

## Sanctions and penalties in environmental treaties

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### 1. INTRODUCTION AND SCOPE

1.1 In this briefing paper (the “Paper”), we are set out an analysis of the following question:

*What sanctions/penalties exist in other environmental treaties (e.g. CITIES, CBD, Montreal Protocol)? Without commenting on the merits of such sanctions/penalties, would any of these be compatible with the Convention or the current LCA text.*

### 2. COMPLIANCE AND ENFORCEMENT PROVISIONS IN INTERNATIONAL ENVIRONMENTAL TREATIES<sup>1</sup>

#### *Summary*

- 2.1 All of the international environmental treaties reviewed below emphasise a co-operative approach to achieving compliance through assistance to non-compliant Parties.
- 2.2 Some of the regimes envisage the potential for sanctions, including formal cautions and the suspension of rights and privileges under the relevant Convention or Protocol. Such rights and privileges may include financial rights and privileges such as the funding for its participation in meetings or other forms of financial assistance and thus amount to a form of financial penalty.
- 2.3 CITES enforcement can and does involve the use of trade restrictions as a measure of last resort. There has also been one instance of a trade restriction being recommended under the Montreal Protocol enforcement regime. Both these multilateral environmental agreements have the control of trade in specific areas as a central purpose.
- 2.4 None of the regimes envisage a system of financial penalties of the nature that may be imposed under national laws.

#### **Compatibility of potential UNFCCC / LCA mechanisms with other compliance mechanisms**

- 2.5 The UN Framework Convention on Climate Change provides that the Conference of the Parties:
- 2.5.1 “shall make, within its mandate, the decisions necessary to promote the effective implementation of the Convention”<sup>2</sup>; and, to that end specifically refers to it;
- 2.5.2 “shall make recommendations on any matters necessary for the implementation of

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<sup>1</sup> This sections responds to the question set out in paragraph 1.1.4 in this Paper.

<sup>2</sup> Article 7(2)

the Convention”<sup>3</sup>; and

- 2.5.3 “shall exercise such other functions as are required for the achievement of the objectives of the Convention”<sup>4</sup>.
- 2.6 The mandate of the Convention, and therefore of the Conference of the Parties is set by the objective in Article 2 to achieve “stabilisation of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system... within a timeframe sufficient to allow ecosystems to adapt naturally to climate change, to ensure food production is not threatened and to enable economic development to proceed in a sustainable manner”.
- 2.7 Article 3 sets out five principles, which should guide the Parties, and therefore the Conference of the Parties, in relation to their actions to achieve the Article 2 objective. These include reference to the precautionary principle and action on the basis of equity, as well as to developed country Parties taking a lead with the specific needs and special circumstances of developing country Parties. Of particular potential note here is the final part of the fifth principle, that “measures taken to combat climate change... should not constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction on international trade”.
- 2.8 The Conference of the Parties therefore has a wide scope to adopt enforcement and compliance measures of a similar nature to those used under other multilateral environmental agreements that are of a facilitative nature or involve cautions or suspension of rights or privileges accrued under the Convention. Trade restrictions, and suspensions of rights or privileges that could be considered to amount to de facto trade restrictions, would need to be approached with caution in light of the fifth principle and the fact that control of trade in specific substances, species or products is not a central purpose of the Convention, notwithstanding the role played by trade in economic instruments linked to emissions.

### **Convention on biodiversity and the cartegena protocol on biosafety**

- 2.9 The CBD Convention text does not include specific enforcement provisions, sanctions or penalties. Article 27 provides for dispute resolution between Parties as to the application or interpretation of the Convention.
- 2.10 The Cartagena Protocol on Biosafety text includes at Article 34 provision for the Conference of the Parties serving as a Meeting of the Parties to the Protocol (the “**CBD CoP MoP**”) to consider and approve, at its first meeting, co-operative procedures and institutional mechanisms to promote compliance with the Protocol and address cases of non-compliance.
- 2.11 Pursuant to Article 34 various steps were undertaken, initially and prior to the entry into force of the Protocol under the auspices of a body called the Intergovernmental Committee for the Cartagena Protocol (the “**ICCP**”) which put forward recommendations to the first CBD CoP MoP. These steps included:
- 2.11.1 a review, as at September 2000, of compliance regimes in other multilateral environmental agreements, the report from which is available on the CBD website<sup>5</sup>, together with other relevant documents including a subsequent review concerning repeated cases of non-compliance under other multilateral environmental agree-

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<sup>3</sup> Article 7(2)(g)

<sup>4</sup> Article 7(2)(m)

<sup>5</sup> <https://www.cbd.int/doc/meetings/bs/iccp-01/official/iccp-01-07-en.pdf>

ments in December 2007<sup>6</sup>;

