

## Chapter 8

### Compliance and Dispute Settlement

#### I. Introduction (p. 305)

In introducing compliance and dispute settlement, three issues are worth highlighting to underscore the need for a careful consideration of appropriate “sticks” and “carrots” in multilateral environmental agreements (MEAs). First, “carrots” in a multilateral environmental agreement are necessary because of the consent-oriented approach to lawmaking in international law. Countries are not bound by a treaty until they ratify or otherwise accede to a treaty through their international processes. Unless a norm becomes customary international law, the norms of a treaty are not binding on a country until it consents to be bound by a treaty. As such, countries do not need to participate in a treaty at all. To the extent that the negotiators of a treaty believe that having broad representation in a treaty is necessary, they will need to find incentives for countries that have little interest in or perceive few benefits from participating in the treaty.

Second, in the case of climate change, developing countries may not participate in a regime that imposes penalties on them for violating their reporting and other obligations. Participating in the convention will impose costs on them: costs of attending meetings and costs of implementing reporting and other obligations required by the treaty. If noncompliance is met with stiff sanctions, then many countries will simply decide not to ratify a treaty or, if they have already ratified a treaty, they may decide to withdraw, unless a convention provides substantial benefits.

Third, in addition to any direct benefits a country may obtain from resolving an environmental problem, it is the environment or the global commons generally that benefits from an MEA. Thus, not only does noncompliance harm everyone, but so too does non-participation. For these reasons, negotiators must balance the need to ensure compliance with a treaty with the need to ensure participation in a treaty.

#### II. Compliance Under Multilateral Environmental Agreements (p. 306)

The lack of capacity cannot be stressed enough. In many countries, environmental agencies simply do not have the human, financial, or technical resources to do their jobs effectively.

While not strictly related to compliance, the lack of capacity is easy to see at meetings of the Parties. While some countries attend meetings with 40 or 50 delegates, many developing countries attend with just one or two. Whenever meetings are held simultaneously, obviously a country with just one delegate can participate in only one meeting. That country's interest may not be adequately represented in the negotiations in designing a treaty's provisions. That lack of participation up front may exacerbate noncompliance once the treaty enters into force.

Xeuman Want and Glenn Wisner (pp. 308–309) highlight the three steps generally found in MEAs to manage compliance: (1) reporting, (2) verification, and (3) assessing compliance and responding to it. While these general features of managing compliance may be common to different regimes, it is the specific implementation that may differ. With respect to reporting, the nature of the environmental problem will dictate what is reported. Because the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) regulates trade in species of conservation concern, Parties are directed to report on imports and exports of protected species. In this way, officials can determine whether a country's reported exports are consistent with imports reported by other countries. The Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer must report on their production and consumption of listed ozone depleting substances to determine whether Parties are meeting the scheduled phaseouts of those substances.

As Wang and Wisner note, verification in MEAs is often non-confrontational. Indeed, in many cases, there are no means to verify the data submitted by the Parties; the honor system prevails and the treaty includes no independent means to verify the data reported by a Party. If there is some discrepancy, for example with reported exports and imports under CITES, then the Parties may ask a Party to provide additional information. Similarly, the Montreal Protocol does not envisage verification of national reports; such verification takes place only if a complaint is submitted to the Montreal Protocol's Implementation Committee. On the other hand, the UNFCCC and the Ramsar Convention on Wetlands of International Importance allow for country visits to verify data (of course, only with permission of the country being visited) and the Kyoto Protocol requires verification of data by expert review teams. These requirements for independent review of data are not common in MEAs.

Even where noncompliance is found, dispute settlement or sanctions is not the first step towards resolving that noncompliance. As pointed out in the introduction, above, the nature of international law and global environmental problems does not encourage the use of an adversarial or sanctions-based model of compliance. Instead, the first step is usually to provide the noncomplying Party with technical assistance. In CITES, for example, the Parties may request the Secretariat to visit a noncomplying Party to assist with drafting new implementing legislation, provide customs training, or provide other assistance to encourage compliance.

Unlike the Montreal Protocol, CITES, and the Kyoto Protocol, most MEAs have no compliance mechanism that results in sanctions.

### **Questions and Discussion (p. 309–10)**

1. Self-explanatory, although given the success of these sanctions-based compliance mechanisms, it is worth asking why more MEAs do not include them. In CITES, for example, even though Parties recognize the success of the sanctions-based model, many Parties oppose it. They believe that MEAs should rely even more on carrots (capacity building, technology transfer) or perhaps discard sanctions altogether in favor of positive incentives.

