

# Promoting Compliance in an Evolving Climate Regime

EDITED BY

**Jutta Brunnée, Meinhard Doelle  
and Lavanya Rajamani**

CAMBRIDGE

PROMOTING COMPLIANCE  
IN AN EVOLVING  
CLIMATE REGIME

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## PREFACE

Our work on this volume began in 2008. At the time, like many other observers of the UN climate change regime, we were optimistic that the 2009 Copenhagen meetings would produce at least the basic framework of a post-2012 regime. We embarked on a book project that was intended to provide a comprehensive assessment of the climate regime's existing compliance system, and an authoritative guide to the new elements of the system, which we were hoping would emerge from the Copenhagen meetings. We were not alone in our optimism about the future trajectory of the climate regime. In a remarkably short time we were able to assemble a first-rate group of authors, comprising leading scholars and practitioners with close knowledge of the climate regime. Our authors enthusiastically committed to a tight writing schedule, designed to produce a complete book manuscript within a few weeks of the Copenhagen meetings.

The rest is history, as the saying goes. It became clear in the summer and autumn of 2009 that Copenhagen was unlikely to produce the much anticipated breakthrough. Indeed, 'Copenhagen' has since come to be associated with fundamental shifts in the structure and approach of the global climate regime. The Copenhagen Accord, a non-binding policy instrument cobbled together in the dying hours of the meetings, signalled a departure from the prescriptive, internationally negotiated commitments and oversight mechanisms that had characterized the UN Framework Convention on Climate Change and its Kyoto Protocol and, indeed, the majority of multilateral environmental agreements. Instead of this centralized approach, the Copenhagen Accord heralded decentralization – a shift toward non-binding, self-selected, and nationally or regionally supervised commitments.

Given these developments, which have since been confirmed by the outcomes of the 2010 Cancun meetings of the parties to the convention and protocol, we reoriented the approach of this volume. We asked our authors to consider the experience with the climate regime to date, as well as the implications of its new directions for efforts to promote compliance

with climate commitments. We are extremely grateful to our authors for their good humour, their flexibility, and, above all, their insight into the evolving climate regime and its compliance elements. From an international law perspective, the shifts in the climate regime may well have led us to produce a more interesting volume. Not only are our authors taking stock of the strengths and weaknesses in the design and practice of the climate regime's existing compliance system, they also put their fingers on the pulse of international environmental law, tracking the latest developments and analysing their broader ramifications for the structure and process of international climate law and, perhaps, beyond.

Of course, every book is the result of the hard work of individuals other than those whose names appear in the table of contents. This one is no exception. We have benefited immeasurably from the editorial support provided to us by two young lawyers. Christie Kneteman, a Student-at-Law at Torys LLP, as well as a veteran of the Copenhagen and Cancun climate meetings, has been instrumental in bringing our book manuscript together. She has been an outstanding editor and a calm guardian of consistency and 'the most recent version'. We are grateful to Christie for her assistance and to Torys LLP for enabling her to work with us on a *pro-bono* basis. We also thank Don McCrimmon, an SJD candidate at the Schulich School of Law, Dalhousie University, for all of his equally careful editorial work on the chapters that make up this volume. We are also grateful to Shibani Ghosh, a Research Associate at the Centre for Policy Research in Delhi, for her marvellous editing in the final stages of readying the manuscript for submission. This volume has benefited tremendously from her remarkable eye for detail and demanding standards for precision and accuracy. Finally, our thanks go to Finola O'Sullivan at Cambridge University Press, for her support, encouragement, and flexibility throughout our work on this volume, and to Richard Woodham, also at Cambridge University Press, for his advice and assistance in the finalization of the book.

*Jutta Brunnée, Meinhard Doelle, and Lavanya Rajamani*  
April 2011



## ABBREVIATIONS

AAU	assigned amount unit
ACESA	American Clean Energy and Security Act
AfDB	African Development Bank
AGF	Advisory Group on Climate Change Financing
AIEs	Accredited Independent Entities
AIJ	Activities Implemented Jointly
AOSIS	Association of Small Island States
AWG-KP	Ad Hoc Working Group on Further Commitments for Annex I Parties under the Kyoto Protocol
AWG-LCA	Ad Hoc Working Group on Long-term Cooperative Action under the Framework Convention on Climate Change
BAP	Bali Action Plan
BASIC	Brazil, South Africa, China, and India
BCAs	border carbon adjustments
CBD	Convention on Biological Diversity
CBDR	common but differentiated responsibilities
CBDRRC	common but differentiated responsibilities and respective capabilities
CC	Compliance Committee
CCS	carbon capture and storage/sequestration
CDM	Clean Development Mechanism
CERs	certified emissions reductions
CITES	Convention on International Trade in Endangered Species
CITL	Community Independent Transaction Log
CMP	Conference of the Parties serving as the meeting of the parties to the Kyoto Protocol
COP	Conference of the Parties
CPM	compliance procedures and mechanisms
CTCN	Climate Technology Centre and Network
EB	enforcement branch
EBRD	European Bank for Reconstruction and Development
ECJ	European Court of Justice
EITs	economies in transition
ERT	expert review team

