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# STRENGTHENING THE IMPLEMENTATION OF MULTILATERAL ENVIRONMENTAL AGREEMENTS

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## SUMMARY

This article summarizes tools for compliance with obligations imposed by environmental agreements. The author looks to the development and successful implementation of compliance incentives under the Montreal Protocol to provide an example to Parties of other multilateral environmental agreements, while they are developing their own mechanisms for implementation.

## 1 INTRODUCTION

The normative element of compliance with treaty obligations derives from the duty and obligations contained in the customary principle, *pacta sunt servanda*, as enshrined in the Vienna Convention on the Law of Treaties. The principle, however, does not provide the mechanism upon which compliance with treaty obligations must be observed, a function that is fulfilled by developing the compliance mechanisms.

### 1.1 Implementation as a Tool For Compliance

The implementation of obligations contained in environmental agreements encompasses all the actions required to carry out the commitments in those agreements. This requires the development of strategies for such implementation. One important element for such a strategy is the identification of obligations to be implemented along with other elements of compliance strategy. Elements of compliance strategies include data collection and reporting, identification of potential non-compliance trends, regular review and assessment of implementation of obligations, and peer pressure.

The implementation of these obligations requires a phased approach whereby at the national level, each state party is required to agree on national implementation measures and to ensure its national compliance. Unless there is a well-laid down strategy for national implementation of treaty obligations, it may be difficult to comply with them.

Important prerequisites in the implementation of multilateral environmental agreements include the linkage between the extent to which developing countries meet their treaty obligations and the provision to them of financial and technical assistance

### 1.2 Reporting of Data as a Monitoring Measure

Most environmental agreements contain a requirement that national compliance with environmental obligations be reported by providing specific information to the designated international organizations. The Montreal Protocol on Substances that Deplete the Ozone Layer provides for each party to report to the Secretariat statistical data on its annual production and consumption of ozone-depleting substances.<sup>1</sup> The reduction in production and consumption of ozone-depleting sub-

stances is measured against the reported baseline data. The data is also used to determine the developing country status of those countries perceived to be developing. In addition, each Party to the Protocol has to report to the Secretariat the establishment and operation of a system for licensing the import and export of controlled substances.<sup>2</sup>

### 1.3 Monitoring as a Supervision Technique By International Institutions

The obligation to report information on national implementation of environmental agreements provides the necessary evidence for monitoring compliance at the international level. Monitoring by international institutions is a supervisory tool for the Parties to assess the effective implementation of their treaty obligations. Thus, effective monitoring of compliance with environmental agreements depends on the establishment of international institutions that are empowered to take measures to ensure compliance with the established standards. In order for these institutions to have a balanced assessment and easy comparability of compliance information, they develop guidelines and formats for uniform data reporting.

Under the Montreal Protocol, for example, the institutional structure comprised of the Secretariat, the Implementation Committee and the Meeting of the Parties is responsible for assessing compliance and providing guidelines to Parties on matters related to data reporting. Under this arrangement, the Secretariat has designed formats for reporting data on production and consumption of ozone-depleting substances by Parties and submitted them to the Implementation Committee for review after which they are approved by the Meeting of the Parties for use in monitoring compliance.

Non-governmental organizations (NGOs), too, are part of this institutional framework as they play important roles in fostering compliance with environmental agreements. Since their main task is to

inform public and raise concern, they can provide relevant information to the appropriate treaty bodies and put pressure on governments and other actors to comply.

### 1.4 Compliance Incentives

The incentives for implementation and compliance with environmental agreements are built within the agreements themselves. For developed countries, but also applicable to developing countries, compliance incentives include full implementation of treaty obligations to avoid trade sanctions, suspension of the operation of a treaty or of specific rights and privileges, whether or not subject to specific time limits. Cooperation strategy among Parties to remove obstacles, clarify issues, and convince themselves to change their behavior is yet another incentive for implementation of multilateral environmental agreements.

In the case of developing countries, compliance incentives include capacity building for developing countries through establishment of financial mechanisms, application of the principle of common but different responsibility in environmental protection, and the transfer of technology to developing countries to enable their compliance with treaty obligations.<sup>3</sup> The incentives, some of which have been extended to countries with economies in transition, are conditional for developing countries' compliance with their treaty obligations. For example, a linkage has been created between the implementation and compliance with the Montreal Protocol by developing countries and provision of financial assistance and transfer of technology to them under the Protocol.<sup>4</sup>

#### 1.4.1 Financial Assistance

The financial mechanism of the Montreal Protocol was the first of its kind to be created among the multilateral environmental agreements to provide the type of assistance required for building the capacity of developing countries to comply with their treaty obligations. The mechanism provides for the creation of the Multilateral

Fund for providing financial and technical co-operation, including the transfer of technologies to developing countries to enable their compliance with the control measures. However, the financial transfers from the Fund are not open-ended as they are meant to meet “agreed incremental costs” for a transition period.<sup>5</sup> Of particular interest is the use of financial “incentives” as a tool for compliance with Protocol obligations. It is more effective if coupled with monitoring to ensure that the obligations are complied with than resorting to classical means of treaty enforcement, which includes punitive measures.

