
THE RISE OF GLOBAL ENVIRONMENTAL ADMINISTRATIVE LAW – IMPROVING IMPLEMENTATION AND COMPLIANCE THROUGH THE MEANS OF GLOBAL GOVERNANCE

AVGERINOPOULOU, DIONYSIA-THEODORA

Legal Adviser, Chamber for the Environment and Sustainability; Executive Director, European Institute for Law, Science and Technology, 520 West 112th St., apt. 8-C, New York, N.Y., 10025, U.S.A.; da2160@columbia.edu

SUMMARY

This article discusses the relationship between Global Governance and Environmental Compliance as understood under the emerging field of Global Administrative Law (GAL), the administrative law governing international institutions. Implementation of and compliance with international environmental regimes is a duty imposed not only on states, but also on international institutions. The new body of Global Administrative Law, and consequently of Global Environmental Administrative Law, might be useful for enhancing implementation of and compliance with international environmental regimes. Global Administrative Environmental Law should, for example, regulate the ways that international institutions assist states in coming into compliance. The purpose of environmental regimes could be more easily fulfilled if the expert bodies of the international institutions were competent to adopt “secondary” implementation laws and policies. If so, Global Administrative Environmental Law should include international administrative procedures that guarantee transparency, accountability, and democratic participation. Reform of international administration could lead to enhanced implementation of and compliance with the current environmental regimes.

1 INTRODUCTION

According to a common definition, “compliance” means the fulfillment by the contracting parties of their obligations under multilateral environmental agreements and any amendments thereto, and other arrangements.¹ Implementation of environmental obligations – when the agreements require further specification through the enactment of laws, regulations, policies, and other measures and initiatives – is a prerequisite for compliance. The definition is indicative of the fact that theories on compliance have focused on the performance of states, disregarding the role of other actors, such as international institutions. The traditional framework for approaching compliance is hierarchical and

focused on states. The latest literature speaks of alternative compliance strategies, such as sunshine techniques, incentives, and sanctions. Despite the enhanced compliance that the international community has achieved by using these techniques, on many occasions states still do not perform well. As a result, even the objective of the agreement could be nullified.

However, environmental agreements have evolved over time.² More recently, they tend to include as recipients of the obligations they impose, not only states, but also many other actors, including various international institutions. As a result, current policymakers should understand compliance as a multi-level issue. International organizations are compliance-monitoring bodies, compliance-facilitation

bodies, and recipients of obligations imposed by environmental regimes to which they must themselves comply. The question is: what structures and decision-making processes do international institutions have to adopt in order to be able to respond more effectively to the needs of the related environmental regimes, assist the states to comply with their obligations under these regimes, and most of all, be able to comply with their own obligations?

1 CURRENT CONTRIBUTION OF ADMINISTRATIVE ORGANS TO COMPLIANCE EFFORTS

1.1 Dissemination of Information, Consultation, and Compliance Monitoring

Until recently, the role of the international institutional arrangements in facilitating compliance was limited to hosting meetings of the member-states or disseminating information. Secretariats to international agreements play an important role in securing compliance by member countries and targeted non-state actors. They have substantial influence in part because they may be the only bodies with comprehensive knowledge of the extent to which parties are complying. When necessary, the secretariats – assisted by expert bodies – provide valuable information to states on how better to comply with their obligations, since compliance with international regimes, particularly the environmental ones, is apt to require a degree of scientific and technical expertise that not all countries possess. For example, scientific bodies working in the framework of the Mediterranean Action Plan (MAP/UNEP) offer this kind of assistance to the signatory states.³ In many instances, guidance on the ways that states could comply with their obligations is required, i.e. when there is no clear explanation of the steps a state needs to take in order to comply with its obligations under the agreement. Accordingly, intergovernmental organizations could be resources of technical assistance, legal assistance, and know-how transfer, partic-

ularly at the stage of drafting national legislation to implement international provisions.

