

Non-Compliance Procedures and the Climate Change Convention

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Introduction ²

A number of recent environmental treaties, including the 1997 Kyoto Protocol to the 1992 United Nations Framework Convention on Climate Change (FCCC), adopt a non-compliance procedure (NCP) to address failure by Contracting Parties fully to implement their treaty obligations. Recourse to such procedures is evidence of a growing awareness that traditional rules of international law concerned with material breach of treaty obligations and with state responsibility are inappropriate to address problems of environmental treaty implementation.³ It is the purpose of this paper to set forth some of the issues which will need to be addressed in establishing a NCP under the Climate Change Convention, in particular in connection with the application of such procedures to the mechanisms for achieving the substantive commitments undertaken by developed States under the Kyoto Protocol.⁴ Before turning to the Climate Change Convention and the Protocol, the concept of NCP and the development of such procedures in contemporary international environmental law will first be traced.⁵

What are "non-compliance procedures" (NCPs)?

Essentially NCPs embody procedures established under multilateral treaties to meet the following objectives:

- (i) to provide positive encouragement to Contracting Parties to comply with their treaty obligations;
- (ii) to provide a multilateral forum for dispute resolution/avoidance;
- (iii) in the event of non-compliance, to provide a "softer", less legalistic mechanism than offered by traditional dispute settlement procedures under international law. NCPs generally apply a less rigid test by which compliance is measured and the first object is to obtain a return to full compliance by the "defaulting" State, rather than impose a sanction for non-compliance or award compensation to an injured party.
- (iv) to provide for internal resolution of disputes, without recourse to external adjudicators or institutions;

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² This paper is part of ongoing research by the author, in conjunction with Professor Malgosia Fitzmaurice of the University of London, into the relationship between non-compliance procedures, the law of treaties and state responsibility. I am indebted to Professor Fitzmaurice for many of the insights contained herein.

³ For cogent analysis of the many legal issues which arise in regulating the boundary between compliance and responsibility, see M. Koskenniemi, "Breach of a Treaty or Non-Compliance? Reflections on Enforcement of the Montreal Protocol" (1992) *Yearbook of International Environmental Law* 123.

⁴ In particular, joint implementation, the clean development mechanism, and tradeable emission permits - the so-called flexibility mechanisms.

⁵ It is not intended to sketch in any detail here the existing procedures, a task in any event which has already been comprehensively performed in the literature on non-compliance. In addition to the sources cited *infra*, see generally P. Szell, "The Development of Multilateral Mechanisms for Monitoring Compliance" in W. Lang (ed.), *Sustainable Development and International Law* (1995), Chapter 7; and J. Cameron, J. Werksman and P. Roderick, *Improving Compliance with International Environmental Law* (1996).

(v) to facilitate access, since NCPs may typically be invoked by, *inter alia*, one Party, and are therefore not dependent upon common agreement; thus, unlike traditional dispute settlement mechanisms, NCPs need not be consent-based.

From these objectives, it may be seen that NCPs are concerned both with facilitating compliance by Contracting Parties with their Convention obligations, and with providing a "softer system" for addressing non-compliance by a Contracting Party than is presently afforded by traditional dispute settlement procedures under international law. In the latter context, non-compliance procedures may be viewed as an international form of alternative dispute settlement (ADR),⁶ long employed in municipal legal systems to resolve conflicts arising in longer term legal relationships. The use of NCPs at the international level is thus a recognition of the relational character of certain international treaties and the need to ensure both continuing participation and the fulfilment of generally non-reciprocal treaty obligations designed to ensure the achievement of common goals. Accordingly, NCPs are less confrontational and generally less legalistic and are designed to assist the defaulting State in returning to compliance, not necessarily to incriminate for non-compliance.⁷ This is reflected in a trend away from provisions relying solely on "dispute settlement", a phenomenon observable not just in the environmental sphere, towards the addition of provisions addressing "assessment",⁸ "monitoring"⁹, "verification"¹⁰, "verification of compliance"¹¹, "implementation"¹² and "considering progress made in the implementation" of the Convention.¹³ Many of the perceived advantages of a NCP are reflected in the rationale for the multilateral consultative process set forth in Article 13 of the Climate Change Convention.¹⁴

The dual nature of NCPs is also a reflection of the various reasons for non-compliance by States with their international obligations which may range from the free rider exploiting the economic advantage derived from non-compliance¹⁵ to an inability to meet treaty obligations because of their high cost or a lack of capacity, e.g. lack of relevant technology or expertise.¹⁶ A NCP needs both to reduce/eliminate the economic benefit to be derived from non-compliance and to facilitate compliance where obstacles relating to lack of capacity, particularly for developing States, are identifiable.

The goal of NCPs is therefore distinguishable from traditional rules on state responsibility, since the object is to ensure a return to full compliance with treaty obligations rather than to require compensation by the defaulting State for the harm caused to another State or States for breach of an international obligation. The latter point highlights a further negative feature of traditional dispute

6 Or, perhaps more accurately, dispute avoidance.

7 G. Handl, "Controlling Implementation of Compliance with International Environmental Commitments: the Rocky Road from Rio" (1994) 5 *Colorado Journal of Environmental Law & Policy* 305, at p. 329. However, as will be discussed further below, non-compliance responses may be facilitative or coercive. In the latter case, incrimination for non-compliance may be one mechanism to achieve a return to compliance, analogous to "name and shame" techniques under certain international human rights instruments.

8 Article 6, 1987 Montreal Protocol to the 1985 Ozone Layer Convention.

9 Article 9, 1979 Convention on Long-Range Transboundary Air Pollution Treaty ("LRTAP").

10 Article 19, 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal.

11 1987 US/USSR Treaty on the Elimination of Intermediate Range and Shorter Range Missiles.

12 Article 13 FCCC.

13 Art. 17(1) Convention on the Elimination of Discrimination Against Women.

14 See, for example, "Consideration of the Establishment of a Multilateral Consultative Process for the Resolution of Questions Regarding Implementation", A Note prepared by the Interim Secretariat (to the FCCC), 26 July 1994, para. 11-14

15 See, generally, J. Heister, E. Mohr, F. Stahler, P. Tobias Stoll and R. Wolfrum, "Strategies to Enforce Compliance with an International CO₂ Treaty" (1997) 9:1 *International Environmental Affairs* 22, at pp. 23-24 ("reasons for noncompliance").

