Towards a Procedural Law of Compliance Control in International Environmental Relations

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I. Introduction

It is the purpose of this paper to discuss the procedural aspects of compliance control[1] in international environmental law. The analysis will concentrate on institutionalised compliance control[2] as opposed to the control of state behaviour by peers. With various actors (states, secretariats, conferences of states parties, non-governmental organisations) involved in such a procedure it is necessary not only to co-ordinate their respective activities and, in particular, their input into the system, but also to ensure that any of their interests that might be affected in the course of the process are given due respect. In other words, there is a need to develop a procedural structure and procedural safeguards for compliance control. Thus, there are two relevant issues to be addressed: first, the procedural

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[1] On the concept of compliance control see generally W. Butler (ed.), Control over Compliance with International Law (1991); A. Chayes/A.H. Chayes, On Compliance, International Organization 1993, 175 – 906; W. Lang, Verhinderung von Erfüllungsdefiziten im Völkerrecht, Beispiele aus Abrüstung und Umweltschutz, in: Festschrift für Herbert Schambeck (1994), 817 – 835; M. Bothe/B. Graefrath/M. Mohr (eds.), Tatsachenfeststellung in den internationalen Beziehungen (forthcoming).

[2] In referring to the fact that nearly 25 % of international environmental agreements concluded up until the early 1990s create new international bodies with secretarial, review or co-ordination functions, it has recently been argued that there is a trend towards institutionalism in international environmental law (K. Sachariew, Promoting Compliance with International Environmental Legal Standards: Reflections on Monitoring and Reporting Mechanisms, Yearbook of International Environmental Law 2 [1991], 31 at 33). This trend is considered, *inter alia*, to be "a reflection of the need to monitor domestic implementation of international rules for the protection of the environment" (ibid.).

steps structuring such a mechanism, and second, general procedural principles applicable throughout the whole process which ranges from what has been called "compliance information systems"[3], including reporting and fact finding, to reactions in the event of non-compliance.

In the absence of a generally accepted international procedural law this paper will mainly draw on the provisions of specific international environmental agreements granting limited enforcement roles to international institutions. These agreements are primarily the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)[4], the 1987 Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol)[5], the 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic (Paris Convention)[6], and the 1994 Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Further Reduction of Sulphur Emissions (Oslo Protocol)[7]. In view of the ongoing discussions about Article 13 of the 1992 UN Framework Convention on Climate Change (the FCCC)[8] issues related to designing a compliance system for this Convention will also be addressed.

Before turning to the procedural details, it is worthwhile to recall a few underlying assumptions and general characteristics of compliance control. These considerations may contribute to a better understanding of compliance control as a co-operative means of law enforcement. Such co-operative mechanisms have been developed in view of the limited success of traditional means of law enforcement in international environmental law[9], in

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[3] R.B. Mitchell, Compliance Theory: An Overview, in: J. Cameron/J. Werksman/P. Roderick (eds.), Improving Compliance with International Environmental Law (1996), 3 at 19 et seq.; P. Sands, Compliance with International Environmental Obligations: Existing International Legal Arrangements, in: Cameron/Werksman/Roderick, ibid., 48 at 54.

[4] ILM 12 (1973), 1085.

[5] ILM 26 (1987), 1541.

[6] ILM 32 (1993), 1069.

[7] ILM 33 (1994), 1540.

[8] ILM 31 (1992), 849.

[9] For an assessment of the traditional approaches to enforcement in international environmental law see M. Bothe, The Evaluation of Enforcement Mechanisms in International Environmental Law – An Overview, in: R. Wolfrum (ed.), Enforcing Environmental Standards: Economic Mechanisms as Viable Means? (1996), 13 at 26 et seq., and A.H. Chayes/A. Chayes, New Sovereignty (1996), 29–108. On the ineffectiveness of sanctions see A.H. Chayes/A. Chayes/R.B. Mitchell, Active Compliance Management in Environmental Treaties, in: W. Lang (ed.), Sustainable Development and International Law (1995), 75 at 77 et seq.

particular unilaterally imposed economic sanctions and the law of state responsibility which may also be effected unilaterally, *inter alia*, by seizing the assets of another state. Based on an analysis of the reasons for compliance and non-compliance, showing that "[w]illful violation is the exception, not the rule"[10], it has been argued that "active treaty management"[11] contributes more to the enforcement of international environmental law than punitive measures. Compliance control is one of the possible approaches to active treaty management. Other than the classical (often adversarial) enforcement measures it focuses on confidence building between the parties to a convention rather than on authoritative or confrontational means. In other words, compliance control is a device for generating confidence of states that the benefits of respecting and implementing the obligations of the treaty outweigh the costs[12]. Compliance control is designed to increase transparency[13] in order to reduce misperceptions of the behaviour of other states parties and to enable *bona fide* parties to demonstrate their compliance. Given the recent and still embryonic development of co-operative means of law enforcement and the limited success of traditional means to ensure compliance with international environmental law, several provisions of Agenda 21[14] stress the need for a better implementation and enforcement of international environmental agreements and for the development of procedures to this effect.

For the purposes of the present analysis compliance control in international environmental law is considered as encompassing two mechanisms, only one of which actually refers to the term "compliance". The first of these may be called "implementation review mechanism"[15]. This mechanism is already well established and – referring to a term of disarmament

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[10] Chayes/Chayes/Mitchell (note 9), 78.

[11] Ibid., 83 et seq.

[12] R.O. Keohane/P.M. Haas/M.A. Levy, The Effectiveness of International Environmental Institutions, in: P.M. Haas/R.O. Keohane/M.A. Levy (eds.), Institutions for the Earth (1993), 3 at 22 – 23: "The monitoring activities of international institutions can also be vital to the ability of states to make and keep agreements. Whereever states have reason to fear the consequences of being cheated, monitoring can help reassure them that such cheating will be detected in time to make appropriate adjustments. Monitoring makes state commitments more credible, thereby increasing the value of such commitments".

[13] On the importance of transparency see Chayes/Chayes/Mitchell (note 9), 81 et seq.

[14] UN Doc. A/CONF.151/26/Rev. 1 (Vol. I), 9 et seq.; see in particular Chapter 39, paras. 3(d), (e), (f), (h), 7, and 9.

[15] Bothe (note 9), 22 et seq. On the term "implementation review mechanism" see D.G. Victor [et al.], Review Mechanisms in the Effective Implementation of International Environmental Agreements, IIASA (International Institute for Applied Systems Analysis)

law – may be described as a routine procedure[16]. It is to a large extent inspired by reporting systems established under human rights instruments[17]. Implementation review, which is a function of the permanent plenary body established by nearly all recent environmental agreements, covers two aspects: the efficiency of the agreement as a whole and – what is relevant in the present context – the question whether the agreement is actually complied with. The second, rather new, and – again referring to the terminology of disarmament law – *ad hoc* procedure[18] was set up for the first time only in 1992 by the parties to the Montreal Protocol and is called "non-compliance procedure"[19]. This paper covers both mechanisms, focusing on their procedural aspects.

II. Procedural Steps

1. The Initiation of the Procedure

a) The Routine Procedure

Addressing regular, continuous or – in other words – routine procedures first, they do not seem to raise particular problems in respect of their initiation[20]. However, a distinction may be drawn between initial reports[21] to be presented within a certain period of becoming a party and further reports to be submitted at regular intervals. The major difference

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Working Paper (WP-94-114, 1994), 4, and D.G. Victor [et al.], An Empirical Study of Review Mechanisms in Environmental Regimes, IIASA Working Paper (WP-94-115, 1994), 26-29.

[16] Bothe (note 9), 30.

[17] See K.J. Partsch, Reporting Systems in International Relations, in: R. Bernhardt (ed.), Encyclopedia of Public International Law, Instalment 9 (1986), 326 et seq.; L. Boisson de Chazournes, La mise en œuvre du droit international dans le domaine de la protection de l'environnement: enjeux et défis, RGDIP 1995, 37 at 56 et seq.

[18] Bothe (note 9), 30.

[19] See generally P. Széll, The Development of Multilateral Mechanisms for Monitoring Compliance, in: Lang (note 9), 97 at 99 et seq.

[20] On the various points of departure for the initiation of control activities see W. Lang, Compliance with Disarmament Obligations, ZaöRV 55 (1995), 69 at 74 et seq.

[21] Data included in initial reports serve as a baseline for the further implementation of the respective agreements; see, *inter alia*, S. Thomas-Nuruddin, Saving the Ozone: Monitoring and Ensuring Compliance Under the Vienna Convention and the Montreal Protocol (Paper presented at the Conference on Administrative and Expert Monitoring of International Legal Norms, New York University School of Law, Centre for International Studies, February 2-4, 1996), 12.

in terms of initiation is that those agreements providing for initial reports set a certain time frame for the submission of baseline data.

Under Article 7, paragraphs 1 and 2, of the Montreal Protocol states parties have to provide initial data on their production, imports and exports of certain listed substances to the Secretariat within three months of becoming a party or within three months of entry into force of the relevant amendments to the Protocol for that party. A similar requirement is included in Article 7, paragraph 3, of the Protocol for other data, however, with a time frame of nine months after the end of the year concerned. It is noteworthy that, notwithstanding the clear wording of these obligations, the Secretariat, in practice, explicitly had to request the submission of initial reports[22]. Obviously, states parties were prepared to comply with their reporting obligations only if reminded to do so by the Secretariat in time[23]. According to Article 12, paragraph 5, of the FCCC developed countries have to submit their initial communications within six months of the entry into force of the Convention for the reporting party, while the time frame for other parties is three years, either upon the entry into force for that party or upon the availability of specified[24] financial resources[25]; least developed countries are not subject to any time frame with regard to their initial communications.

