Compliance Control in International Environmental Law: Institutional Necessities

*Winfried Lang**

1. Introduction

During a recent workshop on "International Environmental Law Aiming at Sustainable Development" participants identified several factors that they believed make compliance and implementation measures particularly important for international environmental law[1]. Among these factors were the following: the pace, irreversibility and potential magnitude of environmental problems; lack of reciprocity as a tool for enforcing environmental agreements (as compared to trade agreements); failure to operationalize state liability and state responsibility in the environmental field; and the fact that compliance can be more precisely measured in this field than in others because of the ease of quantification. Little was said during that workshop on the institutional perspective except for the need to increase fact-finding and investigative measures as methods for strengthening compliance control. Some remarks were made on regional approaches to compliance and implementation; this would need further study in the light of the experience of regional human rights bodies that monitor violations of human rights standards.

Compliance control appears to be in need of strong, effective and efficient international institutions or mechanisms (these two notions are used

* Professor of International Law and International Relations at the University of Vienna, at present Ambassador of Austria in Belgium, to NATO and WEU, former Ambassador to GATT/WTO and UN in Geneva.

[1] Expert Group Workshop on International Environmental Law Aiming at Sustainable Development, Washington, 13–15 November 1995, Chairman's Summary (on file with the author).

interchangeably), because in each and every case of non-compliance the tension between sovereignty and interdependence, between political convenience and respect for legal obligations, is likely to arise[2]. Compliance control to be successful has to be based on the shared political will of all participants in a specific regime. Control takes place only to the extent that it is accepted by those to be controlled.

This paper will as a first step explore the institutional possibilities that are available for compliance control[3]. Then, three cases of existing or emerging control-systems will be analyzed. Finally, after comparing possibilities and real life situations, some preliminary conclusions will be drawn.

2. Institutional Possibilities

What types of international institutions are at the disposal of treaty-makers[4]?

---

[2] On compliance control in environmental regimes see in particular A. Handler Chayes/A. Chayes/R. Mitchell, Active Compliance Management in Environmental Treaties, in: W. Lang (ed.), Sustainable Development and International Law, London 1995, 75 – 89; P. Szell, The Development of Multilateral Mechanisms for Monitoring Compliance, ibid., 97 –109; see also K. Sachariew, Promoting Compliance with International Environmental Legal Standards: Reflections on Monitoring and Reporting Mechanisms, Yearbook of International Environmental Law 1991, 31– 52; J. H. Ausubel/D. G. Victor, Verification of International Environmental Agreements, Ann. Rev. Energy Environ. 17/1, 1992, 1– 43; D. Victor et al., Review Mechanisms in the Effective Implementation of International Environmental Agreements, Working Paper IIASA (International Institute of Applied Systems Analysis, Laxenburg – Austria) November 1994 and L. Boisson de Chazournes, La mise en oeuvre du droit international dans le domaine de la protection de l'environnement: enjeux et défis, Revue Générale de Droit International Public, janvier-avril 1995, 37 – 76, as well as W. Fischer, The Verification of International Conventions on Protection of the Environment and Common Resources, Berichte des Forschungszentrums Jülich 2495, and most recently A. Chayes/A. Handler Chayes, The New Sovereignty. Compliance with International Regulatory Agreements, Cambridge Mass. 1995; J. Cameron/J. Werksman/P. Roderick (eds.), Improving Compliance with International Environmental Law, London 1996, as well as E. Brown Weiss/H.J. Jacobson (eds.), Compliance with International Environmental Agreements, New York 1996.

[3] On the specifics of compliance control in the field of environment beyond institutional issues see R. Mitchell, Intentional Oil Pollution at Sea, Cambridge Mass. 1994, 297 – 344.

[4] As for the characteristics of institutionalized compliance control see also W. Lang, Compliance with Disarmament Obligations, ZaöRV 55 (1995), 69 – 88 and W. Lang, Verhinderung von Erfüllungsdefiziten im Völkerrecht: Beispiele aus Abrüstung und Umweltschutz, in: Für Staat und Recht, FS für H. Schambeck, Berlin 1994, 817 – 835.

– Bureaucratic/administrative bodies such as secretariats, which are composed of international civil servants, paying allegiance to the overall purpose of the respective organization, and without financial or other dependence on their home governments.

