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Item 6 of the provisional agenda

Procedures and mechanisms relating to compliance under the Kyoto Protocol

Submissions from Parties

Note by the secretariat

1. At its fourth session, the Conference of the Parties, by its decision 8/CP.4, established a joint working group, under the Subsidiary Body for Implementation and the Subsidiary Body for Scientific and Technological Advice, to develop procedures and mechanisms under the Kyoto Protocol (FCCC/CP/1999/16/Add.1).

2. At that same session, the Conference of the Parties invited Parties to submit views to the secretariat on matters relating to compliance under the Protocol by 1 March 1999.

3. Submissions* have been received from eight Parties. In accordance with the procedure for miscellaneous documents, these submissions are attached and are reproduced in the language in which they were received and without formal editing.

FCCC/SB/1999/MISC.4

* In order to make these submissions available on electronic systems, including the World Wide Web, these contributions have been electronically scanned and/or retyped. The secretariat has made every effort to ensure the correct reproduction of the texts as submitted.

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PAPER NO. 1: AUSTRALIA

Preliminary Views on Matters Relating to Compliance under the Kyoto Protocol

Australia

3 March 1999

Australia supports the development of a strong and effective compliance framework under the Kyoto Protocol. Such a compliance framework is essential:

- to ensure the environmental integrity of the Kyoto Protocol;

- to achieve the successful implementation of the Kyoto Protocol, including its mechanisms; and

- to provide Parties with certainty and confidence as they implement their commitments.

Role and Method of Joint Working Group on Compliance

Annex II of Decision 8/CP.4 from COP4 on "Preparations for the first session of the Conference of the Parties serving as the Meeting of the Parties to the Kyoto Protocol" established a joint working group (JWG) on compliance under the SBI and SBSTA. This decision also provides guidance on the role and working methods of the group and should provide a point of reference for the group as it undertakes its work.

One of the first tasks facing the JWG will be the identification of compliance-related elements in the Kyoto Protocol. This task will involve a detailed survey of the different obligations contained in the Protocol, an analysis of their varying nature and consideration of any further elaboration that is necessary (most of which will be undertaken by other groups). The specific nature of obligations under the Protocol must be taken into account in the development of the compliance framework. The JWG will also need to be fully apprised of work taking place in other relevant groups and bodies and the implications of this work for the likely shape of the compliance regime. The JWG might also be able to identify compliance-related issues to be taken up in these groups and bodies.

Other tasks of the JWG will include identifying and addressing compliance related issues not dealt with by other groups, developing procedures for the assessment of whether obligations under the Protocol have been met (for example, the steps which will follow technical assessments by expert review teams under Article 8), considering responses to non-compliance and ensuring that a coherent and comprehensive approach is taken to compliance under the Protocol.

Principles to Guide Consideration of a Compliance Framework

In general, existing compliance frameworks for international environmental treaties tend to be piecemeal and underdeveloped and focused on annual reporting, supported by supervision by the COP and various adjudication provisions. There is general acceptance among Parties that a strong compliance framework is needed for the Kyoto Protocol. Having said this, Parties will be concerned to avoid the creation of a new, and potentially administratively complex, multilateral compliance framework.

A compliance system which is sensitive to the sovereignty concerns of States is likely to find greater support among Parties. The compliance framework developed for the Protocol should therefore allow Parties sufficient flexibility to determine domestic compliance procedures which accord with national circumstances provided they meet agreed international requirements. These domestic procedures should work in a complementary manner with international compliance procedures to ensure that consistency in outcomes is achieved.

Reference has been made previously to the need for provision in the international emissions trading rules for appropriate compliance and enforcement mechanisms relevant to the trading system (paragraph 32, Non-Paper on Principles, Modalities, Rules and Guidelines for an International Emissions Trading Regime, FCCC/SB/19998/MISC.1/Add.1/Rev.1, 10 June 1998). Compliance procedures and consequences should, as far as possible, be built into the rules for all the Kyoto Mechanisms to ensure market confidence and the efficient and effective operation of the mechanisms. This approach should ensure that compliance procedures and consequences of non-compliance are relevant to, and can interact with, the operation of these rules. These procedures and consequences for the mechanisms must be as rigorously defined as those agreed for other obligations under the Protocol to achieve consistency and equity in the application of the compliance framework.

Design Features for a Compliance Framework

Transparent yet simple design features are important in the development of an effective framework for compliance under the Kyoto Protocol. The framework must be workable, predictable, administratively cost-efficient and consistent in its application. Parties must be certain that "everyone is playing by the same rules" and be confident that all Parties face similar incentives to ensure that their obligations are met.

It is also important that the Protocol's compliance framework works to prevent non-compliance and to facilitate and promote compliance. The provisions in the Protocol for monitoring, reporting and review can help prevent non-compliance by enabling Parties to identify possible compliance problems at an early stage. One simple way to facilitate compliance is to allow Parties the opportunity to correct minor omissions or errors (e.g. not following the required format for reporting emission estimates). A pro-compliance approach to the Protocol may be encouraged through promoting strong domestic compliance systems.

A compliance framework under the Kyoto Protocol could be expected to have the following features:

- Clear identification of the rules and guidelines which provide the substance of Parties' obligations;
- Modalities for measuring Parties' compliance with these obligations;
- Procedures for adjudging whether or not a Party is in compliance with these obligations;
- The consequences of non-compliance.

Coverage and Rules:

An initial examination of the Kyoto Protocol indicates that the joint working group on compliance will need to consider the differing nature and implications of the following rules and guidelines in overseeing the development of a Kyoto Protocol compliance framework. The JWG should be guided by the understanding that some obligations are more central to overall compliance with the Protocol than others, for example a minor failure to meet the guidelines relating to reporting in the national communications is in a different category to a major breach of the rules for one of the Kyoto Mechanisms and its consequent effect on a Party meeting its Article 3 target.

- The central obligations under the Kyoto Protocol are the Article 3 quantified emission limitation and reduction commitments ("targets"). Interpretation of other Articles of the Protocol, such as Articles 3.3 and 3.4, and the development, reporting and verification of inventory estimates under Articles 5, 7 and 8, are important to the substance of these obligations.
- Substantive rules, modalities and guidelines are necessary for each of the Kyoto Mechanisms:
- Emissions trading under Article 17.
- Clean Development Mechanism under Article 12.
- Joint Implementation under Article 6.
- A work program for developing these rules, modalities and guidelines was set in place at COP4. It is important that discussions on the Kyoto Mechanisms and other compliance-related aspects of the Protocol progress in parallel so that Parties can assess the whole compliance regime when considering ratification.
- Guidelines are also required for:

- Measuring and monitoring emissions under Article 5 (national systems and methodologies for the estimation of emissions and removals by sinks).

- Reporting of emissions under Article 7 (communication of information, including inventories).

- Technical assessment of inventories and national communications under Article 8 (expert review teams).

