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THE CLIMATE CHANGE REGIME—BETWEEN A ROCK AND A HARD PLACE?

*Laurence Boisson de Chazournes**

INTRODUCTION

The phenomenon of climate change—also known as the greenhouse effect or global warming—has been featured on the international agenda since the 1980s. The risk of a significant increase in global temperature during the twenty-first century, caused by increased greenhouse gas emissions in the atmosphere, has led to broad agreement among States to build a regime to control the emissions of greenhouse gases. In addition to the natural component of the greenhouse effect, it is the emissions of anthropogenic origin that is held responsible for this phenomenon,¹ notably due to the

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consumption of fossil fuels such as oil, gas, and coal, but also due to methane emissions linked to agricultural and forestry practices. Many problems result from the significant increase in temperature that accompanies the greenhouse effect. These could include a rise in the sea level, the loss of ecosystems, floods, and soil infertility. The human consequences include epidemics, food shortages, and movements of population. The impacts will vary from State to State but none will be spared completely of the consequences. This is a collective challenge and its effects will be global, although it is true that many developing countries may suffer most as they do not always have the resources to adopt adaptation strategies.

For this global issue, a legal regime for climate protection was conceived in the early 1990s. Although the regime has progressively developed since its conception, it is yet to be strengthened. In order to protect the environment, the regime uses a number of legal strategies, which this article will analyze in turn. These legal strategies need to be clarified and consolidated to avoid serious consequences over the next few decades.

I. STRATEGIES FOR THE CONSTRUCTION OF A LEGAL REGIME ON CLIMATE CHANGE

A. *The Holistic Nature of the Regime*

Since the 1980s, international conventions have negotiated a new genre of environmental protection. The Framework Convention on Climate Change is a convention of this type. The challenge to which these conventions must respond is the need to manage, through a single legal framework, a complex environmental issue in a way that is comprehensive, is not fragmented, and takes into account the interdependence of natural phenomena and human actions as the origin of damage. Action must be conducted at many levels (global,

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1. Article 1.2 of the United Nations Framework Convention on Climate Change defines climate change as “a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods.” United Nations Framework Convention on Climate Change art. 1.2, May 9, 1992, 1771 U.N.T.S. 107 [hereinafter Framework Convention].

regional, national, and local), which must complement and reinforce each other.

Geographical distance cannot be a barrier to confronting climate change, and all States are called upon to act. The consequences of the damage are being and will be felt at all latitudes, and the participation of each State is necessary for anticipating and providing solutions to the problems. The question of climate change, along with the degradation of the ozone layer, biological diversity, and forests, are all part of the same dynamic. These questions, which fall within the remit of the “global environment,” highlight the solidarity and interdependence that is emerging in the international community for the purpose of environmental conservation and protection of common interests at the universal level.

Constructing a universal regime for environmental protection includes a holistic approach to addressing the issues. The legal regulation of climate change focuses not only on climate protection generally, but also covers its related aspects. The fight against climate change must focus its attention on the “climate system,” which means “the totality of the atmosphere, hydrosphere, biosphere, and geosphere and their interactions.”²

Constructing a universal regime also imposes rights and obligations that reflect and legally protect collective interests. It is in this way that international instruments concerning the fight against climate change are needed for action at the universal level and must be the keystone in the design of legal strategies. States, declaring that they are aware that “change in the Earth’s climate and its adverse effects are a common concern of humankind,”³ attempted, through the establishment of policy frameworks, to transcend the rivalries between national interests. This exercise is one of finding a balance in the name of the promotion of a collective interest that is manifested in universal legal instruments. It indicates that the institutional fight against climate change is the result of a compromise around differences between national or regional interests, and a response to criticism by those who challenge the merits of the strategies proposed. In this political context, the law cannot ignore these tensions and compromises that constitute the roadmap followed by all States. The law that is applicable in this area

2. *Id.* art. 1.3.

3. *Id.* pmb. ¶ 1.

is of a special nature, constructed on a multi-level basis and assigning rights and obligations, which represent a universal perspective, or at least “universal” in that they attempt to involve all stakeholders. The *universality* of the approach does not mean *uniformity* of the system, however. The differentiation of rights and obligations is a driving force behind the construction of the climate change regime.

B. A Staggered Normative Strategy to Create a Universal and Inclusive Approach

By adopting the Framework Convention on Climate Change, which opened for signature at the Rio Conference in June 1992 and came into force in March 1994, the community of States expressed their intent to fight the problem of global warming despite the uncertainties remaining about the magnitude and scope of its consequences.⁴ The negotiation of this instrument revealed the divergence in interests between different groups of States, especially with respect to the economic and financial courses of action. These differences have left their mark on the content of the Framework Convention.⁵

In December 1997, the adoption of the Kyoto Protocol to the United Nations Framework Convention on Climate Change⁶ was a further step towards consolidating the climate change regime. The Kyoto Protocol required developed States to reduce total emissions “at least [five percent] below 1990 levels in the commitment period from 2008 to 2012.”⁷ Universalism is combined with equity in the sense of a differentiation of rights and obligations, in particular to

4. See Daniel Bodansky, *The United Nations Framework Convention on Climate Change: A Commentary*, 18 *YALE J. INT’L L.* 451, 471 (1993) (observing the policy differences between oil-producing states who opt for a “go slow” approach and low-lying coastal states who argue for stronger response measures).

5. See *id.* at 558 (explaining how the Convention’s failure to include strict targets and timetables had political and practical significance); Laurence Boisson de Chazournes, *Le Droit International au Chevet de la Lutte contre le Réchauffement Planétaire: Éléments d’un Régime [International Law at the Bedside of the Fight against Global Warming: Elements of a Regime]*, in *MÉLANGES EN L’HONNEUR DU PROFESSEUR H. THIERRY [ESSAYS IN HONOR OF PROFESSOR H. THIERRY]* 43–55 (1998).

6. Kyoto Protocol to the United Nations Framework Convention on Climate Change art. 28, Dec. 10, 1997, 37 *I.L.M.* 22 [hereinafter *Kyoto Protocol*].

7. See *id.* art. 3.1; see also *id.* Annex B (providing a list of State Parties to the Protocol from the United States and European nations).

benefit developing countries. As such, the responsibility for achieving this common goal should be born by developed countries and in accordance with the principle known as “common but differentiated responsibilit[y].”⁸

In the context of shaping a universalist approach in the fight against climate change, the law has a role to play, but it must do so in conjunction with other scientific disciplines. We must understand that the law has a diversity of functions in the fight against climate change. Its prescriptive contours are evident, but they are of little use in the development phase of the regime. Other functions must also be emphasized, such as its ability to elaborate a common language and its utility as an instrument of legitimization. The legal regime of the fight against climate change is very recent: the law has only penetrated this area over the last fifteen years. But the law has nevertheless already helped to clarify and establish the terminology used in this area, and in the process has forged a universal language—legal and political—common to different actors in developed and developing countries as well as those from the public and private sectors.⁹ This is an evolving language that is cognizant of the knowledge that has emerged, as well as the agreements that are being made. The law should not hide the tensions that require trade-offs and compromises.

