



Volume 22

Issue 2 Symposium: *Critical Intersections for Energy & Water Law: Exploring New Challenges and Opportunities*

Article 14

1-1-2010

The "Triumph" of the Commons: An Analysis of Enforcement Problems and Solutions in the Western Climate Initiative

Brooks V. Rice
Pacific McGeorge School of Law

Follow this and additional works at: <https://scholarlycommons.pacific.edu/globe>

 Part of the [Environmental Law Commons](#), and the [International Law Commons](#)

Recommended Citation

Brooks V. Rice, *The "Triumph" of the Commons: An Analysis of Enforcement Problems and Solutions in the Western Climate Initiative*, 22 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 401 (2009).

Available at: <https://scholarlycommons.pacific.edu/globe/vol22/iss2/14>

This Comments is brought to you for free and open access by the Journals and Law Reviews at Scholarly Commons. It has been accepted for inclusion in Global Business & Development Law Journal by an authorized editor of Scholarly Commons. For more information, please contact mgibney@pacific.edu.

The “Triumph” of the Commons: An Analysis of Enforcement Problems and Solutions in the Western Climate Initiative

Brooks V. Rice*

TABLE OF CONTENTS

I. INTRODUCTION	402
II. THE WESTERN CLIMATE INITIATIVE: A BRIEF OVERVIEW	403
A. <i>The Nuts and Bolts of the System</i>	403
B. <i>Theoretical Problems with Cap-and-Trade System</i>	405
C. <i>Theoretical Benefits of a Cap-and-Trade System</i>	408
III. PROBLEMS INHERENT IN THE WCI	410
A. <i>The U.S. and Canadian Capacities to Enter into the Agreement</i>	411
1. <i>The Modern Application: Similar Agreements</i>	412
B. <i>Lessons from Experience: A Case Study in the European System</i>	415
1. <i>A Look at the European Union Emission Trading System</i>	415
2. <i>Comparing the WCI and the E.U. ETS</i>	419
IV. ENFORCEMENT: SERIOUS PROBLEM OR NON-ISSUE?	420
A. <i>Revised Notions of Compliance within the Cap-and-Trade Model</i>	421
1. <i>Compliance is Compliance</i>	421
2. <i>The Regulatory Pressure of the Social Stakeholder</i>	423
B. <i>What is Enforcement?</i>	425
C. <i>The Public Role in Enforcement</i>	426
D. <i>Reputational and Voluntary Compliance-Based Adherence to International Law</i>	428
V. CONCLUSION	433

* J.D., University of the Pacific, McGeorge School of Law, to be conferred May 2010. A special thanks to Professor Stephen McCaffrey for his help and guidance in making this comment possible. I would also like to thank my wife Erin for her support.

Ruin is the destination toward which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons. Freedom in a commons brings ruin to all.

—Garrett Hardin
*The Tragedy of the Commons.*¹

I. INTRODUCTION

Currently, the United States has the dubious honor of being one of the top producers in the world of greenhouse gases ("GHGs").² All aspects of industry—from transportation to power generation to manufacturing—release GHGs into the Earth's atmosphere, unconcerned with any state boundary or national government. The Western Climate Initiative ("WCI") will be the most ambitious attempt to reduce GHGs and combat global warming.³ However, with ambitions come pragmatic problems, chief among these is the question of how to enforce the parties' compliance with their obligations under the WCI. This is particularly relevant because the WCI contains no enforcement body, and relies on nothing but the good faith of the individual jurisdictions to enforce the agreement.

The WCI began in February of 2007⁴ as a cooperative effort, and currently includes seven U.S. States and four Canadian Provinces.⁵ The heart and soul of the WCI is its demanding cap-and-trade system, which by the time it is fully in place in 2015 will comprehensively regulate more GHG emissions than any other scheme in place on the planet, with nearly ninety percent of emissions in the member states and provinces covered by the cap.⁶ It will be more comprehensive than the Northeast's Regional Greenhouse Gas Initiative ("RGGI"), which currently is the only active cap-and-trade system within the United States, but only regulates electricity producers.⁷ It will also regulate more emissions than the

1. Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243, 1244 (1968), available at <http://www.sciencemag.org>.

2. Steven Mufson, *Power-Sector Emissions of China to Top U.S.*, *WASHINGTON POST*, Aug. 27, 2008, at D01. The authors note that China will produce about 3.1 billion tons of CO₂ in 2008, up from about 2.3 billion tons of CO₂ in 2007. In comparison, the U.S. emitted 2.8 billion tons in 2008. However, the U.S. electricity usage also exceeds all other countries, approximately 9.5 tons of CO₂ per person, compared with 2.4 tons per person in China, 0.6 in India and 0.1 in Brazil. *Id.*

3. WESTERN CLIMATE INITIATIVE: DESIGN RECOMMENDATIONS FOR THE WCI REGIONAL CAP-AND-TRADE PROGRAM 15 (Sept. 23, 2008), <http://www.westernclimateinitiative.org/document-archives/wci-design-recommendations> [hereinafter RECOMMENDATIONS]; *But see* PEW CENTER ON GLOBAL CLIMATE CHANGE, CLIMATE CHANGE 101: CAP AND TRADE 7 (2009), <http://www.pewclimate.org/docUploads/Climate101-CapTrade-Jan09.pdf> [hereinafter PEW CENTER] (citing the European Union's Emission Trading System as the "world's most ambitious and far-reaching example of greenhouse gas emissions trading").

4. RECOMMENDATIONS, *supra* note 3, at 15.

5. *Id.* (including member states: Arizona, California, Montana, New Mexico, Oregon, Utah, Washington; and member provinces: British Columbia, Manitoba, Ontario, and Quebec).

6. *Id.*

7. *See* REG'L GREENHOUSE GAS INITIATIVE, EXECUTIVE SUMMARY, http://www.rggi.org/docs/RGGI_Executive_Summary.pdf.

world's leading cap-and-trade system, the European Union's Emission Trading Scheme ("EU ETS"), which neglects to place limits on the transportation sector⁸ (though the European Union indicates it will soon include airline traffic in its emission permit system⁹). All told, the WCI will likely reduce emissions within the region to fifteen percent of 2005 levels by 2020.¹⁰ Given its lofty goals, broad application, and large region, the WCI stands to make a huge impact on GHG emissions.

At the time this Comment was written, the WCI was not yet force. However, on September 23, 2008, the WCI revealed its Design Recommendations (hereinafter "Recommendations") detailing the scope and precise manner of execution for its cap-and-trade system. This comment will discuss these Recommendations, primarily exploring the issues of enforcement and compliance. Section II begins with a brief summary of the Recommendations themselves, and then travels to a discussion of the theoretical benefits and problems that impact cap-and-trade systems. Section II will also comparatively evaluate some of the problems suffered by the largest now-existing cap-and-trade system in the world—the EU ETS. Section III addresses some of the more problematic issues in the WCI, and briefly touches on the recognizably complex issue of the provincial and state capacity to enter into these agreements, including whether such agreements may be legally enforced within the terms of the Recommendations. Finally, section IV presents the thesis of this comment by examining the practical consequence of the partners' compliance with their obligations. Despite an apparent lack of legal mechanisms to secure enforcement, ultimately the confluence of the agreement's prodigious breadth and the overall shared interests of the participating partners ensures the success of the WCI—a proverbial "triumph" of the commons.

II. THE WESTERN CLIMATE INITIATIVE: A BRIEF OVERVIEW

A. *The Nuts and Bolts of the System*

The WCI is enormous in scope covering approximately 85 million people¹¹ and encompassing roughly seventy percent of Canadian and twenty percent of

8. RECOMMENDATIONS, *supra* note 3, at 15. This source was updated, with minor changes, in March 2009. The updated version can be found at: <http://www.westernclimateinitiative.org/document-archives/wci-design-recommendations>. For a summary of the differences between the 2008 and the 2009 version see <http://www.westernclimateinitiative.org/component/remository/general/design-recommendations/March-13-Correction-to-September-23-Design-Document>.

9. James Kanter, *Europe Forcing Airlines to Buy Emissions Permits*, N.Y. TIMES, Oct. 25, 2008, at B2.

10. OVERVIEW: THE WESTERN CLIMATE INITIATIVE'S CAP-AND-TRADE PROGRAM DESIGN RECOMMENDATIONS (Sept. 23, 2008), http://www.ecy.wa.gov/climatechange/WCI/docs/092308WCI_Overview_FINAL.pdf [hereinafter OVERVIEW].

11. RECOMMENDATIONS, *supra* note 3, WCI Map located at beginning of document.

U.S. gross domestic product.¹² It will regulate the emissions of the six major GHGs¹³ over three compliance periods beginning in 2012, each lasting three years,¹⁴ and with each period phasing in a new level of reduction. The emissions caps are to be established by estimation based upon mandatory monitoring beginning in 2010.¹⁵ Initially, the WCI will cover only the electricity-producing sector¹⁶ with transportation emissions coming under the program in the second compliance period in 2015.¹⁷

One of the most important aspects of the Recommendations relates to how much it will allow the individual partner jurisdictions (hereinafter "partner[s]") to pollute before they exceed their limit and must purchase credits on the market. The "allowance apportionment"¹⁸ for emissions governs the amount of reduction to which each partner must adhere. The apportionment is two-part, considering: (1) the overall emissions goal of the entire region, or "regional cap,"¹⁹ and (2) the individual goals created by each partner jurisdiction.²⁰ The amount set for the cap springs from the best estimate of expected emissions,²¹ but also considers population and economic growth, as well as the concurrent voluntary and mandatory emissions reductions. Each entity in the regulated sectors exceeding 10,000 CO₂e must report their GHG emissions subject to third party verification.²² This uniform reporting process is filled with certain exceptions and formulae allowing for proper flexibility in reporting, the specifics of which are beyond the scope of this paper.²³ However, once the cap is set, the individual jurisdictions possess the sole authority to determine how many carbon credits each polluting sector receives.²⁴ Notably, this allows for the individual states and provinces to maintain a strong element of control over their corresponding reduction obligations, allowing the partners to consider what is best for local industry in meeting their allotment goals. This independence begs a very

12. OVERVIEW, *supra* note 10.

13. RECOMMENDATION, *supra* note 3, at 1 (regulating carbon dioxide, methane, nitrous oxide, perfluorocarbons ("PFCs"), hydrofluorocarbons ("HFCs"), and sulfur hexafluoride).

14. *Id.* at 4 & n.7 (3 year compliance periods are: 2012-2014, 2015-2017, 2018-2020).

15. *Id.* at 11.

16. *Id.* at 1.

17. *Id.* at 2.

18. *Id.* at 5 & n.8 (defining "allowance apportionment" as the "Partner's budget or share of WCI region-wide GHG emission allowances. Allowance budgets must be set for each Partner jurisdiction.").

19. *Id.* at 4 & n.6 (defining "regional cap" as "the overall limit on total emissions included in the cap-and-trade program.").

20. *Id.* at 5.

21. *Id.* at 27.

