ANALYSIS OF TEXT BY THE CO-CHAIRMEN OF THE JOINT WORKING GROUP ON COMPLIANCE DATED 10 SEPTEMBER 2000, FCCC/SB/2000/CRP.7

CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW (CIEL)
WORLDWIDE FUND FOR NATURE (WWF)

SECTION II, ESTABLISHMENT AND STRUCTURE

Compliance Committee

Paras 1-3. We agree that the Committee should consist of separate facilitative and enforcement branches; should be relatively small in number (e.g., 15 members); and that members should serve in their personal capacity and not as Party representatives. This last point—that members will act in their personal capacities as experts and not political representatives—is key to creating a compliance system based upon the principle of due process. Accordingly, the Committee should not be created as a subsidiary body to the COP/MOP, because such a body, by definition, would be comprised of Party representatives.

Parties eventually will need to agree to the terms by which the COP/MOP will elect Committee members. Depending on the composition of the two branches, it may be necessary to have different election procedures for each branch.

Para 4 (Bureau). We support the proposal that a Bureau or subdivision of the Committee be charged with determining the allocation of compliance questions. A relatively small body (e.g. four to six members) will allow for flexibility and quick decision-making. The Bureau should be composed of an equal number of members from each branch. To assure consistency and predictability, the Bureau's discretion in deciding allocation of cases should be constrained by clearly defined, mandatory guidelines. (Please see comment re Section III, para 3, *infra*.)

Para 5. Allowing the Bureau to designate one or more members of one branch to participate in the work of the other will help enhance the abilities of a branch to deal with a question in a competent and comprehensive fashion. Nonetheless, the text should clearly state that a member who is "on loan" shall have an advisory role only, and will not be permitted to vote in the branch's decisions.

Facilitative Branch

Para 6. We are comfortable with the text provisions that define the number of members and their terms of service. The facilitative branch should be available to serve all Parties in need, and it should be constituted in a manner that will make all Parties comfortable that their needs will be fairly treated. Accordingly, we believe the branch's members should be elected on the basis of equitable geographic representation from the five UN regional groups.

Para. 8 (mandate). The text should make clear that the facilitative branch does not have the power to decide upon or apply outcomes of non-compliance, and it may not make any binding decision regarding whether or not a Party is in non-compliance. If this point is unambiguously included in the text, there should be no need to include any language that lists or defines different outcomes of the facilitative process for Annex I and Non-Annex I Parties.

Because we advocate a rule that *all* questions of implementation related to the 3.1 targets should be allocated to the enforcement branch (see comments on Section III, para. 3, *infra*), we do not believe the facilitative branch should ever have a formal role in referring such a question to the enforcement branch.

Para 10 (Multilateral Consultative Process). The emerging consensus among Parties is that both branches of the Committee should be comprised of members who serve in their individual capacities and not as Party representatives. The MCP, which would be comprised of Party representatives, does not conform to that consensus, and should be deleted from the text.

Enforcement Branch

Para 11 (composition). Parties that have adopted binding emissions targets will only have confidence in the compliance system if they believe it will rigorously incorporate due process and fairness. A fundamental principle of due process is that one should be judged by a jury of one's peers. G-77 Parties and China can not expect to have it both ways in this regard. If they demand to be specifically exempted from the possibility of an enforcement proceeding *solely by virtue of the fact that they are Non-Annex I Parties*, then they can not fairly expect to sit in judgement of an Annex I Party in such a proceeding. We believe equitable geographic representation for members of the enforcement branch will be appropriate only if the scope of that branch is based upon the nature of Party commitments, and not on a Party's status as Annex I or Non-Annex I. If, instead, Non-Annex I Parties are specifically exempted from enforcement proceedings, then the composition of the enforcement branch should be weighted towards members who are nationals of Annex I Parties and those Non-Annex I Parties that have accepted targets and the full jurisdiction of the enforcement branch.

Para 13 (scope). The compliance system being negotiated under the Protocol represents, to a significant degree, a new development under international environmental law. Accordingly, sovereign states who will be subject to the enforcement powers of the Compliance Committee are reluctant to give the Committee such powers unless their enforceable obligations are clearly defined and were created under their prior consent. The core target-related commitments of Articles 3.1, 5.2 and 7.4 reflect such clear definition and consent. The provisions of Article 3.14 do not, because they contain no specific terms against which compliance or non-compliance could be judged. Article 3.14 is vague because the Parties were unable to agree on its terms with any specificity at Kyoto. The insistence now of some Parties that 3.14 be included under the scope of the enforcement branch thus represents an attempt to amend the Protocol through the text of the compliance decision, in contradiction to the collective intent of the Parties when they ratified the Protocol. This attempt contradicts the terms of the Protocol and fundamental precepts of international law. References to Article 3.14 in this section of the text should thus be deleted.

With the above arguments in mind, the scope and limits of the enforcement branch's mandate must be clearly delineated to assure all Parties—both Annex I and Non-Annex I—that neither the Compliance Committee nor either branch will have the power to amend the terms of this part of the implementing decision. Accordingly, we recommend that the chapeau of Para 13 be changed to read, "The enforcement branch shall be responsible for, and its mandate limited to:".

