The Early Operation and Effectiveness of the Montreal Protocol's Non-Compliance Procedure

David G. Victor

ER-96-2
May 1996

David G. Victor is Co-leader of the Implementation and Effectiveness of International Environmental Commitments (IEC) Project at the International Institute for Applied Systems Analysis (IIASA), Laxenburg, Austria.

INTERNATIONAL INSTITUTE FOR APPLIED SYSTEMS ANALYSIS
2361 LAXENBURG, AUSTRIA

International Standard Book Number 3-7045-0128-X

Executive Reports bring together the findings of research done at IIASA and elsewhere and summarize them for a wide readership. Views or opinions expressed herein do not necessarily represent those of the Institute, its National Member Organizations, or other organizations supporting the work.

Cover design by Anka James.

Printed by St. Gabriel, Mödling, Austria.

Contents

Foreword

What happens to international environmental agreements once they are signed, and how does the implementation of such agreements influence their effectiveness? These are the questions that motivate the Implementation and Effectiveness of International Environmental Commitments (IEC) Project at the International Institute for Applied Systems Analysis (IIASA), Laxenburg, Austria.

In this IEC essay, David G. Victor assesses the operation of the Non-Compliance Procedure of the Montreal Protocol on Substances That Deplete the Ozone Layer. Although in operation for only six years, the Procedure and its standing Implementation Committee have already made significant contributions to the effectiveness of the Montreal Protocol. The Implementation Committee serves as a forum for discussing compliance-related issues; it has played a central role in managing individual cases of noncompliance.

Victor applies some lessons from the Montreal Protocol experience to the design of noncompliance procedures and similar mechanisms in other multilateral environmental agreements. He focuses on the Multilateral Consultative Process (Article 13) of the United Nations Framework Convention on Climate Change. This essay is one of three from the IEC Project that apply historical experience to the possible designs for Article 13 of the Climate Convention. The essays are contributions to the work of the Advisory Group on Article 13, a legal and technical expert body that is currently exploring the need and possible designs for Article 13.

Prof. Eugene B. Skolnikoff
Project Co-leader
International Environmental Commitments Project, IIASA

Acknowledgments

This paper has benefited from the support of many people. The author especially thanks Gilbert Bankobeza, Hugo M. Schally, and Patrick Széll for interviews and comments on the manuscript. Thanks also go to Abram Chayes, Winfried Lang, Cesare Romano, Peter Sand, Jacob Werksman, and two anonymous reviewers for many helpful discussions and comments, and to Ellen Bergschneider, Linda Foith, and Cara Morris for their help in the preparation of the manuscript. The Ozone Secretariat (Nairobi) was extremely helpful and provided many documents.

Executive Summary

The Non-Compliance Procedure of the Montreal Protocol on Substances That Deplete the Ozone Layer consists of two interlocking systems. The "regular" system is managed by a standing committee, the Montreal Protocol Implementation Committee. The Committee reviews specific cases of noncompliance, debates general matters related to implementation of and compliance with the Protocol, makes recommendations to other bodies, and issues a publicly available report after every meeting. The Committee also operates a second, "ad hoc" system that allows Parties to the Montreal Protocol to file "submissions" about alleged noncompliance by other Parties or about problems with their own compliance. The Secretariat can also invoke the ad hoc system, but is highly reluctant to do so.

This essay reviews the origins and operation of the Procedure. It evaluates the role of the Implementation Committee as a forum for addressing compliance-related issues and how specific cases of noncompliance have been handled. The analysis covers the period from the Committee's inception through December 1995, when the Committee handled its first cases in the ad hoc system.

During that period the Committee was quite active, which has led many observers to hope that noncompliance procedures will prove to be an effective means of handling compliance issues. In contrast, dispute resolution mechanisms are often cited as devices for resolving compliance problems, but in practice they have never been invoked in multilateral environmental agreements, despite many instances of noncompliance.

Because it is small (only 10 members) and well-managed, the Committee has improved the overall efficiency of the Montreal Protocol by serving as the forum where compliance issues are first handled. Many of the issues are ultimately referred to the Meeting of the Parties for formal decision, but the Committee handles most of the debate and deliberation. It has also helped implement some provisions of the Protocol. For example, it has played a central role in determining Montreal Protocol policies on issues such as how to classify and reclassify Parties eligible to receive special treatment as "developing countries" (Article 5). It has

also evaluated data submitted by non-Parties to determine which of these non-Parties merit exemption from the Protocol's trade sanctions against non-Parties that are not in compliance with the Protocol.

Since 1993 the Committee has devoted an increasing share of its agenda to handling specific cases of noncompliance. Initially these concerned primarily the Protocol's requirements to report data. In 16 cases where Parties have persistently failed to report data, the Committee has invited them to explain their actions. Four did not cooperate, but direct questioning of the others was influential; half the Parties questioned brought some data with them or submitted data shortly before the meeting. The Committee also has a wider effect on compliance with data reporting by supporting the efforts of the Secretariat, which sends repeated reminders to Parties that fail to report data. Virtually all of the Committee's attention to data reporting has concerned missing data. So far, little attention has been given to the more difficult task of assessing and improving the quality of data.

The Committee's powers are limited to its ability to discuss and give public exposure to noncompliance issues and make recommendations to the Meeting of the Parties; consequently, its direct influence has been evident only in instances where Parties have found it relatively easy to bring themselves into compliance. Nonetheless, compliance with the Protocol's data reporting requirements is higher today than it would be without the Committee's activities. However, where compliance by developing countries has been at stake, even more important has been funding from the Protocol's Multilateral Fund (MLF) for projects to gather and report data and build capacity to improve regular data reporting. The Committee has helped to make MLF funding conditional on compliance with reporting of initial, baseline data. The threat to remove MLF funding has been made once (against Mauritania), with almost immediate results. The Committee and the MLF cooperate by exchanging information, but their activities could be much more integrated.

In 1994, when the Protocol's commitments to control ozone-depleting substances (ODS) began to take full effect, the Committee's work load expanded beyond data reporting. Several countries with economies in transition, at their own instigation, have raised concerns and sought the Committee's advice about their abilities to comply with the ODS controls.

For five years, from 1990 to 1995, the Committee worked solely as a standing body that handled issues that it, other bodies, the Secretariat, and Parties thought would be useful to address. In 1995 the Committee received its first submissions under the ad hoc system, which concern the imminent noncompliance of five Parties whose economies are in transition: Belarus, Bulgaria, Poland, Russia,

and Ukraine (hereafter, the BBPRU submissions). The cases of Belarus, Russia, and Ukraine are especially challenging because achieving compliance will require implementation of costly projects. The Global Environment Facility (GEF) will provide the funding, but it has made its resources conditional on the Committee's approval of each country's plan to bring itself into compliance with the Protocol. (GEF is not formally a part of the Montreal Protocol; it is providing the funds because these countries are not "developing" and therefore are ineligible for MLF funding.) The Committee will thus conduct regular performance reviews of each country's progress.

This essay includes a quantitative analysis that confirms three clear trends in the Committee's work load: (a) until recently most attention was given to compliance with the Protocol's data reporting requirements; (b) although the Committee regularly handles general compliance issues, there has been a consistent increase in attention to the compliance problems of specific Parties; and (c) nearly all of the issues related to ODS controls handled by the Committee have concerned specific problems encountered by specific Parties. These trends in its work load are an encouraging sign that the Committee is responsive to changes in the compliance issues that are the most relevant to the Protocol, and over time it has sought to increase its effectiveness. Especially important is the increased attention to specific cases of noncompliance. The detailed analysis in this essay shows that the Committee plays its most unique role, and has its greatest influence on compliance, by handling specific cases.

Throughout its history, the Committee's approach has been pragmatic. Its aim has been to cooperate with Parties to find ways to achieve compliance rather than to adjudicate and apportion blame. This essay explores why the Committee does not have at its disposal stronger tools for achieving compliance, such as the ability to make more of the benefits of the Montreal Protocol (notably MLF funding and trade) conditional on compliance. The merits of a strong noncompliance procedure and conditionality are controversial topics. In the Montreal Protocol, stringent commitments have led some Parties that were unsure of their ability to comply with the Protocol to be reluctant to adopt a more powerful noncompliance procedure. The same experience need not repeat itself in other regimes: strong commitments can and often must go hand in hand with strong compliance controls. But the Montreal Protocol experience underscores that the design of compliance systems is part of the package of substantive commitments that constitute an international agreement.

The Montreal Protocol experience suggests some tentative lessons for the design of noncompliance procedures and similar mechanisms within other international environmental agreements, such as under Article 13 of the Framework

Convention on Climate Change (FCCC). Among these is the benefit of promptly establishing a limited-membership standing committee for handling the regular supply of queries and mostly minor issues of noncompliance. In the case of the FCCC, such a committee could contribute to issues related to data reporting as part of the required "national communications," and in doing so build experience and legitimacy that will be needed if the committee is eventually also charged with handling ad hoc submissions about noncompliance. However, the Montreal model cannot be transferred directly. The relationship between a small committee and a noncompliance procedure and the FCCC's open-ended Subsidiary Body for Implementation (SBI) must be addressed. No SBI-like body exists in the Montreal Protocol. Moreover, unlike the Montreal Protocol experience, reporting of data in the FCCC has been relatively complete; quality and comparability of data are more problematic. Because of the characteristics of the industrial chemicals and commitments in the ozone regime, data quality and comparability have not yet been overly problematic issues; however, they will be extremely important in the Climate Convention, where it could be more difficult to measure implementation and compliance.

Acronyms

BBPRU	Belarus, Bulgaria, Poland, Russia, and Ukraine
CFCs	chlorofluorocarbons
CIS	Commonwealth of Independent States
CITES	Convention on International Trade in Endangered Species
EC	European Community
ENGO	environmental nongovernmental organization
FCCC	Framework Convention on Climate Change
GATT	General Agreement on Tariffs and Trade
GEF	Global Environment Facility
HBFCs	partially hydrogenated bromofluorocarbons
HCFCs	partially hydrogenated chlorofluorocarbons
IE/PAC	Industry and Environment Programme Activity Centre (UNEP)
ILO	International Labour Organization
MLF	Multilateral Fund of the Montreal Protocol
NGO	nongovernmental organization
ODP	ozone-depleting potential
ODS	ozone-depleting substance(s)
OECD	Organisation for Economic Cooperation and Development
OEWG	Open-Ended Working Group
SBI	Subsidiary Body for Implementation
TEAP	Technology and Economic Assessment Panel
UN	United Nations
UNDP	United Nations Development Programme
UNEP	United Nations Environment Programme
UNIDO	United Nations Industrial Development Organization
VOCs	volatile organic compounds
WTO	World Trade Organization

1
Introduction

Multilateral environmental agreements typically do not include effective machinery for handling problems of noncompliance. Many agreements include requirements to submit reports. In practice, few reporting systems function well and little is done with the data that are gathered.[1] A few agreements include modest mechanisms for reviewing implementation, but typically no system is in place to address specific compliance problems that might be detected. There has been some unilateral monitoring and enforcement of multilateral agreements.[2] However, many observers have pointed out that unilateral enforcement is a tool available only to powerful states and is inconsistent with the multilateral spirit that guides many international agreements. All recent multilateral environmental agreements include dispute resolution procedures that in principle could serve as a forum for addressing problems of noncompliance. In practice, these often elaborate procedures are never used.[3]

Noncompliance procedures are a recent innovation that may improve the capacity to address problems of compliance with multilateral environmental agreements. They provide a dedicated forum for discussing compliance problems. Because they are consultative in spirit, they may be invoked more often than intrinsically confrontational dispute resolution systems. Because they are multilateral, noncompliance procedures can handle compliance with collective obligations that are ill-suited for bilateral, dispute-oriented systems. These procedures could offer an outlet for handling many issues of noncompliance that would otherwise be left

---

An excerpt of this paper, with additional analysis applied to possible designs of noncompliance procedures in other legal regimes (notably the Framework Convention on Climate Change), is published as part of the proceedings of a workshop held in conjunction with the Seventh Meeting of the Parties to the Montreal Protocol on Substances That Deplete the Ozone Layer, 4 December 1995, at Vienna, Austria. See Victor, D.G., 1996, The Montreal Protocol's Non-Compliance Procedure: Lessons for making other international environmental regimes more effective, in W. Lang, ed., *The Ozone Treaties and Their Influence on the Building of Environmental Regimes*, Austrian Foreign Policy Documentation, Austrian Ministry of Foreign Affairs, Vienna, Austria.

unresolved. Such hopes are supported by the experience of multilateral supervision in the International Labour Organization (ILO), some of the many systems of human rights supervision, and performance reviews conducted by the Organisation for Economic Cooperation and Development (OECD).[4] These experiences are relevant to the design of consultative procedures, but none applies directly to the situation in multilateral environmental agreements.

The only major international environmental agreement with an operating noncompliance procedure is the Montreal Protocol on Substances That Deplete the Ozone Layer.[5] Given this unique position, its experience is highly relevant for parties to other multilateral environmental agreements as they design similar procedures. The Framework Convention on Climate Change, the Convention to Combat Desertification, and the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal are all in the early stages of considering and designing noncompliance procedures. The 1991 Protocol concerning the Control of Emissions of Volatile Organic Compounds (VOCs) requires that a noncompliance procedure be developed. The 1994 Second Sulphur Protocol has elaborated a system, based on the Montreal Protocol's Non-Compliance Procedure, that is not yet in operation.

Although the Montreal Protocol is a central model for other noncompliance procedures, the literature that actually assesses its operation is limited. One study documents the origins and design of the Procedure.[6] Others discuss aspects of the early experience under the Procedure as well as some of the legal issues.[7] But as yet there is no written, independent assessment of the actual operation of the Montreal Protocol's Non-Compliance Procedure. This essay fills that gap. It reviews and assesses the origins, operation, and effectiveness of the Procedure, giving special attention to the Implementation Committee, the 10-member standing committee that manages the Procedure.

The analysis is articulated in five parts. First, the origins of the Procedure and its modalities of operation are briefly reviewed. Second, the operation and effectiveness of the "regular procedure" are analyzed. Under the regular procedure, the Committee handles compliance issues as needed, without a formal submission of noncompliance. Third, the first cases under the "ad hoc procedure" are presented and analyzed. They concern formal submissions of noncompliance by five countries with economies in transition: Belarus, Bulgaria, Poland, Russia, and Ukraine (hereafter the BBPRU submissions). These cases have not yet been fully resolved; they are discussed here because the Committee's approach to resolving them gives a sense of the future role of the Non-Compliance Procedure as part of the larger system of institutions that serve the aims of the Montreal Protocol. The regular and ad hoc procedures are both handled by the Implementation Committee

and have much in common. They are analyzed separately here because they are two different ways to put issues on the Committee's agenda and, in practice, they have concerned compliance issues of markedly different severity.

