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**FIGHTING AGAINST CLIMATE CHANGE: THE EFFECTIVENESS  
OF MULTILATERAL ENVIRONMENTAL AGREEMENTS AND  
MECHANISMS OF THE UNFCCC, KYOTO PROTOCOL AND  
PARIS AGREEMENT**

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I hereby declare that I have compiled the thesis independently and all works, important standpoints and data by other authors have been properly referenced and the same paper has not been previously presented for grading.

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## TABLE OF CONTENTS

ABSTRACT .....	5
INTRODUCTION .....	6
1. Multilateral Environmental Agreements .....	9
1.1. Legal Bindingness .....	10
1.2. Controversial Issues.....	11
1.3. Discrimination .....	12
1.4. The Issues with Burden-sharing .....	13
1.5. Principle of Sovereignty .....	14
1.6. The Compliance Mechanism .....	15
1.6.1. The Issues with Interpretation .....	16
1.6.2. Lack of Participation .....	16
1.6.3. Violation of No-harm Principle.....	17
1.6.4. The Issues with Cost-effectiveness.....	18
1.6.5. The Question of Fairness .....	18
2. The Implementation Mechanism .....	19
2.1. Implementation Flexibility .....	20
2.2. International Implementation Case Study: Canada .....	21
2.3. The Enforcement Mechanism.....	21
2.4. Non-compliance.....	23
2.5. Need for Litigation .....	23
2.6. Sanctions and Penalties .....	25
3. The Question of Effectiveness.....	25
3.1. Failure of Effectiveness .....	26
3.2. Advantages and Shortcomings .....	26
4. Future Developments and Human Rights.....	27
4.1. The Importance of Human Rights .....	28
4.2. The Judicial Influence .....	29
4.3. Future Proposals .....	30
CONCLUSION .....	30
KOKKUVÕTE .....	33
LIST OF REFERENCES.....	35

APPENDICES .....	38
Appendix 1. Non-exclusive licence .....	40

## **ABSTRACT**

This thesis provides an overview of the current legal international environmental law tools such as the United Nations Framework Convention on Climate Change, the Kyoto Protocol and the Paris Agreement. The aim of this thesis is to find out how effectively existing legal instruments on climate change protect and prevent climate change on global level. This thesis discusses the international environmental law critical issues analysing why current legal documents are not effective enough. Consideration is given to their compliance, implementation and enforcement mechanisms to address the level of effectiveness. Finally, proposed improvements and developments are suggested. It is crucial to take actions now and seek solutions to the problems we are facing now and in the future.

Keywords: UNFCCC, Kyoto Protocol, Paris Agreement, climate change, environmental law

## INTRODUCTION

International environmental law is by its nature challenging, complex and controversial.<sup>1</sup> The relationship between humankind and other living ecosystems is a common concern of humankind.<sup>2</sup> Protection of the environment and fighting against climate change is undoubtedly the most critical concerns in time for the safety of humanity and future generations. It is relevant because of the current global disastrous events, including droughts and floods, forest fires, and sea-level rise. Climate change is a problem of its own, and international legal instruments have been created to address the legal issues.<sup>3</sup>

First attempts to protect the environment, especially shared property, such as rivers, lakes, and sea can be dated back to ancient civilisations.<sup>4</sup> To tackle the issues on the global level, countries have to come together. Cooperation between countries is essential. Scholars have argued that climate change is simply too vast and complex to be resolved through a single instrument.<sup>5</sup> For that reason, this thesis will be focusing on the effectiveness of the United Nations Framework Convention on Climate Change (hereinafter UNFCCC), the Kyoto Protocol and the Paris Agreement, their compliance, implementation and enforcement mechanisms.

The reason for choosing this topic is that the author of this thesis believes that international environmental law instruments are not effective enough to fight against climate change and overall does not gain enough attention. In practice, the most critical problem on achieving effective climate change mitigation is the lack of legislative process, lack of capacity in enforcement, lack of binding commitment, lack of domestic implementation, lack of scientific data, lack of

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<sup>1</sup> Fisher, E. (2017) *Environmental Law: A Very Short Introduction* 1st ed. United Kingdom Oxford University Press, 6.

<sup>2</sup> The UNFCCC legal text

<sup>3</sup> Sands, P., Peel J., Farba A., MacKenzie R. (2018) *Principles of International Environmental Law* 4th ed. United Kingdom Cambridge University Press, 295.

<sup>4</sup> Fisher (2017), *supra nota* 1, 36.

<sup>5</sup> Moncel, R., van Asselt, H. (2012). All Hands On Deck: Mobilizing Climate Change Action Beyond the UNFCCC. *Review of European, Comparative & International Environmental Law*, 21(3), 165 referenced in Prins and Rayner, *Time to Ditch Kyoto*, 2007, 973, at 974; Victor, (Global Warming Gridlock: Creating More Effective Strategies for Protecting the Planet Cambridge University Press, 2011, 210-215).

international cooperation and information sharing.<sup>6</sup> International environmental law is created based on cooperation and mutual agreements to respond to climate change.

The basis of analysing the hypothesis of this thesis will be an in-depth study of existing legal instruments on the climate change issues to answer the following research questions: Why the compliance, implementation and enforcement mechanisms of the UNFCCC, the Kyoto Protocol, and the Paris Agreement on the climate change issues are inefficient? How to improve the compliance, implementation and enforcement mechanisms of the UNFCCC, the Kyoto Protocol and the Paris Agreement on climate change issues from a legal perspective? The UNFCCC, the Kyoto Protocol and the Paris Agreement are the most crucial climate change regimes<sup>7</sup> to tackle climate change issues. However, these international treaties are not effective enough since they have not been able to stop greenhouse gas emissions growth.<sup>8</sup> Therefore, for this reason, this thesis aims to determine the effectiveness of the UNFCCC, the Kyoto Protocol and the Paris Agreement on the climate change issues, their compliance, implementation and enforcement mechanisms. An international instrument's effectiveness is affected by numerous reasons, one of them being the compliance, implementation and enforcement mechanisms. For that reason, this thesis will analyse the mentioned mechanism to answer the research questions.

In order to explain why current international legal instruments have not achieved their goal, this thesis will be built upon a qualitative and inductive approach, meaning that the research is established on the data-based investigation, analysing and comparing international environmental legal instruments on climate change. Building detailed theories based on analysis of existing primary sources, the UNFCCC, the Kyoto Protocol and the Paris Agreement, regulations, conventions and treaties. Furthermore, including secondary sources, books, legal articles, journals, reports and case law on the subject to find answers to the research questions and propose future developments.

The structure of this thesis is divided into four chapters. The first chapter is an overview of the Multilateral Environmental Agreements, such as the UNFCCC, the Kyoto Protocol and the Paris Agreement. Followed by an analysis of the legal binding nature of these instruments and the major

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<sup>6</sup> Sands, P., Peel J., Farba A., MacKenzie R. (2018) *supra nota* 3, 16.

<sup>7</sup> Ediboglu, E. (2017). The Paris Agreement: Effectiveness Analysis of the New UN Climate Change Regime. *University College Dublin Law Review*, 17, 165.

<sup>8</sup> Sands, P., Peel J., Farba A., MacKenzie R. (2018) *supra nota* 3, 296.

legal issues of the compliance mechanism. In the next chapter, the analysis of the UNFCCC, the Kyoto Protocol and the Paris Agreement implementation mechanism and the issues why the mechanism is ineffective is followed to support the argumentations that the climate change regime lacks in its effectiveness. In the third chapter the question of the effectiveness will be answered. In the last chapter, the discussion over proposed improvements and future developments is followed. Some of the most important cases are included in this thesis to support the argument that the UNFCCC, the Kyoto Protocol, and the Paris Agreement are ineffective. Human rights should be incorporated into international environmental law to take climate change issues more seriously.

The author of the thesis would like to express gratitude towards her supervisor for the well-needed guidance, family and friends who did not lose faith and helped with their positivity.



# 1. Multilateral Environmental Agreements

The UNFCCC was the first international multilateral environmental legal instrument to focus on climate change issues on a global level,<sup>9</sup> and it entered into force in 1994.<sup>10</sup> There are 197 parties to the Convention.<sup>11</sup> Its ultimate focus is the "stabilisation of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system".<sup>12</sup> The UNFCCC was established on the idea not to set too strict obligations, and it is based on non-binding targets, which turned out to be not effective enough to tackle climate change.<sup>13</sup> Thus, the level of effectiveness of the UNFCCC has been questionable since countries have not met the global emission targets, and the global greenhouse gas emission keeps increasing.<sup>14</sup>

Since the UNFCCC did not meet the effective greenhouse gas reduction targets, a radical change in the international environmental legal regulations needed to be ensured.<sup>15</sup> After several negotiations of the parties to the UNFCCC, the outcome was the establishment of the Kyoto Protocol in 1997<sup>16</sup>, which entered into force in 2005, currently, there are 192 parties to the Protocol.<sup>17</sup> The Protocol sets more specific and legally binding greenhouse gas emissions reduction targets for developed countries but not for developing countries.<sup>18</sup> The author of this thesis notices that it took seven years for the Protocol to enter into force, which indicates that its too strict and unjust obligations were not favoured by countries. The most evident reason, why the

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<sup>9</sup> Wang, X., Wiser, G. (2003). The Implementation and Compliance Regimes Under the Climate Change Convention and Its Kyoto Protocol. *Global Environmental Law Annual*, 135.