- Parties must have in place national systems for the estimation of emissions and removals by sinks under Article 5 and submit inventories and supplementary information under Article 7. However, there is no explicit obligation upon Parties to develop accurate inventories. Moreover, these obligations are partly based on "guidelines" rather than "rules". Unlike rules, guidelines are technically not legally binding. This distinction creates issues regarding whether a Party can be penalised for not following a guideline (when the contrary act of conforming with a guideline creates a presumption of compliance). Considerable work is progressing in other fora to improve the accuracy, transparency and reporting of Parties' emissions estimates. The JWG needs to take into account this work in the development of the compliance framework.

- Article 4 sets out certain obligations for those Parties which decide to make an agreement to fulfil their commitments under Article 3 jointly. Articles 4.5 and 4.6, which allocate responsibility in the event of failure to achieve the Parties' combined level of emission reductions under such an agreement, will be part of the Kyoto compliance framework.

Modalities:

Articles 5, 7 and 8 provide the tools for measuring and assessing many of the obligations to be undertaken by Parties under the Protocol, in addition to containing obligations in their own right. These tools need to be acknowledged (and developed, if appropriate) in a Kyoto compliance framework.

Procedures for adjudging compliance:

Procedures need to be put in place for determining whether obligations under the Kyoto Protocol have been fulfilled. Issues which need to be addressed include:

a. Who and what would trigger an inquiry whether a Party is in compliance with a particular obligation (e.g. would such an inquiry occur only after the identification of a question of implementation by an Article 8 expert review team)?

b. Who would be responsible for determining that a Party is not in compliance with its obligations?

c. Do we need a separate procedure (or sub-procedure within a general procedure) for dealing with compliance elements of the Kyoto Mechanisms or certain issues relating to them?

d. How would assessment of compliance, for example with procedural obligations such as the timeliness and format of annual inventories and communications, during the commitment period be conducted?

It can be expected that a grace period to work out ultimate compliance at the end of the commitment period will be necessary given the long time lag in collection of inventory data. Such a period would allow Parties the opportunity to take action on the basis of these figures to ensure compliance with the Protocol. A grace period would thus encourage compliance while maintaining the integrity of the Protocol. Consideration should be given to how such a grace period could be integrated into the Kyoto compliance framework.

As noted above, Parties are not explicitly obliged under the Protocol to develop accurate inventories. However, if inventories and supplementary information provided by Parties are to provide the basis on which Parties' compliance with other obligations is assessed, procedures will be required to assess that these are at least technically acceptable. At the same time, the compliance framework will need to reflect the fact that the accuracy of inventories is assisted by the development of national methods for the collection of data, the development and improvement of emission factors, the estimation and revision of uncertainties, and the calculation of emission estimates. There is no single methodology for the accurate calculation of emission estimates which can be applied by all Parties and the implications of this will need to be considered.

These procedures for assessing whether inventories and supplementary information submitted by Parties are technically acceptable could be incorporated into the guidelines which will instruct the technical assessments undertaken by expert review teams under Article 8. Expert review teams might be instructed to:

- examine Parties' use of common reporting formats for inventory information (as these formats will facilitate the examination and comparison of inventory estimates);

- consider whether the transparency and documentation of inventory estimates meets required levels;

- conduct thorough and comprehensive technical reviews of inventory estimates.

There may be scope under the Protocol for developing a two-tier compliance framework, such that compliance measures are applied and enforced both at national and international level. The implementation of procedures at a national level for adjudging compliance in the first instance would give Parties the flexibility to develop their domestic procedures in accordance with their national system and circumstances. These domestic procedures should work in a complementary

manner with international compliance procedures, which might act as a default. Pro-compliance could be encouraged by standardised monitoring and reporting at a national level and by other measures designed to to enhance compliance and prevent problems arising.

Consequences of non-compliance:

The language of the Protocol supports the development of differentiated or graduated responses to the various obligations under the Protocol. A wide spectrum of possible responses to compliance problems might be developed in the form of an indicative list, beginning, for example, with those responses designed to assist a Party to return to compliance. Consideration needs to be given whether the application of these measures to specific breaches would be discretionary and reactive or whether specific consequences might be mandated for particular breaches in advance of the event.

PAPER NO. 2: CANADA

PRELIMINARY VIEWS ON MATTERS RELATING TO COMPLIANCE UNDER THE KYOTO PROTOCOL

CANADA

(March 1, 1999)

The elaboration of a workable compliance framework is one of Canada's priorities in fleshing out the work done at Kyoto. Canada firmly believes that an effective compliance system is crucial to the success of the Kyoto Protocol and in ensuring a level playing field among Protocol Parties. Canada is pleased that COP-4 succeeded in establishing a forum and initial goals for further work on compliance matters. Canada is committed to working with other Parties with a view to developing a compliance system in timely fashion.

Discussions at COP-4 confirmed that much preliminary and exploratory work remains to be done, including on identifying key issues and options, both in the context of individual Kyoto mechanisms and regarding any broader compliance regime. Issues related to compliance arise under different provisions of the Protocol and it is important to coordinate relevant work under the auspices of different groups so as to develop a coherent compliance system for the Protocol and to avoid unnecessary duplication.

I. Basic Features of a Compliance System for the Kyoto Protocol

In Canada's view, a compliance system for the Protocol must have strong preventive and facilitative features.

Prevention

Emphasis should be placed upon features that can help prevent non-compliance. Such preventive features include a rigorous and transparent monitoring, reporting and review system, as well as appropriate mechanism rules. Consideration might further be given to the role that national compliance systems could play in promoting the implementation of Protocol commitments and to a "grace period" after the end of the commitment period, during which Parties can take final steps to ensure compliance.

Monitoring, Reporting and Review: There are a number of reasons why strong and transparent monitoring, reporting and review must be the foundation of a Protocol compliance system:

- The information generated assists Parties in recognizing at an early stage potential compliance problems they may face and in determining what measures may be required to prevent non-compliance.

- Transparent information about Parties' performance can have deterrent effects.
- Reliable and comprehensive factual information is a prerequisite for and facilitates compliance assessment.

Kyoto Mechanism Rules: Consideration might be given to opportunities that the Kyoto mechanisms may provide for promoting compliance. For example, it has been suggested that the mechanism rules could make compliance with certain Protocol obligations (*e.g.* Article 5 on monitoring and Article 7 on reporting) a prerequisite for transferring/selling emission rights or credits through mechanisms such as joint implementation or international emissions trading.[1] Under this approach, eligibility to transfer/sell would be contingent upon compliance with certain Protocol commitments, an approach that could be distinguished from one involving "consequences" to non-compliance.

National Compliance Systems: A Party's performance under the Kyoto Protocol will ultimately depend upon private actors. Domestic incentive and enforcement systems will thus be crucial to Parties achieving compliance with their commitments. Thought should be given to how national systems could support the Kyoto Protocol's compliance system.

Grace Period: Consideration might be given to a short period after the end of the commitment period during which Parties can, if necessary, take final steps to ensure their compliance with Protocol commitments. Such a period could be combined with or follow a true-up period that will be necessary for purely practical reasons, rooted in the time lags between Parties' actions during a commitment period and the availability of data and thus of final emissions inventories. In affording Parties an opportunity to avoid non-compliance and the need to resort to any non-compliance processes, a grace period can enhance the preventive features of the compliance system.

