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Non-compliance Mechanisms: Interaction between the Kyoto Protocol System and the European Union

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Abstract

The universality of climate change challenges and interdependence in the reduction of greenhouse gas (GHG) emissions called for a collective response in a multilateral framework. However, because of discrepancies on the appropriate design for an international regime the European Community (EC) took the lead on the international stage in the negotiation and the application of the Kyoto Protocol. Thus, an international regime – a mixed agreement to which both the EC and its Member States are parties – and a regional regime in the framework of the European Union coexist. In both regimes, one of the core challenges remains to ensure the effective application of the law, which requires the setting up of compliance control mechanisms. At the international level, an innovative non-compliance procedure organizes a continuous monitoring which combines traditional techniques with more intrusive procedures. The system is also remarkable as regards the legal qualification of and reaction to non-compliance situations. For its part, the EC created a specific non-contentious mechanism and can make use of a reinforced jurisdictional armory and a reinforced sanctioning power. The EC's control mechanism should be able to take over from the Kyoto Protocol non-compliance mechanism in order to reinforce the effectiveness of adopted rules. Through the study of these mechanisms' interactions, this article aims to assess the capacity of the control system as a whole to ensure the very credibility of the Protocol and the reliability of the international and European economic tools to reduce GHG emissions at least cost. Finally, it allows the envisaging of the possible evolutions of the legal regime of the fight against climate change.

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The respective competences of the European Community and of its Member States in the framework of the Kyoto Protocol form a complex legal and institutional pattern, reflecting political reality and proving relatively difficult for the layman to grasp. These interactions show the unique specificities of the European Union on the international scene.

Unlike some other fields, the environment is not an exclusive competence of the EU. It remains a shared competence, and, as such, is a field in which the EU and its Member States find themselves competing against one another.¹ As a result, most of the international environmental agreements are signed by both the EU and its Member States individually. These agreements are, in other words, mixed agreements. The EU's participation is more of a cumulative type than a substitutive type, which generates many difficulties both internally and externally. Competence sharing, which is in essence an internal issue, could create consequences for third parties.

However, at an internal level, a mixed agreement has Community agreement status and hence forms an integral part of Community law as regards the provisions pertaining to the EC competence. The Community judges have the competence to interpret these agreements and control their application.² The Court

of Justice of the European Union (ECJ) even has exclusive jurisdiction to settle disputes between Member States, as the Court reaffirmed in the *Mox Plant* case: disputes arising out of the interpretation and the application of Community law cannot be settled by any other dispute settlement means.³

Pertaining to a competence shared by both the EU and the Member States, the Kyoto Protocol was ratified as a mixed agreement. That means that the EC alongside Member States has the status of Party to the Kyoto Protocol. This dual membership will probably remain in a post-2012 agreement as, under the Lisbon Treaty, climate change policy still pertains to a shared competence. As in the case of other international conventions, the text of the Kyoto Protocol tries to anticipate and prevent the difficulties which may arise from its mixed status.

On the one hand, Article 24(3) of the Kyoto Protocol states that '[i]n their instruments of ratification, acceptance, approval or accession, regional economic integration organizations shall declare

in Case C-431/05, *Merk Genéricos-Produtos Farmacêuticos*, available at: [¹ See Art. 175 ECT, Art. 192 TFEU.](http://curia.europa.eu/jurispl/cgi-bin/form.pl?lang=en&alljur=alljur&juredj=juredj&jurtpi=jurtpi&jurtfp=jurtfp&numaff=C-431/05&nomusuel=&docnodecision=docnodecision&allcommjo=allcommjo&affint=affint&affclose=affclose&alldocrec=alldocrec&docor=docor&docav=docav&docsom=docsom&docinf=docinf&alldocnorec=alldocnorec&docnoor=docnoor&radtypeord=on&newform=newform&docj=docj&docop=docop&docnoj=docnoj&typeord=ALL&domaine=&mts=&resmax=100&Submit=Rechercher.</p>
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² Case C-53/96, *Hermès International/FHT Marketing Choise BV* [1998] ECR I-3603. Joined Cases C-390 & 392/98, *Parfums Christian Dior v. Tuk Consultancy* [2000] ECR I-11307. Karayight, 'Why and to What Extent a Common Interpretative Position for Mixed Agreements?' [2006] *European Foreign Affairs Review* 445. See also the conclusions of Colomer AG of 23 Jan. 2007

³ Art. 292 ECT, Art. 344 TFEU. See Case C-459/03, *Commission v. Ireland ('MOX Plant')* [2006] ECR I-04635.

the extent of their competence with respect to the matters governed by this Protocol. These organizations shall also inform the Depository, who shall in turn inform the Parties, of any substantial modification in the extent of their competence'. Yet, the EU Declaration provides very few indications to third parties. The somewhat basic framework for competence sharing provided by the Kyoto Protocol, which reads 'the organization and the member States shall not be entitled to exercise rights under this Protocol concurrently'⁴ does very little to clarify the situation.

