

## THE KYOTO PROTOCOL COMPLIANCE REGIME AND TREATY LAW

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This paper examines a number of issues arising from the relationship of the *Kyoto Protocol to the Climate Change Convention* and its compliance regime with certain provisions of the law of treaties as codified in the *Vienna Convention on the Law of Treaties*. One issue is the nature of the treaty relationship between the Parties to the *Kyoto Protocol*, considered in relation to Article 30 of the *Vienna Convention* (concerning the application of successive treaties relating to the same subject matter). A second issue is whether there are any obligations on the part of signatories to the *Kyoto Protocol* to implement its provisions, notwithstanding that it has not yet come into force. This issue arises for consideration because certain provisions of the Protocol have been implemented through the medium of the Meeting of the Parties to the *Climate Change Convention*, even though the Protocol has not yet entered into force. Article 18 of the *Vienna Convention* (concerning the obligation not to defeat the object and purpose of the treaty prior to its entry into force) is relevant here. A third issue is the question whether the suspension of a State Party under compliance regimes generally, and under the *Kyoto Protocol* compliance regime in particular, is governed by the suspension rules of the law of treaties (namely, the rule in Article 60 of the *Vienna Convention*) or by the law of state responsibility (specifically, the countermeasures rule).

### I. INTRODUCTION

#### A. *The Kyoto Protocol and its Compliance Mechanism*

The *Kyoto Protocol*<sup>1</sup> (the Protocol) is a protocol to the 1992 *United Nations Framework Convention on Climate Change* (referred to in this essay as the “Climate Change Convention”).<sup>2</sup> The Protocol was adopted in 1997 at the Conference of the Parties to the Climate Change Convention. Although the *Kyoto Protocol* has not yet come into force, its entry into force is thought to be imminent. Even before its entry into force, certain of its provisions have been given some effect through an informal procedure that involves their adoption in Meetings of the Parties to the Climate Change Convention. In particular, this procedure has been adopted in connection with the compliance mechanism under the *Kyoto Protocol*. The setting up of a compliance mechanism is envisaged in Article 18 of the Protocol itself,

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<sup>1</sup> *Kyoto Protocol to the United Nations Framework Convention on Climate Change*, 16 March 1998, 37 I.L.M. 22; see online: UN Framework Convention for Climate Change <<http://unfccc.int>>. UNCCC, Conference of the Parties, 3rd. Sess., U.N.Doc.FCCC/CP/1997/L.7/Add.1 (1998). According to Article 25, it “shall enter into force on the ninetieth day after the date on which not less than 55 Parties to the Convention, incorporating Parties included in Annex I which accounted in total for at least 55 per cent of the total carbon dioxide emissions for 1990 of the Parties included in Annex I, have deposited their instruments of ratification, acceptance, approval or accession ...” As of 6 June 2003, 110 Parties ratified, which accounted for 43 per cent emissions, source: <http://unfccc.int/recourse/kthermo.html>.

<sup>2</sup> *United Nations Framework Convention on Climate Change*, 4 June 1992, 31 I.L.M. 849 (entered into force 21 March 1994). See also, UN Framework Convention for Climate Change website <<http://unfccc.int>>.

which provides as follows:

The Conference of the Parties ... serving as the meeting of the Parties to this Protocol shall, at its first session, approve appropriate and effective procedures and mechanisms to determine and to address cases of non-compliance with the provisions of the Protocol, including through the development of an indicative list of consequences, taking into account the cause, type, degree and frequency of non-compliance. Any procedures and mechanisms under this Article entailing binding consequences shall be adopted by means of an amendment to this Protocol.

In 2001, the Conference of the Parties to the Climate Change Convention adopted a text laying down the “procedures and mechanisms relating to compliance under the *Kyoto Protocol*.”<sup>3</sup> As the *Kyoto Protocol* itself has not yet come into force, the first Meeting of the Parties to the Protocol that will formally adopt this compliance mechanism has not taken place, and the amendment to the Protocol envisaged in Article 18 (see above) has therefore not yet been effected.

### B. *The Scope of the Essay*

This essay will focus on certain issues arising from the relationship of the Climate Change Convention, the *Kyoto Protocol*, and its compliance regime with certain provisions of the law of treaties as codified in the 1969 *Vienna Convention on the Law of Treaties* (the VCLT).

I wish to raise three issues in relation to the possible operation of the VCLT:

#### 1. *The nature of the treaty relationship*

What will be the nature of the treaty relationship between the Parties to the *Kyoto Protocol*? This question has to be viewed not only in relation to the relevant provisions of the *Kyoto Protocol*, but also to Article 30 of the VCLT (concerning the application of successive treaties relating to the same subject matter).<sup>4</sup>

#### 2. *Obligations of signatories*

Do the signatories to the *Kyoto Protocol* have any obligations with respect to the implementation of its provisions, notwithstanding that it has not yet come into force? As will be described below, this issue arises because certain provisions of the Protocol have been implemented through the medium of the Meeting of the Parties to the Climate Change Convention, even though the Protocol has not yet entered into force. Here, we must ask what

<sup>3</sup> *Procedures and Mechanism Relating to Compliance under the Kyoto Protocol*, FCCC Dec. 24/CP.7, FCC/CP/2001/13/Add.3, UNCCC, 8th Plenary Meeting, 7th Session 2001. The Decision stated, *inter alia*, the following:

“Recognizing the need to prepare for the early entry into force of the *Kyoto Protocol*,

Also recognizing the need to prepare for the timely operation of the procedures and timely operation of the procedures and mechanisms relating to compliance under the *Kyoto Protocol*,

Noting that it is the prerogative of the Conference of the Parties serving as the meeting of the Parties to the *Kyoto Protocol* to decide on the legal form of the procedures and mechanisms relating to compliance,

1. Decides to adopt the text containing the procedures and mechanisms relating to compliance under the *Kyoto Protocol* annexed hereto;

2. Recommends that the Conference of the Parties serving as meeting of the Parties to the *Kyoto Protocol*, at its first session, adopt the procedures and mechanisms relating to compliance annexed hereto in terms of Article 18 of the *Kyoto Protocol*.”

On the history of the negotiations of the compliance procedure under the *Kyoto Protocol* see R. Lefeber, “From The Hague to Bonn to Marakesh and Beyond: A Negotiating History of the Compliance Regime Under the *Kyoto Protocol*” (2001) 14 Hague Y.B.Int’l L. 25. See also J. Brunnée, “A Fine Balance: Facilitation and Enforcement in the Design of a Compliance Regime for the *Kyoto Protocol*” (2003) 13 Tul.Env’tl.L.J. 223.

<sup>4</sup> See section 3.1 below.

role Article 18 of the VCLT might play (concerning the obligation not to defeat the object and purpose of the treaty prior to its entry into force).<sup>5</sup>

### 3. *Suspension of State-Parties*

Is the suspension of a State Party under compliance regimes generally, and under the *Kyoto Protocol* compliance regime in particular, governed by the suspension norms of the law of treaties (namely, the rule in Article 60 of the VCLT) or by the law of state responsibility (specifically, the countermeasures rule)?<sup>6</sup>

### C. *Compliance Regimes*

Compliance regimes are designed to provide a softer approach to treaty non-compliance than the traditional, classic system of dispute settlement under international law.<sup>7</sup> The main purpose of compliance procedures, at least in their facilitative form, is to encourage a non-complying State to return to compliance without accusing it of wrongdoing, or holding it to account for the consequences that entail from wrongdoing. In other words, in focusing on assisting party states to achieve compliance rather than punishing non-compliance, compliance procedures are intended to be preventive and not remedial in nature. In general it may be said that the non-compliance regime “lacks complexity; it has a non-confrontational and transparent character; it leaves the competence for decision-making on the Contracting Parties to each Convention; and it includes a transparent and revolving reporting system and procedures.”<sup>8</sup>

The compliance regime under the Kyoto Protocol is just one of many compliance regimes currently operating in the environmental field. Other examples include the regime of the 1987 *Montreal Protocol on Substances that Deplete the Ozone Layer*,<sup>9</sup> and the *Aarhus Convention*.<sup>10</sup> These compliance regimes are designed to be fundamentally different from

<sup>5</sup> See section 3.2 below.

