

# Compliance Mechanisms in the Framework Convention on Climate Change and the Kyoto Protocol

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Résumé de l'article

Les traités multilatéraux relatifs à l'environnement prévoient, d'habitude, des mécanismes spécifiques de contrôle et de respect de leurs dispositions. Cet article analyse les deux mécanismes les plus singuliers prévus à la CCCC et au PK : le Mécanisme consultatif multilatéral et la nouvelle Procédure relative au contrôle du respect. Parallèlement, l'étude tient compte du rôle joué par la bulle européenne dans le fonctionnement des mécanismes. Ceux-ci cherchent un équilibre entre facilitation et respect, ce qui devrait être reflété au niveau institutionnel et procédural. Les cas de non-respect ont des conséquences spécifiques qui sont associées à la nature des obligations prévues dans ces traités internationaux.

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# Compliance Mechanisms in the Framework Convention on Climate Change and the Kyoto Protocol\*

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## ABSTRACT

*Multilateral environmental agreements usually provide for mechanisms to monitor and ensure compliance. This paper focuses on the analysis of two of the most singular mechanisms under the FCCC and the KP : the Multilateral Consultative Process and the new Compliance Procedure. The authors analyse how the European bubble plays a role in the application of such mechanisms. Those mechanisms search for a balance between facilitation*

## RÉSUMÉ

*Les traités multilatéraux relatifs à l'environnement prévoient, d'habitude, des mécanismes spécifiques de contrôle et de respect de leurs dispositions. Cet article analyse les deux mécanismes les plus singuliers prévus à la CCCC et au PK : le Mécanisme consultatif multilatéral et la nouvelle Procédure relative au contrôle du respect. Parallèlement, l'étude tient compte du rôle joué par la bulle européenne dans le fonctionnement des*

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*and enforcement, which should be reflected at the institutional and procedural levels. In cases of non-compliance, specific consequences are associated to the concrete nature of the obligations foreseen in such international instruments.*

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## I. INTRODUCTION

This paper aims to analyse how the Framework Convention on Climate Change (FCCC) and the Kyoto Protocol (KP) set up certain particular systems for guaranteeing the fulfilment of their provisions and preventing potential disputes. Besides this general objective, this paper also intends to discuss the impact of such a system in relation to the participation of the EC and its Member States. First part of this paper is devoted to certain general issues related to the obligations established by the FCCC and the KP, as well as the particular role of the EC in the climate change regime. Second and third parts deal with the Multilateral Consultative Process (MCP) and the Compliance Procedure (CP) foreseen by both conventional instruments.

Both the Multilateral Consultative Process and the Compliance Procedure are meant to be mechanisms to facilitate a more preventive role of international law. The main elements of these new and multifunctional procedures could be set as: non-confrontational, forward-looking and non-judicial.

i) *Prima facie*, defining them as “non-confrontational” they do not need to assume, by principle, a “disagreement”, “contradiction” or “opposition” of thesis. Nevertheless, the scope of such an expression must be considered. The use of expressions like “non-confrontational” and “not [...] contentious acts” aims to avoid the animosity among Parties, trying to favour collaboration and agreement. The problem would be how to overcome the difficulties related with the *ex ante* classification of these situations; and whether it will be useful for the purpose of “depoliticising” their functioning.

ii) Moreover, they are characterized for its *pro futuro* approach, basically looking for that Party that do not fulfil its obligations to change into fulfilling them, avoiding a backwards analysis on possible liabilities for damages already caused.

iii) Finally, the “non-judicial” character is clearly an answer to the reluctance of States to the jurisdictional means for settling disputes, expressed in a very intense way in the field of international environmental law. However, despite that no judicial body is established, it can be noted that it

seems that certain elements of judicial character are certainly in presence in the Compliance Procedure.

These particular features affect the development of climate change compliance mechanisms, which are characterized by the creation of new and original mechanisms that intend to allow a “socialization” of differences.<sup>1</sup>

#### A. GENERAL FEATURES OF THE OBLIGATIONS UNDER THE FRAMEWORK CONVENTION ON CLIMATE CHANGE (FCCC) AND THE KYOTO PROTOCOL (KP)

A first characteristic of both the FCCC and the KP is the absence of a clear reciprocal relationship between the rights and obligations of the Parties, a pretty common element of environmental agreements. By contrast with other bilateral and multilateral treaties, such a reciprocal relationship can not be so clearly perceived and there is certain independence between Parties’ rights and obligations. Such a situation may be regarded as the result of the normal *erga omnes partes contractantes* nature of the main obligations of such agreements, protecting the common good of the Parties as a whole (for example, “achieving a stabilisation in the concentration of greenhouse effect gases”), and which cannot be divided into a set of bilateral relationships. Consequently, any violation of those obligations is seen as a violation that affects all Parties, and also creates a collective damage neither individually distinguishable nor, by implication, bilaterally.<sup>2</sup>

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1. See P.H. SAND, “Transnational Environmental Disputes”, in D. BARDONNET (ed.), *The Peaceful Settlement of International Disputes in Europe: Future Prospects*, Workshop, The Hague, 6-8 September 1990, Martinus Nijhoff Publishers, Dordrecht/Boston/London, 1991, pp. 131-135.

2. The notion of obligations *erga omnes partes contractantes* is reflected in the “Draft articles on Responsibility of States for internationally wrongful acts”, adopted at the second reading by the International Law Commission in 2001 (Doc. A/56/10, Chapter IV.E.1), when referring to obligations in relation to “a group of States” and “for the protection of a collective interest of the group” (articles 42.b) y 48.1.a)). On this notion, see also: W. RIPHAGEN, “State Responsibility: New Theories of Obligations in Interstate Relations”, in R. ST. J. MACDONALD, D.M. JOHNSTON (eds.), *The Structure of and Process of International Law: Essays in Legal Philosophy Doctrine and Theory*, Martinus Nijhoff Publishers, Dordrecht/Boston/Lancaster, 1986, pp. 581-625, in pp. 600-603; P. REUTER, “Solidarité et divisibilité des engagements conventionnels”, in Y. DISTEIN (ed.), *International Law in a Time of Perplexity*, Kluwer Academic Publishers, Dordrecht, 1989, pp. 623-634.

In this sense, international obligations established in the FCCC and in the KP are “integral” obligations on all Parties as a whole. Some authors, referring in general to environmental international law, have pointed out that this area has entailed a great change when compared with classical international law, as it goes beyond the exclusively State-to-State framework, being an issue that affects the international community. Thus, as climate change is a world phenomenon affecting the interests of the international community, the rules of the FCCC should be seen in the context of powers to define the behaviour of States bearing on the satisfaction of the common interests. This also affects the consequences for these treaties’ violation.

Moreover, Article 3.1 of the FCCC expressly recognises the existence of common but differentiated responsibilities of the Parties. So, it establishes an asymmetric regime that just captures the fairly known principle enounced by the Principle 7 of the “Rio Declaration on Environment and Development”,<sup>3</sup> in accordance to which a preferential treatment to the developing countries is recognised. In the context of the FCCC, this principle materialises in the establishment of different categories of Parties when setting their international obligations, as well as in the establishment of a basic distinction between developed countries (included in Annex I) and developing countries. In practice, the existence of special circumstances that affect the developing countries and that have an impact in the establishment of their commitments is recognized. This results in a) the existence of certain general obligations for all Parties, and b) the existence of specific commitments with which only Annex I Parties are required to comply (i.e. commitments concerning the reduction of emissions of greenhouse gases, sources and sinks).

The KP uses an identical criterion for distinguishing not only among the mentioned Parties, but also among the developed countries themselves. A specific example of the application of this criterion to the developed countries can be found in the establishment of shares (quota) of reduction of greenhouse

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3. Doc. A/CONF.151/26/Rev.1, “Report of the United Nations Conference on Environment and Development. Rio de Janeiro, 3-14 June 1992. Vol. I : Resolutions adopted by the Conference”.

gases' emissions on the basis of the percentages established in the Annex B to the Protocol. So, for instance, the specific commitments may vary from the reduction of the 8 per cent assumed by the EU, to the reduction of the 7 or 6 per cent respectively assumed by the USA and Japan, while there are countries that are allowed to increment the levels of emissions in certain percentages (Australia 8 per cent and Iceland 10 per cent). Differences regarding resources and capabilities among developed countries are therefore recognised, and this results in assigning the quantified objectives on an individual basis in accordance with their respective economic characteristics.

## B. THE DESIGN OF THE "EUROPEAN BUBBLE"

A particular case arises as regards to the EC's Member States, all of them included in Annex I. At this respect, Article 4 of the KP allows a group of Annex I Parties to fulfil their commitments jointly, through the establishment of joint quantified objectives that are subsequently distributed on the basis of their economic capacity and the degree of development (the so-called "burden sharing agreement"). This provision refers to those joint actions to be carried out in the framework of international organisations of economic integration. This is precisely the situation concerning the EC (the so-called "European bubble").<sup>4</sup>

The "European bubble" means that the whole EC needs to achieve a total reduction and that individual Member States have different targets based on their specific situa-

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4. It is worth mentioning at this point the existence of Declarations made by the Community at the ratification of the Framework Convention and at the signature of the KP. In accordance with the firstly mentioned Declaration: "(...) the commitment to limit anthropogenic CO<sub>2</sub> emissions set out in article 4(2) of the Convention will be fulfilled in the Community as a whole through action by the Community and its Member States, within the respective competence of each (...)". The second Declaration states that "The European Community and its Member States will fulfil their respective commitments under article 3, paragraph 1 of the Protocol jointly in accordance with the provisions of article 4", Council Decision 94/69/EC of 15 December 1993 concerning the conclusion of the United Nations Framework Climate Change Convention, OJ L 33, 7.2.1994; and Council Decision 2002/358/EC of 25 April 2002 concerning the approval, on behalf of the European Community, of the Kyoto Protocol to the United Nations Framework Climate Change Convention and the joint fulfilment of commitments thereunder, OJ L 130, 15.5.2002.

tion. So, within the overall context of the objective of the 8 per cent of reduction assumed by the EC for the first commitment period (2008-2012), the EC had to set out the contribution of each Member State on this matter. In this sense, the Environment Council of 16-17 June 1998<sup>5</sup> set out the Member States' contributions, which were later ratified by the Council Decision of 25 April 2002 concerning the EC ratification of the KP.<sup>6</sup> This distribution, which must be obviously accompanied by the adoption of the necessary domestic and Community's policies and measures, has been finally established as follows: Luxembourg: -28%; Denmark: -21%; Germany: -21%; Austria: -13%; United Kingdom: -12,5%; Belgium: -7,5%; Italy: -6,5%; Netherlands: -6%; France: 0%; Finland: 0%; Sweden: +4%; Ireland: +13%; Spain: +15%; Greece: +25%; Portugal: +27%.

Article 4 of the KP does not establish the requirements applying to such a mechanism in a very precise way, and it just refers to: a) the notification of the agreement to the Secretariat, b) the temporary character of the agreement, c) and the individual responsibility of each Member State, together with the European Community, which is itself a Party to the Protocol, in the event of failure to achieve the total combined level of emission reductions — which requires to establish a monitoring and control procedure at the Community's level regarding both the specific framework of climate change and the general regime.

The only reference at this respect can be found in the Council Decision of 2002. On one hand, the Decision turns to Article 10 of the European Community Treaty (ECT), in accordance to which Member States individually and collectively have the obligation to take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations resulting from action taken by the institutions of the Community. On the other hand, this Decision provides that the base-year emissions of the Community and its Member States will not be established definitively before the entry into force of the Protocol.

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5. Council of the European Union, Environment Council, Luxembourg, 16-17 June 1998. Press release, Europe, n. 7244, 18 June 1998.

6. Official Journal (OJ) L 130, 15.5.2002.



Likewise, Article 4 of the KP adds a relevant rigid element to the provision that allows setting the “European bubble”. That is to say the impossibility of the existing commitments on the reduction of emissions being affected by an eventual alteration in the composition of the organisation, i.e. in the case of an enlargement of the EU.<sup>7</sup> The Visegrad countries<sup>8</sup> have all been included as Annex I Parties of the FCCC and as Annex B Parties of the KP. They were not considered, however, for inclusion in the “European bubble”. Actually, it is to be noted that the EC seems to have disregarded climate change issues during pre-accession negotiations, and they were rarely reported in the yearly assessments undertaken by the EU Commission. Therefore, since the “bubble” cannot be changed for the first commitment period, those countries cannot join it for such a period.<sup>9</sup> However, the use of the KP project-based mechanisms, and particularly Joint Implementation (JI), could be a powerful tool to integrate them into the EU climate policy strategy.<sup>10</sup> This means that important issues are to be solved: the need to prepare a more centrally coordinated approach, the urgent need for strengthening institutions and capacity building, and the enhancement of methodologies on data collection, monitoring and verification.

The “burden sharing agreement” practice somehow implies the possibility of transferring or acquiring “emissions reduction units” among the EC’s Members in more advantageous conditions than those applying to the rest of Annex I Parties. However, as it will be analysed below, this

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7. Treaty of Accession to the European Union, of the Czech Republic, Estonia, Cyprus, Latvia, Lithuania, Hungary, Malta, Poland, Slovenia and Slovakia, signed in Athens on 16 April, 2003, OJ 23.9.2003.

