



## INFORMAL EXCHANGE OF VIEWS AND INFORMATION ON COMPLIANCE UNDER THE KYOTO PROTOCOL: 6-7 OCTOBER 1999

The informal exchange of views and information on compliance under the Kyoto Protocol to the Framework Convention on Climate Change (FCCC) was held from 6-7 October 1999 at the Diplomatische Akademie in Vienna, Austria. The informal exchange was designed to facilitate deliberations on the development of a compliance system under the Kyoto Protocol. The workshop was organized by the Austrian Government in cooperation with the FCCC Secretariat and the Co-Chairs of the Joint Working Group on Compliance (JWG). Ninety-seven participants attended the meeting, including experts, representatives from governments, UN agencies, and intergovernmental and non-governmental organizations. Participants met in several sessions over two days to hear presentations from experts and discuss various issues related to compliance, including: compliance regimes under the Montreal Protocol, the Convention on Long-range Transboundary Air Pollution (LRTAP) and its protocols, the International Labour Organization (ILO) and the World Trade Organization (WTO); institutional issues such as facilitative and enforcement functions, eligibility to raise issues and information gathering; and issues related to the consequences of non-compliance. The Co-Chairs of the JWG will prepare a non-paper on elements of a compliance system based on discussions held during the workshop to be presented to the fifth Conference of the Parties to the FCCC.

## A BRIEF HISTORY OF THE FCCC AND THE KYOTO PROTOCOL

The United Nations Framework Convention on Climate Change was adopted on 9 May 1992, and was opened for signature at the UN Conference on Environment and Development in June 1992. The Convention entered into force on 21 March 1994, 90 days after receipt of the 50th ratification. It has currently been ratified by 179 countries.

**COP-1:** The first meeting of the Conference of the Parties to the FCCC (COP-1) took place in Berlin from 28 March - 7 April 1995. In addition to addressing a number of important issues related to the future of the Convention, delegates reached agreement on what many believed to be the central issue before COP-1 — adequacy of commitments, the "Berlin Mandate." Delegates agreed to establish an open-ended *Ad Hoc* Group on the Berlin Mandate (AGBM) to begin

a process toward appropriate action for the period beyond 2000, including the strengthening of the commitments of Annex I Parties through the adoption of a protocol or another legal instrument. COP-1 also requested the Secretariat to make arrangements for sessions of the subsidiary bodies on scientific and technological advice (SBSTA) and implementation (SBI). SBSTA serves as the link between the information provided by competent international bodies, and the policy-oriented needs of the COP. During the AGBM process, SBSTA addressed several issues, including the treatment of the Intergovernmental Panel on Climate Change's (IPCC) Second Assessment Report (SAR). SBI was created to develop recommendations to assist the COP in the review and assessment of the implementation of the Convention and in the preparation and implementation of its decisions. SBI addressed several key issues during the AGBM process, such as national communications and activities implemented jointly.

**AD HOC GROUP ON ARTICLE 13:** AG13 was set up to consider the establishment of a multilateral consultative process available to Parties to resolve questions on implementation. AG13-1, held from 30-31 October 1995 in Geneva, decided to request Parties, non-Parties, and intergovernmental and non-governmental organizations to make written submissions in response to a questionnaire on a multilateral consultative process (MCP).

Delegates continued their discussion over the course of three meetings. At their fifth session, they agreed that the MCP should be advisory rather than supervisory in nature and AG13 should complete its work by COP-4.

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**AD HOC GROUP ON THE BERLIN MANDATE:** The AGBM met eight times between August 1995 and COP-3 in December 1997. During the first three sessions, delegates focused on analyzing and assessing possible policies and measures to strengthen the commitments of Annex I Parties, how Annex I countries might distribute or share new commitments and whether commitments should take the form of an amendment or protocol. AGBM-4, which coincided with COP-2 in Geneva in July 1996, completed its in-depth analysis of the likely elements of a protocol and States appeared ready to prepare a negotiating text. At AGBM-5, which met in December 1996, delegates recognized the need to decide whether or not to allow mechanisms that would provide Annex I Parties with flexibility in meeting quantified emissions limitation and reduction objectives (QELROs).