<sup>6</sup> See section 3.3 below.

<sup>7</sup> The Group of Legal Experts under the *Montreal Protocol* has stated that a non-compliance procedure “allows and encourages the parties to assist each other in the implementation of the control measures agreed by them and to a certain degree to prevent them from referring cases of breaches of the Protocol directly to confrontational settlement of disputes procedure.” Ms. C. Brojoklund, who was the first President of the *Montreal Protocol* Implementation Committee, described the *Montreal Protocol* NCP as “an assisting rather than dispute solving body which is to act as a new forum outside the traditional judicial framework.” Cited in, I. Rummel-Bulska, “Implementation Control: Non-Compliance and Dispute Settlement” in W. Lang, ed., *The Ozone Treaties and Their Influence on the Building of International Legal Regime* (Austria: Federal Ministry for Foreign Affairs, 1996).

<sup>8</sup> Paragraph 23.1 of the 1993 Lucerne ECE Declaration, Environment for Europe, online: United Nations Economic Commission for Europe <<http://www.unece.org/env/europe/>>. See also on the character of non-compliance regimes: G. Handl, “Controlling Implementation of Compliance with International Economic Commitments: The Rocky Road from Rio” (1994) 5 *Colo.J.Int'l.Envnt.L.& Pol'y* 329; J. Brunnée, “The Kyoto Protocol: Testing Ground for Compliance Theories?” (2003) 63/2 *Zeitschrift für Ausländisches öffentliches Recht und Völkerrecht* 255-280; see also R. Wolfrum, “Means of Ensuring Compliance with and Enforcement of International Environmental Law” (1998) 272 *RCADI* 56; G. Loibl, “Dispute Avoidance and Dispute Settlement in International Law—Some Reflections on Recent Developments” (1997) XXIV *Curso Der Derecho Internacional* 101.

<sup>9</sup> Adopted in 1992 by the Copenhagen Amendment, see Report of the Fourth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, UNEP/OzL.Pro.4/15 25 November 1992. See also: Review of the Non-Compliance Procedure of the Montreal Protocol Pursuant to Decision IX/35 of the 9th Meeting of the Parties, Ad Hoc Group of Legal and Technical Experts of Non-Compliance with the Montreal Protocol, First Session, Geneva, 3-4 July 1998.

<sup>10</sup> Decision I/7 Review of Compliance, First Meeting of the Parties, Luca, 21-23 October 2002, online: United Nations Economic Commission for Europe <<http://www.unece.org/env/pp/documents/mop1/ece.mp.pp.2.add.8.e.pdf>>.

traditional dispute settlement. As their purpose is to facilitate compliance as opposed to post-facto sanction for non-compliance, they establish multilateral fora that provide for discussion of compliance problems before they develop into formal disputes. This allows for the resolution of compliance issues without recourse to international adjudication. Further, access to these compliance procedures is broader than that to traditional dispute settlement procedures. Once again, this is because these compliance procedures are not intended to establish culpability for purposes of sanction but to aid party states in meeting their treaty obligations. Thus, under the Montreal Protocol, for example, one of the ways in which the compliance mechanism can be set in motion is through a submission by the non-complying Party itself.<sup>11</sup> Alternatively, a concerned party may invoke the procedures in question or the Secretariat may report cases of apparent non-compliance.

The 1989 *Basel Convention on Transboundary Movement of Hazardous Wastes and Their Disposal*<sup>12</sup> (the Basel Convention), for example, provides another example of the facilitative character of non-compliance procedures.<sup>13</sup> Article 1 of the “Mechanism for Promoting Implementation and Compliance” therein, adopted at the sixth meeting of the Conference of the Parties to the Basel Convention, states that: “The objective of the mechanism is to assist Parties to comply with their obligations under the Convention and to facilitate, promote, monitor and aim to secure the implementation of and compliance with the obligations under the Convention”.<sup>14</sup> Article 2 in turn states further that: “The mechanism shall be non-confrontational, transparent, cost-effective and preventive in nature, simple, flexible, non-binding and oriented in the direction of helping parties to implement the provisions of the Basel Convention. It will pay particular attention to the special needs of developing countries and countries with economies in transition, and is intended to promote cooperation between all Parties. The mechanism should complement work performed by other Convention bodies and by the Basel Convention Regional Centres.”<sup>15</sup>

Indeed, the latest mechanism represents a further softening of the approach usually taken to non-compliance in that it only contains a facilitative procedure and no enforcement procedure. In particular, it contains no provision allowing for the suspension of a non-complying Party. The facilitation procedure set out in Article 19 of the Mechanism provides only for the establishment of a *voluntary* “compliance action plan.” If compliance remains an issue after the establishment of such a compliance action plan, the most that Article 20 allows the administering Committee is (a) to consider further support, and (b) to issue a cautionary statement and to “provide” advice regarding future compliance in order to help the Parties implement the provisions of the Basel Convention and to promote co-operation between all Parties.<sup>16</sup>

Unlike traditional dispute settlement procedures, compliance mechanisms do not require the consent of the interested states. There need not be an “injured State” in order to invoke the procedure. This differs from the traditional stance under the rules of state responsibility,

<sup>11</sup> Paragraph 4 of the non-compliance procedure under the Montreal Protocol: “[w]here a Party concludes that despite having made its best, *bona fide* efforts, it is unable to comply fully with its obligations under the Protocol, it may address to the Secretariat a submission in writing, explaining, in particular, the specific circumstances that it considers to be the cause of its non-compliance. The Secretariat shall transmit such submissions to the Implementation Committee which shall consider it as soon as practicable.” Adopted by Decision IV/5 and Annexes IV and V of the Fourth Meeting of the Parties to the Montreal Protocol, UNEP/ Ozl.Pro.4/15, 25 November 1992, 32 I.L.M. 874 (1993).

<sup>12</sup> *Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, 22 March 1989, entered into force 5 May 1992, 28 I.L.M. 657 (1989).

<sup>13</sup> See Monitoring The Implementation of and Compliance with the Obligations Set Out by the Basel Convention, Geneva, December 9-13, 2002.

<sup>14</sup> Report of the Conference of the Parties to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, UNEP/CHW.6/40, 6th Meeting, Geneva, 9-13 December 2002, online: Secretariat of the Basel Convention <<http://www.basel.int/COP6/ENGLISH/Report40e.doc>>.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Ibid.*

even taking into consideration that the International Law Commission in its Articles on State Responsibility has broadened the universe of States that, in principle, may invoke the responsibility of another State.<sup>17</sup> Compliance procedures are designed to ensure continuing participation in a co-operative treaty regime and fulfilment of obligations that are not always reciprocal in nature. The underlying logic is that the failure to fulfil these obligations will affect the achievement of the common goals of a treaty, such as a treaty which has the protection of the environment as its principal aim. These treaty regimes are designed to protect the environment in such areas where the pace, magnitude and irreversibility of environmental damage render remedial measures futile and preventive action to forestall environmental damage imminent. Thus, *inter partes* punitive enforcement is ineffective in any event and compliance regimes are now focused on creating procedures that aid in securing compliance so as to prevent or forestall environmentally harmful activities in the first instance.

Not only are compliance procedures designed to prevent harmful activities, they are also meant to induce the cessation of continuing harm, such as harm to the environment. That preventive element is reflected in provisions dealing with assessment (Article 6 of the Montreal Protocol), monitoring (Article 9 of the 1979 *Convention on Long-Range Transboundary Air Pollution Treaty* “LRTAP”) and verification of compliance (Article 19 of the 1989 Basel Convention<sup>18</sup> and Article 21 of the 1995 *Straddling Stocks Agreement*<sup>19</sup>). (Should the info in parentheses be relegated to the footnotes?)