Indeed, the role of international institutions in ensuring implementation and compliance has evolved over time. Currently, international bodies are directly engaged in the implementation, compliance, and enforcement procedures. Conventions may provide for the establishment of specific administrative positions, such as an enforcement officer in the Convention for the International Trade of Endangered Species (CITES); the development of a formal link with industry, as in the Montreal Protocol; and the establishment of scientific and technical assessment bodies, as in the Montreal Protocol and the Persistent Organic Pollutants (POPs) Convention.⁴ Despite these developments, compliance still remains an issue – raising the question of whether further empowerment of the international administration through a reallocation of powers between states and the international organization's expert bodies, and an elevation of the role of those expert bodies, could promote compliance, and if so, under what conditions.

1.2 The Methyl Bromide Case

There are many ways that a state might not comply with its international obligations. Usually, states try unlawfully to unbind themselves from obligations that they have previously undertaken. In other cases, states might exercise their discretionary power in a way contrary to the spirit and the purpose of the environmental regimes, or they might use an "escape clause" to unbind themselves from previously accepted obligations. In these cases, the states may comply with the letter, but not with the substance, of the law. This type of "disguised" non-compliance is difficult to detect and cope with. Until recently, these cases were dealt with by the states or the political organs of the institutions, which are comprised of representatives of the states and which could decide the non-compliance issue based on political criteria not necessarily relevant to the object and purpose of the agreement. The participation of

administrative and expert bodies in the evaluation process for such cases – e.g., in cases of retreat from previously accepted obligations – has to a certain extent limited the abuse of discretion and use of the escape clauses contrary to the spirit and purpose of the agreement. However, states hold the final decision-making power. International administrative and expert bodies could only make recommendations on these issues and not take any authoritative decision or action against the “non-complying” party. One wonders whether the situation could be improved by giving these bodies further powers.

Such is the case under the Montreal Protocol for Substances that Deplete the Ozone Layer, which contains an escape clause for countries to unbind themselves from previously adopted obligations, e.g. the ban on the use of ozone-depleting substances. According to the escape clause, the states may decline to enforce the ban if the use of the substance is critical, the ban may result in a “significant market disruption”, and “there are no technically and economically feasible alternatives or substitutes”.^v Whereas, under previous regimes, the signatory state or the political body (Meeting of the Parties) would have been the sole evaluator of a use as critical, there is now an expert body – the Technology and Economic Assessment Panel – that intervenes in the decision-making procedure and provides feedback. A recent case under the exemption for critical use is the application of the U.S. to unbind itself from the obligation to ban the use of Methyl bromide on financial grounds, namely the risk to tomato and strawberry production (especially in the state of California).

Methyl bromide has been used worldwide since the 1930s as a pre-plant soil fumigant to control insects, pathogens, and weeds. It has also been used for quarantine and pre-shipment application. Because of its effectiveness, Methyl bromide is one of the very few chemicals that were approved for broad-spectrum use in agriculture and pest control globally. In 1992, the Parties to the Montreal Protocol recognized Methyl bromide as contributing

to the depletion of the ozone layer. Indeed, Methyl bromide is a potent ozone-depleting chemical, with a potential – ‘atom-for-atom’ – to destroy 60 times more stratospheric ozone than chlorine from CFCs. It is also highly toxic to humans. Accordingly, the Parties agreed to freeze the production and importation of the substance in industrialized countries in 1995 at the 1991 levels.⁶ In 1997, the Parties to the Protocol agreed to a complete elimination of MeBr in industrialized countries by 2005, with interim reductions and with some exemptions for quarantine and pre-shipment uses.⁷ In 1998, the U.S. amended the Clean Air Act to adopt the phase-out date established under the Montreal Protocol, but in 2003, applied for an exemption from the Methyl bromide ban. The U.S. held that the use of methyl bromide was critical for its economy, because tomato and strawberry farmers in California could not replace it with any other substance as cost-effective. The U.S. applied through the critical use clause and got an extension for some uses of Methyl bromide until 2007. Currently, in 2005, the U.S. has reapplied for a renewal of the extension, which it seems very possible that it will get. Methyl bromide still remains in use.

