

Looking for Adequate Tools for the Enforcement of Multilateral Environmental Agreements : Compliance Procedures and Mechanisms

Haroldo Machado Filho

1. Is the State Responsibility Regime Appropriate for the Enforcement of International Environmental Norms ?

The topic of state responsibility in international law is extremely delicate, both legally and politically, which can be deduced from the fact that it has been on the international agenda since 1924¹ and on the agenda of the International Law Commission (ILC)² since 1949.

Originally, the subject area was more restricted, concentrating on state responsibility for injury to the person or property of aliens. This approach, which was considered between 1956 and 1961, was abandoned as being too limited and controversial. In 1962 and 1963, the ILC, after reconsidering its approach to the issue, set up a Sub-Committee on State Responsibility, which would be essentially devoted to the general aspects of state responsibility.³ According to a report by the Chairman of the Sub-Committee on State Responsibility⁴, Roberto Ago, issued in 1963, it was unanimously agreed by the Sub-Committee that priority should be given to 'the definition of general rules governing the international responsibility of the State'.⁵ An outline programme of work was approved with the key points to be considered, such as the general aspects of the international responsibility of the State, focusing mainly on international wrongful acts and its consequences.⁶

¹ The topic had already been selected for codification under the League of Nations. See S. Rosenne, *League of Nations Committee of Experts for the Progressive Codification of International Law (1925-1928)* (1972).

² The International Law Commission (ILC) established by GA Res. 174 (III), 21 September 1947, is the main organ in charge of promoting the progressive development and codification of international law.

³ According to the terms of reference of the Sub-Committee laid down by the Commission in its 668th meeting on 26 June 1962. See Doc. A/5209 and Corr.1, para. 68, Official Records of the General Assembly, 17th Session, Supplement No. 9.

⁴ Doc. UN A/CN.4/152, Report by Mr. Roberto Ago, Chairman of Sub-Committee on State Responsibility (approved by the Sub-Committee), *Yearbook of International Law Commission* (1963, II) 227-228.

⁵ *Ibidem*, 228, para 5. The experience and material gathered on responsibilities for injuries to the person or property of aliens – which was the focus of the works on responsibility in the first phase – should not be neglected, as the report recommended.

⁶ *Ibidem*, 228, para 6. The preliminary point raised was on the definition of the concept of international responsibility of the State, not taking into account the responsibility of other subjects of international law, such as international organisations. The first point to be addressed in subsequent works concerned the origin of international responsibility (international wrongful act, determination of the component parts of the international wrongful act, the various kinds of violations of international obligations, and circumstances in which an act is not wrongful) and the second was related to the forms of international responsibility (duty to make reparation, reparation and its forms, and sanctions).

Hence, the Commission, rather than establishing a distinction between lawful and unlawful activities (the so-called ‘primary rules’), focused on determining the principles which govern state responsibility for the breach of obligations under international law (the so-called ‘secondary rules’).

It represented a turning point in the works of the International Law Commission on state responsibility, taking into account that:

‘(...)the Commission has generally concentrated on defining the rules of international law which, in one sector of inter-State relations or another, impose particular obligations on States, and which may, in a certain sense, be termed “primary”, as opposed to the other rules – precisely those covering the field of state responsibility – which may be termed “secondary”, inasmuch as they are concerned with determining the consequences of failure to fulfil obligations established by the primary rules.’⁷

The General Assembly endorsed that new approach in 1993, and a new phase of the work continued until 1996⁸ when the Commission adopted, on first reading, an entire set of Draft Articles dealing with a range of legal issues, including the elements constituting an internationally wrongful act, the definition of an internationally wrongful act as an international crime or delict, and the consequences of such an act. Nevertheless, three major unresolved issues required special consideration: the idea of international crimes, the regime of countermeasures, and the settlement of disputes.

In 1997, the Commission adopted a timetable aimed at completing the second reading by the year 2001. During the second reading, the ILC renamed the draft articles as ‘*Responsibility of States for International Wrongful Acts*’ and the work was confined to an extended summary of the debate about each article and the Rapporteur’s⁹ general conclusions, in order to avoid contentious reactions in the Sixth Committee.

Thus, taking into account the differing opinions expressed by the countries within ILC over nearly forty years, the Commission finally completed its second reading, adopting the final text of the Draft Articles¹⁰ and accompanying commentaries by the end of its fifty-third session, in August 2001.

An analysis of all the provisions of the Draft Articles goes beyond the scope of this section, which aims at analyzing whether the State responsibility regime — established through the long process that has been briefly described above — is appropriate for the enforcement of international environmental norms. Therefore, the next relevant step within the scope of this section is to identify the basic principles of State responsibility from which the others norms proceed.

⁷ Doc. UN A/CN.4/246 and Add. 1-3, Third Report on State Responsibility, by Mr. Roberto Ago, Special Rapporteur, “The International Wrongful Act of the State, source of international responsibility”, *Yearbook of International Law Commission* (1971, II) 202, para. 15.

⁸ Three special rapporteurs have worked on this topic since 1963: Roberto Ago from 1963 to 1980, Willem Riphagen from 1979 to 1986, and Gaetano Arangio-Ruiz from 1987 to 1996.

⁹ During this period the special rapporteur in charge was James Crawford.

