Elements of a Supervisory Procedure for the Climate Regime

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1. Introduction

The United Nations Framework Convention on Climate Change (FCCC)[1] is one of the most recent environmental treaties. After alarming new scientific findings and in the wake of heightened environmental concerns over acid rain and the ozone hole, the issue was taken into the political arena in the 1980s by the United Nations Environment Programme (UNEP) and the World Meteorological Organization (WMO)[2]. They organized a series of workshops which led to an influential semi-diplomatic conference in Toronto 1988[3] and to the Second World Climate Conference in Geneva 1990[4]. Following a call by the latter, the UN General Assembly established the Intergovernmental Negotiating Committee for a

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[1] Text in: 31 ILM 851 (1992); BGBl. 1993 II, 1783.

[2] For the history of the FCCC cf. D. Bodansky, The United Nations Framework Convention on Climate Change: A Commentary, in: 18 Yale J. of Int'l Law (1993), 451–558; I. Rowlands, The Politics of Global Atmospheric Change, Manchester 1995; D. Zaelke/J. Cameron, Global Warming and Climate Change – An Overview of the International Legal Process, in: 5 Am. Univ. J. Int'l Law & Policy (1990), 249–289; S. Oberthür, Politik im Treibhaus. Die Entstehung des internationalen Klimaschutzregimes, Berlin 1993; H. Ott, Das internationale Regime zum Schutz des Klimas, in: T. Gehring/S. Oberthür, Umweltpolitik durch internationale Regime, Opladen (to be published by the end of 1996).

[3] The Changing Atmosphere: Implications for Global Security, cf. 5 Am. Univ. J. of Int'l Law & Policy (1990), 515.

[4] J. Jäger/H.L. Ferguson (eds.), Climate Change: Science, Impacts and Policy. Proceedings of the Second World Climate Conference, Cambridge 1991.

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Framework Convention on Climate Change (INC/FCCC) and a Secretariat located in Geneva[5]. Within fifteen months the INC drafted and adopted the FCCC, just in time for it to be signed by 154 States and the EC at the June 1992 UN Conference on Environment and Development in Rio de Janeiro[6].

The FCCC does not contain legally binding obligations for controlling greenhouse gases[7] and, largely due to its framework character, the Convention soon entered into force on 21 March 1994, three months after the fiftieth document of ratification was deposited with the UN Secretary General. The preparations for the first Conference of the Parties, to be convened within one year after the entry into force of the Convention (Art. 7.4 FCCC), commenced with a "prompt start"[8]: The INC continued to exist after the Convention's entry into force and served as a Preparatory Committee for the first Conference of the Parties. It met six times after the adoption of the Convention, and the first Conference of the Parties, which took place in Berlin from 28 March to 7 April 1995, was able to build on the INC's considerable administrative and technical preparatory work. The first Conference of the Parties was therefore largely successful in the establishment of an institutional and procedural structure for future efforts to grapple with climatic changes[9].

The first Conference of the Parties also laid the foundation for the further development of the climate regime and established a working

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[5] U.N. Resolution on the Protection of Global Climate for Present and Future Generations, G.A. Res. 45/212, U.N. Doc. A/45/49 (1990).

[6] The "Earth Summit", for the documents see N. Robinson/P. Hassan/F. Burhenne-Guilmin, Agenda 21 & The UNCED Proceedings, New York 1992.

[7] Cf. H. Ott, Völkerrechtliche Aspekte der Klimarahmenkonvention, in: H.G. Brauch (ed.), Klimapolitik. Naturwissenschaftliche Grundlagen, internationale Regimebildung und Konflikte, ökonomische Analysen sowie nationale Problemerkennung und Politikumsetzung, Heidelberg 1996, 61–74.

[8] Cf. Bodansky (note 2), 552 et seq.

[9] For the results of the first Conference of the Parties see S. Oberthür/H. Ott, UN-Convention on Climate Change. The First Conference of the Parties, in: 25 Environmental Policy & Law (1995), 144–156 (quoted *infra*: Oberthür/Ott 1995a); M. Grubb, The Berlin Climate Conference: Outcome and Implications, London 1995; S. Oberthür/H. Ott, Stand und Perspektiven der internationalen Klimapolitik, in: 4 Internationale Politik und Gesellschaft 1995, 399–415 (quoted *infra*: Oberthür/Ott 1995b); T. Krägenow, Verhandlungspoker um Klimaschutz: Beobachtungen und Ergebnisse der Vertragsstaaten-Konferenz zur Klimarahmenkonvention in Berlin, Freiburg 1995; M. Ehrmann, Ergebnisse des Berliner Klimagipfels, in: Umwelt- und Planungsrecht (1995), 435–439.

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group (*Ad Hoc* Group on the Berlin Mandate) that is supposed to draft a climate protocol (or "another legal instrument") in time for the third Conference of the Parties by the end of 1997[10]. The Parties to the FCCC were not able, however, to agree on a procedure for the "resolution of questions regarding implementation", as requested by Art. 13 of the Convention. This issue, the development of a supervisory procedure, shall be explored in the following contribution. Given the limited space, however, it can only give an overview and does not aim to be exhaustive.

