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**PRESERVING THE GLOBAL ENVIRONMENT:
COMPLIANCE WITH INTERNATIONAL
ENVIRONMENT TREATIES IS KEY**

© **Anne Daniel**

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(The views expressed in this paper are those of the author and do not represent the views of the
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ABSTRACT

The thesis of this paper is that (1) the successful implementation of international environmental agreements depends on compliance issues in those agreements being effectively addressed; (2) this necessitates compliance issues being addressed both during the initial negotiation of such agreements, and in their subsequent implementation; (3) a number of innovative compliance mechanisms are available which appear to be well-suited to the environmental context, but they may require some refinement.

The paper explores the concept of compliance and the theoretical and practical aspects of obtaining compliance with international law. It then utilizes a case study of *the Framework Convention on Climate Change* to illustrate how the theoretical and practical research described earlier in the paper can be translated into concrete results in environmental treaties.

The analysis undertaken in the paper suggests that compliance-related problems are significant in international environment treaties, but not insurmountable. The widest array of compliance techniques possible must be integrated into such treaties--both at the time of their negotiation, and during their implementation--if a sustainable future is to be attained for the planet.

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CHAPTER 1: INTRODUCTION

In the past twenty years, there has been growing recognition that many environmental problems have transborder dimensions, and therefore must be addressed at the international level. This has led to the negotiation of a flurry of international environment agreements (IEAs)¹ and more are currently being developed.² These conventions and protocols represent significant collective progress in solving key global environmental issues such as ozone depletion, climate change and loss of biological diversity. Yet, until the early 1990's, comparatively little attention had been paid³ to the question of whether states comply with their international environmental obligations, and if not, how to get them to do so. Until

¹ For instance, the U.N. Economic Commission for Europe *1979 Geneva Convention on Long-Range Transboundary Air Pollution* (LRTAP), 1983 U.K. T.S. 57, Cmnd. 9034, 18 Int. Leg. Mat. 1442. (hereafter the LRTAP Convention), and its subsequent protocols; the *Vienna Convention for the Protection of the Ozone Layer* 1988 C.T.S. No.23, 1987) 26 Int. Leg. Mat. 1516 (in force September 22, 1988); the *Montreal Protocol on Substances that Deplete the Ozone Layer* (1987), 26 Int. Leg. Mat. 1541; the *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal* (1989), 28 Int. Leg. Mat. 657 (in force for Canada November 26, 1992); the *Convention on Biological Diversity* U.N. Doc. UNEP/Bio.Div./N7INC.5/4, (1992), 31 Int. Leg. Mat. 822; and the *Framework Convention on Climate Change* U.N. Doc. A/AC.237/18 (Part II)/Add.1 and Corr.1; (1992) 31 Int. Leg. Mat. 851.

² Examples of important agreements currently under negotiation include new protocols on heavy metals and persistent organic pollutants (POPs), and NOx under the LRTAP Convention: "Treaty Signatories Agree to Push Ahead on New Protocols for Heavy Metals, POPs", *International Environment Reporter*, March 6, 1996, 157; and a global convention on prior informed consent (PIC) on the movement of hazardous chemicals: "INC Outlines Broad Guidelines, Framework for Treaty on Import of Dangerous Chemicals", *International Environment Reporter*, March 20, 1996, 208.

³ Peter Sand, ed. *The Effectiveness of International Environment Agreements* (Cambridge: Grotius Publications Limited, 1992) (hereinafter *Effectiveness*). The U. S. General Accounting Office concluded that there is incomplete reporting on compliance with international environment agreements and therefore it is difficult to assess the level of compliance. However, with respect to developing countries, it does suggest that this reflects a larger compliance problem caused by a lack of financial and technical capability to comply. U.S. General Accounting Office, *International Environment: International Agreements are not Well Monitored* (Washington: January 1992), at 58 (hereinafter U.S. GAO Report). For some recent articles, see: Wolfgang Fischer, "Verification of International Treaties for the Protection of the Environment", in J.C. di Primio and G. Stein (eds.), *A Regime to Control Greenhouse Gases: Proceedings of a Workshop* (Bad Neuenahr: 1991) 47, at 50; and, Martti Koskenniemi, "Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol" (1992), 3 YbIEL 123; Gunther Handl, "Controlling Implementation of and Compliance with International Environmental Agreements: The Rocky Road from Rio" (1994), 5 Colo. J. Int'l Env't'l Law & Pol'y 305.

recently, even those rare conventions which addressed compliance issues, such as the Basel Convention or the Montreal Protocol, dealt with it very cursorily. In such cases, compliance considerations have been primarily left to post-negotiation implementation.⁴

Compared with domestic legislative regimes, the international legal system, including those aspects pertaining to compliance, is complicated by a number of factors revolving around the concept of state sovereignty. Unlike domestic (known in international law as “municipal”) legal systems, the international system has no single, centralized, institutionalized rule-making body akin to Parliament or legislatures which can unilaterally impose obligations on subjects within its jurisdiction.⁵ In international law, sovereign states can choose whether or not to become a party to a treaty and therefore be bound by its rules.⁶

A problem particularly acute in developing international law agreements pertains to “free riders”—that is, states which are not party to a treaty or convention but nevertheless benefit from the results of the agreement, or, states which are party but who choose not to comply. This is a particular challenge in the environmental field, where, for example, all states benefit

⁴ Although the *Montreal Protocol's* non-compliance procedures have been widely praised, the Article authorizing their creation was very general in nature; references to compliance in the *LRTAP VOCs Protocol* is very brief, as is the reference to verification in the *Basel Convention*. The *FCCC* and the *Desertification Convention* both refer to a “multilateral consultative mechanism for the resolution of questions”. The *LRTAP Convention's Second SO2 Protocol* contains the most detailed provisions in an IEA to date. The London Convention's amending Protocol, to be approved at a diplomatic conference in the fall of 1996 specifically mentions compliance and the requirement for Parties to establish procedures, rules, regulations and institutional mechanisms necessary to monitor, assess and promote compliance: IMO, 18th Consultative Meeting of Contracting Parties to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, Report of the 18th Consultative Meeting, December 4-8, 1995, LC 18/11, Annex 3, 16 January 1996 (hereafter the *London Convention*).

⁵ The majority of international environmental law norms are treaty-based because this is the quickest and most effective way to deal with international environmental problems: Winfried Lang, “Diplomacy and International Environmental Law-Making: Some Observations” (1992), 3 Yearbook of International Environment Law 108, at 108-9. For an interesting article advocating a central legislature for environmental matters, see Geoffrey Palmer, “New Ways to Make International Environmental Law” (1992) 86 A.J.I.L. 259.

⁶ Gerhard von Glahn, *Law Among Nations*, 5th ed. (New York, London: MacMillan Publishing Company Inc., Collier MacMillan Publishers, 1986) at 16.

from measures taken by other states to reduce emissions of greenhouse gases into the atmosphere--whether they take similar measures or not.⁷ Without the participation and compliance of all affected states--including those who might prefer to free ride--the effectiveness of international agreements can be significantly compromised. A second difficulty concerns the "global commons": those areas of the planet that do not belong to any state, such as the atmosphere, but which nevertheless require protection as the common heritage of humankind.⁸ As these examples suggest, attracting universal participation in the development of appropriate rules, and obtaining compliance with them, pose particular challenges in the international environment field deserving of study.

Typically in international law, when an issue requiring inter-state cooperation arises (e.g. ozone depletion), like-minded states attempt to work together to reach an agreement. However, the requirement for prior express state consent in international treaty law can lead to the obligations agreed to being less onerous than they might be in a domestic legislature type of situation, as negotiating states attempt to find common ground.⁹ In turn, this can mean that the compliance aspects of agreements--those components which move agreements beyond mere "talk" to effect actual changes in behaviour--may not receive the attention they deserve.

And finally, with respect to implementation of international agreements, the lack of a single, centralized, institutional enforcement system akin to that in place within domestic legal systems raises obstacles for development of effective compliance regimes.

⁷ On this point, see: Lawrence Susskind and Connie Ozawa, "Negotiating More Effective International Environmental Agreements", in Andrew Hurrell and Benedict Kingsbury, eds., *The International Politics of the Environment* (Oxford: Clarendon Press, 1992) 142 at 152.

⁸ See on this point: Edith Brown Weiss, "International Environmental Law: Contemporary Issues and the Emergence of a New World Order" (1993) 81 *Georgetown L.J.* 675, especially at 702-704.

These distinctive characteristics of international law do not make compliance impossible. Rather, they are challenges to be overcome, requiring the ingenuity of all parties concerned. This paper is fundamentally devoted to addressing some of those challenges.

The thesis of this paper is that (1) the successful implementation of international environmental agreements depends on compliance issues in those agreements being effectively addressed; (2) this necessitates compliance issues being addressed both during the initial negotiation of such agreements, and in their subsequent implementation; (3) a number of innovative compliance mechanisms are available which appear to be well-suited to the environmental context, but they may require some refinement.

The first half of this paper explores the concept of compliance and the theoretical and practical aspects of obtaining compliance with international law. The second half of the paper is a case study of the Framework Convention on Climate Change (*FCCC*), providing an illustration of how the theoretical and practical research from the first half of the paper can be translated into concrete results in environmental treaties.

Chapter 2 looks at key terms in the compliance field, and briefly examines why the issue of compliance is so important in ensuring compliance with international norms which protect the biosphere--a critical element of a sustainable future.¹⁰ Levels of compliance with international law generally, and problems with inadequate compliance information are also discussed. Taken together, the chapter suggests that more work is needed to both assess and achieve compliance.

⁹ Abram Chayes and Antonia Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements* (Cambridge, London: Harvard University Press, 1995) at 6-7.

¹⁰ See: United Nations Conference on Environment and Development (UNCED) Rio de Janeiro, 3-14 June 1992, *Agenda 21*, Ch. 39 (International Legal Instruments and Mechanisms).

Chapter 3 examines the distinctive nature of the international environmental law context, in order to provide the background to understanding how traditional international law theory on compliance, examined in Chapter 4, can be applied in the environmental field. This chapter also discusses the variations within environmental issues themselves, which may necessitate varying compliance approaches.

Chapter 4 highlights the views of international law writers and regime theorists on factors which contribute to states complying with international law generally, taking each of the factors and exploring its relevance to the international environmental law field. This analysis distils some factors which should be considered during the negotiation of international environmental agreements, and others which are important to consider during the implementation of such agreements.

Chapter 5 examines a number of environmental and other international regimes which have had some success in producing compliant behaviour. The Chapter groups key compliance issues during both the negotiation and ongoing implementation of international environment agreements under the following headings: (i) uncertain and asymmetrical obligations¹¹ in agreement texts (ii) reporting mechanisms (iii) convention institutions (iv) non-compliance procedures (v) financial mechanisms, and (vi) role of NGOs. This completes the first half of the paper.

The second half of the paper is directed at a case study of the *Framework Convention on Climate Change (FCCC)*, which illustrates in a practical manner how the lessons from

¹¹ "Asymmetrical" or "differentiated" obligations refer to obligations in a regime which are different for different categories of states. For a discussion of the pros and cons of this type of obligation, see: Peter Sand, *Lessons Learned in Global Environmental Governance* (World Resources Institute: 1990), at 6-9 (hereinafter *Lessons Learned*).

Chapters 2 through 5 can be used to design an internally consistent compliance "package" for an IEA.¹² The *FCCC* was chosen for this exercise because it presents a more complex set of compliance issues than have currently been dealt with to date in other environmental treaties.¹³

Chapter 6 opens with a brief description of the climate change problem, the particular characteristics it exhibits as an environmental phenomenon, and a brief history of the *Framework Convention on Climate Change*. It also addresses the issue of compliance in the *FCCC* by providing a short overview of the compliance-related provisions therein.

Chapter 7 uses the lessons learned in Chapters 3, 4 and 5 to analyze how the *FCCC* has dealt with compliance issues in the six areas discussed in Chapter 5--areas which address compliance issues during both negotiation and implementation stages--and proposes how the *FCCC* could be improved in each of the six areas.

Chapter 8 concludes the analysis by summarizing some of the techniques which can be used by negotiators of international environment agreements and those involved with their implementation.

Analysis undertaken in this paper suggests that compliance-related problems are significant when addressing international environmental issues, but not insurmountable. As pressure mounts for international environmental agreements to improve their compliance mechanisms, the widest array of techniques possible--including non-compliance procedures, greater transparency and phased-in obligations--will be required to meet the challenge of

¹² The concept of a compliance "package" was suggested by Kamen Sachariew, "Promoting Compliance with International Environmental Legal Standards: Reflections on Monitoring and Reporting Mechanisms" (1991) 2 *YbIEL* 31.

¹³ As mentioned earlier, the *Montreal Protocol* Parties have adopted non-compliance procedures, but this paper will later suggest that the potential instances of non-compliance under that regime are easier to detect, and the

ensuring a sustainable future for our planet. And in doing so, the international community will have to address the fundamental question of how “hard” or “soft” those techniques will be.

non-compliance procedures for such an instrument may need to be much different than for the types of non-compliance that will be generated under the *FCCC*.

CHAPTER 2: COMPLIANCE, ITS IMPORTANCE AND COMPLIANCE LEVELS

2.1 Introduction

This chapter attempts to address a number of basic questions about compliance. What is compliance? Why is compliance important? Do states usually comply with international law? Do states usually comply with international environmental law?

2.2 Definitions

A leading authority has defined compliance in the following manner:

“Compliance can be said to occur when the actual behaviour of a given subject conforms to prescribed behaviour, and non-compliance or violation occurs when actual behaviour departs significantly from prescribed behaviour.”¹⁴ For purposes of this paper, the prescribed behaviour in question is that set down in legally-binding treaty rules.

While this concept seems straightforward, the literature suggests a number of nuances. Compliance is not necessarily a black and white issue and many activities are caught in shades of grey.¹⁵ While some obligations may seem to be fairly straightforward, many are not clear, due to poor wording in a convention text, intentional or otherwise. Where ambiguity exists, states are given the latitude to interpret a situation so that they actually appear to be in

¹⁴ Oran R. Young, *Compliance and Public Authority: A Theory with International Implications* (Baltimore: Johns Hopkins University Press, 1979) at 104 (hereinafter *Compliance and Public Authority*).

compliance with the rule.¹⁶ In other cases, it may be difficult for a state to prove that it is in compliance, such as when the only available methods of verification is politically unacceptable.¹⁷ In still other cases, the technical letter of a rule may be upheld, but a violation of the spirit may result in an actual circumvention of the rule.¹⁸ By keeping in mind the fact that there can be shades of compliance, and that ambiguity can be purposely built into agreements, the reader will better appreciate why developing methods of improving compliance can be a challenge.

Compliance can also be a matter of timing--at one point in time there may not be compliance, but at another, a party may actually perform as required. For example, the use of persuasion in the Montreal Protocol regime convinced certain parties to improve their reporting over time.¹⁹ Similarly, the complexity of implementing international obligations may result in states assuming obligations before they can fully meet them. Thus, early on in a treaty regime, non-compliance may be more frequently the case than after the regime settles into place.²⁰

Another issue is the "completeness" of compliance: what degree of compliance is required? Is substantial compliance adequate, will only absolutely full compliance suffice, or is reasonable compliance sufficient? Indeed, the level of compliance that is acceptable may

¹⁵ *Ibid.* at 105 Young suggests that compliance is not a binary choice. While binary formulations make it easier to detect violations, it does not allow for any intermediate acceptable behaviour and makes the choices stark--either comply with a perhaps unsatisfactory rule or violate.

¹⁶ *Ibid.* at 107, Young illustrates: "...if a country wishes to intervene in a conflict taking place within another country without appearing to violate the rule against intervention in internal conflicts, it can claim that the situation really amounts to a case of international warfare rather than civil strife."

¹⁷ *Ibid.* at 107-8. As an example: "Thus it may be extremely difficult for a foreign country to prove that it is not providing fissionable material in the absence of external inspections that are quite unacceptable".

¹⁸ *Ibid.* at 107, citing arms control agreements as an example.

¹⁹ Chapter 5, *infra*, will illustrate this point with respect to the *Montreal Protocol* non-compliance procedures, and how they have successfully achieved improvements in Parties' reporting over time.

depend on the context, the nature of the treaty and the urgency of the problem, and the capacity of parties to meet the obligation.²¹

While this paper attempts to isolate particular factors underlying compliance, it must also be recognized that compliance can be the result of a number of such factors and the complex interplay between them. Levels of compliance are part of an ever-changing political backdrop in a particular treaty context and eventually rise over the lifetime of the treaty.²²

While acknowledging that what are acceptable levels of compliance may vary, for purposes of this paper there will be an assumption that substantial compliance is required: absolute perfection is not the standard, just as it is not in domestic law.²³

Whether non-compliance is intentional or not is irrelevant to the final outcome (e.g. a reduction in emissions), but can be important during the process of developing obligation provisions which yield compliance, and in addressing responses to non-compliant behaviour. Consequently, intention is discussed in the section about states' motivations to comply with international law generally.

It is also important to have an understanding of the term "implementation" for the purposes of this paper. Implementation can have two meanings, and the context will clarify which one is intended throughout the paper: (1) implementation by individual state parties of their international obligations into their domestic law or administrative procedures; and, (2) collective implementation of a particular agreement by state parties. This latter type of implementation includes all of those activities which contribute to the full realization of a

²⁰ Chayes and Chayes, *supra* note 9, at 15.

²¹ *Ibid.* at 17.

²² *Ibid.* at 20.

successful working convention, such as the collective establishment of administrative measures, secretariat financing and operation, financial and technical assistance, monitoring, reporting, compliance measurement, and enforcement measures.²⁴ Consequently, ensuring compliance is simply one component of collective convention implementation, which may lead to the implementation and compliance of individual parties being called into question.

"Enforcement" too is just one aspect of implementation. While compliance is the achievement of behaviour conforming to agreed standards, enforcement is one of the methods by which compliance can be achieved. Enforcement can be defined as any form of legally imposed sanction directed at ensuring compliance.²⁵ As this paper attempts to demonstrate, there are many ways in which compliance can be nurtured beyond harsh "enforcement" measures, which have a role to play in appropriate, albeit limited, circumstances.²⁶

"Verification" is another term that is found in the literature on compliance and that is used in this paper. One determines whether there is compliance through verification procedures, which involve data collection, data analysis and reaching a conclusion on the

²³ Oran R. Young, *International Cooperation: Building Regimes for Natural Resources and the Environment* (Ithaca: Cornell University Press, 1989) at 70-71 (hereafter *International Cooperation*).

²⁴ See Sand, *Effectiveness*, *supra* note 3 at 5-6 for a more detailed listing of implementation criteria.

²⁵ Anthony D'Amato, *International Law: Process and Prospect* (Dobbs Ferry, N.Y.: Transnational Publishers, Inc., 1986). For a similar definition, see *International Cooperation*, *supra* note 20 at 71. For the purposes of this paper, which examines a number of methods of obtaining compliance, enforcement has the more limited meaning and will be restricted to discussions involving non-compliance procedures and related sanctions for non-compliance.

²⁶ A number of enforcement-oriented measures are available in international environmental agreements. For example, there are trade sanctions which can be applied against those failing to comply (*Montreal Protocol Non-compliance Procedures*), there may be requirements for domestic laws to incorporate offence provisions (*Basel Convention*, Article 9), or liability and compensation regimes which can have the effect of making Parties scrutinize their behaviour more closely at the outset. A current example of a liability regime under negotiation is the draft Protocol on Liability and Compensation being developed by the Parties to the *Basel Convention*: see Fourth Session, *Ad Hoc Working Group of Legal and Technical Experts to Consider and Develop a Draft Protocol on Liability and Compensation for Damage Resulting from Transboundary Movements of Hazardous Wastes and their Disposal*, UNEP/CHW.1/WG.1/4/L.1/Rev.1. Chayes and Chayes, *supra* note 20 at 22 assert that coercive measures are both misguided (as not addressing the real causes of non-compliance) and costly.

basis of the foregoing as to whether treaty obligations have been met.²⁷ Verification of performance under environmental treaties can serve three main roles: deterrence of "cheating", alerting other parties to cheating (thereby allowing them to salvage the situation) and confidence-building within the regime.²⁸

"Effectiveness" is a term that is often encountered in discussions of compliance, and must be carefully distinguished. While verification procedures may reveal that a party has complied with a particular rule, such procedures will not answer the question of whether the rule in place is the proper rule to effectively achieve the environmental goal in question. This paper restricts its scope of inquiry to the former point.²⁹

2.3 Why is Compliance Important?

The most obvious reason for desiring high levels of compliance is to have the parties comply with the particular convention in order to achieve the specific goals which they have collectively established. Given the potentially disastrous impacts that could occur should a key environmental rule fail to be complied with, this is one of the reasons that compliance is important in the environmental field.³⁰ Achieving compliance with the individual rules designed to protect the environment is also a key underpinning to achieving sustainable

²⁷ P.M. Lewis, "Experiences in Verification; What can be Learned for a Greenhouse Gas Convention", in *A Regime*, *supra* note 3, 53 at 54.

²⁸ *Ibid.* These are the same goals for verification in traditional arms control agreements: Fischer, *supra* note 3 at 49.

²⁹ That "effectiveness" consists of more than compliance measurement is obvious from a review of the study commissioned by the UNCED Preparatory Committee on the effectiveness of IEAs. The general criteria, under which sub-criteria were listed, for assessing effectiveness: objectives and achievement; participation; implementation; information; operation, review and adjustment; codification programming: Sand, *Effectiveness*, *supra* note 3 at 4-7.

³⁰ Winfried Lang, "Treaty-making, Science and Compliance Control", in Winfried Lang, ed., *The Ozone Treaties and their Influence on the Building of International Environmental Regimes* (Vienna: Austrian Ministry for Foreign Affairs, Seminar Proceedings of December 1995) 93 at 95.

development at the global level.³¹ Good implementation procedures within a convention may be "the surest way to avoid environmental disputes,"³² no small matter when commentators are now characterizing certain environmental problems as a new international security threat.³³

When nations comply in a particular manner, this establishes habits of performance and precedents of considerable value in creating an expectation of conforming behaviour within a convention regime. Eventually, "a body of commonly accepted prescriptions...will gradually build up within the regime,"³⁴ something which is of crucial importance in the environmental field because of the actual or potential severity of the effects of violations.³⁵

Compliance with international agreements is important to international law in general, as law observance assists in preserving international stability and respect for international law of any sort. As Henkin explains: "[Nations] observe laws they do not care about to maintain others which they value, and to keep "the system" intact..."³⁶

Pursuit of compliance with treaty commitments helps build feelings of confidence and cooperation among states, which may help further the development of international law generally and in the specific subject area. Compliance with an agreement and success under it

³¹ *Agenda 21*, Chapter 39.

³² Profullachandra N. Bhagwati, "Environmental Disputes", in *Effectiveness*, *supra* note 3, 436 at 436-7.

³³ For a more in-depth discussion of this point, see: *Proceedings from the 1994 Annual Conference of the Canadian Council on International Law*, Panel on Environmental Threats to International Peace and Security: Kernaghan Webb, "Environmental Threats to Peace and Security: Some Thoughts on the International Law Implications, 147; Jutta Brunnée, "Environmental Security and Freshwater Resources: The Role of International Law", 124; and Anne Daniel, "Environmental Threats to International Peace and Security: Combatting Common Security Threats through Promotion of Compliance with International Environment Agreements", 134.

³⁴ Thomas Gehring, "International Environmental Regimes: Dynamic Sectoral Legal Systems" (1990) 1 *YbIEL* 35 at 45.

³⁵ Gunther Handl, "Environmental Security and Global Change: The Challenge to International Law" (1990) 1 *YbIEL* 3, at 4 (hereinafter "Environmental Security").

³⁶ Louis Henkin, *How Nations Behave*, 2d ed. (New York: Columbia University Press, 1979) at 51.

will build on months or years of possibly difficult negotiations, leaving parties more prepared to undertake the negotiation of a much-needed protocol or even amendments to the original agreement. Even the process of attempting to achieve compliance, and failing, can have a rule and system-reinforcing effect when non-compliance is appropriately addressed.³⁷

Improving compliance with IEAs may eventually prove important in the resolution of trade and environment disputes involving trade measures in environmental agreements, as trade experts have suggested that such resolution may require more certainty with respect to environmental norms and more effectiveness with respect to securing compliance with them.³⁸

2.4 Levels of Compliance with International Law

An important part of the legal context in which states operate is the general principle of "*pacta sunt servanda*": agreements are to be observed. This has been called "the most important principle of international law", and the sanctity of undertakings has been the foundation of international trade and finance.³⁹ This principle has been captured in the *Vienna Convention on the Law of Treaties* in Article 26, which provides: "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."

It has been suggested that there is a law "habit" and states usually comply with international law in a myriad of ways every day, from respecting the rights of foreign

³⁷ See Chayes and Chayes, *supra* note 9, at Chapter 6 for a good discussion of this.

³⁸ See, for example, the work of OECD Joint Trade and Environment Experts, which reported to Ministers in June 1995 with document COM/ENV/TD(95)48/Final, at 12. The World Trade Organization's Committee on Trade and Environment is currently discussing the interface between trade and environment agreements, leading up to a ministerial level meeting in Singapore in December of 1996: International Environment Reporter, "WTO Environment Committee at Work on Building Consensus for Singapore Report", June 26, 1996, 544.

³⁹ Henkin, *supra* note 36 at 47. Young, *Compliance and Public Authority supra* note 14 at 47, agrees.

diplomats to adhering to the rules of international trade.⁴⁰ The painstaking attention which negotiators pay to the negotiation of treaty texts, along with monitoring and implementation of obligations provide evidence that international legal and policy practitioners expect compliance--their own and other states'.⁴¹ In fact, Louis Henkin has observed that: "It is probably the case that almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time."⁴²

Although there are many who believe that domestic law is more readily complied with, Brierly points out:

There is in fact no criminal class among states, and deliberate breaches of the law, such as every municipal system is continuously engaged in preventing and punishing, though none succeeds in eradicating them, are very rare in the international system.⁴³

This view of the general propensity of states to comply with their international obligations does not suggest that they always do comply. Rather, it provides a more realistic focus for efforts to improve compliance. This must begin with adequate information about the compliance status quo.

Although the twenty-odd years since the Stockholm Conference on the Human Environment

⁴⁰ Henkin, *supra* note 36 at 19 and 200.

⁴¹ Chayes and Chayes, *supra* note 9 at 4.

⁴² Henkin, *supra* note 36 at 47. See also: Hans Corell, "The Role of the Legal Adviser of the Department of State" (1991) 85 AJIL 358 at 359.

⁴³ James Leslie Brierly, *The Basis of Obligation in International Law and Other Papers*, ed. by Sir Hersch Lauterpacht and C.H.M. Waldock (Oxford: Clarendon Press, 1958) at 201.

have witnessed a proliferation of international environment agreements, inadequate attention has been given to whether those carefully negotiated obligations have been, and are currently being, met. Considering the time, money and effort expended negotiating and putting into place international environmental agreements, it is rather startling that compliance concerns have received so little attention until quite recently.

Perhaps surprisingly, very little data is available on rates of compliance. An important 1992 study by the U.S. General Accounting Office indicated that it was difficult to be certain whether states were complying with international environment obligations, because the reporting records of states were spotty and incomplete.⁴⁴ A major work done in conjunction with the U.N. Conference on Environment and Development on implementation of international environment agreements concluded that better compliance with international agreements is required.⁴⁵ Further, one of the stated goals of Agenda 21 is to have greater attention paid to the effectiveness of international environment agreements.⁴⁶

In addition to failures to report, which are the most easily detected, there have been noted failures of states to pay into funds that support Secretariat functions and activities under international conventions.⁴⁷ While convention secretariat officials often have a general sense of compliance levels, this varies greatly between agreements.⁴⁸

⁴⁴ U.S. GAO Report, *supra* note 3.

⁴⁵ *Effectiveness*, *supra* note 3.

⁴⁶ Chapter 39.

⁴⁷ U.S. GAO Report, *supra* note 3 at 30-32.

⁴⁸ *Ibid.* at 33.

A review of the texts of international environment agreements show that many are either silent on the issue of compliance⁴⁹ or deal with it in a cursory fashion.⁵⁰ It is only in newer convention texts, or more recent meetings of parties, that compliance is beginning to consistently appear.⁵¹ Although the collective implementation of those provisions is generally still embryonic, such references provide evidence that the international community is increasingly ready to act to make IEAs more effective at the level of compliance.

2.5 Summary

Achieving compliance with international environmental law is an important step in ensuring that critical environmental concerns are effectively addressed. Other benefits include dispute avoidance, nurturing respect for international law generally and in the environmental field specifically, and the progressive achievement of sustainable development.

Although there appears to be a general view that international law is usually complied with, specific information on rates of compliance with IEAs is meagre. What does exist suggests that rates of compliance are in need of improvement.

A dearth of references to compliance, both in the literature and in convention texts, has been common until very recently. This increased scrutiny of compliance issues suggests that states now appear ready to concede some of their valued sovereignty in order to ensure compliance with legal obligations. The time is therefore ripe for concerted efforts to be made

⁴⁹ For instance, the *Ramsar Convention on Wetlands of International Importance*, February 2, 1971, 1981 C.T.S. No.9; (1972) Int. Leg. Mat. 969.

⁵⁰ For example, the *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, March 22, 1989, 1992 C.T.S. No. 19, Article 18.

⁵¹ See the agreements noted in footnote 4, as examples.

in negotiating international environment agreements that will be complied with and in implementing agreements in a fashion that encourages respect for their terms.

CHAPTER 3: THE INTERNATIONAL ENVIRONMENT CONTEXT

3.1 Introduction

This chapter highlights the historical and current context in which international environment issues are negotiated and implemented, providing a basis for determining factors which might have an impact on IEA compliance.

3.2 The Special Nature of Environmental Problems

A study of environmental problems illustrates that they have many features in common, such as their transboundary nature, but it is also the case that each environmental problem has its own particular characteristics which should guide international negotiators in tailoring solutions.

Pollution and environmental degradation transcend national boundaries, creating the dynamic tension set out in Principle 21 of the Stockholm Declaration: the sovereign right of states to manage their natural resources as they see fit, so long as this does not harm other countries or the global commons.⁵² Whether the transboundary movement is inadvertent, through air emissions, or via trade, as with endangered species, it is evident that the global community must co-operate in order to find appropriate solutions to such problems.

The global commons provides another oddity of the environmental field. It involves those areas of the planet which are not under the jurisdiction of any state. Although there may be cases where there is self-interest involved in states' desire to protect the commons (e.g.

⁵² Patricia W. Birnie and Alan E. Boyle, *International Law and the Environment* (Oxford: Clarendon Press, 1992) at 89-102.

fishing), there may also be situations where there is no such interest--and yet without cooperative international action, the commons will deteriorate.

The problem of free riders is particularly acute when dealing with global issues. The ideal situation for a free rider is to either avoid becoming a party, or if this is not possible, to become a party and fail to comply. Either way the free rider enjoys the benefits of the regulatory and economic efforts by other states to control the problem.

Because some cases of transboundary degradation are global in nature (e.g. climate change, ozone depletion, transboundary movements of hazardous wastes), global solutions may be required. This often requires a diverse range of countries--with a wide range of interests, contribution to the problem and capacities to address it--to collaborate in resolving the problem through treaty negotiations. Problem-solving approaches are forced through the negotiating process to accommodate these wide-ranging needs and interests.

Many of the environmental solutions chosen to date have been highly regulatory in nature, and because of this, written instruments have been utilized most frequently, rather than relying on customary international law. Nevertheless, the rapidly changing scientific information base and the need to avoid environmental harm before it occurs, suggest that treaty forms need to be flexible in order to accommodate changing circumstances. And, because environmental damage may come to our attention before science can absolutely prove its cause, coupled with the need to avoid harm which is often irreversible in nature, the principle of precaution has developed.⁵³

⁵³ The precautionary principle is an emerging principle of customary international law which generally provides that where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation. Because it has found different expressions in both soft law instruments (such as the *Rio Declaration*) and treaties (like the *FCCC* and the newly

At least in industrialized countries, environmental issues have come to enjoy a fairly high profile in the media, with environmental and business groups, and the public at large. There is a generally high public participation ethic. This means that if an issue can garner sufficient public support, the public may be able to utilize that to leverage its influence.

Finally, it must be noted that although there are commonalities among environmental issues. As contrasted with other international concerns like human rights, each environmental issue has its own particular features that must be individually addressed in the negotiating and implementation processes. For instance, it may prove easier to marshal public opinion to protect a cute, cuddly endangered species, but much more difficult to interest the public in the problem of greenhouse gases altering the global climate.