2. It is important to bear in mind that CITES sanctions relate to trade in CITES-protected specimens (parts or derivatives of CITES-listed species). Sanctions deriving from the Montreal Protocol's Implementation Committee have been limited to loss of a developing country Party's grace periods for implementing the phaseouts and loss of funding through the Global Environment Facility or the Protocol's Multilateral Fund for projects to reduce consumption and production of ozone depleting substances. As such, there is a close connection between the purpose of the treaty and the sanctions imposed. In the context of climate change, an underlying question is whether any sanctions with the same close connection could be imposed. It is highly unlikely that a trade ban on products from noncomplying Parties would succeed, as such sanctions would likely encourage Parties to withdraw from the Kyoto Protocol. Another possibility is to remove a Party's right to use the flexibility mechanisms. As discussed in Chapter 6, the Parties have already unsuccessfully attempted to link compliance to use of the flexibility mechanisms.

## **III. Compliance with the Climate Change Regime (p. 311)**

### **A. The Climate Change Convention (p. 311)**

While “merely” a reporting obligation, the obligation to submit annual inventories of greenhouse gas emission is obviously critical to the FCCC and Kyoto Protocol. Without annual inventories, it would not be possible to establish baseline emissions levels and determine whether or not Parties are reducing GHG emissions or enhancing sinks. Beyond reporting on the actual emissions, Annex I parties must include other elements in their reports:

Annex I inventories must include complete estimates for all major GHG sources and sinks, as well as a full time-series of annual estimates going back to 1990. The time series helps to identify inconsistent use of methodologies over time and enables the evaluation of emission trends. Inventories are submitted electronically

in a standard format to facilitate data analysis and comparison. As part of its annual inventory submission, each Annex I party must submit a National Inventory Report providing detailed documentation on the methods and data sources used to calculate emissions and removals, with emphasis on the most important source and sink categories. Each Annex I party must also describe its inventory planning and compilation practices, including organizational and decision-making responsibilities, quality assurance procedures, and archiving of inventory information.

Reviews of Annex I inventories focus on assessing the conformity of the methodologies and data sources used in the preparation of the inventory with the IPCC Guidelines and Good Practice Guidance. Where possible and appropriate, each party's reported data are compared with its previously submitted data, data reported by other parties, and those maintained by certain international organizations. For instance, each party's reported statistics used in the preparation of estimates of emissions from the energy sector are compared to those maintained by the International Energy Agency. Similarly, statistics used for estimation of agricultural emissions are compared to UN FAO data.

CLARE BREIDENICH & DANIEL BODANSKY, MEASUREMENT, REPORTING AND VERIFICATION IN A POST-2012 CLIMATE AGREEMENT 12 (Pew Center on Global Climate Change, April 2009).

As noted, developing countries have much less rigorous reporting obligations. They are not, for example, required to use the IPCC Guidelines and Good Practice Guidance, and they are not required to submit a time series. In any event, 134 of the 150 non-Annex I Parties have submitted their initial national communications. The Republic of Korea and Uruguay have submitted their second and Mexico has submitted its third. *Id.* at 13.

### **Questions and Discussion (p. 312)**

The discussion note highlights the link between reporting obligations and carrots for implementation. In other words, the UNFCCC understood that compliance costs, even for reporting, might be too substantial for developing countries. Thus, the carrots for compliance were built directly into the treaty regime.

In addition, the requirement for developed countries to provide “new and additional” financial resources is sometimes referred to as an “additionality” requirement. This financial “additionality” is obviously quite different from “additionality” as that term is used for Joint Implementation and Clean Development Mechanism projects. The requirement for financial additionality is a common feature of MEAs. Developing countries fear that a requirement to fund

implementation of a new treaty will cause a drop in funding from developed countries through other bilateral and multilateral funding sources.

## **B. The Kyoto Protocol (p. 312)**

The Kyoto Protocol includes a number of reporting obligations. As under the UNFCCC, the Kyoto Protocol requires Parties to report their greenhouse gas inventories. Decision 15/CMP.1, *Guidelines for the Preparation of the Information Required under Article 7 of the Kyoto Protocol* (2006). That Decision is too long to reprint here, but you may want to encourage students to review it so that they can gain a better appreciation for the complexity and detail required to report accurately on a Party's greenhouse gas emissions. As part of their national communications, Annex I Parties must also provide detailed information on the policies and measures they are implementing to meet their Convention obligations and their Kyoto Protocol targets.

