Design Options for Article 13 of the Framework Convention on Climate Change: Lessons from the GATT Dispute Panel System

David G. Victor

ER-95-1
November 1995

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

INTERNATIONAL INSTITUTE FOR APPLIED SYSTEMS ANALYSIS
2361 LAXENBURG, AUSTRIA

International Standard Book Number 3-7045-0126-3

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 Martin Schobel.

Printed by St. Gabriel, Mödling, Austria.

Contents

Foreword

Hundreds or even thousands of international legal instruments on "the environment" are legally in force. What happens to international environmental agreements once they are signed? 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). Research teams are examining these questions from many angles using many methods.

Researchers working in the IEC Project are applying the lessons learned from their work to current policy questions. In this paper, David G. Victor brings the results of earlier research to the issue of design options for the Multilateral Consultative Process of the Framework Convention on Climate Change. The Process could allow "questions" about the implementation of the Convention to be raised and discussed in a systematic fashion. By offering a venue for addressing implementation issues, the Process could contribute to the Convention's overall effectiveness. It could help to improve the extent to which the Parties actually implement their international commitments to manage climate change, which has already proved to be a problem during the Convention's short history. Moreover, the Process could help the content of future commitments that are negotiated under the Convention to stay connected with the reality of what states can implement.

In March 1995 a meeting of the Conference of the Parties to the Climate Convention was held. As a next step, a group of legal and technical experts will be convened to design the Multilateral Consultative Process. This paper is a contribution to the debate that will ensue on how to make the Process most effective.

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

Acknowledgments

The author is grateful to Jo Elizabeth Butler, Abram Chayes, Cesare Romano, and Eugene Skolnikoff for related discussions and comments. An anonymous reviewer with a legal background provided particularly helpful comments on possible distinctions between consultation and dispute resolution. Ellen Bergschneider and Cara Morris provided invaluable assistance during final editing.

1
Background and Summary

Article 13 of the Framework Convention on Climate Change (FCCC) (UN, 1992) permits the establishment of a Multilateral Consultative Process for the resolution of questions regarding implementation of the Convention (see box on page 4). The processes for resolving the disputes, challenges, and complications that will arise during and from implementation of the Convention have been addressed throughout the Convention's negotiations, but agreement on the need for, and the exact form of, a Multilateral Consultative Process has been elusive.[1] Implementation remains a serious challenge to the overall effectiveness of the Convention (Victor and Salt, 1994): although the Convention has initiated broad and in-depth reviews of national implementation (Interim Secretariat, 1994b), there is still a need for a system that can respond to particular questions about implementation.

This essay examines possible elements of an Article 13 Process and suggests answers to important design questions that will arise during its creation and maintenance. It traces the consequences of different design choices for the operation of the Process – for example, the role "standing" rules play in shaping participation in the Process, and the roles expert support staff and decision-making timetables play in improving its effectiveness. The essay also examines potential relationships between a possible Article 13 Process and the other procedures and bodies established under the Convention. The intended audience is primarily the legal and technical experts who will be responsible for suggesting the initial design of the Article 13 Process, as well as a wider group of scholars and practitioners who are generally interested in the options for designing effective international procedures for reviewing implementation of the Convention.

Other participants in the design of the Article 13 Process have drawn on the experience of the nascent implementation committees of the Montreal Protocol on Substances That Deplete the Ozone Layer and the 1994 sulfur protocol to the Geneva Convention on Long-range Transboundary Air Pollution. Additional models include the supervision by the International Labour Organisation (ILO), implementation review mechanisms in human rights conventions, and the dispute

resolution procedures within the United Nations Convention on the Law of the Sea (UNCLOS) and the General Agreement on Tariffs and Trade (GATT) (Interim Secretariat, 1995b).

Of these many models only one, the Montreal Protocol Implementation Committee, has been analyzed by independent researchers for the lessons it offers for the design of Article 13 (Werksman, 1995; Victor, 1995; Greene and Salt, 1994). This paper complements other contributions by drawing heavily on the experience of the Dispute Panel system of the GATT. The aim is to ensure that the benefits of panel-oriented systems are considered when the details of Article 13 are debated. In contrast to noncompliance procedures in the ozone and sulfur protocols, the GATT Dispute Panel system has been used extensively. The history of this system is also marked by experimentation with a variety of alternative designs that help illuminate choices and tradeoffs that are also relevant for the design of the Article 13 Process. The GATT Dispute Panel system is bilateral and dispute oriented; thus, some of the lessons have been tailored to the multilateral and less adversarial nature of Article 13. The design explored here is a panel system for handling questions that is embedded within a multilateral framework which provides overall guidance. The key contribution of this model, and of its application here to Article 13, is that it underscores the benefits of focused debate and interpretation that derive from a slightly more adversarial system of raising and resolving questions. This is in contrast to the purely non-adversarial systems proposed for Article 13 (e.g., Government of Canada, 1995). The idea of a panel system for resolving specific questions was one of the leading models considered during the negotiations that led to what is now Article 13 (see especially INC, 1991).

The panel system, including some features of adversarial dispute resolution, is used as a central model for this analysis because the dispute resolution procedures in international environmental agreements are never used (Birnie and Boyle, 1992). Consequently, the benefits of raising, interpreting, and disposing of disputes are never realized. Giving the Article 13 Process some of the most useful features of a dispute resolution procedure could help to ensure that those important functions are performed on a regular basis. Because the Article 13 Process would remain less adversarial than formal dispute resolution, the Parties might actually make use of a such a Process and in doing so fill an important gap in international environmental management. Nonetheless, Article 13 would formally remain a procedure in the middle of a continuum – with the normal process of self-reporting (Articles 4 and 12) and review (Articles 4 and 10) at one end and the Convention's system of formal dispute resolution (Article 14) at the other (Interim Secretariat, 1994a).

The specific policy advice offered here is that a panel system designed to handle specific questions of noncompliance or other implementation-related disputes should be established within the Article 13 Process. It seems likely that the core of the Process will consist of a standing committee, perhaps modeled on the 10-member Implementation Committee that manages the Montreal Protocol's noncompliance procedure. However, the power to convene smaller, case-specific panels to handle issues that arise in specific cases would be enormously beneficial. This paper shows how that panel system might be designed. A good design for the Convention's Article 13 Process could serve as a foundation for handling noncompliance throughout the climate treaty system far into the future, even if the initial scope and influence of Article 13 are modest. Future protocols to the Convention might only need to make minor adjustments to that foundation. For example, Parties to a protocol might adopt the Convention's Article 13 Process, but with more stringent procedures and timetables for panel deliberations in an effort to ensure high levels of compliance with the protocol. This has been done for the last two decades under different aspects of GATT law.

A further point of policy advice is that countries that want the Article 13 Process to evolve into a robust system should take an active role in shaping the early cases that are supplied to the Process and handled by the Article 13 panels. The experience with the GATT suggests that the procedures for handling allegations of noncompliance can suffer enormously if they are forced to handle highly politicized cases, especially during fragile and formative years. Early cases should illustrate the benefits of an Article 13 Process; they should not be so difficult to handle that the Article 13 Process is incapable of effective action.

The International Environmental Commitments Project

As part of its effort to connect current research to issues on the public agenda, the IIASA project on Implementation and Effectiveness of International Environmental Commitments (IEC) is publishing several papers that explore issues related to Article 13. These include a review by Cesare Romano of the supervisory systems in the International Labour Organisation, which is one of the models that may inform the design of the Article 13 Process. The Project will also publish a complete review of the operation and effectiveness of the Montreal Protocol's Implementation Committee (see Victor, 1995), which is the leading model for the Article 13 Process.