16 Mitchell identifies three principal sources of non-compliance: preference, incapacity and inadvertence. See R.B. Mitchell, "Compliance Theory: an Overview" in J. Cameron, J. Werksman and P. Roderick, *Improving Compliance with International Environmental Law* (1996), Chapter 1, at pp. 11-13.

settlement mechanisms in the environmental context, namely that environmental damage has generally already occurred. Moreover, in the climate change context the effects of non-compliance may be "subtle and cumulative", with the full effects manifest only over a considerable time. In common with other transfrontier environmental problems, it may also be difficult to attribute particular harm to the actions or omissions of one State or States. This enhances the need for a NCP, which places the emphasis on prevention, rather than on remedying harm caused.

Though not confined to the environmental context, it is nonetheless clear that NCPs have a particularly important role to play in this context because of the distinctive character of environmental treaty obligations. A number of factors may be identified: the pace, magnitude and irreversibility of environmental problems; the essentially non-reciprocal nature of the treaty obligations which renders enforcement *inter partes* ineffective; the failure to operationalise traditional rules on state liability and responsibility; the ability to measure compliance against quantifiable targets; and the necessity for national implementation to render international environmental obligations effective.¹⁷ Perhaps the best known existing NCP is that established under the 1987 Montreal Protocol to the 1985 Vienna Convention on the Protection of the Ozone Layer ("Ozone Convention").¹⁸ This was the first multilateral environmental treaty to go beyond reporting and dispute settlement provisions in providing for a non-compliance procedure.¹⁹ While Article 11 of the Convention provides for traditional dispute settlement, Article 8 of the Protocol envisages a non-compliance procedure, which has subsequently been developed by meetings of the Parties.²⁰ The procedure was finalised at the Fourth Meeting of the COP in London in 1992. A pivotal role is played by a ten-member Implementation Committee.²¹ Early issues included data reporting to establish important baselines for assessing compliance with quantitative and temporal obligations (targets and timetables).²²

Monitoring and compliance are essential bedfellows.²³ There is little point in adopting a compliance mechanism without the capability to gather information relevant to a determination

17 See Fitzmaurice and Redgwell, "Non-Compliance Procedures" (forthcoming), text accompanying n.5.

18 For recent analysis, see D.G. Victor, "The Operation and Effectiveness of the Montreal Protocol's Non-Compliance Procedure" in D.G. Victor, K. Raustiala and E.B. Skolnikoff, The Implementation and Effectiveness of International Environmental Commitments (1998), Chapter 4.

19 As Szell observes, it was the first such agreement to "fill the gap" between reporting and dispute settlement with a "meaningful procedure": Szell, *supra*, n.4, at p. 99.

20 Article 8 requires the first MOP to consider and approve procedures and institutional mechanisms for determining non-compliance with the provisions of the Protocol, and for treatment of Parties found to be in non-compliance. The procedures established pursuant to Article 8 of the 1987 Montreal Protocol are without prejudice to the operation of Article 11 of the Ozone Convention (dispute settlement provisions): UNEP/OxL.Pro.3/L.4 (Decision III/2). MOP3 requested the Ad Hoc Working Group of Legal Experts to compile indicative lists under Article 8 of the possible situations of non-compliance with the Protocol and of "advisory and conciliatory measures to encourage full compliance"; See Decision III/2(a)(ii), Montreal Protocol MOP3, UNEP/OxL.Pro.3.L.4. In the event, only an indicative list of measures is found as Annex V to Report of MOP4: UNEP/OxL.Pro.4/5/15, 23 November 1992. It sets an escalating response from assistance through to a caution to suspension of rights and privileges under the Protocol.

21 The IC reviews specific cases of non-compliance, debates general issues of implementation and compliance, makes recommendations to other Convention bodies, and issues a publicly available report after each meeting. Issues of non-compliance may be referred to the IC by Parties concerned with their own, or other Parties', compliance or by the Secretariat.

22 Article 7 of the Protocol sets forth detailed data reporting requirements. As Werksman observes, the early work of the Montreal Protocol Implementation Committee focused on concerns raised by the Ozone Secretariat regarding compliance with such requirements: *supra*, n.4, at p. 97. One interesting phenomenon has been the Committee's willingness to overlook non-compliance evidenced in data in an effort to ensure participation in and eventual compliance with the Protocol: B. Kingsbury, "The Concept of Compliance as a Function of Competing Conceptions of International Law" (1998) 19:2 Michigan Journal of International Law 345, at p. 366. This emphasis on cooperation over conflict, and a certain flexibility in permitting adherence to treaty obligations over time, suggests a certain progressive character to the obligations.

23 "Without regular, detailed and objective reporting of performance, any meaningful supervision of a state's observance of its commitments [is] impossible": Szell, *supra*, n.4, at p. 98; see also K. Sachariew, "Promoting Compliance with International Environmental Legal Standards: Reflections on Monitoring and Reporting Mechanisms" (1991) 2 Yearbook of International Environmental Law 33.

whether treaty obligations are being met. This is part of an integrated process which has been termed "implementation control". This can take place in incremental stages, i.e. monitoring and information gathering preceding the development of non-compliance mechanism(s). A good example of this process is the 1979 Geneva Convention on Long-Range Transboundary Air Pollution²⁴ (LRTAP) which has seen data collected under the EMEP Programme²⁵ form the basis for an assessment of the first sulphur emissions protocol in 1985²⁶ and led to agreement on a tightened emission reduction schedule in the second sulphur protocol in 1994 with a non-compliance mechanism.²⁷ Of course, the obligation to report is itself a concrete obligation, non-compliance with which may be subject to a NCP.