¹⁰ Final text contained in Chapter V of the Commission’s Report on its Fifty-Third Session. See also text in J. Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentaries* (2002) 61-73.

The core of the State responsibility regime is the secondary rules or, in other words, the legal consequences that might be applied in case of a breach of an international obligation, which represents, according to this regime's terminology, an international wrongful act.

Article 2 of the International Law Commission's Draft Articles on Responsibility of States for International Wrongful Acts, which is entitled 'Elements of an International Wrongful Act of a State', states: '*There is an internationally wrongful act of a State when conduct consisting of an action or omission: (a) is attributable to the State under international law; and (b) constitutes a breach of an international obligation of the State.*'

Thus, the conditions cumulatively required to establish the existence of an internationally wrongful act of a State are: a conduct (action or omission) must be attributable to the State under international law¹¹, and such conduct must constitute a breach of an international legal obligation of the State in force for such State at that time. It is worth mentioning that Article 1 of the Draft Articles states that 'every international wrongful act of a State entails the international responsibility of that State.'

Having considered such terminology, the question that arises is how to reconcile the ILC language on state responsibility and the notion of responsibility under international environmental law. Is the state responsibility regime appropriate for the enforcement of international environmental norms ?

2. International Environmental Law and the Challenge to the Traditional Notion of State Responsibility

In recent decades we have witnessed a "boom" of treaty making processes, resulting from the increasing interdependence between States. This also applies to the field of international environmental law, considering the growing concern in protecting the environment at the local, regional and global level. These developments have been dominated by a multilateral approach, while bilateral cooperation, which had been the rule for international law in the past, has recently played a secondary role in the environmental field.¹²

At the same time, we can notice organised efforts by several States to create new norms without resorting to multilateral treaties, including resolutions and declarations adopted by international organisations and/or by heads of States, to promote, declare or confirm principles of law. In some areas of international law, especially those that are very dynamic, such as international environmental law, general principles and the notion of 'soft law' play a very important role, considering that fast changes require quick responses.

Moreover, considering the complexity and scientific uncertainties of some environmental issues, and concomitant with the necessity of regulating them at global level, one can observe the emergence of "framework conventions" with principles and obligations, allowing successive protocols and related agreements to be negotiated, adding to or revising the initial treaty.¹³

Despite the multiplicity of instruments, the States seem reluctant to fully implement the commitments they have taken. The open-endedness of such "framework conventions" and the

¹¹ Art. 3 of the Draft Articles states that the characterisation of an internationally wrongful act is independent of its characterisation as lawful in accordance with the domestic law of the State concerned.

¹² A. Kiss, "The implications of global change for the international legal system", in E. Brown Weiss (ed), *Environment Change and International Law* (1992) 317.

¹³ P. Birnie and A. Boyle, *International Law and the Environment* (2002) 10-11.

uncertainty about the binding nature of their protocols and annexes have created some difficulties in assessing the compliance of the States with the commitments they have assumed.¹⁴

Therefore, it is necessary to establish concrete measures in terms of legal enforcement of the environmental commitments assumed in the international arena, and of attributing responsibility in case of an environmental damage.

The notion of responsibility under the international environmental law emerged for the first time in the *Trailer Smelter* arbitration. The result of this arbitration between the United States and Canada set the basic principle that a State is generally recognised as responsible for damage to the environment caused outside its borders by acts which have taken place within the limits of its jurisdiction.¹⁵

Curiously, since the decision was handed down on 11 March, 1941, only a few cases related to transboundary environment effects on which environmental specialists can rely were presented before international courts or arbitral tribunals.¹⁶

Nevertheless, this very principle can be found in Principle 2 of the Rio Declaration on Environment and Development (1992), which is usually evoked as the root statement of the responsibility of States in avoiding damage to the environment beyond their jurisdiction, whereby:

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental 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.

It expresses the same principle previously embodied in the Declaration of the United Nations Conference on the Human Environment, adopted in Stockholm in 1972 (Principle 21). Both principles reflect, in the field of environmental law, general principles of customary law recognised by the International Court of Justice that every State is under an ‘obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States’.¹⁷

However, the debate on whether the traditional rules of state responsibility are a valid means to guarantee the observance of environmental norms has always raised a great deal of concern in international environmental law, and several criticisms have been launched against it.¹⁸

One of the greatest obstacles that can be identified regarding the adequacy of the State responsibility regime in dealing with environmental norms is the fact that most environmental harm results from activities that are themselves perfectly legal, not ‘wrongful’ in themselves (e.g. emission of methane by cattle, nuclear power plants, etc.).

¹⁴ M. Koskenniemi, “Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol”, 3 *Yearbook of International Environmental Law* (1992) 123.

¹⁵ *Trail Smelter Case (Canada/United States)*, Arbitral Tribunal, Washington, 11 March 1941, in *International Environmental Law Reports*, No. 1.

¹⁶ See *Chorzów Factory*, *Corfu Channel*, *Lac Lanoux* cases.

¹⁷ *Corfu Channel Case (United Kingdom v. Albania)*, ICJ Reports (1949) 22.

¹⁸ VITANYI, B., ‘Les positions doctrinales concernant le sens de la notion de principes généraux reconnus par les nations civilisées’, 86 *Revue Générale de Droit International Public* (1982) 48.