22. *Id.* at 43.

23. See generally WESTERN CLIMATE INITIATIVE, FINAL ESSENTIAL REQUIREMENTS OF MANDATORY REPORTING (July 15, 2009), <http://www.westernclimateinitiative.org/component/remository/Reporting-Committee-Documents/Final-Essential-Requirements-for-Mandatory-Reporting>.

24. RECOMMENDATIONS, *supra* note 3, at 31-32.

important question—what happens when partners do not comply with their obligations?

B. Theoretical Problems with Cap-and-Trade System

The compliance and enforcement²⁵ procedures are central to this comment. The WCI currently recommends that if an entity²⁶ does not have sufficient carbon allowances at the end of the compliance period, either because it exhausted its allowances or failed to purchase further ones, that entity must relinquish three allowances for every excess metric ton of CO₂e.²⁷ There is no further assessment of monetary penalty. The market is the sole regulator here, setting the penalty price by virtue of the carbon offsets offending entities must purchase.²⁸ This market reliance is by design. It would be impossible, the Recommendations say, to assure any set penalty amount would exceed the market cost of the allowances;²⁹ a set penalty below market cost of compliance would quickly erode the efficacy of the cap-and-trade market. However, the Recommendations do not preclude the partners from establishing individual criminal or civil penalties for violations within their own jurisdictions.³⁰

Predictably, the exclusive reliance on the market to provide penalties creates a new complication in itself. The European Union stumbled over this during the creation of its carbon trading market when some jurisdictions issued too many credits to polluters.³¹ The consequent saturation of the carbon credit market reduced their value by half,³² precipitating a situation whereby a failure to meet emissions requirements brought a negligible financial penalty. It has taken years for that market to significantly recover.³³ What is most startling about this cautionary tale is not how a similar situation would decimate the ability of the WCI to have any penalties whatsoever, but—given the independent nature of the member states—how easily it would be for a similar situation to occur. With each jurisdiction maintaining its individual sovereignty to issue credits as it sees appropriate, a similar problem is a very real possibility.

25. *Id.* at 46 (defining “[e]nforcement [as] the means of assuring covered entities compliance with the cap-and-trade program.”).

26. *Id.* at 3 n.4 (defining “entity” as a company that must cover the cost of CO₂e it is importing as power, and generally used when the point at which emissions are regulated and monitored is upstream from the point at which they are actually used).

27. *Id.* at 46; *see also id.* at 3 n.4 (explaining that CO₂e is the carbon dioxide equivalent using the GHG power of one metric ton of Carbon Dioxide as the basic unit of measurement).

28. *Id.* at 46.

29. *Id.*

30. *Id.*

31. James Kanter, *The Trouble with Markets for Carbon*, N.Y. TIMES, June 20, 2008, at C1.

32. *Id.*

33. *See id.*

Overall, enforcement is very decentralized; the Recommendations providing no overarching management board or enforcement agency.³⁴ Each partner is responsible for enforcement procedures³⁵ and is entitled to assess its own penalties for failure to comply.³⁶ Nevertheless, the Recommendations do call for a "regional organization"³⁷ to facilitate administrative tasks, improve communication, reduce administrative costs, and "improve program transparency and consistency."³⁸ All the same, the organization's authority will be limited and shall not exceed the authority of the individual partners.³⁹

In a strange showing of self-assurance, the Recommendations cite the RGGI as a successful example of a similar administrative organization. That organization, it claims, has been very effective at coordinating the implementation of that region's cap-and-trade system.⁴⁰ To be sure, the RGGI has been relatively successful thus far, however, its success does not imply the success of a comparable administrative body within the WCI. Placing an analogous faith is misguided for two primary reasons.

The first is that the RGGI has an immense advantage regarding the very cornerstone of the entire cap-and-trade system⁴¹—its emissions monitoring. Determining which industries will be regulated, how many allowances those industries should be given and whether they have exceeded their allotment, all depend on accurate emissions monitoring systems. The RGGI uses emissions data from the electronic emissions regulation systems already in place through the Environmental Protection Agency's Acid Rain Program (hereinafter "the Program").⁴² Succinctly stated, the Program is the U.S. effort to reduce sulfur emissions in the U.S. as part of the Clean Air Act Amendments of 1990.⁴³ An agreement with Canada followed, which established "specific. . . limitations or reductions of sulfur dioxide. . . ."⁴⁴ That Agreement sought to reduce the total

34. See generally RECOMMENDATIONS, *supra* note 3.

35. *Id.* at 46 ("Participants must be accountable for their emissions and must comply with requirements for monitoring, reporting, and holding adequate emissions allowances.").

36. *Id.*

37. *Id.* at 47 ("A regional organization centralizes the execution of administrative tasks for the WCI Partner jurisdictions.").

38. *Id.* at 47-48 (other responsibilities of the organization include: to "[c]oordinate the regional auction of allowances; [t]rack emissions and provide public information on progress towards the WCI regional goal; [m]onitor and report on market activity . . . [c]oordinate, review and adopt[] protocols for offsets . . .").

39. *Id.* at 47.

40. *Id.* at 47-48.

41. See *id.*

42. REGIONAL GREENHOUSE GAS INITIATIVE, OVERVIEW OF RGGI CO₂ BUDGET TRADING PROGRAM 1, 8 (Oct. 2007), http://rggi.org/docs/program_summary_10_07.pdf.

43. NATIONAL ACID PRECIPITATION ASSESSMENT PROGRAM, REPORT TO CONGRESS: AN INTEGRATED ASSESSMENT 1 (2005) [hereinafter NATIONAL], available at <http://www.esrl.noaa.gov/csd/aqrs/reports/napareport05.pdf>.

44. Agreement on Air Quality, U.S.-Can., at 4, Mar. 13, 1991, TIAS No. 11,783, amended by Protocol Amending the Agreement on Air Quality, U.S.-Can., Dec. 7, 2000, Temp. State Dep't No. 01-20, Hein's No. KAV 5863.

amount of sulfur dioxide released into the atmosphere by both countries⁴⁵ under the belief that such emissions were a significant cause of the acid rain⁴⁶ that was believed to be poisoning the waterways of the two countries.⁴⁷ This agreement between the two countries was really one of the first to address large-scale “transboundary air pollution”⁴⁸ emitted in large part from utilities in the two countries.⁴⁹

The total cost and ease with which the RGGI administers is low, albeit deceptive, for a reason. This EPA Program uses Continuous Emission Monitoring Systems (“CEMS”) on approximately thirty-six of the regulated industries, accounting for ninety-six percent of regulated emissions.⁵⁰ Because the RGGI covers only those emissions from power plants within the partner states,⁵¹ and a substantial number of those emissions are already monitored by the aforementioned accurate CEMS, the RGGI has a very strong and accurate foundation. Consequently the RGGI’s regulatory body has fewer hurdles—both because of fewer regulated industries (only power plants under the RGGI) to oversee and an efficient monitoring system in place for the only industry it regulates. If the cornerstone of a cap-and-trade system is accurate monitoring, the RGGI is seemingly destined for success.

These CEMS that the RGGI is so fortunate to utilize, are incredibly expensive and not likely to be used in similar scope under the WCI. The CEMS machines used to monitor emissions under the Program cost \$124,000 per unit when they were installed in 1995.⁵² In total, installation of the CEMS units accounted for seven percent of total compliance costs in 1995 alone.⁵³ Though the WCI will benefit from these very same CEMS systems monitoring emissions under the Program, because the WCI will regulate far more than just the electricity-producing sector (the RGGI’s only focus), including, *inter alia* transportation fuel combustion, residential and industrial fuel combustion, and

45. EDITH BROWN WEISS, STEPHEN C. MCCAFFREY, DANIEL BARSTOW MAGRAW & A. DAN TARLOCK, *INTERNATIONAL ENVIRONMENTAL LAW AND POLICY* 502-05 (2d ed. 2006).

46. NATIONAL, *supra* note 43 (stating that “[A]cid rain occurs when emissions of sulfur dioxide and nitrogen oxides react in the atmosphere (with water, oxygen, and various oxidants) to form various acidic compounds.”).

47. WEISS ET AL, *supra* note 45, at 503 (quoting a 1988 Canadian report that “14,000 lakes and at least nine salmon-bearing rivers were dead due to acid rain. . .”).

48. *Id.* at 501-02 (defining transboundary air pollution as “air pollution whose physical origin is situated wholly or in part within the area under the national jurisdiction of one State and which has adverse effects in the area under the jurisdiction of another State.”).

49. See Agreement on Air Quality, U.S.-Can., at 24, Mar. 13, 1991, TIAS No. 11,783, amended by Protocol Amending the Agreement on Air Quality, U.S.-Can., Dec. 7, 2000, Temp. State Dep’t No. 01-20, Hein’s No. KAV 5863.

50. Lesley K. McAllister, Putting Persuasion Back in the Equation: Compliance in Cap and Trade Programs, 24 PACE ENVTL. L. REV. 299, 318 (Summer 2007).

51. See REGIONAL GREENHOUSE GAS INITIATIVE, *supra* note 7.

52. McAllister, *supra* note 50, at 319 n.140.

53. *Id.*

industrial process emissions sources,⁵⁴ these sources will not benefit from an already in-place CEMS. Accordingly, for those industries not benefiting from CEMS, regulation and reporting could be much more difficult and expensive.

The second glaring difference between the RGGI and WCI is the fact that the RGGI operates solely within the jurisdiction of the United States.⁵⁵ As a consequence, potential disputes may resort to the U.S. court system, a luxury the WCI cannot afford due to its international nature. Considering these factors, one might deduce that the reason for the success of the RGGI's administrative body is because it has had the luxury of relying on the EPA established CEMS for emissions monitoring, and the United States courts for dispute resolution. Due to these crucial differences, the WCI Recommendations should be cautious in exalting the RGGI as a model for administrative efficiency. As stated previously, that program has many advantages the WCI will not experience, and surely it cannot follow that the success of the RGGI's administrative body indicates any amount of success for the similar WCI body.

C. Theoretical Benefits of a Cap-and-Trade System

To be fair, a cap-and-trade system has many advantages, at least in theory. Proponents of the system—the Recommendations included - typically cite the increase in efficiency that these programs offer compared to similar command-and-control models.⁵⁶ These models are efficient because a government involved in the WCI needs only: "(1) to ensure that covered sources accurately report their emissions and . . . surrender a number of allowances equal to their emissions; and (2) to provide some market oversight to ensure fair competition."⁵⁷ The Recommendations point to the success of the EPA's Program as a model of this efficiency because it managed a huge amount of polluters with a minimal expenditure of resources.⁵⁸ However, as addressed in the preceding section, the absence of CEMS for many of the regulated GHG sources suggest the WCI is not likely to be similarly efficient.

