



CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW

LEGAL MEMORANDUM: MANDATE OF COP TO ADOPT COMPLIANCE PROCEDURES AND MECHANISMS

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1. QUESTION PRESENTED

Does the Conference of the Parties to the U.N. Framework Convention on Climate Change have the legal mandate to adopt an annex containing proposed procedures and mechanisms relating to compliance under the Kyoto Protocol, as suggested in the “Draft Decision Proposed by the Co-Chairmen of the Negotiating Group,” FCCC/CP/2001/CRP.12/Rev.1, dated 27 July 2001?

2. BRIEF ANSWER

Yes. The mandate of the COP specified in FCCC Article 7.2 contains a “catch all” provision instructing the COP to “exercise such other functions as are required for the achievement of the objective of the Convention as well as all other functions assigned to it under the Convention.” Having realized that the Convention’s commitments alone would not accomplish the objective of “stabiliz[ing] greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system,” the COP has engaged in the process of adopting the Kyoto Protocol and preparing for its timely entry into force by developing the rules and guidelines for its implementation. Because the decision on adoption of the Protocol’s compliance procedures and mechanisms was a critical factor in the ability of Parties to conclude the Bonn Agreement and thus continue to go forward with the Protocol process, that decision must be deemed to fall within the COP’s exercise of functions “required for the achievement of the objective of the Convention.” An interpretation of Article 7.2 that accepts the power of the COP to adopt the procedures and mechanisms relating to compliance under the Kyoto Protocol as part of the Bonn Agreement but not the draft compliance decision would be manifestly absurd and unreasonable. Moreover, the compliance negotiating group’s mandate to prepare a legal text for compliance “incorporating and giving full effect” to the terms contained in the Bonn Agreement obligates the group to respect all of the Agreement’s substantive terms. It does not give the group’s members the power to void this key provision of the Agreement.

3. FACTS

On Tuesday, July 24, 2001, at the resumed session of the Sixth Conference of the Parties to the U.N. Framework Convention on Climate Change (COP6*bis*), high-level representatives of over 170 countries resolved the core outstanding issues necessary for implementation and entry into force of the Kyoto Protocol.¹ This “Bonn Agreement” was the culmination of around-the-clock negotiations based upon COP President Jan Pronk’s proposed draft decision, “Core elements for the implementation of the Buenos Aires Plan of Action” dated July 21, 2001. President Pronk submitted the “Core Elements” proposal to Parties as a “take it or leave it” offer. Ultimately, they accepted all of it verbatim, with the exception of the section on procedures and mechanisms related to compliance under the Kyoto Protocol. After engaging in tense negotiations on that section throughout the night of July 22 and the morning of July 23, Parties finally agreed to a compromise compliance text, which they then adopted, along with the other sections of the “Core Elements,” as the Bonn Agreement.

While several parts of the compliance section were revised in order to obtain consensus among the Parties, the most difficult challenge was the “adoption” question: whether, when and how Parties would agree to the adoption of a legal instrument that would make the consequences of non-compliance with the Protocol’s emissions targets “binding.”² President Pronk’s original “Core Elements” paper would have committed Parties to adopting at COP6*bis* “a legal instrument on procedures and mechanisms relating to compliance as an integral part of the Kyoto Protocol.”³ In the compromise text, the COP instead agreed (a) to “adopt at, at its sixth session, the procedures and mechanisms relating to compliance” described in the balance of the section and (b) to recommend to the Protocol’s Conference of the Parties serving as the meeting of the Parties (COP/MOP) that it adopt “procedures and mechanisms relating to compliance in terms of Article 18 of the Kyoto Protocol.”⁴

The Bonn Agreement further instructed negotiators in the technical negotiating groups (which include the compliance group) to spend the remainder of COP6*bis* preparing texts “incorporating and giving full effect” to the terms above and all the other provisions of the Agreement.⁵ Consequently, the Co-Chairs of the compliance negotiating group prepared a revised draft decision on compliance that attempted to satisfy that instruction by incorporating verbatim subparagraphs (a) and (b) of the Bonn Agreement’s provisions for adoption of the compliance system.⁶

¹ See Preparations for the First Session of the Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol, Decision 5/CP.6: Implementation of the Buenos Aires Plan of Action, FCCC/CP/2001/L.7 (July 24, 2001) [hereinafter the Bonn Agreement].