The Global Environment Facility (GEF) is another source of funding. In order to avoid duplication of effort and not substituting for other sources of funds, the GEF provides only complementary assistance outside the Montreal Protocol financial mechanism. This assistance goes to otherwise eligible recipient countries with economies in transition (CEITs), whose activities, while consistent with the objectives of the Montreal Protocol, is of a type not covered by the Multilateral Fund.<sup>6</sup>

In the event that any Party is found to be in non-compliance with Protocol obligations, any funding is subject to the Non-Compliance Procedure of the Montreal Protocol, including notification of causes of non-compliance, assessment of expected delays in the implementation of control measures, and a revised schedule of commitments. Assistance is provided under both the Multilateral Fund and GEF consistent with the indicative list of measures that might be taken by a Meeting of the Parties in respect of non-compliance with the Montreal Protocol to enable Parties in non-compliance to comply with their Protocol obligations.

#### 1.4.2 Common But Differentiated Responsibilities

A common but differentiated responsibility is one of the principles underlying the Montreal Protocol regime. In the Montreal Protocol context, one aspect of this principle is to allow developing coun-

tries to delay the implementation of control measures to phase out ozone-depleting substances for ten years. This measure is also linked to the building of capacity of developing countries by providing them with technical and financial assistance from the Multilateral Fund. It is also consistent with the fact that states are unlikely to adopt or obey agreements requiring them to bear greater economic costs for the common good. The ozone layer, for example, is a common good that is of concern to many Parties and therefore unless the economic burden of developing countries to comply with the obligations for its protection is shared by those Parties that are more economically endowed, the former left on their own will not be able to do so.

The principle of common but differentiated responsibilities is also manifested in other forms. Compliance assistance by developed countries to developing countries under multilateral environmental agreements is one of those forms whereby the obligation of some state Parties to assist others through capacity building is part of their commitment to comply with the objectives of the agreements. Assistance in the form of experts and technicians by developed countries to developing countries is part of the collective but differentiated responsibility under the Montreal Protocol.

The principle of common but differentiated responsibilities is also relevant when assessing compliance with environmental obligations by “major Parties” which are crucial in realizing the objectives of some environmental. This aspect is valid in a situation where a group of key Parties would have a major impact on the success of the environmental agreement. The Montreal Protocol belongs to that category of environmental agreements whose success depends on the co-operation of major Parties that are the largest producers and consumers of ozone-depleting substances although compliance by all Parties to the Protocol is also important.

It would have been difficult for the Parties to the Montreal Protocol to achieve the current phase out of over ninety per

cent of the total global production and consumption of ozone-depleting substances by 2002 had it not been for the full implementation and compliance with the control measures of the Protocol by key Parties. These include Australia, Canada, China, France, Germany, India, Italy, Japan, Netherlands, Russian Federation, Spain, United Kingdom and United States of America which were major producers and consumers of the controlled substances at the time of the conclusion of the Montreal Protocol in 1987.<sup>7</sup> They collectively commanded the near total global supply of ozone-depleting substances. They were, and still are, indispensable in the success of the Montreal Protocol because the majority of them, as opposed to developing countries, are generally endowed with more resources, both technical and financial, than is the case for the rest of the Parties and therefore able to promote compliance.

The application of the principle of common but differentiated responsibility in relation to compliance with environmental obligations involves a process that changes over time when the country's capacity to comply improves. It is an incentive to join in the co-operative effort to protect the environment and without such co-operation it would be difficult to realize the objectives of the environmental agreements. The transfer of technology to developing countries for the purpose of fostering compliance with the environmental obligations also reflects the principle of common but differentiated responsibility.

#### 1.4.3 Transfer of Technology

The transfer of relevant technology is one of the compliance incentives to assist developing countries in the implementation of their environmental obligations under multilateral environmental agreements. The Montreal Protocol commits Parties to transfer the best available environmentally safe substitutes and related technologies to developing countries at fair and most favorable conditions.<sup>8</sup>

The key elements of this provision

are the "best available technologies" to be transferred to developing countries and such transfers to "occur under fair and most favorable conditions." The technology transfer under these conditions serves as a mechanism for achieving the objectives of the Montreal Protocol and at the same time brings developing countries to the same level as their counterparts, in terms of accessing the up-to-date technology to phase out controlled substances. The required technology builds the capacity of developing countries to comply with the objectives of the Protocol because it is offered under fair and most favorable conditions.<sup>9</sup>

The implementation of the provision for technology transfer under the Montreal Protocol has been a subject of some important decisions of the Parties, which emphasizes the need for effective implementation of financial co-operation and technology transfer to developing countries in complying with the control measures of the Montreal Protocol. The significance of the transfer of technology to developing countries in the Protocol implementation process is highlighted by its being tied up with the adoption of new control measures under the Protocol. In this connection, the Parties decided in 1995 that additional funding and technology transfer "to be reflected in the replenishment of the Multilateral Fund" must accompany any new control measures.

