

Günther · Heidel · Wollenteit · Hack

Rechtsanwälte – Attorneys at Law

RAe Günther · Heidel · Wollenteit · Hack
Postfach 130473 · 20104 Hamburg

Michael Günther*
Hans-Gerd Heidel^{*1}
Dr. Ulrich Wollenteit^{*2}
Martin Hack^{*2} LL.M. (Stockholm)
Clara Goldmann LL.M. (Sydney)
Dr. Michéle John
Dr. Dirk Legler LL.M. (Cape Town)
Dr. Roda Verheyen LL.M. (London)

* zugelassen auch am Hanseatischen OLG

¹ Fachanwalt für Familienrecht

² Fachanwalt für Verwaltungsrecht

Postfach 130473
20104 Hamburg

Mittelweg 150
20148 Hamburg

Tel.: 040-278494-0

Fax: 040-278494-99

Email: post@rae-guenther.de

Gerichtskasten 177

30th October 2006

06/0603UR/C/rv

Sekretariat: Frau Fürst

Tel.: 040-278494-12

Legal Opinion

**provided by Dr. Roda Verheyen, LL.M. (London),
attorney at law in private practice and international lawyer by training**

on

**whether Canada is currently in violation of, or is likely to violate, its
obligations under the United Nations Framework Convention on Climate
Change and/or the Kyoto Protocol**

Contents:

Executive Summary	3
A. Introduction	5
I. Instructions	5
1. General	5
2. Canada's Plans and Performance	7
B. Violating International Law – Specific Breaches	11
I. Violation of Art. 2 and 4.2 FCCC by not establishing measures to reverse emission trends	11
1. The Obligation	11
2. The Breach	15
II. Violation of Art. 4.2 FCCC by failing to formulate and implement national adaptation programmes	18
III. Violation of Art. 12 FCCC: reporting duties	20
IV. Violation of Art. 3.2 and 7 Kyoto Protocol - Demonstrable progress....	22
1. Introduction.....	22
2. The Rules	23
3. Art. 3.2 – A Substantive Duty.....	24
4. Breach of the obligation of conduct.....	28
5. Breach of a Reporting Duty	29
V. Openly denouncing the Kyoto target	33
VI. Canada is likely to violate the Kyoto target	35
C. Conclusion.....	38
Annex.....	39

Executive Summary

Through the Framework Convention on Climate Change (FCCC) of 1992, Canada is obliged to do its part to prevent dangerous climate change. Through the Kyoto Protocol of 1997, Canada is obliged to reduce its greenhouse gas emissions by 6% in the period from 2008-2012 compared to 1990 levels (Art. 3.1 and Annex B Kyoto Protocol). Yet, as of 2004 Canada's emissions were 26.6% above 1990 levels and still increasing. The "Kyoto gap" - the difference between current emissions and compliance with Canada's Kyoto target - is a staggering 34.6%.

Having continuously adopted climate change plans and programs supposedly to lower emissions since 1995, and, in recent years, to comply with the Kyoto Protocol, the Government is now suggesting to replace the Kyoto target with new, longer-term targets. On the bases of the emission data not disputed by the Canadian Government, the policies and measures set in place by the various Governments since 1995, and the legal obligations assumed by Canada through the Kyoto Protocol and the FCCC, this legal opinion finds that Canada is:

(a) currently in breach of the FCCC in 3 respects, namely:

(1) Canada is violating Art. 4.2 a) and b), in conjunction with Art. 2 FCCC, which oblige industrialised country Parties to establish measures that would lead to a reversal of the long-term trend of increasing greenhouse gas emissions in order to stabilize atmospheric greenhouse gas concentrations. A review of the past plans and programmes adopted by the Governments shows that in fact, no such measures have been taken, despite continuous warnings from the Environment Commissioner. Canada has at no point in time set in place measures that could have resulted in a reversal of emission trends, as confirmed by the most recent assessment of the Environment Commissioner of October 2006;

(2) Canada is violating Art. 4.1 a) FCCC with regard to adopting and implementing measures to adapt to the impacts of climate change. It has not responded to this obligation at all. No measures have been implemented to facilitate adaptation, as programmes are still restricted to research and information and lack specific measures to help Canadians and Canadian ecosystems to adapt; and

(3) Canada is violating its reporting duties under the FCCC by not submitting its 4th National Communication as required by Art. 12 and 4 FCCC and Decision 4/CP.8 (deadline: 1st January 2006);

(b) currently in breach of the Kyoto Protocol in 2 respects, namely:

(1) Canada is violating Art. 3.2, which requires Parties to make “demonstrable progress” in achieving its 6% reduction target by the year 2005, by not effectively working towards it. As the 2006 Environment Commissioner's report finds, there is still no sign of adequate measures and assignment of responsibilities within Government; and

(2) Canada is further violating a reporting duty, set by Art. 7.2 and 7.3, with Art 3.2 and Decision 22/CP.7, by not having reported on its “demonstrable progress”. While Canada may not have been obliged to report by 1st January 2006 as suggested by Decision 22/CP.7, it certainly is required to report well before the start of the 1st commitment period, which is now only 14 months away.

(c) also likely to be in breach of the Kyoto Protocol in 1 further respect:

Canada is also likely to violate its Kyoto obligations in terms of the 6% reduction target. Since the commitment period spans from 2008-2012, compliance will only be formally assessed in 2013 onwards. Canada is also at liberty to use the flexible mechanisms to comply, i.e. purchase allowances abroad. Yet, given the state of domestic reduction trends and the fact that the Canadian Government seems, at the moment, inclined not to make extensive use of the Flexible Mechanisms, compliance with the Kyoto target seems impossible. Should Canada run into non-compliance, it will face a suspension in the ability to use those mechanisms and a penalty rate of 1.3 times its excess emissions added onto its burden in the second commitment period of the Kyoto Protocol, which is currently under negotiation.

In addition, openly denouncing the Kyoto Protocol and abandoning its targets could, in itself, constitute a violation of international law. While Canada could, in principle, withdraw from the Protocol as of 2008, withdrawal at such a short time before the start of the commitment period could infringe the international law principle of good faith. Since the Government of Canada has not made its intentions clear as regards the Kyoto Protocol as a treaty and its membership, no final assessment on this issue is possible.

A. Introduction

I. Instructions

I have been instructed by Friends of the Earth Canada and the Climate Justice Programme, an international and collaborative initiative hosted by Friends of the Earth International, to provide a legal opinion on the question above.

The factual basis for the legal opinion submitted is information provided by the clients, as well as openly available information on Canada's climate change policies and mitigation measures.

The legal basis is provided by the existing international agreements on climate change, United Nations Framework Convention on Climate Change (FCCC)¹ of 1992 and the Kyoto Protocol (KP)² of 1997. Canada is a Party to both of these agreements³ and thus bound under international law to comply with the obligations contained in them, as applicable to Canada.

The author has written part of her PhD thesis on compliance of State Parties with the FCCC and the Kyoto Protocol, thus some material used in this opinion originates from the author's book.⁴

II. Rationale for this Legal Opinion

1. General

The rationale for this opinion is Canada's poor performance with respect to reducing greenhouse gas (GHG) emissions and protecting the climate.

¹ United Nations Framework Convention on Climate Change, (1992) 31 ILM 849. In force since 21st March 1994. All documents related to the FCCC or Kyoto Protocol (document symbols FCCC/...) can be found on the official website: <<http://unfccc.int>>.

² Kyoto Protocol to the United Nations Framework Convention on Climate Change, (1998) 37 ILM 22. In force since 16th February 2005.

³ Canada ratified the FCCC on 4th December 1992, and the Kyoto Protocol on 17th December 2002. Both treaties apply to Canada as of their entry into force. See for information on Canada's membership in the global climate regime: <http://maindb.unfccc.int/public/country.pl?country=CA>

⁴ Verheyen, Climate Change Damage in International Law – Prevention Duties and State Responsibility, Martinus Nijhoff Publishers, 2005.

Canada is responsible for about 2.2% of global GHG emissions, but has the 8th highest per capita carbon emission rate.

Through the Kyoto Protocol, Canada is obliged to reduce its GHG emissions by 6% in the period from 2008-2012 compared to 1990 levels (Art. 3.1 and Annex B Kyoto Protocol). This means that Canada is not allowed to emit in excess of what is called its "assigned amount", i.e. the GHG budget for the 5 year period.⁵

Yet, Canada's emissions of GHGs covered by the Kyoto Protocol are in fact 26.6% above 1990 levels (data of 2004), and still increasing. The "Kyoto gap" - the difference between current emissions and compliance with Canada's Kyoto target - is a staggering 34.6% compared to 1990 levels.⁶

By way of comparison, other Kyoto Parties, such as New Zealand, Spain and several other EU Member States (Portugal, Greece) have also recorded major increases in emissions of GHG since 1990.⁷ Yet, given the individual nature of the Kyoto targets, no other country is as "far off" its target as Canada (the "Kyoto gap").

Industrialised country parties to the FCCC and KP must submit regular updates of the GHG performance. These are called the "National Inventory (NI)" and represent authoritative statements about States' actual and projected emissions of all relevant GHGs⁸. Canada's recent NI was released in April 2006, covering GHG sources and sinks from 1990-2004⁹.

⁵ Roughly, this budget is calculated as follows: Canada's 1990 emission levels minus 6% times 5.

⁶ Commissioner of the Environment and Sustainable Development of Canada, Report 2006, The Commissioner's Perspective, p. 8, Climate Change – An Overview, para. 41, available at <http://www.oag-bvg.gc.ca/>. Henceforth "Commissioner Report 2006". All Commissioner's reports mentioned in this opinion are available at this website.

⁷ See for comparative summary official emission data on the FCCC website: www.unfccc.int (various documents).

⁸ The NI are separate from other reporting requirements, such as the National Communication (see Section B IV. and V.).

⁹ http://unfccc.int/national_reports/annex_i_GHG_inventories/national_inventories_submissions/items/3734.php. Canada's inventories for 2003-2005 are also available from that page. The UNFCCC Secretariat's status report on this report, dated 29th June 2006, does not seem to show any major reporting issues: <http://unfccc.int/resource/docs/2006/asr/can.pdf>

The Executive Summary of that report states:

“In 2004, Canadians contributed about 758 megatonnes of CO₂ equivalent (Mt CO₂eq³) of GHGs to the atmosphere..., an increase of 0.6% over the 754 Mt recorded for the year 2003. This is considerably less than the 3.9% increase that occurred between 2002 and 2003. Canada’s economic GHG intensity — the amount of GHGs emitted per unit of economic activity — was 2.6% lower in 2004 than in 2003. Since 1990, emissions have increased by about 27%... [I]t is evident that the 27% increase in GHG emissions during the 14 year period outpaced increases in population (which totalled 15%) and approximately equalled the increase in energy use (which was 26%). However, the growth in total emissions was well short of the 47% growth in GDP between 1990 and 2004...

Another trend worth noting is the much larger growth in energy production than energy use between 1990 and 2004. This is a consequence of Canada’s large fossil fuel resources and an economy geared to take advantage of it, with increasing quantities of energy being delivered to the international market. The resultant sharp growth in energy exports over the period has had a significant impact on the emission trend.”¹⁰

The figures used and trends reported in this opinion are thus not disputed, but all based on the Government of Canada’s own data.

