objective is to facilitate, promote and enforce compliance with the commitments under the Protocol. . . .

The Compliance Committee is made up of two branches: a facilitative branch and an enforcement branch. As their names suggest, the facilitative branch aims to provide advice and assistance to Parties in order to promote compliance, whereas the enforcement branch has the responsibility to determine consequences for Parties not meeting their commitments. Both branches are composed of 10 members, including one representative from each of the five official UN regions (Africa, Asia, Latin America and the Caribbean, Central and Eastern Europe, and Western Europe and Others), one from the small island developing States, and two each from Annex I and non-Annex I Parties. The Committee also meets in a plenary composed of members of both branches, and a bureau, made up of the chairperson and vice-chairperson of each branch, supports its work. Decisions of the plenary and the facilitative branch may be taken by a three-quarters majority, while decisions of the enforcement branch require, in addition, a double majority of both Annex I and non-Annex I Parties.

Through its branches, the [Compliance] Committee considers questions of implementation which can be raised by expert review teams under Article 8 of the Protocol, any Party with respect to itself, or a Party with respect to another Party (supported by corroborating information). Each Party designates an agent who signs submissions containing such questions, as well as comments. The bureau of the Committee allocates a question of implementation to the appropriate branch, based on their mandates. In addition, at any time during its consideration of a question of implementation, the enforcement branch may refer a question of implementation to the facilitative branch.

The enforcement branch is responsible for determining whether a Party included in Annex I (Annex I Party) is not in compliance with its emissions targets, the methodological and reporting requirements for greenhouse gas inventories, and the eligibility requirements under the mechanisms. In case of disagreements between a Party and an expert review team, the enforcement branch shall determine whether to apply adjustments to greenhouse gas inventories or to correct the compilation and accounting database for the accounting of assigned amounts.

The mandate of the facilitative branch is to provide advice and facilitation to Parties in implementing the Protocol, and to promote compliance by Parties with their Kyoto commitments. It is responsible for addressing questions of implementation by Annex I Parties of response measures aimed at mitigating climate change in a way that minimizes their adverse impacts on developing countries and the use by Annex I Parties of the mechanisms as "supplemental" to domestic action. Furthermore, the facilitative branch may provide "early warning" of potential non-compliance with emissions targets, methodological and reporting commitments relating to greenhouse gas inventories, and commitments on reporting supplementary information in a Party's annual inventory.

* * *

In the case of the enforcement branch, each type of non-compliance requires a specific course of action. For instance, where the enforcement branch has determined that the emissions of a Party have exceeded its assigned amount, it must declare that that Party is in non-compliance and require the Party to make up the difference between its emissions and its assigned amount during the second commitment period, plus an additional deduction of 30%. In addition, it shall require the Party to submit a compliance action plan and suspend the eligibility of the Party to make transfers under emissions trading until the Party is reinstated.

No such correspondence exists in the case of the facilitative branch, which can decide to provide advice and facilitation of assistance to individual Parties regarding the implementation of the Protocol, facilitate financial and technical assistance to any Party concerned, including technology transfer and capacity building and/or formulate recommendations to the Party concerned.

In the enforcement branch, questions of implementation will be resolved within approximately 35 weeks from receipt by the branch of the question of implementation. In time-sensitive requests, including those relating to eligibility to participate in the mechanisms, the expedited procedures involving shorter periods will apply. Apart from the three-week deadline given to complete its preliminary examination, no fixed deadlines are provided for the facilitative branch.

The branches of the Compliance Committee will base their deliberations on reports from expert review teams, the subsidiary bodies, Parties and other official sources. Competent intergovernmental and non-governmental organizations may submit relevant factual and technical information to the relevant branch after the preliminary examination.

There are detailed procedures with specific timeframes for the enforcement branch, including the opportunity for a Party facing the Compliance Committee to make formal written submissions and request a hearing where it can present its views and call on expert testimony.

Any Party not complying with reporting requirements must develop a compliance action plan as well, and Parties that are found not to meet the criteria for participating in the mechanisms will have their eligibility withdrawn. In all cases, the enforcement branch will make a public declaration that the Party is in non-compliance and will also make public the consequences to be applied.

If a Party's eligibility is withdrawn or suspended, it may request, either through an expert review team or directly to the enforcement branch, to have its eligibility restored if it believes it has rectified the problem and is again meeting the relevant criteria.

In the case of compliance with emission targets, Annex I Parties have 100 days after the expert review of their final annual emissions inventory has finished to make up any shortfall in compliance (e.g., by acquiring AAUs, CERs, ERUs or RMUs through emissions trading). If, at the end of this period, a Party's emissions are still greater than its assigned amount, the enforcement branch will declare the Party to be in non-compliance and apply the consequences outlined above.

As a general rule, decisions taken by the two branches of the Committee cannot be appealed. The exception is a decision of the enforcement branch relating to emissions targets. Even then, a Party can only appeal [to the Conference of the Parties serving as the meeting of the Parties to the Protocol] if it believes it has been denied due process.

2. *The Consequences of Noncompliance*

The Kyoto Protocol's compliance mechanism treats different noncompliance issues differently. For example, the duty to establish a national system for estimating anthropogenic emissions of greenhouse gases is subject to the facilitative branch's carrot approach to compliance. In contrast, the penalty provisions of the enforcement branch apply to noncompliance with binding targets and timetables. As a consequence, only Annex I Parties are currently subject to the enforcement branch.

DECISION 27/CMP.1, ANNEX, PROCEDURES AND MECHANISMS RELATING TO COMPLIANCE UNDER THE KYOTO PROTOCOL (2005)

XIV. Consequences applied by the Facilitative Branch

The facilitative branch, taking into account the principle of common but differentiated responsibilities and respective capabilities, shall decide on the application of one or more of the following consequences:

(a) Provision of advice and facilitation of assistance to individual Parties regarding the implementation of the Protocol;

(b) Facilitation of financial and technical assistance to any Party concerned, including technology transfer and capacity building from sources other than those established under the Convention and the Protocol for the developing countries;

(c) Facilitation of financial and technical assistance, including technology transfer and capacity building, taking into account Article 4, paragraphs 3, 4 and 5, of the Convention; and

(d) Formulation of recommendations to the Party concerned, taking into account Article 4, paragraph 7, of the Convention.

XV. Consequences applied by the Enforcement Branch

1. Where the enforcement branch has determined that a Party is not in compliance with Article 5, paragraph 1 or paragraph 2, or Article 7, paragraph 1 or paragraph 4, of the Protocol, it shall apply the following consequences, taking into account the cause, type, degree and frequency of the non-compliance of that Party:

   (a) Declaration of non-compliance; and

   (b) Development of a plan in accordance with paragraphs 2 and 3 below.

