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UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE

Ad Hoc Group on Article 13

RESPONSES TO QUESTIONNAIRE RELATING TO THE ESTABLISHMENT OF A MULTILATERAL CONSULTATIVE PROCESS

Submissions by intergovernmental and non-governmental bodies

Note by the secretariat

The Ad Hoc Group on Article 13, at its first session, decided to request Parties to make written submissions relating to a multilateral consultative process (FCCC/AG13/1995/2, para. 17). These, and any other issues Parties considered to be relevant to the exercise, were to be identified through a questionnaire to be circulated by the secretariat no later than 30 November 1995. The Group also requested that inputs should be submitted by 8 February 1996 to be compiled and synthesized by the secretariat. In addition, inputs from intergovernmental and non-governmental organizations were also welcomed. The compilations were to be made available during the sessions of the subsidiary bodies to be held in February/March 1996. The compilation and its synthesis will be considered by the Group at its second session in July 1996.

In accordance with that decision, the secretariat has produced the attached compilation consisting of inputs from the following intergovernmental and non-governmental bodies: Development Alternatives, Foundation for International Environmental Law, Global Climate Coalition, International Institute for Applied Systems Analysis, Hamburg Institute for Economic Research, RainForest ReGeneration Institute, Tata Energy Research Institute, University of Bradford, Verification Technology Information Centre, Woods Hole Research Center. The compilation containing inputs from Parties and non-Parties has been issued in document FCCC/AG13/1996/MISC.1.

In accordance with the procedure for miscellaneous documents, submissions are reproduced in the language(s) in which they are received and without formal editing. Any submission that is received following the issuance of this document will appear in an addendum to this document.

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CONTENTS

PAPER NO. 1: DEVELOPMENT ALTERNATIVES

Section A: Definition and scope of the process

1. The terms 'multilateral consultative process'. It clearly means that the consultative process should be multilateral and not an inter-governmental process. We feel that consultative process should involve, besides government and UN representatives, the NGOs (Environmental) private sector, legal, economic, social and technical experts.

2. A process necessarily means that it has a beginning and an end. Therefore, it means 'a mechanism to steer a sequence of events'.

3. Yes. It should be simple, transparent, facilitative and non-confrontational in character.

4. Yes. Though Article 14 supplements Article 13 or vice-versa but the Multilateral Process (Article 13) will be available to Parties on their request, but the Mechanism under Article 14 is of permanent nature and settlement of disputes between any two or more Parties concerning the interpretation or application of the Convention. Article 13 deals with a general requirement of all the Parties whereas Article 14 deals with inter party dispute settlement.

5. Please see comments under A.1 above.

6. Please see comments under A. 4 above.

7. yes, already explained under A.4

8. Not necessary. It may be independent of the subsidiary bodies.

Section C: Legal and procedural consideration.

9. Legal status: same as any other bodies formed under Articles of the UNFCCC.

10. Parties by consensus should be able to communicate to the CoP Secretariat for triggering the process under Article 13.

11. No.

PAPER NO. 2: FOUNDATION FOR INTERNATIONAL ENVIRONMENTAL LAW AND DEVELOPMENT

Designing a Compliance System for the United Nations Framework Convention on Climate Change[1]

prepared by
Jacob Werksman

Foundation for International Environmental Law and Development

Introduction

The first meeting of the Conference of the Parties to the Climate Change Convention (COP 1), in accordance with Article 13, initiated discussions to respond to the challenge of designing a "multilateral consultative process, available to Parties on their request, for the resolution of questions regarding the implementation of the Convention."[2] This process could form an important part of the Convention's compliance system, and assist in enabling and encouraging Parties to comply with the Convention's provisions.

A well-designed multilateral compliance system will be of particular importance to both developed and developing country Parties that are concerned about the effective implementation of the Convention, but that: 1) may have concerns about their own ability to comply or 2) may not have the political or economic power to act alone in encouraging compliance by fellow Parties.

Although the text of Article 13 is brief, discussions on the further development of a compliance system, to be carried out by an ad hoc open-ended working group of technical and legal experts (AG13), need not begin from scratch. The AG13 may draw, as does this paper, on proposals made during the negotiations of the Convention, and on compliance systems being developed for other international environmental agreements.

This paper provides a general overview of the issues Parties to the Convention will have to address when returning to the negotiation of Article 13. **Part I** highlights the importance of clarifying and strengthening the commitments under the Convention, and suggests that the common but differentiated structure of the Convention will mean that the availability of financial resources will play a crucial role in the Convention's compliance system.

Part II identifies gaps in the institutions, procedures and methodologies for assessing compliance provided for in the existing text of the Convention. In particular, it notes the development, since September 1994, of the Convention's in-depth review process, and its potential to identify concerns with regard to individual Party's compliance with the Convention. In **Part III,** Articles 13 and 14, which represent alternative approaches to responding to concerns about Parties' non-compliance, are analyzed. The benefits and drawbacks of traditional dispute settlement procedures, and more recently developed non-

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[1]This paper significantly updates an earlier FIELD working paper of the same title, and provides a summary of a Chapter of the same title from *Improving Compliance*, J. Cameron, J. Werksman & P. Roderick, eds. (Earthscan, 1996), [hereinafter, *Improving Compliance*].

[2]Article 13.

compliance procedures are discussed.

Part IV suggests that as traditional dispute settlement procedures are rarely, if ever, invoked, Parties should consider using Article 13 as a basis for establishing a strong non-compliance procedure capable of assessing and responding to individual circumstances of non-compliance. Two basic design alternatives are described: a system based on ad hoc panels, and one based on a standing committee. The analysis concludes that the Convention's institutions and procedures should be developed to treat implementation review as a regular, and not an exception or ad hoc, part of the Convention's operations.

Part V looks ahead to the effect that future developments, such as activities implemented jointly and protocols to the Convention, might have on the analysis of compliance with the Convention.

Part I. Clarifying Commitments and Strengthening Compliance

Clarifying the qualitative and quantitative character of the Convention's commitments will be an important first step towards enabling Parties to understand and assess their own and each other's compliance with these commitments. Such clarification, which should result from the Berlin Mandate Process,[3] will affect the way in which Parties further develop the Convention's compliance system.

Logic, and domestic law models suggest that more detailed and restrictive legal rules will demand more sophisticated and demanding compliance systems. The successful implementation of more precise commitments under the Convention would appear to require a more exacting monitoring and verification scheme. In practice however, states will commonly attach well-developed compliance systems to treaties devoid of substantive commitments,[4] and will undertake tougher commitments only with the assurance that the compliance system will remain lenient.[5]

Recent evidence suggests, however, that Parties to international environmental agreements *have* been willing to gradually strengthen compliance systems in step with their increasing

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[3]Report of the Conference of the Parties on its First Session, FCCC/CP/1995/7/Add.1 ("Report of COP 1), Decision 1/CP.1. See *Carrying Forward the Berlin Mandate: Strengthening Commitments and Implementing Activities Jointly, A FIELD Working Paper*, J. Werksman & F. Yamin, (FIELD, 1995).

[4]See, for example, the 1985 Vienna Convention for the Protection of the Ozone Layer, which contained no binding restrictions on the production and consumption of Ozone depleting substances (prior to the development of the Montreal Protocol), and yet had a fully developed dispute settlement procedure with annexes on arbitration and conciliation.

[5]Széll P. "Compliance Regimes" in *Natural Resources and International Dispute Settlement: A Conference Review*; (Frere Cholmeley Bischoff and FIELD, 1994).

commitments. Specific developments in the context of the Montreal Protocol[6] and the UN-ECE Second Sulphur Protocol[7] will be discussed in greater detail below.

Progress towards a strengthened and equitable compliance system will likely depend on the availability of financial resources for those Parties less able to comply. The Convention goes beyond the provision of resources to developing countries; it links developing country compliance to the compliance of developed countries with their commitments to provide these resources.

Financial assistance under the Convention forms part of the primary commitments of the developed Parties and is recognised not merely as an inducement, but as a necessary condition for developing country compliance.[8] This suggests that a compliance system, whenever it reviews the compliance of a developing country Party must follow a cycle of commitments which will lead it to review developed Parties' compliance with their financial commitments, and the effectiveness of the operation of the Convention's financial mechanism.

Part II. Institutions and Procedures for Compliance

A. Compliance Information and Review Processes

The Convention currently provides a skeletal framework of institutions and procedures that allow for two types of implementation review:[9] 1) a review of the "overall aggregated effect" of steps taken by Parties[10] and 2) an examination of Parties' commitments in light of the Convention's objective[11] including, in particular, the review of the adequacy of the

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[6]1987 Montreal Protocol on Substances that Deplete the Ozone Layer, as adjusted and amended, 25 November 1992, Report of the Forth Meeting of the Parties, UNEP/OzL.Pro4/15. ("Report of MOP4").

[7]1994 Protocol to the 1979 UN-ECE Convention on Long-Range Transboundary Air Pollution on Further Reductions of Sulphur Emissions (the Second Sulphur Protocol) will in all likelihood be adopted this year. References to the Second Sulphur Protocol Process for Reviewing Compliance are made to the final version of the text in EB.AIR/WG.5/CRP.13.

[8]Article 4.7, 12.5.

[9]For a detailed analyses of how these processes might work, see Lanchbery, et al "Reporting and Review Processes in the Climate Change Convention: A Briefing Paper for the INC Delegates and Secretariat" *VERTIC* (London: 1994)("VERTIC").

[10]Article 7.2.e; Article 10.2.a.

[11]Article 7.2.a

developed country Parties' commitments.[12] Both of these processes will be carried out by the COP with assistance from two of its subsidiary bodies, the Subsidiary Body for Implementation (SBI) and the Subsidiary Body for Scientific and Technical Advice (SBSTA).

These review processes have the potential to generate the information necessary to conduct a review of an individual Party's compliance with its commitments to mitigate greenhouse gas emissions. The Convention's institutions will be provided with data on each Party's sources and sinks of greenhouse gases, and on the measures taken by Parties to control their net emissions.

Each Annex I Party will further be required to provide a specific estimate of the effects its policies have on its net emissions.[13] Scientific assessments of the effects of these measures will be provided by the SBSTA.[14] Further information may be made available to the COP by competent intergovernmental and non-governmental organizations.[15]

While the Convention's text does not explicitly empower any of its institutions to review the extent to which an individual Party has complied with its commitments, a process for the in-depth review of Annex I Parties' first national communications was endorsed by COP 1.[16] This process opens opportunities for scrutinising the usefulness and credibility of information provided by individual Parties seeking to demonstrate that they are in compliance.[17] Expert review teams are established to conduct in-depth "paper" reviews and, with Party's approval, country visits. These reviews, which should be completed within one year of the receipt of the national communication by the Secretariat, will aim at providing a "thorough and comprehensive technical assessment of the implementation of the Convention commitments by individual Annex I Parties and Annex I Parties as a whole."[18]

The in-depth review process seeks to strike a balance between the Convention's emphasis on the review of "overall" and "aggregated" performance, the practical needs of the COP and its Subsidiary Bodies to achieve accuracy, consistency and relevance in data flow, and to build confidence in individual Party's performance. While the COP has stressed that the

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[12]Article 4.2.d; Article 10.2.b.

[13]Article 12.2.b.

[14]Article 9.2.b.

[15]Article 7.2.1.

[16]Report of COP 1, Decision 2/CP.1.

[17]"Teams Start In-Depth Review of National Communications", L. Assuncao & P. Stiansen, *Climate Change Bulletin*, Issue 8, 1995.

[18]Report of COP 1, Decision 2/CP.1.

purpose of the review is to be "facilitative" and "non-confrontational",[19] it is also to be carried out in an open and transparent manner designed to preserve the independent and expert assessment of the review team. Should there be points of disagreement between the team and the Party, the integrity of the team's conclusions will remain intact, and the Party's views will be incorporated in a separate section of the team's report.[20]

The in-depth review process is expected to culminate with the presentation of summary reports of each team review to the COP and its Subsidiary Bodies.[21] An assessment of the process itself will help the COP to determine whether to extend in-depth review to future communications of Annex I Parties or to the national communications expected from non-Annex I Parties. Nevertheless, it is worthwhile to consider now whether the in-depth review process may be useful in identifying the types of "questions" or "disputes" anticipated by anticipated in Articles 13 and 14, and thus play a significant role in the Convention's compliance regime.

Part III. Articles 13 and 14: Non-Compliance Procedure and Dispute Settlement Procedure

An opportunity to develop procedures under the Convention that will scrutinise an individual Party's compliance, has been left open by Article 13, which anticipates the establishment of a process for resolving questions regarding the implementation of the Convention; and by Article 14, which allows Parties, under certain circumstances, to invoke dispute settlement procedures for the resolution of disputes between two or more Parties "concerning the interpretation or application of the Convention."[22] These Articles represent two distinct types of processes for addressing Parties' non-compliance: non-compliance procedures (NCP) and traditional dispute settlement procedures (DSP).

A. Article 13: A Multilateral Consultative Process

The brief text of Article 13 belies the detailed discussions held during the negotiations on the need for, and the nature of, a compliance system for the Convention. Delegates weighed a number of specific proposals for the development of such a system including an elaborate model proposed by the Co-Chairs of Working Group II.[23] Article 13's text, which is a legacy of the Co-Chair's proposal, (entitled "Resolution of Questions Regarding Interpretation and Implementation of the Convention") acknowledges that questions regarding

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[19]Ibid., Decision 2/CP.1, Annex I.

[20]Decision 2/CP.1, para 2(d).

[21]*Climate Change Bulletin.*

[22]Article 14.1.