Turning to periodic reports several conventions specify the relevant intervals while others empower the Conference of the Parties to determine such intervals. Thus, Article 8, paragraphs 7(a) and (b), of CITES provide for certain annual and biennial reports. Article 7, paragraph 3, of the Montreal Protocol also provides for annual reports to be forwarded "not later than nine months after the end of the year to which the data relate". This latter clause is an important specification since even the requirement to submit annual reports may need an interpretation as the uncertainties concerning the interpretation of "year" in Article 7 and the period of twelve months in Article 2 of the Montreal Protocol have shown[26]. Under Article 12, paragraph 5, of the FCCC the intervals for subsequent communications are

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[22] See UNEP/OzL.Pro.3/5, 6.

[23] It is noteworthy that the Implementation Committee even excused late submission by states parties of data for the year 1989 arguing that the Secretariat had not requested these data in time; ibid., 26.

[24] Article 4, paragraph 3, of the FCCC.

[25] See also J. Werksman, Designing a Compliance System for the UN Framework Convention, in: Cameron/Werksman/Roderick (note 3), 85 at 90.

[26] See Sachariew (note 2), at 42 et seq. with reference to the Report on the First Meeting of the Working Group of Legal and Technical Experts in 1988 as reproduced in Environmental Policy and Law 18 (1988), 56.

to be determined by the Conference of the Parties[27], "taking into account the differentiated timetable set by this paragraph". Article 5, paragraph 1, of the Oslo Protocol stipulates that the time frame is to be determined by the Executive Body while Article 22 of the 1992 Paris Convention only sets forth that reports have to be submitted "at regular intervals" without specifying these intervals nor the body to determine them.

b) The Non-Compliance Procedure

The initiation of the control mechanism raises more questions in the case of an *ad hoc* procedure. Considering the non-compliance procedure adopted under the Montreal Protocol[28] this mechanism may be initiated by states parties, by the Secretariat or even by the non-complying state itself[29]. Similar provisions are included in the mechanism provided for under the Oslo Protocol[30]. According to Article 23 of the 1992 Paris Convention the Commission shall assess the compliance of states parties "on the basis of the periodical reports referred to in Article 22 and any other report submitted by the Contracting Parties". Whereas Article 22 only refers to reports submitted by states parties on measures taken "by them" (in contrast to the non-compliance procedure under the Montreal Protocol which refers to reservations about "another Party's implementation")[31], Article 23 also includes "any other report". This may be read as nevertheless enabling parties to bring the possible non-compliance of another party to the attention of the Commission, while the decision whether or not the matter is taken up seems to be within the discretion of the Commission.

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[27] For a similar approach cf. Article 20 of the Convention for the Protection of the Mediterranean Sea against Pollution (1976 Barcelona Convention; ILM 15 [1976], 285), Article 5 of the Convention on the Protection of the Ozone Layer (1985 Vienna Ozone Convention; ILM 26 [1987], 1516) and Article 26 of the UN Convention on Biological Diversity (1992 Biodiversity Convention; ILM 31 [1992], 818).

[28] UNEP/OzL.Pro.4/15, Annex IV, 46 et seq.

[29] Ibid., paras. 1, 3, 4. The original Montreal procedure (UNEP/OzL.Pro. 2/3, Annex III, 40 et seq.) provided merely for the activation of the process by one party against another one. The Secretariat was only given the power to trigger the regime when the provisions were revised in November 1992. The notion of self-incrimination was introduced upon a proposal by the former Soviet Union which considered this option to conform to the conciliatory character of the regime. See Széll (note 19), 100.

[30] Decision Taken by the Executive Body at the Adoption of the Protocol (UN Doc. ECE/EB.AIR/40, 30 et seq.), paras. 3, 4, 5.

[31] On these differences see J. Hilf, The Convention for the Protection of the Marine Environment of the North-East Atlantic – New Approaches to an Old Problem?, ZaöRV 55 (1995), 580 at 593.

Under the non-compliance procedures of the Montreal and the Oslo Protocols another party may only initiate the process (1) if it has "reservations about another Party's implementation of its obligations" and (2) if the submission is supported by "corroborating information". Although states are in general restrained in their comments about the performance of other states, the requirement of corroborating information is a useful tool to avoid abuse of the procedure. The initiation of the non-compliance procedure by the Secretariats is linked to the respective Secretariat's involvement in the routine procedure[32]. What is extraordinary about the Montreal and the Oslo non-compliance procedures is their possible initiation by the non-complying state itself. This requires (1) a conclusion of a party to be unable to comply with its obligations, (2) an explanation in writing of the specific circumstances considered to be the cause of its non-compliance, and, (3) implicitly, some proof that it has made its best *bona fide* efforts to comply.

The initiation by the non-complying state itself was the approach taken when, in 1995, the non-compliance procedure of the Montreal Protocol was invoked for the first time to handle formal submissions of non-compliance[33]. Five countries with economies in transition (Belarus, Bulgaria, Poland, Russia, and Ukraine) expressed concern about their ability to comply, after January 1, 1996, with their obligations under the Montreal Protocol. It is interesting to note that the request (in the form of a declaration) of these five countries for a special five-year grace-period was originally intended to be submitted directly to the Meeting of the Parties[34]. However, the request was re-routed to the Implementation Committee under paragraph 4 of the non-compliance procedure, concerning submissions on a party's own non-compliance.

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[32] As to the Secretariat triggering the process, there is a slight difference between the Montreal and the Oslo Protocol non-compliance procedures. Whereas the Secretariat under the Montreal Protocol may only draw the Implementation Committee's attention to situations of which it becomes aware "during the course of preparing its report", the Secretariat under the Oslo Protocol may report to the Implementation Committee no matter how it becomes aware of possible non-compliance. See Széll (note 19), 106.

[33] For an analysis see D.G. Victor, The Montreal Protocol's Non-Compliance Procedure: Lessons for Making Other International Environmental Regimes More Effective (Paper presented at a workshop on The Ozone Treaties and Their Influence on the Building of Environmental Regimes, Vienna, December 4, 1995), 2 et seq. A report of the workshop is distributed as UNEP/OzL.Pro.7/INF.1.

[34] The request is reproduced in Annex II of UNEP/OzL.Pro/ImpCom/11/1, 13–14.

2. The Objective and Scope of Control: Jurisdiction

No international control mechanism can be properly performed if the substance of what is to be controlled is not clear. This is obvious in the case of the transmission of certain statistical or other data. These have to be precisely defined. However, the same applies to the reporting of legislative and administrative measures. Since the scope of the control mechanism is not necessarily identical with the substantive obligations assumed under a treaty[35] there is a need for clear rules on applicable standards for compliance control. Definitions are essential from the point of view of the procedure's reliability, in the light of the respect of sovereignty, and also in view of the interests of private individuals concerned (such as the industry under the Montreal Protocol). Unfortunately, numerous international environmental agreements lack precision in this respect. However, some conventions empower treaty organs to specify their jurisdiction.

a) The Interrelationship Between Primary Rules and Compliance Control

If a treaty does not include specific provisions on the scope of compliance control but only refers to its substantive provisions this may give rise to further difficulties. The primary rules of the FCCC are a vivid illustration of this. To a large extent these primary rules are themselves ambiguous, "riddled with inchoate language"[36]. They lack the degree of precision which is a prerequisite for an assessment of compliance. It may even be argued that it is difficult for parties to comply at all if there is no clear and agreed understanding, quantitatively and qualitatively, of the obligations included in the Convention. In general terms, "primary rules can increase compliance through greater specificity"[37]. The choice of primary rules is essential not only for the implementation of an agreement but also for its transparency in respect of compliance and non-compliance. To take another example for the interrelationship between substantive obligations and compliance control, the Montreal Protocol is primarily concerned

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[35] Under most international environmental agreements it would not make sense to extend the scope of compliance control to all substantive obligations included in the convention. For reasons of cost-effectiveness a limited number of critical issues must be chosen for an assessment of whether or not a party is in compliance.

[36] Werksman (note 25), 87; see also R. Dolzer, Die internationale Konvention zum Schutz des Klimas und das allgemeine Völkerrecht, in: U. Beyerlin [et al.] (eds.), Recht zwischen Umbruch und Bewahrung. Festschrift für Rudolf Bernhardt (Beiträge zum ausländischen öffentlichen Recht und Völkerrecht, Bd. 120) (1995), 957 at 960 et seq.

[37] Mitchell (note 3), 19.

with limiting emissions of ozone depleting substances; however, its commitments focus on consumption, partly because it was easier to monitor few producers than thousands of consumers[38]. However, there is a different issue in regard to the Montreal non-compliance procedure that has not yet been solved: the identification of situations which can be categorised as non-compliance[39]. An attempt towards such an identification was made by the Third Meeting of the Ad Hoc Working Group of Legal Experts on Non-Compliance With the Montreal Protocol[40] which listed (1) non-compliance with provisions relating to control measures, (2) non-compliance with provisions relating to the control of trade with non-parties, (3) non-compliance with time schedules and non-reporting of specified data, (4) failure to co-operate in the activities under Article 9, (5) non-payment of contributions to the financial mechanism, (6) failure to take steps for the transfer of technology, and (7) non-observance of decisions of the Meeting of the Parties. Since the parties to the Protocol could not agree upon whether or not financial contributions under Article 10 were voluntary and in how far decisions of the Meeting of the Parties were binding, the list was never adopted[41].

b) Specified Standards

Notwithstanding these particular problems it is possible to specify some of the applicable standards for compliance control. The starting point for this analysis are those provisions of the relevant agreements that set out the aims of compliance control.