Para 13(e) (application of consequences). After the enforcement branch has made a determination of non-compliance, the application of consequences should be guided by specific criteria so that it is done as automatically as possible. Consequences may, where appropriate, include facilitation, recommendations, or other assistance. However, under no circumstances should the enforcement branch have the discretion to decide to apply *no* consequences after making a determination of non-compliance. Accordingly, we recommend that the first set of brackets, "[Determining whether to apply]", be deleted, and the brackets around "Applying" be removed.

Para 15 (exemption for Non-Annex I Parties). The proposal to exempt all Non-Annex I Parties from the possibility of an enforcement proceeding may appear to make sense at first, because it seems to support the idea of "common but differentiated responsibilities." But it presents a potentially serious problem: Presumably, some Non-Annex I Parties will take on targets in the future. But if the compliance system text exempts all Non-Annex I Parties from enforcement proceedings, then the terms for enforcement that will be applicable to such a Party may have to be negotiated individually. This could lead to the anomalous situation of some Parties with targets being subject to one set of enforcement rules while other Parties with targets were subject to different rules. Even more importantly, it could result in some Non-Annex I Parties being able to participate in emissions trading without having an enforceable obligation to meet their targets.

The better position is that the scope of the enforcement branch should be determined by the type of commitment, not by the category of Party. That means only Parties with targets would be liable for enforcement, and compliance system rules would not have to be individually negotiated each time a non-Annex I Party accepts a target. The text should be altered to reflect this position. (Please also refer to our comments re Para 11, *supra*.)

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SECTION III, PROCEDURES

Preliminary Comments Regarding Transparency and Public Participation

As the Rio Declaration, Agenda 21 and the recent Aarhus Convention recognize, truly sustainable development will not be not attainable without broad involvement and support from the public. Similarly, these agreements acknowledge that meaningful public participation requires that the concerned public receive notice of environmental decision-making processes at an early stage and in an adequate, timely and effective manner.

The text of Section III is inadequate in this regard. At a minimum, a publicly available "docket" of each compliance-related proceeding should be freely available via the internet for review by interested persons and organizations. The docket would (again, at a minimum) list (1) the Party or Parties involved in a proceeding, (2) a calendar of the prior and upcoming steps of the proceeding, (3) the results of each step, and (4) due dates for submissions of information that might be relevant to the proceeding. (Please see our comments on Section III, Para 12, for further discussion of this topic.)

Submission of Questions of Implementation

Para 1. The most predictable, timely, and fair way for a target-related question of implementation to reach the Compliance Committee will be for the Expert Review Teams to identify problems in their reports and forward the reports to the secretariat, which will then forward them to the Committee. This is the process envisioned by the 5, 7 & 8 group. It is similar to the procedures

used under numerous multilateral agreements. The chapeau of this paragraph should be elaborated to complement the work of the 5, 7 & 8 group.

Para 1(c) (COP/MOP as "trigger"). Even if the COP/MOP were capable of making a decision to initiate a compliance proceeding against a Party, we do not believe that such a political, policy-oriented body should have any formal role in this part of the compliance procedure. Subpara (c) should be deleted.

Allocation of Questions

Para 3. Regardless whether the Committee or the Bureau is mandated to decide which branch a question should be allocated to, there should be extremely little discretion involved in the allocation decision, insofar as refences to the enforcement branch are concerned. Under no circumstances should the facilitative process serve as a way for a Party to avoid an enforcement branch proceeding once a question of implementation has been identified that pertains to the target-related obligations. This is especially important because of the implications target-related non-compliance will have for emissions trading under Article 17.

We recommend that all questions of implementation regarding target-related obligations be allocated to the enforcement branch. Once an enforcement branch proceeding begins, it should end only upon a finding that the Party concerned is or is not in compliance. Such a finding could occur pursuant to a preliminary examination, initial or final determination, and/or an appeal, if available.

Nevertheless, if the Party concerned requires facilitative assistance, then the question may be allocated to the facilitative branch at any time *concurrently to the enforcement proceeding*. Finally, the enforcement branch may have the discretion, when appropriate, of applying a facilitative consequence in response to a finding of non-compliance.

Preliminary Examination of Questions

Para 4, chapeau. First, it is unclear to us why a preliminary examination of a question would be necessary for the facilitative branch, other than to decide whether the branch was capable of helping the Party concerned. Accordingly, our view of the preliminary examination is that it should be performed only after a question has been referred to the enforcement branch.

Second, as the chapeau to Para 4 presently reads, it could be interpreted to mean that the Committee or relevant branch bears the burden of proving that the question is supported by sufficient information and is not ill-founded. Such a burden of proof could effectively turn the preliminary examination into a full examination of all relevant information/evidence.

This situation may be avoided by substituting the following text for Para 4:

> "The [Committee][relevant branch] shall make a preliminary examination of questions. Unless the [Committee][relevant branch] determines that the question is (a) not supported by sufficient information or (b) is ill-founded, the [Committee][relevant branch] shall make a decision to proceed."