Facilitation

In designing compliance procedures and mechanisms for the compliance system, strong emphasis should be placed upon approaches that aim at facilitating Parties' compliance and at promoting, through cooperative means, the active participation of Parties facing potential problems of non-compliance in efforts to correct the situation.

Experience with existing MEAs has demonstrated that compliance systems that focus upon facilitating means by which Parties can fulfil their commitments, such as advice or assistance, are more likely to encourage Parties' participation, both in the agreement as a whole and in the compliance system. Facilitative and cooperative approaches are crucial to promoting Parties' reliance upon and trust in the compliance system. In turn, trust in the compliance system is crucial to the legitimacy and effectiveness of both the system as such and any consequences to non-compliance that may eventually be decided upon.

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[1] In the case of joint implementation, such an idea would, of course, have to be examined in light of the decision in Article 6.1(c) to impose such a requirement only upon Parties seeking to acquire emission units.

II. Designing (Non-) Compliance Procedures and Mechanisms

The (non-) compliance procedures and mechanisms for the Kyoto Protocol must provide for several distinct, yet related, steps. Precision in distinguishing the following steps or tasks can be helpful in formulating and answering the many questions that arise in designing (non-) compliance procedures and mechanisms for the Kyoto Protocol.

Assessment

The first step must necessarily be compliance assessment, designed to evaluate the Parties' performance in meeting their Protocol commitments. Compliance assessment can be purely technical/factual (Article 8), or can involve legal or political considerations. In most cases, technical assessment will be a prerequisite for legal or political assessments.

Formal Findings of (Non-) Compliance

A second step will be a finding of compliance or non-compliance, as the case may be. Given the potential implications of a formal (non-) compliance finding, it is a qualitatively different task than the assessment as such and may require involvement of a different body than that carrying out the assessment.

Determination of Appropriate Consequences to Non-Compliance

A potential third step, following a finding of non-compliance, consists in the determination of what, if any, consequences a particular instance of non-compliance should have. This may involve both legal and policy considerations, pertaining to the relative gravity of non-compliance on the basis of the type of obligation affected and the cause, degree and frequency of non-compliance.

An Initial List of Questions

- How do the different steps in the (non-) compliance process relate to one another?
- How might the different steps best be built into a coherent system? How can overlaps, duplication as well as gaps be avoided? To what extent can the compliance system be built around existing elements, such as the expert review process under Article 8?
- Who should be able to trigger technical and/or legal and/or political compliance assessment?
- Who should undertake each of the different steps/tasks?
- Is a distinct (non-) compliance body needed to conduct legal compliance assessment? If so, what should be the mandate of that body? What, if any, should be its role in finding Parties to be in (non-)compliance and in determining consequences to non-compliance?
- Who should make formal findings of (non-) compliance and determinations of consequences to non-compliance?
- Are several procedures needed to deal, for example, with the rules governing the

individual Kyoto mechanisms?

- Assuming several procedures are indeed required, could these all be handled by the same body?

III. The Road from Buenos Aires

In Canada's view, the elaboration of rules that flesh out both the Protocol's monitoring, reporting and review framework and the provisions governing the Kyoto mechanisms should be a priority in the development of a compliance system for the Kyoto Protocol. While the work on mechanism rules will take place within the groups tasked with fleshing out the relevant Protocol provisions, the manifold links between mechanism rules and compliance questions will require those working on the latter to stay in close touch with those elaborating the former.

With respect to the system's procedural dimensions, Canada considers that the joint Working Group on Compliance might initially focus on stock-taking of the Protocol's different provisions relevant to compliance, their scope, the compliance-related issues that might arise in the work of other groups on elaborating rules to flesh out the Kyoto mechanisms, and the potential need for different rules for the different mechanisms. Such stock-taking will assist discussion by the Working Group of questions pertaining to the design of (non-) compliance procedures and mechanisms, such as those raised above.

PAPER NO. 3: GERMANY

(on behalf of the European Community and its member States)

MATTERS RELATING TO COMPLIANCE

Germany on behalf of the European Community and its Member States submits views on matters related to compliance as requested in decision 8/CP.4. This submission is intended inter alia to serve as an input for the consultation on compliance scheduled for 31 May 1999 in Bonn. The EU plans to submit further views on compliance before this date.

The EU welcomes the decisions taken at COP4 with respect to compliance. The EU suggests that the participants of the joint working group on compliance under SBI and SBSTA should include both legal and technical experts.

The EU reiterates that the following issues are important for the work on a compliance system:

1. A comprehensive, coherent, unified, strong, efficient and effective compliance system is essential for the successful implementation and application of the Kyoto Protocol. A comprehensive and unified approach is necessary towards supervision of compliance regarding obligations in respect of, in particular, reporting, assigned amounts, Kyoto mechanisms and policies and measures. In order to ensure a comprehensive system, close co-operation inter alia between the groups elaborating rules, modalities and guidelines for the Kyoto mechanisms and the group developing a compliance system will be necessary.

2. At the centre of a strong, efficient and effective compliance system stands full and timely reporting by individual Parties. Timely and comprehensive reporting and review on the basis of Articles 5 and 7 of the Protocol is an essential element of a compliance system and is conducive to achieving such compliance.

3. Compliance should as far as possible be promoted through incentive measures, since they are most in the interest of the environment. Incentives and sanctions in general should be applied in a graduated manner.

4. Application of consequences should be proportionate to the nature of the obligation and the seriousness of the breach (i.e. "the cause, type, degree and frequency of non-compliance").

5. The compliance procedure should be based on the principle of due process, which means in particular that Parties concerned have the right to participate in the proceedings and to present their views. Further consideration needs to be given to the question whether taking into account the "graduated riposte" approach, different stages of the compliance system ought to be elaborated. In this regard it is important to note that legal questions should be dealt with by quasi-judicial bodies. In any case sanctions should not be imposed without "due process".

6. The EU underlines that a compliance system should be applied without prejudice to the dispute settlement procedure. The multilateral consultative process (MCP) should be used in conjunction with the compliance system to assist in the resolution of compliance issues.

PAPER NO. 4: NEW ZEALAND

Compliance Under the Kyoto Protocol
Preliminary Views

New Zealand

New Zealand considers that it is essential to have an effective compliance system for the Kyoto Protocol which provides certainty and enhances the confidence of all Parties that the commitment obligations will be and have been met. The system should:

- be simple, efficient, flexible and transparent;
- encourage Parties to undertake and comply with their commitments;
- be structured towards preventing non-compliance;
- facilitate the efficient operation of the Kyoto Protocol mechanisms;
- enable identification of instances of potential or actual non-compliance; and
- deal with the consequences of non-compliance in a manner which facilitates and assists compliance and promotes the protection of the environment.

Compliance framework: environmental objective and prevention of non-compliance

In the event of non-compliance with the obligations of the Kyoto Protocol, it is the international community as a whole and the global environment which suffers harm. In order to promote the protection of the environment the compliance system should:

- secure the cooperation of Parties in efforts to correct problems resulting in or contributing to failure to comply;
- encourage a facilitative approach to compliance problems; and
- ensure that any compliance response is relevant to and consistent with the environmental objective of the Protocol.