Article 13 of the Framework Convention on Climate Change.

"The Conference of the Parties shall, at its first session, consider the establishment of a multilateral consultative process, available to Parties on their request, for the resolution of questions regarding the implementation of the Convention" (UN, 1992).

The first session of the Conference of the Parties (COP) was held in March 1995.

2

Possible Functions and Logic of an Effective Multilateral Consultative Process

Article 13 of the FCCC, also known simply as the Climate Convention, allows the Parties to establish a Multilateral Consultative Process for raising, discussing, and resolving "questions" about implementation of the Convention. A consultative mechanism could have many benefits, including increasing the flow of information, clarifying interpretations, collecting and disseminating expertise on issues related to implementation, building awareness of issues in time for the Parties to take preventive action, and offering a forum for continued negotiation and interpretation of the Convention's commitments.[2]

In addition to these general benefits, a Multilateral Consultative Process with a central role for handling specific implementation questions can lead to a more effective Climate Convention by aiding the performance of two crucial functions. First, by focusing on particular concerns and cases, a Multilateral Consultative Process can render judgments on whether a Party is complying with the agreement. Performing this function leads to more effective agreements in three different ways:

- Where core legal language is ambiguous there is an understandable tendency for the Parties to interpret the agreement in their own interest and to interpret their way out of compliance and implementation problems.

  These ambiguities can be constructive – without them it might be impossible to reach and maintain acceptable agreements, and in cases where underlying science and politics are uncertain and variable the agreement must embody some flexibility for interpretation. However, a legitimate interpretative process can set helpful limits on the diversity of interpretations. In areas such as reporting on emissions inventories and on policies and measures, where adherence to a single standard is necessary for allowing comparisons

between countries, a means of identifying a central interpretation is crucial for maintaining standards.

- If the Process functions properly, problem cases can be considered and disposed of before they impede progress in other aspects of the regime. Without such a process, these problem cases ultimately may be resolved through ad hoc negotiations, but a legitimate process would facilitate their resolution.
- If the Process operates somewhat smoothly, it will demonstrate that implementation problems can be identified, raised, and resolved. If the Parties implement the Convention in good faith, this Process will help build confidence in the agreement. Confidence that the commitments and spirit of the Convention are being taken seriously is the most important condition for the Parties' being willing to negotiate and implement tougher obligations.[3]

Second, the process of rendering judgments about critical cases can help shape the agreement over time, which will lead to more effective agreements for three reasons:

- It is clear that the state representatives of few, if any, of the current Annex I Parties (or any other Parties) really understand the detailed constellation of domestic interests that will affect the types of climate policies that can be implemented. This is normal during the early stages of building a regime about a complex problem. However, those Parties will learn about interests over time, and the learning process will be aided by the existence of an international forum at which the Party is accountable for the policies it is attempting to implement. This forum can also help to make clear which policies work, which fail, and why. Thus the forum helps to connect real policies and interests to the overall obligations of the regime in a systematic way. It forces the regime to become starkly aware of the real consequences, difficulties, and opportunities of implementation.
- Resolution of critical cases over time could yield a body of "case law" that interprets the Convention; this would give the Convention a mechanism to evolve, within bounds, in response to particular concerns and problems in a manner more efficient than holding repeated formal diplomatic negotiations.
- All cases offer the opportunity to compare the relationship between the interpretation of a particular case and the objective and spirit of the Convention. This helps to make clear which areas need adjustments. Indeed, if the mechanism works properly it will occasionally produce critical cases that offer legitimate public symbols around which stakeholders can mobilize to urge changes in national and international policy. Similarly, critical cases make points of tension within the agreement clear and, if chosen and resolved

properly, help to identify ways that the regime can be adjusted to promote the proper changes in domestic policy. Those cases can be threatening to the stability of the regime unless there is confidence that the regime has some way to review the adequacy of the commitments and objectives over time. An example of a regime-threatening symbol is the growing concern that the free trade system is incompatible with environmental protection – a fear exacerbated by the GATT's salient tuna-dolphin cases.

Both these functions can be performed without a formal procedure such as might be created under Article 13; indeed, there is some evidence that if the formal procedure is inadequate it would be better not to formalize this process. Formality introduces administrative costs, can block progress, and might undermine confidence. However, if the Parties take seriously the idea that the regime should be built to allow flexibility, learning, and evolution over time, then such a formalized process will likely lead to much greater efficiency and learning. International regimes that do not have legitimate procedures are more likely to accumulate problem cases, which in turn may undermine confidence in the regime. Regimes that include formal or informal legitimate procedures for handling implementation problems – notably, the GATT and virtually all legitimate domestic legal systems – do experience helpful adjustment over time, precisely because the process of considering, interpreting, and debating real implementation problems helps to sharpen the real issues at stake.

It is important to note that the operation of an effective Article 13 Process, whether or not it is based on the Dispute Panel system or other design options considered here, could also threaten the Convention's acceptability to major Parties and thus undermine international cooperation. This could make the overall effort to manage climate change less effective. Clarifying areas of ambiguity might unravel fragile and complex deals that were built on the Parties' agreeing to disagree by leaving language constructively vague. The current commitments, especially Article 4.2, may be one such area. Further, an international process that is explicitly intended to make the Parties accountable could encounter serious domestic opposition in some countries, especially those with strong sentiment against international organizations; this problem could be more severe if the international process is formal and visible. This paper begins with the assumption that elaborating an effective Article 13 Process is desirable but notes these potential obstacles and, where appropriate, suggests some areas of compromise to help avoid damaging opposition.

Both these functions are traditionally identified by legal scholars as being the province of dispute resolution, not consultation. Nonetheless, this paper pursues

a design for Article 13 that seeks to fulfill these functions because the traditional modes of dispute resolution are never used in international environmental law (Birnie and Boyle, 1992), and thus these important functions are practically never realized. Given this history, formal dispute resolution procedures will rarely, if ever, be invoked in the climate treaty; given this outlook, it is important to seek other avenues for providing these useful functions.

What is meant by "consultative" in Article 13 is unclear. The Convention's negotiations and working texts and the models the negotiators had in mind support many possible interpretations. One extreme is a purely nonconfrontational system; the other is a system of supervision with fact-finding that approaches a dispute resolution and investigation system. Here a middle view is adopted, with the recognition that the functions of a case-oriented and slightly adversarial system are beneficial but also that they must be created in the context of a system that is primarily intended to be multilateral and consultative. In this spirit, the Article 13 Process is a procedure in the middle of a continuum – with the normal process of self-reporting and review at one end and the Convention's system of formal dispute resolution (Article 14) at the other.

The exploration of design options here is motivated by the need to create a system that performs these two main functions and focuses on questions. The options are built on the premise that a system of panels created to hear particular cases would be efficient and effective. A panel system, although not yet elaborated in the context of Article 13, is one major alternative reflected in the negotiations of Article 13 (see INC, 1991). (The other main alternative is a form of standing committee, akin to the Montreal Protocol Implementation Committee, which is less rigorously oriented toward handling particular cases as they arise.) The idea for a panel system is not fixed, but the basic principle is some form of an ad hoc panel created to handle a question as needed; the issue of exactly how the panels might operate is the topic of this paper. It outlines the possible elements of the Multilateral Consultative Process by approaching the issue from two angles: by examining important design issues in each major function to be performed by an effective Multilateral Consultative Process; and by describing the relationship between an Article 13 Multilateral Consultative Process and other procedures, bodies, and obligations under the Convention.

