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RESPONDING TO NON-COMPLIANCE UNDER THE CLIMATE CHANGE REGIME

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FOREWORD

The Annex I Expert Group oversees development of analytical papers for the purpose of providing useful and timely input to the climate change negotiations. These papers may also be useful to national policy makers and other decision makers. In a collaborative effort, authors work with the Annex I Expert Group to develop these papers. As such, the papers do not necessarily represent the views of the OECD, nor are they intended to prejudge the views of countries participating in the Annex I Expert Group.

The Annex I Parties or countries referred to in this document refer to those listed in Annex I to the UNFCCC (as amended at the 3rd Conference of the Parties in December 1997): Australia, Austria, Belarus, Belgium, Bulgaria, Canada, Croatia, Czech Republic, Denmark, the European Community, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Monaco, Netherlands, New Zealand, Norway, Poland, Portugal, Romania, Russian Federation, Slovakia, Slovenia, Spain, Sweden, Switzerland, Turkey, Ukraine, United Kingdom of Great Britain and Northern Ireland, and United States of America. Where this document refers to "countries" or "governments" it is also intended to include "regional economic organisations", if appropriate.

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EXECUTIVE SUMMARY

This paper builds on previous OECD work and describes options that may be available to Parties in designing responses to the non-compliance of Parties with their commitments under the emerging climate regime. This analysis draws from the existing provisions in the Convention, the Protocol and general international law; review proposals by Parties, by academics and NGO observers, and precedents from other international legal regimes.

Given the early stage of the development of the climate regime, this exercise is necessarily abstract and speculative. Nonetheless it is crucial that issues related to non-compliance responses be drawn to the fore. A growing interest in a more robust compliance system for the climate regime, including tougher responses to non-compliance, was reflected in the negotiations of the Kyoto Protocol. Parties began to bring forward proposals for "mandatory" and "binding" procedures empowered to impose both automatic and discretionary penalties. The main justifications for these proposals were:

- legal character of commitments: *the need to back the Protocol's binding targets with a means of enforcing them;*

- competitiveness concerns: *the need to ensure all Parties would pull their weight*;

- market-based instruments: *the need to assure buyers of allowances and offsets that their investments would be sound.*

This change in direction may be due in part to a growing perception that positive incentives may not be sufficient to ensure compliance with a toughening climate regime. If the costs of compliance with the Protocol prove to be high, an overuse of compliance "carrots" in the Kyoto Protocol could provide a perverse incentive for Parties to overplay the difficulties of compliance, in order to negotiate easier targets in the future or to secure financial assistance. This concern may be heightened by Kyoto Protocol's application of market mechanisms to sovereign obligations. Although these mechanisms may substantially reduce the costs of compliance, some observers have expressed the concern that they could potentially provide an incentive for Parties to understate emissions or overstate emissions reductions in order to better exploit the opportunity to trade. This could have a negative effect on overall Annex I emissions levels and compliance.

If properly structured, the Protocol's implementation "mechanisms" should increase the likelihood of compliance by providing lower cost opportunities for achieving emissions reductions. Implementation mechanisms could provide one of a number of "safety valves" under the Protocol, that would allow Parties experiencing difficulties in meeting their commitments through domestic action, to bring themselves into compliance by acquiring part of another Party's assigned amount (allowance), or carbon offsets generated by projects in other countries.

However, introducing too lenient a safety valve within any commitment period could have a longer term detrimental effect on certain Party's compliance, and on the progressive evolution of the regime. An Annex I Party that chose to achieve a significant portion of its QERLC overseas, rather than making efforts

at home, may find it more difficult to undertake and to fulfil more rigorous domestic commitments in a later commitment period.

Provisions for determining and addressing non-compliance under the Convention and the Protocol and for providing a compulsory means for imposing and enforcing binding consequences for non-compliance have yet to be agreed. Negotiations on a Multilateral Consultative Process under Article 13 of the Convention, and Non-compliance Procedure under Article 18 of the Protocol provide an opportunity for strengthening the regime.

The obligation to comply with the commitments under the UNFCCC and the KP will run between and among states. These commitments are first and foremost subject to the rules, procedures and mechanisms of public international law. It is, however, anticipated that the KP's implementation "mechanisms" will generate derivative legal relationships whereby emissions allowances and offsets are transferred between states. These transactions may also fall under the jurisdiction of domestic law, or of the private international law which governs transboundary commercial transactions. Furthermore, the authorisation by the Protocol of the involvement of private or legal "entities" suggests that private commercial relationships of direct relevance to the implementation of the Protocol may arise between states, between states and private entities, and between private entities.

The derivative legal relationships made possible by the Protocol's implementation "mechanisms" may prove to be the regime's greatest strength. They allow negotiators to entrust the enforcement of the Protocol to rules, procedures and mechanisms of more than one legal system. Many of the proposals reviewed in this analysis suggest that new rules agreed at the international level should aim not only at strengthening international responses to non-compliance, but also at encouraging states to strengthen the non-compliance response and enforcement capacity at the regional and domestic level.

The Protocol's derivative legal relationships may be more concrete and specific than the multilateral commitments that run between all the Parties to the Protocol. Depending on what rules on transactional responsibility are set by the Protocol or agreed ad hoc, a Party that has acquired allowances or offsets from another Party will have a far greater interest in ensuring the other Party's compliance than might otherwise have been the case. These more concrete and specific relationships increase the likelihood that Parties will seek both traditional and innovative means for enforcing compliance.

Article 18 of the Protocol calls for development of an indicative list of consequences, depending on the cause, type, degree and frequency of non-compliance. Developing a detailed matrix with applicability to the Protocol as a whole is likely to prove problematic, and indeed may not be necessary. Associating specific levels of responses to particular commitments would require negotiators to develop an explicit hierarchy of commitments from a subtly nuanced text. Disagreements could easily arise, for example, over whether the consequence for violating an emissions reduction commitment should be treated more severely than failing to honour a commitment to transfer financial resources or technology.

While an Implementation Committee would no doubt consider the underlying causes of the non-compliance when recommending an appropriate response measure, it may be both difficult and inappropriate to categorically associate specific causes with specific response measures in advance of a particular case. In cases of non-compliance, the Committee could consider whether the Party should have been able to anticipate the events causing the breach, whether adequate precautionary measures were taken, and whether the shortfalls are easily reparable, before deciding to apply a punitive response. However, it may not be appropriate to require the Committee to carry the evidentiary and the political burden of having to establish and accuse a Party of wilful non-compliance before imposing the maximum consequence. For these reasons, the Parties may consider agreeing a full range of non-compliance responses, but leaving the

equivalent of an Implementation Committee the discretion to tailor the non-compliance response to the particular facts before it.

This last point raises again the issue of what procedures and mechanisms will be "effective and appropriate" in determining and addressing non-compliance under the Protocol. In particular, delegations will have to decide the extent to which either the determination of non-compliance, or the application of a particular response should take place automatically, or should be subject to the consideration of one of the Protocol's institutions.

The design of the Protocol's non-compliance response system will require procedures and mechanisms that strike a careful balance between discretion and automaticity. Allowing a non-compliance system broad discretion to determine and address non-compliance on a case-by-case basis may imbue the regime with a sense of fairness, but may cause uncertainty and delay. Automatic responses carry a deterrent punch and provide certainty to the market place but heavy reliance on automatic penalties may, in the high stakes game of climate change, drive participants who feel they have been dealt with unfairly, from the regime, and discourage others from joining.

1. INTRODUCTION

This paper builds upon previous OECD Information Papers that assess design options for the reporting and review of national performance (OECD 1998b) and that explore means for ensuring compliance with the 1992 United Nations Framework Convention on Climate Change ("UNFCCC" or "Convention") and its 1997 Kyoto Protocol ("KP" or "Protocol") (OECD 1998a). In particular, it describes options that may be available to Parties in designing responses to the non-compliance of Parties with their commitments under the emerging climate regime. This analysis draws from the existing provisions in the Convention, the Protocol and general international law; reviews proposals by Parties, by academics and NGO observers; and looks to precedents from other international legal regimes.