2. *Implementation Review and Resolution of Disputes in the FCCC*

Since the law of nations is characterized by the absence of a formal hierarchical structure, it has never been easy to establish means of ensuring compliance with its obligations. The significance of these means is, however, enhanced in the framework of treaty regimes with its more refined and elaborated mutual obligations. Treaty regimes thus frequently provide for the peaceful settlement of disputes and establish a so-called "self-contained régime" which excludes resorting to unilateral reprisals for the contracting parties[11].

Whereas in many international treaties conflict management is left to either diplomatic activities or to judicial settlement by the International Court of Justice (ICJ) (or an international *ad hoc* tribunal), modern environmental treaties are increasingly using political and sometimes quasi-judicial supervisory procedures[12]. Examples are the Non-Compliance Procedure established under the Montreal Protocol on Substances that Deplete the Ozone Layer (1987)[13] and the procedure established under the

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[10] The so-called "Berlin Mandate", Dec. 1/CP.1, UN Doc. FCCC/CP/1995/7/Add.1 (containing the decisions of the Berlin meeting); cf. Oberthür/Ott 1995a (Anm. 9), 144 et seq.

[11] The terminology of the International Court of Justice (ICJ) in the Case concerning *United States Diplomatic and Consular Staff in Tehran* (*USA* v. *Iran*), ICJ Rep. 1980, 3, 40, 43.

[12] Cf. T. Gehring, International Environmental Regimes: Dynamic Sectoral Legal Systems, in: 1 Yearbook of International Environmental Law (1990), 35 – 56; M. Koskenniemi, Breach of Treaty or Non-Compliance? Reflections on the Enforcement of the Montreal Protocol, in: 3 Yearbook of International Environmental Law (1992), 122 –162.

[13] Text of the treaty 26 ILM 1541, 1550 (1987); BGBl. 1988 II, 1014; the non-compliance procedure is contained in the report of the Fourth Meeting of the Parties, 32 ILM 874 (1993); BGBl. 1993 II, 2182, 2196. For an elaboration see Koskenniemi (note 12) and

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Second Sulphur Protocol (1994)[14]. These procedures are part of the implementation mechanism of these environmental treaties, building on multilateral communication and review procedures[15].

The Framework Convention on Climate Change does provide for judicial dispute settlement under Art. 14 and contains the foundations for a multilateral review procedure, which has been further elaborated by decisions of the Parties. These two means of supervision and enforcement of obligations shall be described briefly in the next chapters, before dealing with the negotiations on a comprehensive supervisory procedure under Art. 13 FCCC.

a) The dispute settlement procedure

Most multilateral environmental treaties contain a provision on judicial dispute settlement, usually modelled after Art. 33 of the United Nations Charter[16]. Thus Art. 14 of the FCCC stipulates a step-by-step process for the settlement of disputes: The Parties shall first attempt to

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the contribution of Jacob Werksman in this issue; for the interim procedure adopted in 1990 cf. H. Ott, The New Montreal Protocol: A Small Step for the Protection of the Ozone Layer, a Big Step for International Law and Relations, 24 Verfassung und Recht in Übersee (Law and Politics in Africa, Asia and Latin America) (1991), 188 – 208; an overview of the practice is provided by O. Greene, Ozone Depletion: Implementing and Strengthening the Montreal Protocol, in: J.B. Poole/R. Guthrie (eds.), Verification Report 1992, London/New York 1992, 265 – 274 and O. Greene, Limiting Ozone Depletion: The 1992 Review Process and the Development of the Montreal Protocol; in: J.B. Poole/ R. Guthrie (eds.), Verification 1993. Peacekeeping, Arms Control and the Environment, London/New York 1993, 269 – 280; see also E. Barratt-Brown, Building a Monitoring and Compliance Regime Under the Montreal Protocol, in: 16 Yale J. of Int'l L. (1991), 519 – 570.

[14] 1994 Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Further Reductions of Sulphur Emissions of 14 June 1994, 33 ILM 1540 (1994); the procedure is reprinted in: 24 Environmental Policy & Law (1994), 57, 122; for a description see P. Széll, The Development of Multilateral Mechanisms for Monitoring Compliance, in: W. Lang (ed.), Sustainable Development and International Law, London/Amsterdam 1995, 97 –109, 104 et seq.

[15] Some of these are described by K. Sachariev, Promoting Compliance with International Environmental Legal Standards: Reflections on Monitoring and Reporting Mechanisms, in: 2 Yearbook of International Environmental Law (1991), 31– 52.

[16] Cf. Art. 18.2 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) (1973), 12 ILM 1085 (1973); Art. 18.2 Convention of the Protection of the Marine Environment of the Baltic Sea Area (1974), 13 ILM 546 (1974); Art. 22.2/3 Barcelona Convention for the Protection of the Mediterranean Sea Against Pollution (1976), 15 ILM 285, 290 (1976); Art. 11.3 Vienna Convention for the Protection of

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settle their disputes through negotiations (or "other peaceful means") (Art. 14.1), widely regarded as the most effective means of conflict resolution[17]. An amicable solution of conflicts between the Parties to the Convention is facilitated by the institutionalization of the treaty, i.e. the existence of several multilateral treaty organs. These bodies allow disagreements to surface early and provide a communicative structure for their cooperative solution.

As a second step the dispute may be submitted to the ICJ or to arbitration (Art. 14.2)[18]. If both Parties to the dispute have made a declaration at the time of ratification to accept compulsory jurisdiction (Art. 14.2), each of the Parties to a dispute may unilaterally bring the issue to the ICJ or arbitration. However, to date the Solomon Islands are the only Party to the FCCC to have deposited such a declaration[19]. Since the compulsory jurisdiction only exists with regard to those Parties that have made a declaration, all conflicts will have to be submitted jointly by the disputing states.