More traditional approaches like a flat carbon tax on emissions, or an overall emissions reduction goal wherein each polluter must reduce by a set percentage, have greater costs and less flexibility. Cap-and-trade systems increase administrative efficiency by allowing regulated facilities the "flexibility in

54. RECOMMENDATIONS, *supra* note 3, at 1-2.

55. See Memorandum of Understanding, Regional Greenhouse Gas Initiative (2005), available at http://rggi.org/docs/mou_final_12_20_05.pdf (participating states in RGGI: Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, and Vermont).

56. McAllister, *supra* note 50, at 332.

57. See RECOMMENDATIONS, *supra* note 3, at 49.

58. *Id.* at 49 n.30 ("For example, the U.S. acid rain program requires a staff of approximately 50 people to track all emissions data, allowance transfer, and compliance for over 4000 sources including auditing of all hourly emissions data, tracking several thousand allowance transfers per year, annual compliance determination, and annual program assessment.").

determining whether, when, and how to reduce their emissions.”⁵⁹ At its most basic, cap-and-trade systems permit those facilities where the cost of compliance with regulations is prohibitively high (possibly resulting in a disproportionate increase in consumer prices) to trade carbon credits with those facilities who could more easily comply with emissions levels. This reduces the overall cost of emissions reduction per CO₂e unit.⁶⁰ Moreover, because an ever-fluctuating market sets the cost of compliance, regulated facilities are free to determine their own approach to their compliance obligations.⁶¹ This means that the facility could choose to spend its money investing in new facilities or technologies to reduce emissions, or could just choose to purchase more credits on the market. This theoretically avoids the commonplace negotiations between the regulating agency and the offending party, thereby reducing cost of administration. Under such a model, the state is no longer saddled with the burden of mandating the appropriate amount of reductions for an individual facility, nor need the state spend valuable resources negotiating with facilities on how to best achieve compliance.⁶² In turn, “[I]itigation that used to be common with respect to setting, implementing, and enforcing technology-based standards is eliminated.”⁶³

In contrast, traditional command-and-control schemes require the government take a stronger, more diligent role in securing compliance, thereby increasing the total cost of compliance on all parties. A simple look reveals governments must not only establish an entity’s reduction obligations, but also determine if the entity is in compliance, and if not, enforce the payment of fines or taxes for failure to meet the obligations. Though this cursory explanation oversimplifies both process and problems, the traditional scheme is likely to be prohibitive in cost.⁶⁴ Compared to the alternative command and control schemes,⁶⁵ cap-and-trade systems have a lower cost of operation while also encouraging technological innovation through the natural tendency of markets to promote and reward those technologies that empower regulated entities to achieve a market advantage.⁶⁶

The fact that the WCI is a regional program with multiple partners is also a sizeable advantage. The breadth of the program will help reduce the costs of trade, and reduce the effects of emissions leakage.⁶⁷ “Emissions leakage occurs when economic activity and associated emissions shift out of the jurisdiction

59. McAllister, *supra* note 50, at 332.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. See RECOMMENDATIONS, *supra* note 3, at 49.

65. *Id.* (defining command-and-control scheme as those “programs in which governments specify various performance, operational, or emission[s] requirements based upon technology”).

66. See *id.*; see also PEW CENTER, *supra* note 3, at 3 (“Under traditional command-and-control regulation, there is no incentive to go beyond the regulatory standard.”).

67. RECOMMENDATIONS, *supra* note 3, at 50.

covered by the policy in order to avoid the costs of compliance.”⁶⁸ Naturally, this would prove economically detrimental for those participating jurisdictions. A larger regulated area where compliance costs are fairly stable and equal makes it more difficult for industry to move to an unregulated area.⁶⁹ Avoiding compliance should not be as simple as packing the bags and moving to a neighboring state. The Recommendations also note that the substantial size of the program will further lower the cost of implementation by sharing administrative and technical support functions between jurisdictions.⁷⁰

In sum, the WCI is a grouping of eleven partners, each pledging to regulate themselves and to penalize offending entities. Absent a strong enforcement board with the authority to punish offending jurisdictions, it would appear the primary enforcement mechanism of the WCI is its transparency, essentially “shaming” an offending state into compliance with the rest of the partners. However, as this comment will later address in section IV, this particular approach will likely prove to be more effective than it appears on its face.

III. PROBLEMS INHERENT IN THE WCI

As zealous as the WCI is, it relies upon an optimism that overlooks some very manifest issues. Because the WCI is an agreement between states and provinces, there is a minuscule—though largely settled—issue whether those partners have the capacity to legally engage in the agreement in the first place. Further, given the total absence of specified sanctions or the establishment of a regulatory body, is the agreement facially unenforceable, that is, does the agreement provide the mechanisms necessary for enforcement? For that matter, if none exist, are there other mechanisms that would provide the WCI strength and ensure compliance?

It should be noted that an agreement of this magnitude, which places significant restraints on twenty percent of the total United States economy, may face a federal preemption issue. However, the preemption question is beyond the scope of this comment. Instead, it will limit discussion to the primary international issues, and to an examination of the aforementioned major problems the WCI drafters will likely face during the formation and execution of this program.

68. *Id.*

69. *See id.*

70. *Id.*

A. *The U.S. and Canadian Capacities to Enter into the Agreement*⁷¹

The ability of the states and provinces to enter into an agreement, in theory, presents a conflict because the U.S. Constitution appears to plainly prohibit agreements by states with foreign powers. The “Compact Clause” unequivocally states that “[n]o state shall, without the consent of Congress . . . enter into any agreement or compact with another state, or with a foreign power”⁷²

In spite of this seemingly clear prohibition, the modern interpretation of the “Compact Clause,” as stated in *Virginia v. Tennessee*,⁷³ permits these agreements. Addressing the validity of a boundary agreement entered into between Virginia and Tennessee, the Court focused on whether the agreement required the “Compact Clause’s” requirement of congressional consent. It held such agreements permissible, and consequently did not require congressional consent where they did not extend the political power of the states, nor encroach upon the supremacy of the United States.⁷⁴ The RESTATEMENT ON FOREIGN RELATIONS echoes this tenet,⁷⁵ and sums up the current state of the law:

In general, agreements involving local transborder issues, such as agreements to curb a source of pollution, to coordinate police or sewage services, or to share an energy source, have been considered not to require Congressional consent. Such agreements are not international agreements under the criteria stated in § 301(1), but other State compacts might be.⁷⁶

There is also the small issue of the Canadian capacity to enter into these agreements. The Canadian Constitution differs patently from the U.S. Constitution in that it does not reserve exclusive foreign affairs powers to the federal government.⁷⁷ However, Canadian courts recognize at common law that

71. For an extensive and interesting discussion on the issue of U.S. constitutional limitations on state agreements with foreign nations, see Peter R. Jennetten, Note, *State Environmental Agreements with Foreign Powers: The Compact Clause and The Foreign Affairs Power of the States*, 8 GEO. INT’L ENVTL. L. REV. 141 (1995).

72. U.S. CONST. art. I, § 10, cl. 3; Cf. U.S. CONST. art. II, § 2, cl. 2. (giving the President power to make treaties with the consent of the Senate).

73. 148 U.S. 503, 519 (1893).

74. *Id.* (quoting 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES: WITH A PRELIMINARY REVIEW OF THE CONSTITUTIONAL HISTORY OF THE COLONIES AND STATES BEFORE THE ADOPTION OF THE CONSTITUTION § 1403, (Melville M. Bigelow ed., 5th ed., photo reprint 1994) (1891).)

75. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 302 cmt. f (1987) (stating that “a State compact with a foreign power requires Congressional consent only if the compact tends ‘to the increase of political power in the States which may encroach upon or interfere with the just supremacy of the United States.’”).

76. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 302 cmt. f; see generally RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 301 (1) (“‘international agreement’ means an agreement between two or more states or international organizations that is intended to be legally binding and is governed by international law.”); see also JANICE CHERYL BEAVER, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS: U.S. INTERNATIONAL BORDERS: BRIEF FACTS (Nov. 9, 2006), available at <http://italy.usembassy.gov/pdf/other/RS21729.pdf> (citing the U.S.-Canadian border spanning 3,987 miles, and the U.S.-Mexico border spanning 1,933 miles).

77. Marcia Valiante, *The Great Lakes Charter Annex 2001: Legal Dimensions of Provincial Participation*, 13 J. ENVTL. L. & PRAC. 47, 63 (2003).

the treaty making power resides in the executive power.⁷⁸ Similar to the U.S., legislative consent is not requisite for valid agreements, but they may not impede or diminish the federal powers.⁷⁹

The Canadian treatment of these agreements could also be an issue because absent an express clause in an agreement stipulating the method of dispute resolution, Canadian courts treat agreements with sub-nations as generally unenforceable.⁸⁰ These agreements can be terminated unilaterally without legal recourse⁸¹ based upon the principle of parliamentary sovereignty.⁸² This concept creates a problem for an agreement like the WCI because Canadian custom provides political justification for provincial governments to terminate agreements at will. Fortunately, provincial repudiation of an agreement as important as the WCI is extremely unlikely, because the provinces typically "treat[] [agreements] with a high level of political respect,"⁸³ "altering their commitments under a political accord only in dramatic circumstances. . . ."⁸⁴

1. *The Modern Application: Similar Agreements*

The U.S. Constitution's prohibition on agreements with foreign nations notwithstanding, modern states possess this capacity, particularly regarding environmental issues. An examination of some of these agreements provides insight into how the WCI may be received at the federal level, as well as how the enforcement issue has previously been addressed by similar agreements.

The Great Lakes Charter (hereinafter "Charter") of 1985 sought to limit the amount of water diverted from the Great Lakes.⁸⁵ Despite their size, the Great Lakes are essentially a "nonrenewable resource," replenished annually by only one percent of their volume.⁸⁶ Recognizing this problem, eight states and two provinces⁸⁷ entered into an agreement to place a cap on the amount of water that

78. *Id.* (citing PETER HOGG, CONSTITUTIONAL LAW IN CANADA § 11.6 (4th ed. Supp. 1997).

79. *Id.* at 63-64 (citing *Canada v. Saskatchewan Water Corp.*, [1991] 1 W.W.R. 426 (Can.)).

80. *Id.* at 64, 66.

81. *Id.* at 64.

82. *Id.* at 64 & n.62 (defining parliamentary sovereignty as the principle by which "Parliament and provincial Legislatures reserve the power to modify the decisions of their predecessors.").

83. *Id.* at 66 (citing John Whyte, *Issues in Canadian Federal-Provincial Cooperation*, in *MANAGING NATURAL RESOURCES IN A FEDERAL STATE: ESSAYS FROM THE SECOND BANFF CONFERENCE ON NATURAL RESOURCE LAW* 322, 324-25 (J. Owen Saunders ed., 1986).

84. *Id.* at 66-67.

85. COUNCIL OF GREAT LAKES GOVERNORS, *THE GREAT LAKES CHARTER: PRINCIPLES FOR THE MANAGEMENT OF GREAT LAKES WATER RESOURCES* 1 (Feb. 11, 1985), available at <http://www.cglg.org/projects/water/docs/GreatLakesCharter.pdf> [hereinafter "CHARTER"].

