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The Implementation and Compliance Regimes under the Climate Change Convention and its Kyoto Protocol

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INTRODUCTION

Global warming occurs when greenhouse gases (GHGs) in the Earth's atmosphere prevent some of the sun's thermal radiation from being reflected back into space. Human activities, primarily the combustion of fossil fuels such as coal, oil and gas, deforestation and agricultural practices, have increased concentrations of GHGs and led to a corresponding rise in global temperatures. In the absence of policies specifically designed to lower emissions, GHG levels are projected to increase significantly during the twenty-first century.

Rising temperatures caused by climate change may have profoundly adverse effects on human health, economic growth and ecological systems. Tens of millions of people could become environmental refugees due to rising sea levels. Extreme weather events will likely occur more frequently, leading to significant economic harm and loss of life. Climate change is not only an environmental problem. The solution to the climate change problem lies in a fundamental shift in human social and economic activities – in other words, a shift to sustainable development.

The United Nations Framework Convention on Climate Change (the UNFCCC), adopted in 1992, is the centrepiece of global efforts to combat global warming. The ultimate objective of the UNFCCC is to stabilize the atmospheric concentration of GHGs at a safe level to allow 'economic development to proceed in a sustainable manner'.[1]

The UNFCCC represents the first step of international action to combat climate change. The commitments under the Convention, however, have proved to be far too inadequate to reach the objectives of stabilizing GHG concentrations. Accordingly, in 1995, immediately after the UNFCCC entered into force, parties to the UNFCCC launched a new round of negotiations to take more concrete action. After three difficult years of negotiations, the parties adopted the Kyoto Protocol.

This article provides an overview of the compliance approaches employed by the UNFCCC and the Kyoto Protocol and outlines the ideas and proposals that emerged from the negotiations among parties to develop the Protocol's compliance system. These ideas may provide useful lessons for negotiators in other environmental treaty regimes. The article contains four parts. The first part describes the general compliance theory reflected in most multilateral environmental agreements (MEAs). This theory is different from the traditional means States have used to deal with non-compliance in other areas of international relations. The UNFCCC and the Kyoto Protocol are good examples to illustrate this compliance theory. The second and third parts describe the various means used by the UNFCCC and the Kyoto Protocol to promote implementation and compliance. The final part discusses the development of the procedures and mechanisms on compliance under the Kyoto Protocol.

COMPLIANCE THEORY UNDER MULTILATERAL ENVIRONMENTAL AGREEMENTS

Since the 1972 Stockholm Conference on the Human Environment, more than 200 MEAs have been developed. An important challenge confronting governments and the international community has been how best to implement and comply with the commitments under these environmental treaties, including how to deal with countries that fail to meet their treaty obligations.

The traditional, adversarial approach to addressing non-compliance – in which States seek damages for harm caused by injurious behaviour, or in which they suspend their performance under a treaty in response to another's failure to perform – has inherent

[1] United Nations Framework Convention on Climate Change (New York, 9 May 1992), printed in 31 ILM (1992), 849 (entered into force 21 March 1994) (hereinafter UNFCCC). See UNFCCC, Article 2.

disadvantages for MEAs. Many MEAs deal with the 'global commons', such as the atmosphere, oceans or biological diversity. Thus, it can be difficult or impossible for a State to establish the causal link between an injury it suffers and a specific act of non-compliance by another State. Moreover, States have been reluctant to use the International Court of Justice (ICJ) to resolve cases of non-compliance under MEAs, because ICJ proceedings tend to be very time-consuming and inherently confrontational, thereby posing political risks to bilateral relationships. For similar reasons, the dispute-settlement mechanisms provided in most MEAs have rarely been used. Instead, a discrete compliance theory has gradually evolved in which compliance under MEAs is addressed in three ways: preventing non-compliance, facilitating compliance and managing compliance.

PREVENTING NON-COMPLIANCE

Most MEAs are intended to protect the global commons. One country's non-compliance thus harms everyone, and reciprocating that country's non-compliance by suspending one's own compliance with the treaty will only make the situation worse. Consequently, the task of devising effective mechanisms for compliance and enforcement in MEAs is difficult. Because reciprocity will mean only greater environmental damage, MEAs must, in the first instance, strive to prevent non-compliance. States have tried to accomplish this by concentrating on facilitating and managing compliance, rather than punishing non-compliance.

FACILITATING COMPLIANCE

The capacity of a State to comply with its commitments under an MEA is often the key factor that determines its status of compliance. Building up a domestic compliance system to implement an MEA requires sufficient technical, bureaucratic and financial resources. A party may adopt a commitment in good faith, but nevertheless fail to comply due to lack of resources or capacity. For example, in 1995, five parties to the Montreal Protocol on Substances that Deplete the Ozone Layer (the Montreal Protocol) – Russia, Bulgaria, Poland, Ukraine and Belarus – declared that they did not have the ability to meet their reduction targets, and instead submitted their case to the Implementation Committee of the Protocol to request assistance.[2]

Lack of sufficient capacity for compliance is common in developing countries. Environmental issues do not receive priority in the agendas of many developing country governments because limited resources must be allocated to more pressing concerns. In many cases, developing countries are unable to comply with their MEA obligations unless they receive outside assistance.

As non-compliance is thus often due not to willful disobedience, but instead to a lack of capability, approaches for addressing non-compliance must be directed at the root of the problem. Two policy instruments, among others, are now used in MEAs to induce compliance: capacity building and reduction of compliance costs.

Capacity building strives to enhance the ability of States to implement and comply with their commitments. In MEAs, capacity building may include technical and financial assistance, transfer of technology, training and education. For example, the Global Environmental Facility (GEF) administered by the World Bank Group funds developing countries to assist them in implementing their obligations in focal areas such as climate change and biodiversity. Outside of the World Bank system, the Montreal Protocol Fund has successfully supported projects in developing countries that have resulted in a considerable phase-out of the consumption of ozone-depleting substances.[3]

Some MEAs affirmatively link compliance with the availability of financial resources. For instance, Article 20(4) of the Convention on Biological Diversity states that:

> the extent to which developing country Parties will effectively implement their commitments under this Convention will depend on the effective implementation by developed country Parties of their commitments under this Convention related to financial resources and transfer of technology and will take fully into account the fact that economic and social development and eradication of poverty are the first and overriding priorities of the developing country Parties.

Similar provisions can also be found in Article 4(7) of the UNFCCC.

The second policy instrument is intended to make compliance easier by lowering its costs. Some commentators predict that compliance costs in MEAs like the Kyoto Protocol could be substantial. To encourage compliance, the Kyoto Protocol creates market-based mechanisms to increase flexibility and cost effectiveness. As discussed in the third part of this article, these mechanisms will facilitate the attainment of the Protocol's environ-mental obligations, while assisting States to secure economic and social policy objectives as well.

[2] Montreal Protocol Secretariat, *The Montreal Protocol Handbook*, 5th edn, (Montreal Protocol Secretariat, 1995), at 173–74, available at <http://www.unep.org/ozone/pdf/Handbook2000.pdf>.

[3] G. Porter, J. Welsh Brown and P.S. Chasek, *Global Environmental Politics*, 3rd edn, (Westview Press, 2000).

MANAGING COMPLIANCE

Policy instruments alone are insufficient to address compliance in MEAs. To address this gap, managerial approaches have been developed to handle compliance in a systematic manner. The most common of these is the establishment of a regulatory framework, or compliance system. The purpose of these systems is to make compliance processes transparent, to identify any potential compliance problems at an early stage, to help parties fix problems and, finally, to respond to non-compliance.

A comprehensive compliance system may contain three steps: (1) reporting, (2) verification, and (3) assessing compliance and responding to non-compliance.[4] Each is reviewed in turn below.

Reporting The first step in the compliance systems of most MEAs is self-reporting by parties. Parties report information on their performance in implementing their treaty commitments. They may also include information submitted by international organizations or non-government organizations (NGOs), as is the practice under the Convention on International Trade in Endangered Species (CITES).[5] To improve the quality of data and ensure timely reporting, technical and financial assistance may be needed to help parties – in particular developing countries – collect and prepare their national reports. As the data generated in the reports constitute the basis for assessing compliance in the future, it is important to establish a uniform format of reporting, with clear and precise requirements as to how and what to report.

Verification The second compliance step is verification of the reported information. Key considerations are who will conduct the verification and how they will do it. The Convention Secretariats or a group of experts may undertake the task of checking the reliability and accuracy of data. On-site monitoring with the consent of parties may also be an option to verify compliance. The UNFCCC and the Ramsar Convention on Wetlands[6] authorize country visits to review implementation of their obligations. However, unlike the practice in arms-control agreements, such as the Chemical Weapons Convention,[7] verification processes under MEAs are generally non-confrontational, and have the aim of discovering problems and helping parties to fix them so that they can avoid non-compliance.