2. The Party not in compliance under paragraph 1 above, shall, within three months after the determination of non-compliance, or such longer period that the enforcement branch considers appropriate, submit to the enforcement branch for review and assessment a plan that includes:

   (a) An analysis of the causes of non-compliance of the Party;

   (b) Measures that the Party intends to implement in order to remedy the non-compliance; and

(c) A timetable for implementing such measures within a time frame not exceeding twelve months which enables the assessment of progress in the implementation.

3. The Party not in compliance under paragraph 1 above shall submit to the enforcement branch progress reports on the implementation of the plan on a regular basis.

4. Where the enforcement branch has determined that a Party included in Annex I does not meet one or more of the eligibility requirements under Articles 6, 12 and 17 of the Protocol, it shall suspend the eligibility of that Party in accordance with relevant provisions under those articles. At the request of the Party concerned, eligibility may be reinstated in accordance with the procedure in section X, paragraph 2 [requiring a finding by an expert review team indicating that the eligibility requirements are met].

5. Where the enforcement branch has determined that the emissions of a Party have exceeded its assigned amount . . . it shall declare that that Party is not in compliance with its commitments under Article 3, paragraph 1, of the Protocol, and shall apply the following consequences:

(a) Deduction from the Party's assigned amount for the second commitment period of a number of tonnes equal to 1.3 times the amount in tonnes of excess emissions;

(b) Development of a compliance action plan in accordance with paragraphs 6 and 7 below; and

(c) Suspension of the eligibility to make transfers under Article 17 of the Protocol until the Party is reinstated in accordance with section X, paragraph 3 or paragraph 4.

6. The Party not in compliance under paragraph 5 above shall, within three months after the determination of non-compliance or, where the circumstances of an individual case so warrant, such longer period that the enforcement branch considers appropriate, submit to the enforcement branch for review and assessment a compliance action plan that includes:

(a) An analysis of the causes of the non-compliance of the Party;

(b) Action that the Party intends to implement in order to meet its quantified emission limitation or reduction commitment in the subsequent commitment period, giving priority to domestic policies and measures; and

(c) A timetable for implementing such action, which enables the assessment of annual progress in the implementation, within a time frame that does not exceed three years or up to the end of the subsequent commitment period, whichever occurs sooner. At the request of the Party, the enforcement branch may, where the circumstances of an individual case so warrant, extend the time for implementing such action for a period which shall not exceed the maximum period of three years mentioned above.

7. The Party not in compliance under paragraph 5 above shall submit to the enforcement branch a progress report on the implementation of the compliance action plan on an annual basis.

8. For subsequent commitment periods, the rate referred to in paragraph 5 (a) above shall be determined by an amendment.

Designing appropriate and effective noncompliance measures in an international regime is always a difficult tight-rope walk: if the consequences are too severe, governments simply refuse to consent to the mechanism; if they are too soft, then they are unlikely to deter noncompliance. Did the Parties get the balance right?

XEUMAN WANG & GLENN WISER, THE IMPLEMENTATION AND COMPLIANCE REGIMES UNDER THE CLIMATE CHANGE CONVENTION AND ITS KYOTO PROTOCOL

11 RECIEL 181, 196–197 (2002)

Two types of consequences were adopted for the Protocol . . . This first type of consequences includes those associated with the facilitative branch. They are purely facilitative in nature, such as advice, financial and technical assistance, and recommendations. These measures aim to assist parties in their efforts to avoid non-compliance or return to compliance. Due to their generally non-confrontational nature, the facilitative consequences received relatively little attention from the JWG [Joint Working Group].

The second type includes the consequences imposed by the enforcement branch. Regarding these consequences, the most contentious issues were what would happen if a party failed to honour its Protocol, Article 3(1) emissions reduction target, and what would be the nature of those consequences. The remainder of this section discusses those consequences related to Article 3(1).

Deduction of Excess Emissions from a Party's Future Emissions Allowance (Assigned Amount). The deduction proposal was also known as "restoration of tonnes" and — derisively by many environmentalists — as "borrowing." The rationale behind deduction was partly based on the assumption that it would provide incentives for parties to comply with their targets during the first commitment period, because deducting excess tonnes from the subsequent commitment period would significantly increase the difficulty and cost of compliance for that period. Yet several problems were identified for this consequence. First, deduction from the second commitment period will not truly make up for the excess emissions in the first unless there is some extra means of ensuring that the non-complying party does, in fact, reduce its emissions during the second period. Many commentators predicted that the party would in fact simply "borrow" from commitment period to commitment period, in the same way that someone might pass on debt indefinitely into the future until the system was forced to accept that the debt would never be repaid.

Second, commentators were concerned that the party facing deduction would simply negotiate its second (or third) commitment period targets to a higher amount of emissions, to accommodate for the deduction. As stated by the Australian Department of Foreign Affairs and Trade, "[p]arties would simply take into account any anticipated subtraction of emission in negotiating their targets for the subsequent commitment period, thus removing the incentive." Moreover, there was little agreement on what the correct deduction rate should be or how it should be calculated, with some parties arguing that a one-to-one deduction rate would provide the proper compliance incentives, while others replying that discount rates, opportunity costs of money, compliance theory and various other analyses should be taken into account in arriving at the number.

Despite the well-recognized shortcomings of deduction, parties eventually consented to it because no other politically feasible or realistic non-compliance

response seemed possible. While most Annex I parties agreed that the Protocol would require a strong compliance system, they were generally loath to expose themselves to the possibility of non-compliance consequences with "teeth", such as financial penalties or trade measures. The deduction rate that was finally adopted, 1.3-to-1, "split the difference" between those who wanted a higher penalty rate and those who preferred a one-to-one deduction.

Compliance Action Plan. The compliance action plan was proposed by the EU as a way to make deductions more palatable to parties that supported stronger consequences. This consequence requires an Annex I party that has exceeded its emissions target to submit a plan explaining specifically how it will comply with its emissions reduction targets for the subsequent commitment period. The plan is subject to "review and assessment" by the enforcement branch. The rationale of the compliance action plan is that it will provide a means for the enforcement branch to remain involved in the efforts of a non-complying party to meet its subsequent, reduced target, thereby reducing the likelihood that the party will simply 'roll-over' its emissions excess into commitment period after commitment period.

The major concern of some negotiators was that the enforcement branch might use the compliance action plan requirement to dictate to a party the specific means by which it must return to compliance; in particular, the extent to which it could use the Kyoto flexible mechanisms instead of purely domestic actions. These negotiators believed that such a situation would amount to the enforcement branch being able to order a party to adopt specific policies and measures to reach its targets, which was an approach that was specifically rejected during the Kyoto negotiations (and consequently not included in the Protocol). In the end, the compliance action plan language that was adopted did not give the enforcement branch the power to "approve" a compliance action plan. Instead, the enforcement branch is empowered to 'review and assess' the plan after the party submits it.