On the other hand, the Kyoto Protocol does establish the intra-Community character of this sharing of responsibilities: '[i]n the case of such [regional economic integration] organizations, one or more of whose member States is a Party to this Protocol, the organization and its member States shall decide on their respective responsibilities for the performance of their obligations under this Protocol'.⁵

Moreover, the EC and its Member States made use of the option given by Article 4 of the Protocol of defining a joint commitment in the framework of a system called the 'European bubble', in order to reach a common target figure for the reduction of greenhouse gas (GHG) emissions (–8 per cent by 2012 below 1990 levels). In fact, after long negotiations, the EU and its Member States managed to have this 'tailor-made' measure written into the Protocol.⁶ The –8 per cent target was

then spread between the 15 Member States which were part of the European Union at the time of the ratification of the Kyoto Protocol.⁷ The sharing is mainly political. It reflects constraints which vary from one country to another. The idea here is to share the economic burden of climate protection equitably.⁸ Some countries may increase their emissions, according to their lower level of development and industrialization. Others must keep them at the same level. And the others have to decrease them, from –6 per cent to –28 per cent.

This flexibility comes at a price, however, as the Member States and the Community share joint responsibility in the implementation of the Protocol. Should the 'European bubble' fail to achieve the –8 per cent objective at the end of the allocated period, the EU would be responsible collectively as well as the failing

⁴ See Kyoto Protocol, available at http://unfccc.int/kyoto_protocol/items/2830.php, note ECT.

⁵ *Ibid.*

⁶ The EC decision to ratify the Framework Convention already prefigured a joint commitment to reductions (Dec 94/69/EC, OJ (1994) L 033/11, preamble).

⁷ Council Dec. of 25 Apr. 2002 concerning the approval, on behalf of the European Community, of the Kyoto Protocol to the United Nations Framework Convention on Climate Change and the joint fulfilment of commitments thereunder, 2002/358/EC, OJ (2002) L 130/4. The distribution within the European Bubble is as follows: –28% for Luxembourg, –21% for Germany and Denmark, –12.5% for the UK, 0% for France, +13% for Ireland, +15% for Spain, +25% for Greece, and +27% for Portugal. The 12 Member States which joined the Union since then remain outside the Bubble (Art. 4(3) of the Protocol) and have (or do not have, in the case of Cyprus and Malta) their own commitments to reductions according to the Protocol of between –6 and –8%.

⁸ See Dehousse and Zgajewski, 'Climate Change: What Are the Implications for the International System and the European Union', LXI *Studia diplomatika* 3.

Member States individually.⁹ The commitment to reduce GHG emissions is inscribed in Community law,¹⁰ making it both an international and a Community obligation which binds the EU and its Member States.

To help reach the common reduction target, the European Community adopted various measures and common policies, among which the European Union Emissions Trading System (EU-ETS) holds a key position. Working along the same principles as the Protocol's flexibility mechanisms, it aims to fit into them. An important element, however, distinguishes international trading systems from the intra-Community ones. If private companies are allowed to take part in the flexibility mechanisms set up by the Kyoto Protocol, they do so under the responsibility of their respective states. By contrast, a certain number of companies are directly concerned by the EU-ETS Directive and thus become the main actors in the market for GHG emission permits.

The unique legal and institutional nature of the joint participation by both the EU and the Member States gives rise to delicate questions concerning

the monitoring of the Protocol's implementation and liability in the event of non-compliance. How are both control mechanisms articulated? Are they compatible, mutually supportive, or is there room for conflict? Indeed, due to the mixed nature of the Protocol, international and intra-Community controls are superimposed on each other without being explicitly meshed, involving both the EU itself on one side and its Member States on the other. At a time when 'post 2012' is being negotiated, it is all the more interesting to ponder on these questions, since intra-Community control mechanisms are more sophisticated and more intrusive and could therefore be analysed as testing laboratories for possible evolutions in control mechanisms for the international climate context of tomorrow. From this point of view it is interesting to analyse both control mechanisms and consequences in case of non-compliance.

1 Control Techniques: How Do International and Intra-Community Systems Interact?

The originality of the Protocol is in the degree of sophistication of its control techniques and the way in which it combines a large panel of them. The control is based on the combination of three systems: the registry system, the reporting system, and the verification system. All three find counterparts in Community law, with which they interact.

A *Interconnection of Registries*

Holding a key position in the control system, the Kyoto Protocol International

⁹ 'If Parties acting jointly do so in the framework of, and together with, a regional economic integration organization which is itself a Party to this Protocol, each member State of that regional economic integration organization individually, and together with the regional economic integration organization acting in accordance with Article 24, shall, in the event of failure to achieve the total combined level of emission reductions, be responsible for its level of emissions as notified in accordance with this Article': Kyoto Protocol, Art. 4(6).

¹⁰ Dec. 2002/358/EC, *supra* note 7, annex II.