Assessing Compliance and Responding to Non-Compliance One of the most common features of compliance assessments under MEAs is their non-judicial nature. Most assessments are conducted in a facilitative, cooperative manner aimed at helping to bring parties back to compliance. The Montreal Protocol was the first major environmental treaty to create an institutionalized non-compliance procedure. The Protocol's Implementation Committee identifies facts and possible causes of individual cases of non-compliance.[8] It makes recommendations to the party concerned on ways to remedy the non-compliance, and can provide and arrange for assistance, including technical assistance for data collection, financial assistance and transfer of technology.[9] More MEAs now follow the Montreal Protocol model, calling for the establishment of specialized compliance procedures carried out by a standing compliance committee empowered to assess the compliance of parties.[10]

Backing up the compliance assessment are the responses to non-compliance mandated under the regime. So far, only a few MEAs explicitly provide for response measures to non-compliance. These measures may include the provision of technical and financial assistance, publication of cases of non-compliance, issuance of cautions, or suspension of treaty rights and privileges. The 'indicative list' used in the Montreal Protocol's non-compliance procedure is perhaps the best-known example outside of the climate

[4] For an overview of reporting, review, assessment and response mechanisms used in multilateral agreements, see generally G. Wiser, *Compliance Systems Under Multilateral Agreements: A Survey for the Benefit of Kyoto Protocol Policy Makers* (CIEL, 1999), available at <http://www.ciel.org/Publications/SurveyPaper1.pdf>.

[5] See Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) (Washington, 3 March 1973), printed in 12 ILM (1973), 1085. See CITES, Article 12(1). See also J. Lanchbery, 'Long-Term Trends in Systems for Implementation Review in International Agreements on Fauna and Flora', in D.G. Victor, K. Raustiala and E.B. Skolnikoff (eds), *The Implementation and Effectiveness of International Environmental Commitments: Theory and Practice* (MIT Press, 1998), 57, at 71.

[6] Convention on Wetlands of International Importance, Especially as Waterfowl Habitat (Ramsar, 2 February 1971), printed in 996 UNTS 245, composite text including amendments, available at <http://www.RAMSAR.org/key_conv_e.htm>.

[7] Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (Paris, 13 January 1993).

[8] See *Report on the Work of the Ad Hoc Working Group of Legal and Technical Experts on Non-Compliance with the Montreal Protocol* (UNEP/OzL.Pro/WG.4/1/3, 1998), Appendix, para. 7(d), adopted in *Report of the Tenth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer* (UNEP/OzL.Pro1.10/9, 1998), Decision X/10 (hereinafter Montreal Protocol Non-Compliance Procedure).

[9] Ibid., para. 9. *Report of the Fourth Meeting of the Parties to the Montreal Protocol on Substances that Deplete the Ozone Layer* (UNEP/OxL.Pro.4/15, 1992), Annex V, para. A (hereinafter Montreal Protocol Indicative List).

[10] See, for instance, Cartagena Protocol on Biosafety (Montreal, 29 January 2000), Article 34; Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (Paris, 17 June 1994), Article 27; Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (Rotterdam, 10 September 1998), Article 17; Stockholm Convention on Persistent Organic Pollutants (Stockholm, 22 May 2001) Article 17.

regime.[11] Stronger enforcement measures ('sticks'), in which trade sanctions or threats of trade sanctions have been used to enforce compliance, have been explored in MEAs such as CITES.[12]

It should be noted that the strictness and comprehensiveness of a compliance regime under an MEA depends to a significant extent on the nature of the commitment embodied in the agreement. Not all MEAs need to adopt the full three-step system outlined above. If the nature of the commitments in the agreement is both general and soft (thus, leaving much of its interpretation and implementation up to the discretion of individual parties), a strong compliance system may not be appropriate. On the other hand, if an MEA contains hard, precise and measurable commitments, a comprehensive compliance regime with 'teeth' may provide an effective way to prevent free riders and ensure the full implementation of the obligations.

THE CLIMATE CHANGE CONVENTION

The UNFCCC and its Kyoto Protocol illustrate the compliance theory elaborated above. In particular, they demonstrate how a regime can evolve from having unquantified, 'soft' commitments and minimal compliance rules to one establishing the most advanced and complicated compliance procedures and mechanisms in any MEA to date. This part of the article and the following one examine the UNFCCC and the Protocol, respectively. Each part is structured in the same way, first describing the characteristics of the agreement's commitments, then reviewing the policy instruments employed to encourage implementation and compliance, and finally, analysing the procedures and mechanisms used for managing implementation and compliance.

CHARACTERISTICS OF THE COMMITMENTS

The UNFCCC sets out a legal framework under which the international community will address climate change. Because it represented the first concerted, international effort, and because there were significant uncertainties in climate science and economics, the UNFCCC contains 'soft' commitments requiring parties to undertake general obligations to mitigate and adapt to climate change. The UNFCCC did not establish specific GHG reduction targets. Instead, developed country parties agreed to adopt policies and measures to reduce their emissions 'with the aim of returning' to their 1990 emissions levels.[13]

One of a few measurable commitments under the UNFCCC is the procedural obligation of developed country parties to report on policies and measures taken to abate their emissions.[14] Additionally, all parties are obliged to report their GHG inventories on an annual basis.[15] Because the obligations under the UNFCCC lack specificity, and because there has been no clear and agreed understanding of what parties' obligations are, parties have not reached a high level of compliance under the UNFCCC. In fact, the term 'compliance' does not appear anywhere in the UNFCCC or in the follow-up decisions of the Conference of the Parties (COP). Perhaps it is more accurate to label the fulfilment of the commitments under the UNFCCC as an implementation process rather than a compliance process, where the term 'implementation' refers to measures taken by States to make an international treaty effective under their domestic law.

POLICY INSTRUMENTS TO FACILITATE COMPLIANCE

The main policy instrument to induce compliance in the UNFCCC is capacity building. Recognizing that parties, particularly developing countries, need assistance in building and strengthening their capacities to implement the treaty, the UNFCCC identifies a range of needs and areas for capacity building that include the following:

- *Provision of financial resources*. Developed countries committed to provide 'new and additional financial resources' to developing countries to meet the full and agreed costs of compliance with their treaty obligations.[16] To meet these objectives, the UNFCCC establishes a mechanism for the provision of financial resources on a grant or concessional basis,[17] which is administered by the GEF.
- *Transfer of technology*. A series of activities was launched to assess technology needs, identify barriers to technology transfer, and develop financial incentives.[18]

[11] See Montreal Protocol Non-Compliance Procedure, n. 8 above, at para. 9; and see Montreal Protocol Indicative List, n. 9 above.
[12] See CITES Secretariat, *Review of Alleged Infractions and Other Problems of Implementation of the Convention*, Report of the Secretariat, Ninth Meeting of the Conference of the Parties, Document 9.22, Annex, Summaries of Alleged Infractions (1994).
[13] UNFCCC, Article 4(2).
[14] Ibid., Article 4(2)(b).
[15] Ibid., Article 4(1)(a).
[16] Ibid., Article 4(3).
[17] Ibid., Article 11.
[18] See Report of the Conference of the Parties on its Seventh Session, Part Two: Action Taken by the Conference of the Parties (hereinafter the Marrakesh Accords), Vol. I, (UNFCCC/CP/2001/13/Add.1), Decision 4/CP.7, Development and Transfer of Technologies, at 64.

- *Support for national reporting*. As most developing countries lack the resources and capacities to prepare their own national reports, a consultative group of experts was set up to facilitate and support developing country reporting activities. This group of experts was instructed to identify the difficulties encountered by developing countries in their implementation and to consider their needs for technical and financial assistance.[19]

THE INSTITUTIONAL MECHANISMS TO MANAGE IMPLEMENTATION

The institutional mechanisms to manage implementation of the UNFCCC include two parallel processes: the overall assessment of the 'aggregated effects' of implementation, and the individual assessment of each developed country parties' performance.

The Overall Assessment of Implementation

The overall assessment of implementation lies with the COP and its two subsidiary bodies, the Subsidiary Body for Implementation (SBI) and the Subsidiary Body for Technological Advice (SBSTA). The COP is the supreme body of the UNFCCC, comprised of all the States that have ratified or acceded to the UNFCCC. It is empowered to 'periodically examine the obligations of the parties' and to 'assess . . . the implementation of the UNFCCC by the parties, [and] the overall effects of the measures taken pursuant to the Convention'.[20]

Due to its size and the fact that it only meets annually, the COP has been used during the last 7 years primarily as a forum for statements by ministers and for other high profile, political events. To date, the most important actions of the COP have been to launch a new round of talks regarding additional commitments (COP-1), to adopt the Kyoto Protocol (COP-3) and, most recently, to adopt the package of rules for implementing the Kyoto Protocol (COP-7).

The SBI and the SBSTA are authorized to provide the COP with scientific and technical information and to advise it on the 'effect of the steps taken by the parties' in implementing their commitments.[21] By the end of 2001, 14 subsidiary bodies meetings had been held to carry out actions ranging from promoting enabling activities, developing reporting guidelines, elaborating the relationship of the Convention with the GEF, and improving methodologies for calculating GHG emissions. The subsidiary bodies have actively promoted the implementation process of the UNFCCC and have provided a forum for parties to conduct a constructive dialogue on the general problems of implementation. The major weakness of the two bodies in performing their functions has been that the processes are highly politicized. As a result, the debate has often failed to deal with the specific problems of implementation.

Assessment of Performances of Individual Developed Country Parties

Each developed country party's performance is evaluated through the three-step process of reporting, review and assessment.

Reporting

Article 12 of the UNFCCC obliges parties to report their GHG inventories on an annual basis and to submit national reports on their overall implementation every 4 years. Over time, guidelines for reporting have been developed to help ensure that parties compile the data in a uniform format. Developed countries have completed two rounds of comprehensive national reports to date. The initial reporting process for developing countries is on-going.