[23]See Part IV.A, below, for a more detailed discussion of this proposal.

the implementation of the Convention may arise and that they should be resolved, to the extent possible, through multilateral (as opposed to bilateral) consultative (as opposed to confrontational) processes. The Article does not prejudge to which of the Convention's institutions such a process should be assigned, or whether a new institution might be needed.

B. Article 14: Traditional Dispute Settlement

Article 14 provides for a hierarchy of procedures designed to respond to a situation where a disagreement between two or more Parties to the Convention has ripened into a dispute.[24] Should Parties fail to settle their dispute through negotiations "or other peaceful means" Parties may avail themselves of either judicial dispute settlement through the International Court of Justice, arbitration or conciliation under the auspices of the Convention.

The main questions raised during the negotiations of these provisions were whether jurisdiction over the disputants should be compulsory or voluntary; and whether the outcome of the procedures should be considered legally binding upon them, or merely recommendatory.[25] The Convention allows any Party to declare in writing "when ratifying, accepting, approving or acceding to the Convention, on any time thereafter" that it recognises as compulsory either or both the jurisdiction of the Court, or the jurisdiction of an arbitral tribunal set up under the Convention, over any dispute concerning the interpretation of the Convention in relation to any other Party making the same declaration.[26] Any decision taken by the Court would be legally binding upon the Parties to the dispute[27]. The COP has yet to elaborate arbitration procedures but, should it decide to follow the precedent established by other international environmental agreements, decisions of the arbitral tribunals set up under the procedure would also be binding upon Parties to the dispute.[28]

If a disputing Party has not subjected itself to the compulsory jurisdiction of either of these procedures it cannot be forced to do so. However, if the dispute remains unsettled after a year has passed, any of the Parties to the dispute can submit the dispute to an ad hoc

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[24]These provisions have their root in Article 33 of the UN Charter, and are modeled on dispute settlement procedures found in the Vienna Convention and in other international environmental agreements.

[25]A similar point is made by Bodansky, p. 549.

[26]Article 14.2. This is in accordance with the Statute of the International Court of Justice, Article 36.2.a. Some delegations suggested that ICJ jurisdiction for the settlement of disputes under the Convention be compulsory. See proposal of Norway, A/237/AC/Misc 5/Add.2, p. 14).

[27]Article 59 of the Statute of the International Court of Justice.

[28]*See e.g.*, Vienna Convention for the Protection of the Ozone Layer, Annex on Arbitration, Article 15.

conciliation commission[29] composed of an equal number of members appointed by each of the disputants. The jurisdiction of the conciliation commission is compulsory for all Parties. Its decisions, however, are "recommendatory" in nature and the disputants are required only to "consider" the award "in good faith."

This flexible, multitrack approach, which allows states to effectively select from the three formal dispute settlement procedures, anticipates that multilateral treaties cover a wide range of state interests. Any particular situation may require a different institutional or procedural response, tailored to meet the concerns of the states involved. This flexibility, however, also provides loopholes. Those states seeking to avoid compliance with the Convention can escape legal censure either by declining to declare themselves subject to the binding adjudication of the Court or tribunal, or by rejecting the recommendatory decisions of the conciliation commission.

C. Comparing DSPs and NCPs

Comparisons of DSPs and NCPs continue to form part of a largely theoretical exercise: DSPs have long been included in international environmental agreements, but have never been invoked. NCPs have only recently been adopted and have only begun to demonstrate their value in practice. Nevertheless certain generalisations about each type of procedure can be made. Traditional dispute settlement procedures, such as those contained in Article 14, can provide a formal and structured process for resolving legal disputes between two or more Parties to an international agreement. Through litigation, arbitration or conciliation, Parties entrust the settlement of their differences to a limited and putatively impartial group of qualified individuals, external to the Convention's institutions, who consider evidence, adjudicate and render a final decision or award.

These procedures are often criticised as confrontational and adversarial, intended primarily to "look backward" at past behaviour in order to assess blame and impose sanctions on an offending party. The complex and formal procedures needed to initiate and pursue a dispute, which require Parties to identify specific breaches of commitments by other states, have come to be regarded as unnecessarily hostile. The confrontational character of these procedures can be seen as having an adverse effect on state relations, and is thought to discourage states from initiating dispute settlement.[30] Indeed, to date, no Party to an international environmental agreement has taken advantage of formal dispute resolution procedures of the type contemplated in Article 14, even though implementation of these agreements has been less than complete.

It was, in part, in response to what negotiators viewed as the shortcomings of traditional dispute resolution, that the Convention anticipates the establishment of an NCP under Article 13. Multilateral NCPs, which are to be supervised by a convention's governing body, offer

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[29]Article 14.5-14.7. The details of these procedures are to be adopted by the COP "as soon as practicable."

[30]Birnie and Boyle.

a less confrontational approach, that is said to "look forward" for ways in which the Convention's collective resources can be used to facilitate Parties' compliance. Multilateral NCPs are designed to pre-empt and avoid confrontations that might trigger more formal dispute resolution. They are thought to be particularly well-suited to global environmental regimes, where a large number of Parties share an interest in the effective implementation of the Convention's objectives.

Multilaterally negotiated solutions encourage states to act as trustees of global interest and to resist or escape the strictures of pre-existing bilateral relationships.[31] Finally, NCPs that aim to facilitate compliance, rather than to reprimand failures to comply, suit multilateral agreements which involve a wide range of Parties with differing abilities.

NCPs such as those in the Montreal Protocol Implementation Committee (MPIC) and the Second Sulphur Protocol Implementation Committee (SSPIC), are, however, a new development in international environmental law, and not enough practice is available to accurately judge their effectiveness. Nevertheless, the multilateral, facilitative approach has been criticised in principle, as leading to "least common denominator", negotiated solutions governed by the politics of expediency, rather than the principles of law. If the resolution of conflicts over the interpretation or application of rules is always subject to the flexibility of multilateral negotiations, the binding quality of the rules themselves can be called into question. Under such a system, rules would never reach a point of stasis, and the Convention would be open to constant renegotiation.

The success of such a process will depend upon Parties developing a common interest in the success of the Convention, so that the resolution of questions would be based on agreed principles rather than on a bargain struck between states with very different priorities and interests.[32]

Standing alone, purely facilitative approaches appear to be able to respond effectively only to a limited categories of non-compliance. They are designed, primarily, to identify instances of non-compliance and to assist Parties willing but unable to comply with their commitments. The treaty's financial mechanism can be alerted to cases of non-compliance by the NCP or by the party in need of assistance. However, the common but differentiated nature of the Convention's mitigation and financial commitments leaves the developed countries, who bear the bulk of the treaty's substantive commitments, ineligible for financial assistance. Furthermore, countries simply unwilling to comply, regardless of their eligibility and the availability of financial resources will not likely be swayed by efforts to facilitate their compliance.

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[31]Birnie and Boyle, 137.

[32]Birnie and Boyle, somewhat sceptical of what they call "institutional" dispute resolution suggest that "the true role of such bodies may thus be closer to a legitimation of national policies than to acting a as fiduciary for the interests of the environment." cite

Part IV. Strengthening Non-compliance Procedures

It is tempting to view the two approaches represented by Articles 13 and 14 as complementary rather than as alternatives, as a carrot and stick for facilitating and coercing compliant behaviour. Although a number of international environmental agreement now contain both types of procedure, any relationship between the two has been discouraged rather than elaborated.[33]

The general characteristics of Article 13 and 14, and their sequential positioning in the text suggests that NCPs should be used as a means to avoid the need for DSPs. Should a Party remain in non-compliance after the NCP had exhausted its efforts to encourage compliance, traditional dispute settlement techniques would be available to coerce compliance by adjudicating a final judgment, and offering a specific remedy to the complaining Party.

However, the formalities of a DSP, which require states to lodge an accusation based on breach of international law, have proved an insurmountable political obstacle to the use of traditional dispute settlement procedures. Under these circumstances it seems unlikely that the coercive benefits of formal dispute resolution will have any more force than a symbolic and unarticulated threat.

Certain procedural and substantive improvements can be made to the primarily political, facilitative approach of NCPs to give them the more adjudicatory character necessary to assess non-compliance, and to bring to bear the most pressure possible on resistant Parties to comply. Thus, instead of relying on traditional dispute resolution procedures to provide the coercive element to compliance systems, the climate change Parties may chose to revisit a number innovative proposals[34] put forward during the negotiation of the Convention, or that have gained acceptance in other international agreements. These proposals can be roughly separated into two groups distinguished by their use of either ad hoc panels or standing committees.

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[33] The Parties to the Montreal Protocol, and to the Second Sulphur Protocol have adopted general statements that the two procedures are separate and that NCP should operate "without prejudice" to DSPs. The Third Meeting of the Parties to the Montreal Protocol determined that the Protocol's Mon-Compliance Procedure and the DSP contained in the Vienna Convention were "two distinct and separate procedures." (Dec III/2). Second Sulphur Protocol, Article 7.4.

[34]It must be emphasised that a number of these proposals were introduced into the debate at a stage in the negotiations before Parties were certain what shape the Convention's primary rules would take. Although they can be said to represent the type of compliance regime countries might support generally, there has been no indication that these delegations will introduce similar proposals in the future.

A. Ad hoc panels[35]

The Co-Chairs of Working Group II[36] of the INC proposed, during the negotiation of the Convention, a process that would avoid the open-ended political debate within the Conference of the Parties by assigning specific questions of non-compliance to an ad hoc panel. The Co-Chairs' proposal focused on developing the Convention's institutional capacity to carry out the adjudicatory functions and legal analysis that might otherwise be provided by traditional dispute resolution. They proposed that the process be designed to resolve *questions* regarding both implementation and the *interpretation* of the Convention, suggesting that the process could take up issues not yet ripened into formal legal disputes and subject them to an analysis that extended into the legal aspects of Parties' commitments.

Under the Co-Chairs' proposal the Ad Hoc Panel could make a recommendation on how to resolve questions raised, but the power to take actions appropriate to that outcome in order to "advance the objectives of the Convention" would rest with the COP. The legal backbone to the COP's analysis could be provided through requests from the COP or the Ad Hoc Panel, for the establishment of a parallel Panel of Legal Experts (also established on an ad hoc basis); or through requests for advisory legal opinions from the International Court of Justice.

More recent proposals[37] seek, similarly, to rely on an ad hoc "Committee of Experts" to "recommend courses of action to address or answer" questions raised under Article 13.[38] Under a Canadian proposal, questions would first be brought before the Convention's SBI, which would determine what it considers to be an appropriate resolution of the question. If the SBI is unable to reach resolution of the question, it may recommend, to the COP, that the issues be taken up by the Committee of Experts, established, ad hoc, for that specific purpose.

The expressed intent of this and other, similar proposals, is to create a "non-confrontational" procedure capable of providing a "swift response." However, the referral of questions in the first instance, to the wide-ranging agenda of the SBI, and, in the second instance, through the COP, to an ad hoc panel, would appear, instead, to establish many procedural (and therefore political) barriers to swift resolution. Requiring a decision of the COP to initiate

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[35]This discussion is based on the Revised Single Text on Elements Relating to Mechanisms, 30 October 1991, A/AC.237/Misc.13, presented to delegates at INC 4.

[36]The Co-Chairs of Working Group II, which was responsible for negotiating the institutional aspects of the text were Elizabeth Dowdeswell (Canada) and Ambassador Robert F. Van Lierop (Vanuatu).

[37]Consideration of the Establishment of a Multilateral Consultative Process for the Resolution of Questions Regarding Implementation (Article 13), Submission by the Government of Canada, FCCC/CO/199/Misc.4.

[38]Ibid., Annex I.

a process to resolve difficult questions would seem to invite both confrontation and delay.

Discussion of the Co-Chairs' proposals generated a number of insightful criticisms of the ad hoc panel approach. Ad hoc panels require a formal request from a Party or Parties and the selection and convening of a body for that specific purpose. Such procedures can raise the same political barriers to action raised by traditional dispute settlement procedures. Questions cannot arise as a matter of course, but must be triggered, in a necessarily confrontational manner, at the initiative of a Party. Finally, ad hoc processes allow no opportunity for policy makers to develop the institutional experience that seems essential for consistent analysis, and for building the confidence of Parties in the Convention's compliance system.

B. A standing committee

In order to avoid the difficulties of relying on ad hoc procedures, the Parties may wish to consider borrowing from the development of the Implementation Committees under the Montreal Protocol and the Second Sulphur Protocol, and assign a strengthened compliance procedure to a standing committee responsible for implementation review.

Although the text of Article 13 provides an invaluable procedural foothold for Parties wishing to develop further the Convention's compliance procedure, Parties have not and need not feel restricted by Article 13 when developing institutions and procedures for reviewing implementation. The COP's broad mandate[39] and the existence of a Subsidiary Body on Implementation ready to "assist the COP in the assessment and review of the effective implementation of the Convention" provides Parties with more than adequate leeway to develop a compliance system, and to assign its functions to new or existing institutions.

In effect, a number of the adjudicatory functions that might have been carried out by external courts or tribunals, or ad hoc panels, could be assigned to a standing committee, operating under the authority of the Convention's SBI and COP. Under such a procedure the traditional dispute settlement procedures of Article 14 would remain available to help ensure the stability and integrity of the Convention's primary commitments while recognizing that they are unlikely to be involved with any frequency.

Part V. Elements for Inclusion in a Compliance System

Some assessment of the legal and political possibilities for developing the Article 13 process, can be drawn from the precedent of other agreements, and from the experience of the negotiation of the Convention itself, during which a number of delegations submitted innovative proposals.

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[39] The COP may "establish such subsidiary bodies as are deemed necessary for the implementation of the Convention" and to "exercise such other functions as are required for the achievement of the objective of the Convention" (Article 7.2.i; Article 7.2.m.).

