

**PART V:  
JUDICIAL REVIEW AND  
INTERNATIONAL CLIMATE CHANGE  
LITIGATION**



## Some Perspectives on Global Governance, Judicial Review and Climate Change

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### *Abstract*

This article is about the public law reaction to the global governance phenomenon, and in particular about the concerns that have been raised about the accountability and legitimacy deficits associated with global governance institutions which, arguably, need to be addressed from a normative, as opposed to a purely functional, understanding of the concept of global governance. The scholarly debate on these issues has also entered the subject of global environmental governance, where a multiplicity of institutions with overlapping mandates form a non-hierarchical governance system, lacking a single, overarching organisation with the necessary political authority to coordinate the different international environmental regimes and their decision-making. From this perspective, the article then addresses the view that sees a remedy in the systemic linkages between climate change and other international law concerns, and the promise that these linkages hold for facilitating an improved system of supranational governance based on the compliance and enforcement mechanisms created by multilateral environmental agreements.

### *A. Introduction*

Scholarship on the relevance of administrative law principles for the enforcement of legal obligations for the protection of the environment is influenced by mainly two developments. The first development originated in social science studies in the early nineties on the concept of global governance<sup>1</sup> which drew attention to the growing importance of international in-

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1 Rosenau & Czempiel (1992); Kooiman (1993).

stitutions and their impact on domestic activities; the growth of procedures and instruments that often escape the grasp of established legal concepts; and the multilevel character of governance activities which tend to blur the traditional divisions between international, supranational and national activities and decision-making processes. The second development derives its meaning from liberal and democratic public law scholarship which pointed out the accountability and legitimacy deficits in global governance institutions and the potential undermining of individual freedoms by the unilateral exercise of authority if such authority is allowed to determine outcomes free from the realm of public law constraints which are articulated by uncontested principles such as lawfulness, reasonableness, procedural fairness and proportionality.

In this manner, the public law reaction to the global governance phenomenon wants to shift the focus from a pure functional understanding of the concept of global governance to a normative one which sees global governance as an exercise of (international) *public* authority which ought not to escape legal accountability and legitimacy analysis and justification.<sup>2</sup>

This article starts with an overview of the global administrative law initiative and the identification of emerging administrative law principles and mechanisms to ensure accountability and legitimacy in the various transnational systems of decision-making and regulation. This is then followed by an explanation of the problems associated with the current state of global environmental governance and the potential of the climate change regulatory regime to function as a vehicle for overcoming fragmentation and giving shape to an improved system of environmental governance. In the next part, developments at the national level in seeking administrative law and other remedies for environmental harm and the obstacles one may face in that regard, are dealt with.

### *B. The Global Administrative Law Approach*

In 2005 the New York University School of Law initiated a research project with the aim of systemising studies in diverse national, transnational and

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2 See for instance von Bogdandy et al. (2009:5f.); Slaughter (2001); Weiler (2004:559f.); Meidinger (2006); Esty (2006:1515f.).

international settings relating to the administrative law of global governance. The rationale for this project has been explained as follows:<sup>3</sup>

Underlying the emergence of global administrative law is the vast increase in the reach and forms of transgovernmental regulation and administration in such fields as security, the conditions on development and financial assistance ..., environmental protection, banking and financial regulation, law enforcement, telecommunications, trade in products and services, intellectual property, labor standards, and cross-border movement of populations, including refugees. Increasingly, these consequences cannot be addressed effectively by isolated national regulatory and administrative measures. As a result, various transnational systems of regulation or regulatory cooperation have been established through international treaties and more informal intergovernmental networks of cooperation, shifting many regulatory decisions from the national to the global level.

In proposing that much of global governance is in the form of administrative action through rule-making, administrative adjudication and other forms of regulatory and administrative decision-making and management, global administrative law is then defined by these authors as those principles and practices that “promote or otherwise affect the accountability of global administrative bodies, in particular by ensuring they meet adequate standards of transparency, participation, reasoned decision and legality, and by providing effective review of the rules and decisions they make”.<sup>4</sup>

What the research project has brought to light is that the growing concern with the accountability deficit in the increasing exercise of transnational regulatory power has given rise to two different types of responses. The one is to apply the principles of domestic administrative law to inter-governmental regulatory decisions having an effect in the domestic sphere; the other to develop new mechanisms of administrative law at the global level to address accountability issues within inter-governmental regimes. Cautioning against constructing a too-easy analogy between national and transnational administrative law<sup>5</sup>, the authors have ventured, firstly, to identify, in preliminary fashion and based on developments in domestic and international jurisprudence, emerging principles of administrative law for ensuring accountability and legitimacy in global administrative decision-making; and secondly, to raise the question about crafting, in addition, alternative accountability mechanisms suitable for the global administrative process of governance characterised by diffuse and multilevel decision-making, often

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3 Kingsbury et al. (2005:16).