Recourse to the Framework Convention reveals that this is the case. Providing a legal framework for an initial compromise, the content of such an agreement is flexible enough to allow all parties involved to adhere to it even though their precise demands may vary.¹⁰ This technique has the added value by providing the

8. See United Nations Conference on Environment and Development, Rio de Janeiro, Braz., June 3–14, 1992, *Rio Declaration on Environment and Development*, princ. 7, U.N. Doc. A/CONF.151/5/Rev.1 (Vol. 1) (Aug. 12, 1992).

9. See, e.g., *infra* Part I(A), for a discussion on the United Nations Framework Convention on Climate Change.

10. See Laurence Boisson de Chazournes, *La Gestion de l'Intérêt Commun à l'Épreuve des Enjeux Économiques: Le Protocole de Kyoto sur les Changements Climatiques* [Management of the Public Interest in the Examination of Economic Issues: The Kyoto Protocol on Climate Change], 43 ANNUAIRE FRANCAIS DE DROIT INTERNATIONAL [FRENCH DIRECTORY OF INTERNATIONAL LAW] 700, 701, 703 (1997); Alexandre Kiss, *Les Traités Cadres: Une Technique Juridique Caractéristique du Droit International de l'Environnement* [Framework Conventions: A Technical Legal Feature of International Environmental Law], 39

foundation for a regime that is consolidating gradually and allows the subsequent adoption of various legal instruments, whether additional protocols or amendments to decisions of the State Parties to the Convention.

The Framework Convention on Climate Change and the Kyoto Protocol both help to achieve this function. This strategy in the fight against climate change represents an attempt to build a new legal regime in light of the fact that the existing law was not equipped with the necessary means of action.

The Kyoto Protocol provides a second framework of sorts. Negotiations that took place during the 1992 Convention helped to consolidate the foundations of the regime and call for the making of new commitments. Adopted in 1997, its content has subsequently been clarified through difficult and sometimes tense negotiations.¹¹ These negotiations resulted in the adoption of a set of thirty-nine decisions by the State Parties to the Convention, also known as the “Marrakesh Accords” after the name of the venue of the Seventh Conference of the Parties in 2001.¹²

The Kyoto Protocol entered into force on the February 16, 2005. It should be understood and interpreted in light of the “Marrakesh Accords,” which were in the most part adopted by the Contracting Parties to the Kyoto Protocol at their first meeting held in Montreal in December 2005.¹³ The decisions made here permit its application. This meeting illustrated that adoption of the Kyoto Protocol has not

ANNUAIRE FRANCAIS DE DROIT INTERNATIONAL [FRENCH DIRECTORY OF INTERNATIONAL LAW] 792, 792–97 (1993).

11. See Daniel Bodansky & Lavanya Rajamani, *The Evolution and Governance Architecture of the Climate Change Regime*, in INTERNATIONAL RELATIONS AND GLOBAL CLIMATE CHANGE 11, 22, 25 (Detlef Sprinz & Urs Luterbacher eds., 2d ed. forthcoming), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2168859 (discussing the European Union’s efforts to impose a ceiling on the use of flexibility mechanisms and discussing developing countries’ efforts to obtain greater financial assistance).

12. Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154. The Marrakesh Accords were named after the venue of the Seventh Conference of the Parties in 2001. See *id.*

13. See generally the decisions of the First Session of the Conference of Parties serving as the Meeting of the Parties to the Kyoto Protocol, Nov. 2005, available at http://unfccc.int/meetings/montreal_nov_2005/session/6260/php/view/decisions.php.

been easy and that the pathway to building a regime of climate change policy can present many obstacles.¹⁴

Beyond the development of terminology, principles of action and behavior should be formulated and institutions should be established. The law has permitted their elaboration and formalization. The regime of the fight against climate change has as its foundation the Framework Convention, the Protocol, and the many instruments adopted at the national and regional levels that help to implement the regime. A new instrument is needed to complete this legal structure, which will engage reduction commitments beyond the 2012 termination of the initial commitment period of the Kyoto Protocol.

As the December 2009 Copenhagen Conference revealed,¹⁵ the negotiation of such an instrument would be subject to many uncertainties, although the sixth meeting in Cancun in December 2010 sought the achievement of a minimum consensus.¹⁶ While the Kyoto Protocol prescribed quantified commitments to reduce greenhouse gas emissions, the strategic interest in involving all States in the reduction of emissions (including the United States, but also the emerging economies, such as China, India, and Brazil (also known as the BRICs)) warrants a greater degree of flexibility.

14. See generally Sandrine Maljean-Dubois, *La Mise en Route du Protocole de Kyoto à la Convention-Cadre des Nations Unies sur les Changements Climatiques* [Starting Up the Kyoto Protocol to the United Nations Framework Convention on Climate Change], 51 ANNUAIRE FRANCAIS DE DROIT INTERNATIONAL [FRENCH DIRECTORY OF INTERNATIONAL LAW] 433 (2005); Laurence Boisson de Chazournes, *De Kyoto à La Haye, en Passant par Buenos Aires et Bonn: La Régulation de l'Effet de Serre aux Forceps* [From Kyoto to the Hague, by Way of Buenos Aires and Bonn: The Regulation of the Greenhouse Effect with Forceps], 1 ANNUAIRE FRANCAIS DE RELATIONS INTERNATIONALES [FRENCH DIRECTORY OF INTERNATIONAL RELATIONS] 709 (2000).

15. See United Nations Framework Convention on Climate Change, Conference of the Parties, 15th Sess., Copenhagen, Den., Dec. 7–18, 2009, *Copenhagen Accord*, U.N. Doc. FCCC/CP/2009/11/Add.1 (Mar. 30, 2010) [hereinafter *Copenhagen Accord*]; Emmanuel Guérin & Matthieu Wemaere, *The Copenhagen Accord: What Happened? Is It a Good Deal? Who Wins and Who Loses? What Is Next?*, IDDRI IDÉES POUR LE DÉBAT, no. 08/09, Dec. 2009, available at http://www.iddri.org/Publications/Collections/Idees-pour-le-debat/Id_082009_guerin_wemaere_copenhagen%20accord.pdf.

16. United Nations Framework Convention on Climate Change, Conference of the Parties, 16th Sess., Cancun, Mex., Nov. 29–Dec. 10, 2010, *Cancun Agreements*, U.N. Doc. FCCC/CP/2010/7/Add.1 (Mar. 15, 2011) [hereinafter *Cancun Agreements*].