A. Institutions

The functions currently assigned to the Convention's institutions appear inadequate to provide for a functional implementation and compliance review system. However, the Convention's general framework, and the COP's broad mandate allow ample room for institutional and procedural growth.

1. Conference of Parties[40]

The Conference of the Parties has the dual mandate to keep under regular review the implementation of the Convention, and to make the decisions necessary to promote the effective implementation of the Convention. As the Convention's "supreme body" all final decisions regarding compliance will likely rest with the COP.

Although the detailed task of reviewing individual communications may be passed to a smaller subsidiary body, meetings of the COP will play a central role in focusing media and NGO attention on progress being made in the implementation of the Convention. Meetings of the COP will be open to any body or agency qualified in matters covered by the Convention. The COP may take into account information from the widest variety of sources, including intergovernmental and nongovernmental sources, as well as information gathered through the systematic observation anticipated in Article 5.

2. Secretariat[41]

The Secretariat's powers with regard to implementation appear to be limited to compiling and transmitting reports submitted to it, and to facilitating assistance to the Parties in preparing and communicating information. Staffed by international civil servants, the Secretariat will provide intersessional continuity to the work of the COP. It will act as a neutral screen for information reported by Parties, by aggregating information designated as confidential by Parties before passing it on to the subsidiary bodies engaged in reviewing compliance.[42] The Secretariat will also serve as the interface for coordination of all agencies involved in implementation. This will be particularly important in light of the central role the GEF and its implementing agencies will have in the implementation of the Convention.

Under the MPIC and the SSPIC, parties have found it essential that their respective secretariats, as the focal points for reporting on commitments, have the power to initiate NCPs. The secretariats of these agreements will also serve as a point of diplomatic contact for resolving misunderstandings. Although recognising these powers within the Climate Change Secretariat would appear to considerably expand those enumerated in the

[40]Article 7.

[41]Article 8.

[42]Article 12.9.

Convention's Article 8,[43] a similarly narrow mandate, given to the secretariat in the original text of the Montreal Protocol, was expanded by decision of the Parties to include the types of functions outlined above.[44]

3. Subsidiary Body for Implementation[45]

The SBI has an open-ended membership of government representatives "who are experts on matters related to climate change". These broad parameters have allowed the SBI to operate with a large and unwieldy membership, and were included in the Convention at the insistence of less powerful developing countries concerned about being excluded from a smaller, representative body. While such an arrangement appears to promote transparency and democracy, careful analysis of individual Parties' compliance is likely to prove impossible in the unfocused and politicised atmosphere of the SBI.

4. Implementation Review Committee

The experience of the MPIC suggests that, in order for a body to operate an effective compliance procedure, its membership would have to be limited to a manageable number of representatives.[46]The establishment of a standing Implementation Review Committee was supported by a number of delegations during the negotiations. Some of the concerns of smaller developing countries could be assuaged by relying on traditional UN power sharing formulas and by providing for representation based on an "equitable geographical distribution of Parties[47]," by formulating new balances and constituencies that may be better suited to this

[43]Article 8.2.b;c and g.

[44]The primary difference between the climate change Secretariat's powers and the original mandate of the Ozone Secretariat is the Ozone Secretariat's power to "prepare" rather than merely "compile" reports. This hardly seems significant in light of the expansion of Secretariat duties that has since taken place in the Ozone regime. Montreal Protocol, Article 8.

[45]Article 10.

[46]The MPIC was initially comprised of five members, it now has ten, elected for a period of two years.

[47]The present MPIC is divided evenly between the five regional groups that maintain a tenacious hold on UN politics. These are African Group, the Asian Group, the Group of Latin American and the Caribbean, and the Western European and Other Group (WEOG), and the Eastern European and Russian Group. The New Zealand delegation proposed a Committee with a limited membership of 15, again, evenly divisible by 5, and based on equitable geographic distribution. (A/237/AC/Misc 5/Add.2 p.12)

particular Convention, or to the geopolitical make up of actual Parties.[48] Further procedural safeguards, such as ensuring that the Party whose compliance is being reviewed can participate in the deliberations of an Implementation Review Committee, would help to allay fears of exclusion from the process.[49]

Equally important to the size and geopolitical balance of the institution is the quality of the participation of the individuals which serve as its members. The MPIC and the SSPIC both provide for the election of members in their capacity as representatives of Parties, and not as individuals. Such a system allows a Party that has been elected to the Committee but that is faced with limited resources or scheduling difficulties to vary the individual that attends meetings on their behalf.

The present MPIC recently signalled its concern that inconsistent attendance at its meetings was disrupting the continuity and effectiveness of its work.[50] Consistency in attendance could be made part of a procedural requirement by refining the qualifications required of representatives, or by requiring that members be elected as named individuals. The need for flexibility could be accommodated through the provision of financial assistance to eligible developing country delegates and the use of named alternates who could serve on the Committee should the principal delegate be unable to attend.

B. Power

Further powers, that have been considered necessary to the effective review of compliance in the context of other international environmental agreements, have focused on ensuring that the compliance system be transparent, and have access to as much information from as many sources as possible. To this end both the MPIC and the SSPIC will have the power to request further information from Parties[51]; to send visiting missions upon invitation by the

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[48]The recently restructured Global Environment Facility, for example, designed to balance the interests of recipient and donor countries, has formed a governing council composed of 16 developing country members, 14 donor countries and 2 from former COMECON countries with "economies in transition." Individual constituencies were to be formed on the basis of six factors ranging from contributions to the GEF to "natural resource endowment and environmental vulnerability". Annex E to the GEF Instrument. The Second Sulphur Protocol, which has a largely Western European membership will have a Committee of eight members, with no formal requirements with regard to geographical representation.

[49]To ensure the impartiality of the MPIC's decisions, Parties "involved in a matter under consideration" are not, however, entitled to take part in the "elaboration or and adoption of recommendations on that matter." Report of MOP4, Annex IV, paras 10, 11.

[50]UNEP/Ozl.Pro/ImpCom/7/2

[51]Report of MOP4, Annex IV, para. 7(c)

Party concerned to conduct information gathering;[52] and to receive and assess information from accredited NGOs.[53] Certain delegates to the INC sought during the negotiations to replicate these, as well as other powers, in the Convention's compliance system.[54]

A further, enumerated function of more developed compliance systems, is the power of the Committee to make specific recommendations to the COP on measures to assist or to bring about compliance by a Party.[55] This power, though it is recommendatory in nature and is filtered through the political processes of the COP, is highly significant in that it entitles the subsidiary body to form a preliminary conclusion as to whether or not a Party is in compliance, and an initial assessment of why a Party has failed to comply. The publication of a report of the Committee, detailing an impartial review that concludes that a Party is wrongfully violating the Convention, will prove a useful a tool for bringing to bear public and diplomatic pressure on a Party to comply.

C. Process

1. Standing

In designing a non-compliance procedure, Parties must determine which entities will be allowed to trigger such a procedure. Article 13 anticipates a process that is "available to Parties on their request". This can be read as limiting standing to initiate the process in three different ways:

> 1) by requiring that the process can only be initiated at the request of the Party having questions with regard to its own implementation (i.e., available to a Party at its *own* request) or
>
> 2) by limiting the right to initiate procedures to Parties to the Convention (i.e., available to Parties but not, e.g., to the Secretariat) or
>
> 3) by requiring that Parties to the Convention as a whole, through a decision of the COP, must initiate the process (i.e., available on the

[52]Report of MOP4, Annex IV, para. 7(d).

[53]A/AC.237/Misc.5/Add.2, p.12 (Submission of New Zealand)

[54]See the submissions of Australia and New Zealand to INC 2; A/AC.237/Misc 5/Add.2 p.11-12. Australia proposed that the Convention's bodies be given the further power to "investigate complaints." A/AC.237/Misc 5/Add.2, p.11.

[55]Both the MPIC and the SSPIC have this power. Report of MOP4, Annex IV para 9. New Zealand supported its inclusion in the Convention's non-compliance response system. Misc 5/Add.2 p.13.

request of the Parties).[56]

Each of these interpretations, if applied exclusively, would unnecessarily limit the potential of the Convention to promote compliance. Parties to both the MPIC and the SSPIC have found it appropriate to allow their agreements' compliance procedures to be triggered by a Party concerned about its own ability to comply, as well as by concerns expressed by other Parties, acting jointly or individually, and by the secretariat. Allowing Parties themselves, as well as an impartial secretariat to initiate compliance procedures, helps give such procedures a more administrative and less confrontational character, and could, in turn, help lower the political costs involved in directly challenging another Party's compliance.

Under the MPIC and the SSPIC, any Party, regardless of whether it can establish that its own rights under the agreement are being adversely affected, may raise its concerns about another Party's performance, as long as it supports its submissions with corroborating information. This helps, as well to depoliticise the process by encouraging Parties to take an interest in the implementation of the agreement per se, rather than using the Convention's mechanisms to protect individual interests.

2. Jurisdiction

Compliance procedures generally anticipate that only a Party's individual compliance can be brought under scrutiny.[57] A number of the Convention's commitments are, however, effectively collective. Parties as a whole, for example, undertake the implied commitment to adjust commitments in step with an improving knowledge of climate change. Although the COP has the general mandate to supervise the implementation of the Convention, there may be circumstances in which an individual Party may wish to challenge, in a fora other than the COP, whether the Parties as a whole are acting in accordance with agreed "collective commitments". In such a circumstance, a Committee of limited membership may prove useful in making assessments of the Parties' collective behaviour.

3. Access to Information

This Paper has emphasised the need for a free flow of information into and out of any process established to assess Parties' compliance with their commitments. MPIC has an open policy towards information and must receive, consider and report on "any . . . information received and forwarded by the Secretariat concerning compliance". Although NGOs do not have standing to initiate complaints under the MPIC procedures, they may submit information to the Secretariat about "possible non-compliance" which may, in turn, be made available to the Implementation Committee.

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[56]Although the language lends itself least to this interpretation, it most closely reflects the Co-Chairs proposal, whereby Parties agree to establish a panel.

[57]The MPIC, for example, allows one or more Parties (plural) to raise concerns with regard to another Party (singular).

The COP's broad mandate to base its decisions on the best available scientific, social and technical information, and to seek and utilize information from all competent sources, should be extended to whatever subsidiary body to which it delegates the power to review individual Parties' compliance.

To enlist the support of the public in promoting the implementation of the Convention, as much information about Parties' compliance as possible should be made widely available. This, of course must be balanced against the need for Parties to be able to communicate to the Committee information that may be considered too sensitive to be made public. The Convention anticipates that the COP will establish criteria by which a Party may designate information as confidential as part of its normal reporting commitments, *prior* to its having reached a Committee.[58] This does not preclude the Committee from following the example of the MPIC and negotiating with an individual Party involved in a compliance review for access to additional information in return for guarantees of confidentiality. a)

Part VI. Future Issues

A. Joint Implementation: A further complication

Joint implementation was conceived as a mechanism to increase the likelihood of achieving the objective of the Convention by overcoming the economic disincentives for compliance. Its proponents argue that by allowing developed country Parties to fulfil their emissions reduction commitments in countries where it is cheaper to do so, both developed and developing country Parties are encouraged to undertake activities that further Convention's objective. Developed countries save money and political friction at home, and may prove more willing to undertake more ambitious commitments. Developing countries will benefit from improved technologies and the domestic environmental and economic benefits of lessened dependence on fossil fuels. The domestic benefits of such projects carried out in developing countries may, it has been argued, encourage developing countries to take on commitments of their own.

Joint implementation thus sits comfortably within the framework of the "facilitative" approach to compliance systems, as it encourages a non-confrontational look at Parties' abilities to comply and seeks cost-effective and politically acceptable solutions. What appears to be an economically straightforward and sensible concept, has raised serious questions in terms of its legal, procedural and institutional implications, that have yet to be resolved.[59]

The most significant of these would be revealed by a traditional dispute settlement mechanism, which is structured to assess Parties' activities against their legal commitments.

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[58]Article 12.9.

[59]See Grubb, "Pragmatics in the Greenhouse"; 354 *Nature* 348 (1991), 349.; Nitze W. *The Greenhouse Effect: Formulating a Convention* (Royal Institute of International Affairs, 1990), Yamin F. "The Use of Joint Implementation to Increase Compliance with the Climate Change Convention", in *Improving Compliance*.

Joint implementation "for credit", even in its simplest form would allow Parties to transfer across borders, activities undertaken to fulfil their commitments. Thus while a developed country would remain responsible for financing the fulfilment of its own commitments, the responsibility for carrying them out would, in effect, be subcontracted to a developing country Party.

It is unclear how the Convention Parties, which collectively have the power to determine criteria for joint implementation, will view the legal effect of such shifts in responsibility. What began as a straightforward commitment by a single country to reduce emissions, would be bifurcated into separate commitments on the one hand to finance, and on the other to implement the proposed activity. Parties may wish to continue to view the commitment to reduce as solely that of the developed country, and require that country to verify and ensure the compliance of the host country through bilateral channels. In this circumstance, Parties to the Convention could invoke compliance procedures for failure to achieve emissions reduction targets against the investing country only.

Alternatively, Parties may wish to retain the multilateral nature of the Convention and view the commitments of the donor and the host country as running between them and to all Parties to the Convention. Such a situation might be brought about by the more sophisticated iterations of the joint implementation schemes which envision all Parties being allocated emissions entitlements, based on formulas derived from per capita or historical emissions patterns, which could then be traded freely. Under such a system, all Parties to the Convention would have an interest, and should be entitled to enforce each Party's compliance, in order to maintain the value of their own emissions entitlements.