3

Possible Elements of the Multilateral Consultative Process

This section describes the elements that might be included in the Multilateral Consultative Process by dividing the operation of the Process into two main functions: the supply of valid questions to be considered by the Process and the consideration and resolution of those questions. Important areas where design choices are needed are identified, as are the author's preferences for the best options. Most of the analysis is based on the logic of the Process, but in some locations the analysis draws heavily on the experience of the system of dispute panels under the GATT, as well as the special panel systems established with the GATT Codes negotiated in the 1970s.[4] [The panel system has been adjusted under the agreement establishing the World Trade Organization (WTO), but the GATT experience is used here because it is too early to assess the effectiveness of the new WTO system. In a few places the changes are noted to underscore the lessons that have been learned in the GATT context and their relevance for the design of Article 13.] The GATT experience was an important model for what is now the Multilateral Consultative Process, and for good reason – it is the most elaborate of all systems of international panels.[5]

Lessons from the GATT Dispute Panel system are valuable, but they must be drawn with one central caveat in mind: because the GATT system is organized to handle disputes that arise from alleged violations, its operation is mostly bilateral, and at times it operates in the adversarial mode common in domestic legal systems. Article 13 envisions a more multilateral, participatory, and consultation-oriented process; the issues it would address, at least initially, would be framed as questions rather than alleged violations. Where the lessons from the bilateral system must be modified, the discussion below shows why and what alternative design options might be more consistent with the open, less adversarial, and more multilateral nature of what could become the Article 13 Process.

The Supply of Questions

Under what conditions can questions be raised and submitted to the Process? Designing a proper mechanism requires choices in at least three dimensions:

Who can invoke the Multilateral Consultative Process by raising questions?

This design issue is divisible into two related choices: issues of standing and the balance between adversarial and consultative modes of operation.

First, there is the classic question of who has standing to lodge cases in legal systems. At the domestic level there is enormously diverse experience that suggests that all stakeholders should be allowed access in some form. The optimal style of access depends on the costs of prosecuting cases and the social benefits of different outcomes. Societies that adopt broad measures of what "justice" is tend to give standing to more actors; those with narrower definitions of "justice" tend to grant standing to a more limited number of actors.

At least four categories of actors might be given the right to raise questions: Parties to the Convention; non-Parties who are states; international organizations with competence in the field; and non-state actors (e.g., environmental and industry groups) who act as watchdogs and ombudsmen. It seems unlikely that any groups other than the Parties and bodies comprising Parties (e.g., the subsidiary bodies to the Convention) will be given formal standing to raise questions. In its early years the Multilateral Consultative Process probably will not have the resources to handle the increased number of cases produced by broad access. Further, broad access directly contravenes virtually all of the state-oriented experience in international diplomacy. In practice this is not as restrictive as it seems, because non-state actors will work at the domestic level within sympathetic states to gain access. However, domestic experience does suggest that allowing competent non-state actors to raise questions independently of states could improve the effectiveness of the Process. In that spirit, the Parties should agree to language supporting the early review of access by non-Parties, including non-state actors.

The GATT system is organized to handle bilateral disputes, but it would be more appropriate to allow groups of states to invoke (or be the subject of) a question. Indeed, a group of states may be engaged in similar behavior that merits raising a question. A common problem with a truly global issue like greenhouse warming is that the commitments are owed mutually, by all Parties to all Parties; any individual Party may have little incentive to discover and raise "questions," but collectively it is in the Parties' interest to ensure that these issues

are resolved. Allowing groups to raise questions may reduce these incentives and may also help promote the multilateral spirit of the Article 13 Process. (The same arguments apply to the invoking of disputes, but given the aversion to creating formal disputes, the need to have this provision in the Article 13 Process is even greater. See discussion below on Article 14, which concerns dispute settlement.)

It may be that the commitments by Annex I countries under Article 4.2 to implement "policies and measures" will become the main focus of the Multilateral Consultative Process, especially if these commitments are made more stringent in the future. If so, there could be some pressure to limit access to Annex I countries only. This would probably send the wrong signal, especially if Annex I countries want to eventually broaden the Annex or obligations to other countries, either directly (e.g., through negotiated commitments) or indirectly (e.g., through participation in joint implementation schemes). In short, for both symbolic and substantive reasons, access to the Multilateral Consultative Process should not be determined based on Party obligations, at least not in the early stages of the Convention when the tone and style are being set.

Second, even if standing is limited to the Parties, there may be debate about the balance of adversarial and consultative modes. The Convention's negotiators do not appear to want a strongly adversarial process. This will be a point of tension between a broadly acceptable process and one that is effective, because the dialectic of argument and counterargument is efficient. Constructive adversarial processes are effective insofar as they encourage this dialectic.

Although this is a matter of style in the operation of the Multilateral Consultative Process, in practice this balance directly affects the question of who can invoke the Process that examines a Party's implementation of the Convention. In the consultative spirit there will be strong pressure for a state to be allowed to invoke the Process only for itself. In the adversarial mode, a state would be allowed to invoke the Process to examine whether another state is adhering to the Convention. The latter is preferable because a strictly consultative process offers few incentives for the Party under scrutiny to provide full and accurate information and even fewer incentives for others to challenge or provide alternative information.

The INC/4 (INC, 1991), the INC/5 (part 1) (INC, 1992), and the recently reissued consolidated working text (Interim Secretariat, 1995a) leading to what is now Article 13 all contain language indicating that the Parties might accept a Process that is invoked to consider questions of implementation by any of the following: the Party itself, another Party, or any of the subsidiary bodies of the Convention. This broad language is reasonable and the balance of this essay will

presume, except where noted, that the Multilateral Consultative Process can be invoked by any of these actors.

What is a valid question?

There are procedural and substantive issues involved in determining what questions are valid. The procedural issue is fairly straightforward. Questions would be formally raised by filing a written request to the Multilateral Consultative Process, perhaps via the Secretariat. Procedures are important because the costs of meeting procedural standards affect the supply of cases and thus will shape the outcome of the Multilateral Consultative Process. The specifics of forms, language, certification, etc., are not considered here.

The main substantive issues pertain to the criteria by which the request is judged to be valid. Two questions are central:

- *First, to what degree must the request be relevant*? Probably there are two main options: the request must be only broadly relevant to the Convention and its objective, or the request must pertain to an issue that is directly relevant to the Convention and to its implementation. The latter is preferable because requests, and therefore the whole process that follows, would be closely connected to the substance of implementation of the Convention.[6] However, this is one area where the GATT Dispute Panel system does not directly apply. Because the Article 13 system is for focused consultation, not for the handling of disputes, the standards for valid questions must be relaxed to allow for the full range of useful consultations. Notably, hypothetical questions might be allowed, whereas a dispute resolution system would typically allow only real cases.
- *Second, to what degree must the request be supported by argument and evidence*? Insofar as the Process will either involve Parties with different legal and expert capacities or allow for real exploration of possible implementation problems, there will be some tension between requiring valid requests to contain substantive arguments backed by evidence and allowing requests simply to be made on an exploratory basis. It would be best to adopt language that urges the Parties to submit as much information on the substance of the question as is feasible, thus pushing the Process as far as possible toward the domestic legal model (i.e., toward a model where the resolution of questions is greatly assisted by the Parties' having done their homework in preparing and arguing with evidence and precedent). A fully exploratory Multilateral Consultative Process will lead to a flood of cases and, if they are to be resolved

adequately, an enormous burden on the Process. However, politically it will probably prove impossible to adopt language that includes high standards of evidence and argument because many countries will not be able to meet them. Further, because any individual Party may have little incentive to raise questions, except perhaps when a direct economic competitor is not implementing expensive commitments, the Parties collectively may benefit from having some system for encouraging questions. That may take the form of low standards for evidence and relevance.