Roberto Ago calls attention to the fact that one usually applies the same terminology to refer to different concepts.¹⁹ In the Latin-rooted languages only the term ‘responsibility’ is applied.²⁰ In English, there are the terms ‘liability’ and ‘responsibility’, although the difference between the two terms is not always taken into consideration. However, in legal terms, ‘responsibility’ is used for unlawful acts and ‘liability’ for lawful acts.

In 1978, the ILC introduced a separate topic for development and codification : ‘*Liability for Injurious Consequences of Acts not Prohibited by International Law*’. During the work on this topic, the Commission has increasingly focused on environmental damage.²¹

Some authors disagree with this approach, questioning whether this topic should be distinguished from State responsibility and whether this work represents a useful basis for the development of existing law and practice related to environmental harm.²² Such authors see no need for a special environmental liability regime, considering that the traditional concept of state responsibility suffices to solve the problems of environmental harm.²³

In the field of environmental law, from a pragmatic approach, it is evident that some activities will be considered lawful and others unlawful; and the interpretation could be altered as the substantive environmental law develops and changes.²⁴ In any case, one cannot deny that the language used in the final text of the ILC Draft Articles on state responsibility, especially the notion of ‘*internationally wrongful act*’, poses difficulties in assessing the environmental damages caused by acts not contrary to international law.

In 1997, the ILC included a specific topic on environmental issues in its long term programme of work: ‘*The Law of the Environment: Rights and Duties of States for the Protection of the Human Environment*’; where the use of the expressions ‘responsibility’ and even ‘liability’ was avoided in such formulation.

Moreover, there are other difficulties in the debate on whether the traditional rules of state responsibility are a valid means of ensuring the observance of environmental norms.

The first problem that can be identified is a jurisdictional one. The regime of state responsibility is based on the classical model of bilateral conflict between one State as wrongdoer and other as victim in a situation of transboundary damage (usually air or water pollution). Nevertheless, significant harm to the environment takes place within the boundaries of a State

¹⁹ R. Ago, ‘Conclusions du Colloque Responsabilité des États pour les dommages à l’environnement’, in F. Francioni and T. Scovazzi, (eds), *International Responsibility for Environmental Harm* (1991) 493.

²⁰ Considering the variations: ‘responsabilité’ (French), ‘responsabilità’ (Italian), ‘responsabilidad’ (Spanish), ‘responsabilidade’ (Portuguese), ‘responsabilitate’ (Romanian).

²¹ T. Gehring and M. Jachtenfuchs, ‘Liability for Transboundary Environmental Damage: Towards a General Liability Regime?’, 4 *European Journal of International Law* (1993) 92.

²² A. E. Boyle, ‘State Responsibility and International Liability for Injurious Consequences of Acts not Prohibited by International Law: A Necessary Distinction?’, 39 *International and Comparative Law Quarterly* (1990) 2.

²³ *Ibid*, 10 and M. Akehurst, “International Liability for Injurious Consequences of Acts not Prohibited by International Law”, 16 *Netherlands Yearbook of International Law* (1985) 3.

²⁴ R. Higgins, *Problems and Process: international law and how we use it* (1994) 165.

(e.g. destruction of species and habitats), and in cases where there is no transboundary damage it might not be subject to a claim by another State.²⁵

Secondly, usually it is difficult to prove the link of causality. In order to consider someone responsible for a certain act (whether by action or omission), it is fundamental to prove that an obligation was violated and that harm resulted from the violation. However, for most environmental damages it is very difficult to identify a clear link of causality between an identifiable source and the damage. The attribution of responsibility is difficult and, in some circumstances, even impossible for many reasons²⁶ : the noxious effects of an activity may not be felt until many years or decades after the act; the distance separating the source from the place of damage may be huge; some damages occur only if the act continues over time; and the harmful effects could vary considerably due to the role played by physical circumstances, etc. Once these questions have been clarified, the issues of identifying the author and of measuring the damage itself remain. The issue of greenhouse gas emissions and the consequent problem of global warming is a good example of all these difficulties.

Moreover, responsibility is applicable after the breach and the harm have already occurred and the recognition of an international wrongful act usually comes too late to prevent environmental harm, which, in some cases, is irreparable (e.g. loss of biological diversity). This idea goes against the precautionary principle, which raises the need for preventive measures and is a fundamental element in ensuring sustainable development, in order to meet the basic needs of the present generation as well as those of future generations.

Another significant point that must be taken into account is that some norms of international environmental law have not yet been fully or universally recognized. Many principles of international environmental law, which play a fundamental role in this field, do not represent a sufficiently clear obligation under international law to trigger state responsibility for its breach. These principles are usually mentioned in the preambular parts of the treaties and are rarely fully incorporated into the very body of these instruments. Sometimes, even when they integrate the substantive part of the texts, their language are usually “softened”, not resulting in a legally binding obligation. Hence, their future legal value depends to a large extent on treaty-law and on customary law.

Furthermore, States avoid pointing out another State as responsible for environmental damages because they fear being blamed for damages as well. Given the complexity of global environmental problems and the interdependence of issues and/or states, there is little space for absolute innocence.²⁷

In addition, the breach of an international obligation does not take into account special circumstances. One important emerging principle under international environmental law is the

²⁵ C. Tinker, ‘State Responsibility and the Precautionary Principle’, in D. Freestone and E. Hey (eds), *The Precautionary Principle and International Law: the Challenge of Implementation* (1996) 54.