8. The Czech Republic, Estonia, Latvia, Lithuania, Hungary, Poland, Slovenia and Slovakia, which accessed the European Union on the 1<sup>st</sup> of May 2004. Romania and Hungary, also part in this group, are expected to join the European Union by 2007.

9. For the next commitment period, two options are possible: 1) Maintaining the present EU target, but renegotiating the targets of existing Member States in order to take into account the new Member States; 2) Adding the new State Members into the “European bubble” without changing the existing Member State targets, even if that raises the question of renegotiating the global EU target.

10. See M. FERNÁNDEZ ARMENTEROS — A. MICHAŁOWA, *Joint Implementation and EU Accession Countries*, Discussion paper 173, Hamburg Institute of International Economics, 2002.

precisely implies a higher difficulty for determining the individual responsibility of each Member State regarding its quantified commitments on the limitation or reduction of emissions in those cases where a failure to comply with the amounts jointly assigned to the organisation does not take place simultaneously.

Certain elements have to be taken into consideration when dealing with questions of compliance related to the EC and its Member States being together and separately Parties of the FCCC and the KP. First, the lack of a specific attribution of powers to the EU on climate change policy. Second, the fact that environment is a field of shared competence between the EC and its Member States. These elements are somehow captured by the already mentioned Declaration by the European Community made in accordance with Article 24(3) of the KP, annexed to the Agreement between the European Community and its Member States under Article 4 of the KP.<sup>11</sup>

### **C. THE EUROPEAN COMMUNITY AND THE CLIMATE CHANGE REGIME**

Likely to other international organisations, the EC has been established for the purpose of achieving specific objectives, and this implies to develop specific functions whose effective implementation requires conferring certain powers to the appropriate institutions. In this sense, the EC only holds those powers that have been expressly or implicitly conferred by the Treaties, and its activity can only be developed in those fields regarding which the States have accepted to confer the enforcement of such powers to the EC's institutions. Article 5 of the ECT reaffirms this principle by stating that "The Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein".

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11. Council Decision 2002/358/EC of 25 April 2002 concerning the approval, on behalf of the European Community, of the Kyoto Protocol to the United Nations Framework Climate Change Convention which contains the Agreement between the European Community and its Member States under article 4 of the KP, OJ L 130, 15.5.2002.

As far as climate change is concerned, the ECT does not contain a single legal basis upon which the adoption of this kind of measures can be generally based. On the contrary, the institutions (Council and European Parliament) will have to turn to different legal basis depending on the nature and content of the specific measure that they intend to adopt (e.g. Art. 71 — transport policy —, Art. 95 — approximation of laws for the establishment and functioning of the internal market —, Art. 133 — commercial policy —, or Art. 175 — Environment policy —). At this respect, the European Court of Justice (ECJ) has pointed out the consequences that the election of a specific legal basis may imply for the determination of the content of the act.<sup>12</sup> The ECJ understands that, even though Articles 174-176 of the ECT confer powers for the Community's institutions undertaking specific actions regarding the protection of the environment, this does not exclude the possibility of taking such measures on the basis of other different Articles of the Treaties, even if they are aimed at environmental objectives, among others. In accordance with the ECJ, the legal basis will be determined as a function of the main objective and purpose of the provision. So, for instance, only if the measure approximates provisions laid down by laws, regulations or administrative action in Member States which aims to the establishment and functioning of the internal market, its adoption should take place on the basis of Article 95 of the ECT (despite the measure may also have a secondary environmental objective). On the contrary, if such an "approximation" purpose merely has a secondary character, and the measure is aimed at environmental objectives included within the Title devoted to Environment, Article 174 ECT will constitute the appropriate legal basis.

In fact, and despite their transversal character, the measures regarding climate change adopted by the EC up to date have been based upon Article 175 of the ECT. These measures can be distinguished by its programmatic or legislative nature. Among the programmatic measures, it can be pointed out the

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12. EC Court of Justice (ECJ), Judgement of 26.3.1987, *Commission v. Council*, case 45/86, 1987, *European Court Reports (ECR)*, p. 1493 and ECJ, Judgement of 2.2.1989, *Commission v. Council*, case 275/87, 1989, *ECR*, p. 259.

adoption of the EU Strategy for Sustainable Development;<sup>13</sup> the Sixth Environmental Action Program;<sup>14</sup> and the European Climate Change Program (ECCP).<sup>15</sup> The most significant legislative measures that have been adopted are the Directive 96/61/EC, of September 24, 1996, concerning integrated pollution prevention and control;<sup>16</sup> the Decision 2000/479/CE, of July 17, 2000, on the implementation of a European Pollutant Emission Register (EPER);<sup>17</sup> the Directive 2003/87/EC of October 13, 2003, establishing a scheme for greenhouse gas emission allowance trading within the Community,<sup>18</sup> the Decision 280/2004/EC of February 11, 2004, concerning a mechanism for monitoring Community greenhouse gas emissions and for implementing the KP.<sup>19</sup> There are also two interesting Commission's proposals under discussion, the proposal for a Regulation on certain fluorinated greenhouse gases<sup>20</sup> and the proposal for a Directive amending the Directive establishing a scheme for greenhouse gas emission allowance trading within the Community, in respect of the Kyoto Protocol's project mechanisms.<sup>21</sup> Finally, there are some other measures that have been adopted by the EC with a direct impact on this field. This is the case of the Special Action Program for Vigorous Energy Efficiency (SAVE program);<sup>22</sup> the Decision of February 28, 2000, on renewable energies (ALT-ENER program);<sup>23</sup> the Directive 2001/77/EC, of September 27,

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13. <http://europa.eu.int/comm/environment/eussd/index.htm>.

14. OJ L 242, 10.9.2002.

15. COM(2000)88 final, 8 March 2000, Communication from the Commission to the Council and the European Parliament on EU policies and measures to reduce greenhouse gas emissions: towards a European Climate Change Programme (ECCP).

16. OJ L 257, 10.10.1996.

17. OJ L 192, 28.7.2000.

18. OJ L 275, 25.10.2003.

19. OJ L 49, 19.2.2004. This Decision substitutes the Decision 93/389/EEC, OJ L 167, 9.7.1993, amended by Council Decision 99/296/EC, OJ L 117, 5.5.1999.

20. COM(2003)492, 11.8.2003.

21. COM(2003)403, 23.7.2003.

22. Decision 647/2000/EC of the European Parliament and of the Council, of 28 February 2000, adopting a multiannual programme for the promotion of energy efficiency (SAVE 1998-2002), OJ L 79, 25.10.2000.

23. Decision 646/2000/EC of the European Parliament and of the Council, of 28 February 2000, adopting a multiannual programme of renewable energy sources in the Community (ALTENER 1998-2002), OJ L 79, 25.10.2000.

2001, on the promotion of electricity produced from renewable energy sources in the internal electricity market;<sup>24</sup> the Directive 2003/30/EC, of May 8, 2003, on the promotion of the use of biofuels or other renewable fuels for transport;<sup>25</sup> and the Directive 2003/96/EC, of October 27, 2003, restructuring the Community framework for the taxation of energy products and electricity.<sup>26</sup>

On the other hand, it has to be pointed out that the scope of the powers of the EC regarding the energy sector, concerning which the ECT does not foresee any specific legal basis, is particularly reduced. As a matter of fact, although there have been attempts to base certain measures concerning energy upon the environmental legal basis, the Community's acts regarding this sector have been traditionally based on the provisions on the internal market, and the Member States have frequently invoked the principle of subsidiarity for the purpose of retaining such a power.

Using Article 175 as the legal basis of the actions on climate change also determines the decision-making procedure within the Council. In this framework, the Council decides by qualified majority and following the co-decision procedure with the European Parliament laid down by Article 251 of the ECJ.

Notwithstanding, the ECT maintains relevant concessions to the Member States for previously delimiting the principles and development of the environmental policy. So, the paragraph 2 of Article 175 establishes that, by way of derogation of the decision-making procedure mentioned above, the Council, acting unanimously, may adopt decisions on "a) provisions primarily of a fiscal nature; b) measures affecting town and country planning, quantitative management of water resources or affecting, directly or indirectly, the availability of those resources, land use, with the exception of waste management; and, c) measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply". In any case, the adoption of such measures still depends on the will of the governments of the Member States exclusively, and any of them

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24. OJ L 283, 27.10.2001.

25. OJ L 123, 17.5.2003.

26. OJ L 283, 31.10.2003.

may use its veto. In fact, this is what happened with the proposal of a directive introducing a tax on carbon dioxide emissions and energy, brought by the Commission in 1992 and finally withdrawn because of the strong opposition of several Member States. On one hand, the “cohesion” States (Spain, Greece, Portugal and Ireland) asked for additional structural funds for accepting the proposal; on the other hand, France was reluctant to apply such a tax to the nuclear energy sector; and, finally, the United Kingdom preferred to introduce such a tax at a domestic scale.

Determining the mechanism for the adoption of the Community’s decisions in the context of climate change is not therefore a minor question. The debates previous to the ratification by the Community of the FCCC and the KP provide a good example of its relevance. In principle, in accordance with Article 300 of the ECT, the Council must decide on the ratification of the international agreements by qualified majority, unless “the agreement covers a field for which unanimity is required for the adoption on internal rules”. Having in mind that the second paragraph of Article 175 of the ECT requires the Council to act unanimously and that the climate change regime may affect the enforcement of fiscal measures, some Member States (mainly, France and the UK) asked for the application of this mechanism for deciding the ratification of both agreements by the Community. Finally, the question was solved through a political agreement within the Council,<sup>27</sup> and the ratification of both agreements took place by qualified majority (on the basis of the former Article 130 S of the ECT as regards to the FCCC, and on the basis of the current Article 175 as concerns to the KP — together with the Article 300 of the ECT). As it will be explained below, this has a relevant impact in the legal standing of the Community and its Member States when participating in the control mechanisms and, particularly, in the Compliance Procedure.

Once the competence of the Community has been established, it is necessary to mention the way in which it is exercised, that varies depending on the greater or lesser extent to

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27. 2413th European Council of Environmental Ministries, Brussels, 4.3.2002, at <http://ue.eu.int/en/summ.htm>.

which the specific field concerned is open to the Community's intervention. So, in certain matters the Community holds exclusive competence,<sup>28</sup> which means that all decision powers fall within the Community and that Member States may merely play an enforcement function. In other cases, the Community and the Member States hold shared powers regarding certain areas,<sup>29</sup> and each of them act within the decision-making procedure on the basis of its own competence. In addition, in areas which do not fall within its exclusive competence (such as the environment area), the Community's action is subject to two pre-requisites: the principle of proportionality as regards to the intensity of the Community's action; and the principle of subsidiarity when appraising if there is a need for the Community's taking action.

As for the environmental matter, Article 174.1 of the ECT states that the Community "shall contribute" to preserve, protect and improve the quality of the environment. Likewise, Article 176 establishes that the protective measures adopted by the Community shall not prevent any Member State "from maintaining or introducing more stringent protective measures". This is clearly a shared competence between the EC and its Member States. This implies that Member States keep full competence for adopting laws, regulations and administrative acts in those areas where the Com-

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28. In fact, only two areas have been considered by the ECJ as areas of exclusive Community's competence: common commercial policy, and the policy regarding the preservation of fishery resources. See at this respect: ECJ Judgement of 15.12.1976, case 41/76, *Donkerwolke*, *ECR*, 1976, p. 1921; ECJ Judgement of 5.5.1981, case 804/79, *Commission v. United Kingdom*, *ECR*, 1981, p. 1045. However, the Commission, in its Communication of 1990, includes as areas where the Community could potentially hold exclusive competence the following matters: removal of obstacles to the free movement of production factors, general rules on competition, common organisation of agricultural and fishery markets, the definition of the essential elements of the transport policy, and the development of the monetary policy and the establishment of the change rates at the last stage of the UEM; SEC (92) 1990.

29. For the Commission shared competence's areas are the following: legislative actions directly related to the functioning of the internal market and common policies, common actions for the achievement of the economic and social cohesion; research and technological development; actions contributing to launch measures in the framework of: social policy, environment policy, trans-European networks, industrial policy, consumers policy, professional education; complementary actions regarding education, culture and sanitary matters; SEC (92) 1990.

munity has not taken action. Furthermore, by developing their normative activity, Member States can complement and strengthen the provisions adopted by the Community's institutions. So, the KP affects competences shared by the Community and the Member States, and, from this perspective, it is a mixed agreement to which they have had to express their consent in a cumulative way.<sup>30</sup> This scheme will have a clear impact in the context of the procedures regarding the compliance with the Protocol, similarly to what happens with other mixed agreements.<sup>31</sup>

## II. THE MULTILATERAL CONSULTATIVE PROCESS (MCP)

### A. INTRODUCTION

The Multilateral Consultative Process (MCP) mentioned in Article 13 of the FCCC<sup>32</sup> provides for the institutionalisation of a consultative mechanism, of a strong political character, to deal with questions relating to the implementation of the FCCC. Accordingly the MCP aims at guaranteeing the effectiveness and efficiency of the Treaty, rather than to play a strict enforcement function. Thus, the MCP should be considered an instrument for the application of the FCCC, but not a mechanism for monitoring the actions of the Parties (regarding which Article 7.2 of the FCCC sets up a specific system for transmitting information). In the same sense, the MCP should neither be considered a mechanism for settling

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30. See the "Declaration by the European Community made in accordance with Article 24(3) of the Kyoto Protocol", included in the Annex III to the Council Decision of 25 April 2002 concerning the approval, on behalf of the European Community, of the Kyoto Protocol. The EC thereby declares that: "[...] its quantified emission reduction commitment under the Protocol will be fulfilled through action by the Community and its Member States within the respective competence of each".

