

This document presents the conclusions of the multi-disciplinary research carried out at the CERIC, in which IDDRI took part. The results of this project were presented during the workshop on "The effectiveness of the Kyoto Protocol on Greenhouse Gases

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¹ | S. Kerr, "Additional Compliance Issues Arising from Trading", in *Global Emissions Trading. Key Issues for Industrialized Countries*, S. Kerr (dir.), Edward Edgar Publishing, 2001, from p. 85; C. Boemare, P. Quirion "Implementing greenhouse gas trading in Europe: lessons from economic literature and international experiences", *Ecological Economics*, 43/2002, from p. 213.

² | Decision 24/CP.7, Procedures and mechanisms relating

COMPLIANCE WITH THE KYOTO PROTOCOL ON CLIMATE CHANGE:

Challenges for the International Monitoring of Compliance

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Ranking among the basic challenges for the implementation of international environmental law in general and the Kyoto Protocol in particular are the monitoring of compliance by signatory parties and sanctions in case of non-compliance. Contrary to other international environmental protection conventions, the Kyoto Protocol is based on economic tools governed by the "invisible hand" of the market more than by official authority. Nevertheless, the efficient monitoring and sanctioning of breaches are vital conditions for its smooth running and are even particularly justified for reasons of economic competition¹.

The Protocol's negotiators had this in mind from the outset. But during the Kyoto conference in 1997, no agreement was reached as to the actual content of a non-compliance procedure. This thorny issue was postponed until the first Meeting of the Parties (COP/MOP). In 1998 a working group was set up, which succeeded after several meetings in drawing up a non-compliance procedure. Particularly controversial, this procedure was part of a package deal represented by the Bonn-Marrakech agreements, adopted by the Conference of the Par-

ties to the Framework Convention on Climate Change (COP) in 2001². In December 2005 in Montreal, the first COP/MOP did not reopen the discussion on its content and adopted *mutatis mutandis* the text the COP³ had proposed. At a time when compliance mechanisms – in other words monitoring the fulfillment of commitments and sanctions for non-compliance – are being set up, three main questions arise. What is the relationship between these mechanisms and the more classical mechanisms for settling international disputes? How are they original, and particularly are they judicial or not? And finally, what is the scope of the procedure adopted, binding or not binding?

Compliance, a substitute for classical dispute settlement mechanisms?

Almost all international environmental protection conventions include a classical dispute settlement clause, holding that any dispute relating to the interpretation and application of the convention shall be settled by diplomatic

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to compliance under the Kyoto Protocol, FCCC/CP/2001/13/Add.3, p. 68.

³ | Decision 27/CMP.1, Procedures and mechanisms relating to compliance under the Kyoto Protocol, FCCC/KP/CMP/2005/L.1.

⁴ | *Southern Bluefin Tuna Case, Australia and New Zealand v. Japan, Award on Jurisdiction and Admissibility*, 4 August 2000, [http://www.intfish.net/cases/fisheries/sbt2/index.html], consulted on 30 March 2007.

⁵ | *Dispute concerning Access to Information under article 9 of the OSPAR Convention, Irl. v. United Kingdom, Final Award*, 2 July 2003, [http://www.pca-cpa.org/PDF/OSPAR%20Award.pdf], consulted on 30 March 2007.

⁶ | *Dispute concerning the clearance of accounts between the Kingdom of the Netherlands and the French Republic under the Protocol of 25 September 1991 to the Convention on the protection of the Rhine against chloride of 3 December 1976, Netherlands/France, arbitration award of 12 March 2004*, [www.pca-cpa.org/ENGLISH/RPC/#Netherlands/France], consulted on 30 March 2007.

⁷ | Art. 19 of the Protocol.

⁸ | L.-A. Sicilianos, « Classification des obligations et dimensions multilatérales de la responsabilité internationale », in *Obligations multilatérales, droit impératif et responsabilité internationale des États*, P.-M. Dupuy (ed.), Pedone, Paris, 2003, p. 169.

means or, should this fail, by (generally optional) recourse to international jurisdiction, an *ad hoc* court of arbitration or the International Court of Justice. Although for many years such provisions were not availed of, they have recently resulted in three arbitration awards: in the *Bluefin Tuna* case between Australia, New Zealand and Japan⁴, in the *MOX Plant* case between Ireland and the United Kingdom⁵, and in the *Clearance of Accounts* case between the Netherlands and France⁶. In all three cases, the establishment of a court of arbitration was requested unilaterally, without the need for the agreement of the conflicting parties.