² The final sentence of Article 18 of the Kyoto Protocol provides that any procedures or mechanisms adopted under the article “entailing binding consequences shall be adopted by means of an amendment” to the Protocol. Parties have long recognized that that requirement presents a number of difficult legal challenges, particularly relating to the timing of entry into force of such an amendment.

³ Core Elements paper, annex, sect. V, ¶ 8.

⁴ Bonn Agreement, *supra* note 1, at 14, annex, sect. VIII, ¶ 8.

⁵ *Id.* at 2, ¶ 2.

⁶ See Procedures and Mechanisms on Compliance Under the Kyoto Protocol, Non-paper by the Co-Chairmen (July 26, 2001), *officially released as* Preparations for the First Session of the Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol, Procedures and Mechanisms on Compliance Under the Kyoto Protocol: Draft Decision Proposed by the Co-Chairmen of the Negotiating Group, FCCC/CP/2001/CRP.12/Rev.1

However, when the compliance group reconvened to carry out its task, Australia, supported by Japan, Russia, Canada and the United States, argued that it was not possible to include subparagraph (a) in the COP's draft decision, because it would be *ultra vires*—beyond its powers—for the COP to adopt the annex containing the procedures and mechanisms relating to compliance under the Protocol. Because the subparagraph was *ultra vires*, Australia concluded, it was obviously a “technical inconsistency” that the working group should ignore as it integrated the Bonn Agreement into the compliance text.⁷

Instead of adopting the compliance text's annex, argued Australia, the COP could only recommend that the COP/MOP adopt something “relating to compliance in terms of Article 18” (as the Bonn Agreement's subparagraph 8 (b) and the COP's draft decision paragraph 2 provided). Moreover, Australia insisted that an additional provision inserted into the text by the Co-Chairs—which would have the COP recommend that the COP/MOP confirm the COP's decision on compliance and then bring the procedures and mechanisms into operation—was “redundant” with the decision's paragraph 2 and must be deleted as well.

After prolonged but inconclusive debate, during which many other members of the compliance group vigorously denounced the Australian position as an attempt to substantively change the Bonn Agreement after its adoption, it became apparent to the Co-Chairs that agreement would not be possible during these final days of COP6bis. Concerned that a failure to agree upon compliance could endanger the Bonn Agreement as a whole, Parties agreed to delay completion of the legal texts until negotiations resumed at COP7 in October 2001.⁸

4. ANALYSIS

The Conference of the Parties to the Convention was established and its mandate created under that instrument's Article 7. Accordingly, a determination of whether the COP is empowered to adopt an annex containing procedures and mechanisms relating to compliance under the Kyoto

(July 27, 2001) [hereinafter the compliance text]. The compliance text is comprised of three parts: a draft decision of the COP, a draft decision of the COP/MOP, and an annex containing the actual compliance procedures and mechanisms. Paragraph 1 of the COP's draft decision is where paragraph 8 (a) of the Bonn Agreement compliance section appears. The exact text of paragraph 8 (a) instructs the COP to “Adopt, at its sixth session, the procedures and mechanisms relating to compliance as specified above” [in this compliance section of the Agreement]. The compliance text's annex is where those procedures and mechanisms will be “incorporated and given full effect.” Accordingly, paragraph 1 of the COP decision in the compliance text has the COP decide “to adopt the procedures and mechanisms on compliance under the Kyoto Protocol, *annexed hereto*” [emphasis added].