<sup>10</sup> The UNFCCC, Status of ratification of the Convention webpage [Online]. Retrieved from <https://unfccc.int/process-and-meetings/the-convention/status-of-ratification/status-of-ratification-of-the-convention>

<sup>11</sup> *Ibid.*

<sup>12</sup> The UNFCCC Article 2.

<sup>13</sup> Warnock, A. (2004). The Climate Change Regime: Efficacy, Compliance and Enforcement. *New Zealand Journal of Environmental Law*, 8, 107.

<sup>14</sup> Nasa Global Climate Change webpage [Online]. Retrieved from <https://climate.nasa.gov/vital-signs/carbon-dioxide/>

<sup>15</sup> Freeland, S. (2001). The Kyoto Protocol: An Agreement Without Future. *University of New South Wales Law Journal*, 24(2), 532.

<sup>16</sup> Council on Foreign Relations. [Online]. Retrived from <https://www.cfr.org/backgrounder/paris-global-climate-change-agreements>

<sup>17</sup> The UNFCCC What is the Kyoto Protocol? [Online]. Retrived from [https://unfccc.int/kyoto\\_protocol](https://unfccc.int/kyoto_protocol)

<sup>18</sup> Wang, X., Wiser, G. (2003), *supra nota* 9, 140.

Protocol appeared to be ineffective did not receive global support is because it failed to establish a global respond to a global problem.<sup>19</sup>

The Paris Agreement was adopted by 196 parties and entered into force in 2016.<sup>20</sup> What makes the Paris Agreement different from the Kyoto Protocol is that the discriminative distinction between parties has been replaced by the commitments where all parties are expected to fight against climate change.<sup>21</sup> However, the UNFCCC, the Kyoto Protocol and the Paris Agreement, all three treaties have turned out to be unsuccessful to slow emissions growth sufficiently to achieve a sustainable climate future.<sup>22</sup> Therefore, this thesis aims to find answers to why the UNFCCC, the Kyoto Protocol and the Paris Agreement are not effective enough to fight against climate change? How to improve the international environmental law from the legal perspective? An in-depth study of the UNFCCC, the Kyoto Protocol and the Paris Agreement provisions, principles, and mechanisms needs to be conducted to answer whether the legal instruments are effective to fight against climate change.

## 1.1. Legal Bindingness

Discussions over the UNFCCC, the Kyoto and the Paris Agreement being effective or ineffective legal frameworks have drawn attention to analyse their legally binding character. The author of this thesis noted that many academics have concluded that an international legal instrument's efficacy can be determined by these three key elements: compliance, participation, and problem-solving ambition.<sup>23</sup> Legally binding obligations set out in a legal instrument affect compliance,

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<sup>19</sup> Ediboglu (2017), *supra nota* 7, 172.

<sup>20</sup> The UNFCCC webpage [Online]. Retrived from <https://unfccc.int/process-and-meetings/the-paris-agreement/the-paris-agreement>

<sup>21</sup> Ediboglu (2017), *supra nota* 7, 177.

<sup>22</sup> Sands, P., Peel J., Farba A., MacKenzie R. (2018), *supra nota* 3, 296, referenced in Clarke ( Clark, D. Has the Kyoto Made Any Difference to Carbon Emissions? The Guardian 2012) ; Marcacci ( Marcacci S. Was the Kyoto a Success or Failure? Clean Technica, 2011).

<sup>23</sup> Voigt, C. (2016). The Compliance and Implementation Mechanism of the Paris Agreement. Review of european, Comparative & International Environmental Law, 25(2), page 161 referenced in Barrett ( Barrett S. Environment and Statecraft: The Strategy of Environmental Treaty-Making Oxford University Press 2003 ; Bodansky (Bodansky, D. Legally Binding Versus Non-legally Binding Instruments in: Berrett, Carraro, Melo (S. Barrett, C. Carraro and J. de Melo, Towards a Workable and Effective Climate Regime CEPR Press and Ferdi, 2015, 155).

implementation, participation and enforcement therefore, it has an important role to determine the effectiveness of an international environmental tool.<sup>24</sup>

## 1.2. Controversial Issues

Therefore, the first question to find an answer is whether the UNFCCC, the Kyoto Protocol and the Paris Agreement are legally binding under international law? For example, Bodansky has brought to attention that even though under the Vienna Convention on the Law of Treaties (hereinafter VCLT), the UNFCCC is legally binding, nevertheless the Article 4.2 of the UNFCCC itself states the opposite.<sup>25</sup> Bodansky points out that Article 4.2 was created not to impose legal obligations, which means, that the Convention has a non-binding nature.<sup>26</sup> According to Bodansky even if an international treaty is legally binding it does not have to create legal obligations to all its provisions.<sup>27</sup> Bodansky suggests that it is important to analyse a legal instrument as a whole.<sup>28</sup> Furthermore, Article 4.1 sets legal obligations because it establishes what the parties should do to fight against climate change.<sup>29</sup> Often, treaties include mandatory and non-mandatory commitments, making it even more complicated to understand an international treaty's true nature.<sup>30</sup> Therefore, the author of this thesis discovers that the Convention has a controversial nature.

Article 2.1 of VCLT states that the Kyoto Protocol is a treaty, but is it legally binding? For example, Article 18 of the Protocol sets legally binding commitments that apply only to the parties that ratify the Protocol.<sup>31</sup> In other words, it means that the Protocol is the first international legally binding treaty to tackle climate change.<sup>32</sup> According to Wang and Wiser, they argue that even though the legally binding obligations set out in Article 18 of the Protocol, it is more of a political approach

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<sup>24</sup> Bodansky, D. (2015). Legally binding versus non-legally binding instruments. *Towards a Workable and Effective Climate Regime*, 160.

<sup>25</sup> Bodansky, D. (2016). *The Legal Character of the Paris Agreement*. *Review of European, Comparative & International Environmental Law*, 25(2), 144.

<sup>26</sup> *Ibid.*

<sup>27</sup> Bodansky (2015) *supra nota* 24, 158.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*

<sup>30</sup> *Ibid.*

<sup>31</sup> Hannah Chang, Feb 23, 2010 General Earth Institute A “Legally Binding” Climate Agreement: What Does it Mean? Why Does it Matter? Columbia Law School’s Centre for Climate Change Law [Blog post]. Retrieved from <https://blogs.ei.columbia.edu/2010/02/23/a-%E2%80%99Clegally-binding%E2%80%99D-climate-agreement-what-does-it-mean-why-does-it-matter/#:~:text=Under%20Article%2018%20of%20the,the%20parties%20that%20ratified%20it.>

<sup>32</sup> *Ibid.*

rather than a legal instrument to tackle climate change.<sup>33</sup> However, the effectiveness of the legally binding nature of the Kyoto Protocol is questionable since countries will always have their political and economic interests in mind when it comes to the adoption of a legally binding document.<sup>34</sup> As earlier mentioned the Kyoto Protocol took long time to enter into force, countries did not favour the Protocol for many reasons and, therefore, did not achieve full participation, which is crucial for a legal instrument to be effective.<sup>35</sup>

Since the Protocol's legally binding nature did not achieve the needed participation and effectiveness, a less strict new legal instrument was created.<sup>36</sup> The most recent legal tool to fight against climate change and protect the environment, the Paris Agreement, has also received criticism, whether it is legally binding and whether it creates legal obligations at all.<sup>37</sup> For example, Bodansky states that the Paris Agreement does qualify as a treaty within the meaning of the VCLT, and it creates legal obligations, meaning that compliance is not voluntary.<sup>38</sup> However, since the agreement entered into force, parties to the agreement have not met their commitments to tackle climate change, therefore, in-depth analysis of the UNFCCC, the Kyoto Protocol and the Paris Agreement compliance, implementation, and enforcement mechanisms is followed to address the issue why these instruments are not effective enough.

The legally binding obligations do not make the legal document effective, domestic implementation and complying with the obligations make international environmental legal instruments effective.<sup>39</sup>

### 1.3. Discrimination

As discussed before, the UNFCCC and the Kyoto Protocol has gained a negative reputation because it derives a clear distinction between the parties to the Convention,<sup>40</sup> not to mention that it imposes a heavy burden on only developed countries.<sup>41</sup> As mentioned earlier, one of the main

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<sup>33</sup> Wang X., Wiser, G. (2003), *supra nota* 9, 151.

<sup>34</sup> Chang (2010), *supra nota* 31.

<sup>35</sup> Warnock (2004), *supra nota* 13, 130.

<sup>36</sup> Ediboglu (2017), *supra nota* 7, 176.

<sup>37</sup> Bodansky. D. (2016), *supra nota* 25, 142.

<sup>38</sup> *Ibid.*

<sup>39</sup> Chang (2010), *supra nota* 31.

<sup>40</sup> Sands, P., Peel J., Farba A., MacKenzie R. (2018), *supra nota* 3, 301.