²⁶ A. Kiss and D. Shelton, *International Environmental Law* (1991) 351-352.

²⁷ ‘*Nous sommes tellement cause de tout qu’il n’y a plus d’innocence possible. Nous devenons responsables de tout, indéfiniment coupables, par principe. Et, les théories modernes de la causalité ou de la quasi-causalité – complexité, « fractal » - ne sont pas pour réduire cette infinitisation.*’ Cf. F. Ewald, ‘L’Experience Responsabilité’, in T. Ferenczi (org.), *De quoi sommes-nous responsables* (1997) 33.

principle of common but differentiated responsibilities²⁸, which deals with the asymmetry of commitments under a regime, constituting a deviation from the traditional international law principle of sovereign equality that requires legal (formal) equality between States. However, the principle of common but differentiated responsibility is legitimised considering the proportional contributions of the countries to the environmental problem and their differences in financial and technological capabilities and developmental priorities.²⁹ Therefore, in some circumstances, in assessing the breach of an obligation by a State, consideration must be given to economic or political difficulties and financial and technological capabilities, as well as the State capacity to implement the obligation.

Above all these difficulties, the main problem in applying the traditional notion of state responsibility regime for environmental damages lies in the very core of such a regime, in other words, the condition of the existence of ‘an internationally wrongful act’. In addition, it is difficult to reconcile activities that can harm the environment with the State responsibility regime’s terminology of ‘primary’ and ‘secondary’ obligations.

Nevertheless, acknowledging that the final aim of international environmental law is to preserve and protect the environment for the use of present and future generations, alternative approaches have been explored in practice in order to enforce international environmental norms, a task that requires the effort of all States, in a co-operative manner.

3. Looking for Adequate Tools of Enforcement: Compliance Procedures and Mechanisms

Most multilateral environmental agreements are made by consensus and rely on the States’ good behavior in respecting the agreement’s explicit rules. Certainly, breaches of States’ obligations are a real possibility. Hence, how to deal with such breaches ?

The trend in environmental law is the recognition that punitive sanctions generally do not provide solutions, but rather serve only to exacerbate tensions. Instead, the focus must be on an intensified persuasive process towards the respect of the international obligations³⁰; what has become known as compliance procedures. Using the political science terminology, if a ‘stick’ does not seem effective, then international environmental law must use a ‘carrot’, meaning incentives to change.

Thus, compliance means that a Party has met or fulfilled its individually binding international legal obligations under a multilateral environmental agreement. Instead of the traditional and coercive bilateral procedure focused on the breaches, it represents a movement towards a more consultative, multilateral, and co-operative procedure.

²⁸ The principle of common but differentiated responsibilities is clearly enunciated in the Principle 7 of the 1992 United Nations Declaration on Environment and Development, which reads as follows: ‘States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth’s ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.’

²⁹ See L. Rajamani, ‘The Principle of Common but Differentiated Responsibility and the Balance of Commitments under the Climate Regime’, 9 *Review of European Community and International Environmental Law*, (2000, issue 2) 120-131.

³⁰ J. Cameron *et al.*, *Improving Compliance with International Environmental Law* (1996) 14.

The Vienna Convention on the Protection of the Ozone Layer, signed in 1985, was the first agreement to address an environmental problem caused by emissions from non-point sources and affecting all states of the world. The Montreal Protocol to the Vienna Convention, signed in 1987, came into force in 1989, setting the elimination of ozone-depleting substances as its final objective. To enforce the commitments assumed, negotiators faced the challenge of creating a procedure that could address breaches in this legal regime. The result of the negotiations was the establishment of an innovative ‘non-compliance procedure’.

The general aim of the non-compliance procedure under the Montreal Protocol was to create a system to ensure the implementation of the obligations under the Vienna Convention and the Protocol itself. Therefore, an Implementation Committee was created, with the main task of reviewing submissions about alleged non-compliance filed by Parties to the Montreal Protocol, and of reporting on them, including any recommendation it deemed necessary to the plenary organ of the regime, the Meeting of the Parties. This procedure addresses and eventually prevents breaches of States’ obligations, and its novelty lies in their function as a means of avoiding disputes rather than having the objective of settling disputes.³¹

Regarding other issues, similar procedures have been adopted in the last decade.³² ‘Soft responsibility’³³ based on monitoring and reporting is increasingly used for compliance control. Notwithstanding this progress, it is doubtful whether such procedures are sufficient to deal with serious or persistent breaches.³⁴

Despite these uncertainties, and taking into account the reasons presented above, non-compliance procedures seem to be more useful and constructive for resolving conflicts in an environmental context than the mechanisms under the State responsibility regime.³⁵ The increasing recourse to such procedures is evidence of this.³⁶

An interesting question raised by Koskenniemi in one of his thought-provoking articles is whether a State recognized as being in non-compliance with its commitments under a specific environmental regime could be considered responsible for an internationally wrongful act. This paper aligns itself with his answer that an ‘internationally wrongful act’ can only be assessed from the perspective of general international law and, therefore, the specific non-compliance regime cannot be used to determine wrongfulness.³⁷

Hence, the question that remains is how to enforce compliance and how to apply concrete consequences to States failing to meet their obligations under a specific regime.