The Kyoto Protocol contains no specific dispute settlement clause, but stipulates that “*The provisions of Article 14 of the Convention on settlement of disputes shall apply mutatis mutandis to this Protocol*”⁷. However, article 14§1 of the Convention states that the parties shall seek to settle their disputes by diplomatic means. In case of failure, article 14§2 contains an optional judicial settlement clause: parties may agree in advance to submit disputes to the International Court of Justice or to a court of arbitration. Its activation in response to a breach of the Convention is theoretically possible, especially given that both the concept of a “*dispute (...) concerning the interpretation or application of the Convention*” and the notion of injured State should be understood in a broad sense. Made up of obligations and tools for reducing emissions, the core of the Protocol probably enters the category of *erga omnes partes* obligations (in relation to all parties to the treaty). For obligations of this kind, an “*universalization of accountability relationships*”⁸ –making it possible to consider that, even in the absence of any identified damage, a State is injured simply by the fact of another State violating an international environmental protection convention to which they are both parties – should be accepted.

In practice though, because it is optional, this clause is likely to have little effect. Indeed, the clause met with almost no success: of the 189 parties, only the Solomon Islands have accepted the mandatory arbitration of article 14§2. This rejection by States is revealing: such clauses are unsuited to the settlement of disputes arising from the interpretation or application of multilateral conventions adopted for the protection of a “*collective interest*”⁹. Indeed, fearing they may become a target in turn, States are reluctant to use them “*simply*” to protect a collective interest. Moreover, the significant number of parties makes the traditionally mutual and decentralized monitoring of compliance with international law a difficult task.

This observation goes far beyond the field of climate change and can be extended to all international environmental protection conventions. It has led to a move to find alternative ways of settling disputes with an essentially preventive vocation. First, monitoring is no longer carried out on a case-by-case basis, but continuously. Next, it is no longer bilateral and reciprocal, but multilateral and centralized, placed in the hands of conventional bodies, as is the response to non-compliance, which includes assistance and incentives in addition to actual sanctions (carrots and sticks). Collective measures will be more readily adopted, better tolerated and in theory less discretionary. Although the obligations are “*hard*” ones, monitoring procedures are implemented with flexibility, with a “*soft enforcement*”¹⁰ approach. The example of this is the non-compliance procedure drawn up in 1992 within the framework of the Montreal Protocol on Substances that Deplete the Ozone Layer, a procedure that has already been taken up and adapted by a dozen other environmental conventions.

The Kyoto Protocol has given rise to the most comprehensive non-compliance procedure to date. The importance of environmental issues and the specificity of the Protocol, which uses economic tools, explain the step taken and its degree of refinement¹¹.

Innovative mechanisms

The aim of the procedure is to “*facilitate, promote and enforce compliance with the commitments under the Protocol*”. This therefore implies above all preventing breaches by identifying difficulties as early as possible, rather than settling disputes. The potential sanctions are essentially intended to be dissuasive; they will only be used as a last resort.

At the institutional level, the procedure rests with a committee which monitors compliance with the Protocol’s provisions. This Compliance Committee operates within the framework of a plenary, a bureau and two branches, the “*facilitative branch*” and the “*enforcement branch*”. The Committee is one of the most powerful and independent committees of its kind established by an environmental convention¹². Made up of 20 members elected during the COP/MOP in Montreal, it has been operational since March 2006. The members, who are elected for four years, sit “*in their personal capacity*”. They are of recognized competence in the field of climate change and in “*relevant fields, such as the scientific, technical, socio-economic and legal fields*”. Furthermore, members

of the enforcement branch must have experience in the legal field.

The functions of the plenary are mostly administrative and budgetary. It is the branches that deal with cases of non-compliance, and the bureau that submits implementation issues to the competent branch. The procedure can be set in motion by the Secretariat, based on the reports of Experts Review Teams that inspect the national reports the parties must submit. Here, the secretariat has its hands tied: it has less authority than the secretariat of the Montreal Protocol on substances that deplete the ozone layer. The procedure can also be launched by “*any party with respect to itself*”. This possibility is also recognized under the Montreal Protocol for the ozone layer. From experience, it is in fact generally the party concerned that requests the launch of the procedure itself: reporting its difficulties, it requests assistance from the community of parties. The third possibility is that the procedure can be launched by “*any Party with respect to another Party, supported by corroborating information*”. In the case of a breach, States thus have the opportunity to assert a soft legal interest, in other words their authority to act as a representative of the community of parties to protect the common interest¹³. This possibility, although little used in other environmental conventions that have tried out procedures of this kind, could however be used here, in view of the economic consequences of the Protocol.