The Climate Change Secretariat has summarized these obligations as follows:

Each Annex I Party must submit an annual inventory of its greenhouse gas emissions and removals to the secretariat, calculated using standard guidelines based on IPCC methodologies. The annual inventory will also include other information that must be submitted annually, for example, on total annual transactions (for the previous year) in AAUs, CERs, ERUs and RMUs and on action taken to minimize adverse impacts on developing countries. As they will be more detailed, these annual inventories will supersede those currently required under the Convention.

Expert review teams will check annual inventories, to make sure they are complete, accurate and conform to the guidelines. The annual inventory review will generally be conducted as a desk or centralized review. However, each Annex I Party will be subject to at least one in-country visit during the commitment period. If any problems are found, the expert review team may recommend adjusting the data to make sure that emissions during any year of the commitment period are not underestimated. If there is disagreement between a Party and the expert review team about the adjustment that should be made, the Compliance Committee will intervene. Aside from recommending data adjustments, the expert review team has the mandate to raise any apparent implementation problems with the Compliance Committee. Once the compliance procedures have been finalized, the compilation and accounting database will be updated with a record of the Party's emissions for that year.

Annex I Parties must also submit regular full national communications on the action they are taking to implement the Protocol. These will be merged with

national communications submitted under the Convention. Although no fixed timetable has been set yet, they will probably be required every three to five years. Each national communication submitted under the Protocol will be subject to an in-depth review by an expert review team performed as either an in-country visit or a centralized review. The expert review team will prepare a report on its review, including any identified potential implementation problems.

Expert review teams for both annual inventories and national communications will be coordinated by the secretariat. Consisting of some four to twelve people, they will be composed of experts selected from a roster of individuals nominated by Parties, and will be led by two lead reviewers, one each from an Annex I and a non-Annex I Party. Expert reviewers will have to undergo training, to ensure that they possess the necessary competence to carry out reviews.

Climate Change Secretariat, Reporting and Review, at [http://unfccc.int/national\\_reports/accounting\\_reporting\\_and\\_review\\_under\\_the\\_kyoto\\_protocol/items/1113.php](http://unfccc.int/national_reports/accounting_reporting_and_review_under_the_kyoto_protocol/items/1113.php).

Two observers of the climate change regime believe these requirements have substantial shortcomings:

However, with parties' commitments related to mitigation measures so loosely defined, specific standards or metrics for measuring and reporting policies and measures have not been adopted under either the Convention or the Protocol. Further, the reporting guidelines do not require documentation to substantiate parties' estimates of the GHG effects of their policies and measures. Consequently, the type and level of information provided on mitigation measures varies widely across parties.

The information regarding mitigation measures is reviewed as part of a party's national communication. While inventory reviews are based on clear guidelines and standards, there are no explicit guidelines for review of national communications under the Convention, only an overall objective and a list of tasks. While review guidelines have been adopted under the Protocol, they are geared toward assessing the transparency and completeness of the information. As a result, under both the Convention and the Protocol, the review of GHG mitigation measures is largely facilitative: expert teams meet with national experts and stakeholders to better understand, and provide feedback on, the information reported in the national communication. To the extent possible, review teams attempt to verify reported information and check emissions estimates against inventories or other data, but their ability to truly verify this information is limited.

CLARE BREIDENICH & DANIEL BODANSKY, MEASUREMENT, REPORTING AND VERIFICATION IN A POST-2012 CLIMATE AGREEMENT 15 (Pew Center on Global Climate Change, April 2009).

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## 1. The Kyoto Protocol's Compliance Mechanism (p. 312)

*Errata:* The “limitation” referred to in line five of this section should be an “important limitation,” not an “importation limitation.”

## 2. The Consequences of Noncompliance (p. 315)

### Questions and Discussion (pp. 319–22)

1. Decision 27/CMP.1 allocates issues to the facilitative and enforcement branches of the compliance committee very clearly.

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. Decision 27/CMP.1, Annex, at para. V(4)–(5).

The **Facilitative Branch** 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. It also considers the “provision of information” concerning action “supplemental” to domestic action by Annex I Parties. It further provides “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. *Id.* at IV(4)–(5).