Facilitative measures are typically linked with the compliance regime. For example, in the context of ozone layer and climate change, the system of reporting and data collection provides the data needed to make the compliance mechanism work. Such facilitative measures make it possible to verify whether, and to what degree, States comply with their treaty obligations.<sup>20</sup> Even though facilitative measures could stand alone, it is useful to combine them with compliance procedures. For our purposes, these two elements of compliance regimes, *sensu largo*, are reflected in the two “branches” of the Compliance Committee, the facilitative and the enforcement branches, set up under the *Kyoto Protocol* (see section 2.2 below).

## II. THE KYOTO PROTOCOL AND ITS COMPLIANCE REGIME

### A. General Structure

The Framework 1992 Climate Change Convention acknowledges in its Preamble that climate change and its adverse effects are a common concern of mankind. Article 2 outlines the main purpose of the Convention, which is to achieve the stabilisation of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropocentric interference with the climate system. The parties to the Climate Change Convention comprise of Annex I countries (developed countries and countries with economies in transition) and non-Annex I countries (developing countries). Annex I countries are obliged to reduce

<sup>17</sup> Draft Articles on State Responsibility of States for Wrongful Acts, Articles 42 and 48, in *Report of the International Law Commission on the Work of its Fifty-third Session*, UNGAOR, 56th Sess., Supp.No.10, at 43, UN Doc. A/56/10 (2001), online: International Law Commission <<http://www.un.org/law/ilc>>. The Articles are also annexed to GA Res. 56/83, para. 2 (Dec. 12, 2001). See also James Crawford, *The International Law Commission's Articles on State Responsibility: Introduction, Text and Commentary* (Cambridge: Cambridge University Press, 2002).

<sup>18</sup> *Supra* note 12.

<sup>19</sup> *The 1995 Agreement on Straddling and Highly Migratory Fish Stocks*, 4 December 1995, 34 I.L.M. 1542 (entered into force 11 December 2001).

<sup>20</sup> C. Chinkin, “International Environmental Law in Evolution”, in: T. Jewel & J. Steele, eds., *Law in Environmental Decision-Making, National, European, and International Perspectives*, (Oxford, Clarendon Press, 1998) 247.

greenhouse emissions to 1990 levels by the year 2000.<sup>21</sup> They are also committed to financial mechanisms and technology transfer obligations to aid developing countries towards the achievement of the “effective implementation” of the regime.<sup>22</sup>

Brunnée points out that: “The dichotomy between Annex I and non-Annex I party commitments also underpins the Kyoto Protocol. It contains no new commitments for non-Annex I parties, only a series of soft, highly qualified, policy-related commitments, and the language neither envisages future emission-related commitments by developing countries nor provides for their creation.”<sup>23</sup>

The main provisions of the Kyoto Protocol are contained in Articles 3 (imposing legally-binding emissions reductions and limitations by the Annex I parties),<sup>24</sup> 5 and 7 (monitoring and reporting commitments). Furthermore, in order to discharge their commitments, Annex I parties can employ various mechanisms<sup>25</sup> which are intended to help countries meet their targets. These mechanisms are primarily joint implementation, the clean development mechanism and emissions trading. Architecturally, the two central features of the Kyoto Protocol are that (1) all the mechanisms are subject to Article 3.1 (the core provision of the Protocol) and (2) the mechanisms are themselves interrelated. For example, the transfer or acquisition of reduction units between the Parties, for the purpose of Article 3, is subject to compliance by the Parties with their obligations under Articles 5 and 7. Non-compliance would entail the Parties losing their eligibility for such transactions.

The key provision is Article 18, which sets up the system of non-compliance under the Kyoto Protocol.<sup>26</sup> A major prerequisite of any effective non-compliance system is transparency amongst the several Parties. A sound national reporting system is critical. The Climate Change Convention had already placed a reporting obligation on all Parties,<sup>27</sup> and the Kyoto Protocol is based on a system of in-depth reporting on the general compliance of the Parties with Article 3.<sup>28</sup> There is, furthermore, a system of expert assessment of

<sup>21</sup> Article 4.2 (a) of the Convention.

<sup>22</sup> Articles 4.1 and 12.1 of the Convention.

<sup>23</sup> Brunnée, at 230, *supra* note 3.

<sup>24</sup> Article 3 (1): “The Parties included in Annex I shall, individually or jointly, ensure that their aggregate anthropogenic carbon dioxide equivalent emissions of the greenhouse gases listed in Annex A do not exceed their assigned amounts, calculated pursuant to their quantified emission limitation and reduction commitments inscribed in Annex B and in accordance with a view to reducing their overall emissions of such gases by at least 5 percent below 1990 levels in the commitment period 2008 to 2012.” Individual parties’ “quantified emissions reduction and limitations commitments” (“QELRCs”) are included in Annex B of the Protocol and their resulting “assigned amounts” range from eight percent reductions to ten percent increases.

<sup>25</sup> Other significant provisions are contained in Article 4 (joint fulfilment), Article 6 (joint implementation), Article 12 (use of clean development mechanism—the “CDM”), and Article 17 (international emission trading).

<sup>26</sup> “The Conference of the Parties serving as the meeting of the Parties to this Protocol shall, at its first session, approve appropriate and effective procedures and mechanisms to determine and to address cases of non-compliance with the provisions of this Protocol, including through the development of an indicative list of consequences, taking into account the cause, type, degree and frequency of non-compliance. Any procedures and mechanisms under this Article entailing binding consequences shall be adopted by means of an amendment to this Protocol.” The Procedures and mechanisms relating to compliance under the Protocol were adopted by Decision 24/CP.7 at the 8th plenary meeting of the COP, 10 November 2001. See FCCC/CP/2001/13/Add.3, at p. 64.

<sup>27</sup> Article 12.1.

<sup>28</sup> Article 7: “1. Each Party included in Annex I shall incorporate in its annual inventory of anthropogenic emissions by sources and removals by sinks of greenhouse gases ... submitted in accordance with relevant decisions of the Conference of the Parties, the necessary supplementary information for the purposes of ensuring compliance with Article 3, to be determined in accordance with paragraph 4 below. 2. Each party included in Annex I shall incorporate in its national communication, submitted under Article 12 of the Convention, the supplementary information necessary to demonstrate compliance with its commitments under this Protocol, to be determined in accordance with paragraph 4 below. 3. Each Party included in Annex I shall submit the information required under paragraph 1 above annually, beginning with the first inventory due under the Convention for the first year of the commitment period after this Protocol has entered into force for that Party. Each such Party shall submit the information required under paragraph 2 above as part of the first

the implementation of the commitments of the Parties (Article 8.3). These in turn lead to expert reports to the Conference of the Parties which serves as a meeting of Parties to the Protocol (hereafter, “COP/MOP”), and which takes a decision on any matter required for the implementation of the Protocol itself (Article 8.6).

While there are many approaches towards securing compliance with treaties, varying from a soft “managerial” approach to one based on enforcement procedures,<sup>29</sup> the *Kyoto Protocol* combines both these approaches.

### B. *The Facilitative and Enforcement Branches*

The system under the *Kyoto Protocol* is administered by a Compliance Committee (the “CC”). This body functions as a plenary organ with a bureau consisting of two branches, the facilitative branch and the enforcement branch.<sup>30</sup> They are each required to co-operate with the other,<sup>31</sup> and generally speaking, the system involves highly developed procedures for reporting, expert assessment and the development of appropriate action plans. Emphasis is placed on the input of the non-complying Party itself.

#### 1. *The facilitative branch*

As its name indicates, the facilitative branch is intended to facilitate and promote compliance by the parties with the Protocol commitments. Thus, it is responsible for providing advice and facilitation to the Parties in implementing the Protocol, and for promoting compliance by the Parties with their Protocol commitments. It is also responsible for providing early warning of potential non-compliance. Furthermore, the facilitative branch determines whether an Annex I Party is in compliance with the following responsibilities: (a) its qualified emissions limitation or reduction commitment under Article 3.1 of the Protocol; (b) the methodological and reporting requirements under Articles 4, 5.1-2 and 7.1 of the Protocol; and (c) the eligibility requirements under Articles 6, 12 and 17 of the Protocol (Section V.4 a-c of the procedure).