2. Canada's Plans and Performance

In the past decades, Canada’s Governments have issued various climate action or “green” plans, with the political intention of reducing emissions and, partially, also with the intention to adapt to the impacts of climate change. The most important elements of these plans are briefly displayed here, to provide a context in which to judge whether Canada is in breach of its international legal obligations.

As Canada's first response to the FCCC, the National Action Program on Climate Change (NAPCC) was approved by federal, provincial and territorial ministers of energy and the environment in February 1995, endorsing the precautionary principle and the commitment to stabilising GHG emissions at 1990 levels by the year 2000 (the stabilisation goal). It was to provide "strategic directions" and leave the formulation of concrete programs of action and measures for later,¹¹ even though forecasts already predicted GHG emissions to be 13% higher in the year 2000 in absence of adequate measures. The main tool suggested in the NAPCC itself was the Voluntary Climate Challenge and Registry Programme, a "soft" measure which was to encourage

¹⁰ Ibid., e-pages 32 f.

¹¹ See Canada's National Action Programme on Climate Change, 1995, p. 5 f. "Further analytical work will be undertaken to assess the applicability of the measures" [as suggested in a report "Options to Meet Greenhouse Gas Emissions Goals].

all relevant sectors and actors to "explore cost-effective actions" to reduce emissions, and which contained elements of verifications and monitoring.¹²

Yet, the federal government officially acknowledged early on that the NAPCC would not lead to stabilization by 2000. No real incentive to reduce emissions was provided, as, for example, the Registry Programme allowed companies to essentially double count efficiency improvements that would have occurred in any event. Canada's Environmental Commissioner¹³ found that while the NAPCC provided strategic direction, it did not define the specific roles and responsibilities of the various jurisdictions or parties to it.¹⁴

In 2000, three years after the Kyoto targets were adopted and at a time when GHG emissions were already 15% above 1990 levels, the Government of Canada introduced a new "Action Plan on Climate Change"¹⁵, targeting key sectors which was intended to take Canada a third of the way toward its Kyoto target, but which essentially only suggested "soft" measures. For example, reduction targets for big polluters would have been set through an "intensity-based" target. The Environmental Commissioner's report 2001 found that, while funding to address climate change had been strengthened and some changes in the management structure been made, effective action to reverse emission trends would depend on the implementation of proposed and new measures, as well as on effective monitoring.¹⁶

In 2002, the "Climate Change Plan for Canada"¹⁷ was announced by the Government, which contained measures to reduce GHG emissions annually by 240 Mt. This plan came at a time when emissions were almost 20% higher than in 1990, and essentially repeated possible policies, as described already in 1995 and 2000 but did not introduce binding measures.

¹² Ibid, p. 17f.

¹³ The official title is: Commissioner of the Environment and Sustainable Development of Canada, which is a special section of the Auditor General of Canada, an official body, set up through the "Act respecting the Office of the Auditor General of Canada and sustainable development monitoring and reporting". The Auditor General reports to the Canadian Parliament, the House of Commons.

¹⁴ Commissioner's Report 1998, para. 3.151.

¹⁵ Government of Canada, Action Plan 2000 on Climate Change. 2006 Commissioner's Report provides an overview of the content of the various plans, see Chapter 1, p.6.

¹⁶ Commissioner's Report 2001, Climate Change and Energy Efficiency – A Progress Report, para. 6.2.

¹⁷ The plan is available through <http://www.climatechangeconnection.org>. The official website of the Canadian Government holding this and other climate related document has been put out of use.

Before the elections in 2005, considering the entry into force of the Kyoto Protocol and well aware of the fact that emissions were now almost 27% above 1990 levels, the Government introduced "Project Green", which contained, *inter alia*, plans for a domestic emission trading scheme to force reductions on large emitters. Also, for the first time, legislation was used to incorporate GHGs in concrete regulations: The Canadian Environmental Protection Act (CEPA), a framework law which becomes effective with the establishment of regulations under the Act, was amended to include the six Kyoto GHGs in Schedule I, and the Government was mandated to introduce regulations to reduce emissions of these gases by 2008¹⁸. Canadian NGOs still criticised the plan, for example, as lacking in details on the policy and measures and doubted it would lead to reductions needed to comply with the Kyoto targets.¹⁹

None of the plans and programs contained measures that would, overall, achieve the Kyoto targets or stabilise emissions at 1990 levels. As reported by the Environmental Commissioner in 2006, the measures suggested were non-binding in nature²⁰ and, most importantly, not implemented or their effect monitored properly.²¹

The political intention, however, remained to reduce emissions effectively and to abide by the Kyoto targets agreed in 1997.

Yet, this changed with the entry of the new Conservative Government in January 2006. The new Environment Minister, Rona Ambrose, reportedly stated openly:

“Our position remains that the Kyoto accord is seriously flawed and that the emissions targets it imposes on Canada are unrealistic and unattainable.”²²

and later confirmed that Canada was unable to “meet the targets the Liberals negotiated.”²³ Most recently, the Environment Minister has stated that new emissions-cutting targets will be set to replace those in the Kyoto Protocol and

¹⁸ Under CEPA, once a substance has been included in Schedule I, some government response, for example binding regulations must follow within the next 24 months, see CEPA, s.92(1).

¹⁹ See: David Suzuki Foundation: Briefing Note on Canada's Climate Change Plan, April 13 2005, available at <http://www.davidsuzuki.org/>

²⁰ Even the listing a CEPA substance had no effect in terms of reducing emissions, as concrete targets would have to be drawn up by regulations or action plans under CEPA.

²¹ Commissioner's Report 2006, note 6, Managing the Federal Approach to Climate Change, para. 1.11 ff.

²² As reported in the *Toronto Star*, Feb. 25, 2006.

²³ As reported in the *National Post*, May 12, 2006.

that the new targets will depend on a “new round of discussions across the country”.²⁴

The position of the Government with regard to its international obligations, as assumed in the Kyoto Protocol, remains unclear.

A Bill introduced by Government in October 2006 would amend CEPA and remove the six GHGs from Schedule I of CEPA,²⁵ which currently requires regulation within a two year period, that is by 2008. This Bill also shows that the Government now intends to adopt a long-term goal to reduce GHG emissions by 45-65% compared to 2003 levels by 2050, but no longer seeks to introduce any short-term goals, which would be necessary to comply with Kyoto targets.

In September 2006, Canada’s Environmental Commissioner filed her latest report, focussing on climate change. This report contains a devastating message for Canada, as it states that Canada is “not on track to reduce greenhouse gas emissions”, and that the Governments have continuously failed to tackle the issue adequately, despite having spent Can\$ 6 billion since 1997 on climate change-related programs.²⁶

Most recently, a bill has passed the Parliament in 2nd reading, opposed by the Government, that would oblige the Government to respect its obligations under the Kyoto Protocol.²⁷

Against this background, I will proceed to examine whether Canada is violating or likely to violate international law.²⁸ This is done by describing and

²⁴ As reported in *CanadianPress*, Oct 05, 2006.

²⁵ Bill C-30, Clean Air Act, October 20, 2006, c-30, ss.38-40. As the Bill sets out, after three years of consultation with the industrial sector beginning in the fall of 2006, and for the short (2011-2019) to medium term (2020-2025), the government intends to set emission “intensity targets” as of 2011, that is the amount of GHGs created by each unit of economic output, such as a barrel of oil.

²⁶ 2006 Commissioner's Report, note 6.

²⁷ A vote was taken in the House of Commons on Wednesday, October 04, 2006. Despite the government voting against, a majority of MP’s voted in favour of Bill C-288, that now goes to a House committee and then to the Senate. The bill's stated purpose is "to ensure that Canada takes effective and timely action to meet its obligations under the Kyoto Protocol and help address the problem of climate change."

²⁸ I have been asked to consider the issue of likely violations, as section 166(1)(b) of CEPA applies where Ministers have reason to believe that a substance released from a source in Canada into the air creates, or may reasonably be anticipated to contribute to, air pollution that violates, or is likely to violate, an international agreement binding on Canada in relation to the prevention, control or correction of pollution.

analysing specific duties and identifying the pertinent breaches or rather the behaviour which leads to a specific breach of international law.

I assume that the basics of international law are known to the reader – a discussion of international law theories is only conducted where the legal issues are difficult. I also assume that the basics of climate change are known to the reader, including the facts on the necessary emission cuts to prevent dangerous climate change.

The analysis starts with duties derived only from the FCCC, and then turns to the Kyoto Protocol. It is important to note that these are connected, but separate, treaty systems. For example, a breach of the FCCC will not be judged by the Compliance Committee of the Kyoto Protocol. Also, duties stemming from the FCCC can still be in force in parallel with the Kyoto Protocol's obligations.

Lastly, I examine whether and under what circumstances denouncing the Kyoto Protocol can constitute a breach of law, in particular the principle of good faith and other the customary law principles, such as those laid down in the Vienna Convention on the Law of the Treaties and whether, by its actions as evidenced today, Canada is likely to violate international obligations in the future.

B. Violating International Law – Specific Breaches

I. Violation of Art. 2 and 4.2 FCCC by not establishing measures to reverse emission trends

In my opinion, the FCCC, specifically Art. 2 and 4.2 read in conjunction, contains a *substantive obligation* to establish measures that would lead to a reversal of emission trends in the long term, which Canada is in breach of.

1. The Obligation

Art. 2 contains the “ultimate objective” of the Convention which is:

“to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a timeframe sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.”

As I have argued before in depth,²⁹ the language in Art. 2 FCCC is not merely descriptive, but constitutes a legally binding long-term duty of prevention. States must undertake the necessary measures to prevent dangerous interference with the global climate. This reading of Art. 2 is the result of a legal interpretation of the various concepts contained therein, applicable because the provision is contained in an international agreement and is therefore open to such a legal interpretation.³⁰

In this context, it is also important to note that Canada, just as any other Party, has the legal obligation not to “defeat” the objective, i.e. engage in activities that will hamper the achievement of Art. 2, prevention of dangerous interference. This obligation is in Art. 18 of the Vienna Convention on the Law of the Treaties (VCLT)³¹, which reads:

“A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when:

- (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or
- (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed.”

This provision was designed to apply to the pre-entry into force phase, but – as it essentially only captures the principle of good faith, which constitutes general customary law – its principles clearly apply *a fortiori* as a principle to State behaviour post-ratification and after entry into force. Art. 18 VCLT has not been subject to major writings or decisions, but given the nature of the VCLT as a whole, defining and capturing the principles of good faith between Parties when they enter into treaties, no other interpretation of Art. 18 and the principles behind it seems possible to the author.

²⁹ See: Verheyen, note 4, pp.64 ff., Verheyen, The Climate Change Regime after Montreal: Article 2 of the UN Framework Convention on Climate Change Revisited, in: Yearbook of European Environmental Law 2006, forthcoming.

³⁰ It should be noted that others have contended that Art. 2 is in fact too vague to have any legal bearing on Parties, see for example Bodansky, The UN Framework Convention on Climate Change: A Commentary, (1993) 18 *Yale Journal of International Law* 2, 451-554; Yamin, J.B. Smith, and I. Burton, ‘Perspectives on “Dangerous Anthropogenic Interference”: Or How to Operationalize Article 2 of the UN Framework Convention on Climate Change’, in Schellnhuber/Cramer/ Nakicenovic/ Wigley/Yohe (eds.), *Avoiding Dangerous Climate Change*, Cambridge: Cambridge University Press, 2006, p 81.