Transaction Log (ITL) allows the registries of the different parties to interconnect. These registries form a set of electronic databases which monitor the units issued from the Kyoto Protocol (assigned amount unit (AAU), removal unit (RMU), emission reduction unit (ERU), or certified emission reductions (CER)). The standardization of these registries allows them to interconnect through the ITL.¹¹ The ITL is thus an important lock because it checks the flow of transfers and can block the transfer of false or just suspect units. In addition to the ITL, the Community Independent Transaction Log (CITL) monitors the transfer of allowances within the EU-ETS. As can be seen, this set up is quite complex.

1 Relations between ITL and CITL

These two international and European logs worked independently for a time before being interconnected in October 2008. They now work jointly. In practice, when 'Kyoto units'¹² are involved,

European supervision becomes subservient to international supervision: thus, if ITL detects discrepancies or inconsistencies, CITL must go along with its conclusions.¹³

Since 16 October 2008, all accounting processes regarding Kyoto units have been communicated to the ITL. The United Nations Framework Convention on Climate Change (UNFCCC) secretariat checks them, then transfers the results to the CITL when these processes involve EU Member States. These processes can be classified into two categories:

- Processes translating into accounting terms the correspondence between Kyoto units within the international accounting system of flexibility mechanisms, and allowances within the EU accounting system of the EU-ETS. The allowances given within EU-ETS are indeed charged to the Kyoto unit budget allocated to each Member State, based on its individual reduction target.
- Processes linked to the direct use of individual Kyoto units on the EU market. A European directive, named the 'Linking Directive', allows for

¹¹ See Guttinger, 'Le système des registres', in S. Maljean-Dubois (ed.), *Changements climatiques. Les enjeux du contrôle international* (2007), at 149–156.

¹² According to the terminology used in Commission Reg. 2216/2004 of 21 Dec. 2004 for a standardized and secured system of registries pursuant to Dir. 2003/87/EC of the European Parliament and of the Council, OJ (2004) L 386/1, and in Dec. 280/2004/EC of the European Parliament and of the Council, OJ (2004) L 386/1 and Commission Reg. 994/2008 of 8 Oct. 2008 for a standardized and secured system of registries pursuant to Dir. 2003/87/EC of the European Parliament and of the Council and Dec. 280/2004/EC of the European Parliament and of the Council, OJ (2008) L 271/3, repealing Reg. 2216/2004 of 1 Jan. 2012.

¹³ Art. 30(2) of the consolidated version of *ibid.* illustrates this interaction, as it reads: 'If the UNFCCC independent transaction log has detected an inconsistency, the Central Administrator shall ensure that the Community independent transaction log does not allow any further process . . . concerning any of the Kyoto units which are the subject of the earlier inconsistency, and which is not subject to the UNFCCC independent transaction log's automated checks, to proceed.' See also Art. 29 of Reg. 994/2008, *supra* note 12.

Kyoto units coming from project mechanisms to be used on the European market instead of European allowances. In this way, companies directly impacted on by the EU-ETS directive, or anyone with a holding account, will be able to invest in CDM or JI projects and will be able to obtain CER or ERU credits which they will then be able to sell to other international or EU operators or surrender for their own CO₂ emissions. To do so, Article 11*bis* of the 'linking' Directive plans for these Kyoto units to be converted into allowances through a transfer of these units to the national account of the Member State on the register of which the investor has an account. Similarly, to see credits generated by its investment on the international market, the operator concerned will have to go through its state's account. The ITL is then informed and carries out checks to detect possible discrepancies. For example, if the eligibility of the state concerned is suspended, as was the case for Greece for several months in 2008, the process cannot be authorized: the units will not be translated into allowances or be used for international transactions. The account holder then unfortunately suffers from the lapses of the Member State on the registry of which his account is hosted. In this way, the effects of the consequences adopted at an international level are imparted within the EU-ETS, thereby reinforcing their coercive nature and thus discouraging Member States from ignoring their international obligations on the basis of the tensions this could generate. Still,

despite being forbidden to take part in international mechanisms, Greek companies could still take part in the trading systems at intra-Community level, which lessened considerably the impact of the decision made by the Kyoto Protocol Compliance Committee. In that respect, the cooperation between the two compliance systems remains to be established to a large extent.

Regarding these processes, it must also be noted that the 'linking' Directive only allows a partial use of the ERU and CER, whether from a quantitative¹⁴ or a qualitative¹⁵ point of view. Thus, even if a process has not detected any discrepancy following the ITL control, the CITL could still detect discrepancies and reject the proposed transfer.

Upon analysis, it appears that international and European controls of the

¹⁴ The maximum limit of Kyoto units converted into allowances useable on the EC market was left to the discretion of the Member States for the pilot phase of the EU-ETS, although supervised by the Commission during its *prima facie* examination of the national allocation plan (NAP). For phase II, the sum of these upper limits was expressed as a maximum quantity of credits allowable on the EC market and is set at 13% of the total allowances allocated. For subsequent periods, the Commission Proposal for a Dir. of the European Parliament and of the Council amending Dir. 2003/87/EC so as to improve and extend the greenhouse gas emission allowance trading system of the Community (COM(2008)16 final), stopped the entry of new credits on the EC market until an international agreement was concluded.