Suspension of Eligibility to Participate in International Emissions Trading. Many multilateral treaty regimes provide for suspension of a State's rights and privileges when a State fails to honour its treaty obligations. Because participation in the Protocol's emissions trading mechanism will be an important part of many parties' efforts to comply with their targets in a cost-effective manner, the prospects of losing that privilege could provide parties with a powerful incentive to restore themselves to compliance or avoid non-compliance in the first place. Moreover, because the integrity of the trading regime is predicated on the notion that a party will only transfer surplus, valid emissions credits, and not credits that it needs for its own compliance, most negotiators agreed that a non-compliant party should not be allowed to make any emissions trading transfers until it has demonstrated that it will be able to comply with its current emissions target.

The only major point of contention regarding this consequence was how a suspended party would have its eligibility to trade reinstated. In the final Marrakesh rules, parties agreed upon specific reinstatement procedures that create a presumption that the enforcement branch will reinstate a party's eligibility after the party requests it to do so. However, the rules allow the enforcement branch to deny reinstatement if it believes the party has not complied, or will not be able to comply, with its emissions targets for the subsequent commitment period.

Compliance Fund. One alternative to deductions that was considered by negotiators was a compliance fund, which was included in the various compliance negotiating drafts prior to the adoption of the Bonn Agreement. The compliance fund was intended as a mechanism that would allow parties to remedy or avoid a finding of non-compliance by making payments to a fund that would invest the

proceeds in GHG mitigation projects. Either a domestic or an international entity could have administered the fund. While one version or another of the compliance fund attracted the support of many parties, it was eventually dropped because some countries perceived it as a potential form of financial penalty, while others suspected that it would be used to set a "price cap" on the compliance cost of parties.

Financial Penalty. Financial penalties are rarely used in multilateral agreements, partly because there are few effective ways to ensure that they will be paid. During the JWG's discussions, many parties felt that the prospect of financial penalties for non-compliance with their emissions targets would make it politically difficult for them to win domestic support for the Protocol. Although financial penalties appeared in some of the compliance text drafts during the negotiations, they never received broad enough support from parties to make them a realistic prospect for adoption.

QUESTIONS AND DISCUSSION

1. Carefully review the compliance procedures above and answer the following questions:

- Which compliance issues are allocated to the facilitative branch and which are allocated to the enforcement branch? Considering the consequences of noncompliance, do you think this allocation is appropriate?
- Which body makes the final decision concerning compliance measures, the Compliance Committee or the CoP/MoP? Which body do you think should make such decisions?
- Which compliance measures may be appealed? On what grounds may a Party appeal? To whom is the appeal directed?

2. Wang and Wiser note that the Parties adopted the emissions deduction scheme for noncompliance with emission targets because "no other politically feasible or realistic non-compliance response seemed possible." Do you agree? As mentioned earlier in this chapter, the use of trade measures has been very effective within the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). What kind of trade measures, if any, would be appropriate in the climate change context? Can you think of alternative penalties to trade measures or emissions deductions?

3. ***Proportionality.*** A major issue concerning any international compliance scheme is proportionality — that is, penalties or other measures to redress noncompliance should be proportionate to the nature of the obligation and seriousness of the breach, taking into account the cause, type, degree, and frequency of noncompliance. If a Party fails to report its emissions, it is impossible to ascertain what its baseline emissions are and whether it is meeting its targets and timetables. What measure is proportional to this offense? If a party fails to meet its target by one percent, what constitutes a proportionate response? What if a Party misses its target by 30 percent? In establishing two different branches of the Compliance Committee and imposing different penalties for different noncompliance issues, have the Parties created an equitable compliance regime?

4. Because the targets and timetables do not apply until 2008–2012, only the facilitative branch of the Compliance Committee has been active. At the second meeting of the facilitative branch, South Africa, on behalf of developing countries, submitted questions of implementation concerning 15 Annex I Parties, including

Bulgaria, Germany, France, Russia, and others. In each case, South Africa reported that the 15 Parties had not submitted their national communication submissions detailing whether they were making "demonstrable progress" towards meeting their commitments, as required by Article 3.2 of the Kyoto Protocol. South Africa's submissions can be found at http://unfccc.int/kyoto_protocol/compliance/facilitative_branch/items/3786.php.

The facilitative branch voted not to proceed against Latvia and Slovenia. Votes to proceed and not proceed against the other Parties did not receive the required three-fourths majority and those decisions were not adopted. Compliance Committee, Facilitative Branch, *Report of the Third Meeting*, CC/FB/3/2006/2 (Sept. 6 2006); *see also* Report to the Compliance Committee on the Deliberations in the Facilitative Branch Relating to the Submission Entitled "Compliance with Article 3.1 of the Kyoto Protocol" (CC-2006-1/FB to CC-2006-15/FB). Are you surprised by the inertia of the facilitative branch, which was designed to assist with implementation and not to impose punitive measures? If the facilitative branch had pursued these compliance matters, what would have been an appropriate response for a Party's failure to make "demonstrable progress" in achieving its commitments?

5. Under the dispute settlement provisions of the World Trade Organization (WTO), the WTO members are not only subject to compulsory dispute settlement, but also to binding arbitral awards. If a member fails to comply with the rulings of a WTO panel or the WTO's Appellate Body, the prevailing member in the dispute may impose trade sanctions against the losing member. These sanctions take the form of increased tariffs — taxes imposed on products as the price of admission to the importing country's market. These economic sanctions can be significant. In one case, an arbitrator authorized the European Community to impose $4 billion in additional tariffs on imports of certain goods from the United States to offset an impermissible subsidy granted by the United States to certain U.S. exporters. United States-Tax Treatment for Foreign Sales Corporations: Recourse to Arbitration under Article 22.6 of the DSU and Article 4.11 of the SCM Agreement by the United States, Decision of the Arbitrator, WT/DS108/ARB (Aug. 30, 2002). Why do you think governments are willing to submit disputes regarding environmental and other laws affecting trade to binding dispute settlement and possible economic sanctions within the WTO but unwilling to adopt similar processes and remedies within an environmental forum? Is a World Environmental Organization needed that could adjudicate allegations of breaches of international environmental treaties?

6. ***Composition of the Compliance Committee.*** Within international agreements, the establishment of any committee raises questions about its composition. Should composition be based on geographic representation? Should members serve in their individual capacities? Should the Committee include members of nongovernmental organizations? (At least one compliance committee, the Independent Review Panel of the Agreement on International Dolphin Conservation Program, includes a representative of a nongovernmental organization.) In the end, the Parties agreed that both the facilitative and enforcement branches would have ten members serving in their individual capacity, selected on the basis of equitable geographic representation. If only Annex I Parties are subject to enforcement proceedings, do you think that the majority of the Compliance Committee or at least the enforcement branch should be represented by Annex I Parties?