The enforcement or facilitative branch of the Compliance Committee makes final decisions concerning possible actions for noncompliance. The CoP/MoP, as the decisionmaking body for the Kyoto Protocol, has entrusted the Compliance Committee to make such decisions through Decision 27.CMP.1. Only when a Party has been found to be in violation of its emissions targets and it believes that the enforcement branch violated its due process may the CoP/MoP hear an appeal. This process is analogous to that used in CITES, where the CITES Standing Committee deliberates on compliance matters and makes decisions on behalf of the Conference of the Parties. CITES, Resolution Conf. 14.3, *CITES Compliance Procedures* (2007). In contrast, the Montreal Protocol’s Implementation Committee recommends actions to

be taken to the Montreal Protocol's Meeting of the Parties, which has final say on which actions will be implemented.

Sending the decision to the Conference or Meeting of the Parties could introduce additional delay into the process. In CITES, where the CoP meets every 2.5 years, that delay could be significant. The Standing Committee, on the other hand, meets every six months. The issue of delay may not be so significant under the Montreal Protocol or the Kyoto Protocol where the decisionmaking bodies meet every year. Even so, it may be easier to reach consensus in a smaller group. On the other hand, perhaps a decision by just 10 of the Kyoto Protocol's 184 Parties is insufficient to represent the interests of the entire membership in the Kyoto Protocol. Under CITES, the Standing Committee includes 35 of 172 Parties.

2. This question reprises the question raised in note 2 on page 310, but asks students to reconsider the question in light of what the Kyoto Protocol Parties have actually done. One reason that the Parties likely agreed to "emissions" penalties is that they could simply negotiate lower targets for subsequent compliance periods.

3. In some respects, the Parties have built proportionality into the compliance regime, although of course it can be debated whether the Parties made the right decisions. For example, a failure to comply with a target generates "emissions" penalties, whereas a failure to report is subject to facilitation. If one assumes that data submission is less serious than compliance with a target, then the regime embraces proportionality. However, one can easily make the case that it is more important for accurate assessment of a Party's baseline emissions and annual inventories, because without accurately assessing baselines and inventories one cannot determine compliance with a target.

In other ways, the compliance regime does not embrace proportionality. For example, the emissions deduction for noncompliance with a target does not increase—at least on a percentage basis—if a Party misses its target by 30% as opposed to 2%.

4. One must wonder whether the motivation of the developing countries was purely political—to highlight that several Parties were not making "demonstrable progress"—or whether they really sought to facilitate compliance by these countries. If the facilitative branch had moved forward on the submissions of South Africa and other developing countries, and found a lack of "demonstrable progress," it could have reviewed emissions in particular sectors and recommended actions to reduce emissions in particular sectors, perhaps based on best practices among similarly situated countries. It could have also analyzed particular laws, policies, and practices of the noncomplying Party to encourage reforms (e.g., encouraging stricter emissions standards or the elimination of subsidies or other incentives to use higher carbon fuels). The

broad mandate of the facilitative branch gives it much discretion in framing its recommendations. *See* Decision 27/CMP.1, Paragraph XIV on page 315.

5. Governments are willing to submit trade disputes to dispute settlement primarily because most governments simply care far more about international trade issues than environmental issues. As one example, the Office of the United States Trade Representative in Geneva has a staff of about 25 and is headed by a politically-appointed Deputy U.S. Trade Representative with the rank of ambassador. The Geneva office communicates regularly with WTO staff and similar trade missions of other WTO Members. The United States also maintains significant trade or commercial missions in several embassies around the world. In contrast, the United States may have just one or two persons posted to the U.S. embassy in Nairobi with environmental expertise to liaise with UNEP. As of 2003, the State Department had foreign service officers in embassies around the world who were responsible, as part of their work, for reporting on environmental issues; only the embassy in Mexico City, however, had a full-time environmental attaché from EPA. Sanford E. Gaines, *The Problem of Enforcing Environmental Norms in the WTO and What to Do About It*, 26 HASTINGS INT'L & COMP. L. REV. 321, 373 (2003).

There have been many proposals for a World Environmental Organization (WEO) or Global Environmental Organization (GEO) as an institutional counterweight to the WTO. *See, e.g.*, Daniel C. Esty, *The Value of Creating a Global Environmental Organization*, ENV'T MATTERS, June 2000; C. Ford Runge, *A Global Environment Organization (GEO) and the World Trading System: Prospects and Problems*, 35 J. WORLD TRADE 399 (2001). Others are skeptical that such a new environmental entity, even if it could be agreed on, would have sufficient coherence or authority to be an effective alternative forum on issues like the WTO-MEA relationship. Sanford E. Gaines, *The Problem of Enforcing Environmental Norms in the WTO and What to Do About It*, 26 HASTINGS INT'L & COMP. L. REV. 321 (2003).