⁷ As noted earlier, all of President Pronk's proposals were accepted “as is” in the Bonn Agreement except for the compliance section, which was revised to win consent from all the Parties. The draft that was agreed upon contained a number of grammatical and other minor errors. It also contained a few inconsistencies, most notably a reference in the section on eligibility to participate in the mechanisms that required Parties to “have accepted the agreement on compliance supplementing the Kyoto Protocol.” That reference was to the original compliance section paragraph 8, which was deleted in the final agreement and replaced by subparagraphs (a) and (b). After agreement was reached on July 23, President Pronk intended to “clean up” that text to correct the minor errors and the inconsistencies created by the revised compliance section. However, that strategy created some confusion, so he ultimately offered the original July 23rd draft to the plenary, which adopted it as FCCC/CP/2001/L.7.

⁸ See Report of the Conference of the Parties on Its First Session, Part I, Proceedings, at 19, ¶¶ 57-8, FCCC/CP/2001/5 (2001).

Protocol must begin with an analysis of the relevant text of Article 7. That analysis should be conducted “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”⁹

Moreover, the analysis must take into account (a) “any subsequent agreement between the parties regarding . . . the application of [the treaty’s] provisions” and (b) “any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation.”¹⁰

Finally, if the above analysis (a) “leaves the meaning ambiguous or obscure” or (b) “leads to a result which is manifestly absurd or unreasonable,” then “recourse may be had to supplementary means of interpretation” to determine the treaty’s meaning.¹¹

4.1. The Framework Convention Provides the COP with Broad Discretion to Take Action to Prevent Dangerous Anthropogenic Interference with the Climate System

After establishing the COP as “the supreme body of the Convention,” Article 7 empowers the COP to “make, within its mandate, the decisions necessary to promote the effective implementation of the Convention.”¹² The Article lists numerous specific activities that the COP must fulfill to that end. However, because the Convention’s framers understood that they could not reasonably anticipate or identify every necessary activity or function the COP might need to undertake, they added the final, “catch all” power of subparagraph (m) to the list: [The COP shall] “exercise such other functions as are required for the achievement of the objective of the Convention as well as all other functions assigned to it under the Convention.”¹³

That mandate is extremely broad. The second clause of the subparagraph instructs the COP to exercise any and all functions that are assigned to it under the Convention, whether or not they are specifically identified in the list of Article 7.2. That clause establishes that the COP’s mandate is *not* limited solely to those functions listed in Article 7.2 (a)-(I).

Meanwhile, the first clause of the subparagraph gives the COP the mandate to exercise any other functions that are necessary to accomplish the Convention’s objective of achieving “stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.”¹⁴ That clause empowers the COP to take any and all actions it deems necessary to counter the threat of human-induced climate change. The only constraints on that power are, by inference, (1) the political ability of the COP to

⁹ Vienna Convention on the Law of Treaties, May 22, 1969, art. 31.1, 1155 U.N.T.S. 331.

¹⁰ *Id.* art. 31.3.

¹¹ *Id.* art. 32.

¹² FCCC Art. 7.2 chapeau.

¹³ *Id.* subparagraph (m). Similar provisions are common in multilateral environmental agreements. *See, e.g.*, Convention on Long-Range Transboundary Air Pollution (LRTAP), Nov. 13, 1979, art. 10, 1302 U.N.T.S. 217 (stating Executive Board shall “fulfil such other functions as may be appropriate under the provisions” of the Convention); Montreal Protocol on Substances that Deplete the Ozone Layer, Sept. 16, 1987, art. 11.4 (j), 1522 U.N.T.S. A-26369 (stating Meeting of the Parties shall “consider and undertake any additional action that may be required for the achievement of the purposes of this Protocol”).

¹⁴ *See* FCCC art. 2 (stating ultimate objective of the Convention).

express its will through its decision-making processes and (2) any constraints imposed under general principles of international law.