3.3 The Developing Country Dynamic

Over the last twenty-five years⁵⁴ there have been tensions between developed and developing countries regarding the protection of the global environment. As the environment has gained prominence on the international stage, mainly at the behest of the developed world, developing countries have questioned whether the environment should take primacy over the development aspirations of the world's poorer countries.

The concerns of the developing countries find their origins in the colonial past. Many of today's industrialized countries were colonial rulers throughout South America, Africa and Asia. Colonization severely depleted the resources of the colonies and established certain

negotiated Protocol to the *London Convention*) it is difficult to state conclusively that it is a clear principle of customary international law, although it is increasingly gaining acceptance. For more, see: Boyle and Birnie, *ibid.* at 95-98.

⁵⁴ As mentioned earlier, the last twenty-five years have been the key period for the development of international environment instruments, both of a binding and non-binding nature.

types of economies--export-oriented--which are still constraining the less developed states today.⁵⁵ While the United States was never a colonial power in this sense, and in fact during the 1940's, 1950's and 1960's was a large donor of aid, it has been accused of modern colonial rule through its aid and the mechanisms of the U.S.-dominated World Bank and International Monetary Fund (IMF). These two institutions have, since their inception in the mid-1940's, totally transformed the world economy--to the detriment of developing countries, critics claim.⁵⁶

The growth of a "development ideology" among developing countries began after World War II.⁵⁷ There were a number of complex factors at work: decolonization, increased awareness of First World affluence and environmental degradation caused by First World countries, improved Third World health, and a lack of participation in key international fora, like GATT and the World Bank.⁵⁸ Several concepts are associated with this ideology, such as equality--people everywhere have basically equal capacities and rights (especially with respect to self-determination) and everyone shares the responsibility to help eradicate inequalities. However, the responsibilities of sovereign states differ: developing nations have the obligation to develop, and developed nations are required to assist developing nations in this process. With respect to aid, it is supposed to be politically and culturally neutral.⁵⁹

⁵⁵ Commission on Developing Countries and Global Change, *For Earth's Sake*, (Ottawa: International Development Research Centre, 1992) at 39-43.

⁵⁶ See: Mark Abbey, "Breaking the Bank", *Ottawa Citizen*, April, 1992; Peter Korner, Gero Maass, Thomas Siebold, Rainer Tetzlaff, *The IMF and the Debt Crisis: A Guide to the Third World's Dilemma* (London: Zed Books, 1986).

⁵⁷ Francis X. Sutton, "Development Ideology: Its Emergence and Decline", in Francis X. Sutton, ed., *A World to Make: Development in Perspective* (New Brunswick, New Jersey: Transnational Publishers, 1990) at 35.

⁵⁸ See on these points generally: Paul Streeten, "Development Ideas in Historical Perspective," in Kim Q. Hill, ed., *Toward a New Strategy for Development* (New York: Pergamon Press, 1979); and Nurul Islam, "Revolt of the Periphery", in Hill, *ibid.* at 171-2.

⁵⁹ Sutton, *supra* note 57 at 36.

By the 1960's, as Third World leaders were feeling a growing mistrust for traditional development, their version of development became broader and more aspirational.⁶⁰ In 1974, the less developed countries (LDCs) were successful in having the U.N. General Assembly adopt⁶¹ a Declaration on the Establishment of a New International Economic Order.⁶² This instrument reflected a number of concepts that have continued to recur in environmental treaty negotiations. According to this Declaration, the international economic order has precluded the equitable development of developing countries, developed countries should be providing unconditional assistance to developing countries, and the latter need to focus all of their resources on development. Soon after, the U.N. adopted a similar document, by resolution, on a Charter of Economic Rights and Duties of States by a vote of 120 in favour, 6 against, with 10 abstentions.⁶³ Debate in the U.N. on development resulted in the 1986 adoption of the Declaration on the Right to Development by the General Assembly.⁶⁴

3.4 From Stockholm Forward

At the seminal Stockholm Conference on the Human Environment in 1972, it became apparent that the developing countries felt that global pollution was more a problem of the industrial world, the main source of pollution,⁶⁵ while the focus of developing countries was more appropriately focused on development. Furthermore, there were concerns expressed by

⁶⁰ Sutton, *supra* note 57 at 51-2.

⁶¹ This was adopted without a vote. According to one source, the NIEO was adopted by a "pseudo-consensus" because there was no vote, an indication that the chair realized that there was not general support of the text and there would have been a divided vote. See: Johan Kaufmann, *United Nations Decision-Making* (Netherlands: Sijthoff and Noordhoff, 1980) at 128.

⁶² Resolution 3201 (S-VI); reprinted in 13 Int.Leg. Mat. 715 (1974).

⁶³ U.N. Doc. A/Res/3281 (XXIX). The votes against and abstentions were all from industrialized countries. See 14 Int. Leg. Mat. 262 (1975).

⁶⁴ U.N. Doc. A/Res/41/128, December 4, 1986. The sole vote against was that of the United States.

developing countries that industrialized countries might reduce their development aid in favour of spending on the new environmental priorities⁶⁶ and that this new environmentalism would impact negatively on their economies.⁶⁷ The LDCs were ultimately successful in having their concerns reflected in many of the Principles in the Stockholm Declaration and in forging strong political alliances amongst themselves.⁶⁸

Throughout the 1970's and 1980's, similar tensions continued to be reflected in debates over the environment versus development.

For example, in the *Law of the Sea Convention* negotiations, LDCs viewed the establishment of an international sea-bed authority as a critical instrument in achieving economic equity with respect to the seabed beyond national jurisdiction, something which came to be called "the common heritage of mankind". Industrialized countries, on the other hand, sought freedom for their corporations to be able to develop the seabed. After years of negotiation, a compromise solution was a parallel system under which an international authority, through its commercial arm, would have equal access to the seabed with commercial entities.⁶⁹ Disagreement about the provisions relating to the Authority is the main reason why the Law of the Sea for years was not ratified by industrialized states.⁷⁰

⁶⁵ This is not necessarily the case. While many environmental problems are due to overconsumption of the North, there are many which are due to overpopulation and other causes in the South.

⁶⁶ Alexandre Kiss and Dinah Shelton, *International Environmental Law* (New York: Transnational Publishers Inc., 1991) at 49.

⁶⁷ Allen L. Springer, "U.S. Environmental Policy and International Law: Stockholm Principle 21 Revisited", in J. Carroll, ed., *International Environmental Diplomacy* (Cambridge: Cambridge University Press, 1988) at 50.

⁶⁸ Tim E.J. Campbell, "The Political Meaning of Stockholm: Third World Participation in the Environment Conference Process" (1973) 8 *Stanford Journal of International Studies* 138.

⁶⁹ Hasjim Djalal, "A Southeast Asian Perspective", in Giulio Pontecorvo, ed., *The New Order of the Oceans: The Advent of a Managed Environment* (New York: Columbia University Press, 1986) 199 at 209.

⁷⁰ The seabed issue has now been resolved by the international community. See: Stephen J. Darmody, "The Law of the Sea: A Delicate Balance for Environment Lawyers" (1995) 9 *Natural Resources & Environment* 24. The *U.N. Convention on the Law of the Sea* came into force November 16, 1994.

The *Montreal Protocol's* success in having certain key developing countries become Parties was based in large part on its 1990 amendments which added a financial mechanism to provide funding for the incremental costs of developing countries' control measures. This, along with technology transfer provisions, heralded a new beginning in international environmental negotiations, an attempt to resolve the tensions between environment and development, and were the reasons China and India finally became Parties.⁷¹

The tensions that have existed about achieving equity in the global economy and the need to develop versus environmental protection remain visible. In the negotiations leading up to the 1992 conclusion of the *Framework Convention on Climate Change* and the *Convention on Biological Diversity*, there was considerable acrimony between North and South on many issues, with the main points of concern being financial mechanisms and technology transfer provisions. Furthermore, at UNCED, there was a clear split on how to approach the "Earth Charter", with the result that much of the G-77's⁷² proposed version was incorporated into "The Rio Declaration", while the more environmentally-focused developed country approach was rejected.

During the 1980's, the World Commission on Environment and Development (WCED) studied the issues of environment and development and in its report essentially legitimized the development concerns of LDCs. The Commission, established in 1983, reported in 1987 in a document entitled, *Our Common Future* (also known as the "Brundtland Report").⁷³ It

⁷¹ Jason M. Patlis, "Multilateral Fund of the Montreal Protocol: A Prototype for Financial Mechanisms for Protecting the Global Environment" (1992) 25 Cornell Int'l L. J. 181 at 194.

⁷² G-77 is the name of a grouping of developing states which often takes common positions on environmental negotiations. The group now has over 120 members.

⁷³ World Commission on Environment and Development, *Our Common Future* (Oxford: Oxford University Press, 1987) (hereinafter WCED).

popularized the concept of sustainable development and directly addressed difficult issues such as the international economy (including the debt crisis), over-population, food security, energy depletion, species and ecosystem protection, and industrial development. It suggested that changes were needed to laws, institutions and national and international policy.

The report stressed the links between the global ecological crisis and the global economy in succinct terms:

Yet at the same time the developing countries must operate in a world in which the resources gap between most developing and industrial nations is widening, in which the industrial world dominates in the rule-making of some key international bodies, and in which the industrial world has already used much of the planet's ecological capital. This inequality is the planet's main "environmental" problem; it is also the main "development" problem.⁷⁴

One of the results of developing country poverty is the stress that is placed on the environment:

Those who are poor and hungry will often destroy the immediate environment in order to survive: They will cut down forests; their livestock will overgraze grasslands; they will overuse marginal land; and in growing numbers they will crowd into congested cities. The cumulative effect of these changes is so far-reaching as to make poverty itself a major global scourge.⁷⁵

About North-South tensions, the Commission commented:

The Commission therefore regrets but cannot ignore the recent decline in multilateral co-operation in general and a negative attitude to dialogue on development in particular. At first sight, the introduction of an environmental dimension further complicates the search for such co-operation and dialogue. But it

⁷⁴ *Ibid.* at 5-6.

⁷⁵ *Ibid.* at 28.

also injects an additional element of mutual self-interest, since a failure to address the interaction between resource depletion and rising poverty will accelerate global ecological deterioration.⁷⁶

At its final meeting, the Commission issued the Tokyo Declaration, which asked all nations to integrate sustainable development into their goals and to adopt a number of principles to guide their policy actions.⁷⁷ Developed nations publicly acclaimed the Brundtland Report, yet the issues which it raises about Third World poverty and the international economy have yet to be properly addressed.

This having been said, there has been a slow, albeit implicit, recognition by the developed countries that they are responsible for much of the degradation which has occurred at the global level.⁷⁸ The development of financial mechanisms has been a fairly predictable outcome of this recognition, and later in this paper it will be argued that such mechanisms, appropriately crafted, are critical to continued success in negotiating environmental treaties and in obtaining the compliance of developing countries with their provisions.

3.5 Summary

Environmental problems are often transboundary in nature and therefore necessitate cooperative international solutions. They exhibit characteristics--such as the need for speed and flexibility--which should be taken into account when negotiating or implementing environmental treaties. This said, in addition each type of environmental issue must be addressed with its special characteristics in mind.

⁷⁶ *Ibid.* at 90.

⁷⁷ Those principles were: 1. revive growth. 2. change the quality of growth. 3. Conserve and enhance the resource base. 4. Ensure a sustainable level of population. 5. reorient technology and manage risks. 6. integrate environment and economics in decision-making. 7. reform international economic relations. 8. strengthen international cooperation: *ibid.* Annex 2 at 365-6.

Environmental treaty negotiations are characterized by a high level of North-South divergence, originating at least in part from the colonial past. Developing countries continue to want to focus on their development, generally taking on new environmental obligations only when there are incentives to do so. Developed countries have to some degree acknowledged that they should address the concerns of developing countries in environmental treaty negotiations, while still striving to address key issues of global environmental degradation. This has led to the development of innovative mechanisms in environmental treaties intended to address the differences in perspectives of developed and developing countries.

⁷⁸ See, for example, the preamble to the *Framework Convention on Climate Change*.

CHAPTER 4: THEORIES ABOUT FACTORS MOTIVATING STATES TO COMPLY WITH INTERNATIONAL LAW

The task of measuring compliance, and of understanding the variables which set the pattern, must necessarily go hand in hand.⁷⁹

A central issue in any treatment of compliance involves the motivations or incentives of those subject to the provisions⁸⁰

4.1 Introduction

This chapter discusses a number of key themes which international law commentators have generally considered to be important in understanding what motivates states to comply with international law.⁸¹ And, building on the discussion in Chapter on the international environment context and the particular character of environmental problems, the general compliance themes explored here will be applied specifically to environmental problems. Finally, this chapter will summarize by translating compliance theories into concrete suggestions for improving compliance prospects for IEAs, both during their negotiation and implementation phases.

⁷⁹ Rosalyn Higgins, "Compliance with United Nations Decisions on Peace and Security and Human Rights Questions", in Stephen M. Schwebel, ed., *The Effectiveness of International Decisions* (Leyden: A.W. Sijthoff, Oceana Publications Inc., 1971) 32 at 50.

⁸⁰ Oran R. Young, *Resource Regimes* (Berkeley: University of California Press, 1982) at 37.

⁸¹ Although this subject is exceedingly difficult to capture in a few pages, an attempt has been made to reflect important themes and concepts by consulting selected authorities in international law and regime theory.

4.2 Compliance Motivation Factors

4.2.1 Presumptive Compliance⁸²

The backbone of presumptive or habitual compliance with international law is the *pacta sunt servanda* rule.⁸³ Henkin's view that most nations observe international law most of the time recognizes that many international law rules are habitually complied with--compliance is presumed to be the natural state of affairs. Similarly, Brierly has observed: "...states are habitually scrupulous in their observance of the obligations of international law....I do not think it is a point on which any careful observer of international practice can have any doubt."⁸⁴ Yet--instances of violations of international law are not hard to find. It is therefore useful to explore which types of rules are more likely to be habitually obeyed, what features they have, and what this suggests for the negotiation and implementation of environmental agreements.

Franck argues that compliance can be secured at least in part by a perception on the part of those subject to the rule as to whether it is legitimate or not. He suggests that to the extent that rules have certain qualities, they will exert strong influence on the behaviour of states. Those qualities include: determinacy, symbolic validation, and coherence.⁸⁵

⁸² For more on this topic, see: von Glahn, *supra* note 6, at 6; Philip C. Jessup, *A Modern Law of Nations* (Archon Books, 1968) at 8; Thomas Franck, "Taking Treaties Seriously," (1988) 82 *A.J.I.L.* 68 (hereinafter "Taking Treaties Seriously"); David G. Victor, "The Montreal Protocol's Non-compliance Procedure: Lessons for Making Other International Environmental Regimes More Effective", in *The Ozone Treaties*, *supra* note 30, 58 at 74-5.

⁸³ See Chapter 2, *supra*.

⁸⁴ Brierly, *supra* note 43 at 203.

⁸⁵ Thomas M. Franck, "Legitimacy in the International System" (1988) 82 *A.J.I.L.* 705 at 706 (hereafter *Legitimacy*).

Determinacy refers to the clarity of the text of the rule transmitted to those who are subject to it: the clearer the rule, the more likely it can be complied with and less likely its ambiguity can be used as an excuse for non-compliance or to argue that compliance has in fact occurred.⁸⁶ While complex issues might require a somewhat more flexible expression, there must be a process available for resolving ambiguity.⁸⁷

Determinacy is key in attracting adherence to rules, yet as later discussions about uncertainty and asymmetry of obligations reveal, many environmental treaties are drafted in extremely ambiguous terms. In addition, reasonable processes to resolve those ambiguities are not generally available.⁸⁸

Symbols, ritual and pedigree are factors which Franck suggests should be carefully guarded with respect to important rules.⁸⁹ These factors endow a rule with authority, which is communicated to the addressee of the rule in a public way. Symbolism and public ritual were certainly an important component of the 1992 U.N. Conference on Environment and Development in Rio de Janeiro. Never before had so many world leaders appeared together to address critical environmental issues. Public signing of the *Biodiversity* and *Climate Change Conventions* at that summit has certainly given both agreements a symbolic and legal stamp of authority for many states.

An example of a “pedigree” is an environmental treaty which has its roots in long-standing guidelines or codes of conduct with a well-established record of success, such as the

⁸⁶ Clarity also removes lack of clarity as an excuse for non-compliance, or the argument that compliance has in fact occurred. This point has also been made in the context of compliance with United Nations decisions: Higgins, *supra* note 79 at 41-3.

⁸⁷ *Ibid.* at 712.

⁸⁸ Chapter 5 will explain that dispute resolution provisions in environmental treaties are not used, and only one operative non-compliance procedure exists, and that is in a fledgling state.

two sets of voluntary guidelines which are the precursors to the current negotiations for a global treaty on a prior informed consent procedure for chemicals.⁹⁰ Such pre-existing rules in the form of soft law or framework treaties with general obligations provide a sufficient level of comfort for states with international rules to comply with such rules when they are articulated in binding form.

Coherence is another quality which lends legitimacy to legal rules. Coherence involves ensuring that laws are consistently applied, and that differential treatment is based on related underlying general principles, with similar distinctions made throughout the system of rules.⁹¹

Ambiguity of obligation may preclude the perception of "coherence" of the rules, and will likely result in inconsistent application of the rules. Again, the shortage of user-friendly procedures in IEAs for clarifying obligations may further reduce the likelihood that environmental agreements will be complied with because there is no effective system to ensure consistency and fairness.⁹²

It has also been suggested that the international "culture of compliance"⁹³ can be nurtured and developed through an equitable and credible international negotiation process, and through verification techniques similar to those which have promoted confidence building in

⁸⁹ *Legitimacy*, *supra* note 85 at 735.

⁹⁰ The *London Guidelines for the Exchange of Information on Chemicals in International Trade*, UNEP Governing Council Decision 15/30, May 25, 1989; *International Code of Conduct on the Distribution and Use of Pesticides*, Food and Agriculture Organization of the United Nations, Rome, 1990.

⁹¹ *Legitimacy*, *supra* note 85 at 750-51. Franck concludes at 751 that this web of underlying principles is an aspect of community which validates membership in the community and "accords equal capacity for rights and obligations derived from its legitimate rule system."

⁹² Of course, traditional dispute resolution procedures could still be relied on, but as Chapter 5 illustrates, these have not been used in the environmental field even though they have been part of convention provisions.

⁹³ Young discusses this in *Compliance and Public Authority*, *supra* note 14 at 31.

arms control regimes. It has been suggested that the mere identification of the common interest through collective processes is in itself a factor militating towards compliance.⁹⁴

Over the last twenty years, an increasing number of international environmental agreements have been negotiated. This frequent coming together of the international community to discuss common concerns is beneficial in itself. These IEAs have features particular to the environmental field, and have constituted a "restructuring of multilateral legislative processes",⁹⁵ creating common expectations of performance and setting behavioural precedents.⁹⁶ Many of these precedents or expectations operate at less than a legally binding level. For example, decisions of contracting parties to a treaty are not considered legally binding unless given that character in the treaty, but they nevertheless can result in the development of common regime expectations⁹⁷--thus slowly building and reinforcing habitual compliance with regime rules.

The extent to which habitual compliance may be relied on appears to sometimes depend on the nature or subject matter of a rule. Countries are more likely to violate political or substantive limitations on conduct than functional or technical aspects, such as arbitration procedures.⁹⁸ Political treaties, such as those dealing with issues of peace and territorial sovereignty,⁹⁹ are most often violated when their political basis is removed or no longer exists.¹⁰⁰ In fact, there may be political conditions prevailing which encourage violations,

⁹⁴ Higgins, *supra* note 79 at 49-50, quoting Schachter.

⁹⁵ Handl, "Environmental Security", *supra* note 35 at 5.

⁹⁶ Gehring, *supra* note 34 at 45.

⁹⁷ *Ibid.* at 50.

⁹⁸ Henkin, *supra* note 36, at 55fn.

⁹⁹ *Ibid.* at 80.

¹⁰⁰ *Ibid.* at 89.

such as the Arab-Israeli historical conflict, where institutions like the media, and resultant public opinion, could encourage violations.¹⁰¹

Relevance of the legal rule is a key factor in attracting compliance with it. The level of satisfaction with the rule may indicate the relevance of the rule to those subject to it. Not surprisingly, those satisfied with the status quo are more likely to comply with it.¹⁰² And, it appears that relevance has to be ongoing: treaties in need of renewal, if not renewed, may well be ignored.¹⁰³

Relevance is also in the eye of the beholder. The serious nature of the environmental challenges facing present and future generations could, on this basis alone, be presumed to support compliance with environmental treaties. Yet, as Chapter 3 noted, developed and developing countries have traditionally not been in agreement regarding the issues on the international agenda or their treatment once there. First of all, developing countries have traditionally viewed international law as a Western European construct.¹⁰⁴ Second, developing countries have not always agreed that international treaty negotiations reflect their priorities (e.g. ozone depletion, climate change) and unless incentives are also available, participation in such negotiations and subsequent compliance with the agreed rules may be very weak. Where the subject matter is of more significance to developing countries, such as desertification, they will more likely have a strong commitment to compliance. The same is true with the developed world. Where subject matters affect their populace directly, such as

¹⁰¹ *Ibid.* at 74.

¹⁰² *Ibid.* at 53.

¹⁰³ *Ibid.* at 76-7.

¹⁰⁴ T.O.Elias, *New Horizons in International Law*, 2d rev. ed. (Dordrecht: Martinus Nijhoff Publishers, 1992) at Chapter 2; Gehring, *supra* note 34 at 5; Tayo O. Akintoba, *African States and Contemporary International Law* (The Hague/Boston/London: Martinus Nijhoff Publishers) at 21.

ozone depletion, they are more inclined to initiate international negotiations and comply with the final agreement. However, as Chapters 6 and 7 will illustrate, where economic or lifestyle interests are involved, much more cautious behaviour is exhibited.

Despite these traditional misgivings, developing countries now have an opportunity to participate in the development of a rapidly-growing body of international environmental law and make their voices heard. To the extent that they--and other states, including developed countries of varying degrees of influence--perceive the negotiation process to have adequately reflected their interests, the environmental rules resulting therefrom will more likely acquire the necessary legitimacy which encourages compliance. The complex development of negotiating positions at the domestic level through governmental, intergovernmental and public consultations, through to the dynamics of shifting coalitions and positions at the international level, ensure that treaties generally reflect the interests of those negotiating them.¹⁰⁵ Because of imbalances in power between states, and because most states will not be able to achieve all of their negotiating objectives, the final text will reflect a collective accommodation. But once agreed upon, those rules carry the weight of international law and a presumption that parties will comply with them. If they are generally well-designed and sensible, taking into account the likely behaviour patterns to be expected from states parties, there is a higher likelihood that instances of non-compliance will be manageable.¹⁰⁶

¹⁰⁵ Chayes and Chayes, *supra* note 9 at 4-7.

¹⁰⁶ *Ibid.* at 7.

4.2.2 Self-Interest, Reciprocity and the Balance Sheet

As with individuals, self-interest is an important motivating factor in the actions states take to comply (or not) with their international obligations. However, prevailing international relations theory ignores habitual or presumptive compliance and suggests that state behaviour can be simply reduced to rational calculations of what is in a state's best interest in a given situation.¹⁰⁷ Henkin suggests that although observance of international law is the rule, there are situations where the cost of compliance may be high and the cost of non-observance quite low, with the result that there is a violation of international law.¹⁰⁸ However, as Henkin himself notes, the discussion of the costs and benefits of compliance is merely the starting point for an analysis of compliance.¹⁰⁹ Understanding what are "costs" and "benefits" to states collectively and individually in the environmental field in the 1990's--the balance sheet--is key to constructing a successful environmental regime. Whether cost-benefit analysis is actually conducted by states is somewhat debatable, since it is recognized that states are not rational integrated actors, as are human beings.¹¹⁰ Nevertheless, the individuals within the government of a state attempt to weigh a number of factors along with their underlying natural inclination to comply with international law.

The self-interest of states in negotiating environmental agreements has been established earlier: developing countries tend to put development concerns ahead of environmental concerns, at least when the topic is one of less direct interest to them, such as ozone depletion and climate change. On the other hand, developed countries tend to want to take measures to

¹⁰⁷ *Ibid.* at 8-9.

¹⁰⁸ *Ibid.* at 68-9.

¹⁰⁹ *Ibid.* at 50.

combat selected global and regional problems which they see as potentially or actually dangerous to them, but as the climate change debate has illustrated, are careful about economic and lifestyle impacts.

However, as the Brundtland Report noted, mutual self-interest between developed and developing countries dictates that solutions be found to this interplay, because "a failure to address the interaction between resource depletion and rising poverty will accelerate global ecological deterioration."¹¹¹ Thus, the serious nature of environmental problems can form the basis for collective self-interest once states are convinced that the magnitude and complexity of the problems the planet faces can only be dealt with through concerted international cooperation.¹¹² In order for this to translate into a tendency to comply with an IEA, widely accepted and thorough scientific research is required.¹¹³

One could argue that the recent use of financial mechanisms, technology transfer provisions and asymmetrical obligations in environmental agreements has been directed at the self-interest of developing states. Whether it is to ensure compliance with obligations, to ensure presence at the bargaining table, or to combat Third World lack of capacity, these mechanisms have begun to affect whether obligations will be assumed by countries at the outset, and how those obligations will be met.

In the environmental field the ultimate in self-interest is "free riding", denying participation in a regime (or participating without compliance) while at the same time

¹¹⁰ *Ibid.* at 50-1.

¹¹¹ WCED, *supra* note 73 at 90.

¹¹² Andrew Hurrell and Benedict Kingsbury, "The International Politics of the Environment," in Hurrell and Kingsbury, eds., *supra* note 7, 10 at 23.

¹¹³ Lang, *supra* note 30 at 97.

benefiting from the efforts of other states parties to reduce environmental degradation.¹¹⁴ In other words, the optimum situation for a free rider would be compliance by every party except the free rider. Obligations and compliance mechanisms should be geared toward reducing this phenomenon or else it will reduce the confidence of others in the regime and result in general non-compliance.¹¹⁵ Climate change is an example of a phenomenon that lends itself easily to free riding, since measures required to manage climate change will be costly, and the benefits globally diffuse.

Stability in the international community may form part of the "benefits" of the self-interest ledger. According to Brierly:

The ultimate explanation of the binding force of all law is that man, whether he is a single individual or whether he is associated with other men in a state, is constrained, in so far as he is a reasonable being, to believe that order and not chaos is the governing principle of the world in which he has to live.¹¹⁶

To maintain a stable international society, give and take is required by all nations.¹¹⁷

Henkin suggests that law observance is an assumption built into international relations because states have an interest in the continuing stability of the international environment.¹¹⁸

Stability also provides predictability with respect to the behaviour of other nations.¹¹⁹ Within

¹¹⁴ I. William Zartman, "International Environmental Negotiation: Challenges for Analysis and Practice" (1992) *Negotiation Journal* 113 at 118. Frances Cairncross, "The Environment: Whose world is it, anyway?" *The Economist*, May 30, 1992 at 6 suggests that this is more likely when costs and benefits greatly diverge or longer time periods exist between the cost and the benefit. The balance of costs and benefits will also vary from one country to another. "An individual country can generally do best of all by dropping out of a pact, as long as it cannot be excluded from the resulting gains."

¹¹⁵ *Compliance and Public Authority*, *supra* note 14 at 36.

¹¹⁶ von Glahn, *supra* note 6 at 6, quoting from Brierly.

¹¹⁷ *Ibid.* at 6.

¹¹⁸ Henkin, *supra* note 36 at 51. Hurrell and Kingsbury agree, in , "The International Politics of the Environment", in Hurrell and Kingsbury, *supra* note 7 at 23.

¹¹⁹ von Glahn, *supra* note 6 at 7.

environmental regimes, this desire for stability can be the basis upon which states comply in order to avoid conflict.

Another form of self-interest that has been suggested as a key element in ensuring compliance with international law is the perception on the part of states that non-compliance may result in reciprocated treatment from those harmed by their behaviour.¹²⁰ This reciprocity could take the form of retaliation in kind, economic sanctions, or even war. Similarly, it has been suggested that the international system enforces itself because nations, upon admission to statehood, receive "entitlements" which are reciprocal; it is in their own interest to keep their entitlements, such as respect for their borders, by respecting the entitlements of others.¹²¹

Certain environmental issues are particularly susceptible to possible reciprocity as a factor encouraging compliance. Laws about nuclear testing, use of scarce water resources and the installation of hazardous facilities are among those which serve to stabilize transboundary environmental relationships. Respect for the rights and sensitivities of neighbouring countries may play a part in compliance with such regimes, but often it is the fear of reciprocal harm or retaliation which governs most strongly. Where resources have to be rationed, it is generally in the best interests of all to follow mutually agreed rules.¹²²

It is generally agreed that parties are more willing to concede some level of self-interest by submitting to supervision mechanisms if others will also submit. They are more willing to commit to onerous but necessary obligations if other countries are willing to assume their equitable share of the burden, especially if it is based on their share of the blame for the

¹²⁰ Higgins, *supra* note 79 at 48.

¹²¹ D'Amato, *supra* footnote 25 at 19. Other entitlements of statehood are the right to send an ambassador to states wishing to receive them, the capacity to enter into agreements with other states, and the application of rules of customary international law generally.

particular environmental problem.¹²³ Thus short-term self-interest may be sacrificed for long-term self-interest. Nevertheless, violations can occur when a state is mistaken or unsure about where its interests lie.

The costs of the violation may not be clear, as they could be long-term and imprecise, such as negative public opinion,¹²⁴ or environmental impacts, where imprecision may be caused by scientific uncertainty. On the other hand, the benefits of a rule may be hard to quantify or assess and may make the cost-benefit analysis more difficult.¹²⁵ A state may also be uncertain about the consequence of a violation.¹²⁶

In other situations, self-interest may suggest that the costs of violations may seem low and the likelihood of continued friendly relations between the parties likely, especially where there is no reciprocity of violation possible or likely.¹²⁷ This may be the case where the environmental issue is not transboundary in nature (e.g. where the effects are entirely within one country, such as downstream river pollution) or affects the global commons (e.g. climate change). This has two obvious consequences. One is that violators can enjoy the benefits of others' compliance without complying themselves (the free rider), and second, the global commons becomes degraded because as Hardin has stated, "Ruin is the destination toward

¹²² Brunnée, *supra* note 33.

¹²³ U.S. GAO Report, *supra* note 3. It should be noted that such developments in the environmental field are extremely recent and still tenuous. As recently as 1989, it was suggested that, "Countries seem reluctant to give up autonomy on monitoring and enforcement at this juncture in history." See: Robert W. Hahn and Kenneth R. Richards, "The Internationalization of Environmental Regulation" (1989) 30 *Harvard International L.J.* 421 at 438, fn. 66.

¹²⁴ Henkin, *supra* note 36 at 69.

¹²⁵ *The Economist*, "Environmentalism runs riot," August 8, 1992, 11.

¹²⁶ Henkin, *supra* note 36 at 72.

¹²⁷ *Ibid.* at 71.

which all men rush, each pursuing his interest in a society which believes in the freedom of the commons. Freedom in a commons brings ruin to us all."¹²⁸

4.2.3 International Reputation/Peer Pressure

The international community is very small, so maintaining a reputation as a state that respects its agreements can be extremely important to that state in ensuring that other countries will continue to do business with it.¹²⁹ Credibility is a key ingredient of successful foreign policy and can be promoted through law observance and damaged through non-compliance.¹³⁰

Nations generally want to maintain good reputations, remain criticism free and enjoy friendly international relations.¹³¹ The desire to be trusted is evidenced in the fact that those accused of violations of international law usually attempt to argue their innocence.¹³² Consequently, peer pressure is invaluable in the relatively small international community in ensuring that nations comply with international law. In fact, many argue that enforcement of compliance with international agreements generally depends on peer or public pressure.¹³³

The environment is one of those subjects which evokes a strong response at the popular level world-wide. Consequently, one might assume that states will generally try to avoid actions which will isolate them as straying far from the environmental norm; conversely, they

¹²⁸ Garrett Hardin, "The Tragedy of the Commons," *Science*, December 13, 1968.

¹²⁹ See: Franck, "Taking Treaties Seriously", *supra* note 82 at 68; Hurrell and Kingsbury, *supra* note 118 at 24. Sometimes international pressure can be very subtle, for instance the ostracization of a country at a particular meeting for not sending a sufficiently high level of official.