4 (ibid.:17).

5 (ibid.:28).

with indirect effects and an absence of proper checks and balances and review mechanisms.<sup>6</sup>

With regard to the first response above, the following have been identified as emerging principles, of both a procedural and substantive character, determining the outcome of administrative decision-making in a global setting: participation and transparency; reasoned decisions; judicial or other forms of review; proportionality; rational connection between the means and the ends; avoidance of unnecessary restrictive measures; and legitimate expectations.<sup>7</sup> Following administrative law practices in various national jurisdictions and good governance strategies developed by international institutions, some scholars have catalogued a number of requirements to construct a coherent link between administrative law-derived principles and the potential to enhance legitimacy in global policy-making. These requirements include anti-corruption control measures; the rule against bias; regular auditing; procedurally fair decision-making; notice and comment procedures; disclosure of the identity of decision-makers; properly documented decisions; transparency and public participation; open forum justification of policies; access to information; and checks and balances through judicial review.<sup>8</sup>

It is on the basis of these results that there is an ongoing debate and a growing number of scholarly contributions on developing new mechanisms of administrative law suitable for the international regulatory process. This is not the place even cursorily to deal with these developments. What should be mentioned, though, is that there is considerable agreement amongst scholars working in the field that domestic mechanisms for ensuring accountability and just administrative decision-making cannot be transplanted to the global institutional level without pragmatic adjustments with a view to accommodating the special challenges inherent in global governance structures.<sup>9</sup> But there is also the view that there is no clear distinction between the domestic and global spheres and that the distinction between national and international law in this area is unpersuasive. The argument here is that a real administrative judicial system has evolved at the global level where principles common to at least the dominant domestic systems have

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6 (ibid:55f.).

7 (ibid.:37–41).

8 Esty (2006:1524–1536). See also Cassese (2005:690f.).

9 For a more comprehensive account of these issues see Grant & Keohane (2005:29f.). See also Esty (2006:1509f.).

been absorbed into the global level of decision-making and that, in the process, international law has begun some kind of constitutionalisation of global administration characterised by greater openness, participation and transparency.<sup>10</sup> Paradigmatic examples that are used to support this development are usually decision-making by World Trade Organisation inspection panels, the North American Free Trade Agreement review panel, the Arbitration and Mediation Centre of the World Intellectual Property Organization and the International Centre for the Settlement of Investment Disputes.<sup>11</sup>

### *Global Environmental Governance*

Central to the debate on international environmental governance is the role and future of the United Nations Environmental Programme (UNEP), established pursuant to the 1972 Stockholm Conference on the Human Environment<sup>12</sup> as a subsidiary organ of the United Nations.<sup>13</sup> This historical event marked the beginning of a movement that rapidly succeeded in bringing environmental issues to the centre of international public opinion and to decision-making in almost every sector of government activity. Within a few decades a multifaceted array of agencies and institutions with environment-related mandates exploded onto the world scene. This resulted in a loose network of UN bodies, state and non-state actors forming a structurally non-hierarchical governance system lacking a single, over-arching organisation, with the political authority to centralise and coordinate international environmental regimes and their decision-making in a coherent and authoritative manner.<sup>14</sup> Over time these developments could no longer be aligned with the original thinking behind the creation of UNEP and its core mission, namely to have a unit within the United Nations system that could provide central leadership and a comprehensive and integrated overview of environmental problems and develop stronger linkages between the different institutions and programmes. This led to many voices, including the United States National Academy of Sciences, raising concern, at an early stage, over the fragmentation and uncoordinated interventions across a number of policy

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10 Cassese (2005:684f.). See also Kingsbury & Donaldson (2011).

11 Cassese (2005:685f.).

12 See UN General Assembly resolution 2398 (XXIII) of 3 December 1968.

13 See General Assembly resolution 2997 (XXVII) of 15 December 1972.

14 See Hierlmeyer (2002:773f.).

areas, such as agriculture, health, labour, transportation and industrial development, and the effect that this would have on the envisaged central leadership and coordinating function of UNEP.<sup>15</sup>

Today there is no shortage of literature arguing that UNEP has failed in its role as an inter-agency coordinator and in performing its mandate as the leading organisation in global environmental governance.<sup>16</sup> As a result, the call for the establishment of an overarching international or global environmental organisation<sup>17</sup> facilitating collective action, consolidating organisational mandates and strengthening monitoring, enforcement and compliance has gained significant support in recent times. The argument has been put forward that, until this is achieved, climate change should be looked at as a vehicle for overcoming fragmentation and giving shape to an improved system of environmental governance. This view finds its logic in the systemic linkages between climate change and other international law concerns, such as the law of the sea, human rights, international trade and biodiversity, and in the prospects for improved systems of supranational governance created by the institutional linkages between these areas. It follows then that as a new category of international problem, which is inter-disciplinary in nature, climate change issues force climate change negotiations to cross boundaries between international environmental law and other branches of international law “to demand a new type of hybrid, more engaged system of law”, since climate change, more than any other environmental issue, “requires policy-makers to develop linkages between normally compartmentalised systems of law”.<sup>18</sup>