Turning to routine procedures first, the purpose and substance of national self-reporting are often couched in very general terms, stipulating merely that parties shall prepare and submit reports on their implementation of the agreement[42]. However, treaties providing for an elaborate mechanism of compliance control also include more specific provisions on

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[38] See O. Greene, On Verifiability, and How it Could Matter for International Environmental Agreements, IIASA (International Institute for Applied Systems Analysis) Working Paper (WP-94 –116, November 1994), 6; see also UNEP/OzL.Pro/ImpCom/7/2.

[39] The Meeting of the Parties in its decision III/2 (UNEP/OzL.Pro.3/11, 15), at para. (a)(i) requested the Working Group of Legal Experts to "identify possible situations of non-compliance with the Protocol".

[40] UNEP/OzL.Pro/WG.3/3/3, Annex II.

[41] Széll (note 19), 101 at note 13.

[42] Sachariew (note 2), at 43, distinguishes two categories of reports: "those containing information on the overall implementation of the convention by the reporting state, and those reporting on the implementation of specific provisions".

the submission of information and, in practice, decisions of treaty organs have led to reporting duties which are quite specific and elaborate. Under the 1992 Paris Convention states parties shall report on "the legal, regulatory, or other measures taken by them for the implementation of the provisions of the Convention and of decisions and recommendations adopted thereunder, including in particular measures taken to prevent and punish conduct in contravention of those provisions; ... (on) the effectiveness of the(se) measures ... (and on) problems encountered in the implementation of the provisions referred to" (Article 22). Article VIII, paragraphs 6 and 7, of CITES require detailed information (including the number and type of permits and certificates granted, the states with which such trade occurred, the numbers or quantities and types of specimens, etc.) on the trade in specimens of certain listed species as well as information on legislative, regulatory and administrative measures taken to enforce the provisions of the Convention[43]. Article 7 of the 1987 Montreal Protocol and Article 5 of the Oslo Protocol lay down even more detailed reporting obligations[44]. Thus, in their initial report, parties to the Montreal Protocol are required to report data on production, imports and exports of controlled ozone depleting substances for 1986 and the year during which they become a party; further information has to be provided on imports and exports of recycled ozone depleting substances. The information to be provided under Article 5 of the Oslo Protocol covers the implementation of national strategies, policies, programmes and measures, as well as the levels of national annual sulphur emissions (within the geographical scope of EMEP even with temporal and spatial resolution). As already indicated, several agreements include an element of flexibility and entrust bodies established under the respective agreements with the task of determining or further specifying the format and content of the information to be included in the reports. This contributes to the uniformity and comparability of reports[45]. Under the Vienna Ozone Convention the Secretariat was charged with the preparation of a format for reporting[46], and Article 5 of the Oslo Protocol stipulates that such decisions are to be taken

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[43] For a similar approach see Article 13, paragraph 3, of the Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (Basel Convention), ILM 28 (1989), 649 at 669 – 670.

[44] It has been argued that the Montreal Protocol reporting system is one of the most detailed; see P. Sands, Principles in International Environmental Law (1995), 270.

[45] On this issue see Sachariew (note 2), 44 et seq.

[46] Paragraph 2 of the decisions of the first Meeting of the Parties to the Vienna Convention for the Protection of the Ozone Layer (ILM 26 [1987], 1516), UNEP/OzL.Conv.1/5, 9.

by the Executive Body. It is noteworthy that the first Meeting of the Parties under the Montreal Protocol dealt with the facilitation of reporting and decided to modify the "Harmonised Commodity Description and Coding System", a classification system for record-keeping in international trade, originally developed under the auspices of the Customs Cooperation Council[47]. As important as the specification of format and content is, it does not make obsolete requests for further information. Thus, Article XII, paragraph 2(d), of CITES enables the Secretariat "to request from Parties such further information with respect thereto as it deems necessary to ensure implementation of the ... Convention"[48].

Addressing *ad hoc* or non-compliance procedures one may first refer to the powers entrusted to specific implementation bodies. Under the Oslo Protocol the Implementation Committee is established "to review the implementation of the present Protocol and compliance by the Parties with their obligations" (Article 7). There is no such specification of purpose stipulated in the decision establishing the Montreal Protocol non-compliance procedure. However, Article 8 of the Protocol itself indicates the purpose of relevant procedures and institutional mechanisms as to determine non-compliance with the provisions of this Protocol. It has already been shown above that no definition of non-compliance has been agreed upon so far[49]. Hence, the scope of the non-compliance procedure is not clear. The compliance procedure under the Paris Convention aims at an assessment of compliance of contracting parties "with the Convention and the decisions and recommendations adopted thereunder", thus including what may be called secondary legislation ("decisions and recommendations adopted thereunder") as an applicable standard to assess compliance. Although international environmental conventions do not necessarily refer to decisions and recommendations adopted under the respective regimes, it may well be argued that acts adopted by the contracting parties according to the provisions of any such agreement may also be considered to set standards for compliance control. Turning again to the Paris Convention, it has already been shown that national self-reporting is the basis for measures of compliance and that the reporting system under this Convention is quite extensive.

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[47] UNEP/OzL.Pro.1/5, 13, and ibid., Annex VII, 1 et seq.

[48] Article 13, paragraph 3(i), of the 1989 Basel Convention refers to "such other matters as the Conference of the Parties shall deem relevant" as information to be included in the national reports.

[49] See notes 40, 41 and accompanying text.

3. Permissible Ways and Means of Ascertaining Facts: The Availability of Objective Information on Implementation

Any compliance control relies heavily on fact-finding and an evaluation of these facts in light of the applicable standards. What is interesting about compliance control in international environmental law is that national self-reporting is not only a starting point within the routine procedure of implementation review but it is also of major importance in the context of any *ad hoc* or non-compliance procedure as will be shown below. In order to assess an individual state party's performance under an international environmental agreement the implementing bodies need more than national reports. Thus, the question arises what are permissible ways and means of obtaining further information and of ascertaining relevant facts.

a) National Self-Reporting and Monitoring

Within a routine mechanism national self-reporting is the input for the assessment of compliance. There have been doubts about the effectiveness of reporting procedures since there is an inherent element of self-assessment on the part of the controlled subject[50]. Further, if the reporting requirements cover not only legislative measures but also specific administrative or even private activities there is a need for national data collection by the parties. It is admitted here that in such a case the success or failure of the routine procedure will largely be determined by how conscientiously states parties conduct their national monitoring and otherwise prepare themselves for submitting full and accurate reports. To put it clear: If garbage is what states parties feed into the reporting system, then garbage is what will come out of it[51].

As the fairly low compliance rate with reporting obligations suggests, states seem to face difficulties to provide regular national reports[52]. However, the picture is not as straightforward as it might seem. To take two

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[50] On the effectiveness of reporting procedures see Sachariew (note 2), 41 et seq.

[51] On a parallel judgement in respect of the monitoring and data collection required of states parties under the Chemical Weapons Convention see J.P.P. Robinson, The Verification System for the Chemical Weapons Convention, in: D. Bardonnet (ed.), The Convention on the Prohibition and Elimination of Chemical Weapons: A Breakthrough in Multilateral Disarmament (Hague Academy of International Law. Workshop 1994 [1995]), 489 at 491.

[52] See Bothe (note 9), 14 with reference to U.S. General Accounting Office, International Environment – International Agreements Are Not Well Monitored (January 1992), 24 et seq. See also Sands (note 3), 55.

contrasting examples: While the reporting status for CITES in 1989 amounted to 24 per cent only, 80 per cent of the parties to the Montreal Protocol accounting for 90 per cent of the world-wide consumption of controlled substances complied with their reporting obligations. It is doubtful whether the reason for this is a problem of administrative capacity (although the increasing number of reporting requirements in fact causes such problems). Rather it seems that this difference is due to priority judgements of governments. Nevertheless, it has rightly been argued that "[r]eporting on the implementation of environmental agreements and programmes might need some streamlining"[53].

Apart from national self-reporting, monitoring activities are another means to assess the degree of effective implementation of international environmental rules. Monitoring has been defined as "the continuous observation, measurement and gathering of information, mostly by technical means and on a long-term basis"[54]. It is not strictly compliance-oriented but fulfils a review function *lato sensu*[55]. However, as with national self-reporting monitoring often also is located at the national level. Nevertheless, there are tendencies either to entrust treaty organs with autonomous monitoring powers and the respective infrastructure or to establish integrated monitoring systems with an international evaluation centre. The most well known example is the implementation of the Co-operative Programme for the Monitoring and Evaluation of the Long-Range Transmission of Pollutants in Europe (EMEP) in Article 9 of the ECE Convention on Long-Range Transboundary Air Pollution (CLRTAP)[56]. This programme first aimed at reducing the lack of scientific evidence on the effects of several major air pollutants. Subsequently, it was entrusted with calculations aimed at monitoring the record of states parties against the background of their obligations assumed under various protocols, and as provided for in Article 5, paragraph 3, of the Oslo Protocol EMEP shall provide technical information to the Executive Body established under the Convention. An example for autonomous monitoring and research powers of treaty organs may be taken from CITES, where Article XII, paragraph 2(c), stipulates that the Secretariat may undertake scientific and

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[53] Bothe (note 9), 24.

[54] Sachariew (note 2), 34.

[55] Ibid., 35.