Regardless of the ability of a WEO to be an effective counterweight to the WTO, environmental interests may be more difficult to enforce, and many obligations of MEAs are far more difficult to identify than those found in trade agreements. For example, it is a relatively simple task to identify, in most circumstances, whether a WTO Member is taxing or regulating the products of foreign countries less favorably than like domestic products, thereby violating the Member's "national treatment" obligation of the General Agreement on Tariffs and Trade. Similarly, it may be relatively straightforward to determine whether a WTO Member has enacted restrictions on the importation of foreign goods in violation of Article XI of the GATT. In contrast, it may be very difficult to ascertain whether a Party to the Convention on Biological Diversity has "as far as possible and as appropriate ... [e]stablish[ed] a system of protected areas." Similarly, a court would likely struggle to determine when an export of a specimen of a CITES-listed species was "detrimental to the survival of the species." Yet, many obligations of multilateral environmental agreements could be adjudicated. For example, determining compliance with targets and

timetables under the Kyoto Protocol and the Montreal Protocol would be relatively straightforward.

6. Whether a person serves in his or her individual capacity reflects, to some extent, the degree to which those persons must negotiate a common position among members of the region or group he or she represents. The questions about composition of the committees are designed to get students thinking about what fairness might mean in different contexts. For example, many students may believe it is entirely appropriate for non-Annex I parties to be included in the enforcement branch because many developing countries will be hit first and hardest by climate change (low-lying island countries) or have the least ability to adapt to climate change (much of Africa). Also, many students may not be aware of the important role that NGOs play in monitoring implementation of MEAs. Representatives from NGOs help identify legal and illegal trade in wildlife (CITES) and ozone depleting substances (Montreal Protocol), provide administrative support (Ramsar), advise governments on implementation matters, and even represent governments at meetings of the Parties. As such, NGOs may be extremely qualified to assist with issues of compliance under the Kyoto Protocol.

7. The material included in note 1, on page 309, suggests that the threat of sanctions drives the success of self reporting. As described there, Parties to the Montreal Protocol and CITES did not come into compliance until push came to shove, i.e., sanctions loomed.

There are certainly valid grounds for restricting the role of the Secretariat. If the Secretariat is viewed as part of the compliance process, then perhaps Parties will be less willing to provide information or seek assistance from the Secretariat for fear of generating a compliance procedure. On the other hand, the Secretariat is strategically placed to assist Parties achieve the overall objectives of an MEA. As a repository of information for an MEA and by being in regular communication with Parties to the MEA, the members of the Secretariat may have the best information about compliance with the provisions of an MEA. If that information cannot be used to assist in the achievement of the MEA's environmental goals, then an enormous opportunity is lost.

8. The expert review teams are an important aspect of compliance because they can ensure some consistency in the use in the preparation of greenhouse gas inventories. Because of the obvious economic incentives to report inventories and other information that are not accurate, the expert review teams that review and verify a Party's efforts to implement its Kyoto Protocol obligations "will enhance international cooperation, promote transparency, persuade parties to implement their commitments more fully, and help focus attention and resources on solving the problem the agreement was intended to address." DONALD GOLDBERG ET AL. BUILDING A COMPLIANCE REGIME UNDER THE KYOTO PROTOCOL (CIEL/EuroNatura, 1998). To achieve these goals, the Kyoto Protocol directs the expert review teams to not only review annual inventories and national communications, but also prepare reports containing a "thorough and comprehensive technical assessment of all aspects of the implementation by a Party of [the] Protocol." Kyoto

Protocol, art. 8.3. They also assess a Party's implementation efforts and identify any potential problems or factors influencing the fulfillment of its commitments.