¹⁵ The credits issued for activities in Land Use, Land-Use Change, and Forestry are not allowed onto the EC market considering the uncertainties of potential 'carbon leakage' of removed emission and the physical impossibility of attaining permanent emission reduction.

accounting processes linked to flexibility mechanisms are particularly coherent with one another. Indeed, the objects, the means, and the effects of verification are identical. Furthermore, the Member States are clearly subordinated to the international and EU systems, the latter being obliged to submit to the results of the international control. This interlocking architecture, in certain cases, allows the climate change regime to impact on private entities directly within the EU-ETS beyond the realm of the state.

2 *Exporting the European Model?*

All the registries of the 'European bubble' must integrate the data relating to transactions carried out in the framework of the EU-ETS, which are recorded according to codes which are specific to the Community.¹⁶ The European Commission is thinking of simplifying the system for the post-2012 period, with increased harmonization of allowance records held and transferred, so that the exchange of allowances can proceed without restrictions within the EU. Indeed, the EC considers that

due to the technical, political and administrative risks related to the current registry system and in the light of the uncertainty concerning the future development of the UN registry system, EU ETS allowances issued from 1 January 2013 onwards should be held in the Community registry. As well as simplifying the system, this is also necessary to ensure that the EU ETS can link to other emissions trading systems in third countries and administrative entities.¹⁷

Throughout the world, several GHG emissions trading systems have been or are being created. Each one functions differently since it is left to the discretion of the parties concerned. The Commission considers that the EU-ETS is an important basic element of the emergence of a world network of emissions trading systems.

It is both an opportunity for the EU to strengthen its influence, and for international negotiations to end the deadlock of the United States blockage of talks or the misgivings of developing countries. Indeed, paragraph 18 of the preamble to the 'linking' Directive opens up the possibility of connecting the European permit market to a system which comes under a state which is not a party to the Protocol, on the double condition that this system is mandatory and that it sets absolute reduction targets within the limits of state systems.¹⁸ The implementation of a single European registry could contribute to ensuring the compatibility of the different systems' control mechanisms. In this way, the Commission hopes to export its model, and particularly its monitoring mechanism, by counting on the EU-ETS's appeal to participants outside the European Union. The EU's experience is undeniably useful, the EU-ETS already being seen as a large linking exercise between the initial 25 national systems, extended in 2007 to Romania and Bulgaria.¹⁹ A mutual recognition

¹⁶ Reg. 2216/2004, *supra* note 12.

¹⁷ COM(2008)16 final, *supra* note 14, at 7.

¹⁸ See Kruger and Pizer, 'Greenhouse Gas Trading in Europe. The New Grand Policy Experiment', 46 *Environment* (2004) 8, at 8.

¹⁹ See Lefevere, 'Linking Emissions Trading Schemes: The EU ETS and the "Linking Directive"', in D. Freestone and C. Streck (eds), *Legal Aspects of Implementing the Kyoto Protocol Mechanisms: Making Kyoto Work* (2005), at 511.

agreement was also signed between the EU and Norway, Iceland, and Liechtenstein whose emission permits trading systems were built on the EU-ETS model. This link is possible because of the integration of the 'allowance' Directive in the agreement on the European Economic Area.²⁰ In close collaboration with the monitoring authority for the European Free Trade Association, the Commission examines the national allowance allocation plans put forward by these countries following the same methods used for the assessment of plans put forward by Member States of the European Union.

B Interlocking Reports in the Reporting System

The reporting system places very heavy constraints on states, owing to the application of both the UNFCCC and the Kyoto Protocol. Greater precision of the commitments under the Protocol goes hand in hand with a tighter reporting system, more complex and heavier than the reporting system the UNFCCC provides for. The stakes are the collection of information of good quality which can be compared and verified, a crucial element for the flexibility mechanisms to work properly.²¹

The EU and its Member States must, like all parties to the Protocol, comply with the obligation to inform the conventional institutions of the adoption of their

Protocol implementation measures and to provide individual implementation reports. These requirements follow the logic of the mixed agreement.

The Commission being dependant on the information provided by the Member States in order to build its own reports, a series of measures was taken to rationalize the drafting and use of the reports required for the international monitoring of the EU's implementation of the Kyoto Protocol. The Member States must coordinate their reports with those of the Community itself to ensure that coherent information is declared by the components of the 'European bubble' and to allow the EU to hand in its reports within the deadlines.

As early as 1993, to comply with the requirements of the UNFCCC, the European Community established a monitoring mechanism of CO₂ emissions and other greenhouse gases. This largely decentralized mechanism proved to be inadequate: indeed, the first assessment was carried out within the timeframe allocated but it was incomplete, and the second had to be postponed for one year. If reports improved with time, the information provided remained insufficient properly to assess the progress made. Furthermore, the compilation of the Member States' reports proved to be impossible since the data collected were not really comparable.