ERUs	emission reduction units
ETS	emissions trading system
EU	European Union
EU ETS	European Union Emissions Trading Scheme
EUAs	European Union Allowances
EUTL	European Union Transaction Log
FB	facilitative branch
FCCC	United Nations Framework Convention on Climate Change
GEF	Global Environmental Facility
GHG	greenhouse gas
GIS	Green Investment Schemes
GWP	global warming potential
IACHR	Inter-American Commission on Human Rights
IADB	Inter-American Development Bank
IBRD	International Bank for Reconstruction and Development
ICA	international consultation and analysis
ICC	Inuit Circumpolar Council
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
IDA	International Development Association
IEA	International Energy Agency
IGO	intergovernmental organization
IPCC	Intergovernmental Panel on Climate Change
IR	international relations
ITL	International Transaction Log
ITPGR	International Treaty on Plant Genetic Resources
JI	Joint Implementation
JISC	Joint Implementation Supervisory Committee
JPAC	Joint Public Advisory Committee
LDCs	least developed countries
LOSC	United Nations Convention on the Law of the Sea
LRTAP	Convention on Long Range Transboundary Air Pollution
LULUCF	land use, land-use change and forestry
MCCF	Multilateral Carbon Credit Fund
MEAs	multilateral environmental agreements
MRV	measurement, reporting and verification
NAFTA	North American Free Trade Agreement
NAMAs	Nationally Appropriate Mitigation Actions
NCPs	non-compliance procedures
NEPA	US National Environmental Policy Act
NGOs	non-governmental organizations
NIR	national inventory report

NOA	National Observatory of Athens
NTUA	National Technical University of Athens
ODA	official development assistance
OECD	Organization for Economic Cooperation and Development
OPIC	US Overseas Private Investment Corporation
PDDs	project development documents
QA/QC	quality assurance/quality control
QELROs	quantified emissions limitation and reduction obligations
REDD	Reducing Emissions from Deforestation and Degradation
REDD+	Reducing Emissions from Deforestation and Degradation and supporting forest conservation, sustainable management of forests and enhancement of forest carbon stocks
REIO	Regional Economic Integration Organization
RMUs	removal units
SB	subsidiary body
SBI	Subsidiary Body for Implementation
SCCF	Special Climate Change Fund
SCM	World Trade Organization Agreement on Subsidies and Countervailing Measures
SIARs	Standard Independent Assessment Reports
SIDS	Small Island Developing States
tCO <sub>2</sub> e	tonnes of carbon dioxide equivalent
TEC	Technology Executive Committee
UNCED	United Nations Conference on Environment and Development 1992
UNDP	United Nations Development Programme
UNECE	United Nations Economic Commission for Europe
UNESCO	United Nations Educational, Scientific and Cultural Organization
WB	World Bank
WHC	United Nations Educational, Scientific and Cultural Organization's World Heritage Committee
WTO	World Trade Organization

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## Introduction: The role of compliance in an evolving climate regime

LAVANYA RAJAMANI, JUTTA BRUNNÉE, AND  
MEINHARD DOELLE

### 1. The climate regime: contested and limited?<sup>1</sup>

Few environmental issues in living memory have attracted the political capital, media attention, and popular imagination that climate change has in recent years. Climate change has emerged over the last few decades as the ‘defining human development challenge of the 21st century’.<sup>2</sup>

In this time, the scientific community has offered ever clearer and more rigorously defended proof that the warming of the climate system is unequivocal and accelerating.<sup>3</sup> The global average temperature has increased by 0.74 °Celsius in the last century, the largest and fastest warming trend in the history of the Earth.<sup>4</sup> Climate change will, among other impacts, increase the severity of droughts, land degradation and desertification, the intensity of floods and tropical cyclones, the incidence of malaria and heat-related mortality, and decrease crop yield and food security.<sup>5</sup> It is also increasingly clear that, as the climate system warms, poorer nations, and the poorest within them, will be the worst affected.<sup>6</sup> Climate change is ‘a massive threat to human development’.<sup>7</sup>

Notwithstanding the magnitude of the problem, an effective and universal solution to address it has thus far eluded the international

<sup>1</sup> This section draws on L. Rajamani, ‘From Berlin to Bali and Beyond: Killing Kyoto Softly’, *International and Comparative Law Quarterly*, 57 (2008), 909.

<sup>2</sup> UNDP, ‘Fighting Climate Change: Human Solidarity in a Divided World’, *Human Development Report* (2007/8), at <http://hdr.undp.org/en/reports/global/hdr2007-2008/>.

<sup>3</sup> S. Solomon *et al.* (eds), *Climate Change 2007: The Physical Science Basis. Contribution of Working Group I to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2007).

<sup>4</sup> *Ibid.* <sup>5</sup> *Ibid.* <sup>6</sup> *Ibid.*

<sup>7</sup> UNDP, ‘Summary for Policy Makers’, *Human Development Report*, above note 2.

community. There are significant hurdles facing nations seeking to craft a common platform for addressing climate change. There are vast differences between countries in terms of contributions to the stock of carbon in the atmosphere, industrial advancement and wealth, nature of emissions use, and climate vulnerabilities. There is a worsening of poverty in some parts of the world, a reluctance to modify existing lifestyles or development pathways and there are differing levels of faith in technological solutions. Operating within the constraints posed by these hurdles, states have over the past two decades created a legal regime, albeit a contested one, to address climate change and its impacts.