<sup>41</sup> Panjabi, R. (1993). Can International Law Improve the Climate? An Analysis of the United Nations Framework Convention on Climate Change signed at the Rio Summit in 1992. *North Carolina Journal of International and Commercial Regulation*, 18(3), 525.

issues why some countries have not shown their full participation and ambitions to comply with the climate change regime is because the UNFCCC and the Kyoto Protocol both have created distinguishing barriers between the parties by dividing the parties into developed and developing countries.<sup>42</sup>

The UNFCCC has received critical statements of how it creates barriers between the developed countries and developing countries.<sup>43</sup> To support this statement under Article 4.2 of the UNFCCC, only developed country parties agreed to reduce their emissions to return to their 1990 emissions levels.<sup>44</sup> Voigt and Ferreira have illustrated this barrier by introducing a concept known as "positive discrimination", which serves the name.<sup>45</sup> The argumentations between academics if it is fair and reasonable for developed countries to be held responsible for the climate change issues and developing countries to benefit from the financial support is one of the controversial issues within the UNFCCC.<sup>46</sup> Also, the Kyoto Protocol established burden-sharing formula, where developed countries had to take the burden, and developing countries could benefit from it and grow their economy by emitting greenhouse gases.<sup>47</sup> However, with the establishment of the Paris Agreement the distinction between countries based on their economic wealth was evaporated.<sup>48</sup>

#### **1.4. The Issues with Burden-sharing**

As it became evident in the UNFCCC compliance mechanism analysis, complying with the obligations could be expensive as it sets a heavy burden to only developed countries.<sup>49</sup>

This thesis argues that the UNFCCC and the Kyoto Protocol's compliance mechanism is not effective because it lacks participation, cooperation, and fulfilment of the countries' obligations. The UNFCCC created barrier between the countries, setting heavy burden on developed countries to take lead on tackling climate change.<sup>50</sup> The distinction between developed and developing

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<sup>42</sup> Ediboglu (2017), *supra nota* 7, 172, referenced in Honkonen (Honkonen T. The Common but Differentiated Responsibility Principle in Multilateral Environmental Agreements: Regulatory and Policy Aspects, Kluwer Law International 2009, 188-190).

<sup>43</sup> Menkes, J., Menkes, M. (2009) International Organisations, Climate Change Expectations, and the Reality of Institutionalisation an Analysis of the United Nations Framework Convention on Climate Change (UNFCCC). Polish Yearbook of International Law, 29, 122.

<sup>44</sup> Wang X., Wiser G. (2003) *supra nota* 9, 138, referenced in UNFCCC, Article 4(2).

<sup>45</sup> Voigt, C., Ferreira F. (2016). Differentiation in the paris agreement. Climate Law, 6, 1-2, 61.

<sup>46</sup> Menkes, J., Menkes, M. (2009), *supra nota* 43, 122.

<sup>47</sup> Ediboglu (2017), *supra nota* 7, 173.

<sup>48</sup> *Ibid.*, 177.

<sup>49</sup> Panjabi, R. (1993), *supra nota* 41, 525.

<sup>50</sup> Ediboglu, *supra nota* 7, 172.

countries did not disappear in the Protocol<sup>51</sup>, which is one of the controversial issues within the Protocols' context. The Protocol creates the burden-sharing formula which means in other words, that the developing countries can keep emitting greenhouse gases at the expense of developed countries.<sup>52</sup> However, under international law, all parties should have equal rights and obligations.<sup>53</sup> Since the Protocol creates unequal norms and barriers between the countries, this is the main reason why some countries do not participate in the Protocol or have withdrawn or not even become a party to<sup>54</sup>, for example, the United States, Japan and European Union countries shall reduce their emissions, while some countries can increase their emissions and some do not even have any obligations under the Kyoto Protocol.<sup>55</sup>

On the other hand, the principle of polluter pays, and the principle of responsibility means that the bigger emitters should be held responsible and lead to combat climate change.<sup>56</sup> Therefore, for this reason, the author of this thesis comes to a conclusion that the UNFCCC and the Kyoto Protocol have controversial issues and the main issue being the burden-sharing formula also for this reason the compliance mechanism is ineffective.<sup>57</sup> It is important to keep in mind that an international legal instrument is effective only when full participation and cooperation of the parties is achieved, however, the heavy burden set on developed countries and the burden-sharing formula did not accomplish any of the above mentioned therefore, not effective enough.<sup>58</sup>

## 1.5. Principle of Sovereignty

This thesis argues that under international law principles, the UNFCCC itself violates the principle of sovereignty. Under international law, all states are equal despite their economic, social, political, or other nature.<sup>59</sup> However, Article 3 of the UNFCCC states that developed countries should take

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<sup>51</sup> *Ibid.*

<sup>52</sup> Ediboglu (2017), *supra nota* 7, 173.

<sup>53</sup> Ringius, L., Torvanger, A., Underdal, A. (2002). Burden Sharing and Fairness Principles in International Climate Policy. International Environmental Agreement Politics Law Economy, 2, 5.

<sup>54</sup> Voigt, C. (2016), *supra nota* 23, 162.

<sup>55</sup> Ringius, L., Frederiksen, P., Birr-Pedersen, K. (2002). Burden Sharing in the Context of Global Climate Change. A North-South Perspective. National Environmental Research Institute, NERI Technical Report no. 424. Retrieved from [https://www2.dmu.dk/1\\_viden/2\\_Publikationer/3\\_fagrappporter/rapporter/FR424.pdf](https://www2.dmu.dk/1_viden/2_Publikationer/3_fagrappporter/rapporter/FR424.pdf)

<sup>56</sup> Ringius, L., Torvanger, A., Underdal, A. (2002), *supra nota* 53, 7.

<sup>57</sup> Ediboglu (2017), *supra nota* 52.

<sup>58</sup> Ediboglu (2017), *supra nota* 7, 174.

<sup>59</sup> Sands, P., Peel J., Farba A., MacKenzie R. (2018), *supra nota* 3, 12, referenced in Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, UNGA Resolution 2625 (XXV) (1970). Retrieved from <https://www.un.org/ruleoflaw/files/3dda1f104.pdf>

the lead in to fight against climate change.<sup>60</sup> Menkes has referred to developing countries as the beneficiaries because they are not entitled to pay for climate protection.<sup>61</sup> Menkes also points out that according to Article 4.3 and Article 4.9 of the UNFCCC, the developing countries can benefit from the financial help and transfer of technology, which can be very expensive, from the developed countries and other developed country parties.<sup>62</sup>

However, Article 3.1 of UNFCCC, principle of polluter pays<sup>63</sup> means, in other words, that the bigger emitters should be held responsible for the current climate change problems and therefore contribute more to the fight against climate change.<sup>64</sup> This also illustrates how controversial and poorly designed the Convention is. Also, as earlier mentioned that one of the reasons why the Kyoto Protocol lacks in participation, which is crucial element for the instrument to be effective, is the burden-sharing formula.<sup>65</sup> The author of this thesis concludes that the burden-sharing formula appeared unjust between the states, if parties to the treaty are treated unfairly, then States were not enthusiastic to be part of a treaty that might threaten their sovereignty.<sup>66</sup>

## 1.6. The Compliance Mechanism

As mentioned earlier, one of the key elements to determine whether an international legal instrument is effective its compliance mechanism needs to be analysed. Compliance itself means in other words, State's capability to fulfil its obligations under an agreement.<sup>67</sup> The primary purpose of compliance procedures in an international environmental treaty is created to ensure participation, cooperation, and fulfilment of obligations and commitments, avoiding non-compliance and punishment.<sup>68</sup> This thesis argues that if compliance and enforcement mechanisms are too strong, States will start to hesitate and not be a part of the climate change regime as it may become subject to their sovereignty.<sup>69</sup> Under international law, a State is independent and sovereign.<sup>70</sup> In order to determine the effectiveness of each legal instrument the compliance mechanism needs to be analysed. Further questions can be asked, what are the main issues, and

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<sup>60</sup> The UNFCCC, Article 3.

<sup>61</sup> Menkes, J., Menkes, M. (2009), *supra nota* 43, 122.

<sup>62</sup> *Ibid.*

<sup>63</sup> Sands, P., Peel J., Farba A., MacKenzie R. (2018), *supra nota* 3, 197.

<sup>64</sup> The UNFCCC Article 3.1

<sup>65</sup> Ediboglu (2017), *supra nota* 47.

<sup>66</sup> Ediboglu (2017), *supra nota* 7, 180.

<sup>67</sup> Wang X., Wiser G. (2003), *supra nota* 9, 136.

<sup>68</sup> Fitzmaurice, M. (2004). The Kyoto Protocol Compliance Regime and treaty Law. Singapore Yearbook of International Law, 27.

<sup>69</sup> Warnock (2004), *supra nota* 13, 121.

<sup>70</sup> Ediboglu (2017), *supra nota* 7, 172, referenced in Shaw (Shaw M. International Law 2008, 29-30).

what is meant by the compliance mechanism within the UNFCCC, the Kyoto and the Paris Agreement?