The compliance system should be structured towards the prevention of non-compliance. This requires a rigorous reporting, monitoring and review system which would enable the early identification of potential compliance problems and enhance the incentive to comply. Reliable and transparent information on which to base assessments of compliance is fundamental to such a compliance system.

Compliance: core obligation

The core obligation in the Kyoto Protocol to which a compliance system needs to be addressed is the Article 3 commitment to meet the emission reduction target.

The Protocol, its rules, modalities and guidelines contain the building blocks to enable this core obligation to be met. Reporting, measuring and monitoring emissions and changes in carbon

stocks are supplementary obligations that underpin the commitment obligation in Article 3. Consistent elaboration, application and compliance with these will be important in ensuring the overall integrity of the Protocol. Similarly the development of appropriate Kyoto Protocol mechanism rules designed to ensure the integrity of the Kyoto Protocol mechanisms can have a beneficial impact on and enhance compliance, including through lowering the costs of meeting Parties' emission reduction commitments.

Aside from the core obligation, New Zealand does not consider that a prescriptive compliance system which deals piece by piece with each and every obligation under the Protocol is desirable. The key focus of the compliance system should be on encouraging and facilitating compliance with emission limitation and reduction commitments.

Procedures for determining non-compliance

Reporting, monitoring and review procedures should be the foundation of the compliance system. These procedures should be simple, efficient, impartial, cost-effective, and flexible. To enhance coherence and efficiency, existing bodies and mechanisms established in the Kyoto Protocol should be utilised where appropriate. The aim should be to enhance existing systems without restricting the flexibility the Protocol accords Parties in meeting their commitments.

Fair assessment of compliance requires comparable measurement and verification of compliance as and between Parties. Confidence in the inventory data should be assured. These objectives may be assisted by the use of Article 8 expert review teams and the development of appropriate guidelines for review and verification of reporting and inventories.

Given the time-lag following the end of the commitment period before which inventory, emission and other data will be available, a short grace period to enable Parties to ensure compliance would also facilitate the achievement of commitments.

Consequences of non-compliance

A compliance system which deals with the consequences of non-compliance has as its foundation domestic control measures, the effective implementation of which can provide a solid base for compliance. Domestic compliance procedures will likely form the cornerstone of a Party's compliance where sub-national entities are involved. The flexible mechanism rules and the reporting and other obligations that provide input into meeting the commitment target can usefully contribute to an effective compliance system. At each of these steps measures can be taken to facilitate compliance, or if a problem of non-compliance is identified, to assist in bringing a Party back into compliance. A coherent, mutually reinforcing, and consistently applied system of consequences is required.

The consequences of non-compliance with the emission limitation and reduction commitments should be the same irrespective of the manner in which a Party has sought to implement its obligations through recourse to Kyoto Protocol mechanisms.

Responses to compliance problems should be designed to return a Party to compliance. A facilitative approach would best achieve the environmental objective of the Protocol. Parties should consider what positive measures of assistance could be used to help overcome implementation or compliance problems.

The compliance system and the consequences of non-compliance should be designed to promote the achievement of the environmental objective of the Protocol. A graduated response may be necessary depending on the nature and gravity of any non-compliance.

Evolution of the compliance system

Once a sound compliance structure is in place, the compliance system should be allowed to evolve to encourage further change in the behaviour of States to reduce global emissions. The system should have the flexibility to develop as the implementation of the Kyoto Protocol matures.

New Zealand supports the establishment of the joint working group on compliance under the SBI/SBSTA and considers that a sound compliance system should be expeditiously developed.

New Zealand reserves the right to make further submissions on the details of such a compliance system.

PAPER NO. 5: SAMOA

(on behalf of the Alliance of Small Island States (AOSIS)

SUBMISSION BY THE
ALLIANCE OF SMALL ISLAND STATES (AOSIS)

on

Procedures and Mechanisms relating to Compliance:
Preparation for a Joint Working Group
on Compliance under SBI and SBSTA

In Decision 8/CP.4 the Conference of the Parties established a Joint Working Group of the Subsidiary Bodies on Compliance and invited Parties to submit views to the secretariat on matters relating to compliance under the Kyoto Protocol, to be made available by the secretariat in a miscellaneous document. AOSIS welcomes this opportunity to set out its initial comments on this issue, and to participating actively in further discussions at a one-day consultation among Parties immediately prior to SB-10.

Throughout the negotiations of the Convention and of the Protocol, AOSOS has consistently called for the establishment of rules, procedures and institutions that would enable the climate change regime to anticipate, prevent, identify and respond to situations of non-compliance. The adoption, through the Kyoto Protocol, of legally binding and quantified commitments and the introduction of market-based "mechanisms" make the development of such non-compliance procedures imperative.

Decision 8/CP.4 identifies four elements for the joint Working Group's agenda, namely to :

- identify compliance-related elements in the Kyoto Protocol;
- follow the development of these elements in various groups including, for example, elements on substantive rules and consequences of non-compliance, and identify gaps in order that they are addressed in the suitable forum;
- develop procedures by which compliance with obligations under the Kyoto Protocol should be addressed, to the extent that they are not being considered by other groups; and
- ensure coherent approaches to developing a comprehensive compliance system.

AOSIS understands this mandate to direct the joint Working Group to take a proactive, integrative and comprehensive approach to identifying the needs, resources and gaps in the Protocol's compliance system. While specialized rules and procedures may well be developed

within the context of particular mechanisms, the joint Working Group must be in a position to ensure that the combined resulting rules are coherent, proportionate, and effective.

AOSIS considers that the "procedures and mechanisms" called for in Article 18 of the Kyoto Protocol constitute only one aspect of the regime's compliance effort. The Protocol must be assessed in its totality with a view to identifying the essential tools for anticipating, preventing, identifying and responding to non-compliance.

Thus, the joint Working Group's agenda must be set against the backgroup of the need for, among other things:

- the further elaboration of the Protocol's primary obligations, in such a way that will allow clearer benchmarks against which to assess demonstrable progress (Article 3.2); eligibility for participation in mechanisms (Articles 4,6,12 and 17); efforts to implement policies and measures (Article 2); and progress in meeting quantified emissions reduction and limitation commitments (QERLCs) (Article 3);

- the definition of relevant principles, modalities, and guidelines for the verification, reporting and accountability under the protocol's "mechanisms";

- the enhancement and harmonization of rules and guidelines for the calculation and reporting of national inventories of greenhouse gases;

- an assessment of the Protocol's In-Depth Review (IDR) procedures, based on the experience thus far with the Convention's IDRs under 2/CP.1;

- the potential application to the Protocol of any multilateral consultative processes adopted under the Convention; and

- a critical evaluation of the Convention and the Protocol's financial mechanism as a means of assessing both the obligations of Annex II Parties, and the adequacy of this mechanism in assisting non-Annex I Parties to comply with the Protocol.

AOSIS believes strongly that the possibility of ensuring binding consequences will be an important element of a compliance procedure, and will enhance the Parties' collective ability to deter non-compliance and to take decisions that counteract the effects of non-compliance. AOSIS believes procedural means can and should be found to bring into force Article 18 procedures and mechanisms that have the full authority to adopt decisions with binding consequences, simultaneously with the entry into force of the Protocol and the operations of its mechanisms.