This exercise is, at this stage, necessarily abstract and speculative. The bulk of the commitments in force under the Convention are not precisely defined, both in terms of their substance and their legal character. Without more precise rules, notions of non-compliance and non-compliance responses have limited relevance. The Kyoto Protocol, although it is far more precise in its commitments, leaves substantial gaps in the design of its rules and the mechanisms for implementing them. Until the details of these rules and mechanisms are developed further, the implications for the design of non-compliance responses will be difficult to assess with any precision.

Nonetheless it is crucial that issues related to non-compliance responses be drawn to the fore. They are currently under discussion for the Convention under Article 13. They will also form an essential but as yet unresolved element of the design of many aspects of the Kyoto Protocol, particularly with regard to its non-compliance procedures (Article 18) and any specialised procedures to ensure the integrity of the Protocol's implementation "mechanisms" (Articles 4, 6, 12 and 17).

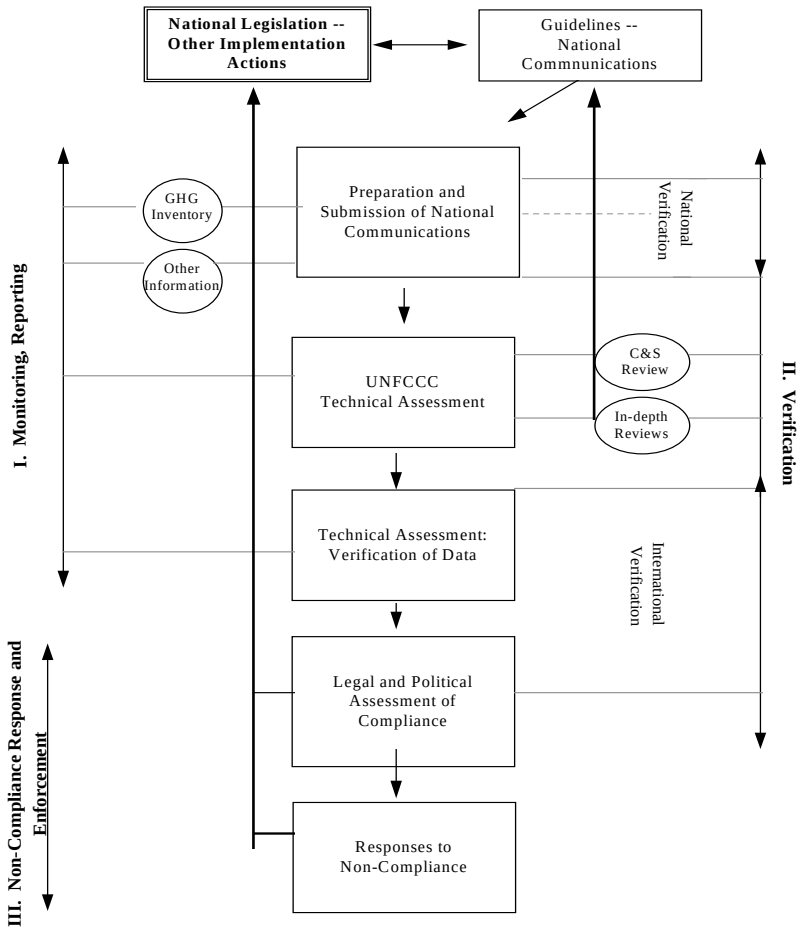
The purpose of this paper is to assess rules, procedures, and mechanisms that could be developed within the UNFCCC/KP compliance system to provide the non-compliance response and enforcement function as set out in Figure 1. Discussion will focus on compliance with the Protocol's primary rules, i.e., the quantified emissions limitation and reduction commitments (QELRCs) of Annex I Parties set out in Article 3 and Annex B. It will also touch on the tools that may be available for encouraging compliance with the Protocol's commitments to implement programmes, policies and measures; to provide financial assistance and transfer technology; to compile and provide information; and to comply with any rules developed to as part of the Protocol's implementation "mechanisms."

Table 1.: Commitments under the Kyoto Protocol

KP Article	Commitment	Parties
3, Annex B	QERLC	Annex I
2	policies and measures	Annex I
10	national programmes	all Parties
11	finance	Annex II
10(c)	technology	all Parties
5,7	information	Annex I
4	joint fulfilment	participating Annex I
6	joint implementation	participating Annex I
12	CDM	all participating Parties
17	emissions trading	participating Annex B

Article 18 of the Protocol refers to the functions associated with responding to non-compliance as involving "appropriate and effective procedures and mechanisms *to determine* and *to address* cases of non-compliance."

Figure 1: Compliance System for the UNFCCC



Source: Adapted from GAO, 1992 and Greene and Comes, 1996, as cited in OECD 1998.

The discussion reveals that the *determination* of non-compliance is likely to involve a mixture of factual and legal/political issues that necessarily engage a combination of different sets of rules, procedures and mechanisms. Issues related to the factual or technical determination of non-compliance, including reporting and review, are discussed in a companion OECD paper. (OECD 1998b) The present paper focuses instead on approaches to making the legal and political judgement of whether to characterise any particular factual or technical determination as a "case" of non-compliance. This function is represented in Figure 1 as the "legal and political assessment of compliance."

This paper also focuses on rules, procedures and mechanisms for *addressing*, or responding to cases of non-compliance, once they have been identified. This discussion is directed by the text of Article 18 of the Protocol which calls for development of an indicative list of consequences, depending on the cause, type, degree and frequency of non-compliance.

It must be stressed that the process for determining non-compliance and the penalties available to address non-compliance are inherently related. As the political, legal or economic stakes of being found in non-compliance are raised, states and other entities will and should become more concerned that these rules, procedures and mechanisms are designed in such a way that is both equitable and effective.

1.1 Relationships and Governing Law

Any discussion of responses to non-compliance must begin with an understanding of the nature of the underlying obligation at issue, and the legal personality of the entities involved (i.e., whether they are states or private entities). These factors will in turn determine what rules, procedures and mechanisms govern this obligation.

The obligation to refrain from harming the earth's climate system, and more specifically, to comply with the commitments under the UNFCCC and the KP will run between and among states. These international obligations are first and foremost subject to the rules, procedures and mechanisms of public international law. It is, however, anticipated that the KP's implementation "mechanisms" will generate derivative legal relationships whereby emissions allowances and offsets are transferred between states. These transactions may also fall under the jurisdiction of domestic law, or of the private international law which governs transboundary commercial transactions. Furthermore, the authorisation by the Protocol of the involvement private or legal "entities" under Articles 6 and 12, and their possible involvement under Article 17, suggests that private commercial relationships of direct relevance to the implementation of the Protocol may arise between states, between states and private entities, and between private entities.

Figure 2: Framework of Governing Law

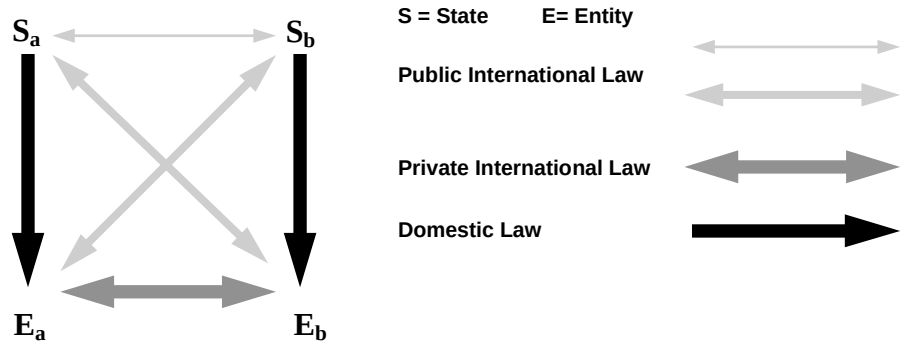


Table 2. Relationships and governing law

	KP Article	**relationship/ transaction (⇔)**	**Parties/ participants S= state E= entity**	**Governing Law**
Primary commitment	3	quantified emissions reduction and limitation commitments	$S_a \Leftrightarrow S_{b+c+d}$	Public international law
Derivative legal relationship	4	joint fulfilment agreement	$S_a \Leftrightarrow S_{[b+c+d]}$ $S_a \Leftrightarrow S_{[b+c+d]}$ +REIO	Public international law/regional law
	6,12	CDM or JI transaction	$S_a \Leftrightarrow S_b$	Public international law
	6,12	CDM or JI transaction	$S_a \Leftrightarrow E_b$	Domestic, Public and Private international law
	6,12,17	sovereign trade of PAA or CER/ERU	$S_a \Leftrightarrow S_b$	Public international law
	6,12,17	transaction between entities from different states	$E_a \Leftrightarrow E_b$	Private international law Domestic law
	6,12,17	private trade or investment between entities of the same state	$E_a \Leftrightarrow E_a$	Domestic law

While the taxonomy of relationships and governing law set out in Table 2 is neither precise nor exhaustive, it provides an indication of the potential complexities raised by the Kyoto Protocol.