### **1.6.1. The Issues with Interpretation**

It cannot be ignored that the term "compliance" has not been even introduced into the original text of the UNFCCC.<sup>71</sup> However, the word "implementation" is used instead in the UNFCCC text, which refers to the States' fulfilment of the commitments and obligations.<sup>72</sup>

This thesis argues that the Convention lacks a proper interpretation approach. Because without an appropriate interpretation, which is an essential legal aspect for an effective legal instrument, parties to the Convention have no clear understanding nor clear obligations to follow.<sup>73</sup> Therefore, the author of this thesis acknowledges that the lack of a proper interpretation approach is why the UNFCCC compliance mechanism is not effective.<sup>74</sup> Suppose an international environmental treaty contains hard, precise, and measurable commitments such as the Kyoto Protocol in such case, regime may provide an effective way to prevent free riders and ensure the full implementation of the obligations.<sup>75</sup> This leads to another issue within the Protocol if the obligations were more precise and clearer to understand, the breach of a clear obligation would lead to a dispute. However, the dispute-settlement and the process of the International Court of Justice proceedings tend to be too time-consuming, and the countries rarely use dispute-settlement mechanism provided in the multilateral environmental agreement.<sup>76</sup>

### **1.6.2. Lack of Participation**

Another factor that affects the success of a compliance mechanism is the full participation of the States.<sup>77</sup> Some researchers and academics have put the effort in finding a solution to the ineffective compliance problem of achieving the balance between effective compliance mechanisms and attracting a greater number of participants in international environmental regimes to fight against climate change.<sup>78</sup> Even though a State may become a party to the Convention in good faith<sup>79</sup> to comply with the obligations, it fails to fulfil its commitments due to the lack of capacity and

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<sup>71</sup> Wang X., Wiser G. (2003), *supra nota* 9, 138.

<sup>72</sup> Warnock (2004), *supra nota* 13, 105.

<sup>73</sup> Sands, P., Peel J., Farba A., MacKenzie R. (2018), *supra nota* 3, 107.

<sup>74</sup> *Ibid.*

<sup>75</sup> Wang X., Wiser G. (2003), *supra nota* 69.

<sup>76</sup> *Ibid.*, 136.

<sup>77</sup> Warnock (2004), *supra nota* 13, 121.

<sup>78</sup> *Ibid.*, 102.

<sup>79</sup> VCLT Art. 26 *pacta sunt servanda* principle on acting in good faith.



financial resources, which can be very expensive.<sup>80</sup> Capacity building, in other words, means financial support, transfer of technology and support of national reporting, which can be costly for developing countries.<sup>81</sup> Is it fair and just for the developing countries to pay for the capacity building so that the developing countries could benefit from it? Why should developing countries suffer from the damages the developed countries have caused by emitting greenhouse gas? These questions will be discussed later on in this thesis.

As mentioned before, several States have refused to ratify the Kyoto Protocol claiming that the emissions reduction target approach is that a State cannot be sure how expensive compliance will prove.<sup>82</sup> Also, if Canada can violate its commitments under the Kyoto Protocol and get away with it, what assurance is there that others will comply?<sup>83</sup> According to Warnock, the solution to the issue would be a compliance mechanism that incorporates both encouragement and penalties.<sup>84</sup> The only way to ensure compliance is to decrease the cost of compliance and increase participation, since lack of participation affects compliance.<sup>85</sup> However, there is no enforcement mechanism, no international power to dictate what policies and measures a State should implement within its territory, no power to order that a government introduces environmental taxes or penalties for non-compliance.<sup>86</sup> On the other hand penalties and trade sanctions do not favour the participation of the climate change regime.<sup>87</sup> Lack of trade sanctions means no enforcement mechanism, which weakens the compliance mechanism's effectiveness.<sup>88</sup> However, even with full participation and implementation by all countries, humankind is still facing a devastating temperature rise of 3 degrees Celsius, violating the Paris Agreement.<sup>89</sup>

### 1.6.3. Violation of No-harm Principle

Developing countries whose contribution to the climate change problem has been minimal and who lack the capacity to fight against climate change suffer the most on the consequences.<sup>90</sup> States

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<sup>80</sup> Wang X., Wiser G. (2003), *supra nota* 9, 136.

<sup>81</sup> *Ibid.*, 138-139.

<sup>82</sup> Warnock (2004), *supra nota* 13, 134.

<sup>83</sup> Bodansky, D. (2011). Implementation of International Environmental Law. Japanese Yearbook of International Law, 54, 78.

<sup>84</sup> Warnock (2004), *supra nota* 13, 121.

<sup>85</sup> *Ibid.*, 125.

<sup>86</sup> *Ibid.*

<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid.*

<sup>89</sup> Safe Climate: A Report of the Special Rapporteur on Human Rights and the Environment, United Nations Human Rights Special Procedures, United Nations Environment Programme 2019 A/74/161, 14. Retrived from <https://www.ohchr.org/Documents/Issues/Environment/SREnvironment/Report.pdf>

<sup>90</sup> *Ibid.*, 18.

violate the customary international law by not following the no-harm principle set out in the UNFCCC to ensure that their activities do not cause harm to other nations or to itself since the increasing climate change impacts affect everyone and everywhere.<sup>91</sup> Therefore, the author of this thesis finds that States fail to comply with the obligations and commitments, which makes the compliance mechanism ineffective within the climate change regime.

#### 1.6.4. The Issues with Cost-effectiveness

To encourage compliance, the Kyoto Protocol creates market-based mechanisms to increase flexibility and cost-effectiveness.<sup>92</sup> The effectiveness of a compliance mechanism is affected by cost-effectiveness.<sup>93</sup> This thesis argues that States are likely to violate the international instrument because they cannot effectively comply with the obligations and commitments.<sup>94</sup> For example, as Zovko pointed out that based on the Organisation for Economic Co-operation and Development report on international regulation of marine pollution showed that it remains cheaper for countries to pollute the marine environment rather than comply with strict legally binding obligations and international environmental standards.<sup>95</sup> Therefore, to support the argument that it remains cheaper and more cost-effective for countries not to be part of a strict instrument, and instead keep polluting the environment than comply with the obligations the United States and Canada decided not to be a part of the Protocol, their withdrawal was based on the violation of their sovereignty and putting a risk on their economy.<sup>96</sup>

#### 1.6.5. The Question of Fairness

As mentioned earlier the UNFCCC and the Kyoto Protocol both created distinctions between the parties favouring one and disfavouring the other. For this reason, the author of this thesis raised a question of fairness. The author of this thesis agrees with Menkes's approach that developed states should carry out the duty to prevent climate change since they are bigger emitters than developing states, considering the polluter pays principle.<sup>97</sup> The author also acknowledges that this approach leads to disfavouring the developed countries as developing countries can benefit from the

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<sup>91</sup> *Ibid.*, 30.

<sup>92</sup> *Ibid.*, 136.

<sup>93</sup> Zovko, I. (2005). *International Law-Making for the Environment: A Question of effectiveness*. University of Joensuu, 121.

<sup>94</sup> *Ibid.*, 121, referenced in Organization for Economic Co-operation and Development, *Costs saving from Non-Compliance with International Environmental Regulations in the Maritime Sector*, Report by the OECD's Maritime Transport Committee, 2003. Retrieved from [www.oecd.org/dataoecd/4/26/2496757.pdf](http://www.oecd.org/dataoecd/4/26/2496757.pdf).

<sup>95</sup> *Ibid.*

<sup>96</sup> Warnock (2004), *supra nota* 13, 134.

<sup>97</sup> Sands, P., Peel J., Farba A., MacKenzie R. (2018), *supra nota* 3, 197.

implementation costs.<sup>98</sup> However, the Paris Agreement notices that all parties have to contribute to climate change meaning that there is equal responsibility between the countries.<sup>99</sup> On the other hand, under international law principles, the principle of justice is being violated.<sup>100</sup> Is it fair for developing countries to pay for the costs made by developed countries? This, on the other hand, makes it questionable if the Paris Agreement is appropriate towards its all parties. Also, is it fair for developing nation countries to pay for costs where they did not cause the climate change problem in the first place? Although the Paris Agreement is based on a global target and unity of adaptation and mitigation, developed countries are still required to bear most of the financial burden of climate actions.<sup>101</sup> The wealthy States must contribute their fair share towards mitigation and adaptation costs in low-income countries, following the principle of common but differentiated responsibilities.<sup>102</sup>

## 2. The Implementation Mechanism

International law has no specified way or any particular implementation method, and each State can decide how it will fulfil its international obligations in accordance with its domestic law.<sup>103</sup> One possible way to enforce international law into domestic law are through domestic courts.<sup>104</sup> Implementation of international environmental law means, in other words, how international obligations are interpreted into national law.<sup>105</sup> Domestic implementation of the international rules is the critical element for an international legal instrument to be effective.<sup>106</sup> *Pacta sunt servanda*, the foundation of international law, requires States to implement treaty obligations to their national law.<sup>107</sup>

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<sup>98</sup> Menkes, J., Menkes, M. (2009), *supra nota* 43, 122.

<sup>99</sup> Safe Climate Report, *supra nota* 89, 31.

<sup>100</sup> *Ibid.*

<sup>101</sup> Ediboglu (2017), *supra nota* 7, 178.