- 2.11.2 developing draft text for the procedures and mechanisms.
- 2.12 Following this process the first CBD CoP MoP adopted a decision<sup>7</sup> setting out the underlying objectives, nature and principles of the procedures and mechanisms and establishing a Compliance Committee and setting out its functions, procedures and measure it could take to promote compliance. The underlying objectives, nature and principles are:
- 2.12.1 objectives – to promote compliance, address cases of non-compliance and provide advice and assistance;
  - 2.12.2 nature – simple, facilitative, non-adversarial and co-operative;
  - 2.12.3 principles – transparent, fair, expeditious and predictable, with particular attention to the special needs of developing country Parties and Parties with economies in transition.
- 2.13 The measures to address non-compliance include:
- 2.13.1 on the part of the Compliance Committee:
    - (A) providing advice and assistance;
    - (B) making recommendations regarding provision of financial and technical assistance, technology transfer, training and capacity-building;
    - (C) requesting, or assisting, a Party to develop a compliance action plan;
    - (D) inviting a Party to submit progress reports;
    - (E) reporting to the CBD CoP MoP; and
  - 2.13.2 on the part of the CBD CoP MoP:
    - (A) provision of financial and technical assistance, technology transfer, training and capacity-building;
    - (B) issue of a caution;
    - (C) requesting publication of non-compliance in the Biosafety Clearing-House; and
    - (D) in cases of repeated non-compliance taking such measures as may be decided by the CBD CoP MoP.
- 2.14 The rules and procedures have since been developed through successive meetings of the Compliance Committee and CBD CoP MoP<sup>8</sup>. Notably, in terms of the scope of the compliance processes the most recent Compliance Committee meeting considered whether it had a

<sup>6</sup> [http://bch.cbd.int/protocol/cpb\\_art34\\_doc.shtml](http://bch.cbd.int/protocol/cpb_art34_doc.shtml) (see the link under the 4<sup>th</sup> meeting for the second report expressly mentioned).

<sup>7</sup> <http://bch.cbd.int/protocol/decisions/decision.shtml?decisionID=8289>

<sup>8</sup> [http://bch.cbd.int/protocol/cpb\\_art34\\_info.shtml](http://bch.cbd.int/protocol/cpb_art34_info.shtml)

mandate to receive and consider a submission made by an NGO alleging non-compliance and found that it did not and could only consider submissions made by Parties.

### **Convention on International Trade in Endangered Species of wild fauna and flora**

- 2.15 The CITES Convention text does not include specific enforcement provisions, sanctions or penalties. However, Article XIII provides a basic escalation process where non-implementation by Parties is suspected, whereby:
- 2.15.1 when the CITES Secretariat is satisfied, in light of information received, that the provisions of the Convention are not being effectively implemented it shall communicate this to the relevant Party or Parties;
  - 2.15.2 the informed Party shall then as soon as possible provide any relevant facts, insofar as its laws permit, and propose remedial actions if appropriate;
  - 2.15.3 the informed Party may also hold an inquiry if it consider it desirable;
  - 2.15.4 the information provided by the Party and the results of any inquiry are then reviewed at the next Conference of the Parties (“**CITES CoP**”), which may make whatever recommendations it deems appropriate.
- 2.16 Resolution conf 14.3 of the CITES CoP adopted a Guide to CITES compliance procedures (the “**Guide**”)<sup>9</sup>, drafted by the CITES Secretariat pursuant to CITES CoP Decision 12.84.
- 2.17 The Guide is a non-legally binding statement of the objective and principles. The underlying and first stated general principle is that a “supportive and non-adversarial approach is taken towards compliance matters, with the aim of ensuring long-term compliance”. The Guide and CITES CoP Resolution 11.3 on compliance and enforcement<sup>10</sup> emphasise co-operation between Parties and between the Parties, the CITES Secretariat and other CITES Committees.
- 2.18 If a Party fails to take sufficient remedial action within a reasonable time limit then the CITES Secretariat shall bring the matter to the attention of the CITES Standing Committee. In exceptional circumstances and after consultation with the Party, the CITES Standing Committee may take measures aimed at achieving compliance. A non-exhaustive list of facilitative and cautionary measures, up to and including recommending to the CITES CoP that trade in CITES-listed species with the Party be suspended in the event of persistent unresolved non-compliance which the Party shows no intention of resolving, is set out in the Guide.
- 2.19 In taking or recommending measures aimed at achieving compliance, the CITES Standing Committee must take into account, and set out in its recommendations:
- 2.19.1 the Convention and any Resolutions or Decisions of the CITES CoP applicable to the compliance matter in question;
  - 2.19.2 the capacity of the Party concerned;
  - 2.19.3 the cause, type, degree and frequency of the compliance matters;
  - 2.19.4 the appropriateness of the proposed measures to the compliance matters; and