Although the substitution of Methyl bromide is technically possible, a country may choose not to ban the substance after a cost-benefit analysis, even if it agreed to do so. In this legitimate non-compliance case, the expert bodies of the Ozone Regime have a say. The Methyl Bromide Technical Options Committee, the basic committee of the the Technology and Economic Assessment Panel that mainly deals with MeBr cases, renders recommendations to the Meeting of the Parties. Irrespective of the recommendations of the expert bodies, however, the Meeting of the Parties always has the last say. This procedure allows for decisions potentially grounded only on political criteria,⁸ and illustrates that even one of the most successful compliance regimes, such as the Ozone regime, allows for non-compliance opportunities. With the last say always remaining with the states, the states have a

“security valve” when they decide to enter stringent legal regimes.

Perhaps compliance would be more easily achieved if scientific checks and balances were imposed for the characterization of a chemical use as “critical,” for evaluation of the cost-effective and technically possible alternatives to ozone-depleting substances, and for other relevant issues. If these evaluation tasks remained mainly with the expert bodies, and the expert bodies could have decision-making powers, it could avoid this type of non-compliance by the states. However, the delegation of such powers to the expert bodies of the international institutions will not be without strong opposition from states, individuals, and other actors in the international scene. Ways to delegate power to expert bodies of the intergovernmental institutions, in order to achieve advanced implementation and compliance with the environmental regimes with the aim of strengthening the efficiency of international administration, are among the subjects of the new field of Global Environmental Administrative Law studies.

3 THE POTENTIAL CONTRIBUTION OF GLOBAL ADMINISTRATIVE LAW TO COMPLIANCE ISSUES

3.1 The Emerging Field of Global Administrative Law

According to the definition that the leading Global Administrative Law Research Project of New York University School of Law has given, “global administrative law” is “the body of law that comprises the structures, procedures and normative standards for regulatory decision-making including transparency, participation, and review, and the rule-governed mechanisms for implementing these standards that are applicable to formal intergovernmental regulatory bodies; to informal intergovernmental regulatory networks; to regulatory decisions of national governments, where these are part of or constrained by an international intergovernmental regime; and to hybrid public-private transnational

bodies.”⁹ “Global administrative law” covers a broad spectrum of action. It refers to the structures and internal organization of an international institution, to the competence of the bodies within the institution, to the relationships among them, to the relationships between the administrative and the political bodies that comprise the international organization, as well as the relationships among the administrative bodies, national governmental bodies, and other entities. Furthermore, Global Administrative Law governs all the activities of the organs that belong to the administration of an institution, even activities that are not traditionally administrative. On the international level there is no separation of powers. The international administrative bodies enjoy legislative powers and promulgate internal regulations and rules, applicable directly on the member-states of an intergovernmental organization, individuals and actors. This legislative function is usually based on their expertise and serves the further specification of the framework regimes that govern the international organizations and the multilateral agreements that these administrative organs serve.¹⁰ Further, various administrative organs hold supervisory and quasi-judicial powers. Within this conceptual framework, the body of law that will potentially govern the administrative action of international arrangements with competence on environmental issues defines “global environmental administrative law.” The question is whether and how this emerging instrument, could contribute to achieving enhanced compliance with the international environmental regimes.

3.2 Global Environmental Administrative Law as the new modus operandi

The rising body of global environmental administrative law could create a new modus operandi for the existing intergovernmental organizations with competence on environmental issues, based on sorting out the most successful organizational and regulatory decision-making models based on compliance and optimization

of the system models.¹¹ The above case may suggest for example that global environmental administrative law should provide for the empowerment of administrative and expert bodies in the pursuit of implementation and compliance with environmental obligations. In cases that require expertise and not just political judgment, such empowerment could occur either through the appropriate restructuring of the environmental regimes so that expert bodies are included in every decision-making process, or by the delegation of some law-making powers to expert bodies. The way to organize such redesign could be through an international (environmental) administrative procedures act. Such an act could be built on the following principles, among others.