Fourth, the Committee's reports are analyzed quantitatively. This analysis shows how the Committee's work load has shifted from issues related to reporting of data to problems of compliance with the Protocol's commitments to control ozone-depleting substances (ODS). The analysis also shows that the Committee increasingly deals with case-specific problems of noncompliance. This trend is important because the analysis of the regular and ad hoc procedures suggests that by handling specific cases the Committee is most effective and serves its most unique role within the Montreal Protocol's system of institutions. A concluding section reiterates the main findings and implications for the design of other noncompliance procedures.

2

Origins and Modalities of the Montreal Protocol's Non-Compliance Procedure

The Montreal Protocol's negotiators knew that the treaty would probably face problems of noncompliance and might need a procedure for handling them. In the final stages of the negotiations, the USA proposed an elaborate noncompliance procedure based on its review of how compliance issues had been handled in many other treaties.[8] The proposal was viewed by some European participants as a US negotiating strategy to clutter the agenda at the last minute. With neither time nor consensus to work out the details of the procedure, the Protocol was adopted in Montreal with only a short and loosely worded Article 8 that deferred addressing the details of a noncompliance procedure until later.[9] The first Meeting of the Parties of the Montreal Protocol, in 1989, established an ad hoc Working Group of Legal Experts to develop proposals for a noncompliance procedure.[10] Following a brainstorming session by members of the ad hoc group, the group's chairman, Patrick Széll, produced a list of elements for the procedure that has so far remained more or less intact. The ad hoc group had no particular model in mind; rather, the procedure was developed based on the logic of the functions it needed to perform.[11] The group recommended an interim Non-Compliance Procedure, which was adopted by the Second Meeting of the Parties.[12] This Procedure established the Implementation Committee as a standing committee with five members, as well as some rules to allow a Party or group of Parties to make a formal submission should they have concerns about another Party's compliance with the Protocol's commitments. That Procedure was agreed only on an interim basis because some Parties, led by Norway, thought a tougher system for noncompliance would be needed.[13] Therefore, the ad hoc group was reconvened and given a mandate to deliver a stronger Procedure; in parallel, the Committee began to operate under the interim Procedure.

The interim period might have provided some useful experience to guide the design of the final Non-Compliance Procedure. However, the Committee

did little during its early meetings (notably in 1990 and 1991), and thus no real lessons were learned or applied. The Committee did suggest some changes that the reconvened ad hoc group considered, some of which were included in the final Procedure. The two bodies' memberships overlapped, so there was some exchange of views. On the basis of a recommendation by the reconvened ad hoc group, at the Fourth Meeting of the Parties the expanded final Procedure was adopted (see Appendix 1).[14]

Throughout the negotiation of the interim and final systems, most countries were not heavily involved with the design of the Non-Compliance Procedure, which probably benefited from their benign neglect. Australia and a few of the European participants (Austria, European Commission, Netherlands, Norway, and UK) led the way; the Soviet Union and Argentina participated throughout the process.[15] The USA participated actively, but starting in 1990 it became less supportive of a strong Non-Compliance Procedure as it was also fighting battles on the Multilateral Fund (MLF) and did not want a Procedure that could find the USA in noncompliance with the delicate agreement on MLF contributions (see discussion below).[16] A few active developing countries, primarily from Latin America, were suspicious of a stringent process. The participation of those countries that were concerned about their ability to comply with the Protocol weakened the Procedure that was ultimately adopted.

The deliberations and thoughts behind specific elements of the Non-Compliance Procedure and its overall legal context are discussed in more detail elsewhere.[17] The general aim of the Procedure was to create a system that was multilateral and aimed at building confidence through nonconfrontational discussion rather than adjudication.[18] The Procedure was developed to be completely independent of the dispute resolution system in the Vienna Convention.[19] The introduction to the Non-Compliance Procedure underscores that "[i]t shall apply without prejudice to the operation of the settlement of disputes procedure laid down in Article 11 of the Vienna Convention."

The terms of reference for the final Non-Compliance Procedure are given in Appendix I. They consist of two major elements. The first element is a system for handling submissions about noncompliance as described in paragraphs 1 to 4. Parties may enter a submission if they have concerns about another Party's implementation. A Party may also enter a submission about itself when it finds that it cannot comply with the Protocol. The Secretariat has an ambiguous obligation to inform the Implementation Committee if it becomes aware of possible noncompliance.[20] The Procedure includes basic instructions and timetables for communicating information about such submissions among the Parties, the

Secretariat, and the Implementation Committee.[21] Collectively, these procedures will be referred to here as the "ad hoc system."

The Non-Compliance Procedure also creates a standing Implementation Committee. In what is referred to here as the "regular system," the Committee meets on a regular basis to consider compliance issues, even when it has no formal submissions on its agenda. It reports its deliberations and recommendations to the Meeting of the Parties, the Montreal Protocol's supreme decision-making body. The Committee is also charged with considering submissions under the ad hoc system. During its first five years, most of the Committee's work load concerned the regular system. The ad hoc system was invoked for the first time in mid-1995 (the BBPRU submissions). In all of its work, the Committee's mandate is to seek amicable solutions "on the basis of respect for the provisions of the Protocol."

The Committee consists of 10 members who serve as representatives of their countries (i.e., not in their personal capacities) and are selected for "equitable geographic distribution." This system contrasts with that of the ILO, where members of supervisory committees, except for the (more political) Conference Committee, serve in their individual expert capacities.[22] Because the Montreal Protocol's Procedure includes only one Committee, it must handle all expert and political functions; its members could potentially handle political topics, and therefore all act on behalf of governments.

In practice, Committee membership is roughly balanced between industrialized and developing countries. Members may serve for up to two consecutive two-year terms. The work of the Committee is growing more complicated, and its president has encouraged two-term (four-year) participation in an effort to promote continuity.[23] In practice, the two-year terms are staggered so that at most half the members are replaced in any given year. Following the practice in other meetings of the official bodies of the Montreal Protocol, Committee members and invited participants who represent developing countries are offered assistance from a trust fund for travel and local costs associated with the meetings. Bilateral aid supports participation by representatives from countries with economies in transition; none is considered a "developing country," but many face similar financial problems.

The Procedure's rules explicitly allow participation in the Committee's deliberations by only three groups: members of the Committee, the Secretariat, and any Party involved in a submission. In addition, the Committee invites other participants as needed. No Party involved in a matter being considered by the Committee may participate in the elaboration and adoption of related recommendations.

Because financial assistance is often crucial to a Party's ability to comply, the Committee must maintain an "exchange of information" with the Montreal

Protocol's MLF. Since 1992 representatives from the Secretariat of the MLF and its four implementing agencies have been invited to attend meetings of the Implementation Committee. Ever since, most of those organizations have been represented at most Implementation Committee meetings. The president of the Implementation Committee, an Austrian, has also attended the meetings of the Executive Committee of the MLF (of which Austria is also a member, and so would have been represented anyway). A representative of the Global Environment Facility (GEF) has attended every meeting of the Implementation Committee since the ad hoc system was first invoked. None of the BBPRU countries is eligible for MLF funding, and thus they will rely on the GEF to provide the financial assistance they need to comply with the Protocol.

There are no provisions for attendance at the Committee's deliberations by other international organizations, countries that are not Parties to the Protocol, or nongovernmental organizations (NGOs). Three non-Parties – Armenia, Georgia and Kyrgystan – were once invited to discuss their situations with the Committee because they are likely to be affected by the handling of Russia's noncompliance, with whom they have close trading relationships. But participation remains controlled and limited. An environmental group informally made the first request by an NGO to attend an Implementation Committee meeting; it was denied (June 1995) on the basis that confidential, delicate, and sensitive information might be discussed and the presence of an NGO could limit frank discussion.[24] Although they currently do not participate in meetings, in principle NGOs can raise issues for possible discussion by working through the Secretariat or sympathetic members of the Committee; so far this has never happened.

Meetings have been held twice a year but are likely to be held more frequently as the work load increases. They are typically scheduled back-to-back with other related meetings to allow efficient participation. The working language is English; requests for translation during the meeting have been refused, but starting in 1996 translation will probably be provided on a limited basis when necessary.[25]

Reports are written after every meeting and, with the exception of the first report (which says little), they have had unrestricted distribution and are translated into all United Nations (UN) languages. The Committee can consider confidential data, but its public reports obviously must not include confidential information.[26] The problem of how to handle confidential data has long been an issue in the ozone regime because some data on ODS have commercial value to market competitors.[27]

3

Operation and Effectiveness of the Regular System

During its first five years, until 1995, all of the work of the Implementation Committee was done under the regular system. The Committee acts as a standing body to hear issues that Parties to the Protocol, the Secretariat, other institutions of the Montreal Protocol, and Committee members think are important to address. This section answers three central questions about the operation of the Committee: How do issues arrive on the Committee's agenda? How does the Committee handle the issues on its agenda? Why does the Committee not have tougher responses available to it? This study will show that the regular system has made valuable contributions to the Montreal Protocol system. Other international regimes, such as the Framework Convention on Climate Change (FCCC), might emulate the practice of establishing a committee that operates even when formal cases of noncompliance have not been lodged. The distinction is made here between the regular and ad hoc systems, both of which are means of putting issues on the agenda. The ad hoc procedure is discussed separately, in the next section, in an effort to carefully distinguish the operation of these two different modes.

The Committee's Agenda

The issues that can be handled in the regular system reflect the primary responsibilities and benefits of membership in the Montreal Protocol: reporting of data, operation of the MLF, and control of ODS. Each is considered in turn below. In practice, the Committee's agenda is flexible; therefore, the analysis also considers how specific agenda items are selected from the universe of possibilities and how certain politically sensitive issues are avoided.

Data Reporting

All Parties to the Montreal Protocol are required to submit *baseline* and *annual* data on production, imports, and exports of each controlled substance.[28] Until 1995 most of the Committee's work load concerned inadequate reporting of baseline data and problems related to assessing and revising reported data. Most of these issues have been put on the Committee's agenda due to the Secretariat's efforts to compile all reported data and identify Parties that have failed to supply the required data.[29] This Secretariat-led mode of agenda setting has been quite efficient because the Secretariat can easily and regularly inform the Committee on this topic. Nearly every Committee meeting begins with a lengthy review by the Secretariat of the state of data reporting. Problem cases are highlighted; some are considered in detail. Since the third meeting of the Committee, the Secretariat's report has included a list of specific countries whose data are most incomplete.

The Secretariat's report has identified data reporting problems in all types of countries. Among the countries with economies in transition, two years before the BBPRU submissions were lodged the Committee questioned Belarus, Russia, and Ukraine about their failure to report data. Western industrialized countries have also encountered some problems. The European Community (EC), which is a Party along with each EC member country, had difficulty compiling data on consumption of ODS because of trade among EC members and the desire to protect confidential business information.[30] Italy encountered severe bureaucratic problems in preparing its data reports.[31] These cases illustrate that low "capacity" to comply is not only a problem in developing countries.

Problems of missing data have been more extensive in developing countries than in developed countries. For example, by 1994 baseline data were overdue from 51 developing countries. Only 9 countries not operating under Article 5 had overdue baseline data. Of those 9, only 1 was an OECD member (Luxembourg).[32]

Data from developing countries are especially important for implementing the Protocol. The Protocol provides two major benefits to developing countries: financial assistance from the MLF and lenient provisions for controlling consumption of ODS, such as a 10-year delay in the requirement to phase out major chlorofluorocarbons (CFCs) and Halons.[33] Article 5 of the Protocol determines eligibility for these benefits: a Party must be *both* a "developing country" *and* have consumption of ODS below certain per capita thresholds.[34] There is no single definition of a "developing country," but in 1989 the Meeting of the Parties adopted a list that has since been adjusted slightly.[35]

The other half of the Article 5 definition is its most innovative part, but it is impossible to implement without data on population and consumption of ODS. Regarding population data, at the request of the Secretariat, the Committee has reviewed (and approved) the practice of using mid-year population estimates drawn from the UN for the purpose of computing per capita consumption.[36] (UN data are drawn from reports submitted by UN member countries.) In practice, some countries also submit their own population data directly to the Montreal Protocol. The Secretariat does its best to smooth out any differences between the two sets of data. So far only Lebanon has submitted population data that are significantly different from the UN data. Some countries report data to the Executive Committee of the MLF that are different from data they have reported to the Montreal Protocol's Secretariat. Recently, the Implementation Committee and Parties urged the Secretariat to compare these different data sets in an effort to adopt the most accurate data; nonetheless, in the case of conflicts such as the Lebanese population data, the Committee has advised that the data supplied by the Party must be used.[37]

The Secretariat or any Party can formally raise concerns about the veracity of reported data. However, none has done so. Nor has the Committee sought to check the veracity of any data, although it has the mandate to do so if it wishes. In practice, the Secretariat checks incoming data to see if they are reasonable and communicates directly with the Party if they are not. However, whenever the Secretariat has prepared its annual report on data and led the agenda of the Implementation Committee on data, it has focused exclusively on *missing* data rather than suspected inaccuracies in the data.

The problem of missing data from developing countries can be addressed only with funded projects to gather baseline data and build capacity to report data on an annual basis. Such projects have taken time to develop. Yet, the data for purposes of determining compliance and classification under Article 5 were required very early on because Article 5 status determined which countries were eligible to receive MLF funding and which had to contribute to the MLF. Thus, many Parties have employed estimates of their data, a practice that is explicitly allowed under the Protocol.[38] Presumably estimates could be manipulated, but this issue has not been addressed directly by the Committee.[39] Initially, the Secretariat made estimates to determine whether particular countries were above or below the Article 5 thresholds. Those estimates have not been reviewed or challenged by the Committee, but an ad hoc Group of Experts on the Reporting of Data reviewed the status of some countries on the borderline of qualifying under paragraph 1 of Article 5.[40]

Related to the accuracy of data is the correction of reported data and the reclassification of countries under Article 5. A Working Group preparing for the Meeting of the Parties asked the Committee to address these issues, particularly how to handle funding of MLF projects in countries that are reclassified under Article 5. In response, the Committee has provided some guidance to the Executive Committee of the MLF.[41] One outcome of its deliberations was a Decision by the Meeting of the Parties to continue funding projects already under way but not to allow additional projects once the country has been reclassified.[42]

The Protocol includes restrictions on trade of controlled substances that must be used against states that have not become Parties.[43] This threat helps explain why so many countries have joined the Montreal Protocol. States that are not Parties to the Protocol can avoid trade restrictions if they submit data that demonstrate that they are complying with the control measures concerning the particular controlled substance.[44] The Meeting of the Parties is responsible for making a final determination of which Parties are exempt from the trade restrictions, but it has asked the Implementation Committee to review the data submitted by states seeking such an exemption. In this capacity, the Committee has considered data from 22 states; it has accepted 13 as sufficient to qualify for an exemption.[45] In doing so, the Committee has demonstrated one of its roles in facilitating the implementation of the Protocol, in addition to handling problems of inadequate implementation (noncompliance) as they arise.