In April 1999, this mechanism was revised and reinforced to adapt to the specific requirements of the Kyoto Protocol's targets. The Member States had to provide an estimate of their GHG emissions following the methods adopted in the Kyoto Protocol and to provide the Commission with reports containing data on their emissions, removal, policies, and measures on an annual or biannual

²⁰ Decision of the EEA Joint Committee, 146/2007 of 26 Oct. 2007 amending Annex XX (Environment) to the EEA Agreement, OJ (2008) L 100/92.

²¹ See Lanfranchi, 'Le système des rapports, de la Convention au Protocole', in Maljean-Dubois (ed.), *supra* note 7, at 157.

basis, depending on the nature of the data. In April 2002, the Commission sent letters of formal notice of non-provision of data relating to the year 2000 to seven of its Member States. Moreover, an analysis of the national reports which were submitted to the Commission showed that it was impossible to trace a European path because of the differences in hypothesis and methodology used by the Member States.

In 2004, the Community decided to take a step further. It adopted two decisions²² which took up and toughened in Community law the principles relating to the reporting system defined at the international level.

As far as form is concerned, the Community reinforced the mandatory character of the international principles. Indeed, if some uncertainties remain about the legal nature and binding character of the international guidelines, their transposition into the Community's legal order allowed the integration of the international reporting system into the Community's own monitoring system, and thus gave these principles an unquestionable binding character.

In terms of content, in order to ensure that individual communications of Member States and its own communications remained coherent, the EU included in its decisions a series of additional rules aimed at coordinating the EU monitoring system with the pertinent international requirements. The objective was both to guaran-

tee that reports from the 'European bubble' would be on time by setting an anticipated calendar for the Member States, and to improve the quality of the reports, particularly by unifying certain standards concerning the elaboration of those destined for international control. This was not enough, however, to prevent an implementation issue being raised about the Greek assessment system, making this Member State the first party to the Protocol to be found non-compliant by the Compliance Committee and to see its eligibility to participate in flexible mechanisms suspended.

The Greek incident is symptomatic of the collision between the European level and the international level, and of the – if not legal then at least practical – issues which the management of the 'European bubble' raises. The Greek difficulties also generated problems within the European Union. The European Commission found itself incapable of drafting the report determining the quantities attributed to the EC and its Member States, and as a consequence lodged a complaint against Greece for failure to fulfil its reporting obligations, not under the Kyoto Protocol but under Community law.

We should probably give the steps taken by the European Community in 2004 time to bear fruit. Besides, the European reporting system will surely evolve. Experience hitherto shows the need almost completely to harmonize the EU-ETS in order to guarantee that it works correctly.²³ The

²² Council Dec. 2002/358/EC, *supra* note 7, completed by Commission Dec. of 10 Feb. 2005 laying down rules implementing Dec. 280/2004/EC of the European Parliament and of the Council concerning a mechanism for monitoring Community greenhouse gas emissions and for implementing the Kyoto Protocol, OJ (2005) L55/57.

²³ See Tabau, 'Le système communautaire d'échange de quotas d'émission, instrument du leadership de la Communauté européenne dans la lutte globale contre les changements climatiques' (2008), available at: www.iucn.org/about/union/commissions/cel/cel_resources/.

drafting of reports could be supervised further, following modalities harmonized on a European scale, which suggests that the international framework will undergo a similar evolution.²⁴ Unfortunately, the results of the European approach will be fully meaningful and visible only at the end of the first commitment period, which prevents the EU from using the experience it gained in this matter to further the current ‘post 2012’ negotiations on the future modalities of control.

C Verification

The complex, even labyrinthine, verification system created in the framework of the Kyoto Protocol is at the heart of the compliance control operation. It is an original and advanced system, which supports and provides a framework for the gathering, compilation, processing, and interpretation of information, particularly that coming from states parties: registries’ reports, inventories, and national communications. As a whole, verification processes have evolved quickly as international tools were adopted in the field of global warming which considerably refined the verification system in terms of types of measures used and entities involved. As regards its capacity to achieve its assigned objectives – monitoring and control of states parties’ compliance – the system is undeniably efficient.

Besides, it guarantees the permanence of a thorough control mechanism which would outlive the quasi-jurisdictional mechanism created by the Compliance Committee if the system could not be imposed on all states parties.²⁵

As for the EU, it has its own ‘verification system’ which is in fact of a dual nature. It combines general control mechanisms with special control procedures created to meet the Kyoto Protocol’s specific requirements.