Should the Multilateral Consultative Process have any independent means of selecting questions?

Beyond applying standards of standing, access, and relevance (as discussed above), it could prove highly effective for the Multilateral Consultative Process to have a means of avoiding particularly difficult cases (e.g., cases that have become politicized or cases that are impossible to resolve satisfactorily because they require expertise, judgment, and resources that the Multilateral Consultative Process does not have at its disposal). Particularly if it faces limited resources, the Multilateral Consultative Process may want to have the right to select only those cases whose resolution and interpretation would offer broader benefits to the agreement and its Parties, e.g., by setting important precedents or raising important issues.

The author is unaware of any examples in international law where this is formally permitted. This kind of discretion is regularly allowed in domestic legal systems, notably in the appeals process, but the domestic and international settings are obviously different. It seems unlikely that the Parties will formally allow such discretion (although it might evolve tacitly). Presumably it would be argued that discretion would limit access to the Multilateral Consultative Process and thereby undermine confidence. In fact, if discretion were used properly it would increase confidence because thorny cases could be avoided. This is no doubt that all Parties would be nervous about giving any real powers of discretion to this new body. Thus, it is probably best to avoid the issue by not allowing this kind of discretion, but it would be valuable to include language that allows the Parties to revisit this question, which they might choose to do if and when the first really difficult problem cases work through the Multilateral Consultative Process. (If discretion were to be allowed, an additional design issue would be the question of whom to empower with these choices. This should be a small group selected by the Parties who manage the Process.)

In practice, considerable discretion will be used by the Parties in choosing which questions to raise. Indeed, in the GATT Dispute Panel system only a small number of the eligible cases ever make it into the system (and even fewer actually ever result in adoption of a Panel decision). Through informal negotiations the Parties will select and shape the cases that are brought into the Multilateral Consultative Process, and at times they will do this in a manner that helps the effective evolution of the regime. It would be helpful if one or a few powerful Parties were to (informally) agree to help guide the Multilateral Consultative Process in the early years, working to control the cases that enter. (Of course the Parties will also try to limit and shape cases to their own interests, and in doing so the powerful states will try to bully the weak. That cannot be avoided fully – it is the nature of the international system – but a formal procedure such as the one envisioned in Article 13 would probably help to reduce coercion by offering a guaranteed point of ultimate access, open to all Parties.)

The Resolution of Questions

Having considered how questions might find their way into the Multilateral Consultative Process, the paper now considers how those questions might be interpreted, investigated, and resolved within the Process. The possible designs are virtually endless; nine main dimensions are considered here.

Who is allowed to present arguments and provide evidence?

The basic design choice is whether to limit evidence to briefs and arguments provided by Parties. The standard model of international diplomacy gives access primarily to states, but there is special reason to think that in the case of climate change much would be gained by seeking advice and input from other actors, not just state representatives. However, as mentioned earlier, it seems unlikely that there will be broad agreement to give significant roles to non-state actors. Clearly non-state actors – nongovernmental organizations (NGOs) of all types, research groups, etc. – have a lot to offer. The Multilateral Consultative Process would benefit substantially if at least a form of *amicus curiae* briefs were allowed from any interested actor, including non-state actors.

[The issue of access for non-state actors in a formal process will make the general issue of NGO access in the UN system more salient for the Climate Convention. Currently, NGOs have access to the FCCC negotiations on a more or less unstructured basis, but if the Convention envisions giving NGOs roles beyond this fairly simple observer status, it will probably come under pressure

to elaborate procedures for controlling access. This could be a very unpleasant and unproductive debate, and it is probably one best left until long after the UN Commission on Sustainable Development (CSD) and the UN Economic and Social Council (ECOSOC) have completed their investigations and revisions to standards for NGO access.]

A further design issue is whether to allow all Parties to the Convention to present evidence and arguments or to limit access to only those states with a direct interest in the matter – i.e., the state(s) that brought the question into the process and the state whose implementation is being examined. The author prefers not to limit access narrowly for two reasons: cases that establish precedents should be decided on the basis of broad experience and evidence, perhaps including more than the particular state's implementation; all states potentially are stakeholders and thus all have an interest in presenting relevant arguments.

Who makes decisions?

The possibilities here are numerous, and essentially all of them already have been explored at least implicitly in the negotiation of the Convention (INC, 1991). There are at least seven choices:

- *Should the Multilateral Consultative Process have an ultimate decision-making body that consists of all Parties or a limited selection of Parties*? As the COP will provide the ultimate authority this decision need not be made – indeed, it would be difficult, if not impossible, to give ultimate authority to any body other than the COP. However, the COP should designate a subsidiary body or committee, consisting of a balanced selection of Parties, that can make operational decisions. The subsidiary body or committee could be selected or approved by the COP, thus giving further broad oversight and control to the COP. (For further discussion of this committee or body see the discussion of the COP in the next section of this essay.)
- *In any specific case, should decisions be made by a large committee or a smaller panel selected to hear the particular case*? A smaller committee or panel would be able to make decisions more efficiently and on the basis of information particular to the case at hand. However, the answer to this question depends fundamentally on whether the Article 13 Process allows a panel system to play a central role or whether the Process is thoroughly and highly multilateral, in the sense that all significant decisions and debates take place in a forum allowing wide participation. On the logic of a case-oriented system, the author's preference is to vest decisions in a panel convened to hear and weigh evidence and make decisions.

- *Should panel members be selected as needed or should a pool be maintained*? The lessons from the GATT, where the panel process has been applied extensively, strongly suggest that the pool approach helps to streamline the process. The optimal size of the pool is unclear, but perhaps a pool of 5 to 10 times the expected annual demand for panel members is a good size.
- *Should panels consist of state representatives or experts*? Politically it is probably essential to vest ultimate decision-making authority in the states. Following the GATT model, states should be allowed to nominate panel members on the basis of their qualifications. The GATT Dispute Panel system has had reasonable success in keeping the level of expertise and independence of panel members high, so there is hope that this process would not become captive to narrow state interests.
- *How should panels be selected*? The subsidiary body or committee (as proposed above) should select the pool on the basis of state nominations and should select the panels to achieve a balance and avoid direct conflicts of interest.
- *What size should the panels be*? GATT panels consist of three to five panelists, selected by the organization with input from the Parties. In the Climate Convention's Multilateral Consultative Process it may prove politically important to sustain careful and representative balances across geographical regions, and between different levels of economic development and expertise. This could be difficult with small panels, so a number of five to seven may prove to be about right. Language suggesting small but representative committees would be appropriate.
- *What should the rules of decision be*? At least in the early stages, panels should probably decide on a consensus basis. This will reduce the risk of highly contentious decisions emerging from the panel process – even if the panel system is designed properly it will be fragile in the early years, and bad or politically contentious decisions could be very destructive.

Expertise and support staff

The roles of internal expertise and the ability to draw on external advisors as needed are critical design issues that tend to be given inadequate attention. Many other international organizations and procedures have faced similar issues – the World Health Organization, the Food and Agriculture Organization, and the World Meteorological Organization, for example – and the experience with soliciting expertise is not a new problem. There are choices in at least two areas.