B. Protocol Negotiations[60]

Although a protocol must be adopted under the auspices of the Convention, and all Parties to it must also be Parties to the Convention, it will likely contain a legally distinct set of relationships and commitments. Not all Parties to the Convention need become Parties to a protocol. Decisions under any protocol can be taken only by Parties to the Protocol concerned, including, presumably, decisions related to a Party's compliance with the Protocol.

The relationship between the Convention's institutions and procedures, and those that may be established by a Protocol, including a governing body, a financial mechanism and a compliance system, is as yet unclear. Should the Convention and the Protocol share a compliance system, procedures could be developed within a Committee, and within the COP to vary the right to participate or vote depending on which agreement or which Parties were at issue. Given the current state of the Convention's primary commitments, Parties might, alternatively, await the outcome of protocol negotiations before deciding whether to follow the example of the Ozone regime and develop a compliance procedure specific to the more developed protocol.

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[60]Article 17.

This would allow Parties to tailor a compliance system to the protocol's primary commitments. If, for example, a protocol chooses to specify measures (such as the imposition of energy efficiency standards, minimum technological standards or carbon taxes) the emphasis of compliance assessment may shift from questions of whether a country is achieving its target within a certain timetable, to whether a party has adopted certain regulations or put in place particular technologies. This would ease some of the methodological challenges facing compliance analysis under the Convention.

Conclusion

The tools available for the enforcement of compliance with international environmental law are blunt and limited. Funds for the facilitating compliance are in short supply.[61] The types of sanctions contemplated for coercing compliance are unlikely to have a deterrent effect on the behaviour of wealthier or more powerful non-compliers and could not therefore be equitably applied against weaker Parties.

The political and ethical environment generated by the rhetoric of global environmental issues, such as ozone depletion, biodiversity and climate change, encourages states, regardless of their real motivations, to appear to be acting in good faith. The Convention's compliance system, in order to promote the compliance of reluctant Parties must establish both objective and normative standards whereby Parties' actions may be assessed against their commitments. Clearly articulated primary commitments and methodologies, and transparent, publicly available reports will help to expose and distinguish the inadvertent and intentional manipulation of compliance data.

A compliance procedure, strengthened institutionally and procedurally along the lines outlined above, could provide clear criteria and transparent procedures for assessing and facilitating compliance and strip away the excuses that dissenting states use to mask intentionally non-compliant behaviour. Traditional dispute settlement mechanisms must be available to step in where good faith non-compliance is exposed as a wrongful breach of commitments and to add the sanction of unlawfulness to the embarrassment of non-compliance.

The concerns of those countries reluctant to initiate compliance procedures can be addressed in part by reducing the procedural barriers, and lowering the political costs associated with non-compliance. Empowering impartial institutions, such as the Convention's Secretariat which, unlike many developing countries, will have the resources to monitor and assess compliance information, to raise questions about Parties' compliance and will help depoliticise responses to non-compliance. The Convention's compliance system must

[61]The GEF, which is to provide financing for climate change, biodiversity, ozone and international waters projects in developing countries and countries with economies in transitional has just been replenished at US$2.2 billion for a three year period. To place this figure into perspective, if the GEF's funds were spread evenly to 100 countries eligible for funding, and climate change receives 40% of the GEF's total budget, approximately US$2million a year would be available per country per annum over a three year period.

maintain an emphasis on facilitative activities, while ensuring the process sends the correct signals about the importance of the Convention's objective and its primary commitments.

The challenge that global warming shares with the degradation of the ozone layer and the depletion of biological diversity is that it operates on a strict time scale. While the precise limits of that scale have not yet been sharply defined by science, we have been told that there is some point on the horizon by which we will have to achieve a certain goal or the results may be catastrophic. Any achievements leveraged by this Convention that fall short of that critical goal, may have some worthwhile benefits, both for the environment and for human development. If the science is to believed, however, these achievement will wilt beside the large scale misery and disruption that could be brought on by accelerated global warming. Arguments in favour of soft rules and flexible compliance systems, often grounded on rationales of cost-effectiveness and political pragmatism must be judged against the long term costs of doing too little too late.

The commitment to strengthen the Convention's compliance system must go hand in hand with the commitment to strengthen the Convention's commitments or risk further eroding the public's confidence in the ability of international law and global governance to deal effectively with the challenges of sustainable development.

PAPER NO.3: GLOBAL CLIMATE COALITION

Global Climate Coalition Response to Questionnaire and Request for Submission Relating to the Consideration of a Multilateral Consultative Process and It's Design (AG13)

Our response will follow the Questionnaire's format:

I. Context

A. Convention mandate:

Article 13 of the 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."

B. Decision 20/CP.1 of the Conference of the Parties:

"1. Decides to establish an ad hoc open-ended working group of technical and legal experts to study all issues relating to the establishment of a multilateral consultative process and its design;

2. Requests the ad hoc open-ended working group to report its findings to the Conference of the Parties at its second session."

II. Questions

Parties and contributors are invited to forward their responses to the following questions:

Section A: Definition and scope of the process

"1. What should be understood by the term "multilateral consultative process" and what "questions regarding the implementation of the Convention" should be covered by such a process?"

Response: The term "multilateral Consultative process" means just what the words imply. One or more Parties may initiate consultations on "questions regarding the implementation of the Convention." Such consultation could involve two Parties, a group of Parties or all Parties of the COP, and the "process" could be a process or procedure for a Party or Parties to have an issue about the Convention included on the agenda of the COP (without resorting to the extraordinary session provisions of Article 7.5) or a subsidiary body.

The AG-13 "process" is not an informal dispute resolution process. It is not intended nor should be considered as a **substitute** for Article 14. Article 14 refers to a "dispute between two or more Parties concerning the interpretation or application of the Convention.". Article 13, on the other hand, does not use the term "dispute", refer to multiple Parties, or

refer to interpretation or application issues. It has no decision making characteristics. Rather, it seems to suggest that a process could be established by which **one** or more Parties could seek a resolution of "questions", not "disputes", regarding the implementation of the Convention which, of course, could include questions of interpretation or application of the Convention. The Article seems to be directed at facilitating the implementation of the Convention, not resolving disagreements between Parties. If an informal companion process to Article 14 were to be established under Article 13, then it is clear that Article will likely never be used.

"Questions regarding the implementation of the Convention" could range from questions regarding interpretation or application of the Convention (the subjects of Article 14's formal dispute resolution process) to questions from a Party or groups of Parties regarding the mechanics of commitment implementation (i. e. a how to do it question), but such "questions" are not necessarily in the nature of a dispute.

We believe the most important issue is the nature of the questions that could be subject to an Article 13 process of any kind. Whatever the process, the questions should not deserve consideration under Article 13 unless they meet clear criteria established by the COP indicating that they are significant, important, have an effect on more than one Party, and cannot be addressed under any other Article of the Convention or are not being addressed under any other Article for procedural or substantive reasons. If questions could be raised under Article 13 by a Party about another Party's compliance, it is likely that such a question would be adversarial or confrontational in nature.

"2. What is meant by the word "process" in Article 13? Should it be understood as a sequence of events or as a mechanism or as an institution? Could it imply all of these?"

Response: Clearly a "process" is a sequence of events. The term "mechanism" can be used almost interchangeably with "process" or could be how the "process" is implemented. In Article 13 the term "process" does not mean is an "institution", such as the International Court of Justice. An informal consultative "process" does not require an institution, and indeed, one would be detrimental to the concept of Article 13.

The word "process" should be considered in the context of the existing Convention bodies, such as the COP, the SBSTA, etc. The process for considering questions could clearly be carried out by such bodies rather than create a new body or institution with the added costs.

"3. What principles should govern the process? Is it sufficient that the process should be simple, transparent, facilitative and non-confrontational in character?"

Response: In addition to the principles listed one other should be adopted: The participation in the process should be "voluntary". The words of the Article make clear that any process established shall be "available to Parties on their request". It is clearly a voluntary act to request consultations, and, since this is not a confrontational process, it is equally clear that any other Party may or may not wish to participate in the consultation.

"4. Is it necessary to establish such a multilateral consultative process? If so, what measures should the Conference of the Parties take for its adoption: decision of COP? Amendment? Protocol?"

Response: The answer to the question depends on the vision of what the process is going to be about. Some Parties at AG-13-1, most notably China, questioned whether such a process is necessary, in that the COP itself can handle any implementation questions. They felt that a separate process would dilute the authority of the COP, would be mis-used and would be a mis-allocation of scarce resources. This would be particularly true if a new "institution" were created to handle the process. On the other hand, if, as suggested by the United States and Russia, the Article 13 process may be viewed as a place to go for help in addressing questions regarding implementation (similar to the US Country Studies Program) it may have merit.

The Article requires that COP "consider" the establishment of a consultative process. Its establishment is not mandated by the Article now or in the immediate future. The Parties need experience under the Convention to see how this Article could best be utilized. In other words, the issue is not ripe for resolution.

"5. If a new mechanism or institution were to be established under Article 13, should its membership be general or restricted to specialists such as legal, economic, social or technical experts? In this context should a roster of experts to provide advice be envisaged"?

Response: Under no circumstances should the membership be "restricted", no matter what the issue. If the questions involve requests for specific help in implementing Convention commitments such as developing national inventories of greenhouse gases, how to prepare National Communications, or how to develop mitigation and adaptation plans, then a "roster of experts" approach might have merit as long as each Party is free to add, subtract and choose from such a roster.

Section B: Relationship of Article 13 to Convention institutions and processes

"6. What linkages would need to be established with other Articles of the Convention, notably, Articles 7.2(c), 8.2(c), 10, 12 and 14? (For example, are the provisions on the review process complete in themselves or is there scope for them to receive support through the process envisaged under Article 13? What is the relationship of Article 13 to Article 14? Would the process under Article 13 automatically be halted if a Party invokes Article 14?)"
"7 Is there a gap between the processes on review of implementation and on settlement of disputes? If so, what is the extent of that gap and how could Article 13 contribute to narrowing it?"

Response: These two questions need to be answered together, since if there is no "gap" between the implementation review processes and settlement of disputes, an Article 13 process is not needed and "linkages" are irrelevant. The Articles of the Convention cited in question 6 are very comprehensive regarding implementation and review of commitments:

-Article 7.2(C) (the COP shall regularly review the implementation of the Convention and "Facilitate, at the request of two or more Parties, the coordination of measures adopted by them...") Other Articles outlining COP's functions regarding implementation of the Convention are Article 7.2(e) (assess the implementation by the Parties), 7.2(f) (consider regular reports on the implementation), and 7.2(g) (make recommendations on any matters necessary for the implementation).

-Article 8.2(c) (the Secretariat shall "facilitate assistance to Parties, particularly

developing country Parties, on request, in the compilation and communication of information required...").

-Article 10 (SBI established to assist COP in the assessment and review of "effective" implementation, including the consideration of National Communications (Article 12.1) and information communicated under Article 12.2 for the "adequacy of commitments" review required under Article 4.2(d)).

-Article 12 (in addition to requiring National Communications regarding implementation and timing of such communications, Article 12.7 requires the COP to arrange for technical and financial support to developing countries in compiling and communicating the information required. Such support may be provided by other Parties, other international organization, and the Secretariat, as appropriate).

It is not clear that there is a "gap" between this comprehensive implementation and review scheme and the formal dispute resolution process of Article 14. Both COP and SBI are perfectly capable of holding informal, non-confrontational consultations on questions regarding implementation, including disputes "concerning the interpretation or application of the Convention" (the subjects of Article 14) without setting up a new and costly "process" or "mechanism." SBI is to assist the COP "in assessment and review of the effective implementation of the Convention" (Article 10.1). This mandate is broad enough to encompass questions involving one Party's National Communication even though Article 10.2(a) states that SBI is to consider such communications to assess the "overall aggregated effect of steps taken by the Parties..." (Also see Article 10.2(c)).

However, since any new process established under Article 13 is voluntary, it would terminate if a Party invokes Article 14 on the same question.

"8. Is there a relationship between the Article 13 process and the subsidiary bodies established under the Convention, for example, the AGBM"?

Response: No such relationship is automatic by the terms of the Convention or Article 13. However, if such a consultative process is established it would seem logical that it would be established under the auspices of SBI. It would have no relationship to AGBM, except to the extent that any implementation requirements that might result from the work of AGBM adopted by COP and accepted by the Parties, could be made subject to the Article 13 process.

Section C: Legal and procedural considerations

"9. What is the legal status of the process?"

Response: There is no "legal status" conferred under Article 13. If a process is established and adopted by the COP, it should be in the form of a COP "decision" or "advisory opinion." It should not be a formal "protocol", "amendment" or "annex" to the Convention since it would be a voluntary process and will not have any binding effect on the participating Parties or any other Parties.

"10. What is meant by the Article 13 phrase: "Parties on their request"? Who may trigger

the process apart from the Parties themselves? Is this process compulsory or optional"?

Response: There is no ambiguity in the wording of this clause. The process, if one is established, can only be triggered by the involved Parties. No one else can initiate the process - not the Secretariat, not by other intergovernmental organizations, and certainly not by non-governmental organizations. Participation in any consultation must be "optional" or "voluntary" on the part of any Party. If participation were to be made "compulsory" the process would lose its non-confrontational character and the Parties might as well go directly to the Article 14 dispute settlement mechanism. A related question that appears on page 10 of the INC Secretariat's note on Article 13 of July 26, 1994 (A/AC.237/59) is whether questions could be raised "about another Party's compliance" or only "about the [requesting] Party's own compliance"? To the extent that one Party can raise questions about another Party's compliance it would seem that the "process" loses its "non-confrontational" character, no matter how "informal" or "non-binding" it is structured.