Review

The review process is arguably the most important step for checking the national reports submitted by the developed country parties listed in the Convention's Annex I (Annex I parties). The review covers two steps. The first is a technical check conducted by the secretariat to compile and synthesize the information reported.[22] The second step is an in-depth review carried out by a group of experts recommended by parties.[23] These in-depth reviews are generally comprised, in part, by an in-country visit conducted with the prior consent of the party concerned. The in-depth review is intended to:

> provide a thorough and comprehensive technical assessment of the implementation of the Convention commitments by individual Annex I parties and Annex I parties as a whole. Its purpose is to review, in a facilitative, non-confrontational, open and transparent manner, the information contained in communications from Annex I parties to ensure that the Conference of the Parties has accurate, consistent and relevant information at its disposal to assist it in carrying out its responsibilities . . .[24]

As of 2001, on-site visits had been conducted twice for each Annex I party. The reports of country visits, although written in non-confrontational language, have identified 'questions of implementation' relating

[19] Report of the Fifth Session of the Conference of the Parties (UNFCCC/CP/1999/6/Add.1), Decision 8/CP.5, paras 3–5.
[20] UNFCCC, Article 7.
[21] Ibid., Articles 9 and 10.
[22] Ibid., Articles 8(2)(b), 12(6) and 12(10).
[23] Report of the First Session of the Conference of the Parties (UNFCCC/CP/1995/7/Add.1), Decision 2/CP1, para. 2.
[24] Ibid., Annex I, chapeau.

to specific parties. For example, the in-depth review reports for the USA pointed out that there was little evidence that significant measures had been taken to reduce GHG emissions. The report suggested that more attention should be paid to the transport sector, which takes up a large share of the emissions.[25]

The Implementation Assessment

Reports prepared by the in-depth review teams are sent to the subsidiary bodies for their consideration. As indicated above, the political nature of the subsidiary bodies has made it difficult to discuss, in any meaningful way, the questions identified in the review reports. To address this shortcoming, a multilateral consultative committee (MCC) was to be created to resolve questions of implementation of individual parties.[26] This ten-member body was to provide advice to parties 'to overcome difficulties encountered in their implementation of the Convention' and to prevent disputes from arising.[27] The multilateral consultative procedure would allow a party to raise questions of implementation with respect to its own performance or to that of another party.[28] After considering the questions raised, the MCC would make a recommendation or take suitable measures to accomplish the effective implementation of the UNFCCC.[29] The procedure was to be conducted in a facilitative, cooperative, and non-judicial manner.[30] Unfortunately, the COP never finalized the multilateral consultative procedure because it was unable to agree upon the MCC's composition and size.[31]

The existing mechanisms for assessing an individual party's implementation have made the implementation process fairly transparent. The in-country review process provides insights into the reasons for implementation problems that may exist in a country. Importantly, the reviews foster a dialogue between the review teams and the parties that facilitates the early resolution of problems.

The weakness of this system comes from the COP's failure to establish mechanisms that are capable of taking concrete action to respond to the implementation problems identified in the review reports. As noted above, the SBI is handicapped by its political character, while the establishment of the MCC remains unrealized. Parties have tended not to concentrate on the effects or outcome of the UNFCCC's inadequate implementation, partly because the treaty's core obligations are vague and effective assessment of its implementation is thus difficult, and partly because they have been concentrating on the adoption and implementation of the Kyoto Protocol, which establishes much more specific obligations.

THE KYOTO PROTOCOL

CHARACTERISTICS OF THE COMMITMENTS

Unlike the UNFCCC, the Kyoto Protocol establishes legally binding GHG emissions targets for developed, Annex I country parties in the commitment period of 2008–2012. The targets are equal to an aggregate reduction of about 5.2% below these parties' 1990 emissions levels. The Protocol also contains new qualitative and quantitative commitments for developed countries, including the establishment of a national system for estimating GHG emissions and removals,[32] reporting of GHG emissions,[33] and rules for the Protocol's three market-based mechanisms, joint implementation (JI), the clean development mechanism (CDM) and international emissions trading.[34]

From an environmental point of view, the 5.2% reduction target will not be sufficient to 'prevent dangerous anthropogenic interference with the climate system',[35] and it will have little, if any, substantive impact on global emissions trends. However, the revolutionary aspect of the Kyoto targets is not the level of the reduction figure. Rather, it is the legally binding nature of the targets, which hopefully will place the international community on a path away from business as usual and toward eventually stabilizing and reversing its current emissions trends.

[25] Report on the In-depth Review of the Second National Communications of the United States of America (UNFCCC/IDR.2/USA), available at <http://unfccc.int/resource/docs/idr/usa02.pdf>.
[26] Report on the Ad Hoc Group on Article 13 (UNFCCC/AG13/1998/L.1, 1998), Annex 2, paras 1 and 2.
[27] Ibid., para. 2(a).
[28] Ibid., para. 5.
[29] Ibid., para. 12.
[30] Ibid., para. 3.
[31] Report of the Conference of the Parties on Its Fourth Session (UNFCCC/CP/1998/16/Add.1), Decision 10/CP.4, para. (a). The last session of the Ad-Hoc Group on Article 13 was held in 1998. Although the COP decided to review the remaining unresolved issues at COP-5 (see ibid., at para. (b)), considerations of the multilateral consultative procedure were largely subsumed by negotiations to develop the Kyoto Protocol's compliance procedures and mechanisms. The COP has since demonstrated little interest in focusing on the multilateral consultative procedure.
[32] Kyoto Protocol, Article 5(1).
[33] Ibid., Article 7(1).
[34] Ibid., Articles 6, 12 and 17.
[35] UNFCCC, Article 2.

POLICY INSTRUMENTS TO ENCOURAGE COMPLIANCE

As many countries meeting in Kyoto were uncertain of their economic, technical and political abilities to comply with legally binding targets, parties adopted both traditional and novel ways to facilitate compliance in a flexible and cost-effective manner. The Kyoto Protocol follows the approach used in the UNFCCC to encourage compliance by enhancing the capacities of parties. Capacity building focuses not only on developing countries, but also on the economies in transition (EITs) of Eastern Europe and Russia, which will likely require significant assistance if they are to comply with their obligations. The wealthier, donor countries (Annex II parties) are encouraged to provide financial and technical support to developing countries and EITs through multilateral agencies such as the GEF, as well as through bilateral agencies and the private sector.[36]

Perhaps the most creative part of the Protocol is its provisions that create market instruments to assist parties in complying with their targets. Some countries have worried that their implementation costs will harm their market competitiveness and hinder their economic development. The Protocol addresses that concern by creating three market mechanisms: the CDM,[37] JI[38] and international emissions trading.[39] These mechanisms will enable Annex I countries to achieve their targets by working cooperatively with other parties. The CDM and JI are project-based mechanisms that allow Annex I parties to obtain emissions credits for compliance purposes by investing in countries where the marginal cost of obtaining reductions is cheaper than at home. By creating a vehicle for investment in developing country (non-Annex I) parties, the CDM creates a new partnership between North and South that promises to bring climate-friendly technologies and additional resources to developing countries. JI will facilitate emissions mitigation projects between Annex I parties, especially between the Organization for Economic Cooperation and Development (OECD) countries and the EITs. International emissions trading will establish an international market that enables parties to buy and sell emissions credits that they can use to comply with their reduction targets.

The Protocol also allows parties to offset some of their fossil-fuel emissions by receiving credit for carbon that is absorbed and sequestered in forests, agricultural and other 'sinks' activities. Given the tremendous uncertainty of the methodologies for calculating the net GHG emissions and reductions from sinks, this approach was, and remains, among the most controversial parts of the Protocol. In the CDM, its use is restricted to afforestation and reforestation projects. Negotiations to balance the cost effectiveness and environmental integrity of sinks activities are ongoing.

The Protocol's market instruments and sinks rules will provide incentives for sustainable development and will significantly lower the costs of compliance with emissions targets. However, if they are not governed by well-designed rules for measuring emissions reductions and ensuring compliance, these mechanisms could fail to accomplish genuine emissions reductions and could undermine the commitments of developed countries to modify their long-term emission trends.

A COMPREHENSIVE IMPLEMENTATION AND COMPLIANCE SYSTEM

The Kyoto Protocol inherits the overall processes for assessing parties' implementation that were established under the UNFCCC. These processes will be overseen by the Protocol's supreme body, the Conference of the Parties serving as the Meeting of the Parties (COP/MOP), and by the SBSTA and the SBI. While the COP/MOP will assess implementation in a manner similar to the way the COP assesses implementation under the UNFCCC, the Protocol greatly strengthens and intensifies the process for evaluating each individual party's performance, especially the performance of developed countries.

Unlike the UNFCCC and most other MEAs, the Protocol will manage compliance by establishing a comprehensive compliance system. This regime will be essential to ensure the credibility and accountability of the Protocol and likely will be a prerequisite for the effective operation of the three market-based mechanisms. An efficient compliance system should help ensure that all parties undertaking Kyoto targets do so on a 'level playing field'.

The Protocol's compliance system will manage compliance using all three steps identified in the first part of this article: reporting, review, and assessing compliance and responding to non-compliance. However, because the objectives of the Protocol are more ambitious than in most other MEAs, the Protocol's compliance system will be novel and more robust in numerous ways.