First, a choice must be made on the extent to which the Multilateral Consultative Process is supported by in-house expertise or only very limited secretariat functions. Building significant in-house capacity will be politically (and financially) difficult, but it is one of the few options considered in this essay where it would *not* be wise to bend to political pressure. The experience in the GATT strongly suggests that the effectiveness of the dispute resolution procedure depends heavily on the legal and technical expertise that supports the decision-making body. Indeed, where expertise is thin the possibility of making bad or incomplete decisions is very high. The GATT experience also strongly suggests that bad decisions threaten confidence in the regime, undermine the legitimacy of the regime's procedures and the stature of the organization, and impede the ability of procedures such as this Multilateral Consultative Process and dispute resolution processes to assist the proper adjustment of the regime over time.

Second, the relationship with outside experts and with experts elsewhere in the climate regime, such as in the Intergovernmental Panel on Climate Change (IPCC) and in the Subsidiary Body on Scientific and Technological Advice, requires clarification. There is little to say except that language that allows these bodies to be consulted would be important.

Independent freedom of action

It is possible to compensate for limited or incomplete evidence if the decision-making body has powers to seek other evidence or to investigate claims. In practice it seems unlikely that many investigative powers will be granted to the Multilateral Consultative Process, in part because of the fear of intrusiveness and in part because proper investigations demand many resources. However, language might be added to the mandate of the Multilateral Consultative Process that allows the COP to revisit this issue after the initial operation of the Multilateral Consultative Process. Information gained from independent assessments, investigations, interviews, and site visits would be very beneficial.

Products and decisions

The issue of what products and decisions might arise from the Multilateral Consultative Process clearly affects many other design choices, such as the expertise of support staff, timetables for making decisions, and transparency of the Process. Thus only some stylized options are discussed here.

First, the logical output of the Process is a report, but there are few clear answers on the proper levels of detail and argument that such a report should contain. Detailed reports will not be possible if in-house expertise is thin. However, as a minimum, the report should include a reasonably well-documented case for the decision, as well as the decision itself. In practice, especially if this is a co-operative process, the important outcomes will not be "decisions," but rather the information and interpretations, along with recommendations. If the Parties are convinced that this is the proper style then the argument for providing significant in-house expertise is much stronger.

Second, there will be pressure to add hortatory language about an "open and transparent" Process. The experience with other review mechanisms suggests that full transparency may not be desirable, because it will make delicate negotiations and discussions difficult to conduct. However, in an effort to promote learning and participation, any formal investigations and consultations probably should be transparent. The best balance is not clear. If the OECD and GATT review processes are guides, the proper balance may be to make final reports and arguments fully transparent but to enable a wide range of consultations that do not have to meet the strict standards of transparency and openness. These processes will evolve as needed, and thus the only design issue at present is the type of language to be adopted. Language that urges transparency throughout the Process without demanding full transparency and openness of all procedures would be helpful. Of course, if closed negotiations and consultations are not allowed, the parties will find private fora on their own to handle delicate matters.

Issues of confidentiality could be handled exactly as they are currently handled in Article 12.9, pending a decision by the COP on criteria of confidentiality. In practice it would be surprising if confidentiality clauses were to be used often. Some Parties might use confidentiality to restrict information that they do not want released because such information is embarrassing rather than strictly confidential. If so, the COP might reserve the right to reopen these criteria to minimize this problem.

Third, if the Multilateral Consultative Process evolves into a mechanism for making definitive interpretations of the Convention, its decisions will imply a connection to subsequent enforcement actions and incentives. Even if it does not evolve into the definitive interpretive body (that being reserved for the COP), decisions may still be used by states, international organizations, and non-state actors as the basis for sticks and carrots related to the performance of Parties under the Convention. This is true under the GATT and some international agreements to protect wildlife where the USA (and to a lesser degree the EC/EU) has applied unilateral actions to enforce international law.[7] Mindful of this experience, many

states are wary of any process that can be connected to unilateral enforcement. There is little that can be done about this, but perhaps some legal language to discourage unilateral enforcement would help to keep broad-based political support.

Fourth, in view of the above point, the Parties will take the Process more seriously if the COP vests in it a clear mandate to make interpretive decisions. Language supporting this would be helpful.

Fifth, much of the thinking about the Multilateral Consultative Process, and this paper in particular, has used the GATT as a model. The GATT Dispute Panel system offers many helpful examples, but one area where it should not be followed is in the adoption of final reports. Panels issue reports, but these reports are not formally "GATT legal" until they are adopted by the GATT's Council, a process that has required unanimity (i.e., allowing any Party to block adoption). The author's view is that the formal adoption process has added little to the GATT legal system and that the Climate Convention's Multilateral Consultative Process should not require adoption of the reports by the COP or another body. Indeed, if the spirit of the process is learning and consultation – furthered by the dialectic of argument and counterargument – then formal adoption of the final report may not be necessary. The panel report itself may be all that is required. However, not adopting the report may be incompatible with the preceding point.

If formal adoption is desired, perhaps as a way to sustain quality and accuracy of the reports, Parties to the Climate Convention should learn the lesson, now clear in the GATT, that unanimity rules are not helpful. (Because it has proved very difficult in some cases to adopt panel reports, GATT moved slowly away from unanimity rules and the WTO's dispute settlement procedures have abandoned unanimity in adoption of panel reports.) As a minimum, if a unanimity or near-unanimity rule is adopted, Parties with a direct stake in the outcome should not have voting rights for the particular case; however, it could be impossible to gain widespread approval for this type of system. Adoption will be more efficient if it is done, not by the COP, but rather by a smaller subsidiary body or committee of Parties created to manage the Multilateral Consultative Process.

Decision-making timetables

The GATT experience has also produced the lesson, learned much too late, that timetables for action help to keep the process from becoming stalled. The GATT has explored several options, and through the separate dispute resolution procedures established under some of the Tokyo Round codes has actually experimented with timetables. The new WTO panel system will employ very detailed timetables.

It is unclear how many of the lessons apply to the Climate Multilateral Consultative Process, because feasible timetables depend on the substance of the cases. However, it would be a good idea to establish the principle of timetables early in the evolution of the Multilateral Consultative Process. Initially, a two-year timetable – from formal lodging of a request to issuance of a final report – might be reasonable. Within that period, other standards might be set. Notably, a panel might be convened within four to six months of any request, which is feasible if a pool of panelists is created and the steering body for the Multilateral Consultative Process meets on a regular basis.

Language

Allowing some or all reports to be issued in only one language would help streamline the Multilateral Consultative Process and could markedly reduce administrative costs. If possible, sessions of the panels should by agreement be conducted in a single language. A precedent exists in the Montreal Protocol's Implementation Committee, whose deliberations are restricted to one language (English) while its formal report of each session is translated into all UN languages (see Victor, 1995).

Appeals

As suggested above, the COP retains final authority regarding the interpretation of the Convention, and thus matters of interpretation of implementation questions in reality are ultimately referred to the COP. Thus the COP is the logical place for appeals. A more elaborate appeals process is not necessary at the early stages. In practice, the COP will probably be an unwieldy mechanism for appeals, but legal language that underscores the COP's final authority might still be useful.

Funding

The system envisioned here could be expensive by normal standards of environmental secretariats, but an adequate level of expertise and in-house support is crucial to the proper operation of the Multilateral Consultative Process. The exact funding needs will vary according to the use of the Process; ultimately, however, a professional staff on the scale of the current Interim Secretariat may be required if these procedures are combined with other critical review functions that are required under the Convention. (For more on the relationship between the Multilateral Consultative Process and the review procedures, see the next section.)