If such information gathering and reporting is viewed as part of a broader compliance information system, the question remains of what response is made, if any, to identified problems of non-implementation by Parties. Absent a non-compliance mechanism, non-implementation can only (in formal legal terms at any rate) be addressed as a dispute between contracting Parties, dealt with, if at all, under traditional dispute settlement mechanisms. This is the present position under the 1992 Convention on Biological Diversity - it is the parties themselves whom inspect reports, with any alleged non-implementation a matter for dispute settlement under Article 27 of the Convention. Other recent environmental treaties go further, including the 1987 Montreal Protocol; the 1991 VOC and 1994 Sulphur Protocols to the 1979 Long-Range Transboundary Air Pollution Treaty;²⁸ the 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic;²⁹ and, of course, the 1997 Kyoto Protocol, all of which envisage a separate mechanism for compliance being established. The Parties to the 1989 Basel Convention on the Transboundary Movement of Hazardous Wastes and their Disposal are also considering a NCP.³⁰ Of these examples only the NCP under the Montreal Protocol is fully operationalised.

Without concrete obligations, and the monitoring of implementation/compliance with those obligations, it is not practicable to speak of non-compliance mechanisms. This is seen clearly in the climate change context which has proceeded from general commitments without specific timetables and targets to agreement upon such specific commitments with attention turned to implementation thereof and to compliance control.³¹ The 1987 Montreal Protocol, the 1994 Second Sulphur Protocol,

24 24 ILM 484 (1985). See further J. Carlos di Primio, "Data Quality and Compliance Control in the European Air Pollution Regime" in D. Victor et al., (eds), *supra*, n. 17.

25 1984 Protocol on Long-Term Financing of the Cooperative Programme for Monitoring and Evaluation of the Long-Range Transmission of Air Pollutants in Europe (EMEP), 24 ILM 484 (1985).

26 Protocol on the Reduction of Sulphur Emissions or their Transboundary Fluxes by at least 30%, 27 ILM 707 (1988).

27 See also Article 3(3) of the 1991 Protocol concerning the Control of Emissions of Volatile Organic Compounds or their Transboundary Fluxes, 31 ILM 568 (1992).

28 The 1994 Sulphur Protocol entered into force on 5 August 1998; the 1991 VOC Protocol entered into force on 29 September 1997. In 1997 an Implementation Committee was established for review of compliance by Parties with protocols to LRTAP by Decision 1997/2 of the Executive Body of the Convention. That decision urges the Parties to the VOC and Sulphur Protocols to consider its use for review of compliance in accordance with Article 3(3) (VOC) and Article 7 (Sulphur) of the Protocols.

29 32 ILM 1069 (1993). See Article 23, which empowers the Commission established pursuant to Article 10 to assess the compliance of Contracting Parties and to call for steps to bring a non-complying Contracting Party back into compliance. These provisions have not yet been implemented, since this Convention only entered into force on 25 March 1998, with the first meeting of the OSPAR Commission held in July 1998.

30 At COP3 (September, 1995), the Parties to the Basel Convention requested the Consultative Sub-Group of Legal and Technical Experts to examine all the issues relating to the establishment of a mechanism for monitoring implementation and compliance with the Convention (Decision III/11). At COP4 (February, 1998), the Parties endorsed the Sub-group's proposal to continue its step-by-step approach to examination of these issues (Decision IV/21). In addition, the Sub-group was requested to consider whether the dispute settlement mechanism of Article 20 of the Basel Convention "continues to meet the needs of the Parties to the Convention".

31 In this sense, a continuum may be perceived from communication of information and review thereof through to non-compliance and culminating in dispute settlement. This is what Szell refers to as "filling the gap" with an effective mechanism. See *supra*, n.4; see also the note on implementation (Article 13 FCCC) prepared by the interim secretariat,

and the 1997 Kyoto Protocol suggest a new cycle of strengthening compliance systems gradually, and in step with the strengthening of commitments.³²

The FCCC ³³

The traditional dispute settlement approach is present in Article 14, which adopts an approach, which conceptualises disputes as arising between two or more Contracting Parties in connection with the interpretation or application of the Convention. If ever activated, the traditional hierarchy of peaceful dispute settlement mechanisms would apply, ranging from negotiation and third party mediation or good offices, through to arbitration or submission of the dispute to the International Court of Justice. Under Article 14, recourse to negotiation or other means of peaceful settlement is obligatory,³⁴ with either Party able to request creation of a conciliation commission in the event that negotiation is unsuccessful; however, the awards of the commission are recommendatory only.³⁵ This bilateral dispute settlement route is considered to be complementary to the Article 13 process.³⁶

Article 13, on the other hand, is a good example of the trend away from total reliance on traditional dispute settlement methods in recent multilateral environmental agreements noted above. It establishes a multilateral consultative process ("MCP") for resolution of questions concerning the implementation of the Convention. Little detail is contained in Article 13, thus the first meeting of the COP established an Ad Hoc Group on Article 13 to operationalise the MCP.³⁷ The sixth and final session of this Group was held in Bonn in June 1998 where its work was completed in anticipation of COP 4. ³⁸ It has adopted the framework for a MCP, which must now be considered at COP4, including the resolution of the matters left unresolved in the Committee.³⁹ Annex II to the Group's Report on its sixth session⁴⁰ contains the terms of reference for the MCP, including the proposal for a standing Multilateral Consultative Committee to be established to consider questions of implementation referred

³² *supra*, n.13, at para. 18 (continuum from communication of information and review - article 12 - to the multilateral consultative process - article 13 - through to dispute settlement - article 14). However, Szell also points out the risk of an inverse relationship between the stringency of NCP and the toughness of the commitments which Parties are willing to undertake (*ibid.*, at p. 107), at point echoed by Victor, *supra*, n.17, at p. 139.

³³ Even where concrete obligations have been established, compliance with which has been ensured, the effectiveness of the treaty regime is not thereby ensured. Compliance is not synonymous with effectiveness since the latter depends in part upon the strength of the obligations and their clarity. Low standards, and/or ambiguous ones, reduce effectiveness even where "compliance" has been ensured. On effectiveness, see generally D.G. Victor, K. Raustiala and E.B. Skolnikoff (eds.), *The Implementation and Effectiveness of International Environmental Commitments* (1998).

³⁴ For excellent analysis of the FCCC, see J. Werksman, "Designing a Compliance System for the UN Framework Convention on Climate Change" in J. Cameron, J. Werksman and P. Roderick, *Improving Compliance with International Environmental Law* (1996), Chapter 4.

³⁵ Article 14(1) FCCC.