[56] ILM 18 (1979), 1442; for a general analysis of the Convention see L. Gündling, Multilateral Cooperation of States under the ECE-Convention on Long-Range Transboundary Air Pollution, in: C. Flinterman/B. Kwiatkowska/J. Lammers (eds.), Transboundary Air Pollution (1986), 19 et seq.

technical studies contributing to the implementation of the Convention[57]. Another interesting development under CITES was the decision of the Third Conference of the Parties to establish Regional Committees to review the status of species within each region, and make recommendations as to whether they should be listed, delisted, uplisted, or downlisted[58]. Although the purpose of this decision was not to review individual states' behaviour, but to present recommendations to the next Conference of the Parties for discussion and action, it nevertheless was an important source of independent information by way of monitoring. Anyway, due to a lack of resources this review process was stalled and responsibility for periodic review was assigned to the CITES Animal and Plant Committee[59].

b) The Contribution of Other States Parties and of NGOs

Although it is true that states parties are reluctant to formally comment on the behaviour of another state party, there is, nevertheless, some potential for additional information in comments of third states. This is obvious in the case of the non-compliance procedures under the Montreal (paragraph 7[d]) and Oslo (paragraph 7[b]) Protocols which may be initiated at the request of one party which has reservations about the compliance with the obligations under the agreement by another party. Such a submission has to be accompanied by corroborating information.

Another and perhaps more important source of information for secretariats and other treaty organs charged with compliance control are NGOs, including environmental pressure groups as well as associations of the relevant industries. Their participation in the process of fact-finding gives rise to two issues: first, their status within the pertinent treaty system, and second, their contribution to compliance control[60]. Under numerous international environmental conventions NGOs may be

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[57] Also, according to Article 22, paragraph 8, of the Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa (ILM 33 [1994], 1328) "the Conference of the Parties may request competent national and international organizations which have relevant expertise to provide it with information".

[58] Resolution Conf.3.20.

[59] Resolution Conf.4.26; see also D.S. Favre, International Trade in Endangered Species (1989), 46 – 48.

[60] The Working Group that drew up the non-compliance regime under the Montreal Protocol discussed arguments put forward by some participants that NGOs should also be able to trigger the process. The majority rejected these proposals in order not to threaten the acceptability of the procedure for states parties. See Széll (note 19), 100.

granted observer status. Thus, Article 11 of the Paris Convention stipulates that the "Commission may, by unanimous vote of the Contracting Parties, decide to admit as an observer: ... any international governmental or any non-governmental organisation the activities of which are related to the Convention". As specified in Article 11, paragraph 2, of the said Convention "such observers may participate in meetings of the Commission but without the right to vote and may present to the Commission any information or reports relevant to the objectives of the Convention". Further details are to be set in the rules of procedure of the Commission. According to Article 11, paragraph 5, of the Montreal Protocol "any body or agency, whether national or international, governmental or non-governmental, qualified in fields relating to the protection of the ozone layer which has informed the Secretariat of its wish to be represented at a meeting of the Parties as an observer may be admitted unless at least one third of the Parties present object. The admission and participation of observers shall be subject to the rules of procedure adopted by the Parties". Similar provisions are to be found in Article XI, paragraph 7, of CITES and Article 7, paragraph 6, of the FCCC[61].

Although NGOs are thus admitted to various meetings, not only of the Conferences of the Parties but also to treaty organs with a limited membership (such as the Executive Body for the CLRTAP), and notwithstanding the fact that some rules of procedure provide for the possibility that observers submit relevant information[62], most treaties and rules of procedure lack explicit norms for a specific role of NGOs in the process of fact-finding. As has been rightly argued "their role ... will be limited as long as their standing with respect to the reporting procedure is not expressly defined"[63]. Nevertheless, there are positive examples of the contribution of NGOs, in particular, under CITES. Their role in this respect has been characterised as "guardians of the spirit and purpose of CITES by monitoring both compliance and enforcement"[64]. In practice, NGOs

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[61] See also Article 6, paragraph 5, of the Vienna Ozone Convention, Article 15, paragraph 6, of the Basel Convention, and Article 23, paragraph 5, of the Biodiversity Convention.

[62] See, *inter alia*, Rules of Procedure for the Meetings of the Parties of the Montreal Protocol, Rule 7(2); UNEP/OzL.Pro.1/5, Annex I.

[63] Sachariew (note 2), 49. On the potential of NGOs in improving compliance see also J. Cameron, Compliance, Citizens and NGOs, in: Cameron/Werksman/Roderick (note 3), 29 at 36 et seq.

[64] P. Sands/A.P. Bedecarre, Convention on International Trade in Endangered Species: The Role of Public Interest Non-Governmental Organizations in Ensuring the Enforcement of the Ivory Trade Ban, Boston College Environmental Affairs Law Review 17 (1989/1990), 799 at 800.

under CITES have tracked the progress of endangered species regulations by compiling reports on the status of countries' implementing legislation and violations of wildlife trade laws[65], and industry has helped traders to comply with permit requirements under the Convention and has contributed funds to trade control projects[66]. What is really striking is the establishment by NGOs of TRAFFIC (Trade Record Analysis of Flora and Fauna In Commerce), a network composed of wildlife and trade experts created to collect and analyse data of wildlife trade and to disseminate this information[67].

c) On-Site Inspections

On-site visits or inspections have not yet come to play a major role in the process of fact-finding under international environmental agreements. This instrument of compliance control has so far primarily been discussed and applied in the context of arms control and disarmament[68]. However, there are several environmental treaties and agreed procedures that provide for such on-site visits.

The Fourth Meeting of the Conference of the Parties to the Convention on Wetlands of International Importance (Ramsar Convention)[69] instituted a monitoring procedure[70]. This procedure is to be applied where human interference results in or might lead to changes in the ecological character of sites included in the List of Wetlands of International Importance. It includes on-site visits and discussions with the countries concerned. The purpose of these measures is not confrontational but co-operative in that they serve to identify sites most in need of conservation measures. These sites are specifically listed (the so-called Montreux Record) and the Fifth Meeting of the Conference of the Par-

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[65] See generally C. de Klemm, Guidelines for Legislation to Implement CITES, IUCN Environmental Policy and Law Paper No. 26 (1993).

[66] S. Fitzgerald, International Wildlife Trade: Whose Business Is It? (1989), 333.

[67] Favre (note 59), 274; for details see D. Vice, Endangered Species Treaties: Monitoring, Fact-Finding and Dispute Resolution (Paper presented at the Conference on Administrative and Expert Monitoring of International Legal Norms, New York University School of Law, Centre for International Studies, February 2 – 4, 1996), 41 et seq.

[68] Cf. R. Hanski/A. Rosas/K. Stendahl, Verification of Arms Control Agreements – with special reference to on-site inspections (1991), *passim*.

[69] ILM 11 (1972), 963.

[70] Cf. C. de Klemm, 1990: The Year in Review (Nature Conservancy: Natural Lands and Biological Diversity), in: Yearbook of International Environmental Law 1 (1990), 187 at 189.

ties in 1993 adopted procedural rules for the listing and delisting of such sites[71].

Reference may also be made to Article XIII, paragraph 2, of CITES. Under this provision an "inquiry may be carried out by one or more persons expressly authorised by the Party" where the party considers an inquiry to be desirable. However, the details of any such inquiry are not set out in the Convention nor in any decision of a treaty organ.

Recently, on-site visits have been included in the non-compliance procedures under the Montreal and the Oslo Protocols. Thus, the Implementation Committee under the Montreal Protocol may request to undertake information gathering on the territory of a party. However, such on-site fact-finding is only possible if the Committee is invited by the party concerned. Since on-site visits are a sensitive issue there is a particular need for developing adequate procedural safeguards for the conduct of such operations. Agreement on these matters may be reached for a single visit only or a set of rules may be adopted by the competent treaty organs in advance. None has been done so far in the context of the Montreal nor the Oslo Protocols.

4. The Evaluation of Information on Implementation

It is important to distinguish between factual and legal evaluation. Factual evaluation means the way in which decisions as to whether certain facts exist or do not exist are taken. Legal evaluation is the process of bringing the facts and the law together, in other words, taking a decision on whether or not a particular party has complied with its obligations under a certain agreement. The questions to be addressed here are (1) which body deals with the evaluation of facts, (2) whether there are specific rules for factual evaluation, and (3) whether the process of legal evaluation is somehow formalised. When addressing these issues it has to be kept in mind that most international environmental agreements are either not very clear on these matters or lack specific provisions in this respect.

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[71] Cf. C. de Klemm, 1993: The Year in Review (Nature Conservancy: Natural Lands and Biological Diversity. General Report), in: Yearbook of International Environmental Law 4 (1993), 240 at 241.

a) CITES

As stipulated in Article XII, paragraph 2(d), of CITES the Secretariat provides more than "switchboard services"[72] between the parties: it is charged with the substantive examination of the reports ("to study the reports") of the parties. The power of the Secretariat to examine such reports is considerably strengthened by the fact that it may request additional information when necessary for the implementation of CITES. Article XII, paragraph 2(d), definitely includes the factual evaluation of information. This may be taken from the fact that paragraph 2(g) requires the Secretariat to prepare annual reports for the parties, covering, *inter alia*, problems of enforcement[73]. The situation is not quite clear with regard to the legal evaluation of information received by the Secretariat. On the basis of Article XII alone it seems rather doubtful whether the Secretariat may actually claim that a particular party is not in compliance with CITES. Article XIII may be considered to be more specific. It reads as follows: "When the Secretariat in the light of information received is satisfied that any species ... is being affected adversely ... or that the provisions of the present Convention are not being effectively implemented, it shall communicate such information to the authorised Management Authority of the Party or Parties concerned". The wording of this provision implies factual ("in the light of information received") and legal evaluation ("is satisfied that any species ... is being affected adversely ... or that the provisions ... are not being effectively implemented") by the Secretariat. In the context of Article XIII, paragraph 1, it is disputable whether the "information" to be communicated means "information received" by the Secretariat or whether it means the Secretariat's finding that provisions are not implemented or species affected adversely. The latter interpretation would certainly contribute to the efficiency of the procedure.