<sup>102</sup> Safe Climate Report, *supra nota* 89, 31.

<sup>103</sup> Bodansky, (2011), *supra nota* 83, 71.

<sup>104</sup> Colombo, E. (2017). Enforcing international climate change law in domestic courts: New trend of cases for boosting principle 10 of the Rio Declaration. *UCLA Journal of Environmental Law and Policy*, 35(1), 101.

<sup>105</sup> Sands, P., Peel J., Farba A., MacKenzie R. (2018), *supra nota* 3, 144.

<sup>106</sup> Colombo (2017), *supra nota* 104, 101.

<sup>107</sup> Bodansky (2011), *supra nota* 83, 68.

## 2.1. Implementation Flexibility

This thesis argues that too flexible national measures and commitments are not effective to tackle climate change. For example, the Kyoto Protocols implementation mechanism is mainly based on States taking "appropriate" measures as stated in Article 2, which in other words means that States can determine according to their legal system and national circumstances what measures are "appropriate."<sup>108</sup> The treaty establishes vague national emissions targets that give parties flexibility to achieve the goals through taxes, product standards, limits on emission, voluntary agreements with industry, subsidies, education, etc.<sup>109</sup> Some countries have worried that their implementation costs will harm their market competitiveness and economic development and therefore do not participate in the treaty.<sup>110</sup>

Also, the Paris Agreement leaves many details of its implementation to future negotiation rounds.<sup>111</sup> As national measures set out in the nationally determined contributions are not legally binding under the Paris Agreement, the Agreement leaves room for national flexibility.<sup>112</sup> The author of this thesis concludes that too broad national commitments and obligations give countries freedom to set their targets that are not legally binding and therefore do not legally violate the Agreement even if the domestic actions are unjust.<sup>113</sup>

This thesis argues that the nationally determined contributions are too flexible and create schemes and loopholes for countries to keep emitting lawfully since the obligations are not binding. For example, in 2020, the Tartu Administrative Court accepted a complaint by Fridays for Future Estonia to annul a new construction of a shale oil plant permit issued to Eesti Energia by the Narva-Jõesuu town government.<sup>114</sup> Fridays for Future claimed that the permit was not following the Paris Agreement climate impacts and commitments.<sup>115</sup> Eesti Energia, the state-owned energy company, argued that since the Fridays for Future claims were based on the effects rather than the construction itself and the proof of the negative impact on the climate was not presented, the Court did not satisfy the application.<sup>116</sup> *Fridays For Future Estonia v. Eesti Energia* is an example of

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<sup>108</sup> *Ibid.*, 71

<sup>109</sup> Bodansky (2011), *supra nota* 83, 71.

<sup>110</sup> Wang X., Wiser G. (2003), *supra nota* 9, 141.

<sup>111</sup> Sands, P., Peel J., Farba A., MacKenzie R. (2018), *supra nota* 3, 335.

<sup>112</sup> *Ibid.*, 328

<sup>113</sup> *Ibid.*

<sup>114</sup> ERR News (2020, May 26) [Online]. Retrieved from <https://news.err.ee/1094565/court-accepts-fridays-for-future-estonia-s-oil-plant-complaint>

<sup>115</sup> *Ibid.*

<sup>116</sup> *Ibid.*

how too broad and too flexible domestic implementation of the nationally determined contributions weaken the Paris Agreement's effectiveness.<sup>117</sup>

## **2.2. International Implementation Case Study: Canada**

This case study on Canada demonstrates how easy it is for States to violate international obligations and not be punished or sanctioned for their non-compliance.<sup>118</sup> For example, in 2002, Canada ratified the Kyoto Protocol on climate change, during the 2008-2012 commitment period, Canada was required to reduce its emissions and other greenhouse gases by 6 per cent from 1990 levels.<sup>119</sup> But instead of reducing its emissions, Canada's emissions have continued to rise and will go beyond its Kyoto target.<sup>120</sup> Therefore, Canada fails to comply with its obligations under the Kyoto Protocol. This case illustrates that depending on the States to implement their international environmental commitments is highly based on trust.<sup>121</sup> Canada's violation of the Kyoto Protocol is a relatively small part of the problem, but what assurance is there that others will comply if Canada can violate its commitments under the Kyoto Protocol and get away with it?<sup>122</sup> Kyoto Protocol approach neither provided a global answer nor opened a strong path for actions of the parties.<sup>123</sup>

## **2.3. The Enforcement Mechanism**

Under international law, enforcement means that a party to a treaty must comply with and implement the obligations set in the treaty.<sup>124</sup> Enforcement in this context means that the international environmental obligations are followed and fulfilled. Due to a lack of enforcement

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<sup>117</sup> *Ibid.*

<sup>118</sup> Bodansky (2011), *supra nota* 83, 78.

<sup>119</sup> *Ibid.*

<sup>120</sup> *Ibid.*

<sup>121</sup> *Ibid.*

<sup>122</sup> *Ibid.*

<sup>123</sup> Edibolgu (2017), *supra nota* 7, 200.

<sup>124</sup> Sands, P., Peel J., Farba A., MacKenzie R. (2018), *supra nota* 3, 153.

mechanism in multilateral environmental agreements, international law norms and obligations are being breached, not to mention that international law enforcement is exceptionally challenging.<sup>125</sup> Firstly, international law cannot be directly enforced upon any State. However, this thesis argues that the absence of the enforcement mechanism affects the effectiveness of the climate change regime and that international law implementation in domestic courts is one of the most effective enforcement tools. Enforcement mechanism usually involves sanctions to encourage compliance.<sup>126</sup> However, based on the analysis of the climate change regime it cannot impose trade sanctions on a country because when making compliance mechanisms too strong, participation in the regime is decreased and the goals are not reached.<sup>127</sup>

As mentioned earlier, international law enforcement is quite rare in multilateral environmental agreements<sup>128</sup> since it can interfere with the State's sovereignty and economic interests.<sup>129</sup> The absence of trade sanctions undoubtedly weakens the effectiveness of the compliance mechanism.<sup>130</sup> In theory, the climate change regime's ability to impose sanctions would help national governments persuade populations and businesses that such measures must be implemented, as parties at both ends of the political spectrum would be duty-bound to address the issue.<sup>131</sup> Some support from countries has been expressed for the use of financial penalties in the case of non-compliance.<sup>132</sup> This would ensure that the government of the day and any future government tackle climate change effectively by implementing efficacious legislation.<sup>133</sup> Nevertheless, there are successful cases that support the concept of implementing international law into domestic courts.<sup>134</sup> For example, the *Urgenda Foundation v. The Netherlands* and *Leghari v. Federation of Pakistan*.<sup>135</sup> In the *Leghari* case, a Pakistani farmer argued that the government's

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<sup>125</sup> Colombo, (2017), *supra nota* 104, 100, referenced in Damrosch, Murphy (Damrosch L.F., Murphy S.D., International Law: Cases and Materials 2014.

<sup>126</sup> Bodansky, D. (2015), *supra nota* 25, 159.

<sup>127</sup> Warnock (2004), *supra nota* 13, 125.

<sup>128</sup> Druzin, B. H. (2015-2016). Plan to Strengthen the Paris Climate Agreement. *Fordham Law Review Res Gestae*, 84, 18-23, 21.

<sup>129</sup> Warnock (2004), *supra nota* 13, 121.

<sup>130</sup> *Ibid.*, 125.

<sup>131</sup> *Ibid.*

<sup>132</sup> Brunnee, J. (2000). Fine balance: Facilitation and enforcement in the design of compliance regime for the Kyoto Protocol. *Tulane Environmental Law Journal*, 13(2), 249.

<sup>133</sup> Warnock (2004), *supra nota* 13, 125.

<sup>134</sup> *Ibid.*

<sup>135</sup> Colombo, (2017), *supra nota* 104, 102 referenced in *Urgenda Foundation v. The State of Netherlands*, The Hague District Court, ECLI:NL:RBDHA:2015:7145, *Ashgar Leghari v Federation of Pakistan*, Lahore High Court, W.P. no. 25501/2015.

inaction and delay in implementing national policies and frameworks on climate change violated his constitutional rights to life and dignity.<sup>136</sup>

In other cases, violations often go unpunished because parties to the treaty do not wish to bear the costs of enforcing the agreement.<sup>137</sup> There is no enforcement mechanism within the climate change regime based on sanctions.<sup>138</sup>

## 2.4. Non-compliance

As mentioned above, compliance means the capacity to fulfil obligations and commitments<sup>139</sup>. Therefore, non-compliance means failure to comply with the obligations and commitments under an agreement or treaty.<sup>140</sup> Since the compliance mechanism turned out to be ineffective, an analysis of non-compliance is followed. To build up an effective compliance and enforcement mechanism, the prevention of non-compliance is one of the most critical factors.<sup>141</sup> Some academics have pointed out that litigation could combat climate change.<sup>142</sup>

## 2.5. Need for Litigation

This thesis argues that through a proper litigation system, the climate change regime could be more effective. The Convention lacks the power to enforce obligations into domestic law under international law, in other words, it has no enforcement mechanism there is no punishment or sanctions for non-compliance.<sup>143</sup> Enforcement would be a potential solution to the non-compliance problem, however, it is very challenging for international environmental law.<sup>144</sup> This creates

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<sup>136</sup> Banda, M. L., Fulton, S. (2017). Litigating climate change in national courts: Recent trends and developments in global climate law. *Environmental Law Reporter News & Analysis*, 47(2), 10123, referenced in *Ashgar Leghari v. Federation of Pakistan*, Lahore High Court, W.P. no. 25501/2015

<sup>137</sup> Druzin, B. H. (2015-2016), *supra nota* 128, 21, referenced in Simmons (Beth A. Simmons, *International Law*, in *Handbook of International Relations* 352, 367).