The weakest link in this framework of governing law is at the international level where obligations must be enforced between and among states. Thus the "derivative" legal relationships that arise from the Protocol may prove to be the regime's greatest strength. They allow Parties to entrust the enforcement of the Protocol to more than one legal system where existing rules, procedures and mechanisms regularly enforce legal relationships with binding penalties. Many of the proposals reviewed in this analysis suggest that new rules agreed by the Parties at the international level must aim, not only strengthening international responses to non-compliance, but also at encouraging states to strengthen their non-compliance response and enforcement capacity at the regional and domestic level.

The discussion that follows will look at means for determining and addressing non-compliance under the UNFCCC/KP from three perspectives:

- general international law applicable to the climate regime;
- specialised non-compliance systems under Article 13 of the UNFCCC and under Article 18 of the KP, that will be generally applicable to the climate regime; and
- specialised non-compliance systems under the Kyoto Protocol's implementation "mechanisms" (Articles 4, 6, 12 and 17).

The overarching criteria for assessing means for responding to non-compliance will be the extent to which each of these is likely to achieve the two main objectives of a compliance system, to:

- deter non-compliance (deterrence) and/or

- repair the effects of non-compliance once it has occurred (reparation).

Because Article 18 anticipates the need to develop rules, procedures and mechanisms capable of imposing "binding consequences" on a Party in non-compliance, it is assumed, for the purposes of this analysis that effective means of addressing non-compliance will require rules, procedures and mechanisms that are:

- compulsory in their jurisdiction, in that Parties must answer claims brought against them;

- binding in their outcome, in that the compliance response must have the same legal character as the commitment it is seeking to enforce; and

- enforceable, in that a means is provided for ensuring that Parties comply with the decisions of a non-compliance procedure.

1.2 Theoretical Approaches to Non-compliance Responses

Previous OECD publications have summarised the recent academic literature on compliance with Multilateral Environmental Agreements (MEAs) as advocating a range of responses from a soft "managerial" approach, which relies primarily on co-operative problem solving, to an "enforcement" approach which relies on stronger tactics to deter non-compliance or to coerce non-complying states into complying (OECD 1998a).

Proponents of a managerial approach have supported their claims with research that reveals that states are generally willing and likely to comply; and that non-compliance usually results from a lack of capacity or control rather than bad intent. (OECD 1998a, Chayes and Chayes 1995). Consequently, compliance systems should focus on providing incentives or "carrots" in the form of financial and technical assistance rather than the "sticks" of penalties or sanctions. A closely related "transformational" school suggests that soft obligations and soft approaches to compliance are essential to the early development of effective MEAs. To these scholars, the threat of coercive enforcement measures may drive potential participants away from an MEA and stunt its development. (Downs, 1998).

However, recent critiques of the managerial and transformational schools have challenged these conclusions by suggesting that they are based on selected reference to MEAs containing obligations that are easily achieved. In other words, the high rate of compliance under the studied regimes may be due more to the weakness of the commitments, than to the effectiveness of the managerial approach. States will only change their behaviour to comply with an MEA when the short term costs of compliance are low. This "enforcement" perspective stresses that as MEAs evolve to require substantial changes in state behaviour, the likelihood of intentional non-compliance will increase. As MEAs become more ambitious, more formal and coercive enforcement strategies that raise the cost of non-compliance will become necessary. Drawing primarily from agreements on trade liberalisation (WTO), economic integration (the EC), and arms control, the enforcement school claims to provide evidence that strengthening non-compliance responses is necessary, as the interdependence of Parties on each other's compliance increases (Downs, et al 1996, Downs 1998).

MEAs generally, and the climate change regime in particular, appear to be incorporating elements of all three approaches, not as alternatives, but rather as a menu of possible responses to different possible types of non-compliance. A growing interest in a more robust compliance system for the climate regime,

including tougher responses to non-compliance, was reflected in the negotiations of the Kyoto Protocol. Parties began to bring forward proposals for "mandatory" and "binding" procedures empowered to impose both automatic and discretionary penalties. The main justifications for these proposals were:

- the legal character of commitments: *the need to back the Protocol's binding targets with a means of enforcing them*;
- competitiveness concerns: *the need to ensure all Parties would pull their weight*;
- the use of market-based instruments: *the need to assure buyers of allowances and offsets that their investments would be sound.*

The outcome of the Kyoto Protocol negotiations on compliance and recent progress in developing the Convention's multilateral consultative process, will be discussed below, in section 0. This discussion turns first to the general rules of international law that govern the relationship between states in the absence of any specialised rules agreed under the Protocol.

2. GENERAL INTERNATIONAL LAW

General international law is residual in nature, and it will only be necessary to resort to it to the extent that the Convention and Protocol do not provide their own rules on non-compliance. The climate regime is, at present, largely silent on issues of non-compliance. The following review of the rules and principles of general international law may provide useful guidance for specialised rules under the climate regime.

2.1 Law of treaties

Unless an international treaty contains its own non-compliance provisions otherwise, it can be presumed that non-compliance with its terms will be governed by the rules set out in the Vienna Convention on the Law of Treaties (VCLOT). Although not all Parties to the UNFCCC are Parties to the VCLOT, much of Vienna Convention is considered to be customary international law, and thus binding upon all states. The VCLOT is invoked regularly by international dispute settlement bodies, including the International Court of Justice, and the panels of the Dispute Settlement Body of the World Trade Organisation (WTO), primarily as guidance for treaty interpretation.

With regard to multilateral treaties, such as the UNFCCC/KP, the VCLOT rules entitle any "specially affected Party" to invoke the material breach by another Party as a grounds for suspending the operation of the treaty, in whole or in part, between itself and the defaulting state. The other Parties to the treaty, acting unanimously, may agree to jointly suspend the treaty, in whole or in part, with regard to the defaulting Party. Article 60 of the VCLOT limits its application to a *material* breach of the treaty, which consists in "the violation of a provision essential to the accomplishment of the object and purpose of the treaty."

The usefulness of these rules to the UNFCCC/KP is limited for a number of reasons. The range of violations that Parties to the UNFCCC might wish to deter or to repair are likely to include those that might not be found to amount to a "material breach", such as failure to put in place a national system for estimating emissions, or falling behind on a national communication. Furthermore, because the causes and the impacts of climate change are widely dispersed, over time and over space, it may be difficult for any one Party to establish that it has been "specially affected" by a specific breach of the UNFCCC/KP.

While general treaty law does not provide much specific guidance on the appropriate responses to non-compliance, it does provide an additional legal underpinning for the suspension of treaty rights to counter a material breach. The threat of suspension of rights under the KP might provide a useful deterrent to non-compliance. Finally, until the Parties to the climate regime adopt more specific voting rules, Article 60 of the VCLOT could be invoked as a basis for taking decisions with binding consequences over the objections of the defaulting Party.