The initial groundwork for this approach was laid in 2011 at the seventh session of the Meeting of the Parties in Durban.¹⁷ Two broad steps were agreed upon and considered as essential to avoiding the collapse of the global response to carbon emissions.¹⁸ First, and of greatest urgency, the European Union and Small Island Developing States (SIDS) achieved an agreement for the extension of the Kyoto Protocol into a second commitment period.¹⁹ This decision provided the Ad Hoc Working Group on Long-Term Cooperative Action under the Convention, a subsidiary body established under the 2007 Bali Action Plan,²⁰ with one year to reach agreement as to the specific details of State Parties' emission limitation commitments under Annex B of the Kyoto Protocol.²¹ At the 2012 session of the Meeting of the Parties in Doha, the Kyoto Protocol was formally extended for a second commitment period of eight years, from 2013 until 2020.²² However, following the withdrawal of some large States and the continued absence of other major emitters from the framework of binding reduction obligations, those parties which have undertaken commitments during this second phase (mostly the

17. United Nations Framework Convention on Climate Change, Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol, 7th Sess., Durban, S. Afr., Nov. 28–Dec. 11, 2011, U.N. Doc. FCCC/KP/CMP/2011/10/Add.1 (Mar. 15, 2012); Bodansky & Rajamani, *supra* note 11.

18. See David Crossland, *The World from Berlin: The Durban Climate Agreement 'Is Almost Useless'*, SPIEGEL ONLINE INT'L (Dec. 12, 2011, 1:02 PM), <http://www.spiegel.de/international/world/the-world-from-berlin-the-durban-climate-agreement-is-almost-useless-a-803158.html>.

19. See *id.*

20. United Nations Framework Convention on Climate Change, Conference of the Parties, 13th Sess., Bali, Indon., Dec. 3–14, 2007, *Bali Action Plan*, U.N. Doc. FCCC/CP/2007/6/Add.1 (Mar. 14, 2008).

21. United Nations Framework Convention on Climate Change, Conference of the Parties, 17th Sess., Durban, S. Afr., Nov. 28–Dec. 11, 2011, *Establishment of an Ad Hoc Working Group on the Durban Platform for Enhanced Action* ¶ 1, U.N. Doc. FCCC/CP/2011/9/Add.1 (Mar. 15, 2012) [hereinafter *Ad Hoc Working Group*].

22. United Nations Framework Convention on Climate Change, Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol, 8th Sess., Doha, Qatar, Nov. 26–Dec. 8, 2012, *Amendment to the Kyoto Protocol Pursuant to Its Article 3, Paragraph 9 (The Doha Amendment)*, U.N. Doc. FCCC/KP/CMP/2012/13/Add.1 (Feb. 28, 2013).

European countries and Australia) contribute only fifteen percent of global carbon dioxide emissions.²³

Second, Member States decided to launch a process under the auspices of a new subsidiary body known as the Ad Hoc Working Group on the Durban Platform for Enhanced Action.²⁴ This body is charged with developing a new “protocol, another legal instrument or an agreed outcome with legal force”²⁵ for adoption by both developed and developing States with large-scale emissions. The Durban Platform set 2015 as a deadline for defining and adopting such an instrument, and 2020 as its entry into force.²⁶ At the November 2013 Meeting of the Parties in Warsaw, an agreement was reached well in advance of the 2015 COP to be held in Paris that countries would submit new emissions reduction contributions. The understanding is that these contributions would be part of a single framework linking both developed and developing countries. Emerging economy countries insisted on the word “contributions,” rather than commitments, so as to leave open the discussion on the legal nature of the regime to be forged.²⁷

Lastly, it is interesting to note the progressive step taken in the outcome documents of the Doha conference. There was a willingness to address loss and damage resulting from climate change, implying

23. See Jennifer Morgan, *Reflections on COP 18 in Doha: Negotiators Made Only Incremental Progress*, WORLD RESOURCES INST. (Dec. 14, 2012), <http://insights.wri.org/news/2012/12/reflections-cop-18-doha-negotiators-made-only-incremental-progress>.

24. *Ad Hoc Working Group*, *supra* note 21, ¶ 2.

25. *Id.*

26. *Id.* ¶ 4. This was confirmed in Warsaw in 2013. See United Nations Framework Convention on Climate Change, Conference of the Parties, 19th Sess., Warsaw, Pol., Nov. 11–23, 2013, *Further Advancing the Durban Platform*, U.N. Doc. FCCC/CP/2013/10/Add.1 (Jan. 31, 2014).

27. See Thomas Spencer, *2B Continued . . . The Outcome of the Warsaw Climate Conference and Implications for Paris 2015*, IDDRI POLICY BRIEF, NO. 15/13, Nov. 2013, http://www.iddri.org/Publications/Collections/Syntheses/PB15_13_TS_warsaw%20climate%20conference.pdf; Sandrine Maljean-Dubois & Matthieu Wemaëre, *La Conférence sur le Climat de Varsovie: Des Résultats Mitigés, des Perspectives Inquiétantes [The Warsaw Climate Conference]*, in ENVIRONNEMENT ET DEVELOPPEMENT DURABLE—REVUE MENSUELLE LEXISNEXIS [ENVIRONMENT AND SUSTAINABLE DEVELOPMENT—LEXIS NEXIS MONTHLY REVIEW] 12–17 (Jan. 2014).

the possibility of a future liability framework.²⁸ This marked an important step toward addressing the concerns of small island developing States that remain in danger of being overtaken by rising tides.²⁹

While the Kyoto Protocol has a prominent place in respect of quantified targets for reducing emissions and international economic strategies for achieving the objective of reducing emissions quantifiably, one can only wonder whether the compromises to come, despite building on the logic of the international carbon market, appear to mostly make room for the “internal forces” at the regional, national, and local levels to find innovative solutions and alternatives to using fossil fuels. Further specific and binding quantifiable commitments at the international level would undoubtedly help to achieve the objectives, while ultimately resting on the will of each party to implement them. National legislation should in this context play a major role, but it will have to be implemented within a framework of international cooperation based on equity and the sharing of responsibilities between developed and developing countries. The emerging economies will be called upon for a special contribution, taking into account their share and future projection of emissions of greenhouse gases.

We do not know the legal form of the instrument that may ultimately supersede the Kyoto Protocol. It is possible that any such instrument may be the death knell for the Protocol or some of its mechanisms. Will the new instrument be an extension of the Framework Convention? The challenge is to ensure that the reduction commitments will be met, even if their profile evolves and differs from the Kyoto Protocol scheme.

28. See Roger Harrabin, *UN Climate Talks Extend Kyoto Protocol, Promise Compensation*, BBC (Dec. 8, 2012), <http://www.bbc.co.uk/news/science-environment-20653018>.

29. See U.N. Framework Convention on Climate Change, Conference of the Parties, 18th Sess., Doha, Qatar, Nov. 26–Dec. 8, 2012, *Agreed Outcome Pursuant to the Bali Plan*, U.N. Doc. FCCC/CP/2012/8/Add.1 (Feb. 28, 2013); Morgan, *supra* note 23.

II. THE LAW, UNCERTAINTY, AND RISKS ASSOCIATED WITH CLIMATE CHANGE

Beyond the need to protect a collective interest, the universalist nature of the regime is necessary because of the nature of the risks involved in the fight against climate change. These are global and uncertain risks, which presuppose the establishment of control mechanisms of a universal type. The understanding and management of these risks has served and continues to serve as a spearhead in building and strengthening the climate change regime.