¹³⁰ von Glahn, *supra* note 6 at 7.

¹³¹ Henkin, *supra* note 36 at 52.

¹³² "Taking Treaties Seriously", *supra* note 82 at 68.

¹³³ U.S. GAO Report, *supra* note 3 at 12. Later, at 56, in a Department of State letter to the GAO, the Department suggests that parties play the primary role in inducing each other to comply.

may attempt to provide environmental leadership to demonstrate their stellar environmental stewardship.¹³⁴ The visibility of certain environmental impacts may have sufficient negative potential that the threat of bringing non-compliance to light among the international community can have an important deterrent effect.

4.2.4 Public Opinion and Pressure

Public pressure can be exerted both domestically and internationally. Although for most politicians, domestic public opinion is most directly relevant, world public opinion can also have a strong impact on whether officials and politicians of states ensure compliance with international law. For instance, the efforts of Amnesty International to report violations of international law are well-known around the world. Although "world public opinion" may be difficult to discern, it can be verified through a number of sources.¹³⁵

With increasing global telecommunications, such as the Internet, international public opinion is becoming more easily mobilized and apparent. One recent example was the threat by Oxfam Canada to mount a Canadian tourist boycott of Florida if the U.S. Helms-Burton bill continued to interfere with its charity work in Cuba.¹³⁶

Public pressure can be a key motivating factor towards compliance, particularly if it is exerted within an open and democratic society. A populace that is well-educated on environ-

¹³⁴ An example is former Prime Minister Mulroney of Canada who was the first representative of a developed country to sign the *Biodiversity Convention*, which had the result of providing the momentum and leadership needed to get developed countries to sign: G.V. Buxton, "Sustainable Development and the Summit: A Canadian Perspective on Progress" (1992) 47 *International Journal* 776 at 788.

¹³⁵ von Glahn, *supra* note 6 at 7, raises the problem but does not see UNGA necessarily doing the job, which makes sense as it is a political organ. However, sources of world public opinion can be found in academic and general writings, media, scientific community and NGOs, to name a few. It can also be seen as the cumulative domestic public opinion, which, in developed countries is easily ascertained through polls.

¹³⁶ Juliet O'Neill, "U.S. Compromise fails to Remove Trade-war Threat", *Ottawa Citizen* (July 17, 1996) A1.

mental matters and enjoys a wide range of legal and political rights, along with a well-developed NGO community, will have the most influence on their leaders and negotiators. In such circumstances, governments are forced to be more responsive to the expressed wishes of their electorates.¹³⁷ Most western industrial countries fit this description to some degree.

Non-governmental organizations (NGOs) can play a key role in ensuring that particular issues, such as non-compliance, are kept on the public agenda and debated in the media. Such pressure can also act to encourage compliance with international law.¹³⁸ NGOs also play a key role in public education about environmental issues and have been given credit for the increasingly widespread concern for the environment which has been expressed in recent years. NGOs are more likely to be strong in countries with a strong democratic tradition, and governments of such countries, as mentioned earlier, will need to be more responsive to the criticisms and suggestions of such groups.

On the other hand, the domestic populace of LDCs may not be organized enough to have the same impact: NGO development is usually quite weak, and such people are often faced with political regimes that are less than democratic. As a consequence, rulers of such states are less moved by popular opinion because they can afford to be.¹³⁹ Thus, NGOs tend to play a strong role in most developed countries and one of varying levels weakness in the developing world.

¹³⁷ On the increasing importance of NGOs in the international community, but with a focus on UNCED, see: Andrew Fenton-Cooper and J.-Stefan Fritz, "Bringing the NGOs in: UNCED and Canada's International Environmental Policy" (1992) 47 *International Journal* 796 at 800.

¹³⁸ One example is the Earth Summit "report card" given Canada by domestic NGOs in the past.

¹³⁹ Witness the recent execution of human rights activist Ken Saro-Wiwa and others in Nigeria against both domestic and world opinion. When a Commonwealth action group sought a meeting with Nigerian leader General Sani Abacha, he simply refused. Subsequent sanctions by the Commonwealth were considered weak by some, including Canada: see Aileen McCabe, "Commonwealth's Nigeria Sanctions Fall Short of Tough Economic Pressure", *Ottawa Citizen*, Wednesday, April 24, 1996.

Unfortunately, not all environmental problems attract the full attention they require, whether from the public, NGOs or the international community. For example, daily incremental increases of toxins into the Great Lakes attract far less attention than the possible extinction of a specimen of a particularly attractive species or holes in the ozone layer which cause skin cancer in developed countries. As compliance levers, it would appear that public and peer pressure are more likely to be successful when the environmental issues are made visible and are of crisis proportions.

4.2.5 Domestic Factors

If one accepts the realist perspective that the compliant behaviour of states is the result of a strict cost-benefit analysis, this could suggest that all instances of non-compliance are intentional in nature. While this may be true in the most egregious of cases, such as the invasion of Kuwait or the refusal of North Vietnam to have its nuclear installations inspected as required by treaty obligation, this is not generally true of most non-compliance.¹⁴⁰

The domestic context of an individual state has an important bearing on how it complies with international law.¹⁴¹ One key domestic factor is the prevailing capacity of a state to implement and comply with its international obligations. Poverty and lack of infrastructure in the developing world is a major reason why environmental conventions are not adequately implemented.¹⁴² Achieving compliance by such states requires that this consideration be borne in mind. If a particular environmental problem is primarily one caused by developed

¹⁴⁰ Chayes and Chayes, *supra* note 9 at 9-10.

¹⁴¹ Harold K. Jacobson and Edith Brown Weiss, "Strengthening Compliance with International Environmental Accords: Preliminary Observations from a Collaborative Project" (1995) 1 *Global Governance* 119, describes a project examining the factors at the national level which affect compliance.

¹⁴² Lang, *supra* note 30 at 97.

countries, or if significant new obligations are required of developing countries, it may prove more likely that the international community will be called upon to provide funding or other assistance to LDC's to facilitate their compliance.

Poverty results in a lack of infrastructure, reflected by the very weak governmental and NGO structures in many LDC's. Infrastructure deficiencies may also pertain to law-making capacity or enforcement capability. One of the key reasons that developing countries pushed for an amendment to the Convention to ban the export of hazardous wastes from Annex 7 countries (OECD and Liechtenstein) to non-Annex 7 (developing countries) was because developing country Parties do not have the infrastructure to regulate imports at their borders. So, notwithstanding that a notification to the Secretariat of a domestic ban on imports would have precluded their export from developed countries, developing countries preferred to put the onus on developed countries to prevent the export.¹⁴³ The implementation of IEAs requires complex domestic regulatory implementation because the behaviour being regulated is for the most part not that of states, but of private actors, who must be regulated through a system of rules. Thus the inability of developing countries to control pollution, whether that of locals or multinational corporations, is a serious problem for compliance with international regimes. In contrast, a ban on nuclear testing is something that virtually any state, no matter what capacity it has, can implement--since the prohibition is on the state itself.¹⁴⁴

Information is key to understanding environmental stresses and as a basis for targeting solutions. Poverty is a factor in whether such information is available to governments for

¹⁴³ See Articles 3 and 13 of the *Basel Convention*.

¹⁴⁴ Chayes and Chayes, *supra* note 9 at 13-14.

their decision-making, and whether governments can afford to inform their public and facilitate their participation in environmental decision-making .

Lack of resources for environmental matters may also be a problem in more developed states, but systems are in place to pass appropriate legislation, a suitably qualified public service is in place to negotiate and implement agreements, and enforcement structures exist. While often weak even in the most industrialized countries, at least the institutional structures are available should the will to enforce increase. Financial, technological and technical assistance incentives in environmental treaties are attempts by developed countries to help make environmental goals attainable by LDCs, by addressing some of these capacity-building questions.

Compliance with international law is more likely if a country has a history of compliance with, and respect for, international law.¹⁴⁵ Countries which enjoy a domestic tradition of respect for law will more likely spawn a bureaucracy and foreign service office which engender respect for international law.¹⁴⁶ Although this is generally true, there are cases where cost-benefit analyses can lead even countries with a law-abiding tradition to violate international law.¹⁴⁷

Even where domestic legal systems are fairly developed, the nature of such systems can also have an impact on fulfilment of international legal obligations. If international treaty law automatically becomes a part of a country's domestic law, there is less likelihood that a signed

¹⁴⁵ Henkin, *supra* note 36 at 61-2.

¹⁴⁶ *Ibid.* at 60 and 65; *Compliance and Public Authority*, *supra* note 14.

¹⁴⁷ Re the extraterritorial application of U.S. law, see: "A Half-measure All Wrong on Cuba", *Ottawa Citizen* (July 18, 1996) quoting an excerpt of a July 17 editorial in the *Chicago Tribune*. See a related editorial, "A bill of goods", *Ottawa Citizen* (July 18, 1996) which cites the upcoming U.S. election as the cause of U.S. President Bill Clinton's decision to delay implementation of part of the Helms-Burton bill until after the election.

convention will fail to be ratified, since implementation is less burdensome—in contrast with states which must specifically incorporate international treaties into their domestic law.¹⁴⁸ A federal system, for example, imposes additional burdens which may inhibit the effective implementation of international law.¹⁴⁹ And, domestic national institutions, such as the U.S. Congress (now Republican-controlled), can inhibit a state's ability to effectively meet its international obligations.¹⁵⁰ Some countries do not have departments of state capable of giving the sophisticated legal advice required to assess whether a particular action is in compliance with international law.¹⁵¹ On the other hand, U.S. State Department lawyers have been accused of supporting and justifying state policies of doubtful legality.¹⁵²

Likewise, political leadership can be an important domestic factor¹⁵³: if the leader refuses to comply with international law, or less obviously, fails to exhort compliance with international law, then there is less pressure for conformity on those responsible for interpreting and implementing international obligations domestically.¹⁵⁴

¹⁴⁸ See on this point: L.C. Green, *International Law: A Canadian Perspective* (The Carswell Company Limited, 1988) at 86, para. 45. However, it should be noted that because many environmental treaties are written in terms that are less than operational, even those states for which a treaty automatically forms part of the domestic law upon ratification will require some additional implementation.

¹⁴⁹ For instance, in Canada, the federal government has the legal authority to enter into international agreements, but does not necessarily have the legislative jurisdiction over the subject matter: see the *Labour Conventions* case: *Attorney General for Canada v. Attorney General for Ontario* [1937] A.C.326, (1937) 1 D.L.R. 673 (J.C.P.C.). Consequently, in many situations, including the environment, the provincial governments have to legislate. Even where all jurisdictions within Canada legislate as required, they may later repeal or amend such legislation and bring Canada out of compliance. Or, they might fail to enforce, transmit data, and the like. Similarly, Henkin, *supra* note 33 at 75, mentions this latter situation with respect to the U.S.

¹⁵⁰ Henkin, *supra* note 36 at 75. The U.S. Congress, currently Republican-controlled, has attacked environmental laws in the U.S. The Clinton administration has been hard pressed to counter such moves: John H. Cushman Jr., "Republicans prepare for all-out attack on green programs", *Ottawa Citizen*, July 17, 1995, A-7. The rollback of domestic environmental law, if implementing treaty obligations, can affect compliance with those international obligations.

¹⁵¹ Henkin, *supra* note 36 at 75.

¹⁵² Correll, *supra* note 42 at 359.

¹⁵³ Henkin, *supra* note 36 at 64-5.

¹⁵⁴ Correll, *supra* note 42 at 359.

4.2.6 Enforcement

Strangely, it has been suggested that enforcement is generally not a key factor in obtaining compliance with international agreements.¹⁵⁵ Brierly suggests:

In international law the cause of obedience is apparent on the surface. In both (i.e. municipal and international law) the cause is simply the force of opinion, the conviction of the majority of individuals in the state, and in the international field the conviction of all states, that obedience to law is not a matter for individual choice, but is obligatory. Sanctions, however lawfully organized, cannot be stronger than this conviction upon which they rest, which, indeed, is the only force which gives them their organized form; and if law and public opinion point different ways, the latter ... is always the stronger.¹⁵⁶

To date, the international community has generally been hesitant to prescribe treaty-based sanctions for non-compliance.¹⁵⁷ Furthermore, such mechanisms--where they have been used, have been rarely invoked, and not very effective.¹⁵⁸

A recent study of compliance with international treaties of a regulatory nature, like IEAs, examined treaty-based military and economic sanction, unilateral sanctions and membership sanctions. It concluded that: (1) coercive sanctions are not feasible for routine treaty enforcement; (2) membership sanctions are so momentous that they are rarely used; (3) unilateral, non-treaty sanctions do not provide an effective system for treaty enforcement.¹⁵⁹

¹⁵⁵ von Glahn, *supra* note 6 at 6. suggests: "Assuredly, fear of 'punishment' may on occasion play a part in bringing about a willingness, expressed by word or deed, to abide by the rules of the law. But other and more important causative factors appear to play a part."

¹⁵⁶ Brierly, *supra* note 43 at 202.

¹⁵⁷ Chayes and Chayes, *supra* note 9 at 32-33.

¹⁵⁸ *Ibid.*

¹⁵⁹ Chayes and Chayes, *supra* note 9 at 108.

In the international environmental law field, many agreements do not contain sanctions.¹⁶⁰ As international environmental law is primarily being developed through written mechanisms (i.e. treaties), as opposed to customary international law, one needs to address the types of enforcement mechanisms realistically available for such treaties. This "realism" is dictated by the nature of the international system. Because treaty obligations are adopted voluntarily by states and cannot be imposed on them, so too the range of enforcement mechanisms likely to be agreed to will be affected by the voluntary nature of the legislative system at the international level.¹⁶¹

In developing such mechanisms, one should also take into account the fact that at the international level there is also no mandatory international court to which all disputes must be directed, and no international police force which universally enforces the judgments of such international bodies that do exist.

It has been noted that although a state's fear of sanctions can push it towards compliance, the downside of a more adversarial approach is that once a state decides not to comply until sanctions are applied, further compliance actions may need to be coercive.¹⁶²

Just as enforcement may improve compliance, lack of or ineffective enforcement may provide an incentive for failure to observe the law, especially when there is little risk of detection of violations.¹⁶³ Lack of enforcement may occur when the systems in place are not

¹⁶⁰ Hilary French, "Strengthening Global Environmental Governance", in Linda Starke (ed.) *State of the World 1992* (New York/London: W.W. Norton & Company, 1992) at 163. On the utility of liability rules to solve complex environmental problems, see: Jutta Brunnee, "The Responsibility of States for Environmental Harm in a Multinational Context—Problems and Trends" (1993) 34 *Cahiers de Droit* 781.

¹⁶¹ Victor, *supra* note 82 at 76.

¹⁶² Higgins suggests that U.N. directives being aimed at individual states are more conducive to achieving compliance therewith. The analogy is relevant here.

¹⁶³ Henkin, *supra* note 36 at 72.

capable of doing the job, or where there is a lack of funds available to allow enforcement systems to function appropriately. As noted earlier, this latter problem is not just one in the developing world.¹⁶⁴

Enforcement techniques developed in IEAs can provide help enforce a treaty's rules. Many environmental obligations, although appropriately couched as state obligations, in effect have to be performed by individuals or transnational corporations, with states attempting to enforce such private behaviour. The compliance mechanisms chosen for IEAs can reflect this by providing a menu of choices, depending on the issue. For example, in a number of agreements, such as the *Basel Convention* and the *Convention on International Trade in Endangered Species of Wild Fauna and Flora, (CITES)* there is a specific requirement for states to take enforcement measures at the domestic level.¹⁶⁵ When coupled with reporting, the international system can monitor the effectiveness of the domestic measures being taken to regulate non-state actors.¹⁶⁶

One regional agreement that takes advantage of publicity to ensure domestic law enforcement takes a slightly different approach. The *North American Agreement on Environmental Cooperation (NAAEC)*,¹⁶⁷ an environmental "side agreement" to the *North American Free Trade Agreement (NAFTA)*, allows individuals to complain that one of the three parties to the agreement is failing to effectively enforce its environmental law. Although the remedy available is limited to the creation of a "factual record" which can be made public,

¹⁶⁴ For example, the EC faces its own enforcement challenges. See: Cynthia Pollock Shea, "European Environmental Policy: Effects of the Single Market", *International Environment Reporter*, January 13, 1993, 30 at 32.

¹⁶⁵ *Basel Convention*, Article 9; the *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, March 3, 1973, (1973) 993 U.N.T.S. 243, 1975 C.T.S. No. 32, Article 8 (hereinafter *CITES*).

¹⁶⁶ The *London Convention*, Article VII(2) requires parties to report on such matters.

an avenue is thereby provided at international law for individuals to address domestic enforcement of environmental law.¹⁶⁸

Although this solution works best where the environmental laws of the Parties are of similar breadth and stringency, because the substance of the law is irrelevant to the exercise, this approach provides a legal right to a remedy that can result in public exposure. This takes into account the key factors motivating the behaviour of states, as discussed in section 4.2.4, above.

Compliance can also be affected by the efficacy and mode of follow-up enforcement actions in a situation in which compliance is desired.¹⁶⁹ The availability of judicial adjudication may provide an additional incentive for states to comply with the terms of multilateral conventions.¹⁷⁰ Enforcement of trade disputes through bilateral dispute settlement techniques has become increasingly legalized in nature.¹⁷¹ Because the most recent improvements to the GATT system are new, it remains to be seen whether this increased judicialization will reduce the number of disputes or effectively deal with those that arise. Another consideration is whether such bilateral enforcement techniques, which can provide a clear economic benefit for the complaining state, are relevant in the world of environmental agreements which address the global systems upon which all life depends in all states.

¹⁶⁷ 8 September 1993, Canada-Mexico-United States, 32 I.L.M. 1480.

¹⁶⁸ Articles 14 and 15. A state to state remedy of consultations and dispute settlement, including the possibility of financial penalties (monetary enforcement assessments), exists where one of the parties demonstrates a "persistent pattern" of failure to effectively enforce its domestic law: Part V. For a discussion of both, see: Pierre Marc Johnson and Andre Beaulieu, *The Environment and NAFTA* (Washington, D.C./Covelo, Calif.: Island Press).

¹⁶⁹ Higgins, *supra* note 79 at 43.

¹⁷⁰ Higgins, *supra* note 36 at 44.

¹⁷¹ Chayes and Chayes, *supra* note 9 at 18-21.

In summary, treaty-based sanctions are rarely used in international law; similarly, in the environmental field, cooperation has been the by-word and enforcement has been little utilized. In the next chapter this paper will consider how non-compliance procedures have been utilized in IEAs as a softer enforcement technique, but with the potential for sanctions against parties which are in non-compliance.

4.2.7 Special compliance motivation factors for environmental problems

Chapter 3 noted the peculiarities of environmental problems as part of the international context. In addition to sharing those features mentioned throughout this chapter regarding compliance motivators, this section highlights the additional special characteristics which can be reflected throughout the negotiation and implementation of IEAs.

Transboundary and global environmental degradation brings countries of diverse interests, resources and history to the negotiating table. In the face of such diversity, there is a need to negotiate flexible, innovative provisions which reflect the capabilities of all parties to comply. Because of this diversity and the potential for conflicts, there may also be the need for special mechanisms to resolve inter-state complaints.¹⁷²

Many environmental problems require multilateral solutions, either on a regional or global basis. Therefore, the interest of all other states parties is involved when violations of such international environmental norms occur. Thus, unlike trade disputes, for example,

¹⁷² Regarding natural resource conflicts, see: Cairncross, *supra* note 114.

where bilateral dispute resolution mechanisms are generally appropriate, environmental treaties may need multilateral dispute resolution processes.¹⁷³

As regards norms, not all environmental issues present the same challenge. Some can be more easily put into normative terms and more clearly yield incidents of non-compliance, while others are more ambiguous to describe and detect. For instance, where emissions are permitted within certain parameters but not prohibited outright, it may be more difficult to determine incidents of non-compliance. On the other hand, IEAs with absolute prohibitions of releases provide a more cut-and-dried set of circumstances for determining compliance and non-compliance.¹⁷⁴ Although both situations present challenges, the former is of a particularly difficult nature as will be illustrated by the case study on the *Framework Convention on Climate Change*.¹⁷⁵ In addition, attention to free-riding will be an important component in establishing norms, as free riding will affect overall compliance levels within the treaty.

The trend in this field to utilize written treaties to establish the rules of the international community is important. As noted earlier, through negotiations there is an opportunity for states to attempt to achieve a reasonable accommodation of their interests. To the extent that the negotiation process is successful in engaging states, those states will more likely be motivated to comply with the treaty rules which result.¹⁷⁶

Irreversibility is one characteristic which makes many environmental issues inherently crisis issues. Even where reversible, such as is possibly the case with the ozone layer, it may

¹⁷³ Victor, *supra* note 82 at 76. Although it could be argued that bilateral mechanisms can be surrogates for multilateral solutions, the unique features of IEAs outlined in Chapter 5 suggest that states tend not to raise bilateral complaints, thereby reducing the utility of bilateral dispute resolution provisions.

¹⁷⁴ For instance, in the case of the *Montreal Protocol*, which is moving to phase out ozone-depleting substances: Victor, *supra* note 82 at 71.

¹⁷⁵ *Ibid.* at 72.

take decades to repair the damage--a prospect which is not much better. This crisis aspect may assist the international community to accept a review of individual state performance--especially if also linked to a "level playing field" for economic interests. Ironically, waiting until a problem is a full-fledged crisis may result in the international community agreeing to obligations that they might not have otherwise.¹⁷⁷ Of course, such an approach risks being too little, too late.

The irreversibility of some environmental problems, such as species extinction or climate change, may encourage states to adopt approaches that are preventive or precautionary in nature both in substantive rules, and in procedural rules such as monitoring and reporting. In certain circumstances, measures sufficiently strong to deter future transgressions may be agreed to during negotiations, if negotiating states can be convinced of such irreversibility through adequate scientific substantiation. Approaches such as inspections, from another area of potential irreversibility--nuclear non-proliferation--might be agreed to in such a context. When an environmental problem is of such potentially catastrophic proportions, monitoring and up front prevention can be an important component of any non-compliance process.

Another peculiar feature of environmental problems is their dynamic nature--changes in the scientific understanding of the problem, of product substitutes, and of technology can constantly generate new approaches and call for further actions. Consequently, procedures in an agreement which address enforcement and compliance issues must be able to respond quickly and flexibly, within a regime which features these same qualities.

¹⁷⁶ Chayes and Chayes, *supra* note 9 at 4-7.

¹⁷⁷ The *Montreal Protocol* is a case in point. When the *Vienna Ozone Convention* was signed in 1985, major countries such as Germany were not fully convinced of the problem. However, by 1987, they became convinced by the scientific data and the *Montreal Protocol* was negotiated and signed within nine months.

The economic costs of complying with environmental obligations can be huge, for instance in the biodiversity and climate change fields.¹⁷⁸ Thus, while such costs may inhibit the undertaking of difficult obligations, once those obligations are assumed these economic outputs will likely reinforce the multilateral interest in seeking compliance with the treaty.¹⁷⁹ On the other hand, parties who may have given up more than others during the negotiations may be more likely to violate its terms.¹⁸⁰

4.3 Summary of Factors Motivating State Compliance

The foregoing review of the literature suggests a number of principles can serve as the foundation for improving the negotiation and implementation of IEAs from a compliance perspective.

(i) Presumptive compliance

- (a) UNEP and other international organizations sponsoring negotiations can enhance the legitimacy of the negotiating process by ensuring that such processes are equitable,¹⁸¹ and by emphasizing the symbolic importance of the negotiations process through ceremony and the use of high-level/ministerial meetings
- (b) promotion of the use of soft law¹⁸² (i.e. non-binding) instruments as precursors may enhance the likelihood of binding rules being eventually adopted and followed.

¹⁷⁸ Lang, *supra* note 30 at 97.

¹⁷⁹ U.S. GAO Report, *supra* note 3.

¹⁸⁰ Chayes and Chayes, *supra* note 9 at 7.

¹⁸¹ Equitable negotiations can include funding travel of developing countries to negotiations, sponsoring workshops information workshops in conjunction with negotiations, and ensuring appropriate developing country representation on the bureau of the negotiating committee.

¹⁸² See the discussion of “soft law” in section 5.1.1, below.

- (c) development of treaty obligations which are clear increases the likelihood that the rules will be enforceable
- (d) regular review of IEAs to ensure they are up-to-date is likely to keep the agreements credible, which may assist in compliance efforts.

(ii) Self-interest

- (e) negotiating countries need to examine the nature of the legal rules under discussion and their context, in order to isolate cost-benefit factors which will promote compliance, and deter non-compliance
- (f) UNEP and other international organizations, as well as negotiating states, can build on collective self-interest by ensuring that sound scientific analysis is available at the outset of negotiations to the extent possible

(iii) International Reputation/Peer Pressure

- (g) parties can promote compliance with agreed upon rules by developing processes which ensure that incidents of non-compliance become known
- (h) promotion of opportunities for positive leadership in the environmental field can enhance the value of positive peer perception

(iv) Public Opinion and Pressure

- (i) transparency in reporting and decision-making processes, and in non-compliance outcomes, can ensure that the public will become aware of incidents of non-compliance
- (j) parties to treaties can facilitate the role of NGOs in ensuring that IEAs are adhered to
- (k) parties can play a role in facilitating and promoting public education about environmental problems and their causes, and in furthering the participation of the public in environmental decision-making

(v) Domestic Factors

- (l) strengthening of domestic legal institutions can further compliance with IEAs
- (m) during negotiations, recognition of, and attention to, domestic infrastructure issues which make compliance difficult for developing countries, are important

(vi) Enforcement

- (n) because the international legislative system is voluntary in nature, the availability of a wide range of enforcement options may make them more palatable, and allow for tailoring to the nature and sources of the environmental problem being addressed

(vi) Special Problems in the Environmental Field

- (o) because of the diverse range of parties and the importance of environmental issues to the planet, IEAs may benefit from compliance mechanisms which allow inter-state complaints
- (p) for treaties dealing with environmental degradation which is irreversible, more emphasis should be considered for preventive and transparent compliance processes, such as monitoring and reporting, than on after the fact sanctions
- (q) where an environmental problem is characterized by rapid change, compliance mechanisms which reflect the need for speed and flexibility may be more successful
- (r) a multilateral focus in non-compliance processes may better reflect the broad environmental and economic interest of all states party in the behaviour of other states party.

CHAPTER 5: PRACTICAL COMPLIANCE LESSONS: EVALUATION OF CURRENT INTERNATIONAL REGIMES

This chapter examines the compliance aspects of international regimes which have reasonably successful compliance results, have developed an interesting approach to compliance, or provide lessons about techniques to avoid. It draws on experiences from the international environmental, human rights, labour, and nuclear non-proliferation contexts.

5.1 Uncertainty and Asymmetry of Obligations

Environmental regimes provide a good example of some of the problems associated with unclear or asymmetrical obligations.

5.1.1 uncertainty

In many environmental conventions, the parties' obligations are not clearly stated. Thus, the use of a treaty format does not necessarily ensure that "hard" obligations will ensue.¹⁸³

While "softness" may refer to the form of the instrument not being binding (i.e. UNGA Declarations), it can also refer to ambiguity of an obligation contained in a hard format. This latter form of softness is the focus of the present discussion.

¹⁸³ While "softness" may refer to the form of the instrument not being binding (i.e. UNGA Declarations), it can also refer to ambiguity of an obligation contained in a hard format. This latter form of softness is the focus of the present discussion. For a detailed discussion of soft law, see: Christine M. Chinkin, "The Challenge of soft law: development and change in international law" (1989) 38 *Int'l & Comp. L.Q.* 850, and on this point at 851.

Because the international system is a decentralized one, it tends to produce norms that are more ambiguous than in domestic legal systems.¹⁸⁴ Since states cannot be bound by treaty obligations without their consent, there is a process of usually protracted negotiations during which the provisions of a convention are essentially drafted by committee, with all of the compromises and ambiguity that this implies.¹⁸⁵ Further, because the membership in the international community is quite diverse, with interests that may be constantly in flux, as in the negotiation of global environmental treaties, the compromises can be complex and create inconsistencies within an agreement text.

Another reason for ambiguity in IEAs is the recent trend in environmental agreements to use a generally worded framework agreement, coupled with subsequent Protocols which provide for more stringent obligations. Such an approach, although providing greater negotiating flexibility than traditional approaches, results in a "significant degree" of indeterminacy of norms in the framework agreement produced.¹⁸⁶ Many international situations which warrant regulation are difficult to capture in precise legal terms.¹⁸⁷ Or, situations can occur where parties agree on the norm, but not on the activity or event that is the subject of the non-compliance allegation. Attempts have been made to avoid this in

¹⁸⁴ *Compliance and Public Authority*, *supra* note 14 at 36. For an interesting article arguing for a centralized legislature for promulgating international environmental standards, see: Palmer, *supra* note 5.

¹⁸⁵ This has even been a problem in the EC where the text of Directives is the result of "political compromises" of just 12 Member States: Robert H. Donkers, "Enforcing Environmental Agreements Within the European Community", in *International Enforcement Workshop* (Utrecht, The Netherlands: Ministry of Housing, Physical Planning and Environment, 1990) 303 at 305.

¹⁸⁶ "Environmental Security", *supra* note 35 at 6.

¹⁸⁷ *Compliance and Public Authority*, *supra* note 14 at 43 puts this the opposite way: "...many important international prescriptions are intrinsically difficult to put into operation in real-world situations."

certain fields like arms control and drug control with the use of principles of zero tolerance.¹⁸⁸

Ambiguity has two results: it may be difficult to know whether convention goals have been achieved¹⁸⁹ or whether the prescribed standards have been complied with. For instance, in the *Bonn Convention*, the term "migratory species", the essential element being regulated, was so vague that the Parties had to clarify it through guidelines adopted by the Second Conference of the Parties.¹⁹⁰ Until such clarification, compliance would have been difficult to determine.

Under the *Basel Convention*, Parties have a number of obligations which turn on the meaning of the phrase, "environmentally sound management".¹⁹¹ Although the term is defined in the Convention,¹⁹² it lacks sufficient precision to provide the guidance needed by Parties to understand the full extent of their obligations.¹⁹³ A key provision of the Convention is Article 4.5, which prohibits Parties from shipping hazardous wastes to or from a non-Party. Article 11 provides a key dispensation from that rule where the Party has entered into an agreement or arrangement that provides for environmentally sound management "compatible with" that provided under the *Basel Convention* or equal to environmentally sound management as provided under the Convention.¹⁹⁴ A lack of certainty about this key term could put in jeopardy one of the fundamental tenets of the Convention. Although a Technical

¹⁸⁸ Chayes and Chayes, *supra* note 9 at 121.

¹⁸⁹ *Effectiveness*, *supra* note 3 at 8. As mentioned in ch. 1, effectiveness is beyond the scope of this paper

¹⁹⁰ Boyle and Birnie, *supra* note 52 at 472.

¹⁹¹ Articles 4.2(e), 4.2(g), 4.8, 4.10 and 11. Article 4.2(d) refers to environmentally sound and efficient management.

¹⁹² See Article 2.

¹⁹³ This phrase has been the subject of criticism: see Katharina Kummer, *International Management of Hazardous Wastes* (Oxford: Clarendon Press, 1995) at 57.

Working Group has developed a number of guidelines which provide guidance on what environmentally sound management means in various contexts, and with respect to different types of hazardous wastes,¹⁹⁵ this remains a concern because the term is still evolving. In short, ambiguity in the wording of a provision can have a serious negative impact on compliance with international obligations, even where the will to comply is present.

5.1.2 Asymmetry of obligations

A new trend in environmental agreements is to include asymmetrical or differential obligations to reflect parties' different situations, either as a source of the environmental problem¹⁹⁶ or their ability to take measures to combat it. Recent examples are the *Framework Convention on Climate Change* and the *Convention on Biological Diversity*. Other rationales which have been offered for that asymmetry are that it promotes broad state acceptance of agreements, while avoiding the problem of the "lowest common denominator",¹⁹⁷ it can facilitate international cooperation, and can help offset a lack of reciprocity in a regime by acting as an incentive.¹⁹⁸

Two types of a asymmetry will be the focus here: those which provide for different substantive obligations for the parties in very specific terms, and those which provide for generalized asymmetry in ambiguous terms. An example of the first type is the *Montreal Protocol*, which provides LDC's with a ten-year grace period before having to meet their

¹⁹⁴ The different standard depends on whether the agreement or arrangement pre-dates or post-dates the coming into force of the *Basel Convention*.