³⁶ Article 14(5) and (6). Article 14 thus represents a compromise between a mandatory or voluntary procedure and its binding or non-binding effect: see further D. Bodansky, "The United Nations Framework Convention on Climate Change: A Commentary" (1993) 18:2 *The Yale Journal of International Law* 451, at p. 549. It is very similar in language to the dispute settlement clauses found in other recent international environmental agreements such as the Ozone Convention (Article 11), the Basel Convention (Article 20) and the Biodiversity Convention (Article 27).

³⁷ See Bodansky, *ibid.*, at p. 548.

³⁸ As stipulated in Article 13 itself, which provides that "[t]he Conference of the Parties shall at its first session, consider the establishment of a multilateral consultative process, available to Parties on their request, for the resolution of questions regarding the implementation of the Convention.

³⁹ Decision 14/CP.3 of COP 3 (FCCC/CP/1997/7/Add.1) invited the Group to complete its work before the fourth session of the Conference of the Parties in Argentina in 1998.

⁴⁰ The Provisional Agenda for COP4 suggests that the President of the Conference may initiate informal consultations with a view to resolving the outstanding issue of the composition of the proposed Multilateral Consultative Committee (MCC). Parties are asked to be prepared to nominate relevant experts for the MCC in order that the Conference may designate members for the first period of office should such informal consultations reach a successful outcome. See Note by the Executive Secretary, Provisional Agenda and Annotations, FCC/CP/1998/1, 28 August 1998, paras. 51-52.

⁴¹ FCCC/AG13/1998/2, 9 July 1998.

to it by Contracting Parties or by the COP as a whole.⁴¹ This will clearly encompass the commitments contained in Articles 4-6 and 12 of the Convention. Of particular note is the objective of the process, set forth in Paragraph 2, and the mandate of the proposed standing Multilateral Consultative Committee, set forth primarily in Paragraph 6:⁴²

2. The objective of the process is to resolve questions regarding the implementation of the Convention, by:
 - (a) Providing advice on assistance to Parties to overcome difficulties encountered in their implementation of the Convention;
 - (b) Promoting understanding of the Convention;
 - (c) Preventing disputes from arising.⁴³

6. The Committee shall, upon a request received in accordance with paragraph 5, consider questions regarding the implementation of the Convention in consultation with the Party or Parties concerned and, in light of the nature of the question, provide the appropriate assistance in relation to difficulties encountered in the course of implementation, by:
 - (a) Clarifying and resolving the questions;
 - (b) Providing advice and recommendations on the procurement of technical and financial resources for the resolution of these difficulties;
 - (c) Providing advice on the compilation and communication of information.

In earlier sessions the Group has emphasized the advisory rather than supervisory nature of the MCP, further distancing the process from a more rigorous form of NCP. This is clearly reflected in the language of paragraph 6, which is strongly facilitative: "appropriate assistance", "clarifying and resolving", "providing advice and recommendations" and "providing advice". The advisory nature of the MCP is further enforced by the link between paragraphs 6 and 12. Under paragraph 12, the Committee may make "[r]ecommendations regarding cooperation between the Party or Parties concerned and the other Parties to further the objectives of the Convention", and "[m]easures that the Committee deems suitable to be taken by the Party or Parties concerned for the effective implementation of the Convention". Whilst specific outcome is not expressed in mandatory terms ("may"), paragraph 12 is mandatory in the requirement that the outcome of the Committee's deliberations must be consistent with its mandate in paragraph 6.⁴⁴

The MCP is without prejudice to the dispute settlement provisions of Article 14, the latter applying, *mutatis mutandis*, to the Protocol.⁴⁵ There is no internal "exhaustion of local remedies rule" in operation. But there is some doubt whether Article 14 will ever be invoked in a traditional dispute settlement;⁴⁶ indeed, one of the reasons for including Article 13 was the perception that traditional dispute settlement would have a very limited role to play under the Convention where the likely nature of disputes would not be amenable to such procedure. Nonetheless, the relationship between the two requires some clarification. Some States favoured the automatic suspension of Article 13 when Article

41 Paragraph 3 sets out how issues will be taken up, whilst Paragraph 8, still containing square brackets in relation to size and equitable geographic distribution of membership, addresses the Constitution of the Committee. Its mandate is set forth in Paragraphs 6 and 7.

42 Paragraph 7 further provides that the Committee shall not duplicate the activities of other Convention bodies.

43 Paragraph 4 emphasizes that the MCP is separate from, and without prejudice to, the provisions of Article 14 FCCC on dispute settlement. This reflects the view of most delegations in negotiating the text that the two mechanisms should be complementary, not competing: Bodansky, *supra*, n.34, at p. 548.

44 Paragraph 12 further mandates that the conclusions and any recommendations of the Committee must be sent to the Party or Parties concerned for consideration, and that an opportunity to comment thereon must be provided. Written comments by the Party or Parties concerned are then to be forwarded to the Conference of the Parties, along with the Committee's conclusions and any recommendations.

45 Protocol, Article 18. Koskienniemi has raised the interesting and complex issue of the effect of non-compliance procedures upon traditional rules of state responsibility in terms of the wrongdoing State's traditional defences to responsibility: see *supra*, n.2.

46 Thus, at best, such provision plays a largely symbolic role as a deterrent: see Note by the interim secretariat, *supra*, n.13, at para. 13.

14 is invoked, but in the event this is not the approach of paragraph 4 of the terms of reference of the MCP which stresses that the process is both separate from and without prejudice to the provisions of Article 14 FCCC. Whilst this addresses the procedural hierarchy of the Article 13 and 14 processes, it may not wholly cover the substantive interaction of disputes arising under Article 13 and Article 14 procedures. For example, the "without prejudice" argument might be difficult to maintain where non-conforming behaviour has been condoned under an Article 13 mechanism, but an Article 14 dispute nonetheless arises in connection with that act or omission. Though it is beyond the scope of this paper fully to explore the issue, condonation of behaviour in technical breach of the treaty could give rise to acquiescence and estoppel arguments being maintained against the complaining State.