Looking at the practice under CITES the impact of these provisions on the implementation of the Convention has been rather limited. First, it must be admitted that the Secretariat has only limited resources[74] and thus can hardly do a careful analysis of trade data included in national reports. Second, as has become clear with regard to Article XII, paragraph 2(i), which states that the function of the Secretariat will also be "to perform any other function as may be entrusted to it by the Parties" states are reluctant to delegate to the office the authority to act upon the information

[72] This term has been used by Sachariew (note 2), 45.

[73] As to the topics usually included in the report see Favre (note 59), 287.

[74] On the financing of the Secretariat see Favre, ibid., 289 et seq.

obtained[75]. Rather, as a consequence of the recent dispute concerning the staffing of the Secretariat[76], parties will further draw a sharp line between the Secretariat obtaining information and taking decisions. Whether this will have an impact on the already limited powers of the Secretariat in reporting on implementation problems (Article XII, paragraphs 2[g] and [h]) is an open question since there are already numerous "road blocks to (its) full implementation"[77]. On the other hand, the Secretariat has reported to the parties problems of implementation at each meeting of the Conference of the Parties and these have to a large extent been taken seriously[78]. Reference may also be made to the temporary existence of a Technical Expert Committee. This subsidiary organ was established[79] to discuss implementation problems and to prepare draft recommendations for the Conferences of the Parties[80]. Based on the annual reports submitted by the parties and on other information, the Committee studied compliance of states parties with their obligations and developed guidelines for the solution of implementation matters. Unfortunately, the Sixth Conference of the Parties decided to disband the Committee[81]. The true reasons behind this decision are not quite clear since it formed part of a general restructuring of the committee system under the Convention.

b) Vienna Ozone Convention and Montreal Protocol

Under the Vienna Ozone Convention parties have to "transmit, through the secretariat, to the Conference of the Parties ... information on the measures adopted by them in implementation of this Convention and of protocols" (Article 5). The Secretariat then has "(t)o prepare and

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[75] Favre (note 59), 288.

[76] There was a conflict between the states parties and UNEP over authority to control staffing decisions within the CITES Secretariat, see D.S. Favre, 1990: The Year in Review (Trade in Endangered Species), in: Yearbook of International Environmental Law 1 (1990), 193 at 195 et seq.; id., 1991: The Year in Review (Trade in Endangered Species), in: Yearbook of International Environmental Law 2 (1991), 205 at 206. Obviously the dispute was resolved before or during the Eighth Conference of the Parties, see Doc.8.16 and Resolution Conf.8.25; see also D.S. Favre, 1992: The Year in Review (Trade in Endangered Species), in: Yearbook of International Environmental Law 3 (1992), 317 at 320.

[77] Favre (note 59), 294.

[78] Ibid., 295 with further references.

[79] Resolutions Conf.2.5 and Conf.3.5.

[80] See G. Bendomir-Kahlo, CITES – Washingtoner Artenschutzübereinkommen. Regelung und Durchführung auf internationaler Ebene und in der Europäischen Gemeinschaft, Beiträge zur Umweltgestaltung Vol. A 116 (1989), 131.

[81] Resolution Conf.6.1 on the establishment of committees.

transmit reports based upon (such) information" (Article 7, paragraph 1[b]) and the Conference of the Parties "shall keep under continuous review the implementation of this Convention" (Article 6, paragraph 4) and shall consider information provided by the parties and reports submitted by any subsidiary body. This mechanism attributes to the Secretariat the task of preparing reports on information received from the parties which is nothing else than the filtering of such information, the extracting of relevant information. Although this is not factual evaluation *stricto sensu* this power of the Secretariat is broad enough as to include elements of factual evaluation. There is no explicit provision on the legal evaluation of information received, however, it may be argued that the Conference of the Parties, under its power to consider information and reports received, is in a position to assess these in light of the legal obligations undertaken by the parties.

The Montreal Protocol requires parties to transmit to the Secretariat statistical information (Article 7) initially and on an annual basis[82]. The Secretariat "receive(s)" (Article 12, paragraph a) such data and "prepare(s) and distribute(s) ... reports based on information received" (Article 12, paragraph c). Again, similarly to the provisions of the Ozone Convention, this may include elements of factual evaluation even if the outcome is a summary data report. At least, the Secretariat again acts as a filter before submitting information to the Meeting of the Parties which shall, *inter alia*, "review reports prepared by the Secretariat pursuant to Article 12(c)" (Article 11, paragraph 4[e]). Taken together with its power to "review the implementation of this Protocol" (Article 11, paragraph 4[a]) the Meeting of the Parties may enter into the process of legal evaluation.

The respective roles of the Secretariat and the Meeting of the Parties will become more comprehensible when looking at the Montreal Protocol's non-compliance procedure which includes the establishment of yet another body involved in compliance control: the Implementation Committee[83]. This standing body since its creation in 1990 has regularly met even in the absence of formal cases to be resolved, in fact, until its ninth meeting in 1994 without considering a single formal submission. During the period from 1990 through to 1994 the Implementation Committee got involved in the routine procedure under the Protocol. It inves-

[82] See also Art. 7, para. 2, of the London Amendment and Art. 7, para. 3, of the Copenhagen Amendment.

[83] For further details see W. Lang, Compliance Control in International Environmental Law: Institutional Necessities (this volume), 685 at 689 et seq.

tigated the failure of parties to report data and helped to improve the completeness of the reported data[84]. This shows that the routine and the *ad hoc* procedure are not strictly separated, a finding that may already be taken from paragraph 3 of the decision establishing the non-compliance procedure. Looking more closely at the way how the Implementation Committee contributed to improved data reporting, it is interesting to note that the Committee first addressed the issue of the failure of parties to submit data on time in very general terms but later began naming specific countries. Subsequently, in addition to giving increased attention to party-specific deliberations the Committee also moved from data reporting to compliance problems related to the phase-out of ozone-depleting substances[85]. It is further noteworthy that in 1994 the Committee even reviewed draft decisions for the Meeting of the Parties, a fact illustrating that the Committee meanwhile is a well established component of the compliance control system under the Montreal Protocol[86].

Turning to the non-compliance procedure, this is not only administered by the Secretariat but also by the Implementation Committee. Factual evaluation is a matter within the hands of this Committee which receives its information from the Secretariat. As laid down in paragraph 7 of the decision establishing the non-compliance procedure, the Implementation Committee has to "receive, consider and report on any submission; ... to receive, consider and report on any information or observations forwarded by the Secretariat in connection with the preparation of the reports referred to in Article 12(c) of the Protocol and on any other information received and forwarded by the Secretariat". The Committee, however, is not limited to factual evaluation. As may be taken from its task to secure "an amicable solution of the matter on the basis of respect for the provisions of the Protocol" (paragraph 8) and "to report to the Meeting of the Parties, including any recommendations" (paragraph 9) the Implementation Committee also deals with certain elements of the process of legal evaluation. Thus, there is not only a factual report at the end of the Committee's considerations. As the wording "on the basis of respect for the provisions of the Protocol" suggests, the Committee must bring the facts and the law together. The inclusion of recommendations in the

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[84] Victor (note 33), 2.

[85] On these developments see Victor, ibid., 5 et seq.

[86] See the report of the Implementation Committee (UNEP/OzL.Pro/ImpCom/6/3) and the draft decisions submitted to the Meeting of the Parties by the Preparatory Meeting (UNEP/OzL.Pro.5/Prep/2, Annex), prepared on the basis of the draft decisions circulated by the Secretariat (UNEP/OzL.Pro.5/L.1 and Add.1).

Committee's report to the Meeting of the Parties further leads to believe that the Committee at least implicitly must make an assessment of whether or not a particular party has complied with its obligations under the Protocol. This understanding of the pertinent provisions is supported by the fact that a party concerned may participate in the consideration of submissions but not in the elaboration and adoption of recommendations on that matter (paragraphs 10, 11). The final decision on compliance is, however, then taken by the Meeting of the Parties (paragraph 9).

c) An Appraisal of the Auditing Stage

The important role of and the problems related to the evaluation of information have been illustrated by reference to two rather important instruments. There are, however, other agreements also including provisions on the auditing stage. Thus, a procedure similar to the one established under the Montreal Protocol has been set up under the Oslo Protocol. Further, the Paris Convention requires contracting parties to report to the Commission which then – on the basis of these reports and "any other report submitted by the Contracting Parties" – shall assess the compliance of parties with their obligations. *Prima facie*, this includes factual and legal evaluation which underlines the important role of the Commission established under the Paris Convention.

It is difficult to draw any firm conclusions on this issue without succumbing to the danger of illegitimate generalisations. However, a few tendencies may be underscored: First, there is a growing tendency to strengthen the role of secretariats or other less or non-political treaty organs in the process of compliance control. The Implementation Committee under the Montreal Protocol's non-compliance procedure is an example to this end although the Committee is in the hands of the parties rather than independent experts. What contributes to its relative independence is its fairly small size which "has probably made it easier for the group to navigate around difficult issues while zooming in on those areas where it could improve compliance"[87]. Second, there seems to be a need for separating factual and legal evaluation; at least the final phase of legal evaluation and the actual decision on reactions in the case of non-compliance should be in the hands of a political body. This enables the other treaty organs to be more scrupulous in tracing cases and to be more country-specific (which is indispensable for effective compliance control).