86. INT'L JOINT COMM'N, *PROTECTION OF THE WATERS OF THE GREAT LAKES: FINAL REPORT TO THE GOVERNMENTS OF CANADA AND THE UNITED STATES* 1 (2000), available at <http://www.ijc.org/php/publications/pdf/ID1560.pdf>.

87. CHARTER, *supra* note 85, at 7 (citing State signatories Illinois, Indiana, Michigan, Minnesota, New York, Ohio, Wisconsin and the Commonwealth of Pennsylvania; and Provincial signatories Ontario and Quebec).

could be “diverted” from the Lakes without consultation with the other party members.⁸⁸ Much like the current WCI, the Charter relied on “good faith performance” of the agreement and lacked any sort of overarching compliance or enforcement procedures.⁸⁹ Moreover, it preserved the individual state’s right to make decisions in its own interest,⁹⁰ as well as to pursue legal action in any desired forum.⁹¹

The agreement remained undisturbed by either the Canadian or U.S. governments until in 1998 when the Ontario Ministry of the Environment issued a permit to withdraw 10,000,000 liters per day from Lake Superior.⁹² In the face of huge public outcry, the government withdrew the permit.⁹³ Nonetheless, Ontario’s actions illustrate the flimsy quality of an agreement bound together by the concept of good faith dealings (though affirms the power of the public voice). This enforcement issue, among other problems in the Charter, prompted the subsequent passing of the Great Lakes Charter Annex and the St. Lawrence-River Basin Agreement and Compact.⁹⁴ The latter compact was drafted in 2005⁹⁵ and as of October 3, 2008 finally became law.⁹⁶

Another agreement addressing a regional environmental concern is the 2001 Oil Spill Memorandum of Cooperation (hereinafter “Memorandum”) between the Pacific States⁹⁷ and British Columbia. Originally signed in 1989, the Memorandum established planning procedures for oil spill response, prevention methods, and consistency between the separate jurisdictions.⁹⁸ Largely because the law governing agreements between U.S. states and foreign states is so ambiguous, the Memorandum contains disclaimers, that are intended to avoid conflict with constitutional and federal limitations, stating its intent not to “create

88. *Id.* at 4.

89. *Id.* at 5.

90. *Id.* (“The Great Lakes States and Provinces mutually recognize the rights and standing of all Great Lakes States and Provinces to represent and protect the rights and interests of their respective jurisdictions and citizens in the shared water and other natural resources of the Great Lakes region.”).

91. *Id.* at 6 (“Each Great Lakes State and Province reserves and retains all rights and authority to seek, in any state, provincial, federal, or other appropriate court or forum, adjudication or protection. . . .”).

92. Valiante, *supra* note 77, at 54.

93. *Id.*

94. See Lauren Petrash, *Great Lakes, Weak Policy: The Great Lakes-St. Lawrence River Basin Sustainable Water Resources Agreement and Compact and Non-Regulation of the Water “Products” Industry*, 39 U. MIAMI INTER-AM. L. REV. 145, 155-57 (2007).

95. Great Lakes—St. Lawrence River Basin Water Resources Compact, Dec. 13, 2005, available at http://www.cglg.org/projects/water/docs/12-13-05/Great_Lakes-St_Lawrence_River_Basin_Water_Resources_Compact.pdf.

96. Great Lakes—St. Lawrence River Basin Water Resources Compact, Pub L. 110-342, 122 Stat. 3739 (2008).

97. The Pacific States/British Columbia: Oil Spill Task Force, 2001 Oil Spill Memorandum of Cooperation, http://www.oilspilltaskforce.org/memo_cooperation.htm (Alaska, California, Hawaii, Oregon, Washington) [hereinafter Oil Spill Memorandum].

98. *Id.*

2010 / The "Triumph" of the Commons

any separate legal or administrative entity,"⁹⁹ and that "each party may terminate its agreement at will"¹⁰⁰

New York, Vermont, and Quebec have also entered into environmental covenants over Lake Champlain.¹⁰¹ The cooperation between these parties began with the 1988 Memorandum of Understanding on Environmental Cooperation on Lake Champlain. Since then, the parties have continuously renewed their commitment to this Memorandum, most recently in 2003.¹⁰² One of the provisions of this Memorandum requires the parties to "'give prior notice and . . . consult' before commencing 'major action or project [which] would be likely to adversely affect [the other party].'"¹⁰³ The memorandum is very similar to the Charter's primary purpose of notification and consultation, yet unlike that covenant, it contains no provision expressly indicating the nonbinding nature of the agreement.¹⁰⁴ This failure to explicitly define the nature of enforcement may prove problematic because current authorities are undecided whether this type of agreement necessarily implies the enforcement mechanism.¹⁰⁵ However, although the three jurisdictions are not strictly obligated to comply with these agreements, in practice the three jurisdictions treat them as "binding covenants."¹⁰⁶

Other examples of agreements between U.S. and foreign states include the Friendship Protocol Alaska has with Russia.¹⁰⁷ The government of Alaska has many Memorandums of Understanding with the Russians on environmental and natural resource issues.¹⁰⁸ These memorandums contain the often-important language that they will not "bind the state to a specific course of action or require the commitment of funds."¹⁰⁹ This language, like that in the Vermont/Quebec agreement, reflects an awareness of the primary limitation regarding state/foreign state agreements: agreements are likely valid provided they do not "increase [the] political power [of] the [state]"¹¹⁰

99. *Id.*

100. *Id.*

101. Jennetten, *supra* note 71, at 171.

102. WILLIAM G. HOWLAND ET AL, LAKE CHAMPLAIN: EXPERIENCE AND LESSONS LEARNED BRIEF 97 (2005) http://www.iwlearn.net/publications/11/lakechamplain_2005.pdf.

103. *Id.* (quoting Memorandum of Understanding on Environmental Cooperation §5, Quebec-New York, May 10, 1993 (on file with the Georgetown International Environmental Law Review)).

104. Compare *Id.*, with CHARTER, *supra* note 85, at 1.

105. Compare Jennetten, *supra* note 71, at 171 (suggesting the agreement's non-binding nature is implicit in the memorandum of understanding format), with RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 301 cmt. a (1987) (listing "memorandum of understanding" as a designation of binding international agreement, and further stating that "[w]hatever their designation, all agreements have the same legal status").

106. HOWLAND ET AL, *supra* note 102, at 97.

107. Jennetten, *supra* note 71, at 172.

108. *Id.*

109. *Id.*

110. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 302 cmt. f (1987).

The Great Lakes Basin Compact of 1968¹¹¹ (hereinafter “Compact”) offers a cautionary tale for state governments seeking agreements with foreign states. The Compact provided for the establishment of a Great Lakes Commission, which would primarily act as a policy recommending body to the party states.¹¹² It also stated that the provinces of Quebec and Ontario would be coequal states within the agreement.¹¹³ After ratification by five of the member states, the covenant became effective in 1955.¹¹⁴ However, at the time of the covenant’s conception the ability of states to make such agreements was unclear.

Faced with the constitutional limitation on agreements, the parties sought to guarantee its legality by eliciting the consent of Congress.¹¹⁵ Congress objected to the compact primarily on the grounds that it usurped powers that had been within the scope of the federal government.¹¹⁶ Specifically, the Great Lakes Commission appeared to effectively function in much the same way as the International Joint Commission,¹¹⁷ established by the Boundary Waters Treaty in 1909.¹¹⁸ During Congressional hearings on the issue, the State Department specifically objected to the Canadian membership because “it infringed upon State Department turf.”¹¹⁹ Apparently, the executive department preferred it retain the sole authority to make recommendations to foreign states. Congress ultimately consented to the Compact, but under the conditions that it exclude the Canadian province’s membership, and that the Great Lakes Commission would have the ability to make any recommendations to the provinces.¹²⁰ As one scholar pointed out, the irony of that process was that the Compact did not likely require consent of Congress to be valid, but instead was “sought mainly to ensure the validity of Canadian involvement.”¹²¹ Of course, it was this very action that lead to the exclusion of Canadian involvement.

B. Lessons from Experience: A Case Study in the European System

1. A Look at the European Union Emission Trading System

The global economic crisis that occurred in the last quarter of 2008 cautions against an agreement relying on good faith and individual regulation because the

111. Great Lake Basin Compact, Pub L. 90-419, 82 Stat. 412 (1968), available at <http://www.glc.org/about/glbc.html>.

112. Jennetten, *supra* note 71, at 165.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 166.

117. *Id.*

118. Petrash, *supra* note 94, at 153.

119. Jennetten, *supra* note 71, at 166-67.

120. *Id.* at 167.

121. *Id.*

WCI deals with massive economies on the scale of the European Union ("E.U.")¹²² This similarity cautions that many of the same problems the E.U. has experienced implementing its ETS could be felt by WCI partners.

Towards the end of 2008, countries and industries faced with a debilitating recession began to vehemently oppose the third phase of the E.U. Emissions Trading System ("ETS"). The ETS currently allocates carbon credits to the industries mostly without charge.¹²³ However, beginning in 2013 the proposed third phase will begin auctioning a percentage of the previously free emissions allowances to industrial polluters.¹²⁴ The ETS will initially mandate the polluters purchase thirty percent of their emissions allowances and increase incrementally until one hundred percent of the allowances will be auctioned by 2020.¹²⁵

Some E.U. leaders are demanding a less stringent standard than proposed, with the leaders of Italy, Poland, and Latvia threatening to veto the new standards unless they are softened.¹²⁶ In October of 2008, Poland, Hungary, Slovakia, Romania, and Bulgaria reached an accord of their own calling for a more gradual approach to the new phase of the ETS.¹²⁷ The countries stated the new phase would threaten "external competitiveness of the European industry, labor market and financial situation of households."¹²⁸ The Eastern European countries are at a distinct disadvantage in the ETS because they derive the majority of their power from coal fired plants¹²⁹ and thus would have to pay more under the ETS to generate power than their western counterparts.

For these emerging economies, coal is a natural choice. Proponents of the energy source claim that coal reserves will last at least two hundred years compared with fifty years for oil and natural gas.¹³⁰ It is comparatively cheaper than alternative energies, notwithstanding the recent rise in prices.¹³¹ Perhaps most importantly, hundreds of countries mine coal,¹³² creating a more reliable and constant energy stream free from foreign influence, thus avoiding the threat of supply interruption as a means of political influence.

122. Central Intelligence Agency, *The World Factbook: European Union*, available at <https://www.cia.gov/library/publications/the-world-factbook/geos/ee.html> (last updated Oct. 8, 2009) (stating 2007 E.U. GDP as \$14.79 trillion).

123. *EU Politics: Summit Deal on Climate/Energy Package*, ECONOMIST INTELLIGENCE UNIT: VIEWSWIRE, Jan. 8, 2009, available at 2009 WLNR 472095.

124. *Id.*

125. *Id.*

126. James Kanter, *Europe's Leadership in Carbon Control at Risk in Credit Crisis*, N.Y. TIMES, Oct. 21, 2008, at B10 [hereinafter Kanter, *Europe's Leadership*].