NCP under the 1997 Kyoto Protocol⁴⁷

The application of the Article 13 MCP to the Protocol is an issue left undetermined by the Protocol itself. Article 16 of the latter provides that the Conference of the Parties serving as a meeting of the Parties to the Protocol shall "as soon as practicable" consider such application, with or without modification.⁴⁸ If the Article 13 MCP were so extended, the Protocol expressly provides that such procedure would operate without prejudice to the NCP under the Protocol (which in turn is without prejudice to the dispute settlement provisions of Article 14 FCCC). What is clear is the determination to distinguish a specific non-compliance procedure under the Protocol from both the dispute settlement provisions of Article 14 of the Convention /Protocol and the MCP of Article 13 (if extended to the Protocol).⁴⁹

It is Article 18 of the Protocol which expressly refers to non-compliance in the following terms:

The Conference of the Parties serving as the meeting of the Parties to this Protocol shall, at its first session, approve appropriate and effective procedures and mechanisms to determine and to address cases of non-compliance with the provisions of this Protocol, including through the development of an indicative list of consequences, taking into account the cause, type, degree and frequency of non-compliance. Any procedures and mechanisms under the Article entailing binding consequences shall be adopted by means of an amendment to this Protocol.⁵⁰

Due to the politically sensitive nature of non-compliance procedures, in particular binding consequences flowing from a determination of non-compliance, it is not surprising that decision on any such characteristics will require the stringent treaty amendment procedures of the Protocol to be followed.⁵¹ Establishing this significant procedural hurdle to the adoption of binding consequences for

⁴⁷ For general analysis of the Protocol, see P. Davies, "Global Warming and the Kyoto Protocol" (1998) *International and Comparative Law Quarterly* 446.

⁴⁸ Protocol, Article 16. In this connection it should be noted that paragraph 14 of the draft terms of reference of the MCP clearly envisages the evolution of those terms over time in the light of experience, decisions of the COP, and of any amendment to the Convention. The terms of reference further provide that they may be amended by the COP (para. 14).

⁴⁹ Article 16 of the Protocol provides that "[a]ny multilateral consultative process that may be applied to the Protocol shall operate without prejudice to the procedures and mechanisms established in accordance with Article 18". Article 18 of the Protocol refers to non-compliance.

⁵⁰ Article 20 sets forth the formal requirements for amendment to the Protocol at an ordinary session of the COP. Amendments may be proposed by any Party, require six months notice and, if not adopted by consensus, require a three-quarters majority of Parties present and voting. There is the further requirement for acceptance by three-fourths of the Parties to the Protocol for the amendment to become binding, and then only on those Parties having accepted it. Thus whilst it is not possible to opt-out of general non-compliance procedures once a Party to the Protocol and such procedures have been agreed by the COP (unless of course any such procedures otherwise provide for opt-out), it is possible to remain outwith any binding consequences of non-compliance through non-acceptance of such in a treaty amendment.

⁵¹ It is not intended to suggest that the FCCC is anomalous in this respect, since many treaties take a rigorous approach to amendment.

non-compliance is in part a reaction against the dynamic development of the Montreal Protocol NCP unfettered by such further requirement of treaty amendment but subject rather to the decision-making rules of the COP.⁵² There is a clear reluctance to provide a "blank cheque" for binding non-compliance consequences to the COP, even as the supreme body of the Convention.

The design of a future NCP under the Protocol will entail both institutional and functional aspects: what is the procedure designed to achieve, and which organ(s) will be responsible for it? A special body will need to be established, most likely a standing committee of legal, economic and technical experts (or generalists with access to a roster of experts). Moreover, the relationship between this body and the existing Convention bodies will require careful definition. Experience has shown that the development of a NCP can take some time. How then will the NCP be operationalised pending the entry into force of the Protocol? This is particularly problematic given that the key features of the flexibility mechanisms under the Protocol have also yet to be determined.

In fact, these matters have already been raised in the Subsidiary Body for Scientific and Technological Advice (SBSTA) and the Subsidiary Body for Implementation (SBI) which have met since the adoption of the Kyoto Protocol (Bonn, June 1998). Included on the agenda of each body was consideration of suggested elements for a work programme to operationalise the mechanisms under the Kyoto Protocol,⁵³ in particular joint implementation, the clean development mechanism, and emissions trading.⁵⁴ Compliance is identified as one of the outstanding issues under each of these mechanisms, which will be addressed in turn.

Mechanisms under the Kyoto Protocol

(i) Joint Implementation by Annex I Parties

Under Article 6 of the Protocol, Annex I countries may acquire "emission reduction permits" resulting from projects with other Annex I Parties aimed at reducing emissions or enhancing natural carbon sinks.⁵⁵ Such joint implementation is, however, expressly stated to be supplemental to

52 Article 11 of the Montreal Protocol empowers the meeting of the Parties, inter alia, "to consider and approve the procedures and institutional mechanisms specified in Article 8 [Non-compliance]".

53 A lengthy list is appended as Annex II to the SBSTA Report of its Eighth Session in Bonn; however, the list is not negotiated. It is based on submissions by the G77 and China, suggestions of other Parties, by Canada et al. (including Australia, Iceland, Japan, New Zealand, Norway, the Russian Federation, Ukraine and the USA) and by the UK on behalf of the EC and its member states.

54 See the Report of the Subsidiary Body for Implementation on its Eighth Session, Bonn, 2-12 June 1998, FCCC/SBI/1998/6, 6 August 1998 and the Report of the Subsidiary Body for Scientific and Technological Advice on its Eighth Session, Bonn, 2-12 June 1998, FCCC/SBSTA/1998/6, 12 August 1998. The meetings of SBSTA and the SBI on the Kyoto Mechanisms were held jointly, as reflected in the Draft conclusions by the Chairmen of both bodies on the suggested elements for a work programme on Mechanisms of the Kyoto Mechanisms, FCCC/SB/1998/CRP.2, 12 June 1998.