In carrying out its tasks, the facilitative branch (which is required to take into account the principle of common but differentiated responsibilities) may do one or more of the following things. Firstly, to provide advice and facilitate the provision of assistance to individual Parties regarding the implementation of the Protocol. Secondly, to facilitate financial and technical assistance, including technology transfer and capacity building, taking into account Article 4.3-5 of the Climate Change Convention and thirdly, to assist in the formulation of recommendations to the Party concerned, taking into account Article 4.7 of the Climate Change Convention.<sup>32</sup>

#### 2. *The enforcement branch*

As well as determining non-compliance by a Party, the enforcement branch also determines whether to apply adjustments or corrections to a Party’s emissions obligations in the event of a disagreement between an expert review team under Article 8 of the Protocol and the Party in question (Section V.5 a-b of the procedure).

national communication due under the Convention after this Protocol has entered into force for it and after the adoption of guidelines as provided for in paragraph 4 below ...”

<sup>29</sup> J. Werksman, *Compliance and the Kyoto Protocol: Building a Backbone into a “Flexible” Regime*, (1998) 9 Y.B.Int’l Env’tl.L. 48 at 56.

<sup>30</sup> Article II.1 of the procedure. On elections to the CC, see Article II. 4-6. On the composition of the facilitative branch see Article IV.1-3.

<sup>31</sup> Section II, para. 7 of the procedure.

<sup>32</sup> Section XIV of the procedure.

The measures available to the enforcement branch are detailed in Section XV of the procedure. In the event of breach of the obligations under Article 5 (1) or (2) or Article 7 (1) or (4) of the Protocol by either Annex I or Annex II Parties, the enforcement branch may: declare non-compliance and develop a compliance action plan. This plan is submitted by the Party itself for review and assessment in accordance with paragraphs 2 and 3 of the compliance procedure.

If the enforcement branch determines that an Annex I Party does not meet one or more of the eligibility requirements under Articles 6 (emissions transfer), 12 (clean development mechanism) or 17 (emissions trading), it is required to suspend the eligibility of that Party under those articles. Following such a suspension, the Party's eligibility may be reinstated in accordance with Section X.3 of the compliance procedure.

### C. *Outstanding Issues*

#### 1. *The Multilateral Consultative Process*

There are, however, unresolved issues concerning the non-compliance procedure under the *Kyoto Protocol*, such as its relationship with the Multilateral Consultative Process (the "MCP"),<sup>33</sup> and the relationship of the non-compliance procedure with the dispute settlement procedure.<sup>34</sup>

The MCP is not in operation yet. However, according to the Report of the Climate Change Convention's *Ad Hoc* Group on Article 13, the MCP will in due course implement the Convention on the basis of transparency and co-operation, in a non-judicial, non-confrontational, and timely manner. The Multilateral Consultative Committee (the "MCC") was established in order to consider the issues of Parties' implementation and will activate the MCP in the event of non-compliance, at the request of the non-complying Party, another concerned Party (or group of Parties), or the COP. The MCC's task will thus be to advise the Parties, and clarify the issues with a view to resolving the problem. In this regard, the MCC is to make recommendations to the COP on measures to assist the non-complying Party to achieve compliance.<sup>35</sup> Brunnée says:

The facilitative approach of the MCP reflects the nature of commitments in the [Climate Change Convention]. The MCP is not intended to produce "findings" of non-compliance but is aimed at bringing about parties' compliance with their convention obligations. By definition, this type of approach cannot adequately address non-compliance with protocol commitments and, in particular, the target-related commitments of Annex I parties. Whether any application of the MCP-type process to the Protocol is appropriate will depend on the non-compliance procedures that the

<sup>33</sup> Article 16: "The Conference of the Parties serving as the meeting of the Parties to this Protocol shall, as soon as practicable, consider the application to this Protocol of, and modify as appropriate, the multilateral consultative process referred to in Article 13 of the Convention, in the light of any relevant decisions that may be taken by the Conference of the Parties. Any multilateral consultative process that may be applied to this Protocol shall operate without prejudice to the procedures and mechanisms established in accordance with Article 18." Article 13 of the Climate Change Convention reads as follows: "The Conference of the Parties shall, at its first session, consider the establishment of a multilateral consultative process, available to Parties on their request, for the resolution of questions regarding the implementation of the Convention."

<sup>34</sup> Article 19 of the Kyoto Protocol: "The provisions of Article 14 of the Convention on settlement of disputes shall apply *mutatis mutandis* to this Protocol." Article 14 of the Climate Change Convention provides for the settlement of disputes by negotiation or non-binding conciliation, or, if the Parties so declare, by the International Court Justice and/or arbitration.

<sup>35</sup> *Ad Hoc* Group on Article 13, U.N. FCCC. U.N. FCCC/AG13/1998/2 (1998), Decision 10/CP, adopted by the COP 4.

parties end up developing pursuant to Article 18. To the extent that these encompass facilitative approaches, there may be no need for a protocol-specific MCP.<sup>36</sup>

It appears therefore that the mandate of the facilitative branch of the Compliance Committee is analogous to the proposed mandate of the MCC. For this reason, in my view, there is really no need to activate the MCP at all.

## 2. *Relationship between the non-compliance procedure and the dispute settlement procedure*

Issues concerning the relationship between the settlement of disputes procedure (the “SDP”) and the non-compliance procedure of the Kyoto Protocol form a subset of a broader and still unresolved problem in international law of how such procedures should interact with each other.

Exhaustive presentation of that issue, however, exceeds the framework of this study.<sup>37</sup> Suffice to say that the difficult relationship between these two regimes was cause for much concern during the Montreal Protocol discussions and no agreement was reached as to the priority between these two systems. As a consequence of the parallel existence of the non-compliance regime and the SDP, a State in default could find itself subjected to both systems. The position of such a State would be particularly aggravated under the non-compliance system of the Kyoto Protocol if the enforcement branch imposes strong measures against it. The possibility of suspension of the rights of a party in default creates a further, grave complication. Suspension arguably places certain parts of the non-compliance procedure within the ambit of the law of state responsibility, including the possibility of countermeasures, and raises serious questions regarding its relationship to the provisions of the 1969 Vienna Convention on the Law of Treaties. As a practical matter, not only does the possibility of unnecessary competition between the two regimes exist, actual conflict between different findings of the two procedures will be problematic.

### III. THE KYOTO PROTOCOL AND THE LAW OF TREATIES

#### A. *The Kyoto Protocol and Article 30 of the Vienna Convention on the Law of Treaties*

##### 1. *The issue*

The manner in which the compliance regime under the Protocol was introduced means that all Parties to the Protocol may be Parties to the amendment containing the compliance regime. In effect, the Protocol containing the compliance regime amendment will constitute a later treaty on the same subject matter as the Protocol without the compliance regime. Understanding the treaty relationship between States that are parties to this later treaty and States that are only parties to the Protocol will, therefore, become an important issue. In the general law of treaties, this situation is governed by Article 30 of the VCLT.<sup>38</sup>

<sup>36</sup> Brunnée, *supra* note 3 at 241.

<sup>37</sup> See M. Koskenniemi, “Breach of a Treaty or Non-compliance? Reflections on the Enforcement of the Montreal Protocol”, (1992) 3*YbIEL*123; M. Fitzmaurice and C. Redgwell, “Environmental Non-Compliance Procedures and International Law”, (2000) 30 *Nethl.Y.B.I.L.* 36 at 43-52.