The regime in the fight against climate change has been largely built on the notion of a risk of significant harm, if not irreversible harm, caused by this phenomenon of climate change. The risks have been and continue to be the catalyst of the action. The action on these risks is concerned with scientific uncertainty. The desire to objectify these risks has been based on a process of scientific consultation and cooperation, focused on the goal of reaching a global scientific consensus on the nature of those risks. The establishment of such a progressive consensus, in particular through the Intergovernmental Panel on Climate Change (IPCC), provides some predictability to the legal regime of international climate protection.³⁰ It stimulates political and legal action. But, above all, a universal approach ensures that everyone, at one level or another, feels they are stakeholders in building the system.

The shared desire for scientific input in the universal plan reflects a paradigm shift in international law. As the system is permeated by scientific knowledge, some level of uncertainty is injected into the regime. As a consequence of this uncertainty in the law, the principle of precaution has come to be a cornerstone of the regime.³¹ The Convention requires States to “take *precautionary measures* to anticipate, prevent or minimize the causes of climate change and mitigate its adverse effects. Where there are threats of serious or

30. See Makane Moïse Mbengue, *The Intergovernmental Panel on Climate Change (IPCC): A Singular Model of Expertise at the International Level*, in *THE TRANSFORMATION OF INTERNATIONAL ENVIRONMENTAL LAW* 97 (Yann Kerbrat & Sandrine Maljean-Dubois eds., 2011).

31. Laurence Boisson de Chazournes, *Precaution in International Law: Reflection on Its Composite Nature*, in *LAW OF THE SEA, ENVIRONMENTAL LAW AND SETTLEMENT OF DISPUTES* 21, 34 (Tafsir Malick Ndiaye & Rüdiger Wolfrum eds., 2007); see also Alexander Proelss, *International Environmental Law and the Challenge of Climate Change*, 53 *GERMAN Y.B. INT’L L.* 65 (2010).

irreversible damage, *lack of full scientific certainty* should not be used as a reason for postponing such measures”³²

By means of precaution, the legal regime of climate change requires States to take into account in their decisions any risks to human activity. The principle of precaution, which derives its purpose from scientific uncertainty, is different from the principle of prevention, which is based on science, forecasting, and expertise to guide policymakers. Over the years, however, certainty has gained ground on uncertainty in the area of climate change, with particular reference to emission sources and projections in this domain, and hence precaution gradually gives way to prevention.

The evolution of scientific knowledge of the risks associated with climate change has been facilitated by building bridges between different scientific communities at the national, regional, and international levels. These bridges progressively shape the “common” scientific discourse and provide the foundation for normative discourse. The reports of the IPCC are significant in the evolution of knowledge in the field.³³ Despite this, precaution will continue to factor into the legal instrument to be negotiated because many phenomena related to climate change, for example in terms of its impact, continue to be only partially known.

III. THE CONTOURS OF EQUITY IN THE CLIMATE CHANGE REGIME

A. Universality in Differentiation

The negotiations of the Framework Convention on Climate Change, such as those surrounding the Kyoto Protocol and the regime for the period after 2012, have been and continue to be impeded by the conflicting interests of different groups of States, primarily with respect to the economic and financial aspects. In the conflict between developed and developing countries on the division of responsibilities, there are also differences within each group of States. From the beginning, universalism was combined with equity in that the responsibility for meeting the common objective should

32. Framework Convention, *supra* note 1, art. 3, ¶ 3.

33. IPCC, CLIMATE CHANGE 2013: THE PHYSICAL SCIENCE BASIS (Thomas F. Stocker et al. eds., 2013); *see Reports*, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, http://www.ipcc.ch/publications_and_data/publications_and_data_reports.shtml (last visited Apr. 28, 2014).

fall only to developed countries under the principle of common but differentiated responsibilities.³⁴ This type of equity is reflected in the Framework Convention and the Kyoto Protocol.

In addition to commitments to reduce emissions,³⁵ industrialized countries are subject to the requirement to provide new and additional financial resources, as well as to encourage, facilitate, and finance the transfer of technology to developing countries. In this context, the Global Environment Facility, set up jointly by the World Bank, United Nations Development Programme (UNDP), and United Nations Environment Programme (UNEP), is the financial mechanism for the provision of financial resources in the form of grants and concessional loans.³⁶ Other financial mechanisms were then created following the Kyoto Protocol.³⁷ They are each defined by equity in the funds they provide to developing countries, as well as in the governance systems that they seek to implement.³⁸ The Green Climate Fund, which was decided upon in Copenhagen and given commitments of support in Durban,³⁹ constitutes a centerpiece of efforts to increase capital flows to developing States for the purpose of climate change adaptation and mitigation.

The shared commitments of all States include the establishment of emission inventories of greenhouse gases and the implementation of sector-specific policies aimed at reducing these emissions by using

34. See *Kyoto Protocol*, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE, http://unfccc.int/kyoto_protocol/items/2830.php (last visited Feb. 24, 2014) (“Recognizing that developed countries are principally responsible for the current high levels of GHG emissions in the atmosphere as a result of more than 150 years of industrial activity, the Protocol places a heavier burden on developed nations under the principle of ‘common but differentiated responsibilities.’”).

35. See *Kyoto Protocol*, *supra* note 6, art. 3, ¶ 1. The measurement technique used is based on a system of assigned amount units (AAUs).

36. Laurence Boisson de Chazournes, *The Global Environmental Facility Galaxy: On Linkages Between Institutions*, 3 MAX PLANCK Y.B. UNITED NATIONS L. 243, 244, 252 (1999).

37. See *infra* Part III(B).

38. Laurence Boisson de Chazournes, *Les Nouveaux Mécanismes de Financement du Développement dans le Cadre des Changements Climatiques [The New Mechanisms for Financing Development in the Climate Change Framework]*, in LE NUOVE FORME DI SOSTEGNO ALLO SVILUPPO NELLA PROSPETTIVA DEL DIRITTO INTERNAZIONALE [NEW WAYS OF PROMOTING COOPERATIVE DEVELOPMENT IN THE CONTEXT OF INTERNATIONAL LAW] 167–91 (Gabriella Venturini ed., 2009).

39. See *Ad Hoc Working Group*, *supra* note 21.

comparable methods. In addition, States should encourage the development and dissemination of technologies to control emissions of anthropogenic greenhouse gas emissions, particularly in the areas of energy, transport, industry, agriculture, forestry, and waste management. This information should be communicated to the Protocol bodies to facilitate the evaluation of the implementation of the Kyoto Protocol and the possible adoption of new measures to meet the ultimate objective of the Convention.