4.2. FCCC Article 7.2 Establishes the COP's Power to Adopt an Annex Containing Proposed Procedures and Mechanisms Relating to Compliance under the Kyoto Protocol

4.2.1. Because the decision on adoption of the compliance procedures and mechanisms was a central factor in the ability of Parties to conclude the Bonn Agreement, it must be deemed to fall within the COP's exercise of functions "required for the achievement of the objective of the Convention."

As noted above, FCCC Article 7.2(m) establishes that the COP's powers include not only those specifically enumerated in Article 7.2 (a)- (l), but also any other functions required to achieve the Convention's objective. Adopting the compliance text annex thus will be within the COP's mandate if doing so is necessary to address the threat of anthropogenic climate change.

The COP's adoption of the Berlin Mandate, Kyoto Protocol, and Buenos Aires Plan of Action established that (1) the commitments contained in the Convention's Article 4, paragraphs 2(a) and (b) are inadequate to achieve the Convention's objective;¹⁵ (2) the Kyoto Protocol is needed for strengthening those commitments for Annex I Parties;¹⁶ (3) the Protocol must include effective procedures and mechanisms for addressing cases of non-compliance with its commitments;¹⁷ and (4) the COP should maintain political momentum towards preparation for the Protocol's entry into force by overseeing, through the efforts of the Joint Working Group on Compliance, the elaboration and development of procedures and mechanisms for the Protocol's compliance system.¹⁸ The COP further decided that this preparatory work should be completed at COP6, "so as to enable the Conference of the Parties to adopt a decision on a compliance system under the Kyoto Protocol at that session."¹⁹

In other words, having realized that the Convention's commitments alone would not accomplish the Convention's objective, the COP decided to do everything it could to prepare for the timely entry into force of a legal instrument containing binding emissions targets and a means of addressing cases of non-compliance with them. Moreover, the COP recognized that maintaining "political momentum" throughout that process would be essential for its success. All of these actions were plainly "required for the achievement of the objective of the Convention." In fact,

¹⁵ See Report of the Conference of the Parties on Its First Session, Part II at 4, Decisions Adopted by the Conference of the Parties, Decision 1/CP.1: The Berlin Mandate, chapeau, FCCC/CP/1995/7/Add.1 (1995) [hereinafter the Berlin Mandate].

¹⁶ See Report of the Conference of the Parties on Its Third Session, Part II at 4, Decisions Adopted by the Conference of the Parties, Decision 1/CP.3: Adoption of the Kyoto Protocol to the United Nations Convention on Climate Change, chapeau, FCCC/CP/1997/7/Add.1 (1997).

¹⁷ See Kyoto Protocol art. 18.

¹⁸ See Report of the Conference of the Parties on Its Fourth Session, Part II at 4, Decisions Adopted by the Conference of the Parties, Decision 1/CP.4: The Buenos Aires Plan of Action, chapeau, FCCC/CP/1998/16/Add.1 (1998) [hereinafter the Buenos Aires Plan of Action]; *id.* at 32, Decision 8/CP.4, chapeau, annex I.

¹⁹ Report of the Conference of the Parties on Its Fifth Session, Part II at 39, Decisions Adopted by the Conference of the Parties, Decision 15/CP.5, Future Work of the Joint Working Group on Compliance, ¶ 2, FCCC/CP/1999/6/Add.1 (1999).

they were taken because the Convention was failing to achieve its objective. Accordingly, they all fell well within the COP's mandate.

The Bonn Agreement and the legal texts incorporating it—which were to have been completed by the various technical groups during the second week of COP6*bis*—represent the culmination of the preparatory work the COP identified as essential for the Protocol's entry into force. Yet the Bonn Agreement was made possible only after ministers representing the European Union, the Group of Seventy-Seven and China, the Umbrella Group and other Parties consented to the compromise text on adoption contained in paragraph 8 of the Agreement's compliance section. Subparagraph (a) of that paragraph, which calls on the COP to adopt the compliance rules and procedures, was essential for winning the support of the EU and the G-77 and China, while subparagraph (b)'s vague and non-committal language on adoption of a legal instrument was required for Japan's and other members of the Umbrella Group's support.