If we accept that the legal inter-linkages made possible by the climate change regime form an essential ingredient in promoting good governance in climate matters and in addressing the fragmentation in the current environmental governance system, then our attention should, in the first instance, turn to the compliance and enforcement mechanisms established in terms of the relevant multilateral treaty arrangements. Ironically, it is in the area of creating international environmental agreements that UNEP has been most successful, but, once established, these agreements and the institutional mechanisms set up by them have become autonomous entities with an in-

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15 See Ivanova (2010:32f.); Hierlmeyer (2002:779f.).

16 See for instance Ivanova (2010:46); Andresen (2002:22f.); Carlarne (2008).

17 See Carlarne (2008:459, 473).

18 (ibid.:472).

fluence that surpasses that of UNEP.<sup>19</sup> For current purposes, some general remarks on the compliance and enforcement regimes created in terms of the 1987 Montreal Protocol<sup>20</sup> and the 1997 Kyoto Protocol<sup>21</sup> will suffice.

The legal basis for the Montreal Protocol's compliance and enforcement mechanism is article 8, which instructs states parties to consider and approve, at their first meeting, "procedures and institutional mechanisms for determining non-compliance". The actual establishment of the mechanism occurred during the fourth Meeting of the Parties (MOP),<sup>22</sup> where a central role was assigned to the implementation committee composed of ten representatives of the parties and performing an advisory and conciliatory function. The committee is empowered to consider submissions relating to non-compliance in respect of both procedural obligations and substantive commitments determined by the treaty obligations of the states parties.<sup>23</sup> Although the procedure to be followed in determining non-compliance is conceived as cooperative, non-confrontational and conciliatory, deliberations are conducted under principles of due process which includes prior notification, the right to a fair hearing and impartiality.<sup>24</sup>

The Kyoto Protocol also contains only an enabling provision to ensure compliance. Article 18 authorises the Conference of the Parties (COP), which serves as the Meeting of the Parties (MOP) for purposes of the Protocol, to approve appropriate and effective procedures and mechanisms for determining and addressing cases of non-compliance. This mandate includes the development of an indicative list of consequences, taking into account the cause, type, degree and frequency of non-compliance. Binding consequences for non-complying parties are subject to adoption by means of an amendment to the Protocol. This has been achieved through the Marrakech Accords agreed to in November 2001 at the 7<sup>th</sup> Conference of the Parties.<sup>25</sup>

The Accords, pursuant to COP Decision 8/CP.4, provide for the establishment of a compliance committee, made up of a plenary, a bureau and a

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19 Ivanova (2010:42, 43, 46).

20 The protocol supplements the 1985 Vienna Convention on Substances that Deplete the Ozone Layer. The Convention entered into force on 22 September 1989. For the text see ILM 26 (1987) 1529.

21 The Kyoto Protocol is supplementary to the United Nations Framework Convention on Climate Change. See also Láncoš (2009:271f.).

22 MOP Decision IV/5 25 November 1992.

23 See also Jacur (2009:19).

24 (*ibid.*:21f.).

25 For the Marrakech Accords and Decisions see Sands & Galizzi (2004:179).

facilitative and enforcement branch.<sup>26</sup> The members of the two branches make up the plenary of the committee. The facilitative branch is responsible for providing advice and facilitation to the parties in implementing the Protocol and for promoting compliance by parties with their commitments under the Protocol. In performing this function, the facilitative branch must take into account the principle of common but differentiated responsibilities and respective capabilities, as well as the circumstances pertaining to each one of the cases before it. Specific questions of implementation included in the mandate of the facilitative branch are those related to the minimisation of adverse social, environmental and economic impacts on developing countries resulting from implementation by Annex I (to the United Nations Framework Convention on Climate Change (UNFCCC)) parties of their Protocol commitments, and those related to joint implementation, the Clean Development Mechanism and Emissions Trading under Articles 6, 12 and 17 of the Protocol, respectively. Early warning of potential non-compliance is an important element in enabling the facilitation branch to preempt states parties defaulting on their commitments. To act timeously in such instances, the facilitation branch also has the responsibility to advise on appropriate action to be taken with respect to emission reduction commitments, national systems and methodologies for the estimation of greenhouse gas emissions, and national inventories and information dissemination on such emissions, as required by Articles 3, 5 and 7 of the Protocol, respectively.