³¹ The Vienna Convention on the Law of the Treaties (1969), entered into force on 27 Jan 1980, 91 Contracting Parties, 8 ILM 679 (1969). Most of its important provisions are reflections of customary international law, see Brownlie, *Principles of Public International Law*, 1998, 608. Canada is a Party to the Convention and is bound by its rules since its entry into force. See Canada Treaty Series, CTS1980/37.

Yet, the prevention duty enshrined in Art. 2 FCCC only becomes meaningful if coupled with specific obligations. Naturally, the Kyoto Protocol itself is an implementation of the duty, but there are also specific obligations in the FCCC.

This is important because, while Canada is not currently on track to reach its Kyoto targets, compliance with these will not be judged before the end of the commitment period, i.e. in practice 2013. It is not currently possible therefore to state that Canada violates Art. 3.1 and Annex B of the Kyoto Protocol, which together contain the 6% reduction target. This is particularly so as Canada could acquire the assigned amount units necessary to reach its target by using the flexible mechanisms of the Kyoto Protocol (see Section B.VI)

The pertinent commitment resulting in an obligation to reverse emission trends is contained in Art. 4.2, the first two subparagraphs of which read as follows:

“The developed country Parties and other Parties included in Annex I commit themselves specifically as provided for in the following:

a) Each of these Parties shall adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases and protecting and enhancing its greenhouse gas sinks and reservoirs. These policies and measures will demonstrate that developed countries are taking the lead in modifying longer-term trends in anthropogenic emissions consistent with the objective of the Convention, recognizing that the return by the end of the present decade to earlier levels of anthropogenic emissions of carbon dioxide and other greenhouse gases not controlled by the Montreal Protocol would contribute to such modification, and taking into account the differences in these Parties' starting points and approaches, economic structures and resource bases, the need to maintain strong and sustainable economic growth, available technologies and other individual circumstances, as well as the need for equitable and appropriate contributions by each of these Parties to the global effort regarding that objective. These Parties may implement such policies and measures jointly with other Parties and may assist other Parties in contributing to the achievement of the objective of the Convention and, in particular, that of this subparagraph;

b) In order to promote progress to this end, each of these Parties shall communicate, within six months of the entry into force of the Convention for it and periodically thereafter, and in accordance with Art. 12, detailed information on its policies and measures referred to in subparagraph (a) above, as well as on its resulting projected anthropogenic emissions by sources and removals by sinks of greenhouse gases not controlled by the Montreal Protocol for the period referred to in subparagraph (a), with the aim of returning individually or jointly to their 1990 levels these anthropogenic emissions of carbon dioxide and other greenhouse gases not controlled by the Montreal Protocol. This information will be reviewed by the Conference of the Parties, at its first session and periodically thereafter, in accordance with Article 7;
...”

Whereas this provision is, admittedly, rather cryptic, it essentially prescribes that Annex I Parties, i.e. industrialized countries, ‘shall adopt national policies and take corresponding measures’ to reduce GHG emissions and to protect and

enhance GHG sinks. Moreover, they must ‘communicate detailed information ... with the aim of returning individually or jointly to their 1990 levels ... of carbon dioxide and other greenhouse gases’, ‘by the end of the century’, i.e. the year 2000. Taking such measures would ‘demonstrate that developed country Parties are taking the lead in modifying longer-term trends in anthropogenic emissions consistent with the objective of the Convention’, and Parties recognize that the return of emissions to earlier levels would ‘contribute to such modification’ of trends. As is well known, the majority of Annex I Parties are far from having reduced or stabilized their emissions to or at 1990 levels.

Canada is among the countries that adopted the stabilisation target politically (return to 1990 levels by the year 2000) as early as 1988, when it hosted the second World Climate Conference.³² However, the Government abandoned this target in 1997, when projections revealed that the target would not be easily reached.³³

But, despite the fact that many countries confirmed the target as a “target” through political adoption, legal literature has so far been reluctant to conclude that Art. 4.2 contains any substantive obligation, i.e. beyond a reporting element.

With the benefit of the FCCC having been in force for 12 years, however, the analysis of the legal content provides four firm legal arguments to support the conclusion that the FCCC places an ‘obligation of conduct’ on Annex I Parties to establish measures that would lead to a reversal of emission trends in the long term in order to stabilize atmospheric concentrations.

Firstly, all Parties are bound by a duty to prevent under Art. 2, which they shall not ‘defeat’, according to Art. 18 VCLT and the customary international law principle of good faith.

Secondly, climate science shows clearly since at least 1995 (IPCC Second Assessment Report) that emissions must be substantially reduced globally to achieve the objective of Art. 2. This science has since continuously firmed up.

Thirdly, Annex I Parties are specifically committed under Art. 4.2 a) and b) FCCC, as opposed to other FCCC Parties.

³² In fact, the Conference called on governments to reduce their emissions of CO₂ by 20% by 2005 compared to 1988 levels. See: The changing atmosphere: Implications for global security – Conference Statement, Toronto, Canada, June 27-30 1988, reprinted in 5 American University Journal for Int'l Law & Policy (1990) 515.

³³ See Commissioner's 1998 Report, para. 3.50 ff.

Fourthly, Annex I Parties specifically accept, again under Art. 4.2 a) and b), that a modification of trends is consistent with the objective of Art. 2.

It is not directly relevant to the binding nature of this obligation of conduct that no clear timeframe or volume targets are provided in the FCCC. Art. 4.2, in conjunction with Art. 2, contains a duty of conduct, while not one of result (as for example the Kyoto targets).³⁴ The difference between the two is that a country could – to some extent – argue that it was on path to reverse trends, as long as measures taken and implemented can demonstrate that such reversal will take place. The advantage of the Kyoto targets as an obligation of result is that compliance will simply be measured against the absolute performance, over the time period 2008-2012. Since obligations of conduct are typically difficult to enforce due to the lack of specific timeframe or volume targets, a Kyoto-style target or timetable obligation is preferable. This does not, however, alter the qualification of the Annex I Parties' obligation of conduct as a binding duty under international law.

2. The Breach

Based on current evidence, Canada has not lived up to this duty.

The pertinent behaviour against which to judge this is not the failure to meet the year 2000 stabilisation aim, but the fact that according to the Government's own appointed "referee", i.e. the Environment Commissioner, Canada has at no point in time set in place policies or even governance frameworks which could have actually worked towards reversing emission trends in the long-term. The assessments of the Environment Commissioner are of particular value as it is an official, impartial body with deep insights into Canadian institutional structure and politics. Legally, its assessments can be used as witness statements or rather expert testimony.

The 1995 National Action Program on Climate Change declared that:

"Canada is working to meet its current commitment to stabilize greenhouse gas emissions at 1990 levels by the year 2000. Canada's National Action Program on Climate Change sets strategic direction in pursuit of that objective, as well as provides guidance for actions beyond 2000."

³⁴ International and national legal norms can be categorised into obligations of result (aiming at a concrete result) and obligations of conduct (aiming at a particular conduct rather than a firm result). This differentiation has been used in particular to determine whether a state has violated an international obligation and must face legal consequences under the law of state responsibility. It was introduced by the International Law Commission in 1977, but later withdrawn (See further Chapter V and Dupuy, *Reviewing the Difficulties of Codification*, 10 (1999) EJIL 371; Crawford, *Revising the Draft Articles on State Responsibility*, 10 (1999) EJIL 435 at 440 ff.; Okowa, *State Responsibility for transboundary air pollution in international law*, 2000, 171 ff.).

Had this aim actually been worked towards with concrete measures, it would at the same time have constituted a behaviour to reverse emission trends, given the fact that in 1995, Canada's GHG emission were already 9% higher than in 1990, and projections showed further substantial increases towards the year 2000.

Yet, no real progress was made towards the aim.

In its 1998 report the Environment Commissioner stated that despite the clear commitments and while the NAPCC provided direction,³⁵

- the roles and responsibilities of all levels of government had not been defined;
- concrete measures with an estimate of their precise impacts on emissions were lacking; and
- there was no agreement on measures designed to achieve the goal.

The failure of implementation is highlighted in this quote:

“... no agreement has been reached on a broad portfolio of measures designed to achieve Canada's stabilization goal. The challenge is not to find the best set of measures ... [but] to select a prudent strategy supported by a broad portfolio of measures, begin moving in the right direction and adjust the strategy and measures in light of new information”³⁶

The 2001 Report of the Environment Commissioner came at a time where emissions were already over 15% higher than in 1990 (1999 figures) and thus the lack of implementation of political commitments was already evident. The 2001 Report commented on the Climate Change Action Plan 2000, which resulted in the so-called National Implementation Strategy (NIS). Still, there was no clear move towards reversing GHG trends. Rather, (in the year 2000) the NIS was based on the idea that, until Canada ratified the Kyoto Protocol, only basic measures were needed (phase 1) to build momentum for further action. More action would depend on Canada's “responses to climate change and the nature of the international commitments”.³⁷ Neither the Action Plan 2000 nor NIS acknowledge the clear need to reverse emission trends on the basis of the already-in-force FCCC. They did not

“...provide any targets or performance expectations for the individual measures within each sector that would make it possible to assess future performance.”³⁸

³⁵ Commissioner's Report 1998, para. 3.70 ff.

³⁶ Ibid, para. 3.113.

³⁷ Commissioner's Report 2001, para. 6.38

³⁸ Ibid, para. 6.80.

Measures in the Action Plan, as noted by the Commissioner's 2001 Report, still focussed very much on information, public education, research and development, voluntary measures, etc. and their effectiveness was not evaluated.³⁹

By 2001, Canada's emissions had risen by 18.4% compared to 1990 levels.⁴⁰ No binding policies, which were by this time in place in other industrialised countries, had been targeted at large emitters, the oil and gas and transport sector. Each year, it became apparent that emission trends were not controlled or reversed. Yet, no effective action was taken. In 2002, after the ratification of the Kyoto Protocol, the Climate Change Plan for Canada was released, which states regarding the Kyoto targets:

"It is vital to have a plan that will enable Canada to successfully meet its climate change objectives. The initiatives included in the Climate Change Plan for Canada will do that."

It included the kind of measures necessary to reverse emission trends, with clear legal and fiscal measures targeted at the various contributing sectors. Yet, this plan did not actually move into operation either, as the Environment Commissioner's report 2006 clearly established. In fact, according to the Commissioner, current measures to reduce emissions from industry and transport, the two main sources of emissions,

"are not expected to bring emissions below 1990 levels; they may at best slow the rate at which greenhouse gas emissions in these sectors continue to grow",⁴¹

The lack of commitment was also demonstrated by the fact that no progress report was issued in the follow up of the 2002 Plan, even though annual reports were promised.

As the House of Commons Standing Committee on the Environment and Sustainable Development found in 2005, actions to reduce GHG emissions remained ad hoc, lack an overall strategy and do not have an accountability framework.⁴² To this overall lack of direction contributed the intended phase out of the Climate Change Secretariat in 2004, which had been installed in 1998.