³¹ C. Romano, ‘The Peaceful Settlement of International Environmental Disputes: A Pragmatic Approach’ (PhD thesis on file at the IHEI, Genève) (1999) 77.

³² For instance, in the 1994 Oslo Protocol to the 1979 Economic Commission for Europe Convention on Long-Range Transboundary Air Pollution and in the 1989 Basel Convention on Control of Transboundary Movements of Hazardous Wastes and their Disposal.

³³ Expression borrowed from A. Kiss, ‘Present Limits to the Enforcement of State Responsibility for Environmental Damage’, in F. Francioni and T. Scovazzi (eds), *supra* note 19, at 7.

³⁴ Koskenniemi, *supra* note 14, at 128.

³⁵ See G. Handl, ‘Controlling Implementation of Compliance with International Environmental Commitments: The Rocky Road from Rio’, 5 *Colorado Journal of Environmental Law and Policy* (1994) 328.

³⁶ C. Redgwell, ‘Non-Compliance Procedures and the Climate Change Convention’, in Global Environment Information Center (GEIC), *Global Climate Governance: Inter-Linkages between the Kyoto Protocol and other Multilateral Regimes* (1998) 23.

³⁷ Koskenniemi, *supra* note 14, at 121.

4. Promoting and Enforcing Compliance under the Climate Change Regime

This section aims at assessing tools for promoting and enforcing compliance under a specific multilateral environmental regime. Recently, under the climate change regime, the international community was able to agree on a more robust non-compliance system.

Global climate change is one of the most significant and complex environmental issues of our time. The international community is tackling the problem and the climate change regime encompasses a series of recent agreements through which countries around the world are banding together to meet this challenge.

The climate change regime consists of the United Nations Framework Convention on Climate Change (hereafter referred to as UNFCCC, or “the Convention”) of 1992, which entered into force on 21 March, 1994; the Protocol to the United Nations Framework Convention on Climate Change of 1997 (hereafter referred to as the Kyoto Protocol, or “the Protocol”), which entered into force recently, on 16 March, 2005; and a considerable volume of decisions made by the Conference of the Parties (CoP), the supreme organ of the Convention.

The central objective of both the Convention and the Protocol is to achieve “stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.”³⁸ The Climate Change Convention is a “framework instrument”, which lays down guiding principles for the cooperation among states, but lacks mandatory language, relying on an ongoing negotiating process to define modalities and details for this co-operation.³⁹ Therefore, the Kyoto Protocol to the UNFCCC was adopted with the objective of strengthening the existing commitments set out in the Convention.

This Protocol is a legally binding agreement which establishes commitments for the developed country Parties included in Annex I⁴⁰ (countries with reduction emission targets;

³⁸ Art. 2 of the Convention.

³⁹ Art. 13 of the Convention required the CoP 1 to ‘consider the implementation of a multilateral consultative process, available to all Parties on their request, for the resolution of questions regarding the implementation of the Convention.’ The aim of this article was to establish a non-adversarial, facilitative rather than punitive process, similar to the one adopted by the ozone regime. A group in charge of establishing a multilateral consultative process (MCP) was established at CoP 1. A text on the MCP was presented at CoP 4, in 1998, but Parties were not able to reach an agreement on the constitution of the MCP Committee. See para. 8 and 9 of the Annex to Decision 10/CP.4; contained in Doc. FCCC/CP/1998/16/Add.1, 20 January 1999, 42-46. See also FCCC/AG13/1998/2, Report of the AG13 (6th session). Therefore, the MCP has not been adopted by the CoP so far and it is not formally part of the rules, institutions and procedures of the climate change regime. Cf. F. Yamin and J. Depledge, *The International Climate Change Regime: a guide to rules, institutions and procedures* (2004) 384.

⁴⁰ Annex I of the UNFCCC includes the majority of the members of the Organisation for Economic Cooperation and Development (OECD) in 1992, as well as Central and Eastern European states undergoing the process of transition to a market economy. The Parties included in the Annex I of the UNFCCC are Australia, Austria, Belarus, Belgium, Bulgaria, Canada, Czechoslovakia, Denmark, European Economic Community, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Lithuania, Luxembourg, Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Russian Federation, Spain, Sweden,

Annex B, according to the Protocol's language⁴¹) of reduction by at least 5% from 1990 levels of combined greenhouse gas⁴² emissions during the period from 2008 to 2012, calculated based on the average of emissions in a timeframe of five years. These Parties are required to individually or jointly⁴³ ensure that their aggregate anthropogenic carbon dioxide equivalent emissions of greenhouse gases do not exceed their assigned amounts, which is a level up to which Annex I Parties shall limit or reduce their emissions, calculated pursuant to their quantified limitations and reduction commitments set out in Annex B of the Protocol.⁴⁴

The great innovation of the Kyoto Protocol is the possibility of using market mechanisms, the so-called "flexible mechanisms"⁴⁵, to allow reduction objectives of the Annex I countries to be reached more efficiently from the point of view of costs incurred by each country, without, however, compromising the environmental goals in question.

There are basically three cooperative implementation mechanisms established in the Kyoto Protocol: Joint Implementation (Article 6), Emissions Trading (Article 17) and the Clean Development Mechanism (Article 12); the first two mechanisms to be implemented between developed countries (those of Annex I), which have reduction commitments, and the last to be implemented between countries which have reduction commitments and countries without these objectives (non-Annex I, or developing countries). It should be emphasised that there was no intention of establishing any hierarchy between these mechanisms.