As the protocol was drafted during the sixth and seventh sessions of the AGBM, in March and August 1997, respectively, delegates "streamlined" a framework compilation text by merging or eliminating some overlapping provisions within the myriad of proposals. Much of the discussion centered on a proposal from the EU for a 15% cut in a "basket" of three greenhouse gases by the year 2010 compared to 1990 emission levels. In October 1997, as AGBM-8 began, US President Bill Clinton included a call for "meaningful participation" by developing countries in the negotiating position he announced in Washington. The insistence on G-77/China involvement was linked to the level of ambition acceptable by the US and in response, the G-77/China distanced itself from attempts to draw developing countries into agreeing to anything that could be interpreted as new commitments.

**COP-3:** The Third Conference of the Parties (COP-3) was held from 1-11 December 1997 in Kyoto, Japan. Over 10,000 participants, including representatives from governments, intergovernmental organizations, NGOs and the media, attended the Conference, which included a high-level segment featuring statements from over 125 ministers. Following a week and a half of intense formal and informal negotiations, including a session that began on the final evening and lasted into the following day, Parties to the FCCC adopted the Kyoto Protocol on 11 December. In the Kyoto Protocol, Annex I Parties to the FCCC agreed to commitments with a view to reducing their overall emissions of six greenhouse gases (GHGs) by at least 5% below 1990 levels between 2008 and 2012. The Protocol also established emissions trading, "joint implementation" between developed countries, and a "clean development mechanism" (CDM) to encourage joint emissions reduction projects between developed and developing countries. To date, 84 countries have signed and 14 have ratified the Kyoto Protocol. The Protocol will enter into force 90 days after it is ratified by 55 States, including Annex I parties representing at least 55% per cent of the total carbon dioxide emissions for 1990.

**POST-KYOTO SUBSIDIARY BODIES MEETINGS:** The subsidiary bodies of the FCCC met from 2-12 June 1998 in Bonn, Germany. SBSTA-8 agreed to draft conclusions on, *inter alia*, cooperation with relevant international organizations, methodological issues, and education and training. SBI-8 reached conclusions on, *inter alia*, national communications, the financial mechanism and the second review of adequacy of Annex I Party commitments.

In its sixth session, AG13 concluded its work on the functions of the MCP. After joint SBI/SBSTA consideration and extensive contact group debates on the flexibility mechanisms, delegates could only agree to a compilation document containing proposals from the G-77/China, the EU and the US on the issues for discussion and frameworks for implementation.

**COP-4:** The Fourth Conference of the Parties (COP-4) was held from 2-13 November 1998 in Buenos Aires, Argentina, with over 5,000 participants in attendance. During the two-week meeting, delegates deliberated decisions for the COP during SBI-9 and SBSTA-9. Issues related to the Kyoto Protocol were considered in joint SBI/

SBSTA sessions. A high-level segment, that heard statements from over 100 ministers and heads of delegation, was convened on Thursday, 12 November. Following hours of high-level "closed door" negotiations and a final plenary session that concluded early Saturday morning, delegates adopted the Buenos Aires Plan of Action. Under the Plan of Action, the Parties declared their determination to strengthen the implementation of the Convention and prepare for the future entry into force of the Kyoto Protocol. The Plan contains the Parties' resolution to demonstrate substantial progress on: the financial mechanism; the development and transfer of technology; the implementation of FCCC Articles 4.8 and 4.9, as well as Protocol Articles 2.3 and 3.14; activities implemented jointly (AIJ); the mechanisms of the Kyoto Protocol; and the preparations for the first Meeting of the Parties (COP/MOP-1).

**SBI-10 AND SBSTA-10:** The subsidiary bodies to the FCCC held their tenth sessions in Bonn, Germany, from 31 May - 11 June 1999, and began the process of fulfilling the Buenos Aires Plan of Action. The SBSTA considered topics such as Annex I communications, methodological issues and the development and transfer of technology. The SBI discussed, *inter alia*, administrative and financial matters and non-Annex I communications. SBI and SBSTA jointly considered the mechanisms of the Kyoto Protocol, activities implemented jointly and compliance. A joint SBI/SBSTA working group on compliance (JWG) discussed identification of compliance-related elements, including gaps and suitable forums to address them; design of a compliance system; and consequences of non-compliance. The JWG resolved to hold a workshop to facilitate informal exchange of views on relevant issues, including experiences under other conventions. The Co-Chairs were asked to make a factual, informal report, with no recommendations, on this workshop to COP-5.