¹⁹⁵ Kummer, *supra* note 193 at 58.

¹⁹⁶ "Environmental Security", *supra* note 35 at 9. And see the preamble and Article 3 of the *FCCC*, which reflect the responsibility of industrialized countries for the climate change problem.

¹⁹⁷ *Lessons Learned*, *supra* note 11 at 5-9.

¹⁹⁸ "Environmental Security", *supra* note 35 at 9.

obligations.¹⁹⁹ Although it has been suggested that asymmetrical obligations have ensured greater universality of participation,²⁰⁰ others have cautioned that in the case of the *Montreal Protocol*, the asymmetrical concessions given could, in fact, cancel out emissions reductions by developed countries.²⁰¹ However, at least with the *Montreal Protocol* approach, the asymmetry is destined to be phased out over time.

Handl suggests that regimes which utilize asymmetry of this type can be problematic in the long run, citing the *Nuclear Non-Proliferation Treaty*²⁰² as one which, by sanctioning different treatment of nuclear "have" and "have not" states, has continuously suffered in its implementation and has almost come apart.²⁰³ There are also higher administrative costs in a regime which provides for different obligations among the parties.²⁰⁴ But more importantly, asymmetry can greatly reduce the effectiveness of supervisory procedures.

In the long term, shielding developing countries from taking on obligations either permanently or temporarily can harm their progress in moving towards sound environmental management practices domestically. Thus, issues of North-South equity arguably should be dealt with through alternative mechanisms or the environment might well suffer.²⁰⁵

Asymmetry of this type therefore appears best-suited to be addressed on a case-by-case basis, and where found necessary, a more reasonable compromise would be for states to

¹⁹⁹ Article 5.

²⁰⁰ *Lessons Learned*, *supra* note 11 at 6.

²⁰¹ Richard Elliot Benedick, *Ozone Diplomacy* (Cambridge, Mass./London: Harvard University Press, 1991) at 151.

²⁰² *Treaty on the Non-Proliferation of Nuclear Weapons*, 161 U.N.T.S. 72.

²⁰³ "Environmental Security", *supra* note 35, at 9. Chayes and Chayes, *supra* note 9 at 132 state: "Although the NPT is in many ways an extremely successful international agreement, the basic discrimination between weapon and non-weapon states has cast a shadow on its legitimacy that has plagued it throughout its history and has at times even seemed to threaten its survival."

²⁰⁴ *Ibid.*

²⁰⁵ *Ibid.* at 10.

consider phasing it out over time. This would result in a gradual tightening of obligations for LDC's which would eventually lead to the same obligations shared by developed countries. From an environmental protection point of view, permanent asymmetry may not be tenable in many circumstances.²⁰⁶

The second type of differentiated obligation is more generalized and is typified by such introductory phrases in obligations such as, "as appropriate", "in accordance with their capabilities" and "as far as possible". Where obligations are prefaced by subjective terminology which imparts the message, "each according to their ability or circumstance", it would be difficult to determine if any party is either compliant or non-compliant. Although in the climate change and biodiversity contexts, these two problems were cited to be the "common concern of mankind", resulting in the adoption of the principle of "common but differentiated responsibility"²⁰⁷ to address them, not all environmental agreements will fall into this category. Further, this type of general asymmetry may not implement the principle appropriately.

Ambiguous asymmetry arguably could detract from compliance because a weakening of obligations for one category of state could be perceived as implying that the environmental problem in question is perhaps not so serious after all, thereby undermining the rule with which compliance is sought.

²⁰⁶ For instance, the planet cannot long afford to have China not bound by obligations to reduce greenhouse gas emissions because of its current and potential output. See chapter 6.

²⁰⁷ Advisory Committee on Protection of the Sea, *ACOPS Background Paper on the Legal Regime, Institutional and Financial Arrangements for the Conference on Funding and Institutional Issues for the Washington Action Programme on Protection of the Marine Environment from Land-based Activities*, 1995, at 13 (hereinafter ACOPS). The paper suggests that this principle is "a recognition of the reality that the contributions of developed and developing States to global environmental problems such as climate change are different and that their economic and technical capacity to tackle these problems also differs widely."

To summarize, although asymmetrical obligations can be useful in the formation of a regime, they may be contrary to compliance objectives in the short run and environmental objectives in the long run, the former by making supervision extremely difficult, and the latter by allowing some parties to fall behind in addressing domestic environmental concerns. Phased out asymmetry may be a useful compromise where environmental goals would not be unduly harmed. Generalized asymmetry is generally unhelpful.

5.2 Reporting

5.2.1 General

Reporting forms the backbone of subsequent compliance efforts within an international regime. Reports provide information about the activities which parties are undertaking to comply with, and implement, a treaty's provisions. The regime's transparency, the importance of which was highlighted in Chapter 4, is determined by the nature of reporting provisions and responses to them.²⁰⁸ In the human rights field, three main remedies exist to enforce provisions of international human rights instruments: reporting, individual complaints and inter-state complaints. The primary method used is the obligation to compile state reports and have these considered by independent review processes.²⁰⁹

Reporting, accompanied by joint public review, is also a common method of compliance control in environmental agreements.²¹⁰ Reporting is the key element of supervision of

²⁰⁸ Chayes and Chayes, *supra* note 9 at 154.

²⁰⁹ Scott Leckie, "The Inter-state Complaints Procedure in International Human Rights Law: Hopeful Prospects or Wishful Thinking?" (1988) 10 *Hum. Rts. Q.* 249 at 253. On reporting, see: Ineke Boerefijn, "Towards a Strong System of Supervision: The Human Rights Committee's Role in Reforming the Reporting Procedure Under Article 40 of the Covenant on Civil and Political Rights" (1995) 17 *Hum. Rts. Q.* 766.

²¹⁰ *Effectiveness*, *supra* note 3 at 13.

compliance, because reports provide the information necessary to assess parties' compliance, determine the effectiveness of agreements and targeting of assistance,²¹¹ and meet a number of other purposes.²¹² Although some argue that the main purpose of reporting is an assessment of overall and individual state implementation of the IEA, and not to detect individual cases of non-compliance,²¹³ reporting can be a useful trigger for non-compliance procedures (e.g. *Montreal Protocol*) and it can also serve a rudimentary verification function in the developmental stages of IEAs without non-compliance procedures.

There is extremely wide variance in the reporting quality under IEAs.²¹⁴ Experience has shown that under many environmental agreements, parties' reporting has often been late and incomplete.²¹⁵ The U.S. General Accounting Office analysis of reporting under eight important environmental agreements²¹⁶ documented a number of reasons why parties failed to report,²¹⁷ including: lack of financial and technical resources, lack of political priority, and lack of enthusiasm for reporting.²¹⁸

Research also shows that reporting levels under international human rights agreements are not very high. Although lack of capacity accounts for the non-reporting for many of the

²¹¹ U.S. GAO Report, *supra* note 3 at 23.

²¹² See Annex 1 for a detailed list of the purposes which reporting plays in various international environmental agreements.

²¹³ Sachariew, *supra* note 12 at 41.

²¹⁴ *Ibid.* at 42; *Effectiveness*, *supra* note 3 at 13.

²¹⁵ U.S. GAO Report, *supra* note 3 at 3-4.

²¹⁶ The eight agreements were: The *Basel Convention*, *MARPOL*, *CITES*, the *International Whaling Convention*, the *NOx Protocol*, the *International Timber Agreement*, the *Montreal Protocol*, and the *London Dumping Convention*.

²¹⁷ U.S. GAO Report, *supra* note 3 at 23-28.

²¹⁸ For full details as they relate to the reasons for poor reporting under particular agreements, see Annex 2.

violators, it has been suggested that non-reporting by some countries has been a conscious effort to avoid the supervisory system.²¹⁹

5.2.2 Form and timing of reports

Successful reporting regimes provide for a standard form for reports. This ensures comparability of data and a more objective assessment of the implementation of the agreement.²²⁰ Ideally, guidelines on the form of reporting should be as detailed as possible.²²¹

For example, the International Labour Organisation, which has a supervisory regime that is recognized internationally as successful,²²² has the Governing Body adopt forms of report for each ILO Convention.²²³ In the environmental field, two approaches to provision of reporting formats have been used. An example of a non-legislated approach is the "Outline of Major Reviews", a model for annual reports provided by the LRTAP Executive Body pursuant to its general powers to oversee implementation.²²⁴ An example of inclusion in a convention text is the U.N. ECE *Convention on Environmental Impact Assessment*, which specifically provides outlines of reports in an annex.²²⁵

As part of the process of submission of reports, exact reporting deadlines are required,²²⁶ as any ambiguity can operate as an excuse not to report in a timely manner and honest confusion

²¹⁹ Chayes and Chayes, *supra* note 9 at 161.

²²⁰ Sachariew, *supra* note 12 at 44-5.

²²¹ Ineke Boerefijn, Aalt-Willem Heringa & Jeroen G.C. Schokkenbroek, "Towards a New System of Supervision for the European Social Charter" (1991) 46 *International Commission of Jurists Review* 42 at 48-9.

²²² See Leckie, *supra* note 209 at 277. See also Victor, *supra* note 81 at 76, footnote 32.

²²³ International Labour Organization, *International Labour Standards*, (Geneva, undated) at 16. Article 22 of the ILO Constitution provides in part: "These [annual] reports shall be made in such form and shall contain such particulars as the Governing Body may request."

²²⁴ Sachariew, *supra* note 12 at 44. The Executive Body was created under the *LRTAP Convention* to supervise implementation of the Convention, and continues to play a key institutional role in the Conventions' protocols.

²²⁵ Article 13, Annex V.

²²⁶ Sachariew, *supra* note 12 at 42.

can result when deadlines are not clear. Timeliness is critical in ensuring that the supervisory process is effective, and tight linkages should be made with non-compliance procedures when reports are not received in a timely fashion.

5.2.3 Content of reports

The content of reports in environmental agreements has in the past varied from extreme generality ("measures adopted by them in the implementation of this Convention and of protocols to which they are a party")²²⁷ to determined specificity.²²⁸ Environmental agreements have typically required reports on measures taken to implement a treaty, such as: the legislative, administrative, technical and other measures taken to implement the provision of a convention;²²⁹ calculation of specific emissions;²³⁰ statistical data related to the base measurement year;²³¹ tracking of permits, where trade is monitored through a permit system, along with details about the environmental resource being tracked;²³² records of imports and exports;²³³ identification of competent authorities;²³⁴ measures adopted in addition to

²²⁷ *Vienna Ozone Convention*, *supra* note 2, Article 5.

²²⁸ Examples are Article VIII of *CITES* and Article 13 of the *Basel Convention*.

²²⁹ Sachariew, *supra* note 12 at 26. Examples are *MARPOL*, Article 11(1)(a), and *CITES* Article VIII (7)(b) regarding enforcement.

²³⁰ *LRTAP SO₂ Protocol*, *supra* note 2, Article 4; *LRTAP NO_x Protocol*, *supra* note 1, Article 8. Regarding the importance of this provision, see: Peter M. Lawrence, "International Legal Regulation for Protection of the Ozone Layer: Some Problems of Implementation" (1990) 2 J. of Env. L. 17 at 47.

²³¹ For example, Article 7 of the *Montreal Protocol*.

²³² *CITES*, Article VIII.7(a); *Basel Convention*, Article 13. The mere existence of a permit system does not guarantee that reports will be required on permits issued. For example, the London Dumping Convention reporting requirements do not require reports on the number of special and general permits issued by parties, although parties are required to report on "the nature and quantities of all matter permitted to be dumped and the location, time and method of dumping...".

²³³ This is required under *CITES* and the *Basel Convention* which are trade systems, as mentioned, but also is required under agreements such as the *Montreal Protocol*, Article 7, to track reductions of controlled substances worldwide.

²³⁴ Article 13 of the *Basel Convention*.

convention measures and requirements;²³⁵ specimens of certificates;²³⁶ list of reception facilities, including location, capacity and available facilities;²³⁷ annual statistical reports on penalties imposed for infringement of a convention;²³⁸ statistics on the environmental and human health effects of the regulated activity.²³⁹

Other agreements require reporting of actual success in meeting treaty obligations, such as the requirement in the new Protocol amending the London Convention, which requires information to be reporting on waste actually dumped. Environmental agreements could also usefully report on difficulties encountered in implementing the agreement and measures taken to overcome the difficulties.²⁴⁰ A new trend in international law, having origins in the IMF, OECD and more recently the WTO, requires parties to report on future policies and programs in the subject area of the treaty. This provides a strong tool for managing overall compliance.²⁴¹ Other interesting reporting requirements come from the ILO, which also requests whether employers' or workers' organizations have provided comments to the government on the application of the particular convention.²⁴² And, the ILO Governing Body can request countries to report with respect to the extent to which their law and practice gives

²³⁵ Article VI.3 of the *London Convention*.

²³⁶ Article 11, *MARPOL*.

²³⁷ *Ibid.*

²³⁸ *Ibid.*

²³⁹ Article 13 of the *Basel Convention* requires parties to provide information on available qualified statistics compiled on effects on human health and environment from the generation, transportation and disposal of hazardous or other wastes.

²⁴⁰ Boerefijn, Heringa & Schokkenbroek, *supra* note 221 at 49. Also included in the *London Convention* amendment proposals referred to, *supra* note 4.

²⁴¹ Chayes and Chayes, *supra* note 9 at 167.

²⁴² This latter question is important because governments must provide to the most representative of those organisations copies of the reports they have sent to the ILO: *International Labour Standards*, *supra* note 223 at 16-17.

effect to the provisions of an unratified Convention or of a Recommendation; and the difficulties preventing or delaying ratification of a Convention.²⁴³

5.2.4 Supervisory machinery for reporting

The effectiveness of international environmental reporting processes are often called into question on two grounds: one, that they are self-assessment systems and two, that they lack tough follow-up provisions.²⁴⁴ Reports are submitted to various institutions, some to existing organizations, such as the IMO,²⁴⁵ or to a Conference of the Parties, a Secretariat or an Executive Council.²⁴⁶

While some institutional bodies are merely given the role of passing on information to parties, others are authorized to "review implementation", which includes an implied authorization to review reports.²⁴⁷

In the international human rights and labour fields, the review is done on a country by country basis by an expert panel.²⁴⁸ Environmental conventions traditionally have sent state reports to technical or secretarial bodies, which collate them and consolidate them for the Conference of the Parties.²⁴⁹ This reduces the ability to verify the record of individual countries and reduces public accountability, which is a key lever in the behaviour of states. To adequately address this issue, the supervisory institution could be authorized to assess the implementation record of each party against the legal standard, to request additional

²⁴³ *Ibid.* at 17.

²⁴⁴ *Ibid.* at 41. Sachariew lists as examples of the latter as states out of compliance not being specifically named, a finding of "non-compliance" is usually avoided, and no sanctions are applied.

²⁴⁵ For reports under Article 11 of *MARPOL*.

²⁴⁶ Sachariew, *supra* note 12 at 41.

²⁴⁷ *Ibid.* at 30.

²⁴⁸ *Ibid.* at 47.

information and to make recommendations to improve implementation.²⁵⁰ In addition, the reviewing body could be provided with the right to "guesstimate" data should parties fail to report, but allowing for parties' corrections.²⁵¹

Experience in the human rights and labour fields also demonstrates that these review processes are most effective when NGOs are participants in them, thus opening such processes to the public and playing on the sensitivity which many states demonstrate to public opinion.²⁵² In the environmental field, individuals and national and international NGOs are playing an increasingly important role in reviewing the implementation of treaty obligations.²⁵³ NGO participation plays on the key factor of publicity and helps counter the self-interested aspects of a reporting system. Their presence can add to public meeting discussions as another pressure point, as they can challenge the correctness of reports or provide their own.²⁵⁴

These experiences suggest that there could be a more formal role demarcated for NGOs in the reporting process in IEAs.²⁵⁵ Some examples, discussed in more detail in 5.6.2, below, could be to give them a role as part of the Conference of the Parties to form a tripartite type system like that of the ILO, to include or improve the right to be consulted, or to even elevate NGOs to expert panels to review reports.

²⁴⁹ *Ibid.* at 33.

²⁵⁰ *Ibid.*

²⁵¹ Sachariew provides as an example of the Executive Body of the *LRTAP Convention*: *ibid.* at 43.

²⁵² Boerefijn, Heringa & Schokkenbroek, *supra* note 221 at 48-9; Sachariew, *supra* note 12 at 48-50.

²⁵³ Sachariew, *supra* note 12 at 34, fn 9 states: "NGOs are considered an important factor in the process of monitoring and of verification of compliance with the 1989 *Basel Convention*..".

²⁵⁴ Boerefijn, Heringa & Schokkenbroek, *supra* note 221 at 46-7: to be successful, such groups need the right to have access to domestic environmental information.

²⁵⁵ Sachariew, *supra* note 12 at 48-50.

It is critical during review of reports that countries whose report is at issue be present during the discussions and prepared ahead of time for the questions the body will ask.²⁵⁶ The body should also be given the authority to make recommendations to particular countries.²⁵⁷

Once comments have been directed at a state, ILO experience suggests that there must be a mechanism through which responses are monitored, followed up and returned to the body for further review. And, periodic reports could be made public, such as through UN information centres in the particular country.²⁵⁸

Lastly, the reporting procedures should be linked with the non-compliance procedures discussed below, in order to ensure that for persistent non-compliance there will be a list of sanctions or measures to be taken which is pre-established²⁵⁹ and to avoid encouraging non-reporting as a method of avoiding supervision.

5.2.5 Summary and Conclusions

Reporting does and should occupy a central role in the supervision of implementation of international environmental agreements in order to ensure that those agreements are working effectively. The form, deadlines and content of reports are more effective when clearly specified in a detailed manner. Reporting must be part of an overall supervisory mechanism, which includes follow-up on incomplete, vague or missed reports and be closely linked to non-compliance procedures. To strengthen such systems, there will be the need to augment and clarify the role of the reviewing body, ensure data is provided on a country basis, allow for questioning of individual countries by the supervisory body, include a more formal role

²⁵⁶ *Ibid.* at 51; Boerefijn, Heringa & Schokkenbroek, *supra* note 221 at 49.

²⁵⁷ Boerefijn, Heringa & Schokkenbroek, *supra* note 221 at 50.

for NGOs in reporting, and provide mechanisms for follow-up after supervisory and non-compliance procedures are utilized.

5.3 Convention Institutions

5.3.1 General

The term “institutions” is used here to refer to the following bodies typical of IEAs: Conference of the Parties (or similar body), any subsidiary body established or authorized to be established, and the secretariat.²⁶⁰ Because of the specific way these institutions have developed within the environmental field, the discussion which follows makes somewhat fewer references to non-environmental agreements than other portions of this Chapter.

5.3.2 Environmental agreements

Environmental conventions have developed two basic models of international supervision:

1. regular meetings/conferences of the parties, with continuity provided by a secretariat; and
2. establishment of a formal commission in which member states are represented.²⁶¹

This paper examines the former because it is the structure utilized in the *Climate Change Convention* and is the model which has been more frequently used in recent global environmental treaties.²⁶²

²⁵⁸ *Ibid.*

²⁵⁹ Sachariew, *supra* note 12 at 48, supports the need for measures in the event of non-compliance.

²⁶⁰ See Alan E. Boyle, "Saving the World? Implementation and Enforcement of International Environmental Law Through International Institutions" (1991) 3 *J. Env. L.* 229 at 230, describes "institutional machinery in the form of intergovernmental commissions and meetings of treaty parties...". This paper goes further because there are additional convention institutions which are relevant for compliance purposes.

²⁶¹ Boyle and Birnie, *supra* note 52 at 165.

²⁶² For example, regular meeting of the parties approach has been used in key global conventions like CITES, the *Basel Convention*, the *Montreal Protocol*, the *FCCE*, and the *Biodiversity Convention*, and regional agreements, such as the *LRTAP Convention*. Examples of the Commission approach are: the *1974 Convention for the*

This model constitutes the Conference of the Parties as the primary institution within the treaty context, charged with overseeing implementation of the treaty. It is typically assisted by subsidiary bodies, and usually accompanied by a secretariat, each with a role to play in the compliance process. Each of the foregoing institutions will be examined here.

5.3.2.a Conference of the Parties

A Conference of the Parties is established in most recent IEAs, and usually meets on a regular basis; sometimes that regularity is established in the convention and sometimes it is left for the Conference of the Parties to decide.

The Conference of the Parties is essentially a political body: it is a gathering of those who have negotiated an agreement for the purposes of furthering its implementation. Yet, it may also be called upon to discharge functions of a quasi-judicial nature, such as when an implementation committee refers cases of non-compliance to it for review.²⁶³

The COP is usually established as the ultimate authority for a Convention, with powers to make decisions concerning: rules of procedure;²⁶⁴ the consideration and adoption of protocols and amendments;²⁶⁵ advisory functions;²⁶⁶ the promotion of the harmonization of appropriate policies, strategies and measures for minimizing harm to human health and the environment

Prevention of Marine Pollution from Land-Based Sources (Paris) U.K.T.S.64 (1978), Cmd. 7251; 13 I.L.M. 352 (1974); the 1976 *Rhine Pollution Conventions*, 16 I.L.M. 242, 265 (1977); the 1972 *Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft* (Oslo), 932 U.N.T.S.3, 11 I.L.M. 262 (1972); the 1980 *Convention on the Conservation of Antarctic Marine Living Resources* (Canberra), U.K.T.S.48 (1982), 19 I.L.M. 837 (1980); and the 1946 *International Convention for the Regulation of Whaling*, 161 U.N.T.S. 72, U.K.T.S.5 (1949), Cmd.7604 (the only global one); Boyle and Birnie, *supra* note 52 at 165.

²⁶³ Gehring, *supra* note 6 at 53.

²⁶⁴ *Industrial Accidents Convention*, Article 18.2(e); *Basel Convention*, Article 15.3.

²⁶⁵ *Basel Convention*, Article 15.5(d).

²⁶⁶ *Industrial Accidents Convention*, Article 18.2(b).

by the regulated substance;²⁶⁷ the consideration and undertaking of any additional action that may be required for the achievement of the purposes of the Convention.²⁶⁸

In addition to these broad powers, there are usually powers provided with direct relevance to monitoring and assessing compliance: review of implementation of the convention;²⁶⁹ the establishment of working groups or subsidiary bodies;²⁷⁰ receiving and considering reports received from the Secretariat or any Party.²⁷¹

Although "review of implementation" is typical language in IEAs, Conferences of the Parties are not generally given the specific authority to review "compliance" with the agreement and methods of improving both compliance and effectiveness. While one might argue that effectiveness and implementation reviews include compliance, implementation duties are so broad that the COP might never focus on them. Further, isolating compliance in COP powers provides the backdrop against which all other compliance aspects of an agreement can be linked. For instance, the subsidiary bodies could be specifically charged with examining records of compliance, helping to improve compliance, etc.

The role of the Conference of the Parties in the review of compliance is therefore not very clear. In the section on reporting, *supra*, it was shown that while reports are usually clearly required to go through the Secretariat to the CoP, the CoP's role in their review could be more

²⁶⁷ *Basel Convention*, Article 15.5(a).

²⁶⁸ *Basel Convention*, Article 15.5(c); related provisions: *Industrial Accidents Convention*, Article 18.2(d); *LRTAP*, Article 10.2(c).

²⁶⁹ This wording is used in the *Industrial Accidents Convention*, Article 18.2(a) and the *LRTAP Convention* Article 10.2(a). Variations on this wording are: "continuous review and evaluation of the effective implementation of the convention" (*Basel Convention*, Article 15.5); and to make recommendations for improving the effectiveness of the Convention (*CITES*, Article XI.3(e)).

²⁷⁰ *Industrial Accidents Convention*, Article 18.2(c); *LRTAP Convention*, Article 10.2(b); *Basel Convention*, Article 15.5(e).

²⁷¹ *CITES*, Article XI.3(d).

clearly stated.²⁷² It could be given powers to receive the report, review it (not just review "implementation"), review individual country performance, ask for additional information (from Parties and other sources, including NGOs and call countries to appear before it. It could also be clearly outlined what options it has in cases of non-compliance (or non-reporting) and the linkages of those options with any non-compliance procedure.

One key omission in powers given to COPs in IEAs is the power to make legally binding decisions with respect to non-compliance: typically, the COP is restricted to making non-binding decisions. Although Parties to IEAs have traditionally supported only the latter, the 1995 refusal by the Russian Federation to agree to a Decision restricting their trading rights under the *Montreal Protocol* has brought this issue to a head, with the result that Russia has to date successfully resisted a consensus Decision effectively applying trade sanctions against it, taking advantage of uncertainties about the legal force of decisions of the Meeting of the Parties made pursuant to the non-compliance procedure, as well as sensitivities about directly confronting Russia.²⁷³ The discussion below on non-compliance procedures will focus specifically on this issue and whether harder or softer approaches are more effective in obtaining compliance. The bottom line: to make legally binding decisions, the COP must have such authority in the Convention text.

²⁷² The *LRTAP Second SO2 Protocol* provides a rare instance of this in Article 7.2: "Upon consideration of a report, and any recommendations, of the Implementation Committee, the Parties, taking into account the circumstances of a matter and in accordance with Convention practice, may decide upon and call for action to bring about full compliance with the Protocol, including measures to assist a Party's compliance with the Protocol, and to further the objectives of the present Protocol.

²⁷³ See the Report of the Seventh Meeting of the Parties to the *Montreal Protocol on Substances that Deplete the Ozone Layer*, UNEP/OzL.Pro.7/12, 27 December 1995, at paras. 76, 123-34. At the Thirteenth Session of the Implementation Committee, Russia was not confronted directly on the refusal to accept the decision of the Parties: see Report of the Implementation Committee under the Non-Compliance Procedure for the Montreal Protocol on the Work of its 13th Meeting, UNEP/OzL.Pro/ImpCom/13/3, 28 March 1996. See a more extensive discussion of the Russian situation in section 5.4.2, below.

The role of the CoP is frequently not very clear with respect to its relationships with other compliance bodies, as some of the functions described above could reasonably be conducted by subsidiary bodies, such as experts committees or implementation committees.²⁷⁴ In addition, the Secretariat will also have a role to play in compliance achievement. Consequently, the role of all of these institutions and their interrelationships should be clearly demarcated.²⁷⁵

5.3.2.b Secretariat

Environmental agreements using the Conference of the Parties model usually ensure institutional continuity and follow-up through the use of a Secretariat. Sometimes the Secretariat services are provided by a staff set up specifically for a treaty regime, but in the past some NGOs or UNEP have also provided these services. Secretariats can prove to be a valuable cornerstone of a compliance system within a treaty regime. Typical duties and functions of a Secretariat include: (1) to arrange for and service meetings of the parties;²⁷⁶ (2) to coordinate with other relevant international organizations and to enter into contractual and other arrangements as may be required;²⁷⁷ (3) to prepare and transmit reports based on information received under various agreement sections to the parties, including from subsidiary bodies and, as appropriate, from intergovernmental and non-government bodies;²⁷⁸

²⁷⁴ Victor, *supra* note 82 at 80, suggests the need for the compliance aspects of a treaty to form part of an integrated treaty, the effect of which is enhanced by such integration.

²⁷⁵ Manfred Mohr, "The Turin Protocol of 22 October 1991: A Major Contribution to Revitalizing the European Social Charter" (1992) 3 *E.J.I.L.* 362.

²⁷⁶ *Basel Convention*, Article 16.1(a); *CITES* Article XII.2(a); *LRTAP Convention*, Article 11.

²⁷⁷ *Vienna Ozone Convention*, Article 7.1(d); *Basel Convention*, Article 16.1(b).

²⁷⁸ *Basel Convention*, Article 16.1(b); *Vienna Ozone Convention*, Article 7.1(b); *Montreal Protocol*, Article 12(c).

(4) prepare reports on its activities;²⁷⁹ (5) receive and convey information from and to Parties in various areas;²⁸⁰ (6) other duties assigned by the Parties.²⁸¹

The functions allocated to the CITES Secretariat are somewhat broader than those allocated in other environmental conventions.²⁸² The areas entrusted to the Secretariat which are most relevant to the achievement of compliance are:²⁸³

- if the Secretariat receives information which satisfies it that any Appendix I or II species is being adversely affected by trade in specimens of that species, or that the provisions of the convention are not being adequately implemented, it is required to communicate that information to the Management Authority of the Party concerned.
- undertaking scientific and technical studies authorized by the CoP to study reports of the Parties and to request further information it deems necessary to ensure that the Convention is properly implemented to invite the attention of the Parties to any matter pertaining to the aims of the Convention
- to prepare annual reports to the Parties on its work and the implementation of the Convention and other reports the Parties may request
- to make recommendations for the implementation of the aims and provisions of the Convention.

The Secretariat is therefore given sufficient authority to take an active role in verifying compliance. In fact, the CITES Secretariat acts more like an implementation committee than most secretariats, although it is not authorized to conduct inspections on the territory of parties. However, it can play a key role in alerting the Conference of the Parties to

²⁷⁹ *Basel Convention* Article 16.1(c); *Vienna Ozone Convention*, Article 7.1(d).

²⁸⁰ *Basel Convention*, Article 16.1(g); *LRTAP Convention*, Article 11(b); *CITES*, Article XII.2(f).

²⁸¹ *Basel Convention*, Article 16.1(k); *CITES*, Article XII.2(i); *LRTAP Convention*, Article 11(c).

²⁸² This statement is borne out by a review of various conventions; see also: U.S. GAO Report, *supra* note 3 at 29.

compliance problems which surface in reports, especially when reports from different countries contain conflicts which are evidence of a lack of compliance.²⁸⁴ The Secretariat can also play an important role in ensuring that compliance matters are placed on the agenda of the Conference of the Parties and it can file reports and make recommendations which can improve compliance with the Convention.²⁸⁵ The U.S. General Accounting Office found in a recent study that Secretariats generally do not verify or assess compliance, although many secretariat officials believe that they have a good sense of any major compliance problems. Secretariat officials generally view themselves as facilitators and coordinators.²⁸⁶ Obviously, the CITES Secretariat is an exception in the role it plays in assessing compliance.²⁸⁷

Nevertheless, provisions with potential for encouraging compliance are contained in other agreements. For instance, the *Basel Convention* provides Secretariat functions which are more diverse than those of other conventions, and which may be of considerable use in achieving compliance. For example, while the Secretariat is to facilitate information exchange regarding sources of technical assistance and training, available technical and scientific know-how, sources of advice and expertise and availability of resources, these functions are specifically linked to parties' obligations under the Convention, such as the

²⁸³ Article XII.

²⁸⁴ Simon Lyster, *International Wildlife Law* (Cambridge: Grotius Publications Limited, 1985) at 271 points out the following example: "...in 1979 the Secretariat notified South Africa that although it had reported exporting a total of 300 kilogrammes of ivory to Hong Kong in the last six months of 1978, Hong Kong had reported imports of 16,300 kilogrammes from South Africa over the same period. South Africa, which was being used to "launder" ivory obtained elsewhere, subsequently tightened up its controls. By cross-checking dubious trading documents with the issuing Management Authority, the Secretariat was able to verify fifteen cases of forgeries in 1980 alone, and information supplied by the Secretariat to Management Authorities has led to the initiation of criminal proceedings against the offending trader in several instances."

²⁸⁵ Chayes and Chayes, *supra* note 9 at 275, suggest that "the international secretariat influences action through its control of the organizational routine."

²⁸⁶ U.S. GAO Report, *supra* note 3 at 30.

²⁸⁷ *Ibid.*, at 29.

monitoring of hazardous wastes, and the handling of the notification system. Another duty that could help facilitate compliance with obligations is the duty to provide to parties upon request information on consultants having the necessary technical competence in the field to assist them in assessing a shipment of wastes which they have reason to believe will not be managed in an environmentally sound manner.²⁸⁸ The Convention also requires the Secretariat to communicate with focal points and competent authorities, which is a useful way to track activities and detect problem areas before they become compliance issues.²⁸⁹ And even more critical to a solid compliance function is the requirement that the Secretariat assist Parties (upon request) in their identification of cases of illegal traffic and to circulate immediately to the Parties concerned any information it has received regarding illegal traffic.²⁹⁰ In sum, the *Basel Convention* includes provisions that provide the Secretariat with the potential to pursue compliance more aggressively, should the Parties choose to move in this direction.²⁹¹

Other interesting features that could strengthen the ability of a secretariat to encourage compliance is that contained in the *Montreal Protocol*, where the Secretariat is to notify the Parties of any request for technical assistance received so as to facilitate the provision of such assistance. This provides the opportunity for states with the capacity to help those lacking it to comply with the Protocol.²⁹² Another feature of the *Montreal Protocol* Secretariat is that it

²⁸⁸ Article 16.1(h).