The role of the multidisciplinary facilitative branch is to provide technical and financial advice and assistance to States experiencing difficulty in meeting their commitments. In order to do so, it must consider the “*principle of common but differentiated responsibilities and respective capabilities*” of States. This approach is above all educational. The branch can facilitate the provision of assistance outside the conventional sphere; it can also turn to the Global Environment Facility (GEF) and the different conventional funds.

The enforcement branch has a different purpose. Its approach is more intrusive. Reactions to non-compliance range from incentives and support to States in breach to sanctions. This gradation exists in other non-compliance procedures. But the structure of the Committee is wholly original: the existence of two branches reflects the duality of a procedure that is both preventive and reactive. The enforcement branch is in fact responsible for establishing whether or not the parties comply with their assigned commitments to limiting and reducing emissions, with provisions concerning methodology and communicating information

(inventories, reports), and eligibility criteria for flexibility mechanisms¹⁴. In the case of a disagreement between a party and an expert review team under article 8, the Branch can also “*apply adjustments to inventories*” (art. 5§2) or “*a correction to the compilation and accounting database for the accounting of assigned amounts*” (art. 7§4).

Among the “*consequences*” when non-compliance is established, the enforcement branch can make a declaration of non-compliance, which constitutes an initial sanction that works through the reputation effect (name and shame). It can also ask the party concerned to present a plan analyzing the causes of non-compliance and indicating the measures and agenda for correcting this situation. The branch can also suspend eligibility for flexibility mechanisms if a party does not meet the criteria set or if its emissions exceed the amounts assigned. In this case, the amounts assigned for the following period will be reduced by 1.3 times the excess amount. The sanctions can therefore be considerable. Few international conventions have gone this far in the definition of a binding regime to react to breaches. Such measures are possible because the Protocol uses economic tools. However, though very elaborate, the system is not totally fail-safe. A State experiencing great difficulty could choose to override it. Of course, it would be excluded from market mechanisms and “*banished*” from the community of parties, but it could on the other hand accumulate environmental debts until they became irrecoverable¹⁵. Everything will depend in the end on the attractiveness of market mechanisms. The more attractive they are the more States will fear exclusion and the greater the pressure they will accept from the private sector to avoid or reduce the duration of such exclusion. Furthermore, the uncertainty surrounding the second commitment period (post-2012) is undermining motivation somewhat. Finally, as national objectives are negotiated by States, a party could always renegotiate its reduction objectives for the second period, integrating the weight of potential penalties.

Has the Compliance Committee been given jurisdictional competence, thus creating – without acknowledging it – a new international tribunal? This is a tricky question given how difficult it is to systematize the notion of international court¹⁶. But the procedure followed, at least before the enforcement branch, is undeniably hybrid. It goes beyond a classical diplomatic procedure of the conciliatory or even mediatory kind. The enforcement branch will be able to make a ruling on *disputes*, even if this is not its main attribution. It will make

⁹ | Expression found in article 48 (invocation of responsibility by a State other than an injured State) of the International Law Commission’s Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001).

¹⁰ | O. Yoshida, “Soft Enforcement of Treaties: The Montreal Protocol’s Non-compliance Procedure and the Functions of Internal International Institutions”, *Colo. J. Int’l Envtl. L. & Pol’y*, 1999, pp. 95-141; M. Koskenniemi, “Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol”, *YIEL*, 1992, p. 131.

¹¹ | J. Werksman, “Compliance and the Kyoto Protocol: Building a Backbone into a ‘Flexible’ Regime”, *YIEL*, 1998, vol. 9, p. 65.

¹² | J. Voïnov Kohler, *Le mécanisme de contrôle du respect du Protocole de Kyoto sur les changements climatiques : entre diplomatie et droit*, Doctoral thesis in Law, University of Geneva, 2004, p. 139.