## REPORT OF THE WORKSHOP

The informal exchange of views and information on compliance under the Kyoto Protocol was opened by Amb. Ernst Sucharipa, Director of the Diplomatische Akademie, on Wednesday, 6 October 1999. Co-Chair Harald Dovland reminded participants that the JWG had agreed during the tenth session of the subsidiary bodies that the workshop would be designed merely to facilitate exchange of information and views. On organization of work, he said delegates would be recognized by their name not their country. He outlined the agenda for the sessions, as agreed upon in the JWG: four presentations on compliance regimes in other bodies; a question and answer session; a presentation by Peter Sand on compliance systems under international treaties; and an informal exchange of views.

### EXCHANGE OF VIEWS AND INFORMATION RELATED TO RELEVANT EXPERIENCE IN OTHER CONVENTIONS

**PRESENTATIONS:** The workshop participants first heard four presentations on compliance regimes in other bodies.

**Madhava Sarma, Executive Secretary of the Montreal Protocol,** provided an overview of Montreal Protocol provisions that relate to Parties' obligations, reporting of data and the non-compliance procedure. He identified the major obligations of Parties as, *inter alia*, control measures for the phase out of 95 chemicals; control of trade with Parties and non-Parties; reporting of data; and transfer of technology. Compliance with the control measures is monitored through the analysis of reports presented by the Parties. Parties are obliged to submit data to the Secretariat to the extent that they have ratified the respective amendments. Although data is accepted from Parties, as reported, verification is possible through the work of the implementing agencies of the Multilateral Fund such as the United Nations Development Programme (UNDP), United Nations Environment Programme (UNEP), the World Bank and the Global Environment Facility (GEF).

Sarma said the non-compliance procedure could be triggered by: one Party expressing a reservation regarding another Party's compliance; the Secretariat's observations in its report on data; and a Party submitting an explanation of its non-compliance to the Secretariat. An implementing committee created by the Meeting of the Parties (MOP) will consider representations before it, gather information and prepare recommendations to the MOP, which is the final authority on non-compliance issues. In 1992 the Parties decided on an indicative list of measures that may be taken by the MOP in case of non-compliance. These include: providing appropriate assistance, issuing cautions, and suspending specific rights and privileges under the Protocol.

Sarma stressed that this procedure is based on the presumption that all Parties wish to implement the Protocol and that their inability to comply is due to a problem that the international community should assist in solving. In conclusion he suggested that the Kyoto Protocol consider two types of procedures for non-compliance — a facilitative, non-confrontational and assistance based procedure for determining non-compliance in all cases and a legal procedure where the non-compliance is determined to be “willful.”

**Henning Wuester, United Nations Economic Commission for Europe (UNECE)**, explained that the common compliance regime adopted in 1997 for the Convention on Long-range Transboundary Air Pollution (LRTAP) and its eight Protocols was under revision. He outlined the four basic functions of the compliance committee: conducting periodic reviews of reporting requirements; considering specific issues referred to it by one or more Parties about another Party, one Party on its own compliance problems, or the Secretariat based upon information received by Parties or other sources such as NGOs; examining the quality of data; and reporting on the implementation of specific obligations at the request of the Executive Body.

On access to information, he specified that the compliance committee could: gather information from the Secretariat or other sources through the Secretariat; get expert advice from the Convention bodies or other experts; and visit countries by invitation. Wuester explained that Parties had to submit two types of reports based on a framework common to the Convention and its Protocols — one on strategies and policies adopted to mitigate air pollution and another on emissions data.

In conclusion, he outlined the elements essential to a compliance regime: the bodies running the compliance regime should have a clear mandate, yet be sufficiently flexible to adapt to the needs of the new instruments and the wishes of the Parties; the reporting system must be transparent, well defined, as detailed as necessary and focused on specific obligations; and there must be independent technical bodies to assist the compliance committee on technical issues.