31. See J. HELISKOSKI, *Mixed Agreement as a Technique for Organizing the International Relations of the European Community and its Member States*, The Hague, Kluwer Law International, 2001.

32. To determine what MCP is, we need to refer to the terminology used at the Convention in their different languages: "Processus Consultatif Multilatéral" / "Multilateral Consultative Process" / "Mecanismo Consultivo Multilateral". From the deliberations of the Ad Hoc Group on Article 13 (AG13) comes the idea that "mechanism" be used in the context of the FCCC, meaning a continuous process, a sequence of events, which implies in this continuum both the process and the institution. See Doc. FCCC/AG13/1996/1, p. 4.



disputes (insofar as it is literally aimed at the prevention of disputes), nor a mechanism intended for law enforcement purposes (an aspect that the MCP disregards but that is present in the “compliance procedure” envisaged in Article 18 of the KP). As Bodansky notes, “its main goal should be to help Parties come into compliance with the Convention rather than to adjudicate blame or impose sanctions”.<sup>33</sup>

The establishment of such a procedure<sup>34</sup> has attracted the attention, since 1995, of the Ad Hoc Working Group of Legal and Technical Experts (AG13) — created by the First Conference of the Parties (COP 1).<sup>35</sup> Its works were carried out throughout three different phases.<sup>36</sup> At a first stage the AG13’s works focussed on compiling the different proposals of the Parties, the international organisations and the NGOs regarding the characteristics, functions, institutional arrangements and procedures upon which the MCP should be based.<sup>37</sup> At a second stage, the proposal elaborated by the AG13 was negotiated on an article by article basis.<sup>38</sup> Finally, these works resulted in the elaboration of a proposal of decision — agreed by consensus within the AG13 —, whose adoption was recommended to the Conference of the Parties

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33. D. BODANSKY, “The United Nations Framework Convention on Climate Change: A Commentary”, Summer 1993, Vol. 17, 2, *The Yale Journal of International Law*, pp. 451-558, p. 548.

34. A direct precedent for the MCP, is the “non-compliance” system established in Article 8 of the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, which was provisionally adopted at the Second Meeting of the Parties, Doc. UNEP/OzL.Pro.2/3, Decision II/5 and Annex III. It was finally fully endorsed at the Fourth Meeting of the Parties to this Protocol, Doc. UNEP/OzL.Pro.4/14, Decision IV/5 and Annex IV. For some authors, this long creation process benefited the regime arising from the negotiations, fostering detail and precision and letting amendments to the Protocol introduced at the meetings of London and Copenhagen be taken into consideration, P. SZÉLL, “Implementation Control: Non-Compliance Procedure and Dispute Settlement in the Ozone Regime”, in W. LANG (ed.), *Österreichische Außenpolitische Dokumentation (Special Issue: The Ozone Treaties and their Influence on the Building of International Environmental Regimes)*, Bonn, Federal Ministry for Foreign Affairs, pp. 43-50, at p. 46.

35. Doc FCCC/CP/1995/7/Add.1.

36. See at this respect, M. EHRMANN, “Procedures of Compliance Control in International Environmental Treaties”, 2002, n. 13, *Colorado Journal of International Environmental Law*, pp. 377-443, p. 425.

37. This was mainly carried out by using questionnaires. See Doc. FCCC/AG13/1996/Misc.1/Add.1, Doc. FCCC/AG13/1996/Misc.2/Add.1, Doc. FCCC/AG13/1996/1.

38. Doc. FCCC/AG13/1997/2.

(COP). AG13's work ended at its Sixth Meeting in Bonn in 1998, with the approval of a Draft<sup>39</sup> including such a procedure. The COP 4 (Buenos Aires, 1998) approved the preliminary establishment of the MCP, with the exception of some key issues.<sup>40</sup> The proposal was supposed to be finally approved in the COP 5 (Bonn, 1999), but the lack of agreement on the membership of the Committee during the inter-sessional period prevented the proposal from being definitively approved. So, it was only possible to reach an agreement on following up on the consultations on this point and reporting to the Conference of the Parties.<sup>41</sup> The COP 6 (The Hague and Bonn, 2000) just showed that these consultations had failed.<sup>42</sup> Finally, at the COP 7 (Marrakesh, 2001) it was decided that the MCP's question would not be included in the agenda, provided that it "will be taken up at future session in the light of relevant outcomes of COP 7".<sup>43</sup> Thus, the final adoption of MCP is still pending of the decision of the Conference of the Parties to the FCCC. Moreover, it seems that the treatment of this question has been suspended "sine die" — provided that the COPs 8 and 9 agendas (Delhi, 2002 and Milan, 2003) did not include any mention to the MCP — even under the head of "other Matters", unlike the usual practice in the last sessions of the Conference of the Parties.<sup>44</sup>

## **B. FUNCTIONS OF THE MCP WITHIN THE FCCC AND THE KP**

The multifunctional character of the MCP and its relationships with peaceful settlement of disputes mechanisms — as they are established at the FCCC and the KP — will be considered below.

Concerning the functions of the MCP, Article 13 of the FCCC only mentions "implementation" of the conventional

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39. Doc. FCCC/AG13/1998/2, Annex 2.

40. Decision 10/CP.4: Multilateral Consultative Process, Doc. FCCC/CP/1998/16/Add.1.

41. Doc. FCCC/CP/1999/1/Add.1 and Decision 15/CP.5, at Doc. FCCC/CP/1999/L.1.

42. Doc. FCCC/CP/1999/6 y Doc. FCCC/CP/2000/1.

43. Doc. FCCC/CP/2001/6/Add.1.

44. Doc. FCCC/CP/2002/7 and Doc. FCCC/CP/2003/6.

clauses, and COP 4's decision 10/CP.4 on the MCP simply establishes as MCP's objective "to resolve questions regarding the implementation of the Convention, by: a) providing advice on assistance to the Parties (...), b) promoting understanding of the Convention, c) preventing disputes from arising".<sup>45</sup> Should the MCP also deal with questions referring to interpretation of the FCCC and the KP raised by the Parties? The answer seems to be affirmative, since the AG13 had always supported that the interpretation of the provisions of the FCCC and the clarification of the scope and contents of the obligations of Parties were both included among the powers of the Committee of the MCP.<sup>46</sup> Nevertheless, having in mind that the body that governs the MCP is greatly influenced by political factors, the question regarding how far it can go in the interpretation of international law still remains.<sup>47</sup>

Indeed, the main task of the MCP is to advise and assist Parties in the implementation of the conventional regime. In this regard, the MCP might serve to prevent and allow the early treatment of problems in implementation; to check that such problems can be identified, discussed and dealt with satisfactorily, thus building the confidence of the Parties in the FCCC procedures; and to identify what conventional issues require adjustment, so as to facilitate the adaptation of its provisions. Further to the typical categories of control, dispute settlement and law enforcement, the MCP moves closer to a function of assistance and preventive diplomacy, focusing on positive actions that rely on the willingness of the Parties to respect their duties and to actively promote a "physiological" operation of the FCCC before any "pathological" situation arises.

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45. Doc. FCCC/CP/1998/Add.1.

46. Doc. FCCC/AG13/1998/2, Annex II, par. 2.b and 6.a.

47. There is the risk, as Koskeniemmi warns when referring to the Montreal Protocol system, that the lack of impartiality guarantees the procedure "will be used to enforce obligations which leave room for interpretation and to castigate 'bona fide' application or excusable non-performance and to deepen the parties' political and economic disagreements", M. KOSKENIEMMI, "Breach of Treaty or Non Compliance? Reflections on the Enforcement of the Montreal Protocol", 1992, *Yearbook of International Environmental Law*, pp. 123-162, p. 133.

Another issue is whether, despite its conciliatory nature, the MCP has to deal with disputes among Parties. In other words, does the wording of Article 13 include or not the possibility of the MCP raising issues mentioned in Article 14, referring to the obligation of a peaceful settlement of disputes? The inclusion of these controversial issues under the MCP is supported by the preparatory work of Working Group II of the ICN, which warned of the possibility of “a conflict of jurisdictions in the same dispute and among the same Parties” and suggested successive and non-simultaneous resort to both procedures.<sup>48</sup> Similarly, AG13 also considered, among the aims of the MCP, the prevention of disputes,<sup>49</sup> and it was finally included on the COP 4’s decision 10/CP.4, which among the MCP’s objectives includes “preventing disputes from arising”. This option is not without problems, some of which are mentioned below.

Unlike the peaceful settlement of disputes, the MCP offers “a less confrontational approach, which is said to ‘look forward’ for ways in which the Convention’s collective resources can be used to facilitate Parties’ compliance”.<sup>50</sup> Coexistence of dispute settlement procedures with the MCP procedure might raise several difficulties<sup>51</sup>. Particularly, it might lead to a fragmentation of the conventional law on the climate change regime. This twin-track system, putting conciliatory systems first, might not be appropriate since there is neither any single forum where Parties can go to solve their differences, nor any procedure that guarantees a uniformity of solutions given to similar cases across systems.

The FCCC does not require all controversies to be dealt with through the MCP. There is nothing to prevent Parties from directly resorting to the settlement of disputes offered in

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48. Doc. A/AC.237/18 (Part I) and A/AC.237/Misc.21.

49. Doc. FCCC/AG13/1998/2, Annex II, par. 2 a. and c, and 6.

50. J. WERKSMAN, “Designing a Compliance System for the UN Framework Convention on Climate Change”, in *Improving Compliance with International Environmental Law*, London, FIELD, pp. 85-112, p. 102.

51. According to AG13, “The process shall be separate from, and without prejudice to, the provision of Article 14 of the Convention (Settlement of Disputes), Doc. FCCC/AG13/1998/2, Annex II, par. 3.

Article 14 of the FCCC.<sup>52</sup> In fact, as Handl points out, “it would be naive to believe that these procedures by themselves, ingenious as they may be, render superfluous formal third party dispute settlement mechanisms (...) where basic constituent principles and hard legal parameters are concerned, disputes should be amenable both technically and politically to formal third party decision making in accordance with international law narrowly defined”<sup>53</sup>.

This raises the issue of whether resort to the MCP must be prior to the use of the jurisdictional means of settlement of Article 14 of the FCCC, as some authors have suggested<sup>54</sup> and in accordance with the AG13 position.<sup>55</sup> Nevertheless, a simultaneity of procedures might also be assumed from the wording of Article 13 of the FCCC itself, which does not preclude claims to be brought before the MCP or the COP, both political bodies.

Another question is whether the procedure started at the MCP must automatically be suspended once Article 14 of the FCCC has been invoked. If the same dispute is simultaneously dealt with at the MCP and at a judicial or arbitration body, this double way could lead to a political or legal solution for the Parties, whether binding or not. If primacy were recognised to the system of peaceful settlement envisaged in Article 14 of the FCCC, it might seem inappropriate to allow

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52. Factors that might condition resort to the MCP or to the means for peaceful settlement of disputes might be diverse. Apart from the simply recommendatory nature of the MCP, important, for instance, is the different membership of its Committee (essentially experts on climate change, possibly not jurists, greater representation of developing countries as a result of the criterion of equitable demographic proportion) in comparison with the composition of an arbitration tribunal or even the International Court of Justice (experts on international law, but probably not prestigious in the field of climate change, lesser representation of developing countries, though applying the equitable demographic proportion criterion), or the possibility of a wider access to the MCP, as this could be enlarged not only to States Party and international organisations, but also to other entities, such as bodies of the Framework Convention, or in the future to NGO's.

53. G. HANDL, “Controlling Implementation of and Compliance with International Environmental Commitments: The Rocky Road from Rio”, 1994, Vol. 5/2, *Colorado Journal of International Environmental Policy*, pp. 305-331, pp. 329-330.

54. W. LANG — H. SCHALLY, “La Convention cadre sur les changements climatiques. Un élément du bilan normatif du Sommet de la Terre”, 1993/2, *Revue Générale de Droit International Public*, pp. 321-335, p. 335.