If the dispute has not been settled after 12 months, a third step of the procedure can be invoked. Either of the Parties may then submit the issue to a conciliation commission (Art. 14.5; 14.6). This commission is to be composed of an equal number of members appointed by either Party and by a chairman chosen jointly by those members (Art. 14.6); its verdict is not binding and has a recommendatory character (Art. 14.6)[20]. Any decision of the International Court of Justice (ICJ), however, is automatically legally binding according to Art. 59 of the ICJ Statute. This question was not yet resolved for the arbitration procedure, which the Parties have failed to adopt until now. There are at present no activities

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the Ozone Layer (1985), 26 ILM 1516 (1987) and Art. 20.3 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (1989), 28 ILM 649, 657 (1989).

[17] L.B. Sohn, The Future of Dispute Settlement, in: R.St.J. MacDonald/D.M. Johnston (eds.), The Structure and Process of International Law. Essays in Legal Philosophy, Doctrine and Theory, The Hague (1983), 1121–1146, 1122. Similarly the ICJ in the *Fisheries Jurisdiction* Case (*UK* v. *Iceland*), ICJ Rep. 1974, 3, at para.72; cf. also the Case concerning *Passage through the Great Belt* (*Finland* v. *Denmark*), Order of 29 July 1991, ICJ Rep. 1991, 12, 20, where the Court welcomes ongoing negotiations during the proceedings.

[18] The Parties have so far not adopted an annex on arbitration, as required by Art. 14.2 *lit.* b FCCC.

[19] Whereas the Republic of Cuba expressly declared that, in relation to Art. 14 FCCC, disputes should be settled by way of diplomatic negotiations, cf. UN Doc. FCCC/1996/Inf. 1, p.15.

[20] The compulsory or mandatory character of the dispute resolution was a contentious issue, see Bodansky (note 2), 549.

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to elaborate such a procedure, although precedents would point to the binding nature of its awards[21].

As far as it is known there has never been a case where, in the framework of an environmental treaty, Parties to a dispute have resorted to these dispute settlement procedures. This is first of all due to the fact that only a limited number of treaties provide for the unilateral submission of a dispute to an Arbitration Tribunal or the ICJ[22]. Furthermore, there are only a very few declarations by Parties that they are willing to accept the compulsory jurisdiction of the ICJ or an *ad hoc* tribunal. Even if there are such occasional declarations, the other Party to a dispute will not have made a declaration and is therefore generally not in the position to take the first Party to court unilaterally. The reasons for this reluctance to provide for unilateral submission in the treaty and to submit a dispute to judicial proceedings are manifold[23] and the effect of these traditional means of conflict resolution is quite limited. Nevertheless negotiators keep on using them in international treaty-making[24].

b) The multilateral review procedure

In the absence of binding commitments to reduce greenhouse gases, the obligations for reporting and review of national communications are a very important element of the FCCC. Precise information on sources and

[21] J. Werksman, Designing a Compliance System for the United Nations Framework Convention on Climate Change, UN Doc. FCCC/AG13/1996/Misc.2, 9.

[22] The unilateral submission of a dispute to a tribunal is provided for in the Brussels Convention Relating to the Intervention on the High Seas in Case of Oil Pollution Casualties of 19 November 1969, 8 ILM 466 (1969), Art. VIII and an Annex; the London Dumping Convention of 29 December 1972, 18 ILM 510 (1979), Art. 11 and a procedure; the Paris Convention of 4 June 1974, 13 ILM 352 (1974), Art. 21 and Annex B; the Bonn Convention on the Protection of the Rhine Against Pollution of 3 December 1976, 16 ILM 242 (1977), Art. 15 and Annex B and the Berne Habitat Convention of 19 September 1979, Art. 18 II. Art. I of the Optional Protocol Concerning the Compulsory Settlement of Disputes to the Vienna Convention on Civil Liability for Nuclear Damage of 21 March 1963, 2 ILM 727 (1963) provides for the unilateral submission of a dispute to the ICJ but has never entered into force.

[23] See D.W. Bowett, Contemporary Developments in Legal Techniques in the Settlement of Disputes; in: 180 RdC (1983 II), 177 – 235, at 178 et seq., 181 et seq.; A. Giustini, Compulsory Adjudication in International Law: The Past, the Present, and the Future, in: 9 Fordham Int'l L. J. (1985/86), 213 – 256.

[24] Mainly because they satisfy a certain desire for "completeness" of a treaty.

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sinks of greenhouse gases, on policies and measures being taken and their effect on emissions are, first of all, a precondition for subsequent design of effective regulatory measures in a protocol. Secondly, this information may provide the basis to assess not only the overall effectiveness of the Convention, but also the individual performance of each Party. As such it might provide the foundation for a multilateral supervisory procedure that is designed to deal with cases of individual non-compliance.