7. ***Triggering the Compliance Procedure.*** The compliance mechanism can be triggered in three distinct ways. First, the reports of the expert review teams may point to implementation problems. Second, a party may request assistance if it is struggling to meets its obligations. This approach is consistent with the facilitative approach to redressing injuries to collective or commons resources. Self reporting

of noncompliance has become a common and effective feature of the Implementation Committee of the Montreal Protocol. Third, a party may initiate a claim against another party. Although this approach is used in both the Montreal Protocol and CITES, it is viewed as confrontational and is thus more controversial. Do you agree? Do you think the success of self reporting is due to the threat of a more adversarial process? What else might motivate self-reporting of noncompliance?

In both CITES and the Montreal Protocol, the Secretariat may trigger the compliance mechanism. As the recipient of the various reports from the Parties and as an important conduit for technical and other expertise, the Secretariat is strategically placed to identify potential compliance problems. Nevertheless, the Parties to the Kyoto Protocol refused to grant authority to the climate change secretariat to trigger the compliance mechanism. Are there valid grounds for restricting the role of the secretariat to administrative functions within the compliance regime?

8. ***Expert Review Teams under Article 8.*** Perhaps the most innovative aspect of the Kyoto Protocol is Article 8, which calls for the establishment of expert review teams to analyze a Party's annual inventory of anthropogenic emissions by sources and removals by sinks of greenhouse gases. Most environmental treaties do not authorize the independent verification of information submitted by Parties, because governments view such verification as an infringement of State sovereignty. Thus, incidents of noncompliance are often uncovered by nongovernmental organizations that use informal channels to bring such cases to the attention of Parties. As a consequence, the authorization of formal expert review teams to verify information submitted by governments is quite an innovation. The compliance mechanism broadens that innovation. Where an expert review team uncovers evidence of noncompliance, that information will automatically be forwarded to the Compliance Committee. Consequently, a State's compliance with the Kyoto Protocol will be subject to technical review by independent experts, and then to a legal assessment by a group of experts, acting in their personal capacities, on the Compliance Committee. This level of non-State involvement in compliance matters is quite extraordinary. Why do you think it is necessary to bypass governments when assessing information concerning a Party's emissions of greenhouse gases?

9. ***Expedited Review.*** To ensure the integrity of the Kyoto Protocol's flexibility mechanisms, the Parties designed an expedited review of cases of noncompliance with the flexibility mechanisms. While the process is more or less the same as the standard procedure, the timelines for review of information and submission of documents are all shorter than those of the standard procedure.

10. Some observers have been critical of Kyoto's compliance mechanism, questioning whether it provides any real binding teeth to the Parties' reduction commitments:

> [A]ccording to Article 18, "any procedures and mechanism . . . entailing binding consequences shall be adopted by means of an amendment to this Protocol." Under the rules of international law, an amendment is binding only on the countries that ratify it, and on the countries that accede to the original agreement after the amendment enters into law. Since any party to Kyoto could decline to ratify a subsequent compliance amendment, it can avoid being punished for failing to comply. In other words, there is nothing in the agreement that actually makes countries do what they said they would do. As matters now stand, the Kyoto emission limits are more "political" than "legal."

* * *

> This is a defective mechanism, and not only because it cannot be binding for the first control period, except by means of an amendment. First, the mechanism relies on every party punishing itself for failing to comply. But what happens if a country doesn't implement the compliance punishment in the second control period? How is the enforcement mechanism to be enforced? This problem has not yet been addressed. Second, the emission limits for the second control period have yet to be negotiated. A country that worries that it may not be able to comply in the first control period may thus hold out for easy targets in the second control period — so that the punishment, if triggered, doesn't actually bite. Finally, and perhaps most importantly, a country can always avoid the punishment — by not ratifying the Protocol, or by not participating in a future protocol or amendment, or even by withdrawing from the Protocol. Since this is the easiest option available, participation is a key challenge for enforcement.

Scott Barrett, *U.S. Leadership for a Global Climate Change Regime*, 14–15 (Climate Policy Center 2003), *available at* http://www.cleanair-coolplanet.org/cpc/library_cpc.php. Do you agree with this assessment? Realistically, we won't know how effective the compliance mechanism is until the close of the reporting period in 2012. What criteria would you use at that point to evaluate the fairness and effectiveness of the Kyoto compliance regime?

IV. DISPUTE SETTLEMENT AND RESOLUTION

International disputes in the climate context may arise in two different ways. First, Parties to the Convention or Protocol may have disputes that arise under the climate treaty regime and involve an interpretation or application of the Convention or Protocol. Such disputes would be addressed by the dispute settlement provisions of the Convention and are discussed in Section A. The second type of dispute might be brought by either Parties or non-Parties to the Convention that raise claims rooted in customary international law — not based on the Convention or Protocol. The most widely discussed example of such a claim is one brought by a low-lying island State threatened by sea level rise from climate change that seeks compensation or other remedies for harms caused by the major emitters of greenhouse gases. This type of dispute is discussed further in Section B.

A. Settlement of Disputes under the Climate Change Regime

Most international environmental agreements include provisions for resolving disputes that arise in the application or interpretation of the agreement. These are frequently distinct from compliance mechanisms as discussed above. Article 14 of the UNFCCC provides the provisions for dispute settlement, which Article 19 of the Kyoto Protocol adopts by reference for disputes arising under the Protocol:

UNFCCC, ARTICLE 14

1. In the event of a dispute between any two or more Parties concerning the interpretation or application of the Convention, the Parties concerned shall seek a settlement of the dispute through negotiation or any other peaceful means of their own choice.

2. When ratifying, accepting, approving or acceding to the Convention, or at any time thereafter, a Party which is not a regional economic integration organization may declare in a written instrument submitted to the Depositary that, in respect of any dispute concerning the interpretation or application of the Convention, it recognizes as compulsory ipso facto and without special agreement, in relation to any Party accepting the same obligation:

(a) Submission of the dispute to the International Court of Justice, and/or

(b) Arbitration in accordance with procedures to be adopted by the Conference of the Parties as soon as practicable, in an annex on arbitration.

These provisions of the UNFCCC mirror those of many other international environmental agreements. The resort to negotiation as a first step for settling disputes is an almost universal element of dispute settlement in international treaties. Such negotiations do not have to be disclosed, and thus it is not known to what extent climate-related disputes have been resolved through negotiation. On the other hand, no dispute concerning a multilateral environmental agreement has ever been resolved by arbitration or the ICJ. Perhaps as a consequence, the Parties to the UNFCCC have yet to develop procedures for arbitration.