<sup>138</sup> Ediboglu (2017), *supra nota* 7, 180

<sup>139</sup> Wang X., Wiser G. (2003), *supra nota* 9, 136.

<sup>140</sup> *Ibid.*, 135.

<sup>141</sup> Wang X., Wiser G. (2003), *supra nota* 9, 136.

<sup>142</sup> Achieving Justice and Human Rights in an Era of Climate Disruption, International Bar Association Climate Change Justice and Human Rights Task Force Report 2014, 76, referenced in Gerrard (Gerrard M. B. *Survey of Climate Change Litigation*, New York Law Journal 2007. Retrieved from [www2.nycbar.org/mp3/ClimateChangeLitigationNew\\_Y.pdf](http://www2.nycbar.org/mp3/ClimateChangeLitigationNew_Y.pdf).

<sup>143</sup> Bodansky (2015), *supra nota* 24, 160.

<sup>144</sup> Bodansky (2011), *supra nota* 83, 79.

opportunities for states to intentionally violate the obligations and commitments set out in international law instruments.<sup>145</sup>

As mentioned earlier, the Convention lacks a proper interpretation approach, which means that there has to be a breach of a clear obligation for successful litigation to happen.<sup>146</sup> However, there is no effective judicial body within the UNFCCC process that individuals can apply to; the International Court of Justice (hereinafter ICJ) is limited to disputes filed by other states.<sup>147</sup> Under international law, individuals have no standing to bring claims against states at the international level.<sup>148</sup> However, successful cases show that it is possible to hold governments responsible for not fulfilling commitments set out in international environmental law.<sup>149</sup> For instance, to combat climate change through litigation Europe and Australia have made the most effective effort.<sup>150</sup> In the *Urgenda Foundation v. The State of the Netherlands* case, the Dutch government failed to comply with its obligations to reduce greenhouse gas targets<sup>151</sup> by breaching its duty of care, even though the Netherlands has been seen as the environmental leader.<sup>152</sup> A proposed solution to the problem would be introducing an international environmental court, whether through ICJ or as a new independent International Court of Environment.<sup>153</sup> Bodansky suggests that if non-compliance would be more expensive than compliance, States would rather comply with the obligations.<sup>154</sup> For example, trade sanctions opposed by the United States against Japan.<sup>155</sup>

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<sup>145</sup> Bodansky (2011), *supra nota* 83.

<sup>146</sup> Sands, P., Peel J., Farba A., MacKenzie R. (2018), *supra nota* 3, 107.

<sup>147</sup> Achieving Justice and Human Rights in an Era of Climate Disruption, International Bar Association Climate Change Justice and Human Rights Task Force Report 2014, *supra nota* 142, 84.

<sup>148</sup> *Ibid.*

<sup>149</sup> Safe Climate Report, *supra nota* 89, 30, referenced in *Urgenda Foundation v. The State of the Netherlands*, The Hague District Court, ECLI:NL:RBDHA:2015:7145

<sup>150</sup> Achieving Justice and Human Rights in an Era of Climate Disruption, International Bar Association Climate Change Justice and Human Rights Task Force Report 2014, *supra nota* 142, 76, referenced in Statute of the International Court of Justice, Article 34, 1945. Retrieved from [www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0&](http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0&)

<sup>151</sup> Bodansky, D. (2017). The Role of the International Court of Justice in Addressing Climate Change: Some Preliminary Reflections, *Arizona State Law Journal*, 49, 12, referenced in *Urgenda Foundation v. The State of Netherlands*, The Hague District Court, ECLI:NL:RBDHA:2015:7145

<sup>152</sup> Warnock (2004), *supra nota* 13, 116, referenced in Ministry of Tourism Financial reports. Retrieved from [http://www.tourisminfo.co.nz/cpirub/annualreport/files/Complete\\_Tourism\\_Annual\\_Rep.pdf](http://www.tourisminfo.co.nz/cpirub/annualreport/files/Complete_Tourism_Annual_Rep.pdf)

<sup>153</sup> Achieving Justice and Human Rights in an Era of Climate Disruption, International Bar Association Climate Change Justice and Human Rights Task Force Report 2014, *supra nota* 141.

<sup>154</sup> Bodansky (2011), *supra nota* 83, 82.

<sup>155</sup> *Ibid.*



## 2.6. Sanctions and Penalties

According to Wang and Wiser, one way to prevent States' non-compliance is not to apply penalties and punish their non-compliance.<sup>156</sup> Punishing States for their non-compliance is not the best solution for the problem as it does not achieve domestic support for the adoption of the international instrument.<sup>157</sup> Opposed financial stress on a State does not necessarily encourage adopting a legal instrument<sup>158</sup> as each State has its economic growth and business in focus.<sup>159</sup> However, any other law field has a proper litigation process and judicial body to settle disputes, it appears that environmental law does not receive the necessary attention and is not taken seriously enough at this stage. It should not be different from any other law field.

## 3. The Question of Effectiveness

The main focus of this thesis is to address whether the UNFCCC, the Kyoto Protocol and the Paris Agreement are effective enough to fight against climate change. This thesis argues that the UNFCCC, the Kyoto Protocol and the Paris Agreement are not effective enough. According to Bodansky, a legal international instrument is considered effective if it achieves compliance and ineffective if countries fail to meet their obligations.<sup>160</sup> Also, consider that the UNFCCC sets relatively soft and unequal commitments and responsibilities to the parties.<sup>161</sup> One positive aspect is that it imposes specific time frames and processes to go through for effective implementation of the Convention.<sup>162</sup> Unfortunately, this does not seem to encourage States to comply with the obligations as there is no effective enforcement mechanism in the legal text of the Convention, in other words, no penalties or punishment for non-compliance.<sup>163</sup> The UNFCCC is a rather weak Convention that promotes activity on the international, regional, and national levels to fulfil its requirements<sup>164</sup> but does not do so in an obligatory manner. Since the adoption of the UNFCCC,

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<sup>156</sup> Wang X., Wiser G. (2003), *supra nota* 9, 136.

<sup>157</sup> *Ibid.*, 151.

<sup>158</sup> *Ibid.*

<sup>159</sup> Wang X., Wiser G. (2003), *supra nota* 9, 141.

<sup>160</sup> Bodansky (2011), *supra nota* 81, 64.

<sup>161</sup> Wang X., Wiser G. (2003), *supra nota* 9, 138.

<sup>162</sup> Panjabi (1993), *supra nota* 41, 525.

<sup>163</sup> Warnock (2004), *supra nota* 84

<sup>164</sup> *Ibid.*

the climate change targets have not been met, which proves that the Convention lacks in its effectiveness.<sup>165</sup> As Warnock stated that the UNFCCC is an expression of political ideals, it is not an effective legal tool.<sup>166</sup>

### 3.1. Failure of Effectiveness

Furthermore, many academics have pointed out that the Kyoto Protocol's burden-sharing formula is one of the main reasons why it was not effective enough.<sup>167</sup> Several academics have speculated that if developed nations would implement an idea such as the carbon tax into domestic law, this could mitigate the climate change problems, on the other hand, it might conflict with the State's priorities and economic interest.<sup>168</sup> Fighting against climate change is supposed to be a common concern of humankind<sup>169</sup>, however, the UNFCCC and the Kyoto Protocol both state that the developed countries have a greater responsibility due to their historical overuse of fossil fuels<sup>170</sup>, which lead to a refusal to ratify the Protocol by the United States and also lead to a rapid emissions growth in several large developing countries such as China.<sup>171</sup> Lack of participation will fail the multilateral environmental agreements goal, even with parties' full compliance.<sup>172</sup> Therefore, the UNFCCC and Kyoto Protocol are not effective enough since climate change is a global problem, and it should receive a global response, not partial contributions of parties.<sup>173</sup>

### 3.2. Advantages and Shortcomings

As it became evident from the in-depth analysis of the multilateral environmental agreements and their mechanism climate change regime lacks in its effectiveness. The shortcoming of the UNFCCC and the Kyoto Protocol have carried a role in the development of more effective legal instrument to fight against climate change. What makes the Paris Agreement more favoured among the nations is the global response and promoted ambitious actions with "nationally determined"

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<sup>165</sup> Moncel, Asselt (2012) *supra nota* 5, 163.

<sup>166</sup> Warnock (2004), *supra nota* 13, 112.

<sup>167</sup> Ediboglu (2017), *supra nota* 47.

<sup>168</sup> Panjabi (1993) *supra nota* 41, 546.

<sup>169</sup> The UNFCCC legal text

<sup>170</sup> Ediboglu (2017), *supra nota* 7, 172.