**Natan Elkin, International Labour Organization (ILO)**, outlined the compliance system and the reporting requirements established by the Constitution of the ILO. The compliance system is comprised of the Committee of Experts, the Conference Committee, the Committee on Freedom of Association and the Commission of Inquiry. The reporting system is built around two cycles: an initial cycle of first and second reports, and a subsequent cycle of periodic reports that are required every two years for certain priority conventions and every five years for the others. Failure to report is noted by the Committee of Experts in its report that is then discussed by the Conference Committee. The Committee of Experts presents its conclusions as observations in the case of long-standing cases of failure, as comments and surveys set out in its report, or in direct requests that are communicated to the concerned governments. If a country fails to conform to the recommendations of the Governing Body or the repeated comments of the Committee of Experts, the

Conference Committee records the government's failure to act in its report. Where more drastic measures are called for, a resolution is adopted.

**Nicholas Lockhart, World Trade Organization (WTO)**, distinguishing the compliance regime of the WTO from that of multilateral environmental agreements (MEAs), said that the WTO regime was Party driven and did not involve the Secretariat. He introduced the three phases and the institutional actors under the dispute settlement regime. In the diplomatic phase, formal or informal consultations are entered into. This is a prerequisite to formal litigation and is used as a means of resolving the dispute or collecting information.

The judicial phase is characterized by a compulsory procedure and confidentiality. A panel composed of experts operates like a court of first instance. It makes an objective assessment of the matter and delivers a report that is automatically adopted by the dispute settlement body. Each party can submit information at any time of the dispute and the panel can request that information be delivered. If this is not done, the panel may draw inferences regarding information withheld. An appellate body provides a “safety net” in view of the automaticity with which the panel's report is adopted. It may uphold, modify or reverse the panel's findings.

The final phase is implementation. The panel and/or appellate body reports are automatically adopted by the dispute settlement body that then makes recommendations on its basis. One of the strengths of the dispute settlement process is its reliance on negative consensus as a basis for decision making: unless there is consensus against a recommendation, its content is automatic. A dispute over implementation of the recommendations may be referred back to the dispute panel and it can lead to trade sanctions.

**QUESTION AND ANSWER SESSION:** Co-Chair Espen Rønneberg questioned if the adherence to the LRTAP common reporting format was strict and whether, given the LRTAP system was under development, there would be any scope for retroactive penalties. He also sought elaboration on the issue of comparability of data and standards. Wuester responded that adherence to the framework had been varied and consequently was under revision. He said the format would evolve continuously based on experience in reporting and the comments of the Parties. On retroactive penalties, he said that he did not have the experience to respond to this, since no case of strict non-compliance had yet been brought before the committee. He said, however, the focus was on non-confrontational methods and assistance. He said work was underway on the issue of comparability of data and technical standards, but several issues were yet to be resolved.

Peter Sand, University of Munich, suggested that a useful contrast could be drawn between the WTO adversarial process and the *ad hoc* procedures of the ILO. One participant questioned whether the prominent role that the Secretariats play in the non-compliance procedure affects their neutrality. Sarma and Elkin replied in the negative.

One participant inquired if any proposal for fixing a system of multilateral sanctions existed under the WTO that would effectively take into account “level playing field” concerns of smaller States. Lockhart responded that while no such proposal existed, it would be useful to note that the first few cases before the WTO dispute settlement panel were brought and won by developing countries against the US. Another participant asked if parties could withhold information despite their obligation to appear before the dispute settlement panel. Lockhart replied that the compulsory jurisdiction of the WTO existed because the members had agreed to it. Although no legal right existed to do so, in practice countries did withhold information. He said the panel could draw inferences based on such behavior.

One participant asked how long the entire compliance process would take in the case of each of the international instruments discussed. Lockhart responded that at the WTO it could take 15 months. Sarma said the Montreal Protocol process would take less than a year.

### **COMPLIANCE SYSTEMS UNDER INTERNATIONAL TREATIES**

Peter Sand, University of Munich, referred to recent efforts by political scientists to develop a "management" approach to treaty compliance that seeks to address non-compliance through assistance or capacity building. He presented the different steps in a compliance process. The first step would involve a reporting system on environmental quality data, baselines and implementation of obligations. The reports would go through a verification process that entailed assessing quality, reviewing implementation, monitoring compliance and establishing a fact-finding mission. He outlined four different types of compliance institutions and procedures: a complaint mechanism triggered by a Party or the Secretariat; an adversarial proceeding of a judicial nature whereby a state would initiate a dispute settlement procedure against another state; a custodial system whereby the Secretariat or NGOs, as opposed to Parties, have a custodial duty over treaty compliance; and an implementation body especially created to take over compliance issues.