As a result, any dispute outside of the compliance mechanism would take place before the ICJ, provided that each Party in the dispute has consented to the jurisdiction of the ICJ. Because the ICJ does not have compulsory jurisdiction to hear disputes, nations must provide their consent to the ICJ's jurisdiction for climate change disputes through their ratification documents to the UNFCCC. They may also submit to the ICJ's jurisdiction through official declarations to the ICJ, although they may limit their consent to certain types of disputes.

QUESTIONS AND DISCUSSION

1. What is the relationship, if any, between the compliance mechanism on the one hand and the dispute settlement provisions of Article 14 of the UNFCCC and Article 19 of the Kyoto Protocol on the other hand? Do you agree with the following position of Saudi Arabia?

> Difficult issues arise concerning the relationship between Articles 18 and 19 of the Protocol. This is because Article 19 applies Article 14 of the Convention (Settlement of Disputes) to the Protocol; and Article 14 of the Convention concerns a dispute between as few as two Parties regarding "interpretation or application of the Convention" (and, therefore, the Protocol); yet "non-compliance [by a Party] with the provisions of this Protocol," which is the subject of Article 18, is a matter of concern to all Parties to the Protocol. If Party X believes it is aggrieved by Party Y's non-compliance with a provision of the Protocol, the settlement of their dispute pursuant to Article 14 of the Convention/Article 19 of the Protocol, even though satisfactory to them, may or may not be satisfactory to the other Parties to the Protocol. The decisions of the COP/MOP concerning procedures for compliance/noncompliance should make clear that resolution of disputes between Parties, pursuant to Article 14 of the Convention/Article 19 of the Protocol, is without prejudice to full use of the compliance/non-compliance procedures under the Protocol.

UNFCCC, *Procedures and Mechanisms relating to Compliance under the Kyoto Protocol*, Submissions from Parties, 53–54 (Sept. 29, 1999).

2. Although their historic and current contributions to climate change are insignificant, small island developing States (SIDS) and some other developing countries are bearing disproportionate effects of climate change. Do they have a claim that they can bring against major emitters? If all of the concerned countries are Parties to the Kyoto Protocol, then a small island State could bring their claim under Article 14 of the Convention as discussed above — but those dispute settlement provisions are limited to disputes "concerning the interpretation or application of the Convention." What if they want to bring an action against the United States, which is not a Party to the Protocol? Moreover, even if all countries comply with the Protocol, small island states are still expected to suffer considerable damage from climate change. What recourse do they have? We turn our attention to this situation in the next section.

B. Climate Disputes under Customary International Law

For many years, representatives of island States and their allies have considered litigation as a possible means for redressing climate change. As early as 1990, two environmental attorneys in analyzing the possibility of an international climate action wrote:

> Of all the geographic areas, low-lying reef and atoll islands, such as those found in the South Pacific and Indian Oceans, may be the most threatened by sea-level rise. These islands are rarely more than three meters above sea level and some are considerably less. Within only a few decades the islands of Kiribati could disappear beneath the Pacific, making refugees of the islands' 60,000 inhabitants. The Republic of the Maldives, in the Indian Ocean, is also vulnerable; a two-meter rise in sea level would flood the capital and over one-half the populated atoll islands of the republic. The Pacific atoll island nations of Tokelau, Tuvalu, and the Marshall Islands are similarly threatened.
>
> Even a moderate rise in sea level could have serious consequences for small coastal and island states. Despite their small size, many have relatively large populations. Existing problems caused by rapid population growth and development would be exacerbated as floods, and possibly storms, become more frequent and severe. Erosion, already a problem, due in part to the diversion of currents by man-made structures, would be accelerated. Saltwater would displace freshwater, diminishing already strained supplies of drinking water and damaging crops which cannot tolerate salt. Tourism and fishing, economic staples for small coastal and island states, will also suffer as beaches erode and dying coral reefs cease to yield their plentiful supply of bait.

Durwood Zaelke & James Cameron, *Global Warming and Climate Change — An Overview of the International Legal Process*, 5 AM. U. J. INT'L L. & POL'Y 249, 259–260 (1990).

As noted in Chapter 1, these scenarios are not far fetched. To the contrary, citizens of Tuvalu, as well as the Carteret Islands in Papua New Guinea, already have become climate change refugees. Moreover, the most recent reports of the IPCC confirm the dire environmental prospects for developing countries as a whole and SIDS in particular. Both the IPCC and the UNFCCC report that SIDS are

already feeling the impacts from climate change and that they have few resources to help them adapt.

UNFCCC, CLIMATE CHANGE: IMPACTS, VULNERABILITIES AND ADAPTATION IN DEVELOPING COUNTRIES

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In SIDS, arable land, water resources and biodiversity are already under pressure from sea level rise. Increases in population and the unsustainable use of available natural resources add further problems. Tropical storms and cyclones cause storm surges, coral bleaching, inundation of land, and coastal and soil erosion with resulting high-cost damages to socio-economic and cultural infrastructure. For example, in the Pacific islands region, cyclones accounted for 76 per cent of the reported disasters between 1950 and 2004, with the average costs relating to damage caused per cyclone standing at USD 75.7 million in 2004 value. In the Caribbean region, the 2004 hurricane season alone caused damages estimated at USD 2.2 billion in four countries: the Bahamas, Grenada, Jamaica and the Dominican Republic. * * *

Water supply in SIDS is likely to be exacerbated by future climate change. Freshwater lenses are predicted to reduce in size due to increased demand and reduced rainfall. It has been estimated that a 10 per cent reduction in average rainfall by 2050 could produce a 20 per cent reduction in the size of the freshwater lens on the Tarawa Atoll, Kiribati, and reduce the thickness of the freshwater lens on atolls by as much as 29 percent. Freshwater supplies are also threatened by saltwater intrusion due to storm surge and sea level rise.

The projected impacts of climate change on agriculture include extended periods of drought, loss of soil fertility and shortening of the growing season which will lead to major economic losses and seriously affect food security.

On many islands, prime agricultural land is located on the coastal plains which are already threatened by sea-level rise. The relative magnitude of economic losses due to climate change is likely to differ among islands. For example, in the absence of adaptive measures on a high island such as Viti Levu in Fiji, the cost of damages could be in the range of USD 23–52 million per year (2–3 per cent of GDP) by 2050 whereas in a low island such as Tarawa, Kiribati, the annual average cost of damages would be in the order of USD 8–16 million (17–18 per cent of GDP) by 2050.

