AN INTERNATIONAL COURT FOR THE ENVIRONMENT AND CLIMATE CHANGE LAW COMPLIANCE AND ENFORCEMENT

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Background

Since the 1972 United Nations Conference on the Human Environment, regional and multilateral environmental agreements (i.e. treaties and associated protocols) have proliferated. Through both general and specific treaties, the subject matter scope of international environmental regulation has evolved to include atmospheric pollution, the marine environment, toxic substances, nuclear power, international watercourses, species protection, biodiversity conservation and climate change. While the specific aims of any particular treaty may vary, the general objectives of environmental treaties are to protect, conserve, manage and develop the natural environment.

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10 See generally, Philippe Sands and Jacqueline Peel (eds), Principles of International Environmental Law (CUP, 3rd ed, 2012); Patricia Bernie, Alan Boyle and Catherine Redgwell (eds), International Law & The Environment (OUP, 3rd ed,
Progress towards achieving treaty objectives is facilitated, with varying degrees of success, through numerous State-agreed mechanisms. These mechanisms include reporting, monitoring and verification obligations as well as certain non-compliance procedures. For various reasons, compliance with environmental treaty obligations remains inconsistent among States. This has the effect of undermining not only the spirit and purpose of an environmental treaty, but also the attainment of its objectives. Additionally, enforcement for breach of environmental obligations may, in some instances, be lacking. This is especially evident through the use of both domestic and international dispute resolution fora.

**Purpose of an International Court for the Environment**

It has been suggested that the current international environmental law regime presents a mismatch between global interdependence and global inter-governance. Arguably, what is lacking is an international judicial body with specific competence to hear and determine environmental matters. The call for increased judicial involvement has been put forward, especially for governments to:

“[c]reate, negotiate and agree on treaties that reduce environmental damage and climate change, should be underpinned by an established, mandated court that provides access to justice in cases where biosphere, biodiversity, agriculture, fresh water access, habitats, livelihoods and health have been impaired” - Stephen Hockman QC.

Accordingly, this short concept paper illustrates how a new International Court for the Environment (“ICE”) could provide the primary forum for arbitration, conciliation, judicial determination and advisory opinions for disputes arising out of obligations in customary and treaty-based environmental law. In particular, an ICE could subsume the role of existing environmental treaty-based enforcement bodies, such as those provided for under the United Nations Framework Convention on Climate Change (“UNFCCC”) and the Kyoto Protocol. Under these agreements, States’ must achieve particular obligations that are accompanied by

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2009); Daniel Bodansky, Jutta Brunnee and Ellen Hey (eds), The Oxford Handbook of International Environmental Law (OUP, 2008).

11 For a particularly successful example see Montreal Protocol on Substances that Deplete the Ozone Layer, open for signature 16 September 1987, 1522 UNTS 3 (entered into force 1 January 1989).

12 Lord Anthony Giddens, ‘International Court for the Environment’ (Presentation at the London School of Economics, 24 November 2009).


enforcement procedures. Importantly, use of an ICE as a dispute resolution forum could be achieved without modifying the existing textual provisions.

**ICE and UNFCCC Dispute Settlement**

Existing UNFCCC provisions are flexible enough to empower the ICE to resolve disputes arising from the obligations of States Parties, without changes to the Convention, as follows.

**Voluntary Forum for Peaceful Dispute Settlement**

UNFCCC article 14 provides the modalities of dispute resolution regarding its interpretation and application. It mandates that parties “shall seek a settlement of the dispute through negotiation or any other peaceful means of their own choice” (emphasis added). This wide permissive scope will arguably enable States Parties to submit matters to ICE for determination, without amendment to the Convention.

**Compulsory Forum for Arbitration**

UNFCCC article 14(2) permits States Parties, when joining the Convention, to provide compulsory dispute resolution jurisdiction, without special agreement, to the either (a) the International Court of Justice, or (b) arbitration in accordance with the procedures to be adopted by the Conference of the Parties (“CoP”). Accordingly, States Parties may choose to establish procedures to empower an ICE as the arbitral body for bilateral or multilateral disputes under the Convention.

**Conciliation Forum at the Request of States Parties**

UNFCCC article 14(6) permits States Parties in dispute to establish a conciliation commission and article 14(7) empowers the CoP to adopt conciliation procedures. These facilitative provisions permit ICE to be declared as the conciliation commission and for its procedures to be adopted by the CoP as those to be followed by States Parties.

**ICE and Kyoto Protocol Enforcement Mechanism**

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16 UNFCCC, art 14(1).
The Kyoto Protocol provides for general dispute settlement procedure similar to the UNFCCC, as well as a non-independent obligation enforcement body, which ICE could oversee. In particular, it states that the UNFCCC dispute settlement procedures apply to it *mutatis mutandis* (making necessary alterations). According to Kyoto Protocol article 19, the CoP may empower other bodies, such as an ICE, to serve as an independent enforcement branch. This would go some way to overcoming the inherent limitations of the compliance committee as a quasi-judicial body, including its susceptibility to political influence. This possibility permits a truly partial, fair and independent determination of Kyoto Protocol obligations that is not afforded by the current institutional machinery.