The legal texts that comprise the climate regime – the United Nations Framework Convention on Climate Change<sup>8</sup> (FCCC) and its Kyoto Protocol<sup>9</sup> – are in force,<sup>10</sup> have concrete content, and are binding. Resources are in place to facilitate the negotiation process,<sup>11</sup> incentivize emissions reductions,<sup>12</sup> as well as supervise and enforce compliance with the obligations imposed by these treaties.<sup>13</sup> There are, however, both fundamental disagreements, as well as inadequacies, at the heart of the climate regime. These factors have created a political drag in the implementation of current commitments, and the negotiation of further commitments.

The FCCC and its Kyoto Protocol are structured around two fundamental premises. The first is that a prescriptive, quantitative, time-bound approach to addressing environmental problems is a superior and preferred approach. The FCCC and Kyoto Protocol contain quantitative

<sup>8</sup> United Nations Framework Convention on Climate Change, UN Doc. A/AC.237/18 (Part II)/Add.1, (1992) 31 I.L.M. 849.

<sup>9</sup> Kyoto Protocol to the United Nations Framework Convention on Climate Change, FCCC/CP/1997/L.7/Add.1, (1998) 37 I.L.M. 22.

<sup>10</sup> There are 193 parties to the Kyoto Protocol and 195 parties to the FCCC: see [www.unfccc.int](http://unfccc.int).

<sup>11</sup> The FCCC and the Kyoto Protocol are serviced by a secretariat based in Bonn, staffed by several hundred international civil servants: see <http://unfccc.int/secretariat/items/1629.php>.

<sup>12</sup> Through Joint Implementation, the Clean Development Mechanism, and Emissions Trading, Kyoto Protocol, above note 9, at Articles 6, 12, and 17.

<sup>13</sup> At the seventh FCCC COP, parties adopted the Marrakesh Accords which laid down operating rules for the mechanisms and accounting procedures for emissions reduction credits. They established a compliance system and set out the consequences for non-compliance. See Report of the Conference of the Parties on its Seventh Session, Addendum, Part two, Action taken by the Conference of the Parties, Volume I, FCCC/CP/2001/13/Add.1 (21 January 2002); see also Volume II, FCCC/CP/2001/13/Add.2 (21 January 2002); Volume III, FCCC/CP/2001/13/Add.3 (21 January 2002); and Volume IV, FCCC/CP/2001/13/Add.4 (21 January 2002).



greenhouse gas (GHG) mitigation commitments set to timetables and backed by a compliance system.<sup>14</sup> The second is that leadership from developed countries, and its corollary differential treatment in favour of developing countries, is the equitable and therefore appropriate basis on which the international response to climate change must be structured. This is captured in the principle of common but differentiated responsibility,<sup>15</sup> a fundamental part of the conceptual apparatus of the climate regime. The FCCC and Kyoto Protocol require developed countries, given their enhanced historical and current contributions to the carbon stock as well as their greater wealth and technological capacity, to take the lead in assuming and meeting ambitious GHG mitigation commitments.<sup>16</sup>

Elements of prescription (for developed countries), leadership (of developed countries), and differentiation (in favour of developing countries) are evident in the tone, intent, and design of the FCCC and the Kyoto Protocol. Differential treatment in favour of developing countries, although integral to many multilateral environmental agreements, has assumed a unique form in the climate regime. The FCCC and Kyoto Protocol are the only multilateral environmental agreements that differentiate between countries with respect to central obligations, such that some have commitments while others do not. FCCC Article 4(2) containing 'specific commitments' is limited to industrial countries. The Kyoto Protocol requires certain developed country parties listed in Annex I to the FCCC to reduce their overall emissions of a basket of GHGs by at least 5 per cent below 1990 levels in the commitment period of 2008–12. The Kyoto Protocol's targets and timetables, like the 'specific commitments' in the FCCC, apply exclusively to industrial countries. Developing countries (non-Annex I) are required to implement qualitative GHG mitigation policies and measures.

Both these fundamental premises of the climate regime, as well as this unique form of differential treatment, have remained highly contentious through the years. The United States' rejection of the Kyoto Protocol in 2001 can, in large part, be traced to a resistance to these premises, and this form of differential treatment.<sup>17</sup> While there is a shared understanding among states that a global climate regime is necessary, and that they

<sup>14</sup> Kyoto Protocol, above note 9 at Article 3; FCCC, above note 8 at Article 4.2(b), also contained a target and a time frame, albeit not a country-specific one as in the Kyoto Protocol, above note 9 at Article 18.

<sup>15</sup> FCCC, above note 8 at Article 3. <sup>16</sup> *Ibid.*

<sup>17</sup> Text of letter from the President to Senators Hagel, Helms, Craig, and Roberts, The White House, Office of the Press Secretary (13 March 2001).