Para 4(b) (*de minimis* question). In the context of a question regarding compliance with Article 3.1, the idea that a question may be *de minimis* should be irrelevant. The obligation under Article 3.1 is for Parties not to exceed their assigned amounts. There is no way of coherently establishing what a *de minimis* amount of tonnes in this situation might be, because that

threshhold could always be exceeded by a seemingly equal *de minimis* amount. In our view, any Party discovering during the true up that it has *de minimis* overage should be expected to immediately cure that overage by purchasing sufficient mechanism credits on the open market or from a Compliance Fund. Should the Party fail to do so, it will presumptively demonstrate its lack of good faith, and should thus be subject to the full range of available consequences, including loss of selling privileges in the next commitment period. Accordingly, we suggest that the reference in Para 4 to a *de minimis* question be deleted, at least insofar as a question related to compliance with Article 3.1 is concerned.

Procedures for Further Handling of Questions

Sources of Information

Para 11(c). When read with the chapeau, this subpara could be interpreted to prohibit the branch from making a determination until it had received and considered information from the other branch. We recommend that subpara (c) be changed to read, "The other branch if it provides any such information."

Para 12 (information from outside experts and organizations). As we discussed in our Preliminary Comments to this Section regarding transparency and public participation, *supra*, the COP and COP/MOP will best ensure the success of the Protocol by providing broad opportunities for public participation in all aspects of the Protocol's implementation. This will be particularly important for enforcement proceedings, in which public input through the submission of information will help tap the extensive expertise of the public sector, enhance the quality of decision-making, and build public confidence in the integrity of the system.

The present text is ambiguous as to whether or not NGOs and other interested members of civil society will have a right to submit relevant, unsolicited information to the enforcement branch during a proceeding, or whether the branch will instead be permitted to receive and consider information from outside organizations only after the branch "seeks" it. This question has been the subject of extensive litigation under the WTO Dispute Settlement Understanding, where it has finally been resolved so that the WTO Appellate Body may consider any unsolicited information it receives. Under no event should the Kyoto Protocol—which is premised upon the idea of sustainable development—have weaker public participation rules than the WTO. We recommend that the text of Para 12 be changed to read:

> The branch may seek and receive information from any source it deems relevant. Non-governmental organizations and other members of civil society may also provide relevant information to the branch.

Para 13 (availability of information to the public; confidentiality). Any confidentiality exception to the public availability of information must be narrowly tailored and articulated in advance in written rules of procedure. Determinations of confidentiality must not be made on an ad-hoc basis. Whenever information is withheld under the confidentiality exception, the rules should provide that a written notice of such withholding is included in a publicly available docket of the proceedings.

Decisions and Recommendations

This subsection should include a paragraph establishing the need for a quorum before the branch may make any binding decisions.

Proceedings of the Enforcement Branch

In the interest of expediting a proceeding when a Party does not contest a question of implementation brought against it, the text should provide a Party with the opportunity to waive its rights to a preliminary examination, preliminary finding, and/or appeal and instead simply accept a final decision of non-compliance.

Para 17 (written submission). All submissions made under this Para should be made available to the public.

Para 18 (hearing). The last sentence of the text is bracketed and would require hearings to be held in public unless the branch decides that part or all of them should take place in private. We strongly agree that all hearings should be held in public and recommend that portion of the sentence be unbracketed. However, if the branch is also given the discretion to hold hearings in private, such discretion should be exercised only under narrowly defined, written rules of procedure.

Reference to the Facilitative Branch

Para 20. Please refer to our comments under Allocation of Questions, Section III, Para 3, *supra*.

Under no circumstances should there be a requirement that questions not be considered by the enforcement branch until after a decision is first made by the facilitative branch. Such a rule would likely have the practical effect of removing the possibility of enforcement proceedings under the Protocol's compliance system.

Preliminary Finding, Final Decision, Appeal

Most Parties agree that due process should be a fundamental principle of the compliance system, and that enforcement proceedings should provide an opportunity for a Party to request the branch to reconsider its findings before a final determination of non-compliance is rendered. Nevertheless, we believe most Parties will agree that if a preliminary examination, preliminary finding, final decision, and appeal were all available, enforcement proceedings might drag on for years. Parties should agree that the text will provide for either a preliminary finding or appeal, but not both.

Appeal

Para 34 (Option 2). Because the COP/MOP is a political, policy-making body that will meet only once a year, we do not believe it would be appropriate or effective for the COP/MOP to have any active role in an enforcement proceeding. Consequently, we recommend that Option 2 be deleted from the text.

True-Up Period

Para 41(b) (voluntary payment into a "climate change fund"). We have long advocated the availability of a Compliance Fund during the true up that would be available to Parties in the event there are insufficient tonnes from the mechanisms available on the market to satisfy demand. We recommend that any Fund considered by the Parties be an internationally administered one with a per-tonne price set marginally higher than the cost of mechanisms tonnes during the commitment period. Moneys collected by the Fund should be invested in reliable mitigation projects with a view towards achieving equitable geographic distribution of sustainable development projects in developing countries. "Sinks" projects should be ineligible for investment by the Fund.