All consequences resulting from the compliance procedure - whether or not they are considered

"binding" – should be proportionate and responsive to the case at hand. The joint Working Group should therefore discuss a full range of potential cases of non-compliance and design an indicative list that is proportionate to the cause, type, degree and frequency of non-compliance. The Working Group should consider specifically the benefits of establishing procedures for imposing automatic consequences in certain circumstances.

AOSIS understands that national and regional regulatory institutions will play an important role in ensuring compliance with the Protocol. For this reason, each Party should be called upon to demonstrate that robust relevant regulatory frameworks are in place as part of their Protocol commitments.

However, because the Protocol will involve complex transnational and interregional relationships, a multilateral and global regime will also be essential to fill gaps in domestic and regional structures, and to ensure the coherent and consistent enforcement of the Protocol's rules.

Finally, AOSIS is concerned to ensure that all Parties keep in mind the potential, long-term consequential impacts of non-compliance with the Protocol. The Article 18 procedures could help to answer this concern by making available any financial penalties resulting from a non-compliance procedure to meet the costs of adaptation. In any case, any non-compliance procedures developed under the protocol or the Convention will in no way affect the rights of all States under international law concerning State responsibility for the adverse effects of climate change.

PAPER NO. 6: SOUTH AFRICA

INITIAL VIEWS ON MATTERS RELATING TO NON-COMPLIANCE UNDER THE KYOTO PROTOCOL (dec 8/CP4)

South Africa wishes to present its initial views on the development of a non-compliance regime as envisaged under Article 18 of the Kyoto Protocol (KP) as well as on the task spelled out therein. It is noted that Article 18 requires that appropriate and effective procedures and mechanisms be approved to determine and address cases of non-compliance with the provisions of this protocol. This shall include the development of an indicative list of consequences, taking into account the case, type, degree and frequency of non-compliance. In the development of such a list, Parties should keep in mind that any procedure and mechanism under this Article entailing binding consequences can only be adopted through an amendment to this protocol.

Although the KP contains far more precise obligations than those contained in the United Nations Framework Convention on Climate Change (UNFCCC), the mechanisms, rules, and schedules for the implementation thereof remain to be developed by the Parties. South Africa is of the view that an effective non-compliance regime will have to be tailor made in order to properly address the non-compliance challenges that the various flexible mechanisms will present to it. As the rules and procedures of these flexible mechanisms are still to be determined and their impact on non-compliance thus difficult to assess, it is at this stage impossible to present precise views on how the non-compliance regime should look like.

In general though, South Africa believes that the non-compliance regime will have to display certain characteristics in order to be effective. These characteristics should form the framework around which an effective non-compliance regime could be build. The non-compliance regime should:

a) be comprehensive and generic in nature to address non-compliance cases under all of the provisions of the KP, but detailed and flexible enough to address non-compliance under any of the flexible mechanisms;

b) have response measures that could be tailored to fit different types of non-compliance;

c) acknowledge the capacity of Parties to comply with their commitments;

d) acknowledge the principle of the common but differentiated responsibilities of Parties in responses to non-compliance;

e) utilise institutions that take cognisance of the need for representation and the principles of due process; and

f) be effective, fair and equitable and operated in a timely and efficient manner.

In more specific terms we now wish to turn our attention to the issue of appropriate and effective procedures and mechanisms to determine and address **cases of non-compliance**.

It is envisaged that the determination of cases of non-compliance will involve factual, political and legal issues that will require different rules and procedures. Useful tools for the determination process would be monitoring, reporting, reviewing and verification of Parties' obligations.

Inherently linked to this process, is the identification of responses to address non-compliance by Parties. In this regard Article 18 provides for the development of an indicative list of consequences, depending on the cause , type, degree, and frequency of non-compliance. On this issue our initial views would be that such an indicative list of consequences could include the following aspects:

a) appropriate assistance, including technical and financial expertise and capacity building;
b) issuing cautions;
c) suspension of rights, including ability to participate in Articles 6, 12, and 17;
d) penalties, including financial penalties.

Finally, South Africa is of the view that it would be very difficult to identify and define a complete range of incidents that would constitute categories of non-compliance and to link these to specific response measures that will automatically apply when a Party is found to be in non-compliance. Efforts should rather be focussed on identifying a complete list of responses to address cases of non-compliance. The institution entrusted with the determination of non-compliance, such as an implementation committee, will be tasked to consider each case individually, taking into account the circumstances of a particular non-compliance incident and apply the appropriate response measures identified earlier on the list. These response measures identified and applied to that specific case should be such that they would meet the main objectives of a compliance regime, namely to act as a deterrent for non-compliance and as reparation for the effects thereof.

PAPER NO. 7: SWITZERLAND

Subsidiary Body for Implementation
Tenth session, Bonn, 31 May - 11 June 1999

Elements for a Compliance Regime under the Kyoto Protocol

In response to the call at the fourth Conference of the Parties (Decision 8/CP.4) for comments on matters relating to compliance under the Kyoto Protocol, Switzerland submits the following views :

1. Principles

Mechanisms and procedures to ensure Parties' implementation of the Kyoto Protocol (KP) and compliance with its provisions should be guided by the following principles :

- Compliance encompasses a number of elements, ranging from measures designed to assess compliance to determining non-compliance and possible consequences for such non-compliance.
- Article 18 KP calls for "appropriate and effective procedures and mechanisms to determine and to address cases of non-compliance with the provisions of this Protocol".
- A comprehensive, coherent, unified, strong, efficient and effective compliance regime is essential for the successful implementation and application of the KP.
- The mechanisms of the KP are only available to Parties who are in compliance with their procedural obligations and are bound by a compliance regime.
- All the elements of non-compliance should be addressed together, recognizing the cross-cutting and integrated nature of the issue.
- The whole compliance regime shall consist of both facilitative and enforcement measures; incentives and sanctions in general should be applied in a graduated manner reflecting the common but differentiated character of Parties' commitments. Application of consequences should be proportionate to the nature of the obligation and the seriousness of the breach, taking into account the cause, type, degree and frequency of non-compliance.
- Both procedural and substantive non-compliance shall be subject to the compliance regime.
- The compliance regime should be designed in a way to make compliance more attractive than non-compliance.
- The MCP elaborated under Art. 13 of the Convention should be part, with the necessary adaptations (Art. 16 KP), of a coherent compliance regime under the KP in order to assist the resolution of compliance issues.
- Verification procedures have to be designed in a way to allow timely assessment of a Party's compliance.
- Consequences for Parties not complying with their obligations should be clear in advance. Therefore, a certain automatic approach concerning the relation between the kind of non-compliance and the sanction seems preferable.

- The elaboration of the mechanisms of the KP and the compliance regime has to proceed in close coordination.