<sup>38</sup> Vienna Convention Article 30: “1. Subject to Article 103 of the Charter of the United Nations, the rights and obligations of State Parties to successive treaties relating to the same subject-matter shall be determined in accordance with the following paragraphs. 2 When a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier treaty, the provisions of that other treaty prevail. 3. When all the parties to the earlier treaty are also parties to the later treaty but an earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are

## 2. Article 30 of the VCLT (*States Parties to Successive Treaties*)

Article 30 of the VCLT represents one of the most complicated and obscure areas in the law of treaties.<sup>39</sup> Sinclair summarises the principles underlying Article 30:

- (a) If a treaty is subject to, or is not to be considered incompatible with, another treaty, that other treaty will prevail;
- (b) As between Parties to a treaty who become parties to a later, inconsistent, treaty, the earlier treaty will prevail only where its provisions are not incompatible with the later treaty;
- (c) As between a Party to both treaties and a party to only one of them, the treaty to which both are Parties will govern mutual rights and obligations of the States in question.<sup>40</sup>

The most important feature of Article 30 is its residual character. It operates only in the absence of express treaty provisions regulating priority. Although it is not indicated expressly in the text of the Article, its residual character was confirmed by Sir Humphrey Waldock at the Diplomatic Conference in Vienna.<sup>41</sup> One thing that emerged was that not all differences between treaties must entail incompatibility within the meaning of Article 30, paragraph 3.<sup>42</sup> Secondly, the terms “earlier” and “later” treaty are to be interpreted on the basis of the moment of adoption of the text and not of its entry into force. However, the rules laid down in Article 30 bind each Party to a treaty from the date of entry into force of the treaty for that Party.<sup>43</sup> Thirdly, the expression “relating to the same subject matter” must also be understood strictly. Therefore it does not apply to cases where a general treaty has an indirect impact on the content of a particular provision of an earlier treaty, a situation that would be covered by the maxim *generalia specialibus non derogant*,<sup>44</sup> according to which specific provisions of a treaty retain priority over general ones.

Sinclair considered Article 30 to be “in many respects not entirely satisfactory.” He goes on to elaborate that:

The rules laid down fail to take account of the many complications which arise when there coexist two treaties relating to the same subject-matter, one negotiated at the regional level ... and another negotiated within the framework of a universal organisation. The complications are perhaps such that no attempt to lay down general rules would have disposed of all the difficulties; this is an area where State practice is continually developing, and where it may possibly have been premature to seek to establish fixed guidelines. Perhaps little harm has been done so long as the Convention rules are regarded as residuary in character ....<sup>45</sup>

compatible with those of the later treaty. 4. When the parties to the later treaty do not include all the parties to the earlier one: (a) as between States Parties to both treaties the same rule applies as in paragraph 3; (b) as between a State Party to both treaties and a State Party to only one of the treaties, the treaty to which both States are Parties governs their mutual rights and obligations. 5. Paragraph 4 is without prejudice to Article 41, or to any question of the termination or suspension of the operation of the treaty under article 60 or to any question of responsibility which may arise for State from the conclusion of or application of a treaty the provisions of which are incompatible with its obligations towards another State under another treaty.” See generally: J.B. Mus, “Conflicts between Treaties in International Law”, (1998) 45 *Neth.Int'l.L.Rev.* 208. The *Kyoto Protocol* does not contain so-called “saving clauses,” *i.e.*, clauses indicating that the terms of an earlier agreement prevail over incompatible clauses of a later agreement. Absent a saving clause, the terms of a later agreement prevail over incompatible clauses of an earlier agreement for states parties to both agreements.

<sup>39</sup> Sir Ian Sinclair, *The Vienna Convention on the Law of Treaties*, 2nd ed. (Manchester: Manchester University Press, 1984).

<sup>41</sup> *Ibid.* at 97.

<sup>42</sup> *Ibid.* at 97, Sinclair citing Yasseen.

<sup>43</sup> *Ibid.* at 98.

<sup>44</sup> *Ibid.* at 98.

<sup>45</sup> *Ibid.* at 98.

### 3. *Article 30 in relation to the Kyoto Protocol*

As discussed in section 1 above, the Compliance Mechanism of the *Kyoto Protocol* was adopted by the Conference of the Parties to the Climate Change Convention, effectively in pursuance of Article 18 of the Protocol.<sup>46</sup> The operative words of Article 18, in the present context (for present purposes?), are, “Any procedures and mechanisms under this Article entailing binding consequences shall be adopted by means of an amendment to this Protocol.” Due to the residual character of Article 30 of the VCLT, when a treaty contains an amendment procedure, that procedure will apply. The *Kyoto Protocol* contains an amendment procedure in Article 20 which may be summarised as follows: Firstly, any Party may propose amendments to the Protocol. Secondly, the Parties are enjoined to make every effort to reach an agreement on any proposed amendment by consensus. If, however, consensus cannot be reached, as a last resort the amendment will be adopted by a three-fourths majority vote of the Parties present and voting at the meeting. Thirdly, an amendment adopted in accordance with this procedure will enter into force for those Parties that have accepted it on the ninetieth day after the date of receipt by the Depositary of an instrument of acceptance by at least three-fourths of the Parties. Fourthly, the amendment will enter into force for any other Party after the date on which that Party deposits with the Depositary its instrument of acceptance.

Under the foregoing procedure, an amendment binds only a Party that accepts it. The principle that a treaty does not create either obligations or rights for a third State without its consent<sup>47</sup> (*pacta tertiis nec nocent nec prosunt*) naturally applies to the amendment of a treaty.<sup>48</sup> Therefore, if the later amendment to the treaty does not include all the Parties to an earlier one, Article 30 paragraph 4 (b) of the VCLT will apply, with the result that the treaty to which both States are Parties governs their mutual rights and obligations. Therefore when not all the States Parties to the *Kyoto Protocol* are also Parties to the amendment introducing the non-compliance procedure, the unamended Protocol would govern the relationship as between States Parties to the Protocol only and States Parties to both the Protocol and the amendment. The amended Protocol would then apply to States Parties to both the Protocol and the amendment.

The problem of compatibility between environmental treaties and other treaties with overlapping subject matter is not confined to the *Kyoto Protocol* and its non-compliance regime.<sup>49</sup> It may be questioned, in fact, whether any regime of detailed formal and inflexible legal rules, such as those in Article 30 of the VCLT, can resolve the complex problem of conflicts between treaties. Safrin describes the problem in the following practical terms:

...international lawyers and negotiators may find it more difficult to resolve the substantive issues of whether the parties actually intended to modify their existing international rights and obligations in the event of an unanticipated conflict between successive agreements. Instead, the issue may be reframed into an overarching and perhaps unanswerable question of which set of important international goals reflected in a series of treaties, such as affecting trade, human rights, law enforcement, the environment, and so on, holds greater import.<sup>50</sup>

<sup>46</sup> For the text of Article 18, see Section 1.1 above.

<sup>47</sup> VCLT Article 34.

<sup>48</sup> See “Third Report of the Special Rapporteur on the Law of Treaties” in *Yearbook of the International Law Commission* 1958, vol. 2 at 43. (“Since anything that some of the parties to a treaty do *inter se* under another treaty is clearly *res inter alios acta*, it cannot in law result in any diminution of the obligations of these parties under an earlier treaty, or affect juridically the rights or position of the other parties, which remain legally intact and subsisting.”)

<sup>49</sup> S. Safrin, “Treaties in Collision? The Biosafety Protocol and the World Trade Organization Agreements”, (2002) 96 A.J.I.L. 606.

<sup>50</sup> *Ibid.* at 622

Some answers to these problems may be found by examining the relationship between environmental treaties and the World Trade Organisation (the WTO). There is a cluster of highly important environmental treaties that preceded the creation of the WTO and potentially clash with the agreements resulting from the 1994 Uruguay Trade Round. Central among them are the 1973 *Convention on the International Trade in Endangered Species*, the 1987 Montreal Protocol and the 1989 Basel Convention.

The subject of conflict between these treaties and the WTO agreements has been the subject of a voluminous literature.<sup>51</sup> Curiously Safrin observes that: "If anything, the operations of these trade-related multilateral environmental agreements appear remarkably unaffected by the later-time Uruguay Round agreements."<sup>52</sup> However, with the greatest respect for Safrin's views, her observations do not contain any lasting solution to this problem. According to her description of existing practice, the coexistence of conflicting treaties thus far has relied entirely on the passive acceptance of the *status quo*. However, this practice may be inadequate to provide a long-term solution. In my view, one possible source of such a solution lies in environmental law concepts such as the doctrine of the common heritage of humankind (as contained in the Preamble of the Climate Change Convention)<sup>53</sup> and the concept of intergenerational equity, which may be expected to have an important, if indirect, influence on the issue. In my view, the undisputed importance of environmental issues to humankind should prevail over technical legal rules of precedence, a trend that is, I believe, already evinced in the relationship between the WTO and environmental treaties. We have to look at future practice in relation to these concepts rather than at rules codified in Article 30.