Multilateral Fund Issues

For most of the Implementation Committee's history, representatives of the MLF and its implementing agencies have attended the Committee's meetings.[46] As with the Secretariat, the representatives give periodic reports to the Committee on their activities. Over time, the Committee's work has been increasingly linked to that of the MLF, especially in matters of data reporting. The MLF funds projects to collect and report baseline and annual data. Thus, MLF representatives can offer precise information about projects to improve the reporting of data by developing countries, which has been valuable to the Committee in its handling of specific noncompliance problems as well as its general deliberations.

Although representatives of the MLF and its implementing agencies are responsive to requests for information on their projects, they have never brought particular instances of noncompliance before the Committee, nor have they actively sought the Committee's advice. This may reflect that the MLF and its implementing agencies are primarily concerned with disbursing funds and often take the perspective of the recipient and the need for stable funding of projects

rather than that of the enforcer of compliance. Insofar as they review Party performance and perhaps connect MLF benefits to it, they do so through their own review procedures and not through the Protocol's dedicated Non-Compliance Procedure and Implementation Committee.

Beyond some communication, few active links exist between the work of the MLF and that of the Implementation Committee; however, the Committee has played a role in introducing the principle of conditionality to MLF funding. Prompted by the concerns of many MLF donor countries, the Open-Ended Working Group (OEWG) prepared for the 1994 Meeting of the Parties by exploring ways to make continued MLF funding to Parties conditional on compliance with the Protocol's requirement to report data. The OEWG asked the Committee to review the decisions.[47] Following the guidance of the OEWG and the Committee, the Meeting of the Parties adopted a Decision to cut funding to countries that do not report baseline data within one year of approval of their MLF country program and the implementation of projects to strengthen institutional capacity.[48] Since country programs typically include funding to collect and estimate baseline data, a task often performed by outside consultants, in principle this conditionality should not be too onerous. Forged with the assistance of the Implementation Committee, this is the first explicit linkage between compliance by the Parties and the benefits provided under the Protocol, in this case, funding.

This conditionality has not significantly affected the agenda or work of the Committee. Although it is difficult to judge, conditionality has probably increased the effectiveness of efforts within the Montreal Protocol system to improve data reporting. The Secretariat's pressure on a Party to report baseline data is probably more influential because of the credible threat that failure to supply this data will result in the Party's losing Article 5 status. On one occasion, the case of Mauritania, the persistent failure to supply baseline data led the Implementation Committee to recommend withdrawal of the country's Article 5 status.[49] Within days of that recommendation, with a draft Decision to be adopted imminently by the Meeting of the Parties, Mauritania submitted the needed data.[50] Although it is evidently influential, at least in the Mauritania case, this conditionality is highly limited. It applies only to baseline data: no such conditionality exists for the annual data that Parties are also required to report, which are chronically late and incomplete.

Control of Ozone-Depleting Substances

The Non-Compliance Procedure and Implementation Committee may ultimately be judged primarily on their ability to improve compliance with the Protocol's

main substantive obligations: to limit and phase out consumption of ODS. For countries not operating under Article 5, these requirements consist primarily of

- The elimination of the three controlled Halons by 1994;
- The elimination of 15 CFCs, carbon tetrachloride, and methyl chloroform by 1996;
- The elimination of transitional partially hydrogenated chlorofluorocarbons (HCFCs) by 2030;
- The elimination of partially hydrogenated bromofluorocarbons (HBFCs) by 1996; and
- A freeze on methyl bromide by 1996.[51]

There are timetables for these phaseouts in most cases, some additional limits within each category, and some exceptions, notably for "essential uses." The Seventh Meeting of the Parties (Vienna, December 1995) strengthened some of these measures, notably for methyl bromide.[52]

These controls are only now taking full effect, thus the potential cases of noncompliance are only now becoming evident. Because of delays in submitting annual data, even once a deadline has passed it may take several years for a full assessment of compliance.

The countries to which these obligations apply fall broadly into three categories: developed countries without economies in transition (mainly the members of the OECD, except for the Czech Republic, Mexico, and Turkey); countries with economies in transition; and developing countries that exceed the Article 5 thresholds. Each category is considered here. Developing countries that are still operating under Article 5 do not yet face stringent requirements concerning the control of ODS, thus their compliance with such controls is not discussed.

First, all OECD developed countries appear to be on track to comply with the Protocol, and thus it is unlikely that they will be a source of noncompliance issues to be handled by the Implementation Committee. Most OECD countries implemented domestic laws or regulations that phased out the principal CFCs and/or Halons more rapidly than was required by the Protocol's targets.[53] Nonetheless, it is unclear how compliance will fare as the control levels decrease to zero and the list of allowable essential uses is pared down. Indeed, the Secretariat and the Committee have become aware of some potential cases of noncompliance; however, these cases have not been on the Implementation Committee's agenda because they are already being handled elsewhere. For example, the US Customs Service has discovered some problems with falsified import documents that claimed that virgin chemicals had actually been recycled.[54] The USA is addressing this issue on its own. Many similar cases in OECD countries underscore

that the commitments under the Montreal Protocol have made some ODS as valuable as illegal drugs, leading to similar problems of smuggling and enforcement of border controls. For now, the Committee has rightly decided that it cannot do much to help, but in principle these could become issues of noncompliance that the Committee or other Parties might want to discuss. The number of these potential agenda issues may increase now that the phaseouts are in full effect, because such problems will become more detectable and the economic value will be higher when allowable consumption is zero. Already the Committee's efforts to address Russian noncompliance with the Protocol might reduce some illegal trade in ODS, as there is evidence of a large Russian supply (see the discussion below on the first cases in the ad hoc system).

Second, several countries with economies in transition are encountering significant problems of noncompliance. These countries are not considered to be "developing countries," and thus are not eligible for Article 5 status. As is discussed later in this essay, five such countries (including Russia) have invoked the ad hoc system. However, most of them and a few others, had already had some of their compliance problems on the Committee's agenda before the ad hoc system was invoked. Belarus, Russia, and Ukraine had explained their failure to report data (see discussion above). Poland forecast its inability to meet domestic demand for CFCs because the supply from the EC was being phased out; it sought from the Committee (but was denied) special treatment that would have involved imports during 1994 and 1995 in excess of the Protocol's limits in order to meet Polish domestic needs after the EC's 1995 phaseout.[55] Romania sought to transfer some of its production quota to Greek firms, which might have affected Greece's compliance.[56] Russia, followed by Ukraine, predicted its noncompliance with the 1994 Halon ban and announced through the Implementation Committee that it would need additional financial transfers, access to Halon banks, and/or lenient treatment from the Meeting of the Parties in order to remain in compliance.[57] In a letter from its prime minister to the Ozone Secretariat, Lithuania sought a five-year delay in implementing some controls on ODS.[58] Nearly all the issues on the Committee's agenda concerning ODS controls have pertained to countries with economies in transition. In each case, the issue was put on the Committee's agenda because the Party volunteered to discuss its concerns.

Third, some developing countries might face noncompliance with ODS controls because their consumption of ODS exceeds what is allowed under Article 5. Countries on the borderline of Article 5 status could face sudden problems of formal noncompliance, as well as loss of MLF funding. The Implementation Committee is clearly the logical place to handle such issues, but so far none of this type have been on its agenda. One reason is the correction of data. In 1995

five developing countries were classified with per capita consumption above the Article 5 threshold.[59] Two of them (Kuwait and Lebanon) corrected their data, bringing themselves back below the threshold, and thus avoided the problem of sudden noncompliance. Kuwait claimed that there had been a typographical error in its Halon data. Lebanon challenged the population statistics used to calculate per capita consumption (see discussion above). Two of the remaining countries (Cyprus and Slovenia) intend to comply with the Protocol without Article 5 status (both also want to join the European Union, none of whose members are "developing countries"). The last of these five countries (United Arab Emirates) has not submitted even its baseline data; its compliance remains unclear.

Selecting the Agenda

Because the Committee operates as a standing body rather than one convened only to hear particular cases, its agenda is flexible. The Secretariat and Committee are active in deciding which topics they want to pursue, because until recently most issues have not arrived on the Committee's agenda on their own. They have focused on issues and cases where they think they can make a contribution and where their advice is sought.

Flexibility in setting the agenda has allowed the Committee to avoid certain issues, notably the politically sensitive matter of contributions to the MLF. The legal status of these contributions is purposely vague. Most donor countries interpret the obligation to contribute to the MLF as binding; the USA treats it as voluntary. The text of the MLF agreement says neither. None of the donor Parties wants to raise the issue formally as it might unravel the delicate MLF agreement, which survives through a combination of differing interpretations and the fact that the MLF appears to be working well. Indeed, all major contributors have paid their shares. The only OECD members that have persistently failed to pay their contributions are Italy and Portugal. Clarifying the status of MLF contributions might even be counterproductive. Of the US$119 million outstanding (22% of total "agreed" contributions), half is due from Belarus, Russia, and Ukraine. These countries are now also addressing their failure to comply with the Protocol's ODS controls and will themselves require financial assistance to achieve full compliance. The GEF has agreed to provide the money, and the issue of their delinquent MLF contributions has been informally set aside and is not part of the resolution of their ad hoc submissions (see discussion below). Facing scrutiny on their MLF contributions while also in front of the Implementation Committee because of failure to implement the Protocol's control measures might have deterred these countries from volunteering to discuss their noncompliance.[60]

The Parties themselves can also shape the deliberations of the Committee by not cooperating. Delegates from three countries (Maldives, Trinidad and Tobago, and Togo) simply did not appear when requested in 1993 to discuss their failure to report data.[61] However, such behavior has been rare. Indeed, all the more severe issues of noncompliance that have been discussed by the Committee have been instigated by the affected Parties themselves. They participate because it is in their interest to do so: they want the Committee's advice and imprimatur. In short, a substantial and growing part of the Committee's work load directly reflects issues that the affected Parties themselves want to address.

The flexibility of the Committee's agenda is not absolute. In principle, any ad hoc submission to the Committee must be heard, because the Procedure gives no mandate to decide formally against hearing an issue, unless the submission is not accompanied by the required corroborating information.[62] In practice, conflicts over whether to hear formal submissions are likely to be rare, because most problems will probably be addressed before any formal submission is lodged. However, the experience to date does not offer any guide.

Summary on Agenda Setting

The issues that have arrived on the Implementation Committee's agenda have reflected some of the main obligations of the Montreal Protocol. All Parties are required to report data; the failure of many to supply the required data has continuously been on the agenda. Requirements to phase out ODS went into full effect in 1994 (Halons) and 1996 (CFCs), and increasingly the Committee's agenda has been dominated by the failure of a few Parties to fully implement such controls.

Virtually all issues related to data reporting have arrived on the Committee's agenda at the initiative of the Committee or the Secretariat. The Secretariat can easily identify countries that have failed to report required data. The Committee has given clear support to the Secretariat's efforts to cajole recalcitrant Parties into reporting data. The Committee has invited all of the most delinquent Parties to appear before it and explain their behavior. Some specialized issues related to data reporting, such as reclassification of Article 5 countries and the use of estimated data, have been put on the Implementation Committee's agenda by other Montreal Protocol institutions, including the Meeting of the Parties.

In contrast, all the issues related to compliance with the Protocol's obligations to phase out ODS have been put on the Implementation Committee's agenda by the affected Parties themselves. This style of volunteering to discuss noncompliance may set the pattern for the Committee's work and distinguishes the

Non-Compliance Procedure from accusatory dispute resolution systems. Currently, most of its work concerns compliance issues that were brought to the Committee by the affected Parties, sometimes after those Parties failed to obtain a hearing elsewhere. Three years ago the opposite was true: at that time most of the Committee's work reflected issues put on its agenda by the Secretariat and Committee members.

Representatives of the MLF and its implementing agencies regularly participate in the deliberations of the Committee and provide critical information on MLF projects. However, the link between the MLF and the Non-Compliance Procedure remains surprisingly weak. Conditionality has been established between MLF funding and compliance with data reporting requirements, but in practice this concerns only baseline data and not the persistent problem of incomplete annual data. The link portends a possible closer relationship between funding and compliance, but so far the MLF has not referred compliance problems to the Implementation Committee. The obligation to pay funds into the MLF is the only significant commitment under the Montreal Protocol that has never been on the agenda of the Implementation Committee.

Actions Available to the Committee and Their Effectiveness

Once an issue is on the agenda, the tools available to the Committee are limited. It can *discuss* issues, *make recommendations* to the Meeting of the Parties, and *make transparent* which Parties are in compliance.[63] The ability to discuss issues and make recommendations allows the Committee to serve as a forum. As such, the Committee can improve awareness of compliance issues and serve as a "first stop" for handling matters that ultimately go to the Meeting of the Parties for formal decision. The ability to make transparent which Parties are in compliance can be influential because delegates and other national officials might fear the embarrassment of representing noncompliant countries. Some officials and NGOs might not even be aware of their nation's noncompliance until a report or official query from the Committee makes the problem transparent. These three interrelated tools – discussion, recommendation, and transparency – are often described as elements of a "soft" approach to managing compliance. Those tools may nonetheless be influential, especially as "hard" techniques such as sanctions are often not available or effective.[64]

This section analyzes how the Committee has applied these tools; the next section explores why the Committee does not have stronger tools at its disposal. The analysis asks whether the Committee has had an *effect* on the individuals,

firms, and countries whose behavior is the target of the Montreal Protocol. It traces whether the Committee has had a direct effect on behavior. Moreover, it examines whether the Committee has had indirect influence on behavior by making it possible for the other institutions and commitments of the Montreal Protocol to be more effective than they would be otherwise. Evaluating the direct and indirect influences of international institutions on behavior is difficult because evidence is often incomplete and assessing whether an institution has been influential requires considering what might have happened otherwise.