Because both subparagraphs (a) and (b) were central factors in the ability of the Parties to compromise, adopt the Bonn Agreement, and thus continue to go forward with the Protocol process, they must both be viewed as critical elements of the Agreement. (They certainly were not “technical inconsistencies” as alleged by Australia.) In turn, because the Bonn Agreement and the legal texts incorporating its terms are necessary for the success of the Protocol and the COP's strategy for addressing the Convention's inadequate commitments, they must be deemed to fall within the exercise of functions “required for the achievement of the objective of the Convention.” A good faith interpretation of Article 7.2(m)'s “ordinary meaning” must thus conclude that that article provides the COP with the power to include—in both the Bonn Agreement *and* the compliance text—a decision for it to adopt procedures and mechanisms relating to compliance under the Kyoto Protocol.

4.2.2. The compliance negotiating group's mandate to prepare a legal text for compliance “incorporating and giving full effect” to the terms contained in the Bonn Agreement does not give its members the power to void key provisions of the Agreement.

Because adoption of the compliance text falls within the COP's mandate, it will be a valid exercise of COP power unless the Bonn Agreement itself was not properly adopted or if adoption of the compliance text would violate an overriding principle of international law. Neither exception applies to this case. Even if one did, the compliance negotiation group would not be the appropriate forum to question the COP's decision.

President Pronk presented the Bonn Agreement to the COP for official adoption at the 16th plenary meeting on July 25, 2001. No objections were heard, and the ministers attending adopted the Agreement by consensus as Decision 5/CP.6, FCCC/CP/2001/L.7.

No Party has questioned the validity of that act nor suggested that the decision was improperly adopted by the high-level representatives of each Party present. Yet, when the negotiating group on compliance met to incorporate the terms of the Agreement into the existing draft compliance text, the Australian delegate, supported by delegates from the U.S., Japan, Russia and Canada,

claimed that the Agreement's compliance paragraph 8 (a) could not be included in the COP's draft decision, despite its having been a critical factor in the Agreement being reached.

The demand to delete the words of subparagraph (a) would represent, if successful, a stunning overreaching of the compliance group's powers. The mandate of the Joint Working Group on Compliance was to develop a draft legal text of the procedures and mechanisms relating to a compliance system under the Kyoto Protocol and then submit its findings to the COP, through the subsidiary bodies.²⁰ After the JWGC completed its service at the first session of COP6 in The Hague, it was succeeded by the compliance negotiating group, which was generally comprised of the same technical experts. The mandate of that group, as defined in the Bonn Agreement, was to prepare a legal text for compliance "incorporating and giving full effect" to the terms contained in the Agreement.²¹ Nowhere did the mandate of the group (nor of the JWGC before it) ever include the power to void or even question the integrity of any COP decision.²² For any member of the group to suggest, as these Umbrella Group delegates now were doing, that they possessed such power could only be interpreted as an attempt by them to usurp the prerogatives of the COP and negate terms that had been formally adopted under the Convention at the highest political level.

4.2.3. Because the COP's decision to adopt the procedures and mechanisms relating to compliance under the Kyoto Protocol is a statement of political intent and not an attempt to infringe on the prerogatives of the COP/MOP, the decision comports with applicable principles of international law.

The Vienna Convention on the Law of Treaties states that a "treaty does not create either obligations or rights for a third State without its consent."²³ Additionally, "[a]n obligation arises for a third State from a provision of a treaty if the parties to the treaty intend the provision to be the means of establishing the obligation and the third State expressly accepts that obligation in writing."²⁴

Although the Kyoto Protocol shares the ultimate objective of the Convention and will be comprised of Convention Parties, it is a separate treaty that must be ratified, accepted, approved or acceded to by every country that wishes to be party to it.²⁵ The ultimate decision-making body of the Protocol will be the COP/MOP, not the COP.²⁶ For purposes of the Vienna Convention on the Law of Treaties, Protocol Parties will thus be "third States" insofar as the Framework Convention's ability to create obligations for them is concerned.