Only part of the review procedure is written into the text of the FCCC and, in line with the process-oriented character of environmental regimes, large parts of the procedure were left to be decided by the treaty organs[25]. The Convention does stipulate in Art. 12.1, 12.2, 12.3 and 4.2(b) FCCC, what kind of information has to be included in the national communications from industrialized countries[26]. These so-called Annex I-Parties[27] have to report sources and sinks of greenhouse gases[28], a detailed description of the policies and measures taken to implement the commitment contained in Art. 4.2 and a specific estimate of the effects that these steps will have on anthropogenic emissions of greenhouse gases. The first of these reports were due six months after the entry into force of the Convention for each Party respectively. At the ninth session of the INC the Parties had agreed on a set of guidelines for harmonization purposes and, by February 1995, the Secretariat had received most of the required communications[29]. The reviews of these early communications by the Secretariat provided the basis for the decision of the first Conference of the Parties that the provisions of the Annex I-Parties to the FCCC were inadequate[30].

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[25] For an elaboration of this approach cf. Gehring (note 12); Oberthür (note 2).

[26] See R.J. Kinley, The Communication and Review of Information under the United Nations Framework Convention on Climate Change, in: W. Katscher/G. Stein/ J. Lanchbery/J. Salt (eds.), Greenhouse Gas Verification – Why, How and How Much?, Proceedings of a Workshop, Konferenzen des Forschungszentrums Jülich, Vol.14/1994, 141–146.

[27] These are the OECD-countries and the EC (minus Mexico, Hungary and the Czech Republic) and some Eastern European States with so-called "economies in transition" (CEIT) listed in Annex I to the FCCC. There are special rules for reports of developing countries, cf. Art. 4.1, 12.1 and 12.5 FCCC.

[28] Although CO_2 is the only gas with a mandatory requirement to be reported, data on all other greenhouse gases may be reported voluntarily.

[29] Cf. Oberthür/Ott 1995a (note 9), 149.

[30] Dec. 1/CP.1, UN Doc. FCCC/CP/1995/7/Add.1; cf. Oberthür/Ott 1995a (note 2), 144 et seq.

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The Convention does not specify the process for the review of communications. The Conference of the Parties is, however, empowered to review the information received (Art. 4.2(b)) and to assess the overall effectiveness of the FCCC (Art. 7.2(c)). The Subsidiary Body for Implementation (SBI) is called upon to assist the Conference of the Parties in carrying out the review (Art. 10.2). In order to elaborate this process, the INC adopted at its tenth session in August 1994 an in-depth review procedure for the Secretariat[31]. This procedure was subsequently adopted by the Conference of the Parties and provides the basis for an evaluation of the information submitted by the Parties[32]. For this purpose, the Secretariat may, *inter alia*, compare the data with data gathered by other organizations and expert review teams may – with the approval of the Party concerned – conduct country visits[33].

This multilateral review procedure for the implementation of the commitments under the FCCC is designed to assess the overall effectiveness of the Convention. Long debates in the INC ensured that the review is "non-confrontational", but the reports of the in-depth reviews do allow to evaluate the performance of individual Parties[34]. The in-depth review procedure therefore may serve as a basis to supervise the compliance of individual Parties with the commitments under the Convention. This procedure does, however, fail to indicate the steps that might be taken once a case of non-compliance is established. Such a function could be given to the multilateral consultative process to be established under Art. 13 FCCC.

3. The Elaboration of a Supervisory Procedure

Because of experiences in other environmental regimes the negotiators of the FCCC discussed elements of a supervisory procedure as early as in the third session of the INC. The Co-Chairs of Working Group II pro-

[31] UN Doc. A/AC.237/76, Dec. 10/1; cf. H. Ott, Tenth Session of the INC/FCCC: Results and Options for the First Conference of the Parties, in: 2 Environmental Law Network International Newsletter 1994, 3–7; Oberthür/Ott 1995a (note 9), 149.

[32] Dec. 2/CP.1, UN Doc. FCCC/CP/1995/7/Add.1.

[33] In March 1996 six early in-depth reviews had been made available, cf. Global Environmental Change Report. By June 1996, most Annex I-Parties had received country visits by expert review teams, cf. the report of the Secretariat, UN Doc. FCCC/CP/1996/1.3. Most of the individual reports are available on the World Wide Web (http://www.unep.ch/iwcc.html).

[34] Cf. e.g. the reports on Norway and Japan, UN Doc. FCCC/IDR.1/NOR and UN Doc. FCCC/IDR.1/JPN.

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posed a procedure to deal with "Questions Regarding Interpretation and Implementation of the Convention at the fourth session of the INC[35]. Under this procedure the advisory and adjudicatory function was to be given to special *ad hoc* panels that would have to be established for each occasion[36]. The panel's decisions were supposed to be recommendatory in character and the ultimate decision would lie with the Conference of the Parties. There was, however, no agreement at the fourth session of the INC on the design of such a procedure. Proponents of this *ad hoc* panel system as well as those favouring a non-compliance procedure with a "standing committee" included some language to that regard in the Consolidated Working Document[37].

Since the issue could not be resolved until the adoption of the FCCC in mid-1992, the negotiators decided to include a "marker" into the text of the Convention[38]: According to Art. 13 FCCC the Conference of the Parties "shall, at its first session, consider the establishment of a multilateral consultative process, available to Parties on their request, for the resolution of questions regarding the implementation of the Convention". The term "process" indicates the degree of disagreement on the design and function of the instrument[39]. It should be noted, that Art. 13 only refers to the "implementation", not the "interpretation" of the FCCC. This restriction is, however, without prejudice for the negotiations after the first Conference of the Parties, since Art. 13 only directs the Parties to

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[35] UN Doc. A/AC.237/Misc.13, 30 et seq. of the Revised Single Text on Elements Relating to Mechanisms.