The new regime to be put in place has been and is the subject of extensive negotiations. These have taken into account the evaluations of the IPCC, including those in its fourth report.⁴⁰ They call for a radically alternative action to that which was taken during the first commitment period of the Kyoto Protocol. This may include a veritable decarbonization of the atmosphere that is incentivized with the objective of fifty percent emissions reduction by 2050. One of the major emitters of greenhouse gases, the United States—hitherto absent from the Kyoto Protocol—should be part of the new regime. However, the United States refuses binding commitments and has been joined since 2012 by large nations such as Russia, Japan, and Canada.⁴¹ The negotiations to be concluded in 2015 will require and identify new legal strategies to this end to attract greater participation in climate change mitigation.

In addition, developed countries want to deconstruct the apparent solidarity of the group of developing countries and involve the emerging economies (notably China, India, and Brazil) in reducing emissions of greenhouse gases.⁴² A more equitable approach is called

40. See IPCC, *CLIMATE CHANGE 2007, MITIGATION OF CLIMATE CHANGE* (Bert Metz et al. eds., 2007), http://www.ipcc.ch/pdf/assessment-report/ar4/wg3/ar4_wg3_full_report.pdf; IPCC, *CLIMATE CHANGE 2007: SYNTHESIS REPORT* (Rajendra K. Pachauri et al. eds., 2007), http://www.ipcc.ch/pdf/assessment-report/ar4/syr/ar4_syr.pdf.

41. See Regan Doherty & Barbara Lewis, *Doha Climate Talks Throw Lifeline to Kyoto Protocol*, REUTERS (Dec. 8, 2012, 2:44 PM), <http://www.reuters.com/article/2012/12/08/us-climate-talks-idUSBRE8B60QU20121208>.

42. See Kathryn Ann Hochstetler, *The G-77, BASIC, and Global Climate Governance: A New Era in Multilateral Environmental Negotiations*, 55 *REVISTA BRASILEIRA DE POLÍTICA INTERNACIONAL* [BRAZILIAN JOURNAL OF INTERNATIONAL POLITICS] (2012) (concluding that the effectiveness of G-77 developing countries as a negotiating bloc has come to depend on the solidarity of the so-called BASIC countries (Brazil, South Africa, India, and China), which at

for by developed countries given the current and projected emission rates of the emerging economies, and in the light of the conditions of economic competition globally. Although these countries seem to accept that action is needed in principle, this is not the same as a binding commitment for a numerical reduction in emissions of greenhouse gases subject to verification by an international system.⁴³ In addition, the commitments of these countries has been linked to the granting of financial assistance,⁴⁴ if not for their benefit then at least for that of other developing countries.

The principle of common but differentiated responsibilities will be without doubt reinterpreted or redefined through the new instrument. Emerging economies, in particular those whose emissions reach a certain threshold, should take on new responsibilities. However, this is likely to be in a context that will allow greater flexibility at the national level for individual States. Can such an approach meet the ambition of a fifty percent reduction (if not eighty percent reduction) of greenhouse gas emissions compared to pre-industrial levels?

B. Financial and Technical Assistance and the Need for a Climate "Marshall Plan"

The role of financial and technical assistance in the field of climate change is to provide assistance for mitigation and adaptation. If mitigation is the objective sought by a significant reduction in greenhouse gas emissions, this action is not sufficient to offset the consequences of climate change. Adaptation measures are needed, even if they do not focus on the problem of increasing emissions of greenhouse gases. Financial assistance for mitigation aims to reduce emissions of greenhouse gases through, for example, projects concerning the use of renewable energy and transportation. Financial assistance for adaptation provides funds to States to strengthen their resilience to the adverse impacts of climate change.⁴⁵

Durban "showed themselves to be seriously divided over climate action at Durban, especially on the question of their own action.").

43. See Copenhagen Accord, *supra* note 15, ¶ 5; Cancun Agreements, *supra* note 16, ¶ 16.

44. See Michael Jacobs, *What Is the State of International Climate Talks?*, GUARDIAN (Feb. 6, 2013, 5:33 PM), <http://www.theguardian.com/environment/2012/sep/17/international-climate-talks-faq>.

45. See ADAPTATION COMM., UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, THE STATE OF ADAPTATION UNDER THE UNITED NATIONS

Adaptation to climate change primarily concerns the least developed countries. It is, as with mitigation, inseparable from the development process. This, however, raises the question of additional financial and technical assistance with respect to climate change for developing countries, which must be assessed in relation to development aid. The management of financial assistance in the field of climate change must therefore maintain a close link with that of development aid.

Since the early 1990s, many financial mechanisms have been created. The Global Environment Facility was the first global financing mechanism to cover the incremental costs of measures to protect the global environment and in particular the fight against global warming. Other mechanisms have been created since. These include the “Clean Development Mechanism” established by the Kyoto Protocol in 1997, the Adaptation Fund, the Least Developed Countries Fund, and the Special Climate Change Fund. The last three have been created by virtue of the decisions of the Conference of the Parties in Marrakech in 2001. Other financial mechanisms have been established within the World Bank, such as the Prototype Carbon Fund, established in 1999. In July 2008, the Board of Directors of the World Bank approved the creation of two new investment funds: the Clean Technology Fund and the Strategic Climate Fund.⁴⁶ More recently, there has been the Green Climate Fund. This will certainly be an important mechanism in the governance of financial assistance in the post-Kyoto period.

As a means of cooperation between developed countries and developing countries, financial mechanisms underline the specific responsibilities of developed countries and the needs of developing countries. The division of responsibilities is to promote a common interest, namely the stabilization of greenhouse gas emissions “at a level that would prevent dangerous anthropogenic interference with the climate system.”⁴⁷ This level should be achieved “within a time

FRAMEWORK CONVENTION ON CLIMATE CHANGE (2013), http://unfccc.int/files/adaptation/cancun_adaptation_framework/adaptation_committee/application/pdf/ac_2013_report_low_res.pdf.

46. Boisson de Chazournes, *supra* note 36. For a discuss of financial mechanisms, see Laurence Boisson de Chazournes, *Technical and Financial Assistance*, in *THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW* 947 (Daniel Bodansky et al. eds., 2007).

47. Framework Convention, *supra* note 1, art. 2.

frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.”⁴⁸

Since the adoption of the United Nations Convention on Climate Change in 1992 and the Kyoto Protocol in 1997, the legal regime of climate change has emerged. It now seeks consolidation. Although the vast majority of scientists recognize the impact of human activities on global warming, the debate is now on the contours of a plan for the post-2012 period. In this context, both in Bali in December 2007 and afterwards, States have insisted that the provision of financial resources and investments should be important pillars of any strategy to come.⁴⁹

Financial assistance for adaptation to climate change is now seen as crucial. The contribution in terms of greenhouse gas emissions of many developing countries, aside from the emerging economies, has been—and continues to be—rather marginal in the context of the overall amount of emissions.⁵⁰ Nevertheless, these States are highly vulnerable to the impacts of climate change. A number of financial mechanisms were set up to assist developing countries but it is necessary to urgently increase the level of financial aid.