Accordingly, Protocol Parties may not be bound by decisions of the COP, unless they have specifically agreed to be so bound. While the Protocol's text does establish a role for the COP in

²⁰ See Future Work of the Joint Working Group on Compliance, *supra* note 19, at ¶ 2.

²¹ See Bonn Agreement, *supra* note 1, at 2, ¶ 2.

²² Arguably, it would be beyond the power of any Convention body other than the COP itself to do so, because the COP is "the supreme body" of the Convention. See FCCC art. 7.2.

²³ Vienna Convention, *supra* note 9, art. 34.

²⁴ *Id.* art. 35.

²⁵ See Kyoto Protocol, chapeau and art. 24.

²⁶ See *id.* art. 13.1.

defining many of the procedures for reporting and review of Protocol commitments,²⁷ and while it instructs only the COP to define the “principles, modalities, rules and guidelines” for emissions trading,²⁸ it does not articulate a role for the COP in “approving” the procedures and mechanisms for compliance under Protocol Article 18. Therefore, while the COP has had an important role in developing the compliance procedures and mechanisms (through the efforts of the subsidiary bodies and the compliance groups), it may not adopt those procedures and mechanisms *on behalf of the Protocol’s Parties*.

No Party has claimed that the COP’s decision to adopt the procedures and mechanisms on compliance as expressed in the Bonn Agreement or the draft compliance text is an attempt to accomplish that or infringe upon the power of the COP/MOP. In fact, by including a recommendation that the COP/MOP adopt the compliance text at its first session, paragraph 3 of the compliance text’s draft COP decision provides an express acknowledgement of the limits of the COP’s power to bind the COP/MOP.

Instead, the intent of those Parties who insisted on inclusion of paragraph 8 (a) in the Bonn Agreement was to “lock in” the terms of the compliance text *at the highest possible political level* after it is modified to reflect the provisions of the Agreement. As a purely legal matter, the COP’s adoption of the Bonn Agreement and the compliance text annex will not preclude the COP/MOP from revising the annex or adopting an entirely different one if it so chooses. However, states enter into international agreements with the expectation that they will be observed.²⁹ By agreeing to adopt the rules and procedures outlined in the compliance section of the Bonn Agreement, and by further agreeing to negotiate constructively and adopt a compliance text “incorporating and giving full effect” to all of the Agreement’s terms, each member of the COP has promised not to renege on any substantive provisions of the Agreement. That includes those provisions to which it would have preferred not to have consented, had compromise for the sake of the overall Agreement been unnecessary. Similarly, the COP’s adoption of the compliance text annex, and its recommendation that the COP/MOP do so as well, will constitute a strong indication of the intent of every member (most of whom will ultimately be party to both the Convention and Protocol) to respect the Bonn Agreement’s terms when they adopt procedures and mechanisms on compliance in their capacity as Kyoto Protocol Parties.

The assurance that the COP would “lock in” the text, insofar as its role in developing the Protocol’s compliance system is concerned, was key to Parties being able to conclude the Bonn Agreement. Any attempt to eliminate that assurance through the application of artful interpretations of the Convention can only be viewed as a bad-faith refusal to abide by the Vienna Convention on the Law of Treaties and duly adopted decisions of the COP.

²⁷ See, e.g., *id.* arts. 5.2-3, 7.1, 7.3, 8.1-2, 10(a),(f).

²⁸ See *id.* art. 17.

²⁹ “The most important principle of international law is *pacta sunt servanda*: agreements shall be observed.” LOU HENKIN, *HOW NATIONS BEHAVE* (1979).

4.3. An Interpretation of FCCC Article 7.2 that Accepts the Power of the COP to Adopt the Procedures and Mechanisms Relating to Compliance under the Kyoto Protocol as Part of the Bonn Agreement but not the Draft Compliance Decision Would Be Manifestly Absurd and Unreasonable

Article 32 of the Vienna Convention states:

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) leaves the meaning ambiguous or obscure; or
- (b) leads to a result which is manifestly absurd or unreasonable.