55 Article 6 of the Protocol provides:

1. For the purpose of meeting its commitments under Article 3, any Party included in Annex I may transfer to, or acquire from, any other such Party emission reduction units resulting from projects aimed at reducing anthropogenic emissions by sources or enhancing anthropogenic removals by sinks of greenhouse gases in any sector of the economy, provided that:

(a) Any such project has the approval of the Parties involved;

(b) Any such project provides a reduction in emissions by sources, or an enhancement of removals by sinks, that is additional to any that would otherwise occur;

(c) It does not acquire any emission reduction units if it is not in compliance with its obligations under Articles 5 and 7;

domestic action to curb greenhouse gas emissions; thus it is not possible for Annex I Parties wholly to meet their Article 3 reduction commitments via this route. Nor is it possible to buy up emission reduction units to meet Article 3 commitments where a question of implementation has arisen in the course of the expert review of annual inventories.⁵⁶ Key elements of JI remain to be addressed by the first meeting of the COP serving as a meeting of the Parties to the Protocol, most notably guidelines on implementation, including verification and reporting procedures. The extent to which emission reduction units may be utilised as "supplemental to domestic actions" also requires clarification, given concerns that the flexibility of Article 6 may be used to avoid meeting Article 3 commitments through domestic measures. Not least this raises competition concerns, with the "burden on business" perceived to be less where an Annex I Party relies extensively on emission reduction units in meeting Article 3 commitments.

Where joint implementation is pursued, Article 4 provides that a failure to achieve joint emission reduction targets does not absolve Parties from the obligation to meet their own emission reduction targets which are obliged to be set forth in the agreement.⁵⁷ This simplifies the application of a NCP to the joint implementation process where there has been a failure to achieve targets, and provides additional incentive for reaching the targets set forth in the joint implementation agreement. Whilst implementation may be joint, responsibility for non-compliance with targets is still that of the individual State.

The verification and reporting criteria which are to be established at MOP1 (or as soon as practicable thereafter) could give rise to non-compliance thresholds, as could the extent to which JI is supplemental to domestic implementation measures. The additionality requirement of Article 6(1)(b) provides a further benchmark for the application of NCP.

(ii) The Clean Development Mechanism

Article 12 of the Protocol establishes the clean development mechanism (CDM), the purpose of which is "to assist Parties not included in Annex I in achieving sustainable development and in contributing to the ultimate objective of the Convention, and to assist Parties included in Annex I in achieving compliance with their quantified emission limitation and reduction commitments under Article 3." It will be recalled that, notwithstanding strong support from some Annex I Parties for a New Zealand proposal to make wealthier developing countries also subject to specific commitments,⁵⁸

(d) The acquisition of emission reduction units shall be supplemental to domestic actions for the purposes of meeting commitments under Article 3;

2. The Conference of the Parties serving as the meeting of the Parties to this Protocol may, at its first session or as soon as practicable thereafter, further elaborate guidelines for the implementation of this Article, including for verification and reporting.

3. A Party included in Annex I may authorize legal entities to participate, under its responsibility, in actions leading to the generation, transfer or acquisition under this Article of emission reduction units.

4. If a question of implementation by a Party included in Annex I of the requirements referred to in this paragraph is identified in accordance with the relevant provisions of Article 8, transfers and acquisitions of emission reduction units may continue to be made after the question has been identified, provided that any such units may not be used by a Party to meet its commitments under Article 3 until any issue of compliance is resolved.

⁵⁶ Protocol, Article 6(4).

⁵⁷ A similar provision applies to the "EC bubble", namely, that in the event of the failure by Member States acting jointly within the EC to meet their total combined level of emission reduction levels, then individual member States will remain responsible for the level of emissions notified in accordance with Article 4(2): see Article 4(6).

⁵⁸ Including Australia, Canada, Japan and the USA. See further P. Davies, *supra*, n.46.

the Protocol introduces no new commitments for developing States.⁵⁹ What Article 12 accomplishes is to provide a mechanism whereby joint implementation between Annex I and non-Annex I Parties may take place, with Annex I Parties implementing quantifiable emission reductions under Article 3 of the Protocol while non-Annex I Parties implement the obligations set forth in the Convention.⁶⁰ Private and/or public entities may participate in projects which are subject to certification and verification in order for emission reductions to be "claimed".⁶¹ The mechanism is to be supervised by an executive board.⁶² The executive board and "operating entities" under Article 6 could perform a compliance function in respect of the CDM, in which case the issue of whether multiple compliance mechanisms will evolve under the Protocol, perhaps linked with specific flexibility mechanisms, will need to be addressed by the COP/MOP. As under Article 6, the establishment of auditing and verification criteria will also give rise to the need also to establish non-compliance parameters.

As with JI between Annex I Parties, concerns that Article 3 commitments would be met wholly through the CDM are addressed in Article 12(3)(b) which explicitly provides that certified emission reductions from such project activities may contribute to compliance with part of their Article 3 commitments (as determined by the COP).⁶³ A key concern for all three of the Kyoto mechanisms is to establish an appropriate level of reliance on these mechanisms, jointly and severally, in addition to domestic implementation. The setting of a precise level would constitute a yardstick against which compliance with the supplementarity requirement could be measured. Finally, as with JI, emission reductions deriving from CDM project activities must demonstrate that such reductions are additional to any that would occur in the absence of the certified project activity (Article 12(5)(c)), thus providing a further benchmark for the application of a NCP.

(iii) Emissions Trading

Article 3 of the Protocol envisages an emissions trading system which will establish a market amongst Annex I Parties in emission credits. Thus, for example, if an Annex B Party⁶⁴ discovered that it risked exceeding its quota, it would have the option of acquiring some or all of the unused quota of another Annex B Party, thus increasing its total allowable emissions under the Protocol. However, it is left to the Conference of the Parties to define "the relevant principles, modalities, rules and guidelines, in particular for verification, reporting and accountability for emissions trading."⁶⁵ Nor is any time scale for operationalising emissions trading stated in the Protocol, though it is certainly expected to be operational during the first commitment period (2008-2012). Any trading is expressed to be supplemental to domestic actions to meet reduction commitments;⁶⁶ limiting the operation of the

59 Article 10 of the Protocol reaffirms existing commitments under the Convention on the part of both Annex I and non-Annex I Parties. At the request of Argentina, the issue of "voluntary commitments by non-Annex I Parties" has been placed on the provisional agenda for COP4 in Buenos Aires and is expected to be the object of informal consultations: Provisional Agenda and Annotations, A Note by the Executive Secretary, FCCC/CP/1998/1, 28 August 1998, item 6, para. 105.

60 As Davies explains, "The CDM has a dual purpose in that it enables developing countries to operate projects which results in emissions reductions and thus to contribute to the objective of the convention, and also allows Annex I countries who finance such projects through the CDM to use emission reductions attributable to such projects to reduce their own emission totals." *Supra*, n.46, at p. 457. This dual purpose is set forth in Article 12(3).