Discussion and Recommendations

There is only limited evidence that discussion about *general* issues of compliance has led to greater awareness of what constitutes compliance and ways to improve it. For example, the Committee and Secretariat have stressed that Parties that are unable to provide real baseline data can comply with the requirement by supplying estimates. Many Parties have now done so, and a few may not have known about that possibility before. However, in the case of the Russian Federation, where the need for some data was extremely urgent because the country is a large producer and consumer of controlled substances, repeated requests even for *estimates* were not rewarded with data. Russia fully complied with the baseline data requirement only later, when its noncompliance was being handled under the ad hoc system and the Committee required data before it would approve the Russian compliance plan (see discussion below). Focused discussion could also promote effectiveness by making Parties aware of solutions that have been employed in other countries. However, there is no evidence from the operation of the Committee that merely exchanging views has resulted in that benefit.

The Committee has been quite active and influential as a "first stop" forum for discussion of *specific* cases. As recently as 1993 the role of the Committee within the Montreal Protocol was unclear. Today, it is increasingly accepted as the first forum in which to air compliance issues before other avenues are pursued. For example, Romania asked that its request to transfer production quotas to Greek firms be addressed by the Meeting of the Parties in 1994, but the issue was sent to the Implementation Committee first. The BBPRU cases began as a Russian appeal submitted on behalf of all five countries to the Meeting of the Parties, but the request was rerouted through the Implementation Committee. In this role, the Committee has substantially improved the overall efficiency of the Montreal Protocol's system of institutions. As reviewed in the previous section, the Committee has debated and prepared some draft decisions for the Meeting of the Parties. It has largely resolved many issues related to the reclassification

of Article 5 countries and the correction of data. It has probably helped to dispose of some potentially cumbersome issues before they grew too large; for example, the question of whether developing countries can transfer production quotas to industrialized countries. Without the Committee, these issues would be on the agenda of other institutions or, worse, would not be addressed at all. The Committee is becoming the most efficient body for handling them because its members (and the Secretariat) are increasingly experienced and expert on all matters related to compliance with the Protocol. These are important contributions, but the same can be said of any well-designed subsidiary body with limited membership: it debates issues on its agenda and reaches sensible recommendations.

The most important current example where the Committee serves as a "first stop" forum are the BBPRU submissions. The cases, described in more detail below, help to illustrate why the Implementation Committee is different from other subsidiary or ad hoc bodies. Before those cases were formally lodged, four of the countries (Belarus, Poland, Russia, and Ukraine) had already raised their imminent noncompliance with the Committee.[65] Those discussions did result in some airing of views, during which the Committee repeatedly underscored that its role was as a deliberative forum with neither the desire nor the authority to tailor the commitments of the Protocol to the circumstances of particular parties. This style has remained central to the Committee's deliberations, both in the regular system and in its handling of the ad hoc cases. But it may also explain why Belarus, Russia, and Ukraine, all of which wanted the Protocol's commitments to be tailored to their needs, had merely informed the Committee about their looming noncompliance rather than seeking the Committee's advice on how to proceed.[66] These countries became more engaged in discussing their situations only once the ad hoc system had been invoked and the Committee was the only forum in which they could present their cases. The experience suggests, but does not prove, that the Committee's role in the regular procedure may be enhanced now that it has demonstrated its central role in the ad hoc system.

After discussion of an issue, the Committee's actions are limited to making recommendations.[67] The Meeting of the Parties makes the final decisions. This division of power is understandable since giving the Implementation Committee greater powers of decision would require significant revisions of the Committee's mandate and of the Protocol itself. The practice of the Committee that has evolved is essentially conservative. The Committee does not appear to be trying to expand its decision-making role, although it is trying to secure its special place in the Montreal Protocol's system of institutions as the body responsible for issues related to noncompliance. In practice, decisions adopted by the Meeting of the

Parties have never substantially deviated from the Implementation Committee's recommendations, a fact that has strengthened its place. Today the Committee has the imprimatur as the legitimate body within the Montreal Protocol's system for handling compliance issues. Two years ago it had not yet developed that reputation.

Transparency

A second way the Committee might influence behavior is by making cases of noncompliance transparent. Of the Montreal Protocol's institutions, the Secretariat plays the most important role in making compliance transparent, notably through its compilation of baseline and annual statistics on the consumption of ODS. These statistics reveal (with self-reported data) which countries are complying with the obligations to limit ODS and to supply data. The Secretariat's gathering of data and making compliance transparent is probably more effective because the Committee and the Meeting of the Parties regularly support its activities. When the Secretariat writes to Parties to inform them that they are not complying with the Protocol's requirement to submit data, it is able to refer to a specific mandate from the Implementation Committee that probably gives the missive more weight.[68] However, it is difficult to marshal evidence to support this claim of the Committee's indirect influence on compliance.

Considerable evidence is available to show the importance of transparency in several egregious cases of failure to report data where the Committee has become directly involved. Nine Parties were invited by the Committee to appear at its seventh meeting, in 1993, to explain their persistent failure to report baseline data. Six of the countries did so.[69] The discussion and outcomes of those cases illustrate the problems encountered by the countries that had been most delinquent with their data. Some were implementing projects to gather the data or had experienced bureaucratic problems. Five Parties brought the data with them or submitted the information shortly before the meeting.[70] By inviting these Parties to explain their behavior, the Committee provided a deadline that probably helped speed the provision of data.

Some Parties still persistently failed to report data. The Implementation Committee repeated the exercise at its ninth meeting (October 1994) and invited seven countries to explain their situations. Two did not appear (Lebanon and Swaziland). Of the five that attended, three reported that they had recently submitted the needed data (Algeria, Iran, and Syria). The remaining countries (Antigua and Barbuda, and Central African Republic) discussed the problems they had encountered and offered timetables for the full reporting of their data.[71]

In none of these cases did transparency alone cause significant changes in the behavior of governments. As a minimum, transparency was backed by critical discussion, which increased pressure on countries to comply. But these tools have only limited influence – they have been effective only when the country and its delegates have been responsive and it has been relatively easy to comply. For developing countries, the MLF-funded country programs, which include grants to gather baseline data as well as capacity building to improve the ability of countries to provide data, have had a much greater influence than the Implementation Committee.[72] In those few cases where MLF funding has not rapidly improved the reporting of baseline data, the 1994 Decision of the Meeting of the Parties to cut off funding has helped to induce compliance. Its direct effect was evident in the case of Mauritania, and it may deter other Parties from not complying with the requirement to submit baseline data. Every developing country with a long-standing MLF country program has now reported its baseline data. Nonetheless, in 1995 baseline data for the core CFCs and Halons (Annex A) were more than two years overdue for 15 Parties, all of them developing countries.[73] An encouraging sign is that most of the delinquents eventually report their data. Only three countries on the 1995 list had been on the same list in 1994.[74] Only two of the Parties that the Committee queried about missing data in 1993 needed to be invited back for another face-to-face inquiry in 1994.

The above cases of non-reporting are extreme examples. The regime faces a much larger, chronic problem of incomplete and late annual data. In 1994 one-third of Parties had not reported the required annual data for 1992.[75] In 1995 about half had not reported data for 1993.[76] Developing countries account for most of the missing annual data, but several industrialized countries have also failed to report their annual data. If the past is a guide, MLF funding will be most important in the general improvement of data reporting by developing countries. The Secretariat and Implementation Committee might play a role in the most delinquent cases; so far the Implementation Committee has not been active on this issue.

The influence of the Implementation Committee's efforts to induce compliance might be multiplied by pressure from environmental nongovernmental organizations (ENGOs). However, ENGOs are excluded from the Committee's deliberations, and there is no evidence that they have been closely observing the Committee's actions and reports. Thus, when the Committee or the Secretariat makes cases of noncompliance transparent, the ENGOs typically are not waiting in the wings to seize on the information and use it to pressure governments to comply. The lack of ENGO action in tandem with the Committee reflects that the Committee has not engaged a single significant issue in a country where ENGOs

are active domestically on the stratospheric ozone problem (for example, Germany, UK, and USA). In countries with severe compliance problems on which the Committee has focused its attention and where additional domestic pressure from ENGOs could be very helpful, ENGOs are largely inactive and are not influential on the ozone-depletion issue (for example, Russia, Ukraine, and several developing countries). The exceptions are the EC and perhaps Italy, both of which have encountered problems reporting data. However, their noncompliance has reflected problems with the common market and the difficulty of overcoming domestic bureaucratic obstacles, which are now mostly resolved. Attention from ENGOs probably would not have been very helpful. Italy has also persistently failed to pay its contributions to the MLF.[77] However, the Implementation Committee has never raised any compliance problems related to MLF contributions. Further, compliance with data reporting is hardly the type of issue typically championed by ENGOs, especially those that are keen to make public images that attract dues-paying members. Some ENGOs within industrialized countries have been active on the dramatic issue of illegal trade in ODS, but that issue has not been addressed by the Implementation Committee.[78] In short, the Committee's influence has not been multiplied by ENGOs, which is a reflection of the countries and issues that have dominated the agenda thus far and not a suggestion that this mode of influence is ineffective or unavailable.

Summary on the Committee's Operation and Effectiveness

Like other subsidiary bodies with good leadership and limited membership, the Committee has made many contributions by handling issues in a small forum and then referring them to a larger, more political body for final debate and decisions. But ultimately the Committee will be judged by whether it helps change the behavior of Parties that might or have failed to comply with the Protocol.

When countries have found it relatively easy to reverse their noncompliance, the Committee has been effective in inducing them to do so simply by informing them of their noncompliance with their obligations. In some instances, the embarrassment of being identified and questioned as a noncompliant Party by the Committee has probably resulted in countries' reporting data more quickly and completely than they would have otherwise. Nonetheless, the tools available to the Committee are limited to discussion, making recommendations, and making noncompliance transparent. Hence, the Committee can only contribute to improving overall compliance with the Protocol in special ways. Its successes in the most difficult cases – such as inducing Mauritania and Russia to report data – reflect the combination of transparency and political or economic pressure. This history

points to the important role of transparency, discussion, and nonconfrontational approaches, but it also underscores that on its more difficult issues the Committee is effective because it can employ some element of critique, confrontation, and even threats. The "soft" mode of compliance management is made more effective by the existence of a "hard" edge. Nonetheless, on balance the entire regular system is substantially less confrontational than dispute management systems; it operates in the spirit of dispute avoidance.

In addition to its direct and indirect influences, the Committee might have some additional influence by deterring noncompliance. The Mauritania case shows that the threat of applying conditionality is serious, which presumably deters other Parties. But few other Parties will be in the same position because conditionality applies only to baseline data. The decisions concerning exemption of trade sanctions show that the Montreal Protocol system is serious about implementing such sanctions against countries that stay outside the regime. (Whether Parties to the Protocol actually implement the sanctions remains to be seen.) It is likely that the Committee is influential as a deterrent, but this estimation is extremely difficult to substantiate with evidence. Assessing the deterrent value of enforcement systems is a notoriously tricky task, because the actual case load indicates little about the Procedure's deterrent value. A procedure that is never used may be completely ineffective because nobody bothers to use it, or completely effective as a deterrent and thus is never used because it is never needed. Procedures that are used frequently may be ineffective and thus face many undeterred violations, or effective because they often catch minor problems before they become more severe. It is likely that the deterrent value of the Committee's work is greater when it handles specific cases (e.g., Mauritania) rather than generalities. But this is a hypothesis, not a fact proved by the experiences under the Non-Compliance Procedure.

Possible Tougher Responses and Why They Are Not Available

The Committee could have many other tools available, notably some stronger powers to sanction noncompliance or reward compliance. After the interim Non-Compliance Procedure was adopted in 1990, the ad hoc Group of Legal Experts on the Non-Compliance Procedure was instructed to explore possibilities for stronger options.[79] Despite the goal of a tougher procedure, agreement was possible only on a weak "indicative list of measures that might be taken by a Meeting of the Parties in respect of noncompliance with the Protocol" (see Appendix I). The list includes "positive" incentives as well as punitive measures.

The "indicative list" appears to have had no effect on the behavior of Parties, nor will it in the future. Some Parties have referred to it, but only when it serves their interests.[80] The fact that measures beyond an "indicative list" were not adopted reflects that the noncompliance system was in its infancy, the subject was politically sensitive, and the ad hoc group could not agree on whether strict judgements, implemented through such measures, should be part of the mandate of the Committee. Once the Committee has discussed a case at length and has perhaps made some comments in its reports, its avenues for action have nearly reached a dead end. A case could move to dispute resolution, or Parties could even pursue dispute resolution in parallel, but if the empty history of multilateral environmental dispute resolution is a guide, these actions are unlikely.

It is useful to consider some stronger tools and why they are not available to the Committee, and to speculate on their possible use in the future. Some observers will surely lament that the Non-Compliance Procedure is not tougher. This section illustrates why it is not stronger, and in doing so helps to define some political and practical limits on the power and efficacy of the Procedure and Committee, and possible similar arrangements in other multilateral environmental agreements.

First, one should consider the possibility of a closer link with the MLF. A closer relationship between the bodies could help target funding and other pressure at countries with compliance problems. Although the Executive Committee of the MLF and the Implementation Committee keep each other informed of their activities, in practice MLF funding decisions have been made and monitored almost entirely by the MLF's Executive Committee and Secretariat. The beginning of a closer relationship may be evident in the Implementation Committee's small role in creating conditionality between MLF funding and compliance with baseline data reporting and its role in enforcing that conditionality (i.e., the Mauritania case).

Given how effective the few existing links have proved, there may be a strong case for an even closer relationship between these two bodies. Elsewhere in this essay it is argued that the Implementation Committee should be viewed as part of a system of institutions that provides credible technical advice, enables rapid adjustment of the Protocol's commitments over time, gathers and disseminates information about implementation, assists countries in paying the costs of implementation, and manages problems of noncompliance as they arise. To the extent that the system operates synergistically it will be more effective, especially in managing difficult cases of noncompliance that demand a full range of tools (i.e., sticks and carrots).[81] A reasonable next step toward integration might be to create conditionality between MLF funding and the supply of annual data.