2.2 State Responsibility

The rules and principles of state responsibility are not set out in a treaty, but instead have their source in international customary law, as reflected in the practice of states and clarified through the decisions of international courts and tribunals. Generally, the rules and principles of state responsibility provide that the breach of an international obligation will give rise to a duty to make reparation for consequences of that act. The international obligation at issue in the context of climate change might arise out of the UNFCCC or Protocol, or it may arise out of the widely recognised "general obligation of states to ensure that activities within their jurisdiction and control respect the environment of other states or of areas beyond national control".[1] If reparation is not provided to the injured state, the law of state responsibility may authorise the injured state to take countermeasures against the defaulting state.

A full discussion of the application of this extremely complex area of international law to climate change is beyond the scope of this paper. Nonetheless a number of general principles relating to non-compliance and responses to non-compliance may provide a useful guide to Parties as they design specialised rules for non-compliance with the climate regime.

The International Law Commission has since the 1950s, been working to codify a set of principles that would capture the contemporary law and practice of state responsibility. The most recent set of Draft Articles is incomplete and controversial (ILC 1998). Analysts have raised doubts as to the useful applicability of such rules to resolving disputes arising from damage to areas of the "global commons" such as the climate system (Boyle 1997). As was the case with the law of treaties, notions of state responsibility turn, in part, on a particular state being able to demonstrate that it has been injured by the breach. Remaining scientific uncertainties regarding climate change and the dispersed causes and impacts of global warming raise difficult (but not insurmountable) evidentiary issues. Furthermore, rules of state responsibility are generally directed towards an "internationally wrongful act" which may not cover all the types of behaviour the climate change Parties will wish to discourage.

Nonetheless, a decision maker left with the discretion to design a response to non-compliance with the UNFCCC/KP may well turn to the emerging rules on state responsibility for guidance on the types of remedies that may be available and compatible with general international law.

Once a breach has been demonstrated, reparation must, as far as possible, wipe out all the consequences of the illegal act. The ILC Draft Articles provide that reparation may be required, either singly or in combination, in the form of:

- restitution in kind: the re-establishment of the situation which existed before the wrongful act was committed;
- compensation: the giving of an equivalent or a substitute of equal value of what was damaged (usually money);
- satisfaction: an apology, nominal damages or punitive damages reflecting the gravity of the infringement;
- guarantees by the breaching Party that the wrongful act will not be repeated.

[1] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of the International Court of Justice, ICJ Reports 1995.

The ILC Draft Articles would place general constraints on the level of reparation that may be required of a defaulting Party. They provide that whatever remedy is imposed shall not deprive the population of the defaulting state of its own means of subsistence. Provision is also made to ensure that the remedies balance the need to respect the political independence and economic stability of both the injured State and the defaulting State.

The ILC Draft Articles also anticipate the need for countermeasures that might be taken by the injured state in order to induce the compliance of a defaulting State should it fail to provide reparation. Countermeasures are acts taken by the injured State against the defaulting State that might in other circumstances be considered unlawful. In a bilateral context, countermeasures are the main means of enforcing an international legal judgement.

Although the ILC Draft Articles do not list specific countermeasures, they do provide procedural guidelines and substantive parameters that the injured State must follow. These include a duty first to negotiate, and to resort to any binding dispute settlement procedures that are in force between the two States. Countermeasures must be "in proportion to the degree of gravity of the internationally wrongful act." Extreme countermeasures are expressly prohibited, including a threat or use of force as prohibited by the UN Charter or the use of extreme economic or political coercion designed to endanger the territorial integrity or political independence of the State concerned.

2.3 Procedures and Mechanisms

The procedures and mechanisms for handling disputes arising between any two or more Parties concerning the interpretation or application of the climate regime are set out in UNFCCC Article 14, and are to be applied, *mutatis mutandis*, to the Kyoto Protocol (Article 19). These include adjudication by the International Court of Justice (ICJ), or arbitration or conciliation in accordance with procedures to be adopted in annexes to the Convention. In the absence of any specific guidance to the contrary, these procedures would impose responses to non-compliance in accordance with the general principles of treaty law and the law of state responsibility outlined above.

UNFCCC Article 14 procedures for dispute settlement, which appear in a similar form in many MEAs, have never been invoked. The effectiveness of these procedures is impaired in that either their jurisdiction over Parties is optional, or their outcome is not binding.

Binding adjudication or arbitration of disputes arising under the climate regime is compulsory only as between Parties that have accepted jurisdiction. Parties may accept the jurisdiction of the ICJ as part of a general declaration under Article 36 of the ICJ Statute, or through a specific declaration under the Article 14 of the Convention. No Party has made an Article 14 declaration,[2] and the rules and procedures governing the establishment of ad hoc arbitral tribunals under Article 14 have yet to be designed.

It has often been suggested that these procedures, always present but never used, add value to MEAs as a deterrent threat to be triggered when other efforts fail. However, the optional jurisdiction of the adjudication and arbitration clauses, and the recommendatory character of the outcome of the conciliation process may effectively blunt this threat.

[2] Only one Party has made a declaration regarding Article 14, and it has indicated a preference for "diplomatic negotiation" over any of the Conventions formal dispute settlement mechanisms. Several Parties to the UNFCCC have made general and specific declarations under Article 36 of ICJ Statute. Further analysis of these declarations would be required to determine their relevance to disputes arising under the UNFCCC/KP.

It has been argued that even if made compulsory, Article 14 procedures are inappropriate to the effective implementation of an MEA. Adjudication and arbitration are designed to provide third-Party dispute settlement for bilateral disputes after a disagreement has ripened into a fully fledged legal conflict. The smooth functioning of an MEA depends instead on avoiding disputes before they arise, and encouraging solutions negotiated multilaterally, amongst the Parties themselves.

However, the Protocol's implementation "mechanisms", as described below, create discrete relationships between two or more Parties, in which one Party may rely upon the specific performance of another in order to achieve its international obligations. This dynamic, combined with the high economic and political stakes attached to the QERLC's in Annex B Parties, distinguishes the emerging climate regime from other MEAs, and may well justify a greater reliance, as a last resort, on more traditional means of dispute settlement. Experience from the WTO Dispute Settlement System suggests that, when the economic and political stakes of non-compliance are high, carefully tailored forms of compulsory and binding arbitration can resolve bilateral disputes in such away that supports a multilateral framework.

If the Parties are to rely on these procedures, either as a genuine deterrence or as a means of providing reparation once a breach has occurred, they will need to create incentives for Parties to make declarations of compulsory jurisdiction under Article 14.2 of the Convention. Furthermore, as both the Convention and the Protocol are tied to the Article 14 procedures, an increased effort to develop Annexes on Arbitration and Conciliation may be warranted.

Table 3. Traditional Dispute Settlement

process	**"jurisdiction"**	**character of responses**	**type of responses**	**Mechanisms**
adjudication	optional	binding	unspecified	ICJ
arbitration	optional	binding	unspecified	ad hoc tribunal
conciliation	Compulsory	recommendatory	unspecified	ad hoc commission

3. TREATY-SPECIFIC MECHANISMS FOR NON-COMPLIANCE

Treaty-specific mechanisms for responding to non-compliance have been developed in part as recognition of the failure of general international law and traditional dispute settlement mechanisms to provide an efficient and effective means of deterring and providing reparation for non-compliance.

The history of the treatment of compliance issues under the climate change regime is reflected in the text of Article 13 of the Convention, the subsequent and ongoing work of the Ad Hoc Group on Article 13 (AG-13), and Articles 16 and 18 of the Kyoto Protocol. During the negotiations of the UNFCCC, the majority of delegations did not support the inclusion of a robust mechanism for enforcing compliance with the Convention's soft and ill-defined commitments. (Werksman 1996a). The AG13 negotiations that started after the Convention entered into force, have focused on the establishment of a 'non-confrontational' and 'facilitative' multilateral consultative process for the resolution of questions regarding implementation of the Convention. However, the course of the Protocol negotiations revealed that strengthened commitments and more sophisticated means for implementing those commitments would require a correspondingly more elaborate system for identifying and responding to non-compliance.