2. Procedures and Institutions

- A single body should treat all questions (procedural and substantive) with relation to non-compliance.
- This body should be a small, specialized, independent entity which can address individual problems on an ad hoc basis and react rapidly to demands.
- Members to this body shall be elected by the COP/MOP on the basis of their personal expertise and merits in technical and legal fields related to the implementation of the UNFCCC, taking into account equitable geographical distribution. This body shall report directly to the COP/MOP.
- Cases can be submitted to the compliance body by :
  - Parties with respect to their own or the implementation by another Party;
  - other bodies of the Convention / Protocol;
  - the review teams;
  - the Secretariat.
- Parties concerned have the right to participate fully in the proceedings and to present their views (principle of due process), but do not participate in the decision-making.
- In order to allow fast progress in developing a compliance regime, the joint working group on compliance established at COP 4 should report to COP 5 on progress in the areas identified in decision 8/CP.4. COP 5 should establish an ad hoc working group on compliance comprising legal and technical experts.

3. Commitments under the Kyoto Protocol subject to compliance

Provisions of the KP that are relevant to compliance / non-compliance include those relating to:

(a) Policies and measures (Article 2)
(b) Assigned amounts (Article 3, Annex A)
(c) Joint fulfilment (Article 4)
(d) Monitoring, reporting and review (Articles 5, 7, 8)
(e) National programmes (Article 10)
(f) The mechanisms of the KP :
  - Joint implementation (Article 6)
  - Clean development mechanism (Article 12)
  - Emissions trading (Article 17)
(g) Potential application of the MCP (Article 13 UNFCCC; Article 16)
(h) Procedures and mechanisms to determine and address cases of non-compliance (Article 18)

PAPER NO. 8: UNITED STATES OF AMERICA

March 1, 1999

Compliance-Related Issues under the Protocol:
Submission of the United States

Introduction

- The United States made an initial statement regarding compliance at COP 4 in Buenos Aires. That statement, which is attached:

  -- stressed the importance of the compliance regime for effective implementation of the Protocol;
  -- noted existing compliance-related aspects of the Protocol;
  -- identified compliance-related areas still to be elaborated; and
  -- raised various issues associated with the elaboration of such areas.

- This submission seeks to build on the previous U.S. submission. At the outset, it includes some general comments on the Protocol's compliance regime. It then includes a more specific discussion focusing on compliance aspects of Article 3 targets.

General

- The Protocol's compliance regime needs to be developed with the following objectives in mind:

  -- transparency (which is likely to foster compliance, as well as Party and public confidence in the system);

  -- credibility (while we should primarily be striving to create a "compliance system" rather than a "non-compliance" system, Parties and the public need to know that, in the final analysis, there will be appropriate consequences for noncompliance; further, credibility will be bolstered if it is clear that the system is depoliticized and cannot be "gamed"); and

  -- reasonable certainty (there needs to be a certain level of automaticity to the system, so that Parties know which actions/inactions will lead to which results and so that parallel infractions will be treated in a parallel manner; on the other hand, the system somehow needs to take account of particular circumstances).

- It is important to look at the various kinds of obligations under the Protocol (e.g., quantitative/qualitative, individual/collective, annual/continuous/end of commitment period) in considering how compliance by Parties should be reviewed.

- In several aspects, the substantive provisions of the Protocol need to be elaborated, e.g., mechanisms, national estimation of emissions, reporting. It will be important to think about the future compliance regime when elaborating such provisions. (For example, it does not appear that the current guidelines for national communications under the Convention would form a solid basis for assessing compliance.) It would be desirable, from a compliance point of view, if negotiators charged with elaborating substantive rules/guidelines/etc. would:

  -- make clear which are requirements and which are recommendatory; and

  -- structure any requirements in such a way that compliance therewith can be ascertained with reasonable ease.

- The compliance regime should 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, e.g., technical expertise, to meet their obligations). This might be accomplished through one integrated procedure or more than one procedure.

- In developing the Protocol's compliance regime, it is important to bear in mind that we are not starting from scratch. For example, Article 8 already sets forth numerous aspects of a review process applicable to Article I Parties. In addition, the Framework Convention has established the principles of transparency and public access in its procedures for reporting and review. Extension of these principles to the procedures and mechanisms under the Protocol (e.g., reports from the Parties, reports from the experts groups to the Parties, etc.) could serve as a valuable compliance tool.

- Non-compliance consequences will likely vary depending upon the nature of the obligation that has been violated, as well as the degree, frequency, etc., of the noncompliance.

- Achieving compliance with the Protocol's obligations will largely depend upon domestic enforcement by various Parties of their laws implementing the Protocol. The international non-compliance regime should create incentives for Parties to have strong domestic enforcement, but the international regime will not be directly involved in domestic enforcement. This being so, it seems desirable for Parties (whether under Article 5 or 7 or elsewhere) to report on the domestic enforcement regime(s) applicable to domestic laws implementing Protocol obligations, particularly Article 3.

<u>Compliance with Quantified Emission Limitation and Reduction Commitments ("Targets")</u>

- Particular attention is warranted regarding Article 3 of the Protocol, along with Articles 5 and 7, which are the means by which an Annex I Party demonstrates its compliance with Article 3.

- In order to develop a system capable of assessing compliance with quantified emission limitation and reduction commitments ("targets"), it is instructive to identify the various

pieces of the Protocol that are relevant to such an assessment.

- When the Protocol is "reverse engineered," it appears that calculating compliance with targets is akin to a mathematical formula, with emissions during the commitment period on one side of the equation and assigned amount on the other.

- The attached chart demonstrates the various components of the formula that would need to be calculated and reviewed in order to assess whether a Party had complied with its target.

- On the left side of the equation is "emissions," which refers to emissions during the commitment period. It should be noted that the Protocol is not based on actual emissions, but rather on estimation of emissions based on agreed methodologies. The way a Party demonstrates its emissions is by using the estimation methodologies under Article 5 and then reporting its results under Article 7.

- On the right side of the equation is "assigned amount." Emissions on the left side must be less than or equal to assigned amount.

- Assigned amount is calculated by beginning with original assigned amount, i.e., 5 years times the percentage for that Party inscribed in Annex B times its baseline emissions (Article 37). The baseline can vary in several ways, depending upon whether a Party is a country with an economy in transition (Article 3.5), has chosen 1995 for three gases (Article 3.8), and/or qualifies for including net land-use change (Article 3.7).

- Original assigned amount can then be modified in several ways:

  -- It might increase or decrease depending upon sink-related changes during the commitment period (Articles 3.3 and 3.4).

  -- It might increase or decrease depending upon the acquisition or transfer of joint implementation reduction units (Articles 6, 3.10, and 3.11).

  --It might increase or decrease depending upon the acquisition or transfer of units of assigned amount under emissions trading (Articles 17, 3.10, and 3.11).

  -- It might increase depending upon the acquisition of CDM reductions (Articles 12 and 3.12).

  -- It might increase or decrease depending upon banking (increasing if tonnes have been carried over from a previous commitment period, decreasing if tonnes are being carried over into the next commitment period) (Article 3.13).

- Breaking the target formula into its component parts illustrates a number of points and raises several issues concerning the compliance regime, including with respect to

substantive rules, procedure, and consequences for non-compliance.

- In terms of the substantive rules that make up the formula, many are already contained in the Protocol. At the same time, many elements of the formula are in the process of being elaborated, including, e.g., Articles 5 and 7, and the Kyoto mechanisms. It will be important, as noted above generally, to elaborate these provisions bearing in mind their relationship to the target formula and the need for compliance therewith to be ascertainable (for example, clarity as to what is mandatory versus advisory, ability of a third party to assess whether a Party has followed a particular rule).