The increasingly common answer to funding needs is the creation of a trust fund. Trust funds should be avoided here because they typically are dependent on a small number of enthusiastic donors and thus are not real multilateral endeavors. Moreover, trust funds are voluntary and thus the Multilateral Consultative Process, especially in its formative years, will face the real stresses and pressures of uneven funding that now seriously challenge environmental secretariats. Finally, there is a direct conflict of interest between Parties' roles as donors and as participants (especially defendants) in the process. The options for a mandatory fund are numerous. Probably the best system is a simple one that divides a bounded cost (agreed on and adjusted by the COP, based on the experience and needs of the Multilateral Consultative Process) among the Annex I Parties in proportion to their emissions (perhaps only emissions of fossil fuel carbon dioxide due to the difficulties in quantifying and comparing the other emissions). This would send an elegant message that the burden of improving the effectiveness of implementation is being borne directly by the industrialized countries in direct proportion to their contribution to the greenhouse problem.

4

Relationship to Other Aspects, Procedures, and Bodies under the Convention

Some observations from the previous section are now revisited and extended from a different angle, with the purpose of describing in detail the possible relationships between an Article 13 Multilateral Consultative Process and other major features of the Convention. In particular, eight broad relationships are considered, noted below with reference to the relevant Articles.

Articles 2, 4, 15, 16, and 17 and Annexes: Objectives and commitments of the Convention and its protocols

The Multilateral Consultative Process can judge questions of implementation only insofar as there are commitments to implement. By design the Multilateral Consultative Process will have a close relationship to the commitments because it will serve as interpreter and, over time, will highlight areas where the commitments might be adjusted. However, a formal relationship is probably not necessary, beyond the COP ideally giving a clear mandate to the Multilateral Consultative Process as interpreter of the Convention. (Indeed, it might be unwise to provide any formal linkage between the Multilateral Consultative Process and, e.g., the review of the adequacy of the commitments required in article 4.2.d, because that could needlessly politicize the Multilateral Consultative Process.) The language adopted should underscore that the Multilateral Consultative Process applies to commitments under the Convention *and* its amendments, annexes, and protocols (as described in Articles 16 and 17).

Even if the Multilateral Consultative Process operates smoothly it will be unable to resolve or significantly advance the sensitive debates over adequacy of commitments and the balance of commitments and authority between groups of Parties. The Multilateral Consultative Process should be designed to interpret, not act as a surrogate (or siphon) to, the core political debates. In practice, this

may actually require that the stewards of the Multilateral Consultative Process use some discretion to avoid particularly tough cases and, in doing so, actually reduce the linkage between the Multilateral Consultative Process and the commitments of the Convention. This will be a point of continued tension in the system. The GATT/WTO appears headed for a dispute resolution mechanism that is narrowly interpretive and makes fewer efforts to establish broader precedents and a body of "case law." This may be a good way for the Multilateral Consultative Process to start.

If more detailed obligations are elaborated in protocols, the Parties to those protocols may want to consider creating additional review and assessment procedures such as this one, for example with greater enforcement powers, stricter timetables, limited standing, stricter standards of relevance, and perhaps more definitive interpretive powers. The GATT has done this with the Codes (separate agreements adopted by some GATT members as part of the Tokyo Round package), with some success. Separate procedures could prove important if the Convention's Process does not get under way properly or proves ineffective. In practice, the only need right now is to avoid adopting legal language that is too restrictive – i.e., language that implies that the Multilateral Consultative Process is the one and only mechanism for considering implementation problems. New protocols could be well served if the Convention's Article 13 Process develops promptly and provides a readily available, operable outlet for handling problems of noncompliance. Strong and transparent incentives will exist to violate emissions controls, particularly if a system of joint implementation evolves after the pilot phase (which extends to 2000) to include credits, and these incentives will become stronger as emissions controls are tightened. This is when a properly functioning Article 13 Process could be most valuable, especially if reluctance to raise formal disputes persists and thus tensions due to noncompliance have no legitimate outlet.

The commitment in Article 4.3 to provide financial resources to comply with, *inter alia*, paragraph 1 of Article 4 might be interpreted as a commitment to provide resources for the full and effective participation of developing countries in the Multilateral Consultative Process. The text does not literally support this interpretation, but it would be a reasonable request. The COP, as ultimate authority, might have to adopt additional language enabling this commitment to the use of financial resources under the Convention. The author does not know how this potential use of resources fits with other activities of the Global Environmental Facility (GEF) (aside from its role as the interim Financial Mechanism) or of other bodies, such as the UN Institute for Training and Research (UNITAR). However, a large amount of attention is now given to capacity-building issues, and support

for participation in the Multilateral Consultative Process probably qualifies under that broad heading.

Article 7: Conference of the Parties

The COP is the supreme body of the Convention, so all matters in the Multilateral Consultative Process are ultimately referred to the COP. As the governing body, the COP's most important roles should be to provide broad direction and to select or approve a representative committee of perhaps 15 to 20 members to serve as a subsidiary body to manage the Multilateral Consultative Process. (The COP has clear authority in Article 7.2.i to convene such an additional subsidiary body, and the relevance of such a subsidiary body is echoed in the broad language and authority given to the COP in Article 13.) That committee or subsidiary body would then handle issues of panel selection, detailed revisions to the criteria and procedures of the Multilateral Consultative Process as needed and appropriate, and perhaps also formal adoption of panel reports.

As mentioned above, it could prove very helpful, especially in the early years of the Multilateral Consultative Process, for the COP to give a clear mandate to the Process to interpret questions regarding implementation; doing so would require that the COP cede some of its operational control and authority to the Multilateral Consultative Process.

Article 12: Communication of Information Related to Implementation

The Multilateral Consultative Process will operate only insofar as there is information with which to learn about and judge implementation problems. Thus, proper operation of the system of national communications is important. However, the Multilateral Consultative Process should not limit itself to information provided by national communications. Some independent capacity to gather facts could be useful, but the degree to which such independence is granted will depend on where in the balance between consultative and adversarial modes the Article 13 Process is situated.

Article 9: Subsidiary Body for Scientific and Technological Advice (SBSTA)

The Multilateral Consultative Process should be allowed to make requests to the SBSTA. However, it is too early to assess whether the SBSTA will be effective or able to respond to requests in a timely manner, and the Multilateral Consultative Process might be seriously damaged if it is highly dependent on a single body for

important scientific and technological advice. Thus the Multilateral Consultative Process should not be limited or even channelled to the SBSTA as the sole or primary source of scientific and technological advice. In principle, the SBSTA may independently highlight implementation questions for action by the Multilateral Consultative Process.

Article 10: Subsidiary Body for Implementation (SBI)

Logically there should be a close relationship between the SBI and the Multilateral Consultative Process, because both consider similar issues and draw on similar bases of information, and both need in-house expertise that can be shared to some degree. In practice it is difficult to make any detailed observations or recommendations on linkages because the criteria for the SBI's operation are still under review. However, three points of reflection may help clarify the design issues at stake:

- It would be logical to share personnel, and indeed if a system of independent funding for the Multilateral Consultative Process is approved this could be a way to help ensure that some in-house expertise is available and can be used in other areas of the Convention.
- If the SBI functions properly it will discover questions that should be referred to the Multilateral Consultative Process, and thus it is probably crucial that the subsidiary bodies, the SBI in particular, be given standing to raise questions. Formally, the SBI would probably raise a question for the Multilateral Consultative Process by agreeing (i.e., voting) to make a formal request to the Multilateral Consultative Process. Thus the parties serving on the SBI would retain control of the Body's standing, which should allay any Parties' concerns about granting independent standing to the subsidiary bodies.
- The Conference of the Parties (Article 7) formally oversees the assessment of implementation of the Convention and the adequacy of the commitments and implementation. However, in practice much of the process of reviewing the national communications seems logically suited to being conducted within the SBI. As with the preceding point, this review process could discover questions. Indeed, if the review process functions properly, it should discover such questions, and that process of discovery and consideration of questions by the Article 13 Process could make the review process much more effective by giving a venue for considering issues that arise during reviews.