The enforcement branch of the compliance committee must comprise members with legal experience. This branch must determine whether an Annex I (to the UNFCCC) party is not in compliance with its emission reduction commitments under Article 3 of the Protocol; the methodological and reporting requirements under Articles 5 and 7 of the Protocol, and the eligibility requirements under Articles 6, 12 and 17 of the Protocol. In addition, the enforcement branch may also determine adjustment to inventories in the event of a disagreement between an expert review team and a party; and a correction to the compilation and accounting database for the accounting of assigned amounts of greenhouse gas emissions in the case of a disagreement between an expert review team and a party concerning the validity of a transaction or the party's failure to take corrective action.

Matters concerning implementation or non-compliance end up before the facilitation or enforcement branch via the secretariat and are based on reports

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26 See also Urbinati (2009:68f.); Röben (2009:828f.).

by expert review teams, which, under Article 8 of the Protocol, are responsible for the assessment of information provided to them by the parties in accordance with Article 7 of the Protocol. Any preliminary examination by the respective branches must ensure that the issue of implementation is supported by sufficient information; is not *de minimus non curat lex* or ill-founded; and is based on the requirements of the Protocol.

In following the rules of natural justice, the compliance procedures determine that any information considered by the branches shall be made available to the party concerned and that the branch must indicate to that party which parts of the information have been considered with a view to providing the party with the opportunity to respond in writing to the relevant parts of the information used by the relevant branch. Considerations of confidentiality aside, the information considered shall also be made available to the public, unless the branch, on its own volition or at the request of the party, decides against disclosure to the public until such time as a final decision has been reached. The decisions of a branch must include conclusions and reasons and the party concerned must be given the opportunity to comment in writing to any decision of the relevant branch.

Since it is clear from the Marrakech Accords that the proceedings before the enforcement branch are in the form of a hearing and presumably also since a finding of non-compliance may reflect more negatively on a party to the Protocol, the proceedings follow more closely the fairness rules of judicial proceedings. The party concerned may therefore dispute evidence (information) and provide evidence in rebuttal and may also present expert testimony or opinion at the hearing. The enforcement branch may put questions to and seek clarifications from the party concerned, either in the course of the hearing or at any other time and the party must provide a response thereto within a prescribed period. Failure to respond may result in a preliminary finding of non-compliance, which, if it remains unchallenged, will become a final decision; or the branch may decide not to proceed further with the issue.

The judicial-like decision-making and enforcement actions characterising the compliance mechanisms above could function as centres of good environmental governance in two ways.

The first way is through the application of principles and rules that have a normative quality and by means of which certain behaviour is directed or

action is required.<sup>27</sup> Their application in concrete settings requires justification and reasoning and, as such, ‘legal’ precedents (even if non-binding) are created, which, in any legal system contribute to the development of the law and determine its coherence, relative uniformity and predictability. The success of this is directly related to the articulation of principles such as common but differentiated responsibilities, polluter-pays, sustainable development, sovereignty over natural resources, good neighbourliness, good faith, prevention, and precaution in the decision-making process in concrete situations.<sup>28</sup> This must coincide with the protection, by procedural means, of the rights and interests of those affected by the exercise of compliance control, an objective that requires conformity of decisions with the principle of procedural cooperation; the right to be heard; equitable (as opposed to equal) treatment; proportionality between the measures and their objectives; and the protection of confidential information in circumstances justifying confidentiality.<sup>29</sup>

The second way entails the taking into consideration of what is known in some national legal systems as jurisdictional facts. In national law, jurisdictional facts are often circumscribed in legislation, while in international law they are spread over a variety of locations and legal regimes, and when environmental issues are involved, also in scientific data. In this instance, one may borrow from the observation that, since compliance procedure follows a “clear-cut legal and administrative design”, compliance control is bound to impact on sovereignty and the interests of private entities, all of which may be affected by (scientific) data collection and reporting.<sup>30</sup> But apart from jurisdictional facts such as these, compliance control in climate change matters can hardly avoid taking into account, where applicable, the inter-linkages between the international climate change regime and other areas of environmental regulation, such as ozone depletion, biodiversity, transboundary air pollution, international trade and human rights, to name a few. Such an integrated approach, apart from bringing greater legitimacy to the compliance process, promotes, in an important way, “institutional cooperation,

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27 See Beyerlin & Marauhn (2011:37).