²⁸⁹ Article 16.1(e).

²⁹⁰ Article 16.1(i).

²⁹¹ A first meeting on compliance issues was held in June 1996 by a working group of legal and technical experts. A focus on utilizing the full strength of the current legal framework will be a sensible point of departure for that group: see UNEP, Report of the Consultative Sub-group of Legal and Technical experts on the Work of its First Session, UNEP/CHW/LSG/1/3, 20-21 June 1996 (hereinafter *Basel Compliance Report*).

²⁹² Article 12 (d).

is required to encourage non-Parties to attend the meetings of the Parties as observers and to provide as appropriate to non-Parties the information and requests sent to Parties.²⁹³

Environmental agreements with a clearly delineated role for the secretariat will be better able to manage compliance issues.²⁹⁴ States negotiating IEAs should consider whether it is the appropriate vehicle to assess parties' performance, whether it should merely provide administrative support, or perform a role somewhere in between. It would be very natural for states to object to the secretariat taking a more aggressive role in promoting compliance, given sensitivities about national sovereignty. However, retaining key compliance powers within Implementation Committees or the COP should not preclude negotiators of IEAs from providing powers to a Secretariat which can fully support the other institutions involved in addressing compliance issues. Secretariats are generally understaffed and under-resourced, sometimes precluding them from fulfilling their duties. For instance, CITES, including the Secretariat, is funded by the Parties, but has never had a budget approved with enough funds to cover all activities necessary to implement the Convention.²⁹⁵ Funding has been considered inadequate as well for the Secretariat of the *London Convention* and *MARPOL*.²⁹⁶ The secretariats for the *Montreal Protocol* and *Basel Convention* had to make up shortfalls from additional UNEP funds because the Parties failed to meet their required

²⁹³ Article 12 (e) and (f).

²⁹⁴ Chayes and Chayes, *supra* note 9 propose a compliance management model, rather than a sanctions-based approach for addressing non-compliance.

²⁹⁵ U.S. GAO Report, *supra* note 3 at 31-2. As an example, officials have indicated that Parties "regularly have not approved funding requested by the secretariat for studies to help determine whether certain species should be protected under CITES and for certain technical assistance." In the case of some secretariats, while there may not necessarily be funding shortfalls, there has been some instability in funding which has been made up for by UNEP. UNEP, however, indicates that parties' cannot continue to act in this way and must fulfill their financial obligations. *Ibid.* at 32.

²⁹⁶ *Ibid.* at 31.

contributions. UNEP has indicated in the past that it cannot continue to make up such shortfalls.²⁹⁷

Thus the funding of secretariats is an issue that is critical to compliance if they are to monitor the behaviour of parties, follow up on inadequacies and generally facilitate compliance. The most appropriate arrangement may be to maintain secretariats in administrative and facilitative roles, but with clearly specified follow-up responsibilities, allowing them to make compliance recommendations to the COP, and ensuring that they are adequately funded.

5.3.2.c Subsidiary Body for Implementation Issues

A number of environmental agreements have included implementation bodies, some in the text of the agreement,²⁹⁸ others not.²⁹⁹ Although experience in the environmental field with such bodies is limited to date, a number of other fields of international law have created bodies designed to further compliance with, and implementation of, treaties. Although the functions assigned to an implementation committee will vary from treaty to treaty, and will be discussed in section 5.4 below, it may be useful to discuss models which have enjoyed some success.

This section discusses the role and functions of subsidiary bodies under the *European Social Charter (ESC)* and ILO. The *European Social Charter* has experienced difficulties with its supervisory process³⁰⁰ and a Protocol was recently negotiated to address many of

²⁹⁷ *Ibid.* at 32.

²⁹⁸ For example, the *FCCC* and the *LRTAP Second SO2 Protocol*.

²⁹⁹ The *Montreal Protocol* and the *Basel Convention*, for example.

³⁰⁰ Mohr, *supra* note 275; Boerefijn, Heringa & Schokkenbroek, *supra* note 221.

these concerns.³⁰¹ Under the *European Social Charter*, the body most relevant for present purposes, the Committee of Experts, deals with the legal aspects of compliance. In addition to dealing with individual instances of non-compliance, the Experts Committee can also make general statements regarding interpretation of the Charter, thus facilitating the building up of practices and precedents.³⁰²

Members are required to have recognized competence in national and international social issues, be independent, impartial and available.³⁰³ The experience under the ESC was that seven members were too few. Under the Protocol this has been expanded to nine or more.³⁰⁴ Greater numbers can assist in handling the workload more effectively, provide for balanced representation from member states, and permit the establishment of smaller working groups which have proven effective in other systems.³⁰⁵ Independence of members was felt to be preserved by having them elected by the Parliamentary Assembly.³⁰⁶

The lack of clarity of the role of this Committee had been a problem that reduced the efficiency of the supervisory system,³⁰⁷ and resulted in tensions, ineffectiveness and the doubling of the workload.³⁰⁸ The Protocol amendments more clearly relegated the legal sphere to the Experts Committee, leaving the next level of review, the Sub-Committee of the Governmental Social Committee of the Council of Europe, to deal more with systemic violations.³⁰⁹ Thus, final legal interpretation of the ESC has been left with the Committee of

³⁰¹ Mohr, *supra* note 275 at 362.

³⁰² *Ibid.* at 365.

³⁰³ *Ibid.* at 364.

³⁰⁴ *Ibid.* at 363.

³⁰⁵ *Ibid.*

³⁰⁶ Boerefijn, Heringa & Schokkenbroek, *supra* note 221 at 44.

³⁰⁷ *Ibid.* at 43; Mohr, *supra* note 275 at 364.

³⁰⁸ Mohr, *supra* note 275 at 364.

³⁰⁹ *Ibid.* at 364.

Experts, with the other bodies having the responsibility of promoting the continuing fulfilment of legal obligations--a more political role. There is effectively no appeal provided from a decision of the Committee of Experts.³¹⁰ An earlier weakness which has been cured in the Protocol provisions allows for oral hearings between the Committee of Experts and representatives of the Parties. These can deal with non-compliance, allow the Committee to offer praise where deserved, and allow for parties to demonstrate compliance.³¹¹

The ESC experience provides an illustration of the importance of a clear process. The fact that the Parties did not necessarily address issues raised by the Expert Committee reduced the authority of that body and the overall effectiveness of the supervisory process.³¹² Therefore, where there is more than one level of review, one level of review must logically flow through to the next. In addition, the ESC experience suggests that while a small working group can address compliance, it needs to be large enough to be representative and effective.

The ILO provides for a Committee of Experts on the Application of Conventions and Recommendations consisting of experts in the area of international labour law and administration. To ensure its independence, the Committee is appointed for three-year periods and is accountable only to the Governing Body of the ILO to which it submits a report on its work.³¹³

This Committee meets every year for two weeks, but has developed efficiencies by studying government reports year-round, thus enabling the two-week meeting to focus on

³¹⁰ *Ibid.* at 365. Boerefijn, Heringa & Schokkenbroek, *supra* note 221 at 45, suggest in their article, which predated the Protocol, that the conclusions of the Expert Committee should be binding with respect to interpretation of the *Charter* and whether it has been complied with.

³¹¹ Mohr, *supra* note 275 at 366.

³¹² Boerefijn, Heringa & Schokkenbroek, *supra* note 221 at 43.

³¹³ *International Labour Standards*, *supra* note 223 at 21.

problem cases, especially with ratified Conventions. Once the Committee's observations are incorporated in its report, it is sent to member states for their consideration before the annual Conference. The report also includes a factual survey of the law and practice in the subject area which was selected for reporting that year. At the June Conference, states may be asked to clarify some of the Committee's Report before the Conference. In addition, minor or technical points are addressed directly to governments which are asked to address them in their next reports, and therefore are not included in the Committee's Report.³¹⁴

This Report, together with explanations given by governments, is discussed at the Conference Committee, which is a tripartite committee made up of government, workers' representatives and employers' representatives. The Conference Committee takes up the most serious cases and issues and discusses them, inviting governments to explain to the Committee their difficulties in meeting their obligations and the measures they are taking in overcoming them. The Committee's discussions and conclusions are reported to the Conference Plenary.³¹⁵

It should also be noted that once representations from employers' or workers' organizations or complaints by states are made, conclusions and recommendations by the relevant examining bodies are followed up on by the aforementioned Committees.³¹⁶

The Montreal Protocol's Implementation Committee was established by a Decision of the Parties to the Protocol.³¹⁷ It consists of ten Parties providing equitable geographic representation, elected for two-year terms. It meets semi-annually. The functions of the

³¹⁴ *Ibid.*

³¹⁵ *Ibid.* at 24.

³¹⁶ *Ibid.* at 27.

³¹⁷ Fourth Meeting of the Parties, November 1992: UNEP/OZL.Pro4/L.1/Rev.2.

Implementation Committee are strictly related to the non-compliance procedures discussed in section 5.4, below.

5.3.3 Summary and Conclusions

The ESC provided a model for a subsidiary body that makes binding legal findings--its role was clearly delineated, and members were independent experts. The ILO established a Committee of Experts which handled review of reports and the most serious issues of non-compliance resulting from those reports or other parts of the supervisory process. It had a clear relationship to the next level of review. In contrast, the Implementation Committee of the Montreal Protocol consists of Parties, elected by the Meeting of the Parties, and not independent legal experts. However, it too is small in number in order to operate more effectively. It is not empowered to make binding legal decisions.

For an Implementation Committee to be an effective part of a supervisory system, the following elements appear necessary: (1) in composition, it must be small, but representative; members must be appropriately qualified, and--where legal conclusions are to be reached--it might be useful if they are independent of governments; (2) functionally some of the considerations are:

- whether the role is to be an independent body making binding decisions, or a recommendatory body, will depend on the needs of the particular regime; international human rights and labour regimes rely heavily on interpretations of fundamental rights to guide government action; environmental regimes will each have to determine whether they value accurate legal decisions for their regime

- whether it is desirable for the regime that the subsidiary body be empowered to make general statements about the legal interpretation of the agreement
- whether the reporting cycle of which the IC is a part should ensure that all cases or a representative sampling are examined by the CoP.

(3) operationally, the following features could be beneficial:

- members be appointed by the CoP for terms long enough to allow them to gain experience
- that the Committee's role be clearly delineated in the agreement provisions and coordinated with that of the Secretariat and the Conference of the Parties
- that it be allowed to examine cases of individual countries both in writing and orally
- that its conclusions automatically be made public
- that NGOs be allowed to provide input to the IC.

5.4 Non-compliance Procedures

5.4.1 General

Non-compliance procedures are a new phenomenon in IEAs and the first such procedure was developed by the Parties to the *Montreal Protocol*. Prior to this time, Parties could only resort to customary international law and the *Vienna Convention on the Law of Treaties*³¹⁸ on breach of treaty, the dispute resolution provisions of the particular IEA, or peer pressure at meetings of the parties, based on information gleaned from sources including reporting.³¹⁹

³¹⁸ 500 U.N.T.S. 95 (in force 1980).

³¹⁹ Patrick Szell, "Implementation Control: Non-compliance Procedure and Dispute Settlement in the Ozone Regime" in *The Ozone Treaties*, *supra* note 27 at 43. For an excellent article comparing traditional breach of treaty remedies with non-compliance procedures see Koskenniemi, *supra* note 3. On breach of treaty generally, see: Shabtai Rosenne, *Breach of Treaty* (Cambridge: Grotius Publications Limited, 1985).

These three options were considered too weak for the strong normative system being developed in the *Montreal Protocol* and the critical need for ozone protection.³²⁰ Further, the *Vienna Convention on the Law of Treaties* does not bring with it automatic remedies or sanctions. The dispute resolution provisions have not been invoked in any environmental treaty,³²¹ perhaps reflecting the general reluctance that states have in invoking such procedures,³²² and peer pressure may not always be successful in obtaining compliance, especially when data is not readily forthcoming.³²³

5.4.2 The *Montreal Protocol* Non-Compliance Procedures

Thus, the Parties to the Protocol developed, and in 1992 adopted by Decision of the Meeting of the Parties, non-compliance procedures under the *Montreal Protocol*.³²⁴ The framework for this unique approach has been adopted in other IEAs³²⁵ and will be analysed in detail in this section.

Article 8 of the *Montreal Protocol*, entitled, "Non-Compliance", required the Parties at their first meeting to consider and approve procedures and institutional mechanisms for determining non-compliance with the Protocol and for treatment of those found in non-compliance.³²⁶

³²⁰ *Ibid.* at 44.

³²¹ *Ibid.*

³²² Chayes and Chayes, *supra* note 9.

³²³ *Ibid.*

³²⁴ The procedure was approved at the Fourth Meeting of the Parties, November 1992: UNEP/OZL.Pro.4/L.1/Rev.2.

³²⁵ See discussion below.

³²⁶ This is reiterated in Article 11.3(d) wherein the agenda for the First Meeting of the Parties was to, among other things, consider and approve the procedures and institutional mechanisms specified in Article 8.

An Ad Hoc Working Group of Legal Experts on Non-Compliance developed interim non-compliance procedures which were approved by the Second Meeting of the Parties,³²⁷ with the final non-compliance procedures being adopted at the Fourth Meeting of the Parties.³²⁸

The procedure establishes an Implementation Committee,³²⁹ whose role is defined throughout the non-compliance procedures (NCP). The Implementation Committee consists of ten Parties elected for two-year terms on the basis of equitable geographic distribution and is to meet semi-annually.

The NCP allows any Party having "reservations regarding another Party's implementation of its obligations under the Protocol" to address such concerns in writing to the Secretariat, with the Secretariat providing a copy of the submission to the alleged violator. Any reply and supporting information are to be provided to the Secretariat and the "Parties involved" within three months or such longer period as may be required. The Secretariat then transmits all of the foregoing to the Implementation Committee.

The NCP recognizes the interests that all Parties have regarding compliance, as there is no suggestion that the Party be "affected" before it can complain. Unfortunately, however, follow-up on the complaint is restricted to the "Parties involved" and then to the Implementation Committee, which then reports to the Meeting of the Parties. The Implementation Committee conducts its work behind closed doors, and even Parties not members of the Committee are excluded.

³²⁷ London, June 27-29, 1990: UNEP/OzL.Pro.2/3.

³²⁸ UNEP/OzL.Pro.4/15, Annex IV, 25 November 1992. All further references to the NCP are from this document.

³²⁹ Paragraph 5.

Another interesting requirement is that the submission be supported by "corroborating information". Although such a requirement may seem reasonable on its face, in some situations it will be impossible to provide strict corroboration without having the right to enter the territory of another state and inspect, something the Implementation Committee itself is only allowed to do "upon the invitation of the Party concerned."³³⁰ A more flexible wording might have suggested a submission "accompanied by reasons for the belief that non-compliance has occurred." "Corroboration" has a meaning which implies sufficient information at an evidentiary level, whereas it is the essence of the work of the Implementation Committee to consider whether non-compliance has occurred³³¹ and to obtain the information required to make that assessment.

Another trigger for the non-compliance procedures arises when the Secretariat prepares reports based on information received from Parties regarding Articles 7 and 9 of the Convention.³³² When possible non-compliance comes to the attention of the Secretariat in this manner, it can request the Party to furnish necessary information about the matter. If there is no response within three months (or such longer period as the circumstances may require) or it is not resolved through administrative action or diplomatic contacts, then the Secretariat is to include it in its report to the Meeting of the Parties and inform the Implementation Committee.

The third method by which non-compliance can be brought forward is through self-reporting, where a Party addresses its submission and reasons to the Secretariat for transmittal

³³⁰ Paragraph 7(d).

³³¹ Paragraph 7(a).

to the Implementation Committee. In recent cases involving Belarus, Ukraine, Bulgaria, Poland and Russia, the Implementation Committee deemed the NCP to have been triggered in this manner.³³³

The Implementation Committee is empowered to seek further information³³⁴ on matters under consideration and to undertake information-gathering in the territory of the Party concerned, but only on that Party's invitation.³³⁵ The Implementation Committee is also to maintain links with the Executive Committee of the Multilateral Fund regarding financial and technical cooperation.³³⁶ However, the Multilateral Fund does not have as part of its mandate to refer issues of non-compliance to the Committee.³³⁷

The basis on which the Implementation Committee is to consider submissions and related information is with a view to securing an "amicable solution of the matter on the basis of respect for the provisions of the Protocol."³³⁸ This approach is supported by Decision IV/5³³⁹ which states: "responsibility for legal interpretation of the Protocol rests ultimately with the Parties themselves." This conciliatory approach is conveyed in the potential outcomes from the Parties who can "decide upon a call for steps to bring about full compliance with the

³³² Article 7.2 requires Parties to report annually statistical data on its production, imports and exports to Parties and non-Parties of controlled substances. Article 9 requires Parties to cooperate in promoting research, development and exchange of information.

³³³ UNEP, *Report of the Implementation Committee under the Non-compliance Procedure for the Montreal Protocol on the Work of its Tenth Meeting*, UNEP/OzL.Pro/ImpCom/10/4(1995) at para.31.

³³⁴ Paragraph 7(c).

³³⁵ Paragraph 7 (d).

³³⁶ Para. 7(e) of the procedure.

³³⁷ Victor, *supra* note 82 at 77.

³³⁸ Paragraph 8.

³³⁹ UNEP/OzL.Pro.4/15, 25 November 1992.

Protocol, including measures to assist the Parties' compliance with the Protocol, and to further the Protocol's objectives."³⁴⁰

Follow-up on Parties' decisions regarding non-compliance has been left rather vague. The "Parties involved" are to inform the Meeting of the Parties about implementation of a decision by the Parties or the results of proceedings taken under Article 11 of the *Vienna Convention*.³⁴¹ Two points arise from this. First, follow-up should be carried out by an institutional body, such as the Secretariat, which would report further non-compliance to the Implementation Committee. Second, the linkages between the non-compliance procedure and the Article 11 process are unclear. When does a non-compliance issue get elevated to an interpretation/application dispute? What is the relationship between the international law of countermeasures, Article 11 and the NCP?³⁴²

Accompanying the procedure when it was submitted for approval by the Fourth Meeting of the parties were two lists: An Indicative List of Possible Situations of Non-Compliance with the Protocol (Annex V) and an Indicative List of Measures that Might be Taken by a Meeting of the Parties in Respect of Non-Compliance with the Protocol (Annex VI).

Annex V listed the following possible situations of non-compliance--Article 2 (control measures), Article 4 (trade), Article 7 (data), failure to cooperate in and report Article 9 activities, Article 10 (non-payment of contributions to financial mechanism), Article 10A (failure to take "every practicable step" consistent with programs supported by the financial

³⁴⁰ Paragraph 9.

³⁴¹ Paragraph 12.

³⁴² The relationship of the NCP with Article 11, as well as international law generally is discussed in Martti Koskenniemi, *supra* note 3.

mechanism for technology transfer, and lastly, "non-compliance with the obligations in decisions of the Parties to the Protocol."

This Annex was not adopted by the Meeting of the Parties, and one of the key reasons was a disagreement about whether contributions to the financial mechanism were voluntary or legally binding.³⁴³

However, Annex VI was adopted and lists three measures which might be taken by a Meeting of the Parties to address non-compliance:

- appropriate assistance (technical, financial, data collection, technology and information transfer, training)
- issuing cautions
- suspension of specific rights and privileges under the Protocol, in accordance with the applicable rules of international law governing the suspension of the operation of a treaty, including those concerned with industrial rationalization, production, consumption, trade, technology transfer, financial mechanism and institutional arrangements.

To date, the *Montreal Protocol's* NCP has focused primarily on failures to report data, slowly developing its modus operandi and reputation.³⁴⁴ Its supervision has resulted in improved reporting.³⁴⁵ Reporting markedly improved when countries were specifically named

³⁴³ "Whether Accelerated Phase-out Deadlines Apply to Developing Countries Unresolved", *International Environment Reporter*, December 2, 1992, at 772 (hereinafter "Accelerated Phase-out Deadlines"). The United States position is that the contributions are voluntary.

³⁴⁴ Victor, *supra* note 82 at 59; Hugo Maria Schally, "The Role and Importance of Implementation Monitoring and Non-compliance Procedures in International Environmental Regimes", in *The Ozone Treaties*, *supra* note 30, 82 at 86.

³⁴⁵ Victor, *supra* note 82 at 65; Szell, *supra* note 319 at 47, fn 9.

in Committee reports.³⁴⁶ Many observers agree that this careful build up was required before the Committee could take more aggressive action.³⁴⁷

Yet, it has also been recognized that the process, having been established by a non-legally binding Decision of the Parties, is theoretically weaker than if it had been established in the Protocol itself.³⁴⁸ Further, its inability to make binding decisions, but only recommendations, also means that it is in the precarious position of having to use diplomatic means to achieve its results.³⁴⁹

This was made particularly clear at the Seventh Meeting of the Parties, which was the culmination of over a year's worth of Committee meetings on the first case involving non-compliance with phase-out obligations. Five countries (Belarus, Bulgaria, Poland, Russia, Ukraine) intended to submit a request for a five-year grace period to a Meeting of the Parties, but instead were routed through the Committee.³⁵⁰ Because their non-compliance situations were less egregious, the Committee eventually dealt with the cases of Poland and Bulgaria separately. Belarus, Ukraine and Russia were consulted by the Committee, which developed recommendations for the Meeting of the Parties to address the compliance issues. The Belarus and Ukraine Decisions were adopted unanimously by the Parties as written by the IC.

The Russian Decision (VII/18) was subject to a last-minute change from developing countries to ensure its application to them. As with the Belarus and Ukraine decisions, this decision was intended to, among other things, preclude Russia from trading controlled

³⁴⁶ Victor, *supra* note 82 at 65.

³⁴⁷ *Ibid.* at 59, 61. Szell, *supra* note 319 at 48-9; Schally, *supra* note 344 at 86.

³⁴⁸ Szell, *supra* note 319 at 46.

³⁴⁹ Victor, *supra* note 82 at 67.

substances outside the Commonwealth of Independent States. And, conversely, it was to prohibit developed country parties from importing from Russia. Developing countries noted that the Belarus, Ukraine and Russian decisions had neglected to include developing countries in the reference to imports. Although the chair ruled that the two earlier decisions could not be reopened, the Russian decision was reopened to include developing countries, along with a reference of this nature to the Belarus and Ukraine decisions. Unfortunately, the wording which was proposed late in the evening without translation resulted in language more ambiguous than that in the Belarus and Ukraine decisions—even though the intent was the same as evidenced by the fact that the three draft decisions were identical. Russia refused to agree to the Decision, unlike Belarus and Ukraine, but the Chairman nevertheless ruled that it was a consensus decision of the Parties to adopt it.³⁵¹

Although it has been suggested that there was a tacit understanding by the Implementation Committee that the Russian Federation would not receive critical Global Environment Facility (GEF) funding which it sought unless its case was satisfactorily resolved under the NCP,³⁵² the Report of the Thirteenth Meeting of the Implementation Committee indicates that while the Committee was satisfied that Russia had taken important steps towards fulfilling the requirements of Decision VII/18, there were many additional points on which information was needed.³⁵³ Further, the Russian Federation was to monitor

³⁵⁰ *Ibid.* at 60.

³⁵¹ Seventh Meeting of the Parties to the Montreal Protocol, *Report*, UNEP/OzL.Pro.7/12, 27 December 1995, para. 132.

³⁵² Victor, *supra* note 82 at 66, fn 14, and 70.

³⁵³ Thirteenth Meeting of the Implementation Committee of the Montreal Protocol, *Report*, UNEP/OzL.Pro/ImpCom/13/3. In fact no representative from the Russian Federation appeared at the meeting, despite an invitation to do so. At the end of the meeting, a representative from the Russian Federation's Permanent Mission in Geneva appeared merely to announce that the meeting would be getting no further information than it had already received.

and report on the implementation of the trade restrictions referred to in the Decision. Despite the fact that Russia clearly has some way to go, the GEF funds have since been released.³⁵⁴ One must therefore question how effective the Committee was in its first instance of non-compliance, although it must be noted that Russia has not withdrawn from the Protocol, one very real danger, and efforts are ongoing to improve Russia's compliance. However, it remains to be seen whether the Russian situation will bring the non-compliance procedures into disrepute, or provide the stimulus to augment efforts to ensure that they are effective.

As can be seen, drawing the line between an adversarial (with legally binding results) and a facilitative process is difficult to do, particularly when the withdrawal from the Protocol of a country like Russia could be extremely damaging to the Protocol's goals. Although a more cooperative approach has generally been recommended, it has been suggested that the door be left open to more adversarial approaches.³⁵⁵

The role of the Conference of the Parties in the non-compliance procedures is something that needs further study. The CoP in recent environmental agreements has functioned in both a political and quasi-judicial manner.³⁵⁶ The negotiating of an agreement and the development of protocols, amendments, and implementation policies and procedures takes place through the political process of negotiation--nothing very new. What is new is the development of non-compliance procedures, under which the Conference of the Parties is now exercising powers of judgement over the performance of states, adding a new alternative process to

³⁵⁴ "Russia: Nation Gets \$80 Million in Grants from GEF", *International Environment Reporter*, June 12, 1996, 529.

³⁵⁵ Victor, *supra* note 82 at 70-71.

³⁵⁶ Martti Koskenniemi, "Book Reviews" (1991) 2 Y.I.E.L. 390 at 391 (hereinafter "Book Reviews").

traditional dispute resolution mechanisms, which have fallen into disuse.³⁵⁷ A number of concerns about the role of the Conference of the Parties arise from this move towards non-compliance procedures.

First, the Conference of the Parties may not necessarily be strictly governed by international law when it makes its decisions about non-compliance. Using the *Montreal Protocol* as an example, the basis upon which the Meeting of the Parties makes its decision is "steps to bring about full compliance with the Protocol, including measures to assist the Parties' compliance with the Protocol, and to further the Protocol's objectives."³⁵⁸ There is no requirement that international law outside the Protocol be consulted and the Meeting of the Parties is not required to deal with all cases of non-compliance.³⁵⁹ Consequently, the Parties may ignore rules of international law that they deem unsuitable in the circumstances, and can also draw upon normative rules developed within the regime that may have a status somewhat less than formal international law.³⁶⁰ Even if the Convention were drafted to avoid this problem, it is doubtful that the COP is the appropriate forum for discussion of matters of a primarily legal nature. Decisions might end up being based on political considerations, or might be handled without the certainty and precedential approach of a court, thus harming the

³⁵⁷ Gehring, *supra* note 34 at 51.

³⁵⁸ Fourth Meeting of the Parties to the *Montreal Protocol* on Substances that Deplete the Ozone Layer, November 23-25, 1992, UNEP/OzL.Pro.4/L.1/Rev.2, para. 9 of the non-compliance procedure.

³⁵⁹ Gehring, *supra* note 34 at 52-3.

³⁶⁰ As an example of the former, Gehring cites at 52 the law on state responsibility and liability for damage a state may cause due to non-compliance; as regards the latter, Gehring, *supra* note 34 suggests that *Montreal Protocol* Parties have, in a number of instances, altered the norms of the regime without using the formal amendment procedures: at 47-50.

credibility of the process.³⁶¹ This role might be more appropriately filled by an independent implementation committee of experts.³⁶²

The second concern which leads from the first is that the Parties are the ones who must comply--yet they are the ones deciding who has complied, and on a basis that may not be necessarily on all fours with international law. This constitutes a potential conflict of interest, whereby the subjects of a rule are also judges of breaches of the rule. When looking at the environment as a topic of regulation which is subject to human impacts in myriad ways, it is clear that the economic and social interests of Parties may not always be consistent with the compliance requirements of environmental conventions and protocols. It is not difficult to visualize a regime where parties hesitate to criticize the performance of other parties because they too are out of compliance. Or, the CoP could fail to take action on annual reports which have been submitted and reflect non-compliance, but illustrate scenarios which implicate too many other parties. Therefore, if the CoP is to remain the pinnacle of the compliance system in a regime, certain protections for the environment may need to be considered in order to ensure that some objectivity remains. The most obvious is to include NGO representatives in a participatory fashion in an expert/implementation committee process or the decision-making process on compliance issues in the Conference of the Parties. This could help provide a fuller discussion of compliance issues and would more likely ensure that follow-up would occur with problematic cases. Given that COPs are likely to retain the double political and quasi-judicial role for the immediate future, and in fact can play a positive role in helping all parties comply better, this latter may be a reasonable option

³⁶¹ Chayes and Chayes, *supra* note 9 at 108.

A third area of concern is how this "internal dispute settlement mechanism"³⁶³ can be integrated with traditional dispute settlement mechanisms usually included in environmental treaties, notwithstanding the Conference of the Parties structure. In some circumstances a state may decide that it wants an authoritative legal interpretation of state obligations when non-compliance has occurred, and not the application of the internal non-compliance regime. Yet, without the cooperation and consent of the other state, this cannot occur. Thus, the internal procedure can be used to frustrate the traditional dispute resolution procedure, and safeguards may be needed.³⁶⁴

. Many features typical of COPs can have a positive impact on compliance. The speed with which the Conference of the Parties can operate, as compared with more traditional dispute resolution mechanisms, is a positive factor,³⁶⁵ because in the environmental field, prevention and mitigation are critical because much damage is irreversible. Decisions on non-compliance can be made more swiftly and on a pragmatic basis because the CoP is likely not restricted to formal international law in its decision-making. It has also been argued that the Conference of the Parties is the most appropriate forum to decide disputes involving claims which seek to modify the normative structure of the regime.³⁶⁶ While that may be the case, it should be recognized that many cases of non-compliance do not seek to alter the normative structure of the regime, but confirm it.

³⁶² See section 5.4.4, below, on the ILO, which has instituted such a committee.

³⁶³ Gehring uses this term, *supra* note 34 at 54.

³⁶⁴ *Book Reviews, supra* note 356 at 391 suggests that this frustration could occur, although no reason is given. However, Koskenniemi adds: "More thought needs to be given to the problem of how to combine reliable methods for ascertaining compliance with adequate safeguards so that these methods cannot be used by some States to impose their interpretations on other contracting parties."

³⁶⁵ Gehring, *supra* note 34 at 50 makes this point with respect to decisions about changes in norms, but the comment is applicable to decisions on non-compliance.

³⁶⁶ *Ibid.* at 54.

Other key lessons that can be derived from the first experiences of the *Montreal Protocol's* NCP: (1) the NCP needs to be fully integrated with the Convention regime to take full advantage of all of the "carrots and sticks" available;³⁶⁷ (2) NCPs appear more effective when they are handling specific non-compliance cases;³⁶⁸ (3) the design of an NCP may differ depending on whether one is trying to eliminate an environmental problem (ozone-depleting substances) or manage it (climate change, biodiversity).³⁶⁹

5.4.3 Other IEAs

The *Volatile Organic Compounds Protocol*³⁷⁰ under the LRTAP Convention is another regime which could develop a non-compliance procedure. It requires the Parties to establish a mechanism for monitoring compliance with the Protocol. Until then, based on Article 8 reporting or other information, any Party which has reason to believe that another Party is acting (or has acted) in a manner inconsistent with its obligations under the Protocol may inform the Executive Body and other Parties.³⁷¹ Any Party may request that the matter be taken up at the next meeting of the Executive Body.³⁷²

More detail was included in the 1994 LRTAP *Second SO2 Protocol* with respect to the establishment of an Implementation Committee and the review of compliance, where both of these were clearly referenced.³⁷³ In addition, in a draft amending Protocol proposed for the adoption of the Parties to the *London Convention* this fall at a diplomatic conference,

³⁶⁷ Victor, *supra* note 82 at 71, 80; Schally, *supra* note 344 at 92.

³⁶⁸ Victor, *supra* note 82 at 66.

³⁶⁹ *Ibid.* at 74; Schally, *supra* note 344 at 91-2.

³⁷⁰ *LRTAP VOCs Protocol*, *supra* note 1.

³⁷¹ Similar to Article 19 of the *Basel Convention*.

³⁷² Article 3.3 of the Protocol.