In addition to the "traditional" dispute settlement procedures discussed above, the Convention and the Protocol share between them three distinct sets of rules, procedures and mechanisms that, when in eventually in force, could provide the means for determining and addressing cases of non-compliance. These are:

- In Depth Review Process
- Multilateral Consultative Process
- Non-Compliance Procedure

3.1 In Depth Review

While the Convention's text does not explicitly empower any of its institutions to review the extent to which an individual Party has complied with its commitments, a process for the in-depth review (IDR) of Annex I Parties' national communications has been established and extended by the COP. The IDRs reflect the only experience of the climate regime thus far in reviewing the implementation of commitments under the UNFCCC, and this could form the basis for determining and addressing cases of non-compliance under the Kyoto Protocol. Under the Kyoto Protocol (Article 8), the IDR process is strengthened to empower the expert review teams to identify problems or questions related to an individual Party's fulfilment of its commitments. (See OECD 1998b, for a discussion of the role of the IDR in the reporting and review of national performance).

Under the Convention, expert review teams will conduct in-depth "paper" reviews of Annex I national communications and, at the invitation of the Party concerned, may undertake country visits to clarify aspects of the communications. Under the Convention, these reviews, which should be completed within

one year of the receipt of the national communication by the Secretariat, aim at providing a "thorough and comprehensive technical assessment of the implementation" by individual Parties.

While the COP has stressed that the purpose of the review is to be "facilitative" and "non-confrontational", the review is also to be carried out in an open and transparent manner designed to preserve the independent and expert assessment of the review team. Experts are not allowed to participate in the review teams for their own country's national communication. Should there be points of disagreement between the team and the Party, the integrity of the team's conclusions will remain intact, and the Party's views will be incorporated in a separate section of the team's report. Thus far the tone of the IDR reports is generally descriptive, and balanced in both praise and criticism (UNFCCC 1995.)

Nevertheless, IDRs of the initial national communications revealed that the European Community, the United States and Japan, were each likely to exceed 1990 greenhouse gas emission levels in 2000 (UNFCCC 1997a, 1996a, 1996b). These IDRs, of three Parties whose performance is central to the Convention's success, demonstrate that the expert teams were able to assess the quality of the data submitted.

Despite these and similar findings with regard to other Annex I Parties, the Convention's formal mechanisms have thus far retained a focus on an "overall" assessment of implementation. The Secretariat provided COP2 with a summary based on the IDRs of the initial national communications which named no particular country, but concluded that for a majority of Annex I Parties "additional measures" would be needed to return CO_2 to 1990 levels by 2000. In turn, COP2 maintained that Annex I Parties were fulfilling their commitments, but that "for many Annex I Parties further actions will be needed" to meet the Convention's stabilisation "aim". (UNFCCC 1996c.)

The extension of the IDR process to the Protocol prepares the ground for the next logical step in the evolution of the regime's compliance system: the development of procedures and mechanisms to respond to identified instances of non-compliance by individual Parties. Under the Protocol, national communications must be enhanced to include information geared specifically to "demonstrate compliance" with the Protocol's commitments. (Article 7.2.) The Protocol expressly authorises the expert review teams to transmit, through the Secretariat, "potential problems" and "questions" regarding the implementation of individual Parties, to the COP/MOP for consideration. As part of this consideration, additional questions may be raised by Parties. (Article 8.3.)

The Protocol has already authorised one "non-compliance response" that may result from the IDR process. Once a "question of implementation" is raised by an IDR, the ability of the Party concerned to add to its assigned amount any emission reduction units (ERUs) acquired through joint implementation, is suspended until the question is resolved. The COP/MOP is, furthermore, authorised pursuant to its consideration of questions raised by the IDR, to "take decisions on any matter required for the implementation of this Protocol" (including, presumably, to re-instate a Party's ability to use ERUs). The open-ended nature of this function can be interpreted as empowering the COP/MOP both to make a legal/political determination that a Party is indeed in non-compliance, and to unleash any sanction available to it including the permanent suspension of the right to use ERUs. It may also be viewed as not much more than a restatement of the COP/MOP's residual powers under Article 13.4(j).

One of the limitations of the IDR process as a non-compliance response system is that, as the Protocol stands, it will apply only to Annex I Parties. Discussions on the process for the review of non-Annex I national communications under the Convention are ongoing.

3.2 Multilateral Consultative Process

A further opportunity to develop procedures under the Convention that can scrutinise an individual Party's compliance, has been left open by Article 13, which anticipates the establishment of a process for resolving questions regarding the implementation of the Convention. Article 13 is referenced in Article 16 of the Protocol, which leaves open the possibility that the same or a modified version of the process could be applied to the Protocol, if the COP/MOP so decides.

COP1 assigned the task of deciding whether and how to establish a Multilateral Consultative Process (MCP) to an ad hoc open-ended working group of technical and legal experts (AG13). At the time of this writing AG13 has met six times. The Report of the Sixth Session of AG13 contains draft terms of reference and a draft decision through which COP-4 could, if it chooses, bring a standing Multilateral Consultative Committee (MCC) into being. Only two portions of bracketed text, related to the size and composition of the MCC, prevented AG13 from unanimously recommending the process to the COP for adoption (UNFCCC 1998).

The AG13 negotiations are leaning towards establishing a "soft" process of the kind endorsed by the "managerialist" approach to non-compliance. In the context of the Convention's soft commitments, the weak mandate in Article 13 itself, and sensitive to the concerns, particularly of developing countries, about intrusions on national sovereignty, the draft MCP describes its "nature", as "facilitative, co-operative, non-confrontational, transparent and non-judicial."

It is possible, nonetheless, to piece together from the draft MCP some of the elements necessary to begin to determine and address specific cases of non-compliance. The institutional characteristics of the MCP owe a great deal to those established under the Montreal Protocol Non-Compliance Procedure and its Implementation Committee. (See section 0 below). Most crucially, the MCP would establish a standing committee of limited membership to which any Party could raise a question regarding the implementation of the Convention by another Party. Once a question is raised, the Committee may initiate consultations with the Party concerned. While it is inappropriate to apply "judicial" terms to a "non-judicial" process, this aspect of the Committee's mandate has the flavour of compulsory jurisdiction. It would appear that the Party concerned could not reject the application of the process to itself.

A further function enumerated in the draft MCP, is the Committee's authority to make specific recommendations to the COP on measures to assist or to bring about compliance by a Party. This power, though it is recommendatory in nature and is filtered through the political processes of the COP, is highly significant in that it entitles the Committee to form a preliminary conclusion as to whether or not a Party is in compliance, and make an initial assessment of why a Party is failing to comply.

The draft MCP is weakest in the ambiguity of its mandate and the nature of the conclusions and recommendations it may reach. The MCC may "clarify and resolve questions", but the types of "outcomes" it may recommend are too vague to provide real guidance. At most, the Committee's powers could extend to resolving a question regarding the implementation of a particular Party. It may reach a conclusion that included measures the Committee deemed suitable to be taken by the Party concerned to encourage the effective implementation of the Convention. While these conclusions must then be forwarded to the COP, there is no indication that the COP need review or approve them. The publication of a Committee report that concludes that a Party is failing to comply with the Convention could prove a useful a tool for bringing to bear public and diplomatic pressure on a Party to comply.

Reading too much into the MCP would run counter to the spirit in which it was negotiated, and its "facilitative, co-operative" nature. Nonetheless its open textured mandate and outcome have surprising potential, and its amendment procedures have been designed to allow it to evolve with relative ease. This

is particularly important to keep in mind because, until the Protocol enters into force, the MCC, which will be a Convention body, may be the only institution capable of taking up compliance issues arising from the "prompt start" of any of the Protocol's mechanisms.

3.3 Non-compliance Procedure

As has been discussed, the growing likelihood that the Protocol would contain binding commitments and market mechanisms led delegations to introduce proposals for a strengthened compliance system. Although no proposal was fully elaborated, suggested text (as in the AG-13 process) drew on the precedent set by the Montreal Protocol Non-Compliance Procedure (MP-NCP) and its Implementation Committee. Because the Article 13 and 18 negotiations ran on parallel and distinct tracks, there are significant potential overlaps, at least at the institutional level, between the draft MCC and whatever "procedures and mechanisms" that might be agreed under Article 18.