127. James Kanter, *Poland Leads Charge to Delay European Climate Reforms*, N.Y. TIMES, Oct. 6, 2008 [hereinafter Kanter, *Poland Leads Charge*].

128. *Id.*

129. *Id.*

130. Elisabeth Rosenthal, *Europe Turns to Coal Again, Raising Alarms on Climate Change*, N.Y. TIMES, Apr. 23, 2008, at A1.

131. *Id.*

132. *Id.*

In recent years, interruption of supply, or the threat thereof, has become a major problem for eastern countries like Ukraine, Georgia, Belarus, and the rest of Europe¹³³ as well. The Russian gas monopoly Gazprom imposes significantly higher rates on those countries more sympathetic to the West.¹³⁴ With forty percent of European gas coming from Russia,¹³⁵ the members of the E.U. are eager to develop other methods of energy production. Countries unable to afford development of alternative energy claim that penalties for the use of coal will only push them towards a heavier reliance on natural gas¹³⁶ resulting in a weaker supply stream, and greater dependence on the often fragile mood of the Russian administration. Meanwhile, the leaders of countries who receive the bulk of their energy from non-carbon sources such as wind and nuclear power are pushing for the new standards.¹³⁷ Under the E.U. ETS, cleaner companies gain profits from the sale of extra carbon credits to more polluting industries such as those in the eastern bloc. These conflicting economic situations are threatening harmonious functioning of the ETS.

Private companies also expressed their exasperation with the proposed third phase. Recently *Ineos*, a chemical company and Britain's largest private employer, threatened to move to a country with less stringent emissions standards should the United Kingdom adopt the tougher E.U. admissions standards.¹³⁸ Its CEO estimated that as many as 200,000 jobs would be at risk in the UK alone.¹³⁹ Referenced previously in this comment, this exodus of jobs is known as "carbon leakage,"¹⁴⁰ and is one of the biggest fears regarding cap-and-trade systems. Moreover, the dual threats of carbon leakage and supply interruption illustrate the incredible economic stakes at play within the WCI.

As hinted at earlier in section II, there is another problem regarding the actual allowance requests made by the jurisdictions. The E.U. and WCI have cap-and-trade systems founded on the mandatory GHG emissions reporting from the various sectors to be regulated.¹⁴¹ Jurisdictions then propose the amount of

133. See Andrew E. Kramer, *Russia Cuts Gas; Europe Shivers*, N.Y. TIMES, Jan. 7, 2009, at A1 [hereinafter Kramer, *Russia Cuts Gas*]; see also Kramer, *infra* note 133 (Gazprom warns Poland, Lithuania and Germany of potential disruptions in natural gas supply).

134. See Andrew E. Kramer, *Gazprom Warns of Wider Cutoffs if Belarus Interferes With Gas*, N.Y. TIMES, Dec. 28, 2006, at A18 (comparing gas prices in Ukraine at \$135 per 1,000 cubic meters, pro-western government of Georgia at \$235 per 1,000 cubic meters, and Western Europe at \$265 per 1,000 cubic meters).

135. Kramer, *Russia Cuts Gas*, *supra* note 133.

136. Kanter, *Poland Leads Charge*, *supra* note 127.

137. See Kanter, *Europe's Leadership*, *supra* note 126.

138. Danny Forston, *Chemical Boss Warns of Exodus: Prime Minister is Urged to Change EU Climate Change Rules to Prevent Mass Exit*, SUNDAY TIMES (UK), Dec. 7, 2008, available at http://business.timesonline.co.UK/tol/business/industry_sectors/industrials/article5299219.ece.

139. *Id.*

140. *See id.*

141. Compare *supra* Part II (explaining that initially, only the electricity-producing sector will be covered, with transportation emissions to follow in the second compliance period in 2005), with Pew Center, *supra* note 4, at 3 (providing that "[s]ome sectors that might be included under the cap are electric power, manufacturing, transportation, or fossil fuel use.").

allowances they should receive. The allowance estimate is crucial because an excess of granted allowances will flood the market with credits, thereby driving down the price of carbon and interfering with the state's abilities to regulate and penalize the excessive emission of GHG.¹⁴²

In the E.U., one of the most contentious times in the system occurs when the state submits its National Allocation Plan (NAP), to the overall governing body of the European Commission (hereinafter "the Commission").¹⁴³ The Commission is then free to accept or reject the proposal, and frequently has. The Commission uses the denial of the allocation as a tool to regulate what it determines are excessively generous allocations to particular sectors, or to motivate a country to move more quickly in a particular area.¹⁴⁴ The countries may be free to propose their own carbon allocations, but the Commission has the final authority. The process is extremely contentious and the Commission has threatened legal action in some instances,¹⁴⁵ and in others, has had legal action threatened against it.¹⁴⁶ In recent review, the Commission rejected Germany's proposal for its allocation for the period 2008-2012, notwithstanding Germany's initial voluntary reduction.¹⁴⁷ Germany responded by threatening to sue the Commission in the European Court of Justice.

Disputes in the E.U. over allocations demonstrate an important deficiency in the WCI. The Recommendations do not create an institution analogous to the Commission. It instead relies on self-regulation and transparency to ensure the healthy carbon market that is the backbone of the entire system. The E.U. has this transparency, but in verifying all members adhere to their obligations it also has a weapon the WCI does not have: litigation (or the always-persuasive threat of action) in an international court of justice.

The various economic conditions created by assorted methods of electricity production and industry pose a serious divergence of interests. Though all member states agree that reducing GHG emissions is paramount, countries like Poland, who derive the bulk of their electricity from coal-fired power plants, believe the sudden cap on their electricity is unfair. After all, decades of unregulated industry permitted and vitalized the very nations who now seek to place the most stringent caps.

To address the problem of carbon leakage, the Commission will analyze those industries that are particularly susceptible to carbon leakage in 2010. If the

142. See *supra* Part II.

143. See PEW CTR. ON GLOBAL CLIMATE CHANGE, THE EUROPEAN UNION EMISSIONS TRADING SCHEME (EU-ETS) INSIGHTS AND OPPORTUNITIES 2, 12 (2005) [hereinafter PEW CTR. ON GLOBAL CLIMATE CHANGE].

144. See *id.*

145. *Id.*

146. Judit Zegnál, *European Commission Unveils New Energy Policy*, BUDAPEST BUS. J., Jan. 15, 2007, available at 2007 WLNR 798443.

147. *Id.* (reporting that Germany's allocation was permitted to be 453.1 million tons of CO₂, down from the proposed 462 million tons, which had been initially voluntarily reduced from 485 million tons).

Commission determines they are particularly susceptible to losing business to unregulated nations, those industries will be allotted a greater amount of free credits, more so in those situations where the industry in question uses the best available technology.¹⁴⁸

2. *Comparing the WCI and the E.U. ETS*

Similar disharmony will likely affect the partners of the WCI, as some states will certainly find the transition into a carbon emissions cap system easier. One of these states will be California, who in December 2008 finally adopted its carbon emissions reduction plan into law.¹⁴⁹ The plan will offer the most sweeping GHG reductions of any state in the nation.¹⁵⁰ Despite extensive public debate on the matter, the plan's proponents, including California Governor Arnold Schwarzenegger, eventually prevailed.¹⁵¹ The plan will take effect in 2012,¹⁵² the same year the WCI goes into effect, and there is sure to be extensive future planning in order to expeditiously execute it. To be sure, California is fortunate to have citizens and legislators who are willing to put such a plan in action independently. However, with each WCI partner responsible for creating its own enforceable program to comply with the WCI design, California will be in a significantly better position to comply with the mandate of the WCI, as will Canada, which ratified the Kyoto Protocol requiring an approximately five percent reduction of emissions by 2012.¹⁵³ These jurisdictions have a head start on meeting the emissions goals that the WCI will impose because they already have programs in place, and industry is already prepared for the movement towards reduced GHG.

If Europe proves to be an analogous system, the WCI potentially faces a situation similar to the above-mentioned imbalance existing between Eastern and Western Europe. There, the poorer eastern bloc nations must rely on cheaper technologies thereby incurring a disproportionate amount of cost of compliance with the reduction goals. In Europe, it is the poorest countries that demand softer regulation¹⁵⁴ and provide the strongest resistance.¹⁵⁵

148. *EU Politics*, *supra* note 123.

149. Margot Roosevelt, *State Orders Big Cuts in Gases: California Aims to Slash Greenhouse Emissions 15% by 2020 with the Most Sweeping Plan of any State*, L.A. TIMES, Dec. 12, 2008, available at 2008 WLNR 23843777.

150. *See id.*

151. *Id.*; *see also* California Global Warming Solution Act of 2006, CAL. HEALTH & SAFETY CODE §§ 38500-38505 (West 2009) (statute supports the emissions goals set by the plan).

152. CAL. AIR RES. BD. FOR THE STATE OF CAL., CLIMATE CHANGE PROPOSED SCOPING PLAN: A FRAMEWORK FOR CHANGE, at ES-1 (Oct. 2008), available at <http://www.arb.ca.gov/cc/scopingplan/document/psp.pdf>.

153. PEW CTR. ON GLOBAL CLIMATE CHANGE, *supra* note 143.

154. *See* INTERNATIONAL MONETARY FUND, WORLD ECONOMIC OUTLOOK DATABASE (Oct. 2007), available at <http://www.imf.org/external/pubs/ft/weo/2007/02/weodata/index.aspx> (the 2007 Gross Domestic Product, as measured by then-current prices in US billions, was: Latvia - \$27.001, Bulgaria - \$39.071, Slovakia

Under a similar cap-and-trade system, those less prepared and less capable partners will feel similarly disadvantaged. Some states are already making large strides in reducing their GHG emissions, and should therefore have an easier time complying with their share of the regional GHG emissions goals. Though it remains to be seen, one needn't go too far to imagine that Montana (with a GDP of \$34.25 billion¹⁵⁶ and no current emissions plan in place) will have a significantly more difficult time complying with regulations than British Columbia—which has a carbon tax currently in place,¹⁵⁷ California (with a GDP of \$1,812.97 billion¹⁵⁸ and aggressive new emissions plan¹⁵⁹), or Ontario (with GDP of C\$582.02 billion¹⁶⁰ and the adoption of the Kyoto Protocol).

Poor economic conditions will only exacerbate the economic advantages these states will have when the WCI begins in 2012. Unfortunately, absent strong centralized method of enforcement, the economic disparity will likely make uniform compliance extremely difficult. Hopefully, the good faith mechanisms and public opinion will be able to hold states to their obligations.