¹³ | L. Boisson de Chazournes, « La mise en œuvre du droit international dans le domaine de la protection de l’environnement : enjeux et défis », *op. cit.*, p. 66.

¹⁴ | Three mechanisms aim at facilitating the reduction of greenhouse gases and associated costs: the Clean Development Mechanism (CDM), Joint Implementation (JI) and the emissions trading system.

a decision *based on law* and not on appropriateness considerations (unlike the facilitative branch). This decision will be *mandatory* and opposable to the concerned State, even if a form of appeal for irregular procedures before the COP/MOP is provided for. These are three elements of the definition of what is an international jurisdiction, to which could be added the fact that the members elected by the COP/MOP act in their personal capacity and have legal expertise, the fact that the procedure considers adversary proceeding and the rights of the defendant, the form of decisions that reminds of the International Court of Justice's, and the public nature of decisions etc.

Stimulating as it is, this issue is of entirely theoretical interest. On the other hand, examining the scope and potential impacts of the non-compliance procedure takes on a highly practical interest.

What are the scope and the potential impacts of the Protocol's compliance mechanisms?

As the mechanisms were defined in the Bonn-Marrakech agreements, the discussion in Montreal focused not on their content, but on the thorny issue of their scope and potential impact. Article 18 of the Protocol stated that the COP/MOP “*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 this Article entailing binding consequences shall be adopted by means of an amendment to this Protocol*”¹⁵. Visibly hoping to introduce an exemption (opt out) clause¹⁷, Saudi Arabia made a proposal along these lines that was not accepted. The European Union, widely supported, highlighted the need to make the system rapidly operational and proposed a two-phase approach: the adoption of compliance mechanisms by means of a COP/MOP decision, then the launch of a process that could eventually lead to an amendment of the Protocol¹⁸. The COP/MOP decision is in this spirit. It adopts the procedure while launching negotiations on this point, in order to enable the third COP/MOP to reach a decision.

One of the arguments against the amendment of the Protocol is based on article 20 which stipulates that an amendment must be

accepted by a Party in order to enter into force as far as it is concerned. Parties thus keep a right of veto, not at the time the amendment is adopted by the COP/MOP, which does not require unanimity, but at the time of its ratification. Indeed, these procedures are in essence long and uncertain, all the more that the adoption of such an amendment is far from agreed upon by the parties. The risk would therefore be creating two categories of parties: those bound by the amendment, for which the procedures would entail *binding consequences*, and those that would not be bound by the amendment, theoretically shielded from such consequences. During the negotiation of the Bonn-Marrakech agreements, the European Union attempted to make the right to participate in the Protocol's flexibility mechanisms depend on a definite acceptance to be bound by the Protocol's provisions on the non-compliance procedure. This proposal was not accepted.

While awaiting a hypothetical decision by the third COP/MOP, the situation is unclear. How can the repressive part of the compliance procedure work if it does not bind the parties? Isn't the compliance mechanism in fact mandatory since a State's eligibility for flexibility mechanisms depends on its submission to the procedures applicable in the field of compliance monitoring and verification?

As long as the amendment is not adopted, the situation will remain confused and the parties which could find themselves in the hot seat would be able to benefit from this situation. The originality of the compliance procedure is that it allows considering sanctions. But unless the amendment is adopted, the “*facilitation*” aspect will considerably override the “*enforcement*” aspect.

The discussion on the scope and potential impacts of the non-compliance monitoring and verification procedure is part of the new negotiation package, which includes the post-2012 period and the allocation of greenhouse gas reduction objectives to emerging countries. Its outcome will probably depend on that of the whole of the negotiations. Ideally, the revision of the Protocol aimed at defining new reduction obligations for the second commitment period should ensure that compliance becomes a condition for participating in the Protocol. ■

¹⁵ | R. Guesnerie, *Kyoto et l'économie de l'effet de serre*, Rapport CAE #39, La Documentation Française, Paris, 2003, p. 72.

¹⁶ | L. Cavaré, « La notion de juridiction internationale », *AFDI*, 1956, pp. 502-503.

¹⁷ | Proposal by Saudi Arabia aimed at modifying the Kyoto Protocol, FCCP/KP/CMP/2005/2, 26 May 2005.

¹⁸ | *Adoption of procedures and mechanisms relating to compliance under the Kyoto Protocol, in terms of Article 18 of the Kyoto Protocol*, FCCC/KP/CMP/2005/MISC.1.