Broader conditionality is already evident elsewhere. Outside the Protocol, the GEF has made funding of ozone projects in countries with economies in transition conditional on compliance with the Protocol (and the London Amendment). More broadly, several multilateral financial institutions, notably the World Bank, now require recipients to be members of and in compliance with all relevant multilateral environmental agreements.[82]

However, if broader conditionality is to be developed within the ozone regime, the debates that led to the existing conditionality for baseline data must be kept in mind. When forging the conditionality on baseline data, some Implementation Committee members from developing countries were concerned, with good reason, that the terms of conditionality not be so strict that they do not reflect the real difficulties countries face in gathering and reporting data. Donors and enthusiasts of ozone-layer protection might want to be tough with countries that do not comply, but in general the experience with conditionality has been mixed and controversial. Strict efforts to increase conditionality within the Montreal Protocol could easily entrain the disenchantment, distrust, and evasion that have characterized conditionality elsewhere, such as in the International Monetary Fund. The experience so far indicates that the Montreal Protocol has been able to find reasonable compromises in the application of conditionality. Countries have one to two years to report baseline data before the threat to cut off MLF funding is invoked. Based on the current experience with data reporting, allowing up to a two- or three-year delay in the reporting of annual data would be a reasonable compromise between the Protocol's need for prompt data and the Parties' need for time to gather the necessary statistics. Nonetheless, conditionality is a highly imbalanced tool. It is not useful against countries that do not draw resources from the MLF, yet several such countries have failed to provide annual data on a timely basis. Further, conditionality is a blunt instrument – useful in extreme cases, but difficult to apply when Parties are making good-faith efforts to comply but are encountering unforeseen problems that may require patience and further resources to correct. In the near future MLF conditionality will not be relevant to cases of noncompliance with the ODS controls, since by definition those controls have not taken full effect for any of the countries eligible for MLF funding. But when they do, it is logical to expect that the possibility of conditionality will also arise in those cases. Insofar as conditionality is applied, the Implementation Committee will probably be the arbiter, as it was in the Mauritania case.

If allowed at all, MLF conditionality must be used sparingly. High levels of membership of developing countries in the Montreal Protocol mainly reflect the threat of trade sanctions against nonmembers and the existence of the MLF to pay the incremental costs of compliance. Limiting access to those crucial funds

could induce a critical group of countries to produce and consume ODS outside the Montreal Protocol system, undermining the fundamental objectives of the Protocol. That would be risky for the Parties involved, but the risks of extensive use of conditionality to the Montreal Protocol are significant as well.

Another stronger power of the Committee could be to interpret (legally or even politically) the provisions of the Protocol in specific cases. This quasi-judicial function could lead to a body of "case law" and interpretation. However, the Fourth Meeting of the Parties reaffirmed that even the legal interpretation of the Protocol "rests with the Parties themselves." In particular instances where it would have been extremely efficient to delegate detailed decision making to the Committee, even if it did not entail a substantial loss of power by the Meeting of the Parties, the Meeting of the Parties has underscored its final authority.[83] In practice the Committee will probably develop a quasi-judicial function, provided that its recommendations continue to be supported by the Meeting of the Parties. Recognition of that nascent role is reflected in the decisions by Lithuania, Poland, Romania, and others to volunteer to discuss their compliance problems with the Committee and to seek the Committee's advice on possible next steps.

Ironically, wariness of a powerful Committee may be a direct consequence of the "strength" of the Montreal Protocol. Many countries, especially in the developing world, joined the Protocol to avoid the trade sanctions authorized against non-Parties. But they were and are unsure exactly how they will comply with their obligations. Furthermore, Parties are prohibited from making any reservations when they join the Protocol.[84] So far, disbursements from the MLF have been sufficiently large to fund data collection, capacity building, and many projects to limit consumption of ODS. But in the future there is some risk that MLF funding will not be sufficient to support full compliance with the Protocol's most stringent commitments to control ODS. In principle, if MLF funding proves inadequate, developing countries could make their compliance contingent on the supply of additional MLF resources. In practice, countries that lack strong domestic support for eliminating ODS are understandably wary of the imposition of global environmental commitments without the means to comply. This fear is exacerbated by generally low levels of trust between developed countries (MLF donors) and developing countries (MLF recipients). Thus, from the outset the developing countries have been especially wary of a strong Non-Compliance Procedure and of efforts to develop excessive levels of conditionality.

Both these elements – the lack of reservations and the inclusion of trade sanctions – are often identified as reasons the Protocol is strong and reasons its example should be followed in other areas. However, if difficult noncompliance problems become more numerous and the Implementation Committee remains weak, these

features of the ozone regime may be seen as sources of weakness because they weaken the noncompliance system. If the Montreal Protocol experience is to be applied to other regimes, it could be valuable to consider integrating the design of the procedure more closely with the negotiations over substantive commitments. In practice there was some connection in the Montreal Protocol, because the Procedure was elaborated in parallel with negotiations on the 1990 and 1992 amendments and adjustments. But as Széll has pointed out, the Non-Compliance Procedure is part of a package of negotiated commitments that, together, make up the obligations of the Montreal Protocol.[85] Leaving noncompliance procedures to be negotiated after the substantive commitments have been decided may tend to yield weak procedures, especially if substantive commitments are stringent. In the Montreal Protocol, the design of the Procedure was deferred because there was not enough time in Montreal to resolve the issue; however, making these kinds of deferrals a general practice may, on balance, lead to less effective multilateral environmental agreements.

4

The First Cases Under the Ad Hoc System

The Implementation Committee, with the same tools at its disposal, handles cases under the ad hoc system. In 1995 that system was invoked for the first time to handle formal submissions of noncompliance. The submissions concerned the imminent failure to comply with the Protocol by five countries with economies in transition: Belarus, Bulgaria, Poland, Russia, and Ukraine (the BBPRU submissions). Some observers maintained that some of these countries, notably Russia, already were not in compliance with the Protocol's interim reduction targets (the existing ban on Halon consumption) and were also supplying an illegal trade in ODS. However, data submitted by all five show that they were in compliance. Thus the formal submissions concern only these countries' failure to comply with the Protocol after 1 January 1996, when they were to have eliminated essentially all consumption of the 15 most noxious CFCs, carbon tetrachloride, and methyl chloroform.

The five Parties, led by Russia, originally intended to submit their request for a special five-year grace period directly to the Meeting of the Parties.[86] Instead, their request was rerouted through the Implementation Committee, which declared them as "submissions" under paragraph 4 of the Procedure, which allows a Party to make submissions concerning its own noncompliance.[87] In other words, the five countries "accused" themselves of noncompliance. As mentioned above, before the ad hoc system was invoked, four of the five countries (all except Bulgaria) had already been in front of the Committee to discuss their probable noncompliance with the Protocol's controls on ODS. Belarus, Russia, and Ukraine had been questioned by the Committee about their failures to report baseline data. Russia did not report the full baseline data required by the Protocol until after the BBPRU submissions were lodged and such data were absolutely required before the Committee would approve the Russian compliance plan.

The BBPRU submissions are not yet fully resolved, but they are on track for an even-handed assessment based primarily on an objective evaluation of the facts and circumstances of each country. That might not have been true had the

matter been handled entirely within the more political Meeting of the Parties, as Russia had originally intended. That the Implementation Committee was given the task of handling these submissions under the Non-Compliance Procedure is one measure of its reputation as the legitimate and competent forum for handling such matters.

The Committee has wisely divided the omnibus submission into individual submissions. Two of the Parties (Poland and Bulgaria) may find it possible to comply with the Protocol in 1996; if not, their cases will be reviewed later. The other three Parties (Belarus, Russia, and Ukraine) have been instructed to develop plans to achieve compliance with the Protocol. As of this writing, each country has submitted a plan. However, the Implementation Committee has deemed each compliance plan inadequate and has asked each Party to both provide more details on technical aspects and clarify its *political* commitment to comply with the Protocol. The Implementation Committee has responsed to each country's situation by focusing on working with the country to achieve compliance with the Protocol as rapidly as possible. Rather than tailor the Protocol to the Party, the Party is to bring its performance back to the Protocol's standards, with periodic reviews along the way. The approach aims at solving problems rather than apportioning blame or taking enforcement actions.

The BBPRU submissions and planned reviews of each Party's situation involve technical issues beyond the competence of the members of the Committee. For these submissions the Committee has had the advice of a special Technology and Economic Assessment Panel (TEAP) on countries with economies in transition.[88] TEAP experts have been active participants in the deliberations of the Committee concerning these submissions. This panel is one of several expert groups that provide legitimate, useful, and timely advice to the ozone regime.

The Implementation Committee presented its approach to the Meeting of the Parties, which adopted the Committee's recommendations as formal Decisions mostly intact. The one significant exception concerns the Committee's proposed ban on some exports of ODS from Belarus, Russia, and Ukraine. Belarus and Ukraine, with no domestic production of ODS or recovery and recycling facilities, agreed with the Implementation Committee to stop exports. However, as permitted by the Protocol, Russia intended to continue exports to developing countries for "basic domestic needs" and to develop an ODS recovery and recycling industry. Some developing countries, concerned about Russian ODS exports to lucrative markets in the developing world, sought to strengthen the ban. But the result of their revisions to the Decision is more ambiguous wording that bans the re-export of Russian production through other members of the Commonwealth of Independent States (CIS), including Belarus and Ukraine. The Decision does

not explicitly ban Russian direct exports for the "basic domestic needs" of developing countries. Russia must still submit information on recovery and recycling facilities if it wants such production to comply with the Protocol's requirements, but such information is required of any Party that engages in recovery and recycling. Trade among CIS members is allowed; their economies remain closely interlinked, despite the collapse of the Soviet Union.[89] These three Decisions set a framework for handling likely submissions by other CIS Parties.

Although the BBPRU cases are examples of self-accusation, in none of the countries was the submission an entirely voluntary act. Funding needed for those countries to comply has been allocated by the GEF. However, before the GEF would approve additional projects in Belarus, Russia, and Ukraine, it sought broad approval of these countries' compliance plans by the Implementation Committee and the Meeting of the Parties. Although the GEF has no official role within the Montreal Protocol's system of institutions, in general it sees its role as supporting the funding of projects that contribute to the compliance and effectiveness of relevant international environmental agreements. Because none of the countries with economies in transition is a "developing country," none is eligible for MLF funding. Thus, the GEF has identified these countries as its niche for funding of stratospheric ozone projects. (Stratospheric ozone depletion is one of four priority areas for GEF funding.)

Although the GEF will provide the funding, the Implementation Committee will continue to play a central role in regularly reviewing progress and dealing with compliance issues as they arise. The Decisions pertaining to Belarus, Russia, and Ukraine each state that, "[i]n case of any questions related to the reporting requirements and the actions [of Belarus, Russia, or Ukraine], the disbursement of the international assistance should be contingent on the settlement of those problems with the Implementation Committee."[90] Speaking to the Implementation Committee, a GEF representative underscored that "GEF funding was subject to the formal processes of the Montreal Protocol for noncompliance." Also, "GEF was awaiting the advice of the Implementation Committee as to the quality of the Russian Federation's submissions . . . before proceeding with a project for the Russian Federation."[91] Thus, in practice the *system* of integrated institutions extends even beyond the formal boundaries of the Montreal Protocol. The Committee serves as the arbiter of conditionality between these countries' compliance and the supply of GEF funding. This model is promising, but it does not indicate how compliance problems will be handled in developing countries, which are suspicious of the conditionality and will draw their funding from the MLF, not the GEF.

By far the most difficult of the BBPRU cases has been that of Russia. Many observers are privately skeptical of the accuracy of the Russian data, but there are no independent means to verify them and there are many other more important aspects of the Russian situation. One is concern that Russia will not implement the full phaseout, even within its proposed five-year period. But most important is the problem of trade. Russia is the only major CFC producer of the former Soviet Union, and it had been planning to recover, recycle, and sell ODS in foreign markets to earn hard currency. The Decision by the Meeting of the Parties may limit that lucrative trade. Russia's strong objections to that ban led to the unusual outcome that the Decision was adopted "by consensus" with one Party (Russia) dissenting.[92] Whether Russia's dissent matters is unclear. While the Decision instructs Russia to control these exports, it also legitimizes efforts by other countries to ban imports from Russia. Given the already lax Russian export controls, it may be the import controls that matter most.

Interestingly, depending on how the ambiguous Decision is interpreted, this is the first time that substantial trade sanctions have been applied within the Montreal Protocol regime. It is a blessing to the Implementation Committee, the GEF, and others interesting in inducing Russian compliance that Russia is not a member of the World Trade Organization (WTO). If it were, it might initiate a dispute to challenge the trade restrictions. That scenario has long been feared by those who advocate using trade sanctions in environmental agreements; compatibility of such measures with the free trade–oriented WTO rules remains unclear, but this problem does not arise when trading outside the WTO membership.

5

Systematic Analysis of Trends in the Work of the Committee

In the previous sections the operation and effectiveness of the Implementation Committee were analyzed, using as illustrations the particular issues it has handled. Here, an effort is made to analyze all of the work of the Committee systematically and to provide a quantitative assessment of how the Committee's agenda has changed over time.

Two major classes of questions motivate this systematic analysis. First, most analysts have informally claimed that the Implementation Committee has primarily dealt with issues related to the reporting of data. The analysis above suggests the same. But, is this true? To what degree are other issues also being addressed, and is the subject matter shifting? Second, are there trends in the balance of the Committee's work between general issues and those specific to particular countries?

Answers to the first questions are important because they indicate the extent to which lessons from this experience are limited to noncompliance procedures that deal with data reporting; visions of noncompliance procedures for other environmental agreements include the hope that they will address problems of noncompliance that are more difficult than those concerning data reporting. If the Montreal Protocol experience is mainly limited to data reporting, then its lessons may be similarly limited.

Answering the second question is important because noncompliance procedures (and other systems for compliance supervision) may be most effective when they address specific cases of noncompliance. Deterrence is more effective if individual Parties fear that they will be individually called to account for their actions. The recommendations developed by the Committee will be more precise and effective if they are based on specific experience. If these benefits are attractive to the designers of noncompliance procedures, then it is important to know

whether (and why) the Implementation Committee's work load has evolved over time to focus on country-specific cases.