28 See also the International Law Association’s study on Legal Principles Applicable to Climate Change, ILA (2012).

29 See also Beyerlin & Marauhn (2011:334).

30 (*ibid.*:333).

the promotion of cross-cutting coherent rules and effective implementation at both the national and international levels”<sup>31</sup>

At about the same time as the Kingsbury report<sup>32</sup> the renowned German scholar, Eberhard Schmidt-Aßmann, gave an inaugural speech upon the conferral on him of the status of professor emeritus at the University of Heidelberg on the internationalisation of administrative relations as a challenge for administrative law.<sup>33</sup> In his speech, Schmidt-Aßmann propagated the idea of “open statehood” as a normative ideal to accommodate the convergence of international law and administrative law through the internationalisation of administrative relations and processes of secondary law-making that flow from treaty-based institutional structures. In concluding this section, two points made by Schmidt-Aßmann need to be recounted. The first is that the law on internationalised administrative relations will first have “to orient itself toward *principles*, before individual regulations can be developed. Such principles can be derived inductively from national law and international treaties and deductively especially from human rights protections under international law”<sup>34</sup> The second is that —<sup>35</sup>

International administrative law is to be understood as the administrative law originating under *international law*. It involves processes of reshaping national law and reconstructing international law.... As a matter of clarification, it is worth noting that none of this changes the fact that *national* administrative law remains the main point of orientation for the practical administrative activity of most agencies. ... For the newly defined international administrative law, I would propose ... three main functional circles: it is a body of law governing international administrative institutions, a body of law *determinative* of national administrative legal orders, and a body of law on *cooperative* handling of specific associative problems.

Schmidt-Aßmann acknowledges that tensions between the legal orders will continue with the intensification of administrative activities by international bodies, leading to forms and levels of intervention that the international legal order is not yet equipped to handle. This, he argues, is illustrated by the literature on international environmental law where the level of compliance

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31 ILA (2012:40).

32 Kingsbury et al. (2005).

33 Schmidt-Aßmann (2006).

34 This is taken from the English version of his inaugural speech published as Schmidt-Aßmann (2009).

35 (ibid.:961). See also Schmidt-Aßmann (2012); von Bogdandy (2009:24).

monitoring has not been matched by “a canon of indispensable procedural principles”.<sup>36</sup>

### *C. Developments in National Jurisdictions*

In a recent publication the observation is made that it is “important to bear in mind that ... climate change liability is daily being established in less glamorous and less globally significant ways, especially in an administrative law context”. In support of this, legal developments in eighteen jurisdictions are analysed and documented, showing, what the authors call a frustration with the slow process of addressing climate change matters by means of international regulation.<sup>37</sup> Seeking redress within existing national laws, members of and entities in society are turning increasingly to existing legal concepts and doctrines in both private and public law to get a legal response to questions about climate change liability in its different forms. As far as the use of public law is concerned it is pointed out that national laws in most jurisdictions provide for the judicial review of decisions by public authorities and that it is necessary to consider properly such administrative law remedies in the context of the relevant substantive national law which may be found in the constitution, in national environmental law and possibly also in human rights law.<sup>38</sup> As the comparative material in the book shows litigants in several of the jurisdictions have used administrative law remedies to challenge government decision-making or the failure to act, even in cases where national laws have inadequately provided for climate change considerations. However, the outcome of these efforts is still mixed in terms of the question whether the remedies sought eventually materialised. But even unsuccessful cases have meaning in that they too contribute to the development of the law and there are still many open questions relating to jurisdiction, standing, causation and damages for which answers will have to be found.

The relevance of the precautionary principle for climate change regulation has also given rise to attempts at determining the contribution of precaution to a liability claim in the case of, for instance, inadequate regulation or the

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36 Schmidt-Aßmann (2009:955).

37 Brunnée et al. (2012:3–5).

38 (ibid.:31). On the human rights connection see the compilation of contributions in Shelton (2011).

failure to regulate.<sup>39</sup> It is suggested that the precautionary principle can be used as a legal tool in holding emitters of greenhouse gases directly responsible for climate change. In this sense, the principle does not function as an aid in choosing between either strict or fault-based liability, but it affects the standard of care or due diligence required by favouring precaution over inaction in circumstances where an element of scientific uncertainty still prevails.<sup>40</sup> But, even in cases where a finding of fault may still be relevant, the argument is put forward that in view of the precautionary principle governments as well as entrepreneurs should have been under an obligation to question their conduct, as happened from the 1950s onwards, when the risks in question became more than a suspicion. Consequently, there is a case to be made out for proactive gathering of information and investment in follow-up research, as opposed to doing nothing until further notice.<sup>41</sup>

The potential link between human rights and climate change has evoked mixed reactions. From the perspective of the United Nations Human Rights Council climate change impacts on a range of substantive human rights, such as the right to life, to adequate food, to adequate housing and to access to safe drinking water and sanitation.<sup>42</sup> In addition, climate change may also impact negatively on the resources available to states and hence their ability to comply with their obligations in rendering socioeconomic rights meaningful.<sup>43</sup> But this should not detract from the obstacles a human rights approach to climate change could possibly face. One obvious obstacle is establishing a causal link between greenhouse gases emitted in a specific state and an alleged human rights violation. Another relates to the question whether from the perspective of the national state, the state of origin, human rights obligations have extra-territorial effect. At least with regard to the first obstacle there are other approaches by means of which the causality issue can be addressed, such as the duty to cooperate in the United Nations Charter and in human rights treaties for the achievement of universal respect for, and observance of, human rights. This obligation, it has been argued, includes the duty of each state not to interfere with the ability of other states to fulfil their human rights obligations and to prevent private actors from doing so. In the context of climate change, this “could be reasonably construed as an

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39 Haritz (2011:21).