The commitment of developed countries in terms of financial assistance is without doubt the most significant outcome of the meetings in Copenhagen and Cancun. The document adopted in 2009 specifies that:

The collective commitment by developed countries is to provide new and additional resources, including forestry and investments through international institutions, approaching USD 30 billion for the period 2010–2012 with balanced allocation between adaptation and mitigation. Funding for adaptation will be prioritized for the most vulnerable developing countries, such as the least

48. *Id.*

49. See *Bali Climate Change Conference—December 2007*, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE, http://unfccc.int/meetings/cop_13/items/4049.php (last visited Apr. 28, 2014).

50. See CAIT 2.0 Beta, WORLD RES. INST., <http://cait2.wri.org/wri/Country%20GHG%20Emissions?indicator=Total%20GHG%20Emissions%20Excluding%20LUCF&indicator=Total%20GHG%20Emissions%20Including%20LUCF&year=2010&chartType=geo> (last visited Apr. 27, 2014).

developed countries, small island developing States and Africa. In the context of meaningful mitigation actions and transparency on implementation, developed countries commit to a goal of mobilizing jointly USD 100 billion dollars a year by 2020 to address the needs of developing countries. The funding target of USD 100 billion per year was confirmed in Cancun in December 2010. This funding will come from a wide variety of sources: public and private, bilateral and multilateral, including alternative sources of finance. New multilateral funding for adaptation will be delivered through effective and efficient fund arrangements, with a governance structure providing for equal representation of developed and developing countries.⁵¹

The stakes are high. Funding needs to come from public and private sources and to integrate domestic policies and the discussion on “international” finance governance.⁵² Questions of governance are also key in the negotiations for what will link the new Green Climate Fund with the Conference of Parties of the Convention, the Protocol, and any instrument to come.⁵³ The relationship between the new and existing financial mechanism should also be addressed in order to avoid the phenomena of competition, fragmentation, or conflicts in the orientation of policies.

IV. LAW, ECONOMICS, AND THE FIGHT AGAINST CLIMATE CHANGE

A. Economic Globalization and the Fight against Climate Change

The influence of economic globalization is prominent in the regime of the fight against climate change, particularly in assessing efforts and strategies to reduce emissions of greenhouse gases. The economy has become the predominant prism of action. A very important place is given to economic strategies aimed at comparative advantage, for

51. See Copenhagen Accord, *supra* note 15, ¶ 8.

52. Spencer, *supra* note 27.

53. Lorrae van Kerkhoff et al., *Designing the Green Climate Fund: How to Spend \$100 Billion Sensibly*, ENV'T, May–June 2011, <http://www.environmentmagazine.org/Archives/Back%20Issues/2011/May-June%202011/green-climate-fund-full.html>.

example, with the exchange of emission credits through investment projects, the creation of markets for emission trading in greenhouse gas emissions, and the imposition of taxes. These mechanisms, following the logic of the market economy, may constitute incentives for States and the private sector. They are designed around a dual purpose: first, reducing greenhouse gas emissions, and second, generating revenue that can be reinvested in research and technologies used to deal with the effects of climate change.⁵⁴ In this context, the private sector is seen as a key player in the international instruments for combating climate change. It is specifically targeted in the Kyoto Protocol,⁵⁵ which indicates that public action is not sufficient to deal with climate change. The policy dialogue must be rooted in the economic life of societies.

There are problems, however, and these should be mentioned. Indeed, the mechanisms are very technical and this can tend to obscure the real purpose, which is to achieve the collective interest in protecting the environment. The rationale for the establishment of market mechanisms, including the promotion of sustainable development for all countries should not be forgotten. The role that civil society can take to ensure that this double purpose is not sacrificed on the altar of compromise becomes critical in this respect. Access to information and the principle of public participation can support this role.

The fragmentation of law must also be mentioned. There is a risk that the economic standards employed may come into conflict with other standards and objectives in the fight against global warming, such as those related to equity and human needs. The use of economic and financial mechanisms have meaning only if they fit within the general framework of the continued struggle against climate change, ecological considerations, and human security, and are interpreted with these considerations in mind. This symbiosis between considerations of a diverse nature reveals one prerequisite of the fight against climate change that must be respected.

Another characteristic of globalization relates to the impact of trade rules in climate change, whether due to economic activities that increase greenhouse gas emissions, or alternatively due to measures

54. See FORESTRY DEPT., U.N. FOOD & AGRIC. ORG., WORKING PAPER FP/12, PLANTATIONS AND GREENHOUSE GAS MITIGATION: A SHORT REVIEW 5–7 (D.J. Mead ed., 2001), <ftp://ftp.fao.org/docrep/fao/006/ac132e/ac132e00.pdf>.

55. See Kyoto Protocol, *supra* note 6, arts. 6, 12.

taken with the aim of reducing greenhouse gas emissions or, in the further alternative, due to measures aimed at sanctioning State behaviour that fails to meet expectation.⁵⁶ It is well known that the possibility for conflict between the World Trade Organization (WTO) regime and that of climate change is high,⁵⁷ and may occur through unilateral measures adopted by a State under the guise of a tax or a restriction on imports. Some of these measures can be justified under WTO law but, if they cannot be, emerging countries and developing countries may find that measures, such as carbon taxes, become a source of controversy. The question is how to thwart the possibility of recourse to unilateral measures as States prepare to negotiate an instrument to succeed, prolong, and deepen efforts following the Kyoto Protocol. If the community of States manages to adopt a binding instrument, it would have to include provisions dealing with its relationship to the WTO agreements. The Framework Convention on Climate Change has already called for this.⁵⁸ Any future instrument should address the question of the relationship between the regime of the fight against climate change and that of international trade law, but will it address the question with sufficient precision?⁵⁹ The principle of mutual supportiveness advocated by other international agreements to protect the environment may be of utility, but cannot by itself provide answers to all problems that may arise.⁶⁰ It requires that all affected actors and institutions adjust and change their policies in a way that is sensitive to other regimes.

56. Steve Charnovitz, *Trade and Climate: Potential Conflicts and Synergies*, in *BEYOND KYOTO: ADVANCING THE INTERNATIONAL EFFORT AGAINST CLIMATE CHANGE* 141 (2003), available at http://stephenschneider.stanford.edu/Publications/PDF_Papers/BeyondKyoto.pdf.

57. See Harro Van Asselt et al., *Global Climate Change and the Fragmentation of International Law*, 30 *L. & POL'Y* 423, 433 (2008).

58. See Framework Convention, *supra* note 1, art. 4, ¶ 5; Laurence Boisson de Chazournes, *The United Nations Framework Convention on Climate Change: On the Road towards Sustainable Development*, in *ENFORCING ENVIRONMENTAL STANDARDS: ECONOMIC MECHANISMS AS VIABLE MEANS?* 285, 292 (Rüdiger Wolfrum ed., 1996).

59. See *Copenhagen Curtain Raiser: The Perfect Storm*, ICTSD BRIDGES COPENHAGEN UPDATE 1–2, Dec. 7, 2009, <http://ictsd.org/downloads/2009/12/bridges-copenhagen-update-1.pdf>.