[87] Victor (note 33), 9.

Third, the procedures are neither purely political nor purely judicial; they are quasi-judicial. This seems to be the middle course for states under scrutiny to be assured of having their interests safeguarded while at the same time allowing sufficient flexibility and autonomy of the control mechanism so that other parties do not lose confidence in the system. In this context, it is noteworthy that NGOs in as far as they have been granted observer status may not only submit information but to a limited extent may also participate in the process of evaluating information. Fourth, under the Montreal Protocol it is relatively easy to determine whether a party is complying with the substantive provisions of the Protocol since the commitments to control ozone-depleting substances can be easily and immediately compared with the submitted data. This is not always the case, rather it is an exception. As has been shown above with reference to the FCCC[88] there are conventions with not only enormous data requirements for determining compliance but also with rather unspecified obligations[89]. The dividing line obviously is between agreements eliminating environmental pressures and those managing complex environmental problems[90]. This notwithstanding, it has been shown that even under the Montreal Protocol it is difficult to define what actually is non-compliance, whether this term only aims at certain obligations or not[91].

5. Reactions in the Event of Non-Compliance

a) Treaty-Specific Reactions

Once the process of legal evaluation has been completed, the competent treaty organs must take a decision on how to react in the event of non-compliance. Traditionally, the consequence of non-compliance would be state responsibility. However, given the non-adversarial and co-operative structure of compliance control, reactions focus on remedial action rather than punitive sanctions. This is particularly important since compliance control seeks to take into account the reasons for non-compliance. There is a difference between wilful acts of obstruction and situations where the causes of non-compliance are beyond the control of the respective government. This may be the case if a country does not have at its disposal

[88] See above II.2.a.

[89] Some specifications are to be expected from a climate protocol, negotiated by the Ad hoc Group on the Berlin Mandate; UN Doc. FCCC/1995/7/Add.1.

[90] Victor (note 33), 12.

[91] See above notes 40 and 41 and accompanying text.

the means to fulfil the obligations assumed under a certain treaty. Thus, statements of non-compliance may be graduated and qualified[92]. Consequently, there will be no clear-cut answers to the question on the respective consequences. And even if sanctions are provided for, these are primarily "in-treaty sanctions", suspending certain rights and privileges granted under the pertinent agreement (such as voting rights). The kind of reaction also depends on the obligation not complied with. Thus, in the case of non-compliance with a reporting obligation, different measures may be taken than in the event of failure to comply with substantive obligations assumed under the agreement. To give an example, a possible reaction to non-compliance with procedural obligations is the threat of a treaty organ to rely on estimates or non-official information if official data are not submitted within a certain time frame[93]. The non-adversarial structure of the process notwithstanding, it is important that compliance control does not remain "toothless" if a state is really unwilling to comply. Thus, there is a need to have the possibility to resort to more severe sanctions, at least as an *ultimum remedium*.

As to the competent treaty organ, in most cases the decision about reactions in the event of non-compliance is in the hands of a political body, usually the Conference of the Parties[94]. The powers entrusted to the Conference of the Parties are, however, not very specific. Rather, they appear to be broad and to include punitive as well as remedial action.

An example to this end is Article XIII of CITES. Once the Secretariat has communicated information related to implementation problems to the parties concerned, it is up to these parties to inform the Secretariat of any relevant facts and to propose remedial action. It has already been mentioned that even an inquiry may be carried out with the consent of the party under scrutiny. Relevant information is then reviewed by the next Conference of the Parties "which may make whatever recommendations it deems appropriate". Thus, the decision-making power lies in the hands

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[92] Chayes/Chayes/Mitchell (note 9), 80: "We believe that there are acceptable levels of compliance – not an invariant standard, but one that changes over time with the capacities of the parties and the urgency of the problem". For a more critical view see M. Koskenniemi, Comment on the Paper by Antonia Handler Chayes, Abram Chayes and Ronald B. Mitchell, in: Lang (note 9), 91 at 94 et seq.

[93] For details see Sachariew (note 2), 43.

[94] It is noteworthy that under the Paris Convention it is not the Conference of the Parties but the Commission which is the only competent organ to "decide upon and call for steps to bring about full compliance" (Article 23). However, the Commission includes representatives of each of the Contracting Parties (Article 10, paragraph 1).

of a political body which may, however, make only "recommendations". Rightly this provision has thus been characterised as toothless[95].

Under the Montreal Protocol non-compliance procedure there is a more detailed mechanism. The Implementation Committee first is mandated to seek to secure an amicable solution. If this cannot be achieved, the Committee makes a non-binding determination as to compliance and presents recommendations to the Meeting of the Parties as to the parties involved. It is then the Meeting of the Parties which may "decide upon and call for steps to bring about full compliance with the Protocol, including measures to assist the Parties' compliance with the Protocol, and to further the Protocol's objectives" (paragraph 9 of the decision). The possibility of the Implementation Committee to influence decisions taken by the Meeting of the Parties by making "any recommendations it considers appropriate" seems all the more relevant as the Committee itself shall first seek an amicable solution of the matter. Reactions to non-compliance can be both positive and negative. There may be technical and financial assistance, a kind of admonition but also the suspension of certain rights existing under the Protocol[96] as may be taken from the "Indicative List of Measures that Might be Taken by the Meeting of the Parties in Respect of Non-Compliance with the Protocol"[97]. The Meeting of the Parties is, however, not restricted to actions enumerated therein.

b) The Relationship Between Compliance Control and Dispute Settlement

At present, traditional dispute resolution measures and mechanisms of compliance control exist in parallel under various international agreements. Thus, the opening paragraph of the decision establishing the non-compliance procedure under the Montreal Protocol explicitly provides: "The following procedure has been formulated pursuant to Article 8 of the Montreal Protocol. It shall apply without prejudice to the operation of the settlement of disputes procedure laid down in Article 11 of the Vienna Convention". Similarly, Article 7, paragraph 4, of the Oslo Protocol states: "The application of the compliance procedure shall be without prejudice to the provisions of article 9 of the present Protocol". Article 9 of the Oslo Protocol provides for a detailed dispute settlement mecha-

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[95] Favre (note 59), 297: "A more 'toothless' provision would be hard to imagine".

[96] This, *inter alia*, covers rights related to trade, transfer of technology, or financial assistance; see W. Lang, Compliance-Control in Respect of the Montreal Protocol, ASIL Proceedings 1995, 206 at 208.

[97] UNEP/OzL.Pro.4/15, Annex V, 48.

nism. No such provision is included in the Paris Convention. However, Article 32 of the Convention stipulates that disputes between contracting parties may first be settled "by means of inquiry or conciliation within the Commission". Only if this is not successful, other mechanisms are at hand.

The interrelationship between the non-compliance procedure and the dispute settlement procedure provided for under the Montreal Protocol has given rise to debates and controversies from the beginning of the deliberations within the Working Group entrusted by the Meeting of the Parties with the drawing up of the procedure[98]. Neither was there agreement on giving priority to one of the two regimes nor was it considered appropriate to defer the non-compliance procedure to dispute settlement provisions. The outcome of the discussions was the above-quoted opening paragraph and the obligation of the parties involved in a particular non-compliance case to "inform ... the Meeting of the Parties of the results of proceedings taken under Article 11 of the Convention regarding possible non-compliance, about implementation of those results and about implementation of any decision of the Parties ..."[99]. The main difference between the non-compliance procedure and dispute settlement is the latter's reliance on outsiders and its potentially confrontational character. This is particularly true in cases of compulsory third-party settlement, as provided for, *inter alia*, in Article 32 of the Paris Convention. According to this provision the initiation of the dispute settlement procedure does not depend on common agreement for its operation of the parties to the dispute. It is initiated "at the request" of any of the parties. It must, however, be admitted that compulsory third-party settlement still is the exception rather than the rule. Thus, under Article 11 of the Vienna Convention, the operation of the Convention's dispute settlement regime is dependent on common agreement. The usual pattern of dispute settlement under international environmental agreements is a hierarchy from negotiation through good offices of a third party and arbitration or submission to the International Court of Justice up to the submission of the matter to a Conciliation Commission[100].

There is some criticism as to the potentially parallel operation of compliance control procedures and traditional dispute settlement mechanisms. Thus, it has been suggested that the Montreal Protocol non-compliance

[98] See Szell (note 19), 102 et seq.

[99] Paragraph 12 of the Montreal Protocol non-compliance procedure.

[100] See, *inter alia*, Art. 11 of the Vienna Ozone Convention and Article 14 of the FCCC.

procedure should be amended in a way that it must first be exhausted before giving parties the possibility to initiate the dispute resolution mechanism[101]. Another possibility would be to establish a self-contained regime which requires parties to first exhaust intra-treaty dispute resolution procedures. Given the difficulty in reconciling mechanisms of compliance control and traditional means of dispute resolution in one instrument, it is noteworthy that the Montreal Protocol Implementation Committee has urged the Meeting of the Parties to deal with the relationship between non-compliance and the dispute resolution measures of the Vienna Convention[102].

III. Procedural Principles

The tension inherent in the development of international environmental law, namely the interrelationship between national sovereignty and international co-operation[103], comes to a point when compliance control is at issue: interferences with national sovereignty are inherent in any international control mechanism. Such interferences are only acceptable for states if their sovereign rights are given due respect. There are hardly any explicit references to the sovereign rights of states parties in the context of any environment-related compliance control mechanism. However, numerous provisions of the pertinent agreements reflect the need for balancing national sovereignty and international scrutiny.