Before the Protocol enters into force, a strengthened MCC may have a role to play in monitoring the early implementation of mechanisms that are piloted. Once in force, the Parties to the Protocol may decide, given the close institutional relationship between the two treaties, and a general aversion to creating new institutions, that the MCC could perform the non-compliance functions developed under Article 18. The Protocol anticipates that both procedures might be run in parallel as long as the MCP is operated without prejudice to Article 18's procedures and mechanisms. It may prove appropriate to have a single committee operating both a "facilitative" MCP and a non-compliance procedure capable of tougher outcomes. The choice of procedure might be based on the type of commitment at issue, or given the highly differentiated character of the commitments under both the Convention and the Protocol, whether or not a Party was in Annex I. The ability of a single Committee to perform both functions will of course depend on the extent to which the characters of the two procedures overlap. Should the NCP begin to take on a more judicial character, the size, composition and structure of the MCC may prove inappropriate to resolving cases of non-compliance.

The text of Article 18 reflects a broad consensus amongst the negotiators that "appropriate and effective procedures and mechanisms to determine and address cases of non-compliance" will be essential to the functioning of the Protocol. Most also agreed that the Article 18 procedures should be empowered to impose binding consequences on Parties found to be in non-compliance. Consensus failed, however, on the issue of whether these binding consequences would have to be enumerated and agreed in the Protocol itself, or whether instead the power to impose binding consequences should be granted in principle, leaving the specific consequences to be developed later.

Deadlock on this issue left the text with a compromise that may prove awkward for the further development of non-compliance responses. It was agreed that an indicative list of consequences, taking into account the cause, type, degree and frequency of non-compliance would be approved by the COP/MOP at its first session. However, any "procedures and mechanisms under this Article entailing binding consequences shall be adopted by means of an amendment of this Protocol," which will require a potentially cumbersome ratification procedure before it would enter into force.

Some guidance as to how the Parties may take forward the negotiation of an indicative list of non-compliance responses, including those entailing binding consequences can be drawn from the experience of the Montreal Protocol Non-Compliance Procedure. Its six years of operation are widely considered to have been a success by both the Parties and academic observers.

The Parties to the Montreal Protocol adopted by decision an indicative list of "measures that might be taken by a meeting of the Parties in respect of non-compliance." These are:

- appropriate assistance, including technical and financial assistance;
- issuing cautions;
- suspension, in accordance with the applicable rules of international law concerning the suspension of the operation of a treaty, of specific rights and privileges under the Protocol, whether or not the subject to time limits, including those concerned with industrial rationalisation, production, consumption, trade, transfer of technology, financial mechanism and institutional arrangements (UNEP 1992.)

All of the cases the MP-NCP has dealt with thus far have focused on finding pragmatic solutions to the problems of Parties having difficulty in complying with their commitments. All cases have been brought before the Implementation Committee at the initiative of the Party concerned. The closest the MP-NCP has come to a "contentious case" involved the potential non-compliance of certain countries with economies in transition. Here the MP-NCP used a combination of a "carrot" of financial assistance and the "stick" of financial conditionality and trade restrictions, to help strengthen political resolve of the country concerned to carry out its obligations. Funding from the Global Environment Facility (GEF), released in tranches conditioned on demonstrable progress, was particularly influential, both in assisting compliance and in creating a process for monitoring and enforcement. (Werksman 1996).

While viewed as a success for the "managerialist" point of view, it is questionable as to how well the precedents set by the MP-NCP will continue to hold for the ozone regime or will be applicable to the climate regime. If the enforcement school is correct, the efficacy of facilitative approaches will decline as the number of Parties facing genuine compliance difficulties increases. However, the MP-NCP experience also suggests that strong enforcement responses may only be effective and politically feasible when a wide majority of the Parties to the agreement are themselves in compliance.

The GEF is currently filling the role as the operating entity of the financial mechanism for non-Annex I Parties to the Convention, and might provide the same function for the Protocol. However, those Parties that carry the heaviest burdens under the climate regime, are not eligible for GEF climate change assistance. Those countries with economies in transition that the MP-NCP was most effective in assisting, may have the least difficulty in meeting the Protocol's emissions limitation and reduction commitments.

The MP-NCP's ability to use trade pressures is tied directly to the Montreal Protocol's general ban on trade in regulated substances between Parties and non-Parties. This allows the MP-NCP to treat the ability to trade in regulated substances as a privilege granted by the Protocol, and to incrementally suspend that privilege in order to encourage compliance. Although the KP does not have a similar trade ban to draw upon, provisions to suspend a Party's ability to trade allowances and offsets may similarly prove a useful compliance response available to the Kyoto Protocol.

Efforts to pre-define categories of non-compliance and to associate these with specific non-compliance responses, have thus far failed under the Montreal Protocol. A list of "possible situations of non-compliance with the Protocol" was developed by an ad hoc group of legal experts, but rejected by the Meeting of the Parties. The process rapidly politicised as the exercise of highlighting particular aspects of the Protocol as more important than others, was perceived as an effort to renegotiate the agreement. Texts, like the Montreal and the Kyoto Protocol, that represent carefully balanced and nuanced compromises may well unravel if Parties were asked to categorise and prioritise individual commitments into a hierarchy of response measures. Although efforts to clarify these issues under the MP-NCP were raised again recently,

the Parties seem minded to continue to allow the NCP to develop its responses as needed, on a case-by-case basis (UNEP 1998.)

A critical issue that has yet to be confronted under the Montreal Protocol, but that may await the Parties to both the ozone and the climate regimes is the question of the legal character of the response measures generated by a non-compliance procedure. Are the consequences developed by the non-compliance procedure binding on the Party concerned, and are they enforceable as distinct legal obligations? For the MP-NCP, the legal character of the outcome is determined by the powers of the Montreal Protocol's Meeting of the Parties (MP-MOP). The relevant financial conditionalities were put in place through a request to the GEF Council and their legal character was never at issue. The trade restrictions contained in the MP-MOPs decision were, however, directed at the behaviour of the party concerned, which in response, sought to block the adoption of the MP-MOP's decision, but its objections were overridden by a consensus of the remaining Parties under the MP-MOP rules of procedure. After the MP-MOP adopted the decision, the party concerned never formally challenged whether it is legally bound by the outcome (Werksman 1996, Victor 1998.)

Article 18 of the Kyoto Protocol, for the reasons mentioned above, appears to demand a clearer resolution of issues that the ozone regime has avoided confronting. Article 18 appears to require a graduated scale of responses associated with particular categories of non-compliance. While only "indicative" in character, this list may well prove challenging to negotiate. Furthermore, Article 18 stipulates that any binding consequences resulting from this process must be adopted by amendment. This can be read to suggest that any consequences flowing from Article 18 that are not so adopted would not be binding.

The history of the Article 18 negotiations indicates that the Parties attach a high degree of importance to the legal character of the outcomes of non-compliance procedures. Failure to comply with a binding consequence entails heavier public opprobrium, and may trigger the rules of state responsibility and countermeasures discussed earlier. However, Article 18's constraint on the adoption of binding consequences applies only to procedures and mechanisms developed under that Article. Article 18 does not by itself prevent the Parties from agreeing to binding consequences under other Protocol provisions. As discussed in section 4.4 below, the suspension of rights and privileges under the Protocol's implementation "mechanisms" provides fertile ground for creating incentives and disincentives for non-compliance that may be binding on the Parties.

Finally, lessons from other regimes suggest that, for enforcement purposes, the ongoing supervision of a country's compliance is at least as important as the legal character of the outcome of a non-compliance procedure. Once it has taken up a case of non-compliance, the Montreal Protocol non-compliance procedure has, as a matter of practice, continued to review the progress of the Party concerned until compliance is achieved. Similarly, the WTO Dispute Settlement Understanding provides for the "surveillance of implementation of recommendations and rulings", and the WTO Dispute Settlement Body will retain the matter on its agenda until it is resolved.