Moreover, the recently advocated position of the Government of Canada to disregard its Kyoto targets but to advocate a "made in Canada" solution does

³⁹ Commissioner's Report 2001, para. 6.52

⁴⁰ Commissioner's Report 2003, para. 2.18

⁴¹ Commissioner's Report 2006, Main Points, p. 48.

⁴² Cited after the Commissioner's Report 2006, para. 1.16

not give rise to the expectation that Canada will seriously act to reverse emission trends.

Taken together, this is evidence of failure of the Government of Canada to establish measures that would lead to a reversal of emission trends in the long term, as prescribed by Art. 2 and 4.2 FCCC.

Regardless of whether the Government of Canada decides to alter its Kyoto targets, it is under the legal obligation to bring its behaviour in line with international law and thus – as all Annex I Parties – present policies and measures, underpinned by clear responsibilities and implementation plans, that will effectively reverse emission trends. Based on customary law on state responsibility and the law of the treaties, any other state could demand that Canada cease its illegal behaviour with respect to the FCCC. In addition, the internal conciliation mechanism of the Convention (Art. 14.6 FCCC⁴³) could be called upon to judge the matter in the transparency of an international forum.

This breach of international law would not, however, be subject to the Compliance procedure of the Kyoto Protocol, as it is not based on Kyoto provisions. Unfortunately, the FCCC does not currently have its own internal compliance committee. While Art. 13 FCCC provides that such a mechanism could be established, asking the Conference of the Parties (COP) to

“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”

the Parties have not so far moved to establish this institution, which would not be an ad-hoc body as the conciliation commission provided for in Art. 14.6 but a permanent body watching over the implementation of the FCCC.

II. Violation of Art. 4.2 FCCC by failing to formulate and implement national adaptation programmes

Art. 4.1 b) FCCC provides that all Parties must

"formulate and implement national or regional programmes containing ... measures to facilitate adequate adaptation to climate change".

⁴³ Art. 14 FCCC calls upon Parties generally to settle disputes regarding "the interpretation or application of the Convention": see the Annex of this opinion for the text of this provision.

This provision, while mainly interpreted as a reporting duty, contains a separate obligation to implement adaptation programmes. As the wording suggests, ("...programmes containing measures...") programmes are implemented by carrying out specific, real-life measures to facilitate adequate adaptation.

Already in 1998, Official Reports found that effects of climate change on Canada are potentially serious.⁴⁴

Yet, as the 2002 Climate Change Plan shows, adaptation is still regarded as a mere research exercise.⁴⁵ Rather than formulating and implementing measures to ensure adequate adaptation it envisions to "identify priority areas/regions where there is a need to consider future actions" with the help of multidisciplinary teams.

In its 2006 report, the Environment Commissioner found *inter alia* that:

"The government has not yet put in place key measures to support Canadians in adapting to a changing climate. Nor has it clarified how it intends to manage its own adaptation efforts."

"The government has not developed a strategy for federal adaptation efforts to indicate the expected results and timelines, and which departments would assume what responsibilities. Federal progress in working with provinces and territories has been limited."

In fact, a federal adaptation strategy was started in 2003 but not completed, and to date no coherent effort is made to identify vulnerabilities across the country and design measures such as early warning, technical measures or increasing adaptive capacity generally. A 2005 initiative, the "National Climate Change Adaptation Framework", was developed following a request by federal, provincial, and territorial ministers of the environment and energy in 2002, but its development, let alone implementation has been stalled by official intervention.

As the Commissioner states:

"Since ratifying the United Nations Framework Convention on Climate Change, the federal government has not clarified whether and to what extent it intends to deal proactively with the potential impacts of a changing climate. Furthermore, it has not clarified whether it intends to focus mainly on the implications for its own policies

⁴⁴ Commissioner's Report 1998, para. 3.32.

⁴⁵ Note 17, 2002 Plan, "Improving Our Understanding of Climate Change and Preparing to Adapt", pp. 51-52.

and programs or on the potential impacts on Canadians that it identifies in collaboration with other levels of government.”⁴⁶

These facts, and assessing activities that have taken place from 1994 (since the entry into force of the FCCC) till today (when current impacts in the Arctic have been identified for years⁴⁷ and there is no scientific question any more about the fact that impacts will affect Canadians severely), present enough evidence to find Canada in breach of Art. 4.1 b) FCCC with respect to adaptation.

Art. 4.1 is a binding (“shall”) provision and was introduced to respond to the concern of citizens that mitigation efforts will not be sufficient to prevent dangerous impacts on nature and people. Adaptation as a strategy in parallel with mitigation has been officially recognised by the Government of Canada in all of its Climate Plans and Programs since 1995. The obligation must be honoured for the benefit of the Canadian public.

III. Violation of Art. 12 FCCC: reporting duties

Art. 4.1, 4.2 and 12.1 FCCC together establish the reporting and monitoring system of the climate regime. Annex I Parties must

(i) produce national GHG inventories, using methodologies agreed by the Conference of the Parties (COP) (Art. 4.1 a))

and

(ii) communicate, within six months of the entry into force of the Convention and periodically thereafter, in accordance with Article 12, detailed information on its policies and measures as well as on its resulting projected anthropogenic emissions by sources and removals by sinks, and give an estimate about their effects on emissions and sinks as well as about the Party’s respective overall emission path (Art. 4.2(a) and (b)).

The information required in (i) above has been provided in National Inventories and these have been submitted by Canada. Yet, the information

⁴⁶ Commissioner's Report 2006, para. 2.29.

⁴⁷ Ibid, para. 2.3: “The Arctic is expected to respond faster and more severely to projected climate change than other regions of the world. Canada's northern territories, particularly in the western Arctic, are already affected by a changing climate (see Melting permafrost destabilizes northern infrastructure). The consequences, such as melting of permafrost and the reduction of sea ice, are affecting many aspects of life in the North.”

required under (ii) above is reported in "National Communications" in accordance with Art. 12.1 FCCC.⁴⁸

By not submitting its 4th National Communication⁴⁹, Canada is currently violating Art. 4.2 and 12 FCCC which provide that Annex I Parties, including Canada, must "periodically" submit National Communications.⁵⁰

The pertinent time-line for the 4th National Communication can be found in Decision 4/CP.8, in which the COP

*“requests Parties included in Annex I to the Convention to submit to the secretariat, in accordance with Article 12, paragraphs 1 and 2, a fourth national communication by 1 January 2006”*⁵¹

It is the author's view that this Decision and time-line, in conjunction with Art. 12 and 4.1 a) FCCC constitutes binding international law which is to be observed by Canada.

The legal quality of decisions of the COP is debated, as they exist outside the general sources of international law: treaties or customary international law.

Generally, as the COP is not an international organisation, its decisions have no binding force beyond the treaty regime. Such decisions are often referred to as "secondary law". COP decisions express the subsequent will of all Parties and could therefore also be said to constitute binding international declarations by States. Only if a treaty regime permits majority decision making can the relevant COP have legislative powers that are different from the sum of the will of the Parties. This is true for example for the Conference of the Parties to the Montreal Protocol which can take binding decisions with a 2/3 majority and establish binding rules for Parties that never consented to them.⁵²

⁴⁸ Art. 12.1 (for all Parties) and Art. 12.2 (for Annex I only), Art. 4.2(a) and (b), 7.2(a), (d) and (e), 9.2 (b) and 10.2 FCCC contain more detailed provisions about the content of National Communications.

⁴⁹ Parties not having submitted their 4th National Communications include Canada, Croatia, Ireland, Italy, Luxembourg, Poland, Romania, Turkey and the US (status of 19th October 2006).
http://unfccc.int/national_reports/annex_i_natcom/submitted_natcom/items/3625.php

⁵⁰ Former decisions for the deadlines of National Communications were 9/CP.2, 6/CP.3, 11/CP.4 and 33/CP.7.

⁵¹ FCCC/CP/2002/7/Add.1.

⁵² See Beyerlin, Umweltvölkerrecht, 2001, 48 and 80; Sands, Principles of International Environmental Law, 1995, 261 ff.').

However, Decision 4/CP.8 represents no amendment or change of the original treaty – which could trigger discussions as to whether decisions are actually binding on Parties – but a mere supplement to the text of Art. 12 and 4.1 As the COP (in absence of adopted rules of procedure) currently only allows for consensus in taking decisions, all Parties to the treaty have consented to this concretisation. Therefore, the legally binding force intra-regime cannot be questioned.

Given the mandatory language ("request ... to submit by ...") Canada is therefore obliged to duly submit its 4th National Communication instantly to bring its behaviour in line with international law. Sanctions for failure to submit are not foreseen in the FCCC. Yet, as pointed out above, any other Party could demand that Canada ceases its illegal behaviour and, if needed, ask for a settlement of the matter in the framework of the conciliation commission.

IV. Violation of Art. 3.2 and 7 Kyoto Protocol - Demonstrable progress

1. Introduction

The Kyoto Protocol obliges Parties to make “demonstrable progress” by 2005 and to report on compliance with its commitments assumed through the Kyoto Protocol (Art. 3.2 and 7).

According to the 2006 report of the Environment Commissioner, Canada is

“not on track to meet its obligations to reduce emissions”⁵³

and thus arguably also not “making demonstrable progress”. Canada has also failed to submit a report about its progress in accordance with Decision 22/CP.7 and 25/CP8.

This section argues that Canada in fact infringes international law by failing to abide by Art. 3.2 and 7 of the Kyoto Protocol.

⁵³ Commissioner's Report 2006 – The Commissioner's Perspective, p8.

2. The Rules

According to Art. 3.2 of the Kyoto Protocol,

“Each Party included in Annex I shall, by 2005, have made demonstrable progress in achieving its commitments under this Protocol.”

Para.4 of Decision 22/CP.7⁵⁴ “urges” Parties to the Kyoto Protocol

“to submit, by 1 January 2006, a report to provide the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol with the basis for reviewing the demonstration of progress by 2005, in accordance with Article 3, paragraph 2, of the Kyoto Protocol”

Decision 25/CP.8⁵⁵ contains outlines structure and content of the said report, and clarifies that the report should be a stand-alone document, which will be evaluated together with the 4th National Communications of Annex I Parties.

Reading the text of Art. 3.2, it is clearly a substantive duty, and therefore well placed in the treaty’s main provision on emission reduction targets – even if no reference points or indicators are provided to assess “demonstrable progress”. As stated above, the targets for the first commitment period of the Kyoto Protocol as set out in Art 3.1, 3.7 and Annex B are strictly legally binding.⁵⁶

According to Art. 7.2 Kyoto Protocol, making demonstrable progress is also connected to specific reporting duties:

“Each Party included in Annex I shall incorporate in its national communication, submitted under Article 12 of the Convention, the supplementary information necessary to demonstrate compliance with its commitments under this Protocol, to be determined in accordance with paragraph 4 below.”

Art. 7.4 mandates the Conference of the Parties serving as the Meeting of the Parties to the Protocol (COP/MOP) to determine specific guidelines in the form of decisions. Pertinent decisions taken are the already quoted 22/CP.7 and 25/CP.8, which specify the timeline and content of the report to be submitted.

Compliance with Art. 3.2 is subject to control by the compliance committee, as established by Decision 27/CMP.1.⁵⁷ In May 2006, as requested by Decision

⁵⁴ Contained in FCCC/CP/2001/13/Add.3, p.14

⁵⁵ FCCC/CP/2002/7/Add.3

⁵⁶ See only Oberthür/Ott, The Kyoto Protocol, p. 123.