Thus, the preamble of CITES recognises "that peoples and States are and should be the best protectors of their own wild fauna and flora" and Article XIII, paragraph 2, provides for an inquiry only "(w)here the Party considers that an inquiry is desirable". It further stipulates that "such inquiry may be carried out by one or more persons expressly authorised by the Party". Another example may be taken from the Montreal Protocol non-compliance procedure which permits information-gathering in the territory of a party only "upon invitation of the Party concerned". Even more explicit are the FCCC and the United Nations Convention on Biological Diversity. The FCCC in its preamble reaffirms "the principle of

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[101] M. Koskenniemi, Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol, Yearbook of International Environmental Law 3 (1992), 123 at 134.

[102] See Thomas-Nuruddin (note 22), 24.

[103] See generally U. Beyerlin, Staatliche Souveränität und internationale Umweltschutzkooperation. Gedanken zur Entwicklung des Umweltvölkerrechts, in: Beyerlin [et al.] (note 36), 937 et seq.

sovereignty of States in international co-operation to address climate change" and the Convention on Biological Diversity underlines "that States have sovereign rights over their own biological resources".

Respecting the principle of national sovereignty first of all means that compliance control depends upon acceptance of the mechanism by the states concerned. Whether or not states agree to subject themselves to such procedures depends on the acceptability of these mechanisms. Factors contributing to such acceptability are numerous. They reflect the – sometimes diverse – interests states want to pursue. In general, states want to maximise their influence upon the procedure while at the same time minimising impacts upon themselves. This requires some balancing which may, *inter alia*, be done by structuring the procedure through defining procedural steps as well as by applying certain procedural principles.

Such principles are discussed here from an analytical perspective. Their legal basis is not at issue. Nevertheless, it may be pointed out that the present analysis is primarily based on the pertinent international agreements. This does not exclude that some of the principles can be considered to form part of customary international law already while others may develop into norms of customary law in the future.

1. The Principle of Procedural Co-operation

The importance of co-operation between states in international environmental relations is more than obvious. Co-operation is a broad concept: it includes procedural aspects, such as the obligation to co-operate, as well as norms established by and reflecting co-operation[104]. Procedural co-operation has hitherto primarily been discussed as a matter of inter-state co-operation in the management of environmental hazards rather than co-operation in respect of compliance. However, both aspects are interrelated.

Norms of procedural co-operation have first been developed as part of the customary international law on transboundary pollution, translated into more specific commitments such as the duty of a state responsible for a (possible) transboundary impact to notify the potentially affected neighbour states and to enter into consultations with them[105]. These norms

[104] See P.-T. Stoll, The International Environmental Law of Cooperation, in: Wolfrum (note 9), 39 et seq.

[105] F. Francioni, International Co-Operation for the Protection of the Environment: The Procedural Dimension, in: W. Lang/H. Neuhold/K. Zemanek (eds.), Environmental Protection and International Law (1991), 203 at 205 et seq.

were subsequently supplemented by rules on the exchange of information on matters other than emergencies, in particular on monitoring[106] but also on available technologies to cope with environmental problems[107]. Beyond these procedures forms of co-operation have become more frequent that come close to compliance control, in particular the exchange of information relating to state activities, including legislative and administrative measures. The essential change under new mechanisms of compliance control is that interstate co-operation has been transformed into co-operation between states parties and treaty organs. This necessitates that the treaty organs have achieved a degree of institutional autonomy and do not merely provide "switchboard services"[108].

The above outlined developments show that there are norms obligating states to co-operate. However, if there is a move towards co-operation with a treaty organ, then the question arises in how far the treaty organ itself is obliged to co-operate and not simply to implement the co-operation of states. A first aspect is that international scrutiny of an individual state party's compliance with its obligations is based on the voluntary[109] subjection of that state party to the relevant control regime. As has been argued in the introductory part of this paper, compliance control is a means of confidence building between states parties. Thus, the activities of a particular treaty organ charged with supervision are not an end in themselves but contribute to the generation of trust between the parties. This purpose is reflected in the co-operative structure of compliance control: although competent treaty organs have some unilateral powers vis-à-vis states parties these are only subsidiary in character. What has to be sought in the first place are constructive and amicable solutions adopted in agreement with the party under scrutiny. This may be illustrated by reference to the subsidiary nature of non-compliance procedures and to the primary focus on reporting mechanisms. Thus, under the Montreal Protocol as well as under the Oslo Protocol international control is primarily based upon the reporting system, with the non-compliance procedure only complementing the routine mechanism. The co-operative structure extends also to the non-compliance procedure as may be shown by men-

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[106] See Sands (note 44), 612 et seq.

[107] Francioni (note 105), 217 et seq.

[108] On this term see Sachariew (note 2), 45.

[109] On voluntariness see the Report of the Expert Group Meeting on Identification of Principles of International Law for Sustainable Development (Geneva, Switzerland, September 26 – 28, 1995), UN Division for Sustainable Development, paragraph 155.

tioning the possibility of a state party to express concern about its ability to comply, thus, initiating the non-compliance procedure itself.

Looking more closely at the obligations assumed by the parties to the pertinent agreements and the treaty organs dealing with compliance control the principle of co-operation does not only concern the structure of the procedure but also the way in which the procedure is handled. States parties are under an obligation to implement their obligations *bona fide* (cf. Article 26 of the Vienna Convention on the Law of Treaties) and to co-operate with the competent implementation bodies. *Bona fide* implementation does not only apply to their substantive obligations but also to reporting requirements and to the furnishing of further information to the Secretariats and other treaty organs if so requested. It goes without saying that inquisitory powers of implementation bodies and co-operation by states parties are complementary: the more a party co-operates, the less it is necessary for the competent treaty organs to encroach upon that party's sovereignty. The application of the principle of procedural co-operation to the treaty organs established under a particular agreement may be illustrated by reference to the Secretariats under the Montreal Protocol and under the Oslo Protocol which are required to inform parties about any formal submissions concerning their compliance with the Protocols[110]. Particular expression of this principle of procedural co-operation is the obligation of the Implementation Committees under both Protocols to secure "an amicable" (Montreal) or "constructive" (Oslo) "solution of the matter"[111].

2. The Right to be Heard

The right to be heard flows from the principle of procedural co-operation. It can also be considered to be part of an international rule of law[112]. The possibility for a party under scrutiny to present its position before any decision concerning its compliance or non-compliance is taken is essential for the acceptability of compliance control procedures encroaching upon a state's sovereignty. The right to be heard is particularly important if a convention provides for the adoption of sanctions in the event of non-compliance.

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[110] Para. 2 of the Montreal Protocol non-compliance procedure; para. 3 of the Oslo Protocol non-compliance procedure.

[111] Para. 8 of the Montreal Protocol non-compliance procedure; para. 6(c) of the Oslo Protocol non-compliance procedure.

[112] On the concept of an international rule of law see A. Watts, The International Rule of Law, German Yearbook of International Law 36 (1993), 15 et seq.

Under Article XIII of CITES the Secretariat shall communicate information related to implementation problems to the authorised Management Authority of the party concerned. This illustrates that information is a precondition for the party concerned not only to provide further information but also to present its views. As Article XIII of CITES provides, the party concerned shall inform the Secretariat of any relevant facts and, if considered to be desirable by the party, even an inquiry may be carried out. The right to be heard may also be derived from the fact that the party concerned is part of the plenary body which may make recommendations.

In the case of the Montreal Protocol non-compliance procedure the party whose compliance is the object of another party's submission will receive a copy of the submissions and will have the possibility to reply (paragraph 2). Further, if initiating the procedure itself a party has to explain "the specific circumstances that it considers to be the cause of its non-compliance" (paragraph 4). Also, the securing of an amicable solution necessitates to hear what the party concerned wants to put forward in support of its position. Finally, "a Party ... not a member of the Implementation Committee ... shall be entitled to participate in the consideration by the Committee of that submission" (paragraph 10). This and its membership of the plenary body ensure that a party is being heard before any measures as to its non-compliance are adopted.

What may be taken from these examples is the conclusion that each party subject to compliance control has the right to be heard. In the case of a routine procedure this right is not limited to national self-reporting but a party may be involved in the evaluation of its report[113]. *Ad hoc* or non-compliance procedures require that the party whose implementation of a treaty provision is at issue is informed about any such submission. The party concerned usually has the possibility to reply and to submit further information. Under some procedures there is participation of the party concerned in the consideration of submissions, however, not in the elaboration and adoption of recommendations on that matter[114].

3. The Principle of Proportionality

Irrespective of whether or not this principle is considered to form part of general customary international law, it is reflected in numerous provi-

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[113] This depends on the treaty organ charged with the evaluation.

[114] Under the Montreal Protocol non-compliance procedure a party that has been the object of another party's submission or that has addressed to the Secretariat a submission

sions dealing with compliance control. Before addressing the impact of the principle of proportionality on the conduct of compliance control the notion's status in international law deserves closer attention. Its origins "as a rather crude yardstick of State behaviour"[115] are to be found in the customary international law of reprisal and self-defence; however, since then it has become increasingly more sophisticated. The principle continues to be applied in particular fields of inter-state relations, as for instance, the rights of self-defence and reprisal, international humanitarian law and human rights. However, today it also extends to relations between international organisations and member states. Thus, it is argued that the principle of proportionality must be taken into account with regard to enforcement measures taken by the Security Council under Article 42 of the UN Charter[116]. Similarly, the principle applies to various procedures of international control and law enforcement, such as for instance under the IAEA safeguards[117] or under the verification regime of the Chemical Weapons Convention[118].