[36] A proposal by Canada for the first Conference of the Parties in Berlin reiterated many of these ideas and called for the establishment of a "Committee of Experts" working under the Subsidiary Body for Implementation (SBI), cf. UN Doc. FCCC/CP/1995/Misc.4.

[37] UN Doc. A/AC.237/15 Annex II; some elements were reproduced by the Secretariat prior to the first Conference of the Parties in UN Doc. A/AC.237/Misc.46.

[38] A clause (which might be called a "programme norm") that demands certain action from the treaty bodies and keeps a subject on the agenda, cf. also Széll (note 14), 99.

[39] Like "mechanism", another increasingly used term in international agreements, e.g. in the case of the "Financial Mechanism" of the Montreal Protocol (1987) or the "Dispute Settlement Mechanism" under the CSCE (30 ILM 382 [1991]), for the latter cf. H. Hillgenberg, Der KSZE-Mechanismus zur friedlichen Regelung von Streitfällen, in: 34 German Yearbook of International Law (1991), 122 –137, esp. 130 et seq.

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"consider the establishment" of such a process. Therefore the FCCC neither requires the Parties to establish a multilateral consultative process[40], nor does it mandate a certain design.

The Parties to the FCCC in Berlin did not consider the establishment of such a process in much detail and decided to establish an *ad hoc* group of technical and legal experts to "study all issues" and to report to the second Conference of the Parties[41]. This "*Ad Hoc* Group on Article 13" held a short session on 30 – 31 October 1995 in Geneva, concurrently with the *Ad Hoc* Group on the Berlin Mandate which is negotiating a climate protocol[42]. This session was not characterized by marked progress. This resulted partly from the unwillingness of some Parties to have a result by the second Conference of the Parties and partly from lack of preparation of some "technical and legal experts"[43].

The working group approved the nomination of the chairman by the President of the Conference of the Parties[44] and gathered some initial views of Parties on the multilateral consultative process. It soon became visible that there was no agreement on either the necessity or the design of such a mechanism. Whereas the EC, Japan and Russia were supportive of its establishment, the US remained rather defensive. China and, to a lesser extent, Australia questioned the use of any new procedure altogether. One of the tasks of the group therefore was seen as defining the meaning of the term "process" in Art. 13, since this term had concealed the differences in the drafting of the FCCC. The "*Ad hoc* Group on Article 13" decided that the best way to elicit and compile views from the Parties would be to send out a questionnaire which was drafted by the Chairman building on points which had been identified during the session[45].

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[40] See also the Note by the interim Secretariat, UN Doc. A/AC.237/59, 10.

[41] Dec. 20/CP.1, UN Doc. FCCC/CP/1995/7/Add.1; this approach had been recommended by the interim Secretariat after a careful analysis of the issue, cf. UN Doc. A/AC.237/59, 11.

[42] See Oberthür/Ott 1995a and 1995b (note 9); Grubb (note 9) for the process.

[43] Although for the first Conference of the Parties already the Secretariat had prepared a note on supervisory procedures in other regimes and organizations (UN Doc. FCCC/CP/1995/Misc.2).

[44] The German Environment Minister, Angela Merkel, had nominated Patrick Széll (UK), an expert in the elaboration of supervisory procedures.

[45] See the report of the first session, UN Doc. FCCC/AG13/1995/2, 6 et seq.

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The answers to the questionnaire were made available to the Parties at the meetings of the subsidiary bodies and the "*Ad hoc* Group on the Berlin Mandate" in March/April 1996[46]. They did not indicate any fundamental change of positions from those voiced during the session of the "*Ad hoc* Group on Article 13" in October. The answers give, however, a more differentiated picture of Parties' views on a supervisory procedure[47]. As a first result the necessity or desirability of an Art. 13 process has become clear: Apart from China and Australia all Parties seem to feel the need for some kind of a multilateral consultative process[48]. There is, moreover, broad agreement that the process should be established by way of a decision of the Conference of the Parties for reasons of speed and universal applicability. Chile favours the inclusion of this procedure into an annex to the FCCC or any protocol[49]. At first sight this seems to be prohibited by Art. 16.1, since annexes should be "restricted to lists, forms and any other material of a descriptive nature". There are, however, exceptions to this general rule for the annexes on arbitration (Art. 14.2(b)) and conciliation (Art. 14.7) in the FCCC. It could be argued therefore, that an annex on a supervisory procedure would be close enough to allow an analogous application[50].

Apart from these areas of agreement many differences in opinion are apparent, however, with regard to the design and the functions of a process under Art. 13 FCCC. The views range from a single rapporteur to give expert advice (Australia) to a strong legal body, issuing binding judgments on questions of lacunae of law and on its interpretation (Chile). Whereas China, in principle opposed to any new procedure or body, can perceive an Art. 13 process to have a conciliatory function, the Russian Government (expressly favourable of a procedure) conceives Art. 13 as a

[46] UN Doc. FCCC/AG13/1996/Misc.1 and Misc.1/Add.1 (inputs by Parties and non-Parties), references to views of Parties will be references to this document. Inputs by international governmental organizations and non-governmental organizations are contained in UN Doc. FCCC/AG13/1996/Misc.2 and Misc.2/Add.1.