Power of initiative and proposal: the Secretariat and the expert bodies of the international organizations should have the power to take the initiative and make proposals for the identification of non-compliance cases and their evaluation, and initiation of non-compliance procedures. Apart from the non-compliance cases, the power of initiative and proposal could apply also to amendments of the organization's treaties, the conclusion of new treaties, inclusion of new issues in the agenda for negotiations, and directing research. Similar power is held, for example, by the Secretary of the Codex Alimentarius Commission and the administration under the Montreal Protocol.

Opting-out procedures and quasi-legislative powers: institutions with competence on environmental issues should adopt decision-making processes and regulatory lawmaking procedures in ways similar to the so-called "technical" organizations. Global intergovernmental organizations with competence on specific environmental issues, such as the International Civil Association Organization, the World Meteorological Organization, the Food and Agriculture Organization, and the World Health Organization, are able to amend technical and other regulations that become binding on their member-states without any further act of ratification. In this way the states cannot avoid compliance

with their obligations through contrary legislation or absence of appropriate implementing legislation. It prohibits the states from acting against the purpose of the primary rules. For example, the International Civil Association Organization adopts environmental standards on aircraft engine emissions and aircraft noise according to art. 37 (e) and (k) of the Convention on International Civil Aviation (Chicago Convention).¹² The administration of the International Maritime Organization clearly declared that when its decision-making structure was based solely on political bodies, they could not achieve any satisfactory results on progressive lawmaking and governance. After having adopted similar lawmaking procedures, International Maritime Organization demonstrated success at the mitigation of sea pollution by oil.¹³ International secretariats supporting multilateral environmental agreements and other expert bodies and committees that work under models similar to the above-mentioned "technical" organizations are also considered to be successful. These entities participate in the lawmaking process through the enactment of technical regulations in annexes or amendments to conventions and have a stronger role at the implementation stage of the convention. In addition, these procedures better serve the quick adaptation of international environmental law to new technological evolutions, enhance the speed of response to environmental emergencies, and avoid the slowness that political negotiations *de novo* may cause. If an environmental regime requires the use of Best Available Technology, for example, then the identification of the Best Available Technology and its application may happen quickly through the enactment of legislation promulgated by international administration, whereas states may delay such legislation on purpose, resulting in non-compliance. Within the framework that general primary rules create, being the constituent instruments of intergovernmental organizations, multilateral environmental agreements,¹⁴ and "main" protocols¹⁵ – and according to procedures established by them – some cate-

gories of secondary, more detailed, implementing laws serve to specify the primary laws. This secondary law could be promulgated exclusively by expert bodies. These rules could be provisions in annexes, rules of technical nature, rules specifying obligations already accepted by the political organs, rules that do not impose legal obligations, rules that do not impose additional costs to states, or laws fully justified by clear science.¹⁶ Notably, Global Administrative Environmental Law has to identify more criteria for categorizing these “secondary” rules.

The duty to give reasons: A further example of a promising procedure required by an international administrative act could be the “duty to give reasons”. In the case of a debate between the consultative body and the decision-making body, the latter could either adopt rules according to the proposal of the consultative body, or if they choose to adopt different legislation, they should either justify their different decision or abstain from the regulation.¹⁷ In the Methyl Bromide case, for example, the Meeting of the Parties would have to justify its decision, if it decided to abstain from the recommendations of the Technology and Economic Assessment Panel and Methyl Bromide Technical Options Committee. A similar duty to give reasons exists in the EC Treaty (art. 253). Both civil law and common law legislation have adopted rules similar to the duty to give reasons.¹⁸

Post-legislative scientific review: Apart from democratic checks and balances, scientific checks are also necessary. Procedures should be adopted so that rules of international environmental law could be examined for their scientific validity. A post-legislation scientific review requirement for technical regulations adopted by either the international bodies or by states could be adopted. In the U.S. legal system, this post-legislative scientific review is combined with the judicial review. Judicial review at the very end “is the most effective means to ensure the accountability of the regulators.”¹⁹

Such delegation would unavoidably create issues of democratic represen-

tation and accountability. Despite the necessity of a science-based administrative and lawmaking system for the environmental issues, the democratic principle raises limits to the delegation of lawmaking powers to expert bodies.²⁰ To face these issues, Global Administrative Law may suggest the application of administrative procedures that could ensure internal and external accountability of the work of the administration and expert bodies,^{xxi} information disclosure,²¹ transparency in decision-making, and democratic checks and balances on the acts and laws by international administration.