61 Protocol, Article 12(5). Only projects in which Parties participate voluntarily, which produce quantifiable long-term benefits related to the mitigation of climate change, and result in emission reductions over and above what would occur without such a certified project, will qualify for certification under Article 12(5).

62 Protocol Article 12(4).

63 While emission reductions from jointly implemented projects in the period 2000-2008 may be used by Annex I Parties in meeting their own emissions reduction target under the Protocol, projects from the pilot phase which is due to conclude no later than the end of 1999 will not be eligible: see further Davies, *supra*, n.46.

64 The Protocol provides that it is Parties listed in Annex B thereto which may participate in emissions trading for the purposes of meeting their Article 3 commitments (Article 17).

65 Protocol Article 17.

66 *Ibid.*

trading to developed States further meets the concern expressed by developing States that such States would meet their quotas without implementing necessary domestic measures to reduce emissions simply through purchasing quota.

Conclusion

As has been seen, a great deal has been left for determination by first meeting of the Conference of the Parties serving as the meeting of the Parties to the Protocol (MOP1),⁶⁷ including the non-compliance procedures and mechanisms referred to in Article 18. Moreover, as has already been observed, no binding consequences arising out of non-compliance may be imposed under the Protocol without further amendment of that instrument in accordance with the procedures set forth in Article 20 thereof. It is a tall order to establish the NCP at the first MOP, particularly given that so much of the detail of the Kyoto mechanisms remains to be fleshed out.⁶⁸ In practice it is SBSTA and the SBI which have been charged with the preparatory work to allow the Conference of the Parties meeting as the Parties to the Protocol to discharge its functions,⁶⁹ including an Article 18 NCP. Further guidance from the Parties on the modalities and schedule for operationalising the flexibility mechanisms will come from COP4.⁷⁰

There are a number of factors which should be considered in establishing an NCP under the Kyoto Protocol. First is the general guiding principles - that any NCP agreed should be simple, facilitative, cooperative, non-judicial, non-confrontational, timely and transparent. In fact, these are many of the characteristics of the Article 13 MCP and are broadly consistent with the essential characteristics of a NCP identified by the Working Group charged with establishing the Montreal Protocol NCP.⁷¹ As for the functions of an NCP, these could include: (i) data-collection (e.g. national reports); (ii) review of data; (iii) investigation (e.g. further information requested, site visit); (iv) recommendation(s) (to indicate the end of the review process, with full or partial compliance indicated); and (v) further measures (facilitative or sanctions).⁷² A new body (or bodies) would need to be created, along the lines of the Committee under the Article 13 MCP or the Committee on Implementation under the Montreal Protocol. Membership issues (e.g. size, duration of tenure, geographic distribution, personal or government representation)⁷³ could prove contentious, as has been the case for the composition of the Article 13 MCP Committee. For example, should the body reflect the traditional UN approach of equitable geographic distribution, or should other principles govern, e.g. weighting in favour of Parties undertaking specific timetables and commitments under the Protocol? Who should take actual decisions, particularly in respect of binding consequences of non-

67 Entry into force requirements are set forth in Article 24 of the Protocol.

68 Note, however, that the first MOP will take place only after the Protocol enters into force, the provisions relating to which are contained in Article 24. Fifty-five Parties to the Convention must become Parties to the Protocol, including Annex I Parties accounting for to 55% of total CO₂ emissions for 1990, in order for the Protocol to enter into force ninety days from the 55th ratification, acceptance, approval or accession, satisfying such condition. A relatively high threshold is required to ensure the effectiveness of the Protocol and of steps taken in complying with the specific targets and timetables embodied therein.

69 See Decision 1/CP.3, para.6, *ibid.*; and the Note by the Chairmen of SBSTA and SBI on matters related thereto, FCCC/CP.1998/3, 10 September 1998. Annex I thereof proposes that procedures and mechanisms relating to non-compliance under Article 18 will be allocated to the SBI. It will be recalled that Article 15 of the Protocol establishes the SBI and SBSTA as such bodies for the Protocol, with the provisions of Articles 9 and 10 FCCC applying, *mutatis mutandis*, to the Protocol.

70 Matters relating to the Kyoto Protocol, in particular the flexibility mechanisms (JI, CDM and emissions trading) are on the agenda for COP4 where the task of operationalising the flexibility mechanisms will continue: Provisional Agenda and Annotations, *ibid.*, item 5, at paras. 96-98.

71 Namely, to avoid complexity, to be non-confrontational, transparent, and with decision-making by the COP, not a subsidiary body: Szell, *supra*, n.4, at p. 99.

72 W. Lang, "Compliance Control in International Environmental Law: Institutional Necessities" (1996) 56:3 *ZaöRV* 685, at pp. 687-688.

73 Membership issues are highly important since these influence the legitimacy and effectiveness enjoyed by a committee and any recommendations made by it.

compliance? Should this be the COP (the procedure followed by the Montreal Protocol and under the Second Sulphur Protocol)? One benefit of such division of function between an NCP body and the COP is that this encourages the NCP to be less confrontational and will facilitate cooperation between the NCP body and the "defaulting" State.

In terms of the measures taken by a NCP body in the event of non-compliance, studies of the most fully operational NCP, the Montreal Protocol NCP, have shown that a combination of facilitation and sanction (assistance and coercion) is the most effective in ensuring compliance with treaty obligations.⁷⁴ Facilitative measures might include interpretation of ambiguous provisions and financial assistance to meet obligations arising under the Protocol. However, since the obligations undertaken are by Annex I Parties, lack of financial and technical resources is unlikely to be a convincing explanation for non-compliance.