⁵⁷ Contained in: FCCC/KP/CMP/2005/8/Add.3, Report of the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol on its first session, held at

22/CP.7 and 25/CP.8, the Secretariat prepared a synthesis report on demonstrable progress, which concluded that:

“Annex I Parties reported noticeable progress in organizing government-wide efforts to address climate change in the implementation of the Kyoto Protocol”.⁵⁸

The report includes a qualitative assessment of Parties’ efforts to reduce emissions, and not only a procedural assessment of whether reports have been submitted. As of October 2006, 10 months after the date set by Decision 22/CP.7, 6 Annex B countries had not reported on "demonstrable progress", including Canada.⁵⁹

Against this background it is arguable that Canada has violated two duties with respect to the concept of “demonstrable progress”:

- it has failed to make demonstrable progress (substantive duty of conduct);
- it has failed to provide a report on its demonstrable progress (procedural duty of reporting).

To determine a breach of international law by Canada, the legal quality and legal content of the provision must be clarified.

3. Art. 3.2 – A Substantive Duty

As described above, the text of Art. 3.2 is clearly worded as a substantive and binding duty on all Annex I Parties. Yet, Art. 3.2 has been qualified as “soft” provision by some commentators.⁶⁰ Others have commented on the strength of this provision, but have also criticised the non-mandatory nature of the timeline set by Decision 22/CP.7 (“urges”).⁶¹

Montreal from 28 November to 10 December 2005 Addendum - Part Two (Decisions 16-27/CMP.1).

⁵⁸ FCCC/SBI/2006/INF.2, Synthesis of reports demonstrating progress in accordance with Article 3, paragraph 2, of the Kyoto Protocol, at p.32.

⁵⁹ The other 5 countries are Italy, Luxembourg, Poland, Russia and Ukraine: see the page on the UNFCCC Secretariat's website at this url, as accessed on 29th October 2006: http://unfccc.int/national_reports/annex_i_natcom/submitted_natcom/items/3625.php

⁶⁰ Ibid.

⁶¹ Anderson, ‘Demonstrable progress’ on climate change: prospects and possibilities, in: Verification Research, Training and Information Centre (VERTIC) (Ed.) Verification Yearbook 2003, p 171 ff.

The background of Art. 3.2 lies in concerns of Parties with respect to the late start of the Kyoto Protocol's first commitment period (2008-2012) at the time when the Protocol was negotiated. This is well summarised by *Anderson*:

“When negotiations on the Kyoto Protocol started at the First Conference of the Parties (COP1) in Berlin, Germany, in March 1995, participants were talking about a five-year compliance (or commitment) period, beginning in 2008, 13 years in the future. Due to the periodicity of reporting, a final assessment of compliance would only be available in 2015, 20 years hence. Given the atmosphere of mistrust that had emerged, developing countries were concerned that this was another attempt by developed nations to shirk their responsibilities and to delay taking action. This prompted them to push for an interim measure of progress to gauge whether developed countries were on course to meet their emissions reduction obligations. This concept was finally adopted in Article 3 of the accord, which states that ‘each party included in Annex I (developed) shall by 2005 have made demonstrable progress in achieving its commitments under this Protocol’. What is notable is the strength of this commitment. The use of the word ‘shall’ gives the article teeth, although, as will be seen below, lack of an implementation mechanism is likely to prove problematic.”⁶²

Given this negotiation history, the role of the concept of “demonstrable progress” has been described mainly in the context of reporting and verification, rather than as a binding duty of conduct. The roles ascribed include an ‘early warning system’ for states not acting quickly or radically enough to meet their emissions reduction commitments in 2008–12, a tool to build trust between Annex I parties and a specific forum in which exchange information and to establish ‘best practice’.⁶³

Yet, Art. 3.2 is a provision of public international law and must therefore be interpreted in accordance with the principles laid out in the Vienna Convention on the Law of the Treaties (VCLT).⁶⁴ This means that the wording of Art. 3.2 should be interpreted within its ordinary meaning in context and in the light of the object and purpose of the treaty itself (Art. 31.1 VCLT).

This principle applies despite the fact that the Kyoto Protocol has its own compliance and thus “treaty interpretation” forum.⁶⁵

⁶² Note 61, p. 172.

⁶³ Anderson, p.173

⁶⁴ See note 31 above.

⁶⁵ The Kyoto Protocol compliance mechanism is designed to strengthen the Protocol's environmental integrity and the carbon market's credibility. Its objective is to facilitate, promote and enforce compliance with the commitments under the Protocol. The Committee was established pursuant to Art. 18 KP and Decision 27/CMP.1, which contains in its Annex the “Procedures and mechanisms relating to compliance under the Kyoto Protocol”.

The Kyoto Protocol's complex and thoroughly regulated compliance system has been heralded as unprecedented in international law.⁶⁶ It has two separate "chambers" (branches): the enforcement and the facilitative branch. The enforcement branch is not concerned with assessing compliance with Art. 3.2, but only concerned with assessing compliance with the quantitative targets (Art. 3.1 and Annex B), compliance with the reporting requirements under Art. 5.1 and 5.2, 7.1 and 7.4 after 2008 and assessing eligibility to participate in the use of the flexible mechanisms. It is adjudicatory in character. The facilitative branch on the other hand is to provide "advice and facilitation" to Parties in implementing the Protocol; and to promote compliance.⁶⁷

While there is legal discussion around whether or not a decision taken by the enforcement branch of the Compliance committee could be overturned by a judge in a national setting (or whether such a situation could arise at all), this discussion is inapplicable for decisions of the facilitative branch which does not make legally binding determinations of non-compliance.⁶⁸ Also, there has not so far been any discussion of the legal consequences of not "making demonstrable progress" in the Compliance Committee. Moreover, in keeping with the system of the Protocol, any intra-system legal interpretation of a piece of text of the Kyoto Protocol would ultimately rest with the system's highest forum, the COP/MOP.

Therefore, in interpreting the Protocol, an international lawyer is still to use the VCLT and is not bound in his interpretation by any intra-climate regime decisions.

As a first tool therefore, the wording is essential. This does not leave any doubt about the substantive nature of the obligation. In contrast to provisions such as, for example, Art. 4.2 FCCC (see above), the obligation is not attached to reporting duties or general assumptions. Art. 3.2 contains clear and understandable language: by 2005 Parties are to have made ("shall") demonstrable progress in achieving the Kyoto commitments. By

⁶⁶ ENB Final COP-7, 12 Earth Negotiations Bulletin 189, (2001), available at <<http://www.iisd.ca>>, at 15 (noting that the Kyoto Protocol contains "the most innovative and elaborate non-compliance procedure for any existing multilateral environmental agreement."). See also Wang/Wiser, *The Implementation and Compliance Regimes under the Climate Change Convention and the Kyoto Protocol*, 11:2 RECIEL (2002) 181 and Oberthür/Marr, *Das System der Erfüllungskontrolle des Kyoto Protokolls*, ZUR 2002, 81, Ulfstein/Werksman, *The Kyoto Compliance System: Towards Hard Enforcement*, in: Ulfstein/Stokke/Hovi, *Implementing the Climate Regime: International Compliance*, Earthscan 2005. 39 ff.

⁶⁷ Decision 27/CMP.1, Section XIV. Consequences applied by the Facilitative Branch

⁶⁸ Ulfstein/Werksman, *ibid*, p. 45.

“commitments”, the norm refers back to Art. 3.1 and Annex B which contain the quantitative targets.

This is also the stated will of the Parties, as is evidenced by the decision taken on the content of the reports on demonstrable progress. These country-by-country reports are to include *inter alia* policies and measures that have been implemented and the legal or institutional steps that have been taken to meet emissions reduction targets, trends in, and projections of GHG emissions and details on how policies implemented will contribute to meeting emissions reduction commitments.⁶⁹

With respect to interpretation on the basis of the will of the Parties, it should also be borne in mind that the provision has been drafted to reconcile AOSIS (Alliance of Small Island States) and EU concerns, who wanted agreed targets and timetables for 2005.⁷⁰ This clearly points to a substantive duty rather than some “soft” obligation. Naturally, the legal quality of Art. 3.2 is not one of “obligation of result”, but one of “obligation of conduct”. What the latter entails exactly is often a difficult question to answer for an international lawyer.

Yet, the question arising is not whether Art. 3.2 constitutes a binding substantive obligation but how to enforce it given the lack of indicators and reference points which could help determining what exactly “demonstrable progress” is. Again, taking the VCLT and general international law of treaties as a guideline, the mere use of an unspecified and vague factual term requiring legal interpretation does not alter the binding nature of an obligation. Rather, it is quite often the case that treaty language will, over time, be specified by subsequent practise or decisions of treaty institutions.

Thus, one should proceed to interpret the term “demonstrable progress”. Literally, this means that a country should have advanced in achieving the aims of the Kyoto Protocol (in the case of Canada, reducing GHG emissions by 6% below 1990 levels in the period of 2008-2012) from 1997, the date of signature onwards, in a verifiable manner, i.e. (as decided by the Parties in the context of reporting on the duty) by showing policies and measures in relation to emission trends etc. which would enable a Party to reach its Kyoto target.

⁶⁹ Decision 22/CP.7.

⁷⁰ See Oberthür/Ott, p. 123.

4. Breach of the obligation of conduct

While it might be difficult to determine exactly what making progress would mean generally, in the case of Canada I contend that it is possible to state that no “demonstrable progress” has been made given the current evidence – this evidence shows that, as already discussed in Section B.I. no “advance” was made with respect to achieving the Kyoto target.

Not only are Canada’s emissions of Kyoto gases almost 27% above 1990 levels in 2004, the “gap” to achieving the 6% target has widened to 34.6% reductions necessary.⁷¹

The Environmental Commissioner, based on Government records and assessments has also found continually since 1998 that the Government is not on track to achieving either its own climate protection targets nor the goals set by the Kyoto Protocol (see section B. I).

In its 1998 report, it stated that “key opportunities for implementation were lost”,⁷² despite the fact that the federal Government had already made a commitment to stabilize CO₂ emissions on 1990 levels by the year 2000 and should therefore have been well prepared.⁷³ While the Commissioner's reports and Canada’s National Communications show that the gap towards achieving the Kyoto target of 6% reduction is widening each year, no effective policies and measures are introduced. Particularly, the federal Government, the addressee of the duties under the Kyoto Protocol, has repeatedly been criticised for its lack of direction and commitment.⁷⁴

The 2001 Report identified the same weaknesses, and stated that emissions had by 2001 increased by 15% over 1990 levels, despite the fact that Canada had developed various action plans as well as a “National Implementation Strategy”.⁷⁵ It was also always quite clear that even if all programmes would have been implemented, a gap of 18% reduction towards the Kyoto target would remain.⁷⁶

⁷¹ Auditors report, note 53, p. 8.

⁷² Commissioner's Report 1998

⁷³ 1998 Report, para.. 50

⁷⁴ 1998 Report, para. 3.83 ff.

⁷⁵ Commissioner's Report 2001- Climate Change and Energy Efficiency, A Progress Report, para 6.30 ff.

⁷⁶ 2001 Report, para. 6.41.