[47] Cf. also the synthesis of responses, prepared by the Secretariat, UN Doc. FCCC/AG 13/1996/1.

[48] The US did not submit any views.

[49] UN Doc. FCCC/AG13/1996/Misc.1, 27 et seq.

[50] The establishment by way of an annex does not offer any advantages from the adoption of an amendment though, since the procedure for the adoption of annexes is rather strict and requires an act of ratification by three fourths of the Parties (Art. 16.2 with Art. 15.4 FCCC).

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new subsidiary body on legal and economic advice. Much more compatible with each other are the ideas of the EC, Japan, Canada[51] and Turkey, since all of them appear to take the non-compliance procedure of the Montreal Protocol (1987) as a model for departure[52]. The main function assigned to a process under Art. 13 by these countries is to deal with the individual performance of a Party or a group of Parties and with individual cases of non-implementation.

This function necessarily implies that these Parties are in favour of the establishment of an institutional structure. The EC, Canada and Turkey thus envision a standing committee of representatives[53]. Most other replies to the questionnaire indicate that some organ or body would have to be established by the Art. 13 procedure (Chile, Czech Republic, Latvia[54], Mali, Russia, Senegal). Australia does not have an opinion on this and Zambia is against any institution being set up. Overall there is a strong inclination of the responding Parties and non-Parties towards a state-centred procedure, which involves only state actors and may only be initiated by States. Canada, however, envisions a role for the Secretariat and Japan recommends to give the right to "trigger" the process to a geographical "group" of Parties[55] or to a subsidiary body of the Conference of the Parties.

As regards the compulsory or non-compulsory character of a procedure under Art. 13, almost all respondents emphasize its voluntary nature and sometimes expressly reject the notion that it may lead to a binding decision[56]. An exception to this is Chile, advocating a strong judicial proce-

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[51] Canada, which has always taken great interest in the Art. 13 process, has changed its position on the institutional framework of a procedure under Art. 13 since the first Conference of the Parties: Whereas it used to argue in favour of *ad hoc* panels and expert committees, it now prefers a standing committee composed of Parties and assisted by a panel of experts.

[52] Turkey, a non-Party, expressly calls this procedure the example to be followed; in contrast, Australia rejects any idea to establish a non-compliance procedure under Art. 13 FCCC.

[53] Japan does not specify its institutional preferences.

[54] Although Latvia is conscious of the financial implications of an institution and emphasizes that the use of the process under Art. 13 should be "free of charge".

[55] This would meet with difficulties, however, since the geographical groupings used for the composition of organs are not formal institutions under the FCCC.

[56] It should be noted, that it is not always clear what is meant by the term "compulsory" and that the competence of a body "to deal with a question" and the question whether the final outcome of this process is compulsory are sometimes confused.

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dure, and possibly Turkey[57]. The EC did not express an opinion on this and leaves to the Conference of the Parties the question of whether a multilateral consultative process would be compulsory or optional. The United Kingdom, in addition to the response of the EC, has submitted further ideas on this question and emphasizes that the procedure should not be judicial or otherwise inquisitorial or confrontational.

The second session of the *Ad hoc* Group on Article 13 was held in conjunction with the second Conference of the Parties to the FCCC, July 8–19, 1996 in Geneva. No substantial negotiations took place, but the session was preceded by an informative workshop with experts from various organizations or treaty regimes who gave an insight into their respective procedures[58]. The session itself lastet for only half a day and produced a recommendation to the Conference of the Parties on its further work. This decision, which was adopted by the Conference of the Parties without amendments, calls on the *Ad hoc* Group on Article 13 to continue its work and to report to the third session of the Conference of the Parties, December 1997 in Kyoto, Japan[59].

4. *Some Comments*

It is not easy to predict what kind of procedure will result from the negotiations in the *Ad hoc* Group on Art. 13 or whether there will be a multilateral consultative process at all. After one session of the *Ad hoc* Group on Article 13 and after twenty-one Parties to the FCCC have responded to the questionnaire, it appears that some of the contradictions which characterized the negotiation of the issue before the adoption of the Convention have resurfaced[60]. However, there is still a broad consensus that the procedure should be non-confrontational, non-punitive and rather facilitative in character. These characteristics are reasonable in light of the experiences with the non-compliance procedure of the Montreal Protocol

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[57] "The Convention constitutes the basis of legal rules that govern relationship among states and international organizations. The process should be considered to be part of those legal rules". Russia stresses the consultative role of this process, but also envisages it to be used "directly as a basic mechanism under Article 14 of the Convention (Settlement of Disputes)".

[58] Discussants came from ILO, WTO, the Centre for Human Rights, the Basel Convention Secretariat and the Montreal Protocol Implementation Committee.

[59] UN Doc. FCCC/CP/1996/L.1 of 11 July 1996.

[60] See Bodansky (note 2), 547 et seq. for the negotiation history.

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(1987) and they are also in line with academic thinking on this subject[61]. A punitive approach does not offer much success in bringing about compliance if the reasons for non-compliance are, in general, not a wilful disregard for legal obligations, but rather the incapacity of Governments, the ambiguity of norms or changing circumstances between the adoption of a treaty and its entry into force[62].