These mechanisms give Parties the chance to utilise lower cost opportunities to reduce emissions or increase removals, in order to lower the overall cost of reducing emissions. Through emissions trading, Annex I Parties may acquire assigned amount units - AAUs - from other Annex I Parties that are able to meet their emissions targets more easily, as well as acquire emission reduction units - ERUs (from joint implementation projects). Annex I Parties can also use the certified emission reductions - CERs - accruing from project activities in non-Annex I countries (from CDM projects). It is also worth mentioning the removal units - RMUs - resulting from removal by sinks. Transfers and acquisitions of these units must be submitted to a control through national registries.

All these mechanisms aim at assisting Parties included in Annex I to achieve compliance with their quantified emission limitation and reduction commitments set out in the Kyoto Protocol. To ensure compliance, Article 18 of the Protocol states that the first session of the CoP serving as the meeting of the Parties to the Kyoto Protocol (CoP/MoP) 'shall approve appropriate

Switzerland, Turkey, Ukraine, the United Kingdom of Great Britain and Northern Ireland, and the United States of America. Developing country Parties are known as non-Annex I Parties.

⁴¹ The same countries included in the Annex I of the Convention, except Turkey and Belaurus, but including Croatia, Liechtenstein, Monaco and Slovenia. Czech Republic and Slovakia succeeded the former Czechslovakia.

⁴² Cf. Annex A of the Kyoto Protocol : carbon dioxide (CO₂), methane (CH₄), nitrous oxide (NO₂), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), sulphur hexafluoride (SF₆).

⁴³ Art. 4 of the Protocol allows Annex I Parties to meet their commitments jointly under agreed terms. If the Parties fail to meet their combined level of emission reductions, each Party must be responsible for its previously set level. The member States of the European Community agreed to redistribute their overall reduction targets among themselves in a proportional way, the so-called "bubble".

⁴⁴ Art. 3(1) of the Protocol.

⁴⁵ The term "flexibility measures" was created by the United States.

and effective procedures and mechanisms to determine and to address cases of non-compliance with the provisions of the Protocol'.⁴⁶

Despite the adoption of the Kyoto Protocol in 1997, considering its complexity and innovative character, it was recognized that there was a need to adopt a working plan in order to prepare for the future entry into force of the Kyoto Protocol to the Convention.

Therefore, the 'Buenos Aires Plan of Action', adopted at CoP 4, called for work on, *inter alia*, the preparations for CoP/MoP 1, including the elements of the Protocol related to compliance, and established a joint working group (JWG) to develop a compliance system under the Protocol, with a view to adopting a decision on this issue at CoP 6.⁴⁷

Considering the deadlocks in the CoP 6 negotiations due to political and technical reasons, as with other issues, the negotiating texts on compliance were forwarded to a resumed session of CoP 6 for further consideration (the political agreement resulting from this meeting is known as the Bonn Agreements), but only at CoP 7 Parties were able to adopt a set of decisions (known as the Marrakech Accords), including one on the procedures and mechanisms relating to compliance under the Kyoto Protocol⁴⁸, which is among the most comprehensive and rigorous in the international arena.

Such procedures and mechanisms include concrete consequences for States failing to meet their targets under the Kyoto Protocol. Most other multilateral environmental agreements have weaker compliance systems⁴⁹, which are often based on reporting requirements and ad hoc procedures.⁵⁰

The main objective of these procedures and mechanisms is to facilitate, promote and enforce compliance with the commitments under the Protocol. It consists of a Compliance Committee composed of two branches: a Facilitative Branch and an Enforcement Branch. The Facilitative Branch aims at providing advice and assistance to Parties in order to promote compliance, whereas the Enforcement Branch is responsible for determining consequences for Parties not meeting their commitments. Both branches are composed of 10 members⁵¹, including

⁴⁶ One notices a terminological evolution. The expression 'compliance with obligations' was avoided during the negotiation of the UNFCCC. Parties involved in the negotiations, for political reasons, preferred to use a more neutral expression: 'implementation'; expression that one may verify in Art. 13 of the Convention.

⁴⁷ Decision 8/CP. 4 (8th plenary session), 14 November, 1998; contained in Doc. FCCC/CP/1998/16/Add.1, 20 January 1999, 32-39. Cf. Annex II of this decision, 37.

⁴⁸ Decision 24/CP.7 and its annex (8th plenary session), 10 November, 2001; contained in Doc. FCCC/CP/2001/13/Add.3, 21 January 2002, 65-77.

⁴⁹ Compliance procedures can be identified in provisions addressing 'assessment', 'monitoring', 'verification', and 'implementation'. For instance, Art. 11 of the 1985 Vienna Convention on Ozone Layer and Art. 6 of its 1987 Montreal Protocol; Art. 9 of the 1979 Convention on Long-Range Transboundary Air Pollution and its 1994 Protocol; Art. 19 of the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal; and Art. 13 of the 1992 United Nations Framework Convention on Climate Change. Cf. Redgwell, *supra* note 36, at 14.

⁵⁰ G. M. Wiser, 'Kyoto Protocol Packs Powerful Compliance Punch', 9 *International Environment Reporter* (2002) 86.