On the consequences of non-compliance, he explained that these could range from incentives such as financial or technical assistance, to disincentives whereby the granting of an advantage normally allowed under the treaty would be refused, and to corrective measures.

He concluded by stressing that the retaliatory remedy of terminating a treaty as a consequence of its breach, as in Article 26 of the Vienna Convention on the Law of Treaties, made little sense in the case of MEAs. He highlighted the special case of international humanitarian law whose provisions can in no circumstances be ignored. He said it was up to environmental lawyers to develop similar rules that departed from a retaliation approach.

**INFORMAL EXCHANGE OF VIEWS:** Participants put forth a range of views on compliance and clarified various issues during this session. One participant commented on the reluctance to discuss state-to-state, as opposed to multilateral, interactions in the context of the non-compliance procedure. Sand responded that while the issue of state-to-state interactions should be kept in mind, the focus should be on those aspects of the non-compliance procedure that are not state-to-state.

Another participant sought information on approaches to non-compliance at the international level that could strengthen domestic regulations. Sand responded by giving examples, *inter alia*, that the ILO had focused specifically on strengthening national regulations on labor standards.

One participant asked what the legal consequence of merely signing the Protocol was and whether an amendment would be required to design a compliance system that would have binding consequences. Sand responded that several existing provisions of the Protocol with legal consequences could serve as a basis for a non-compliance procedure. He clarified that although a treaty would have binding consequences only upon ratification, there was an expectation that the signatory would not act contrary to treaty commitments.

Another participant noted that the Montreal Protocol's indicative list of measures that could be taken in the case of non-compliance, which included the suspension of Protocol rights and privileges, was adopted through a MOP decision rather than through the tedious process of an amendment. In response, Sarma said that the indicative

list was drafted under Montreal Protocol Article 8 (non-compliance procedure) that mandates Parties to draft a non-compliance procedure. Therefore the adoption of this list was presumably legal.

The Center for International Environmental Law (CIEL) outlined elements of its paper on compliance. On compliance information systems, he noted that review might be more effective if review teams can raise compliance concerns with Parties and identify areas of non-compliance. On compliance response systems, he stressed that compliance will be enhanced if civil society has the right to initiate the non-compliance procedure. On the question of determination of non-compliance, he said various features of the WTO dispute settlement system were worth emulating. These include the composition of the panel with independent experts rather than government representatives, the existence of due process provisions, and the use of negative consensus to arrive at decisions.

### **INSTITUTIONAL ISSUES RELATED TO A COMPREHENSIVE COMPLIANCE SYSTEM UNDER THE KYOTO PROTOCOL:**

**Facilitative and Enforcement Functions of a Compliance System/Institutional Arrangements to Meet these Functions:** In introducing this item, Sand noted that while facilitation may only be available to non-Annex I Parties, enforcement would address compliance issues relating to any Annex I and non-Annex I obligation. He suggested that participants consider whether one or two bodies be established to exercise the facilitative and enforcement functions. He also suggested that the relationship of the compliance system with other institutional arrangements under the Protocol, such as the dispute settlement mechanism, be discussed.

Susan Biniiaz (US) presented her country's proposal, as contained in the charts in document FCCC/SB/1999/7/Add.1. The proposal is based on several assumptions, *inter alia*: the design must be specific to the Protocol; both facilitation and enforcement should be provided for; non-compliance with Protocol Article 3 (quantified emission limitation and reduction commitments) should lead to binding consequences known in advance; and two different bodies should be established to deal with the two functions.

Following the presentation, one participant sought elaboration on the distinctive nature of the facilitative and enforcement functions in the proposal and, with other participants, questioned the application of the latter only to developed countries. She added that compliance with Protocol targets could also be handled through a facilitative process, as shown by the Montreal Protocol experience. With others, she asked whether the adoption of binding consequences by the compliance body needed to go through the amendment procedure as specified in Protocol Article 18 (non-compliance).