Table 4. Specialised mechanisms regimes for responding to non-compliance

process	"jurisdiction"	character of responses	type of (potential) responses	mechanisms
IDR Article 6	compulsory over Annex I Parties	binding (Article 6.4)	(suspension of ERUs transferred or acquired)	expert review teams, COP/MOP
IDR other	compulsory over Annex I Parties	COP/MOP decision	(unspecified)	expert review teams, COP/MOP
MCP (draft)	compulsory over all Parties	conclusions and recommendations	"measures deemed suitable"	MCC
NCP (Montreal)	compulsory over all Parties	MOP decision (binding?)	• assistance • cautions • suspension of rights and privileges	Implementation Committee, MOP
NCP (Kyoto)	undetermined	undetermined (binding?)	indicative list of consequences	"procedures and mechanisms"

3.4 Compliance and the KP's implementation mechanisms

The Kyoto Protocol establishes four mechanisms that entitle Annex I Parties to vary their primary commitments under Article 3. Under Article 4, they may enter into an agreement to reallocate their commitments through a side agreement; they may transfer or acquire parts of assigned amounts (PAAs) under Article 17; they may transfer or acquire emissions reductions units (ERUs) resulting from projects under Article 6; or they may acquire certified emissions reduction units (CERs) resulting from project activities generated under the clean development mechanism (CDM). In each circumstance the Parties engage in a transaction in which one Party (the "buyer") acquires a PAA, an ERU, or a CER from another (the "seller").[3]

The creation of these assets, and of the market in which they can be traded may affect compliance with the Protocol in a number of ways. If properly structured, the Protocol's implementation "mechanisms" should increase the likelihood of compliance by providing lower cost opportunities for achieving emissions reductions. Implementation mechanisms could provide one of a number of "safety valves" under the Protocol. Such a valve would allow Parties experiencing difficulties in meeting their commitments through domestic action to bring themselves into compliance by acquiring part of another Party's assigned amount (allowance), or carbon offsets generated by projects in other countries.

However, introducing too lenient a safety valve within any commitment period could have a longer term detrimental effect on certain Parties' compliance, and on the progressive evolution of the regime. An Annex I Party that chose to achieve a significant portion of its QERLC in other countries, rather than making efforts at home, may find it more difficult to undertake and to fulfil more rigorous domestic commitments in a later commitment period.

The Protocol's mechanisms introduce a new set of tools for responding to cases of non-compliance. Once agreed, the rules covering implementation of the Protocol's "mechanisms" may be used as a means of leveraging a more robust compliance system at both the domestic and the international level. By viewing participation in these mechanisms as a privilege rather than a right, Parties could choose to precondition

[3] The terms "Buyer" and "Seller" are used here for the purposes of discussion. These terms do not appear in the Protocol and should not be taken to imply that money will necessarily be exchanged as part of any of these transactions.

their operation, and the eligibility of individual Parties, on the acceptance of rules that create an environment that makes compliance more likely, and that authorises the use of appropriate responses to non-compliance. For example, Article 6.1(c) of the Protocol preconditions the right to acquire emissions reductions units (ERUs), on compliance with the Protocol's commitments on national inventories and national communications (Articles 5 and 7). A companion OECD paper which focuses on emissions trading discusses possible consequences associated with the rules for trading that may prove generally applicable to the Protocol. The range of consequences runs from soft, managerial approaches, to harder enforcement actions. (OECD 1998c)

A key tool that is available to the UNFCCC/KP institutions, is determining the terms and conditions by which allowances and offsets can be generated, allocated and sold. This can both directly determine the value of these assets (by discounting or invalidating them), or indirectly influence the extent to which they are valued by the market (by sending compliance-related market signals). This provides significant leverage over the compliance of Parties that hold, or that wish to sell these assets, as these Parties will want to preserve their value. The threat of direct or indirect devaluation of the asset can be used to deter non-compliance. A non-compliance penalty assessed in the form of these assets provides a tool for both deterrence and reparation as the defaulting Party must go out and generate additional offsets to come into compliance.

Allowing for the discounting or invalidation of allowance or offsets after they have entered the market place does, however, raise the issue of whether the buyer or the seller should bear the risk when the asset loses value. This risk could be allocated on an ad hoc basis as part of the negotiation of the contractual relation between Parties, between Parties and international organisations, and/or between Parties and private entities that underpins any transaction. Alternatively, and as part of a non-compliance response system under the Protocol, the Parties could create specialised rules of "responsibility"[4], that will determine whether the buyer or the seller bears the risk of non-compliance if the emissions reductions represented by the allowance or the offset are not actually achieved (OECD 1998c; UNCTAD 1998; Goldberg, et al 1998; Greenpeace 1998; Zhang 1998; Nathan 1998).

Both buyer and seller responsibility regimes depend ultimately on the effectiveness of the Protocol's non-compliance system to ensure that the Party left carrying the burden is brought into compliance. Getting this dynamic right may require a closer look at the characteristics of the most likely participants in the market. Domestic trading regimes rely on strong enforcement mechanisms applied against entities within a country's regulatory jurisdiction. This is based in part on the assumption that the source is either selling from a position of strength as it improves its efficiency and technology or, that it will simply be driven out of business (and thus cease emitting altogether). The typical seller in the first commitment period of the Kyoto Protocol is more likely to be an economy in transition struggling through a period of financial insecurity. If such a source oversells, it is not clear whether tough measures will bring it into compliance or drive it from the regime (and continue emitting). Facilitative, problem solving from the managerialist school may be a more appropriate compliance response. Ironically, this type of approach, while best suited to this type of seller, may be least suited to the market-based mechanisms.

All discussions of allowance and offset trading have stressed the central importance of compliance systems, and non-compliance responses to the success of these mechanisms (OECD 1998c, UNCTAD 1998). They draw this insight from the study of a limited but growing number of trading regimes established in domestic legal systems. However, most are quick to recognise that the fundamental difficulty in drawing analogies between international and domestic legal systems is the absence of

[4] The terms liability and responsibility have each been used by various analysts to describe a rule that determines which Party must bear the risk of the transaction. The word "responsibility" is chosen here to remain consistent with its use in Article 4.6 of the Protocol.

powerful enforcement mechanisms at the international level. The creation of trading systems at the domestic level offers emitters a more flexible alternative to a "command and control regulation" which sets and enforces restrictions on a source by source basis. In exchange for greater flexibility, regulators are able to design tough compliance systems, including automatic financial penalties, to ensure that the flexibility is not abused.

3.5 Developing An Indicative List Of Non-Compliance Consequences

As has been discussed, Article 18 of the Protocol calls upon COP/MOP 1 to develop an indicative list of consequences that take into account the cause, type, degree and frequency of non-compliance. From the forgoing discussion, the range of measures that might be included in such a list begins to emerge.

3.5.1 Capacity building and expert technical assistance

The provision of financial and technical assistance to Parties having difficulties complying or demonstrating compliance with their commitments will clearly play a key role in any compliance response system the Protocol develops (OECD 1998a, Werksman 1996b). The experience of the Montreal Protocol Implementation Committee suggests that conditional offers of financial assistance can be a useful tool for encouraging compliance when a Party is "willing" but "unable" to comply. The Protocol's implementation "mechanisms" may well involve transfers of significant financial resources that could provide a source of assistance. In certain circumstances, it may be appropriate for the compliance system to require that Buyers incorporate funding for a programme of compliance capacity building as part of the transaction cost of acquiring an allowance or offset.

3.5.2 Suspension of Rights

The threat of selective suspension of rights could be another tool to encourage compliance. The multilateral suspension of treaty rights has a sound basis in treaty law, and has been incorporated and applied in the Montreal Protocol Non-Compliance Procedure. International Commodity Agreements (ICAs) which have been noted as sharing legal and institutional characteristics with the Kyoto Protocol, regularly provided for (but rarely invoked) the suspension of rights to vote as a response to non-compliance (Chimni 1987). Arguably, the non-compliance provisions in Article 6.4, which suspend the ability of a buying Party to use ERUs if either the buying or the selling Party fails to comply with Article 6 requirements, could potentially be applied to other flexibility mechanisms. While of significant deterrent value, an absolute suspension of the right to trade would clearly interfere with the ability of a Party in non-compliance to make reparation.