60. Laurence Boisson de Chazournes & Makane Moïse Mbengue, *A 'Footnote as a Principle': Mutual Supportiveness and Its Relevance in an Era of Fragmentation*, in 2 *COEXISTENCE, COOPERATION AND SOLIDARITY* 1615 (Holger P. Hestermeyer et al. eds., 2011).

B. *Regionalization and Universal Action*

Universal action and the search for equity among members of the international community should not obscure the diversity of approaches, and this has been strongly emphasised in the negotiations of the legal regime for the current second commitment period of the Kyoto Protocol. Regional action can facilitate differentiated action. European action shows one way towards a regionalization of action in the field of climate change. In Doha, the European Union committed to a twenty percent reduction in emissions by 2020, as well as by thirty percent if other States commit to that order and if the emerging economies show their determination to reduce their emissions.⁶¹ As such, the European Union plans to review by 2014 the ambition of all countries participating in the second commitment period of the Kyoto Protocol.⁶²

The actions envisaged in the European Union speak both to the public authorities and the private sector. This regional perspective is conscious of any universal system to come, both in the possible expansion of the trading of emission credits or in the establishment of an emission permits system. Other regional strategies could be experimented with, such as reducing energy intensity by economic sector as proposed under the initiative of the Asia-Pacific Economic Cooperation (APEC). These regional strategies may reflect certain regional characteristics more precisely, such as climate data and economic or social structures.⁶³

The Kyoto Protocol had in fact given way to the possibility of regional measures through joint action in reducing emissions.⁶⁴ Such joint actions may be accompanied, in addition, by a differentiated status for States that are parties. The “European Bubble”

61. See 26 November–08 December 2012 Doha Climate Change Conference (COP 18/CMP 8), EUR. COMM’N, http://ec.europa.eu/clima/events/0062/index_en.htm (last updated Dec. 10, 2012).

62. *Id.*

63. Philippe Le Prestre, *Géopolitique Régionale du Climat et Cooperation Internationale* [Regional Geopolitics of International Climate Cooperation], in CAHIERS DE DROIT, SCIENCE ET TECHNOLOGIE [LAW, SCIENCE AND TECHNOLOGY PAPERS] 85 (2009).

64. See Kyoto Protocol, *supra* note 6, art. 4.

implemented on the basis of Article 4 of the Kyoto Protocol is illustrative of this approach.⁶⁵

Over the last two decades, the law has helped to build and solidify a framework for universal action in the field of climate change. Now it must help to ensure that the strategy outlined is put into everyday practice, and as such that the objectives and commitments made at the universal level now define the action of each State Party to the Protocol. Various strategies are advocated to meet this goal, whether economic or regional. The interplay between them should allow the collective interest in the field of climate change as a “concern for humanity as a whole”⁶⁶ to be promoted, while ensuring that these approaches are not at the expense of equity.

V. THE SYSTEM OF CLIMATE CHANGE AND STRATEGIES TO PROMOTE COMPLIANCE WITH THE LAW OR TO SANCTION NON-COMPLIANCE

The promotion of respect for the rule of law has been accompanied by a greater focus on dispute resolution in recent years. Judicial and other mechanisms have been created for the purpose of dispute resolution. These often operate in the framework of multilateral environmental agreements (MEAs).⁶⁷ The latter, referred to as *procedures for non-compliance*, are often described as non-contentious proceedings to highlight their diplomatic character. However, this qualification is in some cases too simple an analysis of the dynamics of the procedures for non-compliance. These procedures reveal more and more of a complex picture. There would appear to be both diplomatic and judicial elements at play within

65. The European Community and its Member States have jointly committed to reducing their emissions of greenhouse gases. See Council Decision 2002/358/CE, 2002 O.J. (L 130/1) 1; ANNE-SOPHIE TABAU, *LA MISE EN ŒUVRE DU PROTOCOLE DE KYOTO EN EUROPE* [IMPLEMENTATION OF THE KYOTO PROTOCOL IN EUROPE] 513 (2011).

66. See Framework Convention, *supra* note 1, pmb1.

67. LAURENCE BOISSON DE CHAZOURNES, *LA MISE EN ŒUVRE DU DROIT INTERNATIONAL DANS LE DOMAINE DE LA PROTECTION DE L'ENVIRONNEMENT: ENJEUX ET DÉFIS* [IMPLEMENTATION OF INTERNATIONAL LAW IN THE FIELD OF ENVIRONMENTAL PROTECTION: ISSUES AND CHALLENGES], in *REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC* [GENERAL REVIEW OF PUBLIC INTERNATIONAL LAW] 37 (1995).

them.⁶⁸ Some procedures for non-compliance therefore have more of a diplomatic character and others have more of a litigious character. The procedure for non-compliance with the Kyoto Protocol is a case in point. Drawing inspiration from other procedures for non-compliance, it may be qualitatively distinguished from other methods of implementing international law.⁶⁹

This is because the Kyoto Protocol innovated an original and complex international regime.⁷⁰ Issues of non-compliance have been addressed since the beginning of the negotiations given the broad scope of the commitments made by States. States had, however, failed to reach an agreement on the appropriate mechanisms and procedures for monitoring compliance with the Protocol at the time of its adoption. Some consensus was achieved by the time of the Marrakech negotiation in 2001. *Procedures and mechanisms relating to compliance under the Kyoto Protocol* were first adopted by the Seventh Conference of the Parties in Marrakech (COP 7) in 2001,⁷¹ and these were then approved and adopted in 2005 by the First Conference of the Parties (COP/MOP 1) of the Kyoto Protocol in *Decision 27/CMP.1*. The originality and complexity that characterize the regime of the Protocol are reflected in these procedures and mechanisms. While drawing inspiration from other procedures in the field of environmental protection, these have some particular traits. The qualitative difference with these compliance procedures gives them juridical texture,⁷² ensuring effectiveness, sustainability, and efficiency of the legal regime under the Protocol.

68. See NON-COMPLIANCE PROCEDURES AND MECHANISMS AND THE EFFECTIVENESS OF INTERNATIONAL ENVIRONMENTAL AGREEMENTS, ASSER INST. (Tullio Treves et al. eds., 2009).

69. JULIETTE VOÏNOV-KOHLER, LE MÉCANISME DE CONTRÔLE DU RESPECT DU PROTOCOLE DE KYOTO SUR LES CHANGEMENTS CLIMATIQUES [THE COMPLIANCE MECHANISM OF THE KYOTO PROTOCOL ON CLIMATE CHANGE] 219 (2006).

70. Jutta Brunnée, *A Fine Balance: Facilitation and Enforcement in the Design of a Compliance Regime for the Kyoto Protocol*, 13 TUL. ENVTL. L. J. 223, 226–27 (2000).

71. United Nations Framework Convention on Climate Change, Conference of the Parties, 7th Sess., Marrakesh, Morocco, Oct. 29–Nov. 10, 2001, *Annex, Procedures and Mechanisms Relating to Compliance under the Kyoto Protocol*, U.N. Doc. FCCC/CP/2001/13/Add.3 (Jan. 21, 2002).