"11. Should the multilateral consultative process be made to apply to related legal instruments in addition to the Convention"?

Response: It is premature to answer the question is the abstract without a decision on the nature of the process and the questions it may address. Additionally, even if a satisfactory consultative process is defined for resolution of questions regarding implementation of the Convention, its application to other legal instruments related to the Convention should be specified in such legal instruments.

Section D: Other issues

"12. Under this section Parties and contributors are invited to make any additional inputs that they consider relevant to the consideration of a multilateral consultative process and its design".

Response: If such a process is adopted, it should be, in the words of the Canadian delegate, "a cooperative approach to problem solving", and not a "non-compliance" or "enforcement" process. Any enforcement of the Convention requirements must be taken up under Article 14, not Article 13.

PAPER NO. 4: HAMBURG INSTITUTE FOR ECONOMIC RESEARCH

Position of the HWWA concerning the multilateral consultative process (AG 13)

January, 1996

Section A:

Question 1: The multilateral consultative process shall be as broad as possible. It should not only encompass governments and IGOs but also NGOs and researchers, even interested individuals.
The same should be valid for the definition of "questions regarding the implementation of the Convention". Anything concerning targets, timetables, protocols, working programs of the bodies etc. should be open for discussion. The decision power stays with the Parties.

Question 2: The process should be defined as the regular sequence of discussion sessions (e.g. semiannual) with an open agenda. For meetings between these regular sessions, a quorum of NGOs or researchers should be necessary to convene a session. Any Party would be free to convene a session. A small secretariat should inform accredited NGOs and the media on the agenda of the sessions and distribute documents.

Question 3: The principles listed seem appropriate. There should be rules of procedure which prevent that interest groups "seize" a session (e.g. strict time limits for speakers). Agenda items should have to be submitted in written form in advance.

Question 4: A well structured, open consultative process is indispensable to give credibility to the climate negotiations. Citizens will honour the commitment of the international structures to free and broad debate on decisions which will be crucial for generations to come.
The COP should legitimate the process through a simple decision as an amendment or a protocol would take longer to negotiate.

H W W A * Neuer Jungfernstieg 21 * D - 20347 Hamburg * FRG
Telefon (0)40 / 35 19 00 * Fax (0)40 / 35 19 00 * Telex 211 458 hwwa d

Question 5: The secretariat which guides the process should consist of experts. The participation in the discussions should not be limited. As the IPCC and the subsidiary bodies do good work, another roster of experts does not seem appropriate.

Section B:

Question 6: The process should not interfere with other articles of the Convention. It seems that the general review process could be provided with additional input through the discussions. Questions of dispute settlement should not be touched by the discussions. On the other hand, dispute settlement should not interfere with the process.

Question 7: The dispute settlement should be distinct from the review of implementation. Any Party which feels injured through the review can invoke the dispute settlement procedure, which in itself should be strengthened (in analogy to the World Trade Organisation dispute settlement procedure)

Question 8: The process should provide additional input for the activities of the subsidiary bodies. They should not be compelled to take it into account, though.

Section C:

Question 9: The process should become an integral part of the climate negotiation regime and be instituted through a decision of the COP

Question 10: If the COP decides on the installation of the process, the request shall be assumed as lasting until the COP takes a decision cancelling the process. Any single party shall be free to summon a consultative session (see Question 2).

Question 11: Yes

Section D:

Question 12: No further comment

PAPER NO. 5: INTERNATIONAL INSTITUTE FOR APPLIED SYSTEMS ANALYSIS

Answers to Article 13 Questionnaire

NGO submission:
International Institute for Applied Systems Analysis (IIASA)*

8 February 1996

Section A: Definition and Scope of the Process

1. *What should be understood by the term "multilateral consultative process"?*
The Multilateral Consultative Process could provide a forum in which issues arising during the implementation of the Convention can be discussed. The Process might also yield recommendations for action by the Parties, the Secretariat, COP or other bodies associated with the Convention. For general matters of implementation, these functions might already be available through the SBI and the COP. However, those bodies, which already have many tasks to perform, are likely to be too large to handle efficiently the potentially large number of detailed implementation issues that arise in the particular circumstances of individual Parties.

What "questions regarding implementation of the Convention" should be covered?
Any issue regarding the implementation of the Convention could be considered in the Process. At this early stage in the development of the Convention, it would be politically and substantively difficult to identify particular issues that should be excluded or included.

In practice, many decisions will be required to determine which issues are most appropriately handled by the Process and which belong elsewhere (e.g. the SBI and COP). Any Party may formally invoke the Process by raising questions regarding implementation. If a standing committee is created to oversee the Process, that Committee should also be empowered to take up issues without requiring formal submission by a Party. Thus in practice much of the process of selecting which issues to handle will be made informally as the committee sets its agenda in collaboration with other bodies of the Convention.

2. The term "Process" could imply all three: a sequence of events, a mechanism, or an institution.

The limited experience with the Non-Compliance Procedure of the Montreal Protocol suggests that a permanent mechanism served by a dedicated institution (there, the Implementation Committee) will result in a more active and effective Process. The institution develops memory and

*This submission was prepared by some members of the International Environmental Commitments Project at IIASA, David Victor and Eugene Skolnikoff, co-leaders. Views and opinions expressed in the questionnaire do not necessarily represent those of the Institute, and its National Member Organizations.

experience; it and the procedure gain credibility and legitimacy over time as they handle issues properly. These factors suggest that the Process should not merely be a sequence of events. Whatever procedural form is adopted for the Process should be complemented by an institution (e.g., limited membership committee).

The Montreal Protocol experience also suggests that the institution should meet regularly to work on implementation issues as needed, even without a Party formally invoking the Process. Indeed, it the Montreal Protocol's Implementation Committee met for four years, at least two of which were active and effective, before it handled its first formal submission.

3. The principles that the Process be "simple, transparent, facilitative and non-confrontational" are reasonable to guide the process. Our view is that the Process could help to fill a gap between the regular processes on review of implementation and settlement of disputes (see question #7). Given that function, it should be recognized that some of what the Process does will be at least mildly adversarial because it will deal with problems and conflicting interpretations before they become disputes. The term "non-confrontational" should thus not be construed so narrowly as to preclude presentation and debate of questions on which different Parties have differing views.

4. The initial design and operation for the Process should be pursued now, in a flexible manner. The Process might not handle extremely difficult "questions" for several years, especially as the current commitments of the Convention are modest. But starting now will help to ensure that a credible Process is available when it is needed in the future. Following the current negotiating schedule, the earliest the Process could be established formally would be COP-3. Thereafter, the experience with the Montreal Protocol's non-compliance procedure suggests that at least two years (perhaps four or more) will be needed for the institution to develop experience and credibility. If additional time is allowed for initial operation and subsequent revision of the Process, a further few years will be needed. In all, a fully operational system might not be available until early next century even if the initial Process begins shortly after COP-3. Thus, early operation of the procedure could well serve the long term interests of an effective Climate Convention.

   Although the substantive commitments of the Climate Convention are modest, there will be plenty for the Process and institution(s) to do during their first few years of operation. Parties will surely encounter obstacles in compiling their required communications, questions will arise during the review of the communications, and problems will surely arise during the collection and integration of emission inventories. Many of the technical issues can be handled through the SBI, SBSTA and panels. But less

technical and more interpretive, sometimes political, questions will remain. The Multilateral Consultative Process could be the forum where they are discussed rapidly and efficiently. After the Process handles such issues for 2-3 years, the Advisory Group on Article 13 could be reconvened to consider the lessons learned and the possible need for a revised design.

What measures should the COP take for the adoption of the Multilateral Consultative Process?
A Decision of the COP would probably be the easiest and most effective means of adopting a Multilateral Consultative Process. A Decision is easily updated or revised (through adoption of another Decision) should the Parties want to revise the functions and design of the Process on the basis of experience. It seems to have been contemplated by the Parties that the Process would be established by COP Decision.

Adopting the Process through an amendment and/or protocol requiring ratification is more problematic because Parties that don't ratify the amendment/protocol may not have formal access to the Process.

5. A completely open membership is likely to be somewhat ineffective because the group considering "questions" could be large and little institutional memory will develop. Thus some form of limited committee would be the best option. Politically, the Process will probably be much more acceptable if membership in the institutions consists entirely of Parties. Our view is that this is not a purely technical Process, and thus a purely expert body would not be appropriate. Nonetheless, regular participation of some experts, as advisors but not members of the body, could aid the Process. The Secretariat might provide some of that ongoing expertise, but independent experts could still be a valuable addition. Insofar as other experts are needed to supply advice on particular issues, a roster could be valuable. Rosters maintained for other purposes in the Convention, perhaps as part of the SBSTA panels, could also be used and augmented where appropriate.

A particularly productive device might be to allow establishment of small panels of experts and/or Parties to hear and discuss the particular issues in a given case, with the results of the deliberations forwarded to whatever institution is established to manage the Process. In the early years of the Process the workload might be sufficiently small that such panels are not needed, but later the panel approach could prove quite efficient. Panels could consist wholly or partially of delegates who also sit on whatever institution is established to manage the Process (e.g. an implementation committee). Panels would serve an advisory, not adjudicatory, function. Their services would be on call of the body.

Section B: Relationship of Article 13 to the Convention institutions and processes

6. The possible linkages are numerous. We consider only those explicitly mentioned in the questionnaire.

COP responsibility to facilitate coordination (Article 7.2c). The Multilateral Consultative Process could easily provide this function for the COP.

Secretariat responsibility to facilitate communications (Article 8.2c). The Multilateral Consultative Process could be a forum where these issues are discussed and relevant recommendations made to the COP. But detailed facilitation is probably best left to the Secretariat. If the Process becomes involved with the system of national communications, it should be at the instigation of particular Parties, the Secretariat or the relevant subsidiary body.

More generally, the secretariat could best provide the technical, administrative and meeting support needed for the Article 13 Process. This is not explicitly mentioned in Article 8 but would be allowed, if instructed by the COP, under Article 8.2g.

Subsidiary Body for Implementation (Article 10). The work of the SBI could easily overlap with that of the Process. One possible means of dividing the work would be to make the SBI responsible for all general matters of implementation and the review of implementation. The Multilateral Consultative Process could be responsible for providing a forum for consideration of implementation issues that arise in the particular contexts of individual Parties implementing the Convention. This division of function suggests that the Process must have a close relationship with the SBI. Making the Multilateral Consultative Process a subsidiary body to the SBI should be explored.

Communication of Information (Article 12). All Parties must submit communications in order to implement fully their obligations under the Convention. As with the other Convention obligations, questions related to the preparation and submission of communications are candidates for discussion within the Multilateral Consultative Process. Where the communications include confidential information, the Process must respect the requirement to keep that information in confidence. In the Montreal Protocol, the possibility of considering confidential information has been one reason why non-Parties are restricted from participating (even as observers) in the work of the Montreal Protocol Implementation Committee, except by invitation. Our view is that such a restriction is excessive and contrary to the principle of transparency. If needed, participation can be restricted when confidential matters arise. Reports of meetings should not contain confidential information and should be open and available to all interested groups.

Settlement of Disputes (Article 14). The availability of dispute resolution should be considered independent of whatever Process is designed under

Article 13. If Article 13 proceedings were automatically terminated once a dispute was formally lodged then one forum for resolving the dispute (i.e. the Article 13 Process) would be eliminated. Creating some linkage between Article 13 and Article 14 could be a time-consuming and ultimately fruitless task. If the experience with all other major multilateral environmental agreements is a guide, the system for dispute resolution will never be used.

7. Our view is that a significant gap exists. The review process is not charged with the task of pursuing significant questions that may arise during review of the communications. Nor is it designed for responding to questions that other Parties may raise concerning the implementation of the Convention by a Party. The SBI is a forum for discussing implementation issues, but it is large and has many diverse responsibilities that make it unlikely to be effective in handling particular, sometimes detailed, questions that arise. Particular questions could be handled through the dispute resolution mechanism, but only if they are formal disputes. But bilateral dispute mechanisms are not ideally suited to improving compliance with agreements where the benefits of compliance and the costs of non-compliance (e.g. reduced or increased global warming) are diffused among many nations. Indeed, the empty history of multilateral environmental disputes demonstrates that Parties have been unwilling to confront each other, even when it has been widely known that implementation by a Party is inadequate.

The Multilateral Consultative Process can fill the gap by offering many of the benefits of a dispute resolution system (e.g. focussed discussion in response to particular questions) without the highly confrontational, bilateral nature of formal disputes.

8. *Relationship between Article 13 Process and Subsidiary Bodies:* discussed above.

Relationship to AGBM:
The AGBM is a new negotiation whereas the Multilateral Consultative Process should be concerned with on-going implementation issues as they arise in the course of operating the treaty. They are separate processes.

However, as the AGBM makes progress on defining additional commitments, one of the issues it must discuss is how to handle problems of inadequate implementation and non-compliance. Whatever new legal instruments are established through the AGBM process (e.g. an amendment or protocol) could make reference to the Multilateral Consultative Process established under the Convention, and perhaps adapt it to the specific needs of the amendment/protocol, instead of creating a new process.

Section C: Legal and Procedural Considerations

9. The Process is consultative, suggesting that the spirit of its work should be to promote discussion and exploration of issues, perhaps leading to recommendations that could be sent to the COP or via the SBI to the COP. The Process should not be vested with formal decision-making powers. However, it could develop elaborate procedures (including, e.g., panels to discuss particular issues and cases) within the Climate Convention's system of institutions while still yielding only recommendations to the COP for formal adoption.