3.5.3 Deductions from a subsequent commitment period with a Penalty

The most frequently cited compliance tool used to back up analogous regimes at both the domestic and the international level is the authority to deduct any "overage" evident at the end of one commitment period from the subsequent commitment period, usually with a premium attached. This technique is available under the US Acid Rain Program and is in place in a number of International Commodity Agreements, as well (UNCTAD 1998, Chimni 1987). The failure of the Ad hoc Group on the Berlin Mandate (AGBM) process to agree assigned amounts for a second commitment period removes this tool from the Protocol for the time being. Indeed, unless a second commitment period is agreed well before the end of the first there may be a danger that the possibility of borrowing would provide an incentive for negotiators to inflate the second budget.

3.5.4 Financial Penalties

Assessing financial penalties against Parties that fail to meet their commitments is extremely rare in international treaty law. However the introduction of the Protocol's implementation "mechanism" provides the Parties with an "asset" that can be used to assess non-monetary fines in a way that could both deter non-compliance and provide a means of reparation. Mandatory insurance or compliance reserves that charge a premium for access to their assets are, in a sense financial penalties that could be available to a non-compliance procedure.

3.5.5 Economic or trade sanctions

Economic or trade sanctions can be defined as the "deliberate, government-inspired withdrawal, or threat of withdrawal, of customary trade or financial relations" (IIE 1998). A recent study reviewed 115 cases of economic sanctions between World War I and 1990. Most of the cases studied were not of direct relevance to the types of disputes likely to arise from the climate regime, and instead involved foreign policy responses to violations of human rights, or military interventions. Nonetheless, the conclusions reveal a number of interesting insights on the fairness and the effectiveness of these acts as a means of changing state behaviour. Sanctions proved at least partially successful in approximately 35% of the cases. Success rates were highest when sanctions were imposed multilaterally, when the policy goal was relatively modest, when the target country was economically and politically weak, when the sanctioner and the target were friendly to each other prior to the imposition of the sanction, when the sanctions were imposed quickly and decisively, and when the costs to the sanctioning country or countries were low (IIE 1998).

A further restraint on the use of sanctions is emerging from the powerful rules and dispute settlement system of the Word Trade Organisation (WTO). Past experience generally, and the present threat of WTO challenges, suggest that sanctions imposed to enforce compliance with the climate regime should be designed narrowly, and developed and agreed multilaterally, preferably within the context of the regime's implementation "mechanisms".

3.5.6 Pairing response measures with types of non-compliance

The list of possible responses required under Article 18 is likely to be indicative, rather than prescriptive. Its purpose will be to provide a guidance to parties as to the risks associated with different categories of non-compliance, and to provide guidance to a smaller set of decision makers (such as the members of an Implementation Committee) as to the expectations of the COP/MOP as a whole.

Developing a detailed matrix with applicability to the Protocol as a whole is likely to prove more problematic, and indeed may not be necessary. Associating specific levels of responses to particular commitments would imply that an explicit hierarchy of commitments can be drawn from what is a subtly nuanced text. Disagreements could easily arise, for example, over whether the consequence for violating a QELRC should be more grave than failing to honour a commitment to transfer financial resources or technology. Compliance features could be included in provisions for the Protocol's implementation mechanisms to complement and reinforce Article 18 responses.

While an Implementation Committee would no doubt consider the underlying causes of the non-compliance when recommending an appropriate response measure, it may be both difficult and inappropriate to categorically associate specific causes with specific response measures in advance of a particular case. In cases of non-compliance, the Committee could consider whether the Party should have been able to anticipate the events causing the breach, whether adequate precautionary measures were taken, and whether the shortfalls are easily reparable, before deciding to apply a punitive response. However, it

may not be appropriate to require the Committee to carry the evidentiary and the political burden of having to establish and accuse a Party of wilful non-compliance before imposing the maximum consequence. For these reasons, the Parties may consider the example of the Montreal Protocol parties by agreeing a full range of non-compliance responses, but leaving the equivalent of an Implementation Committee the discretion to tailor the non-compliance response to the particular facts before it.

3.6 Balancing Automaticity and Discretion

This last point raises again the issue of what procedures and mechanisms will be "effective and appropriate" to determining and addressing non-compliance under the Protocol. In particular, Parties will have to decide the extent to which either the determination of non-compliance, or the application of a particular response, should take place automatically, or should be subject to the consideration of one of the Protocol's institutions. The non-compliance response identified under Article 6 will be triggered by the "determination" of an IDR expert review team, and "addressed" automatically by the suspension of the right to use offsets.

The design of the rest of the Protocol's non-compliance response system will require procedures and mechanisms that strike a careful balance between discretion and automaticity. Allowing a non-compliance system broad discretion to determine and address non-compliance on a case-by-case basis may imbue the regime with a sense of fairness, but may cause uncertainty and delay. Automatic responses carry a deterrent punch and provide certainty to the market place, but too heavy a reliance on automatic penalties may, in the high stakes game of climate change, drive away from the regime participants who feel they have been dealt with unfairly, and may prevent others from joining.[5]

[5] A better balance between the two might be achieved by the introduction of a system of automatic but appealable penalties. The US Acid Rain Program, which has inspired many climate policy makers allows emitters that feel hard done by to appeal decisions of the regulator.

4. CONCLUSIONS

The Kyoto Protocol negotiations, and the resulting text appear to reflect a strong interest of a number of delegations to promote more rigorous non-compliance procedures. The legally binding nature of Parties' commitments under the Kyoto Protocol and the perception that meeting them will be expensive raises the stakes of the agreement. This suggests that purely facilitative approaches to non-compliance may not answer Parties' concerns about the need to ensure all Parties pull their weight, and that the Protocol's market mechanisms provide confidence to investors.

At the international level, the compliance mechanisms available are relatively weak. General treaty law provides legal underpinning for the suspension of treaty rights to counter a material breach. Until the Parties to the climate regime adopt more specific voting rules, Article 60 of the VCLOT could be invoked as a basis for taking decisions with binding consequences over the objections of the defaulting Party. ILC Draft Articles provide procedural guidelines and substantive parameters that an injured State should follow.

Procedures and mechanisms for handling disputes between and among Parties are set out in UNFCCC Article 14, and are to be applied, *mutatis mutandis*, to the Kyoto Protocol (Article 19). However, no Party has made an Article 14 declaration, and binding adjudication or arbitration of disputes is compulsory only between Parties that have accepted jurisdiction. Article 14 procedures for dispute settlement appear in a similar form in many MEAs, but have never been invoked.

General international law is residual in nature, and it will only be necessary to resort to it to the extent that the Convention and Protocol do not provide their own rules on non-compliance. Issues related to non-compliance responses are currently under discussion for the Convention under Article 13. They will also form an essential but as yet unresolved element of the design of many aspects of the Kyoto Protocol, particularly with regard to its non-compliance procedures (Article 18) and any specialised procedures established to ensure the integrity of its implementation "mechanisms" (Articles 4, 6, 12 and 17).

As the negotiators seek to fulfil the mandates in the Convention and in the Protocol to further develop In Depth Review procedures, a Multilateral Consultative Process and a Non-compliance Procedure they can draw from a rich array of opportunities summarised in this paper to strengthen the regime's ability to identify, prevent and respond to cases of non-compliance.

The effectiveness of the procedures designed as part of the Article 18 negotiations and the effectiveness of the Protocol's implementation mechanisms appear to be mutually dependent. The Protocol's diverse implementation mechanisms have the potential to create a wide range of legal relationships that promise to be more specific and concrete than those found in other multilateral environmental agreements. The rules of the mechanisms must be compatible with the wider set of procedures related to the compliance system as a whole, but could provide additional incentives to comply and additional responses to non-compliance.

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