In response, Biniiaz explained that while representatives of Parties would deal with the facilitative function, independent experts would handle enforcement issues. She added that non-Annex I countries would not be amenable to enforcement and binding consequences since their obligations, such as in Protocol Article 10 (continuing to advance the implementation of existing commitments), were imprecise. On the procedure for the adoption of binding consequences, she noted that it was not useful to let Protocol Article 18 (non-compliance) drive the substance of the debate.

One participant suggested that the compliance system be built around the concept of facilitation given the real risks of countries withdrawing from MEAs. Another participant added that the facilitative function should also include a preventive dimension. Another wondered whether the MCP (FCCC Article 13) could act as the facilitative body under the Protocol. In response another participant said that Protocol Article 16 (MCP) required Parties to consider the application of the MCP, modified as appropriate, to the Protocol.

The World Wildlife Fund (WWF) and CIEL presented a joint proposal for a compliance system under the Protocol. They proposed the creation of two bodies, a non-compliance body and a facilitative body. The compliance process could be triggered by NGOs, the Secretariat, Parties and through self-reporting. Cases of Annex B Parties' non-compliance with certain select articles would go before the screening committee that would either dismiss the case or refer it to the non-compliance or facilitative body. In the case of non-Annex B Parties, the case would proceed directly to the facilitative body. Each body could refer the case to the other if it would be more appropriately dealt with there.

One participant asked if there was a trend in international law regarding the increasing role and significance of NGOs and independent experts in compliance procedures. She also inquired whether NGOs and civil society should be allowed to trigger the process and what the composition of the compliance body should be.

Sand responded that the frequency of verification by independent fact-finding actors had increased over the years. Regarding composition of the compliance body, Sarma said the body could either be of the WTO type or the MEA type. Universal participation was critical for MEAs but not for the WTO. Given the danger of countries abandoning MEAs, he said judgments on compliance should ultimately be political, although aided by experts.

**Eligibility to Raise Issues:** Sand introduced this item by stressing that the decision on who could trigger the compliance system was a very important issue. He said it was clear that Parties as well as the COP/MOP had this function, but that it was more complicated when it came to the Secretariat. He added that other potential actors, such as affected groups, could be eligible to trigger the compliance system.

One participant stressed that this issue was linked to the nature of the procedure. In the case of enforcement, the number of actors entitled to trigger the process would be more limited than in a facilitative context. With regard to Protocol Article 6.4 (joint implementation), she said that raising an issue under Protocol Article 8 (review of information) should not prevent a Party from proceeding with joint implementation. On the role of the COP/MOP, she said it should not have to approve whether an issue went forward to facilitation or enforcement, but could have a say at the end of the compliance procedure.

One participant cautioned that the potential triggering role of the Secretariat should not affect its neutrality. Another participant said that any Party was eligible to raise compliance issues regarding Protocol Article 3 (quantified emission limitation and reduction commitments). He added that Protocol Article 3.2, which requires that Annex I Parties shall, by 2005, have made demonstrable progress in achieving their commitments, could be the basis for a facilitative compliance process in order to help Parties "put on track what has to be put on track." One participant stressed that the determination of who was eligible to trigger a compliance regime should be decided on the basis of what was best for the efficient functioning of the Protocol. The process should be open and transparent. He emphasized the need to look at processes developed under other treaties and reviewed possible actors:

- any Party or group of Parties, generally accepted;
- the Secretariat, as shown by previous positive experiences under the LRTAP and the Montreal Protocol;
- SBI or SBSTA or COP/MOP, which is redundant since it is covered by a "group of Parties;"
- expert review teams, as under Protocol Article 8 (review of information); and
- NGOs or civil society, through a Party rather than through a Secretariat.

Two participants suggested a possible screening of the issues that would take the enforcement track, either by requesting the triggering actor to bring concrete evidence of a Party's possible non-compliance, or by providing that the enforcement track only be taken if the expert review teams have identified a potential problem.

**Information Gathering:** Co-Chair Dovland, introducing the topic of information gathering, asked participants to consider the information already available under the climate change regime including emissions inventories of Annex I countries, national communications, and reports of expert review teams. Sand commented that four key questions had to be answered. They are:

- Who collects the information?
- What type of information should be gathered?
- Where should the information be gathered?
- How should the information gathering system function?