Method

Discussion of the substantive matters in each of the 12 Committee reports was coded into one of four categories.[93]

- Matters of noncompliance related to reporting and availability of data
    1. General discussions
    2. Country-specific discussions or deliberations initiated by the situation of a specific country
- Matters of noncompliance *except* the reporting and availability of data
    3 General discussions
    4 Country-specific discussions or deliberations initiated by the situation of a specific country

Coding was done by hand by the author; copies of the coded Committee reports are available for inspection. The number of lines in Committee reports devoted to each category were then counted and tabulated.

Results and Implications

Figure 1 shows the tabulated results of the substantive analysis (raw data are reproduced in Appendix II).

Although it is difficult to identify robust trends after only 12 meetings, three findings are evident from the data. First, the bulk of the Committee's work has been general and has concerned data reporting (see *Figure 1*). Since the third meeting, the attention given to general matters of data collection has been relatively constant, largely because each meeting includes a section (of fairly constant length) in which the Secretariat gives a summary of the state of data reporting. The bulk of the Secretariat's report is general; specific countries are mentioned, usually in lists, but most of the discussion does not result in a focus on particular countries or in asking countries to explain why they have not reported their data.[94] The conventional wisdom that much of the Committee's first four years was spent on data reporting is correct.

Second, whereas the general attention to data reporting has been relatively constant since 1992, attention to country-specific aspects of data reporting has

image missing

increased (see *Figure 1*). The Committee began with a loose mandate; it started by addressing those issues of noncompliance that were most immediate for the Protocol, data reporting, and did so in a general way. But that system has evolved, developing the capacity to deal with specific issues as well. It is encouraging that this shift to case-specific issues took place in 1993 and 1994, under the regular system and before any formal cases of noncompliance were raised. The Committee has been able to evolve on its own to handle a wider range of issues.

Third, since late in 1993 the Committee has increasingly addressed matters of potential noncompliance that are unrelated to data reporting. Essentially, all of this attention has come in the form of country-specific discussions, primarily concerning countries with economies in transition (see *Figure 1*).[95] In the most recent meetings, the majority of the Committee's attention has been devoted to the ad hoc procedure (see data in Appendix II).

As the agenda has shifted from data issues, the work of the Committee has increasingly reflected what the affected Parties themselves want to discuss. The analysis in the previous two sections has shown that most data-related issues have been placed on the agenda of the Committee at the instigation of the Secretariat, Committee, or other bodies of the Montreal Protocol system. In contrast, practically all issues related to compliance with ODS controls have been placed on the Committee's agenda by the affected Parties.

6

Conclusions and Some Implications for Other Noncompliance Procedures

The Montreal Protocol Implementation Committee is the only functioning noncompliance procedure in a major international environmental agreement. Consequently, much attention has been given to it as a model for similar procedures envisioned in other agreements. This paper offers the first independent analysis of its short history.

Until the last two years, the Non-Compliance Procedure did not have a clear position within the Montreal Protocol's system of institutions.[96] Now its legitimacy and influence are growing. In the past its relative obscurity gave it control over its agenda, but more and more the Committee is being asked by other bodies of the Montreal Protocol system to consider issues. Increasingly, Parties also seek the Committee's advice on compliance problems. Today the Committee is the legitimate "first stop" in any formal discussion within the Montreal Protocol on matters related to compliance.

This study shows that the Committee has had some influence in getting countries to report data as required by the Protocol. But its influence has been most evident when countries have found it relatively easy to comply. Because its powers are quite limited, the Committee has had less success in inducing compliance in cases where gathering and reporting data has been difficult, primarily in developing countries and a few economies in transition, notably Russia. Regarding data reporting from developing countries, the MLF and its implementing agencies now have many projects under way to help these countries improve their capacities to report. Essentially all efforts to identify and manage these projects are made within the MLF, its implementing agencies, and the Parties. The Implementation Committee plays almost no role. The MLF, implementing agencies, and Committee exchange information, but there is little if any change in what the MLF and agencies support as a consequence of the issues brought before the Committee.

Increasingly, the Committee has addressed issues beyond data reporting, notably, compliance with the Protocol's obligations to control ODS. Nearly all have consisted of specific concerns about compliance by a particular Party. All of those issues have been put on the Committee's agenda by the affected Party.

For five years, from 1990 to 1995, the Committee worked solely as a standing body that handled issues that it, other bodies, the Secretariat, and Parties thought would be useful to address. This essay includes a quantitative analysis that confirms three clear trends in the Committee's work load: (a) until recently most attention was given to compliance with the Protocol's data reporting requirements; (b) although the Committee regularly handles general compliance issues, there has been a consistent increase in attention to the compliance problems of specific parties; and (c) nearly all of the issues related to ODS controls handled by the Committee have concerned specific problems encountered by specific Parties. This essay argues that the Committee plays its most unique role, and has its greatest influence on compliance, by handling specific cases. These trends in its work load are an encouraging sign that the Committee is responsive to changes in the compliance issues that are the most relevant to the Protocol, and over time it has sought to increase its effectiveness.

In 1995 the Committee heard the first cases lodged under the ad hoc system by Belarus, Bulgaria, Poland, Russia, and Ukraine. In handling those cases, which are still under way, the Committee has adopted a pragmatic, problem-oriented approach. It has focused on ways to achieve compliance, requiring each Party that is not in compliance (currently only Belarus, Russia, and Ukraine) to document its plans for complying with the Protocol. The Committee will review these plans periodically and stand ready to handle any issues that may arise. The GEF will provide the main multilateral financial assistance.

This essay analyzes the regular and ad hoc systems separately in order to explore their differences, which will aid in applying lessons from this experience to other regimes that include both regular and ad hoc systems. But there are many commonalities. Both the ad hoc and regular systems have the same basis in law (the Non-Compliance Procedure) and are managed by the same institutions (the Implementation Committee and Secretariat). The tools that the Committee uses to handle both its regular work load and ad hoc cases are the same. These commonalities have been important – the Committee's work as a standing body over five years built legitimacy and competence that improved its ability to handle the first ad hoc submissions. In the future, the Committee's work as a standing body may be more influential because it has handled the first ad hoc submissions well.

The work of the Committee probably has a wider effect deterring noncompliance, but that has been difficult to substantiate. Both the handling of specific noncompliance problems and deterrence require the ability to detect noncompliance, which in turn requires accurate and complete data. The Committee has helped improve the reporting of missing data. So far, it has given little attention to the more difficult task of assessing and improving data quality.

This history suggests some detailed lessons for the design of similar procedures in other regimes, such as in the Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and Their Disposal and under Article 13 of the Framework Convention on Climate Change (FCCC).

- The standing committee has been valuable because it has been able to handle issues even without the formal "submission" system's being invoked. A standing committee, backed by an active Secretariat, can help handle the easier issues. The Montreal Protocol experience also shows that a standing committee can build expertise and legitimacy, which are useful assets once difficult issues of noncompliance arrive on its agenda.
- The Committee's work has been much more focused when dealing with specific cases of noncompliance. Although some hope that noncompliance procedures will be nonconfrontational, the history here suggests that friendly confrontation is beneficial. Asking Parties to explain their noncompliance, which can be confrontational, is what gives the Non-Compliance Procedure its focus and relevance.
- The Committee's mandate is mainly to address matters of compliance. Thus the treaty commitments are important in determining when the Committee is activated, especially when serious matters of compliance are addressed through the ad hoc procedure. Clarity of commitments may be needed for a similar body to contribute to the FCCC, where commitments to control greenhouse gases are currently ambiguous. That does not forestall creating a standing committee that might handle the clear existing commitment to report data, but if compliance is a goal for the future in the climate treaty there must be some way to assess what is and is not compliance.
- Governments wanted Parties, not individuals, to have seats on the Implementation Committee. This does not rule out the possibility of amending the Procedure to allow roles for individual experts sometime in the future, such as on panels to hear specific cases. Further, the Committee and Parties appear comfortable with the exclusion of non-Parties (e.g., NGOs), which is somewhat opposed to general trends in formal bodies attached to other international environmental agreements, where expanded NGO access has

been the norm. This decision was made to allow frank discussion of issues among diplomats.

If the designers of other noncompliance procedures intend to create mechanisms capable of efficiently handling difficult cases of noncompliance, they should use caution in drawing lessons from the operation of the Montreal Protocol's experience. The Protocol's noncompliance system has not often been used to handle difficult problems of noncompliance; its ad hoc "submissions" system is being used only now for the first time. Efforts to give it more extensive powers that might be needed to handle difficult cases have been rejected. Links between the Committee and the MLF and its implementing agencies, which could give the Committee more influence and leverage, are relatively weak but appear to be growing. A recent decision to cut off MLF funding to Parties that persistently fail to report data represents one of the Committee's toughest tools, but that applies only to baseline data, which are relatively easy to report once an MLF program is in place.

Many observers of the Montreal Protocol see the stringent targets for abatement of ODS, wide participation of industrialized and developing countries, prohibition against reservations, and the inclusion of trade sanctions as sources of strength. Yet these strong commitments may be directly responsible for the weakness of the Implementation Committee's mandate. Patrick Széll, chairman of the ad hoc group that designed and elaborated the Non-Compliance Procedure, suggests that the experience of the Montreal Protocol illustrates an inverse correlation between the strictness of supervision and the stringency of its substantive obligations.[97] The analysis here supports that claim. The weak Non-Compliance Procedure stems mostly from the participation of countries that were unsure whether they would be able to implement the substantive obligations, and thus were wary of stringent supervision. The same experience need not repeat itself in other regimes: strong commitments can and often must go hand in hand with strong compliance controls. The design of the Montreal Protocol's Non-Compliance Procedure underscores that compliance systems must be debated and designed in the larger context of the commitments of an international agreement. Commitments and institutions for managing compliance are a package. It might be valuable to allow some relief to Parties once the Implementation Committee has gone through a series of direct exchanges with the relevant Party on the relevant topic. The prospects for relief may reduce the understandable conservatism adopted by countries that are wary of being constrained by compliance control and thus wary of more stringent noncompliance procedures.

To close, it must be underscored that throughout its history, the Committee's approach has been pragmatic.[98] Its aim has been to cooperate with Parties to find ways to achieve compliance, rather than to adjudicate and apportion blame. This approach is one way it differs from traditional dispute resolution and is part of the reason the Committee and Procedure have been active. They improve compliance by operating in the realm between mere peer pressure (which is often ineffective in ensuring compliance) and abrasive dispute resolution (which is never used).[99] The pragmatic approach raises many questions about traditional concepts of state responsibility for compliance under international law.[100] So far, however, the approach seems to contribute to the effectiveness of the Protocol.

To some degree, "temporary relief" has been the Committee's pragmatic approach in the BBPRU submissions. As long as the countries are implementing their agreed plans to comply with the Protocol, less attention is being focused on their formal status of noncompliance. This pragmatic, solution-oriented approach is one reason the Non-Compliance Procedure has been used actively and is a model for cautious application elsewhere.

Notes and References

[1] For a review of monitoring and enforcement in environmental treaties, see Ausubel, J.H., and Victor, D.G., 1992, Verification of international environmental agreements, *Annual Review of Energy and the Environment*, **17**:1–43; Sachariew, K., 1992, Promoting compliance with international environmental legal standards: Reflections on monitoring and reporting mechanisms, in G. Handl, ed., *Yearbook of International Environmental Law, Volume 2, 1991*, Graham and Trotman, London, UK.

[2] Notably by the USA in the case of wildlife agreements; see Charnovitz, S., 1994, Environmental trade sanctions and the GATT: An analysis of the Pelly Amendment on foreign environmental practices, *The American University Journal of International Law and Policy*, **9**:751–807.

[3] Birnie, P.W., and Boyle, A.E., 1992, *International Law and the Environment*, Clarendon Press, Oxford, UK, ch. 4; Sand, P.H., ed., 1992, *The Effectiveness of International Environmental Agreements*, Grotius, Cambridge, UK, p. 14.

[4] For a brief but comprehensive review and analysis of the ILO supervisory system, with applications to the design of supervisory procedures in other regimes, see Romano, C.R., 1996, *The ILO System of Supervision and Compliance Control: A Review and Lessons for Multilateral Environmental Agreements*, ER-96-1, International Institute for Applied Systems Analysis, Laxenburg, Austria. See also Landy, E.A., 1966, *The Effectiveness of International Supervision: Thirty Years of I.L.O. Experience*, Stevens & Sons, London, UK; Valticos, N., 1994, Once more about the ILO system of supervision: In what respect is it still a model?, in N.

Blokker and S. Muller, eds., *Towards More Effective Supervision by International Organizations*, Martinus Nijhoff, Dordrecht, Netherlands, pp. 99–113.

For information on systems of human rights supervision, see, for example, Meron, T., 1982, Norm making and supervision in international human rights: Reflections on institutional order, *American Journal of International Law*, **76**:754–778; Donnelly, J., 1986, International human rights: A regime analysis, *International Organization*, **40**:599–642.

For information on OECD performance reviews see, for example, Lykke, E., ed., 1992, *Achieving Environmental Goals: The Concept and Practice of Environmental Performance Review*, Belhaven Press, London, UK.

[5] In addition to the Montreal Protocol's Non-Compliance Procedure, Sand's comprehensive review of international environmental agreements mentions two other systems with a similar function of handling cases of suspected noncompliance: the system for discussing noncompliance under the Convention on International Trade in Endangered Species (CITES); and the European Community's (EC) enforcement of the Single European Act. Each procedure is different from the noncompliance procedure discussed in this paper. The CITES system is operated by the CITES Secretariat. Information on approximately 100 cases of noncompliance per year is transmitted by the Secretariat to the CITES Conference of the Parties: no standing Committee of Parties is dedicated to case-by-case discussions, review, or recommendations for action. The EC system is special because the enforcement powers of the EC are much greater than those of any of the other international bodies that typically manage multilateral environmental agreements. See Sand, *op. cit.*, note [3], p. 14.

[6] Széll, P., 1995, The development of multilateral mechanisms for monitoring compliance, in W. Lang, ed., *Sustainable Development and International Law*, Graham and Trotman, London, UK, pp. 97–109. See also Széll, P., 1996, Implementation control: Non-compliance procedure and dispute settlement in the ozone regime, in W. Lang, ed., *The Ozone Treaties and Their Influence on the Building of Environmental Regimes*, Austrian Foreign Policy Documentation, Austrian Ministry of Foreign Affairs, Vienna, Austria.