55. Doc. FCCC/AG13/1996/1.

the procedure at the Committee of the MCP to continue. Particularly since one of the Parties has preferred to resort to judicial means and the case becomes *sub judice* (the recommendation that the Committee might brought before the COP necessarily implies an assessment of the existence of a breach of the treaty, and accordingly a description of the action). Nevertheless, international law supports the possibility of the MCP Committee continuing to work for a politically friendly solution.<sup>56</sup>

Nonetheless, resort to classical means for settling disputes should not be excluded, especially jurisdictional means, at least while international environmental law progressively strengthens. Regarding the role that these mechanisms retain, the words of the International Court in the ICAO Council case are relevant: "(...) the appeal to the Court contemplated by the Chicago Convention and the Transit Agreement must be regarded as an element of the general regime established in respect of ICAO. In thus providing for judicial recourse by way of appeal to the Court against decisions of the Council concerning interpretation and application (...) the Chicago treaties gave Member States, and through them the Council, the possibility of ensuring a certain measure of supervision by the Court over those decisions. To this extent, these treaties enlist the support of the Court for the good functioning of the organisation and therefore the first reassurance for the Council lies in the knowledge that means exist for determining whether a decision as to its own competence is in conformity or not with the provisions of the treaties governing its action (...)"<sup>57</sup>

### C. INSTITUTIONAL ISSUES : THE COMMITTEE OF THE MCP

AG13 had to determine what structure the MCP should be placed in. In this regard, the AG13 considered two options : creating ad hoc groups of experts, or setting up a permanent body.<sup>58</sup> This latter possibility was the solution finally adopted

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56. Great Belt right of passage case, 1991, ICJ Rep. 1991, p. 61.

57. ICAO Council case, 1972, ICJ Rep. 1972, p. 46.

58. Doc. FCCC/AG13/1998/2, Annex II, par. 1 and 6.

by the COP.<sup>59</sup> Discussion of the proposals of Working Group II on the creation of ad hoc groups of experts<sup>60</sup> was supported by several national delegations<sup>61</sup> and gave rise to several alternatives,<sup>62</sup> which mainly had to do with the creation of another subsidiary body of the COP, the establishment of a subsidiary organ of the Subsidiary Body for Implementation (SBI), and the direct management of the MCP by the SBI. Throughout this debate, some delegations (among them, that of the European Community)<sup>63</sup> stand for establishing a permanent Committee.<sup>64</sup> They questioned whether the COP should decide the establishment of such panels, due to the political or almost political nature of the MCP, and also offered the positive experience of the Implementation Committees set up by virtue of the Montreal<sup>65</sup> and Oslo Protocols.<sup>66</sup> The fact is that though decisional power is absolutely linked to the COP, it probably seems more advisable the establishment of a new organ, permanent and smaller than the COP.

On the other hand, composition of the Committee was also a delicate question. Generally speaking, Parties are interested in keeping the COP's authority. Thus, the majority position was the preference for governmental representatives "who are experts in relevant fields",<sup>67</sup> even if that meant to introduce a degree of impartiality into the Committee. This was the option for the Implementation Committees at the Montreal Protocol and the Oslo Protocol.

The Committee established by the COP finally consists of "persons nominated by Parties who are experts in relevant fields",<sup>68</sup> who should be designated by the COP for three years. Such a solution seems reasonable as far as it keeps the

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59. Doc. FCCC/CP/1998/16/Add.1.

60. Doc. A/AC.237/15, Doc. A/AC.237/59 and Doc. A/AC/237/Misc.13.

61. Doc. FCCC/CP/199/Misc.4.

62. Doc. FCCC/AG13/1996/1 y Doc. FCCC/AG13/1997/Misc.1.

63. Doc. FCCC/AG13/1997/Misc.1.

64. Doc. FCCC/AG13/1996/1. See D. BODANSKY, "The United Nations Framework Convention on Climate Change: A Commentary", *op. cit.*, p. 548.

65. Doc. UNEP/OzL.Pro.4/15, Annex IV.

66. Doc. ECE/EB.AIR/40.

67. Doc. FCCC/AG13/1998/2, Annex II, par. 8.

68. Doc. FCCC/CP/1998/16/Add.1.

governmental link and these are representative enough of the Parties and of the different interests at stake. Anyhow, Parties can rely on the supremacy of the COP, even when they become a party to the procedure. However, this situation shows how difficult it is to remove any of these mechanisms from the political context in which they were created. It also has to be emphasised that even so, the political factor does not disappear since the power of decision will remain with the COP.

Surprisingly, unlike what happened with the Compliance Procedure adopted at the COP 7 (Marrakesh, 2001),<sup>69</sup> the decision concerning the number of members of the MCP Committee is an issue still pending since the provisional decision was adopted in 1998. In this regard, the AG13 recommended a limited number members (10, 15, 25) with a rotating mandate of three years.<sup>70</sup> But discrepancies on this point could not be overcome in Buenos Aires and no agreement has been reached until now on fixing the distribution criteria. According to the well-established United Nations practice, a geographically equitable distribution is preferred by most of the delegations, particularly the Group of 77 and China. On the opposite side, the United States upholds the replacement of such system by a direct designation of MCP's members, equally for countries in Annex I (1/2) and countries that are not part of it (1/2). In any case, it seems clear that, while the principle of a geographically equitable distribution militates against the developed countries (provided that they are only represented by one or two of the five regional groups), an equal number of representatives of Annex I and non-Annex I Parties negatively affects the interests of the developing countries (given that they would be in a position of disadvantage). Perhaps an eventual arrangement would

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69. Decision 24/CP.7 "Procedures and mechanisms relating to compliance under the Kyoto protocol", Doc. FCCC/CP/2001/13/Add.3. The Compliance Committee consists of 20 members elected by the COP/MOP, 10 of them will serve in the facilitative branch and 10 will serve in the enforcement branch. Both, the facilitative and the enforcement branch shall be composed of 1 member from each of the five regional groups of the United Nations and 1 member from the small island developing States, 2 members from Parties included in Annex I, and 2 members from Parties not included in Annex I.

70. Doc. FCCC/AG13/1998/2, Annex II; see also Doc. FCCC/CP/1998/16/Add.1.



follow a similar approach to that adopted in the framework of the Compliance Procedure, whose Committee consists of two members from each of the five regional groups of the United Nations, 2 members from the small island developing countries, 4 members from Parties included in Annex I and 4 members from Parties not included in Annex I.

Independently of the decision to be taken by the COP on such an issue, confrontation between developed and developing countries over Committee's membership is not a good omen for the future functioning of the Process, and in any case, it highlights the risk of the functioning of the MCP being biased by political interests. The experience of the Implementation Committee of the Montreal Protocol lends support, with the aim of guaranteeing the effectiveness of the mechanism, to the creation of a body with restricted membership, limited to 10/15 members, as some delegations would like.<sup>71</sup> The criteria of equitable geographical distribution should be obviously taken into account.

#### D. INITIATION OF THE PROCEDURE

Questions regarding implementation may be raised voluntarily by a Party or group of Parties with respect to its/their own implementation of the FCCC.<sup>72</sup> Thus, the procedural principle of *rogatio* is applied, as it is necessary that one or some of the Parties or the COP take some action for the procedure to be initiated. The Committee itself is not able to work *ex officio*. This is the most consistent option with the FCCC itself, whose Article 13 envisages a procedure that Parties can resort to "on their request". It is relevant to note that the expression "Parties in dispute" was never used in the context of the *travaux préparatoires* of the MCP. Instead, they usually referred to the "interested Party". Evidently, this means all Parties to the FCCC, not just those Parties of Annex I which bear most of the burden of the convention obligations.

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71. Doc. FCCC/AG13/1996/1. Among them, the delegation of the European Community, see Doc. FCCC/AG13/1997/Misc.1.

72. Doc. FCCC/CP/1998/16/Add.1.

A question rose of whether any Party “worried about any other Party’s fulfilment of its obligations” under the FCCC<sup>73</sup> should be allowed to initiate the procedure. Here again, the Montreal Protocol, which allows the procedure to be initiated upon the request not only of the interested Party but also of Parties with respect to the implementation by another Party or groups of Parties,<sup>74</sup> was taken as a model. Thus, following the general trend within AG13,<sup>75</sup> both possibilities were finally accepted (either that the procedure be initiated upon the request of a Party or a group of Parties *vis-à-vis* their own implementation of the FCCC, or *vis-à-vis* implementation of the FCCC by another Party or group of Parties), together with questions raised by the COP.<sup>76</sup> Such an option may involve a certain degree of confrontation into the MCP system, an element that should be avoided, in principle, because of the emphasis on the exclusively consultative nature of the procedure.

It should be borne in mind that, unlike settlement of disputes, the legitimacy of an action brought before the MCP does not derive from defence of individual interest. Nor does it derive from the terms of the international legal dispute, but from a right to act on behalf of the international community to guarantee respect of those obligations referring to the management of common interests. Since the fulfilment of FCCC obligations is of interest to the international community, an intermediate mechanism should allow the procedure to be initiated either by an affected State, or by the community of States Party to the Convention. Thus, even though this procedure was very carefully defined as non-judicial and non-confrontational, its general approach (not requiring any injury or other condition of standing for the Party submitting the complaint) resembles that of an *actio popularis* in the interest of all Parties.<sup>77</sup> Nonetheless, the experience of the Montreal Protocol shows that cases brought before the Imple-

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73. A possibility initially foreseen at the preliminary deliberations of the FCCC; see Doc. A/AC.237/15 and Doc. A/AC.237/18 (Part I).

74. Doc. UNEP/OzL.Pro.4/15, Annex IV.

75. Doc. FCCC/AG13/1998/2, Annex II, par. 5.

76. Doc. FCCC/CP/1998/16/Add.1.

77. P. SAND, “Transnational Environmental Disputes”, *op.cit.*, p. 131.

mentation Committee so far have been submitted by Parties with respect to its own implementation, with no accusation against other Parties. Furthermore, when this Committee tried to bring matters concerning another Party's implementation without its previous agreement, the Parties affected have withdrawn their cooperation by simply not appearing before the Committee.<sup>78</sup> So, it seems to be preferable to wait for the non-complying Parties themselves to report on their situation to the Committee.

Lastly, it was also suggested at some time that non-Parties to the FCCC might initiate the procedure. There are at least four categories of actors for which the exercise of this right might be arguable : States that are not yet Parties of the FCCC, international organisations with powers in the field of the FCCC, Non-Governmental Organisations, and the organs of the FCCC.<sup>79</sup> Right now, none of them might raise a question before the Committee. As for the FCCC's bodies, it is worth mentioning that Canada suggested to include the Secretariat of the FCCC among those bodies entitled to raise questions. This proposal was expressly rejected by other Parties. However, it has to be noted that the Secretariat would be in a very good position to undertake this kind of action,<sup>80</sup> as it is first to find out about implementation issues reported on by Parties.

#### E. PROCEDURAL ASPECTS AT THE MCP

On the one hand, the COP provisional decision on the MCP says nothing concerning the specific nature of the implementation issues that may be brought before the procedure. Should the MCP deal with any sort of issues, including

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78. See D.G. VICTOR, "The Montreal Protocol's Non-Compliance Procedure : Lessons for Making Other International Environmental Regimes More Effective", in W. LANG (ed.), *Österreichische auBenpolitische Dokumentation (Special Issue : The Ozone Treaties and their Influence on the Building of International Environmental Regimes)*, op. cit., pp. 58-81, at p. 70.

79. Doc. FCCC/AG13/1996/1.

80. See H. OTT, "Elements of a Supervisory Procedure for the Climate Regime", 1996, Vol. 56/3, *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (ZaöRV)*, pp. 733-749, p. 746. See also the Wuppertal Institute paper on Doc. FCCC/AG13/1996/Misc.2/Add.1.

legal, economic, social and technical issues? Or, by contrast, it would be preferable to exclude purely technical and scientific issues, which are already the concern of the SBSTA. The latter option appears to be more reasonable.

To begin with, the original proposal of Working Group II of the ICN<sup>81</sup> authorised the future MCP to deal with any implementation's aspects, specifically including the implementation and interpretation of Articles on obligations (4, 5, 6, 12), the financial mechanism (Article 11), and future amendments and annexes to the text, provided they do not duplicate functions of subsidiary bodies. In this regard, it is interesting again to consider the Montreal Protocol. Initially, most of its work was linked to monitoring of submitting national reports. It also dealt with total or partial non-fulfilment by Parties, helping the Secretariat with the least cooperative States (for instance, directly asking the delegates of the Parties for data not submitted in national communications). From 1994 onwards, the Implementation Committee has also focused on other issues related to the correctness of national measures Parties plan to adopt to fulfil their obligations.<sup>82</sup> Thus, for example, it has dealt with issues of exemptions "for essential uses" of CFCs (Poland) and the transfer of production quotas (Romania).

Article 13 of the FCCC and COP 4's decision 10/CP.4 are far from precise on this point since they only refer to "resolution of questions regarding the implementation of the Convention". Such an ambiguity is relevant because of the general nature of the climate change and the multiplicity and diversity of issues that may arise. Thus, it seems to be left to the Committee to decide on the real degree of linkage to the FCCC of the question submitted. However, it would seem advisable that Parties define precise criteria for admissibility of issues before the MCP. Moreover, the adoption of the KP makes it necessary to define the scope of the MCP with regard to this instrument. The possibility of the MCP being automatically applied to protocols adopted within the FCCC raises the difficulty that these protocols might establish separate — though connected — legal regimes, with additional obligations, as it is

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81. Doc. A/AC.237/59.