In SIDS, increasing extreme events such as tropical cyclones are predicted to have huge impacts on forest cover and biodiversity, particularly as adaptation responses on small islands are expected to be slow, and impacts of storms may be cumulative. Changes in temperature are likely to particularly affect high elevation SIDS, and biological invasions are predicted to drive several species, including many endemic birds, to extinction. Increasing temperatures and decreasing water availability due to climate change may also increase the burden of diarrhoeal and other infectious diseases in some small island States. Increases in tropical cyclones, storm surges, flooding, and drought are likely to have both short and long-term effects on human health, including drowning, injuries, increased disease transmission, decreases in agricultural productivity and subsequent malnutrition.

Coastlines will almost certainly suffer from accelerated coastal erosion as well as inundation of settlements and arable land with associated social and economic consequences. For example, in Grenada, a 50 cm rise in sea level could lead to serious inundation with 60 per cent of beaches in some areas being lost. A one-

metre rise in sea level is expected to cost Jamaica USD 462 million, 19 per cent of its GDP; while for the Maldives a one-meter rise in sea level would mean the complete disappearance of the nation.

Sea level rise, increasing sea surface temperatures and acidification of the oceans will entail a loss of mangrove forests and coral reefs and reduced fish stocks throughout this region. For example, studies have projected that 3 per cent of Cuba's mangrove forests may be lost with a one meter rise in sea level. For the same rise in sea level a complete collapse of the Port mangrove wetland in Jamaica is predicted, since this system has shown little capacity to migrate over the last 300 years.

Climate change is also likely to have a negative effect on tourism in SIDS, seriously affecting the economy of many small islands. The increasing frequency and severity of extreme weather, sea-level rise and accelerated beach erosion, degradation of coral reefs (including bleaching), and the loss of cultural heritage on the coasts through inundation and flooding are likely to reduce the attractiveness of small island States to tourists. For example, in Barbados 70 per cent of the hotels are located within 250 m of the high water mark. This suggests that many hotels are almost exclusively within the 1 in 500 and 1 in 100 inundation zones, placing them at risk of major structural damage.

Assuming that the ICJ has jurisdiction over a dispute, the question is: what law would apply to such a dispute? As described in Chapter 4 Section I, the ICJ may resort to treaties, custom, and general principles of law to determine the obligations of nation States. Recall that treaty provisions may emerge as customary norms through State practice and *opinio juris*. Do you think any provisions of the UNFCCC or Kyoto Protocol have attained the status of custom?

A large number of international law principles have guided the creation of international treaties, international declarations, and domestic law, and these principles may also provide the basis for claims to mitigate climate change. The precautionary principle (*see* Chapter 4, Section IV.A.7), polluter pays principle (*see* pages Chapter 2, Section II.B), and duty to cooperate (*see* Chapter 4, Section IV.A.1) are bedrocks of international environmental law. However, the obligation not to cause environmental harm, together with the principle for assessing liability, State responsibility, provide the most compelling basis for redressing harms caused by climate change.

1. *The Duty Not to Cause Environmental Harm*

The roots of the obligation not to cause environmental harm are found in the *Trail Smelter Arbitration*, a dispute involving transboundary pollution from Canada into the United States in the 1920s and 1930s. Perhaps the most famous international environmental dispute, the *Trail Smelter Arbitration* centered on a smelter in Trail, British Columbia, which emitted thousands of pounds of sulfur dioxide (SO_2) annually. Those emissions crossed the U.S.-Canada border just a few miles away, causing hundreds of thousands of dollars in damage to crops, buildings, and livestock. The tribunal ultimately concluded that "under the principles of international law, as well as of the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by

clear and convincing evidence." Trail Smelter Case (United States v. Canada), Arbitral Tribunal, 1941, 3 UN Rep. Int'l Arb. Awards (1941). The tribunal imposed monetary penalties on Canada and required the smelter to undertake investments costing some $20 million to reduce its emissions.

The tribunal does not provide much formal legal precedent, because Canada and the United States negotiated a special treaty to establish the tribunal and resolve this dispute. The treaty specified the sources of law to be reviewed and directed the tribunal to "give consideration to the desire of the high contracting parties to reach a solution just to all parties." Nevertheless, the obligation not to cause environmental harm can be viewed as an extension of the general international norm that prohibits a State from using its territory, or to allow others to use its territory, in a way that can harm the interests of another State. The ICJ has affirmed the obligation not to cause harm in several rulings, perhaps most notably in the *Corfu Channel* case, which concerned damage to British warships caused by mines placed in Albanian waters. In holding Albania responsible, the ICJ stated:

> From all the facts and observations mentioned above, the Court draws the conclusion that the laying of the minefield which caused the explosions on October 22nd, 1946, could not have been "accomplished without the knowledge of the Albanian Government." The obligations resulting for Albania from this knowledge are not disputed between the Parties. Counsel for the Albanian Government expressly recognized that [translation] "if Albania had been informed of the operation before the incidents of October 22nd, and in time to warn the British vessels and shipping in general of the existence of mines in the Corfu Channel, her responsibility would be involved. . . . "
>
> The obligations incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of a mine field in Albanian territorial waters and in warning the approaching British warships of the imminent danger to which the minefield exposed them. Such obligations are based, not on the Hague Convention of 1907, No. VIII, which is applicable in time of war, but on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; *and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States* [emphasis added.]

Corfu Channel (U.K. v. Alb.), Merits, 1949 I.C.J. Rep. 4, 22 (Judgment of April 9).

Trail Smelter and *Corfu Channel* provide clear precedents for the development of international environmental law. At the first major multilateral meeting to develop international environmental policy, governments adopted the Stockholm Declaration on the Human Environment, including Principle 21 which provides:

> States have . . . the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."

Stockholm Declaration on the Human Environment, UN Doc. A/CONF.48/14 and Corr.1, June 16, 1972 (1972), *reprinted in* 11 I.L.M. 1416 (1972). *See also* Rio Declaration on Environment and Development, UN DOC A/CONF.151/5/Rev. 1, Principle 2, June 13, 1992, *reprinted in* 31 I.L.M. 874 (1992); *Lac Lanoux*

Arbitration, (Spain v. Fr.) XII R.I.A.A. 281 (1957); *UNEP Principles for Shared Natural Resources*, Principle 3; *United Nations Convention on the Law of the Sea*, Part XII; *IUCN Draft Covenant*, at Principle 4; *IUCN Draft Covenant on Environment and Development*, at Article 11.