⁵¹ Decision 24/CP.7, *supra* note 48, II.3.

one representative from each of the five official UN regions⁵², one from the small island developing states, and two each from Annex I and non-Annex I Parties. Decisions of the Committee and the Facilitative Branch may be taken by at least a three-quarters majority, whereas decisions by the Enforcement Branch require, in addition, a double majority of both 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 Chair and Vice-Chair of each branch, supports its work.⁵³

A potential compliance problem, known as a ‘question of implementation’⁵⁴, can be raised either by an expert review team after the assessment of national communications⁵⁵, or by a Party regarding its own compliance (for instance, if it wishes to seek help from the Facilitative Branch), or by a Party raising concerns about another Party. After a preliminary examination, the ‘question of implementation’ will be considered in the relevant branch of the Compliance Committee, in accordance with their mandates. Competent intergovernmental and non-governmental organizations may submit relevant factual and technical information on the relevant branch.

The Facilitative Branch shall be responsible for providing advice and facilitation to Parties in implementing the Protocol, and for promoting compliance by Parties with their commitments under the Protocol, taking into account the principle of common but differentiated responsibilities and respective capabilities. Moreover, the Facilitative Branch is responsible for assessing whether the use of the flexibility mechanisms is supplemental to domestic action in Annex I Parties and whether these Parties are striving to minimize adverse impacts on developing countries when implementing the commitments under Article 3(1) of the Protocol.⁵⁶ The Facilitative Branch is also in charge of providing for early-warning of potential non-compliance of the Parties’ emission targets⁵⁷; situation in which this branch can formulate recommendations and also facilitate financial and technical assistance to help the Party concerned.

The Enforcement Branch, in turn, is responsible for determining whether an Annex I Party is not complying with its emission target or reporting requirements, or has lost its eligibility to participate in the flexible mechanisms.⁵⁸ It can also decide whether to adjust a Party’s inventory or correct the compilation and accounting database, in the event of a dispute between a Party and the expert review team.⁵⁹

In the case of non-compliance with emission targets, Annex I Parties are granted a period of time after the expert review of their final annual emissions inventory has been finished to

⁵² Africa, Asia, Latin America and the Caribbean, Central and Eastern Europe, and Western Europe and others.

⁵³ Decision 24/CP. 7, supra note 48, III.1.

⁵⁴ *Ibid*, VI.1.

⁵⁵ National communications to the UNFCCC are the main tool for communicating information related to the implementation of the Convention. According to Art. 12 of the UNFCCC, it encompasses, *inter alia*, a national inventory of anthropogenic emissions by sources and removal by sinks of all greenhouse gases not controlled by the Montreal Protocol. This assessment uses comparable methodologies promoted and agreed upon by the Conference of the Parties. All Parties shall develop, periodically update, publish and make available such national inventories, as requested by the Art. 4(1)(a) of the Convention.

⁵⁶ Decision 24/CP.7, supra note 48, IV.5.

⁵⁷ *Ibid*, IV.6.

⁵⁸ *Ibid*, V.4.

⁵⁹ *Ibid*, V.5.

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, it must make up the difference in the second commitment period, plus a penalty of 30%. It will also be suspended prevented from making transfers under emissions trading and, within three months, it must develop a domestic 'compliance action plan' detailing the action it will take to make sure that its target is met in the next commitment period.⁶⁰

Any Party not complying with reporting requirements must develop a similar plan 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.⁶¹

This public declaration can be an efficient incentive to Parties to comply with their commitments, since it is certainly quite uncomfortable for Parties in non-compliance to have their situation made public. A subject of international law who consistently fails to comply with its commitments will simply not deserve credit from the other subjects, because of the elements of stability, predictability, and expectancy which rule international relations⁶².

Detailed additional procedures with specific timeframes for the Enforcement Branch and an expedite procedure to raise questions on eligibility to participate in the mechanisms are also set out, 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. In the case of non-compliance with emission targets, the Party can also lodge an appeal to the CoP/MoP if that Party believes it has been denied due process.

In spite of the adoption of these innovative procedures and mechanisms relating to compliance under the Kyoto Protocol, negotiators were unable to agree on the legally binding nature of such procedures and mechanisms. Given differences in the interpretation on the mode of adoption of the procedures and mechanisms relating to compliance contained in the Bonn Agreement, the decision 24/CP.7⁶³ adopted in Marrakech defers a decision on the legal nature of the compliance regime until the first meeting of the CoP/MoP, following the treaty's entry into force.

The discussion regarding the mode of adoption of the procedures and mechanisms of compliance results from the text of the Article 18 of the KP, which states that:

The Conference of the Parties serving as the meeting of the Parties to this Protocol shall, at its first session, approve appropriate and effective procedures and mechanisms to determine and to address cases of non-compliance with the provisions of this Protocol, including through the development of an indicative list of consequences, taking into account the cause, type, degree and frequency of non-compliance. Any procedures and mechanisms under this Article entailing binding consequences shall be adopted by means of an amendment to this Protocol.

Decisions provide authoritative statements by the CoP to guide the Parties' future conduct and implementation. Some decisions concern internal, procedural and administrative matters.

⁶⁰ *Ibid*, XV.5 and 6.

⁶¹ *Ibid*, XV.1.

⁶² R. Wendzel, *International Relations* (1985) 33.