## B. Article 18 of the Vienna Convention

### 1. General considerations

What obligations, if any, do the signatories to the *Kyoto Protocol* have notwithstanding that the Protocol has not yet come into force? Article 18 of the VCLT<sup>54</sup> contains an "interim obligation" not to defeat the object of a treaty prior to its entry into force.<sup>55</sup> This interim obligation becomes operational when the signature of a State does not constitute the final stage of its consent to be bound by a treaty, or (even) when a State has expressed its consent to be bound, the treaty has not entered into force. Aust argues that:

It is sometimes argued that a state which has not ratified a treaty, must, in accordance with Article 18, nevertheless comply with it, or at least, do nothing inconsistent with its provisions. Such an argument is clearly wrong, since the act of ratification would then have no purpose because the obligation to perform the treaty would not then be dependent on ratification. The obligation in Article 18 is only to "refrain" (a relatively

<sup>51</sup> See e.g. S. Charnovitz, "Critical Guide to the WTO's Report on Trade and Environment", (1997) 14 *Ariz.J.Int'l & Comp.L* 347-348, *Supra* note 49.

<sup>52</sup> *Supra* note 49 at 624.

<sup>53</sup> "Acknowledging that change in the earth's climate and its adverse effects are a common concern of human kind."

<sup>54</sup> Obligation not to defeat the object and purpose prior to its entry into force: "A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to a treaty; or (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed."

<sup>55</sup> See generally P. McDade, "The Interim Obligation between Signature and Ratification of a Treaty: Issues Raised by the Recent Actions of Signatories to the Law of the Sea Convention with Respect to the Mining of the Deep Seabed", (1985) 32 *Neth.Int'l.L.Rev.* 5; J. Charne, "The Interim Obligation of Article 18 of the Vienna Convention on the Law of Treaties: Making Sense of an Enigma", (1991) 25 *Geo.Wash.J.Int'l L.& Econ.* 71 .

weak term) from acts which would “defeat” (a strong term) the object and purpose of a treaty. The signatory state must therefore not do anything which would affect its *ability* fully to comply with the treaty once it entered into force. It follows that it does not have to abstain from all acts which will be prohibited after entry into force. Nonetheless the state may not do any act which would (not merely might) invalidate the basic purpose of the treaty.<sup>56</sup>

## 2. *The Kyoto Protocol, the 1992 Climate Change Convention and Article 18 of the Vienna convention*

The Kyoto Protocol provides the following procedure for its entry into force:

This Protocol shall enter into force on the ninetieth day after the date on which not less than 55 Parties to the Convention, incorporating Parties included in Annex I which accounted in total for at least 55 percent of total carbon dioxide emissions for 1990 of the Parties included in Annex I, have deposited their instruments of ratification, acceptance, approval or accession.<sup>57</sup>

Therefore, there are two triggers for the Protocol’s entry into force. The first trigger is the ratification or accession by 55 governments (As of 29 July 2004, there were 84 signatures and 124 ratifications, amounting to 44.2% of total emissions).<sup>58</sup> The second trigger is that ratifying or acceding governments must include developed countries representing at least 55 percent of that group’s 1990 carbon dioxide emissions. At this stage the developed countries which have ratified the Protocol account for 43.9 percent of that group’s 1990 carbon dioxide emissions. It is anticipated that Russia will soon ratify the Kyoto Protocol and since it represents 17.4 percent of the group’s 1990 emissions, the 55 percent requirement would automatically be met upon Russian ratification.

It must be noted that neither the Protocol itself nor a decision by the Parties was the basis for the provisional application of the *Kyoto Protocol*. Thus far the issues concerning the implementation of the *Kyoto Protocol* have been addressed at the Conference of the Parties of the Climate Change Convention.<sup>59</sup>

The following example is a case in point. The Conference of the Parties (the “COP”) of the Climate Change Convention at its 8th Meeting,<sup>60</sup> serving as a Meeting of the Parties (the “MOP”) of the *Kyoto Protocol*,<sup>61</sup> addressed issues arising from the Kyoto Protocol and took action directed at Parties to the Protocol and to the Climate Change Convention. The COP requested those Parties to the Climate Change Convention that are also Parties to *the Kyoto Protocol* to submit a report by 1 January 2006 in order to provide the COP with a basis for reviewing progress by 2005 (in accordance with Article 3, paragraph 2 of the

<sup>56</sup> A. Aust, *Modern Treaty Law and Practice*, (Cambridge: Cambridge University Press, 2000) at 94 (footnotes omitted).

<sup>57</sup> Kyoto Protocol, Article 25, para. 1.

<sup>58</sup> Online: United Nations Framework Convention on Climate Change <<http://unfccc.int/resource/kpstats.pdf>>.

<sup>59</sup> According to Article 7 of the *Kyoto Protocol*, each Party is obliged to incorporate in its annual reporting an inventory of anthropogenic emissions by sources and removal by sinks in accordance with the decision of the Conference of the Parties to the Climate Change Convention, and therefore within the legal framework of the Convention; further, according to Article 7.2, each Party included in Annex I must incorporate in its national communication, submitted under Article 12 of the Convention (communications of information related to implementation), the supplementary information necessary to demonstrate compliance with its commitments under the Protocol. Therefore, the possibility that the Parties to the *Kyoto Protocol* might, before it was in force, act within the Climate Change Convention, which was already in force, is incorporated in the terms of the Protocol.

<sup>60</sup> 23 October-1 November 2002, New Delhi, online: United Nations Framework Convention on Climate Change <<http://unfccc.int/cop8/index/html>>.

<sup>61</sup> According to Article 13 of the *Kyoto Protocol*, the Conference of the Parties of the Climate Change Convention serves as the Meeting of the Parties of the *Kyoto Protocol*.

Protocol). Thus, Switzerland, for example, submitted in its national report that it agreed to cut its total greenhouse gas emissions by 8 percent of its 1990 emissions levels between 2008 and 2012. National reports on implementation of the *Kyoto Protocol* were submitted not on the basis of its provisional application, but within the framework of the Climate Change Convention.<sup>62</sup>

By using the COP to implement the *Kyoto Protocol*, an ingenious procedure that allows the adoption of decisions concerning the implementation of a treaty not yet in force through the medium of a binding agreement has been developed.<sup>63</sup> The implementation of the Protocol would exceed the requirements of Article 18 of the VCLT which only imposes a limited obligation not to frustrate the object and purpose of the treaty. Notably, in this regard, the Parties to the Climate Change Convention have already committed themselves to meeting the emissions targets agreed upon in the *Kyoto Protocol* and to the introduction of its mechanisms. One reason for this is that the entry into force of the *Kyoto Protocol* is imminent and its domestic implementation requires the employment of great financial resources and the introduction of structural changes of far reaching nature. States are therefore eager to begin taking steps towards meeting their Protocol commitments.<sup>64</sup>

Unlike the Climate Change Convention, which is only a framework convention, the *Kyoto Protocol* has thereby introduced a strict and structured regime on the reduction of greenhouse gases emissions that States Parties are prepared to follow in order to protect the global climate even before the Protocol enters into force.