Principle 21 of the Stockholm Declaration appears to be broader than the holdings in *Trail Smelter* and *Corfu Channel*. Whereas *Trail Smelter* limited its conclusions to transboundary pollution between States, the Stockholm Declaration applies to "areas beyond the limits of national jurisdiction," including, for example, the oceans and Antarctica. In addition, the ICJ in *Corfu Channel* suggested that a violation of another legal norm, such as the duty to notify, is required as a prerequisite to finding a breach of the duty not to cause harm to another State. In contrast, the Stockholm Declaration, as well as subsequent iterations in other declarations and treaties, makes clear that the harm itself is sufficient to trigger a breach of the duty not to cause environmental harm. Nonetheless, Principle 21 prohibits only the impacts from activities under a State's "jurisdiction or control."

Principle 21 is widely accepted as customary international law. Indeed, the ICJ, in its advisory opinion on the Legality of the Threat or Use of Nuclear Weapons, declared:

> The Court recognizes that the environment is under daily threat and that use of nuclear weapons could constitute a catastrophe for the environment. The Court also recognizes that the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. *The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now a part of the corpus of international law relating to the environment.*

Para. 29–30 (emphasis added). While the Court's formulation differs from that of Principle 21, it nonetheless seems to endorse the general obligation not to cause environmental harm.

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2. *State Responsibility*

The concept of State responsibility establishes a set of rules that describe the consequences of a State's breach of its international obligations. As Ian Brownlie puts it:

> Today one can regard responsibility as a general principle of international law, a concomitant of substantive rules and of the supposition that acts and omissions may be categorized as illegal by reference to the rules establishing rights and duties. Shortly, the law of responsibility is concerned with the incidence and consequences of illegal acts, and particularly the payment of compensation for loss caused. However, this, and many other generalizations offered on the subject, must not be treated as dogma, or allowed to prejudice the discussion which follows. Thus the law may prescribe the payment of compensation for the consequences of legal or "excusable" acts, and it is proper to consider this aspect in connection with responsibility in general.

IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 433 (6th ed. 2003).

International tribunals have several times affirmed State responsibility as an international legal norm. In the *Chorzow Factory* case, for example, the Permanent Court of International Justice, the predecessor to the ICJ, held:

> It is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation. In judgement No. 8 . . . the Court has already said that reparation is the indispensable complement of a failure to apply a convention, and there is no necessity for this to be stated in the convention itself.

PCIJ (1928), Ser. A, no. 17, p. 29. Subsequently, the ICJ held in the *Corfu Channel* case that Albania was "responsible under international law" for allowing the use of its territory to harm British vessels and that Albania must pay compensation for the loss of property and human life.

Principle 21 of the Stockholm Declaration explicitly extends State responsibility to breaches of the obligation not to cause environmental harm. As noted above, Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration refer to States' "responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment."

QUESTIONS AND DISCUSSION

1. ***Due Diligence.*** The duty to prevent environmental harm is not absolute. In practice it appears to require States to use due diligence in taking all practicable steps to prevent harm. For example, Article 194 of the UN Convention on the Law of the Sea requires that:

> States shall take, individually or jointly as appropriate, all measures consistent with this Convention that are necessary to prevent, reduce and control pollution of the marine environment from any source, using for this purpose the best practicable means at their disposal and in accordance with their capabilities, and they shall endeavor to harmonize their policies in this connection.

See also Convention on Environmental Impact Assessment in a Transboundary Context, Article 2(1), *done* Feb. 25, 1991, 30 I.L.M. 800, 803 (providing that "[t]he Parties shall, either individually or jointly, take all appropriate and effective measures to prevent, reduce and control significant adverse transboundary environmental impact from proposed activities"). Other Conventions link the general principle to avoid harm to one that requires due diligence in environmental management. The Basel Convention, for example, requires the "environmentally sound management of hazardous wastes and other wastes," which is defined as: "taking all practicable steps to ensure that hazardous wastes or other wastes are managed in a manner which will protect human health and the environment against the adverse effects which may result from such wastes." Basel Convention, Article 2(8); *see also, e.g.*, London Convention, 1972. How should the principle of common but differentiated responsibilities be reflected in a due diligence standard? Does the due diligence standard suggest that a negligence standard applies when seeking to hold a State responsible for environmental harm? Or should the focus of the inquiry simply be on the extent and nature — the "significance" — of the resulting harm, regardless of whether the acting State was at fault?

2. ***Jurisdiction and Control.*** Principle 21 of the Stockholm Declaration limits a State's responsibility (i.e., when it must pay compensation) for harm to those

activities under that State's "jurisdiction and control." How far does a State's responsibility extend? Is a State responsible for transboundary pollution caused by individuals and corporations within its "jurisdiction"? Because individuals and corporations emit most greenhouse gases, as well as other transboundary pollution, the answer to this question is of obvious importance. Decisions of international tribunals do not provide much guidance. The U.S. *Restatement* (Third) *of the Law of Foreign Relations*, a scholarly review of what leading U.S. academics believe to be the state of international law from a U.S. perspective (but which is *not* a statement of the law *per se*), provides the following description of these terms in *Comments c* and *d* to Section 601 on State Obligations with Respect to the Environment of Other States and the Common Environment:

> *c. "Activities within its jurisdiction" and "significant injury."* An activity is considered to be within a state's jurisdiction under this section if the state may exercise jurisdiction to prescribe law with respect to that activity under sections 402–403. The phrase "activities within its jurisdiction or control" includes jurisdiction, Part V, as well as activities on ships flying its flag or on installations on the high seas operating under its authority. . . . International law does not address internal pollution, but a state is responsible under this section if pollution within its jurisdiction causes significant injuries beyond its borders. "Significant injury" is not defined but references to "significant" impact on the environment are common in both international law and United States law. The word "significant" excludes minor incidents causing minimal damage. . . . In special circumstances, the significance of injury to another state is balanced against the importance of the activity to the state causing the injury.
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> *d. Conditions of responsibility.* A state is responsible . . . for both its own activities and those of individuals or private or public corporations under its jurisdiction. The state may be responsible, for instance, for not enacting necessary legislation, for not enforcing its laws against persons acting in its territory or against its vessels, or for not preventing or terminating an illegal activity, or for not punishing the person responsible for it. In the case of ships flying its flags, a state is responsible for injury due to the state's own defaults . . . but is not responsible for injury due to fault of the operators of the ship. In both cases, a state is responsible only if it has not taken "such measures as may be necessary" to comply with applicable international standards and to avoid causing injury outside its territory. . . . In general, the applicable international rules and standards do not hold a state responsible when it has taken the necessary and practicable measures; some international agreements provide also for responsibility regardless of fault in case of a discharge of highly dangerous (radioactive, toxic, etc.) substances, or an abnormally dangerous activity (e.g., launching of space satellites) . . . . In all cases, however, some defenses may be available to the state: e.g., that it had acted pursuant to a binding decision of the Security Council of the United Nations, or that injury was due to the failure of the injured state to exercise reasonable care to avoid the threatened harm. . . . A state is not responsible for injury due to a natural disaster such as an eruption of a volcano, unless such disaster was triggered or aggravated by a human act, such as a nuclear explosion in a volcano's vicinity. But a state is responsible if after a natural disaster has occurred it does not take necessary and practicable steps to prevent or reduce injury to other states.