On who should gather the information, he said the existing structure had to be related to the compliance body. On the type of information to be gathered, he said a distinction should be drawn between environmental quality data and Parties' implementation data. He identified sources of information as, *inter alia*, governments, NGOs and industry. In the case of industry, confidentiality concerns could be raised. On the functioning of the information gathering system, he referred to the need for due process.

Participants stressed the need to refer to Protocol Article 8 (review of information) in discussing the information gathering aspect of compliance. On the link between the expert review team reports and the compliance procedure, Co-Chair Dovland noted that there were two options. The report could go directly to the compliance body or it could go to the COP/MOP through the Secretariat. In the latter case it would go to the compliance body only if a Party complained. One participant highlighted a third option wherein guidelines would specify the situations where the report would go directly to the compliance body. Some favored a role for the COP/MOP while others objected, as such a role would politicize the compliance issue.

One participant asked what voting arrangement could be put in place in the COP/MOP for cases of non-compliance. If it were consensus, the party in non-compliance could vote itself out of the compliance procedure. She also suggested that there be at least one multilateral trigger to the compliance mechanism.

A few participants highlighted the importance of timeliness, with one suggesting that a balance be struck between timeliness and efficiency. One participant, stressing the facilitative function of the compliance system and the obligations under the Protocol, highlighted the need for Parties to have the opportunity to respond to and correct any problems expert review teams identify. She also stressed the necessity for a body that could provide expert facilitative advice. A few participants underscored the need to formalize the involvement of expertise, with one inquiring if a permanent standing source of technical expertise existed and if not, how the gap could be filled. Co-Chair Dovland commented that there is an existing roster of experts, including the IPCC roster, that could be drawn upon.

On confidentiality of information, one participant recommended that confidentiality should not be maintained at the expense of an effective compliance regime. Sarma, citing the Montreal Protocol example, said that information specific to compliance could be made public and other information could be kept confidential. One participant recommended that the Secretariat be the appropriate body to gather information. Another participant cautioned against the use of information from outside bodies.

One participant highlighted the relationship between the expert review team process and the triggering of the compliance mechanism. He said that the expert review team's report should contain at least the minimum information necessary to determine non-compliance. Parties

should be able to request more information if necessary. Another participant sought clarification on what kind of non-compliance developing countries could find themselves in. She also asked what kind of information would be available from developing countries, given that expert review teams did not deal with developing countries. Co-Chair Rønneberg highlighted the fact that there are several avenues to raise compliance questions even within the Convention processes.

**Range of Consequences of Non-Compliance/Automatic Consequences:** Sand introduced the item by outlining the different possible consequences in international instruments. These range from making non-compliance publicly known, such as in human rights conventions, to making adverse inferences on the part of the Party that has not delivered requested information, such as the WTO dispute settlement procedure, or to imposing sanctions. He explained that sanctions could consist of positive measures resulting from a facilitation process, such as access to financial or technical assistance, or of punitive measures issued on an enforcement basis, such as withholding funding available under the Protocol. He added that procedural principles needed to be developed, such as requiring proportionality between the degree of non-compliance and the sanction imposed. He concluded by addressing the issue of automaticity, which he understood to mean that a determination on facts would lead to the imposition of sanctions without requiring a decision on non-compliance. He linked automaticity to the binding consequence of sanctions and created a distinction between non-binding consequences, which would be automatic and subject to an appeal process, and binding consequences, which would not be automatic and therefore not subject to an appeal process.

A few participants said the compliance system should, as far as possible, only impose sanctions once facilitation had been exhausted. One participant added that although public awareness of non-compliance was an important consequence, it could be insufficient in the context of technical environmental treaties. Supported by others, he said that a list of possible consequences should include high financial sanctions, the proceeds of which would be used to finance greenhouse gas reduction projects in developing countries. Other participants said they could support neither financial nor trade sanctions.

In response to a query, Sand said that the current trend at the global level favored trade sanctions and public exposure of non-compliance. He added that financial penalties were used in other contexts but there was limited information on their effectiveness. He cautioned that Parties might leave the organization upon withdrawal of their voting rights.