10. In addition to allowing Parties to trigger the Process, it could be useful to allow similar trigger powers to the Secretariat. Further, it is likely that many questions will arise during the review of communications, and it could be helpful to allow that review process (perhaps the SBI) to trigger the Article 13 Process. Many questions that arise during the review process will be technical and best handled by the Secretariat or other bodies, but some may deserve more formal and focussed attention by a small body such as the Multilateral Consultative Process.

Surely the issue will arise whether non-state actors can trigger the Process. Our view is that allowing that role for non-state actors is likely to be extremely controversial and would severely diminish support from many Parties, perhaps jeopardizing the political support needed to institute an Article 13 Process. Non-state actors (and non-Parties) may work through sympathetic Parties (or the secretariat) to trigger the Process and to contribute to the deliberations of any institution established under the Process.

Although designers of the Process should give attention to formal rules concerning how the process is triggered, we underscore that if a standing committee is created that much of the useful work done under the Process might occur without formal triggering. In the Montreal Protocol the Secretariat has been active in working with the Implementation Committee and identifying particular issues that deserve attention, notably the non-reporting of data by many Parties, some of which have been invited by the Committee to discuss their problems. All of this useful activity took place without any formal triggering of the Montreal Protocol's non-compliance procedure. Indeed, it is likely that the Secretariat, wary of over-stepping its bounds of neutrality within the Climate Convention, will be reluctant to create any formal cases.

Is the Process compulsory or optional?
It will be difficult to gain political support for a compulsory Process, nor would that be appropriate for the early, formative years. The experience with the Montreal Protocol's non-compliance procedure underscores that

Parties may choose not to participate if they don't want to discuss their non-compliance with the Implementation Committee. In practice, nearly all have participated when invited by the Committee.

11. Discussed above. Our view is that, if possible, a single Multilateral Consultative Process should be created for the Convention. That same Process can be adapted as necessary for other legal instruments in addition to the Convention.

Section D: Other Issues

12. The exact functions that can be fulfilled by the Process, and the best institutional and procedural designs, are likely to remain somewhat unclear. Yet the need to begin operation of such a Process remains. Thus our view is that this Process must be treated as the novel experiment that it is. It should begin soon but designed with flexibility in mind. Notably, an interim Process might be adopted in the near future, perhaps as early as COP-3, with the understanding that after it has been in operation for a few years that a group will consider the lessons learned and suggest revisions to the COP as necessary.

In April or May, 1996, IIASA will circulate three case studies on other international procedures that may offer lessons for the design of the Article 13 Process: the Montreal Protocol's Non-Compliance Procedure; the International Labour Organisation's supervisory system; and the GATT Dispute Panel system. In each case, we review the operation of the relevant procedures and institutions, assess their effectiveness, and draw some lessons for the Article 13 deliberations. Any person wishing copies of these case studies should contact: Project on Implementation and Effectiveness of International Environmental Commitments, International Institute for Applied Systems Analysis, A-2361 Laxenburg, Austria, tel: (43 2236) 807 287, facsimile: (43 2236) 71313, email: info.iec@iiasa.ac.at.

PAPER NO. 6: RAINFOREST REGENERATION INSTITUTE

Comments on the AG-13 Multilateral Consultative Process submitted by The RainForest ReGeneration Institute

In lieu of responding to the questionnaire presented by the Secretariat, which seems to bog down in semantic issues, this contribution provides some comments on what would appear useful as a multilateral consultative process at this juncture, in the process touching on questions raised in the questionnaire.

Background and Context

The UN General Assembly created an Intergovernmental Negotiating Committee, charged with negotiating a framework convention on climate change, to be ready for signature at UNCED, the "Earth Summit" held in Rio de Janeiro. INC successfully met its basic mandate.

In the absence of agreement on substantive goals, measures, and timetables during the pre-UNCED period, the framework convention is just a framework of possibly useful mechanisms available if needed. During the "fast start" negotiations between Rio and Berlin, INC continued working, developing reporting guidelines (reporting being the only clear commitment contained in the Convention), structuring institutions and procedures, and generally consulting where UNFCCC should be going. INC demonstrated that the Parties could divide up into working groups, set up ad hoc and limited discussions, and draw on staff support to provide thoughtful working papers for discussion, and that NGO observers could contribute by organizing workshops and presenting research or study results on pertinent subjects.

At COP-1, the Parties concluded the Convention was inadequate after 2005 and called for negotiation of a protocol, or other instrument, by COP-3 to prevent or ameliorate adverse climate change. It is clear from the meetings of UNFCCC there is no consensus yet on what such a protocol should achieve.

Suggestions for a Consultative Process

Questions about the adequacy and veracity of national reports on emissions and implementation can be resolved through the report review process piloted tested in the first round if reports.

It would appear that SUBSTA is an already established forum for resolution of technical questions, which can draw on its proposed panel of experts and on IPCC. For the maximum effectiveness and responsiveness, given that questions are hard to delineate long in advance, a large roster of experts and a small panel of generalists to determine which experts' advice would be most appropriate on a question would be preferable to having 15 pre-designated experts.

A legal forum does not appear needed. The parties are sovereign nations that can agree to whatever they wish. Any protocol, like the Convention, would almost certainly have a withdrawal clause. Enforcement mechanisms beyond persuasion of Parties to meet their commitments are unlikely to be accepted and hence to resolve.

What is missing as a consultative mechanism is advice from the stakeholders how protocol(s) should be targeted. The various categories of stakeholders, for example, environmental and industrial interests, energy-producing and energy-consuming interests, highly industrialized economies and agricultural economies, probably have more in common within each category than across the Parties. Further, if given a suitable opportunity, the stakeholders might be better able to merge and compromise their competing interests than could contracting Parties.

Given the discussion in plenary session in August 1995, it appears a business consultative group available to SUBSTA would be useful, while a broadly based NGO advisory group on implementation could be established to support SBI.

For the purpose of seeking advice on direction from stakeholders, broad consultation would be most helpful, with the NGO participants resolving their different interests through their own round table process, perhaps in regional meetings so travel costs and language do not become prohibitive. Given the wide divergence of interests at present, when stakeholders have no reason to seek closure with competing interests, it would be unproductive to seek their advice on implementation without creating mechanisms, such as regional roundtables, by which they could sort things out prior to rendering advice to SBI. Such integrated advice from the stakeholders would be more valuable than the piecemeal representations from lobbyists, both in comprehensiveness and as indications of what stakeholders would support domestically at the protocol ratification step. It would be important to ensure that the consultative process is not limited to the well-financed NGOs of the industrialized countries.

Washington, D.C., 96.2.7

PAPER NO. 7: TATA ENERGY RESEARCH INSTITUTE

Questionnaire Relating To the Work of the Ad hoc Group on Article 13

Article 13: The COP-1 shall 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.

1. The MCP (Multilateral Consultative Process) can be visualized as a mechanism or a forum where a large and diversified group of experts would be able to deliberate upon questions and issues related to the implementation of the Convention, and try to resolve them through discussions and consultations.

Implementation of the Convention implies a wide range of issues, most important being the commitments of the Parties provided under Article 4. Emissions reduction targets, provisions of funds and technological transfers, and reporting of emissions inventories being the most significant for the Annex I countries and the developing countries (DCs), respectively. The MCP could assess the working of the Convention and monitor the compliance of these commitments.

Also, there exist numerous grey areas which need to be resolved, like questions of adequacy of commitments, additional commitments, eligibility criteria for the financial mechanism and operational criteria for the AIJ (activities implemented jointly). The MCP could attempt to resolve issues, on request, through debates and consultations, and provide recommendations for the effective implementation of the Convention.

The SBI (subsidiary body for implementation) has been already been established to assist the COP in the assessment and review of the effective implementation of the Convention, comprising of government representatives who are experts on matters related to climate change. The SBSTA (subsidiary body for scientific and technological advice) has also been established to provide the COP and other subsidiary bodies with information and technological matters relating to the Convention, comprising of government representatives components in the relevant field of expertise.

The MCP should be a part of both the SBI and SBSTA. As mentioned before, it should comprise of experts from NGOs active in the fields related to climate change, and could draw upon members from SBI or the SBSTA depending on the issue being discussed. The MCP would, hence, be an issue-driven mechanism with ad-hoc representation of experts aimed at analyzing and providing solutions to the issues raised by the Parties regarding implementation of the FCCC, for further deliberations at SBI or the SBSTA.

2. "Process" should mean exchange of ideas and opinions, holding discussions, and reaching agreement. This would be a sequence of events or a mechanism by which a large group of experts put forward their views and perspectives on issues raised, on request of the SBI, SBSTA or the COP, and try to find the most effective solutions.

3. The principles governing the MCP should ensure that the members exchange ideas and opinions on a equal basis recognizing the 'common but differentiated responsibilities'. The process should be simple, transparent, facilitative and non-confrontational in character, where all are given the autonomy and equal opportunity to discuss the issues in a constructive manner.

4. It would beneficial to establish the MCP in order to obtain fresh insights and NGOs' perspectives on the issues related to the implementation of the FCCC. It would be forum where the experts, other than government representatives, from NGOs active in various fields related to climate change, can become a part of the Convention's negotiations process. The MCP could be a platform to voice their concerns, deliberate on each others' perspectives in a constructive manner in order to resolve issues and work towards effective implementation of the Convention.

The establishment of the MCP should be a COP decision. Following which SBI and SBSTA would take effective steps to establish it.

5. The MCP should be based on an open-ended participation, where the organizations and experts sensitive to the specific issues are given equal opportunity to provide recommendations. The membership should be restricted to specialists in the field, and there should be equal representation. However, to the extent possible a balance of skills and expertise should be maintained in order to facilitate equal weightage of all perspectives, that is environmental, legal, developmental etc.

6. Article 14.1 gives the provision that in the event of a dispute, the concerned parties could seek settlement negotiations or any peaceful means of their own choice. Discussions and consultations in the MCP could be an option to settle the disputes.

8. The SBI or SBSTA (or the COP) would put forward the issues to the MCP for inputs, recommendations and solutions. The members of the MCP working in the area related to the specific issue, could then start a consultative process in order to resolve the issue.

10. The MCP should be open-ended and optional. The MCP would discuss the issues and find solutions for questions raised by the Parties through the SBI, SBSTA or the COP, on the request of these bodies. NGOs and experts should be encouraged to participate in order to facilitate greater exchange of ideas and constructive debate.

PAPER NO. 8: UNIVERSITY OF BRADFORD

Response to Questionnaire relating to the Work of the Ad-Hoc Group on Article 13

NGO Submission: University of Bradford, UK [1]

Section A: Definition and Scope of the Process

1. What should be understood by the term 'multilateral consultative process', and what 'questions regarding the implementation of the convention' should be covered by such a process?

In the context of the climate change convention, the multilateral consultative process should be regarded as a system for addressing issues and concerns about the implementation by certain parties of their commitments under the convention in a systematic but non-confrontational, facilitative, open and transparent way. It would aim to help to resolve or prevent possible disputes about compliance and to provide recommendations for consideration by the Conference of the Parties (CoP) and the Subsidiary Body for Implementation (SBI). The multilateral consultative process should integrate closely with the implementation review processes established in the convention, particularly by addressing questions arising from the reviews of national communications.

Any question relating to the implementation by particular parties, or groups of parties, of their commitments under the convention should in principle be covered by the multilateral consultative process. These could relate for example to: problems with the submission, comprehensiveness or transparency of national communications; concerns about certain parties' progress towards implementation of their obligations under the convention or its protocols; concerns about possible non-compliance.

Thus, in practice, the multilateral consultative process should not cover the whole range of possible implementation issues, but only those arising in relation to the performance of specific parties or groups of parties. However, provided its broad function is understood, it may not be necessary or desirable for the formal remit of the multilateral consultative process to be restrictively drafted. A successful convention needs mechanisms for promoting implementation that can be flexibly used, and adapted according to emerging requirements.

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[1] Prepared by Owen Greene, Senior Lecturer, Department of Peace Studies, University of Bradford, UK. This submission builds upon a working paper distributed at INC X (O. Greene and J. Salt, Priorities in the Design of the FCCC Multilateral Consultative Process (Article 13): between implementation review and dispute resolution, Dept of Peace Studies, University of Bradford, August 1994) and draws upon research carried out as part of a project funded by the UK Economic and Social Research Council Global Environmental Change programme. It has also been informed by research carried out by the researchers including the author at the International Institute for Applied Systems Analysis (IIASA), which is more fully reflected in the submission on behalf of IIASA. The views expressed do not necessary reflect those of any of the above institutions.

2. What is meant by the word 'process' in Article 13? Should it be understood as a sequence of events or as a mechanism or as an institution? Could it imply all of these?

The multilateral consultative process would imply all three of these, but most importantly it should be established as a permanent mechanism served by a dedicated standing committee or other body. This would help to ensure that: the process is routinely, regularly and actively used; the institution develops competence, expertise, memory; and the mechanism can develop legitimacy, precedents and credibility.

There is much to be learned from the role and operation of the Implementation Committee of the Montreal Protocol here, although it seems clear that the multilateral consultative process cannot straightforwardly be modelled on the mechanisms and institutions of Montreal Protocol (not least because of the different (and potentially more fully developed) mechanisms for reviewing national reports established in the climate change convention).

3. What principles should govern the process? Is it sufficient that the process should be simple, transparent, facilitative and non-confrontational in character?

The above principles provide an important guide for the way the process should operate. Other key principles for its operation should be that it is designed so that:
- it is likely to be routinely, regularly and actively used;
- questions and concerns about implementation of commitments by parties can be systematically addressed in detail (drawing on expert advice wherever necessary);
- it operates in close coordination with the review mechanisms under the convention, and particularly with reviews of national communications, and can flexibly address any problems and concerns that emerge from such reviews.