3 CONCLUSION

Long lasting issues, such as non-compliance, require new approaches. International institutions have an important role to play in compliance reinforcement through either compliance monitoring and provision of assistance to states to achieve compliance, or through more direct participation towards the implementation of the environmental regimes and the development of review mechanisms of states’ behavior. The reinforced status of the international institutions and expert bodies, although justified on grounds of effectiveness, should comply with the democratic governance requirement. The development of an international environmental procedural act applicable to all international institutions with environmental competence is necessary. The emerging body of Global Administrative Law could provide the framework for the restructuring of international institutions and for the promulgation of procedural rules. Successful examples of governance at either the national, regional, or international level need to be studied, to draw out the appropriate rules to govern international environmental regimes.

4 REFERENCES

- ¹ See, Edith Brown Weiss, Strengthening National Compliance with International Environmental Agreements, 27 *Envl.*

- Poly. & L. 297 (1997).
- ² *Supra*, at 1.
- ³ Haas, P. M. 1990. *Saving the Mediterranean: the Politics of International Environmental Cooperation*: Columbia University Press, Haas, P. M., R. O. Keohane, and M. A. Levy. 1993. *Institutions for the Earth: Sources of Effective Environmental Protection*: The MIT Press, Haas, P. M. *Science Policy for Multilateral Environmental Governance*, International Environmental Governance, Gaps and Weaknesses, Proposals for Reform: United Nations University.
- ⁴ For example, the implementation committee and noncompliance procedures of the Montreal Protocol were used initially to help non-complying Article V developing countries come into compliance with reporting obligations.
- ⁵ Decision IX/6.
- ⁶ Art. 2H (1) of the Protocol.
- ⁷ Art. 2H (5) of the Protocol.
- ⁸ Notably, since there is no obvious non-compliance, the Implementation Committee, which is the competent organ of the Montreal Protocol to judge non-compliance issues, could not be involved in the case.
- ⁹ Kingsbury, B. Krisch N. and Steward B. R., *The Emergence of Global Administrative Law*, Draft Paper for the Global Administrative Law Research Project of the New York University School of Law (2004). For further working papers and project documents, please visit the project website, available at: www.iilj.org.
- ¹⁰ Lately, there was reference to the “imperial Security Council” when the UNSC promulgated acts purely legislative in their nature (e.g. Resolution 1267 and 1373) raising questions about the authority that the UNSC had to proceed to legislation. Paul C. Szasz, “The Security Council Starts Legislating” (2002), 96 *American Journal of International Law*, 901. This example shows that at the international level, there is a gap of legislation. There are many issues that need to be regulated and the regulation has to be on the international level.
- ¹¹ Decleris, Michael, ed. 1986. *Systems Theory*. Edited by G. S. Group. Athens - Komotini: Ant. N. Sakkoulas.
- ¹² For the law-making procedures of ICAO see T. Buergethal, *Law-Making in the International Civil Aviation Organization*, (1969).
- ¹³ See, (International Convention for the Prevention of Pollution from Ships (MARPOL), London 1973, in 12 *ILM* 1319 (1973). The Maritime Safety Committee (MSC), the highest technical committee of IMO, is able to adopt amendments to conventions, such as the Safety of Life at Sea Convention (SOLAS). Other technical committees that participate in the decision-making process of IMO, but clearly do not hold any lawmaking power, are the Marine Environmental Protection Committee (MEPC), the nine sub-committees that assist the MSC and the MEPC and the Facilitation Committee. For a detailed reference to the evolution of the rule-adoption techniques by the organs of IMO, visit: www.imo.org/home.asp. However, the research on IMO will not be organ-specific, but treaty-specific, because IMO Assembly decided not to amend IMO’s Constitution regarding the voting procedures, but each convention separately. 14th Session of IMO Assembly, Sept. 1972.
- ¹⁴ E.g. the Vienna Convention on the Substances that Deplete the Ozone Layer, the Framework Convention on Climate Change, and the Biodiversity Convention.
- ¹⁵ E.g. the Montreal Protocol, the Kyoto Protocol, and the Cartagena Protocol respectively.
- ¹⁶ Here I use the word “implementation” under a broad sense that is different from the rules that depict the implementation process of a multilateral environmental treaty, or the decision of an intergovernmental organization, or national rules of