82. See Decisions VII/15 to 19 on Poland, Bulgaria, Belarus, the Russian Federation and Ukraine adopted at Vienna in December 1995.

the case with the KP. This might justify the establishment of a different procedure for each protocol, more suited to its specific requirements.

On the other hand, the Committee is supposed then to consider the admissibility of the issue on the basis of the information provided by the Parties. Nothing is said about the possibility that the Committee ask the Parties for additional information, the question of the degree of technical support that the Committee might receive from national expert groups or external advisors remaining absolutely open, or about possibility of carrying out a field inspection. Nevertheless, it does not seem for the present that the MCP will be granted important powers to conduct independent investigations, partly because the States themselves wish to limit any interference in national matters from a mechanism that might be too active in the future, and partly because there are insufficient economic resources for this task. Be that as it may, the principle of *bona fides* applies here regarding the fulfilment of the international obligations of the States, a principle that puts legal duties on the Parties also in the context of the development of the procedure of the Committee.

Finally, the Committee meets at least once a year to deliberate<sup>83</sup> and, in the absence of any explicit criteria, it seems that it has to adopt its “conclusions” and “recommendations” on the basis of consensus among its members. The Committee has no powers of decision and is required to forward such conclusions and recommendations to the COP, who is empowered to take the necessary actions.

According to the Parties “a mechanism should not be given official powers to adopt decisions, but the mechanism should provide the Parties with non-binding recommendations or should put forward proposals to be sent to the Conference of the Parties for consideration and possible approval”.<sup>84</sup> The AG13 considered two options : either that the Committee might formulate recommendations to be forwarded to the COP for their final adoption — the alternative finally adopted

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83. Doc. FCCC/AG13/1998/2, Annex II, par. 10 and Doc. FCCC/CP/1998/16/Add.1.

84. Doc. FCCC/AG13/1996/1, p. 16.

by the AG13<sup>85</sup> — or that consultations within the Committee give rise to a simple report to the COP, which would not be obliged to approve the recommended measures<sup>86</sup> — the alternative that seems to be finally adopted by the COP 4's decision — which only foresees that the Committee shall, in addition “forwards its conclusions and recommendations and any written comments of the Party or Parties concerned to the Conference of the Parties in due time before its ordinary sessions”.

In any case, both options mean that the impact of the Committee in the climate change regime will essentially depend on the way the COP receives and deals with its conclusions and recommendations. This situation is considered unfavourably by Victor, who when referring to the Implementation Committee of the Montreal Protocol warns that “the lack of decision-making authority is one factor that accounts for why the Committee remains in a delicate position, sustained by diplomacy rather than a constitutionally ordained role”.<sup>87</sup> Other authors maintain, nevertheless, this pre-eminence of the COP and the confidence of the Parties that they control, in the last analysis, the procedure account for its acceptance by the States.<sup>88</sup> Nevertheless, it remains to be decided how often and in what context the Committee should submit reports to the COP, the only criteria being the “due time before its ordinary session”, and what legal criteria the COP should use in drawing up its recommendations. Moreover, there is no final decision as to whether the conclusions and recommendations of the Committee are subject to prior approval of the affected Parties.<sup>89</sup> Bearing in mind the aim of the MCP, it would seem that the recommendations of the Com-

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85. Doc. FCCC/AG13/1998/2, Annex II, par. 11.

86. Doc. FCCC/AG13/1996/1.

87. D.G. VICTOR, “The Montreal Protocol's Non-Compliance Procedure: Lessons for Making Other International Environmental Regimes More Effective”, *op. cit.*, p. 67.

88. See, for instance, H.M. SCHALLY, “The Role and Importance of Implementation, Monitoring and Non-Compliance Procedures in International Environmental Regimes”, in W. LANG (ed.), *Österreichische Außenpolitische Dokumentation, (Special Issue: The Ozone Treaties and their Influence on the Building of International Environmental Regimes)*, *op. cit.*, pp. 82-92, at p. 90.

89. Doc. FCCC/AG13/1998/2, Annex II, par. 3.

mittee to the COP should be limited to the proposal of measures to “provide the appropriate assistance” to the Parties. Among these are measures of technical assistance, data collection and treatment, financial transfers, transfer of human resources, transfer of technology and also funds from financial mechanisms, etc.

### III. THE COMPLIANCE PROCEDURE (CP)

#### A. INTRODUCTION

The effective achievement of the objectives established by the international treaties on the protection of the environment requires to overcome the compliance mechanisms provided by the general international law. As it has been noted above, the controversial, formalist and essentially bilateral character of the procedures for the solution of international disputes does not fit a framework that: 1) requires the prior willingness of the States to comply with their obligations (a preventive, rather than repressive, action); 2) needs to be adaptable to pretty varied circumstances; 3) and frequently requires a global answer of the international community.<sup>90</sup>

In this context, Article 18 of the KP explicitly refers to the need for establishing “appropriate and effective procedures and mechanisms to determine and to address cases of non-compliance”. It is up to the COP (established as a FCCC body, but serving also as the meeting of the Parties to the KP-COP/MOP) to specify the contents and nature of the said procedures and mechanisms. At this point, Article 18 of the KP just refers to a couple of issues: a) the possibility of developing “an indicative list of consequences, taking into account the cause, type, degree and frequency of non-compliance”; and b) the provision that “any procedures and mechanisms under this Article entailing binding consequences shall be

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90. In this sense, see M. EHRMANN, “Procedures of Compliance Control in International Environmental Treaties”, *op.cit.*, pp. 337 *et seq.*; A.J. RODRIGO HERNÁNDEZ, “Nuevas técnicas jurídicas para la aplicación de los tratados internacionales de medio ambiente”, 2002, *Cursos de Derecho Internacional y Relaciones Internacionales de Vitoria-Gasteiz*, Bilbao, Universidad del País Vasco, pp. 155-243.

adopted by means of an amendment to this Protocol” (which obviously relates to the nature of the procedure).

In 1998 the COP 4 decided that it was necessary to define and provide for substantive contents to the non-compliance procedure, and established a joint working group on compliance to develop a compliance system. Having in mind the nature of the obligations laid down by the Protocol, an effective mechanism for controlling the compliance under the Protocol was considered to be an essential issue for the ratification, and an agreement in this respect should therefore be reached with the utmost urgency.<sup>91</sup> The negotiations on this subject materialised in a series of documents that were submitted to the COP 6 (The Hague, 2000). In the beginning of this Conference there was consensus among Parties regarding the advisability of establishing a mechanism relying on the creation of a new body: the Compliance Committee, which would be structured in two branches dealing with “facilitation” and “enforcement” respectively.<sup>92</sup>

As regards to this question, it has to be underlined that references to “non-compliance” procedures or mechanisms were early on substituted by references to the “compliance mechanism” or to the “compliance procedure”. This change, which puts emphasis on “compliance” rather than on “non-compliance”, fits the final objective of the procedure in a better way.<sup>93</sup> Let us remind again that in the framework of the protection of the environment, any effective action should be a

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91. In fact, Article 18 of the KP foresaw that the COP would deal with this issue from its first period of sessions. For the EU, the agreement on the compliance mechanism was an essential element as a first steps towards the ratification of the Kyoto Protocol. See, among others, the document 19-27 July 2001, *European Commission Briefing paper — EU position for the Bonn conference on climate change*.

92. The EU's position was that the “facilitation branch should promote compliance, give advice and facilitate assistance to industrialised and developing countries alike” while the “enforcement branch should handle a number of specific commitments made by industrialised countries and the eligibility requirements for their participation in the Kyoto mechanisms”, see 3 November 2000, *Briefing paper The EU's positions for COP 6*.

93. As it is stated in the document that contains the position of Canada in response to the request of the Joint Working Group on Compliance, the relevant objectives of the compliance mechanism were “promoting the implementation of the Protocol, preventing non-compliance from arising and bring Parties into compliance, providing both facilitative and enforcement tools to promote compliance with the Protocol”, Doc. FCCC/SB/2000/MISC.2, p. 28.



preventive action, and Article 18 of the KP should therefore be understood in the sense that it is intended for favouring the compliance with the obligations under the said Protocol.

Debates mainly focussed on the legal nature of the compliance mechanism. There were two different approaches at this point. In this sense, it can be said that the EU and G77's proposals based the compliance with the Protocol upon the reduction of excess of emissions and the achievement of the Assigned Amounts Units through domestic reduction efforts. By contrast, in the US Proposal the means recommended had to do with the mechanisms foreseen in Articles 6, 12 and 17 of the Protocol.<sup>94</sup> In any case, it was difficult to reach an agreement on the consequences that the unfulfilment of the commitments assumed should imply. Another disputed question, which was also linked to the nature of the procedure, was related to the membership of the Compliance Committee.

In the Conference of The Hague the Parties could not reach a definitive agreement on the compliance mechanism, and the negotiation was postponed up to the continuation of the Conference in Bonn (2001). By contrast to the sectorial approach adopted at the negotiations in the Conference of The Hague, the Conference of Bonn was developed on the basis of a consolidated text that dealt with the different points for the discussion. The proposal brought by the President of the COP 6, Jan Pronk, dealt in a single document with all aspects included in the Buenos Aires Plan of Action. Despite this trait, the COP 6 could not reach a complete agreement.

The COP finally adopted in Marrakesh a decision on the procedures and mechanisms relating to compliance under the KP (Decision 24/CP.7).<sup>95</sup> The general objective of the Compliance Procedure (CP) is to "facilitate, promote and enforce compliance with the commitments under the Protocol".<sup>96</sup> The provisions regarding such a procedure were established by a decision of the Conference of the Parties — not through an amendment to the Protocol —, and this element has to be taken into consideration when analysing it in detail.

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94. V. ULARGUI — R. GAUTHIER, "Procedures and Mechanisms Relating to Compliance", <http://www.climent.org/pubs/compliance.html>, p. 4.

95. Decision 24/CP.7, of 10 November 2001.

96. Annex to the Decision 24/CP.7. FCCC/CP/2001/13/Add.3.

## B. FUNCTIONS OF THE CP WITHIN THE KP

The provision contained in Article 18 regarding the future establishment of a compliance procedure (not referred to in the FCCC) clearly showed the willingness to fit the Protocol with a more effective system of guarantees (or, with a figurative meaning, “to make up the teeth of the Protocol”).<sup>97</sup>

Article 18 was significantly placed between the provision regarding the MCP (Article 16) and the provisions concerning the classical means for the settlement of disputes (Article 19). By having a look to the scarce provisions contained in this Article, it can be said that the compliance procedure seemed to be mainly meant in principle for developing a *law-enforcement function*.

Nevertheless, at the preparatory works that led to the Decision 24/CP.7 (adopted in Marrakesh) the Parties generally shared the idea of structuring such a procedure as a multifunctional mechanism.

In this sense, the Parties generally insisted on the need to include in this mechanism certain aspects related to preventive diplomacy, facilitation, and advise.<sup>98</sup> The EC and its Member States widely shared such an approach, and they defended that this mechanism should be regarded as a whole of procedures essentially aimed at the positive promotion of the compliance with the Law.<sup>99</sup>

By having resort to another typical metaphor, it can be said that the mechanism finally designed fits the paradigm of the “carrot” and the “stick” alike, which materialises at the institutional and procedural levels. So, the Compliance Committee established for administering the CP is structured in two branches: the Facilitative Branch and the Enforcement

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97. Pretty common English idiom that is included in the synthesis of the compliance mechanism available at the official site of the FCCC, where it is stated that the mechanism “[...] makes up the ‘teeth’ of the Kyoto Protocol”. See <http://unfccc.int/issues/comp.html>.

98. See J. BRUNNÉE, “A Fine Balance: Facilitation and Enforcement in the Design of a Compliance Regime for the Kyoto Protocol”, 2000, Vol. 13, *Tulane Environmental Law Journal*, pp. 223-270, at pp. 255-259.

99. See, in this sense, the declarations made on behalf of the EC, its Member States, and other European countries in Doc. FCCC/SB/1999/MISC.4, pp. 13-14 and Doc. FCCC/SB/1999/MISC.4/Add.1, pp. 2-3.

Branch. Two different procedures, which bring about different consequences, are developed within the said Committee.<sup>100</sup>

In any case, conferring a multifunctional character to the CP is not an entirely new technique, and its closest precedent can be found in the non-compliance procedure under the Protocol of Montreal.<sup>101</sup>

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100. See a description of the mechanism in : A.J. RODRIGO HERNÁNDEZ, "Los Acuerdos de Marrakesh adoptados en la séptima reunión de la conferencia de las partes de la Convención Marco de las Naciones Unidas sobre el Cambio Climático", 2001, Vol. LIII, 1 and 2, *Revista Española de Derecho Internacional*, pp. 331-342, in pp. 339-340; G. WISER, "Kyoto Protocol Packs a Powerful Punch", 2002, Vol. 25, n. 2, *International Environmental Reporter*, pp. 86 et seq.; M. VESPA, "Climate Change 2001 : Kyoto at Bonn and Marrakech", 2002, Vol. 29, *Ecology Law Quarterly*, pp. 395-420.

101. So, making operational the brief provision contained in Article 8 of the Protocol of Montreal, the Conference of the Parties held in London in June 1990 approved the "non-compliance procedure", (Report of the second meeting of the Conference of the Parties, Doc. UNEP/OzL.Pro.2/3, Annex III (1990)).