72. Laurence Boisson de Chazournes & Makane Moïse Mbengue, *A Propos du Caractère Juridictionnel de la Procédure de Non-Respect du Protocole de Kyoto* [On the Jurisdictional Character of the Kyoto Protocol Non-Compliance Procedure], in CHANGEMENTS CLIMATIQUES—LES ENJEUX DU CONTRÔLE

The Compliance Committee with the Protocol functions under two branches, namely the facilitative and enforcement branch. The facilitative branch is responsible for giving advice, providing assistance to State Parties for the implementation of the Protocol and promoting compliance with their commitments under the Protocol, taking into consideration the principle of common but differentiated responsibilities and the capability of State Parties. The facilitative branch appears at first as a diplomatic body responsible for promoting the implementation of the Kyoto Protocol.⁷³

The enforcement branch is responsible for determining, *inter alia*, whether or not State Parties respect their quantified emission restrictions in accordance with Article 3 of the Protocol, and whether they comply with the reporting provisions in Article 5 and Article 7 of the Protocol and the criteria relating to economic activities set out in Articles 6, 12, and 17 of the Protocol.⁷⁴

The proceedings before the enforcement branch have a clear juridical texture. The procedure is initiated by a communication through the Secretariat, from a Party to the Protocol which has raised questions concerning implementation by another Party to the Protocol, either by virtue of its own judgment or on the basis of a report of experts pursuant to Article 8. The dispute then occurs between the Committee and the Party whose implementation has been questioned.⁷⁵ It is noteworthy that the procedure for non-compliance with the Kyoto Protocol, as well as other mechanisms for monitoring compliance with MEAs, entail a *sui generis* category of disputes. The disputes are, in some sense, “nipped in the bud.”⁷⁶

Furthermore, Sections XIV (“Consequences Applied by the Facilitative Branch”) and XV (“Consequences Applied by the Enforcement Branch”) of the Decision 27/CMP.1 confer the power to impose sanctions to both the facilitative and enforcement branches.

INTERNATIONAL [CLIMATE CHANGE—THE CHALLENGES OF INTERNATIONAL MONITORING] 73 (Sandrine Maljean-Dubois ed., 2007).

73. See *Introduction*, U.N. FRAMEWORK CONVENTION ON CLIMATE CHANGE, https://unfccc.int/kyoto_protocol/compliance/items/3024.php (last visited Apr. 24, 2014).

74. *Id.*

75. *Id.*

76. Lucius Caflisch, *Cent Ans de Règlement Pacifique des Différends Interétatiques* [*One Hundred Years of Peaceful Dispute Settlement between States*], 288 HAGUE ACAD. COLLECTED COURSES 447, 447 (2001).

Thereby, a host of “consecutive measures” is provided to allow the violating States to come back into compliance. For example, where the enforcement branch has determined that a Party has failed to comply with the provisions of paragraph 1 or 2 of Article 5 or paragraph 1 or 4 of Article 7 of the Protocol, it applies “the following consequences: (a) declaration of non-compliance; and (b) development of a plan”⁷⁷ The latter requires the defaulting Party to submit a plan to the enforcement branch, which includes “(a) [a]n analysis of the causes of non-compliance of the Party; (b) [m]easures that the Party intends to implement in order to remedy the non-compliance; and (c) [a] timetable for implementing such measures within a time frame not exceeding twelve months which enables the assessment of progress in the implementation.”⁷⁸ The plan must be submitted within three months of the determination of non-compliance. In addition, the defaulting Party is required to “regularly” report to the Board on the progress of the plan. Apart from the obligation to submit a plan, other measures may consist of sanctions for non-compliance. This applies to the suspension of eligibility as foreseen in Articles 6, 12, and 17 of the Protocol.

Certain consequential measures can be taken by the facilitative branch but these are of a different nature due to its mandate, namely to assist and advise a defaulting Party. These consist of incentives and recommendations:

- (a) Provision of advice and facilitation of assistance to individual Parties regarding the implementation of the Protocol;
- (b) Facilitation of financial and technical assistance to any Party concerned, including technology transfer and capacity building from sources other than those established under the Convention and the Protocol for the developing countries;
- (c) Facilitation of financial and technical assistance, including technology transfer and

77. See United Nations Framework Convention on Climate Change, Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol, 1st Sess., Montreal, Can., Nov. 28–Dec. 10, 2005, *Procedures and Mechanisms Relating to Compliance under the Kyoto Protocol*, § XV, U.N. Doc. FCCC/KP/CMP/2005/8/Add.3 (Mar. 30, 2006)

78. *Id.* § XV, 2(a)–(c).

capacity building . . . ; and (d) Formulation of recommendations to the Party concerned⁷⁹

In almost all mechanisms for monitoring compliance with MEAs, it can be difficult to distinguish between the phases of facilitation and enforcement⁸⁰ and, in this way, all steps in the procedure have usually been qualified as having a diplomatic character. Given the need to make the enforcement branch autonomous, meaningful commitments were considered necessary to establish its legitimacy, effectiveness, and the efficiency of the control of the implementation of the Kyoto Protocol's provisions. Juridical guarantees better serve these overall objectives. Indeed, the legitimacy of the procedure is achieved mainly because of the involvement of a third party, respect for the adversarial process, and submission to international law. The effectiveness of the process depends on the enforceability of decisions.⁸¹

The procedure for non-compliance with the Kyoto Protocol is atypical in that it actively promotes compliance. It controls and sanctions non-compliance with its own provisions. However, a procedural approach based on reporting and the establishment of a verification system without any provision for a system to address non-compliance has been advocated for future adoption.⁸² The question is whether the protection of a significant collective interest, such as the drastic decrease of emissions of greenhouse gases, may be achieved through a departure from a veritable multilateral legal strategy that is responsive to breaches of the law. The promotion of respect for the law by a third body is the key to the credibility and viability of such a regime.

VI. CONCLUSION

During the development of an instrument for the post-2012 period, doubts have been increasingly expressed about the sustainability of the Kyoto Protocol as such. This instrument establishes a system that engages only developed States in terms of emissions reductions and the provision of financial and technical assistance. It seems to be

79. *Id.* § XIV.

80. VOÏNOV-KOHLER, *supra* note 69, at 98–110.

81. Boisson de Chazournes & Mbengue, *supra* note 72, at 108–09.

82. See Copenhagen Accord, *supra* note 15, ¶¶ 4, 5.

accepted that the future of the climate change regime will have to be different, with the emerging economies taking on new responsibilities for emission control. In addition, the Kyoto Protocol has allowed for a complex system of international mechanisms. It seems increasingly that in the new phase of climate change regulation that is taking shape, an approach that endorses the “nationalization” of actions, while disposing of some of the constraints of international action, will be privileged.

The implementation of the Kyoto regime was necessary to consolidate the common interest in the fight against climate change and to cement the principles of action. Scientific knowledge and the requirements to act are always evolving. These are testing the political trust between States. In this context, will States be able to act in the required way while trusting others within a legal framework that remains largely to be defined in terms of future commitments?