Furthermore, compliance with environmental treaties is complicated by the fact that their structure is different from that of most bilateral and many multilateral treaties[63]. Because of their non-reciprocal character[64] most environmental treaties generally lack a certain interdependence of rights and duties[65], which is usually the basis for the enforcement of obligations in treaty regimes. In a multilateral environmental convention, a violation of environmental obligations by one Party does not automatically lead to an infringement of another Party's rights, but rather is a violation of the rights and expectations of all other Parties to this treaty. Enforcement of a Party's obligations therefore cannot rely only on bilateral procedures as it is foreseen in traditional dispute settlement procedures like Art. 14 FCCC.

For the enforcement of environmental treaties, the multilateral non-compliance procedure developed in the framework of the Montreal Protocol (1987) appears to be a much better model[66]. This is the approach ap-

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[61] See e.g. Gehring (note 12), 50 et seq.; Koskenniemi (note 12); Széll (note 14); A. Chayes/A. Handler Chayes, On compliance, in: 47 International Organization (1993), 175 – 205, and A. Handler Chayes/A. Chayes/R.B. Mitchell, Active Compliance Management in Environmental Treaties; in: Lang (note 14), 75 – 89.

[62] See Chayes/Handler Chayes (note 56) and Handler Chayes/ Chayes/Mitchell (note 56); cf. also R.B. Bilder, International Third Party Dispute Settlement; in: 17 Denver J. of Int'l L. & Pol. (1988/89), 471– 503 at 478 and L.K. Caldwell, Beyond Environmental Diplomacy: the Changing Institutional Structure of International Cooperation; in: J.E. Carroll (ed.), International Environmental Diplomacy, Cambridge 1988, 13 – 27 at 14.

[63] These treaties (like private law contracts) are characterized by a "synallagma", i.e. the correspondence of rights and duties for the contracting Parties.

[64] The basic treatise on the role of reciprocity for the conclusion of treaties is B. Simma, Das Reziprozitätselement im Zustandekommen völkerrechtlicher Verträge. Gedanken zu einem Bauprinzip der internationalen Rechtsbeziehungen, Berlin 1972; cf. also A.C. Kiss/D. Shelton, System Analysis of International Law: A Methodological Enquiry, in: XVII NYIL (1986), 44 – 74 at 73, and for the ozone regime W. Lang, Die Abwehr weiträumiger Umweltgefahren, insbesondere durch Internationale Organisationen, in: 32 BDGesVR (1992), 57 – 85 at 77.

[65] R. Wolfrum, Purposes and Principles of International Environmental Law, in: 33 GYIL (1990), 308 – 330, at 327.

[66] Cf. Barratt-Brown (note 13); Ott (note 13); Koskenniemi (note 12); Széll (note 14) and the contribution of Jacob Werksman in this issue.

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parently favoured by the EC and Japan[67], although the concept would have to be adjusted to the special circumstances of the climate regime[68]. Such a non-compliance procedure would best be established by way of a decision of the Conference of the Parties. Art. 7.2 (i) and Art. 7.2 (m) of the FCCC provide a legal basis for this secondary legislation: The first clause enables the Conference of the Parties to establish any subsidiary bodies it deems necessary, and the latter empowers the Conference of the Parties to exercise such other functions as are required for the achievement of the objective of the FCCC.

If the precedent of the ozone regime is followed, the initiation of this supervisory procedure will not be restricted to the Parties. Experience with other procedures, such as the enforcement of EC law and human rights conventions, indicates that the right to "trigger" proceedings should in addition be given to a body other than the Parties. The Secretariat would be in a good position for this purpose since it oversees the implementation of the Convention and has the required skilled personnel[69]. It would have the first opportunity to notice implementation problems of a Party, since its experts conduct the in-depth review of national communications, and it would be able to receive and verify information supplied by non-governmental sources[70].

The ultimate decision-making power should lie with the Conference of the Parties as the supreme body of the Convention (Art. 7.2). However, a smaller body would have to be established in order to deal with questions of non-compliance in a facilitative manner. The Implementation Committee of the Montreal Protocol (1987), consisting of ten members with equal geographical distribution is a good model for the size and structure of such a body. As much as it would be desirable to give non-state actors the right to sit on such a body, considerations of sovereignty and political expediency speak strongly in favour of a body of representatives. This "Committee on Art. 13" should receive the complaints by other Parties,

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[67] Most contributions from scientists or non-governmental organizations in their response to the questionnaire are pointing to the same direction, cf. UN Doc. FCCC/AG13/1996/Misc.2 and Misc.2/Add.1.

[68] As it was adjusted in the case of the Second Sulphur Protocol (1994), cf. Széll (note 14), 104 et seq.

[69] Cf. also UN Doc. FCCC/AG13/1996/Misc.2/Add.1 (Contribution of the Wuppertal Institute).

[70] Under the non-compliance procedure of the Second Sulphur Protocol (1994), the Secretariat is allowed to report to the Implementation Committee on possible non-compliance however it becomes aware of it.

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indications of non-compliance by the Secretariat or submissions by the Party experiencing difficulties. It should then try to reach an amicable solution to the problem and, failing to reach a solution, report to the Conference of the Parties and recommend a suitable course of action.

The establishment of such a supervisory procedure would therefore not only provide a structure for the detection of problems in implementation by individual Parties and for the resolution of conflicts regarding non-compliance, but would furthermore act as a "conflict avoidance mechanism"[71]. Through a phased procedure, taking the in-depth review or individual submissions as a starting point, difficult cases would be subjected to a cooperative process of communication and (mild) coercion that could facilitate the smooth and effective implementation of the Convention's commitments.