In accordance with this procedure, all Parties may bring submissions with respect to the non-compliant behaviour of any Party, without having resort to the traditional means for the settlement of disputes. Such a procedure, which is defined as "non-confrontational", has a versatile and multifunctional character, and may be used to assist the Parties in their efforts complying with their obligations, as well as for condemning the Parties or imposing genuine sanctions. These may imply to suspend certain rights and privileges expressly established by the Protocol, with special regard to the transfer of technology, financial arrangements, the right to participate in the debates within the management bodies. These can even imply commercial sanctions, such as those decided for the first time against Russia (Decision VII/17, of 7 December 1995, Doc. UNEP/OzL.Pro.7/12, p. 52 y ss). See, on this issue : P.-M. DUPUY, "Où en est le droit international de l'environnement à la fin du siècle?", 1997, 4, *Revue Générale de Droit International Public*, pp. 873-901, p. 896, footnotes 66 and 67; W. LANG, "Les mesures commerciales au service de la protection de l'environnement", 1995/3 *Revue Générale de Droit International Public*, pp. 545 et seq.

Following the submissions brought by the Parties, the central role within this procedure is played by the Secretariat and the Compliance Committee (which consists of the representatives of ten Parties). The Secretariat gathers all the necessary information and, after having consulted the Parties affected, reports to the Compliance Committee. After investigating the alleged non-compliance, the Committee tries to find a friendly solution to the problem, by providing information and making recommendations, if necessary, at a Meeting of the Parties. The "Meeting of the Parties" will consider the measure to be adopted with regards to the non-compliant Party, and this includes the possibility of imposing sanctions. On this procedure in general, see : W. LANG, "Compliance-Control in Respect of the Montreal Protocol", in S. MURASE et al., "Compliance with International Standards : Environmental Case Studies", 1995, *Proceedings of the 89th Annual Meeting of the American Society of International Law*, pp. 206-210; S. MURASE, "Perspectives from International Economic Law on Transnational Environmental Issues", 1995, Vol. 253, *Recueil des Cours de l'Académie de Droit International*, pp. 285-429, at pp. 421-422.

Multifunctionality of the CP under the KP raises the question concerning its relationship with the rest of the guarantees foreseen in the Protocol, and it is possible to anticipate that their respective functions may coincide or overlap in certain cases.<sup>102</sup> Section XVI of the Decision 24/CP.7 partially deals with this issue. In this sense, it establishes that the CP “shall operate without prejudice to Articles 16 and 19 of the Protocol”, on the MCP and the settlement of disputes respectively. In any case, it is clear that the possibility of the different mechanisms operating in parallel does not exclude eventual cases of duplicity or overlapping.

So, as a matter of fact, the CP may be used as an alternative mean to the classical means for the solution of disputes. Although certain Parties have insisted on the need to set a conceptual distinction between both instruments, other Parties pretty sensible to the impact of climate change — such as the countries gathered in the Alliance of Small Island States (AOSIS) — have defended that compliance-related procedures have to be precisely able to deal with questions that have evolved into real “controversies” or “disputes”.<sup>103</sup>

Since the States have been generally reluctant to submit their environmental disputes to the traditional means for the settlement of disputes — particularly as regards to judicial remedies —,<sup>104</sup> it is possible to anticipate that the CP will become the way in which the real controversies on the implementation of the KP will be dealt with in practice.

Overlapping can also take place as regards to the MCP foreseen by Article 13 of the FCCC. In fact, the designed CP puts such a special emphasis on the function of “facilitation” that, in certain cases, it is difficult to distinguish between their respective missions. In this sense, some authors have

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102. See Doc. FCCC/SB/1999/7/Add.1, Paragraph III (Relationships), pp. 23-38.

103. Doc. FCCC/SB/1999/7/Add.1, p. 7, par. 11.

104. Cfr. : R.B. BILDER, “The Settlement of Disputes in the Field of the International Law of the Environment”, *op.cit.*, pp. 139 *et seq.*; A.C. KISS, “Le règlement des différends dans les conventions multilatérales relatives à la protection de l’environnement”, in R.-J. DUPUY (ed.), 1983, *The Settlement of Disputes on the New Natural Resources*, pp. 119-130; P.H. SAND, “Transnational Environmental Disputes”, *op. cit.*, pp. 123-135.

pointed out that clarifying the relationship between both mechanisms will constitute a rather complex task.<sup>105</sup>

### C. INSTITUTIONAL ISSUES : THE COMMITTEE OF THE CP

Establishing a specific institutional framework has become a usual practice in the international environmental treaties. As it has been noted by certain authors, "the purpose of these arrangements is to develop the normative content of the regulatory regime established by each agreement and to supervise the states parties' implementation of and compliance with that regime".<sup>106</sup> Such an institutionalisation is consistent with the general trend to cooperation that characterises the international law nowadays, and also fits the specific nature of the matter which these treaties deal with : the protection of the environment.<sup>107</sup>

The Compliance Committee constitutes the institutional basis of the mechanism elaborated by the Conference of the Parties. It is established as a subsidiary body by a decision of the said Conference. In this sense, as it has been stated below, this Committee does not directly depend on the KP but on the development of Article 18 decided by the COP and this implies its general dependence of the COP as the principal organ that decides its composition and internal functioning.

The Note by the co-Chairmen of the Joint Working Group on Compliance, of June 2000, pointed out that it was advisable that the institution entrusted with the compliance were made up of "one or more branches, components or procedures".<sup>108</sup> In accordance with Annex of the Decision 24/CP.7, the Committee "shall function through a plenary, a bureau and two branches, namely the facilitative branch and the

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105. See M. EHRMANN, "Procedures of Compliance Control in International Environmental Treaties", *op. cit.*, p. 430, where it is stated that : "one of the most difficult questions for the future will be to clarify the relationship of the multilateral consultative process for the Framework Convention and the non-compliance procedure to be elaborated under the Kyoto Protocol".

106. R.R. CHURCHILL — G. ULFSTEIN, "Autonomous Institutional Arrangements in Multilateral Environmental Agreements : a Little-noticed Phenomenon in International Law", October 2000, Vol. 94, n. 4, *American Journal of International Law*, p. 623.

107. *Id.*, pp. 655-659.

108. Doc. FCCC/SB/2000/1.

enforcement branch". The idea is to adjust the structure of the institution to the functions to be developed.

Divergences arose when determining the total number of members of the Committee and the criteria that should rule the composition of each group. The documents that were debated in the COP 6 foresaw a total number of 15 members, 10 for the branch "facilitation" and 5 for the branch "enforcement."<sup>109</sup> Other documents, such as the Note by the co-Chairmen of the Joint Working Group on Compliance, took into consideration other different figures concerning the number of members, which varied from ten members — similarly to the Compliance Committee established under the Protocol of Montreal — to a total maximum of 21 members.<sup>110</sup> In general terms, it was intended to strengthen the presence of the Annex I Parties in the enforcement section. As it has been noted above, the KP follows the principle of setting common but differentiated responsibilities. So, the idea was that the body entrusted with controlling the compliance with the assumed commitments should capture these differences.<sup>111</sup> Notwithstanding, there was not consensus among Parties at this point and, in this sense, it was proposed: 1) to distribute the members among Parties in accordance with an equitable geographical distribution on the basis of "the five United Nations regional groupings, taking into account the interest groups as reflected by the current practice in the UNFCCC Bureau"; 2) to assign all members to the Annex I Parties; 3) or to ensure majority of the Annex I Parties within this body.<sup>112</sup>

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109. Doc. FCCC/CP/2000/5/Add.3, p. 20.

110. Doc. FCCC/SB/2000/1. The position defended by the European Union in the document submitted to the Subsidiary Body for scientific and technological advice, can be summarised as follows: the Committee would consist of a total number of 15 members, elected by the COP every 4 years, changing eight and seven members of the Committee alternatively every two years. Doc. FCCC/SB/2000/MISC.2, p. 65.

111. See V. ULARGUI — R. GAUTHIER, "Procedures and Mechanisms Relating to Compliance", in <http://www.climnet.org/pubs/compliance.html>. Among others, the EU and Canada militated in favour of keeping a balance between the obligations assumed under the Protocol and the composition of the Committee, in such a way that majority of Annex I Parties should be present in the Enforcement Branch. See European Commission Briefing Paper, EU position for the Bonn Conference on Climate Change, 19-27 July 2001, p. 5. See also Doc. FCCC/SB/MISC.2, 17 February 2000, and Doc. FCCC/SB/1, of 10 May 2000.

112. Doc. FCCC/CP/2000/5/Add.3 (Vol. IV), pp. 23-24.

However, the final text of the Conference held in Bonn already foresaw that the Committee would consist of 20 members — 10 members for each branch —. Members would be distributed on the basis of the same criterion in both cases: “one member from each of the five regional groups of the United Nations and one member from the small island developing States, taking into account the interest groups as reflected by the current practice of the bureau of the Convention; two members from Parties included in Annex I; and two members from Parties not included in Annex I”.<sup>113</sup> This was the option chosen by the final text approved by the COP 7,<sup>114</sup> so that proposals in favour of recognising an overriding presence of the Annex I Parties did not succeed at last.

Each branch is made up and structured in a similar way. Members of the Committee are elected by the Conference of the Parties in accordance with the distribution criteria mentioned previously and taking into account their “competence relating to climate change and relevant fields such as the scientific, technical, socio-economic and legal fields”.<sup>115</sup> As it has been mentioned above, they should develop their functions in their individual capacities, and not as representatives of the Parties. For this reason the final text does not include the proposal concerning that the members can not be involved in the examination of those cases relating the country where they come from.<sup>116</sup> Mandates will be limited to a four years period, although the members may be re-elected for two consecutive periods. Renewal of the body takes place on a fourths basis (the half of each branch is renewed every two years). For each member of the Committee, the Conference of the Parties serving as the meeting of the Parties to the Protocol shall elect an alternate member.

Both, the Facilitation Branch and the Enforcement Branch elect, from among its members and for a term of two years, a chairperson and a vice-chairperson. The agreement

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113. Doc. FCCC/CP/2001/2/Add.6. Partial renewal of the groups every four years is also foreseen.

114. See Annex to the Decision 24/CP.7, Doc. FCCC/CP/2001/13/Add. 3.

115. Doc. FCCC/CP/2001/13/Add.3.

116. Note by de Co-Chairmen of the Joint Working Group on Compliance, Doc. FCCC/SB/2000/1.

foresees the need of keeping the balance between Annex I and non-Annex I Parties. In accordance with the Decision of the COP, the chairing of each branch shall rotate between Parties included in Annex I and Parties not included in Annex I in such a manner that at any time one chairperson shall be from among the Parties included in Annex I and the other chairperson shall be from among the Parties not included in Annex I. This is a somehow surprising provision, provided that the members of the Committee serve in their own capacity, and not as representatives of the Parties where they come from. However, both decisions can be explained by turning again to the principle of common but differentiated responsibilities. In this sense it is worth noting that, on one hand, although an overriding presence was not conferred to the Annex I Parties, the differences regarding responsibilities require at least to ensure a balanced composition and functioning of the body. Even though the members serve in their own capacity, the presence of members from a particular country is deemed to guarantee that decisions will not be adopted without taking into consideration its specificities and problems, and favours a higher implication. On the other hand, requiring members to serve in their individual capacity fits the common nature of the protected interest — the environment —, which does not relate to any Party in particular, but to all Parties as a whole.

The plenary of the Committee shall consist of the members of the facilitative branch and the enforcement branch. Likewise, the Committee shall be fitted with a Bureau, which consists of the chairpersons and vice-chairpersons of each branch. The chairpersons of the two branches shall be the co-chairpersons of the plenary. The Bureau should ensure that the Facilitative Branch and the Enforcement Branch interact and cooperate in their functioning. For this purpose, the bureau may designate one or more members of one branch to contribute to the work of the other branch on a non-voting basis. The bureau of the Committee shall allocate questions of implementation to the appropriate branch and, as it will be analysed below, the bureau has a certain margin of discretion when doing so. Finally, the Secretariat referred to in Article 14 of the KP may perform functions at the Committee's service.



The Committee shall, unless it decides otherwise, meet at least twice each year, taking into account the desirability of holding such meetings in conjunction with the meetings of the subsidiary bodies under the Convention. The Committee shall make every effort to reach agreement on any decisions by consensus. If all efforts at reaching consensus have been exhausted, the decisions shall as a last resort be adopted by a majority of at least three fourths of the members present and voting. Having resort to consensus for adopting decisions within a body that is specifically in charge of guaranteeing the compliance with the obligations assumed under the Protocol seems to be a surprising mechanism. Likewise, by having a look to the wording of the Decision, it can be noted that there is still an unresolved question, which is open to debate : although the Decision really provides for an alternative decision-making procedure, it does not precisely determine “when” and “how” it can be understood that consensus can not be reached — so that the rule of majority would apply.