Reporting GHG inventory data and its quality will be the backbone of the Protocol's compliance system. To improve data quality, the reporting rules have been (and will continue to be) developed to facilitate transparency, comparability, completeness and accuracy of

[36] See Marrakesh Accords, n. 18 above, Vol. I, Decision 3/CP.7, Capacity Building in Countries with Economies in Transition, at 15.
[37] Kyoto Protocol, Article 12.
[38] Ibid., Article 6.
[39] Ibid., Article 17.

information. In order to assess compliance easily, the reporting requirements have been elaborated to indicate clearly which are mandatory and which are merely advisory.[40]

Review The Protocol builds upon the review mechanism in the UNFCCC to assess national reports of developed country parties. On one hand, the Protocol's review process will continue to serve as a forum for a constructive dialogue with parties to clarify issues and assist them in correcting problems at an early stage. On the other hand, the role of fact-finding in the review has been strengthened. The main purpose of the review, as defined in the Protocol, is to provide 'a thorough and comprehensive technical assessment of all aspects of the implementation by a party' and to identify any potential problems in, and factors influencing, the fulfilment of commitments.[41] To ensure a timely review, which will be particularly important for the operation of emissions trading, a strict timetable for each step in the process has been established.[42] In addition, expert review teams will be created to ensure reviews are conducted objectively and fairly.[43]

Assessing Compliance and Responding to Non-Compliance As discussed earlier, the mechanisms for responding to an individual party's implementation problems are weak in the UNFCCC. During the negotiations that culminated in the Protocol's adoption at Kyoto, most parties recognized that the legally binding nature of the Kyoto targets would necessitate a far more rigorous system. However, because at Kyoto there was neither the time nor consensus to develop and agree upon the precise nature of the compliance rules, Article 18 provided no specifics, but instead left them to future negotiations. The development of these compliance rules is the subject of the next part of this article.

DEVELOPMENT OF PROCEDURES AND MECHANISMS ON COMPLIANCE UNDER THE KYOTO PROTOCOL

The procedures and mechanisms on compliance were developed primarily by the Joint Working Group on Compliance (JWG). Established in 1998 at COP-4, the JWG was co-chaired by Mr Harald Dovland (Norway) and Ambassador Tuiloma Neroni Slade (Samoa), who replaced Mr Espen Ronneberg (Marshall Islands) after COP-5 in 1999. The COP instructed the JWG to complete its work at COP-6, 'so as to enable the Conference of the Parties to adopt a decision on a compliance system under the Kyoto Protocol at that session'.[44]

The first meeting of the JWG was held in July 1999 and resulted in a questionnaire to invite parties to submit their views on the compliance system to the secretariat. The questions covered issues such as the objective and nature of the compliance mechanisms, institutional and procedural arrangements, the relationship with the review process under Article 8 of the Protocol and the consequences of non-compliance.[45]

To help foster a common level of understanding among JWG delegates and to draw lessons from other treaty regimes, the co-chairs invited representatives from the secretariats of the World Trade Organization, International Labour Organization, the Montreal Protocol and the Convention on Long-Range Transboundary Air Pollution to a JWG workshop in Vienna in October 1999. The representatives briefed the JWG on the compliance and/or dispute-resolution procedures and mechanisms of their respective regimes. After their presentations, the USA tabled a model for the design of the Kyoto Protocol's compliance system. Additionally, representatives from two NGOs, the Centre for International Environmental Law (CIEL) and the World Wide Fund for Nature (WWF) presented papers giving an overview of compliance systems in multilateral agreements, and a potential design for the Protocol's compliance system that was structurally very similar to the US proposal.[46]

At the second meeting of the JWG in November 1999, several parties, including Australia, Canada, the EU, Samoa on behalf of the Alliance of Small Island States (AOSIS) and the USA, independently tabled models on how the compliance mechanism could be structured and operated.[47] At the end of this meeting, the co-chairs of the JWG presented a non-paper containing

[40] For additional details, see Marrakesh Accords, n. 18 above, Vol. III, Decision 22/CP.7, Guidelines for the Preparation of the Information Required under Article 7 of the Kyoto Protocol, at 14.
[41] Kyoto Protocol, Article 8.
[42] See Marrakesh Accords, n. 18 above, Vol. III, Decision 23/CP.7, Annex, at 52, paras 72–78.
[43] Ibid., at 42–45, paras 20–45.
[44] Report of the Conference of the Parties on its Fifth Session, Part II, Decisions Adopted by the Conference of the Parties (UNFCCC/CP/1999/6/Add.1), Decision 15/CP.5, Future Work of the Joint Working Group on Compliance, at 39, para. 2. The compliance rules were not finalized until November 2001 at COP-7.
[45] See generally Report of the Subsidiary Body at Its Tenth Session, Annex I to the Report of the Joint Working Group on Compliance: Questions Related to a Compliance System Under the Kyoto Protocol (UNFCCC/SBI/1999/8), at 43.
[46] See G. Wiser, n. 4 above; J.L. Morgan and S.J. Porter, *Compliance Institutions for the Kyoto Protocol: A Joint CIEL/WWF Proposal* (WWF/CIEL, 1999), available at <http://www.ciel.org/Publications>.
[47] Personal experience of authors.

the basic elements they believed should be considered in creating the compliance mechanism.[48]

Informal consultations and workshops were held during the intersessional period to speed up the process. At the third meeting of the JWG in June 2000, the JWG co-chairs tabled a text that formed a basis for negotiations.[49] In the run-up towards COP-6 at The Hague in November 2000, the work of the JWG intensified. To a large extent, delegates shared a common view of the institutional and procedural structure of the compliance mechanism. However, one of the most important issues, the consequences of non-compliance, remained controversial and unresolved.

After the failure of COP-6 at The Hague in November 2000 and the rejection of the Protocol by the USA the following March, most UNFCCC parties redoubled their efforts to resume and successfully conclude negotiations on the Protocol's rules. At the resumed COP-6 session in July 2001 at Bonn (COP-6*bis*), the parties agreed to a framework for the compliance rules. Compliance was the last area that kept the parties apart throughout that marathon, all-night and day session;[50] however, by the morning of July 23, COP-6 President Jan Pronk announced that there was a 'meeting of the minds' that would allow all participating parties to endorse the Bonn Agreement.

Parties convened once again for 2 weeks in October and November 2001 at Marrakesh, Morocco to finalize the legal texts that would implement the terms of the Bonn Agreement. Having been the focal point of so much contention at COP-6*bis*, the compliance working group was the only group to complete its task days before the high-level, ministerial segment of COP-7 began. Parties adopted the compliance text as part of the Marrakesh Accords, which complete this critical rule-making phase for the Protocol.

The 3 years of intensive learning, discussion and negotiation have generated interesting ideas and important lessons. This part of the article begins by outlining the compliance procedures and mechanisms for the Kyoto Protocol, as adopted in the Marrakesh Accords. Next, it analyses the ideas and principles that informed the development of the compliance mechanism. Finally, the part describes the main issues that members of the JWG faced as they attempted to develop the design of the Protocol's compliance system.

THE MARRAKESH ACCORDS: COMPLIANCE PROCEDURES AND MECHANISMS UNDER THE KYOTO PROTOCOL[51]

Institutions and Mandate The Marrakesh Accords adopted at COP-7 create a new Protocol institution, the Compliance Committee, which will be charged with promoting compliance, providing advice and assistance to Protocol parties, determining cases of non-compliance, and applying appropriate consequences for non-compliance.[52] The UNFCCC secretariat in Bonn will serve as the secretariat of the Compliance Committee.[53]

The Committee will consist of two branches. A facilitative branch will be available to assist all parties in their implementation of the Protocol.[54] A judicial-like enforcement branch will determine whether an Annex I party has (1) met its emissions target, (2) complied with its monitoring and reporting requirements, and (3) met the eligibility tests for participating in the flexible mechanisms. When the enforcement branch finds that a party has failed to comply with one of these obligations, it will have the power to apply the appropriate consequence(s) to the party.[55]

The membership of both the facilitative and enforcement branches will be based upon equitable geographical representation.[56] All members of the compliance committee will serve in their individual capacities and not as representatives of parties.[57]

Additionally, a bureau of the Committee, comprised of the chair and vice-chair of each branch, will be responsible for allocating questions of implementation to the appropriate branch.[58] The plenary of the Compliance Committee will consist of the members of both branches, and will be tasked with carrying out various administrative tasks. The plenary will also be responsible for developing any needed rules of procedure.[59]

[48] Co-Chairs, Joint Working Group on Compliance non-paper, Co-Chairs' Initial Thoughts on Procedures and Mechanisms Relating to a Compliance System under the Kyoto Protocol (3 November 1999), on file with authors.

[49] See Report of the Joint Working Group on Compliance on Its Work during the Twelfth Sessions of the Subsidiary Bodies, Proposals from the Co-Chairmen of the Joint Working Group on Compliance (UNFCCC/SB/2000/CRP.3/Rev.1, 2000), Annex.

[50] The two most difficult issues were the composition of the compliance committee and the legal nature of the consequences of non-compliance.

[51] The full text on procedures and mechanisms on compliance is contained in the Marrakesh Accords, n. 18 above, Vol. III, Decision 24/CP.7, at 64 (hereinafter Compliance Text).

[52] Ibid., at 65, section II.

[53] Ibid., at 77, section XVII.

[54] Ibid., at 67, section IV.

[55] Ibid., at 68, section V.

[56] Ibid., at 67, section IV, para. 1; and at 68, section V, para. 1.

[57] Ibid., at 65, section II, para. 6.

[58] Ibid., section II, para. 4; and at 69, section VII, para. 1.

[59] Ibid., at 66, section III.