### C. Material Breach of a Treaty and the *Kyoto Protocol*

An issue concerning the material breach of a treaty in connection with compliance arises, however, in relation to one of the measures that may be adopted under a compliance regime, namely the suspension of a State Party to a treaty. As I pointed out above, the compliance mechanism of the *Kyoto Protocol* applies only to Annex I Parties that do not meet one or more of the eligibility requirements under Articles 6, 12 and 17 of *Kyoto Protocol*. Suspension is limited to suspension of the eligibility of the Party concerned under these Articles, and not of the Party's rights under the *Kyoto Protocol* generally. Articles 6 and 17 relate to emissions trading and Article 12 relates to the clean development mechanism.<sup>65</sup>

<sup>62</sup> See also, Report to the UNFCCC from the EC on Community Actions Regarding Global Observing Systems, online: United Nations Framework Convention on Climate Change <<http://unfccc.int/resources/docs/gcos/engocs.pdf>>.

<sup>63</sup> There are several decisions adopted in such manner. See e.g., Decisions in progress on Articles 5, 7 and 8 of the *Kyoto Protocol* (FCCC/CP/2001/5/add.2); Revised decision and guidelines text for Articles 5, 7 and 8 of the *Kyoto Protocol* (FCCC/CP/2001/INF.5); Views from Parties on "demonstrable progress" under Article 3.3 of the *Kyoto Protocol* (FCCC/CP/2001/MSC.2); Draft Guidelines for a review process under Article 8 of the *Kyoto Protocol* (FCCC/SBSTA/2000/7); Draft Guidelines for National Systems under Article 5.1 (FCCC/SBSTA/2000/INF.5/Add.1); Submissions from Parties (FCCC/SBSTAS/2000.MISC.1 and Add.1-2; FCCC/SBSTA/2000/MISC.7 and Add.1-2), Online: United Nations Framework Convention on Climate Change <<http://unfccc.int/issues/art578.html>>.

<sup>64</sup> There are many issues relating to the implementation of the *Kyoto Protocol* which require prompt and global action, such as special situation of developing States, technology transfer and capacity building. It was stated such at the 8th Conference of the Parties of the Climate Change Convention, in Decision CP.8, The Delhi Ministerial Declaration on Climate Change and Sustainable Development, in the following terms: "[a]daptation to the adverse effects of climate change is of high priority for all countries. Developing countries are particularly vulnerable, especially the least developed countries and small island developing States. Adaptation requires urgent attention and action on the part of all countries. Effective and result-based measures should be supported for the development of approaches at all levels of vulnerability and adaptation as well as capacity building for the integration of adaptation concerns into sustainable development strategies. The measures should include full implementation of existing commitments under the Convention and the Marrakesh Accords."

<sup>65</sup> Article 12 defines the purpose of the clean development mechanism as being to "assist Parties not included in Annex I in achieving sustainable development and in contributing to the ultimate objective of the Convention,

Such compliance regimes may best be viewed as a sort of halfway house between collective suspension of a single obligation under a multilateral treaty and collective suspension of the treaty instrument as a whole.

If a party materially breaches a multilateral treaty, however, Article 60 of the VCLT allows the other parties unanimously, or individual parties under certain circumstances, to suspend the treaty in whole or in part. In order to constitute a material breach under the Vienna Convention, there must be a repudiation of the treaty not sanctioned by the Vienna Convention, or the violation of a provision essential to the accomplishment of the object and purpose of the treaty. Article 60 of the VCLT also provides for termination of a treaty in case of material breach, a means that is however not contemplated under non-compliance procedures. On the other hand, the law of state responsibility provides for countermeasures that, in the case of a material breach, could resemble the suspension of treaty obligations under VCLT Article 60.<sup>66</sup> Thus, compliance procedures generally provide for flexible responses outside the realms of both state responsibility/countermeasures and material breach of a treaty, though they may also, at the same time, embody elements of both responses.

Notably, all the current non-compliance procedures, with the sole exception of the Kyoto Protocol, refer to suspension “in accordance with the applicable rules of international law concerning suspension of the operation of a treaty.” It is not entirely clear, however, what is intended by this formulation. It could refer to the provisions of the VCLT concerning suspension (Article 60 and Articles 65-68). However, all the relevant Articles in the VCLT refer to individual or collective responses of the Parties in relation to suspension, while the current non-compliance procedures generally rely on a sort of specialised collective mechanism created by these conventions. Significantly, there is no place under these procedures for individual or collective State responses outside the mechanism specifically provided for. This could mean the exclusion of Article 60 of the VCLT. If so, such references to “international law” would be limited to Articles 65-68 of the VCLT, safeguarding the rights of the Parties.

Under the Montreal Protocol, suspension is, for example, included in an indicative list of measures that might be taken by a meeting of the Parties in respect of non-compliance with the Protocol. This is couched in the following terms: “Suspension [of a party is permitted], in accordance with the applicable rules of international law concerning the suspension of the operation of a treaty, of specific rights and privileges under the Protocol, whether or not subject to time limits, including those concerned with industrial rationalisation, production, consumption, trade, transfer of technology, financial mechanism and institutional arrangements.”<sup>67</sup> Under the *Aarhus Convention*, the Meeting of the Parties may likewise

and to assist Parties included in Annex I in achieving compliance with their quantified emission limitation and reduction commitments under Article 3.” (Article 12.2.) Under Article 12.3 (b), “Parties included in Annex I may use the certified emission reductions accruing from such project activities to contribute to compliance with part of their quantified emission limitation and reduction commitments under Article 3 ...”

<sup>66</sup> The difference between countermeasures and VCLT Article 60 has been acknowledged by James Crawford, the Special Rapporteur of the International Law Commission’s State Responsibility project. He said: “Countermeasures are to be clearly distinguished from the termination or suspension of treaty relations on account of the material breach of a treaty by another State, as provided for in article 60 of the Vienna Convention on the Law of Treaties. Where a treaty is terminated or suspended in accordance with article 60, the substantive legal obligations of States parties will be affected, but it is quite different from the question of responsibility that may already have arisen from the breach. Countermeasures involve conduct taken in derogation from a subsisting treaty obligation but justified as a necessary measure and proportionate response to an internationally wrongful act of the State against which they are taken. They are essentially temporary measures, taken to achieve a specified end, whose justification terminates once the end is achieved.” Report of the 53rd Session of the International Law Commission, 56 UN GAOR, Supp. 10 (A/56/10), at page 326 (2001).

<sup>67</sup> Adopted by Decision IV/5 and Annex IV and V of the Fourth Meeting of the Parties to the Montreal Protocol, UNEP/OzL.Pro.4/15, 25 November 1992.

“suspend, in accordance with the applicable rules of international law concerning the operation of a treaty, the special rights and privileges accorded to the Party concerned under the Convention.”<sup>68</sup> The reference to rules of general international law concerning suspension contained in the compliance mechanisms of the Montreal Protocol and *the Aarhus Convention* could, as I have said, refer to Article 60 of the VCLT, codifying the general rules of international law relating to suspension of rights under a particular treaty as a result of a material breach of that treaty. Even if so, however, Article 60 does not expressly apply to non-material breaches. It appears that in the case of non-material breach at least, the law of countermeasures, including the requirement of proportionality, may apply instead.<sup>69</sup>

It is worth noting that the Montreal Protocol’s non-compliance procedure envisages not only suspension of the operation of a treaty (the Protocol itself), but also of specific rights and privileges under the Protocol. The *Aarhus Convention*’s non-compliance system provides, on the other hand, only for suspension of special rights and privileges, but not for suspension of the operation of the whole treaty. The procedure under the *Kyoto Protocol* likewise provides that suspension of eligibility regarding Articles 6, 12 and 17 of the Protocol will be effected (only) “in accordance with relevant provisions under those Articles”.<sup>70</sup> But while all the other existing non-compliance procedures provide that suspension is implemented by the conference or meeting of the parties as the highest body set up under the treaty and that, in relation to suspension, rules of general international law apply, presumably as codified in the VCLT, the *Kyoto Protocol* is exceptional in this respect as a decision to suspend a Party would be adopted by the enforcement branch. Yet the provisions of the *Kyoto Protocol* neither create a detailed procedure nor refer to general rules of international law. Thus, the critical question which remains to be seen is whether a detailed procedure will be adopted or, if not, whether Article 60 will apply by default.