These special procedures consist mainly of procedures for verifying information on the levels of GHG emissions in the EU, and procedures pertaining to the application of the emission allowances trading scheme. Indeed, like those of other parties, the Community reports are dealt with by the international secretariat and assessed by international expert review teams. Beyond compliance with international reporting guidelines, the fear that its compliance could be questioned urged the EU to develop its own system of verifying information relating to the implementation of the Kyoto Protocol by the ‘European bubble’. This special procedure is intended to guarantee that the inventories of the ‘European bubble’ comply with international guidelines,²⁶ and results from

²⁴ COM(2008)16 final. Along this line see Fujiwara and Egenhofer, ‘What Lessons Can Be Learned from the EU Emissions Trading Scheme?’, *CEPS Policy brief*, no. 153, Feb. 2008; Kelly, ‘An Evaluation of the European Union’s Emissions Trading Scheme in Practice’, 15 *European Environmental L Rev* (2006), 175.

²⁵ See Richard, ‘Le système de vérification : un colosse aux pieds d’argile?’, in Maljean-Dubois (ed.), *supra* note 7, at 171.

²⁶ Dec. 15/CMP.1, Guidelines for the preparation of the information required under Art. 7 of the Kyoto Protocol, with annex, FCCCKP/CMP/2005/8/Add.2. Decision 19/CMP.1, Guidelines for national systems under Art. 5, para. 1, of the Kyoto Protocol, with annex, FCCCKP/CMP/2005/8/Add.3.

a decision adopted by the Parliament and the Council,²⁷ the implementation modalities of which were adopted following the comitology procedure.²⁸

As efficient and thorough as it may seem, this special Community procedure set up to verify GHG inventories is not enough on its own for one to assess the implementation of all their Kyoto Protocol commitments by EU Member States. In particular, its scope remains restricted and it cannot be presumed that the Member States will always comply with the decisions adopted by the Commission within this framework. In this respect, the general procedures can provide useful support.

These general procedures consist of the control exerted by the European Commission acting as the 'keeper of the treaties',²⁹ control which can lead to an action before the ECJ. Unlike special procedures which are of a systematic nature, general procedures come within the discretionary powers of the European Commission. They are complementary and thus they can be used in the event that the special procedures fail. They also allow an extension of the scope of the verification which is to be carried out. Yet, if only due to a lack of means, it is not at all certain that the Commission always exerts this competence, leaving it to the

international verification procedure to try to find a first, non-contentious solution in identified non-compliance cases, and intervening only as a last resort. This is precisely what happened in the case involving Greece, which did not reach the contentious stage.

Finally, it must be noted that the EU's verification system also organizes the control of some of the Kyoto Protocol's implementation tools which are not governed by international guidelines. This is the case of the control of information declared under the EU-ETS. Nevertheless, the techniques and tools developed for that purpose are inspired by those created at the international level. In this, the EU verification system for EU-ETS is inspired by an '*esprit de suite*'³⁰ encouraging the coherence of the verification system for the EU's implementation of the Kyoto Protocol, considered in its entirety. Growing desires to integrate the EU-ETS within the Kyoto Protocol flexibility mechanisms also impose a series of constraints which the Community must take into account in its EU-ETS verification system. Conversely, the modalities of the EU-ETS control could also have some influence at the international level.

2 Consequences of Non-compliance

When reacting to identified situations of non-compliance, the mixed nature of the Kyoto Protocol hangs over the Member States of the European Union as a double threat.

²⁷ Dec. 280/2004/EC, *supra* note 12, Commission Dec. 2005/166/EC of 10 Feb. 2005 laying down rules implementing Dec. 280/2004/EC of the European Parliament and of the Council concerning a mechanism for monitoring Community greenhouse gas emissions and for implementing the Kyoto Protocol, OJ (2005) L 55/57.

²⁸ Commission Decision 2005/166/EC of 10 February 2005, *op. cit.*

²⁹ See Art. 226 ECT/Art. 258 TFEU.

³⁰ See F. Ost and M. van de Kerchove, *Le système juridique entre ordre et désordre* (1988).

On the one hand, on the international scene the EU and its Member States can be held jointly liable, as we described earlier, for the failure to apply the Protocol. However, each Member State is also responsible for its own emissions levels as they were notified when the combined total level of emission reductions cannot be reached³¹ and for other obligations which it has to meet in compliance with the intra-Community sharing of responsibilities.³² Individual states and/or the EU can be the subject of non-compliance proceedings³³ or else of a dispute settlement procedure.³⁴ Concerning the joint responsibility of the ‘bubble’ for the implementation of commitments to reduce GHG emissions, which will be assessed at the end of the first commitment period in 2012, it remains difficult to determine who will be held liable internationally and who can be sanctioned: the EU as such, with the effect of sanctioning all its Member States, including the compliant ones? Or will the sanction extend only to non-compliant Member States?³⁵ The question cannot be answered by reading the Protocol and experience and practice tell us very little. If there are numerous mixed agreements in the field of the environment to which

the EU is a party alongside its Member States, the Protocol is the only one establishing such joint responsibility for its implementation. Similarly, with regard to the mixed nature of the Protocol, one can wonder whether the EU could also be liable for the non-compliance with the Protocol of one of the 12 EU Member States which are not part of the ‘European bubble’.