Procedures of the Compliance Committee

The Marrakech Accords contain fairly detailed processes governing how the Compliance Committee will deal with compliance-related questions. Nevertheless, the Accords anticipate that it will be necessary to develop more specific rules of procedure relating to, *inter alia*, confidentiality, conflicts of interest, and submission of information by intergovernmental and non-government organizations.[60] Currently, no date has been set for negotiating the rules of procedure governing this process. However, preliminary negotiations are likely to begin within the next 2 years. The rules of procedure will be developed by the plenary of the Compliance Committee, which will then submit them for the approval of the COP/MOP.[61]

Compliance proceedings may be triggered by questions of implementation that have been (a) set out in reports of the Article 8 expert review teams and forwarded to the Committee by the secretariat; (b) submitted by any party with respect to itself; or (c) submitted by any party with respect to another party.[62] After the compliance procedure is triggered, the bureau of the Committee will allocate questions of implementation to the relevant branch on the basis of the branches' respective mandates.[63] The relevant branch will then make a preliminary examination of questions of implementation submitted to decide whether or not it will pursue the case further.[64]

The system will include specific provisions designed to protect each member country's due process (procedural fairness) rights. There will be procedures for introducing evidence and for interested non-disputants to file information relevant to the case. In addition, the member country in question will have the opportunity to be represented in those hearings by an attorney or some other advocate.[65]

The enforcement branch will take decisions by double majority voting. Under this rule, a decision can only be adopted if majorities from each bloc of branch members – Annex I and non-Annex I – approve it.[66] The safeguard of double majority voting was intended to allay the concerns of some Annex I parties that enforcement branch membership based upon equitable geographical representation could somehow mean they might be subject to unfair or politically motivated decisions by that branch.

There will be potentially significant opportunities for public participation in compliance proceedings. Intergovernmental and non-government organizations will be entitled to submit technical and factual information to the committee's relevant branch.[67] Subject to limited exceptions, compliance hearings held by the enforcement branch will be open to the public.[68] Information considered in an enforcement proceeding will be made publicly available by the secretariat in Bonn.[69]

After the enforcement branch determines that a party has exceeded its emissions target, the party will have the right to appeal the decision to the supreme body of the Protocol, the COP/MOP. An appeal will be accepted only on the grounds that the party was denied due process during the enforcement proceeding. The enforcement branch's decision will stand pending an appeal, and it may be overturned only by a three-quarters majority vote of the COP/MOP.[70]

There will be procedures for reinstatement when a party has been found ineligible to participate in the Protocol's three flexible mechanisms.[71] These procedures will help ensure that the enforcement branch applies specific criteria when deciding whether or not to reinstate the party's eligibility after it has been suspended, and they will help guarantee that only those parties that are truly eligible to participate will be allowed to do so.

Consequences Each branch of the Compliance Committee is empowered to apply 'consequences' as part of a compliance-related proceeding. The consequences that may be applied by the facilitative branch include:

- provision of advice and assistance;
- facilitation of financial and technical assistance; and
- formulation of recommendations.[72]

As noted above, the enforcement branch is mandated to apply consequences when an Annex I party has failed to (1) comply with its monitoring and reporting requirements, (2) meet the eligibility tests for participating in the flexibility mechanisms, or (3) meet its emissions target.

[60] Ibid., section III, para. 2(d).
[61] Ibid.
[62] Ibid., at 69, section VI, para. 1.
[63] Ibid., section VII, para. 1.
[64] Ibid., para. 2.
[65] Ibid., at 70, section VIII, paras 3–4, 6 and 8; section IX, paras 2–3 and 7–8.
[66] Ibid., at 66, section II, para. 9.
[67] Ibid., at 70, section VIII, para. 4.
[68] Ibid., at 71, section IX, para. 2.
[69] Ibid., para. 10.
[70] Ibid., at 74, section XI.
[71] Ibid., at 73, section X, paras 2–4.
[72] Ibid., at 75, section XIV. From a semantic point of view, using the term 'consequences' to describe the results of a facilitative branch proceeding may seem malapropos. The term evolved in the JWG primarily within the context of discussions regarding the 'consequences of non-compliance'. Yet the facilitative branch is not empowered to make determinations of non-compliance; on the contrary, it can only promote compliance by 'providing advice and facilitation' (ibid., at 67, section IV, para. 4). Nevertheless, the JWG decided to adopt the term 'consequences' uniformly for each branch, primarily for reasons of diplomatic expediency.

In cases of non-compliance with the monitoring and reporting requirements of Protocol, Articles 5(1), 5(2) and 7(1), the enforcement branch will (1) declare the non-compliance of the party concerned, and (2) require the non-compliant party to submit to the enforcement branch an action plan that includes an analysis of the causes of non-compliance, corrective measures the party will take to remedy the non-compliance, and a timetable to assess the progress of the implementation of the action plan.[73]

When an Annex I party is found to be out of compliance with the eligibility requirements for the Kyoto mechanisms, the enforcement branch will order suspension of the party's eligibility to participate in the Kyoto mechanisms until the party in question has returned to compliance with the requirements.[74]

Annex I parties that fail to meet their emissions targets under Protocol, Article 3(1) will face the following consequences. (1) For every tonne of emissions by which a party exceeds its target, 1.3 tonnes will be deducted from its emissions allocation (assigned amount) for the subsequent compliance period. (2) The party will prepare a detailed plan explaining how it will meet its reduced target for the subsequent compliance period. The enforcement branch will have the power to review the plan and assess whether or not it is likely to work. (3) The party will not be able to use international emissions trading to sell parts of its emissions allocation until it has demonstrated that it will be able to comply with its current target.[75]

GUIDING PRINCIPLES FOR DESIGNING THE COMPLIANCE PROCEDURES AND MECHANISMS

The compliance rules of the Marrakesh Accords were the product of countless hours of instruction, brainstorming, debate, lobbying and political horse-trading among party delegates, academics, NGO compliance specialists and, ultimately, the highest levels of government. During the early phase of the negotiations, the JWG focused primarily on the nature of the compliance mechanism and the basic principles that should guide its development. In the end, the following principles were reflected in the design of the compliance procedures and mechanisms that parties adopted at COP-7.

Differentiation of Commitments The commitments in both the Protocol and the UNFCCC are significantly based upon the principle of 'common but differentiated responsibilities'.[76] This principle acknowledges that, having enjoyed the historical benefits of industrialization and the GHG emissions associated with it, the developed countries should take the lead in combating climate change and its adverse effects. Accordingly, throughout the Protocol and the UNFCCC, parties are grouped into two different categories: Annex I parties (developed countries) and non-Annex I parties (developing countries).

Reflecting this principle of common but differentiated responsibilities, the Protocol contains binding, 'hard' commitments and non-binding, 'soft' commitments. Only Annex I parties are subject to the hard commitments, of which the target-related provisions are the most important.

The JWG concluded that the compliance system should treat hard and soft commitments differently. The group agreed that only those binding, hard commitments of Annex I parties should be subject to the enforcement procedures of the compliance system.[77]

Facilitation versus Enforcement Most parties believed that the legally binding Kyoto targets suggested that the compliance system must include 'teeth' that would allow it to respond forcefully if a party failed to fulfil its core, target-related obligations. Enforcement measures would be necessary to deter non-compliance, instil confidence, and prevent free-riding. However, the 'system should be designed to incorporate not only enforcement features but also facilitative/help-desk features (recognizing that compliance may in some cases be affected by the capacity of parties, for instance, technical expertise, to meet their obligations)'.[78] All parties agreed that a primary objective of the compliance regime should be to assist parties to comply with their Protocol obligations. Accordingly, the principles of both facilitation and enforcement were key to the system's design.

Efficiency and Timeliness The three Kyoto mechanisms posed novel challenges to the compliance regime. Most parties realized that the environmental integrity of the mechanisms – and their potential for instilling confidence in the international trading markets – would be significantly predicated on the ability of the Kyoto regime to ensure that its members comply with their emissions reduction targets. At the same time, the markets would require that compliance-related questions or disputes are resolved as quickly as possible. Negotiators concluded that a clearly

[73] Ibid., at 75, section XV, paras 1–3.
[74] Ibid., at 76, para. 4.
[75] Ibid., paras 5–6.
[76] See UNFCCC, Article 3, chapeau; and Kyoto Protocol, Article 10.
[77] See Procedures and Mechanisms Relating to Compliance under the Kyoto Protocol: Elements of a Compliance System and Synthesis of Submissions, Note by the Co-Chairs of the Joint Working Group on Compliance (UNFCCC/SB/1999/7, 1999), at 4, para. 7.
[78] Ibid., at 7, para. 23.

defined timetable for each step in the compliance assessment process would be the best way to ensure that mechanism-related compliance questions did not unduly impede operation of the trading markets.[79]

Transparency and Reasonable Certainty

Transparency has long been recognized as an essential component of sustainable development. Hence, delegates agreed that the compliance regime should be transparent, both as a means of fostering compliance and as a way to build confidence in the regime on behalf of parties and the public. Delegates also believed that the system should provide as much certainty as possible, so that parties would clearly know in advance which actions or inaction would lead to what kind of consequences.[80]

Due Process The traditional principle of State sovereignty establishes that national governments are vested with independent, supreme power, and are not themselves subject to any other State in any respect.[81] Despite the modern proliferation of international institutions, most States zealously guard their sovereignty. Accordingly, the idea that they could be held accountable to the authority of an internationally administered compliance system was deeply troubling to some parties. One of the ways delegates working on the Protocol's compliance text addressed this problem was to insist that due process principles of fairness, predictability and impartiality be fundamental guides in the design of the system.[82]

Proportionality Concerns about due process led delegates to agree that any response measures in cases of non-compliance should be applied in a graduated manner and should be proportionate to the nature of the obligation and seriousness of the breach, taking into account the cause, type, degree and frequency of non-compliance.[83]

MAIN ISSUES IN THE DEVELOPMENT OF THE COMPLIANCE SYSTEM AND THE FINAL AGREEMENT

Once a common understanding was achieved regarding the general characteristics of the system, the challenge was how best to merge those characteristics into a coherent whole and, eventually, into a final legal text. This section describes the main issues that the members of the JWG faced as they attempted to develop the design for the Protocol's compliance mechanism.