  However, serious reviews of policies and measures require extensive resources, expertise, and political support in the early formative years; it will

be difficult to make the reviews of underlying assumptions, policy forecasts, assessments of the efficacy of potential policy measures, etc., in a way that is really helpful to the Parties and the Convention itself. Virtually no evidence exists of such review processes working effectively in other international environmental agreements, in part because resources are not systematically made available for conducting serious reviews. However, review mechanisms in OECD, the International Monetary Fund (IMF) and, to a lesser degree, GATT all underscore that the review mechanism can improve the effectiveness of the regime, but doing so requires proper staffing and expertise.

The architects of Article 13 may decide that the normal process of reviewing and comparing the national communications could supply questions to the Article 13 Process. Such questions could help the Convention stay connected to the reality of what the Parties are actually implementing. If so, perhaps the most important issue facing the Convention – far more important than negotiating the formal and binding targets and timetables or protocols – is getting the review process firmly established. The efforts to build the Article 13 Process and the system of communications and review are synergistic: each could give the other needed legitimacy and support in their fragile formative stages.

Article 14: Settlement of Disputes

What is described here for an Article 13 Multilateral Consultative Process has many features of a dispute resolution procedure because the main model used is the GATT Dispute Panel system, which operates as an adjudicatory mechanism invoked by disputes. Thus the presence of a separate Article in the Convention on dispute resolution, including mention of a special conciliation commission that could make decisions for disputing parties to consider, would suggest that either the functions of the Multilateral Consultative Process envisioned here should be conducted under Article 14 or that there should at least be a close relationship between the two Articles. If the Parties adopt this view, the presence of Article 14 could be a serious obstacle, because the Article actually says very little about how to resolve disputes and it offers few areas of flexibility to allow operation of a more robust mechanism, such as that proposed here for Article 13. Thus it may be best to underscore that the pursuit of a question under Article 13 is done without prejudice to any action under Article 14 – i.e., the procedures are separate, and one does not lead to another.

Nonetheless, Article 13 should be viewed in a continuum, with Article 14's dispute resolution procedures at one extreme should a question become a dispute

or should a question somehow be determined to be more appropriately classified as a dispute (Interim Secretariat, 1994a). In practice, the use of dispute resolution will probably be rare – states and diplomats are reluctant to create formal disputes, and for problems such as global warming where the obligations and consequences are diffused across many Parties, the incentives for any one Party to lodge a dispute may be small. Because the Parties may be more willing to raise a question than a formal dispute, the Article 13 Process may in practice perform many of the functions of resolving adversarial situations that lawyers typically assume are the province of dispute resolution mechanisms, without having the drawback of being rarely used.

Other analysts will draw a stronger distinction between Articles 13 and 14 and move the more adversarial functions described in this paper from Article 13 to Article 14. This is a crucial design question; the model of the GATT Dispute Panel system suggests that some of the adversarial functions, as described here, could be usefully maintained in Article 13. This may further reduce the use of formal dispute resolution procedures, and will further illustrate the difficulty of drawing the line between a dispute and other, less adversarial concepts (such as questions).

Article 8: Secretariat

The Multilateral Consultative Process envisioned here requires extensive internal expertise, and it would be logical to share that expertise with staff required for the operation of the review mechanism and other functions of Convention. All of this suggests that these staff should be located broadly within the Secretariat of the Convention, at the same physical location, with opportunities to communicate with other Secretariat members. However, the portion of this broad organization that is formally considered the Secretariat should be limited to those officers who perform the functions listed in Article 8. If the Multilateral Consultative Process and other bodies and staff of the Convention that handle controversial issues become politically sensitive, it will be very important to have them formally separated from the core Secretariat functions, which require the Secretariat to avoid controversy.

Article 11: Financial Mechanism

As with the subsidiary bodies, the details of the financial mechanism are still under consideration, and thus the best relationship between the mechanism and the Multilateral Consultative Process is unclear. However, it would be logical to at

least include language that the Multilateral Consultative Process should provide advice and information to the financial mechanism, subject to review by the mechanism and the COP. It may be important for three types of information to pass between the financial mechanism and the Multilateral Consultative Process. First, some questions about implementation will pertain to the provision of financial and other resources by Parties, and thus the Multilateral Consultative Process will need advice from the financial mechanism in order to interpret the obligations of the donor countries and their performance. Second, some questions about implementation will pertain to the use of financial resources distributed by the mechanism. Third, some questions will result in decisions by the Multilateral Consultative Process that involve additional or redirected financial resources, suggesting that the Multilateral Consultative Process would advise the financial mechanism to act on the decision. All three of these are sensible and might be mentioned as linkages, but the actual linkages will depend for the most part on the details still under negotiation.

5
Conclusions

This paper concerns the design of the Multilateral Consultative Process envisaged in Article 13 of the FCCC. What was intended by "consultative" is unclear; at least one major view during the negotiations that led to the current Article 13 is that a system of panels could be created for hearing and reviewing particular questions. The central model for those panels appears to have been the GATT Dispute Panel system, which illustrates the benefits of focused and somewhat adversarial discussion about a particular case. Therefore it is relevant to use the GATT model in thinking through possible designs for Article 13. This paper, which does precisely this, is intended to complement other research that has used different models, notably the Montreal Protocol Implementation Committee, which many scholars and practitioners have in mind as the foremost alternative to a panel-oriented system such as suggested by the GATT experience.

The GATT experience must be used cautiously: whereas it is organized around bilateral disputes, the Article 13 system is more explicitly multilateral and many advocate that it should also be non-adversarial. The design presented here is a panel system that balances these two visions and retains some adversarial elements but adopts more lenient standards for the types of questions that can enter the Process and the degree of multilateralism that should prevail in debating and deciding the questions. It is a system that is more confrontational than is usual for a "consultative" process, but it is entirely consistent with some visions presented during the negotiations. In part, the promotion of a panel-oriented system is intended to rectify a failure of much international environmental law: dispute resolution procedures are rarely invoked, and thus potential disputes (which can be helpful if aired and which at minimum should be resolved) are rarely given a proper hearing. By adopting some of the functions of dispute resolution procedures – namely the benefit of working with specific, focused cases in an at least partially adversarial mode – and using a model that was developed as a dispute resolution system, the vision presented here is of an Article 13 that performs some of the helpful functions traditionally reserved for dispute resolution. The dispute

resolution system in the Convention, Article 14, would be preserved as the ultimate outlet for disputes; however, if it is used rarely, which seems likely, there will at least be an outlet for the many queries about implementation that lie on the fuzzy border between a "question" and a "dispute."

Notes

[1] For general information, see Bodansky, 1993; for information specifically on Article 13, see Bodansky, 1993, pp. 547–548 and Interim Secretariat, 1994a.

[2] For general information, see Interim Secretariat, 1994a; Birnie and Boyle, 1992. The author is grateful to an anonymous reviewer for pointing out these general benefits, in addition to the case-oriented benefits that are the focus of the paper.