The adoption of decisions by the enforcement branch shall require a majority of members from Parties included in Annex I present and voting, as well as a majority of members from Parties not included in Annex I present and voting. Abstentions will not be taken into account at this point. So, even though the discussions on the composition of the body did not result in a higher presence of the Parties included in Annex I in this branch, the just mentioned provision somehow compensates such a trait, provided that it requires a favourable vote of the majority of members from these Parties. Since the members should serve in their individual capacity, one might be surprised again when appraising that the decision establishes such a safeguard. However, it can be said that the states perceive that this requirement guarantees that their interests will be properly taken into consideration, without preventing an objective and independent action of the members of the Committee.

#### **D. INITIATION OF THE PROCEDURE**

As it has been anticipated, within the common framework of the CP, the Decision 24/CP.7 distinguishes between

the procedures to be respectively carried out by the Facilitative Branch and the Enforcement Branch. In any case, the initiation of both types of procedures takes place in the same way : by the “submission” of a “question of implementation” to the Compliance Committee through the Secretariat.

There are two major issues to take into consideration at this stage : the legal standing for submitting these questions, and the motives upon which these submissions should be based.

As for the first point, the paragraph 1 of the Section VI of the Decision 24/CP.7 establishes that the Committee shall receive questions of implementation submitted by : the expert review teams under Article 8 of the Protocol; any Party with respect to itself; or any Party with respect to another Party.

It is worth noting that during the preparatory works it was considered the possibility of conferring legal standing for submitting questions to a wider range of entities (including the COP/MOP, the Subsidiary Bodies or the Secretariat). It seems that no Party defended the possibility of conferring legal standing to other intergovernmental or non-governmental organizations. In any case, it is recognised that these latter organisations enjoy the opportunity of participating in the ongoing procedures by providing “factual and technical information” to the relevant branch (Section VIII).<sup>117</sup>

Establishing that the procedure may be initiated not only at the request of any Party, but also on the basis of the questions of implementation arising in the reports of expert review teams under Article 8 of the Protocol, deserves a positive opinion. This means to introduce a sort of *attorney general* within the mechanism. Although the initiation of the procedure must not be considered an event of confrontation between Parties, it is clear that the States would be inclined to the possibility of a third party submitting the question from a diplomatic point of view. In this sense, for instance, it

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117. See Doc. FCCC/SB/1999/7, of 19 September 1999, p. 6, par. 18. According to G. WISER, *Report to CAN on Compliance Section of Marrakech Accords to the Kyoto Protocol (December 7, 2001)*, available at <http://www.climatenetwork.org/>, at p. 2, the fact that NGOs will be entitled to submit technical and factual information to the relevant branch gives “potentially significant opportunities for public participation in compliance proceedings”.

is pretty significant the crucial function played by the European Commission in the action for Member State infringements established in the framework of the EC.<sup>118</sup> Certain authors (as Sand) consider that such an infringement action has inspired the compliance procedures in the framework of the Protocol of Montreal on substances that deplete the ozone layer,<sup>119</sup> and it can constitute an adequate point of reference for the KP as well.

The multifunctional character of the CP also justifies that any Party can submit a question of implementation with respect to itself, searching for the assistance of the Facilitative Branch for the proper fulfilment of its obligations under the Protocol.

Cases where any Party submits a question of implementation “with respect to another Party” would be the useful path for managing certain controversies between Parties. Note that the Party that submits the question is not requested to have any specific link or relationship with the particular matter to be dealt with, but only to have “corroborating information”. The multifunctionality of the CP and the *erga omnes partes contractantes* nature of the obligations under the Protocol have therefore propitiated the recognition of a sort of *actio popularis*<sup>120</sup>.

The issues concerning the legal standing for both submitting a question and being directed by a submitted question raise specific problems as regards to the EC and its Member States. So, it is necessary to analyse the impact of such a distribution of competences within the CP. It has to be pointed out that these kinds of questions have also arisen with regards to other relevant mixed agreements such as those concerning the World Trade Organization (WTO), which are fitted with an advanced dispute settlement system.

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118. Articles 226-228 ECT.

119. P.H. SAND, “Transnational Environmental Disputes”, *op. cit.*, pp. 133-135.

120. In fact, as it has been noted by P.H. SAND, “Transnational Environmental Disputes”, *op. cit.*, pp. 131 and 135, there is a “growing number of environmental disputes that do not fit the prototype “A v. B” situation” and “the new focus on environmental obligations *erga omnes* calls for innovative [...] patterns of dispute resolution and prevention”.

When the Court of Justice of the European Communities precisely established the respective competence of the European Communities and the Member States regarding the commercial agreements reached in the Uruguay Round — Opinion 1/94 of 15 November 1994 —, it noted that, without prejudice of the distribution of competences, there was a “duty of cooperation” between the Community’s institutions and the Member States regarding the dispute settlement procedure. This duty should be regarded as a particular concretion of the general principle of cooperation established by Article 10 of the ECT.<sup>121</sup>

From the perspective of the legal standing for submitting complaints, this has implied in practice that the EC has always brought the complaints to the WTO. From the opposite perspective, it can be said that there have been complaints brought against the EC and complaints brought against particular Member States, on the basis of the established distribution of competences.<sup>122</sup>

The WTO’s experience would constitute a point of reference for the KP. However, we think that, besides the peculiar characteristics of the procedure established by the Decision 24/CP.7, the KP has two peculiar elements that should be taken into consideration :

- a) On one hand, as it has been mentioned previously, the matters that the KP deals with relate to areas of shared competences between the EC and its Member States. By contrast, as regards to the WTO, there is a clear pre-eminence of areas where the EC holds exclusive competence.
- b) On the other hand, in accordance with Article 4, paragraphs 1 and 2, of the KP, the EC and its Member States have reached an “agreement to fulfil their commitments

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121. See Opinion 1/94, of 15 November 1994, *ECR*, 1994, p. I-5267, at p. I-5420, paragraphs 106-110. See also J. HELISKOSKI, “The ‘Duty of Cooperation’ between the European Community and Its Member States within the World Trade Organization”, 1996, Vol. VII, *Finnish Yearbook of International Law*, pp. 59 *et seq.*

122. So, for instance, as regards to matters relating to the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS Agreement), there have been complaints addressed against particular Member States. Cfr. cases : *Ireland — Measures affecting the grant of copyright and neighbouring rights (brought by US)*, DS 82, 22 May 1997; and *Denmark — Measures affecting the enforcement of intellectual property rights (brought by US)*, DS 83, 21 May 1997.

under Article 3 jointly”. This agreement of “joint fulfilment” affects the central obligation under the KP : the limitation and reduction of greenhouse gases, upon which the rest of the obligations under the Protocol are established.

From this premise it is possible to analyse the legal standing of the EC and its Member States separately.

As for the initiation of the procedure, it has to be underlined that, within the procedure laid down by the Decision 24/CP.7, those that submit a “question of implementation” are not considered as a sort of “plaintiffs” nor as parties of the procedure in strict sense. Thus, the initiation of the procedure does not compare with bringing a lawsuit — in accordance with the classical structure of the judicial procedures —, but rather with the fact of “giving notice” of a question of implementation. The Party that submits a question of implementation is not requested to have any sort of particular link with the matter to be considered. On the contrary, it is understood that any Party, for the mere reason of being a Party to the Protocol, enjoys the right to initiate the procedure without further requisites.

In principle, from the perspective of the KP, it could be possible to understand that both the EC and any of its Member States could submit a question of implementation with respect of another Party independently.

Notwithstanding, from the Community’s perspective, there are some elements that seem to require a joint action of the EC and its Member States — besides the generic duty of cooperation. So, unilateral actions would not fit well the agreement of “joint fulfilment” of the essential obligation under the Protocol, mentioned above. These actions would be also inconsistent with the principle of subsidiarity, provided that these would be actions relating to shared competences that have an impact in the international sphere.<sup>123</sup> Likewise, these could affect the useful effect of Article 174.4 of the ECT, which estab-

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123. In accordance with Article 5 of the ECT: “In areas which do not fall within its exclusive competence, the Community shall take action, in accordance with the principle of subsidiarity, only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States and can therefore, by reason of the scale or effects of the proposed action, be better achieved by the Community.”.

lishes that “within their respective spheres of competence” in the framework of environment, “the Community and the Member States shall cooperate with third countries and with the competent international organisations [...]”.

Furthermore, these reasons would lead to refuse that any Member State could submit a question of implementation with respect to another Member State, provided that it would be inconsistent with the principle of fair cooperation. So the controversies within the European Union (at the internal scale) could be solved through the remedies provided by the Community Law; through specific monitoring and control mechanisms; or through the general ways such as the infringement action against a Member State that “has failed to fulfil an obligation under this Treaty” (to which the provisions of the agreement of “joint fulfilment” approved by Council Decision may be re-directed)<sup>124</sup> or the action for failure to act against any eventual lack of action of the Community’s institutions.<sup>125</sup>

As for the legal standing for being questioned against, one might wonder whether the questions of implementation submitted by third parties should be necessarily referred to the Community and its Member States jointly, or they could be considered on an individual basis.

In those cases where a particular Member State does not comply with its obligations concerning the limitation or reduction of emissions, we do understand that a third party can not submit any question with respect to this state individually considered. So, the agreement of “joint fulfilment” of the central obligation of the KP implies a joint responsibility of the Community and its Member States, and this trait can not be disregarded by the rest of the Parties to the Protocol.

If the obligations can be separated from the “European bubble” context, we understand that third parties can not be jeopardised by the uncertainties concerning the specific distribution of competences between the EC and its Member States, so that they can either submit the question against the EC and its Member States jointly, or against some of

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124. Articles 226-228 ECT.

125. Articles 232-233 ECT.

them. So, in the implementation of a mixed agreement, priority should be given to the non-EC parties' interest in certainty and predictability.<sup>126</sup> This aspect might be regarded in a different way if, similarly to what happens with other mixed agreements, it had been foreseen to conduct a sub-procedure intended for the EC and its Member States determining their respective competences on a case-by-case basis (so determining with respect of which of them the question of implementation should be considered).<sup>127</sup>

Once the issues concerning the legal standing have been studied, it is time to analyse the aspects relating to the motives upon which the "submissions" can be based. At this point the mechanism could not have adopted a broader approach, provided that it generically refers to a "question of implementation". So, note that the Decision 24/CP.7 does not require the submitting Party to invoke a concrete "breach" of an obligation under the Protocol nor any "unfulfilment" of — or "lack of compliance" with — the Protocol.

It is worth mentioning that Article 18 of the KP expressly refers to cases of "non-compliance". However, it has been finally preferred to include the broader and vaguer notion of "question of implementation", which, apart from being more acceptable from a diplomatic point of view, fits better the multifunctional character of the compliance procedures and mechanisms — in that they would rather address to prevent than to punish cases of non-compliance.

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126. J. HELISKOSKI, *Mixed Agreement as a Technique for Organizing the International Relations of the European Community and its Member States*, *op.cit.*, paragraph 5.2.2.

127. *Ibid.* This takes place, for instance, as regards to the Energy Charter Treaty. So, upon deposit of the Community's instrument of approval, the following statement was submitted: "The European Communities and their Member States have both concluded the Energy Charter Treaty and are thus internationally responsible for the fulfilment of obligations contained therein, in accordance with their respective competences. The Communities and the Member States will, if necessary, determine among them who is the respondent party to arbitration proceedings initiated by an Investor of another Contracting Party. In such case, upon the request of the Investor, the Communities and the Member States will make such determination within a period of 30 days". See Council and Commission Decision of 23 September 1997 on the conclusion, by the European Communities, of the Energy Charter Treaty and the Energy Charter Protocol on energy efficiency and related environmental aspects, OJ L 69, 9.3.1998.

During the negotiations the USA particularly opposed to the eventual need for invoking “non-compliance” to initiate the procedure. This country noted that the KP does not only establish legal obligations in strict sense, but also lays down certain provisions of a basically programmatic character. In the USA’s understanding the concept of “non-compliance” would only fit the nature of the said legal obligations, being so identified as a “breach” of an obligation.<sup>128</sup>

By choosing the notion of “question of implementation”, the Decision 24/CP.7 allows avoiding such a conceptual discussion. Nevertheless, when precisely establishing the concrete questions of implementation that the Facilitative Branch and the Enforcement Branch will respectively deal with, the CP somehow reflects the arguments explained by the USA at the negotiation process. This would indirectly affect the contents of the submissions to be brought in the future.<sup>129</sup>

#### E. PROCEDURAL ASPECTS AT THE CP

Once the question of implementation has been submitted, the procedure established by the Decision 24/CP.7 moves towards a first stage of paramount importance: the allocation of the question of implementation to the relevant branch of the Compliance Committee. It is up to the Bureau of the Committee to decide on the allocation of the question, which will be subsequently referred to the Facilitative or the Enforcement Branch in accordance with their respective mandates (Section VII, paragraph 1).

Questions will be allocated on the basis of their contents, following a substantive distribution criterion rather than a progressive, sequential, or step by step criterion. So, the procedure in front of the Facilitative branch does not necessarily constitute a first step (*a prius*) for the Enforcement Branch taking action. The nature of the question of implementation will determine which of the “alternative” branches will deal with the said question. Obviously, this does not prevent that

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128. See Doc. FCCC/SB/1999/MISC.4, pp. 29-30.