#### 1.4.4 Cooperation

There can be no effective implementation of transboundary environmental problems such as those addressed by multilateral environmental agreements without effective means of cooperation between states. Cooperation plays an important and effective role in information gathering and provision of resources required to meet the objectives contained in the agreements. In addition, protection of the environment requires very high levels of coordination and cooperation between states on complex activities, without which no single state can, by unilateral action, succeed in the

protection of transboundary environmental problems unless it is a sole source of environmental pollution.

## 2 CONCLUSION

The development and successful implementation of compliance incentives under the Montreal Protocol has had a positive effect to Parties to other multilateral environmental agreements while developing their own mechanisms for implementation of those agreements. In this way, the Montreal Protocol has made a significant contribution to influencing the strengthening of implementation of multilateral environmental agreements, which is its legacy.

## 3 REFERENCES

<sup>1</sup> Article 7 of the Protocol. Other multilateral environmental agreements with requirement for data reporting include the Persistent Organic Pollutants (POPs) (Article 15 – production, imports, exports); Climate Change Convention (Article 12 – inter alia, national inventory of anthropogenic emissions by sources and removals by sinks of greenhouse gases); Kyoto Protocol to the Climate Change Convention (Article 7(1) - information on emissions or discharges); Basel Convention on Hazardous Wastes and their Disposal (Article 13(2) and (3)), Biosafety Protocol to the Convention on Biological Diversity (Article 23), – information on agreed implementation measures).

<sup>2</sup> Article 4B (3) of the Montreal Protocol.

<sup>3</sup> See for example the Montreal Protocol's Article 5 (common but differentiated responsibility), Article 10 (financial mechanism), and Article 10A (technology transfer).

<sup>4</sup> For example Article 5(5) of the Montreal Protocol which provides that "Developing the capacity to fulfil the obligations of the Parties operating under paragraph 1 of this Article to comply with the control measures set out in Articles 2A to 2E and 2I, and any control measures in Article 2F

to 2H that are decided pursuant to paragraph 1bis of this Article, and their implementation by those same Parties will depend upon the effective implementation of the financial co-operation as provided by Article 10 and the transfer of technology as provided by Article 10A." See also Article 20(4) of the Biodiversity Convention and Article 11(3) of the Climate Change Convention.

<sup>5</sup> The Indicative List of Categories of Incremental Costs that was agreed by the Parties to the Montreal Protocol in 1992 include: Supply of substitutes such as cost of conversion of existing facilities, cost of patents and designs and incremental cost of royalties; cost arising from premature retirement or enforced idleness of facilities, cost of establishing new production facilities for substitutes, net operational cost including cost of raw materials, cost of import of substitutes, use in manufacturing as an intermediate good such as cost of conversion of existing equipment and product manufacturing facilities, cost of patents and designs and incremental cost of royalties, capital cost, cost of retraining, cost of research and development, operational costs including raw materials, end use such as cost of premature modification or replacement of user equipment, cost of collection, management, recycling, and if cost effective, destruction of ozone-depleting substances; and cost of providing technical assistance to reduce consumption and unintended emission of ozone-depleting substances. (Annex XII, Indicative List of Categories of Incremental Costs, and Report of the Fourth Meeting of the Parties to the Montreal Protocol, document UNEP/OzL.Pro.4/15 (1992)).

<sup>6</sup> Global Environment Facility, Operational Strategy 64 (February 1996). Many countries with economies in transition (CEITs), but not all, are outside the financial mechanism of the Montreal Protocol. Article 5 of the Protocol defines eligibility in terms of per capita consumption of ozone-depleting substances and some CEITs such as Romania, Georgia, Bosnia and

Herzegovina, Croatia, The Former Yugoslav Republic of Macedonia, Albania, Serbia and Montenegro, Kyrgyzstan, Turkmenistan and Armenia are eligible under the Multilateral Fund.

<sup>7</sup> For example in 1986 which is the reference year for calculation of global production of ozone-depleting substances, the total global production of chlorofluorocarbons (CFCs) stood at 1,124,000 tons. Out of this amount the production of each individual country was as follows: USA (311,000 tons); Germany (123,000 tons); Japan (120,000 tons); Russian Federation (105,000 tons); United Kingdom (102,000 tons); France (71,000 tons); Italy (56,000 tons); China (47,000 tons); Netherlands (42,000 tons); Spain (33,000 tons); India (22,000 tons); Canada (19,000 tons); Australia (15,000 tons), Report of the Secretariat on information provided by the Parties in accordance

with Article 7 of the Montreal Protocol on Substances that Deplete the Ozone Layer, document UNEP/OzL.Pro.14/3 (2002).

<sup>8</sup> Article 10A of the Protocol provides that “Each Party shall take every practicable step, consistent with the programmes supported by the financial mechanism, to ensure: (a) that the best available, environmentally safe substitutes and related technologies are expeditiously transferred to Parties operating under paragraph 1 of Article 5; and (b) that the transfers referred to in sub-paragraph (a) occur under fair and most favourable conditions.”

<sup>9</sup> See similar provision in the United Nations Convention on the Law of the Sea (Article 266 (1)); Climate Change Convention (Article 4(7)); and Biodiversity Convention (Article 16(1)).