One may infer from that rule that Convention Parties must refrain from interpreting FCCC Article 7.2 in such a way that “leads to a result which is manifestly absurd or unreasonable” if there is an alternative interpretation conducted pursuant to Vienna Convention Articles 31 and 32 that does not lead to such a result.

The demand of Australian and Umbrella Group delegates to delete the COP’s decision to adopt the compliance annex, ostensibly because such adoption would be beyond the mandate of the COP, leads to a manifestly absurd result and thus should not be allowed to take precedence over a good-faith interpretation of Article 7.2 that recognizes the COP’s legitimate power. At no time has any Party formally questioned the authority of the COP to adopt the Berlin Mandate, the Buenos Aires Plan of Action or the Bonn Agreement. The Australian delegate in the compliance negotiating group did not question that authority. Neither did the delegate attempt to claim that the COP lacked the power to adopt any portion of the Bonn Agreement, including the compliance section and its paragraph 8 (a). In fact, one must presume that the ministers of Australia and the other Umbrella Group members believed the Convention gave them the power to adopt all of the Agreement, because if they did not believe it did, then they would have had no rational basis for adopting the Agreement in the first place.

Rather, the Australian delegate tried to assert that because paragraph 8 (a) supposedly fell beyond the COP’s mandate, it must be a “technical inconsistency” that needed to be excised by the compliance group. However, as has been shown above in section 4.2 of this memorandum, paragraph 8 (a) was critical to the EU’s, G-77 and China’s, and other Parties’ acceptance of the Agreement as a whole. The claim that it was an error produced by sloppy or inconsistent drafting is manifestly absurd and must be discarded from any serious interpretation of Article 7.2.

The Australian delegate’s “lack of mandate” argument was based on an observation that nowhere in Article 7.2 was there any explicit mention of the COP’s power to adopt procedures and mechanisms relating to compliance under the Kyoto Protocol. Yet such reasoning requires that one completely ignore Article 7.2’s crucial subparagraph (m), which, as demonstrated above, clearly establishes that power through its deliberately broad language.

After having dismissed the assertion that paragraph 8 (a) was an inconsequential drafting error, and after having noted that Article 7.2(m) is part of the Convention, one is left with the unalloyed absurdity of the Australian delegate's argument: Australia agreed along with the rest of the COP to adopt the core procedures and mechanisms relating to compliance under the Kyoto Protocol in a legal document, the Bonn Agreement. That action was acceptably within the COP's mandate as interpreted under Article 7.2. Yet Australia and the rest of the COP are prohibited from adopting the identical core procedures and mechanisms as incorporated into another legal document, the compliance text, because to do so would be beyond its mandate as interpreted under Article 7.2.

Because the Australian delegate's interpretation of Article 7.2 leads to a result that is manifestly absurd and unreasonable, it must be rejected in favor of an ordinary reading, made in light of the Convention's object and purpose and the practices of the COP, that recognizes that the COP's adoption of the compliance annex is a necessary component of the international community's efforts to stabilize concentrations of anthropogenic greenhouse gases in the atmosphere.

4.3.1 An interpretation of FCCC Article 7.2(m) that would allow the COP to adopt rules pertaining to one area of the Protocol but not to another when neither the Convention nor the Protocol contains any mention of a COP role in adopting such rules would be manifestly unreasonable.