On the other hand, at the intra-Community level, even though this case is not expressly provided for by the dispute settlement clause to which the Kyoto Protocol refers and despite the absence of a jurisdictional disconnection clause which benefits the EC judges, the latter may have to decide on the interpretation or the application of the Protocol on implementation issues which pertain to the Compliance Committee’s area of competence. The case of the EU is indeed specific since the EU is a full member of the Protocol. In the eyes of the other parties, the ECJ is considered to be an internal jurisdiction. It is therefore natural that EU Members settle the disputes which arise between them or with the EU institutions in the ECJ, all the more so as the compliance mechanism is not an exclusive procedure, as shown by the provision of Decision 27/CMP.1 under which the compliance control procedure is ‘without prejudice to’ other means of settling disputes.³⁶

The ECJ can be called upon for several reasons. Agreements signed between the EU and one or several states or an international organization ‘shall be binding

³¹ Kyoto Protocol, *supra* note 4, Art. 4(6).

³² *Ibid.*, Art. 24(2).

³³ See *ibid.*, Art. 18.

³⁴ See *ibid.*, Art. 19 combined with Art. 14 of the UNFCCC, available at: http://unfccc.int/essential_background/convention/background/items/2853.php.

³⁵ See Jacquemont, ‘The Kyoto Compliance Regime, the European Bubble: Some Legal Consequences’, in M. Bothe and E. Rehlinger (eds), *Climate Change Policy* (2005), at 351.

³⁶ Sect. XVI, annex to 27/CMP.1 Decision, Procedures and mechanisms relating to compliance under the Kyoto Protocol, FCCC/KP/CMP/2005/8/Add.3.

on the institutions of the Community and on Member States'.³⁷ When these agreements are signed properly, they are from their entry into force sources of legal obligations the institutions must respect.³⁸ Established case law shows that when they adopt an act of secondary law the institutions must be careful to respect the provisions of international conventions.³⁹ The latter are then part of the reference rules used within the framework of the legality control the Court may have to perform.

On this basis, an institution, a Member State, or a natural or legal person could contest a text adopted by a European Union institution or body and have it annulled, or else have it established that a EU institution or body failed to adopt a binding act (action for annulment and action for failure to act).

An external agreement can create rights and obligations for individuals and can be considered to be directly applicable in Community law provided the provisions of such agreement are clear and precise and they are not subject in their implementation or their effects to the adoption of any subsequent measure. Most of the Protocol's provisions probably do not meet these conditions, but some provisions in decisions adopted by the Meeting of the Parties to the Protocol which clarify the Protocol's provisions could on the other hand be considered

directly applicable.⁴⁰ For their part, Member States can be the object of an action for failure to fulfil their obligations brought by another Member State⁴¹ or more frequently by the Commission.⁴² Finally, the Court can also give a preliminary ruling on the interpretation of agreements signed by the EU, in order to guarantee the uniformity of their application within the Community legal order.⁴³

But for all that certain areas remain shady, as a result first of the difficulty in determining what in the Kyoto Protocol comes under EU or state competence. The very elliptical declaration of competence adopted by the EU when the Protocol was concluded does not shed any light on this matter. In principle, the ratification of the Kyoto Protocol as a mixed agreement by the European Community and its Member States means that this agreement is an integral part of the Community legal order, concerning the provisions under which the EC has effectively used its competence. In practice, the Court's competence to interpret mixed agreements seems extremely wide, and almost unlimited.⁴⁴ Consequently, the ECJ is able to control the way in which

³⁷ See Art. 300(7) ECT/Art. 216(2) TFEU.

³⁸ Case 181/73, *Haegeman v. Belgian State* [1974] ECR 449.

³⁹ See Mehdi, 'L'effet direct du droit communautaire', *Juristas Europe* (2008), Fasc. 195.

⁴⁰ Case C-192/89, *Sevince v. Staatssecretaris van Justitie* [1990] ECR I-3461; Joined Cases C-102 and 211/98, *Kocak and Örs* [2000] ECR I-1287.

⁴¹ See Art. 227 ECT/Art. 259 TFEU.

⁴² See Art. 226 ECT/Art. 258 TFEU.

⁴³ *Haegeman*, *supra* note 38.

⁴⁴ Tietje, 'The Status of International Law in the European Legal Order: The Case of International Treaties and Non-binding International Instruments', in J. Wouters, A. Nollkaemper, and E. de Wet (eds), *The Europeanisation of International Law: The Status of International Law in the EU and Its Member States* (2008), at 55. See Joined Cases C-300 & 392/98, *Parfums Christian Dior SA*, *supra* note 2; Case C-239/03, *Commission v. France ('Etang de Berre')* [2004] ECR I-9325, at paras 29-31.

the Member States and EU institutions comply with this external agreement.