[3] This essay will not consider whether tougher or different commitments, policies, and measures are needed. Willingness to negotiate and implement policies and measures that are interdependent will depend on the interests of the Parties – including their sense of whether the greenhouse issue demands stronger action – as well as on their confidence that other Parties share a commitment to the agreement. The Multilateral Consultative Process can contribute to both, resulting in changes in underlying interests as well as improving confidence and shared commitment to the integrity of the agreement.

[4] For further information see the extensive literature on the GATT. The best recent description of the GATT Dispute Panel system that includes an analysis of the case history is R.E. Hudec's *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System* (Hudec, 1993).

[5] See Bodansky, 1993, p. 548; for the exact language of the texts and the mention of the panel system as one of the two foremost alternatives see negotiating texts in INC, 1991 and 1992, and Interim Secretariat, 1995a.

[6] If the Multilateral Consultative Process is applied to some Parties' future, perhaps more detailed and onerous, commitments there may be pressure to adopt stricter relevance standards in an effort to ensure that the Multilateral Consultative Process focuses on the most important issues. Similarly, future protocols may wish to adopt their own Article 13 – like procedures with stricter standards (or use the Convention's Article 13 Process with tighter guidelines). This is discussed later in this essay. For now, with the current commitments of the Convention and at the early stages of the Multilateral Consultative Process, less strict relevance standards are tolerable, but efforts should be made to keep a close connection between questions and the implementation of the commitments of the Convention.

[7] In the GATT case, some scholars argue that unilateral enforcement tends to support the objectives of the agreement because enforcement threats tend to conform to GATT law and even sometimes to the particular outcomes of GATT panel decisions (although the principle of unilateralism does not). In the wildlife cases, where no panel-like mechanism exists to assess whether a Party is in compliance, unilateral actions may also support the agreement; however, the agreement has no legitimate and formal

means of declaring whether or not a Party's implementation is in compliance. In practice, in both these areas much of the activity to determine whether a potential enforcement target is in compliance takes place at the domestic level by the country initiating the unilateral enforcement. That is clearly at variance with the multilateral spirit, but scholars disagree on whether unilateral enforcement and its domestic procedures have on balance supported international law and the GATT system. A significant failing of relying on unilateral enforcement is, of course, that it is a tool of enforcement that is typically invoked only by major powers; less powerful states do not have this option, and thus the law is not applied in an evenhanded manner. The question remains as to whether applying the law in an uneven way is better than applying it only through multilateral fora, especially if multilateral enforcement is weak or nonexistent.

References

Birnie, P.W. and Boyle, A.E., 1992, *International Law and the Environment* Clarendon, Oxford, UK: ch. 4.

Bodansky, D., 1993, The United Nations Framework Convention on Climate Change: A commentary, *Yale Journal of International Law*, **18**:451–558.

Government of Canada, 1995, Canadian Proposal Regarding Effective Implementation of the United Nations Framework Convention on Climate Change, Conference of the Parties to the UNFCCC, First Session, FCCC/CP/1995/Misc. 4.

Greene, O. and Salt, J.E., 1994, Priorities in the Design of the FCCC Multilateral Consultative Process (Article 13): Between Implementation Review and Dispute Resolution, Department of Peace Studies, University of Bradford, UK (August): 8–9.

Hudec, R.E., 1993, *Enforcing International Trade Law: The Evolution of the Modern GATT Legal System*, Butterworth Legal Publishers, Salem, NH, USA.

INC (Intergovernmental Negotiating Committee), 1991, Revised Single Text on Elements Related to Mechanisms, A/AC.237/Misc.13, pp. 30–39 (30 October 1991).

INC (Intergovernmental Negotiating Committee), 1992, Revised Consolidated Text Under Negotiation (Article 15: Resolution of Questions Regarding Interpretation and Implementation of the Convention), "Report of the Intergovernmental Negotiating Committee for a Framework Convention on Climate Change on the Work of the First Part of its Fifth Session, Held at New York from 18 to 28 February 1992," A/AC.237/18 (Part I), 10 March 1992: 65–66.

Interim Secretariat, 1994a, Consideration of the establishment of a multilateral consultative process for the resolution of questions regarding implementation (Article 13), Intergovernmental Negotiating Committee for a Framework Convention on Climate Change, A/AC.237/59.

Interim Secretariat, 1994b, First Review of Information Communicated by Each Party included in Annex I to the Convention, A/AC.237/81 (7 December).

Interim Secretariat, 1995a, Consideration of the Establishment of a Multilateral Consultative Process for the Resolution of Questions Regarding Implementation (Article 13): Submissions from delegations relating to Article 13, Intergovernmental Negotiating Committee for a Framework Convention on Climate Change, A/AC.237/Misc.46.

Interim Secretariat, 1995b, Consideration of the Establishment of a Multilateral Consultative Process for the Resolution of Questions Regarding Implementation (Article 13): A review of selected non-compliance, dispute resolution and implementation review procedures, Framework Convention on Climate Change Conference of the Parties, First Session, FCCC/CP/1995/Misc.2.

UN, 1992, *United Nations Framework Convention on Climate Change*, United Nations General Assembly, documents: A/AC.237/18 (part II)/Add.1 and A/AC.237/18 (part II)/Add.1/Corr.1.

Victor, D.G. and Salt, J.E., 1994, From Rio to Berlin: Managing climate change, *Environment*, **36** (December): 6–15, 25–32.

Victor, D.G., 1995, The Early Operation and Effectiveness of the Montreal Protocol's Non-compliance Procedure, IEC Project, International Institute for Applied Systems Analysis, Laxenburg, Austria.

Werksman, J., 1995, *Designing a Compliance System for the Climate Change Convention*, Working Paper, Foundation for International Environmental Law and Development, London, UK.

Further information about IIASA's research project on
International Environmental Commitments is available from

IEC
IIASA
A-2361 Laxenburg, Austria

Telephone +43 2236 807 ext. 287
Telefax +43 2236 71313
E-mail: info.iec@iiasa.ac.at
or on the World Wide Web at
http://www.iiasa.ac.at/Research/IEC

About IIASA

The International Institute for Applied Systems Analysis, located in an 18th-century Habsburg palace near Vienna, is a center for the scientific study of global change. IIASA brings to this task a unique set of credentials, including unmatched experience assembling teams of researchers from different nations and different sciences and a proven ability to bridge cultural and political gaps. Unlike most research institutions, IIASA:

- does not carry a national label, either directly or through a single dominant funder;
- defines global change to include environmental, technological, economic, and social dimensions;
- is integrated, or interdisciplinary;
- draws talent from East, West, North, and South;
- concentrates on the mid-term, 5–20 years out, so that it is neither overly influenced by politics nor focussed so far in the future as to be useless for policy purposes.

IIASA was founded in 1972 at the initiative of the US and Soviet governments as a place where scholars from East and West could work together, free of political influence, on problems common to advanced societies. With the end of the Cold War the mandate was broadened to global change.

In the 1980s IIASA helped develop and refine the concept of sustainable development. Current projects include studies of transboundary air pollution in Europe and Southeast Asia; interactions between land use, climate, and water resources; implementation and effectiveness of international environmental agreements; the flows of toxic chemicals in industrial societies; interactions among population, environment, and development; energy use and greenhouse gas emissions; economic and social transitions in Eastern Europe; sustainable development of Siberia's forests and industry; and advanced mathematical tools for systems analysis.

IIASA is independent of governments. Its governing council comprises one person from each of 17 scientific member organizations in Austria, Bulgaria, Canada, the Czech Republic, Finland, Germany, Hungary, Italy, Japan, Kazakhstan, the Netherlands, Poland, Russia, Slovakia, Sweden, Ukraine, and the USA.