Article 60 of the VCLT is *lex generalis* regarding material breach of a treaty, and it is subject to the general procedural requirements of Articles 65-68 which relate to notification to other parties of a claimed breach, a three-month waiting period in the absence of special urgency before action is taken, and resort to conciliation if other dispute-settlement methods fail. Nevertheless, parties to a treaty may create their own *lex specialis* which is not subject to the material breach provisions of the VCLT by inserting specific treaty provisions that are applicable in the event of breach.<sup>71</sup> The purpose of such derogation may be either to permit more severe responses on the part of an injured party so as to deter violations. But it may also be to limit the responses and make them less severe in order to avoid the breakdown of the whole regime.

It appears that, taken as a whole, the system developed under the *Kyoto Protocol* is of the latter variety—a *lex specialis* regime with its own elaborate procedures. In this regard,

<sup>68</sup> Economic Commission for Europe, Meeting of the Parties to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, First Meeting, Luca, Italy, 21-23 October 2002, Draft Decision I/7, para. 37(g), UN Doc. MP.PP/2002/9.

<sup>69</sup> See “*Naulilaa*” (*Responsibility of Germany for Damage Caused in the Portuguese Colonies in the South of Africa*), (1928) II R.I.A.A., Vol. II, at 1013 (1928), 208; *Air Services Agreement of 27 March 1946 (United States v. France)*; 18 R.I.A.A. 417 (1978); see also, *Gabcikovo-Nagymaros Project* [1997] ICJ Rep. 55 at paragraph 55. See also D. Bederman, “Counterintuiting Countermeasures”, (2002) 96 A.J.I.L. 817 at 820-822. Article 51 of Articles on Responsibility of States for Internationally Wrongful Acts (2001) sets out a proportionality requirement: “Countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question.” Draft Articles on State Responsibility of States for Wrongful Acts, in Report of the International Law Commission on the Work of its Fifty-third Session, UNGAOR, 56th Sess., Supp. No.10, at 43, UN Doc. A/56/10 (2001), online: International Law Commission <<http://www.un.org/law/ilc>>. The Articles are also annexed to GA Res. 56/83, para. 2 (Dec. 12, 2001). See also Crawford, *supra* note 17.

<sup>70</sup> XV.4 Compliance Procedure of the *Kyoto Protocol*.

<sup>71</sup> B. Simma, “Reflections on Article 60 of the Vienna Convention on the Law of Treaties and its Background in General International Law” (1970) 20 ZaöRV 5 at 82.

further elaboration of the guidelines for implementation by the COP/MOP, envisaged in the Kyoto Protocol, will apply to the rules relating to suspension of a Party.

In contrast, the procedures in the case of suspension are unclear at the level of legal principle in either the Montreal Protocol or the Aarhus Convention. In the case of these two regimes, it is difficult to determine whether their compliance procedures are subject to the provisions for suspension under VCLT Article 60 or whether they represent *lex specialis* in relation to Article 60. Under Article 60 as it applies to multilateral treaties, material breach of a treaty constitutes (for a party specially affected) a ground for suspension of the treaty. In other words, its effects are dependent upon the exercise of a right of election by a specially affected State, rather than the material breach itself giving rise *ipso facto* to the termination or suspension of the treaty. Parties not specially affected may seek recourse to the suspension remedy only where the material breach radically changes the position of every party in respect to further performance of its obligations. In addition, whenever a material breach occurs, the other parties may either unanimously suspend the treaty, in whole or in part, or terminate it. In addition, Articles 65–68 of the Vienna Convention impose strict procedural safeguards to forestall a precipitous response to a material breach. These safeguards are rooted in the general principle of reciprocity among parties to the treaty. But environmental treaties, protecting common areas such as the global atmosphere or climate (*e.g.* the Climate Change Convention and the *Kyoto Protocol*), are based on non-reciprocal rights and obligations. In this case some complicated questions arise.

In the case of the *Kyoto Protocol*, it is not clear from the formulation of the relevant provision (Section XV. 4) what the applicable law is in the case of suspension under its non-compliance procedure. Simma has observed, however, that the *leges generalis* would apply either if the procedural *leges specialis* are affected by a breach from the beginning, or if the State that has breached substantive provisions objects to the application of the special procedural rules in the dispute. In such cases, where the procedure under a special regime (such as the Kyoto Protocol compliance regime) is unclear, the procedural rules in Articles 65–68 of the Vienna Convention would presumably apply nonetheless.<sup>72</sup>

If the “default rules” of the Vienna Convention apply, there remains the important question then of the appropriateness of termination or suspension of an international environmental treaty as a response to breach by one party where the treaty in question is normative in character. Wolfrum argues that Article 60 of the Vienna Convention does not adequately address the problem of treaty obligations that are not simply owed reciprocally *but also* serve the interests of the community of States as a whole. He suggests that the normative function of such treaties should

... render the validity and the applicability of international agreements immune to actions in reaction to their breach. The object and purpose of agreements for the protection of components of the environment which are of global relevance requires that the standard of protection once achieved should be sustained and even enforced rather than eroded in consequence of the failure to comply therewith.<sup>73</sup>

But Wolfrum’s suggestions are only aspirational and do not necessarily reflect international law as it stands. His views appear to call for the development of a rule of general international law that would prohibit the operation of Article 60 in relation to global environmental agreements. In this regard, the compliance mechanisms in environmental treaties, which provide for the withdrawal of the privileges of membership,<sup>74</sup> while leaving intact the obligations entered into by the parties under the treaties concerned (and of which the compliance regime under the *Kyoto Protocol* is an example), are a step in the right direction.

<sup>72</sup> *Ibid.* at 82.

<sup>73</sup> Wolfrum, *supra* note 8 at 57.

<sup>74</sup> *Ibid.*

## IV. CONCLUSION

The Kyoto Protocol and its non-compliance procedure introduce some new and interesting approaches to the problems of compliance with environmental treaty obligations. The implementation of the *Kyoto Protocol* even prior to its entry into force via a related binding agreement is certainly an original way of implementing treaty provisions that are not yet binding. It is different from, and indeed far more extensive than provided for by Article 18 of the VCLT. States submit their reports concerning the implementation of the *Kyoto Protocol* pursuant to the binding rules of the Climate Change Convention. This is particularly important for achieving the Protocol's objectives and goals in case it does not enter into force.

If the *Kyoto Protocol* does enter into force but not all Parties accept the amendment establishing the non-compliance procedure, the procedure would apply only as between States Parties to the Protocol and the amendment.

Difficult interpretative problems will arise with respect to the operation of the non-compliance procedure in connection with the application of the treaties law. One problem is that Article 30 of the VCLT provides insufficient guidance in relation to the interrelationship and conflict of treaty rules. Article 30 caused much controversy in the ILC and is one of the few Articles of the VCLT that has not well withstood the passage of time. The solution may therefore have to be found elsewhere when treaty conflicts occur in practice.

Other difficult questions would also arise in respect of treaty suspension, or the suspension of particular rights and privileges. Should the applicable law be that of the law of state responsibility (countermeasures), the law of treaties (specifically, Article 60 of the VCLT), or both? Of the treaties I have discussed, only the *Kyoto Protocol* specifies the circumstances that would justify suspension.<sup>75</sup> These circumstances (listed under Articles 6, 12 and 17) are material to the accomplishment of the objectives of the *Kyoto Protocol*. In the other treaties, such as the Montreal Protocol, it appears that the materiality of a breach would have to be established separately. Notably however, the *Kyoto Protocol's* non-compliance procedure does not envisage suspension on the basis of international law at all, and may constitute a species of *lex specialis*. Moreover, the suspension of a Party under a compliance regime is itself an innovative collective institution combining characteristics of both material treaty breach and countermeasures.<sup>76</sup> But suspension has never been implemented in practice. We do not know the form it would take when it does occur. We can only say that, at the present stage of the implementation of these regimes, the facilitative, assistance-based approach has been the preferred one and we can at least hope that it will remain the case.

<sup>75</sup> See 3.3 above.

<sup>76</sup> M.A. Fitzmaurice and C. Redgwell, *supra* note 37.