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## AN OUTLOOK FOR THE NON-COMPLIANCE MECHANISM OF THE KYOTO PROTOCOL ON CLIMATE CHANGE

Sandrine Maljean-Dubois\*

Ranking among the basic challenges for the implementation of international environmental law in general and the Kyoto Protocol in particular are the monitoring of compliance by signatory parties and sanctions in case of non-compliance. Contrary to other international environmental protection conventions, the Kyoto Protocol is based on economic tools governed by the “invisible hand” of the market rather than by any official regulator. Nevertheless, the efficient monitoring and sanctioning of breaches are vital conditions for the smooth running of the system and are justified by their ability to support economic competition.

The Protocol’s negotiators had this in mind from the outset. However, during the Kyoto conference in 1997, no agreement was reached as to the actual content of a non-compliance procedure. This thorny issue was postponed until the first Meeting of the Parties (COP/MOP). In 1998 a working group was set up and, after several meetings, it succeeded in drawing up a non-compliance procedure. Particularly controversial, this procedure was part of a package deal represented by the Bonn-Marrakech agreements, adopted by the Conference of the Parties to the Framework Convention on Climate Change (COP) in 2001. In December 2005 in Montreal, the first COP/MOP did not reopen the discussion on its content and adopted *mutatis mutandis* the text the COP<sup>1</sup> had proposed. The Kyoto Protocol has thus given rise to a non-compliance procedure, which is among the most elaborate and innovative of its kind, while the Compliance Committee is the most powerful and independent of all committees of its kind. The application of this system was then eagerly awaited.

### I. The Outline of the Non-Compliance Procedure

This Compliance Committee operates within the framework of a plenary, a bureau and two branches, the “facilitative branch” and the “enforcement branch”. The Committee is one of the most powerful and independent committees of its kind established by an environmental convention.<sup>2</sup> Made up of 20 members elected during the COP/MOP in Montreal, it has been

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<sup>1</sup> Decision 27/CMP1, Procedures and mechanisms relating to *compliance* under the Kyoto Protocol, FCCC/KP/CMP/2005/L.1.

<sup>2</sup> J. Voïnov Kohler, *Le mécanisme de contrôle du respect du Protocole de Kyoto sur les changements climatiques : entre diplomatie et droit*, Doctoral thesis in Law, University of Geneva, 2004, p. 139.

operational since March 2006. The members, who are elected for four years, sit “in their personal capacity”. They are of recognized competence in the field of climate change and in “relevant fields, such as the scientific, technical, socio-economic and legal fields”. Furthermore, members of the enforcement branch must have experience in the legal field.

The functions of the plenary are mostly administrative and budgetary. It is the branches that deal with cases of non-compliance, and the bureau that submits implementation issues to the competent branch.

The procedure can be triggered by the secretariat on the basis of non-compliance reports provided by teams of experts, by “any party with respect to itself” or by “any Party with respect to another Party, supported by corroborating information”. The system is complex, heavy, extremely sophisticated and rather intrusive, both in the information gathering process (registry techniques, reporting system) and in terms of information processing (checks, compilation, communication). The procedure followed, at least before the enforcement branch, is undeniably hybrid. It goes beyond a classic diplomatic procedure of conciliation or even mediation and presents some jurisdictional traits.<sup>3</sup> Indeed, because they are so sophisticated, the control techniques represent an important qualitative leap with regards to the well-tried procedures habitually used until a certain time in international environmental law. Even if numerous weaknesses and flaws remain, the Kyoto non-compliance system still presents in certain respects the picture of a giant with clay feet.

The role of the multidisciplinary facilitative branch is to provide technical and financial advice and assistance to States experiencing difficulty in meeting their commitments. In order to do so, it must consider the “principle of common but differentiated responsibilities and respective capabilities” of States. This approach is above all educational. The branch can facilitate the provision of assistance outside the conventional sphere; it can also turn to the Global Environment Facility (GEF) and the different conventional funds.

The enforcement branch has a different purpose. Its approach is more intrusive. The enforcement branch is in fact responsible for establishing whether or not the parties comply with their assigned commitments to limit and reduce emissions, with provisions concerning methodology and the communication of information (inventories, reports), and also eligibility criteria for flexibility mechanisms. In the case of a disagreement between a party and an expert review team under article 8, the Branch can also “apply adjustments to inventories” (art. 5§2) or “a correction to the compilation and accounting database for the accounting of assigned amounts” (art. 7§4).

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<sup>3</sup> L. Boisson de Chazournes & M. Mbengue, “À propos du caractère juridictionnel de la Procédure de non-respect du Protocole de Kyoto”, in *Changements climatiques. Les enjeux du contrôle international*, op. cit., p. 206.

Among the “consequences” when non-compliance is established, the enforcement branch can make a declaration of non-compliance, which constitutes an initial sanction that works through the reputation effect (name and shame). It can also ask the party concerned to present a plan analyzing the causes of non-compliance and indicating the measures and agenda for correcting this situation. The branch can also suspend eligibility for flexibility mechanisms if a party does not meet the criteria set or if its emissions exceed the amounts it has committed to. In this case, the amounts assigned for the following period will be reduced by 1.3 times the excess amount. The sanctions can therefore be considerable. Few international conventions have gone this far in terms of the establishment of a binding regime to react to breaches. Such measures are possible because the Protocol uses economic tools. However, though very elaborate, the system is not totally fail-safe. A State experiencing great difficulty could choose to override it. Of course, it would be excluded from market mechanisms and be “banished” from the community of parties, but it could on the other hand accumulate environmental debts until they became irrecoverable. Everything will depend in the end on the attractiveness of market mechanisms. If they more attractive, more States will fear exclusion and become more likely to accept greater pressure from the private sector to avoid or reduce the duration of such exclusion. Furthermore, the uncertainty surrounding the second commitment period (post-2012) is somewhat undermining motivation. Finally, as national objectives are negotiated by States, a party could always renegotiate its reduction objectives for the second period, integrating the weight of potential penalties.

## **II. The Committee’s Practical Impact**

Set up in March 2006, the Committee has experienced a steady increase in its power. The main part of its function is indeed the verification of compliance with the reduction of greenhouse gas emissions. Yet this substantial evaluation will not be examined before the end of the first period of commitment, in 2012. In the meantime, the Committee is in charge of verifying that the numerous procedural or administrative obligations imposed on the member states by the Protocol itself have been implemented, and that several important decisions from the Meeting of Parties have been added. Though procedural, these obligations are no less essential. They allow for the assessment of the quality and reliability of national inventories on emissions and of how comparable they are. They are thus necessary to evaluate at a later stage the reductions implemented. The verification must also allow the assessment of policies and measures set up to fight climate change and establish that the Party has set up a system, particularly a national register, allowing it to take part in the exchange mechanisms. The obligations are verified by expert review teams that are coordinated by the secretariat and act according to guidelines provided by the Meeting of the Parties. The Committee has already had to deal with five cases: one in the facilitative

branch, and the four others in the enforcement branch. In the case involving Greece, the enforcement branch considered that the Greek system for recording greenhouse gas emissions was defective and notably suspended Greece's eligibility to take part in the flexibility mechanisms of the protocol for several months, thereby preventing its participation.

Even if it is still too early to assess how well the compliance procedure works, its future is nonetheless under discussion in current negotiations on post 2012. All options remain open for the moment: will the verification procedure be kept or improved? Or will it be weakened, or cancelled in favor of a decentralized system of verification resting on the power of States alone?