129. See Section IV, paragraphs 5 and 6, and Section V, paragraphs 4 and 5 of the Decision.



in certain cases a question that initially deserved the examination by the Facilitative Branch could subsequently reach the Enforcement Branch.

As it has been anticipated, it is up to the Bureau of the Committee to decide on the allocation of the question. Let us remind that Parties included in Annex I and non-Annex I Parties have an equal presence within this Bureau, so that at this point the parity criterion has been given priority with respect to the equitable geographical distribution — which is the criterion that basically inspires the composition of both the Facilitative and the Enforcement branch.

Since the question has been allocated, the procedure follows up within the competent branch. The next state consists of the preliminary examination of the question of implementation. The intention at this preliminary stage is to filter out frivolous or undeserving questions. Any decision not to proceed should be based upon the motives. A branch may decide not to proceed if the question before it: is not supported by sufficient information; is *de minimis* or ill-founded; is not based on the requirements of the Protocol. It is important to point out that the concepts just mentioned have a rather vague meaning, and, for instance, it can be anticipated that in practice there will be a need for precisely determining what does “*de minimis*” precisely mean.

Once the question has passed the preliminary examination and the relevant Branch has decided to proceed, the general procedures set up in Section VIII will apply. These try to ensure the adequate participation of the interested Parties and the obtention of relevant information through pretty different ways (including expert advice and information provided by competent intergovernmental and non-governmental organizations).

As for the procedures for the Enforcement Branch, Sections IX and X of the Decision establish specific elements that are intended for reaffirming the “quasi-judicial” character of such procedures — following the approach defended by the EC and its Member States.<sup>130</sup>

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130. See Doc. FCCC/SB/1999/MISC.4, p. 13, paragraph 5, where it was stated that: “[...] legal questions should be dealt with quasi-judicial bodies”. See VESPA, M., *op. cit.*, p. 415.

After the examination of the question, the competent branch, by following the appropriate voting procedure, will adopt the decision on consequences applying to the case. The observance of the applied consequences will be supervised. It has to be kept in mind at this point that, in the absence of consensus, the adoption of decisions by the Enforcement Branch shall require a majority of members from Parties included in Annex I present and voting, as well as a majority of members from Parties not included in Annex I present and voting.<sup>131</sup> And let us remind again that, since the members should serve in their individual capacity — not on behalf of the Parties —, one might be surprised when appraising that the Decision establishes such a safeguard.

One of the flashiest characteristics of the CP consists of allowing an eventual appeal (Section XI). The appeal is only receivable regarding a very specific case : against a final decision of the Enforcement Branch relating to Article 3, paragraph 1, of the Protocol. This can be likely justified by taking into consideration that it really constitutes the most serious breach of the KP — given that it affects the obligation concerning the limitation or reduction of emissions of greenhouse gases, which has been regarded by certain delegations as the “core obligation” under the Protocol.

Only the Party in respect of which a final decision has been taken may appeal to the Conference of the Parties, and it should invoke that “it has been denied due process”. The motive upon which appeals can rely is therefore of procedural character (similarly to what happens with extraordinary judicial remedies based on the lack of observance of the applicable procedural safeguards, such as “*cassation*”). So, appeals are not conceived as a second instance for reviewing the substantive decision on the case (through a new examination and interpretation of the facts or the applicable law). Appeals under Decision 24/CP.7 are also different to other types of appeals that have recently emerged in international practice (such as those foreseen in the framework of the WTO Dispute Settlement Understanding — DSU —, where appeals may be

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131. See Section II, paragraph 9 of the Decision.

brought for remedying the wrongful application of Law or cases of misinterpretation by the panels).<sup>132</sup>

The Conference of the Parties serving as the meeting of the Parties to the Protocol shall consider the appeal, and it may agree by a three-fourths majority vote of the Parties present and voting at the meeting to override the decision of the Enforcement Branch. The COP/MOP does not cast any decision on the substantive content of the case, but just refers the matter of the appeal back to the Enforcement Branch. Thus, the Enforcement Branch will examine the matter again, and will correct the fault that has resulted in the appellant Party being denied due process.

It is a bit strange that a decision of a “quasi-judicial” body (the Enforcement Branch) can be appealed before a political body for specifically deciding on the legal question regarding the observance of the rules of the “due process”. The contrast between the intention of the appeal (to ensure the observance of the rules governing the due process) and the inter-governmental composition of the body in charge of considering the appeal would raise many problems in practice. In fact, as far as the appeal is decided by the vote of the Parties, it seems to be a political intervention instrument, rather than a mechanism for verifying the proper functioning of the procedure from a legal/technical point of view.

## F. CONSEQUENCES

One of the essential aspects concerning the establishment of the CP has consisted of determining its consequences in general, and, in particular, the consequences applying to cases of non-compliance with the KP. The real effectiveness regarding the enforcement of the Protocol will largely depend on the rigorousness of such consequences.

When elaborating Article 18 of the KP it was preferred to avoid the term “sanctions”, so that the more neutral concept of “consequences” was included. Likewise, Article 18 foresees that these consequences will be legally binding only when they are adopted by means of an amendment to the Protocol

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132. See Article 17.6 of the WTO DSU.

— once the KP has entered into force. So, the consequences listed by the Decision 24/CP.7 can not be considered as legally binding consequences, despite that the said Decision uses a prescriptive or mandatory language.<sup>133</sup>

The concept of “consequences” covers both the measures to be eventually applied by the Facilitative Branch (such as the provision of advice or facilitation of financial and technical assistance), and the measures to be eventually applied by the Enforcement Branch (which include the declaration of non-compliance or certain penalties).

It is specially worthy to underline that these consequences have been designed with the view of making them fitting to the particular nature of each question of implementation. So, in cases of non-compliance, a specific consequence is associated with the concrete failure to comply with certain provisions. This insists on the current trend to shape the international conventional regimes like “custom-made suits”, and this has also satisfied the demands of the Parties regarding legal certainty and the predictability of the system.

For the most serious breach of the obligations under the Protocol (i.e. to exceed the amount of the emissions assigned) the following main consequences have been established: the deduction from the Party’s assigned amount for the second commitment period of a number of tonnes equal to 1.3 times the amount in tonnes of excess emissions; and the suspension of the eligibility to make transfers under Article 17 of the Protocol.<sup>134</sup>

It has to be noted that, during the preparatory works, were considered the possibility of imposing penalties consisting on deductions higher than the 30 per cent, commercial counter-measures, or financial sanctions (for instance, by the countries grouped in the Alliance of Small Island States and Switzerland).<sup>135</sup>

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133. G. WISER, “Report to CAN on Compliance...”, *op. cit.*, at pp. 1 and 3-4, underlines that the “question of whether there will be ‘legally binding consequences’ is among the most important compliance-related issues remaining for the future governing body of the Kyoto Protocol (the COP/MOP) to resolve”, and that “Japan, Russia and Australia have long resisted the efforts of most other Parties to adopt ‘legally binding’ consequences”.

134. See Section XV, paragraph 5, Decision 24/CP.

135. See Doc. FCCC/SB/1999/7/Add.1, pp. 64-65, paragraphs 348 and 358.

By excluding financial sanctions, a possible source for financing policies concerning the adaptation to the Protocol's requirements has been lost. On the other hand, the consequences finally established are characterised by insisting on the substantive obligations that the non-compliant Party has been unfulfilling, without including other measures not linked to the emissions.

In any case, the Decision has adopted the said consequences in accordance with a *pro futuro* approach — or following a forward looking perspective —, provided that it does not set any measure relating to the compensation of the damages eventually caused, and the consequences are essentially aimed at encouraging a compliant behaviour of the Party in breach of its obligations.

The list laid down by the Decision 24/CP.7 could be regarded as the establishment of a particular regime of consequences associated with wrongful acts within the KP, which lies apart from the provisions of the general international Law on the international responsibility. This possibility is allowed by the “Draft articles on Responsibility of States for Internationally Wrongful Acts”, adopted by the International Law Commission in 2001, so that these particular regimes are considered as a sort of *lex specialis*.<sup>136</sup>

The question is to determine whether the “consequences” particularly established for the KP exclude the possibility of having resort to the remedies provided by the general international Law in case of an internationally wrongful act or not. The Decision 24/CP.7 does not expressly exclude such a possibility, and certain delegations, such as the countries grouped in the Alliance of Small Island States, defended during the negotiation process that the KP should not be perceived as a closed system or a full “self-contained regime” that prevents the general provisions of the international

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136. In accordance with Article 55 of the Draft (Doc. A/56/10), “*Lex specialis*”, the general provisions on the responsibility of the States “[...] do not apply where and to the extent that the conditions for the existence of an internationally wrongful act or the content of implementation of the international responsibility of a State are governed by special rules of international law”.

law to be invoked.<sup>137</sup> In any case, the procedures and mechanisms relating to compliance are not the suitable vehicle for such a possibility.

The CP does not refer to the compensation for damages caused, but this trait should not be regarded as a particular weak point of this mechanism. On one hand, it has been noted that the States “have tended to avoid [...] liability-based methods”,<sup>138</sup> and the general provisions on the international responsibility do not seem to fit certain environmental disputes.<sup>139</sup> On the other hand, certain authors have pointed out that corrective measures *pro futuro*, rather than measures focussed on the compensation for damages, are widespread and established in many areas of the international practice.<sup>140</sup>

#### IV. FINAL REMARKS

The analysis of the compliance mechanisms in the FCCC and the KP is justified : on one hand, by the characteristics of

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137. So, in the understanding of these States : “In any case, any non-compliance procedures developed under the Protocol or the Convention will in no way affect the rights of all States under international law concerning State responsibility for the adverse effects of climate change”, Doc. FCCC/SB/1999/MISC.4, 29 April 1999, p. 20. According to Koskenniemi, “in environmental law, special ‘non-compliance mechanisms’ have been construed to set aside the rules of formal dispute settlement and countermeasures”, but “in case a State Party to an environmental treaty providing for specific non-compliance mechanism fails to comply by its obligations in regard to that mechanism, the general rules of State responsibility become fully operative”. See M. KOSKENNIEMI, *Fragmentation of International Law — The Function and Scope of the Lex Specialis Rule and the Question of Self-contained Regimes : An Outline*, International Law Commission Group on Fragmentation, May 2003, [http://www.un.org/law/ilc/sessions/55/fragmentation\\_outline.pdf](http://www.un.org/law/ilc/sessions/55/fragmentation_outline.pdf), at p. 10.

138. R.B. BILDER, “The Settlement of Disputes in the Field of International Law of the Environment”, *op. cit.*, pp. 139 *et seq.*

139. P.-M. DUPUY, “Où en est le droit international de l’environnement à la fin du siècle?”, 1997 *Revue Générale de Droit International Public*, pp. 873 *et seq.*

140. So, the study carried out by Bindschedler on the settlement of disputes in the international organisations showed that in many cases “le contentieux de l’indemnité sera tout aussi exclu”, and underlined that “il existe aussi toute une série d’organisations [...] où l’on se contente de mesures correctives *ex nunc*”. D. BINDSCHEDLER, “Le règlement des différends relatifs au statut d’un organisme international”, 1968, Vol. 124, *Recueil des Cours de l’Académie de Droit International*, II, pp. 455-547, at pp. 505-506. See also : 1990, Vol. 1, *Yearbook of the International Law Commission*, Summary records of the meetings of the forty-second session, 1 May — 20 July 1990, 2170<sup>th</sup> meeting, 7 June 1990, p. 154; and B. CONFORTI, 1995, 4<sup>th</sup> ed., Editoriale Scientifica, *Diritto internazionale*, pp. 374-375.

the obligations under these conventions; and, on the other hand, by the specific aspects relating to the distribution of competences between the European Community and its Member States as regards to the matters affected.

The specific elements of the international legal regime on the climate change, from which derive obligations of integral character for the protection of collective interests, has resulted in the need for establishing a range of control mechanisms that specifically take into account such specificity. This follows a growing trend in the framework of the international environmental law.

The MCP, focussed on the facilitation of the compliance with the obligations, was initially supposed to be the cornerstone of such a system. However, since the adoption of the KP, a different approach — closer to a law-enforcement perspective — has been given overriding priority. Since the new Compliance Procedure foreseen in the KP provides for a facilitation branch, the virtuality of the MCP has been undermined.

Thus, the interest has focussed on the establishment of a mechanism (the CP) that brings together the facilitation and enforcement functions. Such a multifunctional nature has required establishing a peculiar structure of bodies, which is conditioned by the existence of groups of Parties with divergent interests and asymmetric obligations.

From the perspective of the international law, in these mechanisms of hybrid character certain typical approaches of the preventive diplomacy and quasi-judicial arrangements converge with a mixture of several legal and political elements. These will not be always easy to reconcile.

In this context, the participation of the EC and its Member States raises pretty relevant legal challenges, which have to do with the shared character of the competences that both hold regarding the matters affected by the climate change regime, as well as with the particular agreement of “joint fulfilment” of the core obligation under the KP.

The questions relating to the rules of standing applying to the EC and its Member States in the framework of the CP appear to be of particular interest. In this context, from a Community’s perspective, the distribution of competences

must be considered in relation to the principle of cooperation, and without disregarding the preservation of the interests of third parties.

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