  -- To take the example of Articles 5 and 7, ongoing confidence in the quality and accuracy of a Party's emissions estimation and reporting will be essential for assessing compliance with Article 3 obligations at the end of a commitment period. Therefore, in elaborating requirements under these Articles, Parties must consider not only the minimum technical requirements necessary to ensure a high standard of inventory quality, but also what should constitute non-compliance with the requirements and how potential non-compliance could be identified (e.g., what indicators might be found through the review process). Finally, Parties should consider what kinds and degree of failure to comply with measurement and reporting requirements begin to undermine confidence in emission estimates and, therefore, hinder the verification of targets.

- In terms of designing the procedure to assess compliance with the various elements of the target formula, several points are worth noting:

  -- As noted above, the Protocol (Article 8) already includes a role for expert review teams in reviewing implementation of commitments by Annex I Parties. Article 8 authorizes expert review teams to conduct a thorough review of implementation and to flag implementation questions. Based on our experience under the Convention, key questions are how to improve the process generally and, more specifically, how to tailor it so that it can effectively apply to review of legally binding targets In this regard, the process should provide more focus on development and reporting of greenhouse gas inventories. The process would also be improved by establishing an automatic link to a follow-up procedure in cases where a review team has identified a question of implementation.

  -- Given that the authority of the expert review teams under Article 8 does not extend to determining or responding to non-compliance, there will be a need for an additional procedure(s). Numerous issues arise in connection with devising such a procedure:

    There is the question of whether the procedure should automatically review each Party's compliance with its target obligation after each commitment period or, alternatively, whether compliance should only be reviewed when an issue has been affirmatively raised. It appears that the non-compliance procedure does not need to automatically review each Party's compliance with its target obligation. If there is confidence in a Party's measurement and reporting (which should be

known from annual review of inventories and assigned amounts, as well as from period in-depth reviews), then the only step that is required at the end of a commitment period is a final evaluation to ascertain whether total reported emissions are less than or equal to adjusted assigned amount. This evaluation should occur automatically as part of the annual review and accounting of assigned amounts by expert review teams. Referral to a further procedure would appear to be necessary only if there is a lack of confidence in a Party's measurement and reporting or if (taking into account the need for a true-up period) the annual review indicates that emissions exceed assigned amount.

There is also the question of the composition/expertise of any review body. As illustrated above through the target formula, compliance issues might arise under any one of the formula elements. On the left side of the equation, for example, there might be an issue concerning whether a Party has followed required methodologies; on the right side, for example, there might be issues concerning a Party's baseline emissions or whether the rules for a particular mechanism have been followed. The procedure and the members of any body need to be capable of reviewing all such issues.

The nature of the procedure also needs to be related to the consequences that might flow from a determination of non-compliance. The more "binding" and serious the potential consequences, the more the procedure must afford "due process."

- In terms of consequences for non-compliance, again several points are worth considering:

  -- The target formula appears to contain at least three different kinds of elements:

  (1) elements that are obligations in and of themselves (such as reporting under Article 7);

  (2) elements that are pure accounting elements and not actually written as obligations themselves (such as sinks under Article 3.3); and

  (3) elements that are accounting elements but derive from mechanisms governed by obligations (such as CDM, trading, etc.).

  -- Non-compliance with an element that is an obligation in and of itself might carry more than one consequence. For example, a reporting violation might carry its own consequence (such as the inability to use JI tonnes, as set forth in Article 6.1.c), as well as lead to a consequence related to non-compliance with the target obligation.

  -- Concerning accounting elements that are not written as obligations, such as sinks under Article 3.3, there cannot, strictly speaking, be "non-compliance" with such an element;

rather, the value of that element in the formula would simply be adjusted to make it accurate (unless, perhaps, inaccuracies were chronic).

-- Regarding elements that derive from mechanisms, to the extent a problem with such an element were due to non-compliance with the rules governing the related mechanism, additional consequences might be appropriate beyond adjustment of the element's value.

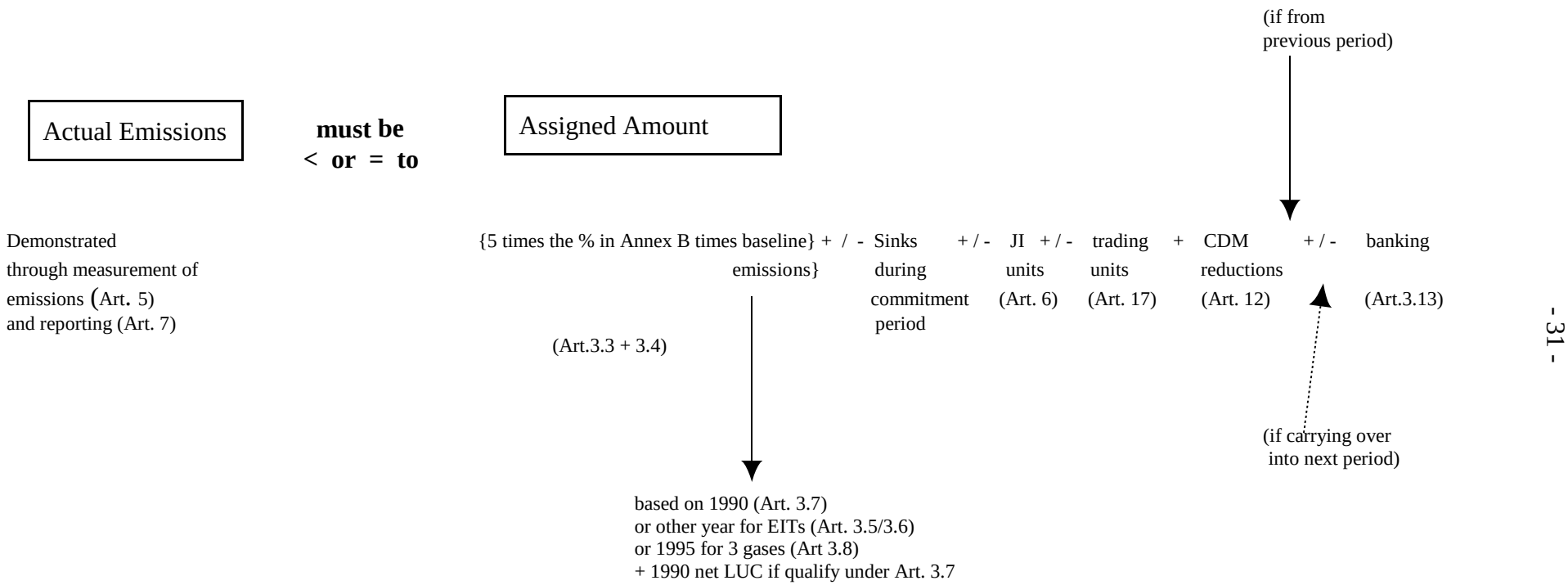
-- Different kinds of inconsistencies could merit different treatment:

> Some kinds of inconsistencies (such as being a day late in reporting or a minor technical error of no substantive import) should be considered de minimus, not rising to the level of a Protocol violation.
>
> Some kinds of inconsistencies, while not strictly speaking de minimus (such as missing a category of emissions in a communication), might be easily cured if the Party is given the opportunity.
>
> At the other end of the spectrum, some kinds of inconsistencies (such as an inconsistency with Article 5 or 7 not in either of the above categories) might constitute a violation of that Article and/or non-fulfillment of a participation requirement for a Kyoto mechanism (see, e.g., Article 6.1.c on JI); it might also contribute to a violation of the target obligation.