A typical coercive mechanism is to reduce or withhold the benefits of treaty participation, including access to GEF funding⁷⁵ or to the proposed Multilateral Carbon Fund, if established, but a sanction of little relevance to non-complying Annex I Parties. This is part of the application of a sanction of suspending rights and privileges enjoyed under the Protocol, which could range from limiting permitted reliance on emission reduction units under JI and the CDM to reducing or denying access to an international emissions trading system. There are few examples of multilateral trade sanctions being applied for non-compliance,⁷⁶ a rare exception being the NCP agreed by the International Commission for the Conservation of Atlantic Tuna (ICCAT) in 1996.⁷⁷ The compatibility of any measures adopted with other treaty obligations, including GATT/WTO obligations, will require further, careful analysis. Some fisheries arrangements provide for a reduction in total allowable catch for a subsequent fishing period, where the total allowable catch for the existing management period has been exceeded. An analogous approach under the Protocol would be increasing reduction commitments in a second commitment period; however, without the establishment of such a period such a mechanism would be inoperative. Since the MOP is to institute consideration of Annex B at least seven years before 2012 - i.e. 2005, this might be the stage at which to link consideration of future commitments with analysis of "significant progress"; however, any

74 See, for example, Victor, *supra*, n.17, at p. 139.

75 On the experience of the Russian Federation under the Montreal Protocol, see J. Werksman, "Compliance and Transition: Russia's Non-Compliance Tests the Ozone Regime" (1996) 56:3 *ZaöRV* 750 (who raises, inter alia, the interesting question whether restricting Russia's trade in CFCs amounts to "multilateral enforcement of retorsion against a defaulting state").

76 As Werksman discusses, *ibid.*, the limited restriction on Russian trade in CFCs agreed at the seventh Meeting of the Parties falls within this category, though the compatibility of such restriction with the GATT/WTO did not arise with the Russian Federation not yet a member. In this instance, the Russian Federation was limited to trade with other members of the CIS, and to restricting further export to Article 5.1 (developing) and other countries. For the text of the decision, see (1996) 26/2/3 *Environmental Policy and Law* 120-121.

77 See C. Carr, "Recent Developments in Compliance and Enforcement for International Fisheries" (1997) 24:4 *Ecology Law Quarterly* 847, at pp. 857-860. The NCP for Contracting Parties has three steps: (i) explanation for non-compliance and indication of steps to remedy/prevent further non-compliance; (ii) where annual quota is exceeded, a reduction of the next year's TAC to match overfishing (quantifiable non-compliance with proportionate response); and (iii) where quota is exceeded for two consecutive management periods, the ICCAT Commission may further reduce quota and, as "an absolute last resort", recommend trade measures against the defaulting State. A similar mechanism was established in respect of non-Contracting Parties in 1994, including the possibility of prohibiting imports of bluefin tuna products from the defaulting, but non-Contracting, State. This made ICCAT "the first international fisheries organization to authorize the use of multilateral trade measures against non-contracting parties that compromise its conservation and management objectives": *ibid.*, at p. 857. Such a recommendation was made in 1996 in connection with Atlantic bluefin tuna and its products from Belize, Honduras and Panama: *ibid.*, at p. 858. Concerns about compatibility with GATT/WTO obligations were evidently raised: *ibid.*, at p. 858 n.55.

change in Annex B requires the amendment procedures of the Protocol to be complied with and the written consent of the Party concerned.⁷⁸

Article 18 specifically mandates the development of an indicative list of consequences of non-compliance with the provisions of the Protocol, "taking into account the cause, type, degree and frequency of non-compliance". It has been suggested that a NCP could be simplified and shortened through the prior classification of non-compliance consequences, automatic or discretionary, depending on the type, degree and frequency of non-compliance. This is closer to a coercive, sanction-based regime and is probably most suited to breach of quantifiable, non-derogable and fixed obligations. As already indicated, however, if binding consequences are stipulated, amendment of the Protocol is required.

In addition to considering the prior classification of non-compliance responses, there is the additional possibility of a listing of presumptively non-complying acts and/or omissions. Indeed, since Article 18 links the development of an indicative list of consequences with, *inter alia*, the type of non-compliance, it is difficult to see how some classification of non-complying acts may be avoided if Article 18 is to be fully implemented. There are two, potentially compatible, approaches to setting non-compliance triggers. The first, a "bottom-up" approach, might arise from monitoring and reporting requirement. For example, Article 3(3) requires States to submit data regarding GHG sources and sinks, which are reviewed by expert review teams pursuant to Articles 7 and 8. Such analysis of national reports under Articles 7 and 8 could be linked with the Article 18 NCP in a "bottom-up" approach to NCP. A "top-down" approach is the prior classification of certain acts and omissions as *prima facie* instances of non-compliance. This might include various temporal triggers for assessing compliance with the provisions of the Protocol, *viz.* 2005 (has demonstrable progress in implementing commitments been exhibited as required under Article 3(2)?), 2007 (has a national system for reductions been implemented as mandated by Article 5(1)?) and 2008-2012 (have emission reductions been met within the commitment period as stipulated by Article 3(1)?)

An additional NCP design issue is to determine the entities entitled to invoke the NCP. There are at least five possibilities:

- (i) One Party against another Party (or groups of Parties);
- (ii) a Party in respect of its own conduct;
- (iii) the Secretariat;
- (iv) other Convention bodies, including the COP;
- (v) States and/or non-State entities (NGOs for example) outwith the Convention regime (or limited to those entities with observer status).

This goes beyond any existing NCP; the original Montreal Protocol trigger utilised only (i), but has evolved to incorporate (ii) and (iii). The proposed Article 13 MCP procedure would permit (i), (ii) and (iv)(the COP). However there would no doubt be considerable objection to widening participation in the NCP, particularly if binding consequences of non-compliance are agreed.⁷⁹

There are thus a large number of design issues to be addressed in implementing Article 18 of the Protocol, many of which are linked to the details of the flexibility mechanisms yet to be

⁷⁸ It may be necessary to consider in the design of the NCP whether coercive measures ought to be considered according to their impact on the specific non-complying State to avoid the inequitable application of such measures as between States.

⁷⁹ A role for NGOs and for individuals has also been discussed under the Montreal Protocol, was rejected as unnecessary at least in the early stages of the development of the process, in part due to concerns regarding the non-confrontational character of the process and in part due to a perception that the concerns of such entities could be channelled through other bodies with standing in the NCP.

established. A key concern in the forthcoming negotiations, as the flexibility mechanisms are fleshed out, will be to ensure that the substantive commitments under the Protocol do not lead to irresistible pressures to weaken the non-compliance mechanism under Article 18. Absent such a mechanism there is no realistic alternative for ensuring the effective implementation of the Protocol.