Regarding the range of sanctions, several participants stressed the need for advance notice of the options available to the compliance body. This would help ensure legal certainty and would act as a deterrent. One participant said the range of consequences should be different for Annex I and non-Annex I Parties since, in his view, facilitation would only be available to non-Annex I Parties.

On the issue of automaticity, one participant interpreted it to mean that a sanction could be imposed without the approval of the non-compliant Party. Another participant said that automaticity cannot not take into account the cause, type and degree of non-compliance. She valued a "menu approach" whereby the Party could choose the consequence of its non-compliance, such as borrowing from a subsequent period or buying emission reduction units. On specific compliance cases, one participant said that Annex I Parties adopting mitigation measures that did not minimize adverse effects on other Parties would risk being in non-compliance. Another Party said that incentives should be put into place to ensure compliance with Protocol Article 3.2 (demonstrable progress by 2005). She added that Protocol Article 18 (non-compliance) could not be interpreted to mean that binding sanctions needed to be adopted through an amendment.

## OTHER MATTERS

Co-Chair Rønneberg invited Sand to comment on the annex to the note of the Co-Chairs of the joint working group on compliance (FCCC/SB/1999/7) and asked participants to comment on next steps. Sand said that all the elements included in the annex were useful and needed further elaboration. On next steps, participants expressed different views. One participant said he hoped a compliance regime would be adopted during COP-5, another said COP-6. Several participants said it would be helpful if the Co-Chairs drafted elements of a compliance system for the JWG to consider at COP-5. One participant said that such elements should provide for a distinction between Annex I and non-Annex I Parties' compliance. Another participant said the list of consequences should be agreed upon before addressing other elements of the compliance system. A third participant said the elements put forward by the Co-Chairs should leave room for a facilitative as well as an enforcement scenario.

## CLOSING SESSION

In conclusion, Co-Chair Rønneberg said the meeting had been successful and that the Co-Chairs would provide an oral report of the workshop at COP-5. He said they would also prepare a non-paper on elements of a compliance system based on the annex to the note of the Co-Chairs of the JWG (FCCC/SB/1999/7), Parties' submissions (FCCC/SB/1999/7/Add.1) and discussions during the workshop. He thanked the organizers of the workshop as well as its sponsors: Austria, Canada, the EC, Finland, France, Germany, Japan and Switzerland. He closed the meeting at 1:00 PM on Thursday, 7 October.

## THINGS TO LOOK FOR BEFORE COP-5

### FOURTH INTERNATIONAL CONGRESS ON ENERGY, ENVIRONMENT AND TECHNOLOGICAL INNOVATION:

The 4th International Congress on Energy, Environment and Technological Innovation will be held from 20-24 October 1999 in Rome, Italy. Organized by "La Sapienza" and "Roma Tre" Universities and the Universidad Central de Venezuela, the Congress offers the opportunity for high-level scientific debate and communication between participants on the problems related to regional and urban management. For more information, contact: EETI99, Facolta di Ingegneria, Via Eudossiana 18, 00184 Rome, Italy; fax: +39-6-4883235; Internet: <http://www.ing.ucv.ve/ceait/eeti.htm>.

### INTERNATIONAL SEMINAR ON KYOTO MECHANISMS

**BUSINESS OPPORTUNITIES:** "Kyoto Mechanisms Business Opportunities: How Much is a Project Worth? Selection, Verification and Certification of Projects," will be held in Basel, Switzerland, from 21-22 October 1999. For more information contact: Wolfram Kaegi, Institute for Economy and the Environment, University of St. Gallen, Tigerbergstrasse 2, CH-9000 St. Gallen, Switzerland; tel: +41-71-224-2583; fax: +41-71-224-2722; e-mail: [Wolfram.Kaegi@unisg.ch](mailto:Wolfram.Kaegi@unisg.ch); Internet: <http://www.iwoe.unisg.ch/forschung/ji/seminar.html>.

### FCCC FIFTH MEETING OF THE CONFERENCE OF THE

**PARTIES:** COP-5 will be held from 25 October - 5 November 1999 at the Maritim Hotel in Bonn, Germany. For more information, contact: the FCCC Secretariat; tel: +49-228-815-1000; fax: +49-228-815-1999; e-mail: [secretariat@unfccc.de](mailto:secretariat@unfccc.de); Internet: <http://www.unfccc.de/>.