-- There will be a time gap between the end of a commitment period and the availability of data/final emissions inventories. In this regard, we should build in a short grace period after the end of the commitment period (the analogue of a domestic "true-up" period), during which Parties can seek to remove any overages.

-- Consequences for exceeding the target after an assumed true-up period should be designed so as to promote the environmental effectiveness of the Protocol (for example, by restoring excess tonnes to the system). As will be recalled, the United States proposed at Kyoto that any excess tonnes be subtracted from a Party's assigned amount for the subsequent commitment period, with a penalty (at a rate designed to make overages unattractive). We are open to considering other proposals.

CALCULATING COMPLIANCE
WITH ASSIGNED AMOUNTS (TARGETS)*



*The formula would apply to Parties using an Article 4 bubble
as a group, unless the group exceeded its aggregate assigned amount.

November 10, 1998

United States Delegation

Statement and Additional Comments on
Compliance Issues Under the Kyoto Protocol
COP 4 - Buenos Aires

Summary

- From a substantive point of view, the United States supports a compliance regime that is strong and effective and that strikes a careful balance between sufficient stringency to promote compliance while avoiding inappropriate intrusions on sovereignty, and that seeks to ensure a level playing field by providing for parallel consequences for parallel cases of non-compliance including among Parties who trade, Parties that do not trade and Parties that operate under Article 4.

- In this regard, further work is necessary to elaborate the existing compliance framework:

  1) the substantive rules related to, for example, measurement and reporting, emissions trading and the CDM;
  2) the procedure or procedures by which compliance with Protocol rules will be assessed; and
  3) the consequences for a Party found to be in non-compliance.

- We need to bear in mind that numerous provisions of the Protocol are relevant to compliance - including, for example, Articles 4, 5, 6, 7, 8, 12, 17 and 18.

- From a process point of view, the United States recognizes that work on issues related to compliance will inevitably have to be carried out in various groups dealing with aspects of the Protocol, such as groups elaborating rules and guidelines for the flexibility mechanisms. It is also important to ensure coherence among various compliance-related elements of the Protocol, as well as to fill in gaps that may not be covered by the work of groups focusing on the modalities for the flexibility mechanism. These efforts on compliance should be organized in such a way that progress is achieved quickly, and that the key elements of compliance are concluded at the same time as key work programs on the flexibility mechanisms, possibly as part of such mechanisms. In this way, Parties can understand the key elements of compliance when considering ratification.

- In our view, an appropriate way to ensure progress in this regard would be to request the SBSTA and SBI, in their next sessions in June, to jointly convene a group for the purpose of undertaking the following tasks:

  - to identify various Protocol provisions that are relevant to compliance;

- to track the development in various groups of compliance-related elements, such as substantive rules and guidelines related to implementation of various Protocol provisions, procedures by which compliance with Protocol rules will be evaluated, and consequences for non-compliance;
- to integrate such elements, as appropriate; and,
- to identify gaps in the compliance regime that are not being addressed by various groups and to ensure that such gaps are addressed in an appropriate forum, including, if necessary and appropriate, by such group.

- Parties should be invited to submit comments to the Secretariat by March 1,1999, on matters related to compliance. The Secretariat would compile those comments for consideration at the joint session in June. After the joint session, the subsidiary bodies could then report back to COP 5 on their work in relation to compliance.

- We look forward to working with other Parties to develop a compliance regime that will effectively promote the objectives of the Protocol.

* * *

Additional Comments

Discussion

- In the U.S. view, promoting compliance with the Protocol is a key component of its successful implementation.

- As will be recalled, in addition to supporting legally binding targets, the United States introduced several of the provisions in the Protocol that relate to compliance, such as:

  -- obligations regarding accurate measurement of greenhouse gas emissions;
  -- enhanced reporting obligations;
  -- the use of expert review teams;
  -- various market mechanisms whose implementation will promote compliance; and
  -- certain consequences for non-compliance (such as the inability of a Party to acquire JI emission reduction units if it is not in compliance with its obligations under Article 5 and 7).

- The United States had also introduced additional compliance-related provisions, such as those relating to emissions trading (which dropped out when the emission trading article was shortened) and a provision that would have required a Party that had exceeded its assigned amount at the end of a commitment period to subtract the number of excess tonnes, with a penalty, from its subsequent assigned amount (which was not ultimately included).

- The United States considers, therefore, that the elaboration of a compliance regime will

be a key component of filling out the Kyoto Protocol.

- The three main elements of the compliance regime (apart from various compliance-inducing provisions) will be:

  -- the substantive rules to be followed;
  -- the process for determining whether they have been followed;
  -- the consequences for non-compliance.

- Numerous issues arise with respect to each of these elements.

Substantive Rules

- Many of the Protocol's substantive rules are already contained in the Protocol; others are to be elaborated (such as those related to measurement, emissions trading).

- An example of an issue that arises regarding Protocol rules is the following:

  -- Some rules are actually written in terms of being "guidelines." What kind of legal status do we want to accord to "guidelines" when addressing non-compliance? Can a non-compliance system validly penalize a Party for not following a guideline?

Procedure

- The key issues here are "who" and "how."

- Who:

  -- Which body or bodies are empowered to decide whether or not a Party is in compliance with the Protocol? A neutral third party (as is the case under the article addressing traditional bilateral dispute settlement)? A body composed of a sub-set of other Parties? The COP/MOP? (If so, by what voting regime?)

  -- This will depend, among other things, on whether the body is going to be looking at factual issues, legal issues, policy issues, etc. It will also depend upon the status and stringency of consequences for a determination of non-compliance.

- How:

  -- Is the compliance review process to take place automatically (for example after 2012 for all Annex I Parties)? Or only if triggered by a Party, expert review team, etc.?

  -- What kind of authorities will the reviewing body enjoy? On factual issues, what will be its sources of information? On legal issues, will it be empowered to decide on

legal questions?

Consequences

- Assuming the need for parallelism among Parties that trade, Parties that do not trade, and Parties that operate under Article 4, what should the consequences be for exceeding the target (the central obligation under the Protocol)?

- Should there be such a thing as a separate violation of measurement obligations, reporting obligations, trading rules, or should such violations simply factor into whether a Party has met its target?

- Do consequences need to be spelled out in advance (in which case a body is simply determining whether there has been non-compliance) or should a body be empowered to decide both whether there has been non-compliance and the consequences for such non-compliance? Or a hybrid of the two?

  -- Note that the whole reason Article 18 requires an amendment for binding consequences is because of the "pig in a poke" problem; this problem would not be addressed if we took an approach that did not spell out at least the major consequences.

- These are just some of the basic issues that will need to be reviewed.

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