The Australian delegate's argument is further undercut by the fact that some of the draft decisions prepared by other negotiating groups acting under the mandate of the Buenos Aires Plan of Action and the Bonn Agreement also contain provisions in which the COP would adopt or establish procedures and mechanisms for the Kyoto Protocol, even though neither the Convention nor Protocol contain specific references to the COP's mandate to do so. For example, the draft decision for funding under the Protocol would have the COP decide to establish an adaptation fund, which would be operated under the guidance of the COP until the COP/MOP is able to take over its responsibilities.³⁰ Even though the adaptation fund will be created and administered purely under the auspices of the Protocol, all of the substantive decisions in the text would be made by the COP; the text does not put off the decisions by couching them as recommendations to the COP/MOP. In this regard, the text closely mirrors the corresponding adaptation fund text in the Bonn Agreement, yet no Party representative has objected that it would be beyond the COP's mandate to adopt it.³¹

Even more pointedly, the draft decision text for the clean development mechanism provides that the COP will "facilitate a prompt start for a clean development mechanism by *adopting the*

³⁰ See Draft Decision Proposed by the Co-Chairmen of the Negotiating Group: Funding Under the Kyoto Protocol, FCCC/CP/2001/L.15 (July 27, 2001).

³¹ FCCC Article 7.2(h) includes among the COP's powers the obligation to "Seek to mobilize financial resources in accordance with [FCCC] Article 4, paragraphs 3, 4 and 5, and Article 11." While Article 4.4 does call for Annex I Parties to provide unspecified adaptation assistance to those developing countries that are particularly vulnerable, it does not create an obligation under the Kyoto Protocol. Moreover, the COP's draft decision on funding in FCCC/CP/2001/L.15 contains no reference to the Convention at all, but instead begins its chapeau by "recalling Articles 10, 11 and 12.8 of the Kyoto Protocol."

modalities and procedures contained in the [attached] annex.”³² Moreover, the COP would decide that, “for the purposes of this decision, the [COP] shall assume the responsibilities of the [COP/MOP] as set out in the annex” until the COP/MOP has the opportunity to adopt the decision confirming its acceptance of the COP decision.³³ Again, neither the Convention nor the Protocol contains any mention of a COP role in adopting rules for the clean development mechanism. Paradoxically, Australia and other Umbrella Group members—who are among the most ardent supporters for an early start to the CDM—have not argued that these draft decisions are beyond the mandate of the COP and thus must be deleted.

When viewing the compliance, adaptation fund, and CDM draft texts as a whole, one must conclude that it would be manifestly unreasonable to interpret FCCC Article 7.2(m) in such a way that would allow the COP to adopt procedures, mechanisms, or modalities pertaining to one of these areas of the Protocol but not to another, especially when the Parties offering such an interpretation appear to be motivated more by their preference for one of the areas than by their concern for a consistent application of legal principles. Such an interpretation must be rejected in favor of one that recognizes that the COP’s adoption of procedures and mechanisms for all three of these areas falls squarely within its mandate.

5. CONCLUSION

The compromise text regarding the adoption of procedures and mechanisms relating to compliance under the Kyoto Protocol was key to the ability of FCCC Parties to conclude the Bonn Agreement. Because the Bonn Agreement was essential to sustain the Protocol process and the COP’s efforts to achieve the Convention’s objective, the COP’s adoption decision for the compliance rules must also be deemed necessary for achievement of that objective.

Accordingly, that adoption decision falls well within the COP’s mandate as set out in FCCC Article 7.2(m). An interpretation of Article 7.2(m) that would permit the COP to adopt procedures and mechanisms relating to compliance under the Kyoto Protocol as part of the Bonn Agreement but not as part of a compliance text “incorporating and giving full effect” to the Agreement would be manifestly absurd and unreasonable, and would violate governments’ obligations to interpret the Convention “in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Efforts by some delegates in the compliance negotiating group to force such an absurd interpretation upon the rest of the group should be rejected as a violation of the letter and spirit of the Bonn Agreement and as an unprecedented, *ultra vires* attempt to usurp the power of the COP.

³² Preparations for the First Session of the Conference of the Parties Serving as the Meeting of the Parties to the Kyoto Protocol, Work Programme on Mechanisms: Draft Decision Proposed by the Co-Chairmen of the Negotiating Group, at 16, ¶ 1, FCCC/CP/2001/CRP.11 (2001).

³³ *Id.* at ¶ 2.