implementation of international documents. Implementation rules under the meaning in the present paper may include a large part of rules of implementation under the usual meaning.

- ¹⁷ Greek administrative law also provides for such a requirement.
- ¹⁸ For example, Canadian administrative law provides for such a requirement. See, e.g. *Baker v. Canada*, [1999] 2 CLR 273 (HCA).
- ¹⁹ Rose-Ackerman, Susan. 1992. *Rethinking the Progressive Agenda*. New York: The Free Press, p. 34. See, also: Majone, Giandomenico. 1993. *Controlling Regulatory Bureaucracies: Lessons from the American Experience*, EUI Working Paper SPS No. 93/3. Badia Fiesolana, San Domenico (FL): European University Institute, Florence, Department of Political and Social Sciences, p. 22; Majone, Giandomenico. 1994. *Independence vs. Accountability? Non-Majoritarian Institutions and Democratic Government in Europe*. In *EUI Working Papers in Political and Social Sciences*. European University Institute, Florence, p. 21.
- ²⁰ The main argument for science-based lawmaking versus democratic lawmaking is the effectiveness that the above-mentioned schemes have demonstrated thus far. International, regional, and national institutions base their success mainly on their reliance on expertise and not on politically elected bodies. Democracy is a basis of legitimacy for lawmaking powers but it is not the only one. Not only could scientific expertise be a further basis, but it could also increase the perceived legitimacy of the regulations. An additional argument for the science-based lawmaking is that integration of scientific expertise in lawmaking may enhance the democratic rule. Experts may come from civil society, giving expert networks and non-governmental organizations a direct voice at the international level. Incorporation of independent experts in schemes that participate in the lawmaking procedures assists in the problem of the inequality of weapons available to interest groups in environmental governance. For example, pro-environmental coalitions may not have adequate resources to sustain major research programs, as corporations have. For further relevant issues, see Majone, Giandomenico. 1994. *Independence vs. Accountability? Non-Majoritarian Institutions and Democratic Government in Europe*. In *EUI Working Papers in Political and Social Sciences*. European University Institute, Florence.
- ²¹ Global Administrative Environmental Law could endorse "internal accountability" and create "external" accountability. Most of the international organizations have mechanisms that obligate them to answer to their member-states ("internal accountability") and then the member-states' governments in turn answer to their citizens by means of national administrative law, if such provisions exist. It is necessary that the "internal accountability" mechanisms towards member-states be endorsed and accessible to every single member-state that wants to initiate a procedure. It is also important that mechanisms of "external accountability" be created in order for the individual to have direct access and be able to question the rules and acts of the international organization at the international administrative level. These mechanisms are very important, especially taking into account that judicial review mechanisms on the international level do not sufficiently exist. For the design of accountability mechanisms, there are examples from the constellation of international economic institutions, such as the International Monetary Fund (IMF), the World Bank (Inspection Panels), and the European Central Bank. For further details, see: One World Trust, *Power without Accountability?*, The Global Accountability Report 2003, p. 3.
- ²² Institutions should promote the direct participation of the individual in the work of the international institutions. The indi-

vidual – scientist or any other citizen – could have access to information concerning the work of the institution, the data that the decisions were based on, and the deliberations of the organs. Individuals should have access to the pool of information that the international organi-

zation holds in order to support their case against non-complying states. The provision of access to information is one of the procedural rights that is easily fulfilled without much effort or institutional redesign of the international institution upon which the obligation is posed.