³⁷³ See Article 7.

compliance matters are specifically mentioned. Both the *FCCC* and the *Desertification Convention* require that Parties "consider the establishment of a multilateral consultative process...for the resolution of questions regarding the implementation of the Convention." Under the *Basel Convention*, a Consultative Sub-group of Legal and Technical Experts met in June 1996 to discuss implementation of, and compliance with, the Convention.³⁷⁴

The *FCCC* and Basel working groups have begun their initial work on compliance mechanisms by preparing a list of questions regarding the type of mechanisms or processes appropriate to each Convention, and transmitting it to the Parties with the plan to consolidate the responses and use them as guidance in the development of any procedures that are felt required.³⁷⁵

5.4.4 International Labour Organisation

In addition to the review of country reports, discussed under the Implementation Committee, above, the ILO also has a system for representations and complaints. It provides an interesting contrast to the *Montreal Protocol*, because it has taken a more legalistic approach.

Representations are those complaints which are made by employers' or workers' organizations, while complaints are made by a State which has ratified the Convention in

³⁷⁴ *Basel Compliance Report, supra note* . A background paper prepared for the Secretariat contains a useful summary of a wide variety of international law regimes with respect to the monitoring of implementation of and compliance with their provisions: UNEP/CHW/LSG/1/Inf.2.

³⁷⁵ *Ibid.*; regarding the *Climate Change Convention*: U.N. Doc. A/AC.241/50, 20 December 1995. This latter document also raised a list of questions for consideration of the members of Working Group II of the *Desertification Convention* with respect to its "resolution of questions" provision, Article 27.

question.³⁷⁶ These latter are most like the non-compliance procedures of the *Montreal Protocol* where they provide for state reporting of non-compliance of other states.

Complaints are usually referred to a commission of inquiry composed of three independent persons appointed by the Governing Body. However, before referring the complaint to a Commission of Inquiry, the Governing Body may communicate with the government in question and invite it to make a statement on the subject.³⁷⁷ If no statement is made in reply, or the Governing Body does not think it necessary to communicate with the government in question, then a commission of inquiry is appointed. Commissions may take evidence from witnesses and conduct on-site inquiries. A report is presented which includes their analysis of the situation and makes recommendations which will ensure compliance with the pertinent convention.³⁷⁸ Once the governments are supplied with a copy of the report, they have three months to inform the ILO whether they accept the recommendations of the report or not, and if not, whether they intend to refer the complaint to the International Court of Justice.³⁷⁹ Any decision of the International Court of Justice is final.³⁸⁰ If the government does not follow the recommendations of the Commission of Inquiry or the judgment of the International Court of Justice, as the case may be, then the Governing Body may recommend to the Conference to take "such action as it may deem wise and expedient to secure compliance therewith."³⁸¹

³⁷⁶ Article 26.1. Article 26.4 provides that the Governing Body may initiate the complaints procedure of its own motion or on receipt of a complaint from a delegate to the Conference.

³⁷⁷ Article 26.2.

³⁷⁸ *International Labour Standards*, *supra* note 223 at 27.

³⁷⁹ Article 29.

³⁸⁰ Article 31.

³⁸¹ Article 33.

To date, the complaints procedure has been little used, consisting primarily of questions of fundamental human rights.³⁸² In all cases, the results of the commissions of inquiry were accepted by the government concerned, and the regular supervisory bodies have been able to follow up on the progress made in implementing the recommendations.³⁸³ One could therefore argue that the complaints process was a success in terms of complaints it actually received; however, it is difficult to know whether more complaints should have been received and what could be done to encourage this.

5.4.5 Summary and Conclusions³⁸⁴

Non-compliance procedures are developing into a part of the supervisory structure of environmental regimes, and address several factors which might motivate states to comply with the regime. Such approaches can reinforce the general habit of states to comply with international law, by reminding them of their obligations to comply with the regime and to defend their implementation, as well as building confidence in the regime as a whole. Through peer review, an NCP also plays on peer pressure, which can be used to convince states to comply with their legal obligations. Public opinion and pressure can also be exerted through non-compliance procedures if they are transparent in their operation and inclusive in their structure. However, where a compliance procedure operates within a regime where some sanctions are possible, then the threat of enforcement may become a factor which extracts compliance from states.

³⁸² *International Labour Standards*, *supra* note 223 at 28.

³⁸³ *Ibid.*

³⁸⁴ For a detailed list of improvements that could be made to the *Montreal Protocol's* non-compliance procedures, please see Annex 3.

The continuing tension remains as to whether a legally binding, more adversarial approach should be taken (like in the ILO) or to continue with the softer, cooperative approach such as that under the *Montreal Protocol*. This is a question that will have to be examined closely within each IEA, depending upon the type of environmental problem being addressed. Finally, clear links should be made between the NCP and other institutions and processes in the IEA, in order to maximize the range of "carrots and sticks" available.

5.5 Financial Mechanisms³⁸⁵

5.5.1 General

In some areas of international law, the economic cost to states of complying can be relatively low because compliance is completely within the control of the state (e.g. refraining from conducting nuclear tests in the atmosphere).³⁸⁶ However, requirements to take positive action are more costly, and can be even more so when they involve the implementation of complex regulatory schemes at the domestic level.³⁸⁷ Environmental obligations can be expensive, often requiring parties to take preventive measures, find substitutes for harmful products, install infrastructure to monitor movements, or implement complex and costly regulatory regimes to reduce pollution. In Chapter 3 the distinctive desire on the part of developing countries to continue to work towards their own basic development needs was discussed, and in Chapter 4 the fact that poverty can be a key reason for non-compliance was examined. On the other hand, developed countries have awakened to the severe environmental

³⁸⁵ Because of space constraints, provisions in IEAs regarding technology transfer to developing countries have not been discussed here, but they too are a mechanism by which lack of capacity as a reason for non-compliance can be addressed.

³⁸⁶ Chayes and Chayes, *supra* note 9 at 13.

degradation now being experienced world-wide, and there is generally high recognition of the major contributing role of developed countries to this degradation.

It is in seeking to reconcile these opposing perspectives that financial mechanisms have been an increasingly common feature in environmental treaty regimes.³⁸⁸ Whether they are characterized as compensation for lost opportunity, incentives for compliance, or as pure necessity, such payments have put environmental agreements into the vanguard of encouraging LDC compliance with international law. This chapter discusses the Multilateral Fund of the *Montreal Protocol* as an example of this type of environmental fund.³⁸⁹

5.5.2 Montreal Protocol Multilateral Fund

The 1987 *Montreal Protocol* contained measures for the control of the production and consumption of CFC's, with a special ten year grace provision for developing countries.³⁹⁰ However, it soon became apparent that further changes would be required to tighten up the control mechanisms, and to introduce a precise financial mechanism in order to persuade key developing countries to sign the Protocol.³⁹¹ The Protocol had established no concrete financial arrangements to assist in technology transfer, and without this, developing countries could do little about adopting alternatives to CFC's. The grace period provided in 1987 for LDC's would be rendered irrelevant with a more rapid phase-out.³⁹² Furthermore, the Protocol

³⁸⁷ *Ibid.* at 14.

³⁸⁸ The *Montreal Protocol*, the *World Heritage Convention*, the *Ramsar Convention*, the *Climate Change Convention* and the *Biodiversity Convention*.

³⁸⁹ The financial mechanism of the *FCCC* will be discussed in Chapter 7.

³⁹⁰ Article 5.

³⁹¹ Patrick Szell, "Ozone Layer and Climate Change", in Winfried Lang, Hanspeter Neuhold & Karl Zemanke, eds., *International Environmental Law* (London/Dordrecht/Boston: Graham & Trotman/Martin Nijhoff, 1991) 169 at 172 (hereinafter "Ozone Layer").

³⁹² Benedick, *supra* note 201 at 148.

gave no guarantees that developed countries would provide access to substitute technologies after the grace period was over.³⁹³ Several of the larger, more influential developing countries made it clear that their signature on the Protocol would depend on the development of an adequate financial mechanism to fund the added costs to LDC's of obtaining substitutes for CFC's.³⁹⁴ Furthermore, their participation was critical: without controls, the LDC's could double their share of world CFC consumption to almost 30 per cent by the year 2000.³⁹⁵ Thus, the financial mechanism served two purposes: to attract key countries to join the Protocol, and to provide LDC's with the means to meet their obligations.

The financial mechanism was established in June 1990 and began operation on January 1, 1991.³⁹⁶ The Fund, which is the principal feature of the financial mechanism,³⁹⁷ operates under the authority of the Parties, who decide on the overall policies of the Fund.³⁹⁸ An Executive Committee has been established to develop and monitor the implementation of specific operational policies, guidelines and administrative arrangements, including the disbursement of resources. The World Bank, UNEP and the UNDP assist in the handling of these tasks.

Capitalization of the fund is through developed country contributions over and above their usual transfer payments to LDC's ("additionality"), although bilateral cooperation can count towards the contribution owed. The amendments avoid use of the word "compulsory" in

³⁹³ Rene Bowser, "History of the Montreal Protocol's Ozone Fund", *International Environmental Reporter*, November 20, 1991, 636.

³⁹⁴ For an excellent account of the background to the Fund, see Benedick, *supra* note 201, chapters 12 and 13. The Fund is to meet the agreed incremental costs of the phase-out of CFCs, to finance clearing-house functions (such as LDC country studies and other technical co-operation) and to finance the secretarial services of the Fund and related support costs: Article 10.3.

³⁹⁵ Bowser, *supra* note 393 at 636-7.

³⁹⁶ Benedick, *supra* note 201 at 186.

³⁹⁷ "Ozone Layer", *supra* note 391 at 173.

terms of contributions and the funds are payable in convertible currency in accordance with the U.N. scale of assessment.³⁹⁹ That the payments are not compulsory is according to some an accurate reading of the Protocol,⁴⁰⁰ but the better view is that there is an obligation to pay. Nevertheless, the former view was enough to prevent the adoption of a list of situations of possible non-compliance, one of which was failure to contribute to the Multilateral Fund.⁴⁰¹

Article 5 also raises an important compliance issue:

Developing the capacity to fulfil the obligations of the Parties operating under paragraph 1 [i.e. LDC's] of this Article to comply with the control measures set out in Articles 2A to 2E and their implementation by those same Parties will depend upon the effective implementation of the financial co-operation as provided by Article 10 and transfer of technology as provided by Article 10A.

This provision, although somewhat obliquely worded, appears to make fulfilment of LDC obligations, i.e. compliance, dependent on the financial and technological cooperation promised elsewhere. This is confirmed by wording in Article 10 which refers to a mechanism for financial and technical cooperation "to enable their [LDC] compliance with the control measures...". This is also supported by the provisions of Article 5 which preclude action being taken against LDC's for non-compliance, if this ground is alleged as the reason therefor, until a Meeting of the Parties.

The compliance of LDC's is therefore arguably contingent on compliance of developed countries with the financial and technology transfer provisions.⁴⁰² Yet, because the Parties

³⁹⁸ Article 10.4.

³⁹⁹ Article 10.6.

⁴⁰⁰ Benedick, *supra* note 201 at 187, states: "With the amount of the interim fund decided, the issue of voluntary versus mandatory contributions by industrialized countries was solved by adroit drafting. Extremely careful reading of the new Article 10 text would reveal that contributions were not obligatory, but neither did the word voluntary appear. The fact that a detailed "scale of contributions," expressed in percentages to two decimals, was accepted and appended, did convey the impression of at least a tacit commitment."

⁴⁰¹ "Accelerated Phase-out Deadlines", *supra* note 343.

⁴⁰² See on this point Patlis, *supra* note 71 at 196.

have not clearly agreed that the funding requirements are mandatory, both the obligation and ability of developing countries to comply appears dependent on a system of effectively "voluntary" payments.

This having been said, there has been great difficulty in ensuring that Parties pay their contributions.⁴⁰³ Questions have arisen about merging the Fund with the Global Environment Facility (GEF), but to date have been resolved in the negative. Although not required to do so by its mandate, the MFMP has not yet reported non-contributing Parties via the non-compliance procedure.⁴⁰⁴ Experience with the World Heritage Fund illustrates that, although there were difficulties with donor contributions, this lessened when contributors felt their donations were being effectively spent to protect the common heritage of mankind.⁴⁰⁵

There seems to be a general consensus that a fund was a sensible approach to assist LDC's in achieving the goals of the Protocol. The ozone problem had special features which lent itself to solution of this type: there are substitutes for CFC's and hence it is feasible to fund their phase-out; there is a finite number of producers of CFC's and these were able to explore new options without necessarily threatening market share; the cost of replacement substances and technologies has been steadily decreasing, so that the necessary capital outlays have been within reach.⁴⁰⁶

⁴⁰³ As of July 1992, about a dozen countries had not paid their 1991 contributions and 31 had not paid all or part of their 1992 payments: *International Environment Reporter*, "New Target Dates Endorsed by Most Nations, Likely to be Adopted in November, Tolba Says", July 29, 1992, at 492. The 1993 budget was set at \$113 million, with 1994-5 funding projected to be \$340-500 million: "Accelerated Phase-Out Deadlines", *supra* note 343, at 771. The Report of the Seventh Meeting of the Parties, UNEP/OzL.Pro.7/12, indicated at para. 48 that arrears remained a "matter of significant concern for the Executive Committee, especially the 22 per cent of arrears" from OECD countries.

⁴⁰⁴ Victor, *supra* note 82.

⁴⁰⁵ Lyster, *supra* note 234 at 210-11.

⁴⁰⁶ *Ibid.* at 229-30.

Although a convention financial mechanism is in place for the Protocol and has been established for the two UNCED conventions--Biodiversity and Climate Change--more recently negotiated instruments have avoided following these precedents. Whether it be the *Desertification Convention* or the *London Convention's* amending Protocol, more recent global efforts have offered clearing house mechanisms or more traditional technical assistance.

Ways in which a financial mechanism could be improved from a compliance perspective include:

- improve links between such a mechanism and any Implementation Committee
- seek to improve party contributions to the fund by using the non-compliance procedures for failure to pay contributions
- develop accountability measures regarding requests for funds and their subsequent expenditure⁴⁰⁷
- conduct ongoing monitoring and evaluation of the effectiveness of the financial mechanism to ensure that the goal of compliance with the agreement is met
- because of the potential for donor fatigue, continue to seek out other sources of funding.⁴⁰⁸

5.6 Non-governmental Organizations (NGOs)⁴⁰⁹

5.6.1 Background

NGOs can play an important role in bringing to the world's attention the environmental ills which plague us and the deficiencies of governments in meeting their legal obligations.

⁴⁰⁷ *Ibid.* at 203 et seq. See also: Victor, *supra* note 82 at 77.

⁴⁰⁸ See *ACOPS*, *supra* note 207 at 27.

⁴⁰⁹ For purposes of this section, NGOs refers to environmental and other NGOs which provide important input into the international environmental law-making process.

NGOs have alerted the world to the harm inflicted upon the biosphere by human activity. Despite the comparatively marginal role which they played at the 1972 Stockholm Conference, since that time they have had a major influence on the activities of governments. In the intervening period they have provided public education and pressured business and government to take appropriate environmental care.⁴¹⁰ But it was their role at the Earth Summit in Rio in June 1992 that showed that real change has occurred.⁴¹¹ Not only were many international and national NGOs present, but they were actually part of certain delegations, reflecting a fairly new role in decision-making processes.⁴¹² Notwithstanding this, however, NGOs were sometimes excluded at critical points in the UNCED process.⁴¹³

The success of NGOs in compliance activities is closely tied to the extent of their expertise on environmental issues, and their different--and very public--perspective. As was demonstrated in Chapter 3, a state's reputation is deeply cherished: adverse publicity can tarnish that reputation both among peers and among its domestic populace. By exposing state non-compliance, NGOs can help achieve compliance with international law and standards. The role of NGOs in compliance is likely to continue to grow as time goes on.⁴¹⁴

⁴¹⁰ Ian H. Rowlands, "The International Politics of Environment and Development: The Post-UNCED Agenda" (1992) 21 *Millenium* 209 at 215.

⁴¹¹ John Bell, "Follow-up to UNCED" (Luncheon Speech at the Canadian Institute of International Affairs, September 29, 1992 [unpublished]).

⁴¹² Rowlands, *supra* note 410 at 15. For an interesting perspective on the role of Canadian NGOs on the Canadian delegation to UNCED, see Andrew Fenton Cooper and J.-Stefan Fritz, "Bringing the NGOs in: UNCED and Canada's International Environmental Policy" (1992) XLVII *International Journal* 796 at 808.

⁴¹³ Rowlands, *supra* note 410 at 16.

⁴¹⁴ "Environmental Security", *supra* note 35 at 18. On the increasing role of NGOs in the UN system, see: Dianne Otto, "Non-governmental Organizations in the United Nations System: The Emerging Role of International Civil Society" (1996) 18 *Hum. Rts. Q.* 107.

5.6.2 Specific Roles for NGOs

This chapter examines the potential role which NGOs can play in ensuring that states comply with their legal obligations, in: (1) monitoring the subjects of international environmental law, e.g. species and hazardous waste movement (2) ensuring that the information and data contained in national reports are accurate (3) assisting from a technical perspective in the verification of compliance reports submitted by state parties (4) acting as observers and participants at meetings of the conference of the parties to an agreement, especially regarding compliance issues (5) publicizing the failure of states to comply with obligations (6) assisting in the design of compliance and verification systems.

5.6.2.a monitoring the environment

NGOs can play an important role in monitoring the health of the environment, just as they have played an important role in monitoring human rights abuses. In the human rights field, public debate continues to be the primary method of protection against human rights violations.⁴¹⁵ Within the U.N. General Assembly, ECOSOC and the Human Rights Commission, states can raise questions about the human rights situation in another country. However, NGOs are also given a role in making human rights violations public. NGOs with consultative status with ECOSOC can make representations to the Commission on Human Rights and its Sub-commission.⁴¹⁶ Public debate draws attention to the situation, can facilitate the marshalling of public opinion with resultant pressure on government, can lead to a resolution or other response from the body in question, a fact-finding mission or direct contact

⁴¹⁵ B.G.Ramcharan, *The Concept and present Status of the International Protection of Human Rights: Forty Years After the Universal Declaration* (Dordrecht/Boston/London:Martinus Nijhoff, 1989) at 104

with the government in question. Any of the foregoing could help both with a particular case or the situation generally in that country.⁴¹⁷ Recent publicity has increased the detection of alleged violations and the number of NGOs speaking about them before the HRC and its Sub-commission, including NGOs from the country of alleged abuse.⁴¹⁸

Appropriate NGOs can be very useful in monitoring the environment or the trade in harmful substances or illegal wildlife. The International Union for the Conservation of Nature and Natural Resources (IUCN) and TRAFFIC (Trade Records Analysis of Flora and Fauna in Commerce), have proved very valuable in monitoring the implementation of the *Convention on the Illegal Trade in Endangered Species (CITES)*, by conducting studies of states' permit systems and evaluating species to determine whether they need *CITES* protection.⁴¹⁹

The role of NGOs is crucial to the success of CITES. Data for purposes of monitoring trade are collected by the NGO Wildlife Trade Monitoring Unit (WTMU) located in the UK. It receives governmental information and also information from the IUCN/TRAFFIC (Trade Records Analysis of Flora and Fauna in Commerce) offices in various states. This, backed by information supplied by other NGOs, enables the CITES Secretariat to identify problems and take counter measures, if controls are, or are about to be, evaded. Annual reports from member states back up this process. As information accrues, the effectiveness of CITES is correspondingly enhanced.⁴²⁰

With respect to hazardous waste, NGOs have been important in the past in advising both importing countries and the public of potentially harmful waste disposal operations, and assisting in the tracking of such exports.⁴²¹ This is particularly important given the difficulty of controlling the movement of hazardous waste even at the national level. Thus, even though

⁴¹⁶ *Ibid.*

⁴¹⁷ *Ibid.* at 105.

⁴¹⁸ *Ibid.* at 106.

⁴¹⁹ U.S. GAO Report, *supra* note 3 at 42.

⁴²⁰ Boyle and Birnie, *supra* note 52 at 477.

⁴²¹ "Environmental Security", *supra* note 35 at 18.

the *Basel Convention* provides for the establishment of subsidiary bodies and formal verification procedures, it has been suggested that input from informal sources may turn out to be key to the regime's effectiveness.⁴²² Nevertheless, while informal monitoring information will no doubt continue to be available from NGOs, states need to focus more on bringing this resource to bear in a more formalized, routine manner.⁴²³

Considering that NGOs often are a source of key environmental information, their regular participation in the early stages of treaty negotiations might be the first step in formulating a compliance-friendly regime. NGOs could provide the regime from the outset with ideas as to the types of contributions they could make to the treaty verification system through monitoring. Aside from being a source of information, such groups might be able to actively participate in the monitoring of the environment or environmentally harmful activities on behalf of the treaty regime. Obviously there would be funding and accreditation issues, but these are not insurmountable.⁴²⁴ NGOs could also be given the right under non-compliance procedures to report cases of violation of Convention provisions to the implementation committee or the Secretariat.

5.6.2.b ensuring accuracy of data in national reports

Lessons could no doubt be learned from the use the ILO makes of its NGO groups, workers and employers. The ILO has a unique tripartite structure which provides a role for workers' and employers' organizations at several levels of the ILO's work. One place where

⁴²² *Ibid.*

⁴²³ The U.S. GAO Report, *supra* note 3 at 42 supports this idea, but provides no suggestions on how this might be done.

⁴²⁴ *Ibid.*: NGOs interviewed recognized that there would be need to be a process to select which NGOs would be given these roles. Furthermore, they raised lack of resources as an issue.

they make an important contribution is during the reporting process on convention implementation. Governments are required to send copies of information they provide to the ILO to their most representative organizations of workers and employers. These organizations may provide comments on the reports themselves or more generally on how the conventions are applied in their country. Next, the Committee of Experts provides governments an opportunity to reply to the comments and makes its own conclusions on them, which then form part of the report which the Committee places before the tripartite Conference Committee.⁴²⁵ This Committee, which consists of governments, workers and employers, selects a number of cases involving the most serious issues for oral discussion with officials from the countries involved. At such meetings, governments have an opportunity to explain the reasons for the failure to comply with obligations, and workers' and employers' representatives do not hesitate to express their concerns about non-compliance.⁴²⁶

The OECD, in conducting its environmental performance reviews of member states, interviews NGOs and not just governments, when researching a country under review.⁴²⁷

NGOs may not only evaluate data differently than governments, business or the public, but may also have different sources of information, which can result in different reports altogether. Given the importance of reporting systems, environmental groups can play an important role in verifying the accuracy of data provided in national reports. This obviously is a task well-suited to certain national and local environmental groups.

⁴²⁵ *International Labour Standards*, *supra* note 223 at 25.

⁴²⁶ *Ibid.* at 24.

⁴²⁷ This was the author's experience as part of the Canadian government team which briefed the OECD: part of their schedule of meetings in Canada included meetings with some provinces and with NGOs.

5.6.2.c Assisting in the verification or assessment of report data

Beyond accuracy, data must also be analysed against the standards in the convention in question, such as whether the state party is meeting a binding emissions target. Qualified NGOs could usefully provide expertise and advice to technical, scientific and implementation committees about whether reported behaviour in fact conforms to the requirements of a convention. Such committees function well because they are more removed from the political atmosphere of the Conference of the Parties, and might function most effectively with the advice of neutral experts, rather than the Parties' officials. In fact, this is exactly how the Committee of Experts on the Application of Conventions and Recommendations of the ILO functions. It consists of 19 members chosen for their special expertise in the area of labour law, but who are independent of government, workers' groups and employers' groups. They are appointed for three year periods and are accountable only to the Governing Body, to whom the Committee provides reports on its work.⁴²⁸ A similar approach was recently recommended to improve the effectiveness of the supervisory machinery of the *European Social Charter*.⁴²⁹ In that report, it was recommended that certain bodies in the supervisory machinery be either eliminated or restructured to include fuller participation by NGOs. It was suggested that "procedural economy" is best served by having NGOs involved at the earliest stages. The favoured option was to create consultative status for NGOs with the Committee of Experts which reviewed state reports.⁴³⁰

⁴²⁸ *Ibid.* at 21.

⁴²⁹ Boerefijn, Heringa and Schokkenboek, *supra* note 221.

⁴³⁰ *Ibid.* at 47.

Convention provisions could be drafted to allow for an NGO role of this nature. A more radical option would be a tripartite system such as that of the Conference Committee of the ILO, where government, environmental groups and possibly business representatives could participate. Given the success which this has been at the ILO,⁴³¹ it is something worth considering, as the Conference Committee has been called "the soul and conscience of the ILO".⁴³²

5.6.2.d Presence of NGOs at Conference of the Parties

While many environmental conventions are not specific about the presence of NGOs at the Meetings of the Conference of the Parties, one standard provision has been used with some frequency (such as in CITES and the Basel Convention):

6. The United Nations, its Specialized Agencies and the International Atomic Energy Agency, as well as any State not a Party to the present Convention, may be represented at meetings of the Conference by observers, who shall have the right to participate but not to vote.

7. Any body or agency technically qualified in protection, conservation or management of wild fauna and flora, in the following categories, which has informed the Secretariat of its desire to be represented at meetings of the Conference by observers, shall be admitted unless at least one-third of the Parties present object:

(a) international agencies or bodies, either governmental or non-governmental, and national governmental agencies and bodies; and

(b) national non-governmental agencies or bodies which have been approved for this purpose by the State in which they are located.

⁴³¹ Both the Experts Committee and the Conference Committee find the practical insight provided by both workers' and employers' organizations very important in their work: *International Labour Standards*, *supra* note 223 at 25.

⁴³² *Ibid.* at 24.

Once admitted, these observers shall have the right to participate but not to vote.⁴³³

By participating at such meetings when compliance issues are discussed, NGOs can correct misinformation and misconceptions, help evaluate reports of subsidiary committees and represent the threat of publicity should parties attempt to evade their legal obligations.⁴³⁴

By contrast, the Implementation Committee meetings of the *Montreal Protocol* are currently held behind closed doors. Even Parties who are not members of the Committee are not allowed to attend. Those who have worked closely with the non-compliance process fully support this confidentiality because of the relative newness of the regime; progress under the non-compliance procedure is felt to be fragile.⁴³⁵ It may be some time before these meetings are opened up, but at least the reports of such meetings are made public.

At the annual International Labour Conference, each member delegation consists of two government, one worker and one employer representative, all of whom are entitled to speak and vote independently.⁴³⁶ The Conference examines social problems and adopts Conventions and Recommendations for submission to governments. Electoral Colleges of the Conference elect the Governing Body, which is comprised of 28 Governments, 14 employers and 14 workers and supervises the work of the International Labour Office.⁴³⁷ The Conference

⁴³³ CITES, Article XI.6 and .7. Similar provisions can be found in the *Bonn Convention on the Conservation of Migratory Species of Wild Animals, 1979*, Article VII.8 and .9 and the *Basel Convention* Article 15.6. The second paragraph can also be found in the *Convention on the Conservation of European Wildlife and Natural Habitats, 1979*, Article VI.3.

⁴³⁴ Kevin Stairs and Peter Taylor, "Non-governmental Organizations and the Legal Protection of the Oceans: A Case Study", in Hurrell and Kingsbury, *supra* note 7, 110 at 129.

⁴³⁵ Szell, *supra* note 319; Victor, *supra* note 81; Schally, *supra* note 344.

⁴³⁶ *International Labour Standards*, *supra* note 223 at 49.

⁴³⁷ *Ibid.* at 51.

Committee also submits its compliance report to the Plenary Conference,⁴³⁸ thus providing all delegates with an opportunity to comment on compliance issues.

5.6.2.e Making public cases of non-compliance

The opportunity for NGOs to participate in conferences of parties provides opportunities for input gives NGOs information about which states are failing to meet their obligations. Regular publication of state implementation reports, such as is done by the Executive Body of the *LRTAP Convention*, also provides a source of such information. As mentioned earlier, NGOs often have their own sources; but information supplied by the parties or an executive body provides NGOs with additional information--the international response to instances of non-compliance. Making cases of non-compliance public is one of the most important roles NGOs can play, since fear of negative publicity is a prime motivator of state behaviour.⁴³⁹

5.6.2.f Assistance in the design of compliance mechanisms

The specialized knowledge possessed by NGOs on various subjects can make them very useful contributors to the design of mechanisms for the verification of compliance during agreement negotiations. For instance, NGOs have demonstrated special expertise in the illegal movement of hazardous wastes and would no doubt provide invaluable expertise in designing the verification system envisaged by the *Basel Convention*.⁴⁴⁰ A recent report by an NGO on illegal trade in elephant products suggests that those who drafted CITES were unaware of how the trade in endangered species actually functioned.⁴⁴¹

⁴³⁸ *Ibid.* at 24.

⁴³⁹ See Lyster, *supra* note 234 on this point.

⁴⁴⁰ "Environmental Security", *supra* note 35 at 18.

⁴⁴¹ Boyle and Birnie, *supra* note 52 at 479.

However, to participate in the meetings of subsidiary committees where such systems are developed, the rules of procedure which make such meetings private would have to be changed. Or, conventions would have to include NGOs as one of the potential sources of members for such committees.

5.7 Conclusions

A number of techniques have been used in international treaties to try to improve compliance with their provisions. The regimes examined in this Chapter revealed approaches that have succeeded and those that have failed. The lessons that can be learned from these examples can help the international community refine them, but the lessons are also more fundamental: these techniques must be considered both during and after treaty negotiations.

CHAPTER 6: THE CLIMATE CHANGE PROBLEM AND THE FRAMEWORK CONVENTION: AN OVERVIEW

Through its constituent gases the atmosphere provides the basic conditions for life on Earth. But it is through climate that it shapes the patterns and sets the limits of terrestrial existence.⁴⁴²

As the *Framework Convention on Climate Change* has been selected to illustrate how to develop an integrated compliance system in IEAs, an understanding of the Convention's provisions and the nature of the issues it is trying to address are essential to an appreciation of the significance of the compliance issues raised in Chapter 7.

6.1 The Climate Change Problem

The earth's average temperature will remain constant as long as energy leaves and enters the climate system at the same rate.⁴⁴³ "The flow of energy through the system is regulated by certain gases within the atmosphere"⁴⁴⁴--but those gases make up only 1% of the atmosphere. "This 1% is made up of a variety of gases and aerosols that reflect, absorb and re-emit significant amounts of both incoming solar radiation and outgoing heat energy."⁴⁴⁵ Some of these gases create the greenhouse effect because they absorb most of the heat energy emitted

⁴⁴² Henry Hengeveld, *Understanding Atmospheric Change: A Survey of the Background Science and Implications of Climate Change and Ozone Depletion*, 2d ed. (Ottawa: Minister of Supply and Services, 1995), at 13.

⁴⁴³ *Ibid.* at 13.

⁴⁴⁴ *Ibid.*

⁴⁴⁵ *Ibid.* at 14.

from earth towards space, eventually making the atmosphere opaque to outgoing radiation, resulting in heat being trapped around the earth: hence their name, "greenhouse gases".⁴⁴⁶

Global warming is thus caused by the emission of greenhouse gases (GHGs) into the atmosphere, via natural or anthropogenic sources. The key problem gases from anthropogenic sources are carbon dioxide, methane and nitrous oxide,⁴⁴⁷ and they are mainly emitted through fossil fuel combustion, industrial emissions, deforestation, fermentation of farm products and the use of fertilizers.⁴⁴⁸ Although anthropogenic sources provide only 1/20 of the total emissions of GHGs, this amount is a net addition to the global carbon cycle which is otherwise roughly in balance--and it is cumulative over time.⁴⁴⁹

Even though up to fifty per cent of GHGs emitted return to the natural carbon cycle, the future outlook is not good.⁴⁵⁰ A recent scientific assessment concluded that without policies to mitigate climate change, the temperature of the planet could rise 2° Celsius over the next 100 years.⁴⁵¹ Such changes to the atmosphere will result in changes to sea levels, drought and air circulation which have disturbing potential effects world-wide, with possible impacts of greater severity in more tropical climates. In particular, climatic changes would result in more rapid rainfall and evaporation, causing floods in some parts of the world and desertification in others. By the year 2100, it is expected that the sea level will have risen 50 centimetres, with

⁴⁴⁶ *Ibid.* at 15.

⁴⁴⁷ These are listed in descending order of magnitude: *ibid.* at 30. Although CFCs are potentially the most effective molecules at absorbing heat energy, international actions under the Montreal Protocol have reduced growth rates of CFCs. And, the direct effect of CFCs may also be offset by the thinning of the ozone layer which results in the cooling of the lower atmosphere. Overall, however the link between ozone-depleting substances on the climate system is not clear: *ibid.* at 29 and 30.