The principle of non-confrontation is an important one in this context, but it should not be interpreted in a way that restricts systematic and detailed examination of possible problems relating to particular parties' implementation of their commitments.

4. Is it necessary to establish such a multilateral consultative process? If so, what measures should the Conference of the Parties take for its adoption: decision of CoP? Amendment? Protocol?

It is necessary to establish the mechanisms and institutions for such a multilateral consultative process. This should preferably be done at an early stage so that they can develop legitimacy, expertise and precedents so that they can be effectively used when they are needed. This takes time. Moreover, there will be many possible issues for it to address, primarily emerging from the reviews of first national communications.

It would probably be adequate for the mechanisms and institutions (standing committee, panels etc.) of the multilateral consultative process to be established by decision of the CoP.

5. If a new mechanism or institution were to be established under Article 13, should its membership be general or restricted to specialists such as legal, economic. Social or technical experts? In this context, should a roster of experts to provide advice be envisaged?

The main new body established to service the multilateral consultative process should probably be a restricted membership standing committee consisting of parties elected for limited terms of office from the CoP and serviced by the Climate Secretariat. This standing committee should be able to draw on the advice of a wide range of technical experts, and to invite such experts and representatives of other bodies or organisations to participate in its work, as it deems appropriate. However, it should be consist of parties to the convention in order to promote its standing and legitimacy.

Such a standing committee should have a restricted membership, in order to facilitate: learning; the development of expertise and competence; and effective and detailed examination of issues and concerns before it.

In considering concerns about compliance or progress towards implementation of commitments, the standing committee should be able routinely to draw on the advice of all those involved in the reviews of national communications, any panels of technical experts established in association with SBSTA and SBI, and also on experts from the IPCC and the relevant implementing agencies for the multilateral funding and technology transfer mechanisms (GEF etc.) established in association with the convention.

Considerations of questions relating to possible non-compliance or implementation are likely to identify confusions or differences in interpretation of obligations under he convention. These should be drawn to the attention of the CoP for clarification or resolution, but in this context it may also be useful for the standing committee for the multilateral consultative process to ask for the advice of a panel of legal or other experts.

<u>Section B: Relationship of Article 13 to Convention Institutions and Processes</u>

6. What linkages would need to be established with other Articles of the Convention, notably: Articles 7.2(c), 8.2 (c), 10, 12, 14? (For example, are the provisions on the review process complete in themselves or is there scope for them to receive support through the process envisaged under Article 13? What is the relationship of Article 13 to Article 14? Would the process under Article 13 automatically be halted if a party invokes Article 14?)

There would be numerous linkages. Indeed, the development in practice of effective and flexible operational linkages with other bodies, mechanisms and processes within the Convention would be of critical importance to the effectiveness of the multilateral consultative process. Above all, there should be close and careful linkage with the implementation review processes established under the convention. There is much scope for such review processes to receive support from the multilateral consultative process, and vice versa.

Linkage with Article 7.2 (c)? (CoP facilitation of coordination of implementation measures). The multilateral consultative process could in principle contribute to this CoP function, but this linkage does not appear to be important to the central role of the multilateral consultative process. The main way in which Article 13 mechanisms could be important in this context would be to contribute to the resolution of concerns raised about the character of collaborative measures and implications for parties' meeting their obligations (cf. disputes about 'measures implemented jointly').

Linkage with Article 8.2 (c)? (Secretariat role in facilitating assistance to parties in compilation of national communications, etc.). The main potential link with the article 13 mechanisms and institutions in this context is probably that through efforts to clarify and resolve problems with implementation of reporting obligations, requirements for assistance can be identified and then raised with the CoP, funding mechanism implementing agencies, or other bodies. The Implementation Committee of the Montreal Protocol played this role when it addressed concerns about inadequate reporting of data by developing country parties and countries in economic transition.

Linkage with Article 10? (Subsidiary Body for Implementation). The linkage between the multilateral consultative process and the SBI would be of critical importance. The central role of Article 13 mechanisms and institutions would be to help to prevent or resolve issues and concerns relating to parties' implementation problems or possible non-compliance. Much of its business could emerge from reviews of national communications overseen by the SBI. Similarly, issues raised through the multilateral consultative process would be expected to inform the review process and the actions and recommendations of the SBI.

In principle, the institutions of the multilateral consultative process could report to the SBI rather than directly to the CoP, but this would probably be unnecessary and potentially undesirable - such institutions should probably report to the CoP, alongside the SBI, and independently of it. But it is clear that the linkage should nevertheless be very close.

Linkage with Article 12? (National communications). As discussed above, addressing problems with the content or delivery of national reports (in order to improve reporting rates and the quality of submissions) may be one of the important roles of the multilateral consultative process. Moreover, the discussions within the multilateral consultative process on concerns about parties' implementation of obligations would largely be based on information provided in national communications and analyses of such information arising from the review process.

Linkage with Article 14? (Settlement of Disputes). Clearly there is an important relationship between the multilateral consultative process and the mechanisms for settlement of disputes, for the reason discussed in the answer to question 7. In principle the process under article 13 could continue even after article 14 has been invoked, and it would be unwise to restrict such a possibility. In practice, the linkage between Article 13 and Article 14 mechanisms is unlikely to be important because experience with other environmental conventions indicates that Article 14 type mechanisms are virtually never invoked.

7. Is there a gap between the processes of review of implementation and on settlement of disputes? If so, what is the extent of that gap and how could Article 13 contribute to narrowing it?

A very significant gap exists. An effective climate change convention requires mechanisms and institutions that can address and resolve problems or concerns about implementation arising from the implementation review process. Such problems or concerns cannot routinely and systematically be examined in detail in large open - ended institutions such as the CoP or SBI. In the great majority of cases Article 14 mechanisms are hopelessly inadequate for this task, and indeed could be counterproductive. Thus there is a major gap which Article 13 mechanisms and institutions are best placed to fill. Its potential contribution has been indicated in answers to previous questions.

8. Is there a relationship between the Article 13 process and the subsidiary bodies established under the Convention, for example the AGBM?

As discussed in answers to the previous questions, the relationships between Article 13 mechanisms and institutions and the subsidiary bodies of the convention would be of critical importance to the operation and implementation of the regime, and they should be close.

In relation to the AGBM, the relationship is more likely to relate to the institutional development of the convention: as obligations become more stringent, the usefulness of well-established and effective Article 13 processes could be expected to increase. Moreover, new protocols might include provisions for developing or strengthening Article 13 institutions, though it would be preferable that these were mainly developed through decisions of the CoP of the framework convention itself.

Section C: Legal and procedural considerations

9. What is the legal status of the process?

It is understood that the answer to this question is still open. However, the process should be advisory and consultative, based on decisions and recommendations of the CoP, and not involve legal or decision-making powers.

10. What is meant by the Article 13 phrase: 'Parties on their request'? Who may trigger the process apart from the Parties themselves? Is this process compulsory or optional.

The phrase should not be taken to imply that most questions and concerns might normally be expected to be raised and resolved informally outside the article 13 process, which might only be invoked when the 'questions' have developed into

'disputes' that the parties concerned cannot resolve on their own. Issues and concerns (raised, for example, by the review process) should routinely and easily be put on the agenda of the article 13 institutions or mechanisms.

The process should therefore be able to be triggered at least by any party, the CoP, the Secretariat, and perhaps the SBI (in response to concerns arising from a review process). An article 13 restricted membership standing committee (such as was discussed above in relation to question 5), being composed of an elected group of parties, should have the scope to determine its own agenda (within guidelines established by the CoP).

The process should not be compulsory. But once article 13 mechanisms or institutions have been established, questions and concerns raised about particular parties' (or groups of parties') progress in implementation should routinely be referred t them by the CoP or SBI, if they touch on types of issues where the article 13 institutions have established some competence.

11. Should the multilateral consultative process be made to apply to related legal instruments in addition to the Convention?

As discussed in response to earlier questions, the mechanisms and institutions of the multilateral consultative process should as far as possible apply to all of the convention (and thus to additional protocols as well as the framework convention).

Answers to AG13 Questions
John Lanchbery (VERTIC)

Section A: Definition and scope of the process

Q 1. What should be understood by the term "multilateral consultative process" and what "questions regarding the implementation of the Convention" should be covered by such a process?

A 1. Before considering what exactly is meant by the terms "multilateral consultative process" (MCP) and "questions regarding implementation of the Convention" it might be wise to try to establish what potential problems we may be trying to address and which are not already covered by existing provisions in the Convention.

Given that the Convention establishes, and is developing, a quite thorough implementation review process and that it also has a well defined dispute resolution process, one might ask why a further process should be needed for the resolution of questions regarding implementation. In essence, the answer is that neither of the two processes is particularly suitable for answering certain types of question. To demonstrate what I mean it is first worth considering some of the features of the dispute resolution and implementation review processes.

Parties to international environmental agreements are usually loathe to use dispute resolution mechanisms, in part because they almost always take a long time to resolve problems and in part because the have a air of finality about them - one party is usually seen as losing and states are reluctant to invoke potentially humiliating processes. Recourse to the International Court of Justice (ICJ), as envisaged in Article 14, paragraph 2, of the Convention and in many other agreements, has both of these potential disadvantages: it is likely to be slow and its decisions are final. Parties to the Convention can, of course, opt for a dispute to be considered by a conciliation commission, instead, although the decisions of the commission are not binding their decisions might tend to identify a winner and loser and, again, there is no appeal process, except perhaps to the ICJ.

Thus, in spite of the fact that the Convention has quite a well defined dispute resolution process, or rather processes, they are unlikely to be invoked in the case of questions relating to implementation which, although potentially serious, are not normally about matters that one party is likely to take another to court over. Such questions are more likely to be resolved in a less controversial and confrontational process which is seen as being more constructive.

The implementation review process in the Convention, and those which it is developing, are, so far, non-confrontational and relatively non-controversial. Parties compile national communications containing emission inventories and policies and measures for emission abatement and then and submit them to the CoP which reviews them, with the aid of the Subsidiary Bodies and the Secretariat. So far this has been a fairly straightforward process but it may not remain so. As the Convention develops, and particularly if commitments become more stringent and difficult to meet, questions are bound to arise concerning the reliability of emission estimates from some states and, potentially more contentiously, about the efficacy of certain policies and measures in achieving particular emission stabilisation or reduction objectives. Some of these questions can be answered as part of routine technical processes and in the in-depth reviews which have already begun. Others, however, cannot. It is these potentially contentious questions that the implementation review process is not really

designed to, and should not address, because they could significantly disrupt it. On the other hand, parties raising the questions may not, for the reasons outlined before, be willing to raise them as part of a formal dispute resolution process. Consequently there is, or will be, a need for a separate process.

If one accepts the arguments outlined above then one would conceive of the "multilateral consultative process" as sitting in the Convention structure somewhere between the implementation review and dispute resolution processes. I take the view that it should be more closely allied to the review process. It should certainly be set up so as not to inhibit parties from raising questions concerning implementation, as a dispute resolution process might. Indeed, particularly during the formative stages of the Convention, parties should be encouraged to inquire about implementation in order to promote more general learning and understanding, and hence to build confidence in the agreement. Nevertheless, the process needs to be capable of dealing with questions of substance and to be sufficiently robust to constructively criticise and to recommend amendments to inventories, policies and measure which have been formally submitted by parties. Thus, although it might be best from a confidence building viewpoint to have an expert, fairly informal process, it may ultimately need the authority of a formal, judgmental one.

I think that by roughly defining what the MCP should do, as I hope I have done above, then one has a reasonably good idea of what is meant by the term MCP, whilst not actually having defined it. The sorts of questions that might be addressed by the MCP also follow from deciding what the process should seek to achieve. Before discussing this issue, however, it is perhaps sensible to consider where such questions might should be raised and who should raise them because these factors also influence the nature of the questions. I incline to the view that the issues considered by the MCP should come from the formal review process because to do otherwise would probably make for a very messy system with two overlapping and potentially competing processes. The question of who can raise questions is rather more difficult. Non-parties, IGOs and NGOs can have information which could be valuable in answering questions relating to implementation. They are also often in a position to raise such questions where a Party may be unwilling to do so because of the possibly embarrassing consequences to the government concerned. However, to have open access for all interested organisations to raise questions might overload the system and run the risk of some Parties not taking the process seriously, or even boycotting it. Given that it is vital that all states participate, it would probably therefore be best for only states, or bodies established by the Convention, to be empowered to raise questions while allowing access to other interested organisations as observers and providers of evidence.

If one accepts the above arguments then "questions regarding implementation of the Convention" should be based on the national communications submitted by the parties and on in-depth reviews of the type currently being conducted. They should thus relate to the emission inventories or to policies and measures. But in what sense would they then be different to those already being considered as part of the implementation review process? In this respect I would see the Article 13 process essentially as one for defusing potential disputes. If a Party or Parties have a question regarding anothers emission estimates, policies or measures which is not easily answerable within the normal review process (which is not really set up to deal with contentious issues) then they should raise it in the MCP. The Subsidiary Bodies or even the CoP might also ask the MCP to consider certain issues.

Q 2. What is meant by the word "process" in Article 13? Should it be understood as a sequence of events or as a mechanism or as an institution? Could it imply all of these?

A 2. In my opinion the word "process" should be taken to include all of the these. To illustrate what I mean, I outline below how the MCP might function.

The MCP should be, and be conceived of as being, an expert consultative process providing advice and assistance, rather than as a dispute resolution process. In my opinion, questions should thus be raised before groups of experts, appointed by Parties, in appropriate fields. The process would thus, in effect, be based on a set of expert panels and would function in the following way.