<sup>171</sup> Sands, P., Peel J., Farba A., MacKenzie R. (2018), *supra nota* 3, 308.

<sup>172</sup> Warnock (2004), *supra nota* 13, 130.

<sup>173</sup> Ediboglu (2017), *supra nota* 7, 172, referenced in Rajamani (Rajamani L. The Principle of Common but Differentiated Responsibility and the Balance of Commitments under the Climate Regime. Review of European Community and International Environmental Law 2000, 120).

commitments.<sup>174</sup> This situation creates a risk of lowered contributions from parties since it is unclear whether the parties will contribute according to their actual capabilities.<sup>175</sup> Since parties will determine their national circumstances and capacities, there is room for different interpretations of 'ambitious' commitments and differentiated responsibilities.<sup>176</sup>

The Paris Agreement applies to all parties rather than relying solely on developed country parties to make climate change mitigation progress.<sup>177</sup> However, the Paris Agreement's effectiveness is also questionable since its nationally determined contribution targets are not legally binding and have not managed the countries to decrease their emissions.<sup>178</sup> Instead of enforcement mechanisms, the Agreement introduces the naming and shaming mechanism that threatens the parties' reputation to ensure their compliance.<sup>179</sup> However, the academics believe that the treaty's robust system for reporting and reviewing provisions will be crucial to its effectiveness.<sup>180</sup> Most of the provisions are expressed not as legal obligations but rather as recommendations, expectations or understandings.<sup>181</sup> What makes the Paris Agreement more effective than previous legal instruments is its aim for global action meaning all countries have to share the responsibility to protect the environment against global warming.<sup>182</sup> As a result, it gathered the will of many countries and became almost a global agreement.<sup>183</sup>

## 4. Future Developments and Human Rights

We cannot ignore that there has been a great international effort towards protecting the environment against climate change. Still, as it became evident, the international legal instruments

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<sup>174</sup> Ediboglu (2017), *supra nota* 7, 180.

<sup>175</sup> *Ibid.*, 182

<sup>176</sup> Ediboglu (2017), *supra nota* 7, 172, referenced in Rajamani (Rajamani L. The Principle of Common but Differentiated Responsibility and the Balance of Commitments under the Climate Regime. Review of European Community and International Environmental Law 2000, 511).

<sup>177</sup> Sands, P., Peel J., Farba A., MacKenzie R. (2018), *supra nota* 3, 334.

<sup>178</sup> Ediboglu (2017), *supra nota* 7, 180.

<sup>179</sup> Ediboglu (2017), *supra nota* 7, 172, referenced in Jacquet and Jamison (J. and Dale Jamieson D. Soft but Significant Power in the Paris Agreement 2016 Nature Climate Change 643, 645).

<sup>180</sup> Sands, P., Peel J., Farba A., MacKenzie R. (2018), *supra nota* 3, 328.

<sup>181</sup> Bodansky, (2016), *supra nota* 25, 146.

<sup>182</sup> Ediboglu (2017), *supra nota* 7, 177.

<sup>183</sup> *Ibid.*, 200.

are not effective enough. The most common problem for treaty compliance is that the lack of trust countries otherwise willing to honour their commitments may cheat.<sup>184</sup> Knowing that others might not comply with their obligations, triggers non-cooperation.<sup>185</sup> Lack of participation, non-compliance and trust among the nations is crucial, for these reasons international treaties tend to fail.<sup>186</sup>

As it became evident from the analysis of the three major multilateral environmental law treaties and their mechanisms, another issue within the regime is how countries should share the burden fairly.<sup>187</sup> Some academics argue that the State's wealth should not be relevant to determine its fair share to fight against climate change.<sup>188</sup> This is fair since, under international law, all countries should have equal rights and obligations.<sup>189</sup> On the other hand, as discussed earlier, the developing countries have a minimal role in the worldwide global warming issue, therefore they should not pay as much as developed countries. The burden-sharing formula in the Kyoto Protocol did not achieve much but divided parties apart.<sup>190</sup> However, one possible way to improve combating climate change could be through litigation.<sup>191</sup>

#### **4.1. The Importance of Human Rights**

States fail to comply with international environmental law, which violates the States obligation to protect its citizens' human rights.<sup>192</sup> One could assume that there might be a solution to the climate change problem when involving human rights to international environmental law.<sup>193</sup>

Many cases have been filed against governments and private entities to impose liability and make governments responsible for the emissions.<sup>194</sup> The possibility of holding public officials accountable for due diligence failures includes class actions and targeting big businesses and

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<sup>184</sup> Druzin (2015-2016), *supra nota* 128, 21.

<sup>185</sup> *Ibid.*, 22.

<sup>186</sup> *Ibid.*

<sup>187</sup> Posner, E. A., Sunstein, C. R. (2008). Climate change justice. *Georgetown Law Journal*, 96(5), 1610

<sup>188</sup> *Ibid.*

<sup>189</sup> Ringius, L., Torvanger, A., Underdal, A. (2002), *supra nota* 53

<sup>190</sup> Ediboglu (2017), *supra nota* 47

<sup>191</sup> Banda, M. L., Fulton, S. (2017), *supra nota* 136, 10123.

<sup>192</sup> Safe Climate Report, *supra nota* 89, 34.

<sup>193</sup> Safe Climate Report, *supra nota* 89, 18.

<sup>194</sup> Banda, M. L., Fulton, S. (2017), *supra nota* 136, 10122.

significant groups of emitters.<sup>195</sup> Also, Remi states that if climate change policies would be taken more seriously if they could be part of human rights and national security.<sup>196</sup>

## 4.2. The Judicial Influence

One of the biggest emitters are big businesses, and the government should make companies comply with human rights to mitigate climate change.<sup>197</sup>

For example, the *Massachusetts v. Environmental Protection Agency* decision illustrates judicial influence in the global climate change field.<sup>198</sup> The Agency was given the power to regulate greenhouse gas as air pollutants to protect public health and welfare.<sup>199</sup> This power was derived under the United States Clean Air Act.<sup>200</sup> This means that regulating greenhouse gas under a national code is possible.<sup>201</sup> In the event of an abuse of this domestic law, national courts can impose obligations.<sup>202</sup> In this way, courts can increase domestic compliance, which is an essential factor for the regime's success.<sup>203</sup>

Another successful case is *Juliana v. United States*. A group of young people claimed that their government promotes fossil fuels, which violates their right to life, liberty, equal protection and right to a stable climate.<sup>204</sup> The *Urgenda* case in the Netherlands has an important precedent. The Court relied on international human rights law to hold the Government of the Netherlands accountable for fulfilling commitments the government itself says are necessary to prevent dangerous climate change.<sup>205</sup>

The *Urgenda* case has played a significant role in developing international environmental law as foreign courts have been using the case in their analysis.<sup>206</sup> It demonstrates that it is possible that the government can be held responsible for breaching its duty to care combined with domestic law, EU human rights law and international law.<sup>207</sup>

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<sup>195</sup> Achieving Justice and Human Rights in an Era of Climate Disruption, International Bar Association Climate Change Justice and Human Rights Task Force Report 2014, *supra nota* 141, 6.

<sup>196</sup> Moncel, Asselt (2012) *supra nota* 5, 166.

<sup>197</sup> Safe Climate Report, *supra nota* 89, 32.

<sup>198</sup> Banda, M. L., Fulton, S. (2017), *supra nota* 136, 10128.

<sup>199</sup> Ediboglu (2017), *supra nota* 7, 184.

<sup>200</sup> *Ibid.*

<sup>201</sup> *Ibid.*

<sup>202</sup> *Ibid.*

<sup>203</sup> *Ibid.*

<sup>204</sup> Banda, M. L., Fulton, S. (2017), *supra nota* 136, 10124, referenced in *Juliana v. United States*, The United States District Court, no. 6:15-CV-1517-TC, 2016 WL 1442435, 46 ELR 20072, 2016.

<sup>205</sup> Safe Climate Report, *supra nota* 89, 30.

<sup>206</sup> Banda, M. L., Fulton, S. (2017), *supra nota* 136, 10123.

<sup>207</sup> *Ibid.*

### 4.3. Future Proposals

Resources should not be wasted any longer for fruitless discussions, random actions and empty gestures.<sup>208</sup> The proposal here is that this framework should be grafted onto the Paris Agreement to strengthen compliance and avert the accord's potential collapse.<sup>209</sup> Druzin introduces the deposit scheme, where states would contribute an upfront payment to an international regulatory body to understand that part or all of their contribution would be already paid for if they fail to honour their conservation commitments.<sup>210</sup> Carbon tax? The only fair basis for the trading of carbon internationally with the full participation of all states.<sup>211</sup>

Without a new environmental model, it is impossible to change the current ecological concept, whereas a politically oriented ecology pertinently criticised as "green on the outside but communist red to the core" cannot be accepted in the long term.<sup>212</sup> Monetary penalties, including payments into a compliance fund, have also been advocated by some nongovernmental groups such as the Centre for International Environmental Law.<sup>213</sup> Also, new proposals by the Commission is estimated by June 2021.<sup>214</sup>

## CONCLUSION

This thesis aimed to determine why countries have failed to comply with their international environmental law obligations and commitments under the UNFCCC, the Kyoto Protocol and Paris Agreement. The main research question was why the UNFCCC, the Kyoto Protocol and Paris Agreement are ineffective in fighting against climate change issues. To answer the research

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<sup>208</sup> Menkes, J., Menkes, M. (2009), *supra nota* 43, 133.