Despite the innovation of the expert review teams, Goldberg et al. have these comments on "in-depth review" (IDR), as it is called under the UNFCCC and the subsequent expert review teams under the Kyoto Protocol:

The main shortcoming of the IDR process under the Convention has been that it is far too slow and cumbersome. IDR teams take two to three months to prepare for country visits. After their visits, three to four more months are required to incorporate host country comments into the report and for the final report to be edited and published. The combined process of national communications and IDR examinations currently takes over three years, contributing to the infrequency of national communications to date. Under the Protocol, annual inventories will be reviewed on a yearly basis. The reviews should be conducted in tandem with careful tracking of each Party's progress, to verify the accuracy of its reports. Moreover, despite these increased responsibilities, Article 8 review will have to be set up so it can be accomplished much faster than IDR has been to date. This should be possible with increased experience and with review becoming nearly a full time activity.

Significantly, the review teams' powers have been enhanced so that the teams may assess a Party's implementation and identify problems related to fulfillment of its commitments. Coupled with Article 7's requirements that annual inventories include "information for the purposes of ensuring compliance," and national communications include "information necessary to demonstrate compliance with its commitments," these new responsibilities create the groundwork for vesting review teams with genuine investigative powers.

Related to that observation is the question of how much authority a review team or oversight body should have to go into a country to conduct an inspection or verify a report. The success of the Protocol, particularly emissions trading and other cooperative mechanisms, may hinge on the ability of review teams to verify the data submitted by the Parties. The utility of inspections, in turn, may be directly proportional to the degree to which teams are permitted to operate free of constraints from the host country. The COP/MOP will have to balance the need of the teams and/or oversight body to accomplish their mandate against the Parties' reluctance to subject themselves to intrusive investigations. As mentioned above, Parties have customarily invited IDR review teams in to facilitate consultations and clarifications of their communications. Guidelines for Article 8 review could formally provide that Parties would invite review teams in for those purposes as well as verification and inspection. Such invitations would be given upon request by the review teams and/or the facilitation body, and would not be unreasonably denied. The guidelines could further provide that if a Party failed to extend a requested invitation, the matter would be referred to the COP/MOP for

discussion. This approach would retain an element of voluntariness, out of respect for each Party's sovereignty, while relying on peer pressure and the possibility of public opprobrium to ensure that the review process functioned as an effective device for tracking the Parties' implementation progress.

*Id.* at 10–11.

9. Self-explanatory.

10. Even if one agrees with Scott Barrett's assessment that the compliance mechanism is defective and the Kyoto Protocol's targets are political targets, not legally binding targets, most governments are taking the targets very seriously. More generally, many of his complaints pertain to *all* international agreements. For example, a country may always refuse to opt in to an agreement.

#### **IV. Dispute Settlement and Resolution (p. 322)**

The materials from pages 322–333, together with principles of international law and the UNFCCC (equity, precautionary principle, common concern) found at pages 150–168, provide the basis for a provocative mock dispute. Discussion note 4 on page 331 outlines the structure of the dispute.

##### **A. Settlement of Disputes under the Climate Change Regime (p. 322)**

It remains true that no country has sought to use the dispute settlement procedures of an MEA for resolution of a dispute. In addition, the Parties to the UNFCCC have not yet developed rules for arbitration under Article 14 of the Convention.

#### **Questions and Discussion (pp. 323–324)**

1. Saudi Arabia will point out the fundamental differences between dispute settlement by arbitration or the International Court of Justice (ICJ) and compliance within the climate change regime. In particular, Saudi Arabia is concerned that any resolution of a dispute under UNFCCC Article 14 and Kyoto Protocol Article 19 will establish a decision binding only on the parties to the dispute. Yet, the type of noncompliance at issue may have broader implications affecting the larger international community. Saudi Arabia wants to ensure that any resolution of the dispute should not affect the decision of the Kyoto Protocol Parties to submit an issue of noncompliance to the Compliance Committee (established pursuant to Article 18 of the Kyoto Protocol). Saudi Arabia's view should prevail. Under international law and rules of arbitration, disputes are binding only as between the parties to the dispute. If resolution of that dispute does not eliminate

the noncompliance, then the Compliance Committee could review the issue. The rules of the Compliance Committee currently make no reference to disputes settled by other means.

2. These are rhetorical question designed to get students thinking about the types of claims that developing countries might have.

## **B. Climate Disputes under Customary International Law (p. 324)**

You may want to review the impacts of climate change on developing and other countries in Chapter 1, particularly pages 16–36.