One or Two Compliance Bodies: Functions and Procedural Aspects At the early stage of negotiation, delegates concluded that a standing entity composed of legal and technical experts would be needed to assess compliance and perform the functions of facilitation and enforcement. The question remained, however, whether the two functions of facilitation and enforcement should be performed by one or two distinct bodies. Proponents of a two-body system argued that facilitative and enforcement compliance functions involved fundamentally different approaches.[84] They believed that the work with respect to either function could be prejudiced if it was performed within the same body, because each function would require distinct institutional competence. According to one party, '[a]n enforcement function (at least one leading to binding consequences) involves more judicial scrutiny than a facilitative function'.[85] Because these proponents anticipated that the procedures for enforcement would be quasi-judicial in nature, containing elements of due process such as hearings and rebuttal of information, they believed that such procedures would be unnecessary or even inappropriate for the body performing facilitation.

Critics of the two-body approach raised the concern that the compliance assessment conducted by two bodies would affect the coherence and integrity of the decision-making process, including the application of consequences to non-compliance.[86] The relationship and interaction of the two bodies could be complex, eventually affecting the efficient operation of the whole system.

As noted above, a compromise was eventually found that met the concerns of both sides. The final rules established a standing committee comprised of two branches, the facilitative branch and the enforcement branch.[87]

Composition of the Compliance Committee

A long-simmering source of disagreement among negotiators was the composition of the Compliance

[79] See Compliance Text, n. 51 above, at 72, section X.
[80] See Note by the Co-Chairs, n. 77 above, at 7, para. 25.
[81] See *Black's Law Dictionary*, 5th edn, (West Publishing, 1979), at 1252.
[82] See Note by the Co-Chairs, n. 77 above, at 4, para. 5.
[83] See Procedures and Mechanisms Relating to Compliance under the Kyoto Protocol, Submissions from Parties (UNFCCC/SB/1999/MISC.12, 1999), at 16 (China), 22 (EU), 29 (Japan), 42 (Alliance of Small Island States) and 60 (Switzerland).
[84] See, for instance, D. Goldberg *et al.*, *Building a Compliance Regime Under the Kyoto Protocol* (CIEL, 1998), at 3–4, available at <http://www.ciel.org/Publications/buildingacomplianceregimeunderKP.pdf>; Morgan and Porter, n. 46 above, at 5.
[85] Submissions from Parties, n. 83 above, at 71 (quoting US submission).
[86] See, for instance, ibid., at 23 (Finland submission on behalf of EU and its Member States).
[87] See Compliance Text, n. 51 above, at 65, section II, paras 1–2.

Committee. While some parties wanted members of the Committee to serve as party representatives[88] (as was envisioned in the multilateral consultative process), a consensus developed that decisions relating to enforcement should be made by legal experts serving in their individual capacities.[89]

More intractable was the question of deciding from which countries the experts should come. Annex I parties argued that the committee should have a majority of members from Annex I countries, because only Annex I countries had targets and, hence, only they would be subject to enforcement branch proceedings. By contrast, non-Annex I parties believed that the Committee's composition should be based on equitable geographic representation, as is the practice in most UN bodies.[90]

In the run-up to the resumed COP-6 session in Bonn, COP President Jan Pronk proposed that both the facilitative and enforcement branches would have ten members serving in their individual capacity, selected on the basis of equitable geographic representation.[91] During the all-night negotiating session on Pronk's 'package deal', composition was the last issue that kept parties from agreement. By mid-morning of the following day, Pronk prevailed in convincing the remaining Annex I parties to accept his composition proposal, which allowed the Bonn Agreement to be finalized.[92]

Trigger for the Compliance Procedure The question of who or what would be entitled to initiate a compliance procedure became a source of significant disagreement at the final stages of negotiations at Marrakesh. The options that were considered are discussed below.

A Party with Respect to Itself

A party that believes it will have trouble complying with its commitments may go to the Compliance Committee to request assistance. This is the model established in the non-compliance procedure of the Montreal Protocol, which has successfully helped parties to overcome implementation problems that they have had.[93] There were few objections at COP-7 to the inclusion of this trigger in the compliance text.

A Party with Respect to Another Party

A party or parties may initiate a compliance proceeding against another party by submitting a question of implementation to the compliance entity. Some countries raised doubts about this 'party-to-party trigger' because they argued it would be inherently confrontational and adversarial, creating disincentives for parties to seek advice or be forthcoming about their difficulties. To address this concern and avoid possible abuse of the procedure, it was suggested, and later agreed, that the party-to-party trigger will only be valid if it is 'supported by corroborating information'.[94]

The Secretariat

The secretariats of both CITES and the Montreal Protocol are empowered to invoke the compliance procedures under their respective treaties. This will not be the case under the Kyoto Protocol. During the JWG's negotiations, some parties believed that giving such power to the secretariat would provide an important means of spotting compliance problems at an early stage, because the secretariat – who will be the recipient of parties' national reports – will likely be the first to become aware of a potential case of non-compliance.[95] Other parties argued that the role of the secretariat should be confined to administrative functions such as providing conference services, preparing documents, and compiling and distributing information. One party commented, 'at all times the secretariat should be regarded as the servant of all of the parties and, therefore, it must be scrupulous in neither taking sides in the process nor appearing to do so'.[96] In the final compliance text, this latter view prevailed: the secretariat is not included as one of the entities entitled to submit a question of implementation to the Compliance Committee, although it still could prove to be an important player behind the scenes.[97]

[88] See Submissions from Parties, n. 83 above, at 56–57 (Saudi Arabia). The USA originally proposed that the facilitative branch be composed of party representatives, while the enforcement branch be composed of members serving in their individual capacities. See ibid., at 74.

[89] See Compliance Text, n. 51 above, at 65, section II, para. 6.

[90] Interventions by Brazil, China, Iran, Saudi Arabia, USA and Australia before the Joint Working Group on Compliance, Eleventh Session of the Subsidiary Bodies (Bonn, 30 October 1999), notes on file with Glenn Wiser.

[91] Preparation for the First Session of the Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol, Consolidated Negotiating Text Proposed by the President: Decisions Concerning Procedures and Mechanisms Relating to Compliance under the Kyoto Protocol (UNFCCC/CP/2001/2/Add.6, 2001), Articles 4(1) and 5(1), at 6–7.

[92] See Preparations for the First Session of the Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol (Decision 8/CP.4), Implementation of the Buenos Aires Plan of Action, (UNFCCC/CP/2001/L.7, 2001) (hereafter the Bonn Agreement), Decision 5/CP.6, at 14, section VIII, para. 6.

[93] See Montreal Protocol Non-Compliance Procedure, n. 8 above, para. 4.

[94] See Compliance Text, n. 51 above, at 69, section VI, para. 1(b).

[95] See Submissions from Parties, n. 83 above, at 45 (Samoa on behalf of the Alliance of Small Island States).

[96] Ibid., at 57 (submission of Saudi Arabia).

[97] See Compliance Text, n. 51 above, at 69, section VI.

Expert Review Teams under Article 8

The Protocol's Article 8 arguably envisions the expert review process as the most important source for identifying questions of implementation relating to individual parties. Debate arose, however, regarding who or what would deal with the questions once review teams had identified them. Article 8 directs review reports to the subsidiary bodies and the COP/MOP. Nonetheless, practice under the UNFCCC process suggests that it is unlikely that a subsidiary body or the COP/MOP would give adequate attention to the questions of implementation identified in the review reports. Some parties thus advocated establishing an automatic link between the technical review and the compliance assessment that would allow questions of implementation to be forwarded automatically to the Committee.[98]

Those parties that argued against such an automatic link generally did so out of a concern for State sovereignty. Some delegates expressed unease that a State's performance could be subject to technical review by independent experts, and then to a legal assessment by a group of experts acting in their personal capacities. These countries maintained that governments should retain control of the process. Accordingly, they proposed that a panel consisting of parties should first examine any questions raised by the Article 8 review teams and then decide whether those questions should be forwarded to the Compliance Committee.[99] However, the majority of parties felt that establishing another compliance-related body would lead to a proliferation of institutions that would create too much delay, inefficiency and bureaucracy. Eventually, parties agreed that, while the COP/MOP will provide policy guidance for the Committee, questions of implementation identified in the expert review team reports will be automatically forwarded by the secretariat to the Committee.[100]

Treatment of Cases Once a case enters into the compliance system, the immediate question is how the Committee should handle it. Two approaches emerged in the discussions, one 'staged' and the other 'parallel'. Under the staged approach, every case would first be dealt with by the facilitative branch. Only after the facilitative branch had exhausted all available measures and failed to resolve the case successfully would it be referred to the enforcement branch.

Under the parallel approach, the facilitative and enforcement branches would each have clearly defined 'jurisdictions' or mandates that would precisely define what kinds of cases would be handled by each branch. Questions concerning the target-related commitments or eligibility of parties to participate in the Kyoto mechanisms would be referred immediately to the enforcement branch. All other cases, including those concerning developing country parties, would be forwarded to the facilitative part of the system.