Difficult and potentially contentious questions arising from the implementation review process would initially be raised at an informal level and preferably directly between Parties. If the Parties were unable to resolve the questions between themselves they could be put to a fairly small, "clearing house" panel which would be responsible for defining the questions so that they could then be passed on to expert groups. Both the clearing house and expert groups will probably need to be quite small if they are to function effectively: ten or so people might be appropriate. They would be composed of experts nominated by parties and probably selected on a regional basis or to reflect a balance between developed and developing countries and countries in transition. The expertise of the groups would depend on the nature of the questions asked.

The selection process for the groups might be run by the Subsidiary Bodies but would probably be best undertaken by a standing committee specifically set up to undertake the task by the CoP. Such a committee would comprise delegation members and could be responsible for overseeing the operation of the MCP and for reporting back to the CoP.

In general, the groups should be open but where questioned or questioning Parties requested then they should be closed. As far as possible the proceedings should be informal. They should be allowed to call upon advice from any expert sources and, preferably to conduct country visits where necessary. If they are to operate effectively, membership of the groups should last for a significant period of time, perhaps three years with one third of the members being replaced each year. The panels should be able to meet frequently.

When expert groups were successful in resolving questions relating to implementation then both they and the Parties involved would report back to the implementation review process on their findings. If the a group was unable to resolve a particular question then it would report to the standing committee, mentioned earlier, which might make a final effort at solving the problem. In the event of it failing to do so it would report back to the CoP and, if appropriate, the Parties could look for a solution to the dispute resolution process.

Q 3. What principles should govern the process? Is it sufficient that the process should be simple, transparent, facilitative and non-confrontational in character?

A 3. The process should be transparent, facilitative and initially non-confrontational in character. It should not necessarily be simple but it may be sensible for it to be so at first and allow it to grow in complexity if this proves necessary in light of experience of its operation. I other words it may be sensible to devise a "framework" process/mechanism .

Regarding the process being non-confrontational, as I have written above, I think that the early stages of its development the process should be non-confrontational and also that whenever the process is used it should begin so. However, as mentioned in the answer to the first question, if the process is to be effective in as many cases as possible it needs to be

sufficiently robust to criticise and recommend amendments to formal communications from the Parties. The process should thus be designed to, ultimately, be quite formal and judgmental, and thus potentially confrontational.

Q 4. Is it necessary to establish such a multilateral consultative process? If so, what measures should the Conference of the Parties take for its adoption: decision of COP? Amendment? Protocol?

A 4. Yes, for the reasons given in answer 1. Namely that there is a gap in the Convention between the implementation review process and the dispute resolution process which could usefully be filled by the MCP.

At this early stage in the development of the Convention and when we are not quite sure of exactly how the MCP will operate, it might be unwise to inscribe the MCP in tablets of stone by formally amending the Convention or adding a protocol to it. An Amendment or Protocol would probably either be so vague as to be fairly useless or so rigid as to be inflexible and incapable of constructively changing over time in the light of experience. Experience of many other environmental agreements indicates that a CoP decision might work best in this case. A CoP decision has the advantage that it allows flexibility. The Parties can easily modify their decision and, indeed, it will be easier for them to arrive at a decision in the first place.

Example of agreements in which CoP decisions rather than protocols and amendments have proved effective include CITES, the Ramsar Convention and the Whaling Convention.

Q 5. If a new mechanism or institution were to be established under Article 13, should its membership be general or restricted to specialists such as legal, economic, social or technical experts? In this context, should a roster of experts to provide advice be envisaged?

A 5. Membership should be for experts, certainly in the initial stages of the process. For further details of how the experts might be chosen see below (which is an exact repeat of the text already given as an example in answer to Question 2.) A roster of experts would be envisaged.

Difficult and potentially contentious questions arising from the implementation review process would initially be raised at an informal level and preferably directly between Parties. If the Parties were unable to resolve the questions between themselves they could be put to a fairly small, "clearing house" panel which would be responsible for defining the questions so that they could then be passed on to expert groups. Both the clearing house and expert groups will probably need to be quite small if they are to function effectively: ten or so people might be appropriate. They would be composed of experts nominated by parties and probably selected on a regional basis or to reflect a balance between developed and developing countries and countries in transition. The expertise of the groups would depend on the nature of the questions asked.

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conduct country visits where necessary. If they are to operate effectively, membership of the groups should last for a significant period of time, perhaps three years with one third of the members being replaced each year. The panels should be able to meet frequently.

When expert groups were successful in resolving questions relating to implementation then both they and the Parties involved would report back to the implementation review process on their findings. If the a group was unable to resolve a particular question then it would report to the standing committee, mentioned earlier, which might make a final effort at solving the problem. In the event of it failing to do so it would report back to the CoP and, if appropriate, the Parties could look for a solution to the dispute resolution process.

Section B: Relationship of Article 13 to Convention institutions and processes

Q 6. What linkages would need to be established with other Articles of the Convention, notably, Articles 7.2(c), 8.2(c), 10, 12 and 14? (For example, are the provisions on the review process complete in themselves or is there scope for them to receive support through the process envisaged under Article 13? What is the relationship of Article 13 to Article 14? Would the process under Article 13 automatically be halted if a Party invokes Article 14?)

A 6 The MCP could, and probably would, facilitate the processes envisaged by Articles 1.2 (c) and 8.2 (c) but, particularly if the MCP was set up under a CoP decision, there would be no need to establish formal linkages with them. Regarding Article 10, it might, as mentioned in Answer 5, be sensible to include the SBI in the process established by Article 13. Likewise, the Article 13 process would be strongly linked to the communication of information mentioned in Article 12. The implementation of Article 13 as envisaged here would complement and build upon the provisions of Articles 10 and 12, but I see no reason for establishing extra, formal linkages with them, again especially if the Article 13 process is based on a CoP decision.

In my opinion, the Article 14 processes should remain the ultimate dispute resolution process and would be invoked if Parties where dissatisfied with the Article 13 process. Parties could, of course, invoke the Article 14 processes directly, in which case invoking the Article 13 process would seem a little pointless. Whether or not it would automatically halt the Article 13 process is a moot but, I would contend, not very important point.

Q 7. Is there a gap between the processes on review of implementation and on settlement of disputes? If so, what is the extent of that gap and how could Article 13 contribute to narrowing it?

A 7. Yes. See the answer to question 1, above, for how the Article 13 process fills the gap.

Q 8. Is there a relationship between the Article 13 process and the subsidiary bodies established under the Convention, for example, the AGBM?

A 8. Yes. There should, I think, be links to the SBI and possibly SUBSTA (see answer 5, above.) There should also be links to any agreement reached by the AGBM. A protocol containing more stringent commitments is more likely to need the sort of process that could be established under Article 13 than the Convention is. It is thus important that any protocol or amendment be able to use such a process.

Section C: Legal and procedural considerations

Q 9. What is the legal status of the process?

A 9. CoP decision, binding but not in the same sense as in a formal amendment or protocol. In fact, it would be an optional process anyway, see A 10 below.

Q 10. What is meant by the Article 13 phrase: "Parties on their request"? Who may trigger the process apart from the Parties themselves? Is this process compulsory or optional?

A 10. Optional. For further details of who might ask questions and why, see answers 1 and 5.

Q 11. Should the multilateral consultative process be made to apply to related legal instruments in addition to the Convention?

A 11. Yes, for the reasons given in answer 8.

Section D: Other issues

Q 12. Under this section Parties and contributors are invited to make any additional inputs that they consider relevant to the consideration of a multilateral consultative process and its design.

A 12. I hope that this is largely covered by the previous answers, particularly 1, 2, and 5.

PAPER NO. 10: THE WOODS HOLE RESEARCH CENTRE

THE WOODS HOLE RESEARCH CENTER
Program on Science in Public Affairs
13 Church St. P.O. Box 296
Woods Hole, MA USA

Submission Relating to the Consideration of a Multilateral Consultative Process and its Design (AG13)

8 February 1996

Kilaparti Ramakrishna, Ph.D.
&
Andrew M. Deutz, MALD

Article 13 provides that the COP should consider the establishment of a Multilateral Consultative Process (MCP) for the consideration of questions regarding the implementation of the Convention. The process is explicitly consultative, and not quasi-judicial. Its success will depend upon its ability to function in an open, transparent and non-confrontational manner. As a cooperative process, it should result in the elaboration of recommendations to other Convention bodies to help the Party in question meet its commitments. These recommendations might include suggestions for capacity building, in the form of technical assistance, financial support, technology transfer, etc. The process should seek to answer the question: "How can the Convention best help individual Parties, given their unique national circumstances, in meeting their agreed commitments?"

The word "process" in Article 13 could be interpreted in a number of ways. The best however is to think of the process as a mechanism to help Parties in meeting their commitments. That said, the question arises regarding whether the existing subsidiary bodies of the Convention could be used to carry out the process. SBI and SBSTA have full agendas already. It is unlikely that either could deal with issues of individual Parties' implementation in the detail and with the attention they warrant. This implies, therefore, that a separate, new, and tightly comprised subsidiary body should be created which would be capable of fulfilling this role.

A multilateral consultative process can be established by a simple decision of the Conference of the Parties. Article 13 provides that the COP "shall ... consider the establishment of a multilateral consultative process". The COP, as the supreme body of the Convention, possesses sufficient authority to establish a multilateral consultative process under Article 13, as well as under Article 7.2 (l) which gives the COP the capacity to establish further subsidiary bodies for the implementation of the Convention, and under Article 7.2 (m) which gives it the blanket authority to "exercise such other functions as are required for the achievement of the objective of the Convention". An MCP could be established under any of these provisions of the COP's mandate.

A Subsidiary Body on the Multilateral Consultative Process (SBMCP) should be comprised of a small number of members, perhaps 10 to allow two per geographic region. This structure is also used in the Implementation Committee of the Non-Compliance Procedure (NCP) of the Montreal Protocol. The SBMCP should be comprised of experts nominated by Parties who would serve in their individual capacities. It would produce "recommendations" on ways that the Convention bodies and resources could provide assistance to parties, which should be technical in nature. It would not be performing the judicial function of formally interpreting the Convention, and its recommendations would be forwarded to and subject to the endorsement of the COP. For these reasons, it should consist of individuals with technical expertise rather than representatives of Parties. It should be noted, for reference, that the conciliation commission which can be established under Article 42 of the 1966 International Covenant on Civil and Political Rights to deal with state to state complaints on compliance with the Covenant is comprised of experts who serve in their individual capacities. Articles 11-13 of the 1966 International Convention on the Elimination of All Forms of Racial Discrimination contain similar provisions, providing for the use of individual experts. To provide this expertise, the Secretariat should be requested to compile a roster of experts nominated by parties.

The multilateral consultative process is not a dispute resolution mechanism. The latter fall under Article 14 of the Convention which provides for negotiation, adjudication, and arbitration, for questions concerning the "interpretation or application" of the Convention. These processes are intended to answer questions such as: "Is Party X in compliance with its commitments". Such adversarial procedures, however important they might be, are rarely, if ever, invoked in multilateral environmental agreements.

The Subsidiary Body for Implementation has an essential role in the process of the review of national communications under Article 12. Indeed, it is the first body to consider them, and will make recommendations to the COP based on its findings. In addition, the SBI will assess the overall aggregate steps taken by the Parties, which relates to questions of the implementation of the Convention as a whole. SBI also has a role, under Art. 10.2 (b) to assist the COP in its review of the adequacy of commitments. This review process relates to the effectiveness of the Convention as a whole, and rests on an examination of the cumulative effects of measures and commitments undertaken by Parties. Thus, even while the SBI might scrutinize individual communications and the reports of the in-depth reviews, it should be a body to draw larger conclusions from the national communications process. It was not envisioned as a body to examine implementation of individual Parties to determine if particular Parties were in compliance. Indeed, as the Secretariat has indicated, the review of national communications "is not seen as a mechanism for verification or for determining whether a party is in compliance, but rather as a tool to ensure that the COP has the information necessary to carry out its mandate." The only purpose for which such a determination should be made would be as a preliminary step toward finding solutions the Parties in question might take to ensure their compliance.

There should be four mechanisms to trigger the process. First, a Party should be able to initiate the procedure in situations where it has reason to believe that it may not be able to comply with its commitments and therefore wishes to notify other Parties and enter into

consultations to aide in compliance. Second, other Convention bodies should be able to initiate the process. Questions may arise in the consideration of national communications by SBI, for example. Third, Parties should be able to raise questions regarding implementation by other parties. Fourth, it would be highly desirable to have the Secretariat be able to raise questions in its own right. The secretariats of the Montreal Protocol and the 1994 Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Further Reduction of Sulphur Emissions both have the right to initiate the non-compliance procedures under those treaties, and the limited experience with the Montreal Protocol's procedure demonstrates that this provision works well.

The process itself should be triggered by a written submission to the Secretariat, which would then be transmitted to all Parties concerned. Any reply and information in support thereof should then be transmitted to the Subsidiary Body on the Multilateral Consultative Process, for its consideration. All Parties concerned should be invited to participate in the proceedings of the SBMCP, but not in the drafting of its report and recommendations. The process should ensure that there is an explicit mechanism for other interested Parties, IGOs and NGOs to provide information for its consideration. The Subsidiary Body should be constituted as a standing body with members elected to regular terms of office. It should meet fairly frequently, on the margins of the meetings of the other Subsidiary Bodies for the sake of convenience. Responsibility for the election of experts could be handled either by the COP or be delegated to one of the other subsidiary bodies. In either case, the reports of the SBMCP should be transmitted directly to the COP.

The multilateral consultative process should be made available to related legal instruments of the Convention, with the stipulation that the experts serving on the SBMCP should be drawn from Parties to the legal instrument in question.

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