40 (*ibid.*:23).

41 (*ibid.*:23f.).

42 See HRC resolution 7/23 of 2008 and 18/22 of 2011.

43 See OHCHR (2009).

obligation on the part of major greenhouse emitting States to substantially reduce emissions so as to not interfere with ... the ability of a State to grow food or ensure adequate water resources to its citizens".<sup>44</sup>

The obligations of states in this regard are known as *erga omnes* obligations, i.e. obligations a state owes to the international community as a whole,<sup>45</sup> a matter that, on occasion, has received the attention of the Human Rights Committee, the monitoring body of the 1966 International Covenant on Civil and Political Rights (ICCPR). In its General Comment No 31 the Committee has stated that, since states parties assume obligations towards individuals in terms of the ICCPR, "every State Party has a legal interest in the performance by every other State Party of its obligations" and that the "contractual dimension of the treaty involves any State Party to a [human rights] treaty being obligated to every other State Party to comply with its undertakings under the treaty". It is this understanding of the effects of human rights treaties that prompted the Committee to comment that the violations of treaty rights by any state deserves the attention of every other party to the treaty.<sup>46</sup>

This special character of human rights treaties and the obligations they impose on states parties go back to 1951 when the International Court of Justice in the Genocide Convention case distinguished between ordinary treaties and those of a human rights or humanitarian character. In the latter instance, states parties "do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention".<sup>47</sup> Ten years later the European Commission of Human Rights argued in a similar fashion in affirming that the obligations imposed on states parties by the European Convention on Human Rights are of an objective character in that they are designed to protect fundamental rights from infringement by any of the states parties, as opposed to creating subjective and reciprocal rights for the parties

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44 ILA (2012:53).

45 *Barcelona Traction, Light and Power Company (Belgium v Spain)* 1970 ICJ Reports 3 at para 33.

46 UN Doc CCPR/C/21/Rev. 1/Add.13 of 26 May 2004, para 2.

47 *Reservations to the Genocide Convention (Advisory Opinion)* 1951 ICJ Reports 15 para. 23.

themselves.<sup>48</sup> To this one should add the following important views of the Inter-American Court of Human Rights –<sup>49</sup>

[M]odern human rights treaties in general ... are not multilateral treaties of the traditional type concluded to accomplish the reciprocal exchange of rights for the mutual benefit of the contracting States. Their object and purpose is the protection of the basic rights of individual human beings irrespective of their nationality, both against the State of their nationality and all other contracting states. In concluding these human rights treaties, the States can be deemed to submit themselves to a legal order within which they, for the common good, assume various obligations, not in relation to other States, but towards all individuals within their jurisdiction.

#### *D. Concluding Remarks*

The different attempts at both the international and national level to introduce a normative approach to the governance concept – inter alia, by means of exploring a variety of options to enforce compliance by states to their international commitments on climate change and other environmental concerns – is a project that is only now gaining momentum. It therefore stands to reason that many issues remain open-ended and ripe for further research and deliberation. In this concluding section, some observations are made with regard to three matters that may be of importance for the debate on governance and the enforcement options within the administrative law paradigm.

The first one deals with the development, as pointed out in the growing literature in the field, of a genuine administrative judicial system that has taken root in the global institutional setup and the links between that system and what one finds at the national level. An essential element of any such administrative system, if it wants to be legitimate, accountable and efficient, is the rationality of its decision-making. What matters, it has been observed, is a “governance process that produces rational analysis within legal boundaries yielding good outcomes”.<sup>50</sup> This hints to a re-application in the global governance sphere of Max Weber’s famous theories on the virtues of bu-

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48 *Austria v Italy* Application no 788/60, 4 Yearbook of the European Convention on Human Rights 1961 at 140.

49 The Effect of Reservations on the Entry into Force of the American Convention, IACtHR Series A No. 2, 24 September 1982, paras 29–30.