Critics of the staged approach argued that it could indefinitely delay the determination of a party's compliance status because there would be no clear-cut criteria as to when the facilitation stage should end and the enforcement stage begin. On the other hand, critics of the parallel approach felt that countries should be given every opportunity available to correct problems before the declaration of non-compliance and imposition of consequences.[101]

Ultimately, parties adopted a modified version of the parallel approach. After a compliance procedure is triggered, the bureau of the Committee will allocate questions of implementation to the relevant branch on the basis of the branches' respective mandates. The enforcement branch can, at any time, refer a case to the facilitative branch, but not vice visa. This does not mean that once the enforcement branch handles a case, the facilitative branch cannot deal with it. On the contrary, a case can be addressed simultaneously and independently in both branches at the same time. The enforcement branch will make a determination of compliance or non-compliance and impose consequences, but this would not prevent the facilitative branch from providing assistance to help a party return to compliance.

Screening Process After a case is allocated to the relevant branch, the branch will need to decide whether to pursue it. Some cases could involve minor or even trivial compliance breaches whose pursuit could overburden, lead to abuse, or undermine confidence in the system. Most countries agreed that a screening process to undertake preliminary examination of cases was needed to decide which issues should be pursued and to promote consistency among cases. The rules ultimately provided for a screening process in which the relevant branch will proceed with a case only if it is (a) supported by sufficient information; (b) not *de minimis* or ill-founded; and (c) based on the requirements of the Protocol.[102]

Cases Related to the Market Mechanisms

One of the key purposes of the compliance system is to

[98] For instance, see Submissions from Parties, n. 83 above, at 23–24 (EU).
[99] Report of the Conference of the Parties on the First Part of Its Sixth Session, Part Three: Texts Forwarded to the Resumed Sixth Session by the Conference of the Parties, Vol. IV, (UNFCCC/CP/2000/5/Add.3), at 26, paras 32–35.
[100] See Compliance Text, n. 51 above, at 69, section VI, para. 1.
[101] See Elements of a Compliance System and Synthesis of Submissions: Note by the Co-Chairs of the Joint Working Group on Compliance (UNFCCC/SB/1999/7, 1999), at 6, paras 16–17.
[102] See Compliance Text, n. 51 above, at 69, section VII, para. 2.

instil confidence and integrity in the Kyoto flexible mechanisms. However, many parties were concerned that the compliance procedures could unduly increase transaction costs or diminish liquidity in the system, and undermine the anticipated benefits of the mechanisms. A key issue that thus emerged was whether it would be necessary to establish a specialized body or an expedited procedure to handle cases of non-compliance related to the mechanisms.

Most countries, hoping to avoid a proliferation of institutions, believed that the enforcement branch should handle cases related to the mechanisms. They agreed that such cases should be treated with due process safeguards, yet in an expedited way so they could be resolved swiftly.

At COP-7, an expedited procedure was designed for the cases related to the market mechanisms. The expedited procedure will resemble the regular procedure of the enforcement branch. However, the timelines for the various stages of the process, such as the preliminary examination, periods for receiving written submissions and preparation of the final decision, are all shorter than in the regular enforcement procedure.[103]

Relationship of the Compliance System with the COP/MOP The COP/MOP, as the supreme body of the Kyoto Protocol, is responsible for reviewing how parties are implementing their obligations.[104] The question arose as to whether all the decisions of the Committee should be subject to the COP/MOP's approval. Some countries believed that the COP/MOP should exercise control over the Committee by approving and reviewing the outcomes of the Committee.[105] Other parties were concerned that, if all the decisions of the Committee had to be approved by the COP/MOP, the non-political, impartial nature of the enforcement process would be undermined.[106] Parties finally agreed that the Committee will report to the COP/MOP on an annual basis, and that the COP/MOP's role will be restricted to providing the Committee with general policy guidance.[107]

Appeal Procedure The question of an appeal procedure raised two sets of questions. The first was whether a procedure for appeals was needed at all, and if it was, what kind of issues should be subject to appeal. For some compliance cases, such as those handled by the facilitative branch, there was no apparent reason why a party would want to appeal at all. For other cases, such as enforcement branch proceedings regarding eligibility to participate in the mechanisms, an appeal process could significantly prolong a case and leave the validity of trades in question. In the end, parties agreed that only those cases involving questions of non-compliance with emissions targets – which had the most serious potential consequences – would be eligible for appeal.

The second related set of questions concerned how the appeal procedure would function. While the World Trade Organization's (WTO) dispute-settlement procedure has independent appellate panels to review initial panel decisions, a similar idea for the Kyoto compliance system was never seriously considered due to the concern of creating too many institutions. An alternative proposal was offered under which the COP/MOP would serve as the appellate body. However, many parties feared that giving that power to the COP/MOP would mean that decisions would be delayed or, in some cases, never made, as was the case under the old General Agreement of Tariffs and Trade (GATT) rules. They proposed that the COP/MOP take its appellate decisions under a negative consensus rule, meaning the COP/MOP would automatically confirm the Committee decision unless it decided by consensus to overturn it.[108] However, others noted that a purely negative consensus rule would make it virtually impossible for a party to succeed in its appeal, which was not the intent of those who supported the appeal procedure.

A compromise was struck at the final stage of negotiation. The COP/MOP will have the power to hear a party's appeal against a decision of the enforcement branch relating to Article 3(1) if the party believes it was denied due process in the original compliance proceeding. The enforcement branch decision may only be overridden by a three-fourths majority vote of those parties present and voting at the meeting.[109]

Consequences of Non-Compliance The consequences of non-compliance applied by the enforcement branch will be important to ensure that the Protocol's compliance regime deters non-compliance, instils confidence in the system among parties who successfully strive to fulfil their commitments, and serves as a means of mitigating excess emissions once they have occurred. However, in devising consequences, most parties realized that a careful balance needed to be struck. If the consequences were too strong or were perceived as being punitive, some

[103] See ibid., at 72–72, section X.
[104] Kyoto Protocol, Article 13(4)(b).
[105] For instance, see Submissions from Parties, n. 83 above, at 39 (Poland) and 57 (Saudi Arabia).
[106] Interventions by the USA, Australia, New Zealand, Argentina and the UK before the Joint Working Group on Compliance, Eleventh Session of the Subsidiary Bodies (Bonn, 28 October 1999), notes on file with Glenn Wiser.
[107] See Compliance Text, n. 51 above, at 74, section XII.
[108] Text forwarded to COP-6, Part II by COP-6, Part I (UNFCCC/CP/2000/5/Add.3).
[109] See Compliance Text, n. 51 above, at 74, section XI, para. 3.

countries could be reluctant to join the Protocol. If, on the other hand, the consequences were too soft, they would not effectively deter non-compliance and prevent free-riders.

Two types of consequences were adopted for the Protocol to achieve this balance. The first type of consequences includes those associated with the facilitative branch. They are purely facilitative in nature, such as advice, financial and technical assistance, and recommendations. These measures aim to assist parties in their efforts to avoid non-compliance or return to compliance. Due to their generally non-confrontational nature, the facilitative consequences received relatively little attention from the JWG.

The second type includes the consequences imposed by the enforcement branch. Regarding these consequences, the most contentious issues were what would happen if a party failed to honour its Protocol, Article 3(1) emissions reduction target, and what would be the nature of those consequences. The remainder of this section discusses those consequences related to Article 3(1).[110]

Deduction of Excess Emissions from a Party's Future Emissions Allowance (Assigned Amount)

The deduction proposal was also known as 'restoration of tonnes' and – derisively by many environmentalists – as 'borrowing'. The rationale behind deduction was partly based on the assumption that it would provide incentives for parties to comply with their targets during the first commitment period, because deducting excess tonnes from the subsequent commitment period would significantly increase the difficulty and cost of compliance for that period. Yet several problems were identified for this consequence.[111] First, deduction from the second commitment period will not truly make up for the excess emissions in the first unless there is some extra means of ensuring that the non-complying party does, in fact, reduce its emissions during the second period. Many commentators predicted that the party would in fact simply 'borrow' from commitment period to commitment period, in the same way that someone might pass on debt indefinitely into the future until the system was forced to accept that the debt would never be repaid.

Second, commentators were concerned that the party facing deduction would simply negotiate its second (or third) commitment period targets to a higher amount of emissions, to accommodate for the deduction. As stated by the Australian Department of Foreign Affairs and Trade, '[p]arties would simply take into account any anticipated subtraction of emission in negotiating their targets for the subsequent commitment period, thus removing the incentive'.[112] Moreover, there was little agreement on what the correct deduction rate should be or how it should be calculated, with some parties arguing that a one-to-one deduction rate would provide the proper compliance incentives, while others replying that discount rates, opportunity costs of money, compliance theory and various other analyses should be taken into account in arriving at the number.

Despite the well-recognized shortcomings of deduction, parties eventually consented to it because no other politically feasible or realistic non-compliance response seemed possible. While most Annex I parties agreed that the Protocol would require a strong compliance system, they were generally loath to expose themselves to the possibility of non-compliance consequences with 'teeth', such as financial penalties or trade measures. The deduction rate that was finally adopted, 1.3-to-1, 'split the difference' between those who wanted a higher penalty rate and those who preferred a one-to-one deduction.