[7] For reflection on the early experience under the Non-Compliance Procedure by the president of the Implementation Committee, see Schally, H.M., 1996, The role and importance of implementation monitoring and non-compliance procedures in international environmental regimes, in W. Lang, ed., *The Ozone Treaties and Their Influence on the Building of Environmental Regimes*, Austrian Foreign Policy Documentation, Austrian Ministry of Foreign Affairs, Vienna, Austria. For discussion on some important legal implications, see Koskenniemi, M., 1993, Breach of treaty or non-compliance? Reflections on the enforcement of the Montreal Protocol, in G. Handl, ed., *Yearbook of International Environmental Law*, Graham and Trotman/Martinus Nijhoff, London, UK, pp. 123–162. In addition, one other published article addresses this topic, but it is substantially less informative than the accounts by Széll (see note [6]) and Koskenniemi: see Trask, J., 1992, Montreal

Protocol Non-Compliance Procedure: The best approach to resolving international environmental disputes, *The Georgetown Law Journal*, **80**:1973–2001.

[8] Background interviews.

[9] Article 8 states, "The Parties, at their first meeting, shall 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."

[10] Decision I/8.

[11] Patrick J. Széll, interview with author, London, UK, 20 June 1995.

[12] Decision II/5.

[13] Patrick J. Széll, interview with author, London, UK, 20 June 1995. To allow continued consideration of the issues, the Second and Third Meetings of the Parties both gave the ad hoc group a mandate to keep working on a revised, final Non-Compliance Procedure. Decisions II/5 and III/2.

[14] Decision IV/5.

[15] Patrick J. Széll, interview with author, London, UK, 20 June 1995.

[16] Background interviews.

[17] See primarily Széll *op. cit.*, note [6], and Koskenniemi, *op. cit.*, note [7].

[18] Patrick J. Széll, interview with author, London, UK, 20 June 1995.

[19] The Convention's dispute resolution system also applies to the Montreal Protocol. All Parties to a protocol to the Convention must be Parties to the Convention (Article 16 of the Convention); the provisions of the Convention that relate to its protocols apply to the Montreal Protocol (Article 14 of the Montreal Protocol); and the Convention's dispute resolution system applies to its protocols (Article 11.6 of the Convention).

[20] Paragraph 3 of the Non-Compliance Procedure. The Secretariat does not have a strict obligation to report possible noncompliance. If the Secretariat becomes aware of possible noncompliance, "it may request the Party concerned to furnish necessary information about the matter. If there is no response from the Party concerned within three months or such longer period as the circumstances of the matter may require . . . then the Secretariat shall include the matter in its report to the Meeting of the Parties . . . and inform the Implementation Committee accordingly." The Secretariat has never formally asked a Party for information about its noncompliance while operating under this paragraph of the Non-Compliance Procedure. Thus, while the Secretariat (and everyone) is aware of some noncompliance, it has never requested the "necessary information," therefore, the Secretariat has not been compelled to initiate the Procedure under this paragraph. If the Secretariat were to provide such information to the Implementation Committee, it would not formally be labeled a "submission." In practice, the formal label probably does not matter.

[21] Paragraph 2 of the Non-Compliance Procedure.

[22] See Romano, *op. cit.*, note [4].

[23] Hugo M. Schally, interview with author, Vienna, Austria, June 1995. Schally was president for the two years at the end of the period covered in this study. During that time the Committee's work load and role within the Montreal Protocol's system

of institutions increased dramatically. In March 1996 a representative from Peru (Antonio Garcia Revilla) became president of the Implementation Committee.

[24] Background interviews.

[25] UNEP/ImpCom/12/3 (1 December 1995), p. 10.

[26] Decision I/11 requires the Secretariat to ensure that confidential data are not disclosed, except to Parties that have guaranteed in writing that they will not disclose such data. Paragraphs 15 and 16 of the Non-Compliance Procedure require the Committee and any Party involved in its deliberations to protect the confidentiality of information they receive in confidence.

[27] Nearly all countries have classified as "confidential" almost all their data on production of the main chlorofluorocarbons (CFCs) and Halons (listed in Annexes A and B). In practice, all data on production and trade are treated as confidential by the Secretariat, whose regular compilation of data (see notes [28] and [29] and accompanying text *infra*) reports national production and consumption for groups of substances, not for each of the controlled substances individually. The compromise on confidential data is to require such data where needed but to ensure their confidentiality by not publishing such data in public reports and by demanding that all Parties keep such data in confidence. Although the Committee's report must not contain confidential data, all data (including confidential data) that are exchanged in relation to any recommendation of the Committee must be made available to *any* Party that requests them; that Party, in turn, must ensure that the data remain in confidence (see paragraph 16 of the Non-Compliance Procedure). It is unclear whether Parties are convinced that the system for exchanging confidential data is secure, although so far it has not been tested. In the Montreal Protocol in general, the handling of confidential data does not appear to have caused major problems – the lack of reported data is much more serious than their confidentiality.

[28] Article 7. Most of the Protocol's control measures are expressed in terms of a group of substances (e.g., Group I of Annex A), but data are required for *each* controlled substance *individually*, because the group is computed by weighting production, imports, and exports of each controlled substance according to its ozone-depleting potential (ODP). Production, import, and export data are required because the control measures in the Protocol are defined in terms of *consumption* of controlled substances. Consumption is calculated according to the following formula: production + imports − exports. The procedure for weighting substances and computing consumption is described in Article 3.

Parties are also required to submit data on the amounts used for feedstocks, amounts destroyed by approved technologies, and imports from and exports to Parties and non-Parties, respectively (Article 7.3). Data are required for imports of some recycled substances (Article 7.3 bis). Regional economic integration organizations may comply with all the export and import data requirements by providing data on exports and imports between the organization and States that are not members of the organization (Article 7.4). Such organizations must still provide national data on production.

The exact data-reporting requirements depend on the particular situation of the country, as there are now three versions of the Protocol in force: the original Protocol (1987), the London Amendment (1990), and the Copenhagen Amendment (1992). Not all Parties have ratified all amendments. Each amendment has expanded the list of controlled substances, and thus each has expanded the reporting requirements.

Baseline years are 1986 for the core CFCs and Halons, listed in Annex A; 1989 for the other CFCs, carbon tetrachloride, and methyl chloroform, listed in Annex B; 1989 for the "transitional" HCFCs and HBFCs and their isomers, listed in Annex C; and 1991 for methyl bromide, listed in Annex E. The baseline years are specified with the control measures (Article 2) and repeated in the Articles on reporting of data (Articles 7.1 and 7.2).

[29] At present, the most recent of the Secretariat's annual reports on data (required by Article 12.c of the Protocol) is UNEP/OzL.Pro.7/6 (25 September 1995).

[30] The Protocol was amended in 1990 to allow the EC and other "Regional Economic Integration Organizations" to report only imports and exports between the Organization and states that are not members of the organization. This issue does not arise for other Parties, because the EC is the only Party with the status of Regional Economic Integration Organization under the Protocol. The confidentiality issue, which has been a concern for members outside the EC, is handled by allowing data to be submitted on a confidential basis and by requiring the Secretariat to aggregate some data in its public reports to obscure commercially sensitive information.

[31] Data reporting by Belarus, Italy, and Ukraine was discussed at the seventh meeting. See UNEP/OzL.Pro/ImpCom/7/2 (16 November 1993), pp. 2–5.

[32] See UNEP/OzL.Pro.6/5 (15 July 1994).

[33] Article 10 mentions financial assistance from the MLF for developing countries. Article 5 mentions lenient provisions for controlling consumption of ODS.

[34] That main definition is in paragraph 1 of Article 5. This paragraph sets a consumption threshold at 0.3 kg per capita for the core five CFCs and three Halons (listed in Annex A and weighted according to ODP) on the date of entry into force for that particular Party, or any time thereafter until 1 January 1999.

[35] Decision I/12 E. This list consists of all countries of the UN minus OECD members (in 1989), minus a few special cases (e.g., Israel, Liechtenstein, Monaco, and South Africa), and minus all the economies in transition (except Albania, Romania, and Yugoslavia, which are perhaps economies in transition but are included on the list). Turkey, an OECD member but classified as a developing country by the World Bank and the United Nations Development Programme (UNDP), was added to this list in 1991 (Decision III/5). Mexico is on the list although it has since joined the OECD (1995). The Meeting of the Parties requested that a working group further define criteria to determine what is a "developing country" (Decision III/5). That group made little progress, and the Meeting has decided to handle requests for developing country status on a case-by-case basis (Decision IV/7).

[36] UNEP/OzL.Pro/ImpCom/4/2, 6 October 1993, p. 2–3.

[37] Twelfth Meeting of the Implementation Committee, UNEP/OzL.Pro/ImpCom/12/3 (1 December 1995 – advance copy), p. 9. The Lebanese challenged the UN data by presenting alternative population estimates from the World Bank; Decision VII/20.

[38] Where Parties do not have actual data for a year they may use "the best possible estimates." See Articles 7.1 and 7.2.

[39] However, the "sense" that data had been manipulated for the purpose of putting a country below the threshold identified in paragraph 1 of Article 5 led some members of the Implementation Committee to argue strongly that rules about data correction be put in place to protect against such manipulation, especially where changes in data would modify the status of a country under Article 5. See UNEP/OzL.Pro/ImpCom/8/3 (4 July 1994), p. 10.

[40] Their recommendations were adopted by the Meeting of the Parties in 1991. On that basis, Bahrain, Malta, Singapore, and United Arab Emirates were all temporarily categorized as not operating under paragraph 1 of Article 5. Decision III/3.

[41] UNEP/OzL.Pro/ImpCom/8/3 (4 July 1994), pp. 9–11. The Committee was considering an issue on the agenda of the Open-Ended Working Group, the main intersessional working group that prepares issues for handling by the Meeting of the Parties.

[42] See Decision VI/5 (c).

[43] Article 8. The specific trade restrictions have been expanded in tandem with the addition of new controlled substances in the 1990 and 1992 amendments to the Protocol. Thus the specific application of the trade restrictions depends on which substance is concerned as well as the applicable amendment.

[44] This formal exception is listed in Article 4.8 and elaborated in Decision IV/17 C.

[45] UNEP/OzL.Pro/ImpCom/6/3 (26 August 1993), p. 5.

[46] Initially, the formal name was the Interim Multilateral Fund; after its first three years of operation, the Fund was renewed and made permanent and is now called the Multilateral Fund. (Hereafter, both are simply referred to as the Multilateral Fund, MLF.) The implementing agencies are the United Nations Development Programme (UNDP), the Industry and Environment Programme Activity Centre (IE/PAC) of the United Nations Environment Programme (UNEP), United Nations Industrial Development Organization (UNIDO), and the World Bank. These agencies and the MLF were first invited to attend the fourth meeting of the Committee, September 1992.

[47] Hugo M. Schally, interview with author, Vienna, Austria, June, 1995. UNEP/OzL. Pro/ImpCom/9/2, pp. 4–6.

[48] Decision VI/5.

[49] UNEP/OzL.Pro/ImpCom/12/3 (1 December 1995), p. 2, with reference to Decision VI/5.

[50] See the report from the Seventh Meeting of the Parties: UNEP/OzLPro.7/12 (27 December 1995), p. 23.

[51] The provisions are given, respectively, in (1) Article 2B and Group II of Annex A; (2) Article 2A and Group I of Annex A (the core five CFCs); Article 2C and Group I of Annex B (an additional list of 10 CFCs); Article 2D and Group II of Annex B

(carbon tetrachloride); Article 2E and Group III of Annex B (methyl chloroform); (3) Article 2F and Group I of Annex C; (4) Article 2G and Group II of Annex C; and (5) Article 2H and Annex E.

[52] UNEP/OzL.Pro.7/12 (27 December 1995), pp. 60–62.

[53] Parson, E.A., and Greene, O., 1995, The complex chemistry of the international ozone agreements, *Environment*, **37**:16–20 and 35–43.

[54] Ibid.

[55] UNEP/OzL.Pro/ImpCom/9/2 (5 October 1994), p. 7.

[56] Romania thought that it potentially possessed excess quotas, in part because it was treated as a developing country under Article 5 and thus had lenient controls on ODS and found it easy to over-comply. The case was deferred to the next meeting of the Committee, but it was never raised again by Romania or Greece and has not yet been resolved. See UNEP/OzL.Pro/9/3, pp. 6–7.

[57] UNEP/OzL.Pro/ImpCom/7/2, p. 5.

[58] The Implementation Committee decided to seek more information from Lithuania and pointed out that Lithuania would not gain assistance from international financial institutions for projects concerning ODS unless it ratified the London Amendment. The GEF has made membership in and compliance with relevant international agreements a condition for receipt of GEF money. UNEP/OzL.Pro/ImpCom/12/3 (1 December 1995), pp. 9–10.

[59] Cyprus, Kuwait, Lebanon, Slovenia, and the United Arab Emirates. UNEP/OzL.Pro/ImpCom/10/4 (30 August 1995), pp. 3, 5–6.

[60] The current status of fund contributions is in the report of the MLF's Executive Committee: UNEP/OzL.Pro/ExCom/18/75 (24 November 1995), Annex I.

[61] UNEP/OzL.Pro/ImpCom/7/2 (16 November 1993).

[62] Paragraphs 1 and 4 of the Non-Compliance Procedure.

[63] The Committee also makes recommendations to the Executive Committee of the MLF, the only other body within the Montreal Protocol that has decision-making authority.

[64] These arguments are developed at length in Chayes, A., and Chayes, A.H., 1995, *The New Sovereignty: Compliance with International Regulatory Agreements*, Harvard University Press, Cambridge, MA, USA.

[65] The statement of the Russian Federation in the eighth meeting (UNEP/OzL.Pro/ImpCom/8/3, 4 July 1994, p. 12) indicates that Russia intended to request from the Meeting of the Parties a special status until 1998. At that same meeting, Ukraine sent a letter saying that it and other countries in transition would seek "flexibility in the application of the Protocol." For discussion of Poland's possible compliance problems, see note [55] and text *supra*. At the seventh meeting (UNEP/OzL.Pro/ImpCom/7/2, 16 November 1993, p. 4), Belarus reported that it would have problems meeting some of the requirements of the Protocol, especially the rapid phaseout of Halons. The matter was also supposed to be discussed in the ninth Committee meeting (UNEP/OzL.Pro/ImpCom/9/2, 5 October 1994), but Russia did not attend although it was both a member of the Committee and had its own business before the Committee. The next year (1995), Russia submitted

its request for leniency to the OEWP that was preparing for the Meeting of the Parties; that request was declared a "self-submission" and the BBPRU submissions were formally under way by the tenth meeting of the Implementation Committee (UNEP/OzL.Pro/ImpCom/10/4, 30 August 1995, p. 6).