– Expert/scientific bodies, which meet periodically and are composed of highly qualified individuals who do not depend for their remuneration or appointment on their home government, although some exceptions and certain grey zones may be unavoidable.

– Judicial bodies come close to the previous category except for the fact that legal arguments dominate in their deliberations; nevertheless many of these arguments have to rely on expert/scientific insight. Such bodies may be of a permanent character or they may be called into action whenever the need arises (see WTO panels). Most of the members of these bodies have a legal background as lawyers or judges.

– Political bodies are composed of government representatives, who reflect official views. The smaller such bodies are (as opposed to so-called "open-ended" bodies), the less likely they are to transform themselves into a purely diplomatic negotiation exercise.

The above-mentioned types are "pure" models, which means that all kinds of mixtures may exist. These bodies usually do not work in isolation from each other; e.g. the political body deciding on sanctions or assistance measures relies on information collected by a secretariat and evaluated by a scientific committee. Furthermore, international institutions do not act in a vacuum: they need the financial support of governments for their very existence. In many instances they have to base their work on data furnished by the same governments they are supposed to control. More or less independent sources of information such as NGOs or media may be helpful especially in cases where governments try to cheat or to deliver no data at all. If environmental regimes have financial mechanisms which are supposed to facilitate the performance of developing countries or economies in transition, it is likely that compliance control bodies will use these mechanisms in order to apply a strategy of "carrots" and "sticks". Thus, compliance control is a complex process that involves several institutions and actions at various levels.

What functions have to be performed by international institutions in the context of compliance control[5]?

[5] Possible functions of compliance control systems in general were identified by E. Kornblum, Etude comparative de différents systèmes de rapports d'auto-évaluation, portant sur le respect, par les Etats, de leurs obligations internationales, Revue Internationale de la Croix Rouge, 77/812, mars-avril 1995, 159–160.

– Data-collecting function: This may be restricted to the simple registration of data submitted by governments but may also include the results of investigations undertaken by the international institution itself.

– Reviewing function: The control body reviews data and information submitted by governments on their performance and/or information obtained by other means. This review may range from the simple taking note of submissions to a thorough evaluation of their contents against the background of parameters fixed in the treaty or related instruments.

– Investigative functions: The control body does not satisfy itself with information received; it requests supplementary written information from the respective government; it may ask questions of the representatives of the government under scrutiny; it may even trigger "on-site inspections", which however, in most instances require the consent of the state to be inspected.

– Recommendatory function: The control body after summing up its conclusions issues recommendations directly or indirectly, publicly or in confidence to the government under scrutiny, if the latter's performance has not been in full conformity with its obligations. The degree of publicity given to these recommendations can be an element of pressure ("shaming them into compliance"). Recommendations may also be submitted by the expert/scientific body to the political body, especially as regards the consequences of poor compliance or non-compliance.

– Taking measures function: This function is necessary insofar as the relevant treaty entitles the control body or bodies to go beyond the mere monitoring and evaluating activity. Measures to be taken cover a broad spectrum of possibilities: Sanctions from within (e.g. suspension of rights and privileges of membership); sanctions from without (e.g. trade embargos for environmentally detrimental behaviour). Assistance measures or withholding of assistance may work, if the country under scrutiny does not have at its disposal the technical capacities, administrative skills and/or financial means to fulfill adequately its obligations; it may therefore be vulnerable vis-à-vis pressures exerted by the membership as a whole.

The above-mentioned functions need not be performed by one and the same institution. It could well be that the second, third and fourth tasks (review, investigation, recommendation) are accomplished by an expert/scientific body composed of highly qualified individuals who act independently of any governmental influence. But the fifth function, which may in some instances severely interfere with the sovereignty of the country concerned, is frequently reserved for a political body on which repre-

sentatives of all or a limited number of other governments are sitting and drawing conclusions in respect of other states' parties more or less poor performance ("peer review").

Against the background of these rather abstract types of institutions and functions three cases will be examined: ozone depletion, climate change and marine pollution. The first two cases are of a global dimension, whereas the third one has a regional scope[6].

3. Three Cases

The Montreal Protocol on Substances that Deplete the Ozone Layer (1987) is considered the most advanced system of compliance control in the environmental field. This system, which is only in the early phases of functioning, has – from an institutional perspective – some significant features[7].