It can also control (almost independently, without referring to international law) the way secondary law aiming at implementing the Protocol in Community law is applied, and particularly the implementation of the EU-ETS. Insofar as the different decisions, directives, and regulations adopted by the European Community to implement the Protocol cover almost all the provisions of this agreement, the ECJ's jurisdiction seems particularly wide and could also overlap the jurisdiction of the Compliance Committee. The special regime of liability under Community law can thus potentially interact on both accounts, directly and indirectly, with the compliance procedure.

Another blurred area is the ECJ's case law pertaining to the WTO agreements. We know that, for political reasons, the Court has hitherto refused to acknowledge that their direct effect could be invoked, thereby leaving a blind spot in its control.⁴⁵ The main reason for this refusal is that such an acknowledgement could place the EU in a less favourable situation than the other parties to the WTO agreements, which would make the reciprocity principle ineffective.⁴⁶ Case law is here applied on a case by case basis and

is not yet consistent. Nothing, it seems, could preclude it from being applied in the future to other fields such as the Kyoto Protocol's.

Still, since the two bodies may have to arbitrate on the same facts in parallel, the risks of a 'case law' conflict, or at least of an interpretation conflict between the ECJ and the Compliance Committee, cannot be ruled out. Indeed, in practice, the Greek case testifies that both procedures, the international one (non-compliance before the Compliance Committee) and the intra-Community one (threat from the European Commission to bring an action for failure to fulfil), were triggered almost simultaneously. However, probably in a spirit of conciliation, the Commission remained relatively cautious: it was careful not to refer the matter to the Court before the Compliance Committee had released its final decision, and in the end did not go to the ECJ. It seems that the Commission used the threat of an action for failure to fulfil to put pressure on Greece, not to say as a shield to protect itself against possible actions for non-compliance against the European institutions themselves, rather than with the firm intention of referring the matter to the Court. At the opposite end, the Commission used the Article 226 ECT procedure against Luxembourg for not having submitted information relating to its implementation of the Kyoto Protocol before the international deadline, as required by Community law. The Court's ruling stating the failure of this Member State⁴⁷ leads it to restore the situation internationally, preventing a

⁴⁵ See, e.g., Joined Cases C-120/06 P & 121/06 P, *Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM), Fabbrica italiana accumulatori motocarri Montecchio Technologies Inc (FIAMM Technologies), Giorgio Fedon & Figli SpA, Fedon America, Inc. v. Council of the European Union, Commission of the European Communities, Kingdom of Spain* [2008] ECR I-6513.

⁴⁶ See Lavranos, 'The Communitarization of WTO Dispute Settlement Report. An Exception to the Rule of Law', 10 *European Foreign Affairs Review* (2005) 313.

⁴⁷ Case C-390/08, *Commission v. Luxembourg (National measures to reduce or limit greenhouse gas emissions)*, judgment of 18 May 2009, not yet reported.

case of non-compliance being brought before the Compliance Committee.⁴⁸ If those situations illustrate how reaction mechanisms are somewhat subsidiary to a situation of non-compliance with Community law, at least in practice they also demonstrate that the double international and internal pressure can reinforce the effectiveness of the Protocol on the territory of EU Member States. A ruling from the Court is more binding in its consequences. Indeed, the Member States 'shall be required' to take the necessary measures to enforce the judgment of the ECJ. If they do not, a new ruling can condemn them to pay extremely prohibitive fixed or periodic financial penalties.⁴⁹ However, in practice the procedure takes quite a long time and would thus be very difficult to mesh with the strict schedule of the Protocol.

Even if the balance between the two courses of action for non-compliance remains fragile, it seems that the two complement one another rather than stand in direct competition. Combined with the dual monitoring system, the double threat which hangs over the Member States is perhaps one of the reasons explaining

why the latest forecasts raise hope that the commitments to reduce GHG emissions, whether for the 'bubble' alone or for the European Union of 27, will be met and further may be exceeded.⁵⁰ Even so, the Copenhagen Accord raises concerns about the future of the international non-compliance mechanism, and even the Kyoto Protocol. If recent developments in international climate negotiations still illustrate the central character of control issues, 'Monitoring, Reporting and Verification' (MRV) mechanisms, as envisaged in the Copenhagen Accord, are more 'bottom-up' conceived and less intrusive than the Kyoto Protocol non-compliance procedure. On the other hand, the Lisbon Treaty provides the EU with some tools to strengthen its presence and influence, but lack of political will may prevent them from being used successfully. In the future, the relationship between international and European mechanisms may well be fundamentally redesigned, with, on the one hand, the continuation of a comprehensive and binding European control and, on the other, the lightening of the international control.

⁴⁸ Luxembourg submitted its fifth National Communication, along with its second, third and fourth ones on 14 Feb. 2010.

⁴⁹ See Art. 228 ECT/Art. 260 TFEU.

⁵⁰ See *Greenhouse Gas Emission Trends and Projections in Europe 2009*, EEA Report No. 9/2009.