The 2003 Report focusing on transport stated clearly that the current programs would not contribute enough to emission reductions in the transport sector to reach the Kyoto target.⁷⁷

The 2006 Report delivered a clear message that – despite the various action plans, effective measures to reduce emissions and reach the Kyoto target at least partially are still missing.

It is particularly telling that the Government is now openly stating that it cannot and will not reach the Kyoto targets.⁷⁸ Rather, it is now proposing medium-term targets, apparently not attaching any significance to the 2008-2012 commitment period.

This track record and current political positioning shows clearly that demonstrable progress towards meeting Canada's 6% reduction aim is not made. I conclude therefore that Canada is currently in violation of Art. 3.2 of the Kyoto Protocol.

5. Breach of a Reporting Duty

As described above, Decision 22/CP.7, based on Art. 7, as well as Decision 25/CP.8, urge Parties to submit a report on their demonstrable progress by 1st January 2006.

In May 2006, a submission⁷⁹ was made by South Africa on behalf of the Group of G77 and China to the Facilitative Branch of the Kyoto Protocol's

⁷⁷ Commissioner's Report 2003, Road Transportation in Urban Areas: Accountability for reducing greenhouse gases, para 2.77 ff

⁷⁸ It was widely reported in the Canadian Press that the Conservative Government will "turn its back on the Kyoto accord and set its own targets for reducing greenhouse-gas emissions", as expressed by now-Prime Minister Stephen Harper. It is reported that he said: "The accord's targets cannot be met either internationally or within Canada", Mr. Harper said, citing the country's woeful record on climate change since the agreement was signed in 1997. See Canadian Press, Thursday, January 12, 2006, Halifax — <http://www.theglobeandmail.com/servlet/story/RTGAM.20060112.wkyot0112/BNStory/specialDecision2006/>. In response to the 2006 Environmental Auditor's report, Canada's environment Minister, Rona Ambrose said that Canada needed "targets that are achievable with the best available technology", not refuting claims that the Harper Government is turning away from Kyoto. See CanWest News Service, September 30, 2006 <http://www.canada.com/nationalpost/news/story.html?id=0e00c4ee-e75d-4c3e-a350-a700c4cb1440&k=75341>

⁷⁹ The submission was made in accordance with section VII, paragraph 2 of the annex to decision 27/CMP.1.

Compliance Committee⁸⁰, to complain about the lack of implementation of Canada, and in particular violation of Decision 22/CP.7.⁸¹

According to the status report of the Secretariat as of 7th September 2006, Canada “informed” the FCCC organs of the delay, but did not specify a date at which it will submit the report on demonstrable progress.⁸²

The Facilitative Branch has failed, so far at least, to take a decision on whether or not to proceed on the basis of the submission.⁸³ This was due to the fact that the Committee could not reach consensus on whether the procedural requirements for deliberations of the Compliance Committee (as specified in Decision 27/CMP.1) were met, for example whether it was appropriate for a whole group to file a complaint; and to subsequently tied votes.⁸⁴

On the basis of Decision 22/CP.7, complemented by Decision 25/CP.8 (on the content and structure of the report), and under-pinned by Art. 7, it is clear that Canada must report about its “demonstrable progress”. The questions arising are whether a legally binding obligation to report arises, and if so by a particular time.

Given the analysis outlined above for the submission of the 4th National Communication, this question also arises because the legal basis for the demonstrable progress report is not precisely the same as that for the National Communications report.

⁸⁰ FCCC/KP/CMP/2006/6: Annual report of the Compliance Committee to the Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol.

⁸¹ Submission by South Africa, as Chairman of the Group of 77 and China, on behalf of the Group of 77 and China (Party concerned: Canada), CC-2006-3-1/FB. The CC connotes the document as Compliance Committee document.

⁸² Status of national communications and reports demonstrating progress of Annex I Parties. Note by the secretariat, CC/3/2006/6/Rev.1.

⁸³ Report to the Compliance Committee on the Deliberations in the Facilitative Branch relating to the Submission entitled “Compliance with Article 3.1 of the Kyoto Protocol” (Party concerned: Canada), CC-2006-3-3/FB 22 June 2006.

⁸⁴ The Report of the Compliance Committee, *ibid.*, states in paragraph 2 that “[w]hen all efforts to reach agreement on a decision by consensus had been exhausted, a vote was taken electronically on 21 June 2006, resulting in the failure to adopt either a decision to proceed or a decision not to proceed by a majority of three-fourths of the members present and voting, as required by section II, paragraph 9 of the annex to decision 27/CMP.1 in relation to section VII, paragraphs 4 and 6 of the annex to decision 27/CMP.1.”. The report goes on to indicate that the vote on the proposed decision to proceed was tied at 4/4 (with 2 abstentions), and that the vote on the proposed decision not to proceed was tied at 5/5 (no abstentions).

The obligation to provide a National Communication is explicitly contained in Art. 4.2 b) and the frequency of such communications, after the first one, is to be determined by the COP in pursuant Art. 12.5 FCCC.

For the demonstrable progress report, the Kyoto Protocol does not foresee an explicit reporting obligation in Art. 3.2. Art. 7.2 requires each (relevant) Party to include in its national communication “the supplementary information necessary to demonstrate compliance with its commitments under this Protocol, to be determined in accordance with paragraph 4 below.”

Art. 7.3 requires each Party to submit such information “as part of the first national communication due under the Convention after this Protocol has entered into force for it and after the adoption of guidelines as provided for in paragraph 4 below.” Art 7.3 also provides for the “frequency of subsequent submission of information” to be determined by the COP/MOP.

Art. 7.4 provides that the COP/MOP “shall adopt at its first session, and review periodically thereafter, guidelines for the preparation of the information required under this Article, taking into account guidelines for the preparation of national communications by Parties included in Annex I adopted by the Conference of the Parties.”

At its first session in 2005, the COP/MOP adopted Decision 15/CMP.1, entitled “Guidelines for the preparation of the information required under Article 7”, but did not include within such guidelines any information relating to the demonstrable progress reports under Art. 7.3. Neither has it re-adopted the decisions taken by the COP on the structure, content and deadline for the demonstrable progress reports (Decisions 22/CP.7 and 25/CP.8). As a pretext to Decision 15/CMP.1⁸⁵, Kyoto Parties simply “considered Decision 22/CP.7”.

It might therefore be said that in absence of a COP/MOP decision under Art. 7.4 on the information requirements for the demonstrable progress report, the reporting duty does not formally apply.

Addressing this question makes it necessary to assess the quality of Decision 22/CP.7 and 25/CP.8 in the context of compliance with provisions of the Kyoto Protocol. Since the Kyoto Protocol has its own decision making forum, the COP/MOP (Art. 13.1), decisions on Kyoto Protocol norms can only under special circumstances be taken by the COP as the Conference of the Parties to the FCCC, as a quasi-interim body.⁸⁶ Therefore, most decisions known as the

⁸⁵ Guidelines for the preparation of the information required under Article 7 of the Kyoto Protocol, contained in FCCC/KP/CMP/2005/8/Add.2

⁸⁶ See Oberthür/Ott, p. 242 ff.

Marrakesh Accords were agreed in package by the 1st COP/MOP, but not Decision 22/CP.7.

At the same time, all Parties to the Kyoto Protocol are also Parties to the FCCC and COP decisions must – in absence of agreed rules of procedure – be taken by consensus.

This divergence between institutional/legalistic and practical views enabled the COP in the past to take decisions binding on Kyoto Parties, such as Decision 17/CP.7 which enabled Parties to start operations under the Clean Development Mechanism as well as to set up the Executive Board of the CDM while the Kyoto Protocol was not yet in force. But while Decision 3/CMP.1 expressly confirms Decision 17/CP.7, no such formulation can be found in any of the first COP/MOP decisions with respect to Decision 22/CP.7 and 25/CP.8.

The reason for this seems to be that the Parties did not deem it necessary to repeat their decision, given that the COP/MOP took place in December 2005 and the deadline stipulated for reports on demonstrable progress was the 1st of January 2006. In contrast to Decision 17/CP.7 on the CDM, there was no apparent need to re-acknowledge their decision of 2001 formally. This is underpinned by the fact that there is no evidence to the effect that Parties wished to deviate from the Marrakesh Accords, which included Decision 22/CP.7⁸⁷ Furthermore, Parties could not have deviated from the general reporting duty as enshrined in Art. 7.2 Kyoto Protocol in any case.

This reading makes it possible to state that the COP decision with its requirements for a demonstrable progress report, while not formally reiterated by the first COP/MOP, are binding on Parties to the Kyoto Protocol, given that they reflect consensus at the time and given that the reporting duty as such is already contained in the text of the Kyoto Protocol (Art. 7.3, 2nd sentence).

Another question then arises as to whether the deadline of 1st January 2006 for the submission (contained in Decision 22/CP.7) is in fact a binding deadline. Generally, as discussed above, intra-regime decisions can, as concretisation of treaty provisions which have been ratified, be binding on States under public international law. At the same time, the language of the said decision 22/CP.7 is not particularly mandatory (“urges”).

It might therefore be argued that the 1st January 2006 deadline is not legally binding. Yet, in the author’s view, this question can be left open. When the G77 submission was filed, in May 2006, the deadline as expressed in Art. 3.2

⁸⁷ See the report of the 1st COP/MOP on the adoption of the Decisions forwarded by the COP, FCCC/KP/CMP/2005/8, which contains a full endorsement of the Marrakesh Accords in para. 33.

Kyoto Protocol ("by 2005") had long passed. At the time of writing, the year 2006 draws to an end. In the opinion of the author, the fact that a binding deadline might not have been established by the Parties cannot prevent a State Party from entering non-compliance with Art.7.2, 7.3 and 3.2 Kyoto Protocol in conjunction with Decision 22/CP.7 and 25/CP.8.

It is generally for the Facilitative Branch of the Compliance to judge "problems of implementation", (section IV.4 of Decision 27/CMP.1) but any national judge would be able to assess compliance. In the opinion of the author, if a duty to report exists, this duty must be complied with within a reasonable time in order for the relevant document to have the use for which it was intended, which is, essentially, to have a transparent early warning system in place to make sure the Kyoto Protocol will function and no Party will run into major non-compliance problems with their respective targets. If these reports are provided, say, in the course of 2007 only, no early warning function will be exercised by them, given the fact that the commitment period already starts on 1st January 2008.

The deadline of 1st January 2006 is possibly not legally binding, but it nevertheless constitutes a consensually-agreed timeline. It seems arguable that, failing to provide the report even 10 months or a whole year after this deadline would seem unlawful, especially given the fact that the information required is available to the Canadian Government and no special circumstances apply. A country would, to comply with the spirit and words of Decision 22/CP.7 have to submit the report well before the start of the 1st commitment period, which is now only 14 months away.

Thus, Canada and all other Annex I Parties which have not, by the end of October 2006 submitted their demonstrable progress reports can be said to violate Art. 3.2 in conjunction with Art. 7.2 and 7.3 Kyoto Protocol and 22/CP.7.

V. Openly denouncing the Kyoto target

The Government of Canada is currently stating that it will not meet the Kyoto targets but will establish longer-term targets based on Canada's needs: the intended long-term goal is now to reduce GHG emissions by 45-65% compared to 2003 levels by 2050.

This behaviour could in itself constitute a violation of international law. An assessment can only be preliminary as the precise conduct of the Government towards the international climate regime is unclear.