Instead of a single body responsible for compliance control, it has a set of three organs which act in an interlocking way:

– The Secretariat (bureaucratic body) is not only in charge of receiving the relevant data from the Parties and incorporating them into highly sophisticated documents. The Secretariat is also entitled to trigger an *ad hoc* investigation if, during the performance of its routine duties, it concludes that a certain Party has deviated from its obligations.

– The Implementation Committee is composed of "Parties" and not of independent individuals. This fact may cause some doubts as to the impartiality and objectivity of this body. However, as the size of the body is small – its 10 Parties represent less than 10 percent of the membership – a relatively high degree of efficiency can be expected. This Committee performs not only the reviewing and investigatory function (with the possibility of on-site inspections if accepted by the Party to be inspected) but also the recommending function; it has to recommend to the

---

[6] As regards possible future compliance control systems see Doc. UNEP/CHW 3./Inf. 5 of 14 June 1995 (Monitoring Implementation of and Compliance with the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Other Wastes and Their Disposal).

[7] Among the growing literature on the compliance control system of the ozone regime see W. Lang, Compliance Control in Respect of the Montreal Protocol, ASIL Proceedings 1995, 206 – 210; and the contributions to the International Workshop on the Ozone Treaties and their Influence on the Building of International Environmental Regimes, Doc. UNEP/OzL. Pro 7/INF 1, of 6 December 1995.

main political organ, the Meeting of the Parties, whatever measures appear to be advisable in cases of non-compliance or poor compliance.

– The Meeting of the Parties, as the political body comprising the full membership of the Protocol, is entitled to take measures that range from sanctions to assistance: it may issue interim calls and/or recommendations; it may decide on giving or withholding assistance through the Multilateral Fund or the Global Environment Facility (GEF); it may suspend rights and privileges under the Protocol in the field of trade or transfer of technology.

It should be noted that this complex machinery of interlocking institutions and procedures was not contained in the original version of the Protocol, which only provided for some kind of "enabling clause" (Article 8) [8]. This clause served as the basis for later decisions by subsequent Meetings of the Parties which established a full-fledged system of control. Furthermore, it should be mentioned that the full functioning of this complex system did not start before 1995[9]. Only at this late stage did the Implementation Committee refuse to satisfy itself with conclusions concerning the fulfillment of duties on data reporting, although some states were still not in compliance with this minimum requirement. Mauritania was threatened with a cut-off of support from the Multilateral Fund if it did not confirm its eligibility for such support by submitting data to justify its qualification as a developing country. Countries in transition, in particular Russia, although complying with their reporting duties, had serious difficulties justifying their non-compliance with reduction commitments. Such non-compliance could also engender the loss of support from financial sources such as the Global Environment Facility (GEF).

In this context it should be noted that one of the positive features of the Montreal Protocol, namely its role as a "living organism", which implies a continuing strengthening of prohibitions, phase-outs etc., does not facilitate compliance control. As long as not all Parties have ratified the most recent amendment or acquiesced to the most recent adjustment – levels of required compliance thus being different – no clear picture of the general performance can be attained. From an overall perspective the system of the Montreal Protocol is considered consensual and non-confrontational. It reflects a kind of encouragement-based approach that has served as a model for other systems such as that on the reduction of sulfur emissions.

---

[8] For the original and revised versions of the Protocol see Handbook for the Montreal Protocol on Substances that Deplete the Ozone Layer, 3rd ed., August 1993.

[9] See the respective entry in the Yearbook of International Environmental Law 1995.

The Framework Convention on Climate Change (1992) has been considered a brain-child of the Montreal Protocol[10]. Despite some grain of truth in this statement, the differences between the two instruments are much too salient to allow for a simple comparative analysis. Whereas the Montreal Protocol is the second step in a "framework convention *cum* protocol" approach, the Climate Change Convention is only the first step in such a system. This means that compliance with the Montreal Protocol requires compliance with quantified targets (emissions, consumption, production) within certain time-limits. Such stringency is alien to the commitments contained in the Climate Convention. Thus, any mechanism of control under the latter instrument can only produce results that are much less concrete than those emerging from the control-system established under the Montreal Protocol. Furthermore, the Protocol is an instrument already functioning, whereas the Convention's system is only about to be established.

What are the institutional perspectives of this new system? They are certainly less concrete than those under the Montreal Protocol. Nevertheless, they should not be neglected as regards the potential for evolution in the future, especially because the Climate Convention follows two separate tracks, one which relates to collective implementation, and the other which covers individual compliance[11].