50 *Esty* (2006:1517). See also *Cohen* (2005:1102).

reaucratic governance processes that rely on the expert knowledge, neutrality and insulation from politics of decision-makers in delivering superior decision-making outcomes determined, inter alia, by rational legal authority and rules of governing performance. Some scholars, quite appropriately in this author's view, have linked this form of governance (at the national level) to the promise of the modern constitutional state to act rationally, in the sense that the modern state is based on the belief in the comprehension of and command over the world by means of reason. Consequently, government organs should, in the performance of their functions, refrain from speculation, magic, intuition, metaphysics or religion, and do what is rationally justifiable.<sup>51</sup> In performing their tasks state administrations are or ought to be guided by what is constitutionally or legally determined and take into account the doctrine of *trias politica* as minimum requirement. Apart from these *constitutive* elements, decision-making takes place in a *regulatory* environment of which the contours are determined by discretionary prerogatives, proportionality assessments, the relationship between measures and their objectives, scientific data and the balancing of interests. All of this raises important questions about the level of expertise and professionalism administrative components in institutions of governance must command to instil confidence in their ability to even modestly address the complexity of problems modern societies face.

The second matter relates to the relationship between the executive and the judiciary when government action or inaction in environmental issues such as climate change needs to be reviewed. The case of *Friends of the Earth v Canada*<sup>52</sup> offers a good illustration. This case deals with Canada's Kyoto Protocol Implementation Act (2007), which has the unequivocal aim of giving effect to Canada's Kyoto Protocol commitments. It states in its preamble that Canada has a clear responsibility to take action on climate change given the fact that the country's greenhouse gas emissions are amongst the highest in the world and that some consequences of this are already unfolding, particularly in the Arctic. Moreover, Canada has also undertaken to reduce its average annual greenhouse gas emissions during the 2008–2012 period to 6% below the 1990 levels.

To make this a reality, the Act envisaged a number of measures that the government needed to take, which included a climate change plan spelling

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51 Voßkuhle (2008:640).

52 2008 FC 1183, 2009 3 FCR 201. For a more comprehensive discussion of the case and related matters see Strydom (2011).

out the measures to be taken to ensure compliance with Canada's obligations in terms of the Protocol. It may be mentioned here that the Act was unpopular from the start. Introduced as a private member's bill, its legislative programme was at odds with the government's declared Kyoto policy, namely that, for economic reasons, Canada could not comply with its obligations under the Kyoto Protocol. The government cited an economic decline in gross domestic product and a fall in employment levels should the country deliver on its Kyoto promises.

In 2008 the applicant commenced action in a federal court, seeking judicial review of the government's inaction and declaratory, mandatory relief in connection with the government's alleged breaches of its Kyoto obligations. Fundamental to the legal issues before the court was the question about the justiciability of the government's climate change policy, which raised pertinent questions about the boundaries of judicial intervention in executive decision-making and about the prospects of climate change litigation as a means of ensuring compliance with a country's international environmental law obligations. The dismissal of the application, confirmed on appeal, centred around the court's view that the measures envisaged by the Act fall outside the realm of judicial review and involved policy-laden considerations by government, which involve matters that cannot be completely controlled by government and which are subject to review and adjustment within a continuously evolving scientific and political environment.

A striking feature of the case is the almost resigned manner in which the court accepted the arguments put forward by government as to why Canada was justified in reneging on its international treaty obligations. No attempt was made by the court to examine carefully each of the different measures imposed on government by the Act or to reflect on the feasibility of their adoption and potential contribution in reaching the targets Canada has knowingly accepted as a signatory to the Kyoto Protocol. But, apart from this, the question can be raised whether courts in such circumstances should not shy away from investigating scientific and economic data. Two cases can be mentioned as illustration. The one is the ruling by the South African Supreme Court of Appeal in *Foodcorp (Pty) Ltd v Deputy Director-General, Dept of Environmental Affairs and Tourism*.<sup>53</sup> This case involves an application for the review of the allocation of commercial fishing rights in terms of the Marine Living Resources Act 18 of 1998. The main issue was the blind use

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53 2005 1 All SA 531 (SCA).

of a formula by government for allocating commercial catch between successful tenders and which the applicant claimed infringed its right to administrative justice in view of the unreasonable results of the formula used in the allocation. In the Cape High Court the matter was dismissed on the basis that it was a policy-laden issue which entailed a certain degree of specialist knowledge and expertise which very few judges could be expected to have. The specialist knowledge the court referred to involved a mathematical algorithm developed with the expert assistance of a professor of mathematics. However, on appeal the Supreme Court of Appeal, after having acquainted itself with the anomalies in results of the formula, concluded that one does not need to understand the complex processes, mathematical or otherwise, to realise that at least some of the results produced by the application of the formula were irrational and inexplicable. In upholding the appeal and referring the matter back to the respondent for re-consideration, Harms JA reasoned as follows:<sup>54</sup>

A reasonable decision-maker would, in my judgement, have used a formula to make a provisional allocation but would have considered the output as a result of the application of the formula and then have considered whether the output gives reasonable justifiable results bearing in mind the facts. That the results were distorted would have been patent to anyone applying his or her mind to them. Some participants were inexplicably and unreasonably favoured; at least the appellant was prejudiced, but not only the appellant. A reconsideration of the formula or of the input fed into it would have been called for. If the problem had not been solved thereby, the results would have been adjusted to make some sense.