<sup>209</sup> Druzin (2015-2016) *supra nota* 128, 21.

<sup>210</sup> *Ibid.*

<sup>211</sup> Warnock (2004), *supra nota* 13, 135.

<sup>212</sup> Menkes, J., Menkes, M. (2009), *supra nota* 43, 133.

<sup>213</sup> Brunnee (2000), *supra nota* 132, 249, referenced in Goldenberg D. M., et al Center For International Environmental Law. Euronatura, Building a Compliance Regime Under the Kyoto Protocol, 1998, 15-16, Retrived from <http://www.ciel.org/pubccp.html>

<sup>214</sup> European Commission webpage [Online]. Retrived from [https://ec.europa.eu/clima/policies/strategies/progress\\_en](https://ec.europa.eu/clima/policies/strategies/progress_en)

question on the effectiveness of the legal instruments, their compliance, implementation and enforcement mechanisms were analysed.

In conclusion, the author can say that the UNFCCC is an ineffective legal instrument, mainly because it did not achieve the expected effect to combat climate change. From the analysis, it became evident that one of the main reasons why the UNFCCC is not effective enough is the challenge it created between international law and domestic law. Under international law, every country is equal and have equal rights and obligations. However, the UNFCCC did not follow sovereignty, therefore discriminating and threatening countries sovereign rights. Also, it established too soft commitments and non-binding targets for the parties to comply with. When international environmental law commitments are too vague and poorly interpreted, they create unwanted ways to back out and not comply with their obligations.

The Kyoto Protocol, on the other hand, established stricter rules and legally binding obligations. However, it did not gain the support of many countries and therefore was not effective enough. Participation and cooperation are crucial elements for international legal instruments to be effective and achieve the goals. However, the Kyoto Protocol did not accomplish any of that. Lack of participation and cooperation was mainly because the Protocol established burden-sharing formula, which created a heavy burden on developed countries. The Protocol's burden-sharing formula ruined its effectiveness because effectiveness is defined by participation, cooperation, and fulfilment of the obligations. Since there is a lack of participation, lack of cooperation and no fulfilment of the duties, the Protocol is not effective enough. The compliance mechanism turned out to be not effective because it is affected by cost-effectiveness. If complying with the commitments and obligations is too expensive, countries are more prone not to comply as their economy and sovereignty might be at risk.

Paris Agreement turns out to be most effective within the international environmental regime. Nationally determined contribution and no division between the States favoured the participation of the Agreement. However, it is not effective enough. Since international agreements do not have a proper enforcement mechanism, they tend to rely on trust. Without an enforcement mechanism, there is are no sanctions or punishment if obligations are not met. International environmental law cannot establish enforcement since the country argues that it in breach of countries sovereignty.

Based on the in-depth analysis of the compliance, implementation and enforcement mechanisms of the UNFCCC, the Kyoto Protocol, and the Paris Agreement, the author of this thesis concluded that the international environmental law lacks effectiveness. Litigation and lawsuits against governments holding them responsible and accountable for inactions are proposed prospects for the effectiveness of the international environmental law. Recently, there have been many successful cases that prove that it is possible to fight against climate change through litigation. Another improvement for international environment law could be establishing an international Court specifically meant for international environmental disputes. For that reason, if non-compliance is sanctioned, more expensive, countries might take more ambitious measures to comply with the obligations.



## KOKKUVÕTE

### VÕITLUS KLIIMAMUUTUSTE VASTU: MITMEPOOLSETE KESKKONNA KOKKULEPETE JA MEHCHANISMIDE EFEKTIIVSUS, ÜRO KLIIMAMUUTUSTE RAAMKONVENTSIOON, KYOTO PROTOKOLL JA PARIISI KOKKULEPE

Heliis Liiv

Käesoleva uurimistöö eesmärk oli välja selgitada põhjused välja, miks riigid ei ole suutnud täita oma rahvusvahelise keskkonnaõiguse kohustusi, mis tulenevad ÜRO kliimamuutuste raamkonventsioonist, Kyoto protokollist ja Pariisi kokkulepe. Peamine uurimistöö küsimus oli, miks ÜRO kliimamuutuste raamkonventsioon, Kyoto protokoll ja Pariisi kokkulepe on kliimamuutuste vastu võitlemisel ebaefektiivsed. Uurimistöö küsimusele vastamiseks analüüsiti õigusaktide tõhusust, nende vastavuse, rakendamise ja jõustamise mehhanisme.

Kokkuvõtteks võib öelda, et ÜRO kliimamuutuste raamkonventsioon on ebaefektiivne õigusakt, peamiselt põhjus selleks on, et see ei saavutanud kliimamuutustega võitlemiseks oodatud tõhusust. Analüüsist selgus, et üks peamisi põhjusi, miks raamkonventsioon ei ole piisavalt tõhus, seisneb selle väljakutsest rahvusvahelise õiguse ja siseriikliku õiguse vahel. Rahvusvahelise õiguse kohaselt on kõik riigid võrdsed ning neil on võrdsed õigused ja kohustused, kuid raamkonventsiooni põhiselt suveräänsuse põhimõtet pole piisavalt arvestatud, diskrimineerides ja ohustades seetõttu riikide suveräänsust. Samuti kehtestati raamkonventsioonis osapooltele täitmiseks liiga pehmed kohustused ja mittesiduvad eesmärgid. Kui rahvusvahelise keskkonnaõiguse kohustused on liiga ebamäärased ja puudulikult tõlgendatud, loovad need soovimatuid viise, kuidas riigid saavad oma kohustustest taganeda ja neid mitte täita.

Kyoto protokoll, aga seevastu kehtestas rangemad reeglid ja õiguslikult siduvad kohustused. Kuid see ei pälvinud paljude riikide toetust ega osutus seetõttu ebaefektiivseks. Osalemine ja koostöö on rahvusvaheliste õigusaktide tõhususe ja eesmärkide saavutamiseks üks põhi elementideks. Kyoto protokoll aga kahjuks ei saavutanud eespool mainitud. Osalemise ja koostöö puudumine oli

peamiselt tingitud sellest, et protokoll kehtestas koormuse jagamise valemi, mis tekitas arenenud riikidele ebaõiglast koormust. Protokollis sisalduv koormuse jagamise valem rikkus selle tõhusust, kuna tulemuslikkuse määratleb osalemine, koostöö ja kohustuste täitmine. Riikide mitteosalemine, koostöö puuduslikkus ja kohustuste mitte täitmine, teevad protokoll ebaefektiivseks. Nõuetele vastavuse mehhanism osutus mitte tõhusaks, kuna seda mõjutab kulutõhusus. Kui kohustuste täitmine osutub liiga kulukas, kalduvad riigid neid mitte täitma, sest see omakorda ohustab nende majandust ja suveräänsust.

Pariisi kokkulepe osutub olemaks kõige tõhusamaks rahvusvaheliseks keskkonnarežiimiks praegusel hetkel. Siseriiklikult määratud panused ja riikidevahelise jaotuse eemaldamine soosis kokkuleppes osalemist. Kuid ka see ei osutunud piisavalt tõhusaks kliimamuutuste vastu võitlemiseks. Kuna rahvusvahelistel lepingutel puudub nõuetekohane jõustamismehhanism, kiputakse tuginema riikidevahelisele usaldusele. Ilma täitemehhanismiga puuduvad sanktsioonid ja karistused, juhul kui kohustused jäävad täitmata. Rahvusvahelisel keskkonnaõigusel puudub jõustamise kehtestamine, kuna riikide peamiseks argumentatsiooniks on, et see on vastuolus nende suveräänsusega.

Põhinedes ÜRO kliimamuutuste raamkonventsiooni, Kyoto protokoll ja Pariisi kokkuleppe järgimise, rakendamise ja jõustamise mehhanismide põhjalikule analüüsile, jõudis käesoleva uurimustöö autor järeldusele, et rahvusvahelises keskkonnaõiguses puudub efektiivsus. Kohtuprotsessid ja kohtuasjad valitsuste vastu, pannes neid vastutama oma tegevusetuse eest, on üks välja pakutud väljavaadetest rahvusvahelise keskkonnaõiguse tõhusamaks muutmiseks. Viimasel ajal on olnud piisavalt edukaid juhtumeid, mis tõestavad, et kohtuvaidluste abil on võimalik kliimamuutuste vastu võidelda. Rahvusvahelise keskkonnaõiguse teiseks edasiarendamiseks võiks välja pakkuda spetsiaalselt rahvusvaheliste keskkonnavaidluste jaoks välja mõeldud rahvusvahelise kohtu loomise. Sel põhjusel võivad riigid kohustuste täitmiseks rakendada ambitsioonikamaid meetmeid ning kohustuste mitte täitmise eest võidakse määrata sanktsioone mis võivad osutada veelgi kallimaks.

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