[66] Furthermore, it is unclear if Russia (and perhaps Ukraine) would have even discussed noncompliance with the Committee had a representative from Russia not been a member of the Committee and therefore both informed about the operation of the Committee and given abundant opportunity to present his views because he was already planning to attend the meetings. The experience suggests that it may be valuable if some Committee members come from countries that are likely to face problems of noncompliance, and thus are on hand to present their views and intimate knowledge of the problems as necessary.

[67] Paragraphs 9 and 14 of the Non-Compliance Procedure (see Appendix I).

[68] At its fifth meeting, the Committee "requested the Secretariat to contact each of the Parties that had not reported their data expressing the concern of the Implementation Committee in the light of its mandate as approved by the Fourth Meeting of the Parties." UNEP/OzL.Pro/ImpCom/5/3 (9 March 1993), p. 2. Since its third meeting (April 1992), the Committee has named in its report Parties that have not complied with the requirement to submit (baseline) data.

[69] Maldives did not appear, but a representative from the United Nations Environment Programme (UNEP, one of the MLF implementing agencies) reported on a country program in Maldives, stating that the relevant data had just been submitted to the Secretariat. Trinidad and Tobago did not appear, nor did Togo.

[70] Belarus, Iran, Maldives, Ukraine, and Syria. UNEP/OzL.Pro/ImpCom/7/2 (16 November 1993), pp. 2–5.

[71] These discussions are excerpted from UNEP/OzL.Pro/ImpCom/9/2 (5 October 1994), pp. 2–3.

[72] GEF-funded projects in countries with economies in transition have played a similar role in building capacity to report the required data.

[73] See the Secretariat's annual data report for 1995: UNEP/OzL.Pro.7/6 (25 September 1995), p. 2. This report also lists Russia's data for Annex A substances as being more than two years overdue, but Russia provided that data as part of its deliberations with the Implementation Committee and its name was removed from the list of delinquents. See UNEP/OzL.Pro/ImpCom/12/3 (1 December 1995), p. 8.

[74] The list referred to here is that of countries with Annex A baseline data delinquent more than two years. For the 1994 list (which contains nine countries – seven developing and two industrialized), see UNEP/OzL.Pro.6/5 (15 July 1994), p. 2.

[75] UNEP/OzL.Pro.6/5 (15 July 1994), p. 3.

[76] UNEP/OzL.Pro.7/6 (25 September 1995), p. 4.

[77] UNEP/OzL.Pro/ExCom/18/75 (24 November 1995), pp. 4–7.

[78] For example, see note [54] and main text *supra*.

[79] See notes [14] and [15] and accompanying main text *supra*.

[80] Notably, Russia referred to the list when complaining about the trade sanctions imposed against exports of Russian-produced ODS. It argued that the milder measures

on the list – such as financial assistance and the issuance of cautions – should be employed before harsher measures (i.e., sanctions) are effected. UNEP/OzL.Pro.7/12 (27 December 1995), p. 53. For the full context, see the next section on the BBPRU submissions.

[81] Victor, D.G., 1995, The Montreal Protocol's Non-Compliance Procedure: Lessons for making other international environmental regimes more effective, in Winfried Lang, ed., *The Ozone Treaties and Their Influence on the Building of Environmental Regimes*, proceedings of a workshop held in conjunction with the Seventh Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer, 4 December, at Vienna, Austria.

[82] Sand, P.H., 1995, The potential impact of the Global Environmental Facility of the World Bank, UNDP and UNEP, *Enforcing Environmental Standards: Economic Mechanisms as Viable Means?* Symposium at Heidelberg, Germany, 5–7 July.

[83] For example see notes [35] and [67].

[84] Article 18.

[85] See Széll, *op. cit.*, note [6], p. 107.

[86] The request, in the form of a statement by Russia on behalf of all five of the BBPRU countries as well as three countries that intend to become Parties to the Protocol (Armenia, Georgia, and Kyrgyzstan), is reproduced in Annex II of the report of the eleventh meeting of the Implementation Committee, UNEP/OzL.Pro/ImpCom/11/1 (14 September 1995), pp. 13 and 14.

[87] The formal basis for this determination is the declaration by Russia, on behalf of the five Parties, that they were unable to meet their obligations under the Protocol. Later, that declaration and a similar letter to the Executive Director of UNEP were formally defined as "submissions."

[88] TEAP Ad-Hoc Working Group on CEIT Aspects, Assessment of Basic Problems Confronting Countries with Economies in Transition in Complying with the Montreal Protocol, United Nations Environmental Programme, Nairobi, Kenya.

[89] The final decisions are reported as Decisions VII/15–VII/19 (Poland, Bulgaria, Belarus, Russia, and Ukraine, respectively), UNEP/OzL.Pro.7/12 (27 December 1995), pp. 31–36, pp. 51–54. For the Implementation Committee proposals, see UNEP/OzL.Pro.7/9/Rev.1 draft decisions circulated at the Meeting of the Parties.

[90] Decision VII/17 (paragraph 7), Decision VII/18 (paragraph 9), and Decision VII/19 (paragraph 7), UNEP/OzL.Pro.7/12 (27 December 1995), pp. 32–36.

[91] UNEP/ImpCom/12/3 (1 December 1995), pp. 5–6.

[92] UNEP/OzL.Pro.7/12 (27 December 1995), pp. 52–54.

[93] "Substantive matters" excludes all portions of the report concerned with rules of procedure, officers, reorganization of the Committee, and formalities in opening and closing the meeting.

[94] The large number of lines in this category in the eighth Committee Report reflects a lengthy (general) debate about how to classify and reclassify developing countries, what to do if countries want to adjust data they have already reported, and some questions related to financial assistance, which depends upon whether a country is classified as "developing."

[95] Usually only a few lines of each report are devoted to general discussions, such as the typical observation that many Parties have exceeded their obligations to control ODS. The large number of lines devoted to general discussions in the fourth meeting was an anomaly and reflected general presentations by the MLF and implementing agencies that focused on projects to phase out controlled substances in developing countries rather than data collecting; presentations they have made to the Committee since then have focused more sharply on data collection, which has been the main interest of the Committee and the only area where developing countries have immediate obligations under the Protocol.

[96] Hugo M. Schally, interview with author, Vienna, Austria, June 1995.

[97] Széll, *op. cit.*, note [6], p. 107.

[98] Schally, *op. cit.*, note [7], p. 90.

[99] Széll, *op. cit.*, note [6], p. 45.

[100] Koskenniemi, *op. cit.*, note [7].

Appendix I
Terms of Reference for the Non-Compliance Procedure

(As developed by the ad hoc Working Group of Legal Experts, adopted on an interim basis at the second Meeting of the Parties, subsequently elaborated and adjusted, and adopted in its current form at the fourth Meeting of the Parties.)

From: Ozone Secretariat, *Handbook for the Montreal Protocol on Substances that Deplete the Ozone Layer*, third edition, United Nations Environmental Programme, Nairobi, Kenya.

Non-Compliance Procedure

The following procedure has been formulated pursuant to Article 8 of the Montreal Protocol. It shall apply without prejudice to the operation of the settlement of disputes procedure laid down in Article 11 of the Vienna Convention.

1. If one or more Parties have reservations regarding another Party's implementation of its obligations under the Protocol, those concerns may be addressed in writing to the Secretariat. Such a submission shall be supported by corroborating information.
2. The Secretariat shall, within two weeks of its receiving a submission, send a copy of that submission to the Party whose implementation of a particular provision of the Protocol is at issue. Any reply and information in support thereof are to be submitted to the Secretariat and to the Parties involved within three months of the date of the despatch or such longer period as the circumstances of any particular case may require. The Secretariat shall then transmit the submission, the reply and the information provided by the Parties to the Implementation Committee referred to in paragraph 5, which shall consider the matter as soon as practicable.
3. Where the Secretariat, during the course of preparing its report, becomes aware of possible non-compliance by any Party with its obligations under the Protocol, it may request the Party concerned to furnish necessary information about the matter. If there is no response from the Party concerned within three months or such longer period as the circumstances of the matter may require or the matter is not resolved through administrative action or th[r]ough

diplomatic contacts, the Secretariat shall include the matter in its report to the Meeting of the Parties pursuant to Article 12 (c) of the Protocol and inform the Implementation Committee accordingly.

4. Where a Party concludes that, despite having made its best, bona fide efforts, it is unable to comply fully with its obligations under the Protocol, it may address to the Secretariat a submission in writing, explaining, in particular, the specific circumstances that it considers to be the cause of its non-compliance. The Secretariat shall transmit such submission to the [I]mplementation Committee which shall consider it as soon as practicable.
5. An Implementation Committee is hereby established. It shall consist of 10 Parties elected by the [M]eeting of the Parties for two years, based on equitable geographical distribution. Outgoing Parties may be re-elected for one immediate consecutive term. The Committee shall elect its own President and Vice-President. Each shall serve for one year at a time. The Vice-President shall, in addition, serve as the rapporteur of the Committee.
6. The Implementation Committee shall, unless it decides otherwise, meet twice a year. The Secretariat shall arrange for and service its meetings.
7. The functions of the Implementation Committee shall be:
   (a) To receive, consider and report on any submission in accordance with paragraphs 1, 2 and 4;
   (b) To receive, consider and report on any information or observations forwarded by the Secretariat in connection with the preparation of the reports referred to in Article 12 (c) of the Protocol and on any other information received and forwarded by the Secretariat concerning compliance with the provisions of the Protocol;
   (c) To request, where it considers necessary, through the Secretariat, further information on matters under its consideration;
   (d) To undertake, upon the invitation of the Party concerned, information-gathering in the territory of that Party for fulfilling the functions of the Committee;
   (e) To maintain, in particular for the purposes of drawing up its recommendations, an exchange of information with the Executive Committee of the Multilateral Fund related to the provision of financial and technical cooperation, including the transfer of technologies to Parties operating under Article 5, paragraph 1, of the Protocol.
8. The Implementation Committee shall consider the submissions, information and observations referred to in paragraph 7 with a view to securing an amicable solution of the matter on the basis of respect for the provisions of the Protocol.

9. The Implementation Committee shall report to the Meeting of the Parties, including any recommendations it considers appropriate. The report shall be made available to the Parties not later than six weeks before their meeting. After receiving a report by the Committee the Parties may, taking into consideration the circumstances of the matter, decide upon and call for steps to bring about full compliance with the Protocol, including measures to assist the Parties' compliance with the Protocol, and to further the Protocol's objectives.
10. Where a Party that is not a member of the Implementation Committee is identified in a submission under paragraph 1, or itself makes such a submission, it shall be entitled to participate in the consideration by the Committee of that submission.
11. No Party, whether or not a member of the Implementation Committee, involved in a matter under consideration by the Implementation Committee, shall take part in the elaboration and adoption of recommendations on that matter to be included in the report of the Committee.
12. The Parties involved in a matter referred to in paragraphs 1, 3 or 4 shall inform, through the Secretariat, the Meeting of the Parties of the results of proceedings taken under Article 11 of the Convention regarding possible non-compliance, about implementation of those results and about implementation of any decision of the Parties pursuant to paragraph 9.
13. The Meeting of the Parties may, pending completion of proceedings initiated under Article 11 of the Convention, issue an interim call and/or recommendations.
14. The Meeting of the Parties may request the Implementation Committee to make recommendations to assist the Meeting's consideration of matters of possible non-compliance.
15. The members of the Implementation Committee and any Party involved in its deliberations shall protect the confidentiality of information they receive in confidence.
16. The report, which shall not contain any information received in confidence, shall be made available to any person upon request. All information exchanged by or with the Committee that is related to any recommendation by the Committee to the Meeting of the Parties shall be made available by the Secretariat to any Party upon its request; that Party shall ensure the confidentiality of the information it has received in confidence.

Indicative List of Measures That Might Be Taken by a Meeting of the Parties in Respect of Non-Compliance with the Protocol

A. Appropriate assistance, including assistance for the collection and reporting of data, technical assistance, technology transfer and financial assistance, information transfer and training.

B. Issuing cautions.

C. Suspension, in accordance with the applicable rules of international law concerning the suspension of the operation of a treaty, of specific rights and privileges under the Protocol, whether or not subject to time limits, including those concerned with industrial rationalization, production, consumption, trade, transfer of technology, financial mechanism and institutional arrangements.

Appendix II
Tabulated Data on the Substantive Work of the Implementation Committee

Table A.1. Substantive work of the Montreal Protocol Implementation Committee (lines of meeting reports devoted to general and specific topics).

Meeting of the Impl. Committee (date of meeting)		General, data[a,b]	General, non-data[a,c]	Specific, data[b,d]	Specific, non-data[c,d]	Ad hoc procedure[e]	Total
1	(12/90)	45	0	4	0	—	49
2	(12/91)	27	0	0	0	—	27
3	(4/92)	110	10	23	10	—	153
4	(9/92)	133	69	9	0	—	211
5	(3/93)	68	0	17	0	—	85
6	(8/93)	137	3	28	0	—	168
7	(11/93)	44	0	101	34	—	179
8	(7/94)	461	10	53	69	—	593
9	(10/94)	135	0	94	71	—	300
10 & 11	(8/95)	107	36	150	358	317	651
12	(12/95)	54	13	34	318	283	419

[a] General= Matters related to noncompliance of a general nature, including general debates and discussions not focused on, or motivated by, concerns about a particular country.

[b] Data = Concerning the reporting and availability of data as required under the Montreal Protocol and subsequent revisions, including discussions about how to handle the substantive obligations of countries that have not fully reported their data, whether to tie assistance under the MLF to the full reporting of data, etc.

[c] Non-data = Matters related to noncompliance that are not primarily the reporting of data; in practice, these are concerns and observations that are related to the central obligations of the treaty and its amendments, i.e., the control of ODS.

[d] Specific = Matters related to noncompliance that are focused on, or motivated by, concerns about a particular country.

[e] Figure indicates the number of lines devoted to the BBPRU submissions handled under the ad hoc procedure (also coded as "specific," mostly "non-data").

[f] Meeting no. 4 marks the first participation of the MLF and implementing agencies; their reports at that meeting account for 133 lines.

[g] Meeting no. 7 tabulations have been increased by 25% to account for a different (smaller) font.

[i] Meeting nos. 10 and 11 are tabulated together; they considered the same agenda and occurred within a few days of one another.