IV. ENFORCEMENT: SERIOUS PROBLEM OR NON-ISSUE?

Stated in Section II of this comment, the Recommendations do not set out a strong process for enforcement of the obligations contained therein. There is no mention of the possible binding nature of the agreement, nor is there any outline for a dispute resolution procedure—via arbitration or traditional court proceedings.¹⁶¹ Nor do they establish a regulatory body to enforce compliance, or set a fine for a failure to comply.¹⁶² Instead, the Recommendations look to the market to set the penalty.¹⁶³

Undoubtedly, some method of compliance is necessary. Compliance with the obligations contained in the agreement not only reinforces the sanctity of the agreement, but also is necessary to accomplish the very purpose of the agreement¹⁶⁴ - the agreement necessarily depending on uniform compliance.

Most importantly, enforcing compliance within the WCI ensures that non-complying countries do not get a free ride.¹⁶⁵ This "free rider" problem manifests

- \$71.574, Hungary - \$136.358, Poland - \$413.312).

155. See Kanter, *Poland Leads Charge*, *supra* note 127.

156. *Recommendations*, *supra* note 3, WCI Map located at beginning of document.

157. *Id.* at 4.

158. *Id.* WCI Map located at beginning of document.

159. California Global Warming Solution Act of 2006, CAL. HEALTH & SAFETY CODE § 38501(c) (West 2009).

160. *Recommendations*, *supra* note 3, WCI Map located at beginning of document.

161. *Id.* at 46-47.

162. *Id.*

163. *Id.* at 46.

164. WEISS ET AL., *supra* note 45, at 177.

165. *Id.*

itself in two primary ways. “First, the violating [state] benefits from the restraint shown by others”¹⁶⁶ The WCI crucially relies on large regional compliance to minimize the effect of carbon leakage. Because the operating cost in regulated industries will increase slightly within WCI jurisdictions, partners not adequately enforcing their regulatory obligations would be able to lure business away with the temptation of lesser costs, consequently eroding the purpose potency of the WCI. “Second, the violating [state] also benefits in not having to assume, or having its industry assume, the cost of compliance”¹⁶⁷ This is the more direct consequence of the free rider problem. It simply lowers the costs of enforcement for the individual jurisdiction and on the industries regulated.

Though the absence of a generally agreed upon forum for dispute resolution or a strong enforcement body may appear troublesome, this section argues that the very nature of cap-and-trade systems alters the classic conceptions of compliance and enforcement in such a way as to create a system that is self-enforcing. The WCI separates itself from the classic Westphalian concept of international law by which external arbitral bodies are necessary to ensure compliance. Considering the unambiguous nature of compliance under a cap-and-trade system and the shared interests of all partners involved, the WCI is internally self-regulating.

A. Revised Notions of Compliance within the Cap-and-Trade Model

1. Compliance is Compliance

The WCI partners will almost certainly comply with their obligations despite what appears to be a complete lack of centralized enforceability. But what does it mean to be in compliance? Fascinatingly, a cap-and-trade system involves a significantly easier notion of compliance than traditional models typically employed in environmental enforcement. Professor Edith Brown Weiss states that compliance is a fairly broad term, referring both to the implementation of the agreement—the laws adopted to respect the agreement—and the extent to which the party to the agreement respects and abides by those laws.¹⁶⁸ It is this black and white simplicity that may be the cap-and-trade model’s greatest asset. Compliance is compliance.

Compliance under a cap-and-trade approach is notably different from traditional models. The process of conventional compliance is described as “sometimes cooperative, sometimes conflictive”¹⁶⁹ wherein facilities and agencies

166. *Id.*

167. *Id.*

168. See Edith Brown Weiss, *Understanding Compliance with International Environmental Agreements: The Baker’s Dozen Myths*, 32 U. RICH. L. REV. 1555, 1563 (1999) [hereinafter Weiss, *Understanding Compliance*].

169. McAllister, *supra* note 50, at 302-03.

(or perhaps more accurately, their lawyers) negotiate over what compliance entails for that particular facility.¹⁷⁰ This results in a highly discretionary relationship between the regulator and the regulated,¹⁷¹ one where the notion of compliance is as much tied in with the ongoing negotiation process as it is with the very environmental goal itself.¹⁷² Consequently, terms like "compliance plans,"¹⁷³ "substantial compliance,"¹⁷⁴ and "full compliance" infuse themselves into the conversation.¹⁷⁵

Modern interpretation of the Trail Smelter Arbitration illustrates this variable spectrum of compliance over what appears to be fairly straightforward rule or principle. In extreme brief, the Trail Smelter arbitration is the quintessential case on international transboundary pollution,¹⁷⁶ and provided the world with the foundational principle in the field of international environmental law¹⁷⁷: "no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein"¹⁷⁸ Modern interpretations of this principle underscore a major problem with compliance: it will be unavoidably diluted in some shape or fashion as the parties negotiate an agreement. The once clear golden rule of international environmental law has subsequently eroded, now limiting only "significant or substantial" transboundary harm, and (is) perhaps further limited to include only a duty by the source state to "undertake due diligence"¹⁷⁹ in avoidance of environmental harm.

Regulatory agencies embody this philosophy by diluting compliance into Orwellian concepts such as "tolerable non-compliance," acknowledged as non-compliant behavior, but one in which "identifying it as a violation is not appropriate or necessary."¹⁸⁰ There are even the additional categories of "specific and general" compliance; "[g]eneral compliance refer[ing] to the responsiveness of the regulated sector as a whole; specific compliance refer[ing] to the

170. *Id.*

171. *Id.* at 306.

172. *Id.* at 307.

173. *Id.* ("Compliance plans, in which companies committed to taking a series of steps over a period of time to attain compliance, were a central component of the compliance process.")

174. *Id.* at 310 ("A company is considered to be in substantial compliance when it attains most of the standards most of the time.")

175. *Id.* ("Full compliance is recognized as an unattainable goal.")

176. Noah D. Hall, *The Evolving Role of Citizens in United States-Canadian International Environmental Law Compliance*, 24 PACE ENVTL. L. REV. 131, 141 (2007).

177. *See id.* at 141, 145 (noting that the liability principle from the arbitration was incorporated into Principle 21 of the United Nations Conference on the Human Environment, Stockholm Declaration of 1972).

178. Trail Smelter Arbitral Tribunal (U.S. v. Can.), 3 R.I.A.A. 1938, 1965 (1941), available at http://untreaty.un.org/cod/riaa/cases/vol_III/1905-1982.pdf.

179. Hall, *supra* note 176, at 146 (alteration in original) (quoting John H. Knox, *The Myth and Reality of Transboundary Environmental Impact Assessment*, 96 AM. J. INT'L L. 291, 293 (2002)).

180. McAllister, *supra* note 50, at 310.

responsiveness of a particular regulated company.”¹⁸¹ Principally, this confusion results from the inherent ambiguity—or flexibility, depending on one’s perspective—within the statutory regulations the agencies enforce.¹⁸²

A cap-and-trade system avoids these shifting notions of compliance and the subjective role of the regulators in making the determination. Subject to a more objective determination, compliance under cap-and-trade is “ascertainable and quantifiable.”¹⁸³ Professor McAllister expresses the determination in a mercifully uncomplicated manner: compliance = allowances—emissions.¹⁸⁴ Thus, facilities are in compliance when their emissions do not exceed their allowances, or more specifically, if the emissions do not exceed the sum of offsets and allowances purchased by the facility on the open market. This straightforward approach to compliance removes some of the standard factors in the compliance model.

First, a cap-and-trade compliance model largely eliminates the good faith element because it removes from consideration the intent of the regulated industry to comply with its obligations. Under a traditional compliance model, facilities are frequently “in compliance”—failure to meet their standards notwithstanding—based on their continuing good faith efforts to meet objectives.¹⁸⁵ As a consequence, regulators tend to place less emphasis on the actual environmental results of a regulation and too much emphasis on a facility’s environmental behavior. Conversely, a cap-and-trade compliance model evaluates compliance in terms of objective results.

2. The Regulatory Pressure of the Social Stakeholder

Secondly, the role of the public—“the social stakeholder”—in exerting regulatory pressures on the facility diminishes substantially.¹⁸⁶ Professor McAllister notes that under a traditional model, the public may exert external regulatory pressures in three ways: “they could act as an auxiliary enforcer of regulatory requirements;¹⁸⁷ they could help bring about a tightening of regulatory requirements by complaining to regulators; and they could push a facility to go beyond-compliance in order to prove ‘good citizenship.’”¹⁸⁸

A study tracking the social pressures within the paper mill and paper pulp manufacturing industry revealed that social issues are one of the principle

181. *Id.*

182. *See id.*

183. *Id.* at 317.

184. *Id.*

185. *Id.* at 300-01.

186. *Id.* at 313-14.

187. *Id.* at 313; *see also* 42 U.S.C. § 7604(a) (2000) (allows citizen lawsuits against: (a) polluters for failing to comply with valid emission limitations; or (b) the Administrator of the EPA for failing to perform a nondiscretionary act or duty).

188. McAllister, *supra* note 50, at 313-14

stimulants in complying with environmental regulations.¹⁸⁹ Examples of social pressures exerting a force on facilities are indeed numerous. For instance, a 1991 law enacted by Canada obligates pulp mills to eliminate chlorinated organic discharges by December 2002.¹⁹⁰ Through constant efforts by Greenpeace to mobilize support condemning the discharge practice, by 1998, the amount of chlorinated organics had decreased almost ten-fold—several years before the regulated time period.¹⁹¹ Whatever the reaction, corporations are motivated by risk management calculations¹⁹² and are primarily concerned that “not meeting the requirements of the social license will ultimately result in increased regulation or greater economic costs to the company”¹⁹³ For most of the companies surveyed, the “social license” had a significant impact on the decision making process.¹⁹⁴

These extra methods of pressuring entities to comply with environmental regulations are not necessarily present under a cap-and-trade compliance model. With so many concepts of compliance, citizen groups could exert a greater amount of pressure on a facility as a result of it being out of compliance in some shape or form, or perhaps not as in compliance as one group would like. However, when compliance is attached to an objective determination, social pressures have less to work with—a facility is either in or out of compliance.

Furthermore, compliance tends to be disassociated from individual facility performance under a cap-and-trade approach¹⁹⁵ because compliance no longer means a facility has reduced pollution emissions, or is abiding by a particular regulation. Compliance simply means the facility did or did not buy enough allowance credits.¹⁹⁶ Indeed, a facility could chose to either reduce emissions or purchase more credits—both of which would mean the facility was in compliance. Contrast with a traditional approach where only the reduction of emissions would mean the facility was compliant. Thus, the actual behavior of the facility becomes somewhat irrelevant to the context. The disassociated role of a facility’s behavior necessarily results in a public faced with a diminished influence over that same behavior.

A cap-and-trade compliance model also diminishes, if not eliminates, the traditional role of a regulatory body. Under a standard relationship between

189. Neil Gunningham, Robert A. Kagan & Dorothy Thornton, *Social License and Environmental Protection: Why Businesses Go Beyond Compliance*, 29 LAW & SOC. INQUIRY 307, 321 (2004) (reporting that a manager of a paper mill was “motivated less by avoiding regulatory violations per se than by avoiding ‘anything that could give [the company] a bad name.’”).