Firstly, the Kyoto Protocol constitutes international law binding on Canada as it has ratified the treaty. The commitments for the first commitment period are set out in Art. 3.1 and Annex B of the Protocol. To legally refrain from meeting them, Canada must either seek a re-negotiation of the current Art. 3.1 and Annex B or withdraw from the treaty.

As for a re-negotiation, this would be possible from a legal point of view, as Parties to a treaty are free to alter and change it. Moreover, the Kyoto Protocol's second commitment period is currently under negotiation. Yet, it is highly unlikely that the other 164 Parties would consent to such an undertaking as it would open up the Pandora's Box of every Party claiming that it cannot reach the targets negotiated in 1997.

As for withdrawal, any State Party to an international treaty can withdraw from the treaty under the conditions specifically stipulated in the treaty itself or under the Vienna Convention on the Law of the Treaties. Conditions for withdrawal are set out in Art. 27 of the Kyoto Protocol. A withdrawal is possible after 3 years after the entry into force of the Protocol for the Party willing to withdraw. The entry into force was in February 2005, thus Canada cannot legally withdraw from the Protocol before March 2008. Yet, from the current deliberations of the Environment Minister it seems that Canada does not wish to formally withdraw.

Should therefore Canada choose neither of these paths, it is unclear how it wishes to remain in compliance with international law. Moreover, it is arguable that by denouncing its targets two years before the start of the commitment period, having had time to prepare for compliance since 1997 constitutes a breach of the accepted international law principle of good faith.⁸⁸

Moreover, even if Canada would withdraw from the Kyoto Protocol, its obligations under the FCCC would remain. Besides, customary international law rules such as the no-harm rule⁸⁹ would prohibit Canada from not taking action to prevent climate change, as damage to the climate system inevitably also results in damage to states and citizens worldwide.

⁸⁸ Brownlie, *Principles of Public International Law*, 18.f. Similarly Vitzhum, in: Vitzhum, *Völkerrecht*, 76 ff. stresses that such principles ("allgemeine Rechtsgrundsätze") can only be deducted from municipal law by way of comparative law analysis. The ICJ relied on the principle of good faith and *pacta sunt servanda* for example in the *Nuclear Tests* cases, ICJ Rep. 1974, 267 f.

⁸⁹ The no-harm rule is a basic rule of customary international law which, as adapted in the preamble to the FCCC, says: "... States have, ... the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction."

It is also arguable that asking for a re-negotiation at this stage, as well as denouncing the targets just before the start of the commitment period constitutes a direct infringement of the cooperation duties laid out in the FCCC:

All current 188 State Parties to the FCCC plus the EU have assumed an obligation to cooperate in the future development of the climate regime and to further its objectives. In addition to constituting a general principle of international law, this duty is explicitly enshrined in Art. 4(2)(d), 7(2)(e), and 17 of the FCCC. These are applicable to all Parties to the Convention. Moreover, as described above, under Art. 18 of the VCLT all Parties are obliged to refrain from actions that would defeat the objective of a treaty they have joined. To destabilise the Kyoto Protocol's entire architecture and future by asking for a re-negotiation of the 1st commitment period's targets violates this obligation, again, an obligation of conduct.

Should Canada elect to simply run into non-compliance, the matter would be brought before the compliance committee (enforcement branch) and a finding of non-compliance would be issued, likely before the end of the first commitment period. On this basis, claims against Canada, both in international and national courts would be possible on the simple basis that Canada does not meet the agreed 6% target.

VI. Canada is likely to violate the Kyoto target

If Canada chooses to remain a Party to the Protocol the question must be asked whether it is *likely to violate* its obligations, come the end of the commitment period. It seems quite obvious that Canada will have major problems meeting its 6% target solely by installing domestic actions and policies.

As evidenced by the recent Environmental Commissioner's report 2006 and based on Canada's 1990 baseline and the resulting assigned amount, meeting the Kyoto target would mean that Canada would have to reduce almost 5% GHG emissions on average per year from 2004-2012⁹⁰ – this would be an unprecedented effort, and no other country is currently suggesting to achieve such drastic reductions in such a short timeframe.

Yet, under the Kyoto Protocol, Parties are allowed to use the Flexible Mechanisms (Joint Implementation, Clean Development Mechanism and Emissions Trading) to achieve their targets.

⁹⁰ Roughly calculated. Canada's 1990 baseline is 599 Mt, the average yearly allowance (Kyoto target from 2008-2012) 563Mt. Emissions in 2004 (the year for which figures are available) were 758 Mt.

The text of the Kyoto Protocol does not prescribe whether and to what extent the targets must be achieved domestically, i.e. by reducing GHG emissions at home. This was a major area of dispute during the negotiations of the so-called Marrakesh Accords which contain the detailed rules for the use of the Mechanisms.

According to the pertinent decisions, domestic actions (as opposed to use of the mechanisms) must constitute a “significant element” of the efforts made by each Annex I Party to meet its target under the Kyoto Protocol⁹¹, but the Parties refrained from specifying a quantified proportion that is to be met through domestic action. This is captured by Decision 2/CMP.1, through which the COP/MOP decided,

“that the use of the mechanisms shall be supplemental to domestic action and that domestic action shall thus constitute a significant element of the effort made by each Party included in Annex I to meet its quantified emission limitation and reduction commitments under Article 3, paragraph 1”.

Decisions relating to Articles 5, 7 and 8 of the Protocol (Reporting) require in turn that Annex I Parties demonstrate that their use of the mechanisms is “supplemental to domestic action” to achieve their targets.⁹²

On this basis it seems clear that Canada will not be able to comply with the Kyoto Protocol should it refrain *altogether* from establishing domestic policies and measures that will reduce emissions domestically, and instead rely solely on the use of the flexible mechanisms to achieve its overall target. Given the vagueness of the term “significant element” it is, however, not possible to judge to what extent these domestic measures would have to contribute to compliance.

Given that the Canadian Government seems, at the moment, inclined not to establish sufficient domestic measures as well as not to make extensive use of the Flexible Mechanisms⁹³, compliance with the Kyoto target seems impossible, and Canada is thus likely to violate Art. 3.1 and Annex B of the Kyoto Protocol.

⁹¹ Decisions 2/CMP.1, 3/CMP.1., 9/CMP.1., 11/CMP.1, all contained in FCCC/KP/CMP/2005/8/Add.1.

⁹² See Decision 15/CMP.1, ANNEX: Guidelines for the preparation of the information required under Article 7 of the Kyoto Protocol, para. 33, contained in FCCC/KP/CMP/2005/8/Add.2.

⁹³ See Notes to Bill C-30, note 25.

Compliance with the quantitative targets would be judged by the Compliance Committee – Enforcement Branch, yet at the earliest in 2012/2013. Whether or not Canada makes significant efforts domestically in accordance with Decision 2/CMP.1 will be judged by the Facilitative Branch of the Compliance Committee, yet much earlier, as the Facilitative Branch will be able to control whether Canada's annual reports live up to the requirements of the pertinent COP/MOP decisions.

Should Canada choose to remain a Party to the Protocol and also choose not to comply with its 6% reduction targets, the Enforcement Branch of the Kyoto Protocol would have to apply legal consequences.

Should non-compliance with the targets be found, the Enforcement Branch will deduct 1.3 times the volume of emissions of the Party in non-compliance, as compared to its target from the allowance for the second commitment period. This means that – by way of a binding⁹⁴ ruling by the Enforcement Branch in ca. 2015 – a Party in non-compliance would have to achieve reductions in the next commitment period which add up to:

- its excess emissions in the first commitment period;
- plus an extra 30% of those as "penalty"; and
- plus its negotiated target for the commitment period starting after 2012.

Such a Party would no longer be allowed to participate in international emission trading by selling assigned amount units. There would also be a Compliance Action Plan developed upon suggestion of the Party, which would be continuously monitored.⁹⁵

⁹⁴ There is some discussion as to the legal nature of the non-compliance consequences, as Art. 18 Kyoto Protocol foresees that "Any procedures and mechanisms under this Article entailing binding consequences shall be adopted by means of an amendment to this Protocol.", see Ulfstein/Werksman, *ibid.*, p.57ff. This dispute is not of relevance in this particular context.

⁹⁵ Decision 27/CMP.1, Section XV. Consequences applied by the Enforcement Branch, para. 5

C. Conclusion

This opinion shows that Canada is currently violating the FCCC in three respects:

- Art. 2 and 4.2 – not reversing emission trends;
- Art. 4.1 a) – not adopting and implementing programmes and measures to adapt; and
- Art. 12 and 4.1 – not reporting,

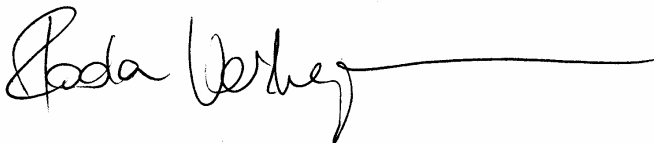
and the Kyoto Protocol in two respects:

- Art. 3.2 – not making demonstrable progress towards meeting the 6% target; and
- Art. 7.2, 7.3 and 3.2 - not reporting on “demonstrable progress”.

It also shows that:

- Canada, by not meeting the 6% target either through domestic measures or use of the Flexible Mechanisms, is likely to run into non-compliance with Art. 3.1 and Annex B of the Kyoto Protocol and thus face compliance consequences; and
- that it is probable that, by openly denouncing the Kyoto Protocol so shortly before the start of the first commitment period, or by withdrawing from the Treaty at this stage, Canada would infringe its duties of cooperation under the FCCC as well as the customary international law principle of good faith.

Done in Hamburg, Germany, 30th October 2006



Annex

Extracts from some provisions of the UN Framework Convention on Climate Change and of the Kyoto Protocol, referred to in the opinion

A. United Nations Framework Convention on Climate Change

ARTICLE 2 OBJECTIVE

The ultimate objective of this Convention and any related legal instruments that the Conference of the Parties may adopt is to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time-frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.

ARTICLE 4 COMMITMENTS

1. All Parties, taking into account their common but differentiated responsibilities and their specific national and regional development priorities, objectives and circumstances, shall:

(a) Develop, periodically update, publish and make available to the Conference of the Parties, in accordance with Article 12, national inventories of anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol, using comparable methodologies to be agreed upon by the Conference of the Parties;

(b) Formulate, implement, publish and regularly update national and, where appropriate, regional programmes containing measures to mitigate climate change by addressing anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol, and measures to facilitate adequate adaptation to climate change;

...

(j) Communicate to the Conference of the Parties information related to

implementation, in accordance with Article 12.