Seen together with the in-depth review, such a procedure could thus fulfill all three functions which are vital for an effective supervisory mechanism: review, correction and creativity[72]. The in-depth review, established by Dec. 2/CP.1 in Berlin, provides the basis for a determination of the factual situation with regard to implementation. After further elaboration, e.g. for the review of developing country communications, it could serve as a first step of the supervisory procedure for the detection of implementation problems (review function). The correction function is missing in the FCCC so far but it does have a basis in Art. 13. Its aim is the prevention or elimination of non-compliant behaviour of a Party through negotiations, financial or other assistance, internal or public shaming or, as a last resort and with all due care, by way of sanctions.

The third function, that of creativity, aims at more than the correction of individual misbehaviour. The creativity function intends to adjust the rules of a regime to changed circumstances. In national legal systems the creativity function is sometimes assigned to a constitutional court, but courts are rarely used at the international level[73]. Nevertheless, circumstances change, sometimes rules become problematic simply with the

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[71] Similarly the response of the UK to the questionnaire, UN Doc. FCCC/AG13/1996/Misc.1.

[72] Cf. G.J.H. van Hoof/ K. de Vey Mestdagh, Mechanisms of International Supervision, in: P. van Dijk (Gen. ed.), Supervisory Mechanisms in International Economic Organisations, Deventer 1984, 3 – 45 at 11 et seq.

[73] An exception to this is the European Court of Justice, whose function is not only the interpretation and application of EC law, but also its progressive development.

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lapse of time and this may lead to inadvertent non-compliance[74]. The supervisory procedure could therefore include a provision for the adjustment of norms[75], preferably by way of a decision of the Conference of the Parties as the supreme body where all Parties are represented. In developing the supervisory procedure under Art. 13 FCCC, the negotiators should therefore aim to establish not only a mechanism for the correction of non-compliance by a Party, but also for the correction of the rules if necessary.

5. *Conclusion*

The negotiations within the *Ad hoc* Group on Article 13 are an open-ended process and the final recommendation to the Conference of the Parties may not necessarily be in favour of establishing a multilateral supervisory procedure under the FCCC. According to the mandate of Dec. 20/CP.1, extended by the decision of the second Conference of the Parties, the group has to report to the third Conference of the Parties in December 1997. The next session of the *Ad hoc* Group on Article 13, where substantial negotiations are supposed to take place, is scheduled, from 16 to 18 December 1996. This timetable might, however, be suitable for a second and only implicit purpose of the *Ad hoc* Group on Article 13, namely to negotiate a supervisory procedure for the future climate protocol (or another legal instrument) to be adopted by the third Conference of the Parties[76].

This expectation of a future climate protocol may be one explanation for the rather glacial progress in developing a multilateral consultative process within the FCCC. Most Parties do not seem to feel the need to establish a procedure for the settlement of conflicts within the Convention[77]. An important reason for this reluctance may be the fact that the FCCC does not contain any substantial commitments. The Convention imposes only very limited legally binding obligations, mainly with regard

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[74] Cf. Chayes/Handler Chayes (note 56), 195 et seq.

[75] Here the resolution of conflicts may turn into *ad hoc* legislation, cf. M. Koskenniemi, Peaceful Settlement of Environmental Disputes, in: Nordic J. of Int'l L. (1991), 73 – 92, at 81.

[76] Apparently with this in mind, the Chairman of the *Ad hoc* Group on Article 13 proposed a recommendation that links its work to the negotiations on a climate protocol taking place in the *Ad hoc* Group on the Berlin Mandate, cf. UN Doc. FCCC/CP/1996/L.1.

[77] A further indication for this lack of urgency is the failure to adopt the required annexes on arbitration and conciliation (Art. 14.2 (b) and Art. 14.7).

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to national communications (Art. 4 and Art. 12) and the financing of developing countries' reporting by industrialized countries (Art. 4.3)[78]. In the absence of substantial obligations, however, any encroachment upon the Parties' sovereignty will meet with strong resistance, which can only be overcome if there are equally strong overriding interests.

Further support for this suggestion can be found in the history of the two existing non-compliance procedures, negotiated in the framework of the Montreal Protocol (1987) and the Second Sulphur Protocol (1994)[79]. Both these treaties contain strong and legally binding reduction targets for certain damaging substances, and the compliance with these obligations may have substantial economical implications. In these cases the Parties had a profound interest in preventing "free riding", i.e. not to allow other Parties to enjoy the benefit of the treaty without having to pay the "price" and comply[80]. This is the kind of situation where most Parties to an environmental treaty will support the establishment of a supervisory procedure, although they may, in general, not be inclined towards multilateral enforcement mechanisms[81].

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[78] See Bodansky (note 2) and Ott (Anm. 7).

[79] Although Patrick Széll appears to draw the opposite conclusions from these examples, cf. Széll (note 14), 107. It is not clear, however, whether Széll regards the non-compliance procedures as "strict" enforcement mechanisms or as rather soft approaches compared to strict judicial enforcement.

[80] The "free rider problem" is part of the global commons problem, cf. E. Ostrom, Governing the Commons. The evolution of institutions for collective action, Cambridge 1990, 6.

[81] One example for this rather reluctant attitude is the US, which nevertheless was one of the proponents of a non-compliance procedure in the Montreal Protocol (1987), cf. Széll (note 14), 99.

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