<sup>9</sup> <http://www.cites.org/eng/res/all/14/E14-03C15.pdf>

<sup>10</sup> <http://www.cites.org/eng/res/all/11/E11-03R15.pdf>

- 2.19.5 the possible impact on conservation and sustainable use of the compliance matters and the proposed measures.
- 2.20 Trade bans with respect to non-compliant Parties, with respect to particular species or with the Party in relation to all CITES-listed species, are the sanction of last resort but have been used in a number of cases. They may also be used for purposes other than non-compliance by the Party (eg as a result of the significant trade review process to protect a particular species or population or to reinforce a Party's own national measures). There are currently 38 trade suspensions in place, only one of which, against Nigeria, relates expressly to enforcement matters (although poor enforcement may be a contributory factor to recommendations based on significant trade reviews)<sup>11</sup>.

### Montreal protocol on substances that deplete the ozone layer

- 2.21 As with the Cartagena Protocol to the CBD, the Montreal Protocol text itself simply provides for the development of a non-compliance procedure at the first Meeting of the Parties ("MP MoP"). Article 8 of the Protocol requires them to "consider and approve procedures and institutional mechanisms for determining non-compliance with the provisions of this Protocol and for treatment of Parties found to be in non-compliance.
- 2.22 An interim procedure was approved in 1990 and reviewed and finalised in 1992 at the fourth MP MoP. It was reviewed and amendments adopted in 1998 at the tenth MP MoP. The Decision at the 10<sup>th</sup> MoP envisaged a further review by 2003 unless the Parties determined otherwise but no further amendments appear to have been made. The non-compliance procedure and Decisions of the MP MoP relating to it and taken with respect to non-compliance by Parties under it are available online (current version up to October 2007)<sup>12</sup>.
- 2.23 As with the Cartagena Protocol and CITES compliance regimes, the procedure is based on a non-confrontational, conciliatory and co-operative mechanism designed to encourage and assist Parties to achieve compliance.
- 2.24 As with the Cartagena Protocol the primary triggers for the non-compliance procedure is limited to reservations expressed by other Parties or a Party itself concludes it is not in compliance and reports itself to the Secretariat. There is no direct right for NGOs or other third parties to raise reservations but there is a third trigger where the Secretariat "during the course of preparing its report [to the MP MoP] becomes aware of possible non-compliance".
- 2.25 The non-compliance procedure is administered by an Implementation Committee made of 10 Parties elected on a two year cycle with proportionate geographical distribution. The Implementation Committee considers information provided by the Secretariat and the relevant Party with a view to reaching an "amicable solution", exchanges information with the Protocol fund mechanism to inform its recommendations, and makes recommendations to the MP MoP. The Implementation Committee may also, upon invitation by the relevant Party, conduct information gathering in that Party's territory.
- 2.26 The indicative list of measures that might be taken by the MP MoP in cases of non-compliance, drawn up at the fourth MP MoP includes:
- 2.26.1 providing appropriate assistance (including data collection and reporting, technical,

<sup>11</sup> [http://www.cites.org/eng/news/sundry/trade\\_suspension.shtml](http://www.cites.org/eng/news/sundry/trade_suspension.shtml)

<sup>12</sup> [http://ozone.unep.org/Meeting\\_Documents/impcom/MOP\\_decisions\\_on\\_NCP.pdf](http://ozone.unep.org/Meeting_Documents/impcom/MOP_decisions_on_NCP.pdf)

technology transfer, financial, information transfer and/or training);

2.26.2 issuing cautions; and

2.26.3 suspension of specific rights and privileges under the Protocol, including those concerned with industrial rationalisation, production, consumption, trade, transfer of technology, the financial mechanism and institutional arrangements.

2.27 From a brief review of the MP MoP Decisions up to October 2007, it would seem that the sanctions under the third limb of the indicative list of measures had not to that date been used, although Parties were requested to impose a trade ban on exports of CFCs to Azerbaijan by a Decision in December 2005 (ostensibly under the first limb).

### **UN-ECE Convention on long-range transboundary Air pollution**

2.28 The Convention text does not include specific provision in relation to non-compliance but does require the Executive Body of the Convention (the “EB”) to review implementation.

2.29 The Convention has eight Protocols. The fourth, known as the VOC Protocol includes at Article 3 a requirement for the Parties to establish a mechanism for monitoring compliance with the VOC Protocol and as a first step allows Parties with reason to believe another Party is acting, or has acted, in a manner inconsistent with its obligations under the Protocol to inform the EB and the relevant Party and to request that the matter be taken up at the next meeting of the EB.