2. The developed country Parties and other Parties included in Annex I commit themselves specifically as provided for in the following:

(a) Each of these Parties shall adopt national policies and take corresponding measures on the mitigation of climate change, by limiting its anthropogenic emissions of greenhouse gases and protecting and enhancing its greenhouse gas sinks and reservoirs. These policies and measures will demonstrate that developed countries are taking the lead in modifying longer-term trends in anthropogenic emissions consistent with the objective of the Convention, recognizing that the return by the end of the present decade to earlier levels of anthropogenic emissions of carbon dioxide and other greenhouse gases not controlled by the Montreal Protocol would contribute to such modification, and taking into account the differences in these Parties' starting points and approaches, economic structures and resource bases, the need to maintain strong and sustainable economic growth, available technologies and other individual circumstances, as well as the need for equitable and appropriate contributions by each of these Parties to the global effort regarding that objective. These Parties may implement such policies and measures jointly with other Parties and may assist other Parties in contributing to the achievement of the objective of the Convention and, in particular, that of this subparagraph;

(b) In order to promote progress to this end, each of these Parties shall communicate, within six months of the entry into force of the Convention for it and periodically thereafter, and in accordance with Article 12, detailed information on its policies and measures referred to in subparagraph (a) above, as well as on its resulting projected anthropogenic emissions by sources and removals by sinks of greenhouse gases not controlled by the Montreal Protocol for the period referred to in subparagraph (a), with the aim of returning individually or jointly to their 1990 levels these anthropogenic emissions of carbon dioxide and other greenhouse gases not controlled by the Montreal Protocol. This information will be reviewed by the Conference of the Parties, at its first session and periodically thereafter, in accordance with Article 7;

...

ARTICLE 12

COMMUNICATION OF INFORMATION RELATED TO IMPLEMENTATION

1. In accordance with Article 4, paragraph 1, each Party shall communicate to the Conference of the Parties, through the secretariat, the following elements of information:

- 41 -

(a) A national inventory of anthropogenic emissions by sources and removals by sinks of all greenhouse gases not controlled by the Montreal Protocol, to the extent its capacities permit, using comparable methodologies to be promoted and agreed upon by the Conference of the Parties;

(b) A general description of steps taken or envisaged by the Party to implement the Convention; and

(c) Any other information that the Party considers relevant to the achievement of the objective of the Convention and suitable for inclusion in its communication, including, if feasible, material relevant for calculations of global emission trends.

2. Each developed country Party and each other Party included in Annex I shall incorporate in its communication the following elements of information:

(a) A detailed description of the policies and measures that it has adopted to implement its commitment under Article 4, paragraphs 2(a) and 2(b); and

(b) A specific estimate of the effects that the policies and measures referred to in subparagraph (a) immediately above will have on anthropogenic emissions by its sources and removals by its sinks of greenhouse gases during the period referred to in Article 4, paragraph 2(a).

3. In addition, each developed country Party and each other developed Party included in Annex II shall incorporate details of measures taken in accordance with Article 4, paragraphs 3, 4 and 5.

4. Developing country Parties may, on a voluntary basis, propose projects for financing, including specific technologies, materials, equipment, techniques or practices that would be needed to implement such projects, along with, if possible, an estimate of all incremental costs, of the reductions of emissions and increments of removals of greenhouse gases, as well as an estimate of the consequent benefits.

5. Each developed country Party and each other Party included in Annex I shall make its initial communication within six months of the entry into force of the Convention for that Party. Each Party not so listed shall make its initial communication within three years of the entry into force of the Convention for that Party, or of the availability of financial resources in accordance with Article 4, paragraph 3. Parties that are least developed countries may make their initial communication at their discretion. The frequency of subsequent communications by all Parties shall be determined by the Conference of the Parties, taking into account the differentiated timetable set by this paragraph.

....

.../ 42

ARTICLE 13

RESOLUTION OF QUESTIONS REGARDING IMPLEMENTATION

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.

ARTICLE 14

SETTLEMENT OF DISPUTES

1. In the event of a dispute between any two or more Parties concerning the interpretation or application of the Convention, the Parties concerned shall seek a settlement of the dispute through negotiation or any other peaceful means of their own choice.

2. When ratifying, accepting, approving or acceding to the Convention, or at any time thereafter, a Party which is not a regional economic integration organization may declare in a written instrument submitted to the Depositary that, in respect of any dispute concerning the interpretation or application of the Convention, it recognizes as compulsory ipso facto and without special agreement, in relation to any Party accepting the same obligation:

(a) Submission of the dispute to the International Court of Justice, and/or

(b) Arbitration in accordance with procedures to be adopted by the Conference of the Parties as soon as practicable, in an annex on arbitration.

A Party which is a regional economic integration organization may make a declaration with like effect in relation to arbitration in accordance with the procedures referred to in subparagraph (b) above.

...

5. Subject to the operation of paragraph 2 above, if after twelve months following notification by one Party to another that a dispute exists between them, the Parties concerned have not been able to settle their dispute through the means mentioned in paragraph 1 above, the dispute shall be submitted, at the request of any of the parties to the dispute, to conciliation.

6. A conciliation commission shall be created upon the request of one of the parties to the dispute. The commission shall be composed of an equal number of members appointed by each party concerned and a chairman chosen jointly by the members appointed by each party. The commission shall render a recommendatory award, which the parties shall consider in good faith.

7. Additional procedures relating to conciliation shall be adopted by the Conference of the Parties, as soon as practicable, in an annex on conciliation.

8. The provisions of this Article shall apply to any related legal instrument which the Conference of the Parties may adopt, unless the instrument provides otherwise.

ANNEX I COUNTRIES

Australia	Lithuania*
Austria	Luxembourg
Belarus*	Monaco**
Belgium	Netherlands
Bulgaria*	New Zealand
Canada	Norway
Croatia*/**	Poland*
Czech Republic*/**	Portugal
Denmark	Romania*
European Economic Community	Russian Federation*
Estonia*	Slovakia*/**
Finland	Slovenia*/**
France	Spain
Germany	Sweden
Greece	Switzerland
Hungary*	Turkey
Iceland	Ukraine*
Ireland	United Kingdom of Great Britain and Northern Ireland
Italy	United States of America
Japan	
Latvia*	
Liechtenstein**	

*Countries that are undergoing the process of transition to a market economy.

** Countries added to Annex I by an amendment that entered into force on 13 August 1998, pursuant to decision 4/CP.3 adopted at COP 3.

B. KYOTO PROTOCOL

Article 3 [Emission reductions by Annex I Parties]

1. The Parties included in Annex I shall, individually or jointly, ensure that their aggregate anthropogenic carbon dioxide equivalent emissions of the greenhouse gases listed in Annex A do not exceed their assigned amounts, calculated pursuant to their quantified emission limitation and reduction commitments inscribed in Annex B and in accordance with the provisions of this Article, with a view to reducing their overall emissions of such gases by at least 5 per cent below 1990 levels in the commitment period 2008 to 2012.

2. Each Party included in Annex I shall, by 2005, have made demonstrable progress in achieving its commitments under this Protocol.

...

9. Commitments for subsequent periods for Parties included in Annex I shall be established in amendments to Annex B to this Protocol, which shall be adopted in accordance with the provisions of Article 21, paragraph 7. The Conference of the Parties serving as the meeting of the Parties to this Protocol shall initiate the consideration of such commitments at least seven years before the end of the first commitment period referred to in paragraph 1 above.

10. Any emission reduction units, or any part of an assigned amount, which a Party acquires from another Party in accordance with the provisions of Article 6 or of Article 17 shall be added to the assigned amount for the acquiring Party.

11. Any emission reduction units, or any part of an assigned amount, which a Party transfers to another Party in accordance with the provisions of Article 6 or of Article 17 shall be subtracted from the assigned amount for the transferring Party.

12. Any certified emission reductions which a Party acquires from another Party in accordance with the provisions of Article 12 shall be added to the assigned amount for the acquiring Party.

13. If the emissions of a Party included in Annex I in a commitment period are less than its assigned amount under this Article, this difference shall, on request of that Party, be added to the assigned amount for that Party for subsequent commitment periods.

Article 7 [National inventories and communications of Annex I Parties]

1. Each Party included in Annex I shall incorporate in its annual inventory of anthropogenic emissions by sources and removals by sinks of greenhouse gases not controlled by the Montreal Protocol, submitted in accordance with the relevant decisions of the Conference of the Parties, the necessary supplementary information for the purposes of ensuring compliance with Article 3, to be determined in accordance with paragraph 4 below.

2. Each Party included in Annex I shall incorporate in its national communication, submitted under Article 12 of the Convention, the supplementary information necessary to demonstrate compliance with its commitments under this Protocol, to be determined in accordance with paragraph 4 below.

3. Each Party included in Annex I shall submit the information required under paragraph 1 above annually, beginning with the first inventory due under the Convention for the first year of the commitment period after this Protocol has entered into force for that Party. Each such Party shall submit the information required under paragraph 2 above as part of the first national communication due under the Convention after this Protocol has entered into force for it and after the adoption of guidelines as provided for in paragraph 4 below. The frequency of subsequent submission of information required under this Article shall be determined by the Conference of the Parties serving as the meeting of the Parties to this Protocol, taking into account any timetable for the submission of national communications decided upon by the Conference of the Parties.

4. The Conference of the Parties serving as the meeting of the Parties to this Protocol shall adopt at its first session, and review periodically thereafter, guidelines for the preparation of the information required under this Article, taking into account guidelines for the preparation of national communications by Parties included in Annex I adopted by the Conference of the Parties. The Conference of the Parties serving as the meeting of the Parties to this Protocol shall also, prior to the first commitment period, decide upon modalities for the accounting of assigned amounts.

Article 8 [Expert review of information submitted under Article 7]

1. The information submitted under Article 7 by each Party included in Annex I shall be reviewed by expert review teams pursuant to the relevant decisions of the Conference of the Parties and in accordance with guidelines adopted for this purpose by the Conference of the Parties serving as the meeting of the Parties to this Protocol under paragraph 4 below. The information submitted

under Article 7, paragraph 1, by each Party included in Annex I shall be reviewed as part of the annual compilation and accounting of emissions inventories and assigned amounts. Additionally, the information submitted under Article 7, paragraph 2, by each Party included in Annex I shall be reviewed as part of the review of communications.

...

Article 18 [Non-compliance procedures and mechanisms]

The Conference of the Parties serving as the meeting of the Parties to this Protocol shall, at its first session, approve appropriate and effective procedures and mechanisms to determine and to address cases of non-compliance with the provisions of this Protocol, including through the development of an indicative list of consequences, taking into account the cause, type, degree and frequency of non-compliance. Any procedures and mechanisms under this Article entailing binding consequences shall be adopted by means of an amendment to this Protocol.

Annex A
Greenhouse gases

Carbon dioxide (CO₂)
Methane (CH₄)
Nitrous oxide (N₂O)
Hydrofluorocarbons (HFCs)
Perfluorocarbons (PFCs)
Sulphur hexafluoride (SF₆)

...

Annex B

Party	<u>Quantified emission limitation or reduction commitment</u> (percentage of base year or period)
Australia	108
Austria	92
Belgium	92
Bulgaria*	92
Canada	94
Croatia*	95
Czech Republic*	92
Denmark	92
Estonia*	92
European Community	92
Finland	92
France	92
Germany	92

Greece	92
Hungary*	94
Iceland	110
Ireland	92
Italy	92
Japan	94
Latvia*	92
Liechtenstein	92
Lithuania*	92
Luxembourg	92
Monaco	92
Netherlands	92
New Zealand	100
Norway	101
Poland*	94
Portugal	92
Romania*	92
Russian Federation*	100
Slovakia*	92
Slovenia*	92
Spain	92
Sweden	92
Switzerland	92
Ukraine*	100
United Kingdom of Great Britain and Northern Ireland	92
United States of America	93

* Countries that are undergoing the process of transition to a market economy.