⁴⁴⁸ Alvaro Soto, "The Global Environment: a Southern Perspective" (1992) XLVII *International Journal* 679 at 690. See Hengeveld, *supra* note 442 at 25-31 for an informative discussion of sources of each gas.

⁴⁴⁹ Hengeveld, *supra* note 442 at 27.

⁴⁵⁰ *Ibid.* at 27-28.

resulting devastating effects for low-lying countries. An increase in temperature and humidity would facilitate the spread of malaria and other diseases in tropical climates. As well, climatic change could result in the extinction of plant and animal species.⁴⁵² Although it may appear that global warming could have beneficial effects for some regions, no one can ensure that global warming will stop at a particular advantageous temperature.⁴⁵³

This issue did not come to the fore internationally until roughly the mid-eighties, mainly due to a lack of consensus in the scientific community about the issue. This was largely because the impacts of global warming were not proven, but were based on global climate modelling.⁴⁵⁴ Nevertheless, even in early 1991 when negotiations began on the *FCCC*, a minority of scientists still doubted the conclusions drawn from modelling.⁴⁵⁵ However, the most recent report of the Intergovernmental Panel on Climate Change (IPCC) appears to have helped solidify world-wide scientific support.⁴⁵⁶ Even when climate change is accepted as a problem, consensus approaches to resolving the issues are difficult to find.

It must also be pointed out that the bulk of greenhouse gas emissions have come from developed countries.⁴⁵⁷ And they continue to do so: North America contributes roughly 24%, other industrialized countries 20%, Eastern Europe and former USSR 23%, developing

⁴⁵¹ International Environment Reporter, "Failure to Curb Emissions will cause Dangerous Environmental Changes, IPCC says," January 10, 1996 (hereinafter cited as "Failure to Curb") 3.

⁴⁵² *Ibid.* at 3.

⁴⁵³ Gareth Porter & Janet Welsh Brown, *Global Environmental Politics* (Boulder: Westview Press, 1991) at 92.

⁴⁵⁴ *Ibid.* at 93.

⁴⁵⁵ *Ibid.*

⁴⁵⁶ A Ministerial Declaration issued at the Second Conference of the Parties received widespread, although not universal, support. It endorsed the Second Assessment Report of the IPCC and stated, among other things: "The balance of evidence suggests a discernible human influence on global climate." See: FCCC/CP/1996/L.17.

⁴⁵⁷ See paragraph 3 of the Preamble of the *FCCC*, which states in part: "Noting that the largest share of historical and current global emissions of greenhouse gases has originated in developed countries..."

countries 22% and China 11%.⁴⁵⁸ Developing countries' emissions are increasing rapidly and if this trend continues could result in substantial global increases of GHGs.⁴⁵⁹

Because GHG emissions present more than just a problem of carbon dioxide, if policy approaches focus solely on reduction of CO₂, this will have a major negative impact on industrialized countries, whereas if a "comprehensive approach" is taken, then developing countries would have to contribute as well. Developing countries have wanted the focus to be on carbon emissions from energy use, in order to shift the onus back to those consuming the most energy.⁴⁶⁰ At the same time, many developed countries have favoured the comprehensive approach.⁴⁶¹

6.2 History of the Convention

Major international climate change research programs did not get underway until the late 1970's.⁴⁶² The World Meteorological Organisation and UNEP began pushing the issue onto the international agenda in the mid-1980's and it gathered scientific momentum throughout the decade.⁴⁶³ To capitalize on this and to develop a common factual basis to the problem, the WMO and UNEP helped establish the Intergovernmental Panel on Climate Change (IPCC) in

⁴⁵⁸ Hengeveld, *supra* note 442 at 27.

⁴⁵⁹ *Ibid.* at 27. The rest of the third preambular paragraph of the *FCCC* provides: "...that per capita emissions in developing countries are still relatively low and that the share of global emissions originating in developing countries will grow to meet their social and development needs."

⁴⁶⁰ Porter and Welsh Brown, *supra* note 453 at 96.

⁴⁶¹ For background on this issue see: Daniel Bodansky, "Draft Convention on Climate Change" (1992) 22 *Environmental Policy and Law* 5. For a view critical of the comprehensive approach, see: Jeremy Leggett and Paul Hohnen, "The Climate Convention: A Perspective from the Environmental Lobby" (1992) 23 *Security Dialogue* 75.

⁴⁶² Hengeveld, *supra* note 442 at 59.

⁴⁶³ *Ibid.* at 59-60.

1988. It established three working groups which, by August 1990, had concluded that global warming was a serious threat to the planet.⁴⁶⁴

In the meantime, an international conference held in Toronto in 1988 had called for a comprehensive global convention and protocols, a reduction in carbon emissions by 20 per cent of 1988 levels by 2005, and the establishment of a world atmosphere fund.⁴⁶⁵ The IPCC's first assessment report in 1990 called for international negotiations to begin on a framework convention, a call which was reiterated at the Second World Climate Conference several months later.⁴⁶⁶ On December 21, 1990, the U.N. General Assembly passed Resolution 45/212 which established the INC as the negotiating process for a framework convention on climate change, which was to be ready to be signed in June 1992 at the U.N. Conference on Environment and Development.⁴⁶⁷

From the commencement of negotiations and throughout, the focal points were targets and timetables for reductions in greenhouse gases. The position taken by each country depended in large part on the type of economy it had and how its various economic sectors could respond to, or would be damaged by, a particular approach.⁴⁶⁸

However, as negotiations on the *FCCC* proceeded, it became clear that issues of international equity were also on the table, resulting in extremely difficult negotiations surrounding provisions on financial and technological resource transfers, which were

⁴⁶⁴ Porter and Welsh Brown, *supra* note 453 at 94.

⁴⁶⁵ *Ibid.*

⁴⁶⁶ Daniel Bodansky, "The Framework Convention on Climate Change: A Commentary" (1993) 18 *Yale J. Int'l L.* (hereinafter "Framework Convention") 451 at 469.

⁴⁶⁷ *Ibid.* at 474.

⁴⁶⁸ For example, during the negotiations, the U.S. Chief Negotiator rejected the idea of stabilizing emissions of GHGs at 1990 levels by the year 2000, citing cost reasons. The U.S. energy strategy at the time relied heavily on abundant coal reserves. In addition to cost, the U.S. cited energy security as a reason that cleaner sources of energy

perceived as the cost to the developed countries of obtaining developing countries' buy-in to a problem they had caused.⁴⁶⁹

The *FCCC* entered into force on March 24, 1994, and the First Conference of the Parties (COP1) was held in Berlin from March 28 to April 7, 1995, following five INC meetings held since the Convention was concluded at the Rio Conference in 1992. COP1 resulted in a number of important achievements, the key one being the adoption of the Berlin Mandate to strengthen Annex I country commitments for the post-2000 period "through the adoption of a protocol or other legally binding instrument."⁴⁷⁰

6.3 Convention Provisions--Overview

The Convention is a framework, a first step in coming to grips with the problem of climate change.⁴⁷¹ Framework conventions, followed by more explicitly worded protocols, have been an emerging trend in international environment agreements.⁴⁷² Viewed from this perspective, the weak commitments in the *FCCC* can be seen to be the beginning of an iterative process that will tighten up the commitments with respect to emissions.

The objective of the Convention is to achieve stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic

could not be adopted: "Money, U.S. Position Remain Barriers for Accord on Climate Change Issues", *International Environment Reporter*, September 25, 1991, 502.

⁴⁶⁹ "Framework Convention", *supra* note 466.

⁴⁷⁰ See U.N. Doc.FCCC/CP/1995/L.14.

⁴⁷¹ Ted Hanisch makes this point in, "The Rio Climate Convention: Real Solutions or Political Rhetoric?" (1992) 23 *Security Dialogue* 63 at 64.

⁴⁷² It is noteworthy that a number of IEAs that began with framework conventions later developed into protocols with more specific obligations: for example, the *Vienna Ozone Convention* generated the detailed *Montreal Protocol*; similarly, the U.N. ECE *LRTAP Convention* spawned a number of Protocols on NO_x, SO₂, VOCs, while protocols on heavy metals and persistent organic pollutants are currently under negotiation: see note 2, *supra*.

interference with the climate system.⁴⁷³ The Convention has been criticized as not having the capability of meeting this objective⁴⁷⁴--and the Parties now agree.⁴⁷⁵

The *FCCC* has its primary obligations in Articles 4, 11 and 12. The convention is characterized by differential obligations for various categories of parties.

Article 4.1 contains commitments for all Parties to develop, update, publish and make available national inventories of anthropogenic emissions and programmes containing measures to mitigate climate change, promote and cooperate in scientific and technical research, and promote and cooperate in education, training and public awareness related to climate change.⁴⁷⁶ The main purpose is to introduce transparency concerning the causes of climate change, relevant technologies to limit emission of GHGs and to cooperate in the further development of such knowledge.⁴⁷⁷

However, the commitments set out in Article 4.1 are prefaced by the words "taking into account their common but differentiated responsibilities and their specific...priorities, objectives and circumstances", thus making the obligatory legal nature of the commitments which follow ambiguous. It can be argued that there is a separate standard required for each Party to the Convention based on that language.⁴⁷⁸

⁴⁷³ Article 2.

⁴⁷⁴ Leggett and Hohnen, *supra* note 461 at 76. See also: Rowlands, *supra* note 410 who also acknowledges this criticism and provides citations of sources of this criticism.

⁴⁷⁵ At COP 1 the Parties decided: "...having reviewed Article 4, paragraph 2(a) and (b) and concluded that these are not adequate, agrees to begin a process to enable it to take appropriate action for the period beyond 2000, including the strengthening of the commitments of Annex I Parties in Article 4, paragraph 2(a) and (b), through the adoption of a protocol or another legal instrument." See: U.N. Doc. *FCCC/CP/1995/L.14*.

⁴⁷⁶ See Articles 4.1, 5 and 6.

⁴⁷⁷ Hanisch, *supra* note 471 at 65.

⁴⁷⁸ Because negotiations resulted in a weak targets commitment by developed countries, developing countries argued successfully for their general commitments to be correspondingly limited: "Framework Convention", *supra* note 466 at 506.

The main commitments for "developed country Parties and other Parties included in annex I" are contained in Article 4.2. Such Parties commit themselves to adopting national policies and taking corresponding measures on the mitigation of climate change. This is to be done by states limiting their anthropogenic emissions of greenhouse gases and protecting and enhancing their greenhouse gas sinks and reservoirs.⁴⁷⁹

As to emissions levels, Article 4.2(b) requires Annex I Parties to report on the policies and measures referred to in (a), along with projected anthropogenic emissions for the rest of the decade "with the aim of returning individually or jointly to their 1990 levels these anthropogenic emissions of carbon dioxide and other greenhouse gases not controlled by the *Montreal Protocol*." (emphasis added) As can be seen, there is no explicit target or timetable for which any party can be held legally accountable, as the stabilization "target" is expressed simply as an aim.⁴⁸⁰ As will be discussed in Chapter 7, this poses a central problem for compliance--without a clearly binding obligation, Parties cannot be held accountable for compliance on a legal level.⁴⁸¹

Another key obligation is that contained in Article 4.3, which requires the developed country Parties and other developed Parties included in Annex II (OECD countries) to provide new and additional financial resources to meet the agreed full costs incurred by developing country parties in complying with their reporting obligations under Article 12.1. In addition, they are to provide such financial resources, including for the transfer of technology, needed

⁴⁷⁹ Article 4.2(a).

⁴⁸⁰ Bodansky suggests: "Indeed, it is questionable whether the Convention creates a legally binding target and timetable at all." : "Framework Convention", *supra* note 466 at 516.

⁴⁸¹ It should be noted, however, that current national communications do convey information about whether this stabilization target is met and the FCCC expert review teams are using this target in their reviews: see Chapter 7, below.

by the developing country Parties to meet the agreed full incremental costs of implementing measures that are covered by Article 4.1 and that are agreed between a developing country party and the international entity operating the financial mechanism. Unfortunately, no specific amount is established for such contributions.

In a related obligation, Article 4.5 requires the same Parties to take all practicable steps to promote, facilitate and finance, as appropriate, the transfer of, or access to, environmentally sound technologies and know-how to other Parties, particularly developing country Parties, to enable them to implement the provisions of the Convention.

The reporting requirements in Article 12 provide for different reporting content and timetables among developed and developing countries. This regime was intended as a way of obtaining and sharing information and applying pressure on governments to "develop effective abatement policies."⁴⁸² It will be important as the *FCCC* evolves to ensure that all countries report, and to monitor the quality of those reports. The Parties appear to be on the right track, having adopted guidelines for first national communications by Annex I Parties.⁴⁸³

The Convention sets up a number of institutional bodies: The Conference of the Parties, the Secretariat, the Subsidiary Body for Scientific and Technological Advice, the Subsidiary Body for Implementation, and the Financial Mechanism (to be operated in the interim by the GEF).⁴⁸⁴ These all have a role to play in compliance issues, but their respective roles will be discussed more fully in Chapter 7.

⁴⁸² Michael Grubb, "The Climate Change Convention: An Assessment", *International Environment Reporter* (August 12, 1992) 540 at 541.

⁴⁸³ See: A/AC.237/WG.1/L.16/Rev.1, February 15, 1994.

⁴⁸⁴ Articles 7, 8, 9, 10, and 11, respectively.

The financial mechanism was an issue of vital importance during negotiations of the *FCCC*, and will be important in assisting developing countries to meet their obligations. However, should Parties fail to adequately finance it, Article 4.7 creates a potential escape clause for LDC non-performance.

Article 13 required the First Conference of the Parties to consider the establishment of a multilateral consultative process, available to the Parties on their request, for the resolution of questions regarding implementation of the Convention. At COP 1 it was decided by the Parties to establish an ad hoc open-ended working group of technical and legal experts to study "all issues relating to the establishment of a multilateral consultative process and its design", to report its findings to COP 2.

Article 14 establishes a fairly typical dispute resolution model to address disputes between Parties on the "interpretation or application" of the Convention. Parties have the option on ratification to submit automatically to the jurisdiction of the ICJ or to arbitration. It also provides that if negotiation or other peaceful means is not successful after 12 months, a conciliation commission may be established, which can make recommendatory awards.

A feature of the *FCCC* fairly unique to international environmental agreements is the article dealing with Principles.⁴⁸⁵ Unfortunately, the way the principles have been enunciated has a tendency to add a filter that further weakens the commitments adopted, instead of bolstering them.⁴⁸⁶

These and other compliance issues will be discussed in Chapter 7 in more detail.

⁴⁸⁵ "Framework Convention", *supra* note 466 at 501.

⁴⁸⁶ Article 3, in its opening words, limits the application of the principles by indicating that Parties shall merely "be guided" by them. Article 3.1 arguably waters down commitments further by stating that, "The Parties should protect the climate system...on the basis of equity and in accordance with their common but differentiated responsibilities...." This will be discussed further in Chapter 7.

CHAPTER 7. COMPLIANCE ISSUES IN THE *CLIMATE CHANGE CONVENTION*

With the benefit of previous chapters, which reviewed theories of state motivations for compliance, the international environmental context, the experience in existing international environmental and other regimes, and the background to the climate change problem, it is now possible to evaluate whether the *FCCC* is likely to attract compliance with its requirements, and, if not, how it could be improved.

7.1 Uncertainty of obligations and asymmetry of obligations

As discussed in Chapter 2, compliance with international law is not an issue until there is a legal obligation for a Party. Other chapters highlighted the importance of clearly drafted obligations in promoting compliance. A lack of clarity regarding obligations is evident throughout the *FCCC*.

As was pointed out in Chapter 6, the *FCCC* is a framework convention, and tighter obligations will likely be assumed by at least industrialized Parties within the next few years. Nevertheless, the *FCCC* will not be completely supplanted, and thus the issues raised in this Chapter should continue to be monitored from a compliance perspective. Whether amendments to the *FCCC* or a new Protocol are adopted, the following analysis could be useful in drawing lessons to avoid.

There are six main areas of concern: 1. obligations for developed country Parties are overly vague; 2. the impact on obligations of the Convention's Principles Article is unclear; 3. there is qualified wording regarding universal obligations; 4. there are disclaimers about

compliance of developing country Parties and Parties with economies in transition; 5. joint implementation could potentially cloud responsibility for meeting obligations 6. there are too many categories of Parties. Because ambiguity and asymmetry are closely linked in these provisions, and because there are so few obligations in the *FCCLC*, the two issues will be dealt with together in this chapter.

7.1.1 Article 4.2: greenhouse gas reduction obligation?

Article 4.2 commitments are the core of the Convention. They essentially apply only to developed country Parties and are extremely vague. Article 4.2(a) requires each such Party to "adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases and protecting and enhancing its greenhouse gas sinks and reservoirs." Alone, this requirement could reasonably be criticized as requiring very little action, if any.⁴⁸⁷ However, the provision is further qualified by:

taking into account the differences in these Parties' starting points and approaches, economic structures and resource bases, the need to maintain strong and sustainable economic growth, available technologies and other individual circumstances, as well as the need for equitable and appropriate contributions by each of these Parties to the global effort regarding that objective.⁴⁸⁸

Paragraph (b) of Article 4.2 provides for each Party to report on the above policies and on its resulting projected anthropogenic emissions by sources and removals by sinks of greenhouse gases not controlled by the Montreal Protocol for the period referred to in

⁴⁸⁷ Leggett and Hohnen, *supra* note 461 at 77: "Yet the Climate Convention does not require industrialised nations even to freeze, much less reduce, CO2 emissions. Industrialized countries, who have caused some 80% of the human-enhanced greenhouse-effect problem to date, will be able to increase their carbon dioxide emissions, and still be able to claim that they are in compliance with the tortured wording of the commitments section of the Treaty...." And at 78, quoting from a letter from the White House Counsellor to the President for Domestic Policy to the US House of Representatives on May 8, 1992: "...there are two key paragraphs to this proposed agreement and neither binds the United States to specific commitments of any kind."

subparagraph (a) [i.e. by the end of the decade], with the aim of returning individually or jointly to their 1990 levels.

The combination of 4.2(a) and (b) detracts substantially from the establishment of a legally binding obligation to stabilize GHG emissions at 1990 by the year 2000. In 1995, the First Conference of the Parties decided that Article 4.2(a) and (b) were not adequate, and began a process known as the "Berlin Mandate" to enable Parties to take appropriate action for the period beyond 2000, including the strengthening of the commitments of Annex I Parties in Article 4.2(a) and (b), "through the adoption of a protocol or another legal instrument."⁴⁸⁹

Recalling that the expression of obligations is key to their attracting compliance, no single action of a state before the year 2000 could bring it out of compliance. Consequently, in the pre-2000 era, national communications and their review, along with the process developed under Article 13, will be key tools for Parties to monitor progress on the stabilization "obligation".

Unilateral commitments like those in paragraphs 4.2(a) and (b) are only effective if they are "clear, substantial and address the concerns of others, and their implementation should be relatively unambiguous and monitorable; otherwise they tend to invite cynicism and resentment."⁴⁹⁰ Should amendments or a protocol be utilized, this comment is an excellent point of departure for those negotiating.

⁴⁸⁸ Article 4.2(a).

⁴⁸⁹ U.N. Doc. FCCC/CP/1995/L.14, 7 April 1995.

⁴⁹⁰ Owen Green and Julian Salt, "Limiting Climate Change: Verifying National Commitments", *Ecodecision*, December 1992, 9 at 10.

7.1.2 Principles: Article 3

The FCCC provides the first usage of a principles section in a major global environmental treaty. While some regional agreements have utilized them,⁴⁹¹ an examination of their utility from the perspective of compliance with a global treaty is useful. Their purpose is stated to be to "guide" Parties in their actions to achieve the objective of the Convention and to implement its provisions. Unlike preambular provisions, these principles form part of the treaty text and therefore have the same legal status as the rest of the FCCC.

As such, they add another level of differentiation to obligations which, as has been shown earlier, are already asymmetrical. Article 3.1 provides an example:

Article 3

In their actions to achieve the objective of the Convention and to implement its provisions, the Parties shall be guided, *inter alia*, by the following:

1. The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.

This appears to introduce complex qualifiers into every obligation in the Convention. Further, "take the lead", "common but differentiated responsibilities" and "respective capabilities" are not defined, and can be open to a number of different subjective interpretations, which could allow all Parties to self-interpret their Convention obligations.

Similarly, Article 3.2 requires the following to be "given full consideration":

⁴⁹¹ For example, the *Convention on the Protection and Use of Transboundary Watercourses and International Lakes* (1992) 31 Int. Leg. Mat. 1312; and the 1992 OSPAR Convention, which combines the Oslo and Paris Conventions and which cover marine waters in the geographic region of Northern Europe.

The specific needs and special circumstances of developing country Parties, especially those that are particularly vulnerable to the adverse effects of climate change, and of those Parties, especially developing country Parties, that would have to bear a disproportionate or abnormal burden under the Convention....

The term "burden" could refer to legal obligations of developing country parties, which currently are limited to Article 4.1 and 12.1 obligations. Developing countries could interpret Article 3.2 as providing a justification for non-compliance with Convention obligations.

Principles articles are fairly new to IEAs. Use to date in other IEAs do not reveal principles as far-reaching as those set out in the FCCC. Rather, they are usually limited to expressions of the precautionary principle, the polluter pays principle and the like.⁴⁹²

Furthermore, such principles have been used to support more stringent approaches to the interpretation of environmental obligations, rather than detracting from them. The principles articulated in Article 3 are problematic from a compliance perspective because they do not strengthen obligations nor add clarity.

7.1.3 Universal commitments

Another source of ambiguity is the "chapeau" of Article 4.1; the ten commitments contained in that article are prefaced by the wording, "All Parties, taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances, shall..."⁴⁹³

Coupled with the general principles articulated in Article 3, discussed above, it would be extremely difficult to allege non-compliance on the part of any Party under Article 4.1 because the chapeau makes the obligations unclear.

⁴⁹² Ibid.

As has been illustrated, asymmetry has been built into the agreement in terms which make it difficult for compliance to be assessed. Although differentiated responsibilities may have brought more universal participation in the Convention, it would have been preferable to objectively differentiate between categories of countries without allowing for subjective self-differentiation by every party. The availability of funding and technology transfer through the financial mechanism to meet obligations arguably preclude the need for such confusingly differentiated obligations as are found in the *FCCC*. If the Berlin Mandate is eventually realized through a Protocol,⁴⁹⁴ the parties should consider whether compliance with the Protocol is important to them, and whether limiting differentiation of obligations to the greatest extent possible should be the goal.⁴⁹⁵

7.1.4 Compliance Issues Raised by Articles 4.7 and 4.6

Article 4.7 provides:

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

This Article further dilutes the very weak obligations imposed on developing countries.

Apart from adding another "escape clause" from compliance with obligations, the provision is

⁴⁹³ Article 4.1.

⁴⁹⁴ Seth Dunn describes the Berlin meeting as providing "a clear path for the *FCCC* to evolve from framework to protocol" in, "The Berlin Climate Change Summit: Implications for International Environmental Law", *International Environment Reporter* (May 31, 1995) 439 at 443.

⁴⁹⁵ It should be noted that developing country obligations are not expected to factor too heavily into any tighter obligations under the Convention: U.N. Doc. FCCC/CP/1995/L.14, 7 April 1995.

extremely vague in nature. This is compounded by the fact that the financial and technology transfer commitments referred to are themselves not entirely free from ambiguity.

Article 4.3 provides financial obligations for developed countries but no specific amounts are designated.⁴⁹⁶ Nor does the Article 4.4 obligation for countries particularly vulnerable to the adverse effects of climate change provide detail regarding funding of “costs of adaptation to those adverse effects”.⁴⁹⁷

Similarly, Article 4.5 is quite general in nature. It provides that developed country parties and other Annex II Parties “shall take all practicable steps to promote, facilitate and finance, as appropriate, the transfer of, or access to environmentally sound technologies and know-how to other Parties, particularly developing country Parties.” The generality of Article 4.5 appears to have opened the door to the use of Article 4.7 by developing countries. One possible objective source for Parties to assess the adequacy of activities under Article 4.5 may be supplied by the technology paper agreed to at COP 1,⁴⁹⁸ which provided for the review of the adequacy of Article 4.5 at COP 1, along with the transfer of technology to be reviewed at each subsequent COP.⁴⁹⁹ Although currently LDCs are not the key source of GHGs, their full participation in the Convention will become increasingly necessary because their emissions are on the rise.⁵⁰⁰

Article 4.6 requires the COP to provide to Annex I Parties undergoing transition to a market economy “a certain degree of flexibility...in the implementation of their commitments” under Article 4.2. Because Article 4.2 provides a less than legally binding obligation, Article

⁴⁹⁶ See Section 7.5 below on the Financial Mechanism, where Article 4.3 is discussed in detail.

⁴⁹⁷ “Framework Convention”, *supra* note 466 at 528.

⁴⁹⁸ U.N. Doc. FCCC/CP/1995/L.10.

⁴⁹⁹ Dunn, *supra* note 494 at 441.

4.6 would seem unnecessary; its existence raises concerns similar to those mentioned earlier about Article. 4.7.

7.1.5 Joint Implementation

"Joint implementation" (JI) is permitted under the Convention so that Parties may implement policies and measures jointly with other Parties and may assist other Parties in contributing to the achievement of the objective of the Convention, and, in particular, that of subparagraph 4.2(a).

JI has been a controversial topic for a number of reasons. Initially, developing countries were of the view that it is available only among Annex I Parties, whereas Annex I Parties have argued that it applies to all Parties. Developing countries and environmentalists have been concerned that developed countries will try to meet their emissions targets solely through joint implementation initiatives with developing countries, rather than by making changes to lifestyles to reduce or eliminate those sources contributing the most to climate change.⁵⁰¹ The question of whether credits will be available for those involved in JI projects, how credits might operate and whether they would be retroactive have been outstanding issues.

At COP1 it was agreed that a JI pilot phase could be initiated.⁵⁰² However, a number of ground rules were set. Activities implemented jointly between Annex I Parties and non-Annex I Parties will not be seen as fulfilment of current commitments of Annex I Parties under Article 4.2(b) of the Convention, although they could contribute to the fulfilment of

⁵⁰⁰ Hengeveld, *supra* note 442 at 27.

⁵⁰¹ Dunn, *supra* note 494 at 441 makes this point fairly cynically.

Annex I Parties' Article 4.5 commitments on technology transfer. Further, activities implemented jointly in no way modify the commitments of each Party under the Convention.

The COP will annually review the progress of the pilot phase and make a conclusive decision on the pilot phase by the end of the decade.

As this concept develops, Parties should be encouraged to pay full attention to the ramifications of JI for compliance verification of *FCCC* obligations, particularly if the Berlin Mandate results in tighter obligations being assumed by the Parties. Joint implementation should not be allowed to dilute individual state accountability for performance. And, should JI initiatives eventually be allowed for credit, it must be absolutely clear how this will work and whether it can account for the meeting of obligations. Reporting obligations related to JI will be very important.⁵⁰³

From a compliance point of view, this is an issue to monitor closely as it develops.

7.1.6 Types of Parties

The Convention provides another challenge to securing compliance with its provisions by establishing numerous categories of Parties, each category with different obligations to be met. Categories with relevance to compliance issues are: (1) all Parties,⁵⁰⁴ (2) developed country parties in Annex I,⁵⁰⁵ (3) other Parties in Annex I,⁵⁰⁶ (4) developing country parties,⁵⁰⁷ (5) developed Parties in Annex II,⁵⁰⁸ (6) other developed Parties in Annex II,⁵⁰⁹ (7) Parties in

⁵⁰² UNEP Doc. FCCC/CP/1995/L.13.

⁵⁰³ Dunn, *supra* note 494 at 441.

⁵⁰⁴ Article 4.1.

⁵⁰⁵ Article 4.2 and throughout.

⁵⁰⁶ Articles 4.2, 12.2, 12.5.

⁵⁰⁷ Throughout the Convention.

⁵⁰⁸ Articles 4.3, 4.4, 4.5, 12.3.

Annex I undergoing the process of transition to a market economy,⁵¹⁰ and (8) least developed countries.⁵¹¹

This wide range of Parties poses a particular challenge to the institutional mechanisms of the Convention in tracking the obligations of each country and reviewing compliance with them. Unless such diversity is eventually harmonized and streamlined,⁵¹² compliance verification will be very difficult. In negotiating a new protocol or amendments, Parties should keep this in mind.

7.2 Reporting

Parties' obligations to report under the Convention should be assessed against the lessons learned in earlier chapters, especially about timelines for reporting, review of reports, and form and content of reports. In the FCCC, reporting assumes a more central role, given that the commitments on emissions are rather elusive.⁵¹³

Reporting and review of such reports will likely be, for the time being, the most important Convention process for measuring compliance with Convention obligations, even more so than the resolution of questions mechanism under Article 13. This is because of the nature of the current aim under Article 4.2(b) to stabilize at 1990 levels of GHGs by the year 2000, which means that a target is the goal. No one act of a Party will cause it to fail to meet that goal; rather, it is through its annual reports and peer review thereof, that the international

⁵⁰⁹ Articles 4.5, 4.4, 4.5, 12.3.

⁵¹⁰ Article 4.6.

⁵¹¹ Articles 4.9 and 12.5.

⁵¹² As an example, Article 5 Parties [developing countries] under the *Montreal Protocol*, after the ten-year grace period, become harmonized with Article 2 Parties as regards phase-out obligations.

⁵¹³ Grubb, *supra* note 482 at 541.

community will have a true measure of progress towards the stabilization goal.⁵¹⁴ And, proper reporting and evaluation should signal non-compliance to the Conference of the Parties long before it actually occurs.

All Parties are required to submit reports on national inventories of anthropogenic emissions by sources and removals by sinks, a general description of steps taken or envisaged by the Party to implement the Convention and any other information the Party considers relevant.⁵¹⁵

Developed country Parties are required to report much more information than developing countries. This includes a detailed description of policies and measures adopted to implement Article 4.2(a) and (b) commitments and a specific estimate of the effects that such policies and measures will have on anthropogenic emissions by its sources and removals by its sinks of greenhouse gases. As well, they must report on measures taken in accordance with Article 4.3 to 4.5.⁵¹⁶ Guidelines were adopted by INC9 to assist countries in these national communications⁵¹⁷ and review teams have been reviewing these already.⁵¹⁸

The analysis in Chapter 5 suggested that clear deadlines are important to obtain compliance with reporting obligations. Yet, Article 12.5 creates a differentiated timetable for reporting for different types of Parties, thus complicating the overall implementation, aggregation of statistics and follow-up on individual country reports.

⁵¹⁴ This is likely to be true of more stringent commitments adopted under the Berlin Mandate: Victor, *supra* note 82 at 72.

⁵¹⁵ Article 12.1(a) to (c).

⁵¹⁶ Article 12.2 and (3).

⁵¹⁷ UNEP Doc. A/AC.237/WG.1/L.16/Rev.1.

⁵¹⁸ Subsidiary Body For Scientific and Technological Advice, First Session, August 28-September 1, 1995, *Report*, FCCC/SBSTA/1995/3, October 5, 1995, para. 33 (c).

Annex I Parties are to make their initial "communication" within six months of the coming into force of the Convention for that Party. Non-Annex I Parties can make their first communication within three years of the Convention's coming into force for that Party or of the availability of financial resources in accordance with Article 4.3. For those Parties who are "least developed countries", they may make their initial report at their discretion, with no time limit set.⁵¹⁹ Aside from the initial communications, the COP will decide upon the frequency of subsequent communications, "taking into account the differentiated timetable set by this paragraph." It would appear that, unless the COP regularizes it, asymmetrical reporting has been adopted indefinitely, thus perpetuating reporting complexities and making the measurement of compliance more difficult. A variable reporting cycle can lead to information gaps and difficulties in structuring non-compliance procedures. The COP should be urged to consolidate reporting timing as quickly as possible, especially as obligations increase in number and intensity.

Reports are to be made to the Conference of the Parties, through the Secretariat.⁵²⁰ The COP is required to review national communications at COP 1⁵²¹ and periodically thereafter, in accordance with Article 7. Under that Article, the Conference of the Parties is required to assess on the basis of all of the information made available to it the implementation of the Convention by the Parties and the overall effects of the measures taken.⁵²² It is also required to consider and adopt regular reports on the implementation of the Convention and to ensure

⁵¹⁹ Article 12.5.

⁵²⁰ Article 12.1.

⁵²¹ Article 4.2(b).