### **1. The Duty Not to Cause Environmental Harm (p. 326)**

The duty not to cause environmental harm is the cornerstone of international environmental law. It should be kept distinct from State responsibility, which is the legal concept regarding liability for wrongful acts. States would base their claims for damages under State responsibility, but they would need to also articulate the breach of a duty. That duty may be the duty not to cause environmental harm, duty to cooperate, the duty to provide prior notification that an activity could harm another State, or some other duty. Because of the way some authorities describe the duty not to cause environmental harm, this distinction is sometimes blurred.

The *Corfu Channel* case, like the *Trail Smelter Arbitration*, is sometimes thought to be imperfect precedent. In that case, the ICJ appears to say that Albania breached its duty to notify other countries that the Corfu Channel was mined. In other words, while States have the duty not to allow the use of their territory in ways that harm other States, that obligation is triggered only when another obligation is breached.

In many respects, Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration resolve this issue with respect to environmental harm. These two principles specifically provide that States must ensure that activities under their control do not cause damage to the environment of other States or to areas beyond the limits of national jurisdiction.

### **2. State Responsibility (p. 328)**

The principle of State responsibility does not establish a substantive norm. Instead, it affirms that States must make reparations for harm to another State where they have violated an international duty.

## Questions and Discussion (p. 329)

1. The due diligence standard does suggest that a negligence standard applies by pointing to some level of practice—taking all practicable steps—by which conduct will be measured. However, the ICJ has suggested that due diligence operates as a sliding standard: countries with greater resources may have a higher burden to demonstrate that they have taken due diligence. Such a sliding scale is seen in the concept of common but differentiated responsibilities, which recognizes that some countries are more responsible for certain problems and should thus shoulder a greater burden to fix the problem. The UNFCCC adopts this principle expressly in Articles 3.1 and 3.2 (see page 162). Other MEAs express the concept by qualifying obligations with phrases such as: “Each Contracting Party shall, *as far as possible and as appropriate* ... [e]stablish a system of protected areas.” Convention on Biological Diversity, art. 8.1.

2. Even if treaties and decisions of the ICJ and other international tribunals do not provide guidance on which activities are under the jurisdiction and control of a State, that phrase is commonly understood to include the activities of individuals and corporations within the boundaries of a State. The *Restatement (Third) of the Law of Foreign Relations* (“*Restatement*”) explains the common understanding very well. In addition, although Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration declare that a State is responsible for “damage to the environment” of another state or beyond the limits of national jurisdiction, “damage to the environment” is commonly understood to mean “significant damage” to the environment. The *Restatement* articulates this as “significant injury.”

3. This question is probably best addressed in the context of discussion note 4, below. The outline of the elements provided here will make more sense after reading the explanation of some of the elements of State responsibility described in note 4. The common elements of a climate change claim under Principle 21 of the Stockholm Declaration are:

- a. State Conduct
  - i. Must show sufficient State involvement or lack of involvement to trigger “State action.”
  - ii. Must show that the activity causing harm was under “jurisdiction and control” of the State
  - iii. Must show that the State failed to apply due diligence
- b. Nature of the Duty

- i. What is the Duty? –
  - (1) not to cause significant harm to another state or the area beyond the jurisdiction of any state; or
  - (2) a violation of some other duty that causes significant environmental harm.
- ii. Scope of Duty — harm-based and rule-based
  - (1) ensure activities do not cause significant injury to the environment of another state
  - (2) ensure activities comply with generally accepted rules and standards of international law;

To obtain a remedy for breaching the duty not to cause environmental harm, the plaintiff State would need to fulfill the elements of State Responsibility:

- a. State Conduct (see above)
- b. Breach of International Duty (see above)
- c. Causation – Proximate Causation
- d. Damages

4. The questions posed in this discussion note are probably best answered through additional research by the students. The law of State responsibility is anything but clear. In considering international climate change litigation, the government of Tuvalu should consider the following questions:

- *Will you have a better chance of success against the United States or another State?* The large emissions of the United States make it a target for any international climate change litigation. The plaintiff State will still face difficulties proving causation, however, regardless of the size of a State's emissions.
- *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?* The provisions of a multilateral environmental agreement such as the Kyoto Protocol can crystallize into customary international law. To do so, the ICJ or another court would need to determine that a particular norm has been generally accepted as a rule of conduct. To prove that a customary international norm exists, the court must establish general acceptance of the norm by demonstrating that *State*

*practice* is consistent with the norm and that States are acting in accordance with the rule from a sense of legal obligation to do so (*opinion juris*). State practice generally requires extensive and virtually uniform practice among those States that are particularly affected by the norm.