Compliance Action Plan

The compliance action plan was proposed by the EU as a way to make deductions more palatable to parties that supported stronger consequences. This consequence requires an Annex I party that has exceeded its emissions target to submit a plan explaining specifically how it will comply with its emissions reduction targets for the subsequent commitment period. The plan is subject to 'review and assessment' by the enforcement branch. The rationale of the compliance action plan is that it will provide a means for the enforcement branch to remain involved in the efforts of a non-complying party to meet its subsequent, reduced target, thereby reducing the likelihood that the party will simply 'roll-over' its emissions excess into commitment period after commitment period.

The major concern of some negotiators was that the enforcement branch might use the compliance action plan requirement to dictate to a party the specific means by which it must return to compliance; in particular, the extent to which it could use the Kyoto flexible mechanisms instead of purely domestic actions. These negotiators believed that such a situation would amount to the enforcement branch being able to order a party to adopt specific policies and measures to reach its targets, which was an approach that was

[110] For a brief overview of all the non-compliance consequences adopted in the Marrakesh Accords, see discussion above, the section on the Marrakesh Accords, Consequences.

[111] For instance, see G. Wiser and D. Goldberg, *Restoring the Balance: Using Remedial Measures to Avoid and Cure Non-Compliance Under the Kyoto Protocol* (WWF, June 2000), at 18–22, available at <http://www.ciel.org/Publications/restoringbalance.pdf>.

[112] Department of Foreign Affairs and Trade, Australia, *Climate Change: Options for the Kyoto Protocol Compliance System* (DFAT, 2000), at 20.

specifically rejected during the Kyoto negotiations (and consequently not included in the Protocol). In the end, the compliance action plan language that was adopted did not give the enforcement branch the power to 'approve' a compliance action plan. Instead, the enforcement branch is empowered to 'review and assess' the plan after the party submits it.[113]

Suspension of Eligibility to Participate in International Emissions Trading

Many multilateral treaty regimes provide for suspension of a State's rights and privileges when a State fails to honour its treaty obligations.[114] Because participation in the Protocol's emissions trading mechanism will be an important part of many parties' efforts to comply with their targets in a cost-effective manner, the prospect of losing that privilege could provide parties with a powerful incentive to restore themselves to compliance or avoid non-compliance in the first place. Moreover, because the integrity of the trading regime is predicated on the notion that a party will only transfer surplus, valid emissions credits, and not credits that it needs for its own compliance, most negotiators agreed that a non-compliant party should not be allowed to make any emissions trading transfers until it has demonstrated that it will be able to comply with its current emissions target.

The only major point of contention regarding this consequence was how a suspended party would have its eligibility to trade reinstated. In the final Marrakesh rules, parties agreed upon specific reinstatement procedures that create a presumption that the enforcement branch will reinstate a party's eligibility after the party requests it to do so. However, the rules allow the enforcement branch to deny reinstatement if it believes the party has not complied, or will not be able to comply, with its emissions target for the subsequent commitment period.[115]

Compliance Fund

One alternative to deductions that was considered by negotiators was a compliance fund, which was included in the various compliance negotiating drafts prior to the adoption of the Bonn Agreement. The compliance fund was intended as a mechanism that would allow parties to remedy or avoid a finding of non-compliance by making payments to a fund that would invest the proceeds in GHG mitigation projects.[116] Either a domestic or an international entity could have administered the fund. While one version or another of the compliance fund attracted the support of many parties, it was eventually dropped because some countries perceived it as a potential form of financial penalty, while others suspected that it would be used to set a 'price cap' on the compliance costs of parties.

Financial Penalty

Financial penalties are rarely used in multilateral agreements, partly because there are few effective ways to ensure that they will be paid. During the JWG's discussions, many parties felt that the prospect of financial penalties for non-compliance with their emissions targets would make it politically difficult for them to win domestic support for the Protocol. Although financial penalties appeared in some of the compliance text drafts during the negotiations, they never received broad enough support from parties to make them a realistic prospect for adoption.

Legal Nature of the Consequences Despite the unanimous adoption of the compliance rules at Marrakesh, parties were unable to agree on the precise legal nature of the rules. The question of whether the consequences will be 'legally binding' is thus among the most important compliance-related issue remaining for the COP/MOP to resolve after the Protocol enters into force.

The last sentence of the Protocol's Article 18, which deals with compliance rules and procedures, stipulates that the compliance procedures and mechanisms 'entailing binding consequences shall be adopted by means of an amendment to this Protocol'. That requirement reflects the inability of negotiators to agree upon the issue of consequences for non-compliance during the talks leading to adoption of the Protocol at Kyoto in 1997. It also implies that parties will be politically, but not necessarily legally, bound to respect the decisions and consequences ordered by the enforcement branch if the compliance procedures and mechanisms are not adopted in a legally binding format.

JWG negotiators understood that this amendment requirement would make their work more complicated. If an Article 18 amendment were adopted, it would have to be ratified by participating countries just like any other treaty. It would not enter into force until 90 days after three-fourths of the parties had submitted their notices of acceptance and ratification, and it would bind only the parties ratifying or acceding to the amendment. Unless a means was agreed upon to ensure that all Protocol parties would be bound by the amendment, parties could eventually face a situation similar to that of the pre-WTO GATT, in which different States were subject to increasingly different legal obligations until the system as a whole

[113] Compliance Text, n. 51 above, at 76, section XV, para. 6.
[114] See Wiser, n. 4 above, at 30 and 32.
[115] See Compliance Text, n. 51 above, at 73, section X, paras 2–4.
[116] See Wiser, n. 111 above, at 3–8; also see generally G. Wiser and D. Goldberg, *The Compliance Fund: A New Tool for Achieving Compliance Under the Kyoto Protocol* (CIEL, 1999), available at <http://www.ciel.org/Publications/ComplianceFund.pdf>.

no longer functioned effectively. JWG negotiators agreed that it would be unacceptable for some Annex I parties to be subject to legally binding consequences while others were not.

Up until the adoption of the Bonn Agreement at COP-6*bis*, the JWG explored the possibility of developing some form of supplementary legal instrument, which all parties would agree to ratify at the same time that they ratified or acceded to the Protocol. This instrument would both establish the compliance system and modify the Protocol so that binding consequences could be adopted via the supplementary instrument rather than an Article 18 amendment. However, the emerging consensus toward such an instrument was lost after the USA announced it would not participate in the Protocol. Consequently, those Annex I parties that had been sceptical of the need for binding consequences prevailed at Bonn and Marrakesh, winning a concession that the question of the legal nature of the consequences would not be taken up until the first meeting of the COP/MOP.[117]

CONCLUSION

Preventing non-compliance, facilitating compliance and managing compliance are the main approaches employed by MEAs to ensure that parties abide by treaty rules and obligations. The UNFCCC – with its generally 'soft' commitments – and the Kyoto Protocol – with both 'hard' and 'soft' commitments – illustrate how these approaches are evolving under international law.

Like many other MEAs, the UNFCCC contains unenforceable provisions for monitoring and reporting by parties on their performance under the treaty, and for review of that reporting and performance. By contrast, the Kyoto Protocol, with its novel market mechanisms and binding emissions targets, is far more ambitious. Moreover, unlike the non-compliance procedure of the ozone regime's Montreal Protocol, which combines a facilitative approach with stronger, yet ad hoc, measures, the Kyoto Protocol establishes formalized procedures and institutions for the independent administration of facilitation and enforcement. The Kyoto compliance system includes a facilitative branch, which will assist States to meet their obligations by providing guidance, incentives and technical assistance in securing compliance with Protocol commitments. The compliance system also includes an independent, quasi-judicial enforcement branch, which will have the authority to declare publicly and formally that a country has violated its treaty obligations when it exceeds its emissions target.

This article has reviewed the main issues that challenged government negotiators as they attempted to develop a comprehensive, workable compliance system for the Protocol. Many of the most difficult points of contention can be distilled to concerns over responsibility and sovereignty. On one hand, the question of which parties – Annex I or non-Annex I – would be responsible or exempt under the various compliance provisions created two broad blocs of negotiators that often had difficulty bridging their differences. On the other hand, parties' fears that the creation of an independent enforcement branch could compromise their rights as sovereign States made agreement on nearly every point elusive, with shifting alliances of negotiators not always grouped simply on the basis of whether they were from developed or developing countries.

Ultimately, concerns over sovereignty, and the attendant fear of going too far, too fast, resulted in parties not yet reaching consensus on the issue of legally binding consequences for non-compliance. An amendment or other formally ratified legal instrument would provide the highest possible expression of the intent of parties to respect the results of an enforcement branch proceeding. However, the Accords agreed upon and adopted in Marrakesh by all participating States establish the procedures and institutions for the compliance system as well as the consequences for an Annex I party's failure to honour its obligations, including failure to meet its emissions target. That is a politically potent accomplishment that makes the Protocol's compliance system the most robust ever adopted for an MEA.

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The views expressed in this article are those of the authors. They do not represent the views of the Climate Change Secretariat or the Climate Action Network.

[117] See Compliance Text, n. 51 above, at 64, para. 2, in which the COP recommends that the COP/MOP 'adopt the procedures and mechanisms relating to compliance . . . in terms of Article 18 of the Kyoto Protocol'. The USA was among the most forceful advocates for a binding compliance system. After the US Government withdrew from the Protocol in March 2001, Russia and Japan – never supporters of binding consequences – had significantly more influence in the debate. That was because their participation in the Protocol became essential if the entry-into-force requirement of 55 countries including Annex I parties accounting for at least 55% of 1990 Annex I emissions was to be met. See Kyoto Protocol, Article 25(1).