190. *Id.* at 322-23.

191. *Id.* at 323 (“The net effect was that in 1991, chlorinated organic discharges from pulp mills in British Columbia equaled 0.6 to 6.0 kg/ton, but by 1998 . . . the range was 0.2 to 0.72”).

192. *Id.* at 336.

193. *Id.*

194. *Id.*

195. McAllister, *supra* note 50, at 328.

196. *See id.* at 340.

regulated and regulator, the regulatory agency negotiates with facilities to determine whether they are in compliance (once again taking into account the subjective good faith behavior of the facilities).¹⁹⁷ Because compliance in a cap-and-trade system merely refers to whether the facility acquired enough allowance credits, the regulator becomes more of an “accountant” than anything else.¹⁹⁸ The system eliminates the necessity for discretion or bargaining or constant evaluation in order to determine compliance. This leads to less conflict, less negotiation, and less litigation.¹⁹⁹ Consequently, the WCI will not actually need a strong central regulatory body to regulate the program, but only a small one with small authority. Our traditional notions of compliance, and of a strong agency to ensure that compliance, is simply irrelevant for the WCI.

B. What is Enforcement?

The concept of enforcement under the cap-and-trade model is so significantly different that standard notions of enforcing agreements are—like the compliance discussion above—relatively immaterial. For purposes of evaluation, this paper notes that enforcement is a process combining traditional notions of legal action, as well as subtle influence upon the regulated.²⁰⁰

Enforcement of environmental agreements falls within two basic categories: the legalistic style and the conciliatory style.²⁰¹ “The legalistic style is based on coercion[,]” relying predominantly on the assessment of penalties and sanctions to enforce an agreement.²⁰² Conversely, the conciliatory style relies on persuasion and negotiation and “seeks to prevent a harm rather than punish an evil.”²⁰³ Studies indicate that the legalistic style is less efficient²⁰⁴ than the conciliatory style because the legalistic style involves litigation as well as political lobbying, and therefore increases the cost without necessarily leading to greater results.²⁰⁵ These two styles are worth noting because under a cap-and-trade approach, neither is applicable.

As mentioned previously, the regulator’s primary purpose is to keep track of the allowance issues and to monitor emissions reporting, no longer do regulators

197. *See id.* at 300.

198. *Id.* at 301 (stating that the role of the regulator is in “keeping track of a facility’s emissions and allowance holdings and seeing if they match at some predetermined time.”).

199. *See id.*

200. *See id.* at 311-12 (“Regulatory enforcement encompasses not just formal legal action by regulators against regulated actors but the larger social process through which regulators influence the behavior of regulated entities.”).

201. McAllister, *supra* note 50, at 311.

202. *Id.* at 311-312.

203. *Id.* at 312 (quoting KEITH HAWKINS, ENVIRONMENT AND ENFORCEMENT: REGULATION AND THE SOCIAL DEFINITION OF POLLUTION 4 (1984)).

204. *Id.*

205. *Id.* at 313 (defining efficiency as “the extent to which the regulatory style minimizes the social and economic costs to attain the desired environmental improvement.”).

have to spend time and resources coercing or persuading entities to comply with its obligations.²⁰⁶ For example, "[i]t has been estimated that of the seventy-five EPA employees directly involved in administering the Acid Rain Program, approximately 75% are focused on the measurement, verification, and tracking of emissions data."²⁰⁷ Under cap-and-trade systems, facilities know precisely what compliance entails, and are permitted the flexibility to achieve that compliance in the most cost-effective manner.²⁰⁸ Contrast this with a standard regulatory system where the regulator tells the facility how to meet the regulations, haggling with the facilities over litigation, and then ensuring that they carried it out.²⁰⁹ Given this reduced role, the WCI will have little need for an organization capable of enforcing the agreement.

C. The Public Role in Enforcement

The public role of enforcement is not simply a fallback method for the WCI to use. Rather, it is an effective and efficient method for enforcing obligations (not to be confused with the previous discussion on the irrelevance of the public role in determining compliance). Mentioned previously in this part, section B(1), the role of the public, or "social stakeholder"²¹⁰ can be very effective. Given the success of such social pressures, many international agreements now acknowledge them as legitimate means of enforcement.

The United States and Canada formed the Air Quality Agreement in 1991 to address the shared problem of acid rain.²¹¹ The United States implemented the agreement by creating the Acid Rain Program, discussed *supra*, part II, section B. The agreement contains a provision mandating communication between the parties and the states and provinces as well as the public in general.²¹² Importantly, this provision "provides a means by which . . . state or provincial governments, citizens, and interest groups, can exert substantial pressure on the [parties] to implement and effectuate the objectives of the agreement."²¹³ The prevalence of these citizen participation provisions emphasizes their success.

Perhaps the most recognizable citizen enforcement provision is that contained in the North American Agreement on Environmental Cooperation ("NAAEC"). The Agreement enforces environmental concerns as part of the

206. *Id.* at 326.

207. *Id.* at 327.

208. *Id.* at 328.

209. *See id.*

210. McAllister, *supra* note 50, at 313-14.

211. Hall, *supra* note 176, at 150-51.

212. Agreement on Air Quality, U.S.-Can., at 4, Mar. 13, 1991, TIAS No. 11,783, amended by Protocol Amending the Agreement on Air Quality, U.S.-Can., Dec. 7, 2000, Temp. State Dep't No. 01-20, Hein's No. KAV 5863.

213. Jeffrey L. Roelofs, *United States-Canada Air Quality Agreement: A Framework for Addressing Transboundary Air Pollution Problems*, 26 CORNELL INT'L L.J. 421, 449 (1993).

North American Free Trade Act (“NAFTA”) through the Commission for Environmental Cooperation (“CEC”).²¹⁴ With the passage of NAFTA there were concerns the increase in trade would cause the member countries to neglect enforcement of their environmental laws.²¹⁵ Principally, environmentalists believed Mexico would fail to enforce its environmental regulations.²¹⁶ In response, NAFTA implemented the NAAEC.²¹⁷ One of the most striking provisions within the NAAEC is the “citizen submission procedure” contained in articles fourteen and fifteen.²¹⁸ Known as an “international spotlight,” it encourages domestic compliance with environmental regulations within Canada, Mexico, and the United States.²¹⁹ A submission may be made by “any non-governmental organization or person asserting that a Party is failing to effectively enforce its environmental law[.]”²²⁰ The spotlight prohibits certain submissions, malicious submissions among them.²²¹ If the Secretariat determines that it concerns an issue of environmental law, and is not prohibited, the matter is referred to the CEC for further determination of appropriate action.²²²

Though effective in bringing alleged environmental violations to light, the citizen submission procedure is not the final word and citizens are “still unable to ultimately force compliance with international environmental commitments on unwilling federal governments.”²²³ Professor Hall recounts a recent situation where concerned citizens from both Canada and the U.S. informed the CEC of transboundary water pollution of the Devil’s Lake in North Dakota, an apparent

214. David L. Markell, *Governance of International Institutions: A Review of the North American Commission for Environmental Cooperation’s Citizen Submissions Process*, 30 N.C.J. INT’L L. & COM. REG. 759, 759-60 (2005).

215. E.g. John H. Knox, *A New Approach to Compliance with International Environmental Law: The Submissions Procedure of The NAFTA Environmental Commission*, 28 ECOLOGY L.Q. 1, 54 (2001) (noting additional concerns that “by removing barriers to foreign investment in Mexico, NAFTA would lure companies to move there in search of a ‘pollution haven,’ and thereby contribute to the pollution of the Mexican environment, take jobs from U.S. workers, and put pressure on all three North American countries to lower their environmental standards in a ‘race to the bottom.’”).

216. See *Id.*

217. *Id.*

218. See David L. Markell, *The Commission for Environmental Cooperation’s Citizen Submission Process*, 12 GEO. INT’L ENVTL. L. REV. 545, 550 (2000).

219. Markell, *supra* note 214, at 762.

220. North American Agreement on Environmental Cooperation, U.S.-Can.-Mex., art. 14(1), Sept. 9-14 1993, 32 I.L.M. 1480 (defining “environmental law” as “any statute or regulation of a Party, or provision thereof, the primary purpose of which is the protection of the environment, or the prevention of a danger to human life or health . . .”).

221. North American Agreement on Environmental Cooperation, U.S.-Can.-Mex., art. 14(2), Sept. 9-14 1993, 32 I.L.M. 1480 (“(a) the submission alleges harm to the person or organization making the submission; (b) the submission, alone or in combination with other submissions, raises matters whose further study in this process would advance the goals of this Agreement; (c) private remedies available under the Party’s law have been pursued; and (d) the submission is drawn exclusively from mass media reports.”)

222. North American Agreement on Environmental Cooperation, U.S.-Can.-Mex., art. 14(1), Sept. 9-14 1993, 32 I.L.M. 1480 (“Where the Secretariat determines that a submission meets the criteria set out in paragraph 1, the Secretariat shall determine whether the submission merits requesting a response from nacec.”).

223. Hall, *supra* 176, at 156.

violation of the Boundary Waters Treaty.²²⁴ The Secretariat of the CEC ultimately dismissed the submission, in part because the Boundary Waters Treaty itself did not call for a citizen submission procedure.²²⁵ Thus, the citizen submission failed to enforce the domestic environmental obligations of the two nations. The procedure, however, still has great value because it serves as a factual record of alleged abuses.²²⁶ This publication of negative environmental conduct can serve to eventually pressure the governments to act.²²⁷

D. Reputational and Voluntary Compliance-Based Adherence to International Law

Though there is no outside regulatory body to enforce WCI obligations, the notions of voluntary compliance and reputational preservation assure the partners will uphold their commitments. These ideas are quickly gaining traction with scholars in the international law field²²⁸ as a means of explaining why states respect their commitments, even in the face of *de minimis* or non-existent legal sanctions. Whatever the true motivation, the general principle of international law as stated by Professor Henkin, is that “almost all nations observe . . . their obligations almost all of the time.”²²⁹ Scholars dispute whether this principle finds its justification in the general behavior of states (voluntary), or in the strength of the threat of sanctions (economic or trade restrictions, reputational damage/prestige, etc.).²³⁰

Both models rely on the assumption that states act rationally and within their own interests,²³¹ or rational-actor model of international law.²³² Because the WCI addresses the problem of greenhouse gases, which extend well beyond the borders of the individual partner or the partner’s neighboring states, a substantial reduction in GHG emissions will almost certainly benefit each partner to the agreement. The Recommendations proclaim that the impact of climate change observed in the region is the prime impetus behind the agreement. Conditions ranging from the earlier onset of spring and the consequent reduction in frost-free days, prolonged drought and increased flooding, growing number of wildfires,

224. *Id.* at 156-57.

225. *Id.* at 157-58.

226. *Id.* at 158.

227. *Id.*

228. *See, e.g.,* Andrew T. Guzman, *A Compliance-Based Theory of International Law*, 90 CAL. L. REV. 1823 (2002).