The second example is the ruling by the German Bundesverfassungsgericht (BVerfG) in the controversial Hartz IV matter.<sup>55</sup> In this matter, the BVerfG ruled unconstitutional welfare calculation rules for payments to adults and children under a new social welfare dispensation embarked on in 2005. The Court in this matter argued that although constitutional guarantees do not contain quantifiable indicators of what a dignified existence in the circumstances would mean, they nevertheless render necessary judicial control over the foundation and the method of ascertaining the social welfare amounts and whether these amounts were justifiable in view of the applicable constitutional guarantees. Consequently, to ensure in this instance the constitutionality of the legislative measures, the calibration of the welfare payments

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54 (ibid.:para 19).

55 BVerfG, 1 BvL 1/09 of 9 February 2010, paras 1–220.

must be shown to be based on reliable figures and proven calculation processes. In concrete terms, the court reasoned, this would mean that the court would exercise its judicial control function over the following: whether the legislature correctly understood and circumscribed the aim of realising a dignified existence in accordance with the relevant constitutional provisions by means of the impugned welfare payments; whether, within its own margin of appreciation, the legislature has chosen an appropriate calculation method to determine the amount due to the beneficiary; whether the legislature has ascertained the requisite facts in a complete and suitable manner; and whether the legislature, in working through the different calculation phases has stayed within the calculation processes and the underlying structural principles of the statistical method chosen for the purpose.<sup>56</sup> On the basis of an extensive analysis of the government's calculation methods and their outcomes, the court was in a position to discover a number of anomalies which caused the government measures to be in breach of the relevant constitutional guarantees.<sup>57</sup> What should be clear from the approach followed by the federal constitutional court is that judicial review firmly embedded in the foundational principles of the *Rechtsstaat* is conceptually a different cup of tea from judicial review under a dispensation where the separation of powers doctrine is not yet clearly grounded in theoretical or constitutional precepts and the boundaries between the different branches of government are still fluid.

Lastly, is the matter of the impact of changes in government on the international treaty obligations of states, keeping in mind the well-known international law principle that a change of government does not affect a state's legal duty to comply with international law obligations binding upon it. The *Friends of the Earth* case, referred to earlier, should illustrate the point. Canada was one of the first countries to sign (1998) and ratify (2002) the Kyoto Protocol. Since the lapse of time between signing and ratifying international agreements is usually used by states to assess their ability to comply with their treaty obligations and to bring about the necessary changes in their domestic legal orders to facilitate compliance, one could assume that the government in power at the time of ratification was fully aware of Canada's international legal obligations associated with the country's membership of the Kyoto Protocol. On 12 August 2003, the Canadian government

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56 (ibid.:para 143).

57 (ibid.:para 210).

pledged \$1 billion more for its climate change plans, bringing total federal spending to a level of \$3,7 billion, which included incentives to consumers and industry. In the same year when the Kyoto Protocol entered into force, i.e. 2005, conservatives threatened to vote against the budget because of a controversial provision in the budget bill causing greenhouse gas emissions to become a controlled substance. Opting for appeasement of the conservatives, the liberal government at the time agreed to a deal to do away with the controversial provision. In addition, an earlier Kyoto plan was revamped and emission targets for large industry polluters were relaxed. In 2006 the liberal government was unseated and in 2007 the new government published its climate change plan which formed the basis of the government's justification for non-compliance with its Kyoto obligations in the *Friends of the Earth* case.<sup>58</sup>

These events raise a number of questions: was ratification of the Kyoto Protocol based on a reasonable prospect of compliance, following a proper assessment of the factual and other circumstances that existed at the time? If so, could the factual basis have changed so dramatically between 2002 and 2006 that the new government had no option but to renege on its international obligations? Or was the true reason for the change of mind a change in political and economic interests that coincided with the liberal-conservative divide?

The developments underlying these questions can take place in any country and they require careful thinking about what can be expected of the courts in such circumstances when called upon to perform judicial review functions. The question that arises is whether courts in cases like *Friends of the Earth* should be more inclined to adopt review proceedings that are not only more stringent, but are also more responsive to the justifiability and accountability requirements for government actions associated with modern constitutional democracies and the compelling nature of the obligations they have agreed to by ratifying the UNFCCC and the Kyoto Protocol.

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58 See CBC News (2007).

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