⁶³ In fact, Decision 24/CP. 7 contains the procedures and mechanisms relating to compliance under the Kyoto Protocol in the form of an *Annex* to this CoP decision.

CoP decisions regarding the commitments of Parties are usually not considered to be legally binding. Nevertheless, such decisions are not negligible in terms of state practice and might be considered as ‘subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions’⁶⁴.

Some authors recognise that subsequent agreements between the Parties aimed at interpreting a treaty which they have concluded previously are quite rare⁶⁵, especially when the treaty is a multilateral one. Usually, ‘subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation’⁶⁶ is the most relevant element that must be taken into consideration in interpreting any treaty.

However, the language of subparagraph 3(a) of the Vienna Convention on the Law of the Treaties’ Article 31 on the agreement is vague and, therefore, the agreement may take different forms. Hence, there is an increasing recognition that these forms can even include a decision adopted by a meeting of Parties⁶⁷.

Furthermore, decisions can become binding in particular circumstances and the CoP can, in some cases, adopt legally binding instruments, such as protocols, amendments, annexes, and amendments to annexes.⁶⁸ Their precise legal status and legal implications at any time will therefore depend on their content and on Parties’ behaviour and legal expectations.

Protocols and amendments to the conventions require ratification by the Parties before they can enter into force⁶⁹. Therefore, if the procedures and mechanisms relating to compliance under the Kyoto Protocol are to be adopted by an amendment to this legal instrument, each Party must ratify such an amendment in order to be bound to it after its entry into force. This implies that some Parties may be legally bound to the compliance regime (those that have ratified the amendment) and others may not (those that refuse to ratify the amendment).

Despite the uncertainty about whether the non-compliance consequences set in the Annex of Decision 24/CP. 7 are legally binding or not, economic incentives are used to attempt to compel Parties to accept the compliance regime. The rules contained in the CoP decision related

⁶⁴ Art. 31(3)(a) of the Vienna Convention on the Law of Treaties, 22 May, 1969, 1155 UNTS 331.

⁶⁵ I, Sinclair, *The Vienna Convention on the Law of the Treaties* (1984) 136.

⁶⁶ Art. 31(3)(b) of the Vienna Convention on the Law of Treaties.

⁶⁷ A. Aust, *Modern Treaty Law and Practice* (2000) 191.

⁶⁸ The 1959 Washington Treaty establishes the framework convention on the protection of the Antarctic environment, followed by the 1980 Canberra Convention and the 1991 Madrid Protocol. The Bonn Convention on Migratory Species was adopted in 1979 and seven subsequent agreements were established between 1990 and 1994. Art. 8 of the 1985 Vienna Convention for the Protection of the Ozone Layer states that “the Conference of the Parties may at a meeting adopt protocols pursuant to Article 2”, which says that Parties shall “cooperate in the formulation of agreed measures procedures and standards for the implementation of this Convention, with a view to the adoption of protocols and Annexes.” Hence, the Montreal Protocol on Substances that Deplete the Ozone Layer was signed in 1987, and it was adjusted and amended in 1990, 1992, and 1995. Moreover, annexes also should be taken into account. Art. 17 of the United Nations Framework Convention on Climate Change states that “the Conference of the Parties may, at any ordinary session, adopt protocols to the Convention”. The 1997 International Waters Convention is also states that protocols can be adopted, in accordance with its preamble, and Art. 3(3).

⁶⁹ Procedures related to amendments to the Kyoto Protocol and entry into force requirements were established in its Art. 20.

to the Kyoto Protocol's flexible mechanisms require all Parties to accept the authority of the Enforcement Branch in order to verify whether they satisfy certain eligibility criteria for participating in all three mechanisms⁷⁰. These are important provisions, given that a Party must be subject to all of the compliance rules before it could start trading.⁷¹

However, even if the consequences of non-compliance are accepted in the first CoP/MoP as legally binding, only the consequences applied by the Enforcement Branch, which has a limited mandate, will have this nature. The consequences to be applied by the Facilitative Branch, namely the provisions of advice, facilitation of assistance, and issuance of recommendations, do not intend to bind Parties to the Kyoto Protocol, due to their own facilitative nature.⁷²

The first CoP/MoP will be held later this year (it will take place from 28 November to 9 December 2005), in Montreal, and in such occasion the procedures and mechanisms relating to compliance under the terms of Article 18 of the Kyoto Protocol annexed to the Decision 24/CP.7 shall be adopted. This decision states clearly that it is the prerogative of the CoP/MoP to decide on the legal form of the procedures and mechanisms relating to compliance. Only then we will be able to verify if a significant progress in attempts to improve enforcement of multilateral environmental agreements, especially in the sensitive issue of climate change, will be achieved⁷³.

⁷⁰ See Annex to Decision 15/CP. 7, para 5.

⁷¹ Wisner, *supra* note 50, at 24.

⁷² R. Lefeber, 'From the Hague to Bonn to Marrakesh and Beyond: a Negotiating History of the Compliance Regime under the Kyoto Protocol', 14 *Hague Yearbook of International Law* (2001) 53.

⁷³ Moreover, the establishment and implementation of comprehensive and effective compliance procedures and mechanisms under the complex regime of climate change will be fundamental for the achievement of the final objective of the Convention and its Protocol, which is already compromised by the fact that the major emitter of greenhouse gases, the United States, has refused to ratify this later legal instrument.