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**A Legitimate Arbiter of Enforcement Branch Matters**

The Marrakesh Accords established mechanisms to facilitate, promote and enforce compliance with Kyoto Protocol commitments. To do so, two branches of a Compliance Committee were established: Facilitative and Enforcement. While the facilitative branch may provide practical support to a party’s effort to comply with its obligations, the enforcement branch monitors and investigates State non-compliance. Additionally, it may impose a limited range of consequences if the factual and legal circumstances permit. Decisions of the enforcement branch may be appealed to the CoP, a political body that will find it challenging to provide an independent and judicious decision.

According to Kyoto Protocol article 20, the CoP may empower other bodies, such as an ICE, to serve as an independent enforcement branch. This would go some way to overcoming the inherent limitations of the compliance committee as a quasi-judicial body, including its susceptibility to political influence. This possibility permits a truly partial, fair and independent determination of Kyoto Protocol obligations that is not afforded by the current institutional machinery.

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**Compliance Committee in Practice**

The below table summarises the matters brought before the Compliance Committee Enforcement branch on questions of national implementation. These matters could readily be subsumed within an ICE through the mechanisms discussed above and serve as a proxy of the potential initial scope of work of an ICE. The consequence of each of the below final decisions was a declaration of non-compliance, a requirement that the party submit a plan to the Compliance Committee to demonstrate how it intended to rectify non-compliance, and a declaration that the party be ineligible for participation in market mechanisms until they return to full compliance.

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17 Kyoto Protocol, art 19.
19 Ibid, cls XI (1).
Table 1: Select Matters Before the Enforcement Branch

<table>
<thead>
<tr>
<th>Parties</th>
<th>Year</th>
<th>Duration</th>
<th>Decision</th>
<th>Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>Greece</td>
<td>2007</td>
<td>11 months</td>
<td>Found in non-compliance with national system obligations, including institutional, legal and procedural arrangements for estimating emissions and sinks covered by the Kyoto Protocol, and for not reporting and archiving this information.</td>
<td>Submission and revision of plans to bring about compliance. Declaration of compliance given in November 2008.</td>
</tr>
<tr>
<td>Canada</td>
<td>2008</td>
<td>3 months</td>
<td>After preliminary examination, Enforcement branch decided not to proceed as certain threshold issues were not established.</td>
<td>National registry issues were not investigated.</td>
</tr>
<tr>
<td>Croatia</td>
<td>2009</td>
<td>2.5 years</td>
<td>Found in breach of assigned amount and its commitment period reserve.</td>
<td>Appeal to CoP at Cancun, withdrawal of appeal, submission and revision of plans to bring about compliance. Declaration of compliance given in February 2012.</td>
</tr>
<tr>
<td>Bulgaria</td>
<td>2010</td>
<td>10 months</td>
<td>As above per Greece.</td>
<td>Submission and revision of plans to bring about compliance. Declaration of compliance given in February 2011.</td>
</tr>
<tr>
<td>Roma...</td>
<td>2011</td>
<td>14 months</td>
<td>As above per Greece.</td>
<td>Submitted plan to address non-compliance, reviewed by committee, now required to submitted revised report with amendments to rectify breach. Declaration of compliance given in July 2012.</td>
</tr>
<tr>
<td>Ukraine</td>
<td>2011</td>
<td>9 months</td>
<td>As above per Greece.</td>
<td>Submitted plan and progress report to address non-compliance, found acceptable. Requested reinstatement in February 2012. Declaration of compliance given in March 2012.</td>
</tr>
<tr>
<td>Lithuani...</td>
<td>2011</td>
<td>Ongoing</td>
<td>As above per Greece.</td>
<td>Plan to be submitted by March 2012 to address its non-compliance issues and steps to redress. In country review of national system required.</td>
</tr>
<tr>
<td>Slovakia</td>
<td>2012</td>
<td>3 months</td>
<td>As above per Greece.</td>
<td>Plan to be submitted by October 2012 to address its non-compliance issues and steps to</td>
</tr>
</tbody>
</table>
Withdrawal from the Kyoto Protocol

Canada’s withdrawal from the Kyoto Protocol raises many questions about the lawfulness of withdrawal, practical consequences and potential international responsibility. Under international law, a party is entitled to withdraw from a treaty in conformity with the provisions of the relevant treaty. Withdrawal from the Kyoto Protocol is facilitated by article 27(1), which requires that written notice of an intended withdrawal be provided to the Depositary (United Nations Secretary-General). If all procedural obligations are complied with to affect a withdrawal, the CoP, UNFCCC or Kyoto Protocol institutional machinery has few options to legally intervene.

Numerous technical and practical challenges within the context of the Kyoto Protocol arise from a proposed and eventual withdrawal. These issues include how to treat, and what to do, with any emission reductions targets for the country in question, and what happens to any enforcement measures underway. Additionally, questions about possible international responsibility at general international law may also become pertinent, especially if the climate change regime is not characterised as being a self-contained regime. It is argued that an ICE could provide an independent, impartial and technically competent international forum to address and determine these issues, thereby strengthening global environmental governance.

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21 Kyoto Protocol, art 23.