3. Given the above discussions, outline the primary elements that must be demonstrated to bring a climate change claim against a State with large greenhouse

gas emissions for violating Principle 21's obligation not to cause environmental harm.

4. Consider the various obligations of the UNFCCC and the Kyoto Protocol as well as relevant principles of international environmental law. What legal advice would you give to the government of Tuvalu if it asks you to help it build a case seeking damages and injunctive relief to mitigate climate change? What problems will you have in bringing your claim? Consider the following questions:

- Will you have a better chance of success against the United States or another State?
- Although the United States is not a Party to the Kyoto Protocol, can you claim that the commitments to reduce emissions in the Kyoto Protocol have become customary international law?
- What level of harm should trigger any obligation to avoid harm from greenhouse gas emissions?
- To what standard of care should the State be held?
- What activities should be considered under the "jurisdiction and control" of a State?
- What remedies should be available to States who suffer such damage?

See generally RODA VERHEYEN, CLIMATE CHANGE DAMAGE AND INTERNATIONAL LAW: PREVENTION DUTIES AND STATE RESPONSIBILITY (2005); Durwood Zaelke & James Cameron, *Global Warming and Climate Change — An Overview of the International Legal Process*, 5 AM. U. J. INT'L L. & POL'Y 249 (1990).

5. Do the UNFCCC and the Kyoto Protocol help define the contours of the obligation not to cause environmental harm or establish other obligations upon which Tuvalu could base its claim? Consider the following.

DAVID M. DRIESEN, FREE LUNCH OR CHEAP FIX?: THE EMISSIONS TRADING IDEA AND THE CLIMATE CHANGE CONVENTION

26 B.C. ENVTL. AFF. L. REV. 1, 58–61 (1998)*

The Framework Convention articulates a broad normative idea that nations should avoid dangerous climate change. It translates this broad norm into a developed country "aim" of returning greenhouse gas emissions to 1990 levels by the year 2000. This locution makes it difficult to give national leaders either credit or blame for committing to stabilize emissions (or deciding not to do anything). The phrasing makes it difficult to state whether the leaders have agreed to a binding limit stabilizing emissions or not. The mention of a concrete target certainly suggests a serious commitment. But the use of the term "aim" might suggest something more akin to a goal than a binding commitment.

Furthermore, this ambiguity made it difficult to hold nations accountable for emission increases after the adoption of the Framework Convention. It is difficult to argue that developed countries that increased their emissions (such as the United States) violated an international agreement. Hence, the Framework Convention had little normative force as a generator of concrete actions.

Annex B to the Kyoto Protocol, however, seems to help clarify national obligations under the Climate Change Convention. It establishes national quantified emission limitations, stated as a percentage reduction in greenhouse gas emissions below 1990 levels. Article 3, section 1 clearly establishes these limits as binding, stating that the developed country parties "shall . . . ensure that their . . . emissions of . . . greenhouse gases . . . do not exceed their assigned amounts." This means that while holding the international community accountable for any particular accomplishment is difficult, the Protocol, absent trading, establishes a clear basis for holding each developed nation accountable for meeting a quantifiable national commitment. The national caps in Annex B seem to translate an amorphous international goal, preventing dangerous climate change, into fairly specific national obligations aimed at moving toward this goal.

However, these seemingly concrete physical national obligations vanish before the eyes of a careful reader, because of provisions designed to facilitate trading. In fact, the treaty may instead create a much less specific "virtual" obligation, a developed country's obligation to either make the required reduction or earn credits abroad deemed equivalent to the specified reduction under rules yet to be defined. Indeed, the Kyoto Protocol may be read as not requiring any emission reductions at all, to the extent it allows tree planting to substitute for emission reductions. The Kyoto Protocol now contains more amorphous commitments than the Protocol would have if the countries of the world had agreed to the reductions specified in Annex B without trading.

This vagueness creates real difficulties in determining what precisely the parties have agreed to do. A post-Kyoto dispute concerning trading of so-called "hot air" illustrates this vagueness. Because of the economic collapse of Eastern Europe and the former Soviet Union, emissions have fallen in this area since 1990, in spite of antiquated energy systems. A dispute has arisen about whether other developed countries may purchase credits reflecting this downturn in emissions in lieu of physical national compliance.

If the CoP allows trading of "hot air" credits, the developed countries will likely realize less aggregate emission reductions than national compliance without trading would generate. But to the extent the five percent aggregate developed country reduction target in the Kyoto Protocol already takes the economic downturn of countries in transition to market economies into account, the developed countries may realize this five percent target, even if they trade "hot air." Accepting this use of hot air involves interpreting the treaty as using the five percent target, rather than the results of each nation complying with its binding national cap, as the measuring rod of effective implementation. But the Protocol creates no binding obligation to meet the five percent target. Rather, it states that the developed countries "shall, individually or jointly ensure that their aggregate . . . emissions . . . do not exceed their assigned amounts . . . with a view to reducing their overall emissions of such gases by at least 5 percent." This language resembles the amorphous language expressing the Framework Convention's aim to stabilize emissions at 1990 levels by the year 2000. If compliance with this language provides the measuring rod for assessing implementation of the Kyoto Protocol, the world has made little progress in clarifying the Framework Convention.

One might hypothesize that the Kyoto Protocol clearly requires that developed countries at least collectively ensure that their aggregate emissions equal the aggregate of their national targets. But to the extent the COP allows developed countries to claim credits for reductions in developing countries under Article 12, developed country emissions will likely exceed the aggregate limits as well. The provisions introduced to facilitate trading make definite simple statements about

what precisely the parties have agreed to accomplish very difficult. This hinders public understanding of the agreement and accountability.

Do you agree with these conclusions? Are there alternative ways to interpret the obligations of the Parties to the Kyoto Protocol, even in light of emissions trading?

6. Given the dire consequences of sea level rise for many of the small island States, it may at first be surprising that none of them have yet turned to the International Court of Justice to press their claims. Indeed, some countries have seriously considered bringing such a case. *See, e.g.*, Kalinga Seneviratne, *Tiny Tuvalu Steps up Threat to Sue Australia, U.S.*, INTERPRESS SERV., Sept. 5, 2002, found at http://www.commondreams.org/headlines02/0905-02.htm. Why do you think no such cases have been brought? Even if the island States thought they could prevail (and this is not at all clear), many island States are heavily dependent on larger countries. It is thus important to see possible litigation before the ICJ as part of a broader set of diplomatic relationships.