229. WEISS ET AL., *supra* note 45, at 200 (citing LOUIS HENKIN, *HOW NATIONS BEHAVE* 47 (2d ed. 1979)).

230. *See generally* Guzman, *supra* note 228.

231. *Id.* at 1827. *But see* Weiss, *Understanding Compliance*, *supra* note 168, at 1559 (“Sometimes states join because the agreements do not require changes in their present actions, or they may join with no intention of complying or lacking the capacity to comply.”).

232. Guzman, *supra* note 228, at 1860.

shrinking glaciers and reduced snow pack, and reduced air quality²³³ represent the common purpose that each of the jurisdictions share.

Furthermore, the Recommendations share a common economic interest as well²³⁴ because reduction in total GHG levels necessarily carries with it an investment in green technology, as well as reduced fuel and energy consumption.²³⁵ The rational-actor model of international law assumes that states will behave rationally and in their own best interests. Because each partner shares the similar interests of reduced air pollution, increased preservation of natural resources, and creation of jobs, these interests will unite the partners and motivate each to respect the WCI. Additionally, the theory of voluntary compliance asserts that states voluntarily assent to those agreements that they voluntarily make.²³⁶ The rationale for this is relatively common sense, after all, why would a state enter an agreement they did not intend on upholding?

In a correlative to the voluntary theory, Professor Guzman, environmental law professor at the University of California Berkeley School of Law,²³⁷ develops the theory that the desire to maintain reputational integrity motivates states to abide by their agreements.²³⁸ States are typically very reluctant to be branded a violator of agreements.²³⁹ Thus, publicity and reputation provide “an effective incentive to implement and thereby comply with international obligations.”²⁴⁰

While not typically thought of as such, the reputational incentive is very much a type of sanction.²⁴¹ Because the WCI has no enforcement board, and establishes no penalties for non-compliance,²⁴² this may be the only international sanction available. Professor Guzman indicates four factors influencing the strength of reputational sanctions:²⁴³ “(1) the severity of the violation, (2) the reasons for the violation, (3) the extent to which other states know of the violation, and (4) the clarity and commitment of the violation.”²⁴⁴

The alignment of these factors with the general framework of the WCI suggests that reputational sanctions will be very effective. The most significant of these factors is the severity of the violation.²⁴⁵ Those violations that cause a greater harm to neighboring states will necessarily result in greater reputational

233. RECOMMENDATIONS, *supra* note 3, at 15.

234. *Id.*

235. *Id.*

236. WEISS ET AL, *supra* note 45, at 178.

237. Andrew T. Guzman is a Professor of Law and Director of Advanced Legal Degree Programs at the University of California, Berkeley, School of Law. He holds a J.D. and Ph.D. in economics from Harvard University.

238. Guzman, *supra* note 230, at 1825.

239. *See* WEISS ET AL, *supra* note 45, at 180.

240. *Id.*

241. *See* Guzman, *supra* note 228, at 1861.

242. *See* RECOMMENDATIONS, *supra* note 3, § 2(1.15).

243. Guzman, *supra* note 230, at 1861.

244. *Id.*

245. *See id.* at 1862-63.

harm than those that are "victimless."²⁴⁶ Applied to the WCI, the approximate degree of severity an emissions cap violation brings is debatable. Depending on the partners' interpretation of the violation, failure to comply could be seen as a direct cause of increased warming, shorter winters, and species death;²⁴⁷ or the partners may see a violation merely as the proverbial drop in the bucket—relatively benign given the total amount of world GHG emissions. More likely the partners will interpret non-compliance as a sort of laziness; especially in light of the strides the rest of the partners must make to implement the Recommendations. Though the actual impact may be small, failure to "get on board" may be severe enough.

The reasons for the violation also influence the effect of reputational sanctions.²⁴⁸ This factor reflects the reality that compliance with international agreements is imperfect and violations inevitably occur,²⁴⁹ it being "understood that under certain conditions a state will choose to ignore its obligations."²⁵⁰ Absent the presence of a crisis of some sort,²⁵¹ this consideration is unlikely to impact WCI partners much because given the relative homogenous quality of all partners (western states, developed economies, political stability, etc.), excuse for noncompliance will not find a sympathetic ear; either all are capable of dealing with any problem, or all are affected by the same. The third and fourth factors are rather obvious. The two factors—(1) how much the partner jurisdictions are aware of the violation; and (2) how clear the obligation and violation themselves are—immediately impact the violation's reputational effect.²⁵² The awareness of a violation is unimportant for the WCI because the Recommendations establish an intentionally transparent process with the establishment of the "regional organization,"²⁵³ which among other responsibilities, will "track emissions and provide public information on progress towards the WCI regional goal."²⁵⁴ Additionally, the WCI clearly lays out strong guidelines for what constitutes compliance, and likewise what amounts to a violation.²⁵⁵ If all goes accordingly, the Recommendations will establish a process where the partner jurisdictions will always know when another is in non-compliance. Professor Guzman's factors underscore a key tenet implicit in the underlying context of the Recommendations. Because non-compliance will be transparent, unambiguous,

246. *Id.* at 1862.

247. See RECOMMENDATIONS, *supra* note 3, at 15-16.

248. Guzman, *supra* note 228, at 1863.

249. *Id.*

250. *Id.* at 1862.

251. *Id.* (illustrating that "a human-rights treaty is viewed in a different light when it takes place under conditions of great national crisis than if the violation occurs during a period of normalcy").

252. *Id.*

253. See RECOMMENDATIONS, *supra* note 3, at 47-48 ("[T]he regional organization will help reduce costs and improve program transparency and consistency.").

254. *Id.* at 16.

255. See generally *id.*

unexcused, and rather severe, the reputational sanctions stand to be extremely effective.

Reputational sanctions also avoid the “free rider” problem discussed earlier in this comment, though from an opposite perspective. In situations of multilateral agreements, the free rider problem surfaces when not every country equally supports the cost of enforcing obligations.²⁵⁶ While the sanctioning jurisdiction must support the cost of enforcement, it gains only a fraction of the benefit, while other parties to the agreement gain equal benefit, having avoided the financial burden associated with enforcing that gain.²⁵⁷ Under traditional multilateral agreements, this benefit with no cost creates an incentive to be the free rider, which in itself can result in a less effective agreement due to the execution of fewer sanctions and less enforcement.²⁵⁸ Efficiently, the use of reputational sanction avoids this problem while remaining effective.

However, reputational sanctions only have value if a sort of “reputational capital”²⁵⁹ exists. There must be an interest—either present or future—in preserving the capacity to enter into effective agreements. Though the partners to the WCI have not entered into many cross-boarder agreements with each other, the importance and effectiveness of agreements such as the Great Lakes Charter, Great Lakes Basin Compact, Friendship Protocol between Russia and Alaska—all discussed *supra*—speak to the value of state-provincial agreements. The primary agreement existing between some of the partners is the Oil Spill Memorandum in which the pacific states each share responsibility for responding to and remedying oil spills.²⁶⁰ For these states, there is remarkable reputational value in upholding one’s commitments because a failure to adequately honor one’s obligations under the WCI could infect the sanctity of the Oil Spill Memorandum, and vice versa. Furthermore, non-compliance could affect any future ability to engage in cross-boarder agreements.

For the WCI, much of the reputational capital descends from the sheer necessity and substantial value of these types of agreements. Regional agreements such as the WCI, Oil Spill Memorandum, Great Lakes Charter, and others, may accomplish their objectives better than nationally sponsored executive treaties for a number of reasons. For one, they can focus on the specific problems affecting a specific region without distraction from political or financial peripheral interests.²⁶¹ Contrast this advantage with the U.S. Congress where limitless groups with minor interests often exert disproportionate influence, inevitably distorting the intended effect of the agreement.²⁶² Secondly, these

256. Guzman, *supra* note 228, at 1869.

257. *Id.*

258. *Id.*

259. *Id.* at 1846.

260. See Oil Spill Memorandum, *supra* 97.

261. See Jennetten, *supra* note 71, at 142-43.

262. *Id.* at 143.

regional agreements are “more responsive to local needs”²⁶³ because the proportion of representation by the parties to the agreements is far larger than the representation they would receive in Congress where states themselves exert little influence.²⁶⁴ Furthermore, these agreements typically address problems that may lack the importance necessary to provoke government action.²⁶⁵ Though the WCI is large in scope and effect and thus not affected by this concern, future agreements between, for example border states Montana and British Columbia, could unequivocally benefit from an agreement that need not involve the U.S. Congress.

Finally, regional agreements benefit from what this comment refers to as “the triumph of the commons.” Essentially, this concept is the amalgam of the avoidance of the “prisoner’s dilemma,”²⁶⁶ meaning the situation that exists when lack of regulation—particularly involving collective pollutants like GHG—removes incentive to self-regulate (no purpose in regulation when neighbor will pollute anyway); and the benefits resulting from combined action and pooling of resources “to combat a common problem.”²⁶⁷ What is so amazing about this combination is that it singularly provides the incentives to create the WCI and provides the primary mechanism by which the WCI will be self-enforcing. It creates a mutual interest that spans all of the partners. Each affected by the hazards of unregulated GHG emissions, and each requiring the full participation of every other partner in league to make any sort of difference. When one considers this triumph alongside the partner’s desire to maintain their reputational capital so that they may retain the ability to engage in future regional agreements, the true effectiveness of the WCI surfaces.

However, States still fail to comply with their obligations, reputational harm and voluntary good intentions notwithstanding. Studies indicate this failure “is only infrequently due to willful defiance and is more often due to ignorance or to technical or economic disability.”²⁶⁸ This finding implies that the appropriate remedial measures “should instead consist of education and of the rendering of appropriate assistance.”²⁶⁹ This concept makes a compelling case that a rigid enforcement scheme consistent with traditional notions of international law is unnecessary. Proper enforcement—if we are to understand the term as ensuring that the partners sustain their obligations—lies most adequately in a comprehensive and well-drafted program founded in the coequal input of the partners.

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.* at 144.

267. *Id.*

268. BROWN WEISS ET AL., *supra* note 45, at 180.

269. *Id.*

The WCI shares a common purpose while also placing the reputations of eleven states and provinces at issue. These two enormous incentives, when coupled with considerable guidance from the Recommendations provide a *de facto* enforcement mechanism as effective as any court of international justice.

V. CONCLUSION

The cap-and-trade approach to the WCI requires a new understanding of what it means to be in compliance. This approach does not require the centralized enforcement structure the international community is accustomed to, yet remains equally as effective as the traditional framework. It is little wonder the Recommendations do not call for any sort enforcement body. It is simply unnecessary. Instead, the partners' shared interests and the conspicuous nature of the compliance obligation eliminate the necessity for such a body - the triumph of the commons creating an internally enforcing agreement. Though the absence of it in the Recommendations appear alarming and seem to create an unenforceable agreement, nothing could be further from the case. The WCI will likely bind the states and create an effective, low cost system of environmental regulation that should ultimately result in a decisive reduction in GHG emissions.

* * *