The so-called Subsidiary Body for Implementation (Article 10) differs in many respects from the Implementation Committee of the Montreal Protocol:

– It is not supposed to monitor the performance of individual countries, but to "assess the overall aggregated effect of the steps taken by the Parties" (collective implementation).

– It is an open-ended body, a fact which causes doubts concerning its efficiency. But, in this context, government representatives who are members of this body should be "experts on matters related to climate change". It has yet to be seen whether this will remain a dead letter.

– It does not have any investigative or recommendatory functions, but only "considers" information received and only "assists" the main organ, namely the Conference of the Parties. This relatively weak and vague lan-

[10] W. Lang, Is the Ozone Depletion Regime a Model for an Emerging Regime on Global Warming?, UCLA Journal of Environmental Law & Policy, 9/2, 1991.

[11] For the respective provisions see ILM 31 (1992), 849; for the most comprehensive commentary see D. Bodansky, The United Nations Convention on Climate Change: A Commentary, The Yale Journal of International Law, 18/2 (Summer 1993), 453 – 558.

guage corresponds to the very nature of this body which is not expected to examine the concrete behaviour of individual countries, but only to review the general impact of measures, taken by the collective membership, on the state of global climate.

As regards the control of individual compliance, the first Conference of the Parties (Berlin, 1995) fulfilled the mandate given to it by Article 13, namely to 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", by establishing a working group[12]. Article 13 allows for the establishment of an appropriate mechanism by a simple decision of the Conference of the Parties. The language of Article 13 suggests that such compliance control may only be triggered by one of the Parties, but not by the Secretariat (as in the Montreal Protocol). Furthermore, in the light of the negotiating history of the Convention two options are likely to be pursued in this context: either the establishment of a standing committee (see the Montreal Protocol) or the appeal to *ad hoc* panels (see GATT/WTO)[13]. In addition, as the Convention does not contain concrete targets and time-tables, the results of this individualized procedure will be much more diffuse than those in the context of the Montreal Protocol.

Whatever mechanism and procedure will finally be agreed upon under Article 13, it has still to be decided whether this system should also be applied to Protocols (CO_2) or other instruments still to be elaborated under the Convention. In view of the strong role already assigned to the Conference of the Parties as such (the political body), it is likely that measures to be taken in the case of non-compliance will have to be approved by that supreme organ, which will then not only be the main law making institution of this regime but also its organ of last resort as regards the application of law. It is certainly too early to forecast the time-frame for the negotiations to be undertaken by the new working group established by the Berlin conference. In light of the well-known opposition of many de-

[12] The results of the Berlin Conference were reprinted in ILM 34 (1995), 1671; for a comment see A. Klemm, Die Ergebnisse der Berliner Klimakonferenz, Recht der Energiewirtschaft 6, 1995, 233 – 237.

[13] D. Victor, Design Options for Article 13 of the Framework Convention on Climate Change: Lessons from the GATT Dispute Panel System, International Institute for Applied Systems Analysis (Laxenburg – Austria), November 1995.

veloping countries to compliance control as such, early results are not to be expected[14].

Another system of compliance control likely to emerge is contained in the Convention for the Protection of the Marine Environment of the North-East Atlantic (1992)[15]. In this regional context a number of specific features should be noted:

– A political body (Commission) composed of government representatives, which shall meet at regular intervals, is entitled to "assess their compliance with the Convention and the decisions and recommendations adopted thereunder" (Article 23a).

– The same body may "decide upon and call for steps to bring about full compliance including measures to assist a Contracting Party to carry out its obligations" (Article 23b).

– A decision of that body is binding for those Parties which voted for it and did not "opt out" within 200 days after its adoption, provided also that a three-quarter majority supports the decision (Article 13/2).

If this system of compliance control takes off in real life, it could constitute a model for other environmental regimes in which participating countries have the same or similar levels of economic development: Compliance control is not restricted to the basic obligations under the Convention itself, but refers also to new obligations that may be contained in later instruments (decisions and recommendations). Thus, a kind of flexibility similar to that of the Montreal Protocol is envisaged, the latter being further developed by means of so-called amendments and adjustments. The reference to "steps to bring about full compliance" would suggest that the negotiators had among "measures to be taken" sanctions foremost on their mind. However, a later reference to "measures to assist" justifies the assumption that this encouragement-based approach has at least the same priority as punishment. Finally, it should be mentioned that the question of the legally binding nature of the decisions of the control body has been clearly settled only in respect of this treaty. As regards the legal nature of decisions taken under the two other treaties, this question has never been clearly raised or settled[16].