Turning to compliance control in international environmental law, there is no explicit recognition of the principle of proportionality in any of the treaties analysed. However, numerous provisions illustrate that the validity of this principle was underlying the adoption of both, reporting and non-compliance procedures. Thus, information requests under Article XII, paragraph 2(d) CITES may be put forward by the Secretariat only if deemed "necessary to ensure implementation of the present Convention"[119]. The Montreal Protocol non-compliance procedure also stipulates that the Implementation Committee may request, through the Secretariat, further information on matters under its consideration "where it considers necessary" (paragraph 7[c])[120]. Elements of the proportion-

concerning its non-compliance is "entitled to participate in the consideration by the Committee of that submission" (para. 10); however, it shall not take part "in the elaboration and adoption of recommendations on that matter" (para. 11). Similar provisions are included in the Oslo Protocol non-compliance procedure (paras. 9 and 10).

[115] J. Delbrück, Proportionality, in: R. Bernhardt (ed.), Encyclopedia of Public International Law, Instalment 7 (1984), 396.

[116] J.A. Frowein, Article 42, in: B. Simma (ed.), The Charter of the United Nations. A Commentary (1994), 628 at 631.

[117] T. Lohmann, Die rechtliche Struktur der Sicherungsmaßnahmen der Internationalen Atomenergie-Organisation (1993), 99.

[118] T. Marauhn/H. van Heck, Routine Verification under the Chemical Weapons Convention, in: M. Bothe/N. Ronzitti/A. Rosas (eds.), Chemical Weapons Disarmament: Strategies and Legal Problems (forthcoming).

[119] Emphasis added.

[120] Emphasis added.

ality principle may further be taken from the provisions dealing with possible reactions in the event of non-compliance. The pertinent norms empower the relevant treaty organs to adopt "appropriate" measures[121]. Disproportionate measures, it is argued here, cannot be considered to be appropriate. Since all recent non-compliance procedures include measures aimed at remedial action it may be argued that appropriate assistance must first be offered before any punitive measures are taken. Finally, in light of the principle of sustainable development[122], which applies to law-making as well as to law-enforcement, it is possible to argue that measures of compliance control should not hamper the economic and technological development of states parties nor their international co-operation.

4. The Protection of Confidential Information

So far, transparency has been considered to be an important element of compliance control since it contributes to the development of mutual trust and confidence among states parties[123]. There is, in principle, a need for a free flow of information into and out of any process established to assess the compliance of parties to an agreement with their commitments. Thus, under the Montreal Protocol non-compliance procedure the Implementation Committee shall receive, consider and report on "any ... information received and forwarded by the Secretariat concerning compliance" (paragraph 7[b]). Another reason for making widely available information about parties' compliance is to enlist the support of the public in promoting the implementation of environmental agreements. This idea is, for instance, underlying the monitoring and reporting requirements under CITES. They make parties' actions more transparent and are useful because a party may prefer to comply than risking negative public opinion. However, it has already been recognised in CITES that, to some extent, there is a conflict between transparency and the protection of confidential information. Hence, Article VIII, paragraph 8, of CITES stipulates that the information to be provided by the parties shall only be available to the public "where this is not inconsistent with the law of the Party concerned".

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[121] Cf. Art. XIII, para. 3, of CITES ("recommendations it deems appropriate"); Art. 23, *lit.* (b), of the Paris Convention ("when appropriate, decide upon and call for steps"); para. 9 of the Montreal Protocol non-compliance procedure ("recommendations it considers appropriate").

[122] For an analysis of this concept see U. Beyerlin, The Principle of Sustainable Development, in: Wolfrum (note 9), 95 et seq.

[123] On transparency see above note 13.

The need for protecting either sensitive public or confidential business information is particularly important if an international environmental agreement touches upon the production of or the trade in certain industrial products. This is the case with the Montreal Protocol. Consequently, the Protocol's non-compliance procedure includes provisions on the confidentiality of information. Paragraph 15 of the decision establishing the non-compliance procedure concerns the deliberations of the Implementation Committee and comprises the obligation of members of the Committee and parties involved in the Committee's work to protect "the confidentiality of information they receive in confidence". The following paragraph 16 deals with the possibility for the public and any other party to obtain information on the Committee's work. This provision ensures that the Committee's report (which may be made available to the public) does not "contain any information received in confidence". If a party requests and receives information beyond that included in the report it "shall ensure the confidentiality of the information it has received in confidence". It is important to note that information is not confidential *per se* but must be designated as confidential ("received in confidence"). There is no provision on who is competent to do so but it may be assumed that this power is in the hands of the party submitting relevant information. There are no particular rules as to the liability of members of the Committee or states parties in the event of unlawful disclosure of confidential information nor on any dispute settlement mechanism that may be needed in such a case[124].

Recently, the protection of confidential information has been included in Article 12, paragraph 9, of the FCCC: "Information received by the secretariat that is designated by a Party as confidential, in accordance with criteria to be established by the Conference of the Parties, shall be aggregated by the secretariat to protect its confidentiality before being made available to any of the bodies involved in the communication and review of information." This provision goes beyond earlier ones on the protection of confidential information. First, it makes clear that it is up to the individual state party to designate information as confidential. Second, however, the party has not unlimited discretion in doing so but Article 12, paragraph 9, anticipates that the Conference of the Parties will establish criteria for the desig-

[124] The Oslo Protocol non-compliance procedure does not include provisions requiring the Implementation Committee members or the parties involved in the non-compliance procedure to respect confidentiality since the need to protect business secrets was seen as less likely than in the context of the Montreal Protocol.

nation of confidential information. Third, the provision does not allow confidential information outside the sphere of the Secretariat (what is possible under the Montreal Protocol non-compliance procedure); since confidential data have to be aggregated before being made available to any other treaty organ there is no need to ensure that other states parties respect the confidentiality of information so designated.

IV. Perspectives

This paper has aimed at contributing to the further development of compliance control in international environmental relations by presenting an outline of what may be called a procedural law of compliance control. It has been made clear that this is not an exercise *de lege ferenda* but that there are already various norms in place which govern the procedural sequence of compliance control. There are even some tentative dispositions for a set of procedural principles that could apply to the performance of international scrutiny in environmental law.

None of the existing procedures is a fully developed one. This is to a large extent due to their establishment. While reporting systems have been included in various environmental agreements in the past, *ad hoc* procedures have only recently been perceived as a viable means to improve compliance with international environmental law. It is noteworthy that – with the exception of Articles 22 and 23 of the Paris Convention – none of these recent procedures forms an integral part of the relevant treaty nor have they been adopted by way of treaty amendment. Instead, they have been established simply by a decision of the Conference of the Parties taken on the basis of enabling provisions, such as Articles 8 and 11, paragraph 3, of the Montreal Protocol and Article 7, paragraph 3, of the Oslo Protocol. This does not put into question the legally binding character of these procedures[125]. Rather it shows that it is not always easy for states to agree upon substantive norms and mechanisms for their enforcement at the same time. This is particularly true for the FCCC. Its Article 13 again is an enabling provision for the establishment of what is called a "multilateral consultative process, available to Parties on their request, for the resolution of questions regarding the implementation of the Convention". This fairly weak provision was the most states could agree upon during the negotiations for the Convention[126]. Its vagueness gives rise to a va-

[125] Bothe (note 9), 31.

[126] Werksman (note 25), 96 et seq.

riety of interpretations as the discussions among states parties have shown so far. At their first session in 1995, the parties to the FCCC set up a working group on the establishment of such a multilateral consultative process[127]. If such a process is well-designed it can contribute to the effective implementation of the Convention.

Meanwhile, in parallel to the negotiations and discussions within the working group, there have been numerous proposals for such a mechanism put forward by academics[128]. It is not the place here to evaluate these proposals. Only three aspects may be pointed out: First, it is important to balance the non-adversarial approach of compliance control and the need for focused deliberations in respect of a state party under scrutiny. This balancing might be achieved more easily by way of a procedure similar to the Montreal Protocol non-compliance procedure than by adopting something similar to the more adversarial GATT/WTO panel system. Such a system seems to be too focused and to be suitable rather to the solution of bilateral disputes than to scrutiny exercised by an international institution, be it a treaty organ or an international organisation *stricto sensu*. Second, though there is need for detailed provisions governing the process of compliance control, the experience with the Montreal Protocol non-compliance procedure has shown that some flexibility is needed to adapt the mechanism to the specifics of the Convention. This could be done during a pilot phase with non-controversial cases before the competent treaty organs. Such flexibility in the beginning notwithstanding a detailed procedure should be developed in the long run, taking into account and further developing such procedural steps and principles as outlined in this paper. Third, the non-compliance procedures under the Montreal and Oslo Protocols are quasi-judicial procedures. The procedural steps and principles discussed here are designed not to develop compliance control into a judicial procedure but rather to preserve its quasi-judicial character. To this end it should be borne in mind that lawyers and social scientists may well complement each other in fulfilling this task: while social scientists should concentrate on evaluating the effectiveness of the various approaches to compliance control, there remains much to be done by lawyers in developing a procedural law of compliance control.

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[127] FCCC/CP/1995/7/Add.1, 59 (Decision 20/CP.1).

[128] See, *inter alia*, D.G. Victor, Design Option for Article 13 of the Framework Convention on Climate Change: Lessons from the GATT Dispute Panel System, IIASA (International Institute for Applied Systems Analysis) Executive Report (ER-95 –1, 1995) and Werksman (note 25), 105 et seq.