2.30 By Decision 1997/2, the EB adopted a non-compliance procedure applicable to all the Protocols under the Convention. The procedure has been amended twice, most recently in 2006 when it was replaced by Decision 2006/2<sup>13</sup>.

2.31 The non-compliance procedure is similar to that under the Montreal Protocol, with an Implementation Committee and essentially the same triggers, although there is specific but non-exhaustive reference where the procedure is triggered by a referral from the Secretariat to issues the Secretariat becomes aware of as a result of reviewing reports submitted by the Parties in fulfilling their obligations under a relevant Protocol (as opposed to any other source).

2.32 Unlike the Montreal Protocol non-compliance procedure the LRTAP Protocols non-compliance procedure does not include:

2.32.1 express reference to underlying principles (eg for the Implementation Committee to seek amicable solutions) other than that the measures decided on by the EB must be of a “non-discriminatory nature to bring about full compliance with the Protocol in question, including measures to assist a Party’s compliance”; nor

2.32.2 express reference to a specific range of measures that can be imposed on a non-compliant Party.

<sup>13</sup> [http://www.unece.org/env/lrtap/ExecutiveBody/Eb\\_decision.htm](http://www.unece.org/env/lrtap/ExecutiveBody/Eb_decision.htm) (individual compliance decisions are also available on this page)

## Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal

- 2.33 Article 19 of the Convention text permits any Party which has reason to believe another Party is acting, or has acted, in breach of its obligation under the Convention to inform the Secretariat and simultaneously the relevant Party but does not specify what is to happen following such a notification.
- 2.34 Through a series of Decisions the Conference of the Parties (the “**Basel CoP**”) has therefore developed a “Mechanism for Promoting Implementation and Compliance” established by Decision VI/12 of the Basel CoP in 2002, The objective of the mechanism is to assist Parties to comply with their obligations under the Convention and to facilitate, promote, monitor and aim to secure the implementation of and compliance with the obligations under the Convention<sup>14</sup>.
- 2.35 The mechanism establishes a Compliance Committee, made of 15 members with proportionate geographical distribution. The procedure is expressly noted to be non-binding in nature, as well as non-confrontational, transparent, cost-effective and preventative. It is intended to assist in resolving compliance difficulties by providing advice, non-binding recommendations and information and by making recommendations on further additional measures to the Basel CoP. The guide to the mechanism<sup>15</sup> notes that these further measures may be:
- 2.35.1 further support, including prioritisation of technical assistance and capacity-building and access to financial resources; or
  - 2.35.2 issue of a cautionary statement and provision of advice regarding future compliance in order to help Parties to implement the provisions of the Convention and to promote co-operation between all the Parties.
- 2.36 The trigger mechanisms are similar to those for the Montreal Protocol and LRTAP Protocols but the Secretariat initiated trigger is expressly limited to the Party’s reporting obligations and there is also a general review trigger that can be initiated by the Basel CoP.

### Other multilateral environmental agreements

- 2.37 The above sections discuss the compliance and enforcement provisions of a selection of multilateral environmental agreements. It is not exhaustive. The papers prepared in the course of the development of the CBD Cartagena Protocol compliance regime, and referenced in section 3 above<sup>16</sup>, discuss these mechanisms (as well as those under the Kyoto Protocol) and also the approach to repetitive non-compliance under the additional multilateral environmental agreements noted below, but again these reports expressly note that they do not purport to be exhaustive:
- 2.37.1 The International Convention for the Regulation of Whaling;
  - 2.37.2 The Barcelona Conventions for the Protection of the Mediterranean Sea against Pollution and for the Protection of the Marine Environment and Coastal Region of the Mediterranean;

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<sup>14</sup> <http://www.basel.int/legalmatters/compcommittee/index.html>

<sup>15</sup> <http://www.basel.int/legalmatters/compcommittee/brochure-xx0706.pdf>

<sup>16</sup> See footnotes 4 and 5

- 2.37.3 The Convention on Environmental Impact Assessment in a Transboundary Context;
  - 2.37.4 The North American Agreement on Environmental Cooperation;
  - 2.37.5 The 1996 Protocol to the London Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter;
  - 2.37.6 The Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade;
  - 2.37.7 The Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters;
  - 2.37.8 The 1999 Protocol on Water and Health to the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes;
  - 2.37.9 The International Treaty on Plant Genetic Resources for Food and Agriculture; and
  - 2.37.10 The Stockholm Convention on Persistent Organic Pollutants.
- 2.38 In putting together this Paper, we also checked the website of the Ramsar Convention on Wetlands. The Ramsar Convention text does not include measures dealing with compliance and enforcement other than establishing a Conference of the Parties “to review and promote the implementation of the Convention”. The Convention website does not seemingly include a section specifically on compliance or enforcement processes.