In the case of the Kyoto Protocol, one could argue that the Kyoto Protocol establishes a norm to reduce greenhouse gas emissions. However, the United States would be deemed to be a State particularly affected by the norm and the United States has “unsigned” the Kyoto Protocol, asserting that it will not comply with any norm established by the Kyoto Protocol. Moreover, the general acceptance of the Kyoto Protocol by roughly 190 States may not indicate State practice, since only the minority of States included in Annex B has an obligation to reduce their emissions.

- *What level of harm should trigger any obligation to avoid harm from greenhouse gas emissions?* Neither Principle 21 of the Stockholm Declaration nor Principle 2 of the Rio Declaration refers to a specific level of environmental harm that triggers the responsibility for causing transboundary harm. As noted by the *Restatement*, it is generally agreed that the harm must be “significant.”

We note, however, that many authors believe that harm itself is insufficient to trigger responsibility. These authors believe that the harm must be triggered by a violation of some other international norm, such as a violation of a duty to regulate or control the source of harm. The authors of this textbook believe that this view is at odds with the plain language of Principle 21 of the Stockholm Declaration and Principle 2 of the Rio Declaration.

- *To what standard of care should the State be held?* In addition to the limits described above, some believe that there is no responsibility unless there is a failure to act with due diligence. In other words, there is no liability without fault. As above, these scholars believe that multilateral environmental agreements “point clearly in the direction of a due diligence obligation—an obligation of conduct (regulation and control) rather than result (no transboundary harm).” PATRICIA BIRNIE ET AL, *INTERNATIONAL LAW & THE ENVIRONMENT* 218 (3d ed. 2009). There seems little doubt that a due diligence requirement exists, but the previous quote appears to confuse the nature of the obligation (harm vs. conduct) with the standard of care (fault or no fault). For example, a State could be responsible for significant transboundary harm in the absence of a violation of other law but only if it fails to act with due diligence.
- *What activities should be considered under the “jurisdiction and control” of a State?* As Comments c and d to Section 601 of the *Restatement of Foreign Relations* indicate, activities within the “jurisdiction and control” of a State are defined broadly. In the

climate change context, they would include emissions from private facilities that are regulated by that State or otherwise being conducted within the territorial boundaries of that State. They would also include emissions from ships flying the flag of that State.

- *What remedies should be available to States who suffer such damage?* The Permanent court of International Justice, the ICJ's predecessor, has stated that "[r]eparation must, as far as possible, wipe out all the consequences of the illegal act and reestablish the situation which would, in all probability, have existed if that act had not been committed." *Chorzow Factory*, P.C.I.J. Series A No. 17, pp. 47–48. Possible remedies might include a judicial declaration of an illegal act, an order to discontinue the wrongful conduct, indemnification, or an injunction. Concerning injunctions, some judges in the *Nuclear Test Cases* indicated that injunctions were not allowable under international law. The ICJ has subsequently directed States to "take effective steps" to ensure compliance with its obligations. *Bosnian Genocide Case*, ICJ Reports (2007). Most typically, however, the ICJ simply declares that a State has acted wrongfully.

5. It is difficult to argue with Professor Driesen's analysis of the UNFCCC. Article 4.2, the "binding" part of the UNFCCC, was purposefully drafted ambiguously to obscure any legally binding obligation. *See* pages 174–77 of the textbook. Particularly in light of that ambiguity, the Kyoto Protocol could help frame which activities or levels of greenhouse gas emissions constitute a breach of the duty not to cause environmental harm. However, the Kyoto Protocol would not be useful for defining which policy measures must be adopted to meet a country's due diligence, because Article 2 of the Kyoto Protocol only describes a range of policy options that a party could adopt. It does not require the adoption of any particular policy to control greenhouse gas emissions. Thus, so long as a country meets its emissions targets in the ways contemplated by the Kyoto Protocol (i.e., inclusive of emissions trading), a Party would not only be acting consistently with the Kyoto Protocol but would appear to not to be breaching its duty not to cause environmental harm to another State.

6. In addition to the diplomatic relationships that could be tarnished by bringing a claim to the ICJ, island States might have difficulty showing causation. With every country and each individual partially responsible for greenhouse gas emissions, how could Tuvalu or another island State show that emissions from a specific country, the United States or Australia for example, caused its corals to bleach or the seas to rise? In the United States, this problem is overcome through joint and several liability. However, that appears to be an untested concept in international law.