---

[14] For a comprehensive analysis see also J. Werksman, Designing a Compliance System for the Climate Change Convention, FIELD-Working Paper; an earlier study is contained in Doc. A/AC 237/59 of 26 July 1994.

[15] Reprinted in ILM 32 (1993), 1069.

[16] For an evaluation of the OSPAR Convention see also Ph. Sands, Principles of International Environmental Law, Manchester 1995, 156.

4. Institutional Necessities

Against the background of these three cases and in the light of the institutional possibilities earlier referred to some preliminary conclusions may be drawn as to what would or should be the minimum requirements of a satisfactory system of compliance control. Such a list should not lack vision and ambition, but it should also not neglect considerations of political and economic feasibility which are frequently hidden behind the smokescreen of arguments about sovereignty. Thus, such a catalogue of requirements should be balanced and weigh the environmentally desirable against the practically achievable[17].

First and foremost an institution is needed that collects national reports or is itself entitled to collect adequate information from whatever sources are available, be they governmental, NGO-based or other. Such an institution will most probably be a bureaucratic/administrative body (Secretariat) which transforms a broad range of data into some comparable set of information and ensures to some extent the reliability of these basic elements necessary for any meaningful process of monitoring and review.

Second, the task of evaluating and interpreting data and facts is likely to be entrusted to a separate body which is either composed of individual experts or government representatives, and which may be either selective in its membership or open-ended. The consequences of the various options have already been highlighted. Some compromise may be achieved, if the requirement that government representatives have to be experts (Climate Change Convention) is taken seriously. A judicial body is unlikely to play a role in this context; it may perform a useful function in the context of dispute settlement.

Third, the "taking measures" function will most probably be reserved for the main political body of the respective treaty, which acts on its own or upon recommendation from the "reviewing" and/or "recommendatory" body. Whether these measures are of a punitive character or involve encouragement or assistance will depend upon the overall approach of the respective regime. Whether the decisions made by the competent body are compulsory in a strictly legal sense will most probably be left open in global treaties but may receive a positive reply in regional contexts. It may, however, not be excluded that the second and third functions are performed within one and the same body.

---

[17] On external supervision by international organizations see also N. Blokker/S. Muller (eds.), Towards More Effective Supervision by International Organizations, Some Concluding Observations, Dordrecht 1994, 280 – 298.

Looking at the total "life-cycle" of an environmental regime, compliance control is an important device for dispute avoidance; only if it fails must reference be made to dispute settlement as a procedure of last resort. Because compliance control has also been qualified as the soft approach to issues of state responsibility and liability[18], it should be recalled that compliance control usually is about "less" and "more", that is, about degrees of conformity. Thus, it is not necessarily about the existence or non-existence of a breach of law, which most probably would have to be decided by a judicial body. Finally, due to the different degrees of integration of international society at the regional and global levels, systems of compliance control that are established within a narrow geographical scope could well be more stringent and effective than systems of a universal character. The latter are likely to be more complicated and complex because of the need to overcome the special difficulties encountered by developing countries in respect of their performance.

Compliance control is not an end in itself. It contributes to the effectiveness of a treaty or regime to the extent that it is effective on its own[19]. Compliance control certainly contains a grain of distrust, but it is also likely to contribute to confidence among the parties, because each of them can rely on the compliance of the others and therefore be assured that compliance costs are borne by all participants. As in the case of discipline among individuals, it works only if all concerned abide by the same standards.

---

[18] P. M. Dupuy, International Control and State Responsibility, in: Völkerrecht zwischen normativem Anspruch und politischer Realität, FS für K. Zemanek, Berlin 1994, 307 – 318.

[19] For lessons to be drawn from human rights instruments see in particular W. Karl, Besonderheiten der internationalen Kontrollverfahren zum Schutz der Menschenrechte, in: Aktuelle Probleme des Menschenrechtsschutzes, Berichte der Deutschen Gesellschaft für Völkerrecht, Nr. 33, 83 –128; for a broader analysis of compliance issues see also W. Butler (ed.), Control over Compliance with International Law, Dordrecht 1991.