⁵²² Article 7.2(e).

their publication,⁵²³ as well as to review reports submitted by subsidiary bodies and provide guidance to them,⁵²⁴ and to make recommendations on any matters necessary for the implementation of the convention.⁵²⁵ Although the wording of the Convention is unclear as to exactly how individual Party reports will be reviewed, the Parties have begun a peer review process whereby national reports are reviewed individually by review teams.⁵²⁶

Chapter 5 pointed out the importance of clarity regarding the content of reports. Some concerns have been expressed about the generality of the reporting provisions of the *FCCC*, in that many government policies, and especially those in the energy sector, could be put forward as contributing to limiting emissions.⁵²⁷

Although Guidelines have been developed to address this problem, they have not been considered sufficient, as the Parties have decided that further guidelines are required.⁵²⁸ And, as has been recently noted:

...the first round of impressive national reports submitted over the last month leaves much to be desired. Notably, the reports lack sufficient information, reported in a comparable framework, to allow detailed scrutiny of whether existing policies and measures put Parties on track for future compliance.⁵²⁹

Another criticism that has been made is that there is no requirement to list options for reducing emissions which have been rejected.⁵³⁰ Thus, governments could report in a positive fashion on existing policies, indicating that to do more would entail unacceptable financial

⁵²³ Para. (f).

⁵²⁴ Para. (j).

⁵²⁵ Para. (g).

⁵²⁶ U.N. Doc. FCCC/SBI/1996/L.1/Add.1,4 March, 1996.

⁵²⁷ Grubb, *supra* note 482 at 541.

⁵²⁸ *Ibid.*

⁵²⁹ Victor, *supra* note 82 at 72.

⁵³⁰ *Ibid.*

costs.⁵³¹ The closest the guidelines come to addressing this point is where they provide that Parties may briefly describe policies and measures under consideration but not yet adopted.⁵³²

Further, Article 12 does not require reporting on the difficulties which may be impeding emission reduction. This would provide useful information to the Conference of the Parties to ensure better implementation of the Convention as a whole.

7.3 Institutions

7.3.1 Conference of the Parties

The COP is intended to be the highest decision-making authority under the Convention and is given the task of keeping under regular review the implementation of the Convention and any related legal instruments that the COP might adopt, and to make decisions necessary to promote the effective implementation of the Convention.⁵³³ Listed duties to achieve this end are fairly typical of IEAs, and include a number affecting compliance issues: to periodically examine the obligations of the Parties;⁵³⁴ to assess the implementation of the Convention;⁵³⁵ to consider and adopt regular reports on the implementation of the Convention;⁵³⁶ to make recommendations on implementation of the Convention;⁵³⁷ to seek to mobilize financial resources;⁵³⁸ to establish subsidiary bodies and review reports submitted by

⁵³¹ *Ibid.*

⁵³² UNEP Doc. A/AC.237/WG.1/L.16/Rev.1, paragraph 23.

⁵³³ Article 7.

⁵³⁴ Art. 7.2(a).

⁵³⁵ Art. 7.2(e).

⁵³⁶ Art. 7.2(f).

⁵³⁷ Art. 7.2(g).

⁵³⁸ Art. 7.2(h).

those bodies and provide guidance to them;⁵³⁹ to adopt rules of procedure for the Conference of the Parties and the subsidiary bodies.⁵⁴⁰

Nevertheless, several concerns flow from these provisions. The COP's role in compliance review is not clear, nor is it clear that the CoP will review individual Party compliance at all. No methodology is provided in the Convention for review and follow-up on reports. And, the links between the COP, and other Convention institutions, such as the Secretariat, subsidiary bodies and the Article 13 multilateral consultative mechanism⁵⁴¹ are not clearly set out in the Convention. Most importantly, the COP is not given the power to make legally-binding decisions regarding any compliance assessments made.

7.3.2 Secretariat

The Secretariat has a number of functions typical to such bodies, highlighted earlier in Chapter 5, such as making arrangements for meetings of the COP and subsidiary bodies, to compiling and transmitting reports, facilitating assistance to Parties in the compilation and communication of information required in accordance with the Convention, and preparing reports on its activities and presenting them to the COP.⁵⁴²

How effective a role the Secretariat will play in compliance issues depends upon the working relationship it establishes with the COP. As the Convention text now reads, a couple of provisions will provide the Secretariat with some leeway should the COP so desire. The compilation and transmittal of reports can be translated into simply a mechanical function, but

⁵³⁹ Art. 7.2(i).

⁵⁴⁰ Art. 7.2(k).

⁵⁴¹ Victor, *supra* note 82 at 80 recommends this linkage based on his observations of the *Montreal Protocol's* non-compliance procedures. Individual country reviews will be addressed more fully under Section 7.3.4 on the "Multilateral Consultative Process".

it arguably requires that a failure to receive reports should be followed up on. And, advice as to form beyond that in the guidelines will necessarily be given to Parties, as the Secretariat is required to assist parties in the compilation and communication of information. Lastly, preparing reports on its activities gives the Secretariat an opportunity to report on the difficulties or successes it encounters in obtaining reports and other required information, as these not only constitute obligations themselves, but provide an essential information link in the evaluation of compliance with other obligations.

One improvement that could be made to the Secretariat's powers would be to formally give it the power to make recommendations to the COP, or as has been done under the *Montreal Protocol*, to provide for it to report to the COP on specific cases of non-compliance.

Although its omission at present does not preclude suggestions being made to either the COP or the Subsidiary Body on Implementation (SBI), or the COP requesting this function, formal inclusion in the Convention would have clearly provided a mandate for the Secretariat and demonstrated a recognition that it is a valuable source of information and a critical link amongst Parties, and between Parties and the COP. Nevertheless, once the roles of the subsidiary bodies and the consultative mechanism are made clear, the correlative role of the Secretariat can be adjusted by the COP pursuant to para. 8.2(g).

7.3.3 Subsidiary Body for Scientific and Technological Advice (SBSTA)

The Subsidiary Body for Scientific and Technological Advice (SBSTA) could prove invaluable in determining whether there has been actual compliance with the provisions of the

⁵⁴² Article 8.

Convention or future protocols. It has two tasks assigned to it under the Convention which should prove particularly useful from a compliance point of view.

First, the body is required to prepare scientific assessments on the effects of measures taken in the implementation of the Convention.⁵⁴³ While some might argue that this is a global assessment rather than an individual one, the wording certainly supports the latter equally well: "...Prepare scientific assessments on the effects of measures taken in the implementation of the Convention". At its First Session, the SBSTA agreed to put in-depth reviews on its agenda as a standing item.⁵⁴⁴

Furthermore, the body is also required to respond to scientific, technological and methodological questions that the COP and its subsidiary bodies may put to it. Therefore, it could act as a resource to the COP and the Subsidiary Body on Implementation (SBI) during their reviews of country reports, as noted above, and assist in the compliance evaluation process. Given the complexity of climate change questions of cause and effect, this could prove to be a necessary function for the SBSTA to perform. The success of this body for compliance purposes will depend on the quality of those in attendance, in the direction given to it by the COP with respect to its compliance-related functions, and in its ability to respond in a timely and appropriate fashion to requests from the SBI. It remains to be seen whether the open-ended nature of the SBSTA will impede its effectiveness. All of these matters should be monitored by the Parties as implementation evolves.

⁵⁴³ Article 9.2(b).

⁵⁴⁴ U.N. Doc. FCCC/SBSTA/1995/3, 5 October 1995.

7.3.4 Subsidiary Body for Implementation

The Subsidiary Body for Implementation, the most important body for compliance measurement, is left with vague and incomplete duties.⁵⁴⁵ Unfortunately, this has been a regular trend in those IEAs that address compliance.⁵⁴⁶ This body is established to assist the Conference of the Parties in the assessment and review of the effective implementation of the Convention.⁵⁴⁷ It is to consist of government representatives who are experts on matters related to climate change and is required to report regularly to the COP.⁵⁴⁸

Specific tasks assigned are:

- to consider the information communicated in accordance with Article 12.1 to assess the overall aggregated effect of the steps taken by the Parties
- to consider the information communicated in accordance with Article 12.2 in order to assist the Conference of the Parties in carrying out the review of commitments required by Article 4.2(d), and
- to assist the COP in the preparation and implementation of its decisions.

As regards composition, the body is to be open to participation by all Parties, which is likely to hamper its effectiveness. In contrast, the *Montreal Protocol* Implementation Committee is functioning with 10, providing for both equitable geographic representation and effectiveness.⁵⁴⁹ The "Committee of the Whole" approach in the *FCCC* does not appear to be any different than having such matters addressed by the COP. It might be useful to create a sub-group at least to consider matters pursuant to Article 13, discussed below.

⁵⁴⁵ Greene and Salt, *supra* note 490 at 10 support the "vague" contention. Grubb claims at 541: "The text is a shadow of some earlier drafts which attempted to establish a strong body to critically review national reports."

⁵⁴⁶ See, note 4, *supra*.

⁵⁴⁷ Article 10.1.

⁵⁴⁸ Article 10.1.

Second, the composition is simply of government representatives who are climate change experts. This sounds somewhat like the body on scientific advice and not one which will be assessing compliance with the Convention: arguably, it should consist of persons expert both in international law and climate change issues.

Functionally, the body is given the authority to "consider" information submitted by the Parties, but no authority to question the information, ask for more, or make recommendations to the COP. As the 1992 U.S. GAO study showed, incomplete reporting is a serious problem in environmental regimes and affects compliance measurement.⁵⁵⁰ Clarity in the original mandate of the SBI would have prevented the possibility of disagreements later about its capacity to undertake compliance-related functions.

Noticeably, the provisions creating the SBI contain no reference to the individual assessment of performance, which is a serious omission from the body dealing solely with implementation, an important component of which is compliance.

Another omission in the *FCCC* is the assigning of a role to this body in the development of non-compliance procedures or the resolution of questions under Article 13, which are not specifically mentioned in the mandate of the SBI. The Parties have chosen to leave the development of the procedures to an Ad Hoc Open-ended Working Group of Technical and Legal Experts to study all issues relating to the Article 13 process and its design.⁵⁵¹

Lessons from Chapter 5 indicate that a discrete body has to be assigned to look at compliance questions. The *FCCC* regime is being hampered in its effectiveness because while national reports are being reviewed and recommendations being made to the COP by

⁵⁴⁹ As discussed in Chapter 5, *supra*.

the SBI, there is no standing body with an established process which is able to focus on and address specific "questions", whether they be of non-compliance or general implementation. It is unlikely that the Article 13 process will be functioning at all before 1998, and based on the *Montreal Protocol* experience, it will likely take several more years for it to function effectively.

7.4 Multilateral Consultative Process

There is no provision in the Convention similar to Article 8 of the *Montreal Protocol*, which specifically directs the adoption of a non-compliance procedure. However, the *FCCC* COP was required to consider establishing at its first meeting a multilateral consultative process, available to the Parties on their request, for the resolution of questions regarding the implementation of the Convention.⁵⁵² This was a far cry from the detailed verification provisions that had been sought during the negotiation of the *FCCC*.⁵⁵³

At COP1, it was decided to establish an "Ad Hoc Open-ended Working Group of Technical and Legal Experts to study all issues relating to the establishment of a multilateral consultative process and its design" and to report its findings to the Second Conference of the Parties. However, the Working Group has not yet completed its work, and informed sources indicate that the next substantive discussions are expected in December 1996.

The provision raises many questions. The only other environmental agreement to adopt this wording is the *Desertification Convention*, which did so after the *FCCC* was concluded,

⁵⁵⁰ U.S. GAO Report, *supra* note 3.

⁵⁵¹ U.N. Doc. FCCC/CP/1995/L.9, 4 April 1995.

⁵⁵² Article 13.

⁵⁵³ "Framework Convention", *supra* note 461.

and is even less advanced than the *FCCC* in implementing the provision. Questions include the following:

(1) the COP is to consider the establishment not of a body, but of a process. Who will run that process? Who will be a part of that process? What kind of a process is it? Who will be consulted?

(2) it is available to parties at their request. Therefore, it will not provide any sort of mandatory ruling on whether states have complied with the Convention, but will be a tool available to states. How will this differ from the settlement of disputes provisions of Article 14? What linkages, if any, need to be made with Article 14?

(3) the process is for the "resolution" of questions regarding implementation. Does this mean that this body has the final say in matters of implementation submitted to it, or does it provide suggestions which the Parties are free to accept or reject?

(4) what kind of questions regarding implementation would be submitted to this body? Could one state complain about the lack of performance of another state? Could LDC's complain about their failure to receive funding or technology?

Although reporting will be most important under the Convention until tighter emission obligations are adopted, non-compliance procedures will be an important tool for the climate change regime if it is to continue to have credibility for its member states. Further, many reporting obligations apply now and a failure to report should be tied to either a non-compliance or resolution of questions process, as is suggested by the *Montreal Protocol* experience.

As was demonstrated in earlier chapters, it would be very useful for the Ad Hoc Open-ended Working Group to consider the question of context when structuring resolutions of

questions process. One key question is whether the non-compliance procedures should as a procedure be made legally binding, or whether an institution under the procedures should be given the power to make legally binding decisions--and, most importantly, whether either of these scenarios is realistic or necessary in the climate change context. If the goal of performance is an emissions level that is measured at a future date, it may be most useful to have a process which provides ample opportunity to reveal at an early stage which countries are having the most difficulty in controlling their GHG emissions. And, with an opportunity to resolve questions other states may have about this performance and how it impacts on other Parties to the Convention, as well as the global commons, the international community might achieve a better result if the process is short and non-legalistic, but public, instead of lengthy and legalistic. Although a legalistic approach might work in human rights (*European Social Charter*) and quasi-human rights (ILO) situations, and even in some environmental situations, it may not be suitable in the climate change context, where precautionary environmental results, rather than interpretation of fundamental rights, is the key goal.

7.5 Financial Mechanisms

As we have seen, financial mechanisms in treaties can serve two important functions. The first is to lure to the negotiating table parties who would not be there without the financial attractions, and encourage them to take on legal obligations.⁵⁵⁴ The second is a method of ensuring compliance with obligations by addressing the underlying cause of failure to comply in many cases--which is poverty and lack of infrastructure. A fund can therefore play a critical role in ensuring that parties are able to meet important environmental commitments when the

will to do so is present, but the means are not. This section attempts to determine whether the financial mechanism in the *Climate Change Convention* will serve the second of these two purposes, keeping particularly in mind the lessons learned in Chapter 5.

In the negotiations leading up to the conclusion of the *FCCC*, the financial mechanism was one of two key points of contention.⁵⁵⁵ Developing countries were pushing for a separate fund that was not dominated by the developed countries,⁵⁵⁶ while industrialized countries sought to have the Global Environmental Facility designated as the "mechanism" or fund. Article 21 is the result of a negotiated compromise. It appoints the GEF as the interim financial mechanism, but the GEF must "be appropriately restructured and its membership made universal." Since 1992, changes have been made to GEF governance, and *FCCC* Parties have continued to support the GEF in its role as the interim financial mechanism.⁵⁵⁷

The Convention provides for a mechanism for the provision of financial resources on a grant or concessional basis, including for the transfer of technology.⁵⁵⁸ The mechanism is to "function under the guidance of and be accountable to the Conference of the Parties", which shall decide on its policies, programme priorities and eligibility criteria, but the operation of the financial mechanism is to be entrusted to the entity, currently the GEF.

The developed country Parties and other Annex II Parties are also required to assist developing country Parties that are particularly vulnerable to the adverse effects of climate

⁵⁵⁴ *Lessons Learned*, *supra* note 11.

⁵⁵⁵ Grubb, *supra* note 482 at 541. The other was whether specific targets would be adopted.

⁵⁵⁶ "Framework Convention", *supra* note 466 at 538-9.

⁵⁵⁷ Dunn, *supra* note 494 at 441. The GEF was restructured in 1994 and developing countries' influence in its decision-making has been increased: ACOPS, *supra* note 207 at 27.

⁵⁵⁸ Article 11.1.

change,⁵⁵⁹ as well as to promote, facilitate and finance the transfer of or access to environmentally sound technologies and know-how.⁵⁶⁰

A number of compliance issues arise out of the financial mechanism in the Convention. First, there is some ambiguity about whether there is an obligation for developed country Annex 1 Parties to make financial contributions. Although the language of Article 4.3 is mandatory, no specific amount of contributions have been set.⁵⁶¹

However, given the lack of a fixed amount of the contribution, there is some indication that donor countries may take the same line as was taken for the *Montreal Protocol*: that payments are voluntary.⁵⁶² And, if one of the main points of the mechanism is to facilitate LDC compliance with LDC obligations⁵⁶³, then this will not occur if funds are not made available or are inadequate for the purpose.

Article 4.7, pertaining to compliance of developing countries, is written in an extremely ambiguous manner. It can be interpreted by LDC's as meaning that they do not have to

⁵⁵⁹ Article 4.4.

⁵⁶⁰ Article 4.5.

⁵⁶¹ Article 4.3 provides: "The developed country Parties and other developed Parties included in Annex II shall provide new and additional financial resources to meet the agreed full costs incurred by developing country Parties in complying with their obligations under Article 12, paragraph 1. They shall also provide such financial resources, including for the transfer of technology, needed by the developing country Parties to meet the agreed full incremental costs of implementing measures that are covered by paragraph 1 of this article and that are agreed between a developing country Party and the international entity or entities referred to in Article 11, in accordance with that Article. The implementation of these commitments shall take into account the need for adequacy and predictability in the flow of funds and the importance of appropriate burden-sharing among the developed country Parties." See also on this point, "Framework Convention", *supra* note 466 at 525.

⁵⁶² Regarding the *Montreal Protocol*, see *supra* note 400. As regards the *FCCC*, *ACOPS*, *supra* note 207, at 27 cites the UK as making an interpretative declaration on signature of the *FCCC*, reserving its position on the interpretation of the wording of Article 11. The UK's understanding of the provision was that decisions of the COP were only to be made as to the amount of resources needed by the mechanism, and not the nature, size or frequency of developed country contributions.

⁵⁶³ Another is to fund adaptation costs, such as those noted in Article 4.4.

comply with any of the commitments under the Convention that are to be funded under the mechanism unless they have actually received funding or technology.⁵⁶⁴

Given that there is no guarantee of funding under the mechanism other than for reporting requirements⁵⁶⁵, there is a concern, although less so than if the developing countries had greater obligations under the *FCCC*. It is not recommended that a companion to Article 4.7 form part of any protocol adopted to the Convention pursuant to the review of adequacy of commitments; rather the obligations in Article 4.3 could be made subject to the non-compliance procedures. A number of legal issues remain:

- how to establish close links between the GEF and the resolution of questions procedure in order to ensure that failure to pay into the GEF for *FCCC* obligations will be noted and addressed
- whether non-compliance procedures adopted by the Parties should cite failure to pay as an instance of non-compliance
- whether an article like Article 4.7 should be included in any new Protocol
- the GEF's role in compliance i.e. effects of failure to approve an LDC project, should be explored, and information and funding links made with the resolution of questions process
- the impact on compliance and enthusiasm for the Convention generally if the financial mechanism is not adequately funded.

7.6 NGO participation

Because of the complexity of the science surrounding climate change, and the existence of the Intergovernmental Panel on Climate Change, it would be difficult to expect NGOs to

⁵⁶⁴ ACOPS, *supra* note 207 at 13.

⁵⁶⁵ See Article 4.3 and "Framework Convention", *supra* note 466 at 527 on this point.

contribute in any large way to the science on climate change. However, there are other potential roles for NGOs in the climate change context.

Article 7.6 of the Convention deals with the role of NGOs. It provides that the U.N., its specialized agencies and the International Atomic Energy Agency, as well as any State member thereof or observers thereto not Party to the Convention, may be represented at sessions of the Conference of the Parties as observers.

Any body or agency, whether national or international, governmental or not, which is "qualified" in matters covered by the Convention (and which has notified the Secretariat of its desire to be represented at a session of the Conference of the Parties as an observer) may be admitted as an observer unless at least one-third of the Parties present object.

The admission and participation of observers is subject to rules of procedure adopted by the Conference of the Parties. Such rules have been developed⁵⁶⁶ and reiterate the provisions of the Convention in this regard. In addition, it is proposed that the first class of observers (the U.N., its specialized agencies, etc.) may, upon invitation of the president, and if there is no objection from at least one third of the Parties present, participate without the right to vote in proceedings of any session.⁵⁶⁷ As regards the second class of body, those "qualified", they may, upon invitation of the President participate on the same basis, but only "in matters of direct concern to the body or agency they represent."⁵⁶⁸ Rule 8 requires the Secretariat to notify any of the aforementioned entities of any session so that they may be represented by observers. These provisions are fairly typical of the type of reference in other IEAs.

⁵⁶⁶ It should be noted that the Rules of Procedures were not finalized at COP 1, but this point was not one of the outstanding issues: Dunn, *supra* note 465 at 442.

⁵⁶⁷ Rule 6(2). U.N. Doc. A/AC.237/27, 10 February 1993.

⁵⁶⁸ Rule 7(2).

Other rules about the conduct of meetings will affect the right of NGOs or individuals to follow the proceedings of the COP. The Meetings of the Conference of the Parties are proposed to be held in public, unless the COP decides otherwise. However, meetings of the subsidiary bodies are to be held in private unless the CoP decides otherwise.⁵⁶⁹ The Montreal Protocol experience suggests that where non-compliance is being addressed, closed meetings, with meeting reports published later, work best. However, if the Article 13 process is more general in nature then it may be useful to have these meetings open to the public, to best capitalize on the publicity factor.

Based on the foregoing approach, it would not seem that the FCCC would provide a role for NGOs in the resolution of questions procedure. However, as matters evolve under that process, it is open to the Parties to consider allowing information or questions from NGOs to be considered in the process, perhaps via the Secretariat.

Similarly, it is important to note that by defining the members of the SBSTA and the SBI as from the Parties, the FCCC has ignored a factor which has proven helpful in both the human rights and international labour fields: a public examination of state compliance.

7.7 Conclusions

Having regard to earlier chapters, the FCCC unfortunately illustrates many of the scenarios that were problematic. It contains ambiguous obligations, makes it administratively difficult to track reporting and compliance obligations, the role of institutions have not been clearly set out and had to undergo further development post-negotiation, Article 13 is vague and undeveloped, and the role of NGOs in the Convention is minimal.

⁵⁶⁹ Rules 30(1) and (2).

However, some aspects of a “compliance package” are present. Despite the ambiguity of language, a detailed reporting process has been established and utilized, a financial mechanism has been established, and the development of Article 13 has begun.

As negotiators under the Berlin Mandate develop a new instrument with legally binding targets, a number of issues should be noted as key to compliance: (1) the obligations should be clear and measurable; (2) if categories of Parties are felt necessary, these should be kept to a minimum, and universal differentiation should be avoided; (3) reporting requirements should be clear; (4) the financial mechanism of the Convention should be utilized to help developing countries meet any obligations they undertake; (5) a verification and compliance process will be necessary and may have to be different from the Convention’s Article 13 process; (6) overall effectiveness may be enhanced by increased NGO participation, especially in verifying state performance.

CHAPTER 8: SUMMARY AND CONCLUSIONS

Our numbness, our silence, our lack of outrage, could mean we end up the only species to have minutely monitored our own extinction. What a measly epitaph that would make: “they saw it coming but hadn’t the wit to stop it happening.”⁵⁷⁰

The thesis of this paper was threefold: (1) that the successful implementation of international environmental agreements depends on compliance issues in those agreements being effectively addressed; (2) compliance issues need to be addressed both during the initial negotiation of such agreements, and in their subsequent implementation; (3) a number of innovative compliance mechanisms are available which appear to be well-suited to the environmental context, but they may require some refinement.

Analysis undertaken has suggested that the international community has recently begun addressing the effectiveness of international environment agreements. In that pursuit, compliance has been, and continues to be, an important focus. Without a careful understanding about the levels of compliance with current international environmental obligations, it will be difficult to know whether the right rules are in place to achieve sustainable development. Thus, sovereign states must continue to address compliance issues in new and developing environmental regimes.

Analysis also suggested the need for such attention to be focused on compliance issues at the outset of negotiations and throughout, if a comprehensive, yet integrated, “package” of compliance measures is to be included in an agreement. When issues cannot be resolved

during negotiations, leaving them until post-negotiation implementation may sometimes not matter--but usually it does. For instance, the failure to include the power to make binding decisions by the Conference of the Parties, or the choice to adopt non-compliance procedures by a non-binding decision at a later date and not include them in the Convention text, has repercussions which cannot be resolved for many years. Similarly, ensuring obligations are clearly drafted must be done at the time of negotiation of the text, and cannot be relegated till after signature.

However, once negotiations are over, whatever the outcome for compliance after all the trade-offs are completed, the period of implementation is also key. As has been shown, it is at that point that Parties must assess the bargain obtained and determine what gaps remain to be filled. And during that process, it is key for compliance issues to be front and centre, in order to get the regime started off on the road to habitual compliance.

This paper has examined a number of innovative mechanisms being developed in environmental agreements. In particular, the use of non-compliance procedures which are non-adversarial, multilateral and intended to bridge the gap between unutilized dispute resolution procedures and no recourse for exploring non-compliance, has proven effective to a degree. Yet, it has been shown that this mechanism is still in the early stages of development and could benefit from refinements such as providing for greater linkages with other aspects of the regime. Consideration also needs to be given to resolving the tension between non-legal and legally binding processes, and the advantages and disadvantages of each in a given context.

⁵⁷⁰ Sara Parkin, "Power and Green Politics" *Resurgence*, May/June 1991, quoted in Sandra Postel, "Denial in

Similarly, the use of financial mechanisms in environmental agreements is innovative and addresses the fundamental reason for non-compliance by many countries. However, the benefits of financial mechanisms may sometimes be offset by asymmetrical obligations which may discourage developing countries from actively working to improve their domestic environmental situation. Funds under financial mechanisms need to be evaluated for their effectiveness, partly to ensure that donor fatigue does not occur unnecessarily, and partly to ensure that the reason for providing the funds--obtaining compliance with the agreement-- is not forgotten.

Research has also shown that NGOs can play a number of diverse and essential roles in compliance processes. Although there is a high level of transparency in general meetings of convention parties, other processes are not fully taking advantage of the potential NGO contribution to identifying and resolving compliance issues.

As one looks toward the end of the millennium, a number of observations can be made.

Compliance issues will remain on the international law agenda of the world community for a number of reasons. It seems to be part of the natural evolution of international regimes that they concern themselves first about rules, and later about compliance. Further, developed country governments are becoming more bottom-line and results-oriented, and this puts increasing pressure on international regimes to be effective. As tensions continue to escalate between the trade and environment worlds over the question of trade measures in IEAs, there will likely be increasing pressure from trade interests for such agreements to provide better compliance mechanisms, or compulsory dispute resolution mechanisms.

The international community will have to decide whether it will continue to work with facilitative and non-confrontational approaches to non-compliance, or whether it prefers to take a harder, sanctions-based approach, or provide for a mix of the two. The current path of a softer approach is likely to be followed for the foreseeable future unless there is pressure to take a stronger approach, although it is most likely that a mix will eventually be found.

While such pressure could be from the trade community or NGOs, it may also come from states themselves. The case study on the *Framework Convention on Climate Change* illustrated the wide-ranging nature of that problem and potential solutions. It also highlighted the need for compliance procedures for the proposed new legally binding commitments for the post-2000 era. One key incentive to maintain that focus will be the realization of what the economic costs of a state's own compliance will be, resulting in the search for a level playing field through the compliance of other states party.

Similarly, there will have to be an assessment of whether there should be more of an emphasis on dispute avoidance mechanisms rather than on *ex post facto* deterrent solutions such as liability and compensation regimes, with all of the complexities they entail. However, where a liability regime is created, the relationship between liability rules and findings of non-compliance under the environmental agreement of which they are part is an area deserving of future study.

Another question that remains to be answered is whether an increased focus on compliance with international agreements will result in a trend of lower substantive standards being adopted by states.

The role of NGOs will continue to grow, evidence of a world-wide trend towards a greater role for the public in civil society. This participation will serve to stimulate and enhance compliance efforts.

Innovative methods will have to be continuously sought to meet the capacity-building needs of developing countries. This is a critical piece of the compliance puzzle, and without it, there will be no real hope of effective compliance with environmental treaties.

Better compliance mechanisms will not guarantee that the environmental treaty rules chosen are the right ones to solve a particular problem, but they are our only hope for beginning to answer that question. Without them, there will be no one left to write even a measly epitaph for the planet.

ANNEX 1: PURPOSES OF REPORTING SYSTEMS IN INTERNATIONAL ENVIRONMENTAL AGREEMENTS

There are a number of purposes which a centralized reporting mechanism can serve, all of which are related to compliance:

- international "stock-taking" on the state of implementation of a convention generally and in specific countries⁵⁷¹
- national stock-taking of implementation of international legal obligations⁵⁷²
- facilitating review of the record of compliance⁵⁷³
- helping identify for other states the most effective ways of implementing the agreement⁵⁷⁴
- promoting consistency among state practices⁵⁷⁵
- facilitating the evaluation of existing measures and providing the basis for amending standards, improving adherence to existing ones⁵⁷⁶ or establishing new policies⁵⁷⁷
- providing an early warning system to avoid cumulative impacts⁵⁷⁸
- providing for review by independent third parties can be very effective in promoting compliance;⁵⁷⁹ this can also be achieved through review by the Conference of the Parties if done publicly.⁵⁸⁰

⁵⁷¹ *International Labour Standards*, *supra* note 223 at 18.

⁵⁷² *Ibid.*

⁵⁷³ Lee Kimball, "International Law and Institutions: The Oceans and Beyond" (1989) 20 *Ocean Development and International Law*, 147 at 152.

⁵⁷⁴ *Ibid.*

⁵⁷⁵ *Ibid.*

⁵⁷⁶ *Ibid.*

⁵⁷⁷ Scott Hajost and Quinlan Shea, "An Overview of Enforcement and Compliance Mechanism in International Environmental Agreements", in *International Enforcement Workshop* (Utrecht, The Netherlands: Ministry of Housing, Physical Planning and Environment, 1990) at 262.

⁵⁷⁸ Kimball, *supra* note 373 at 152.

⁵⁷⁹ *Ibid.*

⁵⁸⁰ Sachariew, *supra* note 12 at 22-3.

ANNEX 2: REASONS FOR FAILURE TO REPORT UNDER INTERNATIONAL ENVIRONMENTAL AGREEMENTS

- lack of financial and technical resources to gather data (*Montreal Protocol*)⁵⁸¹;
 - customs tracking systems do not differentiate between substances, so data cannot be provided on specific substances (*Montreal Protocol*);
 - data on the controlled substances is often not given to customs officials because importing companies treat the data as confidential (*Montreal Protocol*);
 - difficulty in assembling information from various offices (developed countries, *London Convention*);
 - higher priority given to other activities (developed countries, *London Convention*);
 - lack of financial resources, infrastructure, technology and trained staff to comply with the convention generally, including the reporting requirements (developing countries, *London Convention*);
 - lack of tech. and financial resources needed to implement the agreement (MARPOL);
 - reporting may be given less priority and resources than other responsibilities of the designated national authority (developed countries, MARPOL);
 - reporting related to ability to comply with the agreement in general; lack adequate enforcement legislation and sufficient administrative, technical and financial resources (developing countries, CITES);
 - lack enthusiasm for and understanding of the purpose of reporting (developing countries, CITES);
- difficult to get data from customs officials, high trade volume and insufficient personnel to complete the reports (developed countries, CITES).

⁵⁸¹ The name of the agreement under which this was a problem, and in some cases the Parties for whom it was a problem, are contained in brackets.

ANNEX 3: DETAILED IMPROVEMENTS WHICH COULD BE MADE TO THE *MONTREAL PROTOCOL* NON-COMPLIANCE PROCEDURES

- there should be a clarification of the terms "parties involved"
- there should be no requirement for corroborating information. This is not required by the ILO complaints procedure; even the VOCs procedure uses the phrase "reason to believe" and requires no corroboration
- consideration should be given to providing for legally binding decisions of the Conference of the Parties
- there should be a clearer follow up procedure once a complaint has been dealt with by the CoP
- clear links should be made with the regular reporting process and the Multilateral Fund
- there should be clear linkages with the dispute resolution provisions in the Vienna Convention
- assessments of confidentiality of information should be made by the Implementation Committee, not the Parties individually
- a list of situations of non-compliance should be adopted in order that Parties are aware of what their obligations are; if the whole list cannot be agreed upon, those elements which can be agreed upon should be included.

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